IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 10-Civ-60483 Zloch/Rosenbaum

CONTOUR SPA AT THE HARD ROCK, INC.,
a Florida Corporation

Plaintiff,

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vs.

THE SEMINOLE TRIBE OF FLORIDA,
a Federally recognized Indian Tribe,
MITCHELL CYPRESS, Chairman of the
Seminole Tribe of Florida, JOHN DOE,
unknown member(s) of the Seminole Tribe
and RICHARD ROE, unknown non-member(s)
of the Seminole Tribe of Florida,

Defendants.
_____/

MEMORANDUM OF LAW IN OPPOSITION TO MOTION OF DEFENDANT, MITCHELL CYPRESS, TO DISMISS AMENDED COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR FAILURE TO STATE A CLAIM

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The Plaintiff, CONTOUR SPA AT THE HARD ROCK, INC., (hereinafter "Contour Spa"), by and through its undersigned attorney, files its Memorandum In Opposition To Motion Of Defendant, Mitchell Cypress, (hereinafter "Cypress") To Dismiss Amended Complaint For Lack Of Subject Matter Jurisdiction And For Failure To State A Claim, as follows:

I. Nature of Claims:

Contour Spa has filed an Amended Complaint which joins Mitchell Cypress as a Defendant and seeks declaratory and injunctive against him and the other Defendants. As to Mitchell Cypress the Amended Complaint in part seeks a declaratory judgment that he and the other Defendants do not have authority to act for the Secretary of the Interior or his designee, that Plaintiff has a right to continue to operate its business and to have occupancy of its business premisses restored and that there has been an unlawful taking by Defendants of Plaintiff's property. Count II of the Amended Complaint seeks injunctive relief against Mitchell Cypress and the other Defendants to enjoin them from taking the leased premisses, to order them to vacate Plaintiff's premisses, to restore Plaintiff to its premisses and to restrain and enjoin Defendants from taking further unlawful actions in regard to Plaintiff's business.

As to Mitchell Cypress, the Amended Complaint alleges that at relevant times Mitchell Cypress, a tribal official, acted outside of the scope of the power that the Seminole Tribe of Florida (hereinafter "Tribe") was capable of bestowing on him. It further alleges that he acted in bad faith and in active concert and participation with the other Defendants and without approval or authorization from the United States Department of Interior Bureau of Indian Affairs ("BIA") in preventing Plaintiff from entering its business premisses and in forcibly closing Plaintiff's business by self help. It further alleges that Mitchell Cypress acted with the specific purpose of depriving Contour Spa of its property/leasehold interest in violation of Title 25 parts 2 and 162.

The Amended Complaint alleges substantially more than the eviction of Contour Spa from the leased premisses. To the contrary, the Tribe wrongly represented to Contour Spa that it would and

in fact did obtain BIA approval and then for over three years hid the fact that it needed to address comments made by BIA to finalize approval of the Lease. During this time the Tribe knew that Contour Spa was investing huge amounts of time, effort and over one million dollars into the leased premisses in reliance on the Tribe's assurances that the Tribe obtained all necessary approvals, while by the Tribe's scheme, such investment and good will would then inure to the benefit of the Tribe. After the Tribe's representative advised Plaintiff that all paperwork for the Lease had been submitted by the Tribe and approved, more than three (3) years elapsed before the Tribe for the first time disclosed that it had not secured final BIA Lease approval. As alleged in the Amended Complaint the Tribe then refused to cooperate in addressing BIA's comments in spite of repeated requests by Contour Spa that it do so. The Tribe then sought to use its deception to its economic benefit to the detriment of Contour Spa. The Affidavit and Exhibits filed with this Memorandum show that in June 2007 the Tribe insisted that guests of the Hard Rock Hotel use facilities of Contour Spa for free. When Contour Spa disagreed, the Tribe's representatives first advised that the Lease for the Spa premisses had not received final approval from the Bureau of Indian Affairs ("BIA"). This was contrary to what Joseph Weinberg, who negotiated the Lease for the Tribe, advised Contour Spa in 2004. The Tribe's lawyer , Eric Dorsky, then made it clear in writing that the Tribe's cooperation in responding to the changes requested by BIA was contingent upon Contour Spa's agreement to not charge hotel guests for their use of Contour Spa's exercise facility. (Exhibit C to Panofsky's July 16, 2010 Affidavit) Contour Spa agreed to this request in writing, however, Defendants still refused to cooperate.

Contour Spa rejects the Tribe's contention in its Motion to Dismiss that the Lease was rejected by BIA on two occasions and that the Tribe did not hinder or impede approval of the Lease. On May 27, 2004 the Director of the Eastern Region of BIA sent a letter to the Tribe which offered comments to the Lease Agreement between the Tribe and Contour Spa, advising that "once the above comments have been addressed, the documents can be finalized". On October 26, 2007 the Acting Superintendent Of the Seminole Agency of the Bureau of Indian Affairs sent a letter to Contour

Spa's lawyer, stating that the requested changes should be made and the Lease resubmitted with the changes for approval. Defendants refused to cooperate in spite of numerous efforts made by Contour Spa and its then attorney, David J. Schottenfeld, Esq., to have the Tribe cooperate. These facts are set forth and explained in further detail in the Amended Complaint and in the Affidavits of Fanit Panofsky.

Plaintiff also disputes Defendant's contention in his Motion To Dismiss Amended Complaint that Tribal Resolution C-13-04 does not prescribe any act beyond submission of the Lease to BIA. On its face, the Resolution approved all of the terms and conditions of the Lease, authorized the Chairman to make such changes to the Lease as he may deem appropriate, including the completion of all necessary exhibits, and directed him to submit the Lease to the Bureau of Indian Affairs for any and all necessary approvals required for the same.

. The Amended Complaint alleges that under Title 25, part 162, including Sections 162.108 and 162.110, the Department of the Interior Bureau of Indian Affairs (BIA) has the sole authority and responsibility to grant, approve, enforce and make determinations in regard to leases made under Part 162 and to enforce all regulations under Title 25 Part 162, including the appeal rights of Plaintiff from any BIA determination as provided in Section 162.113 and Title 25 Part 2. Defendants do not have the right to evict Plaintiff from the leased premisses. As the Amended Complaint also alleges, the Tribe's actions violate state law. The Amended Complaint also alleges Defendants violated the Tribe's own Amended Constitution And Bylaws (Exhibit B to Amended Complaint) . Indeed, Article V of the Amended Constitution And Bylaws of the Tribe permit the Tribal Council to exercise certain powers, but those powers are expressly subject to any limitation imposed by the laws of the United States. Article V, Section 3 of the Amended Constitution And Bylaws provides that the Tribal Council has the power to manage and lease or otherwise deal with tribal lands in accordance with law. (emphasis added) The fact that Mitchell Cypress was at relevant times the head of the Tribal Council does not immunize him from those actions committed by him which are outside of the scope of the power that the Seminole Tribe of Florida was capable of bestowing on

him under federal law, state law and the Tribe's own Amended Constitution And Bylaws.

II. SOVEREIGN IMMUNITY DOES NOT APPLY TO TRIBAL OFFICERS WHO ACT IN BAD FAITH BEYOND THE SCOPE OF THEIR AUTHORITY OR TO TRIBE MEMBERS:

Regardless of whether sovereign immunity applies to the Tribe itself, Tribal Officers are protected by tribal sovereign immunity only when they act in their official capacity **and** within the scope of their authority, but not when they act beyond their authority. Tamiami Partners, LTD v. Miccosukee Tribe Of Indians Of Florida, 63 F. 3d 1030 at 1050-51; Santa Clara Pueblo v. Martinez, supra, 436 U.S. at 59, 98 S.Ct. at 1677; Puyallup Tribe, Inc. v. Department of Game, 433 U.S.165, 171, 97 S.Ct. 2616, 2621,53 L.Ed.2d 667 (1977). Even successful assertion of sovereign immunity by a tribe does not impair the authority of a court to adjudicate the rights of individual tribal defendants over whom it properly obtained personal jurisdiction. Northern States Power Co. V. Prairie Island Mdeweakanton Sioux Indian Community, 991 F. 2d 458, 460 (8th Cir. 1993). Tribal immunity does not extend to individual members of the tribe. In this case, the Amended Complaint alleges that Mitchell Cypress acted outside of the scope of his authority in regard to seizure of Contour Spa. Thus, Mitchell Cypress is not immune from this suit under the doctrine of tribal sovereign immunity even if he is a member of the Tribal Council.

In Tamiami Partners, LTD v. Miccosukee Tribe Of Indians Of Florida, 63 F. 3d at 1050-51, the Eleventh Circuit affirmed the District Court's refusal to dismiss claims against tribal officers of the Miccosukee Tribe Of Indians, finding that the Tribe's sovereign immunity did not shield the individual defendants from Tamiami's suit when the Plaintiff there alleged that the individual defendants abused their authority by acting beyond the authority that the tribe was capable of bestowing on them under federal laws defining the sovereign power of Indian Tribes. (On a later appeal the 11th Circuit held that the doctrine could not be used to obtain specific performance of the Tribe's obligations under its agreement where there was no showing that they acted beyond the authority that the Tribe was capable of bestowing on them). Tamiami Partners, LTD v. Miccosukee Tribe Of Indians Of Florida, 177 F. 3d at 1212 (1999) The Eleventh Circuit affirmed that the

individual defendants were subject to suit given Tamiami's allegation that they "have acted beyond the authority that the tribe is capable of bestowing upon them under federal laws defining the sovereign powers of Indian tribes." Moreover, the Court held that Tamiami was not required to exhaust its Tribal Court remedies against the defendants in that case because Tamiami had alleged "bad faith" on the part of the individual defendants. In the case of Contour Spa the Tribal officials and their agents acted in bad faith beyond the authority that the tribe is capable of bestowing upon them under law in forcibly evicting Contour Spa. In the case of the Contour Spa, the Seminole Tribe is not capable of bestowing on the tribal members authority to act contrary to Title 25 C.F.R Parts 2 and 162.

In 1953, Congress enacted Public Law 83-280, granting criminal and limited civil jurisdiction over Indians in certain states and granted the remaining states, including Florida, the option of assuming this jurisdiction by legislative action. (Codified as amended at 28 U.S.C. Section 1360)(1988) The law gives states jurisdiction over civil cause of action to which Indians are parties to same extent that such state has jurisdiction over other civil causes of action. In accordance with this authority, the Florida Legislature enacted section 285.16, Florida Statutes (1961) by which it assumes jurisdiction over civil causes of action between Indians or other persons or to which Indians or other persons are parties arising within Indian reservations. §285.16(1) Fla.Stat. (1961). In Houghtaling v Seminole Tribe of Florida, 611 So.2d 1235 (Fla, 2 DCA 1991), the Florida District Court of Appeal held that while this law does not apply to tribes, it applies to individual Indians as it is intended to address lack of adequate Indian forums for resolving private legal disputes between reservation Indians and between Indians and other private citizens.

Several Florida attorney general opinions on §285.16(1), Fla. Statutes hold that the civil laws of Florida are fully effective and to be enforced on Indian reservations as to Indians so long as there is no conflict with federal law:

> The State of Florida has assumed jurisdiction over criminal offenses committed by or against Indians or other persons or to which Indians or others are parties, arising within Indian reservations, and the civil and criminal laws of Florida are fully effective and to be enforced on Indian reservations in the same manner as elsewhere

> throughout the State so long as not in conflict with federal law. Op.Atty.Gen., 077-29, March 23, 1977.
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> State laws govern criminal offenses committed by or against, and civil actions between, Indians or other persons within Indian reservations, insofar as such laws do not conflict with federal laws, in which instance the federal laws supersede the state law and control. Op.Atty.Gen., 072-403, Nov. 13, 1972.
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> A business operating on a lease on federal or Seminole Indian reservation land has to abide by and tolerate under all state statutes insofar as they do not conflict with federal laws. Op.Atty.Gen., 074-77, March 20, 1974."

Under the circumstances of this case, the individuals who evicted, directed and/or participated in the eviction of Contour Spa from its business premisses at the Hollywood Seminole Reservation, including Mitchell Cypress, were acting contrary to Federal law, 25 C.F.R. Parts 2 and 162. They were also acting contrary to and beyond the authority granted to them by the Tribe's own Amended Constitution and Bylaws. Thus, regardless of whether sovereign immunity extends to the Seminole Tribe of Florida, sovereign immunity does not extend to the individual tribal officials and their agents who committed the actions described in the Amended Complaint, including Mitchell Cypress, as they have acted beyond the authority that the tribe is capable of bestowing upon them under federal laws defining the sovereign powers of Indian tribes.

III. THE TRIBE HAS NO AUTHORITY OR RIGHT TO RETAKE THE PREMISES:

Contour Spa strongly disputes the Tribe's contention in its Motion to Dismiss that it has the authority and right to unilaterally exercise self-help remedies in regard to Indian land leased to Contour Spa pursuant to Title 25 C.F.R. Part 162. The parties agree that the Contour Spa Lease incorporates Title 25 C.F.R. Part 162, which regulates and identifies the conditions and authorities under which certain interests in Indian land and government land may be leased. The general provisions and Subpart F of Part 162 apply to Non-Agricultural Leases and the Contour Spa Lease with the Tribe. Title 25 C.F.R. 162.108 sets forth the General Provisions which govern BIA's responsibilities in administering and enforcing leases. Section 162.08 provides that BIA will ensure that tenants comply with the operating requirements in their leases, through appropriate inspections and enforcement actions as needed to protect the interests of the Indian landowners and respond to

concerns expressed by them. It also provides that BIA will take immediate action to recover possession from trespassers operating without a lease, and take other emergency action as needed to preserve the value of the land.

Sec. 162.109 provides in pertinent part that Tribal laws do not apply to the extent that those tribal laws are inconsistent with these regulations or other applicable federal law. It further provides:

> "These regulations may be superseded or modified by tribal laws, however, so long as: (1) The tribal laws are consistent with the enacting tribe's governing documents; (2) The tribe has notified us of the superseding or modifying effect of the tribal laws; (3) The superseding or modifying of the regulation would not violate a federal statute or judicial decision, or conflict with our general trust responsibility under federal law; and (4) The superseding or modifying of the regulation applies only to tribal land. State law may apply to lease disputes or define the remedies available to the Indian landowners in the event of a lease violation by the tenant, if the lease so provides and the Indian landowners have expressly agreed to the application of state law."

Sec. 162.110 asks whether these regulations can be administered by tribes, on the Secretary's or on BIA's behalf. It then states:

> Except insofar as these regulations provide for the granting, approval, or enforcement of leases and permits, the provisions in these regulations that authorize or require us to take certain actions will extend to any tribe or tribal organization that is administering specific programs or providing specific services under a contract or self-governance compact entered into under the Indian Self-Determination and Education Assistance Act (25 U.S.C. Sec. 450f et seq.). (emphasis mine)

Thus, these provisions expressly prohibit tribes from for the granting, approval, or enforcement of leases and permits, regardless of Self Determination contracts..

Sec. 162.113 provides that BIA decisions made under this part may be appealed except where otherwise provided, pursuant to 25 CFR part 2.

In regard to non-agricultural leases, the following provisions of Section 162, Part F, are applicable:

Section 162.607 provides in paragraph (a) that:

> "Leases for ...business purposes shall not exceed 25 years but may include provisions authorizing a renewal or extension for one additional term not to exceed 25 years**, except for leases of land on the Hollywood (formerly Dania) Reservation, Fla;...; which leases may be made for terms not to exceed 99 years**." (Emphasis mine)

Sections 162.613-162.619 specify actions to be taken by BIA in the event a tenant of a non-

agricultural lease violates terms of a lease. Section 162.619 makes it clear that BIA is the one with authority to determine, after consulting the Indian landowner, as appropriate: (1) whether the Lease should be cancelled by BIA, (2) whether BIA should invoke other remedies available to BIA under the Lease, (3) whether the Indian landowners wish to invoke any remedies available to them under the Lease, or (4) whether the tenant should be granted additional time to cure the violation. Part 162 further provides that BIA has the right to take emergency action (162.622) if the leased premisses are threatened with immediate and significant harm and that if there is an unauthorized use of the property, such as where a tenant remains in possession after cancellation of a lease, that BIA will take action to recover possession on behalf of the Indian. Section 162.106 of the general provisions provides that if possession is taken without a lease by any party, BIA will take action to recover possession on behalf of the Indian landowner. Thus, Part 162 expressly provides that removal actions in regard to Indian land will be taken or approved by BIA itself, as trustee, regardless of whether the Indian owner deems the lease valid or invalid, and that the Indian landowner has no right to elect to retake the land by self-help. Any person adversely affected by BIA action (Title 25, Section 2.3) or inaction (Title 25, Section 2.8), has a right to appeal the Notice Of Administrative Decision (Section 2.7) and to post a bond (Section 2.5), if warranted.

In Yavapai-Prescott Indian Tribe v. Watt, 707 F.2d 1072 (9th Cir. 1983), in spite of 25 C.F.R. Part 162 establishing procedures for termination of a lease which provide for the Secretary to participate in cancellation of a lease, the Yavapa-Prescott Tribe terminated a Lease without Secretarial approval. The Area Director of BIA upheld the authority of the Tribe to terminate the Lease unilaterally. On administrative appeal the Interior Board of Indian Appeals concluded that Part 162 provides the exclusive method by which a tribe can terminate a lease. The Board then set aside the determination of the Area Director and reinstated the lease subject to a decision by the Area Director on the merits of the lease cancellation. The Tribe then filed a District Court action claiming it could cancel a lease without Secretarial approval. After the District Court held that the Tribe could cancel the lease without Secretarial approval, the Ninth Circuit reversed, holding that the Tribe had no authority to

unilaterally cancel the lease without Secretarial approval, finding that possession by the tribe of unilateral power to terminate leases would tend to depress the value of leases to lessees and thus discourage erection of substantial improvements on leasehold property. The court further stated that if the Tribe had the power to exercise remedies belonging to the Secretary,

> "Lessees confronted with tribal termination would not be able to proceed against the Tribe or invoke an administrative remedy. If the tribe has the power to make decisions delegated by Part 162 to the Secretary, including self-help evictions and seizures of leased premisses, then the Secretary's assumed lack of authority over terminations eliminates the administrative remedy while the sovereign immunity of the tribes bars relief against the Tribe."

This is exactly the scenario created by the actions of the Defendants, including Mitchell Cypress, in the case of Contour Spa that Part 162 is designed to prevent and which the Tribe requests this court to sanction and participate in. The court in Yavapai-Prescott Indian Tribe, supra added:

> "It is doubtful that lessees will be able to purchase sufficient immunity from terminations to enable tribes, in a sense, 'to capitalize' the value of their termination power by insisting upon a lease bonus as the price of its surrender. Should this be true, it is likely that commercial leases will yield a lower return to the tribes."

It then determined that based on these considerations, the tribe could not cancel that lease without Secretarial approval.

Similarly, in the case of Contour Spa, it is respectfully submitted that this court should require Defendants, including Mitchell Cypress, to comply with Part 162, including Sections 162.108, 162.110, 162.622 and part 2, including Sections 2.5, 2.7 and 2.8 in regard to the Contour Spa Lease and order that the Contour Spa be immediately restored to possession of the Leased premisses in order to comport to the Regulations of the Secretary of the Interior and the remedy contemplated by Congress when it placed the tribes, including the Seminoles, in trust status. This is the relief sought in Contour Spa's Verified Motion For Emergency Hearing And Injunctive Relief which has been fully briefed by the parties. Plaintiff respectfully requests a hearing on this Motion.

Various authorities hold that BIA has the power to approve agreements under 25 U.S.C. Sec. 415 retroactively. United States of America v. Naegele Outdoor Advertising Company of California, Inc., 739 F.2d 473; See Indian Contracts-Approval Of, 15 Op.Att'y.Gen 585, 590 (1876); Lykins v.

McGrath, 184 U.S. 169, 171-73, 22 S.Ct. 450, 451-52, 46 L.Ed. 485 (1902).

In forcibly removing the Spa and then requesting this court to determine whether it has subject matter jurisdiction and that the Lease is void without BIA first making this final determination and taking whatever BIA action is appropriate in compliance with Title 25 C.F.R. Parts 2 and 162, the Defendants seeks to cut off Plaintiff's rights under Part 162, including the right to appeal any adverse BIA determination. However, the Tribe should have followed the procedures mandated in 25 C.F.R. Parts 2 and 162. Under Section 2.8 the Tribe could have filed an appeal from any BIA inaction. The Tribe has expressly waived sovereign immunity under the Lease for issues regarding breach of the Lease. Accordingly, it is submitted that in spite of the doctrine of tribal sovereign immunity this court has subject matter jurisdiction to order all Defendants to comply with the Department of Interior regulations as envisioned by Congress which regulations the Defendants seek to evade. Even though Title 25 U.S.C. Section 81 was originally passed for the protection of Indians, Plaintiff has the right to request this relief from the court as Contour Spa is within the Statute's zone of interest as it is requesting the court to further the objectives of the Tribal Economic and Contract Encouragement Act (2000 Amendments to Title 25 U.S.C. Section 81) to encourage businesses to contract with Indian tribes. Gasplus, L.L.C. v. United States Department Of Interior, 510 F. Supp2d 18 (D. D.C. 2007)

V. ARGUMENT -WAIVER OF TRIBAL SOVEREIGN IMMUNITY A) BY REMOVAL:

The Tribe and Mitchell Cypress claim in their Motions To Dismiss that Plaintiff's claims must be dismissed pursuant to Rule 12(b)(1) Fed.R.Civ.P for lack of subject matter jurisdiction based upon the doctrine of tribal sovereign immunity since the Lease has never been approved by the Secretary of the Interior or its delegated authority, thereby rendering the Lease and all of its provisions, including those pertaining to alleged waiver of tribal sovereign immunity, null and void. While Defendant Mitchell Cypress did not remove this case to federal court and thereby waive sovereign immunity by removal as to him, the Tribe did remove the case to federal court and thus waived its sovereign immunity by removal. Plaintiff concedes that the law set forth in Santa Clara

Pueblo v. Martinez, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed2d 106 (1978), which holds that suit against an Indian Tribe is barred unless the tribe clearly waives its sovereign immunity, or Congress abrogates it, is the law in the Eleventh Circuit. Seminole Tribe Of Florida v. James E. Billie, 181 F.3d 1237 (11th Cir. 1999) Puyallup Tribe, Inc. V. Department of Game, 433 U.S. 165,172,97 S.Ct. 2616,53 L.Ed.2d 667. However, a challenge to jurisdiction based on tribal sovereign immunity is not amendable to resolution by a motion to dismiss where there are disputed factual questions. Seminole Tribe of Florida v. McCor, supra; Mancher v. Seminole Tribe, 708 So. 2d 327, 328-329 (Fla. 4th DCA 1998) Moreover, where, as here, the issue of subject matter jurisdiction is "inextricably intertwined" with the merits of a lawsuit, a case should not be dismissed on grounds of subject matter jurisdiction, but the court should deal with the objection to jurisdiction as a direct attack on the merits of plaintiff's case, allowing discovery on the jurisdiction issue. Lawrence v. Dunbar, 919 F.2d 1525 (11th Cir. 1990); Eaton v. Dorchester Development, Inc., 692 F.2d 727 (11th Cir. 1982)

Besides the express waiver of sovereign immunity as in the Contour Spa Lease, a tribe can waive Indian sovereign immunity as a defense under various circumstances. Turner v. United States, 248 U.S. 354, 39 S.Ct. 109, 63 L.Ed. 291 (1919). In *United States of America v State of Oregon*, 657 F.2nd 1009 (9 Cir. 1981), the Ninth Circuit Court of Appeals found that the Yakima Indian Nation (Yakima Tribe) waived its sovereign immunity when it intervened in an ongoing fishing dispute as a party plaintiff. In Tamiami Partners, LTD v. Miccosukee Tribe Of Indians Of Florida, 177 F. 3d 1212, our Eleventh Circuit found that an arbitration clause in a contract with a tribe constituted a waiver of sovereign immunity. While any waiver must be explicit, no "magic words" are necessary. In In Re Melvin J. White, Debtor, 139 F.3d 1268 (1998), the Ninth Circuit held that an Indian Tribe's participation as a creditor in a bankruptcy case under Chapter 11 of the Bankruptcy Code waived the Tribe's sovereign immunity from adjudication of that claim, and that the waiver carried forward to Chapter 7.

Plaintiff submits that by voluntarily removing Plaintiff's claims to federal court, the Tribe has consented to this court's jurisdiction and has waived its sovereign immunity. Lapides v. Board of

Regents of the University System of Georgia, 535 U.S. 613, 616, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002); Embury v. King, 361 F 3d 562 (9th Cir. 2004); Estes v. Wyo. Department of Transportation, 302 F. 3d 1200, 1204 (10th Cir. 2002) But see Lombardo v. Pennsylvania, 540 F.3d 190 (3rd Cir. 2008)

In Lapides v. Board of Regents of the University System of Georgia, 535 U.S. 613, 616, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002), the Supreme Court held that a state waives its Eleventh Amendment immunity from suit when it voluntarily removes a lawsuit to federal court. The court reasoned that it was inconsistent for the state to invoke federal jurisdiction by removal, thereby contending that the judicial power of the United States extended to the case, yet claim that jurisdiction did not extend to the case because of sovereign immunity. Removal is a form of voluntary invocation of the federal court's jurisdiction sufficient to waiver state sovereign immunity. In Estes, supra, the 10th Circuit concluded that the state's removal of a case from state to federal court constitutes a waiver of its sovereign immunity. It is irrelevant that the tribe removed this case to federal court simply to challenge the district court's jurisdiction to hear the case. Estes, supra. In Embury v. King, 361 F. 3d 562 (9th Cir. 2004), the Ninth Circuit concluded that the state's removal from state to federal court constitutes an unequivocal waiver of sovereign immunity for federal as well as for state law claims and for claims asserted after removal as well as those asserted before removal. Removal is not of "a claim", but of "the case", which means "the suit". See also Gunter v. Atlantic Coast Line R.R., 200 U.S. 273, 284, 26 S.Ct. 252, 50 L.Ed. 477(1906); Clark v. Barnard, 108 U.S. 436, 447, 2 S.Ct. 878, 27 L.Ed. 780 (1883).

The same principals that apply to removal from state to federal court by a state should apply in this case to removal by the Tribe. In State of New York v. The Shinnecock Indian Nation, 523 F. Supp. 2d 195 (E.D.N.Y. 2007) an action was brought by the State of New York and the Town of Southampton seeking to bar construction of a casino on land allegedly owned by the Shinnecock Tribe. The Tribe argued that sovereign immunity acted as a complete bar to the lawsuit since it did not give consent to be sued. However, the District Court Judge held that the Shinnecock Indian Tribe

waived sovereign immunity and voluntarily submitted to the District Court's jurisdiction when it removed the state court action to federal court. The law is not settled in this area. See Ingrassia v Chicken Ranch Bingo and Casino, 676 F.Supp2d 953 (E.D. Cal. 2009), where the district court judge analyzed whether waiver by removal to federal court would force a tribe to choose between removal and an immunity defense. In the case of Contour Spa, the Tribe clearly and unequivocally chose to ignore the remedies under Title 25 Part 162 and to voluntarily and knowingly remove this case to federal court. Thus, the Tribe clearly and unequivocally waived its subject matter jurisdiction defense.

B. INDIAN CIVIL RIGHTS ACT:

The Indian Civil Rights Act (25 U.S.C. 1301-03) provides that no Indian tribe in exercising power of self government shall:.. "5) take any private property for a public use without just compensation," or "8) deny any person within its jurisdiction the equal protection of the laws or deprive any person of liberty or property without due process of law." In this case, the Tribe has by self help in violation of law taken Contour Spa's property, business, customers and employees without compensation. While Santa Clara, supra, holds generally that the Indian Civil Rights Act (ICRA) does not authorize suits against a tribe nor constitute a waiver of sovereignty, two years after that decision, the 10th Circuit in Dry Creek Lodge, Inc. V. Arapahoe and Shoshone Tribes,623 F.2d 682 (1980) recognized a narrow exception under the ICRA where three circumstances are present: 1) the dispute involves a non-Indian; 2) the dispute does not involve internal tribal affairs; and 3) there is no tribal forum to resolve the dispute. In Dry Creek, the plaintiffs, like Contour Spa, built a facility located within a reservation. After a lodge was completed, plaintiffs were prohibited from using the facility based on a decision made by the tribal council. Plaintiffs filed suit in state court, but the suit was removed to federal court. The tribe moved to dismiss on grounds of sovereign immunity based on Santa Clara, arguing that there was no jurisdiction or remedy, but the 10th circuit allowed the case to go forward reasoning that there had to be a forum where the dispute can be settled. Plaintiff submits that this narrow exception applies to Contour Spa, as this dispute involves a non-

Indian, does not involve internal tribal affairs and Plaintiff contends that there is no tribal forum to resolve this dispute. In the case of the Contour Spa the Defendants took Plaintiff's private property for a public use without just compensation and deprived it of its property interest in the Lease without due process of law, by seizing the Contour Spa by self help, contrary to federal regulations, thereby denying Plaintiff remedies provided in those regulations. On February 11, 2008, after numerous unsuccessful attempts to meet with Jim Allen, who had promised to handle the BIA matter, Plaintiff's president wrote a letter to the Tribe's representative handling the BIA issue advising that Contour Spa wanted to be heard by the Tribal Council in order to obtain a remedy for the Tribe's failure to address the changes to the Lease requested by BIA. The Tribal Council and the Tribe's representatives refused Contour Spa's efforts to address them and would not provide any type of tribal forum to Contour Spa.

In Seminole Tribe Of Florida v. James E. Billie, 181 F.3d 1237 (11th Cir. 1999) the Eleventh Circuit addressed but did not expressly decide whether the lack of a forum to pursue a claim has any bearing on sovereign immunity, finding that other remedies were available in that case.

The facts here are analogous to those in United Nuclear Corporation v United States, 912 F. 2d 1432 (Fed. Cir 1990), where United Nuclear Corporation (United) entered into leases with the Navajo Tribal Council to mine uranium on Indian land in the Navajo reservation. The lease and United's exploration plans for the leased land were approved by the Secretary of the Interior. United then prepared a mining plan, which it submitted to the Secretary for necessary approval under 25 C.F.R. Sec. 177.7, however, the Secretary refused to approve the plan without tribal approval. The tribe used its "veto power" to try to force United to pay more money or its lease would lapse. In order to accomplish its scheme, like here, the tribe withheld its comments on the Secretarial approval. BIA was aware that the tribe was withholding approval because the tribe wanted more money. United made efforts to obtain tribal approval so that Secretarial approval could be obtained, to no avail, which resulted in its lease terminating. United then filed suit against the United States on account of BIA's actions, claiming that the Secretary's refusal to approve the mining plan constituted a taking

of its leases, for which it was entitled to just compensation. On appeal, the Federal Circuit Court of Appeals held that there had been a taking of United's property interest in the leases in violation of the 5th Amendment since the tribe's refusal to approve United's mining plan was due to the tribe's attempt to obtain substantial additional money from United. In the case of Contour Spa, like United, Contour Spa contends that the Tribe withheld its comments needed for BIA's approval, in order to obtain substantially more money than the Tribe contracted for and as part of a scheme to seize Plaintiff's business and good will. In its brief, the government in United asserted that the Secretary's requirement of tribal approval of the mining plan was to promote the Indian's right to development and self determination, much like the relevant portions of Title 25 seek to promote and protect the economic interests of Indians. However, the Circuit Court of Appeals found that encouraging Indians to not to live up to their contractual obligations would not encourage self determination. To the contrary, the court wrote that the best way to make the Indians more responsible citizens would be to require them to live up to their contractual commitments.

C. EXPRESS WAIVER OF TRIBAL SOVEREIGN IMMUNITY/ESTOPPEL:

The statutes requiring Secretarial approval for Leases were originally enacted for the protection of Indians to keep them from entering into "improvident and unconscionable contracts" with non-Indians. A.K. Management Co. V San Miguel Band, 789 F.2d 785 (9th Cir. 1986). Title 25 U.S.C. Section 81 was enacted in 1871 in response to "claims agents and attorneys working on contingency fees who often swindled Indians out of their land, accepting it as payment for prosecuting dubious claims against the federal government". United States ex. Rel. Steel v. Turn Key Gaming, Inc., 260 F.3d 971, 976 (8th Cir.2001). In its original form, Section 81 required that the Secretary of the Interior approve contracts for services with Indians relative to Indian lands.

In 1999 Congress decided to end Section 81's long history of confusing judges, lawyers, Indian tribes, and tribal business partners, and to bring Section 81's antiquated treatment of Indian tribes in line with modern attitudes toward tribal self-determination. See S. Rep. 106-150; see also 65 Fed. Reg. 43,952(July 14, 2000)(noting that the old section 81 "was a relic of a paternalistic policy towards

Indian tribes prevalent at the end of the nineteenth century"). The result was Public Law No. 106-179, the Indian Tribal Economic Development And Contract Encouragement Act of 2000, which Congress described as "an amendment in the nature of a substitute." S. Rep 106-150 at 8.

The 2000 amendments to Section 81 had two purposes: to clarify the statute's language and to narrow its scope. To accomplish those purposes, Congress eliminated the "relative to Indian lands" standard and amended Section 81 so that it would apply only to contracts "that encumber Indian lands". See S. Rep. 106-150 at 9. ("The amendment eliminates the overly-broad scope of [Section 81] by replacing the phrase "relative to Indian lands" with the phrase "encumbering Indian lands.") This revised language "allow[s] Indian tribes and their partners to engage in a wide array of commercial transactions without having to submit those agreements to BIA as a precaution. Id at 9.

The 2000 amendments to Section 81 are designed to remedy the paternalistic view that Indian tribes need protection from third parties and to encourage third parties to enter into business relationships with Indian tribes by clarifying and significantly reducing the scope of prior Section 81. See S. Rep. 106-150 at 4, 9 (1999); Gasplus, L.L.C. v. United States Department Of Interior, 510 F.Supp.2d 18 (District court, D.C. 2007). The overall goal of the amendments was to reduce Government oversight of Indian economic activity. As explained in Gasplus, supra, the fact that a tribe and its business partner may arrive at a dispute over a particular contract, and thereby acquire divergent legal interests, does not mean that tribal business partners' interests are generally inconsistent with the tribes' or with the objectives of Section 81, See In Re: Vitamins Antitrust Class Actions, 215 F.3d 26, 29 (D.C.Cir.2000). One key objective of the amended Section 81 is to create incentives, or to remove a major disincentive, for businesses to contract with Indian tribes. A contrary conclusion would be out of keeping with the intent of the "Indian Tribal Economic Development And Contract Encouragement Act of 2000" Pub.L. No. 106-179, 114 Stat. 46 (2000).

While acknowledging that courts have generally rejected estoppel arguments in regard to BIA approval (see cases cited in Defendant's Motion and supporting Memorandum of Law, many decided before the 2000 amendments) , Plaintiff contends that in light of the changed policy considerations

expressly recognized by Congress in the 2000 amendments to Section 81, under the circumstances of this case Defendants should also be estopped from using BIA approval to invalidate the Lease. Estoppel is an equitable doctrine invoked to avoid injustice where, as in the case of the Contour Spa, one person makes a definite misrepresentation of fact to another having reason to believe the other will rely upon it and the other in reasonable reliance upon it acts. In such case the first person is not entitled to regain the property or its value that the other acquired by the act, if the other in reliance upon the misrepresentation and before discovery of the truth has so changed its position that it would be unjust to deprive it of that which it thus acquired. Restatement (Second) Of Torts Section 894(1)(1979); Heckler v. Community Health Services of Crawford County, 467 U.S. 51, 104 S.Ct. 2218, 81 L.Ed.2d. 42 (1984) The doctrine of estoppel has been invoked against a governmental entity where a property owner in good faith reliance upon some act or omission of the government has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right he or she has acquired. Coral Springs St. Sys., Inc. v. City of Sunrise, 371 F.3d 1320, 1334 (11th Circ. 2004); Castro v. Miami-Dade County Code Enforcement, 967 So 2d 230 (Fla. 3 DCA 2007); Equity Res., Inc. v. County of Leon, 643 So.2d 1112, 1117 (Fla 1 DCA 1994). Florida courts have emphasized that the doctrine of estoppel is based fundamentally on the rules of fair play. Town of Laro v. Imperial Homes, 309 So.2d 571, 573 (Fla. 2 DCA 1975) To state an action for promissory estoppel, a Plaintiff must establish the following three elements: (1) a representation as to a material fact that is contrary to the later asserted position, (2) a reasonable reliance on that representation, and (3) a change in position detrimental to the party claiming estoppel caused by the representation and reliance thereon. Romo vs. Amedex Insurance Company, 930 So. 2d. 643 (Fla. 3d DCA. 2006); FCCI Insurance Company vs. Cayce's Excavation, Inc., 901 So. 2d. 248 (Fla. 2 DCA). In the case of Contour Spa, Plaintiff has established all three of the elements needed to state a cause of action for estoppel. The Tribe repeatedly represented to Plaintiff that it would take all steps necessary to obtain all necessary approvals of the Lease Agreement and that all needed approvals had been obtained. Plaintiff reasonably relied upon the representations and omissions of

the Tribe, which were false. The Tribe intended Plaintiff to rely on them. In reliance upon the misrepresentation and omissions of the Tribe to its detriment, Plaintiff, Contour Spa, invested huge amounts of time, effort and over one million dollars of its monies in designing and building out the spa, and in turning it into a successful operation. In addition, the Defendants unlawfully evicted Contour Spa from its leased premises in violation of federal regulations. Under the circumstances, the Defendants should not be allowed to use their own misconduct to claim that the Lease is void on account of lack of Secretarial approval.

The Lease provides in Section 22.29 for a limited knowing and voluntary waiver of sovereign immunity from suit, stating that the Tribe consents to unconsented suit. The Lease further provides that the limited waiver of sovereign immunity is effective if, and only if, each and every one of certain conditions precedent are met. All conditions precedent, except for one, have been met. This condition precedent to waiver of sovereign immunity is that Plaintiff make a claim in a detailed written statement to the Tribe, stating the specific action or discontinuance of action by the Tribe that would cure the default and provide the Tribe 30 calendar days to cure the default. It is respectfully submitted that the Tribe has waived the last condition precedent to waiver of sovereign immunity by making a unilateral decision to seize the leased property in violation of Part 162, without Secretary of Interior input, by declaring the lease void and by using self-help to lock Plaintiff out of its business premisses without any prior notice. The purpose of the notice requirement, like the statutory notice requirement in Section 768.28 Florida Statutes, is to provide sufficient notice of the claim being made as well as time to respond to the claim to enable the Tribe to make a prompt, thorough investigation, leading to an early decision of Tribe liability. But waiver of a sovereign immunity provision should not be burdened with constructions that would hamper presentation of just claims in the presence of substantial compliance with the rest of the waiver provision. Waiver or estoppel occurs where there is an investigation followed by action in relation to the claimant which would lead a reasonable person to conclude that further notice is unnecessary. In this case, the Defendants, fully aware of Contour's Spa's claim to the premisses, after investigation and legal research by their lawyer, made a legal

determination, as evidenced by Mr. Orlovsky's March 17, 2010 letter (Exhibit J to Amended Complaint), that Contour Spa could no longer remain in possession of the leased premisses. After sending notice at 10:00 p.m at night, at 6:00 a.m. the next morning the Tribe and Defendants then took possession of the leased premisses without any legal process or Secretarial action, forcibly evicting the Contour Spa and claiming that it permanently closed the Spa. Under the circumstances, no practical purpose would be served by requiring 30 days notice before Plaintiff instituted suit to recover possession of the Leased premisses and the Tribe by its conduct is estopped from asserting the notice provision. Kuper v. Perry, 718 So 2d 859 (5th DCA 1998); Rabinowitz v. Town of Bay Harbor Islands, 178 So 2d. 9 Fla. 1965). Rabinowitz v. Town of Bay Harbor Islands, supra. In Wisconsin Winnebago Business Committee v. Koberstein, 762 F.2d 613 (7th Cir. 1985), cited in the Tribe's Motion, the Seventh Circuit considered an estoppel defense, but determined the elements of estoppel were not present there. But see other cases cited in the Tribe's Motion refusing to apply an estoppel defense to Section 81 approval. Since the tribe has clearly consented to suit in the Lease, if the tribe is estopped to assert the lack of BIA approval to invalidate the Lease, then the Tribe has waived its sovereign immunity for this additional reason.

D. LACHES:

Laches is an equitable doctrine. It applies upon the following circumstances and thus applies to the Tribe's conduct in relation to Contour Spa: 1) there was inexcusable delay in assertion of a known right and 2) the party asserting laches has been prejudiced. Brumby v. Brumby, 647 F.2d 320 (Fla. 4 DCA 1994) In this case, assuming arguendo, that as the Tribe asserts it had a unilateral right without BIA action to retake the leased premisses because the Tribe determined Contour Spa's lease is invalid and that Contour Spa was then a trespasser (Plaintiff disputes this), then: 1) there was inexcusable delay of over six years by the Tribe in asserting its claimed right (only the Tribe knew from November 2003 to 2007 that it did not have BIA approval) and (only the Tribe knew it would seize the leased premisses), and 2) Contour Spa was prejudiced by the Tribe's delay in advising that all necessary approvals were not obtained and by the Tribe's concealing the May 27, 2004 letter from BIA to the

Tribe. During this time the Tribe was aware that Contour Spa was spending tremendous amounts of money, time and effort in improving the leased property and in building a successful spa business there. Since the tribe has clearly consented to suit in the Lease, if the tribe is barred by the doctrine of laches from asserting lack of BIA approval to invalidate the Lease, then the Tribe has also clearly waived its sovereign immunity. Thus the Tribe should be barred by the doctrine of laches from being allowed to retake the leased premisses and the court is respectfully requested to return the leased premises to Contour Spa.

CONCLUSION

For all of the reasons and authorities set forth above, Defendant, Mitchell Cypress' Motion To Dismiss the Amended Complaint ought to be denied.

Respectfully submitted,

/s/Peter Kneski

PETER KNESKI, ESQ

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of July, 2010, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send a notice of electronic filing to the following: Donald Albert Orlovsky, Esq., Kamen & Orlovsky, P.A, 1601 Belvedere Road, Ste. 402 South, West Palm Beach, FL 33406.

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