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

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| (1)Wells Fargo Bank, National Association,<br><br>Plaintiff,<br><br>vs.<br><br>(1)Louis Maynahonah, (2) Marquita Carattini, and (3) Karen Heminokeky, in their official capacities as members of the Apache Business Committee; (4) Gene Flute, (5) Ronald Ahtone, Jr., and (6) Austin Klinekole in their official capacities as members of the Apache Gaming Commission; and (7) Richard J. Grellner, in his official capacity as hearing officer for the Apache Gaming Commission,<br><br>Defendants. | Case No. CIV-11-648-D |

**PLAINTIFF'S EMERGENCY MOTION**
**FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND OPENING BRIEF IN SUPPORT**

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## INTRODUCTION

Four weeks ago, Wells Fargo Bank, National Association ("Wells Fargo") sought immediate injunctive relief to prevent the Tribe's Business Committee from issuing an order purporting to vacate the arbitration award that Judge Brett had issued against the Tribe. But the Business Committee then issued the order before this Court had a chance to act. Rather than allow for Wells Fargo's motion to be heard, the Business Committee precluded any possibility of judicial intervention.

Now the Business Committee again seeks to take matters into its own hands, as it attempts to be not only the party asserting claims in a dispute, but also the ultimate adjudicator. When the newly-elected Business Committee caused the Tribe to default on the Casino Loan that was the subject of the arbitration before Judge Brett, it also caused the Tribe to default on its equipment lease (the "Lease"). Pursuant to this Lease, the Tribe leased slot machines and other equipment from TGS Anadarko, LLC ("TGS"). Wells Fargo loaned TGS the funds used to buy the machines that were leased to the Tribe, and holds a security interest in the Lease and the gaming equipment.

Wells Fargo and TGS recently commenced arbitration against the Tribe for the ongoing payment default under the Lease. In an effort to avoid arbitration before a panel of neutral decision-makers, however, the Business Committee caused its counsel to file with the Tribe's Gaming Commission a purported "Petition for License Review." The Business Committee seeks to have an arm of the Tribe make findings and inflict penalties on Wells Fargo and TGS that would free the Tribe of its obligations under the Lease. The Gaming Commission has scheduled a hearing for Friday, July 22, 2011. Any appeal

from the Gaming Commission would go directly to the Business Committee, whose decision "shall be final and not otherwise reviewable."

The Tribe agreed, however, that any dispute related to the Lease shall be resolved by a panel of experienced, third-party arbitrators. More to the point, the Tribe agreed that the arbitrators themselves shall determine whether a claim is subject to arbitration. As a result, as an arm of the Tribe, the Apache Gaming Commission lacks jurisdiction to resolve the disputes at issue in the "Petition for License Review."

This Court should issue immediate injunctive relief that precludes the members of the Apache Gaming Commission and its Hearing Officer (collectively, the "Gaming Commission Defendants") from: (1) proceeding with any hearing on the "Petition for License Review"; (2) granting any of the relief requested therein; and (3) issuing any order or taking any action with respect to Wells Fargo or TGS, including but not limited to retention of the machines by the Tribe, cancellation of the Lease, and disgorgement of rent payments received.

## FACTUAL BACKGROUND

### A. The Business Committee Appoints And Oversees The Apache Gaming Commission, Which Is An Arm Of The Tribe.

The Apache Gaming Commission is an agency of the Tribe, and is responsible for the regulation of tribal gaming operations. (Tribal Gaming Ordinance § 108(a) (Ex. 30) (Exs. 1-31 referenced herein are exhibits to the Amended Complaint, Doc. 25.) Gaming Commissioners are appointed by the Business Committee and serve three-year terms, with no restriction on re-appointment. (*Id.* § 108(d), (h), (i).)

Among other things, the Gaming Commission issues licenses to casino employees and gaming vendors. Federally regulated banks such as Wells Fargo, however, are exempt from the licensing requirements in the Tribe's Gaming Compact with Oklahoma ("State Compact"). (State Compact § 10(C)(4) (Ex. 32 to Declaration of Michael Krauss).) The Gaming Commission may impose civil penalties against any licensee or permittee that it reasonably determines to have violated any of its regulations. (Policy and Procedure Manual ("PPM") 10.002(B) (Ex. 31).) Appeal may be taken only to the Business Committee, whose decision is "final and not otherwise reviewable." (*Id.* 10.002(F).)

**B. TGS Leases Gaming Equipment To The Tribe And Takes Out A Loan With Wells Fargo.**

On December 27, 2007, the Tribe entered into an Equipment Lease Agreement (the "Lease"), whereby the Tribe agreed to lease up to 350 slot machines and other furnishings. (Ex. 17.) Oklahoma law governs the Lease. (*Id.* § 20.10.)

On June 23, 2008, the original lessor assigned all of its right, title and interest in the Lease to TGS Anadarko, LLC ("TGS"), whose principal is Rob Medeiros, a seasoned casino executive. (Declaration of Robert Medeiros ("Medeiros Decl.") ¶¶ 1-3.) The Gaming Commission issued to TGS a Gaming Vendor License, which licensed TGS to lease gaming equipment at the Tribe's casinos. (*Id.* ¶ 4; *see also* Ex. 33 to Medeiros Decl. (TGS's gaming vendor license). As the entity leasing the gaming equipment to the Tribe, TGS registered each year with the Department of Justice under the Johnson Act, 15 U.S.C. §§1171-78. (*Id.* ¶5; Exs. 34-35 to Medeiros Decl. (Johnson Act documentation).)

Also on June 23, 2008, Wells Fargo and TGS entered into a Credit Agreement pursuant to which Wells Fargo loaned TGS $3,500,000, which TGS used, along with other funds, to buy the machines to be leased to the Tribe. (Declaration of Felis M. Gallues dated July 15, 2011 ("Gallues Decl.") ¶ 2.) TGS and Wells Fargo executed an Assignment of Equipment Lease and Rents (the "Assignment") as security for the loan made under the Credit Agreement. (*Id.* ¶ 3; Ex. 18 (Assignment).)

That same day, the Tribe issued to Wells Fargo an Estoppel Certificate, in which the Tribe acknowledged and approved of TGS's assignment of the Lease to Wells Fargo as security for TGS's obligations to Wells Fargo. (*Id.* ¶ 4; Ex. 19 at p. 1) The Estoppel Certificate gave 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. (Ex. 19 at p. 1) The Tribe waived the right of any further notice of the Assignment. (*Id.* ¶ 1.) The Estoppel Certificate further specified that Wells Fargo would "not be subject to any of the burdens or obligations of the lessor under the Lease or in connection therewith." (*Id.*) All parties thus recognized that the obligations to provide goods and services to the Tribe under the Lease remained in the hands of licensed vendor TGS.

**C. The Tribe Agrees to Arbitrate Any Disputes Related to the Lease**.

The Lease contains an arbitration provision at Section 22. The arbitration clause itself is a waiver of sovereign immunity, and both the Lease and the authorizing resolutions contain express waivers of sovereign immunity. (*See* Lease at p. 1-2, and §

22 (Ex. 17).) As Judge Brett concluded in issuing his Award, the Business Committee has the authority to waive sovereign immunity on behalf of the Tribe. (*See* Ex. 8 at ¶¶ 37-40 (Award); *see also* Exhibits 36-40 (documents cited by Judge Brett in ¶¶ 37-40) (Exs. 36-45 are attached to the Declaration of Michael Krauss filed contemporaneously.)

The arbitration 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. (*Id.* § 22.) Furthermore, any dispute over whether a claim is arbitrable shall itself be decided by arbitration. Section 22(a) 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.* § 22(a).) The Lease also specifies that the arbitration proceedings shall be conducted before a panel of three neutral arbitrators, one of whom has at least five years of experience in federal Indian law and one of whom has at least ten years of experience in the gaming industry. (*Id.* § 22(b).)

The Estoppel Certificate extends the benefits of the Lease's arbitration provision to Wells Fargo. (Estoppel Certificate ¶ 13 (Ex. 19).)

### D. The Apache Gaming Commission Determines that Wells Fargo Was Exempt from Licensing Requirements for the Loan Transaction.

Before TGS and Wells Fargo executed the Credit Agreement and related Assignment, they addressed Wells Fargo's potential need for a license with the Apache Gaming Commission. (Gallues Decl. ¶ 5.) The Gaming Commission determined that as a federally and state-regulated bank, Wells Fargo was exempt from licensing. (*Id.*) On

June 23, 2008, Wells Fargo received a letter stating that the Gaming Commission found that Wells Fargo is exempt from licensing specifically for purposes of the Credit Agreement and related documents. (*Id.*; Ex. 21.)

Wells Fargo and the Gaming Commission discussed and agreed that the contemplated assignment would not make Wells Fargo a gaming vendor and so Wells Fargo would not require a license under the State Compact. (Gallues Decl. ¶ 6; *see also* Ex. 20 (May 21, 2008 email from Ms. Gallues to Gaming Commission investigator).)

**E. The New Tribal Regime Breaches the Lease And Seeks to Use the Apache Gaming Commission to Avoid its Obligations.**

Following the election of defendants Maynahonah, Carattini and Heminokeky to the Business Committee, the Tribe defaulted both on its Casino Loan with Wells Fargo and on its Lease with TGS. (Gallues Decl. ¶ 7.) Specifically, in August 2010, the Tribe breached its obligations under the Lease by failing to make any of the required rent payments while keeping the gaming machines and all revenues from those machines. (*Id.*) TGS sent a Notice of Default to the Tribe on December 1, 2010. (Ex. 22.)

Months later—as Wells Fargo and the Tribe were preparing for their arbitration hearing on the Casino Loan before Judge Brett—the Gaming Commission for the first time suggested that Wells Fargo should have obtained a vendor license in connection with the Lease. By letter dated April 13, 2011, the Gaming Commission asserted that Wells Fargo is, and has been since at least June 23, 2008, the owner of gaming machines at the Tribe's casino by virtue of the Assignment. (Ex. 23.) In direct contradiction of its earlier acknowledgement that Wells Fargo was exempt from licensing, the Gaming

Commission alleged that Wells Fargo was acting as a gaming vendor and should have obtained a vendor's license before the Lease was executed. (*Id.*) The Gaming Commission also stated that it would not permit the release of the gaming machines and threatened disgorgement of rent payments the Tribe made to TGS under the Lease, in excess of $2 million, as an appropriate "remedy." (*Id.*)

The Lease requires that before commencing arbitration, the parties "shall consult and negotiate with each other in good faith, and recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to all parties." (Lease § 22(a) (Ex. 17).) In light of the Tribe's breach of the Lease, and as required by the Lease's dispute resolution procedures, Wells Fargo sent a letter to the Tribe on April 20, 2011 stating that the issues raised by the Gaming Commission were governed by the Lease's arbitration clause, and demanding that the Tribe "consult and negotiate" regarding its failure to make payments under the Lease and refusal to return the gaming equipment to TGS. (Ex. 24.) The Tribe refused. (*See* Ex. 25.)

**F. TGS And Wells Fargo Commence Arbitration On The Lease, And The Business Committee Counters With A "Petition For License Review".**

Following the Tribe's refusal to consult or negotiate as required by the Lease, on May 17, 2011, TGS and Wells Fargo filed a Demand for Arbitration and Statement of Claim asserting breach of the Lease, unjust enrichment, and declaratory relief. (Ex. 26.) In the original Statement of Claim, TGS sought $7 million for the Tribe's failure to make rental payments, and TGS and Wells Fargo jointly sought a declaration that Wells Fargo was not required to obtain a vendor license and the Tribe has no basis to retain the

gaming machines or seek disgorgement of payments made under the Lease. (*Id.*) The arbitration process is underway, with designation of arbitrators due by August 1, 2011.

The Gaming Commission originally scheduled a hearing for June 6, 2011, on the issues raised in its April 13 letter, but then agreed to postpone the hearing to no sooner than July 19, 2011, without any prejudice to Wells Fargo's right to seek judicial intervention to enjoin the hearing. (Ex. 27 (June 3, 2011 letter from defendant Grellner memorializing this commitment).)

Despite the ongoing arbitration, on June 24, 2011, the Business Committee's counsel, Mr. Brightmire and Mr. Nowlin, filed with the Gaming Commission a "Petition for License Review." (Ex. 28.) The Business Committee alleged that Wells Fargo was required to obtain a license as a Gaming Vendor by virtue of the Assignment—even though the Assignment serves only to create a security interest and the Gaming Commission determined three years ago that Wells Fargo was exempt from licensing requirements. The Business Committee also alleged—without any evidence and solely on information and belief—that "some or all" of the leased equipment do not meet State Compact standards and may lack evidence of testing letters and registration under the Johnson Act. Finally, the Business Committee 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 Gaming Commission from the outset, and no license is required for TGS to retake possession of machines that it owns. Mr. Brightmire and Mr. Nowlin also submitted a proposed "Order Setting Issues for Adversary Hearing," to be executed by defendant Grellner in his capacity as Hearing Officer. (Ex. 29.)

In the "Petition for License Review," Mr. Brightmire and Mr. Nowlin ask the Gaming Commission 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." (Ex. 28.) Wells Fargo and TGS did not receive a copy of this resolution until the morning of July 15. (Ex. 45.) The Business Committee's April 26 resolution is signed by defendants Louis Maynahonah and Marquita Carattini, and was adopted shortly before the arbitration hearing before Judge Brett. (*Id.*) In it, the Business Committee purports to provide for the remedy of disgorgement for payments made "for benefit of a vendor improperly conducting business through the license of another"—which is the primary allegation in the Business Committee's "Petition for Review." (*Id.*)

**G. The Business Committee's Counsel Submits A New Proposed Order, And Wells Fargo Files An Amended Statement Of Claim In Arbitration.**

On July 12, 2011, Mr. Brightmire and Mr. Nowlin submitted a new proposed order, which would bifurcate the "potential violations of TGS and Wells Fargo noted in the [Petition for License Review]" and set them for separate hearings. (Ex. 41.)

On July 14, 2011, defendant Grellner adopted Mr. Brightmire and Mr. Nowlin's proposed order (the "July 14 Order"), and scheduled a July 22 hearing as to TGS. (Ex. 42.) The issues to be heard are: (1) whether TGS improperly allowed Wells Fargo the benefit of TGS's gaming vendor license by virtue of the Assignment; (2) whether the machines provided by TGS under the Lease complied with the State Compact and the

Johnson Act; (3) whether the Lease is a management contract and sole proprietary interest that is void absent NIGC approval; and (4) whether TGS may obtain a license for the limited purpose of repossessing the slot machines it owns. (*Id.*) The July 14 Order requires opposition briefing no later than Sunday, July 17, and directs the Tribe's counsel to appear as advocates adverse to TGS. (*Id.*) The Gaming Commission reserved the right to schedule a later hearing in its discretion as to Wells Fargo. (*Id.*)

The scheduled July 22 hearing as to TGS would address the same issues that are at the heart of the ongoing arbitration over the Tribe's breach of the Lease. Absent judicial relief, Wells Fargo will have little choice but to participate. If the Tribe, acting through its Gaming Commission or, on appeal, by its Business Committee, were to declare the Lease to be void as a management contract, the Tribe will then argue in arbitration that there would be no basis for an award for breach of the Lease. Indeed, the Tribe asserted just this defense in its arbitration Answering Statement dated June 9, 2011 (Ex. 43), just as it argued in the prior arbitration before Judge Brett that the loan agreement for the Casino Loan was a void management contract. Similarly, the "penalties" that the Business Committee seeks—retention of the gaming machines by the Tribe and disgorgement of rent payments made to TGS—go directly to the remedies available in arbitration for the Tribe's ongoing breach of its payments obligation under the Lease. If the July 22 hearing proceeds, an arm of the Tribe will be in a position to adjudicate issues that the Tribe committed to binding arbitration and determine for itself the Tribe's responsibilities under the Lease—with final appeal only to the Business Committee itself.

Moreover, to find that TGS improperly allowed Wells Fargo to piggyback on TGS's vendor license, the Gaming Commission presumably would have to conclude that Wells Fargo itself should have obtained a vendor license by virtue of the Assignment—which is the primary accusation that the Business Committee has leveled against Wells Fargo. Likewise, the slot machines owned by TGS serve as collateral on Wells Fargo's loan to TGS, and denying TGS its right to retake possession would deprive Wells Fargo a critical source of repayment. Similarly, requiring TGS to disgorge the rent payments that it received, would deprive TGS of funds that it needs to repay Wells Fargo, and impair revenue streams that also serve as Wells Fargo's collateral.

On July 15, 2011, Wells Fargo filed an Amended Statement of Claim that encompasses all issues raised in the "Petition for License Review." (Ex. 44.) Wells Fargo now moves for a temporary restraining order ("TRO") and preliminary injunction enjoining the Gaming Commission Defendants from: (1) proceeding with any hearing on the "Petition for License Review"; (2) granting any of the relief requested therein; and (3) issuing any order or taking any action with respect to Wells Fargo or TGS, including but not limited to retention of the machines by the Tribe, cancellation of the Lease, and disgorgement of rent payments received.

## ARGUMENT

## WELLS FARGO IS ENTITLED TO A TRO AND PRELIMINARY INJUNCTION

### I. This Court Has Jurisdiction Over This Action And Defendants.

Federal jurisdiction is appropriate because the Gaming Commission's lack of jurisdiction to resolve disputes with Wells Fargo and TGS related to the Lease presents a

clear federal question. *See Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316, 324 (2008) ("whether a tribal court has adjudicative authority over nonmembers is a federal question"); *Baker Electric v. Otter Tail Power Co.*, 116 F.3d 1207, 1214 (8th Cir. 1997) ("the extent of an Indian Tribe's authority to regulate nonmembers on a reservation, whether the source of that authority is based on treaty rights, acts of Congress, or inherent tribal sovereignty, is manifestly a federal question"); *Knight v. Shoshone & Arapahoe Indian Tribes*, 670 F.2d 900 (10th Cir. 1982) (holding that tribes' suit to enforce tribal zoning ordinances against non-members presented federal question). The Gaming Commission does not possess jurisdiction to preside over the requested "adversary evidentiary hearing" or to adjudicate the issues raised and penalties sought in the "Petition for License Review."

This action is not barred by the doctrine of sovereign immunity because Wells Fargo seeks prospective relief to enjoin tribal officials from enforcing orders and exercising authority beyond the scope of their jurisdiction. *See Ex parte Young*, 209 U.S. 123 (1908); *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1153-56 (10th Cir. 2011). In *Crowe*, the Tenth Circuit held that "the alleged unlawful exercise of tribal court jurisdiction in violation of federal common law is an ongoing violation of 'federal law' sufficient to sustain the application of the *Ex parte Young* doctrine," which permits suits against state and tribal officials seeking to enjoin ongoing violations of federal law. *Crowe*, 640 F.3d at 1156. *See also Otter Tail Power Co. v. Leech Lake Band of Ojibwe*, 2011 WL 2490820, at *3 n.2 (D. Minn. June 22, 2011) (applying *Ex parte Young* doctrine

in enjoining tribal officials from exercising adjudicative and regulatory authority over non-member).

## II. The Court Should Issue Immediate Injunctive Relief Against The Gaming Commission Defendants.

This Court should issue a TRO and preliminary injunction barring the Gaming Commission defendants from taking any action on the Tribe's "Petition for License Review" and accompanying proposed orders, which includes holding any hearing.

Wells Fargo is entitled to immediate injunctive relief on showing: (1) a likelihood of success on the merits; (2) a likelihood that it will suffer irreparable harm absent injunctive relief; (3) that the balance of the equities tips in Wells Fargo's favor; and (4) that the injunction is not contrary to the public's interest. *See Chamber of Commerce v. Edmonson*, 594 F.3d 742, 764 (10th Cir. 2010).

### A. Wells Fargo Has Shown A Strong Likelihood Of Success On The Merits.

To show a likelihood of success on the merits, Wells Fargo need only establish a reasonable probability of success. *Atchison, Topeka & Santa Fe Ry. Co. v. Lennen*, 640 F.2d 255, 261 (10th Cir. 1981). Moreover, where—as here—the other factors tip strongly in Wells Fargo's favor, Wells Fargo need only show questions going to the merits "so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation." *Star Fuel Marts, LLC v. Sam's East, Inc.*, 362 F.3d 639, 653 (10th Cir. 2004).

Wells Fargo has shown a likelihood that the Gaming Commission lacks jurisdiction over Wells Fargo and TGS with respect to any effort by the Tribe to force disputes regarding the Lease into its own forum. Tribal jurisdiction "is of a unique and

limited character" and "exists only at the sufferance of Congress." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). The Supreme Court has explained that "tribes do not, as a general matter, possess authority over non-Indians who come within their borders." *Plains Commerce Bank*, 554 U.S. at 328. The default rule is "that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana v. United States*, 450 U.S. 544, 565 (1981). As result, "efforts by a tribe to regulate nonmembers … are presumptively invalid," and defendants bear the burden of proving jurisdiction over a non-member. *Plains Commerce Bank*, 554 U.S. at 330 (citation and internal quotation marks omitted).

Defendants cannot meet their burden of proving that the Gaming Commission has jurisdiction here in light of the express terms of the Lease's arbitration clause.

**1. The Lease Commits The Threshold Question Of Arbitrability To The Arbitrators.**

The Lease requires that any claim directly or indirectly related to the Lease must be resolved by a panel of experienced arbitrators—and not by unilateral determination by a tribal agency, with appeal only to the Business Committee. This includes deciding whether a claim is subject to arbitration in the first place.

The Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), requires courts to enforce agreements to arbitrate just as they would any other contractual provision, and "embodies the national policy favoring arbitration." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). Under the FAA, as under the Oklahoma Uniform Arbitration Act (OUAA), "any doubts concerning the scope of arbitrable issues shall be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25

(1983). The FAA, again like the OUAA, provides that written agreements to arbitrate disputes shall be valid, irrevocable and enforceable. 9 U.S.C. § 2.

Under the express terms of the Lease, this Court need not resolve whether the disputes and disagreements at issue in the "Petition for License Review" and accompanying proposed order are bound for arbitration. Rather, the threshold question of arbitrability—whether the claim is subject to arbitration pursuant to the Lease—is itself for the arbitrators to decide. 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 plain terms, the parties agreed that the gateway question of arbitrability is for the arbitrators alone to decide, and shall be the subject of binding arbitration. This provision is clear and unmistakable evidence of the parties' intent. *See, e.g., Saxa, Inc. v. DFD Architecture, Inc*., 312 S.W.3d 224, 229-30 (Tex. App.-Dallas 2010) (holding that arbitration clause contained clear and unmistakable evidence of intent to submit question of arbitrability to binding arbitration) (citing cases); *New River Elec. Corp. v. Blakeslee Arpaia Chapman, Inc.*, 2009 WL 5111566, at *7 (D. Conn. Dec. 17, 2009) (same).

In entering into the Lease, the Tribe clearly and unmistakably agreed that the arbitrators will decide the scope of the arbitration clause and the claims that it encompasses. The Gaming Commission therefore cannot act on the "Petition for License Review" and accompanying order unless and until the arbitrators conclude that the issues raised therein are not subject to arbitration. The Court's inquiry should end here.

**2. The Tribe Agreed To Arbitrate Any Dispute Related To The Lease.**

While this Court's inquiry need not address it, the issues raised in the "Petition for License Review" and accompanying order fall well within the wide ambit of the arbitration clause, which is sweeping and contains no exceptions.

**a. The arbitration clause is sweeping and all-encompassing.**

The Lease requires that any "Claim" shall be subject to binding arbitration, and defines *Claim* as:

> any dispute, claim, question or disagreement between the Owner and Lessee that is directly or indirectly related to this Lease, whether arising under law or equity, whether arising as a matter of contract or tort, whether arising during or after the expiration of the Agreement. (Lease § 22.)

This arbitration clause is sweeping and all-encompassing. The Lease commits to binding arbitration *any* dispute or disagreement that is directly or indirectly related to the Lease. "The term 'any' is all-embracing and means nothing less than 'every' and 'all.'" *JPMorgan Chase Bank, N.A. v. Specialty Restaurants, Inc.*, 2010 OK 65, ¶16, 243 P.3d 8, 14 (interpreting guaranty agreement). Likewise, "[t]he ordinary meaning of the phrase 'relating to' is broad," and arbitration provisions with such terminology are "broadly inclusive." *Chelsea Family Pharmacy, PLLC v. Medco Health Solutions, Inc.*, 567 F.3d 1191, 1199 (10th Cir. 2009). The Lease nowhere limits the scope of the arbitration clause. To the contrary, it specifies that disputes or disagreements even *indirectly* related to the Lease are bound to arbitration, without exception.

The "Petition for License Review" raises various disputes, questions or disagreements related to the Lease, each of which must be resolved in binding arbitration.

For example, the Business Committee asserts that Wells Fargo should have been licensed as a gaming vendor with respect to the Lease, and that the Tribe is entitled to disgorgement of rent payments made under the Lease as a result. Likewise, it asserts that TGS is not suitable to be licensed as a lessor, and therefore may not resume possession of the equipment that it leased to the Tribe under the Lease. In its Petition for License Review, the Business Committee repeatedly refers to the Lease in framing the issues to be resolved. (*See, e.g.*, Ex. 28 at 6.) In each instance, the Business Committee challenges Wells Fargo's and TGS's conduct with respect to the Lease and the slot machines that are the subject of the Lease. And in each instance, the Business Committee seeks penalties that affect Wells Fargo's and TGS's rights under the Lease.

**b. The Lease does not exempt regulatory disputes from arbitration.**

Despite the pervasive reach of the Lease's arbitration clause, defendants may insist that oversight of purported gaming vendors is a regulatory function committed to the Gaming Commission. But nothing prevents the Tribe from voluntarily agreeing to arbitrate issues that otherwise might be considered by its Gaming Commission in the first instance. The Gaming Commission itself is simply an arm of the Tribe, and its decisions on licensing and penalties are subject to final review by the Business Committee. (Gaming Ordinance § 108(a) (Ex. 30); PPM 10.001(F)(7), 10.0002(F) (Ex. 31).)

Neither the Indian Gaming Regulatory Act ("IGRA") nor the regulations of the National Indian Gaming Commission ("NIGC") require tribes to establish tribal gaming commissions. And oversight of gaming vendors is not a regulatory function required by IGRA or the NIGC. *See* 25 U.S.C. § 2710(b)(2)(F) (requiring licensing system only for

key employees and primary management officials). The Tribe designated the Gaming Commission as its "tribal compliance agency" under the State Compact responsible for, among other things, conducting background checks and issuing vendor licenses, but the State Compact does not preclude the Tribe from designating arbitration as the forum to resolve disputes with TGS and Wells Fargo related to the Lease. (*See* State Compact §§ 3(26), 10(B)&(C).) And the State Compact nowhere addresses the imposition of civil penalties, including disgorgement or the retention of gaming machines by the Tribe. (*Id.*)

In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147-48 (1982), the Supreme Court made clear that a tribe, like any sovereign, may waive or restrict a sovereign power through contract, as long as it does so in "unmistakable terms." Here, in Section 22 of the Lease, the Tribe exercised its sovereign authority to commit to arbitration all disputes, questions, or disagreements with TGS and Wells Fargo related to the Lease. There is no exception for any dispute, question, or disagreement that otherwise might have been submitted to the Gaming Commission in the first instance. The Tribe instead designated the arbitration panel—which is to include at least one federal Indian law expert and one gaming industry expert—as the body to resolve all disputes related to the Lease.

The Tribe modified the exercise of its authority elsewhere in the Lease in other ways. In Section 13, the Tribe agreed that any fees or assessments shall "be related to the costs of the regulatory function being conducted, and shall, in no instance exceed Five Thousand Dollars ($5,000) annually to the Owner." (Lease § 13 (Ex. 17).) And in Section 24, the Tribe agreed that it would not adopt any law or legal requirement that could impair or interfere with the Owner's right or remedy under the Lease, "including,

without limitation, any such law or legal requirement relating to taxation, or to licensing of gaming device of [the] Owner." (*Id.* § 24.)

In each instance, the Tribe agreed to modify the exercise of its power as consideration for the benefits of the Lease. TGS would not enter into the Lease, and Wells Fargo would not fund the purchase of equipment under the Lease, if disputes related to the Lease would be resolved by the counterparty. The Business Committee caused the Tribe to enter into the Lease, and, after a change in tribal administration, then caused the Tribe to breach the Lease. More recently, counsel for the Business Committee filed with its Gaming Commission a "Petition for License Review" in an effort to thwart recovery on the Tribe's breach. (Ex. 28.) The petition was filed shortly after the Business Committee adopted a resolution that authorizes disgorgement (which is the principal remedy the petition seeks) as the penalty for improperly conducting business through the license of another (which is the principal misconduct the petition alleges). (Ex. 45.)

Any appeal would go directly to the Business Committee, whose decision "shall be final and not otherwise reviewable." (PPM 10.002(F) (Ex. 31).) As such, the Business Committee—which initiated the "Petition for License Review," and which recently created the remedy of disgorgement as the remedy for the conduct in question—would be the final arbiter of the issues raised in that petition and of the appropriate remedies.

Just last month, the Business Committee purportedly vacated the Arbitration Award issued by Judge Brett before this Court could hear Wells Fargo's motion for immediate injunctive relief. Such conduct further underscores why a prospective lessor and financing source would not agree to conduct business in an environment in which

disputes with the Tribe are resolved exclusively by the Tribe itself. Accordingly, in order to obtain the benefits of the Lease, the Tribe exercised its prerogative as a sovereign to submit disputes related to the Lease for resolution by neutral arbitrators with experience in both federal Indian law and the gaming industry.

Ultimately, the scope of the arbitration clause is for the arbitrators to decide. Even if there were a question as to whether "regulatory" disputes are arbitrable—and there is not—it would fall to the arbitrators to determine whether the disputes here in fact directly implicate the regulation of gaming. *E.g.*, *Casino Resource Corp. v. Harrah's Entertainment, Inc.*, 243 F.3d 435, 437-38 (8th Cir. 2001) (analyzing specific claims and concluding that they did not directly affect or interfere with regulation of gaming).

The Tribe committed to arbitration all disputes related to the Lease, and charged the arbitration panel with answering the threshold question of arbitrability. The Gaming Commission Defendants' conduct in acting on the "Petition for License Review" is "patently violative of the parties' written agreement," and therefore beyond the scope of the Gaming Commission's jurisdiction. *QEP Field Services Co. v. UTE Indian Tribe of the Uintah and Ouray Reservation*, 740 F. Supp. 2d 1274, 1280 (D. Utah 2010) (holding that tribal court's preliminary injunction was not valid because it was entered without jurisdiction in light of parties' written agreement).

**B. Wells Fargo Will Suffer Irreparable Harm If Injunctive Relief Is Denied.**

To prove irreparable harm meriting injunctive relief, Wells Fargo need only show "a significant risk that [it] will experience that cannot be compensated after the fact by

monetary damages." *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009). Without judicial relief, Wells Fargo will suffer irreparable harm in at least three ways.

***First***, if the Gaming Commission Defendants act on the "Petition for License Review," Wells Fargo will be wrongly deprived of its right to arbitration under the Lease and under state and federal law. The Lease expressly contemplates injunctive relief to preserve the status quo pending arbitration. Section 22(d) authorizes each party "to seek and obtain a court order from a court having jurisdiction over the parties requiring that the circumstances specified in the order be maintained pending completion of the arbitration proceedings, to the extent permitted by applicable law." (Lease § 22(d) (Ex. 17).) The parties thus recognized that "[a]rbitration can become a hollow formality if parties are able to alter the status quo before the arbitrators are able to render a decision in the dispute." *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith*, 910 F.2d 1049, 1053 (2d Cir. 1990). The Second Circuit continued: "A district court must ensure that the parties get what they bargained for—a meaningful arbitration of the dispute. … The issuance of an injunction to preserve the status quo pending arbitration fulfills the court's obligation under the FAA to enforce a valid agreement to arbitrate." *Id.* at 1054. For this reason, "temporary restraining orders and preliminary injunctions may be, and frequently are, granted in aid of arbitration claims where necessary to avoid irreparable injury." *Rex Medical L.P. v. Angiotech Pharms.*, 754 F. Supp. 2d 616, 621 (S.D.N.Y. 2010).

The Lease assures the parties that the arbitrators themselves will determine in the first instance the scope of the arbitration clause and which claims it encompasses. If the Gaming Commission proceeds with its scheduled hearing—thereby asserting for itself the

authority to adjudicate matters that have been bound to arbitration—Wells Fargo will be permanently deprived of its right to have the arbitration panel address these issues in the first instance. No monetary award can compensate Wells Fargo for this loss.

***Second***, Wells Fargo will suffer irreparable harm if it is forced to expend unnecessary time and resources in appearing before the Gaming Commission. Even a hearing that purports to address only TGS would adversely affect Wells Fargo. (*See supra* pp. 8-10.) If the hearing now scheduled for July 22 goes forward, Wells Fargo will be compelled to appear in order to assert its rights and attempt to protect its interests. The district court in *Crowe* found irreparable harm based on the significant risk that the plaintiff "will be forced to expend unnecessary, time, money and effort litigating … in the [tribal] Court—a court which likely does not have jurisdiction over it." *Crowe*, 609 F. Supp. 2d 1211, 1222-23 (N.D. Okla. 2009), *aff'd*, 640 F.3d 1140 (10th Cir. 2011); *see also Seneca-Cayuga Tribe of Okla. v. State of Okla.*, 874 F.2d 709, 716 (10th Cir. 1989) (affirming grant of preliminary injunction where movants otherwise "would be forced to expend time and effort on litigation in a court that does not have jurisdiction over them"); *Chiwewe v. BNSF Co.*, 2002 WL 31924768, at *3 (D.N.M. April 15, 2002) (enjoining proceeding in tribal court where tribal court lacked jurisdiction over non-members); *Kerr-McGee Corp. v. Farley*, 88 F. Supp. 2d 1219, 1233 (D.N.M. 2000) (same).

***Third***, proceeding with any hearing runs the risk of inconsistent results. If the Gaming Commission and arbitration panel diverge, Wells Fargo "would be caught in the middle between two conflicting judgments, causing additional irreparable harm." *Crowe*, 609 F. Supp. 2d at 1223; *see also Seneca-Cayuga*, 874 F.2d at 716 (citing risk of

inconsistent judgments as basis for irreparable harm); *Chiwewe*, 2002 WL 31924768, at *3 (same); *Kerr-McGee*, 88 F. Supp. 2d at 1233 (same).

**C. The Harm To Wells Fargo Absent Relief Outweighs Any Harm To The Tribe If Relief Is Granted, And Injunctive Relief Is In The Public Interest.**

The remaining grounds for injunctive relief also strongly favor Wells Fargo. Immediate injunctive relief would simply maintain the status quo and not harm defendants or the Tribe. At most, the Gaming Commission defendants will be prevented, during the pendency of this lawsuit, from conducting proceedings against non-members over which they have no jurisdiction, and in violation of the Lease. The Tribe will retain every opportunity to make its claims in arbitration, as agreed in the Lease. *See, e.g.*, *Emergency Accessories & Installation, Inc. v. Wheelen Engineering Co., Inc.*, 2009 WL 1587888, at *7 (D.N.J. 2009) (granting injunction where "it is difficult to see what harm would result in requiring [the opposing party] to continue to honor an Agreement which has existed between the parties in various forms, for the past eight years").

Injunctive relief would not be adverse to the public interest. There is no basis to conclude that "the exertion of tribal authority over [Wells Fargo], a non-consenting nonmember, is in the public's interest." *Crowe*, 640 F.3d at 1158; *see also Chiwewe*, 2002 WL 31924768, at *3 (public interest supported enjoining tribal proceedings).

**D. Wells Fargo Should Not Be Required To Post A Bond.**

No bond should be required for entry of injunctive relief. This Court has wide discretion under Rule 65(c) in determining whether to require a bond, and may require none if there is "an absence of proof showing a likelihood of harm." *Winnebago Tribe of*

*Neb. v. Stovall*, 341 F.3d 1202, 1206 (10th Cir. 2003). No bond is necessary here because the defendants would suffer no harm: the Gaming Commission has no jurisdiction over Wells Fargo, and defendants are being required only to comply with the Tribe's contractual obligations. Under these facts, defendants can show no harm and this Court should require no bond. *See Crowe*, 609 F. Supp. 2d at 1226.

**III. Comity Does Not Require Tribal Exhaustion.**

Exhaustion of tribal remedies is not a barrier to injunctive relief here. As a matter of comity, "federal courts typically should abstain from hearing cases that challenge tribal court jurisdiction until tribal court remedies, including tribal appellate review, are exhausted." *Crowe*, 640 F.3d at 1149 (internal quotation marks omitted). However, "[a]s a prudential rule based on comity, the exhaustion rule is not without exception." *Id.* at 1150. Comity does not require tribal exhaustion here for two reasons.

***First***, "exhaustion is not required if it is clear that the tribal court lacks jurisdiction, such that the exhaustion requirement would serve no purpose other than delay." *Id.* (internal quotations omitted). The Gaming Commission lacks jurisdiction to address disputes related to the Lease. (*See supra* Point II.A.) In the absence of any compelling argument establishing the Gaming Commission's purported jurisdiction, tribal exhaustion would serve no purpose and is not required. *See Crowe*, 640 F.3d at 1153 (holding that exhaustion was not required for lack of jurisdiction); *Otter Tail Power*, 2011 WL 2490820, at *5 (same) (citing United States Supreme Court case law).

***Second***, in the Lease, the Tribe agreed that it "expressly waives the application of the doctrines of exhaustion of tribal remedies, abstention or comity that might otherwise

require that Claims be heard first in tribal court or other tribal forums of the Tribe." (Lease § 22(g) (Ex. 17).) Separately, Section 22(d) expressly permits the parties to seek injunctive relief pending arbitration "without having to exhaust any tribal remedies first." (*Id.* § 22(d).) Although a court in its discretion may decline the waiver of comity-based defense in the advance of federal interests, no federal interest is served by requiring Wells Fargo to appear before its adversary as the ultimate adjudicator—particularly where the Gaming Commission has no jurisdiction over Wells Fargo or TGS. *See Harriman v. Reynolds*, 971 F.2d 500, 503 (10th Cir. 1992).

**REQUEST FOR EXPEDITED HEARING AND RULING**

The Gaming Commission has set **10:00 a.m.** on **Friday, July 22, 2011**, as the time and date for the hearing on the Business Committee's "Petition for License Review." Wells Fargo therefore requests an expedited hearing and ruling on this motion.

**CONCLUSION**

The Gaming Commission lacks jurisdiction to resolve any dispute related to the Lease. Not only are such disputes committed to arbitration, but the threshold question of whether the disputes are arbitrable is itself subject only to binding arbitration.

Wells Fargo therefore asks this Court to enter a TRO and preliminary injunction enjoining the Gaming Commission Defendants from: (1) proceeding with any hearing on the "Petition for License Review"; (2) granting any of the relief requested therein; and (3) issuing any order or taking any action with respect to Wells Fargo or TGS, including but not limited to retention of the machines by the Tribe, cancellation of the Lease, and disgorgement of rent payments received.

Respectfully submitted,

Dated: July 15, 2011

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## CERTIFICATE OF SERVICE

I hereby certify that on July 15, 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:

John E. Brightmire – jbrightmire@dsda.com
Bryan J. Nowlin – bnowlin@dsda.com

s/Phillip G. Whaley
PHILLIP G. WHALEY