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

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| APACHE TRIBE OF OKLAHOMA,<br><br>Plaintiff,<br><br>vs.<br><br>TGS ANADARKO, LLC, and WELLS FARGO BANK, NATIONAL ASSOCIATION,<br><br>Defendants. | ) | Case No. CIV-11-1078-D |

**PLAINTIFF'S MOTION TO REMAND AND BRIEF IN SUPPORT**

The Apache Tribe of Oklahoma moves the Court to remand this case to the state court from whence it came because the Court lacks jurisdiction.

**STATEMENT OF FACTS**

1. The Apache Tribe is a sovereign, federally recognized Indian tribe headquartered in Anadarko, Oklahoma. Petition, ¶1. (A copy of the Petition is attached at Exhibit A.)

2. The Tribe is governed by a Constitution. Pet., ¶6. The Apache Constitution provides that "[t]he supreme governing body of the Apache Tribe of Oklahoma shall be the tribal council." Pet., ¶7. The Constitution also provides for a 5 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." Pet., ¶8.

3. 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. Pet., ¶12.

4. 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 to the Petition at Exhibit 2.) Pet., ¶10.

5. 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. Pet., ¶11.

6. 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. Pet., ¶15.

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

8. On May 17, 2011, TGS and Wells Fargo initiated an arbitration proceeding against the Apache Tribe with the American Arbitration Association. Pet., ¶17. TGS and

Wells Fargo claim the Apache Tribe breached the Equipment Lease Agreement, and seek money damages, a return of the gaming equipment, and other relief against the Tribe. *Id.*

9. The Apache Tribe denies the claims of Wells Fargo and TGS, and filed an Answering Statement in which it raised as a defense that the Tribe did not validly waive sovereign immunity or consent to arbitration in accordance with Apache tribal law. Pet., ¶24; Answering Statement, Ex. 2.

10. On August 29, 2011, the Apache Tribe filed this action against Wells Fargo and TGS in state court in Caddo County alleging two *state law* claims: (1) a claim for a declaratory judgment under the Oklahoma Declaratory Judgment Act, 12 Okla. §1651, and (2) a claim for an injunction under 12 Okla. Stat. §1381 *et. seq.* and *Oklahoma Oncology & Hematology P.C. v. US Oncology, Inc.*, 2007 OK 12, 160 P.3d 936.

## ARGUMENT AND AUTHORITIES

"A civil case commenced in state court may, as a general matter, be removed by the defendant to federal district court, if the case could have been brought there originally." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 134 (2005). *See* U.S.C. §1441(a). The removing party has the burden to establish that federal jurisdiction exists, and because federal courts are courts of limited jurisdiction there is a presumption against federal jurisdiction. *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974). In determining whether the removing party has met its burden, courts strictly construe the removal statute and must resolve all doubts against removal. *Fajen v. Foundation Reserve Ins. Co., Inc.*, 683 F.2d 331, 333 (10th Cir. 1982).

Wells Fargo has removed on the basis of 28 U.S.C. §1331, which provides that a federal district court "shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Wells Fargo's Notice of Removal at 2. Wells Fargo asserts that "whether the Tribe validly waived its sovereign immunity is a matter of federal law, and therefore a federal question under §1331." Wells Fargo's Notice of Removal at 3.

Over two decades ago the U.S. Supreme Court rejected Wells Fargo's position and held that the issue of an Indian tribe's sovereign immunity does *not* give a federal court jurisdiction over a case. In *Okla. Tax Comm'n v. Graham*, 489 U.S. 838 (1989), the Supreme Court observed that "is has long been settled that the existence of a federal immunity to the claims asserted does not convert a suit otherwise arising under state law into one which, in the statutory sense, arises under federal law." *Id*., at 841 (citing *Gulley v. First National Bank*, 299 U.S. 109 (1936)). This observation led the Supreme Court to conclude that "[t]he jurisdictional question in this case is not affected by the fact that tribal immunity is governed by federal law." *Graham*, at 841.

In *Graham* the Indian tribe was the defendant in the state court action, and it attempted to remove on the basis of the sovereign immunity issue it raised as a defense to the plaintiff's claim. Here, the Apache Tribe has asserted sovereign immunity as a defense to Wells Fargo's and TGS's state law claims that have been filed in arbitration, and the Tribe filed a declaratory judgment petition under state law in state court to assert this defense and halt the arbitration proceeding, as is its right under Oklahoma jurisprudence. *See Oklahoma Oncology & Hematology P.C. v. US Oncology, Inc.*, 2007

OK 12, ¶22, 160 P.3d 936 ("to assure that the parties have consented to arbitration, the courts will decide whether there is a valid enforceable arbitration agreement, whether the parties are bound by the arbitration agreement, and whether the parties agree to submit a particular dispute through arbitration."); *Thompson v. Bar-S Foods Co.*, 2007 OK 75, ¶21, 174 P.3d 567 ("it is the court's role to determine whether a valid enforceable agreement to arbitrate the dispute exists."). Whether the Tribe is asserting sovereign immunity as the plaintiff in a state law declaratory judgment action, like here, or as the removing defendant, as in *Graham*, does not matter – either way the issue of sovereign immunity is a defense to Wells Fargo's and TGS's state law claims, and does not provide a basis for removal.

And the Supreme Court agrees. In *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950), the Court stated that "[t]o sanction suits for declaratory relief as within the jurisdiction of the District Courts merely because, as in this case, artful pleading anticipates a defense based on federal law would contravene the whole trend of jurisdictional legislation by Congress, disregard the effective functioning of the federal judicial system and distort the limited procedural purpose of the Declaratory Judgment Act." *Id*. at 673-4. Two years later, in *Public Service Commission of Utah v. Wycoff Co., Inc.*, 344 U.S. 237 (1952), the Supreme Court elaborated further:

> In this case, as in many actions for declaratory judgment, the realistic position of the parties is reversed. The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant may assert in the Utah courts. Respondent here has sought to ward off possible action of the petitioners by seeking a declaratory judgment to the effect that he will have a good defense

> when and if that cause of action is asserted. ***Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal question jurisdiction in the District Court.*** If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal law defense before the state court begins the case under state law.

*Id.* at 248 (emphasis added).

Here, the Apache Tribe filed a declaratory judgment claim under state law in state court asserting that neither the arbitrator nor the courts could exercise subject matter jurisdiction over the Tribe for the state law claims asserted by Wells Fargo and TGS. Just as the Supreme Court recognized in *Wycoff*, in this declaratory judgment action the realistic position of the parties is reversed. The Apache Tribe is merely seeking to establish a defense to the state law causes of action asserted by Wells Fargo and TGS – the defense of sovereign immunity, which the Supreme Court in *Graham* held does not provide a basis for federal question jurisdiction. Because the character of Wells Fargo's and TGS's claims are based on state law, there is no federal question sufficient to establish jurisdiction in this Court.

Finally, still another reason for finding a lack of federal question jurisdiction exists – *there is no federal question at issue in the first place*. While it is certainly true that 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, *see Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756 (1998), the issue here is *not* whether the Apache Tribe has sovereign immunity. *See* Petition, ¶1 (alleging the Apache Tribe of Oklahoma is a federally recognized Indian Tribe); ¶19 (alleging that 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). Because the Apache Tribe is a federally recognized Indian tribe, there is no question it has sovereign immunity. The issue here is whether the Apache Tribe validly *waived* its sovereign immunity in the Equipment Lease Agreement. *See* Petition, ¶¶11-15, 21-22. And the determination of whether there was a valid waiver of sovereign immunity is a matter of *tribal* law, not federal law. As the Tribe alleged in the Petition,

> 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.***

Petition, ¶20 (emphasis added). Thus, in order to determine whether the Apache Tribe is entitled to declaratory relief, the court must look *to the Apache Tribe's law*, not federal law, to determine jurisdiction. The Apache Tribe's law, of course, is not listed in 28 U.S.C. §1331, which grants federal district courts original jurisdiction of all civil actions "arising under the Constitution, laws, or treaties *of the United States*." (Emphasis added.)

The Oklahoma Supreme Court is not alone in looking to tribal law to determine whether an alleged waiver of sovereign immunity is valid; court after court has turned to

tribal law to decide that issue, not the "Constitution, laws, or treaties of the United States." *See, e.g., Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282, 1287-8 (11th Cir. 2001) (after reciting provisions of Seminole Tribal Ordinance C-01-95 and the Seminole Tribe's Constitution, the court stated the Seminole Tribe's chief did not have actual or apparent authority to voluntarily waive the tribe's sovereign immunity, as "[s]uch a finding would be directly contrary to the explicit provisions of the Tribal Constitution and Tribal Ordinance C-01-95 which expressly sets forth how, when, through whom, and under what circumstances the Seminole Tribe may voluntarily waive its immunity.") (emphasis added); *World Touch Gaming, Inc. v. Massena Mgmt., LLC*, 117 F.Supp.2d 271, 275 (N.D.N.Y. 2000) ("[A]ccording to the unequivocal language of the Tribe's Constitution and Civil Judicial Code, only the Tribal Council can waive the Tribe's sovereign immunity, and such waiver much be express. The Tribal Council did not authorize Walter Horn to waive sovereign immunity, nor did the Tribal Council expressly waive the Tribe's sovereign immunity. . . . Thus, the Tribe's sovereign immunity was not waived, and it is immune from suit."); *Danka Funding Co. v. Sky City Casino*, 747 A.2d 837 (N.J. 1999) (citing tribal laws that address the existence of sovereign immunity and what procedures must be followed in order for the tribe to waive sovereign immunity, and stating that the plaintiffs "could have insured that they received a proper waiver of immunity by resort to tribal law.").

Under the well pleaded complaint rule, it is clear that the Apache Tribe bases its claim for declaratory relief on *tribal law, not federal law*. Moreover, it is clear that tribal law is the relevant law for determining whether the Apache Tribe waived its sovereign

immunity. Accordingly, the claim asserted by the Apache Tribe does not arise under the Constitution, laws, or treaties of the United States, and therefore this Court does not have original jurisdiction and must remand this matter to state court.

In addition to remanding, the Court should award the Apache Tribe its attorney fees and costs in having to move to remand this matter. 28 U.S.C. §1447(c) provides that an order remanding a removed case to state court "may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." In *Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005), the Supreme Court set forth the standard to be utilized by district courts when a case is remanded: "Absent unusual circumstances, courts may award attorney fees under §1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied." *Id.* at 141.

Here, Wells Fargo lacked an objectively reasonable basis for seeking removal. It states its removal is based on federal question jurisdiction, the federal question being the Apache Tribe's assertion of sovereign immunity as a defense to Wells Fargo's state law claims. But the Supreme Court rejected that position in 1989 in *Graham*, explicitly holding that a tribe's assertion of sovereign immunity as a defense to a state law claim does not grant a federal court jurisdiction in a removed action. And as demonstrated above, the fact that the Tribe brought a state declaratory judgment action asserting its sovereign immunity defense does not alter the outcome given the principles articulated by the Supreme Court over half a century ago in *Skelly Oil* and *Wycoff*.

Moreover, if these explicit decisions by the Supreme Court is not enough, the Tribe's waiver in this case, as specifically set forth in its Petition filed in state court, is governed by tribal law, not federal law. In its Notice of Removal Wells Fargo does not point to any provision of the federal Constitution, statutes, treaties, or common law which will be used to decide the Apache Tribe's immunity defense. In fact, none of the cases cited by Wells Fargo based federal question jurisdiction on whether a Tribe waived its sovereign immunity.

Given that the Supreme Court has held that an immunity defense does not support federal court jurisdiction, and that the Tribe's claim of waiver in this case is based on tribal law, not federal law, Wells Fargo's removal is not objectively reasonable. Accordingly, this Court should award the Apache Tribe its attorney fees and costs.

**CONCLUSION**

The Apache Tribe respectfully requests that the Court remand this case to state court, and award it its reasonable attorney fees and costs in having to move to remand.

Respectfully submitted,

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