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 TRIBE'S RESISTANCE TO API'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON JURISDICTIONAL GROUNDS

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INTRODUCTION

In its Motion for Partial Summary Judgment, the Plaintiff requests a declaration that the Sac & Fox Tribe of the Mississippi in Iowa Tribal Court (the "Tribal Court") lacks jurisdiction over certain armed trespasses, conversions of tribal funds, and misappropriations of trade secrets the Plaintiff is alleged to have committed against an Indian Tribe, on the Tribe's land. The Plaintiff's Motion for Partial Summary Judgment cannot be granted because the Plaintiff is not entitled as a matter of law to the declaratory judgment it requests. The Tribal Court has jurisdiction over Plaintiff for the activities it is alleged to have committed, and it correctly exercised its jurisdiction. The Plaintiff is not entitled to a judgment as a matter of law declaring that the Tribal Court does not have jurisdiction. This Court should therefore deny the motion for summary judgment and hold that the Tribal Court does have jurisdiction and that it correctly exercised that jurisdiction.

SUMMARY OF FACTS

This case is before the Court as a result of Plaintiff's averment that it completed its litigation in the Tribal Court of the facts and law related to the jurisdiction of the Tribal Court. Given this procedural posture, the facts, as they were determined in the proceedings in the Tribal Court and affirmed by the Tribal Court of Appeals ("Tribal Court of Appeals") cannot be disputed by Plaintiff. They are the facts the Tribe alleged in its Tribal Court complaint which were not disputed by Plaintiff in its challenge to the Tribal Court's jurisdiction, as supplemented by the Tribal Court's findings of facts on the merits of API's motion to motion to dismiss on jurisdictional grounds. Sac & Fox Tribe of the Mississippi in Iowa v. Attorneys Process and Investigation, Inc., (Sac & Fox App.

Dec. 23, 2008); cf. Osborn v. United States, 918 F.2d 724 (8th Cir. 1990) (applying a similar rule for federal court challenges to the Court's jurisdiction).

API challenged two primary constellations of facts on the merits: facts related to whether it had a contract with the Tribe, and facts related to whether the former Walker Council had apparent authority.[1] As requested by API, the Tribal Court determined those factual matters on the merits rather than on the pleadings, and as API cannot dispute, the Tribal Court determined that API did not have a contract with the Tribe and that Walker did not have apparent authority. The facts, as set out in more detail in the Tribe's Statement of Undisputed Material Facts, establish that the Tribe did not enter into any contract with API, and that instead API established a consensual relationship with Alex Walker, Jr. and others associated with Walker, to attempt the violent overthrow of the Tribe's lawful governing body, that API took $1,022,171.26 of the Tribe's money as payment for its services to Walker, and that API refuses to return the Tribe's funds.

Pursuant to its consensual relationship with Walker, on October 1, 2003, API trespassed in the Tribe's Government Center and the Meskwaki Bingo Casino Hotel (the "Casino"), which are on Tribal land within the Tribe's Settlement. API "broke in" with "approximately 30 enforcers," some of whom were armed, including at least one who was armed with a firearm. (Tr. Ct. App. Order, API Appendix at 82). API's enforcers "committed unlawful assaults and batteries and false imprisonments against tribal members and employees," seized, damaged, and destroyed Tribal property, and more. Id. Moreover, API obtained and exercised control over all or nearly all of the Tribe's gaming information, and over all information of the Sac & Fox Gaming Commission, consisting

[1] The Tribal Court rejected apparent authority on both the facts and the applicable tribal law, and therefore any factual dispute related to apparent authority is not material in these proceedings.

of highly sensitive and confidential information including, without limitation, detailed financial information, information regarding the extent and scope of security and surveillance coverage at the Tribe's Casino, information regarding ongoing Gaming Commission investigations, all personnel files, all legal files, and devices used to insure the integrity of the Casino's operations. Id.

API does not dispute here that it committed any of the above-described acts. It instead rests its motion for summary judgment upon what is alleges are "undisputed facts", but which are contrary to the findings of facts made by the Tribal Court for purposes of determining API's challenge to the Tribal Court's jurisdiction. Most significantly, API's motion for Summary Judgment is based upon a legal argument that its actions were not torts, and so are outside the scope of the Tribal Court's jurisdiction, and are subject to arbitration and to an order by this Court to compel arbitration. Incredibly, Plaintiff asserts that it is an "undisputed fact" it entered into a contract with the Tribe. The Tribal Court has definitively determined, on the merits, that API did not have a contract with the Tribe.[2]

ARGUMENT

I. API IS NOT ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW, BECAUSE THE TRIBAL COURT HAS JURISDICTION AND CORRECTLY EXERCISED THAT JURISDICTION.

Summary judgment is only appropriate if the record shows that "there is no genuine issue as to any material fact **and** that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c) (emphasis added). See also Sartor v. Arkansas

[2] Despite its assertion in its statement of undisputed facts that API entered into a contract with the Tribe through Walker, API apparently acknowledges that the Bear Council was the Tribe's true governing body prior to June 16, 20003. API Brief at 21-22 (describing the Walker Council as being an "otherwise 'unofficial' council, apart from its BIA recognition, and referring to the "'true' Bear Council").

Natural Gas Corp., 321 U.S. 620, 627 (1944). If reasonable minds could differ as to the import of the evidence presented, summary judgment should not be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). The burden of proof is upon the movant and the evidence, facts, and their permissible inferences must be viewed in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970). The party against whom the motion is made is entitled to all favorable inferences which may be reasonably drawn from the evidence. Harlow v. Fitzgerald, 457 U.S. 800, 816 n.26 (1982); U.S. v. Diebold, Inc., 369 U.S. 654, 655 (1962). Where reasonable fact finders could extend an inference in favor of the non-moving party without resorting to speculation, a court may not declare the inference unjustifiable simply because it might draw a different inference. Wallace v. DTG Operations, Inc., 442 F.3d 1112, 1118 (8th Cir. 2006). The Eighth Circuit has repeatedly recognized that summary judgment is a blunt instrument; an extreme and drastic remedy, which should be sparingly employed, and must not be employed unless the movant has established his right to a judgment with such clarity as to leave no room for controversy, and no question that the other party is not entitled to recover under any discernible circumstances. See, e.g., Buford v. Tremayne, 747 F.2d 445, 447 (8th Cir. 1984); Champale, Inc. v. Joseph S. Pickett & Sons, Inc., 599 F.2d 857, 859 (8th Cir. 1979); Giordano v. Lee, 434 F.2d 1227, 1230 (8th Cir. 1970).

It most certainly cannot be said that API has established its right to a judgment that the Tribal Court lacks jurisdiction with such clarity as to leave no room for controversy. A declaratory judgment that the Tribal Court lacks jurisdiction over API

must not be granted because the Tribal Court does have jurisdiction over API. In light of the standards governing summary judgment, API's Motion must be denied.

A. THE TRIBAL COURT CORRECTLY PRESUMED THAT IT HAS JURISDICTION OVER NON-MEMBERS ON TRIBAL LAND.

It is the Tribe's position that the Tribal Court presumptively has subject matter jurisdiction over the activities of API alleged in the Tribe's tort claims because those torts occurred on Tribal land. As the Tribe has discussed at length in other briefs, there is ample precedent to support the Tribe's position. See, e.g., Memorandum in Support of Tribe's Motion to Dismiss, at 14-16. And neither the Supreme Court nor the federal circuit courts have held that Montana applies to nonmember conduct on trust land.[3] (Tr. Ct. App. at 16). In the present matter, there are numerous other facts, in addition to the fact that the torts were on the Tribe's land, which lead to the inescapable conclusion that the Tribal Court has jurisdiction, and the Tribe does not need to rely upon the presumption. Therefore, for current purposes, the Tribe's discussion will progress to examination of application of the Montana analysis to the question of whether the Tribal Court has jurisdiction. The Tribe's position remains, however, that the Tribal Court presumptively has jurisdiction.

B. EVEN ABSENT SUCH A PRESUMPTION OF JURISDICTION, THE TRIBAL COURT HAS JURISDICTION UNDER MONTANA.

API bases its Motion upon a distinct misinterpretation of the United States Supreme Court holding in Montana v. United States, 450 U.S. 544 (1981). In Montana,

[3] API quotes passages from Plains Commerce to support its assertion that Montana does apply to nonmember conduct on trust land. However, these passages are dicta. Plains Commerce involved the sale of fee land from one nonmember to another nonmember. It does not hold that Montana applies to trust land.

the Supreme Court discussed two independent grounds for tribal civil regulatory jurisdiction over non-members:

> 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 Nevada v. Hicks, 533 U.S. 353 (2001) (reiterating the validity of both "Montana exceptions"). In other words, a nonmember can consent to tribal jurisdiction either expressly or by his actions. Plains Commerce, 128 S.Ct. 2709, 2724 (2008).

In Strate v A-1 Contractors, 520 U.S. 438 (1997), the Supreme Court held that the Montana Rule, including both of its exceptions, defines the scope of a Tribe's adjudicatory power on non-fee land:

> Regarding activity on non Indian fee land within a reservation, Montana delineated--in a main rule and exceptions--the bounds of the power tribes retain to exercise "forms of civil jurisdiction over non Indians." As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.

Both of the "Montana exceptions" are well established under federal law, and clearly permit Tribal Court jurisdiction in the matter. API entered into a consensual relationship with a tribal member to conduct substantial actions, including intentional torts against the Tribe itself, on the Tribe's land, including in the Tribe's government center and the Casino. It sought to overthrow the Tribe's governing body. The Tribal Court therefore has jurisdiction under both prongs of the Montana test.

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

As a matter of federal law, the Tribal Court has jurisdiction over the Tribe's tort claims against API under the first prong of the Montana analysis, the "consensual" prong. The June 16, 2003, agreement represents a consensual relationship between API and a member of the Tribe. It is immaterial whether the Tribe consented to a relationship with API; the proper focus of the analysis is on the nonmember's actions. In fact, many, and likely most, consensual relationships which come within Tribal Court jurisdiction under the first prong of the Montana test are not between the non-member and the Tribe. These include suits based upon intentional torts, dissolution of marriage, child custody, violence protection orders, contracts, and many other suits. Here Plaintiff entered into a consensual relationship to take the Tribe's funds and to commit serious, intentional torts against the Tribe on the Tribe's own land. The fact that it did not receive the Tribe's permission does not preclude Tribal Court jurisdiction.

a. API AND WALKER ENTERED INTO A CONSENSUAL RELATIONSHIP TO CARRY OUT NEFARIOUS ACTIVITIES DIRECTED AGAINST THE TRIBE ON THE TRIBE'S LAND; LACK OF CONSENT ON THE TRIBE'S PART DOES NOT DEFEAT TRIBAL COURT JURISDICTION BECAUSE THE FOCUS OF THE "CONSENSUAL" ANALYSIS SHOULD BE ON THE NONMEMBER'S CONDUCT.

The consensual prong of Montana applies to Tribe's claims against API because there is a consensual relationship between API and one of the Tribe's members. API wrongly asserts that the consensual prong of the Montana test applies only when there is a valid contract between the nonmember and the Tribe. But a contract with the Tribe, valid or otherwise, is not a prerequisite to tribal court jurisdiction under the Montana test, for the simple reason that a contract is not the only way of entering into a consensual

relationship with a tribe or its members. Instead, 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. Plaintiff committed harmful acts against the Tribe, *on the Tribe's land*. API committed acts against the Tribe, in its Casino and Government Center *based upon and because of* that consensual relationship. Plaintiff took over $1,000,000 of the Tribe's money based upon and because of that consensual relationship. It committed intentional torts against the Tribe based upon that consensual relationship. It attempted to overthrown the Tribe's government based upon and because of that consensual relationship. In other words, but for the consensual relationship between Walker and API,[4] these harms would not have occurred. Clearly, the nexus between the actions stemming from API's consensual relationship with Walker and the harms alleged by the Tribe is sufficiently immediate to establish that the Tribal Court has jurisdiction to hear the Tribe's claims. Any argument to the contrary is without merit where, as here, the intentional torts sprang directly from, and indeed were required by, the agreement forming the basis of the consensual relationship API admits having with Walker.

Despite acknowledging its consensual relationship with Walker, API asserts that because the Tribe argues that the Tribe was not a party to the purported contract between

[4] API admits that it entered into this consensual relationship with Walker (API Brief at 12) (stating that "API did enter into a consensual relationship with Walker…"). API asserted, and erroneously continues to assert, that in the admitted consensual relationship between Walker and API, Walker was acting as the Tribe's agent.

Walker and API, there can be no consensual relationship giving rise to Tribal Court jurisdiction. (API Brief at 12). API's argument is wholly divorced from the applicable legal rule. As Montana clearly states, the consensual relationship need not be with the Tribe. The consensual relationship also need not be defined by the written document dated June 16, 2003, or by any other *written* document. API's argument is sophistry, designed to lead the Court away from the API's burden to show that the Tribal Court suit is not based upon the "activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." In the present posture of this case API has the burden to establish that its activities, springing from its consensual relationship with Walker, are ***not*** sufficient to permit an exercise of the Tribal Court's jurisdiction; the Tribe does not have the burden to establish the Tribal Court has jurisdiction – the Tribe has already met that burden in the Tribal Court when the Tribal Court ruled that it has jurisdiction over the Tribe's claims against API.

It severely strains logic for API to argue that an agreement (which API even now asserts is valid) authorized it to commit the harms it did against the Tribe, but that there is no consensual relationship for purposes of Tribal Court jurisdiction. Logically, and under the applicable Supreme Court case law, the focus of the consensual analysis is on the actions of the non-tribal party over which the Tribal Court has determined it has jurisdiction. See also API Brief at 10 (acknowledging that the focus on the Montana test is on the activities of the non-member). Although the Tribe did not consent to be bound by any agreement with API, API did consent to enter into an agreement with Walker through which it provided assistance to Walker in his efforts to claim he was the Tribe's

Chairman. It is the Tribal Court's jurisdiction over API that is in question; hence, it is API's consent to enter into a relationship with a tribal member, and its actions which are alleged to have harmed the Tribe, that must be the focus of the analysis of the Tribal Court's jurisdiction. API's argument that lack of Tribal consent to a relationship with API defeats Tribal Court jurisdiction cannot stand when the analysis is properly focused on whether API consented to enter into a relationship with the Tribe or its members, which it did.

Moreover, it is not the case that API entered into a run-of-the-mill consensual relationship with just any member of the Tribe, for just any services. API entered into a consensual relationship with a Tribal member purporting to represent the Tribe, who it knew to be involved in a leadership dispute, for nefarious purposes that directly threatened the stability of the Tribe's government and the success of its economic affairs. It committed torts against the Tribe on the Tribe's land pursuant to that consensual relationship, and was compensated (albeit without authorization) from Tribal funds for its performance. Indeed, API benefited from entering into that relationship, illegally taking over a million dollars of the Tribe's funds.

Under these circumstances, API cannot prevail on its argument that the Tribe's lack of consent to a relationship with API defeats Tribal Court jurisdiction under the consensual prong of Montana. See, e.g., Ford Motor Co. v. Kayenta Dist. Ct., 2008 WL 5444943 (Navajo Dec. 18, 2008) (No. SC-CV-33-07) (distinguishing Plains Commerce Bank and holding that a nonmember company was subject to Navajo jurisdiction under Montana, noting as part of its analysis that the nonmember company had benefited from the transaction in question). The fact that the aggrieved party (the Tribe) did not consent

to the actions of the tortfeasor (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. In this case, API's consensual relationship with Walker establishes Tribal Court jurisdiction under the "consensual" prong of Montana, regardless of the Tribe's lack of consent.

b. APPLICATION OF THE "CONSENSUAL" PRONG TO THIS CASE WILL NOT SWALLOW THE RULE.

API professes concern that Montana's general rule against tribal court jurisdiction over nonmembers will be swallowed by the "consensual" exception if that exception is applied in this case.[5] (API Brief at 11). API's briefing on this issue is convoluted, because it is seeking do disguise the fact that its argument is contrary to established precedent governing the question whether the Tribal Court has jurisdiction over it. The Supreme Court and lower federal courts have clearly defined the nexus which must exist between the consensual relationship and the jurisdiction of the tribal court, and API falls well within conduct which establishes a sound basis for the Tribal Court's exercise of jurisdiction over API. See, e.g., Plains Commerce,128 S.Ct. at 2725 (explaining that a bank's commercial dealings with tribal members may trigger tribal regulation of those transactions, but likely would not trigger tribal regulation of transactions not involving tribal members, but instead between two non-tribal members).

However, API should reasonably have anticipated that its dealings with Walker, including its commission of torts against the Tribe that flow from that consensual relationship and taking of tribal funds when it knew that Walker's authority to dispense

[5] As discussed in Part I.A supra, the Tribe's position is that tribal courts presumptively have jurisdiction over nonmembers on tribal land, but the Tribe, having consented to application of a Montana analysis for purposes of API's Motion, sets forth its argument as if Montana applied.

those funds was in dispute, would trigger Tribal jurisdiction over the activities in which it engaged pursuant to its consensual relationship with Walker. Cf., 2725 ("The Bank may reasonably have anticipated that its various commercial dealings with the Longs could trigger tribal authority to regulate those transactions . . ...."). When, as here, the activities in question are inextricably linked to the consensual relationship, one cannot reasonably dispute that the Tribal Court has jurisdiction. In such instances, the exception can hardly be said to swallow the rule.

c. THE ARBITRATION PROVISION IN THE PURPORTED CONTRACT DOES NOT EXEMPT API FROM TRIBAL COURT JURISDICTION.

API argues that it did not consent to Tribal Court jurisdiction because the Purported Contract provided for binding arbitration of disputes, enforceable in state and federal, not tribal, courts. (API Brief at 14). In support of this assertion, API sets forth a number of disputed legal issues as if they were undisputed. It states that "API sought and expressly obtained the Tribe's consent to arbitrate all disputes arising out of the Agreement," and that "API and the Tribe agreed that the arbitrator's decision would be binding and enforceable only in state and federal courts," and that they "also agreed that motions relating to the arbitration could be brought only in state and federal courts." Id.

However, as API well knows, the veracity of these statements turns on the question whether Walker had the requisite authority to execute the Purported Contract on behalf of the Tribe. If he had the requisite authority, then the Purported Contract might have been valid, and the arbitration provision might have foreclosed any exercise of Tribal Court jurisdiction. As discussed infra, and as this Court has already held in this very case, the Tribal Court has exclusive jurisdiction to resolve the question whether Walker possessed the requisite authority to bind the Tribe to the Purported Contract.

Consequently, arguing as Plaintiff does, that Walker had the requisite authority to bind the Tribe is contrary to the law of this case, for this Court, the Tribal Court, and the Tribal Court of Appeals have consistently held that the Tribal Court had exclusive jurisdiction to determine Walker's authority. Now that the Tribal Court has determined that Walker did not have the requisite authority, API seeks to avoid the result of its actions challenging the Tribal Court's jurisdiction. Thus, while it may be true that API attempted to avoid Tribal Court jurisdiction, there is no valid, binding contract pursuant to which the Tribe consented to arbitration.

API also seeks to pass off this same, previously rejected argument by recasting it as an assertion that the Tribal Court must have been divested of jurisdiction because, API claims, the Purported Contract "plainly manifest API's strenuous withholding of consent to tribal civil jurisdiction." (API Brief at 14). The Tribe does not agree that API strenuously withheld consent to tribal court jurisdiction. The invalid "contract" contains numerous references to Tribal law, which indicate just as plainly that API was well aware that it might be subject to Tribal jurisdiction.[6] Moreover, how strenuously API attempted to withhold consent to tribal court jurisdiction is irrelevant, because the Purported Contract is ***not valid***.

API must not be permitted to enter into an admittedly consensual relationship with Walker, take outrageous actions against the Tribe required of by the Purported

[6] The governing law provision of the Purported Contract states that the agreement shall be governed by the "applicable laws of the Tribe, the United States, and the State of Iowa." (API App. 5). Moreover, the arbitration provision itself states that the arbitrator "shall apply the applicable laws of the Tribe (as enacted or amended), the United States and the State of Iowa." Id. The Purported Contract also exempts API from Tribal taxes, and provides that API will be relieved of its obligations under the Purported Contract in the event that the applicable laws of the Tribe change so as to make API's performance of the Purported Contract impossible or economically infeasible. (API App. at 6).

Contract defining its consensual relationship, and then claim that it is not subject to Tribal Court jurisdiction merely because it indicated in an invalid contract that it didn't want to be subject to Tribal Court jurisdiction. The strenuousness of API's objections notwithstanding, the fact remains that API entered into an admittedly consensual relationship with Walker, which subjected it to Tribal Court jurisdiction for claims stemming from its activities flowing from that consensual relationship. There is simply no valid agreement that exempts API from the Tribal Court's jurisdiction, and its arguments to the contrary are entirely without merit.

In summary, API came onto the Tribe's land and entered into a consensual relationship with a Tribal member, who was also a former Chairman of the Tribal Council purporting to possess authority to bind the Tribe. The consensual relationship was directly related to the Tribe's leadership dispute, and contemplated that API would insert itself into that leadership dispute in an attempt to unseat the Tribe's legitimate leadership. API cannot now complain that it is subject to tribal jurisdiction as a result of that consensual relationship.

2. THE TRIBAL COURT HAS JURISDICTION UNDER THE "PROTECTIVE" PRONG OF THE MONTANA TEST.

The Tribal Court also has jurisdiction under the "protective" prong of Montana, which 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. A case more suitable for application of the "protective" prong can scarcely be imagined.

a. THE "PROTECTIVE" MONTANA EXCEPTION APPLIES IN THIS CASE.

The Tribal Court of Appeals agreed with the Tribe that "it is difficult to conceive of conduct that would constitute a more direct threat to the political integrity, the economic security, *and* the health and welfare of the Tribe" than the conduct engaged in by API. (Tr. Ct. App. 16, API Appendix at 94). The Tribal Court of Appeals further stated:

> To the extent that a Montana exception is necessary to recognize tribal court jurisdiction, this is the rare case that squarely falls within the second Montana exception, even under the most limited reading of tribal jurisdiction. This case is based upon allegedly egregious torts that nonmember API committed against the entire Tribe by converting Tribal funds and by storming the Tribal Center and Casino on behalf of the ousted Walker Council. The allegations in the Complaint are that API expressly contracted to address significant Tribal governmental issues, and to exercise essentially Tribal governmental authority.
>
> The locus of the allegedly tortious nonmember conduct was the Tribal Community Center and Casino, which is on trust land within the Tribe's reservation. This is the Tribe's economic engine, and is where some of the Tribe's most sensitive documents are kept. It was precisely these things over which API sought control, on behalf of the Walker Council. Any tortious activity in which a nonmember engages, directly aimed at the Tribe's gaming operations, while on trust land, is more than sufficient grounds to justify the Tribal Court exercising civil adjudicatory jurisdiction over the nonmember.

(Tr. Ct. App. 16).

API attempts to take the last sentence of the foregoing quote severely out of context, and accuses the Tribal Court of Appeals of measuring API's alleged conversion of Tribal funds, storming of the Tribal Center and Casino, and seizure of sensitive documents, among other egregious actions, by a "relaxed standard that is inconsistent with federal law." (API Brief at 14). Instead, API seeks to do away with the standard by which the US Supreme Court has said the second Montana exception should be judged (which the Supreme Court has repeatedly reaffirmed), and attempts to replace it with a

extremely rigorous standard under which the second prong would only apply if the non-member's conduct was "catastrophic" for tribal self-government.

The Supreme Court has *never* held that the threat or harm must be "catastrophic," as API falsely asserts, and it has clearly and repeatedly defined the requisite risk to the Tribe under the standard announced in Montana. See, e.g., Plains Commerce Bank, 128 S.Ct. 2709(sale of fee land from one nonmember to another); Strate v. A-1 Contractors, 520 U.S. 438 (1997) (commonplace state highway accident); Brendale v. Confederated Tribes, 492 U.S. 408 (1989) (zoning of non-Indian fee lands); Montana, 450 U.S. at 566 (non-Indian hunting and fishing on fee land). See also Ford Motor Co. v. Kayenta Dist. Ct., 2008 WL 5444943 (Navajo Dec. 18, 2008) (No. SC-CV-33-07) (holding that the death of a Navajo Nation police officer because of allegedly defective vehicle meets "protective" prong of Montana); Elliott v. White Mt. Apache Tribal Ct., 2006 WL 3533147 *5 (Distr. Ariz. 2006) (finding it arguable that Montana's "protective" exception applied where forest fire burned a significant part of the tribe's reservation).

API bases its argument upon the Supreme Court's quote, in dicta, of a commentator who, in turn, merely stated that Montana "suggests" the threat must be "catastrophic." Plains Commerce, 128 S.Ct. at 2726. This reference to catastrophic damage in Plains Commerce Court is sheer dicta, as is the Court's statement that the sale of fee land by one non-Indian to another non-Indian "cannot fairly be called 'catastrophic' for tribal self-government." 128 S.Ct. at 2727. There is simply no Supreme Court case elevating the standard for tribal court jurisdiction based on the "protective" exception announced in Montana from conduct which "threatens or has some direct effect on the political integrity, the economic security, or the health or

welfare of the tribe," to conduct which has a "catastrophic" effect on the tribe's "political integrity, the economic security, or the health or welfare." To the contrary, under the "protective" exception set out in Montana, the conduct by which a federal court is to determine whether a tribal court has jurisdiction, is whether the conduct in question "threatens" or has some "direct effect" on the tribe's "political integrity, the economic security, or the health or welfare". An armed takeover of a tribe's government center and economic engine, and an attempt to forcibly install as tribal leaders of people who, it has now been definitively determined, were not the Tribe's leaders, would certainly fall within the definition of harm that is "catastrophic".

As the Tribal Court of Appeals noted, it is nearly impossible to even begin to conceive of conduct that would pose a greater, or more direct, threat to the political integrity, economic security, or the health and welfare of the Tribe than the conduct engaged in by API. API conducted an armed invasion of the Tribe's center of government, and of the Tribe's Casino, its primary revenue generating arm. It attempted to seize control of control of these locations from the Tribe's legitimately elected Tribal Council, thereby threatening the Tribe's political integrity. It harmed or threatened the safety of Tribal members and employees, illegally took over a million dollars of Tribal funds, and seized highly sensitive and confidential information belonging to the Tribe, thereby threatening the Tribe's economic security and welfare. Its invasion of the Casino placed Casino profits and the Tribal programs funded thereby, at risk. API's conduct created serious threats, as well as actual harm, to the Tribe's economic security, political integrity, and general welfare.

Only something along the lines of a full-scale military invasion could be more

catastrophic to the Tribe. Catastrophic risk is not required, but API's actions did pose catastrophic risk to nearly all of the Tribe's core governmental functions and property.

b. THE APPLICATION OF THE "PROTECTIVE" EXCEPTION TO THIS CASE WILL NOT SWALLOW THE RULE.

As it did with regard to the "consensual" exception, API professes grave concern that application of the "protective" exception to this case will swallow what it asserts is the presumption established by Montana against tribal court jurisdiction. (API Brief at 11, 15). API reasons that because a leadership dispute is at the crux of this case, the application of the "protective" prong in this case would mean that every nonmember who interacted with the Tribe during a leadership dispute would be subject to Tribal Court jurisdiction. (API Brief at 15).

The Tribe takes strong exception to API's extreme efforts to characterize as *de minimus* the conduct in which it engaged. API did not merely "interact with the Tribe during an intra-tribal dispute." API voluntarily inserted itself into the leadership dispute for substantial pecuniary gain, and took egregious actions which posed a severe threat to the Tribe's political integrity, economic security, and general welfare. The vast majority of nonmembers presumably would not "interact" with the Tribe in this way. While nonmembers who interact with the Tribe in the midst of a leadership dispute by entering into consensual relationship with the Tribe or its members might subject themselves to Tribal Court jurisdiction under the "consensual" exception, nonmembers would not subject themselves to Tribal Court jurisdiction under the "protective" exception merely by interacting with the Tribe in the midst of a leadership dispute. There must be some conduct by the nonmembers which "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," as API's conduct

did here.

c. THE PURPORTED CONTRACT DOES NOT DIVEST THE TRIBAL COURT OF JURISDICTION UNDER THE "PROTECTIVE" PRONG.

While the Tribe obviously did not consent to the various tortious actions of API, such as its armed, military-style assault on the Tribe's casino, its conversion of Tribal funds, or its misappropriation of trade secrets, API argues that, if the Purported Contract is valid, API's actions would be licensed and therefore not tortious. (API Brief at 11). API then asserts that there would merely be a contract dispute, for which, it asserts in both this Court and the Tribal Court, arbitration would be required. Since it is established that there is no contract, this Court need not be detained by API's argument based upon hypothetical.

In summary, the Tribal Court has jurisdiction over this matter. A more direct threat to the Tribe's political integrity, economic security, and welfare, than that posed by API's conduct is virtually impossible to imagine. The Tribal Court has the exclusive jurisdiction to determine whether Walker had the authority to bind the Tribe to an agreement with API. It held that he did not, and that the Purported Contract was not valid. Accordingly, the Purported Contract cannot divest the Tribal Court of jurisdiction.

II. THE TRIBAL COURT'S EXERCISE OF JURISDICTION WAS APPROPRIATE UNDER FEDERAL LAW.

API also asserts that the question of whether Walker had the authority to enter into an agreement on behalf of the Tribe is a matter of federal law, rather than Tribal law. It cites no authority for this proposition, because, as the Tribe has discussed in its motion to dismiss, all of the case law, including the prior decision of this Court in this case, is directly contrary to its argument. The reason the case law is contrary to API's argument

is that API's argument defies logic. Nevertheless, API asserts that the Tribal Court's determinations that Walker did not have the authority to enter into an agreement on behalf of the Tribe and that the Purported Contract was invalid were incorrect under *federal* law. It asserts that the Tribal Court therefore exceeded its jurisdiction, and that the Tribal Court's conclusions should be disregarded. Finally, relying on those flawed arguments, API asserts that the Federal Arbitration Act divests the Tribal Court of jurisdiction, even though the arbitration provision is invalid.

A. THE TRIBAL COURT HAS EXCLUSIVE JURISDICTION TO DETERMINE WHETHER WALKER HAD THE AUTHORITY TO BIND THE TRIBE TO THE PURPORTED CONTRACT, AND IT CORRECTLY DETERMINED THAT HE DID NOT.

The dispositive threshold issue in this matter is whether Walker held the office of Tribal Chairman 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). This Court's holding was as correct and pertinent then as it is now. Only the Tribal Court can properly determine whether Walker had the authority to enter into agreements on behalf of the Tribe. The Tribal Court has determined that he did not, and API does not dispute that Walker lacked the actual authority to contract on behalf of the Tribe. Instead, API asserts that there is a separate question of whether Walker had the authority under federal law to contract on behalf of the Tribe. It asserts that the BIA's alleged "recognition" of the Walker administration should be determinative, or, in the alternative,

that Walker had the apparent authority to contract on behalf of the Tribe, and that his "apparent authority" should, for some reason which API does not explain, deprive the Tribal Court of jurisdiction. API's arguments are without support and directly contravene well-established federal law.

1. THE TRIBAL COURT HAS THE EXCLUSIVE JURISDICTION TO DETERMINE WHETHER WALKER HAD THE AUTHORITY TO BIND THE TRIBE TO THE PURPORTED CONTRACT.

The question of whether Walker was the legitimate leader of the Tribe when he signed the Purported Contract plainly requires a determination of Tribal law. The Tribal Court has the exclusive jurisdiction to make determinations of Tribal law, and its determinations of Tribal law are binding on this Court. Talton v. Mayes, 163 U.S. 376, 385 (1896) (holding that interpretation of tribal laws is "solely a matter within the jurisdiction of the Courts of that Nation"); Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987) (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."); API v. Sac & Fox Tribe of Miss. in Iowa, 401 F. Supp.2d 952, 961 (N.D. Iowa 2005).[7]

[7] See also Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978) (federal courts lack jurisdiction where tribes have the power to regulate their internal social relations, to make their own substantive law in internal matters, and to enforce those laws); Kiowa Tribe of Okla. v. Mfg. Tech., 523 U.S. 751, 763 (1998) (reaffirming Martinez); 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,

Intra-tribal leadership disputes have been recognized as being within the exclusive jurisdiction of tribal courts, and the tribal courts' determinations in those cases have been recognized as binding on other courts. "It is well established that such an intratribal dispute is exclusively within the tribe's own purview to decide." (Tr. App. Ct. at 8). Nero v. Cherokee Nation, 892 F.2d 1457, 1463 (10th Cir. 1989) (no federal jurisdiction over tribal leadership dispute); Wheeler v. Swimmer, 835 F.2d 259, 262 (10th Cir. 1987) ("The right to conduct an election without federal interference is essential to the exercise of the right to self-government."); Wheeler v. U.S. Dep't of Int., 811 F.2d 549, 552 (10th Cir. 1987) (stating "when a tribal forum exists for resolving a tribal election dispute, the Department must respect the tribe's right to self-government and, thus, has no authority to interfere...."); Goodface v. Grassrope, 708 F.2d 335, 338 (8th Cir. 1983) (expressing "doubt" regarding whether there would be federal jurisdiction over purely intra-tribal leadership dispute); Boe v. Ft. Belknap Indian Cmty., 642 F.2d 276, 278-80 (9th Cir. 1981) (tribal election disputes raise no federal question).

More specifically, this particular intra-tribal leadership dispute has already been determined by the Eight Circuit as being within the Tribal Court's exclusive jurisdiction to determine. In re: Sac & Fox Tribe of the Mississippi in Iowa / Meskwaki Casino Litig., 340 F.3d 749 (8th Cir. 2003). The Meskwaki Casino Litigation was a consolidated appeal from several cases in which the former Walker administration asserted, based upon the Tribe's Constitution and/or alleged BIA recognition, that the federal court was required to hold that it was the Tribe's governing body and therefore had the authority,

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Exhaustion of Tribal Remedies in the Lower Federal Courts after National Farmers Union and Iowa Mutual, 78 MINN. L. REV. 259, 298 (1993) (stating that "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").

inter alia, to enter into contracts and exercise other powers of office conferred on the Tribal Council by the Tribe's Constitution. This Court disposed of that argument, 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 this Court's decision. Governing precedent thus expressly rejects API's claim that the question of whether Walker had the authority to act on behalf of the Tribe is a matter of federal law. (API Brief at 17). In re: Sac & Fox Tribe of the Mississippi in Iowa / Meskwaki Casino Litig., 340 F.3d 749 (8th Cir. 2003). Contrary to Plaintiff's specious claims, there is not any case with a contrary holding, which is why API cites no case in support of its outrageous proposition.

Determinations regarding the validity of agreements allegedly entered into by tribes have also been recognized as being within the exclusive jurisdiction of the tribal courts and binding on other courts. This Court itself has previously recognized this principle, and specifically applied it to this matter. API v. Sac & Fox Tribe of Miss. in Iowa, 401 F. Supp.2d 952, 963 (N.D. Iowa 2005) (repeating that the determination of whether the Tribe was a party to the contract must be settled by the Tribal Court). The decision of the United States Court of Appeals for the Eighth Circuit in Prescott v. Little Six, Inc. is also particularly instructive on this point, 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 the validity of a contract allegedly entered into by Little Six,

Inc. ("LSI"), a governmental department of a federally recognized Indian tribe.[8] The tribal court determined that the contract was invalid as a matter of tribal law, and the tribal appellate court affirmed. The Eight Circuit ultimately held that the determination by the tribal courts that the contracts were invalid as a matter of tribal law was binding on the federal courts. Prescott v. Little Six, Inc., 387 F.3d 753, 758 (8th Cir. 2004). 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. Id. See also TTEA v. Ysleta del Sur Pueblo, 181 F.3d 676 (5th Cir. 1999) (holding that the tribal court had jurisdiction to determine whether an alleged contract was invalid); Bruce H. Lien Co. v. Three Affiliated Tribes, 93 F.3d 1412 (8th Cir. 1996) (holding that the validity of an alleged contract had to be presented to the tribal court); 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 tribal court decision is binding in all non-tribal courts, and that exhaustion of tribal court remedies is required for such claims).

This Court's previous holding that only the Meskwaki Tribal Court could determine whether Walker could bind the Tribe to a contract on June 16, 2003, is correct, and applies here with equal force to defeat Plaintiff's sophistry. The validity of the Purported Contract necessarily turns on the question of whether Alex Walker had the requisite authority to execute it on behalf of the Tribe. That question cannot be resolved without reference to Tribal law and a determination regarding the Tribe's leadership

[8] 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 community, and LSI was therefore, for purposes of the case, synonymous with the Community.

dispute. All of those matters are exclusively within the jurisdiction of the Tribal Court.

2. THE TRIBAL COURT CORRECTLY DETERMINED THAT WALKER DID NOT HAVE THE AUTHORITY TO BIND THE TRIBE TO THE PURPORTED CONTRACT.

a. WALKER DID NOT HAVE ACTUAL AUTHORITY TO BIND THE TRIBE TO THE PURPORTED CONTRACT.

The Tribal Court has correctly determined that Walker did not have the authority to bind the Tribe when he entered into the Purported Contract with API on June 16, 2003. (Trial Court, at 11). The former Walker Council was lawfully removed from office in March, 2003, and the Bear Council was the official Tribal Council as of May 22, 2003, at the latest. (Tr. Ct. App. Order, API Appendix at 88-89). By June 2003, both the Hereditary Chief and the Tribe's membership had unequivocally removed all authority to act on behalf of the Tribe from the Walker Council, and transferred it to the Bear Council. Thus, Walker conclusively lacked actual authority to bind the Tribe to the Purported Contract.

API does not dispute that Walker lacked the actual authority to bind the Tribe to the Purported Contract. (API Brief at 17 and n.8). Instead, API argues that there is a separate question of whether Walker had authority as a matter of federal law, and that the BIA's alleged continued "recognition" of the Walker administration, through the fall of 2003, conferred on Walker the authority to take action on behalf of the Tribe. API attempts to circumvent the fact that Walker's lack of authority was already conclusively determined by the Tribal Courts as a matter of Tribal law, by asserting that, as a matter of federal law, the BIA can confer authority to tribal members to act on behalf of an Indian tribe. Alternatively, API argues that Walker had apparent authority to take action on behalf of the Tribe. API's arguments are without merit.

b. THE DECISION OF FEDERAL AGENCIES TO ADHERE TO THE STATUS QUO PENDING TRIBAL RESOLUTION OF THE LEADERSHIP DISPUTE DID NOT CONFER AUTHORITY ON WALKER TO BIND THE TRIBE TO THE PURPORTED CONTRACT.

The fact that the BIA was, not uncharacteristically, a bit slow on the uptake, and didn't acknowledge the Bear Council as the Tribe's governing body until the fall of 2003, is irrelevant to a determination of whether Walker had authority to act on behalf of the Tribe in June 2003, when he had already been removed from office. Acknowledgement by the BIA does not confer any authority to act on behalf of a tribe. The right to self-government springs from a tribe's inherent sovereignty; it is not delegated by the federal government. As discussed supra, it is well established that the resolution of leadership disputes is exclusively within the jurisdiction of tribal courts.

Nevertheless, API argues that acknowledgment by the BIA of an individual tribal member as the person with whom the federal government will conduct government-to-government relations should trump a tribe's own determination of who its legitimate leaders are. API asserts that when the BIA acknowledges an individual as the chairman of a tribe, that individual has authority, without more, to waive the tribe's sovereign immunity, even if that individual is not the part of the tribe's legitimate governing body. Plaintiff asserts that without such authority BIA recognition is meaningless. (API Brief, at 19). API apparently ascribes greater meaning and weight to BIA acknowledgment than such acknowledgment actually carries. As the sole support for its misinterpretation of federal law, API cites 25 C.F.R. § 83.2.

Plaintiff's reliance on this provision of federal law, and the argument Plaintiff spins from it, illustrates the approach API takes throughout its pleadings when settled law is contrary to its position; rather than constructing a legitimate argument, supported by

cases having value as precedent, it creates its own distorted version of "federal law" out of whole cloth, citing to no cases whatsoever, or to federal laws which provide absolutely no support for its position. As an example, despite API's assertions to the contrary, 25 C.F.R. § 83.2 pertains to BIA acknowledgment of tribes, not of a particular tribal council, and it certainly has no bearing on this Court's determination of whether Walker had authority under "federal law" to bind the Tribe to a contract.

The federal regulation cited by API (API Brief at 18) does not stand for the proposition that acknowledgment by the BIA confers authority on the acknowledged group to act on behalf of a tribe, much less to take actions harmful to the tribe. Instead, that regulation is the tribal equivalent of the equal footing doctrine for states: the regulation stands for the elementary proposition that federal recognition as an Indian tribe establishes an official government-to-government relationship with the United States, along with the tribe's entitlement to all the protection, services, benefits, immunities, privileges, responsibilities, powers, limitations, and obligations associated therewith. 25 C.F.R. § 83.2; Tr. Ct. App. Order, API Appendix at 9 (discussing at length the effect of federal recognition, which entitles tribes to the protection of the federal government, and which makes tribes eligible to receive services from the federal government, but which does not serve as an insurance policy for third parties or provide those third parties with an authority higher than the tribe for questions of tribal law, such as intra-tribal leadership disputes). A tribe is either federally recognized or it is not. BIA acknowledgment of a particular tribal council means only that the BIA recognizes it for purposes of providing services to a federally recognized tribe. It does not determine whether that tribal council, or its purported Chairman, is authorized to act on behalf of

the tribe in other matters. Those who comprise the governing body of a particular tribe is something only the tribe itself can determine.

There is no support in federal law for the proposition that BIA acknowledgment confers authority to conduct business with third parties on behalf of a tribe. API cites only two cases in support of its argument, neither of which stands for that proposition.

API cites Kiowa Tribe for the proposition that tribal sovereign immunity is a matter of federal law, and that the scope of tribal sovereign immunity may be determined by Congress and the United States Supreme Court. (API Brief at 17). Kiowa Tribe indeed states that sovereign immunity is a matter of federal law, and the scope of a tribe's immunity is determined by reference to federal law. Kiowa Tribe of Oklahoma v. Mfg. Tech., Inc., 523 U.S. 751, 759 (1998). But the scope of tribal sovereign immunity is not presently at issue here. What is at issue here is the question of whether Walker had the authority under Tribal law to enter into an agreement on behalf of the Tribe. As a matter of federal law, the Tribal Court has exclusive jurisdiction to resolve that question. If the Tribal Court had determined that Walker had the requisite authority, and that the agreement was therefore valid, only then would a question of sovereign immunity arise. At such a point, there could be a question of whether the arbitration provision constituted a waiver of the Tribe's sovereign immunity. But, the Tribal Court determined that Walker lacked the requisite authority; sovereign immunity is therefore not at issue in determining the scope of the Tribal Court's jurisdiction.

API also attempts to extend Kiowa Tribe in an impermissible and unsupported fashion, stating that the "question of which governing council had the authority to waive [the Tribe's sovereign immunity], select litigation forums, and perform actions related to

the Tribe's federally granted sovereign powers are matters of federal law." (API Brief at 17). These assertions go much too far. Kiowa Tribe does not even begin to support the proposition for which Plaintiff cites the case. Moreover, as discussed supra, the federal courts have consistently held that questions involving tribal leadership issues are within the jurisdiction of the tribal courts. They are simply not issues of federal law. API provides no support for its assertions to the contrary, because there is none, either in Kiowa Tribe or elsewhere.

API cites Goodface for the proposition that the BIA exclusively determines "which tribal government is recognized for purposes of conducting business relating to the Tribe's federally regulated activities." (API Brief at 19-20). But Goodface also does not stand for the proposition for which API cites it. Like the present case, Goodface was an intra-tribal election dispute. Goodface v. Grassrope, 708 F.2d 335 (8th Cir. 1983). The Goodface court noted that the parties would have to seek a tribal remedy for the intra-tribal dispute, and held that the district court lacked jurisdiction to address the merits of the dispute. Id. at 338-39 and n.4. It merely directed the BIA to recognize one of the competing tribal councils on an interim basis pending tribal resolution of the election dispute, in order to ensure the continuation of "necessary day-to-day services." Id. at 338-39. As one might anticipate at this point, Goodface does not stand for the proposition for which Plaintiff cites it. Goodface provides absolutely no support for the proposition that the BIA's choice of which of two competing tribal councils it recognizes has authority, conferred by the federal government, to conduct business with third parties, whether that business is related to federally regulated activities or not. Goodface speaks only to the BIA's obligation to provide day-to-day services to tribes, and the practical

necessity of dealing with some tribal body for that purpose, pending tribal resolution of any dispute regarding leadership. The BIA does not establish whether nonmembers can conduct business with the tribe, and it owes no duties to nonmembers. (Tr. Ct. App. Order, API Appendix at 87). Acknowledgment by the BIA is not an insurance policy, nor does it trump a tribe's determination of who its leaders are. Id.

In this case, the BIA did not pretend that its acknowledgment of the Walker Council was conclusive, or that its recognition conferred any authority to enter into agreements with third parties on behalf of the Tribe. Instead, it consistently reiterated its position that it lacked the authority to intervene in the leadership dispute. While it also noted its continued treatment of the Walker administration as the Tribe's leaders for Bureau purposes on two occasions, it appeared to do so relying on cases which permit it to communicate with some group for Bureau purposes until the Tribe informs the Bureau of the resolution of a tribal leadership dispute. See e.g., Goodface, 708 F.2 at 338-39 (stating that the BIA is obligated to recognize and deal with some tribal governing body for the provision of its day-to-day services to the tribe, pending tribal resolution of a leadership dispute).

As the Tribal Court of Appeals properly noted, the "BIA is not entitled to determine which of rival councils is the official tribal council for purpose of *nonfederal*, day-to-day tribal affairs." (Tr. Ct. App. Order, API Appendix at 86). Otherwise stated, while the BIA may be entitled to determine the council with which it deals, it is not entitled to determine which council may deal with tribal affairs, or determine the nature of a tribe's relationships with non-federal parties seeking to overthrow a tribe's legitimate government.

API nevertheless asserts that nonmembers should be entitled to rely on BIA acknowledgment of a tribal council. But API has not alleged that it even knew about the BIA's acknowledgment of the Walker Council, much less relied on it. Moreover, the BIA made it clear that the resolution of the leadership dispute was in the Tribe's hands, not the BIA's. (API App. at 63, 65).

Under API's reasoning, the whole tribal election process would be meaningless, because only the BIA would have the authority to determine who is authorized to act on behalf of the tribe. This would turn the principle of tribal self-determination on its head, and make tribal governments mere puppets of the BIA. If tribes do not have the ability to choose their own leaders, what sovereignty would they have left? By implication, API is asking this Court to strip tribes of their inherent sovereign authority.

API argues that it would be good policy to hold that the BIA can confer authority to act on behalf of a tribe on an otherwise unauthorized group claiming to be the tribe's governing body. (API Brief at 21-22). Otherwise, API claims, any contract entered into during a leadership dispute would be at risk of being voided. API takes this argument a step further, and asserts that "as long as a challenger was found to be appointed consistent with tribal law, it could disaffirm the predecessor council's valid agreements." API professes concern that nonmember businesses may be afraid to do business with the tribe, which could have serious economic consequences for the tribe. This entire argument is preposterous. Only the properly elected governing body of a tribe has authority to take actions on behalf of the tribe. As the case law on this question uniformly holds, the BIA does not have the authority to determine who a tribe's leaders are. It is true that, in the event of a leadership dispute, businesses contracting with one of the parties to the dispute

would be taking a risk that their agreements would be later invalidated. However, it is not true that a predecessor council's "valid agreements" could be disaffirmed by an incoming tribal council. A duly elected tribal council has the authority to enter into valid agreements on behalf of the tribe, and the tribe remains bound by those valid agreements even when a subsequent duly elected tribal council comes into office. Only agreements that were executed by a group without authority to execute the agreements on behalf of the Tribe would later be in danger, not of being "disaffirmed," but rather of being found invalid from the outset.

To hold as API wishes would severely handicap every newly installed tribal government, regardless of whether it was installed pursuant to a routine election, or during a leadership dispute. Even without a leadership dispute, third parties would probably want to wait until the BIA had conferred authority on an incoming administration before contracting with that administration. In the event of a leadership dispute, a legitimately elected incoming tribal administration would be forced to wait until the BIA formally recognizes it before entering into any agreements. Meanwhile, the former administration would lack the actual authority to enter into agreements on behalf of the tribe. The BIA is not known to be the fastest-moving of federal agencies. But even if it were, requiring formal BIA recognition would handicap a tribe's ability to do business for an indeterminate period of time following every election. The Tribal Court of Appeals accurately characterized this concept as "absurd." (Tr. Ct. App. at 13).

To hold as API wishes in this particular case would also strip all authority from the Hereditary Chief, the very membership of the Tribe, and the Tribal Court system, to determine such a crucial issue of self-governances as who has the authority to take

actions on behalf of the Tribe. API would vest all the power to make that determination in the BIA. This could not be more contrary to well-established, long-held, federal principles of self-governance, self-determination, and respect for Indian tribes. The right to determine its own leaders is one of the rights most basic and essential to any sovereign. A simple contract dispute hardly warrants turning an entire body of federal law on its head.

c. WALKER DID NOT HAVE APPARENT AUTHORITY TO BIND THE TRIBE TO THE PURPORTED CONTRACT, AND EVEN IF HE HAD, APPARENT AUTHORITY WOULD NOT BE SUFFICIENT FOR HIM TO BIND THE TRIBE TO THE PURPORTED CONTRACT.

Tribal Court of Appeals held that the doctrine of apparent authority does not apply to Tribal contracts, or against the Tribe. (Tr. Ct. App. Order, API Appendix at 95). It correctly rejected the conclusion that someone without actual authority to waive a tribe's sovereign immunity can nevertheless do so. Id. Those determinations were matters of Tribal law, exclusively within the jurisdiction of the Tribal Courts.

They were also in accordance with persuasive precedent from other jurisdictions. The doctrine of apparent authority generally does not apply to sovereigns. RESTATEMENT (3RD) OF AGENCY § 2.03(g). Sovereigns are bound only by acts within the scope of an agent's actual authority. Id. They have the exclusive right to prescribe what their agents may do. Id. Third parties, who deal with national governments, quasi-governmental entities, states, counties, and municipalities, take the risk of error regarding the agent's authority. Id. Admittedly, this may cause hardships for third parties. Id.

As a practical matter, API has not claimed and cannot show that it believed (let alone that it reasonably believed) that Walker had the authority to act on behalf of the Tribe. (Tr. Ct. App. Order, API Appendix at 95). In fact, API was fully aware of the

leadership dispute. The very first page of the Purported Contract refers to a "takeover by dissidents," and to "unlawful acts against the Tribal Government." (API Appendix at 1). Thus, API was no innocent vendor entering into a run-of-the-mill contract with a purported tribal leader without knowing that the tribe was in the midst of a leadership dispute.

Even if API did reasonably believe that Walker had the authority to act on behalf of the Tribe, it has not and cannot demonstrate that such a belief would be traceable to any manifestations by the Tribe whatsoever. On the contrary, all of the actions by the Tribal members, the Tribe's Hereditary Chief, and the Bear Council demonstrate Walker's lack of authority.

API admittedly entered into a consensual relationship with Walker, knowing full well that it was entering on to the lands of an Indian tribe where a full blown dispute was underway regarding which Tribal Council comprised the Tribe's leadership, and it did so for the express purpose of bringing that leadership dispute to a violent head. It cannot now claim that it should have been able to rely on Walker's nonexistent "apparent authority" (which it does not even assert that it did rely on). As the Tribal Court of Appeals noted, a company engaged in such a line of work in these circumstances ought to recognize that it is taking a substantial risk, ought to proceed with caution, and ought not to be entitled to complain when its gamble fails. (Tr. Ct. App. Order, API Appendix at 88). The Tribe cannot be responsible for the Purported Contract. (Tr. Ct. App. at 17).

In short, the Tribal Court had exclusive jurisdiction to determine whether Walker had the authority to contract on behalf of the Tribe. It held that he did not, and API does not challenge that determination. Instead, it engages in a bit of sophistry, asserting

Walker had authority as a matter of federal law, and argument for which it finds no support in governing precedent, and for which it constructs an argument resting on false premises and misstatements of law. BIA acknowledgment does not confer authority to act on behalf of a tribe, and the doctrine of apparent authority does not apply.

B. THE FEDERAL ARBITRATION ACT DOES NOT PRECLUDE TRIBAL COURT JURISDICTION

Finally, API argues that the Federal Arbitration Act, 9 U.S.C. § 1 et. seq. ("FAA"), precludes Tribal Court jurisdiction over the Tribe's claims. (API Brief at 22-23). It asserts that the Purported Contract is valid, and that the arbitration provision contained therein accordingly requires any court to stay its hand. Id. In what is but one more blatant misstatement of federal law, it asserts that the FAA requires all disputes involving the Purported Contract, including questions regarding the contract's validity, to be submitted to arbitration. Id.

If the Purported Contract were indeed valid, it may be true that some or all of the disputes related to the Purported Contract would have to be resolved by arbitration. However, the Tribal Courts have already determined that the Purported Contract is not valid, and API has not demonstrated otherwise. The FAA, reasonably enough, only requires that disputes relating to an agreement be submitted to arbitration when the parties have actually *agreed* to the arbitration provision. Preston v. Ferrer, 128 S. Ct. 978, 981 (2008) (stating that the FAA "establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution.") (emphasis added).

As this Court has previously stated, a court must determine whether the Purported Contract is valid before the arbitration clause could be enforced. Att'y's Process & Investigation Svcs., Inc. v. Sac & Fox Tribe, 401 F.Supp.2d 952, 961 (N.D. Iowa 2005).

The dispute over the Purported Contract's validity must be determined by the Tribal Court, because the issue of whether Walker had authority to enter into the Purported Contract with API is at the heart of an intra-tribal dispute. Id. citing Bruce H. Lien Co. v Three Affiliated Tribes, 93 F.3d 1412, 1417, 1421 (8th Cir. 1996) (concluding under similar circumstances that the underlying issues regarding a contract's validity must be resolved before any other provisions contained therein can be addressed).

Where there is a dispute about whether parties actually entered into an agreement, or whether they had the authority to do so, neither the FAA nor Supreme Court precedent requires arbitration of those issues; on the contrary, the resolution of those issues is for the courts. See id.; Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 444 n.1 (2006) (noting the difference between the issue of a contract's validity and the issue of whether the alleged parties actually entered into an agreement, and whether they had the authority to do so, and citing cases holding that determination of those issues is for the courts). The cases cited by API do not stand for the proposition that questions regarding the validity of an agreement containing an arbitration provision must be submitted to arbitration. Rather, they address only situations where a party to an agreement does not dispute that it signed the agreement, but argues that the entire agreement is invalid for some other reason. See, e.g., id. at 981-82, 984 (holding that the arbitrator must determine the validity of an agreement that a party sought to invalidate because the other party acted as a talent agent without the required talent agent license, thereby rendering the entire contract void); Buckeye, 546 U.S. at 441, 446 (holding that the arbitrator must determine the validity of an agreement that a party sought to invalidate because the other party allegedly charged usurious interest rates and the agreement allegedly violated

various lending and consumer protection laws); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 397, 406-407 (1967) (holding that arbitration was required where a party sought to rescind the agreement on the grounds that the other party fraudulently represented that it was solvent when it was not). In such a situation, arbitration might be required. But that is not the situation in this case. At the crux of the present matter is the issue of whether Walker had the authority to enter into the Purported Contract on behalf of the Tribe. This is an issue for the Tribal Court, not for an arbitrator.

CONCLUSION

For all of the foregoing reasons, API's Motion for Partial Summary Judgment must be denied. Jurisdiction is properly in the Tribal Court.

Respectfully submitted,

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