IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

WELLS FARGO BANK, Plaintiff. vs. LOUIS MAYNAHONAH, MARQUITA CARATTINI, KAREN HEMINOKEKY, in their official capacities as members of the Apache Business Committee, GENE FLUTE, RONALD AHTONE, JR., and AUSTIN KLINEKOLE, in their official capacities as members of the Apache Gaming Commission; and RICHARD J. GRELLNER, in his official capacity as hearing officer for the Apache Gaming Commission Defendants.	)	Case No. CIV-11-648-D

DEFENDANTS' RESPONSE TO PLAINTIFF WELLS FARGO BANK'S EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION AND BRIEF IN SUPPORT

Jon E. Brightmire, OBA No. 11623
Bryan J. Nowlin, OBA No. 21310
DOERNER, SAUNDERS, DANIEL & ANDERSON, L.L.P.
Two West Second Street, Suite 700
Tulsa, Oklahoma 74103
(918) 582-1211 (telephone)
(918) 925-5290 (facsimile)
bnowlin@dsda.com
Attorneys for Defendants, Louis Maynahonah, Marquita Carattini, and Karen Heminokeky in their official capacities as members of the Apache Business Committee

Joined by: Richard J. Grellner, OBA No. 15521
434 NW 18th
Oklahoma City, OK 73103
Ph: 405-834-8484
rjgrellner@hotmail.com
Attorney for Ronald Ahtone, Austin Klinekole, and Richard Grellner, in their official capacities for the Apache Gaming Commission

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Defendants Louis Maynahonah, Marquita Carattini, and Karen Heminokeky, sued in their official capacities as members of the Business Committee of Apache Tribe of Oklahoma ("the Business Committee defendants"), joined by Defendants Ronald Ahtone, Jr., Austin Klinekole, and Richard Grellner[1], in their official capacities as members of the Apache Gaming Commission ("the Gaming Commission" defendants) respond in opposition to the Emergency Motion for Temporary Restraining Order and Preliminary Injunction filed on July 15, 2011 (Doc. No. 34), and would show the Court as follows:

Introduction:

Wells Fargo (and attempted intervenor-plaintiff TGS Anadarko, LLC) seek to restrain a tribal government agency from conducting its Congressionally mandated duty of licensing vendors within Indian country. TGS Anadarko, LLC is a former licensee and presently has an application for renewal of license before the Gaming Commission. The Gaming Commission unquestionably has jurisdiction over licensing, but Wells Fargo argues for TGS, that the Tribe has subcontracted in total its licensing ability to private arbitration. Such delegation is not contemplated by IGRA or the State Compact, and would privatize what is supposed to be an exclusively tribal process. State Compact codified at Okla. Stat. tit. 13A §281, Part 7(A). While the Motion provides much irrelevant background information to the present dispute it does not highlight the close relationship between TGS and Wells Fargo which has existed prior to the formation of TGS. When the largest bank in the United States sought to loan money to a company

[1] Defendant Gene Flute is no longer a member of the Apache Gaming Commission and as a result should not be a party defendant.

called KAGD, LLC, it brought in a friend and former Wells Fargo employee Rob Medeiros who formed TGS Anadarko, LLC. Wells Fargo oversaw the negotiation and drafting of the Gaming Equipment Lease which is now subject of the Amended Complaint and the second arbitration initiated by Wells Fargo and TGS against the Apache Tribe of Oklahoma. TGS' investors are also customers and friends of Wells Fargo. In other words, Wells Fargo in supposedly seeking to provide money to KAGD, eventually loaned money to the Tribe, and a number of Wells Fargo's own friends, all secured with the cash-flow from the Tribe's casino. Wells Fargo would have this Court believe that the tribal government's resistance to these arrangements is based on animosity to the previous administration. Not true. Each deal brokered by Wells Fargo served and secured Wells Fargo and its friends to the severe detriment of the financial health and stability of the Tribe's gaming enterprise. The Tribe was forced to operate with sub-standard slot machines, and a debt incurred to pay operating expenses, and now multiplied litigation to seek enforcement of not only those contracts but to privatize and negate the ability of the Tribe's government and regulatory agencies to function.

An important Congressional policy behind IGRA is to provide for strong regulation to protect Indian gaming from a criminal element. 25 U.S.C. §2702 (2). IGRA and NIGC regulations require background checks of vendors and most persons who receive payment from direct gaming revenues. While it may seem trivial to the largest bank in the United States especially when faced by a relatively impoverished Indian tribe, the background checks, licensing requirements, and tribal regulatory authorities themselves all exist to promote the Congressional goal of protecting tribal

gaming revenues to ensure that the revenues are used for the benefit of the Tribe rather than outsiders. If a person or corporation uses the license of another, it is the same as if a background check had never been conducted. The analogy is clear. If Honest Gaming has a contract to provide services to a Tribe then it requires a vendor license from the Tribe. Should Good Gaming disguise an assignment to Criminal Gaming, wherein the Tribe continues to believe that it does business with Honest Gaming, but Criminal Gaming is the legal counter-party and actually receives revenues as well, then the purpose of IGRA is thwarted, the Tribe's revenues are endangered, and the entire purpose of background checks has been avoided. Such is the nature of the Gaming Commission's dispute with TGS regarding its Assignment to Wells Fargo, if it was more of then a security interest then Wells Fargo should have obtained a license.

Factual Background

The defendants disagree with the characterization of the factual background contained within the Motion. [Plaintiff's Emergency Motion at p. 2 – 9]. Much of the offered background is irrelevant to the restraining order sought against the Gaming Commission defendants (and presumably the Business Committee defendants as an appellate body for the Apache Gaming Commission). Rather than provide the complete "other" side of the story, the defendants will expeditiously state to this Court the nature of the License Review sought by the Apache Gaming Commission.

The plaintiff is not scheduled for any hearing before the Gaming Commission or defendant Grellner. A hearing is scheduled regarding TGS only for July 26, 2011 at

10:00 am, per the request of TGS to reschedule the hearing to accommodate its new counsel Colin Tucker's schedule.

TGS Anadarko, LLC and Wells Fargo Bank, NA in the past have recognized the authority of the Gaming Commission to render decisions regarding licensing, including of those that are parties to agreements with the Tribe. The Gaming Equipment Lease for which Wells Fargo claims that any licensing dispute must be subject of private arbitration rather than tribal government was originally signed by Kevin Kean on behalf of KAGD, LLC. As compensation for the assignment to TGS (which was required by the Loan Agreement with the Tribe), KAGD was to receive funds through a Depository Agreement. When the Gaming Commission revoked KAGD's license, Wells Fargo and TGS agreed that KAGD would receive no revenue from the casino. [Exhibit 1, Waiver of Proceeds].

Wells Fargo and potential intervenor plaintiff TGS at that time recognized the authority of the Apache Gaming Commission to issue, revoke, and suspend licenses as well as prevent payment of any gaming revenues to unlicensed vendors such as KAGD. The Gaming Ordinance and State Compact provide that unlicensed vendors are not permitted to receive any gaming revenues. State Compact Part 10(B)(6); Apache Gaming Ordinance § 301(A).

The Gaming Commission unquestionably determined that Wells Fargo, for the purpose of providing financing, was entitled to an exemption from licensing requirements per the State Compact. Wells Fargo also unquestionably informed the Gaming

Commission that it was to provide financing to TGS as well, and the Commission does not dispute that at that time it recognized the financing exemption for TGS as well.

The present dispute is best exemplified by the e-mail from Fellis Gallues to Gaming Commission employee dated May 1, 2008. This is the only communication produced by Wells Fargo at any time wherein the plaintiff informs the Tribe that it will take an assignment of the Gaming Equipment Lease from TGS (after it was assigned to the Tribe). Ms. Gallues states:

> I know you are diligently working on all the licensing requests related to the transactions with Wells and TGS and Kevin. I know you are reviewing the financing license for Wells, and as we discussed we would not be applying for a vendor license at this time as we will not be participating in that capacity.

[Exhibit 2, May 1, 2008 Gallues E-Mail]. Ms. Gallues then requests that the AGC regurgitate certain language to please Wells Fargo's lawyers, which included an acknowledgment that if Wells Fargo took control of the slot machines it would do so only after consultation with the Apache Gaming Commission and potentially obtaining a license. There is no evidence that Wells Fargo ever received the requested language or acknowledgment from the Gaming Commission in 2008 or any time subsequent. This e-mail (also attached to the Amended Complaint as Exhibit 20) is an acknowledgment from Wells Fargo that the Gaming Commission would have jurisdiction over Wells Fargo for licensing purposes (as Wells Fargo stated that it would obtain a license), if it ever operated the machines pursuant to an assignment. The issue presented by the Gaming Commission in April, 2011 and the Tribe before the Gaming Commission is that the

language of the assignment is unconditional, vested title to the slot machines to Wells Fargo, and did not allow reference to other documents for integration, and hence required Wells Fargo to obtain a license. Wells Fargo has produced no evidence that the actual assignment was ever reviewed by the Gaming Commission.

Whether a contract constitutes an outright assignment or a mere security interest is a question of law on which reasonable minds may differ. Wells Fargo in its objection to the Gaming Commission e-mailed on July 8, 2011 and argued that *Stillwater National Bank v. CIT Group Equipment Financing, Inc*., 383 F.3d 1148 (10th Cir. 2004) wherein the Tenth Circuit overturned a decision from the Northern District which had construed a contract as an assignment rather than a security interest supported their position for an exemption. [Exhibit 3, E-Mail from Miranowski to Grellner July 8, 2011]. The Gaming Commission as the sole regulatory authority in the Tribe's Indian country is the only body with authority to decide this question.

Wells Fargo's cohort TGS Anadarko, LLC is a former licensee with the Gaming Commission and has at present an application for renewal of license pending with the Gaming Commission. The Petition for License Review seeks to resolve the renewal of license by providing a temporary license to Mr. Medeiros/and or TGS to receive return of the slot machines which the Tribe does not wish to possess. [Exhibit 5 Petition for License Review, TGS Application attached as Exhibit 4].

After the filing of the Amended Complaint, and as a result of written objection by Wells Fargo directed to defendant Grellner as hearing officer, the Gaming Commission through its hearing officer bifurcated all issues regarding Wells Fargo from TGS [Exhibit

4, Bifurcated Hearing Order July 14, 2011] There is no hearing presently scheduled as to Wells Fargo. Instead, the hearing officer requested information as to whether Wells Fargo placed TGS in default of its loan (as would be expected if it owned a security interest in the collateral which the plaintiff claims to seek protection).

The Petition for License Review was submitted to provide greater clarity to the license review process and provide specific notice to Wells Fargo and TGS of what issues were of concern to the Tribe. The Petition for License Review does not assert any claim for damages or injunctive relief against Wells Fargo or TGS. [Exhibit 5, Petition for License Review] Instead, the Petition for License Review is the Tribe asking the Gaming Commission to review the facts of the TGS/Wells Fargo assignment and certain issues related to slot machines provided to the casino, and issue a penalties if appropriate. The Gaming Commission policies and procedures allow for the imposition of penalties as noted by the Motion and Amended Complaint.

Wells Fargo also includes an irrelevant suggestion that the Business Committee “hid” the April 26, 2011 Resolution Regarding Unlicensed Vendors from Wells Fargo “and Judge Brett.” While equally irrelevant, the Tribe has its own issues with the lack of cooperation displayed by Wells Fargo during the discovery process in the previous arbitration in which hundreds of documents were produced after the extended deadline and only after a motion to compel. To be clear, the Business Committee never made any effort to “hide” its resolution regarding Apache law. The resolution was not relevant to any issue in the original arbitration.

The Gaming Commission has attempted to provide greater due process than the minimal level required by the Gaming Commission's own Policies and Procedures VI. Penalties § A(2)(B). fact, the Gaming Commission's policies state that it may enter findings including a penalty, provide notice to the penalized entity, and then if the party disagrees with the ruling a hearing may be requested before the Commission. In this instance, the Commission provided notice to Wells Fargo beginning on April 13, 2011 and continuing thereafter through multiple extensions on the hearing date, including dates in May, 2011 which were set even before the filing of the original Complaint in this matter.

Standard of Review for Injunctive Relief:

"To obtain a preliminary injunction, the movant must show: (1) a substantial likelihood of success on the merits; (2) irreparable harm to the movant if the injunction is denied; (3) the threatened injury outweighs the harms that the preliminary injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *Gen. Motors Corp. v. Urban Gorilla, LLC,* 500 F.3d 1222, 1226 (10th Cir. 2007). In this action, Wells Fargo seeks to restrain the actions of a tribal regulatory agency, therefore a heightened standard should be applied in relation to public policy. *Union Carbide Agricultural Products Co. v. Costle,* 632 F.2d 1014, 1018 (2nd Cir. 1980) (less vigorous fair ground for litigation standard should not be applied when moving party seeks injunction against government action). *Medical Soc. of State of N. Y. v. Toia*, 560 F.2d 535, 538 (2nd Cir. 1977) (where public interest is adversely affected which

cannot be compensated by bond, moving party undertakes a greater burden of persuasion). The Gaming Commission's duty to regulate is non-delegable by law. State Compact, Part 7(A) ("The Tribe and TCA *shall* be responsible for regulatory activities pursuant to this Compact.")(emphasis added).

1. The Apache Gaming Commission has the right to determine its own jurisdiction over Wells Fargo and TGS.

In *Iowa v. Mut. Ins. Co. v. LaPlante*, the United States Supreme Court affirmatively recognized that jurisdiction over non-Indians doing business on tribal land is an integral component of tribal sovereignty:

> Tribal authority over the activities of non-Indians of reservation lands is an important part of tribal sovereignty . . . Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty or federal statute.

480 U.S. 9, 18 (1987).

Earlier in *Montana v. United States*, 450 U.S. 544 (1981), the Supreme Court did, however, set forth two exceptions to the general rule that the power to regulate nonmembers' activities was beyond a tribe's scope of authority. First, the Court concluded that even on fee lands within reservation boundaries, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 566. Second, the Court concluded a "tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or

has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.*

In *Plains Commerce Bank v. Long Family Cattle* the Supreme Court focused on the first *Montana* exception, which permits a tribe to exercise jurisdiction over "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 128 S.Ct. 2709 (2008)The Court held because a tribe has no authority to regulate the sale of fee lands, the tribal court could not have jurisdiction: "According to our precedents, 'a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.'… We reaffirm that principle today and hold that the Tribal Court lacks jurisdiction to hear the Longs' discrimination claim because the Tribe lacks the civil authority to regulate the bank's sale of its fee land." *Plains Commerce Bank* at 2720.

The Court emphasized the primacy of *Montana*'s general rule over its exceptions and emphasized that any assertion of tribal jurisdiction must be justified by its effect on tribal self-rule. "The logic of *Montana* is that certain activities on non-Indian fee land (say, a business enterprise employing tribal members) or certain uses (say, commercial development) may intrude on the internal relations of the Tribe or threaten tribal self-rule. To the extent that they do, such activities or land uses may be regulated." *Id.* at 2724. The Court held that a mere sale of fee land from one non-member to another does not meet the *Montana* rule. "Once the land has been sold in fee simple to non-Indians and passed beyond the tribe's immediate control, the mere resale of that land works no additional intrusion on tribal relations or self-government." *Id.* at 2724.

The Tribe's relationship with Wells Fargo involves Indian gaming which is vital to the Tribe's economic development. Furthermore, the Tribe at Wells Fargo's request places its police powers at the disposal of any winner of an arbitration – presumably for the collection of an award or seizure of property on the Tribe's trust lands. These are vital governmental interests for which a small "t" tribal forum must exist or a void will exist in Indian Country. The Indian Gaming Regulatory Act mandates sole regulatory authority to Indian tribes to police gaming and vendors of gaming. "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5); *see also*, 25 U.S.C. §§ 2710(d)(1)(A)(ii), (b)(2)(F)(ii). In providing financing to an Indian gaming enterprise, Wells Fargo like any other person doing business with an Indian gaming enterprise, consents to the Tribe's regulatory jurisdiction. As noted by Montana and subsequent U.S. Supreme Court precedent, a tribe's adjudicatory jurisdiction over non-members is co-extensive with its regulatory jurisdiction over non-members.

2. Wells Fargo cannot show irreparable harm warranting immediate injunctive relief.

Wells Fargo cannot show irreparable harm of any kind as (i) there is no evidence as to how the Gaming Commission would rule if allowed, and (ii) the Tribe does not assert claims which are subject to arbitration. See State Compact, Part 7(A). Wells Fargo which has objected to the Gaming Commission's jurisdiction in writing, by providing a

case, and through correspondence, has not obtained a ruling from the Gaming Commission as to any objection (which though made has never been filed in any form resembling a legal brief).

Wells Fargo claims that it has shown a likelihood of success on the merits primarily due to the arbitration clause with the Gaming Equipment Lease. First, Wells Fargo argues that the clause is broad and all-encompassing and that the question of arbitrability should be decided by arbitrators rather than this Court. However, that would apply to claims which are susceptible of falling within the definition of claim. Regulatory action by the Gaming Commission does not fit within the definition of "Claim." There is no mention of a license within the definition of Claim. The Apache Tribe's Gaming Ordinance itself makes no provision for license issues to be subject to private arbitration nor does the State Compact.

Furthermore, such a ruling would blatantly violate the public policy announced by Congress found within the Indian Gaming Regulatory Act as well as Supreme Court recognizing the importance of tribal self-government itself to suggest that the Tribe can contract away its regulatory powers over casino vendors – to vendors. By way of analogy, Wells Fargo would never argue that if it holds deposits for the U.S. government in a simple bank account subject to a depository agreement providing for "all disputes to be within arbitration" that suddenly the Federal Reserve has agreed to arbitrate all of its oversight and regulatory obligations over Wells Fargo before a private and non-governmental panel. Such a contention would be ludicrous. Similarly, merely because IGRA and the State Compact do not specifically disallow arbitration (but the Compact

does disallow delegation), it does not mean that arbitration of such disputes are permitted, let alone that a Court may enforce such arbitration of such issues which are against public policy.

The issues within the Petition for License Review as to Wells Fargo and TGS do not fall within even the broad definition of "Claim" found in the Gaming Equipment Lease. Claim is defined as "any dispute, claim, question or disagreement between the Owner and Lessee, that is directly or indirectly related to the Lease whether at law or equity, whether arising as a matter of contract or tort…" [Gaming Equipment Lease § 22, Exhibit 17 to Amended Complaint]. However, neither the Tribe nor Gaming Commission assert a "claim." The Tribe does not assert a cause of action in law or equity, no injunctive relief or damages are sought at all. Instead, a civil penalty may be ordered for violation of the Tribe's regulations and ordinances, a regulatory proceeding which as a government function would be more closely aligned with criminal law (as the Commission has the exclusive right to enforce the Tribe's regulations).

Wells Fargo then asserts that unless a restraining order issues that it will be required to expend resources appearing at a hearing which addresses only TGS. Such a claim makes no sense, as Wells Fargo has no interest in TGS (beyond apparent goodwill and friendship) and supposedly seeks only the return of its collateral rather than protection of its friends in the gaming industry. However, the Petition for License Review seeks the Gaming Commission to issue a temporary license and render a determination as to TGS and/or its principal Rob Medeiros to allow the return of the slot machines (the collateral) to which Wells Fargo claims an interest. The Tribe has absolutely no interest

in retaining the machines and would like to return them, but is not presently permitted to do so by the Gaming Commission. A private arbitration panel does not have the power to issue a license allowing the return of machines.

Wells Fargo has not explained how it will be harmed by a Gaming Commission hearing or ruling which relates solely to TGS. Indeed, Wells Fargo and TGS are represented by separate counsel. Wells Fargo claims that the Assignment it received from TGS is only a security interest and not an actual assignment rendering Wells Fargo a counter-party to a casino vendor agreement. Wells Fargo claims that it is not the owner of the collateral and only seeks its safe return.

3. The potential harm to the Tribe outweighs any harm to Wells Fargo.

Wells Fargo argues that the government of the Apache Tribe of Oklahoma will suffer no irreparable harm if its judicial branch is not permitted to act on a petition validly submitted to it according to Apache law. As noted above, Wells Fargo voluntarily does business in Indian country and voluntarily does business with TGS Anadarko, LLC within the Tribe's casino. The Gaming Commission is unquestionably the tribal regulatory authority under the State Compact and its ability to protect the Tribe will be irreparably diminished should even a temporary injunction issue. State Compact, Part 7(A). Indeed, every tribal gaming commission in Oklahoma (as well as every individual incapable of passing a background check) will be on notice that the mere existence of an arbitration clause in a vendor's contract will privatize all aspects of tribal regulation.

The Eighth Circuit, in holding that state law claims may not be used to overturn a tribal gaming commission's licensing decision noted, "The purpose of Congress in requiring background checks could be thwarted if retained counsel were inhibited in discussing with the tribe what is learned during licensing investigations, for example. Some causes of action could have a direct effect on the tribe's efforts to conduct its licensing process even where the tribe is not a party." *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 550 (8th Cir. 1996).

A similar result here would completely defeat the purpose of the State Compact and IGRA. The harm to the Tribe will be great, the harm to every other tribal regulatory agency will be immeasureable and not subject to quantification.

4. The public interest favors tribal self-government and weighs against granting the injunction.

There is nothing about this case which shows that the public interest would be served by issuing a preliminary injunction. Indeed, the granting of an injunction in this case would thwart the very purposes of the tribal courts and would "impair the authority of tribal courts," such actions which the Supreme Court has cautioned against. *See, Iowa Mutual v. LaPlante,* 480 U.S. 9, 15 (1987). Injunctive relief would forever neuter every tribal regulatory agency in the State of Oklahoma.

Absent injunctive relief, the Tribe will be irreparably harmed. Federal courts have held that invasions of Tribal sovereignty constitute irreparable harm. *Wyandotte Nation v. Sebelius*, 443 F.3d at 1255 ("We have repeatedly stated that such an invasion of tribal sovereignty can constitute irreparable injury."). As the Tenth Circuit has stated:

> Recognizing the sovereign status of the Kiowa Tribe, we are convinced the Tribe has made a sufficient showing of irreparable harm as a matter of law. First, the seizure of tribal assets, including severance taxes owed to the Tribe, and the concomitant prohibition against full enforcement of tribal laws, significantly interferes with the Tribe's self-government. *See Seneca-Cayuga Tribe v. Oklahoma*, 874 F.2d 709, 716 (10th Cir. 1989) (finding irreparable injury where *threatened* loss of revenues and jobs created "prospect of significant interference with [tribal] self-government").

Kiowa Indian Tribe of Oklahoma v. Hoover, 150 F.3d 1163, 1171-72 (10th Cir. 1998). *See also Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1251 (10th Cir. 2001) (holding that infringement of tribal sovereignty constitutes irreparable injury because “it [can] not be adequately compensated for in the form of monetary damages.”). The Federal District for Kansas has also held that the public has a significant interest in “assuring the viability of tribal self-government, self-sufficiency, and self-determination.” *See Winnebago v. Stovall*, 205 F.Supp.2d 1217, 1223 (D. Kan. 2002).

In this matter, should an injunction issue, the status quo would be altered and would effectively deprive the Tribe of the Gaming Commission to ever function. The term status quo is defined by the reality of the existing relationship between the parties, regardless of whether the existing status and relationships may ultimately be found to be in accord or not in accord with the parties’ legal rights. *See Winnebago v. Stovall*, 205 F.Supp.2d 1217, 1221 (D. Kan. 2002) *citing to SCFC ILC v. Visa USA*, 936 F.2d 1096, 1098 (10th Cir. 1991).

5. Wells Fargo should be required to post-bond.

The potential amount in controversy (should the Gaming Commission find disgorgement is appropriate) is approximately $2.1 million dollars. However, the ability of a criminal or undesirable element to invade the Tribe's Indian country should arbitration clauses lead to the privatization of tribal regulation is an immeasureable threat. If an injunction issues wrongfully, the Tribe will be harmed by the invasion of its right to self-government and having to expend significant resources in arbitrating against this issue against he largest bank in the United States with unlimited resources. It is therefore appropriate for this Court to require the issuance of a bond to protect the Tribe should the injunction issue, and ultimately wrongfully, to the detriment of the Tribe.

6. Tribal Exhaustion is required before this Court grants either injunctive or declaratory relief.

As noted in the concurrently filed Motion to Dismiss, Wells Fargo (and TGS) are required to exhaust tribal remedies before receiving relief in this Court In *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) the Supreme Court held:

> [T]he existence and extent of a tribal court's jurisdiction [over non-Indians] will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions. We believe that examination should be conducted in the first instance in the Tribal Court itself.

Id. at 855-56. The tribal exhaustion rule "holds that when a colorable claim of tribal court jurisdiction has been asserted, a federal court may (and ordinarily should) give the tribal court precedence and afford it a full and fair opportunity to determine the

extent of its own jurisdiction over a particular claim or set of claims." *Ninigret Dev. Corp. v. Narranganset Indian Wetuomuck Housing,* 207 F.3d 21, 31 (1st Cir. 2000). The Tenth Circuit has ruled, "as a matter of comity, a federal court should not exercise jurisdiction over cases arising under its federal question or diversity jurisdiction, if those cases are also subject to tribal jurisdiction, until the parties have exhausted their tribal remedies." *Texaco, Inc. v. Zah,* 5 F.3d 1374, 1376 (10th Cir.1993) (*quoting Tillett v. Lujan,* 931 F.2d 636, 640 (10th Cir.1991)). Tribal exhaustion will not apply only in three limited circumstances: (a) where tribal court is motivated by harassment or bad faith, (b) where trial court violates express jurisdictional prohibitions in law, (c) or where tribal exhaustion would be futile. *Id. citing National Farmers Union Ins. Co. v. Crow Tribe of Indians,* 471 U.S. 845, 856 n. 21 (1985). In this case, there is no evidence of harassment or bad faith. There is no federal common law or statute prohibiting jurisdiction by the Gaming Commission, to the contrary there are federal statutes and a State Compact specifically granting authority to the Tribe to regulate non-members in its casino business. And Wells Fargo cannot show futility because the Gaming Commission has not yet ruled on Wells Fargo's objection to its jurisdiction.

Conclusion:

Wells Fargo cannot show irreparable harm as it seeks to prevent the Gaming Commission from rendering any ruling, including on its own jurisdiction. Wells Fargo claims that it will be unable to arbitrate the "claims" raised in the Gaming Commission before arbitrators. However, the "claims" are not claims for damages but for penalties

which can only be imposed by a governmental agency. Furthermore, the Tribe has regulatory jurisdiction over Wells Fargo which voluntarily conducts business with the Tribe's gaming enterprises. This Court should not grant the injunctive relief requested by Wells Fargo and should dismiss this action or enter a stay pending exhaustion of tribal remedies.

Respectfully submitted,

DOERNER, SAUNDERS, DANIEL &
ANDERSON, L.L.P.

By: *s/Bryan J. Nowlin*
Jon E. Brightmire, OBA No. 11623
Bryan J. Nowlin, OBA No. 21310
Two West Second Street, Suite 700
Tulsa, Oklahoma 74103
(918) 582-1211 (telephone)
(918) 925-5290 (facsimile)
bnowlin@dsda.com

Attorneys for Defendants,
Louis Maynahonah, Marquita Carattini, and Karen Heminokeky in their official capacities as members of the Apache Business Committee

Joined by:

*s/Richard J. Grellner**
Richard J. Grellner, OBA No. 15521
434 NW 18th
Oklahoma City, OK 73103
Ph: 405-834-8484
rjgrellner@hotmail.com

Attorney for Ronald Ahtone, Austin Klinekole, and Richard Grellner, in their official capacities for the Apache Gaming Commission

* Signed by filer with permission

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 21, 2011, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Jerome Miranowksi jmiranowski@faegre.com
Michael M. Krauss smkrauss@faegre.com
Patrick Ryan pryan@ryanwhaley.com
Phillip G. Whaley pwhaley@ryanwhaley.com
Colin Tucker chtucker@rhodesokla.com

s/Bryan J. Nowlin
Bryan J. Nowlin