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STATEMENT OF THE CASE

¶ 1 This an action for damages for breach of contract brought by Plaintff/Appellant MM&A Productions, LLC ("MM&A") against the Yavapai-Apache Nation, its Tribal Gaming Board, and the Yavapai-Apache Cliff Castle Casino and the Casino's Board of Directors, Defendants/Appellees (collectively, "YAN" or "the Nation). The action arises out of a contract between MM&A and the Casino.

¶ 2 The Nation asserted tribal sovereign immunity from suit by filing a motion to dismiss the complaint pursuant to Ariz. R. Civ. P. 12(b)(1). In December of 2008 the Superior Court granted the Nation's motion in a signed minute entry order. That order was later vacated and a fresh judgment of dismissal entered when MM&A moved for and ultimately was granted Rule 60(c) relief. The reason for the Rule 60(c) relief, and the entry of a fresh judgment of dismissal are unimportant to this appeal, but may be gleaned from three previous rulings of this Court in this case.[1]

[1] *See* 2CA-CV 2009-0042 (Nov. 19, 2009) (dismissing appeal for want of a properly signed Superior Court judgment from which an appeal would lie in this Court); 2CA-SA 2011-0078 (Nov. 10 2011) (granting special action relief that Superior Court judge had duty to sign an order of denial of Rule 60(c) relief for original untimely appeal, from which an appeal could be taken to this Court); 2CA-CV 2012-0040 (September 10, 2012) (finding error in Superior Court refusal of Rule 60(c) relief to MM&A, remanding for further proceedings). Upon remand, the Superior Court, in the exercise of its discretion, held that Rule 60(c) relief should be granted; vacated the original order and entered a fresh order of dismissal. This appeal is from that order.

¶ 3 On February 26, 2013 the Superior Court entered a judgment dismissing the complaint for the reasons stated in the minute order of 2008. On February 28, 2013 MM&A filed a timely notice of appeal from the judgment of dismissal of the complaint.

¶ 4 This Court has jurisdiction under A.R.S. § 12-2101(A)(1).

STATEMENT OF FACTS

¶ 5 Unless otherwise noted, the Statement of Facts is drawn from the Complaint. In reviewing the grant of a motion to dismiss a complaint, the court of appeals assumes facts alleged in the complaint to be true and gives plaintiffs the benefit of all inferences arising from those facts. *Capitol Indem. Corp. v. Fleming*, 203 Ariz. 589, 590 ¶ 2, 58 P.3d965, 966 (App. 2002).

¶ 6 **a. The parties, the contract and the waivers of sovereign immunity.** MM&A is a limited liability company located in Pima County. Compl ¶ 2, ROA 2.[2] It is an entertainment production consultant which recommends, produces, and markets programs and events to assist its clients in maximizing their business revenues through the use of entertainment. *Id.* ¶ 18.

[2] Almost all of the record in this case reposes in this Court's No. 2CA-CV 2012-0040, and, pursuant to the Clerk's Order of April 12, 2013 in this case, the Superior Court Clerk is not re-certifying it. Therefore, unless otherwise noted, Record or Document references in this Brief are made to the Record in No. 2012-0040.

¶ 7 The Yavapai-Apache Nation is a federally recognized Indian tribe located in Yavapai County. *Id.* ¶ 3. In its complaint, MM&A also alleged upon information and belief that the Yavapai-Apache Cliff Castle Casino, the Yavapai-Apache Tribal Gaming Board and the Cliff Castle Casino Board of Directors each are business enterprises of the nation. *Id.* ¶¶ 4-6.

¶ 8 MM&A had assisted the Nation and its Casino in booking artists and producing events at the Casino for about seven years prior to the filing of the Complaint. *Id.* ¶19. MM&A had entered into numerous contracts, including a fifteen month exclusive entertainment and production contract in 2002. *Id.* ¶ 20 & Ex. D. That contract, as well as all others between the Casino and MM&A, had been signed by the Casino's Director of Marketing, and had been fully performed, ratified and honored by the Nation and Casino. *Id.* 21.

¶ 9 On May 9, 2006, the Casino signed a contract with MM&A that granted MM&A the exclusive right to be the booking agent and producer for entertainment events at the Casino for a 5-year period beginning March 31, 2007 and continuing through March 30, 2012. *Id.* ¶ 8. A copy of the contract is attached to the Complaint as Exhibit A. In connection with the Agreement of 2006, on June 30, 2006 the Casino and MM&A also executed

a Waiver and Sovereign Immunity Addendum to the Agreement. *Id.* A copy of the Waiver is attached to the Complaint as Exhibit B. The Agreement of 2006 and the Waiver were signed by the Director of Marketing for the Casino, *id.,* just as the previous contracts had been.

¶ 10 The Nation and Casino had also signed a Waiver of Sovereign Immunity in 2003. Agreement. *Id.* ¶ 15. A copy of that Waiver is attached to the complaint as Exhibit C.

¶ 11 Both Waivers were explicit and unequivocal in their terms. The March 27, 2003 Waiver stipulated:

> Tribe hereby expressly and irrevocable [sic] waives its sovereign immunity from any breach or alleged breach in connection with Tribe's obligations and considerations under any and all the Contract(s) between Tribe and [MM&A], including but not limited to, Artist Booking Agreement(s), Production Agreement(s) and Exclusive Agreement(s) or any suit or action in connection therewith including, without limitation, any suit brought under tort or contract theories of recovery by [MM&A], Artist, their representative agents or employees.

Id. ¶ 1.

¶ 12 The 2006 Contract was signed on May 18, 2006. On June 30, 2006 a "Waiver of Sovereign Immunity Addendum" was signed by the parties. It was even broader, more explicit and irrevocable than the March 2003 Waiver had been:

> YAVAPAI-APACHE NATION, YAVAPAI-APACHE CLIFF CASSTLE CASINO AND CLIFF CASTLE CASINO hereby expressly and irrevocably waives its sovereign immunity from breach or alleged breach in connection with CASINO's obligations and considerations under any and all Contract(s) and Addendum(s), including, but not limited to, Exclusive Entertainment and Production Agreement(s) between CASINO and MM&A, and/or any suitor [sic – suit or] action in connection therewith including, without limitation, any suit brought under tort or contract theories of recovery by MM&A for any and all injuries or damages, and in addition, any other remedies MM&A may have at law or in equity, monetary damages or similar remedies.

ROA 2, Ex. B ¶ 1.

¶ 13 In addition, each of the sovereign immunity waivers contained in its paragraph 2. a "Forum and Choice of Law" paragraph. Each specified that all actions "shall be brought in the appropriate United States District Court." *Id.* Ex.'s B, C, ¶¶ 2. It was further specified, however, that "If and only if the United States District Court lacks jurisdiction, then and only then will actions or suits be brought in the judicial system of the State of Arizona in Pima County." *Id.* Each paragraph 2 of these waivers then also re-confirmed the waiver of sovereign immunity: "[Tribe/Casino] *expressly agrees and consents* to be sued in such courts and in such priority." *Id.* (emphasis supplied). Finally, the Nation expressly agreed to "waive any recourse to Tribal Court and agrees that Tribal Court rules and applicable

laws, codes and rules need not be exhausted before seeking resolution of any breach, . . . ” *Id.*

¶ 14 In sum, it could not be clearer that if the respective Marketing Directors of the Casino, who signed the Waivers, had either actual or apparent authority to sign these documents, there was a valid waiver by the Nation of its sovereign immunity and that of its business entities.

¶ 15 **b. Provisions of the Nation’s governing documents pertaining to waiving sovereign immunity.** Because the Nation’s challenge to its own waiver of sovereign immunity is based upon assertions drawn from its Constitution and from Tribal Council and Casino Board Resolutions, it is fruitful to review them here.

¶ 16 Article XIII of the Yavapai-Apache Constitution specifies that:

> The Yavapai-Apache Tribe hereby declares that, in exercising self-determination and its sovereign powers to the fullest extent, the Tribe is immune from suit except to the extent that the Tribal Council expressly waives sovereign immunity, or as provided by this Constitution.

Ex. A to the Nation’s Motion to Dismiss, ROA 9,p. 16.

¶ 17 Article V defines the powers of the Tribal council, which include:

> (p) to appoint subordinate committees, commissions, boards, tribal official and employees not otherwise provided for in this constitution and to prescribe their compensation, tenure, duties, policies and procedures.

Id. p. 9.

¶ 18 The Tribal Council adopted a "Cliff Castle Casino Board of Directors Act." Ex. B. to Motion to Dismiss, ROA 9. Section Fourteen both established the authority for approving and executing contracts, and constituted a delegation to the Casino Board to waive the sovereign immunity of the nation. It vested in the Board the power to negotiate and approve contracts. *Id.* ¶ 1. It delegated to the Chairperson of the Board the authority to execute contracts approved by a majority of the Board. *Id.* ¶ 2. And, under the Heading of Section Fourteen which included the title "Limited Waiver of Sovereign Immunity," it stated that "All contracts shall to the greatest extent possible be drafted or negotiated to include language preserving the sovereign immunity of the Nation." *Id.* ¶ 4.

¶ 19 Thus, clearly, the Tribal Council authorized the Casino Board to waive sovereign immunity. What occurred between the Chairperson of the Board and the execution of the 2003 Contract and the Sovereign Immunity Waiver, and the signing of the contract of 2006 and its Sovereign Immunity Waiver Addendum has never been adequately fleshed out.

¶ 20 **c. Filing of suit and Motion to Dismiss proceedings in the trial court.** In 2008 the Nation breached the 2006 Agreement in numerous respects, and completely repudiated and abandoned it. Compl. ¶¶ 30-32.

MM&A filed suit in the Pima County Superior Court. The multi-count complaint alleged five types of claims arising under Arizona law – breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment, intentional interference with business advantage, and fraud. *Id.* ¶¶ 35 – 58.

¶ 21 The Nation filed a motion to dismiss the complaint pursuant to Ariz. R. Civ. P. 12(b)(1). It alleged that because all of the defendants were clothed with the sovereign immunity of the Nation, that the Superior Court lacked subject matter jurisdiction.

¶ 22 Along with its Motion to Dismiss, the Nation filed a Declaration from Karla Reimer, who in October of 2008 was the secretary of the Tribal Council. In it she declared that she had examined all of the Tribal Council resolutions for 2006 and 2007, and had found no Council *resolution* authorizing a contract with MM&A nor any waiver of sovereign immunity in favor of MM&A. Ex. C. to Mot. to Dismiss, ROA 9.

¶ 23 The Nation also filed a declaration of Deatrice Beauty, a Board Member of the Casino Board, who declared that as such it was her duty to maintain records of all resolutions of the Board. Ex. D. to Mot. To Dismiss, ROA 9. She declared that after a search within the same limited time period she found no *resolution* authorizing the Board, its Chairman, or any

individual Cliff Castle Casino employee to enter into a contract with MM&A or to waive sovereign immunity in favor of MM&A.[3] *Id.*

¶ 24 MM&A opposed the motion, arguing that the signers of the Agreement and of the sovereign immunity waivers had both actual and apparent authority to do so, and in particular pointed out that:

- On its face the Contract is an explicit waiver of the Nation's sovereign immunity;
- That the Director of Marketing who signed the contract in dispute had at least apparent authority to do so;
- There was no legal bar on the Board delegating its authority to the Marketing Director to execute the Contract;
- The Tribal Attorney General reviewed and approved the contract; and
- A resolution may have been passed by the Board or the Tribal Council in 2002, 2003, 2004, or 2005 granting the Director of Marketing of the Casino authority to enter into contracts with MM&A (or others) and to waive sovereign immunity. Plaintiff's Opposition to Mot. to Dismiss, ROA12 p. 2.

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[3] When MM&A noted in its opposition to the motion to dismiss the restricted time period and restricted documents for which the declarants searched, each filed an additional declaration with the Nation's reply, *further narrowing* the time frame within which a records search was made from January 1 to August 31, 2006, and adding one additional limited topic for which a search was made – whether a Council or Board member "motioned for approval" of a contract. Reply on Motion to Dismiss, ROA 14, Ex.'s B, D.

¶ 25 Together with its opposition to the Motion to Dismiss, MM&A filed an affidavit of Paul Miller. Mr. Miller is the Executive Director of MM&A, who personally negotiated the contracts of 2002 and 2006 with the Nation. ROA 9, Ex. A. Mr. Miller's testimony in the affidavit included that:

- In connection with the 2002 contract, J.P. LaFors, then the Director of Marketing for the Casino, told Miller that the Tribal Council had approved the contract and that LaFors had authority to sign it. *Id.* ¶ 3.
- LaFors also told Miller in 2003 that the Tribal Council had approved the waiver of sovereign immunity addendum, and that LeFors had authority to sign it. *Id.*
- In 2006 Steven Wood was the Marketing Director. He approached Miller about MM&A entering into an exclusive entertainment and production agreement. *Id.* ¶ 5. Miller was told in 2006 that the Tribal Attorney General had approved the contract, and that the Casino Board of Directors had given Wood, the Marketing Director, authority to sign the Contract and the waiver of immunity.[4] *Id.*

[4] With its Reply on Motion to Dismiss, the Nation filed a Declaration of the Nation's Acting Attorney General from October 2005 through December 2006, who disputed Miller's assertion. This conflicting evidence further demonstrates why discovery and a hearing should have occurred before the Motion was ruled upon. Moreover, the dispute does not detract from the statement made to Miller as evidence of apparent authority for the Marketing Director to sign the Agreement and Waiver.

- After the 2006 waiver of sovereign immunity was signed, Miller had conversations with certain members of the Nation to the effect that the Board of Directors and the Council were aware of and approved of the waiver of sovereign immunity, and that the Director of Marketing had authority to sign the Contract. These tribal members included Deborah Johnson, the Chair of the Board of Directors, and Darlene Rubio, a member of the Tribal Council. *Id.* ¶ 6.

¶ 26 In addition to opposing the Nation's Motion to Dismiss on the grounds that both actual authority existed, and that apparent authority applied and also existed, MM&A argued that the case could not be dismissed unless the issue of waiver of sovereign jurisdiction was determined by an evidentiary hearing or trial, following discovery. ROA 9 p. 9. MM&A also requested the Court to allow discovery on the Board's and the Council's historical methods of approving contracts. *Id.* p. 11. It sought discovery of contracts entered into by the Casino, the Tribal Gaming Board, and the Council from 20023; Resolutions and minutes of the Council and the Board for that period; any bylaws and regulations concerning sovereign immunity, and correspondence between Council members and the Board regarding MM&A or the disputed contract. *Id.* pp. 11, 12.

¶ 27 **d. Trial Court ruling.** The Superior Court dismissed the complaint. As a threshold matter it held that the complaint was subject to dismissal under the forum selection portion of the Waiver of Sovereign Immunity Addendum, because MM&A had not first filed in the United States District Court. Although that clause permitted MM&A to file suit in superior court "if the United States District Court lacks jurisdiction," ROA 2, Ex. B ¶ 2, the trial court did not determine whether or not District Court jurisdiction was lacking.

¶ 28 The trial court observed that "It is undisputed that Plaintiff filed its complaint, . . . in the Arizona Superior Court, county of Pima, without having initially brought suit in the federal court." Minute Order, Dec. 19, 2008, ¶ 2; Brief Appendix A. The Court then "decline[d] MM&A's perhaps appealing invitation that this state court judge determine whether an Article III judge otherwise has jurisdiction to hear the parties' dispute." *Id.* Taking the unusual position that a superior court judge could not apply federal law to a complaint alleging state-law claims, to determine whether federal jurisdiction existed, the Court held that MM&A had not demonstrated that it could file suit in the Superior Court instead of a District Court.

¶ 29 The trial court next rejected any support for the Waiver based on actual authority in a single sentence: "The record establishes that the

Yavapai-Apache Nation possesses a clear protocol by which a business like MM&A can secure a waiver, and Plaintiff has utterly failed to avail itself of these tribal procedures." *Id.* ¶ 4 (last sentence). The court:

- Did not explain what protocol it was referring to, or discuss any of the evidence which might have embodied that protocol;
- Did not respond to MM&A's position that before the court could rule on the merits of the issue of waiver of sovereign immunity, MM&A was entitled to an evidentiary hearing on precisely the point disposed of by the Court in a single conclusory sentence; and
- Did not rule upon MM&A's request that it be granted discovery on relevant topics related to waiver, and authority to waive, sovereign immunity.

¶ 30 Finally, the trial court held that the doctrine of apparent authority was unavailable to a plaintiff, in the context of the waiver of indian sovereign immunity. *Id.* ¶¶ 5, 6. The court acknowledged that precedents were divided upon the issue. It followed precedent refusing to allow apparent authority, finding it more persuasive, based upon how the subject of tribal incorporation of state law into tribal jurisprudence was dealt with. *Id.* ¶ 6. The Court seemingly viewed the law of apparent authority to arise

only under state law. *Id.* It apparently found that the choice of law upon the issue derived from the Nation's tribal law. *Id.* And it interpreted a provision of the Nation's Judicial Code to require the Nation's courts to look to the laws of other tribes or to federal law. *Id.* The Court therefore denied MM&A the benefit of the doctrine of apparent authority, and dismissed the complaint.

QUESTIONS PRESENTED FOR REVIEW

¶ 31 1. The complaint alleged only state law claims, and no claim arising under federal law. The Nation and its business enterprises are not "citizens of a state" for purposes of federal diversity jurisdiction. Was federal jurisdiction lacking, and was the complaint properly brought in the Superior Court?

¶ 32 2. The law of tribal sovereign immunity as well as its waiver is governed by federal law. Federal common law permits the application of the doctrine of apparent authority in many contexts, expressly including for the waiver of tribal sovereign immunity. Was it error for the trial court to refuse MM&A the benefit of the doctrine of apparent authority?

¶ 33 3. Where the issue of subject matter jurisdiction in general, and waiver of tribal sovereign immunity in particular, depends upon factual determinations, a plaintiff is entitled to an evidentiary hearing on the

jurisdictional issue, or to have it determined at trial. Was it error for the trial court to hold that there was no authority for the marketing director to sign the waiver without a) holding an evidentiary hearing or resolving the issue at trial; and b) resolving the issue without granting MM&A discovery?

SUMMARY OF ARGUMENT

¶ 34 1. The standard of review for this issue is *de novo.* United States District Courts are, of course, courts of limited jurisdiction. In order for MM&A to have been able to sue the Nation in a District Court, it would have been required to identify specific statutory jurisdiction supporting the complaint. There was no such jurisdictional statute available.

¶ 35 The most likely jurisdictional ground would have been diversity of citizenship under 28 U.S.C. § 1332. However, it is well established that indian tribes and their commercial enterprises are not "citizens" of any state for purposes of diversity jurisdiction. Therefore the MM&A complaint could not have been sustained on that basis.

¶ 36 The next available jurisdictional basis would have been "federal question" jurisdiction – that a claim "arises under" the constitution or laws of the United States. 28 U.S.C. § 1331. But the complaint filed by MM&A was in its entirety based upon the common law of Arizona. Therefore MM&A could not have invoked federal question jurisdiction. Because the

District Court "lacked jurisdiction" of the MM&A claims, suit was properly brought in the Superior Court, and it was error for the trial court to conclude otherwise.

¶ 37 2. The issue of whether the doctrine of apparent authority is available to support the validity of a waiver of tribal sovereign immunity is one of law which this Court decides *de novo.* The first step in resolving that issue is to make the choice of which law governs the issue. It is well established that the existence of tribal sovereign immunity, its confines, and the circumstances under which it is waived are controlled by federal law.

¶ 38 In this case, none of the common complexities found in cases of waiver of sovereign immunity exist. The Nation and its commercial enterprises which MM&A sued are clearly entitled to the protection of sovereign immunity unless that immunity is abrogated by Congress, or is waived. Here, the waiver was very clear. There is no issue of Congressional abrogation . There is no question whether a particular contract provision (such as a "sue and be sued" clause), or action by the Nation (such as filing a counterclaim arguably exceeding a tribe's limited waiver) should be deemed implied waivers. There is but one question under this issue – may apparent authority be invoked to support the authority of a person to waive tribal immunity?

¶ 39 Under federal law, the doctrine of apparent authority is generally applicable. Moreover, the Supreme Court has suggested, and other courts have held, based on that Court's statement, that apparent authority is applicable specifically in the circumstance of a waiver of tribal immunity. The trial court's choice of precedents to follow derived from an apparent belief that tribal law governed the choice of what law to look to in deciding whether apparent authority is available. Having done that, the court followed earlier precedent which took the same route. Moreover, the precedent which the trial court relied upon – *World Touch Gaming, Inc. v. Massena Management, LLC*, 117 F.Supp.2d 275 (N.D. N.Y. 2000) – reached its conclusion by erroneously applying Supreme Court cases which prohibit a waiver itself to be implied, to the issue of *authority* to make that waiver. This was erroneous analysis.

¶ 40 Recent cases, including one in which the Nation itself is a party and has argued for the result, hold that federal law dictates the use of apparent authority on the issue of waiver of sovereign immunity, and that apparent authority *is* available. There is no reason for this Court to conclude otherwise, and every reason for it to agree with those cases.

¶ 41 Finally, even if this were an open issue, with neither controlling federal precedent nor persuasive precedent from other jurisdictions, there

would be no reason for this Court not to include the doctrine of apparent authority as part of the jurisprudence of tribal immunity and its waiver. While the Supreme Court has re-confirmed the continued viability of tribal immunity, it has also recognized that the doctrine can – and frequently does – work unfairness and hardship on persons dealing with Indian tribes. Therefore, this Court should not broaden the blanket of immunity by refusing the benefits of apparent immunity to plaintiffs. That is particularly true because apparent immunity is intended to address unfair situations, where a party has manifested an intention that another rely upon its agent's acts but that agent lacks actual authority.

¶ 42 3. The standard of review for deciding whether the trial court should have conducted a hearing; and whether it should have allowed MM&A discovery before doing so, is, to a certain extent, abuse of discretion. However, if the "abuse of discretion" flows from a mistake of law, that mistake is reviewed *de novo*. Here, the error was more than refusal of ordinary discovery. It was also an error of law, because case precedent holds that if a plaintiff's complaint raises reasonable factual issues on waiver of Tribal immunity, discovery and an evidentiary hearing are appropriate.

¶ 43 The trial court refused MM&A the benefit of the doctrine of apparent authority, and ruled without the benefit of a hearing or discovery.

Its silence on the latter two points doubtless resulted from its conclusion that apparent authority was unavailable to MM&A. But MM&A had made a sufficient threshold showing that the Nation's Marketing Director had been clothed with apparent authority that the trial court should have stayed its hand on the jurisdiction issue until appropriate discovery occurred. The trial court then should either have conducted an evidentiary hearing or trial on the jurisdiction and waiver issue.

¶ 44 The trial court also erred in concluding that MM&A had not shown actual authority, by its opaque ruling that MM&A had failed to "avail itself of" a "clear protocol by which" it could secure a waiver. The trial court had before it only skimpy declarations, reciting carefully limited records searches made by the declarants. It should not have decided the jurisdictional issue until MM&A had an opportunity to litigation the issue of actual authority.

¶ 45 MM&A seeks a reversal and remand for further proceedings for which it may have the benefit of the doctrine of apparent authority, and may have an appropriate opportunity to develop a record on both actual and apparent authority, before the Nation's jurisdictional defense is decided.

ARGUMENT

I
THERE WAS NO FEDERAL DISTRICT COURT JURISDICTION UPON WHICH TO BRING SUIT AGAINST THE NATION. SUIT WAS PROPER IN THE SUPERIOR COURT.

¶ 46 **a. Standard of review.** The question of whether there was federal jurisdiction upon which MM&A could base its complaint, and file suit in the District Court, is one of law, decided *de novo* by this Court. When a trial court's decision to grant a motion to dismiss involves statutory interpretation, this Court reviews that decision *de novo*. *See Harris v. Cochise Health Sys.*, 215 Ariz. 344, 351 ¶ 24, 160 P.3d 223, 230 (App. 2007). Here, the trial court declined to determine the issue whether a District Court could take jurisdiction of this case, thereby applying the contract's forum choice clause against MM&A. Demonstrating that there could be no federal question jurisdiction involves interpretation and application of statutes. Therefore review of this issue is *de novo. Valerie M. v. Arizona Dept. of Economic Security*, 219 Ariz. 331, 334, ¶ 10, 198 P.3d 1203, 1206 (2009).

¶ 47 **b. There was no basis upon which a District Court could have had jurisdiction of MMA's complaint.** The District Courts entertain "all civil actions where the matter in controversy exceeds the sum or value

of $75,000, exclusive of interest and costs, and is between Citizens of different States." 28 U.S.C. § 1332(a)(1). Here, diversity was lacking for two reasons.

¶ 48 Courts that have addressed the issue have consistently held that Indian tribes are not citizens of the states in which they are located for purposes of determining whether diversity jurisdiction exists. *See, e.g. Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.,* 207 F.3d 21, 27 (1st Cir. 2000); *Garcia v. Akwesasne Housing Auth.*, 268 F.3d 76, 80 n. 1 (2d Cir. 2001); *Auto Owners Ins. Co. v. Tribal Court of the Spirit Lake Indian Reservation*, 495 F.3d 1017 (8th Cir. 2007); *American Vantage Companies, Inc. v. Table Mountain Rancheria*, 292 F.3d 1091 (9th Cir. 2002); *Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993). Therefore, these courts hold, complete diversity is *lacking* if a non-citizen Indian tribe is a party to the case.

¶ 49 While District Court opinions can be found making a contrary statement, the overwhelming law at the federal circuit level dictates that no diversity jurisdiction could exist in this case. This is particularly so because, of course, Ninth Circuit law controls actions in the District of Arizona, and the Ninth Circuit *American Vantage Companies* case, *supra* is conclusive for this action, which would have had to be brought in the District of Arizona.

¶ 50 Second, *if* the Nation and its enterprises could be deemed citizens, they would be citizens of Arizona. But MM&A, whose principal place of business is in Pima county, compl. ¶ 1, is also a citizen of Arizona. Therefore no diversity could in any even have existed.

¶ 51 The other basis upon which an action could have been brought in the District Court would arise under 28 U.S.C. § 28-1331, the "federal question" provision. Under it, District Courts have jurisdiction "of all civil actions arising under the Constitution, laws, or treaties of the United States." But this case does not present an action arising under such federal law. Therefore section 1331 would not have supported this action, either. And there is no other statutory basis upon which MM&A's state common law claims could even arguably have been brought.

¶ 52 The District of Arizona would have "lacked jurisdiction" of this action. Therefore under the forum clause of the 2006 Agreement, it was properly brought in the Superior Court.

II
MM&A SHOULD BE PERMITED THE USE OF THE DOCTRINE OF APPARENT AUTHORITY TO ESTABLISH THAT THE WAIVER OF SOVEREIGN IMMUNITY WAS BINDING AGAINST THE NATION.

¶ 53 **a. Standard of Review.** This Court reviews *de novo* the question whether the doctrine of sovereign immunity applies to divest the

Arizona courts of jurisdiction over Filer's claims. *Filer v. Tohono O'odham Nation Gaming Enter.*, 212 Ariz. 167, 170, 129 P.3d 78,79 (App. 2006); *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002); *see also Mitchell v. Gamble*, 207 Ariz. 364, P6, 86 P.3d 944, 947 (App. 2004) (order dismissing case for lack of subject matter jurisdiction reviewed *de novo*).

¶ 54 In addition, the issue of whether the doctrine of apparent immunity is applicable here is a pure question of law. This Court reviews such questions *de novo. League of Ariz. Cities & Towns v. Brewer*, 213 Ariz. 557, 559, ¶ 7, 146 P.3d 58, 60 (2006); *Nielson v. Patterson*, 204 Ariz. 530, 531, ¶ 5, 65 P.3d 911, 912 (2003).

¶ 55 **b. The issue posed is simply whether authority to prove waiver of immunity can be established through the federal law of apparent authority.** The issue in this case pertaining to sovereign immunity is much simpler than is often the case. While there can be several considerations in determining whether sovereign immunity does or does not exist, and if so whether it has or has not been waived, here all but the last such consideration is undisputed. That single consideration is whether the law of apparent authority applies to the waiver of the sovereign immunity of an Indian nation.

¶ 56 Thus, here the parties do not dispute that each of the defendants, the Nation, Cliff Castle Casino Business Enterprise and its Board of Directors, and the Tribal Gaming Board, are entitled to sovereign immunity unless waived. *E.g. Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670 (1978); *Filer v. Tohono O'odham Nation Gaming Enter.*, 212 Ariz. 167, 170, 129 P.3d 78,81 (App. 2006); *Dixon v. Picopa Constr. Co.*, 160 Ariz. 251, 772 P.2d 1104 (1989).

¶ 57 Nor is it disputed that sovereign immunity exists unless limited by Congress or waived by the Nation. *Kiowa Tribe v. Manufacturing. Techs.*, 523 U.S. 751, 756, 118 S. Ct. 1700, 1703 (1998). And, sovereign immunity bars lawsuits against Indian tribes in state court "absent a clear waiver by the tribe or congressional abrogation." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S. Ct. 905, 909 (1991).

¶ 58 Moreover, although the case relied upon by the trial court misunderstood this, this is not a case in which one must linger over the rule that a waiver of tribal immunity "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677 (1978). Much of the litigation over waiver of sovereign immunity has involved that issue. *E.g. C & L. Enters., Inc. v.*

Citizens Band Potawatome Indian Tribe, 532 U.S. 411, 121 S. Ct. 1589 (2001) (arbitration clause in standard AIA contract waives sovereign immunity); *United States v. United States Fidelity and Guaranty Co.,* 309 U.S. 506, 510 – 513 (1940) (no implied waiver of tribal immunity by failure to object to a state court cross claim); *Linneen v. Gila River Indian Community*, 276 F.3d 489 (9th Cir. 2002) ("sue and be sued" provision in tribal community charter was waiver) *Filer v. Tohono O'odham Nation Gaming Enter.*, 212 Ariz. 167, 129 P.3d 78 (App. 2006) (no implied waiver by tribe applying for and obtaining Arizona liquor license for its casino). In this case, however, the waivers of sovereign immunity were abundantly clear. They are not subject to challenge for lack of express specificity. This leaves, as a simple issue, whether the Casino marketing manager had apparent authority to waive sovereign immunity with respect to MM&A. Under more persuasive direct precedents, as well as applicable federal law, he did.

¶ 60 **c. Determining the issue of authority is resolved by resort to federal law, which does encompass apparent authority.** The trial court in this case did not invoke federal law respecting the doctrine of apparent authority, to decide this issue. App. A ¶ 6. The court overlooked federal law. Had the trial court applied federal law, it should have concluded that

the doctrine of apparent authority was available to MM&A to prove that the waivers of immunity signed by the Casino Marketing Director were valid and enforceable.

¶ 61 "A doctrine of Indian tribal sovereign immunity was originally enunciated by [the U.S. Supreme] Court," *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510, 111 S.Ct. 905, 910 (1991), thus making the whole field one of federal, judicial law unless Congress intervenes. In *Kiowa Tribe v. Mfg.Techs.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 1702 (1998), the United States Supreme Court held that whether Indian tribal immunity was abrogated by Congress or "the tribe has waived its immunity" is "a matter of federal law."

¶ 62 In *C & L. Enters., Inc. v. Citizen Band Potawatome Indian Tribe,* 532 U.S. 411, 121 S. Ct. 1589 (2001) , in deciding that by agreeing to an arbitration clause in a contract the Potawatome had waived its sovereign immunity, the Supreme Court stated that "reference to uniform federal law governing the waiver of immunities by foreign sovereigns [was instructive] in deciding whether a particular act constitute[d] a waiver of tribal immunity." *Id.*

¶ 63 The Supreme Court did not find it necessary in *C & L* to actually determine the issue of waiver. *Id.* at 423 n. 6. But several lower

courts have applied the Supreme Court's statement in *C & L* to invoke federal law for the decision upon issues of waiver of sovereign immunity, including specifically Indian tribal immunity.

¶ 64 In *Yavapai-Apache Nation v. Iipay Nation of Santa Ysabel*, 201 Cal. App. 4th 190, 135 Cal. Rptr. 3d 42 (2011) involving the same Nation now before this court, in which the Nation took a position diametrically opposed to its position below here, acknowledged that the *C & L* statement called for the use of federal law in resolving an issue of waiver of tribal immunity and urged the court to do so:

> On appeal, YAN now makes different arguments, mainly relying on foreign nation sovereign immunity authorities, or corporate official authorities, to claim the fourth amendment contains a clear, unequivocal, express, authorized waiver of sovereign immunity. YAN is correct that, as recognized in *C & L Enterprises, supra*, 532 U.S. 411, 421, footnote 3, "reference to uniform federal law governing the waiver of immunities by foreign sovereigns [was instructive] in deciding whether a particular act constitute[d] a waiver of tribal immunity."

135 Cal. Rptr. At 58. *Accord, Smith v. Hopland Band of Pomo Indians,* 95 Cal. App. 4th 1, 115 Cal. Rptr. 2d 455 (2002); *California Parking Services, Inc. v. Soboba Band of Luiseño Indians*, 197 Cal. App. 4th 814, 820, 128 Cal. Rptr. 3d 560, 565 (2011)

¶ 65 In *Aquamar S.A. v. Del Monte Fresh Produce, N.A.* 179 F.3d 1279,1294 (11th Cir. 1999) the Eleventh Circuit invoked the field of

international sovereignty discussed by the Supreme Court in fn. 3 of *C & L Enterprises* to hold that federal law governs the determination of authority to waive sovereign immunity.

¶ 66 The application of federal common law to this issue should be simple and straightforward, although as is discussed below courts who have taken up the issue in the context of waiver of Indian tribe sovereign immunity have complicated it.

¶ 67 "The apparent authority theory has long been the settled rule in the federal system." *Am. Society of Mech. Engineers v. Hydrolevel Corp.,* 456 U.S. 556, 567-68, 102 S. Ct. 1935,1942 (1982). In *Hydrolevel* the Supreme Court noted that "[i]n a wide variety of areas, the federal courts . . . have imposed liability upon principals for the misdeeds of agents acting with apparent authority. See, *e. g., Dark* v. *United States*, 641 F.2d 805 (CA9 1981) (federal tax liability); *National Acceptance Co*. v. *Coal Producers Assn*., 604 F.2d 540 (CA7 1979) (common-law fraud); *Holloway* v. *Howerd*, 536 F.2d 690 (CA6 1976) (federal securities fraud); *United States* v. *Sanchez*, 521 F.2d 244 (CA5 1975) (bail bond fraud), cert. denied, 429 U.S. 817 (1976); *Kerbs* v. *Fall River Industries, Inc*., 502 F.2d 731 (CA10 1974) (federal securities fraud); *Gilmore* v. *Constitution Life Ins. Co*., 502 F.2d 1344 (CA10 1974) (common-law fraud).

¶ 68 The better reasoned cases have expressly applied the doctrine of apparent authority to this situation.

¶ 69 In *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402 (Colo. App. 2004) the Colorado Court of Appeals held that apparent authority applied to the waiver of immunity by the Chief Financial Office of the tribe, in a contract signed by him. It rejected a contention by the Tribe that under the line of Supreme Court cases such as *Merrion v. Jicarilla Apache Indian Tribe*, 455 U.S. 130, 102 S.Ct. 894 (1982) and *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670 (1978), holding that waivers of sovereign immunity "cannot be implied but must be unequivocally expressed," the doctrine of apparent immunity could not be invoked. The Tribe had cited the case of *World Touch Gaming, Inc. v. Massena Management, LLC*, 117 F.Supp.2d 275 (N.D. N.Y. 2000) to the *Rush Creek* court to support that argument. *World Touch* is the case relied upon by the trial court in this case.

¶ 70 The *Rush Creek* court rejected the reasoning of *World Touch* in language which is worth quoting even though somewhat lengthy:

> To the extent *World Touch* might stand for the Tribe's proposition that the authority to waive sovereign immunity, like the waiver itself, may not be implied, we disagree with the analysis in that case. . . . . The tribe's constitution expressly stated that only the tribal council could waive sovereign immunity. The court held that, despite any authority, express or

> otherwise, that the third party had to bind the tribe to a contract, it was insufficient to authorize the third party to waive the tribe's sovereign immunity. The court supported its holding by citing *Merrion v. Jicarilla Apache Indian Tribe*, 455 U.S. 130, 102 S.Ct. 894, 71 L. Ed. 2d 21 (1982) and *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L. Ed. 2d 106 (1978), which concluded that waivers of sovereign immunity must be clear and express. The *World Touch* court thereby implied that, like a waiver itself, the authority to waive must also be expressly granted.
>
> We do not read *Merrion* and *Santa Clara Pueblo* to mean that, because waivers of sovereign immunity must be express, the authority to sign admitted waivers cannot be established by apparent authority.

107 P.3d at 407.

¶ 71 In *StoreVisions, Inc. v. Omaha Tribe of Neb*., 281 Neb. 238, 795 N.W.2d 271 (2011), cert. den. 132 S. Ct. 1016 (2012) the Supreme Court of Nebraska found the reasoning of *Rush Creek, supra,* to be persuasive, saying: "We adopt the reasoning of *Rush Creek Solutions* and apply agency principles, specifically the principles of apparent authority, to the purported waiver in this case." *Id.* at 246, 795 N.W.2d at 280.

¶ 72 For reasons expressed by *Rush Creek,* as quoted above, the trial court erred in relying upon *World Touch* to deny the benefits of apparent authority to MM&A. The fact that the trial court was applying the *World Touch* theory – that not only the waiver itself, but the authority to do so, must be express and cannot be implied – is demonstrated by the trial court's

citation to two other cases, *Chance v. Coquille Indian Tribe*, 327 Ore. 318, 963 P.2d 638 (1998) and *Danka Funding Co. v. Sky City Casino*, 329 N.J. Super 357, 747 A.2d 837 (1999). App. A ¶ 5. Each related to whether the terms of contract clauses themselves were sufficiently clear to constitute waiver. They did not deal at all with the question of how authority to waive immunity could be determined.

¶ 73 There are cases more recent than *World Touch* which apply its flawed analysis. They should not be followed. *E.g. Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917 (6th Cir. 2009) (citing *World Touch*); *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288 (10th Cir. 2008) (citing *Merrion*, *supra*, and its "express waiver" requirement); *Sanderlin v. Seminole Tribe*, 243 F.3d 1282, 1288 (11th Cir. 2001) ("The Supreme Court has made it plain that waivers . . . cannot be implied on the basis of a tribe's actions, but must be unequivocally expressed."); *Dilliner v. Seneca-Cayuga Tribe*, 2011 Ok. 61, 258 P.3d 516 (2011) (citing *Merrion,* and also citing *Memphis Biofuels* and *Native American Distributing*, *supra*). One of these cases has built upon another, so that the analytical flaw is repeated. But repetition does not equal validation. *Rush Creek, supra* and *StoreVisions, supra*, provide the correct rule and ought to be applied here.

¶ 74 Finally, if the Court is uncertain about the proper rule, it should recognize apparent authority because not to do so would unduly expand Indian sovereign immunity at a time when its very existence, albeit adhered to by the Supreme Court which created it, is questioned.

¶ 75 In *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S. Ct. 1700 (1998) the Supreme Court acknowledged:

> The rationale [for the doctrine of sovereign immunity], it must be said, can be challenged as inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities. JUSTICE STEVENS, in a separate opinion, criticized tribal immunity as "founded upon an anachronistic fiction" and suggested it might not extend to off-reservation commercial activity. [citation omitted.]
>
> There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians.

523 U.S. at 757, 758. The Court went on to acknowledge the potential for unfairness to those dealing with Tribes, which could result from application of tribal immunity. Not to recognize apparent authority would increase the potential for such unfairness. Apparent authority exists to remedy those situations where a principal holds out an agent as having authority, but doesn't. It should be available here.

III
IRRESPECTIVE OF THE RULING ON APPARENT AUTHORITY, THE CASE SHOULD BE REVERSED AND REMANDED FOR THE ISSUE OF WAIVER OF SOVEREIGN IMMUNITY – AT LEAST ON THE BASIS OF ACTUAL AUTHORITY -- TO BE DECIDED BY A HEARING, AFTER MM&A IS ALLOWED REASONABLE DISCOVERY.

¶ 76 **a. Standard of Review.** The applicable standard of review is not entirely clear. As a general matter, the trial court is reviewed for abuse of discretion in matters pertaining to discovery. *Reid v. Reid*, 222 Ariz. 204, 206 ¶ 8, 213 P.3d 353, 355 (App. 2009). And the principal Arizona case related to resolving motions under Rule 12(b)(1) to dismiss for lack of subject matter jurisdiction indicate that where such motions pose disputed questions of fact, discovery and an evidentiary hearing is contemplated; but does not say that it is required. *Gatecliff v. Great Republic Life Ins. Co.,* 154 Ariz. 502, 744 P.2d 29 (App. 1987) (vacated on other grounds). Nonetheless cases discussed below demonstrate that trial courts have an obligation to permit discovery and resolve motions such as this one with an evidentiary hearing.

¶ 77 **b. The complaint raised an adequate showing on the question of authority to waive immunity so as to call for discovery and a hearing.** To the extent that it was possible for MM&A to demonstrate that apparent authority supported the Waiver Addendum, in the absence of

discovery and a hearing, it did so. *See, supra,* ¶¶ 24, 25. It surely made a sufficient showing to require deferral on the jurisdictional decision until discovery could occur and a hearing could be conducted.

¶ 78 To begin with, it is clear that whomever had authority – or apparent authority – to sign contracts, including the 2006 Agreement – on behalf of the Casino *did* have authority to waive sovereign immunity. The Cliff Castle Casino Board of Directors Act explicitly permitted the Casino Board to waive sovereign immunity, albeit under instruction that "All contracts shall to the greatest extent possible be drafted or negotiated to include language preserving the sovereign immunity of the Nation." ROA 9 Ex. B § XIV, *¶* 4. Had the Council not delegated authority to waive sovereign immunity to the Casino Board, no such instruction would be necessary.

¶ 79 Given that the Casino Board had such authority, evidence of actual delegation by the Casino Board, or apparent authority manifested by it, is key to the issue of waiver. MM&A sought discovery and an evidentiary hearing to develop these facts, but was denied it.

¶ 80 This denial was contrary to at least the expectation of *Gatecliff, supra.* And it conflicted with holdings in several other cases in which the issue of authority to waive tribal immunity was litigated. In *World Touch*

Gaming, 117 F. Supp. 2d 271 (N.D. N.Y. 2000) the Court recognized that when the existence of subject matter is in dispute "the party asserting jurisdiction *should be permitted* discovery of facts relevant to the jurisdiction, particularly where the facts are peculiarly within the knowledge of the opposing party. 117 F. Supp. 2d. at 274 (internal quotes, cites, omitted; emphasis added).

¶ 81 In *Bradley v. Crow Tribe of Indians*, 315 Mont. 75, 67 P.3d 306 (2003) the court was faced with the same issue presented here. Synthesizing from several federal circuit cases, the court described "the procedural requirements that a district court should follow when determining whether an Indian tribe has waived its sovereign immunity:"

> [T]he court *must engage* in sufficient pretrial factual and legal determinations to satisfy itself of its authority to hear the case before trial. [citations omitted.]
>
> When subject-matter jurisdiction is questioned, the court must, of course, satisfy itself of its authority to hear the case, and in so doing, it may resolve factual disputes. The court has considerable latitude in devising the procedures it will follow to ferret out the facts pertinent to jurisdiction, and normally it may rely upon either written or oral evidence. The court *must*, however, afford the nonmoving party an *ample opportunity to secure and present evidence* relevant to the existence of jurisdiction.

67 P.3d at 81, 82 (internal quotes omitted; emphasis supplied).

¶ 82 In *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe,* 107 P.3d 402 (Colo. App. 2004), the court held – in connection with the issue of apparent authority to waive tribal immunity – that "when a court's jurisdiction is challenged by means of a [Rule] 12(b)(1) motion and there are contested issues of fact, the trial court *must* hold an evidentiary hearing to resolve those issues." *Id.* 406 (emphasis supplied).

¶ 83 MM&A demonstrated that there were disputed factual questions on the issues both of actual authority to waive sovereign immunity, and apparent authority to do so. Dismissal of the complaint was premature before MM&A was allowed discovery, and a hearing was conducted.

¶ 84 Even if this Court holds that apparent authority is unavailable to MMM&A in this circumstance, it was still error for the trial court to deny discovery, deny a hearing, and dismiss the complaint. MM&A was entitled to develop the facts supporting the Marketing Director's actual authority to sign the 2006 Agreement and its Sovereign Immunity Waiver Addendum. It must be remembered that, given that the Tribal Council had delegated to the Casino Board the authority to waive sovereign immunity, authority to sign the contract almost surely encompassed authority to waive immunity. And given that MM&A had been engaged in successive contracts for seven years,

which the defendants recognized, honored, and paid, it defies belief that the 2006 Agreement was signed without authority. MM&A is entitled to obtain the proof that it was so.

CONCLUSION

¶ 85 The judgment should be reversed. The case should be remanded for the trial court to allow discovery about and make an evidentiary determination upon whether the Nation validly waived sovereign immunity, either through express or apparent authority.

¶ 59 Respectfully Submitted.

Dated: April 19, 2013.

Michael J. Meehan
LAW OFFICE OF MICHAEL MEEHAN

By s/ Michael J. Meehan

Attorneys for Plaintiff -Appellant

CERTIFICATE OF COMPLIANCE

Under ARCAP 6(c) and 14(b), I certify that this Opening Brief uses proportionately spaced type of 14 points, is double-spaced using a roman font and contains,8,682 words.

Dated: April 19, 2013

By s/ Michael J. Meehan

CERTIFICATE OF SERVICE

A copy of the foregoing was served on all counsel of record this 19th day of April, 2013, via the Court's ECF system and via electronic mail upon:

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Dated: April 19, 2013.

By s/ Michael J. Meehan

APPENDIX A

6

FILED
PATRICIA A. NOLAND
CLERK, SUPERIOR COURT

08 DEC 19 PM 12: 16

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. PAUL E. TANG BY: R. ST. GERMAINE CASE NO. C-20085949

COURT REPORTER: NONE

DATE: December 19, 2008

MM&A PRODUCTIONS, LLC, an Arizona limited liability company,
Plaintiff,

vs.

YAVAPAI-APACHE NATION, a federally recognized Indian Tribe; YAVAPAI-APACHE NATIONS CLIFF CASTLE CASINO, a business enterprise of the Yavapai-Apache Nation; TRIBAL GAMING BOARD; and, CLIFF CASTLE CASINO BOARD OF DIRECTORS,
Defendants.

RULING

IN CHAMBERS RE: DEFENDANTS' MOTION TO DISMISS

1. The Court has under advisement that motion to dismiss ("Motion") filed by the above-referenced defendants ("Defendants" or collectively, "the Nation"). MM&A Productions LLC ("MM&A or "Plaintiff") opposes. The Court has considered the parties' pleadings, their counsels' arguments adduced at the hearing held December 8, 2008, and the entire record. The Court hereby GRANTS the Motion for the reasons outlined in Defendants' pleadings, including those briefly discussed below.

2. First, the subject contract provides, "[i]f and only if the United States District Court lacks jurisdiction, then and only then will actions or suits be brought in the judicial system of the State of Arizona in Pima County." *See* Contract Addendum, para. 2, attached to Exhibit F of *Defendants' Motion to Dismiss*. It is undisputed that Plaintiff filed its complaint, alleging inter alia, breach of complaint, on August 27, 2008 in the Arizona Superior Court, County of Pima, without having initially brought suit in the federal court. By the very terms of the parties' agreement, MM&A was required first to proceed in federal court regarding any waiver claim as to sovereign immunity by the Nation concerning disputes. *See Gaming Court of America v. Dorsey & Whiteney*, 88 F.3d 526 (8th Cir. 1996). Though tempted, the Court declines MM&A's perhaps appealing

Rhonda Munyon
Judicial Administrative Assistant

invitation that this state court judge determine whether an Article III judge otherwise has jurisdiction to hear the subject parties' dispute.

3. Next, Plaintiff has failed to meet its burden in showing that the Court possesses subject matter jurisdiction over the case, particularly, regarding the issue of whether MM&A has shown the existence of a valid sovereign immunity waiver by these Defendants, consisting of the Yavapai-Apache Nation and its co-defendant affiliates. Indian Tribes possess a long-standing common-law immunity from suit, an immunity traditionally enjoyed by sovereign powers. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Moreover, the issue of tribal immunity is a matter of federal law and is not subject to diminution by the States. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756 (1998). Even where states have jurisdiction over transactions in Indian country, absent an express waiver or a Congressional abrogation, such states do not possess jurisdiction over Indian tribes or tribal entities engaged in those transactions. *Id.* at 755; *see also Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 512-14 (1991).

4. Arizona courts recognize the doctrine of tribal sovereign immunity. *Filer v. Tohono O'odham Nation Gaming Enterprise*, 212 Ariz. 167, 170, 129 P.3d 78, 81 (App. 2006), *quoting Val/Del, Inc., v. Superior Court*, 145 Ariz. 558, 560, 703 P.2d 502, 504 (App. 1985). Just as a congressional waiver must be unequivocal and explicit, *Filer, supra* at 83, 129 P.3d at 172; *Val/Del, supra* at 560, 703 P.2d at 504, a waiver by an Indian Tribe of immunity is strictly construed. *Ramey Construction v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982); *Soghomonian v. United States*, 82 F.Supp.2d 1134, 1140 (E.D.Cal.1999). The record establishes that the Yavapai-Apache Nation possesses a clear protocol by which a business like MM&A can secure a waiver, and Plaintiff has utterly failed to avail itself of these tribal procedures.

5. Plaintiff relies heavily on the authority of the Casino's marketing director, Steven Wood, to waive the Nation's immunity within the subject agreement. However, the Court is not persuaded Mr. Wood possessed authority to waive the sovereign immunity of the Yavapai-Apache Nation and its affiliates. *See Chance v. Coquille Indian Tribe*, 327 Ore. 318, 325, 963 P.2d 638, 640-2 (1998); *Danka Funding Co. v. Sky City Casino*, 329 N.J.Super. 357, 361-2, 747 A.2d 837, 839-40 (1999); *World Touch Gaming v. Massena Management*, 117 F.Supp.2d 271, 275 (N.D.N.Y.2000); *but see Rush Creek Solutions Inc v. Ute Mountain Ute Tribe*, 107 P.3d 402, 407 (Colo.App. 2004).

6. MM&A's citation for its proposition as to Mr. Wood's apparent authority rests exclusively on *Rush Creek, supra*. The court in *Rush Creek* refused to follow *World Touch* as "nothing in the Tribe's Constitution expressly speaks to the issue or refutes or prohibits" using Colorado law on apparent authority. *Id.* However, *Rush Creek* represents the clear minority view. *See* Authorities cited in Defendants' Reply, p. 7. More importantly, *Rush Creek* is distinguishable as the court there noted that the Ute Mountain Ute Tribe's constitution was "silent" on the issue of whether state law could be incorporated. *Id.* Section 108(c) of the Nation's Judicial Code, however, specifically provides that the Nation's Tribal Courts look to the laws of *other tribes or the United States*, thereby specifically rejecting the incorporation of any state's laws.

Rhonda Munyon
Judicial Administrative Assistant

For the reasons stated in the foregoing, the Court GRANTS the Motion to Dismiss filed by the above-captioned Defendants.[1]

DATED:

HON. PAUL E. TANG

cc: Hon. Paul E. Tang
Clerk of Court- Civil
Jeffrey Willis, Esq./Jason Vanacour, Esq.- Attorneys for Plaintiff
SNELL & WILMER, LLP
William Foreman, Esq.- Attorney for Defendants
7272 E. Indian School Rd., Ste. 203, Scottsdale AZ 85251
Scott Crowell, Esq.- CROWELL LAW OFFICES, 1670 10th St. West, Kirkland WA 98033

[1] Plaintiff does not dispute that the Nation's affiliates and entities named as co-defendants are entitled to the same immunity as the Nation. *See generally Dixon v. Picopa Const. Co.*, 160 Ariz. 251, 772 P.2d 1104 (1989).

Rhonda Munyon
Judicial Administrative Assistant