UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

MAZASKA OWECASO OTIPI FINANCIAL, INC., a South Dakota Nonprofit Corporation, Plaintiff, v. LILLIAN "TONI" MONTILEAUX, Defendant; IN THE MATTER OF MONTILEAUX V. MAZASKA BROUGHT IN OGLALA SIOUX TRIBE TRIBAL COURT.	CIV. NO. 25-5013 **MAZASKA'S RESPONSE TO THE MOTION TO DISMISS**

COMES NOW Plaintiff, Mazaska Owecaso Otipi Financial, Inc. ("Mazaska"), by and through its undersigned counsel, and responds to Defendant's Motion to Dismiss, concluding and submitting to the Court for its consideration that the limits of tribal court jurisdiction at issue in this case invokes federal question jurisdiction,[1] and submits the Defendant's motion should be denied.

Plaintiff's Table of Authorities follows (pp. ii-iii) for the convenience of the Court.

[1] *Ninigret Dev. Corp. v. Narraganasatt Indian Wetuomuck Housing Authority*, 207 F.3d 21, 27-28 (1st Cir, 2000); 13D C.A. Wright & A.R. Miller, FEDERAL PRACTICE AND PROCEDURE § 3579 (3d ed. 2008).

TABLE OF AUTHORITIES

Case Name	***Page***
The Fair v. Kohler Die & Specialty Co., 228 U.S. 22 (1913)	1
Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978)	7
United States v. Wheeler, 435 U.S. 313 (1978)	7
Montana v. United States, 450 U.S. 544 (1981)	7, 8
Nat'l Farmers Union Ins. Cos. v. *Crow Tribe of Indians*, 471 U.S. 845 (1985)	3
Iowa Mut. Ins. Co. v. *LaPlante*, 480 U.S. 9 (1987)	3
Okla. Tax Comm'n v. Graham, 489 U.S. 838 (1989)	1, 6
Strate v. A-1 Contractors, 520 U.S. 438 (1997)	3, 10
Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001)	8
Nevada v. Hicks, 533 U.S. 353 (2001)	7
Plains Commerce Bank, *v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008)	7, 8, 9
Michigan v. Bay Mills Indian Cmty., 572 U.S. 782 (2014)	7
A-1 Contractors v. Strate, 76 F.3d 930, 939 (8th Cir. 1996)	10
Gaming World Int'l v. White Earth Band of Chippewa Indians, 317 F.3d 840 (8th Cir. 2003)	3, 4
Kodiak Oil and Gas v. Barr, 932 F. 3d 1125 (8th Cir. 2019)	10
Secura Ins. Co. v. Deere & Co., 101 F. 4th 983 (8th Cir. 2024)	5
Christian Children's Fund, Inc. v. Crow Creek Sioux Tribal Court, 103 F. Supp. 2d 1161 (D.S.D. 2000)	9

Colombe v. Rosebud Sioux Tribe, 835 F. Supp. 2d 736 (D.S.D. 2011) 1, 2

United States v. Big Crow, No. CIV 15-5008,
2016 U.S. Dist. LEXIS 26491, at *3 (D.S.D. Mar. 2, 2016) 2

Ninigret Dev. Corp. v. Narraganasatt Indian Wetuomuck Housing Authority,
207 F.3d 21 (1st Cir, 2000) *i*

English v. Seaboard C. L. R. Co., 465 F.2d 43 (5th Cir. 1972) 10

Oliver v. Trunkline Gas Co., 796 F.2d 86 (5th Cir. 1986) 1, 6

Venetie I.R.A. Council v. Alaska, 918 F.2d 797 (9th Cir. 1990) 2

Tenneco Oil Co. v. Sac & Fox Tribe of Indians, 725 F.2d 572 (10th Cir. 1984) 4

Calvagno v. Bisbal, 430 F. Supp. 2d 95 (E.D.N.Y. 2006) 1

Williams v. Berkshire Financial Group, Inc., 491 F. Supp. 2d 320 (E.D.N.Y. 2007) 2

United Keetoowah Band of Cherokee Indians in Okla. v. Kempthorne,
630 F. Supp. 2d 1296 (E.D. Okla. 2009) 10

Statutes ***Page***

28 U.S.C. § 1331 2, 3, 4

12 U.S.C. § 2614 1

12 C.F.R. § 1805 5

12 C.F.R. § 1805.805 5

Secondary Sources ***Page***

13D C.A. Wright & A.R. Miller, FEDERAL PRACTICE AND
PROCEDURE § 3579 (Juris. 3d ed. 2008) *i*

James H. Pannabecker and David McF. Stemler, The RESPA Manual:
A Complete Guide to the Real Estate Settlement Procedures Act § 16
(4th ed., LexisNexis A.S. Pratt) 5

INTRODUCTION

The tribal complaint raises federal questions and seeks relief arising solely from allegations based on the Real Estate Settlement Procedures Act ("RESPA"). *Colombe v. Rosebud Sioux Tribe*, 835 F. Supp. 2d 736, 742 (D.S.D. 2011). The Fifth Circuit Court of Appeals has stated,

> It is true . . . that the well-pleaded complaint rule has given rise to an independent corollary under which a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint. This, however, is simply another way of saying that if a federal cause of action completely preempts a state cause of action, any complaint that comes within the scope of the federal cause of action necessarily arises under federal law.

Oliver v. Trunkline Gas Co., 796 F.2d 86, 87 n.1 (5th Cir. 1986) (citations and quotations omitted).[2] In an Indian taxation case, the United States Supreme Court stated: "Whether a case is one arising under federal law, in the sense of the jurisdictional statute, . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose." *Okla. Tax Comm'n v. Graham*, 489 U.S. 838, 840-41 (1989) (citation omitted); *accord The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) ("[T]he party who brings a suit is master of what law he will rely upon.").

Congress established federal jurisdiction within RESPA's statutory scheme. 12 U.S.C. § 2614; *Calvagno v. Bisbal*, 430 F. Supp. 2d 95, 100 (E.D.N.Y. 2006) (retaining and

[2] *Trunkline Gas Co.* was a case involving the Natural Gas Act which preempted the plaintiff from invoking federal jurisdiction over a state law claim. The Fifth Circuit reiterated the "general rule that a suit 'arises under the law that creates the cause of action.'" 796 F.2d at 88 (quoting *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S. Ct. 2841, 2848 (1983)).

establishing federal jurisdiction under RESPA); *Williams v. Berkshire Financial Group, Inc.*, 491 F. Supp. 2d 320 (E.D.N.Y. 2007) (accepting federal question jurisdiction pursuant to 12 U.S.C. § 2614 but dismissing the case on other grounds). Montileaux brought a tribal complaint relying solely on RESPA for relief. Mazaska asserts an absence of tribal authority and jurisdiction under federal law to adjudicate Montileaux's requested relief. *Colombe*, 835 F. Supp. 2d at 743-44. Even "[u]nder a facial challenge, the reviewing court examines the complaint to determine if the Plaintiff has satisfactorily alleged grounds for subject matter jurisdiction. *United States v. Big Crow*, No. CIV 15-5008, 2016 U.S. Dist. LEXIS 26491, at *3 (D.S.D. Mar. 2, 2016). And "anyone asserting an absence of tribal power under federal statute, treaty, or the 'common law' of federal Indian law has an entree into federal court." *Id.* (quoting William C. Canby, American Indian Law in a Nutshell 244 (5th ed. 2009).

The issue can be stated as whether the federal court has jurisdiction to hear whether Montileaux has been harmed by a violation, if any, of the RESPA by a non-Indian. The answer is, "Yes," this Court has subject matter jurisdiction and Montileaux's motion to dismiss should be denied.

ARGUMENT

I. Legal Standard.

Removal is proper pursuant to 28 U.S.C. § 1331. Specifically, the "existence" of tribal jurisdiction, itself central to this dispute, presents a federal question within the scope of 28 U.S.C. § 1331. *Colombe*, 835 F. Supp. 2d at 742. And an action raising "the issue of tribal sovereign powers, even if raised by an individual rather than a tribe, [is] a sufficient federal question upon which to base § 1331 jurisdiction." *Venetie I.R.A. Council v. Alaska*, 918 F.2d 797, 801 (9th Cir. 1990) (overruled on other grounds) (internal quotes and revisions

omitted). The United States Supreme Court has said that whether a tribal court has reached or exceeded the lawful limits of its jurisdiction is encompassed in 28 U.S.C. § 1331. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985). The Eighth Circuit Court of Appeals has determined that an "action filed in order to avoid tribal court jurisdiction *necessarily* asserts federal law." *Gaming World Int'l v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 848 (8th Cir. 2003) (emphasis added) (citing *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 853 (1985)).

Mazaska's exhaustion of Tribal Court remedies and Montileaux's apparent primary position (i.e., that the Oglala Sioux Tribe is a sovereign power) justify jurisdiction properly belongs in this Court.

II. Tribal court remedies have been exhausted.

Tribal authority over non-Indians, which necessarily encompasses civil jurisdiction, must be exhausted. *Strate v. A-1 Contractors*, 520 U.S. 438, 451 (1997); *accord Nat'l Farmers Union Ins. Cos.*, v. *Crow Tribe of Indians*, 471 U.S. 845, 857 (1985) (stating that exhaustion at the tribal court is required before such a claim may be entertained by a federal court). However, the exhaustion rule is "prudential," not jurisdictional. *A-1 Contractors*, 520 U.S. at 451.

Appropriately, Mazaska followed the rules of comity. "Although the existence of tribal court jurisdiction presented a federal question within the scope of 28 U.S.C. § 1331, considerations of comity direct that tribal remedies be exhausted before the question is addressed by the District Court." *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9, 15 (1987). The inquiry about "whether a tribal court has the power to exercise civil subject-matter jurisdiction . . . should be conducted in the first instance in the Tribal Court itself." *Nat'l*

Farmers Union Ins. Cos., 471 U.S. at 855-56. Mazaska followed this course.

Mazaska filed a motion to dismiss for lack of subject matter jurisdiction at the tribal trial court level. It was denied. Mazaska appealed. The Oglala Sioux Nation Supreme Court denied federal jurisdiction and remanded. Having exhausted its remedies in Oglala Sioux Tribal Court, Mazaska filed its complaint pursuant to 28 U.S.C. § 1331. Mazaska subsequently gave written notice of the pending civil action to Oglala Sioux Tribal Court. But exhaustion alone is not enough—there must be federal jurisdiction over the dispute, which there is.

Jurisdiction asserted by Montileaux on the basis of Tribal Sovereign Power is, itself, a Federal Question. The Oglala Sioux Nation Supreme Court determined that federal jurisdiction did not exist in this action and remanded to the tribal trial court on the basis of the Tribe's sovereign power. However, even the assertion of Indian sovereignty, when directed against a non-Indian, can be the basis for federal question jurisdiction because "such power is circumvented and defined by federal law a federal question is raised necessarily by the attempt to exercise it." *Tenneco Oil Co. v. Sac & Fox Tribe of Indians*, 725 F.2d 572, 575 (10th Cir. 1984) (citing *City of Sault Ste. Marie, Mich. v. Andrus*, 458 F. Supp. 465 (D.D.C.)); *accord Gaming World Int'l*, 317 F.3d at 848.

This issue is of more than slight importance. Mazaska receives federal monies which it then lends to borrowers and secures with real estate. These loans may be sold, assigned, or otherwise transferred to other parties becoming subject to federal regulations over the course of their "life." But in this case, the tribal complaint establishes the basis of the relief: the Real Estate Settlement Procedures Act. It is irrelevant whether Mazaska qualifies as a

lender under RESPA. In the 180-Day Mortgage, *Exhibit A*,[3] Montileaux and Mazaska adopted and bound themselves to the federal act and its requirements. The mortgage adopts RESPA as a uniform covenant. Montileaux's tribal complaint demands relief under federal law, not merely contract, against a non-Indian. Furthermore, Montileaux makes much of Mazaska's apparent status as an unregulated Community Development Financial Institution ("CDFI"). Regulated or unregulated, CDFIs are governed by Title 12 of the United States Code and Title 12 of the Code of Federal Regulations. Sanctions against a CDFI are imposed by the Department of the Treasury and come under 12 C.F.R. § 1805. Mazaska is obligated to comply with all applicable federal (including RESPA), state, and local laws. 12 C.F.R. § 1805.805. The federal question issue is raised under the RESPA, bringing the issue within this Court's jurisdiction.

Jurisdiction is proper under RESPA. Mazaska and Montileaux agreed to be governed by the Real Estate Settlement Procedures Act. There is no tribal regulation or licensing of businesses like Mazaska. There are no tribal laws adopting the RESPA on the Pine Ridge Indian Reservation. There are no laws governing financial transactions. The Tribe has no laws regulating financial transactions. Where the tribal law is silent, it is presumed under RESPA that the federal courts exercise jurisdiction. James H. Pannabecker and David McF. Stemler, The RESPA Manual: A Complete Guide to the Real Estate Settlement Procedures Act § 16 (4th ed., LexisNexis A.S. Pratt).

Section 2 of the mortgage document does more than merely reference RESPA—it adopts the legislation. *Exhibit A.* Montileaux is wrong.

[3] Exhibit A contains highlighted excerpts from each of the three separate mortgage documents.

"Courts do not adopt interpretations that negate or render superfluous any provision." *Secura Ins. Co. v. Deere & Co.*, 101 F. 4th 983, 988 n. 5 (8th Cir. 2024). The "Mortgage One Hundred Eighty Day Redemption" specifically incorporates the uniform covenants:

> THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.
>
> . . .
>
> BORROWER [Montileaux] AND LENDER [Mazaska] COVENANT AND AGREE AS FOLLOWS:
>
> . . .
>
> 2. Funds for Taxes and Insurance. . . . These items are called "escrow items." Lender may, at any time, collect and hold funds in an amount not to exceed the maximum amount a 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 set a lower amount. . . . [emphasis added]

Exhibit A.

The paradox is that her tribal court complaint invokes relief only authorized by RESPA and it is not up to her, but this Court, to determine whether she has a cause of action. *Okla. Tax Comm'n v. Graham*, *supra*; *Oliver v. Trunkline Gas Co.*, *supra*. Congress has not granted jurisdiction for the resolution of disputes under RESPA to Indian Tribes. Therefore, the tribal court is without jurisdiction.

III. There is no tribal court jurisdiction over non-member Mazaska.

The Supreme Court has long described Indian tribes as "domestic dependent nations" that "are subject to plenary control by Congress." *Michigan v. Bay Mills Indian*

Cmty., 572 U.S. 782, 788 (2014); *accord Plains Commerce Bank*, *v. Long Family Land & Cattle Co.*, 554 U.S. 316 327 (2008) (retained tribal sovereignty "is of a unique and limited character" and "subject ultimately to Congress"). Whatever authority tribes may retain "*exists only at the sufferance of Congress and is subject to complete defeasance*." *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (emphasis added). However, absent Congressional action, Supreme Court decisions define the sovereign authority of Indian tribes. "[T]ribes do not, as a general matter, possess authority over non-Indians who come within their borders: '[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328, (2008) (quoting *Montana v. United States*, 450 U.S. 544, 565). "The tribes have, by virtue of their incorporation into the American republic, lost "the right of governing . . . person[s] within their limits except themselves." *Id.* (referencing its earlier holding in *Oliphant* v. *Suquamish Tribe*, 435 U.S. 191 (1978)).

***Montana v. United States* does not apply.** "[E]fforts by a tribe to regulate nonmembers . . . are 'presumptively invalid,'" *Plains Commerce Bank*, 554 U.S. at 330 (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001)). And "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction[.]" *Nevada v. Hicks*, 533 U.S. 353, 357-58, 370 n.9 (2001) (quoting *Strate v. A-1 Contractors*, 520 U.S. at 453).

Even though 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 v. United States*, 450 U.S. 544, 564 (1981), a consensual relationship does not

permit tribal regulation of matters already removed from tribal control, *Plains Commerce Bank*, 554 U.S. at 336. *Montana* does not apply.

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." *Montana*, 450 U.S. at 565-66. But this "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." *Atkinson Trading Co.*, 532 U.S. at 657 n.12 (emphasis in original). This does not apply: the Tribe has made no allegation against Mazaska. "The conduct must do more than injure the tribe, it must 'imperil the subsistence of the tribal community.'" *Plains Commerce Bank*, 554 U.S. 316, 341 (quoting *Montana*, 450 U.S. at 566).

This matter resides outside the scope of tribal regulatory authority, so it also necessarily resides outside the adjudicative authority of the tribal courts. *Nevada v. Hicks*, 533 U.S. at 370 n.9 ("*Montana* dealt only with regulatory authority, and is tied to adjudicatory authority by *Strate*, which held that the latter at best *tracks* the former." (emphasis in original)). The Tribe does not regulate any aspect of the financing arrangement between Montileaux and Mazaska through taxation, licensing, or other means. Therefore, the tribal court cannot adjudicate. There is simply no tribal interest involved. *Montana* simply doesn't apply.

Any consensual relationship is irrelevant. Montileaux relies on the existence of a consensual relationship between Mazaska and the Tribe. As stated above, a consensual relationship does not permit tribal regulation of matters already removed from tribal

control. *Plains Commerce Bank*, 554 U.S. at 336. Mazaska is a nonprofit entity organized under and pursuant to the laws of the State of South Dakota. It is not a tribal member. It is regulated by South Dakota law, and to the extent Mazaska is regulated through licensing, it done so through the State of South Dakota or the federal government. Mazaska receives no licensing from the Oglala Sioux Tribe. No action or conduct by Mazaska touches or concerns the self-government of the Oglala Sioux Tribe. Any reliance on a consensual relationship to establish jurisdiction under a tribal long-arm statute is insufficient for subject matter jurisdiction:

> if providing a forum for its members would be a sufficient reason to confer subject matter jurisdiction upon the tribal courts when a tribal member is a party to a lawsuit, it follows that the tribal courts would always have civil subject matter jurisdiction over non-Indians. There would have been no reason for the discussion in *Montana*[*v. United States*, 450 U.S. 544 (1981)] regarding the broad general rule of no civil jurisdiction over non-Indians and the two narrow exceptions to that general rule.

Christian Children's Fund, Inc. v. Crow Creek Sioux Tribal Court, 103 F. Supp. 2d 1161, 1168 (D.S.D. 2000) (quoting *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087 (8th Cir. 1998)). The limitations of tribal court jurisdiction do not encompass the federal questions in this case or otherwise permit the exercise of tribal jurisdiction.

IV. Montileaux's argument that Mazaska failed to join a necessary party is moot.

Montileaux has argued both that the whole complaint should be dismissed for failure to join a necessary party, and that the Tribal Court cannot be enjoined as an unnamed party under Rule 65 of the Rules of Civil Procedure. This Court has denied without prejudice Mazaska's *ex parte* motion for a temporary restraining order and injunction. In its present posture, Montileaux's request is moot.

To respond to Montileaux's argument for full dismissal, none of the cases on which

Montileaux relied (Doc. 13-1 at 6) stand for the proposition that removal from tribal to federal court require naming the tribal court officer as a necessary party. Indeed, in *Kodiak Oil and Gas v. Barr*, 932 F. 3d 1125 (8th Cir. 2019), the tribal court was a named party, but whether it was a necessary party was not at issue. And when the tribal court attempted to classify a class action, despite commencement of the removal proceedings to federal court, *Kodiak* sought an injunction.

"A party to a contract is the quintessential '"indispensable party" and no procedural principle is more deeply embedded in the common law than that, in an action to set aside a lease or contract, all parties who may be affected by the determination of the action are indispensable.' *United Keetoowah Band of Cherokee Indians in Okla. v. Kempthorne*, 630 F. Supp. 2d 1296, 1301 (E.D. Okla. 2009) (quoting *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 540 (10th Cir. 1987)). But the Tribal Court is not a party to the mortgage documents. Joinder is neither necessary nor is the tribal court indispensable.

The tribal trial court has not scheduled any hearing, nor has the Oglala Sioux Tribal Court moved this Court to consider whether it is a necessary party. However, should this Court consider whether adjudication will cause the Tribal Court to suffer adverse harm, it may sua sponte order the Tribal Court be joined by amendment to the pleadings. *See, English v. Seaboard C. L. R. Co.*, 465 F.2d 43 (5th Cir. 1972).

CONCLUSION

"[T]he kind of sovereignty the American Indian tribes retain is a *limited* sovereignty, and thus the exercise of authority over nonmembers of the tribe is necessarily inconsistent with a tribe's dependent status." *A-1 Contractors v. Strate*, 76 F.3d 930, 939 (8th Cir. 1996). (internal quotations and citations omitted) (emphasis in original). Tribal sovereignty and

jurisdiction is limited but jurisdiction in this Court is proper. Mazaska submits this Court has subject matter jurisdiction over the dispute and remedies and submits this Court should deny Montileaux's motion to dismiss.

WHEREFORE Mazaska Owecaso Otipi Financial, Inc., prays this Court for its Order denying Montileaux's motion to dismiss and denying her attorney fees.

Dated this 8th day of April 2025.

COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER, LLP

By: */s/ Jonathan P. McCoy*
Jonathan P. McCoy
Attorneys for Plaintiff
704 St. Joseph Street
P.O. Box 290
Rapid City, SD 57709
(605) 343-2410

CERTIFICATE OF SERVICE

On this the 8th day of April 2025, the undersigned hereby certifies that he served a copy of the foregoing document upon the person herein next designated, on the date below shown, by placing the same in the service indicated, first class postage prepaid, addressed as follows:

Steven D. Sandven
12294 Gold Mountain Loop
Hill City, SD 57745
sdsandven@gmail.com
Attorney for Petitioner

[ ] U.S. Mail
[ ] Personal Service
[ ] Facsimile
[X] CM/ECF
[ ] Email

COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER, LLP

By: */s/ Jonathan P. McCoy*
Jonathan P. McCoy
Attorneys for Plaintiff
704 St. Joseph Street

P.O. Box 290
Rapid City, SD 57709
(605) 343-2410
jmccoy@costellporter.com