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Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

WILMINGTON SAVINGS FUND  
SOCIETY, FSB, DOING BUSINESS AS  
CHRISTIANA TRUST, NOT IN ITS  
INDIVIDUAL CAPACITY BUT SOLELY  
AS TRUSTEE FOR BCAT 2014-6TT ,

Plaintiff,

v.

COREY FRYBERG, *et al.*,

Defendants.

No. 2:17-cv-01196 RSL

DEFENDANT TULALIP TRIBES'  
MOTION TO DISMISS FOR LACK OF  
SUBJECT MATTER JURISDICTION

*Note on Motion Calendar:*

NOVEMBER 3, 2017

**I. INTRODUCTION AND REQUESTED RELIEF**

Plaintiff, Wilmington Savings Fund Society (“Wilmington”) brings this action seeking to foreclose on a Note and Deed of Trust executed by Defendant Corey Fryberg, concerning subject property commonly known as 1506 62nd St NW, Tulalip, WA 98271, within the Tulalip Indian Reservation. *First Amended Foreclosure Complaint*, Dkt # 8 at p. 9-10. The Tulalip Tribes is also named as a Defendant in this action for having a possible interest in the property. Dkt #8 at p. 2-3. Through this action, Plaintiff seeks to have any right of the Tulalip Tribes in the subject property adjudged inferior and

1 subordinate to the lien of Plaintiff's Deed of Trust. Dkt. # 8 at p. 10. This Court,  
2 however, lacks subject matter jurisdiction as to Plaintiff's claims against the Tulalip  
3 Tribes for at least two independent reasons. First, as a federally recognized Indian tribal  
4 government, the Tulalip Tribes is neither a foreign state nor a citizen of any state and,  
5 under well-established authority, this fact defeats diversity jurisdiction in this matter.  
6 Second, an Indian tribe's sovereign immunity — unless waived or abrogated — deprives  
7 federal courts of subject matter jurisdiction over claims asserted against the tribe. Here,  
8 both the Tulalip Tribes' status as a federally recognized Indian tribal government and its  
9 sovereign immunity from suit deprive this Court of subject matter jurisdiction. Further,  
10 the suit should be dismissed because the Plaintiffs' have failed to exhaust Tribal Court  
11 remedies by seeking foreclosure pursuant to tribal law, as required by federal statute.  
12 Accordingly, the Tulalip Tribes respectfully requests the Court dismiss Plaintiffs' claims  
13 for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).  
14  
15

## 16 **II. STATEMENT OF FACTS**

### 17 **A. Status of Tulalip Tribes.**

18 The Tulalip Tribes is a sovereign Indian tribe recognized by the Federal  
19 Government of the United States. 82 Fed. Reg. 4915, 4919 (2017). The government of  
20 the Tulalip Tribes includes a Tulalip Tribal Court with full jurisdiction over:  
21

22 (a) all persons natural and legal of any kind and to (b) all subject matters  
23 which, now and in the future, are permitted to be within the jurisdiction of  
24 any Tribal Court of a sovereign Indian tribe or nation recognized by the  
25 United States of America and to (c) all matters having to do with rights in  
26 or encumbrances to lands within or without the Tulalip Indian Reservation  
27 held by the United States in trust for the Tulalip Tribes or its members, in  
28 restricted fee by the Tulalip Tribes, or lands held in fee by members of the  
Tulalip Tribes located within the Tulalip Reservation[.]

1 Tulalip Tribal Code (“TTC”) Section 2.05.020(1).<sup>1</sup> Tribal law provides for a judicial  
2 foreclosure process under tribal law in the Tulalip Tribal Court. TTC Section 6.10.140.  
3 In addition, Tulalip Tribal Code explicitly provides for tribal immunity from suit “except  
4 where the immunity of the Tulalip Tribes or its officers and employees is expressly,  
5 specifically, and unequivocally waived by and in a Tulalip Tribal or Federal statute, a  
6 duly executed contract approved by the Tulalip Board of Directors, or a duly enacted  
7 ordinance or resolution of the Tulalip Board of Directors.” TTC Section 2.05.020(3).

8 **B. Present Action.**

9 The present case concerns land held in trust for Defendant Corey Fryberg, and a  
10 home, located within the Tulalip Indian Reservation. The Tulalip Tribes is named as a  
11 Defendant in this action for having a possible interest in the property. Dkt #8 at p. 2-3.  
12 Through this action, Plaintiff seeks to have any right of the Tulalip Tribes in the subject  
13 property adjudged inferior and subordinate to the lien of Plaintiff’s Deed of Trust. Dkt. #  
14 8 at p. 10.

15 **C. Order to Show Cause**

16 The original Foreclosure Complaint was filed in this case on August 8, 2017. Dkt  
17 #1. On August 17, 2017, the Court issued an Order to Show Cause concerning the  
18 Foreclosure Complaint. Dkt. #6. The Order to Show Cause notes that Plaintiff did not  
19 provide the citizenship of the various parties involved in this litigation, for purposes of  
20 establishing diversity jurisdiction. Dkt. #6 at p. 1. Plaintiff was ordered to file an  
21 amended complaint that adequately establishes this Court’s subject matter jurisdiction.  
22 Dkt. #6 at p. 2.

23 Plaintiff subsequently filed its First Amended Foreclosure Complaint on August  
24 25, 2017. Dkt. #8. This amended complaint provided residency or principal place of  
25 business for defendants other than the Tulalip Tribes. Dkt. #8 at p. 2-3, ¶ 2. However,  
26 regarding the Tulalip Tribes the amended complaint states only that “[o]n information  
27

28 <sup>1</sup> The Tulalip Tribal Code is available online at <http://www.codepublishing.com/WA/Tulalip/>.

1 and belief Tulalip Tribes of Washington is a sovereign tribal nation located in  
2 Washington.” Dkt. #8 at p. 3, ¶ 2.5.

3 On September 28, 2017, this Court issued its Order Vacating Order to Show  
4 Cause, finding that Plaintiff’s amended complaint “identifies the parties’ citizenship and  
5 sufficiently asserts the Court’s jurisdiction under relevant tribal and state law.” Dkt. #14  
6 at p. 1-2.

7 **III. STATEMENT OF ISSUES**

8  
9 1. Should the Court dismiss this case for lack of subject matter jurisdiction where  
10 the Tulalip Tribes, as federally recognized Indian tribal government, is not a citizen of  
11 any state and, thus, Plaintiffs fail to establish diversity jurisdiction under 28 U.S.C. §  
12 1332?

13 2. Should the Court dismiss Plaintiffs’ claims against the Tulalip Tribes for lack of  
14 subject matter jurisdiction where the Tribes’ sovereign immunity deprives this Court of  
15 subject matter jurisdiction and Plaintiffs have made no allegation or showing that  
16 immunity from suit has been abrogated or waived?

17 3. Should the Court dismiss Plaintiffs’ claims for failure to exhaust Tribal Court  
18 remedies by seeking foreclosure under tribal law, as required by 25 U.S.C. § 5135(a)?

19 **IV. EVIDENCE RELIED UPON**

20 In support of this Motion, the Tulalip Tribes relies on the pleadings and papers on file in  
21 this action.

22 **V. ARGUMENT AND AUTHORITY**

23 **A. Standard to Dismiss for Lack of Subject Matter Jurisdiction.**

24 A complaint must be dismissed under Fed. R. Civ. P. 12(b)(1) if, considering the  
25 factual allegations in the light most favorable to the plaintiff, the action: (1) does not arise  
26 under the Constitution, laws, or treaties of the United States, or does not fall within one  
27 of the other enumerated categories of Article III Section 2 of the Constitution; (2) is not a  
28

1 case or controversy within the meaning of the Constitution; or (3) is not one described by  
 2 any jurisdictional statute. *Baker v. Carr*, 369 U.S. 186, 198, 82 S.Ct. 691, 7 L.Ed.2d 663  
 3 (1962); *D.G. Rung Indus., Inc. v. Tinnerman*, 626 F.Supp. 1062, 1063 (W.D. Wash.  
 4 1986); *see also* 28 U.S.C. §§ 1331, 1332 (federal question and diversity jurisdiction).

5 “It is a fundamental precept that federal courts are courts of limited jurisdiction.”  
 6 *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374, 98 S. Ct. 2396, 2403, 57  
 7 L.Ed.2d 274 (1978). A federal court is presumed to lack subject matter jurisdiction until  
 8 the plaintiff establishes otherwise. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S.  
 9 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994); *Stock West, Inc. v. Confederated*  
 10 *Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989). Accordingly, the  
 11 plaintiff bears the burden of proving the existence of subject matter jurisdiction.  
 12 *Kokkonen*, 511 U.S. at 377; *Stock West*, 873 F.2d at 1225.

13 **B. Plaintiffs Have Failed to Establish Diversity Jurisdiction.**

14 Plaintiff has alleged diversity jurisdiction under 28 U.S.C. § 1332. Dkt. #8 at p. 3,  
 15 ¶ 3.1. In response to this Court’s Order to Show Cause, Dkt. #6, Plaintiff filed a First  
 16 Amended Foreclosure Complaint, Dkt. #8, in an attempt to establish diversity  
 17 jurisdiction. However, Plaintiff’s assertion that the Tulalip Tribes is “located in  
 18 Washington,” Dkt. #8 at p. 3, ¶ 2.5, is insufficient to establish diversity jurisdiction  
 19 because the Tulalip Tribes is not a citizen of any state for purposes of 28 U.S.C. § 1332.  
 20

21 The diversity statute applies to cases involving “citizens of different states” and to  
 22 cases involving “citizens of a State and citizens or subjects of a foreign state.” 28 U.S.C.  
 23 § 1332(a)(1), (2). Section 1332 requires “complete diversity” between the parties. *See,*  
 24 *e.g., Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 68 & n.3, 117 S.Ct. 467, 136 L.Ed.2d 437  
 25 (1996). In other words, the citizenship of each plaintiff must be diverse from the  
 26 citizenship of each defendant. *Id.*

27 Regarding the citizenship of tribal parties for purposes of diversity jurisdiction, “it  
 28 is...clear that an Indian tribe is not a foreign state.” *Stock West*, 873 F.2d at 1226 (citing

1 *Cherokee Nation v. Georgia*, 30 U.S. 1, 20, 5 Pet. 1, 8 L.Ed. 25 (1831)); *see also Barnett*  
2 *v. Paskenta Gaming Grp., LLC*, No. C15-1907RSL, 2016 WL 8504520, at \*3 (W.D.  
3 Wash. Apr. 7, 2016) (Indian tribes are not foreign states for purposes of diversity  
4 jurisdiction); *Barker-Hatch v. Viejas Grp. Baron Long Capitan Grande Band of Digueno*  
5 *Mission Indians of the Viejas Group Reservation*, 83 F. Supp. 2d 1155, 1156 (S.D. Cal.  
6 2000) (same). “Thus, diversity jurisdiction must depend upon the tribal parties...being a  
7 resident of the state in whose borders the reservation is located”. *Stock West*, 873 F.2d at  
8 1226. Accordingly, Plaintiff’s claim of diversity jurisdiction in this case depends on its  
9 assumption that the Tulalip Tribes is a citizen of Washington State. Plaintiff is mistaken  
10 in this assumption.

11 It is well-settled that “unincorporated Indian tribes cannot sue or be sued in  
12 diversity because they are not citizens of any state.” *Am. Vantage Cos., Inc. v. Table*  
13 *Mountain Rancheria*, 292 F.3d 1091, 1095 (9th Cir. 2002); *Gaines v. Ski Apache*, 8 F.3d  
14 726, 729 (10th Cir. 1993) (same); *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d  
15 1135, 1140 (8th Cir. 1974); (same); *Barnett*, 2016 WL 8504520, at \*3 (same); *Marshall*  
16 *Bank, N.A. v. Nooksack Bus. Corp. II*, No. C09-1245-RSL, 2009 WL 3273826, at \*1  
17 (W.D. Wash. Oct. 13, 2009) (“[A]ny alleged diversity between the parties is destroyed  
18 because Nooksack Indian Tribe, as an unincorporated Indian tribe, is not a citizen of any  
19 state within the meaning of the federal diversity statute and therefore ‘cannot sue or be  
20 sued in diversity.’” (citing *Am. Vantage Cos.*, 292 F.3d at 1093)). “It follows that,  
21 notwithstanding the joinder of other diverse parties, the presence of an Indian tribe  
22 destroys complete diversity.” *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck*  
23 *Hous. Auth.*, 207 F.3d 21, 27 (1st Cir. 2000); *see also Am. Vantage Cos.*, 292 F.3d at  
24 1095, 1098 & n.6 (same; citing *Ninigret Dev. Corp.*, 207 F.3d at 27).

25 Given the Tulalip Tribes’ presence in this suit as a defendant, the asserted basis  
26 for diversity jurisdiction does not exist. This Court should dismiss for lack of subject  
27 matter jurisdiction under Fed. R. Civ. P. 12(b)(1).  
28

1 **C. Tribal Sovereign Immunity Deprives This Court of Subject Matter**  
 2 **Jurisdiction As To Plaintiffs' Claims Against The Tulalip Tribes.**

3 This Court also lacks subject matter jurisdiction under the well-settled principle of  
 4 sovereign immunity. Indian tribes are “domestic dependent nations” that exercise  
 5 inherent sovereign authority over their members and territories. *Oklahoma Tax Comm’n*  
 6 *v. Citizen Band of Potawatomi*, 498 U.S. 505, 509, 111 S. Ct. 905, 112 L. Ed. 2d 1112  
 7 (1991). As such, “Indian tribes have long been recognized as possessing the common-  
 8 law immunity from suit traditionally enjoyed by sovereign powers.” *Santa Clara Pueblo*  
 9 *v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). The United States  
 10 government recognizes tribal sovereign immunity to further tribal self-governance and  
 11 out of respect for tribal sovereignty. *See, e.g., Three Affiliated Tribes of Fort Berthold*  
 12 *Reservation v. Wold Eng’g*, 476 U.S. 877, 890, 106 S.Ct. 2305, 90 L.Ed.2d 881 (1986)  
 13 (“[Both] the tribes and the Federal Government are firmly committed to the goal of  
 14 promoting tribal self-government[.]”) (quoting *New Mexico v. Mescalero Apache Tribe*,  
 15 462 U.S. 324, 334-36 & n.17, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983)); *Santa Clara*  
 16 *Pueblo*, 436 U.S. at 60 (acknowledging respect for tribal sovereignty and congressional  
 17 plenary authority). Tribal sovereign immunity is “a necessary corollary to Indian  
 18 sovereignty and self-governance.” *Three Affiliated Tribes*, 476 U.S. at 890. When tribal  
 19 sovereign immunity exists, the Court is without subject matter jurisdiction. *Pistor v.*  
 20 *Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015) (if defendants were entitled to tribal  
 21 sovereign immunity from suit, the district court lacked jurisdiction over the claims  
 22 against them and was required to dismiss them from the litigation).

23 Under the above authorities, Indian tribes are not subject to suit unless they waive  
 24 their sovereign immunity or Congress expressly authorizes the action. *Kiowa Tribe of*  
 25 *Oklahoma v. Manuf. Technologies, Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 140 L.Ed.2d  
 26 981 (1998); *see also Citizen Band*, 498 U.S. at 509-10. A waiver of tribal sovereign  
 27 immunity “cannot be implied but must be unequivocally expressed.” *Santa Clara*  
 28 *Pueblo*, 436 U.S. at 58, 98 S.Ct. 1670 (internal quotation marks and citations omitted);

1 *see also Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001) (“There is a  
2 strong presumption against waiver of tribal sovereign immunity.”).

3 The present case is brought directly against the Tulalip Tribes as a named  
4 defendant, directly implicating the Tulalip Tribes’ sovereign immunity. Plaintiff thus has  
5 the burden of establishing that the Tulalip Tribes’ sovereign immunity has been  
6 abrogated or waived. *Pistor*, 791 F.3d at 1111. Plaintiff has alleged no waiver or  
7 abrogation in sovereign immunity to allow this case to proceed against the Tulalip Tribes.  
8 This lawsuit cannot be maintained against the Tulalip Tribes and Plaintiffs’ claims should  
9 be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction.

10 **D. Plaintiff is Required to Exhaust Remedies in Tribal Court**

11 In cases where diversity jurisdiction exists, federal courts exercising diversity  
12 jurisdiction are mere adjuncts of state courts. *Woods v. Interstate Realty Co.*, 337 U.S.  
13 535, 538 (1949). Courts in the State of Washington apply Civil Rule 82.5, which provides  
14 that when an action is brought in a state court for which the tribal courts possess  
15 exclusive jurisdiction over the matter, the state court shall dismiss such action pursuant  
16 to CR 12(b)(1). This principle is applicable in federal court where state courts lack  
17 jurisdiction over claims against an Indian tribe and there is no federal question  
18 jurisdiction over the cause of action in federal court. *See, e.g. Littel v. Nakai*, 344 F.2d  
19 486 (1965). That is the case here because diversity jurisdiction is the sole asserted basis  
20 for this Court’s subject matter jurisdiction, and this is a matter of tribal law.

21 Furthermore, where federal question jurisdiction exists, due to considerations of  
22 comity, federal court jurisdiction does not properly arise until available remedies in the  
23 tribal court system have been exhausted. *Auto Owners Ins. Co. v. Tribal Court of Spirit*  
24 *Lake Indian Reservation*, 495 F.3d 1017, 1021 (8<sup>th</sup> Cir. 2007) (Tribal court exhaustion  
25 required in insurers action seeking declaratory relief against Indian elementary school  
26 regarding scope of insurance coverage.); *Weeks Construction v. Oglala Sioux Housing*  
27 *Authority*, 797 F.2d 668, 673-74. (8<sup>th</sup> Cir. 1986). (contract claim against Tribal housing  
28



1 authority properly referred to tribal court given Supreme court’s emphasis on protecting  
2 tribal governments “and to avoid undermining the authority of tribal courts”.)

3 In *Iowa Mutual Insurance Co. v. La Plante*, 480 U.S. 9, 107 S. Ct. 971, 94 L.Ed.  
4 2d 10 (1986), the Supreme Court recognized that tribal adjudicative authority over cases  
5 arising in Indian Country is an important attribute of tribal sovereignty. The court stated  
6 that “Tribal courts play a vital role in tribal self-government and the Federal Government  
7 has consistently encouraged their development.” 106 S.Ct. at 975; *See also National*  
8 *Farmer’s Union Ins. v. Crow Tribe of Indians*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.  
9 2d 8181 (1985).

10 A fundamental component of the Tulalip tribal government is the tribal judicial  
11 system that exercises jurisdiction over civil and criminal matters. The Tribal Court’s civil  
12 jurisdiction extends to claims like this one. TTC Sections 2.05.020 and 6.10.140.  
13 Furthermore, 25 U.S.C. § 5135(a) provides that lands held in trust for individual Indian  
14 owners “shall be subject to foreclosure or sale pursuant to the terms of [a] mortgage or  
15 deed of trust in accordance with the laws of the tribe which has jurisdiction over such  
16 land or, in the case where no tribal foreclosure law exists, in accordance with the laws of  
17 the State or Territory in which the land is located.” In the present case, the Tulalip Tribal  
18 Code provides a process in the Tulalip Tribal Court for judicial foreclosure of lands held  
19 in trust for individual Indian owners. TTC Section 6.10.140. Therefore, 25 U.S.C. §  
20 5135(a) requires Plaintiff to pursue this foreclosure under tribal law.

21 Tribal law, in turn, provides only for judicial proceedings in the Tulalip Tribal  
22 Court. The judicial foreclosure process under tribal law incorporates by reference  
23 Revised Code of Washington (RCW) Chapter 61.12, except that references in the RCW  
24 to “county” shall mean “Reservation” and references to “court” or “superior court” shall  
25 mean “Tribal Court.” TTC Section 6.10.140(1)(a). Therefore, in adopting RCW  
26 61.12.040 subject to the foregoing substitutions, the tribal foreclosure statute provides  
27 that Tribal Court is the proper venue for a judicial foreclosure action. TTC Chapter 6.10  
28 further provides that the foreclosure remedies set forth in that Chapter are exclusive.

1 TTC Section 6.10.140(4). Pursuant to 25 U.S.C. § 5135(a), Plaintiff must pursue this  
2 foreclosure action under tribal law, which requires venue in tribal court.

3 **VI. CONCLUSION**

4 Plaintiff has failed to establish diversity jurisdiction in this case in its original  
5 Foreclosure Complaint, Dkt. #1, or its First Amended Foreclosure Complaint, Dkt. #8.  
6 Moreover, Plaintiff has failed to exhaust Tribal Court remedies, and the Tulalip Tribes is  
7 immune from suit under well-established sovereign immunity principles. Accordingly,  
8 the Tulalip Tribes respectfully requests that this Court dismiss Plaintiff’s claims for lack  
9 of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).  
10

11  
12 DATED this 5th day of October, 2017.

13  
14 By s/ Anthony Jones  
15 Anthony Jones WSBA No. 44461  
16 6406 Marine Drive  
17 Tulalip, WA 98271  
Telephone: (360) 716-4533  
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18 *Attorney for Defendant*  
19 *Tulalip Tribes of Washington*  
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**CERTIFICATE OF SERVICE**

I hereby certify that on October 5, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Kimberly Hood, khood@robinsontait.com  
Craig Peterson, cpeterson@robinsontait.com

I further certify that on October 5, 2017, I served the foregoing upon the following by United States mail:

Corey Fryberg  
1506 62nd St NW  
Tulalip, WA 98271

American General Financial Services, Inc.  
601 NW Second Street  
Evansville, IN 47708

CFH Investments  
1697 N Western Avenue  
Wenatchee, WA 98801

First Heritage Bank  
801 South Fremont  
Shenandoah, IA 51601

DATED this 5th day of October, 2017.

By s/ Anthony Jones  
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