EXHIBIT 8

BEFORE THE
AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION TRIBUNAL

AAA No. 75 Y 181 00066 03JRJ In the Matter of an Arbitration between: CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON, Claimant, -and- STRATEGIC WEALTH MANAGEMENT, INC.; PATRICK SIZEMORE; PARADIGM FINANCIAL SERVICES, INC.; and MARK SIZEMORE, Respondents.	)	Administrator: JENNIFER R. JOHNSON **FINAL AWARD**

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BACKGROUND

This arbitration involves claims and counterclaims between claimant CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON ("CTGR" or "Tribe") and respondents STRATEGIC WEALTH MANAGEMENT, INC. ("SWM") and PATRICK SIZEMORE, and claims by CTGR against respondents PARADIGM FINANCIAL SERVICES, INC. ("Paradigm") and MARK SIZEMORE.[1] In brief, the disputes concern CTGR's purchases of a number of secured promissory notes recommended by SWM and Patrick Sizemore, many of which were brokered by Paradigm and Mark Sizemore.

On January 9, 1992, CTGR and SWM entered into an "Investment Advisory Agreement." That Agreement was also executed by respondent PATRICK SIZEMORE in his capacity as President of SWM. Paragraph 11(h) of the Investment Advisory Agreement provided that "[a]ll controversies which may arise between Client [*i.e.*, CTGR] and Advisor [*i.e.*, SWM] concerning any transaction or the construction, performance or breach of this or any other agreements between them, whether entered into prior, on, or subsequent to the date hereof, shall be determined by arbitration . . . . Any arbitration shall be in accordance with the rules then applying of the American Arbitration Association ["AAA"] . . . " (the "Arbitration Agreement").

Disputes within the scope of the Investment Advisory Agreement's Arbitration Agreement subsequently arose between the Tribe and respondents SWM and Patrick Sizemore. CTGR combined these disputes with its disputes with Paradigm and Mark

[1] CTGR is a federally recognized Indian tribe organized pursuant to the Grand Ronde Restoration Act of November 22, 1983. SWM and Paradigm are both corporations organized under the laws of the State of Washington. Patrick Sizemore is the President of SWM and a resident of Washington. Mark Sizemore is Patrick Sizemore's brother, the President of Paradigm and a resident of Washington.

Sizemore and these initially were filed by the Tribe with the Multnomah County Circuit Court for the State of Oregon in *Confederated Tribes of the Grand Ronde Community of Oregon v. Strategic Wealth Management, Inc., et al.*, Civil Case No. 01-11-11623 ("the lawsuit").

On December 2, 2002, the Honorable Nely Johnson, Multnomah County Circuit Court Judge for the State of Oregon, entered an "Order Granting Defendants Strategic Wealth Management's and Patrick Sizemore's Motion to Compel Arbitration" in the lawsuit. *See* Arbitration Ex. 5270 and Ex. B-2 to the Tribe's Demand for Arbitration. Among other things, that Order provided that "[p]ursuant to ORS 36.310 and paragraph 11(h) of the January 9, 1992 Investment Advisory Agreement, all claims and controversies between plaintiff Confederated Tribes of the Grand Ronde Community of Oregon and Strategic Wealth Management and Patrick Sizemore concerning any transaction or the construction, performance or breach of the 1992 Agreement or any other agreements, whether entered into prior, on, or subsequent to the date of the 1992 Agreement, are subject to binding arbitration." The Order further provided that "[b]y stipulation dated October 29, 2002 [the "Stipulation", *see* Ex. B-3 to the Tribe's Demand for Arbitration], between plaintiff Confederated Tribes of the Grand Ronde Community of Oregon and defendants Paradigm Financial Services, Inc. and Mark Sizemore, all claims and controversies by and between those parties are subject to binding arbitration."[2] (Order, pp. 5-6, ¶¶ 5-6.)

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[2] On October 29, 2002, following Judge Johnson's September 2002 oral ruling announcing the court's decision that the disputes between the Tribe and SWM and Patrick Sizemore should be arbitrated pursuant to the Arbitration Agreement in the Investment Advisory Agreement, CTGR and Paradigm and Mark Sizemore entered into a "Stipulation Regarding Arbitration as to Paradigm Financial Services, Inc. and Mark Sizemore" in which those parties stipulated "to binding arbitration of all claims between them arising from the transactions and dealings currently the subject of this lawsuit. Such

On January 23, 2003, Judge Johnson entered an "Order Referring Claims to Arbitration and Judgment of Dismissal without Prejudice as to Paradigm Financial Services, Inc. and Mark Sizemore." *See* Ex. B-4 to the Tribe's Demand for Arbitration. That Order provided, among other things, that "[a]ll claims before this Court asserted by plaintiff Confederated Tribes of the Grand Ronde Community of Oregon against defendants Paradigm Financial Services, Inc. and Mark Sizemore are subject to binding arbitration before the American Arbitration Association and shall proceed on the same terms and conditions together with the arbitration ordered by the Court between plaintiff and defendants Strategic Wealth Management and Patrick Sizemore." (Order, pp. 1-2, ¶ 1).

THE ARBITRATION HEARING

Claimant CTGR's Demand for Arbitration was filed with the AAA on or about February 3, 2003. Respondents SWM's and Patrick Sizemore's Answering Statement and Counterclaims were filed with the AAA on or about March 5, 2003. Respondents Paradigm's and Mark Sizemore's Response to the Statement of claims was filed with the AAA on or about March 6, 2003. Claimant filed an Amended Statement of Claim with the AAA on or about November 26, 2003.

The undersigned arbitrators were appointed and sworn to hear this dispute in accordance with the requirements of the parties' Arbitration Agreement and Stipulation, the Court's Orders, and the Commercial Arbitration Rules ("Rules") of the AAA.

The Arbitration Hearing in this matter was held in Seattle, Washington, on March 30-April 2, April 5-9, April 12-16, April 19-23, and April 27, 2004. Claimant CTGR was

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claims shall be arbitrated before the American Arbitration Association together with the claims between plaintiff and defendants Strategic Wealth Management, Inc. and Patrick Sizemore."

represented at the hearing by Mr. Steven S. Walters, Ms. Beverly C. Pearman, and Ms. Christine Kosydar, Stoel Rives LLP, of Portland. Tribal Attorney Mr. Rob Greene, and various representatives of the CTGR Tribal Council also attended the hearing. Respondents SWM and Patrick Sizemore were represented by their counsel, Mr. David B. Markowitz and Mr. Kerry Shepherd, Markowitz Herbold Glade & Mehlhaf, P.C., of Portland, and Mr. Erik R. Lied and Mr. W. Eugene Barton, Karr Tuttle Campbell, of Seattle. Respondents Paradigm and Mark Sizemore were represented by Mr. Mark Sizemore.

Both the Tribe and respondents SWM and Patrick Sizemore submitted pre-hearing briefs addressing the principal legal issues relevant to deciding their dispute. In addition, both the Tribe and respondents SWM and Patrick Sizemore submitted supplemental briefs. The panel considered all briefs filed by the parties.

At the conclusion of the Arbitration Hearing, as directed in R-35 of the Rules, the panel inquired of counsel and Mr. Mark Sizemore whether, with the exception of any post-hearing submissions relating to claims for attorneys' fees and litigation expenses, they had any further proofs to offer or witnesses to be heard. Counsel for each party and Mr. Mark Sizemore replied to this inquiry in the negative. Accordingly, the panel finds that all evidence pertinent and material to the substantive issues in dispute in this controversy that the parties wished to offer was received into evidence and heard at the Arbitration Hearing, and that the parties so stipulated at the conclusion of the hearing. An Interim Award, dealing with the substantive claims and counterclaims of the parties, was entered by the panel on May 6, 2004. Rules, R-43(b). This Final Award now supplements and supersedes the previous Interim Award for all purposes.

At the conclusion of the hearing, and also with the agreement of the parties, the hearing record was not closed. The Interim Award directed the parties to provide certain additional written submissions to the panel relating to claims for attorneys' fees and litigation expenses. All parties stipulated and agreed that all issues related to attorneys' fees and costs would be decided on the papers submitted, without oral argument. Respondents SWM, Patrick Sizemore, Paradigm and Mark Sizemore timely filed applications and supplemental applications for fees and costs. The Tribe timely filed objections. All parties filed replies. As reflected in Sections 5 and 6 below, the panel decided all issues raised by the parties with respect to fees and costs on the papers submitted, without oral argument.

Having heard the witnesses; having reviewed the exhibits; proofs, written submissions and legal authorities offered by the parties; having heard the arguments of counsel; and otherwise having considered all of the evidence offered, our Final Award in this matter is as follows.[3]

FINAL AWARD

1. Arbitrability. All of the claims, defenses and disputes made and raised herein, including without limitation respondents' post-hearing claim for attorneys' fees and costs, fall within the scope of the parties' Arbitration Agreement and Stipulation, and the Court's Orders, and are arbitrable in this proceeding. This arbitration has been duly commenced and conducted pursuant to the requirements of the parties' Arbitration Agreement and Stipulation, the Court's Orders, and the Rules. Rules, R-7.

[3] Pursuant to the parties' request, this Final Award, like the panel's Interim Award, is in a narrative or "reasoned" format. (Rules, R-42(b).)

2. **Claimant CTGR's Claims for Relief.** Claimant CTGR's Amended Statement of Claim asserts statutory Oregon Securities Law (ORS 59.115 and 59.135) and common law fraud claims against all respondents, breach of contract claims against SWM, and common law breach of fiduciary duty and negligent misrepresentation claims against respondents SWM and Patrick Sizemore.

Introduction and Overview. A preponderance of the evidence established the following:

In 1988 a young accountant named Jim Sizemore, brother to respondents Patrick Sizemore and Mark Sizemore, was engaged to do some consulting work for the Tribe. Among other things, he helped draft some of the Tribe's ordinances and served on its health board. During the next twelve years, he worked on a wide variety of management, financial, administrative and political issues important to the Tribe and its members. During the course of that work he became a trusted and respected adviser to the Tribe.

In 1991 CTGR asked Jim Sizemore to assist in preparing policies and procedures that would allow it to administer its own investments. At the time, the Tribe had its funds invested with the U.S. Treasury and the Bureau of Indian Affairs ("BIA") and was dissatisfied both with the returns (generally in the 4% to 5% range) and with the quality of the BIA's accounting for its holdings. In the course of this work, Jim Sizemore introduced members of the Tribe to his brother, Patrick. Patrick Sizemore was the President of SWM, an investment advisory firm. The Tribe conducted a search for a new investment adviser, during which it interviewed SWM as well as other firms, and selected SWM. In 1992 SWM and the Tribe entered into the Investment Advisory

Agreement. Under that Agreement, SWM and Patrick Sizemore advised the Tribe concerning its investment policies, provided periodic training sessions on investment issues to members of the Tribal Council and other CTGR executives and staff, selected the fund managers that invested and managed most of the Tribe's portfolio, and made recommendations concerning how the portfolio should be invested and diversified. As the years went by, SWM and Patrick Sizemore also became trusted advisers to the Tribe.

In 1993, accurately anticipating an unsettled market for corporate bonds in the coming year, SWM and Patrick Sizemore recommended that a small portion of the Tribe's portfolio be invested in privately-placed short-term loans to real estate developers secured by real estate collateral ("secured notes"). SWM had previously placed such notes with other clients, with good results. Such notes, described by some of the witnesses as "bridge financing" and by others as "hard money lending," generally featured high interest rates (*e.g.*, 13% to 15%), short terms (generally, one year) and typically were sought by developers whose projects were not yet far enough along to be of interest to banks or other conventional lenders. CTGR approved this recommendation. It invested approximately $2 million in such notes in each of the years from 1994 through 1996. The initial loans paid off as scheduled, and the Tribe was pleased with the high returns it earned on them.

In the years before 1995, the Tribe's income, mainly from timber sales, was modest and its unmet needs were great. This changed in 1995, with the opening of the spectacularly successful Spirit Mountain casino. As earnings from the casino mounted, the Tribe invested heavily in educational, health care and other important needs of its

members, and also began contributing a portion of its earnings each year to charitable purposes within its geographic area. Even with such expenditures, however, the earnings from the casino were so great that the Tribe's investment portfolio began to grow very rapidly. For example, the Tribe's total portfolio was $9 million in 1994, rose to $85 million by 1997, and reached $184 million in 2000. The Tribal Council divided the portfolio into separate funds dedicated to different uses. Initially, these included the Social, Working Capital and Economic Development funds. As the years passed, the Tribe created a number of different funds dedicated to particular tribal purposes. SWM and the Tribal Council agreed on a series of "Investment Policy Statements" outlining how the money in each of these funds should be invested. These Investment Policy Statements set the particular types of "eligible" investments in which the fund's monies could be invested – certain types of stocks, mutual funds, corporate bonds, and various other categories of investments – and also directed SWM to allocate specified percentages of the fund's monies to the different types of permissible investments. The Investment Policy Statements designated the secured notes as an approved type of investment for several of the Tribe's different portfolio funds and, during the time period most relevant to the parties' present disputes, prescribed that approximately 20% to 25% of the portfolio could be invested in the secured notes. The Investment Policy Statements that permitted such investments sought to mitigate the risk that the loans might not be repaid by requiring that the real estate collateral securing the loans must be at least 155% of the loan amount if the collateral was developed real estate and 200% if the collateral was vacant or undeveloped land.

As in the earlier years, SWM recommended the particular fund managers to invest and manage most of the monies invested in the portfolio. SWM took direct responsibility, however, for locating and evaluating the secured notes purchased by each of the funds authorized to invest in such notes. The particular notes selected were identified, researched and recommended to CTGR by SWM and Patrick Sizemore. The requirement of the Investment Policy Statements that the real estate collateral must be at least 155% or 200% of the loan amount (depending on whether the collateral was developed or undeveloped) meant, as a practical matter, that Patrick Sizemore had to form a judgment about the value of the collateral each time he recommended a secured note to CTGR. Paragraph 4 of the Investment Advisory Agreement, captioned "Basis of Advice," stated that SWM "obtains information from a wide variety of publicly available sources . . . . The recommendations developed by [SWM] are based on the professional judgment of [SWM] and its professional counselors or associates and neither [SWM] nor its individual counselors or associates can guarantee the results of any of their recommendations."

The Investment Advisory Agreement also provided that the Tribe was "free at all times to accept or reject any recommendation from [SWM] and . . . [the Tribe] has sole authority with regard to acceptance or rejection of any recommendation or advice from [SWM] . . .." (Agreement, Paragraph 2.) The agreement further provided that the Tribe could "elect unilaterally to follow or ignore completely or in part, any . . . recommendations or counsel given by [SWM]" (Agreement, paragraph 4) and "retain[ed] absolute discretion over all investment and implementation decisions." (Agreement, paragraph 5.) Accordingly, the Tribe and SWM adopted "loan criteria" guidelines

requiring each SWM recommendation to be approved by the Tribe's Finance Officer if the amount of the loan was below $1.5 million and by the entire Tribal Council if the loan was for more than $1.5 million. CTGR's confidence in SWM and Patrick Sizemore was such that all of the secured note recommendations made by SWM prior to 2001 were approved.

SWM was not paid on a commission (*i.e.*, per transaction) basis. Rather, the Investment Advisory Agreement provided for a sliding-scale percentage fee calculated on the total size of the CTGR portfolio under SWM's management; this fee was set at ".60% of first $5 million, .50% of next $5 million, over $10 million negotiable." (Agreement, paragraph 9.) SWM submitted quarterly reports to the Tribe, which Patrick Sizemore personally reviewed with the Tribal Council each quarter, showing each transaction in the secured notes, how much of each fund was invested in such notes, and comparing how the yields on the notes, reported on an accrual basis, compared to each fund's yields on its other categories of investments. SWM also regularly submitted other reports that, among other things, showed the status of each loan in the portfolio and highlighted in red the loans that had gone into default.

In 1995 Jim Sizemore joined SWM. His affiliation was disclosed to CTGR, which made no objection. Jim Sizemore's work with the Tribe for the most part involved consulting services unrelated to the secured note investments, which were handled by Patrick Sizemore and other SWM employees. Among other things, Jim Sizemore provided consulting services to Spirit Mountain Development Corporation, a tribal subsidiary created to explore economic development projects with non-portfolio funds. Although the Investment Advisory Agreement would have entitled SWM to charge the

Tribe on an hourly basis for Jim Sizemore's consulting services, SWM elected not to do so and instead provided such services as part of the SWM services covered by the percentage management fee described above.

In general, the secured notes recommended by SWM and approved by CTGR performed well in the early years of the program. Fifteen notes purchased from 1994-1999 were either paid off by the borrowers in accordance with the loans' terms or, in two cases, were successfully foreclosed and the collateral sold at a gain. On a cash basis, the secured notes generated yields of 9.9% in 1994, 9.3% in 1995, 18.8% in 1996, 14.7% in 1997, and 9.9% in 1998. In general, these yields outperformed the other types of investments in the Tribe's portfolio during those years.

As the portfolio mushroomed, and the secured notes seemed to be performing well, the Tribe's appetite for the secured notes grew.[4] The average balance invested in such notes grew from $2.1 million in 1996 (4.3% of the total portfolio) to $12.1 million in 1998 (10.6% of the total portfolio) to $41.6 million in 2000 (22.6% of the total portfolio). Such growth made it necessary for SWM to communicate with more loan brokers and work harder to find suitable loans. In April 1998 SWM decided to present a group of loans to CTGR that had been brokered by Paradigm. The President of Paradigm is Mark Sizemore, brother of Jim and Patrick Sizemore. Ultimately, SWM recommended and the Tribe purchased a total of 27 loans that had been brokered by Paradigm. Paradigm received brokerage fees on each such loan, paid by the borrower out of the loan proceeds provided by the Tribe.

[4] The evidence presented established that at one point, the Tribal Council discussed increasing the total portfolio allocation in the secured notes to 33% and raising the threshold for Tribal Council review of particular loans from $1.5 million to $2.5 million. Patrick Sizemore advised against both changes, and the Council left the previous 20% to 25% target range and $1.5 million review threshold in place.

Two factors combined to bring the Sizemores' long run with the Tribe to an abrupt end in 2001.

First, the Tribe experienced substantial management turnover in late 2000. In September 2000 two new Tribal Council members were elected, yielding a Council majority in favor of increased direct cash distributions to Tribal members and reduced Tribal involvement in long-term economic development projects. As a result, the Tribe's development subsidiary, Spirit Mountain Development Corporation, essentially ceased to function that fall; SMDC's President, Robert Watson, with whom the Sizemores had worked closely on six of the loans now in dispute, departed in the fall of 2000. At about the same time, Robert Saunders, the Tribe's Finance Officer to whom Patrick Sizemore had reported during the 1998-2000 time period when many of the secured notes now at issue had been purchased, resigned in October of 2000. A new Finance Officer, Lawrence Kovach, took over in March 2001.

Second, during the late 1990's both the U.S. economy generally and the Pacific Northwest economy in particular were booming. In March 2000 the stock market suddenly changed direction and the national economy headed into a recession, later exacerbated by the events of September 11, 2001. These changes adversely affected the fortunes of the real estate developers who were the borrowers on the Tribe's secured note loans. Construction loans from banks and other conventional lenders for these projects became much more difficult to obtain. The Tribe experienced a massive increase in the default rate on its notes, and the borrowers experienced unprecedented problems in finding replacement financing to work themselves out of their defaults. The Tribe's "bridge financing" was turning into a bridge to nowhere. This trend was fairly

apparent by the time Lawrence Kovach took office as the Tribe's new Finance Officer in March 2001, and he decided to take prompt action to deal with it. Shortly after his arrival, he recommended and obtained a Tribal Council moratorium on any further secured note loans.

Mr. Kovach was surprised to learn that the documentation supporting the loans generally did not contain independent appraisals of the properties used as collateral and also became concerned as to whether the Tribe's financial statements needed to reserve for possible losses associated with the loans that had gone into default. On Mr. Kovach's recommendation, the Tribe hired one of SWM's principal competitors, PRIME Asset Consulting ("PRIME," a consulting service of UBS Paine Webber, Inc.), to conduct an independent review of SWM's performance as the Tribe's investment adviser and directed that, as part of that project, an appraiser be engaged by PRIME to appraise the value of the real estate collateral securing the notes.[5] PRIME engaged Arthur Andersen to do the appraisals. Andersen's appraisals found overall collateral values at August 2001 of the secured notes in the Tribe's portfolio that exceeded the amounts that the Tribe had invested in the loans by about $3 million but fell short of the amounts the Tribe would have earned if the loans had been fully performed by about $24 million. Based on the PRIME report and Andersen appraisals, in September 2001 the Tribe gave SWM notice of its intent to terminate the Investment Advisory Agreement and on October 5, 2001 terminated SWM. Since September-October 2001 the Tribe has been directly managing the workout of all of the loans in default. In general, the Tribe has declined to cooperate with the borrowers in default by assisting them with

[5] "We were tasked with independently confirming a valuation of the total portfolio . . . [and given a] mandate to independently confirm the valuation of the portfolio including . . . [the] secured notes portfolio . . . ." (PRIME Report, Arb. Ex. 1094, Tab 1, p. 1).

extensions and workouts of the loans, and instead has chosen to liquidate the collateral by selling it as soon as can be arranged, in many cases at public auction. Appraisals conducted for the Tribe in 2003 by another appraisal firm, PGP, show substantially lower collateral values than reported by Andersen in 2001.

Overall, SWM recommended 48 secured note purchases that the Tribe made out of its investment portfolio and assisted the Tribe with five more that were funded outside the portfolio by Spirit Mountain Development Corporation. Based on the auction and other prices obtained for the properties sold to date and the 2003 appraisals of the remaining properties used as collateral for those notes, the Tribe seeks damages of $56,899,711.

The parties stipulated at the Arbitration Hearing that any recovery by CTGR must be reduced by $3.36 million on account of a prior settlement paid to the Tribe on overlapping claims in its separate lawsuit against the Tribe's former accounting firm.

Summary of Award. Our Final Award rejects all of the Tribe's claims. The Tribe's fraud and statutory securities claims against Paradigm and Mark Sizemore failed because there was no evidence that either respondent committed fraud, behaved recklessly, or made a material misrepresentation or omission. Similarly, the Tribe's fraud claims against SWM and Patrick Sizemore also failed because the evidence presented fell far short of establishing that either of those respondents intentionally attempted to mislead the Tribe or behaved recklessly concerning any material aspect of the secured note purchases; rather, the evidence indicated that SWM, and Jim and Patrick Sizemore, were dedicated to the best interests of the Tribe, and that Patrick Sizemore and SWM worked hard over many years to give CTGR what they believed to

be good advice at the time the advice was given. The statutory securities claims asserted by the Tribe against SWM and Patrick Sizemore also failed because the Tribe's evidence did not support a finding that either respondent materially misrepresented (or failed to disclose) anything.

CTGR's breach of contract claims against SWM failed because the evidence did not establish that SWM committed material breaches of any provision of the parties' Investment Advisory Agreement or of the Investment Policy Statements or loan criteria. In brief, the contract required SWM to act as the Tribe's investment adviser, and to base its advice on reasonable and competent grounds in the circumstances existing at the time the advice was given. The contract reserved to CTGR final authority on all investment decisions, and expressly did not make SWM a guarantor of those decisions; the contract also did not assign SWM responsibility to prepare the Tribe's accounting records. The evidence established that SWM appropriately performed its advisory role in compliance with its contractual duties.

CTGR's breach of fiduciary duty and negligent misrepresentation claims against SWM and Patrick Sizemore failed because the evidence did not support a finding of liability against either of the respondent actors. In addition, the proof offered by CTGR in support of the damages sought on those claims (as well as its fraud and securities claims against all respondents) did not comply with the requirements of Oregon law in two fundamental respects: (1) The evidence established that a very substantial portion of the damages CTGR seeks on these claims was caused by intervening events that were not reasonably foreseeable consequences of the alleged errors by SWM and

Patrick Sizemore, and (2) the Tribe's proof of damages on these claims was impermissibly speculative.

We now turn to a more detailed discussion of claimant's particular claims.

A. Claimant's Fraud Claims Against All Respondents. The essential elements of fraud are the same under both Oregon and Washington law: (a) a representation; (b) its falsity; (c) its materiality; (d) the speaker's knowledge of its falsity or ignorance of its truth; (e) the speaker's intent that it should be acted upon by the hearer; (f) the hearer's ignorance of its falsity; (g) the hearer's reliance on its truth; (h) the hearer's right to rely thereon; and (i) the hearer's consequent and proximate injury or damage. *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996); *Oregon Public Employees' Retirement Bd. v. Simat, Helliesen & Eichner*, 191 Or. App. 408, 423-24, 83 P.3d 350, 359 (2004). At closing argument, the Tribe rightly conceded that the evidence presented did not establish intentionally misleading statements by any of the respondents. The Tribe contended, however, that respondents acted recklessly. A speaker who recklessly misrepresents a material fact (*i.e.*, knowing that he does not know whether the statement is true or false) is just as liable as one who deliberately makes a misrepresentation. *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996); *United States National Bank of Oregon v. Fought*, 291 Or. 201, 225, 630 P.2d 337, 351 (1981).

The Tribe's burden of proof is greater for its fraud claims than for most of its other claims in this arbitration. All nine elements must be proven by clear and convincing

evidence,[6] although proof as to the quantum of damages (as opposed to the fact of damage) may be by a preponderance of the evidence. *Riley Hill Gen. Contractor, Inc. v. Tandy Corp.*, 303 Or. 390, 407, 737 P.2d 595, 606 (1987).

The "representations" of which the Tribe complains are several (although, ultimately, most of them reduce to representations concerning the nature and amount of risk associated with the secured note purchases, and the value of the collateral securing the notes), but the evidence presented in support of the Tribe's fraud claim did not establish either that these representations were intentionally false when made (as noted above, the Tribe conceded that this had not been proven), or that these representations were made recklessly. The Tribe's evidence on these matters, as to all respondents, fell far short of the exacting "clear and convincing" evidentiary standard that must be met to sustain a claim of fraud. As to "recklessness," the evidence established that SWM and Patrick Sizemore had considerable experience placing secured notes both with other clients and with the Tribe, that they believed themselves (with sufficient reason) to be qualified and competent to make recommendations concerning such investments and were relied on by a number of clients to do so, that they engaged in due diligence activities comparable to the standard in the trade for that type of lending, and that they believed the recommendations they made to the Tribe were based on appropriate research and good judgment at the times those recommendations were made. The evidence concerning such conduct fell well below the legal standard required for an allegation of recklessness to substantiate a claim of fraud.

[6] Washington law provides for a "clear, cogent and convincing" evidence standard; Oregon law prescribes a "clear and convincing" standard. There does not appear to be any material difference in the two standards.

Moreover, even if the evidence had supported a finding of liability on the fraud claims against respondents, the Tribe did not prove recoverable damages on these claims for the reasons discussed below.

For these reasons, the Tribe's fraud claims against SWM, Patrick Sizemore, Paradigm, and Mark Sizemore should be, and are, denied and dismissed with prejudice.

B. Claimant's Oregon Securities Law (ORS 59.115 and 59.135) Claims. The Tribe's statutory securities claims are asserted against all respondents. In order to establish liability against any respondent, ORS 59.115 requires proof that the respondent "sold," or "participated" or "materially aided" in the sale of, a "security" by means of a "material misstatement (or omission) of fact." Although fundamental to the Tribe's securities claims is whether the secured notes are "securities" within the scope of the statute and whether any of the named respondents were "sellers" of such securities, or materially aided the "seller," we did not find it necessary to reach any of these predicate issues. Rather, we focused our analysis of CTGR's statutory securities claims on whether any of the respondents made any material misrepresentations (or omissions) to the Tribe in connection with the Tribe's purchase of the Secured Notes.

We address the Tribe's claims against Paradigm/Mark Sizemore and SWM/Patrick Sizemore separately, below. Our discussion includes the Tribe's claim that the respondents also violated ORS 59.135.

(1) Paradigm and Mark Sizemore

CTGR failed to prove that either Paradigm or Mark Sizemore engaged in any conduct – *i.e.*, made any materially misleading statements or omissions to the Tribe – sufficient to trigger liability under the Oregon Securities Law.[7]

Mark Sizemore, who for all practical purposes *was* Paradigm, testified persuasively that, with respect to all of the loans Paradigm brokered to the Tribe through SWM, he conducted the requisite level of due diligence. Just as we concluded that the evidence in support of the Tribe's fraud claim against Paradigm and Mark Sizemore failed for want of proof, the evidence in support of the Tribe's claim that either of those respondents made a material misstatement of fact, or omitted material facts, was insufficient even on the lower "preponderance of the evidence" standard applicable to the Tribe's securities claims against them. The evidence established that Mark Sizemore gave SWM the best information concerning the loans that he had at the time. The loans Paradigm brokered to SWM were all "hard money" or bridge financing loans, to which Mark Sizemore applied the due diligence standards common in that industry.

Finally, although it is not clear that the Tribe asserts an independent claim under ORS 59.135 or that it simply claims that a violation of that statute is actionable under ORS 59.115, the evidence was insufficient to establish any liability of either Paradigm or Mark Sizemore under that statute.

Accordingly, the Tribe's claims against Paradigm and Mark Sizemore for violation of the Oregon Securities Law should be, and are, denied and dismissed with prejudice.

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[7] We address separately below the Tribe's claim that Paradigm's (and, by implication, Mark Sizemore's) role as broker was not disclosed.

(2) SWM and Patrick Sizemore

The evidence presented to us also did not support any finding that either SWM or Patrick Sizemore engaged in any conduct proscribed by ORS 59.115 or 59.135. Neither of those respondents made any material misrepresentations, or omissions, in connection with the Tribe's purchase of any of the notes, including any misrepresentations arising from the alleged failure to disclose to the Tribe Paradigm's and Mark Sizemore's involvement as broker. These issues are discussed separately below.

As noted above, in view of our disposition of CTGR's statutory securities claims, we did not need to reach the other predicate issues referenced above relevant to the Tribe's securities claims. Nonetheless, since the parties' briefing raised them, we briefly discuss those issues here.

First, with the possible exception of three notes as to which the Tribe had a "profits participation" of some sort (Trull, Cherry City, and Peninsula Holdings), the secured notes at issue do not appear to be "securities" within the ambit of the Oregon Securities Law;[8]

Second, neither SWM nor Patrick Sizemore was a "seller" or "materially aided" a seller.[9]

[8] The three possible exceptions aside, each of the other notes is a privately-negotiated commercial loan, secured in most instances by real estate. Without deciding the matter, we found the analysis of the Oregon Supreme Court in *Pratt v. Kross*, 276 Or. 483, 555 P.2d 765 (1976), and *Computer Concepts, Inc. v. Brandt*, 310 Or. 706, 801 P.2d 800 (1990), supportive of our thinking. The non-precedential 1993 letter opinion of the Oregon Department of Commerce cited by CTGR did not appear to us to be a persuasive basis on which to conclude that these "other" notes were securities. These other secured notes also do not appear to be "securities" under the "family resemblance" test of *Reves v. Ernst & Young*, 494 U.S. 56, 110 S.Ct. 945 (1990).

[9] There was no evidence that SWM or Patrick Sizemore were "sellers" of any of the secured notes. Rather, the evidence was clear that SWM and Patrick Sizemore were agents of the Tribe – the

As indicated above in our discussion of the Tribe's securities claims against Paradigm and Mark Sizemore, it is not clear that the Tribe asserts an independent claim under ORS 59.135. Whether it does, or whether it claims that a violation of that statute is actionable under ORS 59.115, the evidence was insufficient to establish any violation of ORS 59.135 by either SWM or Patrick Sizemore.

Finally, even if liability had been demonstrated, CTGR failed to prove recoverable damages on its securities claims for the reasons discussed below.

Accordingly, the Tribe's claims against SWM and Patrick Sizemore for violation of the Oregon Securities Law should be, and are, denied and dismissed with prejudice.

C. **CTGR's Breach of Contract Claims Against Respondent SWM.** The Tribe's Second Claim for Relief in its Amended Statement of Claim alleges that SWM breached the parties' "1992 and 1995[10] Agreements" by (1) recommending that the Tribe invest in secured notes that did not meet the criteria of the Investment Policy Statements and agreed loan criteria, (2) failing to manage the assets within the various funds in accordance with the objectives of those funds, (3) failing to accurately report

buyer - which purchased the notes. Although SWM and Patrick Sizemore facilitated the Tribe's "purchase" of table-funded notes from Paradigm or another lender that provided the table funding, their services were no different than any other investment advisor who assists a client in purchasing a "security" from a third-party.

[10] The evidence established that Judge Johnson's Orders held that the 1995 document, which did not contain an arbitration agreement, was not a valid and enforceable agreement governing the contractual relationship between SWM and the Tribe. For this reason, Judge Johnson determined that the 1992 Agreement governed and required the parties to arbitrate their disputes. This determination is the law of the case and we choose to follow it. Even if the issue had arisen for the first time at the Arbitration Hearing, we would reach the same conclusion as Judge Johnson because the evidence established that the 1995 document was executed for a purpose of Callan Investment Management unrelated to the general contractual relationship between the parties, was not treated or regarded by the parties as a binding or enforceable statement of their contractual duties to one another, was incomplete in material respects, and was not presented to or signed by the Tribal Council. Accordingly, we conclude that the 1992 Agreement constitutes the parties' contract with each other.

information concerning the performance and value of the secured notes, and (4) paying itself excessive fees and causing Paradigm to be paid excessive fees.[11] CTGR argued, and we agreed, that the 1992 Agreement incorporated the requirements of the parties' Investment Policy Statements and loan criteria.

The evidence presented at the Arbitration hearing did not substantiate CTGR's claims that SWM breached the 1992 Agreement in respect of any of these matters:

(1) Investment Policy Statements

The evidence established that the Investment Policy Statements, which were presented to and approved in writing by the Tribal Council, expressly deemed the secured notes to be permissible investments in the various funds if the value of the collateral had the prescribed 155%/200% relationship to the loan amounts. The Investment Policy Statements also required SWM to "underwrite" the loans by reasonably investigating the likely value of the real estate that was to serve as the collateral for the loans. On balance, and as discussed in more detail below, the evidence established that SWM did a reasonable job of investigating the values of the collateral properties and had a good faith belief, based on its research efforts and its professional judgment, that the properties had the requisite 155%/200% relationship to the loan amounts at the times it made its loan recommendations. Paragraph 4 of the 1992 Agreement made clear that the "basis of advice" to be given by SWM would depend on its "professional judgment." That paragraph also expressly disclaimed any

[11] Although not pleaded in the Amended Statement of Claims, CTGR's Hearing Memorandum also alleges that SWM violated its implied contractual duty of good faith and fair dealing. This allegation failed for the same reasons discussed below concerning CTGR's parallel claim of breach of fiduciary duty. In addition, the duty of good faith and fair dealing exists to "effectuate the reasonable contractual expectations of the parties." *Best v. United States National Bank of Oregon*, 303 Or. 557, 739 P.2d 554, 558 (1987). The evidence presented at this arbitration did not establish conduct by SWM outside the reasonable contractual expectations of the parties at the time of contracting.

"guarantee" of the "results of [SWM's] recommendations." In summary, the 1992 Agreement contemplated that SWM would make reasonable efforts to investigate the collateral values, would base its recommendations on those efforts and its professional judgment as to the collateral values, but did not guarantee or insure the accuracy of its conclusions. The evidence established that SWM complied with these requirements.

The Investment Policy Statements also required SWM to monitor the diversification of the various funds to keep the percentage of fund monies invested in any particular type of investment within the guidelines prescribed in the Statements. This was something of a moving target because the amount of monies being added to and withdrawn from the funds by CTGR, and Tribal Council decisions concerning the percentage allocations and distribution of the secured notes among particular funds, required frequent adjustments and "rebalancing." Overall, the evidence established that SWM was attentive to and complied with its duties in this regard and that the few temporary departures from the percentage guidelines were due to Tribal Council decisions or other factors beyond SWM's control.

(2) Loan Criteria

The loan criteria required SWM to "underwrite" the notes by investigating the value of the real estate to be used as collateral. The evidence established that SWM did this by interviewing the developer/borrower and reviewing the borrower's files on the project, assessing the likely feasibility of the borrower's proposed project, reviewing the borrower's credit information where possible, visiting the property, interviewing knowledgeable realtors and local government officials in the area, researching comparable sales figures when available, reviewing prior appraisals and environmental

analyses when available, and, at the end of the day, making a professional judgment as to whether the collateral had sufficient value to meet the Investment Policy Statements' 155%/200% requirements concerning collateral values. The evidence also indicated that SWM typically did not order independent appraisals or environmental analyses of the properties to be used as collateral. As discussed above, paragraph 4 of the 1992 Agreement expressly provided that the basis of SWM's advice would be its "professional judgment" and disclaimed any guarantee of the results of recommendations believed to be sound when made.

Although SWM did not obtain independent appraisals or environmental analyses, the evidence established that others in the bridge-financing trade (as opposed to conventional bank lenders) customarily do not do so either, that the Tribe's Spirit Mountain Development Corporation did not normally commission appraisals when it was evaluating potential investments in real estate development projects, and that on two different occasions the Tribe considered but declined to adopt recommendations that appraisals be required as part of the due diligence preceding secured note recommendations.[12] The evidence also established that bridge loans typically need to be acted on in a limited amount of time, which generally was not consistent with the timelines involved in commissioning appraisals and environmental studies.

In addition, the evidence established that of the total of 53 loans made in the secured notes (including five outside the portfolio), six were extensively and independently underwritten by the Tribe's own Spirit Mountain Development

[12] On one occasion the Tribe's Executive Officer, Francis Somday, made such a recommendation to the Tribal Council, which was not adopted. On another occasion, the Tribe's outside auditor suggested such appraisals to CTGR's Finance Officer, who declined to adopt it because of cost considerations.

Corporation staff which reached conclusions corroborating SWM's, twenty-three either paid off according to their terms or were foreclosed at a gain or CTGR had no claim on them for other reasons, and thirteen (and, on balance, the entire portfolio) were appraised by Arthur Andersen as still having collateral value greater than the Tribe's principal investments as of August 2001, sixteen months after the stock market had gone into a bear market and long after the loan recommendations had originally been made. We considered it entirely appropriate to use the Andersen appraisals for this purpose because they were commissioned by the Tribe and PRIME, and because the Tribe itself regarded them as sufficiently authoritative to use them to set the reserves in both its 2000 and 2001 financial statements. Our review of the twelve notes that Arthur Andersen found to be under water by August 2001 indicated that many of them had prior appraisals in the file at the time SWM conducted its due diligence that supported SWM's assessments and that all of them had reasonable third-party support for the professional judgments reached by SWM as to the collateral values at the times the loans were recommended.

In summary, whether viewed on a note-by-note or entire portfolio basis, the evidence established that SWM's underwriting work was done reasonably and complied with both the 1992 Agreement and the loan criteria.

(3) Fund Management

The evidence established that the Investment Policy Statements set various risk parameters – often described as "low" or "moderate" – for each of the various funds. The terms of the parties' Agreement also established, however, that the Tribal Council, not SWM, had the final say in deciding the particular percentage of each fund –

e.g., 20% to 25% – to be invested in the secured notes, and the evidence presented established that the Tribal Council exercised that authority knowing what the stated risk parameters were for each fund. The Tribe must own those decisions and take responsibility for them. The 1992 Agreement expressly disclaimed any duty by SWM to guarantee or insure the results of its investment recommendations. The Agreement expressly reserved to the Tribe the final decision-making authority as to the allocation and investment of its funds. The Tribe argued, and we agreed, that the allocations approved by the Tribal Council in the Investment Policy Statements were incorporated by reference into and thus became part of the parties' contract. SWM did not breach the 1992 Agreement by following the Tribal Council's directions to allocate the specified percentages of the funds to the secured notes.

(4) Financial Reports

The Amended Statement of Claim alleges that SWM's periodic financial reports breached the 1992 Agreement because they showed accrued interest and penalties as due and owing even when notes had gone into default, and failed to comply with Generally Accepted Accounting Principles ("GAAP"). The Agreement expressly provided, however, that "[i]t is understood and agreed that [SWM] and its employees are not qualified to and will not render any legal or accounting advice nor prepare any legal or accounting documents for implementation of Client's financial and investment plans. Client agrees that his . . . accountant solely shall be responsible for the rendering and/or preparation of . . . (i) all . . . accounting advice; (ii) all . . . accounting opinions and determinations; and (iii) all . . . accounting documents. [SWM] may prepare reports reflecting Client's financial position and changes in financial

position, based on information provided by Client." (Agreement, paragraph 7.) The evidence established that the format of the reports made by SWM during the time period most relevant to this dispute was approved and requested by the Tribe's Finance Officer, Robert Saunders, who understood that the reports were not in a GAAP format but wanted reports that would show him what could be collected if the notes were successfully enforced. As discussed above, the loan-summary reports prepared by SWM made no attempt to conceal the notes in default and, indeed, highlighted them in red. On balance, the evidence established no breach of SWM's reporting duties under the 1992 Agreement.

(5) Fees

As discussed above, the 1992 Agreement set SWM's fees at a percentage of the total size of the portfolio. The evidence did not establish that SWM ever charged or was paid a fee higher than the agreed-upon percentages (and, indeed, established that SWM voluntarily reduced its fee to .50% across-the-board and also generally did not charge for Jim Sizemore's services separately on an hourly basis, as the Agreement would have permitted). In addition, the evidence did not establish that the Tribe ever attempted to negotiate concerning the "negotiable" portion of its fee arrangement with SWM (*i.e.*, fees on portfolio values above $10 million). As discussed above, CTGR also failed to prove that SWM engaged in misconduct intended to inflate the total assets subject to the percentage fee. For these reasons, CTGR's claims of breach of contract regarding SWM's fees were not supported by the evidence.

Nothing in the 1992 Agreement imposed duties on SWM regarding the level of Paradigm's fees, or the fees of any other loan broker. Even if it did, the evidence

established that Paradigm's fees were within the range of customary brokerage fees for bridge financing, although perhaps a bit on the high side, and that Paradigm provided table-funding and post-loan servicing that made its fee levels reasonable in the circumstances. Accordingly, CTGR failed to prove any breach of the 1992 Agreement with regard to Paradigm's fees.

(6) Summary

For the foregoing reasons, CTGR's claims of breach of contract against SWM were not supported by the evidence. Those claims should be, and are, denied and dismissed with prejudice.

D. **Claimant's Breach of Fiduciary Duty and Negligent Misrepresentation Claims Against Respondents SWM and Patrick Sizemore.** Our review of the evidence convinced us that the Tribe's tort claims (breach of fiduciary duty and negligent misrepresentation) could be decided on either of two independent bases – actor liability or proof of damages. We summarize our decision on both matters below.

(1) Common Issues – Liability. The principal liability issues raised are three: (1) Did SWM and Patrick Sizemore adequately counsel the Tribe concerning the risks associated with investing in the secured notes? (2) Did SWM and Patrick Sizemore properly disclose to the Tribe that some of the loans were brokered by Paradigm and therefore involved a fraternal relationship between the Sizemore brothers and that Paradigm would be paid a brokerage fee paid out of the loan proceeds provided by the Tribe? (3) Did SWM and Patrick Sizemore misrepresent the secured notes as "investment grade" debt?

Risk Counseling. CTGR claimed that SWM and Patrick Sizemore failed to counsel the Tribe adequately concerning the risks of the secured note investments. The Tribe argued that SWM and Patrick Sizemore misrepresented or concealed those risks and, as a result, the Tribe was induced to make unsuitably risky loans or purchase unsuitably risky promissory notes.[13]

On balance, the evidence established that SWM and Patrick Sizemore adequately counseled the Tribe concerning the risks associated with the secured notes both at the time the loans were recommended and post-investment. The risks associated with secured note investing were explained repeatedly to the Tribal Council by Patrick Sizemore, and were well-understood by each of the Tribe's several Finance Officers. None of the Finance Officers who testified could recall any untrue statement made to them by SWM or Patrick Sizemore. The loan approval procedures were followed scrupulously; Mr. Sizemore made quarterly and other presentations where he explained that the loans were to developers willing to pay high rates of interest who couldn't get or couldn't wait for conventional bank loans, that the Council should expect that there would be defaults, that the loans individually had both a default and a liquidity risk, and that viewed as a portfolio defaults were to be expected and there was a considerable liquidity risk, but that the risk of losing capital, for the portfolio as a whole,

[13] Although the Tribe did not treat this as a "suitability" case, we did analyze the evidence in those terms as well. The evidence established that Patrick Sizemore took pains to recommend that the Tribe keep its investment in Secured Notes to a reasonable level, both with respect to the portfolio as a whole and in respect of the secured note portion of individual funds. Even the Tribe's expert, Chet Bjerke, testified that some secured notes in a diversified portfolio such as the Tribe's would be appropriate. The only time the 20-25% concentration parameters were substantially exceeded was with respect to the decision in late 1999 to invest up to 60% of the Minor's Trust fund in secured notes. We found the evidence persuasive that this was a Tribal Council decision, backed by the Tribe's Finance Officer, and was driven by the Tribe's desire to achieve an overall 8% return on that fund's investments. The evidence did not persuade us that the modeling SWM used to project various return scenarios was flawed or otherwise inappropriate.

was low. SWM's quarterly reports identified how much of each fund was in the notes and highlighted in red the defaults that did occur. Based on SWM's experience to date with secured loans at the time this advice was given, it was accurate when given and remained generally accurate even into an unprecedented economic downturn, at least according to the Andersen appraisals.

The one additional representation made repeatedly was that the real estate collateral had sufficient value to cover the face amounts of the loans. As discussed above, these representations were believed to be true when made, were based on reasonable underwriting efforts, and reflected SWM's and Patrick Sizemore's professional judgments at the time the representations were made. For the reasons reviewed in the discussion below of whether CTGR proved recoverable damages, the evidence presented did not demonstrate that SWM's and Patrick Sizemore's judgments as to the collateral values were erroneous at the times they were made.

Paradigm/Mark Sizemore Disclosure. CTGR alleged that SWM and Patrick Sizemore never adequately disclosed that many (27) of the loans recommended by SWM were brokered by Paradigm and Mark Sizemore, and that some of CTGR's loan proceeds would be used (by the borrower) to pay Paradigm's brokerage fees. The evidence presented did not prove the Tribe's allegation.[14]

[14] The evidence established beyond any doubt that Mark Sizemore was identified as Patrick Sizemore's (and Jim Sizemore's) brother, and that he and Paradigm had a broker's role in Gary Dinges's Nedonna Beach project, in which the Tribe later invested, in a mid-2000 meeting attended by five Tribal Council members and three tribal attorneys, none of whom objected. The testimony of Jim Sizemore, whom we found to be an extremely credible and impressive witness, also established to our satisfaction that the Mark Sizemore/Paradigm role was disclosed to the Tribal Council by Patrick in the Spring of 1999, before approval of the Peninsula loan, at two different meetings attended by both Patrick and Jim. The principal remaining issue for us was whether Mark Sizemore's involvement as a broker of some of the earlier secured notes was disclosed prior to presentation of the first of the Paradigm loans in Spring 1998.

Patrick Sizemore testified that he discussed, prior to the Tribe's Spring 1998 purchase of the first Trull note (the first note brokered by Paradigm/Mark Sizemore), with the Tribal Council and the Tribe's Finance Officer not only Mark Sizemore's fraternal relationship but also Mark Sizemore's involvement as loan broker through Paradigm and manner in which Paradigm would be compensated, and that no objection was made by anyone in attendance at the meeting. We found Patrick Sizemore's testimony credible, notwithstanding the fact that no Tribal Council minutes reflect the disclosure. Mr. Sizemore testified that the disclosure was made to a "working meeting" of the Tribal Council, for which the evidence established that no minutes were kept. Mark Sizemore was not at the meeting but testified that his brother Patrick reported to him soon afterwards that the disclosure had been made; indeed, Mark Sizemore testified that Patrick Sizemore called him from his car cell phone shortly after the meeting to report that the meeting had gone well and that no one had any objection. None of the Tribal Council members called to testify could remember such a disclosure, although their memories were vague as to many aspects of the many meetings they attended, which contained a daunting list of agenda items. Neither could Pat Mercier, the Tribe's Finance Officer at the time, although she expressed some uncertainty about this and described the Spring of 1998, when she left her position as Finance Officer, as a stressful period during which her attention was focused on a number of other matters. It was also unclear whether she attended the meeting described by Patrick Sizemore.

The totality of the evidence presented persuaded us that the disclosure likely was made in the Spring of 1998 and, in any event, was sufficiently muddled that we

concluded CTGR failed to carry its burden of proving by a preponderance of the evidence that such a disclosure was not made.

The evidence very clearly established that, in any event, by the beginning of 1999 the Tribe was aware that Mark Sizemore was Patrick (and Jim) Sizemore's brother and that, through his company, he was brokering some of the loans recommended to the Tribe by SWM, for which he received a brokerage fee: Robert Saunders testified that shortly after he became the Tribe's Finance Officer, he was asked by the Tribe's then-Executive Officer, Ted Mala, to review SWM's fees and that, in the course of this review, Patrick Sizemore explained to him in detail the role of Mark Sizemore and the fee arrangements for Paradigm, again without any CTGR objection.

"Investment Grade." The Investment Policy Statements provided that "[s]ecured notes will be considered to be investment grade provided that they have a minimum security ratio of 155% of face amount at the time they are made (200% for undeveloped land)." The Tribe contended that the Investment Policy Statements are incorporated by reference into the 1992 Agreement, and thus are contractual undertakings between the parties. As discussed above, we agreed.

CTGR also contended, however, that SWM and Patrick Sizemore misrepresented the notes as "investment grade" and that the notes would not be such even if the 155%/200% security criteria were satisfied. We found this claim unpersuasive. The Tribal Council approved in writing each of the Investment Policy Statements *deeming* the notes to be "investment grade" if the collateral values were present and setting the percentages of each fund that could include such notes as eligible investments. Although this claim might have had merit if the evidence had

established that SWM had committed breaches of its underwriting duties, as discussed above we concluded that SWM did not do so. Absent such misconduct, SWM was entitled to rely on the Tribal Council's agreement and contractual direction in the Investment Policy Statements that secured notes believed to have the requisite collateral values "will be considered to be investment grade . . . ." The Tribal Council directs a sovereign government, employs substantial numbers of financial, legal and other expert management advisers, and understood that the Investment Policy Statements were important documents requiring Tribal Council review and approval. Having expressly agreed and deemed the notes to be "investment grade," CTGR cannot now ascribe an entirely different meaning to the term, particularly where it also claims that the Investment Policy Statements setting forth such agreements were incorporated by reference into the parties' contract.

Summary. We were not persuaded that any of these alleged misrepresentations were proven. The Tribe's claims for breach of fiduciary duty and negligent misrepresentation were not supported by the evidence and should be, and are, denied and dismissed with prejudice on that ground.

(2) Common Issues – Proof of Damages. We agreed with the Tribe that Oregon law should be applied to its tort claims against SWM and Patrick Sizemore. Under Oregon law, claims for damage or economic loss must be proved with "reasonable certainty" or "reasonable probability." *See, e.g., Tadsen v. Praegitzer Indus., Inc.*, 324 Or. 465, 928 P.2d 980 (1996); *Cent. Office Tel., Inc. v. Am. Tel. & Tel. Co.*, 108 F.3d 981, 991 (9th cir. 1997); *GPL Treatment, Ltd. v. Louisiana- Pacific Corp.*, 133 Or. App. 633, 637-38, 894 P.2d 470, 472-73 (1995), *aff'd on other grounds*, 323 Or.

116, 914 P.2d 682 (1996); *Eulrich v. Snap-On Tools Corp.*, 121 Or. App. 25, 43, 853 P.2d 1350 (1993)l *Willamette Quarries, Inc. v. Wodtli*, 308 Or. 406, 412, 781 P.2d 1196, 1200 (1989).

In addition, Oregon law requires that a plaintiff prove that its alleged losses were "'a reasonably foreseeable' consequence of defendant's errors . . .." *Oregon Steel Mills, Inc. v. Coopers & Lybrand*, 336 Or. 329, 347-48, 83 P.3d 322 (2004). A finding of "but for" or "transaction" causation is not a sufficient basis for recovery of damages caused by intervening causal factors that are not reasonably foreseeable consequences of the defendant's alleged torts. *Oregon Steel Mills,* citing with approval *First Federal Savings & Loan Ass'n v. Charter Appraisal*, 247 Conn. 597, 724 A.2d 497 (1999). *See also Movitz v. First Nat'l Bank*, 148 F.3d 760 (7th Cir. 1998), *cert. den.*, 524 U.S. 1094 (1999); *McGonigle v. Combs*, 968 F.2d 810, 821-22 (9th Cir. 1992).

Application of these principles to the present case requires the conclusion that CTGR's breach of fiduciary duty and negligent misrepresentation claims must also fail for two interrelated reasons, both having to do with its claimed damages.[15] First, claimant's proof of damages failed to demonstrate a direct causal relationship between the claimed wrongdoing (*i.e.*, the alleged breaches of fiduciary duty and negligent misrepresentations) and the particular losses alleged. Or, as the *Oregon Steel Mills* decision puts it, the damages sought by claimant were not a "reasonably foreseeable" consequence of the alleged errors by SWM and Patrick Sizemore. Second, CTGR's requested damages were not proven with "reasonable certainty" or "reasonable probability."

[15] The above deficiencies also apply to the Tribe's proof of damages in support of its fraud and securities claims.

Reasonable Foreseeability and Causation. The evidence presented to us established that the losses the Tribe seeks to recover as damages were substantially, and perhaps entirely, caused by two intervening events, both of which occurred after the dates when the alleged misconduct took place – the economic downturn that began in 2000 and the Tribe's approach to realizing on its collateral.

Economic Downturn. The evidence presented established that a severe decline in the Northwest real estate markets for development properties began in late 2000, later exacerbated by the events of September 11, 2001, and that this decline accounts for a very large portion, and perhaps all, of the losses CTGR now seeks to recover as damages. By March of 2001, when Mr. Kovach took over as Finance Officer, both the national economy and the Pacific Northwest economy had suffered a severe set-back. In particular, private investment capital, the mother's milk of bridge financing lenders, had dried up, and the real estate market for development properties in Washington and Oregon went into a severe recession. Although, as Spencer Powell, CTGR's expert, testified, the decline in the equities markets to some extent caused a flight of capital into real estate, these funds went mainly into residential and income-producing properties and were not the funds that fed the "hard money" markets financing development of undeveloped land. Witnesses John Taylor, Ian Ritchie, Brent Connell and Brent Eley, who were familiar with developments in this part of the real estate business, testified credibly, and unanimously, that the post-2000 downturn devastated funds availability for such projects, and caused an unprecedented escalation of default and foreclosure rates among their customers; the Tribe's experience mirrored theirs. Respondent's expert witness, Mr. Menenberg, gave persuasive expert testimony

detailing the overall economic downturn in the post-2000 time period during which, among other things, he referenced one industry source that observed "[b]y September 30, 2001, we had experienced one of the most stunning economic and real estate reversals in the post-war period." (NCREIF Report). In addition, the evidence indicated that the Tribe's Finance Officer, Mr. Kovach, reported at a November 2001 General Council meeting that all of the markets important to the Tribe had "taken a hit" and that the best strategy for the Tribe to follow was "don't trade – wait until the markets come back." Mr. Kovach was also quoted in August 2003 as saying that, "The rest of the country is in a recovery and we're not." Current Tribal Council Chair Cheryle Kennedy was quoted in the same article as saying that "Oregon needs a shot in the arm." Ms. Kennedy's hearing testimony was to the same effect.

In sum, the evidence presented to us established that a general market decline occurred after the time period in which the alleged misconduct by SWM and Patrick Sizemore occurred, that this economic downturn was an intervening development that caused a very substantial portion of the losses that CTGR now seeks to recover as damages, and that this development was not a foreseeable consequence of SWM's and Patrick Sizemore's alleged misconduct. The exact portion of the Tribe's losses caused by the downturn cannot be determined with precision because the Tribe's damages proof did not segregate the portion of its losses allegedly caused by the alleged misconduct from the losses caused by the downturn. The best evidence offered on this subject, comparison of the August 2001 Arthur Andersen appraisals with the later 2003 PGP appraisals, if taken at face value, indicates that *all* of the Tribe's

losses may have been caused by the intervening deterioration in the economy.[16] Given our doubts about the PGP appraisals,[17] however, the evidence indicated to us that a very substantial portion of the losses – if not all – sought as damages were caused by the intervening downturn. Oregon law does not permit these losses to be assessed as damages against SWM and Patrick Sizemore.

CTGR's Approach to Liquidating the Collateral. In addition to the downturn, the evidence also established that a second intervening development caused a significant portion of the Tribe's losses. While SWM was the Tribe's investment advisor and in charge of realizing the most gain (or least loss) on defaulted notes, the Tribe's philosophy – and SWM's approach – was to take a pragmatic and longer-term view and work with the borrower if possible, often agreeing to extensions, sometimes investing new funds to achieve a potentially better result. By the fall of 2001, however, SWM had been dismissed as the Tribe's investment advisor and pointedly told that its assistance in "working out" the defaulted loans was not desired. Moreover, Mr. Kovach requested and obtained Tribal Council approval for his plan to take complete control of the secured notes portfolio and immediately liquidate the outstanding notes and sell off the remaining collateral.[18] The Tribe's new liquidation

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[16] The Andersen appraisals show that the portfolio, viewed as a whole, still had collateral value in excess of the amounts invested as of August 2001, almost a year and a half into the downturn. The PGP appraisals, done in 2003, show substantial losses by then. Taken at face value, this suggests that all of the Tribe's losses are attributable to the impact of the economic downturn after August 2001.

[17] We had considerable doubts about the reliability of the PGP appraisals, and even greater doubts about the "retro" appraisals prepared separately by Mr. Powell, both of which appeared to disregard or discount actual market prices and other relevant information when it suited the purposes of the appraiser to do so.

[18] This was done in the face of Mr. Kovach's contemporaneous advice to the Tribe (discussed above), as to CTGR's other portfolio assets, that the best strategy would be to hold onto the assets during the market downturn, and wait to sell them until after the markets recovered. In other words, the Tribe

process was supervised by one of Mr. Kovach's assistants, Jeffrey Valentine, an accountant whose prior experience was generally unrelated to real estate workouts. While Mr. Valentine is well-meaning and conscientious, the evidence indicates that he was (and remains) singularly unqualified for the job thrust upon him – if the goal was to realize the maximum return on the defaulted notes. He had (and has) no significant previous experience in workouts, foreclosures or liquidation of real estate. The evidence indicated that the Tribe's new approach, which involved selling many of the properties at public auction, some at surprisingly low prices, has impaired the values the Tribe has realized to date on the collateral. The Tribe made this decision despite the fact, described by many of the CTGR witnesses, that it takes a "long-term" approach to assessing the performance of its investments, and that it had no urgent liquidity needs compelling an expedited fire sale of the collateral.

Shortly before this decision was made Mr. Kovach had commissioned an "independent" review of SWM's management policies and investments of the portfolio assets, with particular attention to the secured notes part of the portfolio. As an integral part of that investigation Arthur Andersen appraised all of the collateral securing the notes. The Andersen appraisals (all, by the way, supervised by MAI appraisers) revealed that none of the Tribe's principal investment had been lost as of August 2001. CTGR's proof that liquidated properties subsequently realized values below those appraisals was not persuasive because the evidence established that a substantial portion of such losses was the product of its own expedited-liquidation approach to managing the collateral.

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decided not to sell off its stocks and bonds at a loss while the market was down, but also simultaneously decided to begin an expedited liquidation of its secured notes and collateral.

None of these events could have been foreseeable by SWM and Patrick Sizemore either when they initially advised the Tribe as to its secured note investments or as individual notes went into default. Each of these events – over which SWM also had no control – directly contributed to and caused at least a substantial portion of the losses which occurred after SWM's termination.

Proof of Damages Impermissibly Speculative. Mr. Valentine himself, the chief overseer of the secured notes liquidation policy, testified that he "could only speculate" as to the amount of recovery that might be made on the remaining defaulted notes. He was not the only one. Mr. Powell, the claimant's expert appraiser, opined that at least two of the remaining notes were secured by "good property" and could be viable developments once they were able to get funds to get started. Although this may take time, he acknowledged that the more time one had to sell or develop the properties, the better chance of a larger recovery.

The evidence also indicated there have been and are offers (and counter-offers by the Tribe) outstanding that would indicate far greater recoveries than are projected by the PGP appraisals used as the benchmarks on which the Tribe and its damages expert calculated CTGR's damages. The Tribe responded quite rightly that many of these offers may never come to fruition, but on balance the evidence persuaded us that a number of the collateral properties have real value, particularly in a now-improving economy, not reflected in the PGP appraisals that could well be realized

in future sales, particularly if the Tribe were to relax its liquidation approach to managing the collateral.[19]

In addition, the evidence established that the Tribe made the decision to judicially foreclose nineteen of the secured notes. In general, a secured creditor would not choose to incur the greater costs and delays associated with judicial, as opposed to non-judicial, foreclosure unless a plausible basis exists to believe that the judicial foreclosure route will produce deficiency judgments that can be satisfied out of the borrower's assets unrelated to the real estate collateral. The damages evidence presented to us, however, did not assess with reasonable certainty or reasonable probability whether the judicial foreclosures now in progress are likely to produce deficiency judgments and collections that will reduce the claimed losses. Evidence that "there's probably not much there" is purely speculative and not probative of determining economic loss.

The Tribe also asked us to find future potential damages based solely on the PGP appraisals, admittedly requested for litigation purposes, and, in essence, to ignore all of the other evidence presented as to current and future collateral values. As discussed above, if we chose the Andersen appraisals, also done by MAI appraisers, as being most probative, we would find that the portfolio was still in a gain position at the time of SWM's termination. If we considered other evidence, including testimony from Patrick Sizemore and various of the other witnesses we heard, we might conclude that all of the MAI appraisers undervalued the collateral. If we considered the outstanding offers or the possible deficiency judgments, we might choose another

[19] Respondents also noted persuasively that the evidence presented failed to justify the reasonableness of some of the substantial costs incurred to date in conjunction with the Tribe's management of the collateral.

number. Based on the range and conflicting content of the evidence presented, we could not conclude that CTGR had proven its damages with reasonable certainty or probability.

Finally, reasonable certainty as to the Tribe's losses remains heavily subject to its own efforts. CTGR has the remaining secured notes portfolio totally within its control. To guess now as to its success or failure requires not only a crystal ball, but conjecture as to what policies and procedures it may choose to use to manage or liquidate the investments that it alone now manages and controls. The evidence presented to us strongly suggested that it is within the Tribe's grasp to protect its total investment and perhaps even realize some gain on these properties. Whether it will do so or not is impossible to foretell based on the evidence presented to us.

Summary. The Tribe's damages proof on its claims for breach of fiduciary duty and negligent misrepresentation did not comport with the requirements of Oregon law that damages must include only losses that are foreseeable consequences of the alleged misconduct, and must be proven with reasonable probability. For this reason, and because of CTGR's failure to prove its liability case, the Tribe's tort claims against SWM and Patrick Sizemore should be, and are, denied and dismissed with prejudice.

3. **Respondents SWM's and Patrick Sizemore's Counterclaims.** Respondents SWM's and Patrick Sizemore's Answering Statement and Counterclaims alleged counterclaims against CTGR for breach of contract and breach of the duty of good faith and fair dealing. In brief, these counterclaims allege that the Tribe decided to publicly vilify SWM and Patrick Sizemore, and breached the 1992 Agreement's arbitration and confidentiality provisions, (1) by filing and republishing the Multnomah County lawsuit

instead of bringing the parties' disputes to resolution in a confidential arbitral forum, (2) by discussing the Tribe's differences with SWM and Patrick Sizemore in the Tribe's newsletter, "Smoke Signals," and (3) by including Tribal Council candidates' "candidate statements," several of which made derogatory references to SWM and its personnel, in "Smoke Signals." The 1992 Agreement on which the counterclaims are based provides that it shall be governed by Washington law. (Agreement, paragraph 11(i).) The lawsuit was dismissed and the dispute sent to arbitration, on respondents' motion, but without determination of a "prevailing party."

Except for the attorneys' fees incurred in defense of the lawsuit, respondents SWM's and Patrick Sizemore's presentation in support of their counterclaims failed to prove any recoverable damages with the reasonable certainty required by Washington law. Moreover, to the extent the counterclaims are premised on the candidate statements in "Smoke Signals," those statements appeared to us to be protected by the First Amendment to the United States Constitution and the Tribe's publication of them within the proper purview of a government like CTGR.

As to respondents' attorneys' fees incurred in the Multnomah County suit, Washington law does not permit a party to recover such fees incurred in a judicial action unless the party claiming them can show a statutory or contractual basis for such a recovery. The 1992 Agreement has no attorneys' fees clause authorizing an award of fees to a party that successfully defends a claim of breach in court. Respondents attempted to distinguish between "prevailing party" attorneys' fees, to which they concede they are not entitled under the 1992 Agreement for their expenses in the lawsuit, and "damages" (in the form of attorneys' fees) which they now seek for breach

of the arbitration clause. We do not believe there is such a distinction, and apply the Washington rule that attorneys' fees may not be awarded unless a contractual or statutory basis[20] for such an award exists. Accordingly, the counterclaims of respondents SWM and Patrick Sizemore are denied and dismissed with prejudice.

4. **Award on the Merits of the Parties' Claims and Counterclaims.** For the reasons given above in Sections 2 and 3, (1) all of claimant CTGR's claims for relief in this arbitration are denied and dismissed with prejudice as to all respondents and (2) respondents' SWM's and Patrick Sizemore's counterclaims against CTGR are also denied and dismissed with prejudice.

5. **Respondents' Claims for Attorneys' Fees and Litigation Expenses.** Following entry of our Interim Award, and pursuant to Section 5 thereof, respondents SWM and Patrick Sizemore and Paradigm and Mark Sizemore timely filed applications for attorneys' fees, costs and disbursements[21] under the "prevailing party" fee-shifting provisions of the Oregon Securities Law, general Oregon law concerning the award of fees and costs, and AAA Rules.[22] CTGR objected to respondents' applications.[23]

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[20] We address below the request of respondents for a prevailing party award of fees and costs based on the Oregon Securities Law and general Oregon law regarding taxation of costs.

[21] SWM and Patrick Sizemore seek attorneys' fees of approximately $1,905,000, plus costs of approximately $158,000, plus approximately $195,000 for expert fees, plus all of their AAA fees. Paradigm and Mark Sizemore seek attorneys' fees of approximately $161,530, together with costs of approximately $6,500, plus all of their AAA fees.

[22] Rule R-43(a) [July 1, 2003 ed.] provides that "The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties...." A similar provision has appeared in the AAA rules since at least 1991. *See* Rule R-45(a) [January 1, 2003, July 1, 2002, September 1, 2000 and January 1, 1999 editions]; Rule R-43 [July 1, 1996, November 1, 1993, May 1, 1992 and January 1, 1991 editions]. Since January 1, 1999 AAA Rules have specifically addressed awards of attorneys' fees, providing that "The award of the arbitrator(s) may include...an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement." *See* Rule R-43(d) [July 1, 2003 ed.]; Rule R-45(d) [January 1, 2003, July 1, 2002, September 1, 2000 and January 1, 1999 editions]. Unless otherwise stated, all references in this Section to "AAA Rules" or "Rules" are to the July 1, 2003 edition of the AAA's Commercial Arbitration Rules.

Based on the findings and conclusions made in this Final Award, and on our review of the arguments and exhibits submitted by the parties on the fees and costs issues, we find and conclude that each of the respondents is a "prevailing party" for purposes of deciding applications for an award of attorneys' fees, costs and disbursements under both Oregon law and the Rules. We address the Tribe's objections to respondents' fee and cost applications, and respondents' claims and contentions, below.

A. AAA Rules

The AAA Rules, which are incorporated by reference in the documents on which our arbitral authority is premised, *see* discussion above, pp. 2-3, and below, pp. 46-47 and 51-52,[24] authorize the arbitrators to "grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties" (Rules, R-43(a)) and expressly authorize "an award of attorneys' fees if . . . such an award . . . is authorized by law. . . " (Rules, R-43(d)).[25] *See also* note 22, above. The Oregon Securities Law, ORS 59.115(10), expressly provides a basis for an award of attorneys' fees to the prevailing party, which we have found each of the respondents to be. Oregon law also provides a basis for award of costs to the prevailing party. We thus find and conclude that we have the authority to consider respondents' requests for

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[23] Respondents also requested an award of all of their arbitration fees and expenses pursuant to the Rules. CTGR objected to respondents' request for all of their arbitration fees and expenses. The parties' claims and contentions concerning the assessment of arbitration fees and expenses, including arbitrator compensation, are addressed below, Section 7.

[24] Rule R-1(a) also expressly states that any arbitration agreement providing for AAA arbitration makes any resulting arbitration subject to the AAA Rules. *See also* note 27, below.

[25] Rule R-43(d) also authorizes an attorneys' fee award "if all parties have requested such an award . . . ." We do not rest our conclusion that we have the authority to award respondents their fees on that provision.

attorneys' fees and costs and, to the extent we find them meritorious, to make an award in their favor – unless the doctrine of tribal sovereign immunity bars such an award. We now turn to the Tribe's arguments on that issue.

B. Sovereign Immunity

The Tribe asserts that the doctrine of sovereign immunity[26] bars any award of attorneys' fees, costs or disbursements, whether such an award is sought under Oregon law or AAA rules. We interpret the Tribe's arguments on this issue as a challenge both to the arbitrability of the respondents' claims for attorneys' fees and costs and as an asserted substantive law bar to our authority to make such an award even if the respondents' claim is arbitrable. We reject the argument in both respects.
For the reasons that follow, we conclude that the Tribe has waived its sovereign immunity with respect to respondents' claim for fees and costs. Accordingly, we find that respondents' claims for fees and costs are arbitrable in this proceeding and that the doctrine of sovereign immunity does not bar such an award on the facts of this case.

The authorities confirm that CTGR, as a federally-recognized Indian tribe, enjoys many of the same attributes of sovereignty, including sovereign immunity, as possessed by other governments or nations, whether acting in a governmental or proprietary (commercial) capacity. It is also clear from the authorities that an Indian tribe like CTGR may not be subject to a dispute resolution process, whether judicial or arbitral, without its consent, but that sovereign immunity may nonetheless be waived. The waiver, however, must be "clear." *Oklahoma Tax Commn v. Citizen Band Potawatami Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991). There are a variety of reasons for the rule requiring a clear waiver of sovereign immunity, among them that a central attribute

[26] While the Tribe characterizes its sovereign immunity defense as "jurisdictional," it raised this issue for the first time in its opposition to respondents' fee and cost applications. Under AAA Rules, the arbitrators have the power to decide their own jurisdiction and the arbitrability of claims raised in the arbitration. Rules, R-7.

of sovereignty is the freedom from suit. As the Tribe points out, an ancillary reason is to protect Indian tribes' (or any other sovereign's) public fisc from depletion. The issue upon which the parties strongly disagree is the clarity with which the waiver must be expressed and whether in this case such a waiver was expressed either at all or with the requisite degree of clarity.

As we discussed at pp. 2-3 above, this case came before us in arbitration pursuant to an order of the Multnomah County Circuit Court (Exhibit B-4 to the Tribe's Demand for Arbitration). That order was, in turn, premised on two inter-related factors: *First*, the court's determination (Arbitration Ex. 5270 and Ex. B-2 to the Tribe's Demand for Arbitration) that the dispute between the Tribe and SWM and Patrick Sizemore was subject to arbitration pursuant to the dispute resolution clause in the 1992 Investment Advisory Agreement (Arbitration Ex. 1088 and Ex. B-1 to the Tribe's Demand for Arbitration). *Second*, a stipulation (Ex. B-3 to the Tribe's Demand for Arbitration) entered into between the Tribe and Paradigm and Mark Sizemore that those parties would submit their claims to arbitration in the same proceeding as the Tribe's claims against SWM and Patrick Sizemore.

SWM's and Patrick Sizemore's Claims for Fees and Costs

The dispute resolution section of the 1992 Investment Advisory Agreement reads, in pertinent part, as follows:

> ***All controversies which may arise*** between Client [the Tribe] and Advisor [SWM] ***concerning any transaction or the construction, performance or breach of this or any other agreements between them whether entered into prior, on, or subsequent to the date hereof, shall be determined by arbitration. Arbitration is final and binding on the parties.*** The parties are waiving their right to seek remedies in court, including the right to jury trial. *** The arbitrator's award is not required to include formal findings or legal reasoning and any party's right to appeal or to seek modification of rulings by the arbitrators is strictly limited. *** ***Any arbitration shall be in accordance with the rules then applying of the American Arbitration***

Association....[27] *The award of arbitrators* or of the majority of them, *shall be final and judgement upon the reward [sic] rendered may be entered into any court, State or Federal, having jurisdiction.*[28]

Section 11(h) of the 1992 Investment Advisory Agreement (emphasis added).

The first issue we must decide is whether the foregoing contractual agreement between SWM and the Tribe is a "clear" waiver of the Tribe's sovereign immunity, at least insofar as any disputes with SWM are concerned. We conclude that it is. *C&L Enterprises, Inc. v. Citizen Band Potawatami Indian Tribe of Oklahoma*, 532 U.S. 411 (2001).

In *C&L*, the Potawatami tribe and a contractor entered into a standard form AIA construction contract containing an arbitration clause substantively identical to that in the 1992 Investment Advisory Agreement. The contractor filed a demand for arbitration with the AAA; the Potawatami tribe refused to participate on grounds of sovereign immunity but also advised the arbitrator that it had substantive defenses to the contractor's claim. A hearing was held in the tribe's absence[29] and an award was thereafter rendered; the contractor then commenced enforcement proceedings in state court. The Potawatami tribe defended the enforcement action on grounds of sovereign

[27] We note that Rule R-1(a) provides that "The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association...." Prior versions of the AAA Rules since at least January 1991 contained an identical provision. *See* Rule R-1 [January 1, 2003, July 1, 2002, September 1, 2000, January 1, 1999, July 1, 1996, November 1, 1993, May 1, 1992 and January 1, 1991 editions].

[28] Rule R-48(c) provides that "Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof." Prior versions of the AAA Rules since at least January 1991 contained an identical provision. *See* Rule R-50(c) [January 1, 2003, July 1, 2002, September 1, 2000 and January 1, 1999 editions]; Rule R-47(c) [July 1, 1996, November 1, 1993, May 1, 1992 and January 1, 1991 editions].

[29] Like the Commercial Arbitration Rules (*see* Rule R-29), the Construction Industry Arbitration Rules that applied to the Potawatami tribe's dispute with C&L also provide for proceeding in the absence of a party. *See, e.g.*, Rule R-30, Construction Rules (September 1, 1999 ed.).

immunity. After reviewing the history of the doctrine of sovereign immunity, particularly as it involves Indian tribes, the U.S. Supreme Court held that the Potawatami tribe's execution of the construction contract with its arbitration clause was a "clear" waiver of the tribe's sovereign immunity and the contractor that prevailed in arbitration was permitted to enforce the arbitration award.

We reject CTGR's attempts to distinguish the decision. The Tribe's distinctions are ones without a difference. *First*, while the Supreme Court in *C&L* was technically deciding only whether the Potawatami tribe had waived its sovereign immunity from enforcement of the arbitral award, the Court made it clear that the clause clearly and unambiguously reflected the tribe's agreement to resolve "all contract-related disputes . . . by binding arbitration." *C&L*, 532 U.S. at 418-19. We reach the same conclusion here: CTGR clearly and unambiguously agreed that ***any*** disputes under the 1992 Investment Advisory Agreement would be resolved by arbitration. *Second*, while it is true that the Potawatami tribe proposed the contract in *C&L*, we do not read the Supreme Court's opinion as indicating that its decision finding a "clear" waiver there was premised on that fact. It is a fact, but not a controlling fact. The teaching of *C&L*, and prior state and federal cases finding a standard arbitration clause providing for AAA arbitration to waive sovereign immunity (which the Supreme Court cited with approval), is that such a clause in a contract is a "clear" waiver of sovereign immunity amounting to consent by the Indian tribe to the arbitration of all covered disputes. *Third*, the fact that the Tribe finds itself now defending against a claim for attorneys' fees and costs under a statute's fee-shifting provision in an arbitration it initiated, rather than defending against an affirmative claim-on-the-merits by

respondents in arbitration, does not diminish the holding in *C&L* or our reliance on it here. The Tribe agreed, as both we and the Multnomah Circuit Court have found, clearly and unambiguously, to arbitrate *any* disputes with its investment advisor, SWM.[30] Not some disputes; all disputes.

The Tribe also claims that because respondents' claims for attorneys' fees arise from a fee-shifting statute, any waiver of sovereign immunity concerning such a claim must be specific (*see, e.g., U.S. v. Horn*, 29 F.3d 754 (1st Cir. 1994)), similar to the principle that an Indian tribe is not amenable to a counterclaim merely by virtue of having commenced a court action (*see U.S. v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940), and similar cases cited by CTGR), and in any event limited by the "recoupment" principle. We reject CTGR's contentions as inapposite under the circumstances here.

Our decision on the viability of the Tribe's sovereign immunity defense is not predicated in any respect on the fact that the Tribe has asserted claims under the Oregon Securities Law. Rather, it is premised on CTGR's waiver of its sovereign immunity generally by executing the 1992 Investment Advisory Agreement, which we find to be a "clear" waiver under the teaching of *C&L*. The evidence before us established that, just as in *C&L*, the Tribe waived its sovereign immunity with respect to any dispute it might have with SWM covered by that arbitration agreement; it is immaterial that the present claim involves a post-hearing claim for fees and costs rather

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[30] Although we believe that the *C&L* case is dispositive on the issue of "clear" waiver by virtue of CTGR's acceptance of the contractual arbitration clause, and rest our decision on it, we also note that the Tribe did not raise sovereign immunity as a defense to SWM's and Patrick Sizemore's counterclaim but proceeded to defend against those claims in the Hearing. *See* Rules, R-7(c).

than a substantive counterclaim in the arbitration itself. The Tribe waived its sovereign immunity by executing the 1992 Investment Advisory Agreement and agreed to arbitrate all disputes with SWM regardless of when – or by whom – a claim might be asserted in the arbitration process. The present claim by SWM is within the scope of the parties' arbitration clause. The Tribes' recoupment argument is therefore inapposite and fails. Having agreed without condition to arbitrate all disputes with SWM, the recoupment argument has no application here.

While the 1992 Investment Advisory Agreement is only between the Tribe and SWM, the Multnomah County Circuit Court, relying on the arbitration clause in the 1992 Investment Advisory Agreement, compelled arbitration of the Tribe's claims against both SWM and Patrick Sizemore. The Court necessarily found and concluded that any disputes the Tribe had with Patrick Sizemore, SWM's president, were also subject to binding arbitration under the Agreement. That finding and conclusion is the law of the case and we shall apply it. We thus conclude that the Tribe's waiver of sovereign immunity is effective as to both SWM and Patrick Sizemore.[31]

With respect to SWM and Patrick Sizemore, our decision on the effectiveness of the 1992 Investment Advisory Agreement as a clear waiver of sovereign immunity with respect to those respondents' claim for fees also dictates that the Tribe is liable for such of their costs as we conclude are properly taxable. We discuss those respondent's application for costs below.

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[31] We note, however, that this finding has very little practical consequence. We find that the fees and costs sought by SWM and Patrick Sizemore would have been incurred whether or not Patrick Sizemore was a party to the arbitration. The Tribe contended that SWM, a corporation, acted principally through Mr. Sizemore; any violation of law or duty by him would necessarily implicate SWM.

Finally, we reject the Tribe's other arguments on the sovereign immunity issue insofar as respondents SWM and Patrick Sizemore are concerned.

Paradigm's and Mark Sizemore's Claim for Fees and Costs

The Tribe's sovereign immunity defense against Paradigm's and Mark Sizemore's request for fees and costs stands on a slightly different footing. Neither Paradigm nor Mark Sizemore were parties to the 1992 Investment Advisory Agreement and thus neither could compel CTGR to litigate its claims against them in arbitration. Nonetheless, CTGR, Paradigm and Mark Sizemore entered into a stipulation providing that all parties

> hereby stipulate to binding arbitration of all claims between them arising from the transactions and dealings currently the subject of this lawsuit. Such claims shall be arbitrated before the American Arbitration Association together with the claims between plaintiff [CTGR] and defendants Strategic Wealth Management, Inc. and Patrick Sizemore.

Ex. B-3 to the Tribe's Demand for Arbitration. Similarly, the Court's implementing order provided that:

> All claims before this Court asserted by plaintiff Confederated Tribes of the Grand Ronde Community of Oregon against defendants Paradigm Financial Services, Inc. and Mark Sizemore are subject to binding arbitration before the American Arbitration Association and shall proceed on the same terms and conditions together with the arbitration ordered by the Court between plaintiff and defendants Strategic Wealth Management and Patrick Sizemore....

Ex. B-4 to the Tribe's Demand for Arbitration.

The issue with respect to these respondents is whether, under the circumstances, the foregoing arbitration stipulation and the Court's implementing order, taken alone or together, are a "clear" waiver of sovereign immunity. Applying the principles articulated by the Supreme Court in *C&L*, we conclude that they are. *First*,

both the stipulation and the Court's order refer to "binding arbitration" before the AAA. *Second*, the stipulation expressly references arbitration concerning the "claims between them arising from the transactions and dealings currently the subject of this lawsuit," which necessarily invokes the "prevailing party" fee-shifting claim arising under the Oregon Securities Law. In stipulating to arbitration, the Tribe made a conscious decision to submit all claims and disputes between itself and these respondents to AAA arbitration. *Third*, the Court's implementing order expressly references the consolidation of the SWM/Patrick Sizemore claims and the Paradigm/Mark Sizemore claims, to be heard in the same arbitration and under "the same terms and conditions." We reject the Tribe's other arguments on the sovereign immunity issue insofar as respondents Paradigm and Mark Sizemore are concerned.

We thus find and conclude that the Tribe's consent to arbitration of its claims against Paradigm and Mark Sizemore was a sufficiently clear waiver of its sovereign immunity to permit us to consider those respondents' claims for attorneys' fees as the prevailing party under the Oregon Securities Law. This decision also dictates that the Tribe is liable for such of Paradigm's and Mark Sizemore's costs as we conclude are properly taxable.

In Conclusion

In sum, we find and conclude that the doctrine of sovereign immunity does not insulate CTGR from a post-hearing-on-the-merits claim by any of the respondents for attorneys' fees and costs. The Tribe waived its sovereign immunity with respect to any of the claims asserted by respondents in this proceeding. Whether and to what extent the Tribe is responsible for respondents' fees and costs is an arbitrable issue

properly before this Panel and we have jurisdiction to consider respondents' claims and, if appropriate, enter an award in their favor. For the same reasons, the doctrine of sovereign immunity is not a substantive bar to an award of respondents' attorneys' fees and costs in this case.

C. Respondents' Entitlement to Attorneys' Fees

SWM and Patrick Sizemore seek approximately $1,905,000 in attorneys' fees, for time spent by their attorneys (Markowitz Herbold Glade & Melhaf, Portland, and Karr Tuttle Campbell, Seattle) from the filing of the lawsuit through filing of their last materials in support of their fee application in this arbitration. Paradigm and Mark Sizemore seek approximately $161,530 in attorneys' fees, for time spent by their attorneys (Dunn Carney Allen Higgins & Tongue, Portland)[32] from the filing of the lawsuit through filing of their last materials in support of their fee application in this arbitration. Both sets of respondents seek an award of fees as a prevailing party under the fee-shifting provision of the Oregon Securities Law, ORS 69.115(10).

The Tribe argues that an award of fees under the Oregon Securities Law is discretionary, and that respondents must first demonstrate that the Panel should exercise its discretion and authorize such an award, and then demonstrate that the fees sought are reasonable. *Bennett v. Baugh*, 164 Or. App. 243, 246, 990 P.2d 917 (1999). The Tribe argues that the Panel is required to consider the factors outlined in ORS 20.075 in considering whether to exercise its discretion and that, even if the Panel decides that respondents are entitled to *seek* their fees, respondents have failed to

[32] While Mark Sizemore "represented" himself and Paradigm at the Hearing, both respondents were represented in the lawsuit and during a portion of the pendency of these arbitration proceedings by the Dunn Carney firm.

segregate unallowable fees from allowable fees and thus they have failed to demonstrate any amount of "reasonable" fees. We address these arguments in turn.[33]

Both sets of respondents prevailed in their defense of the Tribe's claims against them under the Oregon Securities Law. While they also prevailed on the Tribe's other claims against them, there is no basis for an award of attorneys' fees incurred in the defense of those other claims. Thus, unless the attorneys' fees incurred by respondents with respect to other matters in the Arbitration were also necessarily incurred in defense of the Tribe's Oregon Securities Law claims, respondents may not recover such fees. The burden is on respondents to demonstrate (1) the relationship of the attorney-work for which they seek recompense to the defense of the Tribe's securities claim, a process which necessarily involves segregation of "qualifying" fees from "non-qualifying" fees, and (2) the reasonableness of the fees sought, a process which necessarily involves the "factors" analysis required by ORS 20.075. On balance we find that, based on the evidence presented, the respondents substantially sustained their burden of proof on these issues.

After carefully reviewing the authorities cited by the parties, including the factors enumerated in ORS20.075, and the fee billings on which respondents' fee applications are based, and after considering other appropriate factors, including the Oregon equivalent of RPC 1.5 (DR-106(B), Oregon Code of Professional Responsibility), and the extent to which the fees sought reasonably relate to the securities claims, we are persuaded that: (1) SWM and Patrick Sizemore have demonstrated an entitlement to

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[33] The Tribe also complains that respondents failed in their applications to address the "factors" ORS 20.075 requires be considered in evaluating a fee application. While we believe respondents should have addressed such matters in their opening briefs rather than in their replies, we find no prejudice to the Tribe. The Tribe not only addressed these matters in their opposition brief, they also submitted – and we have considered – a supplemental opposition brief on the subject.

recover $1,273,395 in attorneys' fees from the Tribe; (2) Paradigm and Mark Sizemore have demonstrated an entitlement to recover $145,375 in attorneys' fees from the Tribe; and (3) the foregoing sums are reasonable.

D. Respondents' Entitlement to Costs

SWM and Patrick Sizemore seek to recover approximately $158,000 in "costs" under both Oregon law pertaining to the taxation of costs to the prevailing party in litigation and AAA Rules.[34] Those respondents seek another approximately $195,000 in fees paid their expert witness, Todd Menenberg, under Rules R-43(a) and (b). Paradigm and Mark Sizemore seek approximately $6,500 in "costs" under both Oregon law and AAA Rules. The Tribe contends that a portion of these costs are not recoverable under Oregon law and that there is no basis, either in Oregon law or the Rules, for the recovery by SWM and Patrick Sizemore of Mr. Menenberg's expert witness charges.

After carefully reviewing the authorities cited by the parties[35] and the cost billings on which respondents' cost applications are based, we are persuaded that all of the "costs" claimed by both sets of respondents ($158,007 for SWM/Patrick Sizemore; $6,485 for Paradigm/Mark Sizemore) are appropriately chargeable to the Tribe as the non-prevailing party under the Oregon Securities Law, general Oregon law concerning taxation of costs and/or the Rules.[36] We also find and conclude that we have the

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[34] Both sets of respondents cite to R-43(a) and (b) as authority for the award of their "costs" in this proceeding.

[35] Both respondents and claimant cite to ORCP 68 as if it binds us in our consideration of these matters. We disagree. While we find ORCP useful as a guideline for our decision-making, that court rule does not control these proceedings.

[36] We note that under the rule of *Robinowitz v. Pozzi*, 127 Or. App. 464, 872 P.2d 993, *rev. denied*, 320 Or. 109, 881 P.2d 141 (1994), some costs are taxable as part of an award for attorneys' fees,

authority under the Rules to award respondents these costs, and exercise our discretion to do so. The Tribe's objections to these cost awards are overruled and rejected.

We do not, however, accept SWM's and Patrick Sizemore's argument that we have authority to, and should, award them the fees charged by their expert witness, Todd Menenberg. Although we found Mr. Menenberg's testimony useful in our consideration of the substantive issues in this case, we do not award those respondents any portion of his fees.

6. **Award on Respondents' Claims for Attorneys' Fees and Costs.** For the reasons given above in Section 5, we award (1) respondents SWM and Patrick Sizemore reasonable attorneys' fees in the amount of US$1,273,395 and reasonable costs in the amount of US$158,007, for a total award in said respondents' favor against claimant CTGR of US$1,431,402; and (2) respondents Paradigm and Mark Sizemore reasonable attorneys' fees in the amount of US$145,375 and reasonable costs in the amount of US$6,485, for a total award in said respondents' favor against claimant CTGR of US$151,860.

7. **Award of Arbitration Fees and Expenses.** Rule R-43(c) provides that "In the final award, the arbitrator shall assess the [AAA's] fees, expenses, and compensation" of the arbitrators and the panel "may apportion such fees, expenses, and compensation of the parties in such amounts as the arbitrator determines is appropriate." An identical provision has appeared in the Rules since at least 1991. *See* Rule R-45(c) [January 1, 2003, July 1, 2002, September 1, 2000 and January 1, 1999 editions]; Rule R-43 [July 1, 1996, November 1, 1993, May 1, 1992 and January 1, 1991 editions]. In their

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rather than Oregon court rules. In any event, while we use ORCP 68 as an important guidepost, we are not constrained by it.

applications for attorneys' fees, costs and other disbursements, respondents asked that all such fees and expenses, and all of the arbitrators' compensation, be assessed against CTGR. The Tribe opposed their request.

Having duly considered all factors bearing on the exercise of our discretion, we assess arbitration fees (Rule R-49), expenses (Rule R-50) and arbitrator compensation (Rule R-51) as follows:

A. Claimant CTGR's AAA administrative fees (filing fee and case service fee) and AAA expenses (hearing room fee), totaling US$21,000.00, shall be borne solely by claimant CTGR.

B. Respondents SWM's and Patrick Sizemore's AAA administrative fees (counterclaim filing fee and case service fee) and AAA expenses (hearing room and work room fee), totaling US$15,850.00, shall be borne solely by respondents SWM and Patrick Sizemore.

C. All AAA expenses (hearing room fee) paid by Paradigm and Mark Sizemore, totaling US$1,250.00, shall be assessed against and borne by CTGR. Accordingly, claimant CTGR shall pay to respondents Paradigm and Mark Sizemore the sum of US$1,250.00.

D. The fees and expenses of the arbitrators, totaling US$297,178.12, are assessed against and shall be borne by the parties in the proportions noted below:

CTGR	80%	—	US$237,742.49
SWM/Patrick Sizemore	20%	—	US$ 59,435.63
Paradigm/Mark Sizemore	-0-%	—	US$ -0-

Accordingly, claimant CTGR shall also pay:

(1) To respondents SWM and Patrick Sizemore the aggregate sum of US$39,621.79 to reimburse those respondents for a portion of sums previously deposited by them with the AAA toward arbitrator compensation;

(2) To respondents Paradigm and Mark Sizemore the aggregate sum of US$99,057.41 to reimburse those respondents for sums previously deposited by them with the AAA toward arbitrator compensation.

8. **Summary of Monetary Award.** For the convenience of the parties, we recap the monetary award made above in Sections 6 and 7 as follows:

A. Respondents SWM and Patrick Sizemore are awarded, and claimant CTGR shall pay them, the sum of US$1,471,023.70;

B. Respondents Paradigm and Mark Sizemore are awarded, and claimant CTGR shall pay them, the sum of US$252,167.41.

9. **Due Date for Payment of Award, Interest.** All sums of money awarded in this Final Award shall be paid no later than thirty (30) days after the date of this Final Award. Sums remaining unpaid after thirty (30) days shall bear interest at the rate of twelve percent (12%) per annum from such date until paid.

10. **All Other Claims Denied.** This Final Award is in full and final satisfaction of all claims, counterclaims, defenses and issues submitted in this Arbitration. All claims, counterclaims, defenses and requests for relief asserted by any party in this arbitration not specifically addressed above are denied and are hereby dismissed with prejudice.

* * * * *

Each of the undersigned arbitrators does hereby affirm upon our oaths as arbitrators that we are the individuals described in and who executed this instrument, which is our Final Award.

DATED this 13 day of August, 2004.

Earl P. Lasher, III
Arbitrator

Philip E. Cutler
Arbitrator

Thomas J. Brewer
Arbitrator

STATE OF WASHINGTON)
) SS.
COUNTY OF KING)

I certify that I know or have satisfactory evidence that Earl P. Lasher, III is the person who appeared before me and signed this instrument before me at Seattle, Washington, and acknowledged it to be his free and voluntary act and deed for the uses and purposes stated therein.

DATED: August 13, 2004.

Elizabeth Charlotte F

Notary Public in and for the State of Washington, residing at Renton.
My appointment expires 4-24-06.
Print name: Elizabeth Charlotte Fuhrmann

STATE OF WASHINGTON)
) SS.
COUNTY OF KING)

I certify that I know or have satisfactory evidence that Philip E. Cutler is the person who appeared before me and signed this instrument before me at Seattle, Washington, and acknowledged it to be his free and voluntary act and deed for the uses and purposes stated therein.

DATED: August 12, 2004.

Amylyn K. Riedling

Notary Public in and for the State of Washington, residing at Tacoma.
My appointment expires 11-03-07.
Print name: Amylyn K. Riedling.

STATE OF WASHINGTON)
) SS.
COUNTY OF KING)

I certify that I know or have satisfactory evidence that Thomas J. Brewer is the person who appeared before me and signed this instrument before me at Seattle, Washington, and acknowledged it to be his free and voluntary act and deed for the uses and purposes stated therein.

DATED: August 12, 2004.

Notary Public in and for the State of Washington, residing at Tacoma.
My appointment expires 11-03-07.
Print name: Amylyn K. Riedling.