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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ELEM INDIAN COLONY OF POMO INDIANS, a federally recognized Indian tribe,

Plaintiff,

v.

PACIFIC DEVELOPMENT PARTNERS X, LLC, a South Carolina limited liability company; et al.,

Defendants.

No. C-09-01044 CRB

OPPOSITION TO MOTION TO VACATE OR MODIFY ARBITRAL AWARD

Date: Friday, April 30, 2010
Time: 10:00 a.m.

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Introductory Statement

After persuading this Court to issue an Order requiring the Elem Indian Colony of Pomo Indians ("Tribe") to submit to arbitration, Pacific Tribal Partners, LLC ("PTP") and Pacific Development Partners X, LLC ("PDP") (collectively, "Defendants") have now filed a Motion to Vacate or Modify Arbitral Award ("Motion to Vacate"), seeking an order vacating or modifying the Award issued by the Arbitrator in favor of the Tribe. For the reasons set forth below, the Motion to Vacate should be denied on the ground that it was not timely made or, alternatively, on the ground that it lacks merit, and the Tribe should be awarded its attorneys' fees incurred in opposing the Motion to Vacate.

Issues To Be Decided

Contrary to Defendants' statement of the issues, the three issues for this Court to decide are:

1. Whether the Motion to Vacate should be denied because it was not timely filed.

2. Whether the Arbitrator could be said to have recognized and ignored well defined, explicit and clearly applicable law in concluding that the MOA is void under IGRA and also is void because it was not approved pursuant to the Tribe's Constitution, and that Defendants are not entitled to an award of damages.

3. Whether the Arbitrator could be said to have recognized and ignored well defined, explicit and clearly applicable law when he concluded that the Tribe is entitled to its attorneys fees incurred in the arbitration in an apparent application of California statutory law.

Background and Procedural History

Defendants initiated an arbitration proceeding based on a Memorandum of Agreement ("MOA") that was executed on September 4, 2007 by Daniel J. Kerrigan, Jr. ("Kerrigan") on behalf of PDP and by Raymond Brown Sr., who at that time was the Chairman of the Tribe, purportedly on behalf of the Tribe. Rather than filing an answer in the arbitration proceeding, the Tribe filed its Complaint initiating this action because the Tribe believed that the MOA was void and that the MOA therefore could not serve as the basis for an arbitration proceeding.

After dismissal of the American Arbitration Association, Inc. ("AAA") from this action, the Tribe and Defendants stipulated to submit cross motions for summary judgment without Defendants having to file an Answer to the Complaint. The Tribe's motion argued that the MOA was void, and Defendants'

motion argued that this Court should not resolve that issue but instead should let that issue be decided in the first instance in an arbitration proceeding.

Following briefing and argument, this Court issued its June 23, 2009 Order ("Order") requiring the Tribe to participate in arbitration. In so doing, this Court expressly "decline[d] to consider the merits of the Tribe's substantive arguments disputing the validity of the MOA." Order at 4:9-10.

Because the Tribe had filed this action rather than filing an answer to the Statement of Demand by which Defendants initiated the arbitration, pursuant to the AAA Commercial Arbitration Rules ("AAA Rules") the Tribe was deemed to have denied the demand.[1/] Also as a result of having initiated this action rather than participating initially in the arbitration, the AAA ruled that the Tribe could not select an arbitrator. (Declaration of Mark St. Angelo in Opposition to Motion to Vacate ("St. Angelo Decl."), Ex. 1.) Therefore, even though the MOA contemplated that the arbitration would be conducted by a panel of three arbitrators, one each selected by the parties and a third, "neutral" arbitrator selected by the first two, in fact the arbitration was conducted by a single arbitrator, B. Mahlon Brown (the "Arbitrator"), who had been selected by Defendants.

The arbitration proceeded on an accelerated schedule. The Arbitrator refused to allow the Tribe to take any depositions, but did allow the parties limited written discovery. (St. Angelo Decl., Ex. 2.) The Arbitrator conducted a one-day hearing at which the Tribe was precluded from putting on some of its witnesses because Defendants used up most of the time. St. Angelo Decl., ¶ 6. Following the hearing, in a written document emailed to all counsel the Arbitrator informed counsel of the issues he thought needed to be addressed in post-hearing briefing, *see* Bergin Decl., Attachment 13. Thereafter, the parties submitted written closing and rebuttal arguments as well as proposed findings of fact and conclusions of law.

On December 7, 2009, after considering the testimony and exhibits introduced at the hearing and after considering all of the post-hearing submissions, the Arbitrator issued an Award in favor of the Tribe. The Award held, *inter alia*, that the MOA was void because it was not approved by the Tribe's General Council as required by the Tribe's Constitution (Award at X), that the MOA was void because it was a management contract under IGRA that was not approved by the NIGC (Award at X), that Defendants were

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[1/] "If no answering statement is filed within the stated time, respondent will be deemed to deny the claim." AAA Rule R-4(c).

not entitled to damages on a theory of quantum meruit (Award at X), and that the Tribe was entitled to recover its costs and its attorneys' fees from the Defendants. (Award at X.)

Defendants now move this Court for an order vacating or modifying the Award.

Argument

A. The Motion to Vacate Should Be Denied Because It Was Not Timely Filed.

The Award was issued on December 7, and was served via email by the Arbitrator to counsel for the parties that same day. (St. Angelo Decl., Ex. 3.) The Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), provides that a court must confirm an arbitration award "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." 9 U.S.C. § 9. The FAA also provides that: "Notice of a motion to vacate, modify or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered." 9 U.S.C. § 12.

In this case, the Award was both filed and delivered on December 7, 2009, when it was faxed by the Arbitrator to the AAA and then emailed by the AAA to all counsel.[2] Therefore, regardless of whether the deadline is calculated with reference to when the Award was "filed" or when it was "delivered," the deadline for serving notice of the Motion to Vacate was March 7, 2010, which is three months from December 7, 2009. Assuming that the deadline was extended to March 8 because March 7 was a Sunday, the deadline for service of the Motion to Vacate was Monday, March 8, 2010. However, as reflected by the Court's own records, the Motion to Vacate was not filed or served until Tuesday, March 9, 2010.

"A party to an arbitration award who fails to comply with the statutory precondition of timely service of notice forfeits the right to judicial review of the award." *Piccolo v. Dain, Kalman & Quail, Inc.*, 641 F.2d 598, 600 (8th Cir. 1981). As with other limitations periods, even a delay of only one day is fatal to a motion seeking to vacate an arbitration award. *See Webster v. A.T. Kearney, Inc.*, 507 F.3d 568 (7th

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[2] In anticipation of an argument by Defendants that service by email was insufficient to "deliver" the Award for purposes of triggering the limitations period of § 12, the Tribe notes that in response to a request for clarification of a procedural matter the Arbitrator issued an Order requiring counsel to serve him directly via email, rather than through the AAA. St. Angelo Decl., Ex. 4. That Order was itself sent only via email. St. Angelo Decl., ¶ 11. Defendants did not object to that Order, and thereafter filed and served all documents in the arbitration proceeding via email. St. Angelo Decl, ¶¶ 12-14 and Ex. 5. Therefore, by the time the Award was issued, it was clearly established that the parties, the Arbitrator and the AAA all agreed to filing and service of all documents via email.

Cir. 2007) (affirming district court's denial of motion to vacate arbitration award, on the ground that the motion was untimely, where the motion was filed and served one day late).

Because the Motion to Vacate was filed the day after the limitations period expired, it is untimely and must be denied on that ground alone. However, as will be shown below, even if the Motion to Vacate had been timely filed it still would have to be denied because it lacks merit.

B. The Standard of Review -- An Arbitration Award May Be Vacated Only on the Grounds Set Forth in the FAA.

In 2008, the Supreme Court resolved a split among the circuits regarding whether the grounds for vacatur and modification of an arbitration award set forth in the FAA itself are exclusive. Affirming a decision by the Ninth Circuit, in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), the Court held that "§§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification." 552 U.S. at 584. Neither factual error nor legal error are listed among the grounds for vacatur in 9 U.S.C. § 10.

Even before the Supreme Court's decision in *Hall Street Associates*, the Ninth Circuit made it very clear, in an *en banc* decision, that:

> Neither erroneous legal conclusions nor unsubstantiated factual findings justify federal court review of an arbitral award under the statute, which is unambiguous in this regard.

Kyocera Corp. v. Prudential-Bache Trade Services, Inc., 341 F.3d 987, 994 (9th Cir. 2003) (*en banc*). Later in that same decision, the *en banc* court reiterated that:

> Under the statute, "confirmation is required even in the face of erroneous findings of fact or misinterpretations of law."

Id. at 997 (quoting *French v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 784 F.2d 902, 906 (9th Cir. 1986)).

In another decision rendered by the Ninth Circuit that was cited by Defendants in the Motion to Vacate, the Ninth Circuit made it clear that "[m]anifest disregard of the facts is not an independent ground for vacatur in this circuit." *Coutee v. Barrington Capital Group, LP*, 336 F.3d 1128, 1133 (9th Cir. 2003). Rather, the Ninth Circuit stated, "[w]e may vacate an arbitration award 'only if that award is completely irrational, exhibits a manifest disregard of the law, or otherwise falls within one of the grounds set forth

1 in the [FAA].'" *Id.* (quoting *G.C. & K.B. Investments, Inc., v. Wilson*, 326 F.3d 1096, 1105 (9th Cir. 2003)).
2
3 In *Coutee*, the Ninth Circuit distinguished its earlier decision in *American Postal Workers Union*
4 *v. United States Postal Service*, 682 F.2d 1280 (9th Cir. 1982) ("*American Postal*"), which apparently was
5 the basis for the argument that "manifest disregard for the facts" could serve as a ground for vacating or
6 refusing to confirm an arbitrator's decision. In *American Postal*, an arbitrator had ordered the reinstatement
7 of a United States Postal Service ("USPS") employee who had been discharged for taking part in a strike.
8 The district court had determined that the arbitrator's order was unenforceable because the order would
9 compel the USPS "to perform an illegal act." 682 F.2d at 1282. This was because a federal statute
10 precluded anyone who had participated in a strike against the government from holding a government
11 position. *Id.* at 1283. Therefore, the Ninth Circuit reasoned, if the former employee had engaged in a strike
12 against the USPS his reinstatement would violate that statute and be illegal. *Id.* One of the facts found by
13 the arbitrator, which was not disputed by either party, was that the former employee had participated in
14 picketing by striking workers, albeit only for a short period of time before he learned that the strike had not
15 been sanctioned by the union. *Id.* Because of that factual finding by the arbitrator, the Ninth Circuit
16 concluded that the federal statute prohibiting employment by the federal government of an person who had
17 participated in a strike made the portion of the arbitrator's award requiring reinstatement "manifest
18 disregard of the law." *Id.* at 1285. At the same time, the Ninth Circuit reiterated that "[a]n arbitrator's
19 award will not be vacated because of erroneous findings of fact or misinterpretations of law." *Id.*
20 In light of the unique legal and factual circumstances in *American Postal*, the Ninth Circuit
21 specifically stated that "*American Postal* does not establish an independent 'manifest disregard of the facts'
22 ground for vacatur." *Coutee*, 336 F.3d at 1133. The court also noted that no other circuit had adopted a
23 "manifest disregard of the facts standard." *Id.* at 1133, n. 5. The Ninth Circuit then affirmed the district
24 court's decision confirming the arbitration award but reversed the district court's decision to the extent that
25 it had vacated the arbitrator's award of attorneys' fees to the prevailing parties. *Id.* at 1135-1136.
26 In *Comedy Club, Inc. v. Improv West Associates*, 553 F.3d 1277 (9th Cir. 2009), the Ninth Circuit
27 reaffirmed that "manifest disregard for the law" is a valid ground for vacatur of an arbitration decision after
28 the Supreme Court's decision in *Hall Street Associates* because "manifest disregard of the law" is

"shorthand for a statutory ground under the FAA, specifically 9 U.S.C. § 10(a)(4)." *Id.* at 1290.[3/]

The Ninth Circuit also addressed general standards for review of arbitration awards in *Comedy Club*, stating:

> Review of an arbitration award is "'both limited and highly deferential'" and the arbitration award "may be vacated only if it is 'completely irrational' or 'constitutes manifest disregard of the law.'" [Citations omitted.] We have not elaborated on what "completely irrational" means, but the Eighth Circuit has persuasively indicated that the "completely irrational" standard is extremely narrow and is satisfied only "where [the arbitration decision] fails to draw its essence from the agreement." [Citation omitted.] This is a view that we adopt.

Id. at 1288. The Ninth Circuit went on to state that:

> for an arbitrator's award to be in manifest disregard of the law, "[i]t must be clear from the record that the arbitrator[ ] recognized the applicable law and then ignored it."

Id. at 1290 (quoting *Michigan Mutual Insurance Co. v. Unigard Security Insurance Co.*, 44 F.3d 826, 832 (9th Cir. 1995)).[4/] Or, as stated by the Ninth Circuit in another case:

> to rise to the level of manifest disregard, '[t]he governing law alleged to have been ignored by the arbitrators must be *well defined, explicit, and clearly applicable*.'

Collins v. D.R. Horton, Inc., 505 F.3d 874, 879-880 (9th Cir. 2007) (quoting *Carter v. Health Net of California, Inc.*, 374 F.3d 830, 838 (9th Cir. 2004)) (emphasis in original).

Other recent, post-*Hall Street Associates* decisions by the Ninth Circuit further explain the standard of review to be applied to an arbitration decision. For example, in *Bosack v. Soward*, 586 F.3d 1096 (9th Cir. 2009), the Ninth Circuit affirmed the denial of a motion to vacate an arbitration award and stated that "[u]nder the 'completely irrational' doctrine, the question is whether the award is 'irrational' with respect to the contract, not whether the panel's findings of fact are correct or internally consistent." 586 F.3d at 1106. The court went on to say that "[w]e have repeatedly held that an award may not be vacated even

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[3/] Section 10(a)(4) provides that a court may vacate an arbitration award, or a portion of an arbitration award, "where the arbitrators exceed their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4).

[4/] In the *Michigan Mutual* case, the Ninth Circuit noted that the award was "somewhat surprising" because it put one set of parties in a better position than they would have been if the arbitrators had awarded them the contract rescission that they had requested. Nevertheless, the Ninth Circuit said that it "cannot conclude, however, that the arbitrators' award was either completely irrational or in manifest disregard of the law." 44 F.3d at 832.

where there is a clearly erroneous finding of fact," *id.*, and that "even if the panel erred by making contradictory findings of fact, this does not render the decision completely irrational."

Similarly, in another case the Ninth Circuit stated:

> An arbitrator does not exceed its authority if the decision is a "plausible interpretation" of the arbitration contract. [Citation omitted.] Accordingly, the court must defer to the arbitrator's decision "as long as the arbitrator . . . even arguably constru[ed] or appl[ied] the contract."

United States Life Insurance Co. v. Superior National Insurance Co., 591 F.3d 1167, 1177 (9th Cir. 2010) (quoting *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987)).

C. The Award Should Not Be Vacated Because Defendants Have Not Shown That the Arbitrator Recognized and Ignored "Well Defined, Explicit, and Clearly Applicable" Law When Deciding That the MOA is "Void, Unenforceable and Gives No Support to Any Claims for Damages".

The Arbitrator concluded that the MOA is "void, unenforceable and gives no support to any claims for damages." Award at 10. The Arbitrator gave two separate and independent reasons for arriving at that conclusion: (1) the MOA "should have received NIGC approval" and because of lack of such approval is "invalid and unenforceable according to . . . the rules and regulations of the National Indian Gaming Commission;" and (2) the MOA "should have received General Council approval (it did not)" and therefore it is "invalid and unenforceable according to the Constitution of the [Tribe]." *Id.*

Defendants have the burden of showing that each of these separate and independent reasons given by the Arbitrator for finding and concluding that the MOA is void is in manifest disregard of the law. *See, e.g.*, *Sovak v. Chugai Pharmaceutical Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002) (party challenging arbitration award on ground that opponent waived right to compel arbitration "bears a 'heavy burden of proof'" in showing the necessary elements) (citing *Britton v. Co-op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990)). Because Defendants have not, and cannot, make the required showing, this Court should deny the Motion to Vacate.

1. Defendants Have Not Shown That The Arbitrator's Conclusion That the MOA is Void Because It Lacked NIGC Approval Is Erroneous, Much Less That It Ignored Any Well Defined, Clearly Applicable Law.

Throughout this litigation, both in this Court and in the arbitration proceeding, the Tribe has pointed out repeatedly the reasons why the MOA is a management contract under the Indian Gaming Regulatory

Act ("IGRA"), 25 U.S.C. §§ 2701-2721, that is void because it was not approved by the Chairman of the NIGC.[5] Although Defendants relatively briefly argued to the contrary in their pre-hearing brief submitted to the Arbitrator (*see* Declaration of Timothy W. Bergin in Support of Defendants' Notice of Motion to Vacate or Modify Arbitral Award ("Bergin Decl."), Attachment 16, at 6-13), Defendants for the most part have made little or no effort to counter the points made by the Tribe.

The Tribe is not going to repeat yet again the arguments it made previously to this Court and to the Arbitrator demonstrating why the MOA is a management contract under IGRA that is void in the absence of approval by the NIGC Chairman.[6] As the cases cited above show, the burden is not on the Tribe to establish that the Arbitrator's conclusions and the Award are punctiliously correct. Rather, the burden is on the Defendants to show not just that the Arbitrator's findings and conclusions are erroneous, but that they demonstrate a "manifest disregard for the law."

In light of the reasons given by the Tribe in its prior submissions to this Court and to the Arbitrator, and the reasons given by the Acting General Counsel of the NIGC in her March 30, 2009 opinion letter concluding that the MOA is a management contract that required approval of the NIGC Chairman to be valid, Defendants were faced with a heavy burden in seeking to have this Court vacate the Arbitrator's decision that the MOA is void for lack of NIGC approval. Defendants have failed to meet that burden. Defendants have not shown any "governing law" that is "well defined, explicit, and clearly applicable" and that was ignored by the Arbitrator. Indeed, Defendants have failed to show even that the Arbitrator's conclusion is erroneous. Therefore, this Court should deny the Motion to Vacate to the extent that it seeks vacation of the Arbitrator's conclusion that the MOA is void because it was not approved by the NIGC

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[5] For example, the Tribe's Motion for Summary Judgment (Docket # 8) filed herein contained a lengthy discussion of why the MOA was a management agreement, at 4-15. Similarly, the Tribe addressed this issue at length in its initial Arbitration Hearing Brief, at 4-16. (St. Angelo Decl., Ex. 6.) The Tribe once again addressed this issue at considerable length in its Proposed Findings of Fact and Conclusions of Law submitted to the Arbitrator, at 33-44. (St. Angelo Decl., Ex. 7).

[6] A brief synopsis of those arguments is that the MOA contains a number of provisions previously found by the NIGC and by the courts (in cases such as *First American Kickapoo Operations, L.L.C. v. Multimedia Games, Inc.*, 412 F.3d 1166 (10th Cir. 2005); *United States v. Casino Magic Corp.*, 293 F.3d 419, 421 (8th Cir. 2002); and *Machal, Inc. v. Jena Band of Choctaw Indians*, 387 F. Supp. 2d 659 (W.D. La. 2005)) to make an agreement a management contract under IGRA, and therefore the MOA itself is such a management contract.

Chairman.

1. Defendants Have Not Shown That The Arbitrator's Conclusion That the MOA is Void Because It Was Not Approved By The Tribe's General Council Is Erroneous, Much Less That It Ignored Any Well Defined, Clearly Applicable Law.

Defendants focus on the Arbitrator's rejection of a particular fact that the parties did not dispute as grounds for their contention that the Arbitrator manifestly disregarded the law when he concluded that the MOA was "void" and that it was "invalid and unenforceable according to the Constitution" of the Tribe. However, for a number of reasons Defendants' contention in that regard lacks merit.

Defendants are not entitled to have the Award vacated to the extent that the Arbitrator concluded that the MOA is void for lack of approval by the Tribe in accordance with its Constitution.

The Arbitrator stated in the Award that:

> To ratify or to rely on a contract with an Indian Tribe with regard to a gaming project requires first that the Tribe's General Council must give it's (sic) prior approval. Reliance, as it relates to Claimants behavior, requires that contract to be enforceable under Indian Tribal Law (Tribe's Constitution) and approval by the NIGC if the contract falls within their guidelines.

Award at 6. This statement is consistent with an oral stipulation made by the parties at the beginning of the arbitration hearing, as well as Stipulated Finding of Fact No. 61.[7/] It also is a correct statement of the law. More to the point, Defendants have not challenged the accuracy of that statement, nor have they shown that it is in manifest disregard of the law.

Consistent with the foregoing statement, the Arbitrator framed the key question regarding whether the MOA was approved in accordance with the Tribe's Constitution as being whether or not the "Final Draft" of the MOA signed by Chairman Brown was approved "according to the mandates of the Tribe's Constitution and By Laws." Award at 6. In that regard, it should be noted that the Arbitrator took judicial notice of the Tribe's Constitution and By Laws, Award at 2, and that the Tribe's Constitution and By Laws explicitly require that in order to be valid and binding on the Tribe a contract must first be approved in advance by the Tribe's General Council before it is executed.[8/]

[7/] The Stipulated Findings of Fact are in the Court's file as Bergin Decl. Attachment 2.

[8/] The Tribe's Constitution and By Laws previously have been provided to this court as Exhibit 1 to the Declaration of Sarah Garcia in Support of Motion for Summary Judgment (Docket # 11-2). Article VII, § 2 of the Constitution explicitly states that the Tribe's Executive Committee "shall not commit the Elem

Regardless of whether the version of the MOA approved by the Tribe's Executive Committee on September 3, 2007 was the same as the version signed by the Tribe's Chairman the next day, in light of the relevant provisions of the Tribe's Constitution and By Laws the Arbitrator correctly concluded that approval by the Tribe's General Council was the key issue.

The Arbitrator listed a number of ways in which Version 3 of the MOA differed with the "Final Draft" of the MOA that was signed, Award at 8, and consequently found and concluded that: "The signed draft (Final Draft) of September 4, 2007 and the document entitled Version 3 (unsigned) are not the same. They are dramatically different, not just in verbage, (sic) but in obligations imposed and remedies or benefits received." Award at 9. A comparison of the two documents shows that this finding/conclusion clearly is correct. In any event, it cannot be said to be in manifest disregard of the law.

The Arbitrator then described what he considered to be the dispositive issue with respect to whether the MOA was approved in accordance with the Tribe's Constitution, saying: "The question then is, did the General Council approve, in any way, the signed document of September 4, 2007?" *Id.* It is, of course, the Tribe's position that this is a correct statement of the relevant law. However, even if Defendants could show that it is an erroneous statement of the relevant law, under *Kyocera* that would not be sufficient to justify vacating that portion of the Award.

There was lengthy testimony at the Arbitration hearing from Kerrigan and from the Tribe's former Chairman, Ray Brown Sr., concerning when different versions of the MOA were received by the Tribe, to whom at the Tribe (if anyone) copies of those different versions were disseminated, and whether there was any discussion of the changes, and the significance of those changes, from one version to another.

The Arbitrator found that "Version 3" of the MOA was the version extant at the time the General Council approved the execution of a Letter of Intent.[9] The Arbitrator also specifically found that there

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Indian Colony to any contract, lease, or other transaction unless it is so authorized in advance by a duly enacted ordinance or resolution of the general council." Similarly, Article I of the By Laws, entitled "Duties of the Chairman," authorizes the Tribe's Chairman to "execute on behalf of the Elem Indian Colony all contracts, leases or other documents," but only "when authorized to do so by the general council."

[9] *See* Award at 3-4, where the Arbitrator set forth various "significant calendar dates," including the date upon which Kerrigan presented Chairman Brown with an initial draft of what the parties referred to during the arbitration hearing as Version 3 of the MOA, the date Kerrigan discussed Version 3 with some

were numerous changes that he concluded were "material and significant" between Version 3 and the "Final Draft" of the MOA that actually was executed. Award at 8. In that regard, he specifically found and concluded that Version 3 of the MOA contained only a "limited waiver of sovereign immunity," whereas the Final Draft contained a waiver that "is totally unlimited and waives just about everything." Referring to the version of the MOA that was signed by former Chairman Brown (i.e., the "Final Draft"), he also specifically found that the "General Council never saw or anticipated anything like this before." *Id.* Thus, logically, he correctly concluded that the General Council had not approved execution of the "Final Draft" of the MOA, and therefore that it was void, invalid and unenforceable.

Initially, because former Chairman Brown refused to cooperate with the Tribe's legal counsel and thus the Tribe lacked copies of earlier versions of the MOA that had been sent directly to Chairman Brown by Kerrigan, the Tribe argued to this Court and to the Arbitrator that the MOA as executed had not been approved by the General Council because it was not in the name of First Nations Capital. However, after receiving copies of printouts of what Defendants represented were the earlier drafts of the MOA (including Version 3) prepared by Kerrigan, the Tribe became aware of the significant differences between the draft of the MOA made available by Kerrigan at the time of the General Council meeting in August 2007 and the "Final Draft" that was executed in September. Therefore, in its written Closing Argument and its Proposed Findings of Fact and Conclusions of Law,[10] the Tribe focused on the fact that Kerrigan made many substantive, material changes to the draft MOA after the General Council voted to enter into a "Letter of Intent" or "MOU" with Kerrigan's company.

As pointed out above, the Ninth Circuit has made it clear that an arbitration award must be confirmed even if it is based on erroneous findings of fact. *Kyocera*, 341 F.3d at 997. *See also Coutee*, 336 F.3d at 1133 ("[m]anifest disregard of the facts is not an independent ground for vacatur in this circuit."). However, the failure to recognize "undisputed, legally dispositive facts ***may***" be deemed a

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tribal members, and the date the General Council met and approved a Letter of Intent with First Nations Capital.

[10] Although not necessary in light of Defendants' failure to establish that the Arbitrator's decision was "irrational" or in "manifest disregard of the law," copies of the Tribe's Closing Argument and Proposed Findings of Fact and Conclusions of Law are attached to the St. Angelo Decl. submitted herewith as Exhibits 8 and 7, respectively.

manifest disregard for the law. *Id.* (Emphasis added.)

Unlike the situation in *American Postal*, where the arbitrator made a factual finding that the fired USPS employee had engaged in conduct that precluded his reinstatement as a matter of law, in this case the Arbitrator made no such finding. Instead, after considering the evidence presented to him at the hearing, the Arbitrator decided to reject one of 63 stipulated facts because, as he stated, he "finds no evidence that this is true." Award at 8. Also unlike the situation in *American Postal*, for two reasons the fact at issue is not legally dispositive of anything. First, even if the Arbitrator were to have accepted as true the factual finding so heavily relied upon by Defendants in the Motion to Vacate, that would not change the fact (also found by the Arbitrator) that the executed "Final Draft" of the MOA differed materially and substantially from anything the General Council "saw or anticipated," Award at 8, and thus differed materially and substantially from anything the General Council might have approved. Second, the Arbitrator concluded for completely a separate and independent reason (i.e., because it required NIGC approval and never received that approval) that the MOA is void and unenforceable. Thus, although the finding that the MOA was not approved pursuant to the Tribe's Constitution provides a separate and additional basis for the Arbitrator's conclusion that the MOA is void and unenforceable, it is not a finding regarding a dispositive fact because the Arbitrator still would have found the MOA to be void even in the absence of that finding of fact.

The fact that the Arbitrator's conclusion is correct, i.e., that the General Council did not approve the version of the MOA that actually was signed, necessarily disposes of Defendants' contention that the Arbitrator's conclusion in that regard was "in manifest disregard of the law." However, even if Defendants could show that the Arbitrator's findings and conclusions regarding the lack of General Council approval of the MOA were erroneous, that would not be sufficient to justify vacating any portion of the Award. Instead, Defendants were required to show that the Award was "completely irrational" or that the Arbitrator ignored governing law of which the Arbitrator was made aware and that is well defined, explicit, and clearly applicable. Defendants did not (and cannot) do so, and therefore the Motion to Vacate should be denied.

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D. An Award Of The Tribe's Attorneys' Fees Is Expressly Authorized By The MOA And By California Law.

In arguing that the Arbitrator lacked authority to award attorneys' fees to the Tribe, Defendants ignore the language of the MOA and relevant California law.[11/] Simply put, California law not only authorizes the award of attorneys' fees to the Tribe, but compels it.

There are two key provisions in the MOA relating to the award of attorneys' fees. One such provision is the final sentence of § VI, ¶ 5e, which states that: "The prevailing Partying (sic) arbitration shall be entitled to reimbursement for all costs and expenses of the arbitration and the enforcement of its judgment, including, but not limited to, attorneys' fees." MOA at 8. From the beginning[12/] to the end[13/] of the arbitration process, Defendants took the position in the arbitration that this provision of the MOA entitled them to an award of attorneys' fees and costs in the event Defendants were to prevail in the arbitration.

The second key provision of the MOA as it relates to the award of attorneys' fees to the Tribe is § VII, ¶ 3, which provides in pertinent part that the "MOA shall be governed by and construed in accordance with the laws of the State of California." As with § VI, ¶ 5e, Defendants have argued the validity and applicability of that provision of the MOA throughout the arbitration and in this Court. Indeed, in the Motion to Vacate, Defendants argue that the Arbitrator was required to follow California law as a

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[11/] Defendants also ignore a key statement in one the decisions cited in the Motion to Vacate, *Shoenduve Corp. v. Lucent Technologies, Inc.*, 442 F.3d 727 (9th Cir. 2006), where the Ninth Circuit said that an "arbitrator's interpretation of the scope of his powers is entitled to the same level of deference as his determination on the merits." 442 F.3d at 733.

[12/] In paragraph 13 of their initial Statement of Demand delivered to the AAA to initiate the arbitration on December 24, 2008, Defendants' stated: "This arbitration seeks to recover equitable relief and damages for: . . . **Sixth:** payment of monetary damages for all sums for Claimant's attorney fees and other arbitration costs, as well as all other costs of this arbitration proceeding and for the enforcement of the judgment rendered in this arbitration, with interest, as provided under the MOA." XXXXX

[13/] The final paragraph of Claimants' Closing Argument, served and filed via email on October 19, 2009, states: "The MOA (§ VI, ¶ 5(e)) provides that in an arbitration, 'The prevailing Party in arbitration shall be entitled to reimbursement for all costs and expenses of the arbitration and the enforcement of its judgment, including, but not limited to, attorneys' fees.' Claimants have calculated the known costs and attorneys fees incurred through October 1, 2009 and will present the additional costs at the time the Arbitrator enters its award for Claimants."

result of this provision of the MOA and that the Arbitrator's alleged failure to apply California law is grounds for vacating the Award.[14]

Notwithstanding the foregoing, Defendants contend that the Arbitrator lacked the authority to award the Tribe's attorneys' fees in the absence of a prior demand for attorneys' fees by the Tribe and because the Arbitrator held that the MOA is void. Those arguments, however, ignore California Civil Code § 1717[15] and California and Ninth Circuit cases interpreting that code section.

The position taken by Defendants in the Motion to Vacate is completely foreclosed by the California Supreme Court's decision in *Hsu v. Abbara*, 9 Cal. 4th 863, 39 Cal. Rptr. 2d 824 (1995). In that case, the plaintiffs had brought a breach of contract claim, and the defendants prevailed on that claim when the trial court concluded that "no contract was ever formed." 9 Cal. 4th at 868. Following that ruling, the parties litigated the issue of whether the defendants were entitled to attorneys fees. The trial court denied the defendants' request for fees, and the parties cross-appealed. *Id.* at 868-870.

"As a preliminary matter," the California Supreme Court dealt with the issue of whether the trial court's ruling that no contract existed precluded an award of fees, stating:

> It is now settled that a party is entitled to attorney fees under section 1717 "even when the party prevails on grounds the contract is inapplicable, invalid, unenforceable or nonexistent, if the other party would have been entitled to attorney's fees had it prevailed."

9 Cal. 4th at 870 (quoting *Bovard v. American Horse Enterprises, Inc.*, 201 Cal. App. 3d 832, 842 (1988)). The court explained the rationale for applying § 1717 in this manner, stating:

> This rule serves to effectuate the purpose underlying section 1717. As this court has explained, "[s]ection 1717 was enacted to establish mutuality of remedy where [a] contractual provision makes recovery of attorney's fees available for only one party [citations], and to prevent oppressive use of one-sided attorney's fees

[14] *See*, *e.g.*, Motion to Vacate at 2:9-12 (Award should be vacated because Arbitrator disregarded the law by "applying restrictive federal law, rather than liberal California law which the parties had chosen to govern" the MOA) and at 11:25-26 (fn. 13) ("the MOA is expressly governed by California law").

[15] Cal. Civil Code § 1717 provides in pertinent part as follows: "(a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs. . . . Reasonable attorney's fees shall be fixed by the court, and ***shall be an element of the costs of suit***." (Emphasis added.)

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> provisions [Citation]" . . . . The statute would fall short of this goal of full mutuality of remedy if its benefits were denied to parties who defeat contract claims by proving that they were not parties to the alleged contract or that it was never formed. To achieve its goal, the statute generally must apply in favor of the party prevailing on a contract claim whenever that party would have been liable under the contract for attorney fees had the other party prevailed.

Id. at 870-871.

In *Hsu*, the California Supreme Court also addressed the issue of whether an award of attorney's fees is mandatory or discretionary when a party to a contract with a fee provision prevails on the contract claim. Looking at the language of the statute, the court stated:

> The words "shall be entitled" reflect a legislative intent that a party prevailing on a contract receive attorney fees *as a matter of right* (and that the trial court is therefore *obligated* to award attorney fees) whenever the statutory conditions have been satisfied.

Id. at 872 (emphasis in original). The court finally concluded:

> When a defendant obtains a simple, unqualified victory by defeating the only contract claim in the action, section 1717 entitles the successful defendant to recover reasonable attorney fees incurred in defense of that claim if the contract contained a provision for attorney fees. ***The trial court has no discretion to deny attorney fees to the defendant in this situation*** by finding that there was no party prevailing on the contract.

Id. at 877 (emphasis added).

Even before the California Supreme Court's decision in *Hsu*, the Ninth Circuit had come to the same conclusions in *Diamond v. John Martin Co.*, 753 F.2d 1465 (9th Cir. 1985). In that case, the party against which fees were awarded contended that the district court should have exercised its discretion to deny any award of fees. The Ninth Circuit disagreed, stating that: "Where, as here, a party sued under an alleged contract containing an attorney's fee clause prevails by establishing that there was no such contract, that party is ***entitled*** to a section 1717 fee award." 753 F.2d at 1467 (emphasis added).

Thus, contrary to Defendants' contention, an award of attorneys' fees to the Tribe was mandatory under governing California law even though the Arbitrator correctly concluded that the MOA is void for two independent reasons (i.e., because it is a management contract under IGRA that never was approved by the NIGC and because the version of the MOA that was signed was never authorized by the Tribe's General Council). Moreover, under that same governing California law, the Tribe is entitled not only to its attorneys' fees for successfully defending against Defendants' claims in the arbitration, but also for

opposing Defendants' Motion to Vacate. *See, e.g.*, *Lafarge Conseils Et Etudes, SA v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1340-41 (9th Cir. 1986) (party that successfully moved to compel arbitration and then lost at arbitration and filed motion to vacate arbitration award held liable under § 1717 for the opposing party's attorney fees incurred in successfully defending against motion to vacate). *See also Carmack v. Chase Manhattan Bank (USA)*, 521 F. Supp. 2d 1017 (N.D. Cal. 2007) (confirming arbitrator's award of fees to party that was successful at arbitration and also awarding fees to same party for getting arbitration award confirmed and for defending against attack on arbitration award).

Conclusion

For all of the foregoing reasons, Defendants' Motion to Vacate should be denied, and the Tribe should be awarded its attorneys' fees for defending against the Motion to Vacate.

Dated: 9 April 2010

Respectfully submitted,

KARSHMER & ASSOCIATES

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