

JACK W. FIANDER  
TOWTNUK LAW OFFICES, LTD.  
SACRED GROUND LEGAL SERVICES, INC.  
5808A SUMMITVIEW AVENUE, #93  
YAKIMA, WA 98908  
(509) 961-0096

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON

UNITED FINANCIAL CASUALTY  
COMPANY, a foreign insurance company,

Plaintiff,

v.

SPENCER TRUCKING LLC, a Washington  
limited liability company; RYAN SPENCER,  
an individual; THE ESTATE OF IVAN  
EMMANUEL CARDENAS SR.; I.C., an  
individual,

Defendants.

No. 1:20-cv-03211-SMJ

MOTION TO DISMISS  
COMPLAINT

Note for Hearing:

January 8, 2021

INTRODUCTION

Defendants Spencer Trucking and Ryan Spencer moves for dismissal of Plaintiff's complaint (ECF No. 1, 3) pursuant to Rule 12 (b) (1) and (6), and for failure to exhaust tribal remedies a mandatory requirement in this Circuit.

For the following reasons, the motion should be granted.

STATEMENT OF FACTS

1 For purposes of ruling upon this motion, the Court may accept as true any  
2 well-pleaded allegations of plaintiff's complaint.

3 In addition of the facts alleged by plaintiff, filed herewith as Exhibits 1 and  
4 2 of this motion are true copies of defendant Ryan Spencer's tribal enrollment  
5 identification verifying his status as a member of the Confederated Tribes and  
6 Bands of the Yakama Nation, a federally recognized tribal nation, and a true copy  
7 of the Yakama Nation Business license of Spencer Trucking, LLC, a Yakama  
8 tribal business with an address of 310 Coburn Road, White Swan. The Court may  
9 take judicial notice that White Swan is within the Yakama Nation Reservation.  
10  
11 Fed. R. Evid. 201 (b) (1), (2).  
12

#### 13 STANDARD OF REVIEW 14

15 For purposes of ruling upon a motion to dismiss, the Court accepts as true  
16 all well-pleaded allegations contained in the complaint, with doubts resolved in  
17 favor of the non-moving party. Fed. R. Civ. P. 12 (b) (6). A complaint must be  
18 dismissed under Rule 12(b)(1) if, considering the factual allegations in the light  
19 most favorable to the plaintiff, the action: (1) does not arise under the  
20 Constitution, laws, or treaties of the United States, or does not fall within one of  
21 the other enumerated categories of Article III Section 2 of the Constitution; (2) is  
22 not a case or controversy within the meaning of the Constitution; or (3) is not one  
23  
24  
25

described by any jurisdictional statute. Baker v. Carr, 369 U.S. 186, 198, 82 S.Ct. 691 (1962).

The plaintiff bears the burden of proving the existence of subject matter jurisdiction. Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir.1989). When considering a motion to dismiss under Rule 12(b)(1), a court is not restricted to the face of the pleadings, but may review any evidence to resolve factual disputes concerning the existence of jurisdiction. *See* McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989); *see also* Biotics Research Corp. v. Heckler, 710 F.2d 1375, 1379 (9th Cir. 1983). A federal court is presumed to lack jurisdiction until the plaintiff establishes otherwise. *See* Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375 (1994); *see also* Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989). Therefore, the Plaintiff bears the burden of establishing this court's authority to entertain plaintiff's complaint. *See* Stock West, 873 F.2d at 1225.

Dismissal under Rule 12(b)(6) may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699. Additionally, 28 U.S.C. 1915 (e) (2) provides that notwithstanding any filing fee that may have been paid the court shall dismiss the case at any time if the court

1 determines that ...the action or appeal is frivolous or malicious, fails to state a  
2 claim on which relief may be granted, or seeks monetary relief against a  
3 defendant who is immune from such relief.

#### 4 ARGUMENT

5  
6 The complaint should be dismissed as a matter of comity toward the Tribal  
7 Court. This civil action is premised upon the Court's diversity of citizenship  
8 jurisdiction, 28 U.S.C. 1332. *See*, Amended Complaint for Declaratory Relief  
9 (ECF No. 3, ¶ 3.1). Plaintiff's complaint is premised upon a contract of insurance  
10 between Plaintiff and Spencer Trucking, a tribally licensed business of the  
11 Yakama Nation which is owned and operated by Ryan Spencer, an enrolled  
12 member of the Yakama Nation. As such, this case involves a consensual  
13 relationship by plaintiff with an Indian tribal member residing on his tribal  
14 reservation and the company owned by him. As such, the Yakama Nation tribal  
15 court possesses jurisdiction over this cause on two bases. First, the plaintiff  
16 entered a consensual relationship with a reservation tribal business and, second, a  
17 policy insuring a member of the tribe inherently implicates his or her health,  
18 welfare, safety or economic security. Montana v. United States, 450 U.S. 544  
19 (1981).

20  
21 In this Circuit, exhaustion of tribal remedies is required, as a matter of  
22 comity, before such a claim may be entertained by a federal court. National

1 Farmers Union Insurance Company v. Crow Tribe, 471 U.S. 845 (1985). *See*  
2 *also*, Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987); Stock West  
3 Corp. v. Taylor, 873 F. 2d 1221, 1227 (9th Cir. 1989); *and* Yellowstone County  
4 v. Pease, 96 F. 3d 1169 (9th Cir. 1996). There are only three narrow exceptions to  
5 this exhaustion rule. Exhaustion of tribal court remedies is not required if the  
6 defendant asserts tribal jurisdiction in bad faith or for the mere purpose of  
7 harassing a litigant. Nevada v. Hicks, 533 U.S. 353, 369 (2001). Nor is  
8 exhaustion required if it —would serve no purpose other than delay. *Id.* Finally, if  
9 it is plain that tribal court jurisdiction is lacking, exhaustion of tribal remedies is  
10 not required. Strate v. A-1 Contractors, 520 U.S. 438, 559- 460 and n. 14 (1997).  
11 No such exceptions apply here.

12  
13  
14  
15 The Supreme Court requires that tribal courts consider the issue of their  
16 own jurisdiction first, with federal court actions to be dismissed or stayed pending  
17 exhaustion of tribal court remedies. National Farmers Union Ins. Cos. v. Crow  
18 Tribe of Indians, 471 U.S. 845, 856-57 (1985). This exhaustion requirement  
19 advances the principles of tribal self-governance and self-determination and  
20 prevents infringement upon tribal law-making authority. *See* Iowa Mut. Ins. Co.  
21 v. LaPlante, 480 U.S. 9, 14-15 (1987). In the Ninth Circuit the exhaustion of  
22 tribal remedies is not discretionary; it is *mandatory*. *See* Yellowstone County v.  
23 Pease, 96 F. 3d 1169, 1171 (9th Cir. 1996). Inherent in plaintiff's amended  
24  
25

1 complaint(s) is the normal anxiety which every opposing counsel feels when  
2 entering a case that is in a forum that he or she is unfamiliar with. Courts in  
3 remote rural regions are often faced with this prejudice—that outside counsel will  
4 be “home-towned”. As was eloquently stated by the United States Supreme  
5 Court, however: Tribal courts have repeatedly been recognized as appropriate  
6 forums for the exclusive adjudication of disputes affecting important personal and  
7 property interests of both Indians and non-Indians. Santa Clara Pueblo v.  
8 Martinez, *supra* 436 U.S. at 65.  
9

10  
11 This case does not appear all together different from Iowa Mutual, *supra*, a  
12 suit brought by an insurance company seeking a declaration of non-coverage  
13 against a tribal defendant residing on the reservation with whom it entered a  
14 contract which is premised upon diversity of citizenship.  
15

### 16 CONCLUSION

17  
18 For the foregoing reasons, the Complaint must be dismissed or abstained  
19 from being entertained as a matter of Comity, either upon defendant’s motion or  
20 by the Court *sua sponte*.  
21

22 DATED this 9th day of December, 2020.

23 Respectfully submitted,

24 S/Jack W. Fiander  
25 Counsel for Defendants  
Spencer Trucking and Ryan Spencer

Exhibit 1

Tribal Enrollment Identification



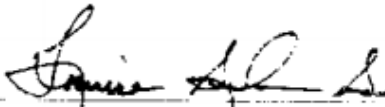
Confederated Tribes and Bands of the Yakama Nation													
	<table><tr><td>08331</td><td>536-72-6465</td></tr><tr><td>Roll No.</td><td>S.S. Number</td></tr><tr><td>03/18/1975</td><td>Yakima, WA</td></tr><tr><td>Date of Birth</td><td>Place of Birth</td></tr><tr><td>9/32</td><td>3/16</td></tr><tr><td>Degree of Yakama Indian Blood</td><td>Other Indian Blood</td></tr></table>	08331	536-72-6465	Roll No.	S.S. Number	03/18/1975	Yakima, WA	Date of Birth	Place of Birth	9/32	3/16	Degree of Yakama Indian Blood	Other Indian Blood
08331	536-72-6465												
Roll No.	S.S. Number												
03/18/1975	Yakima, WA												
Date of Birth	Place of Birth												
9/32	3/16												
Degree of Yakama Indian Blood	Other Indian Blood												
 <b>Ryan Anthony Spencer</b> Signature of Member	 Tribal Official												



Exhibit 2

Tribal Business License

**YAKAMA NATION**  
TOPPENISH, WASHINGTON  
**BUSINESS LICENSE**  
NON-TRANSFERABLE  
DISPLAY CONSPICUOUSLY AT PLACE OF BUSINESS  
THIS IS TO CERTIFY THAT: MEMBER OWNED


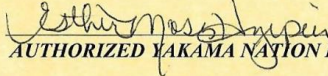
BUSINESS NAME: **SPENCER TRUCKING LLC**

LICENSE NUMBER: **YN-232-20**

BUSINESS ADDRESS: 310 COBURN RD. WHITE SWAN, WA 98952

OWNER(S) AND ENROLLMENT #: RYAN SPENCER #8331

Is licensed to do business from January 1, 2020 to December 31, 2020. In compliance with *Yakama Nation Business License Code, R.Y.C., SECTION S 10.01.117 .& 30.02.09.*

   
AUTHORIZED YAKAMA NATION REPRESENTATIVE



Certificate of Service

The foregoing document was filed with the Clerk of Court with copies served upon all counsel using the court's CM/ECF system.

S/Jack W. Fiander