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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

EXC, Inc., a Nevada corporation, d/b/a Express Charters and D.I.A. Express, Inc.; Conlon Garage, Inc., a Colorado corporation; Go Ahead Vacations, Inc., a Massachusetts corporation; Russell J. Conlon, and; National Interstate Insurance Company,

Plaintiffs,

v.

Jamien Rae Jensen, individually, and as parent and next friend of D. J. J., and as Personal Representative of the Wrongful Death Estate of Corey Johnson; Chavis Johnson, individually, and as Personal Representative of the Wrongful Death Estate of Butch Corey Johnson; Margaret Johnson and Frank Johnson, individually, and as parents and next friends of H. J. and D. J.; Francesca Johnson, individually; Justin Johnson, individually; Raymond Jensen, Sr., individually; Louise R. Jensen, individually; Nicole Jensen, individually; Ryan Jensen, individually; Justin Jensen, individually; Katrina Jensen, individually; Raymond Jensen, Jr., individually, and; Murphy Jensen, individually; the Navajo Nation; the Kayenta District Court; the Navajo Nation Supreme Court; and Judge Jennifer Benally, a judge of the Kayenta District Court,

NO. CV 3:10-cv-08197-PCT-JAT

PLAINTIFFS' RESPONSE TO JENSEN DEFENDANTS' MOTION TO DISMISS WITHOUT PREJUDICE

Defendants.

This is a garden-variety motor vehicle accident that occurred on U.S. Highway 160 on the western edge of the Kayenta Township in Kayenta, Arizona. The Jensen Defendants ignore the uncontested basic facts of this case and ignore controlling law in an effort to hale Plaintiffs into a court without personal jurisdiction. The Jensen Defendants' desire for more discovery and proceedings in tribal court would needlessly cause delay, increase costs, and hurt judicial economy.

Defendants request dismissal for an alleged failure to exhaust remedies in the tribal court. Their argument fails for two independent reasons. First, Defendants wrongly state that exhaustion is a necessary prerequisite to this Court's jurisdiction. The United States Supreme Court unequivocally reaffirmed more than 14 years ago that it is not. *Strate v. A-1 Contractors*, 520 U.S. 438, 449 n.7 (1997) (citing *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 n.21 (1985)). Second, in any event, Plaintiffs unsuccessfully made these same jurisdictional arguments to the Kayenta District Court and the Navajo Nation Supreme Court before filing this action in federal court. In other words, the purpose of exhaustion has already been satisfied.

The issues raised in this motion only waste the parties' time and money and this Court's resources. Instead, this case should proceed to briefing and argument on tribal court jurisdiction over Defendants' claims against Plaintiffs. In a case on all fours with these facts, the United States Supreme Court unanimously held in *Strate* that the tribal court lacks jurisdiction. 520 U.S. at 442. The issue in *Strate* was virtually identical to the issue here -- whether a tribal court has jurisdiction over nonmembers regarding a motor vehicle accident that occurred on a public highway maintained by the State under a federally granted right-of-way over Indian land. In those circumstances, the Supreme Court ruled, a tribal court has no jurisdiction over nonmembers absent certain narrow exceptions not applicable here. *Strate* is controlling, decisive, and requires denial of the

Jensen Defendants' Motion to Dismiss.

A. Uncontroverted factual and procedural background

The key facts relevant to the jurisdictional issue are uncontested.[1] On September 21, 2004, an automobile/tour bus collision occurred on U.S. Highway 160 near Kayenta, Arizona. (Jensen Defendants' Complaint at ¶¶ 21, 51). Butch Corey Johnson was driving eastbound on U.S. Highway 160 in a 1997 Pontiac sedan in which Jamien Rae Jensen and Dakota Jensen Johnson were passengers. (*Id*. at ¶ 51). The bus, driven by Russell J. Colon, was traveling westbound on U.S. Highway 160. (*Id*. at ¶ 53). The sedan and tour bus collided head-on on U.S. Highway 160. (*Id*. at ¶¶ 53, 54). The State of Arizona maintains U.S. Highway 160 under a federally granted right-of-way over Navajo Nation land. (*See id*. at ¶ 18; Agreement for Construction and Maintenance of Roads on the Navajo and Hopi Indian Reservations (attached as Exhibit 2); Assignments of Right of Way and Acceptances of Assignee (attached as Exhibit 3); Navajo Tribal Council Resolution No. CAP-25-59 (attached as Exhibit 4)).

Go Ahead Vacations organized this U.S. National Parks tour, provided a tour guide, and chartered the tour bus involved in the collision. (Jensen Defendants' Complaint at ¶ 42). EXC, Inc. provided tour transportation under a contract with Go Ahead Vacations, and Colon Garage, Inc. owned the bus. (*Id*. at ¶ 18, 40). National Interstate Insurance Company provided insurance to EXC, Inc. None of the Plaintiffs are members of the Navajo Nation. (*Id*. at ¶¶ 25, 48).

The Jensen Defendants filed a Complaint in the Kayenta District Court on September 11, 2006.[2] On January 18, 2007, Plaintiffs filed a Special Appearance and Motion to Dismiss challenging the Kayenta District Court's jurisdiction (attached as Exhibit 5). Following briefing and argument, the Kayenta District Court ruled that it had

[1] For the purposes of this motion, Plaintiffs will rely on the allegations in the Jensen Defendants' Complaint, which is attached as Exhibit 1, and uncontested documents.

[2] The Jensen Defendants' motion erroneously states that they filed their Complaint on September 11, 2004. That is the date of the accident at issue, not the date they initiated litigation.

jurisdiction. Plaintiffs subsequently filed a Petition for Writ of Prohibition (attached as Exhibit 6) in the Navajo Nation Supreme Court seeking review of the District Court's jurisdictional ruling. After briefing and argument, the Navajo Nation Supreme Court denied Plaintiffs' Petition and affirmed the District Court's ruling that it had jurisdiction over Plaintiffs (attached as Exhibit 7). Following the Navajo Nation Supreme Court's ruling that tribal jurisdiction existed, Plaintiffs filed this federal court action.

B. There is no unyielding requirement for exhaustion.

Defendants seek to expand the law regarding exhaustion of tribal remedies. Defendants overstate the holding of *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). Although there is a general "prudential rule, based on comity" of tribal court exhaustion, the Supreme Court noted that it is not "unyielding." *Strate*, 520 U.S. at 449 n.7 (citing *National Farmers*, 471 U.S. at 856 n.21).

Exhaustion is not required where "the action is patently violative of express jurisdictional prohibitions," where the assertion of jurisdiction "is motivated by a desire to harass or is conducted in bad faith," or "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *Id*. Not only has the Supreme Court expressly ruled that tribal courts have no jurisdiction in this type of case, but additional proceedings in tribal court would be futile because both the Kayenta District Court and Navajo Nation Supreme Court have ruled on the jurisdiction issue. So, even if Plaintiffs returned to tribal court, continued developing the factual record, and reargued the jurisdictional issue through another round of tribal court appeals, there is no reason to believe the tribal courts would change their mind.

1. There is no tribal jurisdiction as a matter of law.

Strate reaffirmed the general rule that "the civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally 'does not extend to the activities of nonmembers of the tribe.'" 520 U.S. at 453 (quoting *Montana v. United States*, 450 U.S. 544, 565 (1981)). That general rule precludes tribal jurisdiction unless superseded by

specific provisions in treaties and statutes, or if either of two exceptions identified in *Montana* apply. *Id*. The *Strate* Court found these exceptions inapplicable and held that tribal courts have no jurisdiction over nonmembers regarding a motor vehicle accident that occurred on a public highway maintained by the State under a federally granted right-of-way over Indian land. *Strate* is on all fours with this case.

As in *Strate*, the civil defendants are not tribal members and the location of the accident, U.S. Highway 160, is non-Indian land. Defendants do not appear to contest that they are suing nonmembers in tribal court. But they do seem to contest whether U.S. Highway 160 is non-Indian land and whether the *Montana* exceptions apply here notwithstanding the Supreme Court's holding in *Strate*.

Defendants' argument that U.S Highway is not non-Indian land fails. *Strate* held that, for jurisdictional purposes, a right-of-way granted by an Indian tribe is non-Indian fee land when the tribe did not reserve any right to exercise dominion or control over the right-of-way. *Id*. at 454-56. This status remains "[s]o long as the stretch is maintained as part of the State's highway …" *Id*. at 456.

The right-of-way granted here shows that, as in *Strate*, the Navajo Nation did not reserve any right to exercise domain or control over the right-of-way. There is also no dispute that the stretch of U.S. Highway 160 at issue here "is maintained as part of the State's highway." *Strate* conclusively established highways such as this are non-Indian fee land.

Defendants briefly, and without substantiation, raise four unavailing arguments in a desperate attempt to distinguish *Strate*. First, Defendants' claim that there are "retained treaty rights" is erroneous. The right-of-way retained no such rights. Second, the purpose of why the right-of-way was granted without any applicable reservation is irrelevant. The only question is whether the right-of-way was granted and whether the right-of-way reserved any right to exercise dominion or control over the right-of-way. The documents themselves unequivocally answer that question in favor of Plaintiffs.

Third, whether the tribe "shares" any responsibility for the maintenance of the

highway is irrelevant. The only issue under *Strate* is whether the highway is maintained as part of the State's highway system. 520 U.S. at 456. There is no legitimate argument that it is not. The fact that tribal police patrol stretches of the highway or that tribal medical personnel responded to the accident scene does not alter the status of U.S. Highway 160 as part of the State-maintained highway system. *See id.* n.11 (determination that highway is maintained by the State does not affect the authority of tribal police to patrol roads within the reservation including the rights-of-way made part of a state highway).

Defendants' fourth argument, that the tribe has jurisdiction over commercial touring activities, is also a red herring. Although jurisdiction may exist where nonmembers engage in commercial relationships with the tribe, there is no such relationship here. Indeed, there is no relationship at all between Plaintiffs and the tribe related to the motor vehicle accident. Defendants contend that Plaintiffs were traveling on U.S. Highway 160 for the purpose of touring Indian monuments and, accordingly, should have obtained certain necessary permits from the tribe for doing so. However, Defendants' argument defeats itself. If Plaintiffs did not obtain allegedly required permits, they necessarily did not enter into any commercial relationship with the tribe. A failure to apply for and obtain permits is not a basis for tribal court jurisdiction over nonmembers regarding a motor vehicle accident on non-Indian land.

2. Further exhaustion measures would be futile.

Independently, there is no reason to spend significant time and resources on additional tribal court proceedings regarding jurisdiction. Such efforts would be futile. The arguments for and against jurisdiction were presented to the Kayenta District Court and the Navajo Nation Supreme Court. Both courts considered and rejected Plaintiffs' arguments and ruled that tribal jurisdiction exists. Plaintiffs have no new arguments or new evidence to submit to the tribal courts that would change their prior rulings. Accordingly, forcing Plaintiffs to return to tribal court would only delay resolution of this foundational issue and result in greater costs to the parties and both court systems.

C. The purpose of exhaustion has been satisfied.

The exhaustion rule was intended as a "deference to the capacity of tribal courts 'to explain to the parties the precise basis for accepting [or rejecting] jurisdiction.'" *Strate*, 520 U.S. at 450 (quoting *National Farmers*, 471 U.S. at 857). Here, as in *Strate*, the tribal court considered the jurisdictional issues raised in this action and, in ruling on those issues, explained their basis for accepting jurisdiction. So, the exhaustion rule, even if required, has been satisfied.

Indeed, the procedural history found satisfactory in *Strate* is almost identical to the procedural history of this case. In *Strate*, the civil defendants and their insurer made a special appearance in tribal court to contest jurisdiction. 520 U.S. at 444. After the tribal court ruled that it had jurisdiction, the civil defendants appealed to the tribal court of appeals, which affirmed the ruling. *Id*. Before tribal court proceedings resumed on the merits, the civil defendants filed an action in federal court challenging the tribal court's ruling that it had jurisdiction. *Id*. Despite an extended analysis of the exhaustion rule, the United States Supreme Court identified no shortcomings in the civil defendants' attempts to exhaust in *Strate*.

The procedural history in *Strate* is in sharp contrast to those where the Supreme Court found a failure to properly exhaust. For example, in *National Farmers*, the tribal court had entered a default judgment against a school district. 471 U.S. at 847. Instead of attempting to set aside the default judgment in tribal court, the school district immediately filed suit in federal court challenging the enforceability of the default judgment on jurisdictional grounds. *Id*. at 847-49. Similarly, in *Iowa Mutual*, the defendant filed an action in federal court without appealing the tribal court's initial jurisdictional ruling. 480 U.S. at 12. More recently, the Ninth Circuit found an exhaustion deficiency in *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842 (9th Cir. 2009), where the defendant challenged jurisdiction in the tribal district court, but when the court of appeals refused to hear an interlocutory appeal, the defendant filed suit in federal district court.

This is not a case like *National Farmers* where the defendant never even made an

appearance in tribal court to contest jurisdiction or *Iowa Mutual* where the defendant did not appeal the district court ruling. Nor is this a case like *Elliott*, where the trial appellate court did not rule on the jurisdictional issue. Here, Plaintiffs not only made a special appearance to challenge the Kayenta District Court's jurisdiction but also appealed the District Court's ruling to the Navajo Nation Supreme Court. Both the Kayenta District Court and the Navajo Nation Supreme Court considered and ruled on the jurisdiction issue. The issue is ripe for this Court.

D. There is no need for further discovery on jurisdictional issues.

Although discovery on jurisdictional issues is appropriate in certain instances, it is unnecessary if the claim for personal jurisdiction is "attenuated" or where there is no "colorable case" for jurisdiction. *See Terracom v. Valley Nat'l Bank*, 49 F.3d 555, 562 (9th Cir. 1995); *Negron-Torres v. Verizon Communs., Inc.*, 478 F.3d 19, 27 (1st Cir. 2007). Even if Defendants could set forth a colorable claim for jurisdiction, they would still need to "present facts to the court which show why jurisdiction would be found if discovery were permitted." *Negron-Torres*, 478 F.3d at 27 (citation omitted).

Defendants have not shown any legitimate basis for additional factual discovery regarding jurisdiction. This case is virtually identical to *Strate* and Defendants here make many of the same jurisdictional arguments already addressed and rejected by the United States Supreme Court in that case. Defendants' attempt to distinguish *Strate*'s holding find no basis in law or fact. Accordingly, Defendants' request for additional discovery should be denied.

Conclusion

Defendants' motion to dismiss this action as premature should be denied. First, tribal exhaustion is not required when, as here, jurisdiction is proscribed as a matter of law. Second, even if tribal exhaustion were required, Plaintiffs satisfied such a requirement by making a special appearance in the Kayenta District Court to challenge jurisdiction and subsequently appealing the District Court's jurisdictional ruling to the Navajo Nation Supreme Court. Third, there is no need for additional discovery regarding

jurisdiction because Defendants have not made a colorable claim for jurisdiction in light of the United State Supreme Court's holding in *Strate* that Indian tribes have no jurisdiction over nonmembers regarding a motor vehicle accident that occurs on a public highway maintained by the State under a federally granted right-of-way over Indian land.

RESPECTFULLY SUBMITTED this 17th day of August, 2011.

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