DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	
STATE OF COLORADO, *et al.*, Applicants, v. CASH ADVANCE, Respondent, --and-- STATE OF COLORADO, *et al.*, Applicants, v. PREFERRED CASH LOANS, Respondent.	▲ COURT USE ONLY ▲
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RESPONDENT TRIBAL ENTITIES' BRIEF RE: COURT'S LACK OF JURISDICTION TO PROCEED ON CONTEMPT CITATION AGAINST TRIBAL ENTITIES

Miami Nation Enterprises, an economic subdivision of the Miami Nation of Oklahoma, a federally-recognized Indian tribe, doing business as Cash Advance, and SFS, Inc., a tribally-chartered corporation wholly owned by the Santee Sioux Nation, a federally-recognized Indian tribe, doing business as Preferred Cash Loans (collectively, the "Tribal Entities"), submit the following brief concerning this Honorable Court's lack of jurisdiction to issue bench warrants for the arrest of Tribal officers or otherwise to proceed in any way against the Tribal Entities on the Contempt Citations issued in these consolidated cases pending the final determination of the appeal that has been taken from the Order of this Court entered on March 5, 2007.[1]

The Tribal Entities are submitting this brief pursuant to leave granted by the Court at the advisement proceeding on March 30, 2007.

STATEMENT OF THE CASE

On February 14, 2005, the State of Colorado, *ex rel.* John W. Suthers, Attorney General, and Laura E. Udis, Administrator, Uniform Consumer Credit Code (the "State") commenced the present action to compel compliance with certain administrative subpoenas that had been directed to the Tribal Entities under their respective trade names of Cash Advance and Preferred Cash Loans. *Ex parte* orders were entered by the Court directing compliance with the subpoenas. When the Tribal Entities did not respond, again acting upon the *ex parte* application of the State, the Court ordered the issuance of Citations requiring the Tribal Entities to appear and show cause why they should not be held in contempt for failing to comply with the orders

[1] The Tribal Entities are filing a separate motion to revoke the bench warrants and stay further proceedings on the contempt citations, based on the Tribal Entities sovereign immunity from suit and the appeal from the March 5, 2007 order of this Court which is currently pending in the

enforcing the subpoenas.[2]

On June 20, 2005, appearing specially to challenge jurisdiction, the Tribal Entities moved, pursuant to C.R.C.P. 12(b)(1), (2) and (4), to quash the process and dismiss the action for lack of both subject matter and in personam jurisdiction, and insufficiency of service of process. The Tribal Entities' challenge to subject matter jurisdiction was based on their sovereign immunity from suit. The State was allowed discovery limited to the issue of Tribal subject matter jurisdiction.

On March 5, 2007, this Court entered an order denying the Tribal Entities' Motions to Dismiss. In rejecting the Tribal Entities assertion of sovereign immunity from suit, the Court found that "tribal sovereign immunity does not prohibit a state from investigating violations of its own laws occurring within its own borders. Tribal activities conducted outside of tribal lands are subject to state regulation."[3] The Court thereupon ruled, as a matter of law, that "[t]he Tribal Entities motion to dismiss is DENIED insofar as it relies upon the doctrine of tribal sovereign immunity serving as a bar to the power of the State of Colorado to investigate and prosecute violations of its own laws, committed within the State of Colorado, by tribal entities acting outside of tribal lands."[4]

On March 8, 2007, an advisement hearing on the contempt proceedings was scheduled to

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Colorado Court of Appeals.

[2] Also named in the citations were C.B. Service Corp., a Nevada corporation, and James A. Fontano, one of its officers. Those respondents are not affiliated with Tribal Entities and are not represented by the attorneys who appear herein for the Tribal Entities.

[3] Order denying Tribal Entities motion to dismiss, filed March 5, 2007, at p. 4.

be held on March 30, 2007. On March 23, 2007, the Tribal Entities filed their Notice of Appeal from that order in the Colorado Court of Appeals, and a copy was served upon the Clerk of this Court. The appeal is now docketed as Case No. 07 CA 582 in the Court of Appeals.

Counsel for the Tribal Entities appeared at the March 30, 2007 advisement hearing to insure that the Court had been notified of the appeal and to suggest that the Court therefore lacked jurisdiction to proceed.[5] The Court nonetheless, at the request of the State, issued bench warrants for the arrest of Don Brady and Robert Campbell, who are tribal officers that had previously submitted affidavits on behalf of the Tribal Entities.[6] Counsel for the Tribal Entities objected and argued that as a result of the appeal the Court had lost jurisdiction to proceed with the contempt proceedings. Counsel for the State argued that the appeal did not divest the Court of jurisdiction to go forward with the contempt proceeding. The Court deferred ruling on the issue and authorized further briefing by the parties concerning its jurisdiction in the matter. This brief is respectfully submitted pursuant to that authorization.

II. BACKGROUND PRINCIPLES OF CONTROLLING FEDERAL LAW

Although the Tribal Entities' sovereign immunity from suit has been extensively discussed in prior briefs, certain fundamental precepts warrant discussion at this time.

First, Indian tribes and their economic or political subdivisions have absolute immunity from suit except "only where Congress has authorized the suit or the tribe has waived its

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[4] *Id.*

[5] As counsel informed the Court at that time, he had advised the Tribal Entities that as a result of the pending appeal Tribal officers were not required to appear at the advisement.

[6] The bench warrants were suspended by the Court until thirty (30) days after the Court decides the current challenge to its jurisdiction to act while an appeal is pending.

immunity." *Kiowa Tribe of Oklahoma v. Mfg. Tech., Inc.*, 523 U.S. 751, 754 (1998). This immunity from suit is guaranteed by the Supremacy Clause of the United States Constitution. "[T]ribal immunity is a matter of federal law and is not subject to diminution by the States." *Id.* at 756.

Second, while it may be said that a state has the "right" to regulate off-reservation tribal activities, this "is not to say that a tribe no longer enjoys immunity from suit . . . . There is a difference between the right to demand compliance with state laws and the means available to enforce them." *Kiowa Tribe*, 523 U.S. at 755. Contrary to the conclusion reached by this Court, although the State may have a right to regulate, the Tribal Entities' sovereign immunity from suit makes that "a right without any remedy." *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 514 (1991).

Third, tribal sovereign immunity from suit was plainly violated in the present case by the Court's order enforcing the subpoenas. *United States v. James*, 980 F.2d 1314, 1319-20 (9th Cir. 1992) (even a federal court lacks jurisdiction to enforce a records subpoena against an unwilling tribe). *A fortiorari*, citing the Tribal Entities for contempt and issuing warrants for the arrest of tribal officers violates that immunity. *Bishop Paiute Tribe v. County of Inyo*, 275 F.3d 893, 901-904 (9th Cir. 2002) (execution of search warrant against a tribe violated its sovereign immunity). The Tribal Entities' sovereign immunity from suit also protects tribal officers in their official capacities. *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997). The Tribal Entities' sovereign immunity from suit would be rendered meaningless if the contempt proceedings are allowed to continue in the face of the pending appeal. *Tamiami Partners, Ltd. v. Miccosukee*

Tribe of Indians of Florida, 63 F.3d 1030, 1050 (11th Cir. 1995) (an order denying a motion to dismiss based on tribal sovereign immunity is immediately appealable and such immunity "would be rendered meaningless if a suit against a tribe asserting its immunity were allowed to proceed to trial.")

III. THIS COURT LACKED JURISDICTION TO PROCEED AGAINST THE TRIBAL ENTITIES AT THE ADVISEMENT HEARING

As of the time of the advisement hearing, the appeal which had already been perfected by the Tribal Entities divested this Court of jurisdiction to proceed. "Courts universally recognize the general principle that once an appeal is perfected, jurisdiction over the case is transferred from the trial court to the appellate court for all essential purposes with regard to the substantive issues that are the subject of the appeal." *Molitor v. Anderson*, 795 P.2d 266, 268 (Colo. 1990). In other words, "the filing of a notice of appeal divests a trial court of authority to consider matters of substance affecting directly the judgment appealed from." *Id.* at 269 (citations omitted). The actions of the Court in proceeding against the Tribal Entities at the advisement hearing on the contempt citations, and issuing the bench warrants, not only directly affect but render meaningless the tribal sovereign immunity which the pending appeal seeks to uphold.

Based upon the argument presented by the State at the advisement hearing, the Tribal Entities do not understand the State to disagree with the general principle of exclusive appellate jurisdiction, quoted above, as it was reaffirmed by the Supreme Court in *Molitor*. Instead, the State's position is understood to be that since the appellate jurisdiction of the Colorado Court of Appeals is limited by statute to appeal from "final judgments" of the district courts, the appeal taken by the Tribal Entities, which the State gratuitously styles as an "interlocutory appeal," was

ineffective to transfer jurisdiction to the Court of Appeals.[7] But labeling the appeal as interlocutory gets the State nowhere.

This Court's denial of the Tribal Entities' motion to dismiss was an immediately appealable final order under the collateral order doctrine and the Court of Appeals has jurisdiction to determine the appeal. The decision of the Court of Appeals in *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402 (Colo.App. 2004) is directly on point and controlling here. In that case an Indian tribe was sued in state district court in a commercial dispute with a provider of computer services. Like the Tribal Entities here, the tribe moved to dismiss the complaint, challenging subject matter jurisdiction based on sovereign immunity. The trial court denied the motion and the tribe appealed. The plaintiff moved to dismiss the appeal on the grounds that the order of dismissal was not a final judgment from which an appeal would lie.

In *Rush Creek* the Court of Appeals rejected essentially the same challenge to its jurisdiction over the appeal as the State is now asserting in the present case. The Court of Appeals held that the order in question, which rejected the tribe's sovereign immunity defense as a matter of law, was immediately appealable. The Court of Appeals relied in part on the nature of tribal sovereign immunity itself. In reasoning that is equally applicable here, the Court of Appeals explained:

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[7] At the advisement hearing, counsel for the State argued that the appeal in the present case did not divest this Court of jurisdiction, alleging that the order appealed from was interlocutory, citing *Musick v. Woznicki*, 136 P.3d 244 (Colo. 2006). But the State's argument is purely a circular one and merely assumes what it sets out to prove – i.e., that the order denying the Tribal Entities' defense of tribal sovereign immunity is an interlocutory rather than final order. *Musick* is inapposite since the appeal in that case did not involve a rejection of the defense of tribal sovereign immunity from suit. As the cases discussed *infra* clearly establish, the denial of such

> Tribal sovereign immunity is not merely a defense to liability; rather, it provides immunity from suit. Thus, under federal law, the denial of a motion to dismiss based on tribal sovereign immunity is an immediately appealable collateral order, because that immunity would be meaningless if a suit against a tribe were erroneously allowed to proceed to trial.

Rush Creek, 107 P.3d at 405 (citations omitted).

The Court of Appeals could very well have rested its decision on the logic of the federal cases alone, since under 28 U.S.C. § 1291 the jurisdiction of the federal courts of appeal, like that of the Colorado Court of Appeals, is limited to review of final judgments. And as will be shown below, the federal courts of appeal have uniformly held that an order denying the defense of tribal sovereign immunity is an immediately appealable final collateral order. However, in *Rush Creek* the Colorado Court of Appeals went on to hold that jurisdiction over the case was also mandated by existing Colorado law.

The Court of Appeals rested its decision in part on the decision of the Colorado Supreme Court in *City of Lakewood v. Brace,* 919 P.2d 231 (Colo. 1996). In that case it was held that the rejection of even a *qualified* immunity defense, if decided as a matter of law, is deemed to be "final" order for purposes of appeal because such a defense is analogous to absolute immunity in providing immunity from suit. Such appeals are an exception to the general rule under C.R.S. § 13-4-102 that limits the jurisdiction of the Court of Appeals to a final decision.[8] *Rush Creek,*

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an immunity defense is a final order for purposes of appeal under Colorado law.

[8] In *City of Lakewood,* the Supreme Court adopted the reasoning of the federal courts that, notwithstanding the statutory limitation on the jurisdiction of the circuit courts of appeals to the review of only final decisions of a district court, "certain collateral orders are subject to immediate appeal because they amount to final orders." *Id.* 919 P.2d at 239 (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541(1949)).

107 P.3d at 405.

The result in *Rush Creek* was also mandated by the Colorado Supreme Court's decision in *Furlong v. Gardner*, 956 P.2d 545 (Colo. 1998). In *Furlong*, the trial court had "reserved" ruling on a qualified immunity defense, and ordered discovery to continue. An immediate appeal was taken but the Court of Appeals dismissed the appeal, holding that the trial court's rejection of the qualified immunity defense was not a final judgment. The Supreme Court reversed the decision of the Court of Appeals, holding that the trial court's order which refused to consider the qualified immunity defense "was effectively a final judgment." *Id.* at 547. The Supreme Court held that it would violate the "principle of neutrality" requirement of *Johnson v. Fankell*, 520 U.S. 911 (1997), if Colorado denied interlocutory appeals in § 1983 cases while expressly providing for interlocutory appeals under the Colorado Governmental Immunity Act (the "CGIA"). *Furlong*, 956 P.2d at 550. The Supreme Court further held that "principles of sound appellate practice cause us to follow the approach of federal cases with respect to the collateral order doctrine in § 1983 cases."[9] *Id.*

Based on this firmly established law, the Court of Appeals in *Rush Creek* concluded "that disallowing an appeal of the trial court's order rejecting the Tribe's sovereign immunity claim, which is a claim to immunity from suit, but allowing an appeal of interlocutory orders in cases raising immunity under the CGIA or § 1983, would violate the neutrality principles identified in *Fankell* and applied in *Furlong*, and would render any tribal immunity meaningless." *Rush*

[9] As will be shown below, the federal cases have also uniformly applied the collateral order doctrine to authorize the immediate appeal of an order rejecting a tribal sovereign immunity defense.

Creek, 107 P.3d at 405 (citations omitted). Accordingly, since in that case the claim of tribal sovereign immunity had been rejected by the trial court as a matter of law, as it was in the present case, "the decision is final and appealable." *Id.* at 406.

At the argument before this Court on March 30, 2007, counsel for the State argued that *Rush Creek* was wrongly decided, and urged the Court not to follow it. This Court, with all due respect, cannot do that. A published opinion of the Court of Appeals, like that in *Rush Creek*, "shall be followed as precedent by the trial judges of the state of Colorado." C.A.R. 35(f). Such a decision "was binding on the district court and should have been followed." *Martin v. District Court*, 550 P.2d 864, 865 (Colo. 1976).

As far as can be determined, every other court that has considered the issue, has reached the same result as *Rush Creek*. In the state courts, *see, e.g., Ellis v. Allied Snow Plowing, Removal and Sanding Services Corp.*, 838 A.2d 237, 239 (Conn.App. 2004) ("Although the denial of a motion to dismiss ordinarily is an interlocutory ruling that is not immediately appealable, ... The denial of a motion to dismiss based on a colorable claim of [tribal] sovereign immunity triggers an immediate right to appeal."); and *Hegner v. Dietze*, 524 N.W.2d 731, 733 (Minn.App. 1994) (orders denying motion to dismiss for lack of jurisdiction based on tribal sovereign immunity are immediately appealable.)

Case law in the federal courts is uniformly to the same effect. The federal courts of appeal will, with exceptions not pertinent here, ordinarily exercise appellate jurisdiction only over final decisions. 28 U.S.C. § 1291.

In that class of federal cases identified as being within the "collateral order doctrine,"

however, what otherwise would be interlocutory orders of trial courts nonetheless qualify as "final" for purposes of appeal. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

This has been the uniform result in decisions of the Tenth Circuit. *Osage Tribal Council v. United States Dep't of Labor*, 187 F.3d 1174, 1179-1180 (10th Cir. 1999) (trial court's denial of tribal sovereign immunity immediately appealable under collateral order doctrine); *Berrey v. Asarco Inc.*, 439 F.3d 636, 642-643 (10th Cir. 2006) (motion to certify appeal treated as valid notice of appeal under collateral order doctrine; tribal sovereignty deemed coextensive with immunity of the United States); *Romero v. Peterson*, 930 F.3d 1502, 1506 (10th Cir. 1991) (Indian tribe's interlocutory appeal on sovereign immunity grounds held within circuit court of appeals' jurisdiction).

The decisions of the other federal appeals courts which have considered the issue also hold in favor of immediate appealability under the collateral order doctrine. *Prescott v. Little Six, Inc.*, 387 F.3d 753, 755 (8th Cir. 2004) (collateral order doctrine permits immediate interlocutory appeal of trial court's denial of sovereign immunity); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida*, 63 F.3d 1030, 1050 (11th Cir. 1995) (tribal sovereign immunity provides immunity from suit, not just defense to claim; immunity meaningless if suit against tribe asserting immunity forced to proceed to trial); *Seminole Tribe of Florida v. State of Florida*, 11 F.3d 1016, 1021 (11th Cir. 1994) (federal district court's denial of motion to dismiss on sovereign immunity grounds grants defendants right of immediate, interlocutory appeal).

The appeal taken from this Court's denial of the Tribal Entities' Motions to Dismiss

based on tribal sovereign immunity grounds would therefore be well taken under governing federal law. Given that the rights of tribal sovereign immunity are at the least coextensive with the immunity of the federal government, concerning which this Court could not exercise jurisdiction, neither may this Court defeat the sovereign immunity of Indian tribes by preventing the immediate appeal of the Tribal Entities' Motion to Dismiss under the collateral order doctrine.

During the arguments at the recent advisement hearing, counsel for the State argued that "public policy" weighed in favor of disregarding tribal sovereign immunity and proceeding with the contempt proceeding. Quite to the contrary, case law, including binding Supreme Court precedent, instructs that there is no public policy exception to the fundamental principle that a waiver of sovereign immunity must be express and unequivocal. In this regard, in *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506 (1940), the Supreme Court determined, "[c]onsent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void. . . . Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body." *Id.* at 514; *cf., e.g., Kiowa Tribe of Oklahoma v. Mfg. Tech., Inc.*, 523 U.S. 751, 754-60 (1998). The Tenth Circuit has reiterated that there is *no* public policy exception to the doctrine of Tribal sovereign immunity, stating "the Supreme Court has refused to find a waiver of tribal immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case." *Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998); *e.g. People of State of Cal. ex rel. Cal. Dep't of Fish and Game v. Quenchan*

Tribe of Indians, 595 F.2d 1153, 1155 (9th Cir. 1979); *see, e.g., Val/Del, Inc. v. Superior Court In and For Pima County*, 703 P.2d 502, 506 (Ariz.App. 1985) ("Because of the supremacy of federal law, we are bound to recognize the doctrine of tribal sovereign immunity, even if we were to find valid public policy reasons to hold it inapplicable in this case."). Accordingly, precedent mandates that the State's argument be summarily rejected.

IV. CONCLUSION

In this case the Tribal Entities raised sovereign immunity not as a mere defense, but as *immunity from suit.* Their claim of immunity from suit is based upon firmly established federal law which must be accorded controlling effect. This Court's order rejecting the Tribal Entities' claim of sovereign immunity from suit has been properly appealed by the Tribal Entities. From the time the notice of appeal was filed on March 23, 2007, the Court of Appeals has exclusive jurisdiction of the case. This Court therefore lacked jurisdiction to act on March 30, 2007 when it proceeded against the Tribal Entities on the contempt citations and issued bench warrants for the arrest of tribal officers. The Tribal Entities therefore respectfully ask that the bench warrants

be revoked and that this Court abstain from further action in the case until it is remanded.

DATED: April 9, 2007.

Respectfully Submitted,

A duly signed copy is on file at the offices of Jones & Keller, P.C.

/s/ Edward T. Lyons, Jr.
Edward T. Lyons, Jr.