IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION

Belcourt Public School District and Angel Poitra, Plaintiffs, vs. Ella Davis and Turtle Mountain Tribal Court, Defendants.	)	**PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** Case No. 4:12-cv-114

Belcourt Public School District, Plaintiff, vs. Erica Malaterre and Turtle Mountain Tribal Court, Defendants.	)	Case No. 4:12-cv-115

Belcourt Public School District and Chris Parisien, Plaintiffs, vs. Mike Nelson and Judy Nelson on behalf of their Minor Child S.N. and Turtle Mountain Tribal Court, Defendants.	)	Case No. 4:12-cv-116

Belcourt Public School District, Roman Marcellais and School Board Members for the Belcourt Public School District, Plaintiffs, vs. Bruce Allard, Martin Desjarlais, Jeff Laducer, Chad Marcellais, Robert St. Germain, and Turtle Mountain Tribal Court, Defendants.	)	Case No. 4:12-cv-117

Belcourt Public School District, Roman Marcellais and School Board Members for the Belcourt Public School District Plaintiffs, vs. Steve Herman and Turtle Mountain Tribal Court, Defendants.	)	Case No. 4:12-cv-118

For its reply to the Defendants' Response in Opposition to Plaintiffs' Motion for Summary Judgment, the Belcourt Public School District states as follows:

I. District Not Alleging Eleventh Amendment Immunity.

The Defendants' have misconstrued the Belcourt Public School District's argument. The District argues that it is not subject to the Tribal Court's Jurisdiction. It is not arguing that it has eleventh amendment immunity.

II. Defendants Can Sue the District in State Court.

The Defendants in the consolidated are not without remedy absent Tribal Court jurisdiction – they could pursue their claims against the District in State Court, or in Malaterre's case, Federal Court.

The Defendants' rely on *Gustafson v. Poitra* to argue that the "Tribal Court has exclusive jurisdiction over activities between nonmembers and members when the activity occurs within the boundaries of the reservation." Defendants' brief page 8. This is not a correct interpretation of the Court's opinion in *Gustafson*.

Gustafson involved a non-member suing a member in State Court over land located within the exterior boundaries of the reservation. *Gustafson*, 2011 ND 150, ¶2, 800 N.W.2d 842. Gustafson operated a business that straddled the boundaries of the reservation. *Id.* Gustafson leased the portion of the business located on tribal land from Leon Poitra, an enrolled member of the tribe. *Id.* Poitra died and a probate of Poitra's estate was commenced in tribal court. *Id.* Gustafson then sued Poitra's estate in State Court alleging the estate owed him money for improvements he made to the property he leased from Poitra. *Id.* The District Court granted the relief Gustafson requested and Poitra's estate appealed. *Id.* ¶4.

On appeal the North Dakota Supreme Court considered "whether the state district court had jurisdiction to construe the provisions of a lease, and rights attached to the lease, for Indian-owned fee land within the exterior boundaries of the Turtle Mountain Indian Reservation, where the non-Indian lessee brought his claim against the Indian lessors in the state court." *Id.* ¶8.

Gustafson dealt with State Court jurisdiction not Tribal Court jurisdiction. Aside from this fundamental difference, the circumstances in *Gustafson* are very different from what we

have in the cases currently consolidated and before this court. First, in the underlying actions the non-indian (School District) is the being sued, it is not bringing its own action as Gustafson did. The District is challenging jurisdiction, not trying to invoke it. Secondly, the consolidated actions do not involve a dispute over Indian-owned fee land – they are for the most part employment disputes. Third, and most importantly, the District is not a private party that freely entered into an agreement with a tribal member as Gustafson did.

The Court stated:

> "Relative to the issue of state court jurisdiction, if there is an available forum in the tribal courts, considerations of tribal sovereignty and the federal interest in promoting Indian self-governance and autonomy arise." A state court does not have jurisdiction over a civil action if state court jurisdiction undermines tribal authority. Under the infringement test set forth by the United States Supreme Court in *Williams v. Lee*, 358 U.S. 217, 223, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959), state court jurisdiction over certain claims is prohibited if it would "undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves."

Gustafson, 2011 ND 150, ¶10.

Here, the Tribal Court is not an available forum because it does not have jurisdiction over the District. As previously argued, neither of the exceptions to the general rule that Tribal Courts lack jurisdiction over non-members is present here. There is no consensual agreement between the tribe and a private party and the outcomes of these cases do not impact the tribe's ability to govern itself.

III. Tribal Court Jurisdiction Is Not Necessary to Protect the Political Integrity, Economic Security, Health, or Welfare of the Tribe.

In the consolidated cases, allowing the State to exercise its authority would not "trench unduly on tribal self-government." These cases involve employment disputes - primarily the means in which the District hired and supervised its employees. Neither the District's decision

regarding hiring or firing an employee nor its decision to reprimand an employee would "imperil the political integrity of the tribe" to justify application of *Montana*'s second exception.

IV. The Defendants' Reliance on *Siers v. Mandaree Public School District* is misplaced.

The Defendants argue that the Tribal Court has jurisdiction based on a decision from the Fort Berthold Tribal Court wherein that court held that it had jurisdiction because the School District and Tribe had a lease agreement. See Doc. 26-2 (*Siers v. Mandaree Public School District*). Davis's reliance on *Siers* is misplaced and outdated. *Siers* was decided prior to the Northern Plains Intertribal Court of Appeals decision in *Lohnes v. Fort Totten Public School District* (Exhibit A) of which the Fort Berthold Tribal Court is a member. The Court of Appeals in *Lohnes* found that the *Montana* exceptions did not apply to a public school district and dismissed the plaintiff's claim.

The *Siers* Court held that the first *Montana* exception was satisfied because the school district leased its building from the Tribe. The *Siers* Court found that the second *Montana* exception was satisfied because the lease agreement stated the school district would follow the Tribe's laws - including its tort and safety laws. In *Lohnes*, the Court of Appeals rejected the analysis adopted by the Court in *Siers* and held that the lease agreement and agreeing to follow tribal laws did not confer jurisdiction on the Tribal Court.

The Court stated:

> [J]urisdiction will fail in this case unless . . . there is a consensual relationship, the action is necessary to protect tribal self-government, or the nonmember conduct seeks to control internal relations.

The Court further stated that unless there was "official consent" to tribal jurisdiction, the Tribal Court did not have jurisdiction under the first exception contained in *Montana*. The Court found

there had been no official consent on the part of the school district and ruled that the first *Montana* exception did not apply.

The Court also found that the second exception was also not satisfied because:

> The action or inaction of the Public School Defendants in this case has no impact upon tribal self-government. The tribe does and will continue to make its own laws and be governed by them.

Since neither exception applied, the Court found that the tribal court lacked jurisdiction and dismissed the claim.

The circumstances present in *Lohnes* and *Siers* are not analogous to the facts of the consolidated cases. In both *Lohnes* and *Siers*, the public school district leased space from the Tribe to operate its school and each public school district had a lease agreement with the Tribe. In this case, the District does not have a lease for school buildings with the Tribe. Rather, the District uses space owned by the Bureau of Indian Education (BIE). The BIE and Belcourt Public School District did not have a written agreement pertaining to the use of the building until 2010. In 2010, the BIE issued a permit to the District to allow them to use the buildings where the school currently operates. The permit is revocable, it is not a lease agreement, and does not contain any language that would submit the District to the jurisdiction of the Tribal Court.

V. Agreeing to Abide by Tribal Laws Does Not Subject the District to Tribal Court Jurisdiction.

As the Defendants point out, the District agreed in the Plan of Operations that it would not conflict with applicable Tribal, State or Federal laws. Doing so did not subject the District to the Tribal Court's Jurisdiction.

The Supreme Court has never held that recognizing tribal law somehow waives any right to assert lack of jurisdiction in a future matter. See *Plains Commerce Bank*, 554 U.S. at 342 (the fact that a nonmember sought a tribal court's aid does not constitute consent to future litigation

in tribal court, especially when the nonmember contends that the tribal court lacks jurisdiction over it). For instance, in *Hicks*, the State Game Wardens appeared in Tribal Court to get the Tribal Court to approve their warrant before they carried out the warrant. *Hicks*, 533 U.S. at 356. After they carried out the warrant, the State Game Wardens were sued in Tribal Court. *Id*. The Game Wardens challenged the Tribal Court's jurisdiction and the United Supreme Court held that the tribal court did not have jurisdiction over them. *Id*. The fact that they had previously appeared in the same Tribal Court in which they were later sued, did not play a role in the Courts ultimate analysis. *Id*. Similarly, the Ninth Circuit Court of Appeals has recognized "a nonmember's consensual relationship in one area . . . does not trigger tribal civil authority in another – it is not 'in for a penny, in for a Pound.'" See *Town Pump, Inc. v. LaPlallante*, 2010 WL 3469578 (9th Cir. 2010) citing *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001).

Furthermore, the Plan of Operations contained a provision that invalidated anything in it that was contrary to State law. As discussed in the District's Brief in Support of Summary Judgment, the District can only do what the State Legislature has authorized it to do. The Legislature has specifically stated that a school district cannot enter into an agreement that would subject it to Tribal Court Jurisdiction. Hence, any agreement conferring jurisdiction to the Tribal Court would be invalid since the District did not have the authority to enter into such agreement.

VI. Injunction Prohibiting Tribal Court from Adjudicating Defendants' Claims is Warranted.

"In determining whether preliminary injunctive relief should be granted, the Court is required to consider the factors set forth in *Dataphase Sys., Inc., v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981)." *Nokota Horse Conservancy, Inc. v. Bernhardt*, 666 F. Supp. 2d 1073, 1077 (D.N.D. 2009). This Court, in a very similar recent case, went through the *Dataphase* factors and granted a different public school district's motion for temporary restraining order. *See Fort*

Yates Pub. Sch. Dist. #4 v. Murphy for C.M.B. et al., Case No. 1:12-cv-135, Docket No. 8 (D.N.D. Oct. 23, 2012) (Order Granting Motion for TRO) [hereinafter *Fort Yates*].

Whether a preliminary injunction should be granted under Rule 65 involves consideration of "(1) the movant's probability or likelihood of success on the merits, (2) the threat of irreparable harm or injury to the movant absent the injunction, (3) the balance between the harm to the movant and the harm that the injunction's issuance would inflict on other interested parties, and (4) the public interest." *Id.* (quoting *Wachovia Sec., L.L.C. v. Stanton*, 571 F. Supp. 2d 1014, 1032 (N.D. Iowa 2008) (citing *Dataphase*, 640 F.2d at 114)). The standard for a preliminary injunction is essentially the same as for a permanent injunction, except for a permanent injunction, the plaintiff must show actual success on the merits. *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 546 n.12 (1987). "No single factor in itself is dispositive; in each case all of the factors must be considered to determine whether on balance they weigh towards granting the injunction." *Id.* (quoting *Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc.*, 815 F.2d 500, 503 (8th Cir. 1987); *Dataphase*, 640 F.2d at 114)).

A. Success on the Merits

As discussed in detail above and in the School District's memorandum in support of its motion for summary judgment, this factor weighs in favor of granting the injunctive relief because the tribal court lacks jurisdiction, and exhaustion of tribal remedies either occurred or is not required.

B. Irreparable Harm

The School District "must next establish there is a threat of irreparable harm if injunctive relief is not granted and that such harm is not compensable by money damages." *Nokota Horse Conservancy, Inc.*, 666 F. Supp. 2d at 1080 (citing *Doe v. LaDue*, 514 F. Supp. 2d 1131, 1135

(D. Minn. 2007)). "Possible or speculative harm is not enough." *Id.* A significant risk of harm must be shown by the School District to exist. *Id.*

The School District will suffer irreparable harm if forced to litigate in Tribal Court because it will be required to expend substantial effort and resources. The School District will not be able to recover the money it must spend on the Tribal Court litigation. A court "can presume irreparable harm if the movant has a likelihood of success on the merits." *Calvin Klein Cosmetics Corp.*, 815 F.2d at 505 (citing *Black Hills Jewelry Mfg. Co. v. Gold Rush, Inc.*, 633 F.2d 746, 753 (8th Cir. 1980)). "Other courts have concluded a movant would suffer irreparable harm if forced to litigate in a Tribal Court that likely does not have jurisdiction." *Dish Network Serv. LLC v. Laducer*, Case No. 4:12-cv-058, 2012 U.S. Dist. LEXIS 94183, at *8-9 (D.N.D. July 9, 2012) (citing *Crowe & Dunleavy, P.C. v. Stidham*, 640 F.3d 1140, 1157-58 (10th Cir. 2011)).

In several recent cases, this Court found this factor weighed in favor of granting injunctive relief, because the plaintiff would suffer irreparable harm if forced to expend time, effort, and money in a forum that lacks jurisdiction. *See Dish Network Serv. LLC*, 2012 U.S. Dist. LEXIS 94183, at *9; *Fort Yates*, p. 4. Similarly, the School District would suffer irreparable harm if forced to expend any more time, effort, and money in Tribal Court. This factor weighs in favor of granting the injunction.

C. Balance of Harm

In *Dish Network Serv. LLC*, this Court found this factor weighed in favor of granting an injunction because the plaintiff would be required to expend time and resources litigating in tribal court if the injunction was denied, while the defendants would not suffer any harm because the tribal court proceedings would only be delayed if a preliminary injunction was ordered. *Dish*

Network Serv. LLC, 2012 U.S. Dist. LEXIS 94183, at *9. This Court similarly found this factor weighed in favor of the plaintiff in *Fort Yates*.

In the present case, if the Court determines the Tribal Court lacks jurisdiction, the School District would obviously be harmed in having to continue litigating these actions in tribal court. This factor weighs in favor of granting the injunction.

D. Public Interest

In *Glacier Cnty. Sch. Dist.*, the court noted that the State of Montana "is the authority responsible for safeguarding the inalienable right of children to a public education." *Glacier Cnty. Sch. Dist.*, 47 F. Supp. 2d at 1171. Likewise, the State of North Dakota is responsible for safeguarding the inalienable right of children to a public education in this state. The School District must provide an education to students living within the reservation boundaries pursuant to article VIII, section 1 of the North Dakota State Constitution. "Accordingly, the public interest lies in ensuring the responsible state agencies are free to apply their expertise in resolving the various issues associated with providing an education to the children of this State." *Glacier Cnty. Sch. Dist.*, 47 F. Supp. 2d at 1171.

Furthermore, avoiding duplicative legal proceedings in multiple venues is in the public interest. This factor weighs in favor of granting the injunction.

Conclusion

Pursuant to the forgoing and the Districts Brief in Support of its Motion for Summary it respectfully requests that this court declare that the Turtle Mountain Tribal Court does not have jurisdiction over it or its employees. The general presumption against Tribal Court jurisdiction has not been overcome in any of the cases being considered.

Furthermore, it is appropriate under the circumstances for the Court to enjoin the Tribal Court from further proceeding in any of the cases being considered.

DATED this 19th day of November, 2013.

PEARCE & DURICK

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2013, the foregoing **Plaintiffs' Reply to Defendants' Response in Opposition to Defendant's Motion for Summary Judgment** was filed electronically with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing (NEF) to the following:

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