UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

MAZASKA OWECASO OTIPI FINANCIAL, INC.,

Plaintiff,

v.

LILLIAN "TONI" MONTILEAUX; IN THE MATTER OF MONTILEAUX V. MAZASKA BROUGHT IN OGLALA SIOUX TRIBAL COURT,

Defendant(s).

Civil Action No. 5:25-cv-05013-CCT

DEFENDANT MONTILEAUX'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS AND REMAND

Defendant Lillian "Toni" Montileaux ("Ms. Montileaux"), by and through her attorney, Steven D. Sandven, moves the Court to dismiss this case and remand it to the Oglala Sioux Tribal Court.

INTRODUCTION

This lawsuit arises from a contractual relationship under which Mazaska and Ms. Montileaux expressly consented to Tribal Court jurisdiction. Even if this fact alone was insufficient for the Court to order remand, such a directive would still be required for any or all four of the following independently dispositive reasons: (1) 12 U.S.C. §2614 and 28 U.S.C. §1331 do not establish federal court jurisdiction; (2) the Tribal Court has jurisdiction over conduct occurring on trust land; (3) even if the conduct in question did not occur on trust land, both exceptions

enumerated in *Montana v. United States*, 450 U.S. 544 (1981), support Tribal Court jurisdiction; (4) removal from a Tribal Court action to federal court is not permitted; (5) Mazaska failed to join an indispensable party – the Tribal Court; and (6) even if this Court had jurisdiction, well-established principles of comity require deference to the Oglala Sioux Tribal Court. As such, this Court should reject Mazaska's improvident attempt at removal. Failure to remand would not only allow Mazaska to skirt its contractual obligations to adjudicate this matter in the Oglala Sioux Tribal Court, it would be an affront to Tribal sovereignty. Given the impropriety of Mazaska's removal of this matter, the Court should, pursuant to 28 U.S.C. §1447(c), award Ms. Montileaux her fees and costs incurred to remand this action to the Oglala Sioux Tribal Court.

STATEMENT OF THE CASE AND FACTS

Ms. Montileaux is an enrolled member of the Oglala Sioux Tribe who lives within the boundaries of the Pine Ridge Indian Reservation. Her homesite lies on two tracts of land - T1373-N and 1373-F. The former tract consists of 10 acres and is held in trust for the benefit of the Oglala Sioux Tribe. Ms. Montileaux's lease for this tract runs through 2040. Tract 1373-F is held in trust for Ms. Montileaux, who holds a 25% undivided interest. Ms. Montileaux's mother holds the remaining interest. The improvements and fixtures lie on this tract. Despite being required by federal law, Mazaska failed to obtain approval of the Bureau of Indian Affairs and the majority owner of Tract No. 1373-F for Ms. Montileaux's mortgage.[1]

[1]The concurring Justice of the Oglala Sioux Tribe Supreme Court noted: "I find very disturbing … the mortgage and note clearly vest jurisdiction with the Appellee that some other law could mandatorily apply. While this could be an oversight on the Appellant's part, it was Mazaska that drafted these documents. Second and most troubling …the land secured by the note is not leasehold but trust land requiring all owners and the Secretary of Interior to approve the mortgage under 25 U.S.C. …." Declaration of Steven D. Sandven ("Sandven Decl.") Ex. 1.

Mazaska is a Native Community Development Financial Institution (classified as a non-regulated loan fund) that provides housing loans and financial and homebuyer education training to members of the Oglala Sioux Tribe living on, or in communities adjacent to, the Pine Ridge Indian Reservation and enrolled members of other federally recognized tribes in South Dakota. Mazaska operates its business from trust land lying entirely within the boundaries of the Pine Ridge Indian Reservation. On March 16, 2012, the Oglala Sioux Tribe Executive Committee, taking into consideration its "partnership" with Mazaska, authorized the entity to use its trust land for twenty-five (25) years with an annual rent of $100.00. Mazaska's one and only office building is situated on the Tribe's trust land.

On July 7, 2010, Mazaska and Ms. Montileaux executed a mortgage (One Hundred Eighty Day Redemption) for repayment of Ms. Montileaux's debt in the amount of $51,634.00. Section 2 thereof requires Mazaska to give Ms. Montileaux, without charge, an annual accounting of the escrow account. Ms. Montileaux has never received an annual accounting. On July 7, 2010, Ms. Montileaux executed the first Note therein promising to pay Mazaska $51,634.00, plus interest at a yearly rate of 7.50%. The Note provided for Tribal Court jurisdiction:

> This Note shall be governed by the law of the Tribe upon which the leasehold interest in the land is located and applicable federal law. ***The courts of the Tribe shall have sole and exclusive jurisdiction*** with respect to all controversies or claims relating to or arising out of this Note. (Emphasis added.)

On December 1, 2010, the parties executed a second mortgage (One Hundred Eighty Day Redemption) for repayment of Ms. Montileaux's debt in the amount of $54,084.00. Again, the Note provided for Tribal Court jurisdiction.

On April 19, 2011, the parties executed a third mortgage (One Hundred Eighty Day Redemption) for repayment of Ms. Montileaux's debt in the amount of $66,370.25. Provisions of

the last mortgage were the same as contained within the first two mortgages. All three agreements – which Mazaska drafted - explicitly provided for Tribal Court jurisdiction.

On or about October 14, 2021, Ms. Montileaux filed a complaint in Tribal Court for breach of contract and breach of the covenant of good faith and fair dealing. She asserted that Mazaska had misapplied her payments and demanded a complete accounting of her loans. She claims to have paid more toward the loan balance than shown by Mazaska's records.

On January 22, 2022, Mazaska filed an Answer and Affirmative Defenses but failed to raise lack of personal and subject matter jurisdiction as defenses - "Within thirty days of receiving the Summons, Respondent Mazaska answered the Complaint on the merits and alleged several affirmative defenses. None of the affirmative defenses challenge jurisdiction, subject matter or otherwise." Sandven Decl. Ex. 2 at p. 2-3. On April 11, 2022, Mazaska filed a Motion to Dismiss claiming for the first time that the Tribal Court lacked jurisdiction.

On August 10, 2023, Chief Judge David Dillon of the Oglala Sioux Tribal Court held that Mazaska consented to Tribal Court jurisdiction: (1) contractually; (2) through its litigation conduct, i.e., it answered the Complaint, failed to challenge the initial pleading and requested affirmative relief; and (3) through its decision to conduct substantially all of its business in tribal territory with Tribal members. Chief Judge Dillon held Mazaska implicitly agreed to abide by the adjudicatory authority of the Court when it requested a scheduling order. *Id*.

Mazaska appealed, and on May 30, 2024, the Oglala Sioux Tribal Court rendered its decision:

> Examining the facts of this case, we conclude that the Tribe has regulatory authority over Appellant's conduct, for purposes of tribal court adjudicating civil conduct, in this case under *Montana*'s consensual relationship exception. The conduct that the Tribe seeks to regulate through civil law arises directly out of the consensual business relationship between a tribal member and Appellant. Moreover, given the circumstances, Appellant should have reasonably anticipated that its conduct might "trigger" tribal authority. *Water*

> *Wheel*, 642 F,3d at 818 (*quoting Plains Commerce Bank*, 554 U.S. at 338). Appellant is a business that appears to have purposely located in an area to serve the Oglala Sioux community, its Articles of Incorporation state that the non-profit sole purpose was to provide financial assistance and counseling to tribal members related to improvements to tribal lands, specifically home building and refurbishing. This is not a situation as held in *Atkinson Trading* where the Tribe desires to assert regulatory authority over non-member hotel patrons, on fee land within a reservation. The land at issue here is tribal lands, specifically housing for tribal members. Appellant's patrons are by and large almost exclusively Oglala Sioux tribal members. Appellant cannot evade Montana's first prong by narrowly construing the business relationship by saying a tribal member can only sue under RESPA.

Sandven Decl. Ex. 1 at p. 4. The Supreme Court did not analyze *Montana*'s second exception, but did note that the Tribe's Business Code asserts jurisdiction over on-reservation businesses, and the Tribe can unequivocally regulate the conduct of non-member Mazaska. *Id*. at p. 6.

LEGAL STANDARD

A. Removal.

Removal statutes are strictly construed, and any doubts about the correctness of removal are resolved in favor of state court jurisdiction and remand. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09, 61 S. Ct. 868, 85 L. Ed. 1214 (1941*); In re Bus. Men's Assurance Co. of Am.*, 992 F.2d 181, 183 (8th Cir. 1993); *Transit Cas. Co. v. Certain Underwriters at Lloyd's of London*, 119 F.3d 619, 625 (8th Cir. 1997). The party seeking removal and opposing remand has the burden of establishing jurisdiction. *Cent. Iowa Power Coop. v. Midwest Indep. Transmission Sys. Operator*, 561 F.3d 904, 912 (8th Cir. 2009).

B. Motion to Dismiss.

A motion to dismiss is appropriate when it is demonstrated "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). For the purpose of the motion to dismiss, the complaint is construed in the light most favorable to the plaintiff, and all facts alleged by the plaintiff are

accepted as true. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Moreover, questions of law are to be resolved "liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (*citing McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Choate v. Trapp*, 224 U.S. 665 (1912)).

POINT I

MAZASKA HAS FAILED TO JOIN A NECESSARY AND INDISPENSABLE PARTY

Mazaska asks this Court to enjoin further Tribal Court adjudication until such time as the complaint can be heard. Doc. 1 at p. 9. Because Mazaska has failed to join the Tribal Court, who is a necessary and indispensable party, the Complaint must be dismissed.[2] Indeed, Courts in the Eighth Circuit have routinely enjoined Tribal Courts but have done so if the Tribal Court or a specific judge is named as a party. *See WPX Energy Willison, LLC v. Fetig*, 2024 DIST. LEXIS 229042 (D.N.D. 2024)(Hon. BJ Jones and Tribal Court named as parties); *Kodiak Oil & Gas v. Burr*, 932 F.3d 1125 (8th Cir. 2019)(Acting Chief Judge Mary Seaworth); *Halcon Operating Co. v. RezRock N Water*, 2018 U.S. Dist. LEXIS 218645 (D.N.D. 2018)(Hon. Mary Seaworthy); *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087 (8th Cir. 1998) (Tribal Court and Hon. Stanley Whiting); *Dish Network Serv. LLC v. Laducer*, 725 F.3d 877 (8th Cir. 2018) (Chief and Presiding Judges); Nguyen v Gustafson, 2018 U.S. Dist. LEXIS 46079 (D.Minn. 2018)(Hon. Henry Buffalo and Tribal Court); *Plains Commerce Bank v. Long Family Land & Cattle Co*., 910 F.Supp.2d 1188 (D.S.D. 2012)(Tribal Court).

[2] Mazaska recently filed a Motion for Reconsideration with the Supreme Court, so it appears it is asking this Court to enjoin both the Oglala Sioux Tribal Court and the Oglala Supreme Court.

"[A] nonparty may be enjoined under Rule 65(d) only when its interests closely 'identify with' those of the defendant, when the nonparty and defendant stand in 'privity,' or when the defendant 'represents' or 'controls' the nonparty." *Thompson v. Freeman*, 648 F.2d 1144, 1147 (8th Cir. 1981) (citing *Chase National Bank v. City of Norwalk*, 291 U.S. 431, 436-37, 54 S. Ct. 475, 78 L. Ed. 894 (1934)). Here, there is no evidence and no allegation that the Tribal Court is in privity with Ms. Montileaux or that she represents or controls the Tribal Court. As such, the Tribal Court cannot be enjoined as a nonparty.

POINT II

MAZASKA HAS FAILED TO STATE A CLAIM BECAUSE REMOVAL FROM TRIBAL COURT IS NOT AUTHORIZED

A. Actions Brought in Tribal Court Cannot Be Removed to Federal Court.

No federal statute has been enacted that authorizes Mazaska to remove this case from Tribal Court. 28 U.S.C. §1441(a) (the "Removal Statute") clearly does not authorize such removal. Said statute provides that "any civil action brought in a State court of which the district court of the United States have original jurisdiction, may be removed by the defendant or the defendants" to the local U.S. District Court. "There is no ambiguity in the text of 28 U.S.C. § 1441: it refers specifically to state courts, and state courts only." *Gorneau v. Love*, 915 F. Supp. 150, 153 (D. North Dakota, 1994); *see also Bodi v. Shinglen Springs Band of Miwok Indians*, 832F.3d 1011, 1021 (9th Cir. 2016) (noting absence of "dedicated removal provision for tribes" in Section 1441); *Weso v. Menominee Indian School Dist*., 915 F. Supp. 73, 76 (E.D. Wis. 1995)(concluding that "the statutory language of 28 U.S.C. § 1441(a) limiting removal to actions commenced in 'State courts' does not extend to an action originally commenced in [tribal court."); *White Tail v. Prudential Ins. Co. of America*, 915 F. Supp. 153-54 (D.N.D. 1995) ("There is no ambiguity in the text of 28 U.S.C. § 1441; Congress has never enacted legislation . . . authorizing the removal of

actions brought in Tribal court); *cf. Becenti v. Vigil*, 902 F.2d 777, 780 (10th Cir. 1990) (holding that 28 U.S.C. § 1442(a)(1), which includes language limiting removal to actions commenced in "State court," does not extend to an action in the tribal court, reasoning that "where Congress has intended to permit removal from courts other than state courts it has expressly said so."); *Nevada v. Hicks*, 533 U.S. 353, 368 (2001) (foreclosing §1983 claims in tribal court based, in part, on recognition that § 1441 refers only to removal from state court, and thus, allowing such claims to originate in tribal court would deprive §1983 defendants of a federal forum).

B. 12 U.S.C. §§2609 and 12 U.S.C. §§2609 Do Not Authorize Removal of a Tribal Court Action.

In Count 1 of its Complaint, Mazaska argues that 12 U.S.C. §§2609 and 12 U.S.C. §§2614 warrant removal of this case to federal court. Doc. 1 at p. 7. A cursory legal analysis demonstrates this is not a true reflection of the statutory scheme of RESPA. In fact, a majority of Courts examining 12 U.S.C. §§2609 have not found an implied private right of action. *See Louisiana v. Litton Mortgage Co*., 50 F.3d 1298, 1301-02 (5th Cir. 1995); *Allison v. Liberty Sav.*, 695 F.2d 1086, 1088-91 (7th Cir. 1982), *Birkholm v. Wash. Mut. Bank*, F.A., 447 F. Supp. 2d 1158 (W.D. Wash. 2006); *McWilliams v. Chase Home Fin., LLC*, No. 4:09CV609 RWS, 2010 U.S. Dist. LEXIS 43549, at *9 (E.D. Mo. May 4, 2010). Even Mazaska took note that "RESPA does not a provide for a private cause of action but to the extent it does, violations are the subject matter of the federal court in this instance." *Id*. at p. 6.

The only avenue for bringing suit under RESPA is through 12 U.S.C. §§2614 which provides:

> Any action pursuant to the provisions of section 6, 8, or 9 [12 USCS § 2605, 2607, or 2608] may be brought in the United States district court or in any other court of competent jurisdiction, for the district in which the property involved is located, or where the violation is alleged to have occurred, within 3 years in the case of a violation of section 6 [12 USCS § 2605] and 1 year in the case of a violation of section 8 or 9 [12 USCS § 2607 or 2608]

> from the date of the occurrence of the violation, except that actions brought by the Bureau, the Secretary, the Attorney General of any State, or the insurance commissioner of any State may be brought within 3 years from the date of the occurrence of the violation.

Section 6 of the statute addresses the servicing of mortgage loans and administration of escrow accounts. Ms. Montileaux has not limited her claims to how Mazaska serviced the escrow account. Even if she had, Mazaska is not a lender, creditor, or dealer, and therefore falls outside the purview of RESPA as discussed further in Subsection E of this Memorandum. Section 8 prohibits kickbacks and unearned fees. Section 9 proscribes certain relationships with title companies. Ms. Montileaux's Complaint deals with none of these issues. As such, neither 12 U.S.C. §§2609 nor 12 U.S.C. §§2614 warrant removal of this case to federal court.

C. Ms. Montileaux's Complaint Does Not Invoke RESPA.

Mazaska's premise for its removal of this case to federal court is the argument that Ms. Montileaux sought relief which is subject to RESPA. Doc. 1. However, this statute does not form a proper basis for the removal of the present action, as only an individual member of the Tribe and an entity conducting business with Tribal members while located on trust land leased from the Oglala Sioux Tribe are parties to this dispute.

Under federal law, "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treatises of the United States." 28 U.S.C. §1331. Claims that purportedly provide the basis for removal based on federal subject matter jurisdiction "should be construed narrowly with doubt construed against removal." Particularly relevant here is the principle that the '"mere presence of a federal issue in a state cause of action does not automatically confer federal question jurisdiction.'" Finally, "[a]s a general rule, a case arises under federal law

only if it is federal law that creates the cause of action."[3]

As applied to the instant case, there is no claim listed in Ms. Montileaux's Tribal Court Complaint that remotely involves federal law. Similarly, no relief sought in the closing paragraphs of each of the claims and no relief sought in the prayer for relief at the end of the Complaint are based upon, invoke or even reference federal law. In fact, the Complaint does not reference RESPA at all. So, what is the "cognizable claim" referenced by Mazaska as the basis for removal? The only portion of the Complaint on which Mazaska hangs its removal hat is a reference to Section 2 of the mortgage document which provides:

> Lender may, at any time, collect and hold funds in an amount not to exceed the maximum amount of Lender for a federally related mortgage loan may require for Borrower's escrow account under the federal Real Estate Settlement Procedures Act of 1974 as amended from time to time, 12 U.S.C. Section 2601 *et. seq*. ("RESPA"), unless another law that applies to the Funds sets a lesser amount.

Mazaska mistakenly contends that this single allusion to RESPA converts Ms. Montileaux's claim into a federal claim thereunder.

D. Oblique References to Federal Law in a Contract Does Not Create Removal Jurisdiction.

Section 2 of the mortgage document only references RESPA – it does not adopt the legislation. Parties cannot agree to federal question jurisdiction where it does not otherwise exist. *Gardner v. United States*, 211 F.3d 1305, 1310, 341 U.S. App. D.C. 247 (D.C. Cir. 2000). Additionally, even if a contract incorporates standards included in federal law, or a party might have a defense under federal law to a breach of contract action, claims brought to enforce the contract do not inherently raise federal questions. *E.g., Okla. Tax Comm'n v. Graham*, 489 U.S.

[3]*Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8-10, 103 S.Ct. 2841, 2846 (1983).

838, 841, 109 S. Ct. 1519, 103 L. Ed. 2d 924 (1989).[4]

The parties' agreements refer to RESPA solely for calculating the maximum amount Mazaska may collect for escrow. It does not by itself establish subject matter jurisdiction in federal court.[5]

E. RESPA Does Not Apply to Mazaska.[6]

RESPA, 12 U.S.C. 2601 *et seq*., requires lenders, mortgage brokers, or servicers of home loans to provide borrowers with disclosures regarding the nature and costs of the real estate settlement process. According to 12 CFR 1024.5(a), RESPA is applicable to all "federally related

[4]*Jackson Transit Auth. v. Local Division 1285*, 457 U.S. 15, 29, 72 L. Ed. 2d 639, 102 S. Ct. 2202 (1982)(the mandatory incorporation of federal standards into a contract does not automatically create federal subject matter jurisdiction in a contract action based on an alleged breach of those standards); *Mabe v. G.C. Servs. Limited Partnership*, 32 F.3d 86, 88 n.2 (4th Cir. 1994) (presence of a federal statutory standard in a private contract does not create federal question jurisdiction); *Oliver v. Trunkline Gas Co.*, 796 F.2d 86, 89 (5th Cir. 1986) ("We are aware of no case in which any court . . . has held that a private contract can give rise to federal question jurisdiction simply by 'incorporating' some federal regulatory standard that would not have been binding on the parties by its own force."); *Johnson v. Griffin,* 2010 U.S. Dist. LEXIS 33281 (E.D. Cal. 2010) ("Simple reference to federal law does not create subject-matter jurisdiction. Subject-matter jurisdiction is created only by pleading a cause of action within the court's jurisdiction in the complaint, and plaintiff has not done so.").

[5]*See also Avitts v. Amoco Production Co*., 53 F.3d 690, 693 (5th Cir. 1995); *Alfaro v. FBI*, 2012 U.S. Dist. LEXIS 129518 (E.D. Cal., Sept. 11, 2012)("simple reference to federal law does not create subject-matter jurisdiction"); *Lockridge v. San Juan Unified School Dist.,* 2006 WL 902278, at *2 (E.D. Cal. April 4, 2006) ("simple reference to federal law does not create subject-matter jurisdiction"); *Performance Contractors, Inc. v. Schwab,* 2010 WL 1293040, at *3 (M.D. La. 2010); *Chisesi v. Chisesi*, 2010 WL 1462268, at *4 (E.D. La. April 8, 2010) (same); *Jones v. Bush*, 2009 WL 1883053, at *3 (M.D. La. June 30, 2009); *Bank of New York Trust Co. N.A. v. Olds*, 2008 WL 2246942, at * 1 (N.D. Tex. May 30, 2008); *Janz v. Las Brisas Council of Co-Owners, Inc*., 2007 WL 2021767, at *3 (S.D. Tex. July 11, 2007) (unspecified violations of federal law not removable).

[6] The dissenting Justice of the Oglala Sioux Tribal Supreme Court felt it was not clear whether the Tribal Court had subject matter jurisdiction over this dispute, and the resolution of that question depended on whether RESPA regulates Mazaska and these mortgages. A straightforward analysis of RESPA conclusively shows that Mazaska is not a lender, creditor, or dealer – a requirement for RESPA coverage. Mazaska is a non-regulated loan fund.

mortgage loans," which must satisfy several criteria – one of which is that the loan must be made by a ***lender, creditor, or dealer***. None of these categories apply to Mazaska.

Mazaska does not qualify as a lender which includes financial institutions either regulated by, or whose deposits or accounts are insured by, any agency of the federal government. RESPA covers any creditor that makes or invests in residential real estate loans aggregating more than $1,000,000 per year. *See* Section 103(g) of the Consumer Credit Protection Act (15 U.S.C. 1602(g)). Mazaska does not qualify as a creditor.[7] Finally, a "dealer" is defined in Regulation X to mean a seller, contractor, or supplier of goods or services. Mazaska does not fall into this category. Because Mazaska is a non-regulated loan fund[8] that does not qualify as a "lender", "dealer" or "creditor", RESPA is not applicable to the transaction with Ms. Montileaux. Accordingly, a federal question does not exist.

POINT III

THE OGLALA SIOUX TRIBAL COURT HAS JURISDICTION OVER ACTIVITIES AND CONDUCT OF NON-INDIANS ON TRUST LAND.

Forty years ago, the Supreme Court held unequivocally that Indian tribes could exercise civil jurisdiction over the activities and conduct of non-Indians on "land belonging to the Tribe or held by the United States in trust for the Tribe." *Montana*, 450 U.S. at 557. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144-45, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982) (recognizing a tribe's

[7] Sandven Decl. Ex. 3.
[8] *Id*.

inherent authority to exclude non-Indians from tribal land, without applying *Montana).*[9] [10]

Mazaska is a non-profit entity organized under the laws of the State of South Dakota. By its own

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[9] *See also Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 654, 121 S. Ct. 1825, 149 L. Ed. 2d 889 (2001) (holding that the Navajo Nation's power to tax, derived in part from its power to exclude, should be considered under *Montana* because, unlike in *Merrion*, the incidence of the tax fell "upon non-members on non-Indian fee land"); *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993)(noting that *Montana* established that "when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands"); *Merrion*, 455 U.S. at 144-45 ("Nonmembers who lawfully enter tribal lands remain subject to the tribe's *power* to exclude them. . . . When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its *ultimate* power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry." (emphasis in original)); *Montana*, 450 U.S. at 557 (recognizing a tribe's inherent authority to condition the entry of non-Indians on tribal land as a separate matter from whether a tribe may condition the entry of non-Indians on non-Indian land); *Cohen's Handbook of Federal Indian Law* § 4.01[2][e], 220 (Nell Jessup Newton et al. eds., 2005) (explaining that "[b]ecause the exclusionary power is a fundamental sovereign attribute intimately tied to a tribe's ability to protect the integrity and order of its territory and the welfare of its members, it is an internal matter over which the tribes retain sovereignty"); *cf. Atkinson Trading Co.*, 532 U.S. 645, 121 S. Ct. 1825, 149 L. Ed. 2d 889 (holding that the Navajo Nation's power to exclude did not allow it to tax non-Indians on *non-Indian* fee land (emphasis added)).

[10] On tribal land, inherent tribal civil jurisdiction over non-Indian activities and conduct is presumed to exist. *Window Rock*, 861 F.3d at 900 (citing *LaPlante*, 480 U.S. at 18); *Water Wheel Camp Recreation Area, Inc. v. LaRance*, 642 F.3d 802, 814 (9th Cir. 2011) (tribe has jurisdiction over non-Indians "for claims arising from their activities on tribal land, independent of *Montana*"). BHCEC's argument that this presumption has been discredited and even "rejected" by the Supreme Court is belied by the very cases on which BHCEC primarily relies for its argument: *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), and *Big Horn County. Electric Cooperative, Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000). BHCEC Opening Br. at 17-18 and 23-28. *Strate* unanimously and expressly affirmed that "tribes retain considerable control over nonmember conduct on tribal land." 520 U.S. at 454, citing *Montana*, 450 U.S. at 557) (footnote omitted). and in *Adams*, this Court held that "[t]his Court's post-*Strate* jurisprudence leaves no doubt that Montana's framework applies in determining a tribe's jurisdiction over nonmembers on non-Indian fee land," 219 F.3d at 950-51 (*citing Allstate Indem. Co. v. Stump*, 191 F. 3d 1071, 1074 (9th Cir. 1999) ("Generally speaking, the *Montana* rule governs only disputes arising on non-Indian fee land, not disputes on tribal land"); *see also Knighton*, 922 F.3d at 899 (citations omitted) (noting that this Court has "declined to" "eliminate[e] the right to-exclude framework as an independent source of regulatory power over nonmember conduct on tribal land" (citation omitted)). The presumption of tribal jurisdiction over non-Indians on tribal land emanates, in part, from the sovereign right of tribes to exclude non-Indians from tribal land. *see Window Rock*, 861 F.3d at 899. The tribal right to exclude is a broad right that includes the general powers to regulate and adjudicate. *Window Rock*, 861 F.3d at 899-900. It also includes subsidiary powers such as the right to place specific conditions on the entry by non-Indians to tribal land and on their continued presence on the land. *Id*. at 899 (citing

admission, it is dedicated "to creating homeownership opportunities for the ***Lakota people***" and offers products to create homeownership on the ***Reservation***."[11] (Emphasis added). On March 16, 2012, the Oglala Sioux Tribe Executive Committee authorized Mazaska to use tribal land for twenty-five (25) years in exchange for nominal consideration.[12] On these facts, applying the analysis of *Water Wheel Camp*, the Tribal Court has jurisdiction because the underlying transactions and injuries occurred on trust land and because Mazaska voluntarily availed themselves of the Pine Ridge Reservation in order to market their services and make a profit at the expense of Tribal members like Toni Montileaux.

POINT IV

EVEN IF THE CONDUCT HAD OCCURRED ON FEE LAND, *MONTANA v. UNITED STATES* WOULD NOT PROHIBIT THE TRIBE'S EXERCISE OF JURISDICTION OVER THIS CASE

Assuming *arguendo*, the conduct in question had occurred on fee land instead of trust land, the exceptions enumerated in federal law would still authorize the Tribal Court to exercise jurisdiction over this case. In *Montana v. United States*, 450 U.S. 545, the United States Supreme Court stated: "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. 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

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333 (1983)). These conditions include typical governmental regulatory means such as taxes, fees, and other measures with which the tribe is entitled to require compliance. *Id*.

[11] Services | Mazaska Owecaso Otipi Financial (mazaskacdfi.org)

[12] Sandven Decl. Ex. 4.

health or welfare of the tribe." *Id*. at 565-66 (citations omitted). Both prongs of this test have applicability here.

A. First *Montana* Exception Applies to the Facts of this Case.

1. Consensual Commercial Relationship Exists.

It is well established that consensual relationships need not be express. *FMC Corp*. *v. Shoshone-Bannock Tribes*, 942 F.3d 916, 932 (9th Cir. 2019). Generally, the applicable determining factors for a consensual relationship include the length of time and the extent of a non-Indian's agreements, dealings, or interactions with a tribe or tribe members, and whether the non-Indian was reasonably on notice of tribal laws and its being subject to those laws. *See, e.g., Water Wheel*, 642 F.3d at 818. Application of these factors here strongly supports a consensual relationship.

The Oglala Sioux Tribal Court has jurisdiction over this matter because Mazaska is in a voluntary consensual commercial relationship with an enrolled Tribal member who resides on individual trust land (not non-Indian fee land) within the boundaries of the Pine Ridge Indian Reservation, and Mazaska geared its services almost exclusively to Indian residents for which Toni Montileaux was an intended third-party beneficiary. Mazaska's agreements, dealings, and interactions with the Oglala Sioux Tribe and its members are long-standing and extensive. Mazaska has voluntarily and continually provided financial resources on the Reservation since approximately 2004 and to Ms. Montileaux for nearly 15 years. Based on years of providing financial services to hundreds of Tribal members, Mazaska is "no stranger to the Tribe's governance and laws" and "should reasonably have anticipated that [its] conduct . . . would fall within the Tribe's [civil] jurisdiction." *Knighton v. Cedarville Rancheria N. Paiute Indians*, 922 F.3d 892, 904 (9th Cir. 2019).

2. Tribal Jurisdiction has a Nexus to the Consensual Relationship.

In addition to the existence of a consensual relationship, the asserted tribal jurisdiction must have a "nexus" to the consensual relationship. *Knighton*, 922 F.3d at 904 (citation omitted). The consensual relationship here being Mazaska's voluntary provision of financial services, there is a nexus because Tribal Law and Ms. Montileaux's claims which arise "directly out of" that consensual relationship.

B. Second Montana Exception Applies to the Facts of this Case.

"To invoke the second *Montana* exception, the impact must be 'demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the Tribe.'" *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 431, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989)). In *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997), the Court held that *Montana*'s second exception "can be misperceived." The exception is only triggered by nonmember conduct that threatens the Indian tribe; it does not broadly permit the exercise of civil authority wherever it might be considered "necessary" to self-government. *Id.*

Here, Mazaska lends money to Tribal members secured by leasehold mortgages on Tribal land. These members executed the agreements – drafted by Mazaska – with the assurance that all disputes would be handled in Tribal Court. Now, Mazaska claims that all such disputes must be heard outside Reservations boundaries – despite the fact that all of the services are taking place on trust land within Reservation boundaries. In other words, Mazaska is trying to usurp the Tribe's jurisdiction over matters that are entirely Tribal issues. There can be nothing more threatening to the health, safety and welfare of a Tribe than depletion of its sovereign rights.

Further, taking into consideration Mazaska's arguments that the Tribal Court does not have jurisdiction over a non-Indian party on trust land cuts straight into the heart of the Tribe's sovereignty. Of course, the Tribal Court should have jurisdiction over anyone conducting business within Reservation boundaries and on trust land.

POINT V

THE OGLALA SIOUX TRIBE MAINTAINS THE RIGHT TO EXCLUDE

On tribal land, inherent tribal civil jurisdiction over non-Indian activities and conduct is presumed to exist. *Water Wheel Camp*, 642 F.3d at 814 (tribe has jurisdiction over non-Indians "for claims arising from their activities on tribal land, independent of *Montana*"). As the Courts have acknowledged, the presumption of tribal jurisdiction over non-Indians on tribal land emanates, in part, from the sovereign right of tribes to exclude non-Indians from tribal land. *See Window Rock*, 861 F.3d at 899. The tribal right to exclude is a broad right that includes the general powers to regulate and adjudicate. *Id.* at 899-900. It also includes subsidiary powers such as the right to place specific conditions on the entry by non-Indians to tribal land and on their continued presence on the land. *Id*. at 899 (*citing New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983)). These conditions include typical governmental regulatory means such as taxes, fees, and other measures with which the tribe is entitled to require compliance. *Id*. The Oglala Sioux Tribe's imposition of its law and order code is a valid condition on Mazaska's activities and conduct on Tribal land.

"[U]nless abrogated by a treaty provision or federal statute, the Tribe may regulate non-member conduct" on tribal land. Indeed, *Window Rock* holds that to defeat the presumption of tribal civil jurisdiction over non-Indians on tribal land, the treaty or federal statutory provision must be express. 861 F.3d at 899-900 (citation omitted). "In interpreting the extent of any such

limits, courts do not 'lightly assume that Congress . . . intend[ed] to undermine Indian self-government.'" *Id.* at 900 (*citing Michigan v. Bay Mills Indian Cmty*., 572 U.S. 782, 790 (2014)). The test is whether tribal jurisdiction has been affirmatively limited by a specific treaty provision or federal statute.

Mazaska has pointed to no treaty provision or acts of Congress that divest or diminish the Oglala Sioux Tribe's civil jurisdiction over non-Indian activities and conduct on tribal land. Mazaska has not done so, because none exist. The Tribe's inherent power to exclude nonmembers from Indian lands has been recognized since 1832 as necessary to a Tribe's ability to protect the integrity and order of tribal lands and the welfare of tribal members. *Worcester v. Georgia*, 31 U.S. 515, 516 (1832)(finding that persons are allowed to enter tribal territory with the assent of the Cherokee themselves").[13] The Tribe's inherent right to exclude was not limited by the Fort Laramie Treaty of 1868 but was bolstered as evidenced by Article II thereof:

> Article II: The United States agrees that the following district of country, to wit, viz: commencing on the east bank of the Missouri river where the 46th parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the 104th degree of longitude west from Greenwich, thence north on said meridian to a point where the 46th parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations of the east back of said river, shall be and the same is, ***set apart for the absolute and undisturbed use and occupation of the Indians herein named***, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons, except those herein designated and authorized so to do, and except such officers, agents, and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law,

[13] *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 590, 593 (9th Cir. 1983)(upholding tribal ordinance that permitted exclusion of a nonmember who violated automobile repossession regulations and finding that when non-Indians "enter tribal lands ….[b]y so doing, they have entered the Tribe's jurisdiction"); *Duro v. Reina*, 495 U.S. 676, 696 (1990)(even where tribes lacked criminal jurisdiction over nonmembers, tribes still "possess their traditional and undisputed power to exclude persons who they deem to be undesirable from tribal lands….").

> shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians, and henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided. (Emphasis added).

This inherent right to exclude is also memorialized within the Tribe's Constitution. *See* OST Constitution, Article IV(1)(i)("The Oglala Sioux Tribal Council shall exercise the following powers subject to any limitations imposed by the statutes or the Constitution of the United States, and subject further to all express restrictions upon such powers contained in this Constitution and attached By-Laws: to remove trespassers and exclude and banish persons from within the boundaries of the Pine Ridge Indian Reservation as defined in Article I.").

Since the Tribe has the authority to exclude Mazaska from the Reservation, the Tribal Court has subject matter jurisdiction over the parties and the cause of action.

CONCLUSION

In summation, Mazaska provides services to the Lakota to enable them to purchase homes on the Pine Ridge Reservation – all from a building located on trust land leased to Mazaska by the Oglala Sioux Tribe. Mazaska entered into three mortgage agreements with Ms. Montileaux, an enrolled member of the Oglala Sioux Tribe, which was intended to be secured by individual trust land. Mazaska drafted the mortgage agreements and by its own accord incorporated Tribal Court jurisdiction into each one of those documents. Clearly, the Tribal Court has jurisdiction over this dispute. As such, the Court is therefore bound to dismiss the case and remand it to Tribal Court.

[Signature on following page]

Dated: March 18, 2025

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CERTIFICATE OF SERVICE

I certify that on this 18th day of March, 2025, I served this document electronically on all other attorneys in this action by filing it electronically, thereby causing it to be served electronically on all other attorneys in this action.

DATED this 18th day of March, 2025.

/s/ Steven D. Sandven
Steven D. Sandven