**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NORTH DAKOTA**

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| JASON HANSON, et al., | ) | |
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| *Plaintiffs,* | ) | Civ. Action No. 3:19-cv-270 |
| | ) | |
| v. | ) | **TRIBAL DEFENDANTS' PROPOSED** |
| | ) | **MEMORANDUM OF POINTS** |
| | ) | **AND AUTHORITIES IN** |
| | ) | **SUPPORT OF MOTION TO DISMISS** |
| | ) | |
| JAMES PARISIEN, et al., | ) | The Honorable Peter D. Welte, Chief Judge |
| | ) | |
| | ) | **Oral Hearing Requested** |
| | ) | |
| *Defendants.* | ) | |

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## INTRODUCTION

This case is fundamentally about a non-Indian for-profit corporation that refuses to pay its taxes or otherwise comply with the Turtle Mountain Band of Chippewa Indian's (Tribe's) Tribal Employment Rights Ordinance (TERO) as it is required to do by law. Since the mid-twentieth century, tribal governments have worked to protect tribal rights, resources, and opportunities. Tribes across the United States have effectively exercised self-governance to protect their water, timber, hunting, fishing, and gaming rights in order to garner maximum economic returns and opportunities from the use of their resources. Beginning in the 1970s, tribal governments began extending these protections to tribal employment rights. Today, more than 300 tribal and Alaska Native village governments have established Tribal Employment Rights Ordinances and TERO enforcement programs. Without a doubt, Native American Tribes, as sovereigns, have authority to regulate and control the employment practices of all employers conducting business on their lands. This power enables tribal governments to require that all contractors operating within their jurisdiction provide Indian preference in employment, contracting, and subcontracting, and pay fees to operate on their land in order to fund tribal employment programs.

The Turtle Mountain Band of Chippewa Indians enacted its TERO in order "to promote employment opportunities [and preference] for Indians and business opportunities [and preference] for Indian firms and contractors, and to provide direction, management and business standards for the Turtle Mountain Indian Reservation." *See* Turtle Mountain Tribal Code § 32.0102. The TERO applies to all employers operating on tribal land, including those businesses owned by non-Indians operating on fee land within the reservation. To provide a funding mechanism for the implementation of these important goals, the Tribal Council

authorized the assessment of a fee against regulated entities. Turtle Mountain Tribal Code § 32.0501. TERO fees are only one component of the Tribe's TERO, but the fees are essential to the administration of the program and the welfare of the Tribe, and they apply to *all* regulated entities equally.

In the instant case, Plaintiffs assert that this Court should interfere with a tribal court decision requiring Plaintiffs to comply with the provisions of TERO. After the Turtle Mountain Appellate Court ruled that Plaintiffs must avail themselves of TERO's procedures, Plaintiffs ran to this Court to undo the lawfully decided tribal court decision requiring them to do so, alleging that the tribal courts lack jurisdiction. Plaintiffs have not, however, presented any question that this Court can yet decide. Plaintiffs have not pled a waiver of Tribal sovereign immunity. Plaintiffs have failed to exhaust tribal remedies. And the Turtle Mountain Tribal Court plainly has subject matter jurisdiction, as Plaintiffs admitted when they filed their complaint in the tribal court. For these reasons, Defendants Turtle Mountain Band of Chippewa Indians (Tribe), Turtle Mountain Band of Chippewa Indians' Tribal Employment Rights Commission, James Parisien, Turtle Mountain Tribal Court, and Turtle Mountain Court of Appeals (collectively, Defendants) respectfully ask this Court to dismiss this case.

## PROCEDURAL HISTORY

On January 8, 2018, the Tribal Employment Rights Commission lawfully assessed a fee against Plaintiff Dakota Metal Fabrication consisting of $44,640.00, or three percent of the total amount of a contract for construction services, Turtle Mountain Court of Appeals Order 2 ¶ 9, ECF No. 1-2, pursuant to the Tribal Employment Rights Ordinance, *see* Turtle Mountain Tribal Code § 32.0501 (when referred to generally, TERO Ordinance). Rather than pay the fee, Plaintiff Dakota Metal Fabrication filed a lawsuit in the Turtle Mountain Tribal Court, *Dakota*

*Metal Fabric v. Parisien*, Civ. No. 18-1054, to challenge this fee assessment. Turtle Mountain Court of Appeals Order 3 ¶ 10, ECF No. 1-2. On September 11, 2018, the tribal court entered a preliminary injunction compelling Plaintiff Dakota Metal Fabrication to place the sum of the TERO fee in an escrow account until the court could consider the merits of Dakota Metal Fabrication's claim. *See* Turtle Mountain Court of Appeals Order 4 ¶ 17, ECF No. 1-2.

The tribal court defendants then respectfully moved the tribal court for summary judgment pursuant to Turtle Mountain Tribal Code § 2.0703 and requested that the court enter judgment affirming that all contractors operating on tribal property congruent to and within the exterior boundaries of the Turtle Mountain Chippewa Reservation are subject to the provisions of TERO and enjoining Plaintiff Dakota Metal Fabrication to immediately assign the $44,640.00 fee currently held in escrow to the Tribal Employment Rights Commission.[1] The tribal court ruled that generally, companies similarly situated to Plaintiff Dakota Metal Fabric—nonmember, state-incorporated, for-profit entities doing business on tribal land—must pay TERO fees and comply with TERO's employment provisions. Turtle Mountain Tribal Court Order for Judgment 2, ECF No. 1-1. The tribal court also ruled that there is no exception for nonmember companies that are contracting with a state entity like the School District. *Id.* Yet the tribal court took pity on Plaintiffs and carved out a limited exception to this clear rule based on the specific facts of this case. *Id.*

The tribal court defendants filed an appeal on August 5, 2019. Turtle Mountain Court of Appeals Order, ECF No. 1-1. Specifically, the tribal court defendants asked the Turtle Mountain Court of Appeals to issue an order requiring that all contractors, including

[1] The tribal court defendants in the tribal court action included some of the Defendants here: Turtle Mountain Band of Chippewa Indians, Tribal Employment Rights Commission, and James Parisien (hereinafter, "tribal court defendants").

nonmembers, operating within the exterior boundaries of the Turtle Mountain Chippewa Reservation must pay fees under the Turtle Mountain Tribal Code § 32.0501, *et seq*. and compelling Dakota Metal Fabrication to immediately assign the $44,640.00 fee currently held in escrow to TERO. *See* Turtle Mountain Court of Appeals Order 1, ECF No. 1-2. The Turtle Mountain Court of Appeals held that the tribal court exceeded its authority by exempting Plaintiffs from "paying TERO fees and also ruling that 'enforcement of TERO fees on other contractors on the project will be determined on a case by case basis.'" Turtle Mountain Court of Appeals Order 2, ECF 1-2. The appellate court further held that "[t]he trial court cannot assume the administrative functions of TERO and rule that fees and regulations apply to one situation and not the other. The TERO law and fees apply to all situations unless the law says otherwise." *Id*. The appellate court then remanded the case back to TERO for proceedings consistent with TERO's administrative procedures. Turtle Mountain Court of Appeals Order 3, ECF No. 1-2.

Instead of filing a complaint with the Tribe's TERO office, Plaintiffs initiated this action seeking declaratory and injunctive relief on the grounds that the tribal courts do not have jurisdiction. Defendants now respectfully move to dismiss this action on the following grounds:

1. This Court lacks jurisdiction as to all Defendants because Plaintiffs have not pled a waiver of sovereign immunity.
2. This Court lacks jurisdiction because Plaintiffs have failed to exhaust tribal court and tribal administrative remedies.
3. The Complaint fails to state a claim upon which relief can be granted.

## ARGUMENT

### I. This Lawsuit is Barred by the Doctrine of Sovereign Immunity.

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) challenges a court's subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). This Court must dismiss this case for want of jurisdiction unless the Plaintiffs meet their burden to establish subject matter jurisdiction. *Kokkenen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-103 (1998); *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990) (citing *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). In considering a motion to dismiss under Rule 12(b)(1), the Court is not limited to the facts pled in the complaint but can weigh evidence and determine facts in order to satisfy itself as to its power to hear the case. *Osborn*, 918 F.2d 724, 728 n.4.

Tribal sovereign immunity can be raised in a motion to dismiss. Fed. R. Civ. P. 12(b)(1); *Hagen v. Sisseton-Wahpeton Cmty. Coll*., 205 F.3d 1040, 1043 (8th Cir. 2000) (citing *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995)). Sovereign immunity bars suit against Indian tribes unless a federal statute expressly and clearly waives this immunity, or a tribe agrees, clearly and expressly, to waive its immunity. *See, e.g., Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). To be sure, sovereign immunity is a non-discretionary jurisdictional bar to any claims against a tribe, irrespective of the merits of the claim. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978); *Chemehuevi Indian Tribe v Cal State Bd. of Equalization*, 757 F.2d 1047, 1051, 1052 n.6 (9th Cir. 1985) (immunity applies "irrespective of the merits of the claim") (citations and quotation marks omitted); *see also State of California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979) ("Sovereign immunity involves a right which [a] court[] [has] no choice, in the

absence of a waiver, but to recognize."). Tribes are, therefore, shielded not only from suits for money damages, but also from declaratory and injunctive relief. *Fort Yates Pub. Sch. Dist. #4 v. Murphy*, 786 F.3d 662, 670-671, 2015 U.S. App. LEXIS 8015, *15 (8th Cir. 2015) ("The Supreme Court has made clear, however, that a tribe's sovereign immunity bars suits against the tribe for injunctive and declaratory relief.") (citing *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 134 S. Ct. 2024, 2039 (2014)).

### A. The Turtle Mountain Band of Chippewa Indians, the TERO Commission, and the Tribal Courts are Immune from Suit.

The Turtle Mountain Band of Chippewa Indians is a federally recognized tribe. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 84 FR 1200, 1204 (Feb. 1, 2019). Thus, as a matter of federal law, the Tribe is subject to suit only if Congress has authorized the suit or the tribe has waived its immunity. *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d680, 685 (8th Cir. 2011) (citation and quotation marks omitted). There is a strong presumption against waivers of immunity, *Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001) (citing *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991), and the Eighth Circuit has held that tribal immunity waivers "must be strictly construed and applied," *Missouri River Services, Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848, 852-53 (8th Cir. 2001) (quotations and citations omitted). "[T]he Supreme Court has refused to find a waiver of tribal immunity based on policy concerns, or perceived inequities arising from the assertion of immunity, or the unique context of a case." *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998) (citing *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751, 758 (1998)).

The Supreme Court and the Eighth Circuit have made it clear that "a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58 (citations omitted); *see also Rosebud Sioux Tribe v. Val-U Constr. Co.*, 50 F.3d 560, 562 (8th Cir. 1995); *Weeks Const. Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668, 671 (8th Cir. 1986). For example, *American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374 (8th Cir. 1985), the Eighth Circuit determined that a tribe did not waive its sovereign immunity simply because it entered into a loan with the American Indian Agricultural Credit Consortium. 780 F.2d at 1379. The loan agreement the tribe entered into provided several remedies in the event of a default by the Standing Rock Tribe, "in addition to such other and further rights and remedies provided by law," awarded attorney's fees expended in collection efforts, and stated that the law of the District of Columbia governed the agreement. *Id.* at 1376. While the Eighth Circuit stated that it would be easy to *imply* a waiver of sovereign immunity from these circumstances, such an implied waiver is prohibited by *Santa Clara Pueblo. Id.* at 1377. "[N]othing short of an express and unequivocal waiver can defeat the sovereign immunity of an Indian nation." *Id.* at 1379.

It is also "undisputed that a tribe's sovereign immunity may extend to tribal agencies." *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000). "Tribal agencies," as it is understood by the Eighth Circuit, includes the tribal courts. *Fort Yates Pub. Sch. Dist. #4*, 786 F.3d at 670-671 ("'[A] tribe's sovereign immunity may extend to tribal agencies, including the Tribal Court.'") (quoting *Hagen* 205 F.3d at 1043)).

Here, Plaintiffs are seeking relief against the Tribe and its agencies. Plaintiffs have alleged no facts that could even possibly be construed as a waiver, implied or otherwise, by the Tribe, the TERO Commission, the tribal courts, or any of these Tribal agencies' employees or

officials. Plaintiffs have not met their burden to plead waiver. Thus, the Tribe and its agencies are immune from suit.

**B. Defendant James Parisien is Immune from Suit.**

Similarly, Plaintiffs have failed to allege that Defendant Parisien waived his immunity. Sovereign immunity extends to employees when carrying out official duties on tribal land. *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002); *Garcia v. Akwesasne Housing Authority*, 105 F. Supp. 2d 12, 18 (N.D.N.Y. 2000) (stating that personal capacity claim may proceed against tribal official if allegations indicate that tribal official acted outside scope of delegated authority), *vacated on other grounds*, 268 F.3d 76 (2d Cir. 2001); *see also Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 170-73 (1977) (claim permitted against tribal officials, who were acting as fishermen, rather than tribal government officers when they had engaged in challenged activities).

The United States Supreme Court recently clarified the scope of tribal sovereign immunity as applied to tribal officers, employees, and agents, holding that the general rules applicable to state and federal employees also apply in the context of tribal sovereign immunity. *Lewis v. Clarke*, 137 S. Ct. 1285, 1292 (2017). Under those rules, "courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit." *Id*. at 1291 (citing *Hafer v. Melo*, 502 U.S. 21, 25 (1991)). The *Lewis* Court explained:

> In making this assessment, courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign. *See, e.g., Ex parte New York*, 256 U.S. 490, 500–502 (1921). If, for example, an action is in essence against a State even if the State is not a named party, then the State is the real party in interest and is entitled to invoke the Eleventh Amendment's protection. For this reason, an arm or instrumentality of the State generally enjoys the same immunity

> as the sovereign itself. *E.g.*, *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 429–430 (1997).

*Id*.

Plaintiffs' action is against the sovereign. Plaintiffs do not attempt to obfuscate this, and they do not allege claims against Defendant Parisien in his individual capacity. *See* Complaint ¶ 6. As a TERO employee carrying out official duties on Tribal land, Director Parisien is entitled to the Tribe's sovereign immunity.

**II. Plaintiffs Failed to Exhaust Tribal Administrative Remedies.**

Precedent reaffirms the inherent civil jurisdiction of tribal courts over tribal-related activities on tribal land. *Duncan Energy Co. v. Three Affiliated Tribes of Ft. Berthold Reservation*, 27 F.3d 1294, 1299 (8th Cir. 1994). "[E]xhaustion is required before such a claim may be entertained by a federal court." *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985); *see also Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987) ("federal policy . . . directs a federal court to stay its hand…"); *Krempel v. Prairie Island Indian Community*, 125 F.3d 621 (8th Cir. 1997). In *Duncan Energy*, the Eighth Circuit Court of Appeals held that *National Farmers Union* and *LaPlante* required exhaustion of tribal remedies before a federal court can consider a case. *Duncan Energy*, 27 F.3d at 1300; *see also City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554 (8th Cir. 1993) (noting that *National Farmers Union* requires exhaustion of tribal remedies prior to the exercise of jurisdiction by a federal district court); *United States ex rel. Kishell v. Turtle Mountain Hous. Auth.*, 816 F.2d 1273, 1276 (8th Cir. 1987) ("a federal court should stay its hand until tribal remedies are exhausted and the tribal court has had a full opportunity to determine its own jurisdiction…").

Plaintiffs' failure to exhaust is two-fold. First, the tribal court did not consider its own jurisdiction, as Plaintiffs squarely submitted to the jurisdiction of that court. Tribal Court Complaint ¶ 1 ("This Court has personal jurisdiction over the parties and subject matter jurisdiction under the Turtle Mountain Tribal Constitution, Art. II, Tribal Code of 1976, Re-Codified 2006, Title 2, Ch. 2.01, §§ 2.0 I 01, 2.0102, 2.0406; *International Shoe Co. v. Washington*, 326 U.S. 310 (l 945); *Montana v. United States*, 450 U.S. 544 (198 I); *Gustqfson v. Poitra*, 800 N.W.2d 842 (2011), and *Brian Lewis, et al., v. William Clarke*, (No. 15-1500) 581 U. S. __ (2017), (April 25, 2017).") (attached hereto as Exhibit A to the Tomaselli Decl.); Turtle Mountain Appeals Court 2, ECF No. 1-2 (Plaintiffs "availed [themselves] of the jurisdiction of the Tribal Court to avoid paying the fee and requesting an injunction from that court."). Therefore, the tribal court's own jurisdiction was not at issue during those proceedings and the tribal court has not had the opportunity to evaluate the factual and legal bases for the challenge. As explained by the Court in *National Farmers Union*:

> Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge….Exhaustion of tribal court remedies, moreover, will encourage tribal courts to *explain to the parties the precise basis for accepting jurisdiction*, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.

*Nat'l Farmers Union*, 471 U.S. at 856-57 (emphasis added). Thus, while federal courts review *de novo* a tribal court's determination of its own jurisdiction, *Duncan Energy*, 27 F.3d at 1300, the Supreme Court mandates that tribal courts have the first opportunity to evaluate their own jurisdiction, *Nat'l Farmers* Union, 471 U.S. at 856.

Second, as noted by the Turtle Mountain Court of Appeals, the Plaintiffs failed to first exhaust their administrative remedies through TERO, which would have provided the tribal court

and ultimately this Court a factual record upon which to base their review of Plaintiffs' claims. *See* Turtle Mountain Court of Appeals Order 2, ECF No. 1-2. The TERO contains an administrative procedure that must be followed by the contractors and others who disagree with the Tribe's application of TERO. Chapter 32.07 of the Turtle Mountain Tribal Code provides contractors the opportunity to file a complaint with the Commission, Turtle Mountain Tribal Code § 32.0704, request a hearing, *id*., and appeal any decision by the Commission to the Turtle Mountain Appellate Court, *id.* § 32.09.[2] This procedure was not followed. Turtle Mountain Court of Appeals Order 2, ECF No. 1-2. Instead, Plaintiffs went directly to the tribal court with their grievance, and directly to this Court when the appellate court pointed out their failure to exhaust administrative remedies.

The Ninth Circuit in *Burlington N. R. Co. v. Crow Tribal Council*, 940 F.2d 1239 (9th Cir. 1991) explained that there is no substantive distinction between exhausting tribal court remedies and tribal administrative remedies. 940 F.2d at 1246 ("Crow tribal law provides at least two avenues of remedy for BN to exhaust before invoking federal court power. The ordinance itself authorizes the Commission to hear applications for exemption from the ordinance. . . Had the district court insisted that BN invoke this process first, the Commission would have had the first opportunity to interpret the ordinance and rule on its own jurisdiction."). The Ninth Circuit held that the district court erred by not first requiring exhaustion of administrative remedies. *Id*. at 1247.

Here, this Court would be best served by allowing proper development of both a factual record through a TERO hearing, and a judicial record on jurisdiction at the tribal court level.

[2] A copy of the Turtle Mountain TERO is attached as Exhibit B to the Tomaselli Declaration.

Neither of these things have occurred. Thus, this case must be remanded to back to the Tribe, the party with the benefit of expertise, to decide these critical issues in the first instance.

**III. Plaintiffs' Complaint Fails to State a Claim Upon Which Relief Can Be Granted.**

A motion to dismiss pursuant to a FRCP 12(b)(6) is a challenge to the sufficiency pleadings. "To survive [a] motion to dismiss for failure to state a claim," a complaint must "alleg[e] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *OmegaGenesis Corp. v. Mayo Found. for Med. Educ. & Research*, 851 F.3d 800, 804 (8th Cir. 2017) (citations and quotation marks omitted). A claim is plausibly pleaded when its "factual content . . . allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. Plaintiffs are required to provide "more than labels, conclusions, and formulaic recitations of the elements of a cause of action" in order to survive such challenge. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Plaintiffs' Complaint fails to meet this basic pleading standard. As an initial matter, Plaintiffs request declaratory relief against "Defendants' efforts to adjudicate her [sic] claims against the Plaintiffs in Defendants' Turtle Mountain Tribal Courts." Complaint 6 ¶ 23(d), ECF No. 1. Plaintiffs also complain that without an injunction, "Defendants will proceed with their action to adjudicate her [sic] claims in Defendants Turtle Mountain Tribal Courts against Plaintiffs without jurisdiction over the subject matter of the claims against Plaintiffs." *Id.* at 6 ¶ 25. Yet Defendants have not asserted any claims in the tribal courts—*Plaintiffs* brought their dispute to tribal court. As mentioned above, Plaintiffs admitted the tribal court had both *personal* and *subject matter* jurisdiction in their tribal court complaint. Tribal Court Complaint ¶ 1, Ex. A to Tomaselli Decl. Plaintiffs now claim that the tribal court lacks subject matter jurisdiction because Plaintiffs are (1) a non-Indian corporation incorporated in the state of North Dakota and

(2) the owner of that corporation. This is nonsensical considering that Plaintiffs "availed [themselves] of the jurisdiction of the Tribal Court to avoid paying the fee and requesting an injunction from [that] court." Turtle Mountain Court of Appeals Order 2, ECF No. 1-2. Plaintiffs would seek tribal court jurisdiction as long as it suits them and then deny the tribal court has jurisdiction at all in order to evade compliance with TERO. This Court should not condone this conduct.

While it is difficult to ascertain exactly what Plaintiffs request in their Complaint—the factual content does not allow the Court to draw a reasonable inference that each Defendant is somehow liable for the allegedly unlawful conduct—the Plaintiffs plainly seek declaratory and injunctive relief. However, the parameters of this relief, and the facts and law underlying Plaintiffs' claims, are hard to decipher, and do not meet the factual and legal sufficiency test proscribed by Rule 12(b)(6). Far from even reciting the elements of a cause of action, Plaintiffs' allegations do nothing to provide the reader with a reasonable inference of why the tribal appellate court's determination that Plaintiffs must follow TERO's procedures was improper.

### A. Plaintiffs Fail to State a Claim that Defendants Lack Legislative and Adjudicatory Authority to Regulate Plaintiffs' Conduct.

Under *Montana v. United States*, 450 U.S. 544 (1981), the tribal courts and the Tribe have adjudicatory authority over Plaintiffs. Indian tribes are quasi-sovereign entities that enjoy all the sovereign powers that are not divested by Congress or inconsistent with the Tribe's dependence on the United States. *See Montana v. United States*, 450 U.S. 544 (1981). As a general rule, this means that tribal governments cannot exercise civil jurisdiction over nonmembers, but there are three exceptions to this rule. *Id; see also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). First, tribes may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its

members including "commercial dealing[s], contracts, leases, or other arrangements." *Id.* at 565. Second, tribes may exercise jurisdiction over nonmembers within a reservation when the nonmember's conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. *Id* at 566. These first two exceptions are based on the tribes' inherent sovereignty, and exercises of jurisdiction under them must relate to a tribe's right to self-government. *Id* at 565-566. Third, Indian tribes may exercise jurisdiction over nonmembers under their power to exclude persons from tribal property. *See Merrion,* 455 U.S. at 141.

Under all three exceptions, the Turtle Mountain Band of Chippewa Indians has legislative and adjudicatory authority to regulate Plaintiffs' conduct as a contractor performing work on Tribal lands. Unsatisfied with this result, Plaintiffs now ask this Court to assert subject matter jurisdiction and offer an advisory opinion on an incomplete record as to whether or not the tribal courts have authority to hold the same. However, Plaintiffs have not alleged any specific factual allegations to show why the Tribe does not has legislative and adjudicatory authority to regulate Plaintiffs' conduct.

**1. The Tribe Has Authority to Regulate the Plaintiffs' Conduct Because Plaintiffs Consented to Tribal Jurisdiction.**

Under *Montana's* first exception, a tribe may regulate through taxation, licensing, or other means, "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana,* 450 U.S. at 565. The Supreme Court later clarified that "Montana's consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself." *Atkinson Trading Co., Inc. v. Shirley,* 532 U.S. 645, 656, (2001); *see, e.g., Philip Morris United States v. King Mt. Tobacco Co.*, 569 F.3d 932, 941 (9th Cir. 2009)

("The mere fact that a nonmember has some consensual commercial contacts with a tribe does not mean that the tribe has jurisdiction over all suits involving that nonmember, or even over all such suits that arise within the reservation; the suit must also arise out of those consensual contacts.").

In *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990), the Ninth Circuit Court of Appeals held that the first *Montana* exception applied to the Shoshone-Bannock Tribes' ability to enforce its Tribal Employment Rights Ordinance against a non-Indian company operating on fee land within the reservation. *See* 905 F.2d at 1314-1315. In making its decision, the Ninth Circuit found that the non-Indian company had agreed to comply with TERO in its mining contracts, had actively engaged in commerce with the tribe, and the tribe had the inherent sovereign authority to regulate employment practices within the reservation. *Id.*

Here, the School District is located on federal land leased to the Tribe within the exterior boundaries of the reservation for the benefit Indian school children. Complaint 1 ¶ 1, ECF No. 1. And, like the non-Indian plaintiff in *FMC*, Plaintiffs have a sufficient relationship with the Tribe to justify regulation of its employment practices. First, like the plaintiff in *FMC,* Plaintiffs have engaged in "commercial dealing" within the reservation. Complaint 1 ¶ 1, ECF No. 1. Second, "Dakota Metal Fabrication is apparently no stranger to the application of TERO and its fees on the Turtle Mountain Reservation of Chippewa Indians having done prior work on the reservation and obtaining a license on the reservation." Turtle Mountain Court of Appeals Order 2, ECF No. 1-2. Just as the Ninth Circuit determined in *FMC*, the Tribe has the inherent sovereign authority to regulate employment practices within the reservation and on Tribal lands under its jurisdiction. *See* Complaint 1 ¶ 2, ECF No. 1 ("The TERO ordinance requires all contractors

performing all types of construction contracts within the Reservation to pay a percentage of the contract price … to the TERO office…").

Plaintiffs' Complaint is devoid of allegations that *Montana's* first exception does not apply to them. The Complaint alleges only vague facts and legal conclusions about the School District—a non-party. Plaintiffs allege that the "TERO taxes and fees assessed by Defendants against Plaintiffs will be passed on directly to the School District in violation of the aforementioned memorandum of agreement with Defendants…." Complaint 5 ¶ 16, ECF No. 1. Plaintiffs further allege that the TERO fee will have "an adverse impact on the School District violating the Eight Circuit Court's order and mandate." *Id*. ¶ 17. The Complaint fails to provide facts regarding this alleged memorandum of agreement or explain how the Tribe's assessment of a TERO fee will harm the School District. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007) ("[A] conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality."). More importantly, the Complaint fails to explain how any purported harm to the School District should overcome controlling precedent allowing the Tribe to enforce its TERO against a non-Indian company.

Plaintiffs rely on *Belcourt Public School District v. Steven*, Case No. 14-1541 (8th Cir. 2015) in support of these allegations, but *Belcourt Public School District* is inapposite. Construing *Montana's* first exception, the Eighth Circuit held that *a state agency*, such as the School District, cannot consent to tribal court jurisdiction because North Dakota law expressly prohibits state agencies from doing so. *Id* at 8. Here, the Tribe applied the TERO to non-Indian contractors working on the School District project, which is not the same as the Tribe applying the TERO to the School District itself. *See State of Montana Department of Transportation v. Tracy King*, 191 F.3d 1108, 1114 (9th Cir. 1999) (holding that while the Fort Belknap Indian

Community could not enforce its TERO against the Montana Department of Transportation, non-state employee contractors working on the project were subject to TERO). The Tribe's lack of jurisdiction over the School District here is irrelevant to its jurisdiction over Plaintiffs.

Plaintiffs' naked assertion that "if the [tribal court does not have] adjudicative jurisdiction, then the tribe cannot have legislative jurisdiction," Complaint 5 ¶ 19, ECF No. 1, is both irrelevant and an inaccurate recitation of Supreme Court precedent. First, the tribal court does have adjudicative jurisdiction for the reasons set forth above. Second, the rule is that "[a]s to nonmembers . . . a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Strate v. A-1 Contrs.*, 520 U.S. 438, 453 (1997). "[This] statement stands for nothing more than the unremarkable proposition that, where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts." *Id*. (citations and quotation marks omitted). Here, Defendants plainly have legislative jurisdiction under *Montana*, as explained herein and as alleged by Plaintiffs in their tribal court complaint, Tomaselli Decl. Ex. A ¶ 1.

Plaintiffs' Complaint does not establish a legal theory underpinning the Tribe's alleged lack of jurisdiction over a *private contractor* working within the Tribe's jurisdiction. Simply alleging that an agreement exists between the Tribe and the School District and that application of TERO to Plaintiffs would cause the District harm does not provide a set of facts in support of Plaintiffs' claim that the tribal court lacks jurisdiction *over Plaintiffs*. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) ("[w]hile legal conclusions can provide the complaint's framework, they must be supported by factual allegations."). At most, the Complaint alleges that the Tribe cannot assert regulatory jurisdiction over the state itself, which is irrelevant to whether the Tribe has adjudicative or legislative authority over Plaintiffs.

**2. The Tribe Has Authority to Regulate Plaintiffs' Conduct Because it Threatens the Political Integrity, Economic Security, and Welfare of the Tribe.**

Under *Montana*'s second exception, tribes have legislative authority over nonmembers with respect to "conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. Since *Montana* was decided, the Supreme Court recognized that "certain activities on non-Indian fee land (say, a business enterprise employing tribal members) or certain uses (say, commercial development) may intrude on the internal relations of the tribe or threaten self-rule." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 334-335 (2008). To the extent they do, "such activities or land uses may be regulated." *Id.* at 335. Put another way, "certain forms of nonmember behavior, even on non-Indian fee land, may sufficiently affect the tribe as to justify tribal oversight." *Id.* While tribes generally have no interest in regulating the conduct of nonmembers, they may regulate nonmember behavior that implicates tribal governance and internal relations. *Id*. Notably, a tribe's ability to regulate working conditions of tribal members on tribal land is "plainly central to the tribe's power of self-government." *State Farm Ins. Cos. v. Turtle Mt. Fleet Farm, LLC,* No. 12-cv-00094, 2014 U.S. Dist. LEXIS 65748, *23 (D.N.D. May 12, 2014) (quoting *Dolgencorp v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 175 (5th Cir. 2014).

Here, the Tribe's interest in regulating the employment practices of non-Indians on land located within the reservation itself is at least as great as those recognized by the Supreme Court in *Plains Commerce Bank* allowing tribes to regulate the business practices of employers on non-Indian fee land. 554 U.S. at 334-335. Plaintiffs' conduct has threatened and effected the political integrity, the economic security, and the health and welfare of the Tribe. The Tribe's TERO is

plainly central to the tribe's power of self-government. Plaintiffs failed to allege facts to the contrary or any facts whatsoever to support a claim that a private (non-state) contractor working on the School District project would not be subject to the Tribe's TERO. At best, Plaintiffs recite threadbare "elements of a cause of action, supported by mere conclusory statements" which "do not suffice." *Iqbal* at 678.

### 3. The Tribe Has Authority to Tax Plaintiffs for Their Conduct on Tribal Land Under the Exclusion Doctrine.

The Tribe has the power to control economic activity within its jurisdiction and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction. Nonmembers who refuse to comply with tribal law may be excluded from the reservation. This principal is commonly referred to as the exclusion doctrine, and the Tribe has the authority to tax Plaintiffs' on-reservation commercial dealings under this third exception to the general rule that the Tribe cannot regulate the conduct of nonmembers.

In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), decided one year after *Montana*, the Supreme Court upheld the Tribe's authority to impose a severance tax on a nonmember company extracting oil and gas from tribal property, in addition to the negotiated royalty payments under the lease. 455 U.S. at 159. The Court found the jurisdiction to tax nonmembers on tribally owned land derived from the tribe's power, as a landowner, to exclude nonmembers and its "general authority, as sovereign, to control economic activity within its jurisdiction and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction." *Id.* at 137. The Turtle Mountain Band of Chippewa Indians is similarly empowered to control economic activity within its jurisdiction and to recover the costs of providing governmental services from

the regulated entity. Defendants have the right to exclude Plaintiffs from the reservation, and they have the power to require Plaintiffs to pay TERO fees in exchange for permission to work there.

Therefore, based on the three exceptions above, Plaintiffs have failed to plead sufficient facts that the Tribe's TERO is anything other than a permissible governmental attempt to regulate Plaintiffs' conduct as a contractor performing work on Tribal lands. Plaintiffs have failed to state a claim for which relief can be granted.

**B. Plaintiffs Fail to State a Claim Against Particular Defendants.**

Finally, the Complaint makes a number of conclusory allegations about "Defendants" generally, without specifying who has taken what action; nowhere does it suggest, for example, that Defendant Parisien engaged in unlawful activity, or that the Tribe's TERO law violates federal law. The only inference that can be drawn from Plaintiffs' Complaint is that they themselves seek some kind of exception to the Tribe's TERO based on unsupported allegations of an agreement between the Tribe and the School District. Yet even if such an agreement exists, it would not impede on the Tribe's jurisdiction over non-Indians operating on Tribal lands. *See State of Montana Department of Transportation,* 191 F.3d at 1114.

Plaintiffs' Complaint does not "allow[ ] the court to draw the reasonable inference that [each] defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "[L]umping" defendants together with other defendants in one category results in the reader being unable to determine the exact theory of liability as to each separate defendant." *Wong v. BannCor Mortg*., No. 10-1038-CV, 2011 U.S. Dist. LEXIS 61548, at *40-41 (W.D. Mo. June 9, 2011). As a consequence, Plaintiffs' Complaint should be dismissed for failure to state a claim, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

## CONCLUSION

For the foregoing reasons, the Tribal Defendants respectfully request that this Court dismiss this action and remand to the Tribe for procedures consistent with TERO.

January 31, 2020

Respectfully submitted,

/s/ Paige M. Tomaselli
Paige M. Tomaselli (Bar ID CA 237737)
LEVITANLAW
P.O. Box 5475
Sonora, CA 95370
Email: paige@levitanlaw.net
Phone: (619) 339-3180

Alysia E. LaCounte
WI Bar No. 1019507
P.O. Box 900
Belcourt, N.D. 58316
Alysia.lacounte@gmail.com
(701) 477-2600

*Attorneys for Tribal Defendants*

**CERTIFICATE OF SERVICE**

I hereby certify that on January 31, 2020, I electronically filed the foregoing document using the Court's CM/ECF system, which will send notification of the filing of this document to the e-mail addresses registered in the CM/ECF system, as denoted on the Electronic Mail Service List.

Dated: January 31, 2020

Respectfully submitted,

/s/ Paige M. Tomaselli

Paige M. Tomaselli (Bar ID CA 237737)
LEVITANLAW
P.O. Box 5475
Sonora, CA 95370
Email: paige@levitanlaw.net
Phone: (619) 339-3180
Attorneys for Tribal Plaintiff

*Attorney for Tribal Defendants*