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, SEMINOLE TRIBE OF FLORIDA, 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, 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 "Tribe"), by and through its 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 its 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 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 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, the Chairman of the Seminole Tribal Council and two additional parties.

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.

The claim for Declaratory Judgment seeks, among other things, a declaration of the rights, duties and obligations of the parties under and in connection with the Lease and the validity thereof, as well as Plaintiff's entitlement to use and occupy the restricted tribal trust land that is the subject of the Lease, which has not received written approval by the Secretary of the Interior as required by federal law and associated federal regulations. The rights, duties and obligations of the parties as well as the underlying validity of the Lease are all governed by and arise under the Constitution and laws of the United States and federal regulations promulgated thereunder. See, U.S. CONST. art. I § 8 cl. 3 and 25 U.S.C. §§ 81(b), 177 and 415(a).

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)

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 addition to all of the foregoing, 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 severability clause and the waiver of tribal sovereign immunity.

In the Amended Complaint, Plaintiff is seeking a declaration that the Tribe has violated and is 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 the Chairman of the Seminole Tribal Council 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.

In support of this Motion, Plaintiff has filed and incorporates herein by reference, the Affidavit of Max B. Osceola, Jr., the elected Hollywood Representative of the Seminole Tribal Council (now serving in his thirteenth consecutive two-year term) and the Affidavit Priscilla D. Sayen, the Tribal Secretary who has served in that capacity since 1979. In view of new allegations contained in the Amended Complaint, including those pertaining to the ICRA and, in particular, new factual allegations contained in Count I, the Tribe will supplement the affidavits on file by way of proffer, supplementation to affidavits or by filing further affidavits, or if directed by the Court, by way of live testimony to be presented at an evidentiary hearing.

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 United States Secretary of the Interior. 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 Real Estate Services. Although the Seminole Tribe has had a long standing difference of opinion with the Secretary as to whether the Seminole Tribe possesses the Secretary's power to terminate leases, 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.

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 that is intended to reach any other portion of the ICRA other than 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 Dry Creek exception to the jurisdictional bar of tribal sovereign immunity that is recognized in the Tenth Circuit. This ever weakening post-Santa Clara exception 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, 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). Thus, despite Plaintiff's protestations, although the Seminole Tribe does not have a formal tribal court (one is presently in the process of being created), the Tribal Council does possess and has utilized its adjudicatory power to resolve disputes and to determine rights, duties and obligations of those coming before it. 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 cannot be brought under the ICRA against a Tribe, such as the Seminole Tribe, unless a clear, express and unmistakable tribal waiver of immunity can be shown in a resolution of the Tribal Council duly enacted in legal session or an unmistakable Congressional abrogation. Moreover, federal courts do not have subject matter jurisdiction for claims arising under the ICRA, other than for habeas corpus, as Congress did not intend to abrogate tribal sovereign immunity under the ICRA with respect to Tribes. 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 without an approved Lease for the operation of a spa at the Seminole Hard Rock on its Hollywood Reservation. This restricted tribal land is legally titled in the name of the United States of America 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 federal laws pertaining to the Lease of Indian lands. 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, are expressly conditioned upon written approval of the Lease by the Secretary of the Interior** without which the Lease is void *ab initio*, rendering all terms and conditions thereunder null and void and of no effect, including severability provisions and contractual waivers of tribal sovereign immunity. The Lease, once void, cannot be saved or brought to life. It is a true dead letter. *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. Id.

Despite the fact that the Chairman of the Tribal Council 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, under federal law, to obtain prior written approval to do so from the Secretary or his delegated authority. 25 CFR § 610. 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 Tribe directed the Chairman to submit the Lease to the BIA for any required approval. **The resolution does not ensure that approval would be given nor does it contain any language that prescribes any act beyond submission. The Chairman sent the Lease to the BIA for approval-he did what was required**.

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 BIA, as the delegated authority of the Secretary, has affirmatively rejected the 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, which submitted the Lease to the BIA for approval, Plaintiff did little, if anything, during the period from 2004 through 2007, and then from 2007 through 2010 to correct this fatal defect. Blaming the Tribe for Plaintiff's own lack of diligence does not remedy the situation. At no time did the Tribe 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 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 *ab*

initio 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*. Thus, 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* for failure to obtain the requisite approval 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.

The failure of Contour Spa to have written approval for the Lease is not the only defect in connection with this matter. In addition to the foregoing, 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 all of the assets of the spa, including its alleged Leasehold Estate, as security for a loan intended by Plaintiff and its lender to constitute a long term encumbrance against Plaintiff's claimed interest in restricted tribal land. As Contour Spa knew or should have known, the provisions of 25 U.S.C. § 81(b) and 25 CFR § 610(a) provide that an encumbrance of the Leasehold Estate of restricted tribal trust land can only be made with the approval of the Secretary of the Interior. It appears that no such approval was ever sought or obtained by Plaintiff from the Secretary. 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 requirement for validation of the Lease and has also failed to comply with federal laws requiring Secretarial approval before a Leasehold of tribal lands may be pledged or encumbered.

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 that is essential before a valid lease ever comes 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 of the requirement that any long term lease of tribal trust land from a federally recognized Tribe, such as the Seminole Tribe, is governed by federal law and requires 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 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, Contour Spa has no excuse for its 6 year lack of vigilance between 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 by for nearly 6 years in the "reasonable belief" that the Tribe was taking steps to do more than fulfill its obligation to submit the Lease to the correct party for review and approval. The Tribe certainly gave Contour Spa ample time to obtain approval before dispossessing it. 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.

The relative rights, duties and obligations of the parties are all governed by federal law and the issue cannot be determined without resort to those laws over which this court has original jurisdiction. The original complaint references a loan to build out the spa on tribal trust land. (Complaint at ¶ 10A). 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 the 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 conduct with 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 the Chairman submitted. At the risk of oversimplification, the 3 year period between 2007 and 2010 seems more than ample 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.

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.[1] 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.

[1] 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.

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. Without it, there is nothing.

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 it 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 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.** 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.

In other words, a subsequent effort to give life to a void Gaming Compact or agreement, 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. 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.

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); *See also*, Barona Group of Capitan Grande Band of Mission Indians v. American Management & Amusement, Inc., 840 F.2d 1394 (9th Cir. 1987); 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) and United States 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 provisions of 25 U.S.C. §81, like those of 25 U.S.C. §415(a) and federal regulations promulgated by the Secretary in 25 CFR §§ 604 and 610, were enacted for the benefit and protection of Indian tribes. The public policy concerns that gave rise to the enactment of the predecessor to 25 U.S.C. §81 as well as 25 U.S.C. §415(a) were stated by Senator Casserly in the debates that took place in the United States Senate on February 22, 1871:

> …we owe it to [Indian tribes] to protect them in the precise manner proposed by the Section. While it is a shame to our civilization that such a section should be necessary, yet such a necessity is a part of the lamentable history in all ages and countries of the dealings of the conquering race with a race like these dwindling tribes.

CONG. GLOBE 41st Cong., 3rd Sess. 1487 (1871).

As an aspect of its sovereignty, a Tribe is 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 exist in this case that can survive beyond the unapproved Lease. 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). In each of these cases, actions against tribes and their employees and agents arising under the Constitution and laws of the United States, including the ICRA, have been held to be jurisdictionally barred on tribal sovereign immunity grounds. *See also*, 28 U.S.C. § 1360 (c) regarding the binding effect of tribal ordinances and tribal customs upon courts relative to the application of this ordinance to various types of claims. Under 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 as no clear and unmistakable tribal waiver or congressional abrogation exists with respect to any such claim. Without a tribal waiver or a congressional abrogation, Plaintiff's claims are subject to the jurisdictional bar of tribal sovereign immunity.

This Court does not have subject matter jurisdiction of Plaintiff's ICRA claim since the Seminole Tribe has not clearly, expressly and unmistakably waived tribal sovereign immunity with respect to the ICRA. Likewise, Congress has not clearly, expressly and unmistakably abrogated tribal sovereign immunity regarding any claim arising under the ICRA, other than with

respect to writs of habeas corpus which is not applicable to Plaintiff's claims. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).

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 escapes 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 carefully scrutinizing the ICRA, the Supreme Court noted that Congress acted to modify the effect of Talton and its progeny by imposing certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment. Santa Clara Pueblo *supra* at 57-58. It noted, however, that in 25 U.S.C. § 1303, a writ of habeas corpus is made available to test the legality of an individual's detention obtained by order of an Indian tribe. With the exception of habeas corpus, no other provision of the ICRA is subject to an abrogation of tribal sovereign immunity. Thus, since the Seminole Tribe has not waived its immunity from suit under the ICRA (and no abrogation exists) no viable legal action may be brought thereunder with the exception of a petition for a writ of habeas corpus which is not applicable to this case.

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). The Court then stated:

> Nothing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of federal courts in civil actions for injunctive or declaratory relief. Moreover, since the respondent in a habeas corpus action is the individual custodian of the prisoner…the provisions of Section 1303 can hardly be read as a general waiver of the Tribe's sovereign immunity. In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity from suit. (emphasis added)

436 U.S. *supra* at 59. The Court further noted as follows:

> As we have repeatedly emphasized, Congress' authority over Indian matters is extraordinarily broad and the role of courts in adjusting relations between and among tribes and their members correspondingly constrained. (Citation omitted). Congress retains authority expressly to authorize civil actions for injunctive and other relief to address violations of Section 1302 in the event that the Tribes themselves prove deficient in applying and enforcing its substantive provisions. But 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.

Since an Indian tribe's sovereign immunity is coextensive with that of the United States, a party may not maintain a claim against an Indian tribe or any of its subordinate governmental units or agents absent a firm showing of an effective waiver which is unequivocally and unmistakably expressed. Ramey Construction Company, Inc., v. Apache Tribe of Mescalero Reservation, 673 F. 2d 315, 319-320 (10th Cir. 1982). 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"**.

It is further well settled as a matter of law that the doctrine of tribal sovereign immunity applies to federally recognized Indian tribes, whether or not they are engaged in governmental or commercial activity and irrespective of whether the tribal activity occurred on or off of reservation land. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 US 751 (1998); Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 509 (1991); Sanderlin v. Seminole Tribe of Florida, 243 F.3d 1282 (11th Cir. 2001) (Tribe's agreement to abide by specific federal laws in grant applications and in affirmative assurances to federal government **do not constitute a waiver or abrogation** of tribal sovereign immunity thereunder).

In this case, there is no waiver of tribal sovereign immunity that survives the Contour Spa "Lease" because the complete lack of written Secretarial approval renders the Lease null and void *ab initio* as though it never existed. Additionally, as a result of the lack of written Secretarial approval for the pledge of the alleged Leasehold Estate, as security for a loan, the alleged Leasehold Mortgage or security interest is also null and void and without effect as being in violation of 25 U.S.C. §§ 81(b) and 415(a) as well as 25 CFR §§ 604 and 610.

Had Congress intended to abrogate tribal sovereign immunity relative to the claims asserted by Plaintiff in the 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 in American history, the U.S. 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*.

Without an express and unequivocal congressional waiver of tribal immunity, it is respectfully submitted that no Court or other tribunal is free to imply one. The overriding importance and stability of the jurisdictional bar imposed by the doctrine of tribal sovereign immunity is also found in the well settled canons of construction that require that any ambiguities or doubtful expressions in statutes and agreements regarding Indian tribes and their agents are to be **liberally construed and resolved in favor of tribes**. United States v. Nice, 241 U.S. 591, 599 (1916) (doubtful expressions are to be resolved in favor of the [Indians]).

Respectfully submitted,

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Certificate of Service

I hereby certify that on June 7, 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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