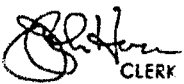


**FILED**

JUN 13 2012

  
CLERKUNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
CENTRAL DIVISIONPlains Commerce Bank, Jerome Hageman, and  
Randy Robinson,

Plaintiffs,

v.

Long Family Land and Cattle Co. Inc., Ronnie  
Long, Lila Long, and Cheyenne River Sioux  
Tribal Court,

Defendants.

Court File No. 12-3021**PLAINTIFFS' MEMORANDUM  
OF LAW IN SUPPORT OF ITS  
MOTION FOR TEMPORARY  
RESTRAINING ORDER****I. INTRODUCTION**

Plaintiffs request a temporary restraining order from this Court to prevent the Defendants from proceeding further with a new suit in Tribal Court. The new suit asserts a claim based on a bond that was filed – in a prior case in Tribal Court – to facilitate an appeal from a judgment in Tribal Court to the Tribal Court of Appeals. The question whether the Tribal Court had jurisdiction to enter that judgment was presented to the Supreme Court of the United States, which concluded that the Tribal Court lacked jurisdiction over the discrimination claim that comprised a part of the judgment. Plaintiffs bring this Fed. R. Civ. P. 65(b) motion for temporary restraining order to enforce the ruling of the Supreme Court of the United States.<sup>1</sup>

**II. STATEMENT OF FACTS**

This present action is part of long-standing dispute. Plains Commerce Bank (the “Bank”) has been a lender to the Long Family Land and Cattle Company (the “Long Company”) since

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<sup>1</sup> Plaintiffs submit the Affidavit of Paul A. Banker pursuant to Rule 65(b)(1)(B), detailing Plaintiffs’ efforts regarding notification to Defendants of the above-captioned action and the present motion.

approximately 1987. The Long Company conducts ranching and farming operations on non-Indian owned land within the boundaries of the Cheyenne River Sioux Reservation.

The Bank entered into two contracts with the Long Company in 1996 – a loan agreement and a lease with an option to purchase. Both agreements related to 2,230 acres of farm pasture real estate owned by the Bank within the boundaries of the reservation. The Long Company failed to exercise its option to purchase this land, and its option expired in 1998. The Bank then sold two parcels of that 2,230 acres to third parties. But because the Long Company continued in possession of the land after its lease expired, the Bank commenced eviction proceedings against the Long Company in 1999.

In response, Ronnie and Lila Long (the “Longs”), together with the Long Company, filed an action in 1999 against the Bank in the Cheyenne River Sioux Tribal Court (the “Tribal Court”) in claiming bad faith, breach of contract, and discrimination. The Bank objected to tribal court jurisdiction, but the Tribal Court held that it had jurisdiction. A jury trial was held in Tribal Court in 2002. The jury returned a general verdict against the Bank in the amount of \$875,922.46 (\$750,000 plus prejudgment interest) predicated on the Bank’s liability for breach of contract, bad faith, and discrimination. The Tribal Court entered judgment upon the general verdict.

The Bank then perfected an appeal of the discrimination claim to the Cheyenne River Sioux Tribal Court of Appeals (the “Tribal Court of Appeals”). In order to facilitate that appeal, the Bank filed an Appeal Bond in 2003 pursuant to Rule 37(e) of the Law and Order Code of the Cheyenne River Sioux Tribe that promised to pay the judgment “once all remedies have been exhausted.” The Bank is a principal on the Appeal Bond, and Plaintiffs Jerome Hageman and

Randy Robinson are joint and several sureties on the Appeal Bond. The Tribal Court of Appeals affirmed the Tribal Court's jurisdiction over the discrimination claim in 2004.

The Bank then commenced a declaratory-judgment action in federal court in 2005 to challenge the Tribal Court's assertion of jurisdiction. The District Court held in 2006 that the Tribal Court had jurisdiction over the discrimination claim. *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.* 440 F. Supp. 2d 1070 (D.S.D. 2006). The Bank then appealed to the 8<sup>th</sup> Circuit Court of Appeals. The Circuit Court affirmed the District Court in 2007. *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 491 F.3d 878 (8<sup>th</sup> Cir. 2007). The Bank petitioned the Supreme Court of the United States for certiorari. The Court granted the petition, and after briefing on the merits, issued a decision in 2008 reversing the Circuit Court and District Court. *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 554 U.S. 316 (2008). The Supreme Court explained that "[i]f the tribal court is found to lack such jurisdiction [over nonmembers], any judgment as to the nonmember is necessarily null and void." The Court noted that the Longs did not contest this "settled principle." *See Plains Commerce Bank v. Long Family Land and Cattle Company*, 554 U.S. 316, 324 (2008).

The Supreme Court then held that the Tribal Court lacked jurisdiction over the discrimination claim against the Bank, which necessarily rendered the Tribal Court judgment against the Bank null and void.

Now, in 2012, the Longs and the Long Company have filed a new claim in Tribal Court against the Plaintiffs. They filed their complaint in Tribal Court on or about May 30, 2012. Service on the Plaintiffs was effected by mail on or about May 30, 2012. This purportedly set in motion an obligation to answer the summons and complaint in Tribal Court within 20 days or risk judgment by default.

Paragraph 7 of this new complaint alleges, “Plains Commerce Bank did not appeal from that portion of the judgment awarding damages for breach of contract and bad faith and appeal from that portion of the judgment is time barred.” (*See* Ex. A. to Plaintiffs’ Complaint.)

Paragraph 8 alleges, “The judgment awarding Plaintiffs damages for breach of contract and bad faith has not been reversed.” (*Id.*) What the complaint fails to acknowledge, though, is that the Tribal Court judgment premised upon the general verdict was rendered null and void by the Supreme Court’s holding that there was no jurisdiction over the discrimination claim.

While it would ordinarily fall to the Tribal Court to rule upon its own jurisdiction in the first instance, this case falls within the exception to that general rule. Given the history between the parties, and the clear direction from the Supreme Court, it would serve no purpose, and indeed cause irreparable harm, if the Bank were required to proceed further in Tribal Court where it has already obtained a final ruling precluding jurisdiction over the discrimination claim.

### **III. STANDARD OF REVIEW**

Temporary restraining orders are governed by Fed. R. Civ. P. 65(b), which allows for the issuance of a temporary restraining order with or without notice to the opposing party where “immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition.” *Id.* The Court has discretion to grant or deny a request for a temporary restraining order. *Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 114 n. 8 (8th Cir. 1981); *see also SRE Real Estate, LLC v. City of Sturgis*, CIV. 10-5064-JLV, 2010 WL 3122630 (D.S.D. Aug. 9, 2010). In deciding whether to issue a temporary restraining order, the Court considers the following four factors: (1) the plaintiff’s probability of success on the merits; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on the defendants; (3) the threat of irreparable harm to plaintiffs; and (4) the public

interest. *Crow Creek Sioux Tribal Farms, Inc. v. U.S. I.R.S.*, 684 F. Supp. 2d 1152, 1157 (D.S.D. 2010), citing *Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981).

#### IV. ARGUMENT

This Court has jurisdiction to issue a temporary restraining order without further delay or exhaustion of Tribal Court remedies because the Longs and the Long Company have brought their Tribal Court action in bad faith to harass Plaintiffs after having lost at the United States Supreme Court on the issue of jurisdiction four years ago. The Supreme Court held that the Tribal Court had no jurisdiction over the Longs' discrimination claim. Because the Tribal Court judgment was premised upon several theories of liability, including the discrimination claim, the Supreme Court's decision rendered the Tribal Court judgment null and void.<sup>2</sup> Plaintiffs are entitled to a temporary restraining order precluding the Longs from proceeding further with their new complaint brought in the Cheyenne River Sioux Tribal Court.

- A. This Court has jurisdiction over this matter because, in light of the United States Supreme Court ruling against them, the Longs' and the Long Company's new Tribal Court action is "motivated by a desire to harass or is conducted in bad faith" and expressly violates the jurisdictional prohibitions established by the United States Supreme Court.**

This Court has jurisdiction to determine whether the Cheyenne River Sioux Tribal Court has jurisdiction over Plaintiffs, who are nonmembers of the tribe. Because the Longs' and the Long Company's new Tribal Court action falls squarely within the well-established exceptions to

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<sup>2</sup> The Longs and the Long Company argued to the Supreme Court that the Bank lacked standing to challenge the Tribal Court's jurisdiction over the discrimination claim. They argued that because the general verdict was also based on liability for breach of contract and bad faith, a decision from the Supreme Court that there was no jurisdiction over the discrimination claim would not change anything. The Court rejected that argument, reasoning that the jury could have based its award – in whole or in part – on the discrimination claim. The Bank was injured by the Tribal Court's exercise of jurisdiction over the discrimination claim. "Those injuries can be remedied by a ruling in favor of the Bank that the Tribal Court lacked jurisdiction and that the judgment on the discrimination claim is null and void." 554 U.S. at 326-27.

the doctrine of exhaustion of Tribal Court remedies, this Court has immediate jurisdiction over this matter.

This Court has jurisdiction pursuant to 28 U.S.C. § 1331 to determine whether the Tribal Court has jurisdiction over the Longs' and the Long Company's complaint. Section 1331 gives federal district courts jurisdiction over "civil actions arising under the Constitution, laws, or treaties of the United States." *Id.*; see also *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985).

Generally, under Section 1331, a defendant must exhaust available tribal remedies before instituting suit in federal court. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987). However, exhaustion of tribal court remedies is not required where an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith," where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction. *Nat'l Farmers Union*, 471 U.S. at 857.

Four years after the Supreme Court determined that the Tribal Court lacked jurisdiction over Longs' discrimination claim from which the Bank appealed, the Longs and the Long Company now attempt to reassert a claim against the Bank based upon an Appeal Bond securing the appeal from the judgment on the issue of discrimination. The Supreme Court found that judgment was null and void because the Tribal Court lacked jurisdiction over the discrimination claim.

The Longs' and Long Company's untimely and continued pursuit of this matter in Tribal Court constitutes bad faith litigation and serves no purpose but to harass Plaintiffs. Moreover,



the Supreme Court already has expressly decided that the Tribal Court lacked jurisdiction to issued the judgment from which the Bank appealed and for which the Appeal Bond was issued.

This action falls squarely within the exceptions to the doctrine of exhaustion of Tribal Court remedies. Consequently, the Court has jurisdiction over this matter and has jurisdiction to issue the temporary restraining order in this case.

**B. Plaintiffs are entitled to a temporary restraining order precluding further proceedings in Tribal Court pending determination by this Court of jurisdiction over the Longs' and the Long Company's new complaint.**

Plaintiffs are entitled to a temporary restraining order enjoining further proceedings in the Cheyenne River Sioux Tribal Court pending determination by this Court of the Tribal Court's jurisdiction over the Longs' and the Long Company's complaint. Plaintiffs are highly likely to succeed on the merits, the harm to the Plaintiffs greatly outweighs any potential harm to the Longs and the Long Company, Plaintiffs will suffer irreparable harm without a temporary restraining order, and public interest weighs in favor of the issuance of the temporary restraining order. Accordingly, the Court should grant Plaintiffs' motion for a temporary restraining order.

In determining whether to issue a temporary restraining order pursuant to Fed. R. Civ. P. 65, the Court considers (1) the plaintiff's probability of success on the merits; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on the defendants; (3) the threat of irreparable harm to plaintiffs; and (4) the public interest. *Crow Creek Sioux Tribal Farms, Inc. v. U.S. I.R.S.*, 684 F. Supp. 2d 1152, 1157 (D.S.D. 2010), citing *Dataphase Sys.*, 640 F.2d at 113; *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008); *Oglala Sioux Tribe v. C & W Enters., Inc.*, 2009 WL 803625, \*1 (D.S.D. March 25, 2009) (applying *Dataphase* factors to TRO motion consideration); see also *Planned Parenthood Minn., N.D., S.D. v. Daugaard*, 799 F. Supp. 2d 1048, 1053 (D.S.D. 2011) (noting that *Dataphase* factors govern temporary restraining orders); *Poet Plant Mgmt., LLC v. Simpson*, CIV 07-4116,

2007 WL 2493514 (D.S.D. Aug. 29, 2007) (same). Under this analysis, no single factor is determinative. *Id.*

Because each of the factors weighs in favor of the issuance of the temporary restraining order, the Court should grant Plaintiffs' motion.

1. Plaintiffs are likely to succeed on the merits.

This case involves an unusual level of certainty that there is no jurisdiction in Tribal Court. Ordinarily, that analysis would involve applying Supreme Court precedent from other cases to the facts of the case at bar. Here, however, the parties have already litigated the question of Tribal Court jurisdiction before the Supreme Court – resulting in a finding of no jurisdiction. Applying that holding to the new claim in Tribal Court involves merely enforcing the Supreme Court's ruling. Because there was no jurisdiction over the Bank to enter the judgment, there similarly is no jurisdiction over the Plaintiffs to enforce the now null and void judgment. Secured by the Appeal Bond (which secured the "Judgment appealed from").

In the original Tribal Court litigation, the Longs and Long Company asserted three claims against the Bank – breach of contract, bad faith, and discrimination. The jury rendered a general verdict against the Bank and awarded damages. But it did not delineate what damages were attributable to each theory of liability. The Bank then appealed only the discrimination claim to the Tribal Court of Appeals and the Tribal Court's jurisdiction over the discrimination claim was the only jurisdictional challenge presented to the federal courts and the Supreme Court.

The Longs attempted to challenge the Bank's standing in arguments first raised before the Supreme Court. They argued that the Bank was not injured in fact, and a ruling that the Tribal Court lacked jurisdiction over the discrimination claim would not change anything because the judgment was still supported by the breach of contract and bad faith claims. 554



U.S. at 325. The Supreme Court rejected that argument by simply stating, “We are not persuaded.” *Id.*

The Court analyzed the general verdict and concluded that it was impossible to say what portion of the judgment was attributable to the discrimination claim. *Id.* But it reasoned that the Bank had standing to challenge jurisdiction over the discrimination claim because, “If the tribal court is found to lack [adjudicative authority over nonmembers], any judgment as to the nonmember is essentially null and void. The Longs do not contest this settled principle but instead argue that the Bank has suffered no ‘injury in fact’ as required by Article III’s case-or-controversy provision.” 554 U.S. at 324. The Court went on to note that the Bank was injured by the Tribal Court’s exercise of jurisdiction, and that those injuries could be remedied by a “ruling in favor of the Bank that the Tribal Court lacked jurisdiction and that its judgment on the discrimination claim is null and void.” 554 U.S. at 326-27. The Court ultimately held that the Tribal Court lacked jurisdiction to adjudicate the discrimination claim concerning the non-Indian Bank’s sale of fee land it owned. 554 U.S. at 320.

Now, nearly four years after the Supreme Court’s opinion, the Longs and the Long Company have commenced a new lawsuit in Tribal Court. The premise of their new suit ignores the reality of the Supreme Court’s holding. It looks back to an Appeal Bond, filed in the Tribal Court, when the Bank appealed the judgment based on the discrimination claim to the Tribal Court of Appeal. The Longs’ and the Long Company’s new complaint suggests that they are turning to the Appeal Bond because the Bank did not appeal from that portion of the judgment awarding damages for breach of contract and bad faith.

There are two problems with this assertion. The first is that there was only one money judgment. And while there is no dispute that the Bank appealed only as to the discrimination

claim, the amount of money attributable to the discrimination claim cannot be separated from the amount awarded as to the other theories. The Supreme Court held that there was no jurisdiction over the discrimination claim – and in doing so recognized the settled principle that any judgment as to the Bank based on the discrimination claim is null and void. The Longs and the Long Company cannot just ignore that holding and proceed forward on the Appeal Bond to collect on the same money judgment as to breach of contract and bad faith. The Tribal Court judgment was rendered null and void because it contained a claim over which the Tribal Court lacked jurisdiction.

The second problem with this assertion is found in the language of the Appeal Bond itself. It provides that the Bank “will pay the Judgment appealed from once all remedies have been exhausted.” New Tribal Court Complaint, ¶ 6. As the Longs and Long Company have pointed out in the new complaint, the only judgment the Bank appealed from was the discrimination claim. *Id.*, ¶ 7. The Appeal Bond secured the money judgment as to the discrimination claim while it was on appeal. The Supreme Court, as part of the Bank’s exhaustion of remedies, held that there was no money judgment as to the discrimination claim. The Appeal Bond is null and void just like the judgment based on the discrimination claim. And so a suit based on the Appeal Bond is not a proper vehicle for the Longs and Long Company to assert entitlement to money from Bank. On the other hand, in the event that they attempt to enforce the Tribal Court judgment as to breach of contract or bad faith in state or federal court, they will run into the same objection – the Supreme Court ruled that the Tribal Court judgment against the Bank was null and void because it contained the discrimination claim over which the Tribal Court lacked jurisdiction.

In short, the Bank is likely to prevail on the merits. The Longs' and Long Company's attempt to return to this dispute via a new lawsuit comes nearly four years after the fact of the Supreme Court's opinion. It is premised on pretending that the Supreme Court did not rule against them in holding that there was no Tribal Court jurisdiction over the discrimination claim, and that they are free to proceed to collect the original amount of their money judgment from the Bank. The fact that they attempt this with a new suit in Tribal Court, given the long history of the dispute, shows a lack of respect for the Supreme Court's decision. This Court should not permit them to ignore it.

2. The harm to Plaintiffs outweighs any harm or injury that might be inflicted on the Longs.

Even assuming for purposes of this motion that there is any merit to the Longs' and the Long Company's complaint (which there is not), they have waited more than 9 years since the bond was issued and nearly 4 years since the Supreme Court issued its opinion in the Bank's favor before attempting to initiate this action to recover under the Appeal Bond. Having waited four years to initiate their Tribal Court action, the Longs and the Long Company cannot now argue that they would be harmed by any relatively short delay created by issuance of a temporary restraining order.

Conversely, the Plaintiffs stand to suffer great harm. Without an order restraining the Tribal Court from proceeding further with the Longs' and the Long Company's complaint, Plaintiffs will be forced to again proceed in a tribal court that lacks jurisdiction to resolve the matter before it. Plaintiffs again will experience the long, drawn out process of a futile and frivolous action at the trial court level, followed by an appeal within the tribal court system, only to end up back in this Court to determine the answer to a question properly before the Court today. Plaintiffs stand to suffer continued harassment at the hands of the Longs and the Long

Company, and would be forced to participate in a lawsuit pursued in bad faith. Furthermore, Plaintiffs stand to incur significant monetary harm if required to immediately proceed in Tribal Court to defend themselves against an improper Tribal Court action.

Because the Plaintiffs must respond to the purported Tribal Court action within 20 days of service, and, in doing so, commence a potentially long and arduous journey they already have taken once before, the Plaintiffs' harm is real and immediate. In contrast, the Longs and the Long Company have had more than four years to pursue their purported claim and chose not to do so until nearly 20 days ago. The Court's decision to issue the requested temporary restraining order will not harm the Longs and the Long Company. This factor heavily weighs in favor of the issuance of a temporary restraining order.

3. Plaintiffs will suffer irreparable harm unless the Court issues the requested temporary restraining order.

Having the Tribal Court assert jurisdiction over the Plaintiffs would cause them an irreparable harm. The parties have litigated the issue of whether there is Tribal Court jurisdiction over the discrimination claim to the Supreme Court. The Supreme Court held that there was no jurisdiction. To allow new lawsuit to proceed in Tribal Court, based on an Appeal Bond filed in Tribal Court to facilitate the appeal of jurisdiction over the discrimination claim, would be to turn in circles. It would render the Supreme Court's opinion meaningless, and suggest that its rulings need not be followed.

It is the very assertion of jurisdiction over the Bank in this new suit when the Supreme Court has held that there is none that would constitute irreparable harm. There is no question that it will also unnecessarily cost the Bank time, money, and attorney's fees. But that is beside the point. The Bank ought to be able to rely on the Supreme Court's ruling as protection against a new suit in Tribal Court based on the null and void discrimination claim judgment.

4. The public interest weighs in favor of issuance of this temporary restraining order.

The United States Supreme Court is the court of last resort. The public interest is served by the upholding of and adherence to Supreme Court determinations. Challenges to already-determined Supreme Court precedent in the very action from which the Supreme Court opinion originated in no way serves the public interest. The public is served by certainty, closure and finality to litigation. This factor weighs in favor of the issuance of a temporary restraining order.

**C. Rule 65(c) security is not required for this temporary restraining order.**

The Court should determine that no additional security is needed in support of the issuance of the temporary restraining order under Fed. R. Civ. P. 65(c) because the order sought restrains the Tribal Court from proceeding with the Longs' and Long Company's new action.

Pursuant to Fed. R. Civ. P. 65(c), the movant is to provide security that the "court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained."

Neither the Longs and Long Company nor the Tribal Court stand to suffer any cost or damage as a result of having been enjoined. Moreover, the merits of the Longs' and Long Company's complaint center on security previously provided by the Bank. No additional security ought be required for the issuance of this order.

**V. CONCLUSION**

Plaintiffs are entitled to a temporary restraining order enjoining and precluding further proceedings on the Longs' and Long Company's new action commenced in Tribal Court. The probability of Plaintiffs' success on the merits is high, the balance of harms weighs in Plaintiffs' favor, the re-assertion of tribal court jurisdiction in contravention of the Supreme Court's opinion would cause irreparable harm, and a temporary restraining order serves the public interest.

Pursuant to Local Rule 7.1(c), Plaintiffs also request oral argument on their motion for a temporary restraining order.

DATED: June 13, 2012

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By 

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