IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

USCA Case No. 13-13822
United States District Court, Southern District of Florida
Case No.: 13-cv-60066-Cohn/Seltzer

ABRAHAM INETIANBOR,

Plaintiff/Appellee,

v.

CASHCALL, INC.,

Defendant/Appellant.

REPLY BRIEF OF APPELLANT CASHCALL, INC.

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In arguing that this Court should affirm the district court's decision to void the parties' arbitration clause, Mr. Inetianbor ignores both the text and spirit of the Loan Agreement and the Federal Arbitration Act ("FAA"). The Agreement never states that the designated forum was the *only* acceptable one.[1] Rather, it states in plain English that if any part of the arbitration clause cannot be implemented, the rest must be, establishing that the parties did not intend the forum to be an exclusive and irreplaceable component of the arbitration clause. In arguing the contrary, Mr. Inetianbor ignores this Court's binding precedent and the uniform view of the federal courts of appeals. The designated arbitral forum is not integral to the arbitration clause.

Further, in asking this Court to create an "integral part" exception to FAA Section 5, Mr. Inetianbor ignores the text of the statute, which never mentions "integrality." To be sure, he cites a number of cases that have recognized the exception, but those cases all derive from one district court opinion in the Seventh Circuit, which that Circuit recently rejected. At most, integrality could be relevant to a state law contract defense to an arbitration clause under FAA Section 2—but Mr. Inetianbor never asserted, and the district court did not rely upon, such a defense.

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[1] Any arguments about the "forum" apply equally to the unavailability of the "consumer dispute rules." (Br. 16-17, 23-24.)

Comparing the "integral part" exception that some courts have found hidden in Section 5 to generally-applicable contract law defenses shows just how far Mr. Inetianbor asks this Court to depart from the FAA's text. As explained below, the so-called "integral part" exception differs greatly from the contract law defenses that might apply (in certain circumstances not found here) when a contractually-designated arbitral forum is unavailable. In asking this Court to void the arbitration clause based on a supposed exception that has no roots in either the statutory text or general contract law principles, Mr. Inetianbor ignores the Supreme Court's command that courts may not carve an exception out of the FAA that neither Congress nor the common law of contract have established. *See, e.g.*, *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586-87 (2008).

Finally, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," including when "constru[ing] the contract language itself." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983), *superseded by statute on other grounds by* 9 U.S.C. § 16(b)(1). The Agreement can be interpreted reasonably in a manner that renders the arbitral forum here available because the Tribe authorizes private arbitration. Thus, any Tribal Elder meets the contractual requirements to serve as the arbitrator, and even if one did not, a suitable and lawful replacement can be designated.

The decision below should be reversed.

I. CashCall Did Not Waive Its Right To Arbitrate.

Mr. Inetianbor starts his first argument by asserting in passing that CashCall waived its right to arbitrate. (Br. 14-15.) The district court rejected that argument. (Doc. 59 at 6-7.) This Court should too, for three reasons.

First, Mr. Inetianbor has waived his waiver assertion by raising it "in a perfunctory manner," as an aside in the introductory paragraph to a section of his brief making a different argument without citing anything in the record to support his factual assertions. *N.L.R.B. v. McClain of Ga., Inc.*, 138 F.3d 1418, 1422 (11th Cir. 1998).

Second, Mr. Inetianbor's waiver assertion fails because CashCall did not act inconsistently with its right to arbitrate. *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1315-16 (11th Cir. 2002). The initial proceedings in state court were necessary for CashCall to determine if it had a right to arbitrate. After Mr. Inetianbor improperly obtained a default, which CashCall had to have vacated, the state court granted CashCall's motion for a more definite statement of Mr. Inetianbor's claim, which he wrote on a court-provided form and framed as one for "defamation." (Doc. 1-4 at 12-36, 46.)[2] Because the amended complaint raised a federal claim for the first time, expressly based on the Loan Agreement, CashCall

[2] CashCall did not "Answer" the initial pleading and there were no substantive hearings. (Br. 3, 14.) CashCall responded to the initial pleading with a motion to dismiss or for more definite statement, and the only "hearings" were motion-calendar proceedings directed to Mr. Inetianbor's procedural errors.

removed the action and moved to compel arbitration under the arbitration clause in its first responsive filing. (Doc. 1; Doc. 16.) Thus, there was no substantial participation in the litigation by CashCall.

Finally, Mr. Inetianbor would have voided any waiver when he filed his second amended complaint (Doc. 48), which increased his damages claim thirty-fold and added a request for punitive damages. In *Krinsk v. SunTrust Banks, Inc.*, 654 F.3d 1194, 1202 (11th Cir. 2011), this Court held that such a material change in circumstances revives a waived right to arbitration.

II. The Contractually-Designated Arbitral Forum Is Not Integral To The Arbitration Clause.

In its opening brief, CashCall demonstrated that the district court erred in holding the contractually-designated arbitral forum integral to the arbitration clause for three main reasons: (1) the arbitration clause contains a severance provision providing that if any part of the agreement to arbitrate is unenforceable, courts must nonetheless enforce the remainder; (2) the arbitration clause does not say that arbitration may *only* occur in the designated forum, a threshold requirement to conclude that the arbitral forum is integral; and (3) Mr. Inetianbor fought tooth-and-nail before the district court to avoid having the arbitral forum hear his claims, making clear the forum was not integral to him. (Op. Br. 18-24.) Mr. Inetianbor's response fails to address those arguments.

A. The Arbitration Clause's Severance Provision Makes Clear The Arbitral Forum Is Not Integral.

The Agreement's severance provision defeats any argument that the parties viewed the contractually-designated forum as integral to the arbitration clause. That provision states that "[i]f any of this Arbitration Provision is held invalid, the remainder shall remain in effect." (Doc. 53 Exh. 2 at 7.) The severance provision answers the question before this Court: if any provision of the arbitration clause cannot be implemented (including use of a particular arbitral forum), "the remainder shall remain in effect." As CashCall's opening brief demonstrated, the existence of a severance provision in an arbitration clause makes the arbitral forum non-integral. (Op. Br. 21-22.) Because the designation of the arbitral forum can be severed from the rest of the clause, the parties must arbitrate in an alternative forum.

Mr. Inetianbor cites two intermediate state appellate court cases from other circuits that ignored severance provisions and voided arbitration clauses when a contractually-designated forum was unavailable. (Br. 27-28.) Those courts stated that by ignoring the severance provision and voiding the clause, they were respecting the "plain language" of the parties' agreements designating a particular forum to hear any disputes. *Stewart v. GGNSC-Canonsburg, L.P.*, 9 A.3d 215, 220 (Pa. Super. Ct. 2010); *Riley v. Extendicare Health Facilities*, 826 N.W.2d 398, 415 (Wis. Ct. App. 2012) (citing *Stewart*). In reality, those courts ignored rather than

furthered the parties' expressed intention. The whole point of a severance clause is to make clear that the parties' "intention [is] not to make the [contractual forum] integral, but rather to have a dispute resolution process through arbitration," even if the chosen forum is unavailable. *Jones v. GGNSC Pierre LLC*, 684 F. Supp. 2d 1161, 1167 (D.S.D. 2010).

Reading a severance provision as those courts did effectively reads it out of the contract entirely. The default rule in contract law *in the absence of any severance provision* is to enforce the balance of a contract where an unenforceable portion is not essential to the contract. *See* Restatement (Second) of Contracts § 184(1) (1981) ("Restatement"). A severance provision makes unmistakable that the parties did not view *any* provision as so essential as to warrant voiding the arbitration clause entirely. Under Mr. Inetianbor's interpretation, however, even when faced with contracts that contain severance provisions, courts may ignore those provisions and instead declare a provision integral that the parties said was not. That makes no sense, and violates the cardinal rule of contractual interpretation that "contracts should not be interpreted in a manner that renders any term or clause of that contract mere surplusage." *Bayshore Ford Truck Sales, Inc. v. Ford Motor Co.*, 380 F.3d 1331, 1335 (11th Cir. 2004). The district court's reading improperly makes the severance provision mere surplusage.

The only question, then, is whether the severance clause here is enforceable. That question is governed by the law of the jurisdiction that governs the contract as a whole. *Anders v. Hometown Mortg. Servs., Inc.*, 346 F.3d 1024, 1032 (11th Cir. 2003). The Loan Agreement contains a choice of law clause stating that it is governed exclusively by Tribal law. (Doc. 53 Exh. 2, at 1, 4.) As CashCall has explained (Op. Br. 30-31 n.6), Tribal law applies general contractual principles, including those drawn from the Restatement. *See White Wolf v. Myers*, 34 Indian L. Rep. 6102, 6106 (CRST Ct. App. 2007); *Bank of Hoven v. Long Family Land & Cattle Co.*, 32 Indian L. Rep. 6001, 6004 (CRST Ct. App. 2004).

The severance provision is enforceable under the general common law contractual principles embodied in the Restatement. With irrelevant exceptions, the Restatement requires a court to enforce the balance of a contract notwithstanding that a certain provision is unenforceable unless that provision is "an essential part of the agreed upon exchange." Restatement § 184(1).[3] Courts applying the Restatement approach generally enforce severance provisions in arbitration clauses, which "reflect[] the parties' intent to give effect to the valid portions of the contract." *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 277-78 (Ill. 2006).

[3] As explained below in Part III.C, general contract doctrines like mutual mistake and severability ask whether the unenforceable provision is essential to the *whole* contract, not just one clause. But the severance provision here applies only to the "Arbitration Provision," not to the whole contract. (Doc. 53 Exh. 2 at 7.)

In *Anders,* which CashCall's opening brief cited but Mr. Inetianbor ignores entirely, this Court held just that. (Op. Br. 22 (quoting *Anders*, 346 F.3d at 1032).) *Anders* held that "a severability provision ... evidences the parties' intention to enforce the remainder of the arbitration agreement in the event any portion of it is deemed invalid." 346 F.3d at 1031. This Court therefore ordered the parties to arbitrate notwithstanding that the arbitration clause contained an unenforceable exculpatory clause. *Id.* at 1031-32. Since *Anders*, this Court has consistently enforced severance provisions in arbitration agreements under generally-applicable contract law, excising the invalid portion and enforcing the rest. *In re Checking Account Overdraft Litig. MDL No. 2036*, 685 F.3d 1269, 1283 (11th Cir. 2012) (South Carolina law); *Jackson v. Cintas Corp.*, 425 F.3d 1313, 1317 (11th Cir. 2005) (Georgia law).

That is the majority view among the federal courts of appeals that have addressed severance provisions in arbitration clauses. As the D.C. Circuit explained, "[c]ompelling [the plaintiff] to arbitrate with the bar on punitive damages severed is entirely consistent with the intent to arbitrate he manifested in signing the . . . agreement in the first place," which contained a severance clause. *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 84-85 (D.C. Cir. 2005). The reason is that "'severance of the provision limiting punitive damages [does not] diminish[] [the plaintiff's] contractual intent to arbitrate because excluding the provision only

allows her the opportunity to arbitrate her claims under more favorable terms than those to which she agreed.'" *Id.* at 84 (quoting *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 682-83 (8th Cir. 2001)).

So too here. Mr. Inetianbor argued below that the Loan Agreement's designation of an arbitral forum consisting of either a Tribal Elder or panel of Council members was an "excuse ... to scare away abused consumers that intend to litigate against Cash Call [sic]." (Op. Br. 23 (quoting Doc. 19 at 8).) Mr. Inetianbor stated below, however, that he would consider arbitrating before the AAA. (Op. Br. 23 (citing Doc. 42 at 8).) Requiring him to arbitrate before an arbitral organization not affiliated with the Tribe would therefore substitute a forum Mr. Inetianbor doubtless would view as more favorable to him than the one to which he agreed when taking out his loan. Accordingly, appointing a substitute arbitrator under Section 5 would not "diminish[] [his] contractual intent to arbitrate." *Gannon*, 262 F.3d at 682-83. In fact, severing the clause designating the arbitral forum and compelling arbitration before an alternative forum is necessary to effectuate the parties' agreement, which contains an "explicit severability clause as well." *Booker*, 413 F.3d at 85; *see also Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 675 (6th Cir. 2003).

Mr. Inetianbor contends that it is impossible to enforce the arbitration clause here because there is no arbitral forum designated in the contract to which a court

could refer this case. (Br. 28.) But that is the situation with every contract where the arbitral forum is not available, yet the majority of courts have nonetheless appointed a substitute forum under Section 5. *See* p. 14 below; *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1223 (11th Cir. 2000); *Khan v. Dell Inc.*, 669 F.3d 350, 356-57 (3d Cir. 2012); *Reddam v. KPMG LLP*, 457 F.3d 1054, 1061 (9th Cir. 2006), *abrogated on other grounds*, *Atlantic Nat'l Trust LLC v. Mt. Hawley Ins. Co.*, 621 F.3d 931 (9th Cir. 2010).

Further, courts "must assume that the parties' arbitration agreement was drafted against the background of the FAA, which [courts] should also deem incorporated into the agreement." *Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787, 797 (7th Cir. 2013) (Hamilton, J., dissenting). This Court therefore must assume that the parties adopted the arbitration clause here, including its severance provision, with the knowledge that FAA Section 5 would allow a court to appoint a substitute arbitrator if the arbitral forum selected by the Agreement is unavailable. In other words, the parties built the possibility of court appointment of a different forum into the arbitration clause here through Section 5—a possibility their severance clause makes explicit.

B. Because The Arbitration Clause Does Not Contain An Express Statement Of The Arbitral Forum's Exclusivity, The Forum Is Not Integral.

Mr. Inetianbor does not dispute that a court cannot nullify an arbitration clause on integrality grounds due to the unavailability of the contractual forum "unless the parties have expressly stated" that the forum is "exclusive of all other fora." (Br. 18 (quoting *Reddam*, 457 F.3d at 1061 (emphasis removed).) Nor does he identify any express statement that the Agreement's arbitral forum was exclusive. Instead, he relies only on the same insufficient statements as the district court: the Agreement's statements that any disputes will be resolved in a Tribal forum under Tribal law. (Br. 19-20.)

Those references to the Tribe fall far short of an express statement that the contractually-designated forum was integral to the arbitration clause. They merely establish that *if* the arbitral forum named in the contract is available for use, the parties must use it. They say nothing about what a court should do if the forum is unavailable. The district court's approach would qualify almost every arbitral forum as "integral," as most arbitration clauses designate a particular forum that the parties must use, and often use language like "shall" in doing so. In *Brown* the arbitration clause required that any disputes "shall be resolved by binding arbitration under the Code of Procedure of the National Arbitration Forum." 211 F.3d at 1220. Yet this Court nonetheless held that "there is no evidence that the

choice of the NAF as the arbitration forum was an integral part of the agreement to arbitrate." *Id.* at 1223. Under *Brown*, therefore, the statement that arbitration "shall be conducted by" an "authorized representative" of the Tribe is not even "evidence" that the arbitral forum is integral, much less conclusive evidence of such status. A true express statement of exclusivity requires that the contract state unequivocally that arbitration will occur "exclusively" or "only" in a particular forum. For example, the Second Circuit held that it could not appoint an alternative forum to the one designated by contract, but only because the contract said that arbitration could occur "*only* before" the designated forum. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Georgiadis*, 903 F.2d 109, 112 (2d Cir. 1990) (emphasis added). No comparable statement exists in the Agreement here.

Brown also forecloses the district court's conclusion (Doc. 45 at 7), and Mr. Inetianbor's argument (Br. 21), that because the arbitration clause "specifically names the arbitral forum and details whom the parties may select as their arbitrator(s)," the arbitral forum was integral. In *Brown*, the arbitration clause specifically named the arbitral forum (the NAF). 211 F.3d at 1220. In addition, the contract in *Brown* required the parties to use the NAF's "Code of Procedure," which laid out how the parties should select the arbitrator. *Id.*; NAF Code of

Procedure, Rule 21.[4] There is thus no meaningful distinction between the Agreement's arbitration clause and the one addressed in *Brown*: both required the parties to use an arbitral forum if available; both laid out how to select the arbitrator; and neither contained an express statement that the contractually-designated forum was the only allowable one. *Brown* compels the conclusion that the Agreement's designated arbitral forum is not integral.

Mr. Inetianbor includes lengthy string citations to federal district court and state court cases that have held, in some circumstances, that the unavailability of the contractually-designated forum voids the clause. (Br. 22 & n.5, 23-24, 26 n.7.) Notably absent is a single published federal court of appeals decision holding that a court could not appoint a substitute arbitrator under FAA Section 5 because the contractually-designated forum was integral to that clause.

Mr. Inetianbor buries at the end of a lengthy footnote the only two published federal court of appeals cases he cites in support of his argument that the arbitral forum here was integral, but neither case discussed an integral part exception to Section 5. (Br. 27 n.7.) *In re Salomon Inc. Shareholders' Derivative Litigation*, 68 F.3d 554, 557-58 (2d Cir. 1995), held that the parties had satisfied their obligation to arbitrate when they submitted a dispute to the forum, which exercised its right under its rules (incorporated into the parties' contract) to decline to hear the case.

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[4] *Available at* http://www.adrforum.com/users/naf/resources/CodeofProcedure2008-print2.pdf.

In *National Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326, 331-32 (5th Cir. 1987), no party argued that Section 5 applied. There, the Fifth Circuit declined to order the parties to arbitrate under FAA Section 4 in a forum other than the one designated by contract where the party seeking to compel arbitration in an alternative forum was also seeking to compel arbitration through foreign courts in the contractually-designated forum. *Id.* at 331. *Ashland Oil* also involved complicated issues under international arbitration law not in play here. *Id.*

By contrast, the published federal courts of appeals decisions that have assumed that Section 5 contains an integral part exception—including this Court's decision in *Brown*—uniformly have held that the contractually-designated forum was not integral, and thus have allowed appointment of a substitute. *See Brown*, 211 F.3d at 1222; *Khan*, 669 F.3d at 356-57; *Reddam*, 457 F.3d at 1061; *accord Smith v. ComputerTraining.Com, Inc.*, 531 Fed. App'x 716, 715-16 (6th Cir. 2013) (unpublished). The lion's share of federal district court and state court cases reach the same conclusion.[5] Mr. Inetianbor cannot salvage his argument by cherry-picking cases that express a minority view.

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[5] *E.g.*, *Selby v. Deutsche Bank Trust Co. Ams.*, No. 12-cv-01562, 2013 WL 1315841, *12 (S.D. Cal. Mar. 28, 2013); *Estate of Adair v. THI of Kan., LLC*, No. 12-1283-KHV, 2013 WL 653619, *5 (D. Kan. Feb. 21, 2013); *Meskill v. GGNSC Stillwater Greeley LLC*, 862 F. Supp. 2d 966, 976-77 (D. Minn. 2012); *Diversicare Leasing Corp. v. Nowlin*, No. 11-CV-1037, 2011 WL 5827208, *7 (W.D. Ark. Nov. 18, 2011); *Clerk v. Cash Cent. of Utah, LLC*, No. 09-4964, 2011 WL 3739549, *6 (E.D. Pa. Aug. 25, 2011); *Jones*, 684 F. Supp. 2d at 1168; *Clerk v.*

C. Mr. Inetianbor's Statements And Actions In This Litigation Demonstrate That The Arbitral Forum Is Not Integral.

"[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000). To meet his burden, Mr. Inetianbor must offer evidence that "the parties would not have agreed upon arbitration absent the selected forum." *Jones,* 684 F. Supp. 2d at 1166.

Mr. Inetianbor has offered no evidence on that front. Indeed, the only evidence before the district court shows the opposite. As CashCall has demonstrated, Mr. Inetianbor fought tooth-and-nail from the outset of this case to avoid arbitrating his claims in the manner specified by the Agreement. (Op. Br. 23.) That evidence, which Mr. Inetianbor simply ignores, proves that he did not view the designated forum as an integral part of the arbitration clause.

D. The Arbitration Clause Is Not A "Sham."

Mr. Inetianbor also argues that the arbitration clause is a "sham," which in his view somehow makes the arbitration clause unenforceable. (Br. 13 & n.3, 23, 25 n.6.) As lone support, he quotes a different district court decision which is currently on appeal, and which based its conclusions entirely on the proceedings at

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First Bank of Del., 735 F. Supp. 2d 170, 180-81 (E.D. Pa. 2010); *Adler v. Dell, Inc.*, No. 08-cv-13170, 2009 WL 4580739, *3-4 (E.D. Mich. Dec. 3, 2009); *McGuire, Cornwell & Blakey v. Grider*, 771 F. Supp. 319, 320 (D. Colo. 1991); *Astra Footwear Indus. v. Harwyn Int'l, Inc.*, 442 F. Supp. 907, 910-11 (S.D.N.Y. 1978); *Schuiling v. Harris*, 747 S.E.2d 833, 838 (Va. 2013).

issue (and now on appeal) in this very case. (Br. 23 (quoting *Jackson v. PayDay Fin., LLC*, No. 11-cv-9288, slip op. at 2-4 (N.D. Ill. Aug. 28, 2013), *appeal pending*, No. 12-2617 (7th Cir.)).) Mr. Inetianbor's argument is meritless for three reasons.

First, the courts may not consider Mr. Inetianbor's argument because he contends that the *entire Agreement* is a "scheme ... devised for the purpose of evading federal and state regulation of defendants' activities." (*Id.*) In *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006), the Supreme Court held that a court cannot refuse to enforce an arbitration clause on the ground that the entire contract that contains the arbitration clause is void because it violates a state's usury laws. Instead, such a "challenge should ... be considered by an arbitrator, not a court." *Id.* at 446.

Second, Mr. Inetianbor has offered no evidence to support his argument. In calling the arbitration clause a "sham," Mr. Inetianbor implies that Western Sky inserted the requirement that arbitration occur in a Tribal forum with knowledge that the Tribe does not oversee arbitration as part of a scheme to dupe consumers. To show that, Mr. Inetianbor would have to prove what the drafters of the arbitration clause knew about the availability or unavailability of a Tribal forum when drafting the Agreement. Mr. Inetianbor offers no evidence on that point in his brief, and developed no facts in support of it below. *Jackson* did not cite any

either. *Jackson*, slip op. at 2-4. Mr. Inetianbor therefore has failed to meet his burden. *Green Tree Fin. Corp.-Ala.*, 531 U.S. at 91.

Third, and finally, CashCall submitted evidence to the district court that proves that Western Sky had a good faith basis to believe that the Tribe did oversee arbitrations. In support of its renewed motion to compel arbitration (Doc. 53), CashCall submitted a copy of an arbitration award issued under the authority of the CRST Court, which confirms that, at least in some cases, the Tribe has directly overseen arbitration. (Doc. 53, Exh. 4.) CashCall also produced a letter from a Tribal magistrate making clear that under Tribal law, "[a]rbitration, as in a contractual agreement, is permissible," and that "[a]fter there is an arbitration award, the parties may seek to confirm the award in Tribal Court." (Doc. 54, Exh. 3.) The only evidence in the record thus refutes Mr. Inetianbor's "sham" argument.

III. The FAA Does Not Allow A Court To Defeat The Parties' Agreement To Arbitrate By Declaring The Contractual Details Regarding Arbitration An "Integral Part" Of The Arbitration Clause.

As CashCall's opening brief demonstrated, nothing in the FAA or the Supreme Court's cases interpreting it allows a court to engraft an integrality exception onto Section 5 in the first place. (Op. Br. 24-29.) CashCall also noted that under FAA Section 2, whether the arbitral forum was integral to the *entire contract* could be relevant under generally-applicable contract defenses. (*Id.* at 27.) But Mr. Inetianbor has never argued that a contract law defense voids the

arbitration clause, much less the entire Agreement, and comparing his proffered "integral part" exception to general principles of contract law shows how far Mr. Inetianbor asks this Court to depart from both the text of the FAA and contract law principles.

A. This Court's Statements In *Brown* Were *Dicta*.

This Court is not bound by the statements in *Brown* that a court cannot appoint an arbitrator under Section 5 if the arbitral forum was an integral part of the arbitration clause. 211 F.3d at 1222. As CashCall demonstrated in its opening brief, those statements were *dicta* because they were "unnecessary to the resolution of the … appeal[]." *United States v. Kaley*, 579 F.3d 1246, 1262 (11th Cir. 2009); (Op. Br. 27-28 & nn.3-4). Mr. Inetianbor never responds to that argument, premising his brief on the mistaken assumption that *Brown* simply *held* that Section 5 contains an integral part exception without explaining why that is so. (Br. 17-18, 22-23.) *Brown* did not so hold, and its *dicta* does not bind this Court.

B. Section 5 Does Not Contain An "Integral Part" Exception.

Nothing in the text or structure of Section 5 allows a court to refuse to appoint a substitute arbitrator on the ground that the forum or rules designated in the contract are "integral" to it. To the contrary, the Supreme Court has instructed the lower courts to apply the FAA's terms strictly, and "[a]n 'integral part' proviso

to § 5 sounds like the sort of addendum that" the Supreme Court has forbidden. *Green*, 724 F.3d at 791 (citing *Hall Street*, 552 U.S. at 586-87).

Mr. Inetianbor does not argue that the text or structure of Section 5 allows a court to declare an "integral part" exception to it. Instead, he argues that "other courts have noted that the test established by this Court in *Brown* is the majority rule for addressing situations where an arbitration forum fails and FAA Section 5 is invoked." (Br. 22.) Mr. Inetianbor relies upon a New Mexico Supreme Court case as support for that proposition, which in turn cited *Brown* and other decisions that relied upon *Brown* to suggest that Section 5 contains an integral part exception. *Rivera v. Am. Gen. Fin. Servs., Inc.*, 259 P.3d 803, 812 (N.M. 2011) (citing *Ranzy v. Tijerina*, 393 F. App'x 174 (5th Cir. 2010) (unpublished); *Reddam*, 457 F.3d at 1061; *Carr v. Gateway, Inc.*, 944 N.E.2d 327, 331 (Ill. 2011); *Stewart*, 9 A.3d at 219; *Grant v. Magnolia Manor-Greenwood, Inc.*, 678 S.E.2d 435, 438 (S.C. 2009)).

But those cases based their reasoning on the district court decision that *Green* rejected, *Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 742 F. Supp. 1359 (N.D. Ill. 1990). *Green*, 724 F.3d at 792. As *Green* pointed out, none of those cases explained how the text of Section 5 supports reading into it an "integral part" exception, and neither does Mr. Inetianbor. His failure to grapple with the text of the statute and explain how it contains an integral part exception

makes clear what is obvious from reading the statute: it requires a court to appoint a substitute when "for any … reason there [is] a lapse in the naming of an arbitrator." 9 U.S.C. § 5. No exception exists for when a court after-the-fact declares the designated forum "integral."

Mr. Inetianbor attempts to distinguish *Green* on the ground that the Seventh Circuit interpreted the agreement only to require the use of the NAF rules, rather than the NAF itself, in any arbitration. (Br. 23.) But that was only in the context of *Green*'s *dicta* stating alternatively that, even if an integral part exception existed, the forum was not integral. 724 F.3d at 790. That has nothing to do with *Green*'s thorough analysis showing that Section 5 contains no such exception in the first place. *Id.* at 791-93.

Mr. Inetianbor also ignores CashCall's argument that the Supreme Court's decision in *Hall Street*—which was issued thirteen years after *Brown*—forecloses any argument that a court can refuse to apply Section 5 for contracts designating "integral" arbitral fora. (Op. Br. 25.) In *Hall Street*, one party argued that contractual parties should be allowed to expand the grounds for judicial review beyond those provided by the FAA "because arbitration is a creature of contract, and the FAA is 'motivated, first and foremost, by a congressional desire to enforce agreements into which parties have entered.'" 552 U.S. at 585 (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985)). The Supreme Court

rejected that argument because even though "the FAA lets parties tailor some, even many features of arbitration by contract, ... the FAA has textual features at odds with enforcing a contract to expand judicial review following the arbitration." *Id.* at 586. In particular, FAA Section 9 states that courts "must grant" confirmation of any arbitral award unless it is "vacated, modified, or corrected as prescribed in sections 10 and 11," which "unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed' exceptions" in Sections 10 and 11 applies. *Id.* at 587.

Section 5 contains similar mandatory language: the court "*shall* designate and appoint an arbitrator" if "for *any* ... reason there shall be a lapse in the naming of an arbitrator." 9 U.S.C. § 5 (emphasis added). Just as there is no exception in Section 9 to its requirement that a court "must" confirm an award unless a specified ground in Sections 10 or 11 allows it to refuse to do so, there is no "integral part" exception in Section 5 to its requirement that a court "shall" appoint a substitute arbitrator if for "any ... reason" there is a "lapse in the naming of an arbitrator," such as because the arbitral forum is unavailable. 9 U.S.C. § 5. *Hall Street* forecloses any argument that courts can engraft an integral part exception onto Section 5.

C. The "Integral Part" Exception Is Not Rooted In Contract Law.

Mr. Inetianbor argues that "arbitration clauses are subject to contract law." (Br. 26.) But comparing the supposed integral part exception that some courts have engrafted onto Section 5 to principles of contract law shows how far such an exception would stray from the FAA's mandate. To be clear, Mr. Inetianbor has never asserted a contract law defense to the arbitration clause in this case, and so has "waive[d] any right to claim such a defense." *Johnson v. Wainwright*, 806 F.2d 1479, 1481 n.2 (11th Cir. 1986); *Hamilton v. Southland Christian School, Inc.*, 680 F.3d 1316, 1318-19 (11th Cir. 2012) (same). CashCall nevertheless includes this discussion because it demonstrates that, far from honoring the general contract law principles that Mr. Inetianbor mentions in his brief (at 26-28), the integral part exception conflicts with contract law principles.

Under FAA Section 2, "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). As the Seventh Circuit recognized in *Green*, the most likely contract law defense when the contractually-designated arbitral forum is unavailable is the mutual mistake defense, a defense Mr. Inetianbor never asserted below. 724 F.3d at 791.

But there are crucial differences between the mutual mistake defense and the supposed integral part exception that some courts have engrafted onto Section 5. For example, a mutual mistake must go to the heart of the *entire contract*, not just one provision (like an arbitration clause).[6] "The test for mutuality of mistake requires the mistaken fact be the underlying basis of *the entire agreement* and, when discovered, that the essence of the agreement is destroyed." 27 Williston on Contracts § 70:69 (4th ed. 2013) (emphasis added); Restatement § 152 cmt. a; *see also Seattle Prof'l Eng'g Emps. Ass'n v. Boeing Co.*, 991 P.2d 1126, 1131 (Wash. 2000).[7]

Further, the mutual mistake defense requires the party invoking it to show prejudice, unlike the integral part exception. The integral part cases ask merely if "the parties would not have agreed upon arbitration absent the selected forum." *Jones,* 684 F. Supp. 2d at 1166. But under the mutual mistake defense, "[i]t is not enough for [a party] to prove that he would not have made the contract had it not

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[6] Even if a mutual mistake defense asked if the mistaken fact upset a basic assumption of just *the arbitration clause*, any mistake here did not do so. *See* Part II above.

[7] Other contract law defenses similarly require consideration of whether an unenforceable provision was essential to the entire contract, not just one provision. *See* p. 7 n.3 above; Restatement §§ 184(1) (severability), 265 & cmt. a (impracticability). Mr. Inetianbor relies on cases demonstrating that his burden under general contract law principles would be to show the arbitral forum was integral to the "entire contract," not just one clause. (Br. 27 (quoting *Stewart*, 9 A.3d at 220) (quoting *John R. Ray & Sons, Inc. v. Stroman*, 923 S.W.2d 80, 87 (Tex. App. 1996)).)

been for the mistake." Restatement § 152 cmt. c. Instead, the party must also show the mistake had "a material effect on the agreed exchange of performances," that is, that "the resulting imbalance in the agreed exchange is so severe that he cannot fairly be required to carry it out." *Id.* § 152(1) & cmt. c. No integral part case requires such a showing.

The high bar imposed on a party seeking to void a contract under contract law doctrines like the mutual mistake defense demonstrates how far courts have strayed from the FAA in creating an integral part exception to Section 5. The courts that have recognized an integral part exception have espoused a doctrine that is uniquely hostile to arbitration, one that relaxes the integrality analysis only in the context of arbitration clauses. That violates the Supreme Court's instruction that, in the FAA, Congress "place[d] arbitration agreements on an equal footing with other contracts." *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010). The FAA thus prohibits "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011). Because the integral part exception is not grounded in statutory text or any background principle of contract law, it contravenes the FAA.

IV. The Arbitral Forum Is Not Unavailable, And Mr. Inetianbor's Bias Arguments Do Not Warrant Holding It So.

The district court held that the designated arbitral forum was not available because Mr. Chasing Hawk (or any Tribal Elder) was not an "authorized representative" of the Tribe, as the arbitration clause requires. (Doc. 90 at 8-9.)[8] The district court held that Mr. Chasing Hawk did not meet the Agreement's requirements to serve as the arbitrator by interpreting the phrase "authorized representative" effectively to require that an official of the Tribe participate directly in the arbitration. CashCall argued in its opening brief that the arbitration clause is ambiguous as to whether the Tribe must participate directly in the arbitration, and showed that it is reasonable to construe the arbitration clause's "authorized representative" language to mean simply that arbitration be "authorized" under Tribal law and that the arbitrator be either a Tribal Elder or a

[8] Mr. Inetianbor claims that he invoked his right to select an arbitral panel of three Tribal Council members (Br. 5, 31-32), but that misstates the record. Mr. Inetianbor filed a document with the district court purporting to do so (Doc. 36), but he did not comply with the contract's requirements for arbitrator selection. (Doc. 39.) In its response, CashCall invited Mr. Inetianbor to work with CashCall to identify an arbitrator meeting the Agreement's requirements. (*Id.* at 4.) But CashCall made clear that Mr. Inetianbor's initial "demand" was not valid. (*Id.* at 5.) Mr. Inetianbor never accepted CashCall's offer to work together to identify an arbitrator, did not cure the defects in his initial selection, and never tried to initiate arbitration again before a panel of Council members. That failure transferred the selection right to CashCall. (Doc. 53 Exh. 2 at 6.) The district court apparently agreed with CashCall, because the court initially ordered the parties to arbitrate before Mr. Chasing Hawk without concluding that doing so violated Mr. Inetianbor's right to arbitrate before a panel of Council members. (Doc. 59.)

panel of three Tribal Council members. (Op. Br. 29-34.) Because under the FAA "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," including when "constru[ing] . . . the contract language itself," *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25, the law obligated the district court to select the reading of the Agreement that would validate the arbitration clause.

Mr. Inetianbor never explains how CashCall's interpretation of the arbitration clause is unreasonable. Instead, he responds with the circular argument that Mr. Chasing Hawk was not an "authorized representative" simply because he was not an "authorized representative," but never refutes CashCall's demonstration that the text of the clause is ambiguous. (Br. 30-31.) Because CashCall's interpretation is reasonable, and because it would allow a court to implement the arbitration clause, the district court was obligated to interpret the Agreement as CashCall urges. (Op. Br. 31-33.)[9]

Rather than respond to CashCall's interpretation of the Agreement, Mr. Inetianbor replies with irrelevant arguments about Mr. Chasing Hawk's alleged

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[9] CashCall concedes the Tribe does not have "consumer dispute rules" to govern the arbitration. (Br. 31.) But the unavailability of designated procedural rules has no effect on the enforceability of the arbitration clause here. *See* pp. 4-24 above; (Op. Br. 20-22, 35 n.7); *Chattanooga Mailers' Union, Local No. 92 v. Chattanooga News-Free Press Co.*, 524 F.2d 1305, 1315 (6th Cir. 1975), *overruled on other grounds*, *Bacashihua v. U.S. Postal Serv.*, 859 F.2d 402 (6th Cir. 1988); *Selby*, 2013 WL 1315841, at *12 n.11; *cf. Green*, 724 F.3d at 791. "[T]he arbitrator may determine his procedures if the parties cannot agree." *Chattanooga Mailers' Union*, 524 F.2d at 1315.

bias, pointing to the district court's decision in *Jackson*. (Br. 32.) Mr. Inetianbor's bias argument is meritless for two reasons.

First, Mr. Chasing Hawk will not serve as the arbitrator should this Court hold that the arbitral forum is available and order the parties to arbitrate before a Tribal Elder. During the arbitration, Mr. Inetianbor's counsel sent an email to Mr. Chasing Hawk calling the arbitral process "clearly illegitimate" and demanding a "stop to these improper proceedings." (Doc. 81, Exh. D at 6.) CashCall's counsel responded by requesting that Mr. Chasing Hawk stay the arbitration proceeding pending the district court's resolution of Mr. Inetianbor's then-pending motion to reconsider and that Mr. Chasing Hawk convene a status conference. (*Id.* at 3). He has never responded. (Doc. 81 at 3-4.) It thus appears Mr. Chasing Hawk has withdrawn as the arbitrator, and CashCall will not seek to submit the arbitration to him.

Second, even if Mr. Inetianbor's bias arguments were still relevant, the FAA would not allow this Court to consider them at this stage of the case. The FAA provides that a court must vacate an arbitration award "procured by corruption, fraud, or undue means," or "where there was evident partiality or corruption in the arbitrators." 9 U.S.C. §§ 10(a)(1), (2). The "usual" case is "where the arbitrator is bribed by the opposing party or fails to disclose a relationship with that party." *United Transp. Union v. Gateway W. Ry. Co.*, 284 F.3d 710, 712 (7th Cir. 2002).

But courts "cannot entertain an attack upon the qualifications or partiality of arbitrators until after the conclusion of the arbitration and the rendition of an award." *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 n.4 (2d Cir. 1980); *see also Gulf Guar. Life Ins. v. Conn. Gen. Life Ins.*, 304 F.3d 476, 490 (5th Cir. 2002) (same).

Allowing parties to bring arbitrator bias claims pre-arbitration would frustrate the FAA's judicial review regime, which precludes review for bias until after an award has issued. *Michaels*, 624 F.2d at 414 n.4. It also would add another layer of pre-arbitration litigation. "Such a preliminary litigating hurdle would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013). Thus, in response to a pre-arbitration attack on an arbitration clause on the ground that the potential forum may be "biased," the Supreme Court "decline[d] to indulge the presumption" that the arbitration would be conducted in a biased manner. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (quotation omitted). This Court should follow suit and allow the arbitration to proceed before deciding whether to brand it biased.

CONCLUSION

CashCall respectfully requests that this Court reverse the district court's order reopening the case and remand to the district court with instructions that the case be sent to arbitration either (a) before a Tribal Elder or (b) before an alternative arbitral forum appointed under FAA Section 5.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 6,986 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii). This brief complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

/s/ Katherine E. Giddings
KATHERINE E. GIDDINGS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 13, 2013, I electronically filed the foregoing Answer Brief with the Clerk of the Court by using the CM/ECF system. I also further certify that the foregoing document was sent by United States Mail to Aaron Goss, John S. Hughes, Mona Lisa Wallace, Cathy Anne Williams, Wallace & Graham, P.A., 525 North Main Street, Salisbury, NC 238144 (agoss@wallacegraham.com, jhughes@wallacegraham.com, mwallace@wallacegraham.com and cwilliams@wallacegraham.com) and Brian William Warwick, Varnell & Warwick, P.A., 20 LaGrande Blvd., The Villages, FL 32159-2384 (bwarwick@varnellandwarwick.com) (Attorneys for Plaintiff/Appellee).

/s/ Katherine E. Giddings
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ADDENDUM

Tab

TAB 1

Elaine played no legally recognized role. Based on the existing record developed in the court below, this Court finds that there is an inadequate factual basis from which to make any reasonable conclusion of law on this particular issue. This problem as largely created by the inability or unwillingness of the executor's lay advocate to fully comply with the requirements of the Cheyenne River Sioux Tribal Probate Code. The most pertinent provision in this regard is Sec. 9-5-6, which requires an accounting before any final distribution of the estate's assets:

> Prior to the distribution of the estate remaining after payment of all just claims and priority payments, the executor *shall submit to the Court for approval an accounting* of all receipts and disbursements for the estate, showing the present status of the estate and that it is ready for distribution, and also showing the computation of any attorney and/or executor's fees involved for which approval for payment is sought. (Emphasis added.)

While this Tribal Code Section does not define the precise amplitude of the required accounting, it remains clear that no reasonable accounting was developed below, especially with regard to the nature and character of Gordon's ranching operation that is at the core of this appeal.[5]

B. Validity of the Codicil

It is well within the authority of both the trial court and the reviewing court to determine the authenticity of a purported holographic codicil. *In re Estate of Mary Ethelyn Graves*, 144 N.W.2d 35 (S.D. 1966). In this case, the trial court's finding that the date on the purported codicil was "in a different handwriting than the document itself" was not clearly erroneous and therefore its determination of the codicil's invalidity was wholly proper and does not constitute reversible error. This finding of the trial court is thus in full accord with the legal requirements of Sec. 9-4-3 of the Tribal Probate Code that require that the signature and material provisions of any holographic codicil be in the handwriting of the testator. The date on the purported handwritten codicil is quintessentially 'material' in the case at bar.

IV. Conclusion

For all the above-stated reasons, the decision of the trial court that Gordon and Elaine's ranching activities constituted a legal partnership is reversed and that portion of the case is remanded for an appropriate accounting in accordance with Sec. 9-5-6 of the Tribal Probate Code to determine the full extent of such ranching activities and whether they constituted a joint activity between Gordon and Elaine (with a right of survivorship in Elaine) or a solo activity of Gordon's alone. The accounting shall include to the fullest extent possible documentary evidence (and relevant testimony) pertaining to such items as vehicle and machinery titles, the purchase and sale of livestock, and brand registration and ownership. The subsequent dispersal of the estate shall be based on such findings.

In addition, the decision of the trial court finding the purported holographic codicil to be invalid as a matter of law is affirmed.

Ho Hec'etu Ye Lo
It Is So Ordered.

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[5]The Court notes in this regard, that any dispute between the parties as to proceeds of any life insurance policy is not properly before it. Such insurance proceeds are in no way part of Gordon LeCompte's estate.

CHEYENNE RIVER SIOUX TRIBAL COURT OF APPEALS

Sullivan WHITE WOLF, Sr., et al. v. Glen MYERS

No. 06-007-A (Sept. 25, 2007)

Summary

The Cheyenne River Sioux Tribal Court of Appeals affirms the tribal court's judgment and remands to that court for the issuance of an order to show cause why the appellant should not be held in civil contempt for issuing a check, he knew or had reason to know was not backed by sufficient funds, in order to secure the release of cattle held pursuant to the tribal court's order as security for the satisfaction of its judgment.

Full Text

Before POMMERSHEIM, Chief Justice; CHASING HAWK and CLINTON, Associate Justices

PER CURIAM

Opinion and Order

This matter involves a breach of contract action arising out of the BIA and Tribal Pasturing Authorizations on Range Unit 255 for the period from May 15, 2006 until October 31, 2006 as well as the prior course of dealings between the parties. The tribal court found that the Defendant Glen Myers (Myers) failed to pay Plaintiffs Sullivan and Lillian White Wolf (White Wolfs) for the full amount of the authorized cattle for the period in question and entered a judgment against Glen Myers in the amount of $25,980.43 and further secured that judgment by enjoining Myers from removing his cattle from the affected range unit until he had paid the White Wolfs the full amount of the judgment. Apparently, in order to both remove his cattle and simultaneously contest the judgment, Myers issued a check for that amount to the White Wolfs, which subsequently was denied by his bank due to insufficient funds, and he also filed a Notice of Appeal. This Court for the reasons stated below affirms the judgment of the tribal court in full and additionally remands this matter to the tribal court in order to have it issue an order to show cause why Myers should not be held in civil contempt for issuing a check he knew or had reason to know was not backed by sufficient funds in order to secure release of cattle held pursuant to order of the tribal court as security for satisfaction of its judgment.

Background

The White Wolfs are both enrolled members of the Cheyenne River Sioux Tribe who reside within the boundaries of the Cheyenne River Sioux Indian Reservation in South Dakota. They hold authorizations to use Range Units 178 and 255. This Court is informed that those range units include both lands held in trust for the Cheyenne River Sioux Tribe (Tribe) and also restricted trust lands held by the White Wolfs. For at least two successive pasturing seasons, Myers had secured Pasturing Authorizations to graze his cattle on range units held by the White Wolfs. Myers is not a member of the Tribe.

The practice of the Tribe in cooperation with the Bureau of Indian Affairs and as part of its range management programs is to set a maximum number of head, the Animal Units, that can graze on any particular range unit during a grazing period. The maximum Animal Units are calculated based on the condition of the range which is partially determined by the number of head of cattle grazing on the range unit during the prior pasturing year. Thus, if the holder of a pasturing unit does not graze the maximum number of authorized Animal Units in any particular year, they receive a credit for the past pasturing year based on the number of authorized cattle that were not actually

grazed on the unit. This credit constitutes a regulatory range management credit and is not a monetary credit that affects the financial terms of any particular grazing contract.

For the grazing period for range unit 255 beginning on May 15, 2006 and running until October 31, 2006,[1] the Pasturing Authorization signed by the parties reflects that the White Wolfs, apparently as an inducement for renewing the grazing authorization with them, expressly agreed to give Myers monetary credit in the amount of $2977.50 for a number of authorized cattle during the prior grazing period (June 1, 2005 through February 28, 2006) which he had not used. Plaintiffs' Exhibit 2. No such concession is contained in the prior Grazing Authorization for Range Unit 255 in the record. Plaintiffs Exhibit 1. Under their last Pasturing Authorization, Myers was authorized to run 285 head of livestock on Range Unit 255 for the period from May 15, 2006 through October 31, 2006. The parties do not dispute that the agreed upon price was $25.00 per head which included the tribal tax for the five and half months.

The White Wolfs testified that they ran cattle for over 15 years on the Cheyenne River Sioux Reservation. Their business practice is that anyone who subleases the range from them pays half of the agreed upon fee at the start of the sublease before any cattle are put on the range and then pays the remainder due before the cattle are removed from the range at the end of the Pasturing Authorization.[2]

The summer of 2006 proved to be a particularly hot and dry summer for grazing on the Cheyenne River Sioux Reservation. Myers testified both to problems he had keeping an adequate supply of water for the cattle on Range Unit 255, to the deaths of some cattle as a result, and to the travel problems he encountered in maintaining his cattle on Range Unit 255 as a result of these conditions. Furthermore, the evidence reflects that Myers was formally notified by the Bureau of Indian Affairs of several violations of his Pasturing Authorization for Range Unit 255 during this period. *E.g.* Plaintiffs' Exhibit 3.

The White Wolfs testified that on or about June 1, 2006 when they sought to collect the sums due for the most recent Pasturing Authorization, Myers refused, claiming that he had already paid them based on his belief that he was entitled to monetary credit for Animal Credits not actually used beyond the express credit contained in the most recent Pasturing Authorization. Thereafter, near the end of the authorized grazing period, Myers sought to remove his cattle from Range Unit 255 without having paid the fees due under the Pasturing Authorization and this litigation ensued. After conducting a lengthy hearing and reviewing the financial records supplied by the parties, the tribal court on October 4, 2006 entered its Findings of Fact and Conclusions of Law which found against Myers and entered judgment against him in the amount of $25,980.43. In order to secure that judgment, the October 4, 2006 order expressly enjoined Myers from removing his cattle from the range unit without satisfying the judgment by paying the prescribed sum to the White Wolfs.

This Court is advised that Myers secured release of the cattle by issuing a personal check in the prescribed amount to the White Wolfs on which payment subsequently was denied by his bank due to insufficient funds. The Court is further advised that separate criminal charges are pending against Myers in the state courts of South Dakota for fraudulently issuing this check. The Court is informed that Myers had entered a guilty plea to some or all of those criminal charges and still awaits sentencing. The judgment against Myers remains unsatisfied. Myers also filed a timely Notice of Appeal. Oral argument on this appeal was held at the Tribal Courthouse in Eagle Butte, South Dakota on September 7, 2007. While both parties appeared *pro se* in the tribal court, at oral argument in this appeal Myers appeared *pro se* and the White Wolfs were represented by their legal counsel, Jim D. Steward, appearing through telephonic connection.

Discussion

While Myers' submissions to this Court, particularly his presentation at oral argument, demonstrate that considerable hostility now exists between Myers and the White Wolfs, the points Myers presented in his oral submission were quite narrow. Despite the fact that he mentioned lack of subject matter jurisdiction in his Notice of Appeal, Myers made no argument whatsoever to this Court suggesting in any way that the tribal court lacked subject matter jurisdiction, having seemingly abandoned that claim. Myers therefore denied this Court an opportunity to address any and all claims he may have regarding that question.

Myers does not deny the existence of a pasturing arrangement and the signing of the Pasturing Authorization in question, yet he denies the existence of an enforceable contract. Nevertheless, Myers conceded at oral argument, his custom and that of those who ran cattle on the western prairies was to lease "grass" (i.e. grazing authorization) on a handshake. In the grazing industry, one's word customarily is one's bond. Other than to contest the basic nature and terms of the contract contained in the Pasturing Authorization, Myers did not question or in any way claim any inaccuracies in the very careful accounting calculations made by the tribal court in arriving at the final judgment amount of $25,980.43. Therefore, since that figure was not challenged by Myers, this Court accepts it as the accurate figure, *if any sums are due*, which, of course, Myers contests because he rejects the existence of a contract and claims that if one existed he is only required under a Pasturing Authorization to pay for "grass" actually used by placing cattle on it, rather than for the *authorized number of head* permitted under the sublease during its entire term.

Myers therefore claims credit against the current lease for cattle, authorized, but not actually run, on the range unit for which he previously paid during prior Pasturing Authorizations. This appeal, while involving complex business transactions, narrows down to two issues: (1) the subject matter jurisdiction of the tribal court over this matter and (2) the existence of a contract and, if one exists, the terms and conditions of a grazing authorization, i.e. whether the Pasturing Authorization subleases the right to run a *permitted* number of livestock during a specified period with amounts due based on the permitted number and prescribed time period or whether the Pasturing Authorization only requires payment from Myers for the number of cattle actually grazed on the unit for actual time period of such grazing. This Court will address these two issues in order and then turn to the troubling question of Myers' efforts, potentially fraudulent, to secure release of the cattle held as security for the judgment by issuing a check that was not paid in his bank due to insufficient funds.

[1]The actual dates on the Pasturing Agreement are May 15, *2005* to October 31, *2005*. Plaintiffs' Exhibit 2. From both the dated heading on the Pasturing Authorization and the dates shown on the signatures, it is clear that the references to 2005 constituted a typist's clerical mistake which should have both read 2006. Myers' signature is dated April 28, 2006, the White Wolfs' signatures are respectively dated April 25 and 28, 2006, the CRST Land & Natural Resources Committee approval is dated April 25, 2006 and the permit was approved by the Agency Superintendent on April 28, 2006. Since the parties clearly were not subleasing grazing rights for a period already long since past when they signed the document, this Court understands the parties to have intended the year 2005 in the duration dates to mean 2006.

[2]As discussed below, this business practice did not conform with the governing federal regulations set forth in 35 C.F.R. § 166.416 since they failed to assure that the Pasturing Authorization expressly authorize them to precollect rents more than 30 days in advance.

A. Subject Matter Jurisdiction

While Myers made absolutely no claim to this Court regarding the lack of subject matter of the tribal court over this matter beyond summarily mentioning it without explanation in his Notice of Appeal, this Court has an independent obligation to assure that both the tribal court and this Court possess subject matter jurisdiction over the cases it hears on appeal. Thus, this Court will consider the question of subject matter jurisdiction on its own motion, albeit without the benefit of any arguments that Myers may have on the question since, for whatever reason, he withheld from this Court his grounds for claiming a lack of subject matter jurisdiction in his Notice of Appeal and therefore seemingly abandoned the claim.

The tribal court found, and Myers does not contest, that all parties were served with due and proper notice of the proceeding. Findings of Fact ¶ 3. Therefore it determined that it had personal jurisdiction over Myers. The tribal court further found that it had subject matter jurisdiction over the case pursuant to Cheyenne River Sioux Tribal Law and Order Code, Section 1-4-3 and Section 1-4-4 as well as under Grazing Ordinance # 71. Under Section 1-4-4 the Courts of the Cheyenne River Sioux Tribe (CRST) "have jurisdiction over any real or personal property located on the Reservation ... or to determine the application of such property to the satisfaction of a claim for which the owner of the property may be liable." Section 1-4-5 further grants the CRST Courts "jurisdiction over all civil causes of action" subject to any contrary provisions exceptions or limitations contained in federal law. Furthermore, section 1-4-2 of the Cheyenne River Sioux Tribe Law and Order Code expressly extends the jurisdiction of the CRST Courts "to the territory within the exterior boundaries [of the Reservation]." By his own admission. Myers entered into an arrangement to sublease grazing rights on Range Unit 255 located entirely within the Cheyenne River Sioux Reservation and composed of lands beneficially owned by the Tribe and by the White Wolfs, who are both members of the Tribe. This discussion highlights that the contractual arrangement in question was one involving tribal and member held lands and was to be performed exclusively on Indian lands within the Cheyenne River Sioux Reservation. Clearly, a civil dispute of this type not only comes within coverage of Grazing Ordinance # 71 but falls squarely within the jurisdiction granted to the CRST Courts by Sections 1-4-2 and 1-4-5, subject, by the express terms of the latter section, to any limitations in federal law. In addition, since Myers' cattle, originally held for a debt arising on the Reservation, were found on the Reservation (before they were arguably fraudulently removed by Myers' issuance of a check not backed with sufficient funds), the tribal court also had jurisdiction over such personal property under the provisions of Section 1-4-4.

Thus, the only jurisdictional question that remains involves the issue of whether federal law imposes any express or implied limitations over contractual disputes between tribal members and others who are not members of the tribe, such as the present one, involving contracts to be wholly performed on the Reservation and involving the use of tribal and individually held Indian lands. In *South Dakota v. Bourland*, 508 U.S. 679 [20 Indian L. Rep. 1026] (1993), the United States Supreme Court accepted the view that Article II of the Fort Laramie Treaty of 1868 with the Sioux Nation, 15 Stat. 635, which recognized the "absolute and undisturbed use and occupation" of Sioux Tribes and that further provided that no non-Indians (except authorized government agents) would "ever be permitted to pass over, settle upon, or reside in" the Great Sioux Reservation, expressly recognized the inherent aboriginal power and authority of the Sioux Tribes, including the Cheyenne River Sioux Tribes, to control the actions of non-Indians on their reservation. Nevertheless, in that case the Court held that various provisions of the Flood Control Act of 1944, ch. 665, 58 Stat. 887, and other subsequent statutes passed to implement it on the Cheyenne River Sioux Reservation curtailed the inherent power of the Tribe to exercise legislative jurisdiction to regulate non-Indian hunting and fishing on reservation lands condemned by the United States for flood control damns and projects. By contrast, the lands involved in this dispute remain in Indian beneficial ownership and Myers has pointed to, and this Court is unaware of, any federal treaty, statute or other law that expressly limits the civil jurisdiction *Bourland* acknowledged that the Fort Laramie Treaty recognized in the Sioux tribes over their lands including jurisdiction over nonmembers located on those lands. This case involves an example of the exercise of that jurisdiction.

Since no federal statute or treaty curtails the inherent civil adjudicatory jurisdiction of the Tribe over nonmember actions on Indian owned lands within the Cheyenne River Sioux Reservation, this Court is left to inquire whether any federal judicial decision has impliedly curtailed that jurisdiction (assuming, only for purposes of argument, that such authority exists in the federal judiciary without the benefit of statute). The critical test for the exercise of tribal jurisdiction in this case is the consensual relations test of *Montana v. United States*, 450 U.S. 544 [8 Indian L. Rep. 1005] (1981), which recognized the civil subject matter jurisdiction, regulatory and taxing authority of Indian tribes over nonmembers who had entered into consensual relationships with the Tribe or its members. In *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 [28 Indian L. Rep. 1019] (2001), the Supreme Court recognized that under the consensual relationship test of *Montana* a Tribe has jurisdiction, whether to tax, regulate, or adjudicate where its assertion of jurisdiction has "a nexus to the consensual relationship itself." This case involves precisely the example envisioned in *Atkinson Trading*. The dispute in this case involves an alleged breach of contract for failure to [make] payment and the holding of livestock as security for payment of that debt which arose directly from a consensual contractual relationship between Myers and Sullivan, a contract that was expressly approved by the Tribe and involved tribal land within the affected range unit. A clearer example of a case that satisfies the *Atkinson Trading* test for tribal jurisdiction under the consensual relationship test of *Montana* is hard to imagine. Recent lower federal court decisions further confirm that conclusion. *In Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 491 F.3d 878 [34 Indian L. Rep. 2147] (8th Cir. 2007), the Eighth Circuit confirmed this conclusion in a very similar case. It found that the courts of the Cheyenne River Sioux Tribe had subject matter jurisdiction to issue a substantial judgment against a non-Indian bank that had discriminated against borrowers as Indians and tribal members when the bank made loans to tribal members on the reservation, including the transactions with the claimants that formed the basis for the judgment. Even though the Bank was a not a tribal member and was not tribally controlled, it had entered into consensual relationships with tribal members to be performed within the Reservation and therefore was subject to the jurisdiction of the CRST Courts for disputes that arose from those consensual relationships.

The Ninth Circuit reached a very similar conclusion in *Smith v. Salish Kootenai College*, 434 F.3d 1127 [33 Indian L. Rep. 2026] (9th Cir. 2006). In *Smith* an *en banc* panel of the Ninth Circuit reaffirmed the jurisdiction of a tribal court to hear a suit by a nonmember for a tort arising on the reservation allegedly committed by the tribe, one of its agencies, or a tribal member. *Smith* involved a tort action brought against a nonmember and a tribal college for wrongful death when an axle broke on a truck owned by the college while the nonmember was driving it within the reservation. Initially, the nonmember did not contest the jurisdiction of the tribal court and in fact sought relief himself, making him a *de facto* plaintiff. After entry of an adverse final judgment, however, he went to federal court to invalidate the jurisdiction of the tribal court and with it the judgment.

Relying on the *Montana* tests set forth above, the Ninth Circuit rejected the effort. It noted that the nonmember had entered into a consensual relationship with the Tribe by enrolling as a student in the tribal college and that the cause of action arose out of that relationship. It found that the tribal college was "a tribal entity and, for purposes of civil tribal court jurisdiction, may be treated as though it were a tribal 'member.'" Stressing that while initially sued, the nonmember ultimately became a claimant in the tribal court and thereby chose to invoke its jurisdiction, the Court found consent to the exercise of the jurisdiction of the tribal court which satisfied the first *Montana* exception:

> This case, unlike the Court's decisions in *Hicks*, *Strate*, and *Montana*, involves a nonmember plaintiff. In this regard Smith is similarly situated to the principal case cited as an example of the *Montana* exceptions: *Williams v. Lee*. This is important, because as a plaintiff Smith chose to appear in tribal court. We are of the opinion that, even though his claims did not arise from contracts or leases with the Tribes, Smith could and did consent to the civil jurisdiction of the Tribes' courts. And in this case, the exercise of tribal jurisdiction is consistent with the limited sovereignty of the Tribes.

See also Naranjo v. Does, Appeal No. 07-0003 (Colorado River Indian Tribes Ct. App., decided July 11, 2007) (sustaining tribal court jurisdiction over a wrongful death action brought against a tribal casino by the estate of a deceased nonmember patron of the casino based on the consensual commercial relations established by the patron's use of casino facilities, including its slot machines and bar).

This Court is advised and also takes judicial notice of the fact that Myers himself has invoked the jurisdiction of the CRST Courts in other disputes he has had with members of the Tribe. A nonmember who routinely invokes the privileges and benefits of the CRST Courts where he seeks redress against tribal members, certainly cannot easily be heard to complain when tribal members seek to use the same tribal courts to secure redress of their claims against him for breach of contractual arrangements.

Thus, in this case both federal and tribal law agree that the CRST Courts unquestionably have jurisdiction to adjudicate a dispute between tribal members and a nonmember which arose from a contractual relationship to be performed within the Reservation. Indeed, that was the precise holding of the Supreme Court's decision in *Williams v. Lee*, 358 U.S. 217 (1959), which concluded that the courts of the Navajo Nation had the exclusive jurisdiction to hear an installment contract collection case brought by a non-Indian traders against two members of the Navajo Nation to collect under the contract. In short, despite Myers' brief and totally unexplained and unsupported suggestion that the CRST Courts lacked subject matter jurisdiction (a claim Myers seemingly abandoned during his prosecution of this appeal), the Cheyenne River Sioux Tribal Law and Order Code, the Fort Laramie Treaty of 1868 and the decided federal cases all unequivocally hold that tribal courts have subject matter to adjudicate cases, like the present one, arising directly from consensual contractual relationships on the reservation. Myers' claim of lack of subject matter jurisdiction, however briefly asserted, therefore must be and hereby is rejected. This Court finds that both the tribal court and this Court had subject matter jurisdiction over this dispute.

B. Contract Formation and Terms

On the merits of this appeal, Myers makes two basic and somewhat inconsistent claims. First he denied the existence of any contract, despite his signature on a Pasturing Authorization that was also signed by the White Wolfs and required tribal and federal officials. Second, he claims that the contract only called for him to pay for "grass" actually used and for the period he actually used it, rather than to pay for the authorized Animal Units on the range unit for the entire duration of the term of the Pasturing Authorization, irrespective of the time the cattle were actually placed there. For reasons described below, this Court rejects both of these claims in construing the contractual terms between the parties.

1. Contract Formation

In his appeal, Myers argued that the custom in the grazing trade was to sell "grass," i.e. pasturing authorizations, on a handshake deal since a man's word is generally honored. Lakota traditional customs of honor and respect certainly are consistent with this practice. Thus, much of the trade in subleases of livestock grazing rights to range units on the CRST Reservation are done through contractual arrangements that include some elements arrived at through "handshake deals."

Since grazing on Indian reservation lands, however, requires the issuance of a Pasturing Authorization signed by officials of the Bureau of Indian Affairs, the signature on these Pasturing Authorizations, which are signed by and reflect the approval of the Indian range unit holder (here the White Wolfs), the sublessee (here Myers), the CRST Land & Natural Resource Committee and the Bureau of Indian Affairs Cheyenne River Agency Superintendent, customarily sufficed to evidence the existence of contractual agreement between the parties. Technically, the Pasturing Authorization is a not itself a contract, but, rather, a regulatory permit to use the described tribal range unit for livestock pasturing. The custom on the Reservation, however, is to have all parties to the antecedent contractual agreement sign the Pasturing Authorization which both applies for the necessary permit and memorializes the antecedent agreement of the parties, which may either be in writing or an oral "handshake deal." Thus, contrary to Myers' arguments, his signature on the Pasturing Agreement contained in Plaintiffs' Exhibit 2 reflects his assent to entering into a contract with the White Wolfs for the term govemed by the Pasturing Authorization and the total number of authorized Animal Units.

This customary practice, which Myers' arguments to this Court basically confirm, makes the job of the CRST Courts a bit more difficult where disputes arise between a range unit permittee and a livestock owner regarding the terms and conditions of the contract or the price to be paid. The reason for this difficulty is that since the Pasturing Authorization constitutes a regulatory permit designed to manage and control range use, it does not contain all of the terms normally expected in a contract. While the Pasturing Authorization certainly contains two critical contractual elements for determining the terms of a grazing sublease, it does not contain the important element of price (other than the tribal tax which is expressly stated), an element that is critical to the contractual arrangement but totally irrelevant to range management issues. This Court is advised that customary practice on the Reservation is for the permittee and grazing sublessee to separately negotiate the price, which sometimes (and preferably from the standpoint of this Court) may be reflected in a separately signed document or, more commonly, is based on an oral understanding, i.e. a "handshake deal," between the parties.

If any dispute existed between the parties to this case over the actual price, the customary practice would make this decision in this case more difficult. In this case, however, Myers and the White Wolfs both agree on the actual price to which they committed, which was $25 per head of livestock, *including* the tribal taxes (which proved to be double what the parties anticipated). Even more significantly, Myers produced at argument on appeal a signed writing reflecting that price which had not been included in the trial record. While we have grave doubt whether the subsequently produced document can be consid-

ered in this appeal since it was not included in the trial record, it only confirms *in writing* the oral arrangement to which both testified at trial.

Thus, contrary to Myers' argument, this Court agrees with the tribal court that a valid and enforceable legal contract had been negotiated, entered into, and sufficiently memorialized in this case.

2. Terms and Conditions of the Contract

The real crux of the dispute in this case turns on the terms and conditions of the contract. Myers claims that a grazing sublease like the one at issue here only rents grass that was *actually used*. Thus, under Myers' construction of the agreement he only owned the White Wolfs for the number of head of livestock he actually place on Range Unit 255 and then only for the actual time period he chose to keep them there, irrespective of the actual duration of the sublease. On this basis, Myers essentially claims the White Wolfs were adequately paid since he was owed credits for overpayments from prior periods when he removed cattle before the expiration of the sublease or placed fewer than the authorized Animal Units on the range. In short, he claims entitlement to a *monetary* credit for the grazing credit normally given in range management decisions from prior underutilization of the resource. No one disputes that the concession that the White Wolfs gave Myers of $2977.50 which appears on the face of the most recent pasturing authorization (Plaintiffs' Exhibit 2) was appropriately credited to him. The question is whether he is entitled to further credit for nonuse not so expressly specified. When asked by this Court if he would owe the White Wolfs anything if hypothetically he chose to place no livestock whatsoever on the range unit after signing the contractual arrangement, he first sought to evade the issue but ultimately answered that under his understanding he would not owe anything to the White Wolfs under such circumstances.

By contrast, the White Wolfs understand the grazing sublease to be an authorization for the use of the range unit for the entire maximum Animal Units established in the Pasturing Authorization for the entire duration of the Pasturing Authorization, irrespective of actual use to which the sublessee places the range unit. While not asked the same question, their understanding, of course, would mean that even if Myers placed no livestock on the range unit after signing the sublease, the White Wolfs would still be owed the full sublease price since they had forgone the opportunity to either run livestock on the unit themselves or sublease the unit to others.

Since Myers chose not to dispute in this appeal the actual accounting calculations made by the tribal court, but simply denied the existence of any contract and claimed that if one existed, he was owed credits from prior years that covered the amount due to the White Wolfs, essentially, this appeal ultimately turns on which interpretation of the contractual arrangement constitutes the correct interpretation of the terms of the contract between the parties. Three reasons suggest that the interpretation of the contract advanced by the White Wolfs is the correct one and that Myers' position therefore was incorrect as a matter of law.

First, the custom and tradition on the Cheyenne River Sioux Reservation is to sublease grazing authorization based on the number of animal units a sublessee *can* (not actually does) place on the range unit for the duration of the sublease (rather than the term of actual use). That is the common understanding in these arrangements on the Cheyenne River Sioux Reservation and the one which this Court therefore must follow. If Myers seeks to avail himself of the privileges and benefits of CRST Grazing Ordinance # 71 and to graze his cattle on lands beneficially held by the Tribe and its members, which he has done in this and other transactions, he has an obligation to familiarize himself with both CRST law and the customs in the trade on the Reservation and to adhere to them in his dealings on the Cheyenne River Sioux Reservation.

Second, often the question of interpreting such contractual arrangements involves the assignment of risk of loss. The extremely hot and dry summer of 2006 on the Cheyenne River Sioux Reservation and Myers' repeated complaints in this appeal regarding the availability and quality of water and the greater need to drive 90 miles to tend to his cattle, reflect that this risk question lies at the core of the dispute in this case. Myers' position would place the risk of weather related problems with the range unit on the White Wolfs, while the position of the White Wolfs indicates that the risk of weather related loss or expense should lie with the livestock owner. Ranching is a risky business. Most ranchers will tell you that the weather can play an important role in the availability of grass and water necessary to feed their livestock. Ranchers generally understand that the risk of such weather related losses falls on them, and not, as claimed by Myers, on any land owner from whom they may rent pasture rights. While it is human nature perhaps to want to pass such losses on to someone else, as Myers' position seeks to do here, that position comports with neither conventional understandings in the trade nor with common sense. The party actually engaged in the ranching operation should bear the risk of loss so long as his lessor has not somehow breached the contract in a fashion that caused the loss. Since Myers did not counterclaim against the White Wolfs for any loss attributable to any failure to honor the contract, the entire risk of loss therefore should rest with Myers. Since his interpretation of the contract would reallocate the risk of weather related or other losses to the White Wolfs, it must be rejected as inconsistent with both the understanding in the trade and with traditional contractual principles.

Third, and perhaps most important, Myers' understanding of the contractual arrangements must be rejected as inconsistent with both common sense and applicable regulations. A party who subleases a range unit obviously often will not be running livestock on the unit affected. They have no incentive to regularly supervise the range unit or take any active responsibility for the condition of the unit so long as fences are up and the water system available at the time the unit is turned over to the sublessee. Thus, they may not even be around to know how many head of livestock a sublessee places on the range unit or the actual period of use. Under Myers' interpretation of the contract, he could remove his livestock at any time and owe the White Wolfs nothing for the remaining period of the Pasturing Authorization. While he suggested that they would then be free to rent the remaining period to someone else, they might not even know of the livestock removal in such circumstances and even if they did, his explanation did not indicate why the Tribe or the BIA would approve a new pasturing authorization for a range unit during a period already governed by an existing one. To use an analogy that Myers was asked about during oral argument in this case, if one rents an apartment and never moves into the unit, the landlord is still due the full rent for the prescribed period of the lease, *not* merely rent for whatever time the tenant chose to occupy the premises.

Myers' position regarding the terms and conditions of the grazing sublease places the entire control over whether or how much he owes to the White Wolfs in his hands, depending on whether and how much he chooses to use the range unit in question. No one would sign a contract on such terms since it makes the contractual obligation of the sublessee essentially illusory. Myers' interpretation of the contract, therefore, must be rejected because it defies experience and common sense, not to mention the traditional way in which leases and other contracts are structured. Grazing subleases, like apartment leases, do not rent grass based on actual use, but, rather, authorized use. Insofar as Myers therefore claims credit for prior periods in

which he did not actually use the range unit, his claims must be rejected. The White Wolfs generously offered Myers a demanded concession of $2977.50 for prior nonuse in the most recent Pasturing Authorization. They were not legally required to do so. Not satisfied, Myers now seeks to convert their generosity into a general principle that confuses range management Animal Unit credits with actual contractual payments. It is a far cry from granting a $2977.50 concessionary credit that was not legally required to insisting on a legal right to credit in the amount of $25,980.43. This Court cannot accept Myers' efforts to convert the White Wolfs' generous concession into a legal entitlement that essentially obviates any requirement that Myers pay the White Wolfs for the use of Range Unit 255 for the most recent grazing period. To accept Myers' argument would unjustly enrich Myers due to the White Wolfs' generosity in granting his demanded, but not legally required, limited concession. Such a result clearly would work a major injustice.[3]

Such claims also must be rejected as a matter of law since they do not comply with the applicable federal regulations governing grazing on Indian laws. Pasturing authorizations like the ones involved in this matter are governed by 25 C.F.R. Part 166. Those regulations expressly prohibit the kind of *prepayment* of rent that form the basis both the payment arrangements made between the parties and Myers' claim of entitlement to credit for prior sums paid for grazing but not actually used. Specifically, 25 C.F.R. § 166.416 provides "[r]ent may be paid no more than 30 days in advance, unless otherwise specified in the permit." While the prior Pasturing Authorization (Plaintiffs' Exhibit 2) contained such an express statement regarding credit for the $2977.50 payment, it surely did not expressly recognize any prepayment of the amount of $25,980.43, which the tribal court found due. Yet, Myers claims that such sums were prepayed. Thus, since Myers' claim is entirely based on his assertion of prepayment through earlier credits from nonuse, his claim must fail as a matter of law since it is inconsistent with this governing federal regulation.

For these reasons this Court concludes that Myers' appeal lacks merit and therefore must be and hereby is denied.

3. Contempt

The tribal court entered on October 4, 2006 its Findings of Fact and Conclusions of Law which found against Myers and entered judgment against him in the amount of $25,980.43. More importantly, in order to secure that judgment and in the exercise of its jurisdiction under Section 1-4-4 of the CRST Law and Order Code, the tribal court expressly enjoined Myers from removing his cattle from the range unit without satisfying the judgment by paying that sum to the White Wolfs. Thus, the tribal court ordered the cattle held as security for the debt. This Court is advised that Myers secured release of his cattle by issuing a personal check to the White Wolfs for the prescribed amount on which, ultimately, his bank declined payment due to insufficient funds. If Myers knew his account lacked sufficient funds to pay the check he issued, his actions constituted the commission of a fraud on the court and therefore might constitute civil contempt. This Court is aware that separate state criminal charges have been filed against Myers for the issuance of this bad check and the Court has reason to believe that Myers already has plead guilty to some or all of those charges and is awaiting sentencing.

Separately from the alleged criminal act of issuing this bad check, Myers also may have committed a fraud on the CRST Courts by securing release of property held as security for a judgment through the issuance of a check he knew or had reason to know was not covered by sufficient funds or perhaps, worse still, because he moved funds out of the affected account to assure that the check did not clear his bank. If Myers knew or had reason to know that the check was not covered by sufficient funds, as might be suggested by his guilty plea to the state charges, he committed a fraud on the tribal court which constitutes a civil contempt of court under Section 1-3-2(1) of the CRST Law and Order Code. Clearly, Myers is entitled to notice and a hearing on the question of whether his actions constituted a civil contempt within the meaning of Section 1-3-2(1) and, if so, what remedies are appropriate under Section 1-3-2(2). Under the latter provision the appropriate remedy is left to the tribal court which may enter any form of coercive or compensatory relief necessary to cause Myers to comply with the October 4, 2006 court order by paying the White Wolfs the amount of the judgment. Such remedies, at the option of the tribal court might include, but are not limited to, seizing and holding as security for payment of the judgment to the White Wolfs any and all personal property, including livestock, vehicles, or other equipment, that Myers may own which can be found on the Reservation; fining Myers a fixed amount for every day that the check is not honored or otherwise made good; banning Myers from conducting any business on the Reservation, including grazing livestock, until the prescribed judgment has been paid; issuing an order excluding Myers from the Reservation until the judgment has been paid; or even, as a last resort, jailing Myers if found within the Reservation until such time as he purges the contempt by making good on his bad check through paying either to the Court or to the White Wolfs the full amount of the judgment. This Court urges the tribal court in this case or in all future cases where personal property is held as security for payment of a debt to expressly require that the payment discharging the obligation be made either by certified check or by money order in order to avoid the potentially fraudulent use of personal checks like those alleged in this case.

For the reasons stated herein Myers' appeal of the Findings of Fact and Conclusions of Law entered by the tribal court on October 4, 2006 must be and hereby is denied and the judgment and order of the tribal court contained in that document is affirmed. Furthermore, this case is remanded to the tribal court with directions to the tribal court to issue immediately a Rule to Show Cause why Myers should not be held in civil contempt as a result of his issuance of the bad check to discharge property secured under that court order, to conduct a hearing on the matter and to conduct further proceedings in conformity with this Opinion and Order and Section 1-3-2 of the CRST Law and Order Code.

Ho HeCetu Ye Lo
It is so ordered.

[3]It should also be noted that the White Wolfs never authorized anyone else to run cattle on the affected unit during the term of Myers' Pasturing Authorization and therefore did not receive any compensation when Myers' cattle were off the unit.

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION TRIBAL COURT

COLVILLE CONFEDERATED TRIBES v. Eli VAN BRUNT

No. CR-2003-26330 (Oct. 15, 2007)

Summary

The Confederated Tribes of the Colville Reservation Tribal Court finds that the warrant to search the defendant's trailer was valid and denies his motion to suppress evidence seized.

TAB 2

CHEYENNE RIVER SIOUX TRIBAL COURT OF APPEALS

BANK OF HOVEN now known as PLAINS COMMERCE BANK v. LONG FAMILY LAND AND CATTLE COMPANY, INC., et al.

Nos. 03-002-A and R-120-99 (Nov. 22, 2004)

Summary

The Cheyenne River Sioux Tribal Court of Appeals affirms the trial court and the jury's award in an action relating to land within the exterior boundaries of the Cheyenne River Sioux Reservation.

Full Text

Before POMMERSHEIM, Chief Justice; DUPRIS and LEE, Justices

PER CURIAM

Memorandum Opinion and Order

1. Introduction and Background

The facts in this case involve a series of complex commercial interactions between Ronnie and Lila Long, the Long Family Land and Cattle Company, Inc., Plaintiffs/Respondents/Appellants (Longs), and Plains Commerce Bank (formerly Bank of Hoven), Defendant/Appellant/Respondent (Bank), dating back to 1989. Kenneth Long was a non-tribal member whose first wife, Maxine Long, was a member of the Cheyenne River Sioux Tribe. Kenneth and Maxine owned approximately 2,230 acres of Dewey County real estate in fee simple as well as a house in Timber Lake. All of this real estate is located within the exterior boundaries of the Cheyenne River Sioux Reservation. All of this real estate was mortgaged to the Bank for loans to the Long Family Land and Cattle Company, Inc.

Upon the death of Maxine, Kenneth became the sole owner of the real estate in Dewey County. At the time of Kenneth's death on July 17, 1995, Mr. Long and the Long Family Land and Cattle Company owed the Bank approximately $750,000. Mr. Long's estate acting through Paulette Long, Kenneth's second wife and personal representative of the estate, conveyed the Dewey County real estate, as well as the house in Timber Lake, to the Bank in lieu of foreclosure. As a result of this conveyance on December 5, 1996, the Long Family Land and Cattle Company was given credit for $478,000 on its outstanding debt to the Bank.

Ronnie Long is a member of the Cheyenne River Sioux Tribe and is the son of Kenneth Long. Upon his father's death, Ronnie inherited Kenneth's interest in the 2,250 acres of land in Dewey County on the Cheyenne River Sioux Reservation as well as his father's 49% interest in the Long Family Land and Cattle Company, Inc. The other 51% of the Company is owned by Ronnie and his wife Lila, who is also a member of the Cheyenne River Sioux Tribe. The Company has always been an Indian controlled company.

After Kenneth Long's death, employees of the Bank came to the Longs' land on the Cheyenne River Sioux Reservation to inspect it as well as the cattle, hay and machinery on the land. In addition, Bank officers met several times with the Longs, officials of the Cheyenne River Sioux Tribe, and Bureau of Indian Affairs employees. These meetings all took place on the Cheyenne River Sioux Reservation. All of these activities were directed to establishing a basis from which the Bank would provide new loans to Ronnie Long and the Long Family Land and Cattle Company, Inc. for their ranching operation on this land.

The Bank initially proposed that it would sell the land back to the Longs (which was conveyed to the Bank by the Long Estate) via a 20-year contract for deed. Upon the advice of counsel, in a letter to Ronnie Long dated April 20, 1996, the Bank withdrew this offer because of "possible jurisdictional problems." (Exhibit 4.) The revised proposal of the Bank offered the Longs only a two-year lease and option within which to purchase and pay for the land in full.

The Lease with Option to Purchase included a purchase price of $478,000 for the land. The other features of the lease provided that annual Crop Reserve Program (CRP) payments to the Longs were assigned to the Bank and the right of the Longs to exercise their option to purchase for $478,000 at the conclusion of the lease period. Another document captioned "Loan Agreement" was signed by both the Bank and the Longs. It recited a series of debits and credits of the Longs to the Bank, and also stated that the Bank would request that the BIA increase the loan guarantee to 90% of note # 98181, that the Bank would make an operating loan to the Longs in the amount of $70,000. The Bank also agreed to make another loan of $53,000 to pay off note # 98809 of $17,000 with the balance of $37,000 to be used to purchase 110 cattle. Both the Lease with Option to Purchase and the Loan Agreement were signed by the Bank and the Longs on December 5, 1996.

Shortly thereafter, mother nature intervened with a vengeance during the horrific winter of 1996-97. As a result of the failure to provide the $70,000 loan and the implacable force of the brutal winter, the Longs lost 230 cows, 277 yearlings, and 8 horses. The Bank did provide some additional loans that were quite modest. The Longs never recovered from these financial and weather-related blows and were unable to meet their outstanding debt to the Bank and were not able to exercise their option to purchase.

The Longs did not remove from the property in question at the expiration of the lease. The Bank began (state) eviction proceedings by sending a notice to quit to the Cheyenne River Sioux Tribal Court for service on the Longs. Service was apparently never effectuated. There was never any hearing or ruling by the state court. Without any order of eviction and with the Longs remaining in possession of the land, the Bank nevertheless sold the land. On March 17, 1999, the Bank sold 320 acres to Ralph Pesicka for cash and on June 29, 1999, the Bank sold the remaining 1,905 acres to Edward and May Jo Mackjewski on a contract for deed. None of these purchasers are members of the Cheyenne River Sioux Tribe.

The Longs then commenced an action in the Cheyenne River Sioux Tribal Court seeking a restraining order preventing the Bank from selling the real estate. The Bank's motion to dismiss for lack of subject matter jurisdiction was denied as was the Long's motion for a restraining order against the Bank. The Longs subsequently amended their complaint to include several causes of action against the Bank that sought damages and other relief. The Bank counterclaimed seeking eviction of the Longs and damages. The Longs requested a jury trial on their claims. The Bank did not seek a jury trial on its counterclaim.

A two-day jury trial was held on December 6 and 11, 2002. At the close of the Plaintiffs' case, Special Judge B.J. Jones dismissed Plaintiffs' claims that sought to void the contract, alleged fraud, failure of consideration, and unconscionability. The jury returned a verdict in favor of the Longs on their claims that the Bank breached the loan agreement, discriminated against the Longs based on their status as Indians, and acted in bad faith with regard to its dealings with the Longs. The jury awarded the Longs $750,000 along with pre-judgment interest. Special Judge B.J. Jones determined that interest to be $123,131. The jury also found that the Bank did not use self-help remedies in an attempt to remove Plaintiffs from the land. A supplemental judgment was later entered permitting the Plaintiffs to exercise the option to purchase the 960 acres of the land they continued to occupy.

Both sides filed timely notices of appeal with this Court. Oral argument was heard on October 6, 2004.

II. Issues

This appeal involves seven (7) issues raised by the Defendant/Appellant/Respondent and two (2) issues of the Plaintiffs/Respondents/Appellants. They are:

A. Defendant/Appellant/Respondent

1. Whether the Cheyenne River Sioux Tribal Court lacked subject matter jurisdiction for a claim of discrimination against an off-reservation bank.

2. Whether the trial court erred in failing to grant Defendant's motion for a directed verdict and judgment N.O.V. on the Plaintiffs' breach of contract claim.

3. Whether the trial court erred in failing to grant Defendant's motion for a directed verdict and judgment N.O.V. on Plaintiffs' separate cause of action based on bad faith.

4. Whether the trial court erred in failing to grant Defendant's motion for a judgment N.O.V. in that the damages awarded by the jury were excessive and controlled by passion.

5. Whether the trial court erred in not granting Defendant's cause of action for eviction against the Plaintiffs.

6. Whether the trial court erred in granting Plaintiffs' motion to exercise its option to purchase some of the real estate sold to Edward and Mary Jo Mackjewski under a contract for deed.

7. Whether the trial court erred in allowing pre-judgment interest on certain damages absent specific instructions to the jury.

B. Plaintiffs/Appellees/Respondents Longs and Long Ranch and Cattle Company, Inc.

1. Whether the trial court erred in its calculation of prejudgment interest.

2. Whether the trial court erred in permitting the Plaintiffs to exercise their option to purchase with regard to only part, rather than all, of the land described in the option to purchase.

Each issue will be discussed in turn.

III. Discussion

A. Defendant/Appellant/Respondent Bank

1. Jurisdiction

The Bank's jurisdictional claim is quite limited in scope and is best understood as involving two separate (but overlapping) legal contentions. As to scope, the Bank argues that the Cheyenne River Sioux Tribal Court does not have jurisdiction over the Longs' discrimination claim. Bank's brief at 6-9. This presumably forecloses any federal appeal under the exhaustion doctrine of any other issue involved in this case save the jurisdiction claim relative to the discrimination cause of action. *See, e.g., National Farmers Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 [12 Indian L. Rep. 1035] (1985). The Bank's two legal arguments, while not drawn as sharply as they might be, assert that the trial court did not have jurisdiction over the discrimination claim because it is a *federal* claim barred under *Nevada v. Hicks*, 533 U.S. 353 [28 Indian L. Rep. 1031] (2002), and because no discrimination cause of action exists as a matter of Cheyenne River Sioux tribal law. Each of these will be discussed in turn concluding with the pertinent jurisdictional analysis under *Montana v. U.S.*, 450 U.S. 544 [8 Indian L. Rep. 1005] (1981).

a) *Nevada v. Hicks* and Federal Causes of Action

The Bank alleges that Cheyenne River Sioux Tribal Court did not have subject matter jurisdiction over Plaintiffs' discrimination claim against the Bank. It is critical to note that the Bank does not challenge (on appeal) the general jurisdiction of the Cheyenne River Sioux Tribal Court over the lawsuit brought by the Longs against the Bank, but only against a single cause of action. Appellant's argument centers its claim on its reading of *Nevada v. Hicks*, 533 U.S. 353 (2002). More precisely, the Bank relies on *Hicks* for the limited proposition that tribal courts do not have jurisdiction over federal causes of action. Appellant's interpretation of *Nevada v. Hicks* in this regard is not incorrect, but it is inapposite. The Court in *Hicks* did hold that tribal courts do not have jurisdiction over a *federal* cause of action alleged under 42 U.S.C. § 1983.[1] The Bank argues by extension that tribal courts would have no jurisdiction over a discrimination claim grounded in 42 U.S.C. § 1981(c). This is likely true, but misses the point. The Plaintiffs discrimination claim is based on a cause of action grounded in tribal, not federal, law.

Plaintiffs' amended complaint did not invoke 42 U.S.C. § 1981 or any federal statute as the source of the discrimination claim and the Bank did not seek to question the source of law for this claim through a motion to dismiss for failure to state a claim on which relief might be granted. In addition, there were no jury instructions provided to the jury on an alleged *federal* cause of action for discrimination. In fact, the Court in the *Hicks* case itself noted that *tribal* law is often a "complex 'mix of tribal codes and federal, state, and traditional law.'" 533 U.S. at 384-85.

In addition, the Court in *Hicks* concluded:

> that tribal authority to regulate *state officers* in executing process related to the violation, off reservation, of state [criminal] laws is not essential to tribal self-government or internal relations.[2]

The case at bar is not a criminal case, does not involve state officers, and did not take place off the Reservation. It is therefore totally inapplicable as to causes of action arising on the Reservation involving private individuals. The *Hicks* opinion limited its holding "to the question of tribal court jurisdiction over state officers" leaving "open the question of tribal court jurisdiction and non-member defendants in general." 533 U.S. 358 n.2.

b) Discrimination Causes of Action Under Tribal Law

Notwithstanding its citation to *Nevada v. Hicks*, the Bank's claim is not really that the Tribal Court does not have subject matter jurisdiction over the discrimination claim, but rather there is no such cause of action under tribal law. In essence, the Bank is claiming that the Longs' discrimination claim should have been dismissed not for lack of jurisdiction, but for a failure to state a claim upon which relief might be granted. This is especially evident in that the Bank's motion to dismiss was not directed to all of the Plaintiffs' claims, but was limited to the discrimination cause of action premised on the (erroneous) theory that it was being pursued as a federal cause of action under 42 U.S.C. § 1981. This more precise claim is also insufficient as a matter of law.

Private claims of discrimination based on status are recognized under federal and state statutes. *See, e.g.*, 42 U.S.C. § 2000 (d), *et seq.* (2003), SDCL § 20-13-21 (2003). They are also recognized under the traditional (or common) law of the Cheyenne River Sioux Tribe.[3] While there is no express tribal ordinance

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[1] The Court's rationale for this holding that there was no congressional delegation of such authority to tribal courts remains unconvincing in light of Justice Stevens' observation that there is no congressional delegation to state courts yet it is unquestioned that state courts have 42 U.S.C. § 1983 jurisdiction. *See Nevada v. Hicks*, 533 U.S. at 402-03 (2002) (STEVENS, J. dissenting).

[2] *Nevada v. Hicks*, 533 U.S. at 364 (2002) (emphasis added).

[3] Discrimination is prohibited under tribal customary law in much the same way that other injurious or tortious conduct is prohibited under the common law. While it is true that discrimination is frequently the subject of legislation, it is also actionable under the common law. The Supreme Court has long recognized that "an action brought for compensation by a victim of ... discrimination is, in effect, a tort action." *Meyer v. Holley*, 537 U.S. 280, 285, 123 S. Ct. 824, 828 (2003) (citing *Curtis v. Loether*, 415 U.S. 189, 94 S. Ct. 1005 (1974)). In *Curtis*, the

creating a civil cause of action based on discrimination, there are nevertheless at least two other sources of tribal law that do recognize such a cause of action. They are tribal common law and the Cheyenne River Sioux Law and Order Code § 1-4-3 which confers jurisdiction on the trial court over claims arising out of "tortious conduct."

Since it is well understood that a claim based on discrimination essentially sounds in tort, jurisdiction over "tortious conduct" necessarily includes jurisdiction over Plaintiffs' discrimination claim.[4] In addition, there is basis for a discrimination claim that arises directly from Lakota tradition as embedded in Cheyenne River Sioux tradition and custom. Such a potential claim arises from the existence of Lakota customs and norms such as the "traditional Lakota sense of justice, fair play and decency to others," *Miner v. Banley*, Chy. R. Sx. Tr. Ct. App., No. 94-003A, Mem. Op. and Order at 6 [22 Indian L. Rep. 6044] (Feb. 3, 1995); and "the Lakota custom of fairness and respect for individual dignity." *Thompson v. Cheyenne River Sioux Tribal Board of Police Commissioners*, 23 Indian L. Rep. 6045, 6048 Chey. R. Sx. Tr. Ct. App. (1996). Such notions of fair play are core ingredients in federal and state definitions of discrimination. Therefore a tribally based cause of action grounded in an assertion of discrimination may proceed as a "tort" claim as defined in the Chey- enne River Sioux Tribal Code, as derived from tribal tradition and custom, or even from the federal ingredients defined at 42 U. S.C. §§ 2000-2001.[5]

The core of the Longs' discrimination claim was based on the Bank's letter to the Longs dated April 26, 1996, (Exhibit 4, TR 106-07, 330), in which the Bank withdrew its offer to sell the land back to Longs on a 20-year contract for deed because it involved an "Indian owned entity" and related (but unidentified) "jurisdictional problems." The Bank's subsequent offer as contained in the lease with option to purchase required *full* payment within 60 days of the expiration of the two-year lease. (Exhibit 7.) It is also significant to recall that the land involved is fee land not trust land. While trust land does involve certain federal restrictions on alienability, fee land does not. The Longs contended that this adverse and differential treatment of them was based on their status as "Indians" and constituted discrimination, a question that was ultimately resolved in their favor by the jury verdict.

It is a testament to the vitality and dignity of American jurisprudence that it would most certainly shock the conscience if a claim of discrimination—especially one based on the disparity of treatment on account or race or status—would not be cognizable in state or federal court. In this vein, the Cheyenne River Sioux Tribal Court is no different from its federal and state brethren in its unwillingness to ignore claims of discrimination. In the area of discrimination, there is a direct and laudable convergence of federal, state, and tribal concern.

c) Jurisdiction under *Montana v. United States*

Since there is a discrimination cause of action under tribal law involving fee land, the most relevant case for jurisdictional purposes therefore is not *Nevada v. Hicks* but *Montana v. United States*, 450 U.S. 544 (1981). In *Montana*, the Court held that tribal courts generally do not have jurisdiction over non- Indians involving matters that arise on fee land within the reservation. This presumption against tribal court jurisdiction is nevertheless subject to *Montana*'s well-known proviso which states: "to be sure, Indian tribes retain sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements.... A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. 565-66 (citations omitted).

It is clear that the case at bar satisfies both prongs. This case is the prototype for a consensual agreement as it involves a signed contract between a tribal member and a non-Indian bank. The contract deals solely with fee land located wholly within the exterior boundaries of the reservation. Fee land that was originally owned by the Longs, but owned by the Bank during the controverted events in this lawsuit. All bank loans in this matter were provided solely for the ranching operation by the Longs taking place on the Bank's land within the reservation. Numerous meetings of the Bank with the Longs, with Cheyenne River Sioux tribal officials, and Bureau of Indian Affairs personnel took place on the reservation, both when the land was owned by the Longs and subsequently when it was owned by the Bank.

It is somewhat misleading for the Bank to identify itself as an *off* reservation Bank, because it *owned* the land *on* the Reservation that is the subject of this lawsuit. As a result, the Bank is more accurately described as owning property and engaged in business activities *both* on and off the Reservation.

In addition, the case clearly involves the "economic security" of the Tribe in that the Cheyenne River Sioux Tribe (along with the Bureau of Indian Affairs) was a direct participant actively consulted by both the Longs and the Bank seeking economic data and support relevant to the cattle operation on the Longs' land. If the economic security of the Tribe was not involved, the Tribe would not have played such a large role in these events in seeking to support and advance the opportunity for tribal members to succeed in their ranching operation on the Reservation.

2. Breach of Contract Cause of Action

Appellant Bank asserts that the Longs' breach of contract claim was improperly submitted to the jury or if properly submitted to the jury, improperly decided by it because no contract existed as a matter of law or fact. In particular, the Bank contends that the key document captioned "Loan Agreement" which was prepared by the Bank and signed by both the Bank and the Longs on December 5, 1996 and recites, among other things, the Bank's commitment to provide two loans to the Long Land and Cattle Company, Inc. was not a contract at all. It was merely some kind of balance sheet that mainly recited a list of debts and credits relative to the real estate conveyed by the Long Estate to the Bank. In essence, according to the Bank, there was no consideration and hence no contract.

In the Bank's motion for judgment N.O.V. on this issue, Judge B.J. Jones decided against the Bank finding there was sufficient

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Court held that a claim for damages under the Civil Rights Act of 1968 "sounds basically in tort" and "is analogous to a number of tort actions recognized at common law." 415 U.S. 189, 195-196, 94 S. Ct. 1005, 1008-1009. The Court noted that, "[a]n action to redress racial discrimination may be likened to an action for defamation or intentional infliction of mental distress," and further that "under the logic of the common law development of a law of insult and indignity, racial discrimination might be treated as a dignitary tort." 415 U.S. at 195-196, n.10, 94 S. Ct. at 1008-1009, n.10. These are precisely the kinds of actions over which the tribal courts have jurisdiction. Under tribal law, the courts "have jurisdiction over claims and disputes arising on the reservation." CRST By-Laws, Art. V, § I(c), including claims arising out of "tortious conduct." Cheyenne River Sioux Tribal Code § 1-4-3. Cheyenne River Sioux Tribe's Amicus Brief at 14, footnote 3.

[4]One kind of classical tort is the harm that results from the differential and invidious treatment of one individual by another individual or entity.

[5]Note this last theory is *not* the pursuit of a *federal* cause of action in tribal court like the 42 U.S.C. § 1983 claim in *Nevada v. Hicks*, but that of a "borrowing" of federal law to stand in or amplify tribal law where it is necessary. *See, e.g.*, Cheyenne River Sioux Tribal Law and Order Code, Title VII Rule I(d).

consideration when the "Loan Agreement" is considered as part of the Lease with Option to Purchase under the integrated document doctrine. These documents were contemporaneous, applied to the same subject matter, and were interrelated as to terms. *See Battey Steamship Co. v. Refineria Panama, S.A.*, 513 F.2d 735, 738 n.3 (2d Cir. 1975). Judge Jones had already adopted the integrated document doctrine in denying the Defendant's motion for summary judgment on its counterclaim for eviction and it appropriately became the law of the case. This Court now adopts the substance of this rule as appropriate law within this jurisdiction. In this view, it is reasonable to construe the Loan Agreement along with the Lease with Option to Purchase and find sufficient consideration provided by the Longs in their commitment to assign their CRP payments to the Bank and their commitment to continue the operation of their ranch in an attempt to pay off their debts to the Bank without the Bank having to resort to legal action and the less than complete loan guarantees provided by the BIA.

The analysis set out by Judge Jones in his well-reasoned opinion of June 7, 2003 is persuasive. As noted above, there certainly was enough evidence submitted to the jury for it to have found adequate consideration. In reviewing a jury's determination on a motion for a judgment N.O.V., the South Dakota Supreme Court has established a reasonable standard of review, which this Court adopts. This standard directs the reviewing court to review the testimony and evidence in a light most favorable to the verdict or nonmoving party and then to decide without weighing the evidence if there is evidence which did support the verdict. *Matter of Estate of Holan*, 621 N.W.2d 588, 591 (S.D. 2000).

In sum, the application of the integrated documents doctrine is an appropriate legal standard within this jurisdiction. In addition, its legal elements of contemporaneity, similar subject matter, and interrelatedness of terms were also satisfied as a matter of law and there was a sufficient factual basis for the jury to find there was adequate consideration for a contract, and the Bank's failure to perform breached this contract.

3. Bad Faith Cause of Action

In a similar vein to the breach of contract claim, the Bank makes two contentions. First, that such a cause of action does not exist as a matter of law because it is subsumed in the breach of contract claim and second, even if such an independent cause of action does exist, there was insufficient evidence submitted to the jury to sustain a verdict upholding such a bad faith claim.

The question of law concerning a bad faith cause of action involves an issue of first impression within this jurisdiction. The trial court ruled that such a cause of action does exist within this jurisdiction and that it is one that is independent of any breach of contract claim. More precisely, it might be stated that the trial court ruled that the bad faith claim *derives from* but is *severable* and hence independent of the breach of contract claim. As Judge Jones stated in his order of June 7, 2003 on the post-trial motions, the heart of the breach of contract claim was the failure to *provide* the $70,000 loan, while the heart of the bad faith claim was the Bank's failure to follow through with its promise to seek an increase in the level of the BIA guarantee for several outstanding loans.

This statement of the governing law is reasonable and appropriate. While it appears that no other tribal court has addressed this issue, it is true that the rule articulated by the trial court is within the ambit of both South Dakota Law, *see, e.g., Garrett v. Bank West, Inc.*, 459 N.W.2d 833 (S.D. 1990), and the general rule as articulated in the *Restatement 2d of Contracts* § 204 (1990) that every contract includes an implied covenant of good faith and fair dealing which prohibits either contracting party from preventing or injuring the other party's right to receive the agreed upon benefits of the contract.

The Bank's challenge to the sufficiency of the evidence in this issue is likewise rejected. Given the standard of review articulated in Part IIIA2 at p. 11 [6003-6004], clearly there was sufficient evidence in the record concerning the Bank's failure to respond to the BIA's request for a more detailed application relative to potential increased loan guarantees from which the jury might conclude that the Bank acted in bad faith.

4. Excessive Damages Controlled by Passion or Prejudice

The jury awarded damages to the Plaintiffs in the amount of $750,000. The Bank claims this was "excessive and controlled by passion and prejudice." (Bank's brief at 16.) This conclusion remains just that, a conclusion unsupported by reason or law. Plaintiffs sought damages in the amount of $1,236,792 (Exhibit 23) and thus the award of $750,000 represents an award of only 60% of the amount requested. The trial judge also sustained a number of objections made by the Bank to the Plaintiffs' claimed damages and Exhibit 23 was changed accordingly. The Bank did not object, stating, "I have no objections with these changes," TR 308, and therefore the Bank waived any subsequent right to appeal. The absence of "prejudice" is also further evidenced by the jury's rejection of the Longs' claim of improper self-help eviction by the Bank.

The Plaintiffs provided extensive evidentiary data and testimony relative to their damages. The Bank had the same opportunity. Given the appropriate standard of review in challenging a jury finding of fact as noted above, this Court cannot conclude that the jury award in this context lacked a sufficient factual predicate, even disregarding the Bank's waiver of this issue.

Ordinarily, this would conclude the Court's analysis of this otherwise legitimate issue, but for the Bank's decision to characterize the entire trial as "tainted":

> Once a claim for discrimination was allowed to be tried to the jury, where no one but tribal members could serve, the Bank could no longer obtain a fair trial. Allegations of racial discrimination by a nonmember Bank located off the reservation *completely enflamed the jury*. They became incapable of rendering a fair and impartial verdict. The *race card tainted* the entire trial process. (emphasis added) (Bank's brief at 23).

This rhetoric is itself inflammatory. At oral argument, counsel for the Bank admitted that he did not challenge any juror for cause, did not challenge the jury panel as a whole because it did not contain any non-tribal members, and perhaps most importantly, he did *not* request that the trial court use its discretionary power under Sec. 1-6-1(2) of the Tribal Code to "adopt procedures whereby non-enrolled Indians and non-Indians may be summoned for jury duty in cases in which one or more non-Indian parties are involved."

The Bank, apparently excusing its own ('benign') neglect of the issue at the trial, then twists it (somehow) to contend that the very existence of a discrimination cause of action was playing the 'race card.' The Bank's apparent 'solution' to this 'problem' is that claims of discrimination against non-resident Banks should not exist as a matter of tribal law. This asserts a rather extravagant privilege for the Bank that is presumably not available to others, especially tribal members and the Tribe itself. Whether intended or not, this is the Bank playing its own 'race card,' which, at a minimum is quite baffling and potentially quite disturbing in the context of seeking to maintain a fair and reasonable legal context for the necessary commercial transactions involving individual tribal ranchers and business people and the banking establishment. Both tribal members and the Bank need each other and it is quite disheartening to have the Bank interject the potentially destabilizing 'race card' into these proceedings.

5. Eviction

The trial court dismissed the Bank's counterclaim for forcible entry and detainer against the Longs. The counterclaim was not tried to the jury as neither party requested it. The trial court rendered its decision after the jury verdict. It reasoned that based

on its own previous decision that the loan agreement and the lease with option to purchase formed an integrated document and the jury's verdict that the Bank breached the contract, it could not render a favorable decision to the Bank on its counterclaim for eviction. The court's reasoning was that the jury finding that the Bank breached the contract (including the lease) effectively precluded any finding that Longs had breached the lease or otherwise improperly held over and were subject to eviction.

In addition, the Bank made no attempt to comply with the Tribal Law and Order Code provisions for recovering the possession of real property set out in §§ 10-2-1—10-2-8. Section 10-2-6 (6) specifically provides that when a tenant has held over for more than sixty days without any notice to quit by the landlord, the tenant shall have the right to remain in possession for a full year after the lease termination date. The lease between the Bank and the Longs ran from December 5, 1996 to December 6, 1998. The Longs held over but no notice to quit was served within the sixty days (i.e. February 5, 1999) and thus the Longs had the right to hold over to December 6, 1999. Indeed, the notice to quit was not served on the Longs until June 16, 1999. (Exhibit 20.) The notice to quit described the Longs as still in possession of the entire 2,230 acres. Despite the fact that the Longs were legally in possession of this land as a matter of express tribal law during this period, the Bank *sold* the land to two different purchasers in violation of the Longs' right to hold over and exercise their option to purchase under the original lease. (Exhibit 20.) At no time did the Bank ever get an order from the tribal court removing the Longs from the land. (TR 370.)

6. Option to Purchase

The trial court granted partial relief to the Longs on this issue when it ruled that the Longs would be permitted to exercise their option to purchase the 960 acres they were currently occupying but not the 960 acres that were sold to the Maciejewskis and the 320 acres sold to the Pesickas. The Bank asserts that the trial court in essence ordered (partial) specific performance be granted against the Bank, but that such a remedy was never sought by the Longs and that such a remedy is equitable in nature and not available in a breach of contract action which is 'action at law' that does not authorize equitable relief. These statements constitute legal observations of a quite general kind and are not part of the positive law of the Cheyenne River Sioux Tribe.

In the instant case, the trial court attempted to strike a balance between law and equity and to secure fairness to both sides. The specific performance element involving the option to purchase involved land originally owned by the lessee and lost because of the inability to pay a significant debt to the Bank. The fact that the Longs were seeking to (re)purchase land that had been in their family for generations takes the case outside the realm of the formal law/equity distinction. In addition, Judge Jones was careful not to interfere with the property rights of the Maciejewskis and the Pesickas as good faith purchasers. The balance struck by the trial court is fair, reasonable, and violated no rule of Cheyenne River Sioux tribal law.

7. Pre-Judgment Interest

The Bank objects to the award of pre-judgment interest.[6] Its essential argument—drawn primarily from South Dakota and California law—is that prejudgment interest should only be awarded if the defendant knows or should have known based on reasonably accessible information what the amount owed was. This general observation however does not require a different result. It is routine in the West—including South Dakota—to calculate pre-judgment interest on lost cattle based on their market value at the time of the loss. Deciding the date of loss—if contested—is a factual question to be resolved by the jury. Thus the method of awarding pre-judgment interest in this case conforms to the general practice throughout western parts of the United States.

The Bank's claim is further undermined by the fact that it did not object to special jury interrogatory 6 or jury instruction 10a on the issue of the potential award of interest and it did not propose any special jury interrogatories of its own. Such failure ordinarily precludes raising the issue on appeal. *See, e.g., Alvine v. Mercedes-Benz of North America*, 620 N.W.2d 608 (S.D. 2001). In addition, the trial court adopted and accepted (to the penny) the Bank's proposed interest of $123,131.81 as opposed to the Plaintiffs' proposal of $453,698.

B. Plaintiffs/Respondents/Appellants Issues on Appeal

The Plaintiff Longs raise two issues on appeal and they are the mirror images of the Bank's issues numbers six and seven, namely that trial court erred in not awarding Plaintiffs complete specific performance to (re)purchase all the land involved in the original lease and option to purchase and the trial court erred in its calculation of pre-judgment interest to be awarded. Each issue will be discussed in turn.

1. Option to Purchase

The Longs contend that the trial court erred in its failure to permit the Longs to exercise its option to purchase all of their 2,225 acres rather than just 960 acres on which they effectively heldover. The Bank had already sold 320 acres to Pesickas and 960 acres to Maciejewskis and Judge Jones decided the option to purchase would *not* apply to these parcels.

In Judge Jones' supplemental judgment of February 18, 2003, he expressly stated:

> The court first notes that the tribal jury returned a verdict for the Bank and against the Plaintiffs on the Plaintiffs' claim that the Bank violated tribal law against self- help remedies when it sold certain parcels of the land the Plaintiffs had an option to purchase. The Court construes this to mean that the jury found that the sale of the land to the other parties was not done in violation of tribal law and the other defendants [i.e. the Pesickas and Maciejewskis] were good faith purchasers.

Counsel for the Longs does not state what the appropriate standard of review is and more directly, why this legal determination of Judge Jones is wrong as a matter of tribal law.[7] Under these circumstances, Judge Jones' decision violated no rule of tribal law and balanced the equities in a most reasonable and fair manner.

2. Pre-Judgment Interest

The Longs contend that while the trial court was correct in submitting the question of whether to award pre-judgment interest to the jury (which answered in the affirmative), the trial judge erred in his calculations of the amount of pre-judgment interest to be awarded. The core of the Longs claim on this issue is that the trial judge should have adopted the South Dakota statute, SDCL 21-1-13.1, which sets a rate of 10% for pre-judgment interest. Working from this assertion, plaintiffs' counsel does what he regards as the necessary mathematical calculations and arrives at the figure of $453,698. (Respondents-Appellants brief at 9.)

There are several shortcomings in this line of argument. Counsel for the Longs does not identify what the appropriate standard

[6]Pre-judgment interest is neither directly authorized nor prohibited by the Tribal Code. This might be an area where direct legislative guidance by the Cheyenne River Sioux Tribal Council would be beneficial, especially as to the rate of interest and the means of calculation of such interest.

[7]The discussion of Cheyenne River Sioux Tribe Law and Order Code Sec. 10-1-5 is inappropriate as it deals with the proposed sale of foreclosed property which is not involved in this lawsuit.

of review is and whether the trial judge's mistake was one of law and/or fact. There can be no mistake of law because there is no express rate of interest specified in the tribal code and therefore any (reasonable) rate of pre-judgment interest would be an appropriate legal standard.[8] Judge Jones required that counsel for both parties submit proposals to him. Then Judge Jones accepted the Bank's proposal of pre-judgment interest in the amount of $123,131.81 based on a rate of 8.5%, the rate of interest identified in the lease with option to purchase to be charged the Longs if they exercised their option to purchase.

In addition to different rates of interest, the proposals of both parties used slightly different mathematical models of calculation based on the varying assessments as to the time of loss, value at the time of loss, and whether interest would be simple or compound. While these differences in approach lead to quite different final calculations, there is no demonstration by the Longs that these figures are clearly erroneous or arbitrary and capricious and therefore the amount of pre-judgment interest awarded by Judge Jones is affirmed.

Unfortunately, a final concern must be addressed. In his concluding summation to this Court, counsel for the Bank stated that a lot of banks and lenders were watching this case. While it seemed jarring and inappropriate at the time, it is even more so upon reflection. It is difficult to see the statement as merely some form of artless advocacy, but rather more as some kind of threat impugning the integrity of the Cheyenne River Sioux Tribe's judicial system, which this Court finds most offensive and unprofessional. Such statements must not be made again. Though it hardly needs repeating, the Court restates its commitment to fair play, the rule of law, and cultural respect for *all* parties who appear in the courts of the Cheyenne River Sioux Tribe.

IV. Conclusion

For all the reasons above stated, the decision of the trial court is affirmed on all issues.

Ho Hec'etu Ye Lo
It is so Ordered.

CHEYENNE RIVER SIOUX TRIBAL COURT OF APPEALS

Floyd CLOWN, Sr.
v. CHEYENNE RIVER HOUSING AUTHORITY

No. 04-009-A (Nov. 3, 2004)

Summary

The Cheyenne River Sioux Tribal Court of Appeals dismisses an appeal for failure to file in a timely manner.

Full Text

Before POMMERSHIEM, Chief Justice

Order Denying Appeal

For good cause shown the appeal filed on November 2, 2004 is hereby dismissed for appellant's failure to file in a timely manner.

Ho Hecétu Ye Lo
It is so ordered.

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[8]As noted above in footnote 6, *supra* at p. 16 [6005], the issue of pre-judgment interest including the specific rate of interest and method of calculation would greatly benefit from specific statutory guidance provided by the Cheyenne River Sioux Tribal Council.

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION TRIBAL COURT

Violet TIGER v. Charles SEYMOUR

No. CV-OC-1996-16221 (Dec. 13, 2004)

Summary

The Colville Confederated Tribes Tribal Court affirms that the respondent is relieved from a legal duty to pay a debt that was discharged in U.S. Bankruptcy Court.

Full Text

Before AYCOCK, Chief Judge

Order Closing Case and Discharging Debt

This matter came before the Court for oral argument on August 3, 2004. Petitioner was present and represented by Richard Price, spokesperson. Respondent appeared pro se.

Judgment was entered against Respondent on June 2, 2000 in favor of petitioner in the amount of $209,547.70. On January 28, 2004, the debt was discharged in bankruptcy. *In Re Charles R. Seymour*, U.S. Bankruptcy Court Eastern District of Washington, Case No. 03-08765-W1B.

On April 8, 2004, Petitioner filed a motion to determine Respondent's ongoing obligation to repay the debt in light of the bankruptcy discharge. Oral arguments were held on August 3, 2004. Supplemental written arguments, along with copies of cited cases, were submitted by Respondent on September 10, 2004.

Petitioner argues that the debt is not discharged since the Colville Tribes has sovereign immunity. The argument is that since the Tribes has immunity, so does the Tribal Court. Since the Tribal Court entered the Order in this case, the federal discharge cannot interfere and thus "the efficacy of the Tribal Court judgment cannot be challenged. The judgment issued by a sovereign remains in full force and effect and cannot be discharged." Letter from Richard Price, page 2, Paragraph 5.

The Tribal Court is not vested in the judgment. The Court's powers are not restricted by the bankruptcy. The discharge in no way diminishes the Court.

The bankruptcy, like the judgment, is between two private citizens, one a member of the Colville Tribes. If either of these parties had sovereign immunity, the analysis would have to be different, even if the outcome were to be the same. Here, neither party has any immunity. Thus, the discharges implicates no sovereign immunity.

This action could have been brought in either state court or tribal court. Under P.L. 280, either forum was open to Petitioner. Certainly, the Petitioner would not be making this argument if a Washington State court had entered the judgment. The mere fact of where he was sued should not so fundamentally restrict Mr. Seymour's rights as requiring him to continue to pay on this obligation would.

Mr. Seymour was found to have injured Ms. Tiger. The discharge in no way changes those facts. While Mr. Seymour may have a moral obligation to pay some money to Ms. Tiger, he no longer has a legal duty to do so.

Petitioner also argued that this debt was not discharged because it was a debt "for personal injuries or death caused by the debtor's operation of a motor vehicle while intoxicated...." Discharge of Debtor Form B18, back side, *Debts That Are Not Discharged*, paragraph e.

The Court has reviewed the Complaint and the Findings of Fact, Conclusions of Law and Order and Judgment in this case. Nowhere in any of those is there any allegation, finding or conclusion that this case was caused by Respondent being intoxicated. While there was some testimony of this, the Court will not look behind the Complaint and Judgment.