

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA

State Farm Insurance Companies,  Plaintiff,  v.  Turtle Mountain Fleet Farm LLC; Rich's Construction, by its owner, Rich Parisien; Lloyd Greenwood and Brenda Greenwood,  Defendants.	Civil No. 1:12-cv-094  <b>PLAINTIFF'S BRIEF IN REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT</b>
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**INTRODUCTION**

Previously, Plaintiff State Farm Insurance Companies, (hereinafter "State Farm"), filed a Motion for Summary Judgment seeking an Order declaring that the Turtle Mountain Tribal Court lacked jurisdiction over the breach of contract and tort claims in the underlying matter. Defendants, Lloyd and Brenda Greenwood (hereinafter "Greenwoods"), filed a response to State Farm's motion asserting that the Turtle Mountain Tribal Court has jurisdiction over this case and that tribal court remedies had not been exhausted. State Farm now files this reply to the Greenwoods' response.

**STATEMENT OF FACTS**

In the interest of brevity, State Farm incorporates all facts set out in its Brief in Support of Motion for Summary Judgment. (Plaintiff's Brief in Support of Motion for Summary Judgment, e-filed as ECF No. 27, at pp. 1-4).

**ARGUMENT**

**I. STANDARD OF REVIEW**

Summary judgment is appropriate where the pleadings, discovery, disclosures and affidavits show there is no genuine dispute as to any material fact and that the movant is entitled to judgment

as a matter of law. Fed.R.Civ.P. 56. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, interrogatory answers, or other materials. Fed.R.Civ.P. 56(c)(1)(A). The court need consider only cited materials. Fed. R. Civ. P. 56 More specifically, a response to a motion for summary judgment must contain, separate from the argument portion of the memorandum, a recitation of the material facts that the moving party claims are uncontested, with each significant material fact supported by reference to specific pages, paragraphs, or parts of the pleadings, depositions, answers to interrogatories, exhibits, and affidavits that have been served and filed with the court and that conform to the requirements of Fed. R. Civ. P. 56(e). U.S.Dist.Ct.Rules D.N.D., Civ. L.R. 7.1. A party's failure to comply with these requirements may result in the denial of the motion. *Id.*

In their response to State Farm's motion for summary judgment, the Greenwoods make numerous factual allegations (nineteen by this author's count) that are not supported by reference to exhibits or evidence in the record. (Greenwood Response Brief, e-filed as ECF No. 37, generally). Most are simply unsupported or unsupportable arguments.

As set out in State Farm's Motion for Summary Judgment, Tribal Court jurisdiction over non-members is very limited. Under the governing case law, "efforts by a tribe to regulate nonmembers ... are presumptively invalid, [and] the party asserting tribal authority bears the burden of showing that its assertion of jurisdiction falls within one of the Montana exceptions. *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Mississippi in Iowa*, 609 F.3d 927, 936 (8th Cir. 2010), citing *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 329, 128 S. Ct. 2709, 2720, 171 L. Ed. 2d 457 (2008). Without such proof, "the

presumption [of no jurisdiction] ripens into a holding. *Atkinson Trading Co., v. Shirley*, 532 U.S. 645, 659, 121 S. Ct. 1825, 1833-34, 149 L. Ed. 2d 889 (2001).

Here, Defendants have failed to cite to any material fact. (Greenwood Response Brief, pp. 1-10) As such, the Greenwoods have not cited any material facts that would overcome the presumption that jurisdiction over State Farm is invalid. Accordingly, State Farm's motion for summary judgment is appropriate.

## **II. TRIBAL COURT JURISDICTION OVER NONMEMBERS IS LIMITED**

Here, State Farm takes the position that the Greenwoods have submitted no appropriate facts to support their argument. Even if the unsupported facts were accepted, though, this Court should still grant State Farms' Motion for Summary Judgment. The Greenwoods' primary argument in their response is that State Farm's contractual dealings with them subject State Farm to tribal jurisdiction. (Greenwood Response Brief, at p. 5). Under the governing case law, though, the Greenwoods must go further than merely identifying a contractual relationship. Rather, they must show that the activities giving rise to their claims actually occurred within the external boundaries of the reservation. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 16, 334. The case law also makes clear that harm suffered by a tribal member on the reservation will not establish jurisdiction if the activity causing the harm occurred off the reservation. *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Mississippi in Iowa*, 609 F.3d 927, 931 (8th Cir. 2010).

In *Attorney's Process*, the court analyzed potential tribal jurisdiction over several related claims, looking specifically at where the alleged claims occurred. *Attorney's Process*, 809 F. Supp. at 928. The claims stemmed from a contract that had been signed with a tribal member. *Attorney's Process*, 809 F. Supp. at 925. Under the contract, the tribal member executed a raid

on a tribal casino. Tribal jurisdiction was subsequently found over claims resulting from the casino raid. An additional claim was made for conversion against the nonmember for “unauthorized receipt and retention of tribal funds.” *Attorney's Process*, 809 F. Supp. 2d at 929. Although the conversion claim stemmed from the contract with the tribal member, the court found that no evidence had been offered to show that the activity the conversion claim sought to regulate **occurred on tribal land**. *Id.* As a result, the court found that tribal jurisdiction over the conversion claim did not exist. *Id.* What is important to note in that case is that, although the court found evidence of a consensual relationship between a member and nonmember of the tribe and evidence that the nonmember had activities on the reservation, the court could still not find that tribal jurisdiction existed over the conversion claim, since no evidence had been offered to suggest that the activities specifically giving rise to the conversion claim arose on tribal land.

There is a burden, therefore, on the party asserting tribal jurisdiction on the basis of a consensual relationship with a tribal member to go further and show, not only that the nonmember had activities on the reservation, but that the specific activities giving rise to the claim occurred on tribal land. Here, the Greenwoods have presented evidence that a consensual relationship existed between the Plaintiff and Defendants, but the Greenwoods have failed to cite to, or let alone offer, evidence that the activities giving rise to their claims occurred on the reservation.

In their brief, the Greenwoods identify six activities that they believe create the existence of tribal jurisdiction. (Greenwood Response Brief, at pp. 5-6). The first allegation is that State Farm “knew it was selling a homeowner's policy home on the reservation and willingly agreed to do so.” (Greenwood Response Brief, at p. 5) It is true that the contract involves a reservation home; however, that alone does not create jurisdiction because the contract was actually solicited and

signed off the reservation. (Bryan Schweitzer Affidavit, e-filed as ECF No. 27-6, at ¶III). In *Progressive Specialty Ins. Co.*, for instance, the court found that 1) a consensual relationship with the insured existed, and 2) tribal member's property, the insured's vehicle, was insured by the nonmember insurer. *Progressive Specialty Ins. Co. v. Burnette*, 489 F. Supp. 2d 955, 958 (D.S.D. 2007) This alone, though, was not enough to overcome the presumption that tribal jurisdiction over the insurer was invalid. *Id.* Likewise, in this case, the sale of a homeowner's policy is insufficient to overcome the presumption that tribal jurisdiction is invalid.

The second set of allegations is that State Farm dealt directly with the contractor. (Greenwood Response Brief, at p. 6) That argument fails for two reasons. First, the contact between State Farm and Turtle Mountain Fleet Farm was between two unenrolled members. (North Dakota LLC Business Record, e-filed as ECF No. 38-1, at p. 1). Moreover, there is no evidence that communication, much less any that might have harmed the Greenwoods, took place on the reservation. The remaining allegations by the Greenwoods are, essentially, that State Farm failed to provide information to them. Not only is there no evidence that that unsupported claim occurred on the reservation, but it also is an inactivity, as opposed to an activity, that would not fall under the first *Montana* exception. *Montana v. U. S.*, 450 U.S. 544, 565, 101 S. Ct. 1245, 1258, 67 L. Ed. 2d 493 (1981).

The Greenwoods have failed to show that the specific activities, or inactivities, that form the basis for their allegations took place on the reservation. Therefore, they have failed to prove that tribal jurisdiction exists. As such, the presumption holds that jurisdiction over State Farm is invalid, and summary judgment is, therefore, appropriate.

### **III. TRIBAL COURT REMEDIES HAVE BEEN EXHAUSTED**

Exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17, 107 S. Ct. 971, 977, 94 L. Ed. 2d 10 (1987). The exhaustion requirement gives tribal courts the opportunity “to explain to the parties the precise basis for accepting jurisdiction” and to “provide other courts with the benefit of their expertise in such matters in the event of further judicial review. *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 491 F.3d 878, 889 (8th Cir. 2007) *rev’d sub nom. Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 128 S. Ct. 2709, 171 L. Ed. 2d 457 (2008). A trial on the merits, however, is not required to satisfy the tribal exhaustion doctrine. *Tunica-Biloxi Indians of Louisiana v. Pecot*, 351 F. Supp. 2d 519, 524 (W.D. La. 2004); citing *Enlow v. Moore*, 134 F.3d 993 (10th Cir.1998). Instead, Tribal exhaustion only requires that tribal appellate courts have an opportunity to review whether or not tribal jurisdiction exists. *Strate v. A-1 Contractors*, 520 U.S. 438, 439, 117 S. Ct. 1404, 1406, 137 L. Ed. 2d 661 (1997) (tribal court should have an initial and full opportunity **to determine its own jurisdiction**).

In *Ford Motor Credit Co.*, this court ruled that tribal remedies had been exhausted after the Turtle Mountain Court of Appeals had ruled that jurisdiction existed. *Ford Motor Credit Co. v. Poitra*, 776 F. Supp. 2d 954, 958 (D.N.D. 2011) In the case at hand, the Turtle Mountain Tribal Court of Appeals was, in fact, given an opportunity to review this matter after the lower Court dismissed State Farm for lack of tribal jurisdiction. (Tribal Court of Appeals Memorandum Decision, e-filed as ECF No. 25-1, at p. 2). In its opinion, the Tribal Appellate Court ruled that tribal jurisdiction over State Farm existed since State Farm “voluntarily entered into a contractual relationship with the Greenwoods.” (Tribal Court of Appeals Memorandum Decision, at p. 3). Since the Turtle Mountain Court of Appeals is the highest appellate court in

Turtle Mountain, tribal remedies have been exhausted. A full jurisdictional review and determination by the tribal court has been completed and tribal exhaustion is satisfied.

### **CONCLUSION**

The Greenwoods have failed to present any evidentiary support for their argument that tribal jurisdiction is proper. In addition, the Greenwoods have failed to establish that the activities that form the basis for their claims occurred on the Turtle Mountain Reservation. Consequently, the Greenwoods have failed to overcome the presumption that the Tribal Court does not have jurisdiction over State Farm. Furthermore, all tribal remedies have been exhausted and ruling is appropriate. Based on the foregoing, it is respectfully requested that the Court grant State Farm's Motion for Summary Judgment and deny Defendants' Cross-Motion.

Dated this 27<sup>th</sup> day of January, 2014.

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### **CERTIFICATE OF SERVICE**

I hereby certify that on the 27<sup>th</sup> day of January, 2014, the Plaintiff's Brief in Reply to Defendants' Response to Plaintiffs' Motion for Summary Judgment, was filed electronically with the Clerk of Court through ECF, and that ECF will send an e-notice of the electronic filing to the following:

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