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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, On-Auk-Mor and the Salt River Pima-Maricopa Indian Community Court, Defendants.	Civil Action No.: CV 11-01361-PHX-FJM **DEFENDANT REBECCA STOVER'S MOTION TO DISMISS**

MOTION TO DISMISS UNDER RULE 12(b)
FOR LACK OF JURISDICTION AND IMPROPER VENUE

Comes now Defendant Rebecca Stover ("Stover") with her Motion to Dismiss Under Rule 12(b) for Lack of Jurisdiction and Improper Venue as a Federal Court shall give deference to the sovereignty of Indian Tribal Courts. Principles of comity require federal courts to dismiss or to abstain from deciding cases in which concurrent jurisdiction in an Indian Tribal Court is asserted. Furthermore, jurisdiction is proper in the Salt River Pima-Maricopa Community Court ("Tribal Court") because Plaintiff Rolling Frito-Lay ("Frito Lay") purposefully availed itself to the laws and jurisdiction of the Tribal Court by doing business on

Tribal Lands. This Motion is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS

On November 16, 2008, Defendant Stover entered On-Auk-Mor Trade Center to make several purchases. As Stover was walking towards the counter to pay for her items she slipped and fell on a cardboard box that had been broken down by a Frito-Lay employee and negligently left on the floor in the path of business invitees. Plaintiff Frito Lay's employee was on tribal land under a consensual business agreement with tribal member Defendant Montiel to display items for sale. In order for Frito Lay to operate on tribal land, it was required to obtain a business license from the tribe. Salt River Pima-Maricopa Tribal Code, Rule 15-21. An action for damages is currently pending in Salt River-Pima Maricopa Community Court against Defendant Montiel, On-Auk-Mor and Frito Lay.

II. ARGUMENT

A. The Salt River Pima-Maricopa Community Court Has Jurisdiction Over This Matter

Plaintiff Rolling Frito-Lay Sales is a foreign limited partnership doing business in the Salt River-Pima Maricopa Community. This matter falls under the civil jurisdiction and procedure of the Tribal Court, and said Court does have subject matter jurisdiction in this civil tort matter.

The Salt River Pima-Maricopa Tribal Code ("Tribal Rules"), Section 4-1(d)(3), states that "The Salt River Pima-Maricopa Indian Community Court shall have jurisdiction in all cases wherein: (3) The defendant has caused an event to occur within the community out of

which the claim which is the subject matter of the complaint arose." *See* Tribal Rules Section 4-1, attached as Exhibit 1. Furthermore, Tribal Rule 4-1(b) states that "The Salt River Court shall have jurisdiction in all cases involving dispute in contract [and] tort…and shall determine such cases upon the customary law of the Salt River Pima-Maricopa Indian Community as may be augmented by the common law as understood in the State of Arizona to the extent that the court requires, in order to do substantial justice to the parties in the dispute." *See* Tribal Rules Section 4-1, attached as Exhibit 1.

In this case, Plaintiff entered into a consensual contract (and probably a written contract) with the On-Auk-Mor Trade Center, an Indian company located on Indian lands. Plaintiff agreed to provide food and other materials to the On-Auk-Mor Trade Center for an agreed upon cost. Plaintiff's employee, "John Doe", negligently placed a cardboard box on the ground in the pathway of invitees, and therefore caused the injuries to Defendant Stover. This event occurred on Indian lands and is therefore subject to the jurisdiction of Salt River Pima-Maricopa Indian Community Court under Tribal Law. In addition, Tribal Rule 4-1(b) grants the Tribal Court jurisdiction over non-Indians in tort cases and an action is currently pending against Frito Lay and Defendants Montiel and On-Auk-Mor. *See* Tribal Rules Section 4-1, attached as Exhibit 1.

In *Montana v. United States*, the United States Supreme Court recognized that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservation." *Montana v. United States*, 450 U.S. 544, 565 (1981). First, "a tribe may regulate, through taxation, licensing, or other means, the activities of ***nonmembers who enter consensual relationships with the tribe or its members, through commercial***

dealing, contracts, leases, or other arrangements. *Id.* Second, "[a] tribe may retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id*. at 566.

In *Water Wheel Camp Recreational Area v. Larance*, a tribal court system exercised jurisdiction over a non-Indian corporation and its non-Indian owner in an unlawful detainer action for breach of a lease of tribal lands and trespass. *Water Wheel Camp Recreational Area v. Larance*, 642 F.3d 802, 804 (9th Cir. 2011). Robert Johnson, a non-Indian, purchased from non-Indian owners Water Wheel Camp Recreational Area, Inc. in 1985. *Id.* at 805. The corporation leased 26 acres from the Colorado River Indian Tribes ("CRIT") and operated a recreational resort on that land. *Id.* When the lease expired, Water Wheel and Johnson failed to vacate the property or pay rent. *Id.* CRIT filed an action in tribal court, and that court ruled in favor of CRIT. *Id.* at 806. The tribal court found that ***because Water Wheel had entered into a consensual relationship with the tribe through commercial dealings,*** the court had subject matter jurisdiction over Water Wheel under *Montana's* first exception. *Id.* The tribal court of appeals affirmed. *Id.*

While the case was pending before the tribal court, Water Wheel and Johnson filed a complaint in the District of Arizona seeking declaratory and injunctive relief against the tribal court's exercise of jurisdiction. *Id.* at 807. The district court found a consensual relationship existed and that the tribal court had subject matter jurisdiction over Water Wheel under *Montana's* first exception. *Id.* The Ninth Circuit Court of Appeals affirmed. *Id.* at 820. The court noted the long-established "federal policy of deference to tribal courts" and that the

"federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts." *Id.* at 808. They further recognized the case of *Iowa Mut. Ins. Co. v. LaPlante*, which held that "Tribal authority over activities of non-Indians on reservation lands is an important part of tribal sovereignty. ***Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute***." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987).

In this case, Frito Lay entered into a consensual business agreement with tribal member Defendant Montiel to display items for sale. Stover was a patron of Montiel's business establishment, On-Auk-Mor. Stover filed a petition in Tribal Court against the above named Defendants, and it is clear that the Tribal Court has jurisdiction under *Montana's* first and second exception. This case is extremely similar to *Water Wheel* because there is a consensual business relationship between a non-Indian organization (Frito Lay) and an Indian organization (On-Auk-Mor) and the Ninth Circuit has clearly held that the Tribal Court has jurisdiction in this situation. Frito Lay purposefully availed itself to the laws and jurisdiction of the Tribe and Tribal Court when they agreed to do continuing business on Indian land.

B. Because The Tribal Court Has Jurisdiction, The Arizona District Court Must Dismiss This Case

In *Crawford v. Genuine Parts Co.*, the Ninth Circuit confirmed that "principles of comity required federal courts to dismiss or to abstain from deciding cases in which concurrent jurisdiction in an Indian tribal court was asserted." *Crawford v. Genuine Parts Co.*, 947 F.2d 1405 (9th Cir. 1991). *Crawford* further explained that "[t]he requirement of exhaustion of tribal remedies is not discretionary; it is mandatory. If deference is called for, the district court may not relieve the parties from exhausting tribal remedies." *Id.* at 1407.

Courts have recognized four exceptions to this rule, none of which apply in this case. *Burlington N. R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1065 (9th. Cir. 1999). One of these exceptions is if "exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction." *Id.* Frito Lay erroneously claims that this exception relieves this court of the exhaustion rule clearly outlined in *Crawford.* Curiously, Frito Lay does not offer any explanation to support their claim except that "any attempt at exhaustion would be futile because of the lack of an adequate opportunity to challenge the Tribal Court's jurisdiction and that the exhaustion requirement would serve no purpose other than delay." *See* Plaintiff's Complaint Declaratory/Injunctive Relief ¶ 19. In reality, Frito Lay has every opportunity to challenge the Tribal Court's jurisdiction. Frito Lay can do this through their Tribal advocate they have admitted to hiring. Frito Lay's counsel can then challenge the Tribal Court's jurisdiction themselves.

In *Grand Canyon Skywalk Development, LLC* v. *Vaughn*, the Plaintiff entered into a formal revenue-sharing agreement with Sa Nyu Wa ("SNW"), a corporation wholly owned by the Hualapai Indian Tribe, for the planning, construction, and operation of a glass skywalk and related facilities on the edge of the Grand Canyon on the Hualapai reservation. *Grand Canyon Skywalk Development, LLC v. Vaughn*, No. CV11-8048-PCT-DGC (Ariz. 6-23-2011). Defendants passed an ordinance that would, according to Plaintiff, allow the Tribe to condemn Plaintiff's contract rights in the skywalk. Plaintiff sought a declaratory judgment in Arizona District Court that the Tribe lacks the power to condemn Plaintiff's contract rights under the ordinance. Plaintiffs in *Vaughn* relied on the same exception to the exhaustion requirement that Frito Lay relies upon in this case. However, the court in *Vaughn* concluded that, "[in] light of

Water Wheel, the Court cannot conclude that the tribal court's lack of jurisdiction over Plaintiff's claim is "plain" as required by the only exception to exhaustion upon which Plaintiff relies."

This case at bar clearly falls under *Crawford's* exhaustion requirement and this court must dismiss this claim and allow the current Tribal case to proceed. As stated above, Frito Lay has more than adequate opportunity to challenge the Tribal Court's jurisdiction in Tribal Court. Furthermore, *Vaughn* disproves Frito Lay's contention that the exhaustion requirement exception applies in this case.

C. Frito-Lay's Authorities on Personal Injury Accidents Between Non-Indians are Clearly Distinguishable From the Case at Bar

Strate v. A-1 Contractors, involved a "run-of-the-mill highway accident" that is clearly distinguishable from the case at bar. *See* Plaintiff's Motion for Summary Judgment, p. 4. First, the highway where the accident occurred was "maintained by North Dakota under a federally granted right-of-way that lies on land held by the United States in trust for the Three Affiliated Tribes and their members." *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). Second, the Court considered the highway property of the State of North Dakota, ***NOT*** Indian property. Third, the court's holding was extremely narrow and ***does not apply*** to the case at bar: "absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers driving on the State's highway, tribal courts may not exercise jurisdiction in such cases." *Id.* at 439. Furthermore, drivers that are traveling between states or across long distances often cross Tribal lands in order to reach their destination. In many instances, drivers cross into Tribal land without even realizing it. When two non-Indians get into an auto collision on Indian Lands, and they were merely traveling across Indian land to reach a non-Indian destination, it is reasonable to disallow Tribal jurisdiction. The case at bar is clearly different because it involves Stover (who voluntarily and knowingly entered Indian land to shop) and Frito Lay (who voluntarily

performed ongoing consensual business on Indian land with an Indian company). The only similarity that the case at bar shares with *Strate* is that both actions are categorized under the broad heading of "Personal Injury Actions." No other similarities in fact or law exist.

Burlington Northern R.R. Co. v. Red Wolf, is similar to *Strate* and equally distinguishable from the case at bar. *Burlington Northern R. R. Co. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1990). In *Burlington*, Beverly Nadine Red Wolf and Regina Bull Tail were killed when a Burlington Northern Railroad Company ("Railroad") train car collided with their automobile at a railroad grade crossing south of Lodge Grass, Montana, within the exterior boundaries of the Crow Reservation. *Id.* at 1062. The railroad tracks right-of-way where the accident occurred was granted to Burlington Northern Railroad Company, a non-Indian company, by the U.S. Congress in 1889. The United States Ninth Circuit Court of Appeals focused on solely on whether the property rights at issue were such that the land may be deemed non-Indian land. The Court answered that question in the affirmative, and that narrow holding was the reason for denying the tribal court's jurisdiction. There is not contention of property rights in the case at bar, and both parties agree Stover's fall happened on Indian land. *Burlington* is completely distinguishable.

The authority Frito Lay cites in the case of *Bashas v. Bashas Inc.* is a Court's order in response to Defendant's Motion to Withdraw the reference of a bankruptcy judge. This order is completely irrelevant to the case at bar, and no *Montana* analysis occurred. The Court's one sentence statement that Frito Lay refers to is ***dicta*** saying that the non-Indian ***debtors*** that were brought into the Navajo Tribal Court by Plaintiff were not subject to Tribal Court jurisdiction. *See* Plaintiff's Motion for Summary Judgment, p. 4-5. It is clear from the court order that the debtors were not even involved in the wrongful death personal injury accident. The Court does not explain why these debtors were brought into the litigation, but the debtors were most likely

medical providers that treated the deceased victim. The court ***does not say*** that the property owner and the driver of the truck, who were directly involved in the incident, could avoid the jurisdiction of the Tribal court.

The case of *Cordova v. Holwegner* is also clearly distinguishable. That case involved the operator (Defendant, non-Indian) of a logging loader and a person (Plaintiff, non-Indian) cutting the tree logs to log length, and the accident happened to occur on Indian land. Both Plaintiff and Defendant worked for the same company. Plaintiff initially filed an action in Tribal court against the Defendant and the logging corporation, which was 51% owned by a member of the tribe and 49% owned by a non-member. Later, Plaintiffs voluntarily dismissed the logging corporation and the logging loader operator was the only Defendant that remained. The State Court of Appeals held that in this circumstance, the Tribal Court did not have jurisdiction. This is clearly distinguishable from the case at bar because *Cordova* only involved two non-Indians in a personal injury action. The Indian held logging company had absolutely no involvement in the case and Plaintiff had voluntarily dismissed them. The case at bar's action in Tribal court involves apportioning fault between two Indian Defendants, one non-Indian Defendant, and one non-Indian Plaintiff.

In *Ford Motor v. Todocheene*, Esther Todocheene, while employed as a law enforcement officer with the Navajo Department of Public Safety (hereinafter "Navajo DPS"), was involved in a one car motor vehicle accident which occurred on the Navajo reservation. *Ford Motor Co. v. Todocheene*, No. CV-02-1100-PCT-PGR (D.Ariz. 2002). The road where the accident occurred was on Navajo land and maintained by the Navajo Nation. *Id.* The Todocheenes filed a product liability lawsuit against Ford in Tribal Court alleging that the Ford Expedition driven by Todocheene was defective and unreasonably dangerous in design or

manufacture. *Id.* The court enjoined the pending lawsuit in tribal court from continuing. *Id. Todocheene* is clearly distinguishable from the case at bar because that litigation involved a product liability case for a Ford vehicle that was manufactured on non-Indian lands and purchased on non-Indian lands. A manufacturer of a product, that was purchased on non-Indian lands and simply driven onto Indian lands, is ***very different*** from a manufacturer (Frito Lay) who holds a consensual agreement with a Tribe to continually provide food products on Tribal land. *Todocheene* is distinguishable and thus not controlling in this case.

In *Town Pump Inc. v. LaPlante*, LaPlante alleged personal injury by toxic discharges from a Town Pump owned gas station within the exterior boundaries of the Blackfeet Indian Reservation. *Town Pump Inc. v. LaPlante*, 394 Fed. Appx. 425 (2010). The court affirmed a permanent injunction of further prosecution of claims in Blackfeet Tribal Court. *Id.* at 426. Again, *Town Pump* is distinguishable from the case at bar. There were no allegations made by the Plaintiff that Town Pump had a consensual commercial relationship with the Blackfeet Tribe, thus removing the case from the first *Montana* exception. In the case at bar, there was an open and obvious consensual commercial relationship between Frito Lay and On-Auk-Mor to display food products, bringing this case into the first *Montana* exception. Therefore, the presentation of *Town Pump* as authority is unavailing and clearly distinguishable.

III. CONCLUSION

For the reasons state above, Defendant Stover's Motion to Dismiss must be granted. Furthermore, under clear precedent and the exhaustion requirement outlined in *Crawford*, the court must allow the Tribal Court actions to proceed.

DATED this 13th day of September, 2011.

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ORIGNAL e-filed this 13th day of September, 2011 with COPIES to:

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