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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

THE CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, a Utah corporation sole; LDS FAMILY SERVICES, a Utah Non-Profit corporation, Plaintiffs, v. RJ, MM, BN and LK, individuals Defendants.	Case No. 2:16-cv-00453-RJS **REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' OBJECTION AND MOTION TO DISMISS** Judge: Robert J. Shelby Magistrate Judge: Brooke C. Wells

INTRODUCTION AND FACTS

RJ, MM, BN and LK filed Complaints for Personal Injury (the "Tribal Court Actions") against Plaintiffs (the "Church Entities") in the Navajo Nation District Court, District of Window Rock, Arizona (the "Tribal Court") *(Pls.' Second Am. Compl. for Decl. J.* at ¶ 1), alleging sexual abuse while enrolled in the Plaintiffs' Indian Student Placement Program (the "ISPP") from approximately 1965 to 1983, collectively. *Id.* at ¶ 9. The ISPP has been referred to by the

Church Entities in the past and too by Defendants as the Lamanite Placement Program ("LPP").

On May 31, 2016, Plaintiffs filed their Complaint for Declaratory Judgment in this Court seeking a determination that the Tribal Court does not have subject matter jurisdiction over them in Defendants' Tribal Court Actions. *Id.* at ¶ 3. Defendants then filed their Objection to Plaintiffs' Second Amended Motion for Preliminary Injunction and Motion to Dismiss, on July 7, 2016. Plaintiffs' filed a response to that motion and objection on July 28, 2016. In response, Defendants file this reply memorandum in support of their Objection and Motion to Dismiss.

ARGUMENTS

Plaintiffs correctly assert that this case is not a complex one, and in fact "[t]he single issue is whether the Tribal Court may exercise subject matter jurisdiction over the Church Entities." *Combined Memorandum in Support of Amended Motion for Preliminary Injunction, and In Response to Defendants' Motion to Dismiss Plaintiffs' Amended Complaint for Declaratory Judgment*, [hereinafter "*Pls.' Reply Memo*."] at 3.

I. DEFENDANTS ALLEGE NEGLIGENT CONDUCT ON THE TRIBAL LANDS WHICH GIVES RISE TO TRIBAL COURT JURISDICTION PURSUANT TO THE EXHAUSTION RULE.

A. The exhaustion rule and policy concerns dictate that the Tribal Court should create a court record establishing and settling the jurisdictional factual issues.

Defendants claim that this Court is not the proper court to determine whether or not the Tribal Court has jurisdiction over Plaintiffs. Because this federal question has already been "foreclosed by prior decisions of [the Supreme] Court" which insists that the Tribal Court determines this issue first, dismissal is proper. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (quoting *Oneida Indian Nation of N. Y. v. County of Oneida*, 414 U.S. 661, 666 (1974)).

Defendants continue to contend that it is proper for this Court to adhere to the exhaustion rule. "[T]he existence and extent of a tribal court's jurisdiction will require a careful examination . . . [and] that examination should be conducted in the first instance in the Tribal Court itself." *National Farmers,* 471 U.S. 845, 855–56 (1985). The Supreme Court stated further, "[u]ntil petitioners have exhausted the remedies available to them in the Tribal Court system . . . it would be premature for a federal court to consider any relief." *Id.* at 857.

Although Defendants allege numerous tortious acts were committed by the Plaintiffs on the Navajo Nation, Plaintiffs argue that Defendants fail to identify any such tortious conduct. Plaintiffs' argument fails in light of the allegations in the original Complaint and established case law.

The Court in *National Farmers* wrote:

> [T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.
>
> We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate **the factual and legal bases for the challenge**. Moreover the orderly administration of justice in the federal court will be served **by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed.** The risks of the kind of "procedural nightmare" that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made. Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.

Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 855-57, 105 S. Ct. 2447, 2453-54 (1985) (emphasis added).

The Supreme Court has already considered the issue of opposing parties that claim different factual allegations in order to come to different jurisdictional conclusions. *See Id.* Therefore, when a factual record needs to be made in order to determine the Tribal jurisdiction, as it does here, the proper court to create that record, and make the first jurisdictional determination, is the Tribal Court. *Id.*

Moreover, due to the ongoing factual battle throughout these proceedings, occurring before discovery has even taken place, it becomes apparent that "it is [NOT] clear that the tribal court lacks jurisdiction" and in fact, the exhaustion rule will lead to a full record developed in the Tribal Court which is bound to aid this Court in the future. *Thlopthlocco Tribal Town v. Stidham*, 762 F.3d 1226, 1238 (10th Cir. 2014). Therefore, adhering to the exhaustion rule will serve an important purpose specifically enumerated by the Supreme Court. Delay is not an issue. *Id.*

B. Defendants have sufficiently alleged tortious and negligent conduct committed by Plaintiffs on the Navajo Nation thereby invoking the exhaustion rule.

Plaintiffs continue to claim that Defendants cannot show that Plaintiffs engaged in tortious conduct on the reservation. *Pls.' Reply Memo*., at 3. While discovery is required to prove tortious conduct within the Navajo Nation,[1] Defendants have nonetheless alleged many acts of negligence committed within the Navajo Nation. *See Pl.s' Second Am. Compl.* (Dkt. 17), at Ex. A, ¶¶ 14–19; Ex. B, ¶¶14–18; Ex. C, ¶¶ 13–18. For example, Defendants allege negligence by Plaintiffs' agents within the Navajo Nation by failing to properly act after sexual abuse was reported to them during the summer break on the Navajo Nation and deciding, based on that information, to place the students in abusive homes during the next school year. *See Pl.s'*

[1] Defendants argued above that, pursuant to the exhaustion rule, this discovery should properly take place in the Tribal Court. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 855-57 (1985).

Second Am. Compl. (Dkt. 17), at Ex. A, ¶¶ 14–19; Ex. B, ¶¶14–18; Ex. C, ¶¶ 13–18.

Plaintiff RJ, for example, disclosed the [sexual] abuse [he had endured] to Mr. Helmstetler (Helmsteddler) within the Navajo Nation, on at least two different occasions following his 4th and 5th grade year. The location of these disclosure included the LDS Chapel (Window Rock Ward or Branch) in St. Michael's, Arizona, and at his home in Sawmill, Arizona." *RJ and MJ's Complaint for Personal Injury*, ¶ 19. After this disclosure, RJ was again placed in a sexually abusive home. *Id.* ¶ 20. Once again, RJ disclosed to agents of LDS Defendants, including James Helmsteddler, the new sexual abuse that was happening to him and his sister at the Edwards' home. Despite this disclosure, for his 8th grade year, RJ was again removed from the Navajo Nation by the LDS Defendants and again placed with the Edwards family. During his 8th grade year . . . he witnessed the same sister being sexually abused as had occurred during the previous year. *Id.* ¶ 21. The next year, sisters of RJ were abused yet again. *Id.* ¶ 22.

There are specific allegations of negligence alleged. For example, par. 43 of RJ's/MM's Complaint states:

> 43. The negligent acts of removing Plaintiffs from the Navajo Nation and the decision to place them in dangerous homes occurred on the Navajo Nation. Likewise, the failure to disclose to Plaintiffs' parents, to police or to child protective services, about sexual abuse that was occurring within the LPP also occurred within the Navajo Nation.

In addition to these claims of negligence, Defendants also seek non monetary relief in their original filings. As alleged in all of Defendants' Navajo Nation Complaints, children from the Navajo Nation began to be placed in the ISPP as early as 1946. *See Pls.' Ex. A,* at ¶ 9; *Pls.' Ex. B,* at ¶ 8; *Pls.' Ex. C,* at ¶ 8. This program continued for over forty years, ending in approximately 1990, with many tens of thousands of Navajo Nation children having participated.

Id. Moreover, the curse doctrine explained in the Complaints has been alleged to not only harm the Defendants, but also the welfare of the Tribe. *See Pls.' Exs. A, B & C.* Indeed, the 8th cause of action is aimed at restoring the cultural harm brought to the Tribe by the ISPP. *See id.* Additionally, the 7th cause of action alleges how Plaintiffs' past and current policies relating to the reporting of child sexual abuse have a direct impact on the health and welfare of this Tribe. *See id.* Due to the multiple individuals who have come forward alleging abuse through Plaintiffs' ISPP, Defendants contend that Plaintiffs' conduct has risen to a level that has damaged the health and welfare of the Tribe members, the Tribe as a whole, and the Tribe's unique culture. *See id.*

Additionally, it can be inferred that the Church Entities entered into consensual relationships with the Tribe or its members through commercial dealing, contracts, leases or other arrangements including but not limited to: individual agreements with tribal families to enroll children in the ISPP, and large scale agreements between the Church Entities and the Navajo Tribe setting parameters for the ISPP, or agreements allowing missionaries and churches within the boundaries of the Navajo Nation. This information bears on the jurisdictional analysis.

Because of the various claims of negligence against the Church Entities, the non-monetary relief sought and the fact that the Church's ISPP has such a prominent presence in the Navajo Nation during 40 plus years this program was in place, it would be premature for this Court to make any sort of determination before the Tribal Court itself has had an opportunity to create a full record and determine its own jurisdiction.

C. Plaintiffs' conduct does give rise to tribal jurisdiction.

Plaintiffs argue that their alleged failures to report or failures to act are not "conduct

occurring on the reservation" but are instead instances of inaction which do not give rise to tribal jurisdiction. *Pls.' Reply Memo.*, at 5.

This argument not only offends common sense but also survivors of sexual abuse in general. It is alleged that Plaintiffs' agents were on the Navajo Nation when they were told of the abuse. Instead of reporting this abuse to the proper authorities, it can only be inferred at this point that the decision was made to not report the abuse. Similarly, instead of protecting the children who were abused, the decision was made to place them in abusive families in subsequent years, despite these reports of prior abuse.

Plaintiffs also claim that in order for the Tribal Court to "establish jurisdiction", Defendants must show, as a threshold matter, that the Church Entities engaged in tortious conduct on the reservation." *Id.* at 3. In support for this assertion that "Non-tortious conduct, even if it took place, in part, on the reservation, cannot create tribal jurisdiction over claims for tortious conduct off the reservation," Plaintiffs cite to *Atkinson Trading Co. v. Shirley*, 523 U.S. 645, 656 (2001). Defendants find no such support in the *Atkinson* case for such an assertion. In fact, the *Atkinson* case does not involve tortious action whatsoever, but instead involves the improper taxation by the Tribe on non-members. Moreover, if one performs a word search in the *Atkinson* case, one will not find the word "tort" or "tortious" throughout.

What the *Atkinson* case does tell us is this: a "consensual relationship [which may lead to Tribal jurisdiction] must stem from commercial dealing, contracts, leases or other arrangements," as opposed to the mere "Indian trader" license which is the case in *Atkinson*. *Atkinson*, 523 U.S. 645, 656. In the instant case, we have consensual relationship regarding the guardianship of children. Indeed, this program took children from their homes, their families and their culture and put them in situations where they were sexually abused, even raped. *Atkinson* deals with

improper taxation issues. The instant case deals with the Church Entities' negligence on the Navajo Nation as described above. *Atkinson* case deals with taxation. This case involves children being taken from their homes, placed with families where they were sexually abused and raped. The two cases are not analogous.

CONCLUSION/REQUEST FOR RELIEF

Due the reasons set forth above, Defendants respectfully request that this Court dismiss, or in the alternative, stay, pending exhaustion of tribal court remedies, Plaintiffs' Complaint for Declaratory Judgment.

DATED this 3rd day of August, 2016

Respectfully submitted:

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By: */s/ Craig K. Vernon*
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CERTIFICATE OF SERVICE

I do hereby certify that on August 3, 2016, I electronically filed the foregoing **Reply to Plaintiffs' Response to Defendants Objection and Motion to Dismiss** using the Court's CM/ECF method, and that a copy of the foregoing was served on all counsel of record, as listed below, via the Court's CM/ECF method.

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