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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' REPLY IN SUPPORT OF MOTION TO DISMISS** Assigned to the Honorable Diane J. Humetewa (Oral Argument Requested)

The presence of both *Montana v. United States,* 450 U.S. 544, 101 S.Ct. 1245 (1981), tribal-jurisdiction-permitting exceptions, as well as an abundant absence of law and fact supporting the Plaintiff's argument, require this Court to order Progressive to exhaust its tribal remedies before seeking relief as it has done here.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Jurisdiction in the Navajo Nation courts is evident

Neither the legal interpretation nor "facts" advanced by Plaintiff in its Response to Defendants' Motion to Dismiss (Response) refute well-established federal law and show the Navajo courts lacked jurisdiction here. In contrast

Defendants presented facts and law in their Motion demonstrating the applicability of both *Montana* exceptions that permit tribal jurisdiction over non Native Americans.

When tribal jurisdiction is merely plausible under either *Montana* exception, federal courts across the country routinely uphold the *National Farmers Union Ins. Cos. v. Crow Tribe* rule that a party may not challenge tribal jurisdiction in a federal civil court until it has first exhausted its remedies in tribal court. 471 U.S. 845, 856 (1985); *see generally Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). In *Allstate Indem. Co. v. Stump*, 191 F.3d 1071, 1074 (9th Cir. 1999), an insurance company's argument that the off-reservation location of its tortious conduct against a Chippewa Cree tribal member with whom the company entered into contract was not enough to show the tribe lacked jurisdiction. In *Sprint Comm. Co. v. Wynne,* 121 F.Supp.3d 893, 899 (D.S.D. 2015), a telecommunication company's arguments that its contracted services had no physical presence on the Oglala Sioux's reservation and that telecommunication regulation was exclusively a federal function failed to persuade the court that the tribe lacked jurisdiction. Nor was tribal jurisdiction lacking in *DISH Network Serv. v. Laducer*, 725 F.3d 877, 885 (8th Cir. 2013), despite a telecommunication company's argument that the claims arose from a contract and filings entered off reservation but with a Chippewa Turtle Mountain Band tribal member for services on tribal land. Just as in those cases, the non-tribal entity here is attempting reap the benefits of contracted tribal business, which Progressive sought from the borders of the reservation, while shirking a responsibility to appear in tribal court.

A. *Todecheene* and *Phillip Morris* are inapplicable

Plaintiff seeks to narrow both *Montana* exceptions by misinterpreting two cases to focus the Court on a nonissue: whether Progressive knew it was insuring members of the Navajo Nation. Response at 6:6-8.

Plaintiff's main arguments against both *Montana* exceptions rely on *Ford Motor Co. v. Todecheene*, 221 F. Supp. 2d 1070 (D. Ariz. 2002). Response at 4:13-

5:19; 8:4-7. Plaintiff fails to mention that five years after the district court opinion it repeatedly cites, the Ninth Circuit *en banc* withdrew its previous affirmation of the district court's order and remanded the matter to the Navajo courts finding that the tribal court did not "plainly" lack jurisdiction under the second *Montana* exception and staying the appeal until the plaintiff exhausted its tribal remedies. *See Ford Motor Co. v. Todecheene*, 488 F.3d 1215, 1216 (9th Cir. 2007).

Plaintiff also relies on *Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.*, 569 F.3d 932 (9th Cir. 2009), for the premise that a non-tribal entity must have real "knowledge" to form a consensual relationship under the first *Montana* exception. Response at 5:20-6:6. After looking for a "contract or consensual relationship between the parties," the Court found the answer to be, "undisputably no. Philip Morris ha[d] no consensual commercial relationship with King Mountain; rather, they [were] market competitors." *Id.* at 941. So the decision not only doesn't support Plaintiff's conclusion, it specifically demonstrates that the presence of a contract over which the dispute arises helps support the conclusion of a consensual relationship.

B. Plaintiff's arguments contain no factual support

Rather than cite to the record, Plaintiff also attempts to refute the tribal-jurisdiction-supporting facts in the Motion by asking the Court in two separate instances to take its word for granted. Plaintiff is entitled to no such presumption of truthfulness. *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983) *citing Thornhill Publishing Co. v. General Telephone Corp.* 594 F.2d 730, 733-35 (9th Cir. 1979). The Court need not weigh the disputed facts to reach its decision,[1] but if it were to do so, it would see that the Navajo courts are still the appropriate venue.

[1] Progressive's knowledge cannot be fully analyzed here as the parties haven't had an opportunity to begin discovery on that question.

First, to address *Montana's* consensual relationship exception, Plaintiff pleads ignorance: "Ms. West never identified herself to Progressive as a member of the Navajo Nation, nor did she ever provide her true address on the reservation," before accusing, "[c]ontrary to Defendants' allegation, the zip code 86040 is not in the Navajo Nation." Response at 2:10-12 and 2:19-20.

Defendants have not found a case that required a showing of actual or constructive knowledge once a contract created a consensual relationship under the first *Montana* exception, but the willful ignorance of a company knowingly doing business along the borders of a reservation in a town it acknowledges was once part of the reservation, should not be permitted to defeat tribal jurisdiction. Progressive's Response contains no confirmation that it asked for or even provided Delveta West the opportunity to fill in more than a mailing address and a garaging zip code as identified in its insurance policy. *See* Response Ex. 1 at 1. That's troubling given that the zip code 86040 does in fact cover 753 square miles, including not only LeChee but also other large portions of the Navajo Nation. **Ex. 8:** U.S. Zip Codes 86040 Data. Another fact: the 2010 census found the largest share (and nearly a majority) of the zip code's residents identified as Native American with 49.3% . **Ex. 9:** 2010 U.S. Census 86040 Data. Moreover, addresses on the reservation are so notoriously difficult to define that even the LeChee Chapter House and LeChee Health Facility use P.O. Boxes in Page, AZ. **Ex. 10:** LeChee Chapter House Address; **Ex. 11:** LeChee Health Facility Address. Given the combination of these basic facts with the absence of any cited facts advanced by Progressive to the contrary, there seems to be, at the very least, a colorable claim that Progressive, had knowledge or was willfully ignorant of Delveta West and Dana Worker's tribal status and reservation residence while it did business along the borders of the Navajo Nation.

Plaintiff asks the Court on a second occasion to take its word when arguing that the Navajo Nation has no tribal interest under *Montana*'s second exception because regulating insurance is the exclusive province of the Arizona Department of

Insurance so, "there can be no dispute that an Arizona court's interpretation and application of insurance policy provisions does not affect the political integrity or the economic security of the Navajo tribe, or has a substantial impact on the tribe as a whole." Response at 8:8-11. That statement references the overruled *Todecheene* case, advances the same flawed "regulation is a government function" argument denied in *Sprint Comm. Co. v. Wynne*, and blatantly ignores the Navajo tribal interest previously clarified by the Navajo Supreme Court in *Benalli v. First Nat. Ins. Co.*, 1 Am. Tribal Law 498 (Nav. Sup. 1998). So the absence of factual support, in combination with a misunderstanding of the law, dissolves any notion that the Navajo Nation lacks jurisdiction.

C. The Choice-of-Law clause doesn't affect the Navajo's jurisdiction

Plaintiff's reliance on what it calls the policy's "forum selection clause" also does not strip the Navajo courts of jurisdiction. Response at 6:9-13; 6:23-7:11. Instead it symbolizes the extent of Progressive's misunderstanding.

Plaintiff mislabels its own clause to argue for forum control in an attempt to align itself with the district court *Todecheene* opinion, which discounted the effect of a true forum selection clause in a financing agreement because, in the court's view, the lawsuit was "wholly unrelated" to the agreement. *Todecheene,* 221 F.Supp. 2d at 1083. But no language is cited in Progressive's policy to support the existence of a forum selection clause. Instead, Progressive cites the following: "Any disputes as to the coverages provided or the provisions of this policy shall be governed by Arizona law." Response at 2:23-26; *see also* Response, Ex. 1 at 33. Such language, if proper, is commonly referred to as a choice-of-law clause[2] and not a forum selection clause

[2] Choice of law is not an issue before this Court so an analysis doesn't follow but it bears mentioning that once the matter is in the appropriate forum court, Arizona follows the Restatement (Second) of Conflict of Laws to determine which laws to apply. *See Beckler v. State Far, Mut. Ins. Co.,* 195 Ariz. 282, 987 P.2d 768 (App. 1999).

because it discusses the law that should be applied by the appropriate forum court as opposed to the issue here, the jurisdiction in which the matter should be brought.

II. Conclusion

No colorable questions of jurisdiction in the Navajo Nation courts arise here because both *Montana* exceptions so clearly exist. The facts contained in this Motion, at a minimum, demonstrate that Plaintiff had plenty of information available to know it contracted to provide auto insurance to a tribal member residing in the Navajo Nation. Moreover the unopposed *Benalli* decision made it explicitly clear long before this insurance policy that the Navajo Nation found the manner in which not-tribal insurance companies provide auto coverage to their people a matter of utmost importance for tribal self-government. If Plaintiff wishes to explore these issues further, any disputes it has with the facts or law must first be resolved in the tribal court before Progressive can be said to have exhausted its tribal remedies.

Dated this 24th day of October, 2016.

MILLER, PITT, FELDMAN & McANALLY, P.C.

By: /s/ Nathan Fidel
José de Jesús Rivera
Nathan J. Fidel

Attorneys for Defendants

EXHIBIT LIST

From First Brief

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)

From Reply Brief

8. U.S. Zip Codes 86040 Data

9. 2010 U.S. Census 86040 Data

10. LeChee Chapter House Address

11. LeChee Health Facility Address

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 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, AZ 85003

/s/ Jennie Larsen