IN THE DISTRICT COURT OF CADDO COUNTY
STATE OF OKLAHOMA

Apache Tribe of Oklahoma, Plaintiff, vs. TGS Anadarko, LLC, and Wells Fargo Bank, National Association, Defendants.	Case No. CJ-2011-108 Judge Van Dyck

STATE OF OKLAHOMA
CADDO CO.
FILED
SEP -9 2011
At _____ O'Clock _____ M.
OPAL CAROL FINCH, Court Clerk
By _____ Deputy

DEFENDANTS' MOTION TO TRANSFER VENUE AND BRIEF IN SUPPORT

Pursuant to 12 Okla. Stat. § 140.2 (2009), Defendants TGS Anadarko, LLC ("TGS") and Wells Fargo Bank ("Wells Fargo") move this Court to transfer venue to the Oklahoma County District Court, where a related action is pending before the Honorable William Graves. In support of this Motion to Transfer, Defendants set forth the following Introduction, Facts, and Argument.

INTRODUCTION

This Court should transfer venue because Plaintiff Apache Tribe of Oklahoma (the "Tribe") has a pending motion before the Oklahoma County District Court in which the Tribe argues the *exact issue* it has raised before this Court—specifically, whether its Business Committee was authorized to waive the Tribe's sovereign immunity and consent to arbitration. Under former leadership, the Tribe borrowed over $4 million from Wells Fargo to improve its casino (the "Casino Loan") and entered into a long-term lease with TGS to lease gaming machines (the "Lease Agreement"). TGS borrowed $5 million to buy the gaming machines leased to the Tribe. The Tribe waived its sovereign immunity and agreed to binding arbitration

EXHIBIT
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under both the Lease Agreement and Casino Loan. The Tribe subsequently elected new leadership and stopped paying on the Lease and the Loan.

Wells Fargo and the Tribe agreed to arbitrate the Casino Loan before former federal judge Thomas R. Brett, who found the Tribe's Business Committee was authorized to and did waive sovereign immunity, and ordered the Tribe to repay the Casino Loan. Wells Fargo moved to confirm Judge Brett's Award in Oklahoma County District Court, where the case was assigned to Judge Daniel L. Owens. After Judge Owens commented favorably on Judge Brett's character and integrity, the Tribe requested Judge Owens recuse himself. Judge Owens did so and the case was transferred to Judge William Graves. In pending motions to confirm and vacate Judge Brett's Award, the Tribe has argued that its Business Committee did not have the authority to waive sovereign immunity. The Tribe makes the identical argument before this Court with respect to the Equipment Lease.

The Tribe's lawsuit in this Court is the latest in a long history of tactics designed to avoid the consequences of its breaches of contract. In addition to the pending case before Judge Graves, the United States District Court for the Western District of Oklahoma issued a preliminary injunction enjoining the members of the Tribe's Gaming Commission from adjudicating any of Wells Fargo's rights under the Lease. In the hopes of finding a friendlier ear than it met in Oklahoma County District Court or federal court in Oklahoma City, the Tribe now asks this Court to stay the arbitration under the guise that its Business Committee did not have the authority to waive sovereign immunity in the Equipment Lease. This Court should reject the Tribe's forum shopping and transfer venue to the Oklahoma County District Court to conserve judicial resources and avoid the possibility of conflicting rulings.

FACTS

The Tribe's Equipment Lease with TGS, and Wells Fargo's Loans to TGS and the Tribe

On December 27, 2007, the Tribe and KAGD, LLC entered into the Equipment Lease, whereby the Tribe agreed to lease up to 350 gaming machines and other ancillary furnishings from KAGD. (*See* Ex. 2 (Lease) to the Pl.'s Pet. for Declaratory and Injunctive Relief ("Pet.").) The Tribe agreed to lease the equipment in order to replace and expand the gaming machines in its Silver Buffalo Casino.

On June 23, 2008, KAGD assigned all of its right, title and interest in the Lease to TGS, the ultimate lessor (the "Assignment"). (*See* Pet. Ex. 6 (Assignment).)

The same day that the Assignment was executed, Wells Fargo and TGS entered into a Credit Agreement (the "Credit Agreement") pursuant to which Wells Fargo loaned TGS $3,500,000, which TGS used, along with other funds, to buy the machines that TGS leased to the Tribe. In conjunction with the Credit Agreement, the Tribe, TGS, and Wells Fargo executed an Estoppel Certificate that extends the benefits of the arbitration provisions in the Lease to Wells Fargo. Also on June 23, 2008, Wells Fargo and the Tribe entered into the Casino Loan pursuant to which Wells Fargo loaned the Tribe $4,365,000. The Tribe used the proceeds from this loan to improve its casino, acquire adjacent land, and pay off existing debt.

The Tribe Stops Performing Under the Casino Loan and the Lease

In August 2010, the Tribe breached the Casino Loan by, among other things, failing to make an interest payment of $13,815.21 on August 31, 2010.

At the same time, the Tribe separately breached its obligations under the Equipment Lease. In particular, the Tribe stopped making any of the required rent payments due under the Lease in August 2010, yet kept the gaming machines and all revenues from those machines.

TGS declared an Event of Default and is entitled to the balance of the Rent that would have been due during the remainder of the Lease Term.

Wells Fargo Succeeds in Arbitration on the Casino Loan

On September 28, 2010, Wells Fargo filed a Statement of Claim with the AAA alleging breach of contract and unjust enrichment. The Tribe filed a counterclaim alleging damages of $39 million. During the week of May 9 to 13, 2011, the Honorable Thomas R. Brett (ret.) as arbitrator, presided over a hearing in Oklahoma City. Following the hearing, Wells Fargo prevailed on its claims. On May 23, 2011, Judge Brett, issued his Arbitration Award with Findings of Fact and Conclusions of Law, awarding Wells Fargo $2,751,160.20 for its breach of contract claim against the Tribe, and dismissing the Tribe's counterclaims against Wells Fargo with prejudice (the "Award"). (The Award is attached as Ex. A.)

The Tribe made the same argument before Judge Brett that it makes before this Court. Specifically, the Tribe argued that Resolutions 73-1 and 78-7 do not delegate authority from the Tribal Council to the Apache Business Committee to waive sovereign immunity or consent to the arbitration of disputes. In rejecting this argument, Judge Brett concluded, "With the authority delegated in Resolution 73-1 and Resolution 78-7, the Business Committee has repeatedly and routinely entered into contracts on behalf of the Tribe and waived the Tribe's sovereign immunity from suit." (Award Findings of Fact ¶ 40.) Further, Judge Brett found that in April 2008, counsel for Wells Fargo and the Tribe discussed whether Tribal Council approval was required to waive the Tribe's sovereign immunity and that Wells Fargo ultimately determined that Tribal Council approval was not necessary because the Business Committee could expressly waive the Tribe's sovereign immunity. (*Id.* ¶ 41.)

TGS and Wells Fargo File a Demand for Arbitration Regarding the Lease

Following the Tribe's breach of the Lease, it improperly refused to return the gaming machines to TGS, the owner and licensed vendor. Therefore, within days of finishing the hearing before Judge Brett, on May 17, 2011, TGS and Wells Fargo filed a Demand for Arbitration with the AAA asserting breach of the Lease, unjust enrichment, and declaratory relief pursuant to 12 Okla. Stat. § 1651. (The Demand for Arbitration and Statement of Claim are attached as Ex. B.) The Tribe filed its Answering Statement on June 9, 2011. (The Tribe's Answering Statement is attached as Ex. C.) On July 15, 2011, TGS and Wells Fargo filed an Amended Statement of Claim. (The Amended Statement of Claim is attached as Ex. D.)

Wells Fargo and TGS filed the Demand for Arbitration in compliance with the Lease's mandatory arbitration provision. The Lease requires that the parties, upon demand, resolve by binding arbitration any dispute, claim, question, or disagreement that is directly or indirectly related to the Lease, whether arising under law or in equity, and whether arising as a matter of contract or tort. (Lease (Ex. 2) § 22.) The Lease further provides that any dispute over whether a claim is arbitrable shall itself be decided by arbitration. Specifically, the arbitration clause states that "the question whether or not a Claim is arbitrable shall be a matter for binding arbitration by the arbitrators" and that "in determining any such question, all doubts shall be resolved in favor of arbitrability." (*Id.*)

The Tribe Engages in Tactics Designed to Delay the Confirmation of the Arbitration Award on the Casino Loan

On May 24, 2011, Wells Fargo filed and served a petition and motion to confirm Judge Brett's Award in the Oklahoma County District Court. The action was originally assigned to the Honorable Daniel L. Owens. Since Wells Fargo moved the Court to confirm the Award, the Tribe has engaged in a series of delay tactics to frustrate enforcement.

First, in early June, the Tribe filed a motion in front of itself to vacate the Award, and set a hearing date for its own motion. The motion was to be heard by the Tribe's Business Committee, which consists of the same people who caused the Tribe to breach its contract with Wells Fargo, who have directed the Tribe's litigation against Wells Fargo, and who actively participated in the arbitration before Judge Brett. In response, on June 10 Wells Fargo moved in U.S. District Court for the Western District of Oklahoma to enjoin the Tribe from issuing an order purporting to vacate the Award. After allowing for opposition briefing by the Tribe, the Honorable Timothy D. DeGiusti set the hearing on Wells Fargo's motion for a TRO for June 14, which was the day before the scheduled proceeding in front of the Tribe's Business Committee. On the eve of the TRO hearing, however, the Business Committee secretly went ahead and issued its "Final Order" supposedly vacating the Award—thereby denying Wells Fargo the opportunity to appear. The Tribe disclosed the "Final Order" once the TRO hearing was underway—before Judge DeGiusti could even consider Wells Fargo's request for immediate injunctive relief.[1] Judge DeGiusti later observed that "the conduct of the Tribe—presumably advanced with the assistance of, or at least the knowledge of, its counsel smacks of the type of 'race against the law' noted critically by the United States Supreme Court." (Ex. E at p. 15 n.9 (citation omitted).)

Second, the Tribe sought further delay to avoid an adverse decision when, on August 5, Judge Owens announced his intent to grant Wells Fargo's motion to confirm the Award. But the Tribe wangled a three-week reprieve by obtaining leave to file a sur-reply purportedly to respond to certain exhibits included in Wells Fargo's reply. Judge Owens set a new hearing for August

[1] Judge DeGiusti summarized the relevant facts in his Findings of Fact, Conclusions of Law, and Order, dated September 2, 2011, granting Wells Fargo's motion for a preliminary injunction ("Sept. 2 Order"). (*See* Sept. 2 Order (attached as Exhibit E) at pp. 14-15.)

26 to announce his decision. (The August 5, 2011 transcript of appearance before Judge Owens is attached as Ex. F.)

Third, on August 10, the Tribe informed Judge Owens of its intent to ask him to recuse himself from this action, and did so on August 26. The Tribe complained that Judge Owens had commented favorably on Judge Brett's character and integrity. (*See* Ex. F for Judge Owens' exact comments.) Judge Owens voluntarily recused himself in order to prevent further potential delay in resolution of Wells Fargo's motion to confirm under the provisions of Rule 15, Rules for District Courts of Oklahoma. The case was reassigned to the Honorable William Graves.

Fourth, on the last day possible, the Tribe moved to vacate Judge Brett's Award. (The Tribe's Motion to Vacate is attached as Ex. G.) Among other arguments, the Tribe attempts to relitigate the issue of whether it validly waived its sovereign immunity in the Casino Loan. In particular, the Tribe argues that Resolutions 73-1 and 78-7 do not delegate authority from the Tribal Council to the Business Committee to waive sovereign immunity or consent to the arbitration of disputes. The Tribe fully litigated this exact argument before Judge Brett, who squarely addressed and rejected the Tribe's position in his Award. The Tribe now seeks to relitigate the same issue yet again before this Court in the context of the Lease.

Wells Fargo's Motion to Confirm the Award and the Tribe's Motion to Vacate the Award are pending before the Oklahoma County District Court.

The Tribe Engages in Similar Delay Tactics to Avoid Arbitration of the Lease

As with its delay tactics to avoid confirmation of Judge Brett's Award, the Tribe has likewise engaged in tactics to avoid its obligation to arbitrate its breach of the Lease.

First, in late June, the Tribe's Business Committee petitioned its Gaming Commission to force Wells Fargo to disgorge monies the Tribe had paid in connection with the Lease. Wells

Fargo moved again in federal court to enjoin the Tribe's Gaming Commission from wrongfully exercising jurisdiction. This time, fortunately, the Tribe's own forum did not unilaterally act before the hearing, and Judge DeGiusti granted Wells Fargo's motion for a temporary restraining order on July 22, 2011, and scheduled a preliminary injunction hearing for the afternoon of August 5. The Court held a preliminary injunction hearing, and then granted Wells Fargo's motion for a preliminary injunction precluding the members of the Tribe's Gaming Commission from adjudicating any of Wells Fargo's rights under the Lease. (*See* Ex. E (Sept. 2 Order.)

Second, the Tribe filed the Petition with this Court requesting a preliminary injunction to stay the Lease Arbitration on the ground that its waiver of sovereign immunity in the Lease was invalid and that it therefore did not consent to arbitration. Despite the Tribe's latest delay tactic, the Tribe had been participating in the arbitration. In fact, pursuant to the dispute resolution provision in the Lease, the Tribe selected one of the three arbitrators only a week before filing this Petition. This case should be transferred to Oklahoma County District Court where a related case is pending before Judge Graves that encompasses the factual and procedural history of this matter and poses identical questions of law.

ARGUMENT

I. This Case Should be Transferred Based on *Forum non Conveniens* Grounds.

The common-law doctrine of *forum non conveniens* authorizes a trial court to "refuse to hear an action that would more appropriately be heard in another location." *Shepherd v. Kawasaki USA*, 2010 OK CIV APP 60 ¶ 4, 239 P.3d 965, 968. *Forum non conveniens* is a "supervening venue provision, permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined." *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 423 (2007) (quoting *American*

Dredging Co. v. Miller, 510 U.S. 443, 453 (1994)). The doctrine was "born in common law[,]" but has now been codified by statute. *Shepherd* at ¶ 4 (quoting *Harwood v. Woodson*, 1977 OK 57, ¶ 10, 565 P.2d 1, 3). That statute specifically authorizes this Court to decline jurisdiction and transfer venue in the interest of justice and for the convenience of the parties:

> If the court, upon motion by a party or on the court's own motion, finds that, in the interest of justice and for the convenience of the parties, an action would be more properly heard in another forum either in this state or outside this state, the court shall decline to exercise jurisdiction under the doctrine of forum non conveniens and shall stay, transfer or dismiss the action.

12 Okla. Stat. § 140.2 (2009). The statute further provides that, "[i]n determining whether to grant a motion to stay, transfer or dismiss an action pursuant to this section, the court shall consider:"

> 1. Whether an alternate forum exists in which the action may be tried;
>
> 2. Whether the alternate forum provides an adequate remedy;
>
> 3. Whether maintenance of the action in the court in which the case is filed would work a substantial injustice to the moving party;
>
> 4. Whether the alternate forum can exercise jurisdiction over all the defendants properly joined in the action of the plaintiff;
>
> 5. Whether the balance of the private interests of the parties and the public interest of the state predominate in favor of the action being brought in an alternate forum; and
>
> 6. *Whether the stay, transfer or dismissal would prevent unreasonable duplication or proliferation of litigation.*

Id. (emphasis added).[2] In the sixth factor listed above, the legislature specifically contemplated that courts would transfer cases that created unreasonable duplication or proliferation of litigation. Accordingly, because the single issue in this case duplicates litigation pending in

[2] Although the doctrine was codified by statute in 2009, "[t]he statutory language does not evidence any legislative intent to supplant the existing common law of *forum non conveniens*." *Shepherd* at ¶ 4, n.16.

Oklahoma County, this is precisely the type of case that should be transferred.

a. Transfer Would Prevent Unreasonable Duplication or Proliferation of Litigation.

This case warrants transfer because it creates duplicative litigation. *Specifically, the single, identical question raised in the Tribe's Petition—whether its Business Committee was authorized to waive sovereign immunity and consent to arbitration—is currently pending before Judge Graves in Oklahoma County District Court.* If the Court were to rule on the merits of the Tribe's Petition, at worst, two Oklahoma state courts could make conflicting rulings and, at best, the two courts would expend precious judicial resources adjudicating the same issue. In response to the Tribe's Petition, TGS and Wells Fargo will raise issues that the Oklahoma County District Court is in a better position to adjudicate because of the procedural history in that case.

First, for example, TGS and Wells Fargo will argue that the validity of the Tribe's consent to Arbitration is a question for the arbitrators. Under the express terms of the Lease, the threshold question of arbitrability—whether the claim is subject to arbitration pursuant to the Lease—is itself for the arbitrators to decide. "Generally, the courts will decide questions of arbitrability *unless there is clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.*" *Oklahoma Oncology & Hematology P.C. v. US Oncology, Inc.*, 2007 OK 12, ¶ 34, 160 P.3d 936, 949. As Wells Fargo has argued in Oklahoma County, where the parties clearly and unmistakably commit threshold questions of arbitrability to the arbitrators, the issue is for the arbitrator to decide, not the court. (*See* Ex. H at 6-8 (Wells Fargo's Brief in Opp'n to the Tribe's Mot. to Vacate Arbitration Award) and Ex. I at 6-8 (Wells Fargo' Reply Brief in Further Supp. of Pl.'s Mot. to Confirm Award).) Here, the Lease states: "[T]he question of whether or not a Claim is arbitrable shall be a matter for binding arbitration by the arbitrators, such question

shall not be determined by any court and, in determining any such question, all doubts shall be resolved in favor of arbitrability." (Lease § 22(a).) In the plainest of terms, the parties agreed that the threshold question of arbitrability is for the arbitrators alone to decide, and shall be the subject of binding arbitration. The same issues are already pending and ripe for decision before Judge Graves in Oklahoma County.

Second, and alternatively, even if the Court concludes that the validity of the waiver is not for the arbitrators to decide, TGS and Wells Fargo will argue that the Court is collaterally estopped from relitigating the issue based on Judge Brett's Award. Under Oklahoma law, the attempt to have the same issue adjudicated before another court is barred by issue preclusion. *In re Hyde*, 2011 OK 31, ¶ 12, 55 P.3d 411, 415.

> Issue preclusion prevents relitigation of facts and issues actually litigated and necessarily determined in an earlier proceeding between the same parties or their privies. An issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined . . . . An issue is necessarily determined if the judgment would not have been rendered but for the determination of that issue. Additionally, the party against whom issue preclusion is interposed must have had a 'full and fair opportunity' to litigate the critical issue in the earlier case.

Id. (quoting *Wilson v. City of Tulsa*, 2004 OK CIV APP 44, ¶ 9, 91 P.3d 673, 677). An arbitration award "can be the basis for the application of issue preclusion if the other criteria are in place." *Wilson* at ¶ 9 (citing *Cities Serv. Co. v. Gulf Oil Corp.*, 1999 OK 14, ¶¶ 16-17, 980 P.2d 116, 124, 125.

Here, Judge Brett determined in his Award that the Apache Business Committee was authorized to waive sovereign immunity under the Casino Loan, which is the identical issue the Tribe raises here with respect to the Lease. Specifically, during the arbitration on the Casino Loan, the Tribe argued that Resolutions 73-1 and 78-7 do not delegate authority from the Tribal Counsel to the Apache Business Committee to waive sovereign immunity or consent to the

arbitration of disputes. In rejecting this argument, Judge Brett concluded, "With the authority delegated in Resolution 73-1 and Resolution 78-7, the Business Committee has repeatedly and routinely entered into contracts on behalf of the Tribe and waived the Tribe's sovereign immunity from suit." (Award ¶ 40.)

Because the Oklahoma County District Court is currently considering Judge Brett's Award in its adjudication of Wells Fargo's motion to Confirm the Award and the Tribe's competing motion to vacate, that Court is in a better position to address whether that Award precludes the Tribe from relitigating the Business Committee's authority to waive sovereign immunity on behalf of the Tribe. Accordingly, transfer to Oklahoma County is warranted because it will avoid duplicative litigation. Additionally, every other factor under the statute further supports the decision to transfer this case to Oklahoma County District Court.

b. An Alternative Forum Exists in Which the Action May be Tried.

The Oklahoma County District Court provides an alternative forum for the Tribe's petition to stay the Lease arbitration. There is an action pending before Judge Graves, which includes pending motions under advisement that involve the identical issue raised in the Tribe's Petition before this Court. Further, the Oklahoma Uniform Arbitration Act requires that an application for judicial relief under the Act must be made in the court of the county in which the agreement to arbitrate specifies the arbitration hearing is to be held. 12 Okla. Stat. § 1878. Because the Lease's arbitration clause specifies Oklahoma City, Oklahoma, as the location of the parties' arbitration, the Oklahoma County District Court is the proper forum to resolve the Tribe's effort to avoid arbitration.

c. The Alternate Forum Provides an Adequate Remedy.

There is no question that the Oklahoma County District Court provides an adequate remedy. The Tribe is currently seeking relief in that Court through its request for an Order vacating the Arbitration Award on the Casino Loan.

d. Maintenance of the Action in Caddo County Would Work a Substantial Injustice to TGS and Wells Fargo.

Maintaining this action would work a substantial injustice to TGS and Wells Fargo because there exists the possibility of two courts ordering conflicting rulings. Further, TGS and Wells Fargo are spending unnecessary resources to litigate issues that have been fully briefed and argued in the Oklahoma County District Court.

e. The Alternate Forum Can Exercise Jurisdiction Over All the Defendants Properly Joined in the Action of the Plaintiff.

There are two defendants joined in the Tribe's action in this Court—TGS and Wells Fargo. The Oklahoma County District Court can exercise jurisdiction over both defendants. They jointly bring this motion and contracted in the Lease and Estoppel Certificate to hold arbitration proceedings in Oklahoma City, Oklahoma.

f. The Balance of the Private Interests of the Parties and the Public Interest of the State Predominate in Favor of the Action Being Brought in an Alternate Forum.

Although the legislature did not specify the relevant "private" and "public" interests when it codified the statute on *forum non conveniens*, the Oklahoma Supreme Court previously defined these terms in *Conoco, In. v. Agrico Chemical Co.*, 2004 OK 83, ¶ 11, 115 P.3d 829, 833. *Shepherd* at ¶ 9. Specifically, the private interests to be considered include whether the forum: (1) is convenient for witnesses; (2) may reach unwilling witnesses by compulsory process; (3) allows a view of the premises; (4) is near the sources of proof; and (5) serves to make trial of the case less burdensome and more convenient. *Id.* The Court further stated that

the public interests include the burden of jury duty on the community and the community interest in having local controversies decided at home. *Id.*

The public interests favor transfer of this case to Oklahoma County. There will be no burden upon this community if the case is transferred to Oklahoma County District Court, where the same question is already being considered and addressed by Judge Graves. The private interests favor none of the parties. The questions posed by the Petition are matters of law, with no witnesses to testify or presmises to be viewed. They are:

1. Does the Lease require the threshold question of arbitrability to be resolved by the arbitrators, and not any court?

2. Alternatively, does Judge Brett's Award collaterally estop the Tribe from relitigating the question of the Business Committee's authority to waive sovereign immunity and consent to arbitration?

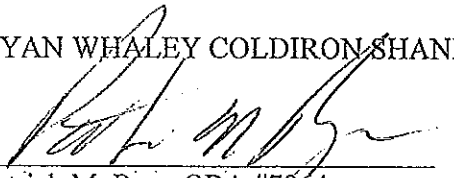
These questions turn on the text of the Lease and the Award, and do not require any testimony. Regardless, the Caddo County courthouse is only about 60 miles from the Oklahoma County courthouse so any inconvenience to witnesses would be negligible at best.

CONCLUSION

For the foregoing reasons, TGS and Wells Fargo respectfully request that the Court grant their motion to transfer venue to the Oklahoma County District Court.

Dated: September 9, 2011

RYAN WHALEY COLDIRON SHANDY PLLC



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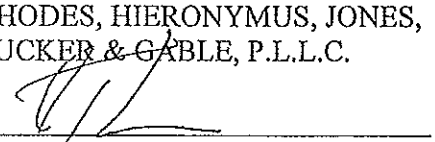
Dated: September 9, 2011

RHODES, HIERONYMUS, JONES, TUCKER & GABLE, P.L.L.C.



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CERTIFICATE OF SERVICE

This is to certify that on this 7th day of September, 2011, a true and correct copy of the above and foregoing instrument was mailed via U.S. Mail, first-class, postage prepaid, to:

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IN THE MATTER OF ARBITRATION BETWEEN

WELLS FARGO BANK, NATIONAL ASSOCIATION,	AAA 71 148 762 10
Claimant,	**ARBITRATOR'S FINDINGS OF FACT AND CONCLUSIONS OF LAW - DECISION**
- against -	
APACHE TRIBE OF OKLAHOMA,	
Respondent.	

BEFORE THE HONORABLE THOMAS R. BRETT (RET.)
ARBITRATOR

I. Introduction

1. This matter involves a breach of contract claim for the balance due of approximately $2.7 million to Wells Fargo, National Association, "WF" on a loan, evidenced by a note, from the borrower, The Apache Tribe of Oklahoma ("AT"), a federally recognized Indian Tribe. The WF claim also seeks damages against the AT for alleged unjust enrichment. The original loan from WF to AT was for $4.365 million for the tribe to operate the "SBC", the Silver Buffalo Casino ("SBC") in Anadarko, Oklahoma. The AT counter claims against WF for $39 million asserting the loan documents are void and unenforceable. The AT claims its damages entitlement due to the alleged wrongful conduct of WF in regard to axillary contracts in which WF made a $3.5 million loan to the AT's gaming machine equipment lessor, TGS. TGS assigned its rights under the gaming machine lease to WF to securitize the WF/TGS loan transaction. AT's counter claim alleges violations of Oklahoma State and Federal law, including an alternative claim for unjust enrichment. (Jt. Exhibits 1 thru 7).

II. The Tribe's Relationship With Kevin Kean previous to the Wells Fargo loan to the Tribe

1. The Apache Tribe of Oklahoma ("AT" or the "Tribe") opened the Silver Buffalo Casino ("SBC" or the "Casino") on May 9, 2006. Kevin Kean's relationship with the Tribe began shortly thereafter, in the summer of 2006. (E.G. Cl.Ex. 130.) Kean was an employee/agent and broker who worked with and for the Tribe to find and raise financing for the AT/SBC, including for the lease of slot machines and other equipment at the Casino. (Cl. Ex. 2' Testimony of J. Brady, F. Gallues, and R. Medeiros.) Kean had little or no experience with casino operations, slot machines, or equipment leasing and maintenance. (Testimony of J. Brady, F. Gallues, and R. Medeiros.)

EXHIBIT A

2. In November 2006, Kean on behalf of the Tribe, hired Davis Tripp as the Casino's general manger. (Testimony of D. Tripp.) Tripp's direct supervisor was the Tribe's Gaming Board of Directors (the "Apache Gaming Board"), and his ultimate supervisor was the Tribe's Business Committee (the "Business Committee"). (*Id.*)

3. From the time Tripp started working at the Casino in December 2006, he understood that the Tribe intended to lease shot machines and ancillary equipment from Kean. (*Id.*) Over the next eighteen months Tripp worked closely with Kean, who spent more time at the Casino than did members of the Apache Gaming Board. (*Id.*)

4. On June 26, 2007, the Gaming Board unanimously proposed for the Tribe to enter into an "Agreement to Lease Equipment" dated June 9, 2007, with Kean's company, KAGD, LLC ("KAGD"). (Cl.Ex. 1.) The Gaming Board also proposed that the Tribe enter into a development financing and services agreement with Kean regarding a potential new gaming facility on the Tribe's Indian Lands in Cotton County, OK ("Red River"). (*Id.*)

5. At some point in late 2007, Kean entered into a financing and services agreement with the Tribe, pursuant to which Kean was to receive a 3% brokerage commission for financing that he raised on the Tribe's behalf.

III. The Tribe's Equipment Lease With KAGD and Then Assigned to TGS.

A. Kean Approaches Wells Fargo For Financing On The Equipment Lease.

6. After receiving the recommendation of the Apache Gaming Board for his equipment lease with the Tribe, Kean began to seek a source of financing for the lease. On August 20, 2007, Kean contacted a representative of Wells Fargo Bank, National Association ("Wells Fargo") regarding financing gaming equipment for the Casino under the lease, and for financing of the Red River project. (Cl.Ex. 2.) By this time, Kean had been working for or with the Tribe for more than a year. Kean made it clear to Wells Fargo that Wells Fargo would have to do business with him as the lessor on the equipment lease for the Casino, and he invited Wells Fargo to provide financing for the purchase of that equipment. (*Id.*; Testimony of J. Brady and F. Gallues.)

7. Joe Brady and Felis Gallues of Wells Fargo did not know Kean before he contacted Wells Fargo on August 20, 2007. (Testimony of J. Brady and F. Gallues.) Brady and Gallues first met Kean in late August. (*Id.*) Wells Fargo told Kean that it could not provide equipment financing with him as the lessor. (*Id.*) Kean intended to put no equity into the equipment, and had no experience with slot machines or casino management. (*Id.*) Nor did he have access to capital.

8. In the first half of September 2007, representatives of Wells Fargo traveled with Kean to visit representatives of the Tribe in Anadarko. (*Id.*) They met members of the Business Committee, the Apache Gaming Board, Casino management, and counsel, each of whom confirmed that the Tribe was entering into a gaming equipment lease with Kean. (*Id.*)

9. Wells Fargo would not be involved in financing the lease of Kean remained the lessor, however, Wells Fargo introduced Kean and the Tribe to Rob Medeiros. (Testimony of J. Brady.) Medeiros, unlike Kean, had established experience with slot machines and casino operations, and also had access to equity financing. (Testimony of J. Brady and R. Medeiros.) Medeiros had been a banker for 11 years; then spent nearly nine years in casino operations as a managing partner, COO, and CFO; and most recently was a Regional Manager at Herbst Gaming, which was the largest slow machine operator at that time. (*Id.*) In late October 2007, Medeiros traveled to Anadarko to meet with Kean and representatives of the Tribe, and to discuss the potential assignment of the lease from KAGD/Kean to TGS. (Testimony of R. Medeiros.)

B. The Tribe Enters Into The Equipment Lease With Kevin Kean/KAGD, LLC.

10. After months of negotiations, the Tribe and KAGD, LLC entered into an Equipment Lease Agreement dated December 27, 2007 ("Lease") whereby the Tribe agreed to lease up to 350 Class III Gaming devices and other ancillary furnishings from KAGD. (Cl. Ex. 61E; Cl.Ex. 121.) In the negotiations, the Tribe was represented by Betsy Brown as its counsel and by John Graves as counsel for the Apache Gaming Board. (*E.G.*, Resp. Exs. 52, 53.) Kean was responsible for negotiating the Lease with the Tribe. (Testimony of R. Medeiros.)

11. The Lease aligned the incentives of the Tribe and the lessor to ensure that the slot machines were popular with customers and maintained in good working order. The Tribe was to pay the lessor 20% of the Net Win for the slot machines under the Lease. (Cl.Ex. 61E § 5.1.) Net Win is the total amount of the cash placed into the machines by customers *minus* the total paid out to customers by the machines. (*Id.*) Accordingly, the greater the Net Win, the greater the rent payments received by the lessor, and revenue received by the lessee Tribe.

12. The Lease required the Tribe to select the equipment, at a cost not to exceed $5 million. Among other things, the Lease states that "the Equipment shall consist of ... 350 Class III Gaming devices to be selected by Lessee." (Id. at p. 2.) "Equipment" itself is defined as "all equipment described in the Lease Schedule," and completing the Lease Schedule is the responsibility of the Tribe. (*Id.* at p. 2 & § 3.5.) Other Lease provisions likewise specify that the Equipment is to be "selected by the Lessee, Tribe." (*Id.* § 3.5.)

13. Under § 8.3 of the Lease, the Tribe was responsible at all times to properly maintain the equipment in good operating condition and to make all necessary repairs in a commercially reasonable manner. (*Id.* § 8.3.) The lessor was obligated to reimburse the Tribe for up to $70,000 per year for wages of slow machine technicians and up to $10,000 per year for slot machine technician training. (*Id.*) To receive reimbursement, the Tribe was required to provide commercially reasonable documentation supporting the amounts to be reimbursed. (*Id.*)

14. The Lease permitted the Tribe to change the games and machines on the Casino floor during the 6 years 364 days of the Lease, all at the lessor's expense. First, the Lease permitted at least 144 conversions, pursuant to which the Tribe could change the software and games played on a particular unit. (*Id.* §§ 4.4, 4.5.) Second, the Tribe could replace at least

36 units in its discretion for any reason, and select the new units to be substituted in. (*Id.* §§ 4.1, 4.5.) Third, the Tribe could designate units for replacement for maintenance reasons. (*Id.* §§ 4.2.) The lessor was required to pay up to $1,050,000 over the almost 7 year life of the Lease to fund any conversions, discretionary replacements, and maintenance replacements. (*Id.* § 4.6.)

15. The Lease Commencement Date was the date on which any slot machines leased from the lessor were installed on the Casino floor and available for play. (*Id.* § 2.1.) The actual Commencement Date was January 1, 2009.

16. The Lease arguably provided better terms than the lease terms given by vendors of the machines, allowed the replacement of poorly performing machines, increased the number of machines at the casino, and resulted in reduced lease rates from other vendors that continued to lease their machines to the Tribe. (Testimony of R. Medeiros; Cl.Ex. 61 ¶¶ 5-7.)

17. As discussed in more detail below, on June 23, 2008, KAGD/Kean assigned its right, title, and interest in the Lease to Rob Medeiros's company, TGS Anadarko, LLC ("TGS"). (See *infra* ¶ 34.)

18. In retrospect WF's decision to not loan money to assignor KAGD/K. Kean was a valuable service to the AT. On 7-11-08 Kevin Kean's Indian gaming license was revoked by the NIGC due to his confirmed lack of credibility and integrity in the Indian Gaming business, so he could no longer be involved in Indian Gaming.

C. The Tribe Selects The Slot Machines To Be Provided Under The Lease.

19. As required by the Lease terms, the Tribe selected the slot machines and other equipment to be included under the Lease. Beginning in early 2008 and continuing throughout the year, Medeiros had numerous communications with Davis Tripp, the general manager of the Casino, and with members and representatives of the Gaming Board, regarding the gaming machines to purchase and to provide under the Lease. (Testimony of R. Medeiros; Cl. Exs. 70-72, 75-76, 78-79, 82, 84-91, 93-94.) Tripp wanted to retain the best performing machines that were already leased by the casino. Medeiros asked Tripp, beginning in at least February of 2008, to identify the existing machines that he wanted to keep. (Cl. Ex. 70.) Tripp finally identified these machines in August 2008. (Cl.Ex. 35.) Of the 161 existing machines selected by Tripp, 137 were included in the lease schedule and were purchased by TGS. (Cl. Ex. 35; JT Ex. 02 at 277-79.) TGS, in consultation with Tripp and others, recommended machines to complete the gaming floor, and Tripp and the Gaming Board approved these recommendations. (Cl.Ex. 58.)

20. In an email dated December 1, 2008, the counsel to the Apache Gaming Board - which was Tripp's direct supervisor - told TGS: "After speaking with Davis and the Board of Directors it is my understanding that the lease schedule is satisfactory as last submitted." (Cl. Ex. 94.) On December 9, 2008, the Tribe provided TGS with its completed Lease Schedule No. 1, executed by the chairman of the Apache Business Committee. (Cl.Ex. 98.) The remaining Lease Schedules were executed in 2009 by Patrick Watson, who succeeded Tripp as the Casino's general manager. (Cl.Ex. 61 ¶ 5; JT Ex. 02 at 280-87.) Tripp and his assistant general

manager, Cheryl Critchfield, were fired on or about December 8, 2008, in the wake of a ticket scam in which cashiers stole approximately $170,000 from the Casino. (Cl.Ex. 51; Cl. Ex. 98 Testimony of J. Adams.)

D. The Tribe Fails To Fulfill Its Obligation To Maintain The Slot Machines.

21. The Tribe failed to fulfill its obligation under § 8.3 of the Lease to maintain the slot machines. The Tribe lacked the infrastructure and expertise to repair and maintain the gaming machines when the Lease commenced on January 1, 2009. (Testimony of D. Tripp.) Still, the Tribe chose not to hire or train qualified slot technicians, even though the Lease required TGS to reimburse actual wages and training expenses up to $70,000 and $10,000 each year, respectively. (Testimony of J. Adams, J. Cook, and E. Harper.) The Tribe did not submit for reimbursement any costs related to slot technician wages or training. (*Id.*; Testimony of R. Medeiros.) The Casino's operations and floor managers - who were directly responsible for the slot machines proper operation on a daily basis - did not know that the Tribe was required to maintain the machines under the Lease. (Testimony of J. Adams, J. Cook, and E. Harper.) And they did not know that the Tribe could spend up to $70,000 for slot technician wages and $10,000 for training each year with full reimbursement. (*Id.*)

22. Employees of TGS provided on-site training to Casino personnel when TGS was at the Casino to install and service the slot machines under the Lease. (Resp. Exs. 266, 270; Testimony of J. ADamns and J. Cook.) Previously, in November 2008, TGS also had hosted Casino personnel in Nevada at TGS's expense to train them on slot machine repair and maintenance, but after 2 days the Casino employees instead required training on casino operations. (Cl.Exs. 75, 84; Testimony of R. Medeiros and E. Harper.)

23. Before he was fired on December 9, 2008, Tripp had told TGS that the Tribe had storage space on site for the new machines to be provided under the Lease. (Cl. Ex. 33; Testimony of D. Tripp.) In early 2009, TGS notified the Tribe approximately three-to-four weeks in advance of the first shipment of new equipment under the Lease. (Testimony of E. Harper.) The Tribe, however, did not rent the storage space located by Tripp, failed to clear sufficient space off of the Casino floor to accommodate the new Equipment, and did not notify TGS that the initial shipment should be delayed. (*Id.*) When the first shipment of new Equipment arrived, the Tribe left the machines outside, where they were subjected to rain, snow, and severe weather. (*Id.*) The Tribe did not even rent trailers as temporary storage for the equipment while the Casino floor was being cleared. (*Id.*)

24. When the Tribe later raised issues about the condition of certain equipment in the fall of 2009, TGS promptly addressed those issues, and the Tribe accepted in writing all machines provided under the Lease. On September 15, 2009, the Tribe sent a letter to TGS alleging that certain slot machines and ancillary furnishings did not satisfy the standard set forth in the Lease, (Resp. Ex. 265.) Within days employees of TGS traveled to the Casino to resolve any issues - which were largely minor to cosmetic - and also to train Casino personnel on how to prevent them going forward. (Resp. Exs. 266, 270; Cl.Ex. 102; Testimony of R. Medeiros.) On October 14, 2009, representatives of TGS, the Apache Gaming Board, and the Casino met to resolve any outstanding issues. (Cl,Ex. 102.) The Tribe stated in writing that the agreed-on action items "will fully settle any outstanding issues regarding acceptance and all parties agree

that the issues listed in the letter mentioned herein are cured." (*Id.*) TGS performed all of the action items. (Testimony of R. Medeiros.)

25. In early 2010, TGS was concerned that a large number of machines were out of service, despite the Tribe's responsibility under the Lease to properly maintain the equipment in good operating condition. (Resp. Ex. 277; Testimony of R. Medeiros.) Accordingly, in late February 2010, TGS engaged a local contractor, Jim Brown, to service and repair machines at the Casino. (Testimony of R. Medeiros and J. Adams.) The number of out-of-service machines then fell dramatically through approximately June 2010. (Cl.Ex. 63 at pp. 16-17 & Ex. 3; Cl. Ex. 124 at 22; Resp. Exs. 500-501; Testimony of J. Adams.) At that time, the Tribe chose to stop making Lease payments and to stop communicating with TGS. (Testimony of J. Pangburn and J. Adams.) The number of out-of-service machines then rose to highs of 36 in December 2010 and 54 by February 2011. (Cl.Ex. 63 at pp. 16-17 & Ex. 3; Cl.Ex. 124 at 22; Resp. Ex. 503; Testimony of J. Adams.)

IV. Wells Fargo's Casino Loan To The Tribe And Its Loan to TGS.

26. Several months after Kean approached Wells Fargo about the equipment financing in August 2007, the Tribe proposed a direct loan from Wells Fargo to the Tribe. (Testimony of J. Brady.) In November 2007, Betsy Brown, the Tribe's counsel, asked Wells Fargo about funding a land acquisition. (*Id.*) The Tribe's propooosal progressed to discussions of a $4,365,000 loan from Wells Fargo to the Tribe to pay off debt, expand and remodel the casino, and acquire land (the "Casino Loan"). (*Id.*)

27. When the Lease was executed by the Tribe and KAGD on December 27, 2007, Wells Fargo had not committed to provide a loan to the Tribe. Wells Fargo issued a commitment letter on the Casino Loan to the Tribe more than two months later, on March 8, 2008. (Cl.Ex. 13.) Among the conditions precedent to funding was assignment of the lease from KAGD to TGS. (*Id.*) On March 27, 2008, the Tribe's Business Committee enacted Resolution 03-2703-08 approving the assignment of the Lease from KAGD to TGS. (Cl.Ex. 16.)

28. On June 23, 2008, the Tribe's Business Committee enacted Resolution 06-23-08 approving a financing transaction with Wells Fargo and authorizing the execution and performance of the loan documents relating to the financing transaction, including the Loan Agreement. (JT Ex. 01 at 188-92; Cl.Ex. 27.) Counsel for the Tribe informed Wells Fargo that the authorizing resolution was "passed by the Business Committeeeee, with a quorum present." (Cl.Ex. 27.) The Certification on the authorizing resolution stated that it was "adopted at a duly called meeting of the Apache Tribe of Oklahoma Apache Business Committee on the 23 day of June, 2008 in Anadarko, Oklahoma by a vote of 3 for and 0 against, a quorum being present." (JT Ex. 1 at 192; Cl.Ex. 27.)

29. On the same day, Wells Fargo and the Tribe entered into a Loan Agremeent dated June 23, 2008 (as amended, the "Loan Agremeent") whereby Wells Fargo agreed to loan the Tribe $4,365,000 (the "Casino Loan"). (JT Ex. 01 at 001-82.)

30. As security for repayment of the Loan, the Tribe entered into a Depository

Agreement with Wells Fargo dated June 23, 2008 (as amended, the "Depository Agreement") whereby the Tribe agreed to deposit revenues it derived from the Enterprise (as defined therein) with a collection bank who would then transfer such revenues directly to the Depository. (JR Ex. 01 at 150-75.) The Depository Agreement specifies how the deposited revenues will be distribued on an agreed priority basis, to first pay expenses and obligations of the Tribe, before distributing net profit to the Tribe.

31. In addition to the security provided by the Depository Agreement, the Tribe granted Wells Fargo a security interest in and to all of the Tribe's right, title and interest in, to and under the Collateral and Enterprise Property (as defined therein) pursuant to a Security Agreement dated June 23, 2008. (JT Ex. 01 at 118-41.)

32. The Tribe, Wells Fargo and Anadarko Bank & Trust Co. ("Anadarko Bank") executed a Deposit Account Agreement dated June 23, 2008 ("Deposit Account Agrement") whereby the parties agreed that pursuant to the Loan Agremeent and Loan Documents, the Tribe gratend a lien and security intereste in all deposit, brokerage and other similar accounts held by the Tribe at Anadarko Bank established in connection with the Enterprise. (JR Ex. 01 at 95-98.)

33. Sections 8.1(a)(xv) and (xviii) of the WF/AT Loan Agrement contained certain conditions precedent with respect to the equipment that had to be satisfied before Wells Fargo would close and fund the Loan. Namely, Wells Fargo required the following: (1) execution of all necessary agrements for the financing and installation of the machines to the Equipment Lease Agreement dated December 27, 2007, between KAGD and the Tribe; and (2) the receipt of the Assignment of the Equipment Lease Agreement form KAGD to TGS Anadarko. (JT Ex. 01 to 050-52 §8.1(a)(xv)(xviii).)

34. On June 23, 2008, both conditions precedent were satisfied. TGS entered into a Credit Agreement with Wells Fargo for the financing and installation of the gaming machines. (JT Ex. 02 at 001-55.) The related Depository Agreement provided for a monthly distribtion, or waterfall, of rental payments received by TGS. After reimbursement to TGS of monthly machine expenses, payment to the lenders of interest and principal, and other distributions, Wells Fargo was entitled to receive a percentage of the remaining "free cash flow," if any. This additional percentage was known as a yield enhancement. (Testimony of J. Brady.) In practice, Wells Fargo never actually received any yield enhancement, and received nothing beyond payment of interest and principal through July 2010 (the last month that payment was received). (Cl.Ex. 120.) The net revenue under the TGS/AT equipment lease did not generate sufficient revenue in TGS's 20% to pay WF any yield enhancements.

35. Also on June 23, 2008, KAGD assigned the Lease to TGS. The Tribe expressly consented to the assignment, and executed an Estoppel Certificate that ackjnoweldged the assignment and TGS's rights under the Lease as lessor. (JT Ex. 02 at 134-39; 140-48.)

36. The arbitrator concludes there was no economic duress involved in the loan agreements or the gaming equipment lease. All parties were acting in good faith negotiations at arm's length.

V. The Tribe's Waiver Of Sovereign Immunity With Respect To The Casino Loan

A. The Business Committee Has Authority To Enter Into Contracts And Waive Sovereign Immunity On Behalf Of The Tribe.

37. The Apache Tribal Constitution governs the activities of the Tribe. (JT Ex. 01 at 193-200.) The supreme governing body of the Tribe is the Tribal Council, which consists of all adult tribal members. (*Id.* art. III.) The Tribal Constitution also provided for a five-member Business Commitee, which has such powers as delegated by resolution of the Tribal Counsil. (*Id.* art. V.) Within its delegated authority, the Business Commitee "may transact business and otherwise speak or act on behalf of the tribe in all matters on which the tribe is empowered to act." (*Id.* art. V.) The Business Committee may conduct business with a quorum of three members present and in agreement. (*Id.* art. XV.)

38. The Tribal Council has delgated to the Business Commitee the power to transact business for the Tribe, which includes entering into contracts on behalf of the Tribe and waiving the Tribe's sovereign immunity from suit. Resolution 73-1 delegates full and complete authority to the Business Committee to transact any and all business related to the tribe involving matters such as tribel land and tribal budget. (Cl.Ex. 17.) Resolution 78-7 likewise delegates authority to the Business Committee to transact business related to the Tribe. (*Id.*)

39. In an opinion dated July 19, 2007, the Department of Interior characterized Resolution 73-1 and Resolution 78-7 as "Grants of general authority" to the Business Committee to act in matters for the Tribe. (Cl.Ex. 21.) In the July 19, 2007 decision, the Department of Interior held that these resolutions remainded operative and eliminated the need for more specific grants of authority to the Business Committee. (*Id.*) The Department of Interior had previously reaffirmed the continued effectiveness of Resolutions 73-1 and 78-7 in an agency letter dated July 16, 1985. (Cl.Ex. 22.)

40. With the authority delegated in Resolution 73-1 and Resolution 78-7, the Business Committee has repeatedly and routinely entered into contracts on behalf of the Tribe and waived the Tribe's sovereign immunity from suit. (Cl.Ex. 64.)

41. In April 2008, counsel for Wells Fargo and the Tribe discussed whether Tribal Council approval was required to waive the Tribe's sovereign immunity. (Cl.Exs. 17, 18, 20, 21, 22.) After engaging in numerous discussions and receiving documents from the Tribe's counsel, Wells Fargo concluded that Tribal Council approval was not necessary and that the Business Committee could expressly waive the Tribe's sovereign immunity, (Cl.Ex. 21; Testimony of F. Gallues.)

42. Wells Fargo also obtained two legal opinions assuring that the Business Committee had proper authority to enter into the Loan Agreement. First, the tribe's legal counsel provided a written opinion stating that the Business Committee "has full power to bind the Borrower for all matters including with respect to the Loan Documents. . . ." (JT Ex. 01 at 176-82 ¶ 3.) Second, counsel for the Gaming Commission of the apache Tribe provided a written opinion stating that "the Business Committee. . .is authorized to transact business and exercise its powers as an Indian tribe and has approved all agreements by duly passed and adopted resolutions." (JT Ex. 01 at 295-97¶ 1.)

B. The Tribe Waives Its Sovereign Immunity in the Resolution and the Loan Agreement

43. In the resolution approving the Loan Documents between the Tribe and Wells Fargo, the Tribe, through its Business Committee, expressly waived its sovereign immunity. Specifically, Resolution 06-23-08 dated June 23, 2008 provides: the "Business Committee further reaffirms the provisions waiving sovereign immunity including in the Loan Documents and states that it expressly waives sovereign immunity as stated therein." (JT Ex. 01 at 191.)

44. The Loan Agreement contains two separate and independent waivers of the Tribe's sovereign immunity. First, under § 11.27 of the Loan Agreement, the Tribe expressly and irrevocably waived its sovereign immunity (and any defenses based thereon) from any suit, actions, or arbitration proceeding with respect to the Loan Agreement or related loan documents. (JT Ex. 01 at 069-70.) Second, under § 11.24 of Loan Agreement, the Tribe agreed to resolve any dispute through binding arbitration. (*Id.* at 067-68.) C&L Enterprises, Inc. v. Citizens Bank of Potawatomi Indian Tribe, 532 US411, 418-19 (2001)

C. The Business Committee Reaffirms The Loan Agreement And Waiver of Sovereign Immunity in February 2009

45. In the fall of 2008, a faction consisting of Ronald Ahtone, Richard Banderas and Marquitta Carattini alleged that it controlled the Business Committee. This faction, represented by defendant's counsel, claimed not to know of or approve of the Casino Loan. On January 29, 2009, however, the Acting Assistant Secretary for the Department of Interior, Bureau of Indian Affairs ("BIA") issued an opinion specifying that two of counsel's three clients were not valid members of the Business Committee. (Cl.Ex. 46.)

46. On February 3, 2009, the Tribe's counsel informed Wells Fargo that the Tribe would affirm all transactions with Wells Fargo, which would put to rest any argument that the loan was somehow not properly approved. (Cl.Exs. 64,49.)

47. On February 5, 2009, the Business Committee reaffirmed the validity of the Loan Agreement by passing Resolution 02-05-09-03. (Cl.Ex. 49.) In Resolution 02-05-09-03, the Business Committee provided that it had "power to transact business for the Tribe under Apache Resolution No. 73-1 and 78-7." (*Id.*) The Business Committee further stated in the Resolution that "the tribe wishes to reaffirm all prior activities with Wells Fargo Bank, including all transactions, agreements, and Resolution 06-23-08 passed on June 23, 2008." (*Id.*) Additionally, the Business Committee reaffirmed "its relationship with Wells Fargo Bank including all resolutions, transactions and agreement...." (*Id.*)

D. The Business Committee Again Reaffirms The Loan Agreement And Waiver of Sovereign Immunity in August 2009.

48. In early 2009, the Tribe was in default of the Loan Agreement for violating financial covenants and requested a waiver. (Cl.Exs. 50-51.) Wells Fargo agreed to modify the Loan Agreement to restructure the covenant level so that the tribe could be in compliance going forward. (Testimony of F. Gallues.)

49. On August 26, 2009, the Business Committee enacted Resolution 08-26-09-01, which authorized a Forbearance Agreement and First Amendment to the Loan Agreement (the "Forbearance Agreement"). (JT Ex. 01 at 340-42; Cl.Ex. 56.) In executing Resolution 08-26-09-01, the Business Committee provided that it "is vested with the authority to negotiate and contract with agencies of the federal, state, local, and tribal entities, as well as private entities and individuals on behalf of the tribe by and through Article V of the Constitution of the Apache Tribe of Oklahoma and Apache General Council Resolutions No. 73-1 and 78-7." (*Id.*)

50. Resolution 08-26-09-01 contained an independent and express waiver of sovereign immunity. In it, the Business Committee reaffirmed that the Loan Agreement and Loan Documents are the "legal, valid and binding obligations of the Tribe, enforceable against the Tribe in accordance with their terms, including the limited waivers of sovereign immunity, consents to jurisdiction and agreements to arbitrate as set forth in the Loan Documents, notwithstanding any contrary provisions of Tribal law...." (JT Ex. 01 at 341.)

[1] In October 208, counsel contacted Wells Fargo on behalf of this faction and requested account information. (Cl.Ex. 81; Testimony of F. Gallues.) Wells Fargo did not release this confidential information that is protected by statute, and instead requested that counsel issue a subpoena. (*Id.*) Counsel did not issue the subpoena until January 20, 2009, just a few days before the BIA issued its ruling, and did not serve the subpoena on Wells Fargo. (Cl. Ex. 45, 46-48.)

VI. The Tribe Releases Wells Fargo From Liability And Waives All Defenses.

51. In the Forbearance Agreement, the Tribe discharged Wells Fargo from any claims that the Tribe had against Wells Fargo before and as of the date of August 26, 2009. (JT Ex. 01 at 350-51 § 6.1.1; Cl.Ex. 56.) Specifically, § 6.1.1 of the Forbearance Agreement reads: "The Borrower hereby releases and forever discharges the Lender ...of and from all damage, loss, claims, demands, liabilities, obligations, actions and causes of action whatsoever which the Borrower may now have or claim to have ...prior to and as of the date of this First Amendment, and whether presently known or unknown, and of every nature and extent whatsoever on account of or in any way concerning, arising out of, founded upon or in any way relating to this First Amendment or the Loan Documents...." (Id. § 6.1.1).

52. The Tribe was represented by in house counsel, Betsy Brown, as its counsel in negotiating and entering into the Forbearance Agreement. (Cl.Ex. 57.) Indeed, Section 2.1.2 of the Forbearance Agreement required an opinion of counsel of the Tribe before the Forbearance Agreement would become effective. (JT Ex. 01 at 346; Cl.Ex. 56.) The Tribe's attorney provided this opinion by letter dated August 25, 2009. (JT Ex. 01 at 336-39; Cl. Ex. 57.)

53. The Tribe received adequate consideration from Wells Fargo in exchange for the release in Section 6.1.1 of the Forbearance Agreement. Before it entered into the Forbearance Agreement, Wells Fargo had the legal right to declare a default and accelerate the Casino Loan as a result of the Tribe's default. (JT Ex. 01 at 57 § 9.2(a).) In entering into the Forbearance Agreement, Wells Fargo surrendered this legal right. (JT Ex. 01 at 346 § 3.1.) This is true

regardless of whether Wells Fargo actually intended to declare a default and accelerate at the time of the Forbearance Agreement. In any event, Wells Fargo could not and would not allow the default to continue in the absence of cooperation and concessions from the Tribe. (Testimony of F. Gallues.) Wells Fargo chose not to enforce the Loan at that time only because the tribe was being cooperative and making concessions due to the ongoing default. (*Id.*)

VII. The Tribe Materially Breaches the Loan Agreement and Wells Fargo Commences Arbitration

54. In August 2010, the Tribe stopped performing under the Loan Agreement by, among other things, failing to make an interest payment of $13,815.21 on August 31, 2010 as required under the Loan Agreement. (Cl.Ex. 104¶ 33.) On September 7, 2010, Wells Fargo provided the Tribe with a notice of default and acceleration. (Cl.Ex. 104 (Ex. K).)

55. Wells Fargo also exercised its rights under the Security Agreement and Deposit Account Agreement by providing written notice to Anadarko Bank & Trust Co. ("Anadarko Bank") that an Event of Default had occurred under the Loan Agreement and directing that the Tribe's right to make withdrawals and initiate transfers from its deposit, brokerage and other similar accounts with Anadarko Bank shall terminate immediately. (Cl.Ex. 103.) In accordance with paragraph (4)(b) of the Deposit Account Agreement, Wells Fargo instructed Anadarko Bank to pay promptly to Wells Fargo the balance of all deposit, brokerage and other similar accounts of the Tribe at Anadarko Bank established in connection with the Enterprise. (*Id.*) On September 17, 2010, Anadarko Bank filed a petition in the District Court of Caddo County, State of Oklahoma ("Petition") requesting the court to order the Tribe and Wells Fargo to interplead and settle among themselves their rights to the monies held at Anadarko Bank which totaled $47,445.10. (Cl.Ex. 104 (Ex.N).)

56. On September 28, 2010, Wells Fargo filed a Statement of Claim with the American Arbitration Association ("AAA") alleging breach of contract and unjust enrichment and seeking declaratory relief pursuant to 12 O.S. § 1651. (Cl.Ex. 104.)

57. The Tribe responded in an Answering Statement letter dated October 15, 2010, which provided that the Tribe was immune from arbitration because it had never waived its sovereign immunity, that the Loan Agreement amounts to an unenforceable management contract, and that the Business Committee lacked authority to enter into the Loan Agreement. The Tribe also asserted a Counterclaim on October 25, 2010, in which the Tribe asserted essentially the same claims that the Tribe had brought in its Complaint in the federal court action - violations of the Bank Holding Company Act, declaratory relief stating that the Loan Agreement is Void and unenforceable, and unjust enrichment.

58. National Indian Gaming Commission

Jt. Ex. 1 para 5.17 states: Borrower shall deliver a favorable written legal opinion of counsel to the Lender, in form and substance satisfactory to the Lender and its counsel confirming and that (i) none of the Loan Documents, including the Equipment Lease Agreement and related documents, constitutes a management contract within the meaning of IGRA that is required to be approved by the Chairman of the NIGC, and (ii) none of the Loan Documents,

including the Equipment Lease Agreement, constitutes a proprietary interest in Class II Gaming or Class III Gaming. Additionally, upon request of the Lender, the Borrower shall, at its sole expense, make an application to the NIGC for a written determination that (i) none of the Loan Documents including the Equipment Lease Agreement and related documents, constitutes a management contract within the meaning of IGRA that is required to be approved by the Chairman of the NIGC, and (ii) none of the Loan Documents, including the Equipment Lease Agreement, constitutes a proprietary interest in Class II Gaming or Class III Gaming. The Borrower shall, at its sole expense, diligently pursue such application and provide the Lender with written updates no later than every 60 days after such application is made or promptly upon the receipt of any communication (written or oral) from the NIGC concerning such application.

59. Jt. Ex. 1 para 11.32 states: "Usury Laws; Governmental Approvals

(a) The Borrower agrees that the only usury laws that shall apply to any of the transactions between the Borrower, any of its Affiliates and the Lender contemplated by the Loan Documents shall be the laws of the State of Oklahoma. The Borrower further agrees that it will not enact or adopt any law, rule or regulation which would impair the Lender's rights with respect to their ability to collect amounts owed under this Agremeent, the Notes or the other Loan Documents, or to realize on any collateral described in any of the Loan Documents. The Borrower agrees not to assert that its obligations to the Lender under the Loan Documents violate any tribal law.

(b) The Borrower agrees not to assert in any suit, action or proceeding that any of the Loan Documents is void, voidable, or otherwise invalid for failure to receive the approval of the Chairman of the NIGC or the Secretary of the United States Department of the Interior."

60. Paragraph 5.11 provides for performance by the borrower and paragraph 11.23 provides for time being of the essence. (Jt. Ex. No. 1.)

VIII. Findings Specific To The Tribe's Counterclaim Under The Bank Holding Company Act.

A. The Tribe Neither Provided Nor Received Any Additional Property, Credit Or Service Outside Of The Casino Loan.

61. The Tribe did not provide any additional property, credit, or service to Wells Fargo outside of its principal and interest payments on the Casino Loan. (Testimony of S. Erickson; Cl.Ex. 62.) The payments by TGS on its loan with Wells Fargo were not payments that Wells Fargo received from the Tribe. (*Id.*) Instead, any funds paid to Wells Fargo came from TGS, and were the property of TGS at the time of payment. (*Id.*) The Tribe was required to use gaming revenues to make rental payments to TGS arising under the Lease. (*Id.*) Once the rental payments were made, however, the money became the property of TGS, which was available to satisfy the obligations of TGS arising under its loan agreement with Wells Fargo. (*Id.*)

B. Wells Fargo Did Not Receive Any Benefit In The Form Of Enhanced Yield

62. Wells Fargo received no benefit from the yield enhancement provision of its loan to TGS because TGS's payments on the loan never generated sufficient funds to pay anything beyond principal and interest due. (Cl.Ex. 120; *see also supra*¶ 33.) Wells Fargo did not receive any payment beyond principal and interest. (*Id.*)

C. Wells Fargo Acted Legitimately To Protect Its Investment With The Tribe And Maximize The Potential For Repayment

63. Wells Fargo did not unlawfully tie the funding of the Casino Loan to the assignment of the Lease from Kevin Kean to TGS. (Testimony of S. Erickson; Cl.Ex. 62.) Wells Fargo acted legitimately to protect its investment with the Tribe and maximize the Tribe's ability to repay the Casino Loan. (*Id.*) Wells Fargo's risk was heightened because the Tribe could not pledge its real property - the Casino building and land - as security for the loan. (Testimony of S. Erickson and K. Washburn.) The Tribe's ability to service its debt to Wells Fargo turned on its ability to generate revenue from the gaming machines rented under the Lease. (Testimony of J. Brady and S. Erickson; Cl.Ex.62.) Without financing in place for a qualified lessor, and without installation of the machines on the casino floor, the Tribe could not generate the operational cash flow to repay Wells Fargo. (*Id.*) A casino generates 85% to 90% of its gaming revenues from gaming devices. (Testimony of S. Erickson; Cl.Ex. 62.) Accordingly, lenders want to make sure that the borrower has the resources to finance or lease the number of gaming devices that a borrower has indicated they will install on the casino floor. (*Id.*) Additionally, the lender to a tribe requires confidence in the lessor that is providing the gaming machines. (*Id.*) It is critical that the gaming devices operate in a proper fashion and are available for use on a continual basis, so that they can generate cash flow to service debt. (*Id.*) The AT/TGS equipment lease provided that "refurbished machines" could be furnished by the lessor.

64. In this case, the Tribe had an existing employment/agent relationship with Kevin Kean, who approached Wells Fargo in search of equipment financing for the Lease after already establishing with the Tribe that he would be the lessor. (*See supra* ¶¶ 1-5.) But Kean lacked the experience, expertise and resources required of a lessor of gaming equipment. (*See supra* ¶¶ 1,7.) Wells Fargo acted appropriately in requiring that the Lease be assigned to a lessor with slot machines and casino management experience and with access to capital, such as Rob Medeiros and TGS. (*See supra* ¶¶ 9, 32.) Wells Fargo acted legitimately and consistent with traditional and usual banking practices to safeguard the value of its investment with the Tribe and to maximize the potential for repayment on the Casino Loan. (Testimony of S. Erickson; Cl.Ex. 62.)

65. Wells Fargo did not unlawfully tie the Casino Loan to any other financing arrangement, concluding the Red River project. Wells Fargo did not condition the closing and funding of the Casino Loan on Wells Fargo's participation in Red River. (Testimony of J. Brady and F. Gallues; Cl.Ex. 24.) Indeed, the Casino Loan was closed and funded even though the Red River project never came to fruition.

D. The Tribe's Alleged Damages

66. The Tribe suffered no damages as a result of any alleged illegal tie. The Tribe has attempted to present evidence only of damages purportedly flowing from assignment of the Lease to TGS. (Testimony of A. Meister.) However, the Tribe was responsible for both the selection and maintenance of the gaming machines and related equipment under the Lease. (*See supra* ¶¶ 12-13.) The Tribe selected the Equipment as provided for in the Lease, and then failed to fulfill its maintenance obligations under the Lease. (*See supra* ¶¶ 18, 20-21, 24.) Any damages that allegedly flow from the selection and condition of the Equipment are not attributable to the conduct of Wells Fargo.

67. The Tribe asserts that the condition of the machines reduced customer traffic, but refused to produce its daily records of actual customer head counts dating back to 2007 that are maintained by the Tribe and located in the Casino. (Testimony of J. Pangburn and J. Adams.) Production of the head count materials was required under the Scheduling Order dated March 25, 2011, which required the Tribe to produce all materials reasonably related to its claims for damages. The Tribe refused to produce these materials even after they were specifically requested once counsel for Wells Fargo learned of their existence. These records are the best evidence of actual customer head counts during the relevant time period and without them the Tribe cannot prove the decrease in customer traffic that is central to its damage claim.

68. The report and testimony of the Tribe's damages expert. Dr. Meister, does not establish that the Tribe is entitled to recovery. The only potentially relevant damages period begins on January 1, 2009, which is the Lease Commencement Date and the date on which Equipment under lease from TGS were first on the Casino floor. (El.Ex. 63 at 18-19.) Even during this time, Dr. Meister's damages figures are unrealistic, speculative and conjectural and are contrary to the Casino's actual earnings since it opened. Dr. Meister opines that if the Tribe had different machines on the floor in 2009, the Casino's earnings before interest, taxes, depreciation, and amortization (EBITDA) would have been triple the Casino's EBITDA in 2008, and more than double its actual EBITDA in 2009 and 2010. (Cl.Ex. 128 & 129.) Moreover, Dr. Meister's chosen benchmarks for calculating damage are unreliable and do not demonstrate that the Lease adversely affected Casino revenues. (Cl.Ex. 63 at 20-35; Cl.Ex. 124 at 23-35.) Since the Casino opened in May 2006, the slot machines that Dr. Meister designated as "non-TGS" outperformed the machines that Dr. Meister designated as "TGS." (Cl.Ex. 63 at 20-22; Cl.Ex. 124 at 24.) Similarly, since the Casino opened in May 2006, it has consistently generated fewer daily slot revenues than the average casino in Oklahoma - which is to be expected given that the Casino is a small facility in a competitive market. (Cl.Ex. 63 at 27-34; Cl.Ex. 124 to 31-35.) These pre-existing differentials hold constant over the life of the Casino and cannot be attributed to the TGS Lease. Dr. Meister's "TGS vs. non-TGS" benchmark is further flawed because he compared a small number of "non-TGS" machines with a large number of "TGS" machines, which resulted in the "non-TGS" machines generating a greater revenue per machine. (Cl.Ex. 63 at 22-24; Cl.Ex. 124 at 25-27.) When the Casino increased the number of "non-TGS" machines in late 2010, the daily revenue per machine fell dramatically (Cl.Ex. 63 at 23-24 & Ex. 11; Cl.Ex. 124 at 28-30.)

E. The Release in the Forbearance Agreement Was Not The Product Of Economic Duress And Was Provided In Exchange For Fair Consideration

69. The Forbearance Agreement, in which the Tribe released Wells Fargo of all liability arising out of all claims and causes of action before August 26, 2006, was not the product of economic duress and was provided in exchange for fair consideration. (*Supra* ¶¶ 46,51.)

IX. Findings Specific To Wells Fargo's Claims For Breach Of Contract And Unjust Enrichment

A. The Tribe Waived Its Sovereign Immunity With Respect To The Casino Loan

70. The Business Committee was authorized to waive sovereign immunity on behalf of the Tribe with respect to the Casino Loan. (*Supra* ¶¶ 35-40.) The Business Committee validly exercised its authority to waive sovereign immunity on behalf of the Tribe on June 23, 2008. (*Supra* ¶¶ 40-42.) The Business Committee later validly reaffirmed the waiver of sovereign immunity in resolutions dated February 5, 2009, and August 26, 2009. (*Supra* ¶¶ 43-45, 47-48.

B. Wells Fargo Is Entitled To Recover On Its Claim For Breach Of Contract

71. The Tribe is in default under the Loan Agrement. The total due and owing under the Loan Agreement through May 16, 2011 is $2,751,160.20, consisting of $2,591.006.69 in principal, $158,404.34 in interest, and $1,749.17 in administrative fees. (Cl.Ex. 116.) Wells Fargo is also entitled to release of the $47,445.10 interpleaded in the District Court of Caddo County, State of Oklahoma.

72. The Loan Agreement and the Security Agreement are enforceable and do not constitute management contracts. Wells Fargo and the Tribe never intended for Wells Fargo to manage the Casino. Section 11.19(b) of the Loan Agreement provides for good faith negotiations to replace any potentially unenforceable provisions. (JT Ex.01 at 066.) This section further provides that the Tribe agrees "to execute further documentation as requested by [Wells Fargo] to reflect such replacement terms" and "to be bound by such replacement provisions as contemplated hereunder." (*Id.*) Wells Fargo has agreed to amend the Loan Agreement to add terms that even the Tribe acknowledges would eliminate any concern that the Loan Documents are a management contract. (Cl.Ex. 118.) Claimant's Exhibit 118 is a Second Amendment to the Loan Agreement, executed by Wells Fargo, which adds the "safe harbor" language approved by the staff of the NIGC in their January 23, 2009 letter to Kent Richey. (Resp. Ex. 299 at p. 5, 6, & Ex. B at 299-028.)

73. The pledge of gross revenues does not make the Loan Agreement a management contract. The arbitrator is aware of no reported case that has held that a pledge of gross revenues makes a management contract out of a loan agreement, and none was cited by the parties. Such a holding would be contrary to the expressly stated purposes of IGRA, including the promotion of tribal economic development and self-sufficiency. As of 2007, commercial banks had made more than $14 billion in commercial loans to Indian tribes, almost all of which were secured by collateral upon an event of default. To now find that these loan agreements are potentially void as management contracts would severely affect future loans to Indian tribes, and

would negatively impact tribal economic development and self-sufficiency. (Resp.Ex. 301, Ex. A ¶¶ 1, 2, 3, 4, 7, 9, 10, 11.)

74. The pledge of gross revenues in these Loan Documents does not create a management contract even under the liberal interpretation of the NIGC staff. The NIGC staff acknowledge that other clauses in the loan documents that limit the ability of a lender to engage in management activities prevent the loan documents from becoming a management contract, even if a pledge of gross revenues is included. (Resp. Ex.301, Ex.B.) The following limitations are included in the Loan Documents regarding the Casino Loan: (1) the Loan Agreement provides that each provision of the Loan Document shall be interpreted as to be effective and valid under applicable law (JT Ex.01 at 65-66 § 11.19(a) and (b); (2) the Loan Agreement provides that nothing in the Loan Documents shall deprive the Tribe of the responsibility for the conduct of gaming activity or any other aspect of the Enterprise (*Id.* at 26 § 4.4); (3) the Depository Agreement provides that any provision that is inconsistent with applicable law or regulation will be deemed ineffective, and will be modified to be consistent with that law and regulation (JT Ex.01 at 158 § 23(e); and, (4) the Security Agreement permits actions by Wells Fargo only "to the extent permitted by law" (Jt Ex.01 at 133 § 6.4(b).). Like the NIGC staff's opinion in *Big Sandy*, this limiting language is sufficient such that the pledge of gross revenues does not make the Loan Documents management contracts. (Resp.Ex.301, Ex.B at 5.).

75. Moreover, in the Loan Agrement, the parties agreed that the Loan Agreement is not a management contract. The Loan Agrement provides that neither the Loan Agreement nor the other Loan Documents, taken individually or as a whole, constitute management contracts or management agreements within the meaning of the Indian Gaming Regulatory Act. (JT Ex.01 at 26 § 4.4.) The Tribe also agreed "not to assert in any suit, action or proceeding that any of the Loan Documents is void, voidable or otherwise invalid" on the grounds that it is an unapproved management contract. (*Id.* at 072 § 11.32(b). Throughout the SBC was managed by the Gaming Board and Gaming Committee of the AT, not by WF.

76. Wells Fargo also obtained legal opinions from the Tribe's counsel that the Loan Agreement was not a management contract. First, the Tribe's legal counsel provided a written opinion stating that "[n]either the Loan Agreement nor the other Loan Documents, taken individually or as a whole, constitute 'management contracts'...." (JT Ex.01 at 180 § 16.) Second, counsel for the Gaming Commission of the Apache Tribe provided a written opinion stating that the "Loan Agreement, Security Agreement, and the ancillary Equipment Lease are not management contracts as defined by the Indian Gaming REgulary Act, 25 U.S.C. § 2711." (JT Ex.01 at 296 ¶ 3.) Third, in connection with the Forbearance Agreement, the Tribe's counsel provided a written opinion stating that neither "the Forbearance Agreement ...nor the other Loan Documents, taken individually or as a whole, constitute 'management contracts'...." (Cl.Ex. 57 ¶ 10.)

77. The Credit Agreement between Wells Fargo and TGS is irrelevant to the management contract analysis with respect to the Loan Agreement between the Tribe and Wells Fargo, and any challenge to the Credit Agreement will be decided in a separate arbitration... (25 CFS § 502.5; Resp. Ex.301, Ex.B.) between TGS & Wells Fargo.

78. In keeping with the above findings, if the Apache Tribe was not required to repay the loan to Wells Fargo it would be unjustly enriched in the amount of the balance due.

CONCLUSIONS OF LAW

Waiver and Release in Forbearance Agreement

1. Section 6.1.1 of the Forbearance Agreement dated August 26, 2009, is valid and enforceable against the Tribe, and waives all defenses asserted by the Tribe in its Answering Statement and its Counterclaim and releases Wells Fargo from all claims and causes of action asserted in the Counterclaim.

Waiver of Sovereign Immunity

2. The Tribe expressly and unequivocally waived its sovereign immunity with respect to all claims and defenses at issue in this Arbitration. (*See* Findings of Fact ¶¶ 35-48.) *C&L Enterprises, Inc. v. Citizens Bank of Potawatomie Indians* 53-2 US 411, 418-19 (2001).

Contract

3. The Loan Agremeent dated June 23, 2008 and all other Loan Documents (as defined in the Loan Agremeent) are valid and enforceable against the Tribe.

4. The Loan Agreement and other Loan Documents do not provide for the management of all or part of the Tribe's gaming operations by Wells Fargo and therefore are not void. (*See* Findings of Fact ¶¶ 68-73.)

5. The Tribe is in material breach and default of its payment obligations under the Loan Agremeent, and Wells Fargo is entitled to recover from the Tribe all outstanding principal, interest at the default rate through May 16, 2011, and administrative fees, which totals $2,751,160.20.

6. The arbitration clause in the Loan Agreement is itself a clear and unequivocal waiver of the Tribe's sovereign immunity, which survives without regard to the remainder of the Loan Documents. In section 11.24 of the Loan Agreement, the Tribe agreed to resolve any Dispute by binding arbitration administered by the AAA. (Jt. Ex.01 at 067-68 § 11.24.) This arbitration clause on its own independently is sufficient to waive the Tribe's sovereign immunity. *C&L Enters, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418-19 (2001).

7. Section 11.24 expressly provides that it "shall survive the termination, amendment or expiration of any of the Loan Documents or any relationship between the parties." (JT Ex.01 at 067-68.) The AAA Rules likewise provide that the arbitration clause "shall be treated as an agreement independent of the other terms of the contract." AAA Rule R-7 (b). Moreover, a "decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause." *Id.*

8. The Supreme Court has repeatedly stated that "as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006). Where there is a challenge to the contract, but not specifically to its arbitration provisions, "those provisions are enforceable apart from the remainder of the contract." *Prima Paint Corp v. Flood & Conklin Mfg. Co.* 388 U.S. 395 (1967). The arbitration provision survives any voiding of the contract. *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs.* 86 F.3d 656, 659 (7th Cir. 1996). *See also Match-E-Be-Nash-She-Wish Band of Pottowatomi Indians v. Keon-Argovitz Resorts* 383 F3d 512, 516 (6th Cir 2004) (holding that arbitration provisions survived even if agreement were void as management contract.)

The Tribe's Counterclaim Under the Bank Holding Company Act

9. The Tribe is not entitled to recovery from Wells Fargo under the anti-tying provisions of the Bank Holding Company Act, 12 U.S.C. § 1972. Under any provision of Section 1972, the Tribe must prove that "(1) the banking practice in question was unusual in the banking industry; (2) an anti-competitive tying arrangement existed, and (3) the practice benefits the bank." *In re Adelphia Communications Corp.*, 365 B.R. 24, 76 (S.D.N.Y. 2007). "Conditioning the extension of credit on measures designed to insure that the bank's investment is protected is well within traditional banking practices, and is not the kind of unusual or anti-competitive practice that gives rise to a BHCA cause of action." *New England Co. v. Bank of Gwinnett County*, 891 F. Supp. 1569, 1575 (N.D. Ga. 1995) (citing cases nationwide in which "courts have upheld a wide range of conditions placed upon debtors in efforts to protect the investment of the creditor-bank"). "The anti-tying provisions were not, however, intended to interfere with or impede 'appropriate traditional banking activities,' through which banks safeguard the value of their investment." *Nordic Bank PLC v. Trend Group*, Ltd., 619 F. Supp. 542, 554 (S.D.N.Y. 1985) (quoting legislative history) (internal citation omitted).

10. Wells Fargo appropriately sought to safeguard its investment with the Tribe and maximize the potential for repayment of the Casino Loan. (See Findings of Fact ¶¶ 59-61.) This case is distinguishable from *Dibidale of Louisiana, Inc. v. American Bank & Trust Co.*, 916 F.3d 300 (5th Cir. 1990). In *Dibidale*, the bank tried to use its loan to the plaintiff to engineer payments to another customer who was delinquent on a pre-existing and unrelated loan. Id. at 303. The sole reason for the alleged tie in *Dibidale* was the bank's desire to be repaid on that pre-existing and unrelated loan. Here, in contrast, Wells Fargo sought to protect its investment with the Tribe, and help ensure repayment by the Tribe on the Casino Loan - not on an unrelated, delinquent loan with another customer.

The Tribe's Claim for Unjust Enrichment

11. The Tribe is not entitled to recovery from Wells Fargo on the Tribe's claim of unjust enrichment.

Award

12. Wells Fargo is hereby granted an award of $2,751,160.20, and the Counterclaims of the Tribe are hereby dismissed with prejudice. Wells Fargo is also entitled to release of the $47,445.10 interpleaded in the District Court of Caddo County, State of Oklahoma, as credit on the award herein. Wells Fargo expressly waived the right to an attorney's fee or costs and additional expenses.

IT IS HEREBY SO ORDERED.

Dated May 23, 2011

/The Honorable Thomas R. Brett (Ret.)
Arbitrator

American Arbitration Association
Dispute Resolution Services Worldwide

COMMERCIAL ARBITRATION RULES
DEMAND FOR ARBITRATION

MEDIATION: If you would like the AAA to contact the other parties and attempt to arrange a mediation, please check this box. ☐
There is no additional administrative fee for this service.

Name of Respondent			Name of Representative (if known)		
Apache Tribe of Oklahoma			Jon E. Brightmire		
Address			Name of Firm (if applicable)		
P.O. Box 1220			Doerner, Saunders, Daniel & Anderson, L.L.P.		
			Representative's Address		
			Two West Second Street, Suite 700		
City	State	Zip Code	City	State	Zip Code
Anadarko	OK	73005-	Tulsa	OK	74103-
Phone No.		Fax No.	Phone No.		Fax No.
		405-247-2686	918-591-5258		918-925-5290
Email Address:			Email Address:		
			jbrightmire@dsda.com		

The named claimant, a party to an arbitration agreement dated June 23, 2008, which provides for arbitration under the Commercial Arbitration Rules of the American Arbitration Association, hereby demands arbitration.

THE NATURE OF THE DISPUTE
Breach of contract, or alternatively, unjust enrichment and declaratory relief

Dollar Amount of Claim $7,000,000.00	Other Relief Sought: ☒ Attorneys Fees ☒ Interest ☒ Arbitration Costs ☐ Punitive/ Exemplary ☐ Other _____

Amount Enclosed $ 10,200.00 In accordance with Fee Schedule: ☐ Flexible Fee Schedule ☒ Standard Fee Schedule

PLEASE DESCRIBE APPROPRIATE QUALIFICATIONS FOR ARBITRATOR(S) TO BE APPOINTED TO HEAR THIS DISPUTE:
Active members of OK Bar or retired judges of state or federal judiciary of OK, w/expertise in substantive laws applicable to dispute

Hearing locale Oklahoma (check one) ☐ Requested by Claimant ☒ Locale provision included in the contract

Estimated time needed for hearings overall:	Type of Business: Claimant National Banking Association
_____ hours or 2.00 days	Respondent Indian Tribe

Is this a dispute between a business and a consumer? ☐ Yes ☒ No Does this dispute arise out of an employment relationship? ☐ Yes ☒ No

If this dispute arises out of an employment relationship, what was/is the employee's annual wage range? Note: This question is required by California law. ☐ Less than $100,000 ☐ $100,000 - $250,000 ☐ Over $250,000

You are hereby notified that a copy of our arbitration agreement and this demand are being filed with the American Arbitration Association with a request that it commence administration of the arbitration. The AAA will provide notice of your opportunity to file an answering statement.

Signature (may be signed by a representative)	Date:	Name of Representative	
	5-17-11	James L. Morgan	
Name of Claimant		Name of Firm (if applicable)	
TGS Anadarko, LLC		Henderson & Morgan, LLC	
Address (to be used in connection with this case)		Representative's Address	
345 N. Arlington Avenue		4600 Kietzke Lane, Suite K228	
City / State / Zip Code		City / State / Zip Code	
Reno / NV / 89501-		Reno / NV / 89502-	
Phone No.	Fax No.	Phone No.	Fax No.
775-348-2286	775-348-6241	775-825-7000	775-825-7738
Email Address:		Email Address:	
rmedeiros@terriblescasinos.com		jmorgan@hendersonmorgan.com	

To begin proceedings, please send a copy of this Demand and the Arbitration Agreement, along with the filing fee as provided for in the Rules, to: American Arbitration Association, Case Filing Services, 1101 Laurel Oak Road, Suite 100 Voorhees, NJ 08043. Send the original Demand to the Respondent.

Please visit our website at www.adr.org if you would like to file this case online. AAA Case Filing Services can be reached at 877-495-4185.

EXHIBIT B

Signature (may be signed by a representative) Date: Jerome Miranowski 5/17/11			Name of Representative Jerome A. Miranowski		
Name of Claimant Wells Fargo Bank, National Association			Name of Firm (if applicable) Faegre & Benson LLP		
Address (to be used in connection with this case) 333 South Grand Avenue, Suite 940			Representative's Address 90 South 7th Street, Suite 2200		
City Los Angeles	State CA	Zip Code 90071-1504	City Minneapolis	State MN	Zip Code 55402-3901
Phone No. 213-253-3684		Fax No. 213-253-5913	Phone No. 612-766-7000		Fax No. 612-766-1600
Email Address: Beth.filipponi@wellsfargo.com			Email Address: jmiranowski@faegre.com		

AMERICAN ARBITRATION ASSOCIATION

In the matter of the arbitration between

TGS ANADARKO, LLC, and WELLS FARGO BANK, NATIONAL ASSOCIATION,

Claimants,

- against -

APACHE TRIBE OF OKLAHOMA,

Respondent.

STATEMENT OF CLAIM

INTRODUCTION

As this Statement of Claim is being filed, claimant Wells Fargo Bank, National Association ("Wells Fargo") and respondent Apache Tribe of Oklahoma (the "Tribe") are completing a separate arbitration over the Tribe's failure to repay a $4,365,000 loan by Wells Fargo. The Tribe used the proceeds from this loan (the "Casino Loan") to improve its casino, acquire adjacent land, and pay off existing debt.

Before the Tribe even sought the Casino Loan from Wells Fargo, however, it entered into a lease for slot machines and other gaming equipment in its casino (the "Lease"). The ultimate lessor was claimant TGS Anadarko, LLC ("TGS"). TGS obtained the financing to purchase equipment under the Lease from Wells Fargo, which loaned $3,500,000 to TGS pursuant to a credit agreement ("Credit Agreement"). In connection with the Credit Agreement, TGS and Wells Fargo also entered into an Assignment of Equipment Lease and Rents (the "Assignment"), pursuant to which Wells Fargo took assignment of the equipment as security for its loan to TGS.

The Tribe now seeks to exploit this legitimate assignment between TGS and Wells Fargo as part of its effort to avoid its own obligations to Wells Fargo. The Tribe makes the outlandish

claim that with the assignment, Wells Fargo is acting as a gaming vendor, but without the required license. As a result, the Apache Gaming Commission (the "AGC"), a governmental agency of the Tribe, has threatened to seek disgorgement of payments made to TGS under the Lease and to retain gaming machines in its possession.

The AGC's claims on behalf of the Tribe are a coordinated effort to pressure Wells Fargo to compromise its legitimate claims against the Tribe. The claims fail for several reasons. First, Wells Fargo does not own any gaming machines and has not acted as a gaming vendor. Second, the AGC previously determined that Wells Fargo was exempt from licensing with regard to the Lease when the parties squarely addressed this issue at the time of the Lease. And third, the disgorgement of all of the rent payments made by the Tribe to TGS for the rental of almost 300 slot machines, which generated millions of dollars for the Tribe, is an entirely inappropriate and unauthorized remedy, as is the refusal to release property owned by TGS.

Meanwhile, the Tribe ceased in August 2010 making any of the required rent payments due under the Lease, yet kept the slot machines and all revenues from those machines, refusing to pay any rent to TGS or debt service to Wells Fargo. TGS declared an Event of Default and is entitled to and declares that the balance of the Rent that would have been due during the remainder of the Lease Term, calculated on the basis of the average Rent paid prior to the Event of Default, is immediately due and payable. That amount is almost $7,000,000. Pursuant to Section 18.2 of the Lease, TGS is entitled to recover almost $7,000,000 together with interest and legal fees and expenses incurred by TGS by reason of the Event of Default or the exercise of any remedy under the Lease.

TGS and Wells Fargo commence this arbitration to resolve the disputes related to the Lease.

THE PARTIES

1. Claimant TGS is a Delaware limited liability company with its principal place of business in Reno, Nevada.

2. Claimant Wells Fargo Bank, National Association is a national banking association with its principal place of business in Sioux Falls, South Dakota.

3. Respondent Apache Tribe of Oklahoma is a federally recognized Indian tribe and Native American sovereign nation with its tribal headquarters located in Anadarko, Caddo County, Oklahoma. The Apache Gaming Commission is a governmental agency of the Tribe, and has no independent authority apart from that of the Tribe.

JURISDICTION AND VENUE

4. The Lease, dated December 27, 2007, contains an arbitration provision at Section 22. This provision requires the parties, upon demand, to resolve by binding arbitration any dispute, claim, question, or disagreement that is directly or indirectly related to the Lease, whether arising under law or in equity, and whether arising as a matter of contract or tort. Furthermore, any dispute over whether a claim is arbitrable shall itself be decided by arbitration. Specifically, the arbitration clause states that "the question whether or not a Claim is arbitrable shall be a matter for binding arbitration by the arbitrators" and that "in determining any such question, all doubts shall be resolved in favor of arbitrability." A copy of the Lease is attached as Exhibit A.

5. Wells Fargo is entitled to demand arbitration under the Lease by virtue of the Estoppel Certificate dated June 23, 2008, executed by the Tribe, approved by Resolution No. 06-23-08, and reaffirmed by Resolution Nos. 08-26-09-01 and 02-05-09-03. Copies of the Estoppel Certificate and Resolutions are attached as Exhibits B-E. Paragraph 13 of the Estoppel Certificate extends the benefits of the arbitration provisions in the Lease to Wells Fargo:

> Lessee (the Tribe) authorizes the dispute resolution and waiver of sovereign immunity set forth in Paragraphs 22(a)-(g) of the Master Lease and such waiver of sovereign immunity and dispute resolution provisions are for the benefit the Assignee (Wells Fargo) and are enforceable by Assignee against Lessee.

6. The Lease requires the arbitration to be administered by the American Arbitration Association ("AAA") in Oklahoma City, Oklahoma.

STATEMENT OF FACTS

The Tribe Seeks Equipment Lease Financing

7. On May 9, 2006, the Tribe opened the Silver Buffalo Casino. In early 2007, the Tribe agreed to lease equipment from KAGD, LLC, a Las Vegas limited liability company owned by Kevin Kean, in order to replace and expand the gaming machines in its Silver Buffalo Casino. On June 26, 2007, the Tribe's Gaming Board of Directors unanimously proposed for the Tribe to enter into an "Agreement to Lease Equipment" dated June 9, 2007, with Kean's company for the Silver Buffalo Casino.

8. On August 20, 2007, Kean contacted a representative of Wells Fargo about financing gaming equipment for the Silver Buffalo Casino under his lease agreement with the Tribe. Kean represented to Wells Fargo that the Tribe had already agreed to lease equipment for the Silver Buffalo Casino from his company, and that he needed Wells Fargo to provide financing for that equipment. On October 5, 2007, Kean provided Wells Fargo with a complete draft of the equipment lease agreement with the Tribe for the Silver Buffalo Casino.

9. Kean, however, did not have any capital for the equipment financing transaction, nor did he have any casino industry or slot experience. Wells Fargo was willing to finance the equipment, but not if Kean was the lessor. Wells Fargo suggested and contacted Robert Medeiros, a casino executive, about the opportunity of taking an assignment of the lease since Medeiros could provide capital and had industry experience.

10. Following months of negotiations as to the terms of the equipment lease, the Tribe and KAGD, LLC entered into an Equipment Lease Agreement dated December 27, 2007 ("Lease") whereby the Tribe agreed to lease up to 350 Class III Gaming devices and other ancillary furnishings from KAGD.

11. On June 23, 2008, KAGD assigned all of its right, title and interest in the Lease to Robert Medeiros's company, TGS Anadarko, LLC. That same day, Wells Fargo and TGS entered into the Credit Agreement pursuant to which Wells Fargo loaned TGS $3,500,000, which TGS used, along with other funds, to buy the machines that it would be leasing to the Tribe. TGS and Wells Fargo executed the Assignment of Equipment Lease and Rents (the "Assignment") as security for the loan that Wells Fargo made to TGS under the Credit Agreement. A copy of the Assignment is attached as Exhibit F.

12. Also on June 23, 2008, Wells Fargo and the Tribe entered into the agreement for the Casino Loan, pursuant to which Wells Fargo loaned the Tribe $4,365,000.

The AGC Determines that Wells Fargo Was Exempt from Licensing Requirements for the Loan Transaction

13. Before TGS and Wells Fargo executed the Credit Agreement and related Assignment, they addressed the licensing issue with the Tribe. The parties specifically discussed that the contemplated assignment would not make Wells Fargo a gaming vendor and so Wells Fargo would not require a license under Part 10 of the State Compact between the State of Oklahoma and the Tribe. For example, in an email from Wells Fargo to a member of the AGC, dated May 1, 2008, Wells Fargo stated: "I know you are diligently working on all the licensing requests related to the transactions with Wells and TGS . . . 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." A copy of this email is attached as Exhibit G.

14. On June 23, 2008, Wells Fargo received a letter from the AGC stating that the AGC found that Wells Fargo is exempted from licensing specifically for purposes of the Credit Agreement. In the final paragraph, the AGC stated that this exemption shall remain in full force and effect as to "that certain Credit Agreement, and related documents, dated on or about June 23, 2008." A copy of this letter is attached as Exhibit H. The Assignment, dated June 23, 2008, was part of the loan transaction of that date and was one of the documents related to the Credit Agreement.

15. The Tribe knew that the Assignment was part of the Credit Agreement documentation when the exemption from licensing was granted. The Estoppel Certificate dated June 23, 2008, approved and executed by the Tribe and later reaffirmed, refers to the Assignment to Wells Fargo in the first paragraph. The Certificate gives notice that all of TGS's right, title and interest in the Lease, together with all monthly rents and other amounts payable by Lessee, and all of TGS's right, title and interest in and to the equipment, and all proceeds, have been or will be assigned to Wells Fargo *as security for obligations of TGS to Wells Fargo*. The Tribe knew that Wells Fargo was taking an assignment of the Lease as security for Wells Fargo's loan to TGS, and the Tribe's commission found, appropriately so, that Wells Fargo was exempt from licensing.

The Tribe Defaults on the Casino Loan, and Wells Fargo Commences Arbitration

16. On June 22, 2010, the Tribe filed suit against Wells Fargo in a preemptive bid to avoid its payment obligations on the Casino Loan. A copy of the Complaint is attached as Exhibit I. On July 19, 2010, Wells Fargo provided the Tribe with written notice demanding that claims asserted against Wells Fargo in the Complaint be resolved by binding arbitration. The Tribe agreed and the parties stipulated that the case would be dismissed without prejudice.

17. The Tribe did not refile its claim as a demand for arbitration. Instead, in August 2010, the Tribe stopped performing under the Loan Agreement by, among other things, failing to make an interest payment of $13,815.21 on August 31, 2010 as required under the Loan Agreement. On September 7, 2010, Wells Fargo provided the Tribe with a notice of default and acceleration. And on September 28, 2010, Wells Fargo filed a Statement of Claim with the AAA alleging breach of contract and unjust enrichment and seeking declaratory relief pursuant to 12 O.S. § 1651. A copy of the September 28, 2010 Statement of Claim is attached as Exhibit J. The Tribe's default under the Casino Loan is being addressed in the separate arbitration, which is being heard at the time of this filing.

The Tribe Breaches the Equipment Lease

18. The Tribe is separately in breach of its obligations under the Equipment Lease. First, the Lease requires the Tribe to make monthly rent payments to TGS, and the Tribe stopped paying rent on the Lease in July 2010. TGS sent a Notice of Default to the Tribe on December 1, 2010. A copy of the Notice of Default is attached as Exhibit K.

The Tribe Promises to Return Gaming Machines

19. When the Tribe defaulted on the Lease, TGS asked the Tribe to release the gaming machines to TGS, a licensed vendor. The Tribe repeatedly assured TGS that it could pick up all of the gaming machines that have been provided under the Lease. Counsel for the Tribe repeatedly assured TGS that it was free to take the machines that have been removed from the casino floor, and to take the remaining machines on their imminent replacement. Counsel for the Tribe informed TGS and Wells Fargo that 112 machines have been removed from the floor, and that 211 are still on the floor.

20. Specifically, on February 14, 2011, the Tribe's counsel informed Wells Fargo that the removed machines may be picked up by TGS at anytime, and that the machines still on the floor would be replaced shortly and would be available for pick up within two to three weeks. On March 11, 2011, the Tribe's counsel informed Wells Fargo that the Tribe now expected the new machines to be delivered by the end of March. Counsel confirmed that the removed machines were available for pick up by TGS and that the remaining machines would be available once they were replaced. On March 31, 2011, the Tribe's counsel again confirmed to TGS and Wells Fargo that all of the machines will be released to TGS, the removed machines immediately and the remaining machines when they are replaced. Wells Fargo has never asked for the release of these machines to Wells Fargo.

The AGC Sends Notice of its Outlandish Claim that Wells Fargo is Acting as a Gaming Vendor

21. The Tribe changed its tune two weeks later, with the hearing on its default on the Casino Loan fast approaching. By letter dated April 13, 2011, the AGC claimed that Wells Fargo is, and has been since at least June 23, 2008, the owner of gaming machines at the Silver Buffalo Casino by virtue of the Assignment. A copy of the April 13, 2011 letter is attached as Exhibit L.

22. The letter also claimed that pursuant to the Assignment, Wells Fargo is responsible for all of TGS's obligations under the Lease. The April 13 letter also alleged that Wells Fargo was and is acting as a gaming vendor and owner of gaming machines by virtue of its "ownership" under the Assignment, and was therefore required to obtain a vendor's license from the AGC prior to implementation of the Lease and receipt of any payments under the Lease. Despite the AGC's earlier determination that Wells Fargo was exempt, the AGC made this assertion on the eve of arbitration.

23. The April 13 letter also stated that the commission will not permit the release of the gaming machines. The April 13 letter concluded that the AGC is conducting an investigation and may require disgorgement of payments the Tribe made to rent the gaming machines under the Lease, an amount in excess of $2 million as an appropriate "remedy."

TGS and Wells Fargo Demand that the Issues Be Resolved Pursuant to the Dispute Resolution Procedures Set Forth in the Lease

24. In a letter dated April 20, 2011, Wells Fargo explained why there was no merit to the AGC's allegations. A copy of Wells Fargo's April 20 response is attached as Exhibit M, and a copy of TGS's April 20 response is attached as Exhibit N. TGS and Wells Fargo demanded that the issues raised in the April 13 letter be resolved pursuant to the Dispute Resolution Procedures contained in Section 22 of the Lease. Specifically, TGS and Wells Fargo requested immediate consultation and negotiation to attempt to reach a just and equitable solution under Section 22(a) of the Lease. This section provides in part that the parties shall use their best efforts to settle the Claim before they proceed to arbitration.

25. By letter dated May 4, 2011, the Tribe refused to consult and negotiate. A copy of the May 4 letter is attached as Exhibit O. Instead, the AGC asserted that it is an independent branch of the Tribe and does not speak for the Tribe. The Tribe's agency asserted that it would be a violation of the State Compact and Apache law to allow the return of the gaming machines in question until the AGC concludes its licensing investigation and grants permission to retain the machines. The AGC volunteered that the Tribe stands ready to return the gaming machines but threatened to issue a civil penalty ordering that the machines be retained. By letter dated May 5, 2011, the AGC stated it would conduct a hearing on the licensing issues on May 17, 2011. A copy of the May 5, 2011 letter is attached as Exhibit P. By email dated May 12, 2011,

Wells Fargo and TGS were told that the hearing was rescheduled to the week of May 23, 2011. A copy of the May 12, 2011 email is attached as Exhibit Q.

Wells Fargo Is Not A Vendor Of The Equipment And No License Is Required

26. Wells Fargo does not own and has never owned the gaming machines at issue. Thus, Wells Fargo is not a vendor of that equipment. The Assignment was not a sale of the Lease from TGS to Wells Fargo. The Assignment instead evidenced the fact that TGS had pledged and granted to Wells Fargo a security interest and lien on TGS's interest in the Lease to secure a Wells Fargo loan to TGS. Wells Fargo's Credit Agreement with TGS specifies that the Assignment merely provides "additional security for the Loan." In this vein, the Credit Agreement lists the Assignment as among the Security Documentation, which "shall secure the due and punctual payment and performance of the terms and provisions of this Credit Agreement, the Note and all of the other Loan Documents." Although styled as an assignment, it nevertheless was simply a security agreement. *See* Oklahoma Code §§ 12A-1-9-109(a)(1); NRS 104.9109(1)(a).

27. Wells Fargo's role as merely a secured party was known to the Tribe at the time of the transaction. In the Estoppel Certificate the Tribe acknowledged that it had been notified that "all of Lessor's right, title and interest in, to and under the Master Lease" would be "assigned to Wells Fargo Bank, N.A. . . . *as security*" for TGS's obligations owing to Wells Fargo. The Tribe made a similar acknowledgement in the Form of Direction and Acknowledgement Regarding Lease Payments dated June 23, 2008. The Tribe expressly stated that it "hereby acknowledges and agrees that Lender has a prior perfected security interest" in all payments due TGS under the Master Lease.

28. The Depository Agreement between Wells Fargo and TGS is further proof that Wells Fargo does not own the equipment and rent payments. To secure Wells Fargo's loan to TGS, the payments due to TGS under the Lease were deposited into an account with Wells Fargo. Wells Fargo held the funds in a fiduciary capacity subject to strict compliance with the Depository Agreement. Under the Depository Agreement, the payments were deposited with Wells Fargo, but they did not remain with Wells Fargo. Instead, each month they were applied first, to pay TGS operating expenses, second, to pay monthly payments owed by TGS on its loan from Wells Fargo, and third, to pay monthly payments owed by TGS to its subordinated lenders. If Wells Fargo owned the equipment and the lease payments, all funds in the account would remain with Wells Fargo—and none would go to TGS for operating expenses or to other lenders of TGS. A copy of the Depository Agreement is attached as Exhibit R.

29. The Security Agreement between Wells Fargo and TGS is additional proof of the limited scope of Wells Fargo's assignment. If Wells Fargo had actually been assigned all of TGS's right, title and interest in the Lease, it would also be responsible for TGS's corresponding obligations. The Security Agreement dated June 23, 2008 between TGS and Wells Fargo provides, however, that Wells Fargo shall not "be required or obligated in any manner to perform or fulfill any of the obligations of Grantor (TGS) under or pursuant to any Contract." A copy of the Security Agreement is attached as Exhibit S. Contracts are defined in Section 1 to include the Equipment Lease Agreement. The Tribe acknowledged receipt of a copy of the Security Agreement in the Form of Direction and Acknowledgement Regarding Lease Payments dated June 23, 2008.

COUNT I – BREACH OF CONTRACT – LEASE AGREEMENT

30. TGS realleges the allegations as set forth in paragraphs 1 through 29 above as if fully set forth herein.

31. The Tribe entered into the Lease, which was assigned to TGS in accordance with its terms. The Tribe approved of the assignment to TGS, even though the Tribe's approval was not required. The Lease is a valid, binding agreement, and TGS has fully complied with its obligations under the Lease.

32. The Tribe materially breached the Lease by failing to pay rent since July 2010. TGS sent a Notice of Default to the Tribe on December 1, 2010.

33. Under Section 18.2 of the Lease, TGS is entitled upon any Event of Default to declare, at its sole option, without notice to or demand upon the Tribe, and without prejudice to any other right or remedy it may possess, immediately due and payable "an amount equal to the balance of any Rent that would have been payable during the remainder of the Lease Term calculated on the basis of the average Rent due during each Rent Period occurring during such Lease Term prior to the Event of Default..." TGS declares and demands as immediately due and payable under Section 18.2 almost $7,000,000. TGS also demands interest at the lesser of 18% or the highest rate permitted by law and reimbursement of all legal fees and other expenses it has or will incur by reason of the Event of Default or the exercise of any remedy under the Lease.

34. As a direct and proximate cause of the Tribe's breaches of the Lease, TGS has incurred damages and is entitled to an award of almost $7,000,000 together with interest, attorneys' fees and expenses.

COUNT II – ALTERNATIVELY, UNJUST ENRICHMENT

35. TGS realleges the allegations as set forth in paragraphs 1 through 34 above as if fully set forth herein.

36. The Lease is a valid and enforceable agreement. But even if the Lease were not enforceable, the Tribe must return to TGS the monies owing to TGS. The Tribe will be unjustly enriched if it does not return to TGS the monies owed to TGS.

37. In addition, Rule R-7(b) of the AAA Commercial Arbitration Rules, which are incorporated into the Lease, provides that an arbitration clause shall be treated as an agreement independent of the other terms of the contract, and a decision by the arbitrator that the contract is null and void shall not for that reason render invalid the arbitration clause. Under binding United States Supreme Court precedent, the arbitration clause is a clear and unequivocal waiver of the Tribe's sovereign immunity. A copy of *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001) is attached as Exhibit T.

38. The Tribe has substantially benefited from the Lease and it would be contrary to equity and good conscience for the Tribe to retain these benefits that have come to it at the expense of TGS.

COUNT III – DECLARATORY RELIEF PURSUANT TO 12 O.S. § 1651

39. TGS and Wells Fargo reallege the allegations as set forth in paragraphs 1 through 38 above as if fully set forth herein.

40. Pursuant to 12 O.S. § 1651, TGS and Wells Fargo seek a judicial determination regarding the parties' rights under the Lease and Assignment that: (1) Wells Fargo is not a gaming vendor and has therefore not violated any licensing ordinance or regulation; and that, as

a result, (2) the AGC has no basis to retain the gaming machines or seek disgorgement of payments made to TGS under the Lease.

41. An actual, existing justiciable controversy exists between TGS and Wells Fargo on the one hand and the Tribe on the other. The parties have opposing and adverse legal interests concerning whether Wells Fargo has violated any Gaming Ordinance and whether the Tribe is entitled to retain the gaming machines and obtain disgorgement of payments made to TGS under the Lease. A determination regarding the parties' rights under the Lease and Assignment will terminate the controversy.

WHEREFORE, TGS and Wells Fargo respectfully requests that the arbitrator:

(1) Pursuant to Count I, award TGS an amount to be determined at arbitration of almost $7,000,000 for payments due under the Lease, interest and other amounts through May 13, 2011;

(2) Alternatively, pursuant to Count II, award TGS an amount to be determined at arbitration of almost $7,000,000 due under the Lease together with prejudgment interest until paid;

(3) Pursuant to Count III, declare that: (1) Wells Fargo is not a gaming vendor and has therefore not violated any Gaming Ordinance; and that, as a result, (2) the AGC has no basis for not releasing the gaming machines or disgorging payments made to TGS under the Lease;

(4) Award TGS and Wells Fargo their attorneys' fees, costs and expenses, including, but not limited to, arbitration fees; and

(5) Grant such further relief as is just and equitable.

Dated: May 17, 2011

HENDERSON & MORGAN, LLC

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Dated: May 17, 2011

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fb.us.6785104.04

American Arbitration Association
Dispute Resolution Services Worldwide

ARBITRATION
Answering Statement and Counterclaim Request

MEDIATION: If you would like the AAA to contact the other parties and attempt to arrange mediation, please check this box. ☐
There is no additional administrative fee for this service.

Name of Claimant TGS/Wells Fargo			Name of Representative (if known) James L. Morgan		
Address: 345 N. Arlington Avenue			Name of Firm (if applicable) Henderson & Morgan, LLC		
			Representative's Address: 4600 Kietzke Lane, Suite K228		
City Reno	State NV	Zip Code 89501	City Reno	State NV	Zip Code 89502
Phone No. 775-348-2286	Fax No. 775-348-6241		Phone No. 775-825-7000	Fax No. 775-825-7738	
Email Address: medeiros@terribleca sinos.com			Email Address: jmorgan@hendersonmorgan.com		
AAA CASE # (if known) 71-148-Y-00282-11			Filing a Counterclaim: ☐Yes ☐No *If yes, please describe nature of counterclaim in space below.*		

PLEASE ANSWER CLAIMANT DEMAND FOR ARBITRATION (AND DESCRIBE COUNTERCLAIM, IF APPLICABLE):
Attach additional pages as necessary.

See attached

Dollar Amount of Claim or Counterclaim $

Other Relief Sought: × Attorneys Fees Interest
Arbitration Costs Punitive/ Exemplary Other ____

Amount Enclosed $____ In accordance with Fee Schedule: ☐Flexible Fee Schedule ☐Standard Fee Schedule

PLEASE DESCRIBE APPROPRIATE QUALIFICATIONS FOR ARBITRATOR(S) TO BE APPOINTED TO HEAR THIS DISPUTE:

Experience in federal Indian law

Hearing locale Oklahoma City, Oklahoma (check one) ☐Requested by Respondent ☑Locale provision included in the contract

Estimated time needed for hearings overall: hours or 5.00 days

Signature (may be signed by a representative) [signature] Date: 6/9/11			Name of Representative Jon E. Brightmire		
Name of Respondent Apache Tribe of Oklahoma			Name of Firm (if applicable) Doerner, Saunders, Daniel & Anderson, L.L.P.		
Address (to be used in connection with this case) P.O. Box 1220			Representative's Address: Two West Second Street, Suite 700		
City Anadarko	State OK	Zip Code 73005	City Tulsa Tulsa	State OK	Zip Code 74103-3117
Phone No.	Fax No. 405-247-2686		Phone No. 918-582-1211	Fax No. 918-925-5258	
Email Address:			Email Address: jbrightmire@dsda.com; bnowlin@dsda.com		

PLEASE SEND TWO COPIES OF THIS ANSWERING STATEMENT, WITH THE FILING FEE FOR ANY COUNTERCLAIM, AS PROVIDED FOR IN THE RULES, TO THE AAA. SEND THE ORIGINAL ANSWERING STATEMENT TO THE CLAIMANT.

Please visit our website at www.adr.org if you would like to file this counterclaim online. AAA Customer Service can be reached at 800-778-7879

EXHIBIT C

IN THE AMERICAN ARBITRATION ASSOCIATION

TGS ANADARKO, LLC, and WELLS FARGO BANK, NATIONAL ASSOCIATION,	)	
Claimants,	)	**Case No. 71 148 Y 00282 11**
v.	)	
APACHE TRIBE OF OKLAHOMA,	)	
Respondent.	)	

THE APACHE TRIBE OF OKLAHOMA'S ANSWERING STATEMENT

Respondent the Apache Tribe of Oklahoma answers the Claimants' Statement of Claims as follows:

1. The Tribe generally and specifically denies the facts and claims within the Claimants' Statement and demands strict proof thereof.

2. Under the Oklahoma-Apache Compact and the Indian Gaming Regulatory Act, the Apache Gaming Commission is the exclusive licensing regulatory body for gaming within the Apache Tribe's Indian Country. **"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). The Apache Tribe must license **"any person or entity who provides through sale, lease, rental or otherwise covered games, or part, maintenance or service in connection therewith to the tribe or the enterprise at any time and in any amount." State Compact Section 10(B)(1).** The Tribe's Congressional mandate to regulate

cannot be delegated by contract to become subject to private arbitration as neither IGRA nor the State Compact allow private arbitrators to determine the propriety of licensing within Indian Country. The Claimants and any other vendors with an alleged arbitration clause cannot as a matter of law be allowed to select their own non-tribal regulators. The dispute regarding Wells Fargo's and TGS's license to provide gaming machines to the Apache Tribe is not properly a subject of this arbitration.

3. The Equipment Lease is an unapproved management contract that is void as a matter of law. The Claimants cannot recover on the void contract. 25 C.F.R. §533.7; *Catskill Dev., L.L.C. v. Park Place Enter. Corp.*, 547 F.3d 115, 128 (2d Cir. 2008) (quoting *A.K. Mgmt. Co. v. San Manuel Board of Mission Indians*, 789 F.2d 785, 789 (9th Cir. 1986)).

4. The Equipment Lease also violates the principle of tribal sole propriety interest and is void. 25 C.F.R. § 522.4(b)(1); *see also* 25 U.S.C. § 2710(b)(2)(A). Specifically, TGS and/or Wells Fargo as owner receive revenue from gaming machines that they do not lease to the Tribe. TGS's principal has stated this was necessary to make TGS's numbers work, i.e. to make the business opportunity sufficiently profitable for TGS and its investors. The Lease also ties-up most of the Tribe's casino floor.

5. The claimants cannot recover on a theory of unjust enrichment as the contract on which the claim is made is void as a matter of public policy.

6. Because the waiver of sovereign immunity is contained within a contract which is void ad initio, no agreement to arbitrate ever existed and this tribunal lacks any jurisdiction over the Respondent.

7. The waiver of sovereign immunity is invalid and this tribunal lacks jurisdiction because only the Tribal Council may waive sovereign immunity under the Constitution of the Apache Tribe of Oklahoma.

8. The Tribe reserves the right to assert additional affirmative defenses and counterclaims as discovery progresses.

CONCLUSION

The Tribunal should dismiss this arbitration as it lacks jurisdiction over the Respondent, the Claimants should take nothing of their claims, and the Respondent should receive any other relief to which it is entitled.

Respectfully submitted,

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

By: *s/Jon E. Brightmire*

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Attorneys for Respondent
Apache Tribe of Oklahoma.

CERTIFICATE OF SERVICE

I do hereby certify that on June 9, 2011, a true and correct copy of the above pleading was delivered via first class mail, postage prepaid thereon, and e-mailed to:

Jerome Miranowksi	jmiranowski@faegre.com
S. Renee Dotson	sdotson@faegre.com
James L. Morgan	jmorgan@hendersonmorgan.com
Gilbert A. Camarena	GilbertCamarena@adr.org

s/Jon E. Brightmire
Jon E. Brightmire

2126741v1

AMERICAN ARBITRATION ASSOCIATION

In the matter of the arbitration between

TGS ANADARKO, LLC, and WELLS FARGO BANK, NATIONAL ASSOCIATION,

Claimants,

AMENDED STATEMENT OF CLAIM

- against -

APACHE TRIBE OF OKLAHOMA,

Respondent.

INTRODUCTION

At the time the original Statement of Claim was filed in this case, claimant Wells Fargo Bank, National Association ("Wells Fargo") and respondent Apache Tribe of Oklahoma (the "Tribe") were completing a separate arbitration over the Tribe's failure to repay a $4,365,000 loan by Wells Fargo. The Tribe used the proceeds from that loan (the "Casino Loan") to improve its casino, acquire adjacent land, and pay off existing debt. Since the original Statement of Claim was filed, the arbitrator issued an Arbitration Award in favor of Wells Fargo and against the Tribe.

Before the Tribe even sought the Casino Loan from Wells Fargo, however, it entered into a lease for slot machines and other gaming equipment in its casino (the "Lease"). The ultimate lessor was claimant TGS Anadarko, LLC ("TGS"). TGS obtained the financing to purchase equipment under the Lease from Wells Fargo, which loaned $3,500,000 to TGS pursuant to a credit agreement ("Credit Agreement"). In connection with the Credit Agreement, TGS and Wells Fargo also entered into an Assignment of Equipment Lease and Rents (the "Assignment"), pursuant to which Wells Fargo took assignment of the equipment as security for its loan to TGS.

EXHIBIT D

The Tribe seeks to exploit this legitimate assignment between TGS and Wells Fargo as part of its effort to avoid its own obligations to Wells Fargo. Before TGS and Wells Fargo filed the original Statement of Claim in this case, the Tribe made the outlandish claim that with the assignment, Wells Fargo was acting as a gaming vendor, but without the required license. As a result, the Apache Gaming Commission (the "AGC"), a governmental agency of the Tribe, threatened to seek disgorgement of payments made to TGS under the Lease and to retain gaming machines in its possession. Since the original Statement of Claim was filed, the Tribe has escalated its efforts to avoid this arbitration and ultimately its contractual obligations. Specifically, the Tribe filed a "Petition for License Review" with the AGC, asking its agency, among other things, to order disgorgement of payments previously made, by the Tribe, under the Lease.

The Tribe and its agency's claims are a coordinated effort to pressure Wells Fargo to compromise its legitimate claims against the Tribe. The claims fail for several reasons. First, Wells Fargo does not own any gaming machines and has not acted as a gaming vendor. Second, the AGC previously determined that Wells Fargo was exempt from licensing with regard to the Lease when the parties squarely addressed this issue at the time of the Lease. And third, the disgorgement of all of the rent payments made by the Tribe to TGS for the rental of almost 300 slot machines, which generated millions of dollars for the Tribe, is an entirely inappropriate and unauthorized remedy, as is the refusal to release property owned by TGS.

Meanwhile, the Tribe ceased in August 2010 making any of the required rent payments due under the Lease, yet kept the slot machines and all revenues from those machines, refusing to pay any rent to TGS or debt service to Wells Fargo. TGS declared an Event of Default and is entitled to and declares that the balance of the Rent that would have been due during the

remainder of the Lease Term, calculated on the basis of the average Rent paid prior to the Event of Default, is immediately due and payable. That amount is almost $7,000,000. Pursuant to Section 18.2 of the Lease, TGS is entitled to recover almost $7,000,000 together with interest and legal fees and expenses incurred by TGS by reason of the Event of Default or the exercise of any remedy under the Lease.

TGS and Wells Fargo commenced this arbitration to resolve the disputes related to the Lease.

THE PARTIES

1. Claimant TGS is a Delaware limited liability company with its principal place of business in Reno, Nevada.

2. Claimant Wells Fargo Bank, National Association is a national banking association with its principal place of business in Sioux Falls, South Dakota.

3. Respondent Apache Tribe of Oklahoma is a federally recognized Indian tribe and Native American sovereign nation with its tribal headquarters located in Anadarko, Caddo County, Oklahoma. The Apache Gaming Commission is a governmental agency of the Tribe, and has no independent authority apart from that of the Tribe.

JURISDICTION AND VENUE

4. The Lease, dated December 27, 2007, contains an arbitration provision at Section 22. This provision requires the parties, upon demand, to resolve by binding arbitration any dispute, claim, question, or disagreement that is directly or indirectly related to the Lease, whether arising under law or in equity, and whether arising as a matter of contract or tort. Furthermore, any dispute over whether a claim is arbitrable shall itself be decided by arbitration. Specifically, the arbitration clause states that "the question whether or not a Claim is arbitrable shall be a matter

for binding arbitration by the arbitrators" and that "in determining any such question, all doubts shall be resolved in favor of arbitrability." A copy of the Lease is attached as Exhibit A.

5. Wells Fargo is entitled to demand arbitration under the Lease by virtue of the Estoppel Certificate dated June 23, 2008, executed by the Tribe, approved by Resolution No. 06-23-08, and reaffirmed by Resolution Nos. 08-26-09-01 and 02-05-09-03. Copies of the Estoppel Certificate and Resolutions are attached as Exhibits B-E. Paragraph 13 of the Estoppel Certificate extends the benefits of the arbitration provisions in the Lease to Wells Fargo:

> Lessee (the Tribe) authorizes the dispute resolution and waiver of sovereign immunity set forth in Paragraphs 22(a)-(g) of the Master Lease and such waiver of sovereign immunity and dispute resolution provisions are for the benefit the Assignee (Wells Fargo) and are enforceable by Assignee against Lessee.

6. The Lease requires the arbitration to be administered by the American Arbitration Association ("AAA") in Oklahoma City, Oklahoma.

STATEMENT OF FACTS

The Tribe Seeks Equipment Lease Financing

7. On May 9, 2006, the Tribe opened the Silver Buffalo Casino. In early 2007, the Tribe agreed to lease equipment from KAGD, LLC, a Nevada limited liability company owned by Kevin Kean, in order to replace and expand the gaming machines in its Silver Buffalo Casino. On June 26, 2007, the Tribe's Gaming Board of Directors unanimously proposed for the Tribe to enter into an "Agreement to Lease Equipment" dated June 9, 2007, with Kean's company for the Silver Buffalo Casino.

8. On August 20, 2007, Kean contacted a representative of Wells Fargo about financing gaming equipment for the Silver Buffalo Casino under his lease agreement with the Tribe. Kean represented to Wells Fargo that the Tribe had already agreed to lease equipment for the Silver Buffalo Casino from his company, and that he needed Wells Fargo to provide financing for that

equipment. On October 5, 2007, Kean provided Wells Fargo with a complete draft of the equipment lease agreement with the Tribe for the Silver Buffalo Casino.

9. Kean, however, did not have any capital for the equipment financing transaction, nor did he have any casino industry or slot experience. Wells Fargo was willing to finance the equipment, but not if Kean was the lessor. Wells Fargo suggested and contacted Robert Medeiros, a casino executive, about the opportunity of taking an assignment of the lease since Medeiros could provide capital and had industry experience.

10. Following months of negotiations as to the terms of the equipment lease, the Tribe and KAGD, LLC entered into an Equipment Lease Agreement dated December 27, 2007 ("Lease") whereby the Tribe agreed to lease up to 350 Class III Gaming devices and other ancillary furnishings from KAGD.

11. On June 23, 2008, KAGD assigned all of its right, title and interest in the Lease to Robert Medeiros's company, TGS Anadarko, LLC. That same day, Wells Fargo and TGS entered into the Credit Agreement pursuant to which Wells Fargo loaned TGS $3,500,000, which TGS used, along with other funds, to buy the machines that it would be leasing to the Tribe. TGS and Wells Fargo executed the Assignment of Equipment Lease and Rents (the "Assignment") as security for the loan that Wells Fargo made to TGS under the Credit Agreement. A copy of the Assignment is attached as Exhibit F.

12. Also on June 23, 2008, Wells Fargo and the Tribe entered into the agreement for the Casino Loan, pursuant to which Wells Fargo loaned the Tribe $4,365,000.

The AGC Determines that Wells Fargo Was Exempt from Licensing Requirements for the Loan Transaction

13. Before TGS and Wells Fargo executed the Credit Agreement and related Assignment, they addressed the licensing issue with the Tribe. The parties specifically discussed

that the contemplated assignment would not make Wells Fargo a gaming vendor and so Wells Fargo would not require a license under Part 10 of the State Compact between the State of Oklahoma and the Tribe. For example, in an email from Wells Fargo to a member of the AGC, dated May 1, 2008, Wells Fargo stated: "I know you are diligently working on all the licensing requests related to the transactions with Wells and TGS . . . 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." A copy of this email is attached as Exhibit G.

14. On June 23, 2008, Wells Fargo received a letter from the AGC stating that the AGC found that Wells Fargo is exempted from licensing specifically for purposes of the Credit Agreement. In the final paragraph, the AGC stated that this exemption shall remain in full force and effect as to "that certain Credit Agreement, and related documents, dated on or about June 23, 2008." A copy of this letter is attached as Exhibit H. The Assignment, dated June 23, 2008, was part of the loan transaction of that date and was one of the documents related to the Credit Agreement.

15. The Tribe knew that the Assignment was part of the Credit Agreement documentation when the exemption from licensing was granted. The Estoppel Certificate dated June 23, 2008, approved and executed by the Tribe and later reaffirmed, refers to the Assignment to Wells Fargo in the first paragraph. The Certificate gives notice that all of TGS's right, title and interest in the Lease, together with all monthly rents and other amounts payable by Lessee, and all of TGS's right, title and interest in and to the equipment, and all proceeds, have been or will be assigned to Wells Fargo *as security for obligations of TGS to Wells Fargo*. The Tribe knew that Wells Fargo was taking an assignment of the Lease as security for Wells Fargo's loan

to TGS, and the Tribe's commission found, appropriately so, that Wells Fargo was exempt from licensing.

The Tribe Defaults on the Casino Loan, and Wells Fargo Succeeds in Arbitration

16. On June 22, 2010, the Tribe filed suit against Wells Fargo in a preemptive bid to avoid its payment obligations on the Casino Loan. A copy of the Complaint is attached as Exhibit I. On July 19, 2010, Wells Fargo provided the Tribe with written notice demanding that claims asserted against Wells Fargo in the Complaint be resolved by binding arbitration. The Tribe agreed and the parties stipulated that the case would be dismissed without prejudice.

17. The Tribe did not refile its claim as a demand for arbitration. Instead, in August 2010, the Tribe stopped performing under the Loan Agreement by, among other things, failing to make an interest payment of $13,815.21 on August 31, 2010 as required under the Loan Agreement. On September 7, 2010, Wells Fargo provided the Tribe with a notice of default and acceleration. And on September 28, 2010, Wells Fargo filed a Statement of Claim with the AAA alleging breach of contract and unjust enrichment and seeking declaratory relief pursuant to 12 O.S. § 1651. A copy of the September 28, 2010 Statement of Claim is attached as Exhibit J.

18. On May 23, 2011, the Honorable Thomas R. Brett (Ret.), as the mutually appointed arbitrator, issued an Arbitration Award (the "Award") in favor of Wells Fargo and against the Tribe. Judge Brett awarded Wells Fargo $2.8 million for the Tribe's breach of the parties' Loan Agreement, and dismissed the Tribe's counterclaims. Judge Brett issued the Award after presiding over a week-long hearing in Oklahoma City, during which the parties introduced hundreds of exhibits and put on fifteen witnesses. A copy of Judge Brett's Findings of Fact, Conclusions of Law and Order is attached as Exhibit U.

The Tribe Breaches the Equipment Lease

19. The Tribe is separately in breach of its obligations under the Equipment Lease. First, the Lease requires the Tribe to make monthly rent payments to TGS, and the Tribe stopped paying rent on the Lease in July 2010. TGS sent a Notice of Default to the Tribe on December 1, 2010. A copy of the Notice of Default is attached as Exhibit K.

The Tribe Promises to Return Gaming Machines

20. When the Tribe defaulted on the Lease, TGS asked the Tribe to release the gaming machines to TGS, a licensed vendor. The Tribe repeatedly assured TGS that it could pick up all of the gaming machines that have been provided under the Lease. Counsel for the Tribe repeatedly assured TGS that it was free to take the machines that have been removed from the casino floor, and to take the remaining machines on their imminent replacement. Counsel for the Tribe informed TGS and Wells Fargo that 112 machines have been removed from the floor, and that 211 are still on the floor.

21. Specifically, on February 14, 2011, the Tribe's counsel informed Wells Fargo that the removed machines may be picked up by TGS at anytime, and that the machines still on the floor would be replaced shortly and would be available for pick up within two to three weeks. On March 11, 2011, the Tribe's counsel informed Wells Fargo that the Tribe now expected the new machines to be delivered by the end of March. Counsel confirmed that the removed machines were available for pick up by TGS and that the remaining machines would be available once they were replaced. On March 31, 2011, the Tribe's counsel again confirmed to TGS and Wells Fargo that all of the machines will be released to TGS, the removed machines immediately and the remaining machines when they are replaced. Wells Fargo has never asked for the release of these machines to Wells Fargo.

The AGC Sends Notice of its Outlandish Claim that Wells Fargo is Acting as a Gaming Vendor

22. The Tribe changed its tune two weeks later, with the hearing on its default on the Casino Loan fast approaching. By letter dated April 13, 2011, the AGC claimed that Wells Fargo is, and has been since at least June 23, 2008, the owner of gaming machines at the Silver Buffalo Casino by virtue of the Assignment. A copy of the April 13, 2011 letter is attached as Exhibit L.

23. The letter also claimed that pursuant to the Assignment, Wells Fargo is responsible for all of TGS's obligations under the Lease. The April 13 letter also alleged that Wells Fargo was and is acting as a gaming vendor and owner of gaming machines by virtue of its "ownership" under the Assignment, and was therefore required to obtain a vendor's license from the AGC prior to implementation of the Lease and receipt of any payments under the Lease. Despite the AGC's earlier determination that Wells Fargo was exempt, the AGC made this assertion on the eve of the arbitration on the Casino Loan.

24. The April 13 letter also stated that the commission will not permit the release of the gaming machines. The April 13 letter concluded that the AGC is conducting an investigation and may require disgorgement of payments the Tribe made to rent the gaming machines under the Lease, an amount in excess of $2 million as an appropriate "remedy."

TGS and Wells Fargo Demand that the Issues Be Resolved Pursuant to the Dispute Resolution Procedures Set Forth in the Lease

25. In a letter dated April 20, 2011, Wells Fargo explained why there was no merit to the AGC's allegations. A copy of Wells Fargo's April 20 response is attached as Exhibit M, and a copy of TGS's April 20 response is attached as Exhibit N. TGS and Wells Fargo demanded that the issues raised in the April 13 letter be resolved pursuant to the Dispute Resolution Procedures

contained in Section 22 of the Lease. Specifically, TGS and Wells Fargo requested immediate consultation and negotiation to attempt to reach a just and equitable solution under Section 22(a) of the Lease. This section provides in part that the parties shall use their best efforts to settle the Claim before they proceed to arbitration.

26. By letter dated May 4, 2011, the Tribe refused to consult and negotiate. A copy of the May 4 letter is attached as Exhibit O. Instead, the AGC asserted that it is an independent branch of the Tribe and does not speak for the Tribe. The Tribe's agency asserted that it would be a violation of the State Compact and Apache law to allow the return of the gaming machines in question until the AGC concludes its licensing investigation and grants permission to retain the machines. The AGC volunteered that the Tribe stands ready to return the gaming machines but threatened to issue a civil penalty ordering that the machines be retained. By letter dated May 5, 2011, the AGC stated it would conduct a hearing on the licensing issues on May 17, 2011. A copy of the May 5, 2011 letter is attached as Exhibit P. By email dated May 12, 2011, Wells Fargo and TGS were told that the hearing was rescheduled to the week of May 23, 2011. A copy of the May 12, 2011 email is attached as Exhibit Q.

After TGS and Wells Fargo Filed the Original Statement of Claim in this Matter, the Tribe Countered with a "Petition for License Review"

27. On May 17, 2011, TGS and Wells Fargo filed the original Statement of Claim in this arbitration. Despite this ongoing arbitration, on June 24, 2011, the Tribe filed with the AGC a "Petition for License Review." A copy of the "Petition for License Review" is attached as Exhibit V. In addition to alleging that Wells Fargo was required to obtain a license as a gaming vendor by virtue of the Assignment, the Tribe further alleged—without any evidence and solely on information and belief—that "some or all" of the leased equipment does not meet State

Compact standards and may lack evidence of testing letters and registration under the Johnson Act. Finally, the Tribe alleged that TGS may not be suitable for licensing and thus may not be eligible to assume possession of the leased machines—even though TGS was licensed by the AGC from the outset, and no license is required for TGS to retake possession of machines that it owns. The Tribe also submitted a proposed "Order Setting Issues for Adversary Hearing." A copy of the "Order Setting Issues for Adversary Hearing" is attached as Exhibit W.

28. In the "Petition for License Review," the Tribe asks its agency to impose civil penalties and fines, including retention of the machines by the Tribe and disgorgement to the Tribe of all rent payments received. The "Petition for License Review" asserts: "Apache law further recognizes that disgorgement is an appropriate remedy as noted by a resolution of the Apache Business Committee passed in April, 2011." This alleged April 2011 resolution has never been disclosed or provided to Wells Fargo, and nothing in the Gaming Ordinance or the AGC's Policies and Procedures provide for disgorgement. Copies of the Gaming Ordinance and the AGC's Policies and Procedures are attached as Exhibits X and Y.

29. On July 14, 2011, Richard Grellner, the attorney and hearing officer for the Apache Business Committee issued an order seeking a July 22, 2011 evidentiary hearing before the Gaming Commission regarding TGS. TGS and Wells Fargo are filing this Amended Statement of Claims to encompass all issues raised by the Tribe or the Gaming Commission regarding the licensing of TGS or Wells Fargo, including but not limited to these raised in the Tribe's "Petition for License Review."

Wells Fargo Is Not A Vendor Of The Equipment And No License Is Required

30. Wells Fargo does not own and has never owned the gaming machines at issue. Thus, Wells Fargo is not a vendor of that equipment. The Assignment was not a sale of the Lease from

TGS to Wells Fargo. The Assignment instead evidenced the fact that TGS had pledged and granted to Wells Fargo a security interest and lien on TGS's interest in the Lease to secure a Wells Fargo loan to TGS. Wells Fargo's Credit Agreement with TGS specifies that the Assignment merely provides "additional security for the Loan." In this vein, the Credit Agreement lists the Assignment as among the Security Documentation, which "shall secure the due and punctual payment and performance of the terms and provisions of this Credit Agreement, the Note and all of the other Loan Documents." Although styled as an assignment, it nevertheless was simply a security agreement. *See* Oklahoma Code §§ 12A-1-9-109(a)(1); NRS 104.9109(1)(a).

31. Wells Fargo's role as merely a secured party was known to the Tribe at the time of the transaction. In the Estoppel Certificate the Tribe acknowledged that it had been notified that "all of Lessor's right, title and interest in, to and under the Master Lease" would be "assigned to Wells Fargo Bank, N.A. . . . *as security*" for TGS's obligations owing to Wells Fargo. The Tribe made a similar acknowledgement in the Form of Direction and Acknowledgement Regarding Lease Payments dated June 23, 2008. The Tribe expressly stated that it "hereby acknowledges and agrees that Lender has a prior perfected security interest" in all payments due TGS under the Master Lease.

32. The Depository Agreement between Wells Fargo and TGS is further proof that Wells Fargo does not own the equipment and rent payments. To secure Wells Fargo's loan to TGS, the payments due to TGS under the Lease were deposited into an account with Wells Fargo. Wells Fargo held the funds in a fiduciary capacity subject to strict compliance with the Depository Agreement. Under the Depository Agreement, the payments were deposited with Wells Fargo, but they did not remain with Wells Fargo. Instead, each month they were applied first, to pay

TGS operating expenses, second, to pay monthly payments owed by TGS on its loan from Wells Fargo, and third, to pay monthly payments owed by TGS to its subordinated lenders. If Wells Fargo owned the equipment and the lease payments, all funds in the account would remain with Wells Fargo—and none would go to TGS for operating expenses or to other lenders of TGS. A copy of the Depository Agreement is attached as Exhibit R.

33. The Security Agreement between Wells Fargo and TGS is additional proof of the limited scope of Wells Fargo's assignment. If Wells Fargo had actually been assigned all of TGS's right, title and interest in the Lease, it would also be responsible for TGS's corresponding obligations. The Security Agreement dated June 23, 2008 between TGS and Wells Fargo provides, however, that Wells Fargo shall not "be required or obligated in any manner to perform or fulfill any of the obligations of Grantor (TGS) under or pursuant to any Contract." A copy of the Security Agreement is attached as Exhibit S. Contracts are defined in Section 1 to include the Equipment Lease Agreement. The Tribe acknowledged receipt of a copy of the Security Agreement in the Form of Direction and Acknowledgement Regarding Lease Payments dated June 23, 2008.

COUNT I – BREACH OF CONTRACT – LEASE AGREEMENT

34. TGS realleges the allegations as set forth in paragraphs 1 through 33 above as if fully set forth herein.

35. The Tribe entered into the Lease, which was assigned to TGS in accordance with its terms. The Tribe approved of the assignment to TGS, even though the Tribe's approval was not required. The Lease is a valid, binding agreement, and TGS has fully complied with its obligations under the Lease.

36. The Tribe materially breached the Lease by failing to pay rent since July 2010. TGS sent a Notice of Default to the Tribe on December 1, 2010.

37. Under Section 18.2 of the Lease, TGS is entitled upon any Event of Default to declare, at its sole option, without notice to or demand upon the Tribe, and without prejudice to any other right or remedy it may possess, immediately due and payable "an amount equal to the balance of any Rent that would have been payable during the remainder of the Lease Term calculated on the basis of the average Rent due during each Rent Period occurring during such Lease Term prior to the Event of Default..." TGS declares and demands as immediately due and payable under Section 18.2 more than $7,000,000. TGS also demands interest at the lesser of 18% or the highest rate permitted by law and reimbursement of all legal fees and other expenses it has or will incur by reason of the Event of Default or the exercise of any remedy under the Lease.

38. As a direct and proximate cause of the Tribe's breaches of the Lease, TGS has incurred damages and is entitled to an award of more than $7,000,000 together with interest, attorneys' fees and expenses.

COUNT II – ALTERNATIVELY, UNJUST ENRICHMENT

39. TGS realleges the allegations as set forth in paragraphs 1 through 38 above as if fully set forth herein.

40. The Lease is a valid and enforceable agreement. But even if the Lease were not enforceable, the Tribe must return to TGS the monies owing to TGS. The Tribe will be unjustly enriched if it does not return to TGS the monies owed to TGS.

41. In addition, Rule R-7(b) of the AAA Commercial Arbitration Rules, which are incorporated into the Lease, provides that an arbitration clause shall be treated as an agreement

independent of the other terms of the contract, and a decision by the arbitrator that the contract is null and void shall not for that reason render invalid the arbitration clause. Under binding United States Supreme Court precedent, the arbitration clause is a clear and unequivocal waiver of the Tribe's sovereign immunity. A copy of *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001) is attached as Exhibit T.

42. The Tribe has substantially benefited from the Lease and it would be contrary to equity and good conscience for the Tribe to retain these benefits that have come to it at the expense of TGS.

COUNT III – DECLARATORY RELIEF PURSUANT TO 12 O.S. § 1651

43. TGS and Wells Fargo reallege the allegations as set forth in paragraphs 1 through 42 above as if fully set forth herein.

44. Pursuant to 12 O.S. § 1651, TGS and Wells Fargo seek a judicial determination regarding the parties' rights under the Lease and Assignment that: (1) Wells Fargo is not a gaming vendor and has therefore not violated any licensing ordinance or regulation; and that, as a result, (2) the AGC has no basis to retain the gaming machines or seek disgorgement of payments made to TGS under the Lease; and (3) there is no merit to any licensing claim raised by the Tribe or the Gaming Commission, including but not limited to the Claims made in the Tribe's "Petition for License Review" or the Proposed Order.

45. An actual, existing justiciable controversy exists between TGS and Wells Fargo on the one hand and the Tribe on the other. The parties have opposing and adverse legal interests concerning whether Wells Fargo has violated any Gaming Ordinance and whether the Tribe is entitled to retain the gaming machines and obtain disgorgement of payments made to TGS under

the Lease. A determination regarding the parties' rights under the Lease and Assignment will terminate the controversy.

WHEREFORE, TGS and Wells Fargo respectfully requests that the arbitrator:

(1) Pursuant to Count I, award TGS an amount to be determined at arbitration of more than $7,000,000 for payments due under the Lease, interest and other amounts;;

(2) Alternatively, pursuant to Count II, award TGS an amount to be determined at arbitration of more than $7,000,000 due under the Lease together with prejudgment interest until paid;

(3) Pursuant to Count III, declare that: (1) Wells Fargo is not a gaming vendor and has therefore not violated any Gaming Ordinance; and that, as a result; (2) the AGC has no basis for not releasing the gaming machines or disgorging payments made to TGS under the Lease; and (3) there is no merit to any licensing claim raised by the Tribe or the Gaming Commission, including but not limited to the Claims made in the Tribe's "Petition for License Review" or the Proposed Order. .

(4) Award TGS and Wells Fargo their attorneys' fees, costs and expenses, including, but not limited to, arbitration fees; and

Grant such further relief as is just and equitable. Dated: July 14, 2011

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

WELLS FARGO BANK, N.A.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CV-11-648-D
	)	
LOUIS MAYNAHONAH, *et al.*,	)	
	)	
Defendants.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Before the Court is Plaintiff's Motion for Preliminary Injunction [Doc. No. 34], filed pursuant to Fed. R. Civ. P. 65. The Court conducted a hearing on August 18, 2011, at which Plaintiff Wells Fargo Bank, N.A. ("Wells Fargo") appeared through local counsel, Phillip Whaley, and through counsel admitted *pro hac vice*, Jerome Miranowski and Michael Krauss; Defendants appeared through counsel Jon E. Brightmire and Bryan Nowlin for members of the Apache Business Committee, and Richard Grellner and Amber Bighorse for members of the Apache Gaming Commission and Mr. Grellner as its appointed hearing officer.[1] The Court received the testimony of witnesses, admitted documentary evidence offered by the parties, and heard the arguments of counsel. Upon consideration of these materials, as well as the motion papers and briefs, the Court now issues its ruling on Plaintiff's request for a preliminary injunction.

I.

Background

On July 22, 2011, the Court issued a temporary restraining order substantially similar to the preliminary injunction now sought. By that Order, the Court prohibited Defendants Gene Flute,

[1] An attorney for TGS Andadarko, LLC, which has filed a motion to intervene, was also present.

EXHIBIT E

Ronald Ahtone, Jr., Austin Klinekole and Richard J. Grellner, as members or officers of the Apache Gaming Commission ("AGC") from conducting any hearing, issuing any order, making any determination, or taking any official action with respect to a pending proceeding against Plaintiff and TGS Anadarko, LLC ("TGS"), which is currently a nonparty. Familiarity with the July 22 Order [Doc. No. 56], and the procedural history set forth therein, is assumed. As pertinent here, Plaintiff accuses the Apache Tribe of Oklahoma (the "Tribe") of acting contrary to its contractual obligations under a gaming equipment lease that contains an arbitration agreement. Plaintiff asks the Court to preserve for decision by neutral arbitrators the question of whether the parties' dispute is arbitrable and, if so, whether a breach of the lease has occurred. Defendants deny that the Tribe's regulatory authority over gaming activities in Indian country can be affected by a contract with private parties or that a dispute involving tribal and federal gaming laws is subject to arbitration. Because the parties' arguments raise complex issues of federal, state and tribal law, the Court entered the temporary restraining order to preserve the *status quo* and permit a more deliberate, better informed decision of whether the AGC should be enjoined from further proceedings.

II.

Preliminary Injunction Standards

The standard for issuance of a preliminary injunction is familiar. "To obtain a preliminary injunction, a plaintiff must show: '(1) a likelihood of success on the merits; (2) a likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the movant's favor; and (4) that the injunction is in the public's interest.'" *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1154 (10th Cir. 2011) (quoting *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 764 (10th Cir. 2010)); *see Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). A preliminary injunction is an extraordinary remedy that is "designed to

'preserve the relative positions of the parties until a trial on the merits can be held.'" *Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1224 (10th Cir. 2009) (quoting *University of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)). In this federal circuit, courts generally apply a modified standard under which, if a movant establishes that other requirements tip strongly in his favor, the movant "may meet the requirement for showing success on the merits by showing that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1255-56 (10th Cir. 2003); *see O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 976 (10th Cir. 2004) (en banc), *aff'd sub nom.*, 546 U.S. 418 (2006).

Contrary to this general rule, three types of preliminary injunctions are "historically disfavored" and require the movant to satisfy a heightened burden and make a strong showing that all four factors are met. *See O Centro*, 389 F.3d at 975; *see also Attorney General v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009); *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009). Defendants contend that one disfavored category is implicated in this case, that is, "preliminary injunctions granting the moving party all the relief it could recover at the conclusion of a full trial on the merits." *Westar Energy*, 552 F.3d at 1224, *O'Centro*, 389 F.3d at 975. Defendants also rely on a fourth category approved by the Tenth Circuit in *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003), for preliminary injunctions that seek "to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme." *See also Nova Health Sys. v. Edmondson*, 460 F.3d 1295, 1298 n.6 (10th Cir. 2006). Defendants argue that Plaintiff is seeking to restrain regulatory action taken by a tribal government in the public interest.

The Court is not persuaded by these arguments. The requested preliminary injunction would not afford Plaintiff full relief, as the Amended Complaint also seeks relief against members and officers of the Apache Business Committee and seeks a declaration of rights regarding matters other than the pending tribal proceeding. Further, as discussed below, the Court does not intend to restrain regulatory action by the AGC within the scope of its legitimate authority but, instead, intends to limit the exercise of the Court's jurisdiction to the federal questions presented by the Amended Complaint.

By separate order, the Court has denied a motion by Defendants to dismiss the Amended Complaint and, in so doing, has found that federal subject matter jurisdiction exists to address allegations that Defendants are violating federal law. The Court has further found that tribal exhaustion should not be required because "the issues framed by the Amended Complaint and Defendants' contentions present federal questions that lie beyond the jurisdiction of the Gaming Commission, or any other tribal entity, to decide." *See* Order of Sept. 2, 2011 [Doc. No. 74] at 8. In the Court's view, the enforceability of the Tribe's contractual commitments to arbitrate disputes is an issue of federal law and is not a matter within the scope of the AGC's regulatory authority.

However, there is no question that the AGC is invested by federal, state, and tribal laws with regulatory authority over tribal gaming within Indian country. The tribal gaming activities at issue in this case are governed by the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-19, and a federally-approved tribal-state gaming compact, which determines the respective regulatory authority of state and tribal governments over Class III gaming conducted on Indian lands within state boundaries.[2] As discussed below, the AGC was established by a tribal gaming ordinance,

[2] IGRA establishes three categories of gaming activity; Class III encompasses gambling activities such as "slot machines, casino games, banking card games, dog racing, and lotteries." *See Seminole Tribe v. Florida*, 517 U.S. 44, 48 (1996); *see also* 25 U.S.C. § 2703(7)(B), (8). Only Class III gaming requires a

which authorizes the AGC to regulate tribal gaming operations and to provide oversight of such operations to ensure compliance with applicable laws. The injunctive relief sought by Plaintiff is overbroad to the extent it would impinge on the AGC's legitimate regulatory authority to determine matters within its jurisdiction. TGS voluntarily sought, and obtained, a gaming license from the AGC, and TGS's activities as a licensed vendor are clearly subject to the AGC's regulation and oversight. This Court is not authorized to decide, and should abstain from deciding, any issues that fall within the AGC's legitimate regulatory authority.[3]

Viewed through the prism of federal jurisdiction, the preliminary injunctive relief requested by Plaintiff does not fall into any disfavored category, and thus, the modified standard applies.[4] Plaintiff seeks to preserve the *status quo* and to prohibit the AGC from taking action that would be contrary to the Tribe's agreement to arbitrate contract-related disputes and would affect contractual rights.[5] Notably, at this point in the case, no challenge has been made to the validity of the arbitration agreement at issue. Rather, Defendants contend the agreement does not encompass, or is unenforceable as applied to, a regulatory matter. However, the Court here considers only whether a preliminary injunction should issue to prevent the AGC from acting *beyond* the scope of its regulatory authority.

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tribal-state compact. *See* 25 U.S.C. § 2710(d)(1).

[3] For example, one issue set for hearing by the AGC is whether TGS is suitable for licensing.

[4] However, as discussed *infra* in Conclusions of Law, the Court's ruling on Plaintiff's Motion would be unchanged if the heightened standard applied.

[5] The "status quo" is the last peaceable or uncontested status between the parties prior to the conflict at issue. *Schrier v. University of Colorado*, 427 F.3d 1253, 1260 (10th Cir. 2005). The Court has previously found that the last peaceable or uncontested status between Plaintiff and the AGC ended in April, 2011, when the AGC first raised allegations now at issue in the pending tribal proceeding. *See* July 22 Order [Doc. No. 56] at 3. The Court adheres to that determination.

III.

Findings of Fact

1. The Tribe and the State of Oklahoma entered into a Tribal Gaming Compact in 2005, allowing the Tribe to engage in Class III gaming on its lands within the State. Plaintiff's Hearing Exhibit ("P. H. Ex.") 3.[6] The Tribal Gaming Compact recognizes the AGC as the Tribal Compliance Agency with authority to carry out the Tribe's regulatory and oversight responsibilities under the Compact. *Id.* at Part 3, ¶ 26. The AGC's oversight and responsibilities focus primarily on the licensing process for employees of gaming facilities and certain other individuals and entities providing specified goods or services to a tribal gaming enterprise. *Id.* Under the Compact, federally regulated financial institutions, such as Plaintiff Wells Fargo, which provide financing are exempt from licensing requirements. *Id.* at Part 10, ¶ C. 4.

2. The Apache Tribe enacted, and federal authorities approved, its Tribal Gaming Ordinance, which in turn empowered the AGC to put in place regulations in connection with its oversight responsibilities. P. H. Ex. 1, § 108.

3. The AGC enacted the Apache Gaming Commission Policy and Procedure Manual ("Manual") setting forth regulations, policies, and procedures regarding gaming in tribal facilities. Defendants' Hearing Exhibit ("D. H. Ex.") 11.[7]

4. The Manual as submitted addresses vendor licensing, and the AGC's ability to impose fines or penalties for noncompliance with regulatory provisions, in several places. A full reading of these provisions reflects that the AGC, in connection with its regulatory authority, may impose

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[6] Many of the same exhibits were submitted by both parties. The Court has generally attempted to cite to the most legible copy submitted.

[7] It is unclear whether the full Manual was provided; D. H. Ex. 11 appears to be incomplete.

civil fines and penalties upon "any licensee" determined to have "violated any of these regulations . . . ." Further, the licensee "shall be required to pay any penalty before the license . . . is reinstated." Although one applicable section of the Manual sets per-day limits for such "one time assessments" as "$500.00 up to $5,000.00," other provisions do not contain a limitation. However, it is clear from the applicable provisions, and the Manual in general, that such penalties and fines are intended to be used to compel compliance by a licensee. *See* D. H. Ex. 11, pp. 14 of 71; 29-30 of 71; and 54 of 71.

5. On or about June 23, 2008, the Tribe and Wells Fargo entered into a Loan Agreement in order to finance the further development and improvement of casino facilities by the Tribe. The Loan Agreement required Wells Fargo to lend the Tribe $4,365,000. P. H. Ex. 8.

6. The Loan Agreement contains a broad arbitration provision requiring, upon demand of a party, any dispute under the Loan Agreement and related documents to be submitted to binding arbitration. The Loan Agreement also contains an express waiver of sovereign immunity by the Tribe to allow for arbitration or other legal action brought against the Tribe. *Id.* at §§ 11.24 and 11.27. 7. In the event of an arbitration award, the Loan Agreement provides that judgment upon such award "may be entered in any court having jurisdiction (including any Tribal Court which now exists or which may become effective after the date of [the Loan Agreement]). . . ." *Id.* at § 11.24(b). The term "Tribal Court" is defined in the Loan Agreement as "any tribal court of the Borrower." *Id.* at § 1.1. At the time of the execution of the Loan Agreement, the Tribe acknowledged that it did not then have a tribal court. *Id.* at § 4.4. The Chairman of the Tribe, Louis Maynahonah, testified at the preliminary injunction hearing that the Tribe still has no court system.

8. Although the Loan Agreement references potential action by a tribal court on an arbitration award, it goes on to state that, "[i]n any event, no action may be brought in any Tribal Court without the prior written consent of [Wells Fargo]." *Id.* at § 11.27(e).

9. In connection with the Loan Agreement the Tribe was required, as a condition precedent to closing, to enact an Arbitration Ordinance in a form acceptable to Wells Fargo. The Tribe enacted the Arbitration Ordinance effective as of the date of closing on the Loan Agreement. P. H. Ex. 57. The Arbitration Ordinance provides that, as used therein, "The term 'Tribal Forum' shall mean (a) if there is no tribal court of the Tribe, the Business Committee or (b) any tribal court established by the Tribe." The Arbitration Ordinance further provides, *inter alia*, that a party to an arbitration may make an application to the Tribal Forum for an order confirming an arbitration award. The ordinance goes on to state, however, that the Tribal Forum may not review or modify an arbitration award, but may only confirm the same "strictly as provided by the arbitrator(s)." The ordinance also provides that, in connection with arbitrated disputes in which the Tribe is a party, the Tribal Forum may enforce an award unless its jurisdiction is expressly prohibited by the underlying contract. *Id.* at §§ 7 and 9.

10. Contemporaneous with the execution of the Loan Agreement, Wells Fargo entered into a Credit Agreement with TGS Anadarko, LLC, ("TGS") to loan up to $3,500,000 to allow TGS to provide gaming machines to the Tribe under a master lease (the "Equipment Lease") between TGS (as assignee of another entity) and the Tribe. P. H. Ex. 9.

11. The Equipment Lease includes a broad arbitration provision for any claim or dispute related to the lease, and further provides that the question whether or not a particular dispute is arbitrable is itself subject to binding arbitration. P. H. 20 A § 22. The Equipment Lease also contains a waiver of sovereign immunity, as well as the doctrine of exhaustion of tribal remedies.

Id. at § 22(f) and (g). The arbitration provision and waivers were reaffirmed by the Tribe in connection with the assignment of the lease to TGS. P. H. Ex. 20 D.

12. As part of its financing agreement with TGS, Wells Fargo took an assignment of the Equipment Lease as additional security under the Credit Agreement between Wells Fargo and TGS. P. H. Ex. 9, § 1.01 ("'Assignment of Rents' shall mean the Assignment of Equipment Lease and Rents to be executed concurrently herewith by Borrower as Assignor for the benefit of Lender or Assignee as additional security for the Loan. . . ."); § 3.03 ("The Security Documentation duly executed by Borrower . . . consisting of the following: . . . (c) Assignment of Rents;").

13. The Assignment of Equipment Lease and Rents between Wells Fargo and TGS provides that, barring default, TGS reserves "a revocable license to collect the rents and to possess, use and enjoy the Lease Agreement and other Assigned Interests." P. H. Ex. 55, § 2. The Assignment further requires TGS to secure from the Tribe an estoppel agreement approving the assignment to Wells Fargo, allowing Wells Fargo to enforce the Equipment Lease, and expressly extending to Wells Fargo the arbitration provision and waiver of sovereign immunity within the Equipment Lease. *Id.* at § 10.

14. In connection with the closing of the various transactions, on June 23, 2008, the Tribe provided to Wells Fargo an "Estoppel Certificate," along with a tribal resolution adopting the same. P. H. Ex. 11.

15. The Estoppel Certificate acknowledges the assignment of the Equipment Lease to Wells Fargo "as security" for obligations of TGS to Wells Fargo. The Estoppel Certificate further recognizes that Wells Fargo, as assignee, would be entitled to the benefits of the lease but would not be "subject to any of the burdens or obligations of [TGS] under the [lease] or, in connection therewith. . . ." The Estoppel Certificate goes on to state that the arbitration provision and waiver

of sovereign immunity within the Equipment Lease inure to the benefit of Wells Fargo as assignee of the lease. In the Estoppel Certificate the Tribe expressly reaffirms its submission to the jurisdiction of Oklahoma state courts and the United States District Court for the Western District of Oklahoma in connection with disputes related to the lease, the Estoppel Certificate, or the enforcement of an arbitration award. Finally, the Estoppel Certificate allows for an action in "any tribal court having jurisdiction" for the purpose of entering judgment on or enforcing an arbitration award, provided, however, that "no action may be brought in any tribal court without the prior written consent of [Wells Fargo]." P. H. Ex. 11.

16. Prior to the closing of the various funding transactions Wells Fargo sought confirmation from the AGC that it would not be required to obtain a vendor license by virtue of the contemplated transactions, and specifically the assignment of the Equipment Lease. P. H. Ex. 4.

17. On June 23, 2008, the Chairman of the AGC at the time, Gene Bigsoldier, stated in a letter to Wells Fargo that it met the requirements for the licensing exemption regarding regulated financial institutions set forth in the Tribal Gaming Compact. P. H. Ex. 7. The AGC stated: "[T]he Apache Gaming Commission finds that Wells Fargo Bank is exempted from licensing specifically for the loan transaction dated on or about June 23, 2008 between Wells Fargo and . . . TGS . . . ." The AGC went on to state: "With respect to that certain Credit Agreement, and related documents, dated on or about June 23, 2008 . . . among TGS . . . as Borrower, and Wells Fargo . . . as Lender, the foregoing exemption shall remain in full force and effect notwithstanding any amendment, restatement, extension, refinancing, refunding, supplement or other modification of the Credit Agreement or the credit facilities provided for therein." *Id.*

18. The Tribe is governed by its Tribal Council, which consists of all voting-age members, but its activities are conducted by an elected Business Committee. The composition of the Tribe's

Business Committee changed after tribal elections in 2010. The former Business Committee had approved and executed the transaction documents and related documents regarding the Loan Agreement between the Tribe and Wells Fargo, as well as the Equipment Lease. The Business Committee as composed following the 2010 elections instituted a complaint on behalf of the Tribe in this Court against multiple defendants, including Wells Fargo, challenging, *inter alia*, the enforceability of the Loan Agreement.

19. Wells Fargo made a demand for arbitration regarding the dispute related to the Loan Agreement, and the Tribe voluntarily dismissed Wells Fargo from that litigation in favor of arbitration.

20. The Tribe and Wells Fargo proceeded to arbitration in May 2011 before retired United States District Judge Tom Brett. P. H. Ex. 30. Wells Fargo alleged that the Tribe had breached the Loan Agreement, and sought approximately $2.7 million in damages; the Tribe asserted that the loan documents were unenforceable, alleged wrongful conduct in connection with TGS and the Equipment Lease, and sought $39 million in damages. *Id.* On May 23, 2011 Judge Brett issued his arbitration decision. *Id.* In his nineteen page decision Judge Brett concluded, *inter alia,* that the Tribe had expressly waived its sovereign immunity with respect to all claims and defenses at issue; the Loan Agreement and related documents are valid and enforceable against the Tribe; the Loan Agreement is not a management contract; and the Tribe materially breached the Loan Agreement. Judge Brett awarded damages in the amount of $2,751,160.20 in favor of Wells Fargo, and found in favor of Wells Fargo on the Tribe's counterclaim. *Id.* at p. 17-18.

21. Just prior to the arbitration proceeding, on April 26, 2011, the Tribe's Business Committee – upon the advice of legal counsel – unanimously adopted the Resolution Establishing Tribal Forum for Arbitration ("Tribal Forum Resolution"). P. H. Ex. 25. The Tribal Forum

Resolution makes reference to the Arbitration Ordinance (*see* P. H. Ex. 57) required as a condition precedent to closing the loan set forth in the Loan Agreement. The Tribal Forum Resolution purports to create the "Tribal Forum" referred to in the Arbitration Ordinance (composed of the Business Committee), and further provide for its jurisdiction and powers. P. H. Ex. 25. However, the Arbitration Ordinance was itself previously adopted by tribal resolution (*see* P. H. Ex. 56), and the Arbitration Ordinance also established the Apache Business Committee as the "Tribal Forum" in the absence of a tribal court. P. H. Ex. 57, § 1(b). Moreover, the Arbitration Ordinance likewise provided for the jurisdiction and powers of such Tribal Forum, expressly limiting it to the confirmation of arbitration awards ("An arbitration award shall not be subject to review or modification by the Tribal Forum, but shall be confirmed strictly as provided by the arbitrator(s)."). *Id.* at (c).

22. The Tribal Forum Resolution borrowed liberally from the text of the earlier Arbitration Ordinance, but sharply diverged from the ordinance by purporting to provide to the Business Committee (acting as Tribal Forum) broad powers of review and modification of arbitration awards. Indeed, the resolution allows the Tribal Forum to "decline to enforce any arbitration award or alternatively order a re-hearing" under circumstances set forth in the resolution.[8] P. H. Ex. 25,

[8] Such action could be taken if the Tribal Forum finds that:

"(1) The award was procured by fraud, corruption, or undue influence
(2) There is evidence of partiality on the part of the arbitrator(s)
(3) A party concealed evidence or failed to provide d [sic] relevant discovery (if discovery is contemplated by the arbitration agreement) in a timely fashion so as to prejudice the rights of the opposing party
(4) The arbitrator abused discretion in refusing to postpone the hearing upon good cause, or in refusing to hear evidence material to the case or controversy; or of any other misconduct by which the rights of any party have been prejudiced
(5) The arbitrator(s) committed a manifest error of law or fact in reaching the award as set forth in any findings of fact or conclusions of law;
(6) The arbitrator(s) exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not

§ 1(d). The resolution further provides that no appeal may be taken from a Tribal Forum order modifying or correcting an arbitration award. *Id.* at § 2(b).

23. The Arbitration Ordinance contains a specific jurisdiction provision applicable to matters in which the Tribe itself is a party. That provision, *inter alia*, expressly limits the jurisdiction of the Tribal Forum to the enforcement of awards, but also allows for the preclusion on such jurisdiction where prohibited by the underlying agreement which provides for the right to arbitrate. P. H. Ex. 57, § 9(a).

24. The corresponding Tribal Forum Resolution provision on jurisdiction is almost identical to Section 9 in the Arbitration Ordinance, except it adds the words "or decline to enforce" an arbitration award to the jurisdictional grant. Importantly, however, the provision preserves the limitation on the jurisdiction of the forum where the underlying contract "expressly prohibit[s] the Tribal Forum from exercising jurisdiction thereunder." P. H. Ex. 25, § 4(a).

25. During the hearing, Chairman Maynahonah testified that the Tribal Forum Resolution was adopted just prior to the May 2011 arbitration hearing in order to protect the Tribe from potential liability, including that which might result from the arbitration proceeding. In response to questioning by Plaintiff's counsel regarding the timing of the resolution, Chairman Maynahonah stated "we were going to arbitration and there's no telling how things might turn out."

26. Also on April 26, 2011 the Business Committee unanimously adopted the Resolution of the Apache Tribe of Oklahoma stating Tribal law as to penalties for unlicensed casino vendors, providing that Apache tribal law includes the "remedy of disgorgement," and authorizing the AGC to "seek enforcement of disgorgement, as well as any other remedy at law or equity, in any tribal,

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made". P. H. Ex. 25, § 1(d).

state, or federal court of competent jurisdiction." P. H. Ex. 24. The purpose of the resolution was purportedly to fill a gap in the Tribal Gaming Compact regarding "remedies for payments made to a casino vendor who was without a license at the time of the payments, or who improperly conducted business through the auspices of a license belonging to another. . . ." *Id.*

27. Chairman Maynahonah also testified during the hearing that the disgorgement resolution was adopted – upon the advice of legal counsel – in order to protect the tribe from litigation and potential liability.

28. The Loan Agreement sought to preclude the Tribe from adopting any tribal law impairing any right or remedy of Wells Fargo under the agreement without its consent. P. H. Ex. 8, § 6.17. Further, the Loan Agreement expressly sought to protect Wells Fargo from impairment of its rights through the Tribe's amendment of material documents, including the Arbitration Ordinance, without the consent of Wells Fargo. *Id.* at § 6.14; § 1.1 (defining "Material Document").

29. Similarly, the Equipment Lease contains a provision seeking to protect the lessor (TGS by assignment) from any after-the-fact adoption by the Tribe of any law or requirement (expressly including any law or requirement relating to licensing of a gaming device owner) impairing the rights or remedies of the lessor. P. H. Ex. 20 A, § 24.

30. Following the issuance of the arbitration decision and award by Judge Brett, the Tribe on June 1, 2011 filed a request that the Business Committee – in its capacity as Tribal Forum – vacate the arbitration award. P. H. Ex. 58. The motion sought vacation of the arbitration decision and award in light of the Tribe's contention that the Loan Agreement, including its arbitration provision, is an illegal management contract – the precise assertion which Judge Brett rejected in his arbitration decision. Judge Brett, the Tribe contended in its motion, committed "a manifest error

of law" in ruling otherwise. Chairman Maynahonah promptly issued an order from the Business Committee, acting as the Tribal Forum, assuming jurisdiction, ordering Wells Fargo to respond, and setting the matter for hearing.

31. On June 8, 2011, Wells Fargo filed a complaint in this Court, and asserted a motion for a temporary restraining order ("TRO") and preliminary injunction to preclude the Tribal Forum from exercising jurisdiction [Doc. No.14].

32. The Court set the TRO motion for hearing on June 14, 2011, and directed Wells Fargo to provide notice to the Tribe [Doc. No. 15]. On June 13, 2011, the Tribe filed its response to the motion for TRO and for preliminary injunction [Doc. No. 20]. At the TRO hearing on June 14, 2011, counsel for the Tribe (the same counsel representing the members of the Business Committee currently before the Court) presented to the Court a "Final Order" issued by the Tribal Forum on June 13, 2011, purporting to vacate the arbitration award – the very action Wells Fargo sought to temporarily enjoin.[9] *See* P.H.Ex. 29; *see also* Order [Doc. No. 24].

33. Around the time that the Tribal Forum sought to assert jurisdiction over Wells Fargo, the AGC attempted to assert regulatory jurisdiction over Wells Fargo and TGS. On April 13, 2011, the Chairman of the AGC, Gene Flute, sent a letter to Wells Fargo and TGS providing notice that, by virtue of the June 2008 Assignment of Equipment Lease and Rents, "Wells Fargo is acting in capacity as a gaming vendor and owner of Class III gaming machines within the Tribe's Silver Buffalo Casino and has acted in that capacity since at least June 23, 2008." P. H. Ex. 23. The letter went on to state that Wells Fargo was required to obtain a license from the AGC "prior to

[9] The parties agreed at that time that the Tribal Forum's action rendered the motion for TRO moot. *See* Order, Doc. No. 24. The Court observes, however, that the conduct of the Tribe – presumably advanced with the assistance of, or at least the knowledge of, its counsel, smacks of the type of "race against the law" noted critically by the United States Supreme Court in *Jones v. Securities and Exchange Commission*, 298 U. S. 1 (1936).

implementation of the lease," and that Wells Fargo is not exempted by the Tribal Gaming Compact from licensing requirements. These positions are directly contrary to the Tribe's express representations at the time of the closing of the Loan Agreement that Wells Fargo was entitled to the licensing exemption under the Tribal Gaming Compact, and that Wells Fargo would not be subject to the performance duties or obligations of TGS under the Equipment Lease. *See* P. H. Ex. 7 and 11, and ¶¶ 14-17, *supra*. The AGC chairman's letter stated in conclusion:

> It is apparent, that the Tribe should not have made payments to TGS as the owner of the gaming machines was Wells Fargo which never requested nor obtained a gaming license. The AGC is conducting an investigation regarding this matter and may determine that disgorgement of revenues paid is the appropriate remedy. We understand that the total amount paid to TGS for the benefit of Wells Fargo is $2,130,352.00. We will make you aware of our findings at the soonest possible opportunity.

P. H. Ex. 21.

34. On May 5, 2011, the AGC Hearing Officer, Richard Grellner, a defendant herein, notified counsel for Wells Fargo and TGS that the AGC would hold a hearing on May 17, 2011, for the purpose of determining "whether Wells Fargo and/or TGS have violated the licensing requirements of the AGC in connection with the ownership and leasing of the gaming equipment to the Apache Tribe for the Silver Buffalo Casino, and if so to determine whether any civil penalty should be imposed against Wells Fargo and/or TGS under Apache law for violation of its licensing requirements. . . ." P. H. Ex. 27.

35. The issues raised in the April 13 letter from the AGC, along with other issues relating to the Equipment Lease, became the subject of a demand for arbitration asserted by Wells Fargo and TGS on May 17, 2011. P. H. Ex. 28. In light of the arbitration demand, and Wells Fargo's

agreement to refrain from immediately taking legal action to compel arbitration, the AGC postponed its hearing. P. H. Ex. 32.[10]

36. On June 19, 2011, the Tribe filed its arbitration answering statement asserting, *inter alia*, that the AGC's authority to regulate gaming through the licensing process cannot be contractually delegated to an arbitrator, and claiming the Equipment Lease is an unapproved management contract which is void as a matter of law. P. H. Ex. 35. The latter assertion was made by the Tribe despite an Opinion Memorandum by the AGC on May 29, 2008, concluding that the Equipment Lease is not a management agreement requiring approval by the National Indian Gaming Commission. P. H. Ex. 5.

37. On June 24, 2011, the Tribe filed with the AGC a Petition for License Review "regarding vendors TGS and Wells Fargo . . . ." P. H. Ex. 37. In the Petition the Tribe asked the AGC to conduct a hearing on five issues, and if violations were found, to "enter a civil penalty" which, the Tribe alleged, should include "complete disgorgement" of all gaming revenues improperly received. *Id.*

38. On July 14, 2011, the AGC entered an order setting for hearing the issues set forth in the Tribe's Petition for License Review. The order identified the issues to be determined as:

> 1. Whether TGS improperly allowed Wells Fargo to use benefit of its gaming license pursuant to an Assignment of the Gaming Lease dated June 23, 2008 between TGS and Wells Fargo.
>
> 2. Whether TGS provided state compact-compliant gaming machines pursuant to the Gaming Equipment Lease effective January 1, 2009.
>
> 3. Whether TGS made prior report of the movement of machines pursuant to the federal Johnson Act.

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[10] Wells Fargo and TGS later filed an Amended Statement of Claim in the arbitration. P. H. Ex. 41.

> 4. Whether a declination letter regarding sole proprietary interest or management contract status was obtained from the NIGC at any time prior to the effective date of the Gaming Equipment Lease.
>
> 5. Whether TGS or its principal Robert J. Medeiros is suitable to obtain a license for the limited purpose of obtaining possession to slot machines provided under the Gaming Equipment Lease effective January 1, 2009 that remain on the Tribe's trust land.

P. H. Ex. 40. The hearing was set for July 22, 2011. *Id.* The order directed TGS to attend the hearing, and directed Wells Fargo to respond to certain inquiries by the AGC, reserving a potential further hearing specifically directed to Wells Fargo. *Id.*

39. On July 5, 2011, Wells Fargo filed an Amended Complaint herein, expanding its original allegations to include claims in connection with the AGC's assertion of jurisdiction over it and TGS, and seeking injunctive relief to prevent such action by the AGC.[11] Doc. No. 25.

40. On July 15, 2011, Wells Fargo again filed a motion for TRO and preliminary injunction, this time seeking to enjoin further action by the AGC pursuant to the order previously entered by the AGC (P. H. Ex. 40) setting various issues for hearing on July 22, 2011. Doc. No. 34.

41. A hearing on Wells Fargo's motion for TRO was held on July 21, 2011. At the hearing counsel for the Business Committee member defendants, Mr. Nowlin, presented argument for all defendants.[12] Counsel initially maintained that the AGC would not address during its contemplated hearing issues leading to determinations affecting Wells Fargo, but would instead adjudicate matters going to TGS, and would not require Wells Fargo to be present. That led to the following exchange between Court and counsel:

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[11] The Amended Complaint also substituted the individual members of the Business Committee and the AGC as defendants.

[12] Mr. Nowlin's argument was supplemented by argument from Mr. Grellner on his own behalf and on behalf of the AGC defendants.

THE COURT: Well, but whether Wells Fargo is being required to be present is just - - it just begs the question. I mean, if you're deciding issues that are going to have some type of preclusive effect on Wells Fargo's ability to assert its rights, whether it's being required to be there or not, and you're affecting the interest of Wells Fargo is - -

MR. NOWLIN: I understand the point, your Honor. And I would argue that the Gaming Commission - - the tribe, as the person who has submitted the petition for license review, recognizes that it will not - - any determinations as to TGS will not be preclusive as to Wells Fargo. I'm happy to state that on the record and, in fact, just have.

THE COURT: So if you all determine that TGS has improperly allowed Wells Fargo to utilize its license, in your words, then whenever the day comes when you require Wells Fargo to show up before the commission, are you going to re-litigate that entire issue and redetermine it?

MR. NOWLIN: According to what I just said, your Honor, that would be the case. And I believe that's the position the Gaming Commission has taken.

THE COURT: That, if not literally impossible, you know, or unlikely, I should say, it's practically unlikely. Would you agree with that?

MR. NOWLIN: I understand that the same fact finders would be making the same decisions, potentially, upon the same evidence.

P. H. Ex. 46, pp. 35-36.

42. The Court issued its TRO on July 22, 2011, and set the matter for further hearing on the request for preliminary injunction. Doc. No. 56.

43. During the hearing on the motion for preliminary injunction, Mr. Grellner, a defendant herein and the AGC hearing officer, testified that the TGS license expired in 2009, and TGS requested license renewal that year. For reasons he was not aware of, TGS was apparently allowed to continue to conduct business as a vendor and receive payments from the Tribe until May or June of 2010. Later in the summer of 2010 – in July or August according to Mr. Grellner – TGS was no longer allowed to conduct business with the Tribe as a gaming vendor and the Tribe cut off payments to TGS. Mr. Grellner confirmed that, by the time the AGC sent the April 13, 2011 letter raising regulatory issues regarding TGS and Wells Fargo, TGS had not been functioning as a vendor for nearly a year. Mr. Grellner further confirmed that, under the circumstances relating to TGS, the AGC could simply decline to reissue a license if it concludes that TGS has not properly supported its renewal application or otherwise has failed to respond to requests for information from the AGC.

44. It is not disputed that, from the summer of 2009 until April 13, 2011, the AGC took no formal action regarding the application for license renewal submitted by TGS.

IV.

Conclusions of Law

In light of the foregoing findings of fact and the principles of law governing preliminary injunctions, the Court reaches the following conclusions.

A. Likelihood of Irreparable Injury

The court of appeals has noted that "[b]ecause a showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction, the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered." *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1261 (10th Cir. 2004) (internal quotation omitted). A movant "satisfies the irreparable harm

requirement by demonstrating 'a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages.'" *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009).(quoting *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir.2003)). Although the concept of irreparable harm is not easily defined, the movant must identify an injury that is "both certain, great, actual and not theoretical." *See Heideman*, 348 F. 3d at 1189; *accord Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001).

In this case, the Court finds that Plaintiff has made a sufficient showing of irreparable harm if the AGC goes forward with a proceeding to decide the issues raised by the Tribe's Petition for License Review. It is undisputed that the Equipment Lease executed by the Tribe contains a broadly worded arbitration agreement that, by its terms, requires any claim related directly or indirectly to the lease to be decided by binding arbitration administered by the American Arbitration Association. The agreement expressly reserves for decision by arbitrators the question of whether a dispute is arbitrable. The Tribe makes allegations in its Petition for License Review regarding the nature and effectiveness of the Assignment and the Equipment Lease; these issues clearly relate to the Equipment Lease and fall within its arbitration provision. Plaintiff's bargained-for right to proceed expeditiously through the arbitral process, and to have the arbitrability question decided by neutral arbitrators, may be irretrievably lost or impaired if the AGC is permitted to determine issues integral to the contractual dispute under the guise of exercising its regulatory power. Further, the civil penalties sought by the Tribe and purportedly available to the AGC may seriously impact Plaintiff's contractual rights and remedies. In short, the Court finds that here, as in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dutton*, 844 F.2d 726, 728 (10th Cir. 1988), extraordinary relief is warranted "to preserve the prearbitration status quo."

The Court finds an additional showing of irreparable harm based on the fact that, if the AGC is allowed to press forward with its proceeding, Plaintiff will be compelled to expend resources and effort in litigating before the AGC issues over which the AGC likely lacks jurisdiction. *See, e.g.*, *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1156-58 (10th Cir. 2011) (trial court issued preliminary injunction due to significant risk of irreparable harm because movant would be forced to expend unnecessary time, money, and effort litigating before tribal court which likely did not have jurisdiction).[13] Here, although TGS has not done business with the Tribe as a gaming vendor since the summer of 2010, the AGC seeks to go far beyond any determination regarding whether to renew TGS's license, or any action necessary to compel TGS to comply with tribal licensing regulations, and *adjudicate* issues related to the nature and effect of contract documents and determine claims for disgorgement of millions of dollars – claims beyond the reasonable pale of regulatory civil penalties to compel compliance by a regulated party. This assertion of general adjudicatory jurisdiction by the AGC is cast against the backdrop of carefully crafted provisions within the Loan Agreement, Equipment Lease, Arbitration Ordinance, and Estoppel Certificate – expressly consented to by the Tribe's previous Business Committee – designed to avoid such an exercise of jurisdiction. Further, Plaintiff's expenditure of time, money, and resources likely could not be recouped later, even if Plaintiff prevails on the merits in this case and even if Plaintiff obtains an arbitral ruling that the Petition for License Review presents an arbitrable dispute. In short, the Court finds that without an injunction Plaintiff stands to suffer both tangible and intangible losses that likely cannot be compensated in money damages.

[13] In affirming the trial court's decision, the court of appeals declined to reach the sufficiency of this basis for the district court's finding of irreparable harm in light of other irreparable economic injury.

For these reasons, the Court finds that Plaintiff has shown a likelihood of irreparable harm if a preliminary injunction does not issue.

B. Balance of Interests

The Court further finds that the potential injury to Plaintiff if the AGC is allowed to proceed outweighs any harm that Defendants may suffer from the issuance of a preliminary injunction. Defendants argue that the requested injunction offends tribal sovereignty and is contrary to a strong federal policy of promoting tribal self-government and self-determination. While sensitive to this concern, the Court finds that a stay of the AGC proceeding is warranted to further an equally strong federal policy favoring arbitration. Plaintiff seeks to prevent the Tribe from stripping Plaintiff of its right to employ the contractual dispute resolution process, and simply asks the Court to preserve for decision by arbitrators the question of whether their dispute is arbitrable, as expressly provided by the arbitration agreement. Defendants, on the other hand, contend that the regulatory matter to be enjoined is not covered by the arbitration agreement and that an arbitrator has no authority over a tribal gaming matter. Defendants' argument begs the question of whether the dispute is arbitrable and, in the Court's view, demonstrates why Plaintiff needs the requested injunction. Without it, the AGC will proceed to determine one or more issues that the Tribe agreed to arbitrate.

Any contention that the AGC needs to proceed expeditiously to protect tribal interests and determine regulatory issues is undermined by the undisputed facts that the AGC allowed TGS's license to expire and delayed taking any action until the first arbitration hearing was imminent, that TGS has not been operating as a licensed gaming vendor since the summer of 2010, and that any penalty imposed by the AGC would simply seek to remedy a past violation. Defendants have not articulated any pressing reason why the AGC should be allowed to proceed before this case can be decided on the merits. Also, the Tribe's Petition for License Review challenges an assignment that

the AGC expressly approved in 2008. The parties reached a written agreement at that time as to the limits of tribal jurisdiction over Plaintiff. They expressly agreed at that time that the AGC would not assert jurisdiction over Wells Fargo with regard to the Equipment Lease and Assignment now at issue in the pending tribal proceeding. Under these circumstances, the Court finds that the balance of hardships between the parties tips in favor of granting Plaintiff's request for a preliminary injunction to stop the AGC from going forward, as set forth herein.

C. Public Interest

For similar reasons, the Court also finds that a preliminary injunction is not contrary to the public interest. Defendants assert that the AGC's regulatory authority cannot be delegated to an arbitrator, and that enjoining a tribal regulatory matter to allow private arbitration of regulatory issues would be against the public's interest in respecting tribal sovereignty and promoting tribal self-governance. As discussed above, this argument assumes that the parties' dispute constitutes a tribal regulatory matter and that the AGC's proceeding as to Plaintiff involves regulatory issues, which are questions that Plaintiff seeks to have decided by arbitrators. As further discussed above with regard to the balance of interests, the Court finds that safeguarding an arbitration agreement made by the Tribe in 2008, the validity of which presently stands unchallenged in this case, best serves the public interest.

D. Likelihood of Success on the Merits

Finally, to demonstrate a substantial likelihood of success on the merits of its claims against the officers of the AGC, Plaintiff is "required to present a prima facie case showing a reasonable probability that [it] will ultimately be entitled to the relief sought." *Salt Lake Tribune Pub. Co., LLC v. AT&T Corp.*, 320 F.3d 1081, 1100 (10th Cir. 2003) (internal quotation omitted). Under the modified preliminary injunction standard, Plaintiff needs only to show that questions going to the

merits of its claims "are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Greater Yellowstone*, 321 F.3d at 1255-56; *see O Centro*, 389 F.3d at 976. The Court has determined that this standard applies in this case, and upon consideration, the Court finds that Plaintiff has made a sufficient showing that its claims deserve more deliberate consideration. In fact, the Court believes that Plaintiff has gone further and made a strong showing of likely success on its claims against officers of the AGC.[14]

Plaintiff alleges, and has provided reliable evidence to show, that the issues as they relate to Plaintiff raised by the AGC in April, 2011, and now pending before it in the tribal proceeding initiated by the Tribe in June, 2011, do not constitute legitimate regulatory matters within the scope of the Tribe's authority to enforce its gaming laws and require compliance with IGRA. Instead, these issues appear to be part of a concerted effort by the Tribe to evade its contractual obligations. The issues to be decided in the tribal proceeding appear to be aimed at deciding the nature of the interest conveyed by the Assignment and whether approval by the National Indian Gaming Commission ("NIGC") was required. However, Defendants have pointed to no law or regulation that places these matters within the AGC's field of competence. The power to void a contract that required, but did not have, proper approval lies with the NIGC. *See* 25 U.S.C. § 2711(f); *see also United States ex rel. Saint Regis Mohawk Tribe v. President R.C.-St. Regis Management Co.*, 451 F.3d 44, 48 (2d Cir. 2006). The legal validity of a contract (as opposed to approval for compliance with IGRA and regulations) is "not within the scope of the administrative bodies" charged with implementing gaming laws. *See Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1418

[14] Under the heightened standard, Plaintiff must make a "strong showing" of likely success. *See O Centro*, 389 F.3d at 975. If this standard applied, the Court would also find it to be satisfied.

(8th Cir. 1996). In short, the Petition for License Review pending before the AGC, and the hearing that its hearing officer seeks to hold, involve matters that are not covered by tribal gaming laws.

Further, the Court finds it to be no coincidence that the AGC issued its notice to Plaintiff, and that the Tribe authorized the remedy of disgorgement, shortly before the arbitration hearing between Plaintiff and the Tribe. Chairman Maynahonah candidly admitted that his pre-arbitration actions were designed to protect the Tribe from the possibility of an unfavorable arbitral ruling. While it is less clear that the AGC shared this purpose, the timing of events and the subsequent involvement of Chairman Maynahonah and the Business Committee in the AGC proceeding strongly suggest that the AGC's activities were similarly aimed at protecting the Tribe from contractual liability. More importantly, it appears that the Tribe's Petition for License Review as it relates to the Assignment involves a "claim" related to the Equipment Lease and governed by its arbitration agreement. If so, the question of whether this claim presents an arbitrable dispute is a matter to be decided by arbitration, and the AGC's assertion of authority to decide issues raised in the Petition is contrary to the Tribe's obligation under the arbitration agreement.

For these reasons, the Court finds that Plaintiff has shown a likelihood of success on the merits of its claim of an improper assertion of jurisdiction by the AGC in attempting to decide issues that are outside its area of regulatory authority and within the boundaries of the Tribe's arbitration agreement.

E. Preliminary Injunction

In summary, the Court concludes that Plaintiff has satisfied its burden to show that the circumstances of the case warrant interim relief and that a preliminary injunction should issue to prevent the officers of the AGC from proceeding further to decide issues that fall outside the

boundaries of their regulatory authority. Accordingly, the Court will issue an injunction designed solely to preserve those issues for decision by arbitration, as agreed by Plaintiff and the Tribe.

V.

Security

Pursuant to Fed. R. Civ. P. 65(c), the Court finds that the security previously posted by Plaintiff in connection with the TRO in the amount of $5,000.00 is sufficient to secure the payment of costs and attorney's fees likely to be incurred in connection with the preliminary injunction, if it is later determined to have been improvidently issued. This case will be set for a scheduling conference on the Court's next available docket.

ORDER

IT IS THEREFORE ORDERED that Plaintiff's Motion for a Preliminary Injunction [Doc. No. 34] is GRANTED.

IT IS HEREBY ORDERED that, pursuant to Fed. R. Civ. P. 65, Defendants Gene Flute, Ronald Ahtone, Jr., Austin Klinekole and Richard J. Grellner, as members or officers of the Apache Gaming Commission, and any other persons who are in active concert or participation with these defendants, are enjoined from proceeding with any hearing, issuing any order, making any determination, or taking any official action with respect to issues raised by the Petition for License Review filed by the Apache Tribe of Oklahoma, and included in the order issued by the Apache Gaming Commission on July 14, 2011, except as expressly mandated by the Tribal Gaming Ordinance. Specifically, this injunction applies to issues numbered 1 and 4, set forth in the July 14, 2011 order, and any other matter which seeks to adjudicate issues regarding Wells Fargo Bank or affecting any of its rights or potential remedies under the Loan Agreement, Equipment Lease or

related documents. This injunction shall remain in full force and effect until a final judgment is entered in this case, or until further order of the Court.

IT IS SO ORDERED this 2nd day of September, 2011.

TIMOTHY D. DEGIUSTI
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

WELLS FARGO BANK, NATIONAL ASSOCIATION,

Plaintiff,

vs.

APACHE TRIBE OF OKLAHOMA,

Defendant.

No. CJ-2011-3545

TRANSCRIPT OF PROCEEDINGS

HAD BEFORE THE HONORABLE DANIEL L. OWENS,

DISTRICT JUDGE

ON THE 5TH DAY OF AUGUST, 2011

Appearances:

Mr. Phillip Whaley, 119 N. Robinson, Oklahoma City, OK 73102, appearing on behalf of the Plaintiff.

Messrs. Jerome Miranowski and Michael Krauss, 2200 Wells Fargo Center, Minneapolis, MN 55402, appearing pro hac vice.

Messrs. Jon E. Brightmire and Bryan Nowlin, Two West Second Street, Suite 700, Tulsa, OK 74103, appearing on behalf of the Defendant.

REPORTED BY:
Hope Alwardt, CSR, RPR
Certificate No. #1883
Official Court Reporter
Oklahoma County Courthouse
Oklahoma City, Oklahoma

* * * * * * * *

MR. WHALEY: Your Honor, Phillip Whaley for plaintiff Wells Fargo; and Jerry Miranowski and Michael Krauss that have been admitted pro hac vice.

MR. BRIGHTMIRE: Jon Brightmire for the defendant, Apache Tribe of Oklahoma, along with Bryan Nowlin.

THE COURT: After the court made its ruling in this case, counsel for the Apache Tribe requested a court reporter and to be able to articulate the reason for the late filing of the request for continuance made in this court five days prior to -- five working days prior to this date. The court announced its intention not to grant that continuance based upon the fact that the other side had not had a discussion with them and the fact that looking at the pleading indicated to this court no reason for a continuance because the issue before the court, which was a motion to confirm an arbitration award, had been thoroughly briefed by both sides as it was supposed to have been under the statute relating to arbitration.

So, Counsel, I believe you asked for a record. I've gone back and, while I was listening to some other things -- sometimes I can do two things at one time -- I reread your motion for continuance, and as I said earlier off the record, everything in this requested continuance

dealt with conflicts in timing. I think you raised off the record that it's because of a reply that was filed by plaintiff, had attachments to it, that you had not seen.

So what is the basis for the request this morning? All I can go by is what is in this written document.

MR. BRIGHTMIRE: Yes, your Honor. And I won't repeat, then, what's in there since you've reread it except to say that we did file it on Friday, July 29. The hearing in federal court did not come up until an order was issued by the federal court judge on Friday, July 22. At some point during the next week, I asked counsel for the plaintiff -- because that order set a hearing on the same day this afternoon. It also requested the parties or ordered the parties to file additional briefing, witness lists, exhibit lists, by noon on August 3.

So at some point the following week, I asked if they had any objection to a continuance. They said they did. Friday, we filed our motion for continuance based upon the reasons that you've already read.

On Wednesday, two days ago, August 3, I happened to be checking the court docket, and I saw that a reply brief in support of their motion to confirm was filed also on Friday, July 29. We did not have a copy of that. Now, the parties have normally been serving each other by

e-mail. That was not served by e-mail, so I immediately e-mailed plaintiff's counsel and I said, "Hey, it looks like a reply brief was filed. We don't have it. Can you please send it to us?" And they sent it to us. And the e-mail sending it said that it had been served by mail. Well, when you look at the certificate of mailing, they have my law firm's old address, which we haven't been in since December. This case was filed in May so it's -- I'm sure it was just a mistake. I'm not saying that they did that intentionally.

But the fact is, by Wednesday, two days ago, we didn't have the reply brief. They e-mailed it to us immediately. We got it Wednesday afternoon.

You know, we're also trying to get ready for this preliminary injunction hearing in federal court. But the reply brief attaches 10 new exhibits, raises additional arguments, and, obviously, we haven't had a chance to respond to that. And so that --

THE COURT: And most likely you won't unless you have good cause.

MR. BRIGHTMIRE: Well, on -- immediately, the next day, we filed a reply brief in support of our motion for continuance, and we added that as an additional reason because we just found out about it the afternoon before. And, as we stated in the reply brief, there is

an Oklahoma Court of Appeal's opinion, this Halliday opinion --

THE COURT: Whoa, Counsel. Stop right there. Let's clarify the record.

You have filed an additional motion that goes with this?

MR. BRIGHTMIRE: There is a reply in support of the motion for continuance.

THE COURT: I don't have it.

MR. BRIGHTMIRE: Well, our clerk over here assures us that she dropped it off at your chambers. We asked her again whether she did that and she said she did.

THE COURT: I don't have it. Go ahead.

MR. BRIGHTMIRE: Well, I apologize for that. We checked with her twice.

But because, obviously, it is short notice, but we didn't know about this until Wednesday afternoon. Their reply brief attaches 10 exhibits, some of which weren't even in existence at the time we filed our response brief. It raises additional arguments. And the Halliday case before the Oklahoma Court of Civil Appeals, it was very similar. I mean, the party filed a reply brief seven days before the hearing. It attached additional exhibits.

And what the Court of Appeal said was, when the other party complained it didn't have a chance to reply, the Court of Appeal said with the new evidence it should have been treated as almost like a new brief and the defendant should have been given -- or the other party should have been given 15 days to respond to it. And it reversed that case.

So I apologize you didn't get our reply brief, but that's the basis for -- or an additional basis for the motion for continuance.

THE COURT: Who is going to talk to me? Only one will be talking to me.

MR. MIRANOWSKI: Your Honor, if I may, I'm Jerry Miranowski.

Your Honor, our reply was filed timely, and we attached not 10 exhibits but five exhibits. They all related directly to arguments raised in the response that was filed by the Tribe.

The first exhibit was a Judge Brett award, which was blacklined, compared to our proposed findings, to show all of the changes that Judge Brett made to those proposed findings. It was in direct rebuttal to the argument in the response brief, response in opposition, that said that -- that alleged that Judge Brett signed our proposed findings verbatim.

The remaining four exhibits all relate to the circumstances under which the Tribe issued -- its own business council issued an order vacating the award against itself. And that was in direct reply to the response brief which claimed that the order issued by themselves, the Tribe, vacated the award and prevents you from actually considering the merits --

THE COURT: Isn't that the whole issue up at federal court regarding the temporary restraining order and the preliminary injunction to be heard --

MR. MIRANOWSKI: That's part of it, your Honor. We wanted to stop that but -- stop that before it happened. The Tribe went ahead and did it anyway, notwithstanding the pending order or pending hearing before the judge. It doesn't matter with respect to your consideration of this motion because none of the elements of res judicata have been complied with. So it does not in any way affect your decision.

So, your Honor, each of the exhibits that were attached were directly responsive to the arguments raised in the response by the Tribe.

THE COURT: Counsel?

MR. MIRANOWSKI: Your Honor, if I could, your Honor, and they've had them for -- they've had these exhibits before this and they had them as of Wednesday.

MR. BRIGHTMIRE: And I'm looking at the reply brief. It goes from Exhibit A to J. Now, maybe the first four or five were attached to their original brief and that's what they're saying they only added five.

THE COURT: Were they or were they not?

MR. BRIGHTMIRE: I don't know. I didn't go back and look.

THE COURT: That's an important part of your argument, Counsel.

MR. BRIGHTMIRE: Well, I'll take his word for it, your Honor. But even adding five additional exhibits two days before the hearing or at least giving us notice of it two days -- not even two full days before the hearing. Even adding one exhibit in the Halliday case, it was just one exhibit that was added.

THE COURT: Weren't those in response to what you said? Because I think one of the things -- and the allegation you made regarding retired Judge Brett was he just signed off on a blanket order that was submitted by Wells Fargo verifying and accepting everything they said to be true, and that indicated that he was biased and unfair. I believe that's part of the allegation asked to be made against the arbitrator. And I thought that was the reference made, and I was surprised I didn't see a copy of what was being alleged against Judge Brett

because I've known him for years. He's more straight arrow than I am, if that's possible. So it surprised me. But that issue doesn't impress me much.

What about the other four exhibits that have been attached that you believe that should grant you the opportunity to file a surreply?

Because let me explain this. If there is a surreply filed to any of this, based upon what you're telling me, it will only address those issues. Nothing else. Because that's the only thing the law requires. Because surreplies are disfavored by trial courts and by the appellate court. I believe the case you're reading, what it's probably saying is if it really raises new evidence that is ambushing the person against who the original motion has been filed, it's an abuse of discretion for the court to allow that surreply. And I agree with that.

But the issue for me is whether or not their surreply is needed. And, first, whether or not this is, in fact, new evidence that you weren't aware of; and, secondly, does the court need a surreply to that. That's the question in my mind. So I think that's what we need to be discussing before I consider your request for continuance. Does that make sense?

MR. BRIGHTMIRE: Well, I would agree and disagree with part of it. But let me start with saying

that, first of all, I have not had a chance to analyze all of this. We were preparing for the federal court hearing up until about 5:30 yesterday evening when, due to a request from Wells Fargo to now put off that hearing, the court granted it. So I have not had a chance to go through this and examine it carefully.

THE COURT: Counsel, wait a moment. If you haven't looked at it to verify what you have just told me as a basis for the requested continuance, who did? And upon what basis is a request being made?

MR. BRIGHTMIRE: Well, I'm assuming that if Wells Fargo felt it necessary to put in new evidence, that they felt it supports their arguments. And I did look at the reply brief enough to know that they raised issues that they didn't raise in their original motion. For instance, the res judicata issue. They didn't talk about res judicata in their original motion.

I also -- you know, Mr. Miranowski says they put in a redline version of the proposed findings of fact and conclusions of law or the ones that Judge Brett adopted. We also have our redline version, and I don't think it agrees with their redline version. So there is an issue of fact.

But a detailed analysis of all five of these exhibits, along with a detailed analysis of what they

have in their brief, I haven't had time to do it. But I do know it's new material.

MR. MIRANOWSKI: Your Honor, a couple of things: The issue of res judicata actually was raised for the first time by the Tribe. It was the final order that purports to vacate the order against itself was actually entered after our petition, so -- and after our motion to confirm. So, of course, it was raised. Our first opportunity to respond was in the reply.

Mr. Nowlin handed to us this morning something I think was denominated a supplemental response to our motion which adds a bunch of exhibits related to the res judicata issue, stuff that -- or materials that may well -- I think he should have put it in his response if he wanted them reconsidered by the court.

And I guess that's all I have to state, your Honor. I don't think a -- this is not new material. This is all material that they were aware of. It was all material that was directly responding to issues raised by the Tribe in the response for the first time in his briefings.

MR. BRIGHTMIRE: Exhibit J is an order dated 7-22-11. Our response brief was filed July 5, 2011.

THE COURT: Counsel, how much time are you asking for?

MR. BRIGHTMIRE: Well, I guess, consistent with the Halliday case, 15 days from the date we received the reply brief.

THE COURT: When did you receive it?

MR. BRIGHTMIRE: Wednesday.

THE COURT: Of this week?

MR. BRIGHTMIRE: Yes, sir.

THE COURT: Do you folks know where you mailed it to? Do you know where you sent your reply brief to? Was it the old office address for opposing counsel? Do you have any idea?

MR. WHALEY: I think it was the -- it's Doerner Saunders. People in our office know Doerner Saunders' address. I'm sure they pulled it from some prior pleading. It was the prior address of Doerner Saunders.

Your Honor, if I could just add one -- the court's indulgence of one thing. I think the order they're referring to pursuant to 7-22 that's new is the federal court case they are parties to. They got it. They got it when we got it. To suggest that --

THE COURT: Here's what I'm going to do. I'm going to grant the request for the surreply. If it's not justified, I'm going to sanction opposing counsel. If it's justified, I'll read it; but if it's not justified, I'll do exactly what I said. This isn't a game to me,

and I see games being played in this case. We're not going to go there.

So you have the statutory time pursuant to that case to file it, the surreply, and it doesn't raise any new matter. It addresses only those issues you have placed in this record before me. And, if it is frivolous, I will do exactly as I have said because now I have to go through and reread all these briefs to verify everything I've just been told, just like I'm having to do with two other cases this morning. I don't mind doing it once, but, in Oklahoma County, we have a caseload that doing it twice -- we don't have time for that. So --

MR. WHALEY: Your Honor, can I make a request?

THE COURT: Sure.

MR. WHALEY: Do we need to do something for you to get it back on the docket?

THE COURT: I'm going to put it on the docket. I don't work that way. I don't do it taking under concealed docket, because that's the only way I can keep pressure on myself.

Counsel, you said you got this on what date?

MR. BRIGHTMIRE: August 3. Wednesday.

THE COURT: So that would make your surreply due August 19. Would you agree with that calculation?

MR. BRIGHTMIRE: That works. Yes, sir.

THE COURT: So this will be on my docket -- before I speak, how bad is the 26th? Do you have any idea?

(The court and the clerk confer.)

THE COURT: Kathy tells me that if the docket is that high (indicating).

We're going to set this for resolution on August 26, and the surreply I expect to see relates to those issues that have been addressed on this record. And, as I said, if I find those to be frivolous and there is not new matter raised in this material, there will be sanctions imposed, because I do have to go back and read this all again, which I will do as I always do.

So we'll see you folks back here August 26, and we'll go ahead and do it at 9:00. The docket is not that bad. I can get you in and out of here before my 10:00 docket.

Anything else on behalf of plaintiff, Wells Fargo?

MR. MIRANOWSKI: No, your Honor. Thank you.

THE COURT: On behalf of defendant, Apache Tribe?

MR. BRIGHTMIRE: No, your Honor.

THE COURT: We'll see you back here on the 26th. And please make sure that I receive a copy of the surreply. All right?

MR. BRIGHTMIRE: Yes, your Honor.

THE COURT: Okay. Thank you.

(Proceedings concluded.)

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

WELLS FARGO BANK, NATIONAL ASSOCIATION,	)	
Plaintiff,	)	
vs.	)	No. CJ-2011-3545
APACHE TRIBE OF OKLAHOMA,	)	
Defendant.	)	

I, Hope Alwardt, Certified Shorthand Reporter, within and for the State of Oklahoma, do hereby certify that the above and foregoing proceedings as described on Page 1 herein is a true, correct and complete transcript of my machine shorthand notes taken in the above styled and numbered cause.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal this 5th day of August, 2011.

Hope Alwardt

Hope Alwardt
Oklahoma Certified Shorthand Reporter
Certificate No. 1883
Exp. Date: December 31, 2011

HOPE ALWARDT, RPR, CSR and
Official Court Reporter in and
for the State of Oklahoma
Certificate No. 1883

My Commission expires: December 31, 2011

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

WELLS FARGO BANK, Plaintiff. vs. APACHE TRIBE OF OKLAHOMA , Defendants.	)	FILED IN THE DISTRICT COURT OKLAHOMA COUNTY, OKLA. AUG 2 2 2011 Case No. CJ-2011-3545 Judge Owens PATRICIA PRESLEY, COURT CLERK by _____ DEPUTY

THE APACHE TRIBE OF OKLAHOMA'S APPLICATION AND MOTION TO VACATE ARBITRATION AWARD, AND BRIEF IN SUPPORT

Respectfully submitted,

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August 22, 2011

EXHIBIT G

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In accordance with 12 Okla. Stat. §1874, the Apache Tribe of Oklahoma moves the Court to vacate an arbitration award entered May 23, 2011.

INTRODUCTION

In June 2008, two of the five elected members of the Tribe's Business Committee illegally passed a resolution authorizing the Tribe to enter into a multi-million dollar loan agreement with Wells Fargo Bank. The proceeds of the loan were to be used by the Tribe to refinance existing indebtedness, acquire some land in Oklahoma, remodel part of the Tribe's existing Casino, and pay operating expenses of the Tribe (mainly, some salaries and legal and consulting fees). The same two Business Committee members approved the inclusion of a waiver of sovereign immunity and an arbitration provision in the loan agreement.

In addition, the loan agreement contained a pledge of the gross revenues of the Tribe's casino as security for the repayment of the loan, and gave Wells Fargo the authority to determine operating expenses of the casino if the loan went into default. Such a provision is considered by the National Indian Gaming Commission (NIGC) to make a financing agreement a management contract, which must be approved by the NIGC to make the agreement valid. Courts hold that an unapproved management contract is void. The loan agreement here was never approved by the NIGC.

Because the Tribe deemed the loan agreement an unapproved management contract and therefore void, it quit making the loan payments. Wells Fargo then filed a claim in arbitration. The Apache Tribe objected to the arbitration and filed a motion to dismiss on the basis that, among other things, the Tribe had not validly waived its sovereign immunity, and the loan agreement was an unapproved management contract and was void and unenforceable, and therefore the provisions waiving sovereign immunity and providing for arbitration were likewise void and of no effect. The arbitrator denied the Tribe's motion, and proceeded to hear the

dispute. At the conclusion of the hearing, the arbitrator entered an award in favor of Wells Fargo on all issues.

Oklahoma law provides that an application and motion to vacate an arbitration award must be filed within 90 days after the party receives notice of the award. 12 Okla. Stat. §1874(B). The Apache Tribe received notice of the award on May 23, 2011. This application and motion is being filed within the 90-day period set forth in §1874(B) and is therefore timely.[1]

SUMMARY OF REASONS FOR VACATING THE ARBITRATION AWARD

There are two reasons this Court should vacate the arbitration award and dismiss this action.

First, the Apache Tribe did not validly waive sovereign immunity, and therefore neither the arbitrator nor this Court has subject matter jurisdiction over the Tribe. "Absent an effective waiver or consent, a state court may not exercise jurisdiction over a recognized Indian tribe." *Dilliner v. Seneca-Cayuga Tribe*, 2011 OK 61, ¶12. This Court must look to tribal law to determine jurisdiction, *id.* at ¶13, and under Apache tribal law the Apache Tribe did not validly waive its sovereign immunity.

Second, under 12 Okla. Stat. §1874(A)(5), "the Court should vacate an award made in the arbitration proceeding if . . . [t]here was no agreement to arbitrate . . . ." The Loan Agreement was an unapproved management contract under the federal Indian Gaming Regulatory Act, and unapproved management contracts are void *ab initio*. *See, e.g., First American Kickapoo Operations, L.L.C. v. Multimedia Games*, 412 F.3d 1166, 1168 (10th Cir. 2005) ("Lacking the formality of NIGC approval, an agreement to manage does not become a contract; it is void."); *Wells Fargo Bank v. Lake of the Torches*, 677 F.Supp.2d 1056, 1059 (W.D. Wis. 2010) (holding

[1] The 90th day was Sunday, August 21, making the filing date Monday, August 22. *See* 12 Okla. Stat. §2006(A); 25 Okla. Stat. §82.1.

a trust indenture was a management contract and void, so any provision of the contract waiving sovereign immunity was void and unenforceable). Therefore, the provisions of the Loan Agreement providing for the waiver of sovereign immunity and arbitration are void and unenforceable, and under §1874 the Court must vacate the arbitration award because there was no valid agreement to arbitrate. *See Oklahoma Oncology & Hematology P.C. v. U.S. Oncology, Inc.*, 2007 OK 12, ¶22 ("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.").

STATEMENT OF FACTS

A. Facts relating to the Tribe's sovereign immunity.

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

2. 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.

3. 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.*

4. 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, and three members of the Business Committee constitutes a quorum to transact business at a Business Committee meeting. *Id.*

5. As a result of elections held in May 2008, the following individuals were elected to the Apache Business Committee: Alonzo Chalepah, Chairman; Mary Rivera, Vice-Chairman; Marquita Carattini, Secretary/Treasurer; Ronald Ahtone, Member; and Richard Banderas, Member. The Bureau of Indian Affairs continually recognized these five individuals as members of the Business Committee from the May 2008 election through at least October 22, 2008. Ex. 2 (Letters from BIA dated June 20, July 24, September 12, and October 22, 2008).

6. The Wells Fargo Loan was placed on the agenda of the Tribal Council's annual constitutional meeting of June 21, 2008. Ex. 3. However, no action was taken by the Tribal Council on the Wells Fargo loan. Ex. 4.

7. On June 23, 2008, the Apache Business Committee purported to pass a resolution approving the Loan Agreement with Wells Fargo. Ex. 5. The resolution was passed by two members of the Business Committee – Alonzo Chalepah and Mary Rivera – and a third person not on the Business Committee named Leonard Chalepah. Ex. 6. Therefore, only two of the five members of the Business Committee as constituted on June 23, 2008 voted for the resolution approving the loan agreement with Wells Fargo, although a quorum of three is required under the Apache Constitution.

8. On August 11 and September 16, 2008, the BIA rejected contracts from the Apache Tribe which were approved by a three member Business Committee consisting of

Alonzo Chalepah, Mary Rivera, and Leonard Chalepah because Leonard Chalepah was not a proper member of the Business Committee and therefore the resolutions were invalid. Ex. 7.

9. There is no resolution from the Apache Tribal Council granting the Business Committee the authority to waive the Tribe's sovereign immunity. The resolution which purported to approve the loan agreement with Wells Fargo (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. Ex. 5. 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. 8. 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. 9. Neither of these resolutions grants the Apache Business Committee the authority to enter into a multi-million dollar loan transaction, and more importantly neither of these resolutions grants the Business Committee the authority to waive the Tribe's sovereign immunity.

10. 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 General Council approval of the waiver of sovereign immunity was necessary. Prior to entering into the Loan 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. 10.

11. Even the Loan Agreement acknowledges that the General Council would need to take action. *See* Ex. 11 (Loan Agreement at Art. 4.2 ("The execution, delivery and performance by the Borrower of the Loan Documents have been duly authorized by all necessary General Council and other action . . . .)).

B. Facts relating to the management contract issue.

12. The Apache Tribe engaged an expert witness, Kevin Washburn, to review the Loan Documents and render an opinion on whether the Loan Documents constitute a

management contract. Washburn is currently Dean of the University of New Mexico School of Law, is a former General Counsel of the NIGC, and is a recognized expert on Indian gaming and contracts. Washburn has testified before Congress on matters involving Indian gaming, and has testified on several occasions in federal, state, and arbitral forums on Indian gaming matters. Ex. 14 (Washburn Aff., ¶¶1-3).

13. As Dean Washburn notes, the Wells Fargo/Apache Tribe Loan Agreement provides Wells Fargo a security interest in the Tribe's casino's future gross revenues, without further limitations. Under the Loan and Financing Documents, Wells Fargo has taken a security interest in "all Cash and Revenues" of the gaming operation as collateral for the Wells Fargo loan. The security interest provisions would allow Wells Fargo "to decide how and when operating expenses at the gaming operation are paid," and thus the NIGC would deem the Loan Agreement to be a management contract consistent with its prior opinions. *Id.* (Washburn Aff., ¶20).

14. In a January 23, 2009 letter from the NIGC to Faegre & Benson, the NIGC's General Counsel wrote:

> From past opinions issued by this office, *you are aware of our legal position that an agreement containing a security interest in a gaming facility's future gross revenues, without further limitation, authorizes management of a gaming facility.* We take this position because in the event of default, a party with a security interest in a gaming facility's gross revenues has the authority to decide how and when operating expenses at the gaming facility are paid, which is in itself a management function. Furthermore, a party that controls gross revenue potentially can control everything about the gaming facility by allocating or putting conditions on the payment of operating expenses. Therefore, agreements with such a security interest constitute management contracts that are void unless and until approved by the Chairman of the National Indian Gaming Commission (NIGC).

Ex. 14 (Washburn Aff., ¶19) (emphasis added), and Ex. B to Washburn Affidavit; Ex. 15.

15. The NIGC's counsel has also provided the industry a standard contract term specifically designed for financing agreements that parties can use to create a "safe harbor" to demonstrate clearly that the contract does not allow for the lender to engage in management. *Id.*, ¶18. Dean Washburn notes that the safe harbor provision was specifically communicated to Wells Fargo's counsel, Faegre & Benson, in the letter from the NIGC dated January 23, 2009. *Id.*, ¶18; Ex. B to Washburn Affidavit.

16. Dean Washburn concluded the Wells Fargo Loan Agreement is void because it is an unapproved management contract:

> Under the NIGC regulations, a loan that is found to constitute a gaming management contract is void unless and until it is approved by the NIGC. As a result, the Wells Fargo loan to the Apache Tribe of Oklahoma is void under the plain language of the NIGC's regulations. This opinion is consistent with the clear guidance from the NIGC to Wells Fargo's own counsel in the NIGC letter quoted above.

Id. (Washburn Aff., ¶23).

ARGUMENT AND AUTHORITIES

PROPOSITION I. The Tribe did not validly waive its sovereign immunity, and therefore neither the Arbitrator nor this Court has jurisdiction over the Tribe.

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. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756. "As a matter of federal law, an Indian tribe is subject to suit only if Congress has authorized the suit or the tribe has waived its immunity." *Id.* at 754. The United States Supreme Court has made it clear that a tribe's waiver of sovereign immunity must be unequivocally expressed, and "cannot be implied ... ." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

Recently the Oklahoma Supreme Court reaffirmed these principles, and stated that "[a]bsent an effective waiver or consent, a state court may not exercise jurisdiction over a recognized Indian tribe." *Dilliner v. Seneca-Cayuga Tribe*, 2011 OK 61, ¶12. In order to determine whether there is an effective waiver or consent, "[c]ourts have looked at tribal law in determining jurisdiction." *Id.*, ¶ 13.[2]

The *Dilliner* Court cited cases such as *Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282 (11th Cir. 2001), to demonstrate that the court must look to tribal law to determine whether an attempted waiver of sovereign immunity is effective. *Id.*, at ¶14. In *Sanderlin*, the Eleventh Circuit rejected the theory that the tribe's chief had actual and apparent authority to waive sovereign immunity because it would violate the tribe's constitution. 243 F.3d at 1288. *See also World Touch Gaming, Inc. v. Massena Mgmt., LLC*, 117 F.Supp.2d 271, 276 (N.D.N.Y. 2000) (tribal executive's signature did not waive sovereign immunity when that right was reserved for the tribal council); *Danka Funding Co. v. Sky City Casino*, 747 A.2d 837, 841-42, 844 (N.J. 1999) (same).

So this Court must look to Apache tribal law to determine whether there was an effective waiver of sovereign immunity in the Loan Agreement. The Apache Constitution provides that "[t]he supreme governing body of the Apache Tribe of Oklahoma shall be the tribal council." Ex. 1, Art. III. The Apache Constitution further provides that the Business Committee "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 and otherwise speak or act on behalf of the Tribe. ..." Ex. 1, Art. V. In *Sanderlin*, the Eleventh Circuit analyzed a similar provision in

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[2] *Dilliner* was decided on June 28, 2011, and therefore the Arbitrator did not have the benefit of *Dilliner* when he made his decision.

the Seminole Tribe's Constitution, and held that the provision required a waiver of sovereign immunity by the Tribal Council to be valid:

> No authorities contained in this Constitution may be delegated by the Seminole Tribal Council to tribal officials, district councils, or associations to carry out any function for which the Tribal Council assumes primary responsibility, except by ordinance or resolution duly enacted by the Tribal Council in legal session, and excepting also those specific requirements contained in the Bylaws of the Seminole Tribe of Florida.

Sanderlin, 243 F.3d at 1286.

There is no resolution from the Apache Tribal Council authorizing the Apache Business Committee to waive the Tribe's sovereign immunity, either in general or for this loan transaction. (In fact, there is no evidence that the Tribal Council passed *any* resolution permitting the loan transaction with Wells Fargo.) Absent a resolution from the Tribal Council expressly authorizing the Business Committee to waive sovereign immunity, no waiver can be effective because, as the Oklahoma Supreme Court has noted, "[w]aiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Dilliner*, at ¶ 12 (*citing Santa Clara Pueblo*, 436 U.S. at 58).

The Business Committee resolution approving the Wells Fargo Loan Agreement cited two old Tribal Council resolutions—one from 1973 and one from 1978— as its authority to approve the loan transaction and waiver of sovereign immunity. Those resolutions are attached at Exhibits 8 and 9, and are quoted in the statement of facts. *Neither of those resolutions authorize the Business Committee to waive sovereign immunity (or even to borrow money).*

Resolution 73-1 is a grant of authority specifically limited to business related to tribal land, tribal budget, and other tribal matters relating to government programs and the Bureau of Indian Affairs; nowhere is there any grant of authority for a multi-million dollar loan transaction involving a pledge of casino revenues (nor could there be, as this resolution

predated the Tribal-State Compact by over 30 years and the opening of the casino by 33 years). Moreover, and more importantly, there was no express grant of authority to the Business Committee to waive sovereign immunity.

Resolution 78-7 is even more general and vague than Resolution No. 73-1, and certainly is not any more expansive than Resolution 73-1, and therefore it, too, is insufficient to grant the Business Committee the power to waive the Tribe's sovereign immunity and enter into a transaction like the $4.3 million Loan Agreement and Security Interest with Wells Fargo. Moreover, Resolution 78-7 suffers from another constitutional infirmity – it shows on its face that it was passed by a vote of 32 for and 0 against, and therefore it does not show that a sufficient quorum was present for the resolution to be constitutionally valid. *See* Ex. 1 (Apache Constitution, Art. XV (requiring 50 members of the Apache Tribal Council to constitute a quorum to transact business at any meeting)).

Even Wells Fargo cannot seriously contend that Resolution Nos. 73-1 and 78-7 constitute effective delegation of authority by the Tribal Council to the Business Committee to waive sovereign immunity. Prior to entering into the loan 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. 10. Mr. McGinnis' position is consistent with tribal, state, and federal law. There was no valid waiver of sovereign immunity in accordance with Apache tribal law. And without a valid waiver of sovereign immunity this Court does not have jurisdiction over the Tribe. *See Dilliner*, 2011 OK 61 at ¶20.

Wells Fargo will, no doubt, argue that the presence of an arbitration clause in the Loan Agreement results in a waiver of sovereign immunity, relying on *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001). But the presence of the arbitration clause is not the issue; there is an explicit waiver of sovereign immunity in the Loan Agreement. Whether one looks at the waiver of sovereign immunity clause or the arbitration clause, the issue remains: did two members of the Apache Tribe's Business Committee have the authority to waive sovereign immunity and consent to suit on behalf of the Tribe? And on this issue *C&L Enterprises* does not help; the Supreme Court expressly acknowledged that issue was not before it and did not address it. *See C&L Enterprises*, 532 U.S. at 423 n.6 ("[t]he Tribe alternatively urges affirmance on the grounds that the contract is void under 25 U.S.C. §81 and that the members of the Tribe who executed the contract lacked the authority to do so on the Tribe's behalf. These issues were not aired in the Oklahoma courts and are not within the scope of the questions on which we granted review. We therefore decline to address them."). Moreover, if *C&L* dictated such a result, then Mr. McGinnis and Wells Fargo would not have been so concerned about General Council approval in Mr. McGinnis' e-mail attached as Exhibit 10; *C&L* was decided in 2001, and Mr. McGinnis's e-mail and advice was in 2008.

Other courts since *C&L* have addressed this issue, however, and hold that for the arbitration clause to constitute a waiver of sovereign immunity it, too, must be authorized in

conformance with tribal law. For instance, in *Lobo Gaming Inc. v. Pit River Tribe of California*, 2002 WL 922136 (Cal. App. 2002), the Court noted that in *C&L*

> "[t]here was no intention that the form contract, which was proposed by the Tribe itself, was not authorized, nor was there any suggestion or hint that whoever approved and executed the agreement did so improperly. Quite simply, the dispositive question raised in this case, whether the power to contract includes the power to waive immunity, was not at issue in C&L Enterprises, and the holding, bears no relevance to the case at hand.

Id. at *4. *See also Hydrothermal Energy Corp. v. Fort Bidwell Indian Community Council*, 170 Cal. App. 3d 489 (1985) (reversing the confirmation of an arbitration award against a Tribe because the waiver of sovereign immunity by the Chairperson of the Tribal Council was not authorized by tribal law); *World Touch Gaming*, 117 F.Supp.2d at 275-6; *Danca Funding*, 747 A.2d at 841-2.

In *Dilliner*, the Oklahoma Supreme Court relied in part on *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917 (6th Cir. 2009). There, Chicksaw Nation Industries (a federally chartered tribal corporation) ("CNI") entered into a contract with Memphis Biofuels. CNI's charter required that its Board of Directors must approve any waiver of sovereign immunity. The contract had a provision expressly waiving any sovereign immunity, coupled with a "representation and warranty" that CNI's waiver was valid, enforceable, and effective. While Memphis Biofuels and CNI signed the contract, the Board of Directors of CNI did not waive sovereign immunity. CNI repudiated the agreement and Memphis Biofuels filed a demand for arbitration under the arbitration clause of the parties' contract. The Sixth Circuit looked to CNI's corporate charter, which controlled the way that sovereign immunity could be waived, and held that CNI did not expressly waive tribal sovereign immunity. Because tribal law required approval of the Board of Directors to waive sovereign immunity, and board approval was never obtained, CNI's sovereign immunity remained intact

despite provisions in the contract waiving sovereign immunity and providing for arbitration. 585 F.3d at 922. *See also* Dilliner, at ¶¶15, 16.

Similarly, here only the Apache Tribal Council can waive sovereign immunity on behalf of the Tribe. And as the cases hold, this is so whether the waiver was in the form of an explicit waiver of sovereign immunity or through an arbitration or choice of law clause. So *Dilliner* controls, and without a waiver of sovereign immunity or consent to suit by the Apache Tribal Council, which, under Apache law, is required to waive sovereign immunity or consent to suit for such waiver or consent to be effective, this Court lacks subject matter jurisdiction over the Tribe.

The arbitration award should be vacated, and this suit dismissed.

PROPOSITION II. The Loan Agreement was an unapproved management contract under the Indian Gaming Regulatory Act, and unapproved management contracts are void *ab initio* and unenforceable.

A. The Indian Gaming Regulatory Act.

In 1988 Congress enacted the Indian Gaming Regulatory Act, 25 U.S.C. §2701 *et. seq.* (IGRA). Congress's stated purpose in enacting IGRA was threefold:

> (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self sufficiency, and strong tribal governments;
>
> (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operating, and to ensure that gaming is conducted fairly and honestly by both the operator and players; and
>
> (3) to declare that the establishment of independent regulatory authority for gaming on Indian lands, the establishment of federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. §2702.

To this end, IGRA established the National Indian Gaming Commission (NIGC) headed by a Chairman. 25 U.S.C. §2704. Among other things, the NIGC is responsible for overseeing contracts between Indian tribes and non-tribal entities for the management of tribal gaming operations; while Indian tribes may enter into contracts for the management of these gaming operations, they may do so only with the approval of the NIGC Chairman. 25 U.S.C. §2711(a)(1). The approval process requires that all management contractors submit detailed background information to the NIGC before approval. *Id.*; 25 C.F.R. §531.3.

B. Under IGRA, unapproved management contracts are void and unenforceable.

Without NIGC approval a management contract is void. 25 C.F.R. §533.7; *see First American Kickapoo Operations, L.LC. v. Multimedia Games,* 412 F.3d 1166, 1168 (10th Cir. 2005) ("Lacking the formality of NIGC approval, an agreement to manage does not become a contract; it is void."); *Catskill Dev., LLC v. Park Place Enter. Corp.*, 547 F.3d 115, 128 (2d Cir. 2008) ("no part" of contract that is void under IGRA may be enforced or relied on) (quoting *A.K. Mgmt. Co. v. San Manuel Board of Mission Indians*, 789 F.2d 785, 789 (9th Cir. 1986)); *Wells Fargo Bank v. Lake of the Torches Econ. Dev. Corp.*, 677 F.Supp. 2d 1056, 1059 (W.D. Wis. 2010) (holding a trust indenture was a management contract and void). *See also* Kevin K. Washburn, *The Mechanics of Indian Gaming Management Contract Approval*, 8 Gaming L. Rev. 333, 334 (2004) Article").

C. What contracts are management contracts?

Regulations promulgated under IGRA define a management contract as "any contract, subcontract, or collateral agreement between an Indian tribe and a contractor. . . if such contract or agreement provides for the management of all or part of a gaming operation." 25 C.F.R. §502.15. While management is not defined in IGRA or the regulations, the regulations define a management official as any person "who has authority . . . [t]o set up working policy for the

gaming operation." 25 C.F.R. §502.19. The NIGC has further explained that "[m]anagement encompasses many activities (*e.g.*, planning, organizing, directing, coordinating, and controlling)," and that "the performance of any one of such activities with respect to all or part of a gaming operation constitutes management for the purpose of determining whether any contract or agreement for the performance of such activities is a management contract that requires approval." NIGC Bulletin No. 94-5 (appended at Ex. 13).

Moreover, to operate a casino a tribe must have in place a tribal gaming ordinance approved by IGRA. IGRA provides that a tribal gaming ordinance may be approved only if "the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity." 25 U.S.C. §2710(b)(2)(A). The NIGC also requires that all tribal gaming ordinances include a provision that the Indian tribe will have sole proprietary interest and responsibility for the conduct of the gaming activity. 25 C.F.R. §522.4(b)(1).

A management contract will also be found where a series of agreements, taken collectively and individually, give unapproved third parties the authority set up working policy for a casino's gaming operation. *See, e.g., United States ex rel Bernard v. Casino Magic Corp.*, 293 F.3d 419, 424-25 (8th Cir. 2002) (series of agreements that gave the contractor "a percentage ownership interest in the tribe's indebtedness" and "mandated the tribe's compliance" with the contractor's recommendations is a management contract); *Machal, Inc. v. Jena Band of Choctaw Indians*, 387 F.Supp. 2d 659, 667-70 (W.D. La. 2005) (finding a series of agreements to be management contracts). *See also* Washburn Affidavit, Ex. 11, at ¶14.

Even the *opportunity* to manage a tribe's casino can invalidate an agreement because contingent management is still management. For example, the Tenth Circuit in *First. Am. Kickapoo* rejected the argument "that a contract is only a management contract if it confers rights

rather than opportunities to manage" as a misstatement of the law. 412 F.3d at 1175. *See also Wells Fargo v. Lake of the Torches*, 677 F.Supp. 2d at 1060-1 (finding management "[e]ven though many of the provisions are contingent").

D. The Wells Fargo/Apache Tribe Loan Agreement is a management contract.

The Loan Documents provide Wells Fargo a security interest in the Silver Buffalo Casino's future gross revenues, without further limitation, which the NIGC has determined authorizes management of the gaming facility.

Article 2.2 of the Loan Agreement provides that the loans "shall be secured by the Liens created by the Collateral Documents." "Collateral Documents" are defined to include the Security Agreement. Section 2 of the Security Agreement grants Wells Fargo a security interest in, among other things, "all Cash and Revenues." "Revenues" is defined in the Security Agreement as follows:

> "Revenues" means earnings, income, revenues and the rights to receive the foregoing, whether in the form of cash, deposit accounts, investments or assets, and the proceeds thereof including, without limitation, all receipts and rights to payment arising from the operation of the Enterprise, including receipts and rights to payment arising from gaming, lodging and food, beverage and other concessions, from the lease or sublease of space, and from any other activities carried on within the Enterprise.

Thus, the definition of "Revenues" is all encompassing, and includes a security interest in the Silver Buffalo Casino's future gross revenues.

Further, the Loan Agreement provides for the establishment of a depository account with Wells Fargo. Ex. 11, Art. 5.19. The depository account provision provides:

> On a daily basis Borrower shall deposit all revenues of the Enterprise (subject to daily cash on hand requirement determined by Lender and Borrower and more fully discussed in the Depository Agreement) into the Depository Account. All amounts on deposit in the Depository Account shall be subject to the Depository Agreement. The Depository Agreement shall provide that all amounts on deposit in the Depository Account (other than a reserve of one month's interest on loans)

> shall be disbursed by an escrow agent satisfactory to the Lender on a monthly basis in a manner to be determined by Lender and Borrower. Amounts deposited into the Depository Account shall be used to establish reserves and then shall be disbursed on a monthly basis in the following priorities: (1) fees, costs and expenses of the depository account escrow agent; (2) Borrower's Casino operating costs, including expenses of the tribal gaming commission (but excluding any tribal distributions or expenses related to any other tribal operations) ***(or in the Event of Default, those operating expenses approved by Lender)***; (3) principal and interest of the loan due to Lender; (4) the remainder to Borrower's Enterprise Operating Accounts, provided that in an Event of Default, disbursements to Borrower's Enterprise Operating Accounts shall be in an amount determined by Lender.

(Emphasis added.) Thus, all casino revenues (other than the vault cash required to be kept on hand for gaming purposes, as determined by Wells Fargo) was required to be placed under the control of Wells Fargo and subject to the terms of the Loan Documents. Significantly, the Loan Agreement expressly provided that revenues necessary for the casino's operating costs were placed under the control of Wells Fargo, and upon an Event of Default only "those operating expenses approved by [Wells Fargo]" would be disbursed by Wells Fargo.

In a January 23, 2009 letter from the NIGC to Kent Richey of Wells Fargo's law firm, Faegre & Benson, **the NIGC confirmed that a tribe's pledge of gross revenues from gaming operations in a loan agreement, without further limitation, results in the loan agreement being a management contract.** The NIGC's General Counsel wrote:

> From past opinions issued by this office, ***you are aware of our legal position that an agreement containing a security interest in a gaming facility's future gross revenues, without further limitation, authorizes management of a gaming facility.*** We take this position because in the event of default, a party with a security interest in a gaming facility's gross revenues has the authority to decide how and when operating expenses at the gaming facility are paid, which is in itself a management function. Furthermore, a party that controls gross revenue potentially can control everything about the gaming facility by allocating or putting conditions on the payment of operating expenses. ***Therefore, agreements with such a security interest constitute management contracts that are void unless and until approved by the Chairman of the National Indian Gaming Commission (NIGC).***

Ex. 15 (January 23, 2009 letter from Penny J. Coleman, Acting General Counsel, NIGC to Kent E. Richey, Faegre & Benson) (emphasis added).

After reciting the language in the NIGC's January 23, 2009 letter that a security interest in a gaming facility's future gross revenues, without further limitation, authorizes management of a gaming facility, Dean Kevin Washburn states in his Affidavit,

> The Wells Fargo loan to the Apache Tribe of Oklahoma contains just such an offending term. It provides Wells Fargo a security interest in the gaming operation's future gross revenues. Under the loan and financing documents, Wells Fargo has taken a security interest in "all Cash and Revenues" of the gaming operation as collateral for the Wells Fargo loan. Thus, it is my opinion that the Wells Fargo loan would be deemed by the NIGC to be a management contract.

Ex. 14 (Washburn Aff., ¶18).

Dean Washburn notes that in the January 23, 2009 NIGC letter to Faegre & Benson, the NIGC provided some language that parties could use in financing agreements to create a "safe harbor". That language is set forth in both Dean Washburn's Affidavit and in the June 23, 2009 letter. *See* Ex. 14 (Washburn Aff., ¶18, n.11); Ex. 15. As Dean Washburn notes, the Loan Agreement in this case does not contain the "safe harbor" provision, and therefore it remains a management contract.

Because the loan documents grant Wells Fargo a security interest in the Silver Buffalo Casino's future gross revenues, without further limitation; because Wells Fargo expressly reserved to itself the ability to determine the operating expenses of the Casino in the event of an Event of Default; and because the NIGC has already held that such provisions in lending transactions constitute management contracts, the Court should find *as a matter of law* that the Loan Documents constitute a management contract. Exercising *de novo* review under 12 Okla. Stat. §1874 and *Oklahoma Oncology*, 2007 OK 12, the Court should hold that the Loan Agreement is void and unenforceable.

E. Because the Loan Agreement is void, this Tribunal lacks jurisdiction over the Apache Tribe.

Because the Loan Agreement is void, the provisions waiving sovereign immunity and providing for arbitration of all disputes, even if they were valid under Apache tribal law, are also void.

To be effective, a contractual waiver of immunity must be part of an enforceable, valid agreement. *See Mo. River Serv., Inc. v. Omaha Tribe of Neb.*, 267 F.3d 848, 854 (8th Cir. 2001) (limiting waiver to language of approved management contracts). Because the Loan Agreement is void, its purported waiver of immunity cannot be enforced. *See A.K. Mgm't Co.*, 789 F.2d at 789 ("[T]he waiver of sovereign immunity is clearly part of the Agreement, and is not operable except as part of that Agreement. Since the entire contract is inoperable without BIA approval, the waiver is inoperable and, therefore, the tribe remains immune from suit."); *Lake of the Torches*, 677 F.Supp. 2d at 1061.

Because "sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits[,]" *Enahoro v. Abubakar*, 408 F.3d 877, 880 (7th Cir. 2005) (quotation omitted), the invalidity of the waiver leaves the Court without jurisdiction over the Apache Tribe. As the Court held in *Lake of Torches*, "[t]he Court's finding that the Trust Indenture is an unapproved management contract destroys the Court's jurisdiction over the defendant." *Id.* at 1061.

CONCLUSION

Neither the arbitrator nor this Court has subject matter jurisdiction over the Apache Tribe, as there is no valid waiver of the Tribe's sovereign immunity. Therefore, the arbitration award must be vacated and this action dismissed.

Further, even if there were a valid waiver of sovereign immunity, this Court exercising *de novo* review should hold as a matter of law that there was no valid agreement to arbitrate. The

loan agreement is an unapproved management contract, unapproved management contracts are void and unenforceable, and therefore all provisions of the loan agreement are void and unenforceable, including the provisions waiving sovereign immunity and compelling arbitration of disputes.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 22, 2011, a true and correct copy of the above and foregoing instrument was mailed, with proper postage thereon, to:

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IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

Wells Fargo Bank, National Association, Plaintiff, vs. Apache Tribe of Oklahoma, Defendant.	Case No. CJ-2011-3545 Judge Graves

PLAINTIFF'S BRIEF IN OPPOSITION TO
DEFENDANT'S MOTION TO VACATE ARBITRATION AWARD

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EXHIBIT H

INTRODUCTION

This Court is the *fourth* sitting or retired judge since May to preside over Wells Fargo's efforts to obtain, and now enforce, its Arbitration Award against the Apache Tribe of Oklahoma (the "Tribe"). Wells Fargo commenced this action to confirm the Award on May 24, 2011, the day after it was issued by Judge Brett. Since then, the Tribe has spared nothing in its bid to frustrate enforcement. Among other things, the Tribe:

- Purported to vacate the Award itself in its own "Tribal Forum";
- Moved to stay the hearing date on Wells Fargo's motion to confirm the Award and then procured from Judge Owens a three-week continuance;
- Acted to recuse Judge Owens after he announced his intent to confirm the Award; and
- After all this, waited until the last day possible to move to vacate the Award.

Wells Fargo has been in continuous litigation with the Tribe since the current leadership assumed control in the summer of 2010. In that time, Wells Fargo has not received any payment from the Tribe on obligations due and owing. The Tribe's instant motion to vacate rehashes the arguments it made before Judge Brett this spring and Judge Owens this summer. The Tribe may not relitigate in this Court disputes that it submitted to arbitration, and that Judge Brett decided after a full hearing. Judge Brett's legal and factual conclusions are not subject to review, and the Award should be upheld because he acted within the scope of his authority. Regardless, nothing the Tribe says now provides a basis to depart from Judge Brett's determinations. The motion to vacate should be denied, the Award confirmed, and this action brought to a close.

STATEMENT OF FACTS

In 2008, through its Business Committee, the Apache Tribe of Oklahoma (the "Tribe") borrowed $4.35 million from Wells Fargo. Then, in June 2010, a new regime, led by Chairman

Louis Maynahonah, displaced its political opponents. The new leadership promptly repudiated the loan, forced the Tribe into payment default, and sued Wells Fargo in federal court.[1]

Wells Fargo demanded that all disputes be submitted to binding arbitration pursuant to the Loan Agreement. The Tribe proposed the Honorable Thomas R. Brett (ret.) as arbitrator, and Wells Fargo agreed. Judge Brett denied the parties' competing motions to dismiss and ordered the parties to engage in full discovery. Among other things, Wells Fargo and the Tribe exchanged thousands of pages of documents, received documents from multiple third parties, exchanged affidavits or reports for five experts, and deposed eight witnesses.

Judge Brett presided over a hearing in Oklahoma City during the week of May 9 to 13, 2011. The parties' pre-hearing submissions included preliminary proposed findings of fact and conclusions of law, extensive exhibit lists, and pre-hearing briefing. At the hearing, the parties made opening and closing statements, introduced nearly 450 exhibits, and put on fifteen witnesses, including four experts. A quorum of the Business Committee attended each day as client representatives, in continuous consultation with the Business Committee's counsel. Two members, including Chairman Maynahonah, testified on behalf of the Tribe. After the hearing, the parties submitted final proposed findings of fact and conclusions of law.

On May 23, Judge Brett issued his Award in favor of Wells Fargo. (Ex. D.) Judge Brett held that the Tribe had waived its sovereign immunity, that the Loan Agreement was valid and enforceable, and that the Tribe was in material breach and default of its payment obligations.

[1] For a detailed factual background, Wells Fargo respectfully refers the Court to Judge Brett's factual findings in the Award. (*See* Ex. D. at 1-11.) An additional copy of the Award is attached hereto. Unless specified otherwise, capitalized terms have the same meaning as in Wells Fargo's prior briefing. Also unless specified otherwise, lettered exhibits refer to Wells Fargo's exhibits in connection with its motion to confirm the Award and the Tribe's instant motion to vacate ("Mot."), and numbered exhibits refer to the Tribe's exhibits in connection with the instant motion. An index of Wells Fargo's exhibits accompanies this brief.

Judge Brett awarded Wells Fargo all outstanding principal, interest at the default rate through May 16, 2011, and administrative fees, for a total monetary award of $2,751,160.20. Judge Brett also held that Wells Fargo is entitled to release of $47,445.10 interpleaded in the District Court of Caddo County as credit on the award. Finally, Judge Brett held that the Tribe was not entitled to recovery on any of its counterclaims, including its claim for $34.5 million, plus post-judgment interest and fees, under the Bank Holding Company Act.

On May 24, Wells Fargo filed in this Court its petition and motion to confirm the Award. The action was originally assigned to Judge Owens. More than three months later, Wells Fargo's petition and motion remain pending, and Wells Fargo has not recovered any damages against the Tribe. The Tribe has done all it can to avoid the consequences of the arbitration to which it agreed and indefinitely delay payment on its longstanding obligations to Wells Fargo.

First, in early June, the Tribe filed a motion in front of itself to vacate the Award, and set a hearing date for its own motion. The motion was to be heard by the Tribe's Business Committee, which consists of the same people who caused the Tribe to breach its contract with Wells Fargo, who have directed the Tribe's litigation against Wells Fargo, and who actively participated in the arbitration before Judge Brett. In response, on June 10 Wells Fargo moved in federal court to enjoin the Tribe from issuing an order purporting to vacate the Award. After allowing for opposition briefing by the Tribe, Judge DeGiusti set the hearing on Wells Fargo's motion for a TRO for June 14, which was the day before the scheduled proceeding in front of the Tribe's Business Committee. On the eve of the TRO hearing, however, the Business Committee secretly went ahead and issued its "Final Order" supposedly vacating the Award—thereby denying Wells Fargo the opportunity to appear. The Tribe disclosed the "Final Order" once the

TRO hearing was underway—before Judge DeGiusti could even consider Wells Fargo's request for immediate injunctive relief.[2]

Second, the Tribe then sought to delay the hearing before Judge Owens on Wells Fargo's August 5 motion to confirm, at which time Judge Owens was expected to rule. In late June, the Tribe again had attempted to decide for itself issues it had agreed to arbitrate, this time in connection with an equipment lease ("Lease") that is related to the Loan Agreement. Specifically, the Tribe's Business Committee petitioned its Gaming Commission to force Wells Fargo to disgorge monies the Tribe had paid in connection with the Lease. But, just as it did in the loan agreement underlying the Award, the Tribe agreed in the Lease to submit all disputes to arbitration. Wells Fargo moved again in federal court to enjoin the Tribe's Gaming Commission from wrongfully exercising jurisdiction. This time, fortunately, the Tribe's own forum did not unilaterally act before the hearing, and Judge DeGiusti granted Wells Fargo's motion for a temporary restraining order on July 22, 2011, and scheduled a preliminary injunction hearing for the afternoon of August 5. (*See* Ex. J (order granting motion for TRO).)

On July 27, the Tribe's counsel requested that Wells Fargo agree to continue the August 5 hearing before Judge Owens, citing the federal preliminary injunction hearing scheduled for later that day. The Tribe rejected Wells Fargo's offer to stipulate to postponement of the federal hearing, and instead moved Judge Owens to continue the hearing on confirmation of the Award.

Third, after Judge Owens did not continue the hearing, the Tribe sought further delay to avoid an adverse decision. On August 5, Judge Owens announced his intent to grant Wells Fargo's motion to confirm the Award. But the Tribe wangled a three-week reprieve by obtaining

[2] For additional detail, *see* Wells Fargo's Exhibit G (July 5, 2011 amended complaint in federal court); Exhibit H (transcript of June 14, 2011 proceedings before Judge DeGiusti); and Exhibit I (June 10, 2011 declaration of Felis M. Gallues).

leave to file a sur-reply purportedly to respond to certain exhibits included in Wells Fargo's reply. Judge Owens set a new hearing for August 26 to announce his decision. (Ex. K (August 5, 2011 transcript of appearance before Judge Owens).)

Fourth, on August 10, the Tribe informed Judge Owens of its intent to ask him to recuse himself from this action, and did so on August 26. The Tribe complained that Judge Owens had commented favorably on Judge Brett's character and integrity. (*See* Ex. K for Judge Owens' exact comments.) Judge Owens voluntarily recused himself in order to prevent further potential delay in resolution of Wells Fargo's motion to confirm under the provisions of Rule 15, Rules for District Courts of Oklahoma.

More than a year has passed since the Tribe stopped paying on its loan and ensnared Wells Fargo in litigation. The time has come to bring this action to a close, and enable Wells Fargo to enforce Judge Brett's Award.

ARGUMENT

The Tribe's motion to vacate is defendant's latest delay tactic. The Tribe waited to file until the last day permitted by statute. Nothing prevented the Tribe from moving to vacate at any time—and particularly when the Tribe filed its opposition to confirmation of the Award. The instant motion simply repeats positions that the Tribe took before Judge Brett and again before Judge Owens.

"Only in limited circumstances may a motion to vacate . . . be granted," *Wilbanks Secs., Inc. v. McFarland*, 2010 OK CIV APP 17, ¶ 8, 231 P.3d 714. In its motion, the Tribe invokes only one statutory ground for vacating Judge Brett's Award—the lack of an agreement to arbitrate. 12 Okla. Stat. § 1874(5). The Tribe asserts that there was no agreement to arbitrate, both because: (1) the Tribe did not waive its sovereign immunity as required to submit disputes

to arbitration; and (2) the entire Loan Agreement, including the arbitration clause, is void as an unapproved management contract.

Judge Brett considered, and rejected, each of these arguments in issuing the Award. (Ex. D at pp. 8-10, 17-18 (sovereign immunity), and pp. 15-16 (management contract).) The Tribe's motion to vacate should be denied because Judge Brett's decision is entitled to deference, and, in any event, the Tribe offers no reason to diverge from Judge Brett's findings.

I. The Motion to Vacate Should Be Denied Because Judge Brett Did Not Exceed His Authority Under The Loan Agreement.

In moving to vacate, the Tribe seeks to relitigate disputes that it submitted to Judge Brett for decision, and that Judge Brett resolved against the Tribe. Because the parties committed to Judge Brett the threshold question of arbitrability, his factual and legal findings are entitled to deference and are not subject to review. Judge Brett acted within the scope of his authority in concluding that the Tribe waived its sovereign immunity with respect to the Loan Agreement and that the agreement was valid, enforceable, and not void as a management contract. The motion to vacate should therefore be denied.

A. Judicial Review of Questions Committed to Arbitration Is Strictly Limited.

"The fundamental purpose of arbitration is to preclude court intervention into the merits of disputes when arbitration has been provided for contractually." *Voss v. City of Oklahoma*, 1980 OK 148, 618 P.2d 925, 927. Accordingly, when the parties clearly and unmistakably agree to submit the threshold question of arbitrability to the arbitrator, judicial review of this question is strictly limited. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-45 (1995) (cited by the Tribe in its July 5, 2011, opposition to Wells Fargo's motion to confirm).

"Generally, the courts will decide questions of arbitrability *unless there is clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.*" *Oklahoma Oncology &*

Hematology P.C. v. US Oncology, Inc., 2007 OK 12, ¶ 34, 160 P.3d 936 (citing *id.* at 944-45) (emphasis added). Where arbitrability has been submitted to the arbitrator, "the court's standard for reviewing the arbitrator's decision about *that* matter should not differ from the standard courts apply when they review any other matter the parties have agreed to arbitrate." *First Options*, 514 U.S. at 943.

When the parties have submitted a dispute to arbitration, Oklahoma courts give deference to the arbitrator's decision and "'will not review the factual or legal findings of the arbitrator nor consider the merits of the award.'" *City College, Inc. v. Moore Sorrento, LLC*, 2010 OK CIV APP 127, ¶ 29, 246 P.3d 726 (quoting *City of Yukon v, Int'l Ass'n of Firefighters, Local 2055*, 1990 OK 48, ¶ 8, 792 P.2d 1176). Judicial review is limited to ensuring that the arbitrator did not exceed his authority under the agreement. *Sooner Builders & Invs., Inc. v. Nolan Hatcher Constr. Servs., L.L.C.*, 2007 OK 50 ¶ 13, 164 P.3d 1063 ("where the arbitrator's award is within the submission and the authority established by the arbitration agreement, the courts will enforce the award"); *City College* at ¶ 29 (refusing to review attack on merits and affirming denial of motion to vacate where decision did not exceed arbitrators' authority under agreement).

B. The Parties Committed to Judge Brett Threshold Questions of Arbitrability.

In this case, the parties agreed that Judge Brett would decide threshold questions of arbitrability, including his own jurisdiction and any dispute as to the existence or validity of the Loan Agreement. Section 11.24(a) of the Loan Agreement (Ex. B) commits to binding arbitration any dispute "arising under or in connection with, or in any way pertaining to any of the Loan Documents." Section 11.24(b) provides that the arbitration shall be conducted in accordance with the AAA Commercial Arbitration Rules ("AAA Rules"; Ex. E). Under these rules, the arbitrator has the power "to rule on his or her own jurisdiction, including any

objections with respect to the existence, scope or validity of the arbitration agreement" and "to determine the existence or validity of a contract of which an arbitration clause forms a part." (Ex. E at R-7(a)-(b).) State statute likewise provides that "[a]n arbitrator shall decide ... whether a contract containing a valid agreement to arbitrate is enforceable." 12 Okla. Stat. § 1857(c).

"When, as here, the parties agree to a broad arbitration clause and explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator." *Saxa, Inc. v. DFD Architecture, Inc.*, 312 S.W.3d 224, 229-30 (Tex. App.-Dallas 2010) (interpreting materially identical arbitration clause) (citing cases); *see also Insurance Newsnet.com, Inc. v. Pardine*, 2011 WL 3423081 (M.D. Pa. Aug. 4, 2011) ("the prevailing rule across jurisdictions is that incorporation by reference of rules granting the arbitrator the authority to decide questions of arbitrability—especially the [AAA] rules—is clear and unmistakable evidence that the parties agreed to submit arbitrability questions to the arbitrators").[3]

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[3] In *Oklahoma Oncology*, in contrast, arbitrability was for the court decide because the relevant contract, the Management Services Agreement ("MSA") simply incorporated by reference the arbitration clause of another contract, the Purchase Agreement. 2007 OK 12 at ¶ 34. The court held that the Purchase Agreement's arbitration clause by its terms applied only to disputes "arising out of the Purchase Agreement," and did not provide for the arbitration of controversies in that case, which related only to the MSA. *Id.* In dicta, the court also stated that the Purchase Agreement's cumulative remedies provision suggested that an arbitrator would not have exclusive authority to interpret the contract. *Id.* The court never addressed or considered the impact of incorporating the AAA Rules, however. As set forth above, courts nationwide have held overwhelmingly that incorporating the AAA Rules is clear and unmistakable evidence of the parties' intent to commit threshold questions of arbitrability to the arbitrator. *See also Awuah v. Coverall North America, Inc.*, 554 F.3d 7, 11 (1st Cir. 2009); *Contec Corp. v. Remote Solution, Co.*, 398 F.3d 205, 208 (2d Cir. 2005); *Terminix Int'l v. Palmer Ranch*, 432 F.3d 1327, 1332-33 (11th Cir. 2005); *Qualcomm, Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006); *Yellow Cab Affiliation, Inc. v. New Hampshire Ins. Co.*, 2011 WL 307617, at *4-*5 (N.D. Ill. Jan. 28, 2011); *Citifinancial, Inc. v. Newton*, 359 F. Supp. 2d 545, 551-52 (S.D. Miss. 2005); *Bishop v. Gosiger*, 692 F. Supp. 2d 762, 769-70 (E.D. Mich. 2010); *Madrigal v. New Cingular Wireless Services, Inc.*, 2007 WL 2513478, at *5-*6 (E.D. Cal. Aug. 17 2009); *Pikes Peak Nephrology Assocs. v. Total Renal Care, Inc.*, 2010 WL 1348326, at *7 (D. Colo. Mar. 30, 2010); *Grynberg v. BP PLC*, 585 F. Supp. 2d 50 (D.D.C. 2008); *Citifinancial Corp. LLC v. Peoples*, 973 So. 2d 332, 339-40 (Ala. 2007); *Dream Theater, Inc. v. Dream Theater et al.*, 124 Cal. App. 4th 547, 557 (Cal. Ct. App. 2004); *James & Jackson, LLC v. Willie Gary, LLC*, 906

C. Judge Brett Did Not Exceed His Authority Under The Loan Agreement.

The Award may not be vacated just because the Tribe disagrees with Judge Brett's rulings on issues that the Tribe committed to arbitration. The parties intended for Judge Brett to rule on his jurisdiction and the validity and existence of the agreement to arbitrate, and therefore his factual and legal findings are not subject to review. *See First Options*, 514 U.S. at 943; *City of Midwest City v. Jarrell*, 2001 OK CIV APP 125, ¶ 9, 33 P.3d 962 (stating that once it is determined that the parties submitted arbitrability to the arbitrator, "the court's role becomes 'strictly limited' to determining whether the arbitrator exceeded his authority") (quoting *City of Yukon*, 1990 OK 48 at ¶ 8); *Kennecot Utah Copper Corp. v. Becker*, 186 F.3d 1261, 1268 (10th Cir. 1999) (accepting without review arbitrator's factual findings bearing on jurisdictional issue of timeliness where parties submitted question of arbitrability to arbitrators).

This Court may consider only whether Judge Brett's decision drew its essence from the Loan Agreement and thus did not exceed his authority. *City College*, 2010 OK CIV APP 127 at ¶ 29. "'[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' this Court has no power to reverse his decision, even if we were convinced the decision was error." *City of Yukon*, 1990 OK 48 at ¶ 17 (citation omitted). By incorporating the AAA Rules, the Loan Agreement authorized Judge Brett to determine his jurisdiction and the existence and validity of the agreement to arbitrate. In determining that the Tribe waived its sovereign immunity with respect to the Loan Agreement, he interpreted and applied the agreement and related authorizing resolutions under tribal law. (Ex. D at pp. 8-10, 17-18.) Judge Brett similarly interpreted and applied the Loan Documents and applicable law in

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A.2d 76, 78-80 (Del. 2006); *Ahluwalia v. QFA Royalties, LLC*, 226 P.3d 1093, 1098-99 (Colo. Ct. App. 2009); *Life Receivables Trust v. Goshawk Syndicate 102 at Lloyd's*, 66 A.D.3d 495, 497-98 (N.Y. App. Div. 2009); *Brake Masters Systems, Inc. v. Gabbay*, 78 P.3d 1081, 1087-88 (Ariz. Ct. App. 2003).

determining that they are not void as an unapproved management contract. (*Id.* at 15-16.)

At a minimum, the Award "draws its essence" from the Loan Agreement: it does not conflict with the agreement's express terms, does not impose additional requirements beyond those terms, and is rationally related to the agreement. No more is required to deny the Tribe's motion to vacate. *See City of Warr Acres v. Int'l Ass'n of Firefighters, Local No. 2374*, 2002 OK CIV APP 124, ¶ 11, 64 P.3d 1118 (upholding award where the "arbitrator applied the facts of this case as she considered them in relation to the language of the CBA as she interpreted same"); *City of Lawton v. Int'l Union of Police Ass'ns, Local 24*, 2000 OK CIV APP 2, ¶ 13, 996 P.2d 954 (upholding award that appeared to be based on arbitrator's interpretation of contractual provision). This Court need go no further to deny the Tribe's motion to vacate.

II. The Tribe Offers No Reason To Diverge From Judge Brett's Findings.

Regardless, even when courts review questions of arbitrability de novo—which is *not* the case here—they do so "with a thumb on the scale in favor of arbitration." *Solvay Pharms., Inc. v. Duramed Pharms., Inc.*, 442 F.3d 471, 478 (6th Cir. 2005) (cited by the Tribe in its opposition to Wells Fargo's motion to confirm). Oklahoma courts recognize "the strong presumption in favor of arbitration" and resolve ambiguities "in favor of finding the dispute is arbitrable." *Highland Crossing, L.P. v. Ken Laster Co.*, 2010 OK CIV APP 124, ¶ 6, 242 P.3d 567 (citations omitted). The Tribe offers no reason to diverge from Judge Brett's factual and legal findings.

A. Judge Brett Properly Concluded That The Tribe Waived Its Sovereign Immunity With Respect to the Loan Agreement.

The Tribe argues that it did not agree to arbitration because it did not waive its sovereign immunity with respect to the Loan Agreement. In so doing, the Tribe ignores Judge Brett's thorough and detailed analysis of the sovereign immunity waiver. Significantly, the Tribe concedes that Sections 11.24 and 11.27 of the Loan Agreement contain clear and unequivocal

waivers of the Tribe's sovereign immunity. (Mot. at 12.) The Tribe instead asserts that the Business Committee lacked authority to issue these waivers. The Tribe is mistaken.

The Tribe primarily contends that the Tribal Council did not adopt a resolution authorizing the Business Committee to waive the Tribe's sovereign immunity with respect to the Loan Agreement. (Mot. at 8-14.) As Judge Brett concluded, however, Tribal Council Resolutions 73-1 and 78-7 did just that. (Ex. D at 8.) The Apache Constitution provides that the Business Committee "shall have such powers as may be delegated by the appropriate resolutions of the tribal council, and within such delegated authority, may transact business and otherwise speak or act on behalf of the Tribe." (Ex. 1, Art. V.) Tribal Council Resolution 73-1 authorized the Business Committee "to transact any and all business related to the tribe involving matters such as tribal land [and] tribal budget." (Ex. 8.) Resolution 78-7 is even more expansive, and delegates to the Business Committee the "authority to transact business related to the Apache Tribe of Oklahoma." (Ex. 9.) As Judge Brett observed, in July 2007, the Department of the Interior characterized these Resolutions as "grants of general authority to the [Business Committee]." (Ex. D at 8; Ex. L (July 19, 2007 decision).) In that decision, the Department of Interior held that these resolutions remained operative and eliminated the need for more specific grants of authority. (*Id.*) Indeed, the Business Committee repeatedly and routinely relied on Resolutions 73-1 and 78-7 to enter into contracts on behalf of the Tribe and to waive the Tribe's immunity from suit. (Ex. D at 8; Ex. M (prior resolutions and agreements waiving immunity).) Moreover, counsel for the Tribe and for the Tribe's Gaming Commission each issued legal

opinions assuring that the Business Committee had proper authority to enter into the Loan Agreement. (Ex. D at 8; Ex. N ¶ 3; Ex. O ¶ 1.)[4]

The Tribe cites no authority holding that these Resolutions are insufficient to empower the Business Committee to waive the Tribe's sovereign immunity. The Tribe's cases are inapposite. In *Dilliner v. Seneca-Cayuga Tribe of Okla.*, 2011 OK 61, __ P. 3d ___, the state Supreme Court held that the business committee had the power to waive sovereign immunity, but did not make the express waiver the law requires. *Id.* ¶¶ 2, 18. Here, in contrast, there is no dispute that the Loan Agreement authorized and entered into by the Apache Business Committee contains clear and unequivocal waivers of sovereign immunity, as does the Business Committee's August 2009 resolution reaffirming the Loan Agreement. (Ex. B §§ 11.24, 11.27; Ex. D. at 9-10; Ex. P (August 26, 2009 resolution); Mot. at 12.)

In *Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282 (11th Cir. 2001), meanwhile, a tribal ordinance specified that sovereign immunity could be waived only through a tribal council resolution acknowledging that the tribe was waiving its immunity on a limited basis and describing the purpose and extent to which such waiver applied. *Id.* at 1287-88 (holding that sovereign immunity was not waived absent tribal council resolution in compliance with ordinance). Here, in contrast, the Apache Constitution broadly vests the Business Committee with "such powers as may be delegated" by the Tribal Council, and no

[4] One of the "facts" offered by the Tribe as proof that Tribal Council approval was necessary for the waiver of sovereign immunity is an email from Wells Fargo's counsel stating that following receipt of Resolutions 73-1 and 78-7 and a brief discussion, Wells Fargo felt strongly that General Council approval was necessary. (Mot. at 6.) The Tribe neglected to disclose to the Court, however, the subsequent communications from the Tribe's counsel attaching authority for the waiver of sovereign immunity by the Business Committee, including the Department of Interior decision, Wells Fargo's testimony that it was persuaded by that authority, and Judge Brett's finding that Wells Fargo concluded that the Business Committee could expressly waive the Tribe's sovereign immunity. (*See* Ex. D at 8; Ex. L; Ex. S.)

other Apache law limits the Tribal Council's ability to issue a general grant of authority to the Business Committee. What is more, the plaintiff in *Sanderlin* did not identify any tribal council resolution whatsoever—whether general or specific—that he claimed authorized the tribal official to waive sovereign immunity on behalf of the Tribe. Likewise, in *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917 (6th Cir. 2009), the charter of the tribal corporate enterprise required board approval to waive sovereign immunity, and the plaintiff did not claim that any conduct by the board constituted the required approval. Here, in contrast to both cases, the Business Committee's resolutions adopting and reaffirming the Loan Agreement cite Tribal Council Resolutions 73-1 and 78-7 as the bases for the Business Committee's authority. (Ex. P; Ex. Q (June 23, 2008 resolution); Ex. R (Feb. 5, 2009 resolution).)

Judge Brett correctly concluded that these Resolutions authorized the Business Committee to waive the Tribe's sovereign immunity with respect to the Loan Agreement. The Tribe's remaining challenges to the Business Committee's authority are not availing. The Tribe asserts that Resolution 78-7 is invalid because it lacked a quorum. (Mot. at 11.) But the Department of Interior has repeatedly determined this resolution to be valid and effective. (*See* Ex. L (concluding that 73-1 and 78-7 Resolutions authorized Business Committee to confer jurisdiction on CFR Court); Ex. S (July 1985 agency letter stating that Resolution 78-7 remains operative).) Finally, the Tribe suggests that the Loan Agreement's waiver of sovereign immunity is invalid because approving the resolution was not passed by a quorum of the Business Committee. (Mot. at 4.) There is no dispute, however, that a full quorum of the Business Committee reaffirmed the validity of the Loan Agreement by resolution in February 2009, and in August 2009 adopted a resolution with an independent

and express waiver of sovereign immunity as set forth in the Loan Documents. (Ex. D at 9-10; Ex. P; Ex. R.) A reaffirmation of an agreement validates the agreement, and no new consideration is required. *Sullivan v. Sykes*, 243 P. 722, 722 (Okla. 1925); *St. Louis v. S.F.R. Co. v. Swearingen*, 123 P. 1122, 1122-23 (Okla. 1912).

In asserting that it never waived sovereign immunity with respect to the Loan Argument, the Tribe repeats the same arguments it advanced, unsuccessfully, before Judge Brett. Nothing now warrants a different result. If anything, the Tribe's conduct in filing a counterclaim to vacate the Award is a further waiver of its sovereign immunity. The Tribe could have chosen to move to dismiss Wells Fargo's petition for lack of subject matter jurisdiction. It did not. In affirmatively seeking relief from this Court as to Judge Brett's Award, the Tribe effected a new and independent waiver of sovereign immunity. *See Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344-45 (10th Cir. 1982).

B. Judge Brett Properly Concluded That The Loan Agreement Is Valid and Enforceable, and Is Not Void as a Management Contract.

In arguing that the Loan Agreement is void as an unapproved management contract, the Tribe again ignores Judge Brett's thorough and detailed analysis supporting his conclusion to the contrary. (*See* Ex. D at 15-16.) Judge Brett determined that the Loan Agreement and other Loan Documents do not provide for the management of all or part of the Tribe's gaming operations by Wells Fargo. As a result, they are not void and instead are valid and enforceable against the Tribe. The Tribe relies almost exclusively on the affidavit of its expert, Kevin Washburn, who opines "that the Wells Fargo loan would be deemed by the NIGC to be a management contract." This reliance is misplaced for four reasons.

First, Mr. Washburn also testified in person, and was subjected to cross-examination and to examination by Judge Brett. After hearing his testimony and evaluating his demeanor, Judge

Brett rejected Mr. Washburn's testimony. The Tribe chose not to make a verbatim transcript of Mr. Washburn's testimony, and without it the Tribe cannot meet is burden of proving that his testimony warrants vacation of the Award. *See Wilbanks Secs.*, 2010 OK CIV APP 17, at ¶ 40 ("Without a record of the arbitration proceeding this Court can only presume the Award is without error.").

Second, as Judge Brett observed, whether the Loan Agreement is a management contract is a matter for the court or arbitrator to decide. (Ex. D at 15.) Mr. Washburn's opinion need be accorded no weight, and opinion letters issued by the NIGC staff "may be accepted by a court only as they have power to persuade." *First Am. Kickapoo Ops., L.L.C. v. Multimedia Games, Inc.*, 412 F.3d 1166, 1174 (10th Cir. 2005). To this day, the Tribe has not cited any reported decision holding that a pledge of gross revenues makes a management contract out of a loan agreement.

Third, the Tribe ignores the Loan Documents' extensive language making clear that the parties did not intend to enter into a management contract, and restricting Wells Fargo's ability to engage in management of the tribal casino operations. This language satisfies even the NIGC staff's position today on when a pledge of gross revenues is permissible. As Judge Brett found, the limiting language here includes:

(1) "Neither the Loan Agreement not the other Loan Documents, taken individually or as a whole, constitute 'management contracts'...." (Ex. B § 4.4);[5]

(2) The Tribe shall not "assert in any suit, action or proceeding that any of the Loan Documents is void, voidable, or otherwise invalid" on the grounds that it is an unapproved management contract (*id.* § 11.32(b));

[5] Wells Fargo also obtained three separate legal opinions from the Tribe's counsel that the Loan Agreement was not a management contract. (Ex. N ¶ 16; Ex. O ¶ 3; Ex. T ¶ 16.)

(3) Each provision of the Loan Documents shall be interpreted to be effective and valid under applicable law (*id.* § 11.19(a)-(b));

(4) Nothing in the Loan Documents shall deprive the Tribe of the responsibility for the conduct of gaming activity or any other aspect of the Enterprise (*id.* § 4.4);

(5) Any provision that is inconsistent with applicable law or regulation will be deemed ineffective, and will be modified to be consistent with that law and regulation (Depository Agreement (Ex. U) § 23(e)); and

(6) Wells Fargo may act only "to the extent permitted by law" to enforce its security interest (Security Agreement (Ex. V) § 6.4(b)).

In a letter dated July 2, 2010, the NIGC staff opined that similar limiting language was sufficient to prevent a management contract, even though the lender was granted a security interest in all assets and revenues of the gaming facility. (Affidavit of Kent Richey ("Richey Aff.") (Ex. W) at Ex. B pp. 4-5 (NIGC opinion letter regarding development documents between Big Sandy Rancheria and Brownstone LLC.) Notably, the NIGC opined that this language was sufficient even though it did not precisely track the "safe harbor" provision that the NIGC first suggested in January 2009—which is after the loan documents in *Big Sandy* were executed and after the Loan Documents here were executed. (*Id.* at 5.)

Fourth, particularly in light of this limiting language, it would be absurd to construe the Loan Documents as a management contract. A pledge of gross revenues is a critical source of security because lenders cannot take a mortgage on the casino real estate, and this pledge was a staple in Indian gaming financings through 2008. (*See* Richey Aff. (Ex. W) ¶ 7.) As Wells Fargo's expert Kent Richey explained, and Judge Brett agreed, a finding that loan agreements are void because they contain a pledge of gross revenues would undermine the objectives of IGRA,

and would jeopardize the extension of credit to Indian tribes, which reached more than $14 billion in 2007. (*Id.* ¶¶ 1-4, 7-12; Ex. D. at 15-16.)

Based on his construction of the Loan Agreement and related Loan Documents, and review of the entire evidentiary record, Judge Brett correctly determined that the Loan Agreement is valid and enforceable, and is not void as a management contract. The Tribe's motion to vacate offers no reason to disturb this result.[6]

CONCLUSION

Wells Fargo respectfully requests that this Court enter such an order: (1) confirming the Award in all respects; (2) denying the Tribe's motion to vacate; and (3) entering judgment in favor of Wells Fargo in the amount of $2,751,160.20 plus reasonable post-Award attorneys' fees and expenses Award pursuant to 12 Okla. Stat. § 1876.B or § 1876.C and § 11.3 of the Loan Agreement, and releasing $47,445.10 interpleaded in the District Court of Caddo County, State of Oklahoma to Wells Fargo.

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[6] Regardless, the agreement to arbitrate and waiver of sovereign immunity in Section 11.24 would survive even if the Loan Agreement were otherwise void. Section 11.24 states that it "shall survive the termination, amendment or expiration of any of the Loan Documents or any relationship between the parties." The AAA Rules incorporated therein likewise provide that the arbitration clause "shall be treated as an agreement independent of the other terms of the contract." (Ex. B at R-7(b).) And, a "decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid an arbitration clause." (*Id.*) "As a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006). Where there is a challenge to the contract, but not specifically to its arbitration provisions, "those provisions are enforceable apart from the remainder of the contract." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). The arbitration provision thus survives any voiding of the contract. *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs.*, 86 F.3d 656, 659 (7th Cir. 1996) (stating that arbitration clause would survive even if tribal contract were illegal and therefore otherwise void because it had not been approved by the Bureau of Indian Affairs). *See also Match-E-Be-Nash-She-Wish Band of Pottowatomi Indians v. Kean-Argovitz Resorts*, 383 F.3d 512, 516 (6th Cir. 2004) (holding that arbitration provision survived even if agreement were void as management contract).

Respectfully submitted,

Dated: September 2, 2011

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CERTIFICATE OF SERVICE

This is to certify that on this 2nd day of September 2011, and true and correct copy of Plaintiff's Brief in Opposition to Defendant's Motion to Vacate Arbitration Award was mailed via U.S. Mail, first-class, postage prepaid, and sent via email to:

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FFIN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

Wells Fargo Bank, National Association, Plaintiff, vs. Apache Tribe of Oklahoma, Defendant.	Case No. CJ-2011-3545 Judge Owens

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

JUL 29 2011

PATRICIA PRESLEY, COURT CLERK

BY _____ DEPUTY

REPLY IN FURTHER SUPPORT OF PLAINTIFF'S MOTION TO CONFIRM

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EXHIBIT I

Introduction

In 2008, through its Business Committee, the Apache Tribe of Oklahoma (the "Tribe") borrowed $4.35 million from Wells Fargo. Two years later, a new regime, led by Chairman Louis Maynahonah, displaced its political opponents. The new leadership repudiated the loan, caused the Tribe to default on its payment obligations, and sued Wells Fargo in federal court.

Wells Fargo demanded that all disputes be submitted to binding arbitration pursuant to the Loan Agreement. The Tribe proposed the Honorable Thomas R. Brett (ret.) as arbitrator, and Wells Fargo agreed. After discovery, Judge Brett presided over a five-day hearing, which featured nearly 450 exhibits and fifteen witnesses, including four experts.

On May 23, Judge Brett issued his Award in favor of Wells Fargo (Ex. D). On May 24, Wells Fargo moved this Court to confirm. Three weeks later, the Business Committee—the same people who caused the Tribe to breach its contract and sue Wells Fargo—issued a so-called "Final Order" purporting to vacate the Award. But the Tribe agreed to submit to Judge Brett all disputes, including threshold questions of arbitrability. The Tribe may not retry these disputes here, nor undo the Award itself. The Award should therefore be confirmed.

Argument

A. The Parties' Dispute Was Subject To Binding Arbitration.

Based on the record before him, Judge Brett found that the Loan Agreement and its arbitration clause are valid and enforceable—rejecting each argument the Tribe now makes. These findings are beyond review, and the Tribe gives no reason to diverge from them

1. Judge Brett's finding of an agreement to arbitrate is beyond review.

As the case law *cited by the Tribe itself* makes clear, Judge Brett's finding of an enforceable agreement to arbitrate is entitled to deference and not subject to review. Where the parties submit the threshold question of arbitrability to the arbitrator, "the court's standard for

reviewing the arbitrator's decision about *that* matter should not differ from the standard courts apply when they review any other matter the parties have agreed to arbitrate." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995); *see also Solvay Pharms., Inc. v. Duramed Pharms., Inc.*, 442 F.3d 471, 477-78 (6th Cir. 2005) (courts should "independently" decide arbitrability only in the absence of "'clear and unmistakable' evidence that the parties intended an arbitrator (rather than a court) to resolve questions of arbitrability") (citing *id.* at 941, 945).

"An arbitrator shall decide ... whether a contract containing a valid agreement to arbitrate is enforceable." 12 Okla. Stat. § 1857(c). Section 11.24(b) of the Loan Agreement (Ex. A) likewise provides that the arbitration shall be conducted in accordance with the AAA Rules (Ex. B). Under these rules, the arbitrator has the power "to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement" and "to determine the existence or validity of a contract of which an arbitration clause forms a part." (Ex. E at R-7(a)-(b).) "When, as here, the parties agree to a broad arbitration clause and explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator." *Saxa, Inc. v. DFD Architecture, Inc.*, 312 S.W.3d 224, 229-30 (Tex. App.-Dallas 2010) (interpreting materially identical arbitration clause) (citing cases); *see also New River Elec. Corp. v. Blakeslee Arpaia Chapman, Inc.*, 2009 WL 5111566, at *7 (D. Conn. Dec. 17, 2009) (same).

Because the parties intended for Judge Brett to rule on the validity and existence of the agreement to arbitrate, his findings are not subject to review. *See First Options*, 514 U.S. at 943. "Giving deference to the arbitrator's decision, 'we will not review the factual or legal findings of the arbitrator nor consider the merits of the award.'" *City College, Inc. v. Moore Sorrento, LLC*, 2010 OK CIV APP 127, ¶ 27, 246 P.3d 726 (citation omitted). But the Tribe repeats the same

arguments that Judge Brett considered and rejected. That is no basis to avoid confirmation.[1]

2. The Tribe offers no reason to diverge from Judge Brett's findings.

Regardless, even when courts review questions of arbitrability de novo—which is *not* the case here—they do so "with a thumb on the scale in favor of arbitration." *Solvay Pharms.*, 442 F.3d at 478. The Tribe offers no reason to diverge from Judge Brett's factual and legal findings.

For example, the Tribe cites one exhibit—the Affidavit of Kevin Washburn—out of the 450 admitted in asserting that the Loan Agreement is a management contract. (Opp. at 4.) Mr. Washburn also appeared in person, and Judge Brett evaluated his demeanor and cross-examination. Based on the full record, Judge Brett rejected Mr. Washburn's testimony and found that the Loan Agreement is enforceable in its entirety. (Ex. D, pp 11-12, ¶ 58; pp. 15-17, ¶¶ 72-78.)

Perhaps even more egregious is the Tribe's assertion that the Loan Agreement violates the Bank Holding Company Act, which was the basis of the Tribe's $39 million counterclaim. (Opp. at 4-5.) After extensive testimony and the admission of hundreds of exhibits—which the Tribe ignores—Judge Brett found no violation. (Ex. D, pp. 1-7, ¶¶ 1-35; p. 13, ¶¶ 62-65; p. 18 ¶¶ 9-10.)

The Tribe also ignores the evidence that Judge Brett cited in finding that the Business Committee was authorized to waive sovereign immunity. (*Compare* Opp. at 5-6; *with* Ex. D, p. 8, ¶¶ 37-42.) Judge Brett reviewed not just the Constitution, but also, among other things, key Tribal Council resolutions delegating to the Business Committee the power to transact business, which includes entering into contracts and waiving immunity. (*Id.* ¶¶ 38-42 (also

[1] The Tribe complains that Judge Brett adopted Wells Fargo's proposed findings rather than the Tribe's. (Opp. at 7.) That is untrue. A redline of the final Award with Wells Fargo's underscores Judge Brett's careful review and revisions throughout. (*See* Ex. F.)

citing Department of Interior decisions, and past Business Committee resolutions waiving immunity).[2] The Tribe addresses none of this evidence, just as it ignores the full basis for Judge Brett's alternate finding that the arbitration clause is an independent waiver of immunity that would survive even if the contract were otherwise void. (Ex. D, pp. 17-18, ¶¶ 6-8.)

B. Res Judicata Does Not Bar Confirmation Of Judge Brett's Award.

The Tribe last asserts that its own purported vacation of the Award by the Business Committee enjoys preclusive effect. (Opp. at 8-9.) The unilateral, and unlawful, conduct of a disgruntled litigant does not strip this Court of its authority to confirm.

Wells Fargo's federal Amended Complaint (Ex. G) sets forth the background of the Tribe's "Final Order." (Am. Compl. ¶¶ 1-4, 22-71.) The Business Committee members are the very people litigating against Wells Fargo. They attended the arbitration each day, and two members, including Mr. Maynahonah, testified for the Tribe. On June 1, after Wells Fargo filed this action, the Business Committee signaled its intent to vacate the Award itself, setting a June 15 hearing date. Wells Fargo promptly moved to enjoin in federal court. In response, the Tribe revealed that in April 2011, two weeks before the arbitration, the Business Committee had secretly passed a resolution purporting to authorize itself to vacate any adverse award. Then, just as the federal hearing began, the Tribe unveiled the "Final Order" it had secretly issued the day before—thus mooting Wells Fargo's plea for relief before it could be heard. (Ex. H (transcript).)

Under these facts, the Tribe cannot meet its burden of proving the elements of res judicata. *See Okla. Dep't of Public Safety v. McGrady*, 176 P.3d 1194 (Okla. 2007); *Miller*

[2] *Dilliner v. Seneca-Cayuga Tribe of Oklahoma*, 2011 OK 61, __ P. 3d ___, supports Judge Brett's finding. The business committee there had the same power to waive immunity as the Apache Business Committee, but did not make the *express* waiver the law requires. *Id.* ¶¶ 2, 18. Judge Brett found that the Business Committee expressly waived immunity in the agreement, and in its approving and reaffirming resolutions. (Ex. D, pp. 9-10, ¶¶ 43-50.)

Dollarhide P.C. v. Tal, 2006 OK 27, ¶ 15, 174 P.3d 559, 565. First, the required "full and fair opportunity to litigate" was not afforded, and is not existent, where there is a close relationship between the tribal court and individual tribal officials, the tribal court hastily issues a ruling, and there is no appellate review. *See Burrell v. Armijo*, 456 F.3d 1159, 1173-75 (10th Cir. 2006) (denying preclusive effect to tribal ruling).

Second, the Business Committee lacked jurisdiction over Wells Fargo. "Efforts by a tribe to regulate nonmembers ... are presumptively invalid," and the Tribe bears the burden of proving jurisdiction. *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316, 330 (2008). Wells Fargo never agreed to a post-award regime in which its adversary is also the decision-maker. Among other things, a Tribal Court's jurisdiction is limited to confirming an award. The Arbitration Ordinance (Tribe Ex. 2) nowhere contemplates an application to vacate. To the contrary: "An arbitration award shall not be subject to review or modification by the Tribal Forum, but shall be confirmed strictly as provided by the arbitrator(s)." (Ex. 2 § 7(c).) The Business Committee's April 2011 resolution purporting to give itself the power to vacate runs afoul of contractual provisions that shield Wells Fargo from any adverse amendment to the Arbitration Ordinance. (Ex. A §§ 6.14(a)-(b), 6.17(a).) Separately, under § 11.27(e) of the Loan Agreement, the Tribe may not bring any action in a Tribal Court without first obtaining Wells Fargo's prior written consent, which Wells Fargo has not provided. (Ex. I (declaration).)

In short, this Court should confirm the Award issued by Judge Brett. Any motion to vacate would be duplicative of the Tribe's response in opposition already on file. (Opp. at 2-3 (summarizing purported motion).) In any event, the Tribe should have raised all objections now, and its threatened motion to vacate should not prevent confirmation. *See Hamm v. Millennium Income Fund, LLC*, 178 S.W.3d 256, 264-66 (Tex. App.-Houston 2005) (citing cases).

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CERTIFICATE OF SERVICE

This is to certify that on this 29 day of July, 2011, a true and correct copy of the above and foregoing Notice of Hearing was mailed via U.S. Mail, first-class, postage prepaid, to the following:

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