IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MM&A Productions, LLC, an Arizona limited liability company, Plaintiff-Appellant, v. YAVAPAI-APACHE NATION, a federally recognized Indian Tribe; YAVAPAI-APACHE NATION'S CLIFF CASTLE CASINO, A BUSINESS ENTERPRISE OF THE Yavapai-Apache Nation; TRIBAL GAMING BOARD; and CLIFF CASTLE BOARD OF DIRECTORS, Defendants-Appellees.	2 CA-CV 2013-0051 Pima County Superior Court Cause No. C 20085949

REPLY BRIEF

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ARGUMENT

I
THERE WAS NO FEDERAL DISTRICT COURT JURISDICTION.

¶1 The Nation asserts that there was "arguable" federal jurisdiction of Plaintiff's claims, and that Plaintiff should have gone through the senseless act of filing suit in federal court to get *that* court's explicit confirmation of what *all* of the existing jurisprudence on the point makes plain – that no federal jurisdiction existed here. This makes no sense.

¶2 1. <u>There wasn't even a colorable claim of federal preemption jurisdiction, let alone the existence of federal jurisdiction for Plaintiff's claims.</u>

¶3 The Nation does not even argue that there *was* federal question jurisdiction arising out of Indian Gaming Regulatory Act ("IGRA") preemption.[1] The most it will contend is that "strong argument can be made that federal courts do have jurisdiction over Plaintiff's claims." Br. p. 10, ¶ 15. In fact, *no* argument can plausibly be made that the IGRA preempts state law claims arising out of the Nation's breach of Plaintiff's contract.

[1] Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (codified at 25 U.S.C. §§ 2701 to 2721.

¶4 IGRA preemption applies only to Management Contracts under the IGRA, or to claims closely related to such Management Contracts, and which implicate an Indian nation's conduct and regulation of *gaming.* Plaintiff's contract comes nowhere close to being such a contract. The primary case upon which the Nation relies, *Gaming Court of America v. Dorsey & Whitney*, 88 F.3d 536 (8th Cir. 1996), Br. p. 10 ¶ 15, describes the very outer limit of potential IGRA preemption. Yet even *Gaming Court* recognizes that Plaintiff's contract for booking agency and entertainment production cannot fall under IGRA preemption. The other two cases relied upon by the Nation, *Great Western Casinos v. Morongo Band of Mission Indians*, 74 Cal. App. 4th 1407, 88 Cal. Rptr. 2d 828 (1999) and *Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684 (7th Cir. 2011), Br. p. 11, ¶ 15, *did* involve Management Agreements, and therefore are completely inapposite.

¶5 Some understanding of the IGRA and Management Agreements contemplated by that Act is useful in understanding why there isn't even arguable preemption in this case.

¶6 In 1987 the United States Supreme Court held that States could not enforce their anti-gambling laws against Indian tribes conducting gaming

activities on reservation lands within the state. *California v. Cabazon Bank of Mission Indians*, 480 U.S. 202, 107 S. Ct. 1083 (1987). Congress responded by enacting the IGRA in order to balance state concerns for regulating or prohibiting gambling with the sovereign rights of Indian tribes. Congress was also concerned about the potential of private gaming management contracts to exploit Indian tribes by extracting excessive gambling revenues, and to facilitate infiltration of Indian gaming operations by organized crime. *Wells Fargo*, *supra*, 658 F.3d at 686, 687. Accordingly, the IGRA established a National Indian Gaming Commission ("NIGC") to regulate and oversee gaming activities by Indian tribes. 25 U.S.C. § 2704. Its Chairman is authorized to approve Management Contracts for Indian gaming. 25 U.S.C, § 2705(a)(4).

¶7 The NIGC by regulation has defined a Management Contract as "any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor *if such contract or agreement provides for the management of all or part of a gaming operation*." 25 C.F.R. § 502.15 (emphasis supplied). Obviously, Plaintiff's exclusive booking agency and entertainment production agreement does not meet that description.

¶8 The nature of the NIGC, and of Management Agreements, is important because not every contract which touches upon, or is performed within, a casino is preempted by the federal IGRA. The Nation asserts that the IGRA "preempted the universe of Indian-gaming related contracts . . . ," Br. p. 10 ¶ 15. The Nation does not define an "Indian-gaming related contract," nor explain how MM&A's agency and entertainment production agreement could possibly be swept within IGRA and therefore preempted by federal law such that federal jurisdiction existed for a district court action.

¶9 Understanding what kind of federal preemption is involved here demonstrates the error in the Nation's assertion that the *Gaming Court* case can or should be stretched to cover Plaintiff's claim.

¶10 As established in the Opening Brief, and as concurred in by the Nation in its Answering Brief, p. 7 ¶ 9, there exists no diversity upon which federal jurisdiction could rest. Nor can any federal question jurisdiction be gleaned from the allegations of Plaintiff's complaint. It is entirely grounded upon state law claims. This means that under the doctrine of the "well-pleaded complaint" rule in federal jurisprudence, Plaintiff could not have filed suit in the District Court, nor could the Defendant Nation have removed the case from the Superior Court to District Court. As the Eighth Circuit

noted in the Nation's lead case, *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536 (8th Cir 1996), "[t]he 'well-pleaded complaint rule requires that a federal cause of action must be stated on the face of the complaint before the defendant may remove the action based on federal question jurisdiction. A federal defense, including the defense that one or more claims are preempted by federal law, does not give the defendant the right to remove to federal court." 88 F.3d at 542-43. But there is an exception to the well-pleaded complaint rule, which is at issue here.

¶11 There is a doctrine of "complete preemption" which is different from preemption used only as a defense. To again quote *Gaming Corp*: "Complete preemption can arise when Congress intends that a federal statute preempt a field of law so completely that state law claims are considered to be converted into federal causes of action." *Id.* at 543. The jurisdictional question, then, is whether "complete preemption" applies here.

¶12 *Gaming Corp did* hold that "complete preemption" applied to the IGRA, even though it recognized that "a statute must have 'extraordinary pre-emptive power,' a conclusion that courts reach reluctantly." 88 F.3d at 543. But, importantly, *Gaming Corp* did *not* hold, as argued by the Nation, that "the universe of Indian-gaming related contracts" are preempted by the

IGRA. Rather, in a paragraph immediately following the above-quoted provisions of *Gaming Corp* the court said "*Only* those *claims* that fall within the preemptive scope of the statute, or treaty, are considered to make out federal questions." *Id* (emphasis supplied). The court then held that claims involving contracts like plaintiff's exclusive booking agency and entertainment product agreement are not preempted.

¶13 *Gaming Corp* stressed that each individual claim must be examined for preemption, and that "potentially valid claims under state law [and thus not preempted] are those which would not interfere with the nation's governance of gaming." *Id.* *Gaming Corp* found that *some* claims were preempted because they involved the performance of a law firm in aiding the nation in its gaming license process. It recognized that others which pleaded state law claims probably were not, although on the posture of the case, the court did not decide whether they were or not. *Gaming Corp* uses broad language. Nonetheless, even under its analysis, the Plaintiff's contract cannot possibly be preempted.

¶14 The majority of courts have held that preemption only applies to a Management Contract. And cases have made clear that claims involving contracts much more involved with gaming activities that

plaintiff's here were *not* preempted. Cases holding that preemption only applies to "Management Contracts" or related agreements include:

- *Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.* 658 F.3d 684, 594-96 (7th Cir. 2011) (issue of preemption depends upon whether trust indenture was "a management contract for the operation of a gaming facility within the meaning of the Act[,]" and referring to the NIGC regulation definition);
- *Great W. Casinos v. Morongo Band of Mission Indians*, 74 Cal. App. 4th 1407, 1424-26, 88 Cal. Rptr. 2d 828, 840-42 (1999) (allegations of the complaint "reveal all causes of action relate to the defendants' allegedly wrongful termination of its contract to manage the tribe's gaming operations. . . As a result [plaintiff's] claims, however styled, are preempted by federal law." *Id.* 843);
- *Trump Hotels & Casino Resorts Dev. Co., LLC v. Roskow*, 2004 U.S. Dist. LEXIS 5401, 2004 WL 717131 (D. Con. 2004) ("IGRA's preemptive force is limited to claims that fall within its scope [citing *Gaming Corp., supra*]. It does not apply to all contract disputes between a tribe and a non-tribal entity, but only those pertaining to management contracts and collateral agreement to those contracts as

those terms are defined under the IGRA. See 25 U.S.C. § 2711; 25 C.F.R. §§ 502.5 and 502.15; *see also Casino Resource Corp. v. Harrah's Entm't, Inc.*, 243 F.3d 435, 439-40 (8th Cir 2001)");

- *Sungold Gaming (U.S.A.) Inc. v. United Nation of Chippewa, Ottawa, and Pottawatomi Indians, Inc.*, 199 U.S. Dis. LEXIS 8891, 1999 WL 33237035 (W.D. Mich. 1999) (agreement at issue not a Management Agreement; therefore IGRA preemption did not apply);
- *Shingle Springs Band of Miwok Indians v. Sharp Image Gaming, Inc.*, 2010 U.S. Dist. LEXIS 109908, 2010 WL 40544232 (E.D. Cal. 2010) ("If a contract is not construed by the NIGC to be a management contract, the contract falls outside of the preemptive effect of the IGRA");
- *Weather Barrier Constr. Ltd. V. Tonkawa Tribe of Okla.*, 2008 U.S. Dist. LEXIS 70648, 2008 WL 4372367 (W.D. Okla. 2008) (holding that if contract is not a management agreement, there is no IGRA preemption).

¶15 The Nation's principal case, *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 550 (8th Cir 1996), is not so specific in its holding that only "Management Agreements" are preempted by the IGRA.

But even it makes plain that IGRA preemption does not occur unless the claims relate directly to Indian tribe gaming activities and regulation. *Gaming Corp.* held that only causes of action which "would interfere with the nation's ability to govern gaming," or "that would intrude on the tribe's regulation of gaming" should be preempted. *Id.* *Gaming Corp* also recognized that "valid claims under state law are those which would not interfere with the nation's governance of gaming." *Id.* *Gaming Corp* itself rejects the Nation's attempt to use it for the proposition that there could be IGRA preemption here.

¶16 There are no cases remotely resembling Plaintiff's exclusive agency and entertainment production agreement which any court has found to be IGRA-preempted. Indeed, cases abound which relate much more directly to gaming and Indian regulation of gaming but were held not to be preempted. Consider:

- *Mashantucket Pequot Tribe v. Town of Ledyard*, 2013 U.S. App. LEXIS 14196, 2013 WL 3491285 (2d Cir. 2013) (contract to lease slot machines "would not interfere with the nation's governance of gaming.");

- *Iowa Mgmt. & Consultants, Inc. v. Northern Sac & Fox Tribe*, 207 F.3d488 (8th Cr. 2000) (a "gaming-related" consulting agreement not preempted, because not a management agreement needing NIGC approval);
- *Shingle Springs Band of Miwok Indians v. Sharp Image Gaming, Inc.*, 2010 U.S. Dist. LEXIS 109908, 2010 WL 40544232 (E.D. Cal. 2010) (gaming machine agreement, equipment lease, and promissory note, all involving tribal gaming, not preempted);
- *Weather Barrier Constr. Ltd. v. Tonkawa Tribe of Okl.*, 2008 U.S. Dist. LEXIS 70648, 2008 WL 4372367 (W.D. Okl. 2008) (contract to build casino not preempted);
- *Runyan v. River Rock Entm't Auth.*, 2008 U.S. Dist. LEXIS 111129, 2008 WL 3382783 (N.D. Cal2008).
- *Trump Hotels & Casino Resorts Dev. Co., LLC v. Roskow*, 2004 U.S. Dist. LEXIS 5401, 2004 WL 717131 (D. Con. 2004) (Agreement to develop a casino not preempted);
- *Sungold Gaming (U.S.A.) Inc. v. United Nation of Chippewa, Ottawa, and Pottawatomi Indians, Inc.*, 199 U.S. Dis. LEXIS 8891, 1999 WL 33237035 (W.D. Mich. 1999) (agreement

between tribe and company to partner in establishing a casino not preempted);

¶17 Here, plaintiff contracted with the Nation to be an agent to find entertainers, and to produce entertainment. This was not related to gaming at all. One may as well find a contract for the delivery of beverages to a casino; to furnish it utilities; or provide janitorial service to a casino building, to be preempted. To do so would make about as much sense as the Nation's argument that Plaintiff's contract claims are preempted.

¶18 There is no colorable claim that federal jurisdiction existed.

¶19 2. <u>There was no need for Plaintiff to do the futile act of filing suit in a court which patently had no jurisdiction of its claims</u>.

¶20 The Nation asserts, Br. p. 9 ¶ 13, that in ¶ 13 of the Opening Brief, Plaintiff "concedes that the [action] required any lawsuit be first filed in the United States District Court and only in the event that the United States District Court dismisses the action for lack of jurisdiction, may a lawsuit be filed in Arizona State Courts." That is incorrect. Plaintiff made no such concession. Nor does the contract state or require that.

¶21 As found in ¶ 13 of the Opening Brief, in each of the express waivers of sovereign immunity was a "Forum and Choice of Law"

paragraph. Each specified that all actions "shall be brought in the appropriate United States District Court." ROA 2, 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.* This is an unambiguous provision. It means that if the District Court has jurisdiction, suit must be filed there. It means that if the District Court does not have jurisdiction, suit may be filed in the Pima County Superior Court. It does not say, nor is the clause capable of being construed to mean, that suit must be filed irrespective of whether federal jurisdiction exists. It does not say, nor is it capable of being construed to mean, that only a United States District Court may determine whether federal jurisdiction exists. State courts routinely make determinations of federal law, and are quite as capable of doing so as are the federal courts. This issue of IGRA preemption is "primarily one of statutory and regulatory interpretation." *Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684 (7th Cir. 2011). The state courts are fully competent to do so.

¶22 To the extent any "interpretation" or "construction" of the contract provision is necessary, the clause should be interpreted to avoid the

futile, time wasting, inefficient act of requiring plaintiff to have filed suit in the District Court just to have it dismissed. A court must apply "a standard of reasonableness" when interpreting a contract. *Gesina v. General Elec. Co.,* 162 Ariz. 39, 45, 780 P.2d 1380, 1386 (App. 1989). To accept the Nation's view of the forum selection clause would be unreasonable.

¶23 The parties agreed that "if the District Court lacks jurisdiction," that suit could be filed in the Superior Court. The District Court *did* lack jurisdiction, and suit was properly filed in the Superior Court.

II
THE DOCTRINE OF APPARENT AUTHORITY IS AVAILABLE TO ESTABLISH THE WAIVER OF SOVEREIGN IMMUNITY.

¶24 The Nation devotes fifteen pages to three lengthy arguments which are either not responsive to the precedents and analysis the Opening Brief furnishes in support if its apparent authority argument, or are beside the point of the issue of apparent authority, or both. Br. pp. 13 – 28, ¶¶ 18-36. It begins with a discussion of cases principally involving estoppel, and not apparent authority and Indian sovereign immunity. Pp. 13-14, ¶¶ 17-19. It discusses at length a group of cases all of which adopt the same reasoning as *World Touch Gaming v. Massena Management LLC,* 117 F.Supp.2d 271

(N.D.N.Y. 2000) – conflating authority to waive, as opposed to specificity of a waiver – as though they contained additional reasoning supporting the Nation's position, or that discussing them in detail makes them more authoritative or persuasive. Pp. 16-21, ¶¶ 20-26. It then uses erroneous analysis to ask this Court to find inapplicable the cases which are soundest and should be this Court's guide – *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402 (Colo. App. 2004); *Store Visions, Inc. v. Omaha Tribe of Neb.*, 281 Neb. 238, 795 N.W.2d 271 (2011) cert. den. 132 S.Ct. 1016 (2012). Pp. 23-27, ¶¶ 28-36.

¶25 It is not that complicated. The issue is simple. Should this Court follow *World Touch Gaming, supra,* which conflates the specificity needed for a *waiver* of immunity, with the issue of whether apparent authority applies? Or should it decide the issue based upon the existence of apparent authority as a matter of federal law of agency, not specificity of a waiver, as did *Rush Creek Solutions, supra.* The latter, Plaintiff's position, should be adopted.

¶26 1. Waiver and equitable estoppel are issues different than apparent authority.

¶27 The Nation invokes judicial rejection of "equitable doctrines such as estoppel" against a government as grounds for refusing to allow apparent authority to apply. The two are quite different.

¶28 The Nation relies principally upon *Federal Ins. Corp. v. Merrill*, 332 U.S. 380, 68 S.Ct. 1 (1947). It involved classic estoppel in which a government agent had mis-informed a farmer about the applicability of certain crop regulations. The Nation cites additional cases which apply estoppel because of acts or misdeeds of *agents.* Br. p. 14: *Utah Power and Light Co. v. United States*, 243 U.S. 389, 37 S.Ct. 387 (1917) (government not estopped by agent's action which the law does not permit – neither general assurances of approval by government agent, nor acquiescence of government in private activity was waiver or estoppel); *United States v. Jones*, 176 F.2d 278 (9th Cir. 1949) (No estoppel from agent performance of unauthorized acts – sale of surplus property); *Bollow v. Federal Reserve Bank of San Francisco*, 650 F.2d 1093 (9th Cir. 1981) (assurance of employment security made by supervisor not enforceable because not authorized). Each of these cases, and cases generally invoking the doctrine

of estoppel or waiver, have something in common which is lacking in apparent authority cases. In each of these instances waiver or estoppel arose from something the agent said, did, or did not do, completely unrelated to the "principal," – *i.e.* the government itself. In contrast, under the doctrine of apparent authority, it is conduct of the "principal" which establishes authority as a matter of law.

¶29 Apparent authority can *only* arise if the *principal* acts, or otherwise creates the circumstance in which a third party is lead to believe the agent has authority to act. As stated in *Am. Society of Mech. Engineers v. Hydrolevel Corp.*, 456 U.S. 556, n. 5, 102 S.Ct. 1935 (19082):

> " 'Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, *arising from and in accordance with the other's manifestations to such third persons*.' Restatement (Second) of Agency § 8 (1957)." (Emphasis supplied).

¶30 "The other" in this Restatement rule refers to the principal. That is, if the principal has "manifested" to third persons facts or circumstances from which the "third person" would reasonably believe the agent had authority to act – that law holds that the agent *did* have authority to act. The newest version: RESTATEMENT (THIRD) AGENCY § 2.03 (2013) describes the principle a bit more clearly:

> Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal *and that belief is traceable to the principal's manifestations*. (Emphasis supplied).

¶31 Accordingly, waiver and estoppel cases cited by the Nation are immaterial to decision of this case.

¶32 2. Cases about how specific a waiver must be expressed don't establish that apparent authority cannot be invoked.

¶33 As discussed, Op. Br. pp. 29 – 31, the line of cases upon which the Nation relies are based on a disconnected proposition – that the rule that because a waiver of sovereign immunity must itself be clear and unequivocal, a clear waiver cannot be authorized through apparent authority. This is illogical. The Response Brief doubles down on the cases using this theory, by independently citing, as holding that apparent authority cannot occur, cases which stand only for the proposition that a particular action taken by an Indian tribe was not a waiver of immunity. Br. pp. 15, 16.

¶34 The first such case is *United States v. USF&G*, 309 U.S. 513, 60 S. Ct. 653 (1940). As quoted by the Nation, Br. p. 15, the Supreme Court held that failure to object to the jurisdiction of a U.S. District Court over a cross claim was not a waiver of sovereign immunity. The Nation then

emphasizes a phrase by the Court that "immunity cannot be waived by officials." That of course is dictum and untrue on its face, inasmuch as *authorized* officials can do so. *USF&G* stands only for the proposition that failure to object was not a waiver of immunity – *i.e.* that a waiver must be clear an unequivocal. That is different from establishing how authority to waive arises.

¶35 Four additional cases also hold only that tribal action not clearly constituting a waiver of immunity were *not* waivers of immunity. Br. p. 16: *Pan. Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416 (9th Cir. 1989) (entering into an arbitration clause not a waiver); *Hydrothermal Energy Corp. v. Fort Bidwell*, 170 Cal.App.3d 489 (1985) (also holding that arbitration clause in contract not a waiver); *Ranson v. St. Regis Mohawk Education and Community Fund, Inc.*, 86 N.Y.2d 989 (N.Y. App. 1995) (no waiver through placement in corporate charter of general business powers, or qualifying to do business in state, or to sue or be sued); *Calvello v. Yankton Sioux Tribe*, 584 N.W.2d 108 (S.D. 1998) (participation in arbitrations not express waiver).

¶36 The Nation then argues that this Court should follow cases which ground their holding, that there can be no apparent authority, upon the

Supreme Court's rule that waiver itself must be explicit. Br. pp. 16 – 19. There are six of them, spread over the Response Brief both before and after its sub-argument c., on page 19.

¶37 The Nation counters Plaintiff's accurate description of these cases, as resting upon the rule that waiver must be express and not implied, in various ways.

¶38 It says that *Chance v. Coquille Indian Tribe*, 327 Ore. 318,963 P.2d 638 (1998) "found no effective waiver despite the fact that its express terms were very clear." Br. p. 20, ¶ 25. But the *Chance* court dealt with two different waiver arguments. In the one quoted by the Nation, it held that the contract signator lacked actual authority. But earlier in its opinion, dealing with a different claim of waiver, *Chance* did rest its decision on Supreme Court precedent on implied waiver, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670 (1978). 963 P.2d at 639. Most importantly, *Chance* did not adjudicate the issue of apparent authority, for either of the asserted waivers involved in the case. The Nation says that *Danka Funding Company, LLC v. Sky City Casino*, 329 N.J. Super. 357, 747 A.2d 837 (1999) "did not reach the question of whether the waiver was sufficiently clear . . ." Br. p. 20 ¶25. But the Nation is wrong. After much discussion

about the need for specificity of a waiver, the New Jersey trial court concluded that the existence of a forum selection clause in the contract at issue was "insufficient to establish the unequivocal waiver necessary [to waive immunity]." 747 A.2d at 844.

¶39 Of the four remaining cases, the seminal case is *World Touch Gaming v. Massena Management, LLC*, 117 F.Supp.2d 271 (N.D.N.Y. 2000). Plaintiff discussed *World Touch*, Op. Br. pp. 29-30, demonstrating why its reasoning is unpersuasive. Plaintiff does not repeat that discussion here, but requests the Court to look again at those pages of its brief. The Nation does not refute that discussion.[2] The second is ***Memphis Biofuels v. Chickasaw Nation Industries***, 585 F.3d 917 (6th Cir. 2009), which relies upon *World Touch*, *supra*, and *Danka Funding Co. v. Sky City Casino*, 329 NSuper. 357, 747 A.2d 837 (N.J. Super. 1999), and perpetuates their error in conflating the requirement for specificity of the waiver itself with

[2] On page 26 of its Brief the Nation circles back to *World Touch*, asserting that the existence of explicit tribal law in *World Touch* specifying who could waive immunity, contrasted with silence on the issue in *Rush Creek* and *Store Visions*, points toward accepting the *World Touch* position. But because apparent authority arises from law (and *federal* law); and because it applies to circumstances where the contracting party (*i.e.* the Nation) has *not* followed these specific dictates, it is immaterial what the law of the Nation (or the tribes in *Rush Creek* and *Store Visions*) did or didn't have in their laws laying out how *actual* authority could be established. *See*, *infra*, pp. 24, 25.

permissible implication of apparent authority. The last two cases are *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288 (10th Cir. 2008), and *Dillinger v. Seneca-Cayunga Tribe*, 211 Ok. 61, 258 P.3d 516 (2011). They have the same holdings as *World Touch, supra*, and are based on citing *Merrion v. Jicarilla Apache Indian Tribe*, 455 U.S. 130, 102 S.Ct. 894 (1982), as had *World Touch*, for its rule that waivers themselves must be specific, not the authority to waive immunity. Indeed, *Dillinger* also cited *Memphis Biofuels and Native American, supra.*

¶40 This group of cases should not be followed merely because they are numerous. They all cite the same concept; and it is an illogical concept. Apparent authority is invoked when there has been no express grant of authority. Apparent authority must necessarily be implied. Therefore it is not proper to deny the application of apparent authority based on precedents requiring the waiver itself to be express. It is an impossibility.

¶41 3. The Nation's grounds for distinguishing *Rush Creek* and *Store Visions* lack merit.

¶42 The Nation asks this Court to disregard *Rush Creek* and *Store Visions* for three reasons: i) that the cases invoke apparent authority, which "sound in equitable estoppel," Br. p. 24; ii) that they applied state, not

federal law, Br. pp. 23, 24; and iii) that in both of those cases, the tribal law was silent on who had authority to waive sovereign immunity, while in this case there are provisions of tribal law about waiver of immunity. None of these justifies doing so.

¶43 The first point is simply a repetition of the Nation's conflation of equitable estopped with apparent authority, dealt with *supra* pp. 15, 16.

¶44 The second point confuses the reference by both cases to the state "general law of agency" with the question of whether their decisions were based upon federal law. The pivotal legal issues on the point are whether apparent authority must be expressed (as noted, *supra*, a conundrum) or is implied, and whether the doctrine of apparent authority is part of the federal law that would relate to waiver of Indian sovereign immunity. In both instances, *Rush Creek* and *Store Vision* invoke federal law (*Store Vision* mostly by noting, describing and adopting the reason of *Rush Creek*). The federal nature of each of these issues is discussed, Op. Br. pp. 26 – 31, to which we again refer the court, and because of which are only briefly mentioned here.

¶45 *Rush Creek* considered the United State Supreme Court cases requiring an express waiver, and rejected their applicability to the issue of

authority to make that express waiver: *Merrion v. Jicarilla Apache 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). 103 P.3d at 407. It then recognized and applied the Supreme Court treatment of waiver of sovereign immunity: "*C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 121 S. Ct. 1589 (2001)(noting that the law governing waivers of immunity by foreign sovereigns is helpful in deciding tribal sovereign immunity issues)" *Id.* at 408. This was a pivotal basis for the courts' approval of apparent authority.

¶46 The Nation's focus upon the reference to state law in *Rush Creek* and *Store Vision* is unimportant. Those references were to a description or definition of apparent authority, to be applied to the facts before them and not whether or not apparent authority would be recognized. Further, the definitions used in *Rush Creek* and *Store Vision* were congruent with the definition of the rule adopted and applied by the Supreme Court for federal law. *See, supra* at 16 (Supreme Court citing Restatement (Second) of Agency § 8 (1957)).

¶47 The Nation's contention is virtually an *ipse dixit*, inasmuch as it does not explain why it makes a difference. And it doesn't.

¶48 If the issue before the Court involved establishing actual authority to waive immunity, it would matter whether there were express provisions of tribal law in one case detailing how immunity is to be waived, but not in another. But the issue is apparent, not actual, authority. And the purpose of apparent authority arises when actual authority is lacking. Therefore it matters not whether tribal law did or did not contain explicit provisions about how the Nation could authoritatively waive its immunity.

¶49 It is true that in *Rush Creek* the Court reached its decision "in part" because the tribal laws there were silent. 107 P.3d at 407. But, while that might have been an appropriate consideration on the issue of actual authority, it is not for apparent authority. And right after the *Rush Creek* statement just quoted, the Colorado court actually realized that it didn't and why. The Court noted that apparent authority "is created by operation of law. *Moore v. Switzer*, 78 Colo. 63, 239 P. 874 (1925)." *Id.* The Supreme has said "the whole field" of Indian tribal immunity is one of federal law, *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 510,111 S.Ct. 905, 910 (1991) including whether " the tribe has waived immunity," *Kiowa Tribe v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 1702 (1998). Thus, the applicable source of

law of apparent authority is not internal law or rules of the contracting party (i.e. the Nation); for, once again, the purpose of apparent authority is to cover situations where the contracting party (here, the Nation) has created a false impression that authority exists even though those internal rules of the contracting party (again, the Nation) were not followed.

¶50 4. Any doubt about whether to allow apparent authority should fall in favor of doing so.

¶51 The Nation misperceives the purpose of citing to the harsh results Justice Stevens described in *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 757-58, 118 S.Ct. 1700 (1998). Plaintiff does not argue "that the doctrine of sovereign immunity should not be perpetuated." Br. p. 27. Rather, it urges that any uncertainty about allowing apparent authority should result in its recognition. To do so would alleviate some of the harshness recognized by Justice Stevens, when that harshness resulted from a tribe's own actions in holding out an agent as having authority.

¶52 The Nation – and its quotes from *World Touch* and *Danka Funding* , Br. p. 28, miss an important point by asking this Court to make its decision based upon a supposition that parties contracting with a tribe are

inevitably sophisticated. To begin with, many, *many* parties dealing with tribes are *not* inevitably sophisticated. Purveyors of various goods and services – from goods sold by a local hardware, store to copies or services from a local copy store, to flowers from a local florist, to automobile repairs by a shade tree mechanic in the vicinity of a reservation – will often *not* be sophisticated. Moreover, these are just the kinds of parties as to which apparent authority is most likely to *exist*, and to whom it should therefore be afforded. It is not good policy to make a rule of broad application based only upon the sophistication of a party who has means or incentive to litigate.

¶53 Secondly, and equally important, is the fact that no matter how sophisticated the plaintiff or others may be, they will both have difficulty obtaining tribal organic documents and judicial codes, and probably have no prospect whatsoever of obtaining copies of council or managing board resolutions, or memoranda or other file documents establishing the true state of affairs of the authority, or lack thereof, held by the agent contracting for a tribe. It may be said that MMA – and other plaintiffs – should be more insistent in seeking such documentation. But realistically, MMA did here what could be done. Its representative discussed both with a tribal council

member and with the Chair of the gaming board whether the marketing director had authority to waive immunity, and was told that he did. ROA 9, Ex. A, ¶ 6.

¶54 It is not a hardship to apply, to ever more sophisticated tribes engaging in nine figure businesses, a doctrine of apparent authority which is occasioned by the tribe's own manner of doing business.

III
THE CASE SHOULD BE 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.

¶55 None of the arguments made by the Nation adequately rebuts Plaintiff's demonstration that this case should be remanded for Plaintiff to conduct discovery; and for the trial court to make a factual determination of whether – through actual *or* apparent authority – the Nation waived sovereign immunity.

¶56 The Nation commences by arguing that the issue is reviewed for abuse of discretion, and that MM&A failed to demonstrate such abuse in the instant case. Br. ¶ 37, pp. 28, 29. These statements reflect two major flaws.

¶57 The first is that the trial court never exercised any "discretion" at all. The trial court did not acknowledge Plaintiff's request for discovery. It did not make an explicit ruling on the request for discovery. It did not act upon the Plaintiff's request in any way except by the implicit effect of its grant of the Nation's motion to dismiss. The failure to act was itself an abuse of discretion. *Ad Hoc Comm. of Parishioners of Our Lady of the Sun Catholic Church, Inc. v. Reiss*, 223 Ariz. 505, 518, 224 P.3d 1002 (App. 2010) ("To find an abuse of discretion, there must either be no evidence to support the superior court's conclusion or the reasons given by the court must be clearly untenable, legally incorrect, or amount to a denial of justice.") Failing to act at all on the request was all of the above.

¶58 The second flaw in the Nation's major premise is its total disregard of the law specifically related to discovery and factual resolution of issues of subject matter jurisdiction. This is so even though the first case cited by the Nation make clear that where motions to dismiss for lack of subject matter jurisdiction pose disputed questions of fact, discovery and an evidentiary hearing is contemplated. *Gatecliff v. Great Republic Life Ins. Co.*, 154 Ariz. 502, 744 P.2d 29 (App. 1987).

¶59 The Nation ignored this rule even though explicitly discussed in the Opening Brief, pp. 33-36. The discussion involved cases the Nation must have read – one of them was its own favorite precedent on apparent authority. As more completely discussed, Op. Br. ¶¶ 76-84, where there are factual disputes on jurisdiction, it is obligatory that the trial court allow discovery and a factual resolution, usually by hearing. *World Touch Gaming*, 117 F. Supp. 2d 271 (N.D. N.Y. 2000) (when the existence of subject matter is in dispute the party asserting jurisdiction *should be permitted* discovery of facts relevant to the jurisdiction); *Bradley v. Crow Tribe of Indians*, 315 Mont. 75, 67 P.3d 306 (2003) (court must engage in sufficient pretrial factual and legal determinations to satisfy itself of its authority to hear the case before trial and must afford the nonmoving party an ample opportunity to secure and present evidence relevant to the existence of jurisdiction); *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402, 406 (Colo. App. 2004) ("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").

¶60 The Nation argues that there is no factual dispute, and that the Tribe presented "clear evidence that such a valid waiver does not exist." Br. ¶ 39, p. 29. But its assertion is apparently based, in part, on its challenge to facts in the complaint, most particularly challenges to the validity of the signed contracts and waivers of sovereign immunity. Br. ¶¶ 3, 4, pp. 2, 3. And the Nation disputes Plaintiff's facts. Br. ¶¶ 4, 5 pp3, 4; ¶¶ 38-42, pp. 29-32. How can the Nation both claim, by relying only upon its own evidence that there is no factual dispute about waiver, because its evidence was "clear that such a valid waiver does not exist," yet acknowledge that there is a conflict in the evidence? It cannot.

¶61 Most of the Nation's discussion, *supra*, about its evidence relating to waiver pertains to the Nation's constitution and laws. Only three types of evidence relate to whether those procedures were followed or not; or whether there was apparent authority, even if they were not.

¶62 One such category was the affidavit of the Attorney General of the Nation, who avowed – in conflict with the evidence contained in Plaintiff's affidavit by Mr. Miller – that no contract had been approved by her office. Br. ¶ 41, p. 31. That is a conflict; but more importantly, whether or not the Nation followed its law relating to attorney general approval of

contracts is immaterial to whether the Nation waived sovereign immunity for its contract. Also immaterial to waiver of immunity is whether the contract was or was not within budget. Br. ¶ 38 p. 30.

¶63 The other category consists of the carefully-crafted affidavits of Council and Gaming Board record-keepers, that no motions or resolutions were found between from January 1 to August 31, 2006. ROA 14, Ex.'s B, D.

¶64 But, those affidavits obviously were incomplete. They did not cover the entire relevant time period. For one thing, a waiver of sovereign immunity which, by its terms, applied to the contract of 2006, was signed in 2003.

¶65 Moreover these affidavits are not only incomplete, they are directly disputed by statements made by tribal council and gaming board members. MM&A's Paul Miller, who negotiated the contracts, furnished an affidavit, ROA 9, under oath, that he had conversations with certain members of the Nation to the effect that the Board of Directors of the Gaming Gaming Board, 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 of the Gaming Board, and Darlene Rubio, a member of the Tribal Council. *Id.* ¶ 6. These statements suffice to raise factual issues that require MM&A to be allowed discovery, and to have a factual determination made by the trial court.

¶66 Finally, the Nation asks that if this Court remands the case for discovery and a hearing, that it do so with instructions to stay it while MM&A pursues its waiver argument in tribal court. But 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, . . . " Complaint Ex.'s B, C, ¶¶ 2.

CONCLUSION

¶ 67 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.

¶68 Request for attorney fees. Plaintiff requests the Court to grant Plaintiff attorney fees pursuant to the Contract, pursuant to A.R.S. § 12-

341.01, and for the Nation's argument on federal court jurisdiction, pursuant to A.R.S. § 12-349.

¶ 69 Respectfully Submitted.

Dated: September 30, 2013.

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CERTIFICATE OF COMPLIANCE

Under ARCAP 6(c) and 14(b), I certify that this Reply Brief uses proportionately spaced type of 14 points, is double-spaced using a roman font and contains,6,755 words.

Dated: September 30, 2013

By s/ Michael J. Meehan

CERTIFICATE OF SERVICE

A copy of the foregoing was served on all counsel of record this 30th day of September, 2013, via electronic mail upon:

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