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

APACHE TRIBE OF OKLAHOMA, Plaintiff, vs. TGS ANADARKO LLC; and WELLS FARGO BANK, NATIONAL ASSOCIATION, Defendants.	)	Case No. 5:11-cv-01078-D

DEFENDANTS' JOINT MEMORANDUM IN
OPPOSITION TO PLAINTIFF'S MOTION TO REMAND

Despite participating for more than three months in the parties' arbitration over claims regarding an Equipment Lease, including selection of party-appointed arbitrators, the Apache Tribe of Oklahoma (the "Tribe") brought this action to stay the arbitration on the ground that the Tribe did not validly waive sovereign immunity with respect to the Lease. Defendant Wells Fargo Bank, National Association ("Wells Fargo"), with the consent of Defendant TGS Anadarko, LLC ("TGS"), removed the Tribe's action to this Court because it presents a federal question under 28 U.S.C. § 1331.

The Tribe's motion to remand is without merit. The Tribe's petition presents a federal question: whether the Tribe validly waived its sovereign immunity as required under federal common law established by the Supreme Court. And the Tribe's request for declaratory relief does not shield its petition from removal. First, federal jurisdiction exists even if this Court were to examine Wells Fargo's and TGS's affirmative claims

against the Tribe, because to establish a breach of the Lease, they must first prove a valid waiver of sovereign immunity. Second, the Tribe's request for injunctive relief to stay the arbitration presents a federal question on the face of the petition under the well-pleaded complaint rule. The Tribe's motion to remand should therefore be denied.

STATEMENT OF FACTS

As this Court is aware, on December 27, 2007, the Tribe entered into an Equipment Lease Agreement, pursuant to which it leased up to 350 slot machines and ancillary furnishings for its Silver Buffalo Casino. (Tribe's Mot. to Remand ("Mot."), Ex. A (Tribe's Pet. for Declaratory and Injunctive Relief ("Pet.")) ¶ 10.) The Lease contains a waiver of sovereign immunity by the Tribe, and a broad arbitration provision for any claim or dispute related to the Lease." (*Id.* ¶ 11; Ex. 2 to Pet. (Lease) § 22.) On June 23, 2008, the Lease was assigned to TGS. (Pet. ¶ 16.) That same day, the Tribe executed an Estoppel Certificate that extended the benefits of the Lease's arbitration provision and sovereign immunity waiver to Wells Fargo. (*See* Exhibit 1 attached hereto, Wells Fargo and TGS's Amended Statement of Claim ("Am. Claim") ¶ 5.)

On May 17, 2011, TGS and Wells Fargo commenced arbitration against the Tribe. (Pet. ¶ 17.) Among other things, TGS and Wells Fargo claim that the Tribe breached the Lease by failing to pay rent since August 2010 and refusing to return the gaming equipment. (*Id.*) The Tribe filed its Answering Statement on June 9, 2011, and further participated in the arbitration proceedings by selecting one of the arbitrators and appearing on administrative calls. (*See* Mot., Ex. B.)

On September 2, 2011, this Court enjoined the Apache Gaming Commission and others from taking action "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." *Wells Fargo Bank v. Maynahonah, et al.*, Case No. 11-cv-00648-D, Dkt. No. 75. In issuing this preliminary injunction, and the temporary restraining order ("TRO") that preceded it, this Court explained that injunctive relief was necessary in order to preserve Wells Fargo and TGS's right to arbitration under the Lease. *Id.*

Three days before the preliminary injunction was issued, and after the TRO, the Tribe filed a petition in Oklahoma state court seeking its own injunction to stay the ongoing arbitration under the Lease. Specifically, on August 29, 2011, the Tribe filed a Petition for Declaratory and Injunctive Relief in the District Court of Caddo County, State of Oklahoma. (*See* Pet.) In its Petition, the Tribe asserts two claims for relief: (1) declaratory judgment "that the Apache Tribe has sovereign immunity from any suit on the Equipment Lease Agreement[;]" and (2) stay of the arbitration proceeding. (*Id.*) Then, on September 1, 2011, the Tribe filed an application for a preliminary injunction to stay the arbitration.

On September 27, 2011, Wells Fargo removed this action to this Court, with the written consent of TGS. Wells Fargo did so because the Tribe's Petition raises a federal question under 28 U.S.C. § 1331: whether the Tribe validly waived its sovereign immunity with respect to the Lease. The Tribe timely moved to remand this action to state court. The Tribe's motion should be denied.

ARGUMENT

I. The Tribe's Petition Presents a Federal Question.

In its Petition, the Tribe seeks to enjoin the ongoing arbitration on the ground that it did not validly waive its sovereign immunity. Whether a Tribe has validly waived its sovereign immunity presents a claim "arising under" federal law. "*As a matter of federal law*, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754 (1998) (emphasis added). This common law rule originated with the Supreme Court, and remains in place absent action by Congress to the contrary. The Supreme Court has explained: "A doctrine of Indian tribal sovereign immunity was originally enunciated by this Court and has been reaffirmed in a number of cases" and further stated that "Congress has always been at liberty to dispense with such tribal immunity." *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991) (internal citations omitted).[1]

The Tribe admits that whether it has sovereign immunity is a federal question. Still, the Tribe asserts that whether it validly waived its immunity is *not* a federal question. (Mot. at 6-8.) This is absurd. This Court has jurisdiction over all civil actions "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

[1] A federal common law rule is a source of federal question jurisdiction under 28 U.S.C. § 1331. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985); *Nahno-Lopez v. Houser*, 625 F.3d 1279, 1282 n.1 (10th Cir. 2010) (relying on *Nat'l Farmers* in holding that the district court had subject-matter jurisdiction under 28 U.S.C. § 1331, "as a federal common-law suit provides federal question jurisdiction").

Whatever facts or legal authorities this Court may consider, this action arises out of the federal common law requirement that a tribe may be sued only if it waived its sovereign immunity.

The Supreme Court has repeatedly held, without exception, "that tribal immunity is governed by federal law." *Okla. Tax Comm'n v. Graham*, 489 U.S. 838, 841 (1989) (cited by the Tribe). The federal doctrine of tribal immunity includes the requirement that "a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (citation and internal quotation marks omitted); *see also Muhammad v. Comanche Nation Casino*, 2010 WL 4365568, at *9 n.11 (W.D. Okla. Oct. 27, 2010) (DeGiusti, J.) ("*Even under federal law generally* . . . a tribe's waiver of immunity must be 'clear.'") (quoting *C & L Enter., Inc. v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001)) (emphasis added).

Accordingly, whether a tribe has waived its sovereign immunity presents a question of federal law. Even the principal case on which the Tribe relies, *Dilliner v. Seneca-Cayuga Tribe of Oklahoma*, acknowledges that "[f]ederal law requires that the waiver of sovereign immunity be express and unequivocal; it cannot be implied." 2011 OK 61, ¶ 19, 258 P.3d 516 (2011). After reviewing the tribe's constitution and by-laws as to who may authorize waiver, the court concluded that there was "no express or unequivocal waiver" as required by federal law. *Id.* ¶¶ 12, 18-20. Thus, a tribe's internal requirements for waiver of immunity may inform the analysis of whether the tribe's waiver was sufficiently clear to satisfy federal law. But, as in *Dilliner*, consideration of

tribal rules in evaluating a waiver does not change the fact that the court is addressing a question that arises under federal law. *See also Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282, 1285-89 (11th Cir. 2001) (considering tribal sources in determining whether tribe clearly and unequivocally waived sovereign immunity in accord with federal law); *World Touch Gaming, Inc. v. Massena Mgmt., LLC*, 117 F. Supp. 2d 271, 274-76 (N.D.N.Y. 2000) (same) *Danka Funding Co. v. Sky City Casino*, 747 A.2d 837, 843 (N.J. 1999) (same and concluding, "By failing to avail themselves of the procedures for obtaining a waiver of immunity under tribal law, [the tribal entities] failed to satisfy the conditions necessary for an unequivocal waiver identified in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).").

II. Having Asserted a Federal Question in its Petition for Injunctive Relief, the Tribe's Suit was Properly Removed.

The Tribe fares no better with its argument that its Petition does not present a federal question because it is a declaratory judgment action that raises sovereign immunity as a defense to TGS and Wells Fargo's claims in the underlying arbitration. (Mot. at 4-6.) The Tribe is wrong for two reasons. First, even under the Tribe's analysis, removal was proper because TGS and Wells Fargo's affirmative claims against the Tribe squarely present the federal question of whether the Tribe waived its sovereign immunity. Second, the Tribe ignores its separate claim for injunctive relief, which also squarely presents a federal question under the well-pleaded complaint rule.

A. Federal-Question Jurisdiction Exists Even if the Tribe Sought Only Declaratory Relief.

Removal on federal question grounds would be proper even if this action were strictly one for a declaratory judgment that the Tribe is immune from suit. The Tribe asserts: "Because the character of Wells Fargo's and TGS's claims are based on state law, there is no federal question to establish jurisdiction in this Court." (Mot. at 6.) This is incorrect. Whether the Tribe validly waived sovereign immunity is a claim arising under federal law that Wells Fargo and TGS must prove in their breach-of-contract claim against the Tribe. In *Wells Fargo Bank, N.A., v. Sokaogon Chippewa Cmty.*, 787 F. Supp. 2d 867 (E.D. Wis. 2011), Wells Fargo sought declaratory relief in the form of a determination that an Indian tribe waived sovereign immunity and that the parties' indenture was not a management contract under the Indian Gaming Regulatory Act ("IGRA"). The court rejected the argument that the federal questions raised by Wells Fargo were merely anticipated federal defenses the defendants would likely raise. *Id.* at 874-75. The court explained: "Wells Fargo's action on the Indenture and the Bonds necessarily raise[s] federal questions concerning whether the Indenture is a management contract within the meaning of the IGRA and, *if so, whether the Tribe's waiver of sovereign immunity is valid*." *Id.* at 875 (emphasis supplied).

As in *Sokaogon*, to prove breach of the Lease, Wells Fargo and TGS must establish that the Tribe entered into a valid and binding agreement. To do so, Wells Fargo and TGS must show that the Tribe validly waived sovereign immunity with respect to the Lease. Indeed, in their Amended Statement of Claim, Wells Fargo and TGS allege

that the Tribe agreed to binding arbitration and waived sovereign immunity with respect to the Lease. (Am. Claim at ¶¶ 4-5.) Accordingly, even if the Tribe sought only declaratory relief regarding the validity of its waiver of sovereign immunity, this Court would have federal-question jurisdiction.

B. Federal-Question Jurisdiction Exists Under the Well-Pleaded Complaint Rule.

This Court need not consider whether the affirmative claims against the Tribe raise a federal question, however, because the Tribe's Petition squarely presents the federal question of whether the Tribe is immune from suit. Under the well-pleaded complaint rule, the Court need only examine the face of the Petition to determine whether a federal question exists. In an effort to avoid the well-pleaded complaint rule, the Tribe invokes *Public Serv. Comm'n of Utah v. Wycoff Co., Inc.*, 344 U.S. 237 (1952), in which the Supreme Court stated that a plaintiff does not raise a federal question by simply seeking declaratory relief that in essence raises a defense to a threatened or pending state action. *Id.* at 248.

Here, however, the Tribe does not merely seek a declaratory judgment that it can use as a defense in the arbitration. Instead, the Tribe seeks the injunctive relief of staying the arbitration. Thus, *Wycoff* and its progeny do not avail the Tribe. *See ANR Pipeline Co. v. Corp. Comm'n of Okla.*, 860 F.2d 1571, 1576 (10th Cir. 1988) ("We express no opinion concerning the dicta in *Wycoff* and its progeny, because this suit is not based solely on a claim for declaratory judgment but also includes a claim for injunction."). In *ANR Pipeline*, the plaintiff asserted a claim for declaratory judgment holding that federal

law pre-empted an Oklahoma statute, and sought injunctive relief to restrain the defendant state agency from attempting to implement or enforce the pre-empted statute. *Id.* at 1573. Applying the well-pleaded complaint rule, the Tenth Circuit held that the district court had federal-question jurisdiction under 28 U.S.C. § 1331 because plaintiff's complaint for injunctive relief presented a federal question. *Id.* at 1576. Similarly, in *Nicodemus v. Union Pacific Corp.*, 318 F.3d 1231, 1239-40 (10th Cir. 2003), the Tenth Circuit considered separately whether the plaintiff's claims for declaratory relief and for injunctive relief presented a federal question. With respect to declaratory relief, the Tenth Circuit followed the analysis of *Wycoff* and its progeny—but as to injunctive relief, the Court of Appeals looked only to the face of the complaint itself. *Id.*

In this case, the Tribe seeks to enjoin the arbitration on the ground that the arbitrators lack subject-matter jurisdiction over any claim against the Tribe because the Tribe did not validly waive its immunity or consent to arbitration. (Pet. ¶¶ 24-27.) In its Petition, the Tribe expressly bases jurisdiction on, in part, 12 Okla. Stat. § 1381 *et seq.*, which, according to the Tribe, "permits the Court to enter an injunction as a final judgment in an action or as a provisional remedy." (*Id.* ¶ 4.) The Tribe also cites *Okla. Oncology & Hematology P.C. v. US Oncology, Inc.*, 2007 OK 12, 160 P.3d 936, as a basis for jurisdiction to stay the arbitration proceedings. (*Id.* ¶¶ 4, 27.)

In short, the Tribe does not simply seek a declaration of a successful defense against Wells Fargo's and TGS's claims in arbitration, but seeks affirmative judicial relief in the form of a court injunction that brings the arbitration to a halt. The Petition therefore presents a federal question under 28 U.S.C. § 1331.

CONCLUSION

This Court has original jurisdiction over this action under 28 U.S.C. § 1331 because the Tribe has asserted a federal question, and it was therefore properly removed to this Court pursuant to 28 U.S.C. §§ 1441(a) and 1446.

Dated: November 4, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2011, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based upon the records currently on file, the Clerk of the Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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