15-71772; 15-71909

United States Court of Appeals
for the Ninth Circuit

THE CHIPPEWA CREE TRIBE OF THE ROCKY BOY RESERVATION, MONTANA,
Petitioner,

v.

U.S. DEPARTMENT OF THE INTERIOR,
Respondent

RYAN K. ZINKE, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE INTERIOR
Respondent

KEN ST. MARKS,
Respondent

On Appeal from the United States Department of the Interior

KEN ST. MARKS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY TO "THE TRIBE" AND TO PEPPER HAMILTON

The consolidated reply and response brief filed by the "Tribe" in this case (hereinafter, "the Tribe's Reply Brief") continues with many of the exact same strategies that these same attorneys and the others who were clearly and openly retaliating against St. Marks used in the tribal fora and in the Agency below. In fact, their "reply brief" is nearly a repetition of their opening brief, with few responsive arguments.

The Tribe continues to use its same fabricated factual allegations, Tr. Reply Statement of the Case §II, even though anyone looking at this case can see that those allegations were not only fabricated but are contrary to facts. And no matter how clear the facts are, the "Tribe" continues to deny the facts and to stick to its made-up narrative. In most instances, it knows that it is misstating the facts to this Court. It had similarly misstated the facts to the Tribe's Court whose judges it then pressured to side with it and to the Agency below. It lost in front of the tribal jury (which then appears to have accused it of fraud against the Tribe). It lost in front of the Agency, which noted that its perseveration on claims that had no factual support further called into question it and its attorneys' motives. It now must lose before this Court.

Because the Tribe provides almost no new arguments, but continues to openly misstate the factual and procedural record, this reply will primarily focus on correcting, yet again, the Tribe's misstatements and applying the law to the actual facts of this matter, not to the Tribe's pretend facts.

I. THE TRIBE'S CONTINUED MISREPRESENTATION OF THE CHIPPEWA CREE VERDICT IS FRIVOLOUS AND THIS COURT SHOULD NOT TOLERATE SUCH INTENTIONAL MISREPRESENTATIONS OF FACT.

Based upon the facts that St. Marks discussed in his opening brief, St. Marks established without the slightest doubt that the Tribe's jury returned a verdict that someone other than St. Marks had committed fraud against the Tribe. It appears that the jury was referring to the testimony that the Pepper Hamilton attorneys involved in this matter[1] and the small corrupt group of tribal members that Pepper Hamilton was working with had openly fabricated the claims against St. Marks. But regardless of who it was referring to, the one person that we know the Jury was not referring to was St. Marks. That Pepper Hamilton, incorrectly purporting to represent the Tribe in this appeal, continues to peddle its despicable misrepresentation illustrates the point that the Agency made below—that openly peddling debunked falsehoods as fact is not merely unpersuasive, but is in fact evidence of the ongoing retaliatory

[1] As in his consolidated opening and answering brief, St. Marks notes that his factually well-founded discussion of the Pepper Hamilton attorneys are limited to those who claimed to represent the Tribe in the retaliation against St. Marks, before the Agency, and in this Court. It is not related to any other Pepper Hamilton attorneys.

motives. Its contention is not serious argument, and has no place in a federal court of appeals.

II. THE TRIBE'S ARGUMENT THAT THE AGENCY SHOULD HAVE REDUCED ST. MARKS SALARY BY $50,000 PER YEAR IS WITHOUT MERIT.

The only issue that the Tribe might have preserved for appeal is its contention that the Agency should have reduced St. Marks' back pay and front pay by $50,000 per year below his salary as set by the Tribe itself. In his own submissions, St. Marks had requested that the compensatory award be based upon his salary set by the Tribe. In the Agency's remedial order, and again in its Consolidated Reply and Response Brief (Agency Consolidated Brief), the Agency provided ample factual justification for its decision. In footnote 17 of its Reply Brief, the Tribe continues to make the conclusory assertion that the Agency should have reduced the salary below the salary set by the Tribe's laws, but the Tribe's sole discussion of the issue in a footnote does not respond to the Agency's evidence. The Agency decision was not arbitrary and capricious and must be affirmed.

In its brief, the Agency also discussed that the Tribe had not preserved the issue for review. Agency Cons. Br. at 57. Because the Tribe did not respond to that argument, the Agency's discussion should be accepted as undisputed. The Agency's decision therefore must be affirmed both because the Tribe did not preserve any error for review and because the Agency's decision is amply supported by the record.

III. THE TRIBE DID NOT TIMELY APPEAL FROM THE REPRISAL DETERMINATION.

A. THE TRIBE'S FAILURE TO DISCUSS THE KNOWN JURISDICTIONAL INFIRMITIES IN ITS OPENING BRIEF REQUIRES DISMISSAL OF THE TRIBE'S APPEAL.

The Tribe does not contest St. Marks' showing that the Tribe failed to establish jurisdiction in its opening brief. St. Marks Consol. Br. at 14-15 (citing Fed. R. App. Proc. 28 and *Lance v. Coffman*, 549 U.S. 437 (2007)). The Tribe attempts, but fails, to establish jurisdiction via its reply brief, but this Court should resolve this matter on the simpler, undisputed rule that an appellant's failure to establish jurisdiction in its opening brief is fatal to its attempt to appeal. It is not permitted to cure that fatal defect through belated discussion in a reply brief.

Dismissal might seem a harsh remedy if we solely focus on the single case which is being dismissed for failure to discuss the known jurisdictional defects in an opening brief, but there are ample reasons that this is the remedy provided for by case law. The rule stems from Article III of the United States Constitution, the rule is well known to all federal practitioners, and not requiring a party to establish jurisdiction in its opening brief leads to the inefficient and backward briefing that has occurred in this case—where the party who does not have the burden to establish jurisdiction ends up having to brief that issue first. The Tribe is represented by experienced federal court practitioners, and the Tribe has offered no excuse for its failure to do what every federal practitioner knows must be done—establish

jurisdiction in the opening brief. This Court should therefore dismiss the Tribe's appeal.

B. PEPPER HAMILTON IS NOT THE TRIBE'S ATTORNEY IN THIS MATTER, AND THIS COURT SHOULD NOT PERMIT THE LEGALLY UNQUALIFIED LAW FIRM TO REPRESENT THE TRIBE IN THIS MATTER.

The Tribe does not dispute, nor could it dispute, that Pepper Hamilton is not legally authorized to represent the Tribe in this appeal. The Tribe's Constitution contains a clear and express requirement that any would-be Chippewa Cree attorney must obtain federal approval. As is undisputed, Pepper Hamilton has known of that constitutional requirement for years now; but as is also undisputed, it has not obtained the constitutionally required approval. Pepper Hamilton's apparent decision not to seek or obtain the constitutionally required authorization to represent the Tribe is, by itself, fatal to its unauthorized filings in the name of "the Tribe."

Pepper Hamilton's primary response to its failure to become constitutionally qualified to represent the Tribe is to assert that St. Marks did not question Pepper Hamilton's authority to represent the Tribe before the Agency. It is incorrect, but more importantly, its allegation is immaterial. The question before this Court is

whether Pepper Hamilton is authorized to represent the Tribe in this Court, not whether it was authorized to represent before the Agency.[2]

In fact, because Pepper Hamilton had already attempted this same evasive argument before, St. Marks made this distinction clear in his Consolidated Brief. St. Marks Br. at 20-21 and n. 6. Pepper Hamilton has no response to that argument, and therefore attempts to distract to a different question. If it had a response to the material legal issue, it would have provided it.

Pepper Hamilton also asserts that St. Marks did not cite any case supporting his position. That too is false: St. Marks cited 25 U.S.C. §81 and multiple cases under that statute for the proposition that courts do not consider filings by a person who is not qualified to represent the party that it is purporting to represent. Even when there is not an express constitutional requirement to protect a party from unauthorized attorneys claiming to represent a party, the same rule would apply. *E.g.*, *Guajardo v. Luna*, 432 F.2d 1324, 1324 (5th Cir. 1970) (affirming district court order dismissing suit by unqualified person); *J.H. Marshall & Assoc., Inc. v Burleson*, 313 A.2d 587 (D.C. App. 1973) (dismissing action filed by attorney who was not admitted to the District of Columbia bar).

[2] In fact, most cases hold that where a party is represented by an unqualified attorney, and that party has lost in a concluded proceeding in the lower forum, the unauthorized practice below is not appealable. In contrast, the ongoing unauthorized practice in this Court is properly before this Court and must be resolved.

It is undisputed that Pepper Hamilton is not qualified to represent the Tribe. It has known that for years. The mere fact that it continues to claim that it represents the Tribe is not a basis for permitting it to represent the Tribe when it is plainly not qualified to do so, and the proper remedy is to dismiss its unauthorized attempt to appeal in the name of the Tribe.

C. THE TRIBE DID NOT TIMELY APPEAL FROM THE DECEMBER 19, 2014 ORDER.

The December 19, 2014 reprisal determination in this matter was subject to supervisory review by this Court, and the December 19 decision itself notifies the Tribe of its right to seek this Court's review. ER00013. The Tribe chose not to appeal the December 19 decision.

The Tribe concedes that failure to timely appeal from a decision deprives this Court of jurisdiction to review the decision. It does not dispute that it failed to submit an appeal of the December 19 order within 60 days. It admits that it was "adversely affected or aggrieved by" the December 19 order. Other than on the one component of damages discussed above, the Tribe does not dispute that the issues it is now seeking to contest were decided in the December 19 order. It also does not dispute that it did not even list the December 19, 2014 order when it appealed from the remediation order.

To attempt to get around its own decision not to timely appeal, the Tribe now asserts that the Agency determination "plainly evidenced" that the decision was not

appealable. That assertion is meritless. The Agency plainly evidenced the exact opposite by, *inter alia*, citing the statute which provides for appeal and including notice of the requirement that a petition for supervisory review was due in 60 days.

The only argument the Tribe could have properly raised would have been to assert that the Agency's was wrong as a matter of law when it concluded that the December 19 order was appealable. The Agency was not wrong as a matter of law. St. Marks discussed in detail the specific statutory provision at issue, ARRA 1553(c)(5). The Tribe does not respond to that argument. Instead, it makes the relatively obvious point that many other statutes only permit supervisory review from final orders. But ARRA permits appeals from any "paragraph 2" order. St. Marks Consolidated Br. At 16. The Tribe is jurisdictionally barred from seeking review of the reprisal determination and its attempt to appeal from that order must be rejected.

IV. THE TRIBE'S "SOVEREIGNTY" ARGUMENT IS FRIVOLOUS.

A. THE TRIBE'S EXERCISE OF ITS SOVEREIGN RIGHTS, INCLUDING ITS CHOICE TO ACCEPT FEDERAL FUNDS WITH STRINGS ATTACHED AND ITS CHOICE TO LITIGATE, DO NOT VIOLATE THE TRIBE'S SOVEREIGNTY.

In its response brief, the Tribe does not provide any meaningful argument that its "sovereign rights" were violated. As St. Marks has previously shown, the Tribe does not have sovereign immunity from a claim by the United States. The United States in fact sues tribes very frequently. *E.g.*, *United States v. Yakima Tribal Court*,

806 F.2d 853, 861 (9th Cir. 1986) ("Like each of the fifty states, the Yakima Nation is not immune from suits brought by the United States."); *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 383 (8th Cir. 1987). See also *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560-61 (1832) (Tribes are subject to the superior sovereignty of the United States).

Additionally, as a sovereign, the Tribe has the power to waive any rights that it may possess. That is part of its sovereign powers. And here, even if we assumed arguendo that the Tribe had sovereign immunity from a whistleblower claim, the Tribe repeatedly and obviously waived its immunity. Acting as a sovereign, the Tribe waived immunity by agreeing to accept ARRA funds with the whistleblower protections attached; then reaffirmed that waiver by choosing to litigate on the merits. The Tribe has no counterargument whatsoever, and it instead seeks to distract.

Illustrating that case law does not support the Tribe's argument, the Tribe asserts that it has sovereign immunity from the United States based upon cases in which tribes were sued by third parties. *Sanderlin v. Seminole Tribe,* 243 F.3d 1282 (1th Cir. 2001) (no waiver for *third-party* claim under federal statute); *Vulgamore v. Tuba City Reg'l Healthcare Corp.*, No. CV-11-8087-PCT-DGC, 2011 WL 3555723, at *2 (D. Ariz. Aug. 11, 2011) (same).

There are four obvious differences between the present matter and *Sanderlin* or *Vulgarmore*, and each one of those is, independently, dispositive for sovereign immunity analysis: 1) the tribes in those cases raised sovereign immunity as a threshold issue, not (as here) as a sandbagged argument only after they had chosen to litigate and then lost; 2) as material to this case, the string attached to the federal funds included the specific remedial scheme contained in the statute and the Agency's authority to apply that remedial scheme; 3) federal application of that remedial scheme is based upon the United States' overriding superior sovereignty; and 4) the Tribe voluntarily accepted that string attached to the federal funds. That the Tribe would cite *Sanderlin* and *Vulgamore* illustrates that they have no actual argument.

B. BECAUSE IT WAS THE TRIBAL ELECTORATE, NOT THE UNITED STATES, WHICH RESTORED ST. MARKS TO OFFICE, THE TRIBE'S "SOVEREIGNTY" ARGUMENT IS INAPPLICABLE TO THE FACTS OF THIS CASE.

In its Reply Brief, the Tribe does not provide a substantial argument regarding violation of its sovereignty. The Tribe's Reply makes the following argument:

Premise 1: The United States restored St. Marks to the position of tribal chairman.

Premise 2: The United States lacks authority to restore St. Marks to the position of tribal chairman.[3]

Conclusion: the United States' order restoring St. Marks to the position of tribal chairman was erroneous.

The obvious problem with the Tribe's argument is that the United States did not restore St. Marks to office. In fact, the Tribe's electorate did. Repeatedly. Every time the tribal officers represented by Pepper Hamilton used their fabricated claims to "remove" St. Marks from office, the Tribe's members voted him back in.

It is incomprehensible that the Tribe would continue to make this factually frivolous argument after all of the corrective discussions of the facts, including those in the Agency's order providing whistleblower protection, the subsequent remedial order, the United States' briefs to this Court, and St. Marks' briefs to this Court. As St. Marks discussed in detail in his opening brief, the Tribe's sole "sovereignty" argument to the Agency below was that the Agency would violate tribal sovereignty if it restored St. Marks to office. In response, the Agency did not restore St. Marks to office. The Tribe did not preserve any other "sovereignty" argument for review,

[3] While this Court does not need to even consider the merits of the second premise of the Tribe's argument, St. Marks notes that the premise is incorrect and in part is based upon incorrect mixing of distinct legal concepts. It is well-established that the United States does have authority to determine who the United States will treat as the Tribe's leaders for federal/tribal interactions where, as here, there was a tribal leadership dispute.

and the issue the Tribe continues to press is simply not presented to this Court in this case.

If the Tribe had a legal argument that was based upon the reality—upon the facts, it would have made that argument to this Court. It does not have any such argument, but that is not an excuse for it to put forward an argument based upon blatant misstatement of the facts of this case.

V. THE AGENCY PROVIDED MORE THAN SUFFICIENT PROCESS TO THE TRIBE.

The evidence that the Tribe, through is corrupt leaders, retaliated against St. Marks was overwhelming. More "process" was not going to change that, nor was more process required given the clear, obvious, record of retaliation. While the Tribe, after the fact, claims it was deprived of due process, it has not made any showing that it was deprived of any process that it requested, that it had any substantial evidence that was not already submitted, or that it is doing anything more than trying to delay justice for St. Marks.

When the Tribe's corrupt leaders found out that St. Marks had provided the United States with evidence of a vast corruption ring among tribal Business Committee members and other senior offices, the Tribe's Business Committee worked with its attorneys to fabricate from whole cloth claims against St. Marks, to initiate numerous fabricated lawsuits against St. Marks, to maliciously have St.

Marks arrested, to force its own judges to sign legally unsupportable orders, even to threaten to assassinate St. Marks and burn his family's house down. ER 14-26.

A. THE ONLY PROPERTY RIGHT THE TRIBE HAD AT STAKE IN THIS MATTER WAS AN ECONOMIC RIGHT TO SOME OF THE MONEY IT WAS ULTIMATELY ORDERED TO PAY TO ST. MARKS.

1. The Tribe does not have a "constitutionally protected interest" in its "sovereign status" or its "governmental functions."

In its opening brief, the Tribe asserted, without supporting legal authority, that its sovereignty is protected by the United States Constitution. In its response, the United States correctly refuted the Tribe's unsupported contention, Agency Consol. Br. §II.B. Yet the Tribe reiterates, still without supporting citation, the same "property interests" in its Reply Brief. The United States Supreme Court has already expressly rejected the argument the Tribe is making. The Supreme Court held tribal sovereignty is an inherent tribal right, not a right which derives from or is protected by the United States Constitution. *Inyo Cty., Cal. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 712 (2003).

The Tribe also asserts that it has a property interest in firing St. Marks. But as discussed above, even if we assume the Tribe had that right, the United States did not deprive the "Tribe" of that right. The Tribe itself, through its electorate, did deprive those retaliating against St. Marks of that "right."

B. THE TRIBE RECEIVED MORE THAN ADEQUATE PROCESS TO PROTECT ANY FINANCIAL PROPERTY INTEREST IT HAD.

The only other property interest the Tribe asserts is an interest in money that it was ordered to pay to St. Marks. Assuming, arguendo, that it has a property interest in that money, it was accorded all the process that was due, and then some, regarding that interest.

The Office of Inspector General (OIG) interviewed numerous tribal officers and agents, including but not limited to tribal judges and clerks, tribal chairman St. Marks, tribal agents who contradicted the corrupt tribal officers' fabricated claims that St. Marks work on the water pipeline was below average, and Pepper Hamilton attorney who provided damning evidence showing that the Tribe's claims were factually unsupported. ER 14-26.

Continuing with its pattern of denying the obvious, the Tribe frivolously asserts that the United States "did not pursue its initial request to set up interviews with the Tribe's Business Committee." Tr. Reply Br. at 40. That assertion is contrary to the clear record in this case. *E.g*. ER 14; 22-23; 26; 46; 76. Pepper Hamilton chose not to make the Tribe's Business Committee members available for interviews.[4] *E.g. Id.*

[4] Pepper Hamilton's decision not to make the Business Committee members available was a correct legal choice, as any attorney would have advised the Business Committee Members to invoke their Fifth Amendment rights. The Business Committee members either would have committed perjury or would have disclosed

In fact, Pepper Hamilton not only did not make tribal business committee members available for interview, but it repeatedly stated that it would respond on behalf of them and it repeatedly did respond on behalf of them. *E.g.*, *Id*. Again, that was a wise choice, to have the attorneys do the talking and present the Tribe's fabricated narrative, but the Tribe is wrong when it now tries to blame the United States for the Tribe's strategic decision.

The only due process interest the Tribe has is the right to the process due under the ARRA. As the United States discussed in substantial detail in its Consolidated Brief, the United States accorded the Tribe those rights. After it submitted the evidence it had wanted to submit and lost, the Tribe began claiming after the fact that it should have been accorded additional process. As St. Marks discussed in detail in his opening brief, the Court need not even consider those belated claims for additional process because the Tribe, in two independent ways, failed to preserve the issue for review. First, as discussed above, the Tribe chose not to appeal or assign error to the December 19 reprisal order. Second, the Tribe did not request a hearing, did not show any need for a hearing, and even now the Tribe cannot make the slightest case that it was prejudiced by not requesting an evidentiary hearing. In its briefs to this Court, the Tribe merely reiterates as fact the very same assertions which

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that they were working with Pepper Hamilton to fabricate claims, and they would have been questioned about their own role in the corruption ring for which many of their associates were being prosecuted/for which some of them would be prosecuted.

corrupt tribal leaders and Pepper Hamilton concocted out of whole cloth as part of their open and obvious retaliation against St. Marks.

While the Tribe repeatedly makes the conclusory but false assertion that it was deprived of a meaningful opportunity to submit evidence, it discusses only two instances where it claims the lack of "meaningful opportunity" impacted this matter. First, it asserts that the OIG failed to interview Business Committee members. But as noted, it was the Tribe which (wisely) chose not to make the Business Committee members available for interviews. And the Tribe does not articulate what those Business Committee members might have provided as evidence that was not already amply of record. For example, in its own statement of facts to this Court, the Tribe merely reiterates the very same fabricated factual allegations against St. Marks that it has been making for years. But the Tribe does not claim that the Business Committee members have any new personal knowledge regarding those claims (nor, of course, could the Business Committee members have personal knowledge, since the claims were made up from whole cloth by the corrupt tribal officers in conjunction with Pepper Hamilton).

Second, in what is likely the Tribe's most outlandish assertion, it claims that the Tribe's Business Committee was unaware of St. Marks' open letter to the Tribal membership in which St. Marks openly stated that he was working with federal officers to bring down the corrupt tribal leadership ring! Notably, the Tribe does not

provide any statement or offer of proof from any Tribal Business Committee member or anyone else claiming that he or she was unaware of the open letter,[5] and it is simply ridiculous that an open letter issued by the Tribe's Chairman in the small closely knit community, which others in the community were talking about, would not be known to the Tribe's leadership.

The Tribe was provided with due process, including all of the process it requested. Unlike *Business Communications, Inc. v. United States*, 739 F.3d 374 (8th Cir. 2013), on which the Tribe attempts to rely, the clear evidence of retaliation and the Tribe's submission of all of the evidence it wanted to submit does not now provide a basis for concluding that because the Tribe lost, an evidentiary hearing was necessary. The overwhelming evidence was that the Tribe was openly retaliating against St. Marks, and numerous tribal officers and Pepper Hamilton's own submissions, which merely repeated their fabricated claims, further supported that conclusion. There is no reason to reverse and remand for an unnecessary and dilatory hearing.

[5] Contrary to what the Tribe implies in its brief, Tribal Judge Gopher stated that he was aware of St. Marks letter. He is a judge before whom issues related to St. Marks eventually came, and he stated he did not read the letter or read other similar information, but that he was aware of the letter.

RESPONSE TO UNITED STATES

VI. THE AGENCY ERRONEOUSLY REFUSED TO REQUIRE THE TRIBE TO PAY ST. MARKS THE AMOUNT THAT THE TRIBE RETALIATORY REFUSED TO PAY HIM ON THE ARROW CONTRACTS AND THE ASSOCIATED ATTORNEY FEES.

This Court will reverse a decision as arbitrary and capricious when the Agency makes its decision upon a legally incorrect standard. The United States' Consolidated Brief confirms that the United States made its determination on attorney fees based upon the wrong legal standard. This Court therefore must reverse the Agency and order the Agency to provide the legally required remedial compensation to St. Marks.

A. ATTORNEY FEES DIRECTLY ON THE WHISTLEBLOWER MATTER AFTER JANUARY 15, 2015 MUST BE AWARDED.

The United States acknowledges that St. Marks was continuing to incur attorney fees on the whistleblower matter after January 15, 2015, but the Agency cut off fees as of that date. St. Marks view is that this is a paradigm example of an arbitrary decision. It simply makes no sense to cut off fees on that date.

In attempting to respond to St. Marks' argument, the Agency argues that it was prohibited from awarding fees after January 15. Agency Consol. Br. at 58. That federal argument confirms, rather than dispels, that the Agency acted arbitrarily: the United States was plainly applying an incorrect legal standard. The United States' sole citation for its assertion that it was barred from providing attorney fees is its own mis-quotation of ARRA 1553(c)(2)(C). ARRA expressly authorized the

Agency to order the employer to pay "all costs and expenses (including attorneys' fees and expert witness' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisals."

The United States' assertion that it was prohibited from providing for recovery of attorney fees after January 15, is also contrary to clearly expressed congressional intent. Congress was clear that the whistleblower protections were an integral part of the ARRA, and that the provisions were patterned on but expanded prior whistleblower protections.

> This language was included in the bill to encourage government and contract workers to come forward in the face of wrongdoing, fraud and corruption…
> The function of the whistleblower is in many respects similar to that of a canary in a coal mine. They are there to warn of us of impending dangers.

H1536-02, 2009 WL 356421 - CONFERENCE REPORT ON H.R. 1 – February 13, 2009. *See also* 155 Cong. Rec. H1307-03, 2009 WL 352677 – February 12, 2009.

The provisions were designed to protect taxpayers' money from the exact types of fraud and abuse that St. Marks disclosed. H1536-02, 2009 WL 356421; 155 Cong. Rec. S2288-01, 2009 WL 356483 February 13, 2009 (discussing that Inspector Generals, working in conjunction with whistleblowers "are integral to any effort to stamp out waste and deter fraud and abuse.")

Finally, the Agency's assertion that it was required to cut off fees as of January 15 is particularly troubling in light of the Agency's refusal to enforce, and then its

neglectful failure to decide, St. Marks' request for a bond pending appeal. See §VIII.B, *infra*. St. Marks' position is that because the Agency permitted retaliation to continue after it issued the remedial order, and because the Agency did not comply with its statutory duty to enforce its order or to stop the ongoing retaliation, the Agency was required to order that St. Marks recover ongoing damages and ongoing attorney fees in connection with the whistleblower matter.

B. ATTORNEY FEES EXPENDED TO COMBAT THE RETALIATORY LITIGATION AND COMPENSATORY DAMAGES FROM THE TRIBE'S RETALIATORY FAILURE TO PAY ST. MARKS ARE "CONNECTED MATTERS" AND THE AGENCY'S APPLICATION OF A DIFFERENT LEGAL STANDARD MUST BE REVERSED.

As St. Marks discussed in his opening brief, litigation is a very common form of retaliation against whistleblowers, and therefore it is recoverable as damages and as recoverable costs under the ARRA and under most other whistleblower statutes.

In its response brief, the Agency again confirms, rather than dispels, the argument that it acted arbitrarily. It asserts that it properly denied the fees and damages because the Agency, in its remedial order, held that the retaliatory Arrow and Tadios "matters did not 'directly involve St. Marks's whistleblower matter' and therefore fees relating to those matters were not recoverable under the act." Agency Consol. Br. at 58 (quoting remedial order). In that sentence, the United States confirms that it was applying the wrong legal standard. The standard is not "directly involve."

The United States' attempt to reframe the applicable legal standard from the statutory language ("in connection with") to the standard the Agency erroneously applies ("directly involve") is so large that the United States has to construct its argument using two steps, both of which are erroneous. First, the United States edits out the phrase "in connection with" when it quotes the statute. Agency Consol. Br. at 58. Cited in full, §1533(c)(2)(c) permits awarding attorney's fees "that were reasonably incurred by the complainant for, **or in connection with,** bringing the complaint regarding the reprisal," but when the United States quoted the statute, it deleted the highlighted language. Second, the United States then jumps from its quotation that the standard is "reasonable incurred by" to the standard the Agency used in the order, "directly involved." This may be good attorney work, but it cannot rescue the Agency's order. The Tadios and Arrow matters were in connection with the whistleblower matter. The Tribe's refusal to pay St. Marks for work performed was in connection with the whistleblower matter. The cases were some of the many ways the Tribe retaliated. The attorney fees to defend those cases were necessary to make St. Marks whole, and the Agency erred by not awarding them. The Agency's assertion that it is limited to compensation and fees that "directly involve the whistleblower matter is an incorrect legal interpretation, and the decision to deny costs based upon that legal error is therefore arbitrary and capricious. It must be reversed.

Applying the statutory standard of "in connection with," it is clear that the Arrow and Tadios matters are in connection with the whistleblower matter. Arrow and Tadios were parts of the Tribe's retaliation against St. Marks. The Tribe and Pepper Hamilton fabricated the claims and then used their own fabrication to retaliate against St. Marks and to put St. Marks to great expense. The Tribe then refused to pay St. Marks "$282,098.02 arising out of the contracts between Arrow Construction and CCT," ER at 1087. In reversing the Agency, this Court should, under the current facts, instruct the Agency to award St. Marks the unpaid amount on the Arrow case and all of his fees in the Arrow and Tadios matters. Because it is clear that, upon application of the correct legal standard to the facts here, St. Marks is entitled to reimbursement and to recover his fees, the proper remedy is for this Court to direct that the agency review award him the full unpaid amount and all of his attorney billings related to Tadios, Arrow, and the whistleblower matter. *E.g.*, *N. L. R. B. v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969).[6]

The Agency's refusal to order restitution for the wrongly denied payment and the attorney fees for St. Marks to secure the victory against the retaliatory suits in Arrow and Tadios also contains a second, independent, reversible error. As St.

[6] St. Marks had submitted his billings up to the approximate time of the compensatory order, but because of the Agency's legal error, it did not review the reasonableness of some of those records. That review should likely be done by the agency in the first instance, instead of by this Court.

Marks discussed in his consolidated brief, there are two separate provisions of ARRA (and other whistleblower statutes) which are relevant. First, they are recoverable where expended in connection with bringing the whistleblower complaint. Second, the costs to defend the Tadios and Arrow matters are recoverable because those cases were part of the retaliation itself, and damages from retaliation are recoverable. While St. Marks provided a detailed discussion of this in his Consolidated Brief, neither the United States nor the Tribe responded. As St. Marks discussed in detail in his opening brief, where a defendant has expenses defending himself from retaliatory actions, those are recoverable.

VII. DAMAGES FROM THE HOTEL PURCHASE WHICH FELL APART BECAUSE OF THE TRIBE'S RETALIATION.

The Agency stated that St. Marks request for $257,100 in damages from the lost opportunity to buy the hotel was "speculative." That is an arbitrary and capricious holding.[7] Lost income from an established business is not speculative. Restatement (Second) of Contracts §352. It appears that the Agency was incorrectly analogizing to damages from a new business. Such damages are often (but not always) speculative. *Id.* While the hotel was going to be a new purchase for St.

[7] $7,100 was for out of pocket expenses for due diligence prior to purchase. The remaining $250,000 was expected profits. As St. Marks discussed in his opening brief, subsequent financial documentation from the hotel showed that the net income in calendar year May 2014-April 2015 was $376,553. St. Marks Consol. Br. at 63.

Marks, it was already an established and ongoing business, and part of a larger established and ongoing hotel chain. St. Marks Consol. Br. §V.B; AR C-4, 29 and attachments thereto. *Compare* Restatement (Second) of Contracts §352, Illustration 5 (recovery of lost profits on established business) *with* Illustration 6 (where a business is new but there are comparable businesses in the area, recovery is possible, but more difficult to establish) *and* Illustrations 7 (if the business is new but there are not similar businesses in the area, recovery is unlikely).

The Agency also stated that the evidence did not "clearly show that the Tribe's reprisal, rather than other factors, was the reason for the transaction's failure." First, and as is, standing alone, the Agency applies the wrong burden of proof. The burden is not clear and convincing. It is no higher than a preponderance of the evidence. Second, the only evidence was that the reprisals were the sole cause for the transaction's failure. AR C-4, 29 and attachments thereto. The transaction was being finalized when the bank pulled out, citing solely to the uncertainty and risk created by the ongoing retaliatory litigation.

The Agencys refusal to award damages for the lost hotel contract was erroneous, and this Court should increase the award $257,100 based upon the record, or should remand for further proceedings (which would then very likely result in an even greater increase in the award).

VIII. THIS COURT SHOULD ORDER THAT PRE-JUDGMENT INTEREST AND POST-JUDGEMENT INTEREST APPLY TO THE AMOUNT AWARDED

A. PRE-JUDGMENT INTEREST.

The general rule is that pre-judgment interest is provided for the portion of a judgment for special damages or other amounts paid out of pocket by the plaintiff. The judgement in this matter does not specify whether or not the Agency was awarding pre-judgment interest. That oversight should be corrected; and instead of remanding to the Agency for it to answer that question, the Court should determine that pre-judgment interest is necessary to make St. Marks whole.

The Agency asserts that its decision not to award pre-judgment interest should be upheld. But the Agency did not make any such decision. Instead, it issued an award for special damages, and interest is appropriate to fulfill the remedial purpose of the statute. This Court need not remand for the Agency to make the decision, as it has the authority to decide that pre-judgment interest on special damages are properly included in the award.

B. POST-JUDGMENT INTEREST.

The Agency's argument regarding post-judgment interest fails to account for the procedural history of this case and the ARRA provisions which require the Agency to enforce its own award.

After the Agency issued its remedial order, the Tribe moved for a stay. St. Marks responded that any stay should be contingent on the posting of a bond

adequate to protect St. Marks from damages caused by the appeal. The Agency then issued a self-contradictory order[8] granting the stay but requesting further briefing on whether to require the Tribe to post a bond or deposit money into an escrow account. The Agency stated that the additional briefing would be "on how the Tribe will protect—through a bond, escrow account or other mechanism, the Order's monetary award so that those funds are readily available to St. Marks if and when the Ninth Circuit upholds the Order." AR D-21. St. Marks submitted the required supplemental brief. AR D-23.

The Tribe, predictably, submitted a brief which attempted to rehash previously decided issues, but which did not discuss the question for which the Agency had requested supplemental briefing. AR D-22. St. Marks submitted an additional letter, on October 23, 2015, in which he reminded the Agency that it had not ruled on the motion for bond, and in which he again requested a ruling.

To date, the Agency still has not ruled on St. Marks request for a bond which would protect him from financial harm from the Tribe's unsupported appeal.

Had the Agency required that the money be placed in escrow as requested by St. Marks, it would have been earning post-judgment interests. The Agency's

[8] Stays pending appeal are made contingent on the Appellant posting bond, and until the bond is posted, the appeal is not stayed. Here the Agency stayed the order (in effect staying the work that the Agency was supposed to be doing to enforce its own award) prior to any bond being posted.

argument that St. Marks has waived any claim to post-judgment interest is therefore without merit.

CONCLUSION

The United States has correctly acknowledged that St. Marks was a whistleblower who brought down a corrupt ring of Chippewa Cree officers and agents who were stealing or embezzling federal funds. The United States has also correctly determined that the Tribe responded by retaliating against St. Marks for St. Marks' whistleblowing. Those determinations are obviously correct, the evidence supporting them overwhelming.

But the Agency has wrongly interpreted the whistleblower statute to preclude St. Marks from obtaining the remedial remedies that Congress intended. This Court should affirm the unappealed determination that the Tribe retaliated, should correct the Agency's erroneous restrictive reading of its remedial powers, and should direct that St. Marks recover additional damages of: $257,100 for the hotel; $282,098.92 from the Arrow matter, ER at 1087; all attorney fees; additional attorney fees and costs for this appeal (in an amount to be determined by submission after this Court issues its decision), plus pre-judgment and post-judgment interest.

Respectfully submitted this 29th day of December 2017.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Circuit Rule 28.1-1(c) in that, according to the word-count feature of the word processing system in which the brief was prepared (Microsoft Word 2016), the brief contains 6,317 words, excluding the portions exempted by Rule 32(a)(7)(B). The brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman font.

By: */s/Jeffrey S. Rasmussen*
Jeffrey S. Rasmussen

CERTIFICATE OF VIRUS CHECK AND REDACTIONS

The undersigned counsel for Respondent, Ken St. Marks, hereby certifies that the foregoing Brief has been scanned for computer viruses using Webroot software, updated December 29, 2017, and that the Brief is virus free. The undersigned further certifies that all required redactions have been made.

December 29, 2017

s/ Jeffrey S. Rasmussen
Jeffrey S. Rasmussen

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of December 2017, a copy of the foregoing **KEN ST. MARKS' REPLY BRIEF** was served via the ECF filing system which will send notification of such filing to all parties of record.

/s/ Ashley Klinglesmith
Paralegal/Legal Assistant