

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION**

Attorney's Process and Investigation Services, Inc.,)	
)	
)	Case No. 1:05-CV-168LRR
)	
Plaintiff,)	COMBINED RESPONSE TO
)	PLAINTIFF'S SECOND
vs.)	MOTION FOR SUMMARY
)	JUDGMENT AND REPLY
Sac and Fox Tribe of the)	IN SUPPORT OF THE TRIBE'S
Mississippi in Iowa,)	MOTION FOR SUMMARY
)	JUDGMENT
)	
Defendant.)	

ARGUMENT

In its response to the Tribe's motion for summary judgment, and in its virtually identical brief in support of its cross-motion for summary judgment, Plaintiff makes no compelling argument for denying the Tribe's motion or granting API's cross-motion. Close examination of the premises underlying API's arguments reveals why its arguments must fail; the arguments API makes require one to reject portions of the decision of the Court of Appeals for the Eighth Circuit and to consider issues that API has previously litigated and lost or issues which are not before this federal court.

The Eighth Circuit Court of Appeals decided the major issues in this case, and remanded to this Court consideration of a single narrow issue: does the Tribe's claim API converted tribal funds bring it within the jurisdiction of the Tribal Court under the first Montana exception? The answer to that question entails that this Court determine "whether the conversion claim has a sufficient nexus to the consensual relationship between Walker and API," to provide for Tribal

Court jurisdiction. Attorney's Process and Investigation Services, Inc. v. Sac and Fox Tribe of the Mississippi in Iowa, 609 F.3d 927, 941 (8th Cir. July 7, 2010) ("API Fed. App.")¹. The Tribe's brief in support of summary judgment answered that question in the affirmative. Yet rather than respond to the Tribe's succinct argument, API devotes most of its brief to rehashing issues that it has already litigated and lost, or to raising challenges to tribal court jurisdiction that are not properly before the Court.

I. THE TRIBAL COURT HAS JURISDICTION OVER API UNDER THE FIRST MONTANA EXCEPTION, REGARDLESS WHETHER IT HAS RULED ON THE APPLICABILITY OF THAT EXCEPTION.

In its response to the Tribe's motion for summary judgment, API argues that the Tribal Appeals Court held that the first Montana exception does not provide jurisdiction over the Tribe's conversion claim. The Tribe's Court of Appeals held nothing of the kind. The subtext to API's argument is that because the Tribe's Court of Appeals did not hold that the tribal courts *had* jurisdiction under the first exception, *this* Court is precluded from holding that jurisdiction exists under the first Montana exception. API's argument contains numerous fatal flaws.

First, API's argument is directly contrary to the Eighth Circuit Court of Appeals' directive that upon remand this Court must determine whether there was a sufficient nexus between API's consensual relationship with Walker, such that the first Montana exception applies. In reaching its holding, the Eighth Circuit acknowledged that it was well aware of the Tribal Court's dicta (that the Tribal Court did not view the first Montana exception as applicable). API Federal Appeal at 20 (discussing the Tribal Court of Appeals' statements related to the first Montana exception). API had repeatedly stressed to the Eighth Circuit Court the dicta in the Tribal Appeals Court's opinion, but the Eighth Circuit Court simply, and

¹ All references to API Federal Appeal refer to the Eighth Circuit Court of Appeals slip copy.

correctly, determined that nothing in the Tribal Court of Appeals opinion precluded a determination on remand of whether the first Montana exception applies.

In its Petition for a Writ of Certiorari to the United States Supreme Court, API acknowledged that its current argument is directly contrary to the Court of Appeals' holding, and to the directive given this Court on remand. In its Petition, API acknowledged that the Court of Appeals' order of remand to this Court was based upon the "implicit holding" of the Eighth Circuit that this Court is required to affirm that the Tribal Court has lawful jurisdiction even if this Court concludes that tribal court jurisdiction arises under a different Montana exception from that relied upon by the Tribal Court. API Pet. at 33-34. API made the same argument to the Supreme Court it is making here—claiming that the Court of Appeals' holding on this issue was not supported by precedent. The Supreme Court declined to review the Eighth Circuit's holding, and this Court is therefore bound to determine whether the first exception applies regardless whether the Tribal Court of Appeals held it did or not.

Second, the Eighth Circuit Court of Appeals' directive to this Court is consistent with federal law. The federal question presented to this Court is whether federal law precludes the Tribal Court from taking jurisdiction over the claims filed in the Tribal Court, not whether tribal law precludes an exercise of jurisdiction. This rule was stated by the Supreme Court in Montana, 450 U.S. 544 (1981) and has been repeated by that Court in subsequent cases. E.g., Plains Commerce Bank v. Long Family Land and Cattle Co., 128 S.Ct. 2709, 2716 (2008) ("We begin by noting that whether a tribal court has adjudicative authority over nonmembers is a federal question.").

For example, in Strate v A-1 Contractors, 520 U.S. 438 (1997), the Tribal Court of Appeals there had held Montana did not even apply to the question of whether the Tribal Court

had jurisdiction. Instead, it held that the line of cases flowing from Williams v. Lee, 358 U.S. 217 (1959) was applicable. The Court of Appeals for the Eighth Circuit rejected application of the Williams line of cases, but then (completely contrary to API's current argument), the Court of Appeals went on to determine whether either of the Montana exceptions applied. The case went to the United States Supreme Court, which *also* reviewed whether either Montana exception applied. Contrary to API's contention, which it makes without citing any case, in deciding A-1 Contractors neither the Eighth Circuit Court of Appeals nor the United States Supreme Court limited itself to reviewing the reasons cited by the Tribal Court, but instead the federal courts resolved the federal issue—whether the Tribal Court had jurisdiction. In fact, although API asserts, without citation that precedents show federal courts are limited to reviewing whether the reasons cited by the Sac and Fox Tribe of the Mississippi in Iowa Tribal Court are correct, the United States Supreme Court often decides Montana cases without even mentioning the reasons relied upon in the tribal court. See, e.g., Long, 128 S. Ct. 2709; Nevada v. Hicks, 533 U.S. 353 (2001).²

Without citing a single case in support (because there are none), API asserts that the question before this Court is whether the reasons for the Tribal Court's conclusion that it had jurisdiction over the conversion claim are the correct reasons. That is simply not the issue under federal law, and API's claim to the contrary must be rejected.³

² E.g., Harper v. Showers, 174 F.3d 716, 719 (5th Cir. 1999); Rueckert v. I.R.S., 775 F.2d 208, 212 (7th Cir.1985). The rule applicable to the present context is similar to the well-known rule that when a federal court reviews a lower court decision, it can affirm for any reason supported by the case, and that the reviewing court is not limited to the reasons relied upon by the lower court.

³ In its brief, API inexplicably asserts that if this Court issues a ruling on the first Montana exception, it will somehow be improperly forcing the Tribal Court to take jurisdiction under that exception. API is wrong. The Tribal Court has already held that it has jurisdiction over the conversion claim, and if this Court agrees, then, as a matter of tribal procedural law, it appears unlikely that the Tribal Court would need to conduct any further review of its conclusion that it has jurisdiction over the conversion claim. Nevertheless, even if this Court's decision were, as a matter of tribal procedural law, to trigger further

Third, API rests its argument upon the incorrect contention that the Tribal Court's statement regarding the first Montana exception is a holding. It is not a holding—it is, as a matter of tribal procedural law, dicta. It was clearly not necessary to the Tribal Court's conclusion that it had jurisdiction over the conversion claim.

The Eighth Circuit Court remanded this case to this Court with instructions to determine whether the first Montana exception applies to the conversion claim. If that exception does apply, then the Tribal Court has jurisdiction over the conversion claim. This Court must answer the question that was remanded to it by the Court of Appeals, not some fictitious issue concocted by API.

II. THE TRIBE HAS MADE A SUFFICIENT SHOWING THAT API'S CONVERSION OCCURRED ON THE SETTLEMENT TO SUSTAIN JURISDICTION IN THE TRIBAL COURTS.

In its Tribal Court complaint in this matter, the Tribe alleged that API committed the tort of conversion of tribal funds on the Tribe's Settlement, land that is owned by the United States in trust for the Tribe.⁴ In its limited factual challenge to Tribal Court jurisdiction, API did NOT challenge this factual allegation. Although API did not previously contest (and therefore implicitly conceded for current purposes), it did argue at length that the Tribe was required to show more than that the tort occurred on the Settlement, and API has discussed at length in prior proceedings in this Court and the Court of Appeals, its views on what, in addition to the conceded locus of the tort being on tribal land, the Tribe must show, and whether the Tribe has

review of the jurisdictional issue in the Tribal Court, this Court's decision that the Tribal Court has jurisdiction would simply not compel the Tribal Court to exercise jurisdiction to the maximum extent permitted by federal law. If the matter were subject to further review on return to the Tribal Court, the Tribal Court clearly could decline to exercise jurisdiction, and API would, no doubt, assert that the Tribal Court should decline jurisdiction over the conversion claim.

⁴ At page 14 of its brief, API incorrectly asserts that the Tribe's theory is that Walker tortuously or illegally took tribal funds and that API later received some of those funds. This is not correct. In its complaint, the Tribe clearly alleges that API converted tribal funds.

made the requisite additional showing. However, in the proceedings in the tribal court, API did NOT challenge the Tribe's allegation that all of the torts occurred on tribal land.

In its order on remand, the Court of Appeals issued holdings specific to the facts of this case and based upon the specific arguments raised by the parties. Because in the tribal courts API did not contest the allegation that all of its tortious actions, including the conversion of the Tribe's funds, were taken on tribal lands, and because this Court and the Eighth Circuit Court reaffirmed the vitality of findings of fact made by tribal courts, API Federal Appeal 13, accepting the tribal courts' findings of fact and resting their decisions on them, and because API did not raise the issue of the locus of its actions before this Court or the Eighth Circuit Court of Appeals, it is precluded from raising as an issue on remand whether the conversion occurred on tribal lands. That issue is not properly before this Court.

Independent of the sufficiency of the Tribe's uncontested allegation that the torts occurred on the Tribe's land, the Tribe alleged that the actual harm from API's activities occurred on tribal land. The complaint alleges that API committed "harm to tribal real property *and to other tribal property* on the Settlement." By definition, other tribal property includes more than real property of the Tribe. It includes tribal funds, as tribal funds are property of the Tribe. Because API did not contest the contention that it this harm to tribal property on the Tribe's land, it also cannot contest this allegation at this time. The tort of conversion was committed against tribal financial property, and the harm to the Tribe occurred on the Settlement, consequently the locus of both the tort and the harm from API's activities are already established jurisdictional facts. Because the locus of the conversion was not an issue raised by API until this remand, there has been no reason for the Tribe to discuss it prior to this brief. Yet, upon examination, because in the tribal courts API did not challenge the Tribe's allegation that the

conversion occurred on the Settlement, did not challenge those allegations before this Court, and did not challenge them before the Eighth Circuit, the allegations are established facts, ones that API is not at liberty to deny.

But now, after API has spent many years of never once contesting the locus of the tort, with API instead litigating to define what else the Tribe must show, API seeks to shift the issue to whether the locus of the conversion was on the Settlement. API's belated effort to seek to reframe the issue as one other than that which it has been litigating for years, is unavailing.⁵

The time for API to have raised that issue was about 5 years ago, and the place that API was required to raise that issue was the Tribal Court. Under the current, somewhat uncommon posture of this case, (which as this Court knows is based upon API's decision to come to this Court after making only a limited and narrow factual challenge to the Tribe's complaint) the Tribe was not required to prove predicate facts for jurisdiction. Instead, as the Court of Appeals held, the Tribe was required to establish, through its complaint, supplemented by conclusions on the jurisdictional facts that API did litigate in the Tribal Court, that the Tribal Court had

⁵ In footnote 3 of its response to the motion for summary judgment, API asserts that the Court of Appeals concluded that the conversion claim did not occur on tribal land. According to API, because the Court of Appeals did not expressly reject API's argument that the conversion did not occur on the Settlement (an argument which API had not presented, and therefore an argument which the Court of Appeals could not therefore have rejected), the Court of Appeals decision must be interpreted as a holding that API is correct and the locus of the conversion was not on the Settlement. As discussed above, the Tribe alleged that the conversion occurred on the Settlement. It did not make more specific allegations regarding some of the component parts of concluding where the conversion occurred—was the unlawful agreement to take tribal funds reached on the Settlement; did Walker initiate individual illegal exchanges of money from his home or other location on the Settlement (under applicable tribal law, in order to make a claim that the Tribe was a party to the contract and approved payments, Walker and API would necessarily have had to show that in addition to Walker being the Tribal Chairman (which he was not), the "Walker Council" approved both the contract and any individual payments while Walker and his "council" were on the Settlement); were exchanges fully completed on the Settlement, etc. Here, the Tribe has not yet obtained discovery from API regarding these component parts, API did not seek to litigate any of these component parts, and the Tribe's general allegation regarding the locus of the conversion remains undisputed.

jurisdiction. API Federal Appeal 13. This was one of the most significant issues in the Federal Court Appeals, and API lost on the issue. API Federal Appeal at 13.⁶

In its Complaint, the Tribe alleged that the conversion occurred on the Settlement. API wisely chose not to challenge the locus of the conversion claim, because if it had made that factual challenged, it would have lost. The allegation that the conversion occurred on the Settlement is established for current purposes. Id. Both in the Tribal Court and in this Court, API did not want to litigate the locus of its intentional tort. Nevertheless, contrary to API's argument, that does not mean that API prevails in this Court on remand. Under the express holding of the Eighth Circuit Court, and under the Tribal Court's notice pleading rules, the Tribe pled that API committed conversion and all of its other torts on the Settlement, and these are established facts for current purposes.

III. A SUFFICIENT NEXUS EXISTS BETWEEN API'S CONSENSUAL RELATIONSHIP WITH WALKER AND THE TRIBE'S CONVERSION CLAIM TO SUSTAIN JURISDICTION IN THE TRIBAL COURTS.

The Court of Appeals remanded this case to give this Court an opportunity to determine whether there is a sufficient nexus between API's consensual relationship with Walker and the Tribe's conversion claim to sustain jurisdiction in the Tribe's courts. As the Tribe established in its brief in support of summary judgment, the required nexus exists, because the Tribe's conversion claim stems from API's consensual relationship with Alex Walker.⁷ The Tribe's

⁶ What API attempted to do on appeal, and what it continues to try to do, is to try to spring a trap on the Tribe—it raised only a few limited factual challenges to the Tribe's complaint while in the Tribal Court, then came to federal court, asserting that it has completed all of its challenges to tribal court jurisdiction. Now it attempts to argue that the Tribe did not prove in the Tribal Court allegations API did not challenge there. The Tribal Court of Appeals, this Court, and the Eighth Circuit Court have all held that API's attempted trap is ineffective—they have all rejected API's argument.

⁷ On page 4 of its brief in support of summary judgment, the Tribe discussed the undisputed facts related to API converting tribal funds as payment for its various on-Settlement investigations and on-Settlement assaults on the Tribe's governing body. On page 9 of its response, API ironically claims that the Tribe's

regulation of API's conduct through the Tribe's conversion claim is not directed at all business activity on the Settlement, nor does the Tribe claim that the first Montana exception permits regulation of all business activity within a reservation (as API seeks to have this Court believe), the Tribe's conversion claim is directed specifically at API, and seeks to regulate API's activities in taking the Tribe's funds, and to regulate the purposes for which the Tribe's funds can be disbursed.⁸

On page 11 of its brief, API asserts, without citation, that the Tribal Court of Appeals found that the Tribe's conversion claim sounds in tort but not contract, as though that precludes any exercise of jurisdiction under the first Montana exception.⁹ Its argument is that because the first Montana exception requires a consensual relationship with a tribe or a tribal member, and because the types of consensual relationships discussed are all contractual in nature, the first exception cannot support jurisdiction based on a tort claim. That argument entirely ignores the language of the first exception. The Supreme Court stated that two things are required before a

argument is a "total non-sequitur" because the conversion claim does not seek to regulate API's investigation and attempted coup. API bases its argument on its disingenuous misrepresentation of the Tribe's argument and its clear misstatement of the Court of Appeals' holding. The Court of Appeals remanded for consideration of the nexus between API's conduct and its relationship with Walker, and the Court of Appeals directed this Court to review the links between the money API converted and API's activities on behalf of Walker. In truth, it is API's argument that is contrary to the Court of Appeals' decision. Although the conversion claim may (as a consequence of regulating API's tortious taking of tribal funds) also regulate API's investigations and attempted coup, that regulation is a secondary result of the Tribe's regulation of the conversion of its funds, which is what the Tribe was discussing on page 4 of its brief in support of its motion for summary judgment.

⁸ API's assertion that the first Montana exception does not allow regulation of all business activity within a reservation is a classic red herring; that was not the Tribe's argument, and is not the issue before the Court. Nevertheless, the first Montana exception is sufficiently broad to permit the Tribe to regulate all uses of its funds by non-members when those funds are converted by a nonmember for actions taken on the Tribe's lands. Because the issue of the scope of the first Montana exception is not before the Court (and **is not** what the Tribe argued in its opening brief), it warrants no further response.

⁹ The Tribe's conversion claim does sound in tort, but at this preliminary stage the Tribal Court has not been asked to determine, and has not determined, whether the claim also sounds in contract. The Tribal Court held that API did not have any contract with the Tribe, but has not issued the broader holding API claims.

tribe can regulate non-member conduct under the first exception.

First, a consensual relationship must exist between the non-member of the Indian tribe and either the Tribe or a tribal member. That consensual relationship can take the form of “commercial dealing, contracts, leases, or other arrangements.” 450 U.S. at 565. Here, the Eighth Circuit has already determined that a consensual relationship existed between API and Walker. Consequently, the Tribe has satisfied that element for tribal court jurisdiction, and no further inquiry regarding it is required by the Court in this remand.

Second, that conduct must have occurred within reservation boundaries. Here, as discussed above, the Tribe has established that API’s conduct took place on the Settlement, which is all trust land, and has the legal status of a reservation. If both these prerequisites are satisfied, the Indian tribe may regulate the non-member’s conduct “through taxation, licensing, or other means.” *Id.* (Emphasis added.) The very language the Supreme Court employed contemplates that the Tribe can regulate a relationship to which it was not a party; that is the very nature of sovereign regulation of activities – regulation by sovereigns, including Indian tribes, is generally directed at business interactions between others, not between the tribe and a nonmember. The express language also clearly contemplates regulation by “other means,” a phrase clearly broad enough to include regulation by means of a claim in a tribal court, whether that claim sounds in tort or contract. Therefore, the argument by API that the first exception cannot serve as the basis for a tort claim that it converted the Tribe’s funds is without merit.

But API’s argument founders on a more fundamental point; Indian tribes have retained sovereign powers of self government, including the very basic and necessary power to control disposition of its public fisc, the inherent sovereign power to regulate how government funds can disbursed, and the inherent sovereign power to regulate what constitutes a proper purpose (i.e.,

one serving the public trust) to which its funds can be applied. The briefest review of the Tribe's Constitution (which the federal government approved) reveals that the Sac & Fox Tribe retains this inherent sovereign authority, set forth in provisions expressly devoted to regulating disbursal of its funds, and the uses of its funds.

As the Tribe established in its opening brief, these explicit provisions in its Constitution regulate the methods for approving expenditures of tribal funds and regulate disbursal of tribal funds. The Tribe discussed these constitutional provisions at length in its motion for summary judgment, and discussed API's own prior assertions, now memorialized as the law of this case, that the Tribe has adjudicatory authority if it has regulatory authority. API provided no substantive response to the Tribe's detailed argument, but instead tries to evade the Tribe's argument by frivolously asserting that the Tribe did not cite any authority for its argument that the Tribe has the power to regulate disbursal of tribal funds. The Tribe did cite, and analyzed at length, authority, including express and federally approved tribal constitutional provisions. Mot. Sum. Judg. at 12. API offers no substantive response. API Br. at 14. API's inability to respond substantively to the Tribe's presentation of the constitutional authority, under which it regulates disbursal of its funds, and how those constitutional provisions form the foundation for the Tribe's conversion claim, confirms the validity of the Tribe's argument.

API's argument related to the nexus between its conversion and its consensual relationship with Walker primarily repeats the very arguments that the Eighth Circuit Court of Appeals rejected. API asserts that there is not a nexus because the "Tribe's contention [is] that [it] was a stranger to API's relationship with Walker." API Br. at 12. While the Tribe was not a party to the contract, it was hardly a stranger. The harms the Tribe suffered, and that engendered this suit, would not have occurred but for the consensual relationship API had with Walker. Had

API, through its consensual relationship with Walker, not converted tribal funds to its own use the Tribe would not have been attacked by API's mercenary army of thugs seeking to overthrow the Tribe's legitimate government, its government offices would not have been invaded, official tribal records would not have been stolen, its Casino management offices would not have been ransacked, and its Gaming Commission office would not have been broken into and sensitive files and records pillaged. The Tribe may have been a "stranger" to the contract between Walker and API, but it is certainly no stranger to the effects of API having entered into that contract. Finally, as API has repeatedly argued, its conversion had everything to do with its consensual relationship with Walker.¹⁰

¹⁰ At page 12 of its response to the motion for summary judgment, API disingenuously claims to take issue with the Tribe's showing that API has consistently argued that its conversion has everything to do with its relationship with Walker. API now claims that until now, it always asserted that its taking of tribal funds (i.e. conversion) had everything to do with its relationship with the Tribe. API is wrong—throughout this matter, API has acknowledged its relationship with Walker and has acknowledged that it took tribal funds based upon that consensual relationship. API asked the Tribal Court to determine whether or not, in that relationship, Walker was acting as the Tribe's agent. API also asserted that even if its relationship was with Walker and NOT with the Tribe that the Tribe should dismiss the conversion claim, and the core premise of API's alternative argument was a distinction between Walker and the Tribe. Even in this federal court matter, API has regularly distinguished between Walker and the Tribe, and API has repeatedly argued that the issue is whether or not Walker's acts bind the Tribe (either because API claims he was the Tribal Chairman, or because API claimed Walker had apparent authority to bind the Tribe, or because API claims Walker had federal approval). E.g., API Br. to 8th Cir. at 10 (stating that one of the primary issues on appeal was "whether Walker's [alleged] federal recognition gave him federal authority to bind the Tribe to the June 2003 Agreement." (Emphasis added)); id. at 30 (stating that the "validity of the June 2003 Agreement . . . turns on whether Walker had authority to bind the Tribe"); id. at 30-46 (API argues that the Tribe is bound by the agreement even if Walker was not the Tribe's Chairman.); API Reply Br. to 8th Cir. at 11 (asserting that "the question thus *not* whether Walker was the legitimate leader of the Tribe when he signed the June 2003 Agreement; it is whether Walker even if not the legitimate leader under tribal law, nonetheless had federal authority to bind the Tribe" (emphasis in original, internal quotations and citation omitted)). See also API Br. to 8th Cir at 3 (stating that "Walker retained API to provide . . . services to the Tribe", that "he [Walker] entered into the agreement"); id. at n.6 ("Walker and API entered their Agreement"); id. at 21 (referring to "Walker's hiring API"), id. at 26 (stating that API "got [tribal funds] from Walker" after API claims that Walker got them from the Tribe).

In the Eighth Circuit Court of Appeals, API presented an even lengthier version of its argument that there could not be a nexus between API's contract and the Tribe's conversion claim, because API's contract was with Walker and not the Tribe. The Court of Appeals rejected API's argument and directed this Court to determine whether there is a nexus between the conversion claim and API's consensual relationship with Walker. Here API consensually took tribal funds, without tribal permission, and the conversion claim arises out of API's consensual acts. The required nexus is present.

API also continues to argue, as it did in the Eighth Circuit Court of Appeals, that API is not subject to tribal court jurisdiction even if there is the required nexus because API claims that it and Walker validly agreed to settle disputes between them in arbitration. The Court of Appeals rejected that argument as well, API Fed. App. at 20, and did not remand to this Court for further consideration of the issue. As the Court of Appeals held, if the required nexus exists, then the Tribal Court had jurisdiction under the first Montana exception. The Court of Appeals reviewed whether the Tribal Court would lose jurisdiction because API allegedly agreed to arbitration of any claims between it and Walker and the Court held that the arbitration provision does not alter the analysis.

IV. WHERE API CLAIMS TO DISPUTE THE TRIBE'S FACTS BUT DOES NOT PROVIDE ANY FACTUAL BASIS FOR ITS POSITION, ITS RESPONSE DOES NOT CONSTITUTE A DISPUTE TO THE TRIBE'S STATEMENTS OF UNDISPUTED FACTS.

The Tribe's statement of undisputed facts sets forth those facts that the Tribe contends are undisputed, and contains the Tribe's citation to the portions of the record that establish that the facts are undisputed. As is well established, in response to the Tribe's statements, API cannot rest upon mere denials. Instead, if it disputes that a fact is true, it is required to provide evidentiary citations in support of its denial. Federal Rule of Civil Procedure 56 (c)(1) states:

A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

- (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
- (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Local Rule 56 provides additional clarity. It states:

A response to an individual statement of material fact that is not expressly admitted must be supported by references to those specific pages, paragraphs, or parts of the pleadings, depositions, answers to interrogatories, admissions, exhibits, and affidavits that support the resisting party's refusal to admit the statement, with citations to the appendix containing that part of the record. The failure to respond, with appropriate citations to the appendix, to an individual statement of material fact constitutes an admission of that fact.

(emphasis added).

With only a few insignificant exceptions, API does not dispute the Tribe's statement of undisputed facts, and does not meet its further duty to provide evidentiary citations in support of any dispute of the Tribe's facts. While API does not dispute, and in fact is not able to dispute, the Tribe's statements of undisputed facts, API makes improper attempts to evade its duty to this Court—a duty to either admit or to expressly deny, with factual citations, the statements in the Tribe's statements of undisputed facts.

One of API's ruses is to pretend to qualify its admission. For example, in response to the Tribe's Statement of Undisputed Fact 1 (that API had a consensual relationship with Walker), API admits this undisputed fact, but then adds the legally meaningless statement that its admission is only "for purposes of determining whether the tribal courts have jurisdiction over

the Tribe's conversion claim." Its admission is not limited to that purpose. Instead, it is for all purposes for which the Tribe is seeking summary judgment.

Similarly, in response to the Tribe's Statement of Undisputed Fact 3 (that API intentionally took \$1,022,171.26 of the Tribe's funds), API has conclusively admitted this fact for all of the purposes in the Tribe's current motion for summary judgment. API's admission is for all current purposes, regardless of API's attempt to qualify its admission as solely related to jurisdictional issues. It is also for all purposes, despite API's statement that it is only admitting that the Tribe alleged API stole this amount from the Tribe. The Tribe's statement was that API took this amount—not merely that the Tribe alleged that API took this amount. The Tribe cited indisputable and undisputed evidence in support of its claim that API intentionally took \$1,022,171.26. The Tribe's factual support was not solely based upon its tribal court complaint.¹¹ API knows it intentionally took this amount, and it therefore would not have been able to contradict the Tribe's allegation for any of the purposes of the Tribe's summary judgment motion. It had the legal duty to provide a clear admission to this Court, and instead it is patently

¹¹ As discussed in the body of this brief and prior briefs, some of the Tribe's allegations in its complaint are deemed undisputed for jurisdictional purposes, but until the Tribe filed its motion for summary judgment could have been considered disputed for other purposes. In its motion for summary judgment, the Tribe showed that all of the essential facts related to the conversion are undisputed for all purposes relevant to the current motion for summary judgment. With only one exception the Tribe cites a factual basis besides its complaint. The one exception is the Tribe's Statement of Undisputed Fact 10 (that the locus of the tort was on the Settlement). It is immaterial whether Statement of Undisputed Fact 10 is deemed undisputed solely for the jurisdictional purpose or for all other purposes, and the Court therefore need not resolve whether that statement is undisputed for all purposes. Other than this single exception, the Tribe has established that the fact is undisputed, and API has done nothing more than provide an unsupported general denial and the Court is required to hold that the fact is undisputed for all purposes.

In its attempt to qualify its responses as solely for jurisdictional purposes, as discussed above, and as the Federal Court of Appeals has made clear, many of the Tribe's allegations in its complaint are undisputed for jurisdictional purposes. For its response to the Tribe's Statement of Undisputed Fact 10 (that the tort occurred on the Settlement), API might or might not had a good faith basis for attempting to show that there were factual disputes regarding the locus of the tort and that therefore the fact was only "undisputed" for jurisdictional purposes, based upon the specific posture of this case and the procedural issues resolved by the Federal Court of Appeal. For all other facts, API did not dispute, and would not have been able to dispute, the facts alleged by the Tribe for all of the purposes of the current motion.

violating the law by making a muddled, purportedly qualified admission. As in any other summary judgment motion, the Tribe supported its claim by citation to facts, API has not denied that fact, and API has not cited facts in support of denial. It has admitted that it intentionally took \$1,022,171.26 of the Tribe's money.

In its response to the Tribe's Statement of Undisputed Facts, API seeks to deny many of the Tribe's statements based solely or partially upon API's contention that the fact stated by the Tribe is not material.¹² Under applicable law, when API does not provide any dispute to the fact, but merely makes a claim that the fact is not material, this is an admission by API that it does not dispute the fact. E.g., Linder v. Myers, 233 F.R.D. 81 (D. Puerto Rico 2005); Bridgeport Music, Inc. v. WB Music Corp., 2006 WL 903737 (M.D.Tenn.) (stating that there are only three proper responses to a movant's statement of an undisputed fact, and that "Objections are not a proper response, and neither is disputed but not material. . . . Response to statement of undisputed facts are not the place for legal argument.").

The purpose of the statement of undisputed facts and response thereto are to provide a clear record of which facts are indeed undisputed and to focus the Court's attention on the alleged facts for which the Court will be required to review the parties' competing citations to factual proof. Under applicable rules, Plaintiff had the legal duty to either admit the facts or deny the facts—it can present its claims regarding materiality in its legal argument. It is improper to argue within its response to the statement of undisputed facts that a question exists regarding materiality. Its attempt to restrict the Tribe's statement of undisputed facts to only

¹² In this District and it appears in all federal districts other than the District of Northern Georgia, a fact is "undisputed" even if a responding party claims the fact is immaterial. (The District of Northern Georgia appears to require parties to include contentions of immateriality in their responses to statements of undisputed facts, but this is a distinction without a material difference.) In all federal courts, if the Court concludes that the fact is material, and if the responding party has not made an alternative, contradicting factual contention and provided evidence in support, the fact is undisputed for all purposes in the motion for summary judgment.

some parts of the Tribe's motion for summary judgment is ineffective. Based upon the Tribe's statement of undisputed facts, and the legal discussion above, the undisputed facts include, but are not limited to, the following:

- 1) API and Walker had a consensual relationship between June 16, 2003 and October 1, 2003.
- 2) Based upon its consensual relationship with Walker, API intentionally took \$1,022,171.26 of the Tribe's funds.
- 3) API's sole benefit from its consensual relationship with Walker was its taking of \$1,022,171.26 of the Tribe's funds.
- 4) The Tribe was not a party to the June 16, 2003 contract and the Tribe had not entered into any contract with API.
- 5) Neither the Tribal Chairman nor the Tribal Council Treasurer signed any document permitting payment of tribal funds to API.
- 6) The Tribal Council did not consent to any payment of tribal funds to API.
- 7) API's sole purpose for entering into the consensual relationship with Walker was to take tribal funds in exchange for performing services designed and intended to result in the overthrow, by force if necessary, of the Tribe's lawful governing body.
- 8) Alex Walker is a member of the Tribe who, at all material times, resided on the Tribe's trust lands.
- 9) When it entered into its contract with Walker, API knew that Walker's claim to office was the subject of a vigorous dispute.

Applying these undisputed facts to the present matter, the Tribe is entitled to summary judgment, either confirming tribal court jurisdiction over the conversion claim (as discussed above) or entering an order requiring API to return the stolen funds to the Tribe, with interest (as discussed in Section 4, below).

V. IF THIS COURT WERE TO HOLD THAT THE TRIBAL COURT DID NOT HAVE JURISDICTION OVER THE CONVERSION CLAIM, THIS COURT IS REQUIRED TO ORDER API TO RETURN THE MONEY WHICH IT HAS STOLEN FROM THE TRIBE.

In its motion for summary judgment, the Tribe argued in the alternative that if this Court were to hold that the Tribal Court lacks jurisdiction to regulate API's conversion of tribal funds, the undisputed facts show that the Tribe is entitled to entry of an order requiring API to return \$1,022,171.26 of tribal funds that are wrongfully in API's possession.

API responds by asserting, "API is entitled to its day in court." API Br. at 2. API is receiving its day in court. As in many cases, that day in court comes in a motion for summary judgment. Here, the Tribe provided undisputed evidence of all of the elements of a conversion claim. API took the Tribe's money without lawful consent and it continues to refuse to return the funds. API's claim that it took the funds pursuant to a contract with the Tribe was definitively rejected. API has a legal duty to return the stolen money to the Tribe. In fact, if it does not return the money, it will be committing a criminal violation of 18 U.S.C. 1163 (theft from an Indian tribal organization).

The applicable rule of law here is that, other than when entering a judgment by default the Court "should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings". Fed. R. Civ. Proc. 54(c). In the present matter, the Tribe has established that it is entitled to return of its money. API has not contested that on the law or on the facts, and if this Court were to hold that the Tribal Court lacks jurisdiction over the conversion claim, it must enter an order requiring API to comply with its established legal duty to return the tribal funds that API currently and wrongfully retains.

CONCLUSION

For all of the reasons stated herein, this Court should deny API's motion for summary judgment and should grant the Tribe's motion for summary judgment. This Court should hold

that the Tribal Court has jurisdiction over the conversion claim, or in the alternative, it should enter an order requiring API to return the money that API stole from the Tribe.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the following document, Combined Response to Plaintiff's Second Motion for Summary Judgment and Reply in Support of the Tribe's Motion for Summary Judgment, was filed and served by electronic filing via CM/ECF to the Clerk of Court for the Northern District of Iowa and opposing counsel in compliance with the LR 10.c.3 on May 2, 2011.


Christina Nogle