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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Rolling Frito-Lay Sales, a Delaware Limited partnership Plaintiff, vs. Rebecca Stover, David Montiel, Auk-Mor and The Salt River Pima-Maricopa Indian Community Court, Defendants.	Case No.: CV 11-01361-PHX-FJM **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** (Oral Argument Requested)

Pursuant to F.R.C.P. 56, Plaintiff Rolling Frito-Lay Sales, (hereinafter "RFLS") moves for summary judgment in this declaratory action requesting:

(1) That Stover's claim for damages for personal injury against RFLS be adjudicated in this Federal Court;

(2) That the Tribal Court be enjoined from proceeding against RFLS in the underlying Tribal Action recently filed by Stover in Salt River Pima-Maricopa Community Court Action number C-11-0012;

(3) For a declaration that Stover's claims against RFLS are barred by res judicata or

otherwise because they were dismissed for failure to prosecute by the Superior Court of Maricopa County; and

(4) For a declaration that Stover's claims against RFLS are barred by the two-year Statute of Limitations at A.R.S. §12-542.

This Motion is supported by the attached separate statement of facts and the following memorandum of law.

STATEMENT OF FACTS

The facts are simple and undisputed. Defendant Stover, a Minnesota resident, was injured on November 16, 2008, when she slipped on a flattened box that had contained Frito-Lay products while she was shopping at The ON-AUK-MORE TRADE CENTER. An employee of RFLS was delivering product to the Center. The Center is owned by the Defendant Montiel, who is a member of the Salt River Pima-Maricopa Indian Community. The Trade Center is on tribal property.

Stover originally brought a state court action against RFLS and Montiel d/b/a ON-AK-MORE for negligence on May 14, 2010. Defendants Montiel/ON-AK-MORE were dismissed based on tribal jurisdiction by state judge Schwartz on August 23, 2010. The state court action remained against RFLS, but was never prosecuted.

Stover then filed an action in Tribal Court against the same Defendants on October 19, 2010, but did not serve the Complaint until May of 2011. Unknown to RFLS, Stover had the same actions pending in both the Superior Court and the Tribal Court from October 2010 to April 2011. By then, the underlying state court action against RFLS was dismissed for lack of prosecution on April 27, 2011.

Under Tribal law for the Salt River Pima-Maricopa Indian Community, no lawyers are allowed for civil matters, only Tribal "Peacemakers and Advocates". RFLS has retained an "advocate" to file an answer recently. The Tribal Court does not allow access to even its civil code non-members, does not allow access to its court files to non-members, does not allow representation or even the filing of pleadings in its civil courts to persons trained in the law, does not permit jury trials except by stipulation, and has no discoverable remedy of appeal.

Before RFLS was served in May of 2011, the Tribal Court had an ex parte hearing with Stover's "advocate". Another "status" is set for August 23, 20011, the nature of which is unknown to this counsel.

Unsure of its rights in Tribal Court as a non-member of the Tribe, RFLS filed this action for declaratory relief on July 8, 2011 and requests relief from any further Tribal proceedings.

ARGUMENT

I. The claims between Stover and RFLS, who are non-Indians, should be decided by the District Court and the Tribal Court should be enjoined from adjudicating the Claims.

A. Federal Jurisdiction.

The question of whether an Indian tribe has the power to compel a non-Indian to submit to the civil jurisdiction of a tribal court is a federal question under 28 U.S.C. §1331. ***National Farmers Union Insurance Company v. Crow Tribe***, 471 U.S. 845, 852 (1985). See, also, ***Strate v. A-1 Contractors***, 520 U.S. 438, 448, 117 S. Ct. 1404, 1411, 137 L. Ed. 661 (1997). Additionally, federal jurisdiction based on diversity exists under 28 U.S.C. §1332, as none of the parties are citizens of the same state. Thus, this Court has subject matter jurisdiction.

B. A presumption exists against the application of Tribal Jurisdiction to non-Indians.

Any analysis of tribal court jurisdiction over non-members starts with ***Montana v. U.S.***, 450 U.S. 544, 101 S.Ct. 1245 (1981), which pronounced the general rule that the inherent sovereign powers of an Indian tribe do not extend to the activities of non-Indians who come within its borders. ***Id.*** 450 U.S. at 565, 101 S. Ct. at 1258. This has been described as the "Montana presumption" against tribal jurisdiction limiting a tribe's legislative and adjudicative authority over non-members. ***Red Mesa Unified School District v. Yellowhair,*** (2010 U. S. Dist. Lexis 104276 Arizona).

Since Montana the federal courts have systematically narrowed tribal jurisdiction placing the burden on the tribe to justify its assertion of jurisdiction by requiring that the claims

be sufficiently "tribal" in nature. This means that the conduct at issue must be of a type which is important to the tribe's sovereignty interest relating to self-governance. More simply, the issue is whether the non-member activity intrudes on internal relations or threatens tribal self-rule. ***Plains Commerce Bank v. Long Family Land and Cattle Co.***, 554 U. S. 316, 128 S. Ct. 2709 (2008). In ***Plains Commerce,*** the Court decided that even a Bank's contract dispute which involved land of an Indian family pledged as security for a loan was no intrusion on tribal relations or self-government. ***Plains*** at 2724. Justice Roberts explained why:

> Indian courts differ from traditional American courts in a number of significant respects.....and non-members have no part in tribal government-they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may fairly be imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations. ***Id***.

Here no such tribal concerns were triggered for what was the routine delivery of snacks to a convenience store on tribal land. The mere sale and delivery of snack foods cannot rise to the level of intrusion on tribal relations or self-government.

C. Personal Injury accidents between non-Indians that simply occur on Indian Land do not trigger tribal jurisdiction.

In ***Strate v. A-1 Contractors***, ***Id.***, the Supreme Court ruled that a tribal court could not entertain jurisdiction over a personal injury claim involving two non-Indians. The case arose from an auto accident on a right-of-way through the Fort Berthold Reservation acquired and maintained by the State of North Dakota as a public highway. Justice Ginsberg commented that this was a claim "distinctly non-tribal in nature... between two non-Indians involved in a run-of-the-mill highway accident." 520 U.S. at 457.

Other courts, including this very court have held similarly. This very court held in the matter of ***Bashas v. Bashas Inc***, a bankruptcy case proceeding which involved the death of an Navajo Indian who was struck by a Basha's truck, that the negligence claim against the non-Indian driver and a property owner could not be brought in tribal court. In the matter of ***Bashas***,

2010 U.S. Dist. LEXIS 85505 (copy attached). See, also, ***Cordova v. Holwegner***, 971 P.2d 531(Wash. App. 1999) ("nothing in the record indicated that the tribe has exclusive or concurrent jurisdiction over this garden-variety tort litigation between nonmembers that arose from an incident occurring on the closed area of the reservation").

Movant anticipates that one or both Defendants may advocate that the tribe's interest in preventing accidents from negligence is sufficient reason to trigger tribal jurisdiction. The 9th circuit rejected this argument in ***Burlington Northern R. R. Co. v. Red Wolf***, 196 F.3d 1059 (9th Cir. 1990). A wrongful death action was brought by the estate of an Indian woman killed at a railroad crossing right-of-way along the exterior boundary of the Crow Reservation. The Court reasoned the prevention of possible injuries to tribal members was insufficient under the ***Strate*** standard, the conduct regulated must "imperil the subsistence" of the tribal community.

Two other cases demonstrate the rule that torts that occur on Indian land, even involving Indian Plaintiffs, do not create tribal jurisdiction. The Arizona case of ***Ford Motor v. Todocheene***, 258 F. Supp. 2d 1038 (2002), involved the death of a Navajo police officer who was killed as a result of a defective Ford vehicle while driving on Indian land. As in the case herein, ***Ford*** sought declaratory and injunctive relief against a pending tribal court action relying upon federal question and diversity jurisdiction. Judge Rosenblatt not only took jurisdiction but enjoined the tribal court. The fact that the Plaintiff was an Indian and the accident took place on Indian land was insufficient for the exercise of tribal jurisdiction:

> Assuming this Court strictly applied ***McDonald***, all product liability torts, in fact all litigation, would be subject to tribal court jurisdiction if the injury occurred on Indian land - and solely because it occurred on Indian land. This is problematic because any manufacturer, or any individual, would be subject to litigation in tribal court simply because the injury occurred on Indian land. Yet, if the same [*1050] product were in use but the land happened to be non-Indian fee land, then the jurisdictional outcome might be different.
> 258 F. Supp. 2d at 1049-50.

One final recent case definitively establishes that tribal courts lack jurisdiction to adjudicate person injury claims against non-members, even when those claims arise on tribal land. ***Town Pump Inc. v. LaPlante***, 394 Fed. Appx. 425 (2010)[1] involved a claim by a tribal member for personal injuries from alleged toxic torts committed on tribal land by non-Indians doing business there. ***LaPlante*** claimed she was injured by toxic discharges from a ***Town Pump*** convenience store which had released fuels from underground storage tanks on the reservation (a copy of this case is attached).

The Ninth circuit easily disposed of ***LaPlante's*** assertion that tribal jurisdiction was necessary to protect tribal self-government under the Montana case. ***LaPlante*** did not sue to remedy any injury to the lands. Nor did the tribal seek to regulate the cleanup on the contaminated soils, the tribe was not even a party to the suit. Instead, ***LaPlante*** sued for only her own personal injuries. This claimed single injury was insufficient to implicate tribal sovereignty interests.

The law is clear: not only are non-Indians forbidden from suing each other in tribal courts for injuries on tribal lands absent significant intrusion or relation to tribal interests, Indians cannot sue non-Indians in tribal court either. Of course, this case involves no suit by an Indian, the only Indian is one of the Defendants in the underlying action. The claim between the injured party Stover and RFLS has no nexus to the tribe except that the situs of the injury happened on be Indian land. That is insufficient to force an non-Indian to defend itself in tribal court.

D. The Salt River Pima-Maricopa Tribal Court lacks civil jurisdiction over Stover's claims against RFLS and should be enjoined from adjudicating them.

The traditional criteria for obtaining injunctive relief include: (1) a strong likelihood of success on the merits; (2) the possibility of irreparable injury to the plaintiff if the preliminary

[1] While Ninth Circuit rules limit the use of unpublished decisions as precedent, Ninth Circuit Rule 36-3, Federal Rule of Appellate Procedure 32.1(a) generally permits citations of unpublished decisions issued after January 1, 2007.

relief is not granted; (3) a balance of hardships favoring the plaintiff; and (4) advancement of the public interest. See, ***Los Angeles Memorial Coliseum Com'n v. National Football League***, 634 F.2d 1197,1200 (9th Circuit 1980)(citations omitted). Accordingly, a party is entitled to injunctive relief provided it demonstrates "probable success on the merits" and "a possibility of irreparable injury," or if it demonstrates "a fair chance of success on the merits (i.e., serious questions are raised)" and the "balance of hardships tips sharply in their favors." ***Confederated Tribes & Bands of Yakima v. Baldridge***, 898 F.Supp. 1477,1483 (W.D. Wash. 1995), quoting, ***State of Alaska v. Native Village of Venetie***, 856 F.2d 1384, 1389 (9th Cir. 1988).

The injunctive relief asked for by Plaintiff RFLS is appropriate because it will ultimately be successful in challenging the Salt River Pima Tribal Court's jurisdiction and the balance of hardships tips sharply in its favor.

a. Plaintiff RFLS will ultimately be successful in challenging The Salt River Pima Tribal Court's Jurisdiction.

Plaintiff will ultimately be successful because, as explained above, the Salt River Pima Tribal Court has no civil jurisdiction over disputes between non-members Stover and RFLS. Since the Tribal court lacks jurisdiction to hear Defendant Stover's claims, Plaintiff will ultimately be successful and a permanent injunction is appropriate.

b. Plaintiff will suffer irreparable harm if the Tribal court is not enjoined.

The Tribal Court's processes are largely a secret. The "codes" are not a matter of public record and may, upon information and belief, include "customary and traditional" practices and oral histories. Tribal judges consider testimony regarding tribal custom and tradition from tribal elders and historians, who need not necessarily base their opinions on documentary evidence that would be required by state and federal evidentiary rules.

At least one ex parte meeting with the Tribal Judge in this case has already occurred in May involving Stover's advocate. A "status" hearing is set for August 23rd the substance of which is a mystery.

The harm Plaintiff RFLS faces is the effect of any rulings now or later from the Tribal Court, which may or may not be binding. Tribal Courts are not based upon any known precedent because their decisions are not published. Yet some state courts have extended full faith to such rulings and federal courts grant comity to tribal court rulings. See, ***In re Buehl***, 555 P.2d 1334 (Wash. 1976) and ***Wilson v. Marchington***, 127 F.3d 805 (9th Circuit 1997). The Plaintiff should not be subject to any action or even potential action of the Tribal Court. An injunction now will prevent any duplication as well as prevent prejudice.

c. A balance of hardships tips sharply in Plaintiff's favor.

If this Court does not enjoin Defendant Stover from continuing prosecution of her tort claim in Tribal Court, the Plaintiff will have no remedy from an adverse decision. The Tribal court has no known (or will not disclose), any right of appeal from its decision-making process which itself is much of a mystery since no lawyers trained in law are allowed.[2] It is difficult to imagine greater prejudice than the denial of the right of appeal particularly from a tribunal that does not rely on precedent, the rules of evidence or published decision-making.

If there is a right of appeal months and perhaps years of unnecessary litigation will be required before the Tribal court renders a final decision regarding Stover's claims. At which point Plaintiff may be back before this Court making the same arguments to challenge the Tribal Court's civil jurisdiction over Plaintiff. Such a process would be an unneeded waste of all parties' money and time and a waste of this Court and the Tribal Court's valuable resources.

Likewise, Defendant Stover would fall prey to the same hardship if she continues this course in the Tribal Court. She may ultimately be successful but the Tribal Court would not have jurisdiction over Plaintiff and the Tribal judgment would be wholly unenforceable. On the other hand, Defendant Stover would not be precluded from bringing her claim against Plaintiff before a court of competent jurisdiction. Enjoining Stover's claims from continuing against

[2] Oddly, the Tribe has a fairly sophisticated set of rules of civil procedure, which are available to the public, which seems inconsistent with the exclusion of advocates who are trained in the law.

Plaintiff in Tribal Court is no hardship.

d. The public interest would be advanced.

There is no public interest in having a court that lacks jurisdiction adjudicate a controversy. There is a public interest in having the Tribe adjudicate maters brought within its own court system. But this interest is minimal as it relates to non-members. ***Ford Motor v. Todocheene***, 258 F. Supp. 2d at 1057 (citing Montana).

It is clear that if the Court does not grant the Plaintiff's requested relief, all the parties will suffer needlessly with protracted and unnecessary Tribal Court litigation which may be voidable as well as prejudicial. The Tribal Court plainly lacks jurisdiction and has no legally protected interest in the litigation between Plaintiff and Defendant Stover.

II. Defendant Stover's claims against RFLS are barred by res judicata or otherwise because her identical action against RFLS in State Court was dismissed for lack of prosecution.

Defendant Stover filed suit against Montiel /ON-AK-MOR and RFLS Defendants in state court. The state court action against Montiel only was dismissed because of Tribal jurisdiction in his favor. The state court case continued against RFLS until it was dismissed on April 27, 2011, for failure to prosecute. In the meantime in October of 2010 Stover filed an action identical to the state court action but filed it in tribal court but failed to serve it until the state court case was dismissed.

The doctrine of res judicata, or claim preclusion, bars re-litigation of claims in a subsequent action between the same parties or their privies of a final judgment that has been entered on the merits. ***In re Schimmels***, 127 F.3d 875, 881 (9th Cir. 1997) (citing ***Montana v. U.S.***, 440 U.S. 147, 153054 (1979). Res judicata will apply when there is "(1) an identify of claims, (2) a final judgment on the merits, and (3)identity or privity between parties." ***Owens v. Kaiser Foundation Health Plan, Inc***., 244 F.2d 708,713 (9th Circuit 2001).

At the outset Plaintiff anticipates that Stover may argue that the Tribal action was not a "subsequent" action for res judicata purposes since it was filed before judgment was entered

in the state action. Such argument is wrong however for two reasons. First, as a matter of simple chronology, the state action was filed first so the Tribal action was "subsequent" as a matter of time. Second, the law is that even if two actions were filed simultaneously, the first judgment to be entered is entitled to res judicata effect without regard to the order in which the two actions were commenced. *18 Wright and Miller*, *Federal Practice and Procedure* §4402 at 22, 24 (1981). Here, the first (and only) judgment entered is the dismissal of the claims against RFLS in April which gives preclusive effect to the tribal action filed in October 2010. That judgment is a bar regardless of which action was begun first.

Since the state court action claims were identical to the Tribal Claims criteria (1) and (3) cannot be contested. Criteria (2), whether a final judgment on the merits was made, also is satisfied by the April dismissal for failure to prosecute. Under the language of both Arizona Rule 41(b) and FRCP 41(b), a dismissal for failure to prosecute is a "treated as an adjudication on the merits for purposes of preclusion." ***Johnson v. U. S. Department of Treasury***, 939 F.2d 820,825 (9th Cir. 1991).

Any action arising out of Stover's claims for personal injuries from this accident, including the tribal action or a declaration of any liability to RFLS is precluded by res judicata.

III. Stover's Claims against RFLS are also barred by the failure to file within the statute of limitations as the filing in tribal court was with a court that lacked jurisdiction which did not toll the statute.

Stover made a tactical decision not to continue prosecuting the state court action relying upon the tribal action filed last October instead. Unfortunately the effect of the filing of the tribal action was to file with a court that has no jurisdiction over RFLS.

As a result the filing of the action against RFLS did not toll the two year statute for personal injury actions at A.R.S. §12-542. A filing of a complaint in a court without competent jurisdiction does not toll the statute of limitations. ***Silverberg v. Thomson Mckinnon Secur., Inc***., 787 F.2d 1079, 1082(6th Cir. 1986). The filing of a defective complaint does not toll the statute. ***Peters v. M and O Construction***, 119 Ariz. 34, 579 P.2d 72(App.

1978). Stover has failed to file properly anywhere within the statute of limitations which expired November 16, 2010.

Stover's claims against RFLS are time-barred.

CONCLUSION

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) created a presumption against tribal jurisdiction over non-Indian defendants. RFLS has a right to have the case against it heard in a forum that is (a) not foreign, and (b) not hostile.

The claims against RFLS do not involve the internal relations of the tribe. The claims should be heard in this Court, claims which RFLS believes are barred anyway. Stover still has her remedy in the tribal court against the tribal Defendant.

RFLS therefore requests:

(1) That Stover's claim for damages for personal injury against RFLS be adjudicated in this Federal Court;

(2) That the Tribal Court be enjoined from proceeding against RFLS in the underlying Tribal Action recently filed by Stover in Salt River Pima-Maricopa Community Court Action number C-11-0012;

(3) For a declaration that Stover's claims against RFLS are barred by res judicata or otherwise because they were dismissed for failure to prosecute by the Superior Court of Maricopa County; and

(4) For a declaration that Stover's claims against RFLS are barred by the two-year Statute of Limitations at A.R.S. §12-542.

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Dated: August 15, 2011.

MANNING & KASS
ELLROD, RAMIREZ, TRESTER LLP

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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2011, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and copy mailed via regular mail to:

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