

Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT  
THE 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; AMERICAN GENERAL  
FINANCIAL SERVICES, INC.; CFH  
INVESTMENTS; FIRST HERITAGE BANK;  
TULALIP TRIBES OF WASHINGTON; AND  
PERSONS OR PARTIES UNKNOWN  
CLAIMING ANY RIGHT, TITLE, LIEN, OR  
INTEREST IN THE PROPERTY DESCRIBED  
IN THE COMPLAINT HEREIN,

Defendants.

NO. 2:17-cv-01196- RSL

PLAINTIFFS RESPONSE TO  
DEFENDANTS MOTION TO DISMISS

COMES NOW plaintiff and responds to Defendant Tulalip Tribes of Washington Motion to Dismiss on basis of (1) lack of diversity jurisdiction, (2) sovereign immunity, and (3) exhaustion of tribal remedies. Plaintiff requests that this court deny Defendant's motion to dismiss in part.

## **AUTHORITY AND ARGUMENT**

### **1. Diversity Jurisdiction**

A federal district court has subject matter jurisdiction over a case only if the complaint asserts a federal cause of action, or if the parties are citizens of different states and the amount in controversy exceeds \$75,000. 28 U.S.C. §§ 1331, 1332(a). For diversity jurisdiction to exist under 28 U.S.C. § 1332, there must be complete diversity of citizenship. In a case involving multiple plaintiffs and defendants, each plaintiff must be a citizen of a different state than each defendant. *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001).

Here, it is undisputed that the Plaintiff is considered a different citizen from each of the named Defendants besides the Tribe. Wilmington Savings Fund Society, FSB, is headquartered in Delaware. Wilmington Savings Fund Society is acting through its servicer and attorney in fact New Penn Financial d/b/a Shellpoint where its principal place of business is in Pennsylvania. Not including the Tribe, each of the Defendants are citizens of a different state than that the Plaintiff. However, the Tribe as a Defendant was not the sole basis for jurisdiction, instead it was each of the other parties. Because the Tribe is not the sole basis for jurisdiction, Plaintiff asks this court to deny the motion to dismiss based on Diversity. If the Tribe as a party were dismissed from the cause of action, Diversity jurisdiction would still exist.

### **2. Sovereign Immunity and Exhaustion of Tribal Court Remedies**

As for Defendant's second and third arguments related to sovereign immunity and exhausting Tribal remedies, Plaintiff agrees that there has been no waiver of sovereign immunity. If the court

determines that the Tribe is immune, then Plaintiff requests that the dismissal solely be as to the Tribe as a party. Furthermore, the exhaustion of Tribal Court remedies only applies to federal question jurisdiction. Where federal question jurisdiction exists, due to considerations of comity, federal court jurisdiction does not properly arise until available remedies in the tribal court system have been exhausted. *Auto Owners Ins. Co. v. Tribal Court of Spirit Lake Indian Reservation*, 495 F.3d 1017, 1021 (8th Cir. 2007). Because Plaintiff does not seek federal court jurisdiction on the basis of federal question, the court can deny Defendant's request to dismiss. Tulalip Tribal Code "TCC" 6.10.140 (1) states that Judicial foreclosure of a mortgage be in conformity of RCW 61.12. The Tribal Code defers to the Washington Revised Code and the laws of the State of Washington and the rules of decisions of the Courts of the State of Washington shall be incorporated. *See* TCC 6.10.140 (3). There is not an exclusive requirement to afford the Tribal court jurisdiction; the code simply defers to Washington State law.

### Conclusion

Plaintiff respectfully requests that this court deny the motion to dismiss in part. First, diversity jurisdiction does exist, as the Tribe was not used to obtain diversity jurisdiction. Since the basis for jurisdiction was not federal question, exhaustion should not be required. Should the court determine that Tulalip Tribe is immune, then the dismissal should apply to the Tribe alone.

DATED this 10<sup>th</sup> Day of November, 2017.

/s/ Kimberly Hood\_\_\_\_\_  
 [ ]Craig Peterson, WSB #15935  
 [ x]Kimberly Hood, WSB #42903  
 Robinson Tait, P.S.  
 Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that on November 10, 2017, I electronically filed the foregoing Response for Plaintiff using the CM/ECF system to the following who have signed up for electronic service:

Tulalip Tribes of Washington, c/o Anthony Jones, Attorney

/s/ Kimberly Hood

.