FORT BERTHOLD DISTRICT COURT
OF THE THREE AFFILIATED TRIBES
STATE OF NORTH DAKOTA

TJMD, LLP, a North Dakota Limited Liability Partnership, Plaintiff, vs. Dakota Petroleum Transport Solutions, LLC, a Minnesota limited liability company, Dakota Plains Holdings, Inc., a Nevada corporation, Western Petroleum Corporation, a Minnesota corporation, and World Fuel Services Corporation, a Florida corporation, Defendants.	)	Civil No. CV-2012-0678

Defendants' Reply Brief in Support of Motion to Dismiss for Lack of Nontribal Member Jurisdiction

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Table of Contents

Page

Table of Authorities

Page

Cases

Statutes

Other Authorities

Argument

1. The Montana consensual-relationship exception to the general rule of no tribal-court jurisdiction over nonmembers does not apply because the defendants did not have a consensual relationship with the tribe or a tribal member out of which any of TJMD's individual claims directly arose, and that involved nonmember conduct that impacted tribal governance and internal relations.

TJMD, LLP has not proved that any of the defendants had a consensual relationship with the tribe or a tribal member relevant to jurisdictional analysis. Although Dakota Petroleum Transport Solutions, LLC did contract with TJMD, that North Dakota limited liability partnership is a non-human entity; not a tribal member.

In Airvator, Inc. v. Turtle Mountain Mfg. Co., 329 N.W.2d 596, 602 (N.D. 1983), and Zempel v. Liberty, 143 P.3d 123, 132 (Mont. 2006), the North Dakota and Montana Supreme Courts respectively held that state-organized corporations were not Indians for jurisdictional purposes, even though owned by Indians. They reasoned that a corporation is an entity distinct from its owners. Airvator, 329 N.W.2d at 603; Zempel, 143 P.3d at 132. See Stephen L. Pevar, The Rights of Indians and Tribes 161 (4th ed. 2012) (stating, "Corporations that are licensed under state law usually are considered 'non-Indian' for jurisdictional purposes even if they are owned by Indians.")

TJMD attempts to distinguish Airvator and Zempel by arguing that limited liability partnerships are different from corporations. They are the same, however, on the point that matters: both are entities distinct from their owners. 1 Carol A. Jones, Fletcher Cyclopedia of the Law of Corporations § 26 (2006)(stating, "the corporation is an entity distinct from its shareholders[.]); Alan R. Bromberg & Larry E. Ribstein, Bromberg and

Ribstein on Limited Liability Partnerships, the Revised Uniform Partnership Act, and the Uniform Limited Partnership Act (2001) § 1.03(a) (2012 ed.) (stating, "limited liability [of an LLP] makes entity characterization of LLP's [even] more certain.").

TJMD argues it is a tribal member because it is a certified Indian company for TERO. Tribal membership, however, is based on blood lineage. "[O]ne of the membership requirements common to all tribal membership ordinances is that one can trace one's ancestry to a person who is not only identified as an Indian, but as an Indian of that tribe." Alex Tallchief Skibine, Duro v. Reina and the Legislation that Overturned it: A Power Play of Constitutional Dimensions, 66 S. Cal. L. Rev. 767, 788 (1993).

Before 2010, the Three Affiliated Tribes Constitution provided that the following were tribal members: "[A]ll persons of Indian blood whose names appear on the official census of the three tribes as of April 1, 1935; and all children born to any member of the tribes who is a resident of the reservation at the time of the birth of said children." Three Affiliated Tribes Const. Art. II, sec. 1 (2008). In 2010, the constitution was amended to provide that the following are tribal members: "Persons of at least 1/8 degree blood of the Hidatsa, Mandan, and/or Arikara Tribes." Three Affiliated Tribes Const. Art. II, sec. 1(a) (2010). In either case, tribal membership requires tracing one's blood back to a qualifying ancestor. As a non-human entity, TJMD cannot have the required blood lineage to be a tribal member.

Relying on Carden v. Arkoma Assocs., 494 U.S. 185 (1990), TJMD argues that whether it is a tribal member should be determined based on its ownership. In Carden, the United States Supreme Court considered how to assign citizenship to a limited

partnership for purposes of federal diversity jurisdiction. Id. at 187-96. The Court deemed the citizenship of the limited partnership to be the citizenship of all its members. Id. at 195-196 The Carden rule is a legal construct that allows a limited partnership to sue and be sued in federal court based on diversity. See Swiger v. Allegheny Energy, Inc., 540 F.3d 179, 185 (3d Cir. 2008)(stating that rule allowing citizenship of a partnership to be determined by the citizenship of its partners is a "legal construct" that allows the partnership access to federal court).

Tribal-court jurisdiction over nontribal members does not allow for a construct of this nature because a presumption exists against tribal authority over nontribal members. Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 330 (2008). Imputing tribal membership to completely private state-organized entities so that they can sue nontribal members in tribal court would run counter to this presumption.

Even applying a Carden-like rule, it would not give TJMD tribal-member status. The Carden rule looks to the status of "*all* the members." 494 U.S. at 195 (emphasis added). The Court specifically said, "[W]e reject the contention that to determine, for diversity purposes, the citizenship of an artificial entity, the court may consult the citizenship of less than all of the entity's members." Id. During the course of Dakota Petroleum's contractual relationship with TJMD – the pertinent period for jurisdictional analysis – TJMD had nontribal members as members of the entity.

TJMD's reliance on Smith v. Salish Kootenai Coll., 30 Indian L. Rep. 6050 (Confederated Salish and Kootenai Ct. of App. 2003), is misplaced. The tribal court of appeals held that the tribal college was a tribal entity, and as a tribal entity, could be

treated as a tribal member. Smith, 30 Indian L. Rep. at 6052. The United States Court of Appeals for the Ninth Circuit, which reviewed the decision, reached the same result. Smith v. Salish Kootenai Coll., 434 F.3d 1127, 1135 (9th Cir. 2006). In deciding that the college was a tribal entity, these courts primarily reasoned that the tribe created the college and exercised control over it through appointment and removal of board members. 434 F.3d at 1135; 30 Indian L. Rep. at 6052. TJMD cannot be considered a tribal entity here. The tribe neither created TJMD nor exercised control over it. TJMD is a mere private business entity.

Even if TJMD were a tribal member, the defendants other than Dakota Petroleum – Dakota Plains Holdings, Inc., Western Petroleum Corporation, and World Fuel Services Corporation – did not have a consensual relationship with TJMD. TJMD has correctly alleged that the contracts were between TJMD and Dakota Petroleum. TJMD's attempt to attribute the contracts to these other defendants fails, because its arguments are factually erroneous and ignore entity separateness.

TJMD correctly alleges that Dakota Petroleum is a Minnesota limited liability company. (Compl. § 4) It incorrectly alleges, however, that Dakota Plains Holdings, Inc. and Western Petroleum Corporation are the owners of Dakota Petroleum. (Id.) Based on these erroneous allegations, TJMD then makes an erroneous legal argument. It asserts that when Dakota Petroleum contracted with TJMD, Dakota Plains Holdings, Inc. and Western Petroleum Corporation also contracted with TJMD. (TJMD Br. at 16-17) Yet, a limited liability company has a "legal identity [that] is separate from that of its owners." 17 Berrien C. Eaton, Business Organizations: Professional Corporations and

Associations § 9A.01[1] (2012). Sections 322B.20, 322B.303, and 322B.88 of the Minnesota Statutes confirm that a Minnesota limited liability company is a distinct entity. See Minn. Stat. § 322B.88 reporter's notes (West 2011)(stating, "A limited liability company is an entity distinct from its owners."). Thus, the contracts entered by Dakota Petroleum could not be attributed to Dakota Plains Holdings, Inc. or Western Petroleum Corporation, even if they were the owners.

TJMD then compounds the error by attempting to attribute the contracts to World Fuel Services Corporation. TJMD asserts that World Fuel Services Corporation is the parent of Western Petroleum Corporation. (TJMD Br. at 17) TJMD then asserts, the contracts, which it has already, and erroneously, attributed to Western Petroleum Corporation, are now attributed to World Fuel Services Corporation. Yet, even assuming a parent-subsidiary relationship between World Fuel Services Corporation and Western Petroleum Corporation, "[a] subsidiary corporation is presumed to be a separate and distinct entity from its parent corporation." Jones, supra, § 26.

TJMD asserts that Dakota Plains Holdings, Inc. had a consensual relationship with TJMD because it "allowed" TJMD on the property. Even assuming TJMD were a tribal member, Dakota Plains' "allowing" TJMD on the property is not the type of relationship (if it can even be called a relationship) that meets the consensual-relationship exception. Dakota Plains leased the property to Dakota Petroleum. (Claypool 2/6/13 Aff. ¶1) Dakota Plains did not give specific permission to TJMD to be on the property. (Id.) Only in an extremely broad sense, i.e., by not requiring Dakota Petroleum to exclude TJMD, did Dakota Plains "allow" TJMD on the property.

The consensual-relationship exception requires that the relationship have arisen "through commercial dealings, contracts, leases, or other arrangements." Montana v. United States, 450 U.S. 554, 565 (1981). Dakota Plains did not have a commercial dealing, contract, or lease with TJMD. Read in context the phrase "other arrangements" means a particularized relationship. To interpret the meaning of that phrase expansively to include generalized relationships would be counter to the Supreme Court's admonition that the Montana exceptions "are 'limited' ones." Plains Commerce Bank 554 U.S. at 330 (quoting Atkinson Trading Co. v. Shirley, 532 U.S. 645, 647 (2001)).

Dakota Plains did not have a particularized relationship with TJMD. Thus, Dakota Plains did not have a relationship with TJMD of the type required to meet the consensual-relationship exception.

Besides a consensual relationship, the consensual-relationship exception requires that the claims against the defendant have directly arisen out of that relationship. TJMD's claims against Dakota Plains are tort claims for tortious interference with contract, tortious interference with prospective economic advantage, and misrepresentation; and for civil conspiracy with the other defendants to have committed these earlier-listed torts. TJMD's claims do not arise out of Dakota Plains having "allowed" TJMD on the property in the direct sense the exception requires.

The Smith v. Salish Kootenai College case shows that the claim must have directly arisen out of the alleged consensual relationship. In that case, Smith was injured while driving a truck as part of a college course. 434 F.3d at 1129. He sued the tribal college for negligent maintenance of the truck and spoliation of evidence. Id. at 1135. The Ninth

Circuit held that Smith's claims against the college did not have a sufficient nexus to his college-and-student relationship to satisfy the consensual-relationship exception. Id. at 1136. The court said, "Any contractual relationship Smith had with [the college] as a result of his student status is too remote from his cause of action to serve as the basis for the tribe's civil jurisdiction." Id. Similarly here, TJMD's claims are too remote from Dakota Plains having "allowed" TJMD on the property to meet the exception.

Even if the first two elements of the consensual-relationship exception – the relationship and claim-nexus elements – were met for any defendant, it still would not trigger tribal-court jurisdiction over that defendant. In Plains Commerce, the Supreme Court added a third element when it said that tribes can regulate nonmember conduct only when it "implicates tribal governance and internal relations." 554 U.S. at 335. Thus, the consensual-relationship exception can be met only when the nonmember's conduct, besides having directly arisen out of the consensual relationship, impacted tribal governance and internal relations. The alleged conduct of the defendants here does not meet this additional requirement.

In sum, the consensual-relationship exception to the general rule of no tribal-court jurisdiction over nonmembers does not apply. As shown below, the threatens-the-tribe exception also does not apply.

2. The Montana threatens-the-tribe exception does not apply because the alleged conduct was not catastrophic to the tribe.

Contrary to TJMD's assertion, the United States Supreme Court intended in Plains Commerce to limit the threatens-the-tribe exception to conduct that has catastrophic

consequences. In analyzing this exception, the Court applied the catastrophic-consequences standard, stating that the conduct involved – the sale of formerly Indian-owned land to non-Indians – "[could not] fairly be called 'catastrophic' for tribal self-government." Plains Commerce, 554 U.S. at 341. The term *catastrophic* is the adjective form of the noun *catastrophe*. Webster's New World College Dictionary 230 (4th ed. 2010). The term *catastrophe* means "a disastrous end, bringing overthrow or ruin." Id.

Even before Plains Commerce, the Court warned that this exception "can be misperceived." Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997). The Court said that it "does not broadly permit the exercise of civil authority wherever it might be considered 'necessary' to self-government." Atkinson, 532 U.S. at 657 [n.12]. This exception, the Court said, "is triggered by nonmember conduct that threatens the Indian tribe." Id. (emphasis removed).

As the Ninth Circuit explained in Philip Morris USA, Inc. v. King Mountain Tobacco Co., 569 F.3d 932, 943 (9th Cir. 2009), this exception is not meant to capture generalized threats to the tribe. Instead, it "envisions situations where the conduct of a nonmember poses a direct threat to tribal sovereignty." Id.

The consequences that TJMD alleges – loss of a contract, loss of potential future work, harm to reputation, and loss of jobs, even if Native American jobs – do not meet the threatens-the-tribe exception. These alleged consequences do not pose a direct threat to tribal sovereignty. Allowing these alleged consequences to meet this exception would allow the exception to swallow or severely shrink the general rule of no-tribal court jurisdiction over nonmembers. The Supreme Court has admonished that the Montana

exceptions "cannot be construed in a manner that would 'swallow the [general] rule,' . . . or 'severely shrink' it...." Plains Commerce, 554 U.S. at 330 (quoting Atkinson, 532 U.S. at 655 and Strate, 520 U.S. at 458). Thus, the threatens-the-tribe exception does not apply.

It should be noted that Strobel Starostka Transfer, the current operator of the facility, is subject to the tribe's TERO ordinance. Under that ordinance, it must "give preference to qualified Indians, with the first preference to local Indians, in all hiring, promotion, training, lay-offs, and all other aspects of employment." TERO Ordinance of the Three Affiliated Tribes, tit. II, sec. 202 (2012). Thus, employment of Native Americans at the facility continues.

In sum, neither the consensual-relationship exception nor the threatens-the-tribe exception applies. But, even beyond these Montana exceptions, TJMD has not met its burden of proving the threshold requirement for tribal-court jurisdiction – that the alleged conduct giving rise to its claims physically occurred on the reservation.

3. TJMD has not proved the threshold requirement that the alleged conduct giving rise to its claims physically occurred on the reservation.

One does not even reach the Montana exceptions unless the nonmember's conduct giving rise to the particular claims physically occurred on the reservation. Plains Commerce, 554 U.S. at 332. TJMD has not proved that any of the alleged conduct of the defendants giving rise to TJMD's claims physically occurred on the reservation. For this reason alone, the Court should dismiss TJMD's claims.

The United States Supreme Court has left open the question whether tribal courts

ever have civil jurisdiction over nonmember defendants. Nevada v. Hicks, 533 U.S. 353, 358 n.2 (2001). To preserve this issue, the defendants assert that no tribal-court civil jurisdiction exists over nonmember defendants for the reasons Justice Souter outlined in his Nevada concurrence. Id. at 383-85.

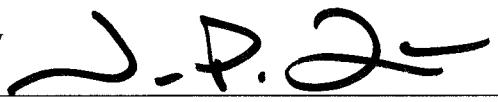
Conclusion

The Court should dismiss this case for lack of jurisdiction over nonmember defendants. None of the defendants had a consensual relationship with the tribe or a tribal member out of which any of TJMD's individual claims arose, and that involved nonmember conduct that impacted tribal governance and internal relations. Additionally, the alleged conduct of the defendants was not catastrophic to the tribe. Finally, TJMD has not proved that any of the defendants' alleged conduct giving rise to its claims physically occurred on the reservation.

DATED this 6th day of February, 2013.

Respectfully submitted,

PEARCE & DURICK

By 

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