UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

Plains Commerce Bank, Plaintiff, v. Long Family Land and Cattle Company, Inc., and Ronnie and Lila Long, Defendants.	) Civ. No. 05-3002)))) **BRIEF OF *AMICUS CURIAE***) **CHEYENNE RIVER SIOUX TRIBE**) **SUBMITTED FOR CONSIDERATION**) **WITH THE PARTIES'**) **CROSS-MOTIONS FOR SUMMARY**) **JUDGMENT**

The Cheyenne River Sioux Tribe ("CRST") submits this brief as *amicus curiae*. The CRST has an interest in this matter because of the challenge by Plaintiff Plains Commerce Bank (the "Bank") to the jurisdiction of the CRST Tribal Court. Defendants Ronnie and Lila Long are enrolled members of the CRST and defendant Long Family Land and Cattle Company (the "Company") is an Indian-owned business eligible for BIA loan guarantees. The CRST Tribal Court properly exercised jurisdiction over this dispute because the undisputed facts show that the Bank entered into a consensual relationship with tribal members. As fully discussed herein, the CRST respectfully requests that the Court grant Defendants' Motion for Summary Judgment and deny Plaintiff's Motion for Summary Judgment.

STATEMENT OF FACTS

A. The Parties.

The Company is a state-chartered, majority Indian-owned corporation engaged in farming and ranching operations on the Cheyenne River Sioux Reservation (the "Reservation"). (Affidavit of Ronnie and Lila Long –"Long Aff."– ¶ 3.) The Company's Articles of Incorporation required that it "be controlled by Native Americans who at least at all times own

51% of the outstanding stock in the corporation." (Long Aff. ¶ 3, Attachment –"Att."– 20.) As an Indian-owned corporation, the Company was entitled to apply for and receive BIA guarantees for bank loans. (Long Aff. ¶¶ 4, 8.)

Ronnie and Lila Long are husband and wife. (Long Aff. ¶ 3.) They have lived on the CRST Reservation all of their lives and are enrolled members of the CRST. (Id., ¶¶ 5-6.) At the time of the agreements involved in this case, Ronnie and Lila Long owned 100% of the Company. (Id., ¶ 9.)

The Bank is a state-chartered bank with its principal place of business in Hoven, South Dakota. (Affidavit of Charles Simon –"Simon Aff."– ¶ 2.) The Bank was the Company's lender, and some of its loans to the Company were guaranteed by the BIA. (Simon Aff. ¶ 4; Long Aff. ¶ 10.) In the course of these commercial relationships, the Bank "kept in constant and timely contact" with BIA and tribal officials located on the Reservation. (Van Norman Aff., Ex. K, p. 2.) The Bank has routinely made BIA guaranteed loans on the Reservation to members of the CRST. See, e.g., Bank of Hoven v. Director, Office of Economic Development, B.I.A., 2000 I.D. Lexis 58, 34 I.B.I.A. 206 (2000) (BIA guaranteed 90% of $500,000 loan made by the Bank to the Company); River Bottom Cattle Company, Inc. v. Acting Aberdeen Area Director, B.I.A.,1994 I.D. Lexis 5 at *1, n. 1, 25 I.B.I.A. 110 (1994) (Bank sought 80% guaranty of $410,040 loan to majority Indian-owned cattle company); Netterville v. Aberdeen Area Director, B.I.A., 1993 I.D. Lexis 12, 24 I.B.I.A. 52 (1993) (concerning application for Indian Business Development grant in conjunction with agricultural loan from Bank to tribal member); Bank of Hoven v. Acting Aberdeen Area Director, B.I.A., 1996 I.D. Lexis 28, 29 IBIA 121 (1996) (dismissing Bank's appeal of BIA decision to reduce Bank's claim for loss on loan to tribal members).

B. The Longs' Land.

Kenneth Long, Ronnie Long's father, owned 2,225 acres of land located within the boundaries of the Reservation (the "Land"). (Long Aff. ¶ 7.) The Land was used in the Company's farming and ranching operations. (Id., ¶ 8.)

Kenneth Long pledged the Land as collateral to the Bank to secure loans for the Company's operations. (Simon Aff. ¶ 4.) Kenneth Long died on July 17, 1995. (Id., ¶ 5.) Under Kenneth Long's Will, the Land and his share of the Company were devised to his children. (Long Aff. ¶ 9, Att. 21.) In December 1995, Ronnie Long's brothers and sisters transferred all of their interests in the Land and the Company to Ronnie Long. (Id.)

In April 1996, a Bank official came on the Land located within the Reservation to inspect the cattle, hay and machinery. (Long Aff. ¶ 11.) The Bank official then met with Ronnie Long on the Reservation at the CRST tribal offices in Eagle Butte, South Dakota. (Id.; Affidavit of Thomas J. Van Norman–"Van Norman Aff."– Ex. B, p. 97.) The Bank proposed that Kenneth Long's house in Timber Lake, South Dakota, be sold with the proceeds applied to debt that had been guaranteed by the BIA. (Long Aff., Att. 2.) As for the Land, the Bank told Ronnie Long that "it would be deeded to the bank and sold back to you on a contract." (Id.)

The Bank, however, changed course in a letter to Ronnie Long, dated April 26, 1996. The Bank declined to sell the Land back to Ronnie Long based solely on his status as a tribal member and the Company's status as an Indian-owned corporation because of "possible jurisdictional problems" if the Bank had to foreclose on land contracted "to an Indian-owned entity on the reservation." (Long Aff. ¶ 12, Att. 2.)

C. The Bank Agrees To Restructure The Company's Debt.

In two related agreements dated December 5, 1996, the Bank agreed to restructure the Company's debt, and provide additional working capital so that the Company would be in a

position to purchase the Land back from the Bank. (Long Aff. ¶ 14, Att. 3; Simon Aff. ¶¶ 6-7, Exs. 5-6.)

(1) Loan Agreement.

- The Bank received a deed to the Land and Kenneth Long's home, and the Company received a credit on its existing debts in the amount of $468,000 for the Land and $10,000 for the house. A Personal Representatives Deed to the Land dated December 10, 1996, was given to the Bank. (Simon Aff. ¶ 4, Ex. 3.)
- The Bank agreed to ask the BIA for an increase in the guarantee percentage from 84% to 90% and to reschedule an approximately $415,000 loan over 20 years with an annual payment from crop and yearling sales.
- The Bank agreed to request a 90% BIA guarantee on a $70,000 annual operating loan to be paid down each year to $1.00 through the Company's sales of calves, yearlings or crops.
- If the Bank's guarantee requests were approved, the Bank agreed to lend the Company $53,500. Of that amount, a portion would be used to pay off other indebtedness and $37,500 would be available to the Company to purchase 110 calves.

The Loan Agreement referenced and attached the deed the Bank had received to the Land and also provided that the Bank would give the Company a lease/purchase option for the Land.

(2) Lease With Option to Purchase. (Simon Aff., Ex. 4.)

- The Company agreed to lease the Land from the Bank for two years. As rent, the Company agreed to assign two annual CRP payments of $44,198 to the Bank. The Company was responsible for paying real estate taxes on the Land.

- During the Lease term, the Company was given an option to buy back the Land for $468,000.
- If the Company exercised the option, all of the rent payments were to be credited to the purchase price (less an amount equal to interest on the unpaid purchase price balance from December 5, 1996).
- If the proceeds from any sale of Kenneth Long's house exceeded $10,000, then the selling price would be decreased by the excess amount. The house eventually sold for $30,000 and after selling expenses the option purchase price was to be reduced by $16,478.64. (Van Norman Aff., Ex. D.)

By deeding the Land to the Bank, leasing it back, and restructuring the remaining debt, the Company reduced its debt payments and improved its cash flow. (Long Aff. ¶ 17; Simon Aff., Ex. 6.) The operating loan would allow the Company to pay annual operating expenses until crops or calves were sold. (Id.) The $37,500 loan to purchase 110 calves would allow the Company to increase its income. (Long Aff., ¶ 19.) These agreements were designed so that the Company would be in a position to purchase the Land in two years. (Id.) When the agreements were finalized on December 5, Ronnie Long explained that he needed the operating loan to move hay twenty miles to where his cattle would spend the winter. (Id., Van Norman Aff., Ex. B, p. 151.) Ronnie Long also told the Bank that he planned to use $2,000 of the operating loan to pay for insurance covering the cattle. (Simon Aff., Ex. 14; Van Norman Aff., Ex. B, p. 156.)

D. The Bank's Breach.

The Bank made an effort to restructure the BIA loans in a letter to Russell McClure, CRST Superintendent, dated December 12, 1996. (Simon Aff., Ex. 6.) By letter dated February 14, 1997, the BIA informed the Bank that a more complete application was required by the

Bank's Loan Guarantee Agreement and applicable federal regulations. (Simon Aff., Ex. 7.) The BIA said it would not act on the Bank's request until it received a more complete application. (Id.)

The Bank, however, never submitted a further application, but did restructure the BIA loans in April, 1997. (Simon Aff. ¶¶ 8-9.) The Bank did not, however, make the $70,000 operating loan or the loan to purchase 110 additional calves. (Simon Aff. ¶¶ 8-10; Long Aff. ¶¶ 17-19; Van Norman Aff., Ex. B, pp. 130, 149, 358.)[1]

Ronnie Long was told on December 5 that he would receive the $70,000 operating loan so that he could pay for moving hay to his cattle located 20 miles away. (Long Aff. ¶ 17; Van Norman Aff., Ex. B, pp. 150-152.) This was in response to just one of many requests Ronnie Long made to the Bank to release money during November through January so that hay could be moved to the cattle. (Long Aff. ¶ 17; Van Norman Aff., Ex. B, p. 291.) Even without the BIA's approval of the restructured loans and the operating line, federal regulations permitted an emergency advance to preserve collateral of up to 10% of the guaranteed amount, or $42,800. (Simon Aff., Ex. 7; 25 C.F.R. § 103.22.)

A five-day blizzard began on December 13, 1996, which completely blocked the county roads. (Simon Aff., Ex. 14.) When the roads were opened, Ronnie Long did everything possible to get feed to his cattle. (Id.) There were minimal losses to the cattle until the blizzard of January 15-16, 1997, when the wind chill dipped to 80 degrees below zero. (Id.) Because the cattle had no hay, three-fourths of the Company's cattle drifted out of the protected draws and

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[1] Between December 10, 1996 and February 12, 1997, the Bank did, under new promissory notes, lend $23,968.46 for lease payments and other miscellaneous expenses. (Simon Aff. ¶ 10, Exs. 11-13.) The money was not part of the promised annual operating loan. (Van Norman Aff., Ex. B, pp. 170, 358.) In April 1997, the Bank extended a $40,000 operating line which was used to pay off the advances described above. (Simon Aff. ¶ 9; Van Norman Aff., Ex. B, p. 215.)

died. (Id.) The Company lost 277 of 286 calves, and 230 of 349 cows. (Van Norman Aff., Ex. C.) If hay had been available, the Company's cattle would have not have drifted out from the protected draws and would have survived. (Simon Aff, Ex. 14; Van Norman Aff., Ex. B, p. 158.) And, if insurance had been purchased, the Company would not have suffered a financial loss. Ultimately, the Company received only $48,000 from FEMA as compensation for its losses. (Van Norman Aff., Ex. B, p. 159.)

E. The Bank Sells The Land.

By letter dated December 1, 1998, Ronnie Long asked the Bank to extend the option exercise date by 60 days. (Long Aff., Att. 6.) The next day, the Bank denied the extension and said that the Company's right to possess the Land would terminate on December 5, 1998. (Long Aff., Att. 7.) At the request of the Bank's counsel, Judge Bluespruce, of the CRST Tribal Court, reviewed and approved for service a Notice to Quit on Ronnie Long, individually, and the Company. (Long Aff., Att. 10.)

The Bank then sold portions of the Land. Three-hundred and twenty acres were sold to Ralph and Norma Pesicka, non-CRST members, for $49,000. (Simon Aff. ¶ 13, Ex. 15.) The remaining acreage was sold pursuant to a Contract for Deed for $401,100 to defendants Edward and Mary Jo Maciejewski, non-CRST members. (Simon Aff. ¶ 14, Ex. 16.) The acreage sold to the Maciejewskis was divided into two parcels. On Parcel One, the Maciejewskis took possession immediately. (Long Aff., Att. 21.) Based on their possession of Parcel One, the Maciejewskis received two $23,000 FSA payments that otherwise would have been paid to the Company. (Van Norman Aff., Ex. B, pp. 168-169, 275, 304-305, Ex. E). The FSA payment was sufficient to make a payment for Parcel One under the Contract for Sale. (Id., Ex. B, p. 368.)

The Bank also received a total of $392,968.55 in federal loan guarantees from the BIA. (Long Aff., Att. 22.) And, because the Company was not able to exercise the option to purchase,

the Bank did not have to offset the purchase price by the proceeds from the sale of the house in an amount of about $16,400, or the excess of the CRP payments over the interest on the unpaid purchase price, an amount of about $8,000 to $9,000. (Van Norman Aff., Ex. B, p. 349.)

The Company offered evidence that it suffered $1,236,792 in damages from 1997 to 2002. (Long Aff. ¶ 18; Van Norman Aff., Ex. B, pp. 302-306, Ex. E.) The damage calculation measured the net financial consequences to the Company arising from the Bank's breach of the loan agreement during each calendar year from 1997 to 2002. The damage amounts were attributable to the death of the Company's cattle, the lost opportunity from not having the 110 calves, and the loss of the use of the Land. (Id., Ex. E.) Thus, the damage calculation was based entirely on the Bank's breach of the Loan Agreement and the resulting inability of the Company to exercise the purchase option.

F. Proceedings In The CRST Tribal Court.

The Company and Ronnie and Lila Long filed a nine-count complaint in the CRST Tribal Court alleging fraud (Count I), breach of contract (Count II), failure of consideration (Count III), avoidance of the deed given to the Bank (Count IV), self-help in violation of the CRST Tribal Code (Count V), discrimination (Count VI), bad faith (Count VII) and unconscionability (Count VIII). (Simon Aff., Ex. 20.) The plaintiffs sought damages and permanent injunctive relief (Count IX). (Id.) The Bank served a Notice to Quit on Ronnie Long and the Company and counterclaimed for wrongful possession. A trial was held over two days before a jury with the Honorable B. J. Jones, presiding. (Simon Aff. ¶ 18.)

After the close of plaintiffs' case, the court dismissed four claims that sought to void the contract (Count IV) and for fraud (Count I), failure of consideration (Count III) and unconscionability (Count VIII). Special interrogatories were submitted to the jury. (Long Aff., Att. 1.) By a unanimous verdict, the jury found: (1) the Bank breached the Loan Agreement; (2)

the breach prevented the Company from performing under the Lease with Option to Purchase; (3) the Bank acted in bad faith when it attempted to gain the increased guarantee from the BIA; and (4) the Bank intentionally discriminated against Ronnie and Lila Long based solely on their status as Indians or tribal members in the Lease with Option to Purchase. (Id.) The jury found that the Bank did not use self-help remedies in an attempt to remove Plaintiffs from the land. (Id.) The jury awarded $750,000 in damages and found that interest should be added to the judgment. (Id.) A judgment was entered on the verdict in favor of the Longs and the Company in the amount of $750,000 plus prejudgment interest of $123,131.81 and costs of $2,850.65. (Simon Aff. ¶ 20.) A supplemental judgment was later entered allowing the Longs and the Company to exercise the option to purchase as to the portion of the Land they presently occupied (960 acres) for $201,600 in exchange for a Partial Satisfaction of the Judgment. (Simon Aff., Ex. 23.)

G. Proceedings In The Tribal Court Of Appeals.

The Bank appealed the judgment to the CRST Court of Appeals. (Simon Aff. ¶ 21.) The judgment of the Tribal Court was affirmed on all issues by a unanimous vote. (Simon Aff., Ex. 24.)

H. Proceedings In United States District Court.

The Bank filed a three-count complaint seeking a declaratory judgment and ejectment. The Bank alleges that the CRST Tribal Court lacked jurisdiction (Count I), denied the Bank due process (Count II), and that Ronnie and Lila Long are in wrongful possession of the Land (Count III). The Bank moved for partial summary judgment seeking a declaration that the CRST Tribal Court lacked jurisdiction and denied the Bank due process. The Longs and the Company moved for summary judgment seeking entry of judgment on the entire complaint.

SUMMARY OF ARGUMENT

The CRST Tribal Court properly exercised jurisdiction over this action. The Bank entered into a consensual relationship with tribal members through its lending relationship with an Indian-owned business. Under Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245 (1981), nothing more was required to establish the tribal court's subject matter jurisdiction over the dispute, which arose out of the consensual relationship through commercial dealing.

The Bank's argument that this is a dispute between non-Indians ignores the reality of the transactions. The Company's status as an Indian-owned entity was essential to obtaining BIA guarantees. The loans were also secured by property located within the boundaries of the Reservation. Ronnie Long and his wife, Lila Long, had ownership interests in the Land. The entire purpose of the negotiations to restructure the debt, was to place the Longs into a position so that they could repurchase the Land. Under the exceptions in Montana, the tribal court had jurisdiction over the dispute with the Bank as a result of its inherent sovereign authority.

ARGUMENT

I. THE CHEYENNE RIVER SIOUX TRIBAL COURT PROPERLY EXERCISED SUBJECT MATTER JURISDICTION OVER THIS ACTION.

"Tribal courts play a vital role in tribal self-government...and the Federal Government has consistently encouraged their development." Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14, 107 S.Ct. 971, 975-76 (1987) (citations omitted). As a general matter, "the inherent sovereign powers of an Indian tribe do not extend to activities of nonmembers of the tribe." Montana v. United States, 450 U.S. 544, 565, 101 S.Ct. 1245, 1258 (1981). Yet this general proposition is subject to controlling provisions in treaties, congressional direction enlarging tribal court jurisdiction and the two exceptions identified in Montana. Strate v. A-1 Contractors, 520 U.S. 438, 453, 117 S.Ct. 1404, 1413 (1997).

Montana is the "pathmarking" case concerning tribal civil authority over non-Indians. Nevada v. Hicks, 533 U.S. 353, 358, 121 S.Ct. 2304, 2309 (2001). After stating the general rule of no jurisdiction over non-members, the Court in Montana cautioned that "[t]o 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." 450 U.S. at 565, 101 S.Ct. at 1258. Under the two exceptions established by the Court, tribes retain jurisdiction over: (1) "the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" and (2) "conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 565-66, 101 S.Ct. at 1258.

A. The Bank Entered Into A Consensual Relationship With Members Of The CRST.

The Bank entered into a consensual relationship as a lender to the Company, an Indian-owned entity located on the Reservation. The Company's status as an Indian-owned entity was essential to the Bank's ability to obtain BIA guarantees of the loans. "To be eligible for a BIA-guaranteed or insured loan, a business entity...must be at least 51 percent Indian owned..." 25 C.F.R. §103.25(b). Failure to maintain the required ownership is a default allowing the lender to seek available remedies, but if the lender continues the loan, the guaranty becomes invalid. Id. For this reason, the Company's Articles of Incorporation required that Native Americans own 51% of the stock of the Company at all times. (Long Aff. ¶ 3, Att. 20.)

Ronnie and Lila Long are enrolled members of the CRST. (Long Aff. ¶ 6.) At the time of the loan restructure negotiations, Ronnie and Lila Long owned all of the Company's stock. (Long Aff. ¶ 9.) The negotiations were conducted on the Reservation and Ronnie Long represented the Company. (Long Aff. ¶ 11.) The Bank was also in "constant and timely contact"

regarding the loan guarantees with BIA and tribal officials located on the Reservation. (Van Norman Aff., Ex. K., p. 2.)

The loans were further secured by the Land in which Ronnie and Lila Long had a beneficial interest. Under his Will, Ronnie Long's father bequeathed the Land to his children. (Long Aff. ¶ 9, Att. 21.) All of Ronnie Long's brothers and sisters transferred their interests in the Land to him in December, 1995. (Id.)

The purpose of the negotiations was to place the Longs and their Company in a position where they could keep the Land. (Long Aff. ¶ 17.) The deed, lease-back, and debt restructuring agreements were designed to improve the Company's financial position so that the purchase option in the lease could be exercised in two years. (Simon Aff., Ex. 6; Long Aff. ¶ 17.)

Ronnie and Lila Long were party plaintiffs, and, indeed, necessary parties to this litigation because of their beneficial ownership interests in the Land. The Bank did not move to dismiss them from the litigation on the grounds that they had no individual claims. On the contrary, when the Bank asked the Tribal Court to serve a Notice to Quit, they asked for service on the Company and Ronnie Long, individually. (Long Aff. ¶ 24, Att. 10.)

In the face of this overwhelming contrary and undisputed evidence, the Bank argues that this case "involves the dealings of two non-Indians" where "[a]ll decisions and transactions underlying the case were made and implemented off the reservation." (Pl. Mem., p. 15.) These arguments were never presented to the CRST Tribal Court or the CRST Tribal Court of Appeals, and should be rejected by this Court.

The Bank cites this Court's decision in Christian Children's Fund v. Crow Creek Sioux Tribal Court, 103 F.Supp. 2d 1161 (D.S.D. 2000) ("CCF") as support for its position. In CCF, the Court found that the first exception in Montana was not satisfied because the parties were not

tribal members and it was clear that there was no consensual relationship with tribal members. CCF, 103 F. Supp. 2d at 1166. While one of the corporations, Hunkpati, was located on the reservation, certain of its key individuals were not tribal members. The letters of agreement between CCF and Hunkpati did not, unlike this case, require that Hunkpati's board of directors be members of the tribe. Id. at 1162. Finally, none of the alleged conduct forming the basis for the complaint occurred on the reservation. Id. at 1166.

In contrast, in this case, two of the three plaintiffs are enrolled members of the CRST and the third plaintiff was a majority-owned Indian business entity. The Company's Articles of Incorporation required majority Indian ownership as did the BIA regulations governing the loan guaranty sought by and provided to the Bank. The Company's representative in the loan restructure negotiations was a tribal member and he signed the agreements involved in this dispute on the Company's behalf. Bank officials conducted the negotiations on the Reservation and kept in constant contact with BIA and tribal officials located on the Reservation. Just as importantly, this dispute centers on the ownership of property located on the Reservation. The Bank argues that "at all relevant times" it owned the Land. (Pl. Mem., p. 15.) In fact, the Land was owned by Ronnie Long's father and upon his death the Land passed to Ronnie Long. The Bank owned a mortgage interest. As part of the agreements at issue, the Land was deeded to the Bank but a lease and purchase option was given to the Longs. In all events, the Bank can hardly argue that it was "dragged along" by someone else's choice to locate on the Reservation. (Pls. Mem., p. 15.) The Bank chose to take a mortgage on property within the Reservation, cause the tribal court to issue a Notice to Quit on a tribal member, sought loan guarantees from the BIA, and became an owner of property on the Reservation pursuant to a contractual agreement. This

case plainly involves the Bank entering into a consensual relationship with tribal members. Accordingly, the CRST Tribal Court had subject matter jurisdiction over this dispute.

B. The Bank's Conduct Threatened The Economic Security And Welfare Of The Tribe.

The Bank's conduct also had a direct effect on the "economic security" and "welfare" of the CRST. A purpose of the BIA loan guaranty program is to develop viable Indian businesses. 25 C.F.R. § 103.2. This case challenges the authority of tribal courts to adjudicate disputes with tribal members and their lenders, including discriminatory or predatory behavior by those lenders, in cases involving BIA guaranteed loans. The Bank's arguments in this very case show the serious tribal interest created by the direct threat to the tribe's economic security and welfare if the tribe is powerless to adjudicate such claims:

> ...the bank admits that they were dealing with the tribal members to make money. It wasn't just to help tribal members. The bank was doing it with the intent of making money. That's what any business does. And how much money they made from tribal members, is really nothing for us to even worry about.
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> That's why I'm concerned, not just for the bank, the bank has got the money to pay the judgment, your Honors. What I'm concerned with, is that this bank is not acting on its own. There are a number of banks around that are looking at this case, not just this Tribe; there are a number of banks around. And let me tell you, if they want to discriminate against tribal members, they can do it and get by with it. They can. They don't have to make everybody loans. They can find a reason for rejecting the loans.

(Van Norman Aff., Ex. H, p. 114.)

Because of the importance of the relationships between lenders and developing Indian businesses, this type of dispute has a direct effect on the "economic security" and "welfare" of the CRST. Accordingly, under Montana, the CRST Tribal Court had jurisdiction over the dispute.

II. THE TRIBAL COURT PROPERLY EXERCISED JURISDICTION OVER THE CLAIM OF DISCRIMINATION.

A. No Federal Law Claim For Discrimination Was Asserted.

Until this proceeding, the Bank has always conceded that the tribal court had jurisdiction over all of the claims except the discrimination claim. See Van Norman Aff., Ex. H, p. 12 ("And I think it's lacking subject matter jurisdiction, for one of the causes of action, and that was for discrimination.") Indeed, the Bank filed a Counterclaim and in its Motion for Summary Judgment affirmatively said that "the [Tribal] Court has jurisdiction over the subject matter of this action." (Van Norman Aff., Ex. F, ¶ 2.) The Bank's argument that there was no jurisdiction over the discrimination claim is based on another newly found position–that the basis for the discrimination claim was federal law. The Bank erroneously claims that the "cause of action for discrimination was tried at the trial court level based on a 42 U.S.C. 1981 claim." (Pls. Statement of Uncontested Facts, ¶ 17.)

The Bank's counsel argued differently before the Tribal Court of Appeals. (Van Norman Aff., Ex. H, p. 13.) ("[N]ot to say that the plaintiff has brought forth specifically, 42 U.S.C. 1981. They haven't."). Indeed, the Complaint did not assert a federal law discrimination claim. (Simon Aff., Ex. 20.) And, the Bank never challenged the discrimination claim, which did not identify federal law as its source, for failure to state a claim. That the tribal trial court considered federal sources of law in shaping its views on the law does not mean that the claim was a federal law claim. Having failed to raise the issue in the trial court by appropriate motion, the Bank should not now be heard to say that the claim was a de facto claim under 42 U.S.C. §1981, or some other federal law.

The Supreme Court has recognized that tribal law is often a "complex 'mix of tribal codes and federal, state, and traditional law.'" Hicks, 533 U.S. at 384-85, 121 S.Ct. at 2323 (J.

Souter, concurring) (quoting National American Indian Court Judges Assn., Indian Courts and the Future 43 (1978)). Private claims of discrimination based on status are recognized under federal and state statutes. See, e.g., 42 U.S.C. §§ 2000-d, et seq. (2003); S.D. Codified Laws § 20-13-21 (2003). They are also recognized under the common law and decisions of the CRST Tribal Court which emphasizes principles of equality, justice, fair play, and decency to others. (See Simon Aff., Ex. 28, p. 16.)

Discrimination is prohibited under tribal common law in much the same way that other injurious or tortious conduct is prohibited. While it is true that discrimination is frequently the subject of legislation, it is also actionable under the common law. The Supreme Court has long recognized that "an action brought for compensation by a victim of...discrimination is, in effect, a tort action." Meyer v. Holley, 537 U.S. 280, 285, 123 S.Ct. 824, 828 (2003) (citing Curtis v. Loether, 415 U.S. 189, 94 S.Ct. 1005 (1974)). As the Supreme Court has noted,

> "[a]n action to redress racial discrimination may...be likened to an action for defamation or intentional infliction of mental distress," and further that "under the logic of the common law development of a law of insult and indignity, racial discrimination might be treated as a dignitary tort." 415 U.S. at 195-196, n. 10, 94 S.Ct. at 1008-1009, n. 10.

These are precisely the kinds of actions over which the tribal courts have jurisdiction. Under tribal law, the courts "have jurisdiction over claims and disputes arising on the reservation," CRST By-Laws, Art. V, § 1(c), including claims arising out of "tortious conduct." C.R.C. § 1-4-3. Just as the Tribal Court did not need congressional authority to hear contractual-based claims (Count II (breach of contract), Count III (a failure of consideration), Count VII (bad faith)), it did not need congressional authority to hear tort-based claims (Count I (fraud), Count VI (discrimination), and Count VII (unconscionability)).

Even assuming arguendo that the Bank were correct and the tribal trial court sustained the discrimination verdict wholly under federal law, this would breathe no life into the Bank's

subject matter jurisdiction argument in this Court. The Tribal Court of Appeals held that the Longs' discrimination claim arose under tribal law, not federal law. See Simon Aff., Ex. 24, p. 8 (including citations to CRST case law.) It is this holding, the final ruling of the CRST's highest court, with which the Bank must contend. This holding leaves no doubt that the Longs' discrimination claim was a tribal common law cause of action, not a federal claim. Because no federal law claim was asserted by the Longs or upheld on appeal, the Bank's argument concerning subject matter jurisdiction over federal law claims does not apply.

B. If One Of The Montana Exceptions Applies, The Tribal Court Had Authority To Adjudicate All Conduct At Issue In The Litigation.

Contrary to the Bank's suggestions, there is no basis to limit the Montana exceptions by requiring a specific congressional delegation of authority to confer subject matter jurisdiction over claims against nonmembers. See Pl. Mem. at p. 16. The tribal court had the power under its inherent sovereign authority to adjudicate the conduct at issue in this litigation if the requirements of the Montana exceptions were met.

The Supreme Court's decision in Hicks regarding jurisdiction over claims arising under 42 U.S.C. §1983 does not change this result. In Hicks, the Court held that a tribal court did not have jurisdiction over state wardens executing a search warrant for evidence of an off-reservation crime. The Court limited this holding "to the question of tribal court jurisdiction over state officers" leaving "open the question of tribal court jurisdiction over non-member defendants in general." 533 U.S. 358 n.2, 121 S.Ct. 2309 n.2. Applying Montana and Strate, the Court first concluded that jurisdiction did not arise as a result of the tribe's inherent sovereign authority. The Court then examined 42 U.S.C. §1983 to determine whether there was any "congressional direction enlarging tribal court jurisdiction." Hicks, 533 U.S. 366 n.7, 121 S.Ct.

2313 n.7. The Court concluded that 42 U.S.C. §1983 did not enlarge the tribal court's jurisdiction. Id.

Hicks does not require a statute or treaty authorizing a tribal court to hear discrimination claims against private parties as opposed to state officers. Taken to its illogical conclusion, the Bank argues that after Hicks, tribal courts may never hear a federal claim absent an express authorization in the applicable federal statute itself. The limited holding in Hicks did not overrule the existing precedent that "[u]nder normal circumstances, tribal courts, like state courts, can and do decide questions of federal law...." El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 485 n.7, 119 S.Ct. 1430, 1438 n.7 (1999). Once subject matter jurisdiction attaches under either of the two Montana exceptions, a tribal court has the authority to adjudicate the dispute as result of its inherent sovereign authority. Here, the undisputed facts establish that one or both of Montana exceptions apply to this action. No further authorization was necessary for the tribal court to hear all aspects of the dispute.

III. EVEN IF THERE WERE NO JURISDICTION OVER THE DISCRIMINATION CLAIM, THE DAMAGE AWARD WAS ENTIRELY SUPPORTED BY THE BANK'S BREACH OF CONTRACT.

All of the damages awarded by the jury were based solely on the financial consequences of the breach of the Loan Agreement and the resulting inability of the Company to exercise the purchase option for the Land. The Company offered evidence that it suffered $1,236,792 in damages from 1997 to 2002. (Van Norman Aff., Ex. B, pp. 302-306, Ex. E.) The damage calculation measured the net financial consequences to the Company arising from the Bank's breach of the loan agreement during each calendar year from 1997 to 2002. Specifically, the damages were attributable to the death of the Company's cattle, the lost opportunity from not having the 110 calves, and the loss of use of the Land. (Id., Ex. E.)

The jury also found that the Bank had intentionally discriminated against Ronnie and Lila Long. No attempt, however, was made to identify any economic consequences from the Bank's discriminatory behavior and the Longs did not ask for (and the jury was not instructed that it could award) non-economic and punitive damages. (Van Norman Aff., Ex. B, pp. 588-601, Ex. G.) Instead, the jury was instructed that the measure of damages were the amount which would compensate the Company and the Longs for a breach of contract. (Van Norman Aff., Ex. G, Jury Instruction No. 10.)

The Court should find that the Tribal Court had jurisdiction over claims that supported the entire verdict, even if there were no jurisdiction over the discrimination claim. The damage award was completely supported by the verdict in favor of the Company for the breach of contract. The evidence of discrimination was a part of the restructure negotiations and established the background and purpose of the transaction. (Long Aff. ¶¶ 2, 12, Att. 2) If the matter were tried without a discrimination claim, the jury would have heard the same facts.

At a minimum, the Court should enter judgment against the Bank on Count III of its Complaint for wrongful possession. This issue was tried in tribal court. By special interrogatory, the jury found that the Bank's breach of contract prevented exercise of the purchase option. (Long Aff., Att. 1.) There was undeniably (and the Bank has so admitted) jurisdiction over their counterclaim. The Bank may not relitigate that issue or have it reviewed in this Court. See Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985). Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987) (federal courts review the subject matter jurisdiction of tribal courts, not final adjudications on the merits).

The CRST offers to make the entire record available to the Court so it can satisfy itself that the presence of the discrimination claim did not "taint" the entire trial, despite the following assertions of the Bank's counsel:

> And you are using the race card against a non-tribal member in Tribal Court, which is consistent of 100 percent tribal members. I mean, it's just a place where it's very, very difficult to get a fair trial, once that race card is used, and that's what was done here. Basically I think that's what tainted the whole case. I'm not even opposed to walking into Tribal Court and trying something. I think the tribal members are just as honest as any other members are, but when it comes to arguing race, boy, you are in trouble if you are in Tribal Court, when race can be brought in.

(Van Norman Aff., Ex. H, p. 14.)

Yet, during the trial, the Longs' counsel did not even mention the discrimination claim in his opening statement and only a small portion of his closing statement was devoted to that claim. (Van Norman Aff., Ex. B, pp. 72-79, 599-601.) A reading of counsel's closing shows that it was not the least bit inflammatory. (Van Norman Aff., Ex. B, pp. 588-601.)

The jury's verdict was fully supported by the contract claim, even assuming there had been no discrimination claim and there was no unfairness to the Bank from the jury having heard the discrimination claim. Accordingly, the Court should, at a minimum, rule that there was subject matter jurisdiction over the contractual claims that fully supported the damage award.

IV. THE BANK WAS NOT DENIED DUE PROCESS OF LAW IN TRIBAL COURT.

The Bank argues that it was denied due process of law in the tribal court proceedings when, in its words, "the Tribal Appellate Court found a basis in tribal law," as opposed to federal law, "to support the discrimination decision." Pl. Mem. at 2. The Bank erroneously asserts that, "[t]hroughout the lower court proceedings, the discrimination claim was brought under Federal Law 42 U.S.C. § 1981," id. at 6, and it was not until "the appellate level" that it was alleged, "for the first time," that the discrimination claim arose under tribal law. Id. at 7.

These arguments are wholly without merit. The Longs never alleged federal law as the basis of their discrimination claim. This claim arose under the tribal common law and was upheld on that basis by the tribe's highest court. The Bank had a full and fair opportunity to litigate the factual and legal bases of the claim. Moreover, the Bank's claim that it was denied due process is not properly before the Court or ripe for adjudication.

A. The Bank's Due Process Claim Is Not Properly Before This Court.

Neither the CRST nor the CRST Tribal Courts are subject to the due process clauses of the Fifth or Fourteenth Amendments to the U.S. Constitution. The "powers of local self-government" exercised by Indian Tribes "are not operated upon by the fifth amendment," Talton v. Mayes, 163 U.S. 376, 384, 16 S.Ct. 986, 989 (1896), the "other provisions of the Bill of Rights,...[or] the Fourteenth Amendment." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56, 98, S.Ct. 1670, 1676 (1978). These constitutional provisions operate on the national and state governments, not tribal governments. That said, the Bank may nonetheless raise a due process challenge to the tribal court proceedings in one of two ways. First, the Bank may file an action under the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303, alleging that the tribal court deprived the Bank of "liberty or property without due process of law." 25 U.S.C. § 1302(8). The Bank has not done so. Second, the Bank can raise a due process challenge in response to any effort by the Longs to seek recognition or enforcement of the tribal court judgment in federal or state court. Such a challenge is premature at this time.

The Longs have not asserted in this action, by way of counterclaim or otherwise, that the tribal court judgment is entitled to enforcement in this Court. The Bank's assertion to the contrary is unfounded. Nowhere in their answer or defenses to Count II do the Longs assert "that the judgment is entitled to recognition" by this Court. See Pl. Mem. at p. 9. Cf., Defendant's Answer and Affirmative Defenses [doc. 10], at pp. 3, 5. Indeed, the Bank recognizes that "this is

not a case in which [the Longs] have filed an affirmative claim seeking recognition of the Tribal Court judgment by this Court." Id. (emphasis added). Nor have Longs brought an action under S.D.C.L. § 1-1-25 to seek recognition of the tribal court judgment in the South Dakota courts.

Were the Longs to seek recognition or enforcement of the tribal court judgment in state or federal court, the Bank would have a full and fair opportunity to raise any claims it might have concerning alleged flaws in the tribal court proceedings. Litigation of such claims at this time is premature. The claims are not properly before the Court; nor are they ripe for review. The "basic rationale" behind the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves" in "disagreements" premised on "contingent future events that may not occur as anticipated, or indeed may not occur at all." Thomas v. Union Carbide Agr. Products Co., 473 U.S. 568, 580-581, 105 S.Ct. 3325, 3332-33 (1985) (internal citations and quotation marks omitted). This Court need not entangle itself in the merits of speculative foreign court recognition or enforcement proceedings.

B. The Bank Had Notice Of The Longs' Claims And An Opportunity To Be Heard.

The Longs' discrimination claim was brought pursuant to tribal law. The complaint alleged that, in selling the Land, the Bank "unfairly discriminated" against the Longs, who are tribal members, in favor of non-tribal members. Simon Aff., Ex. 20 at 9. The Longs alleged that the Bank's sale of the Land to non-Indians on terms more favorable than those offered the Longs "constitute[d] unequal treatment and unfair discrimination." Id. at 10. The complaint did not mention federal law. Id. at 9-10. Nor did it cite a single federal (or, for that matter, state) statute. Id. Instead, the complaint set forth the basic elements of the Longs' common law claim of

intentional discrimination. Nothing more is required to state a claim for relief under the tribal common law.[2]

Like the Longs' complaint, the interrogatory submitted to the jury on the discrimination claim made no mention of federal law. It asked simply: "Did the Defendant Bank intentionally discriminate against the Plaintiffs Ronnie and Lila Long based solely on their status as Indians or tribal members in the lease with option to purchase...?" Long Aff., Att. 1, p. 4. The jury responded in the affirmative by a vote of seven to zero. Id.

The fact that the Bank "proceeded," by its own admission, "under the assumption that the discrimination claim was based upon federal law," Pl. Mem. at 19 (emphasis added), is of no consequence. The Longs' submissions in the tribal court did not support this assumption. Indeed, the Bank's characterization of certain aspects of the record is disingenuous in this regard. Contrary to the Bank's assertions, the Longs' attorney did not state on the record that the Bank violated "the federal law regarding 'private lending.'" Pl. Mem. at p. 19 (emphasis added). Nor did the Longs respond to the Bank's motion for judgment notwithstanding the verdict by arguing that "the Tribal Court had jurisdiction over a federal claim of discrimination." Id. at 20. Not a single mention of federal antidiscrimination law appears in the Longs' post-trial brief. See Simon Aff., Ex. 27.

In denying the Bank's motion for judgment notwithstanding the verdict, the tribal trial court looked to tribal law and relevant federal law. In affirming the judgment, the appellate court noted that tribal law permits the courts to derive the elements of tribal causes of action from federal law. Simon Aff., Ex. 24 at 8 & n.5. The appellate court was careful to note that this

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[2] Rule 8(a) of the tribal rules of civil procedure requires a "short and plain statement of the claim showing that the pleader is entitled to relief ..." Cheyenne River Sioux Tribe Rules of Civil Procedure, Rule 8(a).

process "is not the pursuit of a federal cause of action in tribal court...but that of a 'borrowing' of federal law to stand in or amplify tribal law where it is necessary." Id. (emphasis in original). This comports with Justice Souter's declaration in Hicks, 533 U.S. at 384-385, 121 S.Ct. at 2323, that tribal law is often a "complex mix of tribal codes and federal, state, and traditional law."

The Tribal Court of Appeals upheld the judgment in the Longs' favor on the discrimination claim on tribal common law grounds. The appellate court expressly held that, under the common law of the Cheyenne River Sioux Tribe, intentional discrimination is "tortious conduct" over which the tribal courts have jurisdiction pursuant to Cheyenne River Sioux Tribal Law and Order Code § 1-4-3. The court based its common law holding on the reported decisions of the U.S. Supreme Court and the Cheyenne River Sioux Tribe. See Simon Aff., Ex. 24 at pp. 7-8 & nn.3-4. These decisions, cited and discussed in the Tribe's *amicus* brief in the tribal appellate court, see Simon Aff., Ex. 28, affirm that discrimination is a tort, and that it is prohibited under core principles of tribal common law. The tribal appellate court did not base its holding on historical texts, library books, or other archival information, as the Bank would have this Court believe. See Pl. Mem. 19-20. Indeed, in its nineteen-page opinion, the court cited no such sources. See Simon Aff. Ex. 24.

The fact that the appellate court was more thorough than the trial court in its articulation of the tribal law basis for the Longs' discrimination claim does not mean the Bank was denied due process. Nor does the fact that the appellate court considered alternative grounds not relied upon by the trial court. An appellate court may affirm a "judgment below on any ground which the law and the record permit." Smith v. Phillips, 455 U.S. 209, 215, n.6, 102 S.Ct. 940, 945 n.6 (1982). Accord, U.S. v. Rowland, 341 F.3d 774, 782 (8th Cir. 2003), cert. denied, 540 U.S. 1093, 124 S.Ct. 969 (2003) ("It is a well-settled principle that [an appellate court] may affirm a district

court's judgment on any basis supported by the record." (citation omitted).) For appellate courts considering "alternative grounds...not reached below," rather than "leav[ing] them for disposition on remand," is "an appropriate exercise of...discretion." Bennet v. Spear, 520 U.S. 154, 166-167, 117 S.Ct. 1154, 1163 (1997). In the instant action, the appellate court affirmed the trial court judgment on tribal law grounds that were amply supported by the record and the jury's finding that the "Bank intentionally discriminate[d] against [the Longs] based solely on their status as Indians or tribal members...." Long Aff., Att. 1, p. 4.

Throughout the tribal court proceedings, the Bank had notice of the Longs' discrimination claim and an opportunity to dispute the claim, including the opportunity to file a motion to dismiss for failure to state a claim, which would have clarified for the Bank the claim's source of law. This more than satisfies the fundamental requirements of due process, as articulated by the Supreme Court: "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" Wilkinson v. Austin, – U.S. – 125 S.Ct. 2384, 2396 (June 13, 2005), quoting Fuentes v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1983, 1994 (1972) and Baldwin v. Hale, 1 Wall. 223, 233, 17 L.Ed. 531 (1864).

CONCLUSION

For the reasons stated herein, *amicus curiae* Cheyenne River Sioux Tribe respectfully requests that this Court grant Defendants' Motion for Summary Judgment and deny Plaintiff's Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Steven J. Gunn, do hereby certify that on the 22nd day of December, 2005, I caused copies of the foregoing Brief of *Amicus Curiae* Cheyenne River Sioux Tribe Submitted for Consideration with the Parties' Cross-Motions for Summary Judgment to be electronically served upon:

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