

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 2011-CV-00050 REB-CBS

JORGINA HERRERA,

Plaintiff,

v.

ALLIANT SPECIALTY INSURANCE SERVICES, INC. and  
HUDSON INSURANCE COMPANY,

Defendants.

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REPLY IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT

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Defendants Alliant Specialty Insurance Services, Inc. and Hudson Insurance Company (collectively "Tribal First"), through their attorneys, submit this Reply in Support of the Motion to Dismiss the Amended Complaint [Dkt. # 24].

**I. INTRODUCTION**

This lawsuit involves a dispute regarding Tribal First's alleged bad faith adjustment of Plaintiff Jorgina Herrera's workers' compensation claim. Tribal First filed a Motion to Dismiss based upon lack of subject matter jurisdiction because Plaintiff's claims arise pursuant to tribal law and can only be adjudicated in Tribal Court. Tribal First also requests dismissal of the equitable estoppel claim because this is not a cognizable cause of action in Colorado. Finally, Tribal First requests dismissal of the fraud claim because Plaintiff lacks standing to assert it on behalf of unidentified tribes and based upon undisclosed misrepresentations, as well as because she failed to specifically plead fraud as required by Fed. R. Civ. P. 9(c).

Plaintiff recently filed her Response to the Motion to Dismiss. As to subject matter jurisdiction, Plaintiff argues that she lacks access to the Tribal Court because “the Constitution of the Southern Ute Tribe is by its explicit terms only applicable and limited to ‘enrolled members.’” (Response p. 3.) However, the Constitution actually extends jurisdiction “to all the territory within the exterior boundaries of the reservation . . . .” Similarly, as previously conceded by Plaintiff, the Tribal Court has jurisdiction over her claims pursuant to express Tribal Civil Procedural Code. Plaintiff fails to acknowledge that the United States Supreme Court provides for tribal jurisdiction over non-members who enter into contracts with the tribe. Plaintiff voluntarily entered into an employment relationship with the Tribe. As to her equitable estoppel claim, Plaintiff concedes that it is not a cognizable cause of action in Colorado and, therefore, is improper. Finally, as to her fraud claim, Plaintiff summarily asserts that Tribal First “ha[s] the requisite notice to defend against a claim of fraud.” (Response p. 6.) Importantly, Plaintiff fails to cite any legal authority for her bald assertion that her bare allegations satisfy Fed. R. Civ. P. 9(c) or that she has standing to pursue this claim.

For these reasons, this Court should dismiss the Amended Complaint.

## II. STATEMENT OF FACTS

Plaintiff does not dispute the Statement of Facts included in the Motion to Dismiss. Therefore, the facts are undisputed.

## III. LEGAL ANALYSIS

### **A. This Court Lacks Subject Matter Jurisdiction Since Plaintiff’s Claims are Subject to Tribal Law and, Therefore, Tribal Court Jurisdiction.**

The Constitution of Southern Ute Indian Tribe of the Southern Ute Indian Reservation includes a broad jurisdictional grant as follows, “[t]he jurisdiction of the

Southern Ute Indian Tribe through its general council, its tribal council and courts, shall extend to all the territory within the exterior boundaries of the reservation . . . .” Tribal Constitution, Art. 1 attached hereto as **Exhibit A**.<sup>1</sup> Similarly, Tribal Civil Procedure Code 2-1-101 includes the following broad jurisdictional grant: “[a]ll persons may file a claim in the Southern Ute Indian Civil Court. [] All actions must be within the jurisdiction of the Tribe as follows: (a) The actions complained of took place on Indian lands within the exterior boundaries of the Southern Ute Indian Reservation[.]” Tribal Civil Procedure Code 2-1-101(3)-(4) attached hereto as **Exhibit B**.<sup>2</sup> Personal jurisdiction is also broad pursuant to Tribal Civ. P. 1-1-108(2)(b) which states, “the courts of the Southern Ute Indian Tribe shall have civil jurisdiction over the following persons: . . . [a]ny person who transacts, conducts or performs any business or activity within the reservation either in person or by an agent or representative[.]” *Id.* at Tribal Civ. P. 1-1-108(2)(b). In addition, Tribal Civ. P. 1-1-111 provides “the courts of the Southern Ute Tribe shall have exclusive original jurisdiction over all matters which involve the Southern Ute Indian Tribe or its officers, agents, or employees, or parties in

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<sup>1</sup> Consideration of the Tribal Constitution, Tribal Civil Procedure and Administrative Order is proper as Tribal First seeks dismissal pursuant to Fed. R. Civ. P. 12(b)(1). *Jimi Dev. Corp. v. Ute Mountain Ute Indian Tribe*, 930 F. Supp. 493, 495 (D. Colo. 1996) (citing *Todd Holding Co., Inc. v. Super Value Stores, Inc.*, 744 F. Supp. 1025, 1026 (D. Colo. 1990)). In ruling on a motion to dismiss for lack of subject matter jurisdiction, the Court’s analysis is not limited to the four corners of the complaint. *Id.* Instead, the Court can consider affidavits and other documents attached to the motion to dismiss that were not filed with the complaint. *Id.* To the extent this Court determines the Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6), it can take judicial notice of the Tribal Constitution, Tribal Civil Procedure and Administrative Order without converting the motion to one for summary judgment. See *Stone v. Whitman*, 324 Fed. Appx. 726, 728 (citing *Tal v. Hogan*, 453 F.3d 1244, 1265 n.24 (10th Cir. 2006)) (“court may take judicial notice of facts that are a matter of public record . . . [F]acts subject to judicial notice may be considered in a Rule 12(b)(6) motion without converting the motion to dismiss into a motion for summary judgment.”).

<sup>2</sup> See footnote 1.

their official capacities or as a result of performing their duties for the Tribe.” *Id.* at Tribal Civ. P. 1-1-111. Finally, Congressional policy supporting tribal self-government requires that tribal courts whose jurisdiction is challenged be provided the first opportunity to review the factual and legal basis for that challenge. *Nat’l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985).

Plaintiff baldly alleges that the Tribal Constitution “is by its explicit terms only applicable and limited to ‘enrolled members.’” (Response p. 3.) Plaintiff further argues that “[t]he Southern Ute Tribe has . . . no ordinance or provision in the tribal code for contractual jurisdiction, and the non-native status of the parties to this action precludes the parties from having access to the Southern Ute Tribal Courts.” (*Id.*) This misrepresents the Tribal Constitution and Tribal Civil Procedural Code as set forth above. Importantly, Plaintiff cites no legal authority to support these arguments. Plaintiff has made no attempt to first proceed before the Tribal Court with that Court determining that it does not have jurisdiction under the Tribal Constitution or Tribal Civil Procedural Code.

Plaintiff was employed by the Tribe, her alleged injuries occurred during her employment, and Tribal First issued the Workers Compensation insurance policy at issue to the Tribe subject to tribal law. Plaintiff and Tribal First transacted and conducted business involving the Tribe. In fact, Tribal Court has exclusive jurisdiction over Plaintiff’s claim since she was a Tribal employee and Tribal First is an arguable agent of the Tribe for purposes of the policy. Exhibit B, Tribal Civ. P. 1-1-111. Moreover, directly contrary to her current assertion, Plaintiff previously admitted in a pleading submitted to Tribal First regarding her workers’ compensation claim that

jurisdiction in Tribal Court is proper. (Exhibit B to Motion to Dismiss [Dkt. # 3], ¶ 3.) Plaintiff admitted, “[Tribal Court] has jurisdiction to preside over the controversies herein pursuant to Southern Ute Tribal Code, Rule of Procedure 1-1-106, 1-1-110, and 1-1-111.” *Id.* Regardless, pursuant to *Nat’l Farmers Union Ins. Co.*, the Tribal Court, not Plaintiff or the Colorado state or federal court, must determine whether it has jurisdiction over Plaintiff’s claims.

Plaintiff mistakenly relies on *Travelers Ins. Co. v. Savio*, 706 P.2d 1258 (Colo. 1985); *Scott Wetzel Servs. V. Johnson*, 821 P.2d \*04 (Colo. 1991) and *Vaughan v. McMinn*, 945 P.2d 404 (Colo. 1997). While *Savio* arguably permits claimants to bring bad faith lawsuits before the underlying workers’ compensation claim is fully adjudicated, Tribal First has not alleged that Plaintiff failed to exhaust her administrative remedies. Instead, Plaintiff is required to bring her bad faith claim in the same jurisdiction as her workers’ compensation claim. *Johnson* merely extended *Savio*’s holding to self-insurers and third-party claims administrators. *Johnson*, 821 P.2d at 811, 813. Similarly, *Vaughan* merely concluded that the bad faith claim remains viable despite post-*Savio* amendment to the Colorado Workers’ Compensation Act. *Vaughan*, 945 P.2d at 409-410. Importantly, none of the cases held that a worker pursuing a bad faith claim based on a policy that provides benefits pursuant to tribal law is proper in Colorado state or federal court.

Plaintiff relies on *Montana v. United States* as limiting tribal power to punishment of tribal offenders, determination of tribal membership, regulation of domestic relations amongst members, and adoption of rules of inheritance for members; therefore, precluding tribal jurisdiction over her claims. *Montana v. United States*, 450 U.S. 544,

565 (1981). However, Plaintiff fails to recognize additional grounds for tribal jurisdiction adopted by the *Montana* court which provides:

[t]o be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. 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*, 450 U.S. at 1258 (citations omitted). The Supreme Court also held that state court jurisdiction was improper over a suit by a non-Indian against an Indian for conduct that occurred on the reservation:

[t]here can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations.

*Williams v. Lee*, 358 U.S. 217, 223 (1958). Finally, Plaintiff relies upon *Nevada v. Hicks* for the alleged proposition that “tribal courts are not courts of general jurisdiction.” (Response p. 3.) *Hicks*, 533 U.S. 353 (2001). However, the Supreme Court expressly limited its holding stating it “is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over non-member defendants in general.” *Id.*

Plaintiff, a non-Indian, entered into a consensual employment relationship with the Tribe and voluntarily agreed to work for it. She was subject to the Tribe’s employment policies and procedures, as well as any insurance policy obtained by the Tribe. Similarly, Tribal First, a non-Indian entity, entered into a consensual contractual relationship with the Tribe when it issued the Policy. The Policy was issued to the Tribe

for its employees. Since both Plaintiff and Tribal First voluntarily entered into consensual contractual agreements with the Tribe, Tribal Court jurisdiction over Plaintiff's claims is proper. Plaintiff attempts to distance herself from these contractual relationships by asserting that this is a tort action based upon bad faith, and not a contract action under the insurance policy. (Response, p. 3). However, this is directly belied by the fact that the first cause of action in the Amended Complaint is for breach of contract based upon the insurance policy. (Amended Complaint, ¶¶ 17-18).

Finally, in Plaintiff's Second Reply to Tribal First's initial Motion to Dismiss, she relies on an Affidavit from David Mueller, Esq. and a purported Tribal First letter.<sup>3</sup> The letter relates to a workers' compensation claim filed on behalf of Mr. Mueller's client pursuant to the Colorado Workers' Compensation Act in the State of Colorado Office of Administrative Courts. Plaintiff submitted this information for the argument that Tribal First has somehow previously conceded that jurisdiction in state court is proper. In fact, jurisdiction was challenged and the Administrative Court issued an Order Granting Respondents' Motion for Summary Judgment (the "Administrative Order"), which dismissed the claim as the Colorado Workers' Compensation Act was inapplicable. See Administrative Order attached as Exhibit C.<sup>4</sup> The Administrative Order states, "the court is aware of no case that finds that a federally recognized Indian tribe subjects itself to the jurisdiction of the state Workers' Compensation Act for non-tribal employees by operating a casino on the tribal land located within the state." *Id.* at ¶ 14. The Administrative Order concludes "[b]ecause the Tribe has not waived its sovereign

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<sup>3</sup> Tribal First maintains that this Court should disregard the Second Reply to Defendant's Motion to Dismiss pursuant to D.C.COLO.LCivR 7.1(C)(2) since it is a procedurally improper sur-reply filed without leave of court.

<sup>4</sup> See footnote 1.

immunity by operating the Casino, sovereign immunity for the employer applies to this claim and the Tribe is immune from liability for injuries to claimant arising under the Colorado Workers' Compensation Act." *Id.* at ¶ 17. Thus, a Colorado state administrative agency has already determined that the Colorado Workers' Compensation Act is inapplicable to non-Indian employees of the Tribe like Plaintiff.

**B. Plaintiff Concedes that Her Equitable Estoppel Claim Is Improper.**

Plaintiff concedes that her equitable estoppel claim should be dismissed as it is not a cognizable cause of action in Colorado. (Response p. 6) ("Defendants argue that the doctrine of equitable estoppels [sic] can only be used as a shield, not a sword. Plaintiff agrees with this argument.") Since Plaintiff concedes that equitable estoppel is an affirmative defense, not an independent cause of action, this claim should be dismissed.

**C. Plaintiff Fails to Provide any Legal Authority for Her Bald Argument that She Can Assert Claims of Unidentified Tribes or that She Plead Fraud with Specificity.**

Plaintiff fails to cite any legal authority that would permit her to retain the fraud claim. Instead, Plaintiff merely argues that Tribal First failed to cite "any legal authority for their position that Plaintiff, as an *intended* third party beneficiary of the insurance policy, cannot pursue a cause of action against a carrier who issues a policy of insurance, while intending to deprive injured workers of benefits promised under the policy." (Response p. 6-7.) This entirely mischaracterizes Tribal First's position. Tribal First does not assert that Plaintiff lacks standing to assert a third-party beneficiary breach of contract claim against it. Instead, Plaintiff lacks standing to assert a fraud claim based on alleged misrepresentations that were purportedly made to unidentified



tribes regarding other insurance policies. Plaintiff's standing to assert a third-party beneficiary breach of contract claim as an employee under a workers compensation insurance policy is wholly insufficient to somehow find that she has standing to assert a fraud claim based upon unidentified statements made to other unknown tribes regarding other policies.

Plaintiff entirely fails to explain how two conclusory allegations satisfy Fed. R. Civ. P. 9(c)'s specificity requirement. Instead, Plaintiff merely argues that she somehow satisfied this requirement despite failing to "set forth the time, place and contents of the false representation, the identity of the party making the false statements and the consequences thereof." *Koch v. Koch Indus.*, 203 F.3d 1202, 1236 (10th Cir. 2000) (citing *Lawrence Nat'l Bank v. Edmonds (In re Edmonds)*, 924 F.2d 176, 180 (10th Cir. 1991)). Plaintiff's vague and generic allegations of fraud are precisely the type that Fed. R. Civ. P. 9(c) is designed to prevent.

#### IV. CONCLUSION

For the foregoing reasons, Tribal First respectfully requests that this Court grant its Motion to Dismiss.

Dated: May 11th, 2011

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#### CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the above and foregoing was electronically filed with the Clerk of the United States District Court using the CM/ECF system which will send notification to all counsel referenced below, this the 11th day of May, 2011 addressed to:

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