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

Jason Hanson, & Dakota Metal Fabrication, 312 3rd Street, PO Box 66, Manvel, ND 58256, Plaintiffs, v. James Parisien, Director of the Turtle Mountain Band of Chippewa Indians Tribal Employment Rights Ordinance (TERO), The TERO Office, the Turtle Mountain Band of Chippewa Indians (Tribe), Turtle Mountain Tribal Court, And the Tribal Appellate Court, Defendants.	)	**COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF** Civ. No: 3:19-cv-270

FIRST RESPONSE TO TRIBAL DEFENDANTS' PROPOSE MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TOP DISMISS

RESPONSE TO INTRODUCTION

Plaintiffs incorporate the General Description of the Action found in the complaint, by this reference.

It appears Defendants make *ad hominem* assertions throughout their memorandum of points and authorities in support of their motion to dismiss.

Plaintiffs disagree with Defendants' introduction where Defendants state the tribe has regulatory power over Plaintiffs, who are non-Indians, and have entered into a consensual

agreement with the School District # 7, also a non-Indian and a subdivision of the State of North Dakota. This is not a "threadbare" assertion. The Court can take judicial notice of *Belcourt Public School District; Angel Poitra v. Ella Davis, Turtle Mountain Tribal Court, et al*, No. 14-1542, Circuit Court of Appeals for the Eight Circuit (Date Filed: 05/15/2015 Entry ID: 4275551). In *Davis*, the 8th Circuit characterized the School District # 7, as a non-Indian and a subdivision of the State of North Dakota.

Another shortcoming in Defendants' introduction is that the TERO was enacted to regulate all non-Indian activity on the reservation. There are substantial U.S. Supreme Court, Circuit Court of Appeals decisions which contradict Defendants' assertions in their introductions. These cases will be discussed *infra*.

Plaintiffs did not "run to the tribal courts" to avoid paying TERO fees. Plaintiffs filed in tribal court to make a meritorious challenge against Defendants enforcing the TERO law against Plaintiffs, who are non-Indians and contracting with the School District, another non-Indian. Plaintiffs did not exhaust the TERO administrative remedies, because Plaintiffs sought the tribal court's decision whether the TERO office had authority to regulate Plaintiffs. Plaintiffs submitted to the tribal court for the sole reason of obtaining an injunction to order the TERO from interfering with Plaintiffs' contract with the School District. These facts are well pleaded in the tribal court complaint. See Exhibit # 4.

Furthermore, filing an action in this Court is not a request for the Court to interfere in a tribal process, whether it is the court system or the tribal enforcement of the TERO law. Plaintiffs have a right to file this action as tax payers and as citizens of North Dakota and the U.S. Given the fact that the tribe is a quasi-sovereign, does not afford the tribe superior rights

over Plaintiffs in this Court.

RESPONSE TO PROCEDURAL HISTORY

Plaintiffs disagree with Defendants' statement the TERO assessment of fees was legal. Quite the contrary, it was Defendant James Parisien who was acting illegally. Plaintiffs submitted the tribal court complaint and the response to the appeal in the tribal court of appeals, as exhibits # 4 and 5, respectively. Defendants misapply Fed.R.Civ.P. 12(b)(1) in there Response. Plaintiffs filed a brief in response to the Defendants' brief filed with the tribal court of appeals. Plaintiffs requests the Court to take judicial notice of exhibits # 4 and # 5, as they are part of the record below. Plaintiffs incorporate the facts and arguments found in exhibits # 4 (complaint) and # 5 (plaintiffs'/appellee's brief on appeal to the tribal court of appeals) by this reference.

Another *ad hominem* assertion Defendants make is that "the tribal court took pity on Plaintiffs and carved out a limited exception," to rule in favor of Plaintiffs. This statement is an affront to the tribal court system. The tribal court simply followed federal court precedents in its decision.

Again to repeat the last paragraph on page 2, Plaintiffs did not exhaust the TERO administrative remedy, because Plaintiffs sought the tribal court's decision whether the TERO office had authority to regulate Plaintiffs. Plaintiffs submitted to the tribal court for the sole reason of obtaining an injunction to order the TERO from interfering with Plaintiffs' contract with the School District. Plaintiffs exhausted tribal court remedies. *National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845 (1985), *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, at 20, n. 14; (1987).

RESPONSE TO ARGUMENT

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

Plaintiff disagree Defendants are entitled to the defense of sovereign immunity. Defendants provide several sovereign immunity arguments that Defendants are entitled to the defense of sovereign immunity, without first establishing Defendants are in fact entitled to the defense of sovereign immunity. These arguments are lacking. Defendants are simply requesting the Court to make an assumption Defendants are entitled to the defense of sovereign immunity; because Defendants are part of the tribal government or in Defendant Tribe's case, it is the tribal government.

Defendants failed to introduce into evidence that an agreement exists between Plaintiffs and Defendants, or with a tribal member. Before a tribe can use the defense of sovereign immunity, the tribe has to provide evidence it is entitled to the defense of sovereign immunity. Here Defendants merely cite several instances and federal court decisions where other tribes enjoyed the defense of sovereign immunity. "[T]he inherent sovereign powers of an Indian tribe *do not* extend to the activities of *non* members of the tribe." *Davis*, citing the *Montana v. United States*, 450 U.S. 544 (1981), at 565, (emphases added). Here Defendants have not shown the agreement between Plaintiffs and the School District "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Mere assertions that the tribe's welfare is at risk, without any evidence to back it up, does not overcome the *Montana* general rule disallowing a tribe from regulating conduct between non-Indians on the reservation. *Strate v. A-1 Contractors* (95-1872), 520 U.S. 438 (1997), See *Montana*. There are two exceptions to the general rule in *Montana*. The first exception requires an agreement

between the non-Indian and the tribe or a tribal member. The second exception is set in motion when the conduct the non-Indian "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." . The Court further explained, "[there are] circumstances necessary for the second *Montana* exception to apply." *Plains Commerce Bank v Long Family Land and Cattle Company, Inc.*, et al., 554 U.S. 316 (2008). citing *Montana*.

Defendants have not proven they are they are entitled to the defense of sovereign immunity. The *Montana* court held:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non Indians on their reservations, even on non Indian fee lands. 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. A tribe may also retain inherent power to exercise civil authority over the conduct of non Indians on fee lands within its reservation when that conduct 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. 544 (1981).

The U.S. Supreme Court further interpreting the *Montana* decision as follows:

> Montana thus described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non Indian land within a reservation, subject to two exceptions: The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health, or welfare.

Strate (95-1872), 520 U.S. 438 (1997).

"Accordingly, the Tribe and School District entered into agreements ("Plans of Operations"). ... that provided the School District with exclusive authority to administer the "day-

to-day operations" of the Turtle Mountain Community High School ("Grant High School")." *Davis*, P. 4. Defendant Tribe has divested its authority to regulate the School District's activity with non-Indian contractors, such as Plaintiffs on the School District's campus or the school land, which is under the control of the School District. When Defendants entered into the Plans of Operations, the relationship is similar to *Strate* right of way over tribal lands. Here *Strate* is controlling.

"As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Strate* citing *Montana* at 563. In *Strate* there were two non-Indians (Fredericks, a non-Indian and A-1 Contractors also a non-Indian). Strate was the tribal judge. The two non-Indians "were involved in a traffic accident on a portion of a North Dakota state highway running through the Fort Berthold Indian Reservation." *Ibid*. The highway is on a right of way. "[T]he right of way lies on land held by the United States in trust for the Three Affiliated Tribes (Mandan, Hidatsa, and Arikara) and their members." "A-1 Contractors, **a non Indian owned enterprise with its principal place of business outside the reservation, was at the time under a subcontract with the LCM Corporation, a corporation wholly owned by the Tribes**, to do landscaping work related to the construction of a tribal community building." *Ibid*. Emphasis added. When comparing the facts in Strate, to the facts here, they are virtually the same. The *Merrion* "holding is therefore easily reconcilable with the Montana-Strate line of authority, which we deem to be controlling." "A tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe"). *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, at 142 ("[A] (1982). But, it makes no difference if the tribe owns the land or it doesn't own the land, where a U.S. Court of Appeals held, "Nevertheless, even if

the Tribe owned all of the land and facilities relevant to this case—which is not supported by the record—*Montana* would still apply, *Attorney's Process and Investigation Services, Inc., v. Sac & Fox Tribe of the Mississippi in Iowa*, 609 F.3d 927 (2010)., *See Davis*, at 11, Fn. 5.

Under this set of facts, the Court in *Strate* found neither of the two exceptions in *Montana* applicable. The Supreme Court said in a later decision, "Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Commerce Bank v Long Family Land and Cattle Company, Inc.*, et al., 554 U.S. 316 (2008), See *Montana*, 450 U. S., at 564.

The Plan of Operations should be construed as the Defendants' permission for the School District, and its vendors, such as Plaintiffs, to enter the reservation. It stands to reason the School District, will surely need to acquire goods and services from non-Indians in fulfilling its service conditions (found in the Plan of Operations), to Defendant Tribe.

The question which looms on the back burner is, "Why does Plaintiffs need a TERO license, when other vendors do not?" For example, according the business manger, Duane Poitra, Business Manager, stated Apple Computer (Apple) is just one of the many vendors who are on the School District campus all the time delivering computers and making repairs on computers already at schools. Earl Demery, accounts payable, indicated Quill delivers copy paper to the school. Mr. Demery also stated that Marcos Pizza delivers to the school. Duane Poitra stated Plaintiffs are no different than other vendors who sell goods and services to the School District. The undersigned called the TERO office, and spoke with Sherry Baker, at 3:00 p.m., Thursday, February 113, 2020, to verify if Apple has a TERO license. Ms. Baker said Apple does not have TERO license. Marco and Quill do not have TERO licenses. Defendants

are not only treating Plaintiffs differently, but the disparaging treatment is with a "heavy hand." In discussing the issue with Mr. Poitra. Whether a vendor is at the School District school for one hour, or there for several months/weeks as with Plaintiffs, Pointra indicated they are all vendors. Defendants are treating Plaintiffs differently, or reverse discrimination. TERO was passed by the Congress to eliminate discrimination on Indian reservations. Defendants own arguments are working against them.

The School District agreed to provide educational services to students residing on the Reservation, as memorialized, at least in part, in the Plans of Operations. But these agreements between the School District and the Tribe do not alone confer jurisdiction on the Tribal Court to regulate agreements of non-Indians with the School District under the first *Montana* exception." *Davis*, P. 8. "Although A-1 was engaged in subcontract work on the Fort Berthold Reservation, and therefore had a 'consensual relationship' with the Tribes, Gisela Fredericks was not a party to the subcontract, and the [T]ribes were strangers to the accident.'" *Strate*, 520 U.S. 438 (1997). In other words, because Defendant Tribe has no nexus to the agreement between Plaintiffs and the School District, the conduct does not fit into the first *Montana* exception.

"The second concerns activity that directly affects the tribe's political integrity, economic security, health, or welfare." *Strate* (95-1872), 520 U.S. 438 (1997). Plaintiffs argue the alleged conduct at issue in this case clearly does not "imperil the subsistence" of the Tribe and that Tribal Court jurisdiction is "necessary to avert catastrophic consequences," In fact, just the opposite can be said. Plaintiffs' installation of the mechanical system in the pre-school and the wresting gym is a benefit to Defendant Tribe. In addition, "Other courts have found the second *Montana*

exception inapplicable to conduct that was either comparable or more detrimental to a tribe's subsistence and well-being than the conduct alleged in this case." *Davis*, P. 12. Plaintiffs include footnote #6, in its entirety, to shed light on the fact that Plaintiffs' conduct with the School District, does not impede Defendants from governing themselves the their members.

> 6. *See Evans v. Shoshone-Bannock* 6 *Land Use Policy Comm'n*, 736 F.3d 1298, 1305 (9th Cir. 2013) (holding that the second *Montana* exception did not apply to non-Indian conduct that allegedly caused, among other things, "groundwater contamination" and "improper disposal of construction debris"); *MacArthur,* 497 F.3d at 1075 **(holding that "[w]hile the Navajo Nation undoubtedly has an interest in regulating employment relationships between its members and non-Indian employers on the reservation, that interest is not so substantial in this case as to affect the Nation's right to make its own laws and be governed by them");** *Allen*, 163 F.3d at 515–16 (9th Cir. 1998) (en banc) ("Having divested itself of sovereignty over the very activities that gave rise to the civil claim, nothing in this case can be seen as threatening self-government or the political integrity, economic security or health and welfare of the tribe. . . . Indian tribes or their members . . . may pursue their causes of action in state or federal court."); *Otter Tail Power Co. v. Leech Lake Band of Ojibwe*, No. 11-1070 DWF/LIB, 2011 WL 2490820, at *5 (D. Minn. June 22, 2011) (holding that the second *Montana* exception did not apply to nonmember conduct that would interfere with the tribe's "hunting, fishing, and gathering rights"); *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 846 F. Supp. 2d 646, 650 (S.D. Miss. 2011) (holding that the second *Montana* exception did not apply to a case in which a nonmember of the tribe allegedly molested a minor tribe member), *aff'd*, 746 F.3d 167 (5th Cir. 2014).

The *Strate* court said, "Opening the Tribal Court for her optional use is not necessary to protect tribal self government; and requiring A-1 and Stockert to defend against this commonplace state highway accident claim in an unfamiliar court is not crucial to 'the political integrity, the economic security, or the health or welfare of the [Three Affiliated Tribes].'" *Strate*, citing *Montana*, 450 U.S., at 566.

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

Defendants allege "[N]othing short of an expresed unequivocal waiver can defeat the sovereign immunity of an Indian nation." Citing, *Santa Clara Pueblo v Martinez*, 436 U.S. 436 U.S. 49 at 58 (1978). *Santa Clara* can be distinguished from this case, as it was a Indian Civil Rights Act (ICRA) suit. This is not an ICRA suit, but a suit to challenge the tribes authority to regulate the conduct between non-Indians, regardless where the activity takes place. *Davis*, P. 11, Fn. 5. Plaintiffs include Footnote # 5, in its entirety, to demonstrate the status of the land where Plaintiffs entered into a contract to provide the mechanical installation for the School District is immaterial.

> 5. Of course, the transaction at issue in *Plains Commerce Bank* involved land that non-Indians owned in fee simple both before and after the transaction, and this court is aware that "[t]he ownership status of land" is "one factor to consider in determining whether regulation of the activities of nonmembers is 'necessary to protect tribal self-government or to control internal relations.'" *Hicks*, 533 U.S. at 360. As noted above, however, there is scant evidence in the record what, if any, land and facilities relevant to this case were owned by the Tribe. ***Nevertheless, even if the Tribe owned all of the land and facilities relevant to this case—which is not supported by the record—Montana would still apply***, *see Attorney's Process*, 609 F.3d at 935–41, and our analysis would not change for the reasons stated herein.

Emphasis added.

This action calls into question Defendants jurisdiction to regulate the activities between non-Indians, Plaintiffs and the School District. Defendants have failed to produce an agreement between Plaintiffs and Defendants, or with a tribal member to place Plaintiffs' activities under the first Montan exception. A tribe can regulate Non-Indian activity subject to "two exceptions: The first exception relates to nonmembers who enter consensual relationships with the tribe or its members;. ... ." *Montana*, 450 U.S. 544 (1981).

Again this argument is superfluous without first establishing Defendants are entitled to

the defense of sovereign immunity. *Montana* described a general rule that, "[A]bsent a different congressional direction, Indian tribes do not have civil authority over the conduct of nonmembers on non Indian land [or school land, such in *Davis* Fn 5.], within a reservation, subject to two exceptions." *Strate*, citing *Montana*.

No federal statute or a treaty specifically provides the Tribal Court with jurisdiction over the claims at issue in this case; therefore, the Tribal Court's jurisdiction must arise from its "retained or inherent sovereignty." *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 649–50 (2001). Defendants have not expressed in any way that Congress has allowed the tribe to regulate non-Indians. "Because 'efforts by a tribe to regulate nonmembers . . . are presumptively invalid,' the Tribe bears the burden of showing that its assertion of jurisdiction falls within one of the Montana exceptions." *Plains Commerce Bank*, 128 S.Ct. at 2720 (quotation marks omitted). Those exceptions are narrow ones and "cannot be construed in a manner that would `swallow the rule.'" Id. (quoting Atkinson Trading Co., 532 U.S. at 655, 121 S. Ct. 1825).

B. Defendant James Parisien is Immune from Suit.

Plaintiffs entirely disagree with Defendants' argument here, under this heading. Plaintiffs incorporate the arguments made in "**A**" *supra*, as if the text of the arguments were first written here. Defendant Parisien was acting outside the scope of his authority when Parisien called Plaintiffs' bank, harassing Plaintiffs in an attempt to block Plaintiffs from using their bank account. Defendant Parisien's activity is not in Defendant Parisien's scope of work. See, P. # 9, Complaint labeled as Exhibit 4. Defendants failed to provide a job description to verify Defendant Parisien's scope of work which would allow him to call Plaintiffs' bank. Even if it were in Defendant Parisien's job description, Plaintiffs' argue it would still be illegal. Defendant

Parisien's actions deny him the defense of sovereign immunity.

II. Plaintiffs Failed to Exhausted Tribal Remedies.

The *Strate* Court said tribal courts should determine there own jurisdiction. "In sum, we do not extract from *National Farmers Union* anything more than a prudential exhaustion rule, in deference to the capacity of tribal courts 'to explain to the parties the precise basis for accepting [or rejecting] jurisdiction.'" *Strate*, citing *National Farmers Union*, 471 U.S. 845 (1985).

The Strate Court recognized in *Iowa Mutual* that the exhaustion rule stated in *National Farmers* was "prudential," not jurisdictional. 480 U.S. 9, at 20, n. 14; (1987).

The Strate Court said after further discussing the exhaustion issue or principle:

> Tribal authority over the activities of non Indians on reservation lands is an important part of tribal sovereignty. See *Montana v. United States*, 450 U.S. 544, 565-566 (1981); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152-153 (1980); *Fisher v. District Court [of Sixteenth Judicial Dist. of Mont.]*, 424 U. S. [382,] 387-389 [(1976)]. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.

The *Strate* Court concluded its reasoning by saying, "Read in context, however, this language scarcely supports the view that the *Montana* rule does not bear on tribal court adjudicatory authority in cases involving nonmember defendants." In both *National Farmers Union*, and *Iowa Mutual* the Court discussed the exhaustion of tribal court remedies, and not administrative remedies in a tribe's non-tribal court remedial system. Here Plaintiffs exhausted tribal court remedies, both at the trial court level and at the tribal court appellate level. Plaintiffs' are in compliance with *National Farmers Union*, and *Iowa Mutual*. See Exhibit # 1, the trial court order, and Exhibit #2, the tribal court of appeals order. Finally, "In light of the citation of *Montana*, *Colville*, and *Fisher*, the *Iowa Mutual* statement emphasized by petitioners does not

limit the Montana rule." *Strate* citing *Iowa Mutual* at 480 U.S., at 18.

CONCLUSION

For the reasons argued above, Plaintiffs request a declaratory and injunction relief against Defendants from attempting to regulate Plaintiffs, when providing goods and services to the School District, a non-Indian, and a sub-division of the State of North Dakota, on the reservation, or any other non-Indian.

Respectfully Submitted for:

Plaintiffs/Petitioners

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SERVICE OF PROCESS

Defendants will be provided service of process electronically through their when this document with exhibits are filed.