

Evan S. Goldstein (#011866)
Christi A. Woods (#022770)
Herman | Goldstein
1850 East Thunderbird Road
Phoenix, Arizona 85022
(602) 569-8200
(602) 569-8201 Fax
cwoods@hgfir.com
meo@hgfir.com

Attorneys for Progressive Advanced Insurance Company

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Progressive Advanced Insurance
Company, an Ohio Insurance Company,

Plaintiff,

v.

Dana Worker, an individual; and Delveta
West, an individual,

Defendants,

Case No. 3:16-cv-08107-PCT-DJH

**RESPONSE TO DEFENDANTS'
MOTION TO DISMISS**

(Assigned to the Hon. Diane J. Humetewa)

Plaintiff, Progressive Advanced Insurance Company (“Progressive”), by and through undersigned counsel, hereby files its Response to Defendants’ Motion to Dismiss (Doc. 11).

Defendants do not have a colorable claim to tribal jurisdiction under applicable case law. Therefore, their Motion to Dismiss must be denied.

This Response is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS

1 On April 2, 2015, Defendant Dana Worker was involved in an automobile
2 accident on westbound Interstate 10 near Southern Avenue in Tempe, Arizona.

3 As indicated by Defendants, Delveta West purchased a policy of insurance from
4 Progressive prior to April 2, 2015, which named Dana Worker as an insured person.
5 Delveta West purchased the Progressive policy on the internet through Progressive's
6 website at www.Progressive.com. (Copy of the Progressive Policy and Declarations
7 Page attached as Exhibit "A")

8 When purchasing the policy through the internet, Ms. West provided Progressive
9 with only a P.O. Box address of PO Box 2007, Page, AZ 86040. The policy lists the
10 Garaging Zip Code as 86040, which is the zip code for Page, Arizona. Ms. West never
11 identified herself to Progressive as a member of the Navajo nation, nor did she ever
12 provide her true address on the reservation.

13 City of Page is in Coconino County, Arizona. According to the City of Page's
14 official website, "[t]he City of Page is adjacent to the Navajo Nation." "In 1958, some
15 24 square miles of Navajo land were exchanged for a larger tract in Utah, and
16 "Government Camp" (later called Page in honor of Bureau of Reclamation
17 Commissioner John C. Page) was born." (Copy of City of Page History from
18 www.cityofpage.org attached as Exhibit "B")

19 Contrary to Defendants' allegation, the zip code 86040 is not in the Navajo
20 Nation. In fact, Page City Hall is located at 697 Vista Avenue, Page, AZ 86040.

21 Additionally, the Progressive policy purchased by Ms. West contained the
22 following forum selection clause:

23 **TERMS OF POLICY CONFORMED TO STATUTES**

24 If any provision of this policy fails to conform to Arizona statutes, the
25 provision shall be deemed amended to conform to such statutes. All other
26 provisions shall be given full force and effect. **Any disputes as to the coverages provided or the provisions of this policy shall be governed by Arizona law.**

1 (Emphasis added)

2 Defendants now seek to avoid the terms of their insurance contract with
3 Progressive, and Arizona's well-established case law regarding stacking of
4 Underinsured Motorist coverages, by challenging this Court's jurisdiction.

5 **II. LAW/ARGUMENT**

6 "Indian tribes retain their inherent power to determine tribal membership, to
7 regulate domestic relations among members, and to prescribe rules of inheritance for
8 member." *Montana v. United States*, 450 U.S. 544, 564, 101 S.Ct. 1245, 1257 (1981)
9 However, where non-members are concerned, tribal power beyond that "is inconsistent
10 with the dependent status of the tribes, and so cannot survive without express
11 congressional delegation." *Id.* at 564, 1258; *Nevada v. Hicks*, 533 U.S. 353, 359, 121
12 S.Ct. 2304, 2310 (2001).

13 As indicated by subsequent cases, the United States Supreme Court in *Montana*
14 has "announc[ed] the general rule of no jurisdiction over nonmembers." *See Hicks*, 533
15 U.S. at 359, 121 S.Ct. at 2310. "Tribal assertion of regulatory authority over
16 nonmembers must be connected to that right of the Indians to make their own laws and
17 be governed by them." *Id.* at 361, 2311. As it pertains to this case, the regulation of
18 insurance practices is within the sole control of the State of Arizona through the Arizona
19 Department of Insurance.

20 When on-reservation conduct involving only Indians is at issue, state law is
21 generally inapplicable, for the State's regulatory interest is likely to be
22 minimal and the federal interest in encouraging tribal self-government is at
23 its strongest. When, however, state interests outside the reservation are
implicated, States may regulate the activities even of tribe members on
tribal land

24 *Id.* at 362, 2311.

25 The "general proposition that the inherent sovereign powers of an Indian tribe do
26 not extend to the activities of nonmembers of the tribe" has been well-established in

1 various Arizona District Court, 9th Circuit Court, and United State Supreme Court
2 decisions. *See, e.g. Ford Motor Co. v. Todocheene*, 258 F.Supp.2d 1038, 1044 (Ariz.
3 Dist. 2002) As correctly argued by Defendants, there are two narrow exceptions to this
4 general rule: (1) “a tribe may regulate, through taxation, licensing, or other means, the
5 activities of nonmembers who enter into consensual relationships with the tribe or its
6 members, through commercial dealings, contracts, leases, or other arrangements” and
7 (2) “a tribe may also retain inherent power to exercise civil authority over the conduct
8 of non-Indians on fee lands within its reservation when that conduct threatens or has
9 some direct effect on the political integrity, the economic security, or the health or
10 welfare of the tribe.” *Id.* at 1044-45 (citing *Montana*, 450 U.S. at 565-66, 101 S.Ct. at
11 1258-59)

12 **A. Consensual Relationship Exception**

13 The Arizona District Court case of *Ford Motor Co. v. Todocheene* provides an
14 analysis of the “consensual relationship” exception. In that case, Esther Todocheene
15 (“decedent”) died as a result of a single vehicle accident on the Navajo reservation,
16 while driving a Navajo DPS Ford Expedition. *Id.* at 1041. The decedent’s beneficiaries
17 alleged a defective seatbelt in the Ford Expedition. *Id.* It was undisputed that Ford had
18 entered into a contract with the tribe and “financed the tribe’s bulk-purchase of vehicles
19 six times” prior to the accident. *Id.* at 1050-51. The contract even contained a forum
20 selection clause, which stated that “actions which arise out of this Lease or out of the
21 transaction it represents shall be brought in the courts of the Navajo Nation.” *Id.* at
22 1051.

23 Nevertheless, the Arizona District Court emphasized “the basic rule established
24 in *Montana* that tribes ordinarily will not have jurisdiction over the activities of non-
25 Indians.” *Id.* The Court, citing to *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct.
26 1404 (1997), identified several cases that illustrate the “type of activities the Court had

in mind” when carving out the exception. The cases identified in *Todocheene* and *Strate*, which illustrate the limits of the “consensual relationship” exception are:

- *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269 (1959)(declaring tribal jurisdiction exclusive over lawsuits arising out of on-reservation sales transaction between nonmember plaintiff and member defendant)
- *Morris v. Hitchcock*, 194 U.S. 384, 24 S.Ct. 712 (1904)(upholding tribal permit tax on nonmember-owned livestock within boundaries of the Chickasaw Nation)
- *Buster v. Wright*, 135 F. 947 (8th Cir. 1905)(upholding Tribe’s permit tax on nonmembers for the privilege of conducting business within Tribe’s borders)
- *Confederated Tribes of the Colville Reservation v. Washington*, 447 U.S. 134, 100 S.Ct. 2069 (1980)(tribal authority to tax on-reservation cigarette sales to nonmembers)

It is noteworthy that in every case in which a “consensual relationship” has been found, the non-member was voluntarily conducting a business activity on the reservation. Furthermore, the *Todocheene* Court correctly reasoned that “[t]o the extent that tribal jurisdiction can be conferred by consent, it should be real consent. A non-Indian who enters into a contract with the tribe or a member of the tribe that specifically provides for submission to tribal court jurisdiction should be bound by that agreement.” *Todocheene*, 258 F.Supp.2d at 1051.

Other courts have confirmed the narrow application of the two *Montana* exceptions. In *Philip Morris United States v. King Mt. Tobacco Co.*, the 9th Circuit Court of Appeals cited to the same four cases cited by the *Todocheene* Court, stating that: “We cited four cases in explanation of *Montana*’s first exception [including *Williams*]. Each involved regulation of non-Indian activities on the reservation that had a discernable effect on the tribe or its members.” 569 F.3d 932, 937 (9th Cir. 2009)

1 In *Philip Morris*, it was undisputed that Philip Morris' Marlboro cigarettes were
 2 sold throughout the United States, "including to stores on the Yakama Reservation." *Id.*
 3 at 935. Nevertheless, the 9th Circuit held that the Yakama Tribal Court had no colorable
 4 claim to jurisdiction over the dispute between Philip Morris and members of the tribe.
 5 *Id.* at 945.

6 It is fair to say that "real consent" requires knowledge. Progressive cannot enter
 7 a consensual relationship, and be bound by trial court jurisdiction, without having been
 8 given any information to indicate Defendants were members of the Navajo tribe.
 9 Furthermore, the contract between Progressive and Defendants did not "specifically
 10 provide[] for submission to tribal court jurisdiction." To the contrary, the Progressive
 11 contract to which Defendants consented, specifically dictates that "[a]ny disputes as to
 12 **the coverages provided or the provisions of this policy shall be governed by**
 13 **Arizona law.**"

14 Defendants cite to *Allstate Indem. Co. v. Stump*, 191 F.3d 1071 (9th Cir. 1999)
 15 for support of their argument that Progressive entered into a consensual relationship
 16 with a member of the Navajo tribe, i.e. Delveta West. However, the facts of *Stump* are
 17 distinguishable from the case at hand. First, the car accident that formed the basis of the
 18 dispute in *Stump* occurred on a "tribal road in the Rocky Boy Reservation in Montana."
 19 *Id.* at 1072. The car accident here occurred in Tempe, Arizona. Second, the Allstate
 20 policy in *Stump* "bore [the tribal member]'s reservation address, and Allstate mailed the
 21 policy and premium statements to that address." *Id.* Here, the insured only provided a
 22 P.O. Box in Page, Arizona to Progressive. Progressive was never aware of Ms. West's
 23 address on the reservation. Third, the Allstate policy in *Stump* did not contain a forum
 24 selection clause.¹ The Progressive policy at issue contains a forum selection clause,

25
 26 ¹ The *Stump* decision does not discuss any forum selection clauses.

1 which specifically dictates that “[a]ny disputes as to the coverages provided or the
2 provisions of this policy shall be governed by Arizona law.” Ms. West, as the named
3 insured under the policy, specifically agreed to the contract’s forum selection clause.

4 In short, Progressive was only aware that it was entering into a contract with
5 Defendants, who had a P.O. Box in Page, Arizona. In order to enter into a “consensual
6 relationship with a member of the tribe,” it would be necessary for Progressive to know
7 that Ms. West was a member of the tribe. When Ms. West purchased her policy through
8 Progressive’s website, she did not provide any information that would indicate her tribal
9 membership. Additionally, Progressive never consented to tribal court jurisdiction. To
10 the contrary, Defendants agreed to a contract with a forum selection provision in favor
11 of Arizona courts.

12 **B. Political Integrity, Economic Security, Health or Welfare Exception**

13 “The second exception to Montana’s general rule concerns conduct that
14 ‘threatens or has some direct effect on the political integrity, the economic security, or
15 the health or welfare of the tribe.’” *Strate*, 520 U.S. at 457, 117 S.Ct. at 1415. In *Strate*,
16 the United States Supreme Court ruled that tribal courts do not have jurisdiction over
17 personal injury actions against defendants who are not tribal members. This is despite
18 the fact that “those who drive carelessly on a public highway running through a
19 reservation endanger ... and surely jeopardize the safety of tribal members. But if
20 *Montana*’s second exception requires no more, the exception would severely shrink the
21 rule. Again, cases cited in *Montana* indicate the character of the tribal interest the Court
22 envisioned.” *Id.* at 458, 1415.

23 The Supreme Court, in *Strate*, further stated: “Key to [the second exception’s]
24 proper application ... is the Court’s preface: ‘Indian tribes retain their inherent power
25 [to punish tribal offenders,] to determine tribal membership, to regulate domestic
26 relations among members, and to prescribe rules of inheritance for members But [a

1 tribe's inherent power does not reach] beyond what is necessary to protect tribal self-
 2 government or to control internal relations.” *Id.* at 459, 1416 (citing *Montana*, 450 U.S.
 3 at 564).

4 Arizona District Court has similarly held that Montana's second exception
 5 “should be applied narrowly to ensure that tribal court jurisdiction is, in fact, permitted
 6 only in those rare cases where the particular conduct in question has a substantial impact
 7 on the tribe as a whole.” *Todocheene*, 258 F.Supp.2d at 1052.

8 Here, there can be no dispute that an Arizona court's interpretation and
 9 application of insurance policy provisions does not affect the political integrity or the
 10 economic security of the Navajo tribe, or has a substantial impact on the tribe as a
 11 whole. The Arizona Department of Insurance is tasked with overseeing and regulating
 12 the business of insurance in the State of Arizona. Regulation of the business of
 13 insurance is not “necessary to protect tribal self-government or to control internal
 14 relations.” Thus, the second *Montana* exception is clearly inapplicable here.

15 **C. Abstention is Inappropriate because there is no “Colorable Question”**
 16 **regarding Tribal Court Jurisdiction**

17 “[A]bstention is appropriate where there exists a ‘colorable question’ whether the
 18 tribal court has jurisdiction over the asserted claim.” *Philip Morris*, 569 F.3d at 937.
 19 “[W]hen ... it is plain that no federal grant provides for tribal governance of
 20 nonmembers’ conduct on land covered by *Montana*’s main rule ... the exhaustion
 21 requirement would serve no purpose other than delay.” *Hicks*, 533 U.S. at 369, 121
 22 S.Ct. at 2315.

23 Here, there is no “colorable claim” to tribal court jurisdiction. As noted above,
 24 Defendants did not provide any information regarding their tribal membership when
 25 they purchased their policy online at Progressive’s website. Progressive did not know,
 26 and did not enter into a consensual relationship with the understanding that it was

1 subjecting itself to tribal jurisdiction. Progressive's insurance contract specifically
 2 contains a forum selection clause in favor of Arizona courts. The accident that gives
 3 rise to the parties' dispute occurred in Tempe, Arizona, and not on tribal land.

4 In light of the facts of the case, and the case law cited above, it is abundantly
 5 clear that there is no "colorable claim" to tribal jurisdiction. Therefore, exhaustion
 6 would serve no purpose other than delay.

7 **III. CONCLUSION**

8 Contrary to Defendants' assertion, it is they who are forum shopping, and
 9 attempting to avoid the very forum to which they consented in their contract with
 10 Progressive. Defendants' attempt to forum shopping is geared towards avoiding the
 11 well-established Arizona case law regarding prohibition of Underinsured Motorist
 12 stacking. Defendants entered into an insurance contract with an Arizona forum
 13 selection clause, paid a premium equal to all other Progressive policy holders, but are
 14 now seeking to receive benefits in excess of what others are entitled to by virtue of their
 15 tribal membership. Such is not the intended purpose of tribal jurisdiction.

16 Plaintiff Progressive moves this Honorable Court to deny Defendants' Motion to
 17 Dismiss.

18 Dated this 14th day of September, 2016.

19 HERMAN | GOLDSTEIN

20
 21 By: /s/ *Hesam Alagha*
 22 Evan S. Goldstein
 23 Christi A. Woods
 24 Hesam Alagha
 25 1850 E. Thunderbird Rd.
 26 Phoenix, Arizona 85022
 Attorneys for Progressive

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of September, 2016, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing.

Clerk of the Court
United States District Court
401 W. Washington St., Suite 130
Phoenix, Arizona 85003

By: /s/ Diane Arroyo