

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

COMANCHE NATION, a federally recognized Indian Tribe, and NUMUNU PAHMU, a Limited Liability Company,)	
)	
Plaintiffs,)	Case No. CIV-13-1228-C
)	
v.)	
)	
GOVERNOR MARY FALLIN and THE STATE OF OKLAHOMA,)	
)	
Defendants.)	

**PLAINTIFFS’ MOTION FOR TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION AND BRIEF IN SUPPORT**

Plaintiffs the Comanche Nation and Numunu Pahmu, LLC (collectively “Plaintiffs”), pursuant to Federal Rule of Civil Procedure 65, move the Court for entry of a temporary restraining order for such period of time until the Court conducts a hearing on Plaintiffs’ Motion for Preliminary Injunction, made as part of this same Motion. In support of this Motion, Plaintiffs show the Court as follows:

FACTUAL BACKGROUND

On November 11, 2013, Plaintiffs filed a demand for arbitration in the American Arbitration Association and moved for emergency injunctive relief to resolve a dispute that had arisen between Plaintiffs and Defendants, the State of Oklahoma (“State”) and Governor Mary Fallin (collectively “Defendants”), concerning the parties’ Tobacco Tax Compact.

The State entered into substantially similar tobacco compacts with several tribes who competed for the sales of tobacco products. The compacts, including the one

entered into by the Nation with the State, were originally scheduled to terminate on June 30, 2013 if either party gave notice of an intent not to renew the compacts for an additional term. The compacts recognized the competitive positions of the various compacting tribes and thus included a “most favored nation” clause within each of the compacts, to ensure that no tribe would be treated less favorably than another and thereby be placed at a competitive disadvantage that would potentially drive its tobacco retailers out of the market.

The State gave all the tribes notice of its intent not to renew the compacts and began negotiating new compacts with the tribes. The Comanche Nation and the State agreed in writing to extend the term of the Original Compact through October 31, 2013. The Nation began negotiating for a new compact in good faith, and in the course of negotiation the State represented to the Nation that it was offering to the Comanche Nation terms as favorable as those offered to any other tribe. However, on the eve of the expiration of the Original Compact (October 31, 2013), the Nation discovered the State had provided more favorable terms to several other Indian Nations, including the Chickasaw Nation, to the exclusion of the Comanche Nation. The State refused to extend the Original Compact further and thereby placed the Comanche Nation in a “take-it-or-leave-it” position, while concurrently allowing such more favorable terms to other tribes.

Under the most favored nations clause of the Original Compact, the Nation was entitled to adopt while its own compact remained in force the more favorable terms the State conferred through compact with any other Indian Tribe as to sales of tobacco, and any such adopted compact would supersede the terms of the Original Compact. The

Comanche Nation accordingly gave the State notice on October 31, 2013, the same date the State entered into the Chickasaw Nation Compact, that the Comanche Nation was exercising its option to adopt that Compact as its own to govern the parties' relations with respect to the taxation of the Nation's sales through retailers of tobacco products. The October 31, 2013 Compact (sometimes "Superseding Compact") terminates on December 31, 2023. Thus until December 31, 2023, the parties' relationship is governed by that Compact.

The State promptly repudiated its obligations and refused to perform under the Superseding Compact, breaching its contractual duties. The State informed the Nation that it would not negotiate further with the Nation and that the Nation's only recourse was to arbitrate over the matter. The Superseding Compact provides for arbitration in the event either party claims a breach by the other, or for any other dispute arising thereunder, "which arbitration shall proceed in accord with rules that substantially comport with the rules of the American Arbitration Association." *See* Complaint, Doc. 1, Ex. 2 thereto, ¶ 18(b). The arbitration clause also provides: "Remedies available through arbitration include injunctive and/or declaratory relief for the enforcement of the provisions of the Compact. *Id.*

The only arbitration rules referenced by the parties are those of the AAA, and the applicable arbitration rules for this kind of dispute are the Commercial Arbitration Rules which became effective on October 1, 2013, thirty days before the Comanche Nation adopted the Superseding Compact with its new arbitration clause. The AAA Rules provide for emergency relief pending the outcome of the arbitration, and on November

10, 2013 the Comanche Nation both initiated arbitration proceedings and filed a motion for such emergency relief. The AAA scheduled the matter before emergency arbitrator Patrick Irvine, a former Arizona Court of Appeals Judge. The state responded to AAA that “neither arbitrator Irvine, nor any other AAA appointed arbitrator, have any authority to issue any ruling regarding the State or Oklahoma” and: “Accordingly, the State will not abide by any decision of an AAA appointed arbitrator.” Ex. 3, 11/14/13 email from Ryan Chaffin to Kate Stillman. The State additionally asserted that the Comanche Nation improperly relied upon the arbitration clause in the October 31, 2013 Compact which the Nation claimed the State was breaching -- and the State referred the AAA to the superseded provisions of the prior, 2008 Compact, arguing that those prior terms had precluded the AAA from “administering this arbitration.” *Id.*

The State has refused to recognize its duties under the Superseding Compact and has asserted that the Nation is subject to the higher tax rates provided for non-compacting tribes under 68 O.S. § 349.1. That statute subjects sales of cigarettes and other tobacco products by retailers licensed by non-compacting federally recognized tribes to the full state excise tax rate, 68 O.S. §349.1(A), and allocates to non-compacting tribes a limited number of excise-tax-free or “black stamps” to distribute to retailers for the sale of tobacco on Indian land to tribal citizens tax free. *Id.* § 349.1(B)(2).

The Nation’s tobacco tax compact brings hundreds of thousands of dollars in revenue to the Nation to fund essential governmental and social service programs for its members. The compact allows the Nation’s small, tribal tobacco retailers to compete with larger chains, and absent interim relief, those retailers will be unable to compete for

customers and will permanently lose such customers to competitors, ultimately to be driven out of business altogether. As a result, the Nation's essential governmental and vital social service programs will go unfunded due to the lack of tax revenue.

Recognizing the irreparable harm to the Plaintiffs, with no assertion or showing of corresponding injury to the Defendants, the arbitrator entered an Award on November 18, 2013 granting Plaintiffs' Motion for Emergency Injunctive Relief prohibiting the State from suspending its recognition of the Compact and applying its tax laws pertaining to non-compacting tribes pending resolution of the controversy. A copy of this Award is attached to the Complaint, Doc. 1, Ex. 1.

Simultaneous with this Motion, Plaintiffs filed a Complaint and Application to Confirm the Arbitration Award with this Court. *See* Plaintiffs' Complaint and Application to Confirm Arbitration Award, Doc. 1. Plaintiffs now request the Court to enjoin Defendants from disobeying the arbitrator's ruling pending a hearing on Plaintiffs' Application to Confirm the Award. Plaintiffs have or are serving summons with the Complaint and this filing on Defendants, and thus are proceeding with notice.

ARGUMENTS AND AUTHORITIES

I. A Temporary Restraining Order and Preliminary Injunction Are Necessary to Protect Plaintiffs From Irreparable Harm Pending Confirmation of the Arbitration Award

Plaintiffs request that the Court, through a temporary restraining order followed by a preliminary injunction, enforce the arbitrator's order of interim relief pursuant to the parties' arbitration agreement and the controlling arbitration rules while the arbitration is pending. Absent such relief, the State's repudiation of its obligations may render any

final arbitration award ineffectual, since in the meantime the Nation's tobacco retailers will irretrievably lose their customer base and likely be driven out of business for the sale of tobacco products. The injury to the Nation's tax revenues and consequential harm to its essential governmental and social service programs will be irreparably damaging to the Nation and its citizens.

A temporary restraining order is designed to preserve the relative positions of the parties and prevent irreparable injury until such time as the Court may determine a plaintiff's motion for temporary injunction. *See Granny Goose Foods, Inc. v. Int'l Bhd, of Teamsters*, 415 U.S. 423, 429 (1974). A preliminary injunction serves the same purpose pending outcome of the dispute. *See Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986).

The standards to be applied to temporary restraining orders are almost identical to the standards applied to temporary injunctions. *See Smith v. Soil Conservation Serv.*, 563 F. Supp. 843, 844 (W.D. Okla. 1982); 43 C.J.S. *Injunctions* §17 at 782-784. To obtain a temporary restraining order and preliminary injunction, Plaintiffs must, and herein do, show: (1) they have a substantial likelihood of prevailing on the merits; (2) they will suffer irreparable harm unless the restraining order or injunction is issued; (3) the threatened injury to Plaintiffs outweighs the harm the restraining order or injunction may cause Defendants; and (4) the order, if issued, would not be adverse to the public interest. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246 (10th Cir. 2001); 43 C.J.S. *Injunctions* § 17.

Evidence by Declaration is submitted in support of this Motion. *See* Declaration of Wallace Coffey, Comanche Nation Business Committee Chairman and CEO, attached hereto as Ex. 1; Declaration of Jarrett Jackson, Numunu Pahmu LLC Chief Executive Officer, attached hereto as Ex. 2. It is appropriate to grant such temporary equitable relief pending the confirmation of an arbitration award, to prevent the subversion of the interests to be protected by arbitration and a prospective arbitration award. E.g., *CAP of MB, Inc. v. Champion Rock Prods., Inc.*, 111 F. Supp. 2d 728, 730 (D.S.C. 2000) (noting that the state court entered a temporary restraining order, later supplanted by a temporary injunction, recognizing all claims were subject to arbitration and maintaining the status quo until a decision by the arbitrator was entered); *Prograph Int'l Inc. v. Barhydt*, 928 F. Supp. 983, 992 (N.D. Cal. 1996) (issuing preliminary injunction enjoining employee from pursuing claims on underlying controversy in state court pending arbitral award and confirmation of such award in federal district court); *Communications Workers of Am. v. Capital Cable Co.*, No. A-81-CA-272, 1981 WL 2359, at *2 (W.D. Tex. Aug. 17, 1981) (granting plaintiff's motion for temporary restraining order to compel defendants to comply with arbitrator's award).

A. Plaintiffs Have Substantial Likelihood of Success on the Merits

To obtain a preliminary injunction, the movant need not prove positively that it will prevail on the merits of its claims. In *Atchison, T. and S. F. Ry. Co. v. Lennen*, the court explained:

It is not necessary that plaintiffs show positively that they will prevail on the merits before a preliminary injunction may be granted. As this court stated in *Valdez v. Applegate*, 616 F.2d 570, 572 (10th Cir. 1980), “(t)he

determination of a motion for a preliminary injunction and a decision on the merits are different.” It is only necessary that plaintiffs establish a reasonable probability of success, and not an “overwhelming” likelihood of success, in order for a preliminary injunction to issue. *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980).

640 F.2d 255, 261 (10th Cir. 1981).

Here, there is a substantial likelihood that Plaintiffs will prevail in their quest to enforce the arbitrator’s award of interim relief. The Federal Arbitration Act, 9 U.S.C. § 9, provides that if the parties have agreed for the court to enter judgment upon an award made pursuant to arbitration, any party may apply to the court for an order confirming the award. Upon such application the Court “must grant such an award unless the award is vacated, modified, or corrected” for any of the narrow reasons prescribed within the Act. 9 U.S.C. § 9 (2012). Here, in ¶ 18(b) of the Amended Compact, the parties agreed that “any arbitral award issued pursuant to proceedings initiated under th[e] section [would] be enforceable in a court of proper jurisdiction” and both consented to suit in federal district court for such purposes. *See* Complaint, Doc. 1, Ex. 2 thereto, ¶ 18(b). There are no grounds to correct, vacate or modify the Award under 9 U.S.C. §§ 10 or 11.

Interim awards, in addition to final awards, are eligible for confirmation when they “finally and definitively dispose[] of . . . separate independent claim[s].” *Blue Cross Blue Shield of Mich. v. Medimpact Healthcare Sys., Inc.*, No. 09-14260, 2010 WL 2595340, at *2 (E.D. Mich. June 24, 2010) (quoting *Island Creek Coal Sales Co. v. City of Gainesville*, 729 F.2d 1046, 1049 (6th Cir. 1984), *abrogated on other grounds by Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193 (2000)). Courts have found that an arbitrator ruling granting interim injunctive relief in instances like the

present “qualif[y] as one that finally and definitely disposes of a separate independent claim” and are thus subject to confirmation. *Id.*; *see also Island Creek Coal Sales Co.*, 729 F.2d at 1049 (affirming district court’s observation that “[t]he interim award disposes of one self-contained issue, namely, whether [a party] is required to perform the contract during the pendency of the arbitration proceedings. Th[is] issue is a separate, discrete, independent, severable issue.” (internal quotation marks omitted)).

Furthermore, a district court’s powers to review an arbitration award are “extremely limited,” *Dominion Video Satellite, Inc. v. Echostar Satellite, L.L.C.*, 430 F.3d 1269, 1275 (10th Cir. 2005), and have been described as “among the narrowest known to law.” *Conoco, Inc. v. Oil, Chem. & Atomic Workers Int’l Union*, 26 F.Supp.2d 1310, 1315 (N.D. Okla. 1998) (quoting *Denver & Rio Grande Western Railroad Co. v. Union Pacific Railroad Co.*, 119 F.3d 847, 849 (10th Cir. 1997)). The same principle applies in this procedural posture. For example, in *Communications Workers of America v. Capital Cable Co.*, No. A-81-CA-272, 1981 WL 2359, at *2 (W.D. Tex. Aug. 17, 1981), the U.S. District Court for the Western District of Texas found, in granting plaintiff’s motion for temporary restraining order, that plaintiff’s likelihood of success in a suit to enforce an arbitration award was “quite substantial” considering the district court’s limited authority to review arbitration awards. The rationale for restricting judicial review is that parties agree to arbitrate for the very purpose of avoiding the delay and expense of court proceedings. *See Dominion Video*, 430 F.3d at 1278; *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 932 (10th Cir. 2001); *Conoco, Inc.*, 26 F.Supp.2d at 1315. “A court may only vacate an arbitration award for reasons enumerated under the

Federal Arbitration Act, 9 U.S.C. § 10, or for a handful of judicially created reasons.... Outside of these limited circumstances, an arbitration award must be confirmed.” *Conoco, Inc.*, 26 F.Supp.2d at 1315 (quoting *Denver & Rio Grande Western Railroad Co.*, 119 F.3d at 849).

B. Plaintiffs Will Suffer Irreparable Harm without an Injunction

The Tenth Circuit has recognized that “the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered.” *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1260 (10th Cir. 2003). Having now repudiated the continued viability of the Amended Compact, the State has implemented the imposition of State taxes on the Nation and its retailers under the State’s view of the much higher tax obligation that would subsist absent such agreement. This threatens loss of substantial and necessary revenue to the Comanche Nation, and more importantly, threatens the continued existence of the affected retailers who may be driven out of business once their prices must reflect the higher tax obligations, depriving them of the favorable competitive position they have by virtue of the Compact’s effect. If they are driven out of business by loss of reliable continued sales—or even if they continue to exist but sustain a permanent loss of business because of the loss of customers which the State knows will inevitably occur—the Comanche Nation will not be able to obtain effective relief. The arbitrator recognized such harm in awarding emergency injunctive relief—an award that will mean nothing unless enforced against the State.

Details Of Irreparable Harm

If the award is not enforced, and the State is permitted to impose state taxes on the Nation and its retailers, the Nation will suffer loss of tax revenue that provides considerable supplements to governmental services including, but not limited to:

(a) **governmental services** such as administration and government, land management, enrollment, maintenance, visual media, newspaper and elections;

(b) **career services** such as higher education services through the Comanche Nation College, job training and career counseling and development, scholarships to non-Indian institutions of higher learning, student services;

(c) **family services** such as child care development, day care services, Indian Child Welfare Act assistance to keep Comanche Indian families united, child support assistance and enforcement, children's court, youth shelter, substance abuse shelter and counseling, youth programs and counseling, family assistance, food pantry and assistance, low income home energy assistance, burial assistance, food distribution, home improvement and reintegration;

(d) **health services** such as caregivers, ambulance, nursing home and assisted living, diabetes prevention, control and treatment, fitness center, optometry, prescription assistance, pathways, rehabilitation and transition assistance and nursing training;

(e) **public safety** including police force protection comprising patrol, criminal investigations, administration and sex offender registration (Comanche Police Department assists and works in cooperation with non-Indian law enforcement agencies including local police departments, sheriff's departments in four counties, the Oklahoma Highway Patrol, federal law enforcement agencies including Ft. Sill Military Police, Wichita National Wildlife Refuge rangers and the Bureau of Indian Affairs), fire protection and management, emergency management (including teams that responded and provided aid to recent disasters including the Moore tornadoes), injury prevention programs (including bike helmets, smoke alarms, fire extinguishers and locks for guns), reservation transit systems, gravel tinhorn to assist in providing driveways to citizens in rural areas with unpaved roads, road and bridge construction and maintenance,

environmental and protection in conjunction with local, state federal and intertribal organizations including:

- the U.S. Environmental Protection Agency (EPA), Region 6
- Oklahoma Department of Environmental Quality (ODEQ)
- Natural Resources Conservation Services (NRCS)
- U.S. Public Health Service Environmental Health
- Inter-tribal Environmental Council (ITEC)
- Oklahoma Tribal Water Advisory Council
- Native American Fish & Wildlife Society (NAFWS)
- Inter-tribal Council of Arizona (ITCA)
- Western Oklahoma Tribal Environmental Consortium (WOTEC)
- Oklahoma Water Resources Research Institute (OWRRI)
- United States Department of Agriculture

and divisions that include water quality protection, indoor air quality, solid waste (including cleaning up illegal dump sites) and recycling;

(f) cultural preservation and protection including Numu Tekwapuha--Comanche Nation Language Preservation and Education, Native American Graves and Repatriation Act, Historic Preservation (working in conjunction with numerous federal and state agencies including the Oklahoma Historical Society, U.S. Department of Defense, Department of Army, Bureau of Land Management and the Bureau of Indian Affairs), SIA—The Comanche Nation Ethno-Orinthological Initiative to rehabilitate and preserves eagles and other birds of prey (working in conjunction with numerous state and federal agencies including the U.S. Fish and Wildlife Service), the Comanche National Museum, the Comanche Nation Fair, Comanche Nation Indian Veterans Association;

(g) community outreach including offices in Oklahoma City, Lawton and Dallas, community centers in Cache, Walters, Apache and Wachataker Hall at the Comanche National Complex near Medicine Park (these centers provide facilities for children's events, elder dinners, powwows, funerals, sporting events, community meetings, government committee meetings and the like), elder centers, fitness center and tourism center; and

(h) employment including preference in hiring for Comanche Nation citizens. *See* Chairman Coffey Declaration, Ex. 1 hereto. Additional information about these governmental services is available at <http://www.comanchenation.com/> (last visited Nov. 15, 2013).

See Wallace Coffey Decl., Ex. 1.

Absent the relief requested herein, the Comanche Nation will additionally suffer potential slow down or stopping of the construction and/or renovations to (i) the Plaza fuel stop and retail facility at Exit 1, Interstate 44 near the Red River in Cotton County, Oklahoma; and (ii) the Spur retail/fuel stop facility southwest of Elgin in Comanche County, Oklahoma; all financed and funded in substantial part through tobacco sales and tax revenue. *Id.* These facilities provide economic development, local services, and jobs throughout the region to Comanche citizens, Native Americans, and non-Indian community members alike in rural and economically impoverished areas. *Id.*

Furthermore, if the State is allowed to disobey the arbitration award of interim relief, Plaintiff Numunu Pahmu LLC will suffer lost sales which in turn could require the termination of Comanche citizen employees, loss of revenue, closure of various commercial operations, and loss of revenue provided to the Comanche Nation for the funding of essential governmental services. *See* Jarrett Jackson Decl., Ex. 2. In addition, licensed Comanche Nation retailers will suffer lost tobacco sales, loss of associated sales of convenience store products, and services and will fail to remit tax revenue to the Comanche Nation Tax Commission to fund essential governmental services. *Id.* Such a loss of revenue threatens to cause most licensed Comanche Nation retailers to close their operations and cease existence and jeopardizes the delivery of services to Comanche Nation citizens. *Id.* It is not possible to accurately predict all damages the Comanche Nation, Numunu Pahmu, LLC and the Nation's licensed retailers will suffer immediately by Oklahoma's Compact breaches. *Id.* However, the Nation has estimated that a twenty

percent (20%) loss of sales revenue will result in \$508,700 per month in lost government revenue under the October 31, 2013 Superseding Tobacco Tax Compact. *Id.*

The Superseding Compact expressly forecloses either party from recovering compensatory damages from the other. *Only* injunctive or declaratory relief is available under the Compact. See Complaint, Doc. 1, Ex. 2 thereto, Article III, p.8, ¶18(c).

A. Defendants will not be Harmed by a Temporary Restraining Order or Injunction Enforcing the Arbitration Award

By contrast, the State cannot assert any measurable harm by the enforcement of the interim arbitration award. The State's oppressive and as-yet unexplained position is that it is entitled to act as if no tobacco tax compact exists, while relegating the Comanche Nation to prolonged dispute resolution proceedings. The State did not delay one moment in exerting its will upon the Nation in this respect. It promptly began issuing its allocation of tax stamps to threaten tax penalties and enforcement proceedings against any retailer who does not comport with its view that the Compact no longer exists. Yet the State will suffer no irreparable harm, or indeed any harm whatever, by the confirmation of emergency relief granted by the arbitrator. Rather, if the parties' relative positions are preserved, the State will continue to be paid tax revenues on sales of tobacco products by the Nation and its retailers that would otherwise be thwarted and dramatically reduced because of the higher tax rates. The balance of hardships decidedly favors the Nation.

B. The Public Interest is Served by the Issuance of an Injunction

Finally, the public interest in resolving this dispute without undermining the parties' economic interests and expectations is substantial. This can only be accomplished through the enforcement of the arbitration award, requiring the parties to operate under the Superseding Compact as it stood on October 31, 2013, prior to the State's repudiation of its obligations thereunder. Moreover, the public interest favors protection of the contractual relationships between parties. *See Communications Workers of Am*, 1981 WL 2359, at *2 (acknowledging that the public has a strong interest in enforcing agreements to submit disputes to binding arbitration for peaceful resolution). If the State is allowed to disregard the arbitrator's ruling and the Comanche Nation's rights under their agreement, the Nation and its citizens will suffer greatly through non-collection of the revenues to which they are entitled under the Compact, while the much larger and more affluent State of Oklahoma cannot claim that its economic loss, if any, will be commensurately felt.

CONCLUSION

For the above stated reasons, Plaintiffs respectfully request that their Motion for Temporary Restraining Order and Preliminary Injunction be granted and that Defendants be restrained from disobeying the arbitration award of interim injunctive relief.

Respectfully submitted,

s/ Mike McBride

D. Michael McBride III, OBA #15431

- Of the Firm -

CROWE & DUNLEVY
A Professional Corporation
500 Kennedy Building
321 South Boston Avenue
Tulsa, Oklahoma 74103-3313
(918) 592-9821
(918) 599-6317 (Facsimile)
mike.mcbride@crowedunlevy.com

-AND-

Jimmy K. Goodman, OBA #3451
Harvey D. Ellis, OBA #2694
Paige A. Masters, OBA #31142

- Of the Firm -

CROWE & DUNLEVY
A Professional Corporation
20 North Broadway, Suite 1800
Oklahoma City, Oklahoma 73102-8273
(405) 235-7700
(405) 239-6651 (Facsimile)
jimmy.goodman@crowedunlevy.com
harvey.ellis@crowedunlevy.com
paige.masters @crowedunlevy.com

**LAWYERS FOR PLAINTIFFS
COMANCHE NATION AND NUMUNU
PAHMU LLC**

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 2013, I had the foregoing document served, along with the Summons and Complaint, and I e-mailed the foregoing document to counsel for Defendants at the following addresses:

Steve.Mullins@gov.ok.gov
Ryan.Chaffin@oag.ok.gov
Jeffrey.Cartmell@gov.ok.gov

s/Mike McBride

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

COMANCHE NATION, a federally)
recognized Indian Tribe and NUMUNU)
PAHMU, a Limited Liability Company,)

Plaintiffs,)

v.)

Case No. CIV-13- 1228-C

GOVERNOR MARY FALLIN and THE)
STATE OF OKLAHOMA,)

Defendants.)

DECLARATION OF WALLACE COFFEY

I, Wallace Coffey sworn, upon my oath, declare under the penalty of perjury, 28 U.S.C. § 1746, the following is true and correct and is within my personal knowledge:

1. I am the Chairman of the Comanche Nation Business Committee and serve as the elected leader of the Comanche Nation government.

2. Numunu Pahmu, LLC is a limited liability company chartered under Comanche Nation law, is wholly owned and operated by the Comanche Nation, and has its offices in Lawton, Oklahoma. Numunu Pahmu is organized for the purposes of engaging in sales of tobacco and other products in Comanche Nation Indian Country.

3. The Comanche Nation also licenses other retailers that operate and sell tobacco and other products in Comanche Nation Indian Country.

4. Prior to October 31, 2013, the Numunu Pahmu and Licensed Retailers sold tobacco products under the terms of the Tobacco Tax Compact dated June 26, 2008 (the "Original Compact"). The Original Compact allowed the Comanche Nation and Licensed

Retailers, including Numunu Pahmu, to sell cigarettes and other tobacco products at a reduced Oklahoma state sales tax rate, with both the Comanche Nation and the State of Oklahoma sharing in the revenue generated by the sales tax on tobacco products.

5. The Comanche Nation receives over \$1 million per year in tax revenue from the sales of tobacco products at Numunu Pahmu and Licensed Retailers. These are used to support numerous governmental services of the Comanche Nation, including:

(a) **governmental services** such as administration and government, land management, enrollment, maintenance, visual media, newspaper and elections;

(b) **career services** such as higher education services through the Comanche Nation College, job training and career counseling and development, scholarships to non-Indian institutions of higher learning, student services;

(c) **family services** such as child care development, day care services, Indian Child Welfare Act assistance to keep Comanche Indian families united, child support assistance and enforcement, childrens' court, youth shelter, substance abuse shelter and counseling, youth programs and counseling, family assistance, food pantry and assistance, low income home energy assistance, burial assistance, food distribution, home improvement and reintegration;

(d) **health services** such as caregivers, ambulance, nursing home and assisted living, diabetes prevention, control and treatment, fitness center, optometry, prescription assistance, pathways, rehabilitation and transition assistance and nursing training;

(e) **public safety** including police force protection including patrol, criminal investigations, administration and sex offender registration (Comanche Police Department assists and works in cooperation with non-Indian law enforcement agencies including local police departments, sheriff's departments in four counties, the Oklahoma Highway Patrol, federal law

enforcement agencies including Ft. Sill Military Police, Wichita National Wildlife Refuge rangers and the Bureau of Indian Affairs), fire protection and management, emergency management (including teams that responded and provided aid to recent disasters including the Moore tornadoes), injury prevention programs (including bike helmets, smoke alarms, fire extinguishers and locks for guns), reservation transit systems, gravel tinhorn to assist in providing driveways to citizens in rural areas with unpaved roads, road and bridge construction and maintenance, environmental and protection in conjunction with local, state federal and intertribal organizations including:

- the U.S. Environmental Protection Agency (EPA), Region 6
- Oklahoma Department of Environmental Quality (ODEQ)
- Natural Resources Conservation Services (NRCS)
- U.S. Public Health Service Environmental Health
- Inter-tribal Environmental Council (ITEC)
- Oklahoma Tribal Water Advisory Council
- Native American Fish & Wildlife Society (NAFWS)
- Inter-tribal Council of Arizona (ITCA)
- Western Oklahoma Tribal Environmental Consortium (WOTEC)
- Oklahoma Water Resources Research Institute (OWRRI)
- United States Department of Agriculture

and divisions that include water quality protection, indoor air quality, solid waste (including cleaning up illegal dump sites) and recycling;

(f) **cultural preservation and protection** including Numu Tekwapuha--Comanche Nation Language Preservation and Education, Native American Graves and Repatriation Act,

Historic Preservation (working in conjunction with numerous federal and state agencies including the Oklahoma Historical Society, U.S. Department of Defense, Department of Army, Bureau of Land Management and the Bureau of Indian Affairs), SIA--The Comanche Nation Ethno-Ornithological Initiative to rehabilitate and preserves eagles and other birds of prey (working in conjunction with numerous state and federal agencies including the U.S. Fish and Wildlife Service), the Comanche National Museum, the Comanche Nation Fair, Comanche Nation Indian Veterans Association;

(g) **community outreach** including offices in Oklahoma City, Lawton and Dallas, community centers in Cache, Walters, Apache and Wachataker Hall at the Comanche National Complex near Medicine Park (these centers provide facilities for childrens' events, elder dinners, powwows, funerals, sporting events, community meetings, government committee meetings and the like), elders center, fitness center and tourism center; and

(h) **employment**, including preference in hiring for Comanche Nation citizens.

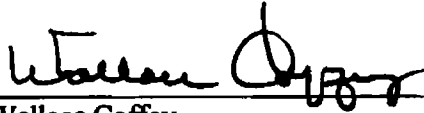
6. A reduction in or loss of tobacco sales will result in a reduction of tobacco tax revenue received by the Comanche Nation and profits on sales of tobacco and non-tobacco products at Numunu Pahmu retail outlets. Any loss of revenue will cause a reduction in governmental services and programs offered by the Comanche Nation as described in paragraph 5 herein.

7. A reduction in or loss of tobacco sales tax revenue will also result in a slow down or stoppage in the construction and/or renovations to (i) the Plaza fuel stop and retail facility at Exit 1, Interstate 44 near the Red River in Cotton County, Oklahoma; and (i) the Spur retail/fuel stop facility southwest of Elgin in Comanche County, Oklahoma. Both of these facilities will provide needed economic development, job creation and local services to Comanche citizens,

Native Americans and non-Indian community members in rural and economically-impooverished areas.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 18, 2013.

A handwritten signature in black ink, appearing to read "Wallace Coffey", written over a horizontal line.

**Wallace Coffey
Chairman
Comanche Nation Business Committee**

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Defendants.)

DECLARATION OF JARRETT JACKSON

I, Jarrett Jackson sworn, upon my oath, declare under the penalty of perjury, 28 U.S.C. § 1746, that the following is true and correct and is within my personal knowledge:

1. I am the Chief Executive Officer of Numunu Pahmu, LLC (“Numunu Pahmu”).
2. Numunu Pahmu is a limited liability company chartered under Comanche Nation law, is wholly owned and operated by the Comanche Nation, and has its offices in Lawton, Oklahoma.
3. Numunu Pahmu is organized for the purposes of engaging in sales of tobacco and other products in Comanche Nation Indian Country.
4. The Comanche Nation also licenses other retailers that operate and sell tobacco and other products in Comanche Nation Indian Country (“Licensed Retailers”).
5. Prior to October 31, 2013, the Numunu Pahmu and Licensed Retailers sold tobacco products under the terms of the Tobacco Tax Compact dated June 26, 2008 (“Original Compact”). The Original Compact allowed the Comanche Nation and Licensed Retailers,

including Numunu Pahmu, to sell cigarettes and other tobacco products at a reduced Oklahoma state sales tax rate, with both the Comanche Nation and the State of Oklahoma sharing in the revenue generated by the sales tax on tobacco products.

6. The Comanche Nation received approximately \$1.04 million last year in tobacco tax revenue. The tax revenues received by the Comanche Nation from the sales of tobacco products by Numunu Pahmu and Licensed Retailers and the profits on the sale of tobacco and non-tobacco productions are used to support numerous governmental services of the Comanche Nation. Additionally, profits at Numunu Pahmu are used for economic development activities that benefit Comanche Nation citizens and noncitizens throughout Comanche Nation Indian Country.

7. Numunu Pahmu and Licensed Retailers employ numerous Comanche Nation citizens and others in areas that are rural, historically economically-impooverished, and lacking in employment opportunities. Numunu Pahmu has approximately 50 employees, 28 of whom are Comanche Nation citizens. Licensed Retailers also employ many Comanche Nation citizens and non-citizens.

8. After a dispute between the State of Oklahoma and Comanche Nation over a compact superseding the Original Compact on or around October 31, 2013, the State of Oklahoma placed the Comanche Nation and Licensed Retailers on "black stamps" as a non-compacting tribe pursuant to Okla. Stat. tit 68, § 349.1. This results in all sales of cigarettes and other tobacco products at any Numunu Pahmu store or Licensed Retailer being subject at the full state excise tax rate.

9. If Numunu Pahmu and Licensed Retailers are required to charge the full state excise tax rate on tobacco products, they will be at a significant price and competitive

disadvantage to other retailers selling tobacco products. The Numunu Pahmu and Licensed Retailers' business models are designed around the compacted tobacco sales tax rate. Moreover, several Numunu Pahmu and Licensed Retailers are located with twenty-five miles of retailers operated by the Chickasaw Nation, which sell tobacco products with a favorable state sales tax rate under a compact with the State of Oklahoma. The price and competitive disadvantages faced by Numunu Pahmu and Licensed Retailers will result in a significant loss of sales of tobacco products and the loss of sales of non-tobacco products at Numunu Pahmu and Licensed Retailers. Advantageous tobacco product pricing under the compact attracts customers and increases traffic at convenience stores and other retail outlets of Numunu Pahmu and the Licensed Retailers, thereby contributing to the sales of non-tobacco products as well as tobacco products. As a result, the loss of tobacco sales will also lead to a significant loss of sales of non-tobacco products and a reduction in revenues and profits.

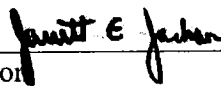
10. Based on historical sales information, the Comanche Nation estimates that paying the full state excise tax rate on tobacco products at Numunu Pahmu and Licensed Retailers will result in a loss of approximately twenty percent of total sales revenue at those retailers. The Comanche Nation estimates that the loss in sales at Numunu Pahmu and Licensed Retailers will result in a loss of revenue of \$508,700 per month.

11. Any loss of tobacco sales tax revenue will also result in a slow down or stoppage in the construction and/or renovations to (i) the Plaza fuel stop and retail facility at Exit 1, Interstate 44 near the Red River in Cotton County, Oklahoma; and (ii) the Spur retail/fuel stop facility southwest of Elgin in Comanche County, Oklahoma. Both of these facilities will provide needed economic development, job creation and local services to Comanche citizens, Native Americans and non-Indian community members in rural and economically-impooverished areas.

12. In addition to the lost revenue to the Comanche Nation, the lost sales will also result in the loss of jobs for Comanche Nation citizens who work at Numunu Pahmu and Licensed Retailers. A twenty percent loss in sales will result in employee layoffs and the outright closure of some Licensed Retailers. The closure of Licensed Retailers will also result in a loss of retail outlets in rural and underserved areas in Comanche Nation Indian Country.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 18, 2013.


Jarrett Jackson

From: "Ryan.Chaffin@oag.ok.gov" <Ryan.Chaffin@oag.ok.gov>
Subject: Re: 71 181 00639 13 Comache Nation v. Gov. Fallin & Oklahoma
Date: November 14, 2013 2:23:09 PM CST
To: Kate Stillman <StillmanK@adr.org>
Cc: "Cass.Newell@oag.ok.gov" <Cass.Newell@oag.ok.gov>, "Harvey D. Ellis" <harvey.ellis@crowedunlevy.com>, Jeffrey Cartmell <Jeffrey.Cartmell@gov.ok.gov>, "Jimmy K. Goodman" <jimmy.goodman@crowedunlevy.com>, "Kelley A. Williams" <kelley.williams@crowedunlevy.com>, Michael McBride III <michael.mcbride@crowedunlevy.com>, "Neal.Leader@oag.ok.gov" <Neal.Leader@oag.ok.gov>, Paige Masters <paige.masters@crowedunlevy.com>, Steve Mullins <Steve.Mullins@gov.ok.gov>, Tulsa Temporary 1 <TTemp1@CroweDunlevy.com>

1 Attachment, 3 KB

Ms. Stillman:

Ms. Stillman:

The Compact between the State and the Comanche Nation excludes the AAA from administering this arbitration. (See Comanche Compact at para. 10(b)). Thus, neither the AAA, nor arbitrator Irvine, have any jurisdiction over the State.

For this reason, and for the reasons outlined in my correspondences of November 13 and 14, I am writing to advise that the State does not agree to AAA administering this arbitration and the State will not participate in this matter any further. The State also will not be paying any of AAA's invoices related to this matter. Moreover, neither arbitrator Irvine, nor any other AAA appointed arbitrator, have any authority to issue any ruling regarding the State of Oklahoma. Accordingly, the State will not abide by any decision of a AAA appointed arbitrator.

Thanks for your attention,

Ryan Chaffin

Ryan R. Chaffin, Assistant Attorney General
Deputy Chief of Tobacco Enforcement Unit
Oklahoma Office of Attorney General
313 Northeast 21st Street
Oklahoma City, Okla 73105
Ph. (405) 521-3921 / Fax. (405) 521-4518

From: Kate Stillman <StillmanK@adr.org>
To: Steve Mullins <Steve.Mullins@gov.ok.gov>, "mike.mcbride@crowedunlevy.com" <mike.mcbride@crowedunlevy.com>, "Cass.Newell@oag.ok.gov" <Cass.Newell@oag.ok.gov>, "Ryan.Chaffin@oag.ok.gov" <Ryan.Chaffin@oag.ok.gov>, "jimmy.goodman@crowedunlevy.com" <jimmy.goodman@crowedunlevy.com>, "paige.masters@crowedunlevy.com" <paige.masters@crowedunlevy.com>, "harvey.ellis@crowedunlevy.com" <harvey.ellis@crowedunlevy.com>, Jeffrey Cartmell <Jeffrey.Cartmell@gov.ok.gov>, "Neal.Leader@oag.ok.gov" <Neal.Leader@oag.ok.gov>, "kelley.williams@crowedunlevy.com" <kelley.williams@crowedunlevy.com>, "TTemp1@CroweDunlevy.com" <TTemp1@CroweDunlevy.com>,
Date: 11/14/2013 12:16 PM
Subject: 71 181 00639 13 Comache Nation v. Gov. Fallin & Oklahoma

Dear Counsel,

This will confirm receipt of the Claimant's Response to the Respondent's Objection to AAA Jurisdiction, Administration and Emergency Injunctive Relief and the Respondent's Response in the above referenced matter.

After careful consideration of the parties' contentions regarding the appointment of an emergency arbitrator, the Association has determined that Arbitrator Irvine's appointment is confirmed pursuant to R-38.

The issue raised by the Respondents regarding the AAA's continued administration of this matter and any response received was considered by the Association. The Association's decision is limited to a determination of whether the filing requirements contained in the AAA Rules have been met by Claimant. Under the Rules, the arbitrators have the power to determine the extent of their own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement and the existence or validity of a contract of which an arbitration clause forms a part. Therefore, the parties' contentions have been made a part of the file

and they will be forwarded to Arbitrator Irvine.

Pursuant to Rule 38(d), a telephone conference call shall be set to establish a scheduling for consideration of the application for emergency relief. Arbitrator Irvine has the following dates and times available for said call:

- Friday, November 15th at 8:00 AM MT
- Friday, November 15th anytime beginning at 11:00 AM MT
- Monday, November 18th anytime beginning at 8:00 AM MT until 1:00 PM MT

Please provide your availability for said dates by **2:00 PM MT today, Thursday, November 14, 2013**. Absent a response we will assume all dates are acceptable and the call shall be scheduled.

Attached please find an invoice for each party. Please make payment to the Association by **Wednesday, November 20, 2013**.

As the arbitrator submits invoices to the AAA, they will be paid equally from the parties' deposits. You will receive automatic emails when these invoices are uploaded to AAA WebFile, for you to review. Do not pay the arbitrator's invoices directly.

Sincerely,

Kate Stillman



[ATT00001.png \(3 KB\)](#)

**Kate Stillman
Director of ADR Services**

American Arbitration Association
16 Market Square
1400 16th Street, Suite 400
Denver, CO 80202-4602
www.adr.org
T:303 831 0823
F:855 267 4082

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[attachment "State of OK Invoice.pdf" deleted by Ryan Chaffin/OAG] [attachment "Comache Nation Invoice.pdf" deleted by Ryan Chaffin/OAG]