IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 07-13039

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA

PLAINTIFF/APPELLANT

VS.

KRAUS-ANDERSON CONSTRUCTION CO.

DEFENDANT/APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF FLORIDA

ANSWER BRIEF OF APPELLEE

Norman Davis
Fla. Bar No. 475335
Jason Daniel Joffe
Fla. Bar No. 0013563
Squire, Sanders & Dempsey, L.L.P.
200 S. Biscayne Boulevard – Suite 4000
Miami, FL 33131
(305) 577-2988
(305) 577-7001 Fax
ndavis@ssd.com
jjoffe@ssd.com

CERTIFICATE OF INTERESTED PERSONS

Philip F. Boelter, Executive Vice President and COO of Kraus-Anderson Companies, Inc.

Steven K. Champlin, Esq.

Thomas L. Dunleavy, Vice President of Finance and CFO of Kraus-Anderson Companies, Inc.

Bruce W. Engelsma, President and CEO of Kraus-Anderson Companies, Inc.

Daniel W. Engelsma, Executive Vice President of Kraus-Anderson Companies, Inc.

H&B Elevators, Inc.

H&B Specialized Products, Inc.

Jason Joffe, Esq.

Key Group Advertising, Inc.

Kraus-Anderson Capital, Inc.

Kraus-Anderson Construction Company

Kraus-Anderson Companies, Inc.

Kraus-Anderson Construction USA, Inc.

Kraus-Anderson, Incorporated

Kraus-Anderson MENA, Inc.

Kraus-Anderson Mortgage Company

Kraus-Anderson Realty Company

Kraus-Anderson Residential Corporation

CERTIFICATE OF INTERESTED PERSONS
(continued)

LaSalle Construction Company

Rosemary A. Manthe, Secretary of Kraus-Anderson Companies, Inc.

Thomas Wratkowski, General Counsel of Kraus-Anderson Construction Company

Norman Davis

STATEMENT REGARDING ORAL ARGUMENT

Kraus-Anderson Construction Co. ("KA"), pursuant to Eleventh Circuit Rule 28-1(c), respectfully states that oral argument is unnecessary to resolve the issues on appeal. The relevant facts are undisputed and, contrary to the Tribe's assertions, can be analyzed under fully developed and applicable federal-tribal comity precedent. The Tribe's reliance on nonexistent terms of the parties' contracts as a basis for oral argument serves only to conceal the applicability of the comity framework.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

FEDERAL RULES

OTHER

STATEMENT OF THE ISSUES

Whether the District Court properly declined to extend comity to the Miccosukee Tribal Court Judgment because the tribal Business Council, sitting as an intermediate appellate court, had an interest in the outcome and was not impartial, and its decision to disallow an appeal constituted a denial of due process.

STATEMENT OF THE CASE

KA objects to the Tribe's Statement of the Case and Facts in that it is highly argumentative, is largely inaccurate, and includes facts superfluous to the issues on appeal. The relevant facts are few, and KA submits the following as a non-argumentative listing of those facts.

The Miccosukee Tribe and The Business Council

The Miccosukee Tribe of Indians of Florida ("the Tribe") is a federally recognized Indian tribe organized pursuant to the Tribe's Constitution and Bylaws. DE 1 (Compl.), p. 2 at ¶ 5. Rules pertaining to the Tribe's court system, and other governmental bodies, are set forth in those documents.

Highly relevant to the issues on appeal are the responsibilities of the five-member Miccosukee Business Council. The Tribe's governing documents charge the Business Council with managing the business affairs of the Tribe. DE 193, Ex. A (Constitution and Bylaws of the Miccosukee Tribe of Indians of Florida), p. 3-4. The Business Council has the authority to, *inter alia*, "engage in any business that will further the economic well-being of the members of the Tribe…" and "[t]o make and perform contracts of every description…" on behalf of the Tribe. *Id.* In addition, the Business Council is involved in the tribal appellate process:

> Section 13. Appeals. Appeals may be taken from the final order of the Miccosukee Court to the Miccosukee Court of Appeals by filing with the Clerk a notice of appeal within fifteen (15) days of the entry of the order from which the appeal is taken with the approval of the

> Miccosukee Business Council. The Clerk shall transmit any notice of appeal to the Chairman of the Business Council promptly upon receipt, and the Business Council shall disallow the appeal or refer it to the Court of Appeals within ten (10) days. The Court of Appeals may affirm or reverse the order of the Miccosukee Court, order a new trial, or may increase or decrease any sentence or fine. On appeal, each case shall be tried anew, except for questions of fact submitted to a jury at the trial in the Miccosukee Court. Proceedings in the Miccosukee Court of Appeals shall be in accordance with the procedures specified in section 4.1, except that there shall be no jury and the Chairman of the General Council shall preside. Decisions of the Miccosukee Court of Appeals shall be by majority vote of the members present. The Miccosukee Court of Appeals may issue rules governing the conduct of its proceedings and appropriate forms not inconsistent with the provisions of the Code.

DE 193, Ex. D (Miccosukee Tribe of Indians of Florida Civil and Criminal Code), p. II-31. The Business Council's actual role is outlined below.

The original complaint filed by the Tribe stated that KA "under the appeal procedure of the Tribal Court, appealed the decision of the Tribal Court, and the appeal was denied." DE 1 (Compl), p. 3 at ¶ 14. The Tribe's Complaint also refers to the decision of the Business Council as the "Tribal appellate court's decision…." *Id.* According to Dione Carroll, in-house General Counsel for the Tribe, "[t]he Business Council acts as an intermediate Court of Appeals when appeals are taken from decisions of the Miccosukee Tribal Court." DE 72, Ex. 2 (Aff. of Dione Carroll), p. 50-52, ¶¶ 1,6. Tribal Chairman Billy Cypress, in his deposition, agreed that the members of the Business Council acted as judges, wearing both "executive and judicial hats[,]" and acted as an intermediate appellate

court. DE 193, Ex. J (Depo. of Billy Cypress), p. 10-11, 28. The Tribal Code stresses the value of impartiality:

> Section 12. Disqualification of Judges. Any Judge shall be disqualified to act in any proceeding: (1) in which he or she has an interest; (2) in which he or she is or has been a material witness; or (3) in which he or she is related to any party or their attorney by marriage or blood in the first or second degree.
>
> A judge may be disqualified on his own motion or by the filing of an affidavit of prejudice by any party in the proceeding.

Id. at p. I-4.

The Construction Contracts and the Dispute

In 1997 and 1998, Kraus-Anderson Construction Co. ("KA") entered into three construction contracts with the Tribe. The Business Council negotiated and finalized the parties' construction contracts on behalf of the Tribe, with the Chairman of the Business Council (and Tribe), Billy Cypress, serving as the primary negotiator. DE 193, Ex. K (Tribal Court Decision), p. 88-95. During the negotiations, KA proposed that disputes be resolved by arbitration under the rules of the American Arbitration Association. DE 220-2 (Depo. of Thomas J. Sackett), p. 40-41. The Tribe rejected that proposal. *Id.* The parties, therefore, deleted from the standard construction contract documents a provision for arbitration. DE 210-2 (AIA Contract), p. 7-8. Ultimately, the contract included the following provision, whereby the Tribe agreed to waive sovereign immunity only in its own tribal court:

> The Owner hereby waives any defense of sovereign immunity from suit in the Miccosukee Tribal Court in connection with any action or proceedings, including any claim, cross-claim, or counter-claim, brought by or against it in connection with this part 2 (a "Claim") for and only with respect to actions brought in Miccosukee Tribal Court. Owner does not waiver immunity in any form for actions in any court (including Miccosukee Tribal Court) not in connection with this part 2 or any of the transactions contemplated in this Part 2.

DE 210-3 (Part 2 of Parties' Contract), p. 3-4 In addition, the contracts contained a provision which specified that the substantive contract laws of the State of Florida would control any dispute, along with other substantive laws of the Miccosukee Tribe. *Id.* at p. 5

In accordance with its duties under the Miccosukee Code, the Business Council was involved with the administration of the parties' contracts. DE 193, Ex. G (Business Council Updates); Ex. I (Depo. of Julio Martinez.) at p. 29, 1-23; Ex. J (Depo of Billy Cypress.) at p. 39, 1-8, p. 42, 2-12. For example, the Business Council reviewed and approved construction documents and authorized Chairman Cypress's execution of those documents on behalf of the Tribe. *Id.* The Business Council was kept abreast of the progress of KA's work pursuant to the contracts. *Id.* The point of contact for these updates was Chairman Cypress. DE 193, Ex. B (Various Letters). Chairman Cypress was the Business Council member who approved change orders. DE 193, Ex. K (Tribal Court Decision), p. 89-93

Eventually, a dispute arose on both sides as to monies owed under the contracts. KA requested additional payments under its contracts totaling over $5,000,000. Chairman Cypress and the other members of the Business Council concluded that the Business Council would make no further payments to KA under the contracts. DE 193, Ex. J (Depo. of Billy Cypress), p. 44-45.

The Tribal Court Proceedings

The decision by the Business Council to withhold further payments under the contracts prompted KA to initiate suit in the Miccosukee Tribal Court. After lengthy proceedings, in which Chairman Cypress testified on behalf of the Tribe, the Tribal Court issued a decision which, after set-offs were taken into consideration, awarded the Tribe $1.65 million. DE 193, Ex. K (Tribal Court Decision).

Pursuant to the Miccosukee Tribal Code, KA filed a Notice of Appeal. DE 193, Ex. Q (Notice of Appeal).[1] That appeal was reviewed by the Business Council sitting as an intermediate appellate court. DE 193, Ex. J (Depo. of Billy Cypress), p. 10-11, 28; DE 72, Ex. 2 (Aff. of Dione Carrol), p. 50-52, ¶¶ 1,6. The same five members of the Business Council who concluded that further payment should be withheld from KA disallowed KA's appeal of the Tribal Court

[1] The Notice of Appeal contained several legitimate issues including, but not limited to, mathematical errors which were readily apparent on the face of the record. DE 193, Ex. Q, ¶ 2 (Notice of Appeal).

judgment. DE 193 Ex. B (Various Letters); Ex. C (Disallowance of Appeal). In its decision disallowing the appeal, the Business Council stated:

> In accordance with Tribal procedure, the Miccosukee Business Council conducted a review of the record in this case and convened a special session to consider your appeal. After careful consideration, the Miccosukee Business Council has determined that the Miccosukee Tribal Court Order, which is the subject of your Notice of Appeal, does not constitute a departure from the essential requirements of Miccosukee Law and/or procedure and other applicable laws and raises no issues meriting review by the Miccosukee Court of Appeals. Accordingly, the Miccosukee Business Council has decided to disallow the appeal. The decision of the Miccosukee Business Council is final.

DE 193, Ex. C (Disallowance of Appeal).

With respect to the relevant facts listed above, the District Court below found as follows:

> As part of its Response to Defendant's Motion, [the Tribe] indicates that it disputes many of the facts Defendant submitted in its statement of material facts, and that this precludes summary judgment. *See* DE 196 (Pl.'s Response) at paras. 3-5. However, Defendant's statement of material facts (DE 192) is supported by specific references to the record in accordance with S.D. Fla. L.R. 7.5(C). In contrast, the pertinent portions of [the Tribe's] statement in opposition are unsupported (*see, e.g.*, DE 197 (Pl.'s Statement) at paras. 1, 2, 5, 7, 8, 9, 11), and in this regard, cannot support an argument that genuine issues of material fact preclude summary judgment herein. *See International Stamp Art, Inc.*, 456 F.3d at 1274 (stating that "[o]nce the moving party has properly supported its motion for summary judgment, the burden shifts to the nonmoving party to 'come forward with *specific facts showing that there is a genuine issue for trial*.'") (emphasis added); *also* S.D. Fla. L.R. 7.5(D) (providing that "[a]ll material facts set forth in the movant's statement filed and supported as required by Local Rule 7.5.C will be deemed admitted unless controverted by the opposing party's statement, provided that the

> Court finds that the movant's statement is supported by evidence in the record.).

DE 231 (May 23, 2007 Order), p. 7 n. 5

The District Court Proceedings

In November, 2004, the Tribe brought the instant action in the Southern District of Florida requesting recognition and enforcement of the Tribal judgment. DE 1 (Compl.) Extensive litigation and discovery ensued, including, but not limited to, several dispositive motions.

One such motion, filed by the Tribe, argued that the District Court should decide the issue of recognition under full faith and credit and not comity. DE 33 (Tribe's Motion for Judgment on the Pleadings and Motion for Partial Summary Judgment Dated March 18, 2005). The District Court's January 18, 2006 Order held that comity should be utilized. DE 57 (January 18, 2006 Order), p. 10-19.

KA filed two motions for summary judgment which were denied by the District Court. DE 122 (August 18, 2006 Order); DE 57 (January 18, 2006 Order). KA's April 13, 2005 motion for summary judgment argued the Tribal Court lacked subject matter jurisdiction, which, if established, would have required the District Court to reject the Tribal Court judgment under the principles of comity. DE 44. Subsequently, on March 24, 2006, KA filed a motion for summary judgment seeking a denial of comity based on the absence of due process within the Tribal Court system. DE 67 (KA's Motion for Final Summary Judgment for Failure to

Provide Due Process). The District Court denied the motion, *inter alia*, because of insufficient facts to support an attack on the system. DE 122 (August 18, 2006 Order)

On December 13, 2006, KA filed a Renewed Motion for Final Summary Judgment, arguing that the Tribal Judgment was derived in the absence of due process because, *inter alia*, the Business Council had a conflicting interest in the outcome of the proceedings involving KA. DE 191 (KA December 13, 2006 Motion for Summary Judgment). The Renewed Motion for Summary Judgment was based on the absence of due process in the KA case specifically, and not on a failure of due process in the Tribal Court system as a whole. *Id.*

The District Court granted KA's motion. In its May 23, 2007 Order, the Order on appeal, the District Court concluded that comity could not be afforded to the Tribal Court Judgment because "after its involvement in the process underlying the parties' dispute, the Business Council's adjudicative undertaking as an intermediate appellate panel that disallowed [KA's] appeal amounts to a denial of due process under the principles of comity." DE 231 (May 23, 2007 Order), p. 22.

The District Court was persuaded by the undisputed facts surrounding the Business Council's close involvement with the administration of the contracts, specifically the Business Council and Chairman Cypress's extensive deliberations

and discussions concerning the dispute between the Tribe and KA prior to KA filing suit in Tribal Court. *Id.* at p. 22-23.

The District Court held that those facts:

> compel the conclusion that the Business Council–sitting as an intermediate appellate court examining whether Defendant's appeal should proceed to the Miccosukee Court of Appeals–was placed in a situation "which would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true." *Aetna*, 475 at 822, 825 (internal quotation marks and citation omitted). The Court is mindful that tribal court procedures need not mirror those of federal courts. *See, e.g., Marchington*, 127 F.3d at 811. The Court's determination, however, is not based on a procedural deficiency of the Miccosukee judicial system, but on the Business Council's adjudicative undertaking in this specific case, after, *inter alia*, previously concluding that Plaintiff would withhold further payments to Defendant. In this regard, the Business Council's involvement and interest in the underlying dispute cannot be characterized as tangential, trivial or speculative as Plaintiff suggests, but as direct, substantial and pecuniary on Plaintiff's behalf. Indeed, Plaintiff's nonpayment of the funds it allegedly owed Defendant led to Defendant's action in the Tribal Court. The Court is convinced that impartiality is a central component of judicial proceedings the results of which Plaintiff seeks to recognize and enforce pursuant to principles of comity. *Id*. at 810-811. That component has been significantly compromised in this case.
>
> *Id.* at p. 23.

SUMMARY OF ARGUMENT

In assessing the Tribal Court judgment in favor of the Miccosukee Tribe, for which the Tribe sought recognition in federal court, the District Court considered and rejected the application of full faith and credit, and instead applied the

principles of comity. Circuit courts in important decisions have concluded that comity is the proper means for judging the acceptance of a tribal judgment.

The Tribe contends that the parties contracted for their disputes to be resolved in the Tribal Court, and that the proceeding there became an "arbitration" that cannot be second-guessed in comity. That incredible and baseless argument was not raised in the District Court to oppose the KA summary judgment motion. The contract language makes no reference to the use of arbitration. Indeed, as the Tribe itself concedes, the parties expressly rejected that form of dispute resolution when the construction contracts were entered into.

The District Court followed *Wilson v. Marchington* and other circuit court decisions to conclude that comity should be withheld because KA was not provided with due process in the Tribal Court proceeding. The Tribe's contention that constitutional due process cannot be required of Indian tribes as to the affairs of the Tribal court system itself is a non-issue, because the argument does not resolve the question. The Supreme Court has repeatedly made it clear that when a non-U. S. judgment is brought to the federal courts for recognition, high standards of due process come into play, whether from the constitution or the common law, and such a judgment must have emerged from impartial proceedings in a tribal court. The District Court applied those standards as set forth long ago for purposes of comity by the Supreme Court in *Hilton v. Guyot.* The *Hilton* principles were

derived from the common law, but in terms of due process and a requirement of impartiality they are akin to constitutional principles.

The District Court cannot be faulted for accepting the Tribe's own proposition that the Miccosukee Business Council sat as an intermediate appellate court in considering KA's notice of appeal after the Tribal Court had entered a sizable money judgment for the Tribe. In doing so, the Business Council had a direct interest in the outcome. The Council had participated in the administration of the construction contracts, and when KA claimed that the Tribe owed it millions of dollars, the Council determined that KA would receive no more compensation from the Tribe. That decision prompted KA to file a claim in Tribal Court. Because impartiality of procedures in a non-U.S. court is a core aspect of due process, it provided a proper basis to deny comity.

The Tribal Code requires judges to recuse or disqualify themselves if they have an interest in a proceeding. The Tribal Chairman testified that the five members of the Business Council considered themselves to be judges, and in any event they performed an adjudicative function, and they should have stepped aside. The Business Council's only role in considering KA's Notice of Appeal was (i) to disallow the appeal, which it did, or (ii) to permit the appeal to proceed to the Court of Appeals. The Business Council could have been impartial as to the Notice of Appeal by permitting the appeal to proceed.

ARGUMENT

A. Introduction

The District Court refused to grant comity to a judgment presented by the Miccosukee Tribe of Indians of Florida ("the Tribe"). The court held that the Miccosukee Business Council (a) made an adjudicatory decision in the Tribal Court not to allow an appeal by KA, and (b) in doing so, had a "direct, substantial and pecuniary" interest in the case on the Tribe's behalf. Order at 23.[2] "Impartiality," said the District Court, "is a central component of judicial proceedings the results of which [the Tribe] seeks to recognize and enforce pursuant to principles of comity," and "that component has been significantly compromised in this case." *Id.* As KA discusses below, impartiality is a major aspect of due process, and due process was not provided.

B. Full Faith and Credit Cannot Apply Here

The Tribe urges this circuit to depart from the modern trend of its sister circuits and analyze the tribal court judgment under the framework of full faith and credit as opposed to comity. *See Wilson v. Marchington*, 127 F.3d 805, 810 (9th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998); *see also Burrell v. Armijo*, 456 F.3d 1159, 1171-72 (10th Cir. 2006); *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d

[2] As cited in this brief, "Order" refers to the District Court's Order Granting Defendant's Motion for Final Summary Judgment, dated May 23, 2007, which is the basis for this appeal. DE 231.

1136 (9th Cir. 2001). The arguments proffered by the Tribe do not justify such a departure.

The legislation implementing the full faith and credit clause of the United States Constitution extends full faith and credit to "every court within the United States and its Territories…." 28 U.S.C. § 1738. Because Indian nations are not explicitly referenced in the statute the question becomes whether tribal lands are United States Territories. *See id*. Further, the term "territory" is left undefined. *Id.*

The Tribe's entire argument hinges on what the Tribe contends is an ambiguity in the term "territory." The Tribe disregards numerous Congressional acts which "can be regarded as legislative interpretation of an earlier act and …'therefore entitled to great weight in resolving any ambiguities.'" *Wilson*, 127 F. 3d at 809 (quoting *Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972)(quoting *Unites States v. Stewart*, 311 U.S. 60, 64-65 (1940)). Congress has provided a narrow legislative interpretation of "territory" which almost totally excludes Indian tribes. In contrast, the Tribe offers a broad "commonly understood" definition of "territory" which includes areas of "the United States…that [are] not a state or province but [have] a separate organized government." (Br. 52). That broad definition is not consistent with the actions of Congress.

Wilson provides a commonsense analysis of the narrow Congressional interpretation of "territory" under § 1738. *Wilson* recognized that subsequent to the enactment of § 1738, Congress wrote several laws which explicitly extended full faith and credit to certain specific and limited tribal court proceedings. *Id.* at 808-09. For example, the Indian Land Consolidation Act, 25 U.S.C. §§ 2201-2211 (2007), narrowly limits the extension of full faith and credit by the Secretary of the Interior to only certain actions involving "trust, restricted or controlled lands[.]" *Wilson*, 127 F. 3d at 809. The Maine Indian Claims Settlement Act, 25 U.S.C. § 1725(g) (2007), is limited to two tribes and the State of Maine: "[t]he Passamaquoddy Tribe, the Penobscot Nation, and the State of Maine shall give full faith and credit to the judicial proceedings of each other." The Act did not extend full faith and credit to other Indian tribes and nations in Maine.

Congress went so far as to specifically include the phrase "every Indian tribe" in a different context than the use of the term "territory" in the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 et seq., in a manner that distinguishes the two. There would be no reason for Congress to enact these subsequent pieces of legislation had the lawmakers intended to extend full faith and credit to all tribes as "territories" of the United States solely under § 1738. *See Wilson*, 127 F.3d at 809.

The Tribe also urges application of full faith and credit because "courts should interpret any ambiguities in statutes affecting Indians in favor of Indians."

(Br. 52-53). Again, Congress has already resolved any ambiguity by way of its decision to apply full faith and credit to only a small handful of tribal court judgments and not others.

Finally, the Tribe provides a rehashing of an argument presented to and rejected by the District Court. The District Court properly concluded that although *Mehlin v. Ice*, 56 F. 12 (8th Cir. 1893) and *Cornells v. Shannon*, 63 F. 305 (8th Cir. 1894) gave full faith and credit to certain specific tribal court judgments, those cases were limited to their respective facts. In *Mehlin*, the Court spent significant time discussing certain treaties and other conduct between the Cherokee Nation and the U.S., which made that relationship "widely different from that of the ordinary Indian tribes." 56 F. 12 at 16. *Cornells* merely cites to *Mehlin* in support of the same contention with respect to the Creek Nation. *Cornells*, 63 F. at 306-07. Even more compelling is the failure of both cases to even reference § 1738, which implements constitutional full faith and credit. *See generally Mehlin*, 56 F. at 12; *Cornells*, 63 F. at 305. The District Court's January 18, 2006 Order fully articulates sound legal reasons for distinguishing *Mehlin* and *Cornells* from the instant case. DE 57 (January 18, 2006 Order), p. 10-19.

In any event, with more than 560 tribal entities extant in the U.S.,[3] the discussion above is clear that full faith and credit was extended fully over more than a century to only two tribes, and to two others only in terms of the State of Maine.

C. The Parties Did Not Agree in the Contracts to Utilize Arbitration

In the lead argument in its brief, the Tribe makes the extraordinary assertion that KA and the Tribe, in contracting for construction projects on tribal land, agreed to a "private forum" that became an alternative dispute resolution process -- they call it "arbitration" -- which excludes any consideration of constitutional due process. (Br. 27). That is flatly wrong. "Arbitration" is an argument that was not presented or preserved below, in the Tribe's opposition to the KA summary judgment motion, and it should be stricken. In an abundance of caution, KA will proceed to address the argument here.

The parties, says the Tribe, contracted for "the exclusive application of the Miccosukee judicial system." (Br. 30) The District Court, the argument continues, in applying a comity analysis, "effectively negated the parties' choice of forum and choice of law." *Id.* In its brief, the Tribe says that the so-called contractual agreement by the parties to a specific forum turned any dispute

[3] Bureau of Indian Affairs, Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs. 72 Fed. Reg. No. 55, 13648, March 22, 2007.

resolution into an arbitration. (Br. 27-28). But in sharp contrast, the Tribe states elsewhere in its brief that KA initially proposed an arbitration clause, and the Tribe would not agree. (Br. 17). The Tribe notes further that the "boilerplate arbitration provision" in the AIA standard construction contract was "conspicuously stricken." *Id*. "Arbitration" in the Tribal Court is a convenient fiction. In its brief, the Tribe reprints the operative section of the contracts:

> The Owner [the Tribe] hereby waives any defense of sovereign immunity from suit in Miccosukee Tribal Court in connection with any action or proceedings, including any claim, cross-claim or counter-claim, brought by or against it in connection with this Part 2 or any transactions contemplated in this Part 2 (a "Claim") for and only with respect to action brought in Miccosukee Tribal Court. Owner does not waive immunity in any form for actions in any court (including Miccosukee Tribal Court) not in connection with this Part 2 or any of the transactions contemplated in this Part 2.

(Br. 17).

That language is clear: the parties did not agree in the contracts to the sole use of the Miccosukee judicial system for the resolution of any and all disputes concerning the contracts. The contract language simply provided that the only place where an affirmative defense of sovereign immunity would not apply would be in the Tribal Court. KA itself waived nothing. KA still had the right to bring an action anywhere, subject to a defense of sovereign immunity that might be raised in another jurisdiction after an action was started there. As a practical matter, KA

used the Tribal Court in a case in which it sought large sums of money because sovereign immunity would have defeated its claims elsewhere.

But dispute resolution for some purposes in the Miccosukee Tribal Court does not change the Tribal Court from a judicial system to an arbitration forum. In saying that it does, the Tribe demeans its own judicial system, which operates for the Tribal sovereign as any state or federal court system would in the United States. In the United States, parties frequently agree to resolve disputes in a specified court, but that in no way changes the application of the law or procedure in that court. In fact, the construction contracts specified that the substantive contract laws of the State of Florida would control any dispute, along with other substantive laws of the Miccosukee Tribe.[4]

The contractual provision did not alter the proceedings and procedures in the Tribal Court.[5] Nor did it alter other obligations in the realm of due process that are discussed below. The Tribe says that when the parties agreed to use a particular court they were "bound by the rules and procedures in force within that forum."

---

[4] The Tribe says that the construction contracts also contained "alternative dispute resolution provisions," but does not cite those provisions. (Br. 31). The contracts contain no such thing.

[5] Even assuming, *arguendo*, that the proceedings could be characterized as a private arbitration, that characterization would not condone the biased role of the Business Council in the KA case. Parties, even in private arbitration, are entitled to an impartial decider of their cases. *See University Commons-Urbana, Ltd. v. Universal Contractors, Inc.*, 304 F.3d 1331, 1338 (11th Cir. 2002) (holding that evident partiality is a ground to vacate arbitration awards and courts should be particularly scrupulous with regard to arbitrators' impartiality).

(Br. 31). That is true enough, but the application of rules and procedures in that court must be in accord with larger due process considerations, at least when it comes to asking a U.S. federal court to recognize a judgment.[6]

D. The Tribal Judgment Cannot be Recognized Through Comity Because Due Process Was Not Afforded

Comity applies to the recognition of tribal court judgments. *Wilson v. Marchington*, 127 F.3d 805, 810 (9th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998); *see also Burrell v. Armijo*, 456 F.3d 1159, 1171-72 (10th Cir. 2006); *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136 (9th Cir. 2001).

"'[C]omity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect.'" *Wilson*, 127 F.3d at 809-10 (quoting *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971)) (emphasis added). Here, that nation is the United States. Therefore, the "interests" of the United States are implicated in any comity analysis. No set of principles embody the "interests" of the United States better than our principles of due process. Once comity is invoked, the Tribe cannot escape due process considerations. As the District Court correctly stated, "federal

---

[6] The Tribe says that the Tribal Exhaustion Rule required that KA bring its concerns respecting the Tribal Court's decision and the Business Council's role in the appellate process to the attention of those bodies. (Br. 34). KA did identify some of its concerns with the Tribal Court's decision in its notice of appeal. DE 193, Ex. Q (Notice of Appeal). As for the Business Council, KA assumed that it would serve some administrative function and had no advance indication that it would be adjudicative.

courts must neither recognize nor enforce tribal judgments if … the defendant was not afforded due process of law." (Order at 6, citing *Wilson*, 127 F.3d at 810). While a Tribal Court is not obliged to afford due process as embodied in the Fifth and Fourteenth Amendments within the confines of self-government and its own Tribal Court system, Congress nonetheless has mandated, in the Indian Civil Rights Act, that due process be afforded by tribal courts (discussed below). The issue upon which the District Court granted summary judgment — impartiality — is a fundamental aspect of due process, an aspect which a United States federal court must ensure is afforded to all. *MacArthur v. San Juan County*, 497 F.3d 1057, 1067 (2007) ("recognition of a tribal court judgment *must* be refused where … a party … was not afforded due process of law")(emphasis in original).

The Tribe argues that the District Court applied an improper standard by blurring the line between constitutional due process and due process as it pertains to Indian Tribes, arguing that the former should not be used to analyze tribal court judgments because "neither the Bill of Rights nor the equal protection components of the Fifth and Fourteenth Amendments apply to Tribal government." (Br. 30). In the alternative, the Tribe contends that it was error for the District Court to apply a "constitutional analysis" because KA was required to demonstrate an "'outrageous departure from our notions of civilized jurisprudence.'" (Br. 34)(citing *Bird*, 255 F.3d at 1142)(quoting *British Midland Airways Ltd. v. Int'l*

Travel, Inc., 497 F.2d 869, 871 (9th Cir. 1974)). Both arguments proffer distinctions without substance. Fundamental fairness and impartiality of the tribunal are at the core of our nation's notion of due process and civilized jurisprudence, whether couched in terms of our Constitution or inherent in an older, more basic concept of due process developed in the common law. Moreover, even assuming a degree and type of distinction argued by the Tribe, it does not follow that such a distinction works its way into a federal court's comity analysis.

The "interests" of the United States, in the comity context, were discussed long ago in *Hilton v. Guyot*, 159 U.S. 113 (1895). United States "interests" are satisfied:

> where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an **impartial** administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either **prejudice in the court**, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.

Id. at 202-03 (emphasis added).

Wilson contains the most modern, detailed analysis of the *Hilton* "interests" and ties those interests to United States principles of due process. *Wilson* recognizes that "[d]ue process, as the term is employed in comity, encompasses most of the *Hilton* factors," even though "[c]omity does not require that a tribe utilize judicial procedures identical to those used in United States Courts." *Wilson*, 127 F.3d at 811. Indeed, *Wilson* stresses that "[t]he guarantees of due process are vital to [the United States] system of democracy. [The United States] demand[s] that foreign nations afford United States citizens due process of law before recognizing foreign judgments; we must ask no less of Native American tribes." *Id.* Due process provides an "opportunity for a full and fair trial before an impartial tribunal that conducts the trial upon regular proceedings after proper service or voluntary appearance of the defendant, and that there is no showing of prejudice in the tribal court or in the system of governing laws." *Id.* These are "basic tenets of due process" that tribal court proceedings must afford a defendant. *Id.* These basic tenets found their way into the Constitution.

The Tribe relies heavily on *Plains Commerce Bank v. Long Family and Cattle Co., Inc.*, 491 F.3d 878 (8th Cir. 2007), in an attempt to undercut the holding in *Wilson* and to draw a distinction between fundamental and constitutional due process. *Plains Commerce* involved a declaratory judgment action brought in federal court by a non-Indian bank against tribal members

seeking to have a judgment rendered by a tribal court of appeals rendered null and void. *See id*. at 880-82.

First, *Plains Commerce* neither challenged nor disputed the holding in Wilson. *Plains Commerce*, after an extensive discussion of *Wilson*, noted that it need not apply the "test articulated in *Wilson*" because "the tribal proceedings violated no basic tenet of due process." *Plains Commerce*, 491 F.3d at 891. Even after the *Plains Commerce* court declined to apply *Wilson*, it nonetheless engaged in a due process analysis. *Plains Commerce*, 491 F.3d at 891-92.

Further, both *Plains Commerce* and *Wilson* invoked the *Hilton* Court when discussing due process. *Plains Commerce* cited *Hilton* in noting that "adequate notice and fair opportunity to defend [oneself]" satisfied the "basic tenet of due process."[7] *Plains Commerce*, 419 F.3d at 891(citing *Hilton*, 159 U.S. at 167, 205). In fact, the *Plains Commerce* court specifically recognized that *Wilson*, "[u]sing an analogy to" *Hilton* "concluded that a tribal court judgment should not be recognized if it was obtained in violation of basic due process rights." *Plains Commerce*, 491 F.3d at 891. Given that both *Wilson* and *Plains Commerce* relied on *Hilton* in their respective due process discussions, the Tribe's contention that

[7] As the quote from *Hilton* above makes clear, a "fair opportunity to defend oneself," quoted in *Plains Commerce*, means there must be "nothing to show either prejudice in the court, or in the system of laws under which it was sitting." 159 U.S. 102-03.

those cases somehow stand for different due process principles is misplaced. (Br. 31).

The Tribe continues to argue, as it did to the District Court, that a "constitutional analysis" is unnecessary because KA is required to establish from the record an "'outrageous departure from our notions of civilized jurisprudence.'" (Br. 34)(citing *Bird*, 255 F.3d at 1142)(quoting *British Midland Airways Ltd. v. Int'l Travel, Inc.*, 497 F.2d 869, 871 (9th Cir. 1974)). The District Court correctly rejected this argument by dissecting the cases relied upon by the Tribe. "*Bird* did not conclude that only 'outrageous departures' from notions of civilized jurisprudence—to the extent [the Tribe] suggests that more than a due process violation must be shown—would bar the recognition of a tribal judgment." (Order at 16). Both *Bird* and the case it relies upon, *British Midland*, repeatedly cast the analysis in terms of due process. (Order at 16).

Again, all roads lead to *Hilton*. *Bird* and *British Midland* invoked *Hilton*, as did *Plains Commerce* and *Wilson*. In fact, the notion of "civilized jurisprudence" was first mentioned by the *Hilton* Court in a scenario jarringly similar to the scenario here:

> It must, however, always be kept in mind that it is the paramount duty of the [U.S.] court, before which any suit is brought, to see to it that the parties have had a *fair and impartial trial*, before a final decision is rendered against either party.

> When an action is brought in a court of [the U.S.], *by a citizen of a foreign country against one of our own citizens*, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a *civilized jurisprudence*, and are stated in a clear and formal record, the judgment is prima facie evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, ***unless*** some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or ***prejudice***, or that, by the principles of international law, and by the comity of our own country, it should not be given full credit and effect.

Hilton, 159 U.S. at 205-06 (emphasis added). That standard provides appropriate deference to tribal and other courts, but it does not compromise the need for due process.

Even assuming the Tribe's proffered standard of an "outrageous departure from our notions of civilized jurisprudence" were applied, *Hilton* qualified its application. A judgment of a foreign court rendered, *inter alia*, "according to the course of a civilized jurisprudence … should be held conclusive … unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice." *Id*. (emphasis added). The absence of fraud and prejudice presumes fairness, and fairness is the hallmark of our notion of due process.

E. The District Court Did Not Say, As TheTribe Contends, That An Appeal Is Required Before Comity Can Apply

In its second argument, the Tribe suggests that the District Court somehow was in error by discussing a party's right to an appeal in a court, and in doing so, to invoke constitutional due process. In pursuit of that goal, the Tribe says that the comity requirements outlined in *Wilson* [8] do not require "access to an appeal as a necessary component of due process or as a precondition to granting comity to a judgment." (Br. 36).

The District Court's Order does not so hold. The Order notes first that an appeal is not required, so long as a full and fair trial on the merits is provided. Order at 20. The Order says further that when an appeal *is* provided, *the issue of the integrity of appellate judges can arise*. *Id*. And in deciding what to do with an appeal, such appellate judges "must not sit in a situation 'which would offer a possible temptation to the average …judge to … lead him not to hold the balance nice, clear and true,'" quoting the Supreme Court. *Id*.

---

[8] The Tribe says that *Wilson's* discussion of comity principles is only *dicta* and that the case "turned solely on its finding that a tribal court lacked subject matter jurisdiction over a non-Indian." (Br. 35). To the contrary, the court there said the appeal "presents the question of whether, and under what circumstances, a tribal court tort judgment is entitled to recognition in the United States Courts." 127 F.3d at 807. The Ninth Circuit discussed at considerable length why comity affords the proper analysis, and identified two factors -- the lack of subject matter jurisdiction and a failure to afford due process -- that *require* U.S. courts to deny recognition of a judgment. That hardly amounts to meaningless *dicta*.

The Tribe takes exception to the District Court's observation that when an appeal is afforded "it cannot be granted to some litigants and capriciously or arbitrarily denied to others . . . ." (Br. 36)(quoting Order at 20). "Capricious" and "arbitrary" are aspects of judicial integrity, which dominates the remaining discussion in the District Court's Order. Order at 20-23.

When the District Court, in pondering judicial integrity, makes references to constitutional due process, the Tribe is aghast. (Br. 36). But the Tribe is confused on this. It is true that the totality of U.S. constitutional due process does not apply within the tribal court system. However, Congress enacted the Indian Civil Rights Act, 25 U.S.C.A. § 301 *et seq*., which contains a number of lesser, modified civil rights protections patterned after those in the U.S. Constitution.[9]

The Tribe thus enjoys significant freedom to apply civil rights and due process as it sees best -- but only in a tribal judicial system -- and a U.S. court cannot directly interfere. The Tribe would prefer that U.S. courts rubber-stamp judgments rendered by its tribal court and recognize them automatically. However, as the Supreme Court said, "[w]hen an action is brought in a court of [the U.S.] by a citizen of a foreign country against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the

[9] Section 1302 of the Act provides that no Indian tribe, in exercising powers of self-government, may deprive any person of "liberty or property without due process of law."

defendant to the plaintiff . . . .” full U.S. standards of due process must apply. *Hilton*, 159 U.S. at 205-06. In particular, said the *Hilton* Court, one ground for impeaching such a judgment is a showing that it was affected by prejudice. *Id*.

Whether a federal district court, in assessing *judicial integrity* in a tribal judgment, looks to principles that many courts trace to the Constitution is of no consequence in a comity analysis. Those principles, first made prominent by the Supreme Court in *Hilton* in 1895, also arise in what the Supreme Court repeatedly has called “fundamental fairness” that developed under the common law even before the Constitution did, as *Hilton* explained.

F. Judicial Impartiality is a Core Component of Due Process, And the Business Council Was Not Impartial

The District Court said that “[t]he Court’s determination … is not based on a procedural deficiency of the Miccosukee judicial system, but on the Business Council’s adjudicative undertaking in this specific case, after, *inter alia*, previously concluding that [the Tribe] would withhold further payments to [KA].” Order at 23. The Tribe does not concede in its brief that the Business Council, in dealing with KA’s notice of appeal, served a judicial function. Instead, the Tribe says that the Business Council acted only “as the gatekeeper for the General Council’s agenda, including whether to permit an appeal to be heard.” (Br. 42). It is undisputed that the Business Council “disallowed” an appeal by KA.

Calling it a "paternalistic review," the Tribe scoffs at the District Court for considering the Business Council members as "judges," (Br. 41), although the record in this case clearly establishes that fact. The Tribe says that the court placed a burden on the Business Council of establishing a lack of impropriety. *Id.* "This approach is totally at odds with the record as well as the applicable law." *Id.* Well, let's look at the record.

In the Tribe's original Complaint, the Tribe said that KA "under the appeal procedure of the Tribal Court, appealed the decision of the Tribal Court, and the appeal was denied." DE 1, at ¶ 14 (emphasis added). "A copy of the Tribal appellate court's decision … is attached as Exhibit D." *Id.* The attachment is a copy of the Business Council's disallowance document.

In the course of the case in the District Court, the Tribe filed an affidavit by Dione Carroll, who said she was the in-house General Counsel for the Miccosukee Tribe of Indians of Florida. DE 72, Ex. 2. At paragraph 6 of the affidavit, she said that "[t]he Business Council acts as an intermediate Court of Appeals when appeals are taken from decisions of the Miccosukee Tribal Court." That is an adjudicatory role.

Tribal Chairman Billy Cypress testified at his deposition as follows:

> Q. Does the Business Council sometimes sit as an intermediate appellate court?
>
> A. Yes, they do.

Q. Now, you agree, then, that at times when it so declares it is a court for appellate purposes?

A. I would say so.

Q. When you sit to review an appeal do you consider yourself a judge?

A. I would, I guess in a way I would say so.

Q. So your understanding is that when the Business Council performs that role it sits as a court and you sit and your colleagues sit as judges; is that right?

A. I would believe so, yes.

Q. So the only hats that the Business Council wears then are executive hats and judicial hats; is that right?

A. That is correct.

DE 193, Ex. J, at 10-11, 28. The District Court's reference to an adjudicative undertaking by the Business Council is thus supported by the Tribe's own admissions.

In its Order, the District Court found that the following facts submitted by KA in support of its motion were supported by the record:

> * The Miccosukee Business Council has authority, under the Tribe's Constitution and Bylaws, to engage in any business that will further the economic well-being of the Tribe, and to make and perform contracts and agreements of every description. Chairman Billy Cypress is a member of the Business Council.
>
> * Chairman Cypress was the Tribe's primary negotiator respecting the construction contracts between KA and the Tribe. Other members of the Business Council were present during KA's presentations to the Tribe prior to execution of the contracts.

> * The Business Council was involved in the process of reviewing and approving construction documents, authorized Chairman Cypress's execution of the contracts, received periodic updates respecting the progress of the construction projects, and had oversight of the same.
>
> * Chairman Cypress personally approved change orders respecting the construction projects, and corresponded periodically with KA concerning the projects' costs and progress.
>
> * The Business Council was copied with correspondence executed by Chairman Cypress outlining the Tribe's position that KA had overcharged the Tribe and that the Tribe had overpaid KA.
>
> * Ultimately, the Business Council concluded that the Tribe would make no further payments to KA.
>
> * After the Tribal Court entered a judgment in favor of the Tribe in the amount of $1,650,000, KA appealed the judgment. The appeal was considered and disallowed by the Business Council acting as an intermediate appellate court.
>
> Order at 7-9.[10] The District Court noted that the Tribe indicated in its

response to the motion that it disputed many of the material facts listed above. The court found that KA's statement of material facts was supported by specific references to the record. In contrast, the court explained, the pertinent portions of

---

[10] At pages 42-43, the Tribe deliberately misleads this Court. The brief quotes from a District Court order dated August 8, 2006 which dealt with, and denied, a *previous* KA motion for summary judgment. That motion focused on the Tribe's judicial system itself. The court said that the fact that the Business Council wore executive and judicial hats was not sufficient, without additional facts, to raise due process issues. KA then filed a renewed motion for summary judgment -- now under review -- and included a host of facts such as those listed in the text above that limited the issues to the KA case itself, and did not expand to the entire judicial system. (Br. 42). The Tribe's continued argument, at page 43, and the additional quotation there from the District Court order is also tied to the earlier motion and is totally irrelevant to the motion and order now under review.

the Tribe's statement in opposition were unsupported and could not be used to establish a genuine issue of material fact. Order at 7 n.5.[11]

The Tribe's appellate process is set forth in the Miccosukee Criminal and Civil Code:

> Section 13. Appeals. Appeals may be taken from the final order of the Miccosukee Court to the Miccosukee Court of Appeals by filing with the Clerk a notice of appeal within fifteen (15) days of the entry of the order from which the appeal is taken with the approval of the Miccosukee Business Council. The Clerk shall transmit any notice of appeal to the Chairman of the Business Council promptly upon receipt, and the Business Council shall disallow the appeal or refer it to the Court of Appeals within ten (10) days. The Court of Appeals may affirm or reverse the order of the Miccosukee Court, order a new trial, or may increase or decrease any sentence or fine . . . . .

DE 193, Ex. D. In disallowing KA's appeal, the Business Council said as follows:

> In accordance with Tribal procedure, the Miccosukee Business Council conducted a review of the record in this case and convened a special session to consider your appeal. After careful consideration, the Miccosukee Business Council *has determined* that the Miccosukee Tribal Court Order, which is the subject of your Notice of Appeal, *does not constitute a departure from the essential requirements* of Miccosukee Law and/or procedure and other applicable laws and raises no issues meriting review by the Miccosukee Court of Appeals. Accordingly, the Miccosukee Business Council has decided to disallow the appeal. . . .
>
> DE 193, Ex. C (emphasis added). That is an adjudication.

[11] It is too late now for the Tribe to attempt to contradict the KA facts on which the District Court relied. And the Tribe's brief makes no attempt to do so.

In its order, the District Court held that "the Business Council's adjudicative undertaking as the intermediate appellate panel that disallowed Defendant's appeal amounts to a denial of due process under principles of comity." Order at 22. The District Court looked to the Supreme Court for due process principles "in the context of judicial functions." Order at 18.

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where *he has an interest in the outcome*. . . . This Court has said . . . that "Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law."

In re Murchison, 349 U.S. 133, 136 (1955) (internal citations omitted) (emphasis added). That standard, the Supreme Court said later, ensures "that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (internal citations omitted). That the Business Council was predisposed against KA is clear in the record.

On the basis of the facts and law set forth above, the District Court held that the Business Council was placed in a situation "which would offer a possible temptation to the average … judge to … lead him not to hold the balance nice,

clear and true," Order at 23, particularly where the Business Council had previously declared that the Tribe would make no further payments to KA. It was that decision of the Business Council, the court noted, that caused KA to file for relief in the Tribal Court. *Id.*

"[T]he Business Council's involvement and interest in the underlying dispute cannot be characterized as tangential, trivial or speculative as [the Tribe] suggests, but as direct, substantial and pecuniary on [the Tribe's] behalf." *Id.* "The Court is convinced that impartiality is a central component of judicial proceedings the results of which [the Tribe] seeks to recognize and enforce pursuant to principles of comity. That component has been significantly compromised in this case." *Id.* (citation omitted).

The Tribe says that KA never complained about the Business Council's role as an adjudicative body, and never objected to the Council's consideration of the KA appeal. (Br. 32). KA had a right to presume, from the tribal documents, that the Business Council had an administrative role in an appeal and would not review the merits. The Code contains detailed appellate rules of procedure that apply to the Court of Appeals, DE 193, Ex. P (The Miccosukee Court of Appeals, Miccosukee Tribe of Indians of Florida, Rules of Appellate Procedure), but there are no appellate rules that apply to the Business Council. The appellate rules for the Court of Appeals provide for briefs, citations to authorities, oral argument and

other steps. Nothing in the Code calls for such procedures when a notice of appeal is being considered by the Business Council. DE 193, Ex. A (Constitution and Bylaws of the Miccosukee Tribe of Indians of Florida). The Tribe emphasizes that, when the Business Council disallowed the appeal, "the judgment was final." (Br. 10). Ultimately, when KA discovered that the Business Council had played a judicial role, KA had no place to complain.

G. Because of Its Evident Interest, the Business Council Could Have, and Should Have, Stepped Aside

Notwithstanding the Business Council's long involvement with the creation and administration of the construction contracts, and the eventual decision by the Business Council after a dispute not to pay any more money to KA pursuant to the contracts, the Tribe's astonishing position in its brief is that "the Business Council should have been free to exercise any level of inquiry or to apply any standard it wishes in deciding whether to permit or deny an appeal to go forward." (Br. 44). So much for impartiality.

The Indian Civil Rights Act prohibits a tribe from depriving both Indians and non-Indians "within its jurisdiction of …liberty or property without due process of law[.]" 25 U.S.C § 1302(8); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196 n.6 (1978). The due process requirements Congress legislated with respect to tribes are not identical, but are similar to those contained in the Fourteenth Amendment. *See Poodry v. Tonawanda Band of Seneca Indians*, 85 F.

3d 874 (2d Cir. 1996). As discussed above with reference to comity standards, a sovereign tribe can govern itself rather much as it wants, and can generally control the standards it wishes to apply in its courts.[12] The Tribe certainly can choose to provide due process to an American citizen in Tribal Court to a standard lesser than that guaranteed by United States law. However, when a Tribe then asks a United States federal court to recognize a judgment rendered by a Tribal Court, U.S. standards will apply.

While Federal courts have made it clear that they will generally avoid influencing the operation of tribal courts, there is a major exception to that stance when due process is involved. That exception has its genesis in the "interests" of the United States as first addressed in *Hilton,* namely a lack of prejudice and fraud with a guarantee of fundamental fairness. As outlined in *Wilson,* above, and other decisions, a federal court may not recognize a tribal judgment where, as here, an American citizen was denied due process through the decision-making of biased judges.

The Tribe says that tribal documents contain no provision for recusal of the Business Council in considering a notice of appeal. (Br. 44). "That being the case, the District Court's decision would effectively mandate -- as a precondition to extending comity -- that the Tribe re-write its entire Tribal Code." *Id*.

[12] Certain limitations on that freedom are fostered by treaties and various Congressional enactments such as the Indian Civil Rights Act.

Significantly, however, the District Court said that its decision "is not based on a procedural deficiency of the Miccosukee judicial system, but on the Business Council's adjudicative undertaking in this specific case . . . ." Order at 23 (emphasis added).

In reality, the KA lawsuit in the Tribal Court was one-of-a-kind, and far from being something commonplace that the Business Council must deal with. Chairman Billy Cypress testified that in the 33 years he has been a member of the Business Council the Council reviewed a notice of appeal on only three occasions, including the KA notice. DE 193, Ex. J, p. 12. Chairman Cypress said that the Tribal Court had never previously handled a dispute of the magnitude of the KA case. *Id*. at 14. Any kind of avoidance action the Business Council might have taken in the KA case need not have affected the Council's routine course of business or adjudication. It would not have required the Tribe to "re-write its entire Tribal Code," as the brief proposes. (Br. 44).

The Tribe contends that the Tribal Code contains no provision for the recusal or replacement of the Business Council when it was confronted with KA's notice of appeal. However, Section 12 of the Code provides that "any judge shall be disqualified to act in any proceeding" in which "he or she has an interest." DE 193, Ex. D, Title I, § 12. The same provision says that a judge may disqualify himself. As discussed above, the Business Council members sat as judges on the

KA appeal. Having decided previously that KA must receive no additional money from the Tribe under the contracts being disputed in the Tribal Court, the Business Council members had a prominent interest in preserving that outcome.

As detailed above, at pages 30-31, the record shows that the Tribe concedes that the members of the Business Council sat as judges, in an adjudicative capacity, in confronting the KA notice of appeal.

The Tribal Code, in a provision for appeals, says that upon receipt from the Clerk of a notice of appeal, the Business Council will "disallow the appeal or refer it to the Court of Appeals." DE 193, Ex. D, Title II, Part II, § 13. The Business Council, despite its manifest interest in the outcome, disallowed the appeal. The Council could easily have avoided a taint of prejudice, and ceded due process, by allowing the appeal to proceed to the Court of Appeals. Nothing in the Code precludes such a course; indeed, the Code says that is an option always available to the Business Council sitting in that capacity.

None of the facts in the record, that demonstrate that the Business Council had an interest in the judicial outcome, directly involved the members of the tribal General Council, which sits as the Court of Appeals. In an appellate setting there,

the members of the Business Council (who are also members of the General Council) could have recused themselves from those proceedings.[13]

CONCLUSION

The District Court refused to grant recognition in comity to the Tribe's judgment against KA because it found that the members of the Business Council had a direct, pecuniary interest in the outcome of the KA notice of appeal over which they presided, and thus were prejudiced against KA in deciding to disallow the appeal. In the Table of Contents of its brief, the Tribe set out four issues that it says should have provided a different outcome. Viewed closely, the four issues are evasions.

The first issue asserts a contract defense, that the Tribe says placed the parties in a private arbitration, which was never raised in the court below in opposition to the KA summary judgment motion. As documented above, the parties very plainly never agreed to arbitration.

---

[13] At page 46, the Tribe invokes the "rule of necessity" to contend that even a biased judge with an interest in the proceeding can sit where there is no provision for another to take his place. This argument should be stricken because it was not raised in the lower court. Nonetheless, the discussion above demonstrates that there was a provision in the Code that provided an alternative course. If the rule has any application here, it requires that the Business Council should have simply passed along the KA appeal to the Court of Appeals, which consists of all adult members of the Tribe. The Court of Appeals was the only alternative for reviewing the KA appeal, but at least it would have been guided by formal rules of procedure in the Code. DE 193, Ex. P (The Miccosukee Court of Appeals, Miccosukee Tribe of Indians of Florida, Rules of Appellate Procedure).

The Tribe next says, in the Table of Contents, that the District Court wrongly concluded that "access to appeal is required" before comity will extend to a tribal court decision. As the District Court's Order shows, there was no such holding.

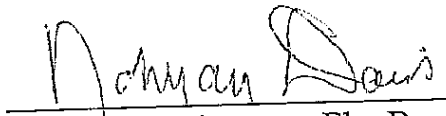
In the third argument, the Tribe says the Business Council members had no duty to recuse themselves. In saying that, the Tribe's brief totally ignores the undisputed facts that paint a major, pecuniary conflict of interest in the Council, and totally ignores the Tribe's own admissions throughout the Record that the Council members sat as judges in an intermediate appellate court. The Tribe bolsters this argument with irrelevant quotations against KA from an earlier District Court order that had nothing to do with the grant of summary judgment to KA, and the Tribe improperly relies on a Rule of Necessity that it never raised below.

The final issue raised by the Tribe involves full faith and credit, which has no legal basis as discussed above.

The KA summary judgment does not condemn the tribal system, but does demonstrate egregious prejudice in the KA case, and thus a failure of due process, in the Tribal Court. Under comity, a federal court has no discretion to recognize such a judgment.

Respectfully submitted,

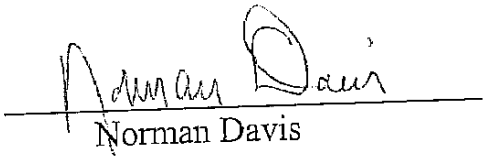
SQUIRE, SANDERS & DEMPSEY, LLP
Counsel for Appellee



Norman Davis Fla. Bar No. 475335
Jason Daniel Joffe Fla. Bar No. 0013563
200 S. Biscayne Blvd., Suite 4000
Miami, FL 33131
305.577.2988 (phone)
305.577.7001 (fax)
ndavis@ssd.com

CERTIFICATE OF COMPLIANCE

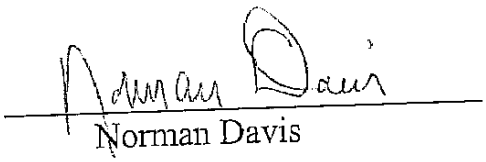
In accordance with Federal Rule of Appellate Procedure 32(a)(7)(B) and (C), I hereby certify that this brief contains 10,536 words, as determined by the word processing system used to prepare the brief.



Norman Davis

CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief was served by hand on Michael R. Tein, Esq., and Michael G. Moore, Esq., Lewis Tein PL, 3059 Grand Avenue, Suite 340, Miami, FL 33133, and by U.S. Mail on Davisson F. Dunlap, Jr., Dunlap, Toole, Shipman & Whitney, P.A., 2065 Thomasville Road, Suite 102, Tallahassee, FL 32308 this 21st day of December, 2007.



Norman Davis

MIAMI/4209960.1