Docket No. 10-35237(L), 10-35288, 10-35348

In the

United States Court of Appeals

For the

Ninth Circuit

WAPATO HERITAGE LLC, a Washington limited liability Company,
KENNETH EVANS, Individual Resident of Washington State,
JOHN WAYNE JONES, Individual Resident of Washington State and
JAMIE JONES, Individual Resident of Washington State,

Plaintiffs-Appellees,

v.

SANDRA D. EVANS, an Individual not a Resident of Washington State,

Defendant-Appellant.

Appeal from a decision of the United States District Court for the Eastern District of Washington, No. 2:07-cv-00314-EFS · Honorable Edward F. Shea

BRIEF OF APPELLANT

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JURISDICTION STATEMENT

The Appellant Sandra Evans ("Evans") denies that the District Court had subject matter jurisdiction. The District Court purported to assert jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332, and 1353. The District Court's final order entered judgment against Evans. This Court may review such a final order pursuant to 28 U.S.C. § 1291. Evans timely filed her Notice of Appeal on March 10, 2010, from the District Court's February 9, 2010 final Order Ruling on Pending Motions and Directing Entry of Judgment against the Appellant. The appeal is timely under Federal Rules of Appellate Procedure 4(a)(1)(A).

ISSUES PRESENTED FOR REVIEW

I. Whether the District Court incorrectly assumed subject matter jurisdiction over the proceedings.

II. Whether the District Court erroneously ruled that 25 U.S.C. § 410 did not apply to the assignment and attachment of trust income from Evans' Individual Indian Money Account.

III. Whether the District Court improperly excluded the testimony of Evans' expert Robert Duffy on the issue of general damages.

IV. Whether the District Court Properly granted summary judgment when there are disputed material issues of genuine fact present in the case.

STATEMENT OF THE CASE

Wapato Heritage, LLC and its owners ("Wapato Heritage") filed a complaint for damages, declaratory relief, specific performance, and injunction on or about October 5, 2007 against Evans and her financial advisor and attorney, Dan Gargan ("Gargan"). ER 196. Evans and the owners of Wapato Heritage had previously entered into a Settlement Agreement in or about September 2005 concerning Evans' claims regarding the estate of Evans' father. Wapato Heritage alleged that Evans breached the terms of that agreement on the advice of Gargan.

Gargan initially moved for summary judgment on July 9, 2008. ER 193. Evans and Gargan filed separate motions for summary judgment on May 8, 2009. ER 186, 189. Gargan's second summary judgment motion was predicated on the fact that no breach of contract occurred.

On July 8, 2009, the court granted in part and denied in part Evans' motion for summary judgment and granted Gargan's motions for summary judgment. ER 121. On July 15, 2009, the court granted Wapato Heritage's motion *in limine* excluding the testimony of her expert Robert Duffy ("Duffy") on the question of general damages, Robert Duffy. ER 107.

In her September 11, 2009 statement in response to the court's inquiry as to what issues remained for trial, Evans again raised issue of the court's lack of subject matter jurisdiction. ER 92. On October 8, 2009, Evans filed a motion to

dismiss for lack of subject matter jurisdiction. ER 53. On October 14, 2009, the court stuck that motion to dismiss and directed that the motion be re-filed and limited to federal question jurisdiction. ER 49.

Evans filed a motion to dismiss for lack of federal question jurisdiction on October 19, 2009. The court denied her motion to dismiss for lack of federal question jurisdiction on November 23, 2009. ER 42. The court entered a final judgment on February 9, 2010 ruling on all pending motions and directing entry of judgment in favor of the Plaintiffs. ER 1. On April 29, 2010 Evans filed a Motion for Stay pending appeal (ER 30), and an amended memorandum in support of that motion was filed on May 10, 2010 due to the earlier memorandum being over length. ER 19. The District Court denied that motion on June 7, 2010. ER 13.

FACTS

Evans is an enrolled member of the Confederated Tribes of the Colville Indian Reservation, located in Washington State. ER 89. She has dual citizenship in the United States and United Kingdom. ER 89. She presently lives in the United Kingdom, but considers Manson, Washington, where she was raised and maintains a residence, as her home. ER 89. Evans still considers the house she was raised in with her parents to be her home. ER 89. Her home is adjacent to the Colville Reservation, where she is registered to vote, and where she files her income taxes when required. ER 89.

Evans' father, William Wapato Evans, was the beneficiary of the MA-10 trust allotment, and had an approximate 24% interest in the MA-8 trust allotment, both lands held in trust by the Unites States government for the benefit of certain Indian tribes. ER 123. Mr. Evans claimed two daughters, Sandra and Nancy Gallagher. Gallagher is now deceased, and is survived by three sons who are the Appellees in this action. The sons have formed a Washington corporation, Wright Wapato Heritage, LLC, which is also an Appellee in this action. Collectively the Appellees will be referred to as "Wapato Heritage". ER 197.

Both trust allotments were subject to leases that generated income each year. Mr. Evans died testate, and Evans challenged his will. The challenge was opposed by Gallagher's three sons. The parties eventually came to a settlement on or about August or September 2005 (the "Settlement Agreement"). The Settlement Agreement stated that Evans would receive a 100% life interest in the MA-10 allotment, while Wapato Heritage would have a 100% interest in MA-8 allotment. It was further agreed that Evans would loan 35% of the income realized from MA-10 to Wapato Heritage for a period of five years, with repayment to begin 10 years later. ER 125. Evans did agree to deposit the repaid amounts in an irrevocable trust for the future benefit of her three nephews' family members. ER 126. The settlement agreement is silent as to who was to receive the interest during Evans' lifetime, and each of the parties dispute who was to receive said interest. Further,

if granted a trial, Evans would have shown that Wapato Heritage had failed to comply with material provisions of the settlement agreement, which would have resulted in Wapato Heritage owing Evans more money than Evans would have owed the Plaintiff.

Evans offered to write checks for the loan amount to Wapato Heritage on a quarterly basis, but that offer was refused. ER 126. Instead, it was demanded that Evans complete 20 assignments from her Individual Indian Money account ("IIM") for the Bureau of Indian Affairs ("BIA") to distribute the money quarterly. Evans agreed to this arrangement, believing that if the BIA approved the loan, the BIA might be more easily persuaded in the future to seek repayment from Wapato Heritage's other allotment income. ER 126. Instead of promptly filing the 20 individual assignments as required by the settlement agreement, the Plaintiffs delayed eight months before filing, and then filed an example of the assignment form sent to Plaintiff's as an example to use in drafting the form. At the time, the only income Wapato Heritage had was the income from the trust allotment.

The form used to effect the assignments was obtained from the BIA, and was approved by all parties' attorneys, including the attorney for Wapato Heritage. ER 167. Although Evans did complete the assignments, the BIA never approved the assignments. ER 126.

The Settlement Agreement was approved by the probate court on January 10, 2006. ER 125. The BIA never disbursed any money from Evans' IIM account. Instead, Evans was directed to complete a different form, one that did not require the BIA to approve the loan. Evans refused because she considered the BIA's approval of the loan an important protection. Evans was represented by Attorneys Mary T. Wynne, Mario Gonzalez and Mary Pearson for the will contest and Settlement Agreement. ER 124, 125.

In 2007 Wapato Heritage filed suit against Evans and her financial advisor and attorney Dan Gargan alleging breach of contract and tortious interference with the contract. The suit culminated in the February 9, 2010 order appealed from that, *inter alia*, directed the entry of a judgment against Evans as a matter of law. Evans has appealed. For the reasons stated below, the order appealed from should be reversed and Evans' motion to dismiss granted. In the alternative, the matter should be remanded for a determination that 25 U.S.C. § 410 applies to this case and to permit Evans' damages expert to testify.

SUMMARY OF THE ARGUMENT

Evans denies that the District Court had subject matter jurisdiction under 28 U.S.C. §§ 1331, 1332 and/or 1353. Evans asserts she is a citizen of Washington State and therefore, there can be no diversity jurisdiction. Evans further argues that there is no jurisdiction under § 1331 since this is a claim for breach of contract,

which does not give rise to a federal question. There is also no jurisdiction under § 1353 since the Appellees were never seeking a right to an allotment. Their claim for damages was predicated on Evans' alleged failure to comply with an agreement to loan them money.

Evans also asserts that no assignment of trust income for a claim or debt can be done without the approval of the Secretary of the Interior pursuant to 25 U.S.C. §410, which never occurred here. Therefore, the District Court's order that she complete further paperwork to effect such assignments is in violation of federal law.

Evans was also denied the opportunity to call an expert witness in her defense that would have supported her affirmative defense of offset, and also would have testified on the general computation of damages and calculation of interest.

ARGUMENT

I. THE FEDERAL COURT DID NOT HAVE JURISDICTION TO HEAR THIS CASE.

The District Court lacked the authority to hear this case. "[F]ederal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." *Magana v. Commonwealth of the Northern Mariana Islands*, 107 F.3d 1436, 1440 (9th Cir. 1997) (emphasis omitted), quoting *Bender v. Williamsport*

Area School Dist., 475 U.S. 534, 541 (1986). Wapato Heritage alleged that the District Court had jurisdiction over the subject matter pursuant to 28 U.S.C. §§ 1331, 1332 and/or 1353. Because none of these sections are applicable to this case, the District Court lacked subject matter jurisdiction over this matter, and the complaint should be dismissed.

A. Standard Of Review.

The Court reviews *de novo* both the District Court findings that it had subject matter jurisdiction and its decision to grant summary judgment. *Payne v. Peninsula Sch. Dist*., 598 F.3d 1123, 1126 (9th Cir. 2010). Evans raised the issue of subject matter jurisdiction in her Memorandum in Support of her Motion for Summary Judgment. ER 165.

B. There Is No Diversity Jurisdiction Since Evans Is A Citizen Of Washington State.

Diversity jurisdiction requires "complete diversity of citizenship." *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 68 (1996). "[D]iversity jurisdiction does not exist unless *each* defendant is a citizen of a different State from *each* plaintiff." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373 (1978). The party asserting diversity jurisdiction bears the burden of proof. *Kanter v. Warner-Lambert Co*., 265 F.3d 853, 857-858 (9th Cir. 2001).

Wapato Heritage alleged in its complaint that the Plaintiffs were all residents of Washington State and that Evans was either a resident of a state other than

Washington, or a resident of the United Kingdom. ER 198. Even if co-defendant Gargan is a citizen of Arizona, that is not enough for diversity jurisdiction because Evans is a citizen of Washington.

Wapato Heritage's allegation that Evans is a resident of some place other than Washington is simply not enough to establish diversity jurisdiction. For diversity jurisdiction, the party must be a citizen of a state. *Sadat v. Mertes*, 615 F.2d 1176, 1180 (7th Cir. 1980); *Woods v. First Nat'l Bank*, 16 F.2d 856, 857 (9th Cir. 1926). "To show state citizenship for diversity purposes under federal common law a party must (1) be a citizen of the United States, and (2) be domiciled in the state." *Kantor v. Wellesley Galleries, Ltd.*, 704 F.2d 1088, 1090 (9th Cir. Cal. 1983), citing *Sadat supra.* The failure of the record to show what state the parties are citizens of is fatal to a claim of diversity jurisdiction. *Woods*, 16 F.2d at 857.

Wapato Heritage's pleadings fail completely on this matter. Wapato Heritage claims Evans is either a resident (no mention of citizenship) of the U.K. or another unidentified state. Failure to adequately plead a diversity action is grounds for dismissal. *Kantor*, 704 F.2d at 1090; *Woods*, 16 F.2d at 857.

Under the test for state citizenship for diversity, Evans admittedly satisfies the first part. She is a citizen of the United States. However, under the second part of the test, she is domiciled in Washington, the same state as Wapato Heritage. An individual is a citizen of the state where she is domiciled. "[I]t has long been

settled that residence and citizenship are wholly different things within the meaning of the Constitution and the laws defining and regulating the jurisdiction of the Circuit Courts of the United States; and that a mere averment of residence in a particular State is not an averment of citizenship in that State for the purposes of jurisdiction." *Steigleder v. McQuesten*, 198 U.S. 141, 143 (1905); citations omitted. The complaint failed to allege any person or corporation's citizenship and thus must fail on its face.

Evans has always maintained that Washington State – where she grew up – is her home and where she intends to return. ER 89. Evans is also an enrolled member of the Confederated Tribes of the Colville Indian Reservation, which is located in Washington. ER 89. Evans is registered to vote in Washington, and when she is required to pay income taxes, Washington is where she would pay. Since Wapato Heritage and Evans are citizens of Washington, there is no diversity of citizenship, and thus 28 U.S.C. §1332 does not confer jurisdiction on the District Court.

However, even if Evans were not a citizen of Washington, there is still no diversity jurisdiction since Wapato Heritage never even alleged in its complaint which other state she could be a citizen of. *Kantor*, 704 F.2d at 1090; *Woods*, 16 F.2d at 857. She must be a citizen of a state for there to be diversity jurisdiction. *Id.*

There is no evidence that Evans was ever a resident of any other state, let alone domiciled in any other state.

C. There Is No Federal Question Jurisdiction Since Wapato Heritage Alleges Only State Law Claims Of Breach Of Contract And Interference With The Contract.

Wapato Heritage also claimed subject matter jurisdiction under 28 U.S.C. §1331 which provides that federal courts have jurisdiction over "all civil actions arising under the Constitution, laws or treaties of the United States." To determine whether an action arises under federal law, the Court must apply the "well-pleaded complaint rule." *Moore-Thomas v. Alaska-Airlines, Inc.*, 553 F.3d 1241, 1243 (9th Cir. 2009); *Toumajian v. Frailey*, 135 F.3d 648, 653 (9th Cir. 1998), quoting *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987). Under this rule, a claim arises under federal law "only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Moore-Thomas.*, 553 F.3d at 1243; *Valles v. Ivy Hill Corp.*, 410 F.3d 1071, 1075 (9th Cir. 2005).

Thus, it makes no difference that Evans asserted a defense predicated under federal law. A case does not arise under federal law within the meaning of § 1331 if the complaint merely anticipates or replies to a probable defense which would be based on federal law. *Begay v. Kerr-McGee Corp.*, 682 F.2d 1311, 1314 (9th Cir. 1982); *see also Valles*, 410 F.3d at 1075 ("A federal law defense to a state-law

claim does not confer jurisdiction on a federal court, even if the defense is that of federal preemption and is anticipated in the plaintiff's complaint.").

For a case to "arise under" federal law, a plaintiff's well-pleaded complaint must establish either (1) that federal law creates the cause of action or (2) that the plaintiff's asserted right to relief depends on the resolution of a substantial question of federal law. *Peabody Coal Co. v. Navajo Nation*, 373 F.3d 945, 949 (9th Cir. 2004) (citation omitted), *cert. denied*, 543 U.S. 1054 (2005).

Plaintiffs' causes of action are all created by Washington state law, not federal law, and their asserted right to relief does not depend on the resolution of any substantial question of federal law. Indeed, the underlying claim here is for enforcement of a settlement agreement. It is not enough to confer jurisdiction that Evans bases her defense in part on the interpretation and applicability of 25 U.S.C. §410.

It is well established that enforcement of a settlement agreement "is for state courts, unless there is some independent basis for federal jurisdiction." *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 382 (1994). The Settlement Agreement may have been done pursuant to an Indian probate issue, but once it was affected, it was simply a contract. "[T]he settlement is just a contract, so a suit *on the settlement* needs an independent basis of federal jurisdiction." *Abbot Laboratories v. CVS Pharmacy, Inc.*, 290 F.3d 854, 857 (7th Cir. 2002) (emphasis original)

(holding that, although class action suit for violation of federal antitrust laws that ended in settlement was within federal-question jurisdiction, suit on the settlement required an independent basis of federal question); *see also O'Connor v. Colvin*, 70 F.3d 530, 531-532 (9th Cir. 1995) (federal courts do not have inherent or ancillary jurisdiction to enforce a settlement agreement merely because the subject of the settlement was a federal lawsuit; once the initial action is dismissed, federal jurisdiction terminates and there must be an independent basis for jurisdiction to enforce the settlement agreement). It is no different here. It is not enough that the Settlement Agreement was entered into regarding the estate of an Indian. The court must only look at the causes of action alleged in the complaint to determine whether there is a federal question that gives the court subject matter jurisdiction. Here, all that has been alleged are state-law claims concerning the alleged failure to make a loan and interference with a contractual right.

The Ninth Circuit has discerned "no reason . . . to extend the reach of the federal common law to cover all contracts entered into by Indian tribes." *Gila River Indian Community v. Henningson, Durhan & Richardson*, 626 F.2d 708, 714-715 (9th Cir. 1980), *cert. denied*, 451 U.S. 911 (1981). There is likewise no reason to extend the federal common law to cover all contracts entered into by members of Indian tribes. "Otherwise the federal courts might become a small claims court for all such disputes." *Id.* The District Court here specifically held that

"[t]o resolve this breach of contract dispute, the Court applies Washington contract law." ER 118. The court itself characterized the matter as a breach of contract dispute.

The fact that the Settlement Agreement was approved by a federal probate court does not transform the agreement into a federal question. "[T]he Supreme Court [in *Kokkonen*] has made clear that mere approval of a settlement agreement [by a federal district court] does not confer subject matter jurisdiction to enforce that agreement." *Bowen v. Monus (In re Phar-Mor, Inc. Securities Litig.)*, 172 F.3d 270, 274-275 (3d Cir. 1999); *see Kokkonen*, 511 U.S. at 381 ("The judge's mere awareness and approval of the terms of the settlement agreement do not suffice to make them part of his order."); *see also Miener by & Through Miener v. Missouri Department of Mental Health*, 62 F.3d 1126, 1128 (8th Cir. 1995) ("We do not believe the District court's approval of the settlement agreement is sufficient to confer ancillary jurisdiction under *Kokkonen*."); *Morrison v. Brosseau*, 377 B.R. 815, 824 (E.D. Tex. 2007); *O'Connor*, 70 F.3d at 531-532 (enforcement of settlement agreement is a separate contract dispute requiring an independent basis of federal jurisdiction).

The claims for relief in the complaint against Evans are for failure to perform under the terms of the Settlement Agreement and "breach of contract". The claim against Gargan is for tortious interference with the contract. ER 196.

None of these arise "under the Constitution, laws or treaties of the United States." Accordingly, there is no federal question jurisdiction in this case.

D. There Is No Cause Of Action Under 28 U.S.C. 1353 Since Wapato Heritage Did Not Allege A Right To An Allotment Of Land.

Finally, no jurisdiction exists under 28 U.S.C. § 1353, which provides as follows:

> The district courts shall have original jurisdiction of any civil action involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any Act of Congress or treaty.
>
> The judgment in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him; but this provision shall not apply to any lands held on or before December 21, 1911, by either of the Five Civilized Tribes, the Osage Nation of Indians, nor to any of the lands within the Quapaw Indian Agency.

Section 1353 "is a jurisdictional recodification of 25 U.S.C. § 345," *Brooks v. Nez Perce County*, 394 F. Supp. 869, 873 (D. Idaho 1975); *see also Scholder v. United States*, 428 F.2d 1123, 1126 n. 2 (9th Cir. 1970) ("28 U.S.C. § 1353 is a recodification of the jurisdictional portion of § 345), *cert. denied*, 400 U.S. 942 (1970). Section 345 of Title 25 provides as follows:

> All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the

> proper circuit court [district court] of the United States; and said circuit courts [district courts] are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands now [Aug. 15, 1894] held by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: Provided, That the right of appeal shall be allowed to either party as in other cases.

25 U.S.C. § 345.

This Court has ruled that, with respect to 28 U.S.C. § 1353 and 25 U.S.C. § 345, "[j]udicial attention has centered on § 345, and we follow this practice." *Scholder*, 428 F.2d at 1126 n. 2. The United States Supreme Court has further recognized that

> Section 345 grants federal courts jurisdiction over two types of cases: (i) proceedings "involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty," and (ii) proceedings "in relation to" the claimed right of a person of Indian descent to land that was once allotted.

United States v. Mottaz, 476 U.S. 834, 845 (1986). In other words, § 345 "contemplates two types of suits involving allotments: suits seeking the issuance of an allotment, . . . and suits involving 'the interests and rights of the Indian in his allotment or patent after he has acquired it.'" *Id.*, quoting *Scholder v. United States*, 428 F.2d at 1129 (in turn quoting *United States v. Pierce*, 235 F.2d 885, 889

(9th Cir. 1956)).

Wapato Heritage's complaint does not fall within the first category of actions identified in *Mottaz*, because it is not an action seeking the issuance of an allotment. Nor does the claim relate to its rights in land that was once allotted, and thus does not fall into the second category identified in *Mottaz.* In *Pinkham v. Lewiston Orchards Irrigation Dist.*, 862 F.2d 184 (9th Cir. 1988), this Court held that a prerequisite to jurisdiction under § 345 is that the case involve the plaintiff's right to ownership of specific land under an allotment. In *Pinkham*, an action was brought by Indians who were beneficial owners of an undivided share of allotted land held in trust by the United States for damages when a canal owned by the United States broke and flooded the trust land. They claimed jurisdiction under 28 U.S.C. §§ 1331 and 1353. This Court upheld the district court's order to dismiss pursuant to the defendants' F.R.C.P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. Holding that the allegations were essentially a tort, this Court therefore found that there was no jurisdiction under "section 345, and its companion provision 28 U.S.C. §1353" because it was a tort claim. *Id.* at 188-189. Because such claims

> are not related to the ownership of title, or any rights appurtenant to allotment, we affirm the district court's dismissal for lack of subject-matter jurisdiction under 28 U.S.C. §§ 1353 and 1331 and 25 U.S.C. §345."

Id. at 189.

The Eighth Circuit reached a similar result in *United States ex rel. Kishell v. Turtle Mountain Housing Authority*, 816 F.2d 1273, 1275 (8th Cir. 1987), citing *Fontenelle v. Omaha Tribe of Nebraska*, 430 F.2d 143, 146 (8th Cir. 1970). In *Kishell*, an Indian plaintiff, who was the successor in title and interest of an allotment, brought a trespass suit against an Indian housing authority, alleging that the authority had interfered with her use of the property. The plaintiff asserted that the defendant authority had constructed units on part of her allotment without her permission.

The district court dismissed the complaint for lack of subject-matter jurisdiction. Affirming, the Eighth Circuit held in *Kishell* that the district court did not have jurisdiction under § 345 over an action for trespass to land whose possession originated under the federal allotment statutes, reasoning that "[t]he present action does not seek the issuance of an original allotment, nor does Kishell seek to recover or quiet title on behalf of Tibbets' estate," the holder of fee title to the allotted land. *Kishell*, 816 F.2d at 1275. The *Kishell* court therefore concluded that "[t]he complaint seeking relief for trespass does not state a claim contemplated by section 345, and that statute also cannot serve here as grounds for federal question jurisdiction." *Id.*

Here, Wapato Heritage's claims are for recovery of damages for breach of contract and tortious interference with that contract. Nowhere in the complaint

does it assert a right in MA-10. Notably, the request for relief seeks damages and specific performance of the duties and obligations under the Settlement Agreement, as well as injunctive relief against Defendants from interfering with future payments. ER 206-208. A right to the allotment is never requested. In fact, it is never even alleged that Evans' life interest in the allotment is anything other than proper and right. Therefore, there is no jurisdiction under 28 U.S.C. §1353.

Accordingly, the District Court had no subject matter jurisdiction to hear the complaint. None of the three bases for jurisdiction asserted, 28 U.S.C. §§ 1331, 1332 or 1353, are applicable to this case. Therefore, the District Court lacked subject matter jurisdiction, and the matter should have been dismissed.

II. THE SECRETARY OF THE INTERIOR MUST APPROVE ANY TRANSFER OF TRUST INCOME FROM AN INDIVIDUAL INDIAN MONEY ACCOUNT.

Assuming for the sake of argument that the District Court could properly exercise jurisdiction over this matter, it nevertheless incorrectly held that the Secretary of the Interior's approval was not required for the assignments of Evans' trust income. Accordingly, the order appealed from should be reversed, and the matter remanded for the proper application of federal law to the purported award of money from Evans' IIM account.

A. Standard Of Review.

The District Court's interpretation of a statute is reviewed *de novo. Rouse v. Law Offices of Rory Clark*, 603 F.3d 699, 702 (9th Cir. 2010). The District Court's decision to grant summary judgment is likewise reviewed *de novo. Payne*, 598 F.3d at 1126. Evans raised the applicability of 25 U.S.C. § 410 in her Memorandum of Law in Support of her Motion for Summary Judgment. ER 165.

B. 25 U.S.C. § 410 Applies To This Case.

At issue here is the income generated from the MA-10 trust allotment ("MA-10") that was owned by Evans' father, William Wapato Evans. Evans realizes income from the lease fees generated from that trust allotment. 25 U.S.C. §410 provides in its entirety that

> No money accruing from any lease or sale of lands held in trust by the United States for any Indian shall become liable for the payment of any debt of, or claim against, such Indian contracted or arising during such trust period, or, in case of a minor, during his minority, except with the approval and consent of the Secretary of the Interior.

It is not disputed by the parties that this is a trust allotment. The money in Evans' IIM account accrues from the lease of those lands held in trust by the United States. It is also not disputed that the Secretary of the Interior has never approved any payment of those monies to Wapato Heritage, or any other person or entity.

Citing to § 410, this Court has held that assignments from an IIM must be approved by the Government. *Kennerly v. United States*, 721 F.2d 1252, 1254 (9th

Cir. 1983). This statute has been strictly construed by state courts as well. The Alaska Supreme Court has taken the position that § 410 was "designed to protect from creditors certain categories of Indian property [and] should be construed broadly: 'ambiguities must be resolved in favor of the Indians.'" *Law Offices of Vincent Vitale, P.C. v. Tabbytite*, 942 P.2d 1141, 1147 (Alaska 1997). Upon first considering a case for the recovery of money relating to a trust income, the Oregon Supreme Court in 1960 noted that while the statute had been enacted for over 50 years, it could find no cases construing it. *Taylor v. Grant*, 220 Ore. 114, 119 (1960). It then held that money held by the defendant bank, which was from the sale of lands held in trust for an Indian, could not be recovered by the parties that initially purchased the land. *Id.*

Evans agreed in part to the use of the assignments by the BIA because that meant that the BIA was approving the loan to Wapato Heritage, and further approving Wapato Heritage's agreement to repay the loan in the future. ER 126. Evans knew that such approval would make it more likely in the future for the BIA to approve withdrawals of Wapato Heritage's lease income from MA-8, which would of course be necessary if repayment from that allotment income was to occur. The District Court, in contravention of federal law, has short-circuited those protections and placed Evans in a transaction that was never contemplated.

Under § 410, no funds in Evans' IIM account may become obligated to another without the approval of the Secretary of the Interior. Such approval by the Secretary is a part of the United States' trust responsibility to Indians. Because that required approval was never obtained here, there is no valid assignment of Evans' IIM account funds to Wapato Heritage. Accordingly, the order appealed from should be reversed, and the matter remanded for the application of § 410 to the case.

C. 25 U.S.C. §410 Applies Whether The IIM Is Restricted Or Unrestricted.

The District Court made the erroneous distinction that since Evans has an unrestricted IIM account, no such approval is needed. ER 145-146. However, there is no such distinction in the law. The C.F.R.s do note that there are three types of IIM account, see 25 C.F.R. 115.002. However, that distinction is not utilized in any of the relevant statutes. Nowhere in the express language of §410 does it limit it to restricted IIM accounts. Evans does have an unrestricted IIM account, but the income generated is all from the lease of trust lands.

The Interior Board of Indian Appeals ("IBIA") has considered this statute more frequently than other courts, but similarly construes §410 strictly. The IBIA noted that 25 U.S.C. §354 prohibits allotted lands from being liable for debts contracted prior to the issuance of the final patent in fee (i.e. no longer held in trust), and that §410 further implements that trust concept. *U.S. v. Acting Area*

Director, Aberdeen Area Office & Celina Young Bear Mossette and U.S. v. Acting Area Director, Aberdeen Are Office, BIA & Geraldine Van Dyke, IBIA 81-7-A and 81-38-A, 89 I.D. 49, 50 (1982). The court noted that when funds are generated, they are placed in an IIM account and then "are available to the Indian owner" but no claims of indebtedness may be paid without the approval of the Secretary of the Interior. *Id.* at 51-52.

This is no different than Evans' situation in which money generated from the lease revenue from the MA-10 is placed in her IIM account which she is able to access at will. However, money for obligations owing by Evans that she does not transfer herself from that account must be approved by the Secretary. Evans did initially offer to write Wapato Heritage regular checks for the money to be loaned, but it refused such an offer and demanded that the BIA make the transfers, which requires the Secretary's approval. It was Wapato Heritage that demanded Evans allow the BIA to transfer funds from her IIM account. Now Wapato Heritage is attempting to blame Evans for the BIA's failure to do so. Because the required approval has never been obtained, money from Evans' IIM account cannot be withdrawn without her consent.

The IBIA has further held that "[p]ayment of a judgment with funds in an IIM account, even though payment was ordered by a court of competent jurisdiction, is thus not mandatory." *Pretty Paint v. Rocky Mountain Regional*

Director, BIA, IBIA 02-123-A, 2002 I.D. LEXIS 147 (I.D. 2002). There a tribal court ordered an Indian to pay back and future child support to the mother of his child. The order in part directed that he pay one half of his lease income, which was deposited into his IIM. When the mother attempted to receive payment of back support from his IIM account, the Superintendant refused, which the Regional Director later affirmed. The court cited §410's prohibition of payment of trust income from an IIM without the approval and consent of the Secretary as the basis for denying the mother's request for payment of back child support from the IIM.

The court never even considers whether the IIM is restricted or unrestricted. There is no evidence in either of these decisions that that the Indian account holder had a restricted IIM, or that the "restricted" or "unrestricted" status of the IIM account had any role in the legal analysis. The status of the IIM is irrelevant. The only relevant factor is whether the money in the IIM was generated from trust income. Here, that is indisputably true. It is further undisputed that the Secretary has never approved or consented to fulfilling such obligations to Wapato Heritage.

Similarly in *Kennerly*, the Indian received several loans from the Blackfeet Tribe, and secured some with written, notarized assignments from his IIM. When the Tribe demanded payment, the BIA made the assignments from his IIM. *Kennerly*, 721 F.2d at 1254. There the court held "payments were appropriate so long as the assignments had been approved as required by 25 C.F.R. § 104.9." *Id.*

at 1255. Such approval has never occurred in this case. While Evans did initially sign papers for the BIA to make the assignments, the BIA refused to assign any of her IIM income to Wapato Heritage. Again, the status of the IIM as "restricted" or "unrestricted" played no role in the analysis.

Restricted IIM accounts are for minors and other legal incompetents, and every disbursement must be approved by the BIA. 25 C.F.R. 115.002. With the exception of *Taylor*, *supra,* there is no indication in *any* of those cases that the IIM account at issue was held by someone of legal incompetence. In fact, that regulation would make § 410 redundant since every disbursement had to be approved regardless. Therefore, the requirements of § 410 still apply to Evans' account. Accordingly, the District Court erred in failing to apply § 410 to this case, and the order appealed from should be reversed.

D. The Assignments From Evans' IIM Account Are A Debt Or Claim Within The Meaning Of 25 U.S.C. § 410.

The District Court reasoned that § 410 did not apply since Evans was the party agreeing to lend money, and instead it was Wapato Heritage that was agreeing to incur a debt. ER 145. This distinction fails since Evans was sued because Wapato Heritage alleges that she failed to meet her obligation to it and she thus owed it a very substantial amount of money.

The term "debt" includes "a contractual obligation to pay in the future for considerations received in the present," Black's Law Dictionary 491 (4th ed. 1968),

which precisely describes Sandra Evans' contractual obligation under the Settlement Agreement. *See also United States v. Austin*, 462 F.2d 724, 736 (10th Cir.) (term "evidence of indebtedness" is "not limited to a promissory note or other simple acknowledgement of a debt and is held to include all contractual obligations to pay in the future for consideration presently received") (citations omitted), *cert. denied*, 409 U.S. 1048 (1972). Wapato Heritage's complaint sought "a declaration of Sandra D. Evans existing and future obligations and duties under the Settlement Agreement." ER 197.

Furthermore, § 410 is not limited to payment of "debts". The statute also precludes paying out "claims against" the Indian arising during the trust period, without the approval of the Secretary. This demand for payments out of Evans' IIM account is certainly a "claim against" the account.

The District Court further reasoned that § 410 did not apply since the money was deposited in her unrestricted IIM account, and she was "free to utilize this unrestricted IIM account money as she wishes." ER 145-146. This is certainly no longer true since the District Court's February 9, 2010 order compels her to pay thirty-five per cent of the trust income to Wapato Heritage. ER 10. The District Court's order that Evans complete documents, including OST 01-004/6, W-9, and Power of Attorney to allow the Office of the Special Trustee to forward 35% of the

MA-10 trust income is a further violation of § 410 since again, the Secretary has not approved this payment of a debt from her trust income.

Accordingly, Evans' purported obligation to transfer money to Wapato Heritage in the future constitutes a debt or claim within the meaning of § 410. Therefore, § 410's prohibition on money accruing from any lease or sale of lands held in trust by the United States for any Indian becoming liable for the payment of any debt or claim against such Indian without the approval and consent of the Secretary of the Interior applies in this case. Because the District Court erred in not applying § 410, the order appealed from should be reversed.

III. THE COURT ERRED BY EXCLUDING THE TESTIMONY OF EVANS' EXPERT WITNESS ON DAMAGES.

In addition to the above errors, the District Court also erred in precluding Evans' expert from testifying on the issue of damages. Evans sought to introduce the testimony of Robert Duffy as a damages expert. ER 160. Evans sought to show that even if Wapato Heritage were owed damages, she was entitled to offset that amount. Evans sought to offset the $75,000 she was still owed under the Settlement Agreement; the amount Wapato Heritage should have paid in premiums for accidental death insurance. Evans also sought to use Duffy's testimony to show how future interest on loan funds was to be allocated. ER 94. The District Court ruled on Wapato Heritage's motion *in limine* to exclude that testimony as irrelevant. ER 107. Because the evidence was obviously relevant on the issue of

the amount of damages, if any, Wapato Heritage was entitled to, the District Court abused its discretion in precluding the expert evidence.

A. Standard Of Review.

The decision to admit or exclude expert testimony is reviewed for abuse of discretion. *De Saracho v. Custom Food Mach., Inc.*, 206 F.3d 874, 879 (9th Cir. 2000).

B. The District Court Abused Its Discretion In Precluding Evans' Expert Evidence As Irrelevant Because The Evidence Had A Tendency To Make The Existence Of A Material Fact – The Damages Allegedly Owed Wapato Heritage – More Or Less Probable.

Federal Rule of Evidence 702 allows admission of "scientific, technical, or other specialized knowledge" by a qualified expert if it will "assist the trier of fact to understand the evidence or to determine a fact in issue." *Mukhtar v. Cal. State Univ.*, 299 F.3d 1053, 1063 (9th Cir. 2002). Expert testimony must be both reliable and relevant to be admissible. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993).

The District Court excluded Duffy's testimony as being irrelevant. ER 107. It never ruled on whether the testimony offered by Duffy would be reliable under *Daubert* or any other standard. Instead, the court cited to Federal Rules of Evidence 401-403 and ruled that the testimony by Duffy that Wapato Heritage had not fulfilled at least $75,000 of its obligation under the Settlement Agreement was

irrelevant to Wapato Heritage's claims and any probative value was outweighed by risk of jury confusion. ER 107. Evans also sought to offer Duffy's expert testimony on the issue of interest calculations in the event judgment was offered in favor of Wapato Heritage. ER 160. Judgment was entered for Wapato Heritage, including an award of interest, with no consideration of mitigating factors identified by Duffy. No jury trial was ever held, and instead the court granted summary judgment.

While the issue of what funds Wapato Heritage may owe Evans may be irrelevant to claims asserted by Wapato Heritage, it is not irrelevant to the issue of damages Evans may owe Wapato Heritage. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence". Fed. R. Evid. 401. Offset is an affirmative defense. *Meadow v. Suntrust Bank*, 225 Fed. Appx. 672, 674 (9th Cir. 2007). Evans is entitled to offset any judgment against her with money that is owed to her by the Plaintiffs. The court never allowed the case to go before a jury. Instead, the court ruled Evans had breached the Settlement Agreement, but never considered what damages could be owed to Evans. Duffy's expert evidence indisputably would make it "more or less probable" that Evans owed Plaintiffs less than the amount they claimed, if anything. Moreover, it can hardly be deemed "unfair prejudice"

for Evans to point out that any amount she purportedly owed to Plaintiffs' should be reduced by the money they owed to her. Accordingly, the District Court abused its discretion in precluding Evans' expert testimony, and the order appealed from should be reversed.

IV. THE DISTRICT COURT IMPROPERLY GRANTED SUMMARY JUDGMENT TO THE PLAINTIFFS BECAUSE THERE ARE GENUINE ISSUES OF MATERIAL FACT.

The District Court also erred in granting summary judgment to Wapato Heritage. There were several genuine issues of material fact in this case, including, but not limited to, whether Evans was a resident of Washington State and whether she even breached the Settlement Agreement in the first instance. The District Court ignored these issues of fact, and granted Wapato Heritage judgment as a matter of law. Accordingly, the order appealed from should be reversed, and the matter remanded for a trial on the merits.

A. Standard of Review.

The District Court's decision to grant summary judgment is reviewed *de novo*. *Payne*, 598 F.3d at 1126.

B. Genuine Issues Of Material Fact Preclude Summary Judgment In This Case.

Summary judgment may be granted only if the pleadings, evidence, and supporting documents, viewed in a light most favorable to the party opposing the motion, show that there are no genuine issues of material fact and that the moving

party is entitled to judgment as a matter of law. *Carver v. Holder*, 606 F.3d 690, 2010 U.S. App. LEXIS 10830, *11-12 (9th Cir. 2010). The non-moving party is entitled to the benefit of all reasonable inferences that can be drawn in her favor. *Edwards v. Wells Fargo & Co.*, 606 F.3d 555, 2010 U.S. App. LEXIS 10201, *5 (9th Cir. 2010). Any doubts must be resolved in favor of the party opposing the motion. *Porter v. Osborn*, 546 F.3d 1131, 1133 (9th Cir. 2008).

Here, there are multiple material issues of fact that preclude summary judgment. For example, Wapato Heritage and Evans dispute whether or not she is a resident of Washington State; and issue that is critical to whether the District Court even has jurisdiction over this matter. Evans also contends that she has at all times complied with the parties' Settlement Agreement, and Wapato Heritage claims she has not honored the agreement. This is obviously a material fact, because Evans cannot be liable to Plaintiffs if she in fact complied with the Settlement Agreement. Rather than viewing the facts in a light most favorable to Evans and giving her the benefit of all reasonable inferences, as required by this Court's prior holdings, the District Court accepted Wapato Heritage's version of the facts and resolved all doubts in Plaintiffs' favor. Accordingly, the order appealed from should be reversed, and the matter remanded for trial.

RELIEF REQUESTED

Evans respectfully asks the Court to reverse the order appealed from and dismiss this matter due to lack of subject matter jurisdiction. Alternatively, Evans prays the Court to hold that 25 U.S.C. § 410 applies to assignments from her IIM account and remand to the District Court for a holding consistent with that finding, and to permit the testimony of Duffy as an expert witness on the issue of damages at a trial on the merits.

CONCLUSION

For the forgoing reasons, the District Court's rulings should be reversed in favor of the Appellant Evans, and the complaint dismissed, or in the alternative, remanded for a trial at which 25 U.S.C. § 410 is applied to any award and Evans' expert on damages is permitted to testify.

July 2, 2010 Respectfully Submitted,

By: s/ Mary T. Wynne
Mary T. Wynne
Attorney for Appellant Sandra D. Evans

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 7,826 words.

STATEMENT OF RELATED CASES

Appellant does not know of any related cases.

July 2, 2010

Respectfully Submitted,

By: s/ Mary T. Wynne
Mary T. Wynne
Attorney for Appellant Sandra D. Evans

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ John Hur