CASE NO. 11-11997 FF

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

Appellant,

vs.

SEMINOLE TRIBE OF FLORIDA,
a federally recognized Indian tribe,

Appellees.

On Appeal of a Final Judgment of the United States
District Court for the Southern District of Florida
Case No.: 10-cv-60483-WJZ

APPELLEES' REPLY BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Contour Spa at the Hard Rock, Inc. vs. Seminole Tribe of Florida, et al.
Case No: 11-11997-FF

Pursuant to Eleventh Circuit Rule 26.1-1, the undersigned counsel for Appellees hereby certifies that the following is a list of persons and entities who may have an interest in the outcome of this case:

INTERESTED PERSONS

1. Peter Kneski, Esq.
2. Paul Kneski, Esq.
3. Kneski & Kneski
4. Contour Spa at the Hard Rock, a Florida corporation
5. Fanit Panofsky
6. United States Department of the Interior
7. Dirk Kempthorne (Secretary of the Interior)
8. Franklin Keel, Eastern Regional Director, Bureau of Indian Affairs
9. Honorable William J. Zloch, USDC, FLSD
10. Honorable Robin S. Rosenbaum, US Magistrate Judge, USDC, FLSD
11. David Shottenfield, Esq.
12. Seminole Tribe of Florida
13. Donald A. Orlovsky, Esq.
14. Kamen & Orlovsky, P.A.
15. John H. Harrington, Esq. (Office of the Solicitor General, S.E. Region)
16. Mitchell Cypress, Chairman, Seminole Tribe of Florida (Defendant)
17. Richard Bowers, Vice-Chairman, Seminole Tribe of Florida (Defendant)
18. Max B. Osceola, Jr., Council Member, Seminole Tribe of Florida (Defendant)
19. Andrew J. Bowers, Council Member, Seminole Tribe of Florida (Defendant)
20. David Cypress, Council Member, Seminole Tribe of Florida (Defendant)

21. Honorable Herbert M. Stettin
22. Eric Dorsky, Esq.
23. Jim Shore, Esq., General Counsel, Seminole Tribe of Florida
24. James F. Allen, CEO, Seminole Gaming
25. Brad Buchanan, CFO, Seminole Gaming
26. Christian Mari, Seminole Hard Rock Hotel & Casino
27. Phil Madow, President, Seminole Hard Rock Hotel & Casino

CORPORATE DISCLOSURE

In this regard to "corporate disclosure," there are no publicly traded companies with an interest in the outcome of this matter.

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C.§ 1291. This district court had federal question jurisdiction under 28 U.S.C.§ 1331 which warranted removal pursuant to 28 U.S.C. §§ 1441 and 1446.

STATEMENT OF THE ISSUES

1. Whether the Tribe's removal of Plaintiff's claims from state court constitutes a waiver of tribal sovereign immunity under the authority of Lapides v. Board of Regents of the University System of Georgia, 536 U.S.613 (2002) which held that a state's voluntary removal of a case from state to federal court constituted a waiver of Eleventh Amendment Immunity?

2. Whether the Indian Civil Rights Act, 25 U.S.C.§ 1301 creates an implied cause of action against an Indian tribe in favor of a non-Indian who claims to have had property taken by the Tribe and has no other remedy to sue the Tribe for damages or other relief ?

3. Whether the Seminole Tribe of Florida may be equitably estopped from asserting tribal sovereign immunity ?

STATEMENT OF THE STANDARD OF REVIEW

The standard of review for an order dismissing a case for lack of subject matter jurisdiction under Rule 12 (b)(1), Fed. R. Civ. P. is *de novo*. Sanderlin v. Seminole Tribe of Florida, 243 F. 3d 1282 (11th Cir. 2001).

STATEMENT OF THE FACTS AND OF THE CASE

The Facts: Defendant, Seminole Tribe of Florida (hereinafter "Seminole Tribe") is a federally recognized Indian tribe that owns and operates the Hard Rock Hotel and Casino Hollywood (hereinafter "the Hard Rock") located in Hollywood, Florida.

DE 16, ¶¶ 4 & 32. Defendant Mitchell Cypress is the Chairman of the Tribal Council of the Seminole Tribe of Florida. Id. at ¶ 5. Plaintiff, Contour Spa at the Hard Rock, Inc. (hereinafter "Plaintiff" or "Contour Spa") is a Florida corporation that owned and operated a spa facility located inside the Hard Rock via a long term lease agreement (hereinafter "lease") with Seminole Tribe from July 18, 2003, until March 17, 2010. See DE 16, ¶¶ 32-76 and DE 31, p. 1.

The Lease was signed in November 2003. It called for an initial term of ten years followed by four renewal terms of five years each. DE 28, p. 2. Under the putative Lease, Seminole Tribe agreed to waive its tribal sovereign immunity from suit as to certain lawsuits that Plaintiff might bring. See DE 16-3, s. 22.29. Under section 415 (a) of Title 25 of the United States Code, Congress made the Lease's validity expressly conditioned upon the Secretary of the Interior (Secretary), providing signed written approval of the Lease. The contract assigned the Chairman of the Seminole Tribal Council, Mitchell Cypress, the duty of submitting an application for lease approval to the Secretary. This much he did, but that application was never approved.

Plaintiff contends that it was not until June 29, 2007, when Defendant first disclosed that it had never obtained secretarial approval of the lease. Plaintiff then wrote to the Interior Secretary to verify this claim. DE 16, ¶ 63. In October 2007, the Secretary confirmed that although the Seminole Tribe had submitted an

application, the Secretary had sent a reply letter to the Tribe noting several deficiencies in the application for lease approval and requested that the Tribe correct said deficiencies and re-submit its application. Id. Plaintiff contends that it then spent the ensuing two years repeatedly cajoling Defendant Seminole Tribe to re-submit its application, but to no avail. DE 16, ¶ 66.

On March 17, 2010, at approximately 10:00 p.m., Seminole Tribe's Counsel e-mailed a letter to Plaintiff informing it that the Tribe had elected to permanently close Plaintiff's business since no valid lease existed. DE 16, ¶ 75. On March 18, 2010, the Seminole Tribe had locked the premises and used its security personnel to deny Plaintiff access to the premises. DE 16, ¶ 76.

The Case: Plaintiff 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") 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. A copy of the Lease is attached to the Amended Complaint as Exhibit "C." (DE 16).

On May 10, 2010, Plaintiff filed and served an Amended Complaint (DE 16) through which additional claims were asserted against the Tribe, the Chairman and two additional unknown parties designated as the John Doe and Richard Roe defendants against which state law claims have been asserted.

In the Amended Complaint, Plaintiff purports to assert the following claims for relief, each of which mistakenly 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 long term lease of restricted tribal trust land in reservation status, legally titled in the name of the United States of America, 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 unapproved Lease as required by federal law and associated federal regulations. 25 U.S.C. § 415 (a) and 25 C.F.R. § 604. 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. See, U.S. CONST. art. I § 8 cl. 3 and 25 U.S.C. §§ 81(b), 177 and 415(a).

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 without which not valid least exists.

In addition, 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 under 25 U.S.C. §81 and 415(a) as well as 25 C.F.R. Part 162 "Leases and Permits." Moreover, 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, Contour Spa's unapproved Lease is void *ab initio* as are all of its terms, including the severability clause and the waiver of tribal sovereign immunity contained therein.

The District Court found that the Seminole Tribe never validly waived its sovereign immunity, and accordingly granted the Seminole Tribe's Motion to Dismiss (DE 28) for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). For the same reason, the Court also granted Chairman Cypress' Motion To Dismiss (DE 31) for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), or in the alternative, under Fed. R. Civ. P. 12(b)(6). The Court also remanded the remaining state law claims back to state court.

SUMMARY OF THE ARGUMENT

It is well settled that Indian tribes enjoy common-law immunity from suit in state and federal court by virtue of their status as sovereign tribal governments. Kiowa Tribe v. Manufacturing Technologies, Inc., 523 U.S. 751, 754 (1998) citing United States v. U.S. Fidelity & Guaranty Co. , 309 U.S. 506, 512 (1940); Sanderlin v. Seminole Tribe Of Florida, 243 F. 3d 1282, 1285 (11th Cir. 2001). "Sovereign immunity is jurisdictional in nature." F.D.I.C. v. Meyer, 510 U.S. 471, 475 (1994). Under federal law, "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." Kiowa Tribe, 523 U.S. at 754. Waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (quoting United States v. Testan, 424 U.S. 392, 399 (1976)).

Plaintiff argues that Defendants should be estopped from asserting the lease's lack of secretarial approval because Seminole Tribe allegedly made oral and written misrepresentions to Plaintiff that it had obtained Secretarial approval prior to the Spa's opening, a contention which is contradicted in the same breadth by Plaintiff's own statements regarding verification that it obtained from the Secretary some three years before Contour Spa was ousted. Even assuming Defendant Seminole Tribe made these assertions, it is unlikely that equitable contract principles apply to agreements that are subject to 25 U.S.C. § 81. The Ninth and Tenth Circuit Courts of Appeals have both so held.

Plaintiff argues that even if the Seminole Tribe's waiver of sovereign immunity was ineffective, this does not bar Plaintiff's claim for violation of the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301, et seq. Plaintiff contends that the ICRA was enacted in 1968 to "insure that the American Indian is afforded the broad constitutional rights secured to other Americans" and to "protect individual Indians from arbitrary and unjust actions of tribal governments." Santa Clara, 436 U.S. at 72-73 (White, J., dissenting) (quoting S. Rep. No. 841, 90th Cong., 1st Sess., 6 (1967)). As Plaintiff is surely aware, ***the ICRA does not provide for an express cause of action to enforce its provisions, with the exception of a petition for a writ of habeus corpus.***

Plaintiff argues that Seminole Tribe waived its sovereign immunity by voluntarily removing the above-styled cause to federal court. The Eleventh Circuit has not addressed this rather novel argument, and Contour Spa does not dispute that the law is far from settled in this area. DE 32, p. 10. In fact, Plaintiff can point to only one case adopting its reasoning. In State of New York v. The Shinnecock Indian Nation, 523 F. Supp. 2d 185 (E.D.N.Y. 2007), the district court found that the Shinnecock Nation (which was not federally recognized), waived its sovereign immunity by removing a state court action to federal court. The court reached this result by extending the Supreme Court's decision in Lapides v. Board of Regents of the University System of Geogia, et al. , 535 U.S. 613 (2002), to an unrecognized and non-sovereign tribe with respect to an aboriginal land claim.

In addition to the foregoing, the laws justifying removal in this case followed by dismissal on sovereign immunity grounds are laws over which federal and not state courts have original and exclusive jurisdiction. The case never belonged in a state court to begin with. Accordingly, removal of the case to the appropriate Court having original and exclusive jurisdiction over the Tribe, the United States and federal trust land was appropriate and cannot be considered a waiver of immunity. Moreover, in this case, Plaintiff is not merely seeking to have the court determine that a waiver, through removal, has taken place, but that the

removal of the case to federal court is functionally equivalent to signed Secretarial approval of an unapproved lease -- an absurd result to be sure.

ARGUMENT

Generally: It is well settled that Indian tribes enjoy common-law immunity from suit in state and federal court by virtue of their status as sovereign tribal governments. Kiowa Tribe v. Manufacturing Technologies, Inc., 523 U.S. 751, 754 (1998) citing United States v. U.S. Fidelity & Guaranty Co. , 309 U.S. 506, 512 (1940); Sanderlin v. Seminole Tribe Of Florida, 243 F. 3d 1282, 1285 (11th Cir. 2001). "Sovereign immunity is jurisdictional in nature." F.D.I.C. v. Meyer, 510 U.S. 471, 475 (1994). Under federal law, "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." Kiowa Tribe, 523 U.S. at 754. Waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (quoting United States v. Testan, 424 U.S. 392, 399 (1976)).

Tribal sovereign immunity is not perfectly analogous to either federal or state sovereign immunity. "[B]ecause of the peculiar 'quasi-sovereign' status of the Indian tribes, the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy." Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877, 890 (1986). In fact, this immunity is broader than that of the United States in at least one respect: tribal governments

retain sovereign immunity even when they operate commercial enterprises, both on and off reservations. In fact, the broader differences between tribal sovereign immunity and that enjoyed by the state and federal governments help to illustrate why removal of a case from state to federal court should not be regarded as an "implied" waiver, particularly since waivers of tribal sovereign immunity must be clear, express and unmistakable and effectuated by tribal governments at their highest level.

When Indian tribes do enter the commercial realm, federal law requires that the United States Government approve certain contracts between Indian tribes and non-Indians. First, 25 U.S.C. § 81 provides that:

> No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of Interior or a designee of the Secretary.

25 U.S.C. § 81(b). It is undisputed that 25 U.S.C. § 81 is applicable to the instant lease which contemplated an initial term of 10 years.

Secretarial approval is thus a condition precedent to the validity of such a lease. Accordingly, a lease of restricted Indian lands that lacks secretarial approval is null and void *ab initio*. See e.g., A.K. Management Co. v. San Manuel Band of Mission Indians, 789 F. 2d 785, 788 (9th Cir. 1986); Barona Group of Capitan Grande Band of Mission Indians v. American Management & Amusement, Inc.,

840 F. 2d 1394, 1403-1404 (9th Cir. 1987) (holding that whether a contract requires approval under section 81 is a question of law, absent ambiguity in the contract); Sangre de Cristo Development Company, Inc. v. United States, 932 F. 2d 891, 895 (10th Cir. 1991).

In addition to the foregoing, the Indian Long Term Leasing Act, 25 U.S.C. §415 and its accompanying regulations promulgated in 25 C.F.R. Part 162 provide, in relevant part, that restricted Indian lands may only be leased and financed with the approval of the United States Government. See, 25 C.F.R. §§ 162.604 and 162.610(a) (stating that both an Indian tribe's approval and the Secretary of the Interior's approval is needed for encumbrance of a Lease of restricted tribal land). In the instant case, it is undisputed that the parties explicitly incorporated these regulations into the instant lease. See DE 16-3, s. 22.33.

While Plaintiff concedes in this case that its lease with the Tribe was never approved by the Secretary and acknowledges that this approval was a necessary prerequisite to the lease's validity, and by extension, to a valid waiver of the Tribe's sovereign immunity, despite a clear Congressional intent to protect the Tribe, Plaintiff nevertheless offers several theories under which it argues the Court should still find that Seminole Tribe waived its immunity, a position that flies in the face of good common sense.

Federal Indian Law is clear regarding a non-Indian's failure to comply with the requirements of 25 U.S.C. §415(a): a lease of restricted tribal trust lands, without valid written approval from the Secretary of the Interior, is unenforceable and is null and void *ab initio*. 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 and a nullity. 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 regulations and requires valid written BIA approval as an essential condition precedent to its validity.

What Contour Spa appears to overlook and what it prefers to rewrite from existing law is the fact that 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 multi-year lack of diligence between 2004 - 2007 and thereafter from 2007 to the present when it knew, or should have known, that it occupied the tribal premises without an approved lease. **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**. How could it have reasonably relied on any set of facts to the contrary? It strains credulity to think that Plaintiff sat idly by for a period of 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 likewise 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 *ab initio* 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 Lease which was entirely void of lack of signed and written 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 and exclusive 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, once again, knew or should have known, 25 C.F.R. § 162.610(a) requires that an encumbrance of a Lease of restricted tribal trust land can be validly made only with the approval of **both** the Tribal Council **and** the United States Secretary of the Interior. In addition, Section 16.1 of the Lease provides that the Tribe's written consent is required for the spa to pledge the

Lease or Leasehold Estate as collateral. It appears that no such approval was ever obtained from the Secretary. Despite Plaintiff's complaints about alleged failures on the part of the Tribe, Contour Spa, has shown little, if any, interest in conforming its own conduct with the requirements of federal law regarding Secretarial approval required to validate the Lease and any related leasehold financing.

Title 25 U.S.C. § 415(a) requires that leases of tribal lands be validly approved by the Secretary. The purpose of §415(a) is for the protection of tribal interests and not for the protection of those parties with whom tribes contract. 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 solely for benefit of the Tribes. It owes nothing whatsoever 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. Equally well settled is the principle that waivers of immunity must be construed strictly **in favor of the sovereign**. Ruckelshaus v. Sierra Club, 463 U.S. 680, 685 (1983).

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). **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 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. . . [the courts] 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 and not the parties with which they contract. *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 Contour Spa'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 several year period between 2007 and 2010 seems more than ample for Contour Spa 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. Its failure to do so creates a burden that rests upon the shoulders of Contour Spa alone.

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 seven (7) years or more 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.

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, as it does today, 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. 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). **No ambiguity**

exists in the putative Lease. Secretarial approval is required; without it there is no Lease. Without it, there is nothing at all.

1. **Equitable Estoppel Does Not Foreclose the Assertion of Tribal Sovereign Immunity.**

Plaintiff argues that Defendants should be estopped from asserting the lease's lack of secretarial approval because Seminole Tribe allegedly made oral and written assertions to Plaintiff that it had obtained secretarial approval prior to the Spa's opening, a contention which is contradicted by Plaintiff's own statements regarding verification that it obtained from the Secretary some three years before Contour Spa was ousted. Even assuming that the Seminole Tribe made these assertions, it is unlikely that equitable contract principles apply to agreements that are subject to 25 U.S.C. § 81. The Ninth and Tenth Circuit Courts of Appeals have both so held.

In A.K. Management Company v. San Manuel Band Of Mission Indians, 789 F. 2d at 786, a non-Indian Corporation entered into a contract with an Indian tribe to operate bingo on the Tribe's reservation. Later, disagreements arose between the parties and the Tribe refused to seek the Bureau of Indian Affairs' (BIA) approval of their agreement. The Corporation then filed suit. The district court ruled that the bingo agreement was null and void under Section 81 and therefore dismissed the complaint pursuant to Fed. R. Civ. P. 12(b)(6). On appeal,

appellant Corporation argued that the Tribe's refusal to seek secretarial approval violated an implied covenant of good faith and fair dealing. However, **the Ninth Circuit held that since the agreement was void, general contract principles did not apply and therefore the Tribe was not obligated to seek BIA approval.** Id. at 789.

On similar facts, the Tenth Circuit relied, in part, on A.K. Management in rejecting a non-Indian corporation's estoppel claim, even where the corporation alleged "particularly egregious conduct" by the Tribe (as Plaintiff's counsel has alleged here). *See,* U.S. ex rel. Citizen Band Potawatomi Indian Tribe of Oklahoma v. Enterprise Management Consultants, Inc., 883 F. 2d 886, 890 (10th Cir. 1989). Thus, both the Ninth and Tenth Circuits have rejected equitable arguments as inapplicable to such contracts based upon the fact that non-compliance renders such agreements void *ab initio*.

For the same reason, **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. What Contour Spa chooses to ignore is the well settled principle that **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. This is a logical conclusion that Plaintiff would just as soon ignore.

Even Plaintiff acknowledges that "courts have generally rejected estoppel arguments in regard to BIA approval." DE 32, p. 14. For this reason, the Court also rejects Plaintiff's laches claim.

The folly of the position advanced by Contour Spa is illustrated in the face of case law that holds that **the protections given to Tribes 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 *will not estop* the court from ruling the contract void.**

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 courts have consistently 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 and similar statutes, such as Section 415 have been required to be interpreted liberally to effectuate their primary 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). This protection lies at the heart of the government to government relationship between the United States and federally recognized tribes.

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).

In addition to the foregoing, the district court noted that even if a misrepresentation did occur, Plaintiff's reliance upon it could not have been reasonable where, as here, Contour Spa had access to the truth:

> If, at the time he acted, such party had knowledge of the truth, or had the means by which with reasonable diligence he could acquire the knowledge so that it would be negligence on his part to remain ignorant by not using those means, he cannot claim to have been misled by relying upon the representation or concealment.

Id. (emphasis added).

Plaintiff did not reasonably rely on Defendant's misrepresentation because it could have discovered that the lease had not been approved by contacting the Secretary as it ultimately did in 2007. In short, Plaintiff did not exercise reasonable diligence to discover the truth, and thus negligently remained ignorant of it. Id. Accordingly, Judge Zloch correctly found that even if equitable contract principles apply to the instant case, Plaintiff has failed to show that its reliance on Defendant's misrepresentations was reasonable, and thus failed to set forth a prima facie case of estoppel.

2. The Indian Civil Rights Act Does Not Create An Implied Claim Against Tribes

Plaintiff argues that even if Seminole Tribe's waiver of sovereign immunity was ineffective, this does not bar Plaintiff's claim for violation of the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301, et seq. Plaintiff contends that the ICRA was enacted in 1968 to "insure that the American Indian is afforded the broad constitutional rights secured to other Americans" and to "protect individual Indians from arbitrary and unjust actions of tribal governments." Santa Clara, 436 U.S. at

72-73 (White, J., dissenting) (quoting S. Rep. No. 841, 90th Cong., 1st Sess., 6 (1967)). Plaintiff has alleged violations of Sections 1302(a)(5) and 1302(a)(8) which respectively provide: "No Indian tribe in exercising powers of self-government shall...(5) take any private property for a public use without just compensation;...(8) deny to any person within its jurisdiction the equal protection of its law or deprive any person of liberty or property without due process of law." ***The ICRA does not provide for an express cause of action to enforce its provisions, with the exception of habeus corpus.***

Nevertheless, ***Plaintiff urges the Court to allow it to bring an implied cause of action under the ICRA pursuant to the Tenth Circuit's holding in Dry Creek Lodge v. Arapahoe and Shoshone Tribes, 623 F. 2d 682 (10th Cir. 1980)***. In Dry Creek, the plaintiffs were non-Indians who owned a tract of land on the Reservation of the Shoshone and Arapahoe Indians in Wyoming. Id. at 683-684. After obtaining a construction license from the Tribes, plaintiffs built a guest lodge for their hunting clientele. Id. at 684. The day after they opened their lodge for business, the Tribes barricaded the access road that led from plaintiffs' lodge to the main highway because that road crossed the land of a tribal family who objected to plaintiffs' use of it. Id. The plaintiffs sought relief from the Tribes' Business Council which, like the Tribal Council of the Seminole Tribe, purported to act as an executive, legislative, and judicial body. But unlike the Tribal Council of the

Seminole Tribe, the Tribes in Dry Creek Lodge denied plaintiffs any opportunity to present their claim. Instead, the Tribes advised both the plaintiffs, and the objecting Indian family, to resolve their differences by exercising "self-help." Thereafter, the plaintiffs sued in federal court alleging, among other things, that the defendant Tribes had violated their due process and equal protection rights under the ICRA.

While this litigation was ongoing, the United States Supreme Court decided the case of Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) . At issue in Santa Clara was a tribal ordinance preventing children born to mixed marriages (one Santa Claran, one non-Santa Claran) from joining the Tribe and enjoying associated rights such as the right to vote in tribal elections and the right to hold tribal office. Id. at 52-53. Martinez, a Santa Claran who had married a non-Santa Claran, and her daughter brought a class-action suit alleging the ordinance violated the equal protection guarantee of the ICRA. Id. at 53-54. Following a full trial, the district court found that although 28 U.S.C. § 1343(4) provided a jurisdictional basis for plaintiffs' action under Title I of the ICRA, plaintiffs were unable to prove an equal protection violation on the merits. Id. The Tenth Circuit agreed that §1343 provided a cause of action, but reversed on the merits because it held that the ordinance did violate the equal protection provision of ICRA. Id. at 54-55.

The Supreme Court reversed. ***Writing for the majority, Justice Marshall held that the ICRA does not expressly or impliedly authorize a cause of action***

for declaratory or injunctive relief against Indian tribes or tribal officers. Id. at 72. While acknowledging that the Court frequently infers a federal cause of action to enforce civil rights, Justice Marshall placed great emphasis on protecting tribal sovereignty in cases of intra-tribal disputes. Id. at 59-60.

Santa Clara was binding law by the time the Dry Creek plaintiffs' appeal reached the Tenth Circuit for the second time. Nevertheless, the Tenth Circuit declined to apply it. The Tenth Circuit distinguished Santa Clara as relying heavily on two factors: (1) the tribal court relief available to the Santa Clara plaintiffs; and (2) the "intratribal nature of the problem sought to be resolved." Dry Creek, 623 F. 2d at 685. By contrast, the Tenth Circuit held that the Dry Creek plaintiffs had "no remedy within the tribal machinery," nor did they have any remedy in state or federal court. Finding that there had to be a forum where the dispute could be settled, the Tenth Circuit reversed the district court's order dismissing the plaintiffs' complaint, and remanded for a new trial on the issue of damages. Id. Thus, the Tenth Circuit created an **extremely limited exception** to Santa Clara whereby it held that ICRA can impliedly authorize a cause of action against an Indian tribe under certain circumstances. Those circumstances are: (1) involvement of a non-Indian in the action; (2) the alleged deprivation of an individual's real property interests; (3) an attempt by the plaintiff to seek a remedy within the tribal system; and (4) the absence of an adequate tribal remedy. Id. In this case, those factors

cannot be met and no other factors exist to allow this questionable and restricted case law to be applied in this Circuit. At no time did Contour Spa ever attempt to obtain a hearing before the Tribal Council.

Contour Spa argues that it meets these criteria and thus urges the Court to apply the Dry Creek exception to the instant case. While the district court did agree that Contour Spa met the first two criteria, the Court found that Plaintiff did not meet the third criterion because they never sought a remedy within the Seminole Tribal Council following Defendant's termination of the Lease.

As to the fourth criterion, Plaintiff argued the that Seminole Tribe has never established a judicial system, despite the fact that its own Constitution and bylaws provide for one. DE 32, p. 3-4; DE 28, Ex. A. It also asserted that Defendant's Tribal Council, which purports to exercise both legislative and adjudicatory functions, is not a competent adjudicatory forum. DE 32, p. 4; DE 28, p. 4. In response, the Seminole Tribe and its Chairman argued that the Supreme Court has recognized the competency of similar tribal forums as constituting sufficient adjudicatory bodies. *See, e.g.,* White v. Pueblo of San Juan, 728 F. 2d 1307, 1312-1313 (10th Cir. 1984).

This Court has stated in dicta that the lack of an adequate tribal forum does not necessarily waive tribal immunity, nor does it confer jurisdiction on federal courts. *See*, State of Florida v. Seminole Tribe v. Florida, 181 F. 3d 1237, 1243-44

(11th Cir. 1999) ("...[I]t is far from clear that 'tribal [sovereign] immunity [must give way to] federal jurisdiction when no other forum is available for the resolution of claims."). This Circuit has also considered it relevant that the plaintiff in that case could bring an action in state court. Id. By extension, even if the Seminole Tribal Council is not an adequate forum, this alone is not controlling since Plaintiff additionally asserts that it has a remedy under Florida statutes.

Accordingly, after balancing the Dry Creek criteria, the district court properly declined to apply the so called Dry Creek exception to tribal sovereign immunity. The district court reached this finding in part because the Tenth Circuit has subsequently narrowed the Dry Creek exception. *See*, Ramey Construction Company, Inc. v. Apache Tribe Of The Mescalero Reservation, 673 F. 2d 315, 319 (10th Cir. 1982) (distinguishing Dry Creek as involving "particularly egregious allegations of personal restraint and deprivation of personal rights"); White v. Pueblo of San Juan, 728 F. 2d 1307 (10th Cir. 1984); Walton v. Tesuque Pueblo, 443 F. 3d 1274, 1278-79 (10th Cir. 2006); Ordinance 59 Assc'n v. U.S. Dept. of Interior Secretary, 163 F. 3d 1150, 1158-59 (10th Cir. 1998); Olguin v. Lucero, 87 F. 3d 401, 404 (10th Cir. 1996); Nero v. Cherokee Nation of Oklahoma, 892 F. 2d 1457, 1460 (10th Cir. 1989). As the Tenth Circuit stated in White v. Pueblo of San Juan, respect for the supremacy of the Supreme Court's decision in Santa Clara

obligates lower federal courts to narrowly interpret the Dry Creek exception which has become a case of very questionable precedential value. 728 F. 2d at 1313.

The Kiowa Court ultimately declined to confine tribal immunity to on-reservation activity or non-commercial activity, in large part because it "defer[red] to the role Congress may wish to exercise in this important judgment." Id. So, too, it is respectfully submitted that the Courts should defer to the plenary power of Congress on the issues raised by Plaintiff.

3. The Tribe's Voluntary Removal of the Case to Federal Court Does Not Constitute a Waver of Tribal Sovereign Immunity.

Plaintiff argues that Seminole Tribe waived its sovereign immunity by voluntarily removing the above-styled cause to federal court. The Eleventh Circuit has not addressed this rather novel argument, and Contour Spa does not dispute that the law is far from settled in this area. DE 32, p. 10. In fact, Plaintiff can point to only one case adopting its reasoning. In State of New York v. The Shinnecock Indian Nation, 523 F. Supp. 2d 185 (E.D.N.Y. 2007), the district court found that the Shinnecock Tribe waived its sovereign immunity by removing a state court action to federal court. The court reached this result by extending the Supreme Court's decision in Lapides v. Board of Regents of the University System of Geogia, et al. , 535 U.S. 613 (2002), to Indian tribes.

In Lapides, the Court held that Georgia's removal of a state law cause of action to federal court constituted waiver of its Eleventh Amendment immunity; however, the Court correctly found that Shinnecock likely overstretched Lapides by applying it to Indian tribes. Perhaps that is why Shinnecock is apparently the only federal court to have vitiated tribal immunity on the basis of removal. After all, the Shinnecock Nation was not a federally recognized tribe at the time and was not entitled to the extensive tribal sovereign immunity to which the Seminole Tribe and other federally recognized tribes are entitled.

Indeed, as Plaintiff acknowledges, at least one other district court has reached the opposite conclusion. *See*, Ingrassia v. Chicken Ranch Bingo and Casino, 676 F. Supp. 2d 953, 961 (E.D. Cal. 2009). The Ingrassia Court noted that "the case law is not absolutely clear whether tribal sovereign immunity is more like immunity enjoyed by the states or by foreign sovereigns in the circumstance of removal." Id. It also observed that several district courts have applied tribal immunity after removal without even addressing the issue. Id. These factors led the Ingrassia Court to conclude that removal to federal court does not waive tribal immunity. Id. Likewise, these reasons lead the Court to decline to follow the reasoning of Shinnecock and instead follow Ingrassia in holding that Defendant Seminole Tribe's removal to federal court did not waive its tribal immunity.

The laws justifying dismissal on sovereign immunity grounds are laws over which federal and not state courts have original and exclusive jurisdiction. Accordingly, removal of the case to the appropriate Court having original and exclusive jurisdiction over the Tribe, the United States and federal trust land was appropriate and cannot be considered a waiver of immunity. Moreover, in this case, Plaintiff is not merely seeking to have the court determine that a waiver has taken place but that the removal of the case to federal court is functionally equivalent to Secretarial approval of an unapproved lease—an absurd result to be sure.

CONCLUSION

In conclusion, the only issues before the Court at this time are jurisdictional and there is no basis for Plaintiff to assert that subject matter jurisdiction is inextricably intertwined with the merits of the lawsuit. The Lease is either approved by the Secretary, or it is not -- there is no gray area to this dispositive inquiry. Contour Spa has failed to act with diligence and has failed to comply with the requirements of federal law regarding written Secretarial approval as a mandatory condition precedent for the 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. As a result, the order of the District Court should be affirmed.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,045 words and this brief has been prepared in a proportionally spaced typeface using Word 2010 in 14-point Times New Roman font.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2011 the foregoing document was served on via first class mail, postage prepaid to BRUCE ROGOW, ESQ., BRUCE S. ROGOW, P.A., Broward Financial Center, Suite 1930, 500 East Broward Blvd., Fort Lauderdale, FL 33394.

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