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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

FIRST SPECIALTY INSURANCE CORPORATION,

Plaintiff,

v.

THE CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON

Defendant.

Case No.: 3:07-CV-05-KI

REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

First Specialty Insurance Corporation's ("FSIC's") focus on the location of the arbitration, is nothing more than a distraction. The Tribe's Petition to Vacate ("Petition") did not concern the rights of the arbitration panel, but those of Strategic Wealth Management, Inc. ("SWM") and Patrick Sizemore ("Sizemore"). Because the Petition arose out of SWM and Sizemore's consensual dealings with the Tribe, the Tribal Court had jurisdiction to resolve the

matter. While FSIC is blatant in its attempts to discredit the Tribal Court, it has failed to establish a valid reason to deny the Tribal Court judgment comity. No such reason exits. The Tribal Court judgment is entitled to recognition and enforcement.

ARGUMENT

A. The Tribal Court had jurisdiction to vacate the arbitration award.

The Tribe's jurisdictional theory is neither expansive nor without legal support. Federal law clearly provides that tribes may exercise civil jurisdiction over disputes arising out of a nonmember's consensual dealings with the tribe or its members. *Strate v. A-1 Contractors*, 520 U.S. 438, 456-457 (1997), *citing Montana v. United States*, 450 U.S. 544, 565 (1981). No matter how much FSIC attempts to characterize it differently, the Tribe's Petition involved such a dispute.

1. The Petition was aimed at SWM and Sizemore, not the arbitration panel.

FSIC's assertion that the Petition was aimed at the conduct of the arbitration panel distorts the Petition's purpose. The Petition was filed to prevent SWM and Sizemore from enforcing an invalid award of attorney's fees and costs[1] against the Tribe. Petition to Vacate, ¶¶ 15, 16, 21 at 4-5.[2] It was SWM and Sizemore's right (or lack of right) to the award that the Petition sought to address. The issue raised in the Petition was whether the Tribe waived immunity against claims for attorney fees in the 1992 Agreement or its consensual dealings with SWM and Sizemore. In the absence of such a waiver, SWM and Sizemore were not entitled to the award of attorney fees and the panel lacked the power to issue it. Accordingly, while the

[1] Hereinafter "attorney fees" refers to both attorney's fees and costs.

[2] The Petition to Vacate is attached as Exhibit 12 to the Declaration of Gregory A. Chaimov in Support of Plaintiff's Motion for Summary Judgment ("Chaimov Decl."), Document No. 14.

Petition asserted that the arbitrators exceed their powers, it was directed at resolving the parties' rights under their 1992 Agreement.

2. The Petition falls within *Montana's* consensual relationship exception.

Montana's consensual relationship exception requires only that the dispute arise out of a consensual relationship with the tribe. *Atkinson Trading Company, Inc. v. Shirley*, 532 U.S. 645, 656 (2001). A dispute can fairly be said to "arise out of" a transaction if there is a connection between the business dealings and the cause of action. *Sole Resort v. Allure Resorts Management, LLC*, 450 F.3d 100, 103 (2nd Cir. 2006). There is clearly a substantial connection between the Tribe's action to vacate the arbitration award and its contractual dealings with SWM and Sizemore. Arbitration is entirely a creature of contract. The disputes which are subject to arbitration, as well as the rules and law the arbitrators will apply, are determined by the parties' agreement to arbitrate. Accordingly, there is a substantial relationship between a challenge to the arbitrators' decision and the contract that provided for the arbitration. *Id*. Moreover, in the case of the Tribal Court action, the contract that provided for the arbitration (i.e., the 1992 Agreement), was substantially tied to the Tribe's argument that the arbitration award was unenforceable. *See supra*, Part A.1.

FSIC argues that *Montana's* consensual relationship exception is not applicable to the Tribe's action to vacate the arbitration award because the award was issued off-reservation and the exception is only triggered when the conduct giving rise to the Tribal Court proceeding occurs on the reservation. FSIC Response Memo. at 3.[3] That argument not only ignores the nexus between the Tribe's Petition and the 1992 Agreement, it is at odds with the more flexible and common-sense approach to the exception employed by courts. It is not necessary for the

[3] All references to "FSIC Response Memo." refer to the Response to Defendant's Motion for Summary Judgment, Document No. 19.

event which allegedly "triggered" the action to physically take place on the reservation. *See, e.g., Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 440 F. Supp. 2d 1070, 1079-1080 (D. South Dakota 2006) (tribal court had jurisdiction over bank's off-reservation tort because it had a clear nexus to the bank's contract with tribal member company). Indeed, such a narrow and hyper-literal application of the exception would allow a nonmember to avoid tribal court jurisdiction in all contract matters by simply stepping off the reservation to breach the contract. The consensual relationship analysis is more flexible than that. It is akin to the Court's Due Process analysis for personal jurisdiction. *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1138 (9th Cir. 2006). It recognizes that nonmembers who enter consensual relationships with tribes may anticipate tribal jurisdiction when their contracts affect the tribe or its members. *Id*. It also requires a "proper balancing" of individual and tribal interests. *Id*. In the case of the Tribe's Petition, the Tribe's interest in ensuring its contracts and waivers of immunity are not expanded beyond their plain terms is substantial.

The only legal authority FSIC offers to support its argument that tribal jurisdiction does not exist to vacate an arbitration award issued off-reservation, is *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087 (8th Cir. 1998). FSIC's reliance on *Hornell* is misplaced. As the court in *Plains Commerce Bank* explained, the dispute in *Hornell* is readily distinguishable because it did not involve consensual relationship criteria. *Plains Commerce Bank*, 440 F. Supp. 2d at 1078. Moreover, the dispute in *Hornell* had no connection to the tribe's reservation whatsoever. The Tribe's Petition on the other hand related directly to the parties' on-reservation contract and consensual dealings.

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B. Tribal Court jurisdiction over the Petition was not barred by issue or claim preclusion.

Neither the Tribe nor the Tribal Court "believe that only decisions of [the Tribal Court] are entitled to *res judicata* effect or comity" as FSIC suggests.[4] FSIC Response Memo. at 4. The decision of the Multnomah County Circuit Court ("Circuit Court") was not given preclusive effect for one simple reason. The Circuit Court order compelling arbitration did not address issues and claims raised in the Tribe's Petition to Vacate.

For claim preclusion to operate in Oregon, the claim for relief must involve the same factual transaction as was previously litigated and be of such a nature that it could have been joined in the first action. *Shoen v. Freightliner LLC*, 2007 WL 1165511, slip op. at 5 (D. Or. April 10, 2007); *Jakobitz v. Iron Horse Business Serv., LLC*, 208 Or. App. 515, 523 (Or. Ct. App. 2006). An "opportunity to litigate" the claim in the earlier action is required. *Thorton v. City of St. Helens*, 231 F. Supp. 2d 1019, 1023 (2002), *citing Drews v. EBI Cos*., 310 Or. 134, 140 (1990). The claims raised by the Tribe's Petition involved a different factual transaction than that at issue in the Circuit Court proceeding. The Circuit Court proceeding was pre-arbitration. It concerned whether or not the Tribe was bound by the arbitration provision in the 1992 Agreement or whether that Agreement was abrogated by a later 1995 Agreement. The Tribal Court proceeding, on the other hand, was post arbitration. It concerned the arbitration award and whether the arbitrators exceed the powers provided to them in the 1992 Agreement.

Even if the claims asserted in the Petition involved the same factual transaction as that at issue in the Circuit Court proceeding, and they did not, the claims could not have been joined in

[4] In fact, the Tribe's trial court explained that the court had reviewed the orders from the Multnomah County Circuit Court Case and none were "res judicata" with respect to the issues determined in the Tribal Court. Order Vacating Arbitration Award at 31, attached at Ex. 9 to the Chaimov Decl., Document No. 14.

the earlier proceeding. The claims did not yet exist. FSIC seeks to preclude the Tribe from asserting "sovereign immunity" against claims for attorney fees. FSIC Response Memo. at 4-5. However, the Tribe did not have an "opportunity to litigate" sovereign immunity in the Circuit Court proceeding because SWM and Sizemore's attorney fee claims did not arise until after the arbitration concluded and the panel deemed them "prevailing parties" in the arbitration. The lack of opportunity to litigate is fatal to FSIC's claim preclusion argument. Nevertheless, FSIC argues that the Circuit Court "implicitly" found that the Tribe waived its immunity to a reciprocal award of fees under the Oregon Securities Law. FSIC Response Memo. at 5. FSIC cites no Oregon law on this point.[5] And, the cases it cites from other jurisdictions involve "issue" rather than "claim preclusion." FSIC SJ Memo. at 12. In any event, an issue can only be "implicitly" determined if it was necessary to the judgment. *Securities Indus. Ass'n v. Bd. of Governors of Fed. Reserve Sys.*, 900 F.2d 360, 365 (D.C. Cir. 1990). As explained in detail in the Tribe's Response to Plaintiff's Motion for Summary Judgment ("Tribe's Response Memo.") at 14, a determination regarding waiver of sovereign immunity with respect to attorney fees was not essential to the Circuit Court's decision.[6]

In sum, the Tribal Court was not precluded from addressing the claims raised in the Tribe's Petition by a prior order.

C. The FAA does not provide this Court with jurisdiction to confirm the award.

Assuming the FAA applied to the 1992 Agreement – and for the reasons stated in the Tribe's Response Memo. at 17, it does not – it would not provide this Court with jurisdiction to

[5] FSIC previously argued that this Court must apply the claim preclusion doctrines of Oregon. Memorandum in Support of Motion for Summary Judgment ("FSIC SJ Memo.") at 11, Document No. 12.

[6] Although FSIC characterizes its argument as one involving "claim preclusion," "issue preclusion" is likewise not a factor. The Tribe covered the elements of issue preclusion in its Response Memo. at 10-14.

confirm the arbitration award. "Even when a petition is brought under the Federal Arbitration Act (FAA), a petition seeking to confirm or vacate an arbitration award in federal court must establish an independent basis for federal jurisdiction." *Carter v. Health Net of California, Inc.*, 374 F.3d 830, 833 (9th Cir. 2004), *quoting Southland Corp. v. Keating*, 465 U.S. 1, 15 n.9 (1984). No independent grounds for exercising jurisdiction over FSIC's request to confirm the award exist. There is no diversity jurisdiction because Indian tribes are not citizens of any state. *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974). Nor, does FSIC's request to confirm the award present a federal question. Accordingly, no jurisdiction exists to entertain FSIC's request for confirmation of the arbitration award.

FSIC cites the Circuit Court's recent ruling with respect to the other parties in the arbitration apparently with the goal of encouraging this Court to confirm the award. FSIC Response Memo. at 5-6. However, the Circuit Court's ruling has no relevance here. First, the Circuit Court proceeding involved an entirely separate arbitration agreement. Second, the ruling is obviously not binding on this Court, nor should it be considered persuasive authority. The Circuit Court ruling has not yet been reduced to a judgment and it may not survive an appeal. Third, FSIC grossly overstates the scope of the ruling. The Circuit Court never "recognized, *C&L Enterprises* disposes of this case in favor of FSIC." FSIC Response Memo. at 6. In fact, the Circuit Court did not analyze *C&L Enterprises* at all. The Circuit Court's confirmation of the award was based on its mistaken belief that it was obligated to defer to the panel's ruling as long as the panel articulated a reasonable interpretation of the law.[7] Finally, the Circuit Court based its decision entirely on Oregon law. It did not even address the contrary federal authorities cited by the Tribe.

[7] *See* Ex. A to the Supplemental Declaration of Gregory A. Chaimov in Support of Plaintiff's Motion for Summary Judgment, Document No. 20.

D. The Tribal Court judgment is entitled to comity.

While FSIC correctly states that comity is a rule of "practice, convenience, and expediency," its application to tribal court judgments is not so discretionary. *See AT&T Corp. v. Coeur D'Alene Tribe*, 295 F.3d 899, 903 (2002) ("As a general rule, federal courts must recognize and enforce tribal court judgments under principles of comity."). Moreover, whenever there is discretion to recognize and enforce a tribal court judgment, the importance of tribal courts and the dignity accorded their decisions will weigh in favor of comity. *Bird v. Glacier Electric Cooperative, Inc.*, 255 F.3d 1136, 1142 (9th Cir. 2001). Generally, only two circumstances preclude recognition of a tribal court judgment: lack of tribal jurisdiction and denial of due process. *Id*. Neither precludes recognition here. As explained above, the Tribal Court had jurisdiction to vacate the arbitration award, and FSIC has never challenged the Tribal Court decision on due process grounds.

FSIC argues instead that comity should be denied based on equitable grounds. FSIC Response Memo at 6. However, equitable grounds for denying comity are available in "limited circumstances." *AT &T Corp*., 295 F.3d at 903. None of those circumstances are present here.

- **The Tribal Court judgment does not conflict with another final judgment that is entitled to recognition.**

  As explained above and in the Tribe's Response Memo., the Circuit Court order compelling arbitration simply did not reach the issues and claims raised in the Tribe's Petition. Moreover, even if the Circuit Court could "implicitly" decide that the Tribe waived immunity to attorney fees, its decision would not be entitled to recognition because the Tribe never had an "opportunity to litigate" sovereign immunity in that proceeding.

- **The judgment is not inconsistent with the parties' contractual choice of forum.**

  The parties did not designate an exclusive forum for confirmation or vacation of an arbitration award and FSIC does not claim otherwise. Instead, FSIC asserts that the Tribal Court's ruling was inconsistent with the parties' agreement to arbitrate. FSIC Response Memo. at 7. FSIC is merely restating its res judicata and merits related

arguments. The Tribal Court was the first court to determine whether the Tribe's agreement to arbitrate – and its waiver of immunity – extended to claims for attorney fees. Disagreement with the Tribal Court's ruling is not a valid ground for denying comity. *See AT&T Corp*., 295 F.3d at 904 ("Unless the district court finds the tribal court lacked jurisdiction or withholds comity for some other valid reason, it must enforce the tribal court judgment without reconsidering the issues decided by the tribal court.").

- **Recognition of the judgment is not against public policy of the United States.**

FSIC argues that the Tribal Court conducted a de novo review of the award in violation of the FAA and that it undermines governing federal law. FSIC Response Memo. at 7. Again, FSIC's argument is based on its disagreement with the Tribal Court decision. The public policy grounds for denying comity cannot be used as a pretext for revisiting issues already decided by tribal courts. In any event, federal law actually permits de novo review of the panel's award. *See Missouri River Services, Inc v. Omaha Tribe of Neb.*, 267 F.3d 848, 852 (8th Cir 2001) (questions of waiver are reviewed de novo); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-944 (1995) (issues of arbitrability are decided independently by the courts).

FSIC's assertion that the Tribal Court does not extend respect to other tribunals is not only offensive and untrue, it too fails to justify a denial of comity. *See Wilson v. Marchington*, 127 F.3d 805, 811-812 (1997) (reciprocity is not required before a court can extend comity). There is simply no valid reason to deny the Tribal Court judgment recognition.

E. FSIC is not entitled to fees and costs incurred in these or the Tribal Court proceedings.

For numerous reasons, FSIC's claims for attorney fees and costs should be denied. First, this action does not involve an appeal of the Tribe's Oregon Securities claim. *Computer Concepts, Inc. v. Brandt*, 141 Or. App. 275, 279 (1996) is therefore inapposite. Second, there is no basis for a discretionary award of fees. The Tribe argued in good faith that the panel exceeded its powers in issuing the arbitration award. The Tribe's argument obviously found support in applicable law because both the Tribe's trial and appellate court agreed that the panel exceeded its powers. FSIC's claim that the "Tribe's effort to use its own courts to vacate the arbitration award was meritless" reflects a stereotypical bias against tribal court systems. FSIC

Response Memo. at 8. It implies that the Tribal Court is not capable of understanding the issues or is less willing to render a judgment against the Tribe than another court. That kind of bias is precisely why there is a need for federal policies promoting tribal court development. Finally, FSIC's attorney fee claims are barred by sovereign immunity. *See United States v. Horn*, 29 F.3d 754, 767 (1st Cir. 1994) (absent waiver, sovereign immunity bars all court-imposed monetary assessments, regardless of their timing or purpose).

CONCLUSION

For each of the above reasons, the Tribe respectfully requests this Court grant summary judgment in its favor and that it give recognition to the Tribal Court decision under principles of comity and res judicata.

Respectfully submitted this 30th day of April, 2007.

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