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IN THE PASCUA YAQUI TRIBE

COURT OF APPEALS

GAMING ENTERPRISE DIVISION OF THE PASCUA YAQUI TRIBE, Plaintiff/Appellee, v. GLOBAL CASH ACCESS, INC. and CENTRAL CREDIT, LLC, Defendants/Appellants.	No. CA-14-0004 **REPLY IN SUPPORT OF MOTION FOR PROCEDURAL ORDER PURSUANT TO 3 PYTC § 2-3-50 TO SUSPEND 3 PYTC § 2-3-90(F) AND TO ACCEPT INTERLOCUTORY CIVIL APPEAL** Trial Court No. CV13-076 (Hon. Melvin Stoof)
GLOBAL CASH ACCESS, INC. and CENTRAL CREDIT, LLC, Counterclaimants, v. GAMING ENTERPRISE DIVISION OF THE PASCUA YAQUI TRIBE, Counterdefendant.	

Defendants/Appellants, Global Cash Access, Inc. and Central Credit, LLC (together, "GCA"), by and through their undersigned counsel, hereby submit their Reply in Support of GCA's Motion for Procedural Order Pursuant to 3 PYTC § 2-3-50 to Suspend 3 PYTC § 2-3-

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90(F) and to Accept Interlocutory Civil Appeal (the "Motion").

ARGUMENT

Plaintiff/Counterdefendant Gaming Enterprise Division of the Pascua Yaqui Tribe ("GED") attempts to argue from analogy with federal and Arizona statutes that the interlocutory appeal sought by the Motion is inappropriate. This reliance is misplaced for at least three reasons: (1) 28 U.S.C. § 1292 is completely inapplicable to GCA's Motion and appeal; (2) properly analyzed under 28 U.S.C. § 1291 or A.R.S. § 12-2101, GCA's would unquestionably be entitled to appeal; (3) GCA's analysis assumes an "extraordinary situation" standard that is not justified by this Court's rules.

A. 28 U.S.C. § 1292(b) is Inapposite to Analysis of GCA's Motion

Contrary to the claim in GED's Response in Opposition to the Motion (the "Response"), there are no similarities between 28 U.S.C. § 1292(b) and 3 PYTC § 2-3-90(F). While § 2-3-90(F) purports to restrict all civil interlocutory appeals, § 1292 actually expands federal appellate jurisdiction over certain interlocutory appeals that those courts would not otherwise be able to entertain. In both form and function, the two statutes could not be further apart. Moreover, while GED's reliance on § 1292 in general is misplaced, the reliance on § 1292(b) in particular is baffling. Subsection (b) explicitly authorizes federal judges to certify otherwise ineligible trial orders for interlocutory appeal. More importantly, however, is the fact that § 1292 does not come into play when the appeal in question is of a final judgment or order that effects a final judgment. As discussed below, the order dismissing certain counts of GCA's counterclaim against GED has the force and effect of a final judgment, thus any consideration of analysis under § 1292 is inappropriate, because in federal court the appeal would be properly governed by 28 U.S.C. § 1291.

B. Analyzed Under 28 U.S.C. § 1291 or A.R.S. § 12-2101, GCA is Entitled to Its Interlocutory Appeal

To the extent that the Court, as GED urges, is persuaded by the rules governing interlocutory appeals in federal and Arizona courts, there is no question that the appeal sought by GCA should be taken for consideration. Under A.R.S. § 12-2101, "[a]n appeal may be

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taken to the court of appeals . . . [f]rom a final judgment entered in an action or special proceeding . . . ." A.R.S. § 12-2101(A)(1). Except for one very narrow category of cases, a final judgment entered in an action is always appealable. Similarly, under 28 U.S.C. § 1291, except where a matter is directly appealable to the Supreme Court of the United States, "[t]he courts of appeals . . . shall have jurisdiction of appeals from ***all final decisions*** of the district courts of the United States . . . ." (emphasis added).

Importantly, neither Arizona rules nor federal rules restrict "final judgments" or "final decisions" to those judgments, decisions, or orders that dispose of a case entirely. Where a matter involves multiple claims, including counterclaims such as in the instant case, Rule 54(b) of both the Arizona Rules of Civil Procedure and the Federal Rules of Civil Procedure provide for a final, appealable judgment for a judgment, decision, or order that disposes of some, but not all of the claims at issue in the litigation. The state and federal rules establish particular criteria for an interlocutory decision or order to constitute a final judgment for appeals purposes, but once that criteria is met, the party against whom the decision was rendered is entitled to an interlocutory appeal as a matter of right, for the appeal of a final judgment, without any complicated analysis of other factors or statutes governing interlocutory appeals of ***non-final decisions or orders***.

The Pascua Yaqui rules of court also define what constitutes a "final judgment," but the Pascua Yaqui rules are considerably less stringent in that designation. In the courts of the Pascua Yaqui tribe, "[a] judgment is a final order of the court which disposes of a claim ***in whole or in part***." 3 PYTC § 2-1-200(A) (emphasis added). "A judgment ***becomes final*** when it has been recorded in the docket book by the court clerk." 3 PYTC § 2-1-200(B) (emphasis added). Under the Pascua Yaqui rules, Judge Stoof's written and recorded order that purports to dispose of certain of GCA's counterclaims is indisputably a final judgment. Should this Court choose, as GCA urges, to be guided by federal or Arizona state procedure, because Judge Stoof's order is unquestionably a final judgment under the applicable rules, the Court need not engage in any of the analysis that GED argues is appropriate.

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C. Under the Actual Standard that Guides this Court's Decision, GCA's Interlocutory Appeal Should be Allowed

GED states summarily that it "does not believe that good cause has been shown." Reponse at 2:2-3. Rather than turn that statement into an argument with supporting facts, GED only reiterates its "belief" that the rule is fair. *Id.* at 3:20. GED "argues" that the prohibition is both in the parties' best interests and in the interest of judicial economy, but fails to offer a single point in support of either rationale. This is patently insufficient to rebut GCA's arguments to the contrary. GED fails to explain how judicial economy is served by potentially requiring breach of contract actions on the exact same contracts to be tried twice is economical. GED fails to explain why it makes more sense, or is more in the interest of the parties, to leave the matter of the counterclaims open for the remainder of this litigation, thereby undermining the potential to settle this matter before trial. GCA fails to give a single reason that either of these points is untrue, and why they do not constitute good cause for the Court to take GCA's interlocutory appeal. Consequently the Court may, and should, entertain GCA's proposed interlocutory appeal.

Even if the Court is inclined to engage in the type of expanded analysis urged by GED, it does not undermine GCA's position. First, the standard is "good cause shown," not "better cause shown." Even assuming for the sake of argument that the points cited by GED constitute good reasons to reject the proposed interlocutory appeal, the standard set forth by the rules doesn't propose a balancing test. If there is good cause to do a thing, the good cause remains, reasons not to do the thing notwithstanding. But second, none of the three points cited by GED really constitutes good cause to reject the proposed interlocutory appeal.

Regarding the "likelihood of multiple and piece-meal appeals," Response at 3:7-8, unquestionably **any** interlocutory appeal increases, in fact may guarantee, that likelihood. That consideration is one for barring some or all interlocutory appeals in the first instance. It does not speak to those circumstances, in this case, "good cause," that justify entertaining an interlocutory appeal despite that likelihood. This is a quintessential example of the difference between a "good cause shown" standard as opposed to a "better cause shown" standard.

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GED's argument that granting the Motion would deny the Court the ability to assess various orders appealed from in context and with the benefit of a review of the trial record, Response at 3:9-12, is simply irrelevant. It assumes that there is a benefit to reviewing the proposed interlocutory appeal in that light, but there isn't. The proposed interlocutory appeal is of a final order dismissing the counterclaims on the basis of sovereign immunity; there is nothing that further proceedings in the trial court can add to the consideration of that decision. If anything, there is a greater risk to denying the Motion, because final resolution of this matter, one way or the other, will affect the future of the trial proceedings, and the outcome of future rulings and orders. Granting the Motion won't deny the Court the ability to assess any future appeal in full context, denying it will.

Finally, GED's argument that this case doesn't involve an "extraordinary" situation that warrants an interlocutory appeal, Response at 3:13-17, attempts to impose a burden on GCA that the Court's rules do not. The circumstances do not need to be "extraordinary" to constitute good cause.

CONCLUSION

For the reasons set forth in the Motion, and all of the reasons stated above, GCA respectfully requests that the Court of Appeals grant the Motion and all relief sought therein.

RESPECTFULLY SUBMITTED this 16th day of June, 2014.

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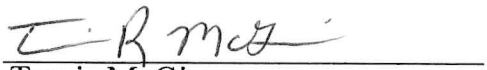
By 

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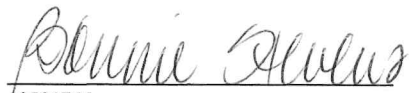

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IN THE PASCUA YAQUI TRIBE

COURT OF APPEALS

GAMING ENTERPRISE DIVISION OF THE PASCUA YAQUI TRIBE, Plaintiff/Appellee, v. GLOBAL CASH ACCESS, INC. and CENTRAL CREDIT, LLC, Defendants. Appellants,	§	Case No. CA-14-0004 **PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR PROCEDURAL ORDER PURSUANT TO 3 PYTC § 2-3-50 TO SUSPEND 3 PYTC § 2-3-90(F) AND TO ACCEPT INTERLOCUTORY CIVIL APPEAL**
GLOBAL CASH ACCESS, INC. and CENTRAL CREDIT, LLC, Counterclaimants, v. GAMING ENTERPRISE DIVISION OF THE PASCUA YAQUI TRIBE, Counterdefendant.	§	

COMES NOW Plaintiff the Gaming Enterprise Division of the Pascua Yaqui Tribe ("GED"), by and through undersigned counsel, and files this its Response in Opposition to Defendants' Motion for Procedural Order Pursuant to 3 PYTC §2-3-50 to Suspend 3 PYTC § 2-3-90(F) and to Accept Interlocutory Civil Appeal (hereinafter "Defendants' Motion") as follows:

Although this Court may "for good cause shown" suspend the rule prohibiting interlocutory appeals in civil cases, 3 PYTC § 2-3-50, the GED does not believe that good cause has been shown. The GED respectfully requests that this Court deny Defendants' Motion.

The Court's rule prohibiting interlocutory appeals in civil cases is very similar to rules existing in both federal and state courts. See, e.g., 28 U.S.C. §1292(b); A.R.S. § 12-2101 (allowing appeals from a final order in a civil case and then listing the limited circumstances in which an appeal of an interlocutory order may be brought; Ill. S.C. R. 304 (interlocutory appeals in civil cases not permitted). Accordingly, the underlying rationale for these rules may be helpful. Under federal law, the prohibition or limitation on interlocutory appeals in civil cases addresses the Courts' and litigants' interests in avoiding piece-meal appeals, "because most often such appeals result in additional burdens on both the court and the litigants." White v. Nix, 43 F.3d 374, 376 (8th Cir. 1994. See also Favell v. United States, 22 Cl. Ct. 132, 139 (U.S.C.C. 1990) (noting that the basic rationale of the finality rule is conservation of judicial resources). As the United States Supreme Court stated:

> From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error…have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal.

McLish v. Roff, 141 U.S. 661, 665-66 (1891). In addition, the requirement of a final order disposing of the litigation may help to ensure a more correct disposition of the merits of the case as a whole. After the proceedings in the trial court, the appellate court can then assess the various orders in context and "with heightened perspective, and [to] avoid the probability of a second appeal." Taylor v. Board of Educ., 288 F.2d 600, 605 (2d Cir. 1961). " Accordingly, under federal law "[p]ermission to allow interlocutory appeals should thus be granted sparingly

and with discrimination." White v. Nix, 43 F.3d at 376. See also United States Rubber Co. v. Wright, 359 F.2d 784, 785 (9th Cir. 1966) (per curiam) (it is to be used in "extraordinary cases" and "was not intended merely to provide review of difficult rulings in hard cases.").

Each of the rationales discussed by federal courts in the cases cited herein weigh in favor of denying Defendant's Motion:

(a) Defendants' Motion, if granted, would certainly increase the likelihood of multiple and piece-meal appeals;

(b) Defendants' Motion, if granted, would deny this Court the ability to assess the various orders appealed from in context and with the benefit of a review of the trial record on appeal; and

(c) this is not a case involving an "extraordinary" situation that might warrant allowing an interlocutory appeal. Instead, it is a contract case wherein the parties are seeking monetary damages. It simply does not represent an "extraordinary" situation.

Finally, it would not be "unfair" to Defendants to require them to wait until the litigation is concluded to bring an appeal. The argument that the rule at issue is inherently "unfair" to litigants is simply not persuasive. Certainly the GED believes the rule is fair and that requiring a final judgment in this case would be in the parties' best interests as well as in the interest of judicial economy. In addition, Defendants will have the opportunity to appeal any rulings that they believe should be appealed at the conclusion of the litigation. The rules as they stand will allow Defendants that opportunity, at the conclusion of the litigation, and thus Defendants' rights to appeal are fairly and adequately protected.

For each of the foregoing reasons, the GED respectfully requests that the Court deny

Defendants' Motion in its entirety.

RESPECTFULLY SUBMITTED this the 5th day of June, 2014.

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Amanda Sampson-Lomayesva
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Original of the foregoing filed with the Court on this the 5th day of June, 2014, and a copy of the foregoing sent to the following by regular mail on this the 5th day of June, 2014:

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IN THE PASCUA YAQUI TRIBE

COURT OF APPEALS

GAMING ENTERPRISE DIVISION OF THE PASCUA YAQUI TRIBE, Plaintiff/Appellee, v. GLOBAL CASH ACCESS, INC. and CENTRAL CREDIT, LLC, Defendants/Appellants.	No. **MOTION FOR PROCEDURAL ORDER PURSUANT TO 3 PYTC § 2-3-50 TO SUSPEND 3 PYTC § 2-3-90(F) AND TO ACCEPT INTERLOCUTORY CIVIL APPEAL** Trial Court No. CV13-076 (Hon. Melvin Stoof)
GLOBAL CASH ACCESS, INC. and CENTRAL CREDIT, LLC, Counterclaimants, v. GAMING ENTERPRISE DIVISION OF THE PASCUA YAQUI TRIBE, Counterdefendant.	

Defendants/Appellants, Global Cash Access, Inc. and Central Credit, LLC (together, "GCA"), by and through their undersigned counsel, respectfully move this Court for a procedural order suspending 3 PYTC § 2-3-90(F), thereby permitting the Court to entertain

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and decide a civil interlocutory appeal in Pascua Yaqui Tribal Court Case No. CV13-076. This motion is supported by the following Memorandum of Points and Authorities and the Affidavit of Counsel in support hereof, attached hereto as **Exhibit 1**.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL AND PROCEDURAL BACKGROUND

On or about September 4, 2013, the Gaming Enterprise Division of the Pascua Yaqui Tribe ("GED") filed a lawsuit against GCA for, among other things, breach of contract for alleged breaches of three different contracts between GED and GCA. On or about January 10, 2014, GCA filed its answer to GED's complaint wherein GCA asserted counterclaims against GED for, among other things, breach of the exact same contracts as those described in GED's complaint. GED subsequently moved to dismiss GCA's counterclaims for lack of subject matter jurisdiction on the grounds of sovereign immunity, which motion was granted, in part, by the trial judge, the Honorable Melvin Stoof, by an order entered on or about April 28, 2014. Judge Stoof's order notwithstanding, this litigation is ongoing with prosecution of GED's original claims, as well as a remaining count of the counterclaim. Consequently, any appeal of the order dismissing certain counts of the counterclaim would constitute an interlocutory appeal, normally prohibited by 3 PYTC § 2-3-90(F).

II. ARGUMENT

Under 3 PYTC § 2-3-50, "the appellate court may, upon motion for good cause shown, suspend the requirements or provisions of any [other rules of appellate procedure] in a particular case, and may order proceedings in accordance with its discretion." The authority vested in the Court of Appeals to suspend other rules of procedure may be exercised at the Court's discretion.

Normally, 3 PYTC § 2-3-90(F) prohibits the Court of Appeals from entertaining an interlocutory appeal in a civil case. In the instant case, there is good cause for the Court to exercise its authority to suspend that rule and accept GCA's proposed interlocutory appeal, filed concurrently herewith (the "Appeal"). Nothing in the Pascua Yaqui rules of court or the Pascua Yaqui civil code addresses what constitutes "good cause" under Section 50. Where

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the factors that weigh against or in favor of "good cause" are not addressed by the rules or the law, then "[w]hat constitutes good cause depends to a considerable degree upon the particular circumstances of each case and upon considerations of practical convenience." *State Farm Ins. Co. v. Roberts*, 97 Ariz. 169, 174 (1965) (superseded on other grounds by rule in *Butler v. Doyle*, 112 Ariz. 522 (1975)). In the instant case, there are at least two reasons that demonstrate good cause sufficient for the Court of Appeals to entertain GCA's Appeal.

First, an interlocutory appeal in this case makes sense as a matter of judicial economy. Judge Stoof's order dismissed counterclaims for breaches of the exact same contracts that are alleged to have been breached in GED's complaint, which is still pending. Unless this matter settles, and there is no basis on which to assume that it will, this matter will go through the entire course of discovery and a scheduled three day trial to verdict before, in the absence of the relief sought by this motion, GCA will be entitled to appeal that decision. If, at that point, GCA pursues and prevails on the Appeal, thereby reviving the dismissed counterclaims, it would necessitate re-litigating what, in many regards, would amount to the exact same case already tried to a verdict. Not only would revival of the counterclaims after a verdict on GED's complaint require a new trial covering the exact same contracts, but it is possible and even likely that discovery would need to be reopened, as any current discovery will be limited in its scope by Judge Stoof's dismissal order. This risk of having to utilize the Tribal Court's limited resources to re-litigate the same contracts a second time should, by itself, constitute good cause to take GCA's Appeal as an interlocutory appeal and either revive the counterclaims at this stage of the litigation, or else foreclose forever the possibility that they may be revived.

Second, it is unfair to the litigants, and particularly to GCA, to leave the question of these counterclaims unresolved. Whether or not GCA has the counterclaims to pursue has a substantial impact on the parties' settlement positions. Should this matter proceed to trial and the counterclaims be revived after a verdict, the incentive to settle that the counterclaims would otherwise have brought to the table, for both parties, is lost and substantial time and money, for the parties as well as the trial court, will have been wasted as a result. Moreover,

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should the counterclaims be revived after a trial, thus requiring the subject contracts to be re-litigated, it will impose potentially substantial double costs on both parties to do so. All of this can be avoided by the Court of Appeals exercising its authority to accept GCA's Appeal on an interlocutory basis, and that fact, too, constitutes good cause to do so.

III. CONCLUSION

The rules clearly give the Court of Appeals the authority to grant the relief sought herein. Judicial economy, incentive to settle, and cost to the litigants all constitute good cause to entertain the Appeal on an interlocutory basis. For these reasons we respectfully request that the Court of Appeals exercise its authority under 3 PYTC § 2-3-50 to suspend 3 PYTC § 2-3-90(F) and accept GCA's Appeal, filed concurrently herewith, for interlocutory consideration on the merits.

RESPECTFULLY SUBMITTED this 22nd day of May, 2014.

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EXHIBIT 1

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COURT OF APPEALS

GAMING ENTERPRISE DIVISION OF THE PASCUA YAQUI TRIBE, Plaintiff/Appellee, v. GLOBAL CASH ACCESS, INC. and CENTRAL CREDIT, LLC, Defendants/Appellants.	No. **AFFIDAVIT OF COUNSEL IN SUPPORT OF MOTION FOR PROCEDURAL ORDER PURSUANT TO 3 PYTC § 2-3-50 TO SUSPEND 3 PYTC § 2-3-90(F) AND TO ACCEPT INTERLOCUTORY CIVIL APPEAL** Trial Court No. CV13-076 (Hon. Melvin Stoof)
GLOBAL CASH ACCESS, INC. and CENTRAL CREDIT, LLC, Counterclaimants, v. GAMING ENTERPRISE DIVISION OF THE PASCUA YAQUI TRIBE, Counterdefendant.	

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STATE OF ARIZONA)
) ss.
County of Pima)

Travis R. McGivern, being duly sworn, upon oath, deposes and says:

1. I am one of the attorneys for Defendants/Appellants, Global Cash Access, Inc. and Central Credit, LLC (together, "GCA") in the above-entitled cause.

2. GCA's instant motion constitutes a motion for a procedural order because whether or not the Court of Appeals may entertain a civil interlocutory appeal is governed by a procedural rule that is subject to suspension at the Court's discretion under 3 PYTC § 2-3-50. No party's substantive rights are affected, as GCA would otherwise be entitled to make this appeal upon conclusion of the trial of the above-entitled cause. The instant motion only affects the timing of the proposed appeal, which is purely a procedural matter.

3. GCA, through counsel, attempted to secure a stipulation from the opposing party, the Gaming Enterprise Division of the Pascua Yaqui Tribe ("GED") for the relief sought by the instant motion. On May 15, 2014, I sent an email to GED's lead counsel, Kim Van Amburg, requesting a stipulation to suspend the prohibition on interlocutory appeals. On May 19, 2014, not having gotten a response from GED's counsel to the May 15 email, I sent a follow up communication. GED's counsel responded to the second email indicating that GED would not agree to stipulate to a suspension of 3 PYTC 2-3-90(F). No explanation was provided by GED or its counsel regarding the reasoning behind this refusal.

4. Because the instant motion constitutes a motion for a procedural order under 3 PYTC § 2-3-80(C), the Chief Justice of the Court of Appeals may grant this motion without awaiting for a response for GED.

5. Any party that feels it is adversely affected by the granting of the instant motion may file a motion requesting rehearing, vacation, or modification of the order granting the relief sought therein.

////

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DATED this 22nd day of May, 2014.

Travis R. McGivern

SUBSCRIBED AND SWORN to before me this 22nd day of May, 2014, by Travis R. McGivern.

Notary Public

My commission expires: 7/31/17

ALYSSIA N. NIELSON
Notary Public - State of Arizona
PIMA COUNTY
My Commission Expires
July 31, 2017

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GAMING ENTERPRISE DIVISION OF THE PASCUA YAQUI TRIBE, Plaintiff/Appellee, v. GLOBAL CASH ACCESS, INC. and CENTRAL CREDIT, LLC, Defendants/Appellants.	No. **NOTICE OF APPEAL** Trial Court No. CV13-076 (Hon. Melvin Stoof)
GLOBAL CASH ACCESS, INC. and CENTRAL CREDIT, LLC, Counterclaimants, v. GAMING ENTERPRISE DIVISION OF THE PASCUA YAQUI TRIBE, Counterdefendant.	

Defendants/Appellants, Global Cash Access, Inc. and Central Credit, LLC (together, "GCA"), by and through their undersigned counsel, respectfully submit this Notice of Appeal from that part of the Order Granting Gaming Enterprise Division's Motion to Dismiss GCA's Counterclaims, in Part, and Denying, in Part, entered on April 28, 2014, whereby the trial court dismissed GCA's counterclaims arising from the June 1, 2008 Cash Access Service

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Agreement, Central Credit Check Warranty Service Agreement, and the Redemption Device Service Agreement on the basis of sovereign immunity. A copy of the order GCA is appealing is attached hereto.

RESPECTFULLY SUBMITTED this 22nd day of May, 2014.

SNELL & WILMER L.L.P.

By _____

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ORIGINAL of the foregoing filed this 22nd day of May, 2014.

ORIGINAL file with the tribal court this same day and **COPY** hand delivered to:

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IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

GAMING ENTERPRISE DIVISION OF THE PASCUA YAQUI TRIBE, Plaintiff, VS. GLOBAL CASH ACCESS, INC., And CENTRAL CREDIT, LLC., Defendants, GLOBAL CASH ACCESS, INC., And CENTRAL CREDIT, LLC., Counterclaimants, VS. GAMING ENTERPRISE DIVISION OF THE PASCUA YAQUI TRIBE, Counterdefendant.	CASE NO. CV-13-076 ORDER GRANTING GAMING ENTERPRISE DIVISION'S MOTION TO DISMISS CGA'S COUNTERCLAIMS, IN PART, AND DENYING, IN PART

On April 23, 2014, this matter came before the court on a Motion to Dismiss Counterclaims for Lack of Subject Matter Jurisdiction, (Sovereign Immunity) filed by and through Kimberly Van Amberg, on behalf of the Gaming Enterprise Division. Appearing for hearing were Travis McGivern for the respondent, Global Cash Access, Inc., and Kimberly Van Amberg for the Movant, Gaming Enterprise Division of the Pascua Yaqui Tribe.

Before the court addresses the issue of whether sovereign immunity applies to bar a suit against the Tribe in tribal court, it must determine the extent of its jurisdiction to do so. The Pascua Yaqui Constitution, Art. VIII establishes the judiciary of the Tribe and provides that the court has jurisdiction over all cases in law and equity arising under the Tribe's constitution and the laws, traditions and enactments of the Pascua Yaqui Tribe, and the court exercises jurisdiction over all persons who are parties, whether member or non-member, unless prohibited by tribal or federal law. Pascua Yaqui Tribal Code Title 20, "Civil Actions" provides that the Court has subject matter jurisdiction on any basis consistent with the inherent sovereignty of the Tribe, and the court has subject matter jurisdiction over all personal property on the reservation, pursuant to section D. Part of the court's authority derives from the constitution Art. VIII and pursuant to Title 20, Rule 101 (J) which provides

that the tribal court has exclusive original jurisdiction to construe the meaning of tribal laws and to determine the legality under the Constitution and laws of the Pascua Yaqui Tribe and the Indian Civil Rights Act, or any action or enactment of the Tribal Council, and the application of any such action or enactment to any person or situation.

This court has jurisdiction to hear disputes arising out of contracts between parties doing business on the reservation, or where the parties are entering into contracts, or where a contract is to be performed within the reservation. Id., at Sec. 101(6). The civil jurisdiction statute allows the court to extend its jurisdiction to corporations, partnerships, associations, and governmental entities. Id., at 101(C).

The U.S. Supreme Court has noted under its Abstention Doctrine that it will not interfere with the ability of a tribal court to determine its own jurisdiction to hear cases filed in a tribal court:

> . . . [T]he existence and extent of a tribal court's jurisdiction will require careful examination of tribal sovereignty, the extent to which the sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodies in treaties and elsewhere, and administrative of judicial decisions. We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy if supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge.

National Farmers v. Crow Tribe, 471 U.S. 845, 856-857 (1985).

In *Iowa Mutual v. Laplante*, the U.S. Supreme court found that the "federal policy supporting tribal self government directs a federal court to stay its hand in order to give the tribal court full opportunity to determine its own jurisdiction . . .because tribal courts are best qualified to interpret and apply tribal law." 480 U.S. 9, 16 (1987).

In *Santa Clara v. Martinez*, the U.S. Supreme Court in holding that the Indian Civil Rights Act does not act as a waiver of a Tribe's sovereign immunity to be sued in federal court, the court noted:

> Tribal Courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. [citations omitted].

436 U.S.49, 64 (1978).

Sovereign immunity is jurisdictional. It automatically raises the question about a tribal court's jurisdiction over the Tribe, its employees, and its entities. A claim of sovereign immunity is a "jurisdictional prerequisite, which may be asserted at any state of the proceedings." *U.S. v. Sherwood*, 312 U.S 584, 586-587, (1941); *Ramey Construction Co. v. Apache Tribe of Mescalero Reservation,* 673 F.2d 315, 318 (10th Cir. 1982); *California v. Quechen Tribe of Indians*, 595 F.2d 1153, 1154 n.1 (9th Cir.,1979).

Santa Clara v. Martinez held that a Tribe's sovereign immunity bars it from being sued in federal court, and the Supreme Court held in *Kiowa Tribe v. Manufacturing Technologies*, that Tribes are immune from suit in state courts, absent an explicit waiver of sovereign immunity by either Congress or a Tribe itself. 523 U.S. 751 (1998).

An example of Congress waiving a Tribe's immunity may be found at 25 U.S.C. 450f(c), which provides that Tribes who receive federal funding under the Indian Self Determination Act must provide for a limited wavier of sovereign immunity in such federally funded programs to cover any potential tort claims filed against such federally funded program employees, and the insurer of such a tribal entity may not assert sovereign immunity of the Tribe as a defense. 25 U.S.C. 450(f)(c)(3)(A).

Additionally, Tribes may waive their own immunity to subject themselves to suits in federal courts. *U.S. v. Oregon*, 657 F.2d 1009 (9th Cir., 1981).

The court in determining whether the Tribe is immune from suit in tribal court looks to the Pascua Yaqui Constitution and tribal ordinances as to waiver of sovereign immunity. The Pascua Yaqui Constitution provides, in pertinent part as follows:

> The Pascua Yaqui Tribe and any person acting within the scope of his or her capacity as an officer or employee of the Pascua Yaqui Tribe shall be immune from suit, unless the Tribal Council enacts an ordinance expressly consenting to suits.

PYT Const. Art XXIV, **SOVEREIGN IMMUNITY**.

This constitutional provision is consistent with the rule established by federal case law that a sovereign's express consent will give jurisdiction to a court over the sovereign, *U.S. v. King,* 395 U.S. 1 (1969); *U.S. V. Testan*, 424 U.S. 392 (1976). In addition, the provision above is in harmony with the rule that an Indian Tribe may consent to suit. *U.S. v. Oregon*, 657 F.2d. 1009 (9th Cir., 1981).

The Court's general civil jurisdiction statutes provide:

> Nothing in this Title shall be construed to affect a waiver of sovereign immunity of the Pascua Yaqui Tribe, its enterprises, division, or other entities, or its employees or officials.

PYTC Tile 20 – Civil Actions, Jurisdiction, Sec. 101(k).

The court reviewed the Gaming ordinance, Title 6, and although it found a section that allows for a limited waiver of the Tribe's sovereign immunity by the Tribe for tort claims up to two million dollars ($2,000,000.00), §§ 14.10, 14.50, 14.60, it could not find any ordinance which waives the Tribe's sovereign immunity in contract cases. The Gaming ordinance, instead, explicitly states that the Tribe has not waived its immunity from suit in cases other than tort claims:

> The Tribe expressly retains its sovereign immunity form suit for those claims or causes of action for which a waiver is not expressly granted pursuant to the provisions of this chapter. Nothing contained in this chapter shall prohibit the Tribe from waiving its sovereign immunity by separate ordinance to permit claims not included in this chapter.

PYTC, Title 6, Gaming Ordinance, § 14.90 **Retention of Rights**.

The court finds that the Pascua Yaqui Constitution, general civil jurisdiction statutes, and the Gaming ordinance do not waive the Tribe's immunity from suit in cases other than tort claims.

GCA's COUNTERCLAIMS ARISING OUT OF THE JUNE 1, 2008 GCA SERVICE CENTER CONTRACTS SHOULD BE DISMISSED, BASED ON THE UNEQUIVOCAL CONTRACT TERMS THAT PYT GAMING DID NOT WAIVE ITS SOVEREIGN IMMUNITY IN THE CASH ACCESS SERVICE AGREEMENT, CENTRAL CREDIT CHECK WARRANTY SERVICE AGREEMENT, AND THE REDEMPTION DEVICE SERVICE AGREEMENTS.

The Supreme Court has ruled that when a Tribe consents to binding arbitration under state law, where an arbitration award may be enforced in a court of competent jurisdiction, as defined by state law and a uniform arbitration law, as a state district court, that a Tribe has waived its sovereign immunity and consents to be sued in a state court for purposes of enforcing the binding arbitration decision. *C. & L. Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001).

GCA makes a similar argument to that made in C& L., that once the parties agreed to allow a forum to resolve a dispute, the PYT Gaming waived its immunity to be sued through a counterclaim. The respondent argued that by entering into the contract with GCA and agreeing to allow the tribal court to decide disputes arising out of the contract, the Tribe thereby consented to a counterclaim under all of the contracts involved in this lawsuit. The court agrees with the movant that the current contract provision as to governing laws differs from the arbitration clause found in *C. & L. Enterprises*, because the Tribe is not mandated to go to arbitration, and even if it were to do so, such an award would not be binding. The court finds that such an arbitration clause does not serve as a waiver of the Tribe's or PYT Gaming's immunity. Nor did the plaintiff waive its immunity to be sued under the June 1, 2008 agreements, based on the mere fact that the PYT Gaming had provided through its agreements for a choice of forum and choice of law in the event of contract disputes, in documents signed by GCA and PYT Gaming, and that Pascua Yaqui Courts would interpret the contract according to Pascua Yaqui law, when read in harmony with paragraph 19, Governing Laws, of the contract which provides that "**[b]y entering into this Agreement, Service Center does not waive any right, privilege, or status including but not limited to, sovereign immunity**." (emphasis added), Cash Access Service Agreement Additional Terms and Conditions ¶ 27, Central Credit Check Warranty Service Agreement Additional Terms and Conditions ¶ 26, and Redemption Device Service Agreement Standard Terms and Conditions ¶ 19.

There is a strong presumption against waiver of tribal sovereign immunity. *Demontiney v. U.S.*, 255 F.3d 801, 812 (9th Cir. 2001) (citing *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1985). Waivers are "interpreted liberally in favor of the Tribe and restrictively against the claimant." *Maryland Casualty Co. v. Citizens Nat. Bank of West Hollywood*, 361 F.2d 517, 521 (1966). In all circumstances, including contract actions, overwhelming legal precedent provides that the sovereign immunity of an Indian nation may not be waived by implication, but the waiver must be express. *American Indian Agricultural Credit Union Consortium, Inc. v. Standing Rock Tribe*, 780 F2d 1374, 1378 (8th Cir. N.D. 1985). Courts generally will not infer a waiver from contract terms, however detailed. *Ramey Construction Co., Inc. v. Apache Tribe of Mescalero Reservation*, 673 F. 2d 315, 319 (10th Cir. 1982).

The Tribal Council has the power to enact ordinances subject to applicable federal law and the Constitution to regulate activities including civil actions and gambling and gaming. Id. Sec. t. It may choose to waive its immunity when it negotiates contracts with entities or individuals doing business with the Tribe. In this case, it chose not to in the June 1, 2008 Agreements, and there has been no action by the Tribe or PYT Gaming to waive its immunity from suit in those Agreements. Based on the Tribe's and PYT Gaming's sovereign immunity, the GCA contract claim arising out of the cash access service agreement, central credit check warranty service agreement, and the redemption device service agreements, filed against the Gaming Division should be dismissed.

While this result may strike some as unfair, the Court notes that the doctrine of sovereign immunity has been in existence since the inception of the United States. The Court further points out that the parties entered an arm's length transaction to which both may have negotiated that the Tribe make a limited waiver of its immunity as a condition of entering their business relationship. In this case, as a party who may negotiate terms and conditions of a contract, the plaintiffs were in as good a position as most to recognize and take action to reduce the risks associated with doing business with a tribal sovereign.

GCA'S COUNTERCLAIM ARISING OUT OF THE MAY 8, 2012 WESTERN MONEY SYSTEMS CONTRACT IS A SEPARATE TRANSACTION FROM THE JUNE 1, 2008 CONTRACTS ABOVE.

As to the May 8, 2012 contract between Western Money Systems (Western Money) and PYT Gaming, unlike the earlier 2008 contract entered into between PYT Gaming and GCA, which explicitly reserved the Tribe's right not to waive sovereign immunity, the Western Money and PYT Gaming are silent as to sovereign immunity. PYT Gaming argues that GCA does not have standing to sue on behalf of Western Money, because according to records with the Arizona Secretary of State, the two companies are listed as separate entities.

GCA HAS STANDING TO SUE ON BEHALF OF WESTERN MONEY.

The respondent provided copies of the GCA and Western Money's articles of merger filed under Nevada law, that supports its position that it may maintain counterclaims, because PYT Gaming waived its immunity to suit in Pascua Yaqui Court in the agreements. As to choice of laws, the Western and PYT Gaming agreement provided that the parties had agreed that Nevada law would apply to the agreement. Western Money Agreement Addendum ¶ 7.

Although PYT Gaming argues that the Western Money agreement contains a choice of law provision, because the contract did not contain language that the Tribe or Gaming Division waived the Tribe's sovereign immunity,

Counterclaimants have filed documents regarding the legal status of GCA and Western Money, and the Court finds that based on the State of Delaware Secretary of State Merger Documents and Nevada corporate merger documents, that the counterclaim on behalf of Western can be filed by GCA as the "surviving Constituent entity" with the "Merging Constituent Entity," Western Money.

GCA's COUNTERCLAIMS ARISING OUT OF THE MAY 8, 2012 WESTERN MONEY SERVICE CENTER CONTRACTS SHOULD NOT BE DISMISSED, BECAUSE THE AGREEMENT DOES NOT CONTAIN UNEQUIVOCAL CONTRACT TERMS THAT PYT GAMING DID NOT WAIVE ITS SOVEREIGN IMMUNITY.

Based on the authorities cited above, any waivers of sovereign or tribal immunity must be unequivocally expressed. *U.S. v. King*, 395 U.S.1 (1969); *Santa Clara v. Martinez*, 436 U.S. 49, (1978). In the sovereign immunity cases, the Tribe may raise the defense as a shield to a lawsuit filed against it, and Tribes must by statute or resolution explicitly waive sovereign immunity to be sued in Tribal, State, or federal courts. See PYTC, Title 6, Gaming Ordinance, § 14.90 **Retention of Rights,** *Kiowa Tribe v. Manufacturing Technologies, U.S. V. Oregon, Santa Clara v. Martinez. Citations omitted.*

However, it is well established that when the United States or an Indian Tribe *initiates* a lawsuit, a defendant may assert counterclaims that sound in recoupment even absent a statutory waiver of immunity. See e.g. *United States v. Forma*, 42 F.3d 759, 764 (2d Cir. 1994); *U.S. V. Tsosie*, 92 F.3d 1037, 1043 (10th Cir. 1996); *Rosebud Sioux Tribe v. Val-U Constr, Co. of South Dakota*, see citation below.

GCA's argument that it has a right to recoupment under the Western Money Agreement has support from several federal court of appeals' decisions. The doctrine of recoupment can operate as a limited waiver of tribal sovereign immunity in cases where an Indian Tribe sues another party. In *Berry v. Asarco, Inc.* 439 F.3d 636 (10th Cir. 2006), for example, the court held that tribal sovereign immunity was not a bar to a counterclaim for common law contribution and indemnity in an action brought by an Indian Tribe to recover

damages from a mining company for environmental contamination of its land. *Berrey* adopted a three prong test for recoupment: A claim must "(1) arise from the same transaction or occurrence as the plaintiffs suit: (2) seek relief of the same kind or nature as the plaintiffs suit; and (3) seek an amount not in excess of the plaintiffs claim." Id at 645.

The doctrine of recoupment has also been applied to overcome the defense of tribal sovereign immunity by the 8th Circuit. In *Rosebud Sioux Tribe v. Val-U Constr. Co. of South Dakota, Inc.*, 50 F.3d 560 (8th Cir.1995), the Court held that a defendant contractor was not barred from asserting a counterclaim for breach of contract in a lawsuit commenced by the Tribe for breach of the same contract. "When a tribe brings a lawsuit," the court noted, "it does not waive immunity for counterclaims. . . except for matters asserted in recoupment." Id at 562. Citing the 10th Circuit decision in *Jicarilla Apache v. Andrus*, 687 F.2d 1324 (10th Cir. 1982), the court continued, "[r]ecoupment is a defensive action that operates to diminish the plaintiffs recovery rather that to assert affirmative relief." Id. See also

Based on the agreement attached to the counterclaimant's response to the PYT Gaming's motion to dismiss, the Court can presume that the contract between Western Money and PYT Gaming was entered into validly, because it was purportedly signed by Wendell Long, CEO, of the Gaming Enterprise Division, and Scott Betts, Western Money. In the absence of evidence to the contrary, the Tribe's argument, that the Western Money contract may not be a valid one, due to lack of Pascua Yaqui Council ratification, fails.

IT IS ORDERED that the PYT Gaming's request to dismiss the CGA counterclaim based on its sovereign immunity shall be granted, as to the June 1, 2008 Cash Access Service Agreement, Central Credit Check Warranty Service Agreement, and the Redemption Device Service Agreements, for good cause shown.

IT IS FURTHER ORDERED that the PYT Gaming's request to dismiss the CGA counterclaim based on its sovereign immunity shall be denied, as to the May 8, 2012 Western Money Agreement.

SO ORDERED THIS 28th DAY OF APRIL, 2014.

Associate Judge, Pascua Yaqui Tribal Court

CC: Date: 04/30/14

✓ Plaintiff ✓ Defendant

Clerk