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

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.	Case.: CV-22-54-GF-BMM **PLAINTIFF'S RESPONSE TO MOTION TO DISMISS OF VIOLET AND PATRICK SCHILDT**

Comes now Plaintiff Kole Pardeep Kumar, by and through counsel, and respectfully submits this Response to Defendants Violet and Patrick Schildt's Motion to Dismiss and Memorandum in Support.

BACKGROUND

On March 31, 2020, Plaintiff, a non-Indian, entered into a Contract for Deed ("Contract") with Violet and Patrick Schildt ("Schildts") for the purchase of the Glacier C-Store ("Subject Property"). Schildts are enrolled members of the Blackfeet Tribe. (Compl., ¶ 7). The Subject Property is on Indian trust land located within the exterior boundaries of the Blackfeet Indian Reservation. (*Id.*, ¶ 11). Since signing the Contract, Plaintiff has honored the terms, and invested significant time and resources into the Subject Property. (*Id.*, ¶¶ 29-30)

On May 4, 2022, Schildts entered into a Buy-Sell Agreement with the Blackfeet Tribal Business Council for the purchase of Subject Property. (Compl., Ex. 3-4) The Resolution approving the Buy-Sell Agreement recognized the need for approval by the Bureau of Indian Affairs ("BIA") before the sale of trust property could be finalized.

On June 8, 2022, Plaintiff sued alleging 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 Complaint named Defendants Violet and Patrick Schildt ("Schildts") and Darryl LaCounte, in his official capacity as Director of Bureau of Indian Affairs.

On June 29, 2022, the Schildts filed a Motion to Dismiss pursuant to Rule 12(b)(6) and Rule 12(b)(1) of the Federal Rules of Civil Procedure, on

the basis that Plaintiff's Complaint fails to plead a viable federal law claim upon which any relief can be granted. (Defs. Mot. Dismiss). In their Memorandum in Support of the Motion, Schildts argue tribal court has exclusive jurisdiction in this matter. (Memo. at 6-7)

LEGAL STANDARD

"In order to survive a Rule 12(b)(6) motion to dismiss, a plaintiff must allege enough facts to state a claim to relief that is plausible on its face." *Kwan v. SanMedica Int'l*, 854 F.3d 1088, 1096 (9th Cir. 2017). The Court must take plaintiff's well-pleaded allegations as true by "drawing all reasonable inferences in the plaintiff's favor" before concluding whether "the allegations are sufficient as a legal matter" to state a cognizable claim for relief. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014).

Federal district courts are authorized by Congress to exercise original jurisdiction in all civil actions arising under the Constitution, laws, or treaties of the United States and to controversies to which the United States shall be a party. U.S. Const. art. III, § 2; 28 U.S.C. § 1331.

ARGUMENT

The case at bar arises under the laws of the United States and the United States is a required party under Fed. R. Civ. P. 19. Both facts confer

jurisdiction on this Court under U.S. Const. art. III, § 2; and 28 U.S.C. §§ 1331 and 1367.

I. EXCLUSIVE FEDERAL JURISDICTION

Contrary to Schildts' argument, Plaintiff's breach of contract and unjust enrichment claims are not grounded in a routine contract which would be governed by general common law principles of contract. Contracts involving Indian trust land are governed by federal law, therefore § 1331 jurisdiction is appropriate.

A. Action arises under the laws of the United States

The district courts shall have original jurisdiction of any civil action involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any Act of Congress or treaty. 28 U.S.C. § 1353.[1] "In interpreting 25 U.S.C. § 345, the Supreme Court has held that federal courts have exclusive jurisdiction to determine disputes involving allotments." See *United States v. Mottaz*, 476 U.S. 834, 845, 106 S. Ct. 2224, 2231 (1986); *McKay v. Kalyton*, 204 U.S. 458, 27 S. Ct. 346, 51 L. Ed. 2d 566 (1907) (interpreting the predecessor statute to 25 U.S.C. § 345).

Consequently, § 345 contemplates two (2) types of suits involving allotments: suits seeking the issuance of an allotment, (citation omitted)

[1] 28 U.S.C. § 1353 is a recodification of the jurisdictional portion of 25 U.S.C. § 345. Judicial attention has centered on § 345 *Scholder v. United States* 428 F.2d 1123, 1126 n.2 (9th Cir. 1970)

and suits involving "'the interests and rights of the Indian in his allotment or patent after he has acquired it." *Mottaz*, 476 U.S. at 845, 106 S. Ct. at 2231.

An analysis of a contract dispute begins with the determination whether or not a valid contract exists. "A valid contract defines the obligations of the parties as to matters within its scope." *Associated Mgmt. Servs. v. Ruff*, 2018 MT 182, ¶ 67, 392 Mont. 139, 424 P.3d 571. Consequently, unjust enrichment applies in the contract context when a party renders "a valuable performance" or confers a benefit upon another under a contract that is invalid, voidable, "or otherwise ineffective to regulate the parties' obligations." *Id*.; Restatement (Third) of Restitution §2(2) cmt. c.; *See also Robertus v. Candee*, 205 Mont. 403, 407, 670 P.2d 540, 541-42 (1983) (unjust enrichment available in contract context to non-breaching parties precluded from seeking contract damages because statute of frauds rendered otherwise governing contract unenforceable).

In the case at bar, the Complaint has pled the necessary elements of a breach of contract claim and, if a valid contract does not exist, an unjust enrichment claim. The Complaint puts at issue the Schildts ability to offer for sale the Subject Property, and the status of the Subject Property. Thus, whether the Schildts properly offered the Subject Property for sale, whether a valid contract was formed, or whether the Schildts were justified in not performing the Contract are all issues that cannot be separated from

questions of title to Indian trust property. Therefore, the Court has jurisdiction under 28 U.S.C. § 1353.

B. Doctrine of complete preemption does not apply

Schildts cite *K2 America Corp. vs. Roland Oil & Gas, LLC*, 653 F.3d 1024 (9th Cir. 2011), cert. denied, 565 U.S. 1157 (2012) in support of the argument that the Court lacks jurisdiction. (Memo. at 6-7) Schildts reliance on *K2* is misplaced, as the issues here are distinguishable.[2]

In *K2 Am. Corp. v. Roland Oil & Gas, LLC*, the Ninth Circuit held there was no federal jurisdiction over a dispute between two (2) Montana corporations involving state-law tort claims regarding an oil-and-gas lease located on Indian trust land. 653 F.3d 1024 (9th Cir. 2011). The Court declined to apply complete preemption because neither company was an Indian party, so the case had nothing to do with the unique relationship between Indian tribes and the federal government. *Id.* at 1030. In addition, the plaintiff did not claim ownership of the lease under federal law, and although the plaintiff sought an interest in trust property, its rights turned exclusively on state law. *Id.* at 1030-31.

Unlike *K2*, Indians are party to this case and interests and rights to Indian trust land are at issue.

[2] *K2* did not bring a cause of action created by federal law, the jurisdictional question concentrated on the doctrine of complete preemption. *K2 America Corp. v. Roland Oil & Gas, LLC*, 653 F.3d 1024, 1029 (9th Cir. 2011)

II. STATE COURT LACKS JURISDICTION

Generally speaking, state courts have no jurisdiction in civil matters affecting Indian trust lands, unless Congress provides otherwise. *Nw. S.D. Prod. Credit Asso. v. Smith*, 784 F.2d 323, 326-27 (8th Cir. 1986)(citations omitted). As the Crow Court of Appeals has recognized, there is "little doubt that State courts lack jurisdiction to adjudicate any kind of dispute involving Indian trust land." *Lande v. Schwend*, 1999 ML 303, P36, 1999 Mont. Crow Tribe LEXIS 1, *21, 1999 Crow 1.

Title 28 U.S.C. § 1353 does not confer jurisdiction upon state courts. Montana has not assumed jurisdiction on the Blackfeet Reservation under PL-280, and the Blackfeet Tribe has not consented to state assumption of civil jurisdiction pursuant to the procedures outlined in PL-280. *Big Spring v. Conway (In re Estate of Big Spring)*, 2011 MT 109, ¶ 48, 360 Mont. 370, 255 P.3d 121.

State courts' inability to hear a case involving Indian trust lands is not a novel issue in Montana. In *Krause v. Neuman,* 284 Mont. 399, 943 P.2d 1328 (1997)[3], the Montana Supreme Court recognized federal question jurisdiction in cases involving the sale of Indian trust lands. In analyzing strikingly similar facts to the current case, the Montana Supreme Court

[3] *Krause* was overruled to the limited extent that it asserts the three-pronged test in *Iron Bear* See *In re Estate of Big Spring*, ¶ 45. The *Krause* decision was limited to the first part of the *Iron Bear* test which asks if a federal statute preempts state jurisdiction. *Krause, 284 Mont.* at 404.

outlined why the sale of trust land is exclusively the jurisdiction of the federal courts. *Id*.

In *Krause*, an enrolled member of the Confederated Salish and Kootenai Tribes attempted to sell tracts of trust land on the Flathead Indian Reservation to a non-Indian. The seller attempted to terminate the agreement and the buyers filed a complaint in the Montana Fourth Judicial District alleging breach of contract, constructive fraud, and fraudulent inducement." *Krause v. Neuman, 284 Mont. at 402, 943 P.2d at 1330.* The district court dismissed the complaint finding that the claims had a substantial nexus to seller's allotment of Indian trust land and therefore federal law precluded the State from exercising jurisdiction. *Id.*, Mont. at 403, P.2d at 1330. The buyers appealed, and the Montana Supreme Court affirmed. *Id.*, Mont. at 408, P.2d at 1334.

The Montana Supreme Court explained why resolution of the breach of contract, tortious misrepresentation, and fraudulent inducement claims required a determination of rights involving Indian trust land.

> The [buyers'] pleadings therefore put at issue the [sellers'] "ability to offer for sale" and the "status" of the land. Further, the [sellers] argue that under the Allotment Act, they could not transfer an interest in Indian trust lands without the approval of the Secretary of the Interior and that any contract to convey the same without such approval is null and void. Thus, whether [seller] properly offered his land for sale, whether a contract was formed, or whether the [sellers] were justified in not performing the contract are all issues that cannot be

> separated from questions of title to Indian trust property. *Id.*, Mont. at 407, P.2d at 1333.

The opinion also recognized that regardless of whether plaintiff prays for specific performance of the contract or for money damages for its breach, the court must decide the issues of liability which it cannot do without asserting jurisdiction over Indian trust land. *Id.*, Mont. at 408, P.2d at 1334.

III. TRIBAL COURT LACKS JURISDICTION

Contrary to Schildts' argument, the Blackfeet Tribal Court also lacks jurisdiction. It is well established that issues involving title to Indian trust property are within § 1331 jurisdiction. However, respect for tribal sovereignty will lead courts to exercise § 1331 jurisdiction in cases involving tribal disputes and reservation affairs 'only in those cases in which federal law is determinative of the issues involved.' *Newtok Vill. v. Patrick*), 21 F.4th 608, 616 (U.S. 9th Cir. 2021). As discussed *supra*, this is a case where federal law is determinative.

A. Jurisdiction Over Non-Members

Where non-members are concerned, tribal courts' adjudicative authority is limited (absent congressional authorization) to cases arising under tribal law. *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1135 (8th Cir. 2019) See *Nevada v. Hicks*, 533 U.S. 353, 366-69 (2001). In *Hicks*, the

Supreme Court concluded tribal courts lack jurisdiction to hear any 42 U.S.C. § 1983 claims due to the lack of congressional authorization. See *Id.*

Like § 1983 claims, 28 U.S.C. § 1353 does not provide congressional authorization for tribal courts to hear suits involving Indian trust land. The complete federal control of Indian trust land, and the corresponding lack of any role for tribal law or tribal government in that process, undermines any notion that tribal regulation in this area is necessary for tribal self-government.

B. Tribal Court Exhaustion is not Required

As a general rule, before challenging an exercise of tribal court jurisdiction in federal court, parties must generally exhaust their challenge in tribal court. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16-19, 107 S. Ct. 971, 94 L. Ed. 2d 10 (1987); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 855-57, 105 S. Ct. 2447, 85 L. Ed. 2d 818 (1985). However, this requirement is not jurisdictional, it is a prudential rule based in respect for tribal self-government. *Strate v. A-1 Contractors*, 520 U.S. 438, 451, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997).

"The requirement of tribal exhaustion contemplates the development of a factual record that will serve the 'orderly administration of justice in the federal court.'" *Duncan Energy Co. v. Three Affiliated Tribes of Ft. Berthold*

Reservation, 27 F.3d 1294, 1300 (8th Cir. 1994). (quoting *Nat'l Farmers*, 471 U.S. at 856). While the development of a factual record may be required where a challenge to tribal court jurisdiction turns on disputed factual questions, factual development is generally not required for facial challenges to jurisdiction. *Kodiak Oil & Gas*, F.3d at 1134.

This case differs markedly from those in which tribal court exhaustion is appropriate. The doctrine of tribal court exhaustion does not apply to cases which, if brought in state court, would be subject to removal. *See El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 119 S. Ct. 1430 (1999) (Congress expressed an unmistakable preference for a federal forum under 42 USCS 2210). Exhaustion is not required where it is "plain" the tribal court lacks jurisdiction or where exhaustion "would serve no purpose other than delay." *Strate*, 520 U.S. at 459 n.14, 117 S. Ct. at 1416.

IV. THE UNITED STATES IS A REQUIRED PARTY

As title owner to the land in question, the United States, by and through the BIA, is a necessary party to this dispute. Consequently, this Court has jurisdiction under U.S. Const. art. III, § 2 and 28 U.S.C. § 1331.

A party is required if that party "claims an interest relating to the subject of the action" and adjudicating the action in that party's absence would impair or impede the person's ability to protect the interest, Fed. R.

Civ. P. 19(a)(1)(B)(i); *Weiss v. Perez* No. 22-cv-00641-BLF(N.D. Cal. May 10, 2022), 2022 U.S. Dist. LEXIS 84511, at *16.

The United States continues as trustee to have "an active interest" in the disposition of Indian assets because the terms of the trust relationship embody policy goals of the United States. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 179-80, 131 S. Ct. 2313, 2326 (2011); citing *McKay* v. *Kalyton*, 204 U.S. at 469.

The Secretary of the Interior, or his duly authorized representative, is hereby authorized in his discretion, and upon application of the Indian owners, to issue patents in fee, to remove restrictions against alienation, and to approve conveyances. 25 USCS § 5134.[4] The statute commits the decision wholly to the discretion of the Secretary or his authorized representative. *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. Hallett*, 540 F. Supp. 503, 505 (D.S.D. 1982).

Clearly the United States has an interest in Indian trust land, and is therefore a required party under Fed. R. Civ. P. 19.

V. Supplemental Jurisdiction

"In any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original

[4] Section was formerly classified to section 483 of this title prior to editorial reclassification and renumbering as this section

jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties. 28 U.S.C. § 1367.

As discussed *supra*, this Court has jurisdiction over Plaintiff's breach of contract and unjust enrichment claims. Plaintiff's other claims form part of the same controversy.

VI. Antitrust Claim

Plaintiff concedes that under the heightened pleading standard of *Bell Atl. Corp. vs. Twombly*, 550 U.S. 544 (2007) and *Ashcroft vs. Igbal*, 556 U.S. 662 (2009), a viable claim for violation of § 1 of the Sherman Antitrust Act has not been pled. Plaintiff requests the Court for leave to file an amended complaint.

CONCLUSION

For the foregoing reasons, federal jurisdiction is proper under U.S. Const. art. III, § 2; 28 U.S.C. § 1331, and 28 U.S.C. § 1367. Therefore, the Motion to Dismiss of Violet Schildt and Patrick Schildt must be DENIED.

DATED this 20th day of July, 2022

By: /s/ Terryl T. Matt
Terryl T. Matt

Attorney for Plaintiff
PARDEEP KUMAR

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of July, 2022, a true copy of the foregoing was served:

Via ECF to the following parties:

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