IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA (WESTERN)

JOANN CHASE ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**CIV. NO. 1:19-CV-00143-DLH-CRH**
	§	
ANDEAVOR LOGISTICS, L.P., ANDEAVOR, F/K/A TESORO CORPORATION, TESORO LOGISTICS, GP, LLC, TESORO COMPANIES, INC., and TESORO HIGH PLAINS PIPELINE COMPANY, LLC,	§	
	§	
Defendants.	§	

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS PURSUANT TO RULE 12(b)(6) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

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Plaintiffs' Response (Doc. 85, pp. 62-71) to the Motion to Dismiss Pursuant to Rule 12(b)(6) (Docs. 73, 75) ("Motion") confirms that Plaintiffs have not asserted legally cognizable claims for trespass, unjust enrichment/constructive trust, breach of contract, or punitive damages. Accordingly, Plaintiffs' Complaint should be dismissed in its entirety under Rule 12(b)(6).[1]

I. There is No Legally Cognizable Federal Common Law Trespass Claim for Individual Allottees (Count I)

Plaintiffs purport to assert only a federal common law trespass claim; not a state law trespass claim. Plaintiffs' argument related to federal common law trespass is based on a legal argument that is wrong (the same one asserted in response to Defendants 12(b)(1) motion)—that the Supreme Court in *Oneida I* and *II* in its ruling granting subject matter jurisdiction, including pursuant to 28 U.S.C. § 1362, to a **tribe** under federal common law to vindicate **aboriginal rights** was also by implication granting broad federal common law rights, including federal common law trespass rights, to individual Indians who own trust allotments. There is no support for Plaintiffs' argument in the *Oneida* opinions themselves, or in the cases decided under and interpreting those rulings. In fact, other courts that have interpreted *Oneida I* and *II* just the way Defendants urge this Court to do, including the Eighth Circuit's controlling decision in *Wolfchild v. Redwood Cnty*., 824 F.3d 761, 767 (8th Cir.), *cert. denied*, 137 S. Ct. 447 (2016) (rejecting, **pursuant to Fed. R. Civ. P. 12(b)(6)**, federal common law claims for ejectment and trespass brought by individual Indian allottees for the express reason that their "lawsuit… concerns lands allocated to individual Indians, not tribal rights to land," and therefore, "does not fall into the federal common law articulated in the Oneida progeny."), and others. Plaintiffs' argument alleging broad federal common law rights in individual Indian allottee owners is fully addressed and refuted in

[1] Importantly, Plaintiffs do not request leave to amend their Complaint. Indeed, re-pleading would be futile, and Plaintiffs have already had an opportunity to amend their complaint once.

Defendants' Reply Memorandum in Support of Motion to Dismiss Pursuant to Rule 12(b)(1) for Lack of Subject Matter Jurisdiction filed concurrently, which is incorporated herein.[2] Because Plaintiffs base their trespass claim solely on federal common law (and not state law), the Court should dismiss trespass (Count I) for failure to state a claim upon which relief can be granted.

II. Plaintiffs Have No Legally Cognizable Claim for Breach of a Contract (Count II) to Which They Are Not a Party

Plaintiffs concede they are not parties to the 1993 Easement (Resp. at 64)—an agreement to which they claim they never consented, but now allege that they have a right to sue under as an "intended third party beneficiary." Resp., at 64. As Defendants established in their Rule 12(b)(6) Motion, however, Plaintiffs **plead no facts** that would support third party beneficiary status (nor do they claim such status in their Amended Complaint), because Plaintiffs are not. *See* Motion, at 15 n.14; FAC, ¶¶ 130-136. To the contrary, based on the language on the face of the agreement that is the subject of Plaintiffs' claim of breach, there is no required clear expression in the contract of the contracting parties' intent to create a third party beneficiary right in Plaintiffs to sue under the contract. *See, e.g.*, N.D.C.C. § 9-02-04; *see also First Fed. Sav. & Loan Ass'n of Bismarck v. Compass Investments, Inc*., 342 N.W.2d 214, 218 (N.D. 1983). Indeed, Plaintiffs wholly fail to assert any alleged basis for their claimed third party beneficiary status in their Response—they simply assert they are, tellingly without citing to any express provision in the agreement, as is required. Resp., at 64 (asserting only, without facts, that "Plaintiffs may … sue for breach of the 1993 Easement as third-party beneficiaries"). Indeed, no cause of action inures to Plaintiffs'

[2] Plaintiffs, too, refer the Court to their Response as it relates to subject matter jurisdiction. *See* Resp., at 63. Plaintiffs also say their trespass claim relates to "violations" of the Right-of-Way Act (Resp., at 64), but that argument is refuted in Defendants' subject matter jurisdiction motion because neither the Right of Way Act nor the regulations promulgated thereunder create a private right of action. Doc. 74, at 21-23. Plaintiffs apparently concede Defendants' position that neither the Right-of-Way Act nor the regulations promulgated thereunder create a private right of action (which a long history of precedent confirms), as they failed to even respond.

benefit solely on account of their being a beneficiary with respect to trust property.[3] Plaintiffs seem to suggest some "federal" body of law that might allow non-party allottees to sue for breach of an agreement to which they are not a party, but there is no such federal common law rule and Plaintiffs cite no authority to support this implausible argument that federal law allows non-party allottees to sue for breach. Resp., at 65 (suggesting that breach of contract on Indian trust land would apply different rules as it relates to suit by a non-party to a contract). Plaintiffs' purported reliance on *Poafpybitty* (Resp., at 64) is misplaced as to standing to assert a breach of contract, because the plaintiffs there **were parties (signatories)** to the oil and gas lease at issue there. *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968) (case involving oil and gas lease executed by Comanche Indians themselves, with Skelly Oil Company). Regardless, the Court in *Poafpybitty* recognized that the individual allottees' claims there arose under state law, and remanded the case back to state court in Oklahoma. *Id.* at 367 & n. 2, 376 (the Supreme Court remanding the case back to state court).[4]

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[3] *See* George Bogert et al., *The Law of Trusts & Trustees* § 869 ("Although the beneficiary is adversely affected by … acts of a third person [with respect to trust property], no cause of action inures to him on that account. The right to sue in the ordinary case vests in the trustee as a representative. If the third person without justification causes harm to trust property, normally only the trustee can sue for damages in an action of trover, trespass on the case, or other form of action framed to recover the loss occasioned."); *Rideau v. Keller Indep. Sch. Dist.*, 819 F.3d 155, 162 (5th Cir. 2016) (citing *The Law of Trusts & Trustees* and recognizing "the limits of a trust beneficiary's ability to bring suit for injury to the trust or trust property").

[4] The other federal cases Plaintiffs cite (Resp., at 64) do not support third party beneficiary status either. Indeed, in *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1056 (Fed. Cir. 2012), the court there found plaintiffs did **not** qualify as third party beneficiaries, reasoning that third-party beneficiary status is an "exceptional privilege" and "should not be granted liberally." The court held that the plaintiffs were not third-party beneficiaries there, for the same reason they are not here, because: (1) the contract language itself treated the Government as the beneficiary; (2) the contracts failed to identify the plaintiffs as beneficiaries; and (3) the contracts failed to mention a class of third parties that could potentially encompass the plaintiffs. *Id.* at 1057. "The mere fact that the [plaintiffs] stand to ultimately benefit from the bond contracts … does not automatically render them intended third-party beneficiaries." *Id.* The court concluded that, like here, "[p]erhaps most importantly, the statutes governing the contracts at issue in both cases do

Finally, Plaintiffs incorrectly claim that Defendants' Motion "ignored" the relationship between the United States and Plaintiffs. Defendants' Motion explained that the nature of that relationship demonstrates why Plaintiffs may not sue for breach of a contract to which they are not a party, and why they do not qualify as third party beneficiaries. Motion, at 15-16.

For all of these reasons, the Court should dismiss Plaintiffs' breach of contract claim for the fundamental reason that Plaintiffs are not a party to it; nor have Plaintiffs alleged or shown the required clear expression of the contracting parties' intent—on the face of the contract—to create a third party beneficiary right in Plaintiffs to sue under the contract.

III. Plaintiffs Have No Legally Cognizable Federal Common Law Claim for Unjust Enrichment/ Constructive Trust (Count III)

Plaintiffs' Response assumes, without any support or rationale, that the individual Indian allottee plaintiffs have a federal common law claim of unjust enrichment / constructive trust. Plaintiffs have not cited to a single case that purports to create a federal common law unjust enrichment / constructive trust claim here. Again, to the extent Plaintiffs purport to rely upon on *Oneida II* (Resp., at 69-70) as creating a federal common law unjust enrichment / constructive trust claim, it simply does not. *Oneida II*, as established above, did not create any federal common law rights for individual Indian allottees. And it certainly did not create a federal common law unjust enrichment / constructive trust claim.

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not grant the plaintiffs the right to bring a private lawsuit …. [and instead] Congress vested the Government with the authority to enforce the Customs bond contracts, not the domestic producers." *Id.* at 1058. And *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1576 (Fed. Cir. 1984) is inapposite, in that it involved a consent decree, and whether plaintiffs were real parties in interest, not at issue here. And there, the consent decree was in favor of irrigation districts established by the individual farmers members/ plaintiffs upon the completion of a new project for the purpose of constructing, operating, and maintaining that project under 43 U.S.C. § 423e, and not surprisingly the court there held that the members, who made up the districts, could sue to enforce the consent decree.

Similarly, the other cases Plaintiffs cite certainly do **not** recognize federal common law unjust enrichment/ constructive trust on behalf of individual Indian allottees, as they suggest in the Response. Resp., at 69. Instead, the cases cited by Plaintiffs arose wholly outside the context of Indian/ Indian lands altogether, and provide a federal constructive trust remedy when a federal Act itself creates and defines the trust or the trust was obtained pursuant to an order of a federal agency, neither of which applies here. *See In re Magna Entm't Corp*., 438 B.R. 380, 393 (D. Del. Bankr. 2010) (the Interstate Horse Racing Act ("IHRA") created a trust for all sums owed pursuant to 15 U.S.C. § 3001 *et seq*. and the Court found the IHRA itself established a uniform law); *United States v. McConnell*, 258 B.R. 869, 869–73 (N.D. Tex. 2001) (the trust monies at issue were collected as a result of orders of a federal agency, pursuant to federal law, and private parties could not alter the orders by contract); *see also F.T.C. v. Network Servs. Depot, Inc*., 617 F.3d 1127, 1141-43 (9th Cir. 2010) (the FTC Act endows the district court with authority to impose a remedy of constructive trust).[5] Therefore, because no federal law or federal agency creates a constructive trust right here, there is no federal common law constructive trust for Plaintiffs here to assert.

Plaintiffs' common law unjust enrichment/ constructive trust "Count" should be dismissed to the extent Plaintiffs assert it arises under federal common law, because it does not.

A. Lack of pre-existing confidential or fiduciary relationship defeats remedy of constructive trust.

Plaintiffs' claim arises, if at all, under state law, and state law provides that unjust enrichment is an element of the remedy of constructive trust, which is not an independent cause of

[5] The other cases Plaintiffs cite to say the court has authority under federal law to issue a constructive trust are equally misplaced. *See Perfect Fit Indus., Inc. v. Acme Quilting Co.,* 646 F.2d 800, 806 (2d Cir. 1981) (merely holding that a federal court has equity jurisdiction to enforce a contempt order for violating a federal court order); *Clark Equip. Co. v. Armstrong Equip. Co.*, 431 F.2d 54, 57 (5th Cir. 1970) (holding court had authority to issue injunctive relief to enforce agreement where location of property was in five different states).

action. *See, e.g.*, *Spagnolia v. Monasky*, 660 N.W.2d 223, 229 (N.D. 2003) (the two elements of the remedy of constructive trust are: 1) unjust enrichment and 2) a confidential relationship); *see generally* Motion at 4 n.6, 13-15.[6] Plaintiffs' Complaint does not allege fraud, or the existence of a pre-existing confidential or fiduciary relationship between the parties, a fundamental requirement for imposition of a constructive trust remedy, thereby defeating the "Count" for that reason. *See, e.g.*, FAC, at ¶¶ 137-149; Motion at 14-16 (citing North Dakota authorities, which Plaintiffs make no attempt to distinguish).[7] For this independent reason—that there is no pre-existing confidential or fiduciary relationship between the parties, which was not disputed by Plaintiffs—constructive trust must be dismissed for failure to state a claim upon which relief can be granted.

B. Plaintiffs try to change course and say unjust enrichment is an underlying cause of action, but their pleadings say constructive trust is based on trespass.

While Plaintiffs assert in the Response that unjust enrichment is the underlying cause of action for the alleged remedy of constructive trust (as opposed to unjust enrichment as an element of a constructive trust remedy, which it is under state law, *see supra*) (Resp., at 65), their Complaint tells a different story altogether, which makes sense given that unjust enrichment is generally regarded by courts as a dependent remedy, not an independent cause of action. *See, e.g., First Nat. Bank of Belfield v. Burich*, 367 N.W.2d 148, 154 (N.D. 1985) ("the equitable ***remedy*** of unjust

[6] Plaintiffs apparently acknowledge that even if unjust enrichment/ constructive trust did arise under federal common law (which it does not), the Court would borrow from state law principles. Resp., at 66 (saying that federal common law "must borrow from state law" when it comports with federal policy, and that unjust enrichment/ constructive trust is recognized by North Dakota law). Therefore, because their unjust enrichment "Count" fails under state law, it would accordingly fail under federal common law as well. Plaintiffs seem to change course later in the argument and say that a court would not borrow from state law for the remedy of constructive trust (Resp., at 68-69), but as established above, the cases Plaintiffs purport to rely on regarding so-called federal constructive trust do not apply here, as those involved trusts that actually arose pursuant to a federal law or order of federal agency.

[7] Plaintiffs cite *Loberg v. Alford*, 372 N.W.2d 912 (N.D. 1985), a case involving the existence of a fiduciary relationship.

enrichment generally rests on the concept of quasi or constructive contract implied by law") (emphasis added). To be clear, Plaintiffs plead their constructive trust remedy as dependent upon **trespass**. *See* FAC ¶¶ 137-145 (asserting the "unjust enrichment – imposition of constructive trust "Count" and alleging, for example, "[t]here is no justification for Defendants' enrichment and Plaintiffs' impoverishment through Defendants' **trespass**" and "[t]o prevent Defendants' unjust enrichment, Plaintiffs are entitled to a constructive trust imposed on all benefits gained by Defendants **as a result of their trespass**, including all costs saved or avoided **due to the trespass**"). And later in the Response at 67-68, Plaintiffs again concede the underlying claim is trespass, saying their constructive trust remedy is consistent with general principles of trespass law. *See also* Resp., at 37 ("Plaintiffs' unjust enrichment claim protects the same interests in Indian trust land as the trespass claims… ."). Therefore, Plaintiffs unjust enrichment/ constructive trust "Count" fails along with the underlying (dependent) claim of trespass.

C. Plaintiffs do not challenge that Defendants owe Plaintiffs no duty of good faith and fair dealing.

Plaintiffs also wholly fail to address in any way Defendants' motion to dismiss related to Plaintiffs' claim of alleged breach of a duty of good faith and fair dealing, which is asserted within the unjust enrichment/ constructive trust "Count." *See* Motion, at 14 (addressing and citing authorities demonstrating that such a duty does not arise here, to which Plaintiffs do not respond or mention). Therefore, lack of a duty of good faith and fair dealing is undisputed by Plaintiffs and Plaintiffs' claim should be dismissed for the additional reason that no such duty exists.

D. Plaintiffs concede the 1993 Easement covers the same subject matter as their unjust enrichment claim, thereby defeating that claim.

In addition, Plaintiffs concede that the 1993 Easement covers the same subject matter as their unjust enrichment claim, and further acknowledge that unjust enrichment is defeated by the existence of an agreement covering the same subject matter. Resp., at 67. Plaintiffs must make

such concession, because the law and pleadings require it. *Id*; *see also* Motion, at 4, n.6. Specifically, Plaintiffs assert a count for breach of the 1993 Easement due to alleged failure to restore the land to its original condition and to reclaim the land upon its expiration. Complaint, at ¶ 134. In short, Plaintiffs admit that to the extent the 1993 Easement is valid, their unjust enrichment count fails.

E. Even if the 1993 Easement was found to be invalid, Plaintiffs' unjust enrichment count would still fail.

Even if the 1993 Easement was found to be invalid, Plaintiffs' unjust enrichment Count would still fail. Indeed, Plaintiffs are alleging holdover possession as to both the 1973 Easement and the 1993 Easement—a holdover of the 1973 Easement as a result of the BIA allegedly improperly granting the renewal in 1993, and if the 1993 Easement was not void *ab initio*, a holdover of the 1993 Easement due to it not being renewed in 2013. *See* Defendants' Failure to Join Required Party Motion (Doc. 76), at 7, n.6. Thus, to the extent the 1993 Easement was invalid, then the 1973 Easement would allegedly cover the same subject matters that Plaintiffs allege that the 1993 Easement covers (including to restore the land to its original condition and to reclaim the land upon its expiration)—which Plaintiffs admit precludes its unjust enrichment count. Resp., at 67.

Thus, whether the 1993 Easement is valid or invalid, Plaintiffs' unjust enrichment count fails. Any remedies must be pursued under the contract, if at all, and by the parties to that contract (not Plaintiffs).

Regardless, unjust enrichment is unavailable here for the additional reason that there is an adequate remedy at law. Resp., at 66 (elements of unjust enrichment include "absence of a remedy provided by law"). Here, Plaintiffs have an adequate remedy at law in connection with the ongoing administrative proceeding which has not been exhausted (*see* Motion to Dismiss for Failure to

Exhaust Administrative Remedies, Doc. 77, and the Reply brief in support of same filed concurrently herewith), or alternatively (according to Plaintiffs) as Plaintiffs allege pursuant to the law of trespass, although trespass arises, if at all, under state—not federal—law. *See also* Resp., at 37 ("Plaintiffs' unjust enrichment claim protects the same interests in Indian trust land as the trespass claims… .").

For each these independent reasons, the Court should dismiss Plaintiffs' unjust enrichment / constructive trust Count.

IV. Plaintiffs Concede That Punitive Damages (Count IV) Are Dependent on Trespass, Which Fails as a Matter of Law

Finally, Plaintiffs do not contest that their punitive damages claim is not an independent cause of action but instead is a remedy dependent upon their trespass claim. Resp., at 71. Therefore, Plaintiffs' punitive damages claim should be dismissed along with the trespass claim. *See supra*, at section I.A.

CONCLUSION

For all of the reasons stated in this Reply, as well as Defendants' Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted Pursuant to Rule 12(b)(6) (Doc. 75), the Court should dismiss Plaintiffs' First Amended Complaint, in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On October 2, 2019, I electronically submitted the foregoing document with the clerk of the court for the U.S. District Court of North Dakota, Western Division, using the ECF System of the court and certify that I have served via the Court's ECF System on all counsel of record or otherwise in compliance with Federal Rule of Civil Procedure 5(b)(2).

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