No. 22-12669-A

In the

United States Court of Appeals

For the

Eleventh Circuit

AQuate II, LLC

Plaintiff/Appellant

vs.

Jessica Myers, et al.,

Defendants/Appellees

On Appeal from the United States District Court
For the Northern District of Alabama
No. 5:22-cv-00360-AKK

Reply Brief of Appellant

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APPEAL NO. 22-12669-A
AQuate II, LLC. v. Jessica Myers, et al.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record for Plaintiff/Appellant AQuate II, LLC, hereby submit the following Certificate of Interested Persons and Corporate Disclosure Statement pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1:

1. Alabama-Quassarte Tribal Town
2. AQuate II, LLC (Plaintiff-Appellant)
3. AQuate Corporation
4. Chancey, Emily J. (Counsel for Defendants-Appellees)
5. Clarke III, Frederick D. (Counsel for Plaintiff-Appellant)
6. Dorsey & Whitney LLP (Counsel for Defendants-Appellees)
7. Durocher, Vernle C. (Counsel for Defendants-Appellees)
8. Eastern Band of Cherokee Indians
9. Economic Development Authority for the Alabama-Quassarte Tribal Town
10. English, W. Brad (Counsel for Defendants-Appellees)
11. Kallon, Hon. Abdul K. (United States District Judge)

12. Kappelman, Ben D. (Counsel for Defendants-Appellees)
13. Kituwah Economic Development Board
14. Kituwah Global Government Group, LLC
15. Kituwah Services LLC (Defendant-Appellee)
16. Maynard, Cooper & Gale, P.C. (Counsel for Defendants-Appellees)
17. Meyer, Therese L. Erickson (Counsel for Defendants-Appellees)
18. Myers, Jessica Tedrick (Defendant-Appellee)
19. Rumberger, Kirk & Caldwell, PA, P.C. (Counsel for Plaintiffs-Appellants)
20. Williams, Richard Scott (Counsel for Plaintiff-Appellant)

APPEAL NO. 22-12669-A
AQuate II, LLC. v. Jessica Myers, et al.

CIP CERTIFICATION

The undersigned certifies that AQuate II, LLC, is not a publicly held company.

Respectfully submitted this 21st day of February, 2023.

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TABLE OF CONTENTS

CIP AND CORPORATE DISCLOSURE STATEMENT C-1

TABLE OF CITATIONS ii

INTRODUCTION AND SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

I. The District Court's Dismissal of Kituwah on the Basis of Sovereign Immunity should be Reversed. 2

A. Kituwah's deliberate misreading of its own sovereign immunity waiver fails to overcome the legal effect of the waiver's plain language, which makes Kituwah amenable to suit in Federal Court. 2

II. The District Court's dismissal of AQuate's claims against Myers under the Doctrine of Forum Non Conveniens should also be Reversed. 9

A. Appellees failed to carry their burden of proving an alternative forum existed to which the District Court could refer AQuate's Claims against Myers. 9

B. As Appellees concede, the District Court exceeded both its jurisdiction and discretion when it weighed in on the legitimacy of an alleged "District Court of Alabama-Quassarte Tribal Town" 13

C. Appellees' have no response to the fact that the AQTT Constitution did not allow for the existence of a tribal court. 15

CONCLUSION 17

CERTIFICATE OF COMPLIANCE 18

CERTIFICATE OF SERVICE 19

TABLE OF CITATIONS

CASES

Applied Scis. & Info. Sys., Inc. v. DDC Constr. Servs., LLC, No. 2:19-CV-575, 2020 WL 2738243 (E.D. Va. Mar. 30, 2020).....6

Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Tex., 571 U.S. 49 (2013).....9, 10

Celotex Corp. v. Edwards, 514 U.S. 300 (1995) 4

Comstock Oil & Gas Inc. v. Alabama & Coushatta Indian Tribes of Texas, 261 F.3d 567 (5th Cir. 2001) 13

Comstock Oil & Gas, Inc. v. Alabama & Coushatta Indian Tribes of Texas, 78 F. Supp. 2d 589 (E.D. Tex. 1999) 15, 16

Coregis Ins. Co. v. Am. Health Found., 241 F.3d 123 (2d Cir. 2001).....4

Dates v. Frank Norton, LLC, 190 F. Supp. 3d 1037 (N.D. Ala. 2016) 12

Herring v. Sec'y, Dept. of Corr., 397 F.3d 1338 (11th Cir. 2005).....12

Hunter v. Redhawk Network Sec., LLC, No. 6:17-CV-0962-JR, 2018 WL 4171612 (D. Or. Apr. 26, 2018).....6

In re Sac & Fox Tribe of Miss. in Iowa/Meskwaki Casino Litig., 340 F.3d 749, 763 (8th Cir. 2003) 14

John Doe, v. Secs. and Exch. Comm'n, No. 21-2537, 2022 WL 16936098 (2d Cir. Nov. 15, 2022) 4

Johnson v. Gila River Indian Cmty., 174 F.3d 1032 (9th Cir.1999) 13

Krempel v. Prairie Island Cmty., 125 F.3d 621 (8th Cir.1997).....13

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 4, 5

Republic of Panama v. BCCI Holdings (Luxembourg) S.A.,
119 F.3d 935 (11th Cir. 1997) 9

Satz v. McDonnell Douglas Corp., 244 F.3d 1279 (11th Cir. 2001) 9, 14

Trondheim Cap. Partners, LP v. Life Ins. Co. of Alabama,
505 F. Supp. 3d 1213 (N.D. Ala. 2020) 11

United States v. McGarity, 669 F.3d 1218 (11th Cir. 2012) 4

United States v. Rothenberg, 923 F.3d 1309 (11th Cir. 2019) 4

STATUTES

13 C.F.R. §124.109 6

15 U.S.C. § 631a 7

15 U.S.C. § 637 8

28 U.S.C. § 1334 4

28 U.S.C. § 1404 9

Constitution and By-Laws of the Alabama-Quassarte Tribal Town Oklahoma (Ratified January 10, 1939) 11, 13, 16

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In defending the District Court's dismissal, Appellees fail to address, or even acknowledge, the plain language of the sovereign immunity waiver provision in Kituwah Services, LLC's ("Kituwah") own organization documents. Appellees also fail to confront the reality that there was no Alabama-Quassarte Tribal Town court to which the District Court could properly defer its jurisdiction. Appellees' brief only confirms that Kituwah waived it sovereign immunity for Plaintiff/Appellant AQuate II, LLC's ("AQuate") claims against it, and that there was no available forum to which AQuate's claims against Jessica Myers ("Myers") could be referred. The District Court's holdings to the contrary are reversible error.

First, Appellees do not meaningfully confront the plain language of Kituwah's own, written sovereign immunity waiver or the immunity waiver required by the Small Business Administration ("SBA"). Nor do Appellees address binding U.S. Supreme Court decisions interpreting the operative "relating to" phrase to be extremely broad in a host of contexts. Instead, Appellees merely recite inapplicable and non-binding case law and then attempt to rewrite their sovereign immunity waiver as limited "only to" a list of items that the waiver provision expressly states is "not limited to." Brief of Appellees ("Resp. Br.") 28-29. This disingenuous re-writing of the waiver's plain language clearly highlights the District Court's

erroneous misinterpretation of Kituwah's sovereign immunity waiver, which should be reversed.

Second, Appellees do not even contend that the Alabama-Quassarte Tribal Town's ("AQTT") Constitution allowed for the creation of a tribal court at the time the District Court dismissed AQuate's claims against Myers. Instead, Appellees attempt improperly to shift the burden of proving the existence of an available alternative forum to AQuate. This burden belongs to Appellees, and their effort to shift the burden to AQuate invited the District Court to error. Appellees also argue that the District Court lacked jurisdiction to involve itself in an intra-tribal dispute, which Appellees themselves brought into these proceedings. Thus, Appellees cannot escape the reality that the District Court exceeded its jurisdiction when it weighed in on that tribal dispute to decide that one faction's alleged tribal court existed in contravention of the AQTT's own Constitution. Thus, this Court should reverse the dismissal and remand for further proceedings.

ARGUMENT

I. The District Court's Dismissal of Kituwah on the Basis of Sovereign Immunity should be Reversed.

A. Kituwah's deliberate misreading of its own sovereign immunity waiver fails to overcome the legal effect of the waiver's plain language, which makes Kituwah amenable to suit in Federal Court.

Appellees ignore the plain language of Kituwah's sovereign immunity waiver to craft an argument that cannot be reconciled with the SBA requirements,

Kituwah's own organizational documents, or the single case they rely upon for support. Instead, Appellees fabricate waiver-limitations that do not exist and would ask this Court to re-write the immunity waiver that Kituwah chose to adopt in order to compete with other economically disadvantaged groups for U.S. government contract work.

When Kituwah chose to participate in the SBA's section 8(a) business development program, it also agreed to waive its immunity and become amenable to suit in the United States Federal Courts for "all disputes or other matters relating to [its] involvement in programs of the Small Business Administration, including but not limited to, 8(a) Business Development program participation, loans, and contract performance." *See* Resp. Br. 29; App. Vol. II, Doc. 18-2 Ex. 1 at 4, ¶ 6. Kituwah's articles of organization go on to state: "Simply stated, the Company [Kituwah Services, LLC] hereby specifically consents to 'sue or be sued' within the jurisdiction of the Federal Court System of the United States." *Id.*

Appellees ignore the broad "relating to" language of Kituwah's waiver, which the Supreme Court and Circuit Courts, including this Circuit, have universally interpreted as "deliberately expansive" with "a connection" or "a reference" to the phrase's object – in this case, Kituwah's involvement or participation in any SBA

program. *See, e.g.*, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992).[1] In *Celotex Corp. v. Edwards*, the Supreme Court interpreted the "related to" language of 28 U.S.C. § 1334(b) comprehensively to reach "all matters connected with" a bankruptcy estate. 514 U.S. 300, 307-08 (1995). Like Appellees in this case, the appellees in *Celotex* argued for a myopic interpretation of "related to" language, contending it should only reach proceedings directly involving property of a debtor's estate. *Id.* at 308. The Supreme Court summarily rejected this argument under a plain language reading of the statute. *Id.*

Appellees do not point to a single case that has interpreted "relating to" language in any context, and they fail to address any of the binding precedents interpreting "related to" language cited by AQuate in its opening brief. *See* Resp. Br. 38. Instead, Appellees resort to hyperbolic "examples" of waivers they claim would occur if this Court read the "relating to" language as broadly as the Supreme Court requires. *See* Resp. Br. 31 (claiming immunity waiver could be found if a tribal entity delivered a bid proposal in a car that was run on illegally siphoned gas). Such

[1] *See also United States v. McGarity*, 669 F.3d 1218, 1262 (11th Cir. 2012) (citing *Morales* and interpreting the phrase "relating to" broadly in another statutory context), *abrogated on other grounds as recognized by United States v. Rothenberg*, 923 F.3d 1309, 1336 (11th Cir. 2019); *John Doe, v. Secs. and Exch. Comm'n*, No. 21-2537, 2022 WL 16936098, at *3 (2d Cir. Nov. 15, 2022) (recently recognizing breadth of "relating to" language in several additional contexts and noting that the phrase "is typically defined more broadly than a term such as 'arising out of'") (quoting *Coregis Ins. Co. v. Am. Health Found.*, 241 F.3d 123, 128 (2d Cir. 2001)).

catastrophizing claims have been swiftly discarded by other courts. *See, e.g.*, *Morales*, 504 U.S. at 390 (rejecting argument that broad interpretation of "relating to" language would "set out on a road that leads to pre-emption" in absurdly peripheral examples offered by appellant in that case).

Appellees then fabricate limitations by twice misinterpreting their own waiver provision and misstating the holdings of the only case they cite in support of their immunity argument. First, Appellees misconstrue the third sentence in their waiver paragraph as a "reassertion of its [Kituwah's] sovereign immunity." Resp. Br. 30. This is an inaccurate reading of the actual sentence, which does not reassert **Kituwah's** immunity, but instead states "nothing contained here is intended to nor shall it be construed to, waive the sovereign immunity of (i) **the Eastern Band of Cherokee Indians** ("Tribe"), (ii) any affiliate or agency thereof or (iii) any official acting on behalf of the tribe." *Id.* (bold emphasis added); App. Vol. II, Doc. 18-2 at 4, ¶ 6. This provision merely states that, although Kituwah's immunity is waived, the "Tribe" is not waiving immunity for itself or its other entities entitled to its sovereign immunity.

Appellees then use this misstatement to claim that Kituwah's waiver is "tailored **only to** '8(a) Business Development program participation, loans, and contract performance.'" Resp. Br. 30 (emphasis added). This claim simply cannot be reconciled with their actual waiver clause, which waives Kituwah's immunity for

"all disputes or other matter relating to [its] involvement in programs of the Small Business Administration, including but **not limited to**, 8(a) Business Development program participation, loans, and contract performance." *Id.* at 29 (emphasis added); Appx. Vol. II, Doc. 18-2 at 4, ¶ 6 (emphasis added). Confusingly, Appellees cite *Applied Sciences* as support for their unilateral re-writing of the plain language of Kituwah's immunity, but nowhere in *Applied Sciences* does that Court modify the tribe's actual immunity waiver to say the opposite of what the actual document states.

Applied Sciences does not support Appellees' contention that the SBA's waiver requirement is limited to an alleged SBA "intent . . . to ensure that the government can enforce the 8(a) program requirements on participating entities." *See* Resp. Br. 31 (citing *Applied Scis. & Info. Sys., Inc. v. DDC Constr. Servs., LLC*, No. 2:19-CV-575, 2020 WL 2738243 (E.D. Va. Mar. 30, 2020)). Nothing in *Applied Sciences* supports this conclusion. Neither that court nor the SBA have stated that the required immunity waiver is limited only to causes of action by the government, and the plain language of the SBA-required waiver itself is expressly ***not*** limited to enforcement of SBA program requirements. *See* 13 C.F.R. §124.109(c)(1); *see also Hunter v. Redhawk Network Sec., LLC*, No. 6:17-CV-0962-JR, 2018 WL 4171612, at *7 (D. Or. Apr. 26, 2018), *report and recommendation adopted*, No. 6:17-CV-0962-JR, 2018 WL 4169019 (D. Or. Aug. 30, 2018) (recognizing "[t]he language

waiving sovereign immunity . . . indicates that waiver does not only apply to 8(a) program participation, but additional matters as well").

Both the SBA-required immunity waiver and Kituwah's articles of organization implement a broad immunity waiver for all disputes and other matters **related to** Kituwah's involvement in SBA programs. Kituwah chose to participate in the SBA 8(a) program and, accordingly, it chose to adopt the requisite waiver of sovereign immunity to participate on an equitable playing field with other 8(a) program participants. Appellees attempt to sweep this fact under the rug, claiming (without support) that the purpose of the SBA's immunity waiver is to enable the government to enforce 8(a) program requirements. Again, this is incorrect and unsupportable under the plain language of the waiver, which is not limited solely to 8(a) participation or SBA requirements. The purpose of the SBA's small business programs is to "preserv[e] and promot[e] a competitive free enterprise economic system" and to "insure a competitive economic climate conducive to the development, growth and expansion of small businesses." 15 U.S.C. § 631a. Appellees' attempts to limit the required immunity waiver would quell competition and thwart the desired competitive economic climate. It would place Native American tribes at an enormous, inequitable advantage over other socially and economically disadvantaged groups that the 8(a) program was designed to assist,

including women, veterans, African Americans, Hispanic Americans, Asian Pacific Americans, and other minorities. *See* 15 U.S.C.A. § 637(d)(3) (West).

Kituwah chose to violate state and federal trade secret laws when it improperly solicited and used AQuate's trade secrets in a competitive bid for a U.S. government contract that was set aside for participants in the SBA's 8(a) program.[2] Kituwah itself made this activity related to its SBA program involvement; thus, Kituwah cannot claim surprise that it has been brought before a U.S. Federal Court, as permitted under Kituwah's own immunity waiver provisions, and as any other socially or economically disadvantaged 8(a) program participant may be sued.

Appellees' incorrect interpretations of both the SBA-required waiver clause and Kituwah's own immunity provisions cannot be squared with the plain language of the code, Kituwah's organizational documents, or with the case law they cite. The District Court's holding that Kituwah is entitled to immunity is based upon the same flawed reasoning and, for the reasons stated herein and in AQuate's opening brief, the District Court's dismissal of Kituwah should be reversed and remanded for further proceedings.

[2] Appellees' argument that the SBX-1 contract is a Navy contract and not a SBA contract (*see* Resp. Br. 34-35) is both irrelevant and unavailing. Appellees acknowledge that the SBX-1 contract was set aside for 8(a) business development participants (*id.*) and, therefore, must concede that Kituwah could only bid for the contract by virtue of its participation in the 8(a) program.

II. The District Court's dismissal of AQuate's claims against Myers under the Doctrine of Forum Non Conveniens should also be Reversed.

A. Appellees failed to carry their burden of proving an alternative forum existed to which the District Court could refer AQuate's Claims against Myers.

Appellees' contention that AQuate should have proven the nonexistence of an available alternative forum is simply wrong. This burden belongs to Appellees, and they failed to show that the forum identified in the dispute resolution agreement exists.

Ordinarily, the "party moving to dismiss on the basis of *forum non conveniens* must demonstrate: (1) that an adequate alternative forum is available; and (2) that the private and public interest factors weigh in favor of dismissal." *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1282 (11th Cir. 2001) (quoting *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 951 (11th Cir. 1997)); *accord* 28 U.S.C. § 1404(a) (allowing a district court to transfer a civil action for convenience of the parties and witnesses, and in the interest of justice, to a forum "where it might have been brought"). Where the parties' contract contains a valid forum-selection clause, *Atlantic Marine* shifts the burden under the second step to the plaintiff, and accords little or no weight to the plaintiff's choice of forum or the private interests of the parties. *Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 571 U.S. 49, 63-64 (2013).

The burden of proving an alternative forum (including the forum identified by the parties in a contractual forum selection clause), is always with the party seeking dismissal. *Atlantic Marine* did not change this, and it was clear legal error for the District Court to skip the first step and shift this burden to AQuate. *See* App. Vol. II, Doc. 39 at 13 (stating that "the existence of th[e] forum-selection clause shifts the burden to AQuate to demonstrate that transfer . . . is unwarranted" and finding that "absent clear evidence from AQuate . . . the AQTT Tribal Court is an available and adequate forum").

Appellees' reliance on *Atlantic Marine* is thus misplaced. Appellees (and the District Court) misconstrued their burden. Nonetheless, they claim to have "provided evidence sufficient to demonstrate the adequacy and availability of the AQTT Tribal Court." Resp. Br. 40. This "evidence" consists of two purported decisions of an alleged "District Court of Alabama-Quassarte Tribal Town" (App. Vol. II, Doc. 31-2)[3] and the forum selection clause itself (App. Vol. II, Doc. 31-1). Appellees concede, as they must, that the forum selection clause recognizes the tribal court of

[3] These purported decisions appear to contain a one-sided picture of the alleged intra-tribal dispute that Appellees claim "is the true impetus for AQuate's disgruntled state." *See* Resp. Br. 22. Appellant notes this here to point out that Appellees, not AQuate, interjected this alleged intra-tribal dispute into these proceedings, first in their response opposing a preliminary injunction (App. Vol. III, Doc. 29 at 4), and then in their Reply in Support of Renewed Motion to Dismiss (App. Vol. II, Doc. 31 at 3-4), where they belatedly added, for the first time, the purported evidence of the existence of an available forum.

the Alabama-Quassarte Tribal Town may not exist. *See id. See also* Resp. Br. 40. In a misguided effort to mitigate this fact, Appellees point to the second clause of that same acknowledgement, which states that "the CFR Court for the geographic region where [Myers] works shall be the exclusive venue for litigation" *Id.* But this claim proves too much, as such a venue also does not exist and, more tellingly, Appellees have not claimed (much less proven) that it does.[4]

Nor have Appellees proven the existence of an AQTT Tribal Court, which they could not legally do at the time the District Court dismissed AQuate's claims against Myers because the *Constitution and By-Laws of the Alabama-Quassarte Tribal Town Oklahoma (Ratified January 10, 1939)* has no provision allowing for such a court. App. Vol. II, Doc. 27 at 11-12; Vol. III, Doc. 38 at 5. Appellees' incorrectly assert that the AQTT Constitution is not properly before this court; however, this ignores the District Court's actual opinion. Appellees first provided the purported decisions of a "District Court of Alabama-Quassarte Tribal Town" as improper new argument in Appellees' Reply in Support of Renewed Motion to Dismiss. *See* App. Vol. II, Doc. 31 at 4, Doc. 31-2. *See also Trondheim Cap. Partners, LP v. Life Ins. Co. of Alabama*, 505 F. Supp. 3d 1213, 1224 (N.D. Ala. 2020) (recognizing "new arguments are improper if presented for the first time in

[4] Appellees again improperly place this burden at AQuate's door. *See* Resp. Br. 40-41.

a reply brief") (quoting *Dates v. Frank Norton, LLC*, 190 F. Supp. 3d 1037, 1040 (N.D. Ala. 2016) (citing *Herring v. Sec'y, Dept. of Corr.*, 397 F.3d 1338, 1342 (11th Cir. 2005). AQuate had no timely opportunity to address these purported orders.

The District Court relied upon this improper, late-filed "evidence" in its Memorandum Opinion (*see* App. Vol. II, Doc. 39 at 15) and further referenced the *Affidavit of Famous Marshall*, which clearly stated: "The Constitution and Bylaws of the Alabama-Quassarte Tribal Town do not provide for the creation of any court." *See id.* at 15; (referencing the arguments and affidavit). *See also* App. Vol. III, Doc. 38 at Ex. A, ¶¶ 6-7. Appellees' belated inclusion of this alleged "evidence" in their reply brief invited the District Court to reversible error, which it committed when it acknowledged these purported orders as proof of an existing AQTT court without further opportunity for response from AQuate. *See* App. Vol. II, Doc. 39 at 15.

AQuate had already shown that no court could exist under AQTT's Constitution, and the District Court considered that showing when it improperly found that an AQTT Court existed based on Appellees belated offer of "proof." AQuate raised this issue again in its Motion to Reconsider, arguing that the District Court committed manifest error in (1) ignoring the Constitution, and (2) not holding Appellees to their burden to prove the existence of a court. *See* App. Vol. II, Doc. 41. Thus, as the District Court and Appellees have acknowledged, this was not new argument or evidence. The District Court only upheld its erroneous decision, which

was based upon improperly shifting Appellees' burden of proof to AQuate and improperly recognizing a tribal court where no such court could properly exist.[5]

As AQuate showed in its initial brief, the District Court erred when it recognized the existence of an AQTT court. Appellees' attempt improperly to shift their burden to AQuate only serves to highlight the District Court's clear error.

B. As Appellees concede, the District Court exceeded both its jurisdiction and discretion when it weighed in on the legitimacy of an alleged "District Court of Alabama-Quassarte Tribal Town"

Appellees concede that the District Court lacked jurisdiction to take a position on an intra-tribal dispute to determine the existence of an available alternative forum, yet they claim the court did not exceed its authority when it did so. *See* Resp. Br. 37-38 (stating intra-tribal disputes are "exactly the sort of conflict over which federal courts do not have jurisdiction" and citing cases). Appellees cannot have it both ways, and their argument that the District Court's dismissal should be affirmed is inappropriate because, contrary to Appellees' contention, the District Court weighed

[5] Appellees' do not dispute, and therefore have conceded, that the AQTT Constitution does not allow for the creation of any tribal court system. Court's routinely determine whether a functioning tribal court exists before declining to exercise jurisdiction. *See, e.g., Comstock Oil & Gas, Inc. v. Alabama & Coushatta Indian Tribes of Texas*, 261 F.3d 567, 572 (5th Cir. 2001) (finding no proper court existed under tribe's constitution, even though the tribe itself argued to the contrary); *Johnson v. Gila River Indian Cmty.*, 174 F.3d 1032, 1036 (9th Cir.1999) (declining to dismiss and finding that exhaustion would be "per se futile" where there was "doubt that a functioning appellate court exist[ed]"); *Krempel v. Prairie Island Cmty.*, 125 F.3d 621, 622 (8th Cir.1997) (same).

in on the intra-tribal dispute when it recognized Appellees' proffered "District Court of Alabama-Quassarte Tribal Town" to be the Alabama-Quassarte Tribal Court referenced in AQuate's dispute resolution documents with Myers.

To be sure, the District Court expressly based its dismissal of AQuate's breach of contract claims on the existence of the purported court indicated on Appellees' late-filed attachments to their reply brief in support of dismissal. *See* App. Vol. II, Doc. 39 at 15 (finding nothing to indicate that the purported orders "are fraudulent or were otherwise created for the purpose of deceiving this court"). And before the District Court could exercise discretion to dismiss AQuate's claims under the forum non conveniens doctrine, it necessarily had to find that the alternative forum actually existed. *See Satz*, 244 F.3d at 1282 (11th Cir. 2001).

Thus, although the District Court expressed hesitancy to "weigh in" on the intra-tribal dispute that Appellees' interjected here, it nonetheless did so when it ignored Appellees' burden of proof to find that an alternative forum exists, thereby taking sides with one purported faction in an alleged intra-tribal dispute. Appellants' concede that this was an abuse of discretion, and that the District Court lacked jurisdiction to make such a finding. *See* Resp. Br. 37-38; *In re Sac & Fox Tribe of Miss. in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 763 (8th Cir. 2003) (cited by Appellees and stating Federal Courts lack jurisdiction to resolve internal tribal disputes over leadership).

Accordingly, the District Court's dismissal for forum non conveniens must be dismissed because it is based upon a determination the District Court lacked jurisdiction to make.[6]

C. Appellees' have no response to the fact that the AQTT Constitution did not allow for the existence of a tribal court.

AQuate acknowledges that the legal framework of the *forum non conveniens* doctrine, as well as the District Court's inability to weigh in on tribal disputes, appears to create a catch 22. This is why *Comstock* is instructive and should direct the Court's analysis here.

While *Comstock* involved a tribal court exhaustion issue, the facts of that case are analogous. There, the court found that tribal exhaustion would be futile because no tribal court properly existed, even though the tribe supplied affidavits and letters from the clerk and judge of the purported tribal court, which the Federal District court held (and the Fifth Circuit affirmed) insufficient to establish the rightful existence or legitimacy of the court. *Comstock Oil & Gas, Inc. v. Alabama &*

[6] In response to AQuate's candid disclosure that the AQTT may now have created a tribal court, Appellees' contend that "no remand is necessary." Resp. Br. 36. This argument misses the point. While AQuate's claims *may* be dismissed after remand, affirmance would not correct the District Court's clear legal error in recognizing the legitimacy of a court that was not authorized by the tribe or its constitution. *See* App. Vol. II, Doc. 27 at 11-12; Vol III, Doc. 38 at 5. Following Appellees' suggestion to affirm on any alternative ground would further compound the clear error of the District Court by leaving its erroneous order and supporting opinion in place. The proper course for this Court is to reverse and remand.

Coushatta Indian Tribes of Texas, 78 F. Supp. 2d 589, 599 (E.D. Tex. 1999), *aff'd in part, rev'd in part on other grounds and remanded*, 261 F.3d 567 (5th Cir. 2001). Specifically, the court found "a lack of authority within the tribal constitution to form a judiciary." *Id.*

Appellees make much about the inclusion of an AQTT Tribal Court on a non-authoritative list maintained by the Bureau of Indian Affairs. Not only does that list conspicuously *not* identify a "District Court of Alabama-Quassarte Tribal Town," the *Comstock* court also made clear that the inclusion or non-inclusion of a tribal court on this list is uninstructive:

> The only fact of which this court might take notice is the absence of the tribal court from the list maintained by the Bureau of Indian Affairs. One could conclude from that absence that either, the court does not exist, or that it does and the list is inaccurate. The absence is by no means conclusive proof that the tribal court does not exist and not sufficient to warrant judicial notice pursuant to F.R.E. 201.

Id. At 598. The same result should follow here.

Just like the Court in *Comstock* could not refer the parties to a "proper" court, the District Court should not have dismissed the claims here to be "refiled" in a court that (regardless of any tribal faction's claim to the contrary) could not properly exist under the *Constitution and By-Laws of the Alabama-Quassarte Tribal Town*. It was clear error to do so, and the dismissal should be reversed.

CONCLUSION

For the foregoing reasons, and the reasons stated in AQuate II, LLC's opening brief, the Court should reverse the dismissal of AQuate's claims and remand for further proceedings.

CERTIFICATE OF COMPLIANCE

1. This brief complied with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains fewer than 6,500 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type selection requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Times New Roman 14 point font.

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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2023, I filed a copy of the foregoing brief with the Clerk of Court using the Appellate CM/ECF system, which system thereby electronically served the same on Appellees' counsel of record:

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