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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

REPLY BRIEF IN SUPPORT OF THE MOTION TO DISMISS OF VIOLET SCHILDT AND PATRICK SCHILDT

Pardeep Kumar has expressly conceded that he has not pled a viable claim under the Sherman Antitrust Act, which was the only federal substantive claim contained in his Complaint (Doc 1). He also has failed to address the Schildts' arguments that the Federal Declaratory Judgment Act (28 U.S.C. § 2201) does not by itself support jurisdiction and that jurisdiction also cannot rest on either 28

U.S.C. § 1360(b) or 28 U.S.C. § 1367(a). All of those points are therefore tacitly but altogether clearly conceded.

Instead, Kumar has attempted to re-cast his Complaint as one actually brought under 28 U.S.C. § 1353 and as such presenting a federal question for which jurisdiction can rest, pursuant to 28 U.S.C. § 1331.

Of course, Plaintiff's Complaint contains no mention of 28 U.S.C. § 1353. So, he is attempting to re-cast his allegations against Schildt's into something never made. Moreover, Plaintiff, who has never claimed to be an enrolled member of the Blackfeet Tribe of Indians and has not done so in his Complaint, lacks standing to pursue any claim under this statute. The matter is addressed directly by *K2 America Corp. vs. Roland Oil and Gas, LLC*, 953 F.3d 1024 (9th Cir. 2011). While Plaintiff has attempted (unsuccessfully!) to distinguish *K2 America* for the reasons which Schildt's cited the case in their opening brief (Doc. 13), Kumar's new argument, that he can bring an action predicated on 28 U.S.C. § 1353, now makes *K2 America Corp*. even more on point:

> Nor does K2 claim ownership of the Allotment Lease under a federal constitutional provision, treaty, or statute, or under federal common law. *See Oneida I*, 414 U.S. at 677-78 (explaining that the tribe grounded its possessory claim in its aboriginal right of occupancy, treaties, and the Nonintercourse Acts); *Oneida II*, 470 U.S. at 236 ("[T]he Court's opinion in *Oneida I* implicitly assumed that the Oneidas could bring a common-law action to vindicate their aboriginal rights."); *see also Littell v. Nakai*, 344 F.2d 486, 487-88

> (9th Cir. 1965). Though K2 seeks an interest in real property held in trust by the United States, its alleged entitlement to the Allotment Lease turns only on state common law and statutory claims; it does not require interpretation of a federal right. *See Oneida I*, 414 U.S. at 676. . . .
>
> The district court's order alluded to the possibility that K2 could sue under 25 U.S.C. § 345, but that provision does not apply here. Section 345 and its companion statute, 28 U.S.C. § 1353, concern suits *by persons who are "in whole or in part of Indian blood or descent.*" 25 U.S.C. § 345; 28 U.S.C. § 1353; *see Johnston v. Staley (In re Condemnation of Land for State Highway Purposes)*, 830 F. Supp. 1376, 1379 (D. Kan. 1993) ("[F]ederal district court jurisdiction under 25 U.S.C. § 345 or 28 U.S.C. § 1353 is predicated on . . . proceedings . . . involv[ing] the rights of any person who is in whole or in part of Indian blood or descent." (footnote omitted)). These provisions do not authorize suit by state corporations such as K2. *See, e.g., United States v. Preston*, 352 F.2d 352, 355-56 (9th Cir. 1965) ("There is no claim that the plaintiffs in this case are persons of Indian blood nor is this action one to claim an allotment of land.")

Id., at 1033-34. Nowhere does Kumar allege that he is of Indian blood or descent. He cannot do so. He may be an Indian, but he is the wrong kind of Indian. He cannot take advantage of 28 U.S.C. § 1353. In that regard, he is no different from K2 America Corp. If a state-chartered corporation lacks authorization, so too do non-enrolled individuals.

Kumar's citations to *United States vs. Mattaz vs. United States*, 476 U.S. 834 (1986) and to *McKay vs. Kalyton*, 204 U.S. 458 (1902) are unavailing. The *Mattaz* case was brought by a tribal member who was challenging the government's issuance of a patent for land for which she claimed to be an allottee.

As such an allotee, she fell squarely within the grant of jurisdiction in 28 U.S.C. § 345, as a person "entitled to an allotment of land under any law of Congress." *Id.* Kumar is not an allottee; nor has he alleged that he is in any other fashion entitled to an allotment under a law of Congress. He has no such right of action under this statute. That was precisely what the Ninth Circuit stated in *K2 America Corp., supra*.

The *McKay* case was a suit amongst allottees, all of whom were tribal members. It again is wholly different from the case at bar. Simply put, Kumar, as a non-tribal member and – consequently a non-allotee – has no sort of federal court standing to enforce common law claims involving allotted land on the Blackfeet Indian Reservation. He has cited no authority for a contrary proposition. Schildt's respectfully submit that there is none.

It is by now axiomatic that a federal court's jurisdiction is limited. A plaintiff coming into federal court must demonstrate the existence of that jurisdiction. *K2 America Corp., supra*. In a more recent decision involving Native Americans, the Ninth Circuit stated:

> We have a continuing duty to ensure we have subject matter jurisdiction over a case. *See Allstate Ins. Co. v. Hughes*, 358 F.3d 1089, 1093 (9th Cir. 2004) (amended opinion). We "possess only that power authorized by Constitution and statute," and we must presume "that a cause lies outside this limited jurisdiction and the burden of establishing the contrary rests upon the party asserting jurisdiction.

> . . . .
> Despite the pervasive influence of federal law in Indian affairs, federal court jurisdiction over cases involving Indians and Indian affairs is not automatic." *1 Cohen's Handbook of Federal Indian Law* § 7.04[1][a] (Nell Jessup Newton ed. 2017). "In addition, respect for tribal sovereignty will lead courts to exercise section 1331 jurisdiction in cases involving tribal disputes and reservation affairs 'only in those cases in which federal law is determinative of the issues involved.'" *Id.* (quoting *Longie v. Spirit Lake Tribe*, 400 F.3d 586, 589 (8th Cir. 2005)).
> . . . .
> But the "mere reference of a federal statute in a pleading will not convert a state law claim into a federal cause of action if the federal statute is not a necessary element of the state law claim and no preemption exists." *Easton v. Crossland Mortg. Corp.*, 114 F.3d 979, 982 (9th Cir. 1997) (per curiam). Likewise, under 28 U.S.C. §§ 1331 and 1362, federal question jurisdiction does not exist simply because an Indian tribe or individual is a party. *See Coeur d'Alene Tribe*, 933 F.3d at 1055 (citing *Stock W., Inc.*, 873 F.2d at 1225). "Nor is there any general federal common law of Indian affairs." *Id.* (cleaned up). Indeed, we have held that federal common law does not cover all contracts entered into by Indian tribes because that might open the doors to the federal courts becoming "a small claims court for all such disputes." *Gila River*, 626 F.2d at 714-15; *see also Peabody Coal Co. v. Navajo Nation*, 373 F.3d 945, 951-52 (9th Cir. 2004).

Newtok Vill. v. Patrick, 91 F.4th 608, 616-7 (9th Cir. 2020). Here, with the abandonment of Kumar's antitrust claim, Kumar's Complaint is itself devoid of any viable federal claim. As *Newtok Vill* instructs, the mere fact that a party to the lawsuit is a Native American does mean that the case presents a federal question.

And, it is the Complaint itself which is determinative:

> A plaintiff is the master of his complaint and responsible for articulating cognizable claims. Under the well-pleaded complaint rule, "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint.

Id., at p. 616. On that basis, the arguments in Plaintiff's Response (Doc. 16) can, and should, simply be disregarded. It is the language of the Complaint which is wholly determinative. That language mandates dismissal of this case.

Even if Kumar is indulged to the extent that the arguments in the Response are considered, the result is the same. The federal statutes which Kumar belatedly seeks to invoke were enacted for the benefit of Native Americans, not non-Natives such as this plaintiff. Kumar cannot claim an allotment of land on the reservation in his own name, as a non-member of the Blackfeet Tribe of Indians.

Kumar has not articulated a cognizable federal claim, either in what is left of his Complaint or if that Complaint is somehow deemed "amended" by his arguments in the Response. The result is the same. This court lacks jurisdiction to hear this case.

DATED this 1st day of August, 2022.

DAVIS, HATLEY, HAFFEMAN & TIGHE, P.C.

By /s/ Maxon R. Davis

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CERTIFICATE OF COMPLIANCE
PURSUANT TO LOCAL RULE 7.1(d)(2)(E)

Pursuant to Local Rule 71(d)(2)(E), the undersigned certifies that this brief contains 1,472 words, which is less than the 3,250 word maximum for reply briefs.

/s/ Maxon R. Davis
Maxon R. Davis