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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,

Defendants.

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

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

Oral Argument Requested

In their Response to Jensen Defendants' Motion to Dismiss without Prejudice, EXC Litigants[1] exhibit a flawed understanding of the doctrine of exhaustion of tribal remedies and, accordingly, fail to recognize the Supreme Court's mandate requiring application of the doctrine in the instant litigation. Although the doctrine is prudential rather than jurisdictional in nature, federal courts are mandated to apply it and require litigants to exhaust tribal remedies before proceeding to challenge tribal jurisdiction in federal court unless an established exception to the exhaustion requirement applies. Here, none of the exceptions apply.

The doctrine serves several important purposes, all of which are relevant in the instant case and are served by this Court's adherence to the Supreme Court's mandate that tribal remedies be exhausted. Even the sole purpose cited by EXC Litigants—i.e., to allow "tribal courts 'to explain to the parties the precise basis for accepting [or rejecting] jurisdiction," *Strate v. A-1 Contractors*, 520 U.S. 438, 450 (1997) (quoting *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985))—necessitates full factual development and further proceedings in the Navajo judicial system. The Navajo Supreme Court's preliminary and facial ruling issued in response to EXC Litigants' expedited Petition for a Writ of Prohibition does not constitute a final jurisdictional determination capable of conveying "the precise basis for accepting [or rejecting] jurisdiction" because there was no formal fact-finding in these proceedings.

[1] Defendants Jamien Rae Jensen et al. herein were Plaintiffs, Appellees, and Real Parties in Interest, and Plaintiffs EXC, Inc., d/b/a Express Charters, et al. herein were Defendants, Appellants, and Petitioners in proceedings before the Kayenta District Court and the Navajo Nation Supreme Court. Throughout this document, Defendants Jamien Rae Jensen et al. are referred to as "Jensen Litigants" and Plaintiffs EXC, Inc., d/b/a Express Charters, et al. are referred to as "EXC Litigants."

The tribal remedies exhaustion doctrine mandates additional fact-finding in tribal court to allow the Navajo Supreme Court to explain "the precise basis" for any final jurisdictional ruling it may issue in the future. Such fact-finding also is indispensable to any subsequent review by this Court, particularly in light of (1) the fact-intensive inquiry required for *any* sound and final jurisdictional ruling in this case and (2) the exclusive role of tribal court fact-finding whenever a federal court conducts post-exhaustion review of an Indian tribe's assertion of civil adjudicatory authority over nonmembers.

Despite making numerous factual assertions in support of their arguments, EXC Litigants resist fact-finding in the proper forum, the Kayenta District Court. Their resistance demonstrates a desire to proceed to immediate federal court review of the jurisdictional issues, based on a defective factual record. Because of the unique procedural history of this case, there was no discovery and no evidentiary hearing on facts bearing on jurisdiction, and the trial court made no factual findings, leaving no conclusively determined facts for this Court to review. EXC Litigants seek a premature federal court review of the jurisdictional issues in order to escape liability for the deaths of two Navajo tribal members, injuries to two other members, and harm caused to many other family members.

I. Because Exhaustion of Tribal Remedies is Mandatory, This Court Must Require Exhaustion Before Proceeding to Inquire into the Question of the Navajo Nation's Adjudicatory Jurisdiction Over EXC Litigants

In their Response, EXC Litigants accuse Jensen Litigants of having "wrongly state[d] that exhaustion of tribal remedies is a necessary prerequisite to this Court's jurisdiction." Plaintiffs' Response to Jensen Defendants' Motion to Dismiss without Prejudice [hereinafter "Pls.' Resp."] at 2. The accusation is without merit. Jensen

Litigants acknowledged this Court's jurisdiction under 28 U.S.C. §1331. Jensen Litigants did not argue that exhaustion of tribal remedies was a "prerequisite" to the existence of this Court's subject matter jurisdiction. On the contrary, Jensen Litigants observed that in *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845 (1985), the Supreme Court held that the question of tribal jurisdiction over nonmembers is one over which federal courts have federal question jurisdiction. *See* Jensen Defendants' Memorandum in Support of Motion to Dismiss at 5. Hence, this Court does *not* lose its jurisdiction over EXC Litigants' claim because of their failure to first exhaust tribal remedies.

Nevertheless, the prudential doctrine of exhaustion of tribal remedies *mandates* that this Court stay its hand until EXC Litigants exhaust remedies available in the Navajo Nation judicial system. This mandate ensures a "full record" is developed by the Navajo Nation courts in the event of subsequent federal review of tribal jurisdiction over EXC Litigants. *See National Farmers Union*, 471 U.S. at 856. The Supreme Court reiterated the exhaustion of tribal remedies mandate in *Strate v. A-1 Contractors*. Summarizing its decision in *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9 (1987), the Court wrote that it

> recognized in *Iowa Mutual* that the exhaustion rule . . . was "prudential," not jurisdictional. [*S*]*ee also* [*Iowa Mutual*, 480 U.S.], at 16, n. 8 (stating that "[e]xhaustion is *required* as a matter of comity, not as a jurisdictional prerequisite"). Respect for tribal self-government made it appropriate "to give the tribal court a full opportunity to determine its own jurisdiction."

Strate, 520 U.S. at 451 (1997) (citations and internal quotation marks omitted) (emphasis added); *see also National Farmers Union*, 471 U.S. at 857 (emphasis added) (concluding that "exhaustion is *required* before . . . a claim [that a tribal court has exceeded the lawful

limits of its jurisdiction] may be entertained by a federal court"); *Boozer v. Wilder*, 381 F.3d 931 (9th Cir. 2004) (emphasis added) ("Exhaustion [of tribal remedies] is prudential; it is *required* as a matter of comity, not as a jurisdictional prerequisite").[2]

II. The Exhaustion of Tribal Remedies Mandate Serves Several Important Purposes, All of Which Are Relevant in the Instant Case

EXC Litigants seem to argue that tribal remedies have been exhausted in this case because "the purpose of exhaustion has already been satisfied." Pls.' Resp. 2. Their argument disregards other important federal purposes for mandating exhaustion of tribal remedies, all of which would be served by requiring exhaustion in this case. Indeed, their argument fails to apprehend that even the single purpose they cite would be served by ordering exhaustion here. Whatever purposes are invoked, the need for exhaustion remains where there has been no development of a factual record and no findings entered by the tribal courts for review by this Court.

In discussing "the purpose of exhaustion," EXC Litigants fasten on a single sentence from *Strate v A-1 Contractors*, arguing that "[t]he 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.' " *See* Pls.' Resp. 7 (quoting *Strate*, 520 U.S. at 450) (citation and internal quotation marks omitted). Since the Navajo Nation courts

[2] EXC Litigants also argue that the procedural history in *Strate* is "almost identical" to the procedural history in the instant case and that this similarity supports their position that they have exhausted tribal remedies. Pls.' Resp. 7. Besides failing to recognize that *Strate* disposed of the exhaustion issue by applying an *exception*, *see Strate*, 520 U.S. at 459 n.14, EXC Litigants ignore the crucial procedural difference between the two cases, namely, that unlike the tribal court proceedings in *Strate*, tribal proceedings in the present case entailed no opportunities for fact-finding. *See* Memorandum in Support of Jensen Defendants' Motion to Dismiss without Prejudice at 2-4 (summarizing procedural history in the instant litigation).

"considered the jurisdictional issues raised in this action and . . . explained their basis for accepting jurisdiction," EXC Litigants' argument continues, "the exhaustion rule, even if required, has been satisfied." *Id.* EXC Litigants ignore that the precise basis for accepting or rejecting jurisdiction cannot be reviewed without entry of factual findings by the tribal courts. *See, e.g., National Farmers Union*, U.S. at 855-56 ("[T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions."), *quoted in Strate*, 520 U.S. at 449. Hence the purpose cited in the sentence EXC Litigants extract from *Strate* would be served by requiring exhaustion in this case.

Moreover, EXC Litigants completely disregard other important purposes served by the exhaustion of tribal remedies mandate as elaborated by the Supreme Court, all of which are relevant in the instant litigation. In *National Farmers Union*, the Supreme Court emphasized a number of these purposes:

> Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover *the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court* before either the merits or any question concerning appropriate relief is addressed. The risks of the kind of "procedural nightmare" that has allegedly developed in this case will be minimized if *the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made*. Exhaustion of tribal court remedies, moreover, *will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction*, and *will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review*.

National Farmers Union, 471 U.S. at 856-57 (footnotes omitted) (emphasis added). In the present litigation, full factual development and a final determination of jurisdiction by the Navajo Nation courts clearly would serve the interest of judicial economy and facilitate the orderly administration of justice by this Court; provide this Court with the benefit of the Navajo Nation's expertise in the event of post-exhaustion review; and give the Navajo judiciary a full opportunity to determine its jurisdiction, rectify any preliminary errors, and explain to the parties the precise basis for its final jurisdictional ruling. More generally, requiring exhaustion here would serve the overarching federal interest in promoting and fostering the development of the Navajo Nation's judicial system. *Cf. Iowa Mutual*, 480 U.S. at 19 (noting the exhaustion mandate's compatibility with "the congressional policy promoting the development of tribal courts").

III. None of the Established Exceptions to the Exhaustion of Tribal Remedies Mandate Applies in This Case

EXC Litigants argue that "[f]urther exhaustion measures would be futile." They claim they "have no new evidence to submit to the tribal courts that would change their prior rulings" and that, 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." Pls.' Resp. 4. EXC Litigants misunderstand the futility exception to the tribal remedies exhaustion mandate. That exception applies only "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *National Farmers Union*, 471 U.S. at 856 n.21. In view of the ample procedural opportunities remaining for EXC Litigants to challenge Navajo jurisdiction in

the tribal courts, the futility exception is not even arguably applicable in the instant litigation.[3]

EXC Litigants argue at length that the present litigation "is on all fours" with *Strate v. A-1 Contractors*, 520 U.S. 544 (1997); *see* Pls.' Resp. 5. Although they seem to be arguing the merits of the jurisdictional dispute, any similarity between *Strate* and the instant case would be relevant to the present Motion to Dismiss only as it arguably bears on the question "whether [tribal] jurisdiction is 'colorable' or 'plausible.' " *Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008) (citation omitted); *see also Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 848 (9th Cir. 2009) (citation and internal quotation marks omitted) ("If jurisdiction is colorable or plausible, then the exception does not apply and exhaustion of tribal court remedies is required."). Additionally EXC Litigants rely on extensive factual allegations to argue that the instant case is identical to *Strate*. EXC Litigants ignore the fact that there are no factual findings rendered by the tribal court. This Court cannot conduct a review of EXC Litigants' factual allegations because they remain mere allegations. Without factual determinations taking place in the tribal courts, this Court has no facts to review, and has no basis for making a sound determination for or against tribal jurisdiction.

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[3] EXC Litigants' argument that the futility exception applies here because they could not possibly get the tribal courts to "change their mind," Pls.' Resp. 4, runs counter to the Supreme Court's "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 (citation and internal quotation marks omitted). The Court has never permitted litigants to circumvent complete exhaustion simply because they believe they stand no chance of prevailing on their jurisdictional arguments at trial or upon final appellate review in the tribal court system. Such a position would contradict the exhaustion mandate's purpose of according "proper respect for tribal legal institutions" by requiring that they "be given a 'full opportunity' to consider the issues before them and 'to rectify any errors.' " *Iowa Mutual*, 480 U.S. at 16 (quoting *National Farmers Union*, 471 U.S. at 857)).

The present litigation is replete with factual distinctions that make the Navajo Nation's jurisdiction both colorable and plausible, thereby rendering *Strate*'s exception to the exhaustion mandate inapplicable. For example, unlike *Strate*, the present case implicates the Navajo Nation's sovereign on-reservation governing authority *as guaranteed by treaty*. *See, e.g.*, *Williams v. Lee*, 358 U.S. 217, 221-22 (1959) (discussing Navajo Treaty of 1868, art. II, 15 Stat. 667) ("Implicit in these treaty terms. . . was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed."); *cf. Montana v. United States*, 450 U.S. 544, 558-59 (1981) (noting that Crow treaty provision, whose language is identical to that of the Navajo Treaty of 1868, "arguably conferred upon the Tribe the authority to control fishing and hunting on [tribal] lands."). This distinction is especially significant because in *Strate* itself the Supreme Court specifically reiterated that the presumption against tribal jurisdiction over nonmembers on non-Indian lands applies "only in the absence of a delegation of tribal authority by treaty or statute." *Strate*, 520 U.S. at 439-40; *see also id.* at 456 (noting that *Strate* litigants "refer[red] to no treaty or statute authorizing" the kind of jurisdiction asserted in *Strate*). Here there is a treaty which requires review. *See* Navajo Treaty of 1868, art. II, 15 Stat. 667.

A second—and related—key distinction is that unlike *Strate*, the present case implicates the Navajo Nation's authority to *regulate* commercial touring within the boundaries of the Navajo Reservation, giving rise to a presumption *in favor of* the tribe's adjudicatory jurisdiction over EXC Litigants. *See id.* at 453 (quoting *Iowa Mutual*, 480 U.S. at 18 (alterations added by the *Strate* Court)) ("[W]here tribes possess authority to regulate the activities of nonmembers, '[c]ivil jurisdiction over [disputes arising out of]

such activities presumptively lies in the tribal courts.' "). In addition, facts to be adduced in the Navajo Nation court system will clearly distinguish U.S. Highway 160, the site of the fatal collision in this litigation, from the federally granted, state-maintained highway at issue in *Strate*. As *Strate* makes clear, this distinction likewise removes this case from the presumption against tribal authority over nonmembers, even in the absence of treaty-based authority. *See id*. at 454-56 (discussing factors relevant to the question whether to "align the right of way . . . with land alienated to non-Indians" for nonmember governance purposes).

Finally, even if the *Montana* presumption against tribal jurisdiction over nonmembers on non-Indian lands were applied in the instant litigation, the Navajo Nation courts' jurisdiction over the tortious conduct of EXC Litigants on the Navajo Reservation is plausible and colorable in light of *Montana*'s exceptions.[4] Fact-finding in tribal court thus will establish, *inter alia*, that (1) EXC Litigants conducted extensive commercial touring activities on the Navajo Reservation and thereby entered into consensual relationships with the Navajo Nation or its members "through commercial dealing, contracts, leases, or other arrangements," *Montana*, 450 U.S. at 565, within the meaning of the first *Montana* exception,[5] and (2) the exercise of tribal jurisdiction over the tortious

[4] In *Strate* the Supreme Court succinctly summarized *Montana*'s presumption and exceptions: "*Montana* . . . described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions: The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health, or welfare." *Strate*, 520 U.S. at 446.

[5] EXC Litigants argue that no commercial relationship existed between them and the Navajo Nation or its members at the time of the fatal collision because they "did not

conduct of EXC Litigants while conducting commercial touring activities on the Navajo Reservation is necessary for preserving the Navajo Nation's political integrity, promoting its economic security, and protecting the health and welfare of all reservation residents. *See id*. at 566; *cf. Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316, 336 (2008) ("[T]he tribe may quite legitimately seek to protect its members . . . from nonmember conduct on the land that [threatens tribal welfare or security]."). Here the precise nature of the claims brought on behalf of decedents, by the injured, and by family members harmed must be specifically determined in order to provide this Court with facts pertinent to a review of the *Montana* exceptions. Without such factual determinations, this Court cannot conduct any review, much less make a sound determination regarding tribal court jurisdiction.

EXC Litigants may want to dispute Jensen Litigants' assertion of facts distinguishing the present litigation from *Strate v. A-1 Contractors*. But because tribal jurisdiction is colorable and plausible in this case, the Supreme Court's exhaustion of tribal remedies doctrine mandates that any such challenge take place within the tribal court system under the supervision of the Navajo Nation judiciary, whose fact-finding

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obtain [the] allegedly required permits." Pls.' Resp. 6. The Ninth Circuit Court of Appeals has rejected similar efforts by litigants to shield themselves from judicial jurisdiction and liability by evading tribal regulations. *See Elliott*, 566 F.3d at 850 ("[T]he tribe makes a compelling argument that the regulations at issue are intended to secure the tribe's political and economic well-being, particularly in light of the result of the alleged violation of those regulations in this very case . . . ."); *see also Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 818 (9th Cir. 2011) (quoting *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316, 337 (2008)) ("For purposes of determining whether a consensual relationship exists under *Montana*'s first exception, consent may be established 'expressly or by [the nonmember's] actions.' . . . We are to consider the circumstances and whether under those circumstances the non-Indian defendant should have reasonably anticipated that his interactions might 'trigger' tribal authority.").

authority in this litigation is exclusive as a matter of federal law.[6] *See Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 817 n.9 (9th Cir. 2011) (concluding that the district court's consideration of an affidavit that was not before the tribal court was error because "the district court's review is akin to appellate review of the tribal court record"); *cf. Attorney's Process & Investigation Services, Inc., v. Sac & Fox Tribe of the Mississippi in Iowa*, 609 F.3d 927, 937 (8th Cir. 2010) (citations omitted) (emphasis added) ("Questions of subject matter jurisdiction often require resolution of factual issues before the court may proceed, and that is particularly true of inquiries into tribal jurisdiction. It is therefore both *necessary* and appropriate for the parties and the tribal court to ensure that 'a full record [is] developed in the Tribal Court.' ").

IV. **Conclusion**

Jensen Litigants respectfully move this Court to dismiss the instant action because in challenging the subject matter jurisdiction of the Navajo Nation courts, EXC Litigants have failed to exhaust tribal remedies as required by federal law. The instant action is premature as no factual findings were made by the tribal trial court, leaving this Court without a full factual record to review and upon which to proceed. In the alternative, Jensen Litigants respectfully request that the Court stay these proceedings to allow appropriate fact-finding to be conducted in the proper forum, the Navajo judicial system.

Respectfully submitted,

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[6] EXC Litigants proffer a long list of "key facts relevant to the jurisdictional issue" which they claim are "uncontested." *See* Pls.' Resp. 3. EXC Litigants do not and cannot deny that none of these asserted facts have been found or even judicially examined in any evidentiary hearing before the Kayenta District Court.

August 29, 2011 s/ Michael J. Barthelemy

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I hereby certify that on this 29th day of August, 2011, I electronically transmitted and mailed by first class mail, postage prepaid, a true and correct copy of the foregoing document to:

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