

THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE STILLAGUAMISH TRIBE OF)
INDIANS, a federally-recognized Indian tribe,)
)
Plaintiff,)
)
v.)
)
PILCHUCK GROUP II, L.L.C., a Washington)
Limited Liability Company)
)
Defendants.)
_____)

No. C10-995 RAJ

**MOTION FOR PRELIMINARY
INJUNCTION ENJOINING
ARBITRATION**

**NOTED FOR CONSIDERATION
FRIDAY, JULY 16, 2010**

I. INTRODUCTION

The Stillaguamish Tribe of Indians (the “Tribe”) brings the present motion requesting that the Court issue a preliminary injunction enjoining the arbitration initiated by Defendant Pilchuck Group II, L.L.C. (“Pilchuck II”) against the Tribe.

II. FACTUAL BACKGROUND

The Tribe is a federally-recognized Indian Tribe with headquarters in Arlington, Washington. The Tribe gained federal recognition in 1976 and adopted a Constitution on June 18, 1986. *See* Constitution of the Stillaguamish Tribe of Indians of Washington (the “Constitution”), attached as Ex. A to the Declaration of Alexandra K. Smith in Support of Motion for Preliminary Injunction (June 24, 2010) (“Smith Dec.”). Pursuant to the Tribe’s Constitution, the Tribe is governed by a six member Board of Directors (the “Board”), from

1 which a Chairman and other officers are selected. *Id.* at Art. IV (Smith Dec., Ex. A). The
 2 Board is vested with “[a]ll the powers and legal authority, express, implied, or inherent, which
 3 are vested or acknowledged by existing Federal Law in the Stillaguamish Tribe as a sovereign
 4 political entity[.]” *Id.* at Art. VII, Sec. 1. This grant of authority to the Board includes the
 5 power to “administer the affairs and assets of the [T]ribe . . . under appropriate contracts” and
 6 to “prevent the sale, disposition . . . or encumbrance of . . . tribal assets.” *Id.*, at Art. VII, Sec.
 7 1(b), (c).

8 A duly elected Board has governed the Tribe and conducted business on behalf of the
 9 Tribe since the adoption of its Constitution. *See* Declaration of Jody R. Soholt in Support of
 10 Motion for Preliminary Injunction, at ¶ 2 (June 22, 2010) (“Soholt Dec.”). The Board takes
 11 official action through resolutions, which are adopted when a majority (or more) of the Board
 12 members vote for passage. *Id.*; Constitution at Art. XIII, § 4 (Smith Dec., Ex. A). Before a
 13 contract can be signed on the Tribe’s behalf, the Board must adopt a resolution authorizing
 14 the Tribe’s entry into the contract. Soholt Dec., at ¶ 3; Constitution at Art. VII, § 1(b); Art.
 15 XIII, § 4 (Smith Dec., Ex. A). Similarly, the only way the Tribe’s sovereign immunity can be
 16 waived is if the Board adopts a resolution explicitly doing so, or specifically approves any
 17 document that purports to do so. *Id.*

18 In July of 2006, the Tribe’s Board was comprised of a Chairman, Shawn Yanity; a
 19 Vice-Chairman, Edward L. Goodridge, Jr.; a Secretary, Darcy Dreger; a Treasurer, Jody
 20 Soholt; and two members, LaVaun Tatro and Marlice DeLys. Soholt Dec., at ¶ 4. On July
 21 15, 2006 a document entitled “Working Agreement By and between Stillaguamish Tribe of
 22 Indians and Pilchuck Group II and Dave Nelson and Nathan Chapman” (the “Agreement”)
 23 was signed by David L. Nelson, on behalf of Pilchuck II, and Edward L. Goodridge, Sr.
 24 (“Goodridge Sr.”), ostensibly signing on behalf of the Tribe. *See* Agreement, at 14 (Smith
 25 Dec., Ex. B). At the time he signed the Agreement, Goodridge Sr. was not a member of the
 26 Tribe’s Board. Soholt Dec., at ¶ 4.

1 The Agreement provides that disputes between the parties that cannot be resolved
 2 amicably are to be resolved through binding arbitration. *See* Agreement at 9, § 10.2 (Smith
 3 Dec., Ex. B). The Agreement also contains a provision that purports to waive the Tribe's
 4 sovereign immunity for the limited purpose of permitting suits and/or arbitration to enforce
 5 the terms of the Agreement. *Id.* at 10, § 11.1.

6 The Tribe's official records demonstrate that no resolution was passed authorizing
 7 Goodridge Sr. to sign the Agreement on the Tribe's behalf. *See* Soholt Dec., at ¶¶ 4-5, and
 8 Ex. A attached thereto (Index to Board of Directors Resolutions for 2006). There is no
 9 evidence the Board passed a resolution approving the Agreement or passed a resolution
 10 approving the Tribe's entry into the Agreement. *Id.*¹ There is also no evidence the Board
 11 passed a resolution approving or agreeing to arbitrate disputes arising from the Agreement or
 12 authorizing the Agreement's purported limited waiver of sovereign immunity. *Id.* Without a
 13 Board resolution approving the Agreement or authorizing anyone to sign it on the Tribe's
 14 behalf, the Tribe did not agree to be bound by the Agreement or any of the provisions therein,
 15 and the Tribe could not have waived its sovereign immunity for claims arising out of the
 16 Agreement. Constitution, Art. VII, § 1(b); Soholt Dec., at ¶ 7.

17 In January of this year, claiming the Tribe had failed to perform under the Agreement,
 18 Pilchuck II sent the Tribe a Demand for Arbitration and Notice of Intent to Arbitrate. *See*
 19 Letter from Harry H. Schneider, Jr. to Alexandra K. Smith (January 26, 2010) (Smith Dec.,
 20 Ex. C). The Tribe responded that it did not have any evidence that the Tribe's Board
 21 authorized Goodridge Sr. to sign the Agreement and did not believe the Agreement, its
 22

23 ¹ There is a resolution passed in 2006 that relates to a different entity called Pilchuck Group, L.L.C. *See* Soholt
 24 Dec., Ex. B, at 1 (Resolution 06/017 "Approval of Operating Agreement of Pilchuck Group LLC"). As the
 25 Resolution itself indicates, the Operating Agreement is for a separate company called Pilchuck Group L.L.C.
 26 ("Pilchuck I"), of which the Tribe was a part. Pilchuck I has different officers and directors and a separate
 corporate existence from Pilchuck II, and was formed six months earlier than Pilchuck II. *Contrast*, Corporate
 information on file with the Secretary of State's Office for Pilchuck I and Pilchuck II, Smith Dec. at Exs. H and I
 respectively.

1 dispute resolution provision, or its limited waiver of tribal sovereign immunity, were
 2 enforceable against the Tribe. *See* Letter from Alexandra K. Smith to Harry H. Schneider, Jr.
 3 (February 26, 2010) (Smith Dec., Ex. D). The Tribe therefore declined to participate in an
 4 arbitration unless Pilchuck II could provide it with evidence that the Tribe's Board had, in
 5 fact, authorized the Tribe's entry into the Agreement. *Id.* Pilchuck II did not respond to the
 6 Tribe, and instead submitted the dispute for arbitration with Judicial Arbitration and
 7 Mediation Service ("JAMS") in Seattle, Washington. *See* Letter from Michele Wilson of
 8 JAMS to the parties (April 14, 2010) (Smith Dec., Ex. E). In response, the Tribe reiterated its
 9 position that neither the Working Agreement nor any of its provisions were enforceable
 10 against the Tribe, and the Tribe again declined to participate in an arbitration. *See* E-mail
 11 from Alexandra K. Smith to Nicholas A. Manheim (May 4, 2010) (Smith Dec., Ex. F).

12 Shortly thereafter, JAMS officially commenced the arbitration. *See* Letter from
 13 Michele Wilson of JAMS to the parties (May 6, 2010) (Smith Dec., Ex. G). On May 21,
 14 2010, the Tribe also notified JAMS that it did not believe that Pilchuck II's asserted dispute
 15 with the Tribe was arbitrable and because the Tribe had not waived its sovereign immunity as
 16 to any such dispute, JAMS was without jurisdiction over the Tribe. Smith Dec., at ¶ 9.

17 **III. ARGUMENT**

18 Federal Rule of Civil Procedure 65(a) authorizes the issuance of a preliminary
 19 injunction to preserve the position of the parties until a full hearing or trial is conducted. *LGS*
 20 *Architects, Inc. v. Concordia Homes*, 434 F.3d 1150, 1158 (9th Cir. 2006). A party seeking a
 21 preliminary injunction must show either "(1) a combination of probable success on the merits
 22 and the possibility of irreparable injury, or (2) that serious questions are raised and the
 23 balance of hardships tips sharply in [their] favor[.]" *Stuhlberg Int'l. Sales Co. v. John D.*
 24 *Brush & Co., Inc.*, 240 F.3d 832, 839-40 (9th Cir. 2001). The two formulations are two points
 25 on a sliding scale, "in which the required degree of irreparable harm increases as the
 26 probability of success decreases." *Roe v. Anderson*, 134 F.3d 1400, 1402 (9th Cir. 1998); *see*

1 *also Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003).
 2 The granting of a preliminary injunction is reviewed for abuse of discretion. *San Antonio*
 3 *Community Hospital v. S. Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1233 (9th Cir.
 4 1997).

5 Here, the Tribe is entitled to a preliminary injunction because it can make a clear
 6 showing of probable success on the merits of its claim that neither the Agreement's arbitration
 7 provision nor its limited waiver of sovereign immunity in the Agreement are enforceable
 8 against the Tribe, and the Tribe can demonstrate the requisite irreparable harm if it is forced to
 9 participate in the arbitration.

10 **A. The Tribe is Likely to Succeed in Establishing That the Pilchuck II Agreement is**
 11 **Not Enforceable Against the Tribe.**

12 The Federal Arbitration Act ("FAA") creates "a body of federal substantive law of
 13 arbitrability[.]" *Moses H. Cone Mem'l. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24
 14 (1983). The FAA allows district courts to either compel arbitration where necessary, or
 15 courts may enjoin a claim from being arbitrated where a dispute is not properly subject to
 16 arbitration. 9 U.S.C. § 4; *see also Textile Unlimited, Inc. v. A. BMH and Co., Inc.* 240 F.3d
 17 781, 785-86 (9th Cir. 2001) (upholding a preliminary injunction preventing arbitration).
 18 Similarly, Washington's Uniform Arbitration Act (the "Washington Act") sets forth
 19 procedures by which a court can enforce an arbitration clause or resolve disputes about
 20 whether a particular claim is arbitrable. RCW 7.04A.070.

21 Sovereign immunity precludes arbitration of claims when the sovereign has not
 22 waived its immunity. *E.g. Memphis Biofuels, L.L.C. v. Chickasaw Nation Indus.*, 585 F.3d
 23 917, 923 (6th Cir. 2009) (upholding denial of motion to compel arbitration because the Tribe
 24 had not waived its sovereign immunity). Similarly, contractual arbitration agreements are
 25 unenforceable when the contract as a whole is unenforceable. *See Moses H. Cone Mem'l.*
 26 *Hospital*, 460 U.S. at 19. Here, the claims Pilchuck II seeks to arbitrate against the Tribe are

not subject to arbitration because there is no evidence the Tribe's Board waived the Tribe's sovereign immunity as to Pilchuck II's claims or authorized the Tribe's entry into either the Agreement or its arbitration provision. *See Bruce H. Lien Co.*, 93 F.3d 1412, 1417 (8th Cir. 1996) (finding a tribe's challenge to the validity of a contract "calls into question all provisions contained therein . . . including provisions relating to arbitration [and] sovereign immunity").

1. The Tribe Did Not Waive its Sovereign Immunity as to Pilchuck II's Claims

Federally-recognized Indian tribes enjoy sovereign immunity from suit. *Pit River Home and Agric. Coop. Ass'n. v. United States*, 30 F.3d 1088, 1100 (9th Cir. 1994). Tribal sovereignty and its corresponding right of sovereign immunity from suit are inherent powers that can only be restricted by the federal government. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982) (noting tribes "retain all inherent attributes of sovereignty that have not been divested by the federal government"). Suits against Indian tribes are therefore barred by sovereign immunity "absent a clear waiver by the tribe or congressional abrogation." *Oklahoma Tax Comm'n. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991). Further, tribal sovereign immunity extends to "suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 760 (1998). Here, there is no statute or other act by which Congress waived the Tribe's sovereign immunity from suit by Pilchuck II. Absent an express waiver by the Tribe, therefore, Pilchuck II's claims cannot proceed.

Waivers of tribal sovereign immunity "cannot be implied . . . but must be unequivocally expressed." *State of Florida v. Seminole Tribe*, 181 F.3d 1237, 1243 (11th Cir. 1999). Further, for any waiver to be effective, it must be "clearly expressed" in the manner specified by the tribe's governing documents. *E.g., Memphis Biofuels*, 585 F.3d at 922

(finding a waiver of sovereign immunity ineffective when the tribe's charter required the governing body pass a resolution waiving immunity, and no such resolution was passed); *Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282, 1287-88 (11th Cir. 2001) (no effective waiver of sovereign immunity without a resolution from the tribal council doing so, as required by the tribe's charter); *World Touch Gaming, Inc. v. Massens Mgmt, L.L.C.*, 117 F. Supp. 2d 271, 275 (N.D. N.Y. 2000) (waiver of sovereign immunity only valid if, pursuant to the tribe's constitution and code, the waiver is authorized by tribe's governing council).

Here, the Tribe's Constitution vests the Board with "all the powers and legal authority, express, implied or inherent which are vested or acknowledged . . . in the Stillaguamish Tribe as a sovereign political entity." Constitution, Art. VII, § 1. These powers include inherent sovereign authority over the Tribe's members and land, as well as the corresponding power to assert (or waive) one aspect of that sovereignty -- immunity from suit. *See id.*; *see also Oklahoma Tax Comm'n. v. Citizen band of the Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) (tribal sovereignty includes immunity from suit). The Tribe's Board exercises these essential, inherent powers on behalf of the Tribe only through written resolutions. *Soholt Dec.*, at ¶ 3. Therefore, without a Board resolution expressly and unequivocally waiving the Tribe's immunity, there is no waiver. *Id.*, at ¶ 7; *see also Memphis Biofuels*, 585 F.3d at 922 (finding that because "the board of directors did not pass a resolution waiving sovereign immunity" the tribe's "sovereign immunity remains intact").

This holds true even if Pilchuck II wrongly believed, or was misled into believing, that Goodridge Sr. had the requisite authority to waive the Tribe's immunity. *See World Touch Gaming*, 117 F. Supp.2d at 276 (neither apparent nor implicit authority can waive a tribe's sovereign immunity). Indeed, it is axiomatic that "[a] tribal official cannot waive the tribe's immunity unless authorized to do so by tribal law." 42 C.J.S. Indians, § 22; *Memphis Biofuels*, 585 F.3d at 922 (collecting cases that hold unauthorized acts of tribal officials cannot waive tribal sovereign immunity); *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*,

1 546 F.3d 1288, 1295 (10th Cir. 2008) (finding misrepresentations by tribal officials or
 2 employees cannot affect the tribe's immunity from suit). Therefore, unless Goodridge Sr. was
 3 authorized under the Tribe's laws to waive the Tribe's immunity, there can be no waiver.

4 Yet, the only way the powers or authorities in the Tribe's Constitution can be
 5 delegated to an individual tribal member or official is through a duly enacted resolution.
 6 Soholt Dec., at ¶ 3. Because there is no resolution delegating the power to waive the Tribe's
 7 sovereign immunity to Goodridge Sr., his signature on a contract that purports to do so is
 8 unauthorized and any such waiver is ineffective. *See id.*; *see also Sanderlin*, 243 F.3d at
 9 1287-88 (without a resolution authorizing a tribal official to do so, the tribal official "did not
 10 have actual or apparent authority to waive the [t]ribe's sovereign immunity"); *Attorney's*
 11 *Process and Investigation Serv., Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, 2009 WL
 12 1783497 at * 7 (N.D. Iowa 2009) (same). Because the Tribe's Board never passed a
 13 resolution delegating authority to Goodridge Sr. to waive the Tribe's sovereign immunity in
 14 the Agreement, the Tribe's sovereign immunity remains intact and Pilchuck II's claims cannot
 15 proceed against the Tribe in any forum. *See Memphis Biofuels*, 585 F.3d at 922; *see also*
 16 *Kiowa*, 523 U.S. at 758 ("[t]his result may seem unfair, but that is the reality of sovereign
 17 immunity").

18 **2. The Tribe Did Not Agree to Arbitrate Pilchuck II's Claims**

19 The party seeking to enforce an arbitration agreement bears the burden of showing the
 20 agreement to arbitrate exists and that its terms bind the other party. *Sanford v. Memberworks,*
 21 *Inc.*, 483 F.3d 956, 962 (9th Cir. 2007). This burden is substantial:

22 Before a party . . . can be ordered to arbitrate and thus be deprived of a day
 23 in court, there should be an express, unequivocal agreement to that effect .
 24 . . . [When a party claims] that no agreement to arbitrate had been made
 25 between the parties, [the court] should give the [party opposing
 26 arbitration] the benefit of all reasonable doubt and inferences that may
 arise.

1 *Three Valleys Mun. Water Dist. V. E.F. Hutton & Co.*, 925 F.2d 1136, 1141 (9th Cir. 1991).
 2 Here, Pilchuck II cannot satisfy its burden of showing an agreement to arbitrate exists between
 3 it and the Tribe.

4 The Tribe's Constitution vests the Board with authority to "administer the affairs and
 5 assets of the [T]ribe . . . under appropriate contracts[.]" Constitution, Art. VII, § 1(b).
 6 Accordingly, for the Tribe to be bound by a contract that could impact the assets of the Tribe,
 7 the Board must have either passed a resolution approving entry into the contract, or passed a
 8 resolution delegating authority to a specific individual to enter into the contract. *Soholt Dec.*,
 9 at ¶ 3. As set forth above, there is no evidence the Board ever passed a resolution authorizing
 10 Goodridge Sr. to sign the Agreement on the Tribe's behalf or bind the Tribe to its terms. This
 11 means neither the Agreement, nor its requirement that disputes arising under it be submitted to
 12 binding arbitration is valid, and the Agreement cannot be enforced against the Tribe. *See Bruce*
 13 *H. Lien Co.*, 93 F.3d at 1417 (finding a lack of signatory power called into question the
 14 validity of the contract as a whole, including its provisions relating to arbitration); *see also*
 15 *AT&T Techs, Inc. v. Communications Workers*, 475 U.S. 643, 648 (1986) (finding arbitration
 16 is a matter of contract and a party cannot be required to submit to arbitration any dispute he
 17 did not agree to arbitrate). Because the Tribe never entered into an Agreement with Pilchuck
 18 II, let alone agreed to arbitrate disputes that arose between it and Pilchuck II, the Tribe has met
 19 its burden of establishing it is likely to succeed on the merits of its claims for declaratory and
 20 injunctive relief enjoining Pilchuck II's arbitration. *See Textile Unlimited, Inc. v. A..BMH and*
 21 *Co., Inc.* 240 F.3d 781, 786 (9th Cir. 2001) (upholding the grant of a preliminary injunction
 22 enjoining arbitration).

23 **B. The Tribe Will Suffer Irreparable Harm if it is Forced to Participate in Pilchuck**
 24 **II's Arbitration**

25 If forced to participate in Pilchuck II's arbitration, the Tribe will also suffer irreparable
 26 harm because it will be forced to expend significant time and resources defending against

Pilchuck II's claims when there is no valid contract or agreement to arbitrate in the first place. *See e.g., Merrill Lynch Inv. Managers v. Optibase, Ltd.*, 337 F.3d 125, 129 (2d Cir. 2003) (finding irreparable harm would result if a party was forced to arbitrate claims it had not agreed to arbitrate); *Maryland Casualty Co. v. Realty Advisory Bd. On Labor Rels.*, 107 F.3d 979, 984-85 (2d Cir. 1997) (time and resources spent in arbitration constitute irreparable harm); *Textile Unlimited*, 240 F.3d at 786 (upholding a finding of irreparable harm and the issuance of a preliminary injunction enjoining arbitration). Even where, as here, the contract at issue allows the prevailing party to recover attorneys fees, the time and human capital needed by the Tribe to arbitrate Pilchuck II's dispute through to a favorable decision will likely not be fully compensated. *See Maryland Casualty*, 107 F.3d at 985. These uncompensable costs are the kind of irreparable harm that support the granting of a preliminary injunction. *Id.*

In addition, if this preliminary injunction is not granted, the Tribe believes Pilchuck II could attempt to proceed with the arbitration, with or without the Tribe's participation, or might move to compel arbitration. This forces the Tribe to choose between participating in the arbitration to protect against an arbitrator issuing an adverse judgment in the Tribe's absence (and potentially risk being deemed to have waived its sovereign immunity by doing so),² or not participating and risking being bound by a proceeding it did not participate in. *See e.g., Oglala Sioux Tribe v. C&W Enterprises, Inc.*, 542 F.3d 224, 231 (8th Cir. 2008) (finding a tribe's participation in an arbitration to constitute a waiver of its sovereign immunity). Either alternative harms the Tribe's interests in preserving its inherent sovereignty and its resources, and the Tribe would be irreparably harmed by having to choose either option.

² The Tribe can raise the defense of sovereign immunity to the arbitrator; however, if it does so, a court's review of the Tribe's sovereign immunity will be limited to reviewing the arbitrator's decision on that issue, rather than de novo review. *George Day Const Co. v. United Brotherhood of Carpenters & Joiners*, 722 F.2d 1471, 1476 (9th Cir. 1984) ("once a party has "initially submitted the arbitrability question to the arbitrator, any subsequent judicial review [is] narrowly circumscribed" to a review of the arbitrator's decision).

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IV. CONCLUSION

The Tribe has met its burden of showing it is likely to succeed on the merits of its of its claims for declaratory and injunctive relief. The evidence demonstrates the Tribe's Board never waived the Tribe's sovereign immunity as to Pilchuck II's claims, and never authorized the Tribe's entry into the Pilchuck II Agreement or its arbitration provision, and never authorized Goodridge Sr. to do so. Further, the Tribe would suffer irreparable harm if forced to participate in Pilchuck II's arbitration. The Tribe respectfully requests that the Court grant its motion and issue a preliminary injunction enjoining Pilchuck II's arbitration.

DATED this 24th day of June, 2010

LANE POWELL PC

By: /s/ Alexandra K. Smith
Alexandra Smith, WSBA No. 20058
LANE POWELL PC
111 Market Street N.E., Suite 360
Olympia, WA 98501-1070
(360) 754-6001
smitha@lanepowell.com

CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned certifies under penalty of perjury under the laws of the State of Washington, that on the 24th day of June, 2010, the motion attached hereto, the Declaration of Alexandra K. Smith in support of the motion (with attachments), the Declaration of Jody R. Soholt in support of the motion (with attachments), and a proposed order were filed with the Court's CM/ECF system. In addition, on June 24, 2010, copies of the foregoing were e-mailed and mailed to:

Harry H. Schneider, Jr.
Nicholas Manheim
Perkins Coie L.L.P.
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
hschneider@perkinscoie.com
nmanheim@perkinscoie.com

Executed on 24th day of June, 2010, at Seattle, Washington.

/s/ Alexandra K. Smith

Alexandra K. Smith