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

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

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), hereby submit this Reply in Support of their Motion to Dismiss, ECF No. 16.

As Defendants presented in their Memorandum of Points and Authorities in Support of their Motion to Dismiss, ECF No. 16-1, this Court should dismiss the Complaint for three reasons: (1) Plaintiffs failed to state a claim upon which relief can be granted; (2) the Tribal Defendants are cloaked with the Turtle Mountain Band of Chippewa Indian's sovereign immunity; (3) Plaintiffs failed to exhaust tribal remedies. Plaintiffs' Response to Defendants' Motion to Dismiss (Plaintiffs' Response) is insufficient to justify why this Court should not dismiss the Complaint.

First, Plaintiffs have not established that the Complaint states a claim upon which relief can be granted. Plaintiffs' Response contains numerous new allegations not pleaded in the Complaint, the truth of which cannot be judicially noticed. The Complaint cannot be enhanced by Plaintiffs' incorporation of these "facts" in a response to a motion to dismiss. In addition, Plaintiffs' amalgamation of distinct lines of Eighth Circuit and Supreme Court authority makes the Response wholly incomprehensible. Cases are miscited for arguments that are not relevant to the subjects being addressed, and it is frequently unclear which case is intended to support which legal argument. Second, Plaintiffs' Response fails to address Defendants' sovereign immunity, and specifically, fails to establish that *any* of the Tribal Court Defendants are not entitled to sovereign immunity. Third, the Response fails to establish that Plaintiffs have exhausted tribal court and tribal administrative remedies. Therefore, Defendants respectfully request that this Court grant its Motion to Dismiss.

I. Plaintiffs' Complaint Does Not State a Claim Upon Which Relief Can Be Granted.

The Eighth Circuit has discussed the standard that a complaint must meet in order to survive a motion to dismiss:

> Federal Rule of Civil Procedure 8 requires that a complaint present "a short and plain statement of the claim showing that the pleader is entitled to relief." In order to meet this standard, and survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" The plausibility standard requires a plaintiff to show at the pleading stage that success on the merits is more than a "sheer possibility."

Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 594 (8th Cir. 2009) (internal citations omitted). The Eighth Circuit "make[s] this determination by considering *only* the materials that are 'necessarily embraced by the pleadings and exhibits attached to the complaint.'" *Carlsen v. GameStop, Inc.*, 833 F.3d 903, 908 (8th Cir. 2016) (citations omitted).

Defendants' Motion to Dismiss provides a thorough argument as to why the Tribal Defendants have legislative and adjudicative authority over Plaintiffs. Instead of responding to these arguments with facts *pleaded in their Complaint*, Plaintiffs attempt to incorporate new unsubstantiated allegations, tribal court filings not appended to their Complaint, and factual findings from *Belcourt Public School District v. Davis*, Case No. 14-1541 (8th Cir. 2015). However, these new facts cannot be incorporated into the pleadings, and the factual allegations actually contained in Plaintiffs' Complaint are "so indeterminate" that the Complaint fails to state a claim. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

A. This Court Must Only Consider Materials That Are Embraced By the Pleadings in Deciding the Sufficiency of the Complaint.

Plaintiffs request judicial notice of certain facts to defeat Defendants' Motion to Dismiss. Judicial notice is a limited doctrine that allows courts to take notice of adjudicative facts that are

"not subject to reasonable dispute." Fed. R. Evid. 201(b). Facts are indisputable, and thus subject to judicial notice, only if they are either: "(1) generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201.

Plaintiffs' Response requests that this Court take judicial notice of certain tribal court filings and an Eight Circuit opinion, and then improperly relies on these documents as if the facts contained in these documents were pleaded in Plaintiffs' Complaint. Exhibit Four, ECF No. 18-1, is a complaint filed by Plaintiffs against Defendant Parisien in his individual capacity in the Turtle Mountain Tribal Court. It is a separate lawsuit and is not part of the tribal court record for this case. Exhibit Five, ECF No. 18-2, is Plaintiffs' response to the Tribal Defendants' appeal in the tribal court action, *Dakota Metal Fabric v. Parisien*, Civ. No. 18-1054. Plaintiffs also request judicial notice of *Belcourt Public School District, et al. v. Steven Herman, et al*, Case No. 14-1541 (8th Cir. 2015). Plaintiffs repeatedly use the factual findings in *Belcourt* to allege (for the first time in their Response) that Defendants and the School Board have agreed upon a "Plan of Operations" that "should be construed as Defendants' permission for the School District, and its vendors, to enter the reservation." Plaintiffs' Response 7. Plaintiffs further allege (for the first time in their Response) that this "Plan of Operations" divests the Tribe of "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." *Id*. at 6. The "Plan of Operations" discussed in *Belcourt* and the provisions that Plaintiffs believe absolve them of their TERO duties were not incorporated in Plaintiffs' Complaint. Plaintiffs cannot incorporate by reference the factual findings of another Court with entirely distinct parties, claims, and factual circumstances by way of citing that case in their Complaint.

Defendants do not object to the Court taking judicial notice of the existence of these court filings, but the facts contained inside these documents are disputed and therefore not subject to judicial notice. *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc*., 969 F.2d 1384, 1388 (2d Cir. 1992) (finding district court erred in taking judicial notice of bankruptcy court order to establish facts asserted therein). When offered to prove the facts stated, court records are hearsay. Accordingly, this Court may take judicial notice of the court records for the limited purpose of recognizing the "judicial act" represented by the record or the subject matter of the litigation, *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994) (listing inter-circuit cases), but not the allegations themselves.

In addition to the request for judicial notice of Exhibits Four and Five and *Belcourt*, Plaintiffs include substantial factual allegations that were not pleaded in or attached to the Complaint. Plaintiffs' Response includes new allegations concerning vendors other than Plaintiffs, and conversations between Plaintiffs' attorney, those other vendors, and Tribal members. Plaintiffs' Response 7-8. It also contains new allegations that Defendant Parisien exceeded the scope of his authority. *Id*. at 9. These new allegations cannot be used to defeat a facial attack under Rule 12(b)(6). *Carlsen*, 833 F.3d at 908.

A complaint must be well-pleaded under Rule 8 of the Federal Rules of Civil Procedure. Defendants request that this Court deny Plaintiffs' attempt to fill in the gaps in their Complaint with the additional facts scattered throughout their Response.

B. Plaintiffs Have Not Pleaded Facts That Plausibly Establish That the *Montana* Exceptions Do Not Apply.

Montana v. United States, 450 U.S. 544 (1981) confirmed that Indian tribes enjoy all sovereign powers that are not divested by Congress or inconsistent with the Tribe's dependence on the United States. While generally tribal governments cannot exercise civil jurisdiction over

nonmembers, the Supreme Court has enumerated three exceptions, all of which are applicable here: (1) 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," *Montana*, 450 U.S. at 565; (2) 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.*; and (3) tribes may exercise jurisdiction over nonmembers under their power to exclude persons from tribal property, *see Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).[1]

1. Plaintiffs Have a Consensual Relationship with Defendants.

Montana's first exception requires a "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565. Plaintiffs argue that there is no consensual relationship between the Plaintiffs and Defendants, and that instead, the relationship only exists between the Turtle Mountain Band of Chippewa Indians and the School District. This argument is belied by Plaintiffs' own Complaint, which states clearly that the Project is a "joint venture between the Tribe and the Belcourt School District." ECF No. 1 ¶ 15. Plaintiffs' Complaint attaches a letter from the TERO Commission to Plaintiffs issued several months before the Project initiated, further confirming Plaintiffs' knowledge of TERO's applicability to the Project. ECF No. 1-4. Plaintiffs argue that the Tribe "divested its authority" over the Project, Plaintiffs' Response 6, while Plaintiffs' allegations clearly state otherwise.

[1] Plaintiffs do not address the power to exclude pursuant to *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) in their Response, so Defendants do not reiterate their arguments on this point in this Reply.

The fact that the Project took place on Tribal lands is equally significant. ECF No. 1 ¶ 5 (alleging that the Project is "within the exterior boundaries of the reservation"). Plaintiffs fail to address *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990), where the Ninth Circuit found the location of the commercial activity there—Indian fee lands—significant in construing *Montana's* first exception. 905 F.2d at 1314 ("[t]here is also the underlying fact that its plant is within reservation boundaries"). *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653 (2001), quoted but not cited by Plaintiffs, further underscores that the location of the activity is directly relevant to its power to tax. 532 U.S. at 653 ("An Indian tribe's sovereign power to tax—whatever its derivation—reaches no further than tribal land.")

In an effort to dilute these findings, Plaintiffs state simply that "*Montana* would still apply." Plaintiffs' Response 7. There is no doubt that *Montana* applies here. The doubt lies only in whether Plaintiffs have plausibly alleged facts to defeat *Montana's* first exception. As stated above, Plaintiffs repeatedly rely on facts and analysis from *Belcourt*—a case that is completely inapplicable to the facts of this case—to support its allegation that there is no consensual relationship. There, School District employees attempted to sue the School District in tribal court for employment-related injuries. *Belcourt*, Case No. 14-1541 at 5. 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 10 (citing *Montana*, 450 U.S. at 544). Unlike in *Belcourt*, the School District is not a party in this litigation, and North Dakota law does not expressly prohibit Defendants from applying the TERO to Plaintiffs' activities on Tribal lands. Put simply, the tribal court did not assert jurisdiction over an employee dispute with a North Dakota state entity; rather the Tribe is asserting regulatory jurisdiction over the employment practices of a business performing work

within the exterior boundaries of the reservation. *Belcourt's* determination that the *Montana* exceptions did not apply under the circumstances of that case cannot be applied wholesale to this case.

Finally, Plaintiffs rely on *Strate v. A-1 Contrs*., 520 U.S. 438 (1997) to support its claims that Defendants lack jurisdiction over Plaintiffs, but this reliance is misplaced. *Strate* involved a car accident between *two non-tribal members* on a *state highway* that traversed tribal land. 520 U.S. at 444. The injured driver filed a civil action in tribal court, and the defendants moved to dismiss for lack of jurisdiction. The tribal court denied the motion and the tribal appellate court affirmed. *Id.* The company and employee then sought an injunction in district court enjoining the tribal court's assertion of jurisdiction. *Id.* The district court denied the injunction and the driver and tribal court judge appealed. *Id.* The court of appeals, on rehearing *en banc*, reversed, and the Supreme Court affirmed. *Id*. at 444-45. In holding that the tribal court had no jurisdiction over a civil action between two parties who were not tribal members that arose out of an accident on a state highway traversing tribal lands, the Eighth Circuit intentionally declined to express a view as to whether the tribal court would have jurisdiction if the accident occurred on tribal land:

> When an accident occurs on a public highway maintained by the State pursuant to a federally granted right-of-way over Indian reservation land, a civil action against allegedly negligent nonmembers falls within state or federal regulatory and adjudicatory governance; absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers driving on the State's highway, tribal courts may not exercise jurisdiction in such cases. *This Court expresses no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation.*

Id. at 439 (emphasis added). Indeed, the Supreme Court confirmed that "tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty," *id*. at 451, and only found the *Montana* rule inapplicable to the specific facts of that case, *id*. at 459.

2. Plaintiffs' Conduct 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. Plaintiffs failed to address Defendants' argument that the Supreme Court has recognized that business enterprises employing tribal members or other 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). Instead, Plaintiffs simply block quote from *Belcourt* in an effort defeat Defendants' facial challenge to the sufficiency of their Complaint. Plaintiffs' Response does not support the sufficiency of their pleadings.

II. Plaintiffs' Response Does Not Address Sovereign Immunity.

Not a single Tribal Defendant in this matter has waived its sovereign immunity. Instead of directly addressing this point, Plaintiffs seem to confuse sovereign immunity with Defendants' inherent sovereignty: the right and power to regulate its internal affairs. Sovereign immunity—the doctrine that precludes the assertion of a claim against a sovereign without the sovereign's consent—stems from a tribe's inherent sovereignty, *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (internal citations and quotations omitted), but it is not the same thing, and the legal arguments require reference to a completely separate line of cases.

In the Eighth Circuit, sovereign immunity is jurisdictional in nature. *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 4043 (8th Cir. 2000); *see also Oglala Sioux Tribe v. C & W Enterprises, Inc.*, 487 F.3d 1129, 1131 n.4 (8th Cir. 2007). It has been long been recognized that tribes possess "common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978). Indian tribes may not be sued absent an

express and unequivocal waiver of immunity by the tribe or "abrogation of tribal immunity by Congress." *Baker Elec. Coop. v. Chaske*, 58 F.3d 1466, 1471 (8th Cir. 1994).

A tribe's sovereign immunity certainly extends to tribal officers and agencies. *Hagen*, 205 F.3d at 1043 (citing *Dillon v. Yankton Sioux Tribe Housing Auth*., 144 F.3d 581, 583 (8th Cir. 1998)). The Eighth Circuit has, however, recognized a tribe's sovereign immunity may be subject to the exception expressed in *Ex Parte Young*, 209 U.S. 123 (1908) that "a suit challenging the constitutionality of a state official's action is not one against the State." *Baker Elec. Coop*., 28 F.3d at 1471. However, in order for *Ex Parte Young* to apply against a tribal official, Plaintiffs must allege that the official is responsible for an "ongoing violation of federal law." *Verizon Md. v. Pub. Serv. Comm'n of Md*., 535 U.S. 635, 645 (2002).

Instead of providing clear allegations about each Defendants' role in this controversy, Plaintiffs' Complaint appears to cut and paste from a pleading in another case. *See, e.g.*, ECF No. 1, p. 7(a) (confusing which party initiated the tribal court litigation); *see also id.* ¶ 25 ("Defendants will proceed with their actions to adjudicate *her* claims…") (emphasis added). Assuming that Plaintiffs' Complaint was clear on its face, and all the allegations and the request for relief were specific to the facts in this case, then it is possible that Plaintiffs could allege that an exception to the general rule that sovereign immunity applies, but specific allegations are required. As it stands, all Defendants are entitled to sovereign immunity.

III. Plaintiffs Failed to Exhaust Its Tribal Remedies.

The tribal court's jurisdiction was not at issue during the tribal court proceedings; thus, the tribal court has not had the opportunity to evaluate the factual and legal bases for the challenge. Plaintiffs' Response fails to address this point, suggesting only that it exhausted its tribal court remedies by filing in tribal court. But this act of filing a case against Defendants in

tribal court does not meet the Supreme Court's mandate in *National Farmers Union* that tribal courts have the first opportunity to evaluate their own jurisdiction. 471 U.S. at 856. Plaintiffs sued Defendants in tribal court, and simultaneously admitted that the tribal court has jurisdiction over the dispute. Tribal Court Complaint, ECF No. 16-3, at 2 ¶ 1. Plaintiffs' attempts to undo that allegation are unavailing. The tribal court has not had the opportunity to explain its precise basis for accepting jurisdiction because its jurisdiction was not placed at issue by Plaintiffs.

The Eighth Circuit has recently stated that the "development of a factual record may generally be required where a challenge to tribal court jurisdiction turns on disputed factual questions." *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1134 (8th Cir. 2019). This applies equally to administrative exhaustion. *See, e.g. Burlington N. R. Co. v. Crow Tribal Council*, 940 F.2d 1239 (9th Cir. 1991). Had Plaintiffs' followed the TERO's exhaustion procedures, the TERO Commission would have had the first opportunity to interpret the TERO and rule on its own jurisdiction.

Plaintiffs' Response fails to resolve the inherent inconsistency between its tribal court complaint—availing Plaintiffs of the jurisdiction of the tribal courts without restriction—to its current position that the tribal courts lack jurisdiction over Plaintiffs. 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. Neither of these things have occurred, and Plaintiffs have provided no legitimate reason why they should not occur.

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.

February 28, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 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: February 28, 2020

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