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IN THE UNITED STATES DISTRICT COURT

DISTRICT COURT OF ARIZONA

PROGRESSIVE ADVANCED INSURANCE COMPANY, an Ohio Insurance Company, Plaintiff, vs. DANA WORKER, an individual; and DELVETA WEST, an individual, Defendants.	Case No.: CV – 16-08107-PCT-JJT **DEFENDANTS' MOTION TO DISMISS** Assigned to the Honorable John J. Tuchi (Oral Argument Requested)

Defendants Dana Worker and Delveta West move the Court to dismiss this case because Plaintiff Progressive Advanced Insurance Company (Progressive) failed to exhaust available remedies within the Navajo Nation where clear jurisdiction exists. The attached Memorandum and exhibits support this Motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Facts and Procedural History

On March 2, 2015, Dana Worker suffered head trauma and fractures to her lower back in an auto collision on westbound Interstate-10 near Southern Avenue in Tempe, AZ. **Ex. 1**: Collision Report. The injuries she suffered necessitated

significant medical medical care, with charges in excess of $198,305.01 that has and will drastically affect Dana's quality of life. **Ex. 2** Medical Bills.

Dana is a certified member of the Navajo Nation. **Ex. 3**: Certificate of Navajo Blood. At the time of the collision Dana resided at her mother's, Delveta West, home on the Navajo Nation (in Coconino County, AZ) in the LeChee Chapter located three miles south on Coppermine Rd. (near Page, AZ). **Ex. 4**: Verification of Residency; **Ex. 5:** Navajo Utility Bill.

Prior to the collision, but while living at the Coppermine Rd. residence, Delveta West used the internet to purchase Defendant Progressive's $250,000.00 individual limits of underinsurance coverage for four vehicles that progressive knew were located at her residence on the Navajo Nation identified by the garaging zip code of 86040. *See e.g.* Plaintiff's Complaint at 3:5, 11, 16, and 22. Delveta named Dana as a driver and resident relative on this auto policy for each vehicle. *Id.* at 3:1-3.

Plaintiff Progressive paid $250,000.00 of underinsurance to Dana but then initiated this action to avoid Navajo law that permits her to stack the three remaining $250,000.00 policies to recover up to $750,000.00 more of underinsurance.

II. Argument

A. Navajo Nation courts have jurisdiction over this case

Both tribal and federal law recognize the Navajo's jurisdiction over this contractual dispute. The Navajo's long arm statute gives their district courts original jurisdiction over "All civil actions in which the defendant is a resident of Navajo Indian Country or has caused an … injury to occur within the territorial jurisdiction of the Navajo Nation," as well as, "All causes of action recognized in law including general principles of American law applicable to courts of general jurisdiction." **Ex. 6:** 7 Navajo Code §253(A)(2-3). Similarly, the U.S. Supreme Court explained that tribal courts enjoy civil jurisdiction over non-member activities when the non-Indians enter into a "consensual relationship with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," or the non-Indians'

conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of a tribe." *Montana v. United States*, 450 U.S. 544, 565-566 (1981). A plain reading of the Navajo Code clearly establishes their view of the availability of jurisdiction as does further analysis of the *Montana* rules.

1. Consensual Relationship

Plaintiff Progressive purposefully availed itself of the Navajo's laws when it established a consensual relationship with Delveta West by entering into a contract over the internet to insure her automobiles garaged on Navajo land.

A consensual relationship exists when a party enters into a commercial contractual relationship with a tribal member. *See Nevada v. Hicks*, 533 U.S. 353, 372 (2001) (private individuals voluntarily submit themselves to tribal regulatory jurisdiction by the arrangements they, or their employers, enter into); *see also Williams v. Lee*, 358 U.S. 217 (1959) (contractual dispute arising from the sale of merchandise by a non-Indian to an Indian on the reservation).

Courts have routinely found that companies conducting business on reservations enter into consensual relationships that fall within tribal jurisdiction even if the company has no physical presence on tribal lands. In *Allstate Indem. Co. v. Stump,* the 9th Circuit held that Allstate's insurance policy sale constituted "purposeful availment" of the Rocky Boy Reservation's laws despite the insured's purchase of the policy taking place in Allstate's off-reservation office. *Id.* 191 F.3d 1071, 1075 (9th Cir. 1999). "[N]ot only did the insurance company [sell] a policy covering travel in [the reservation], it sold the policy to a resident of the reservation." *Id*. Suit in tribal court was just as "…'reasonable' [as] a state's exercise of jurisdiction over a foreign insurance company." *Id*. quoting *Farmers Ins. Exchange v. Portage*, 907 F.2d 911, 914-15 (9th Cir. 1990). Today's "realities of the modern world," like the internet and cellphones, enable companies like Plaintiff Progressive to, "enter a consensual relationship with tribal members or a tribe itself or engage in

activities or conduct on the reservation without physically entering the reservation." *Sprint Comm. Co. v. Wynne*, 121 F.Supp.3d 893, 900 (D.S.D. 2015).

The existence of the contract pled by Plaintiff Progressive in its Complaint combined with Dana's Navajo Registration and Navajo Certificate of Residence demonstrates the company's consensual relationship to do business with the Navajo on the reservation. Those facts establish Navajo jurisdiction over Plaintiff Progressive under the first *Montana* rule.

2. Tribal Interest

Navajo jurisdiction also exists under the second *Montana* rule because the concept of stacking, which Plaintiff Progressive seeks to avoid by this action, is permitted under Navajo public policy and Navajo fundamental law. To violate those core principles would threaten and directly affect "the political integrity, economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566.

The Navajo Supreme Court indicated that stacking aligns with the public policy concerns of the Navajo Nation. **Ex. 7:** *Benalli v. First Nat. Ins. Co.*, 1 Am. Tribal Law 498 (Nav. Sup. 1998). "'Stacking' is a common sense principle. It says that if you buy insurance for more than one vehicle and pay insurance premiums for…coverage more than once, you should be able to have the benefit of all the coverage you buy." *Id*. at 504, ¶44. Regarding business dealings of insurance companies on the Navajo Nation, the Court noted:

> Because large numbers of individuals in this region do not have liability insurance, insurance companies should be required to provide uninsured motorist coverage for their policyholders. The language which provides such coverage will be liberally construed to carry out purposes of compensating those who are injured to the extent that an insured pays premiums for more than one vehicle…Everyone in this region, including insurance agents, is aware that there are large numbers of Indians...and that they have their own territories, laws, and organizations. Insurance companies

> cannot escape those facts and they should take into consideration Indian nation public policy.

Id. at 505, ¶ 49.

Not only does Navajo public policy favor stacking, so does the traditional belief system that controls the fundamental basis of Navajo Nation law. The Navajo common law doctrine of *Nalyeeh* views insurance as, "nothing more than risk-sharing. People who want help when they get hurt put money into a common money bag and entrust that bag to someone. When one of those people is hurt, they go to the holder and ask for help based on need." *Id*. at 508, ¶ 64. In *Bennalli* the Court described stacking as follows: "[The insured] trusted [the insurance company] to hold its money, and it paid extra for five vehicles. [The insured] placed its trust in [the insurance company] and expected that if the [insured]…was hurt, she would receive benefits in accordance with her injury." *Id*. The Navajo Supreme Court then explained that under *Nalyeeh*, "The Navajo maxim is that it should be enough "so there will be no hard feelings." *Id*.

The *Bennalli* case underscores the availability of Navajo jurisdiction pursuant to second *Montana* rule. The Navajo quite clearly claimed stacking to be not only public policy that affects their "political integrity" but also a right that affects the most fundamental "health and welfare of the tribe." Moreover the case made it quite clear to Plaintiff Progressive nearly 20 years ago that it should be on notice of Navajo laws in this area while doing business in Indian country.

B. Progressive failed to try any, let alone exhaust, tribal remedies

It is long established precedent that a party may not sue in federal court to challenge tribal jurisdiction until it has first exhausted its remedies in tribal court. *See Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987); *see also National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 857 (1985)(exhaustion of tribal remedies is required). Exhaustion of tribal remedies includes tribal appellate review on jurisdictional issues. *LaPlante*, 480 U.S. at 17. Even where federal and tribal courts

have concurrent jurisdiction, exhaustion is required. *Id*. at 20. "…[T]he absence of any ongoing litigation over the same matter in tribal courts does not defeat the tribal exhaustion requirement." *Sharber v. Spirit Mountain Gaming, Inc.*, 343 F.3d 974, 976 (9th Cir. 2003). The exhaustion requirement applies unless:

1) "the assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith"; or,
2) "the action is patently violative of express jurisdictional prohibitions"; or
3) "exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction";
4) "it would serve no purpose other than delay."

Strate v. A-1 Contractors, 520 U.S. 438, 459, n. 14 (1997) citing *National Farmers,* 471 U.S. at 856, n.21 (citation omitted). Subject matter jurisdiction must be "plainly" lacking before the District Court can conclude that exhaustion is not required. *Stump*, 191 F.3d at 1072.

What is plainly apparent here is the applicability of *LaPlante* and the absence of any exclusions that would allow Plaintiff Progressive to avoid Navajo jurisdiction. Indian tribes are "distinct, independent political communities," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978), that retain a sovereignty of a "unique and limited character." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Congress and federal courts "…are committed to a policy of supporting tribal self-government and determination." *National Farmers*, 471 U.S. at 856. This policy requires that tribal courts first be afforded the opportunity to determine jurisdiction, while also "…provid[ing] other courts with the benefit of their experience and expertise in such matters in the event of further judicial review." *Id*. at 857. This "…federal policy supporting tribal self-government directs a federal court to stay its hand." *LaPlante*, 480 U.S. at 16. Tribal courts are the "…appropriate forums for exclusive adjudication of disputes affecting important personal property interests of both Indians and non-

Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978). "Adjudication of such matters by any nontribal court infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law." *LaPlante*, 480 U.S. at 16.

III. Conclusion

This Declaratory Action is a blatant attempt at forum shopping. Plaintiff Progressive filed the lawsuit in federal court after Dana made it aware of the Navajo Nation's policy to permit stacking. Both *Montana* rules as well as the Navajo Nation code and case law establish this case should be litigated in Navajo court. Because of those rules, this Court should dismiss the present case under the well-established federal policy of comity that requires exhaustion of tribal remedies.

Dated this 22nd day of August, 2016.

MILLER, PITT, FELDMAN & McANALLY, PC

By: */s/ Nathan Fidel*
José de Jesús Rivera
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EXHIBIT LIST

1. Collision Report

2. Medical Bills

3. Certificate of Navajo Blood

4. Certificate of Navajo Residency

5. Navajo Utility Bill

6. 7 Navajo Code §253

7. *Benalli v. First Nat. Ins. Co.*, 1 Am. Tribal Law 498 (Nav. Sup. 1998)

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2016, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing.

CLERK of the COURT
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COPY mailed this
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