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No. _____

OFFICE OF THE CLERK

In The
Supreme Court of the United States

—◆—
MISSOURI RIVER SERVICES, INC.,

Petitioner,

v.

OMAHA TRIBE OF NEBRASKA,

Respondent.

—◆—
On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

—◆—
PETITION FOR A WRIT OF CERTIORARI

—◆—
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QUESTIONS PRESENTED

1. Whether a court may vacate an arbitration award which satisfies all criteria set forth in the Federal Arbitration Act but (assertedly) violates extra-statutory requirements imposed by the court?
2. Whether a Federal Court to which an arbitration award has been submitted for confirmation may independently determine a question possessing jurisdictional implications where the jurisdictional question is inextricably intertwined with the merits of the case and necessarily was resolved by the arbitrator?

PARTIES TO THE PROCEEDING

The following entities were parties to the proceeding before the United States Court of Appeals for the Eighth Circuit:

Petitioner: Missouri River Services, Inc.

Respondent: The Omaha Tribe of Nebraska, a federally recognized Indian Tribe.

RULE 29.6 STATEMENT

Missouri River Services, Inc. hereby discloses that it is a Delaware corporation, has no parent corporation, and no publically held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED IN THE CASE	2
STATEMENT OF THE CASE	3
A. Summary of the Case	3
B. The Agreement	6
C. The Arbitration and Related Judicial Proceedings	8
D. The Award of the Arbitrator	9
E. The Confirmation of the Arbitrator's Award ...	10
F. The Decision of the Court of Appeals	11
REASONS FOR GRANTING THE PETITION	13
I. This Court Should Grant This Petition Because The Eighth Circuit Erroneously Ruled That A Court May Vacate An Arbitration Award Which Satisfies All Criteria Set Forth In The FAA But (Assertedly) Violates Extra-Statutory Requirements Imposed By The Court, And This Ruling Conflicts With The Decisions Of Other Circuits	15
A. This Court Should Grant This Petition Because The Eighth Circuit's Ruling Conflicts With The Decisions Of Other Circuits	15

TABLE OF CONTENTS – Continued

	Page
B. The Conflict Between Circuits Highlights Uncertainty In The Application Of This Court's Precedents.....	21
II. This Court Should Grant This Petition Because The Eighth Circuit Erroneously Ruled That Where A Question Possessing Jurisdictional Implications Is Intertwined With The Merits Of An Arbitration Decision, A Federal District Court Not Only May But Must Disregard The Arbitrator's Ruling, And This Decision Conflicts With The Decisions Of Other United States Courts Of Appeals	24
CONCLUSION	28
APPENDIX A	
Opinion, <i>Missouri River Services, Inc. v. Omaha Tribe of Nebraska</i> , 267 F.3d 848 (8th Cir. 2001).....	1a
APPENDIX B	
Memorandum Opinion, <i>Missouri River Services, Inc. v. Omaha Tribe of Nebraska</i> , No. 8:CV96-00202 (D. Neb. Nov. 17, 1999).....	15a
APPENDIX C	
Memorandum Opinion, <i>Missouri River Services, Inc. v. Omaha Tribe of Nebraska</i> , No. 8:CV96-00202 (D. Neb. Oct. 7, 1997)	15a
APPENDIX D	
Order, <i>Missouri River Services, Inc. v. Omaha Tribe of Nebraska</i> , No. 8:CV96-00202 (D. Neb. Nov. 13, 1997).....	46a
APPENDIX E	
Order, <i>Missouri River Services, Inc. v. Omaha Tribe of Nebraska</i> , No. 8:CV96-00202 (D. Neb. March 4, 1998).....	47a

TABLE OF CONTENTS – Continued

	Page
APPENDIX F	
Order Denying Petition for Rehearing and for Rehearing En Banc, <i>Missouri River Services, Inc. v. Omaha Tribe of Nebraska</i> , No. 00-1094 (8th Cir. Nov. 5, 2001).....	49a
APPENDIX G	
Award of Arbitrator (American Arbitration Association No. 77 199 0023 95), Denver, Colorado, dated May 12, 1999.....	50a
APPENDIX H	
Stipulation Regarding Arbitrable Issues, <i>Missouri River Services, Inc. v. Omaha Tribe of Nebraska</i> , No. 8:CV96-00202 (D. Neb. submitted Feb. 23, 1998)	58a
APPENDIX I	
Excerpts from Agreement.....	61a

TABLE OF AUTHORITIES

	Page
CASES	
<i>Apex Plumbing Supply Co. v. U.S. Supply Co.</i> 142 F.3d 188 (4th Cir. 1998).....	19, 20
<i>ARW Exploration Corp. v. Aguirre</i> 45 F.3d 1455 (10th Cir. 1995).....	19
<i>Augustine v. United States</i> 704 F.2d 1074 (9th Cir. 1983).....	25
<i>Baravati v. Josephthal, Lyon & Ross, Inc.</i> 28 F.3d 704 (7th Cir. 1994).....	17, 23
<i>Bell v. United States</i> 127 F.3d 1226 (10th Cir. 1997).....	25
<i>Brown v. Rauscher Pierce Refsnes, Inc.</i> 994 F.2d 775 (11th Cir. 1993).....	18
<i>Bull HN Information Systems, Inc. v. Hutson</i> 229 F.3d 321 (1st Cir. 2001).....	18
<i>Chatham Condominium Ass'n v. Century Village, Inc.</i> 597 F.2d 1002 (5th Cir. 1979).....	25
<i>Demarest v. Manspeaker</i> 498 U.S. 184 (1991).....	17
<i>DVC-JPW Investors v. Gershman</i> 5 F.3d 1172 (8th Cir. 1993), <i>reh'g denied</i>	17
<i>Eaton v. Dorchester Dev. Co.</i> 692 F.2d 727 (11th Cir. 1982).....	25
<i>Estate of Cowart v. Nicklos Drilling Co.</i> 505 U.S. 469 (1992).....	17
<i>Gulf Coast Industrial Workers Union v. Exxon Com- pany, USA</i> 70 F.3d 847 (5th Cir. 1995).....	16

TABLE OF AUTHORITIES – Continued

	Page
<i>In Re VMS Securities Litigation</i> 21 F.3d 139 (7th Cir. 1994).....	20
<i>Jenkins v. Prudential-Bache Securities, Inc.</i> 847 F.2d 631 (10th Cir. 1988).....	22
<i>Lapine Technology Corp. v. Kyocera Corp.</i> 130 F.3d 884 (9th Cir. 1997).....	17
<i>Lawrence v. Dunbar</i> 919 F.2d 1525 (11th Cir. 1990).....	25
<i>Missouri River Services, Inc. v. Omaha Tribe of Nebraska</i> 267 F.3d 848 (8th Cir. 2001).....	11, 12, 22
<i>Mosely, Hallgarten, Estabrook & Weeden v. Ellis</i> 849 F.2d 264 (7th Cir. 1988).....	17
<i>Moses H. Cone Memorial Hospital v. Mercury Const. Co.</i> 460 U.S. 1 (1983).....	26
<i>Osborn v. United States</i> 918 F.2d 724 (8th Cir. 1990).....	25
<i>Prima Paint Corp. v. Flood & Conklin Mfg. Co.</i> 388 U.S. 395 (1967).....	20, 27
<i>Pratt Central Park Ltd. Partnership v. Dames & Moore, Inc.</i> 60 F.3d 350 (7th Cir. 1995).....	25, 26
<i>Rocket Jewelry Box, Inc. v. Rocket Gift Packaging, Inc.</i> 157 F.2d 174 (2d Cir. 1998) (per curiam).....	16
<i>Rodriguez de Quijas v. Shearson/American Express, Inc.</i> 490 U.S. 477 (1989).....	14, 21, 23

TABLE OF AUTHORITIES – Continued

Page

<i>Scherk v. Alberto-Culver Co.</i> , 417 U.S. 506 (1974), <i>reh'g denied</i> , 419 U.S. 885 (1974).....	20
<i>Shearson/American Express, Inc. v. McMahon</i> 482 U.S. 220 (1987)	14, 21, 22, 26
<i>Smiga v. Dean Witter Reynolds</i> 766 F.2d 698 (2d Cir. 1985), <i>cert. denied</i> , 475 U.S. 1067 (1986).....	20
<i>Sunshine Beauty Supplies, Inc. v. District Court</i> 872 F.2d 310 (9th Cir. 1989).....	20
<i>United States v. Johnson</i> 529 U.S. 53 (2000)	17
<i>Wall Street Associates, L.P. v. Becker Paribas, Inc.</i> 27 F.3d 845 (2d Cir. 1994).....	16
<i>Wilko v. Swan</i> 346 U.S. 427 (1953)	14, 21, 22, 23
STATUTES	
9 U.S.C. § 1 <i>et seq.</i>	4
9 U.S.C. § 9	2, 16, 20
9 U.S.C. § 10(a)	2, 16, 20
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331	2
OTHER AUTHORITY	
S.Ct. Rule 10(a).....	19

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE MATERIALS	
H.R. Rep. No. 96, 68th Cong., 1st Sess. 2 (1924).....	20

PETITION FOR WRIT OF CERTIORARI

Missouri Rivers Services, Inc. respectfully petitions this Court for a Writ of Certiorari to review the decision of the United States Court Appeals for the Eighth Circuit ("Eighth Circuit"), entered in this proceeding on September 12, 2001, in order to resolve a direct conflict between this decision and the decisions of multiple other Circuits on the important federal questions presented herein.

**OPINIONS BELOW**

The Opinion of the Eighth Circuit which gives rise to this Petition is reported at 267 F.3d 848 and is printed in the Appendix at App. 1a through App. 14a. The Order of the Eighth Circuit, dated November 5, 2001, which denied Missouri River Services, Inc.'s Petition for Rehearing and Rehearing En Banc, is reprinted in the Appendix at App. 49a. The Memorandum Opinion of the United States District Court for the District of Nebraska, dated November 17, 1999, which confirmed the Award of Arbitrator but subsequently was reversed by the Eighth Circuit, is reprinted in the Appendix at App. 15a through App. 30a. A previous Memorandum Opinion of the United States District Court for the District of Nebraska, which contains a discussion of the background of the case incorporated by reference into the District Court's November 17, 1999 Memorandum Opinion, is reprinted in the Appendix at App. 31a through App. 45a. The Award of Arbitrator, which the Eighth Circuit vacated by

its decision, is reprinted in the Appendix at App. 50a through App. 57a.

JURISDICTION

The Opinion of the Eighth Circuit is dated September 12, 2001. The Order denying Missouri River Services, Inc.'s Petition for Rehearing and Rehearing En Banc is dated November 5, 2001. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The lower courts possessed subject matter jurisdiction pursuant to the Federal Question Statute, 28 U.S.C. § 1331.

STATUTES INVOLVED IN THE CASE

Section 9 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 9, states in relevant part:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at anytime within one year after the award is made, any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such award unless the award is vacated, modified, or corrected as prescribed in Sections 10 and 11 on this Title.

Section 10 of the FAA, 9 U.S.C. § 10(a), states in relevant part:

In any of the following cases, the United States Court, in and for the District wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –

- (1) where the award was procured by corruption, fraud, or undue means.
- (2) where there was evident partiality or corruption in the arbitrators, or either of them.
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

STATEMENT OF THE CASE

A. Summary of the Case

This case comes to this Court following a four and one-half year arbitration proceeding. This arbitration included no fewer than ten days of hearing during which arbitrator Melinda M. Harper considered thousands of pages of testimony and written exhibits.

Following the conclusion of the evidence, the parties submitted both written and oral closing arguments. The

arbitrator took the matter under submission, and ultimately issued a written award directing Respondent, the Omaha Tribe of Nebraska ("Tribe"), to pay Petitioner, Missouri River Services, Inc. ("MRS"), the sum of \$6,384,435.00, plus interest at the rate of eight percent, compounded annually.

MRS thereupon submitted this award to the United States District Court for the District of Nebraska for confirmation. The District Court, acting through Senior District Judge Lyle E. Strom, correctly concluded that it was not empowered to review the merits of the arbitrator's decision, and confirmed the award.

The Tribe appealed this judgment to the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit"). The Eighth Circuit proceeded to do what Judge Strom said he could not do, and reviewed the merits of the arbitrator's decision. Based on its own view of the merits of the dispute between the parties, and relying solely upon the "cold" record before it, the Eighth Circuit vacated the arbitrator's award.

As the Court has enunciated on many occasions, the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), establishes a liberal federal policy in favor of enforcing agreements to arbitrate. The Eighth Circuit's decision threatens the integrity of the arbitral process, and with it the attainment of this policy objective, by opening up arbitration awards to judicial second-guessing and extended litigation. Moreover, the Eighth Circuit's decision conflicts with the rulings of other United States Courts of Appeals and this Court in two critical ways.

First, under the case law of the Second, Fifth, Seventh, and Ninth Circuits, a court may vacate an arbitration award only upon a showing that one of the grounds listed in the FAA is present. This Court's recent jurisprudence also supports this result. The Eighth Circuit, however, ruled that a court also may vacate an award based upon extra-statutory grounds, and proceeded to do just that. As a result of this conflict, litigants will be faced with the intolerable circumstance of seeking to enforce arbitration awards in a system where the finality and effect of those awards depends upon the forum chosen.

Second, the case law of the Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits establishes that where a question possessing jurisdictional implications is intertwined with the merits of a case, the jurisdictional question should be regarded as an attack on the merits of the case and resolved accordingly. The Eighth Circuit also appeared to agree with the holding, at least prior to the instant case. In the instant case, the Eighth Circuit identified a jurisdictional question: whether the Tribe's waiver of its tribal sovereign immunity was broad enough to permit the relief awarded by that arbitrator. This question was closely intertwined with the merits of the case. Yet, the Eighth Circuit chose to overlook the arbitrator's decision and resolve the question based upon its own analysis and views. This result threatens to significantly erode the Congressional policy of enforcing agreements to arbitrate by enabling the losing party to seek indirect review of the merits of the case under the guise of raising jurisdictional questions.

B. The Agreement

On December 10, 1987, MRS and the Tribe executed an Agreement ("Agreement").¹ (App. at 61-63). The purpose of this Agreement was to provide for the operation of "highstakes bingo and other gaming activities, as well as complimentary [*sic*] businesses" on the Tribe's reservation. (App. at 61).

The Agreement set forth detailed provisions for the resolution of disputes between the parties. The Agreement first required that all disputes which could not be resolved amicably be submitted to arbitration:

In the event any controversy or claim arising out of this Agreement cannot be settled by the parties hereto, such controversy or claim shall be settled by binding arbitration in accordance with the then current rules of the American Arbitration Association.

(App. at 62).

The Agreement then waived the Tribe's immunity from suit as follows:

Owner [the Tribe] hereby waives its sovereign immunity from suit with respect to any dispute arising under this Agreement, but only to the extent of all real and personal property purchased pursuant to this Agreement, and Owner further agrees that judgment upon any arbitration award may be entered in any court having

¹ MRS was known as Streicher & Stearns, Inc. at this time. The Agreement is excerpted in the Appendix due to its length and the fact that many of its provisions are not germane to the issues raised in this Petition.

jurisdiction thereof, and that such court's judgment may result in an executable lien being placed on any such property. Any monetary judgment or award may be satisfied only out of such property and/or out of Owner's share of any future NOP [Net Operating Profits] under this Agreement.

(App. at 62-63).

The Agreement further specified that MRS would retain its rights under the Agreement for so long as was necessary for MRS to satisfy any award or judgment out of Net Operating Profits:

[MRS] and [the Tribe] agree that this Agreement will remain in full force and effect throughout any such binding arbitration or court proceeding(s) and, further, that this Agreement shall continue in effect for so long as it is required for [MRS] to satisfy such judgment, if any, in addition to any other amounts due and payable under this Agreement, out of NOP.

(App. at 63).

Thus, the Agreement specified that MRS could execute against the profits of the gaming operation, even where MRS' relationship with the Tribe had entirely ceased.

MRS performed its obligations under this Agreement in full. The Tribe, however, expelled MRS from the reservation and subsequently contracted with another

company to build and operate the casino. This casino was constructed near the town of Onawa, Iowa.²

C. The Arbitration and Related Judicial Proceedings

On January 30, 1995, MRS filed a Demand for Arbitration with the American Arbitration Association ("AAA"). On March 24, 1995, the Tribe responded to this Demand for Arbitration. (App. at 33).

Preparations for the arbitration then commenced. A site for the arbitration was selected, an arbitrator was chosen, and correspondence and discovery materials were exchanged. (App. at 33).

On February 1, 1996, the orderly resolution of this case took what the United States District Court for the District of Nebraska described as a "tortuous course." (App. at 34). On that date, the Tribe filed a complaint for declaratory relief, injunctive relief, and monetary damages against MRS in its Tribal Court. In this complaint, the Tribe sought to prohibit MRS from participating in the arbitration. The Tribe further asserted as claims for relief each of the counterclaims it previously had filed against MRS in the arbitration. (App. at 34).

Extensive litigation in the Tribal Court, the District Court for Thurston County, Nebraska, and the United

² The Tribe disputed these factual matters in the arbitration proceeding. The arbitrator evidently resolved these disputed factual matters in MRS' favor. Because this Petition for Certiorari does not concern the merits of the dispute between the parties, these factual matters will not be discussed further herein.

States District Court for the District of Nebraska resulted. (App. at 34-38). The United States District Court for the District of Nebraska ultimately issued an order enjoining the Tribe from proceeding with its extraneous litigation against MRS and directed the parties to return to arbitration. (App. at 44-45).

During the course of this litigation, the Tribe questioned whether all claims pending in the arbitration proceeding were subject to arbitration. (App. at 42-43). The United States District Court set a hearing for the purpose of resolving this issue. (App. at 46). The parties subsequently submitted a Stipulation to the District Court. Pursuant to this Stipulation, the parties confirmed that each claim filed by each party in the arbitration was subject to arbitration. (App. at 58-59). On March 4, 1998, the District Court entered an Order approving this Stipulation. (App. at 47-48). This Order established beyond cavil that the arbitrator possessed authority to resolve each claim before her.

The arbitration proceeding continued. Following a total of 10 days of evidentiary hearings and the submission of both written and oral closing arguments, the arbitrator issued her award.

D. The Award of the Arbitrator

On May 12, 1999, the AAA forwarded the Award of Arbitrator to the parties. In this Award, the arbitrator granted one claim for relief filed by MRS and denied the other. (App. at 51). The arbitrator further granted the Tribe an offset for a settlement paid to a third party (App. at 51), and denied the counterclaims filed by the Tribe.

(App. at 52-56). The net result was an order directing the Tribe to pay MRS the sum of \$6,384,435.00, plus interest. (App. at 56). The Award specified that this sum was to be "paid from the Enterprise, which includes all gaming operations on the reservation of the Omaha Tribe of Nebraska (the Property), including specifically the gaming operation at Onawa, Iowa; or from any other funds the Respondent may elect to use." (App. at 51).

E. The Confirmation of the Arbitrator's Award

MRS moved the United States District Court for the District of Nebraska for an order confirming the Award of Arbitrator, and the Tribe moved to vacate the award. (App. at 15). The District Court heard argument on the matter and, on November 17, 1999, issued a Memorandum Opinion.

In this Memorandum Opinion, the District Court concluded it possessed federal question jurisdiction of the dispute between the parties. (App. at 20). The District Court noted that a court's review of an arbitrator's award is "extremely limited." (App. at 22). The Court further noted that under FAA a court may vacate an award only upon a showing that one of four narrowly defined statutory criteria are present in the case. (App. at 22-23).

The Tribe raised only one of these criteria – the allegation that the arbitrator had exceeded her authority – as grounds for opposing the award. (App. at 23). With respect to this allegation, the Court noted that the arbitrator's decision was based upon a lengthy hearing, with numerous exhibits. (App. at 25). The Court further noted

that the arbitrator was required to interpret the Agreement, "which is, at best, ambiguous, including interpretation of the terms 'property' and 'enterprise.'" (App. at 25). The Court correctly concluded that it was not empowered to examine the merits of the arbitrator's decision. (App. at 25). Thus, the Court declined to rule that the arbitrator had exceeded her authority in fashioning the relief set forth in the award.

The District Court also noted that the Eighth Circuit had established other judicially-created criteria for review of arbitration awards. The District Court concluded that the Award of Arbitration satisfied all such criteria. (App. at 27-29).

With regard to the scope of the Tribe's waiver of its tribal sovereign immunity, the Court noted that the Tribe had stipulated that the interpretation of the limitations on this waiver was subject to arbitration, and that the Court entered an order in accordance therewith. (App. at 25). As a result, the Court determined that deference to this aspect of the arbitrator's decision was appropriate. (App. at 25-26).

F. The Decision of the Court of Appeals

The Tribe appealed the District Court's judgment to the Eighth Circuit. The Eighth Circuit heard oral argument and, on September 12, 2001, issued its opinion. *Missouri River Services, Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848 (8th Cir. 2001) (App. at 1-14).

In this opinion, the Eighth Circuit reversed the judgment of the District Court and struck down the Award of

Arbitrator for two reasons. First, the Court determined that the Tribe's waiver of its immunity was not broad enough to permit MRS to execute against the Onawa, Iowa gaming operation, as authorized by the arbitrator. *Missouri River Services, Inc. v. Omaha Tribe of Nebraska*, 267 F.3d at 852-854 (App. at 6-11). The Court specifically ruled that deference to the arbitrator's determination of the same issue was not appropriate because the answer to this question affected the Court's jurisdiction. *Id.* at 852 (App. at 6). ("Because a waiver from suit implicates jurisdictional concerns, a court must satisfy itself that jurisdiction exists").

Second, the Eighth Circuit directly reviewed the merits of the arbitration award. The Eighth Circuit noted that an arbitration award may be set aside based upon the statutory criteria set forth in the FAA. *Id.* at 854-855 (App. at 12-14). The Eighth Circuit further stated that an award may be set aside based upon extra-statutory, judge-made criteria. *Id.* at 854-855 (App. at 12) (stating that an award may be set aside where it fails to draw its essence from the parties' agreement or evidences a manifest disregard for the law). Based upon its own analysis of the merits of the case, and relying completely upon the "cold" record before it, the Eighth Circuit concluded that the Award of Arbitrator failed to draw its "essence" from the Agreement. More specifically, the Eighth Circuit asserted that the Agreement unambiguously barred MRS from executing against the Onawa, Iowa gaming operation. *Id.* at 855. (App. at 13-14).

MRS strongly disagrees with the Eighth Circuit's construction of the Agreement between the parties. As the

District Court correctly noted, this Agreement is ambiguous. *See* discussion *supra* at Part E. MRS believes that the evidence submitted in the arbitration proceeding convincingly demonstrated that the Agreement was broad enough to permit the relief afforded by the arbitrator. The arbitrator evidently reached the same conclusion. The Eighth Circuit, which was unable to take the measure of the witnesses and had access only to a "cold" record, was not well positioned to reassess this conclusion.

The subject of this Petition, however, does not concern the relative merits of the decisions of the arbitrator and the Eighth Circuit. The issue is the authority of the courts to second-guess the arbitrator's resolution of the matter before her. Accordingly, these factual matters will not be discussed further herein.



REASONS FOR GRANTING THE PETITION

MRS respectfully submits that this Court should grant this petition for three reasons:

1. First, the case law of the Second, Fifth, Seventh, and Ninth Circuits holds that a court must affirm an arbitration award which satisfies all criteria set forth in the FAA, and may not impose additional, extra-statutory requirements. This rule accords with the standard principles of statutory construction set forth by this Court on many occasions. Yet, in the instant case the Eighth Circuit ruled that in addition to the statutory criteria, MRS' arbitration award had to satisfy additional, judge-made standards, and based on these additional requirements, struck down the award.

This case presents the Court an opportunity to establish uniform standards for the review of arbitration awards and eliminate the unnecessary confusion which currently besets this important area of the law. This case further offers the Court an opportunity to affirm the favored status of arbitration under federal law and provide parties to arbitration agreements with greater certainty that disputes will be resolved with the economy and efficiency which arbitration is intended to provide.

2. Second, the conflict between circuits highlights uncertainty in the application of this Court's precedents. The notion that a court may strike down an arbitration award which satisfies all criteria set forth in the FAA but (assertedly) violates non-statutory requirements emanates largely from dicta set forth in this Court's decision in *Wilko v. Swan*, 346 U.S. 427 (1953). The Court first criticized this decision for its mistrust of arbitration, and then overruled it, in two subsequent cases. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). Due to these subsequent cases, considerable uncertainty now exists as to what, if any, continuing force the *Wilko* formula possesses. This Court should grant the Petition to resolve this important question.

3. Third, cases from the Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits hold that where a question possessing jurisdictional implications is intertwined with the merits of the case, the jurisdictional question should be regarded as an attack on the merits and resolved accordingly. In the instant case, the Eighth Circuit identified a jurisdictional question in its opinion: whether the Tribe's waiver of its sovereign immunity was broad enough to permit

the relief awarded by the arbitrator. The arbitrator necessarily resolved this question when she issued her award. Yet, the Eighth Circuit chose to overlook the arbitrator's decision and independently resolve this question based upon its own analysis and views.

This case offers the Court an opportunity to ensure uniformity on this important issue. This case further offers the Court an opportunity to affirm the favored status of arbitration under federal law and establish that arbitration awards may not be second-guessed on the merits through the indirect means of reviewing federal jurisdictional questions.

- I. **This Court Should Grant This Petition Because The Eighth Circuit Erroneously Ruled That A Court May Vacate An Arbitration Award Which Satisfies All Criteria Set Forth In The FAA But (Assertedly) Violates Extra-Statutory Requirements Imposed By The Court, And This Ruling Conflicts With The Decisions Of Other Circuits.**
 - A. **This Court Should Grant This Petition Because The Eighth Circuit's Ruling Conflicts With The Decisions Of Other Circuits.**

Judicial review of arbitration awards under the Federal Arbitration Act is strictly limited. The FAA states that an award may be vacated under the following circumstances:

- (1) Where the award was procured by corruption, fraud, or undue means.
- (2) Where there was evident partiality or corruption in the arbitrators, or either of them.

- (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
- (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

In cases where none of these circumstances are present, the court must confirm the award. *Id.* at § 9.

Under the case law of the Second, Fifth, Seventh, and Ninth Circuits, a court may vacate an arbitration award only upon a showing that one of the grounds listed in the FAA is present. *Rocket Jewelry Box, Inc. v. Rocket Gift Packaging, Inc.*, 157 F.2d 174, 175 (2d Cir. 1998) (per curiam) (“Unless the party opposing confirmation can show a statutory basis for vacating, modifying, or correcting the award, the award must be confirmed.”); *Wall Street Associates, L.P. v. Becker Paribas, Inc.*, 27 F.3d 845, 849 (2d Cir. 1994) (“Under the FAA, the validity of an award is subject to attack only on those grounds listed in § 10, and the policy of the FAA requires that the award be enforced unless one of those grounds is affirmatively shown to exist”); *Gulf Coast Industrial Workers Union v. Exxon Company, USA*, 70 F.3d 847, 850 (5th Cir. 1995) (“Under the Federal Arbitration Act . . . we can only disturb an arbitration award on the grounds set out in that Act”);

Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 706 (7th Cir. 1994) (“There is enough confusion in the law. The grounds for setting aside arbitration awards are exhaustively stated in the statute.”); *Mosely, Hallgarten, Estabrook & Weeden v. Ellis*, 849 F.2d 264, 267 (7th Cir. 1988) (“Sections 10 and 11 of the Act set forth the exclusive grounds for vacating or modifying a commercial arbitration award.”); *Lapine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884, 889 (9th Cir. 1997) (“Federal courts can expand their review of an arbitration award beyond the FAA’s grounds when (but only to the extent that) the parties have so agreed”). A panel of the Eighth Circuit, in a case decided prior to the instant proceeding, also endorsed this rule. *DVC-JPW Investors v. Gershman*, 5 F.3d 1172, 1174 (8th Cir. 1993), *reh’g denied* (“Under this Act, federal courts play a limited role in reviewing the decisions of arbitrators and a district court may only vacate arbitration decisions under the narrow set of circumstances set forth in the statute.”).

This result is consistent with the rules of statutory construction endorsed by this Court on many occasions. In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue, judicial inquiry into the statute’s meaning, in all but the most extraordinary circumstances, is finished. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992); *Demarest v. Manspeaker*, 498 U.S. 184 (1991). Further, under the canon *expresio unius est exclusio alterius*, where Congress sets forth exceptions to a rule in the statutory language, the proper inference is that Congress considered the issue of exceptions and limited the statute to the ones set forth. *United States v. Johnson*, 529

U.S. 53 (2000). Both of these well-established maxims of construction support the conclusion that a court charged with reviewing an arbitration award must confirm the award unless one of the exceptions set forth in the text of the statute is applicable.

The Eighth Circuit disregarded these limits on its discretion. The Eighth Circuit asserted that it was entitled to strike down the award based upon additional, judge-made criteria. The Eighth Circuit proceeded to engage in its own analysis of the merits of the parties' dispute. Based upon this analysis, the Eighth Circuit concluded that the arbitration had erred in her resolution of the issues. (App. at 13-14). The Eighth Circuit took this action even though the parties had stipulated that the arbitrator possessed authority to resolve these issues. In so doing, the Eighth Circuit contradicted both the plain language of the FAA and the authorities cited above.

It is conceded that not every circuit follows the rule enunciated above. In addition to the previous decisions of the Eighth Circuit cited by the Eighth Circuit in its opinion, the case law of the First and Eleventh Circuits supports the imposition of limited non-statutory review of the merits of an arbitrator's decision. *Bull HN Information Systems, Inc. v. Hutson*, 229 F.3d 321, 330-331 (1st Cir. 2001) ("Essentially, arbitral awards are subject to review where an award is contrary to the plain language of the contract and instances where it is clear from the record that the arbitrator recognized the applicable law – and then ignored it") (internal citations and quotations omitted); *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 779 (11th Cir. 1993) (holding that award may be vacated if

it is "arbitrary and capricious" or contrary to public policy).

The case law of other circuits represents yet another approach. Under the law of these circuits, the grounds for vacating an arbitration award are not strictly limited to the circumstances set forth in the statute. At the same time, it is unclear whether these circuits would permit a court to engage in the relatively broad second-guessing of the merits of a decision which the Eighth Circuit indulged in the instant case. *See ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1463 (10th Cir. 1995) (holding that "an arbitrator's erroneous interpretations or applications of law are not reversible" and stating that an arbitrator's decision may be overturned only for 'willful inattentiveness to the governing law' "); *Apex Plumbing Supply Co. v. U.S. Supply Co.*, 142 F.3d 188, 193-194 (4th Cir. 1998) (authorizing limited non-statutory review but ruling that even an arbitration decision which disregards an unambiguous contract provision in favor of a conclusion supported by the record as a whole is not subject to judicial second-guessing).

This split between the circuits is precisely why this Court should review this case. *See* S.Ct. Rule 10(a) (stating that the Court may grant review where a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important question). This conclusion further is buttressed by the policy considerations underlying the FAA. The "unmistakably clear" purpose of the FAA is to ensure that the arbitration procedure, when selected by the parties to a contract, be "speedy and not subject to delay and obstruction in the courts." *Prima*

Paint Corp. v. Flood & Conklin Mfg., Co., 388 U.S. 395, 404 (1967). This act was designed to enable parties to avoid the "costliness and delays of litigation." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511-512 (1974), *reh'g denied*, 419 U.S. 885 (1974) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 2 (1924)).

The judicial second-guessing engaged in by the Eighth Circuit undermines this policy objective by encouraging parties to re-argue the merits of an arbitration to the courts. The instant case provides an apt illustration of the problem. After a four and one-half year arbitration proceeding, two and one-half more years of litigation took place before the Eighth Circuit issued its opinion. The end result was that MRS was stripped of its arbitration award, rendering the entire process nugatory. This result came despite the fact that the parties stipulated that the arbitrator possessed authority to resolve all claims before her. The Court should not allow this frustration of the congressional purpose of the FAA to continue.

The significance of this problem is exacerbated by the possibility of forum-shopping. The FAA states that an action to confirm or vacate an arbitration award "may" be brought in the United States District Court within whose territorial jurisdiction the award was made. 9 U.S.C. § 9-10. In keeping with this language, the weight of the authority holds that this provision is permissive, not mandatory. *E.g.*, *Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 706 (2d Cir. 1985), *cert. denied*, 475 U.S. 1067 (1986); *In Re VMS Securities Litigation*, 21 F.3d 139, 145 (7th Cir. 1994); *Apex Plumbing Supply Co. v. U.S. Supply Co.*, 142 F.3d 188, 191-192 (4th Cir. 1998). *Contra*, *Sunshine*

Beauty Supplies, Inc. v. District Court, 872 F.2d 310, 312 (9th Cir. 1989).

The standard of review to be applied to an arbitration award is one of the most important questions that can arise under the FAA. This Court should accept the opportunity provided by this case to resolve the ongoing split between circuits on this issue. The depth of this split and the absence of any trend toward a single answer makes it evident that the Courts of Appeals are not likely to resolve this issue without direction from this Court. Action by this Court is imperative.

B. This Conflict Between Circuits Highlights Uncertainty In The Application Of This Court's Precedents.

The notion that a court may strike down an arbitration award which satisfies all criteria set forth in the FAA but (assertedly) violates non-statutory, judge-made criteria emanates largely from dicta appearing in this Court's decision in *Wilko v. Swan*, 346 U.S. 427 (1953). The Court criticized this decision for its mistrust of arbitration, and then overruled it, in two subsequent cases. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). Due to these subsequent cases, considerable uncertainty now exists as to what, if any, continuing validity the *Wilko* formula possesses. This Court should grant this Petition to resolve this important question.

In *Wilko*, the question was whether claims under the Securities and Exchange Act were subject to arbitration. The Court expressed considerable ambivalence toward

arbitration in its analysis of this question. The Court concluded that in view of these drawbacks to arbitration, securities acts claims were not subject to arbitration. *Id.* at 437.

In the course of expressing this ambivalence regarding arbitration, the *Wilko* Court stated that a failure of the arbitrators to decide in accordance with the provisions of the Securities Act could constitute grounds for vacating the award if that failure was made clearly to appear. The Court termed that such a failure "manifests disregard" of the law. *Id.* at 436.

In a perceptive opinion, the United States Court of Appeals for the Tenth Circuit noted that the courts subsequently had employed various verbal formulas encapsulating the notion of reviewing the merits set forth in this dictum. *Jenkins v. Prudential-Bache Securities, Inc.*, 847 F.2d 631, 634 (10th Cir. 1988). Included among these formulas was the requirement that the award draw its "essence" from the contract. *Id.* This was the very formula which the Eighth Circuit used to vacate the arbitration award in the instant case. *Missouri River Services, Inc. v. Omaha Tribe of Nebraska*, 267 F.3d 848, 855 (8th Cir. 2001) (App. at 13).

This Court subsequently criticized *Wilko* and the general suspicion of arbitration expressed therein: "it is difficult to reconcile *Wilko's* distrust of the arbitral process with this Court's subsequent decisions involving the Arbitration Act." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 231 (1987). Two years later, the Court overruled *Wilko*, albeit on grounds not at issue on

the instant case. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 485 (1989).

This action places the continuing viability of *Wilko's dicta* regarding the substantive review of arbitration awards into question. In 1994, the United States Court of Appeals for the Seventh Circuit directly addressed this issue. The Seventh Circuit, speaking through Judge Posner, first criticized *Wilko* as inconsistent with current Supreme Court decisions: "created *ex nihilo* to be a non-statutory ground for sitting aside arbitral awards, the *Wilko* formula reflects precisely that mistrust of arbitration for which the Court in its two *Shearson/American* opinions criticized *Wilko*." *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994). Judge Posner further stated in persuasive terms:

We can understand neither the need for the formula nor the role that it plays in judicial review of arbitration (we suspect none – that it is just words). If it was meant to smuggle review for clear error in by the back door, it is inconsistent with the entire modern law of arbitration. If it is intended to be synonymous with the statutory formula that it most nearly resembles – whether the arbitrators "exceeded their powers" – it is superfluous and confusing. There is enough confusion in the law. The grounds for setting aside arbitration awards are exhaustively stated in the statute. Now that *Wilko* is history, there is no reason to continue to echo its gratuitous attempt at nonstatutory supplementation.

Id.

MRS submits that Judge Posner was correct in stating that there is enough confusion in the law. The Seventh

Circuit, however, is just one circuit among many. Only this Court can resolve the current confusion on this important issue. MRS respectfully submits that the Court should accept this opportunity to complete this task.

II. This Court Should Grant This Petition Because The Eighth Circuit Erroneously Ruled That Where A Question Possessing Jurisdictional Implications Is Intertwined With The Merits Of An Arbitration Decision, A Federal District Court Not Only May But Must Disregard The Arbitrator's Ruling, And This Decision Conflicts With The Decisions Of Other United States Courts Of Appeals.

Established law holds that where a question possessing jurisdictional implications is intertwined with the merits of a case, the proper course of action is to assume jurisdiction exists and deal with the obligation as a direct attack on the merits of the plaintiff's case. In the instant case, the Eighth Circuit identified a question with jurisdictional implications: whether the Tribe's waiver of its sovereign immunity was broad enough to permit the relief awarded by the arbitrator. This being so, the Eighth Circuit should have deferred to the decision of the arbitrator, who possessed sole authority to resolve the case on its merits. Instead, the Eighth Circuit chose to disregard the arbitrator's decision and resolve this question based upon its own views. This Court should review this case to resolve the conflict between circuits created by the Eighth Circuit's decision.

The decisions of the Fifth, Seventh, Ninth, Tenth, and Eleventh United States Courts of Appeals hold that where

a question possessing jurisdictional implications is intertwined with the merits of a case, the jurisdictional question should be regarded as an attack on the merits and resolved accordingly. *Chatham Condominium Ass'n v. Century Village, Inc.*, 597 F.2d 1002, 1011 (5th Cir. 1979); *Pratt Central Park Ltd. Partnership v. Dames & Moore, Inc.*, 60 F.3d 350, 360 n. 8 (7th Cir. 1995); *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983); *Bell v. United States*, 127 F.3d 1226, 1228 (10th Cir. 1997); *Lawrence v. Dunbar*, 919 F.2d 1525, 1529-1530 (11th Cir. 1990). The Eighth Circuit appeared to agree with this position, at least prior to the instant case. See *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990) (stating that a court should not rule on a jurisdictional question in advance of trial where "the jurisdictional issue is so bound up with the merits that a full trial may be necessary to resolve the issue.").

A jurisdictional question is "intertwined" with the merits of the case if a decision on the jurisdictional matter effectively would decide an element of the cause of action. *Lawrence v. Dunbar*, 919 F.2d at 1529; *Eaton v. Dorchester Dev. Co.*, 692 F.2d 727, 734 (11th Cir. 1982).

Under these circumstances, the proper course of action for the district court is "to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case." *Lawrence*, 919 F.2d at 1529 (quoting *Williamson v. Tucker*, 645 F.2d 404, 415 (5th Cir.), cert. denied, 454 U.S. 897 (1981)). The jurisdictional issue in such a case should be "referred to the merits, for it is impossible to decide one without the other." *Chatham*, 597 F.2d at 1011-1012. A court may not resolve the merits of

the case through the guise of determining jurisdiction. *Pratt*, 60 F.3d 350, 360 n. 8.

The application of this rule to the instant case is clear. The Eighth Circuit identified a jurisdictional question in its opinion: whether the Tribe's waiver of its sovereign immunity was broad enough to permit the relief awarded by the arbitrator. The parties stipulated that this question was subject to arbitration, and the arbitrator necessarily resolved this issue when she issued the award. This being so, the proper course on appeal was to view the Tribe's continuing argument concerning the scope of the waiver of its tribal immunity as an indirect attack upon the merits of the arbitration award, and defer to the decision of the arbitrator, who possessed sole authority to decide the case on its merits.

Yet, the Eighth Circuit chose to overlook the arbitrator's decision and resolve this question based upon its own analysis and views. This decision threatens to introduce disorder into the law, as attorneys and litigants review the Eighth Circuit's published decision and ask lower courts to do the same.

This decision further threatens to erode the protection properly afforded to arbitration awards. The FAA establishes a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Const. Co.*, 460 U.S. 1, 24 (1983); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). The "unmistakably clear" purpose of the FAA was to ensure that arbitration procedure, when selected by the parties to a contract, be "speedy and not subject to delay or

obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967).

The Eighth Circuit's opinion threatens to significantly diminish the protection afforded to agreements to arbitrate by enabling the losing party to seek indirect review of the merits of the case under the guise of raising jurisdictional questions. The question decided by the Eighth Circuit was "intertwined" with the merits of the case; indeed it was the *same* question as resolved on the merits. This "backdoor" assault on the role of the arbitrator is starkly inconsistent with the established federal policy of encouraging the expeditious resolution of disputes through arbitration.

It is conceded that the factual background of the cases cited above was different than in the instant case. In each of the previous cases, the ultimate question was the procedure to be used to resolve an issue affecting both jurisdiction and the merits, and the division of responsibility between judge and jury for making the determination. In the instant case, however, the decision on the merits already had been made. The difference does nothing to distinguish the cases and show that the established principal should not apply in this case. Indeed, it merely serves to underscore the excesses of the Eighth Circuit's decision.

The decision of the Eighth Circuit directly conflicts with numerous previous circuit court decisions. This case offers the Court an opportunity to affirm the favored status of arbitration under federal law and establish that arbitration awards may not be second-guessed on the merits through the indirect means of reviewing federal

jurisdictional questions. MRS respectfully submits that the Court should take this opportunity and establish clarity in this important area of the law.



CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Writ of Certiorari.

Dated this 4th day of February, 2002.

Respectfully submitted,

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APPENDICES

OPINION OF THE 8TH CIRCUIT – UNITED STATES
COURT OF APPEALS 1a

Memorandum Opinion dated 11/17/99 15a

Memorandum Opinion dated 10/07/97 31a

ORDER: Re: Determent of Issues Subject to Arbitra-
tion dated 11/13/97..... 46a

ORDER: Re: Arbitration of Issues dated 03/04/98.. 47a

ORDER Denying Petition for Rehearing and for
Rehearing En Banc 49a

AWARD of Arbitrator 50a

STIPULATION dated 02/23/98 58a

Excerpts of AGREEMENT 61a