77007-1



NO. 77007-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

WENDELL LONG, an individual,

Appellant,

v.

SNOQUALMIE GAMING COMMISSION, a political subdivision of the Snoqualmie Indian Tribe,

Respondent.

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# APPELLANT'S REPLY BRIEF

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## I. INTRODUCTION

This appeal centers on the unambiguous language of a Settlement Agreement entered into by Wendell Long ("Mr. Long" or Appellant") and the Snoqualmie Indian Tribe ("Tribe"). Mr. Long desires to effectuate the express language of the Settlement Agreement. The Snoqualmie Gaming Commission ("SGC" or "Respondent") seeks to avoid it.

In January 2016, as part of a mediation where both parties were represented by counsel, Mr. Long and the Tribe gave each other "a full and complete general release" of "any and all claims, actions, causes of action demands, rights, damages, costs, and expenses whatsoever…including…all claims…relating to the subject matter of, or arising out of, the Litigation." CP 553-54. This was a sweeping and unequivocal release. Moreover, this release of claims was not offered merely by the "Tribe." Instead, the release was offered by the "Tribe" and "entities or agencies" claiming by, through, or under the Tribe. *Id.* Additionally, the Tribe "expressly and unequivocally waive[d] any and all claim(s) of sovereign immunity" for purposes of resolving any dispute arising under the Settlement Agreement. CP 554. With this global settlement in hand, Mr. Long looked forward to dismissal of the King County Superior Court action instituted by the Tribe, as well as dismissal

of the parallel licensing action initiated by the SGC. In short, Mr. Long looked forward to moving on with his life.

Now, the SGC seeks to renege. This is despite the fact that the Settlement Agreement is express, unambiguous, and binding. It is undisputed that the SGC is part of the Tribe. It is also undisputed that the SGC licensing action is "relating to the subject matter of, or arising out of, the Litigation." CP 553. In fact, the SGC's licensing action against Mr. Long addresses precisely *the same* allegations as those addressed in the Tribe's former action in King County Superior Court. Perhaps the SGC does not like the deal that the Tribe negotiated. Perhaps it disagrees with the Tribe and the Snoqualmie Tribal Council ("Council") regarding proper disposition of the licensing matter. Whatever the SGC's motivation, the fact remains that the Council - on behalf of the entire Tribe - bargained away the licensing action.

This is not the first (nor likely the last) time that the Council has bound the SGC. As demonstrated in prior briefing, the Council controls the SGC to the extent that the Council actually appointed itself as the SGC in the recent past. Moreover, as demonstrated by the declaration of Bo Yath, a former SGC employee, the SGC's purported independence from the Council is a myth – in fact, the SGC is a rubber stamp. Further discovery on the nature of the Council/SGC relationship, and the history

of the Council binding the SGC, was prevented at the trial court by SGC motion. If permitted to take place, that discovery is expected to further illustrate the lack of SGC independence, and demonstrate that the Council can and does bind the SGC in a variety of fashions, thereby demonstrating both the SGC's and Tribe's interpretation of the relationship under applicable law.

Having prevented discovery in the trial court, the SGC now attempts to evade the clear language of the Settlement Agreement by offering two theories. The first is a CR 12(b)(1) sovereign immunity argument that the waiver of sovereign immunity contained in the Settlement Agreement is not sufficiently "express" as to the SGC. The SGC's theory is that a waiver of sovereign immunity by a tribe must articulate each and every sub-agency or sub-entity of the tribe to be effective against that sub-agency or sub-entity. That theory is unsupported by any published authority, anywhere.[1] If the trial court relied on this reasoning, it was in error.

The second theory is a CR 12(b)(6) argument that Mr. Long's Complaint fails to state a claim because the Settlement Agreement was entered into after the date of the SGC's second effort to revoke Mr. Long's gaming license. This argument, however, ignores the plain language of

[1] The lone *unpublished* case offered by the SGC for its proposition is addressed further below. *See infra* at 16-18.

the Settlement Agreement, ignores that the SGC licensing action remains live pending appeal under the SGC's own rules, and belies the usual broad interpretation afforded Settlement Agreements. If the trial court relied on this reasoning, it was similarly in error.

Finally, the need for reversal of the trial court is rendered even more pronounced as the trial court dismissed the case before Mr. Long was accorded the basic right to engage in discovery necessary to establish his claim. For all these reasons, the trial court should be reversed.

## II. RESPONSE TO SGC'S STATEMENT OF THE CASE

In violation of RAP 10.3(a)(5), the SGC's Statement of the Case references a November 13, 2017 unreported decision by the Tribal Court. *See* Respondent's Brief, at 7. In doing so, the SGC notably omits the fact that the Tribal Court ruled that it "would have ruled differently than the SGC," but was compelled by the deferential nature of agency review to affirm the latest decision. *See* Tribal Court Decision and Order, at 23. The November 13, 2017 ruling is currently pending a Motion for Reconsideration, with responsive briefing requested by the Tribal Court.

## III. ARGUMENT

### A. The Settlement Agreement Is Unambiguous.

As an initial matter, the Settlement Agreement's release of claims and waiver of sovereign immunity is wholly unambiguous and should be

enforced. "The court must enforce the contract as written if the language is clear and unambiguous." *Wash. Public Util. Dist's Utils. Sys. v. Pub. Util. Dist. No. 1 of Clallam County*, 112 Wn.2d 1, 10 (1989). A clause is ambiguous only "when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable." *Quadrant Corp. v. American States Ins. Co.*, 154 Wn.2d 165, 171 (2005) (quoting *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654 (2000)). If the language is ambiguous, "the court must attempt to discern and enforce the contract as the parties intended." *Wash. Pub. Util Dist. v. No. 1 of Clallam Cnty*, 112 Wn.2d at 11.

Here, the Tribe offered "a full and complete general release" of "any and all claims, actions, causes of action demands, rights, damages, costs, and expenses whatsoever…including…all claims…relating to the subject matter of, or arising out of, the Litigation." CP 553-54. This release was offered by the "Tribe" and "entities or agencies" claiming by, through, or under the Tribe. *Id*. Moreover, the Tribe "expressly and unequivocally waive[d] any and all claim(s) of sovereign immunity" for purposes of resolving any Settlement Agreement dispute. CP 554.

It is undisputed that the SGC is part of the "Tribe." Indeed, it is only by virtue of being part of the Tribe that the SGC may claim sovereign immunity at all. The SGC's contention that its status as an "independent

agency" of the Tribe is sufficient to avoid the clear language of the Settlement Agreement's waiver of sovereign immunity is addressed further below. *See infra* at 15-21.

In the meantime, the SGC does not identify any terms in the Settlement Agreement that it contends are ambiguous. Instead, the SGC relies entirely on a convoluted sovereign immunity defense, arguing that the Tribe's waiver of sovereign immunity does not really mean what it says. For this proposition, the SGC relies heavily on an unpublished decision from a trial court addressing a completely different waiver of sovereign immunity. Washington courts, however, will give effect to a tribe's or separately-incorporated tribal entity's unambiguous waiver of sovereign immunity. *See e.g. Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.* 172 Wn. App. 799, 814 (2013) ("There is nothing ambiguous about NBC's express limited waiver of sovereign immunity for purposes of this loan transaction under the above terms of the loan agreement.")[2] This comports with the holding that "no magic words are necessary to relinquish tribal sovereign immunity, [but] the intent to do so must be clear." *Auto United Trades Org. v. State*, 175 Wn.2d 214, 226 (2012) (citing *Okla. Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991)).

[2] Notably, the entity at issue in *Outsource Servs. Mgmt* ("NBC") was a tribal corporation separate from the Nooksack Tribe, not a tribal agency, as here. *Id.*, at 804.

It is unnecessary to delve beyond the plain language of the Settlement Agreement in order to resolve this case. The waiver of sovereign immunity is clear: the Tribe "expressly and unequivocally waives any and all claim(s) of sovereign immunity" for purposes of resolving any dispute arising under the Settlement Agreement. The SGC does not contest that it is part of the Tribe, does not control its own sovereign immunity, and does not claim the Settlement Agreement's terms are ambiguous. As such, the waiver of sovereign immunity should be given effect.

## B. If the Trial Court Acted Pursuant to CR 12(b)(1), It Committed Reversible Error.

As noted in prior briefing, the trial court's reasoning in granting the SGC's underlying motion to dismiss is largely unclear. Nevertheless, the bulk of the briefing addressed the CR 12(b)(1) argument that, despite the clear language of the Settlement Agreement, the express waiver of the Tribe's sovereign immunity somehow did not extend to the SGC.

### 1. The Settlement Agreement Is Interpreted According to Washington Law.

As noted above, the SGC offers no response to the argument that the Settlement Agreement is unambiguous. Further demonstrating the unambiguous nature of the Settlement Agreement, the Settlement Agreement contains a clear choice of law provision calling for application

of Washington law. CP 554. Although not alleging ambiguity, the SGC offers two primary arguments in response to this choice of law provision: 1) The Court should simply ignore the choice of law provision as the law of the Tribe purportedly controls; and 2) Washington rules of contractual interpretation do not apply because principles of sovereign immunity preclude them. Both of these arguments are addressed in turn.

a. The Washington Choice of Law Provision Applies.

The SGC requests the Court of Appeals turn a blind eye to the unambiguous choice of law provision requiring application of Washington law. *See* Respondent's Brief, at 16. Washington courts, however, "interpret contract provisions to render them enforceable whenever possible." *Schnall v. AT&T Wireless Servs., Inc.*, 171 Wn.2d 260, 266 (2011) (quoting *Patterson v. Bixby*, 58 Wn.2d 454, 459 (1961)). Further, "w[e] generally enforce contract choice of law provisions." *Id.* (quoting *McKee v. AT&T Corp*., 164 Wn.2d 372, 184 (2008)). Although there are possible exceptions to enforcement, none are addressed or argued by the SGC here. *See Erwin v. Cotter Health Ctrs., Inc*. 161 Wn.2d 676, 694 (2007) (citing and analyzing RESTATEMENT (SECOND) OF CONFLICTS OF LAWS, §187).

Instead, the SGC offers the circular reasoning that Washington law is federal law is tribal law. *See* Respondent's Brief, at 16. It is, of course,

true that whether sovereign immunity applies is a question of federal law. *See Auto United Trades Org*., 175 Wn.2d at 226. It is also true, however, that federal law confirms that a tribe may waive sovereign immunity by contract, and is free to do so in accordance with the terms of the contract. *See J.L. Ward Assocs. v. Great Plains Tribal Chairmen's Health Bd*., 842 F. Supp. 2d 1163, 1178 (D. S.D. 2012) ("An Indian tribe or tribal entity may waive its sovereign immunity by contract if it does so with requisite clarity.") (citing *C&L Enterprises*, 532 U.S. at 418) (internal quotations omitted).

Here, the Tribe freely agreed to interpret the waiver under Washington laws. The SGC's argument would frustrate the Tribe's ability, confirmed under federal law, to waive its own sovereign immunity under terms that it sees fit. Moreover, the SGC overstates two cases in its support for application of the law of the Tribe. Neither *Sharber v. Spirit Mountain Gaming Inc.*, 343 F.3d 974 (9th Cir. 2003) nor *Chance v. Coquille Indian Tribe*, 327 Or. 318 (1998) pertain to the situation here, namely, where a tribe freely bargained for application of state law in interpreting an agreement containing a waiver of sovereign immunity. Put simply, there is no support for the SGC's attenuated "Washington law is federal law is tribal law" argument.

Fundamentally, the SGC's argument "would serve to defeat the basic objectives, namely those of certainty and predictability, which the choice-of-law provision was designed to achieve." *McGill v. Hill*, 31 Wn. App. 542, 548 (1982) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS, §187(e), comment h, at 569 (1971)). If the parties to the Settlement Agreement wished to bargain for application of the Tribe's law, they would have done so. That did not happen.

b. Washington Rules of Contractual Interpretation Apply.

In a related argument, the SGC contends that Washington rules of contractual interpretation do not apply to the Settlement Agreement. Respondent's Brief, at 16. Specifically, the SGC contends that Mr. Long is attempting to use these rules to find "an implied waiver" of immunity. *Id.* ("Long's attempt to use contract law principles to find an implied waiver seeks a "diminution" of tribal immunity, which is prohibited.").

The SGC is incorrect. Far from being *implied*, the Tribe's waiver of sovereign immunity is as *express* as can possibly be:

> The Tribe hereby *expressly and unequivocally* waives *any and all claim(s) of sovereign immunity* for purposes of either Party seeking relief in Washington State Superior Court, King County, as outlined in this paragraph, for purposes of resolving any dispute arising under this Agreement.

CP 554 (emphasis added). The SGC's "waiver by implication" argument should be disregarded. Instead, the SGC's real argument appears to be that the waiver is "too generic" to apply to the SGC. In support of its argument, the SGC seeks to prevent this Court from applying both the choice of law provision and the usual rules governing contracts, arguing that they are subsumed or displaced by the rules governing waivers of sovereign immunity. *See* Respondent's Brief, at 16. Tellingly, the SGC offers no authority for the proposition that principles of contractual interpretation are subsumed or displaced by rules governing waivers of sovereign immunity.

Indeed, courts regularly apply rules of contractual interpretation to ascertain whether a waiver of sovereign immunity is valid. In *C&L Enterprises*, 532 U.S. 411 (2001), for example, the U.S. Supreme Court examined a construction contract to ascertain whether tribal sovereign immunity was "unequivocally" waived. *Id*. at 418-420. In doing so, the Court recited the usual principles of sovereign immunity interpretation (*Id*. at 418), then proceeded to engage in the traditional analysis under principles of contract interpretation, including plain meaning and application of the rule that ambiguous language is construed against the party that drafted it. *Id*. at 418-423 (Concluding that the usual rule that contractual language is construed against the drafter was inapplicable because the contract was not ambiguous.) In short, the U.S. Supreme Court did precisely what should occur here if there is a determination that the language of the Settlement Agreement is not unambiguous on its face:

apply well-known principles of contract interpretation to illuminate the intent of the parties of the Settlement Agreement.

Other courts engage in similar exercises of contractual interpretation when analyzing waivers of sovereign immunity. *See e.g. Val/Del, Inc. v. Superior Court*, 145 Ariz. 558 (Ariz. Ct. of Appeals, Div. 2 1985) ("To the extent possible, all provisions in a contract should be found meaningful.") (Finding tribal waiver of sovereign immunity based on arbitration provision.) As such, the SGC's effort to eliminate consideration of Washington contractual principles must fail.

Application of Washington contractual principles only reinforces the unambiguous text of the Settlement Agreement, and demonstrates the intent of the parties to release the claims by the Tribe and the SGC alike. In Washington, as noted in Mr. Long's Opening Brief, contracts are interpreted as a whole, interpreting particular language in the context of other contract provisions. *See Weyerhauser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 699-70 (2000). Moreover, "[w]hen interpreting a contract, [a court]…harmonize[s] clauses that seem to conflict. [The] goal is to interpret the agreement in a manner that gives effect to all of the contract's provisions." *Nishikiawa v. U.S. Eagle High, LLC*, 138 Wn. App. 841, 849 (2007). Additionally, Washington courts construe contracts so as not to render any provision superfluous. *See Fardig v. Reynolds*, 55 Wn.2d 540 (1960) (citing *Hollingsworth v. Robe Lumber Co.*, 182 Wash. 74, 79 (1935) ("In construing the contract, it is, of course, elementary that the intention of the parties thereto is to be gathered from the whole

instrument, and each part, if possible, should be construed so that all of the parts thereof may have some effect.").

The SGC offers little response to the fact that the SGC's preferred interpretation renders significant portions of the Settlement Agreement entirely superfluous. The SGC claims that the waiver of sovereign immunity still permits Mr. Long to sue the Tribe for any alleged breach of the Settlement Agreement, so the Settlement Agreement accomplishes its "main goal" of settling the employment litigation. Respondent's Brief, at 26. This is incorrect. The "main goal" is stated in the Settlement Agreement: "The purpose of this Agreement is to achieve settlement and compromise *of all claims*, known and unknown, between the Parties." (emphasis added). Moreover, contrary to the SGC, it is not merely to settle the litigation, but to settle the litigation and "all claims…*relating to…or arising* out of, the Litigation." CP 553-54 (emphasis added). The SGC's interpretation renders the "relating to…or arising out of, the Litigation" language utterly unnecessary. If the parties intended to release only the claims asserted by the Tribe against Mr. Long in the "Litigation," and vice versa, then the "relating to" or "arising out of" language is unnecessary. The SGC's interpretation also renders the release of claims by "entities or agencies" of the Tribe entirely superfluous.

Additionally, the SGC contends that the maxim *expressio unius est exclusio alterius* requires that the release of claims in paragraph 2 be read differently from the waiver of sovereign immunity in paragraph 11. Respondent's Brief, at 27. It is accurate, however, for the parties to the

Settlement Agreement to refer to the "Tribe" waiving sovereign immunity in paragraph 11, as the "entities or agencies" referenced in paragraph 2 are subordinate entities of the "Tribe." Moreover, as noted previously, the SGC enjoys no sovereign immunity independent of the Tribe. *See* CP 602-03.

Finally, the SGC offers an inaccurate argument when applying principles of interpreting waivers of sovereign immunity. The SGC argues that the waiver of sovereign immunity must be "interpreted liberally in favor of the Tribe and restrictively against the claimant." Respondent's Brief, at 15. As noted elsewhere in this brief, the waiver is express and unequivocal, so it survives this analysis. The SGC is entirely silent, however, regarding the fact that the Settlement Agreement directly addresses this issue: "this Agreement should not be construed more favorably or unfavorably as to any Party hereto." CP 554. In other words, the SGC is entitled to no special weight in interpreting the waiver contained in the Settlement Agreement. The parties are on even footing on this issue, and traditional principles of contract interpretation demonstrate that the waiver of sovereign immunity applies to the SGC.

2. Even If Interpreted Under the Law of the Tribe, The Waiver Is Express, Unambiguous, and Unique.

As noted in Mr. Long's Opening Brief, *even if* the law of the Tribe *did* apply, the waiver of sovereign immunity contained in the Settlement Agreement still covers the SGC. The SGC argues in response that the

waiver of sovereign immunity contained in paragraph 11 of the Settlement Agreement is insufficiently "express" and somehow "too generic" to encompass the SGC. This is incorrect. The waiver of sovereign immunity is specific, deliberately wide-reaching, and unambiguous.

Before addressing the wide-reaching nature of the waiver of sovereign immunity, a preliminary argument may be dispensed with. The SGC argues repeatedly that the waiver must be "express" to be effective. *See* Respondent's Brief, at 12. This is true. The SGC notably omits, however, that various courts have found that a choice-of-law provision and an arbitration provision, by themselves, constitute the requisite "express" waiver of sovereign immunity. *See e.g. C&L Enterprises*, 532 U.S. at 423. Here, of course, the Settlement Agreement contains, not only a choice of law provision and a dispute resolution provision, but the Tribe's express waiver of sovereign immunity itself: "The Tribe hereby *expressly and unequivocally waives any and all claim(s) of sovereign immunity* for purposes of either Party seeking relief…*for purposes of resolving any dispute arising under this Agreement*." Any argument that the Settlement Agreement does not contain an "express" waiver of the Tribe's sovereign immunity is incorrect.

While the SGC couches the argument in terms of the need for an "express" waiver, the SGC's real argument appears to be that the waiver is

"too generic" to be effective against the SGC. In other words, the waiver fails because it does not specifically mention the SGC. In doing so, the SGC demands precisely the "magic words" warned of in *Auto United Trades Org*, 175 Wn.2d at 226. The SGC identifies no authority for this dramatic expansion of the doctrine of sovereign immunity, other than the unpublished February 2016 ruling by the Snoqualmie Tribal Court addressing a *different* waiver of sovereign immunity in a *different* contract. As noted previously, the Settlement Agreement at issue in this case contains an express choice of law provision that prohibits use of the February 2016 ruling by the Snoqualmie Tribal Court for purposes of this analysis. Moreover, the February 2016 ruling by the Snoqualmie Tribal Court was an unpublished decision by a trial court. As such, it has no precedential value in the Tribe, much less on this Court of Appeals.[3]

Even if the February 2016 ruling were considered, the SGC's counsel's arguments at that proceeding are fatal to its arguments here. Namely, the SGC relied heavily on the "limited" nature of the waiver of sovereign immunity contained in the agreement examined in February 2016. Indeed, counsel for the SGC was unequivocal before the Tribal Court: "Now the whole point of a limited waiver of sovereign immunity is

[3] Even if it did, it is directly contrary to the one other *published* opinion of a tribal *appellate* court which addressed the identical issue that was presented by the parties to this appeal. *See* Opening Brief, at 28, n. 2 (addressing *Sebnem Pura v. Quinault Housing Authority*, Quinault Court of Appeals, Case No. CV 12-2-002 (2013)).

that, in an agreement, the Tribe, or the tribal entity that's involved, says, "We're waiving our sovereign immunity to this entity, or this set of assets."" CP 51, 7. It is that uncompromising stance (indeed, "the whole point") that the SGC seeks to distance itself from here. Respondent's Brief, at 21. The abrupt shift in argument is telling. Before the Tribal Court in 2016, the waiver was too "limited." Before the trial court and this Court of Appeals, the waiver is "too generic." For the SGC, apparently, there is no such thing as a waiver that applies to it. Thankfully, that is not Washington law, nor the law of the Tribe.

Again, even if the law of the Tribe were considered, the February 2016 ruling by the Snoqualmie Tribal Court only further demonstrates the applicability of the waiver of sovereign immunity in the Settlement Agreement. The waiver examined in February 2016 by the Tribal Court was expressly "limited." The Settlement Agreement at issue here is – deliberately – unlimited. As such it does not labor under the same constraints, and further demonstrates the non-generic nature of the waiver. Indeed, it stretches credulity to believe that the Tribal Court, if confronted with the waiver of sovereign immunity under review here, would arrive at the same conclusion as that reached when examining the "limited" waiver of sovereign immunity in February 2016, particularly in light of the SGC's arguments before the Tribal Court at that time.

Finally, the SGC notes that a tribe may "cabin" a waiver of sovereign immunity and that somehow indicates that the waiver here is too generic to apply to the SGC. *See* Respondent's Brief, at 22. The SGC is correct that a tribe may "cabin" a waiver. The SGC omits, however, that the Tribe *did not do so here*. Nowhere does the Settlement Agreement carve out any exclusion for the licensing action. Instead, the release of claims in paragraph 2 uses sweeping and unambiguous language: "any and all claims…relating to the subject matter of, or arising out of, the Litigation." Moreover, the waiver of sovereign immunity in paragraph 11 uses similar language: "The Tribe hereby expressly waives any and all claim(s) of sovereign immunity…" It is presumed that the Tribe knows how to exclude a sub-agency or sub-entity of the Tribe from a waiver of sovereign immunity. Notably, it did not do so. The "cabin" argument by the SGC only further demonstrates that the waiver of sovereign immunity fully applies to the SGC.

a. <u>The SGC's Argument Represents a Significant Expansion of the Doctrine of Sovereign Immunity.</u>

It is important to note that the SGC's "too generic" argument represents a significant expansion of the doctrine of sovereign immunity under Washington law. There is no published authority - anywhere - requiring a waiver of sovereign immunity to specify each and every sub-

agency or sub-entity of a tribe for the waiver to be successfully applied to that sub-agency or sub-entity. The SGC attempts to limit the implications of its argument by restricting it to only the SGC. *See* Respondent's Brief, at 25, n.3. There is, however, nothing that prevents the Tribe or any other tribe from asserting that a similar degree of purported agency "independence" (whether *de jure* or *de facto*) renders ineffective a waiver of sovereign immunity by the tribe's government. As noted in prior briefing, whatever the SGC's "independence" from the Council may be, the SGC is not a separately-incorporated or chartered entity, and the SGC does not control its own sovereign immunity. *See* Opening Brief, at 29 (citing §10.0 of the Snoqualmie Judiciary Act). These points are seemingly conceded by the SGC. The SGC's "too generic" argument opens the door for unending parsing of tribal law to determine whether a tribal agency is sufficiently "independent" of tribal leadership so as to require a separate waiver or specific identification within a waiver. The absurdity of that position is reflected in the fact that a tribal agency only enjoys sovereign immunity by virtue of being part of the tribe itself.

Notably, the SGC's position is a far cry from the well-known proposition that a waiver of sovereign by a tribe may not apply to *separately-incorporated* tribal entities. *See e.g. Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1268 (10th Cir. 1998). In those instances, it

is logical to require a separate waiver – precisely because they are separate tribal entities. Here, the SGC is indisputably part of the Tribe. As such, the waiver of sovereign immunity by the Tribe is fully enforceable.

### C. If the Trial Court Acted Pursuant to CR 12(b)(6), It Committed Reversible Error.

The Respondent's Brief offers two primary arguments in support of its CR 12(b)(6) argument: 1) The revocation of the gaming license is not a "claim" under the Settlement Agreement; and 2) Contrary to law, the Settlement Agreement requires the SGC to take licensing action without being a party to the Settlement Agreement. Each argument is addressed in turn.

First, the SGC argues that, because the SGC's re-revocation of Mr. Long's gaming license took place prior to signing of the Settlement Agreement; it is not a "claim" under the Settlement Agreement. Respondent's Brief, at 33. As noted in prior briefing, however, the SGC ignores the actual language of the Settlement Agreement which applies to "any and all claims, actions, causes of action, demands, rights, damages, costs, and expenses whatsoever…" CP 520.

The SGC's licensing action against Mr. Long is a "claim" and/or an "action" or a "cause of action" that was live as of the date the Settlement Agreement was signed, and remains live today. Indeed, while the SGC contends that the agency's decision is final, the SGC's own Hearing Regulations clarify that the "final decision" of the SGC does not "stand" pending appeal. *See* SGC Hearing Regulations, §2.10(B)(1) ("If a

party fails to provide notice [of appeal] to the [SGC] within this period, he or she waives the appeal to Tribal Court and the [SGC's] limited waiver for such appeal is ineffective, and the final decision shall stand.") As the SGC's decision does not "stand" during appeal, it remains live for purposes of release under the Settlement Agreement. Similarly, the SGC Hearing Regulations clarify that, once appealed, it is the Tribal Court's decision that is final: "The decision of the Snoqualmie Tribal Court on the appeal is final; this limited waiver does not extend to any further appeal beyond the tribal court." *Id.*, at §2.10(C). In short, the licensing matter continues through the appeal, has not been reduced to a final decision, and the SGC may dismiss the licensing action at any time.

Moreover, dismissal under CR 12(b)(6) is inappropriate if "any hypothetical situation conceivably raised by the complaint" is legally sufficient to support the claim. *Halvorson v. Dahl*, 89 Wn.2d 673, 674 (1978). Here, Mr. Long asserted in his Complaint that, unless prevented, the "SGC will continue with its substantively misguided – and now legally divested – efforts to revoke Plaintiff's gaming license." Complaint, at ¶21. Related to this assertion that the "SGC will continue with its…efforts," Mr. Long asserted in his Response in Opposition to Defendant's Motion to Dismiss that the SGC maintains its cause of action, claim, or administrative decision in an action that was then on appeal and stayed before the Snoqualmie Tribal Court. CP 521.

Any number of "hypothetical situations" are raised by these assertions sufficient to defeat a CR 12(b)(6) motion. As noted above, the

SGC's actions do not "stand" during appeal under the SGC's own administrative rules. Additionally, as a factual matter, the SGC itself has failed to take any actions demonstrating that its decision is final, such as reporting the decision to other regulatory agencies, including either the Washington State Gambling Commission or the National Indian Gaming Commission. If the SGC is not acting in conformance with a final decision, there was no reason for the trial court to do so.

Additionally, although the SGC seems to contend that some sort of action is necessary to "undo" the previous revocation, Mr. Long's license expired long ago. Consequently, dismissal of the "claim" or "action" or "cause of action" – or, indeed, whatever the SGC may prefer to call it – simply permits the license to expire of its own accord.

The SGC's next argument is that the Settlement Agreement requires the SGC to take a licensing action without being a party to the Settlement Agreement. This both belies the usual broad interpretation of release agreements given by Washington courts, and ignores the ability of the Tribal Council to bind the SGC on this and a variety of other matters. Washington courts have held that "the law favors private settlement of disputes, and, accordingly, releases are given great weight in establishing the finality of the settlement." *Certification v. State Farm Mut. Auto Ins. Co.*, 130 Wn.2d 688, 693 (1996). That is true particularly in this case where the Settlement Agreement clarifies that it is intended to resolve "all" outstanding disputes between the parties, and where the SGC is not a separate entity from the Tribe.

Moreover, as outlined in the Opening Brief, the Council entirely controls the SGC, even to the extent of appointing itself as the SGC in the recent past. Opening Brief, at 5-6. Additionally, Ms. Yath provided a sworn declaration to the trial court stating that the SGC was a rubber stamp for the Council. *Id.* To the extent, if at all, there is any dispute regarding the Council's ability to bind the SGC – particularly in light of the SGC's past practices - then discovery on that issue should take place.[4]

Finally, to the extent any pleading deficiency is identified under CR 12(b)(6), Mr. Long should be permitted to amend. *See Caruso v. Local Union No. 690 of Intern. Broth. Of Teamsters, Chauffers, Warehouseman and Helpers of America*, 100 Wash.2d 343 (1983). The SGC argues that a motion to amend must have been made at the trial court level, but offers no authority for the proposition that such a motion must be made before the non-moving party will be accorded the opportunity to amend in light of a CR 12(b)(6) motion, particularly if, by amending the complaint, the non-moving party may be able to state a cause of action. Although Mr. Long contends that no pleading deficiency is present (and none was identified by the trial court), if the Court of Appeals identifies any pleading deficiency, Mr. Long respectfully requests the opportunity to amend.

[4] It should be noted that the SGC's claim of "independence" for purposes of this argument is highly ironic in light of the actions by the SGC and Council in recent years. *See* Opening Brief, at 5-6. The SGC should not be permitted to ignore its own agency independence as a matter of course for lengthy periods of time, and then rely upon it when it suddenly becomes convenient for litigation purposes.

**D. Discovery Should Proceed.**

Lastly, the trial court committed reversible error by dismissing Mr. Long's lawsuit under the facts and circumstances as alleged, without even according him the basic opportunity to engage in discovery. *See* Opening Brief, at 35. As pointed out by Mr. Long, if in doubt, courts generally permit the non-moving party facing a CR 12(b)(1) motion to dismiss to discover facts relevant to jurisdiction, particularly when the facts are in the control of the moving party. *See* Opening Brief, at 36 (citing *Wright,* 159 Wn.2d at 119-121).

Interestingly, both parties cite *Wright* to support their discovery arguments. Mr. Long points out that *Wright* supports the proposition that courts generally permit the non-moving party to discover facts relevant to jurisdiction. Opening Brief, at 36 (citing *Wright*, at 119-21). The SGC, in response, argues that *Wright* found that no further fact-finding was needed because the "plaintiff did not dispute organizational structure of the entity, but rather disputed the significance of various provisions." Respondent's Brief, at 41. *Wright*, however, specified that the appellant in that case "did not dispute the relevant facts relating to [the Colville Tribal Services Corporation's] tribal affiliation and organizational structure." *Wright*, at 121. Here, Mr. Long contests both the SGC's claims of "independent" affiliation with the Tribe and "independent" organizational structure of the

SGC vis-à-vis the Council. Moreover, Mr. Long disputes the SGC's claim of how the two entities interact.[5] Although the SGC claims it is wholly independent, the Tribe's organizational structure does not support that assertion. CP 3. Mr. Long asserts the SGC is bound by the Tribal Council, both legally and as a matter of SGC practice.

In this case, Mr. Long has requested various discovery requests illuminating the relationship between the SGC and the Council. These requests include copies of communications between the SGC and the Council or the Tribe demonstrating the coordination between the entities in this case, agreements or contracts whereby the Council has bound the SGC in the past, and any policies or procedures demonstrating the SGC's purported "independence" from the Council. (CP 408, 420-24). If this matter is not resolved as a matter of law in Mr. Long's favor, then discovery should be allowed to take place on these issues.

## IV. CONCLUSION

For all the reasons specified above, the trial court should be reversed.

[5] The reverse of this argument is that Mr. Long claims that it is undisputed that the SGC is part and parcel of the Tribe, and that, as a result, a waiver of sovereign immunity by the "Tribe" applies to the SGC.

RESPECTFULLY SUBMITTED this 21st day of December, 2017.

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## CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 21st day of December, 2017, I caused a true and correct copy of the foregoing document, Appellant Wendell Long's Reply Brief to be delivered to the following counsel of record as indicated:

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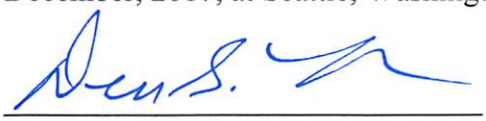

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