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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

EXC, Inc. *et al.*,

Plaintiffs,

v.

Jamien Rae Jensen *et al.*,

Defendants.

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

**PLAINTIFFS' MOTION FOR
 SUMMARY JUDGMENT**

As a matter of law, the Navajo Nation has no jurisdiction over these Plaintiffs, who are all nonmembers of the tribe, regarding this simple motor vehicle accident on a State highway running over Navajo Nation land. This is not a novel issue. In 1997, the United States Supreme Court applied well-settled law limiting tribal jurisdiction in holding that Indian tribes do not have jurisdiction over nonmembers regarding motor vehicle accidents that occur on State highways running through reservation land. *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). This case is on all fours with *Strate* and other Circuit Courts of Appeal that have applied its holding. Accordingly, Plaintiffs request that this Court enter a declaratory judgment regarding the lack of tribal jurisdiction over this motor vehicle accident and permanently enjoin the Jensen Defendants from further prosecuting this matter in tribal court.

I. FACTUAL BACKGROUND

A. The accident

This case involves a motor vehicle accident the Jensen Defendants, who are tribal members, and the Plaintiffs here, who are nonmembers of the Navajo Nation, on U.S. Highway 160, which is maintained by the State of Arizona under a federally granted right-of-way over Navajo Nation land.¹ The accident occurred on September 21, 2004.² Butch Corey Johnson, a member of the tribe, was driving eastbound on U.S. Highway 160 near Kayenta, Arizona in a 1997 Pontiac sedan, which collided head-on with a tour bus traveling westbound on the highway.³ Jamien Rae Jensen and Dakota Jensen Johnson were passengers in Johnson's Pontiac.⁴ Russell Colon, who is not a member of the Navajo Nation, was driving the tour bus.⁵

The tour bus was travelling on U.S. Highway 160 as part of a U.S. National Parks Tour.⁶ Go Ahead Vacations organized the tour, provided a tour guide, and chartered the tour bus involved in the collision.⁷ EXC, Inc. provided tour transportation under a contract with Go Ahead Vacations, and Colon Garage, Inc. owned the bus.⁸ National Interstate Insurance Company provided insurance to EXC, Inc.⁹ None of the Plaintiffs in this action are members of the Navajo Nation.

B. The status of U.S. Highway 160

U.S. Highway 160 lies on land controlled and maintained by the State of Arizona.¹⁰

¹ See Joint Stipulated Statement of Facts for Purposes of Motions for Summary Judgment [Dkt. 82] ("Joint SOF") ¶¶ 3, 20, 21. See also Plaintiffs' Separate Statement of Facts ("PSOF") ¶ 1.

² Joint SOF ¶ 2.

³ *Id.*

⁴ *Id.* ¶ 6.

⁵ *Id.* ¶ 13.

⁶ *Id.* ¶ 1.

⁷ *Id.*

⁸ *Id.* ¶¶ 11-12.

⁹ *Id.* ¶ 15.

¹⁰ PSOF ¶¶ 1-2

1 Navajo Tribal Council Resolution No. CAP-25-59 (“Resolution”) authorized the
 2 Chairman of the Tribe to give consent to the Bureau of Indian Affairs for a right-of-way
 3 over U.S. Highway 160 and other roads and to transfer the right-of-way to the State of
 4 Arizona.¹¹ The only restriction placed on the right-of-way by the Navajo Nation involved
 5 fencing in the open range county referenced in the Agreement for Construction and
 6 Maintenance of Roads on the Navajo and Hopi Indian Reservations (“Agreement”).¹²

7 Pursuant to the Agreement, the State of Arizona agreed to maintain the roads as
 8 State highways once construction was completed.¹³ Any rights and obligations of the
 9 United States, including those regarding maintenance, regarding the roads were assigned
 10 to the State of Arizona in 1961 and 1962.¹⁴

11 **C. Procedural history**¹⁵

12 The Jensen Defendants filed a Complaint in the Kayenta District Court on
 13 September 11, 2006. On January 18, 2007, Plaintiffs filed a Special Appearance and
 14 Motion to Dismiss challenging the Kayenta District Court’s jurisdiction. Following
 15 briefing and argument, the Kayenta District Court ruled that it had jurisdiction. Plaintiffs
 16 subsequently filed a Petition for Writ of Prohibition in the Navajo Nation Supreme Court
 17 seeking review of the District Court’s jurisdictional ruling. After briefing and argument,
 18 the Navajo Nation Supreme Court denied Plaintiffs’ Petition and affirmed the District
 19 Court’s ruling that it had jurisdiction over Plaintiffs. Following the Navajo Nation
 20 Supreme Court’s ruling that tribal jurisdiction existed, Plaintiffs filed this federal court
 21 action.

23 ¹¹ *Id.* ¶ 2.

24 ¹² *Id.* ¶ 3.

25 ¹³ *Id.* ¶ 4.

26 ¹⁴ *Id.* ¶ 5.

27 ¹⁵ The procedural history regarding this case was more fully briefed in Plaintiff’s
 28 Response to Jensen Defendants’ Motion to Dismiss Without Prejudice [Dkt. 73]. The
 documents and rulings referenced in the procedural history were attached to that
 Response. For purposes of efficiency, they are not reproduced here.

1 **II. THE NAVAJO NATION DOES NOT HAVE JURISDICTION OVER THE**
 2 **CONDUCT OF PLAINTIFFS.**

3 The Supreme Court has long held that tribes have no jurisdiction over nonmembers
 4 except in certain narrow circumstances. *Montana v. United States*, 450 U.S. 544, 565
 5 (1981). Nonmembers subject themselves to tribal jurisdiction only when they enter into
 6 commercial relationships with the tribe (or its members) or when their “conduct threatens
 7 or has some direct effect on the political integrity, the economic security, or the health or
 8 welfare of the tribe.” *Id.* at 565-66.

9 The Supreme Court subsequently applied its jurisdictional framework to a fact
 10 pattern nearly identical to this case. *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). In
 11 *Strate*, the Court unanimously held that tribes lack jurisdiction against nonmember
 12 defendants regarding an accident on a public highway maintained by the State under a
 13 federally granted right-of-way over Indian reservation land. *Id.* at 453. *Strate* and
 14 *Montana* require the same result here.

15 **A. Tribal jurisdiction over nonmembers is extremely limited.**

16 In general, “tribes do not ... possess authority over non-Indians who come within
 17 their borders.” *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316,
 18 328 (2008). As the Supreme Court long ago recognized, a tribe’s power to self govern
 19 extends only to “the relations among members of a tribe.” *United States v. Wheeler*, 435
 20 U.S. 313, 326 (1978). Tribes have no sovereignty regarding “relations between an Indian
 21 tribe and nonmembers of the tribe.” *Id.* See also *Strate*, 520 U.S. at 453 (“the civil
 22 authority of Indian tribes and their courts with respect to non-Indian fee lands generally
 23 ‘does not extend to the activities of nonmembers of the tribe.’”) (quoting *Montana*, 450
 24 U.S. at 565).

25 In *Montana*, the Supreme Court extended its prior holdings in *Wheeler* and a
 26 companion case, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), to a tribe’s
 27 civil regulatory power over nonmembers. 450 U.S. at 564-65. Accordingly, “efforts by a
 28 tribe to regulate nonmembers, especially on non-Indian fee land, are ‘presumptively

invalid.” *Plains Commerce*, 554 U.S. at 330. To overcome this presumption, the activity seeking to be regulated by the tribe must come within certain narrow exceptions recognized in *Montana*.

B. The *Montana* analysis

Montana’s general rule of non-jurisdiction applies unless superseded by specific provisions in treaties and statutes, or if either of two exceptions apply. *Id.* The first exception allows tribes to regulate “nonmembers who enter consensual relationships with the tribe or its members.” *Strate*, 520 U.S. at 446. The second exception “concerns activity that directly affects the tribe’s political integrity, economic security health, or welfare.” *Id.*

1. Consensual relationship between tribal member and nonmember parties

Montana recognized that tribes may regulate the activities of nonmembers regarding consensual relationships into which they have entered with the tribe or its members. 450 U.S. at 565. In *Strate*, the Supreme Court examined the scope of this exception. First, it noted that the parties who share the consensual relationship must be the same parties involved in the litigation. 520 U.S. at 457. In other words, even if a nonmember enters into a consensual relationship with the tribe, the tribe does not have jurisdiction over a dispute between that nonmember and a stranger to that relationship. *Id.* The litigation must relate to the nature of the consensual relationship.

Next, the *Strate* Court analyzed the cases upon which the exception was based. *Id.* Those cases included: a sales transaction on tribal land involving a nonmember plaintiff and member defendants; a permit tax on livestock owned by nonmembers within tribal boundaries; a permit tax on nonmembers regarding business conducted within tribal borders; and a tax on cigarette sales to nonmembers on the reservation. *Id.* In each of these instances, the nonmember engaged in a commercial transaction or dealing with the tribal member who brought suit. As *Strate* noted, highway accidents are not a “‘consensual relationship’ of the qualifying kind.” *Id.*

2. Direct effect on vital tribal interests

Proponents of tribal jurisdiction often urge an inappropriately broad reading of this exception. *Strate*, 520 U.S. at 459. The inquiry under this exception is whether jurisdiction over the activity at issue is necessary “to preserve ‘the right of reservation Indians to make their own laws and be ruled by them.’” *Id.* at 459. Indeed, as the *Strate* Court recognized, any broader interpretation would allow the exception to swallow the rule. *Id.* at 458.

As with the first exception, the *Strate* Court analyzed the cases upon which the second exception was based. The issue in all of those cases was “whether a State’s (or Territory’s) exercise of authority would trench unduly on tribal self-government.” *Id.* at 458. Examples of tribal jurisdiction under this exception include adoption proceedings among tribal members and actions for recovery of payments owed by tribal members for goods bought on credit on the reservation. *Id.* Again, when applied in the context of a motor vehicle accident, the *Strate* Court held that the general *Montana* rule of non-jurisdiction, and not its exceptions, applied. *Id.* at 459.

C. As the Supreme Court held in *Strate*, there is no tribal jurisdiction as a matter of law over this State highway accident.

The *Strate* Court, on nearly identical facts, found the *Montana* 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 involved an accident between Gisela Fredericks and Lyle Stockert on a portion of a North Dakota state highway crossing tribal land. 520 U.S. at 442. Fredericks was the widow of a tribal member and mother of five adult children who were tribal members. *Id.* at 443. Stockert was driving a truck owned by his employer, A-1 Contractors. *Id.* A-1 had a contract for landscaping work with a corporation wholly owned by the Three Affiliated Tribes. *Id.* Fredericks and her adult children filed suit against Stockert and A-1, seeking more than \$13 million for injuries sustained in the

1 accident and for loss of consortium. *Id.* at 443-44.

2 The tribal court determined that it had jurisdiction over the accident and the tribal
3 court of appeals affirmed that determination. *Id.* at 444. A-1 and Stockert filed suit in
4 federal District Court, which found that the tribal court had jurisdiction over the accident.
5 *Id.* Following a hearing *en banc*, the Eighth Circuit reversed the District Court's
6 judgment in an 8-4 decision and the United States Supreme Court granted certiorari. *Id.* at
7 444-45.

8 The Supreme Court began by noting that *Oliphant* and *Montana* establish that,
9 "absent express authorization by federal statute or treaty, tribal jurisdiction over the
10 conduct of nonmembers exists only in limited circumstances." *Id.* at 445-46. The
11 question, then, was whether the exceptions recognized in *Montana* encompass an
12 automobile accident on a State highway crossing tribal land.¹⁶

13 First, the Court found that "[t]he right-of-way North Dakota acquired for the
14 State's highway renders the 6.59-mile stretch equivalent, for nonmember governance
15 purposes, to alienated non-Indian land." *Id.* at 454. In support, the Court noted that other
16 than the right to construct crossings over the right-of-way, the Tribes did not expressly
17 reserve any "right to exercise dominion or control over the right-of-way." *Id.* at 455.
18 Moreover, the Tribes had consented to and received payment for the State's use of the
19 land as a public highway. *Id.* at 456. Because the Tribes retained no gatekeeping right, as
20 long "as the stretch is maintained as part of the State's highway, the Tribes cannot assert a
21 landowner's right to occupy and exclude." *Id.* Consequently, the Court held that the
22 right-of-way is considered the same as "land alienated to non-Indians" and the *Montana*
23 analysis governed the case. *Id.*

24 Having held that *Montana* governed the case, the Court considered whether the
25 first exception, a consensual relationship, applied. In *Strate*, unlike in this action, A-1 had

26
27 ¹⁶ The *Strate* Court also analyzed whether A-1 and Stockert had properly exhausted
28 their remedies in tribal court. 520 U.S. at 448-53. That issue has already been addressed
to and decided by this Court.

1 a consensual relationship with the Tribes because it had entered into a subcontract to
2 perform landscaping work for a tribe-owned corporation on the reservation. *Id.* at 457.
3 However, the tribal-court plaintiffs were “not a party to the subcontract and the Tribes
4 were strangers to the accident.” *Id.* Indeed, as both the Eighth Circuit and the Supreme
5 Court noted, the issues arising out of the accident were “distinctly non-tribal in nature.”
6 *Id.* (quoting *A-1 Contractors v. Strate*, 76 F.3d 930, 940 (8th Cir. 1996)).

7 When comparing the accident in *Strate* against the cases cited in *Montana*
8 regarding the first exception, the Supreme Court held that “the Fredericks-Stockert
9 highway accident presents no ‘consensual relationship’ of the qualifying kind.” *Id.* See
10 also *Nord v. Kelly*, 520 F.3d 848, 856 (8th Cir. 2008) (holding that motor vehicle accident
11 on Minnesota state highway that ran through Indian reservation did not give rise to tribal
12 jurisdiction because “the action gave rise to a simple tort claim between strangers, not a
13 dispute arising out of the commercial relationship.”). Indeed, allowing jurisdiction over
14 activities unrelated to the relationship “would expand tribal power over non-members
15 beyond its recognized limits of that necessary to preserve self-governance and control of
16 internal relations.” *Rolling Frito-Lay Sales LP v. Stover*, No. CV 11-1361-PHX-FJM,
17 2012 U.S. Dist. LEXIS 9555 at *12 (D. Ariz. Jan. 26, 2012).¹⁷

18 Next, the *Strate* Court analyzed whether the highway accident met the second
19 *Montana* exception – conduct that “threatens or has some direct effect on the political
20 integrity, the economic security, or the health or welfare of the tribe.” 520 U.S. at 457.
21 (quoting *Montana*, 450 U.S. at 566). The Court noted that when read in isolation, this
22 exception can be misperceived. *Id.* at 459. Although reckless driving on state highways
23 running through tribal lands could jeopardize the safety of tribal members, the second
24 exception requires more. *Id.* at 458. For this exception to apply, tribal jurisdiction over
25 the conduct at issue must be necessary “to preserve ‘the right of reservation Indians to
26 make their own laws and be ruled by them.’” *Id.* at 459 (quoting *Williams v. Lee*, 358

27
28 ¹⁷ A copy of this ruling is attached at Exhibit 1 to this motion.

1 U.S. 217, 220 (1959). Because the highway accident at issue did not implicate this need,
 2 the general rule of non-jurisdiction applied. *Id.* As the Court concluded:

3 Gisela Fredericks may pursue her case against A-1
 4 Contractors and Stockert in the state forum open to all who
 5 sustain injuries on North Dakota's highway. Opening the
 6 Tribal Court for her optional use is not necessary to protect
 7 tribal self-government; and requiring A-1 and Stockert to
 defend against this commonplace state highway accident claim
 in an unfamiliar court is not crucial to "the political integrity,
 the economic security, or the health or welfare of the [Three
 Affiliated Tribes]."

8 *Id.* (footnotes omitted) (quoting *Montana*, 450 U.S. at 566).

9 This case is no different than *Strate* and the same result is warranted. As in *Strate*,
 10 this is an ordinary highway accident that occurred on a state highway that runs through
 11 tribal land. And, as in *Strate*, the Navajo Nation did not reserve any right to exercise
 12 dominion or control over the right-of-way granted to the State of Arizona for U.S.
 13 Highway 160. Moreover, the tribe consented to and duly authorized the State's use of the
 14 land for a public highway. The only right reserved by the Navajo Nation concerned right-
 15 of-way fencing in open range country. Consequently, the stretch of U.S. Highway 160 on
 16 which this accident occurred is, as a matter of law, non-Indian land and tribal jurisdiction
 17 is only appropriate if one of the two *Montana* exceptions apply.

18 For the same reasons articulated by the Supreme Court in *Strate*, neither of the
 19 *Montana* exceptions apply here. There was no consensual relationship between these
 20 Plaintiffs and any of the Defendants who brought suit in the Kayenta District Court.
 21 Indeed, there was not even the attenuated relationship seen in *Strate* between these
 22 Plaintiffs and the Navajo Nation. However, as *Strate* recognized, even if there was such a
 23 relationship, the Navajo Nation was a stranger to this accident and, therefore, it would be
 24 insufficient to confer jurisdiction over the Jensen Defendants' tort claims.

25 Nor does the second *Montana* exception apply. As *Strate* held, a simple motor
 26 vehicle accident on a highway running through tribal land does not implicate "the political
 27 integrity, the economic security, or the health or welfare of the tribe." 520 U.S. at 457.
 28 There are no facts in this case that would distinguish the *Strate* analysis regarding the

1 inapplicability of the second *Montana* exception.

2 Because neither of the *Montana* exceptions apply as a matter of law, the Navajo
3 Nation does not have jurisdiction over this motor vehicle accident and summary judgment
4 in favor of Plaintiffs is warranted.

5 **III. AN INJUNCTION IS WARRANTED**

6 In addition to seeking a declaratory judgment regarding the Navajo Nation's lack
7 of jurisdiction over the Jensen Defendants' tort claims, Plaintiffs also request injunctive
8 relief from the pending tribal court litigation. Injunctive relief is appropriate if Plaintiffs
9 can show "(1) that [they have] suffered an irreparable injury; (2) that remedies available
10 at law, such as monetary damages, are inadequate to compensate for that injury; (3) that,
11 considering the balance of hardships between the plaintiff and defendant, a remedy in
12 equity is warranted; and (4) that the public interest would not be disserved by a permanent
13 injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

14 Plaintiffs have met all four elements for permanent injunctive relief. First,
15 Plaintiffs will continue to suffer irreparable injury if forced to litigate the Jensen
16 Defendants' tort claims in tribal court. If the tribal court action proceeds, Plaintiffs will
17 be subject to litigation in a forum without jurisdiction. Second, if forced to continue
18 litigating in tribal court, Plaintiffs will incur substantial expense and re-litigate the
19 jurisdiction of the tribal court once a ruling is issued. Third, the balance of hardships
20 favor granting the injunction because the Jensen Defendants can proceed with their causes
21 of action in State or Federal court whereas without an injunction Plaintiffs will be forced
22 to defend themselves in litigation before a court without jurisdiction. And fourth, the
23 public interest is not advanced by forcing tribal nonmembers to litigate before a court
24 without jurisdiction.

25 **Conclusion**

26 The Navajo Nation does not have jurisdiction regarding this simple motor vehicle
27 accident, which occurred on a State highway running through reservation land. The
28 United States Supreme Court unanimously ruled that tribes have no jurisdiction in *Strate* -

1 - a case with facts nearly identical to those here. When, as here, the Plaintiffs had no
 2 commercial or other consensual relationship with the Jensen Defendants, the Plaintiffs
 3 have not subjected themselves to the jurisdiction of the tribal courts. Because a simple
 4 motor vehicle accident does not implicate “the political integrity, the economic security,
 5 or the health or welfare of the tribe,” the Navajo Nation has no jurisdiction over these
 6 tribal nonmember Plaintiffs.

7 Accordingly, Plaintiffs seek a declaratory judgment that the Navajo Nation has no
 8 jurisdiction over Plaintiffs regarding the Jensen Defendants’ tort claims arising from the
 9 motor vehicle accident at issue. Plaintiffs also seek a permanent injunction enjoining the
 10 Jensen Defendants from pursuing their claims in any Navajo Nation court or forum.

11 RESPECTFULLY SUBMITTED this 27th day of February, 2012.

12 JONES, SKELTON & HOCHULI, P.L.C.

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s/ Jennifer Bernardo
