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

WELLS FARGO BANK, Plaintiff. vs. LOUIS MAYNAHONAH, MARQUITA CARATTINI, KAREN HEMINOKEKY, in their official capacities as members of the Apache Business Committee, GENE FLUTE, RONALD AHTONE, JR., and AUSTIN KLINEKOLE, in their official capacities as members of the Apache Gaming Commission; and RICHARD J. GRELLNER, in his official capacity as hearing officer for the Apache Gaming Commission Defendants.	)	**C**ase No. CIV-11-648-D

DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

Federal Rules

Defendants Louis Maynahonah, Marquita Carattini, and Karen Heminokeky, sued in their official capacities as members of the Business Committee of Apache Tribe of Oklahoma ("the Business Committee defendants"), joined by Defendants Ronald Ahtone, Jr., Austin Klinekole, and Richard Grellner[1], in their official capacities as members of the Apache Gaming Commission ("the Gaming Commission" defendants) respectfully request this Court to dismiss Wells Fargo Bank, NA's ("Wells Fargo") Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, and Fed R. Civ. P. 12(b)(6) for failure to state a claim, and alternatively to stay this action pending exhaustion of tribal remedies.

Introduction:

This action should be dismissed as (1) the plaintiff has not yet exhausted any tribal remedies and seek an injunction from appearing before a hearing at which no decisions will be made, (2) the doctrine of *Ex Parte Young* only provides jurisdiction over a sovereign such as the Business Committee for prospective injunctive relief, (4) the Amended Complaint fails to state a claim upon which relief may be granted.

The Amended Complaint bears little resemblance to the Complaint filed by Wells Fargo initiating this action. The Amended Complaint seeks to restrain the Apache Tribe's regulatory agency from performing its statutorily mandated duty in the Tribe's Indian country. Wells Fargo was first notified of the Gaming Commission's concerns regarding its relationship with TGS Anadarko, LLC (which remains a non-party, though the only

[1] Defendant Gene Flute is no longer a member of the Apache Gaming Commission and as a result should not be a party defendant.

issues set for hearing on July 26, 2011 before the Gaming Commission involve only TGS and not Wells Fargo) in April, 2011. The hearing which Wells Fargo seeks to permanently enjoin was originally scheduled for May, 2011 and then re-scheduled to accommodate scheduling conflicts. Yet when Wells Fargo initiated this lawsuit in the Complaint, it did not seek any relief as to the Gaming Commission defendants.

The Tribe is charged by the Indian Gaming Regulatory Act and the State Compact with licensing vendors and certain financiers who do business with its casinos. The duty to regulate may not be delegated. Sate Compact, Part 7(A). Wells Fargo does business with the Tribe's casinos. TGS Anadarko does business with the Tribe's casinos. These basic facts are not in dispute. Wells Fargo and its cohort TGS would argue, however, that the Tribe can and has subcontracted its licensing authority to private arbitration. Wells Fargo is wrong, and in any event, at the very least it is required to allow the Tribe's institutions to rule upon the regulatory issues first before attempting any review in the federal courts.

The claims against the Business Committee defendants relating to the actions of the Tribal Forum seek relief which is not prospective in nature and which require a separate waiver of sovereign immunity which is no longer alleged in the Amended Complaint.

This Court should dismiss the claims or alternatively stay this action pending exhaustion of tribal remedies.

Standard of Review:

A complaint may be dismissed for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). *See e.g., Thomas v. Metro Life Ins. Co.*, 540 F. Supp. 2d 1212, 1217 (W.D. Okla. 2008). "The burden of establishing jurisdiction rests squarely on the shoulders of the party claiming it." *See e.g., Southway Central Bank of Nigeria*, 328 F.3d 1267, 1274 (10th Cir. 2003). *See also* Fed. R. Civ. P. 8(a)(1) (noting that a pleading must contain "a short and plain statement of the grounds for the court's jurisdiction"). A complaint may also be dismissed for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). A claim may be dismissed pursuant to Rule 12(b)(6) when "the claim is premised upon an unrecognized legal theory of liability or the complaint fails to contain sufficient facts, either direct or inferential, that support each element of a legally cognizable claim." *See e.g., Debt Exchange, Inc. v. Blount*, No. CIV-07-788, 2008 WL 548827, * 2 (W.D. Okla. Feb. 26, 2008). Federal Rules 12(b)(1) and 12(b)(6) are subject to the same standard of review, *i.e.*, "the allegations of the complaint should be construed favorably to the pleader." *See e.g., Thomas*, 504 F. Supp. 2d at 1217.

This motion to dismiss contains a request to dismiss certain claims pursuant to 12(b)(1) for sovereign immunity (all claims which are not prospective in nature), and failure to exhaust tribal remedies (claims against the Gaming Commission defendants), and seeks dismissal of the remaining claims for 12(b)(6) failure to state a claim upon which relief may be granted. Alternatively, should this Court not dismiss this action or certain claims, this action should be stayed pending exhaustion of tribal remedies.

ARGUMENT AND AUTHORITIES

1. The causes of action relating to the Gaming Commission defendants should be dismissed or stayed pending exhaustion of tribal remedies.

a. The strong federal policy of supporting self-government requires this Court as a matter of comity to allow tribal forums to determine their own jurisdiction.

Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal self government. *See Montana v. United States*, 450 U.S. 544, 565-566; *Fisher v. District Court*, 424 U.S. 382, 387-89 (1976). More accurately, in Oklahoma and pertinent to this case, the Tribe's authority to regulate and license casino gaming within its Indian Country is a vital issue to self-government and specifically conferred by federal law. Exhaustion of tribal remedies "is mandatory, however, when a case fits within the policy" *Gaming World Intern., Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 849 (8th Cir. 2003) *citing Duncan Energy Co. v. Three Affiliated Tribes*, 27 F.3d 1294, 1300 (8th Cir. 1994).

The purpose of the tribal exhaustion doctrine has been explained by the United States Supreme Court as follows:

> [T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.
>
> We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination.

> That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal basis for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed. The risks of the kind of "procedural nightmare" that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine his own jurisdiction and to rectify any errors it may have made. Exhaustion of tribal court remedies, moreover, will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.

National Farmers Union v. Crow Tribe of Indians, 471 U.S. 845, 855-56. In *Iowa v. Mut. Ins. Co. v. LaPlante*, the Supreme Court affirmatively recognized that jurisdiction over non-Indians doing business on tribal land is an integral component of tribal sovereignty:

> Tribal authority over the activities of non-Indians of reservation lands is an important part of tribal sovereignty . . . Civil jurisdiction over such activities presumptively lies in the tribal courts **unless affirmatively limited** by a specific treaty or federal statute.

480 U.S. 9, 18 (1987) (emphasis added). In this matter, as to the Gaming Commission defendants, the inverse is true and the tribe has an express statutory delegation of authority from Congress regarding the activity of non-members within its Indian country conducting business with its gaming enterprises.

Exhaustion is necessary when tribal entities are involved in a dispute arising on the reservation, and questions of tribal law are raised. *See Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1420 (8th Cir. 1996) ("In this case many of the parties are Tribal entities or members and the dispute arises from Tribal governmental activity

involving a project located within the borders of the reservation. Under these facts, exhaustion of tribal remedies is especially appropriate."). A federal district court "has **no discretion** to relieve a litigant from the duty to exhaust tribal remedies prior to proceeding in federal court." *Allstate Indemnity Co. v. Stump*, 191 F.3d 1071, 1073 (9th Cir. 1999). *amended*, 197 F.3d 1031 (9th Cir. 1999) (emphasis added). "A federal court must give the tribal court a full opportunity to determine its own jurisdiction, which includes exhausting opportunities for appellate review in tribal courts." *Boozer v. Wilder*, 381 F.3d 931, 935 (9th Cir. 2004). "[t]he tribal exhaustion doctrine holds that when a colorable claim of tribal court jurisdiction has been asserted, a federal court may (and ordinarily should) give the tribal court precedence and afford it a full and fair opportunity to determine the extent of its own jurisdiction over a particular claim or set of claims." *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 31 (1st Cir. 2000) (citations omitted). For example, a non-Indian's contention that there is no tribal court jurisdiction in management of an off-reservation bank account must "first be heard in tribal court." *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1170-71 (10th Cir. 1992). *See also, United States v. Tsosie*, 849 F.2d 768, 770 (D.N.M. 1994) (sue sponte dismissal on tribal exhaustion grounds).

The Tenth Circuit requires exhaustion of tribal remedies in almost all instances. *See, e.g., Brown v. Washoe Housing Authority*, 835 F.2d 1327, 1327-28 (10th Cir. 1988) (sua sponte dismissal due to tribal exhaustion); *Smith v. Moffett*, 947 F.2d 442, 443-44 (10th Cir. 1991); *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1170-71 (10th Cir. 1992) (interpleader regarding off-reservation accounts does not warrant

exception to tribal exhaustion); *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1501 (10th Cir.1997) (affirming stay of federal court proceedings to allow tribal court to determine its own jurisdiction). In *Pittsburg & Midway Coal Mining Co. v. Watchman,* 52 F.3d 1531 (10th Cir. 1995) the plaintiff challenged the Navajo Nation's taxation of its revenues from off-reservation coal mining which the Tribe contended still occurred in its Indian Country. 18 U.S.C. § 1151. The Tenth Circuit held, "[t]he policies behind abstention are most strongly implicated when a federal court action is brought after a tribal court action has already been filed." *Pittsburg & Midway Coal Mining Co. v. Watchman,* 52 F.3d 1531 (10th Cir. 1995). Even though the location of the activity and taxation was in dispute, the Circuit clearly held that "the district court must abstain if the South McKinley Mine lies within Indian country." *Id*. at 1539. The Tenth Circuit cases reflect that abstention is *mandatory* for issues arising in Indian country. In off-reservation cases, at least in cases challenging assertions of critical tribal powers, abstention may be required whenever the lands in question lie within "Indian country."

As to the relief sought regarding the Gaming Commission defendants, tribal exhaustion is required as an action is pending, the tribal forum has not ruled upon its own jurisdiction, and appeal rights have not been exercised yet by the plaintiffs. "Under the doctrine of exhaustion of tribal court remedies, relief may not be sought in federal court until appellate review of a pending matter in a tribal court is complete." *Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008); *See also, Gaming World International, Ltd. v. White Earth Band of Chippewa*, 317 F.3d 840, 849 (8th Cir.

2003) ("The issue of tribal exhaustion is a threshold one because it determines the appropriate forum.").

b. Exceptions to the tribal exhaustion doctrine are not present.

There are only three exceptions to the tribal exhaustion doctrine permitted by the Supreme Court. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856 fn. 21 (1985) ("Exhaustion would not be required where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile...."). As restated by the Eighth Circuit, "[e]xhaustion is not required if an assertion of tribal jurisdiction is motive by a desire to harass or is conducted in bad faith, if the action is patently violative of express jurisdictional prohibitions, or if exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510, 516 (8th Cir. 1989).

If an exception is not present then, "the tribal court **must** have the first opportunity to address all issues within its jurisdiction." *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916, 921 (9th Cir. 2008) (emphasis added). This includes any tribal appeals process. *Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008). The Amended Complaint does not specifically plead an exception to exhaustion, though it does argue the Tribe is without jurisdiction over Wells Fargo.

The Tribe's officers assert jurisdiction over Wells Fargo for its conduct within the gaming enterprise of the Apache Tribe which occurs entirely within the Tribe's Indian

Country. Unlike the original form of this lawsuit, Wells Fargo pointedly does not argue that the Tribe has contractually waived any doctrine of tribal exhaustion. Nevertheless, none of the exceptions to exhaustion exist. First, Wells Fargo has no proof of the how the Gaming Commission will rule as Wells Fargo seeks to prevent the Gaming Commission from ruling. It is entirely plausible that the Hearing Officer will recommend and the Commissioners will enter an order stating that Wells Fargo is not subject to the jurisdiction of the Gaming Commission. Second, and perhaps more importantly, federal, state, and Apache law confer upon the Gaming Commission the express jurisdiction to determine licensing issues in the Tribe's Indian country. Furthermore, it is expressly contemplated by IGRA and the State Compact that the Gaming Commission will license non-members of the Tribe to perform services with the Tribe's gaming enterprises. As noted by the Court of Appeals for the Eighth Circuit:

> Subject to congressional divestment, the nation has a great interest in not having its decisions questioned by the tribunal of another sovereign. IGRA reflects the intent of Congress that tribes maintain considerable control of gaming to further their economic and political development. The nation established the gaming commission as its licensing body under IGRA and prescribed the procedures to be used by the commission under the nation's gaming ordinance. The nation also has an appeals process which the management companies used in this action against the tribe. **Nothing in the structure created by IGRA or in the tribal-state compact here suggests that the management companies should have the right to use state law to challenge the outcome of an internal governmental decision by the nation**.

Gaming Corp. of Am. v. Dorsey & Whitney, 88 F.3d 536, 549 (8th Cir. 1996) (emphasis added). Wells Fargo cannot prove an exception to exhaustion where the Tribe has an

exclusive grant of jurisdiction over non-members from Congress, where the regulated activity takes place in the Tribe's Indian country, and where Wells Fargo seeks to even allow the Tribe's officers from ruling on their own jurisdiction.

Notably, while Wells Fargo places great emphasis on the perceived bias of the tribal officials, allegations of bias do not excuse exhaustion. *See Burrell v. Armijo*, 456 F. 3d 1159, 1168 (10th Cir. 2006) (citing *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987) ("Allegations of local bias and tribal court incompetence, however, are not exceptions to the exhaustion requirement."). In this case, there is no evidence or harassment or bad faith, and even if there were, Tenth Circuit precedent dictates that the issue of bad faith must first be litigated in the tribal forum. *See Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1171 (10th Cir. 1992). There is no federal common law or statute prohibiting jurisdiction by the Gaming Commission over regulatory matters. Indeed, the State Compact mandates jurisdiction. State Compact, Part 7(A). And Wells Fargo cannot show futility because it has not even allowed the Commission to rule on its own jurisdiction. *See id.* (quoting *White v. Pueblo of San Juan*, 728 F.2d 1307, 1313 (10th Cir. 1984)) ("'[***S]peculative futility is not enough to justify federal jurisdiction.' The Bank cannot simply assert that it is not subject to tribal court jurisdiction; rather, it must actually seek adjudication of this issue in tribal court.***") (emphasis added); *see also Brunette v. Dann*, 417 F. Supp. 1382, 1386 (D. Ida. 1976) ("[F]utility cannot be established in the face of a deliberate bypass of tribal remedies that are explicitly provided in its system of judicial administration.")

c. Exhaustion includes any appeal of a Gaming Commission ruling to the proper tribal institution.

All tribal remedies, including an appeal if available, must be exhausted. See, e.g. *Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008) (requiring tribal appeal rights to be exhausted). Even though the Gaming Commission is a regulatory and hence quasi-judicial body, tribal exhaustion still applies. "Nonjudicial tribal institutions have also been recognized as competent law-applying bodies." *See Santa Clara Pueblo v. Martinez*, 436 U.S. 40, 65-66 (1978) *citing United States v. Mazurie*, 419 U.S. 544 (1975). The defendants request that all relief as to the Gaming Commission defendants be dismissed or alternatively stayed pending exhaustion of tribal remedies by plaintiff. The relief sought against the Business Committee defendants does not require exhaustion, as the order entered by the Tribal Forum is final and not subject to appeal. However, this Court should not entertain the declaratory and injunctive relief sought which is retrospective in nature and not within the doctrine of *Ex Parte Young*.

2. The claims against the Gaming Commission defendants should be dismissed for failure to state a claim upon which relief may be granted as Congress confers power on Indian tribes to regulate non-members participating in the tribal casino business.

As partially stated above, this Court lacks jurisdiction because casino licensing in Indian country (even over non-members) is a tribal matter. State Compact, Part 7(A). The Apache Gaming Commission 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 tribal licensing process is required and regulated by IGRA. Tribes must submit the results of the required background checks to the NIGC. 25 U.S.C. §§ 2710(d)(1)(A)(ii), 2710(b)(2)(F)(ii). IGRA specifically provides, "**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) (emphasis added). IGRA further provides, "Nothing in this chapter precludes an Indian tribe from exercising regulatory authority provided under tribal law over a gaming establishment within the Indian tribe's jurisdiction if such regulation is not inconsistent with this chapter or with any rules or regulations adopted by the Commission." 25 U.S.C. § 2713(d). The Eighth Circuit has held that IGRA completely preempts any attempt to apply state-law in Indian country absent a compact. See, e.g., *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 550 (8th Cir. 1996). Congress in enacting a regulatory scheme for Indian gaming, provided that the Tribe's would have an exclusive role to regulate along with the NIGC. As Congress has provided an express grant of jurisdiction to the Tribe over non-members, this Court cannot provide any relief to the plaintiff which would provide thwart Congress' intent by privatizing regulation of gaming in Indian country.

3. Relief under the Declaratory Judgment Act is a matter of discretion.

Relief under the Declaratory Judgment Act is discretionary. "Since its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and

substantial discretion in deciding whether to declare the rights of litigants." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995). The statute itself states that a federal district court "*may* declare the rights and other legal relations of any interested party seeking such declaration, . . ." 28 U.S.C. § 2201(a) (emphasis added). It is, "an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant." *Wilton*, 515 U.S. 277, 287. (citations omitted). Prior to entertaining declaratory relief, this Court must determine both its own jurisdiction and perform an analysis under the tribal exhaustion doctrine. As declaratory relief of any kind is discretionary, this Court should require Wells Fargo to exhaust all tribal remedies before entertaining such relief.

4. The claims against the Business Committee defendants should be dismissed as the Amended Complaint does not allege an on-going violation of federal law.

The defendants disagree with the Tenth Circuit's holding in *Crowe & Dunlevy, PC v. Stidham*, 640 P.3d 1140 (10th Cir. 2011) (decided days prior to the first hearing in this matter) and its application of the judicially created exception to sovereign immunity found in *Ex Parte Young*, 209 U.S. 123 (1908) to Indian tribes. However, the opinion inarguably binds this Court until such time as it is abrogated by a subsequent decision by the Circuit or the Supreme Court.[2] However, under *Crowe* and *Ex Parte Young*, any claim which does not allege a continuing violation of federal law and which seeks

[2] In applying *Ex Parte Young* to tribal officials the Circuit did not address the inconsistency thereby created wherein past Supreme Court precedent holds that the U.S. Constitution which the exception of Congress' plenary power, does not apply to tribal governments. The Indian Civil Rights Act exists for that reason. The application of Ex Parte Young may allow the wholesale application of federal law in Indian country without the express direction of Congress.

prospective relief must be dismissed due to the Tribal officials' sovereign immunity from suit.

"Because the jurisdiction of federal courts is limited, there is a presumption against our jurisdiction, and the party invoking federal jurisdiction bears the burden of proof." *Marcus v. Kan. Dept. of Revenue*, 170 F.3d 1305, 1309 (10th Cir.1999) (quotation omitted). "Tribal sovereign immunity is a matter of subject matter jurisdiction, and the plaintiffs bear the burden of establishing the court's jurisdiction by a preponderance of the evidence." *Murphy v. Kickapoo Tribe of Okla.*, No. 07-0118, 2007 WL 3392301, at * 1 (W.D. Okla. Nov. 8, 2007) (internal citations omitted). "Courts have long recognized that Indian tribes possess common law immunity from lawsuits." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Furthermore, "[t]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998); *See also Berrey v. Asarco Inc.*, 439 F.3d 636, 643 (10th Cir. 2006) (holding that federally-recognized Indian tribes possess immunity from suit in federal court).

There is no continuing violation of federal law for which the plaintiff seeks relief as to the actions by the Tribal Forum. The Supreme Court recognizes that where there "was no threat of state officials violating the repealed law in the future," the Eleventh Amendment prohibited the issuance of a declaratory judgment to adjudicate past violations of federal law. *Green v. Mansour*, 474 U.S. 64, 68 (1985); *see Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73 (1996) "The federal court may award an injunction

that governs the official's future conduct, but not one that awards retroactive monetary relief." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102-03 (1984). To determine whether a complaint states a claim for prospective rather than retrospective relief, this Court, "need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (internal quotation marks omitted).

The "Final Order" entered by the Tribal Forum is final in all respects as to the Tribe. The Tribal Forum has nothing else to do. The Tribal Forum has no additional means or power to enforce the order within its Indian Country. Declaratory relief that the order is "null and void" or to prevent "further action" on the Tribe's motion is not designed to stop a continuing violation of federal law, but to reverse an action which occurred in the past. The Amended Complaint seeks a declaration that the (1) Final Order and June 1 Order are null and void. As the Tribal Forum has already entered those orders any declaration of invalidity would be retrospective relief which would not end a continuing violation of federal law. [Amended Complaint at ¶ 97]. Likewise, a declaration from this Court that the Tribal Forum lacks jurisdiction over Wells Fargo, or that the Tribal Forum did not have jurisdiction to issue its orders, would not stop a continuing violation of federal law. *Id.* Wells Fargo also seeks a declaratory judgment that the Tribal Forum does not have authority to hold a hearing on the Tribe's Motion. Such relief is moot and again is retrospective as the Tribal Forum has not held a hearing when Wells Fargo did not submit briefing or a written objection as required by its June 1

Order. (The filing of this lawsuit is certainly an objection but it was not a written objection directed to the Tribal Forum to determine its own jurisdiction, as the original Complaint was a lawsuit asking this Court to hold that the Tribal Forum lacked jurisdiction). Wells Fargo's fifth request for declaratory relief is merely a restatement of the fourth numbered request in paragraph 97 of the Amended Complaint which seeks retrospective relief, but which further seems to imply that the Apache Tribe is without power to amend its own legislation.

Wells Fargo's cause of action for permanent injunction as to the Business Committee defendants for permanent injunction is moot. Paragraph 110 of the Amended Complaint seeks a permanent injunction to "enjoin the Business Committee Defendants from enforcing their Final Order.." As noted above, the Business Committee has no means to enforce the order. Wells Fargo also seeks to enjoin the defendants "from in any other way proceeding on its Motion.." while the Tribe does not intend or need to proceed on its Motion. Wells Fargo seeks to restrain action by the Tribe in the "Tribal Forum" which has already occurred. As such, the relief sought is retrospective and not intended to end a continuing violation of federal common law.

The Tribe would agree that the relief sought as to the Gaming Commission defendants is prospective as the Gaming Commission seeks to hold a hearing, enter a decision on the licensing issues presented, and provide opportunity for an appeal of any decision as allowed by the Commission's Policies and Procedures.

Conclusion

This action is quite unlike the original Complaint. The Amended Complaint seeks relief as to an act by a Tribal Forum which has already occurred and for which no other action need be taken in Indian country. As nothing is left to do in Indian country the Amended Complaint does not allege a continuing violation of federal law (the unlawful exercise of tribal court or "Tribal Forum" jurisdiction over non-member plaintiff) and the claims against the Business Committee should be dismissed. The claims against the Gaming Commission defendants seek to prevent the regulatory work of the Tribe from proceeding which occurs under a clear grant of jurisdiction from Congress. The claims against the Gaming Commission defendants should be dismissed for failure to state a claim, failure to exhaust tribal remedies, or alternatively, stayed under the Gaming Commission can complete its work.

The defendants respectfully request that the Court dismiss this action, or in the alternative, stay the action to allow for the exhaustion of tribal remedies.

Respectfully submitted,

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* Signed by filer with permission

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 21, 2011, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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