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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 **DEFENDANTS' OBJECTION TO PLAINTIFFS' SECOND AMENDED MOTION FOR PRELIMINARY INJUNCTION** **AND** **DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT FOR DECLARATORY JUDGMENT** Judge Brooke C. Wells

COME NOW the Defendants, by and through counsel, and do hereby object to Plaintiffs' Second Amended Motion for Preliminary Injunction and do also move this Court, pursuant to the Federal Rules of Civil Procedure 12(b), for an order dismissing Plaintiffs' Second Amended Complaint For Declaratory Judgment based on the reasons and arguments outlined below.

INTRODUCTION AND FACTS

On March 22, 2016 (RJ and MM), May 27, 2016 (BN) and June 6, 2016 (LK), Doe

Defendants, 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. Those Complaints claim that each Doe Defendant suffered sexual abuse while enrolled in the Plaintiffs' Indian Student Placement Program (the "ISPP"), from approximately 1965 to 1983, collectively. *Id.* at ¶ 9.

In response, 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. Accordingly, Defendants now file this Motion to Dismiss pursuant to Rule 12(b), of the Federal Rules of Civil Procedure.

ARGUMENTS

I. APPLICABLE LEGAL STANDARDS FOR MOTION TO DISMISS

Under Federal Rule of Civil Procedure 12(b)(6), a purported cause of action may be dismissed when the complaint fails to state a claim upon which relief can be granted.

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal quotations and citations omitted).

Although Plaintiffs' Complaint likely contains sufficient factual content, their claim is not plausible on its face because it is barred by Supreme Court precedent. When a court maintains subject matter jurisdiction via federal question, as it does here, dismissal is proper when a prior decision of the Court has foreclosed the cause of action. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). "Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is 'so insubstantial,

implausible, **foreclosed by prior decisions of this Court**, or otherwise completely devoid of merit as not to involve a federal controversy.'" *Id.* (quoting *Oneida Indian Nation of N. Y. v. County of Oneida*, 414 U.S. 661, 666 (1974)) (emphasis added).

Accordingly, even when the factual matters provided by Plaintiffs are accepted as true, their Complaint has effectively been foreclosed by the prior decision of *National Farmers Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845 (1985). Therefore, stare decisis dictates that the stay or dismissal of Plaintiffs' Complaint is proper.

II. PLAINTIFFS FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

A. The "exhaustion rule" bars this action from Federal Court until the Tribal Court has conclusively ruled on the issue.

Pursuant to the Federal Rules of Civil Procedure 12(b)(6), and the Supreme Court's ruling in *National Farmers*, Plaintiffs fail to state a claim upon which relief can be granted because they have not exhausted their tribal court remedy as it relates to their jurisdictional challenge. *See National Farmers,* 471 U.S. 845 (1985); *see also Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987).

According to *National Farmers*, although the extent of a tribal court's jurisdiction is a federal question, the party challenging that jurisdiction must initiate that challenge in the tribal court. *Id.* at 855–56. "[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." *Id.* 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. This prerequisite has been referred to by the Supreme Court as the exhaustion rule. *See Strate v. A-1 Contractors*, 520 U.S. 438, 448 (1997).

Because Plaintiffs have failed to exhaust remedies through the Tribal Court, Defendants

respectfully ask that Plaintiffs' claim be dismissed, or in the alternative, for this Court to stay its ruling until relief is properly sought in the tribal court.

1. Plaintiffs are not exempt from the exhaustion rule.

While Plaintiffs acknowledge the *National Farmers* exhaustion rule, they contend that the rule does not apply because such a requirement "would serve no purpose other than delay." *Pls.' Second Am. Compl. for Decl. J.,* at ¶ 27. Plaintiffs base this argument on footnotes 7 and 14 in *Strate v. A-1 Contractors*. *Id.*; 520 U.S. 438, 449, 450–60 nn.7, 14 (1997). Essentially, to avoid the exhaustion rule, Plaintiffs must show that the following conditions are met: if exhaustion is motivated by a desire to harass or conducted in bad faith; if the exhaustion is patently contrary to existing jurisdictional prohibitions or other established federal law (like the prohibition of criminal prosecution of non-tribal members by tribal courts or rules set forth in *Montana v. United States*, 450 U.S. 544, 565–56 (1981)); or where exhaustion would be clearly futile because there is no federal provision granting the Tribe jurisdictional power over nonmember—i.e. a clear lack of an applicable *Montana* exception granting tribal jurisdiction over nonmembers. *See Strate,* 520 U.S. 438, 449, 450–60 nn.7, 14; *see also National Farmers*, 471 U.S. at 856 n.21.

None of the exceptions to the exhaustion rule apply to this case. Additionally, there are certain factual and legal examinations required in order to determine the issue of tribal jurisdiction over Plaintiffs. Therefore, tribal jurisdiction "is not automatically foreclosed," and pursuant to *National Farmers*, these jurisdictional issues the Plaintiffs seek this Court to resolve, actually belong in the capable hands of the Tribal Court.

2. The exception to the exhaustion rule of bad faith is not applicable.

Defendants have not acted in bad faith, nor have Plaintiffs alleged such. Rather,

Plaintiffs allege that the exhaustion rule is inapplicable because it "would serve no purpose other than delay." *Pls.' Second Am. Compl. For Decl. J.* at ¶¶ 27–28. There are simply no facts to support this allegation. Defendants originally filed their respective Complaints in the Navajo Nation seeking monetary and non-monetary damages. Delay is the last thing on Defendants' minds. Rather, justice in a timely fashion is what Defendants seek.

3. The exhaustion rule should be followed since it is not patently violative of express jurisdictional prohibitions, nor is it futile.

Because no federal law specifically prohibits or permits tribal jurisdiction over Plaintiffs in this instance, the jurisdictional reach of tribes over nonmembers in such a civil matter is based on the Tribe's inherent sovereignty. *See Pls.' Second Am. Compl. for Decl. J.* at ¶¶ 17–22; *see also Strate*, 520 U.S. at 456. Here, the general rule in *Montana* (that tribal jurisdiction does not extend to nonmembers) does not govern. *See Montana*, 450 U.S. at 565. Instead, the exceptions to the general rule are activated since Defendants have maintained a significant presence within the Navajo Nation for many decades.

Plaintiffs allege that the general rule of *Montana* governs because none of their conduct giving rise to Defendants' Tribal Court Actions occurred on Tribal land. *Pls.' Second Am. Compl. for Decl. J.* at ¶¶ 17–22. However, Defendants have a significantly different version of events and have alleged multiple instances where Plaintiffs' conduct occurred within the Navajo Nation. *See id.* at ¶ 11.

Plaintiffs' agents in the ISPP, baptized Defendants within the Navajo Nation and removed them from their Navajo Nation homes. Pls.' Ex. A, at ¶¶ 12–15; Pls.' Ex. B, at ¶¶ 11–16; Ex. C, at ¶¶ 11–14.

Furthermore, Plaintiffs' alleged negligent conduct also occurred within the Navajo Nation. For example, Defendant RJ alleges: he informed Plaintiffs' agents, who were within the

Navajo Nation, of the sexual abuse he suffered. *Pls.' Ex. A,* at ¶ 17. (RJ disclosed the sexual abuse to Plaintiffs' agents at two different locations within the Navajo Nation: the LDS Chapel in St. Michael's, Arizona, and his home in Sawmill, Arizona). Despite RJ's disclosure of abuse, Plaintiffs' agents both failed to report it to authorities or Defendant RJ's family, and they again placed RJ within another unfit household. *Id.* at ¶¶ 17–19

After the initial round of disclosure, RJ was again molested, and again disclosed this new sexual abuse to Plaintiffs' agents once he returned to the Navajo Nation after the school year ended. *Id.* at ¶ 19 ("When RJ returned to the Navajo Nation . . . he again disclosed to agents of [the Plaintiffs'] the new sexual abuse that was happening to him and his sister at the Edwards' home. Despite this disclosure . . . RJ was again removed from the Navajo Nation by the [Plaintiffs] and again placed with the Edwards family."). *Id.* at ¶¶ 19–21.

The other Defendants have similar allegations that involve Plaintiffs' ISPP and its operations within the Navajo Nation. *Pls.' Ex. A,* at ¶¶ 9–25; *Pls.' Ex. B*, at ¶¶ 8–19; *Pls.' Ex. C*, at ¶¶ 9–18.

Because Plaintiffs made agreements on the Navajo Nation, and negligent conduct occurred there as well, *Montana's* general rule is inapplicable, just as it was in *Atkinson Trading Co. v. Navajo Nation*, 866 F. Supp. 506, 509 (D.N.M. 1994). That Court, in granting the motion to dismiss for failing to exhaust tribal remedies, wrote: "applying *Montana* to preclude exhaustion is not the correct analysis".[1] *Id.*

There are clearly factual disputes between the parties as it relates to jurisdictional issues.

[1] It is noteworthy that the exhaustion rule was followed in both *Atkinson* and *Strate*. In *Atkinson*, the jurisdictional challenge was required to be brought to the Navajo Tax Commission and then the Navajo Supreme Court after a federal judge granted a motion to dismiss for failure to exhaust tribal remedies. *Atkinson Trading Co. v. Navajo Nation*, 866 F. Supp. 506, 509 (D.N.M. 1994); *see also Atkinson trading Co. v. Shirley*, 532 U.S. 648–49. Likewise, in *Strate*, only after respondents' jurisdictional challenge failed in two Tribal Courts, did respondents commence an action in federal court. *Strate v. A1 Contractors*, 520 U.S. at 444.

Such a factual discrepancy dictates that the exhaustion rule should not give way. Instead, the Tribal Court should be given its opportunity to examine whether or not it has jurisdiction over Plaintiffs in this matter, as *National Farmers* dictates. *See National Farmers*, 471 U.S. at 855–56; *see also Strate*, 520 U.S. at 459 n.14.

In fact, the Navajo Nation Supreme Court has weighed in on this very issue. *See John Doe BF v. Diocese of Gallup*, 2011 Navajo Sup. LEXIS 16, *15 (Navajo Sup. Ct. 2011). The Navajo Nation Supreme Court held that "where jurisdiction is disputed, detailed factual findings and legal conclusions under all relevant laws are required, without exception, in civil proceedings concerning non-member defendants" by the tribal trial court. *Id.*

4. The exhaustion rule governs because the general rule of Montana does not apply to the case at bar.

Montana maintained two exceptions to the general rule that tribal courts do not have jurisdictional authority over nonmembers. *Montana v. United States*, 450 U.S. 544, 565–56 (1981). "The first exception relates to nonmembers who enter consensual relationships with the Tribe or its members; the second concerns activity that directly affects the Tribe's political integrity, economic security, health, or welfare." *Strate*, 520 U.S. at 446.

This first exception states: "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements." *Montana*, 450 U.S. at 565.

According to the Fifth Circuit in *Dolgencorp, Inc. v. Miss Band of Choctaw Indians*, and later affirmed by an equally divided Supreme Court, the first *Montana* exception was applicable, granting tribal jurisdiction over employers of agents accused of abuse when the employer entered into a noncommercial consensual relationship with the Tribe. *See Dolgencorp, Inc. v. Miss. Band*

of Choctaw Indians, 746 F.3d 167, 175 (5th Cir. 2014), *aff'd by an equally divided Court* No. 13-1496, 2016 U.S. LEXIS 4056 (June 23, 2016).

Likewise, this exception applies to the case at bar, because the Plaintiffs entered into agreements with the family of each of the Defendants, who were children at the time, to participate in the ISPP. These agreements to be the guardians of each defendant occurred while on the Navajo Nation, when the Defendants were taken from their Navajo Nation homes. *Pls.' Second Am. Compl. for Decl. J.* at ¶¶ 9–12; *see also Pls.' Exs. A, B, & C.* This first *Montana* exception does not require the applicable agreements to be commercial in nature. *See Dolgencorp, Inc.*, 746 F.3d at 173. Moreover, Plaintiffs acknowledge that these agreements took place with Tribe members. *See Pls.' Second Am. Compl. for Decl. J.* at ¶ 12.

The second exception states: "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation 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 566.

This second exception applies to the instant case as well, because the Plaintiffs' negligent acts occurred on the Navajo Nation and caused damages which have "had some direct effect on the . . . health [and] welfare of the tribe." *Id.* 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 members, the Tribe as a whole, and the Tribe's unique culture. *See id.* The cultural harm suffered by the individual Tribal members has, in turn, negatively affected the Tribe's welfare as a whole. *See id.*

Here, both of the *Montana* exceptions are met. Even assuming all factual allegations in Plaintiffs' Complaint as true, it is in no way clear that "the action is patently violative of express jurisdictional prohibitions, or [that] exhaustion would be futile," and so, the exhaustion rule mandates that the Tribal Court is the proper court to make this jurisdictional ruling. *Strate*, 520 U.S. at 449 n.7 (quoting *National Farmers*, 471 U.S. at 856 n.21).

B. Because Plaintiffs acted on Tribal land, The Navajo Nation has additional jurisdictional authority and the exhaustion rule should apply.

An even stronger reason exists as to why the exhaustion rule should apply. Interestingly, *Montana's* jurisdictional exceptions apply to nonmember conduct occurring on land within the Tribal reservation owned by nonmembers. *Montana*, 450 U.S. at 565–66. In the case at bar, many occasions of Plaintiffs' conduct occurred on land owned by the Tribe or its members, such as entering into agreements with Navajo families. *See Pls.' Exs. A, B, & C.*

The *Montana* court stated, "[t]o be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, **even** on non-Indian fee lands." *Montana, 450 U.S. at 565* (emphasis added).

Later, the Supreme Court added: "Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities

presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Strate*, 520 U.S. 483, at 541 (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987)) (internal quotations and citations omitted); *contrast Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (establishing the outright probation of criminal jurisdiction over non-members, even if the criminal conduct is on tribal land).

Furthermore, the Navajo Nation derives authority to regulate nonmember activity within its territory not only from its inherent sovereignty, but from the Treaty of 1896 as well. *See John Doe BF v. Diocese of Gallup*, 2011 Navajo Sup. LEXIS 16, *9 (Navajo Sup. Ct. 2011).

The occurrence of Plaintiffs' conduct on tribal land suggests the Tribal Court ought to be the court to determine if it has jurisdiction over Plaintiffs, since "tribes retain **considerable control over nonmembers conduct on tribal land**." *Strate*, 520 U.S. at 454 (emphasis added).

The Supreme Court of the Navajo Nation has ruled that when jurisdictional issues exist, its trial courts will:

> make detailed factual findings and legal conclusions [to determine] whether the . . . claim arose on or off the Navajo Nation, and whether upon application of relevant Navajo Nation and federal law, an informed decision could be drawn as to whether the Navajo Nation courts had subject matter jurisdiction over the case at hand.

John Doe BF v. Diocese of Gallup, 2011 Navajo Sup. LEXIS 16, *9.

Due to the reasons above, and stare decisis, Plaintiffs' federal question claim is "foreclosed by [the Supreme Court's] prior decision" in *National Farmers*, and the exhaustion rule set forth herein should be implemented.

C. Another reason this action should be dismissed is because the Tribal Court and Judge are indispensable parties that Plaintiffs failed to join under Rule 19.

Pursuant to Rule 12(b)(7) and Rule 19, Plaintiffs' Complaint For Declaratory Judgment should be dismissed for failing to join two indispensable parties, the Tribal District Judge and the

Tribal Court ("Tribal Parties"). "Rule 19 provides a three-step process for determining whether an action should be dismissed for failure to join a purportedly indispensable party." *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 997 (10th Cir. 2001).

First, the court must determine whether the absent person is "necessary." A person is necessary if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest . . . .
>
> If the absent person is necessary, the court must then determine whether joinder is "feasible." . . .
>
> Finally, if joinder is not feasible, the court must decide whether the absent person is "indispensable," i.e., whether in "equity and good conscience" the action can continue in his absence.

Id.; Fed. R. Civ. P. 19.

The Tribal Parties are necessary because in the instant case, if they are absent, complete relief cannot be accorded to the current parties. If this Court were to declare that the Tribal Court lacks subject-matter jurisdiction, enforcing such a ruling over the Tribal Parties, whom reside in a different jurisdiction and are not parties to this action, is especially problematic. *See Pls.' Second Am. Compl. for Decl. J.* at Prayer for Relief, ¶ 1; Fed. R. Civ. P. 19(a)(1)(A).

Moreover, since jurisdiction of the Tribal Court is the germane issue, the Tribal Court and its Judge have a substantial "interest relating to the subject of the action." *Fed. R. Civ. P.* 19(a)(1)(B). Although Plaintiffs argue it is not necessary to join the Tribal Parties because they are "expected to comply with binding pronouncements of the federal courts," this argument does nothing to negate the fact that the Tribal Parties' substantial interest will not be represented at this Court's proceedings if they are not joined. *Pls.' Second Am. Compl. For Decl. J.* at ¶ 29

(quoting *Yellowstone Cnty. V. Pease*, 96 F.3d 1169, 1172–73 (9th Cir. 1969)).

Therefore, due to the Tribal Parties' direct and inescapable interest in their own jurisdictional reach, if this Court rules on the Tribal Court's jurisdiction without joining these parties, they will not be able to adequately protect that interest.

After recognizing the Tribal Parties as necessary parties, this Court must then determine if joining them is feasible. Defendants concede that the Tribal Parties are likely not subject to service of process making the feasibility requirement difficult to achieve.[2] *Fed. R. Civ. P.* 19(a)(1); *Fed. R. Civ. P.* 4(k).

"Before a federal court can assert personal jurisdiction over a defendant in a federal question case, the court must determine (1) 'whether the applicable statute potentially confers jurisdiction' by authorizing service of process on the defendant . . . ." *Peay v. BellSouth Med. Assistance Plan*, 205 F.3d 1206, 1209 (10th Cir. 2000).

Initially, the Tribal Parties are not subject to personal jurisdiction of this Court because they are not within the 100 mile bulge provision of Rule 4(k)(B). *Fed. R. Civ. P.* 4(k)(B).

Therefore, the remaining avenue for this Court to exercise personal jurisdiction over the Tribal Parties is through Rule 4(e)(1), by use of Utah's long-arm statute. *Omni Capital*, 484 U.S. at 105 ("a federal court normally looks either to a federal statute or to the long-arm statute of the State, . . . a prerequisite to its exercise of personal jurisdiction."). Utah Code enumerates the following acts that, if committed, grant Utah personal jurisdiction over those residing outside the state. *Utah Code Ann.* § 78B-3-205 (2016). The relevant acts are:

[2] Defendants recognize that the respective tribal parties were made parties in *Dolgencorp*, *Strate*, and *National Farmers* because they were necessary and indispensible. However, those federal actions were brought in the district in which the Tribal Court sat, so assumedly, and unlike the instant case, joinder was feasible because the federal courts had personal jurisdiction over the tribal parties. *See Dolgencorp*, 746 F.3d 167*; Strate*, 520 U.S. 438, 444 (1997); *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians of Montana*, 560 F. Supp. 213 (D. Mont. 1983), *rev'd*, 471 U.S. 845 (1985).

> (1) the transaction of any business within this state;
> (2) contracting to supply services or goods in this state;
> (3) the causing of any injury within this state whether tortious or by breach of warranty;
> (4) the ownership, use, or possession of any real estate situated in this state;
> (5) contracting to insure any person, property, or risk located within this state at the time of contracting;

Id.

It is unknown whether the Tribal Parties have committed any of these acts within the state of Utah, therefore whether personal jurisdiction can be established through service remains an open question.

In the event that this Court determines it is not feasible to join the necessary Tribal Parties, this action should be dismissed because this Court cannot in equity and good conscience continue without the indispensable Tribal Parties. *See Citizen Potawatomi Nation*, 248 F.3d at 997. The factors examined by the Court when making this determination are:

> First, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Id.; *Fed. R. Civ. P.* 19(b).

Due the jurisdictional nature of this action, a judgment rendered by this Court denying Tribal jurisdiction will prejudice the Tribal Parties and Defendants. Such a judgment would deprive Defendants of their chosen forum and their day in court, due to Utah's draconian statute of limitations. Moreover, the Tribal Parties will be prejudiced because a decision by this Court may limit the Tribal Court's own jurisdiction. Not to mention, the Tribal Parties have a prudential right established in *National Farmers* to decide this issue themselves.

Also, it should be persuasive that in *Dolgencorp*, *Strate*, and *National Farmers*, the

respective Tribal Parties were defendants, suggesting their indispensible nature. *See supra* note 2. However, those federal actions were brought in districts which were able to establish personal jurisdiction over the Tribal Parties. *Id.*

Based on the reasons above, Defendants respectfully request that this Court dismiss this action for failure to join an indispensible party. An alternative remedy is to transfer venue to the District Court in New Mexico, where the Navajo Nation District Court sits, thereby allowing these indispensable parties to be served.

D. The Brillhart rule is yet another reason this Court should stay this action pending exhaustion of tribal court remedies.

Following the Supreme Court's ruling in *Wilton v. Seven Falls Co.*, the Tenth Circuit has stated "that district courts have 'unique and substantial discretion' in determining whether to declare the rights of litigants when duplicative state proceedings exist. This discretion is conferred upon the district courts by the Declaratory Judgment Act." *United States v. City of Las Cruces*, 289 F.3d 1170, 1179–80 (10th Cir. 2002) (quoting *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286–87 (1995)) (internal citation omitted). Hence, "a district court has discretion to withhold its exercise of jurisdiction over declaratory judgment actions." *Id.* at 1180 (quotations omitted).

This unique and substantial discretion over declaratory judgments is known as the *Brillhart* rule. *See City of Las Cruces*, 289 F.3d at 1181. Pursuant to the *Brillhart* rule and the *Mhoon* factors used by the Tenth Circuit, this Court should decline to exercise jurisdiction over this case, even if it finds this action is properly before it. *See State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979 (10th Cir. 1994); *City of Las Cruces*, 289 F.3d 1170; *Mid-Continent Cas. Co. v. Vill. at Deer Creek Homeowners Ass'n*, 685 F.3d 977 (10th Cir. 2012).

1. <u>An underlying Tribal Court action is sufficiently analogous to a state court action for a *Brillhart/Wilton* analysis.</u>

Because of the parallel nature of the underlying Tribal Court action, the competency of the Navajo Nation, and the existence of the exhaustion rule, there is no reasonable distinction between an underlying state court action and a tribal court action.

Because the Supreme Court of the Navajo Nation requires its trial courts to conduct a thorough investigation into federal law in order to establish subject-matter jurisdiction, the same investigation pending before this Court, the Tribal Court action fits into the *Wilton/Brillhart* analysis. *Wilton*, 515 U.S. at 282 ("ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court **presenting the same issues** . . .") (quoting *Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 494 (1942) (emphasis added)); *John Doe BF*, 2011 Navajo Sup. LEXIS 16, *10 ("As a result of the developments in federal law, an analysis of jurisdictional basis under all relevant laws is proper and shall be required of our district courts . . . .").

Moreover, the exhaustion rule, along with the inherent sovereignty given to Tribes and their respective courts, gives credence the idea that a tribal court should suffice in a *Brillhart* rule analysis. "A federal court must always show respect for the jurisdiction of other tribunals. Specifically, only in the most extraordinary circumstances should a federal court enjoin the conduct of litigation in a **state court** or a **tribal court**." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 21 (1987) (Stevens, J. concurring in part and dissenting in part) (emphasis added).

Due to these circumstances, this Court should find that an underlying tribal Court action is adequate for a *Brillhart/Wilton* analysis.

2. <u>Underlying federal question jurisdiction should not eliminate this Court's unique and substantial discretion over this declaratory judgment action.</u>

Although the Tenth Circuit both expresses concern over using the *Brillhart* rule when the federal courts' subject-matter jurisdiction is based on federal question, and avoided having to

decide on that issue, it nonetheless outlined case law allowing such a determination. *City of Las Cruces*, 289 F.3d at 1181.

> Some courts have held that district court have discretion to refuse to entertain suits involving federal questions if the relief requested is declaratory in nature. *See, e.g., Int'l Ass'n of Entrepreneurs of Am. v. Angoff*, 58 F.3d 1266, 1270 (8th Cir. 1995) (finding no abuse of discretion in district court's refusal to exercise jurisdiction over suit asserting that ERISA preempted state insurance licensing requirement); *Dr. Beck & Co. G.M.B.H. v. Gen'l Elec. Co.*, 317 F.2d 538, 539 (2d Cir. 1963) (patent infringement); *see also* 10B Charles Alan Wright et al., Federal Practice and Procedure § 2761 (3d ed. 1998).

Id.

Moreover, the Court also wrote, "[t]he nature of the relief requested by the plaintiff, not the jurisdictional basis of the suit is the touchstone" of a Brillhart rule analysis. *Id.*

Additionally, *Wilton* did not place an absolute bar on a districts court's use of the *Brillhart* rule when a federal question is the basis for subject-matter jurisdiction. *Wilton*, 515 U.S. at 290. Rather, the Court recognized that such a determination was on the outer boundaries of the *Brillhart* rule. *Id.* ("We do not attempt at this time to delineate the outer boundaries of that discretion in other cases, for example, cases raising issues of federal law . . . .").

Thankfully in this case, the explicit exhaustion rule set out by the Supreme Court in *National Farmers* strongly suggests that this type of federal question is exactly the type within the outer boundaries of the *Brillhart* rule. Due to the exhaustion rule, this type of federal question should not only grant this District Court substantial discretion of refusal through the *Brillhart* rule, but is also the type of federal question that insists upon relinquishment of jurisdiction to the Tribal Court.

3. <u>The Mhoon factors favor a discretionary refusal to determine this action.</u>

The Tenth Circuit has established a five-factor test for determining whether a district court should exercise its discretion in not adjudicating a declaratory judgment. *Mid-Continent*

Cas. Co. v. Vill at Deer Creek Homeowners Ass'n, 685 F.3d 977, 980–81 (10th Cir. 2012). The factors are:

> [1] whether a declaratory action would settle the controversy; [2] whether it would serve a useful purpose in clarifying the legal relations at issue; [3] whether the declaratory remedy is being used merely for the purpose of procedural fencing or to provide an arena for a race to res judicata; [4] whether use of a declaratory action would increase friction between our federal and [tribal] courts and improperly encroach upon [tribal] jurisdiction; and [5] whether there is an alternative remedy which is better or more effective.

Id. (quoting *State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 983 (10th Cir. 1994)).

Importantly, the Tenth Circuit recalls that the first two factors, along with the overall inquiry, are "designed to shed light on the overall question of whether the controversy would be better settled in [the underlying] court." *City of Las Cruces*, 289 F.3d at 1187. That being said, although it is likely that a declaratory judgment from this Court would settle the controversy of whether or not Defendants may bring their personal injury claim in the Tribal Court, the controversy is nonetheless better settled by the Tribal Court.

The Tenth Circuit has again realized that exercising its discretion not to proceed is proper when the underlying court "will be more than adequate to decide the rights of the" parties. *Id.* at 1189. In the instant case, the Tribal Court is not only competent, it is compelled by its Supreme Court to closely examine federal case law dealing with this jurisdictional issue. *See John Doe BF*, 2011 Navajo Sup. LEXIS 16, *10.

Moreover, the Tribal Court has a substantial interest in determining this issue regarding its Tribe members, especially when the underlying personal injury claim is based on a prevalent, widespread epidemic of Plaintiffs' negligence, which has negatively impacted the Tribe's cultural integrity and overall wellbeing. *See Pls.' Exs. A, B, & C.* The Supreme Court of the Navajo Nation wrote, "Our courts have a duty, in parens patriae, to ensure allegations of harm to

our children are fully heard and not dismissed on mere technicalities." *John Doe BF*, 2011 Navajo Sup. LEXIS 16, *27–28.

Next, it seems that this Court should at least be concerned that Plaintiffs are engaged in forum shopping and procedural fencing. Even after their admission of the exhaustion rule, they, without filing answers to the Tribal Court actions, challenged Defendants' Complaints on jurisdictional grounds in order to invoke a more favorable statute of limitations and undercut Defendants' ability to have their day in court. *See Pls.' Second Am. Compl. for Decl. J.* at ¶ 27. This included filing a Motion For Temporary Restraining Order against Defendants to prevent the Tribal Court action. *See Case 2:16-cv-00453-PMW,* Document 3, filed 5/31/16.

The last two factors suggest this Court should exercise its discretion and refrain from determining the jurisdictional issue at bar because, firstly, this action both undermines the Tribal Court's inherent sovereignty and, secondly, the Supreme Court has already outline in *National Farmers* why the Tribal Court "is an alternative remedy which is better or more effective." *Mid-Continent Cas. Co.*, 685 F.3d 977, 980–81. The Supreme Court wrote:

> 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, 471 U.S. 845, 856–57 (1985).

Again, because of the exhaustion rule, this Court's determination of this jurisdictional

issue through a declaratory judgment, "would increase friction between our federal and [tribal] courts and improperly encroach upon [tribal] jurisdiction." *Mid-Continent Cas. Co.*, 685 F.3d at 980–81.

In the event that this Court determines the instant action to be properly before it, it should exercise its discretionary power under the *Brillhart* rule, and stay a decision so that the Tribal Court may properly decide this issue.

CONCLUSION/REQUEST FOR RELIEF

Due the reasons set forth within this Motion, Defendants respectfully request that this Court deny Plaintiffs' Second Amended Motion for Preliminary Injunction and dismiss Plaintiffs' Amended Complaint for Declaratory Judgment. In the alternative, Defendants respectfully request this Court exercise its discretion under the *Brillhart* rule and dismiss Plaintiffs' Complaint so that Tribal Court remedies can be exhausted by allowing the Tribal Court to rule on these jurisdictional issues.

DATED this 11th day of July, 2016

Respectfully submitted:

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Craig K. Vernon

CERTIFICATE OF SERVICE

I do hereby certify that on July 11, 2016, I electronically filed the foregoing **Defendants' Objection To Plaintiffs' Second Amended Motion For Preliminary Injunction And Defendants' Motion To Dismiss Plaintiffs' Amended Complaint For Declaratory Judgment** 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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