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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

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PARDEEP KUMAR,

Plaintiff,

-vs-

VIOLET SCHILDT AND PATRICK SCHILDT INDIVIDUALLY AND D/B/A GLACIER WAY C-STORE, LLC AND DARRYL LACOUNTE, DIRECTOR OF BUREAU OF INDIAN AFFAIRS FOR THE DEPARTMENT OF INTERIOR,

Defendants.

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NO. CV-22-54-GF-BMM

MEMORANDUM IN SUPPORT OF THE MOTION TO DISMISS OF VIOLET SCHILDT AND PATRICK SCHILDT

Introduction

Plaintiff Pardeep Kumar's lawsuit concerns his claimed entitlement to purchase a convenience store on the Blackfeet Indian Reservation from Defendants Violet and Patrick Schildt ("Schildts"). (Compl., ¶ 7). The property at issue is described as located on Indian trust land. (*Id*., ¶ 11).

Kumar alleges five claims for relief – (1) a declaratory judgment, (2) breach of contract, (3) unjust enrichment/constructive trust, (4) injunctive relief and (5) conspiracy in violation of 15 U.S.C. § 1 (the Sherman Antitrust Act). This court's jurisdiction is predicated on 28 U.S.C. §§ 1331 (federal question), 1360(b), 1367(a) and on 15 U.S.C. § 1 and 3. (*Compl*., ¶ 4). He also suggests that the federal declaratory judgment statutes (28 U.S.C. §§ 2201 and 2202) have "authorized" this court to grant him relief. (*Compl*., ¶ 6).

Mr. Kumar is altogether wrong. First, the federal declaratory judgment statutes do not independently create federal court jurisdiction. Secondly, Mr. Kumar raises no federal question. Third, neither 28 U.S.C. § 1360(b) nor § 1367(a) grant any sort of jurisdiction to this court. Lastly, while violations of the Sherman Antitrust Act are unquestionably a basis of federal court's exercise of jurisdiction, the Verified Complaint is so facially defective that this last claim should be dismissed at the pleading stage.

1. Plaintiff Has Not Alleged a Viable Antitrust Claim

Since the seminal cases of *Bell Atl. Corp. vs. Twombly*, 550 U.S. 544 (2007) and *Ashcroft vs. Igbal*, 556 U.S. 662 (2009), complaints in federal court are subject to a heightened "plausibility" standard, which requires that sufficient facts be alleged that takes the complaint beyond mere possibility. *Id*., at 678.

As far as complaints alleging a violation of Sec. 1 of the Sherman Antitrust Act are concerned, there is a well-established body of case law specifying what needs to be alleged to survive a Rule 12(b)(6) motion to dismiss for a failure to state a claim.

> In order successfully to allege a violation of § 1 of the Sherman Antitrust Act, a plaintiff must allege sufficient facts to demonstrate three elements: (1) the existence of a contract, combination, or conspiracy among two or more separate entities that (2) unreasonably restrains (3) interstate trade or commerce. *See American Ad Management, Inc. v. GTE Corp.*, 92 F.3d 781, 788 (9th Cir. 1996). Because CRPUD has not sufficiently alleged a restraint of trade or commerce, we hold the § 1 claim must fail as a matter of law.
>
> In interpreting the phrase "trade or commerce," the Supreme Court has held that § 1 of the Sherman Antitrust Act reaches only those restraints which are comparable to restraints deemed illegal at common law. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495, 84 L. Ed. 1311, 60 S. Ct. 982 (1940). At common law only restraints of trade that involved the "restriction or suppression of commercial competition" were forbidden. *Id.* at 500. Thus, an allegation that "competition has been injured rather than merely competitors" is essential to any § 1 Sherman Antitrust Act Claim. *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 734 (9th Cir. 1987). *See also Sheppard v. Lee*, 929 F.2d 496, 499 (9th Cir. 1991) (holding plaintiff must allege damage that "in some way involves such competition . . . .")

Columbia River People's Util. Dist. v. Portland GE, 217 F.3d 1187, 1189-90 (9th Cir. 2000). Moreover, an antitrust plaintiff must allege what the relevant market is that has been affected by the supposedly anticompetitive behavior, absent a claim of a *per se* violation, such as price-fixing amongst competitors. See *Hicks vs. PGA*

Tour, Inc., 897 F.3d 1109, 1120 (9th Cir. 2018).

Amongst its more glaring deficiencies, Kumar's Sherman Act violations contain no allegation as to how Schildts' dealings with anyone, be it the Blackfeet Tribe or anyone else, over a convenience store on the Blackfeet Indian Reservation, has impacted interstate commerce in any fashion, much less unreasonably restrained it. That omission is fatal to Count V, which is in fact entirely devoid of any allegation that Mr. Kumar has been wronged in a fashion that the Sherman Antitrust Act was enacted to address. Then again, Mr. Kumar has failed to attempt to identify his relevant market, which is separately required absent allegations of a *per se* violation, i.e., horizontal price fixing.

Plaintiff's complaint concerns a single real estate transaction. Manifestly, it is simply not the type of dispute which the antitrust laws were designed to address. See *Vinci vs. Waste Management*, 80 F.3d 1372 (9th Cir., 1996). Those laws were meant to address competition, not competitors. *Id.*, at 1376. This court has itself had occasion to embrace that distinction. *Montana Camo, Inc., vs. Cabela's, Inc*., 2011 U.S. Dist LEXIS 2557. And, even under the most indulgent reading of the Complaint in this case, Mr. Kumar cannot be viewed as a "competitor" of Violet or Patrick Schildt. This case has nothing to do with competition.

Count V fails to state a claim upon which relief can be granted. The

deficiencies are so significant that no amendment could cure them, under the foregoing antitrust jurisprudence, all of which is long established and well settled.

II. There Is No Separate Basis for Federal Jurisdiction

If the Sherman Antitrust Act claim characterized as such but not even remotely asserted in Count V is disregarded, the remaining four counts cannot support federal jurisdiction and dismissal is warranted pursuant to Rule 12(b)(1), F.R.Civ.P. Those remaining four counts are for a declaratory judgment, breach of contract, unjust enrichment and injunctive relief.

The idea that the federal Declaratory Judgment Act (28 U.S.C. 2201) supports jurisdiction over Mr. Kumar's claims is easiest to address. As a predecessor chief judge of this district observed 45 years ago, the "[u]nanimous case law" is just the opposite. *Montana Power Co. vs. Environmental Protection Agency*, 429 F. Supp. 683, 692 (D. Mont. 1977). That unanimity persists. See, for example, *Cox vs. Lee*, 2020 U.S. Dist. LEXIS 67689 (D. Ariz.).

Mr. Kumar also cites 28 U.S.C. §§ 1331, 1360(b) and 1367 as bases for jurisdiction. None apply to the remaining claims.

There is no federal question asserted for what are common law claims, i.e., breach of contract and unjust enrichment. The just-cited *Cox* case is instructive:

> Federal question jurisdiction only arises 'when the plaintiff sues under a federal statute that creates a right of action in federal court.'" *Pence*

> *v. Arizona*, No. CV-17-01857-PHX-GMS, 2017 U.S. Dist. LEXIS 92797, 2017 WL 2619135, at *2 (D. Ariz. June 16, 2017) (*quoting Williams v. United Airlines, Inc.*, 500 F.3d 1019, 1021-22 (9th Cir. 2007)). Plaintiff has not done so.

Cox vs. Lee, *supra*, at hn. 3.

As far as 28 U.S.C. § 1360(b) is concerned, it was this court which itself provided one of the more definitive statements, in a case – like this one – involving a dispute between private litigants which arose on the Blackfeet Indian Reservation. See *K2 America Corp. vs. Roland Oil & Gas, LLC*, 653 F.3d 1024 (9th Cir. 2011), cert. denied, 565 U.S. 1157 (2012).

> The district court correctly concluded that § 1360(b) limits the exercise of state jurisdiction; it does not confer jurisdiction on federal courts. *See, e.g., Frazier v. Turning Stone Casino*, 254 F. Supp. 2d 295, 304 (N.D.N.Y. 2003) (noting that § 1360 concerns state court jurisdiction and does not support exercising federal question jurisdiction over a misappropriation action). Although P.L. 280 "necessarily pre-empts and reserves to the Federal government or the tribe jurisdiction not so granted," *Santa Rosa Band of Indians v. Kings Cnty.*, 532 F.2d 655, 658-59 (9th Cir. 1976), the law plainly did not confer subject matter jurisdiction upon federal courts.

Id., at 1028.

Indeed, a careful reading of the *K2 America* case establishes that neither the state district court nor this court has jurisdiction over Mr. Kumar's claims. Per the Declaration of Patrick Schildt filed herewith, both he and his mother are enrolled members of the Blackfeet Tribe, and the dispute concerns a parcel of trust property

located on the Blackfeet Indian Reservation. Blackfeet Tribal Court is the proper forum. Mr. Kumar appears to tacitly concede that point, as per his allegation in ¶ 37 of his Verified Complaint, that "Plaintiff *fears* that, given the individuals who are assisting the Schildts, he does not have a remedy in the Blackfeet Tribal court and to file a claim there would be *an exercise in futility*." [Emphasis added.] Such an allegation is altogether remarkable for any litigant, but especially so when made by a lawyer who has up to now been such a staunch advocate of tribal court jurisdiction in similar circumstances, i.e., in which non-members of the tribe sue tribal members *in this court*. See, in that regard, *Glacier Electric Cooperative, Inc., et al. vs. Gervais, et al*., No. CV-14-75-GF-BMM.

Plaintiff's invocation of the supplemental jurisdiction statute, 28 U.S.C. § 1367(a) is equally unavailing. By its express terms, supplemental jurisdiction can only be exercised in those cases in which a federal court has "original jurisdiction." If the foregoing points have any vitality, Mr. Kumar has not brought any claims within this court's original jurisdiction; hence there can be no supplemental jurisdiction over his common law claims for breach of contract or unjust enrichment. *Herman Family Revocable Trust vs. Teddy Bear*, 254 F.3d 802, 806 (9th Cir. 2001) ("If the district court dismisses all federal claims on the merits, it has discretion under § 1367(c) to adjudicate the remaining claims; if the court

dismisses for lack of subject matter jurisdiction, it has no discretion and must dismiss all claims.") Accord, *Prather vs. AT&T, Inc.*, 847 F.3d 1097 (9th Cir. 2017). To allow otherwise would be classic bootstrapping.

The same conclusion is inevitable as far as Mr. Kumar's claim for injunctive relief in Count IV is concerned:

> A federal district court may issue emergency injunctive relief only if it has personal jurisdiction over the parties and subject matter jurisdiction over the lawsuit. *See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350, 119 S. Ct. 1322, 143 L. Ed. 2d 448 (1999) (noting that one "becomes a party officially, and is required to take action in that capacity, only upon service of summons or other authority-asserting measure stating the time within which the party must appear to defend"). The court may not attempt to determine the rights of persons not before it.

Davood Khademi v. N. Kern State Prison, 2022 U.S. Dist. LEXIS 77006 (E.D. Cal.) Since this court does not have subject matter jurisdiction over Mr. Kumar's claims, it cannot enjoin any conduct predicated on those claims.

Conclusion

Even taking Mr. Kumar's decidedly one-sided view of his dealings with Violet and Patrick Schildt, those dealings concerned the sale of a single business and associated real estate located on the Blackfeet Indian Reservation. There is nothing that conceivably can support an antitrust claim over the failure of that single transaction. Consistent with that obvious fact, Mr. Kumar's allegations omit

much of what needs to be included in a complaint supposedly brought under the Sherman Antitrust Act. Those allegations are deficient as a matter of law and should be dismissed with prejudice, as they are not curable.

There is no subject matter jurisdiction for the remaining claims. The precedents of this court and numerous others are conclusive.

Mr. Kumar's case should be dismissed.

DATED this 29th day of June, 2022.

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