TRIBAL COURT

OF THE

SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

SMSC RESERVATION **STATE OF MINNESOTA**

Michael Hamilton, in his capacity as Conservator for the Estate of Amanda Brewer-Ross,

Plaintiff,

v. Court File: 930-19

Great Northern Insurance Company,

Respondent.

MEMORANDUM OPINION AND ORDER

I.

INTRODUCTION AND SUMMARY

This case is before the Court on a motion to dismiss brought by the Respondent Great Northern Insurance Company. This matter involves a claim for loss under a homeowner's insurance policy. The Complaint was filed on November 22, 2019.[1] The Answer was filed on December 13, 2019.[2] Among other defenses, the Respondent alleges that the Shakopee Mdewakanton Sioux Community (Community) Court lacks subject matter and personal jurisdiction.[3] The Respondent filed a Motion to Dismiss on January 30, 2020, asking the Court to dismiss this action "for duplicity, and for lack of personal and subject matter jurisdiction under Rules 8(b) and 12(b)" of the SMSC Rules of Civil Procedure.[4]

[1] Docket #1.
[2] Docket #2.
[3] Answer, ¶¶ 12, 13.
[4] Respondent Great Northern Insurance Notice of Motion & Motion to Dismiss (Docket #9) (01/30/2020).

The Court scheduled oral argument on Respondent's Motion[5] and the parties submitted their respective memoranda of law on this motion.[6] Oral argument was held on February 27, 2020.[7]

Diana Young Morrissey, Walle-Friedman & Floyd, P.A.., and Sarah I. Wheelock, SMSC Legal Department appeared on behalf of Plaintiff Michael Hamilton. Ms. Wheelock provided oral argument. Joseph F. Lulic, Brownson P.L.L.C., appeared on behalf of Respondent Great Northern Insurance Company and provided oral argument.

For the reasons set forth below, Respondent's Motion to Dismiss (Docket #9) is denied. The Court finds that the Plaintiff Michael Hamilton has met his burden of showing a *prima facie* case that this Court has both subject matter jurisdiction over his claim and personal jurisdiction over the Respondent. Furthermore, the Court finds that this case should not be dismissed in favor of a parallel federal court action. This case is properly before this Court consistent with the "exhaustion of tribal remedies" doctrine adopted by U.S. Supreme Court.

II.

PLAINTIFF'S BURDEN OF ESTABLISHING JURISDICTION

The burden of establishing jurisdiction rests with the party asserting it. *LSI v. Prescott and Johnson*, 2 Shak. T.C. 152 (Jul. 1, 1996). "[W]hat is necessary is a *prima facie* showing, taking the [Plaintiff's] allegations as true." *Id.*, at 158 (citing *Wessels, Arnold & Henderson v. National Medical Waste, Inc.*, 65 F.3d 1427 (8th Cir. 1995)).

The Court construes this standard as analogous to what is necessary to survive a motion

[5] *See* Clerk's Notice – Motion Hearing on 2/27/20 (Docket #13) (02/03/2020).
[6] *See* Respondent Great Northern Insurance Memorandum of Law in Support of Motion to Dismiss (Docket #10 (January 30, 2020); Plaintiff's Memorandum of Law Opposing Respondent's Motion to Dismiss (Docket #14); Respondent's Reply Memorandum (Docket #21) (February 24, 2020.
[7] *See* Transcript of Oral Argument (02/27/2020).

to dismiss for failure to state a claim under Rule 12(b)(6) of the SMSC Rules of Civil Procedure which parallels Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Plaintiff must "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A motion to dismiss should be granted if the Plaintiff "can prove no set of facts in support of [his] claims which would entitle [him] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The Plaintiff's complaint and supporting documentation "must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under *some* viable legal theory." *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101 (7th Cir. 1984) (quoting *Sutliff, Inc. v. Donovan Cos*., 727 F.2d 648, 654 (7th Cir. 1984) (emphasis in original).

Applying these principles to the case at hand, the Plaintiff bears the burden of establishing this Court's jurisdiction over his claim. Furthermore, the Court must take as true the Plaintiff's direct and inferential allegations that, if proved, would establish the basis for this Court's subject matter and personal jurisdiction under a viable legal theory.

The Court notes that this case is procedurally in its early stages. There have been no evidentiary hearings. Discovery is in its early stages. We are in the modern-era of "notice pleading" where a complaint need only contain "a short and plain statement of the claim"[8] and where "[e]ach averment of a pleading shall be simple, concise, and direct."[9] Thus, "[a]ll pleadings shall be so construed as to do substantial justice."[10]

Consistent with this mandate, the Court finds the factual record to consist of the direct allegations and averments contained in the Complaint and the Answer, as well as the fair and

[8] SMSC Rule of Civil Procedure 9(a).
[9] SMSC Rule of Civil Procedure 9(c).
[10] SMSC Rule of Civil Procedure 9(d).

logical inferences that can be drawn from them. In addition, as is generally the case with respect to motion practice, the Court construes the pleadings *in pari materia* with the parties' respective memoranda of law and exhibits, as well as Counsels' statements and representations at oral argument. This is consistent with the letter and spirit of Community Rule of Civil Procedure 11(b).[11]

III.

STATEMENT OF FACTS

Against this backdrop, the Court takes as true the following jurisdictionally relevant facts that derive from Plaintiff's direct and inferential allegations.

Plaintiff Michael Hamilton filed this lawsuit as the Conservator for the Estate of Amanda Brewer-Ross. He is an employee of the Community and is head of the Community's Conservator Department.[12] He was appointed as Ms. Brewer-Ross' Conservator by this Court in an Order dated December 1, 2017.[13] His appointment was made in accordance with the Community's Conservatorship Ordinance, Resolution 03-11-08- 016, and he performs his duties on behalf of Ms. Brewer-Ross pursuant to that Ordinance.[14]

Ms. Brewer-Ross is a member of the Community and is a resident in Shakopee,

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[11] Rule of Civil Procedure 11(b) in relevant part provides:

> Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
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> * * *
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> 3) the factual contentions have evidentiary support or, if specifically, so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery;
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> * * *.

[12] Plaintiff's Memorandum of Law Opposing Defendant's Motion to Dismiss (Docket #14), at 2. The Court takes judicial notice that the Plaintiff undertakes his Conservator role pursuant to the authority and requirements of the SMSC Conservatorship Ordinance (as amended) 03-11-08-016.

[13] Complaint, ¶ 2.

[14] Transcript of Oral Argument (02/27/2020), at 27.

Minnesota.[15]

Respondent Great Northern Insurance Company is an Indiana Corporation. It is a property and casualty insurer licensed to do business in the State of Minnesota.[16]

The Respondent insured a home owned by Ms. Brewer-Ross located at 3162 Little Crow Drive, Shakopee, MN.[17] This was a homeowner's policy that, among other things, insured against loss due to fire.[18] A fire substantially destroyed the home and its contents on November 26, 2017, at time when the homeowner's policy was in effect.[19]

The policy in question was renewed on February 2, 2017, with an effective period until February 2, 2018.[20] It established coverage limits of $1,275,000 for the dwelling and $510,000 for the dwelling's contents with an annual premium of $6,173.32.[21] The factors for determining the annual premium for renewal of this policy included a 24% premium reduction "for having systems or components that are new or have been upgraded in the last 7 to 10 years." [22]

The policy in question did not contain a choice of law or choice of forum clause regarding disputes that might arise under it.[23]

The Plaintiff, in his capacity as Conservator for the Estate of Ms. Brewer-Ross, filed a claim with the Respondent under the homeowner's policy for the fire loss.[24] The Respondent

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[15] Complaint, ¶3.
[16] Complaint, ¶1; Answer, ¶1.
[17] Complaint ¶4; Answer ¶3; Plaintiff's Exhibit 1 – Chubb's Homeowner Insurance Policy for Amanda Brewer-Ross-Homeowner (Docket #16).
[18] *Id.*
[19] Complaint, ¶¶4, 6.
[20] Plaintiff's Exhibit 1 – Chubb's Homeowner Insurance Policy for Amanda Brewer-Ross-Homeowner (Docket #16), at Coverage Summary Renewal, Page 1.
[21] Complaint, ¶5; Plaintiff's Exhibit 1 – Chubb's Homeowner Insurance Policy for Amanda Brewer-Ross-Homeowner (Docket #16), at Coverage Summary Renewal, Page 1, and at Premium Summary Renewal, Page 1.
[22] Plaintiff's Exhibit 1 – Chubb's Homeowner Insurance Policy for Amanda Brewer-Ross-Homeowner (Docket #16), at Premium Discount Summary, Page 1.
[23] Plaintiff's Exhibit 1 – Chubb's Homeowner Insurance Policy for Amanda Brewer-Ross-Homeowner (Docket #16); Respondent's Reply Memorandum (Docket #21) (February 24, 2020), at 5; Transcript of Oral Argument (02/27/2020), at 41.
[24] Complaint, ¶8.

has denied that claim, asserting, among other things, that Ms. Brewer-Ross has not complied with her obligations to cooperate under the policy's provisions.[25] Each party states a claim that the other has breached contractual obligations under the homeowner's insurance policy.[26]

The insured home was located on land within the Community's reservation that is held in trust by the United States for the benefit of Community and that was leased to Ms. Brewer-Ross as a Community member pursuant to tribal law.[27]

SMSC Home Mortgage, a Community-owned enterprise, provided the financing for the insured home, carried a mortgage on the home, and was listed as the Mortgagee in the homeowner's insurance policy.[28] SMSC Home Mortgage also filed a claim with the Respondent for the fire loss.[29] Respondent represents that this claim by SMSC Home Mortgage was paid on May 18, 2018.[30]

When issuing the homeowner's policy to Ms. Brewer-Ross, the Respondent knew it was insuring a home on Community reservation land, owned by a Community member, and financed

[25] Complaint, ¶¶9-15; Answer, ¶¶15-17.
[26] Complaint, ¶¶16-22; Answer, ¶¶15-18.
[27] Complaint, ¶8. Plaintiff's Memorandum of Law Opposing Defendant's Motion to Dismiss (Docket #14), at 1. *See also* Plaintiff's Exhibit 2 – Federal Rule 26(f) Report from US District Court Civil File 19-CV-0311 (Docket #17), at 3 ("Summary of factual stipulations and agreements"). Plaintiff's Exhibit 2 is a Rule 26(f) report jointly filed by the same parties to this case in a pending federal case. The aspect of a potential "duplicative proceeding" is addressed in Section III, *infra.* At this point, the Court notes that the Respondent's Counsel disputes that Section 4 of the Rule 26(f) Report entitled "Summary of factual stipulations or agreements" contains "stipulated facts." *See* Transcript of Oral Argument (02/27/2020), at 21-23. The Court offers no opinion on the effect or consequences in the federal court for signing and filing the Rule 26(f) Report in relation to Counsel's representations to this Court. For the purposes of this case, however, the Court has no reason to doubt the authenticity of Plaintiff's Exhibit 2. Respondent's Counsel acknowledges that he signed and submitted this report to the federal court. Transcript of Oral Argument, at 22. The Court therefore takes at face value the factual stipulations and agreements contained in that report. In any event, for the purposes of deciding Respondent's Motion to Dismiss, the Court must take them as true since the Plaintiff has incorporated them into his allegations.
[28] Plaintiff's Memorandum of Law Opposing Defendant's Motion to Dismiss (Docket #14), at 9; Plaintiff's Exhibit 1 – Chubb's Homeowner Insurance Policy for Amanda Brewer-Ross-Homeowner (Docket #16), at Additional Interests Summary, Page 1; Plaintiff's Exhibit 2 – Federal Rule 26(f) Report from US District Court Civil File 19-CV-0311 (Docket #17), at 3 ("Summary of factual stipulations and agreements");
[29] Complaint, ¶8.
[30] Respondent's Reply Memorandum (Docket #21) (February 24, 2020), at 7-8.

through SMSC Home Mortgage.[31]

The Plaintiff commenced parallel actions in two courts involving the same parties and the same claims. This action was commenced on November 22, 2019. A state court action was commenced on November 26, 2019, in Minnesota State Court, Scott County, which was later removed to federal court.[32]

There are now cases simultaneously pending in the Community's court and in the U.S. District Court (Minnesota)[33] involving the same parties and the same claims because, as the parties have told the Federal Court:

> With the statute of limitations about to run on this insurance coverage claim, plaintiff filed parallel suits in SMSC Tribal Court and Minnesota State Court to ensure that the claim would not be time-barred. Plaintiff informed the courts and opposing counsel of his preference to proceed to conclusion in SMSC Tribal Court, as the venue with the closest connection to the case. Defendant removed the state court action to federal court. On February 27, 2020 the SMSC Tribal Court will hear argument on defendant's motion to dismiss. If the motion is denied, plaintiff will move to stay this [federal] case so the Tribal Court matter can proceed. If the dismissal motion is granted and plaintiff's appeal from that ruling is denied, plaintiff will proceed with this [federal] case.[34]

On December 16, 2019, Plaintiff provided notice to this Court, the Scott County District Court, and the Respondent of the parallel tribal and state actions and explained his rationale for filing parallel actions.[35]

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[31] Plaintiff's Exhibit 2 – Federal Rule 26(f) Report from US District Court Civil File 19-CV-0311 (Docket #17), at 3 ("Summary of factual stipulations and agreements").
[32] Plaintiff's Exhibit 2 – Federal Rule 26(f) Report from US District Court Civil File 19-CV-0311 (Docket #17), at 1 ("Procedural Posture"); Petitioner's Attorney Morrissey's Letter to Tribal Court, State Court, & Respondent Attorney Lulic of December 16, 2019 (Docket #6); Petitioner's Attorney Morrissey's Letter to Tribal Court, Federal Court, & Attorney Lulic of December 27, 2019 ; Plaintiff's Memorandum of Law Opposing Defendant's Motion to Dismiss (Docket #14), at 2-3.
[33] Michael Hamilton v. Great Northern Insurance Company, Civil File NO. 19-CV-0311. *See* Plaintiff's Exhibit 2 – Federal Rule 26(f) Report from US District Court Civil File 19-CV-0311 (Docket #17).
[34] Plaintiff's Exhibit 2 – Federal Rule 26(f) Report from US District Court Civil File 19-CV-0311 (Docket #17), at 1-2.
[35] Petitioner's Attorney Morrissey's Letter to Tribal Court, State Court, & Respondent Attorney Lulic of December 16, 2019 (Docket #6).

On December 27, 2019, after the state court action was removed to federal court, Plaintiff provided similar notice to this Court, the Federal District Court (Minnesota) and the Respondent regarding the pendency of parallel tribal and federal actions.[36]

III.

DUPLICATIVE PROCEEDINGS AND EXHAUSTION OF TRIBAL REMEDIES

The Respondent first asks this Court to dismiss the tribal court action in favor of the pending federal court action "due to the pendency of a concurrent, duplicative proceeding in Federal Court."[37] It relies principally on two Eighth Circuit cases[38] for the proposition that cases identical in substance should not be litigated simultaneously in courts of different jurisdictions. It argues that the tribal court action "must" be dismissed consistent with this precedent to avoid wasting "precious judicial resources."[39]

The Plaintiff counters that the Respondent's assertion fails "because it ignores the tribal court exhaustion doctrine"[40] set forth by the U.S. Supreme Court in the seminal *National Farmers Union*[41] and *Iowa Mutual*[42] cases. He asserts that "federal courts require a litigant to first exhaust its remedies in tribal court, which includes the tribal court determining its own jurisdiction and any appellate tribal courts reviewing the lower court's determinations."[43]

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[36] Petitioner's Attorney Morrissey's Letter to Tribal Court, Federal Court, & Respondent Attorney Lulic of December 27, 2019 (Docket #23).
[37] Respondent Great Northern Insurance Memorandum of Law in Support of Motion to Dismiss (Docket #10), at 3. The Court notes that it seems more logical to address the Respondent's jurisdictional challenges before addressing its duplicative proceeding challenge. However, the Court will address it first since the Respondent has posited that a resolution on this issue in its favor would make its jurisdictional challenges moot. The Court therefore will presume that it has jurisdiction over Plaintiff's claim for this aspect of Respondent's motion.
[38] *Ritchie Capital Mgt., L.L.C. v. BMO Harris Bank, N.A.*, 868 F.3d 661 (8th Cir. 2017) (involving two federal forums) and *Fru-Con Construction Corp. v. Controlled Air, Inc.*, 574 F.3d 527 (8th Cir. 2009) (involving federal and state forums).
[39] *Id.*, at 4. *See also* Respondent's Reply Memorandum (Docket #21), at 3 ("all of the courts who have been presented with such a scenario have held that a duplicative case must be dismissed").
[40] Plaintiff's Memorandum of Law Opposing Defendant's Motion to Dismiss (Docket #14), at 4.
[41] *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985).
[42] *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).
[43] Plaintiff's Memorandum of Law Opposing Defendant's Motion to Dismiss (Docket #14), at 4.

The Respondent replies that the exhaustion doctrine cannot be relied upon where the Plaintiff commenced the duplicate action in federal court in the first place instead of a different party seeking relief in federal court from an alleged improper assertion of tribal court jurisdiction.[44]

While not articulating it as such, the Respondent is asking this Court to apply an abstention doctrine recognized by federal courts. A good summary of the federal abstention doctrine is found in *Standing Rock Housing Authority v. Tri-County State Band*, 700 F.Supp. 1544, 1545 (D. So. Dak. 1988):

> In *Colorado River Water Cons. Dist. v. United States,* 424 U.S. 800, 814-16, 96 S.Ct.1236, 1244-45, 47 L.Ed.2d 483 (1976), the Supreme Court recognized three abstention doctrines: 1) *Pullman* abstention, where a state court determination of pertinent state law may moot a federal constitutional issue; 2) *Thibodeaux* or *Burford* abstention, where the federal court faces difficult questions of state law bearing on policy problems of substantial public importance transcending the case then at bar; and 3) *Younger* abstention, where federal jurisdiction has been invoked to restrain state criminal or tax proceedings. This case does not fit into any of these three abstention doctrines. *Colorado River,* however, articulated a fourth abstention category based on "exceptional circumstances" and "considerations of wise judicial administration."

The case at hand also fits within the fourth abstention category recognized in *Colorado River*. It involves the contemporaneous exercise of concurrent jurisdiction in duplicate cases that does not fit in any of the other three categories. "Proceedings are duplicative if the issues in one case 'substantially duplicate those raised by a case pending in another court.'" *Ritchie Capital Mgt., L.L.C. v. BMO Harris Bank, N.A.*, 868 F.3d 661, 664 (8th Cir. 2017) (citing *Ritchie Capital Mgmt., L.L.C. v. Jeffries*, 653 F.3d 755, 763 n.3 (8th Cir. 2011)).

Abstention from the exercise of jurisdiction is the exception not the rule. It is matter of discretion not of mandate. As the Supreme Court has held:

"The doctrine of abstention, under which a District Court may decline to exercise

[44] *See* Respondent's Reply Memorandum (Docket #21), at 2.

> or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188 -189 (1959). "[I]t was never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it." *Alabama Pub. Serv. Comm'n v. Southern R. Co*., 341 U.S. 341, 361 (1951) (Frankfurter, J., concurring in result).

Colorado River, 424 U.S. at 813-814.

Further support for the discretionary nature of a court's abstention authority lies in the standard by which an appellate court reviews the exercise of that authority. A federal district court's decision to dismiss federal proceedings in favor of another forum is reviewed for abuse of discretion. *Mountain Pure, LLC v. Turner Holdings, LLC,* 439 F.3d 920, 926 (8th Cir.2006) (citing *Moses H. Cone Mem. Hosp. v. Mercury Constr.,* 460 U.S. 1, 19, (1983)).

The Supreme Court has noted the need for different approaches when applying the abstention doctrine in matters of concurrent federal jurisdiction and of concurrent federal-state jurisdiction:

> Generally, as between state and federal courts, the rule is that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction . . . ." As between federal district courts, however, though no precise rule has evolved, the general principle is to avoid duplicative litigation. This difference in general approach between state-federal concurrent jurisdiction and wholly federal concurrent jurisdiction stems from the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.

Colorado River, 424 U.S. at 817-818 (internal citations omitted).

The primary cases upon which Respondent relies for its "duplicative case" theory involve instances of each. *Ritchie Capital Mgt., L.L.C. v. BMO Harris Bank, N.A.*, *supra,* addressed abstention where there was concurrent federal jurisdiction between a district

court and a bankruptcy court. *Fru-Con Construction Corp. v. Controlled Air, Inc.*, 574 F.3d 527 (8th Cir. 2009) addressed federal abstention where there was concurrent state jurisdiction.

Both cases addressed the question of whether the federal district court should abstain from exercising its jurisdiction in favor of the other forum. Both hold that a court's exercise of its abstention authority is one of discretion not of mandate. Neither supports Respondent's assertion that this case must be dismissed in favor of the parallel action in federal district court. And, neither addressed federal abstention in an instance of concurrent federal and tribal jurisdiction.

In *Fru-Con Construction*, 574 F.3d at 534, the Eighth Circuit noted that federal courts

> have a "virtually unflagging obligation ... to exercise the jurisdiction given them, even when there is a pending state court action involving the same subject matter." [*Mountain Pure, LLC v. Turner Holdings, LLC,* 439 F.3d 920, 926 (8th Cir.2006)] (internal citations omitted). Thus, a federal court may divest itself of jurisdiction by abstaining only when parallel state and federal actions exist and exceptional circumstances warrant abstention. *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817-18, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976).

The Eighth Circuit goes on to note that "[s]ix non-exhaustive factors have been developed to determine whether, in the case of parallel state and federal proceedings, exceptional circumstances warrant [federal court] abstention." *Fru-Con Construction*, 574 F.3d at 534.[45]

In *Ritchie Capital Mgt.,* 868 F.3d at 666, the Eighth Circuit held "that while the district

[45] These factors are:

> (1) whether there is a res over which one court has established jurisdiction, (2) the inconvenience of the federal forum, (3) whether maintaining separate actions may result in piecemeal litigation, unless the relevant law would require piecemeal litigation and the federal court issue is easily severed, (4) which case has priority — not necessarily which case was filed first but a greater emphasis on the relative progress made in the cases, (5) whether state or federal law controls, especially favoring the exercise of jurisdiction where federal law controls, and (6) the adequacy of the state forum to protect the federal plaintiffs rights.

Fru-Con Construction, 574 F.3d at 534, citing *Mountain Pure, supra,* 439 F.3d at 926.

court appropriately invoked its discretion to abstain, the court should have stayed the action rather than dismiss it." *Ritchie Capital Mgt., supra,* 868 F.3d at 666 (8th Cir. 2017).

Like a federal district court, this Court has a virtually unflagging obligation to exercise its jurisdiction even if it may abstain from doing so in exceptional circumstances. The question thus presented is whether exceptional circumstances exist in this case to warrant abstention in favor of the federal court action. They do not.

The prevailing law remains that, vis-à-vis a federal court, a tribal court should have the first opportunity to determine its jurisdiction over the matter at hand and, if jurisdiction is found, to carry the case out to its conclusion (including appeals). *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 855-56 (1985). *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14-20 (1987), specifically addressed tribal exhaustion in the context of federal court diversity jurisdiction, which is the basis for the Minnesota District Court's jurisdiction in the parallel case here. The Supreme Court held in *Iowa Mutual* that "proper respect for tribal legal institutions requires that they be given a 'full opportunity to consider the issues before them.'" *Id.*, at 16.

Interestingly, the tribal exhaustion doctrine is rooted in the same precedent underlying the duplicative proceedings abstention concept. In *Iowa Mutual,* 480 U.S. at 16 n.9, the Supreme Court noted that

> the [tribal exhaustion] rule is analogous to principles of abstention articulated in *Colorado River Water Conservation Dist.* v. *United States,* 424 U. S. 800 (1976): even where there is concurrent jurisdiction in both the state and federal courts, deference to state proceedings renders it appropriate for the federal courts to decline jurisdiction in certain circumstances. In *Colorado River,* as here, strong federal policy concerns favored resolution in the nonfederal forum.

Nothing in the tribal exhaustion doctrine is inherently contradictory to the federal abstention doctrine. Applying it here is not only logical, but clearly preferential from the perspective of both the tribal court and the federal court.

The Respondent seeks to stand the tribal exhaustion principle on its head by asking this Court to defer its jurisdiction to the very court whose precedent holds that this case should be in tribal court in the first place. Federal law and policy presumptively favor resolution in tribal courts of matters falling within tribal authority and jurisdiction. This approach is consistent with general federal court abstention principles vis-à-vis other federal forums or state courts. It serves to prevent piecemeal or duplicative proceedings and to ensure that a matter is handled in the most appropriate forum.

The next question is whether any of the exceptions to the tribal exhaustion doctrine apply. In *National Farmers Union, supra*, 471 U.S. at 856 n.21, the Supreme Court noted:

> We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith," cf. *Juidice v. Vail*, 430 U. S. 327, 430 U. S. 338 (1977), or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

The third exception clearly does not apply here. The Respondent will have the opportunity to appeal this Court's decision to the Community's Appellate Court. And, in accordance with the tribal exhaustion doctrine, it will have the opportunity to seek federal court review.[46] Neither of these opportunities are futile.

As for the second exception regarding an express jurisdictional prohibition, the Respondent asserts no such express and unequivocal bar in this aspect of its motion to dismiss. Certainly, the Respondent argues that there is no tribal jurisdiction in this case pursuant to federal precedent relating to when tribal jurisdiction may be exercised over non-Indians. However, this points to a debatable question rather than to an absolute jurisdictional bar. The Supreme Court adopted a variant of this exception in *Strate v. A-1 Contractors*, 520 U.S. 438,

[46] *Iowa Mutual*, *supra*, 480 U.S. at 19. *See also FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990).

451 (1997) holding that where it is "plain" that the tribal court lacks jurisdiction, exhaustion "must give way, for it would serve no purpose other than delay." Just as there are no clear jurisdictional prohibitions within the meaning of *Iowa Mutual*, this Court's jurisdiction is not plainly lacking. The question of whether tribal court jurisdiction may be exercised under the facts of this case requires a particularized inquiry. *See* Section IV of this Opinion, *infra*. However, by no means is it obvious at the outset that this Court's jurisdiction is plainly lacking to obviate the need for the type of analysis and application of precedent undertaken in Section IV.

As for the first exception, the Respondent expresses concern about the fact that the Plaintiff simultaneously filed parallel actions in two different courts. The Respondent asserts, "The existence of the exhaustion doctrine is not and cannot be justified for commencing duplicative litigation."[47] At oral argument, the Respondent sharpened this point by asserting, "[T]his case presents . . . conduct that shouldn't be sanctioned or allowed by any court, which is to commence the same lawsuit in two different jurisdictions involving the same parties, the same claims, and same subject matter."[48]

The Plaintiff fully admits to commencing parallel actions in two courts involving the same parties and the same claims. This action was commenced on November 22, 2019. A parallel action was commenced in Minnesota State Court, Scott County, on November 26, 2019. The Plaintiff explains that he did so because a two-year statute of limitations was about to expire, and he wanted to ensure that his claim would not be time barred in whichever court has jurisdiction.[49]

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[47] Respondent's Reply Memorandum (Docket #21), at 2.
[48] Transcript of Oral Argument (02/27/2020), at 6.
[49] Plaintiff's Exhibit 2 – Federal Rule 26(f) Report from US District Court Civil File 19-CV-0311 (Docket #17), at 1 ("Procedural Posture"); Petitioner's Attorney Morrissey's Letter to Tribal Court, State Court, & Respondent

The Plaintiff has been transparent as to why he filed his claim simultaneously in two different jurisdictions. Plaintiff's Counsel provided a letter on December 16, 2019, to this Court, the Scott County District Court, and the Respondent explaining his rationale and expressing preference for venue in the SMSC Tribal Court.[50] After removal of the state action to federal court, Plaintiff promptly informed the federal District Court both by letter of December 27, 2019, and in the joint Rule 26(f) report on February 11, 2020. There, he again expressed his preference for venue in this Court and explained that he would be seeking a stay of the federal action pending the disposition of the Respondent's motion to dismiss here.[51]

The Court finds no bad faith on the part of the Plaintiff in commencing this action. A party engaging in bad faith litigation certainly would not make such a concerted effort to disclose its actions and intentions to all courts involved. The Plaintiff has been open and upfront about the protective nature of his filings. He clearly is not engaging in ill-intended forum shopping. Rather, he represents, and the Court agrees, that he is exercising his fiduciary responsibilities to protect Ms. Brewer-Ross' estate and best interests consistent with his role as her Conservator. In this regard, the Court notes that, as the parties certainly must concede, jurisdiction over the Plaintiff's claim is a matter of some complexity in the context of the interrelationship of tribal, state, and federal jurisdictions.

The Court also notes that the Plaintiff's and his Counsels' efforts to disclose and explain the procedural posture of this case in two courts are entirely consistent with their obligations

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Attorney Lulic of December 16, 2019 (Docket #6); Petitioner's Attorney Morrissey's Letter to Tribal Court, Federal Court, & Respondent Attorney Lulic of December 27, 2019 (Docket #23); Plaintiff's Memorandum of Law Opposing Defendant's Motion to Dismiss (Docket #14), at 2-3.

[50] Petitioner's Attorney Morrissey's Letter to Judge & Respondent Attorney Lulic of December 16, 2019 (Docket #6).

[51] Petitioner's Attorney Morrissey's Letter to Judge & Respondent Attorney Lulic of December 27, 2019 ; Plaintiff's Exhibit 2 – Federal Rule 26(f) Report from US District Court Civil File 19-CV-0311 (Docket #17), at 1 ("Procedural Posture").

under SMSC Rule of Civil Procedure 11(b) which in relevant part provides:

> By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; . . . .

The Court does not understand the Respondent to be claiming that Plaintiff's actions in either court are frivolous. The Court finds that, for the purposes of deciding Respondent's motion to dismiss, the action in this Court was not frivolously commenced.

Similarly, the Court does not understand the Respondent to be claiming that the Plaintiff has acted with improper purpose. Rather, the Respondent argues that procedurally only one of the actions should move forward in the interest of judicial efficiency and proper resolution of the Plaintiff's claim in only one forum. From this perspective, the Respondent argues that the Plaintiff's efforts to pursue his claim in two courts at once should not be countenanced.

The authority cited by Respondent undermines his own contentions. As the Eighth Circuit noted in *Ritchie Capital Mgt.,* 868 F.3d at 666:

> [T]he statute of limitations is always a concern in abstention cases. *See, e.g.*, *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 n.2 (1995). For this reason, we have emphasized a preference for stays over dismissals to preserve any claims that might not be resolved by the parallel proceedings. *See Royal Indem. Co. v. Apex Oil Co.*, 511 F.3d 788, 797-98 (8th Cir. 2008). We have implemented that preference even when plaintiffs did not clearly explain why further proceedings in the abstaining court were likely. *See Cedar Rapids Cellular Tel., L.P. v. Miller*, 280 F.3d 874, 882-83 (8th Cir. 2002).

This Court also recognizes a party's interest in protecting against the running of a statute of limitations. It does not infer or find an improper motive or duplicitous intent on the Plaintiff's part given his significant efforts at transparency.

The Respondent also argues that there would be no tribal exhaustion issue had the parallel action remained in state court. As the parallel action no longer is in state court, this Court offers no view and makes no finding regarding this contention. The fact is that the parallel action is now in federal court because the Respondent successfully asked that it be removed there. The Respondent has no standing to now complain about or seek refuge from the consequences of its own litigation strategy and choices.

Absent exceptional circumstances, a party must first exhaust remedies in tribal court before pursuing remedies in federal court. The Respondent here has not demonstrated any such exceptional circumstance. The tribal exhaustion doctrine clearly applies to this case. This Court will not abstain from exercising its responsibility to determine whether jurisdiction exists in this case and, if it is found, to exercise its jurisdiction over this matter.

IV.

JURISDICTION

Subject matter and personal jurisdiction in this case is contingent upon three things. First, the Community must retain the sovereign authority to govern or regulate the conduct, activities, or transaction underlying Plaintiff's claim. Second, the Community must retain the power to exercise that authority over the nonmember, non-Indian Respondent. Third, the Respondent must have had sufficient minimum contacts with the Community to be compelled to answer and defend against Plaintiff's claim. The Court finds that the Plaintiff has made a *prima facie* case that these jurisdictional prerequisites have been met.

A.

SUBJECT MATTER JURISDICTION

The Respondent asserts that this Court lacks subject matter jurisdiction because "[t]he alleged breach [of the homeowner's insurance policy] did not occur on reservation land and does not relate to tribal self-government."[52] It relies heavily on the fact that it is a non-Indian entity located outside of the reservation. Citing *Montana v. United States*, 450 U.S. 544 (1981), it asserts that, as a rule of law, the Community may not exercise jurisdiction over non-Indians. It argues that neither of the *Montana* exceptions to this general rule apply here.

Citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), the Plaintiff counters that subject matter jurisdiction exists pursuant to the Community's inherent authority to condition both member and nonmember conduct occurring on tribal land. He argues that *Montana* does not apply because, unlike in that case, the land involved here is tribal trust land located on the reservation. Alternatively, the Plaintiff asserts that both Montana exceptions provide for tribal court jurisdiction in this case.

To have subject matter jurisdiction, the Community must have the authority to govern or regulate the type of transaction, conduct, or activity that underlies a particular claim as well as the parties involved in that claim.[53] Here, the Community must have the authority to govern the contractual relationship involved in a homeowner's insurance policy that was issued by a non-tribal corporation located in Indiana.

The Court finds that the Plaintiff has made a *prima facie* case that: i) the Community possesses and indeed has exercised its authority to govern and regulate a contractual relationship

[52] Respondent Great Northern Insurance Memorandum of Law in Support of Motion to Dismiss (Docket #10), at 7.
[53] The Supreme Court has described its doctrine of tribal court jurisdiction over nonmembers as pertaining to "subject-matter, rather than merely personal, jurisdiction." *Nevada v.* Hicks, 533 U.S. 353, 367 n.8 (2001).

between a tribal member and a non-Indian entity involving a homeowner's insurance policy in force on tribal lands within the reservation; and ii) the Community may exercise that authority with regard to the Plaintiff's breach of contract claim against the Respondent.

1.

Subject Matter Jurisdiction Under the Community's Jurisdictional Amendment

Under the Community's Ordinance known as the Jurisdictional Amendment, this Court has "original jurisdiction over all civil causes of action arising on lands subject to the jurisdiction of the . . . Community." SMSC Resolution 11-14-95-003, §I.[54] Such lands include "all lands having Reservation or trust status." *Id.*

Plaintiff has sufficiently alleged several key facts to support a finding that these threshold jurisdictional prerequisites have been met. Ms. Brewer-Ross' home was located on land held in trust for the benefit of the Community. Neither party here questions the Community's ability to govern and regulate that land, certainly with regard to tribal members and, if certain conditions are met, with regard to nonmembers as well. The land was leased to Ms. Brewer-Ross pursuant to tribal law for the purpose of building her home. A Community-owned entity provided the financing for the home and held a mortgage on the home.

However, the Respondent asserts that these facts are not by themselves enough to provide jurisdiction because any alleged breach of the homeowner's insurance contract took place off the reservation. The Court disagrees.

The Respondent's position ignores other elements which demonstrate that the Plaintiff's case arose on the reservation. For example, from the facts presented here, it appears that Ms. Brewer-Ross negotiated and consummated the insurance contract on her end while on the

[54] *See also Bryant and Rouse v. Anderson Air., Inc.*, 5 Shak T.C. 92 (Nov. 6, 2007).

reservation. The insurance premiums were billed to and paid from a location on the reservation. Ms. Brewer-Ross' reliance on the insurance contract took place on the reservation. The place of economic impact due to the fire loss was on the reservation. Ms. Brewer-Ross' injury and loss due to the Respondent's alleged breach therefore also were on the reservation. And, the location for tender of payment for the loss was on the reservation for the mortgagee and presumably would be on the reservation for Ms. Brewer-Ross. There are additional potential facts that Plaintiff raised during oral argument that also come into play, including whether the Respondent entered onto the reservation to inspect the home prior to issuing the policy and after the fire loss.[55]

The Court's finding that the Plaintiff's cause of action arose on the reservation is supported by *State Farm Ins. Cos. v. Turtle Mountain Fleet Farm LLC*, No. 1:12–cv–00094, 2014 WL 1883633 (D.N.D. 2014). That case involved a home owned by tribal members located on a reservation that was damaged by a tornado. The home was insured by an off-reservation non-Indian company. Following the loss, a company adjuster inspected the property. A dispute eventually arose regarding the quality of the reconstruction work performed by the insurance company's contractors. A tribal court action was commenced involving the contractors, the homeowners, and the insurance company. One of the homeowners' claims involved a potential breach of contract claim. Among other defenses, the insurance company asserted that the tribal court lacked jurisdiction because "the alleged breach would have occurred with the failure to make the proper payment. And, according to [the insurance company] this would have occurred where the payment would have originated from, which was off the reservation." *Id.*, at 13-14.

The Federal Court, North Dakota District, rejected this argument because it "ignores

[55] Transcript of Oral Argument (02/27/2020), at 46-47.

other elements, such as where the [homeowners'] reliance on being fairly dealt with (including the receipt of any necessary communications) took place and, perhaps more importantly, where the harm occurred." *Id*, at 15. In reaching this conclusion, the District Court examined common principles applied in conflict of law situations and other circumstances requiring a determination where a cause of action arose. It cited factors such as where the economic impact was felt, where the place of injury was, where the harm took place, and where payment was to be made. *Id.*, at 15-16.

The Respondent makes the same argument here that the insurance company made in the *State Farm* case. Like the District Court there, this Court rejects that argument in applying similar factors. Plaintiff has sufficiently alleged that his cause of action arose on the reservation.

Section II of the Jurisdictional Amendment defines this Court's jurisdiction over persons. It provides that jurisdiction extends to "all persons whose actions involve or affect the . . . Community or its members, or where the person in question enters into consensual relationships with the Community or its members through commercial dealings, contracts, leases, or other arrangements." SMSC Resolution 11-14-95-003, §II. A "person" includes all natural persons and corporations "whether members or non-members of the . . . Community." *Id*.

There is no question that jurisdiction is found over the Respondent pursuant to these provisions. The Respondent falls squarely within the definition of a "person." It indisputably entered a consensual relationship with a Community member involving a contract, namely a homeowner's insurance policy. Plaintiff also sufficiently alleges that the Respondent has undertaken actions which involve or affect the Community and one of its members by its alleged breach of the homeowner's insurance policy. As for Ms. Brewer-Ross, the Plaintiff alleges the effect of economic harm due to the Respondent's failure to pay an insurance claim. The Plaintiff

also argues that the alleged facts would allow this Court to conclude that the Community has a strong interest in a number of ways, including that that insurance companies live up to their contractual obligations toward Community members, that a Conservatorship established pursuant to Community law properly fulfills its obligations, and that the Community judicial system is afforded the opportunity to resolve disputes involving Community members and Community interests.[56] Also relevant is the fact that the Community leased the land to Ms. Brewer-Ross and financed her home with Community funds as part of the Community's overall land use and housing policies.[57]

Section III of the Jurisdictional Amendment defines this Court's jurisdiction over common law causes of action. It provides that this Court "shall have subject matter jurisdiction over all civil causes of action pursuant to Section I & II herein, and arising at common law, including, without limitation, all contract claims . . ., all tort claims . . ., all property claims . . ., all insurance claims . . . ." SMSC Resolution 11-14-95-003, §III.

Once again, there is no question that jurisdiction is found over Plaintiff's claims pursuant to these provisions. At least two types of common law actions are involved here, a contract claim and an insurance claim.

In sum, the Court finds that, pursuant to the Jurisdictional Amendment, the Plaintiff has made a *prima facie* case that subject matter jurisdiction exists over this common law contract and insurance claim matter and over the Respondent. Having found that Plaintiff's cause of action arose on the reservation, the plain meaning of the Jurisdictional Amendment's unambiguous provisions readily supports this conclusion.

[56] *See, e.g.,* Plaintiff's Memorandum of Law Opposing Defendant's Motion to Dismiss (Docket #14), at 9.
[57] *See, e.g.,* Transcript of Oral Argument (02/27/2020), at 34-35.

2.

Subject Matter Jurisdiction Under Federal Law

The subject matter jurisdiction analysis would be over if the Community's Jurisdictional Amendment were the only law in play in this case. However, a number key U.S. Supreme Court decisions and their progeny have established a number of rules applied in federal court regarding tribal court jurisdiction over non-Indians.[58] The federal court retains continuing jurisdiction to review this Court's jurisdiction once the Respondent exhausts its tribal remedies.[59] Therefore, the Community's Jurisdictional Amendment must be construed in a manner that is consistent with the precedent that a federal court would apply in determining whether tribal court jurisdiction exists.

In *Montana v. United States*, 450 U.S. 544, 565 (1981), the Supreme Court announced the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." It then set forth two exceptions to this rule:

> To 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. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id.

These two exceptions have come to be known as the consensual relations exception and

[58] *See generally* Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. Colo. L. Rev. 1187 (2010), *accessible at* http://scholar.law.colorado.edu/articles/221.
[59] *Iowa Mutual*, *supra*, 480 U.S. at 19. *See also FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990).

the self-government exception.[60] Under the facts that Plaintiff alleges, the Court finds jurisdiction under the *Montana* consensual relations exception. Because it does so, it is unnecessary to address whether jurisdiction also could be found under the self-government exception. It is similarly unnecessary to address the Plaintiff's assertion that *Montana* and its progeny do not apply because Ms. Brewer-Ross' home was located on tribal trust land.[61]

Montana specifically addressed tribal authority over non-Indian conduct on fee lands within the reservation. However, in subsequent cases, the Supreme Court reinforced and applied *Montana* where the underlying land was held in trust status. *See Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (no tribal court jurisdiction over litigation between nonmembers arising out of a vehicle accident on a state highway within a reservation notwithstanding tribal ownership underlying the road easement); *Nevada v. Hicks*, 533 U.S. 353 (2001) (no tribal power to regulate a search by state officers investigating off-reservation crime even though the search was of an Indian-owned residence on tribal trust land.)

The Respondent asserts that neither of the *Montana* exceptions apply because "[t]he alleged breach did not occur on reservation and does not relate to tribal self-government."[62] However, the Plaintiff has alleged sufficient facts to support a finding that his cause of action

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[60] *See* Alexander Tallchief Skibine, *Incorporation Without Assimilation: Legislating Tribal Civil Jurisdiction Over Non-Members*, Utah Law Digital Commons (01/2019), at 5, *accessible at* https://dc.law.utah.edu/scholarship/173/.

[61] The Plaintiff asserts that *Montana* does not control here because the cause of action arose within the reservation on tribal trust land. He argues that pursuant to M*errion v. Jicarilla Apache Tribe*, 455 U.S. 120 (1982) and its progeny, a tribe has unequivocal authority to regulate non-Indians on tribal trust lands as an incident to a tribe's power to exclude persons from such lands. Plaintiff cites, among other cases, *Water Wheel Camp Rec. Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011) in support of this argument. He also cites *Nevada v. Hicks*, 533 U.S. 353 (2001) for the proposition the land ownership can be the dispositive determinant of tribal authority over non-Indians within the reservation. The Court notes that Plaintiff's construction of *Merrion* and *Hicks* is a matter of disagreement among the federal circuits. *See* Skibine, *supra* n.58, at 8. *See also*, *Window Rock Unified School Dist. v. Reeves*, 861 F.3d 889, 907 (9th Cir. 2017) (Circuit Judge Christen, dissenting). Notably, the Supreme Court held in *Hicks* that "[t]he ownership status of land . . . is only one factor to consider" even though "[i]t may sometimes be a dispositive factor." 533 U.S. at 360. Here, the Court finds that land ownership indeed is one of the dispositive factors supporting jurisdiction under the *Montana* consensual relations exception.

[62] Respondent Great Northern Insurance Memorandum of Law in Support of Motion to Dismiss (Docket #10), at 7.

arose on the reservation. *See* Discussion of the Community's Jurisdictional Amendment §I in Section IV.A.1, *supra.* Moreover, the Respondent too narrowly construes *Montana* and related precedent that addresses tribal powers necessary to protect tribal self-government and control internal relations.

As one commentator has noted, "Although not explicitly spelled out by the [Supreme] Court, it can be inferred that the two exceptions reflect what the *Montana* Court believed were powers 'necessary to protect tribal government or to control internal relations.'"[63] The Court agrees. The *Montana* consensual relations exception is unambiguous. "A tribe may regulate, through taxation, licensing, or *other means* the activities of nonmembers who enter into consensual relationships . . . through *commercial dealing, contracts*, leases, or other arrangements." *Montana*, 450 U.S. at 565 (emphasis added). The Supreme Court clearly connected the dots between tribal self-government and the regulation of consensual relationships expressed through commercial dealings and contracts.

The facts of this case support the application of the *Montana* consensual relations exception. The Respondent entered a consensual commercial relationship with Ms. Brewer-Ross espoused in a homeowner's insurance contract. That policy covered a home owned by a Community member. The home was located on the reservation on tribal trust land. SMSC Home Mortgage, a Community entity, was included as an additional insured in that policy and can be inferred to be a party to that contract. During this consensual relationship, the Respondent directed its conduct toward the reservation. While some of the Respondent's conduct that may have contributed to the alleged breach occurred outside of the reservation, a number of elements of that conduct occurred or were sufficiently related to the reservation to

[63] Skibine, n.5, *supra*, at 5 (citation omitted).

demonstrate the Plaintiff's cause of action arose on the reservation. The Respondent has pointed to no authority that all its actions involved in the alleged breach must occur on the reservation for subject matter jurisdiction to attach. In fact, precedent is to the contrary. "[T]he focus for the purposes of the first *Montana* exception . . . is not limited to where the conduct necessary to establish a particular element for breach of contract . . . took place . . . ." *State Farm Ins. Cos. v. Turtle Mountain Fleet Farm LLC*, No. 1:12–cv–00094, 2014 WL 1883633 (D.N.D. 2014), at 16. *See also Dish Network Service L.L.C. v. Laducer*, 725 F.3d 877, 884 (8th Cir. 2013) ("Even if the alleged . . . tort occurred off tribal lands, jurisdiction would not clearly be lacking because the . . . claim arises out of and is intimately related to DISH's contract . . . and that contract relates to activities on tribal land").

The Court is aware that the *Montana* exceptions are narrow ones and "cannot be construed in a manner that would `swallow the rule.'" *Plains Commerce Bank v. Long Family Cattle Company*, 554 U.S. 316, 330 (2008) (*quoting Atkinson Trading Co. v. Shirley,* 532 U.S. 645, 655 (2001)). The Supreme Court has noted that "*Montana's* consensual relation exception requires that the tax or regulation imposed . . . have a nexus to the consensual relationship itself." *Atkinson Trading Co.*, 532 U.S. at 656. Nevertheless, "[d]espite the limitations recognized in *Montana* and subsequent cases, the [Supreme] Court has consistently acknowledged that '[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty.'" *Dolgencorp, Inc. v. Miss. Band Indians*, 746 F.3d 167, 172 (5th Cir. 2014), *aff'd* 579 U.S. ___ (2016) (quoting *Iowa Mutual, supra,* 480 U.S. at 18).

Dolgencorp is particularly instructive regarding the application of the *Montana* consensual relations exception to a common law claim asserted in tribal court against a non-Indian corporation. *Dolgencorp* involved a tort claim by a tribal member against a non-Indian

corporation. There, the Fifth Circuit analyzed the common law claim under the *Montana* framework. 746 F.3d. at 172. Here, the Court must analyze a common law contract claim and chooses to do so under the *Montana* framework. As *Dolgencorp* instructs, in considering tribal regulation through common law "'courts applying *Montana* should not simply consider the abstract elements of the tribal claim at issue, but must focus on the specific nonmember conduct alleged, taking a functional view of the regulatory effect of the claims on the nonmember.'" 746 F.3d at 173 (quoting *Attorney's Process & Investigative Services, Inc., v. Sac & Fox Tribe*, 609 F.3d 927, 938 (8th Cir. 2010)). *Accord State Farm Ins. Cos. v. Turtle Mountain Fleet Farm LLC*, No. 1:12–cv–00094, 2014 WL 1883633 (D.N.D. 2014).

In *Dolgencorp*, the non-Indian corporation argued "that *Plains Commerce* narrowed the *Montana* consensual relationship exception, allowing tribes to regulate consensual relationships with nonmembers only upon a showing that the specific relationships 'implicate tribal governance and internal relations.'" 746 F.3d at 167. The Respondent here makes a similar argument. As the Firth Circuit rejected this argument, so too does this Court. *Plains Commerce* does not require "an additional showing that one specific relationship, in itself, 'intrude[s] on the internal relations of the tribe or threaten[s] self-rule.'" *Dolgencorp*, 746 F.3d at 175. It is difficult to envision how a single business transaction, like the issuance of single homeowner's insurance policy, could ever have such an impact. *See Id.* ("It is hard to imagine how a single employment relationship between a tribe member and a business could ever have such an impact"). "Nothing in *Plains Commerce* requires focus on the highly specific rather than the general." *Id.*

As this precedent is applied to this case, the nexus component of the tribal jurisdictional analysis centers on the connection between the alleged breach of the homeowner's contract and

the consensual action of the Respondent entering the reservation insurance market. *See Dolgencorp*, 746 F.3d at 174 (examining the nexus between the alleged tortious misconduct and Dolgencorp's consensual action to participate in a tribal youth employment program). Here, taking the Plaintiff's allegations as true, the Respondent knowingly and voluntarily insured a home owned by a tribal member that was located on tribal trust land. It also knew that a tribal entity financed the home and included that entity as an additional insured under the policy. The inference to be drawn is that this insurance transaction is found within the context of the Community's efforts to provide safe and stable housing on the reservation for Community members.[64] The Plaintiff has alleged sufficient facts to demonstrate the connection between the Respondent, its alleged breach, and tribal self-government.

Dolgencorp instructs that this Court should conduct its analysis "at a higher level of generality" regarding the ability of the tribe to govern the overall context in which a particular consensual relationship exists or to establish the rules by which that relationship is to be conducted. *Id.* In doing so, the Court finds that the particular homeowner's policy was issued within the context of the Community's power of self-government in relation to a reservation housing policy and related ordinances, as well as its assertion of common law to govern contractual relationships by application of common law. Moreover, the provisions of a homeowner's policy not only provide protection for the insured premises and for the mortgagee. They also provide general liability protections to the wider public regarding the negligent conduct of the insured. From this boarder perspective, the breach of a homeowner's insurance policy certainly may have a direct and substantial effect on the Community and its members beyond the immediate effect on Ms. Brewer-Ross.

[64] *See* Transcript of Oral Argument (02/27/2020), at 44-47; Plaintiff's Memorandum of Law Opposing Defendant's Motion to Dismiss (Docket #14), at 9 (assertions regarding the Community's interests in protecting its Members).

To further highlight the nexus between the Plaintiff's claim and the Community's right of self-government, the Court takes judicial notice of the Community's Consolidated Land Management Ordinance. Among other things, this Ordinance regulates eligibility for assignment of residential land (Chapter 3), residential land lease (Chapter 4), home financing (Chapter 6), and building and fire codes (Chapter 7). As the Plaintiff avers, [65] each of these provisions serves to provide the social, cultural, and economic environment that provide for and support the Respondent's opportunity to market insurance on the reservation.

For example, the Community has expressed "[a] primary policy . . . to make affordable, high quality housing available to its members on the Community's Reservation and trust lands." Consolidated Land Management Ordinance, §6.1. To support this policy, the Community's home financing program provides "financing for the acquisition, recoupment, construction and improvement of single family, primary residence by and for members." *Id.* This financing is provided from a home loan fund established with Community funds. *Id.*, §6.7. Any loan from this fund must be secured by the member's per capita payments that are disbursed from revenue derived from Community enterprises and assets. *Id.*, §6.4.

To someone outside of the tribal community, the issuance of a homeowner's policy may look like a run-of-the-mill transaction involving only the homeowner and the insurance company. However, from the Community's perspective, the homeowner's policy at issue in this case could not have been issued in the first place had Ms. Brewer-Ross not been eligible to lease tribal trust land, to build her home there, and to secure financing from the Community's home loan fund which she could obtain only by providing the security of her Community-provided per capita payments. Moreover, the Community's land use and housing policies must be viewed

[65] Transcript of Oral Argument (02/27/2020), at 34-35.

from a historical perspective. The Community has adopted these policies and related laws in the face of significant challenges to meet the social, cultural, and economic needs of its members on what is but a fraction of its historic territory.[66] The Community's comprehensive and integrated efforts to maximize housing opportunities for members on tribal lands are indeed an exercise of the right to self-government. These efforts are undermined if homeowner's insurance policies are not available to insure homes on tribal lands or if the parties do not live up to their obligations under such policies.[67]

Support for the Court's approach and conclusions in this case is found in *State Farm Ins. Cos. v. Turtle Mountain Fleet Farm LLC*, No. 1:12–cv–00094, 2014 WL 1883633 (D.N.D. 2014). There, after tribal remedies had been exhausted, the Federal Court, North Dakota District, reviewed a tribal court's decision that it had jurisdiction over a property insurance claim by tribal member homeowners against an off-reservation insurance company. *See* Discussion of this case in relation to the Community's Jurisdictional Amendment §I in Section IV.A.1, *supra.* In *State Farm*, the insurance company made two of the same arguments that the Respondent makes in this case, namely that "whatever relationship it had with the [tribal member homeowners] did not affect tribal self-government or internal tribal relations, " and that "not even the first *Montana* exception applies, given . . . a narrowing of the first exemption by *Plains Commerce Bank*."2014 WL 1883633 at 11.

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[66] *See generally* Kathryn L.S. Pettit, et al., *Continuity and Change: Demographic, Socioeconomic, and Housing Conditions of American Indians and Alaska Natives*, U.S. Department of Housing and Urban Development (January 2014) *accessible at* https://www.huduser.gov/portal/publications/pdf/housing_conditions.pdf; Alan L. Neville and Alyssa Kaye Anderson, *The Diminishment of the Great Sioux Reservation Treaties, Tricks, and Time*, Great Plains Quarterly 33:4 (Fall 2013), *accessible at* https://digitalcommons.unl.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3568&context=greatplainsquarterly.

[67] *See* discussion in Section IV.B.2, infra, regarding the Community's significant challenges in meeting the housing, social, cultural, and economic needs of its growing and aging population on its small present-day land base, as well as its "manifest interest" in ensuring that an off-reservation insurance company honors its contractual obligations with respect to Community member homes located on trust lands.

In rejecting these arguments, the Federal Court in *State Farm* examined the connections between the alleged breach, the consensual acts of the insurance company, and tribal self-government in light the Supreme Court's holding in *Plains Commerce* and as *Plains Commerce* was construed and applied in *Dolgencorp*. It concluded, "State Farm entered into an agreement to provide property damage and loss coverage for a residence owned by tribal members located on the . . . reservation. . . . [T]his was a sufficient consensual relationship with respect to an activity or matter occurring on the reservation to invoke the first *Montana* exception." *Id.*, at 17. It further concluded, "[T]here is a sufficient nexus between the [homeowners'] claims (whether characterized as a breach of contract, a tort, or both) and the consensual relationship arising out of the property insurance contract to provide for tribal court jurisdiction. *To the extent the claims are for breach of contract, they obviously go to the heart of the consensual relationship*." *Id.* (emphasis added).

Like the Federal Court in *State Farm*, this Court also concludes that *Plains Commerce* has not narrowed the *Montana* consensual relations exception to prevent its application regarding a breach of insurance contract claim regarding a tribal member's home located on tribal land. Indeed, honoring the obligations of that contract goes to the very heart of the consensual relationship and relates more broadly to a tribe's self-governmental interest to maximize safe and affordable reservation housing opportunities for its members.

The Respondent also implies that, even if the Community has the requisite authority, it has not in fact enacted regulations that govern the Respondent as an insurance company doing business on the reservation.[68] It specifically asserts that the homeowner's policy in question is

[68] *See* Transcript of Oral Argument (02/27/2020), at 19-21.

not regulated by the Community but by the State of Minnesota.[69] The Court offers no opinion on whether the Respondent is regulated by the State of Minnesota. That issue is not presented here. Moreover, it is not relevant here that the Community might not currently be regulating all aspects of the insurance industry within the reservation through comprehensive statutes or regulations.

What is relevant is that the Community's Jurisdictional Amendment Ordinance specifically regulates the type of contractual consensual relationship at issue in this case. Through this Ordinance, the Community has chosen to exercise its authority by adopting common law. *See* SMSC Resolution 11-14-95-003, §III.[70] The Community's decision to regulate consensual relationships need not be expressed through a comprehensive legislative enactment. *See Attorney's Process & Investigative Services, Inc., v. Sac & Fox Tribe*, 609 F.3d 927, 938 (8th Cir. 2010) ("If the Tribe retains the power under *Montana* to regulate . . . conduct, we fail to see how it makes any difference whether it does so through precisely tailored regulations or through [common law] tort claims . . . ."). The Community's choice of common law as its regulatory modality over contractual relations and insurance claims on the reservation falls squarely within its sovereign prerogatives and within what the *Montana* Court called "other means." *Montana*, 450 U.S. at 565.

The Community's Jurisdictional Amendment Ordinance also lays to rest the Respondent's arguments that, by exercising jurisdiction in this case, the Court would be acting as a court of general jurisdiction.[71] This Court recognizes that it has only that authority which the

[69] Respondent Great Northern Insurance Memorandum of Law in Support of Motion to Dismiss (Docket #10), at 9 (citing Minn. Stat. §65A.01 subd. 3).

[70] §III of this Ordinance provides:

> "common law" shall mean the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from the usages and customs, or from the judgements (sic) and decrees of courts recognizing and affirming such usages and customs, and is generally distinguished from statutory law.

[71] Transcript of Oral Argument (02/27/2020), at 19.

Community has delegated to it. *See* SMSC Resolution 11-14-95-003 *passim*. The Court also recognizes that its adjudicatory jurisdiction cannot exceed the Community's legislative jurisdiction. *See Strate v. A-1 Contractors*, 520 U.S. 438, 439 (1997). This Court is not acting as court of general jurisdiction of the type discussed in *Hicks*. *See* 533 U.S. at 366-367. As the Supreme Court noted, "A state court's jurisdiction is general, in that it 'lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe'" *Id.*, 533 U.S. at 367 (citation omitted). Here, this Court is not attempting to assert inherent tribal court authority where the Community has no legislative authority. Nor is it attempting to adjudicate a case arising under the laws of any other jurisdiction. Rather, it is exercising authority specifically delegated by the Community to adjudicate a case arising under the Jurisdictional Amendment regarding a contractual relationship that, consistent with both Community law and federal precedent, is within the Community's sovereign power to regulate.

In sum, the Court finds that the Plaintiff has made a *prima facie* case consistent with relevant federal precedent that subject matter jurisdiction exists over Plaintiff's common law breach of contract and insurance policy claims, as well as over the non-Indian Respondent.

B.

PERSONAL JURISDICTION

As with subject matter jurisdiction, personal jurisdiction must be analyzed both in terms of the Community's laws and in terms of relevant precedent that a federal court would apply in determining whether tribal court personal jurisdiction exists. For personal jurisdiction, the specific linkage between Community law and federal law is explicit. The Community's courts

already have ruled that the *International Shoe*[72] "minimum contacts" standard is to be applied in construing the Community's long-arm statute.

The Court finds that the Plaintiff has made a *prima facie* case that personal jurisdiction exists over the Respondent pursuant to both the Community's long-arm statute and relevant federal precedent.

1.

Personal Jurisdiction under Community Law

The Jurisdictional Amendment Ordinance serves as the Community's long-arm statute. It provides a straightforward approach as to when off-reservation actors may be called to answer claims arising on the reservation. Where a civil cause of action arises "on lands subject to the jurisdiction of the . . . Community," SMSC Resolution 11-14-95-003, §I, this Court's jurisdiction extends to "all persons whose actions involve or affect the . . . Community or its members, or where the person in question enters into consensual relationships with the Community or its members through commercial dealings, contracts, leases, or other arrangements." *Id.*, §II. A "person" includes all natural persons and corporations "whether members or non-members of the . . . Community." *Id*.

In carrying forward the same analysis and findings with respect to subject matter jurisdiction set forth above,[73] the Court finds with respect to personal jurisdiction that: i) the Plaintiff's cause of action arose on the reservation for the purposes of asserting personal jurisdiction under the Jurisdictional Amendment; ii) the Plaintiff has alleged sufficient facts to demonstrate that the Respondent engaged in conduct that affects the Community and its

[72] *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).
[73] *See* discussion in Section IV.A.1, *supra* (Subject Matter Jurisdiction Under the Community's Jurisdictional Amendment).

members; iii) the Respondent entered into a consensual relationship at least with a Community member if not with the Community itself through a commercial transaction and contract; and iv) the Respondent falls squarely within the Ordinance's definition of a person. Under the facts alleged by Plaintiff, personal jurisdiction over the Respondent exists within the plain meaning of the Jurisdictional Amendment.

However, that is not the end of the analysis. This Court has adopted the *International Shoe* "minimum contacts" test when considering personal jurisdiction over those who do not reside on the reservation. *.LSI v. Prescott and Johnson*, 2 Shak. T.C. 152, 158 (Jul. 1, 1996). *See also In re the Marriage of Nguyen and Gustafson*, __ Shak. A.C. ___, ___ (Slip Opinion at 10) (Jan. 21, 2020). This Court may exercise personal jurisdiction over an off-reservation respondent if the respondent has "certain minimum contacts with [the Community] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

2.

Personal Jurisdiction Under the *International Shoe* Test

The Respondent asserts that it is inappropriate for a tribal court to apply the *International Shoe* minimum contacts analysis in relation to a non-Indian. It offers no other test. Instead, the Respondent falls back on the same arguments it makes with respect to subject matter jurisdiction, namely that tribal courts presumptively do not have jurisdiction over non-Indians and the *Montana* analysis should govern the personal jurisdiction analysis as well. Alternatively, the Respondent argues that it did not have sufficient continuous and systematic contacts with the Community to support personal jurisdiction under the *International Shoe* test.[74]

[74] Respondent's Reply Memorandum (Docket #21), at 5. See also Respondent Great Northern Insurance Memorandum of Law in Support of Motion to Dismiss (Docket #10), at 4-6.

The Plaintiff counters that, consistent with *International Shoe* and its progeny, the Respondent established the requisite minimum contacts by purposely availing itself of the opportunity to do business within the Community and by entering the insurance contract involved in this action. It also argues that the Respondent misconstrues personal jurisdiction by focusing on the Community's sovereign authority over non-Indians rather than on the familiar minimum contacts doctrine that ensures due process for litigants.[75]

The Respondent conflates subject matter and personal jurisdiction in relation to non-Indians. Certainly, the threshold determination must be made regarding subject matter jurisdiction which includes inquiry into both the sovereign authority to regulate in the first place and the authority to regulate the non-Indian involved. The "limitation on jurisdiction over nonmembers pertains to subject matter, rather than merely personal jurisdiction, since it turns upon whether the actions at issue in the litigation are regulable by the tribe." *Hicks*, *supra,* 533 U.S. at 637 n.8. As one commentator has observed, "First, the tribal court has to determine whether it possesses judicial jurisdiction over the suit. And second, the court must resolve whether the tribe has the legislative authority to regulate the conduct of non-Indians engaged in the activities at issue." F. Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction,* 31 Ariz. L.Rev. 329, 335 (1989). Subject matter jurisdiction addresses the court's authority to hear the case in the first place.

Personal jurisdiction addresses due process considerations consistent with "'traditional notions of fair play and substantial justice.'" *International Shoe*, 326 U.S. at 316. These concerns might relate to whether a party has been served with adequate process to be informed of the action against it. Or, as contemplated by *International Shoe*, they might involve whether a

[75] Plaintiff's Memorandum of Law Opposing Defendant's Motion to Dismiss (Docket #14), at 6-7

party had reason to know that a court could compel it to answer a claim in that forum as opposed to another forum. Moreover, personal jurisdiction due process considerations apply to any party regardless of tribal membership even though they seemingly are sharpened regarding a non-Indian party. Nevertheless, these due process considerations remain distinct from the question of the court's power to adjudicate the matter at hand.

The Respondent asks the Court to re-examine the application of *International Shoe* claiming that it is an inappropriate precedent in relation to tribal jurisdiction over a non-Indian. In *LSI v. Prescott and Johnson*, the respondents contended that the *International Shoe* standard is inapplicable in tribal court because "the Full Faith and Credit Clause of the United States Constitution underpins [that standard]." 2 Shak. T.C. at 158. In this case, the Respondent makes a similar argument. It contends that "[a]pplying a minimum contacts analysis is not appropriate as [this] case does not involve one Tribal court asserting control over a foreign Tribal member, as would be analogous to *Int'l Shoe.*"[76]

In the *LSI* case, the Court rejected this type of argument noting that "it is the I*nternational Shoe* test which courts have used when considering the power of tribal courts over persons who are not members of the tribe." 2 Shak. T.C. at 158. The Court pointed to precedent that applied the *International Shoe* standard in a federal court review of tribal court personal jurisdiction over a nonmember. *Id.*, citing *Hinshaw v. Mahler*, 42 F.3d 1178 (1994). Similar precedent can be found where a state court examined the existence of tribal court personal jurisdiction in determining whether a tribal court judgment should be afforded full faith and credit by the state. *See, e.g., Red Fox v. Hettich*, 494 N.W.2d 638, 645 (S.D. 1993) (applied "traditional federal long-arm jurisdictional analysis" to find that tribal court had personal

[76] Respondent's Reply Memorandum (Docket #21), at 4.

jurisdiction; "the same due process standards which govern state court assertions of jurisdiction over nonresident defendants apply to tribal courts"). Subsequent cases in the Community's courts have reinforced this rationale. *See, e.g., In re the Marriage of Nguyen and Gustafson*, *supra,* Slip Opinion at 10-12. There is no need to revisit the application of the *International Shoe* test. It is the straightforward and logical benchmark used by courts in coordinating the exercise of their respective authorities.

Moreover, the Court rejects the notion that tribal courts are outlier judicial forums that fail to provide the same type of due process protections provided by state and federal courts. The Respondent posits that a tribal court "operates under a separate system, applying different rules of procedure, and offering different judicial remedies from Respondent's personal jurisdiction."[77] The Community's laws and procedures indeed may differ in some respects from those of the State of Indiana. They also may differ from those of other states and of other tribes for that matter, just as the laws between states differ. This is the norm in a federal system consisting of multiple sovereigns. The Supreme Court has squarely addressed this point in relation to tribal courts. The Petitioner in *Iowa Mutual, supra,* contended that "the policies underlying the grant of diversity jurisdiction – protection against local bias and incompetence – justify the exercise of federal jurisdiction" but not of tribal jurisdiction. 480 U.S. at 18. The Supreme Court responded, "We have rejected similar attacks on tribal court jurisdiction in the past. The alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement established in *National Farmers Union* and would be contrary to the congressional policy promoting the development of tribal courts." *Id.*, 480 U.S. at 19 (internal citations omitted). The same rationale applies in the context of personal jurisdiction. There is no logical

[77] Respondent's Reply Memorandum (Docket #21), at 4.

reason why a tribe may not exercise long-arm jurisdiction over non-Indians for claims arising within the tribe's territory once subject matter jurisdiction has been established.

Under the *International Shoe* test, this Court may exercise personal jurisdiction over an off-reservation respondent if the respondent has "certain minimum contacts with [the Community] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" 326 U.S. at 316. "Opinions in the wake of the pathmarking *International Shoe* decision have differentiated between general or all-purpose jurisdiction, and specific or case-linked jurisdiction." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011). A court may assert general personal jurisdiction when contacts are so continuous and systematic as to render a respondent

> essentially at home in the forum State. Specific jurisdiction, on the other hand, depends on an 'affiliatio[n] between the forum and the underlying controversy,' principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation. In contrast to general, all-purpose jurisdiction, specific jurisdiction is confined to adjudication of 'issues deriving from, or connected with, the very controversy that establishes jurisdiction.'

Id. (internal citations omitted).

As the Plaintiff concedes, facts are lacking at this point in the case to establish general personal jurisdiction over the Respondent. Personal jurisdiction must therefore be found under specific or case-linked jurisdiction.

Specific personal jurisdiction may be asserted where non-residents have had "'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign.'" *Burger King v. Rudzewicz*, 471 U.S. 462, 471 (1985), citing *Shaffer* v. *Heitner,* 433 U.S. 186, 218 (1977) (Stevens, J., concurring in judgment). This "'gives a degree of predictability to the legal system that allows potential [respondents] to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger*

King, 471 U.S. at 471, citing *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286, 297 (1980).

With respect to an off-reservation respondent who has not consented to suit, this "fair warning" requirement is satisfied if the respondent purposefully directed its activities at residents within the reservation and the litigation results from alleged injuries or harm that arose out of or related to those activities. *See Burger King*, 471 U.S. at 471. For example, this Court would not exceed its authority under a Due Process Clause analysis by asserting personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers on the reservation and those products subsequently injure Community members. *Id.*, at 472, citing *World-Wide Volkswagen Corp.* v. *Woodson, supra,* at 297-298. And, as particularly relevant to this case, the Supreme Court has held with respect to interstate contractual obligations "that parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities." *Burger King*, 471 U.S. at 472, quoting *Travelers Health Assn.* v. *Virginia,* 339 U. **S.** 643, 647 (1950).

In applying these principles, the "touchstone remains whether the [respondent] purposefully established 'minimum contacts'" on the reservation. *Burger King*, 471 at 474. "Jurisdiction unquestionably could be asserted where the corporation's in-state activity is continuous and systematic" and that activity gave rise to Plaintiff's claim. *Goodyear Dunlop, supra*, 564 U.S. at 923. In addition, "the commission of certain 'single or occasional acts' in a State may be sufficient to render a corporation answerable in that State with respect to those acts." *Id.* This "purposeful availment" requirement ensures that a respondent will not be compelled into a forum "solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts."

Burger King, 471 U.S. 475 (citations omitted).

Thus, where a non-resident business deliberately has created continuing obligations between itself and Community members on the reservation, it has availed itself of the privilege of conducting business there. Because its activities are shielded by the benefits and protections of the Community's laws, it is "presumptively not unreasonable to require [that entity] to submit" to tribal jurisdiction. *Id.*, 471 U.S. at 476. *See also In re the Marriage of Nguyen and Gustafson*, *supra*, Slip Opinion at 10

Moreover, jurisdiction in these circumstances may not be avoided merely because the company may not have physically entered the reservation. *Burger King*, 471 U.S. at 476. *Accord In re the Marriage of Nguyen and Gustafson*, Slip Opinion at 10; *Crooks-Bathel v. Bathel*, 6 Shak. T.C. 1 (Feb. 17, 2010). The Supreme Court has consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction "so long as a commercial actor's efforts are 'purposefully directed' toward residents of another [forum]." *Burger King*, 471 U.S. at 476. "[I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a [forum] in which business is conducted." *Id.* If this were true in 1984 when the Supreme Court decided *Burger King*, it is truer today in our ever-more digital and virtual world.

Under the facts alleged by the Plaintiff, the Respondent has purposely availed itself of the opportunity to do business on the reservation with Community members. Its homeowner's insurance policy with Ms. Brewer-Ross is the result of that availment. The obligations upon which the Plaintiff sues arose out of that availment. Whether the Respondent engaged in

activities directed toward other Community members on reservation remains to be seen.[78] Nevertheless, the Respondent created a continuing relationship and continuing obligations with Ms. Brewer-Ross that demonstrate sufficient minimum contacts to establish personal jurisdiction. The policy in force when Ms. Brewer-Ross' home burned was a renewal policy. This indicates an ongoing relationship between the Respondent and Ms. Brewer-Ross rather than an isolated contact of a limited nature. The Respondent did not drop ship a product to Ms. Brewer-Ross from a distant warehouse. Rather, it entered into a longer term relationship with her that involved policy renewal, an ongoing and continual obligation to honor the terms of that policy, continuing administrative management of the policy, billings directed toward her on the reservation, and payments made by her from the reservation. Much, if not most, of the Respondent's conduct involved in its alleged breach of the homeowner's policy occurred within the reservation, including its post-fire activities to investigate the incident, its communications directed toward Ms. Brewer-Ross and the Plaintiff on the reservation, and its alleged failure to pay under the policy either Ms. Brewer-Ross or the Plaintiff on the reservation.

Moreover, the Respondent's and Ms. Brewer-Ross' contractual relationship existed within the context of the benefits and protections afforded by the Community's laws. As noted earlier in the discussion of subject matter jurisdiction, the Community's Consolidated Land Management Ordinance provides much of the social, cultural, and economic environment that makes possible the Respondent's opportunity to market insurance on the reservation. If Ms. Brewer-Ross' homeowner's policy is any indication, the Respondent was able to understand a significant economic opportunity on the reservation. Her policy established coverage limits of over $2 million for the dwelling and its contents for a premium of over $6,000 per year. From

[78] *See* Transcript of Oral Argument (02/27/2020), at 33.

the facts alleged, the Court infers that the Respondent, a sophisticated business entity, understood the nature of the homeowner's insurance market for homes built on tribal trust land, particularly where the Community guarantees any home loan involved. It also infers that the Respondent understood the economic costs and benefits when it entered that market. And, the Court notes that Ms. Brewer-Ross' premium was reduced by 24% for having systems or components that were new or had upgraded in the last 7 to 10 years presumably in compliance with the Community's Building Code found within the Consolidated Land Management Ordinance. The Plaintiff further points to other basic Community public infrastructure that afforded benefits and protections in relation to the Respondent's economic interests on the reservation generally and with respect its homeowner's policy with Ms. Brewer-Ross specifically. These include fire and other emergency services, as well as the civil engineering infrastructure of streets, water, sewer, and similar basic governmental services provided to and for the benefit of homeowners and those whose economic interests are at stake in relation to homeowners.[79]

Finally, and significantly, the Respondent had the opportunity to enforce its contract with Ms. Brewer-Ross in the Community's court. The Community's Jurisdictional Amendment Ordinance would provide jurisdiction over Ms. Brewer-Ross for a breach of contract claim brought by the Respondent. In fact, the Respondent has alleged such a breach as a counterclaim in its Answer.[80] It is not unreasonable for the Respondent to anticipate reciprocal personal jurisdiction with respect to Plaintiff's breach of contract claim.

The Respondent asserts that it was not "put on notice through a choice of law provision that this Court's personal jurisdiction would apply to any future disputes."[81] However, no such

[79] *See* Transcript of Oral Argument (02/27/2020), at 42-44.
[80] Answer, ¶¶14, 15.
[81] Respondent's Reply Memorandum (Docket #21), at 5.

provision is required to establish personal jurisdiction. *See* Burger *King*, 471 U.S. at 471; *In re the Marriage of Nguyen and Gustafson*, *supra*, Slip Opinion at 10. The test is whether the Respondent purposely established minimum contacts on the reservation, which it did. Moreover, the Plaintiff alleges that the Respondent has been subjected to long-arm jurisdiction in eighteen states.[82] If true, the Court may infer that the Respondent is a savvy participant in interstate commerce which understands long-arm jurisdiction and the policies underlying it. It was able to learn about and understand the ramifications of doing business on the reservation and about the types the benefits and protections afforded by the Community's laws. If it failed to undertake the steps to inform itself of Community Law and potential tribal jurisdiction, the fault lies with the Respondent itself. To paraphrase the Supreme Court, the Respondent had the experience and capability to structure its primary conduct toward both Ms. Brewer-Ross and the broader tribal community with some minimum assurance as to where that conduct would and would not render it liable to suit in tribal court. *See Burger King*, 471 U.S. at 471. In any event, the Plaintiff alleges that the Respondent in fact knew that it was doing business on the reservation when it entered into its agreement with Ms. Brewer-Ross. Taking that as true, there is no reason to think that the Respondent lacked fair notice of possible tribal jurisdiction over a breach of contract claim in a tribal forum. "When a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State,' it has clear notice that it is subject to suit there." *World-Wide Volkswagen Corp.* v. *Woodson, supra,* 444 U.S. at 297.

Once it has been decided that the Respondent purposefully established minimum contacts within the reservation, those contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with "fair play and substantial

[82] Plaintiff's Memorandum of Law Opposing Defendant's Motion to Dismiss (Docket #14), at 7.

justice." *Burger King*, 471 U.S. at 476, citing *International Shoe,* 326 U. S., at 320. These factors include the burden on the Respondent, the Community's interest in adjudicating the dispute, and the plaintiff's interest in obtaining convenient and effective relief. *See Burger King*, 471 U.S. at 476. *See also In re the Marriage of Nguyen and Gustafson*, *supra*, Slip Opinion at 12. These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. *Burger King*, 471 U.S. at 476.

The *forum non conveniens* factor plays no role here. The Respondent is willing to defend against Plaintiff's claims in the Federal Court, Minnesota District. That forum is no less inconvenient to the Respondent than is this Court located a short distance from the Federal Court.

The Community's interest in adjudicating this dispute is significant. "A State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Burger King*, 471 U.S. at 473 (citations omitted). *See also Stade-Lieske v. Lieske*, 7 Shak. T.C. 1, 13-14 (May 15, 2014) (The Community has a substantial interest in the proper interpretation and application of its laws that govern the disposition of Community resources); *In re the Marriage of Nguyen and Gustafson*, Slip Opinion, at 12 (citing *Downing v. Goldman Phipps, PLLC*¸ 764 F.3d 906, 912 (8th Cir. 2014)).

Consistent with this precedent, the Plaintiff alleges that the Community "has a substantial interest in matters relating to Tribal member housing on the Reservation, which includes protecting a home with insurance and resolving an on-Reservation dispute in its own judicial system."[83] This Community's history is unfortunately no different than the experience of other

[83] Plaintiff's Memorandum of Law Opposing Defendant's Motion to Dismiss (Docket #14), at 9.

tribes who find themselves with but a fraction of the lands they once held.[84] The Community faces significant challenges in meeting the housing, social, cultural, and economic needs of its growing and aging population on its extremely small present-day land base.[85] The Community therefore has a heightened interest in what might be viewed as an isolated event or singular harm in a larger, more populated forum. For example, as could be the case here, the loss of but one home on the reservation might result in the lost opportunity to continue to reside on the reservation. There may be no other place for the homeowner to go without incurring financial consequences including the state taxation of their per capita income and local property taxes to name a few. The Court may therefore infer that the Community has a "manifest interest" in ensuring that an off-reservation insurance company honor its contractual obligations with respect to even one Community member and that member's home located on trust land. The Plaintiff also asserts that the Community has a strong interest "to ensure that its Conservatorship Department can safeguard the health and wellbeing of Community conservatees like [Ms.] Brewer-Ross and procure homeowner's insurance benefits for them."[86] Taking Plaintiff's allegation as true regarding the Community's substantial interests in adjudicating the dispute, the balance is further tipped toward tribal court jurisdiction over the Respondent regarding its contacts with the reservation.

Finally, the Plaintiff's interest in obtaining convenient and effective relief further supports the assertion of personal jurisdiction. As the Court has found, the Plaintiff's cause of action arose on the reservation. It is axiomatic that, absent compelling reasons or an unequivocal jurisdictional bar, redress for a cause of action should be found where the wrong occurred. There

[84] *See generally* Nevile and Anderson, n.66, *supra*.
[85] *See generally* Petit, et al., n.66, *supra.*
[86] Plaintiff's Memorandum of Law Opposing Defendant's Motion to Dismiss (Docket #14), at 9.

are no such compelling reasons or jurisdictional bars in this case. This factor, too, tips the balance in favor of the exercise of personal jurisdiction over the Respondent.

In sum, the Court finds that, in accordance with both the Community's law and relevant federal precedent, the Plaintiff has made a *prima facie* case that personal jurisdiction exists over the Respondent. "[W]here a [respondent] who purposefully has directed [its] activities at forum residents seeks to defeat jurisdiction, [it] must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King*, 471 U.S. at 477. The Respondent has not presented a compelling case that personal jurisdiction under the alleged facts is unreasonable.

V.

CONCLUSION

The Plaintiff has met his initial burden of establishing a *prima facie* case that this Court has both subject matter and personal jurisdiction in this matter and that this Court has a substantial interest in exercising its jurisdiction. Moreover, this Court will not abstain from exercising its jurisdiction in favor of the parallel action in federal court.

ORDER

BASED ON THE FOREGOING IT IS HEREBY ORDERED:

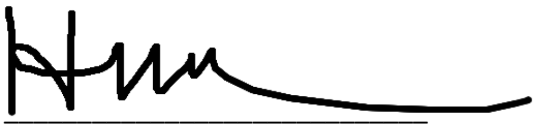
1. The Respondent's motion to dismiss is **DENIED**.

2. The Court will schedule a Pre-Trial Conference consistent with Rule 16. The parties shall meet and confer prior to the hearing to address the matters set forth in Rule 16 (a)-(d) and Disclosure and Discovery as found in Rules 21-23 and the federal rules therein mentioned. The parties shall submit a joint report to the Court 5 days prior to the Conference addressing the issues in Rule 16 and Disclosure and Discovery The parties shall submit a draft scheduling Order

setting dates for Discovery, any limitations, witnesses, time for trial, dates for Dispositive and Non-Dispositive motions, and any other matters the parties wish to address to the Court.

Date: March 31, 2020

BY THE COURT:



Henry M. Buffalo Jr., Judge
Shakopee Mdewakanton Community
Tribal Court