IN THE SUPREME COURT OF ARIZONA
CASE NO. CV-10-0017-PR

ARTURO ROJAS CARDONA, JUAN JOSE ROJAS CARDONA, JUEGOS DE ENTRETENIMIENTO Y VIDEOS DE GUADALUPE, S. DE R.L. DE C.V., ENTRETENIMIENTO DE MEXICO, S.A. DE C.V., ATLANTICA DE INVERSIONES CORPORATIVAS, S.A. DE C.V., AND GUADALUPE RECREATION HOLDINGS, L.L.C.,

Petitioners,

v.

THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

Respondent.

LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS HOLDINGS MEXICO, LLC, a Corporate Enterprise of the Lac Vieux Desert Band of Lake Superior Chippewa Indians, a federally recognized Indian Tribe; and LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally recognized Indian Tribe,

Respondents-Real Parties in Interest.

On petition from decisions of the Arizona Superior Court,
in and for the County of Maricopa; Case no. CV2008-090935

RESPONSE TO PETITION FOR REVIEW OF A SPECIAL ACTION DECISION OF THE COURT OF APPEALS

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I. INTRODUCTION

Pursuant to Rule 23 of the Arizona Rules of Civil Appellate Procedure ("ARCAP"), Respondents and Real Parties in Interest, the Lac Vieux Desert Band of Lake Superior Chippewa Indians Holdings Mexico, LLC ("LVDHM") *et al.* (collectively, "Respondents"), file their response to the Petition for Review of a Special Action Decision of the Court of Appeals filed by Arturo Rojas Cardona, *et al.* (collectively, "Petitioners"). Petitioners have asked that this Court review the Court of Appeals' decision declining special action jurisdiction over the Superior Court's denial of Petitioners' Motions to Dismiss.

Special Action relief is "reserved for 'extraordinary circumstances.'" *Astorga v. Wing,* 211 Ariz. 139, 142, 118 P.3d 1103, 1106 (App. 2006) *review denied* (citation omitted). The Court of Appeals did not err in finding that the Superior Court's denial of Petitioners' Motions to Dismiss called for no such extraordinary remedy. For the reasons stated herein, this Court should exercise its discretion and decline review of the Court of Appeals' decision. If this Court does grant review, it should affirm the Superior Court's Order denying Petitioners' Motions to Dismiss.

II. STATEMENT OF ISSUES

A. Whether the Court of Appeals abused its discretion in declining jurisdiction of Petitioners' Special Action.

B. Whether the Superior Court abused its discretion in denying Petitioners' Motions to Dismiss.

III. STATEMENT OF FACTS

A. Recent Procedural History

On November 20, 2009, Petitioners filed a Petition for Special Action with the Court of Appeals challenging the Superior Court's interlocutory ruling denying Petitioners' Motions to Dismiss for Insufficiency of Service, Lack of Personal Jurisdiction, and Lack of Subject Matter Jurisdiction. On December 16, 2009, the Court of Appeals issued an order declining to accept jurisdiction. The current Petition for Review followed, challenging the Court of Appeals' exercise of discretion.

B. Background of the Transaction

Respondent Lac Vieux Desert Band of Lake Superior Chippewa Indians ("LVD" or the "Tribe") is a small Indian tribe whose reservation is located on the Upper Peninsula of Michigan. (Respondents' Appendix A ("AA") at 1, ¶ 18; AA at 1, Ex. 27, ¶ 1.) Arturo Cardona is the legal representative, manager, and majority shareholder of Entretenimiento de Mexico ("E-MEX"). (AA at 1, ¶ 5.) Juan Cardona, Arturo's brother, is E-MEX's agent and holds himself out as the

verbally agreed to some weeks before the other agreements were later initialed by the parties. (AA at 1, ¶ 51; Exs. 2, 6.) The Tribe agreed to the term sheet because it had already deposited part of its investment into the defendants' bank account and it desired to have something in place to protect it while the specifics of the transaction could be negotiated. (AA at 1, ¶ 52.)

The term sheet states that certain disputes would be arbitrated but also that "[t]he Security and Depository Agreements shall be under the jurisdiction and laws of the State of Arizona, United States." (AA at 1 ¶ 56, Ex. 2 at 3.) The agreements that were drafted after the basic term sheet contained no arbitration provisions. The Security Agreement contains a forum selection clause for resolving "Defaults," stating that the Mexican signatories consent "to the jurisdiction of the Courts of the State of Arizona" and that they agree "that any action or claim arising out of, or any dispute in connection with, this Agreement . . . may be brought in the courts of Arizona." (*Id.*; AA at 1, ¶ 58, Ex. 4, ¶18.) The defendants, after inducing the Tribe's investment, ceased all communications with the Tribe soon after getting their money. They never complied with their agreements and are currently in default. (AA at 1, ¶ 121.) Section 4.2 of the Depository Agreement states that "[t]his Agreement shall be construed in accordance with and governed by the laws of the State of Arizona." (AA at 1, Ex. 3.)

D. Service of Process.

In March 2008, LVDHM filed suit in the United States District Court against the defendants. (AA at 2, ¶ 2.) In April 2008, Juan Cardona, the Tribe's Chairman, and Little Fawn Boland — one of LVDHM's attorneys — met at Juan Cardona's office in Mexico. (AA at 2, ¶ 3.) The address at which Juan Cardona's office is located is the only address that Respondents have ever used for the Petitioners. (AA at 2 ¶ 12.)

During the meeting, Little Fawn Boland observed a Mexican notary personally serve Juan Cardona and an office receptionist with individually addressed summonses and complaints for the District Court action for each of the following: Arturo Cardona, Juan Cardona, E-MEX, JDG, JDM, and ATLICO (collectively, the "Six Defendants"). (AA at 2, ¶¶ 3-4.)

LVDHM dismissed its District Court suit to re-file in the Arizona Superior Court. (AA at 2, ¶ 9.) Service on all the defendants except for the Six Defendants was effectuated. (AA at 2, ¶¶ 9-10.) To properly serve the Six Defendants, LVDHM filed in Superior Court its Motion for Special Service in June 2008, requesting alternate methods of service. (AA at 2, ¶ 10, Ex. 1.) While the motion was pending, the defendants removed the suit to federal court. (AA at 2, ¶ 10.) While at the District Court, LVDHM amended its complaint to add the Tribe as co-plaintiff and to supplement the allegations contained therein. (AA at 2, ¶ 11.) No

additional causes of action or defendants were added. (AA at 1.) Respondents attempted service of the amended complaint and summonses on the Six Defendants via Federal Express, as was specifically provided for on page one of the Security Agreement. (AA at 2, ¶¶ 11-14, Ex. 2.) The address used for service was the same address where all prior communications were sent and where the meeting had been held. (AA at 2, ¶ 12.) Federal Express reported that delivery was "refused." (AA at 2, ¶ 14, Ex. 2.) The documents were also sent to Arturo Cardona's last known addresses in the United States. (AA at 2, ¶ 13.)

In February 2009, the Respondents filed a Motion for Alternate Service at the District Court, which was denied as moot because the suit was remanded to Superior Court. (AA at 2, ¶ 15, Ex. 3.) After remand, Respondents moved the Superior Court, on ex parte application, for an order either (1) deeming Plaintiffs' prior service of the original federal complaint valid and effective as to, among others, the Six Defendants; or (2) permitting alternative methods of service of process pursuant to Arizona Rules of Civil Procedure ("ARCP"), 4.2(i)(1), (3); or (3) permitting additional time in which to serve the Six Defendants, pursuant to ARCP Rule 4(i). (AA at 4.)

The Court held that the Six Defendants must be served by the following methods: by serving the Defendants' attorneys of record via certified mail, by servicing Juan Cardona via his two known email address, and by serving each of

the Six Defendants via Federal Express, return receipt requested. (AA at 5.) The court also determined that service of Arturo Cardona at his last known United States address had already occurred. (*Id.*) The court reaffirmed its order following the defendants' Response to Respondents' ex parte motion and Respondents' Reply. (AA at 6, 12.)

Respondents complied with the Court's Order. The Court deemed service of Arturo Rojas complete as of May 8, 2009. (AA at 5.) The summons and complaint were Federal Expressed to the Six Defendants because no one would accept them at the address. (AA at 2, Ex. 2, ¶ 4; AA at 3, ¶¶ 4.) Plaintiffs sent the documents to the Defendants' attorneys, Randy McCaskill and Michael Reese Davis. (AA at 2, Ex. 2, ¶¶ 8- 10; AA at 3, ¶ F.) Finally, the documents were also emailed to Juan Cardona at both email addresses. (AA at 3, ¶ 6.)

Petitioners then filed their Rule 12(b) Motions to Dismiss for Insufficiency of Process, for Lack of Personal Jurisdiction, and for Lack of Subject Matter Jurisdiction, asserting the same arguments. (AA at 7-9.) After hearing oral argument, the trial court denied the Motion to Dismiss for Insufficiency of Service and for Lack of Subject Matter Jurisdiction and granted the Motion to Dismiss for Lack of Personal Jurisdiction in part and denied it in part, dismissing Nevada Defendants except GRH. (AA at 10, 11.)

IV. ARGUMENT

A. Standard of Review

Supreme Court review should not be sought as a matter of course; rather, this Court's review procedure is intended for those cases in which there is a "tenable claim involving substantial issues of procedure, or in which serious injustice is claimed to have occurred." ARCAP, comment to Rule 23. Further, this Court reviews the Court of Appeals' decision to decline special action jurisdiction for an abuse of discretion and failure to establish such abuse warrants denial of review. Rule 3(c), Arizona Rules of Procedure Special Action ("ARPSA").

B. Petitioners Failed to Establish that the Court of Appeals Abused its Discretion in Declining to Accept Special Action Jurisdiction.

The acceptance of jurisdiction of a petition for special action is appropriate only for issues of first impression involving purely legal questions of statewide importance that are likely to arise again. *Vo v. Superior Court,* 172 Ariz. 195, 198, 836 P.2d 408, 411 (App. 1992). Furthermore, in order to qualify, Petitioners must demonstrate that they lack an "equally plain, speedy and adequate remedy by appeal." Rule 1(a), ARPSA. This Court has held that "appeal after judgment usually is an adequate remedy if the trial court has erred on the law in denying motions to dismiss . . . ." *United States v. Superior Court,* 144 Ariz. 265, 269; 697 P.2d 658, 662 (1985). "A remedy does not become inadequate merely because

more time would transpire by pursuing a conventional action." *Neary v. Frantz,* 141 Ariz. 171, 177; 685 P.2d 1323, 1329 (App. 1984).

This Court has also noted its adherence to "a general policy of declining jurisdiction when relief by special action is sought to obtain review of orders denying motions to dismiss." *Citizen Publishing Co. v. Miller,* 210 Ariz. 513, 516, 115 P.3d 107, 110 (2005) (citation omitted). The rationale behind such a policy is recognition that "special action review of such interlocutory rulings 'often frustrates the expeditious resolution of claims, unnecessarily increases both appellate court caseload and interference with trial judges, harasses litigants with prolonged and costly appeals, and provides piecemeal review.'" *Id.* (citation omitted). As a result, this Court "will rarely review the court of appeals' discretionary refusal to accept jurisdiction of a special action challenging the denial of a motion to dismiss . . . ." *Citizen Publishing Co.*, 210 Ariz. at 516, 115 P.3d at 110.

This Court should uphold the Court of Appeals' discretion to reject special action review. It was adhering to its policy of declining special action review of motions to dismiss because this case does not warrant such extraordinary measures. Moreover, the issues here do not cover new issues of law. Furthermore, the fact-specific circumstances involved here are particular to the dispute between the parties and are therefore not of statewide importance likely to arise again. In

addition, Petitioners have "an equally plain, speedy, and adequate remedy by appeal."

We note that Petitioners neither argued nor established that the Court of Appeals abused its discretion in declining to accept special action jurisdiction. Under ARPSA Rule 3(c) it is an issue that must be raised. This alone justifies this Court's denial of review. Had Petitioners made such an argument, it would have been unconvincing because the Court of Appeals acted within its discretion.

Finally, this Court should also decline review because the Petition for Review is procedurally flawed. Petitioners' Petition for Review fails to meet the requirements of Rule 23(c), ARCAP, as it lacks the requisite attachment of the Superior Court's decision from which the Petition for Special Action was taken. Further, Petitioners failed to file with this Court and serve upon Respondents the Appendix to which they heavily cite in their Petition for Review, as required by ARCAP Rule 23(c) and (e). These substantial procedural errors in Petitioners' Petition for Review further demonstrate why review should be denied.

The Court of Appeals properly declined jurisdiction over Petitioners' Special Action, and Respondents urge that this Court to deny review of its decision.

C. Petitioners Failed to Establish that the Trial Court Abused its Discretion in Denying Defendants' Motions to Dismiss.

Should this Court grant review of the Petition and reach the merits of the Superior Court's decision, it should affirm the Superior Court's Order, as the

Superior Court acted within its authority.

Special action jurisdiction is appropriate only if the case involves a question as to whether the Court of Appeals rendered a decision that was arbitrary and capricious or an abuse of discretion." Rule 3(c), ARPSA. Abuse of discretion means "discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Quigley v. City Court of the City of Tucson* 132 Ariz. 35, 37, 643 P.2d 738, 740 (App. 1982). A trial court does not abuse its discretion in denying a motion to dismiss without detailed findings. *See Wigglesworth v. Mauldin,* 195, Ariz. 432, 990 P.2d 26 (App. 1999).

Petitioners' arguments do not meet these high standards for reversal. The Superior Court acted well within its authority and adhered to applicable law and this Court should affirm the Superior Court's decision should it decide to grant review. The arguments elaborated in Petitioners' Response to Special Action before the Court of Appeals shall be incorporated by reference herein. (AA at 13).

1. The Superior Court properly denied Petitioners' Motion to Dismiss for Insufficiency of Service of Process

Respondents adhered to applicable law, as well as the Superior Court's Order, in their service of process on Petitioners. In its denial of Petitioners' Motion to Dismiss, the Superior Court correctly determined that Respondents' efforts were not prohibited by international agreement and that Rule 4.2(i)(3), ARCP, provided the Court with discretion to order alternative service methods that

were reasonably calculated to give Defendants notice of the proceedings. It was within the Superior Court's discretion, therefore, to hold that court-authorized substitute service consisting of a combination of service by mail, by international courier, by email, and on counsel was sufficient when (1) the prior attempt by a method agreed to by the parties was evaded; (2) personal service of the original complaint in District Court that named the same defendants and consisted of the same causes of action as the Superior Court complaint had been effectuated; and (3) the complaint for each Petitioner had been mailed to the last three known U.S. addresses for one of the two individually-named defendants who also acts as managing partner of each of the named corporate Petitioners and those summonses and complaints were not returned as refused or as undeliverable. Therefore, the Superior Court exercised reasonable discretion in deeming service effective as to Petitioners and properly denied Petitioners' Motion to Dismiss.

2. The Superior Court properly denied Petitioners' Motion to Dismiss for Lack of Personal Jurisdiction.

The Superior Court appropriately recognized that Arizona courts retained personal jurisdiction over Juan Cardona because he consented to such jurisdiction. Although Petitioners allege that the Superior Court "plowed new ground," the Superior Court acted in accordance with applicable law in determining that Mr. Cardona's participation in the transaction made him so closely related that he could be bound to the forum selection clause, which he negotiated and offered to

Plaintiffs to induce them to invest.

One of the activities by which a defendant allows "a court to assert personal jurisdiction over that defendant . . . [is] consent." *Morgan Bank v. Wilson*, 164 Ariz. 535, 537; 794 P.2d 959, 961 (App. 1990). "A litigant may enter into a variety of legal arrangements in which express or implied consent to the personal jurisdiction of the court is given." *Id.* A forum selection clause may bind and be enforceable against contracting parties and others so closely related to the transaction that they should be subject to the clause. *TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990) (citation omitted); *Hillis v. Heineman*, 2009 U.S. Dist. LEXIS 64868, at * 7-5 (D. Ariz. July 23, 2009) (holding that forum selection clause will be enforced against non-party if non-party's "alleged conducts is 'so closely related to the contractual relationship' that the clause should apply to it, as well) (citation omitted).

The Superior Court correctly found that Juan Cardona was bound by the forum selection clause. Juan Cardona was so closely related to the transaction that he should have foreseen that he would be bound to the forum selection clauses consenting to jurisdiction in the contracts. (AA at 1, ¶¶ 4-5, 16, 19, 21-24, 26, 51, 62, 64, 73, 75-81, 86-88, 93, 94, 101, 116-118, 123, 129, 134.) Juan Cardona solicited LVD's participation in the transaction, signed a letter of intent, negotiated the terms of the agreements, acted as agent for all the Defendants, handled day-to-

day operations of the companies, and served as Respondents' only point of contact from the time they made their investment until inception of this litigation. (*Id.*) He had access to the bank account to which the Respondents wired their funds. (*Id.*) Every major decision concerning this transaction was made by Juan Cardona. Therefore, the Superior Court correctly found that Juan Cardona consented to Arizona jurisdiction by way of a forum selection clause and properly denied Petitioners' Motion to Dismiss.

3. The Superior Court properly denied Petitioners' Motion to Dismiss for Lack of Subject Matter Jurisdiction.

The Superior Court also correctly determined that Arizona courts have subject matter jurisdiction over this dispute because the Security and Depository Agreements do not contain provisions requiring arbitration. The Superior Court correctly recognized that the unexecuted term sheet, upon which Petitioners heavily rely, was superseded by the executed Security and Depository Agreements, which explicitly provide Arizona Courts with jurisdiction over precisely the dispute at hand. (AA at 1, Exs. 3, 4, and 27).

Respondents are seeking to enforce the terms of the Security and Depository Agreements, triggering their provisions. (AA at 1, ¶¶ 142-146, 149-152.); (AA at 1, Ex. 3, §§2.1, 2.3; AA at 1, Ex. 4, ¶ 5.) Because the Depository Agreement and Security Agreement forum selection clauses govern this dispute, the Superior Court properly found that Arizona courts have subject matter jurisdiction over this

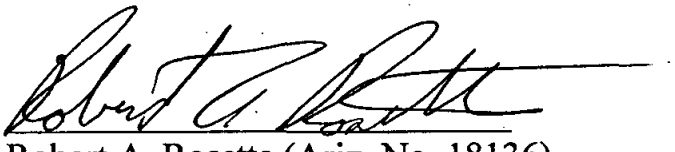
dispute. Even if the term sheet governed, its arbitration provision would be inapplicable because the term sheet carves out an exception for disputes arising under the Security and Depository Agreements. (AA at 1, Ex. 2, p. 3). Thus, should this Court reach the merits of the Special Action, the Superior Court correctly denied Petitioners' Motion to Dismiss for Lack of Subject Matter Jurisdiction.

IV. CONCLUSION

This Court should decline review of the Court of Appeals' decision not to exercise special action jurisdiction over the denial of Petitioners' Motions to Dismiss. To the extent that it grants review, the Court should affirm the Superior Court's Order denying the Petitioners' Motions to Dismiss. Respondents further respectfully request that the Court order an award of attorneys' fees and costs incurred herein and in the proceedings below pursuant to A.R.S. 12-341.01, Rule 21(c), ARCAP, and Rule 4(g), ARPSA.

RESPECTFULLY SUBMITTED this 18th day of February, 2010.

ROSETTE & ASSOCIATES, PC

By: 

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CERTIFICATE OF COMPLIANCE

Pursuant to Arizona Rules of Civil Appellate Procedure, Rules 23(c), 23(e) and 6(c), the undersigned hereby certifies that the above Response to Petition for Review is proportionately spaced, has a typeface of 14 points, and contains approximately 3,431 words.

DATED this 18th day of February, 2010.

ROSETTE & ASSOCIATES, PC

By: 

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DECLARATION OF SERVICE

I, ROBERT A. ROSETTE, declare as follows:

I am one of the attorneys representing Respondents-Real Parties in Interest LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS HOLDINGS MEXICO, LLC, a Corporate Enterprise of the Lac Vieux Desert Band of Lake Superior Chippewa Indians, a federally recognized Indian Tribe; and LAC VIEW DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally recognized Indian Tribe, over the age of 18, and am competent to make this declaration.

In accordance with ARCAP, Rules 6(c) and 23(e), I caused to be served the original and seven copies of the Response to Petition for Review of a Special Action Decision of the Court of Appeals and the original and two copies of Appendix A to the Response to Petition for Review of a Special Action Decision of the Court of Appeals via hand-delivery to:

Office of the Clerk
Supreme Court of Arizona
1501 West Washington
Phoenix, Arizona 85007

And in accordance with ARCAP, Rules 6(c) and 23(e), I caused to be served via U.S. Mail one copy each of the Response to Petition for Review and Appendix A to the Response to Petition for Review on this day to the following parties:

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AND

The Honorable Joseph Kreamer
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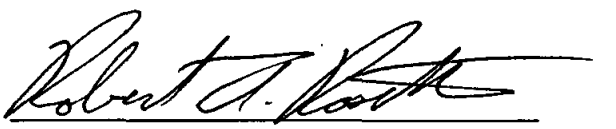
I declare under penalty of perjury under the laws of the State of Arizona that the foregoing is true and correct.

DATED at Chandler, Arizona this 18th day of February, 2010.



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