FORT BERTHOLD DISTRICT COURT
OF THE THREE AFFILIATED TRIBES
STATE OF NORTH DAKOTA

TJMD, LLP, a North Dakota limited liability partnership,

Plaintiff,

v.

Dakota Petroleum Transport Solutions, LLC, a Minnesota limited liability company, Dakota Plains Holdings, Inc., a Nevada corporation, Western Petroleum Corporation, a Minnesota corporation, and World Fuel Services Corporation, a Florida corporation.

Defendants.

Case No.: CV-2012-0678

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF NON-TRIBAL MEMBER JURISDICTION

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INTRODUCTION

This Court has jurisdiction over this dispute under the "Montana exceptions," named after the case where they were first identified by the United States Supreme Court, Montana v. U.S., 450 U.S. 544 (1981). Plaintiff TJMD, LLP ("TJMD") need meet only one of the two Montana exceptions for jurisdiction to be proper. TJMD meets both.

First, this Court has jurisdiction because it is allowed to regulate the activities of nonmembers who enter into consensual relationships with the "Tribe" – i.e. the federally-recognized Mandan, Hidatsa, and Arikara Native American Nations, also known collectively as the "MHA Nation" or the "Three Affiliated Tribes." This Court's assertion of jurisdiction is proper because Defendants entered into contractual and other consensual relationships with the Tribe when they hired TJMD to provide diesel and petroleum transloading services on non-Indian owned land on the Fort Berthold Indian Reservation. TJMD is a member of the Tribe because its majority owner, Virgil White Owl, is a member of the Tribe, and because TJMD is a certified Native American Owned Business with the Tribal Employment Rights Office ("TERO").

Second, this Court has jurisdiction because it is allowed to regulate nonmembers' conduct that threatens or has some direct effect on the economic security or welfare of the Tribe. As described herein, Defendants' conduct has had a direct effect on the economic security and welfare of the Tribe because it displaced Native workers in the tribal community.

Even though it need establish only one of the Montana exceptions for the assertion of jurisdiction to be proper, TJMD establishes both. Accordingly, TJMD respectfully requests that Defendants' motion be denied. This Court has jurisdiction over this dispute.

FACTS

The crude oil transloading facility ("Facility") is located on the Tribe's Fort Berthold Indian Reservation in New Town, North Dakota. (See Compl. ¶¶ 1, 14.) TJMD served as operator of the crude oil transloading Facility between June 2010 and September 2012. (Id. ¶ 2.) In September 2012, Defendants terminated their relationships with TJMD, ousted TJMD from the Facility, and now refuse to pay TJMD more than $260,000 that it is owed. (See e.g. id. ¶¶ 2, 30, 32.)

1. The Parties

TJMD is a North Dakota limited liability partnership with its principal place of business in New Town, North Dakota. (Compl. ¶ 3.) TJMD was formed in February 2010 by Terry Wilber, Jesse Wilber, and Marcia Wilber. (Id.) In May 2011, Virgil White Owl (Terry Wilber's son-in-law) acquired a majority ownership interest in the partnership. (Id.) Mr. White Owl is a member of the Tribe. (Id.; see also Affidavit of Virgil White Owl ¶ 2, submitted herewith.)

TJMD started out as a roustabout service provider to the growing petroleum industry in the region. (Compl. ¶ 15.) TJMD quickly expanded its capabilities to include trenching, snow removal, roadway and site ground maintenance, transloading, and a variety of other key services to the petroleum industry. (Id.)

Defendant Dakota Petroleum Transport Solutions, LLC ("DPTS") was formed in November 2009 for the express purpose of developing and operating the Facility. (Compl. ¶¶ 1, 4, 14.) Although DPTS is a Minnesota limited liability company, DPTS owns and operates the Facility in New Town. (Id. ¶ 8.)

DPTS is a joint venture between Defendant Dakota Plains Holdings, Inc. ("Dakota Plains"), which is a Nevada corporation, and Defendant Western Petroleum Corporation ("Western Petroleum"), which is based in Minnesota and is owned by Defendant World Fuels Corporation ("World Fuels"). (Id. ¶ 4.) Dakota Plains and Western Petroleum each own fifty percent (50%) of DPTS. (Compl. ¶ 4.) Dakota Plains is a developer and owner of petroleum transloading facilities and it owns the land on which the Facility sits. (Id. ¶ 6; Affidavit of Gabriel G. Claypool ("Claypool Aff."), ¶ 1.)[1] Western Petroleum one of the largest petroleum marketing companies in the United States. (Compl. ¶ 5.)

Defendant World Fuels is a marketer and seller of marine, aviation, and land fuel products who, in October 2010, acquired Defendant Western Petroleum. (Id. ¶ 7.) All of these organizations conduct business on the Facility in New Town. (See Compl.)

2. The Courting

Defendants' relationships with TJMD began in early 2010. (Compl. ¶ 16.) Western Petroleum hired TJMD to provide transloading services at one of Western Petroleum's diesel transloading facilities in New Town, North Dakota. (Id.) Western

[1] The Claypool Affidavit was submitted to the Court by Defendants.

Petroleum was an established provider of diesel fuel to the drilling industry and sought to expand its operations through its joint venture (i.e., DPTS) with Dakota Plains. (Id.)

TJMD played a vital role in Western Petroleum's planned expansion and the early success of DPTS. (Compl. ¶ 17.) For example, TJMD's principals provided important political clout that enabled DPTS (and in turn, Western Petroleum, Dakota Plains and World Fuels) to obtain the necessary land use permits from the New Town City Council to operate the Facility. (Id.) Without assistance from TJMD, DPTS would likely not have obtained the necessary land use permits. (Id.)

TJMD also provided Defendants with human resources, equipment, and a host of ancillary services that were required during the construction of the Facility. (Id. ¶ 18.) TJMD assisted DPTS in obtaining the zoning necessary to operate the Facility. (Id.) TJMD also assisted DPTS in acquiring an interest in the land adjacent to the Facility. (Id.) TJMD worked tirelessly to ensure the successful construction and operation of the Facility. (Id.)

TJMD is a TERO-certified Native American Owned Business. (White Owl Aff. ¶ 5.) TJMD prides itself in honoring its Native American community. (Compl. ¶ 19.) TJMD put its reputation on the line and vouched for Defendants in the local Native American community based on Defendants' representations that TJMD would be treated as a long-term "partner" in the Facility. (Id.) Defendants' representations turned out to be false.

3. The Agreements

DPTS (which, again, is a joint venture between Defendant Dakota Plains and Defendant Western Petroleum (which is now owned by Defendant World Fuels)) entered into a "Services Agreement" with TJMD on June 24, 2010. (Compl. ¶ 20.) Through the Services Agreement, TJMD agreed to provide all crude oil transloading and related services necessary for the day-to-day operation of the crude oil portions of the Facility. (Id.) DPTS agreed, among other things, to pay TJMD for its transloading services based on a formula that compensated TJMD per barrel of product transloaded at the Facility per day. (Id.)

The Facility became operational for the purposes of transloading crude oil in August 2010. (Compl. ¶ 21.) TJMD made a substantial investment in human resources, equipment, and political capital to operate the Facility. (Id.) TJMD invested hundreds of thousands of dollars of its own money into the Facility to make it work. (Id.) TJMD wanted to ensure that the Facility would be a success. (Id.)

Between June 24, 2010 and January 12, 2012, the parties performed their obligations without incident or significant disagreement. (Compl. ¶ 22.) DPTS was happy with TJMD's performance under the Services Agreement and often thanked TJMD for its good work. (Id.) On May 11, 2011, TJMD notified Defendants that Virgil White Owl became a 51% partner in TJMD, and that TERO certified TJMD as a 51% Native American Owned Business with TERO. (White Owl Aff. ¶¶ 4-5; Ex. B.)

On January 12, 2012, after Defendants had been notified that TJMD's majority partner was Virgil White Owl, DPTS entered into an Amended and Restated Services

Agreement ("Amended Agreement") with TJMD. (Compl. ¶ 23.) Under the Amended Agreement, DPTS agreed to compensate TJMD based on a formula that compensated TJMD per barrel of product transloaded at the Facility per day. (Id.)

The Amended Agreement required TJMD to submit a "Weekly Throughput Invoice" to DPTS within three (3) days following each calendar week. (Compl. ¶ 25.) The Weekly Throughput Invoice accounted for the number of barrels of product transloaded at the Facility during the prior week. (Id.) DPTS was required to then pay each of TJMD's Weekly Throughput Invoices (the "Transloading Payment") within five (5) business days of receipt by DPTS. (Id.) Although TJMD timely submitted its Weekly Throughput Invoices to DPTS, DPTS has not paid TJMD hundreds of thousands of dollars of Transloading Payments that TJMD is owed. (See Compl. ¶¶ 41-49.)

Consistent with Defendants' early representations to TJMD that their business relationship was to be a "long-term" relationship in which TJMD would be treated as a "partner" in transloading opportunities in the region, the Amended Agreement also included a provision requiring DPTS to present TJMD with an opportunity to bid on and receive an award of services for future work. (Compl. ¶ 29.)

4. DPTS Breaches The Agreement And Defendants Interfere With TJMD's Opportunity To Bid

Before entering into the Amended Agreement with TJMD in January 2012, Defendants invited another company named Strobel Starostka Transfer ("SST") to bid for the rights to operate the Facility. (Compl. ¶ 30.) Defendants invited SST behind TJMD's

back – and before entering into the Amended Agreement – while at the same time praising TJMD for its good work in operating the Facility. (Id.)

Defendants invited SST to bid for the rights to construct and subsequently operate an expansion of the Facility. (Compl. ¶ 31.) Contrary to DPTS's written agreement, contrary to the representations of Western Petroleum and Dakota Plains, and despite TJMD's substantial investment in and satisfactory operation of the Facility, Defendants did not give TJMD the opportunity to bid for the rights to construct or operate the expanded Facility. (Id.) In fact, Defendants intended to replace TJMD with SST well before the Amended Agreement was signed. (Id. ¶ 32.) Defendants entered into the Amended Agreement with TJMD for the sole purpose of giving SST sufficient time to mobilize the equipment and personnel required to take over the Facility. (Id.)

Consistent with its efforts to oust TJMD from the Facility, on June 21, 2012, DPTS purported to give TJMD ninety (90) days' written notice of its intent to terminate the Amended Agreement. (Compl. ¶ 33.) The notice was allegedly issued pursuant to § 1.3 of the Amended Agreement, but it did not cite any reason for the intended termination. (Id.) Had the termination been effective, the Amended Agreement would have terminated on or about September 23, 2012. (Id.)

After its purported termination on June 21, 2012, DPTS for the first time began to complain about the manner in which TJMD operated the Facility. (Compl. ¶ 34.) In particular, DPTS complained about even the most minor spills of crude oil that had occurred at the Facility. (Id.) DPTS is aware that minor spills had occurred in the past at

the Facility and that the majority of those spills were due to the employees and/or agents of DPTS, not TJMD. (Id.)

Again on September 3, 2012, DPTS purported to unilaterally terminate the Amended Agreement, effective September 4, 2012. (Compl. ¶ 35.) The September 3 notice cited "repeated violations" of the Amended Agreement but did not provide any detail about the alleged "repeated violations." (Id.) When DPTS was asked for specifics regarding the "repeated violations" of the Amended Agreement, DPTS was unable to provide any. (Id.)

DPTS had no basis to unilaterally terminate the Amended Agreement on September 3. (Compl. ¶ 36.) As of September 3, 2012, DPTS owed TJMD at least $260,000 for transloading services that TJMD rendered pursuant to the Amended Agreement but that DPTS had not (and still has not) paid for. (Id.)

On September 11, 2012, DPTS concocted an after-the-fact reason for its purported termination. DPTS informed TJMD that it terminated the Amended Agreement as a result of alleged petroleum product spills at the Facility. (Compl. ¶ 37.) DPTS further informed TJMD that DPTS intended to withhold all payments due to TJMD in order to offset alleged cleanup costs at the Facility. (Id.) However, the vast majority of the alleged spills were minor, and DPTS knew they were not the result of action or inaction of TJMD. (Id.)

TJMD abided all of its obligations under the Amended Agreement to report any and all of the alleged spills so that the spills could be remediated. (Compl. ¶ 38.) DPTS's allegations of spills were a pretext for unlawfully terminating the contract early

in order to make way for Defendants' new operator, SST. (Id.) Upon information and belief, the alleged spills were a pretext designed to avoid DPTS's obligation to pay TJMD for services rendered, as well as services which would have been rendered but for the early termination of the Amended Agreement. (Id.)

This case arises in large part because since September 11, 2012, DPTS has failed and refused to pay to TJMD amounts due and owing under the Amended Agreement. (Compl. ¶ 39.) DPTS owes TJMD more than $260,000 for services rendered. (Id.) DPTS's decision to withhold payment is a violation of the plain terms of the Amended Agreement and was made for the sole purpose of bullying TJMD into relinquishing its right to compensation under the Amended Agreement. (Id.)

This case also arises because of Western Petroleum, Dakota Plains and World Fuels' tortious interference with the Amended Agreement and prospective economic relations of TJMD, as well as Defendants' misrepresentations to TJMD. (See Compl. ¶¶ 40, 56-78.) As explained in the Complaint, Western Petroleum, Dakota Plains and World Fuels intentionally interfered with the Amended Agreement and TJMD's reasonable expectation of economic benefits when they awarded SST (and only SST) the right to operate the Facility, and when they awarded SST the right to construct, and then subsequently operate, an expansion of the Facility. (Id. ¶¶ 60-61, 66-67.)

Moreover, Defendants defrauded TJMD when they repeatedly told TJMD that TJMD would be treated as a long-term partner in the transloading opportunity at the Facility and that they would allow TJMD to provide transloading and other services not only at the Facility, but also at other future facilities owned and/or operated by

Defendants. (Compl. ¶¶ 71-72.) In reality, Defendants had no intention of making TJMD a "partner" in the Facility for any longer than it took for SST to mobilize the equipment and personnel necessary to operate the Facility. (Id. ¶¶ 75-76.) In fact, by the time TJMD signed the Amended Agreement, Defendants had already invited SST (and only SST) to bid for the rights to operate the Facility. (Id. ¶ 77.) Together, Defendants conspired to violate TJMD's rights and agreements. (Id. ¶ 80.)

TJMD seeks the amounts owed by DPTS for services rendered pursuant to the Amended Agreement, as well as amounts that TJMD would have earned pursuant to the Amended Agreement had DPTS continued the Amended Agreement through September 21, 2012 (approximately 90 days following the initial notice of termination). (Id. ¶ 40.) In addition, TJMD seeks damages from Western Petroleum, Dakota Plains, and World Fuels for their tortious interference and misrepresentation to TJMD. (Id.)

5. Effect On The Tribe

As a result of Defendants' unlawful conduct toward TJMD, TJMD lost most of its employees. TJMD was forced to let go of between 30 – 35 Native workers as a result of Defendants' termination of their contracts and other consensual relationships with TJMD. (White Owl Aff. ¶ 7.)

ARGUMENT

A. TRIBAL COURT JURISDICTIONAL FRAMEWORK.

"The Supreme Court has repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government." Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation, 27 F.3d 1294, 1294 (8th Cir.

1994). "Tribal courts play a vital role tribal self-government, and the Federal Government has consistently encouraged their development." Id. Since Indian tribes have been recognized as "distinct, independent political communities" for more than two centuries, they are "qualified to exercise many of the powers and prerogatives of self-government." Plains Commerce Bank v. Long Fam. Land & Cattle Co., Inc., 554 U.S. 316, 327 (2008) (citing Worcester v. Georgia, 8 L.Ed. 483 (1832); United States v. Wheeler, 435 U.S. 313, 322-323 (1978)). Due to their importance to our judicial system, tribal courts are tasked with determining the reach of their own jurisdiction. Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985).

B. THIS COURT HAS JURISDICTION OVER THIS DISPUTE

"Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." Strate v. A-1 Contractors, 520 U.S. 438, 451 (1997) (citing Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987)). So, "where tribes possess authority to regulate the activities of nonmembers, 'civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts.'" Strate, 520 U.S. at 451 (citing Iowa Mut., 480 U.S. at 18)). See also Buster v. Wright, 135 F. 947, 950 (C.A.8 1905) (noting the tribe's "inherent" "authority... to prescribe the terms upon which noncitizens may transact business within its borders.").

The authority to regulate the activities of nonmembers on reservation land owned in fee by non-Indians stems from the U.S. Supreme Court's decision of Montana v. United States, 450 U.S. 544 (1981). Under Montana, tribal courts can regulate the activities of nonmembers (and in turn, assert jurisdiction over nonmembers in tribal

court) where: (1) the nonmembers "enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," or (2) the nonmembers' "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 565-566. If the circumstances of a case fit either exception, then the tribal court has jurisdiction over the dispute. See Strate, 520 U.S. at 456 (explaining that party must show only one of the two exceptions to establish tribal court jurisdiction).

This Court has jurisdiction over this dispute because it meets both of the Montana exceptions.

1. TJMD Is A Member Of The Tribe

The United States Supreme Court has held that the citizenship of a limited partnership for purposes of diversity jurisdiction is determined according to the citizenship of its limited and general partners. Carden v. Arkoma Associates, 494 U.S. 185, 195-96 (1990). Several courts have held that this holds true for limited liability partnerships too. See e.g. Haak Motors LLC v. Arangio, 670 F. Supp. 2d 430, 432 n.1 (D. Md. 2009); Mudge Rose Guthrie Alexander & Ferdon v. Pickett, 11 F. Supp. 2d 449, 452 (S.D.N.Y. 1998); Reisman v. KPMG Peat Marwick LLP, 965 F. Supp. 165, 176 (D. Mass. 1997). In other words, the citizenship of the limited liability partners determines the citizenship of the limited liability partnership for jurisdictional purposes.

TJMD is a North Dakota limited liability partnership. For jurisdictional purposes then, the citizenship of TJMD should be determined by the citizenship of its limited liability partners. TJMD's majority limited liability partner, Virgil White Owl, is Native

American, is a member of the Three Affiliated Tribes, and lives in New Town, North Dakota on the Fort Berthold Indian Reservation. (White Owl Aff ¶¶ 1, 2; Ex. A.) Thus, given Mr. White Owl's status as the majority limited liability partner in TJMD, TJMD should be treated as a member of the Tribe for jurisdictional purposes. [2]

TJMD should also be treated as a member of the Tribe for jurisdictional purposes because it is a certified Native American Owned Business with TERO. (White Owl Aff. ¶¶ 4-5; Exs. B, D.) The Tribe allows TERO to exercise its sovereign powers by requiring employers working on or near the jurisdictional boundaries of the Three Affiliated Tribes to give preference to Indian companies. (White Owl Aff. Ex. C.) TJMD is listed as an Indian company on the TERO website. (White Owl Aff. Ex. D.) The Tribe has essentially licensed TJMD as a Native business. TERO requires companies to give preference to Native American owned businesses. (White Owl Aff. Ex. C.)

In an effort to pretend that TJMD is not a tribal member for jurisdictional purposes, Defendants rely on cases having to do with corporations, not limited liability partnerships. (See Defs.' Br. at 6-7.) But TJMD is a limited liability partnership (see White Owl Aff. Ex. A), not a corporation, and those entities are different. See Pierre's Resort, LC v. Interstate Management Co., LLC, No. 6:08–cv–294–Orl–18DAB, 2009 WL 395788, *2 (M.D. Fla. Feb. 17, 2009) ("The standard for determining citizenship for purposes of ascertaining diversity jurisdiction of a limited liability company or limited

[2] As of November 2012, Mr. White Owl is the only partner in TJMD. He owns 100% of the business. (White Owl Aff. ¶ 6.)

partnership is different from that of a corporation."); Maupin v. Meadow Park Manor, 125 P.3d 611, 613 (Mont. 2005) (noting that the internal organization, membership, filing requirements and tax treatments are different between limited liability partnerships and corporations). Thus, Defendants' cases are not applicable. See Airvator, Inc. v. Turtle Mountain Mfg. Co., 329 N.W.2d 596, 604 (N.D. 1983) (explaining that for purposes of jurisdiction, the citizenship of the shareholders, directors, officers and agents have little influence with regard to the citizenship of the corporation); Mann v. Mann, 223 N.W. 186, 189 (N.D. 1929) (stating that corporations are entities separate from its stockholders); Zempel v. Liberty, 333 Mont. 417, 429 (2006) (noting that under particular Montana tribe's constitution, corporations cannot obtain tribal membership status).[3]

2. Defendants Entered Into Consensual Relationships With TJMD

Consensual relationships for the purposes of the first Montana exception include a variety of arrangements. They include relationships based on contract, employment, education, agency and principal, beneficiary status, financing arrangements and the receipt and provision of services, among others. See e.g. Marathon Oil Co. v. Johnston, 2006 WL 6926419, *3 (Shoshone & Arapaho Tribal App. Ct. Apr. 6, 2006) (consensual relationship through lease agreement); Confederated Tribes of Grand Ronde v. Strategic Wealth Mgmt., Inc., 6 Am. Tribal Law 126, 135 (Confed. Tribes G.R. Comm. Tribal Ct.

[3] And, contrary to Defendants' arguments, tribal courts have recognized that corporations are tribal members in some circumstances. See e.g. Smith v. Salish Kootenai College, 4 Am. Tribal Law 90, 97 (Ct. App. Conf. Salish & Kootenai Tribes 2003) (explaining that defendants entered into a consensual relationship under Montana with Salish Kootenai College, a Montana corporation and member of the tribe).

2005) (provision and acceptance of financial advice, services and products constituted consensual relationship); Manygoats v. Atkinson Trading Co., Inc., 4 Am. Tribal Law 655, 661 (Navajo Nat. Sup. Ct. 2003) (employment contract was a consensual relationship); Smith, 4 Am. Tribal Law at 97 (decision to enroll at tribal college was a consensual relationship with the tribe); Lilley v. Davis, 2 Am. Tribal Law 173, 176 (Fort Peck Ct. App. 2000) (deciding that authorized agents of nonmember principals to an agreement satisfied first Montana exception); Clark v. Richter, 2 Am. Tribal Law 179, 187 (Fort Peck Ct. App. 2000) (reasoning that a consensual relationship arose out of tribe's status as a third-party beneficiary to chain of agreements between nonmembers).

Parties that are related to nonmembers who contract with the tribe or its members may also be deemed to have a consensual relationship with the tribe or its members. See Ford Motor Co. v. Kayenta Dist. Ct., 7 Am. Tribal Law 652, 659-660 (Navajo Nat. Sup. Ct. 2008) (deciding that company entered into consensual relationship for purposes of first Montana exception through its subsidiary's financing arrangement with member of the tribe); Bird v. Poplar Comm. Hosp., 3 Am. Tribal Law 346, 350 (Fort Peck App. Ct. 2001) (finding consensual relationship because nonmembers, although not parties to the agreements, were "directly involved" with the agreements, and they were not "'strangers' to those agreements") (citations omitted). Of course, since "contract" is expressly enumerated in Montana as an example of the kind of consensual relationship that qualifies for tribal court jurisdiction, contractual relationships have "repeatedly been held to constitute a consensual relationship under the first Montana exception." Auto Owners Ins. Co. v. Azure, 2009 WL 5202001, *4 (D.N.D. Dec. 22, 2009). See also Gustafson v.

Estate of Poitra, 800 N.W.2d 842, 848 (N.D. 2011) (noting that any contractual connection satisfies the first Montana exception); AGAMENV, LLC v. Laverdure, 866 F.Supp.2d 1091, 1100 (D.N.D. 2012) (explaining that limited liability company that entered into agreements with tribe or its members entered into "consensual relationships" for the purposes of the first Montana exception). The consensual relationship exception requires a nexus between the claims and the consensual relationship. See Atkinson Trading Co. v. Shirley, 532 U.S. 645, 655 (2001).

There is no question that Defendants entered into consensual relationships with TJMD, a member of the Three Affiliated Tribes. Under the consensual relationship exception from Montana, this Court's assertion of jurisdiction is proper.

First, Defendant DPTS entered into contracts with TJMD when they signed the Services Agreement and the Amended Agreement. The Amended Agreement was entered into in January 2012. TJMD had previously notified Defendants (in May 2011) that Virgil White Owl owned 51% of TJMD and that TJMD was certified as a Native owned business with TERO. (White Owl Aff. Ex. B.) So, at the time DPTS entered into the Amended Agreement, it knew that it was contracting with a member of the Tribe.

Second, DPTS entered into weekly contracts with TJMD by paying on TJMD's Weekly Throughput Invoices. By requesting and accepting TJMD's services and then paying for them (at least until August 2012), DPTS entered into weekly contracts for services.

Third, Defendants entered into consensual relationships with TJMD when, through DPTS, they hired TJMD to provide diesel and petroleum transloading services at the

Facility. DPTS is a joint venture between Dakota Plains and Western Petroleum in which Dakota Plains and Western Petroleum each own 50%. Therefore, when DPTS and TJMD entered into the Services Agreement, Amended Agreement and contracted through the Weekly Throughput Invoices, Dakota Plains and Western Petroleum were in effect contracting (and in turn, entering into consensual relationships) with TJMD. Dakota Plains and Western Petroleum directed DPTS to enter into the agreements. The same goes for World Fuels, which owns Western Petroleum. See Ford Motor, 7 Am. Tribal Law at 659-660 (holding that consensual relationship can be created through a company's subsidiary).

Fourth, Dakota Plains entered into a consensual relationship with TJMD when it allowed TJMD to serve as the Facility's transloading operator. Dakota Plains owns the land on which the Facility is located. (Claypool Aff. ¶ 1.) Dakota Plains let TJMD run the show.

There is a nexus between TJMD's claims and these consensual relationships. TJMD asserted claims for: (a) breach of contract and breach of the implied covenant of good faith and fair dealing against DPTS; (b) tortious interference with contract, tortious interference with prospective economic relations and misrepresentation against Dakota Plains, Western Petroleum and World Fuels; and (c) civil conspiracy against all Defendants. These claims all arise out of TJMD's provision of transloading services at the Facility.

The contract claims against DPTS arise out of the Services Agreement, Amended Agreement and Weekly Throughput Invoices between TJMD and DPTS. The tortious

interference claims arise out of Dakota Plains, Western Petroleum and World Fuels' interference with those contracts and with the prospective economic relations that TJMD would have experienced had TJMD not been ousted from the property. The misrepresentation claims are based on the misrepresentations that Defendants made to TJMD when they told TJMD that it would be a long-term "partner" in the Facility and that TJMD would be given the opportunity to bid on future work. All Defendants conspired in their unlawful treatment toward TJMD. Thus, there is a nexus between the relationships and the claims, and the assertion of jurisdiction is proper. [4]

This is not a personal injury case. This is not about a car accident. Defendants are no strangers to TJMD. They hired TJMD to operate the Facility. They allowed TJMD to work on their land. These circumstances reveal that each Defendant – DPTS, Dakota Plains, Western Petroleum and World Fuels – entered into one or more consensual relationships with TJMD. See Hoover v. Colville Confederated Tribes, 2002 WL 34540595, *11 (Colville Tribal App. Mar. 18, 2002) (explaining that it is the "totality of circumstances" that matters).

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[4] Defendants' cited cases are inapposite. See Nord v. Kelly, 520 F.3d 848, 856 (8th Cir. 2008) (explaining that accident that occurred on reservation "gave rise to a simple tort claim between strangers"); Amerirind Risk Mgmt. Corp. v. Malatarre, 633 F.3d 680, 691 (8th Cir. 2011) (J. Beam) (reasoning that contract was not at "heart of [a] dispute" for personal injury and wrongful death claims); Phillip Morris USA, Inc. v. King Mountain Tobacco Co., 569 F.3d 932, 942 (9th Cir. 2009) (explaining that suit involved nationwide sales of product and tribal stores were "strangers" to the trademark infringement claim); MacArthur v. San Juan County, 309 F.3d 1216, 1223 (10th Cir. 2002) (membership to Navajo attorney bar association not enough to create consensual relationship with tribe).

3. Defendants' Conduct Had A Direct Effect On The Economic Security And Welfare Of The Tribe

This Court may also exercise jurisdiction over "the conduct of non-Indians on fee lands within its territory when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Montana, 450 U.S. at 565. The threat or effect to economic security or welfare may include the unemployment of Native workers. See Manygoats, 4 Am. Tribal Law at 662-663 (explaining that the unemployment rates in the Navajo Nation are high and that defendant's trading practices will have a detrimental effect on employment in the tribe). The threat or effect to economic security or welfare also includes circumstances affecting mineral wealth on tribal land. See Marathon Oil, 2006 WL 6926419 at *3 ("It can hardly be doubted that the tribes economic security is an important issue in matters dealing with extraction of its mineral wealth from the tribal lands."). Essentially, this prong is established where there is evidence of a "financial impact" to the tribe. Confederated Tribes of Grand Ronde, 6 Am. Tribal Law at 135.[5]

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[5] Defendants argue that the second Montana exception requires that the conduct have a "catastrophic" effect on the tribe. (Defs.' Br. at 11.) The word "catastrophic" comes from the Supreme Court's explanation of one commentator's interpretation of the second Montana exception as "catastrophic." See Plains Commerce, 554 U.S. at 341 (stating that "one commentator" noted that the second Montana exception suggests that tribal power must be necessary "to avert catastrophic consequences") (citations omitted). There is nothing to indicate that that Supreme Court intended to limit the second Montana exception to consequences of a "catastrophic" nature only, and as one tribal court appropriately noted, "[t]he U.S. Supreme Court did not explain [the term] 'catastrophic.'" Ford Motor, 7 Am. Tribal Law at 660. Regardless, "catastrophic" is defined as "extremely unfortunate or unsuccessful," which is consistent with the displacement of 30 – 35 Native workers. See Oxford Dictionaries Online, available at http://

Defendants' conduct has had a direct effect on the economic security and welfare of the Three Affiliated Tribes because it has had a negative economic and financial impact on the Tribe.

First, Defendants' ousted TJMD, a TERO-certified business, from the Facility such that Virgil White Owl and his employees lost out on the majority of their work.

Second, Defendants' actions resulted in the displacement of 30 – 35 Native workers. (White Owl Aff. ¶ 7.)

Third, Defendants' conduct harmed TJMD's reputation in the Native community. TJMD's principals provided important political clout that enabled Defendants to obtain the necessary land use permits from the New Town City Council to operate the Facility. TJMD put its reputation on the line and vouched for Defendants in the local Native American community based on Defendants' representations that TJMD would be treated as a long-term "partner" in the Facility. This reflects poorly on the Tribe.

Fourth, TJMD and its workers lost out on the opportunity to bid for more work. If TJMD had been provided with the opportunity to bid on additional work at the Facility or for future facilities, TJMD would have undoubtedly hired more Native workers, which would have benefitted the Native economy. Defendants took those opportunities away.

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http://oxforddictionaries.com/definition/american_english/catastrophic (last visited Jan. 14, 2013).

TJMD's allegations establish that the Tribe has suffered a financial and economic impact as a direct result of Defendants' conduct. (Compl. at 2, n.1; White Owl Aff. ¶ 7.) Accordingly, jurisdiction is proper because the second Montana exception applies.

4. The Conduct Giving Rise to TJMD's Claims Occurred on the Fort Berthold Indian Reservation

This Court's jurisdiction extends to any and all lands within reservation boundaries or as provided by federal law. Fort Berthold Tribal Code, Title I, Ch. I, § 3.2. In a last-ditch effort to avoid this Court's jurisdiction, Defendants argue that TJMD's claims did not take place on the reservation. (Defs.' Br. at 11-12.) This is a red herring.

Virgil White Owl, the majority partner of TJMD, lives on the Fort Berthold Indian Reservation in New Town. TJMD's principal place of business is located on the Fort Berthold Indian Reservation in New Town. The Facility that is the focus of this case is located on the Fort Berthold Indian Reservation in New Town. All of the agreements were entered into on the Fort Berthold Indian Reservation in New Town. And, Defendants' unlawful conduct alleged in the Complaint took place on the Fort Berthold Indian Reservation in New Town. In other words, the only place for TJMD's claims is on the Fort Berthold Indian Reservation in New Town. See Phillip Morris USA, 569 F.3d at 938 ("Finally, tribal jurisdiction is, of course, cabined by geography: The jurisdiction of tribal courts does not extend beyond tribal boundaries."). This Court's jurisdiction over this case fits squarely within the boundaries of the Fort Berthold Indian Reservation. Thus, this Court's assertion of jurisdiction is proper.

CONCLUSION

For all of the foregoing reasons, TJMD respectfully requests that Defendants' Motion to Dismiss for Lack of Non-Tribal Member Jurisdiction be denied.

ANTHONY OSTLUND
BAER & LOUWAGIE P.A

Dated: January 14, 2013

By: _____

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