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Kalispel Tribe of Indians

Honorable Edward F. Shea
Hearing Date: February 4, 2008

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

THE KALISPEL TRIBE OF INDIANS, a Native American tribe,

Plaintiff,

v.

SPOKANE RACEWAY PARK, INC., a Washington corporation; WASHINGTON MOTORSPORTS L.P., a Washington limited partnership; ORVILLE MOE and the marital community of ORVILLE and JANE DOE MOE,

Defendants.

Case No. CV-03-0423-EFS

KALISPEL TRIBE'S **SUR-REPLY** SUPPORTING MOTION FOR SUMMARY JUDGMENT

I. LR 56.1 MANDATES DISMISSAL

Plaintiff The Kalispel Tribe of Indians ("the Tribe") filed and served its Motion for Summary Judgment on December 19, 2007. Under this Court's own timing rules, Defendants Moe's response was due on January 9, 2008.

However, the Moes failed to file a response on that date. Instead, they waited until January 22, 2008 to file an alleged response, without offering any excuse, despite the fact that they were notified in writing on January 10,

2008 that they were already late. (*See* Docket 171.) Therefore, pursuant to the express language of LR 56.1(d), "the Court may assume that the facts as claimed by the moving party [the Tribe] are admitted to exist without controversy...."[1]

This Court has long followed that rule:

> Defendants presented the underlying facts of this case. Plaintiff did not file a memorandum in opposition to summary judgment. Therefore, the court construes defendants' facts as uncontroverted. LR 56.1(d). Defendants request a resolution of plaintiff's claims as a matter of law. The court finds summary judgment is appropriate; no facts are in dispute and the constitutionality of the challenged regulations and actions may be determined as a matter of law.

Allen v. Wood, 970 F. Supp. 824, 828 (E.D. Wa. 1997).

Indeed, as was empathically stated in the recent Eastern District case of *Brown v. White, et al.,* 2007 U.S. Dist. LEXIS 33057, *21 (E.D. Wa., May 2007) (reference to due process claim omitted):

> Pursuant to Local Rule 56.1(d), the Court may assume that the facts as claimed by the moving party exist without controversy in the event that those facts are not controverted by the nonmoving party. LR 56.1(d). Here, Plaintiff provides no opposition argument or evidence in his response to dispute Defendants' motion for summary judgment with respect to the claim.
>
> Based on the foregoing, it is apparent that there is no genuine issue for trial with regard to Plaintiff's claim. Defendants' motion for summary judgment with respect to Plaintiff's claim against Defendants is therefore granted.

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[1] Courts routinely hold that LR 56.1 imposes an "exacting obligation...on a party contesting summary judgment." *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 921-22 (7th Cir. 1994) (and cases cited therein).

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As a result, summary judgment is proper because there can be no genuine issue as to any material fact here and the Tribe as the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Pacific Northwest Venison Producers v. Smitch,* 20 F.3d 1008, 1013 (9th Cir. 1994).

However, should the Court decide to accept Moe's extremely late filing (13 full days past the deadline), the Tribe replies below.

II. SUMMARY JUDGMENT SHOULD BE GRANTED

The United States Supreme Court has long held as follows:

> The plain language of Rule 56(c) *mandates the entry of summary judgment . . . against a party who fails to make a showing* sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since *a complete failure of proof* concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986) (emphasis added). That is the precise situation here.[2]

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[2] While Moe's opposition goes far afield to touch on other topics and ideas (insurance, property development, etc.) that are irrelevant to this case's narrow issues, the Tribe's Reply will not follow him down that dead-end path but will instead focus on what is actually before the Court. Moreover, much of Moe's declaration is hearsay and speculation, as well as irrelevant. As a further point of procedure, the allegations in the Opposition, the LR 56.1 "statement," and the Declaration never line up, as required by this Court's Local Rules.

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The actual counterclaims of Orville Moe are that (a) the Tribe allegedly deprived him of compensation as a Joint Venture board member (breach of contract claim) and (b) that when it barred him from the Casino, (1) it defamed him, and (2) it allegedly interfered with "economic relations with third parties" and (3) "injur[ed] his business reputation" (three tort-based claims). (*See* Motion Attachment A at Exhibit 3 [Counterclaim] at pp. 15-16.) However, Moe has not presented any specific facts admissible at trial to establish the required elements of these claims as mandated by Fed. R. Civ. P. 56(e) and LR 56.1(b).

A. Moe Failed to Controvert His Failure of Proof on the Tort Claims.

Nowhere in either the Opposition brief or the LR 56.1 Statement (or in the Declaration of Orville Moe) do Defendants even remotely discuss the alleged facts of or law regarding their three tort counterclaims. Therefore, as a matter of law, all of the tort claims should be dismissed. *See* cases cited above.

B. The "Compensation" Claim is also Dead on Arrival.

The only remaining counterclaim is for an unspecified amount of compensation allegedly owed to Orville Moe for serving on the Joint Venture Board, based on an alleged breach of contract. That too is factually and legally deficient on at least six alternative, independent grounds.[3]

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[3] Seven, really, given that Moe completely failed to specify any dollar amount allegedly owed, and none of the exhibits provide a clue either. *See, e.g., Larsen v. Walton Plywood Co.,* 65 Wn.2d 1, 15-16 (1964) (amount of damages must be proven with reasonable certainty). (The reference to "well over $100,000" [Decl. p. 28] was the former claim of SRP, now settled, for alleged trespass.)

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1. SRP Owes Moe Any Due Compensation.

Moe admits that the Joint Venture prepared minutes of its Board meetings. (Moe Decl. at ¶ 40.) He admits that the Board's secretary prepared minutes for the May 23, 2003 meeting cited in the Tribe's Motion. (*Id.* at ¶¶ 42-43.) In fact, he attached those very minutes to his Declaration as Exhibit K. (*Id.*)

Those minutes state, at Item 10, that Orville Moe would be paid by SRP, not the Tribe:

> 10. The Joint Venture Board discussed board member compensation. Joe Delay stated that each party would be determining what they would pay to their board members. Kent Caputo summarized that the tribe's board members would be compensated out of their 51%, and SRP's board members would be compensated out of their 49%.

As a result of these admitted facts – and especially the above admission by Joe Delay, SRP's and Moe's own attorney,[4] that "each party would determine what they would pay to their board members" – Moe's compensation counterclaim against the Tribe must be dismissed, as a matter of law. He has the option of trying to pursue the claim against SRP (after all, he was "their board member []") in the bankruptcy case, assuming that it is not past the bar date.[5]

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[4] Moe Decl. at ¶¶ 41-43.

[5] Moe belatedly conjures up – for the first time – an unsubstantiated allegation that Tribal Chairman Glen Nenema might have some personal liability for payment (Decl. at p.8), but Chairman Nenema is not a party to this action. Regardless, any such new claim is time-barred. *See* Point 7, below.

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2. The Joint Venture Might Owe Moe the Compensation.

At one point in the opposition memorandum, Moe makes a U-turn and alleges that he "was to be paid for his services in the joint venture by the venture." (Opp. at p. 8, lines 11-14 [emphasis added].) Therefore, assuming for argument purposes the truth of the allegation that Moe was owed compensation by the Joint Venture itself, instead of SRP or the Tribe, then he had a remedy for that but failed to ever timely assert such a claim. Now that Judge Austin has dissolved the Joint Venture (*see* Attachment D), even that claim is moot.

3. Sovereign Immunity Was Not Waived as to *Moe*.

While Moe's opposition brief endeavors mightily to present itself as a treatise on the law of sovereign immunity – albeit a completely incorrect one – its 42 pages are wholly irrelevant because of the undisputed facts.[6] Moe's papers admit that the Joint Venture Agreement was between only two parties: the Tribe and SRP. (Moe Decl. at Exhibits B, C, D.) The "Limited Waiver of Sovereign Rights" (immunity) therein was, as is expressly stated in those same Exhibits, solely for the benefit of SRP.

First, no case law is needed for the obvious proposition that one cannot have a breach of contract claim against a party with whom one never contracted. That is the situation here.

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[6] It appears that the opposition papers were written not by Mr. Lowe, but instead by Robert Kovacevich, who has previously filed similar briefs – with much the same law and the exact same style and pleading paper – with the other state and federal courts that have become involved with these parties. (Query whether this ghostwriting without attribution and signature violates Rule 11.)

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Second, Moe's Exhibit D admits that he personally did not sign as a party to the Joint Venture Agreement: "*Orville Moe, President SRP Inc.*" Therefore, he personally cannot benefit from the Limited Waiver that was negotiated exclusively between the Tribe and SRP, and his compensation claim must be dismissed because it has no merit, in fact or law.[7]

4. There Is No "Issue Preclusion" Because the Tribe Has Never Litigated the Issue of the Limited Waiver of Sovereign Immunity in the JVA.

While Moe argues that Judge Austin allegedly denied the Tribe any sovereign immunity in the state court lawsuit between the Tribe and SRP (Opp. At pp. 14, 31), it is important to note that he failed to attach any such "order." This is not surprising, given that the specific issue was never presented to Judge Austin for ruling – by either party – and there is no such order. This is misrepresentation of the record, pure and simple.[8]

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[7] Sovereign immunity also precludes the unsubstantiated tort claims as well.

[8] The Tribe did argue (as it has in this case) that the entire JVA was void for lack of BIA approval, which necessarily means that if it was void, there would be no waiver. (*See* Attachment C hereto.) However, the contractual effect of the Limited Waiver, in and of itself, has never been contested by the Tribe.

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As a result, Moe's entire collateral estoppel argument is a loser from the start.[9]

5. Moe Ignores the Facts and Binding Case Precedent.

Moe's various and sundry arguments on sovereign immunity – hopeful statements, really, of what he wishes the law to be, not what it actually is – all fly in the face of the facts and well-established holdings of the U.S. Supreme Court and the Ninth Circuit.

a. The Tribe Did Not Consent to the Counterclaims.

Moe argues (Opp. at 32) that the Tribe should be deemed to have impliedly consented to his counterclaims by its bringing a quiet title and injunction action against WML and SRP. However, the Ninth Circuit case *on intervention* that he cites, *United States v. Oregon,* 657 F.2d 1009 (9th Cir. 1981), is not factually or legally similar in any way and contains no such rule (nor could it pertain to the specific facts here).[10]

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[9] Further, Moe cannot argue that because he was the president of SRP, he was somehow in privity with SRP's interest in the joint venture. Judge Austin has ruled, in the receivership action, that SRP held its interest in the Joint Venture "for the benefit of WML" and its multitude of unit holders. (*See* Attachment D hereto, at p. 4, lines 3-10.) And because the Tribe and WML and SRP have settled their dispute over the joint venture (*id.* at lines 11-22), Moe has nothing to be privy to.

[10] Moe also misrepresents the very limited and fact-specific holdings of the *Wyandotte* and *Washoe* quiet title cases cited at p. 34 of his Memorandum.

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To the contrary, the controlling law on the present fact pattern is found in *Oklahoma Tax Commission v. Potawatomi Tribe,* 498 U.S. 505, 509-10 (1991), *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.,* 476 U.S. 877, 893 (1986), *United States v. United States Fidelity & Guaranty Co.,* 309 U.S. 506, 511-12 (1940) (cited in *Potawatomi*), and *Squaxin Island Tribe v. Washington*, 781 F.2d 715, 723 (9th Cir. 1986), which are all discussed in the Tribe's Motion.

b. The Facts Do Not Fit the Cases Cited.

The rest of Moe's briefing (Opp. at 35-41) is likewise irrelevant because of two inescapable and legally determinative facts: (1) the Limited Waiver of sovereign immunity is contractual and only between the Tribe and SRP, and (2) Moe's *permissive* counterclaims are not factually related in any way to either the transactions between the Tribe and SRP or to the quiet title or property damage claims of the Tribe.[11] Moreover, Moe's discussion of trust versus fee land (Opp. at pp. 15-17) are also legally irrelevant and factually wide of the mark. As shown in Moe's own Exhibit E, the Tribe has never owned the land where the joint venture operated and met – it has always been owned by "the United States of America in trust for the Kalispel Tribe of Indians." (*See also* Attachment D.)

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[11] This distinguishes Moe's claims from those in *Berrey* (Opp. at pp. 33-34). Additionally, for some unknown reason, page 41 of the Opposition discusses certain Washington arbitration procedures. No arbitration award has ever been entered against the Tribe, nor any related judgment, so this too is irrelevant.

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c. Moe Has Not Sued a "Tribal Corporation"; He Sued the Tribe.

The Opposition (at pp. 26-30) touches on a number of cases involving management corporations, tribal casinos, and other economic entities regarding the immunity issue. However, Moe has sued the Tribe *qua* Tribe; the Casino (a tribally-chartered operation) is not a party here and therefore this topic is irrelevant.

6. The Claim is Time-Barred.

If the compensation claim could – but it cannot – somehow survive all of the previous five defects, it is still fatally flawed. Moe also failed to controvert the fact that because his "breach of contract" claim for compensation legally accrued beginning in 1995 (*see* Moe Decl. at ¶ 11; LR 56.1 Response at p. 5, lines 6-10), it is now time-barred under RCW 4.16.040(1) (contract actions must be brought within six years of breach; Moe's counterclaims were not filed until 2004).

Thus, no matter how one approaches it, Moe's claim is dead on arrival.

III. CONCLUSION

As Moe's LR 56.1 Response admits, he has raised "uncountable genuine issues of material fact:" they are "uncountable" by virtue of the fact that the actual number raised is exactly Zero. Accordingly, the Court can rule as a matter of law under Fed. R. Civ. P. 56 and grant the Tribe's Motion for Summary Judgment, dismissing all of Defendants Moe's claims.[12]

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[12] The Tribe has not filed a reply LR 56.1 statement because there are no actual facts in Moe's to counter.

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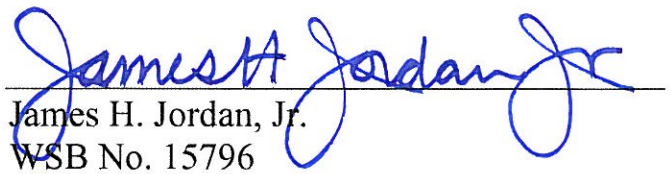
DATED this 28th day of January, 2008.

MILLER NASH LLP



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I hereby certify that on this 28th day of January, 2008, I electronically filed the KALISPEL TRIBE'S **SUR-REPLY** SUPPORTING MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court using the CM/ECF system.

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EXHIBIT C

The Honorable Robert D. Austin

SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

SPOKANE RACEWAY PARK, INC., a Washington corporation, Plaintiff, v. THE KALISPEL TRIBE OF INDIANS, a Native American Tribe, Defendants.	Case No. 03-2-07706-7 ORDER ~~DENYING~~ Granting MOTION TO COMPEL ARBITRATION AND ~~DISMISSING COMPLAINT~~ (PROPOSED) **[Clerk's Action Required]**

This matter came on for hearing on March 4, 2004, on the Court's order to show cause why the Court should not appoint an arbitrator and compel arbitration. The Court considered the following:

1. Complaint to Compel Arbitration filed by plaintiff, Spokane Raceway Park, Inc., and the exhibits thereto;

2. Plaintiff's Motion to Show Cause and Court's subsequent Order to Show Cause;

3. Plaintiff's Memorandum in Support of Motion to Compel Arbitration, and the exhibits thereto;

4. Defendant Kalispel Tribe of Indians' Response to Motion to Compel Arbitration and the exhibits thereto;

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5. Plaintiff's Response Brief to Plaintiff's Motion to Compel Arbitration;

6. Affidavit of Orville L. Moe and the exhibits thereto; and

7. Defendant Kalispel Tribe of Indians' Reply to Plaintiff's Response Brief to Plaintiff's Motion to Compel Arbitration, and the exhibits thereto.

Having considered the above pleadings, as well as the argument of counsel, the Court hereby ORDERS that, ~~because the joint venture agreement is void as a matter of law~~, plaintiff's motion is ~~DENIED~~ GRANTED yet ~~and its COMPLAINT is DISMISSED with prejudice.~~ This order is stayed for 10 days for the Tribe to either seek an appeal or file an action for dissolving the Joint Venture

ORDERED this 4th day of March, 2004.

Judge Robert D. Austin

Presented by:

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EXHIBIT D

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	)	BAP No. EW-07-1210-KMoJ
SPOKANE RACEWAY PARK, INC.,	)	Bk. No. 06-01966
Debtor.	)	
ROBERT E. KOVACEVICH,	)	
Appellant,	)	
v.	)	**MEMORANDUM***
JOHN D. MUNDING, Chapter 11 Trustee,	)	
Appellee.	)	

Argued and Submitted on November 30, 2007
at Seattle, Washington

Filed - December 13, 2007

Appeal from the United States Bankruptcy Court
for the Eastern District of Washington

Honorable Patricia C. Williams, Bankruptcy Judge, Presiding

Before: KLEIN, MONTALI and JURY, Bankruptcy Judges.

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*This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

Debtor is a closely held corporation that filed for chapter 11 reorganization while it was a party to numerous lawsuits pending in both federal and state court. Through mediation, partial settlement of the disputes between the debtor and its partnership, on the one hand, and the opposing party, on the other hand, was reached. The bankruptcy court granted the chapter 11 trustee's motion to approve the settlement over objection by the appellant creditor, who was also a shareholder, officer, and former attorney of debtor.

As there has not been a stay pending appeal of the court order, the settlement has been concluded in circumstances that would be difficult to unravel. Accordingly, we DISMISS this appeal as moot.

Alternatively, we AFFIRM the trial court's approval of the trustee's motion to approve the settlement agreement.

FACTS

Spokane Raceway Park, Inc. ("SRP") was formed as a closely held corporation in the state of Washington in 1971 to manage and oversee the development of a motor racing stadium complex on 640 acres of vacant land located in the vicinity of Airway Heights, Washington.

After SRP's formation, Washington Motorsports Limited ("WML"), a general partnership, was created to own, develop, operate, and be the general manager of the motor racing stadium to be known as "Spokane Raceway Park." WML owns the land upon which the raceway was constructed. SRP was designated as WML's sole general partner.

In 1994, SRP entered into an agreement with the Kalispel Tribe of Indians ("Tribe") creating a joint venture known as the KNAEZ Joint Venture ("Joint Venture") to develop, for profit, a business enterprise zone of 20 acres of a 40-acre property adjacent to the Spokane Raceway Park.[1] The 40-acre property is currently the subject of litigation in state court.

A number of other agreements and leases were entered into between the parties.

As a result of various disputes, SRP, WML, and the Tribe have been involved in various legal actions pending in state and federal court since 2003: (1) the United States District Court for the Eastern District of Washington, Kalispel v. Spokane Raceway Park, Inc., Case No. 03-CV-0423-EFS ("Federal Court Action"); (2) the Spokane County Superior Court, Spokane Raceway Park, Inc. v. Kalispel Tribe of Indians, Case No. 03-02-07706-7 ("State Court Action"); (3) the Spokane County Superior Court, Materne, et al. v. Spokane Raceway Park, Inc., Case No. 03-2068564 ("Receivership Action"); and (4) the United States Bankruptcy Court for the Eastern District of Washington, In re Spokane Raceway Park, Inc., Case No. 06-01966-PCW11 ("Bankruptcy Case").

On August 17, 2006, SRP filed for chapter 11 bankruptcy relief in Washington. The bankruptcy court appointed appellee

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[1]Previously, SRP, as general partner of WML, gift-deeded the 40-acre property to the United States in trust for the Tribe. In 1996, the Bureau of Indian Affairs proclaimed the entire 40-acre property to be part of the Kalispel Indian Reservation. WML owns the other land immediately to the north and west of the 40-acre property, on which SRP operated its raceway complex.

John D. Munding ("trustee") as the chapter 11 trustee, pursuant to 11 U.S.C. § 1104.

In the State Court Action, the state court entered an order dissolving the Joint Venture, on October 22, 2004 (Case No. 03-02-07706-7). Furthermore, in the Receivership Action, on June 1, 2006, the state court determined that any interest SRP had in the Joint Venture was held for the benefit of WML. Accordingly, in the Bankruptcy Case, by order of the bankruptcy court on January 30, 2007, any interest SRP may have had in the Joint Venture was abandoned from the bankruptcy estate by the trustee.

On February 1, 2007, in attempting to resolve the disputes between the Tribe and SRP and WML, the trustee, on behalf of SRP, WML's receiver, on behalf of WML, and the Tribe engaged in an all-day mediation. Partial settlement was reached, memorialized by the "Settlement Agreement and Mutual Release" ("Settlement Agreement"), which resolved certain claims between SRP and WML, on the one hand, and the Tribe, on the other hand, subject to the terms and conditions set forth therein.[2] However, the Settlement Agreement did not resolve any of the pending disputes in the foregoing litigation or otherwise which exist solely between SRP and WML, nor did the Settlement Agreement attempt to allocate settlement proceeds.

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[2]Under the Settlement Agreement, the Tribe released WML and SRP, and WML and SRP released the Tribe from litigation in the Federal Court Action (Case No. CS-03-0423-EFS) and in the State Court Action (Case No. 03-2-07706-7), as well as any current or potential counterclaims. The mutual releases between SRP and WML, on the one hand, and the Tribe, on the other hand, further applied to any current or potential claims in the Receivership Action (Case No. 03-2068564) and in the SRP Bankruptcy Case (Case No. 06-01966-PCW11).