CHEYENNE RIVER SIOUX TRIBAL COURT
CHEYENNE RIVER SIOUX TRIBE
CHEYENNE RIVER INDIAN RESERVATION

IN CIVIL COURT

LONG FAMILY LAND AND CATTLE COMPANY, INC. - RONNIE AND LILA LONG,
Plaintiffs,

vs.

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR JUDGEMENT NOTWITHSTANDING THE VERDICT AND NEW TRIAL

EDWARD AND MARY MACIEJEWSKI AND RALPH H. AND NORMA J. PESICKA, AND THE BANK OF HOVEN, NOW PLAINS COMMERCE BANK,
Defendants.

R-120-99

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1. BREACH OF CONTRACT

The evidence shows that a Lease With Option to Purchase was entered into on December 5, 1996. There is no evidence or allegation that the Bank breached that agreement. The only allegations of a breach by the Bank is that it breached a loan agreement. The loan agreement required nothing from Long Family Land and Cattle Company, Inc. There was not a promise for a promise. No monetary value was given. Absolutely no consideration whatsoever was given by the Long Corporation. Where no consideration is given, the agreement simply is not a binding contract.

When one looks at the document called "loan agreement", it is a mere recitation of what the Bank intended to do. It was an informative document, not a binding contract.

Secondly, even if it was a binding contract, there is no evidence whatsoever that the Bank breached it. The evidence is clear and undisputed that the Bank sent in a request to the BIA on December 12, 1996 requesting everything it said it was going to request in the loan agreement. Instead of a $70,000 operating line, the Bank requested an additional $15,000 because the cash flow provided by the CRST planning office showed a need for an $85,000 line of credit.

The evidence is also undisputed that the Bank did not receive any response from the BIA until a letter dated February 14, 1997. By that date, the undisputed evidence is that Long Family Land and Cattle Company, Inc. had lost all of its cows, other than about 150 head, and all of the calves except about 25. There was testimony that Ronnie Long reported this by phone. Additionally, a letter he sent to the Bank on February 18, 1997 also confirmed the dates of the losses. Even if the loan agreement is a binding contract, the evidence is undisputed that the Bank did not breach the agreement for certain until after the cattle died.

The next question would be if the Bank breached the loan agreement by not continuing to follow up with their letter to the BIA and submit more documentation. The evidence clearly showed that there was a material change in the circumstances and financial condition of Long Family Land and Cattle Company,

Inc. by the time the Bank received the letter from the BIA dated February 14, 1997. That drastic change in the financial condition of the Long Corporation relieved the Bank from any obligation to make additional loans.

Additionally, contracts can be modified by subsequent oral agreements. 17A AmJur 2nd Contracts §§513-538. In this case, Long Family Land and Cattle Company, Inc. executed three promissory notes, two of which rescheduled its prior BIA guaranteed loans and a third for $40,595, which was a new operating line of credit. This was a modification of the loan agreement, assuming that was actually a valid agreement. The parties agreed to a $40,595 operating line of credit because the new cash flow from the CRST planning office showed a need for a $40,595 line of credit. An $85,000 line of credit was no longer needed after Long Family Land and Cattle Company, Inc. changed their operation to running other peoples' cattle. The jury had no evidence to base a finding of the Bank breaching a contract.

2. BAD FAITH

Inceptually, the claim of bad faith should have been dismissed as it is not a separate cause of action in this case. The evidence produced at trial did not amount to fraud and deceit, which could possibly be a tort action. Bad faith allegations in this case, if true, should have been included in

the breach of contract action. See Garrett v Bankwest, Inc. 459 NW2d 833, 841-844 (S.D. 1990)

The claim of bad faith is based upon the assumption that there was a binding agreement to begin with. Firstly, as mentioned above, Defendant does not believe that the loan agreement was a binding agreement in that Plaintiff gave absolutely no consideration. The Bank was not obligated to make the loans listed on the loan agreement. Assuming for argument purposes, however, that it was a binding agreement, there is still no evidence of bad faith on the part of the Bank. Every contract requires good faith and fair dealing. Plaintiff has not produced any evidence that there was a lack of good faith on the Bank's part which would have limited or prevented Plaintiff from receiving the reasonable expected benefits of a contract. The lease with option to purchase was a binding contract, however there is simply no evidence that the Bank did anything to prevent the Plaintiff from receiving the benefits of that contract.

Although it is not clear exactly what actions of the Bank are alleged to be in bad faith, Plaintiff has alleged a lack of operating credit. The facts, however, are that the Bank released about $30,000 for Plaintiff to pay operating bills in September and advanced operating funds for the months of October, November and December, 1996 on a $50,000 operating

line of credit. Additionally, the Bank lent approximately $16,000 for pre-payment of Tribal leases for 1997, $2,250 for a snowmobile and $5,000 for miscellaneous operating during the months of December, 1996 and January, 1997. Banks are not required to loan unlimited funds to a borrower. The fact that banks have not loaned money in other cases has been held to not constitute bad faith. See Garrett, supra; First Bank of S.D. v VonEye 425 NW2d 630 (S.D. 1988)

Plaintiff has blamed the Bank for not loaning money to move hay. This contention is absurd and not backed by any credible evidence. Ronnie Long testified during the first day of trial, under cross-examination, that he had never even asked the Bank for money to move hay. Additionally in his letter of February 18, 1997, money to move hay was apparently not the problem after December 5, 1996, the date the lease was entered into. According to his letter, he had cleaned the area of snow on December 13, 1996 and intended to move the cattle on December 15, 1996. Because of a five-day winter storm he was unable to do so. His letter clearly stated that the roads were never opened wide enough to allow semi tractor-trailers to get down the road until January 29, 1997. By that time, according to his letter, the cattle were already deceased. Most of them died when wind chills were 50 to 80 degrees below zero on January 15 and 16, 1997. He stated that he had trucks lined up

three times to move the cattle, however the tribal emergency snow plowing did not open the roads. Due to blocked roads and bad weather it was impossible to get feed to the cattle on a daily basis. A lack of operating money after December 5, 1996 was not the cause of the death of the cattle, the weather was.

As to bad faith on the Bank's part after February 14, 1997, by the Bank not giving a $70,000 line of credit, there is again, no evidence of bad faith. The Bank, in reality, gave a $40,595 line of credit April 1, 1997. The obvious reason that the line of credit was reduced from the prior request of $85,000 was because the cash flow for $85,000 would no longer work. The calves, which were instrumental to the success of the cash flow, were dead. The new cash flow which required a line of credit of $40,595 was a change in the operation of Long Family Land and Cattle Company, Inc. and the Bank gave that line of credit. There is simply no evidence produced on Plaintiff's part that could sustain a verdict of bad faith.

3. DISCRIMINATION

Plaintiff's claim for discrimination presents the question of whether a Tribal Court can assert jurisdiction for alleged discrimination by a bank located outside the boundaries of the Cheyenne River Sioux Tribe reservation. The United States Supreme Court recently in Nevada v. Hicks 121 S. Ct. 2304, 2001 U.S. Lexis 4669, discussed a similar civil rights claim under

42 U.S.C.S. §1983. In the present case, Plaintiffs are alleging a discrimination action which would fall under 42 U.S.C.S. §1981.

The Court in Nevada, supra. stated that there was no authority for the tribe to adjudicate a claim under 42 U.S.C.S. §1983. The court stated "The Tribal Court had no jurisdiction over §1983 claims. Tribal Courts are not courts of "general jurisdiction." The historical and constitutional assumption of concurrent State Court jurisdiction over cases involving federal statutes is missing with respect to tribal courts, and their inherent adjudicative jurisdiction over non-members is at most only as broad as their legislative jurisdiction. Congress has not purported to grant tribal courts jurisdiction over §1983 claims, and such jurisdiction would create serious anomalies under 28 U.S.C. §1441. P.p.12-15."

Likewise, Congress has not granted this court jurisdiction for any claim of discrimination, which would lie under 42 U.S.C.S. §1981. A Tribal Court is a court of limited jurisdiction. The court, therefore, lacks jurisdiction to decide a discrimination action against a bank which is not a tribal member and is located outside the boundaries of the CRST reservation.

Even if one were to assume, for argument purposes, that the court does have jurisdiction, no evidence of discrimination

existed. The only evidence Plaintiff produced whatsoever was a letter written by Charles Simon, dated April 26, 1996. In that letter Mr. Simon indicated that the only way the Bank would sell the property to Long Family Land and Cattle Company, Inc. was through a guaranteed loan, such as FSA, BIA or SBA. Further, he stated "This is because of possible jurisdictional problems if the Bank ever had to foreclose on this land when it is contracted or leased to an Indian owned entity on the reservation." Although, on its face this letter may appear discriminatory in nature, the actions the Bank took after this letter was written were not discriminatory.

The letter indicates that the Bank could not enter into a contract or lease with an Indian owned entity because of jurisdictional problems. The fact is, however, the Bank actually did just that. The Bank entered into a Lease With Option to Purchase with the Long Corporation in spite of what Mr. Simon stated in the letter. It entered into a contract allowing the Long Corporation to both purchase the real estate and to lease it.

The undisputed testimony in the case is that Edward Maciejewski had a financial statement that was considerably better than that of the Long Corporation. The Bank sold the land to him under a contract only after the Long's option had expired. The difference in interest rates between the 8.5%

under the Lease With Option to Purchase and the contract rate for Maciejewski of 7.75% two years later certainly does not show discrimination. Interest rates change and the ability to repay is taken into consideration when interest rates are set. Actually 320 acres of the real estate were sold to Pesicka for cash without giving him the benefit of a contract whatsoever. Plaintiffs simply did not set forth facts sufficient to sustain a jury verdict of discrimination. In fact, the discrimination cause of action in this lawsuit undoubtedly inflamed the jury to render a decision not based upon the evidence and facts submitted at trial. It tainted the whole case.

4. DAMAGES

The jury's verdict regarding damages shows no relation to the actual evidence which was produced at trial. Plaintiff has alleged that the Bank breached the loan agreement by not giving a $70,000 BIA guaranteed operating loan. That breach caused the loss of cattle. The evidence shows, however, that all of the 230 head of cows and 260 steers and heifers had died prior to February 13, 1997. The Bank did not even receive any response from the BIA regarding its request for a guaranteed operating line until February 14, 1997. There is no evidence whatsoever that the Bank breached an agreement or acted in bad faith prior to February 14, 1997. The loss of all of the cattle could not therefore have been caused by the Bank.

Allegations that the Bank breached the loan agreement by not giving a $70,000 BIA operating line could not have been accomplished without BIA approval. The guaranteed loan could not have been given prior to February 14, 1997 because the BIA did not approve it.

Plaintiffs have also alleged that the Bank did not provide operating money to move the hay to the cattle in the breaks and that is what caused their death. The evidence, however, clearly repudiates this argument. Firstly, Ronnie Long testified during the first day of trial that he never even asked the Bank for money to move the hay. Incredibly on the second day of trial he testified that around Christmas time 1996 he did ask for money to move hay. Even if the jury believed his changed testimony, by Christmas is was too late to get the hay hauled. The letter that Ronnie Long wrote to the Bank on February 18, 1997 indicated from December 13, 1996 to January 29, 1997 the road to the cattle was never wide enough to accommodate a semi tractor and trailer. He could not get the cattle out or move hay in.

The original Lease With Option to Purchase and Loam Agreement was signed on December 5, 1996. Within one week, December 12, 1996, the request was made by the Bank to the BIA to increase the guarantee, reschedule notes, and for a guaranteed operating line of credit of $85,000. Even if the

operating loan had been immediately approved by the BIA the facts indicate that it was too late for the cattle. The roads were impassable by semis to haul cattle or hay until January 29, 1997. The cattle were dead by January 29, 1997. Certainly any breach of contract either by the Bank not doing what they said they were going to do, or bad faith, could not have taken place until after December 5, 1996. From that date until the Bank received the necessary documentation from the CRST planning office, they could not make a request to the BIA. The documents, which include a financial statement and cash flow statements, were not received by the Bank from the CRST planning office until December 11, 1996. The Bank sent the request in immediately on December 12, 1996. The evidence clearly shows that the Bank could not have caused the death of the cattle.

Even if the court finds that there is evidence which would indicate that the Bank is liable for damages, the damages awarded by the jury were not based on the evidence and are excessive. Clearly the jury did not take into consideration the obligation of Long Family Land and Cattle Company, Inc. to mitigate damages. Additionally, the allegations of Plaintiff that the $70,000 operating line and note for $35,750 for the purchase of yearling calves would have made the Corporation's financial condition good enough to be able to borrow the money

to purchase the land is completely speculative and not backed by any evidence whatsoever. Damages based on speculation that the Corporation could have borrowed money to purchase the land as a matter of law should not be allowed.

If one were to assume that the loss of the cattle during 1997 was somehow due to a breach by the Bank, a more reasonable calculation of damages is attached hereto as Exhibit 1. Defendant would also be entitled to a set off for its counterclaim against Plaintiff.

5. NEW TRIAL

It is respectfully submitted that there should not have been allowed a cause of action for discrimination. The evidence and argument produced by Plaintiff in this regard undoubtedly inflamed the jury. The jury was comprised completely of tribal members. The allegations were that the Bank discriminated against an Indian owned corporation. It was virtually impossible for the jury to return a fair and impartial verdict based upon the evidence and the law. The jury's verdict was not based on the evidence and should be set aside and a new trial granted.

Respectfully submitted this 20th day of December 2002.

David A. Von Wald, Attorney
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1997

230 cows less *.8% mortality	= 227 head @ $620.00	$140,740.00
260 yearlings *2.5% mortality	= 254 head @ $700.00	177,800.00
10 yearlings	@ $700.00	7,000.00
		$325,540.00
** Operating Cost		-95,842.00
		$229,698.00
*** Deduct leases to Spring Creek Cattle Co.		-28,811.00
	Total Damages	$200,887.00

* Mortality rates taken from Plaintiff's Exhibit #14
** Average operating cost taken from Defendant's Exhibit #9 tax returns 1990-1996 = $164,250.00 and deducting there from interest at 8.5% on $468,000.00 = $39,780.00
$164,250.00 - $39,780.00 = $124,470.00 average operating expense.
230 cows & 260 yearlings lost = 490 head.
350 cows & 286 yearlings, prior to death loss, = 636 head
490 ÷ 636 = 77% = percent operating expense attributable to dead cattle.
$124,47.00 x 77% = $95,842.00
*** Leases, Defendant's Exhibit #7 total $28,811.00

Exhibit 1

1998

227 cows x .8% mortality	= 225 cows	
replace 70 cows with LIP		
proceeds ($48,780 ÷ $620 per head)	= 79 cows	
	146 cows	
146 cows x 90% calf crop	= 131 yearlings	
131 yearlings x 2.5% mortality	= 128 head @ $700	$ 89,600.00
* Operating expenses		-53,520.00
		36,080.00
** Less pasture leases		-28,811.00
	Damages	$ 7,269.00

* 146 cows + 131 yearlings = 277 ÷ 630 head owned = 43%
  $124,470 x 43% = $53,520

** Pasture leases, Defendant's Exhibit #7

1999

146 cows x .8% mortality = 145 cows
145 x 90% = 131 calves x 2.5% mortality = 128 yearlings

128 yearlings @ $700.00	=	$ 89,600.00
* Operating expenses		-53,520.00
		36,080.00
Less pasture lease		-28,811.00
	Damages	$ 7,269.00

* 145 cows + 128 yearlings = 273 ÷ 630 = 43%
  $124,470 x 43% = $53,520 operating expense

2000

145 cows x .8% mortality = 144 cows
144 x 90% = 130 calves x 2.5% mortality = 127 yearlings

127 yearlings @ $700.00	=	$ 88,900.00
* Operating expenses		-53,520.00
		35,380.00
Less pasture lease		-28,811.00
	Damages	$ 6,569.00

* 144 cows + 127 yearlings = 271 ÷ 630 = 43%
  $124,470 x 43% = $53,520 operating expense

2001

144 cows x .8% mortality = 143 cows
143 x 90% = 129 calves x 2.5% mortality = 126 yearlings

126 yearlings @ $700.00	=	$ 88,200.00
* Operating expenses		-53,520.00
		34,680.00
Less pasture lease		-28,811.00
	Damages	$ 5,869.00

* 143 cows + 126 yearlings = 269 ÷ 630 = 43%
  $124,470 x 43% = $53,520 operating expense

2002

143 cows x .8% mortality = 142 cows
142 x 90% = 128 calves x 2.5% mortality = 125 yearlings

125 yearlings @ $700.00 =		$ 87,500.00
* Operating expenses		-52,277.00
		35,223.00
Less pasture lease		-28,811.00
	Damages	$ 6,412.00

* 142 cows + 125 yearlings = 267 ÷ 630 = 42%
$124,470 x 42% = $52,277 operating expense

RECAPITULATION

1997		$ 200,887.00
1998		7,269.00
1999		7,269.00
2000		6,569.00
2001		5,869.00
2002		6,412.00
	TOTAL	$ 228,365.00

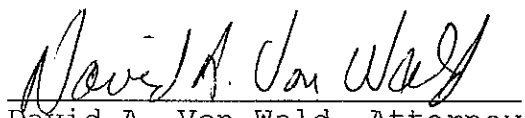
CERTIFICATE OF SERVICE

Comes now David A. Von Wald, Attorney for Defendant, Plains Commerce Bank, and hereby certifies that I served by first class mail, postage prepaid, a true and correct copy of the foregoing BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND NEW TRIAL and the MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND NEW TRIAL on the 20th day of December, 2002, addressed to the following:

James P. Hurley
P.O. Box 2670
Rapid City, SD 57709-2670

Kenneth E. Jasper
P.O. Box 2093
Rapid City, SD 57709-2093

Dated this 20th day of December, 2002.



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