

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.

**PLAINTIFFS' RESPONSE TO
DEFENDANT, PLAINS COMMERCE
BANK'S, MOTION TO DISMISS**

EDWARD AND MARY MACIEJEWSKI
and RALPH H. AND NORMA J. PSICKA,
and THE BANK OF HOVEN,

R-120-99

Defendants.

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Plaintiffs, Long Family Land and Cattle Company, Inc. and Ronnie and Lila Long,
respond to Defendant, Plains Commerce Bank's, Motion to Dismiss, dated December 3, 2002, as
follows:

1. Plaintiffs resist paragraph 1 of the Motion. The evidence at trial will show that the transfer of the deed to the 2,230 acres of land to the bank, which was filed in Dewey County on December 27, 1996, was part of the overall agreement between the Longs and the bank, and that the Loan Agreement dated December 5, 1996, and the Lease With Option to Purchase dated December 5, 1996, were parts of the same transaction. The Loan Agreement mentions the transfer of the land by deed to the bank, and in return for the deed to the land, the bank credited against Longs' obligation to the bank the value of the land in the amount of \$468,000, plus a \$10,000 credit on the house. In the first paragraph of the Loan Agreement, in consideration for the deed, the bank credited \$478,000 against the items listed in paragraph one of the Loan Agreement, reducing the Longs' debt to the bank. Thus, the deed to the bank is part of the Loan Agreement. In paragraph two of the Loan Agreement, as additional consideration, the bank

agreed to a \$70,000 annual operating loan to the Longs, and the bank agreed to make the Longs a loan for \$53,500, with \$17,000 of such loan used to pay off a note, and the balance of \$37,500 used to purchase 110 calves to be fed and pastured with the Longs' calves. The Loan Agreement also refers to the Lease With Option to Purchase. The last paragraph of the Loan Agreement states: "The Bank of Hoven will enter into a lease/purchase option on the approximately 2,230 acres of land described in Exhibit A, under a separate agreement attached hereto." Thus, the Loan Agreement is part of the Lease With Option to Purchase.

The deed transferring the land to the bank is an integral part of the Loan Agreement and the Lease With Option to Purchase Agreement. It was all part of the overall plan to restructure the Longs' farming and ranching operation. When the bank received the deed, the Longs' debt to the bank was reduced, and Longs had two years to operate under the lease and build up equity and money to buy their land back from the bank under the option to purchase. When the Longs bought their land back at the end of the two-year lease, the bank would receive the purchase money of \$468,000 from the Longs under the purchase option, and the bank would transfer the land by deed back to the Longs. The Longs understand that this is how the agreement was supposed to work. However, the Longs claim that the bank failed to make the loans to them as promised in the Loan Agreement, and therefore, they could not pay operating expenses because they had no operating loan, and they could not purchase an additional 110 head of calves to increase their income over the next two years to enable them to buy their land back from the bank.

The Longs' performance under the Lease and Option to Purchase Agreement was conditional upon performance by the bank under the Loan Agreement.

The Longs claim that they were not bound to perform the Option to Purchase Agreement in the two-year time frame contracted for because the bank breached the Loan Agreement prior to the Longs required performance of exercising the option to purchase the land back.

The Longs claim that their performance of the Lease With Option to Purchase was conditioned upon the bank's performance of the Loan Agreement. The Longs claim that the bank's breach of the Loan Agreement relieved them of the obligation to perform under the time frame of the Lease With Option to Purchase.

Under the agreement, the Longs expected consideration in the form of a \$70,000 annual operating loan to be able to continue to operate their ranching and farming operation. Without the operating loan, they were out of business and could not hope to exercise the purchase option and buy their land back from the bank at the end of the lease. In addition, the Longs expected consideration in the form of a loan of \$53,500 to pay off a note to the bank of \$17,000, and to purchase 110 calves for \$37,500 to be fed with their own calves and increase their income to enable them to buy back their land under the purchase option at the end of the lease. They were unable to perform because an important part of their consideration under the agreement had failed. The bank failed to make the loans to them as promised.

Therefore, the Longs believe that Count Three, Failure of Consideration, should not be dismissed.

2. The Plaintiffs agree, in light of this Court's Order dated September 30, 2002, that the Longs shall not present argument in this trial in CRST Tribal Court, to the Court or the jury, that collaterally attacks the Order signed by State Circuit Court Judge Moses in the probate proceedings that transferred the deed to the bank in December of 1996. This Court stated on

page 5 of the Order dated September 30, 2002, that: "The Plaintiffs' remedy with regard to its Complaint regarding how the bank obtained the deed to the land lies with the state court."

In footnote 6 on page 5, this Court stated: "This ruling does not necessarily preclude the Plaintiffs from claiming at trial, should this matter reach trial, that the Defendant Bank did not act in good faith in obtaining a reconveyance of the land and then leasing it to the Plaintiffs as a defense to the eviction action."

Plaintiffs Longs have no intention of violating this Court's Order, or of collaterally attacking the Order entered in the state court probate court proceeding that transferred the land to the bank. As Ronnie Long has stated previously, we had no problem with the bank having the deed to the land, because our debt was reduced, we had the bank's promise of a \$70,000 annual operating loan which would allow us to continue to operate, and we had a promise of a loan for \$53,500, to pay off a \$17,000 note at the bank, and to purchase 110 head of calves to increase our cattle herd and increase our income from cattle, and we had an opportunity to buy our land back from the bank. If the bank had done what it promised to do, we would have been happy. However, the Longs claim that the bank failed to make the loans, the bank breached the agreements, and, as a result, the Longs could not continue to operate or buy back their land from the bank. Therefore, the Longs request that the agreements be voided and they get their land back at this time, not because of how the bank obtained the deed in state probate court, but because since then the bank breached the agreements with the Longs.

Therefore, the Longs request that Count Four of their Amended Complaint not be dismissed.

3. Plaintiffs do not agree with paragraph 3 of the Motion. Count Five of Plaintiffs' Amended Complaint does not deal with personal property as stated in paragraph 3 of the Motion.

Count Five is supported by CRST legal authority. Paragraph 7 of Count Five of Plaintiffs' Amended Complaint states that the Defendants "engaged in self help in violation of the CRST Tribal Code and law which caused damage to the Longs." Title X of the CRST Code of Creditors Rights and Responsibilities, Chapter II, entitled "Actions to Recover Possession of Real Property," Section 10-2-1 entitled "Self-Help Remedies Forbidden" provides that, "self help remedies to secure possession of real property are forbidden except as otherwise provided herein."

In paragraph 7 of Count Five of their Amended Complaint, the Longs request damages as authorized by the CRST Code. Section 10-2-6(10)(1) provides that if the jury finds in favor of the plaintiff and against the defendant, judgment shall be entered for restitution of the premises to the plaintiff. Section 10-2-6(10)(3) provides that the jury shall also assess damages caused to the plaintiff.

Therefore, Plaintiffs Longs submit that Count Five of the Plaintiffs' Amended Complaint, Self Help, which is supported by legal authority, should not be dismissed.

4. Plaintiffs disagree with paragraph 4 of the Motion. Defendant states in paragraph 4 that "this Court lacks jurisdiction." This statement contradicts the statement of counsel for the bank which was made at the summary judgment hearing before this Court. During the hearing on Defendant's Motion for Summary Judgment on September 27, 2002, the Court asked counsel for Defendant bank whether or not the bank was contesting jurisdiction of the CRST Tribal Court in this litigation. Counsel for Defendant bank responded to the Court that this Court does have jurisdiction in this matter. Therefore, Defendant bank should be precluded from claiming that this Court does not have jurisdiction over Count Six of Plaintiff's Amended Complaint, or any other issue raised by the Amended Complaint. The bank claims that the issue of

discrimination is "reserved for Federal Courts and possibly State Courts, but not Tribal Courts." Defendant bank, however, cites no legal authority for this statement.

Therefore, Count Six of Plaintiffs' Amended Complaint should not be dismissed.

5. Plaintiffs Longs disagree with paragraph 5 of Defendant bank's Motion to Dismiss. By stating the facts in Count Eight that constitute a prima facie case for unconscionable contract, Plaintiffs Longs are not attempting in any way to violate this Court's Order, or attempt to set aside the transfer of the land by Order of the state probate court, or to violate the principles of good faith and comity that should be given to the order of the state probate court. However, the Longs claim unconscionable contract because they were not represented by a lawyer when the bank proposed the agreements, the bank prepared the written agreements, and the Longs were not represented by a lawyer when they signed the Loan Agreement and Lease With Option to Purchase on December 5, 1996. They did not understand that the bank could fail to make the loans as promised and still keep their land. In this proceeding they are not challenging the order of the state probate court which transferred their land to the bank, but they are claiming in the circumstances that have developed since that time that this claim should be considered. After the bank received the deed to their land, the Longs allege that the bank breached the agreements and did not make the operating loans they needed to stay in business as the bank promised them, and the bank did not make the loan for them to purchase more cattle to increase their income so they could buy their land back. Although the bank failed to perform as agreed, the bank claims that it has a right to keep their land and evict them off their land, because, under the agreements, the Longs failed to exercise their option to purchase and buy their land back within the time period allowed in the agreements. In these circumstances, the Longs believe that the agreements are unconscionable and should not be

enforced against them. The Longs did not receive the benefits of the agreements. The Longs believe that the agreements were unconscionable and should be voided and their land should be returned to them because the bank failed to perform as agreed, and as a result, they could not perform the option to purchase. The Longs' position in no way challenges the order of the state probate court that transferred the land to the bank in December of 1996, but simply claims that in view of the bank's failure to perform the agreements since that time, and the fact that the Longs did not receive the benefits of the agreements in that they did not receive the loans they needed, as promised by the bank, the agreements should be voided, and the land should be returned to the Longs at this time.

Therefore, Plaintiffs Longs request that paragraph five of Defendant's Motion to Dismiss not be granted.

Respectfully submitted this 4 day of December, 2002.

BANGS, McCULLEN, BUTLER,
FOYE & SIMMONS, L.L.P.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served copies of the Plaintiffs' Response to Defendant, Plains Commerce Bank's, Motion to Dismiss upon the persons herein next designated, all on the date below shown, by depositing copies thereof in the United States mail at Rapid City, South Dakota, postage prepaid, in envelopes addressed to said addressees, to wit:

Mr. David A. Von Wald
Attorney at Law
P.O. Box 468
Hoven, SD 57450

Mr. Kenneth E. Jasper
Attorney at Law
P.O. Box 2093
Rapid City, SD 57709-2093


which addresses are the last addresses of the addressees known to the subscriber; and in addition by facsimile transfer, as follows:

Mr. David A. Von Wald
Fax: (605) 948-2236

Mr. Kenneth E. Jasper
Fax: (605) 348-3299.

which fax numbers are the last fax numbers known to the subscriber.

Dated this 4 day of December, 2002.



JAMES P. HURLEY