

**IN THE DISTRICT COURT OF CADDO COUNTY
STATE OF OKLAHOMA**

APACHE TRIBE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
vs.)	Case No. CJ-2011-108
)	
TGS ANADARKO, LLC and WELLS)	
FARGO BANK, national association,)	
)	
Defendants.)	

PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Apache Tribe of Oklahoma, for its causes of action against Defendants TGS Anadarko and Wells Fargo Bank, alleges and states as follows:

PARTIES

1. The Apache Tribe of Oklahoma is a federally recognized Indian tribe with its tribal headquarters located in Anadarko, Caddo County, Oklahoma.

2. TGS Anadarko is a Delaware limited liability company which does business in Caddo County, Oklahoma. Upon information and belief, TGS Anadarko was formed in December 2007 for the sole purpose of performing under a gaming equipment lease agreement with the Apache Tribe in connection with the Apache Tribe's operation of the Silver Buffalo Casino in Anadarko.

3. Wells Fargo is a national banking association which conducts business in Caddo County, Oklahoma, including entering into a lending transaction with the Apache Tribe, entering into a lending transaction with TGS Anadarko to finance the acquisition of the gaming machines TGS Anadarko leased to the Apache Tribe for the Silver Buffalo Casino, and taking an assignment of that equipment lease agreement from TGS Anadarko.

JURISDICTION AND VENUE

4. This Court has jurisdiction under the Oklahoma Declaratory Judgment Act, 12 Okla. Stat. §1651, which grants district courts jurisdiction to “determine rights, status, or other legal relations, including but not limited to a determination of the construction or validity of any . . . contract . . . or other instrument or agreement . . . whether or not other relief is or could be claimed” Further, this Court has jurisdiction under 12 Okla. Stat. §1381 *et. seq.*, which permits the Court to enter an injunction as a final judgment in an action or as a provisional remedy, and under *Oklahoma Oncology & Hematology P.C. v. US Oncology, Inc.*, 2007 OK 12, 160 P.3d 936.

5. Venue is proper in this Court under 12 Okla. Stat. §137, as TGS Anadarko claims it owns property located in Caddo County (gaming machines located at the Silver Buffalo Casino) and is owed money by the Apache Tribe, and Wells Fargo is a co-defendant which also claims an interest in the Equipment Lease Agreement.

BACKGROUND FACTS

6. The Apache Tribe is a sovereign, federally recognized Indian tribe governed by a Constitution. Ex. 1 (Apache Tribal Constitution).

7. Under Article III of the Apache Constitution, “[t]he supreme governing body of the Apache Tribe of Oklahoma shall be the tribal council.” (The Tribal Council is also sometimes referred to as the General Council.) The Tribal Council consists of all members of the Apache Tribe 18 years of age and older. Ex. 1.

8. Article V of the Apache Constitution provides for a five member Business Committee which “shall have such powers as may be delegated to it by appropriate resolutions of the tribal council, and, within such delegated authority, may transact business or otherwise

speak or act on behalf of the tribe in all matters on which the tribe is empowered to act now or in the future.” *Id.*

9. Article XV of the Apache Constitution provides that 50 members of the Apache Tribal Council constitutes a quorum to transact business at a Tribal Council meeting. *Id.*

10. On December 7, 2007, the Apache Tribe’s Business Committee passed a resolution approving and entering into an Equipment Lease Agreement with an entity called KAGD. A copy of the Equipment Lease Agreement is attached at Exhibit 2.

11. The Equipment Lease Agreement approved and entered into by the Business Committee contains a waiver of sovereign immunity by the Apache Tribe, and a provision requiring arbitration of disputes between the parties.

12. Under Apache tribal law, only the Tribal Council, as the supreme governing body, may waive sovereign immunity or consent to suit, or delegate that authority by an appropriate resolution expressly delegating to the Business Committee the authority to waive sovereign immunity or consent to suit.

13. The resolution which purported to approve the Equipment Lease Agreement with KAGD (and the waiver of sovereign immunity and arbitration provisions) states it was enacted under the authority of Apache Tribal Council Resolutions 73-1 and 78-7. Resolution 73-1, passed on August 26, 1972, provides:

WHEREAS, The Apache Tribe meeting in a general council this 26th day of August, 1972, and

WHEREAS, It now has come to the attention of the tribe to delegate more authority to the Apache Tribal Business Committee.

NOW THEREFORE BE IT RESOLVED: That the tribe does hereby go on record to delegate its full and complete authority to the Business Committee to transact any and all business related to the tribe involving matters such as tribal land, tribal budget and any other tribal matters relating to government programs

and the Bureau of Indian Affairs. FURTHER: That the Land Use Committee of the Apache Tribe is hereby dissolved, since above authority is now delegated to the business committee.

Ex. 3. Resolution 78-7, passed September 10, 1977, provides:

WHEREAS, The General Council of the Apache Tribe recognizes the need for the Business Committee to have some authority, and needs this authority without the necessity of calling a General Council to act on business for the Tribe. According to Article V of the Apache Constitution of the Apache Tribe of Oklahoma and,

WHEREAS, The Apache Tribe of Oklahoma does hereby go on record similar to Resolution 73-1 to delegate authority to transact business related to the Apache Tribe of Oklahoma

NOW THEREFORE BE IT RESOLVED that this foregoing Resolution will go on record for the Business Committee.

Ex. 4. Neither of these resolutions grants the Apache Business Committee the authority to enter into an equipment lease agreement for gaming equipment for a casino (which, of course, did not exist in the 1970s and was not even contemplated in the 1970s, as the Indian Gaming Regulatory Act did not come into existence until years later), and more importantly neither of these resolutions grants the Business Committee the authority to waive the Tribe's sovereign immunity or consent to arbitration in a business transaction.

14. Wells Fargo and its counsel agreed that Resolutions 73-1 and 78-7 do not waive sovereign immunity nor grant the Business Committee the authority to waive sovereign immunity, and that General Council approval of the waiver of sovereign immunity is necessary for any waiver to be valid. In connection with entering into its own loan transaction with the Apache Tribe (which loan transaction included taking an assignment of the Equipment Lease Agreement), on April 1, 2008, Wells Fargo attorney Sean McGinnis wrote:

One of the issues we briefly discussed was authority for the Business Committee to enter into the Loan Documents and associated waiver of sovereign immunity. As you know, this morning we received copies of

resolutions 73-1 (passed in 1973) and 78-7 (passed in 1978) of the General Council of the Apache Tribe of Oklahoma. Our review of the resolutions found that the resolutions lack specificity with regard to this loan transaction and do not explicitly include the authority for the Business Committee to waive sovereign immunity of the Tribe. Additionally, we note that the authorizing language does not appear to be included in the 1987 Amendment to the Tribe's Constitution. In addition, these obviously predate the enactment of IGRA and modern-day Indian gaming. After discussions with Wells Fargo, our client strongly feels that approval by the General Council of the Tribe is necessary for the approval of the Loan Documents and included waiver of sovereign immunity.

Ex. 5.

15. Neither the Equipment Lease Agreement, nor the provisions waiving sovereign immunity and requiring arbitration, were approved by the Apache Tribal Council, and there is no resolution from the Tribal Council delegating to the Business Committee the authority to waive sovereign immunity or consent to arbitration of disputes.

16. On June 23, 2008, KAGD assigned its interest in the Equipment Lease Agreement to TGS Anadarko. Ex. 6. On that same date, TGS Anadarko assigned its interest in the Equipment Lease Agreement to Wells Fargo. Ex. 7.

17. On May 17, 2011, TGS and Wells Fargo initiated an arbitration proceeding against the Apache Tribe with the American Arbitration Association. Ex. 8. TGS and Wells Fargo claim the Apache Tribe has breached the Equipment Lease Agreement, and seek money damages, a return of the gaming equipment, and other relief against the Tribe.

FIRST CLAIM FOR RELIEF

Declaratory Judgment that the Apache Tribe has sovereign immunity from any suit on the Equipment Lease Agreement.

18. The Apache Tribe incorporates paragraphs 1 through 17 above.
19. A federally recognized Indian tribe has sovereign immunity from suit, which is a matter of federal law and may not be diminished by the states. An Indian tribe is subject to suit

only if Congress has authorized the suit or the tribe has validly waived its sovereign immunity. A tribe's waiver of sovereign immunity must be unequivocally expressed, and cannot be implied.

20. The Oklahoma Supreme Court recently held in *Dilliner v. Seneca-Cayuga Tribe*, 2011 OK 61, that absent an effective waiver or consent, a state court may not exercise jurisdiction over a recognized Indian tribe, and in order to determine whether there is an effective waiver or consent courts must look to tribal law to determine jurisdiction.

21. Based upon the facts set forth above, under the Apache Tribal Constitution only the Apache Tribal Council may waive sovereign immunity or consent to suit, unless it expressly delegates the authority to waive sovereign immunity or consent to suit to the Business Committee by an appropriate resolution. There is no resolution from the Apache Tribal Council authorizing the Apache Business Committee to waive the Tribe's sovereign immunity or consent to suit.

22. Because there is no valid waiver of sovereign immunity or consent to lawsuit under Apache tribal law, this Court should enter judgment declaring that the Apache Tribe is not subject to lawsuit or arbitration for any alleged breach of the Equipment Lease Agreement, and that neither a court nor an arbitration forum has subject matter jurisdiction over a suit by TGS Anadarko or Wells Fargo based upon the Equipment Lease Agreement.

SECOND CLAIM FOR RELIEF

Stay of Arbitration Proceeding

23. The Apache Tribe incorporates paragraphs 1 through 22 above.

24. Defendants have been put on notice that the Apache Tribe contends it did not validly waive its sovereign immunity or consent to arbitration in accordance with Apache law.

25. Defendants seek to force the Apache Tribe to present this issue in an arbitration forum, when an arbitration forum does not have subject matter jurisdiction over any claim against the Apache Tribe.

26. Questions concerning the subject matter jurisdiction of a court or arbitration forum to proceed in an action are questions which must first be decided by this Court prior to a party being compelled to arbitrate.

27. A stay of the arbitration proceedings pending this Court's determination of this issue is appropriate under Oklahoma law. *See Oklahoma Oncology*, 2007 OK 12 at ¶¶12, 17.

REQUEST FOR RELIEF

The Apache Tribe requests that this Court grant it judgment (a) declaring that it has not validly waived its sovereign immunity or consented to suit in the Equipment Lease Agreement, and therefore neither the Court nor an arbitrator has subject matter jurisdiction over the Tribe for a suit brought by TGS Anadarko and/or Wells Fargo; and (b) staying the arbitration proceedings pending this Court's determination of the validity of the waiver of sovereign immunity and consent to suit, and permanently enjoining any suit against the Apache Tribe related to the Equipment Lease Agreement.

Respectfully submitted by,

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

By: _____

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