UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

Plains Commerce Bank, Plaintiff, vs. Long Family Land and Cattle Company, Inc., and Ronnie and Lila Long, Defendants.	)	CIV 05-3002 **DEFENDANTS' BRIEF IN RESPONSE TO PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Defendants, Long Family Land and Cattle Company, Inc. and Ronnie and Lila Long (collectively referred to as the Longs), through their counsel of record, respectfully submit their Brief in response to Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, as follows:

Defendants, Long Family Land and Cattle Company, Inc. and Ronnie and Lila Long are sometimes collectively referred to in this Affidavit as the Longs. Ronnie and Lila Long are referred to as Ronnie and Lila Long. Plaintiff, Plains Commerce Bank is referred to in this Affidavit as the Bank. Attachments to Defendants' Brief in Support of Defendants' Motion for Summary Judgment are referred to as (Att. ___).

FACTS

The Bank was the lender for Long Family Land and Cattle Company, Inc. (referred to in this Affidavit as the Company) since 1989. (Simon Aff. para. 4) The Bank also loaned money to Ronnie and Lila Long. (Long Sec. Aff. p. 2) Some of the Bank's loans to the Company were guaranteed by the Bureau of Indian Affairs (referred to in this Affidavit as the BIA) (Simon Aff. para. 4; Long Aff. para. 10)

The Company was at all times a majority Indian-owned corporation involved in farming and ranching land located on the Cheyenne River Sioux Tribe Reservation. (Long Aff. para. 3) The Articles of Incorporation of the Company required that the Company "be controlled by Native Americans who at least at all times own 51% of the outstanding stock in the corporation." (Long Aff. para. 3, Att. 20) The shares of the Company were owned by Kenneth Long, Maxine Long, Ronnie Long, and Lila Long. (Long Sec. Aff. p. 2) Native American CRST members Maxine, Ronnie, and Lila Long at all times owned at least 51% of the Company. (Long Aff. para. 3, Att. 20) When Maxine Long died, she bequeathed her shares in the Company to Ronnie and Lila Long. (Long Sec. Aff. p. 2) When Kenneth Long died in 1995, he bequeathed his shares in the Company to his four children. Three of the children transferred their shares to Ronnie Long. (Long Sec. Aff. p. 2) After Kenneth's death in July 1995, Ronnie and Lila Long owned 100% of the Company. (Long Aff. para. 9) Thus, after July 1995, the Company was 100% Indian owned by CRST members, Ronnie and Lila Long. (Long Aff. para. 9) As an Indian-owned corporation, the Company was entitled to apply for and receive BIA guarantees for the loans it received from the Bank. (Long Sec. Aff. p. 2)

The Company was formed to qualify for and obtain BIA guaranteed bank loans for the Longs' family farming and ranching business. (Long Aff. para. 8) The Bank would not have been able to obtain BIA guarantees of its loans unless the Company was at all times at least 51% owned by Native Americans. 25 CFR sec. 103.7 provides that if Indian ownership falls below 51%, the bank loans will be in default, and the guaranty shall cease. (Long Aff. Att. 17). The Company owned livestock and machinery, grew and harvested crops, and pastured its livestock on 2,230 acres of land owned by Kenneth and Maxine Long. (Long Sec. Aff. p. 3) The Company pastured its livestock on the CRST Indian Range Unit leased by Ronnie Long and his

daughter, Bonita Richter, who are both Native American CRST Tribal members. (Long Aff. para 8.)

Loans made by the Bank to the Company were guaranteed by the BIA. (Long Sec. Aff. p. 3) The BIA guarantees required a first lien on the cattle, machinery, crops, and feed of the Company, and a second mortgage on the land owned by Kenneth and Maxine Long. (Long Aff. Att. 19) The principal place of business of the Company was at all times located on the CRST Reservation, Ronnie and Lila Long maintained a checking account on the CRST Reservation, and since 1996 the Company maintained a checking account on the CRST Reservation. (Long Aff. para. 3) (Long Sec. Aff. p. 3)

Kenneth and Maxine Long, Ronnie Long's parents, owned their 2,230 acres of deeded agricultural land for over 40 years. (Long Aff. para. 7) They also owned a house which was their residence. (Long Sec. Aff. p. 3) The land and house are located within the CRST Reservation. Ronnie Long's wife is Lila Long. Kenneth, Maxine, Ronnie, and Lila Long have lived on the CRST Reservation all of their lives. (Long Aff. para. 5) Maxine Long, and her son, Ronnie Long, and his wife, Lila Long, are all Native American members of the Cheyenne River Sioux Tribe. Kenneth Long was not a member of the CRST. (Long Aff. para. 6)

Kenneth and Maxine Long were required by the Bank to sign personal guarantees of the loans of the Bank to the Company. (Long Aff. para. 10; attached to Long Aff.) Kenneth and Maxine Long were required by the Bank to mortgage their 2,230 acres to the Bank as collateral for the Bank's loans to the Company. (Long Aff. para 10; attached to Long Aff.) The BIA guarantees of the Bank's loans to the Company are noted on the mortgages. (Long Aff. para. 10; attached to Long Aff.) Ronnie Long, Lila Long, Kenneth Long, and Maxine Long were all required by the Bank to grant security interests to the Bank in their personal vehicles, farm

equipment, crops, feed, grain, and livestock that were located on the 2,230 acres and within the CRST Reservation. (Long Aff. para. 10; attached to Long Aff.)

Kenneth Long died in July 1995. (Simon Aff. para. 4) In the spring of 1996, Bank officers came to the Longs' 2,230 acres on the CRST Reservation and inspected the land, livestock, hay, and machinery on the land. (Long Aff. para. 11) The Bank proposed a new loan agreement to Ronnie Long. (Long Sec. Aff. p. 4) Ronnie Long was bequeathed the 2,230 acres of land owned by Kenneth Long when he died in 1995, under his will and the assignments of the other children. (Long Aff. para. 16, Att. 21)

The discussions concerning the new loan agreement took place between the Bank officers, Ronnie and Lila Long, and CRST Tribal officers at the CRST Tribal offices located on the CRST Reservation. (Long Aff. para. 11) The Bank proposed a deed in lieu of foreclosure transferring ownership of the Longs' 2,230 acres and house to the Bank, and in return the Bank would credit $478,000 against the debt owed by the Longs to the Bank. The Bank agreed it would finance the sale of the Longs' land back to the Longs on a bank financed contract for deed. (Long Aff. para. 11) (Long Sec. Aff. p. 4)

Sometime later the Bank changed the agreement. The Bank sent a letter addressed to Ronnie Long, which was admitted into evidence without objection at trial, wherein the Bank told Ronnie Long the Bank would not finance the sale of the land back to the Longs on a contract for deed "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." (Long Aff. para. 12, Att. 2)

In the revised agreement the Bank changed the terms from a bank financed contract for deed to a two-year lease with option to purchase. The Longs could buy their land back from the

Bank by paying the Bank $468,000 in a lump sum at the end of only two years. (Long Aff. para. 13, Att. 3)

During the discussions concerning the revised agreement and the drafting and signing of the written agreements, the Bank was represented by its lawyer, but the Longs were not represented by a lawyer. (Long Sec. Aff. p. 5) The revised agreement was prepared by the Bank in two documents entitled: (a) Loan Agreement, and (b) Lease With Option to Purchase. Both documents were signed at the same time on the same day on December 5, 1996. (Long Aff. para. 16, Att. 3), and were part of the same agreement. (Long Sec. Aff. p. 5)

The revised agreement prepared by the Bank involved several main points: (a) when the 2,230 acres of land and house were deeded to the Bank, the Bank would credit $478,000 against debt owed to the bank by Ronnie and Lila Long and the Company; (b) the Longs would lease the land from the Bank for a period of two years; (c) the Bank would make the Longs a new operating loan of $70,000 to care of their cattle and crops; (d) the Bank would make the Longs a loan of $37,500 to purchase 110 calves to be fed and pastured with the Longs' calves to increase their income so they could buy back the land from the Bank; and (e) the Bank would enter into a lease purchase agreement which would provide that the Longs could buy back the 2,230 acres of land from the Bank at the end of two years. (Long Aff., Att. 3) (Long Sec. Aff. p. 5) The Bank received the deed to the 2,230 acres and the house by Personal Representatives Deed dated December 10, 1996. (Simon Aff., Att. 3) (Long Sec. Aff. p. 6)

The Loan Agreement shows that credit from the transfer of the land and house paid off a personal loan of the Bank to Ronnie and Lila Long, as well as BIA guaranteed loans of the Bank to the Company. (Simon Aff., Att. 5)

The Loan Agreement references and attaches the deed the Bank received to the 2,230 acres of land and the house and also provides that the Bank would enter into a lease with purchase option for the land. (Simon Aff., Att. 5)

Ronnie and Lila Long asked the Bank to extend the option exercise date sixty days. (Long Aff., Att. 6) The Bank denied the extension request. (Long Aff., Att. 6) The Longs did not give up possession of any of the 2,230 acres. (Long Sec. Aff. p. 6) CRST Law and Order Code 10-2-6(6) provides that where a tenant holds over and retains possession for more than 60 days after the expiration of the lease term, without any demand for possession or notice to quit by the landlord, the tenant shall be deemed to have permission of the landlord to hold over for an additional year, and such tenants shall not be liable for unlawful detainer for such holding over.

On October 28, 1995, the Longs met with three Bank officers, Jim Nielsen, Chuck Simon, and Dennis Jensen, and the Bank's lawyer; and also present was Dennis Huber and Bret Maxon from the North/South Dakota Native American Business Development Center; John Lemke, CRST/BIA Finance Credit Officer; Harley Henderson and Monica Lind, CRST officers; and Stacey Johnston, loan officer of the BIA. (Tr. 396) (Long Sec. Aff. p. 6) The cash flows developed by Dennis Huber and Bret Maxon were presented, and all parties agreed that the restructure plan would work. (Tr. 401) Dennis Huber of the North/South Dakota Native American Business Development Center testified at trial that he and his associate, Bret Maxon, prepared the cash flows on October 28, and 29. (Tr. Ex. 8A) He testified that the cash flows marked Trial Exhibit 8A were his work product. (Tr. 397) The Huber cash flows, Exhibit 8A, were prepared to show if the Bank's restructuring plan would work. (Exs. 5A, 6, 7) All parties agreed that the plan was economically feasible and would work. (Tr. 401) Stacey Johnston, credit officer of the BIA, had final approval of the restructuring plan. (Tr. 397) At the end of the meeting on October 28, the Bank, the Longs, and the BIA all agreed on the restructuring plan

and the Huber cash flows. Dennis Huber testified it was a done deal on October 29. (Tr. 400) Jim Nielsen for the Bank initialed the cash flows prepared by Dennis Huber. (Ex. 8A) (Long Sec. Aff. p. 6)

Ronnie Long explained that he needed the $40,000 of the $70,000 operating loan in November to prepare the livestock for winter. (Long Sec. Aff. p. 6) The Huber cash flow shows $40,000 of the $70,000 operating loan paid to Longs in November. (tr. Ex. 8A) Ronnie Long explained he needed the operating loan money in November to move hay twenty miles to where his cattle would spend the winter. (Long Aff. para. 19, Tr. 151) (Long Sec. Aff. p. 6)

The Loan Agreement and Lease With Option to Purchase prepared by the Bank were not ready to be signed however, until December 5, five weeks later. The Bank did not send a letter to the BIA requesting approval until December 12, six weeks later. (Tr. Ex. 8). The Bank enclosed with its letter to BIA a financial statement and modified cash flows. (Tr. Ex. 8)

Ronnie Long learned for the first time at trial, that the Bank had modified the Huber cash flows and the plan five days after he signed the Loan Agreement and Lease With Option to Purchase on December 5, 1996, without his knowledge or approval. (Tr. 188) (Long Sec. Aff. p. 6) Dennis Huber testified that the cash flows sent by the Bank to the BIA (Tr. Ex. 8) were not his work. (Tr. 408-409) He explained that a line of credit loan is key to the success of a restructure plan. (Tr. 409) However, the Bank's cash flows (Tr. Ex. 8) did not show any line of credit loan. The cash flows that Huber prepared show that the restructure plan would work (Tr. Ex. 8A), but the cash flows sent by the Bank to the BIA show that Longs' restructure plan would not work. (Tr. Ex. 8) The overdrafts shown on the bank's cash flows are minus $28,000 the first month, and overdrafts continue to increase throughout the Bank's cash flow (Tr. 410), increasing to $104,280 in overdrafts in August of the third year. It appears clear that the Bank in its letter to the BIA unilaterally increased the line of credit operating loan from $70,000 to $85,000, showing

Longs' operation more needy of borrowed money. (Tr. 410) The increased line of credit requested by the Bank in its letter to the BIA of $85,000, however, would not come close to covering the deficit spending of $104,280 shown on the Bank's cash flows for the third year of the plan. (Tr. Ex. 8) Dennis Huber testified that the BIA would not approve such negative cash flows. (Tr. 410) The Huber cash flows approved by everyone at the October 28 meeting, which were initialed by Jim Nielsen for the Bank and approved by Stacey Johnston for the BIA (Tr. Ex. 8A), show an operating loan of $70,000, not $85,000, and do not show $104,280 of red ink as shown on the Bank's cash flows. (Tr. Ex. 8)

One of the jurors asked the Court "whose initials are on top of the 8A cash flows, year 1?" The Bank responded that the initials are Jim Nielsen's, a Bank officer. (Tr. 429) This shows that the Bank approved Huber's cash flows. (Ex. 8A) Although the Bank's letter to the BIA of December 12 showed an operating loan of $85,000, agreeing with the bad cash flows attached to the Bank's letter to the BIA (Tr. Ex. 8), the Bank's later letter of January 16, to Dennis Huber shows an operating loan of $40,000, which is in line with Huber's good cash flows. (Tr Ex. 10) (Tr. Ex. 8A). Stacey Johnston had already approved Huber's cash flows for the BIA on October 28. (Tr. Ex. 8A) However, the Bank sent modified cash flows to the BIA, which the BIA believed were a "modification" of the plan requiring a "more complete application." (Tr. 290) (Tr. Ex. 8, 11) It is undisputed the Bank never made a more complete application to the BIA as requested by the BIA (Tr. 166, 290) (Tr. Ex. 11), never submitted a more complete application as requested by the BIA, and never loaned Longs any emergency operating money as authorized by 25 CFR 103.22. (Long Sec. Aff. p. 9)

The Huber cash flows approved by everyone October 28, show that $40,000 of the $70,000 operating loan was needed just a few days later in November. (Tr. Ex. 8A) At the meeting on October 28, Ronnie Long stated that he needed the money right away before winter

storms hit to move hay some twenty miles from the fields where it was baled to the cattle located in the winter breaks on Ronnie Long's Indian Range Unit. (Long Sec. Aff. p. 9) Ronnie Long also requested $2,000 of the operating loan to purchase insurance on the cattle. (Long Sec. Aff. p. 9) It is undisputed that the Bank never advanced the Longs any of the $70,000 operating funds as promised. (Tr. 358) The Bank never loaned any of the $37,500 direct loan to buy cattle as promised. (Long Sec. Aff. p. 9) If the Bank had advanced $2,000 for insurance, the insurance would have covered the cattle loss. (Tr. 156)

The Bank could have made an emergency loan under the CFR of 10% of the existing loan guarantee, for an immediate loan of $42,800 automatically guaranteed by BIA to feed and care for the livestock. (Tr. 355) (Tr. Ex. 11) Such emergency loan would be automatically guaranteed by the existing 84% BIA guarantee to preserve the collateral. (Tr. 291) The Bank did not make an emergency loan to move the hay to the cattle or to insure the cattle. (Tr. 290, 359-360) In December before Christmas, Ronnie Long and John Lemke of the CRST Planning Office called the Bank and requested that the Bank make a CFR emergency feed loan under the existing BIA guarantee to protect the cattle. (Tr. 292) The Bank made no response to the BIA, the Longs, or to the CRST Planning Office. (Long Sec. Aff. p. 9)

At trial the Longs argued that the Bank was in bad faith in not promptly preparing the agreement and securing BIA approval within a few days after the October 28 meeting when everyone agreed, including the BIA. (Long Sec. Aff. p. 9) At trial the Bank offered no testimony to explain why it took the Bank from October 29, to December 5, a period of five weeks to get the agreements ready to sign (Tr. Exs. 6, 7), or why it took another week to send the application to the BIA, or why the Bank modified the Huber cash flows. (Long Sec. Aff. p. 10) Seven weeks went by from October 28, when everyone approved the plan and Huber's cash flows, until the Bank finally sent the application to the BIA. This period of time was critical to

the Longs to obtain operating funds so they could move the hay to the cattle and prepare for the coming winter storms. (Long Sec. Aff. p. 10)

Ronnie Long requested and was told on December 5, that he would receive his operating loan so he could pay for moving his hay to his cattle located in winter pastures on his CRST lease twenty miles away. (Long Aff. para. 17, Tr. 150-153) Ronnie Long made several requests to the Bank in November and December for a release of operating loan funds so he could move hay to the cattle in preparation for winter storms. (Long Aff. para. 17, Tr. 291) A serious winter blizzard hit the area January 15-16, 1997, with deep snow, strong wind, and below zero temperatures. (Long Sec. Aff. p. 10) The hungry cattle left the protection of the wooded draws in the storm searching for something to eat and died on the unprotected prairie. (Long Sec. Aff. p. 10) The Longs lost 277 of 286 calves, and 230 of 349 cows, and several horses. (Tr. Ex. 14) The Longs set out their cattle loss damages of $1,236,792 on Trial Exhibit 23. (Long Sec. Aff. p. 10) If hay had been available in the wooded draws, the cattle would not have left the protected draws and would have survived. (Tr. 158) If money had been made available by the Bank from the promised operating loan or CFR emergency funds, insurance would have been purchased, and the Longs would not have suffered the substantial loss.

It was undisputed at trial that from October when the Loan Agreement and Huber cash flow were approved by everyone (Tr. Ex. 8A) through January 15, when the cattle died, the Bank never released to the Longs any of the promised $70,000 operating loan, or any of the promised $37,500 cattle purchase loan, or any emergency funds authorized by the CFR. (Long Sec. Aff. p. 10)

In June of 1999, the Bank sent a letter to the CRST Court requesting that the CRST Court serve a Notice to Quit on Ronnie Long describing the entire 2,230 acres. (Long Sec. Aff. p. 10) The CRST Court accommodated the Bank. The request was approved ex parte by Chief Judge

Bluespruce on June 15, 1999, and was served on the Longs by the CRST Court on June 16, 1999. (Tr. Ex. 20) (Long Aff. para. 24, Att. 10) The Bank voluntarily came into the CRST Court requesting the assistance of the Court without reserving any objection or reservation to the jurisdiction of the CRST Court over the Bank as party to such eviction action. (Long Aff. para. 24, Att. 10) Ronnie and Lila Long and their children did not move off the land and did not remove their cattle, machinery, crops, or hay off of the 2,230 acres of land. (Long Sec. Aff. p. 11)

The pleadings filed in CRST trial court are attached to the Defendants' Brief in Support of Defendants' Motion for Summary Judgment and Mr. Simon's Affidavit as attachments: (1) the Bank's letter to CRST trial court enclosing Notice to Quit to Ronnie Long (Long Aff., Atts. 9 and 10), (2) Longs' Complaint and Amended Complaint (Simon Aff., Atts. 18, 20), (3) CRST Opinion (Simon Aff., Att. 19), (4) Jury Verdicts (Long Aff., Att. 1), (5) CRST Judgment (Long Aff., Att. 14), CRST Supplemental Judgment (Long Aff., Att. 15), and (6) CRST Court of Appeals Memorandum Opinion and Order (Long. Aff., Att. 16).

The Longs' cause of action for discrimination was not tried at the trial court level based on a 42 U.S.C. 1981 claim. (Long Sec. Aff. p. 11) The Bank's statement is not true. When questioned by CRST Appellate Chief Judge Frank R. Pommersheim on this point, Bank counsel stated: "So in the federal case, (Nevada v. Hicks) it came out specifically - - and not to say that the Plaintiff (Longs) has brought forth specifically, 42 U.S.C. 1981. They haven't. But the allegations they have made would be taken care of under that statute, or possibly under a state statute." (Oral Argument, Tr. 13)

ARGUMENT

At trial the Longs presented four claims: (1) breach of contract, (2) contractual bad faith, (3) discrimination, and (4) self help. The jury decided in favor of the Longs on breach of

contract, contractual bad faith and discrimination, and decided for the Bank on self help. (Long Aff., Att. 1)

The Bank has acknowledged that the Tribal court has jurisdiction over the claims of the Longs except for the discrimination claim. The Bank's counsel stated: "And I think it's lacking subject matter jurisdiction, and that was for discrimination." (Oral Argument Tr. 12) The Bank stated in its Motion for Summary Judgment in the Tribal court: "the Court has jurisdiction over the subject matter of this action." (Motion for S.J. para. 2) The Bank's jurisdictional claim is limited in scope to the argument that the CRST Tribal Court does not have jurisdiction over the Longs' discrimination claim. (Bank Appellate Brief pp. 6-9) This limitation in scope of the Bank's jurisdictional claim, should shut out in this Federal Court case any other jurisdiction issue, except the Bank's claim that the Tribal court lacked subject matter jurisdiction over the Longs' discrimination claim. The exhaustion doctrine stated in National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985), forecloses the Bank from raising any other jurisdictional claims in this Court. In the CRST Tribal Court the Bank did not challenge the jurisdiction of the Tribal court over the Longs' claims against the Bank, except for the discrimination claim.

The Longs did not allege 42 U.S.C. sec. 1981 or any federal statute in their Amended Complaint as a basis for the discrimination claim. (Simon Aff., Att. 20, pp. 9-10) The Bank did not question the basis in law for the Longs' discrimination claim through a motion to dismiss for failure to state a claim on which relief might be granted. There were no jury instructions provided to the Tribal court jury on any claimed federal cause of action for discrimination under 42 U.S.C. sec. 1981.

The factual basis for the Longs' discrimination claim was based on the Bank's agreement in 1996 to sell the land back to them on favorable terms on a bank financed contract for deed.

(Long Sec. Aff. p. 12) The Bank then withdrew its agreement to sell the land back to the Longs on a 20 year contract for deed because it involved an "Indian owned entity" and related "jurisdictional problems." (Tr. Ex. 4) (Tr. 106-7, 330) The Bank changed the agreement, and in the Lease With Option to Purchase the Bank required the Longs to make payment of $468,000 in full in a lump sum in two years. The Longs are Native Americans and enrolled members of the CRST, and the Company was 100% Indian owned in 1996 by Ronnie and Lila Long. (Long Sec. Aff. p. 2) After the Bank refused to sell the land back to them on a favorable bank financed contract for deed, the Bank then sold the land to non-Indians who are non-tribal members on favorable terms on a contract for deed where the FSA government payments made the contract for deed payments. The Longs claimed they were discriminated against because the Bank denied them the privilege of favorable Bank financing through a contract for deed solely because of their status as Indians and tribal members. (Long Sec. Aff. p. 13) The jury decided this issue in favor of the Longs. (Long Aff., Att. 1)

The legal basis for the discrimination claims in Tribal court was tribal law. (Long Sec. Aff. p. 13) CRST By-Laws, Art. V sec. 1(c) provides that trial courts "have jurisdiction over claims and disputes arising on the reservation," including "tortous conduct" under C.R.C. sec. 1-4-3(2)D, which provides jurisdiction over a "tortous act" or "tortous conduct" for any "civil cause of action arising from such act or conduct." The Supreme Court has 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 (2003). A claim based on discrimination essentially sounds in tort, therefore, jurisdiction over "tortous conduct" includes jurisdiction over the Longs' discrimination claim.

The legal basis for the Longs' claims against the Bank, including the discrimination claim, is the rule stated by the Supreme Court in Montana v. United States, 450 U.S. 544, 565

(1981). After stating the general rule of no jurisdiction over non-members, the Supreme Court in Montana stated that "to be sure, Indian tribes retain inherent power to exercise some forms of civil jurisdiction over non-Indian fee lands." 450 U.S. at 565. The first exception established by the Supreme Court fits this case and provides the Tribal court with jurisdiction over: "the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." The activities of the Bank in this case fit the first exception and provide the Tribal court with jurisdiction over the Longs' claims. Under the facts of this case, the Tribal court had jurisdiction over the Longs' claims against the Bank including the tortous conduct of the Bank which is the factual basis of the Longs' claim of discrimination. The jury decided on the facts of this case that the Bank "intentionally discriminated 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) (Tr. Ex. 7)

The CRST Tribal court had subject matter jurisdiction over the claims presented by the Longs. The facts in this case establish that the conduct and activities of the Bank fit the first exception set out in Montana v. U.S., 450 U.S. 544, 565 (1981). 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, where the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.

The Bank entered consensual relationships with the Company and with Tribal members, Maxine Long, Ronnie Long, and Lila Long. The Bank loaned money to Ronnie and Lila Long which involved loan agreements, promissory notes, and security agreements. The Bank stated in

Plains Commerce Bank's Brief in Support of Motion for Summary Judgment dated September 24, 2002, submitted in the Tribal court:

> Plains Commerce Bank, formerly Bank of Hoven, has been doing business with various members of the Long Family and entities owned by them since approximately 1989. Kenneth and Maxine Long, husband and wife, as well as their son, Ronnie Long, and his wife, Lila Long, and Long Family Land and Cattle Company, Inc., the corporation owned by them, all did business with Plains Commerce Bank.
>
> The Bank made numerous loans to Long Family Land and Cattle Company, Inc. Kenneth Long and Maxine Long mortgaged all of the land which they owned in Dewey County, which was approximately 2,230 acres, to the Bank as collateral for these loans. Both Kenneth Long and Maxine Long personally guaranteed the debt of Long Family Land and Cattle Company, Inc. to the Bank.

The Bank has admitted consensual relationships with the Company as well as with CRST members, Maxine Long, Ronnie Long, and Lila Long. The Bank made loans to the Company, which was at all times an Indian owned and controlled corporation, with at least 51% of the stock owned by Indian members of the CRST. The Bank required the Company to grant the Bank a security interest in its livestock, machinery, crops, and feed. The Bank entered into contracts and agreements with the Company such as loan agreements, promissory notes, security agreements, a lease with option to purchase, and other consensual relationships.

The Bank required Kenneth Long and CRST member, Maxine Long, to mortgage their 2,230 acres and house to the Bank for collateral for the Bank's loans to the Company. The Bank required Kenneth Long and CRST members, Maxine Long, Ronnie Long, and Lila Long, to personally guarantee the loans of the Bank to the Company. Kenneth Long, and CRST members, Maxine Long, Ronnie Long, and Lila Long, were required by the Bank to grant the Bank a security interest in their personal property including their livestock, machinery, crops, and feed. The Bank required Ronnie Long in connection with the Lease With Option to Purchase to assign to the Bank payments of $44,000 per year received from Kenneth Long's

CRP contract bequeathed to Ronnie Long under his will. Such consensual agreements included loan agreements, personal guarantee agreements, promissory notes, mortgages, and other arrangements.

Such consensual relationships extended over a period of years beginning in 1989. The Bank became the owner of the Longs' 2,230 acres and house located on the CRST Reservation in December 1996, and the Bank was a landowner of such property on the Reservation through 1999, and is still the owner of 960 acres to the present date. The Bank entered into the Loan Agreement (Tr. Ex. 6) and the Lease With Option to Purchase (Tr. Ex. 7) with the Company in December 1996. Such lease with the Bank as the landlord and the Company as the tenant with option to purchase existed through December 1998. The loans of the Bank to the Company were guaranteed by the BIA solely because the Company was an Indian owned and controlled business. The Bank benefited from the BIA guarantees. After the Longs' cattle died, the Bank submitted a claim on the BIA guarantees, and the Bank received $392,968.55 from the BIA. (Tr. Ex. 16) In addition, the Bank received $88,000 in CRP payments on the land under the Lease With Option to Purchase, the Bank received the house and land valued by the Bank at $478,000 in the Loan Agreement, the Bank received $100,000 from the life insurance of Kenneth Long, and the Bank received FSA farm program payments as owner of the land. Clearly the Bank benefited from the consensual relationships with the Indian owned Company and the CRST members.

Such activity of the bank may be properly characterized as a non-member landowner on the CRST Reservation. The Bank filed in Tribal court a Notice to Quit addressed to CRST member, Ronnie Long, to remove him and his wife and CRST member, Lila Long, and their children from the land that was leased to the Company by the Bank.

Such activities of non-member Bank entering into numerous consensual relationships with Tribal members through such commercial dealing, contracts, leases, and other arrangements is a clear fit with the first exception Tribal court jurisdiction rule stated by the Supreme Court in Montana.

The Bank cites as authority for its lack of jurisdiction argument the United States Supreme Court case, Nevada v. Hicks, 121 S. Ct. 2304 (2001). However, the Hicks case does not apply in this case. In Hicks, the Supreme Court held that a Nevada tribal court did not have jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribal member suspected of having violated state law while off the reservation. 121 S. Ct. at 2309-13. Applying the principles of Montana v. United States, 450 U.S. 544 (1981), the Supreme Court determined, among other things, that:

> (1) tribal authority to regulate state officers executing process relating to state offenses that occurred off the reservation was not essential to tribal self-government or internal relations – to "the right to make laws and be ruled by them"; and
> (2) Congress did not strip states of their inherent jurisdiction on reservations with regard to off-reservation violations of state criminal laws.

Id. at 2313. The Court's holding was "limited to the question of tribal-court jurisdiction over state officers enforcing state law," and explicitly left "open the question of tribal-court jurisdiction over nonmember defendants in general." Id. at 2309 n.2; see also, id. at 2319 (Souter, J. concurring); id. at 2324 (Ginsburg, J. concurring).

Inasmuch as Hicks is factually and legally distinguishable from the case at hand, the Hicks case does not apply, much less govern, the jurisdiction of the CRST Tribal court over Longs' claim of discrimination presented in this case.

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) The Bank argues that the instant case,

like CCF, involves the dealings of two non-Indians, and all decisions and transactions underlying the case were made and implemented off the Reservation. (Pl. Mem. p. 15)

The facts in CCF, however, clearly distinguish CCF from the present case. The only parties to the letter agreement were CCF, a Virginia corporation, and Hunkpati, a South Dakota corporation. Neither the Tribe nor Tribal members had any connection with the contracts or the administration of them. Certain key individuals involved in Hunkpati were not enrolled members of the Tribe. Neither party is either a tribe or a tribal member. It is undisputed and clear that there was no consensual relationship with the Tribe or members of that Tribe. The alleged conduct which forms the basis for the complaints in tribal court against CCF did not occur within the Reservation. All decisions and related actions regarding the termination of CCF's involvement with Hunkpati were made and implemented off the Reservation. In CCF, this Court found that the first exception in Montana was not satisfied because the parties were not tribal members, all funds were solicited and received off the Reservation, all location and activities were off the Reservation, and it was clear there was no consensual relationship with tribal members.

The facts in A-1 Contractors v. Strate, 76 F.3d 930 (8th Cir. 1996) is also distinguished on the basis that the case involved two non-Indians involved in a motor vehicle accident on a public highway within the boundaries of the reservation. The consensual relations present in the instant case are not present in Strate.

In the present case, there were numerous consensual agreements entered into by the Bank and the Company, and CRST Tribal members, Maxine Long, Ronnie Long, and Lila Long. The Company was at all times at least 51% owned by CRST members. The Bank required a mortgage on the Longs' land located on the Reservation from the owners, Kenneth and Maxine Long. The Bank became the owner of the land under the Loan Agreement, and leased the land

back to the Company under the Lease With Option to Purchase. (Tr. Ex. 6 and 7) (Long Aff., Att. 3) Discussions concerning these agreements took place on the Longs' land and in the CRST Tribal offices on the CRST Reservation. The discussions included Bank officers, Ronnie and Lila Long, BIA officer Stacey Johnston, and CRST finance officer John Lemke.

In view of the facts of this case, it cannot be said that the Bank was "dragged along" into Tribal court by someone else's choice to locate on the Reservation. In this case the first exception in Montana is satisfied, and the CRST Court had subject matter jurisdiction over the claims and issues of the Longs against the Bank.

Dated this 22nd day of December, 2005.

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