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IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF ARIZONA

ROSEBUD SIOUX INDIAN TRIBE,

Plaintiff,

vs.

PETER J. DENINNO, JUDGE PRO TEMP, GILA COUNTY SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR GILA COUNTY; ANTANELLE DUWYENIE,

Defendants.

CASE NO. 2:09 CV01660-PHX-MHM

RESPONSE BY PLAINTIFF TO STATE JUDICIAL DEFENDANTS' MOTION TO DISMISS COMPLAINT

The plaintiff in this matter is the Rosebud Sioux Indian Tribe. It is separate and distinct from William Moran, an individual. Hence, the appellate case referenced in the State Judicial Defendants' Motion to Dismiss ("Motion to Dismiss"), *i.e*., *Duwyenie v. Moran*, 207 P.3d 754, 220 Ariz. 501 (Ariz. App. Div. 2, 2009), p. 2, lines 7 & 8, is irrelevant because the Rosebud Sioux Indian Tribe was not a party and, for this reason, it is not a state court loser. Accordingly, the *Rooker-Feldman* Doctrine has no application to this case.

THE *ROOKER-FELDMAN* DOCTRINE
HAS NO APPLICATION TO THIS CASE

In the recent United States Supreme Court case of *Exxon Mobil Corporation v. Saudi Basic Industries Corporation*, 125 S.Ct. 1517, 544 U.S. 280, 161 L.Ed.2d

454 (U.S. 03/30/2005), the Court held that the *Rooker-Feldman* Doctrine can only be applied against state court losers. In an article published in the Duke Law Journal, 56 Duke L.J. 643 (The *Rooker-Feldman* Doctrine: What Does It Mean to be Inextricably Intertwined?) the author wrote, "In this way, the Court spelled out that the doctrine does not apply to nonparties to the state court proceeding." After a discussion of the Ninth Circuit case of *Noel v. Hall*, 341 F.3d 1148 (9th Cir. 2003), the article continues, pp. 671 – 673 [footnotes and citations omitted]:

> The unanimous Court specified four requirements for invocation of the doctrine: 1) the case must be brought by a state court loser; 2) the injury alleged must be caused by the state court judgment; 3) the judgment must have been rendered before the district court proceedings commenced; and 4) the case must invite district court review and rejection of that judgment.
>
> Finding that *Exxon Mobil* did not satisfy all four aspects of this exposition and therefore escaped application of the *Rooker-Feldman* doctrine [Emphasis added], the Court did not have occasion to consider whether *Exxon Mobil's* claims were inextricably intertwined…. [B]y not using the concept in its analysis of the case, the Court seemed to show that a determination as to whether a claim is inextricably intertwined or not is not essential to every *Rooker-Feldman* inquiry. It could be that by leaving "inextricably intertwined" out of its distilled definition of the *Rooker-Feldman* doctrine and not using it in its analysis in *Exxon Mobil* the Court was indicating that the concept has no independent meaning and instead simply states a conclusion. [FN 213. See *Hoblock v. Albany County Bd. of Elections*, 422 F.3d 77, 87 (2nd Cir. 2005) ("[T]he phrase 'Inextricably Intertwined' has no independent content. It is simply a descriptive label attached to claims that meet the requirements outlined in *Exxon Mobil*."]

The Rosebud Sioux Indian Tribe was not a party to *Duwyenie v. Moran*. The *Rooker-Feldman* Doctrine is not applicable to this case.

Moreover (if this Court was to ignore – something it cannot do -- the Rosebud Sioux Indian Tribe was not a party in *Duwyenie v. Moran*), the purpose of the

Rooker-Feldman Doctrine is to prevent "a party losing in state court ... from seeking what in substance would be appellate review of the state judgment in a United States District Court, based on the losing party's claim that the state judgment itself violates the loser's federal rights." *Tropf v. Fid. Nat'l Title Ins. Co.,* 289 F.3d 929, 936-37 (6th Cir. 2002), *cert. denied* 537 U.S. 1118, 123 S.Ct. 887, 154 L.Ed.2d 797 (2003) (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1005-06, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994). The Rosebud Sioux Indian Tribe is not "invit[ing] district court review and rejection" of the decision in *Duwyenie v. Moran*. The *Rooker-Feldman* Doctrine, moreover, does not prohibit federal district courts from exercising jurisdiction where the plaintiff's claim is merely "a general challenge to the constitutionality of the state law applied in the state action," rather than a challenge to the law's application in a particular state case. In determining the applicability of the *Rooker-Feldman* Doctrine, federal courts "must pay close attention to the relief sought by the federal-court plaintiff." *Bianchi v. Rylaarsdam*, 334 F.3d 895, 900 (9th Cir.2003) (quoting *Kenmen Eng'g v. City of Union,* 314 F.3d 468, 476 (10th Cir. 2002)).

In its complaint, the Rosebud Sioux Indian Tribe asked for a declaratory judgment to the effect that the Gila County Superior Court infringed upon its sovereignty. This prayer has nothing to do with the issues in *Duwyenie v. Moran.* The Rosebud Sioux Indian Tribe's complaint contains no demand to set aside the decision of the state court. Nor does it ask for relief (nor could it inasmuch as it is not a party is *Duwyenie v. Moran*) for William Moran (who is a party in *Duwyenie v. Moran* but not a party to this lawsuit) from the state court decision." Instead, the

Rosebud Sioux Indian Tribe is seeking declaratory relief that the Gila County Superior Court infringed upon its sovereignty. The *Rooker-Feldman* Doctrine is, again, inapplicable to this lawsuit. See *Edwards v. Illinois Bd. of Admissions to Bar*, 261 F.3d 723, 729 (7th Cir. 2001) ("When the litigant is challenging the constitutionality of a rule that was applied to him, but is not asking to correct or revise the determination that he violated the rule, Rooker-Feldman is no obstacle to the maintenance of the suit." (internal quotation marks omitted)).

For the reasons above-stated, the *Rooker-Feldman* doctrine is not applicable to this case.

ELEVENTH AMENDMENT AND JUDICIAL LIABILITY

While the Eleventh Amendment does prohibit lawsuits seeking monetary damages against judges,[1] the United States Supreme Court has "never held that judicial immunity absolutely insulates judges from declaratory or injunctive relief with respect to their judicial acts." *Supreme Court Virginia, et al, v. Consumers Union United States*, 100 S. Ct. 1967, 446 U.S. 719, 64 L. Ed. 2d 641, 1980.SCT.42068.

The United States Supreme Court in *Raymond Mireles v. Howard Waco*, 112 S. Ct. 286, 116 L. Ed. 2d 9, 60 U.S.L.W. 3307, 1991.SCT.45772, has stated:

> First, a judge is not immune from liability for non-judicial actions, *i.e.*, actions not taken in the judge's judicial capacity. *Forrester v. White*, 484 U.S. 219, 108 SCt.538, 98 L.Ed.2d 555 (1988); *Stump v. Sparkman*, 435, U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978).

[1] A overly broad statement, but it serves its purpose for this Response. Notwithstanding that the Gila County Superior Court acted in the complete absence of all jurisdiction, the relief Plaintiff prays for is declaratory in nature.

> Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction. Id., at 356-357; *Bradley v. Fisher*, 13 Wall. [335], at 351. [80 U.S. 335, 20 L. Ed. 646 (1871)]

The second sentence of 25 U.S.C. § 1911(a) clearly provides,

> Where an Indian child is a ward of a tribal court, the Indian court shall retain exclusive jurisdiction,[2] notwithstanding the residence or domicile of the child.

On April 24, 2007, the minor child (so referred to in *Duwyenie v. Moran*) was made a ward of the Rosebud Sioux Tribal Court.[3] On September 19, 2009, the Hon. Peter J. DeNinno learned of this in a conversation with the Hon. B.J. Jones of the Rosebud Sioux Tribal Court, in which Judge Jones said:

> I made the child a ward of the court….[4]

Notwithstanding the Hon. Peter J. DeNinno knew that he was acting in the complete absence of all jurisdiction, he nonetheless proceeded and, thereby, infringed upon the sovereignty of the Rosebud Sioux Indian Tribe.[5]

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[2] Under a statute giving the United States District Courts "exclusive jurisdiction" of violations of the Securities Exchange Act, all criminal or civil proceedings for violations of the act must be brought in such courts. *Wright v. Securities Exchange Commission*, 112 F.2d 89, 95.

[3] See Order filed April 24, 2007, attached as Exhibit 8 to Defendant Antanelle Duwyenie's Motion to Dismiss.

[4] See Hearing Transcript for October 10, 2007, attached as Exhibit 10 to Defendant Antanelle Duweyanie's Motion to Dismiss.

[5] This is not assertion of malice, corruption or other such wrongful act. Even knowledge that the minor child was a ward of the Rosebud Sioux Court is irrelevant. What matters is that the minor child was a ward of the Rosebud Tribal Court when the *Duwyenie v. Moran* case was commenced and it retained exclusive jurisdiction pursuant to 25 U.S.C. § 1911(a), and that the Gila County Superior Court was without jurisdiction when *Duweyanie v. Moran* was begun.

CONCLUSION

For the reasons stated above, (i) the *Rooker-Feldman* Doctrine is not applicable to this case, (ii) the Eleventh Amendment does not prohibit injunctive and declaratory relief and (iii) the State Judicial Defendants are without judicial immunity in this case.[6]

Respectfully, the State Judicial Defendants Motion to Dismiss should be denied.

Submitted on December 2, 2009.

/s/ ALAN L LIEBOWITZ

Alan L. Liebowitz
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I CERTIFY that on December 2, 2009, I mailed (by first class mail) the attached document to the parties listed below.

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[6] In any event, monetary damages are not being sought against the State Judicial Defendants.