**NO. 06-3093**

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***In The United States Court Of Appeals***

***For The Eighth Circuit***

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Plains Commerce Bank,

Plaintiff – Appellant

v.

Long Family Land and Cattle Company, Inc. and
Ronnie and Lila Long,

Defendants – Appellees

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On Appeal from the United States District Court
for the District of South Dakota
District Court File No. 05-3002

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# *APPELLANT PLAINS COMMERCE BANK'S REPLY BRIEF*

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## ARGUMENT

The Long Defendants rely on a strained interpretation of the Tribal Court proceedings, overstating, and misstating the record in this proceeding to argue that the Tribal Court had subject-matter jurisdiction and provided fundamental due process to Plains Bank. Neither the Long Defendants nor the Tribe deal successfully with the dispositive arguments raised in the Bank's opening brief.

### I. The Tribal Court did not have subject-matter jurisdiction.

#### A. The District Court erred in finding jurisdiction under the first Montana exception.

The question here is whether the Tribal Court had subject-matter jurisdiction over the Long Defendants' claim against the Bank under the first Montana exception. Contrary to the Long Defendants' and the Tribe's suggestions, the second Montana exception is wholly inapplicable. This is what the District Court correctly concluded below. What remains is for this Court to correct the District Court's error regarding the first Montana exception.

The Montana exceptions are narrow qualifications to the holding of the Supreme Court that the inherent powers of Indian Tribes do not extend to the activities of non-members. Nevada v. Hicks, 533 U.S. 353, 358-59 (2001). In an effort to stretch those exceptions to serve their purposes in this case, the Long Defendants and the Tribe misstate the record in this case. For example it is not true, as the Tribe asserts, that at the time of the loans in question "Ronnie and Lila Long owned all of the [Long Company] stock." (Amicus Br., p. 5.) The record

does not support that assertion (A.App. 00140-41) and the District Court did not so find (A.Add. 00021). Further, the land in question was not owned by Defendant Ronnie Long as the Long Defendants assert. (Appellee's Br., p. 2.) The Bank owned the land. (A.Add. 00021.)

The Bank's ownership of the land is an important factor in analyzing jurisdiction under the first Montana exception. In Nevada, the Supreme Court noted that land ownership is frequently dispositive where the power of a tribal court to regulate the activities of a non-member in connection with reservation land is at issue. Nevada v. Hicks, 533 U.S. at 360. (Although tribal ownership is not alone enough to support regulatory jurisdiction over non-members, "the absence of tribal ownership has been virtually conclusive of the absence of tribal civil jurisdiction….")

Similarly, the Long Defendants' percentage ownership of Long Company stock is important. Overstating the record in that regard, the Tribe urges that the Company should be considered a "tribal member" for purposes of the first Montana exception. And the Long Defendants cite a South Dakota case in which that court conflated the corporate separation between a company and its sole tribal member shareholder for purposes of immunity from state taxation. In effect, Appellees and the Tribe argue that the Long Defendants be given a tribal identity for first Montana exception purposes. The argument is specious.

The United States Supreme Court has twice considered the possibility of corporate racial identity. In each case, the Court rejected the concept. In Connecticut General Life Insurance Co. v. Johnson, 303 U.S. 77, 87 (1938), Justice Black stated in dissent that, "Corporations have neither race nor color." Nothing in the majority opinion disputed Justice Black's view, which was upheld more recently in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977). Evaluating whether a corporation had standing to pursue a discrimination claim, Justice Powell observed: "[a]s a corporation, MHDC has no racial identity and cannot be the target of the petitioners' alleged discrimination." 429 U.S. at 263. This Court, invited to characterize the language of Arlington Heights as dictum in Oti Kaga, Inc. v. South Dakota Housing Development Authority, 342 F.3d 871 (2003), declined to do so, finding instead that the corporation's "presumed lack of racial identity" was not dispositive on the standing issue presented. 342 F.2d at 880.

Policy considerations distinguish the South Dakota decision cited by the Long Defendants: Pourier v. South Dakota Dep't of Revenue, 658 NW 2d 395 (2003), vacated in part, 674 N.W. 2d 314. In the face of directly contrary federal-court authority, see Baraga Prod., Inc. v. Comm'n of Revenue, 971 F. Supp. 294, 296-297 (W. D. Mich. 1997), affirmed, 256 F.3d 1228 (6th Cir. 1998) (unpublished), the court concluded that subjecting a 100% Indian-owned corporation to state taxation would, "hinder economic development" in "the

poorest [reservation] in the country," and declared the entity a tax-immune tribal member. Id.

Different policy considerations exist here. The Supreme Court has significantly limited tribal-court civil jurisdiction over non-tribal members, Montana v. U.S., 450 U.S. 544 (1981).

In the most recent Supreme Court decision addressing the principles of Montana, Justice Souter, concurring, outlined the policies underlying the Montana rule:

> The ability of nonmembers to know where tribal jurisdiction begins and ends, it should be stressed, is a matter of real, practical consequence given '[t]he special nature of [Indian] tribunals,'…which differ from traditional American courts in a number of significant respects.

Nevada, 533 U.S. 353, 383 (noting, inter alia, that with a "handful" of exceptions the constitutional protections of the Bill of Rights and the Fourteenth Amendment do not apply to Indian tribes and that tribal courts differ from American courts in a number of ways including "the independence of their judges," which makes tribal law "unusually difficult for an outsider to sort out," id. at 384-85).

The markedly different policy considerations underlying Montana distinguish Pourier and require a different resolution. The District Court should have applied the fundamental rule that a corporation is a separate entity and followed 8th Circuit precedent establishing that a party seeking to disregard the corporate form bears the burden of proving substantial reasons for doing so. See

Contractors, Laborers, Teamsters & Welfare Plan v. Hroch, 757 F.2d 184, 190 (8th Cir. 1985); Lakota Girl Scott Council, Inc. v. Havey Fund-Raising Mgmt., Inc., 519 F.2d 634, 638 (8th Cir. 1975).

Finally, the various factors relied upon by the District Court and urged by the Long Defendants and the Tribe for the proposition that the Bank somehow waived tribal court subject-matter jurisdiction by seeking service of a notice to quit, asserting a counterclaim, and the various other acts and failures to act alleged against the Bank run head long into and fail because of the uniform rule that subject-matter jurisdiction cannot be supplied or waived. The District Court's reliance on the Bank's conduct and statements in the Tribal Court therefore requires reversal.

### B. The Tribal Court improperly tried the discrimination claim under federal law.

A straightforward reading of Tribal Court record makes it clear that the trial court and the parties believed the discrimination claim was predicated on, not "borrowed" from, federal law. The following dialogue occurred before submission of the case to the jury:

> THE COURT: Count VI discrimination – yeah, Count VI, discrimination. I – I think I'm going to let that go to the jury. ….
>
> MR. VON WALD: I would just make a short argument, Your Honor. …. [T]here is a federal law that would be violated if it is indeed discrimination. But that's reserved for federal and state courts. ….

> THE COURT: So your argument is then that this Court has no authority to enforce discrimination laws? And I guess the discrimination law you are alleging was violated was in private lending?
>
> MR. HURLEY: Yes.
>
> ….
>
> THE COURT: I assume there is a federal law.
>
> ….
>
> THE COURT: Well, I think we have authority to enforce federal laws.
>
> ….
>
> THE COURT: Under public – under the law, a bank cannot treat people differently. Say, I offer a contract for deed to non-Indians but not to Indians. That violates federal law.

(A.App. 00117-18.)

Furthermore, in its post-trial Order, the Tribal Court made it clear that the basis for the discrimination claim was federal law. Noting that the Cheyenne River Sioux Tribe code and constitution contained no provision prohibiting private discrimination, the Court stated:

> The Court disagrees with the Bank's argument that this Court lacks the jurisdiction to enforce federal anti-discrimination laws against non-Indian entities over which the Court clearly has jurisdiction under the principles laid out in Nevada v. Hicks . . . .
>
> The Court does not believe that Hicks precludes a tribal court from exercising jurisdiction over a claim of discrimination, ultimately founded upon federal law. . . . Merely because the genesis of a right arises under federal law does not preclude this Court from enforcing that right.

(A.App. 00091 – 92.)

The notion that the discrimination claim was founded in tribal tort law was introduced by the Tribe, appearing as amicus in the Tribal Court of Appeals. The Tribal Court of Appeals adopted the Tribe's argument verbatim, quoting the footnote in which it first appeared in the Tribe's brief in its entirety. Compare footnote 3 of the Tribal Court of Appeals' opinion (A.Add. 0007) with footnote 3 of the Tribe's Amicus Brief (A.App. 00129).

There is no dispute that the Tribe has the power to and has apparently declared that the Tribal Court may try tort claims. Although the section of the CRST Code the Long Defendants, the Tribe, and the Tribal Court of Appeals all have cited appears in the personal-jurisdiction provisions of the code, CRST Code Sec. 1-4-3(2)(D), the Bank accepts the general proposition that the Tribal Court can try tort claims. Whether tribal law recognizes a tort of discrimination as argued by the Long Defendants and the Tribe is another matter.

The Bank has demonstrated that the Tribal Court cases cited in support of that proposition have nothing to do with discrimination and shed no light whatsoever on the proposition for which they are cited. Furthermore, the argument that the Long Defendants and the Tribe make that the Tribal Court was merely "borrowing" the principles of federal discrimination law in applying Tribal tort law is wholly unsupported either in the record or the authorities cited. The Tribal Court judge was not "borrowing" federal law principles when he said, "I think we have authority to enforce federal laws" during a discussion on jury instructions, nor

was he "borrowing" federal law when he said in his Post-trial Order that he did not believe that Nevada v. Hicks "precludes a trial court from exercising jurisdiction over a claim of discrimination, ultimately founded upon federal law." (Emphasis added.) Plainly, the Tribal Court applied federal discrimination law in submitting the case to the jury and upholding the jury verdict following trial.

The Long Defendants cite Dupree v. Cheyenne River Housing Authority, 16 Indian L. Rep. 6106 (CRST Ct. App. 1988) to argue that tribal courts may borrow from federal law. In Dupree, the Tribal Court of Appeals was careful to note that the CRST Rules of Civil Procedure specifically incorporate the Federal Rules of Civil Procedure. No comparable provision of the CRST Code has or can be cited here. If the authors had intended to incorporate federal discrimination laws as part of the CRST code, they presumably would have so stated.

Furthermore, the proposition that a tribal court, though without the power to enforce federal discrimination statutes, can borrow from them in applying tribal court law is a proposition this Court should reject. No lines can be drawn in such an ill-defined legal system and the "practical importance of being able to anticipate tribal jurisdiction" and "risk of substantial disuniformity in the interpretation of . . . federal law" cited by Justice Souter in Nevada v. Hicks are profoundly implicated by such a vague system of tribal court justice. This Court should not affirm the jurisdiction of the Tribal Court in the face of such problems.

The Tribal Court assumed jurisdiction of a federal discrimination claim, leaving the Bank no right to remove the case to a federal court. That right, afforded all other litigants faced with trial of a federal cause of action in a court other than United States District Court, is basic to our federal system of government.

Finally, the fact pointed to by the Tribe that in Montana the Supreme Court cited Williams v. Lee, 358 U.S. 217 (1959) as a case upholding Tribal Court civil jurisdiction over claims "involving non-Indians" does not support Appellee's position. Neither do the "four separate occasions" following Montana in which the Supreme Court has "addressed the power of Indian tribal courts to adjudicate tort claims brought by tribal members against non-Indians." Williams involved an affirmative claim by a non-tribal member, not a suit, as here, commenced against a non-Indian. Indeed, as Justice Scalia noted in Nevada, "we have never held that a tribal court had jurisdiction over a non-member defendant." 533 U.S. at 358. Neither Williams nor the fact that the Supreme Court cited it in Montana is instructive. And, with respect to the four post-Montana decisions the Tribe cites, two of the cases, National Farmers Union Insurance Companies and Iowa Mutual Insurance Co., are exhaustion decisions in which the Supreme Court reached no conclusion whatsoever regarding tribal court jurisdiction. The Supreme Court said as much in the third case the Tribe cites, Strate: "Both [National Farmers Union and Iowa Mutual] describe an exhaustion rule allowing tribal courts initially to

respond to invocation to their jurisdiction; neither establishes tribal-court adjudicatory authority, even over the lawsuits involved in those cases." Strate v. A-1 Contractors, 520 U.S. 438, 448 (1997). In Strate, the Supreme Court held against Tribal Court jurisdiction over non-tribal members. And in Nevada, the Supreme Court specifically held that the tribal court did not have jurisdiction to adjudicate tort claims against non-tribe state officials.

The Tribal Court lacked jurisdiction under the first Montana exception. And notwithstanding that, had no jurisdiction to try a federal discrimination claim. The District Court erred in failing to recognize this.

## II. The Long Defendants' and the Tribe's urging that the Long Defendants brought a tribal, common-law discrimination claim does not make it so; because no such claim existed before the Tribal Court of Appeals' opinion, the Bank was denied due process.

### A. The Long Defendants' discrimination-claim allegations could have implied only a federal claim.

The Long Defendants and the Tribe make much of the fact that the Long Defendants' Amended Complaint containing their discrimination claim made no mention of federal law. (A.App. 70-74.) It didn't. But the analysis does not end there.

If it was not a federal-law discrimination claim, however, then what was it? When the Tribal Court of Appeals considered that question, it had no ready answer. It found no clear guidance in the tribal law. (A.App. 104.) But by starting from its tort jurisdiction, and borrowing from federal discrimination law,

the Tribal Court of Appeals announced a new tribal common-law tort: the tort of discrimination – albeit without precisely defining the elements of that tort. It was only on appeal, responding to issues raised by the Tribe as amicus, and recognizing the problems inherent in the discrimination claim arising out of federal law that the Tribal Court of Appeals recast the discrimination claim as a tribal-law discrimination claim.

The essence of the Bank's due-process claim is that it believed it was litigating a federal discrimination claim – one that the tribal court lacked jurisdiction to adjudicate. The Bank, the Tribal Court, and presumably the Longs (until their view was informed by the Tribe's amicus arguments on appeal) all believed it was a federal claim. There was no reason to think otherwise.

### B. There was no need for the Bank to seek clarification of the Long Defendants' discrimination claim.

It is true that the Bank did not seek clarification of the basis underlying the Long Defendants' discrimination claim. But it had no need to. It was apparent that it was a federal discrimination claim because no other such analogous tribal-law claim had been articulated or recognized. The concept of a tribal, common-law tort of discrimination simply did not exist. The implicit reference to an existing federal-law discrimination claim (made explicit in the Tribal Court's jury-instruction deliberations and its post-trial rulings) is far more accessible than an implicit reference to something that does not yet exist. The due-process problem arose, however, because the Tribal Court of Appeals, in an attempt to preserve

what had occurred at trial, introduced an after-the-fact tribal-law rationalization. In doing so, it violated the integrity of the due-process clause.

### C. The tribal, common-law tort of discrimination remains undefined.

The Tribal Court of Appeals' opinion recognized, for the first time, the tribal, common-law tort of discrimination. What, though, are the parameters of this tribal, common-law discrimination claim? Must there be actual intent? Or is negligence or gross negligence sufficient? Is there any requirement that the claimant prove discrimination damages? Is there any causation requirement between the discrimination and damages? Or is discrimination actionable per se? Are there presumptions and burden shifting that influence the discrimination claim? These questions all have answers when applied to a federal discrimination claim. They have no answer in the context of the common-law tort of discrimination under tribal law announced by the Tribal Court of Appeals. The Tribal Court of Appeals' pronouncement that there is a tort of discrimination under tribal law begs the definition of what that tort consists of. This is the due-process problem.

Analysis of the Long Defendants' discrimination claim in their Amended Complaint, Count VI, does not shed light on these questions. (A.App. 71-74.) There is no allegation of intent. There is no allegation of causation. And there is no allegation of resulting damages. So the question remains: what are the parameters of this newly announced tort of tribal discrimination?

### D. The difference between a federal discrimination claim and a tribal discrimination claim is that the Tribal Court had no jurisdiction to adjudicate a federal claim.

The Long Defendants' brief asks how a federal claim would have differed from a tribal claim. The difference is that a federal claim could not have been litigated in tribal court. If the Bank had known it was litigating a tribal-law discrimination claim that wouldn't be vulnerable to criticism in federal court, that would have made a significant difference. The Bank believed that the Long Defendants' inclusion of a federal discrimination claim tainted the entire outcome, which would ultimately be remedied by a federal court.

There is, unfortunately, no right of removal from tribal court to federal court such as exists to allow defendants to prevent state-court litigation of federal questions. If the Bank had known it was litigating a tribal-law discrimination claim that wasn't subject to post-judgment attack in federal court, that would have influenced its litigation strategy, and quite possibly its settlement position.

### E. Section 1-4-3 does not establish a tribal tort of discrimination.

The Long Defendants, the Tribe, and the Tribal Court of Appeals rely heavily on Cheyenne River Sioux Tribal Law and Order Code Section 1-4-3. But that law merely establishes the tort jurisdiction of tribal court. It begs the question of whether there is a tribal tort of discrimination.

None of the Tribe's statutory laws, nor the tribal cases cited by the Tribal Court of Appeals, articulate a tribal tort of discrimination. They stand merely for

the proposition that the tribal court has jurisdiction to adjudicate torts. In articulating a new tribal common-law discrimination tort, in order to avoid creating a due-process violation, the Tribal Court of Appeals should have remanded the case for further proceedings in the Tribal Court. Instead, it provided after-the-fact justification and violated the principle of fundamental fairness that a party needs to be able to discern the legal basis for a claim before it is litigated in order to defend against it.

### F. Wilson precludes taking judicial notice of unpled and unproven tribal law.

Although the Long Defendants do not even mention it, the Tribe argues in its amicus brief that Wilson v. Owens, 86 F. 571 (8th Cir. 1898) does not control the outcome of this case. Wilson, however, is apposite. The Tribal Court of Appeals cannot just announce new tribal common-law after the fact as supporting what was done in the Tribal Court. The concept of tribal discrimination law did not even exist until the Tribal Court of Appeals' opinion. To say it governed what went before is nonsensical, even Kafkaesque.

The limitation Wilson puts on this is that federal courts have no power to take judicial notice of tribal law that has not been pleaded and proven. The Tribe's and Long Defendants' citation of CRST by laws, and its law and order code as justifying the conclusion of a tribal common-law discrimination claim, is exactly the kind of thing that Wilson prohibits.

### G. The affirm-on-any-ground doctrine does not apply to theories not pressed or passed at trial.

Both the Long Defendants and the Tribe advance similar "alternate grounds" arguments based on overly broad readings of cases that completely ignore the subtleties of those decisions. Setting aside the criminal decisions they cite that have no bearing on the question (U.S. v. Rowland, 341 F.3d 774 (8th Cir. 2003); U.S. v. Sager, 743 F.2d 1261 (8th Cir. 1984); and Smith v. Philips, 455 U.S. 209 (1982)), their remaining cases are either summary judgment or Rule 12 cases where the court used the "affirm on any basis" language (Bennett v. Spear, 520 U.S. 154 (1997); Gralike v. Cook, 191 F.3d 911 (8th Cir. 1999); Stevens v. Redwing, 146 F.3d 538 (9th Cir. 1998); and Wisdom v. First Midwest Bank, 167 F.3d 402 (8th Cir. 1999)). But they fail to even address the pressed-or-passed-below authority distinguished in the Bank's initial brief – thereby presumably conceding that no response was possible other than the one they made.

### H. Justice Souter's concurrence in Hicks favored narrowing tribal-court jurisdiction rather than expanding it.

The Tribe argues that Justice Souter's comment in Nevada v. Hicks, 533 U.S. 353, 384-85 (2001), about tribal law being a complex mix from various sources, is consistent with the Tribal Court of Appeals' borrowing from federal law to extend tribal jurisdiction to the Long Defendants' discrimination claim. But Justice Souter was not advocating an extension of jurisdiction. He made the point that tribal law was a complex mix of tribal codes, federal, state, and traditional law

that would be "unusually difficult for an outsider to sort out," which in turn weighed in favor of constraining rather than expanding tribal jurisdiction. He also explained that the inability to remove a federal claim from tribal to federal court, as can be done with federal claims in state courts, weighed in favor of less rather than more tribal-court jurisdiction.

## I. The Tribe's ripeness argument is without merit.

The Tribe, but not the Long Defendants, raises a new ripeness argument in its brief. The ripeness issue is without merit. The Long Defendants have engaged in this declaratory-judgment litigation over the validity of the tribal-court judgment. If the Bank was deprived of due process, then the judgment lacks validity that would facilitate its recognition or enforcement in state or federal courts. There is no question that there is a case or controversy between the parties and that it has had the benefit of full adversarial presentation to the District Court. This Court is capable of making a declaration about the Bank's due process on appeal. The issue of whether the tribal court proceedings deprived the Bank of due process is joined and the Tribe shouldn't be heard to say otherwise. Unless the Tribe is authorized to concede on behalf of the Long Defendants that they will never seek enforcement of the judgment outside of tribal court, the Tribe's argument about mootness is not well taken.

### J. After-the-fact rationalizations that alter the theory on which a party tried a case are impermissible because they violate due process.

Ultimately, what changed over time was the characterization of the Long Defendants' claim. In the Tribal Court it was a discrimination claim that, while not explicitly mentioning federal law, presumably was based on federal law because there had never previously been a suggestion that a tribal common-law claim for discrimination existed. It was the Tribe as amicus in the Tribal Court of Appeals litigation that first suggested the recharacterization of the underlying basis for the Long Defendants' claim. The Tribal Court of Appeals adopted that suggestion, and the Long Defendants have gone along with it since then. But that change was new. It was a surprise to the Bank. And it was ultimately unfair. Because of this, the Bank asks this Court to reverse the District Court's grant of summary judgment for the Long Defendants on its due-process claim and to enter judgment in the Bank's favor on that count.

## CONCLUSION

The Tribal Court lacked subject-matter jurisdiction under the first Montana exception. It also lacked jurisdiction to entertain a federal discrimination claim. And in adopting the Tribe's recharacterization of the Longs' discrimination claim from federal to tribal law, the Tribal Court of Appeals denied the Bank due process.

This Court should therefore reverse the District Court's grant of summary judgment for the Long Defendants and denial of the Bank's motion for summary judgment. This Court should instead direct entry of summary judgment in favor of the Bank.

Respectfully submitted,

DATED: January ___, 2007

By _____

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**FOR THE EIGHTH CIRCUIT**

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Plaintiff-Appellant,

Eight Circuit File No. 06-3093

v.

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