IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

07-13039-GG

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Appellant,

v.

KRAUS-ANDERSON CONSTRUCTION CO.,

Appellant.

On Appeal from the United States District Court for the Southern District of Florida

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INITIAL BRIEF OF APPELLANT MICCOSUKEE TRIBE OF INDIANS OF FLORIDA

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Eleventh Circuit Rule 26.1-1, undersigned counsel certify that this is a complete list of persons and entities that have an interest in the outcome of this case:

The Honorable Ursula Ungaro, United States District Judge

The Honorable John O'Sullivan, U.S. Magistrate Judge

The Honorable Minnie Bert, Miccosukee Tribal Judge

The Honorable Colley Billie, Miccosukee Tribal Judge

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STATEMENT REGARDING ORAL ARGUMENT

The Miccosukee Tribe of Indians of Florida, pursuant to Eleventh Circuit Rule 28-1(c), respectfully requests oral argument.

This appeal arises from nonrecognition of a tribal-court judgment. Oral argument would be useful, ***first***, to address as fully as possible "the heightened sensitivity to tribal sovereignty [that is] present in [a] federal–tribal comity case[]" such as this one. *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Auth.*, 207 F.3d 21, 32 (1st Cir. 2000) (*citing Smith v. Moffett*, 947 F.2d 442, 445 (10th Cir. 1991)). *Cf. Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1290–91 (11th Cir. 1998) (observing in the context of international agreements that forum-selection clauses "require a complex analysis of fundamental fairness and public policy").

Here, even more so than in the standard federal–tribal comity case, oral argument would be useful, ***second***, because this Court is asked to decide, it would appear for the first time, the appropriate legal framework for recognizing a Tribal judgment undergirded by a freely negotiated forum-selection clause.

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INTRODUCTORY STATEMENT

Over the past ten years the Kraus-Anderson Construction Company has negotiated hundreds of millions of dollars worth of construction contracts with American Indian tribes. (R1:9.) Kraus-Anderson, in business for more than 100 years[1], is neither unsophisticated nor inexperienced. The company has at least the same bargaining power as the 550-member Miccosukee Indian Tribe of Florida, a federally recognized tribe since only 1962.[2]

In 1997 and 1998 Kraus-Anderson entered into a series of contracts with the Miccosukee Tribe of Indians of Florida to build a school, a courthouse, a hotel, and several other buildings (R58:3) on reservation lands (R1:2). Together these projects were valued at more than $50 million. (R191:19.)

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[1] Information provided on Kraus-Anderson's Web site, http://www.krausanderson.com. *See* 56 F.R.D. 183, 206 ("[J]udicial notice may be taken at any stage of the proceedings, whether in the trial court or on appeal.").

[2] Kraus-Anderson's company slogan is ***"Breaking New Ground since 1897."*** http://www.krausanderson.com. The United States did not grant citizenship to American Indians until 1924, some 27 years after the formation of Kraus-Anderson. *See* 8 U.S.C. § 1401(b), Indian Citizenship Act of 1924 ("the Snyder Act").

The above contracts were negotiated by Kraus-Anderson's vice president of construction management (R220-2:4), a 25-year company veteran (R220-2:4), and the president of Kraus-Anderson himself (R220-2:5). During negotiations Kraus-Anderson proposed an arbitration term. (R220-2:41.) The Tribe said no, insisting that litigation be brought only in Miccosukee Tribal Court. (R220-2:40–41.) After being furnished a copy of the Miccosukee Code (R220-2:42) Kraus-Anderson agreed to the Tribe's forum-selection provision (R205:36). As the company itself later acknowledged, Kraus-Anderson "agreed to this requirement because it wanted the business provided by the contracts." (R205-3:22.)

Later, when a dispute occurred over alleged nonpayment (R1:8), Kraus-Anderson did not seek to avoid the parties' pre-negotiated forum. Kraus-Anderson did not challenge personal or subject matter jurisdiction, or any aspect of the parties' forum-selection agreement, including its underlying formation. Instead: Kraus-Anderson sued the Tribe in Miccosukee Tribal Court (R1:3) pursuant specifically to the parties' negotiated forum-selection agreement (R205:36; R205-3:22).

Kraus-Anderson took to the Miccosukee Tribal Court immediately. The company fought successfully ***twice*** to prevent the disqualification of one of the assigned trial judges. (R35:8.) It sought and obtained discovery sanctions ***against the Tribe***. (R35:14.) And at trial, Kraus-Anderson's lawyer was effusive (R205:36), praising the Miccosukee Tribal Court for its authenticity (R205:38), its uniqueness (R205:38), and for its inestimable significance in the broader context of tribal sovereignty and tribal self-governance, in global terms (R205:36).

But when the Tribal Court awarded Kraus-Anderson "only" $1 million in damages (R1:171) or to say it another way, $1.65 million ***less*** than it awarded the Tribe as counterclaimant (R1:171), Kraus-Anderson adopted a different tone. Now suddenly the Court had been intrinsically biased, fundamentally unfair, and all along undeserving of basic comity. Kraus-Anderson would even go so far as to excoriate the Miccosukee Tribal Court for lacking "the will" (R191:19) to bring off "the largest commercial dispute ever handled in the [Miccosukee] trial court" (R191:19).

Now, Kraus-Anderson is one step away from cancelling retroactively a freely negotiated forum-selection agreement. Several errors in the District Court action have led to this point. Kraus-Anderson's renewed motion for final summary judgment was predicated transparently on simple monetary disappointment, not due process. For the reasons below the District Court's award of summary judgment should be reversed.

STATEMENT OF JURISDICTION

I. Basis for Jurisdiction in the Appellate Court

Pursuant to 28 U.S.C. §1291, this Court has jurisdiction to review the District Court's order (R231) granting summary judgment in favor of Appellee Kraus-Anderson. *See, e.g.*, *Imaging Bus. Machs., LLC. v. BancTec, Inc.*, 459 F.3d 1186, 1188 (11th Cir. 2006).

II. Acquisition of Appellate Jurisdiction

The final judgment and order granting summary judgment were entered on May 25, 2007. The Tribe filed its Notice of Appeal in the District Court on June 25, 2007. The Notice of Appeal was timely. Fed. R. App. P. 4(a)(1)(A); *see also, e.g.*, *Pinion v. Dow Chem., U.S.A.*, 928 F.2d 1522, 1525 (11th Cir. 1991).

III. Basis for Jurisdiction in the District Court

Based on federal common law and therefore 28 U.S.C. §1331, the District Court had subject matter jurisdiction over Appellant's action seeking recognition, registration, and enforcement of a tribal-court judgment. *See Wilson v. Marchington*, 127 F.3d 805, 813 (9th Cir. 1997).

STATEMENT OF THE ISSUES

1. Whether the District Court, in granting summary judgment to the Appellee Kraus-Anderson Construction Company, erred by denying recognition, registration, and enforcement of the instant Miccosukee Tribal Court judgment.

2. Whether, in denying recognition of the Miccosukee Tribal Court judgment, the District Court erred by disregarding established principles of contract law.

3. Whether, in denying recognition of the Miccosukee Tribal Court judgment, the District Court erred by misapplying federal–tribal comity principles.

4. Whether, in denying recognition of the Miccosukee Tribal Court judgment, the District Court erred by disregarding precedents constructing the Full Faith and Credit Clause of the United States Constitution.

STATEMENT OF THE CASE

I. The Course of Proceedings

A. Overview

The Miccosukee Tribe of Indians of Florida, a federally recognized tribe (R1:2), brought this action seeking recognition, registration, and enforcement of a $1.65 million Miccosukee Tribal Court judgment (R1:1) against the Kraus-Anderson Construction Company, a Minnesota business corporation (R1:2).

The underlying Tribal Court action, the one resulting in the instant judgment, was initiated by Kraus-Anderson. (R1:3.) Kraus-Anderson brought the suit in accordance with the terms of a forum-selection agreement, which had been incorporated into a series of construction contracts. (R205:36.)

This appeal arises from the federal district court's summary judgment entered in favor of Kraus-Anderson (R231:23) based on "denial of due process under principles of comity" (R231:22).

B. The Tribal Court Action

Kraus-Anderson brought suit in Miccosukee Tribal Court in June 2001 against the Miccosukee Tribe of Indians of Florida, alleging

nonpayment damages (R58:4) in connection with a series of construction contracts (R1:7). The Tribe answered Kraus-Anderson's statement of claim (R1:7), asserted a counterclaim (R35:25), and alleged set-off damages based on unjustified charges and construction defects (R1:8).

Between June 2001 and May 2003 the parties, in the course of their Miccosukee Tribal Court litigation, conducted extensive discovery (R35:7–13), engaged in motion practice (R35:7–13), participated in status hearings (R35:8; R35:12), submitted pretrial catalogues (R35:12) and filed a variety of pretrial briefs (R35:13). Beginning May 5, 2003 (R35:13) the Tribal Court conducted a bench trial (R1:3), which lasted 16 days (R35:13–15) and produced more than 2,600 pages of trial transcript (R191:17).

Following trial the Tribal Court directed the parties to brief additional legal arguments (R35:15–16) and submit documents (R35:15) identified, and described in the Court's order as being "'relevant and necessary for a fair and proper adjudication of the issues, and the parties' claims'" (R191:13). The parties complied (R35:15–16), and more than 90 days later (R35:16), the Tribal Court entered

judgment in favor of the Tribe (R1:3). The judgment was contained in a 166-page document entitled "Trial Decision." (R1:6–171.)

The Tribal Court resolved certain contested issues in favor of Kraus-Anderson (R1:156, 160, 161, 166, 167, 169) and others in favor of the Tribe (R1:157–59, 162–68, 170). The Trial Decision, in turn, contains two sets of awards. (R35:16.) Kraus-Anderson was awarded over $1 million in damages (R1:171), although the final judgment reflects a money award of $1.65 million in favor of the Tribe based on set-off calculations (R1:171).

Kraus-Anderson filed a motion in the Tribal Court on July 2, 2004 (R35:16), shortly after the Trial Decision had been entered (R1:6), seeking reconsideration, amended factual findings, and other forms of post-trial relief (R191:11); in addition Kraus-Anderson contemporaneously filed a Notice of Appeal (R35:16). In accordance with the Miccosukee Code (35:492–93), Kraus-Anderson's Notice of Appeal was presented to the Tribe's Business Council (R35:16).

As provided in Title II, Part II, Section 13 of the Miccosukee Tribal Code, the Miccosukee Business Council decides, without adscititious input, whether to permit an appeal to the Miccosukee Court

of Appeals. (R193: Ex. D at II-31.) In this case, the Business Council reviewed Kraus-Anderson's Notice of Appeal (R1:180) and determined that there were "no issues meriting review by the Miccosukee Court of Appeals" (R1:180). At that point the judgment was final. (R1:3.)

C. The District Court Action

The Tribe brought this action in federal district court in November 2004 seeking recognition, registration, and enforcement of the above Tribal judgment. (R1:1.) Together with its answer Kraus-Anderson filed a counterclaim for "injunctive relief for failure to accord due process." (R7:9–10.) The Tribe moved successfully (R22:6) to dismiss the counterclaim based on sovereign immunity (R13:3–7).

Kraus-Anderson then filed an amended answer, attacking, once again, the Miccosukee Tribal Court and the Miccosukee judicial system. (R32:5–8.) The Tribe responded by filing a motion to strike Kraus-Anderson's affirmative defenses, arguing that

- Kraus-Anderson, in negotiating the instant construction contracts, agreed specifically to litigate only in the Miccosukee Tribal Court (R34:7);

- Kraus-Anderson chose specifically to file suit Miccosukee Tribal Court (R34:6);
- Kraus-Anderson, before it lost at trial, was effusive in its praise of the Miccosukee Tribal Court and the Miccosukee justice system (R34:3–4); and that
- Kraus-Anderson, before it lost at trial, did not complain about the Miccosukee Tribal Court or the Miccosukee justice system (R34:3–4).

The Tribe also filed a motion for judgment on the pleadings, together with a motion for partial summary judgment, seeking an adjudication that the District Court should apply full faith and credit to the Tribal Court Judgment (R33:13–19). Kraus-Anderson then filed its own motion for summary judgment, arguing that the Miccosukee Tribal Court lacked subject matter jurisdiction over the Tribe's counterclaim. (R44:2–11.)

The District Court, in a January 2006 omnibus order, rejected the Tribe's position regarding full faith and credit, and ruled that a comity analysis should be employed instead. (R57:19.) The District Court said that although two older cases, decided in 1893(R57:12) and 1894

(R57:13), had accorded full faith and credit to tribal-court judgments, those cases pertained specifically to the Creek Nation (R57:16) and the Cherokee Nation (R57:16). The District Court, in rejecting the idea of a "blanket rule" favoring full faith and credit (R57:16), noted, in respect of the Cherokee Nation case, that "the Cherokee Nation . . . ha[d] reached a certain level of civilization" (R57:16).

The District Court did, however, grant *in part* the Tribe's motion to strike affirmative defenses. (R57:22.) At the same time, the District Court gave Kraus-Anderson leave to conduct discovery regarding various aspects of the Miccosukee justice system (in general) and the Miccosukee Tribal Court. (R57:23.)

On March 24, 2006, Kraus-Anderson again moved for final summary judgment, alleging that the Tribal Court judgment had been rendered in the absence of due process. (R67:1–15.) Kraus-Anderson argued, first, that it had been denied access to an appeal (R67:9); second, that the Miccosukee Business Council had exercised undue influence over the Miccosukee judicial system (R67:10–12); and third, that the Miccosukee judicial system had not provided "knowable Rules of Procedure and Evidence, as well as substantive law" (R67:13–14).

The District Court, in denying that motion (R122: 8), found that it was "insufficient, without more," to say that Kraus-Anderson had been denied due process because "the Miccosukee Business Council, a political branch of the Miccosukee Tribe, [had] exercised judicial functions and ultimately reviewed [Kraus-Anderson's] appeal." (R122:5–6.) The District Court also found that Kraus-Anderson had "fail[ed] to offer any material facts much less material facts that are not in dispute, demonstrating that it [had been] treated unfairly by the Council or denied due process." (R122:6.) Finally, the District Court observed, as an overarching concern, that Kraus-Anderson would have to "produce facts other than the make-up of the Miccosukee Court itself to persuade this Court that it [had been] denied due process of law"; to elaborate, the District Court expressed that "[w]ere the Court to conclude otherwise, it would be holding that all judgments of the Miccosukee Tribal Court were rendered in the absence of due process." (R122:8.)

Thereafter, the parties engaged in an exchange of documents and deposition discovery, as reflected generally in R:123–R190. On December 13, 2006, Kraus-Anderson filed a Renewed Motion for Final

Summary Judgment seeking an adjudication, as a matter of law, that it had been deprived of due process on a variety of grounds including its renewed claim that it was "summarily denied access to the Miccosukee Court of Appeals." (R191.) The Tribe timely responded to Kraus-Anderson's renewed motion (R196) and the papers accompanying it (R197). On April 2 the Tribe filed its own Motion for Final Summary Judgment (R204; R205), to which Kraus-Anderson on April 16 responded (R213).

On May 15 the District Court directed the parties to brief their positions regarding Miccosukee Tribal Court appellate procedure. (R227:2.) On May 25, after the parties had submitted their briefs (R228; R229), the District Court entered final summary judgment in favor of Kraus-Anderson.

The District Court found that Kraus-Anderson had been denied due process (R231:22–23), not because the Miccosukee Tribal Court was intrinsically "deficient[]" (R231:23), but because Kraus-Anderson had been denied due process "in this specific case" (R231:23) as a result of the Miccosukee Business Council's "involvement in the process underlying the parties' dispute" (R231:22)—in other words

negotiating the contract, overseeing the construction, and making managerial decisions (R231:22). The District Court's summary judgment was based on the following coda: "[T]he Court is persuaded Miccosukee Business Council's adjudicative undertaking as intermediate appellate court that disallowed Defendant's appeal amounts to a denial of due process under principles of comity." (R231:22.)

The order granting Kraus-Anderson's renewed motion for final summary judgment, and the final judgment itself, were entered on May 25, 2007. The Tribe timely filed its Notice of Appeal on June 25. (R235:1.)

II. Statement of the Facts

The Miccosukee Tribe of Indians of Florida

The Miccosukee Tribe of Indians of Florida is a federally recognized Indian Tribe (R231:3), with its reservation in Miami-Dade County, Florida (R1:2). The Tribe comprises approximately 550 members. (R201-2:3.)

The Tribe's political structure is established by an organic document, the Constitution and Bylaws of the Miccosukee Tribe of Indians. (R69:4–11.) The Tribe's judiciary, its court system, and its rules of trial and appellate procedure are established clearly in the Miccosukee Criminal and Civil Code. (R69:13–124.)

The Kraus-Anderson Construction Company

Kraus-Anderson is a Minnesota-based construction company. (R58:3.) Over approximately the past 10 years, Kraus-Anderson has done around $400 million worth of projects for Indian Tribes (R1:9), more than any other general contractor in the United States (R1:9).

The Parties' Contractual Relationship

In 1997 and 1998, Kraus-Anderson entered into a series of contracts with the Miccosukee Tribe of Indians of Florida (R58:3), a federally recognized tribe (R58:2), for the construction of several buildings, including a resort hotel and a convention center, a school, and a courthouse facility (R58:3). All construction was to take place on the Tribe's reservation, located in Miami-Dade County, Florida. (R1:2.) Together, these projects were valued at more than $50 million. (R191:19.)

The contracts were clear that in the event of a dispute arising from the instant transactions, Kraus-Anderson could sue the Tribe only in the Miccosukee Tribal Court. (R1:110.) The Tribe, to effectuate that provision, agreed to a limited waiver of sovereign immunity. (R1:110.)

During contract negotiations Kraus-Anderson proposed an arbitration clause. (R220-2:41.) The Tribe, however, would not agree to that term. (R220-2:41.) The parties' printed contracts attest to this fact: the boilerplate arbitration provision in the American Institute of of Architects (AIA) standard contract is conspicuously stricken. (R205-2: 8–9; 210-7:8.) In the end, the contracts were negotiated to contain the following provision:

> The Owner hereby waives any defense of sovereign immunity from suit in Miccosukee Tribal Court in connection with any action or proceedings, including any claim, cross-claim or counter-claim, brought by or against it in connection with this Part 2 or any transactions contemplated in this Part 2 (a "Claim") for and only with respect to action brought in Miccosukee Tribal Court. Owner does not waive immunity in any form for actions in any court (including Miccosukee Tribal Court) not in connection with this Part 2 or any of the transactions contemplated in this Part 2.

(R210-2 through R210-9.)

The Parties' Miccosukee Tribal Court Litigation

In adherence to the parties' forum-selection agreement, Kraus-Anderson filed a lawsuit in the Miccosukee Tribal Court in June 2001 (R1:7) seeking more than $7 million in damages for breach of contract (R35:18–20; R58:4). As previously stated, the parties litigated in Miccosukee Tribal Court for more than two years. (R35: *passim*.) At no point did Kraus-Anderson object to the Tribal Court's procedures, rules, or customs. (R35: *passim*; R205-1:5.) Kraus-Anderson became critical only upon the entry of an adverse judgment. (R205-1:5.)

III. Standard of Review

An order granting summary judgment is reviewed de novo, "'applying the same standard as did the district court.'" *E.g., U.S. Steel Corp. v. Astrue*, 495 F.3d 1272 (11th Cir. 2007) (*quoting Mahon v. U.S. Dep't of Agric.*, 485 F.3d 1247, 1252 (11th Cir. 2007)). Summary judgment "is appropriate when 'there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a

matter of law.'" *Porter v. White,* 483 F.3d 1294 (11th Cir. 2007) (*quoting Drago v. Jenne,* 453 F.3d 1301, 1305 (11th Cir. 2006)).

The instant order granting summary judgment is reviewed de novo although comity is implicated. *See Diorinou v. Mezitis*, 237 F.3d 133, 139 (2d Cir. 2001) ("Our review of decisions involving international comity ***depends on the sense in which that term is being used***.") (emphasis added). This case involves comity, but in the context of recognition and enforcement of a Tribal judgment. *See Overseas Inns S.A. P.A. v. United States*, 911 F.2d 1146, 1148 n.4 (5th Cir. 1990) (stating that the appropriate standard of review was de novo, not abuse of discretion, where the district court had declined to extend comity on a motion for summary judgment, explaining that "appeals from summary judgment" are reviewed "on a *de novo* basis"); *but cf. Daewoo Motor Am., Inc. v. Gen. Motors Corp.*, 459 F.3d 1249, 1256 (11th Cir. 2006), *cert. denied*, 127 S. Ct. 2032 (2007) ("While we ordinarily review the grant of . . . summary judgment *de novo* . . . a district court's decision ***to abstain*** will only be reversed upon a showing of abuse of discretion.") (internal quotation marks and citations omitted) (emphasis added).

De novo review is further appropriate in this case because the District Court granted Kraus-Anderson's renewed motion for summary judgment based on due process considerations, *cf. Ali v. U.S. Attorney Gen.*, 443 F.3d 804, 808 (11th Cir. 2006) (stating that "constitutional claims" and specifically due process arguments are reviewed de novo) (citation omitted), and because the dispositive issue in this case is the operativeness of a forum-selection clause, *cf. Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1290–91 (11th Cir. 1998) (holding that "the enforceability of forum-selection . . . provisions in international agreements are questions of law that [are] review[ed] *de novo*").

SUMMARY OF THE ARGUMENT

This case inheres principally in contract, then in federal–tribal comity. The dispositive issue is a forum-selection agreement in favor of the Miccosukee Tribal Court. The agreement was entered into voluntarily by an experienced, sophisticated business corporation. Kraus-Anderson has never challenged either the terms of the agreement, or the circumstances underlying its formation.

It is well settled that forum-selection clauses are generally valid, even if the subject forum is international, intrinsically different from an American court, or both. And that principle should apply with ***at least*** the same weight in the context of a Tribal court. In what appears to be a question of first impression, the Court is asked to determine, then apply the correct legal framework for analyzing the enforceability and recognizability of a Tribal-court forum-selection clause, one that was freely negotiated between parties of equal bargaining strength.

Even should the Court find that a typical federal–tribal comity analysis applies in this case, unmodified, as it were, by the presence of a forum-selection agreement, it remains that the District Court erred in

misapplying the extant comity test. ***First***, it was erroneously determined that due process principles apply as though this were a state proceeding. ***Second***, it was erroneously determined that the Miccosukee Business Council is not subject to the Rule of Necessity. And ***third***, it was erroneously determined that the Miccosukee Tribal Court should be acclimated to an "Anglo-Saxon" court, without due regard for the Court's acknowledged, valid differences.

Finally, and although unnecessary for this resolution of this appeal, the Tribe would respectfully submit that the above judgment should have been accorded full faith and credit.

ARGUMENT AND CITATIONS OF AUTHORITY

I. BY AGREEING IN THEIR CONTRACT TO HAVE DISPUTES RELATING TO THE CONSTRUCTION PROJECTS DECIDED IN THE MICCOSUKEE TRIBAL COURT, KRAUS-ANDERSON IS BOUND BY THE TRIBE'S STANDARDS AND PROCEDURES INCLUDING THEIR CRITERIA FOR REVIEWING APPEALS

The District Court said it granted Kraus-Anderson's revised (and ***third***) motion for summary judgment "based on . . . the Business Council's adjudicative undertaking in this specific case." (R231:23.)

The District Court insisted that nothing in its ruling was meant to indict the Miccosukee judicial system ***itself***.

But everything the Business Council did in this case was endemic to its ordinary and established role, as provided in the Tribe's organic documents. (R69:6–7.) The Business Council is ***supposed*** to negotiate contracts, execute contracts, perform contracts, make business decisions, improve tribal lands, and initiate and manage litigation on behalf of the Tribe as a whole. (R69:6) The Tribe agrees that its judicial system is not intrinsically deficient, but opposes the idea that it should be fitted to a Procrustean bed—of Kraus-Anderson's design.

As part of their negotiations and in order for Kraus-Anderson to secure the construction contracts having a value in excess of $50 million, the parties agreed that the Miccosukee Tribal Court would be the exclusive forum for any suit, claim, cross-claim, or counterclaim between Kraus-Anderson and the Miccosukee Tribe related to the construction projects. Kraus-Anderson knew other things about the Miccosukee Tribal Court system before it entered into the contacts with the Tribe:

- Kraus-Anderson was aware that the Miccosukee Tribe was governed by a code that contained a description of the function of Tribal governments and the Tribal Court system. (R220-2:38–42.)
- Kraus-Anderson was aware that the Miccosukee Business Council oversaw the day-to-day, administrative functions of the Tribe. (R220-2:5–6, 8–11.)
- Kraus-Anderson was aware that the Miccosukee Business Council was going to be involved in the negotiation of the contract with Kraus-Anderson and have an oversight role in the construction project. R220-2:5–6, 8–11, 74–76.)
- Kraus-Anderson was aware that Billy Cypress was Chairman of the Business Council. (R220-2:5–6, 8–11, 74–76.)
- Kraus-Anderson was aware that the Miccosukee Business Council, in general, and Billy Cypress in particular, would be involved in administrating the construction project. (R220-2:5–6, 8–11, 74–76.)
- Kraus-Anderson was aware that it was agreeing to a form of dispute resolution in which any case would be tried before the

Miccosukee Tribal Court and would be subject the appellate rules and regulations of the Tribe. (R220-2:38–42.)

- Kraus-Anderson knew or should have known that the Miccosukee Business Council would be the administrative body that would determine whether Kraus-Anderson could pursue an appeal to the Tribe's General Council, should an appeal be desired by Kraus-Anderson. (R220-2:40, 42.)
- Kraus-Anderson knew or should have known that the Miccosukee Business Council members were elected by the Tribe and had no particular leaning or experience as judges. (R220-2:40, 42.)
- Kraus-Anderson was aware that the Miccosukee Code contained no standards to be applied by the Miccosukee Business Council in determining whether to grant an appeal to the Tribe's General Council. (R220-2:40, 42.)
- Kraus-Anderson was aware that there was no provision in the Tribal Code for exclusion or recusal of members of the Miccosukee Business Council from participation in any

determination relating to whether or not to grant an appeal to the General Council. (R220-2:40, 42.)

The instant factual situation—where a non-Indian corporation agrees by contract to have the Tribal Court be the exclusive forum for any dispute between the parties—appears to be one of first impression in the United States Eleventh Circuit Court of Appeals. As a starting point, the law is settled that Indian Tribes can waive their sovereign immunity, and contractually agree to have a dispute arbitrated, or even tried off the reservation, and that the Indian Tribe can contractually agree to the choice of law that will be applied to decide the dispute. *See C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001); *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416 (9th Cir. 1989); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Auth.*, 207 F.3d 21 (1st Cir. 2000); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Auth.*, 32 F.Supp 2d 497 (R.I. 1999); *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656 (7th Cir. 1996).

The Tribal Code vests in the Miccosukee Business Council the exclusive authority to decide whether an appeal can be taken before the General Council. (R35.)

When parties agree by contract to submit their disputes to a private forum that is neither a state nor federal court, constitutional due process considerations are not extended to that alternative dispute resolution process—due process is only to be extended to ***state*** actions.

The Tribal Code vests in the Miccosukee Business Council the exclusive authority to decide whether an appeal can be taken before the General Council. (R35.) When parties agree by contract to submit their disputes to a private forum, one that is not a state or federal court, constitutional due process considerations are inapposite; to say it another way, due process is extended only to ***state*** actions.

As this Court has made clear, a private arbitration proceeding is not a "state action" and is therefore beyond the ken of constitutional due process claim. *See Davis v. Prudential Sec. Inc.*, 59 F.3d 1186 (11th Cir. 1995).

In *Davis*, this Court clearly indicated that "[a]lthough Congress, in the exercise of its commerce power, has provided for some

governmental regulation of private arbitration agreements, we do not find in private arbitration proceedings the state action requisite for a constitutional due process claim." *Davis*, 59 F.3d at 1191 (*quoting FDIC v. Air Florida Sys., Inc.*, 822 F.2d 833, 842 n. 9 (9th Cir. 1987)).

Given that finding, the *Davis* court was emphatic in finding that [t]he fact that a private arbitrator denies the procedural safeguards that are encompassed by the term 'due process of law', cannot give rise to a constitutional complaint." Id. at 1191 (*quoting Elmore v. Chicago & Illinois Midland Ry. Co.*, 782 F.2d 94, 96 (9th Cir. 1986)).

The Miccosukee Tribe is not a state, and the District Court's granting of summary judgment against the Tribe on the basis that KA was not provided due process by the Tribal Court is an improper application of constitutional due process. The proper standard, in light of the fact that KA contractually agreed to have the Miccosukee Tribal Court decide its dispute with the Tribe, should have been whether the Miccosukee Tribal Court and the MBC manifestly disregarded the law by failing to follow their designated procedures. *See Montes v. Shearson-Lehman Bros. Inc.*, 128 F.3d 1456 (11th Cir. 1997). Instead of utilizing this standard, the District Court ignored the effect of the

contract between the parties, by which KA agreed to the application of Miccosukee law and, most tellingly in the case at bar, to the application of the Miccosukee judicial process.

That being the case, the District Court's decision had the practical effect of permitting Kraus-Anderson to avoid its contractual obligations relating to their choice of forum. Had the Miccosukee Tribe agreed by contract to have a different forum decide the dispute between the Tribe and Kraus-Anderson, the Tribe would not have been permitted to avoid ***its*** contractual obligations relating to the alternative dispute resolution or forum selected in its contract. *See C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001); *see also Ninigret Dev., Corp. v. Narragansett Indian Wetuomuck Housing Auth.*, 207 F.3d 21 (1st Cir. 2000). *But cf. FGS Constructors Inc. v. Carlow*, 64 F.3d 1230, 1233 (8th Cir. 1995) (reversing order that would have required the parties to litigate in Tribal Court, where the court found that "[n]o provision in the agreement gave the defendants the right to override a plaintiff's choice of forum under the forum selection clause").

Here in this case, the parties contracted for the exclusive application of the Miccosukee judicial system. The District Court's summary judgment order, in applying a comity analysis, effectively negated the parties' choice of forum and choice of law.

It is well settled that constitutional notions of due process do not apply to Indian Tribes and their courts. The Supreme Court has been consistently emphatic that neither the Bill of Rights nor the equal protection components of the Fifth and Fourteenth Amendments apply to Tribal government. *See Talton v. Moyes*, 163 U.S. 376 (1896); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1977).

The Eleventh Circuit, however, has not yet spoken to type and extent of due process that should be afforded a non-Indian litigant in a Tribal Court forum. However, the Eighth Circuit Court of Appeals has dealt with the factual scenario similar to the one at issue in this appeal, and has held that the Indian Tribal Court is free to strike a different balance between the traditional considerations of due process so long as the tribal court does not deny a defendant adequate notice and fair opportunity to defend itself. *See Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 491 F.3d 878 (8th Cir. 2007).

In *Plains Commerce*, the Eight Circuit merely reviewed the trial record from the tribal court and determined that the tribal court proceedings did not violate the "basic tenets of due process" necessary to insure that the non-Indian defendant was not denied a "fair opportunity to present relevant evidence or to defend itself." *Id* at 891-92.

Given these authorities, it was inappropriate for the District Court to adopt a comity standard which flows solely and exclusively from constitutional due process considerations that are inapplicable to Indian tribes.

The District Court's analysis also fails to account for the fact that Kraus-Anderson's contracts with the Tribe contain forum selection and alternative dispute resolution provisions. The law is clear that when parties agree by contract to have a particular forum decide their dispute, that the parties are bound by the rules and procedures in force within that forum. *See M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1 (1972).

Again, Kraus-Anderson agreed by contract that the Miccosukee Tribal Court would be the exclusive forum for any suit it filed against the Tribe. Kraus-Anderson cannot now be heard to complain that it should not be bound by the composition, rules, and procedures of the Miccosukee Tribal Court system. Kraus-Anderson ***never*** objected to the composition of the Tribal Court or the Miccosukee Business Council at any time prior to the Tribe initiating its federal suit for recognition of the Tribal Court judgment. The record is also clear in establishing that Kraus-Anderson never objected to the consideration of its appeal by the Miccosukee Business Council, and that it never requested the recusal of any of its members.

Comparing the District Court's decision in the case at bar with the above authorities yields several inescapable conclusions. First, the District Court erred in its consideration of a sovereign Indian tribe's judicial system by applying to it a wholly inapplicable constitutional standard. Second, the District Court's decision is in error in that it would impose upon the Tribal Court system a standard of review greatly exceeding the review applied to decisions of private arbitrators. Indeed, if this Court were to approve such a finding, private arbitrators

acting under the auspices of federal law would not be held to a constitutional benchmark, but Indian Tribes acting wholly outside the federal system would be held subject to those standards. Such a conclusion is not supported by the law. Indeed, in the Eleventh Circuit, arbitration decisions can be overturned by the Courts only if (a) the decision runs contrary to the Arbitration Act, or (b) if the arbitration panel "deliberately ignored the law when making its ruling. *See Montes v. Shearson-Lehman Bros. Inc.*, 128 F.3d 1456 (11th Cir. 1997). Further, the Eleventh Circuit has been emphatic in requiring that "if a court is to vacate an arbitration award on the basis of a manifest disregard of the law, there must be some showing in the record, ***other than the result obtained***, that the arbitrators knew the law and expressly disregarded it. *O.R. Secs., Inc. v. Prof'l Planning Assocs., Inc.*, 857 F.2d 742, 747 (11th Cir. 1988). No such showing was made by Kraus-Anderson when its appeal was first presented for consideration by the Miccosukee Business Council. More: Kraus-Anderson never even requested the recusal of ***any*** of its members.

It is, and it always has been, the Tribe's position that the Tribal Exhaustion Rule required Kraus-Anderson to bring its concerns

respecting both the Tribal Court's decision and the Miccosukee Business Council's role in the appellate process to the attention of those bodies, but Kraus-Anderson never did that either. With that being the case, Kraus-Anderson should have been precluded from raising these issues for the first time as part of their comity defense. *See Nat'l Farmer's Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985).

As the Tribe indicated in its papers filed in the District Court, Kraus-Anderson's failure to comply with the requirements of *Nat'l Farmer's Ins. Co.*, and its failure to satisfy the standards contained within *Bird v. Glacier Elec. Coop.*, 255 F.3d 1136 (9th Cir. 2001), should have been fatal to its position without necessity of any constitutional analysis. Plainly and simply, *Bird* requires litigants such as Kraus-Anderson to establish from the record that there was an "outrageous departure from our notions of civilized jurisprudence." *See Bird,* 255 F.3d at 1142 (*quoting British Midland Airways Ltd. v. Int'l Travel, Inc.*, 497 F.2d 869, 871 (9th Cir. 1974)).

The District Court chose to disregard those requirements by characterizing this language as requiring nothing more than a showing of "a due process violation." (R231:16.) Both as a consequence of

Hilton v. Guyot, 159 U.S. 113 (1895) and of *Bird*, and therefore should not have been ignored in application or effect. *See Bird*, 255 F.3d at 1142 (*quoting British Midland Airways, Ltd. v. Int'l Travel Inc.*, 497 F.2d 869, 871 (9th Cir. 1974)).

II. HAVING MADE THE DECISION TO APPLY A COMITY ANALYSIS, THE DISTRICT COURT ERRED IN CONCLUDING THAT ACCESS TO APPEAL IS REQUIRED BEFORE COMITY WILL EXTEND TO A TRIBAL COURT DECISION

Instead of correctly applying contract principles, or full faith and credit to the Tribal Court decision, the District Court chose to analyze the decision under the principles of comity discussed in *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997). As an initial proposition, it should be noted that while *Wilson* discussed comity, it did not turn on those principles. Instead, the *Wilson* decision turned solely on its finding that a tribal court lacked subject matter jurisdiction over a non-Indian. That being the case, *Wilson's* discussion of comity principles is at most *dicta* and does not provide the law of the case.

Irrespective of that *dicta*, "due process" as employed by the *Wilson* court, requires only that "[t]here has been an opportunity for a

full and fair trial before an impartial tribunal that conducts the trial upon regular proceedings after proper service or voluntary appearance of the defendant, and that there is no showing of prejudice in the tribal court or in the system of governing laws." *Wilson*, 127 F.3d at 811. By its terms, this definition does not mention, much less mandate, access to an appeal as a necessary component of due process or as a precondition to granting comity to a judgment.

Despite that fact, the District Court effectively boot-strapped this requirement onto the standard discussed in *Wilson* stating that "'[w]hen an appeal is afforded . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause.'" (R231:20.) The District Court said it was "also apparent . . . that once an appeal is afforded, ***constitutional due process*** requires that appellate judges not sit in a situation "which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true" (R231:20) (*quoting Lindsey v. Normet***,** 405 U.S. 56, 787 (1972)).

But in this case, the Miccosukee Business Council simply withheld reference of the appeal to the General Council. As stated

above, constitutional notions of due process do not apply to Indian Tribes and their courts. The Tribe was free to adopt an appellate process that vested the authority of whether to grant an appeal to the Miccosukee Business Council. The United States Supreme Court has been consistently emphatic that neither the Bill of Rights nor the equal protection components of the Fifth and Fourteenth Amendments apply to Indian Tribal governments. *See Talton v. Moyes*, 163 U.S. 376 (1896); and *Santa Clara Pueblo*, 436 U.S. at 56. Given these authorities, it was inappropriate for the District Court to adopt a comity standard which flows solely and exclusively from constitutional considerations which are inapplicable to Indian tribes.

This is particularly the case given the District Court's use of constitutional due process concepts for the notion that a "possible temptation" to a judge suffices to establish a defense to the application of comity. While this may be the law in the federal courts, it is well settled that (a) the procedures utilized by the Tribal Courts need not be the same procedures followed by the federal courts, and (b) federal courts should avoid undue or intrusive interference in reviewing those procedures. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 67

(1977). Therefore, under a proper comity analysis, the District Court should have:

1. Provided deference to whatever procedure the Tribal Court system chose to follow (*see Smith v. Confederated Tribes of the Warm Springs Reservation of Oregon*, 783 F.3d 1409, 1412 (9th Cir. 1986);
2. Recognized, as it did in its Order dated August 8, 2006, that it was wholly permissible for Tribal Courts to be subordinate to the political branches of its government (*see Duro v. Reina*, 495 U.S. 676, 693 (1990); and should have
3. Properly presumed that the MBC acted appropriately as "men of conscience and intellectual discipline" in reviewing KA's Notice of Appeal. *See United States v. Morgan*, 313 U.S. 409, 422 (1941); and *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140 (8th Cir. 1973).

These presumptions and policies should not be regarded as mere lip service: the sovereignty of the Tribe and the dignity to be afforded to its tribal institutions should have been of paramount importance to the District Court. Instead, the District Court fashioned a new comity

analysis which (a) goes far beyond the comity considerations described in *Wilson;* (b) improperly imposed upon the tribal court system due process considerations flowing from the United States Constitution that are wholly inapplicable to Indian tribes. This undermined the integrity of the MBC as a political body which exercises both legislative and judicial functions for the Tribe); and (c) created a new test wherein the MBC had a duty to prove its integrity instead of requiring KA to prove that its integrity was lacking. In so deciding, the District Court inverted virtually every presumption and consideration that has been mandated by long standing law to apply to the Indian tribes.

III. THE DISTRICT COURT ERRED IN INFERRING A DUTY ON THE TRIBE'S MBC MEMBERS TO DISQUALIFY THEMSELVES

By determining that Chairman Cypress and other members of the Business Council should have recused themselves from considering Kraus-Anderson's appeal, the District Court ignored the fact that such action was not possible under the Miccosukee Code and ignored the principals inherent in the well established Rule of Necessity.

As recognized by the District Court with respect to ***international*** comity, the Supreme Court has held that "[w]e are not prepared to hold that the fact that the procedure in these respects differed from our own courts is, of itself, a sufficient ground for impeaching the foreign judgment," and found that comity does not mandate that tribes use procedures identical to that of the United States. (R122) (*quoting Wilson v. Marchington*, 127 F.3d at 810; *see also Hilton v. Guyot*, 159 U.S. 113, 159 (1895)).

Respecting comity as it applies to tribal court proceedings, it is equally well established that "[e]xtending comity to tribal court judgments is not an invitation for the federal courts to exercise unnecessary judicial paternalism in derogation of tribal self government." *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987). As noted above, the District Court erred when it chose to apply inapplicable constitutional due process considerations to the tribal court system and when it assumed, on the strength of those considerations, that the Miccosukee Business Council could not be trusted, even in the absence of any facts to support that assumption.

It should be noted that this is the exact opposite approach that was taken by the District Court in refusing to allow Kraus-Anderson to take the depositions of the Tribal Court Judges in its October 13, 2006 Order (R168). At that time, the District Court correctly recognized that it was Kraus-Anderson's responsibility to illustrate a *prima facie* showing of impropriety ***from the record*** as a precondition to having the ***right to depose*** the Tribal Court judges, and found that Kraus-Anderson had failed to make that showing. Despite that finding, the District Court later granted summary judgment in Kraus-Anderson's favor, based on an analysis which (a) regarded the Miccosukee Business Council and its members as "judges;" and which (b) would have presupposed their lack of integrity, by placing upon the Miccosukee Business Counsel the burden of establishing their lack of impropriety. This approach is totally at odds with the record as well as the applicable law.

Kraus-Anderson should not have one burden with respect to the Tribal Court judges but a lesser burden with respect to the members of the Miccosukee Business Council. But the District Court's paternalistic review did not end at that point.

As the Tribe pointed out in its own summary judgment papers, Title I, Section 4 of the Tribal Code defines the Miccosukee Court as consisting of "two judges and an alternate judge"—a total of three judges. (R35, Title I, sec. 4.) On the other hand, the Tribal Code provides that the Miccosukee Business Council is made up of ***five*** elected members who properly provide both executive functions and act as the gatekeeper for the General Council's agenda, including whether to permit an appeal to be heard. (R35, Title II, sec. 13.) Nothing within the Tribal Code requires the MBC to perform its duties in a particular manner or to follow any given standards of review. Instead, the Code merely requires that the Miccosukee Business Council make a determination as to whether to allow or disallow any given appeal to go forward to the General Council. In its August 8, 2006 Order, the District Court recognized this and correctly stated that:

> …[the fact that] the MDC, a political branch of the Miccosukee Tribe, exercises judicial functions and ultimately reviewed Defendant's appeal <u>is insufficient</u>, without more, to demonstrate Defendant was denied due process.

(R122) (*citing Howlett v. The Salish and Kootenai Tribes of the Flathead Reservation*, 529 F.2d 233 (9th Cir. 1976)). In *Howlett*, the Ninth Circuit found that, in the absence of any evidence demonstrating that the tribal council had treated the plaintiffs unfairly, the fact that a political entity of the Tribe acted in a judicial capacity over the plaintiffs' appeal was insufficient to demonstrate a lack of due process. *Id.* Applying *Howlett* to the case at bar, the District Court observed that:

> …Defendant fails to offer any material facts, much less material facts that are not in dispute, demonstrating that it was treated unfairly by the council or denied due process. Therefore, the Court finds that Defendant is not entitled to summary judgment on its claim that the MBC's review of Defendant's appeal denied Defendant due process of law. …

(R122.) Clearer language is difficult to imagine, and as stated previously, the District Court should have continued to presume the appropriateness of the Miccosukee Business Council's action instead of adopting an opposite analysis.

In complete contrast to this ruling, and without any facts to sustain such a ruling, the District Court later granted summary

judgment in Kraus-Anderson's favor finding that "the Business Council's adjudicative undertaking as the intermediate appellate panel that disallowed Defendant's appeal amounts to a denial of due process under principles of comity" (R231.)

The point is, the Business Council should have been free to exercise any level of inquiry or to apply any standard it wishes in deciding whether to permit or deny an appeal to go forward. If the former construction is what was intended by the District Court, then this Court should regard their effort as precisely the sort of unnecessary judicial paternalism which was condemned by the Supreme Court in *LaPlante*. Even a cursory reading of the Tribal Code reflects that there is no provision for the recusal, or for the replacement of the Miccosukee Business Council or for any of their members. That being the case, the District Court's decision would effectively mandate—as a precondition to extending comity—that the Tribe re-write its entire Tribal Code. It is respectfully submitted that Indian Tribe's should not have to undergo such a paternalistic exercise in order to receive recognition of their decisions in this nation's courts. There is no evidence, or even an allegation, that the Business Council did anything

other than follow the exact procedures mandated by the Miccosukee Tribal Code.

As stated previously, the various constitutional considerations in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 1986), which were discussed by the District Court as the basis for its decision are not applicable to Indian tribes. However, on the general subject of disqualification, *Aetna* is clear in providing that:

1. The traditional common law rule is that disqualification for bias or prejudice was not allowed; and that
2. The more recent trend has been toward the adoption of statutes that permit disqualification for bias or prejudice.

It is clear that disqualification procedures for bias or prejudice will not be inferred by the courts even in our state and federal systems, and must be enacted legislatively. If such an inference is not appropriate in the state and federal courts, how then can a District Court infer such an obligation on the part of an independent, sovereign nation? It is the Tribe's position that such a ruling is wholly inappropriate. In addition, by effectively finding that the Miccosukee Business Council should not have acted in determining

whether an appeal should be heard under any circumstances, the District Court's decision runs contrary to the "rule of necessity" discussed by the Supreme Court in *United States v. Will*, 449 U.S. 200 (1980). *See also Aetna*, 475 U.S. at 825. That rule applies not only to state and federal court cases, but also to administrative hearings and stands for the proposition that "[w]herever it becomes necessary for a judge to sit even where he has an interest—where ***where no provision is made for calling another in, or where no one else can take his place***—it is his duty to hear and decide, however disagreeable it may be." *United States v. Will*, 449 U.S. at 214 (citation omitted).

Applying this standard, the federal court in Montana permitted a member of a public service commission to hear a case—despite his financial interest in the outcome—based upon this rule, and its finding that there was "no statute of Montana allowing the disqualification of such an officer for bias or prejudice, and no provision made for a substitute if it could be done." *See Montana Power Co. v. Public Service Comm'n of Montana*, 12 F. Supp. 946, 948 (D. Mont. 1935). *See also Bolin v. Story*, 225 F.3d 1234 (11th Cir. 2000).

Here in this case, not only is the Tribal Code completely lacking with respect to the disqualification of an Business Council member, but it also has no provision for a substitute should any member be disqualified. (R35.) Given these authorities and the general Rule of Necessity, it is clear that the Business Council was under no duty to disqualify themselves and their decision cannot be challenged for their failure to do so.

It is anticipated that Kraus-Anderson will rely heavily upon the factual determinations made by the District Court in these summary judgment proceedings, which purported to support its finding that the Miccosukee Business Council was inappropriately involved in the underlying dispute, and that Chairman Cypress' involvement was particularly inappropriate. However, it should be pointed out that, of the five "facts" relied upon by the District Court in making their decision, only two of them pertained to the Business Council as a whole. Those two "facts" were that: (a) the Business Council was copied with certain correspondence pertaining to the Tribe's position at trial regarding Kraus-Anderson's improper charges; and (b) the Business Council made a decision to withhold further payments to

Kraus-Anderson pending the result of the dispute resolution (which were explicitly set forth in the Contracts and explicitly required by the Code).

Neither of these facts can overcome the Rule of Necessity nor would they satisfy the requirements of law that would apply if this action were pending in federal court, and if the members of the Miccosukee Business Council were judges. This is not the case here, but, as recognized by this Court in *Bolin*, 28 U.S.C. § 455(a) requires a judge to recuse himself only if a judge's bias is personal, as opposed to judicial in nature. *See Bolin*, 225 F.3d at 1239.

Improperly, the District Court inferred personal bias on the members of the Business Council simply because they (a) acted appropriately as an executive body when the contracts between the Tribe and Kraus-Anderson were signed, (b) acted appropriately as an executive body when the dispute between the Tribe and Kraus-Anderson was crystallized, and because (c) they properly acted to discharge their duty in considering Kraus-Anderson's appeal. It is respectfully submitted that, even if no issue of fact applied to these findings, they would not suffice to void the Tribal Court's Judgment.

That being said, it is interesting to consider the practical effect of the logic utilized by the District Court. For example, what if the District Court determined correctly that each and every member of the Miccosukee Business Council had a duty to recuse him or herself from Kraus-Anderson's appeal? As stated previously, the Tribal Code does not provide a mechanism to recuse members of the Business Council, voluntarily or otherwise and, in any event, Kraus-Anderson never asked that they do so. Accordingly, if the Business Council were to have acted as the District Court would require, no authority would exist to refer this matter to the General Council! If the Miccosukee Business Council had recused themselves in the manner required by the District Court, would Kraus-Anderson be heard to complain that they were deprived of all appellate access?

This question remained unasked and therefore unanswered by the District Court's ruling, as was an alternative that was never addressed by the District Court. Having made the inappropriate findings, that is, that:

(a) Full faith and credit did not apply to Tribal Court Judgments; that

(b) Principles of comity required access to an appeal (when they do not), and that

(c) The Miccosukee Business Council had some duty to recuse themselves, in the absence of any statutory basis for or request that they do so,

it would have been a simple matter for the District Court to have considered *Bolin* for further inappropriate, but less draconian guidance.

This Court's discussion in *Bolin*, illustrates its finding that the Rule of Necessity "allows at least those judges on this Court who have not been involved in plaintiff's prior appeals to hear this appeal." Applying this albeit inapplicable reasoning to the case at bar, the District Court could have found that Chairman Cypress was factually precluded from participating in the Miccosukee Business Council's decision, thereby allowing the remaining four members to do their duty on behalf of a sovereign Indian tribe. Instead, the District Court effectively unraveled the Tribe's entire judicial system with its decision and this Court should not affirm the District Court's decision.

IV. THE MICCOSUKEE TRIBAL JUDGMENT SHOULD HAVE BEEN ACCORDED FULL FAITH AND CREDIT

The Eleventh Circuit has not decided the legal issue of whether an Indian Tribal Court Judgment should be analyzed under the full faith and credit framework, Article IV, Section 1 of the United States Constitution, or under a comity framework, and hence the Final Judgment of the Miccosukee Tribal Court that is now before this court presents a case of first impression in this Circuit. In its January 18, 2006 Order, the District Court recognized that because Indian Tribes are not explicitly referenced in the statute, the relevant question was whether they should be regarded as "territories," thereby entitling the decisions of their tribal courts to full faith and credit. (R57.)

Citing what it referred to as a "lack of clear precedent establishing full faith and credit for tribal court judgments under § 1738 and the Congress's apparent intent to extend full faith and credit to specific areas on a piece-meal basis," the District Court concluded that the Tribal Court judgment was not entitled to full faith and credit, and that the Tribal Court judgment should be analyzed under principles of comity. (R57:19.)

This finding was in error on two points. First, the undefined term "territory" does not have a "fixed and technical meaning that must be accorded to it in all circumstances." *See Americana of Puerto Rico Inc. v. Kaplus*, 368 U.S. 431, 436 (3d Cir. 1986). Accordingly, the United States Supreme Court has held that:

a. The term "territory" should be construed using the commonly understood meaning of the term (*see FDIC v. Meyer*, 510 U.S. 471 (1994); and that

b. In construing that term, the courts should utilize the utmost liberality by determining the "more broad purposes" of the statute or enactment under consideration. *See United States v. Standard Oil*, 404 U.S. 558 (1972).

With respect to the former, the Tribe should be considered a "territory" for purposes of full faith and credit because it meets the definition of territory which includes "an area of a country…such as the United States…that is not a state or province but has a separate organized government." *See*, Webster's Third New World Dictionary.

Respecting the second point, the Supreme Court has consistently found that the courts should interpret any ambiguities in statutes

affecting Indians in favor of Indians. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). Additionally, the Supreme Court has also recognized that "…Tribal Courts play a vital role in tribal self government, and the federal court has consistently encouraged their development…" *See Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987). Based on this stated policy, the Supreme Court has consistently upheld the ability of the Tribal Courts to decide civil cases involving personal property rights of both Indians and non-Indians. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1977).

Given those policies, the Eighth Circuit's decisions in *Mehlin v. Ice*, 56 F. 12 (8th Cir. 1893), and *Cornells v. Shannon*, 63 F. 305 (8th Cir. 1894) are instructive. In both instances, the Eighth Circuit found that the courts of two separate Indian tribes were to be "entitled to the same respect and to the ***same faith and credit*** as the judgments of the territorial courts of the United States" (emphasis supplied.) *See e.g., Cornells*, 63 F. at 306. Despite this language, in its own words, the District Court was "unpersuaded" by the precedential value of these authorities because neither involved a finding that Indian tribes were territories under §1738, and because the District Court felt that those

decisions should be limited to their facts. (R57:16–19). There is no language contained within either the *Mehlin* case or the *Cornells* case that supports such a construction and the District Court's failure to extend full faith and credit to the Tribal Court's decision was in error.

CONCLUSION

For all of the foregoing reasons the summary judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief complies with Fed. R. App. P. 32(a)(7)(B), in that it contains 11,053 words, as counted by the word processing software used to prepare it (Microsoft Word XP) and excluding those portions of the Brief that are not counted under Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Initial Brief* was served by U.S. Mail this 26th day of October, 2007 on:

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