Case No. 15-35403

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TAKEDA PHARMACEUTICALS AMERICA, INC., et al.

Plaintiffs/Appellants,

vs.

VICTOR CONNELLY

Defendant/Appellee.

On Appeal from the United States District Court
For the District of Montana, Great Falls Division
Honorable Brian Morris
Case No. 4:14-cv-00050-BMM

APPELLANTS' AMENDED REPLY BRIEF

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I.

INTRODUCTION

While Victor Connelly ("Connelly") argues that the Blackfeet Indian Tribe controls the land on which the Indian Health Services ("IHS") clinic was located, this issue is irrelevant to whether the tribal court has jurisdiction over Takeda for acts that the parties stipulated occurred off the reservation. Connelly's unilateral actions in taking Actos on the reservation do not confer jurisdiction over the non-member drug manufacturer whose marketing to the IHS occurred in Oklahoma. Tribal courts have limited jurisdiction over non-members, and there is no authority that gives the tribal court here jurisdiction over a non-member for activities off the reservation. Therefore, it is "plain" that the tribal court lacks jurisdiction here.

II.

ARGUMENT

A. The Character of the Reservation Land is Irrelevant.

Connelly argues at length that the leased reservation land on which the IHS clinic sits is subject to the control and regulation of the Blackfeet Indian Tribe. (Appellee's Br. at 10-21). The character of this land, however, is irrelevant to whether the tribal court has jurisdiction over Takeda. (Appellant's Br. at 11-12). Neither the district court nor Connelly has explained how the tribe's claimed right to control or exclude from the clinic land conferred jurisdiction over Takeda,

simply because IHS doctors prescribed its drugs there. There remains a disconnect between the control of the clinic land, and a finding of jurisdiction over a non-member whom Connelly stipulated did not enter that land. Even assuming that the tribe did control and regulate the clinic land, this has no bearing on whether the tribal court has jurisdiction over a non-member for its activity outside the reservation. (Appellant's Br. at 11-17). Therefore, the Court need not address the character of the reservation land or issue any sweeping proclamation about Indian control over reservation lands that the tribe has leased to the federal government.

Indeed, Connelly's continued reliance on *Water Wheel Camp Recreational Area v. Larance*, 643 F.3d 802 (9th Cir. 2011), and *Grand Canyon Skywalk Development LLC v. Sa Nyu Wa Incorporated*, 715 F.3d 1196 (9th Cir. 2013), remains misplaced. Both cases concerned the right to control land on an Indian reservation. Connelly's claims against Takeda do not. Unlike the non-Indian litigants in the *Water Wheel* and *Grand Canyon Skywalk* cases, Takeda has never asserted a possessory interest in any tribal lands. Furthermore, the theoretical underpinning of both cases is a tribe's reserved power to exclude non-members from the reservation. Its application to this case makes no sense, when Takeda did not enter the Blackfeet Indian Reservation. Indeed, if such reasoning applies here, *i.e*. that a tribe's power to exclude serves as a basis to assert jurisdiction over a non-member who put an article in the stream of commerce that which leads to use

on a reservation, the concept of limited tribal court jurisdiction has been stood on its ear. The exception has swallowed the rule, such that tribal courts have become *de facto* courts of general jurisdiction over non-members. Further, expansion of such a concept serves no identifiable purpose in so far as protecting some as-yet unidentified unique interests of tribal members, when the courts of the state of Montana and the federal judiciary have been fully available to Indian litigants such as Connelly for the claims that he has asserted against Takeda in tribal court.

B. Tribal Jurisdiction is Determined by the Defendant's Activities on the Reservation.

Connelly argues that because he obtained and took Actos on the reservation, the tribal court has jurisdiction over non-member Takeda. (Appellee's Br. at 2, 5). But this analysis is incorrect. It is the conduct of the *non-member defendant on the reservation* that determines tribal jurisdiction, not the conduct of the tribal member. *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1138 (9th Cir. 2006) (the "unilateral activity" of those claiming a relationship with a non-member cannot satisfy the requisite contacts with the forum). In *Smith*, the Court emphasized that "[f]irst, and most important, is the party status of the nonmember; that is, whether the nonmember party is a plaintiff or defendant. . . . The Court has repeatedly demonstrated its concern that tribal courts not require [nonmember defendants] to defend themselves against ordinary claims in an unfamiliar court." *Id*. at 1131

(internal quotation marks omitted).[1] Connelly can point to no authority that Indian tribal courts have jurisdiction over *non-members* based on the activity of *tribal members* on their Indian reservation land.

In support of his argument that the tribal court may exercise jurisdiction here, Connelly cites two cases, *Crawford v. Genuine Parts Co., Inc.*, 947 F. 2d 1405 (9th Cir. 1991) and *Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932 (9th Cir. 2009). Neither supports Connelly's proposed expansion of tribal jurisdiction over non-members. In *Crawford*, this Court held that comity concerns required the non-members to exhaust tribal remedies in a case where tribal members sued the non-members for injuries from an on-reservation accident on a public highway, which this Court stated arose "on the reservation." *Crawford*, 947 F. 2d at 1407-08. *Crawford*'s holding, however, was overruled in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), where the Supreme Court held that tribal courts lack jurisdiction over such claims, as they are "distinctly non-tribal in nature." The Court held that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction," and that, except for authority from a treaty, statue or

[1] The basis for the Court's finding of jurisdiction over the non-member in *Smith* was that he *consented* to tribal jurisdiction when he availed himself of the tribal court by filing suit there. Connelly omits this key distinction in suggesting that Takeda consented to tribal jurisdiction here. (Appellee's Br. at 31-32). Takeda has not consented to jurisdiction, and indeed, had no relationship at all with Connelly or the tribe. (*See* Appellant's Br. at 7, 13).

Montana[2] exception, " the authority of Indian tribes and their courts with respect to non-Indian fee land generally does not extend to the activities of non-members of the tribe." *Strate*, 520 U.S. at 454, 452. Unquestionably, land off the reservation on which Takeda conducted its marketing activities would be considered land not subject to tribal control or regulation.

Connelly cites a footnote in *Philip Morris* stating that Philip Morris might have been required to exhaust remedies under a *Montana* exception if the company had directly sold products on reservation land, thereby entering into a "voluntary commercial relationship" with the tribe. 569 F.3d at 945 n. 2. This footnote is inapposite. Connelly concedes and the record supports that Takeda never directly sold Actos on the Blackfeet reservation. (Appellant's Br. at 13). The main holding in *Philip Morris* supports Takeda's argument here, that "tribal courts are not courts of general jurisdiction," and "[t]he jurisdiction of tribal courts does not extend beyond tribal boundaries." 569 F.3d at 938-39. Because Takeda's activities in marketing Actos to the IHS did not occur on the reservation, the tribal court lacks authority to adjudicate the claim against Takeda. Connelly's use of Actos on the reservation cannot support tribal jurisdiction.

C. Foreseeable Use of a Product on the Reservation Does Not Confer Tribal Jurisdiction.

Connelly argues that because it was "foreseeable" or "intended" that tribal

[2] *Montana v. United States*, 450 U.S. 544 (1981).

members would use Actos on the reservation, tribal courts can adjudicate claims against the non-member seller of the product off the reservation for the "consequences" of that use. (Appellee's Br. at 5, 15, 27). No authority supports this argument, and it is contrary to the Supreme Court's recognition that tribal courts are of *limited* jurisdiction. (*See* Appellant's Br. at 14-15).

The import of Connelly's argument would be to extend tribal jurisdiction to the full limits of due process, like the jurisdiction of state courts. But tribal courts have only the authority that has been specifically granted to them. (Appellant's Br. at 14-16, 20). Absent an "express delegation" of authority, they lack jurisdiction. (Appellant's Br. at 20). No grant of authority, by statute, treaty or judicial precedent has extended tribal jurisdiction this far. Instead, the Supreme Court and this Court have held that if the tribe lacks the ability to regulate the activity, then its tribal court cannot adjudicate the matter. (*See* Appellant's Br. at 18-19). Because the Blackfeet tribe cannot regulate non-member Takeda's activities off the reservation, its tribal court cannot adjudicate them.

D. *Montana's* Exceptions do not apply.

Neither of *Montana*'s exceptions apply to allow tribal court jurisdiction here. Connelly argues that Takeda had a "voluntary consensual commercial relationship" with the IHS, which gives rise to jurisdiction in tribal court. (Appellee's Br. at 29-30). But Takeda's business relationship with the federal government arising from

activity in Oklahoma does not confer jurisdiction in the Blackfeet Tribal Court. Unsurprisingly, Connelly cites no authority for such a proposition. Because Takeda had no relationship at all with Connelly or the Blackfeet Tribe, much less a relationship on Indian land, this *Montana* exception is inapplicable.

Finally, Connelly's use of Actos neither imperils the existence of the tribe, nor affects the tribe's health and welfare within the meaning of the remaining *Montana* exception. (Appellant's Br. at 32-34). Therefore, this exception cannot confer tribal jurisdiction either.

CONCLUSION

Takeda respectfully requests that this Court reverse the district court's judgment and enter judgment in favor of Takeda on its declaratory judgment action.

Respectfully Submitted, this 11th day of November, 2015.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Rule 32 (a)(7)(B) of the Federal Rules of Appellate Procedure, I certify that this Brief contains no more than 7,000 words. Based on the word count of the word processing system used to prepare this Brief, the word count, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32 (a)(7)(B)(iii) is 1,553 words.

I also certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32 (a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32 (a)(6) because this Brief has been prepared in a proportionally spaced font that includes serifs using Microsoft Word in 14 point Times New Roman font.

s/ Leslie A. Benitez
By: Leslie A. Benitez

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing APPELLANT'S BRIEF with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate CM/ECF system on November 11, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Appellant CM/ECF system.

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