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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AT PORTLAND

FIRST SPECIALTY INSURANCE CORPORATION, **PLAINTIFF,** v. **THE CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON,** **DEFENDANT.**	Case No. 07-CV-05-KI MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Defendant The Confederated Tribes of the Grand Ronde Community of Oregon ("Tribe") sued its investment advisor in state court. One of the Tribe's claims was for securities fraud under the Oregon Securities Law, a claim that carries a reciprocal right to attorney fees. In accordance with an arbitration provision in the investment advisory agreement, the court sent all claims in the Tribe's case, including the securities claim, to arbitration, where the Tribe selected the arbitration rules. In both the state-court and arbitration proceedings, the Tribe raised tribal sovereign immunity as a defense. The Tribe lost in arbitration, and the arbitrators awarded the investment advisor attorney fees and costs. The Tribe then brought an action in its own tribal court system to vacate the arbitration award, and the tribal trial and appellate courts ruled that the arbitrators' award of attorney fees was barred by the doctrine of tribal sovereign immunity. Plaintiff First Specialty Insurance Corporation ("FSIC"), successor by assignment of the investment advisor defendants, now brings this action to declare the tribal courts' vacation of the award invalid and to enter judgment on the arbitration award. Because the tribal courts lacked jurisdiction to review the arbitration award, FSIC is entitled as a matter of law to a declaration that the tribal courts' rulings were invalid. Under the Federal Arbitration Act, FSIC is further entitled to entry of the arbitration award in this Court.

II. STATEMENT OF FACTS

A. The Investment Advisory Agreement Between the Tribe and Strategic Wealth Management.

The Tribe became associated with Strategic Wealth Management ("SWM"), an investment advisory firm, and its principal, Patrick Sizemore, in 1992. At that time, the Tribe and SWM entered into an Investment Advisory Agreement ("Agreement") that provided in pertinent part:

> All controversies which may arise between [the Tribe] and [SWM] concerning any transaction or the construction, performance or breach of this or any other agreements between them *** shall be

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> determined by arbitration. *** Any arbitration shall be in accordance with the rules then applying of the American Arbitration Association, New York Stock Exchange or the National Association of Securities Dealers, at [the Tribe's] election,

(Investment Advisory Agreement, Exhibit 1 to the Declaration of Gregory A. Chaimov at 4.)[1]

Among other recommendations, SWM and Sizemore advised the Tribe to invest in promissory notes secured by real property.

B. The Tribe Sues SWM and Sizemore in Multnomah County Circuit Court.

Disappointed by the performance of these notes, the Tribe sued SWM and Patrick Sizemore in 2001 in Multnomah County Circuit Court, claiming that, in transactions with the Tribe, SWM and Patrick Sizemore had violated the Oregon Securities Law, ORS 59.115. This claim carries a reciprocal right to attorney fees. ORS 59.115(10). ("[T]he court may award reasonable attorney fees to the prevailing party in an action under this section.").

SWM and Patrick Sizemore moved pursuant to the Federal Arbitration Act, 9 U.S.C. § 3, to require the Tribe to pursue the Tribe's claims in arbitration. The Tribe objected, arguing that the arbitration clause was "drafted by SWM" and that the Agreement did not cover the claims that the Tribe asserted against SWM and Patrick Sizemore: "[T]he Tribe's claims in this case arise out of a 1995 Agreement between the parties, not the 1992 Agreement." (Tribe's Memo. in Opposition to Motion to Compel Arbitration and to Abate, Exhibit 2 at 5.)

The parties also disputed which agreements had received the appropriate approvals from the Tribe's governing body, with SWM and Patrick Sizemore demonstrating (through responses to requests for admission) that the Agreement "was 'signed by authorized representatives[' and] 'negotiated by the parties,' and [that the] 'Tribal Council [had] authorized its execution.'" (Defendants SWM and Patrick Sizemore's Reply in Support of Motion to Compel Arbitration, Exhibit 3 at 10.)

[1] All references to exhibits are to documents attached to the Chaimov Declaration.

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The Multnomah County Circuit Court rejected the Tribe's arguments, finding that the Agreement "was negotiated by the parties, presented to [the] Tribal Council, and signed by authorized representatives for the parties." (Order Granting Defendants Strategic Wealth Management, Inc.'s and Patrick Sizemore's Motion to Compel Arbitration, Exhibit 4 at 4.) The Multnomah County Circuit Court then dismissed the Tribe's case, stating that:

> [A]ll claims and controversies between [the Tribe and SWM and Patrick Sizemore] *** concerning any transaction or the construction, performance or breach of [the Agreement] or any other agreements *** are subject to binding arbitration.

(*Id.* at 9.)

C. The Tribe Selects the American Arbitration Association.

In 2003, the Tribe selected from among the arbitration organizations listed in the Agreement and submitted its claims against SWM and Patrick Sizemore, including the claim for violation of the Oregon Securities Law, for decision by the American Arbitration Association (the "Association"). The Association's rules provide that:

> 1. "The award of the arbitrator(s) may include: *** *an award of attorneys' fees if all parties have requested such an award* or [the award of attorney fees] is authorized by law or [the parties'] arbitration agreement," AAA Rule R-43(d)(ii);
>
> 2. "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement," AAA Rule R-7(a); and
>
> 3. "A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection," AAA Rule R-7(c).

(AAA Commercial Arbitration Rules, Exhibit 5 at 13, 8; emphasis added.)

All parties requested attorney fees. (Demand for Arbitration & Statement of Claim, Exhibit 6 at 1, 4; Respondent SWM's and Patrick Sizemore's Amended Answering Statement

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and Counterclaims, Exhibit 7 at 2.) ORS 59.115(10) authorized an award of fees to the prevailing party on the claim under the Oregon Securities Law.

In 2004, the panel held a hearing that lasted 21 days. (Final Award, Exhibit 8 at 6.) The Tribe did not object to the arbitrability of the counterclaim for attorney fees or to the Association's authority to award fees on the counterclaim until after the panel had concluded the hearing on the merits of the Tribe's claims. (*Id.* at 48 n.26.)

The Association panel rejected "all of the Tribe's claims" against SWM and Patrick Sizemore, and awarded attorney fees and costs to SWM and Patrick Sizemore in the amount of $1,431,402, with interest at the rate of 12 percent per annum. (*Id.* at 17, 59-61.) In reaching the decision to award fees, the panel interpreted the Agreement to mean that the Tribe had waived its immunity to an award of fees arising out of the dispute with SWM and Patrick Sizemore:

> 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. Not some disputes; all disputes.
>
> * * * * *
>
> *** The Tribe waived its sovereign immunity by executing the [Agreement] and agreed to arbitrate all disputes regardless of when—and by whom—a claim might be asserted in the arbitration process. The present claim by SWM [for attorney fees] is within the scope of the parties' arbitration clause."

(*Id.* at 52-53; emphasis in original)

D. The Tribe Attempts to Vacate the Arbitration Award in Tribal Court.

The Tribe petitioned the Tribal Court of the Confederated Tribes of the Grand Ronde Community of Oregon (the "Tribal Court") and then the Multnomah County Circuit Court to vacate the award of attorney fees and costs. *See Confederated Tribes of the Grande Ronde Community of Oregon v. Strategic Wealth Management, Inc. et al.*, Multnomah County Circuit Court Case No. 0408-08837. Because the tribal court petition was filed first, the state court case

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was stayed pending the resolution of the tribal court case.[2]

SWM and Sizemore moved to dismiss the Tribe's petition to vacate the arbitration award in the Tribal Court, asserting, among other arguments, that both subject matter and personal jurisdiction were lacking. By interlocutory order dated December 20, 2004, the Tribal Court denied the motion. On August 5, 2005, the Tribal Court issued its final Order Vacating Arbitration Award of Fees and Costs. (Tribal Court Order Vacating Arbitration Award, Exhibit 9.) Both orders were timely appealed by SWM and Sizemore to the Court of Appeals for the Confederated Tribes of the Grand Ronde Community of Oregon ("Tribal Court of Appeals").

SWM and Sizemore assigned all right, title, and interest in the arbitration award to plaintiff FSIC. By order of the Tribal Court of Appeals dated December 20, 2005, FSIC was substituted for SWM and Sizemore in the tribal appellate proceeding. (Order Granting FSIC's Motion for Order Substituting Parties and Counsel, Exhibit 10 at 1.)

Before the Tribal Court of Appeals, FSIC argued that the Tribal Court lacked jurisdiction to review and vacate the Seattle arbitration panel's award. FSIC further contended that the decision of the Multnomah County Circuit Court to send the Tribe's claims to arbitration precluded the Tribe from arguing that the Tribe had not waived immunity to the reciprocal claim of attorney fees under the Oregon Securities Law. Finally, FSIC argued that, even if the Tribal

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[2] The tribal courts should not have been in a position even to consider the arbitration award. The Multnomah County Circuit Court abated its proceeding on the arbitration award, believing that the Tribe's action in the Tribal Court was the first filed. The Tribe's Tribal Court action was the first filed, but only because the Multnomah County Circuit Court had mistakenly dismissed the original lawsuit after ordering the Tribe's claims to arbitration. The Multnomah County Circuit Court should have retained jurisdiction of the original action to address the propriety of the award after the parties completed the arbitration into which the court had ordered the parties. *See former* ORS 36.315 ("If any action, suit or proceeding is brought upon any issue arising out of an agreement which contains a provision for arbitration of the matter in controversy in such action, suit or proceeding, then, upon application, any judge of a circuit court, upon being satisfied that the issue is referable to arbitration, *shall abate* the action, suit or proceeding so that arbitration may be had in accordance with the terms of the agreement.") (emphasis added).

The parties have since stipulated to the dismissal of the Tribe's petition to vacate the award in Multnomah County Circuit Court in order that this court might review the tribal court's exercise of jurisdiction over the award.

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Court could review the panel award, the Tribal Court erred in concluding that the panel's decision to award fees and costs was irrational or made in manifest disregard of the law.

A majority of the three-judge panel of the Tribal Court of Appeals rejected FSIC's arguments. The majority ruled that the Tribal Court had the authority to vacate the Seattle arbitration panel's award and that, contrary to the Multnomah County Circuit Court's and arbitration panel's decisions, the Tribe had not waived its immunity to the reciprocal claim for attorney fees. (Tribal Court of Appeals Opinion, Exhibit 11 at 15.) The majority further ruled that the Tribal Court had both subject matter and personal jurisdiction over SWM and Patrick Sizemore. (*Id.* at 18.) The Tribal Court of Appeals therefore affirmed the Tribal Court's decision to vacate the arbitration panel's award. (*Id.* at 21.) It was, however, the dissenting member of the panel who correctly applied the law that applies to the case:

> The trial judge found the application of current AAA rules to this controversy "untenable," slip op. at 26, but *C & L Enterprises* makes it clear that those rules do apply. The majority of this court reasons, in a circular way, that the parties' agreement incorporating the AAA rule on attorney fees cannot authorize an award of attorney fees allowed by law because the Tribe did not agree to arbitrate the issue of attorney fees. Whatever may be the merits of that position, it avoids the question placed before us for decision. Did the arbitrators act irrationally or in manifest disregard for the law by concluding otherwise? I cannot say that they did.

(*Id.* at 23.)

III. STANDARDS FOR SUMMARY JUDGMENT

A party is entitled to summary judgment if the record before the Court reflects no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Bhan v. NME Hosp., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991). If the moving party meets its burden of proof, then the non-moving party must go beyond the pleadings and show that there is a genuine issue of material fact for trial. *Bhan*, 929 F.2d at 1409; *League of Wilderness Defenders v. Marquis-Brong*, 259 F. Supp. 2d 1115, 1118 (D. Or.

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2003). Where the parties' disagreement involves legal interpretations rather than factual disputes, summary judgment is particularly appropriate. *See Smith v. Califano*, 597 F.2d 152, 155 n.4 (9th Cir. 1979).

IV. ARGUMENT

A. As a Matter of Federal Law, This Court May Review the Tribal Courts' Exercise of Jurisdiction Over Nonmembers of the Tribe.

This case centers on whether the Grand Ronde tribal courts could exercise jurisdiction to review and vacate the arbitration award. The extent of a tribal court's jurisdiction over nonmembers is a question of federal law reviewable by this Court. *Boozer v. Wilder*, 381 F.3d 931, 934 (9th Cir. 2004). Moreover, whether a tribe has waived its sovereign immunity is a matter of federal law. *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."); *see also Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852-53 (1985) ("Because petitioners contend that federal law has divested the Tribe of this aspect of sovereignty, it is federal law on which they relay as a basis for the asserted right of freedom from Tribal Court interference.").

B. The Tribal Courts Lacked the Authority to Review and Vacate the Arbitration Award.

The tribal courts did not have personal or subject-matter jurisdiction to review and vacate the arbitration award. Contacts that SWM and Patrick Sizemore had on tribal lands may have given the tribal courts jurisdiction over them, but the Tribe's petition to vacate the arbitration award in the Tribal Court did not challenge conduct by SWM and Patrick Sizemore. The Tribe instead challenged an action by nonmembers—private arbitrators—who had no contacts with tribal lands. Under *Montana v. United States,* 450 U.S. 544, 565 (1981), "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." The only exceptions to this rule are for (a) a tribe's exercise of police (*i.e.*, regulatory) power over nonmembers who choose to do business on tribal lands, and (b) an action that threatens the

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tribe's survival as a nation. Neither exception is present here.

Both the Tribal Court and the Tribal Court of Appeals insisted that they could "void" the arbitration award because of SWM and Patrick Sizemore's on-reservation contacts with the Tribe. The tribal courts thus simply refused to evaluate the Tribe's petition to vacate the arbitration award for what it plainly was—a challenge to the arbitrators' conduct, not SWM's or Patrick Sizemore's. The petition's two claims for relief contended that the arbitration panel "issued an award of affirmative relief against the Tribe in violation of the principles of [sovereign] immunity." (Petition to Vacate, ¶¶ 15, 21, Exhibit 12 at 4, 5.) The petition, therefore, attacked the conduct of the nonparty arbitration panel, an off-reservation entity sitting in Seattle, Washington, and made up entirely of nonmembers of the Tribe. Under the *Montana* rule, the Tribal Court has no jurisdiction over the arbitration panel and cannot review the panel's decisions.

Montana makes clear that a tribe's inherent power "to protect tribal self-government [and] to control internal relations," *Montana*, 450 U.S. at 564, does not extend to off-reservation activity by nonmembers. As the Supreme Court has flatly stated, "[T]here can be no assertion of civil authority beyond tribal lands." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 657 n.12 (2001); *see also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982) (upholding tribe's right to tax on-reservation mining while explaining that "the limited authority that a tribe may exercise over nonmembers does not arise until the nonmember enters the tribal jurisdiction"). No court has held that a tribal court's authority reaches conduct occurring entirely off-reservation. *See Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1091 (8th Cir. 1998) (finding no jurisdiction over brewer's off-reservation conduct and noting that the parties cited no case upholding that jurisdiction). Nor does any reported federal case uphold a tribal court's power to vacate the award of an off-reservation arbitration panel. Here, the tribal courts' expansive view of their jurisdiction leads to absurd results. If the case had proceeded in Multnomah County Circuit Court, to take one example, the tribal courts' view would permit

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them to vacate a state-court judge's order that the Tribe pay a contempt fine to the court, simply because the Tribe was a party to the action. Tribal jurisdiction cannot be extended so far.

Nothing in the two "*Montana* exceptions" changes the general rule that tribal jurisdiction cannot reach off-reservation conduct:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. [1] A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. [2] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, 450 U.S. at 565-66 (internal citations omitted; emphasis added); *see also Strate v. A-1 Contractors, Inc.*, 520 U.S. 438, 446 (1997), ("*Montana* thus described a general rule that *** Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions"; emphasis added). These exceptions, therefore, do not apply because the conduct that gave rise to the Tribe's petition—the arbitration proceeding—did not occur on the reservation, whether on tribal or non-Indian land. *See also Smith*, 434 F.3d at 1135 ("[O]ur inquiry is whether the cause of action brought by these parties bears some direct connection to tribal lands"; citations omitted). Here, any relationship between the arbitration panel and the Tribe bore no territorial connection to tribal lands. *See Atkinson*, 532 U.S. at 655 (rejecting "broad reading of *Montana*'s first exception, which *** subverts the territorial restriction on tribal power"; emphasis added).

Even if tribal jurisdiction could reach off-reservation conduct, neither of the *Montana* exceptions would apply to the actions of the Association's arbitration panel in entering an award. The panel's agreement to arbitrate the dispute in Seattle is not a consensual commercial relationship encompassed by the first *Montana* exception. Each of the cases illustrating the first exception cited by the *Montana* Court involved on-reservation conduct by nonmembers who

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were engaged in the kind of business or activity that government traditionally has regulated through taxation or licensure. *See Montana*, 450 U.S. at 565-66 (citing cases); *see also Strate*, 520 U.S. at 457 (explaining that *Montana*'s list of cases "indicates the type of activities the Court had in mind").

The arbitration panel's conduct also does not satisfy the second *Montana* exception: for conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Montana*, 450 U.S. at 566. The Supreme Court has cautioned that the second exception must not be broadly construed so as to "severely shrink the [general Montana] rule." *Strate*, 520 U.S. at 458; *see also County of Lewis v. Allen*, 163 F.3d 509, 515 (9th Cir. 1998) (en banc) (second exception to be read narrowly). Indeed, *Strate* made clear that the second exception is triggered only by profound threats to tribal self-government: "[E]ach of those cases [cited by the *Montana* Court] raised the question of whether a State's (or Territory's) exercise of authority would trench unduly on tribal self-government." *Strate*, 520 U.S. at 458. Here, the arbitration panel's actions do not amount to an attack on tribal self-government or control of internal tribal relations. The Tribe's contention that the arbitration award's enforcement will have some deleterious economic effect on the Tribe is not the kind of claim that satisfies the second *Montana* exception: "[T]he exception would swallow the rule because virtually every act that occurs on the reservation could be argued to have some political, economic, health or welfare ramification to the tribe." *County of Lewis*, 165 F.3d at 515.

Under these circumstances, the tribal courts lacked jurisdiction to review the actions of the arbitrators.

C. The Tribal Courts Were Precluded From Ruling That Sovereign Immunity Barred the Arbitration Award.

In the tribal court system, the Tribe argued—and the tribal courts accepted—that the award of attorney fees was barred by the doctrine of tribal sovereign immunity. But the tribal courts were precluded from making this determination because it was directly contradicted by

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the decision of the Multnomah County Circuit Court to send "all claims and controversies between [the Tribe and SWM and Patrick Sizemore] *** concerning any transaction or the construction, performance or breach of [the Agreement] or any other agreements" to arbitration. (Order Granting Defendants Strategic Wealth Management, Inc.'s and Patrick Sizemore's Motion to Compel Arbitration, Exhibit 4 at 5-6.)

This Court looks to state law to determine the preclusive effect of state-court judgments. *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 927 (9th Cir. 2006). Here, Oregon law makes clear that the Tribe "is not entitled to 'a second bite of the apple.'" *Aguirre v. Albertson's, Inc.*, 201 Or. App. 31, 47, 117 P.3d 1012, 1021 (2005). Issues decided by another tribunal, whether expressly or implicitly, cannot be relitigated:

> As long as the parties to an action had a "full and fair opportunity to litigate," whether or not they actually did so, claim preclusion prevents relitigation of the same or related claims in order to protect "adversaries from the expense of attending multiple lawsuits" as well as to conserve judicial resources and minimize the possibility of inconsistent decisions.

Id. at 48 (quoting *Montana v. United States*, 440 U.S. 147, 153-54 (1979)).

The Multnomah County Circuit Court considered whether the arbitration clause applied to all or only some of the claims in the case and the extent to which the Agreement was fully and fairly considered. When dismissing the Tribe's lawsuit, the Multnomah County Circuit Court held that:

> (a) The Agreement covered all claims—not just those for breach of the Agreement or closely-related to breaches of the Agreement: "[A]ll claims and controversies between [the Tribe and SWM and Patrick Sizemore] *** concerning any transaction or the construction, performance or breach of [the Agreement] or any other agreements";
>
> (b) The Agreement was not foisted on the Tribe, but "was negotiated by the parties"; and
>
> (c) The Agreement's terms, far from being a surprise to the

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> Tribe's governing body, were "presented to [the] Tribal Council, and signed by authorized representatives for the [Tribe.]"

(Order Granting Motion to Compel Arbitration, Exhibit 4 at 4-6.)

Despite these state court findings, the Tribal Court concluded that "the issue presented in this case [whether the Tribe waived its immunity] was never before the Multnomah County Circuit Court." (Tribal Court Order Vacating Arbitration Award, Exhibit 9 at 31.)[3] (The Tribal Court of Appeals failed entirely to discuss the findings of the Multnomah County Circuit Court.) It is true that the Multnomah County Circuit Court did not expressly state that, by entering into the Agreement, the Tribe waived its immunity to an award of attorney fees, but that finding is implicit in the Multnomah County Circuit Court's decision to send "all claims"—without exception—to arbitration. A court cannot send a claim against a tribe to arbitration unless the Tribe has, by waiving its immunity, consented to litigate the claim in that forum. *See C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 416 (2001) (tribe subject to arbitration award only if tribe waived immunity); *see also Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938) ("Every court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter."). By sending "all claims *** concerning any transaction" to arbitration, the Multnomah County Circuit Court necessarily (albeit implicitly) found that the Tribe had waived its immunity to a reciprocal award of fees under the Tribe's claim under the Oregon Securities Law. An implicit finding is as binding as an explicit one. *See Securities Indus. Ass'n v. Bd. of Governors of Fed. Reserve Sys.*, 900 F.2d 360, 365 (D.C. Cir. 1990) (by not remanding case, court necessarily decided, even though only implicitly, the issue presented to it); *Gilldorn Sav. Ass'n v. Commerce Sav. Ass'n*, 804 F.2d 390,

[3] In the Circuit Court proceeding, the Tribe did not expressly argue that a reciprocal award of attorney fees and costs under the Oregon Securities Law would be barred by tribal sovereign immunity. However, the Tribe did argue, in the context of urging the court that a later agreement was the governing contract between the parties, that tribal sovereign immunity could not be waived absent an express arbitration clause. (Tribe's Memo. in Opposition to Motion to Compel Arbitration and to Abate, Exhibit 2 at 15 n.4.)

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394-395 (7th Cir. 1986) ("Decision on each issue was necessary to the [court's] order as each had to be resolved in order to reach the result."); *see also* 18 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2d § 4420, at 521 (2002) ("Examination of the record often culminates in a process of inference, in which it is taken that an issue was actually decided if its decision was necessary to support the result reached on the record presented in the first action").

The Multnomah County Circuit Court's implicit conclusion on jurisdiction was not, moreover, subject to collateral attack in the tribal court system. Direct review of the Circuit Court was only available in the Oregon Court of Appeals. *See Fischel v. Equitable Life Assurance Soc'y of the U.S.*, 307 F.3d 997, 1005-06 (9th Cir. 2002) (plaintiffs precluded from relitigating jurisdictional question where they failed to appeal ruling). Nor does it matter that the Tribe may have failed to present squarely its sovereign immunity defense to the Circuit Court. Claim preclusion applies to all claims that were raised or could have been raised in an earlier proceeding. *See Aguirre*, 201 Or. App. at 48; *see also Lincoln Loan Co. v. City of Portland*, 340 Or. 613, 630, 136 P.3d 1 (2006) (doctrine of claim preclusion bars challenge to subject-matter jurisdiction that could have been raised in earlier proceeding); *City of S. Pasadena v. Mineta*, 284 F.3d 1154, 1157 (9th Cir. 2002) (failure to invoke sovereign immunity challenge to subject-matter jurisdiction precludes later collateral attack). This is true even if the Circuit Court had in fact lacked subject-matter jurisdiction over some of the claims in the Tribe's suit. *See Mitchell v. Comm'n on Adult Entertainment Establishments of the State of Delaware*, 12 F.3d 406, 408-09 (3d Cir. 1993) ("[W]here non-waivable subject matter jurisdiction is lacking but not raised, a final judgment has *res judicata* effect in a subsequent proceeding, and a collateral attack based on the want of subject matter jurisdiction is barred.").

Because the Multnomah County Circuit Court interpreted the arbitration clause in the Agreement to cover "all claims," the tribal courts should not have reinterpreted the clause to exclude SWM's and Patrick Sizemore's reciprocal claim for attorney fees.

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D. The Tribal Courts Did Not Apply the Federal Arbitration Act's Standard of Review for the Arbitration Award.

Even if the tribal courts could have exercised jurisdiction over the arbitration award, those courts failed to employ the highly deferential standard of review required by the Federal Arbitration Act.

The FAA's application to agreements "involving commerce" is to be construed as broadly as possible to include any activities affecting commerce. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 273-77 (1995). And the FAA plainly applies to this case. SWM and the Tribe's Agreement was between a Washington corporation and an Indian tribe located in Oregon, and involved the provision of financial services across multiple jurisdictions. *See Comanche Indian Tribe of Oklahoma v. 49, LLC*, 391 F.3d 1129, 1132 (10th Cir. 2004) (arbitration agreement between tribe and an out-of-state business); *Val-U Constr. Co. of S. Dakota v. Rosebud Sioux Tribe*, 146 F.3d 573, 578 (8th Cir. 1998) (applying FAA to arbitration agreement between tribe and contractor in South Dakota). Moreover, the FAA permits a court to vacate an arbitration award only where

> (1) The award was procured by corruption, fraud, or undue means;
>
> (2) There was evident partiality or corruption in the arbitrators;
>
> (3) The arbitrators were guilty of misconduct *** or misbehavior; or
>
> (4) The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award on the subject matter was not made.

9 U.S.C. § 10(a). These statutory grounds are exclusive; there can be no other basis for vacating an award. *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (9th Cir. 2003) (en banc). An arbitration panel exceeds its powers when the arbitration award is "completely irrational or evidences a manifest disregard for the law." *See Val U Constr.*, 146 F.3d at 579 (denying motion to vacate arbitration award that included attorney fees despite

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tribe's contention that tribe had not waived immunity through agreement that called for "[a]ll questions in dispute under this agreement [to] be decided by arbitration").

Both the Tribal Court and the Tribal Court of Appeals failed to apply the FAA. Indeed, the Tribal Court expressly disclaimed reliance on the FAA, and reviewed the arbitrator's decision de novo. (Tribal Court Order Vacating Arbitration Award, Exhibit 9 at 32.) The Tribal Court of Appeals cited the FAA and paid lip service to the idea that review of arbitration awards should be deferential, but then proceeded to engage in a lengthy, de novo review of the underlying Agreement. *See e.g.*, Tribal Court of Appeals Opinion, Exhibit 11 at 16 ("The parties have not cited any provision in the tribal or federal constitutions or laws that prevent us from *exercising subject matter jurisdiction over the 1992 Agreement* ***.") (emphasis added). Both tribal courts concluded that the Tribe did not waive its sovereign immunity to an award of prevailing party attorney fees and costs by executing the Agreement. Both tribal courts failed to appreciate that, in submitting its claims for decision by the Association's panel, the Tribe gave the panel the authority to decide "*** any objections with respect to the *** scope *** of the arbitration agreement." (AAA Commercial Arbitration Rules, Exhibit 5 at 8 (AAA Rule R-7(a). Under the FAA, the tribal courts' role was not to interpret the arbitration clause anew, but to determine whether the arbitrators' interpretation of the clause was "completely irrational" or "constitute[d] manifest disregard of the law." *Coutee v. Burlington Capital Group*, 336 F. 3d 1128, 1132 (9th Cir. 2003). This standard of review is "limited and highly deferential" to the arbitrators and "among the narrowest known to law." *Poweragent v. Elec. Data Sys. Corp.*, 358 F.3d 1187, 1193 (9th Cir. 2004); *ARW Exploration Corp. v. Aguirre*, 47 F.3d 1455, 1462 (10th Cir. 1995). A court must defer to the arbitrators if the arbitrators "even arguably construed or applied the contract" correctly. *See Teamsters Local Union 58 v. BOC Gases*, 249 F.3d 1089, 1093 (9th Cir. 2001) (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987)). Put another way, to be in manifest disregard of the law:

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> [t]he error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it.

Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc., 126 F.3d 15, 23 (2d Cir. 1997) (citation omitted).

Here, the arbitrators' conclusion that the Tribe waived its immunity was not only "arguably" correct—it was correct.[4] The Agreement provides that "All controversies which may arise between [the Tribe] and [SWM] concerning any transaction or the construction, performance or breach of this or any other agreements between them *** shall be determined by arbitration." (Investment Advisory Agreement, Exhibit 1 at 4.) In *Knott v. McDonald's Corporation,* 147 F.3d 1065 (9th Cir. 1998), sellers expressly assigned all their right, title, and interest in franchises to the buyers. When the parties disputed the scope of the assignment, the Court of Appeals concluded that "[t]his assignment, while admittedly broad, is not ambiguous .... In short, 'all' means all." *Knott*, 147 F.3d at 1067; *see also Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1114 (3d Cir. 1993) ("Courts have broadly construed similar agreements [containing "all controversies" arbitration clauses], interpreting them to apply to all disputes between signatories.").

The arbitration clause in this case is also identical in all material respects to a clause that the United States Supreme Court interpreted to waive a tribe's immunity to an arbitration award in *C & L Enters. Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma. C & L Enterprises*

[4] The Multnomah County Circuit Court recently ruled that the Tribe waived its immunity to attorney fees that the arbitrators awarded to other defendants under the Oregon Securities Act. The Tribe had no investment advisory agreement with those defendants, but when the Multnomah County Circuit Court sent the claims of FSIC's assignors to arbitration, the Tribe agreed to arbitrate the claims against the other defendants with the claims against FSIC's assignors. Thus, this case presents the odd posture of the tribal courts ruling against the party *with* the arbitration clause and the Multnomah County Circuit Court ruling for the party *without* the arbitration clause.

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demonstrates how "all means all" is true for arbitration agreements waiving tribal immunity. In that case, the tribe entered into an agreement that provided for "[a]ll claims or disputes *** arising out of the Contract or breach thereof [to] be decided in arbitration[.]" *C & L Enters.*, 532 U.S. at 415. An arbitrator awarded attorney fees and costs against the tribe and the tribe sought review in the United States Supreme Court. The Supreme Court held that the arbitration clause's "all claims" was "not ambiguous," *i.e.*, not susceptible of more than one interpretation, and that the tribe had, through the clause, waived its immunity to the arbitration award, including the fees and costs. *C & L Enters.*, 532 U.S. at 423.

The tribal courts attempted to distinguish *C & L Enterprises* by suggesting that (a) the Supreme Court, despite discussing the award's inclusion of "attorney's fees and costs[,]" 532 U.S. at 416, had not really addressed whether the tribe had waived its immunity to fees and costs, and (b) the waiver language in *C & L Enterprises* ("[a]ll claims or disputes") was broad enough to encompass a fee award while the waiver clause in this case ("All controversies *** concerning any transaction") was not. (Tribal Court Order Vacating Arbitration Award, Exhibit 9 at 25-26; Tribal Court of Appeals Opinion, Exhibit 11 at 14-15.)

The distinctions found by the tribal courts do not exist. First, the Supreme Court could not have approved the arbitration award if the tribe had not waived its immunity to the portion of the award that included fees: "An issue may be 'actually' decided even if it is not explicitly decided, for it may have constituted, logically or practically, a necessary component of the decision reached in the prior litigation." *Grella v. Salem Five Cent Sav. Bank*, 42 F.3d 26, 30-31 (1st Cir. 1994) (citation omitted).

Second, there is no textual support for determining that the waiver in *C & L Enterprises* was materially broader than the waiver in this case. The terms "dispute" and "controversy" are listed as synonyms in Roget's International Thesaurus ¶ 456.5 (5th ed. 1992). Because "dispute" and "controversy" are synonyms, the arbitrators' interpretation of the scope of the arbitration clause was not "irrational" or in "manifest disregard of law."

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The arbitration panel also had independent grounds for the fee award under the Association's rules. The Agreement's arbitration clause states that "[a]ny arbitration shall be in accordance with the rules then applying of the American Arbitration Association, New York Stock Exchange or the National Association of Securities Dealers, at [the Tribe's] election." (Investment Advisory Agreement, Exhibit 1 at 4.) The Tribe selected the Association (from among three possible arbitration organizations), the rules of which, when the Tribe commenced the arbitration and now, state:

> 1. "The award of the arbitrator(s) may include: *** an award of attorneys' fees if all parties have requested such an award *or* [the award of attorney fees] is authorized by law or [the parties'] arbitration agreement," AAA Rule R-43(d)(ii); and
>
> 2. "A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection," AAA Rule R-7(c).

(AAA Commercial Arbitration Rules, Exhibit 5 at 13, 8; emphasis added.)

The tribal courts' interpretations of these rules were error-filled and conclusory. The Tribal Court mistakenly believed that the panel could only award fees if a contract or statute provided for the award. (Tribal Court Order Vacating Arbitration Award, Exhibit 9 at 27: "[A]rbitrators would still require a statutory or contractual basis".) That is not what the Association's rule provides. If, as here, the parties to one of the Association's arbitrations both request fees, the arbitrators may award fees regardless of whether there is a statutory or contractual basis for fees. Here, all parties requested attorney fees. (Demand for Arbitration & Statement of Claim, Exhibit 6 at 1, 4; Respondent SWM's and Patrick Sizemore's Amended Answering Statement and Counterclaims, Exhibit 7 at 2.) This fact alone, under the Association's rules, provided a legal basis for the panel to award fees.

Second, contrary to the conclusion of the Tribal Court of Appeals, the rule providing for the award of fees against the Tribe did not have to contain a waiver of the Tribe sovereign

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immunity. The Tribe's selection of arbitration under these rules constitutes an absolute waiver of its immunity. *C & L Enters.*, 532 U.S. at 415 (tribe waived sovereign immunity through arbitration rules that tribe selected, which provided for the enforcement of the award in state court). Under the Agreement, the Tribe could elect to prosecute its claims under the rules of any one of three arbitration organizations: the Association's, the National Association of Securities Dealers', or the New York Stock Exchange's. Of the three sets of rules, only those of the Association—the rules that the Tribe chose to invoke—expressly authorized the arbitrators to award attorney fees to the prevailing party. The Tribe could not have been ignorant of the significance of the Tribe's selection. The Association's rules were the rules that had been at issue two years before in *C & L Enters.*, 532 U.S. at 415, and had been interpreted to permit an arbitration award that included fees.

The Shaw Group, Inc. v. Triplefine Int'l Corp., 2003 WL 2207732 (S.D.N.Y. 2003) , illustrates how an arbitration rule alone provides the consent necessary for award an of attorney fees. In an arbitration involving foreign corporations, the arbitrator awarded fees under an arbitration rule that provided for the award of fees as a cost of the arbitration. The losing party had objected, arguing that the party had not "consent[ed]" to the award through any agreement. The arbitrator found, however, that the parties had fulfilled the "consent requirement" by proceeding with the arbitration under the fee-shifting rule. *Shaw Group*, 2003 WL 2207732 at *3. The court then denied the losing party's motion to vacate the award, concluding that the arbitrator had neither exceeded his authority nor committed a "manifest error of law" by interpreting the party's participation in the arbitration to constitute the consent needed to support the award of fees. *Shaw Group*, 2003 WL 2207732 at *3.

Finally, the tribal courts never acknowledged that the Tribe failed to object to the arbitrability of the counterclaim for attorney fees or to the Association's authority to award fees on the counterclaim until after the panel had concluded the hearing on the merits of the Tribe's claims lasting over 21 days. (Final Award, Exhibit 8 at 52 n.30.) Under the Association's rules,

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which the Tribe selected, the Tribe's objection to the panel's authority to award fees came too late.

E. Because the Arbitrators' Decision Was Not Completely Irrational Nor a Manifest Disregard of Law, This Court Should Confirm the Award Under the FAA.

As explained above, the arbitrators' decision to award fees was not "completely irrational" or in "manifest disregard" of the law. *See Val-U Constr.*, 146 F.3d at 579. Indeed, the arbitrators correctly concluded that *C & L Enterprises* controlled: when executing the Agreement, the Tribe agreed clearly and unambiguously to arbitrate any disputes, including the reciprocal claim for attorney fees and costs. (Final Award, Exhibit 8 at 51.) The Tribe therefore cannot show that the arbitrators' award was defective under the exclusive statutory grounds in the FAA. *See Kyocera*, 341 F.3d at 1000. Accordingly, pursuant to Section 9 of the FAA, this Court should enter an order confirming the award. *See* 9 U.S.C. § 9 (party seeking confirmation of award may petition court and "the court must grant such an order unless the order is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title"); *Ottley v. Schwartzberg*, 819 F.2d 373, 376 (2d Cir. 1987) ("Absent a statutory basis for modification or vacatur, the district court's task was to confirm the arbitrator's final award as mandated by section 9 of the Act.").

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V. CONCLUSION

For the foregoing reasons, FSIC's motion for summary judgment should be granted in its entirety. This Court should further enter (1) a judgment declaring that the orders of the tribal courts are void, and (2) an order confirming the arbitration award.

DATED this 2nd day of April, 2007.

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By 

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** on:

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☐ by mailing a copy thereof in a sealed, first-class postage prepaid envelope, addressed to said attorney's last-known address and deposited in the U.S. mail at Portland, Oregon on the date set forth below;

☐ by causing a copy thereof to be hand-delivered to said attorney's address as shown above on the date set forth below;

☐ by sending a copy thereof via overnight courier in a sealed, prepaid envelope, addressed to said attorney's last-known address on the date set forth below;

☐ by faxing a copy thereof to said attorney at his/her last-known facsimile number on the date set forth below;

☐ by emailing a copy thereof to said attorney at his/her last-known email address as set forth above or

☒ by using Cm/ECF electronic service.

Dated this 2nd day of April, 2007.

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