IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

ATTORNEY'S PROCESS AND INVESTIGATION SERVICES, INC.,

Plaintiff,

vs.

SAC & FOX TRIBE OF THE MISSISSIPPI IN IOWA,

Defendant.

Case No. C05-0168LRR

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Plaintiff, Attorney's Process and Investigation, Inc. ("API"), first filed this suit in 2005, after, and in response to, an independent action brought by the Sac & Fox Tribe of the Mississippi in Iowa ("Tribe") against API in the Sac & Fox Tribe of the Mississippi in Iowa Court ("Sac & Fox Court" or "Tribal Court"). The dispositive threshold issue in each action was whether Alex Walker, Jr. held the office of Chairman of the Sac & Fox Tribe on June 16, 2003, when he allegedly signed a contract with Plaintiff. In 2005 this Court held:

> Clearly, the validity of the Agreement turns on whether Walker was authorized to enter into contracts on behalf of the Tribe. This Court is without jurisdiction to determine whether the Walker Council or the Bear Council was the governing body of the Tribe at the time the Agreement was signed on June 16, 2003, because such a matter is an intra-tribal dispute.

API v. Sac & Fox Tribe of Miss. in Iowa, 401 F. Supp.2d 952, 961 (N.D. Iowa 2005).

The Sac & Fox Court of Appeals held that the intra-tribal dispute was definitively resolved in 2003 by the Tribe's members, concluding as a matter of tribal law that on June 16, 2003 Walker lacked ***any*** authority, actual or apparent, to contract on behalf of the Tribe. The

Sac & Fox Appellate Court unanimously held that the Tribe was governed by the Bear Council prior to June 16, 2003, and that the Tribal Court had jurisdiction over the Tribe's suit and over API. API subsequently renewed its federal court suit, and now asks this Court to conclude that the Sac & Fox Courts lack jurisdiction over it and the suit which the Tribe initiated against API.

Before this Court can answer Plaintiff's question, it must resolve a threshold issue; whether it has subject matter jurisdiction. The answer turns on whether the Tribe has waived its sovereign immunity to permit this suit. If the Court finds it has subject matter jurisdiction, only then can it decide whether the Tribal Court exceeded the limits on tribal court jurisdiction imposed by Montana v. United States, 450 U.S. 544 (1981), and its progeny. When considering these issues, this Court is bound by the Sac & Fox Court of Appeals determinations of tribal law, and must accept the Tribal Court's findings of fact, unless those findings are clearly erroneous.

API has not pled that the Tribe waived sovereign immunity in the June 16, 2003 contract, and there is no other plausible source of a waiver. Consequently, because it has been definitively established, as a matter of tribal law that the contract is not valid, this matter must be dismissed, because the Tribe is immune from this suit, and this Court therefore lacks jurisdiction of this suit.

STATEMENT OF FACTS[1]

On October 1, 2003, API perpetrated an illegal, premeditated, forcible, armed, coordinated[2] attack, trespassing into the Tribe's government center and Casino,[3] in an attempted takeover of the Tribe's property and government. During that armed, military-style attack, API

[1] As discussed in section I.B., infra, the facts for purposes of this case are those alleged in the Tribe's Complaint in the Tribal Court unless the Tribal Court has issued a finding of fact which differs from the facts alleged in the complaint. Additionally, because Defendant failed to timely answer the Complaint, it has admitted the allegations in that Complaint. Meskwaki Tribal Court Rule C-5(c).

[2] Complaint ¶15; 31, 32.

[3] Complaint ¶7; Def. Admis. 9, 11.

committed assaults, batteries, unlawful imprisonment and other criminal acts.[4] It facilitated entry to secured areas of the Tribe's Casino by persons who had previously been banned from the Casino due to their gross violations of tribal gaming laws.[5] Plaintiff acted in conscious or intentional disregard of, or indifference to, the rights of, safety of, or damages to the Tribe.[6]

In the Sac & Fox Court, API conclusively admitted that it engaged in all of the conduct alleged in the Tribal Court Complaint, and the Tribal Court determined that API is liable to the Tribe for damages for trespass to land and trespass to chattel. The Tribal Court set a hearing for January 26, 2009 to determine the amount of damages, which has since been stayed.[7]

Between June 16, 2003 and early November 2003 API took possession of $1,022,171.26 of the Tribe's money. Default Judgment (Count III) (October 13, 2008); Def. Admis. 1. The Tribe did not authorize any payment of any tribal funds to API, and did not authorize API to perform any services for the Tribe. Tribal App. Ct. Order (Dec.23, 2008). API did not perform any services for the Tribe, but did commit illegal acts on the Tribe's Settlement that imperiled the legitimate government, and which bring API within the jurisdiction of the Tribe's Court.

API asserted that it had apparent authority to take the Tribe's funds. The Tribal Court rejected that defense on the facts (finding that API clearly knew about the Tribe's leadership dispute when it entered into a contract with Alex Walker, Jr.),[8] and based upon tribal law (under

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[4] Complaint ¶31.

[5] Complaint ¶23.

[6] Complaint ¶34, 37.

[7] The Tribe notes for the record that the stay was issued by the Tribal Court without the Tribe being heard on the matter. The Tribe will appeal the Tribal Trial Court's Order, for it violates the Tribe's laws.

[8] Cf. API, 401 F.Supp.2d at 954 (taking judicial notice of the Tribe's leadership dispute).

the Tribe's laws (as under the laws of every other sovereign), apparent authority is not a defense to a claim by the sovereign for return of the sovereign's funds).

ARGUMENT

I. THE TRIBAL COURT HAS ESTABLISHED THE FACTS AND TRIBAL LAW APPLICABLE TO THIS POST-EXHAUSTION PROCEEDING.

In its November 15, 2005 Order, this Court held that exhaustion of tribal court remedies was required before this action could proceed. API reopened its suit here averring, based upon the Tribal Court's orders and federal law, that it has exhausted tribal court remedies. The scope of this Court's review after exhaustion of tribal court remedies is well-defined by federal cases that, like the exhaustion doctrine itself, are based upon federal policies encouraging tribal self-government and respect for tribal courts. Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987) (finding exhaustion of tribal court remedies is required because "tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development"); Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294, 1299 (8th Cir. 1994). Like the exhaustion doctrine, the rules applicable to federal court review after exhaustion of tribal remedies require a federal court to tread lightly, both when it interacts with a tribal court or when a tribal court decision is involved.

A. THE TRIBAL COURT'S DETERMINATIONS OF TRIBAL LAW ARE BINDING ON THIS COURT.

Long before the United States Supreme Court articulated the exhaustion doctrine, it held that the final authority for interpretation and application of an Indian tribe's law is the tribe's court, and that interpretation is binding on the federal courts, just as a state court's determination of state law is binding on the federal courts.

The United States Supreme Court first addressed this issue in Talton v. Mayes, 163 U.S. 376 (1896), holding that interpretation of tribal laws is "solely a matter within the jurisdiction of the Courts of that Nation." Id. at 385. The exhaustion doctrine and the rationale for that doctrine have only strengthened the line of cases originating with Talton. Iowa Mutual Ins. Co., 480 U.S. at 19 (holding that "Unless a federal court determines that the Tribal Court lacked jurisdiction ... proper deference to the tribal court system precludes relitigation of issues raised ... and resolved in the Tribal Courts"); id. at 16 ("Adjudication of such matters by any nontribal court also infringes upon tribal law-making because tribal courts are best qualified to interpret and apply tribal law."); Prescott v. Little Six, Inc., 387 F.3d 753, 756 (8th Cir. 2004) (holding that "in this Circuit, we defer to the tribal courts' interpretation of tribal law.").[9]

The decision of the United States Court of Appeals for the Eighth Circuit in Prescott v. Little Six, Inc. is particularly instructive, both because it is the Eighth Circuit's most recent decision on this point of law and because of the remarkable similarity between the facts of that case and the facts of the present case. Like the present matter, Prescott turned on whether an alleged contract with an Indian tribe had been approved by the tribe. Little Six, Inc. ("LSI") (which for analytical purposes in that case had the same legal status as the Shakopee Mdewakanton Sioux Community),[10] brought a suit in the Community Court, asserting that LSI had not entered into certain alleged retirement benefits contracts which, had they been valid,

[9] Duncan Energy Co., 27 F.3d at 1300; City of Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d, 554, 559 (8th Cir. 1993); Prescott v. Little Six, Inc., 897 F. Supp. 1217, 1222 (D. Minn. 1995). See also Timothy W. Joranko, Exhaustion of Tribal Remedies in the Lower Federal Courts after National Farmers Union and Iowa Mutual, 78 Minn. L. Rev. 259, 298 (1993) ("it is a pure contradiction in terms for a federal court to declare that tribal law is not precisely what the tribe's high court announces.").

[10] Little Six, Inc was a corporation chartered under the laws of the Shakopee Mdewakanton Sioux Community and wholly owned by the Community. The Community is a federally recognized Indian Tribe, and LSI was therefore, for purposes of the case, synonymous with the Community.

would have been governed by ERISA. LSI also asserted that funds which Prescott had placed into trust accounts had to be returned to LSI. Prescott and others then filed federal court suit, asserting LSI had approved the contracts, and under ERISA federal jurisdiction was exclusive.

The District Court for the District of Minnesota dismissed the federal court action based upon the exhaustion doctrine, holding, inter alia, that "federal courts must defer to a tribal court's interpretation of its law." Prescott v. Little Six, Inc., 897 F. Supp. 1217, 1222 (D. Minn. 1995). The Shakopee Community Court reviewed the facts and Community law, and determined the contracts were invalid, therefore ERISA did not apply and the funds at issue belonged to LSI.

Prescott returned to the federal courts, asserting he had exhausted tribal remedies, and that the alleged contracts were valid. On appeal, the United States Court of Appeals for the Eighth Circuit held that the determination by the Shakopee Mdewakanton Sioux Community Tribal Court of Appeals that the contracts were invalid as a matter of Community law was binding on the federal courts. Because federal court jurisdiction was dependent upon whether the contracts were valid, and, because under tribal law they were invalid, the federal courts lacked jurisdiction and the suit had to be dismissed.

Similarly, the Sac & Fox Tribal Court's determinations of tribal law are binding in the federal courts and all other courts. Specifically, the determination of the Appellate Court of the Sac & Fox Tribe of the Mississippi in Iowa that the alleged contract was invalid is binding on this Court, and admits but one conclusion; that this suit must be dismissed.

Other holdings of the Sac & Fox Tribe of the Mississippi in Iowa Court on issues of tribal law both relevant to and binding on this Court, include, but are not limited to:

- The Alex Walker, Jr. Council violated the Tribe's Constitution by not setting recall petitions for a vote prior to March 4, 2003.
- By March, 2003, tribal members and the Hereditary Chief exercised constitutional

authority to remove the Walker Council for violations of the Tribe's Constitution.

- In March, 2003, consistent with the Tribe's Constitution, the Tribe had removed from the Walker Council all powers of tribal office.
- That in June, 2003, the Bear Council, not the former Walker Council, had the power to bind the Tribe to contracts, expend Tribal funds, and exercise all other powers of tribal self-government.
- The doctrine of apparent authority does not apply against the Tribe.

B. THE TRIBAL COURT'S FINDINGS OF FACT ARE BINDING IN THIS COURT.

One of the primary purposes of exhaustion is to permit a tribal court to develop the factual record from which legal conclusions concerning jurisdiction can flow. Iowa Mutual Ins. Co., 480 U.S. at 19. Once a tribal court has created a factual record and issued a ruling based upon it, a party can seek federal review of the federal law issues, but is precluded from retrying the facts in the federal court. "[I] n making its analysis, the district court should review the Tribal Court's findings of fact under a deferential, clearly erroneous standard." Duncan Energy Co., 27 F.3d at 1300, citing FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1313 (9th Cir. 1990).[11]

The leading case on this issue is FMC, in which the Ninth Circuit explained that application of the clearly erroneous standard is mandated by the policies underpinning the exhaustion doctrine.

> The Farmers Union Court contemplated that tribal courts would develop the factual record in order to serve the "orderly administration of justice in the federal court." Id. This indicates a deferential, clearly erroneous standard of review for factual questions. This standard accords with traditional judicial policy of respecting the factfinding ability of the court of first instance.

[11] The federal courts may only review facts for purposes of deciding the question whether the Tribal Court exceeded its jurisdiction. For all other purposes, the Tribal Court's findings of fact are binding and not subject to any federal court review. Cf. Am. Radio Ass'n, AFL-CIO v. Mobile S.S. Ass'n, Inc., 419 U.S. 215 (1974) ("The question of whether evidence is sufficient to make out a cause of action created by state law and tried in the state courts is a matter for decision by those courts.")

905 F.2d at 1313. All federal courts which have reached the issue have adopted the Ninth Circuit's analysis on this issue of law. Duncan Energy Co., 27 F.3d at 1300 (citing FMC); Mustang Prod. Co. v. Harrison, 94 F.3d 1382 (10th Cir. 1996) (citing FMC).

The Sac & Fox Tribe of the Mississippi in Iowa Trial Court issued findings of facts in this matter, and, with one inconsequential exception, Plaintiff did not challenge the findings of fact in its appeal to the Tribe's Appellate Court. API, therefore, has absolutely no basis for asserting here that those findings are clearly erroneous, and the Tribal Court's findings of fact must inform this Court's analysis of the issues before it.[12]

II. THIS MATTER MUST BE DISMISSED FOR WANT OF JURISDICTION BECAUSE THE TRIBE HAS NOT WAIVED ITS SOVEREIGN IMMUNITY FROM THIS SUIT.

A. THE TRIBE POSSESSES SOVEREIGN IMMUNITY FROM FEDERAL COURT SUITS.

The Sac & Fox Tribe of the Mississippi in Iowa is a federally recognized Indian tribe. See 70 Fed. Reg. 71194-01 (Nov. 25, 2005) (listing the Tribe as one of the 561 federally recognized Indian tribes). As a federally recognized tribe and a government pre-dating the United States, the Tribe retains inherent sovereign powers which have never been extinguished. United States v. Wheeler, 435 U.S. 313, 322 (1978).

[12] The facts that the Tribal Court found which this Court must accept include, but are not limited to:

- All findings which served as the basis upon which the Tribal Court held that the former Walker Council had violated the Tribe's Constitution by not setting recall elections, that the Tribal Members and Hereditary Chief had lawfully removed the former Walker Council, and that the Tribe had lawfully elected the Bear Council prior to June 16, 2003.
- All findings which served as the basis upon which the Tribal Court held that the June 16, 2003 contract was not binding on the Tribe.
- All findings upon which the Tribal Court concluded that the doctrine of apparent authority did apply to Walker's actions.
- The finding that between June 30, 2003 and September 30, 2003, Appellant received $1,022,171.26 of tribal funds.

One aspect of sovereignty with which Indian tribes are vested, and which has never been extinguished, is sovereign immunity from suit. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978).[13] "Indian tribes enjoy immunity because they are sovereigns predating the Constitution and because immunity is . . . necessary to promote the federal policies of tribal self-determination, economic development, and cultural autonomy." Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1378 (8th Cir. 1985).

"Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." Kiowa Tribe of Okla. v. Manuf. Tech., Inc., 523 U.S. 751, 754 (1998); see also Mo. River Servs., Inc. v. Omaha Tribe of Neb., 267 F.3d 848, 852 (8th Cir. 2001). Because the contract which Plaintiff invokes as the basis for this Court's jurisdiction is invalid, any purported waiver of the Tribe's sovereign immunity it contains is also invalid, and this suit must therefore be dismissed.

B. RULE 12(B) (1) REQUIRES THAT THIS COURT RESOLVE THE TRIBE'S CLAIM OF SOVEREIGN IMMUNITY ON THE MERITS AT THE OUTSET OF THIS PROCEEDING.

Sovereign immunity must be resolved as soon as it is raised. "Since the issue of sovereign immunity is jurisdictional in nature, we must first determine whether the [Tribe] has effectively waived tribal immunity -- thus making it amenable to suit . . . -- irrespective of the merits of [Plaintiff's] tort and contractual claims." Pan Am. Co. v. Sycuan Band of Mission

[13] See also Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth. 207 F.3d 21, 29 (1st Cir. 2000) (stating "Tribal sovereign immunity predates the birth of the Republic"); Hagen v. Sisseton-Wahpeton Cmty. College, 205 F.3d 1040, 1043 (8th Cir. 2000) ("It is undisputed that an Indian tribe enjoys sovereign immunity."); Iowa Mgmt. & Consultants, Inc. v. Sac & Fox Tribe of Miss. in Iowa, 656 N.W.2d 167, 171 (Iowa 2003) (recognizing that the Tribe possesses sovereign immunity from suit); Meier v. Sac & Fox Indian Tribe, 476 N.W.2d 61 (Iowa 1991) (same).

Indians, 884 F.2d 416, 418 (9th Cir. 1989) (citations omitted); Chemehuevi Indian Tribe v. Cal. St. Bd. of Equalization, 757 F.2d 1047, 1051 (9th Cir. 1985), rev'd. on other grounds, 474 U.S. 9 (1985) (holding that when a Tribe asserts sovereign immunity, the Court "must address it first and resolve it irrespective of the merits of the claim.").

The reason sovereign immunity must be resolved before any other issue is that sovereign immunity is not merely a defense to liability; it is jurisdictional bar, preventing a sovereign from having to suffer the unwarranted demands associated with defending a lawsuit. Siegert v. Gilley, 500 U.S. 226, 232 (1991). "The entitlement is an immunity from suit rather than a mere defense to liability." Mitchell v. Forsyth, 472 U.S. 511, 525 (1985). Indeed, numerous cases hold that a Tribe's sovereign immunity is a jurisdictional barrier to suit against the Tribe.[14] Therefore, as a threshold issue, this Court must determine whether the Tribe has waived its immunity.

If the Tribe has not waived its immunity to permit this Court to grant the relief requested, then this Court has no option but to dismiss, because a tribe's sovereign immunity "involves a right which courts have no choice, in the absence of a waiver, but to recognize. It is not a remedy . . . , the application of which is within the discretion of the court." Cal. Dept. of Fish & Game v. Quechan Tribe of Indians, 595 F.2d 1153, 1155.[15] Because "Indian sovereignty, like that of other sovereigns, is not a discretionary principle subject to the vagaries of the commercial

[14] See Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 475 (1994); Puyallup Tribe, 433 U.S., at 172; Hagen, 205 F.3d, at 1043, 1044 (holding that a Tribe's claim of sovereign immunity is a jurisdictional bar "which may be asserted at any stage of the proceedings."); Dillon v. Yankton Sioux Tribe, 144 F.3d 581, 583 (8th Cir. 1998) ("Because the [tribal housing] Authority did not explicitly waive its sovereign immunity, we lack jurisdiction to hear this dispute."); In re Prairie Island Dakota Sioux, 21 F.3d 302, 304-05 (8th Cir. 1994) ("[S]overeign immunity is jurisdictional in nature."); Rupp v. Omaha Indian Tribe, 45 F.3d 1241, 1244 (8th Cir. 1995) ("Sovereign immunity is a jurisdictional question.").

[15] See also Chemehuevi Indian Tribe, 757 F.2d at 1052 n. 6 (holding that "sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation."); Ute Distrib. Corp. v. Ute Indian Tribe, 149 F.3d 1260, 1267 (10th Cir. 1998) (same).

bargaining process or the equities of a given situation," Pan Am. Co., 884 F.2d at 419, this Court is bound by the dictates of federal law to apply these legal principles to the facts established by the Sac & Fox Court of Appeals, and immediately dismiss this suit.

In resolving this jurisdictional issue, this Court is not bound by the allegations of the Complaint, for it must determine the question of immunity on the merits. There are two types of challenges to subject matter jurisdiction which may be made under Rule 12(b) (1): (i) a facial attack; or (ii) a factual attack. In a facial attack, the Court restricts itself to "the face of the pleadings," and the nonmovant receives the same protections as it would if it were defending against a motion brought under Rule 12(b) (6). In a factual attack, the Court considers matters outside the pleadings, the non-moving party does not have the benefit of Rule 12(b) (6) safeguards, and no presumptive truthfulness applies to the factual allegations. Osborn v. United States, 918 F.2d 724, 729 n. 6 (8th Cir. 1990); Sac & Fox Tribe of Mississippi in Iowa Election Board v. Bureau of Indian Affairs, 321 F. Supp. 2d 1055 (N.D. Iowa 2004) (Reade presiding).

C. THE TRIBE HAS NOT WAIVED ITS SOVEREIGN IMMUNITY FROM SUIT.

There are only two sources for a claimed waiver of a Tribe's immunity from suit: 1) Congress can waive tribal immunity through clear and express statutory language; or 2) a tribe can waive its immunity through clear and express language in a legal instrument agreed to by a tribal officer authorized to waive that immunity. C & L Enter., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411 (2001); Kiowa Tribe of Okla., 523 U.S. 751; Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991). The U.S. Supreme Court and other courts have consistently held that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed. Kiowa Tribe of Ok., 523 U.S. 751. Therefore, API has the burden to conclusively demonstrate the existence of an express waiver of

immunity. Cf., E. Transp. Co. v. United States, 272 U.S. 675, 686 (1927) ("The sovereignty of the United States raises a presumption against its suability, unless it is clearly shown; . . .").

Congress did not waive the Tribe's immunity, so the only colorable claim that an express waiver exists which API could assert is that the June 16, 2003 contract waives the Tribe's immunity. Because it is axiomatic that an alleged waiver of immunity is not valid if the contract containing the alleged waiver is not valid, API's assertion the Tribe waived its immunity necessarily fails, because, as a matter of Sac & Fox law, the alleged contract never was valid.[16]

Because it has been conclusively determined that the Tribe was not a party to the June 16, 2003 contract, see § I.A., supra, any exercise of federal court jurisdiction is precluded, because the Tribe never waived its immunity, and this suit must be dismissed.

III. THIS MATTER MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

API has no viable legal theory which could get what it seeks. In its Complaint and its subsequent pleadings to this Court, API is seeking an order which would hold both that the Tribal Court lacks jurisdiction over API and that API's contract with the Tribe is valid. It cannot possibly obtain either.[17]

As discussed above, the sole issue on the merits here is whether the Tribal Court exceeded the scope of its jurisdiction when it held that: 1) it had subject matter jurisdiction to determine whether or not the Tribe was a party to the June 16, 2003 contract; and 2) though API

[16] Calvello v. Yankton Sioux Tribe, 584 N.W.2d 108 (S.D. 1998) (holding unauthorized waiver is ineffective); Hydrothermal Energy Corp. v. Fort Bidwell Indian Cmty. Council, 216 Cal. Rptr. 59 (Cal. App. 1985) (same); Wichita and Affiliated Tribes of Oklahoma v. Hodel, 788 F.2d 765, 772 (D.C.Cir. 1986) (citing United States v. U. S. Fid. & Guar. Co., 309 U.S. 506 (1940)); Dillon, 144 F.3d 581.

[17] The only ever-so-slightly colorable claim that API could make for lack of tribal court jurisdiction would be to assert that it did not have a consensual relationship with the Tribe because it had not entered into a contract with the Tribe. For obvious reasons API has not and will not make that assertion.

did not have a contract with the Tribe, the Tribal Court had jurisdiction over the Tribe's claims that API committed intentional torts against the Tribe.

For the first of these issues, this Court's prior holding is res judicata. This Court already held the Tribal Court had the sole and exclusive jurisdiction to lawfully determine whether the former Walker Council had the power to bind the Tribe to contracts on June 16, 2003.

> "Clearly, the validity of the Agreement turns on whether Walker was authorized to enter into contracts on behalf of the Tribe. This Court is without jurisdiction to determine whether the Walker Council or the Bear Council was the governing body of the Tribe at the time the Agreement was signed on June 16, 2003, because such a matter is an intra-tribal dispute."

API, 401 F.Supp. 952, 961. See also id. at 963 (repeating that the determination of whether the Tribe was a party to the contract "must be settled by the Tribal Court.")

This Court's s holding was required by the decision of the United States Court of Appeals for the Eighth Circuit in the case In re: Sac & Fox Tribe of the Mississippi in Iowa / Meskwaki Casino Litigation, a consolidated appeal from several cases in which the former Walker Council asserted, based upon the Tribe's Constitution and/or alleged BIA recognition, that the federal court was required to hold that the Walker Council was the Tribe's governing body and therefore had the authority, *inter alia*, to enter into contracts and exercise other powers of office conferred to the Tribal Council by the Sac & Fox Tribe of the Mississippi in Iowa Constitution. This Court dismissed that suit, holding that the Tribe, not the federal courts, was the only entity which could resolve the competing claims to tribal office. Sac & Fox Tribe of the Mississippi in Iowa v. Bear, 258 F.Supp.2d 938 (N.D. Iowa 2003). The Eighth Circuit affirmed that decision.[18]

[18] These cases are part of a long line of cases which hold that a tribe, through its internal processes, determines who its leaders are. See, e.g., Wheeler v. U.S. Dept. of Interior, 811 F.2d 549, 551-52 (10th Cir. 1987); Goodface v. Grassrope, 708 F.2d 335, 339 (8th Cir. 1983).

Governing precedent explicitly rejects API's claim that Montana precludes a tribal court from deciding the merits of an allegation that there was not a valid contract between the Tribe and a non-Indian entity. In re: Sac & Fox Tribe of the Mississippi in Iowa / Meskwaki Casino Litig., 340 F.3d 749 (8th Cir. 2003).[19] There does not appear to be any case with a contrary holding.

This Court's holding that only the Meskwaki Tribal Court could determine whether Walker could bind the Tribe to a contract on June 16, 2003, together with the Tribal Court of Appeals' holding that the Tribe was not a party to the alleged contract, defeats API's claim that the Tribal Court exceeded the scope of its jurisdiction. API pled that the contract was valid; the Tribe asserted the contrary. The Tribal Court had jurisdiction to resolve the issue of contract validity, it decided that issue adverse to API, so that inquiry is at an end.

The second issue requires a more detailed analysis, because this Court has not ruled on the issue of whether the Tribal Court has jurisdiction over the Tribe's tort claims against API. However, a wealth of precedent exists to guide this Court's analysis of this question, all supporting but one conclusion; the courts of the Sac & Fox Tribe of the Mississippi in Iowa have jurisdiction over the Tribe's suit against API.

Tribal Court jurisdiction over non-Indians on tribally owned land has been recognized since at least Worcester v. State of Georgia, 6 Pet. 515 (1832), where the Cherokee Tribe had given Worcester permission to be on its lands, but he was convicted under Georgia law making it a crime for a white person to be on Cherokee land without permission of the State. The United

[19] See also Williams v. Lee, 358 U.S. 217 (1959); Bad River Band of Lake Superior Tribe of Chippewa Indians v. Teague, Case No. 96C55 (Bad River Tribal Ct., decided August 18, 1997) (holding that the tribal court had jurisdiction to determine whether an alleged contract was invalid); TTEA v. Ysleta del Sur Pueblo, 181 F.3d 676 (5th Cir. 1999) (same); Vizenor v. Babbitt, 927 F. Supp. 1193 (D.Minn. 1996) (holding that allegations of misappropriation of tribal funds must be brought in tribal court, that the tribal court's decision is then binding in all non-tribal courts).

States Supreme Court reversed the conviction, holding:

> The Cherokee nation . . . is a distinct community, occupying its own territory . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of Cherokees themselves or in conformity with treaties, and with the acts of Congress.

The Supreme Court quoted and applied the above holding from Worcester in Williams v. Lee, 358 U.S. 217 (1959). William, a non-Indian, brought suit in the Arizona state courts, asserting that Lee, a member of the Navajo Tribe, had breached a contract by failing to make all monetary payments required under a contract. Through the claim arose on Indian land within the Navajo Reservation, Arizona's courts held they had jurisdiction over the suit. But an unanimous United States Supreme Court held the Navajo court system had exclusive jurisdiction over the claim, reasoning that because tribes retain the sovereign authority to make their own laws and be ruled by them, including laws exercising sovereign regulatory and adjudicatory power over all tribally-owned land in Indian Country, the Navajo Tribal Court properly had jurisdiction of the case. It stated that:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs, and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation, and the transaction with an Indian took place there.

Worcester notes that a tribe's jurisdiction over its own land can be diminished by an act of Congress or treaty. The most common present day scenario where a congressional act might lead to diminishment stems from the failed federal allotment laws. During the allotment era, lands on some tribal reservations ended up being owned in fee by non-Indians, and tribal jurisdiction over non-members on those non-Indian owned lands is limited. Montana, 450 U.S.

at 544.[20]

The Meskwaki Settlement does not contain allotted lands, API's agents were armed thugs, not state officers, and there is no federal statute which authorized API's entry onto the Tribe's land. Under Worcester and Williams, claims against API arising from a consensual relationship with tribal members and its subsequent actions on the Settlement, and in particular claims which require a court to determine who the Tribe's leaders were in 2003, are within the Tribal Court's jurisdiction. Any argument to the contrary contradicts controlling precedent.

API bases its claim for relief upon a distinct misinterpretation of the United States Supreme Court holding in Montana. In Montana, the Supreme Court discussed two independent grounds for tribal civil regulatory jurisdiction over non-members on non-Indian owned land:

> 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. 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. 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.

450 U.S. at 565 (citations omitted). See also Hicks, 533 U.S. at 359 (reiterating the validity of both "Montana exceptions"); Plains Commerce Bank v. Long Family Land and Cattle Co., 128 S.Ct. 2709 (2008). The Tribal Court has jurisdiction under either exception.

[20] See also Nevada v. Hicks, 533 U.S. 353 (2001) (either adding an additional "exception" to Worcester or interpreting the existing exception more broadly than in prior decisions, the Court held that a state game warden, when exercising state power to investigate an off-reservation offense, was not subject to tribal jurisdiction for claims based upon the state actor's actions on non-tribally owned reservation land).

A. THE TRIBAL COURT HAS JURISDICTION UNDER THE "CONSENSUAL" PRONG OF THE MONTANA TEST.

Under the consensual prong of the Montana test, the Tribal Court has jurisdiction related to "activities of nonmembers who enter consensual relationships with the tribe *or its members*, through *commercial dealing*, contracts, leases, or *other arrangements*." 450 U.S. at 565 (emphasis added). Though API did not contract with the Tribe, it did enter into a substantial consensual relationship with a tribal *member*, Alex Walker, Jr., to overthrow the Tribe's legitimate governing body. As part of its consensual relationship with Walker, API took $1,022,171.26 of tribal funds without lawful authority and committed intentional torts on the Settlement against the Tribe. The Tribal Court had jurisdiction to order the return of stolen funds, to provide related remedies, and to enter an award of damages for intentional torts which API committed as part of its consensual relationship with Walker. The fact that the aggrieved party (the Tribe) did not consent to the actions of the tortfeaser (API) is irrelevant to this Court's determination of the Tribal Court's jurisdiction; it is the consensual nature of the transaction underlying the harms alleged which definitively resolves that question. Any other result would defeat the policies the exhaustion doctrine is intended to promote, contravening settled law.

The Tribal Court also had jurisdiction because API's activities and duties related to tribal gaming, and API took tribal funds as payment for breaking into the Tribe's gaming facility. This, standing alone, is sufficient to establish the Tribal Court's jurisdiction. Gaming licensing is a key bulwark through which the Tribe "shield[s] the operation of gaming from organized crime and other corrupting influences, and assure that gaming is conducted fairly and honestly by both the operator and players." Sac & Fox Tribe of the Mississippi in Iowa Code §11-1102 (2003). The licensing process is designed to discover and exclude any person or entity "whose

prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods and activities in the conduct of gaming." Sac & Fox Tribe of the Mississippi in Iowa Code § 11-3103(c) (2003).[21] In order to protect the Tribe's gaming operation from corrupt entities like API, the Tribe, through its federally approved Gaming Code, requires that people and entities apply for licenses before they begin providing services to or in a gaming operation. Sac & Fox Tribe of the Mississippi in Iowa Code §11-3201 (gaming license application must be submitted "at least thirty (30) days prior to conducing such business or as otherwise allowed in the discretion of the Commission").

As a matter of law, API was subject to tribal gaming licensing procedures and other tribal regulations related to gaming because, under the June 16, 2003 contract, Appellant expressly took on security responsibilities related to the gaming operation.[22] Consequently, API subjected itself, by its actions, to the Tribe's regulatory and

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[21] Sac & Fox Tribe of the Mississippi in Iowa Code Section 11-3101(a) defines the people and entities whose performance of gaming related services bring them within the Tribes' jurisdiction:

> Any employee, agent or contractor working in or for the Tribe's gaming enterprise who has access to cash, tokens or chips, machine components or other gaming supplies or who has management, security or accounting responsibilities . . . shall be required to have and display prominently, or display upon request, an appropriate, valid and current tribal license to do business at or with the Tribe's gaming enterprise.

See also Compact between the Sovereign Indian Nation of the Sac & Fox Tribe of the Mississippi in Iowa and the Sovereign State of Iowa to govern Class III Gaming on Indian Lands of the Sac & Fox Tribe of the Mississippi in Iowa §7 (1995). Under both the Compact and the Ordinance, API was required to be licensed to engage in actions related to gaming; the fact that it violated these laws is sufficient in and of itself to vest the Tribal Court with jurisdiction of the Tribe's suit and over API.

[22] In Section I.2 of the June 16, 2003 contract, Appellant described its responsibilities as follows:

> Services shall include, but not be limited to the following: …
> B Developing a security plan for the re-opening of the Tribe's Gaming Facility. …
> D. Providing general community security services to Tribal Government and its operations as is feasible.
> E. Investigate allegation of unlawful acts and tribal policy violations of the dissident group involving Tribal funds, and gaming operations.

adjudicative authority. The Tribal Court has jurisdiction over API for its actions as Walker's agent. The nexus between API's illegal acts and its consensual relationship with its principal, Walker, is sufficiently close to come within the first Montana exception.

B. THE TRIBAL COURT HAS JURISDICTION UNDER THE "PROTECTIVE" PRONG OF THE MONTANA RULE.

The "protective" prong of the Montana test states: "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. The Montana Court's reference to fee land in the quoted language was not a limitation on the holding, but was instead a reflection of the fact that when the action occurs on the Tribe's own land, the conduct has a direct effect on the Tribe's interests, and therefore Montana's protective prong is, a priori, satisfied.

Nevertheless, the Tribe cannot imagine, nay, cannot begin to fantasize any realistically plausible scenario with a greater impact on the Tribe's political integrity or economic security than that presented by Plaintiff's actions. Plaintiff was a mercenary, trying to help Alex Walker and others take over the Tribal government and depose the lawful Tribal Council. It took substantial tribal funds for its work for Walker and now refuses to voluntarily return those unconstitutionally obtained funds. It committed assaults, batteries, and unlawful imprisonments against tribal members and employees and destroyed tribal property. It took over the Tribe's Casino and Gaming Commission offices, and permitted corrupt individuals, who had been permanently banned from the Casino, to enter the secured areas of the Casino.

API's conduct clearly threatened the political integrity of the Tribe. It tried to depose the

governing body that the majority of tribal members repeatedly declared was suited to hold the office of Tribal Council member. It attempted to do so using force to gain entry to and control of Tribal Government Offices.

API's same conduct clearly threatened the economic security of the Tribe. API tried to take over the Tribe's Casino, the source of funds the Tribe uses to fund health care; education; housing; youth, family and senior services; welfare programs; child protection programs and other services and programs. Its actions violated the IGRA, the Compact, the Sac & Fox Gaming Code and regulations, orders banning others from the Casino, an NIGC closure order, and an order of this Court, and created a grave risk of further sanctions and closures.

API chose to forcibly interject itself into the very core of tribal activities, and it cannot now complain that it has to answer in the Tribal Court for its attempt to depose the Tribe's governing body through the use of force, and its armed attempt to take over the Tribe's Casino. The Tribal Court clearly had and has jurisdiction over API, and, if it reaches the issue, this Court must confirm that the Tribal Court has jurisdiction over API, and that its orders are valid.

CONCLUSION

For all the foregoing reasons, API's suit here must be dismissed.

Respectfully submitted,
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