

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

KYLE GROCERY, INC. a South
Dakota corporation,

Plaintiff,

vs.

RENA SHORT HORN, CHARLES
ABOUREZK, Former Chief Judge and
Presiding Judge of The Oglala Sioux
Tribal Court in *Rena Short Horn v.*
Kyle Grocery, Inc., Civ-19-0128,
Current Chief Tribal Court Judge,
DAVID DILLON, THE OGLALA SIOUX
TRIBAL COURT, and THE OGLALA
SIOUX TRIBE,

Defendant.

Civ. No. _____

**MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION**

Plaintiff Kyle Grocery, Inc. (hereinafter “Kyle Grocery”), by and through counsel, hereby submits this Memorandum in Support of its Motion for Preliminary Injunction to enjoin Defendants, their agents, employees, successors, and assigns¹ from further proceedings against Kyle Grocery in the action filed in the Oglala Sioux Tribal Court, captioned *Rena Short Horn v. Kyle Grocery, Inc.*, Civ-19-0128, until this Court has ruled on Kyle Grocery’s challenge to subject matter jurisdiction of the Tribal Court.

FACTUAL & PROCEDURAL BACKGROUND

¹ “A tribal officer does not possess sovereign immunity from suit if it is alleged that he is acting outside the scope of the authority delegated to him by the Tribe.” *Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006).

Kyle Grocery is located on non-Indian land and is a registered domestic corporation under the laws of the state of South Dakota. See Affidavit of Elizabeth May, attached hereto and incorporated by reference as Exhibit C. As such, for purposes of jurisdiction, Kyle Grocery is deemed a citizen of the state of South Dakota and is a distinct entity from its owners. *F.T.C. v. Payday Financial, LLC*, 935 F.Supp.2d 926, 936 (D.S.D. 2013) (citing 28 U.S.C. § 1332(c)(1)).

On February 5, 2019, Rena Short Horn entered Kyle Grocery. Rena Short Horn tripped over an open and obvious box that was placed, along with a number of other boxes, in the aisle during stocking of the Kyle Grocery's shelves.

On April 30, 2019, Rena Short Horn initiated an action in the Oglala Sioux Tribal Court, captioned *Rena Short Horn v. Kyle Grocery, Inc.*, Civ-19-0128, seeking damages from Plaintiff. Kyle Grocery filed its response on or about May 28, 2019, and affirmatively set forth its defense that the Oglala Sioux Tribal Court has no jurisdiction over the matter.

On or about July 22, 2019, Kyle Grocery filed its Motion and Brief in Support of Motion to Dismiss for Lack of Jurisdiction. On October 1, 2019, Kyle Grocery filed a Renewed Motion to Dismiss for Lack of Jurisdiction and brief in support. On December 3, 2019, the Oglala Sioux Tribal Court heard arguments on the motion. Then, on December 16, 2019, Charles Abourezk, the Chief Judge of the Oglala Sioux Tribal Court and the presiding judge over this matter, issued an opinion denying Kyle Grocery's motion to dismiss.

Kyle Grocery filed its Notice of Appeal to the Supreme Court of the Oglala Sioux Nation on December 23, 2019. Kyle Grocery also requested a copy of the transcript from the December 3, 2019, hearing and submitted payment for the same as required by the Rules of Appellate procedure for the Oglala Sioux Supreme Court. Kyle Grocery confirmed in writing on March 19, 2020, that pursuant to Rule 31 of the Rules of Appellate procedure for the Oglala Sioux Supreme Court, that the parties were waiting for the composition of the record on appeal and docketing of the appeal before the parties could proceed with the serving and filing of the appeal briefs.

Then, on July 7, 2021, the Supreme Court of the Oglala Sioux Nation issued its briefing schedule despite no transcript ever being created or provided to the parties. In addition, there was no record provided to the parties and a request was made for Kyle Grocery's counsel to supplement the official record by emailing all of the pleadings and exhibits to the Supreme Court of the Oglala Sioux Nation for review. Still to this day, there is no official appellate record.

Nevertheless, on August 31, 2021, the Supreme Court of the Oglala Sioux Nation heard oral arguments via Zoom with only two of the three Supreme Court of the Oglala Sioux Nation justices hearing the case as the Chief Justice position is vacant. On or about November 19, 2021, Jack Duran, Jr., Associate Justice of the Supreme Court of the Oglala Sioux Nation, issued an opinion affirming the decision of the lower court. Kyle Grocery has exhausted all tribal remedies.

ARGUMENT

1. This Court should enjoin the Tribal Court Action in order to prevent irreparable harm to Kyle Grocery.

Kyle Grocery is entitled to a preliminary injunction because it is likely to succeed on the merits of its pending request for declaratory relief to determine the nature and extent of the Tribal Court's jurisdiction. Permitting the Tribal Court and Rena Short Horn to proceed will cause immediate and irreparable harm to Kyle Grocery. Determining the proper venue for this tort action will not prejudice Rena Short Horn and will protect Kyle Grocery from having to defend a lawsuit in a forum where jurisdiction is lacking. Public interest is also served by allowing judicial review of the Tribal Court's jurisdiction over a federal question to ensure Kyle Grocery is not being improperly subjected to jurisdiction in the Tribal Court contrary to long-standing Supreme Court precedent.

A. LEGAL STANDARD

Whether a preliminary injunction should issue involves the equitable balancing of the following factors:

- (1) the threat of irreparable harm to the movant;
- (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties' litigant;
- (3) the probability that movant will succeed on the merits; and
- (4) the public interest.

Dataphase Sys., Inc. v. CL Sys., Inc., 640 F.2d109, 114 (8th Cir. 1981). The Eighth Circuit Court of appeals further explained that, "the question is whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined."

Dataphase Sys., 640 F.2d at 113. A court's approach should be flexible

enough to encompass the particular circumstances of each case and no single factor is determinative. *Id.*

1. Kyle Grocery is likely to succeed on the merits:

For purposes of jurisdiction, South Dakota corporations are deemed citizens of the state of South Dakota and are distinct entities from their owners. *Payday Financial*, 935 F.Supp.2d at 936 (citing 28 U.S.C. § 1332(c)(1)) (“[A] corporation shall be deemed to be a citizen of every State ... by which it has been incorporated and of the State.”); *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 88–89, 126 S.Ct. 606, 163 (2005) (noting that a corporation is a citizen of the state where it is chartered and where its principal place of business is located); *see also Brevet Int’l, Inc. v. Great Plains Luggage Co.*, 2000 S.D. 5, ¶ 25, 604 N.W.2d 268, 273 (“We have long recognized that, as a general rule, a corporation is to be considered a legal entity separate and distinct from its shareholders, officers and directors unless and until there is sufficient reason to the contrary.”); *Kansas Gas & Elec. Co. v. Ross*, 521 N.W.2d 107, 111 (S.D. 1994) (“A firmly entrenched doctrine of American law is the concept that a corporation is considered a legal entity separate and distinct from its officers, directors and shareholders....”).

Therefore, as a registered domestic corporation of South Dakota, Defendant Kyle Grocery is a citizen of South Dakota and a non-Indian for purposes of determining jurisdiction regardless of the individual officers, directors, and shareholders.

The United States Supreme Court has held that whether a tribal court has adjudicative authority over nonmembers is a federal question. *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316, 324 (2008). *Plains Commerce Bank* is the Supreme Court’s most recent decision addressing the adjudicative authority of tribal courts over a non-Indian, nonmember of the tribe. Reiterating what it said in *Montana v. United States*, 450 U.S. 544, 565 (1981), the Supreme Court in *Plains Commerce Bank* stated,

Tribes do not, as a general matter, possess authority over *non-Indians* who come within their borders: ‘the inherent sovereign powers of an Indian tribe do not extend to the activities of *nonmembers* of the tribe.

Plains Commerce Bank, 554 U.S. at 328 (quoting *Montana*, 450 U.S. at 565) (emphasis added). Justice Roberts explained that “the tribes have, by virtue of their incorporation into the American republic, lost ‘the rights of governing persons within their limits except themselves.’” *Id.* (quoting *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 209 (1978)).

The Supreme Court has made clear that the *Montana* general rule applies to a tribe’s assertion of authority over nonmembers. *Nevada v. Hicks*, 533 U.S. 353, 358 (2001) (stating that “Indian tribes’ regulatory^[2] authority over nonmembers is governed by the principles set forth in *Montana*[.]”). That is true whether the activity of the nonmember involves Indian or non-Indian

² “[A] tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction.” *Plains Commerce Bank*, 554 U.S. at 330. “*Montana* govern[s] tribal assertions of adjudicatory authority over non-Indian fee land within a reservation.” *Atkinson Trading Co., Inc.*, 532 U.S. at 652 (citing *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997)).

land. *Id.* at 360 (finding that *Montana* clearly implied that its general rule “applies to both Indian and non-Indian land”); *see also id.* (“[T]he existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers.”); *Id.* (“This general rule restricts tribal authority over nonmember activities taking place on the reservation, and is particularly strong when the nonmember’s activity occurs on land owned in fee simple by non-Indians[.]”).

Therefore, because Kyle Grocery is a non-Indian corporation, *Montana* is controlling. The general rule from *Montana* “restricts tribal authority over nonmember activities taking place on the reservation.” *Id.* The rule “is particularly strong when the nonmember’s activity occurs on land owned in fee simple by non-Indians – what we have called ‘non-Indian fee land.’” *Id.* (quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997)). In fact, “[t]he absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction[.]” *Hicks*, 533 U.S. at 360.

Kyle Grocery is a non-Indian corporation. As such, under the general rule in *Montana*, the tribe has no adjudicative authority over it. Moreover, the alleged negligent occurred on non-Indian fee land. For this reason, pursuant to the general rule in *Montana*, the tribe has no adjudicative authority over Kyle Grocery in this tort action.

However, the United States Supreme Court has recognized two exceptions to the general rule that a tribe has no civil jurisdiction over a non-Indian, nonmember of the tribe. *Plains Commerce Bank*, 554 U.S. at 329

(citing *Montana*, 450 U.S. at 565). These are known as the *Montana* exceptions. *Plains Commerce Bank*, 554 U.S. at 330.

First, “[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 (internal citations omitted). Second, “[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.” *Id.* at 566 (citations omitted).

The Supreme Court has explained, “Given *Montana*’s general proposition that inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe, efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are presumptively invalid.” *Id.* The “exceptions are limited ones and cannot be construed in a manner that would swallow the rule or severely shrink it.” *Id.* (citations and quotations omitted).

a. The first *Montana* exception is inapplicable.

In order for the first *Montana* exception to apply, there must be a *nexus* between the authority sought to be exercised by the tribe and the consensual relationship itself. *See Atkinson*, 532 U.S. at 656 (“*Montana*’s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself.”). The Supreme Court has explained, “A nonmember’s consensual relationship in one area thus does

not trigger tribal civil authority in another – *it is not in for a penny, in for a pound.*” *Id.* (quotations and citation omitted) (emphasis added).³

The fact that Kyle Grocery has been issued a Tribal Sales Tax-Use Tax License by the Tribe does not satisfy the first *Montana* exception and does not give the tribe jurisdiction over Plaintiff’s lawsuit. Kyle Grocery’s consent to collect and remit sales tax does not trigger civil tort authority in this matter. Here, there is no nexus – no causal link – between Kyle Grocery’s consent to abide by the Tribe’s taxation and licensing requirements and the allegations against it in this lawsuit. Kyle Grocery’s alleged negligence does not arise out of its tax and licensing relationship with the tribe or its members but, rather, its operation of its non-Indian corporation on non-Indian land.

The Supreme Court’s holding in *Strate* further supports the conclusion that the tribe has no adjudicative jurisdiction over Kyle Grocery in this tort action. In that case, the Supreme Court examined civil jurisdiction over two non-Indian drivers that collided on a portion of North Dakota state highway running through the Fort Berthold Indian Reservation. 520 U.S. 438. One of the drivers was operating a vehicle owned by his employer, a non-Indian owned business, which had contracted with a corporation owned by the Three

³ An unreported opinion in *Farmers Union Oil Co. v. Guggolz*, No. CIV 07-1004, 2008 WL 216321 (D.S.D. Jan. 28, 2008), found when a non-Indian on-reservation business holds open an invitation to tribal members or a particular tribal member to patronize that business and they do patronize the business, this may be sufficient to form a consensual relation between the Tribe or the particular tribal member and that business. However, this opinion was before *Plains Commerce Bank* and Judge Kornmann anticipated additional guidance from the U.S. Supreme Court. That guidance is contrary to this holding.

Affiliated Tribes to do landscaping within the reservation. The tribal court found jurisdiction over the personal injury claim filed in tribal court by one of the drivers, the injured plaintiff, against the other driver and his non-Indian employer. *Id.* at 442-43.

On appeal, the Supreme Court found that the tortious conduct alleged in the injured driver's complaint did not fit within the first *Montana* exception. *Id.* at 456-57. In *Strate*, even though the defendant driver was driving a vehicle owned by the defendant employer at the time of the accident, and the defendant employer had a consensual relationship with the tribes, the court found the first exception unsatisfied because the requisite nexus was lacking. Here, there is no nexus between Kyle Grocery's tax and license relationship with the tribe and its alleged negligence with an individual tribal member that is the subject of this lawsuit as "[a] nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another – *it is not in for a penny, in for a Pound.*" See *Atkinson*, 532 U.S. at 656

The first *Montana* exception is inapplicable.

b. The Second *Montana* Exception is Inapplicable

With regard to the second *Montana* exception, the Supreme Court has explained:

Read in isolation, the *Montana* rule's second exception can be misperceived. Key to its proper application, however, is the Court's preface: "Indian tribes retain their inherent power to punish tribal offenders, to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members[.] But a tribe's inherent power does not reach beyond

what is necessary to protect tribal self-government or to control internal relations.”

Strate, 520 U.S. at 459 (quoting *Montana*, 450 U.S. at 564). The Supreme Court has further instructed:

The second exception authorizes the tribe to exercise civil jurisdiction when non-Indians’ conduct menaces the political integrity, the economic security, or the health or welfare of the tribe. The conduct must do more than injure the tribe, it must imperil of the subsistence of the tribal community. One commentator has noted that the elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences.

Plains Commerce Bank, 554 U.S. at 341 (quotations and citations omitted).

We respectfully submit that none of the actions attributed to Kyle Grocery in this tort action have any direct effect on the political integrity, economic security, or the health and welfare of the tribe. Kyle Grocery’s alleged negligent conduct does not expose the tribe to the danger of ceasing to exist. At best, accepting Plaintiff’s version of the facts, the alleged conduct injured a single tribal member that tripped over an open and obvious box in the aisle. This is not enough under the second *Montana* exception. Tribal jurisdiction over Plaintiff’s tort action is not necessary to avert catastrophic consequences for the tribe. The second *Montana* exception is inapplicable.

Therefore, under *Montana* and its progeny, this matter consists of a civil matter involving a non-Indian defendant corporation on non-Indian land, and the Tribal Court does not have jurisdiction. Kyle Grocery is likely to succeed on the merits of its case.

2. Kyle Grocery will suffer irreparable harm if the preliminary injunction is not granted.

Kyle Grocery will suffer irreparable harm unless the requested injunction is granted. Twice during the pendency of the appeal of this action to the Supreme Court of the Oglala Sioux Nation, counsel for Rena Short Horn moved the Supreme Court of the Oglala Sioux Nation for an order granting limited remand to allow for depositions to be taken. Unless Kyle Grocery is granted a preliminary injunction to allow this Court to consider its arguments that the Tribal Court lacks subject matter jurisdiction, Kyle Grocery will have to litigate this case in Tribal Court. *See Black Hills Jewelry Mfg. Co. v. Gold Rush, Inc.*, 633 F.2d 746, 753 (8th Cir. 1980) (the Eighth Circuit Court of Appeals has explained that a district court can presume irreparable harm if the movant has a likelihood of success on the merits), *see also Kodiak Oil & Gas (USA) Inc. v. Burr*, 303 F.Supp.3d 964, 984 (D.N.D. 2018) (finding plaintiffs would suffer irreparable harm if forced to expend time, effort, and money in a forum that lacks jurisdiction).

3. Balance of harms between movant's injury and any harm granting the injunction will inflict upon adverse party is in Kyle Grocery's favor.

The equities weigh in favor of Kyle Grocery. Kyle Grocery has a strong basis for its position that the Tribal Court lacks jurisdiction. Unless this Court grants the injunction, Kyle Grocery will be forced to go through discovery and a trial in a forum that lacks jurisdiction. In comparison, the preliminary injunction will cause no harm to Rena Short Horn other than delay to her prosecution of her Tribal Court case. A decision on jurisdiction prior to moving

forward in Tribal Court will preserve valuable resources of all parties involved. Finally, even an adverse decision to Rena Short Horn would not leave her without a remedy as she can then pursue his civil action in a proper venue. *Kodiak Oil & Gas (USA) Inc.*, 303 F.Supp.3d at 985.

4. Public interest is served by granting the preliminary injunction.

The public interest will be served by granting Kyle Grocery's preliminary injunction as it is not in the public interest to allow a court that lacks jurisdiction to continue to adjudicate a matter. Further avoiding duplicative legal proceedings in multiple venues is in the public interest. *See id.*

CONCLUSION

For the foregoing reasons, Kyle Grocery respectfully requests that this Court restrain and enjoin the Defendants from continuing to prosecute or adjudicate *Rena Short Horn v. Kyle Grocery, Inc.*, Civ-19-0128

Dated the 17 day of December, 2021.

BEARDSLEY, JENSEN & LEE, Prof. L.L.C.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of December, 2021, I sent to:

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via Process Server a true and correct copy of **MEMORANDUM IN
SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** relative to the
above-entitled matter.

By: /s/ Gary D. Jensen
Gary D. Jensen