UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-Civ-60483 USDJ Zloch/USMJ Rosenbaum

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

Plaintiff,

-vs.-

SEMINOLE TRIBE OF FLORIDA,
a federally recognized Indian tribe.

Defendant.
_____/

MOTION OF DEFENDANT, MITCHELL CYPRESS, TO DISMISS AS TO AMENDED COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR FAILURE TO STATE A CLAIM AND MEMORANDUM OF SUPPORTING POINTS AND AUTHORITIES

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Defendant, Mitchell Cypress, as the duly elected Chairman of the Tribal Council of the Seminole Tribe of Florida, a federally recognized Indian tribe, organized pursuant to Section 16 of the Indian Reorganization Act of 1934, as amended, 25 U.S.C. § 476, (hereinafter "Chairman Cypress"), by and through his undersigned attorneys, hereby files this motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(1) and (6), Fed.R.Civ.P. based upon his immunity from suit under the doctrine of tribal sovereign immunity. In support of this motion, the Tribe has attached hereto, and made a part hereof by reference genuine copies of the Amended Constitution and Bylaws of the Seminole Tribe of Florida (**Exhibit "A"**) and Tribal Ordinance C-01-95 (Tribal Sovereign Immunity Ordinance), duly enacted by the Seminole Tribal Council on March 16, 1995 and approved by the United States Department of the Interior, through the Eastern Regional Director of the Bureau of Indian Affairs (BIA), on April 16, 1995 (**Exhibit "B"**).

I. Introduction.

Plaintiff, Contour Spa at the Hard Rock, Inc., a Florida corporation, (hereinafter "Contour Spa") commenced this civil action against the Seminole Tribe of Florida ("Tribe" or "Seminole Tribe") on March 19, 2010 in State Court ("State Court action"). The claims asserted by Contour Spa against the Seminole Tribe each arise from a long term Lease Agreement ("Lease"), signed on July 18, 2003, between the Tribe, as Landlord, and Contour Spa, as Tenant, relative to the long term possession and use of restricted tribal trust land in reservation status for the operation of a spa facility at the Seminole Hard Rock Hotel & Casino – Hollywood, located on the Hollywood Reservation of the Seminole Tribe of Florida.

The Seminole Hard Rock Hotel & Casino – Hollywood (Seminole Hard Rock) is owned and operated solely and exclusively by the Tribe which holds the sole proprietary interest therein. 25 U.S.C. § 2710 (b)(2)(A). A copy of the Lease is attached to the Amended Complaint as Exhibit "C." On May 10, 2010, Plaintiff filed and served an Amended Complaint (DE 16) through which additional claims have been asserted against the Tribe and Chairman Cypress as well as two additional parties who have not been specifically identified, to date.

II. Nature of Claims.

In the Amended Complaint, Contour Spa purports to assert the following claims for relief, each of which presume the validity of the long term Lease of restricted tribal trust land: **Count I**: Declaratory Judgment and further relief under the Indian Civil Rights Act, 25 U.S.C. §

1301-1302 (the ICRA); **Count II**: Injunctive Relief; **Count III**: Wrongful Eviction and **Count IV**: Unlawful Entry and Detention. **Count V**: Fraud; **Count VI**: Promissory Estoppel; **Count VII**: Unjust Enrichment.

In paragraphs 5 and 15 of the Amended Complaint, Plaintiff contends that Chairman Cypress acted outside of the course and scope of his authority of the Chairman of the Tribal Council of the Seminole Tribe of Florida by acting in bad faith in concert with the unidentified John Doe and Richard Doe Defendants to essentially deprive Plaintiff of certain due process rights, notwithstanding the fact that there is no dispute that the Lease Agreement by which Plaintiff claims its right to possession of tribal trust land is governed by 25 U.S.C. § 415(a) and does not bear the written approval of the United States Secretary of the Interior. In addition to the foregoing, despite Plaintiff's conclusory allegations, Plaintiff does not take into account the fact that Chairman Cypress was, at all times, acting in his capacity as the Chairman of the Tribal Council and not for any singular individual or other personal purpose. To the extent that Chairman Cypress acted at all (i.e, in sending the Lease to the correct party for approval), his acts were authorized by the Tribal Council and were taken within the course and scope of his authority as the Chairman of the Tribal Council. At no time did Chairman Cypress perform any act that was not otherwise authorized by the Tribal Council of the Seminole Tribe of Florida.

It further appears from paragraphs 5 and 15 of the Amended Complaint that Plaintiff is presently speculating that the acts taken to dispossess Plaintiff were taken by the Chairman of the Tribal Council personally and individually, which is not the case. In fact, at no time and under no circumstances, did Chairman Cypress personally engage in the physical dispossession of Plaintiff from restricted tribal trust land notwithstanding the fact that since Plaintiff did not have a lease that was approved in writing by the delegated authority of the Secretary, Plaintiff had no right to be on tribal trust land as any right created by the Lease Agreement was void *ab initio*. Further, at the time Plaintiff was dispossessed, Plaintiff had known for at least three (3) years and perhaps as many as six (6) years that the written Lease Agreement had not been approved by the delegated authority of the Secretary. When the Lease was submitted to the Tribal Council for preliminary and conditional approval pending approval by the Secretary of the Interior, Chairman Cypress was authorized and directed by the Tribal Council, sitting in legal session, to submit the Lease for approval to the Secretary, which he did. Under no circumstances did Chairman Cypress or the Tribe warrant or guarantee that the Lease would be approved.

In paragraph 15 of the Amended Complaint, Plaintiff's claims purport to plead a conspiracy as between the Chairman of the Tribal Council, the Tribal Council and the Tribe which is akin to alleging that a corporate official has conspired with the corporation for which he works. As a government official, Chairman Cypress is bound under the Amended Constitution and Bylaws of the Seminole Tribe of Florida to act for the Tribe and cannot be heard to be a conspirator with the Tribe or with any other tribal employee or agent, such as the John Doe or Richard Roe Defendants. In addition, the dispossession of a party who occupies tribal trust land under an unapproved Lease has no right to continue their occupancy. Accordingly, an alleged conspiracy on the part of Chairman Cypress with the Tribe that elected him at large to dispossess an entity that has no right to occupy tribal trust land under an unapproved Lease that is void *ab initio* for lack of Secretarial approval has not alleged a viable conspiracy. The Tribe has a right to eject such a party from the premises and absent Contour Spa voluntarily quitting and vacating the premises, Plaintiff had no continuing right to possession of tribal trust land.

Under the Lease, Plaintiff developed and operated a spa facility at the Seminole Hard Rock, which is located on restricted tribal trust land in reservation status on the Hollywood Reservation of the Tribe. (Lease, page 1, second paragraph). The initial term of the Lease is ten (10) years, with four renewal terms of five (5) years each. (Lease, Definitions) – a total of thirty (30) years.

The terms and conditions of a long term Lease of Indian lands and the validity thereof are governed by the provisions of 25 U.S.C. § 415(a) and 25 C.F.R. Part 162 "Leases and Permits", including 25 C.F.R. § 604, which is specifically referenced in Section 22.30 of the Lease at page 30. These federal laws, regulations and Lease provisions expressly require written approval of the Lease by the U.S. Secretary of the Interior, or his delegated authority, as a condition precedent to validity. No written approval exists. In addition to the validity of the Lease being conditioned upon Secretarial approval, the "Incorporating Clause" contained in Section 22.33 of the Lease incorporates into the Lease all applicable laws and regulations prescribed by the Secretary of the Interior thereunder pursuant to 25 C.F.R. Part 162 "Leases and Permits." In this regard, the provisions of 25 C.F.R. § 162.604(a) specifically and expressly require that **all leases made under Part 162 are subject to the Secretary's written approval as a condition precedent to validity, something that is completely lacking in this case**. As the result, the

unapproved Lease is void *ab initio* as are all of its terms, including the waiver of tribal sovereign immunity.

In the Amended Complaint, Plaintiff is seeking a declaration that the Tribe and Chairman Cypress, among others, have violated and are liable to Plaintiff under the Indian Civil Rights Act, 25 U.S.C. § 1301-1303 (the ICRA); that the Tribe has no forum or official tribal court for the redress of grievances; that this Court has subject matter jurisdiction over Plaintiff's claims and that neither Chairman Cypress nor any other tribal official has the right to act for the Secretary of the Interior in connection with long term leases. For the reasons set forth herein, the declaratory relief sought by Plaintiff runs contrary to established fact that is or will be supported in the record.

Under the Indian Self Determination and Education Assistance Act (ISDEAA), 25 U.S.C. § 450, et seq., the sovereign tribal government of the Seminole Tribe does administer certain federal governmental functions for the United States which were previously provided by the Secretary. These services are provided under Self Determination Contracts authorized by Public Law 93-638 and are commonly referred to as Self Determination or "638" Contracts. Among the Self Determination Contracts through which the sovereign tribal government of the Seminole Tribe acts for the United States Secretary of the Interior are tribal law enforcement (through which the Seminole Tribe is permitted to defend tort claims under the Federal Tort Claims Act); the Indian Health Service, administered through the United States Public Health Service; and Tribal Real Estate Services. Thus, the Tribe does possess certain powers of the Secretary for Real Estates Services, including the power to deal with defaults under leases and contracts between non-Indian third parties and the Tribe.

Notwithstanding Plaintiff's references to the Bill of Rights contained in Article XI of the Amended Constitution and Bylaws of the Seminole Tribe of Florida which references rights accorded under the Indian Civil Rights Act (ICRA), Plaintiff cannot assert any claim as against either the Tribe or Chairman Cypress arising under the ICRA since the Tribal Council has not waived tribal sovereign immunity and Congress has not abrogated tribal sovereign immunity thereunder, other than that portion dealing with writs of *habeas corpus* which is not applicable here. 25 U.S.C. § 1303. Finally, unless and until such time as Congress sees fit to abrogate tribal sovereign immunity under the ICRA, the Courts do not possess judicial power to find a

waiver of tribal sovereign immunity unless a clear, express and unmistakable waiver of tribal sovereign immunity has been duly enacted in a Resolution by the Tribal Council in legal session.

Although paragraph 31 of the Amended Complaint purports to state that the Tribe does not have a tribal forum for the resolution of disputes, the Tribal Council does possess, in the absence of a tribal court system, the ability to resolve disputes. Without a Lease approved by the Secretary, after having been given several years within which to secure approval, Plaintiff has no right of possession that a tribal forum can address. At this point, the situation is not subject to cure as the condition precedent of Secretarial approval has not been fulfilled. Moreover, Plaintiff was dispossessed after having a lengthy opportunity to obtain approval from the Secretary. Plaintiff elected not to do so. Plaintiff sealed its own fate when it failed to seek approval during the nearly three (3) year long period after admittedly finding out that no approved Lease existed. The Tribal Council authorized Chairman Cypress to submit the Lease for approval and Chairman Cypress did exactly that. The fact that the Lease was not ultimately approved was not a matter of Chairman Cypress's doing. Chairman Cypress did nothing to hinder the approval process.

The ICRA: The *Indian Civil Rights Act* does not contain any congressional abrogation with respect to federally recognized Indian tribes with the sole exception of *writs of habeas corpus* issued under the ICRA. All other rights under the ICRA are rights for which there is neither a clear, express and unmistakable tribal waiver of tribal sovereign immunity through a resolution duly enacted by the Tribal Council while in legal session, or a clear, express and unmistakable Congressional abrogation other than with respect to that portion of the ICRA that pertains to writs of *habeas corpus*.

Contrary to Plaintiff's assertion, the Seminole Tribal Council does possess adjudicatory power for purposes of determining rights, duties and obligations between the Tribe, tribal members and others, including those who submit themselves to such jurisdiction by electing to do business on the reservations. Plaintiff's allegations regarding the present lack of a tribal court in Count I appear to be the basis of an unfounded claim that subject matter jurisdiction may be found under the very limited Dry Creek exception to the bar of tribal sovereign immunity that is recognized in the Tenth Circuit and viewed with disfavor elsewhere. This ever weakening post-Santa Clara exception to tribal sovereign immunity constitutes a minority position that prevailed, until recently, in the United States Court of Appeals for the Tenth Circuit under Dry Creek Lodge v. Arapahoe and Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980). In Dry Creek, the

minority view is one in which courts in the Tenth Circuit allowed for a finding of subject matter jurisdiction where a violation of the ICRA is shown to exist under circumstances where the Tribe in question does not possess a tribal remedy for violations arising under the ICRA (other than habeas corpus). Under the Dry Creek exception – which has never been followed in the Eleventh Circuit or in most other circuits – the analytical criteria are:

(a) Involvement of a non-Indian in the action;

(b) The alleged deprivation of an individual's real property interests; and

(c) The absence of an adequate tribal remedy.

Although Plaintiff would have this Court believe otherwise (Amended Complaint at ¶ 19-31), the United States Supreme Court has held and has found that Tribal Councils, such as the Seminole Tribal Council, are competent adjudicatory forums. White v. Pueblo of San Juan, 728 F.2d 1307, 1312-1313 (10th Cir. 1984), Santa Clara Pueblo v. Martinez, 436 U.S. 48, 58-59 (1978). It should be noted that even the Tenth Circuit is turning away from Dry Creek: "…there can be no expansive interpretation of Dry Creek without opening up the scope of lawsuits against tribes. Throughout our history the Tribes have been regarded as not being constrained by the Constitution's limitations on federal and state authority." White v. Pueblo of San Juan, *supra* at 1312 *citing* Santa Clara Pueblo v. Martinez and Talton v. Mayes, 163 U.S. 376 (1896).

For the reasons more fully hereinafter set forth, an action arising under the ICRA will not lie against a Tribe or one of its officials for matters not involving habeas corpus, unless a clear, express and unmistakable tribal waiver or Congressional abrogation of immunity can be shown. Moreover, federal courts do not have subject matter jurisdiction over claims arising under the ICRA, other than for *habeas corpus*, as Congress did not intend to fully abrogate tribal sovereign immunity under the ICRA beyond *habeas corpus.* Santa Clara Pueblo v. Martinez, 436 U.S. 48, 58-59 (1978).

III. Basic Factual Issues

Contour Spa's claims against the Tribe are factually based upon the decision of the sovereign tribal government of the Seminole Tribe to retake possession of restricted tribal trust land held by Contour Spa where the Lease has not been approved in writing by the Secretary. This restricted tribal land is legally titled in the name of the United States in perpetual trust for the Tribe pursuant to a government-to-government relationship that exists between the Seminole Tribe and the United States of America. The claims asserted by Contour Spa, particularly those

for which declaratory and injunctive relief are sought, are governed by pre-emptive provisions of 25 U.S.C. § 415(a) with respect to restricted tribal land. Paragraphs 12 through 25 of the Complaint, which have been revised in the Amended Complaint, make clear Contour Spa's understanding **that the validity of the Lease with the Tribe and any rights arising thereunder, were expressly conditioned upon written approval of the Lease by the Secretary of the Interior** without which the Lease is void *ab initio*, thereby rendering all terms and conditions thereunder null and void and of no effect, including contractual waivers of tribal sovereign immunity contained therein. The Lease, once void, cannot be saved or brought to life. *See*, Wells Fargo Bank, N.A., as Trustee v. Lake of the Torches Economic Development Corporation, at 5. (W.D. Wisconsin – 4/22/2010), Case No. 09-cv-768. (Where a contract is void, there is nothing left to enforce.[1])

Despite the fact that the Chairman Cypress submitted the Lease for Secretarial approval (his only obligation in this regard), the Lease was rejected in May 2004 (Complaint at ¶ 25) and remains unapproved by the Secretary of the Interior to this day. Before Contour Spa was entitled to pledge the putative Leasehold Estate as security for a loan for the spa operation, Contour Spa was required, to obtain prior written approval from the Secretary to do so. 25 CFR § 610. Plaintiff neglects to mention that it pledged the putative Leasehold Estate without any Secretarial authorization to do so. The failure of Contour Spa to obtain Secretarial approval for the Lease and any pledge of the alleged Leasehold Estate thereunder as security for a loan secured by a leasehold mortgage renders not only the Lease but also the Leasehold Mortgage void *ab initio*, thereby vitiating all provisions contained in the Lease, including any encumbrance and any alleged waiver of sovereign immunity contained in the Lease. Under Tribal Council Resolution C-13-04 (Exhibit D to Amended Complaint), the Tribal Council directed Chairman Cypress to submit the Lease to the BIA for any required approval. **Contrary to Plaintiff's description, the resolution does not ensure that approval would be given nor does it contain any language that prescribes any act beyond submission. Chairman Cypress sent the Lease to the BIA for approval-he did what was required of him**.

The requirements of federal law and the provisions of the Lease each require Secretarial approval as a condition precedent to the validity of the Lease. In fact, the Eastern Regional Director of the BIA, as the delegated authority of the Secretary, has affirmatively rejected the

[1] A copy of this case was filed in the record of this case (DE 29).

Lease on at least two occasions. In September 2007, Contour Spa confirmed with the BIA (if it did not already know) that the Lease had not been approved and, in fact, had been rejected from as early as May 2004 (Complaint at 25A). Although Contour Spa seeks now to blame lack of approval upon the Tribe, Chairman Cypress and others, Plaintiff cannot escape the fact that the Lease was submitted to the BIA for approval and Plaintiff did little, if anything, during the period from 2004 through 2007, and then from 2007 through 2010 to correct this fatal failure. Blaming the Tribe for Plaintiff's own lack of diligence does not remedy the situation. At no time did the Tribe or Chairman Cypress hinder or impede Contour Spa from making contact with the BIA. The truth is, Plaintiff chose not to act or to retain someone with skills to act for it with the Secretary. One wonders why Plaintiff did not obtain a simple signature from the Secretary's delegated authority when it had and was given more than three years before the Tribe took steps to remove Plaintiff. The lack of Secretarial approval on a long term lease of tribal land is a serious matter that is not subject to waiver or avoidance. Secretarial approval is intended to afford fundamental protection to Tribes and their members regarding the long term lease, use or encumbrance of tribal trust lands. The failure of a non-Indian third party to obtain the mandatory protective measure of written Secretarial approval -- for any reason or for no reason at all -- renders the Lease or restricted tribal land **null and void** *ab initio*. In view of the fact that no valid Lease exists between the Tribe and Contour Spa, any rights that Contour Spa purports to claim under the terms and conditions of the Lease are void and of no force or effect, including any alleged waiver of tribal sovereign immunity thereunder. Moreover, in view of the fact that Contour Spa has no valid and subsisting rights under an approved Lease, **the Tribe elected, after more than 3 years of restraint, to retake the premises and has permanently closed and dismantled the spa operation that was being operated by Contour Spa without required legal authorization**.

Based upon the Amended Complaint and all matters of record as well as the exhibits attached hereto, Plaintiff's claim 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 his delegated authority, in writing or otherwise, thereby rendering the Lease – and all of its provisions, including those pertaining to any alleged waiver of tribal sovereign immunity – null and void *ab initio*. If the Court finds that the Lease -- for any reason or for no reason -- has not been approved in writing

by the Secretary, it is respectfully submitted that the Lease is null and void *ab initio* as required by 25 U.S.C. § 415(a) and 25 U.S.C. § 81(b) as well as the regulations contained in 25 CFR § 604(a), thereby requiring dismissal of this case on jurisdictional grounds.

Despite Plaintiff's complaints about alleged failures on the part of the Tribe (which **did** submit the Lease for approval shortly after it was signed by the parties, as required), Contour Spa has failed to act with diligence and has failed to comply with the requirements of federal law regarding written Secretarial approval as a mandatory condition precedent for the validity of the Lease.

IV. **Legal Argument.**

(a) **The Indian Long Term Leasing Act**:

The provisions of federal law contained in 25 U.S.C. § 415(a) provide, in pertinent part:

> Any restricted Indian lands, whether tribally or individually owned, may be leased by the Indian owners with the approval of the Secretary of the Interior for … business purposes…. (emphasis added)

Thus, a lease of restricted tribal trust lands, without valid written approval from the Secretary of the Interior, is unenforceable and, for that matter, is null and void *ab initio*. See, Sangre de Cristo Development Company, Inc. v. United States, 932 F.2d 891, 895 (10th Cir. 1991). ("Because we read 25 U.S.C. Sec. 415(a) as requiring a valid approval from the Department in order for the lease contract to have legal effect, the invalid lease…vested no property interest in Sangre.") What Plaintiff chooses to overlook is the fact that lacking the formality of Secretarial approval, a long term lease of Indian lands under 25 U.S.C. § 415(a) does not become a lease – it is void. Both the statute and the regulations identify this formality as an essential condition precedent to a valid lease ever coming into being. 25 U.S.C. §415(a); 25 CFR § 162 604(a). The terms of the Lease make clear that Contour Spa knew that it was dealing with a federally recognized Indian tribe, and therefore should have been aware that any long term lease of tribal trust land from the Seminole Tribe, would be governed by federal law and would require valid written BIA approval as an essential condition precedent to its validity. The risk of loss arising from lack of Secretarial approval of a contract or a Lease invariably falls upon the non-Indian party since written approval by the Secretary is intended solely to protect tribes and their members as well as their restricted trust lands. *See*, A.K. Management Co. v. San Manuel Band of Mission Indians, 789 F.2d 785, 787 (9th Cir. 1986).

Despite Plaintiff's finger pointing at the Tribe and Chairman Cypress, Contour Spa has no excuse for what may well be a 3 to 6 year lack of diligence from 2004 - 2007 and thereafter from 2007 to the present. **Plaintiff surely knew that Section 22.30 of the Lease makes clear that the validity of the Lease is conditioned upon Secretarial approval – the provision says so, as do all applicable federal laws and regulations**. It strains credulity to think that Plaintiff sat idly for several years in a "reasonable belief" that the Tribe and Chairman Cypress were taking steps to do more than what was required to fulfill their obligation to submit the Lease to the correct party for review and approval. The Tribe and the Tribal Council certainly gave Contour Spa ample time to obtain approval before dispossessing it from the premises.

Moreover, the federal laws and regulations embraced by the "Incorporating Clause" contained in Section 22.33 of the Lease serve to incorporate all applicable laws and regulations prescribed by the Secretary of the Interior pursuant to 25 C.F.R. Part 162 "Leases and Permits." The language of 25 C.F.R. § 162.604 (a) is clear and unambiguous. It specifically requires that **all leases made under Part 162 (such as the Lease upon which Plaintiff presently relies) are subject to the Secretary's written approval, something that is completely lacking in this case which renders the Lease void and of no force or effect**. Id. Since the Lease in question is void *ab initio*, Contour Spa acquired no rights in and to any part of the restricted tribal trust lands within the jurisdiction of the Tribe. No Lease ever came into being -- an entirely predictable result that arose from a lack of Secretarial approval. (*See,* Pueblo of Santa Anna v. Kelly, 104 F.3d 1546 (10th Cir. 1997), *infra*, (Compact signed by Governor without authorization by State Legislature is void *ab initio* and cannot be "vivified" by publication of notice of approval in the Federal Register by the Secretary of the Interior.)

The lack of Secretarial approval of the Lease is not the only substantial problem facing Contour Spa under governing federal law. In securing financing, Contour Spa pledged assets of the spa, including its alleged Leasehold Estate, as security for its loan. As Plaintiff knew or should have known, 25 C.F.R. § 162.610(a) provides that an encumbrance of a Lease of restricted tribal trust land can only be made with the approval of **both** the Tribal Council **and** the United States Secretary of the Interior. In addition, Section 16.1 of the Lease provides that the Tribe's written consent is required for the spa to pledge the Lease or Leasehold Estate as collateral. **It appears that no such approval was ever obtained from the Secretary. Despite Plaintiff's complaints about alleged failures on the part of the Tribe, Contour Spa, has**

shown little, if any, interest in conforming its own conduct to the requirements of federal law regarding Secretarial approval required to validate. Title 25 U.S.C. § 415(a) requires that leases of tribal lands be validly approved by the Secretary of the Interior. The purpose of §415(a) is for the protection of Native American tribal interests. Nulankeyutmonen Nkihtaqmikon v. Impson, 503 F.3d 18, 29 (1st Cir. 2007); Utah v. United States Dep't of Interior, 45 F. Supp. 2d 1279, 1283 (D. Utah 1999); Saguaro Chevrolet, Inc. v. United States, 77 Fed. Cl. 572, 577-78 (Fed. Cl. 2007) ("[T]he Unites States' approval of a lease involving Indian land is consistent with the long-standing relationship between Indians and the government in which the government acts as a fiduciary with respect to Indian property.") **Even if the United States acts as a trustee in approving leases of Native American tribes, its obligation is to the tribes for their benefit and not to the parties with whom the tribes contract**. Sangre De Cristo Dev. Co. v. United States, 932 F.2d 891, 895 (10th Cir. 1991). In view of the fact that Contour Spa's Lease is null and void *ab initio*; the waiver of sovereign immunity contained in the void document also fails. Additionally, waivers of immunity must be construed strictly **in favor of the sovereign**. Ruckelshaus v. Sierra Club, 463 U.S. 680, 685 (1983).

(b) The provisions of 25 U.S.C. § 81(b) (2000):

In its original form, prior to the 2000 amendment, the provisions of 25 U.S.C. §81 rendered null and void *ab initio* any agreement "by any person with any tribe of Indians. . . for the payment or delivery of any money or other thing of value, in present or prospective. . . in consideration of services for said Indians relative to their lands. . ." unless, among other things, the agreement is in writing and has the written approval of the Secretary of the Interior and the Commissioner of Indian Affairs endorsed upon it. These mandatory requirements of Section 81 are explicit and require literal compliance - - that is, neither the Secretary of the Interior nor any other governmental official can dispense with any of the requirements. *See,* 18 OPS. Atty. Gen. 498 (1886). In its unamended form, **Section 81 had been held to apply to virtually every transaction involving Indian land**.

As amended on March 14, 2000, Section 81 (b) provides that "[n]o agreement. . . with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement. . . bears the approval of the Secretary of the Interior or a designee of the Secretary." This amended statute also requires literal compliance and renders null and void *ab initio* any

agreement which violates the terms of the statute. For the reasons set forth herein, the provisions of Section 81, in its amended form, have been violated.

In interpreting Section 81, it is a well settled canon of construction that any ambiguities or doubtful expressions in statutes and contracts regarding Indian tribes are to be liberally construed and resolved in favor of the Tribes as well as in favor of the spirit of the statute and the wrongs it is designed to prevent. Green v. Menominee Tribe, 233 U.S. 558, 569 (1914); United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339, 354 (1941). With regard to Section 81, Congress specifically enacted that statute to protect Indian tribes from improvident and unconscionable contracts. In re: Sanborn 148 U.S. 222, 227 (1893). In analyzing Section 81, the Ninth Circuit in A.K. Management Co. v. San Manuel Band of Mission Indians, 789 F.2d 785, 787 (9th Cir. 1986); the court relied upon and quoted Central Machinery Co. v. Arizona State Tax Commission, 448 U.S. 160, 166 (1980) as follows: "[u]ntil Congress repeals or amends the Indian. . . statutes. . . we must give them a 'sweep as broad as [their] language'. . . ." Thus, in interpreting Section 81 and Section 415(a), a court is required to construe them broadly to effectuate their purpose and to resolve any ambiguities or doubtful expressions in favor of the tribes. *See*, United States v. Santa Fe Pacific Railroad Co., *supra* at 354 *citing* Choate v. Trapp, 224 U.S. 665, 675 (1912). It is difficult to overlook Plaintiff's complete failure to ascertain what it needed to do to obtain approval for the Lease that Chairman Cypress promptly submitted to the Secretary for approval. At the risk of oversimplification, the 3 year period between 2007 and 2010 seems to have been more than ample to enable Plaintiff to locate a lawyer with a working knowledge of federal Indian law, retain the lawyer, contact the Eastern Regional Director of the BIA and then ascertain and correct any deficiencies necessary to obtain written Secretarial approval.

The encumbrance of the Lease of tribal trust land for more than seven (7) years without Secretarial approval constitutes a violation of 25 U.S.C. § 81(b) (2000). Likewise, the encumbrance created by Contour Spa's failure to obtain Secretarial approval for a pledge of a Leasehold Estate of greater than seven (7) years for a loan is also a violation of 25 U.S.C. § 81(b) because the Lease and the pledge thereof encumber tribal trust land for a period of 7 years or more and have not been approved by the Secretary of the Interior or a designee of the Secretary as required by the statute. To determine whether the Lease or the pledge of the Leasehold Estate constitute an encumbrance of tribal land, one need only consult the ordinary meaning of the

term. No special meaning or definition is needed. An encumbrance is defined as any right to, or interest in, land which may subsist in another to the diminution of its value but consistent with the passing of the fee. A claim, lien, charge or liability attached to and binding real property; (*e.g.*, a mortgage, judgment lien, mechanics lien, **lease, security interest**, easement, or right of way), as well as accrued and unpaid taxes are all included within the definition of an encumbrance. *See,* Black's Law Dictionary, (5th Ed. 1979) at 473. (defining, "encumbrance"); *See also*, Ticor Title Insurance Company v. University Creek, Inc., 767 F. Supp. 1127, 1134 (M.D. Fla. 1991) (relying upon the Webster's New Collegiate Dictionary definition of the term encumbrance as a claim against property); Lovett v. City of Jacksonville, 187 So.2d 96, 100-101 (Fla. 1st DCA 1966) (relying upon the Black's Law Dictionary definition of encumbrance) and Lake Placid Holding Co. v. Paparone, 508 So.2d 372, 377-378 (Fla. 2d DCA 1987). In 25 C.F.R. §84.002 (2001), the term "encumber," as related to Section 81, is similarly defined. It means:

> … [t]o attach a claim, lien, charge, right of entry or liability to real property (referred to generally as encumbrances). Encumbrances covered by this part may include leasehold mortgages, easements, and other contracts or agreements that by their terms could give to a third party exclusive or nearly exclusive proprietary control over tribal land.

Under even a liberal definition of the term, the Lease and the granting of a Leasehold Mortgage or other security in the Leasehold Estate constitute an encumbrance against restricted tribal trust land of the Seminole Tribe on its Hollywood Reservation.

Under the Definitions contained in the Lease, the lease term (Initial and Renewal) is for an initial period of 10 years with four (4) 5 year renewals thereafter, a potential total of 30 years.

The provisions of 25 U.S.C. §81 were originally enacted to protect Indians in their contractual dealings from frauds perpetrated by agents and attorneys. Section 81 then evolved to apply to virtually all transactions relating to Indian lands. *See*, A.K. Management Co. v. San Manuel Band of Mission Indians, 789 F.2d 785, 787 (9th Cir. 1986); U.S. ex rel. Shakopee Mdewakanton Sioux Community v. Pan American Management Co., 616 F.Supp. 1200, 1216-1217 (D. Minn. 1985) *appeal dismissed on other grounds* 789 F.2d 632 (8th Cir. 1986). The statute now applies to any transactions which encumber tribal lands for 7 years or more.

In Barona Group of Capitan Grande Band of Mission Indians v. American Management & Amusement, Inc., 840 F.2d 1394 (9th Cir. 1987), the court upheld judgment as a matter of law against a non-Indian corporation and in favor of an Indian tribe which had declared a tribal bingo management contract null and void based on the failure to comply with the requirements of 25 U.S.C. §81. The court specifically held that the agreement required the appropriate approval of the United States government.[2] **The court further held that the question of whether a contract requires approval within the meaning of 25 U.S.C. §81 is a question of law, absent an ambiguity in contract language. Id. at 1401; see also A.K. Management Co. v. San Manuel Band of Mission Indians, 789 F.2d 785 (9th Cir. 1986); Wisconsin Winnebago Business Community v. Koberstein, 762 F.2d 613 (7th Cir. 1985). No ambiguity exists in the putative Lease. Secretarial approval is required; without it there is no Lease and no waiver of immunity.**

Federal courts have consistently held that equitable defenses do not apply to relieve a non-Indian from liability for failure to comply with the mandatory requirements of 25 U.S.C. §81 and 415(a). The reason for this rests on the simple fact that leases or contracts governed by those federal laws which fail to comply with their literal and mandatory terms -- such as the requirement of Secretarial approval -- are rendered null and void *ab initio* in all respects. In A.K. Management Co. v. San Manuel Band of Mission Indians, 789 F.2d 785 (9th Cir. 1986), the court explained that 25 U.S.C. §81 declares contracts to be null and void which do not meet its requirements. **Thus, no term, clause or provision of a contract which fails to comply with Section 81 may be enforced or relied upon, unless and until BIA approval is granted.** The same straightforward analysis applies to Section 415(a). Responding to the same position taken by Contour Spa regarding the Tribe in this case, the court addressed and rejected the argument that the tribe was itself obligated under the contract at issue to obtain BIA approval. Instead, the court found that the tribe had no affirmative duty under law or under the contract; despite its terms, to seek approval under Section 81. Id. at 788 - 789. The court also rejected the proposition that a covenant of good faith and fair dealing would prevent the tribe from denying the right of the defendant to receive the benefit of the agreement since the tribe had prevented the

[2] With the advent of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et. seq., (the IGRA) responsibility for the approval of tribal gaming management contracts was shifted from the BIA to the National Indian Gaming Commission (NIGC). See. 25 U.S.C. § 2711.

fulfillment of a condition precedent to any contractual obligation. Id. **As noted above, non-Indian parties doing business in Indian country with federally recognized Indian tribes do so at their own peril and ultimately bear the total burden of obtaining governmental approval of agreements which encumber tribal trust land, even where a contractual attempt is made to shift that burden to the Tribe.** Id. Based upon the statutory declaration that contracts which violate Section 81 are null and void *ab initio*, **the court held that general contract principles cannot apply to defeat the requirements of Section 81**. Id.

The protections give by Sections 81 and 415(a) will apply even in cases where approval was not obtained because BIA officials erroneously or mistakenly opined that approval was not necessary. *See*, Barona Group of Capitan Grande Band of Mission Indians v. American Management & Amusement, 840 F.2d 1394, 1404-1405 (9th Cir. 1987), *cert. dismissed,* 487 U.S. 1247 (1988). In Barona, a tribal bingo management contract was submitted to the BIA for approval. The BIA representative responded with a letter stating that Secretarial approval was not required because the Indian lands were not involved. The Ninth Circuit held that even an erroneous administrative interpretation of the law **did not estop** the court from ruling the contract void.

In Pueblo of Santa Ana v. Kelly, 104 F.3d 1546, 1548 (10th Cir. 1997), *cert denied*, 522 U.S. 807 (1997), the United States Court of Appeals for the Tenth Circuit considered an issue similar to the one in this case which it identified and discussed with respect to a gaming compact as follows:

> This case presents a central, and dispositive, question: whether, under the Indian Gaming Regulatory Act, the Secretary of the Interior can, by his approval, give life to a compact which was void from its inception because the state governor who signed the compact lacked the authority under state law to sign on behalf of the state. **We hold that the Secretary cannot, under the Act, vivify that which was never alive, and we therefore affirm the decision of the district court**. *(emphasis added)*

In other words, a subsequent effort to give life to a void Gaming Compact or agreement by means such as publication of a notice of approval by the Secretary of the Interior in the Federal Register, will not cure an otherwise defectively executed Compact which is void *ab initio*. This was the case that occurred when the Florida Supreme Court supported the position of the House of Representatives in the case brought against Governor Crist which succeeded in voiding the

initial Gaming Compact in its entirety **because Governor Crist did not have authority to sign the Compact without approval of the Florida Legislature**. Florida House of Representatives v. Crist, 999 So.2d 601 (Fla. 2008). Like the Lease in this case, Governor Crist's lack of signing authority without Florida House approval resulted in a void Compact.

In U.S. ex rel. Citizen Band Potawatomi Indian Tribe of Oklahoma v. Enterprise Management Consultants, Inc., 734 F.Supp. 455 (W.D. Okla. 1990) the court reached the same result as in A.K. Management Co., *supra*, by rejecting the claim of the non-Indian defendants who had argued that the tribe was estopped to assert that 25 U.S.C. §81 invalidated an agreement based on the tribe's failure to seek the approval of the Secretary of the Interior, **as was called for in the agreement**. Id. at 457 - 458. Likewise, in U.S. ex rel. Citizen Band Potawatomi Indian Tribe of Oklahoma v. Enterprise Management Consultants, Inc., 883 F.2d 886 (10th Cir. 1989) **the court held that estoppel does not apply to contracts which violate the requirements of §81**. In fact, the court rejected the argument that tribal conduct estopped the plaintiff from asserting protections under 25 U.S.C. §81 holding that, "[c]ontrary to [the corporation's] contention … similar claims of estoppel based on similar circumstances have been considered in the context of Section 81 and rejected." Id. at 890. **The same analysis applies to Section 415(a).**

Section 81 is to be interpreted liberally to effectuate its purpose of protecting Indians. *See,* In re: Sanborn, 148 U.S. 222 (1893); Wisconsin Winnebago Business Community v. Koberstein, 762 F.2d 613 (7th Cir. 1985). While no one factor is dispositive, it is safe to say that Secretarial approval is required for any contract that limits tribal control of Indian land or transfers possession or control to a non-Indian for 7 years or more. *See*, e.g. 25 U.S.C. §81 (b) (2000).

As an aspect of its sovereignty, a Tribe and its officials, such as Chairman Cypress, are immune in any civil action in any state or federal court without a clear, express and unmistakable waiver by the Tribal Council or a like abrogation of immunity by act of Congress. Neither exists in this case. A waiver or abrogation of tribal sovereign immunity cannot arise by inference or implication. Such waiver must be clear, express and unmistakable. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59 (1978); Sanderlin v. Seminole Tribe of Florida, 243 F.3d 1282 (11th Cir. 2001). Indian tribes have always been considered to have an immunity from suit similar to that enjoyed by the federal government. *See*, Namekagon Development Company v.

Bois Forte Reservation Housing Authority, 517 F. 2d 508, 510 (8th Cir. 1975); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982); Tamiami Partners, Ltd. et al. v. Miccosukee Tribe of Indians of Florida, 177 F.3d 1212, 1225 (11th Cir. 1999).

The vitality of the doctrine of tribal sovereign immunity is so securely rooted in American law that it has been held that federal and state courts lack subject matter jurisdiction to consider actions against Indian tribes, even when the actions are for alleged intentional violations of rights secured by the Constitution and laws of the United States, including the Indian Civil Rights Act (ICRA) and Tribal Constitutions. *See,* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56-57 (1978) (claims for violations of the ICRA, beyond *habeas corpus*, were held to be barred by tribal sovereign immunity); Talton v. Mayes, 163 U.S. 376 (1896) (claim for an alleged intentional violation of Fifth Amendment rights was held to be barred by tribal sovereign immunity); Bruette v. Knope, 554 F. Supp. 301 (E.D. Wisc. 1983) (claims for alleged intentional violations of rights secured under the Fourth, Fifth, Ninth and Fourteenth Amendments together with alleged intentional violations of three federal statutes based upon a police chase and the alleged use of excessive force were all held to be barred by tribal sovereign immunity). Under Tribal Ordinance C-01-95 and under well settled case law, none of the Plaintiff's claims for declaratory relief, injunction, fraud, wrongful eviction, promissory estoppel, unlawful entry and detention and unjust enrichment are viable.

In Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), an action was filed by a female tribal member against the Santa Clara Pueblo for declaratory and injunctive relief under Title I of the *Indian Civil Rights Act of 1968*, 25 U.S.C. §§ 1301-1303. The respondent argued that the membership provisions of a tribal ordinance discriminated against women. In deciding Santa Clara Pueblo, the United States Supreme Court noted that as sovereign tribal governments preexisting the United States Constitution, Indian tribes have historically been regarded as unconstrained by constitutional provisions framed specifically as limitations on federal or state authority, a principle that thus far eludes Plaintiff. It was for this reason that, in Talton v. Mayes, 163 U.S. 376 (1896), the United States Supreme Court held that the Fifth Amendment did not operate upon "the powers of local self-government enjoyed" by the tribes. In ensuing years, the federal courts have extended the holding of Talton to other provisions of the Bill of Rights as well as to the Fourteenth Amendment. *See*, Santa Clara Pueblo, *supra* at 56 n.7.

In Santa Clara Pueblo, the Supreme Court further stated that Indian tribes have long been recognized as possessing the common law immunity from suit traditionally enjoyed by sovereign powers. This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress, but without congressional authorization, Indian tribes are exempt from suit. The Court then went on to state that it is well settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed. Santa Clara Pueblo at 58-59 *citing* United States v. Testan, 424 U.S. 392, 399 (1976) quoting U.S. v. King, 395 U.S. 1, 4 (1969), wherein the Court stated:

> …unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that Section 1302 does not implicitly authorize actions for declaratory or injunctive relief against either the Tribe or its officers.

436 U.S. *supra* at 72. (Emphasis added). As emphasized in the decision contained in Hawk v. Oneida Tribe of Indians Central Accounting Department, 2006 W.L. 1308074 (E.D. Wisc. 2006), the creation of a federal cause of action for the enforcement of rights created by Congress in Title I of the ICRA, however useful it might be in securing compliance with Section 1302, would be at odds with the congressional goal of protecting tribal self-government. If a waiver of immunity exists -- by act of Tribe or Congress -- the waiver or abrogation of immunity must be limited in scope and must be clear, express and unmistakable. United States v. Dion, 476 U.S. 734, 738-739 (1986). See also, Tribal Sovereign Immunity Ordinance of Seminole Tribe, C-01-95, attached hereto as **Exhibit "B"**.

The naming of Chairman Cypress is an alternative claim which, in reality, is another suit against the Tribe, which Plaintiff must know cannot be sued indirectly by making a tribal official the "nominal" defendant. Neither the Tribal Sovereign Immunity Ordinance nor abundant case law will permit that. The law is well settled that where a tribal official, employee or other tribal agent acts on behalf of an Indian tribe in the course of his or her official duties when the conduct in question occurred, that tribal official, employee or agent is immune from suit by a third party by virtue of the Tribe's sovereign immunity. *See*, Tamiami Partners, Ltd. et al v. Miccosukee Tribe of Indians of Florida, 177 F.3d 1212, 1225 (11th Cir. 1999); *see also*, Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479-480 (9th Cir. 1985); United States v. Oregon, 657

F.2d 1009, 1012, n.8 (9th Cir. 1981); White Mountain Apache Tribe v. Industrial Commission of Arizona, 696 P.2d 223 (Ariz. App. 1985); and Seminole Police Department v. Casadella, 478 So.2d 470 (Fla. 4th DCA 1985) (directing dismissal of a wrongful arrest claim against the Seminole Police Department and an individual police officer). In addition to the foregoing, an action brought by a third party, such as plaintiff, against a tribal official will be dismissed on tribal sovereign immunity grounds where, as here, the suit is, in substance, an action against the tribal sovereign or where the action seeks to compel the tribal sovereign to act or to fund compensation from tribal assets. State of Oklahoma ex rel. Oklahoma Tax Commission v. Graham, 822 F.2d 951, 957 (10th Cir. 1987) *vacated on other grounds* 484 U.S. 973; Bottomly v. Passamaquoddy Tribe, 599 F.2d 1061, 1067 (1st Cir. 1979); United Nuclear Corporation v. Clark, 584 F. Supp. 107-109 (D.D.C. 1984) (". . . an Indian tribe may not be sued indirectly by making the Tribal Representatives the nominal defendants.")

Had Congress intended to abrogate tribal sovereign immunity relative to the claims asserted by Plaintiff in the amended complaint arising under an unapproved Lease which is null and void as a matter of law, it would have been required to say so in unequivocal terms. To this point, the United States Supreme Court has elected to defer to the plenary power of the Congress on these issues. ("…we defer to the role Congress may wish to exercise in this important judgment.") Kiowa Tribe of Oklahoma, *supra*, the same result should apply here.

Respectfully submitted,

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Certificate of Service

I hereby certify that on June 15, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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CONTOUR SPA AT THE HARD ROCK, INC. vs. SEMINOLE TRIBE OF FLORIDA
CASE NO. 10-Civ-60483 USDJ Zloch/USMJ Rosenbaum
United States District Court, Southern District of Florida

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