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UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

AMERIND RISK MANAGEMENT CORPORATION, a federally chartered Section 17 Tribal Corporation, Plaintiff, v. BLACKFEET HOUSING, Defendant.	**CASE NO. 1:16-cv-01093-JAP-KK**

DEFENDANT'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

Introduction and Summary

The Plaintiff, Amerind Risk Management Corp., (hereinafter "Amerind"), has filed the instant case asserting that it seeks protection from an action in the Blackfeet Tribal Court (Doc. 1, p.1, ¶1. It seeks the protection of this court ostensibly because of its view that the tribal court

of the sovereign Blackfeet Tribe, a/k/a the Blackfeet Nation, a federally recognized American Indian Tribe, with which it has voluntarily chosen to do business on the Blackfeet Reservation, in Amerind's view, does not have jurisdiction over it. (Doc. 1, p.1, ¶1 and p.2,¶7, *et passim*).

Amerind alleges that the Blackfeet Tribal Court's assertion of jurisdiction over it is a federal question that satisfies the jurisdictional prerequisite of 28 U.S.C. § 1331. As will be explained in greater detail below, this is both legally incorrect and it demonstrates a fundamental lack of understanding of the United States Supreme Court's well settled doctrine of the Court's required tribal/federal jurisdictional jurisprudence as articulated in *National Farmers Union Cos. v. Crow Tribe*, 471 U.S. 845 (1985); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); and, *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). Amerind, also asserts the jurisdiction of this court based on its allegation of complete diversity of citizenship that it asserts satisfies 28 U.S.C. § 1332. (Doc. 1, p.2, ¶8). Finally, Amerind pleads, incorrectly, Supplemental Jurisdiction under 28 U.S.C. § 1367 and Declaratory and Injunctive Relief under 28 U.S.C. §§ 2201-02. (Doc. 1, p.2, ¶6), each it purports satisfies the jurisdictional basis of this court to entertain this case.

As will be explained in detail below, federal question jurisdiction does not exist. It is also barred by *res judicata* or collateral estoppel, There is no diversity of citizenship to satisfy 28 U.S.C. § 1332 in addition to it also being barred based on either *res judicata* or collateral estoppel. Furthermore, it is axiomatic that absent jurisdiction on some other independent basis, such as federal question or diversity jurisdiction, neither Supplemental Jurisdiction nor Declaratory and Injunctive Relief, *ipso facto*, provide this court with the requisite independent basis for jurisdiction. Based upon the reasons articulated in Defendant's Brief in Support of Its Motion to Dismiss as supplemented by this Reply Brief in Support of Its Motion to Dismiss, the

Defendant's Motion to Dismiss should be granted and this case should be dismissed with prejudice.

Procedural Facts

A. First Complaint

On January 28, 2015, Amerind filed a complaint in this court against Defendant, asserting jurisdiction based on 28 U.S.C. §1331 and 1362 and 9 U.S.C. §4. (Ex. 6. p. 9-10). Amerind alleged two counts: 1) Specific Performance to Compel Arbitration, and 2) Declaratory Relief. (*Id.*). Amerind stated in its first complaint that certain provisions of its insurance policy, that it sold to Defendant to insure Defendant's houses located solely on the Blackfeet Indian Reservation, compel arbitration. (*Id.* p.10 ¶8. Amerind admits that none of these provisions call for arbitration to be with AAA or CPA. (*Id.* p.8, ¶22). Furthermore, Amerind admitted in its first complaint "Upon information and belief Blackfeet Housing is a tribally designated housing authority *created* and solely owned by the Blackfeet Tribal Business Council the governing body of the Blackfeet Nation." (*Id.* p.2, ¶2).

Amerind states in its complaint that Blackfeet Housing is a participant in Amerind's Tribal Operation Protection Program, ("TOPP") a shared risk pool, through its participation agreement. (*Id.* p.2 ¶ 3). Amerind stated Blackfeet Housing is also a member of Amerind through its regional representation on the Amerind Board of Directors. (*Id.*) Amerind states "…[p]articpants in TOPP agree to jointly share in the costs of protecting against financial loss and is the monetary claim that may arise from financial loss." (*Id.* p. 2 & 3).

On May 11, 2015, this Court issued its order and accompanying opinion dismissing Amerind's complaint for lack of federal question jurisdiction. (Ex. 7) On June 4, 2015, Amerind filed an appeal with the United States Court of Appeals for the Tenth Circuit.

B. Tenth Circuit Court of Appeals Argument

Amerind's opening brief with attachments is three-hundred eighty-four pages. In Amerind's opening brief it argued that the lower court erred for several reasons: 1) Under 28 U.S.C §1653 defective allegations of jurisdiction may be amended in the trial or appellate court and the district court erred by not allowing Amerind to allege diversity jurisdiction; 2) Under 28 USC §1653 Amerind had a right to amend its complaint to allege diversity jurisdiction under 28 USC § 1332; 3) Amerind argued that its complaint may be amended to allege diversity jurisdiction especially if the elements appear on the face of its complaint; 4) the court should permit amendments to its complaint to avoid an injustice; 5) the complaint arises under federal question jurisdiction; 6) the district court did have diversity jurisdiction; 7) public policy strongly favors arbitration, requiring the district court to look through the complaint; 8) The Blackfeet Tribal Court has no jurisdiction over Amerind based on sovereign immunity; and, Amerind is not required to exhaust tribal court remedies as Amerind is a non-member of the Blackfeet Tribe and this raises a question of law that satisfies federal question jurisdiction under 28 U.S.C. § 1331. (Ex. 8, p. i., p. 13-35.)

Blackfeet Housing filed its Appellee Response Brief on 16th day November 2016. The Tenth Circuit Court of Appeals issued its notice of oral argument hearing on January 1, 2016, setting oral arguments for March 8, 2016. On the 29th day of February, 2016, two weeks before this hearing Amerind voluntarily dismissed its appeal never having moved for leave to amend its complaint to allege diversity jurisdiction in either the district court or the appellate court, even though it argued that the district court judge committed reversible error in not allowing it to amend.

ARGUMENT

1. This District Court Has Previously Dismissed Amerind's Claim Due to the Absence of Federal Question Jurisdiction Notwithstanding Amerind's Status as a Federally Chartered Corporation under Section 17 Authority.

The principles of *res judicata* apply to questions of jurisdiction. *American Surety Co. v. Baldwin*, 287 U.S. 156, 166 (1932).The 10th Circuit's collateral estoppel requirements as stated in *Matosantos,* quoting from the *Dodge* decision at 203 F.3d at 1198, are:

> "1) the issue previously decided is identical with the one presented in the action in question;
> 2) the prior action has been finally adjudicated on the merits;
> 3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication; and,
> 4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action."

See, . *Dodge v. Cotter Corp.,* 203 F.3d 1190 (10th Cir. 2000); and, *Matosantos Commercial Corp. v. Applebee's International Inc.,* 245 F.3d 1203 (10th Cir 2001).

Amerind has filed two complaints in this court and appealed the dismissal of the first. (See Judge Johnson's Judgment entered May 11, 2015, (Ex. 7, p.1) "**IT IS ORDERED** and **ADJUDGED** that Defendants' Motion to Dismiss is hereby GRANTED on the grounds that this Court lacks subject matter jurisdiction over the matter, thus disposing of this case on its merits and in its entirety." (Emphasis in original)). The issue of federal question is the same as that either raised or that could have been raised in the first and now this case. The first case has been finally adjudicated as evidenced by Amerind's appeal and dismissal of the appeal. The two parties, Amerind and Blackfeet Housing are the same in the first and now this case. And finally, Amerind, the party against whom the doctrine of res judicata is invoked, has had more than a full and fair opportunity to litigate the issues of federal question. Thus all of the Tenth Circuit's requirements are met.

Amerind raises its status as a federally chartered corporation that it asserted was its basis for satisfying the requirements of federal question jurisdiction. Judge Johnson's Memorandum Opinion and Order Granting Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction entered also on May 11, 2015, (Ex. 7, p. 12-14 **)** explains clearly that the mere fact that Amerind is a federally chartered corporation is not dispositive of the federal question issue. Rather, he based his decision on the judicial prerogative to look through the issues to the underlying issue that forms the basis or the gravamen of the action. In this case he correctly identifies the underlying contract upon which Amerind relies. Judge Johnson correctly observed that state law governs that contracts interpretation. The very document upon which Amerind relies for its assertion of its right to insist upon arbitration is its contract with Defendants. Nothing has changed that. It is interesting to note the extent to which Amerind goes to describe where its offices are located, but while it relies upon its contract with Defendant for claiming arbitration as the dispute resolution mechanism, it conveniently ignores that the site of its own performance under the contract or policy with Defendant takes place on the many, many homes it has insured that are damaged which are all on the Blackfeet Reservation, not in New Mexico. Amerind itself emphasizes the very point that is dispositive of the federal question.

Amerind's remaining assertion for a federal question is whether the Blackfeet Tribal Court has jurisdiction over Amerind. Indeed, Judge Johnson, in the very Memorandum Opinion discussed above, points out that the question of a tribe's judicial jurisdiction over a non-native party can be a federal question. (See, Ex. 7, p. 13). It is respectfully submitted that this is the poorly reasoned and unsupported reasoning of the Tenth Circuit in *Dry Creek Lodge* II. See, *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980). That case, widely criticized and even

circumscribed by later Tenth Circuit ruling, involved a landlocked non-tribal member who sought access to his property which required going over Indian Reservation land. The tribe, whose land it was, denied him access to its own courts. He was, therefore, effectively without a judicial remedy. That is not the case here as Amerind's Responsive Brief points out in attaching as an exhibit the ruling of the Blackfeet Tribal Court. **(See, Doc. 17, p. 2).** In addition, the specious reasoning of that case is predicated on the unsupported notion that there is something in federal law that spells out for each tribe what constitutes acting in a manner inconsistent with its status as an American Indian Tribe. As it is well stated in Cohen's Handbook of Federal Indian Law, it is worth quoting the footnote at length here:

> Fn 58. *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980). This decision disregards the holding in *Martinez* that the Indian Civil Rights Act did not waive the sovereign immunity of tribal officials. The Tenth Circuit has subsequently held that *Dry Creek* must be read "narrowly." *Ordinance 59 Asps' v. U.S. Dep't of Interior Sec'y*, 163 F.3d 1150, 1157 (10th Cir. 1988); *White v. Pueblo of San Juan,* 728 F.2d 1307, 1312 (10th Cir. 1984). The Ninth Circuit has rejected the doctrine. *See, e.g., R.J. Williams v. Ft. Belknap Hous. Auth.*, 719 F.2d 979, 981 (9th Cir. 1983).

Footnote 58, p. 986 Cohen's Handbook of Federal Indian Law (2012 ed LexisNexis). It is respectfully submitted that all of the Supreme Court's Jurisprudence on federal/tribal jurisdiction can be completely undone by artfully pleading in any case that a tribe's assertion of jurisdiction over a non-Native, regardless of the nexus such a party may have with the Indian Reservation at issue, is inconsistent with that tribe's status as an American Indian Tribe. Doing so would undo the carefully constructed doctrine the Supreme Court has developed to attain a workable judicial balance respective of the rights of all parties including the federally protected and encouraged policy of tribal self-governance, a key to which is the development of tribal judicial forums. See, *National Farmers Union Cos. v. Crow Tribe*, 471 U.S. 845 (1985); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); and, *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

II. There Are No Differences in Substance Between the Claims Pleaded and the Relief Sought Between Amerind's First Complaint and Its Complaint Herein.

Amerind now argues to this court that the two complaints are not in substance identical and has said:

> The prior case had entirely different claims, and *none of the jurisdictional issues* in this case were previously adjudicated. The prior case sought only to compel arbitration, and the Court held only that there was no federal question jurisdiction. This case, by contrast, seeks declaratory and injunctive relief against tribal court's jurisdiction under federal law, which is clearly a federal question under controlling Supreme Court authority.
>
> (Doc 17, p. 2).

In its first complaint Amerind *did* ask for declaratory and injunctive relief, neither of which provides federal courts with jurisdiction to hear a case. 28 U.S.C.§ 2201-02, entitled "Creation of remedy." Provides only a remedy in a federal court "of an actual case of controversy within its jurisdiction." It is axiomatic that the Declaratory Judgment Act only provides authority for a remedy and is not, by itself, a basis for an Article III federal court's jurisdiction over a case. Those sections of the judicial code only provide federal courts with authority to provide specified forms of relief in declaring rights and issuing injunctions to enforce or protect rights so declared. The facts that support this argument are the same facts Amerind argued in both courts. Nothing has changed. Amerind argued in the first case that this court had federal question jurisdiction based on the Indian Reorganization Act and Amerind knew at that time who the parties were and stated such in its brief. Amerind even cited to the same legal authority for grounds for this court having jurisdiction, which was *National Farmers Union and Strate v. A-1 Contractors*. (See Ex. 8, p.13-32). Amerind argued that it was a non-member of the Blackfeet Tribe so the New Mexico Federal Court had jurisdiction. See *Id*. at 32.

II. AMERIND ARGUED ON APPEAL THE ISSUE OF DIVERSITY JURISDICTION.

Amerind did not allege diversity jurisdiction in its complaint until it filed its appeal. On Appeal, Amerind argued that the lower court committed reversible error by not allowing Amerind to amend and include diversity jurisdiction but at no point did it file a motion to amend its complaint. Amerind argued that the Court should allow an amendment to avoid an injustice. (Ex. 8, p.26). With all of this having been argued, Amerind now boldly asserts that it has filed an entirely different claim and none of the jurisdictional issues in this case were previously adjudicated. Amerind clearly could have filed a motion to amend the pleadings or continued with its appeal on this issue. Given Amerind argued diversity jurisdiction on appeal proves Amerind knew that diversity jurisdiction should have been argued in its first complaint. Furthermore, Amerind had every opportunity to do so.

In this case, we are dealing with a prior case wherein Amerind alleged diversity existed on its face. While Amerind argues that the issues it raises in its second complaint were not litigated, a review of the prior case record, for all practical purposes shows this is not true. Amerind vigorously litigated it until just prior to oral argument when it chose to abandon its appeal. It has waived the right to continue to litigate this issue as it has had every opportunity to do so and, after imposing on judicial resources and those of Defendant, it chose to not pursue it further.

III. PERSONAL JURISDICTION

The Participation Agreement contains no forum selection clause. The clause to which Amerind refers is to specific to enforcement of an Arbitration award but for any other issues it is in a court of competent jurisdiction. The Participation Agreement provides:

> 8. **Arbitration**
> (a) Scope of Arbitration. The parties shall resolve any dispute arising out of or relating to this agreement by informal mediation and, if the parties do not resolve the dispute within 90 days of the initiation of informal mediation, then by binding arbitration as follows:

(1) The parties will jointly select a single arbitrator to conduct the arbitration. If the parties cannot agree on the arbitrator, then either party may request the New Mexico Bar Association to select the arbitrator.
(2) The Arbitration Rules of American Arbitration Association will govern the arbitration.

(3) The arbitrator has authority to award compensatory damages (but not punitive or exemplary damages), interest, attorneys' fees, and arbitration proceeding costs, and in any event on the condition that any award entered against ARMC shall be payable solely from the assets of TOPP, not from the assets of ARMC or any other protected cell or risk pool administered by ARMC. If the arbitrator refuses to award attorneys' fees and arbitration proceeding costs, then the parties shall equally share the arbitration costs and bear their own attorneys' fees. The arbitrator must render a written decision setting forth the factual and legal basis of the award. There must be an arbitration record that includes all hearings and all evidence (including exhibits, deposition transcripts, affidavits, etc., admitted into evidence) in the arbitration proceeding.

(5) The arbitrator's award is final, and may be entered and enforced only in either the United States District Court for the District of New Mexico, the Second Judicial District Court of the State of New Mexico, or the Pueblo of Santa Ana Tribal Court (these courts, the "Courts of Competent Jurisdiction"). For this purpose, each party agrees to submit to the jurisdiction of the Courts of Competent Jurisdiction. The Federal Arbitration Act, 9 U.S.C. §§ 1-16, shall govern all matters relating to the enforceability of this section 8, and any arbitrator's award rendered.

(6) The arbitrator shall apply the substantive law of the Pueblo of Santa Ana, exclusive of any conflict of law rules.

(7) Any arbitration proceeding under this regulation must be brought no later than one year after the dispute arose. The failure to timely bring an arbitration proceeding is (i) an absolute bar to the commencement of the arbitration proceeding concerning the dispute and (ii) a waiver of the dispute.

(8) Each party is required to continue to perform its obligations under the regulation pending final resolution of the arbitration proceeding unless to do so would be impossible or impracticable under the circumstances.

(9) Either party may bring an action in either one of the Courts of Competent Jurisdiction to: (i) compel arbitration, (ii) determine the validity of this agreement or this section 8, (iii) determine the authority of the signatories to this agreement, or (iv) determine whether tribal sovereign immunity or tribal remedies has been waived. To the extent permitted by law the Participant waives the exhaustion of tribal court remedies.
(See Ex. 9)

First Section 8(5) deals with the enforcement of an arbitrator's decision. This is not applicable in this case. Second, Section 8(9) states that the parties can bring an action in either court of competent jurisdiction but does not specifically state what court of competent jurisdiction, thus, it is reasonable to argue that the Blackfeet Tribal Court is the court of competent jurisdiction

Third, the Tribal Operation Protection Program ("TOPP") provides:

> Legal Action Against Us You agree not to bring legal action against us unless you have first complied with all conditions of this document, and the amount of our obligation to pay has been finally determined either by a non-appealable final judgment ***after a trial in a court of competent jurisdiction*** or a Settlement Agreement between you, the claimant and us. You also agree to bring any action against us within one year after a loss occurs, but not until thirty (30) days after the Settlement Agreement has been filed with us. (See Ex. 10)

This document states that the issue of legal action against Amerind is "after a trial in a court of competent jurisdiction." Again the Blackfeet Tribal Court is a court of competent jurisdiction. Finally, since Amerind has two controlling documents that state the matter shall be in a court of competent jurisdiction, this does not amount to a forum selection clause, but instead, authorizes Blackfeet Housing to file its complaint in the Blackfeet Tribal Court.

Further, the TOPP policy provision provides that enforcement of an arbitration provision may be done in tribal court.

> **Arbitration** If **you** and **we** do not agree whether coverage is provided by the **document**, then either party may make a written demand for arbitration, which arbitration shall be resolved in accordance with the CPR (Center for Public Resources) Institute for Dispute Resolution Rules for Non-Administered Arbitration by three arbitrators, one of whom each party shall designate in accordance with Rule 5.4 of such Rules. Each party will: a. Pay the expenses it incurs; and b. Bear the expenses of the third arbitrator equally. Unless both parties agree otherwise, arbitration will take place at **our** address as shown on the **Certificate of Coverage**. Any judgment upon the award rendered by the arbitrators may be entered to your tribal or any federal court of competent jurisdiction. (See Ex. 10)

The language in the Participation Agreement and TOPP policy allows a claim to be filed in courts of competent jurisdiction. Neither policy specifically excludes a tribal policy and the TOPP policy specifically states a tribal court is a court of competent jurisdiction. For these reasons Blackfeet Housing believes neither document contains a forum selection clause.

CONCLUSION

Defendant respectfully urges to the Court, based on the reasons and legal authority stated in its Motion to Dismiss, its Brief in Support of that Motion and the additional reasons and legal authority in this Reply Brief, that Plaintiff's complaint and case be dismissed with prejudice.

Respectfully submitted this 19th day of December, 2016,

by /s/ Terryl T. Matt

by /s/ Alan R. Taradash

CERTIFICATE OF COMPLIANCE

I hereby certify that the Reply complies with Rule 7.5 in that the brief is not more than 12 pages double-spaced.

/s/ Terryl T. Matt
Terryl T. Matt
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served this 19th day of December 2016 via the Court's ECF system upon:

/s/Terryl T. Matt
Certifier