

Comanche Nation v. Fallin
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<p>1 IN THE UNITED STATES DISTRICT COURT</p> <p>2 FOR THE WESTERN DISTRICT OF OKLAHOMA</p> <p>3</p> <p>4 COMANCHE NATION, a) federally recognized Indian) 5 Tribe, NUMUNU PAHMU, a) Limited Liability Company) 6 Plaintiffs,) 7 -vs-) Nos. CIV-13-1228-C 8 GOVERNOR MARY FALLIN and) 9 THE STATE OF OKLAHOMA,) 10 Defendants.)</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15 TRANSCRIPT OF HEARING</p> <p>16 BEFORE THE HONORABLE ROBIN J. CAUTHRON</p> <p>17 UNITED STATES DISTRICT JUDGE</p> <p>18 NOVEMBER 20, 2013</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25 REPORTED BY: SHERRI GRUBBS, CSR, RPR, RMR, RDR, CRR</p>	<p>1 (PROCEEDINGS HAD ON NOVEMBER 20, 2013.)</p> <p>2 THE COURT: Please be seated.</p> <p>3 This is Case No. 13-1228-C. Counsel, make</p> <p>4 your appearances, please.</p> <p>5 MR. GOODMAN: Your Honor, if it please the</p> <p>6 Court. Jimmy Goodman, Harvey D. Ellis, Paige A.</p> <p>7 Masters from Crowe & Dunlevy for the Comanche Nation</p> <p>8 and Numunu Pahmu.</p> <p>9 MR. CHAFFIN: Good morning, Your Honor.</p> <p>10 Ryan Chaffin. I'm with the Attorney General's</p> <p>11 office, representing the State through the Governor.</p> <p>12 This is Jeb Joseph, my co-counsel. And this is</p> <p>13 Jeffrey Cartmell from the Governor's office, as well.</p> <p>14 THE COURT: I have had a brief conference</p> <p>15 with counsel immediately before entering the</p> <p>16 courtroom on what exactly we're going to be doing</p> <p>17 today.</p> <p>18 The plaintiffs filed a complaint yesterday</p> <p>19 and later a motion for temporary restraining order.</p> <p>20 This morning, or at least I saw it this morning -- I</p> <p>21 don't know when it was filed -- the defendant filed a</p> <p>22 motion to vacate the arbitration award, which is the</p> <p>23 subject of the complaint.</p> <p>24 Because plaintiffs had given notice, I have</p> <p>25 permitted defendants to appear here and be heard on</p>
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<p>1 APPEARANCES</p> <p>2</p> <p>3 FOR PLAINTIFFS:</p> <p>4 Jimmy Goodman</p> <p>5 Harvey Ellis</p> <p>6 Paige Masters</p> <p>7 Crowe & Dunlevy-OKC</p> <p>8 20 N Broadway Ave</p> <p>9 Suite 1800</p> <p>10 Oklahoma City, OK 73102</p> <p>11 405-235-7717 (phone)</p> <p>12 405-272-5272 (fax)</p> <p>13 goodmanj@crowedunlevy.com</p> <p>14 ellish@crowedunlevy.com</p> <p>15 paige.masters@crowedunlevy.com</p> <p>16</p> <p>17 FOR DEFENDANTS:</p> <p>18 Ryan R. Chaffin</p> <p>19 Jeb Joseph</p> <p>20 Office of Attorney General</p> <p>21 313 N.E. 21st Street</p> <p>22 Oklahoma City, OK 73105</p> <p>23 405-521-3921 (phone)</p> <p>24 405-522-4534 (fax)</p> <p>25 Ryan_Chaffin@oag.state.ok.us</p> <p>Jeb.Joseph@oag.ok.gov</p> <p>Also present:</p> <p>Jeffrey Cartmell</p> <p>Deputy General Counsel</p> <p>Office of Governor Mary Fallin</p> <p>2300 North Lincoln, Suite 212</p> <p>Oklahoma City, Oklahoma 73105</p> <p>405-521-2342 phone</p> <p>405-521-3353 fax</p> <p>jeffrey.cartmell@gov.ok.gov</p>	<p>1 the temporary restraining order. We are not</p> <p>2 proceeding to the merits or even to the preliminary</p> <p>3 injunction, but merely a temporary restraining order</p> <p>4 this morning.</p> <p>5 Mr. Goodman, do you have anything in</p> <p>6 addition to the papers already filed?</p> <p>7 MR. GOODMAN: Yes, Your Honor.</p> <p>8 If it please the Court, Your Honor. First,</p> <p>9 I would just like to announce a stipulation between</p> <p>10 the parties that for purposes of today's record, the</p> <p>11 Court may consider all of the pleadings that have</p> <p>12 been filed, all the attachments thereto, and all of</p> <p>13 the briefs that have been filed and all attachments</p> <p>14 thereto as part of this record.</p> <p>15 THE COURT: All right.</p> <p>16 MR. GOODMAN: In addition, I have to offer</p> <p>17 Exhibits 1 and 2. Exhibit 1 for the plaintiff --</p> <p>18 Plaintiff's Exhibit 1 is Claimant's demand for</p> <p>19 arbitration. That was filed with the American</p> <p>20 Arbitration Association.</p> <p>21 Exhibit 2 is Comanche Nation's motion for</p> <p>22 emergency injunctive relief, which was filed with</p> <p>23 AAA. I have an agreement from counsel for the State</p> <p>24 that they do not object.</p> <p>25 THE COURT: All right. Those will be</p>

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<p>1 admitted.</p> <p>2 MR. GOODMAN: Your Honor, I tried to think</p> <p>3 of a Native American analogy, and I couldn't. So I</p> <p>4 came up with a maritime analogy. It's like two ships</p> <p>5 passing in the night in this case. And the question</p> <p>6 is, on which boat this dispute is sailing?</p> <p>7 It's our position that, clearly, under the</p> <p>8 AAA arbitration we invoked our rights under the 2013</p> <p>9 superseding compact and that we are proceeding on</p> <p>10 that.</p> <p>11 We have always asserted that that is the</p> <p>12 compact, the agreement that we are enforcing. We</p> <p>13 invoked arbitration under the superseding compact.</p> <p>14 We sought interim relief under the superseding</p> <p>15 compact.</p> <p>16 The State has refused to acknowledge the</p> <p>17 compact and continues to refuse the validity of the</p> <p>18 superseding compact.</p> <p>19 We believe the law makes clear that the</p> <p>20 issue of the validity of the superseding compact is</p> <p>21 one for the arbitrator.</p> <p>22 In the U.S. Supreme Court case of</p> <p>23 Rent-A-Center West, Inc. versus Jackson, No. 09-497</p> <p>24 -- the cite is cut off at the top, so I can't read</p> <p>25 the rest of it, but I have a copy for the Court -- it</p>	<p>1 not only covers the Comanche Nation, but as different</p> <p>2 from what the State has taken position in the motion</p> <p>3 to vacate, it does cover Numunu Pahmu and the</p> <p>4 retailers.</p> <p>5 Throughout the compact, it says, "All</p> <p>6 retailers shall comply with the provisions of this</p> <p>7 compact. The entities or groups described in clauses</p> <p>8 A, B, and C of this paragraph shall be collectively</p> <p>9 referred to as the retailers or individually as a</p> <p>10 retailer. The State may remove such retailer from a</p> <p>11 list of retailers entitled to benefits."</p> <p>12 The record makes clear that both Numunu</p> <p>13 Pahmu, which is a retailer of the tribe itself, and</p> <p>14 the licensed retailers fall within the provisions of</p> <p>15 the compact. So they are proper parties to this</p> <p>16 dispute even though the contract is signed only</p> <p>17 between the Nation and the State, because they are</p> <p>18 explicit beneficiaries of the compact.</p> <p>19 In Paragraph 10(C) of the compact, talking</p> <p>20 about arbitration, it says, "The retailers waive any</p> <p>21 such immunity they have to which retailers may be</p> <p>22 entitled if the State seeks to take action against</p> <p>23 the retailers."</p> <p>24 So I think it's interesting that the State</p> <p>25 has taken a position retailers aren't covered by the</p>
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<p>1 was held that in cases like this the decision of</p> <p>2 whether the dispute is arbitrable is for the</p> <p>3 arbitrator. I'll discuss that case a little bit</p> <p>4 further.</p> <p>5 Briefly and historically, the 2008 compact,</p> <p>6 which is attached as Exhibit 2 to the motion to</p> <p>7 vacate -- excuse me, Exhibit 1 to the motion to</p> <p>8 vacate filed by the government, was signed in 2008,</p> <p>9 and it was extended two times. Those extensions are</p> <p>10 at tab 2 and tab 3.</p> <p>11 It's important to note with those</p> <p>12 extensions that it says, "Whereas neither party</p> <p>13 desires that the compact terminate unless</p> <p>14 negotiations prove unsuccessful."</p> <p>15 Then on the next page, on page 2, in each</p> <p>16 case, it says, "Except as specifically amended</p> <p>17 hereby, the provisions of the compact" -- that's the</p> <p>18 2008 compact -- "shall be deemed unchanged and shall</p> <p>19 remain in full force and effect."</p> <p>20 Well, the 2008 compact, as this Court</p> <p>21 knows, included a very important provision, which is</p> <p>22 Paragraph 13, which is referred to as the Most</p> <p>23 Favored Nations clause.</p> <p>24 Now, in reviewing the 2008 compact, it's</p> <p>25 important for the Court, I believe, to note that it</p>	<p>1 compact.</p> <p>2 THE COURT: Mr. Goodman, the retailers</p> <p>3 aren't parties.</p> <p>4 MR. GOODMAN: The licensed retailers are</p> <p>5 not parties to this lawsuit, you are correct.</p> <p>6 THE COURT: All right.</p> <p>7 MR. GOODMAN: But the State took the</p> <p>8 position that not even Numunu Pahmu, who is clearly</p> <p>9 party to this lawsuit --</p> <p>10 THE COURT: I just wanted to make sure that</p> <p>11 I --</p> <p>12 MR. GOODMAN: -- was covered by the</p> <p>13 compact.</p> <p>14 So in looking at Paragraph 13, which is the</p> <p>15 Most Favored Nation clause, it says, "Should another</p> <p>16 Indian tribe become entitled to more favorable terms</p> <p>17 for sales of tobacco after the execution of this</p> <p>18 compact" -- so after June of 2008 -- "by virtue of a</p> <p>19 new compact other than in specifically designated</p> <p>20 areas along the Kansas, Arkansas, Missouri</p> <p>21 borders" -- which doesn't apply here -- "such compact</p> <p>22 and all of its terms may be adopted by the Nation</p> <p>23 upon written notice to the State and shall be</p> <p>24 incorporated into this compact and shall supersede</p> <p>25 any inconsistent terms within this compact."</p>

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<p>1 The State gave the notice that's required. 2 It was given by the letter of October 31st from 3 Chairman Wallace Coffey, who's the duly elected 4 chairman of the Comanche Nation. 5 He notified the State that the Comanche 6 Nation hereby gives notice to the State of Oklahoma 7 that it hereby exercises its option to adopt more 8 favorable terms of the other Nation's tobacco tax 9 compact as follows. 10 Now, the Nation knew that the other tribes 11 were getting more favorable tax rates and that they 12 had essentially the same other terms in their 13 compact, but it hadn't seen those compacts because 14 the State wasn't required to give it to them, the 15 other Nations weren't required to give it to them. 16 In fact, Comanche Nation wasn't sure it 17 would be effective as of October 31st. So what they 18 did was, they said, Well, if the Cherokee Nation has 19 one effective as of October 31st, we adopt that. If 20 they don't, alternatively, then we adopt the one 21 that's effective as of October 31st by the Choctaw 22 Nation. 23 And if there isn't one, then we adopt the 24 one that's effective by October 31st for the 25 Chickasaw Nation. And in barring all that, we adopt</p>	<p>1 then the Nation began its notice under the 2 superseding compact of a request for a meeting and 3 then took action under the superseding compact to 4 initiate the arbitration proceeding. 5 The Most Favored Nation clause, as the 6 Court knows, provides that all of the new compact 7 comes into the 2008 compact. Anything in the 2008 8 compact inconsistent with the Chickasaw Nation 2013 9 compact is overruled. So there is a new beginning 10 date. 11 The beginning date of the new superseding 12 compact is the same as the beginning date of the 13 Choctaw Nation's compact. And that is October the 14 30th. That is inconsistent with the June 2008 date. 15 And under the terms of the Most Favored 16 Nation clause, it supersedes that date because it's 17 more favorable to the Comanche Nation. 18 The same with the ending date, the same 19 with all the tax rates. Most importantly, for this 20 hearing today, the same with the arbitration clause. 21 The arbitration clause in the 2013 compact 22 is more favorable to the Nation. Why? Because it 23 gives them the right to seek interim relief before 24 the end of a period of negotiations is required. 25 The 2013 compact has no requirement that</p>
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<p>1 one we know was executed on September 25, 2013, with 2 the Wyandotte Nation. 3 So going down the order, there wasn't a 4 Cherokee, there wasn't a Choctaw, but there was a 5 Chickasaw compact. And this gives notice that that's 6 what we're adopting. So the notice was given, it was 7 given within its terms. 8 There is no requirement, as argued in the 9 motion to vacate, for tribal resolutions for other 10 things. And if there was such a requirement, the 11 original resolution of the tribe, giving the 12 executive of the tribe the right to simply give 13 notice to adopt the More Favored Nation clause of 14 another tribe's compact is that authority. So we 15 believe that the notice was properly given. 16 As we discussed briefly before this 17 hearing, the Nation was negotiating with the State. 18 It was negotiating in good faith, had been doing so 19 since the spring of 2013. On the very eleventh hour 20 it learned that these other states were getting -- 21 these other nations were getting more favorable tax 22 treatment under their tobacco tax compacts. It would 23 have impacted the Nation several million dollars. 24 The Nation tried to get an extension to 25 continue further negotiations. That was denied. And</p>	<p>1 you must exhaust the right to negotiate before you 2 seek arbitration. It simply says if there's a 3 dispute between the parties, you may go to 4 arbitration in addition to going to the negotiation 5 period for 30 days. 6 We believe that the issues raised against 7 the entry of the motion for temporary restraining 8 order by the State through its motion to vacate are 9 just incorrect as a matter of law. 10 The State wished it had a compact in 2008 11 with the tribe that read different than it did in the 12 Most Favored Nation clause. It doesn't have a 13 different agreement. There is no dispute by the 14 State that they signed that agreement. There is no 15 dispute by the State that there's an arbitration 16 provision in that agreement, and they don't challenge 17 its validity. 18 Same as in the 2013 compact, which the 19 State signed on October 30th. They knew that it had 20 arbitration provisions in it. The State is not here 21 today challenging the validity of those arbitration 22 agreements. They're not saying that the arbitration 23 agreement within the compact was obtained by fraud, 24 duress, coercion, or any other grounds to vacate the 25 arbitration agreement.</p>

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<p>1 They're not even saying that there's any -- 2 they're not saying that there's any question as to 3 the validity of the arbitration clause itself. Their 4 position in this case -- and it's been clear 5 throughout. Like I say, it's two ships passing in 6 the night. Their position is the superseding compact 7 never came into existence, the superseding compact is 8 not valid and enforceable. So they are challenging 9 the validity of the entire agreement. They're not 10 challenging simply the arbitration clause and 11 arbitrability under the arbitration clause.</p> <p>12 In the Rent-A-Center case, which is 130 13 Supreme Court 2772, Rent-A-Center, Inc. -- West, Inc. 14 versus Antonio Jackson, it was an employment case. 15 There was a complaint filed by the employee, 16 Mr. Jackson, that the clause that provided for 17 arbitration was unconscionable because it had been 18 entered into through fraud, duress, 19 misrepresentation, et cetera.</p> <p>20 However, in the agreement itself there was 21 what's known as a delegation clause which said that 22 disputes about the enforceability and validity of 23 this agreement may be decided by the arbitrator.</p> <p>24 And so because of the delegation clause 25 Justice Scalia writing for the majority said that</p>	<p>1 So we believe that under the first prong of 2 the Rent-A-Center case that it falls within the 3 delegation clause.</p> <p>4 More importantly and I think controllingly, 5 as Justice Stevens discusses in the dissent in that 6 case -- and I'm quoting from page 2783 over to 7 2784 -- the rule in Prima Paint -- that's a 8 paraphrase. This is a quote -- "recognizes two types 9 of validity challenges. One type challenges the 10 validity of the arbitration agreement itself on a 11 ground arising from" --</p> <p>12 THE COURT: Stop. 13 (Short interruption.)</p> <p>14 MR. GOODMAN: And the quote, I believe, 15 starts with challenges -- two types of valid 16 challenges. One type challenges the validity of the 17 arbitration agreement itself on a ground arising from 18 an infirmity in that agreement.</p> <p>19 In other words, there's some infirmity in 20 Paragraph 18 of the 2013 compact. The State doesn't 21 say that.</p> <p>22 The other challenges the validity of the 23 arbitration agreement tangentially via a claim that 24 the entire contract, of which the arbitration 25 agreement is but a part, is invalid for some reason.</p>
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<p>1 they had delegated to the arbitrator by the terms of 2 their agreement the decision on whether or not the 3 contract was valid and enforceable.</p> <p>4 Well, in the 2013 compact we have the exact 5 same delegation language. In the 2013 compact under 6 Article 3, General Provisions, Paragraph 18 -- that's 7 found as Exhibit 2 to our complaint, Your Honor -- 8 "In the event of any dispute over the interpretation 9 or enforcement or performance of this compact while 10 it is in effect, the following shall provide the 11 parties sole means of recourse and remedy as against 12 each other."</p> <p>13 Then it says, "Representatives shall meet 14 within 30 days." Then subject to the limitations set 15 forth in Paragraph C -- which it doesn't say you've 16 got to complete your 30 days of meeting, it says, 17 "Either party may seek arbitration of the dispute." 18 So that's what we did. We asked them for 19 the time to meet and we sought arbitration of the 20 dispute.</p> <p>21 We believe that the language in Paragraph 22 18 clearly is a delegation clause to delegate to the 23 arbitrator the decision of how to interpret this 24 agreement and whether or not this agreement shall be 25 performed.</p>	<p>1 Under Prima Paint, a challenge of the first 2 type goes to the Court. That is, Paragraph 18 is 3 invalid for some reason. A challenge of the second 4 type goes to the arbitrator.</p> <p>5 So the State's challenge, which they made 6 in their notice to the AAA that they weren't going to 7 comply with any of AAA's proceedings, basically 8 refused to recognize the superseding compact, 9 challenging the validity of it. Well, that goes to 10 the arbitrator under this case.</p> <p>11 When the parties have demonstrated clearly 12 and unmistakably that it is their intent the 13 arbitrator make a decision under the delegation 14 clause, for example, or when the validity of a 15 arbitration agreement depends exclusively on the 16 validity of the substantive contract of which it is 17 part, the Court held that that must be decided by the 18 arbitrator in the first instance.</p> <p>19 So we believe that the underlying authority 20 for the arbitrator to take up the issue and consider 21 and grant interim relief was properly before the 22 arbitrator. We believe that the argument that 23 "Rule 38 of the AAA which provides for interim relief 24 was not effective at the time of the compact" is 25 incorrect because they're assuming that the time the</p>

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<p>1 contract was made was in June of 2008.</p> <p>2 The time this new contract was made was</p> <p>3 when we exercised our right to adopt that more</p> <p>4 favorable compact. And one of the terms we adopted</p> <p>5 as part of that, as required under the 2008</p> <p>6 compact -- because we had to adopt all the terms --</p> <p>7 was the beginning date of October the 30th of 2013.</p> <p>8 So it was entered after October the 1st of 2013, when</p> <p>9 Rule 38 came into effect.</p> <p>10 So when they provided that they'll operate</p> <p>11 under rules which substantially comport with rules of</p> <p>12 the AAA, when they made that agreement with the --</p> <p>13 now I'm having trouble remembering here -- the</p> <p>14 Chickasaw Nation compact, they were aware that a rule</p> <p>15 that would substantially comport with Rule 38 of AAA</p> <p>16 would provide for interim relief.</p> <p>17 They made that compact on October 30th. So</p> <p>18 the Chickasaw Nation clearly can go to the AAA and</p> <p>19 seek interim relief under Rule 38, but they say that</p> <p>20 we can't.</p> <p>21 So I think that when the Court looks at all</p> <p>22 the factors of whether or not there was jurisdiction</p> <p>23 within AAA to consider the issue and order the</p> <p>24 interim relief that I think that it's found.</p> <p>25 Assuming that is the case then, unless the</p>	<p>1 under either compact. Our only relief is to seek an</p> <p>2 order requiring the State to comply with the compact,</p> <p>3 and that's what we're here doing.</p> <p>4 The State has offered no pleadings or</p> <p>5 filings or any evidence to show that the State will</p> <p>6 be damaged or harmed in any significant way if the</p> <p>7 Court grants interim relief. And so we believe that</p> <p>8 it would be appropriate for the Court at this time to</p> <p>9 recognize the interim order of the arbitrator, to</p> <p>10 enter a temporary restraining order which requires</p> <p>11 the State to recognize the rights of the tribe under</p> <p>12 the superseding compact until such time as the</p> <p>13 hearing on the merits is held, and to grant such</p> <p>14 other relief as the Court may consider reasonable.</p> <p>15 At that time I'll consider it submitted to</p> <p>16 the Court, but we'd be happy to answer any questions.</p> <p>17 THE COURT: Well, I have a question. And I</p> <p>18 apologize to Mr. Chaffin for my response to a</p> <p>19 question he asked me in our meeting before we came</p> <p>20 out here about -- something about remand to the</p> <p>21 arbitrator.</p> <p>22 Your prayer for relief in your complaint</p> <p>23 asks for a judgment in conformity with the award. I</p> <p>24 keep missing the fact that this is an interim award.</p> <p>25 If you win, do you anticipate that judgment</p>
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<p>1 Court finds a reason today to overturn that or a</p> <p>2 reason that it would be inequitable to the State to</p> <p>3 honor that and to enter a TRO accordingly, we submit</p> <p>4 that the Court should recognize it temporarily.</p> <p>5 As we've set out in our moving papers</p> <p>6 and -- which, by the way, there's been no filing</p> <p>7 opposing our motion for the temporary restraining</p> <p>8 order. There's only been a filing opposing the</p> <p>9 complaint to honor the award or any of the AAA</p> <p>10 proceedings, because they've asked for affirmative</p> <p>11 relief to enjoin us and enjoin the AAA from any</p> <p>12 further proceedings in this case.</p> <p>13 So we believe that the equities clearly lie</p> <p>14 with the Nation to require that the State honor the</p> <p>15 2013 superseding compact and all its terms. During</p> <p>16 the interim while this Court considers these matters,</p> <p>17 I think we've already established, with what's</p> <p>18 happened so far in the AAA, that we've met the</p> <p>19 requirements that we're likely to succeed on the</p> <p>20 merits.</p> <p>21 As we've stated, we don't have to prove</p> <p>22 we're going to win but just that we have a reasonable</p> <p>23 likelihood of winning on the merits.</p> <p>24 We established the Nation will be suffering</p> <p>25 irreparable damage. There's no right to damages</p>	<p>1 will enter affirming a temporary order?</p> <p>2 MR. GOODMAN: Yes, Your Honor.</p> <p>3 Based upon the law which we've recited</p> <p>4 about the ability of the courts in these</p> <p>5 circumstances to enter a temporary injunction, which</p> <p>6 is -- which finally resolves one issue, and that</p> <p>7 issue is whether or not the State has to comply with</p> <p>8 the contract pending a determination of the hearing</p> <p>9 on the merits, that that would be --</p> <p>10 THE COURT: But it's not a final decision.</p> <p>11 If this were my order for temporary relief</p> <p>12 that the circuit was considering, they wouldn't</p> <p>13 consider it because it wouldn't be a final order.</p> <p>14 MR. GOODMAN: Well --</p> <p>15 THE COURT: I understand you need to get</p> <p>16 something from this court, whichever way it goes.</p> <p>17 But if it goes back to the arbitrator, I'm wondering</p> <p>18 if the relief that should be given, regardless of</p> <p>19 what you're asking for, is not judgment but an order.</p> <p>20 And then this case would probably be</p> <p>21 administratively closed or something, but it would</p> <p>22 still be here for you to come back and ask for a</p> <p>23 confirmation of the final award if you win, or the</p> <p>24 defendant. Whoever wins would have that ability.</p> <p>25 MR. GOODMAN: Yeah. I'm always deign to</p>

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<p>1 disagree with a federal judge. 2 THE COURT: Please do. I'm just 3 struggling. 4 MR. GOODMAN: But I think that in this case 5 the procedure would be that today the Court would 6 grant an interim order pending this Court's decision 7 on whether or not it will confirm as a judgment the 8 order of the arbitrator. 9 THE COURT: How can I enter judgment on an 10 order that's not -- 11 MR. GOODMAN: Based upon the law that we've 12 cited in our brief, Your Honor, and it's in our 13 motion. Here it is. It's in pages 7, 8, and then 14 over on to 9 and 10. 15 Basically it's the discussion at the bottom 16 of page 8 and over on to page 9. Interim awards, in 17 addition to final awards, are eligible for 18 confirmation when they finally and definitively 19 dispose of separate independent claims. 20 Then courts have found that an arbitrator 21 ruling granting interim injunctive relief in 22 instances like the present -- 23 THE COURT: I don't really question that at 24 all. 25 MR. GOODMAN: Right.</p>	<p>1 to be -- those are the relevant portions of the AAA 2 rules, and that is dealing with Rule 10. And I 3 discussed Rule 38. That's an exhibit as part of my 4 motion to vacate. 5 Okay. Well, Mr. Goodman starts out and he 6 has an analogy, a maritime analogy, that he's making. 7 He says it's like "two ships passing in the night." 8 I think I've got an analogy, as well, that I think is 9 fitting. And I think it's that the tribe is trying 10 to put the cart before the horse, and I'll explain to 11 you what I mean. 12 What we have here is a dispute about what 13 the dispute is. The Comanche Nation compact, which 14 is attached as Exhibit 1 to my motion to vacate, 15 specifically says that it terminates on a certain 16 date which was extended to October 31. 17 There is also a Most Favored Nation clause 18 in that compact, which Mr. Goodman pointed out. And 19 that Most Favored Nation clause is found of page 6 of 20 Paragraph 13. And the tribe, by way of a letter 21 October 31 -- or I say the tribe. The chairman of 22 their tribe sent a confusing and ambiguous and a 23 vague letter referencing four separate compacts. 24 THE COURT: How is that ambiguous and vague 25 and confusing?</p>
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<p>1 THE COURT: It's just procedurally. 2 MR. GOODMAN: Right. 3 THE COURT: I'll worry about that if I need 4 to when the time comes. 5 MR. GOODMAN: And so I would think it would 6 be a temporary restraining order today temporarily 7 enforcing this interim award. And then when we have 8 the hearing on the merits, whenever the Court 9 schedules that, then it would be the time to enter a 10 final judgment or a judgment, whatever you want to 11 call it, on the interim award of the arbitrator. 12 THE COURT: As Pat Jones says, "We'll jump 13 off that bridge when we come to it." 14 Mr. Chaffin. 15 MR. CHAFFIN: Yes, ma'am. 16 May it please the Court. I'm Ryan Chaffin 17 here on behalf of the State. Before I get started, 18 I've got an exhibit, as well. I haven't marked it 19 this morning, but it's just one. It wasn't included 20 in any of the motion papers, and I've shown it to 21 plaintiff's counsel, and they had no objection to it. 22 So if I may approach, I'd like to provide it to you 23 and a copy to the plaintiff, as well. 24 THE COURT: Sure. 25 MR. CHAFFIN: Just so we know, that's going</p>	<p>1 MR. CHAFFIN: He didn't specifically say 2 which compact he was going to adopt, and it was vague 3 and confusing. And for the purposes of where I'm 4 going with this right now, I'd love -- I will come 5 back to why it wasn't properly invoked if you want me 6 to, or if you want to address it right now, I will. 7 THE COURT: You're free to address anything 8 you want to. 9 MR. CHAFFIN: Okay. Well, he says, I 10 invoke the Most Favored Nation clause, and supposedly 11 acting on behalf of the tribe. The response to that 12 by the State was that, No, you have not properly 13 invoked the Most Favored Nation clause, it does not 14 have an application here. 15 What you have here, therefore, is a dispute 16 over whether the Most Favored Nation clause was 17 properly invoked. The State says that it was not 18 properly invoked. The tribe says that it was 19 properly invoked. So there is a dispute over the 20 provision of the Comanche Nation compact that was 21 entered into in 2008. 22 So logically since the dispute is over a 23 provision that is contained within that compact and 24 the dispute pertains to that compact, you should look 25 to the dispute resolution (sic) provisions contained</p>

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<p>1 in the Comanche Nation compact to see how the parties 2 agree to resolve this dispute.</p> <p>3 Because the entire dispute is, did they 4 properly invoke the Most Favored Nation clause. So 5 the dispute is under the Comanche Nation compact.</p> <p>6 What the tribe is doing is, they're trying 7 to put the cart before the horse. And they're 8 saying -- they're completely ignoring the fact that 9 there is a dispute over the Most Favored Nation 10 provision that's contained in that Comanche Nation 11 compact.</p> <p>12 They go straight to the merits and decide 13 that it was -- that those merits are in their favor 14 and that they have automatically adopted this 15 compact, and that this subsequent compact, which was 16 the Chickasaw Nation compact, which was never signed. 17 And so they say since there is a dispute, we're going 18 to look to the dispute resolution provisions that are 19 contained in the Chickasaw Nation compact to resolve 20 this.</p> <p>21 So essentially they're asking -- they asked 22 the arbitration panel and now this Court to look at 23 the dispute resolution provisions contained in the 24 Chickasaw Nation compact to resolve a dispute that 25 exists over a provision that exists in the Comanche</p>	<p>1 the sole and exclusive remedy of mandatory binding 2 arbitration."</p> <p>3 Then in B, if you look at B on the next 4 page, it says, importantly, "An arbitration may be 5 invoked by either party following the negotiation 6 period should the dispute remain resolved (sic) 7 following the negotiation period. There shall be a 8 30-day negotiation period."</p> <p>9 That is a condition precedent to initiating 10 any form and any type of arbitration. And it's the 11 clear language of the contract and obviously the 12 mutual intent of the parties because of the express 13 language used.</p> <p>14 The second requirement of the dispute 15 resolution provision in the Comanche Nation compact 16 has to do with how many arbitrators are going to hear 17 a dispute. It says three, three arbitrators. The 18 State picks one, the tribe picks one, those two 19 arbitrators pick a neutral.</p> <p>20 Then once that panel has been impaneled, 21 the arbitrator has been impaneled, then the dispute 22 can be heard, such as the dispute under this compact, 23 such as the Most Favored Nation clause.</p> <p>24 Here, what the tribe has done is tried to 25 short circuit this and have one arbitrator to resolve</p>
<p>Page 26</p> <p>1 Nation compact.</p> <p>2 And I would say that that is just -- it's 3 illogical and it doesn't make sense at this point in 4 time. So I think they're putting the cart before the 5 horse. I think the first dispute, the dispute is, 6 did they properly invoke the Most Favored Nation 7 clause. They either did or they didn't. That's what 8 we're all here about.</p> <p>9 And when you look to the dispute resolution 10 provisions of the Comanche Nation compact, which is 11 in play to resolve this dispute over the provision 12 which is in that compact, they're found at Paragraph 13 10. Paragraph 10 is located on pages 5 and 6.</p> <p>14 And for the purposes of why we're here 15 today and why the arbitrator's award was void and 16 improper, you will see that there are several 17 requirements, specific requirements, about what is 18 required in the dispute resolution provision of the 19 Comanche Nation compact to resolve disputes like this 20 one.</p> <p>21 First, in 10(A) and the first sentence of 22 10(B), it says that -- I'll do 10(A) first, "Any 23 dispute arising in the interpretation or performance 24 of this compact which is not resolved by good faith 25 and negotiations within 30 days shall be subject to</p>	<p>Page 28</p> <p>1 this matter before the 30-day negotiation period.</p> <p>2 The third requirement of Paragraph 10 of 3 the Comanche Nation compact plainly provides that AAA 4 is not to -- administrative rules of AAA do not 5 apply.</p> <p>6 In Paragraph B on page 6, it says, "The 7 arbitration shall be conducted pursuant to the 8 commercial arbitration rules of the American 9 Arbitration Association except those rules relating 10 to administration of the arbitration by AAA."</p> <p>11 So the State and the parties agreed not to 12 have AAA administer these rules and for none of its 13 administrative rules to have any applicability to any 14 disputes that result under the Comanche Nation 15 compact. That's required.</p> <p>16 Now, you look at why is the tribe -- 17 THE COURT: Mr. Chaffin -- 18 MR. CHAFFIN: Yes, ma'am. 19 THE COURT: -- can you slow yourself down 20 some? 21 MR. CHAFFIN: Yes, I can. 22 THE COURT: All right. 23 MR. CHAFFIN: And then what the tribe is 24 trying to do is rely upon AAA Rule 38. AAA Rule 38 25 is a brand new rule. It's -- a copy of it is</p>

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<p>1 attached as Exhibit 7 to my motion to vacate. And it 2 has some very specific -- well, it's different. It 3 has many differences from Paragraph 10 of the 4 Comanche Nation compact. 5 One of the things that I'd like to point 6 out about AAA Rule 38 is Paragraph A. I'll just go 7 ahead and read it slowly. 8 "Unless the parties agree otherwise, the 9 provisions of this rule shall apply to arbitrations 10 conducted under arbitration clauses or agreements 11 entered on or after October 1, 2013." 12 The Comanche Nation compact, where the 13 dispute lies as to whether they improperly invoked 14 the Most Favored Nation clause, was entered into on 15 2008. 16 The Comanche tribe is attempting to put the 17 cart before the horse and resolve this dispute under 18 the Chickasaw Nation dispute resolution provisions, 19 for one reason, because it was entered after October 20 1, 2013. 21 So they're boot-strapping that date to try 22 to get this AAA Rule 38 to apply, but the dispute is 23 not under the Chickasaw Nation compact. It's under 24 the Comanche Nation compact. And since the Comanche 25 Nation compact was entered prior to October 1, 2013,</p>	<p>1 after a 30-day negotiation period. 2 And importantly, and why I gave you that 3 exhibit, the first one, AAA Rule 10, the Comanche 4 Nation compact expressly provides otherwise from 5 using that rule because AAA Rule 38 is clearly an 6 administrative rule. 7 If you look at Rule 10 of the AAA, what it 8 talks about is administrative conferences. And that 9 rule says, "At the request of any party or upon the 10 AAA's own initiative, the AAA may conduct an 11 administrative conference in person or by telephone 12 with the parties and/or their representatives. The 13 conference may address such issues as arbitrator 14 selection and any other administrative matters." 15 So regardless, even if AAA Rule 38 had some 16 type of retroactive application to the Comanche 17 Nation compact, which it doesn't, we provided 18 otherwise because it's expressly excluded because 19 it's an administrative rule. 20 So what we see is, we've got this dispute. 21 It's a dispute over whether the Most Favored Nation 22 clause applies. That's why we're here today. 23 And the reason that the Most Favored Nation 24 clause -- one of the reasons -- I didn't address this 25 at this point because to this point it's been our</p>
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<p>1 it simply does not apply. 2 Another thing that I would point out is 3 that the first phrase of Paragraph A says "Unless the 4 parties agree otherwise, the provisions of this rule 5 shall apply." So unless they agree otherwise. 6 As I noted in my motion to vacate, the 7 parties have agreed otherwise. They've agreed 8 otherwise because -- for three reasons. 9 First, AAA Rule 38, as we stated, provides 10 for one arbitrator. Rule 10 -- provision 10 in the 11 Comanche Nation compact provides for three 12 arbitrators. 13 So we specifically provided for a different 14 amount of arbitrators. If the parties would have 15 intended to resolve disputes under the Comanche 16 Nation compact using just one arbitrator, it would 17 have said so. But nobody said so. And the language 18 of the compact applied -- is what's controlling in 19 this manner. 20 Another reason is the AAA Rule 38 also 21 provides for immediate resolution for disputes under 22 agreements entered into after the October 1, 2013 23 date. 24 In the Comanche Nation compact it plainly 25 provides that the dispute has to be resolved only</p>	<p>1 position that it's been basically procedural as to 2 where the dispute lied and which set of resolution 3 procedures would be employed. 4 But if you look at the dispute 5 resolution -- I mean, the Most Favored Nation clause 6 of the Comanche Nation compact at page 13, it allows 7 the tribe to adopt more favorable terms for sale. 8 "Terms for sale" are things such as pricing 9 and such as that. It does not include the singular 10 word "term," which is a distinction that I'd like to 11 make. 12 "Term" relates to duration. And there are 13 several cases -- I haven't cited them in my brief. 14 They're going to be cited in response to their motion 15 for preliminary injunction, but several cases that 16 provide that duration may not be extended by the 17 invocation of a Most Favored Nation clause. That's 18 one of the problems that we have. 19 Another problem with the improper 20 invocation -- 21 THE COURT: Well, explain that. I don't 22 understand that. 23 MR. CHAFFIN: The one that specifically I 24 have in mind is a case called -- I think it's 25 Eveleth, E-V-E-L-E-T-H, versus Taconite,</p>

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<p>1 T-A-C-O-N-I-T-E, Mining. It goes in to discuss where 2 one party wanted to use the Most Favored Nation 3 clause of its contract to adopt a different 4 termination date contained in a different contract, 5 and the Court in that matter specifically stated that 6 "term," the singular word "term," is not encompassed 7 in more favorable terms. 8 There is a distinction at law. "Terms" has 9 to do with the covenants and provisions between the 10 parties. What did you agree to sell something for? 11 What was the price? "Term" has to do with duration. 12 What the tribe is trying to do is to stick 13 us into a situation where we're essentially forced to 14 compact with them as long as we compact with anybody 15 else with a later termination than them. So "terms 16 for sale" does not include "term" or "duration." 17 THE COURT: Well, if you read on in 18 Paragraph 13, it says, "Such compact and all of its 19 terms may be adopted by the Nation." 20 Now, do you read that to say the compact 21 except for its beginning and end date? How do you 22 read that? What are you saying to me here about 23 term? 24 MR. CHAFFIN: I'm saying that duration is 25 term. It's a term. It's a term of time.</p>	<p>1 the same -- you can't completely throw out the 2 termination date and disregard it. You can't defeat 3 the language that the party expressly -- 4 THE COURT: So in your argument, this 5 compact, whether it was the Chickasaw compact or the 6 2008 Comanche compact, would have ended on October 7 31st of this year either way? 8 MR. CHAFFIN: Yes, ma'am. 9 THE COURT: Is that your argument? 10 MR. CHAFFIN: That's it, in a nutshell. 11 THE COURT: Okay, all right. 12 MR. CHAFFIN: Also, I'd like to say that 13 the -- I referenced that the letter that the chairman 14 sent was ambiguous and, you know, said it was 15 adopting the Cherokee Nation compact or, if more 16 favorable, the Choctaw Nation compact and on and on. 17 I'd also like to point out one other thing that I 18 think is telling about that letter. 19 If you look at the Comanche Nation compact 20 which we've been talking about, which is Exhibit 1, 21 if you look at the last two pages. And what the last 22 two pages of that are, it's entitled "A resolution of 23 the Comanche Business Committee Approving and 24 Adopting Comanche Nation State of Oklahoma Tobacco 25 Tax Compact 2008."</p>
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<p>1 THE COURT: So you can invoke the Most 2 Favored Nation clause and your compact would still be 3 over because your original compact was at an end? 4 MR. CHAFFIN: Well, not if you'd invoked it 5 at a time when your compact was actually in 6 existence. If it still had time remaining on it, you 7 could operate under the term of that compact under 8 the other compact's terms. 9 THE COURT: So are you saying that if they 10 sent that letter on October 30th, they'd be subject 11 to the Chickasaw compact, but not on October 31st? 12 What are you -- 13 MR. CHAFFIN: No. I'm just saying -- 14 THE COURT: I just don't understand your 15 argument. 16 MR. CHAFFIN: It expires when it expires. 17 I can brief it and it will make more sense. 18 But "term" is duration. It's like a -- 19 THE COURT: I understand that. 20 MR. CHAFFIN: Okay. 21 THE COURT: I just want to know how you 22 read that in Paragraph 13. 23 MR. CHAFFIN: I read that you can adopt 24 "terms," if you did it properly, while your compact 25 is still in existence, but it will still terminate at</p>	<p>1 One of the things in the whereas clauses, 2 the second whereas clause states "Pursuant to 3 Article 6, Sections 7(C) and 7(J), the Comanche 4 Business Committee is the duly elected official body 5 empowered to appoint -- approve contracts on behalf 6 of the Comanche Nation and to promulgate and enforce 7 laws to protect the peace, health, safety, and 8 general welfare within Comanche tribal jurisdiction." 9 And it goes on to say that they reviewed 10 the terms of this Comanche Nation compact and that 11 they think it's -- that that's what they're going to 12 act on behalf of the tribe. 13 And they took a vote, voted 6-4, 0 against, 14 one abstaining. It was signed and attested to by the 15 secretary and treasurer. And so it shows that the 16 Comanche Nation Business Committee gave them 17 authority on behalf of the tribe to act. 18 The letter sent by -- I believe it's 19 Mr. Coffey on October 31 has no such Comanche 20 Business Nation (sic) resolution attached to it, no 21 indication -- 22 THE COURT: Do you have any evidence that's 23 required in this situation? Do you know what the 24 governance of the Comanche Nation is? 25 MR. CHAFFIN: I don't. I'm just saying</p>

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<p>1 that there's no -- there's no -- there's just no 2 evidence or nothing submitted to show that the 3 Comanche Nation committee met, looked at the term 4 they wanted to -- the compact they wanted to adopt 5 and voted that was a good thing. 6 Also, I'd like to bring up the first time 7 that the tribe ever said, We're adopting the 8 Chickasaw Nation compact, was through a letter sent 9 by its lawyer, not anyone at the tribe. It also 10 had -- you know, it was sent on November 4. The 11 compact would have terminated on October 31, 12 regardless. 13 So even if that was the letter in which 14 they first say, Hey, we're adopting the Chickasaw 15 Nation compact, that would have been late. 16 So what I'm saying is, the State takes the 17 position that that Most Favored Nation clause in the 18 Comanche compact was not properly invoked. 19 The tribe says it does, so the dispute is 20 under the Comanche Nation compact. We've got to look 21 at the dispute resolution provisions of that compact 22 to resolve same. It doesn't allow AAA Rule 38 to 23 apply or AAA to even administer the arbitration. 24 That's my point on those things. 25 I think that would address the merits of</p>	<p>1 rate that their local competitors would be in Lawton 2 and the other areas like Circle K or 7-Eleven. The 3 \$1.03 rate just applies to non-tribal sales. 4 What they're wanting to do, by forcing -- 5 trying to enforce the improper arbitrator award is to 6 basically force the State to give it a rebate on its 7 taxes paid for cigarettes sold to non-tribal members 8 so as to put it in a competitive advantage over other 9 non-tribal retailers and other non-compacted tribal 10 retailers. 11 So they're looking for a state rebate on 12 cigarettes involving non-tribal members to help them 13 gain an advantage over their competitors. So the 14 irreparable harm is just not there. 15 Also, status quo. Status quo is one of the 16 reasons for a temporary restraining order. Status 17 quo, I think we can agree, is to keep the parties in 18 the same position that they were at the time the 19 dispute arose. 20 To allow them to operate on an interim 21 basis under the Chickasaw Nation compact would not 22 put the tribe in status quo or in the same position 23 that it was prior to the time that this dispute 24 arose. 25 And that is because they have never</p>
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<p>1 it. 2 I also would like to briefly just bring up 3 irreparable harm. The tribe says a lot of stuff 4 about irreparable harm. I would like to point out 5 that as a non-compacted tribe now because they went 6 off their compact November 1, they are -- the State 7 in no way is interfering with their sovereign right 8 to govern themselves, in that, today, still, tribal 9 members of the Comanche tribe can buy cigarettes 10 without any type of state taxation at all. 11 They get an allotment of tax-free stamps 12 that are based upon a quota system that you apply for 13 with the Oklahoma Tax Commission. They're given 14 these tax-free stamps. Their members can buy these 15 cigarettes tax-free, no doubt about it. 16 What has happened here is that the tribe is 17 not put at a disadvantage. They're just simply put 18 on the same footing as other non-tribal cigarette 19 retailers and other non-compacted tribal cigarette 20 retailers, in that when they go off their compact, 21 that a tax -- I believe the rate is \$1.03 is imposed 22 on sales of cigarettes to non-tribal members. 23 So they're still operating and they can 24 still be competitive because they're still selling 25 cigarettes and they're selling them at the same tax</p>	<p>1 operated one day under the Chickasaw Nation compact, 2 haven't bought any stamps under the Chickasaw Nation 3 compact. That rate has never been applied to their 4 sales. They've never operated that way. So this 5 status quo would not be preserved by putting them 6 into something that they never did before. 7 I would say status quo would leave them a 8 non-compacted tribe or at the -- I just think it 9 would leave them at a non-compacted tribe. 10 Public policy. There is also a public 11 policy element to temporary restraining orders. The 12 arbitrator in this matter decided arbitrability. He 13 said, I'm going to arbitrate, this dispute is 14 arbitrable under AAA Rule 38, over our objection. 15 Arbitrability, according to -- Oklahoma 16 Oncology is a case I cited, and AT&T Technologies is 17 another case I cited in my motion to vacate. 18 Arbitrability is a matter for you to decide. It's a 19 matter of something for a court to decide. 20 If one party says something's not 21 arbitrable, the Court decides it, not the arbitrator. 22 And once that's resolved, it goes to the arbitrator 23 and then it's arbitrated. 24 But the arbitrator took it within his own 25 liberty to say, Hey, this is arbitrable, we're going</p>

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<p>1 to do this, and we're going to do it without you 2 being absent (sic); and even though you agreed 3 otherwise about the number of arbitrators, the timing 4 of this whole thing, all this not applying AAA rules, 5 we're going to go ahead and do it under AAA Rule 38. 6 So his ruling is void ab initio, it's of no 7 effect. And it would be bad public policy to allow a 8 party to be able to use a void arbitration award to 9 compel a party to remain -- to do something that it 10 never consented to the improperly seated arbitrator 11 ordering them to do. 12 And that's multiplied, too, when you look 13 at what the tribe is doing is trying to use this 14 improperly awarded arbitrator award to gain a rebate 15 on sales to non-tribal members to put themselves at a 16 competitive advantage over other Oklahoma taxpayers 17 that sell cigarettes, such as your 7-Eleven, 18 Circle K. 19 That is bad public policy to allow them to 20 invoke this improper arbitrable award at the expense 21 of these other Oklahoma taxpayers who also live in 22 this jurisdiction. 23 I'd also like to point out that as far as 24 injuries to the State, as far as that is concerned, 25 if you look at that, right now the tribe pays \$1.03</p>	<p>1 tribe, you know, as we sit here, is paying -- we'd 2 be -- there's 50 cents difference between what their 3 compact rate was in '08, under the '08 compact and 4 today. 5 And if you put them back on -- there's a 6 50-cent difference there. The State, if you put them 7 under the Chickasaw compact, instead of losing the 50 8 cents, it'd be losing 70 cents per back to non-tribal 9 members. 10 So the State also would be suffering a lack 11 of revenue. And the 70 cents that the State would 12 lose is more than the 50 cents that the tribe would 13 lose. So I think where we stand now, I mean, the 14 State does stand to suffer some harm in this matter. 15 And with that, I would just like to 16 conclude for now to say that it's clear that we have 17 a dispute and it's clear that that dispute is whether 18 the tribe properly invoked the Most Favored Nation 19 clause contained in the Comanche Nation compact. The 20 dispute is over that provision and it's over that 21 compact. 22 And the parties clearly agreed to outline 23 the procedures to be used to resolve disputes just 24 such as this one. And the tribe is basically trying 25 to throw those agreements out the window.</p>
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<p>1 per pack to non-tribal members. If they got their 2 way -- well, back up. 3 They pay \$1.03 per pack to non-tribal 4 members. When they were compacted, under their 5 compact, they paid -- basically 50 cents is what the 6 State got, half of it. I just kind of rounded there. 7 They got about half of that. So we're looking at 8 around 50 cents. So now they pay \$1.03. 9 Well, what they want the State -- so what 10 happens is, if you enforced the Chickasaw compact in 11 the interim, or the arbitrator's award in the 12 interim, the tribe would be -- their tax -- the 13 amount of tax that the State collected under that 14 interim award would be less than it's collecting now. 15 And so there is harm to the State, because we're 16 collecting \$1.03 now. It would be less if you 17 allowed the improper arbitrator award to be enforced. 18 THE COURT: Would it be less than under the 19 2008 compact? 20 MR. CHAFFIN: Yes. 21 THE COURT: By how much? 22 MR. CHAFFIN: I think it's a graduated 23 compact. I think during the first year they paid -- 24 it would be like 30-something percent to the State. 25 But even if you looked at it that way, the</p>	<p>1 Arbitration, as we all know, is a creature 2 of contract. And the parties, including the 3 arbitrator, derives his only authority by virtue of 4 that compact -- contract. 5 So the dispute resolutions provisions in 6 the Comanche Nation compact, not the Chickasaw Nation 7 compact, are what is controlling. 8 Thank you. 9 THE COURT: Five minutes or less. 10 MR. GOODMAN: Okay, Your Honor. I'll take 11 two minutes. Then I'll ask Mr. Ellis to spend three 12 minutes talking about the duration problem. 13 With respect to the agreements, the tribe 14 is trying to enforce the agreements. The State made 15 these agreements. They signed them willingly. 16 They're not challenging the arbitration provisions 17 within them. 18 They've made no reasonable argument that 19 Rent-A-Center West doesn't destroy all of their 20 arguments as to why the arbitrator didn't have 21 jurisdiction to do what he did. So I think if the 22 Court looks at that case, it ought to be able to 23 decide it. 24 With respect to the status quo issue, our 25 position is clear. On October the 30th, they entered</p>


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<p style="text-align: right;">Page 45</p> <p>1 into a compact with the Chickasaw Nation. It had 2 better terms. On October 31st, we adopted it. 3 After we adopted it, they sent their letter 4 saying, We refuse to recognize your rights under the 5 superseding compact. That's the dispute. 6 Maintaining the relative position of the 7 parties, we think, at least under this situation 8 where that issue has been submitted to and decided by 9 an arbitrator, who we believe had jurisdiction to 10 decide it, has been decided in our favor that we 11 properly adopted it as of that date. So that was the 12 status quo when the State said, No, we're not going 13 to comply with that agreement. So we don't think the 14 State is harmed by that. 15 The State likes to decide what the dispute 16 is, but they don't get to. The arbitrator or the 17 Court decides what the dispute is. And so we think 18 the arbitrator had the right to decide what the 19 dispute is and that it was whether or not we had 20 properly invoked that for purposes of interim relief. 21 I'd ask Mr. Ellis to speak about the 22 duration issue. 23 THE COURT: Three minutes or less. 24 MR. ELLIS: Three minutes or less. 25 Your Honor, before -- just so that I don't</p>	<p style="text-align: right;">Page 47</p> <p>1 which is Title 68, Article 3(B). It starts at 2 Section 346. It authorizes the State to enter into 3 compacts like this one. And it entered into a number 4 of compacts. Under all of those compacts that it 5 entered into five years ago, they were all set to 6 expire on the same date. And that date -- they were 7 all entered into on the same date. And all of the 8 tribes were treated substantially the same. That's 9 why they had Most Favored Nation clause. 10 Chickasaw Nation happens to be adjacently 11 located geographically to our tribe and, therefore, 12 they are competitors. 13 If we have to sell our tobacco products at 14 a higher price, they will go to our competitor under 15 their more favorable terms under their contract. 16 That's why it was important that we have these kinds 17 of terms. 18 And that's why this case that I just cited 19 to you as to the duration is important, because the 20 duration of their compact is as important competitive 21 advantage, as well as the arbitration provision. If 22 they are able to arbitrate under different kinds of 23 terms than we are, that puts them at a competitive 24 advantage over our tribe. 25 So that's the reason why the Most Favored</p>
<p style="text-align: right;">Page 46</p> <p>1 go over those three minutes, I want to give you a 2 citation. In case nothing else happens, I'd like you 3 to have the citation. It's 953 N.E.2D 285. It's 4 been cited in our papers to the arbitrator and it's 5 been previously served on the State. So they know 6 about this case. It is Sunoco versus Toledo Edison 7 Company. 8 It talks about the duration of a contract 9 under a Most Favored Nation clause that was actually 10 narrower than our clause. And it applied. The Court 11 said that the duration of the contract definitely 12 applied under the Most Favored Nation clause. So 13 that case is right on point. 14 What I would like you to know, as well, is 15 that these tobacco compacts all originated out of a 16 United States Supreme Court decision. I'm not sure 17 you're familiar with that history. But the 18 United States Supreme Court decision that they arose 19 out of is Oklahoma Tax Commission versus Citizen Band 20 Potawatomi Indian Tribe of Oklahoma, which is 111 21 Supreme Court 905. It was a dispute after which the 22 Supreme Court resolved it. It invited the states and 23 the tribes to try to enter into agreements to resolve 24 these sorts of disputes. 25 Oklahoma then adopted a statutory scheme,</p>	<p style="text-align: right;">Page 48</p> <p>1 Nation clause is there and that's why it's broadly 2 written -- more broadly written than the one in the 3 Sunoco case which I cited to the Court. 4 THE COURT: Thank you. 5 MR. ELLIS: Yes. 6 THE COURT: All of you have argued almost 7 exclusively the likelihood of success on the merits. 8 Mr. Chaffin did reach the other three 9 factors at the end of his argument. To me, this 10 boils down to was the Most Favored Nation clause 11 invoked, invoked in a timely manner, in a 12 procedurally correct manner. 13 In other words, does the Chickasaw compact 14 apply to the Comanche Nation now, both as to its 15 terms of sale of tobacco products and as to its terms 16 of dispute resolution and to its term. 17 I think that the plaintiff has shown a 18 likelihood of success on the merits on that question. 19 Nobody's really discussed irreparable harm until 20 Mr. Ellis just now. 21 The fact that plaintiff is seeking an 22 advantage over its competitors, as Mr. Chaffin 23 argues, doesn't really address whether it is being 24 irreparably harmed as it is not permitted to collect 25 the tax revenues that it has for the last five years</p>

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<p>1 and whether that amounts to a \$500,000 deficit in the 2 tribe's budget and will have the impact on all of the 3 programs as set out in the plaintiff's papers. 4 So I find that irreparable, at least at 5 this stage, weighs in favor of plaintiff. 6 The harm to the plaintiff outweighs the 7 harm to defendant. Although apparently defendant is 8 collecting less tax revenues on its Chickasaw compact 9 than it was under its Comanche compact, the harm 10 still balances in favor of plaintiff because, of 11 course, at this point it's getting nothing. 12 And it's not adverse to the public interest 13 to enter this temporary relief. 14 I disagree, first off, with Mr. Chaffin, 15 that arbitrability is only for the Court and always 16 for the Court. I believe case law says to the 17 contrary. Whether it is for the Court in this 18 instance, I'm sure counsel will brief as we go 19 forward. 20 Finally, an argument that this order would 21 not preserve the status quo is not the fault of the 22 plaintiffs. It preserves -- it comes closer to 23 preserving the status quo than not entering the 24 order. 25 The terms of sale and tax are different</p>	<p>1 Mr. Chaffin, do you want to suggest or 2 argue in favor of a bond or in a specific amount -- 3 MR. CHAFFIN: One second. 4 THE COURT: -- or Mr. Goodman, do you? 5 MR. CHAFFIN: I think a bond might be 6 appropriate in this situation. 7 In the ultimate instance that it's found 8 that the tribe is not successful on this dispute, has 9 not adopted the rate of the Chickasaw Nation compact 10 and instead would be a non-compact tribe, so I 11 think a bond of some amount would be necessary to 12 protect the State in case that finding occurs. 13 I guess it would depend on the length of 14 the arbitration, how long it takes to get that 15 resolved. 16 THE COURT: Does the arbitrator have the 17 power or obligation to impose a bond on his temporary 18 relief? 19 MR. GOODMAN: I wish -- 20 THE COURT: Was that discussed? 21 MR. GOODMAN: I wish I knew the answer to 22 that, Your Honor, so I could give it to you, but I do 23 not. I do not know that. 24 MR. ELLIS: I have the rules. 25 MR. GOODMAN: I think we've got the rules</p>
<p>Page 50</p> <p>1 than they were before the Chickasaw compact was 2 entered into, but at least they're getting more than 3 they would if they didn't have any compact at all. 4 Finally, I want to say this public 5 interest, adverse to public interest, I'm -- it's not 6 for me to decide -- and maybe I shouldn't even say 7 it -- but I find myself wondering why any sovereign 8 tribe would be treated any differently than any -- 9 every other sovereign tribe. 10 To me, it is in the public interest that 11 these sovereign nations who live among us be treated 12 the same by the State. Whether that's good or bad, 13 whether the treatment is good or bad, it should be 14 consistent, I think, among all the tribes. 15 For that reason, I find that this -- the 16 order I am getting ready to enter is certainly in the 17 public interest to even the treatment out. 18 So in essence and in sum, I am granting the 19 plaintiff's relief for temporary restraining order. 20 That is no expression of decision on the 21 merits of preliminary injunctive relief. Although 22 certainly if the evidence is the same at that time as 23 it is now, then the plaintiffs will win again. 24 No one has addressed the requirement of a 25 bond.</p>	<p>Page 52</p> <p>1 with us. We'll see. 2 MR. CHAFFIN: Your Honor, while they're 3 looking, I was just going to say if it'd be 4 permissible, I could get with Mr. Cartmell here, and 5 he could look at the figures. And if we wanted to do 6 so, maybe we could do it by motion or something like 7 that to outline what the proper amount for the bond 8 would be. 9 THE COURT: All right. I read Rule 65(C) 10 as requiring a bond of some kind. And I have, of 11 course, at times required a nominal bond. 12 In this case, if all of this relief is 13 ultimately undone, I presume the State will seek the 14 taxes that you're not paying now up to whenever you 15 have to start paying them again. 16 MR. GOODMAN: Yes. And under the compact, 17 they have the right to withhold -- they collect the 18 taxes from the wholesalers. They have the right to 19 withhold from the Comanche Nation monies that it owes 20 to them if the Comanche Nation has any debit to the 21 State. 22 So I would urge the Court, if it feels like 23 it needs to have a bond, to make a bond in a small 24 amount for two reasons: One, the State has this 25 right of recoupment because they collect the taxes</p>

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<p>1 from the wholesalers on the sales by compacting and 2 non-compacting retailers; and more importantly, that 3 this only, I believe, covers the period from now 4 until we have the hearing on the merits in this case. 5 At which point, we'll be entitled to injunction 6 without bond or we won't. 7 So it just needs to be for a relatively 8 short period of time in any event. 9 THE COURT: Well, I think you're right. 10 But how long the period of damages would be? Given 11 that I'm going to set this in three weeks or so, I 12 would suggest that we waive the entry of a bond. 13 Do you object to that, Mr. Chaffin? It 14 looks like you have your remedies if -- 15 MR. CHAFFIN: I don't necessarily like the 16 idea of just having to depend upon withholding 17 sometime in the future. I think that's fraught with 18 problems and could lead to issues in the future. I'd 19 rather see if we could do some type of bond now. 20 THE COURT: All right. I'll require a bond 21 in the amount of \$25. 22 MR. GOODMAN: All right, Your Honor. We'll 23 get that posted promptly. 24 THE COURT: I will set this for hearing on 25 the preliminary injunctive relief on Thursday,</p>	<p>1 THE COURT: And I will enter an order, 2 hopefully today, but the State should start complying 3 as of now because you're on notice. And we'll be 4 adjourned. 5 (END OF PROCEEDINGS.) 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>
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<p>1 December 12th, at 10:00. 2 I'm not sure -- your 21 days to respond to 3 the motion to vacate would be on the 11th. 4 And your 21 days to respond to the motion 5 for injunctive relief would be the day before that, I 6 suppose. 7 I need those briefs earlier than that. So 8 why don't you both respond to the other's motions by 9 December 9th. At least we can enjoy our 10 Thanksgiving. Maybe not our Christmas. 11 MR. GOODMAN: The 9th is that Monday, 12 Your Honor? 13 THE COURT: Yes. 14 MR. GOODMAN: All right. Thank you. 15 THE COURT: Anything else today, 16 Mr. Goodman? 17 MR. GOODMAN: Your Honor, I just want to 18 make certain that I understand the relief that the 19 Court is granting. The arbitrator decided that -- 20 THE COURT: I'm affirming the arbitrator's 21 relief. 22 MR. GOODMAN: All right. At least on an 23 interim basis? 24 THE COURT: Yes. 25 MR. GOODMAN: Okay.</p>	<p>1 REPORTER'S CERTIFICATE 2 3 I, SHERRI GRUBBS, hereby certify that the 4 foregoing is a true and correct transcript of 5 proceedings taken on November 20, 2013, before The 6 Honorable Robin J. Cauthron, United States District 7 Judge. 8 9  10 S/SHERRI GRUBBS, RPR, RMR, RDR, CRR 11 State of Oklahoma CSR No. 1232 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>