IN THE COURT OF APPEALS
FOR THE STATE OF ARIZONA
DIVISION TWO

MM&A Productions, LLC, a 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 CASINO BOARD OF DIRECTORS, Defendants/Appellees.	No. 2 CA-CV 2013-0051 (Pima County Superior Court Cause No. C20085949)

RESPONSE BRIEF OF APPELLEES

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STATEMENT OF THE CASE

¶1 Defendants/Appellees Yavapai Apache Nation, its Tribal Gaming Board, and the Yavapai Apache Cliff Castle Casino and the Casino's Board of Directors, (collectively "Tribe") have no objection to Plaintiff/Appellant MM&A Productions, LLC's ("MM&A") Statement of the Case except to clarify that Tribe's position is that the Court lacks jurisdiction because the Tribe enjoys sovereign immunity from suit, which immunity has not been waived.

STATEMENT OF FACTS

¶2 Tribe does not agree with MM&A's assertion at ¶ 5 of its Opening Brief that in reviewing the grant of a motion to dismiss the 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. When a court's subject matter jurisdiction is challenged in a motion to dismiss, as it is in the instant litigation, the court is not constrained to the facts alleged in the complaint and may consider evidence and resolve factual disputes essential to the motion, and such preliminary jurisdictional fact-finding is not equivalent to a motion for summary judgment. *Gatecliff v. Great Republic Life Insurance Company,* 154 Ariz. App. 502, 506, 744 P.2d 29 (1987); *Moulton v. Napolitano,* 205 Ariz 506 at 510. Indeed, the court below did consider evidence in its deliberation on the motion to dismiss.

¶3 The Tribe, for purposes of the instant appeal is accepting of MM&A's

Statement of Facts except where facts germane to the court's inquiry of subject matter jurisdiction are expressly refuted. By such acceptance, however, no inference should be made that the Tribe does not dispute such uncontroverted "facts." In this context, Tribe takes issue with and disputes the following sections of MM&A's submitted Statement of Facts:

> at ¶ 8 of the Opening Brief that the alleged agreement had been "ratified and honored" by the Tribe;
>
> at ¶ 9 of the Opening Brief that the "Casino signed a contract with MM&A" and that the Casino "executed a Waiver and Sovereign Immunity Addendum to the Agreement" and that "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:"
>
> at ¶ 12 of the Opening Brief that that "on June 30, 2006 a "Waiver of Sovereign Immunity Addendum" was signed by the parties;
>
> at ¶ 13 of Opening Brief that "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;"
>
> at ¶ 19 of the Opening Brief that "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.;"
>
> at ¶ 20 of the Opening Brief that "In 2008 the Nation breached the 2006 Agreement in numerous respects, and completely repudiated and abandoned it;"
>
> at ¶ 24 of the Opening Brief 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.

¶4 Contravening MMA's allegations, the Tribe submitted to the Superior Court the material laws of the Yavapai Apache Nation including the Constitution of the Yavapai- Apache Nation, Exhibit A to ROA 9, the Cliff Castle Casino Board of Directors Act, Exhibit B to ROA 9, the Yavapai Apache Nation Judicial Code, Exhibit A to ROA 14, affidavits of the Custodian of Records to the Tribe and the Board, Exhibits C and D to ROA 9, and Exhibits B, C and D to ROA 14, as well as the affidavit of the Tribe's Attorney General, Exhibit E to ROA 14. Together they establish the precise manner in which a valid waiver of the Tribe's sovereign immunity may be secured under the Tribe's laws and demonstrate that MM&A did not comply with the Tribe's laws. Rather than following MM&A's lead and use the Statement of Facts as advocacy on the issue of appropriate discovery, the Tribe addresses the relevant factual record in this case in the Argument portion of this Response Brief at Section II(C) and III, *infra*. The Superior Court found, after review of the entire record, which included the Tribe's laws and supporting

declarations and MM&A's supporting documents and declarations that "Plaintiff has utterly failed to avail itself of these tribal procedures." Ruling at ¶¶ 1 and 4, ROA 21.

¶5 The Tribe does not dispute MM&A's enunciation of laws of the Yavapai Apache Nation in ¶ 18 of its Opening Brief as to provisions of Tribe's Cliff Castle Casino Board of Directors Act but finds incomplete generalized statements to be inadequate. The relevant provision material to the instant litigation, Section XIV states:

1. The Board shall have the power to negotiate and approve contracts for the expenditures of funds within approved budgets of the Board, Cliff Castle Casino and Cliff Castle Lodge and Conference Center, subject to review by the Office of Attorney General.
2. The Chairperson of the Board is hereby delegated the authority to execute contracts approved by majority vote of the Board subject to the requirements and restrictions in this section.
3. No contracts obligating the expenditure of funds outside the approved budgets of the Board, Cliff Castile Casino or Cliff Castle Lodge and Conference Center shall be approved without prior written consent of Council.
4. All contracts shall to the greatest extent possible be drafted to include language preserving the sovereign immunity of the Nation.

Exhibit B. to Motion to Dismiss, ROA 9.

¶6 The Tribe also disputes MM&A's self-serving characterization and description at ¶¶ 27 – 30 of the Opening Brief regarding the Superior Court's Ruling in granting the Tribe's motion to dismiss, which Ruling speaks for itself. ROA 21.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Superior Court erred in ruling that MM&A cannot avail itself of the alleged immunity waiver even if it were otherwise valid because MM&A failed to file the action in federal district court and seek a threshold determination as to whether the federal court retains jurisdiction to hear MM&A's claims, prior to filing the instant lawsuit.

2. Whether the equitable doctrine of apparent authority is available in the context of waivers of tribal sovereign immunity, and if so, whether it extends to the circumstances here, where Tribal laws are in place to govern the manner and authority tribal officials must adhere to in order to bind the Tribe to effective waivers of tribal sovereign immunity.

3. Whether the Superior Court abused its discretion in issuing its ruling on the Tribe's motion to dismiss for lack of jurisdiction based on the documents and supporting declarations submitted rather than allow MM&A leave to conduct further discovery.

SUMMARY OF ARGUMENT

¶7 Appellee/Defendants are a federally recognized sovereign tribal government, the Yavapai Apache Nation, possessing the inherent and federal statutory rights to govern its land and its membership, and political subdivisions of the Tribe. In that context, the Tribe operates a gaming facility, Cliff Castle Casino, on its Indian

lands pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq. Appellant/Plaintiff MM&A is an entertainment booking company that has booked acts for Cliff Castle. After the Tribe's marketing director passed away, MM&A produced documents that purport to be a contract for exclusive rights to manage the tribe's entertainment activities, with a multi-million dollar golden parachute/liquidated damages provision and to be an express waiver of the tribe's sovereign immunity from suit. The documents allegedly bear the signature of the deceased marketing director. MM&A presented the document to the Tribe and demanded a multi-million dollar payment. The Tribe refused and MM&A filed the instant litigation.

¶8 The laws of the Yavapai Apache Nation are very specific as to the manner in which a valid effective waiver of the Tribe's sovereign immunity can be obtained and enforced as against the Tribe and/or its political subdivisions. After confirming that the alleged contract and the alleged immunity waivers did not have the requisite tribal approvals from appropriate tribal officials, the Tribe specially appeared (reserving its sovereign immunity) and motioned to dismiss MM&A's claims for lack of an effective immunity waiver. MM&A responded to the motion to dismiss by arguing that even though the marketing director lacked authority under the Tribe's laws to waive the Tribe's sovereign immunity, MM&A's owner was under the impression that the marketing director had such authority and urged

the Superior Court to rule that Arizona courts should apply equitable doctrine of apparent authority to establish a binding waiver of the Tribe's sovereign immunity. After briefing the issue, including submissions by both MM&A and the Tribe of key laws, documents and declarations, and after a hearing on the motion, the Superior Court granted the Tribe's motion.

¶9 On appeal, MM&A argues that the Superior Court erred in ruling that, pursuant to the terms of the alleged immunity waiver, MM&A must have first filed an action against the tribe in federal court and seek a threshold determination of whether the federal court has jurisdiction to hear MM&A's claims before it can file an action in Arizona State courts. MM&A goes to great length to argue that the federal court lacks diversity jurisdiction to hear the case. The Tribe does not disagree. There is a strong argument, however that federal subject matter jurisdiction exists because the claim against the Tribe and its gaming facility, impacting how the Tribe may conduct its gaming business falls within the federal preemption of the Indian Gaming Regulatory Act.

¶10 On appeal, MM&A argues that the Superior Court erred in refusing to apply the doctrine of apparent authority and to excuse MM&A from complying with Tribe's laws regarding effective waivers of sovereign immunity because its owner was under the mistaken belief that the deceased marketing director had authority to bind the tribe to an effective waiver. The Superior Court correctly ruled that such

an argument sounding in equitable estoppel is not available to defeat claims of sovereign immunity, and even if it were available, it is not available here where MM&A utterly failed to avail itself of the Tribe's laws to secure a valid waiver.

¶11 On appeal, MM&A argues that even if the Superior Court is correct on the law, the case should be remanded to allow MM&A to conduct discovery on the jurisdictional issues. Even though the Superior Court had before it the Tribe's laws and supporting affidavits that MM&A did not avail itself of those laws, and even though the Superior Court had before it, an affidavit submitted by MM&A's owner regarding his position and understanding regarding the Tribe's laws and actions of tribal officials, MM&A argues that the Superior Court abused its discretion by ruling on the Motion to Dismiss before MM&A could engage in further discovery. The Superior Court did not abuse its discretion.

¶12 This Appeal Court need only determine that the Superior Court ruled correctly on any one of the first three rulings to uphold the decision below. The Superior Court correctly ruled on all three issues. The decision of the Superior Court should be affirmed.

ARGUMENT

I. PLAINTIFF'S FAILURE TO FILE AN ACTION IN FEDERAL COURT PRIOR TO FILING THE ACTION BELOW IS FATAL TO PLAINTIFF'S CASE.

¶13 The Superior Court reasoned, even if the alleged waiver of tribal sovereign immunity was otherwise a valid waiver, Appellant failed to comply with its terms because MM&A failed to follow the specific priorities set forth in the alleged waiver and file an action in the United States District Court prior to filing the state-court action below. Ruling at ¶2 ROA 21. In MM&A's Opening Brief at ¶13, it concedes that the alleged waiver 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. Appellant argues that the United States District Court does not have diversity jurisdiction or federal question jurisdiction. The dispositive question is not whether the federal courts would have jurisdiction (although there is good argument that they do); the dispositive question is whether MM&A adhered to the express specificity required to invoke the alleged waiver. The Tribe agrees with MM&A that the issue is to be reviewed *de novo* on appeal.

¶14 First, MM&A's self-adjudication of the question of federal court jurisdiction is speculative at best, and does not excuse it of complying with the express terms of the alleged waiver. Here, Appellant has decided that it can replace the federal

courts' deliberation with Appellant's own and decide that federal jurisdiction is lacking. MM&A concedes that waivers of tribal sovereign immunity must have "express specificity," meaning that waivers cannot be implied and are to be narrowly construed and governed by their express terms. Opening Brief at ¶ 59. Tribal waivers of sovereign immunity are strictly construed:

> Because a waiver of immunity is altogether a voluntary act on the part of [a Tribe] it follows that [a Tribe] may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted.

Missouri River Services v. Omaha Tribe of Nebraska, 267 F.3d 848, 852 (8th Cir. 2001); See also, *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). If the alleged waiver is otherwise valid, it is specific as to when it may be used in a state-court action. MM&A concedes that it failed to comply with the express specificity.

¶15 Second, strong argument can be made that federal courts do have jurisdiction over Plaintiff's claims. MM&A again fails to alert this Court to the holding in *Gaming Court of America v. Dorsey & Whitney,* 88 F.3d 536 (8th Cir. 1996). The *Gaming Court of America* court, in a dispute between two non-Indian entities, held that IGRA preempted the universe of Indian–gaming related contracts with the "requisite extraordinary preemptive force necessary to satisfy the complete preemption exception to the well-pleaded complain rule." *Gaming Court*

of America, 88 F.3d at 547 (citing Senate Report No 446, 100th Cong, 2d Sess. 6 (1988), reprinted in 1988 USCCAN 3071, 3076: "[IGRA] is intended to expressly preempt the field in the governance of gambling activities on Indian lands"). See also *Great Western Casinos, Inc. v. Morongo Band,* 74 Cal.App.4th 1407, 88 Ca.Rptr.2d 828 (Cal. App. 1999)(state court action by entity with contract with Tribe dismissed because IGRA completely preempts the field, thereby divesting the state court of jurisdiction). As *Gaming Court of America* demonstrates, a federal court filing - while perhaps not convenient or preferable for MM&A - certainly is not futile. *Gaming Court of America,* at a minimum. establishes that filing in federal court is colorable. The circumstances supporting federal preemption are even stronger in this case. *Gaming Court of America* involved a lawsuit between two non-Indian parties, the result of which indirectly impacts the Tribe's gaming operation; here the Defendants are the Tribe and the Tribe's gaming operation, to be directly impacted by the result. Like *Gaming Court of America* facts are at issue here as to whether the contract in question constitutes an unapproved management contract pursuant to 25 U.S.C. § 2711. Contracts that provide for the management of *any* aspect of the gaming operation require the approval of the National Indian Gaming Commission, 25 C.F.R. § 502.15, and without such approval, the contract is void. *Wells Fargo Bank v. Lake of Torches Economic Development Corp*., 658 F.3d 684, 686 (7th Cir. 2011).

¶16 Even though *Gaming Court of America* was expressly brought to MM&A's attention in the briefing before the Superior Court below, and is expressly cited in the Superior Courts Ruling at ¶ 2, ROA 21, MM&A goes to great length in its Opening Brief to demonstrate that federal diversity jurisdiction is lacking and provides a single conclusory sentence that there is no statutory basis for federal question jurisdiction. That is clearly not correct. Perhaps MM&A has embraced a tactical decision to sandbag the argument with the intent of coming back with citations of lawsuits have been removed to federal court in reliance in part on *Gaming Court of America,* only to be remanded back to State Court. See e.g. *County of Madera v. Picayune Rancheria of Chuckchansi Indians,* 467 F.Supp.2d 993 (E.D. Cal. 2006). Those cases merely demonstrate that the analysis of whether a particular lawsuit falls within the preemptive reach of IGRA turns on an analysis of the specific circumstances at issue. The ultimate disposition of that question is not for MM&A to decide unilaterally. Rather, it must be made in the context of a lawsuit filed in federal court, wherein the federal court finds federal jurisdiction to be lacking. Only then could any action be filed in state court under the express specificity of the alleged waiver.

II. THE DOCTRINE OF APPARRANT AUTHORITY IS NOT AVAILABLE IN THE CONTEXT OF WAIVERS OF TRIBAL SOVEREIGN IMMUNITY

¶17 Neither Federal law, nor the laws of the Yavapai Apache Nation provide for arguments sounding in equity, including the doctrine of apparent authority, to stand against the defense of sovereign immunity. Every federal court that has addressed the issue, and those state courts that apply federal law in addressing the issue, have ruled that a waiver of sovereign immunity is not valid unless the waiving official had authority to do so. The Tribe agrees with MM&A that the issue is to be reviewed *de novo* on appeal, accept for the Superior Court's factual finding regarding MM&A's failure to avail itself of Yavapai Apache Nation's laws, which finding is subject to a clearly erroneous standard of review. See *Casa Grande v. Arizona Water Co.*, 199 Ariz.2d 527, 555, 20 P.3d 590, 598 (Ariz. App. 2001).

A. Federal Law Rejects the Application of Equitable Doctrines Such as Estoppel and Apparent Authority In Attempts to Defeat Sovereign Immunity From Suit.

¶18 Instructive is the federal case law regarding attempts to assert equitable principles of estoppel and apparent authority against the federal government. The United States Supreme Court enunciated this fundamental principle in *Federal Crop. Ins. Corp. v. Merrill*, 332 U.S. 380, 384, 68 S.Ct. 1 (1947):

> [w]hatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority .... And this is so

> even though ... the agent himself may have been unaware of the limitations of his authority.

See also, *Utah Power and Light Co. v. United States*, 243 U.S. 389, 37 S.Ct. 387 (1917)("it is enough to say that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit"); *United States v. Jones*, 176 F. 2d 278, 281-82 (9th Cir. 1949) ("no estoppel can arise the Government from the performance of unauthorized acts or from authority exercised in a manner forbidden."); *Bollow v. Federal Reserve Bank of San Francisco*, 650 F.2d 1093 (9th Cir. 1981); *Haglin v. City of Algona*, 42 Fed. Appx. 55 (9th Cir. 2002) ("estoppel doctrine has no effect on the invalidity of an *ultra vires* act").

B. Federal Law Rejects the Application of Equitable Doctrines Such as Estoppel and Apparent Authority In Attempts to Defeat Tribal Sovereign Immunity From Suit.

¶19 These bedrock principles are equally applicable to sovereign tribal governments. The above rule of law no doubt exists, in part, to protect the public treasury from the acts of wayward officials. No less concerns are at play when the government is an Indian tribe. Indeed, given the federal government's strong public policy of protecting the assets of tribes, the public policies at stake are arguably greater. Accordingly, those federal courts that have addressed the issue in the context of tribal sovereign immunity and those state courts that have applied

federal law, all reject the application of the doctrine of apparent authority.[1] As the U.S. Supreme Court has explained, an official representing a tribe cannot waive the tribe's immunity, but rather, *the tribe itself* must consent to such:

> [I]t is said that there was a waiver of immunity by a failure to object to the jurisdiction of the Missouri District Court over the cross-claim. It is a corollary to immunity from suit on the part of the United States and the Indian nations in tutelage that this immunity *cannot be waived by officials*. If the contrary were true, it would subject the Government to suit in any court in the discretion of its responsible officers.

United States v. USF&G, 309 U.S. 506, 513, 60 S.Ct. 653 (1940) (emphasis added). Holding that suit could not proceed against an Indian tribe due to an official's failure to object to jurisdiction, the Supreme Court explained that "[c]onsent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void." *Id*. at 514. See also,

[1] Yavapai Apache Nation is aware of six unpublished decisions issued in recent years that discuss the very specific questions at issue in this appeal, four of which were decided in federal court. The Tribe is precluded from citing those cases because of the prohibition in Ariz.R.Civ.App. 28(c). The Tribe requests that this Court invoke Ariz.R.Civ.App. 3 and allow both parties to submit supplemental briefs on relevant unpublished decisions, or at a minimum to provide a list of the relevant Westlaw™ or Lexis™ citations and provide copies to this Court. Allowing such leave to supplement would further justice by assisting this Court in the deliberation of this appeal and promote prudence and efficiency. Federal Courts have abandoned the parallel rule that previously precluded citation of unpublished decisions in federal court See e.g. Ninth Circuit Rule 36-3. The questions presented in this appeal are questions of federal law. In the event that the Court were to rule against the Tribe, the Tribe would undoubtedly invoke the exception in Ariz.R.Civ.App. 28(c)(2) and inform the Court of the unpublished decisions in the context of a Motion for Reconsideration.

Pan Am Co. v. Sycuan Band of Mission Indians, 884 F.2d 416, 419 (9th Cir. 1989) ("Indian sovereignty, like that of other sovereigns, is not a discretionary principle subject to the vagaries of the commercial bargaining process or the equities of a given situation"); *Hydrothermal Energy Corp. v Fort Bidwell,* 170 Cal.App3d 489, 496 (Cal. App. 1985) ("a tribal official cannot waive immunity unless that official has been expressly authorized to do so by the tribe"); *Ranson v. St. Regis Mohawk Education and Community Fund, Inc.,* 86 N.Y.2d 553, 658 N.E.2d 989 (N.Y. App 1995) (waivers of tribal sovereign immunity 'must be traceable to an official government action that expressly and unequivocally waives immunity or empowers particular officers to waive immunity"); *Calvello v. Yankton Sioux Tribe,* 584 N.W.2d 108, 113 (S.D. 1998) ("waiver must be clear and unequivocal and must issue from a tribe's governing body, not from unapproved acts of tribal officials).

¶20 In *Memphis Biofuels v. Chickasaw Nation Industries,* 585 F.3d 917 (6th Cir. 2009), an energy company entered into a business agreement with a wholly-owned tribal corporation. The Tribal corporation repudiated the agreement and the energy company sought arbitration. The energy company produced a signed, written agreement with an arguably express waiver of sovereign immunity. Acknowledging that the waiver of immunity was not approved by the Board in compliance with its own by-laws, the energy company advocated for the court to

apply equitable doctrines (apparent authority) to declare the waiver to be valid. In rejecting the invitation, the Sixth Circuit reasoned:

> MBF also argues that even without board approval, CNI waived sovereign immunity based on equitable doctrines because CNI signed the agreement representing that it waived sovereign immunity. We disagree. Courts have held that unauthorized acts of tribal officials are insufficient to waive tribal-sovereign immunity

Id. at 922. MM&A acknowledges the Sixth Circuit opinion, Opening brief at ¶ 73 but dismisses it as embracing the "flawed" analysis of *World Touch,* discussed in subsection C, *infra.*

¶21 In *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288 (10th Cir. 2008), a tobacco product distribution company entered in an agreement with a tribally-chartered business that manufactures tobacco products. The distribution company produced a signed written agreement, but it does not include an express immunity waiver. According to the facts pled in the Complaint, officials of the tribal enterprise told the Distributer that a waiver was not needed because the Corporate Charter contained a "sue and be sued clause."[2] After the relationship soured, the Distribution company filed a lawsuit in federal court. The facts are sympathetic: the alleged misrepresentation by tribal officials was two-fold. First, that the manufacturing company was part of the Tribal chartered

[2] Not at issue in the instant litigation, but the federal Circuits are split on whether a "sue and be sued clause" in a Tribally chartered corporation constitutes a valid waiver. See *Memphis Biofuels*, 585 F.3d at 921-922.

corporation, when it was in fact a separate tribal enterprise. Second, that a separate waiver of immunity was not required. *Id.* at 1293. Despite the inequities, the Tenth Circuit ruled:

> The plaintiffs also argue that even if SCTC is a division of the Tribe, it should be equitably estopped from asserting its immunity because its managers held it out to be a division of the Tribal Corporation in their dealings with NAD and Dilliner. . . . We also conclude that the district court correctly determined that SCTC was not equitably estopped from asserting its immunity due to the misrepresentations of its managers.

Id. at 1293, 1296. MM&A acknowledges the Tenth Circuit opinion, Opening Brief at ¶ 73 but dismisses it as embracing the "flawed" analysis of *World Touch,* discussed in subsection C, *infra,* even though the Tenth Circuit does not even cite *World Touch*, much less discuss its application.

¶22 In *World Touch Gaming v. Massena Management (Akwesasne Mohawk),* 117 F.Supp.2d 271 (N.D.N.Y. 2000), a company in the business of leasing gaming machines sued the Tribe for breach of contract. World Touch produced a written contract with an arguably express waiver of sovereign immunity, signed by the Senior Vice President of the management company, which itself had an approved contract to manage the day-to-day casino operations. The Tribal law at issue in *World Touch* limited authority to waive to only the Tribal Council:

> [A]ccording to the unequivocal language of the Tribe's Constitution and Civil Judicial Code, only the Tribal Council can waive the Tribe's sovereign immunity, and such waiver must be express. The Tribal Council did not authorize [the senior vice president] to waive

> sovereign immunity, nor did the Tribal Council expressly waive the Tribe's sovereign immunity. Thus, the Tribe's sovereign immunity was not waived, and it is immune from suit.

Id. at 275. MM&A's contentions regarding the alleged flaw in the *World Touch* Court's analysis is addressed in subsection C, *infra.*

C. Those State Courts Applying Federal Law Reject the Application of Equitable Doctrines Such as Estoppel and Apparent Authority In Attempts to Defeat Tribal Sovereign Immunity From Suit.

¶23 In *Chance v. Coquille Indian Tribe,* 327 OR. 318, 963 P.2d 638 (1998), the manager of an assisted care facility owned by the Tribe filed suit for wrongful discharge and related claims. He produced a signed, written contract with an arguably express waiver of sovereign immunity, and an affidavit of the head of the Tribe's economic development corporation asserting that he had authority to waive the Tribe's immunity. Nevertheless, the court declared:

> Defendants respond that, however comfortably plaintiff's contentions fit into agency notions under *state* law, they are contrary to the laws of the Coquille Indian Tribe. Under those tribal laws, defendants contend, Anderson had no authority to bind the Tribe on his own, but could do so only with the approval of the CEDCO Board of Directors. Defendants conclude that, because there is no allegation in the complaint or evidence in the record that Anderson did obtain Board approval before entering into the contract at issue, the only possible conclusion is that Anderson's signature did not bind either defendant to the contract or to the "waiver" that was contained therein. We agree.

963 P.2d at 325.

¶24 Similarly, in *Danka Funding Co. v. Sky City Casino(Pueblo of ACOMA)* ,

329 N.J. Super. 357, 747 A.2d 837 (N.J. Super. 1999) the Pueblo terminated a lease of copy machines and the lessor filed suit. Danka produced a written lease agreement with an arguably express waiver of sovereign immunity, signed by the Comptroller of the Tribe's Business Board. The Pueblo's law provides that only the Tribal Council may waive immunity and expressly provides that the Business Board does not have authority to waive immunity, accordingly the New Jersey Superior Court dismissed for lack of an effective waiver.

¶25 MM&A asserts that the issue in both *Chance* and *Danka* is "whether the terms of contract clauses themselves were sufficiently clear to constitute waiver." Opening Brief at ¶72. In *Chance*, the Court found no effective waiver despite the fact that its express terms were very clear. 963 P.2d at 325. In *Danka*, the Court reasoned that it need not reach the question of whether the alleged waiver was sufficiently clear because regardless of its clarity, the Comptroller did not have authority to waive the Pueblo's immunity. 747 A.2d at 844. MM&A's representation of the two cases is simply not correct under any reasonable reading of the two cases.

¶26 In *Dilliner v. Seneca-Cayuga Tribe*, 2011 OK 61, 258 P.3d 516 (Okla. 2011) terminated tribal employees filed suit for breach of contract. The employees produced signed written employment contracts with an arguably express waiver of immunity. The Tribe's laws, however, require the Tribal Council's express consent

to waive immunity. The Tribal Council approved a resolution authorizing the Chief to execute the employment contracts, but did not authorize the waiver of immunity. In affirming the trial court's dismissal, the Oklahoma Supreme Court reasoned:

> Courts have rejected equitable estoppel as a basis for waiver of tribal sovereign immunity on the grounds that unauthorized actions of officers and employees do not waive immunity or confer jurisdiction on a court in the absence of an express waiver

Id. 258 P.3d at 520. MM&A acknowledges the Oklahoma Supreme Court opinion, Opening brief at ¶ 73, but dismisses it as embracing the "flawed" analysis of *World Touch,* discussed in subsection C, *infra.*

¶27 MM&A, at ¶ 64 of its Opening Brief cites a case involving Appellee Tribe wherein the Tribe is admonished by a California Appeals Court for advocating that the "many cases dealing with the implied authority of executive corporate officials" can be applied to find waivers of sovereign immunity. *Yavapai Apache Nation v. Iipay Nation of Santa Ysabel*, 135 Cal.Rptr.3d 42, 57, 201 Cal.App.4th 190, 211 (Cal.App. 2011). The Yavapai Apache Nation filed suit in California state court where the Santa Ysabel Tribe is located to seek an award of damages for Santa Ysabel's breach of a finance agreement. Santa Ysabel argued that although tribal law was properly followed in executing a sovereign immunity waiver in the initial agreement, it was not followed in the execution of the last amendment. Yavapai Apache Nation's California lawyers handling the case argued inter alia, as MM&A does here, that a waiver should be found based on the Chairman's

apparent authority to execute the last amendment. *Id*. at 44, 194. The California Appeals Court rejected the argument: "However, the current dispute must be analyzed under Indian tribal contracting requirements, and the chairman is a representative of the tribe, not of an ordinary corporation" *Id.* Significant to the instant case, the Court looked to Santa Ysabel Tribal law and found that the Tribe previously provided an effective waiver and that waiver extended to later contract amendments. *Id*. at 62, 217. MM&A cites *Santa Ysabel* to make some point that the Tribe's California counsel (wrongly) advocated for the applicability of the doctrine of apparent authority. The *Santa Ysabel* Court noted the error in the Tribe's analysis. As it applies to the instant appeal, the reasoning and holding of *Santa Ysabel*, however, support the Tribe and do not support MM&A.

D. *Rush Creek* and *Storevisions* are Anomalies, Wrongly Decided and Critically Distinguishable on Applicable Tribal Law.

¶28 MM&A goes to great length in its Opening Brief at ¶¶ 60 - 65 to make clear that the question of whether equitable estoppel or the doctrine of apparent authority can form the basis for finding a waiver of tribal sovereign immunity is a question of federal law. Then MM&A devotes substantial text in its Opening Brief at ¶ 67 citing seven federal cases to set forth the many circumstances in which federal courts have applied the doctrine of apparent authority. The Tribe agrees with MM&A that the question is one of federal law. The Tribe notes that **NONE** of the seven federal cases cited by MM&A apply the doctrine of apparent authority to

sovereign immunity. All seven are in the context of the implied authority of executive corporate officials.

¶29 After establishing that the question of applying the doctrine of apparent authority as a basis for waiving tribal sovereign immunity is a question of federal law, MM&A inexplicably urges this Appeal Court to follow two decisions from the courts of other states that applied Colorado and Nebraska law in finding a valid waiver of tribal sovereign immunity: *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402 (Colo. App. 2004) and *StoreVisions, Inc. v. Omaha Tribe of Neb*., 281 Neb. 238, 795 N.W.2d 271 (2011), cert. den. 132 S. Ct. 1016 (2012).

¶30 In *Rush Creek*, a contract for providing computer services and maintenance was executed by the Tribe's CFO. The written contract included language that arguably constitutes and express waiver of sovereign immunity. The Tribe conceded that the CFO had authority to execute the contract, but asserted that the CFO did not have authority to waive the Tribe's sovereign immunity. 107 P.2d at 404. The *Rush Creek* Court applied the Colorado Governmental Immunity Act, C.R.S. §§ 24-10-102 et. seq. and interpretive Colorado State law to find that apparent authority of the CFO was sufficient to find a valid waiver. 107 P.3d at 407.

¶31 In *StoreVisions,*, a general contractor entered into an agreement for work on expansion to the Omaha Tribe's casino operation. In the presence of five of seven

Tribal Council members, the Tribe's Chairman executed a separate document waiving the Tribe's immunity. The Omaha Tribe does not dispute that the Chairman had authority to execute agreements with StoreVisions for labor and materials, but maintained that the Chairman did not have authority to execute the sovereign immunity waiver. 795 N.W.2d at 279. Citing *Rush Creek* and applying Nebraska case law on the doctrine of apparent authority, the *StoreVisions* Court found an effective waiver. *Id.*

¶32 The two cases constitute anomalies against the tide of contrary holdings set forth in subsections A and B, *supra*. Indeed, the Sixth Circuit in *Memphis Biofuels* noted the *Rush Creek* decision as an exception to a long line of cases that went the other way, and declined to follow it. 585 F.3d at 922. See also, footnote 1, *supra*. The two cases are wrong in reasoning that the doctrine of apparent authority, sounding in equitable estoppel can form the basis of a waiver of sovereign immunity. As MM&A so stringently demonstrates, the question is one of federal law; if the courts in *Rush Creek* and *StoreVisions* had applied MM&A's paradigm, they never would have looked to Colorado and Nebraska law regarding apparent authority. See 107 P.3d at 407 (adopting and applying Colorado Governmental Immunity Act, C.R.S. §§ 24-10-102 et. seq.); 795 N.W.2d at 279 (citing to only Nebraska case law regarding the doctrine of apparent authority).

¶33 The two cases are also critically distinguishable on applicable tribal law. In both *Rush Creek* and *StoreVisions*, there was no dispute that the Tribal official had authority to execute the underlying contractual agreements. 107 P.3d at 404, 795 N.W.2d at 279. Here, the Marketing Director did not have authority to execute the contract and did not have the authority to execute the immunity waiver. Exhibits A – D to ROA 9 and Exhibits B-E to ROA 14. In both *Rush Creek* and *StoreVisions* tribal law was silent on the authority to waive sovereign immunity. 107 P.3d at 407; 795 N.W.2d at 278-279. Here, Yavapai Apache Nations' laws are very clear as to who has such authority and the procedures and approvals that must be adhered to for a waiver of tribal sovereign immunity to be valid. Exhibits A – D to ROA 9 and Exhibits B-E to ROA 14. In *Rush Creek*, the waiver and the Tribe's laws provided for Colorado law to apply where federal or tribal law is otherwise silent. 107 P.3d at 404. It cannot be ascertained what choice of law provisions were present in Tribal law and the waiver at issue in *StoreVisions*. Here, there is nothing in Yavapai Apache Nation law that provides any avenue for applying state law. Exhibit A to ROA 14, Yavapai Apache Nation Judicial Code at § 108(c) only allows for the Tribe to look to laws of other tribes and the United States to fill gaps in Tribal law.

¶34 By finding authority to waive immunity based on silence in the laws of the Ute Mountain Tribe and the Omaha Tribe, the *Rush Creek* and *StoreVisions*

opinions were wrongly decided. If allowed to stand, however, they still should not be extended to apply here where the applicable law of the Yavapai Apache Nation is far from silent, where there is not room for state laws to fill gaps in the Tribe's laws and where there is no basis to conflate the authority to execute an agreement with the authority to waive the Tribe's immunity as to that agreement.

¶35 These factual distinctions, limiting any reach of the Colorado and Nebraska state court decisions, also reveal the error in the *Rush Creek* Court's criticism of *World Touch*. The Colorado Appeal Court reasoned that federal law requiring an express waiver of immunity does not necessarily require the authorization of tribal officials to also be express. 107 P.3d at 407. MM&A then uses the same reasoning as its sole basis for this Court to reject the several federal and state court decisions set forth in subsection B, *supra*, that reject the invitation to apply equitable estoppel principles to tribal sovereign immunity. See Opening Brief at ¶ 73. However, the tribal law at issue in *World Touch*, stands in sharp contrast to the silent tribal law at issue in R*ush Creek* and *StoreVisions:*

> [A]ccording to the unequivocal language of the Tribe's Constitution and Civil Judicial Code, only the Tribal Council can waive the Tribe's sovereign immunity, and such waiver must be express.

117 F.Supp.2d at 275. The *World Touch* court noted that the Tribe's laws provided that the only Tribal Council can waive, so a delegation of authority to the casino manager, express or not, was not possible. 117 F.Supp.2d at 275. MM&A and the

Rush Creek Court conflate the applicability of the doctrine of apparent authority with the need for the waiver to comply with express tribal law, if any. Placed in the context of bedrock case law regarding sovereign immunity, that anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority, see *Merrill,* 332 U.S. at 384, the doctrine of apparent authority has no place where the government's laws are clear regarding the bounds of an agent's authority.

¶36 MM&A argues at ¶¶ 74 and 75 of its Opening Brief that the doctrine of sovereign immunity should not be perpetuated because its application can result in harsh cases. MM&A cites Justice Stevens' separate opinion in *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 757-758, 118 S. Ct. 1700 (1998), but Justice Stevens voted to affirm and perpetuate the doctrine of tribal sovereign immunity in that case despite the harsh consequences. *Id.* Rather than increasing the potential for unfairness, affirming the Superior Court's ruling in the instant litigation will promote responsibility and diligence amongst the increasingly sophisticated business community doing business in Indian Country. Despite all of MM&A's experience and expertise in engaging in commercial activity with tribal enterprises in Indian country, See ROA 2, Complaint at ¶ 18, 19, 20, MM&A is

unable to produce a Tribal Council or Board of Director resolution approving the Waiver. Courts are quick to admonish such savvy plaintiffs:

> "Danka Business Services knew it was dealing with an Indian tribe and is charged with knowledge that the Tribe possessed sovereign immunity. The Tribe, through its laws, describes how one may obtain a legally enforceable waiver of that immunity. Neither Danka Business Services nor Danka Funding took advantage of those provisions."

Danka Funding 747 A.2d at 842.

> "Moreover, as a sophisticated distributor of gaming equipment that frequently deals with Indian gaming enterprises, World Touch should have been careful to assure that either the Management Company had the express authority of the Tribe to waive sovereign immunity, or that the Tribe itself expressly waived sovereign immunity with respect to the Sales and Lease Agreements. World Touch is not a novice in matters relating to Indian gaming enterprises and Indian sovereign immunity, and cannot now rely upon naiveté to expand the reading of the Management Agreement to encompass authority to waive sovereign immunity."

World Touch, 117 F.Supp.2d 275-276. At the end of the all the argument and analysis and anomalous case law, MM&A cannot avoid the bedrock principle in federal jurisprudence on sovereign immunity, that MM&A bears the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority.

III. THE CASE SHOULD NOT BE/ NEED NOT BE REMANDED FOR LIMITED DISCOVERY REGARDING THE COURTS JURISDICTION.

¶37 MM&A correctly notes that Superior Court determinations regarding discovery are to be reviewed for abuse of discretion. *Reid v. Reid,* 222 Ariz. 204,

206 ¶ 8, 213 P.3d 353, 355 (App. 2009). MM&A fails to demonstrate such abuse in the instant case. The Superior Court's decision below was not made in a vacuum. Rather, it was presented with the law of the Yavapai Apache Nation and supporting affidavits that the requisite resolutions and approvals required by the Tribe's law do not exist in any records or minutes of the Tribe, which are prepared in due course by the Tribe's and the Casino Board's record-keeping practices. Exhibits A – D to ROA 9 and Exhibits B-E to ROA 14.

¶38 In response, MM&A produced an affidavit from its owner as to the extent (or lack thereof) of its diligence in securing approval in accordance with the Tribe's laws. Exhibit A to ROA 12. The Superior Court ruled that MM&A did not meet its burden of establishing that a valid waiver exists. Ruling at ¶ 3. ROA 21. See also, *Ringling Bros. & Barnum & Baily Combined Shows, Inc. v. Superior Court of Pima County,* 140 Ariz. 38, 42, 680 P.2d 174 (1984); *Swichtenberg v. Brimer,* 171 Ariz. 77, 82, 828 P.2d 1218 (1991); *Moulton v. Napolitano,* 205 Ariz. 506, 511, 37 P.3d 637 (2004).

¶39 Despite the burden on MM&A to establish that a valid waiver exists, the Tribe presented clear evidence that such a valid waiver does not exists. Specifically, the Tribe provided the Cliff Castle Casino Board of Directors Act, which authorizes the Board of Directors to enter into Cliff Castle Casino-specific contracts under limited circumstances and, within the context of those contracts,

the Council authorized the Board to execute limited waivers of the Nation's sovereign immunity. Section XIV of the Act states:

> 1. The Board shall have the power to negotiate and approve contracts for the expenditures of funds within approved budgets of the Board, Cliff Castle Casino and Cliff Castle Lodge and Conference Center, subject to review by the Office of Attorney General.
> 2. The Chairperson of the Board is hereby delegated the authority to execute contracts approved by majority vote of the Board subject to the requirements and restrictions in this section.
>
> 3. No contracts obligating the expenditure of funds outside the approved budgets of the Board, Cliff Castile Casino or Cliff Castle Lodge and Conference Center shall be approved without prior written consent of Council.
>
> 4. All contracts shall to the greatest extent possible be drafted to include language preserving the sovereign immunity of the Nation.

Exhibit B to ROA 9. Yavapai-Apache Nation Cliff Castle Casino Board of Directors Act. Importantly, no other section of the Act confers authority upon the Board to enter into contracts or to waive the Nation's sovereign immunity. Any valid sovereign immunity waiver in favor of MM&A must have been pursuant to a contract that was either (1) within approved budgets, reviewed by the Office of the Attorney General, approved by a majority vote of the Board and signed by the Chair, or (2) outside approved budgets, consented to by the Tribal Council, and approved by a majority vote of the Board and signed by the Chair.

¶40 The Tribe submitted affidavits establishing that the Board is required to keep minutes of all meetings under Nation law, that the Board keeps true, accurate, and complete minutes of all meetings, specifically including documentation of all motions raised and considered by the Board. Exhibits C and D to ROA 9 and Exhibits B, C and D to ROA 14 An exhaustive review of those minutes demonstrates that the Board did not approve the "contract" and "waiver" at issue. *Id.*

¶41 Section XIV of the Act also requires contracts that are within approved budgets to be reviewed by the Attorney General. Ms. Carole Penfield, the Acting Attorney General for the Nation during the time period relevant to this litigation, has submitted an affidavit in which she describes the process that ensured *all* contracts reviewed by the Board were required to bear her signature on a "green" cover sheet. Ms. Penfield attests that at no point during her tenure as Acting Attorney General did she review, much less approve, the contract or the waiver. Exhibit E to ROA 14.

¶42 With this backdrop, MM&A provides three rationales for additional discovery, none of which is compelling or establish abuse of discretion by the Superior Court. First, MM&A notes at ¶¶ 80 – 82 that the cases rejecting the invitation to adopt the doctrine of apparent authority all had before them the relevant laws of the Tribe at issue. The Superior Court below had the relevant laws

of the Yavapai Apache Nation before it. Second, MM&A asserts at ¶¶ 83 and 84 that it demonstrated that facts regarding compliance with those tribal laws are in dispute and that authority to sign a contract "surely encompass authority to waive immunity." MM&A provides no evidence whatsoever that it complied with tribal law, much less establish that material facts were in dispute. MM&A's suggestion that authority to sign a contract encompasses authority to waive immunity ignores the avalanche of case law discussed Sections II(A) and II(B) *supra,* and concedes the error of conflating of the two concepts as addressed in Section II(C), *supra*. Third, MM&A argues at ¶ 84 that "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." The statement is incredulous. Given that MM&A produces a contract allegedly signed by a dead man that includes terms and conditions that are radically different from prior agreements and onerous to the Tribe, it "defies belief" that such a contract would be approved by any official acting within the scope of his/her authority.

¶43 This Court should decline MM&A's invitation to commit error by subjecting an otherwise immune sovereign to the extensive discovery burdens MM&A seeks this Court to impose, particularly when the existing record demonstrates an absolute failure on MM&A's part to refute the attestations of the Nation's

custodians that no approval exists for the contract or the waiver. See, *Univ. of Texas v. Vratil,* 96 F.3d 1337, 1340 (10th Cir.1996) (as we have said in the context of state sovereign immunity, immunity entitles a [sovereign] not only to protection from liability, but also from suit, including the burden of discovery); *Crawford-El v. Britton,* 523 U.S. 574, 598, 118 S.Ct.1584 (1998) (immunity from suit also protects party from burdensome discovery).

¶44 In the unlikely event that this Appeal Court decides to remand the case for additional discovery, it would then be appropriate that it remand the case with instructions that it be stayed while MM&A pursues a declaration from the Yavapai Apache Nation's Tribal Court that a valid waiver of immunity exists. Federal case law requires that a determination of whether a Tribe has waived its immunity from suit must first be resolved in tribal court. *Marceau v. Blackfeet Housing Authority,* 540 F.3d 916 (9th Cir. 2008) At issue in *Marceau* was the need for a judicial interpretation of whether the "sue and be sued" clause in the enabling act constituted a clear and express waiver of the Tribe's sovereign immunity. The 9th Circuit determined that it is for the Tribe's courts to issue that judicial interpretation in the first instance. *Marceau* , 540 F.3d at 921.

¶45 The Superior Court had before it sufficient factual evidence submitted by both parties to make threshold determinations regarding jurisdiction. The Superior

Court did not abuse its discretion by ruling on the Tribe's Motion to Dismiss without allowing for further discovery.

CONCLUSION

¶46 The Superior Court correctly ruled that MM&A's failure to file an action in federal court and seek a threshold determination as to the federal court's jurisdiction was fatal to MM&A's claims. The Superior Court correctly ruled that the equitable doctrine of apparent authority is not available to validate an otherwise invalid waiver of tribal sovereign immunity. The Superior Court correctly ruled that even if apparent authority was available, it does not apply here where MM&A failed to comply with tribal law. This Appeal Court need only find the Superior Court to be correct on any of these three rulings to affirm. Finally, the Superior Court did not abuse its discretion in ruling on the laws, documents and declarations submitted, rather than allow for additional discovery. This Appeal Court should affirm the Superior Court's granting of Tribe's Motion to dismiss for lack of jurisdiction.

Respectfully submitted this 3rd day of September 2013.

/s/ Scott David Crowell
Scott David Crowell
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/s/ William Foreman
William Foreman
William Foreman P.C.

Attorneys for Defendants-Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 14(b), I certify that the attached Appellant's Response Brief uses proportionately spaced type of 14 points or more, is double spaced using Times New Roman font, and contains 8,561 words.

Dated this 3rd day of September, 2013

/s/ *Scott David Crowell*
Scott David Crowell

CERTIFICATE OF SERVICE

I certify that on September 3, 2013 I caused Appellee's Response Brief to be electronically filed with the Court of Appeals, State of Arizona, Division Two, State Office Building, 400 West Congress Tucson, Arizona, 85701, and caused a copy of the foregoing to be delivered via electronic mail to:

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Dated this 3rd day of September, 2013

/s/ *Scott David Crowell*
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