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' CONSOLIDATED OPENING AND ANSWERING BRIEF

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INTRODUCTION

On November 12, 2012, Ken St. Marks took office as the democratically elected Chairman of the Rocky Boy's Indian Reservation. He soon noticed what appeared to him (and which subsequently turned out to be) very substantial corruption by tribal elected and administrative officers related to American Recovery and Reinvestment Act ("ARRA") funds. The United States had provided those ARRA funds to the Tribe with "strings attached," including in pertinent part the Tribe's agreement to a provision which protects the federal purse strings by providing protections to those who disclose misuses of those federal funds, i.e. "whistleblowers." ARRA §1553

St. Marks plainly qualified as a whistleblower under the ARRA, and his actions resulted in numerous federal convictions and recovery of misused federal funds. He requested whistleblower protection on March 9, 2013, March 15, 2013, and March 20, 2013. ER018. If we were looking for an example of a whistleblower statute being good policy and beneficial to the United States, the St. Marks whistleblowing matter would be one of the best.

But then if we look at the consequences to the whistleblower, Mr. St. Marks, it has been a financial disaster; and if we look at the message which the Department of the Interior's (hereinafter the "Department" or the "Agency") refusal to provide

remedial measures sends to future whistleblowers, it is to strongly deter whistleblowers.

Through this case, this Court is asked to re-write the prior paragraph. While this Court cannot retroactively provide the protection that the United States failed to provide, it can and must still make the whistleblower whole. Unless this Court steps in to save the United States from the Department's own misguided actions, the message to whistleblowers is that the United States will not protect whistleblowers and that the United States will not order that the whistleblower be made financially whole.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over Ken St. Marks' petition under ARRA §1553(c)(5), which provides that"[a]ny person adversely affected or aggrieved by an order… may obtain review of the order's conformance with this subsection… in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred." St. Marks seeks review of the Department's April 24, 2015 order issued under §1553(c)(5), for reprisals that occurred within the State of Montana. ER003. St. Marks filed a Petition for Review on June 22, 2015, within the 60 day jurisdictional requirement contained in §1553(c)(5).

As will be discussed in Section I of this brief, this Court does not have jurisdiction over Pepper Hamilton's untimely petition for review of the Department's December 19, 2014 order.

STATEMENT OF ISSUES

Whether the Tribe timely petitioned for review from the December 19, 2014 order.

Whether the Tribe is immune from suits initiated by the United States for misuse of ARRA funds.

Whether the Tribe is represented by Pepper Hamilton.

Whether the Tribe properly preserved its arguments for appeal.

Whether the Department failed to provide proper remedies.

SUMMARY OF THE ARGUMENT

On December 19, 2014, the Department issued an order establishing that Ken St. Marks was a federally protected whistleblower and that the Tribe had retaliated against him. The administrative record in this matter amply, overwhelmingly, supports those conclusions, and the Tribe chose not to appeal from that order.

On April 24, 2015, the Department issued its remedial order. Mr. St. Marks petitioned for review of that order, because the Department's order did not comply with the congressional purpose for whistleblower protection. It did not protect the whistleblower and did not provide required restitution and compensation. The Department concluded that St. Marks had incurred substantial expenses responding to the Tribe's obvious retaliation for St. Marks' whistleblowing, but the remediation

order did not provide for restitution or compensation for much of the established and ongoing retaliation.

That is the only issue properly before this Court by timely petition for review. The Tribe has also petitioned for review of the April 24 order, but as shown in its opening brief, the Tribe almost exclusively is attempting to go back to merits issues or defenses it had not raised prior to December 19, and to factual issues for which it presented its meager evidence but lost in the December 19 order. Appeal of that order is jurisdictionally barred because there was not a timely petition for review of that order, and even if the Tribe had timely petitioned for review, its arguments are without merit. It waived any claim of sovereign immunity when it took ARRA funds and again when it decided to litigate. The fact that it lost in the litigation is not a basis for reviving a waived immunity defense or for raising other waived defenses or arguments. And the overwhelming record shows that the Tribe retaliated against St. Marks. The Tribe barely attempted to hide the fact that it was making up claims against St. Marks to retaliate. Under the ARRA, the Tribe was properly ordered to provide restitution, and this Court must increase the amount of the award to compensate the whistleblower for the full scope of the Tribe's open and obvious retaliation.

STATEMENT OF THE CASE

Ken St. Marks is a 65 year-old member of the Chippewa Cree Tribe of Rocky Boy's Reservation (the "Tribe"). ER0599. The Rocky Boy's Reservation is located in north-central Montana.

In 2006, Congress allocated $129,280,000 for the construction of water pipelines to supply clean, sanitary drinking water to rural areas in and near the Rocky Boy's Reservation. That project was called the Rocky Boy's/North Central Montana Regional Water Systems Project (the Water Project). Between 2006-2012, the United States allocated an additional $52,729,482 for the project. This included $27,526,000 in funds awarded under the ARRA. The Tribe chose to accept these funds, subject to all of the terms of the ARRA. The Water Project and the funds for it were overseen by the Chippewa Cree Construction Corporation, which is a corporation owned by the Tribe. ER0003-0008.

In 2012, the Tribe's membership elected St. Marks to the position of Chairman of the Tribe. ER0008. That is the Tribe's highest elected office, and combines both executive and legislative powers.

Upon taking office in 2012, Chairman St. Marks, an experienced and successful businessman, noticed several discrepancies in the Water Project's financial records. He requested that tribal employees provide him with additional information, some of which they provided. From what St. Marks did receive, it was

apparent that substantial amounts of tribal funds were missing. The Tribal Business Committee members and senior staff who were holdovers from the time when the discrepancies appeared to have arisen could not explain where the missing funds were. St. Marks also noticed that funds appeared to be missing from other tribal accounts, including other accounts which should have held ARRA funds or other federal funds. ER0008; ER0015-16.

Based upon these concerns, St. Marks reported the discrepancies and concerns to federal officials. These included, inter alia:

Department of Interior
Office of Inspector General
Joseph D. Waller, Resident Agent in Charge
Tammy Vericker
Laurie Larson Jackson

Bureau of Indian Affairs
Darren A. Cruzan, Director, Office of Justice Services

Bureau of Reclamation
Regional Director Michael Ryan
Great Plains Office Deputy Regional Director John Soucy

Department of Agriculture
Office of Inspector General Investigations
Monique Hirko-Damuth, Special Agent

Department of Housing & Urban Development
Office of Inspector General Investigations
T.J. Hanes, Special Agent

Department of Health and Human Services
Office of Inspector General Investigations
Kelly Earl, Special Agent

United States Department of Justice
United States Attorney's Office
Michael Cotter

Internal Revenue Service
Criminal Investigation Division

Federal officials relied heavily on St. Marks' initial and ongoing whistleblowing actions in their own investigations, which then determined that St. Marks had brought to the United States' attention a very substantial corruption ring within the Tribe's government.

The corruption included substantial misuse and theft of ARRA funds. ER 0008-09; 0014-17. The Bureau of Reclamation conducted an audit to determine how the Tribe had spent the $52,729,482 it was awarded between 2006-2012. It determined that about a quarter of the funds—nearly $13 million—was unaccounted for. The audit also uncovered that the CEO of the Chippewa Cree Construction Corporation, Tony Belcourt, used his own company to complete work as a subcontractor; and $2.7 million had been wrongly claimed for profits and administration fees, even though the federal contract granting the money to the Tribe did not provide for profit. ER 15.

In addition to the questionable costs related to the Water Project, St. Marks brought other financial improprieties to light. After the Rocky Boy's Health Clinic was destroyed in a flood in June 2010, the Tribe received $11.6 million through the

Federal Emergency Management Agency to assist the Tribe in recovering from the flood. ER0016. The Tribe could not or would not account for substantial portions of those funds.

St. Marks' whistleblowing and the investigation that he then cooperated with for the duration, resulted in the conviction in federal court of:

- Tony Belcourt, CEO of the Chippewa Cree Construction Corporation and former Tribal Business Committee member: guilty of embezzlement, bribery, and conspiracy to file false claims;
- John Chance Houle, Tribal Business Committee member: guilty of embezzlement and tax evasion;
- Bruce Sunchild, former Tribal Business Committee member: guilty of bribery, embezzlement, and tax evasion;
- Fawn Tadios, Chief Executive Officer of the Rocky Boy Health Board Clinic: guilty of misappropriation of tribal health clinic funds;
- Wilbur Harlan "Huck" Sunchild, guilty of three counts of embezzlement from the Rocky Boy's Wellness Center;
- James Howard Eastlick, employee of the Rocky Boy Health Clinic: guilty of public corruption, tax fraud, and bribery;
- Tammy Leischner, guilty of aiding in theft from an Indian tribal government receiving federal funds;
- Mark Leischner, guilty of conspiracy to defraud the government;
- Garcia Duran, employee of the Rocky Boy Health Board: guilty of theft of tribal funds.

When the Tribe found out about St. Marks' whistleblowing, it, through its agents, including elected officers, attorneys, and others, then began numerous reprisals. ER0007-0011. The Agency correctly determined that the Tribe created demonstrably false allegations against St. Marks and that other tribal allegations were implausible. *Id.* The Tribe did not petition for review of that order, and that order is not final. Yet these false or implausible claims are the very same ones that the Tribe still attempts to peddle to this Court despite the Department's decisions. The Tribe then used its own fictitious claims to repeatedly remove St. Marks from office. In an example of democracy working, each time the corrupt individuals removed St. Marks from office, the Tribe's membership promptly voted St Marks back into the Chairmanship. ER820-828 (Providing summary of series of elections, unlawful "removals" and failed attempts by Pepper Hamilton and its supporters to prevent voters from returning St. Marks to office). After St. Marks began his whistleblowing, the Tribe also refused to pay him for services which his company, Arrow Enterprises ("Arrow") had completed for the Tribe (and for which the Tribe had requested and received federal funds based upon a false averment that it had

paid all contractors.[1]) *Id.;* ER 007-9. To attempt to justify that, the Tribe then made up allegations that the Department (and later a tribal jury, ER1121-1128) determined were demonstrably false regarding work that St. Marks's company had performed. ER0003-14, e.g. ER0009-11. The corrupt tribal agents packed the Tribe's Court with relatives, supporters, or others that they apparently thought would see their ruthless retaliation against St. Marks and would go along (but they underestimated one of the judges that they thought would be kowtowed, ER0284-89). Pepper Hamilton then brought multiple cases against St. Marks, including a multi-million dollar claim based upon the made-up allegations. The Tribe spent unknown amounts of money having Pepper Hamilton subject St. Marks to a trial on their false allegations, and in that trial not only did the Tribe lose on all of its fabricated claims and St. Marks prevail on most of his claims, but the Jury returned a verdict that

[1] The Tribe apparently believes that it can somehow keep the hundreds of thousands of dollars that it took from the United States based upon its false assertion that it had already paid that money to Mr. St. Marks. It cannot, because (if it is not already theft) any such attempt by the Tribe to keep the money that it unlawfully took from the United States based upon its prior false averment would be theft or a closely linked variant. The Tribe would either have to pay the money to St. Marks, or return it to the United States (which then presumably would pay it over to St. Marks based upon the Tribal jury verdict that the money properly belongs to St. Marks).

someone other than St. Marks had committed fraud against the Tribe.[2] ER1121-28. After putting St. Marks to substantial litigation costs based upon fabricated claims and enriching itself doing the corrupt officers' biddings, Pepper Hamilton heard its own witness directly testify that Pepper Hamilton was knowingly trumping up claims against St. Marks, and the Jury rejected Pepper Hamilton's fabricated claims, and agreed with most of St. Marks claims.[3]

The Tribe pathetically had a female member of its corruption ring (who was later imprisoned on charges stemming from St. Marks' whistleblowing) assist the Tribe in retaliating against St. Marks by making a false assault allegation (which also was subsequently dismissed in the Tribe's Court). ER0025; ER0942-ER0951. They directed police to arrest and charge St. Marks with a crime (which was

[2] Since the Jury verdict, Pepper Hamilton, continuing with its obsessive attempt to retaliate against St. Marks, has been falsely asserting that the Jury returned a verdict against St. Marks for fraud. That assertion is beyond the pale of proper legal argument. The Jury verdict form asked the jury to first answer whether a fraud had been perpetrated upon the Tribe, and second to state if St. Marks had committed that fraud. The jury answered the first question "Yes" and the second "No." In fact, one of the Tribe's own witnesses testified based upon personal knowledge that Pepper Hamilton and tribal officers met to make up claims against St. Marks and to decide who would lie to support their false claims.

[3] Because that trial was after the Secretarial order at issue in this case, the trial recording and jury verdict were not before the Secretary and are arguably not properly before this Court; but inexplicably Pepper Hamilton has chosen to provide **false** allegations regarding the trial and the Jury's verdict in its opening brief. St. Marks therefore responds with accurate information. The Tribal Court is a court of record, and this Court can take judicial notice of that record.

subsequently dismissed). ER00019. They even threatened to assassinate St. Marks and burn down the house where he, his wife, and children lived. ER0018

The very same Pepper Hamilton attorneys[4] who were implicated in the retaliations now continue to purport to represent the Tribe in this matter.

When the United States asked the Tribe to respond to the whistleblower action, the Tribe merely reiterated its own demonstrably fabricated, trumped up or implausible assertions, and when that was, predictably, found insufficient by the Department, the Tribe chose not to appeal the December 19, 2014 liability determination.

But then when it came time to determine the proper scope of remedial orders, the Tribe attempted to go back to issues it had not contested or had waived or that the Department had correctly rejected as demonstrably false. ER0845.

While the Department properly rejected the Tribe's attempt to go back to those waived or resolved issues, the Department provided a remedial order which was only a half-hearted implementation of an agency's statutory obligation to protect such

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[4] Mr. St. Marks well understands the seriousness of his statements regarding the Pepper Hamilton attorneys who are in this matter, and his statements are amply supported by the record below and the Secretary's decision based upon that record. In fact, the Office of the Inspector General's characterizations of the Pepper Hamilton attorneys relegated to this matter is far harsher than St. Marks. ER 00014. The Secretary did not make any statements reflecting on other attorneys employed by Pepper Hamilton, and St. Marks' discussions in this brief are solely related to the Pepper Hamilton attorneys who participated in the retaliations below and who continue their improper retaliatory actions in this Court.

whistleblower. Without any meaningful evaluation of its obligations under ARRA, the Department did not vindicate the rights of the whistleblower or make the whistleblower whole. The Department recognized that much of Pepper Hamilton's litigation against St. Marks was pretextual, but the Department did not order restitution for many of St. Marks out-of-pocket expenses required to defend against that expensive, pretextual litigation; and (as discussed in detail in section V of the discussion of law below) the Department also did not provide other compensatory damages necessary to make St. Marks whole.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO REVIEW THE REPRISAL DETERMINATION.

By prior motion to this Court, Ken St. Marks moved for summary disposition on Pepper Hamilton's appeal (purportedly filed in the name of the Chippewa Cree Tribe) on two grounds: first that even if Pepper Hamilton were the Tribe's attorney (which it is not), the unappealed December 19, 2014 order is final and unreviewable because no one petitioned for review of that order within 60 days of issuance (or ever); and second that, in fact, Pepper Hamilton is not the Tribe's attorney. This Court did not grant summary disposition, but instead deferred the issues to the merits briefing.

Based upon either of these independent grounds, this Court does not have jurisdiction over Pepper Hamilton's appeal.

A. PEPPER HAMILTON FAILED TO TIMELY APPEAL THE DECEMBER 19, 2014 REPRISAL DETERMINATION.

A party who is "adversely affected or aggrieved by" a reprisal determination can file a petition for review with the circuit court in which the matter arose. 1553(c)5. That same subsection further states: "No petition seeking such review may be filed more than 60 days after issuance of the order by the head of the agency." That deadline is jurisdictional. *E.g., Tiger Int'l, Inc. v. Civil Aeronautics Bd.,* 554 F.2d 926, 931 n. 11 (9th Cir. 1977) (time limits for appeal and review set forth in statutes are universally regarded as jurisdictional).

In its December 19, 2014 reprisal determination, the Department expressly provided notice that any petition seeking review of the retaliation determination had to be filed within 60 days of December 19, 2014. The Tribe now claims it was "adversely affected or aggrieved by" the December 19, 2014 reprisal determination. And as is undisputed, Pepper Hamilton failed to appeal from that order within 60 days.

Pepper Hamilton is therefore left in the unenviable position of having to argue that its obvious failure to meet the jurisdictional deadline stated in the law, and redundantly stated in the written notice in the December 19 order, is somehow of no consequence.

Jurisdiction is a threshold issue in every case, and the Tribe had the duty to establish jurisdiction in its opening brief. Fed. R. App. Proc. 28, *Lance v. Coffman*,

549 U.S. 437, 441 (2007). It failed to establish jurisdiction. In fact, it did not even try to establish jurisdiction over the December 19, 2014 order. In its opening brief, the Tribe merely noted that it timely appealed from the April 24, 2015 order. Opening Br. at 2. With regard to its failure to appeal the December 19, 2014 order, the Tribe was well aware of the jurisdictional question, but chose not to discuss that issue in its opening brief. It has therefore waived that issue. It cannot be allowed to attempt to raise that waived issue in a reply brief. And even if it were allowed to wait until its reply to attempt to establish jurisdiction, it would not be able to prevail, because, simply, it failed to timely petition for review of the December 19, 2014 order.

Most of the errors that the Tribe now seeks to raise were errors in the December 19, 2014 order, and this Court lacks jurisdiction over those alleged errors. For example, in its December 19, 2014 order, the Agency concluded that ARRA's whistleblower provision §1553 applied to the actions the Tribe took against St. Marks. ER0003-0805. The Reprisal Determination set forth the pertinent ARRA procedures, standards, and remedies (ER0004-5); the application of ARRA to the Tribe (ER0005); Findings of Fact (ER0007); Conclusions of Law, including that St. Marks' made protected disclosures regarding misuse of ARRA funds by the Tribe, that St. Marks' disclosures were contributing factors in his removal (ER0009), and that the Tribe failed to rebut that it was not a contributing factor (ER0011). Having

determined liability, the Department then directed the parties to provide additional information on the proper remedies for the Tribe's established retaliatory actions. The Department also provided the Tribe with notice that: "A petition seeking review of this decision must be filed no more than 60 days after issuance of the order." ER0013 (emphasis added).

As stated above, §1553(c)(5) and the Reprisal Determination at ER0003 required the Tribe to appeal within 60 days of a "paragraph 2" occurrence, including the Reprisal Determination. §1553(c)(2). The Department's December 19 notice reiterates this jurisdictional requirement. ER0013. The ARRA provision contrasts with the jurisdictional statute with which this Court is most familiar, which provides for appeals from "final orders." In contrast, ARRA requires appeals within 60 days of "paragraph 2" occurrences. The Tribe did not appeal within 60 days of a paragraph 2 occurrence.

Here, the unappealed Reprisal Determination definitively and conclusively established that a prohibited Reprisal occurred in contravention of ARRA. Only remedies were left to be decided, and only remedies are before this Court based upon the sole timely Petition for Review.

B. IN THE PETITION FOR REVIEW THAT IT DID FILE, THE "TRIBE" DID NOT PETITION FOR REVIEW OF THE DECEMBER 19 ORDER, AND THEREFORE REVIEW OF THAT ORDER IS NOT BEFORE THIS COURT.

Even now, over two years after the Department issued the December 19, 2014 order, the Tribe has not petitioned for review of that order. Federal Rule of Appellate Procedure 15(a)(2)(C) requires a petition for review of an agency order to "specify the order or part thereof to be reviewed." A petitioner cannot appeal from an order that it did not specify in its petition. This flaw is jurisdictional and fatal. *E.g.*, *Washington Util. & Transp. Comm'n v. FERC*, 26 F.3d 935, 941-42 (9th Cir. 1994); *Entravision Holdings, LLC v. FCC*, 202 F.3d 313, 314 (D.C. Cir. 2000); *City of Benton v. Nuclear Reg. Comm'n*, 136 F.3d 824, 826 (D.C. Cir. 1998); *John D. Copanos & Sons, Inc. v. FDA*, 854 F.2d510, 527 (D.C. Cir. 1988). Dismissals occur because courts are "constrained by the unambiguous dictates of Rule 15." Wright & Miller, *Fed. Practice & Proc. Civil* §3961.4 (quoting *Washington Util. & Transp. Comm'n*, 941-42); *Entravision*, 202 F.3d at 314.

In its petition for review, the Tribe only noticed its intent to appeal from the April 24, 2015 order, which it identified by the caption of that order:

> the Final Disposition in the Matter of U.S. Department of the Interior, Office of the Inspector General Report of Investigation U.S. Bureau of Reclamation ARRA Funds – Case No. OI-CO-0243-I (St. Marks)

Petition for Review and Statement of Representation. The Tribe did not include the Reprisal Determination. *Id.* The Tribe also described the order for which it

sought review in the singular--"Order." As such, the appeal of the Reprisal Determination is not before this Court. Fed. R. App. P. 15(a)(2)(C); *Washington Util.,* 26 F.3d at 941-42.

C. PEPPER HAMILTON'S ATTORNEYS DO NOT REPRESENT THE TRIBE, BECAUSE PEPPER HAMILTON HAS NOT BEEN AUTHORIZED TO REPRESENT THE TRIBE IN THIS MATTER.

Like many tribal constitutions, the Tribe's constitution expressly and unequivocally provides that attorneys who want to represent the Tribe must obtain federal approval. It defines that the Business Committee has the power "To employ legal counsel … subject to the approval of the Secretary of the Interior." ER1038, Art. VI, §1(b) (emphasis added).

Provisions requiring certain agreements with Indian tribes be approved by the Secretary of the Interior have long been a feature of federal Indian law and were enacted by tribes and/or Congress to protect the Indians from "improvident and unconscionable contracts." *In Re Sanborn,* 148 U.S. 222, 227 (1893); *A.K. Mgmt. Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 788 (9th Cir. 1986). Specifically, the provision requiring federal review of proposed attorney contracts stems from tribal and federal desire to protect tribes from unscrupulous attorneys, by requiring that attorneys submit their contracts, hourly rates, maximum possible payments and other terms to the United States for review.

Prior to 2001, the Chippewa Cree Constitution Article VI, §1(b) was largely redundant of a federal statute, 25 U.S.C. § 81, which also required federal review and approval. When the United States, in 2000, amended its 25 U.S.C. § 81 to provide that the United States would no longer independently require that would-be-tribal attorneys obtain federal approval, it clearly stated the exact point that St. Marks is making to this Court—that federal approval is still required where that approval is mandated by the Tribe's own laws; and the United States reiterated that it would therefore continue to review, and, if appropriate approve, attorney contracts where federal approval remained necessary under a tribal constitution:

> the [Indian Tribal Economic Development and Contract Encouragement Act of 2000] does not alter those tribal constitutions that require federal approvals for specific tribal actions, such as attorney contracts. Thus, the Secretary must still approve or disapprove attorney contracts if a tribal constitution so requires. The criteria, if any, for approval of such contracts will be those in the tribal constitution and any relevant Federal law.

Attorney Contracts with Indian Tribes, 66 Fed. Reg. 38,924-38,926 (Jul. 26, 2001).

One could question whether the Tribe should follow the United States' lead and eliminate the independent tribal law requirement that attorneys require federal approval in order to be qualified to represent the Tribe, but the Tribe to date has not chosen to remove that protective provision from its own Constitution. It is the Tribe's constitutional requirement.

As is undisputable, Pepper Hamilton had not met that basic requirement to petition this Court on behalf of the Tribe. It knows that, it has known it for years, but it claimed to represent the Tribe based upon purported (but dubious) claims of authorization by someone, but what we know is that it does not have sufficient authorization. Mr. St. Marks' understanding is that Pepper Hamilton claims to represent the Tribe primarily to attempt to protect Pepper Hamilton from liability, not out of any concern for the Tribe. Pepper Hamilton is itself one of the primary entities which was engaged in the illegal retaliatory actions against Mr. St. Marks, and it then made the basic error of missing the jurisdictional filing deadline and has made other large-scale legal errors.

Even if Pepper Hamilton had a contract when it filed its petition for review, it had not even submitted that contract for the constitutionally required review, and any unapproved contract would be a nullity. Because it has not met the Tribe's Constitutional mandate, Pepper Hamilton is simply not qualified to represent the Tribe.[5]

[5] There is reason to think that if Pepper Hamilton were to submit a contract, the United States would conclude that Pepper Hamilton's attorney's in this case are exactly the type which cannot be approved under the Tribe's Constitution. But we need not consider that issue here because Pepper Hamilton has decided not to even take that risk, not to even submit a contract (if it even has one) and attempt to obtain the constitutionally required approval.

It is surprising that this relatively obvious legal issue has gone unresolved in other fora where it has been raised, and that Pepper Hamilton merely continues to claim to represent a party that it is not lawfully authorized or qualified to represent. This Court is now required to determine whether Pepper Hamilton's attorneys, patently unqualified under the Tribe's constitutional protections, were permitted to file any documents in this matter based upon its assertion, which is false as a matter of law, that they represent the Tribe before this Court. Under the plain language of the Tribe's constitution, this Court cannot permit Pepper Hamilton to represent the Tribe.[6]

Even if we assumed, arguendo, that Pepper Hamilton had a proposed contract with the Tribe, any such document is a nullity unless it has the required federal approval. Failure to comply with secretarial approval requirements have rendered a great many contracts with tribes true dead letters. *E.g.*, *A.K. Mgmt. Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 788 (9th Cir. 1986); *Barona Grp. of the Capitan Grande Band of Mission Indians v. Am. Mgmt. and Amusement, Inc.*, 840 F.2d 1394, 1402-1404 (9th Cir. 1987); *Wells Fargo Bank, N.A., v. Lake of the Torches Econ. Dev. Corp.*, 958 F.3d 684, 699 (7th Cir. 2011); *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla.*, 692 F.3d 1200, 1211-12 (11th Cir. 2012),

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[6] The issue here is not whether Pepper Hamilton was authorized to represent the Tribe before the Department. It is whether it is authorized to file the notice of appeal, briefs, or other documents on behalf of the Tribe in this Court.

cert. den., 133 S. Ct. 843 (2013). The failure of a third-party to obtain the written secretarial approval for any reason or for no reason at all renders the contract null and void ab initio. *Contour Spa*, 692 F.3d at 1211-12; *Sangre de Cristo Dev. Co., Inc. v. United States*, 932 F.2d 891, 895 (10th Cir. 1991).

Because Pepper Hamilton's contract was not approved by the Secretary of the Interior as required by the Tribe's Constitution any alleged contract is a true dead letter, null and void ab initio. *Contour Spa*, 692 F.3d at 1211-12; *Sangre de Cristo*, 932 F.2d at 895; *Wells Fargo*, 958 F.3d at 699. Thus, Pepper Hamilton, LLP was not authorized nor qualified to represent the Tribe in this matter and all documents filed by Pepper Hamilton as the Tribe's attorney were and are a nullity.

II. THE TRIBE'S CLAIM OF SOVEREIGN IMMUNITY IS WITHOUT MERIT FOR NUMEROUS OBVIOUS REASONS.

The only thing interesting about the Tribe's sovereign immunity argument is that it shows that the Tribe itself does not have the slightest clue what sovereign immunity is, how it is raised, how it is waived, or how it is preserved. The only aspect of sovereign immunity that the Tribe has shown is that it is a tribe. Despite the contention in its brief, that is not enough to avoid the federally imposed and tribally agreed to consequences from the Tribe's retaliation against its own Chairman for the Chairman's federally protected whistleblower actions.

First, the Tribe does not have sovereign immunity to an action by the United States. Second, even if we were to assume, contrary to law, that the Tribe has

sovereign immunity against the United States, it waived that immunity when it voluntarily decided to take federal funds subject to federal authority to protect whistleblowers. Third, even if we assumed the Tribe could have asserted sovereign immunity, it chose not to. Instead it chose to participate, and now merely raises sovereign immunity because/after it lost.

The Tribe does not possess sovereign immunity against the United States. *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986) ("The Tribe's own sovereignty does not extend to preventing the federal government from exercising its superior sovereign powers.") (citing *United States v. White Mountain Apache,* 784 F.2d 917, 920 (9th Cir. 1986)). The Tribe does not have sovereign immunity to prevent the Department from providing remedies consistent with the conditions attached to the federal funding. *Id.* In fact, the United States regularly brings claims against tribes based upon federal law because tribal sovereign immunity is subject to "the overriding interests of the National Government." *Arizona v. San Carlos Apache Tribe of Arizona,* 463 U.S. 545, 571 (1983).

Even if the Tribe did have sovereign immunity, it waived that sovereign immunity by exercising its sovereign authority to take funds which were subject to the federal whistleblower protections.

Sovereign immunity, whether of a tribe or of any other government is waiveable, and governments, on a daily basis exercise their sovereignty by making

the choice to waive their immunity. The Tribe only needs to make that choice once applicable to this matter, but it has actually made that choice repeatedly.

Its first choice was when it decided, in an exercise of its sovereign authority, to take ARRA funds. The United States made funds available to the Tribe subject to the Tribe's acceptance of all conditions of the acts. P.L. 107-331, §904(c). The Tribe, exercising sovereignty, chose to accept the funds and agreed to the conditions upon which the United States offered the funds. The funds had what would, in any non-corrupt government, be an unconcerning string attached. The recipient agreed that it would not retaliate against someone who whistleblows regarding misappropriation of the federal funds. That relatively innocuous string has only become an issue because the Tribe, its attorneys, and its other agents then chose to retaliate against St. Marks for whistleblowing.

Congress provided the whistleblower protections in the ARRA to protect federal interests. *See* §§IV-V, *infra*. It was looking to fund "shovel ready" projects to stimulate the economy and provided the whistleblower protections to prevent or more quickly catch and then remedy misuses of the federal funds in those projects. No one forced the Tribe to accept those grant funds. The Tribe, exercising its sovereign authority, could have decided that the United States requirement that the Tribe could not get the grant funds unless the Tribe agreed not to retaliate against whistleblowers, was too onerous. It could have decided it did not want ARRA funds.

But of course tribal leadership and their attorneys and other agents were not concerned about that at the time, and were not concerned when 25% of the funds with the whistleblower protections attached disappeared, or when they were then pulling out all of the stops to retaliate against St. Marks for disclosing to the United States the thefts of those ARRA funds. But as the Department correctly concluded, the Tribe chose to agree to the "obligation and expenditure of ARRA funding." ER 0007.

Next, the Tribe chose to waive immunity when it chose to participate in the whistleblower matter without asserting sovereign immunity relevant to the claims currently at issue.[7] The Tribe actively participated in the Reprisal Determination proceedings by presenting "the Tribe's side of the story in this matter." ER0724. It submitted its arguments on the merits. ER0724-ER0775. It said all it could say on the merits. ER0724, ER0725, ER0726, ER0746-ER0747, and ER1043-ER1046. It, however, lost. ER0003-ER0013.

[7] The Tribe did raise sovereign immunity regarding one limited issue. It asserted, without citation, that if the Agency were to "divest" the Tribe of authority to remove St. Marks from elected office, such divestiture "would be unconstitutional and an infringement of the Sovereign Immunity of the Chippewa Cree Tribe." The Agency did not take the action that the Tribe argued against. That issue is therefore moot. But it does illustrate that that the Tribe chose not to assert sovereign immunity to any other issues. For all other issues, it chose to litigate and it lost.

It was only after it lost that the Tribe tried to revive an already waived sovereign immunity defense. It decided to play, it lost, and now it wants this Court to hold, contrary to fact and contrary to all case law, that it never even played. Its assertion was far too late. Even if it could have chosen not to play, it chose to play. It lost. And it cannot take that loss off the record books after the fact.

After it lost, it is not permitted to take out a "sandbagged" sovereign immunity defense. ARRA 1553(c)(5); Reprisal Determination at 11; *Lapides v. Bd. of Regents of Univ. System of Ga.,* 535 U.S. 613, 620 (2002) (a sovereign cannot use "selective use of 'immunity' to achieve litigation advantages.") Where, as here, a party goes beyond mere defensive actions, it manifests an intent to litigate. *Id*. *See also Resolution Trust Corp. v. Bayside Developers,* 43 F.3d 1230, 1240 (9th Cir. 1994). The Tribe did not have sovereign immunity applicable to the whistleblower matter, and even if it did, it repeatedly chose not to assert it. It chose to litigate, and it now must live with the fact that it lost.

III. THE TRIBE DID NOT PRESERVE FOR AND PRESENT A SUBSTANTIAL QUESTION OF LAW PURSUANT TO NINTH CIRCUIT RULE 3-6.

The Tribe did not raise to the Agency the issues contained in its Statement of the Issues before the Reprisal Determination was issued. It did post hoc mention some of them in its February 13, 2015 filing (ER0835-ER1048) but as discussed herein, and as the Department also concluded, those attempts to revive the already dead issues were too late. Final Disposition at 5 (the Tribe's "attempts to include post

hoc evidence of St. Marks' alleged misconduct are unavailing and give no dispositive weight"); *id.* at 9 (The Tribe "attempts to buttress its position with after the fact accusations… or matters beyond the scope of the present inquiry.")

Both from the statute itself and from the Agency's repeated and periodic communications, the Tribe knew the complaint was before the Agency and a reprisal determination was forthcoming. At that time the Tribe decided to attempt to take the merits head on, presenting the "Tribe's side of the story." ER0724. It did not present many of the procedural defenses that it now seeks to resuscitate. Compare ER0724, ER0725, ER0745, and ER1043, with the issues presented for review at Brief for the Chippewa Cree Tribe ("Br.") at 19. And while its various procedural defenses are without merit in any case, this Court need not consider them because the Tribe did not timely submit them below.

One of the Tribe's primary new arguments, which it raised only after the Department had found it liable, is that the Agency should have set the liability determination for a fact-hearing. Br. at 16, 39, 40, 42, 48, 49. At no time during the six months that the Agency had the matter before it did the Tribe ask for such a hearing. It did not even request any additional hearing or other process. Displaying misplaced hutzpah, it was fine with the Department deciding based upon its written submissions, which the Agency did consider. It was only after it realized the Department saw through the implausible assertion in those written submissions that

it wanted another bite at that apple also.[8] This Court cannot give the Tribe what the Tribe did not ask for from the agency at the time.

A. THE TRIBE DID NOT PRESERVE FOR APPELLATE REVIEW CHALLENGES TO THE REPRISAL DETERMINATION BY MENTIONING THE ISSUES IN SUBSEQUENT SUBMISSIONS NOR BY BRIEFING THEM ON APPEAL.

It is a fundamental principle of appellate court practice that a party is required to raise to the trial court the issue it is pressing on appeal, so that the trial court has an opportunity to rule on it. *Bastidas v. Chappell*, 791 F.3d 1155, 1159 (9th Cir. 2015). A party who does not complain of an issue below forfeits his right to review that issue on appeal. *Id.* Because the court of appeals is not "a 'second shot' forum, a forum where secondary, back-up theories may be mounted for the first time ... [p]arties must be encouraged to 'give it everything they've got' at the trial level." *Tele-Communications, Inc. v. Comm'r*, 104 F.3d 1229, 1232 (10th Cir. 1997). Here, the Tribe did give it everything it had. It just did not have any additional facts or argument to present. The record was abundantly clear that the Tribe was, in fact,

[8] The Tribe's submission to this Court further shows that it was not prejudiced by the Department not setting a hearing that the Tribe had never asked for. Throughout this matter, the Tribe has made it clear that it merely repeats the same demonstrably false or implausible claims again and again and again. There was no need for an unrequested hearing to let the Tribe repeat those allegations. We all know what they are. We all know that Pepper Hamilton has never had any evidence to support them, and that the allegations are pretextual, and retaliatory. Pepper Hamilton has not made any offer of proof of anything that would change any of this. Instead, it is merely seeking to stretch its retaliation against St. Marks out through an argument that it waived long ago.

retaliating against St. Marks. This Court therefore cannot review the liability determination, and even if it could, it would merely confirm that the Tribe was retaliating.

Parties do not properly preserve issues for appeal by raising such issues for the first time in a motion for reconsideration. *Hendricks & Lewis PLLC v. Clinton*, 766 F.3d 991, 998 (9th Cir. 2014); *Nat'l Steel Corp. v. Golden Eagle Ins. Co.*, 121 F.3d 496, 500 (9th Cir. 1997); *Self-Realization Fellowship Church v. Anada Church of Self-Realization*, 59 F.3d 902, 912 (9th Cir. 1995).[9] Unsuccessful requests for reconsideration do not create a new final order giving this Court jurisdiction over an untimely petition for review. *Friends of Sierra R.R., Inc. v. ICC*, 881 F.2d 663, 666 (9th Cir. 1989) (citing *Cal. Ass'n of the Physically Handicapped, Inc. v. FCC*, 833 F.2d 1333, 1334 (9th Cir. 1987) and *Provisioners Frozen Express, Inc. v. ICC.*, 536 F.2d 1303, 1305 (9th Cir. 1976)).

Where, as here, the Tribe attempted to seek reconsideration, this Court's jurisdiction is limited only to a review of the lawfulness of the lower tribunal's refusal to reopen a decision. *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S.

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[9] Here, the Tribe did not even file a motion to reopen or reconsider. Instead of being upfront with the Agency, it attempted to hide its attempt to revise already resolved issues within a brief that was supposed to respond to the Agency's request for discussion of remedies for the established retaliation. St. Marks' position is that its improper procedural path is insufficient to preserve for review any of the non-responsive discussions in that brief.

270, 278(1987); *Friends of Sierra R.R.*, 881 F.2d at 666. The Court will review the refusal to reopen only "[i]f the petition that was denied sought reopening on the basis of new evidence or changed circumstances; ... otherwise, the agency's refusal to go back over ploughed ground is nonreviewable." *Locomotive Eng'rs*, 482 U.S. at 284. Such review is expressly prohibited. *Id.* at 280. Prohibiting review of denial of petitions to reopen is jurisdictional, not merely prudential. *Id.* at 291-92.

The Tribe's primary issues on appeal are issues that it improperly attempted to raise in its February 13, 2015 submittal. In response to the Department's narrow request for additional submissions on the proper remedies, the Tribe refused to brief the remedies question asked by the Department, and the Tribe instead argued that the Reprisal Determination should be reversed because the Agency "wholly ignored the Tribe's well-established status as a sovereign nation with an inherent right to govern itself and leadership, and made numerous errors and misstatements regarding the factual record and the applicable law" (ER0835); the Agency's Reprisal Determination was unsound and flawed and infringed on tribal sovereignty (ER0851- ER0858); the whistleblower provisions of the ARRA did not apply (ER0858-ER0865); the Agency erred in its application of the whistleblower provision (ER0865-ER0873); and the relief St. Marks seeks was moot or otherwise prohibited (ER0873-ER0876). These are now the same issues the Tribe seeks to improperly raise in this case.

The Department, acting well within its discretion, rejected the Tribe's attempt to re-raise waived and dead issues. The Tribe had the necessary information but submitted none of the "issues presented for review" (Br. 19) to the Agency for its consideration and possible use in the Reprisal Determination. It presented none of the constitutional arguments it now makes (Br. 24-32) other than to state without citation that if the Agency were to "divest" the Tribe of authority to remove St. Marks from elected office, such divestiture "would be unconstitutional and an infringement of the Sovereign Immunity (sic) of the Chippewa Cree Tribe." ER0726.[10] It made none of the due process arguments it now raises (Br. 33-50). It filed no motion to dismiss. It made none of the sovereign immunity arguments that it now raises (Br. 3-5) other than that which is contained at ER0726 and which is now immaterial or moot. It requested no hearing or opportunity to cross-examine any witnesses. Its arguments are simply not reviewable in this case. *Locomotive Eng'rs*. 482 U.S. at 284; *Friends of Sierra R.R.*, 881 F.2d at 668; *W. Pacific Stockholder's Protective Comm. v. ICC*, 848 F.2d 1301, 1303 (D.C. Cir. 1988); *Cent. States Enter. v. ICC*, 780 F.2d 664, 672-73 (7th Cir. 1985).

[10] The Department did not order reinstatement as discussed in detail below, this argument was seemingly successful for the Tribe. ER1089.

The Tribe had adequate opportunity to challenge the validity of the Reprisal Determination within the timeframe prescribed by ARRA Section 1553(C)(5), and as provided for in the Reprisal Determination at 11.

Such failure to raise the issues to the Agency renders them forfeited. *Bastidas v. Chappell*, 791 F.3d at 1159. This Court is not a "second shot" forum, and the Tribe's arguments of material error are not reviewable. *Locomotive Eng'rs*, 482 U.S. at 284.

B. THE TRIBE'S CLAIMED IGNORANCE OF THE LAW DID NOT PRESERVE ISSUES FOR APPEAL.

The Tribe now claims it was unaware of how the Reprisal Determination process would work. Br. at 39-43. §1553(c)(2), however, provides that the "head of an agency" expending ARRA funds is charged with determining whether "there is sufficient basis to conclude that the non-Federal employer has subjected the complainant to a [prohibited] reprisal." Furthermore, the head of the agency

> may not find the occurrence of a reprisal with respect to a reprisal that is affirmatively established . . . if the non-Federal employer demonstrates by clear and convincing evidence that the non-Federal employer would have taken the action constituting the reprisal in the absence of the disclosure.

ARRA §1553(c)(1)(B). If the agency finds that there was a reprisal, then it is charged with taking any one or more specified actions with respect to the employer. ARRA §1553(c)(2).

The aforementioned statute along with the repeated and periodic letters from the Agency that it was considering whether a prohibited reprisal had occurred defeats the Tribe's claims of ignorance. ER0003-00014.

C. TO THE EXTENT THE TRIBE PRESERVED ANY ISSUE OF SOVEREIGN IMMUNITY, THE AGENCY ESSENTIALLY RULED IN FAVOR OF THE TRIBE.

The Tribe made one narrow sovereign immunity argument prior to the Reprisal Determination being made. It asserted only that ordering reinstatement would be "unconstitutional and an infringement on the Sovereign Immunity (sic) of the Tribe." The Agency seemed to rule in favor of the Tribe. It did not order reinstatement. ER1089.

The Tribe now seeks to change from the narrow claim of sovereign immunity which it presented to the Agency prior to the Reprisal Determination. As discussed above, it is not permitted to do so. And as also discussed above, its waived argument would have been without merit in any case.

IV. THE AGENCY CORRECTLY INTERPRETED AND APPLIED §1553(C)(1) & (2).

For the reasons discussed above, any alleged errors in the December 19, 2014 order are not before this Court. This Court therefore should not need to reach the issues discussed in this section of this brief, but St. Marks will briefly respond to the Tribe's erroneous discussion of alleged errors in the December order. The ARRA was enacted to ensure the enforcement of federal policies, and to protect

whistleblowers who bring forth allegations of their employer's misconduct or misspending of stimulus monies. Pub. L. No. 111-5, §1553(a). §1553(a) of ARRA provides:

> an employee of any non-Federal employer receiving covered funds may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing … information that the employee reasonably believes is evidence of –
>
> > (1) gross mismanagement of an agency contract or grant relating to covered funds;
> > (2) a gross waste of covered funds;
> > (3) a substantial and specific danger to public health or safety related to the implementation or use of covered funds;
> > (4) an abuse of authority related to the implementation or use of covered funds; or
> > (5) a violation of law, rule, or regulation related to an agency contract (including the competition for or negotiation of a contract) or grant, awarded or issued relating to covered funds.

Pursuant to §1553 a whistleblower "shall be deemed to have affirmatively established the occurrence of the reprisal if [he or she] demonstrates that a disclosure in subsection (a) was a *contributing factor* in the reprisal." §1553 (c)(1)(A)(i) (emphasis added). Circumstantial evidence may be used to prove that the disclosure was a contributing factor in the reprisal. Such circumstantial evidence may include: (I) evidence that the official undertaking the reprisal knew of the disclosure; or (II) evidence that the reprisal occurred within a period of time after the disclosure such that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal. ARRA §1553(c)(1)(A)(ii)(I) & (2).

Thus, to prevail on a whistleblower complaint, a complainant must prove by a preponderance of the evidence that she or he (1) made a protected disclosure, (2) suffered a reprisal, and (3) the protected disclosure was a contributing factor in the reprisal. §1553(a)(C)(1)(A).

To rebut a whistleblower's allegation of reprisal, the non-Federal employer must demonstrate by "clear and convincing evidence that the non-Federal employer would have taken the action constituting the reprisal in the absence of the disclosure." *Id.* §1553(c)(1)(B). Once the Agency finds "the non-Federal employer has subjected the complainant to a reprisal prohibited by subsection (a)," the whistleblower-employee is entitled to relief, §1553(c)(2); and the agency is required to presume that full relief must be ordered. *Gaddy v. Abex Corp.,* 884 F.2d 312, 318 (7th Cir. 1989).

Here, the Agency correctly found that St. Marks made a (1) protected disclosure, (2) suffered a reprisal, and (3) the protected disclosure was a contributing factor in the reprisal. §1553(a)(C)(1)(A).

A. THE AGENCY CORRECTLY FOUND THAT ST. MARKS MADE A PROTECTED DISCLOSURE, SUFFERED A REPRISAL, AND THE PROTECTED DISCLOSURE WAS A CONTRIBUTING FACTOR IN THE REPRISAL.

To qualify as a protected disclosure under ARRA, St. Marks must be an employee of a non -Federal employer receiving covered funds. §1553(a). He easily meets these requirements.

1. St. Marks was an "employee" within the meaning of ARRA.

St. Marks is an "employee" within the scope of ARRA. "Employee" is defined as "an individual performing services on behalf of the employer." §1553(g)(3)(A). The record adequately supports that St. Marks was "an individual performing services on behalf of an employer." St. Marks was the Chairman of the Chippewa Cree Tribe. ER0008. In that position, he performed regular services and received regular paychecks for his services. ER1075. As such, the Agency correctly found that St. Marks was "unquestionably performing services on behalf of the employer." Id.

2. The Chippewa Cree Tribe is a "non-Federal Employer" who received "covered funds" under the provisions of ARRA.

In §1553(g)(4)(A)-(B), ARRA defines that "non-Federal employer":

(A) means any employer—

> (i) with respect to covered funds—
>
> > (I) the contractor, subcontractor, grantee, or recipient, as the case may be, if the contractor, subcontractor, grantee, or recipient is an employer; and
> > (II) any professional membership organization, certification or other professional body, any agent or licensee of the Federal government, or any person acting directly or indirectly in the interest of an employer receiving covered funds; or
>
> (ii) with respect to covered funds received by a State or local government, the State or local government receiving the funds and any contractor or subcontractor of the State or local government; and

> (B) does not mean any department, agency, or other entity of the Federal Government.

The CCT is a "non-Federal employer" within the meaning of ARRA. The record shows that CCT and its corporation are non-Federal employers. ER0004-0006; ER1072-74.

Furthermore, per the provisions of ARRA,

> "[c]overed funds" means "any contract, grant or other payment received by any non-federal employer if –
>
> > (a) the Federal government provides any portion of the money or property that is provided, requested, or demanded; and
> > (b) at least some of the funds are appropriated or otherwise made available by this Act.

§1553(g)(2). CCT received covered funds under ARRA. "It received more than $27 million in ARRA funds from the United States." ER1072.

ARRA's whistleblower provisions apply to CCT because CCT entered into an agreement with the Federal government and expressly subjected itself to ARRA's whistleblower provisions by agreeing to the ARRA whistleblower provisions incorporated in Modification No. 6 and 8 in the Annual Funding Agreement No. 06NA602127. ER1072. The Tribe contractually agreed to the following:

> Prohibition of reprisals against contractor whistleblowers
>
> No employee of the Contractor or any subcontractor shall be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing, including a disclosure made in the ordinary course of the employee's duties, to the . . . Inspector General . . . that the employee reasonably believes is evidence of (1) gross mismanagement of this

> addendum/contract; (2) a gross waste of funds awarded pursuant to this addendum/contract; (3) a substantial and specific danger to public health or safety related to the implementation or use of funds awarded pursuant to this addendum/contract; (4) an abuse of authority related to the implementation or use of funds awarded pursuant to this addendum/contract; or (5) a violation of law, rule, or regulation related to this addendum/contract (including the competition for or negotiation of the addendum/contract). This prohibition is enforceable pursuant to processes set up by ARRA.

ER1072-73 (discussing Modification No. 6 at 9; Modification No. 8 at 9-10).

Furthermore, as noted by the Agency, the modifications define "Contractor" to include "Chippewa Cree Tribe, Chippewa Cree Construction Corporation, a federally-recognized Indian Tribe or Tribal Organization, as defined at 25 U.S.C. 450b." *Id.*

Therefore, because CCT received ARRA funds, and "expressly subjected itself to ARRA's provisions generally and to [ARRA's] whistleblower provisions specifically when it entered into Modifications No. 6 and 8 to Annual Funding Agreement No. 06NA602127," CCT is subject to the whistleblower provisions under ARRA. ER0003-14; ER1071-1074.

3. The Agency had a factual basis which supported its determination that St. Marks' Disclosures Were Contributing Factors in CCT's Prohibited Reprisal Against Him.

As mentioned earlier, "[a] person alleging reprisal…shall be deemed to have affirmatively established the occurrence of the reprisal if the person demonstrates

that [his or her] disclosure [of acts such as gross mismanagement of funds under ARRA, §1553(a)] was a *contributing factor* in the reprisal." ARRA, §1553(c)(1).

The "contributing factor" in a whistleblower case is not a demanding standard. *Hutton v. Union Pacific Railroad Company*, supra. A contributing factor is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision, *Clark v. Pace Airlines, Inc*., ARB No. 04-150 (Nov. 30, 2006), slip op. at 11; *Bechtel v. Competitive Techs., Inc.*, ARB No, 09-052, AU No. 2005-S0X-033, at *13 (ARB Sept. 30, 2011) (internal quotations and citations omitted). The contributing factor standard was "intended to overrule existing case law, which required that a complainant prove that his protected activity was a 'significant', 'motivating', 'substantial, or 'predominant' factor' in a personnel action. The "contributing factor" standard for whistleblower complaints reflects Congress's intent to be "protective of plaintiff-employees." USDOL Reporter at 6-8(footnotes omitted); *DeFrancesco, supra*, ARB No, 10-114. For example, in *Defranco*, the employer, as per its routine, reviewed complainant's disciplinary records after he reported an injury. Based upon that review, the employer determined that the employee had a pattern of unsafe conduct and it imposed discipline. The Court determined that the employee's report of the injury was a contributing factor to the imposition of discipline.

To be clear, to be a contributing factor, a plaintiff "need not show that the activities were the primary or a significant cause of his termination." *Feldman v. Law Envtl. Assoc. Corp.*, 752 F.3d 339, 348 (4th Cir. 2014) (interpreting the identical language in the SOX whistleblower protection scheme"; *Am. Star Airways Inc. v. Admin. Rev. Bd.*, 650 F.3d 562, 567-68 (5th Cir. 2011) (interpreting analogous language in the Wendell H Ford Aviation Investment and Reform Act for the 21st Century. Similarly, an employee "need not demonstrate the existence of a retaliatory motive on the part of the employee taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action. *Marano v. Dept. of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993) (emphasis in original); *see also Coppinger—Martin v, Solis*, 627 F, 3d 745, 750 (9th Cir. 2010) ("A prima facie case does not require that the employee conclusively demonstrate the employer's retaliatory motive."). *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152 (3d Cir. 2013). Additionally, and as in the present matter, proof that an employer's explanation is unworthy of credence is persuasive evidence of retaliation. *Florek v. E. Air Cent., Inc.*, ARB No. 07-113 (May 21, 2009), slip op. at 7-8 (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-48 (2000)). Thus, to place the clear and convincing burden on a respondent, all a complainant need do is show the employer knew about the protected activity and the protected activity was a link in a chain of events leading to the adverse activity.

Whistleblowers may use either direct or circumstantial evidence to demonstrate that a protected disclosure contributed to the employer's decision to inflict reprisal. Section 1553 (C)(1)(A)(ii). *Williams v, Domino's Pizza*, supra, ARB 09-092, at *6; *DeFrancesco v. Union Railroad Co*., supra, ARB No, 10-114, at *6-7. Under section 1553 (c) (1)(A)(ii)(I)&(II) circumstantial evidence may include "(I) evidence that the official undertaking the reprisal knew of the disclosure; or (II) evidence that the reprisal occurred within a period of time after the disclosure such that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal." Circumstantial evidence may include temporal proximity between the protected disclosure in the reprisal and proof that the decision-maker who undertook the reprisal knew of the protected disclosure. *Id; Gerhart* v. *D. Constr., Inc*., 2012 US District LEXIS 35406, 2012 Westlaw 893673 at*3 (N.D. Ill 2012).

Likewise, circumstantial evidence may include indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward a complainant after he or she engages in protected activity. *Id*., at *7; see also *Bechtel v. Competitive Techs., Inc*. supra, ARB No. 09-052, at *13, n.69; *Bobreski v. J. Givoo Consultants, Inc*., ARB No, 09-057, ALI No. 2008-ERA-003, at *13 (ARB June 24, 2011).

Circumstantial evidence must be weighed "as a whole to properly gauge the context of the adverse action in question, *Bobreski,* supra, at *13-14. This is because "a number of observations each of which supports a proposition only weakly can, when taken as a whole, provide strong support if all point in the same direction." *Bechtel v. Competitive Techs., Inc*., ARB at *13 (quoting *Sylvester v. SOS Children's Vills, Ill., Inc*., 453 F, 3d 900, 903 (7th Cir, 2006)).

Applying this law to the facts here, St. Marks easily established that his whistleblowing was a contributing factor. In fact, St. Marks would have met far higher legal standards because his whistleblowing was the only reason for most of the retaliation. The Agency had direct evidence that the employer was retaliating against St. Marks for whistleblowing. The agency also had overwhelming evidence, including its own inspections of St. Marks' company's work on the federally funded project, that the Tribe fabricated the claims that St. Marks company's work was below par (and, as noted, a tribal jury subsequently ruled in St. Marks favor on that very issue when Pepper Hamilton, in open violation of the Department's order to cease retaliating, continued to press its retaliatory legal suit). The Agency also had the clear temporal connection between the whistleblowing and the retaliation. That included but was not limited to the close proximity of Chairman St. Marks' open letter to the tribal community (March 5, 2013) and his request for whistleblower protection (March 9, 2013) to the Tribe's retaliatory "suspension" of St. Marks

(March 15, 2013) and repeated removals from his position as Chairman (beginning March 22, 2013).

In response, Pepper Hamilton ludicrously asserts that there is no direct way of showing that tribal officers knew of their own Chairman's March 5, 2013 open letter to tribal membership disclosing that he had become a whistleblower.[11] It was an open letter to the Tribe and its membership, the very point of which was to inform everyone in the small, closely knit community, *e.g.*, ER00016; and the Department certainly was not required to accept Pepper Hamilton's lawyerly assertion that St. Marks needed to prove that the cabal who then immediately began the retaliation had read the open letter from the Tribe's own Chairman. In fact, the Tribe's laughably implausible assertion weighs against the Tribe, because it shows with clarity that the Tribe is asserting pretextual grounds for its retaliation. "Indeed, CCT's continued pursuit of all seven charges despite evidence either challenging or failing to support their veracity calls into question the Business Committee's credibility and motive and renders the charges as pretext." ER1081.

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[11] Apparently forgetting that St. Marks had begun his work as a whistleblower as a confidential source, and contradicting its very own argument that the Tribe did not know, the Tribe also asserts that its retaliation was not all that closely linked in time to the beginning of the whistleblowing. St. Marks disagrees, but notes that the key point was that the retaliation came crashing down very soon after the Chairman's open letter to tribal membership.

The Tribe does not and cannot dispute that St. Marks was a whistleblower, given the clear record. In fact, a person is a protected whistleblower even if his suspicions of wrongdoing do not pan out; but here St. Marks' work resulted in what the Agency calls "numerous criminal indictments and convictions of [tribal Business Committee members and] employees" which caused "significant concern … about the welfare of [the Tribe's] government and its members." ER1089.

The Agency found St. Marks demonstrated by a preponderance of the evidence that the reasons the Tribe cited for discharging him were pretextual. ER0003-0014. In addition, the Agency concluded that CCT was "well aware of St. Marks' communications to the IG and USBR a few short months before his removal[,]"and that St. Marks' election and being vocal with "his suspicions that federal and tribal funds had been embezzled from CCT-owned Chippewa Cree Construction Company, the Northern Winz Tribal Casino, and the CCT-owned business Plain Green" were "not so temporally distant from St. Marks' removal from the CCT Business Committee that the Department could not reasonably determine that a sufficient temporal connection exists to find that St. Marks' disclosures led to CCT's reprisal against him…." ER1077-1078.

This Court cannot reject the Agency's conclusions, and in fact the information before the Agency would have met a far higher burden of proof.

Moreover, as part of the Tribe's reprisal against him, St. Marks was subjected to the Arrow and Tadios lawsuits, and was forced to litigate and defend himself. As will be discussed in detail below, and as supported by the Agency's finding, these lawsuits were merely pretexts, the Tribe brought up these frivolous lawsuits in an attempt to justify the prohibited actions it took against St. Marks.

Thus, St. Marks has sufficiently established that his protected disclosure was a contributing factor in the Tribe's termination of St. Marks and for its bringing forth the concocted lawsuits and adverse employment actions against St. Marks.

B. CCT DID NOT MEET THE CLEAR AND CONVINCING STANDARD TO REBUT ST. MARKS' ALLEGATIONS OF CCT'S REPRISAL AGAINST HIM.

Once a complainant proves by a preponderance of the evidence that reprisal occurred, [the employer] can rebut the claim, by clear and convincing evidence, "that the employer would have taken the action constituting the reprisal in the absence of the disclosure." §1553(c)(1)(B); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 505-508 (1993).

The Clear and Convincing evidentiary standard is more rigorous than the Preponderance-of-the-Evidence standard and denotes a conclusive demonstration that the thing to be proven is highly probable or reasonably certain. *DeFrancesco v. Union Railroad Co*,, ARB No,10-114, AU No, 2009-FRS-9 (ARB February 29, 2012), ARB No, 10-114, at *8 (citing *Clarke v, Navajo Express, Inc*., ARB No, 09-114, ALI No. 2009-STA-018, slip op. at 4 (ARB June 29, 2011)); *Williams v.*

Domino's Pizza, ARB 09-092, ALJ 2008-STA-052, slip op. at 5 (ARB January 31, 2011).

CCT did not rebut St. Marks' allegations with evidence that met the clear and convincing standard. In fact, it confirmed, not rebutted, St. Marks' claims. The agency therefore was well within its authority when it concluded that, "CCT's record on these charges lack contemporaneous evidence documenting discovery of the alleged unauthorized behavior and timely, formal CCT Business Committee (or other tribal entity) process and procedure to investigate and adjudicate any of the allegations. A laundry list of unsubstantiated findings in a tribal government document is wholly insufficient to support the drastic and significant measure of removing an elected official." Final Disposition at 14. Likewise, the Agency correctly stated the obvious: that the Tribe's allegations against St. Marks were post hoc justifications to attempt to cover up its reprisal against St. Marks: "CCT's attempts to include post hoc evidence of St. Marks' alleged misconduct are unavailing and are given no dispositive weight."[12]

[12] As discussed above, even if the Tribe had both permissible and impermissible motives (which it did not), the Agency's retaliation decision would still be correct. *E.g. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 286 (1977) (discharging school board not precluded from establishing that it would have reached the same decision not to grant tenure even in the absence of protected activity).

The Agency found St. Marks demonstrated by a preponderance of the evidence that the reasons the Tribe cited for discharging him were a pretext to the Tribe's true motive. Final Disposition at 14. There is no legal or factual basis for any other conclusion.

Therefore, since the Tribe's evidence significantly fell short of the burden it was required to meet under the Clear and Convincing evidence standard, and, in fact the Tribe did not rebut any of St. Marks' claims relating to the prohibited reprisal, the Agency correctly decided that St. Marks was subjected to a prohibited reprisal.

Likewise, the Tribe's allegations against St. Marks were post hoc justifications to cover up its reprisal against St. Marks, and the Agency saw through CCT's allegations: "CCT's attempts to include post hoc evidence of St. Marks' alleged misconduct are unavailing and are given no dispositive weight." ER1072

Therefore, plainly, the Tribe did not meet its burden to rebut St. Marks' allegations of reprisal.

V. ALTHOUGH THE AGENCY CORRECTLY FOUND THAT ST. MARKS WAS SUBJECTED TO A PROHIBITED REPRISAL, THE AGENCY FAILED TO AFFORD ST. MARKS FULL RELIEF.

"Whistleblowers are a bulwark of accountability against those who would corrupt government or corporations. Therefore, aggressive defense of whistleblowers is crucial to any effective policy to address wrongdoing or abuse of power." *Insigna v. Commissioner,* Motion of National Whistleblowers Center for

Leave to File Brief as Amicus Curiae, U.S.T.C. 4609-12W (2012) (Stephen Kohn). Once a complainant establishes that he or she was terminated as a result of unlawful discrimination on the part of the employer, a presumption in favor of full relief arises. *Gaddy v. Abex Corp.,* 884 F.2d 312, 318 (7th Cir. 1989).

The Department provided some of the restitution to which St. Marks was entitled and, with only one minor exception,[13] the separate items of restitution which were awarded were not challenged below and are not disputed here. Other than that one minor exception, the sole issue properly before this Court is, therefore, whether the Agency should have required additional restitution.

It should have. The Agency correctly concluded that the Tribe was retaliating against St. Marks through pretextual legal suits, but then declined to order the Tribe to restore St. Marks to the financial position St. Marks would have been in had the Tribe not engaged in that prohibited retaliation.

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[13] Without any clear reason, the Tribe now asserts that in the lost wages portion of the Department's remedial order, the Department should not have calculated lost wages based upon St. Marks salary as set by the Tribe's laws. When St. Marks first came into office, he voluntarily decided to not take the full amount of his budgeted salary. But when the Tribe, in established retaliation for St. Marks' whistleblowing, stopped paying his salary, St. Marks requested lost wages at the amount set by tribal law, not the lesser amount he had been voluntarily taking. The Department calculated lost wages consistent with St. Marks requested remedy. The Tribe has no argument this was legal error, and the Department was well within its authority to calculate lost wages based upon the wages set by the Tribe for the position. There was nothing preventing St. Marks from requesting his full salary in the remedial order.

A. The Agency Improperly Applied §1553(c)(2)(C), the Attorney's Fees Provision.

To ensure that private citizens will bring claims forward, ARRA, like most whistleblower statutes, provides that a whistleblower can recover attorney fees when he/she prevails. §1553 (c)(2)(C) (providing the agency with authority to "Order the employer to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the agency or a court of competent jurisdiction."). Whistleblower attorney fee provisions are modeled after 42 U.S.C. §1988, and the congressional determination that "unless reasonable attorney's fees could be awarded for bringing these actions, many legitimate claims would not be redressed." *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560 (1986) (citing H.R. Rep. No. 94-1558, p. 1 (1976)). The "aim was to enable private parties to obtain legal help in seeking redress for injuries resulting from actual or threatened violence of specific federal laws." *Id*. at 565. Awarding attorneys' fees and costs is "but one aspect of complete relief…which Congress considered necessary for the fulfillment of federal goals." *N. Y. Athletic Club v. Carey*, 447 U.S. 54, 67-68 (1980).

Because the aim of awarding attorneys' fees is to ensure that private parties can obtain needed legal help, if a whistleblower prevails in his/her case, the scope

of attorneys' fees are generally construed broadly. *Del. Valley Citizens' Council for Clean Air*, 478 U.S. at 548; *Haley v. Retsinas*, 138 F.3d 1245, 1250 (8th Cir. 1998) (courts construe whistleblower remedy provision in favor of whistleblower); *accord George v. Jr. Achievement of Cent. Ind., Inc.*, 694 F.3d 812, 814 (7th Cir. 2012); *Hill v. Mr. Money Fin. Co.,* 309 Fed. App'x 950, 961 (6th Cir. 2009). *See also EEOC v. Ohio Edison Co.,* 7 F.3d 541, 545 (6th. Cir. 1993) (in employer protection statutes, "restrictive interpretation . . . would allow employer to retaliate with impunity . . . and would frustrate the Act's purpose to prevent retaliation"); *Dunlop v. Carriage Carpet Co.,* 548 F.2d 139, 142, 147 (6th Cir. 1977) (same, regarding FLSA); *NLRB v. Retail Store Employees Union, Local 876,* 570 F.2d 586, 590 (6th Cir. 1978) (same, regarding NLRA); *Hayes v. City of Memphis*, 23 Fed. App'x 529, 531 (6th Cir. 2001); *Crawford v. Metro. Gov't of Nashville & Davidson Cty.,* 555 U.S. 271, 274 (2009)(interpreting Title VII, §2000e-3(a) broadly in favor of employee).

This is particularly important in retaliation cases because "fear of retaliation is the leading reason why people stay silent instead of voicing their concerns". *Crawford*, 555 U.S. at 279. *See also*, *Mitchell v. Robert DeMario Jewelry, Inc.,* 361 U.S. 288, 292 (1960) ("For it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees to quietly accept [unlawfulness].").

The present matter illustrates this point. Corruption was rampant within the Tribe. The list of criminals itself is long, and numerous others knew enough to provide the United States with the basis to start its investigation, yet no one blew the whistle until Mr. St. Marks came along. St. Marks provided substantial benefit to the United States, and the Tribe then, in clear retaliation, attempted to crush St. Marks. Under the law, St. Marks deserved to be made financially whole, as if the Tribe had never retaliated against him. And as cannot be disputed, he was not made whole. If the Agency's half-hearted actions are allowed to stand, St. Marks ends up with hundreds of thousands of dollars of losses as a consequence of his whistleblowing and the Tribe's unlawful retaliation. That is morally wrong, and also wrong under the law. The whistleblower statute in this case, ARRA, was enacted to ensure the enforcement of federal policies, and protect whistleblowers who bring forth allegations of their employer's misconduct or misspending of stimulus monies. ARRA of 2009, Pub. L. No. 111-5, §1553(a).

Here, as the Agency determined, St. Marks supported his attorney fee request with sufficient evidence. His fee request therefore is presumed to be reasonable, and the Tribe did not meet its burden to rebut that presumption. *United States v. $28,000.00 in United States Currency*, 802 F.3d 1100, 1105-10 (9th Cir. 2015). *Blum v. Stenson, 465 U.S. 886, 892 n. 5 (1984); Toussaint v. McCarthy,* 826 F.2d 901, 904 (9th Cir. 1987)*; Gates v. Deukmejian, 987 F.2d 1392, 1397-98 (9th Cir.*

1993); O'Bannon v. NCAA, *No. C* 09-3329 CW, 2016 U.S. Dist. LEXIS 44131, at *39 (N.D. Cal. Mar. 31, 2016).

While the Agency correctly (and as not challenged here) awarded attorney fees, it made two main errors, both inconsistent with the underlying purpose of whistleblower protections, which this Court is required to correct.

First, the Agency correctly determined that the Arrow litigation and the Tadios litigation were pretextual suits instituted to retaliate against St. Marks. But it refused to make St. Marks whole for his out-of-pocket fees and costs in that retaliatory litigation.

Second, even though the retaliation was ongoing, the Agency wrongly cut off the attorney fee recovery as of January 30, 2015.

1. As the Agency correctly recognized, the Arrow and Tadios matters were part of the retaliation, and were therefore plainly "connected with" the reprisals.

According to ARRA, the Agency may "order the employer to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant **for, or in connection with**, bringing the complaint regarding the reprisal." §1553(c)(2)(C) (emphasis added).

The tests for relatedness of claims is not precise. However, to be related, the claims must either involve a common core of facts or be based on related legal

theories, while unrelated claims must be distinctly different, and be based on different facts and legal theories. *Schwarz v. Sec'y of Health & Human Servs.*, 73 F.3d 895, 902-03 (9th Cir. 1995).

The Agency erred in not awarding attorneys' fees to St. Marks for the costs he incurred in litigating *Tribe v. Arrow and St. Marks* (*Arrow)* and *Tadios v. St. Marks* because St. Marks incurred these costs because of the Tribe's reprisal. The district court abuses its discretion when it applies an incorrect rule of decision, or when it applies the correct rule to factual conclusions that are "illogical, implausible, or without support in the record." *Rodriguez v. Disner*, 688 F.3d 645, 653 (9th Cir. 2012). "[A]ny elements of legal analysis and statutory interpretation which figure in the district court's decision are reviewable de novo," *Armstrong v. Davis*, 318 F.3d 965, 970 (9th Cir. 1993); *Fantasy, Inc. v. Fogerty*, 94 F.3d 553, 561 (9th Cir. 1996) (quoting *Hall v. Bolger*, 768 F.2d 1148, 1150 (9th Cir. 1985). The agency must "articulate a rational connection between the facts found and the choice made." *Sierra Club v. United States*, 346 F.3d 955, 961 (9th Cir. 2003) (quoting *Ariz. Cattle Growers' Ass'n,* 273 F.3d 1229, 1236 (9th Cir. 2001)). When "the agency offer[s] an explanation that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise," it is arbitrary and capricious. *Sierra Club,* 346 F.3d 955, 961 (9th Cir. 2003). The court below is not entitled to deference where it did not provide

sufficient analysis or calculation supporting its decision. *SEC v. Sunwest Mgmt.*, 524 F. App'x 365, 366-67 (9th Cir. 2013). It must "show its work" and "explain[] how it arrived at determination with sufficient specificity to permit an appellate court to determine whether [it] abused its discretion in the way the analysis was done." *Id.*

The Arrow counterclaims appeared as Charges 8 & 9 in the Tribe's retaliatory removal actions. The Agency found that those counterclaims were pretexts to hide the Tribe's true intentions of retaliation or reprisal against St. Marks for his blowing the whistle on the corruption within senior tribal leadership, and are therefore proscribed by ARRA: "Indeed, the Business Committee's continued pursuit of all seven charges [including the counterclaims and defenses in Arrow] despite evidence either challenging or failing to support their veracity calls into question the Business Committee's credibility and motive and renders the charges as pretext." *Id*. at 14 (emphasis added).

To reach this conclusion, the United States reviewed the Tribe's fabricated claims related to Arrow, an entity owned by St. Marks and reviewed the inspection and engineering reports which showed that Arrow's work was of good quality and proper. All of the evidence showed that the Tribe's claims were wholly unsupported and pretextual. *Id*. at 15-17 (citing, *inter alia*, Attachment C3, which showed that the leak rate in Arrow's work was less than 3/10 of one percent, much lower than

industry standard.) The United States also noted that the Tribe's repeated false allegations had been the "focus of several investigations" and "a review of thousands of financial records, produced no information that St. Marks transferred funds to tribal officials."

St. Marks' costs in defending himself against the Tribe's claims in *Arrow* were brought about by the Tribe's prohibited reprisal against him, and consistent with ARRA's purpose, St. Marks is entitled to a judgment for all the costs he incurred in protecting himself against those acts.

St. Marks similarly incurred costs in defending himself against allegations by Tadios that the Agency also determined were tribal pretexts; and as with the Arrow litigation costs, recovery of those costs was required in order to make St. Marks financially whole. In his March 5, 2013 open letter to tribal membership announcing his cooperation with federal agency investigations, St. Marks discussed misuse of money under Tadios supervision (and as noted above, she was subsequently convicted of criminal misuse of funds). Three days later, on March 12, 2013, Tadios brought claims of sexual harassment. ER0942-ER0951, and on March 15, 2013, the Business Committee used Tadios false claims as a pretext for attempting to remove St. Marks from his job.

While the timing and the fact that Tadios was part of the corrupt ring itself strongly indicates that Tadios' claim was a pretext, the United States did not stop

there. The United States investigated and discovered that Tadios "was not truthful of locations of the sexual harassment and that her story went back and forth." *Office of Inspector General Report of Investigation, U.S. Bureau of Reclamation ARRA Funds* – Case No. OI-CO-13-024301 (ER0025), and that those connected with other improper retaliation against St Marks overstepped their responsibilities to attempt to further Tadios' fabricated claim. The tribal court dismissed Tadios' claims with prejudice.

As such, Tadios' claim was part of the Tribe's prohibited reprisal against St. Marks. In consonance with the purpose of whistleblower statutes such as those contained in ARRA, the costs of defending himself against this prohibited reprisal should, as well, be awarded to St. Marks.

2. The Agency erroneously cut off Attorney fees and expenses on January 30, 2015 even though the Agency was aware that retaliation was ongoing.

The Agency knew that the Tribe's retaliation against St. Marks (including, but not limited to the retaliatory *Arrow* and *Tadios* cases) remained ongoing. Yet the Agency erroneously cut off restitution as of January 30, 2015.

As one of many examples of the ongoing retaliation, in February 2015, St. Marks won reelection for the third time, and was sworn into office. ER0831 (citing attached documents which are contained in the administrative record). On February 23, 2015, the Business Committee issued yet another letter removing St. Marks from

office, and it yet again asserted the very same pretextual claims against St. Marks that the Agency had determined were mere pretext. ER1049. As such, because the reprisal brought about by the Tribe did not end by January 30, 2015, and because St. Marks still had to incur costs in order to protect himself from the adverse effects of his whistleblowing against the Tribe, and because the Tribe itself did not refute any of the costs alleged by St. Marks, he should be protected against these adverse effects and awarded an amount that is at least equal to all the costs he incurred after January 30, 2015 until the time when this case and appeals conclude.

3. Attorney's Fees for Time Spent Preparing the Fee Application are Compensable.

Because it cut off attorney fees as of January 20, 2015, the attorney fee award did not include St. Marks attorney time to prepare the fee request. That is contrary to law, and that smaller error also should be corrected. Ninth Circuit awards attorneys' compensation in statutory fee award cases for time spent in preparing the fee application as well as in actually litigating the amount of the fee. *In re Nucorp Energy*, 764 F.2d 655 (9th Cir. 1985). In *Nucorp Energy*, the Ninth Circuit cited *Bagby*, a Third Circuit Court case that said, "the policies behind statutory fee awards apply equally to time spent preparing the fee petition and time devoted to litigating the amount of the award at the fee hearing." *Bagby v. Beal*, 606 F.2d 411, 416 (3d Cir. 1979). The Ninth Circuit found this line of reasoning persuasive and stated, "if attorneys were compensated only for time spent litigating the amount of fees to

which they are entitled, but not for time spent to determine the amount, then the overall rate of compensation would be effectively decreased for all hours devoted to the case." *Nucorp Energy* at 661.

This scenario is exactly what statutory fee award provisions are meant to prevent. *See Prandini v Nat'l Tea Co.*, 585 F.2d 47, 53 (3d Cir. 1978). The agency erroneously failed to provide those attorney's fees, and this Court should require that error to be corrected.

B. THE AGENCY ERRED WHEN IT REFUSED TO PROVIDE COMPENSATORY DAMAGES FOR THE HOTEL PURCHASE THAT FELL APART AT THE LAST MINUTE BECAUSE OF THE TRIBE'S RETALIATORY ACTIONS.

ARRA has created "a species of tort liability" in favor of victims of discriminates by permitting the recovery of compensatory damages for violation of its employee protection provision. Damages are designed to compensate for injury caused by a respondent's breach of duty and "may include not only out-of-pocket loss and other monetary harms, but also such injuries as 'impairment of reputation . . ., personal humiliation, and mental anguish and suffering.'" *Memphis Community Sch. Dist. v. Stachura,* 477 U.S. 299, 305-307 (1986) (quoting *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 350 (1974)). Accordingly, compensatory damages contemplate restitution for non-pecuniary loss. *Rowlett v. Anheuser-Busch, Inc.,* 832 F.2d 194, 204-205 (1st Cir. 1987) (compensation for injury caused by anxiety, stress and depression); *Hamilton v. Rodgers,* 791 F.2d 439, 444-445 (5th

Cir. 1986) (embarrassment, humiliation and mental distress); *Foster v. MCI Telecommunications Corp.,*773 F.2d 1116, 1120-1121 (10th Cir. 1985), *aff'g*555 F. Supp. 330, 336-337 (D. Colo. 1983) (embarrassment, humiliation, anxiety and emotional suffering); *Carter v. Duncan-Huggins, Ltd.,* 727 F.2d 1225, 1238 (D.C. Cir. 1984) (humiliation); *Hayes v. Shelby Memorial Hosp.,* 726 F.2d 1543, 1554 (11th Cir. 1984), *aff'g* 546 F. Supp. 259, 267 (N.D. Ala. 1982) (embarrassment, humiliation and emotional distress); *Garner v. Giarrusso,* 571 F.2d 1330, 1339 (5th Cir. 1979) (suffering and humiliation); *Richardson v. Restaurant Marketing Assoc., Inc.,* 527 F. Supp. 690, 697 (N.D. Cal. 1981) (mental and emotional distress). Moreover, injury to a person's credit standing is a basis for awarding compensatory damages in employment discrimination cases. *See Migis v. Pearle Vision, Inc.*, 135 F.3d 1041, 1053 (5th Cir. 1998) (noting that under EEOC guidelines, such injury is compensable in Title VII cases).

Compensatory damages are established by a complainant's own evidence. *Martin v. Dep't of the Army*, ARB No. 96-131, ALJ No. 93-SDW-l, slip op. at 17 (ARB July 30, 1999) (citing *Memphis Community Sch. Dint. v. Stachura*, 477 U.S. 299. 305-307 (1986)); *Creekmore v. ABB Power Systems Energy Services, Inc*., 93-FRA-24 (Feb. 14, 1996) (compensatory damages based solely upon the testimony of the complainant concerning his embarrassment about seeking a new job, his emotional turmoil, and his panicked response to being unable to pay his

debts); *Crow v. Noble Roman's, Inc.*, No. 95-CAA-08, slip op. at 4 (Feb. 26, 1996) (complainant's testimony sufficient to establish entitlement to compensatory damages); *Jones v. EG&G Defense Materials, Inc.*, ARB No. 97-129, ALJ No. I995-CAA- 3 (ARB Sept. 29, 1998) (evidence established by complainant's own evidence of injury to complainant's credit rating, the loss of his job, loss of medical coverage, and the embarrassment of having his car and truck repossessed deemed sufficient bases for awarding the compensatory damages).

Applying this law to the facts here, the agency erred when it denied St. Marks' properly supported request for compensatory damages. In the present matter, St. Marks was nearing completion of a purchase of a Days Inn Hotel, and the evidence clearly established that he lost out on that business opportunity solely because of the Tribe's retaliatory actions.

St. Marks established that but for the Tribe's retaliatory actions, he would have completed the hotel purchase. In fact, he provided a letter from his bank which expressly stated that the retaliatory litigation was the reason: "we are not able to move forward with the Days Inn due to the concerns with the pending litigations that were not resolved." ER0833 (citing attached documents which are part of th administrative record). That evidence lays out a prima facie case of compensatory damages, and the Tribe did not contest it or provide any contrary evidence. The Tribe

therefore did not overcome the presumption in favor of compensatory damages created by St. Marks when he established his prima facie case.

Based on the foregoing, the Agency's decision not to award compensatory damages was arbitrary and capricious. The Agency's decision was irrational because it completely disregarded the only evidence.

Injury to credit and the consequences therefrom are often considered by courts when awarding compensatory damages. *Barber v. CitiMortgage*, 2014 U.S. Dist. LEXIS 13756 (C.D. Cal. 2014); *Sanders v. Fid. Mort. Co.*, 2009 U.S. Dist. LEXIS 38190 (N.D. Cal. 2009). In *Hobby v. Georgia Power Co.,* the Eleventh Circuit articulated, "injury to complainant's credit rating [and] the loss of his job…[are] sufficient bases for awarding compensatory damages." *Hobby v. Ga. Power Co*., ARB No. 98-166, ALJ No 1990-ERA-30 (ARB Feb. 9, 2001). The court in *Hobby* awarded $250,000 in compensatory damages. The Court found that in his final days, the plaintiff-whistleblower "was subjected to a series of slights" that caused more serious problems such as "depleted finances, repeated requests of friends and family for money," and a severely damaged professional reputation. *Id*.

Like the plaintiff in *Hobby*, St. Marks suffered loss, detriment, and injury as a result of the prohibited reprisals. He was repeatedly removed from office, did not receive his salary, and had to repeatedly litigate to even get on the ballot and rerun for the Chairmanship position. He went unpaid for his work through Arrow on the

Rocky Boy's/North Central Mountain Regional Water System, even though the Tribe received federal funding based on his representation that that work was done.

On March 6, 2013 Days Inn provided its losses and profits for the previous year comparison for January through December 2012. And, on May 6, 2013, the Days Inn provided to St. Marks a statement of cash flows; profit and loss previous year comparisons for January through December 2012; occupancy indexes for December 2011; monthly performance documentation for the months of December 2011, December 2012, November 2013, and statistics reports for December 31, 2013; profit and loss statements for January through December 2012 and January through December 2013; rent rolls for 2008 to 2013; annual property operating data for 2012; a statement of cash flows; the management services contract; and its projections for 2014. Additionally, on December 10, 2013, the Days Inn requested from St. Marks three years of personal tax returns, three years of tax returns for any companies, a financial statement, and a resume. St. Marks provided these documents on January 24, 2014.

On December 13, 2013, St. Marks submitted an offer for the purchase of the Days Inn Billings. On December 31, 2013, St. Marks executed a contract to buy and sell real estate (residential) with Jay Bergan for a package of properties he would exchange for the Days Inn Billings. On February 5, 2014, Jay Bergan secured a Title Commitment for the properties St. Marks was selling to him. On March 3, 2014 St.

Marks filled out the application for a license (franchise) for the Wyndham Hotel Group. On March 24, 2014 St. Marks secured an employer identification number for the LLC that was required to be formed to purchase the Days Inn, Billings. That same day, he provided the identification number to Stockman Bank. One week later, on March 31, 2014, St. Marks submitted paperwork for a 1031 Tax Deferred Exchange.

Then in April 2015, the Tribe filed its frivolous counterclaim against St. Marks, which destroyed the Days Inn purchase. Finally, on June 29, 2015, Days Inn provided an income statement for the one year St. Marks would have owned the Days Inn. It reflected a net income of $376,553 for May 2014 to April 2015.

As the above reflects, St. Marks and Days Inn were far into their deal by December 2013. It was not speculative, and St. Marks established that it fell apart (and that he lost both out-of-pocket expenditures and then income) because of the established retaliatory tribal actions. The remedial award should have required recover for those losses.

C. THE AGENCY IMPROPERLY REFUSED TO ENFORCE ITS ORDER AND INTEREST IS WARRANTED.

In its decision to award St. Marks damages resulting from the Tribe's prohibited reprisal, the Agency never addressed interest on his award. This Court should hold that both prejudgment and post judgment interest are included in the award.

“A dollar tomorrow is not worth as much as a dollar today." *Hunt v. Dir., Office of Workers' Comp. Programs, etc.*, 999 F.2d 419, 421 (9th Cir. 1993). The Supreme Court has long acknowledged that lengthy delays in proceedings increase financial hardships on aggrieved employees. *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 243 (1988); *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 267, n. 3 (1987); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985).

“Prejudgment interest is widely recognized by federal courts as a means to restore to a plaintiff the actual value of damages where there has been a delay between the time of the injury and the date of judgment.” *Motorola, Inc. v. Fed. Express Corp.*, 308 F.3d 995, 1005 n. 9 (9th Cir. 2002). Such interest is an aspect of "actual loss” resulting from the "inability to use the money for a productive purpose." *United States v. Gordon*, 393 F.3d 1044, 1059 (9th Cir. 2004). Prejudgment interest ensures the injured party is fairly compensated "for the loss caused by the . . . breach of the statutory obligation." *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 886 F.2d 1545, 1550 (9th Cir. 1989). Prejudgment interest is “necessary to ensure complete justice” for an aggrieved party, even when a statute does not provide for such interest. *GM Corp. v. Devex Corp.*, 461 U.S. 648, 656 (1983). Accordingly, when a statute is silent as to prejudgment interest, the Supreme Court, various administrative agencies, and this Court have allowed such interest on statutory awards in order to make an aggrieved party whole. *Monessen S. R. Co. v.*

Morgan, 486 U.S. 330, 336-337 (1988); *U.S. Dep't of Labor v. Lawn Restoration Serv. Corp.*, 2002-SCA-00006 at 74 (ALJ Dec. 2, 2003); *Gordon*, 393 F.3d at 1059; *Hopi Tribe v. Navajo Tribe*, 46 F.3d 908, 923 (9th Cir. 1995). This is because the remedial purpose of a statutory award "would be undermined" if an offending party was allowed to withhold payments interest-free. *Hunt*, 999 F.2d at 421.

Unlike post-judgment interest rates in civil cases, prejudgment interest rates are not set forth in 28 U.S.C. §1961. However, this Court has determined that prejudgment interest rates should be calculated at the §1961 rate unless "the equities of the particular case require a different rate." *Ford v. Alfaro*, 785 835, 842 (9th Cir. 1986)(quoting *Western Pacific Fisheries, Inc. v. S.S. President Grant*, 730 F.2d 1280, 1289 (9th Cir. 1984)); *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1164 n. 49 (9th Cir. 2001)(quoting *Nelson v. EG&G Energy Measurements Group, Inc.*, 37 F.3d 1384, 1391 (9th Cir. 1994)). 28 U.S.C. §1961 provides:

> (a). . . Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding[.] the date of the judgment.
> (b) Interest shall be computed daily to the date of payment . . . and shall be compounded annually.

Interest is to be calculated from the moment of injury or the date the debt was incurred, through judgment. *Motorola*, 308 F.3d at 1005 n. 9.

For reasons similar to those applicable to prejudgment interest, the Court should clarify that post-judgment interest is provided for in the award. Despite the Agency's decision to award St. Marks damages resulting from the Tribe's prohibited reprisal, St. Marks has not received any portion of the amount awarded. He is entitled to interest on the award from entry until the restitution is paid.

CONCLUSION

For all of the reasons stated above the Court should modify the award and should deny the Tribe's petition.

STATEMENT OF RELATED CASES

Undersigned counsel is unaware of any related case other than the appeal in this Court that has already been consolidated with the instant appeal – *St. Marks v. U.S. Department of the Interior*, No. 15-71909.

REQUEST FOR ORAL ARGUMENT

St. Marks believes that because of the importance of the issues presented, oral argument would assist the Court in resolving this appeal.

Respectfully submitted this 30th day of June 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 15,943 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 June 30, 2017, and that the Brief is virus free. The undersigned further certifies that all required redactions have been made.

June 30, 2017

s/ Jeffrey S. Rasmussen
Jeffrey S. Rasmussen

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of June 2017, a copy of the foregoing **KEN ST. MARKS' CONSOLIDATED OPENING AND ANSWERING 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