Case No. 07-5104

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NATIVE AMERICAN DISTRIBUTING,
a Division of Flat Creek Cattle Co., Inc.,
a Missouri Corporation, and JOHN DILLINER,
an individual,

Plaintiffs/Petitioners-Appellants

vs.

SENECA-CAYUGA TOBACCO COMPANY,
an enterprise of the Seneca-Cayuga Tribe of Oklahoma,
LEROY HOWARD, an individual, FLOYD LOCKAMY,
an individual, and RICHARD WOOD, an individual,

Defendants/Respondents-Appellees

On Appeal from the United States District Court
for the Northern District of Oklahoma
Case No. 4:05-CV-00427-TCK-SAJ
Honorable Terrence Kern, U.S. District Judge

BRIEF OF DEFENDANTS/APPELLEES

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ORAL ARGUMENT NOT REQUESTED

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Defendants/Respondents-Appellees.	)	

CORPORATE DISCLOSURE STATEMENT

The Seneca-Cayuga Tobacco Company ("SCTC"), Respondent-Appellee here and Defendant below, was at all relevant times an enterprise of a federally recognized Indian tribe – the Seneca-Cayuga Tribe of Oklahoma. As a governmental entity, SCTC does not constitute a non-governmental corporate party for purposes of FED.R.APP.P. 26.1.

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There are no prior or related appeals.

STATEMENT OF RELATED CASES

There are no prior or related appeals.

JURISDICTIONAL STATEMENT

This is an appeal from an Order of the United States District Court for the Northern District of Oklahoma (Hon. Terrence Kern), dismissing the action for lack of subject matter jurisdiction, on grounds that the Seneca-Cayuga Tobacco Company, as an enterprise of the Seneca-Cayuga Tribe of Oklahoma – a federally recognized Indian tribe – enjoys immunity from suit as a matter of Federal Law. (Order and Opinion of Hon. Terrence Kern Granting Motions to Dismiss (Aplt. App. 372-98)). Plaintiffs/Petitioners-Appellants also appeal from an Order of the United States District Court for the Northern District of Oklahoma affirming Magistrate Judge Frank H. McCarthy's Order denying plaintiffs' motion for discovery on jurisdictional issues. (Order of Hon. Terrence Kern (Aplt. App. 213-14), *aff'g*, Order of Magistrate Frank H. McCarthy (Aplt. App. 194-200)).

Federal subject matter jurisdiction in the District Court was predicated on 15 U.S.C. §§ 1, 13a , and 28 U.S.C. § 1331. (Order and Opinion of Hon. Terrence Kern (Aplt. App. 9-10)). The District Court's dismissal Order – dismissing all claims against all defendants with prejudice – was entered on June 5, 2007. *Id*. at 398. The District Court's Order affirming the denial of plaintiffs' motion for discovery on jurisdictional issues was entered on February 8, 2006. (Order of Hon.

Terrence Kern (Aplt. App. 213-14), *aff'g*, Order of Magistrate Frank H. McCarthy (Aplt. App. 194-200)). Plaintiffs filed a Notice of Appeal on July 3, 2007. (Aplt. App. 399-400). This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the lower court clearly erred in finding that the Seneca-Cayuga Tobacco Company, as an enterprise of a federally recognized Indian tribe – the Seneca-Cayuga Tribe of Oklahoma – enjoys immunity from plaintiffs' lawsuit as a matter of Federal Law absent congressional authorization or an express and unequivocal waiver of tribal immunity by the Tribe.

2. Whether the lower court clearly erred in recognizing that the Seneca-Cayuga Tribe of Oklahoma's government, through Resolution # 03-070699, declared the Seneca-Cayuga Tobacco Company ("SCTC") to be an enterprise of the tribal government, and as otherwise supported by the record below, so that the "sue and be sued" clause in the Corporate Charter of the Seneca-Cayuga Tribe of Oklahoma does not constitute an explicit or effective waiver of SCTC's immunity from this lawsuit.

3. Whether the lower courts findings were clearly erroneous that the legal effect of Seneca-Cayuga Tribe of Oklahoma Resolution # 03-070699 (the

tribal legislation creating the Seneca-Cayuga Tobacco Company), and other documents considered by the District Court, can be determined based on the plain, undisputed text of the Resolution and documents themselves – without resorting to additional discovery, including parol evidence.

4. Whether the District Court abused its discretion by affirming Magistrate Judge Frank H. McCarthy's Order denying plaintiffs' motion for discovery on jurisdictional issues.

STATEMENT OF THE CASE

A. Course of Proceedings Below

Native American Distributing ("NAD") and John Dilliner ("Dillner"), Petitioners-Appellants here and Plaintiffs below (collectively, the "Plaintiffs"), initiated this action, in July 2005, against the Seneca-Cayuga Tobacco Company ("SCTC"), Respondent-Appellee here and Defendant below, and three tribal officers/officials: Leroy Howard (SCTC's former CEO and former Chief of the Tribe); Floyd Lockamy (SCTC's former General Manager); and Richard Wood (SCTC's former Plant Manager); these three tribal officers/officials, Respondents here and Defendants below, are sometimes collectively referred to hereafter as the "Individual Defendants". [Complaint (Aplt. App. 9-17)]. Plaintiffs' Complaint alleged that SCTC, under the direction and control of the Individual Defendants, breached oral and written tobacco distribution agreements. *Id*. at 11-13. The

Complaint further alleged that SCTC, through the Individual Defendants, engaged in a conspiracy to manipulate tobacco markets. *Id*. at 11, 14-16.

The Individual Defendants filed a motion to dismiss under FED.R.CIV.P. 12(b)(1) for lack of subject matter jurisdiction. (Motion to Dismiss (Aplt. App. 18-25)). Specifically, the Individual Defendants asserted that as tribal officers/officials of the Seneca-Cayuga Tribe of Oklahoma, they were immune from suit as a matter of Federal Law. *Id*. at 23-25. The Seneca-Cayuga Tobacco Company filed a separate motion to dismiss pursuant to FED.R.CIV.P. 12(b)(1) for lack of subject matter jurisdiction. [Mot. to Dismiss for Lack of Subject and Br. in Supp. (Aplt. App. 215-20)]. SCTC asserted that as an enterprise of a federally recognized Indian tribe – the Seneca-Cayuga Tribe of Oklahoma – it has immunity from suit as a matter of Federal Law, and that it had not expressly and unequivocally waived its immunity. *Id*. at 215.

Plaintiffs argued that SCTC had waived its immunity from plaintiffs' lawsuit by virtue of a "sue and be sued" clause contained – not in the organic legislation creating SCTC – but rather in the Corporate Charter of the Seneca-Cayuga Tribe of Oklahoma, issued by the U.S. Secretary of Interior on May 29, 1939, pursuant to 25 U.S.C. § 477. (Resp. in Opp'n to Mot. to Dismiss (Aplt. App. 221-39)). The plaintiffs opposed the Individual Defendants' motion to dismiss, arguing that the

Individual Defendants had waived their immunity from the lawsuit. [Resp. in Opp'n to Mot. to Dismiss (Aplt. App. 64-80)].

In the interim, plaintiffs filed Plaintiffs' Brief Requesting Limited Discovery (purportedly, a motion for discovery on jurisdictional issues), which was referred to Magistrate Judge Frank H. McCarthy (Aplt. App. 150-58). Magistrate McCarthy denied the discovery motion. (Aplt. App. 194-200). Specifically, Magistrate McCarthy ruled that "Plaintiffs have not explained how the requested discovery would even arguably demonstrate the expression of an unequivocal waiver of sovereign immunity as to them . . . ." *Id*. at 197 (original emphasis). Pursuant to FED.R.CIV.P. 72(a), plaintiffs timely filed an objection to the Order denying discovery. [Mot. to Reconsider (Aplt. App. 201-205)]. Subsequently, the District court affirmed the Order. [Order of Hon. Terrence Kern (Aplt. App. 213-14)]. Specifically, the District Court held that the Magistrate Judge's Order "is not clearly erroneous or contrary to the law." *Id*. at 213.

After resolution of the discovery issue, the parties the parties submitted multiple briefs, numerous affidavits and other documents in support of their respective motions to dismiss based on sovereign immunity. (Aplt. App. *passim*). Among those affidavits and documents, the District Court considered the following: Affidavit of Chief Paul Spicer (Chief of the Seneca-Cayuga Tribe of Oklahoma) (Aplt. App. 46-47); Affidavit of John Dillner (an officer of NAD and

Seneca-Cayuga Tribe member) (Aplt. App. 89-91); Second Affidavit of John Dillner (Aplt. App. 244-46); the Corporate Charter of the Seneca-Cayuga Tribe of Oklahoma (issued by the U.S. Secretary of Interior on May 29, 1939) (Aplt. App. 82-89); the Constitution and Bylaws of the Seneca-Cayuga Tribe of Oklahoma (approved by the U.S. Secretary of the Interior on April 26, 1937) (Aplt. App. 48-54); and Seneca-Cayuga Tribe of Oklahoma Resolution # 03-070699 (i.e., the tribal legislation creating the Seneca-Cayuga Tobacco Company) (Aplt. App. 55-57).

On June 5, 2007, after considering the briefs, affidavits and other documents submitted by the parties, and having reviewed applicable federal statutes and cases regarding tribal sovereign immunity, Judge Kern entered a memorandum Order regarding the separate pending motions to dismiss for lack of subject matter jurisdiction on grounds of tribal sovereign immunity. (Order and Opinion of Hon. Terrence Kern (Aplt. App. 372-98)).

The District Court ruled that SCTC and the Individual Defendants were immune from suit as a matter of federal law absent a clear and unequivocal waiver or congressional abrogation. *Id*. at 12. The Court went on to hold that Defendants had not waived their immunity from suit, and the Court thus lacked subject matter jurisdiction. *Id*. at 393-94, 398. The District Court rejected plaintiffs' contention

that the sue and be sued clause in the tribal corporate charter functioned as a waiver of this sovereign immunity.

Specifically, the Court held that SCTC, as a tribal enterprise, has immunity from plaintiffs' lawsuit as a matter of Federal Law absent a clear waiver of such immunity. (Aplt. App. 12). The Court went on to hold that SCTC had not waived its immunity from plaintiffs' lawsuit. *Id.* at 393. Specifically, the Court concluded that the undisputed text of Seneca-Cayuga Tribe of Oklahoma Resolution # 03-070699 declares SCTC to be an enterprise of the constitutional entity named the Seneca-Cayuga Tribe of Oklahoma, and not the corporate tribal entity named the Seneca-Cayuga Tribe of Oklahoma (the "Tribal Corporation") (as defined in 25 U.S.C. §477). *Id*. at 393. The Court held that because SCTC is an enterprise of the constitutional entity, the "sue and be sued" clause in the corporate charter of the Tribal Corporation does not apply to SCTC and does not constitute an explicit waiver of SCTC's immunity from plaintiffs' lawsuit. *Id*.

The District Court concluded that tribal sovereign immunity extends to the Individual Defendants, and thus they are likewise immune from suit. *Id*. at 397. Accordingly, the Court dismissed the action in its entirety with prejudice as to all defendants for lack of subject matter jurisdiction. *Id*. at 398.

On July 3, 2007, plaintiffs filed a Notice of Appeal from June 5, 2007 Order [Notice of Appeal (Aplt. App. 399-400)]. Plaintiffs also appealed from the District

Court's Order affirming the Magistrate's Order denying plaintiffs' motion for discovery. *Id.*

B. Facts

The Seneca-Cayuga Tribe of Oklahoma is a federally-recognized sovereign Indian Tribe acknowledged under treaties with the U.S. government dating back to at least the 1830s.[1] 67 Fed. Reg. 46,328 (2002). The Tribe's reservation is located in northeastern Oklahoma and has been in existence since 1867 (well before Oklahoma gained Statehood).

In 1934, the United States Congress approved the Indian Reorganization Act [48 Stat. 984, *codified at* 25 U.S.C. §§ 461 *et seq.* ("IRA")]. The IRA permitted Indian tribes to organize separate constitutional and corporate entities, either or both of which could be used by the Indian tribe to transact business for purposes of gaining economic independence. 25 U.S.C. §§ 461, 476(a), and 477. The Oklahoma Indian Welfare Act [49 Stat. 1967, *codified at* 25 U.S.C. §§ 501-509] incorporated the IRA by reference and applies to Oklahoma tribes.

[1] It is undisputed that the Seneca-Cayuga Tribe of Oklahoma is a federally-recognized sovereign Indian Tribe. The Tribe appears on the list of federally recognized tribes in the Federal Register. 67 FED. REG. 46,328 (2002). Appearance on the list of federally acknowledged Indian Tribes grants the Tribe immunities and privileges, including immunity from suit. 67 FED. REG. 46,328 (2002).

On May 15, 1937, the Seneca-Cayuga Tribe of Oklahoma ratified an amendment to its then existing constitution and adopted the Constitution and By-Laws of the Seneca-Cayuga Tribe of Oklahoma (the "Constitution"). (Constitution and By-Laws of the Seneca-Cayuga Tribe of Oklahoma (Aplt. App. 48-54)). The Constitution and By-Laws were approved by the U.S. Secretary of the Interior on April 26, 1937. *Id*. The Constitution expressly provides that the Tribe, as a constitutional or governmental entity, has the authority to transact business through the Tribal Business Committee (i.e., the Tribe's legislature): "[t]he Business Committee shall have the power to transact business and otherwise speak or act on behalf of the Seneca-Cayuga Tribe in all matters on which the Tribe is empowered to act." (Aplt. App. at 49). (The constitutional entity is sometimes referred to hereafter as the "Tribe").

Approximately one month after the creation of this reorganized government, the Tribe organized a separate corporate entity also named "the Seneca-Cayuga Tribe of Oklahoma." (the "Tribal Corporation"). The Corporate Charter of the Tribal Corporation (the "Corporate Charter"), was issued by the U.S. Secretary of Interior on May 29, 1939. [Corporate Charter of the Seneca-Cayuga Tribe of Oklahoma (Aplt. App. 82-89)]. Like the Tribe, the Tribal Corporation was granted the authority to transact business. *Id*. However, unlike the Tribe, the Tribal

Corporation has not transacted business since its inception, and had never been capitalized or operated. (Affidavit of Chief Paul Spicer (Aplt. App. 46-47)).

In July 1999, pursuant to the authority conferred to it by the Constitution, the Tribal Business Committee passed Seneca-Cayuga Tribe of Oklahoma Resolution # 03-070699 (the "Resolution"). (Seneca-Cayuga Tribe of Oklahoma Resolution # 03-070699 attached (Aplt. App. 55-57)). The Resolution, which was signed by then acting Chief, Jerry R. Dillner, created the business entity that would become the Seneca-Cayuga Tobacco Company ("SCTC"). *Id*. *See also* Order and Opinion of Hon. Terrence Kern (Aplt. App. at 377) ("it is undisputed that the Resolution created the tribal enterprise that later became known as SCTC.").

The Resolution expressly states that SCTC would be an economic enterprise of the Tribe, not a legally separate and distinct corporate entity: "[T]he Seneca-Cayuga Tribal Business Committee hereby creates an operating division of the Tribe, a tribal enterprise to engage in (a) the manufacture, sale, and distribution of tobacco products; and (b) any other lawful commercial activity; and declares such Tribal enterprise and its activities as essential governmental functions . . . ." (Aplt. App. at 55) (emphasis added). The Resolution does not refer to the Corporate Charter or the Tribal Corporation. *Id*.

As an economic enterprise of the Tribe, SCTC enjoys the same immunity from suit as the Tribe. In recognition of such immunity, the Resolution provided a limited waiver of sovereign immunity:

> The Seneca-Cayuga Business Committee waives the Tribal immunity from suit set out in [the] management agreement and **only to Humble and Riggs and Associates LLC** for enforcement of the arbitration, forum, and other obligations, rights, and duties set forth in the management agreement . . . .

(Aplt. App. at 55) (emphasis added). The plain language of the Resolution makes clear that this limited waiver of immunity from suit applies only to Humble Riggs and Associates ("H&R"), not plaintiffs.

Approximately three years after the Tribe's legislature passed the Resolution, SCTC and Native American Distributing ("NAD") entered into an International Distributor Agreement (the "NAD Agreement"). [International Distributor Agreement (Aplt. App. 30-36)]. Roughly two years later, NAD and Dillner (an officer of NAD and Tribe member), filed the instant action, alleging that SCTC had breached the NAD Agreement. [Complaint (Aplt. App. 9-17)].

The NAD Agreement did not contain a waiver, limited or otherwise, of sovereign immunity. (International Distributor Agreement (Aplt. App. 30-36)). Notwithstanding that the Resolution creating SCTC contains no reference to the Corporate Charter, plaintiffs asserted in their Complaint that SCTC had waived its

immunity from suit by virtue of the "sue and be sued" clause contained in the Corporate Charter.

Based on the undisputed facts in the record (including an examination of the documents discussed above), the District Court properly concluded that SCTC and the Individual Defendants had not waived their immunity from plaintiffs' lawsuit, and the Court thus lacked subject matter jurisdiction. *Id*. at 393-94, 398. Specifically, the District Court judge concluded that the undisputed text of the Resolution declares SCTC to be an enterprise of the constitutional entity named the Seneca-Cayuga Tribe of Oklahoma, and not the dormant Tribal Corporation. *Id*. at 393. The Court held that because SCTC is an enterprise of the constitutional entity, the "sue and be sued" clause in the corporate charter of the Tribal Corporation does not apply to SCTC and does not constitute an explicit waiver of SCTC's immunity from plaintiffs' lawsuit. *Id*. Accordingly, the Court dismissed the action in its entirety with prejudice for lack of subject matter jurisdiction. *Id*. at 398.

ARGUMENT

I. The Standard of Review on Appeal

The United States Supreme Court has explained that a claim of tribal immunity goes to a court's subject matter jurisdiction: "the suability of the United States and the Indian Nations, whether directly or by cross-action, depends upon affirmative statutory authority. Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void." *U.S. v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506, 514 (1940) (emphasis added). The Tenth Circuit has held that "[t]ribal sovereign immunity is a matter of subject matter jurisdiction, . . . which may be challenged by a motion to dismiss under FED.R.CIV.P. 12(b)(1)." *E.F.W. v. St. Stephen's Indian High School*, 264 F.3d 1297, 1302-03 (10th Cir. 2001) (citing *Fletcher v. U.S.*, 116 F.3d 1315, 1323-24 (10th Cir. 1997); and *Holt v. U.S.*, 46 F.3.d 1000, 1002-03 (10th Cir. 1995)).

The Court of Appeals reviews de novo the conclusions of law supporting dismissal under Rule 12(b)(1) for lack of subject matter jurisdiction due to tribal sovereign immunity. *St. Stephen's Indian High School*, 264 F.3d at 1302-03. *See also, Florida Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d. 1126, 1128 (11th Cir. 1999). The Court of Appeals' "independent determination of the issues uses the same standard employed by the district court." *St. Stephen's Indian High School*, 264 F.3d at 1303. The Court of Appeals reviews

the lower courts factual findings for clear error. *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76, 84 (2d Cir. 2001).

A motion to dismiss under FED R. CIV. P. 12(b)(1) on grounds of sovereign immunity can take one of two forms – either (1) a facial challenge or (2) factual attack. *Id*. "In addressing a factual attack, the court does not 'presume the truthfulness of the complaint's factual allegations,' but 'has **wide discretion** to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1).'" *Id*. at 1303 (quoting *Holt v. U.S.*, 46 F.3d 1000, 1002-03 (10th Cir. 1995) (emphasis added)). In other words, the District Court has broad discretion in how to determine whether it lacks jurisdiction due to tribal immunity. This discretion reflects a balancing of the tribe's right to be free from unauthorized suit, while allowing the court some leeway to determine its own jurisdiction short of burdening tribes with oppressive costs of discovery in proving lack of a waiver. In this case, the District Court construed defendants' Rule 12(b)(1) motions as raising a "**factual attack**" to the plaintiffs' allegations regarding subject matter jurisdiction [Order and Opinion of Hon. Terrence Kern (Aplt. App. at 379)].

Plaintiffs argue that the magistrate judge and the district court unduly limited the scope of discovery. In the Tenth Circuit, the Court of Appeals "review[s]

[such] orders relating to discovery for an abuse of discretion." *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, *1520 (10th Cir. 1995) (other citations omitted).[2]

II. The District Court Properly Held SCTC Is A Tribal Entity Clothed With The Sovereign Immunity Of The Seneca-Cayuga Tribe of Oklahoma.

Appellants' Opening Brief offers little more than personal opinions on the wisdom of perpetuating the doctrine of tribal sovereign immunity from suit. The threshold issue in this case is whether the Seneca-Cayuga Tobacco Company ("SCTC"), as an enterprise of a federally recognized Indian tribe, enjoys immunity from plaintiffs' lawsuit as a matter of **existing** Federal Law.

"Indian tribes have long been recognized as possessing common-law immunities from suit co-extensive with those enjoyed by other sovereign powers including the United States as a means of protecting tribal political autonomy and recognizing their tribal sovereignty which substantially predates our Constitution." *Pan American Co. v Sycuan Bank of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989), *citing, Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) and *United States v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506 (1940) (other citations omitted) (emphasis added). For nearly a century, the U.S. Supreme Court has recognized that Indian tribes are immune from suit in any State or Federal court absent federal

[2] Appellants' incorrectly assert in their Opening Brief that "the standard of review of all issues in this case should be de novo." (Brief at pg. 10).

authorization or clear and express waiver by the tribal sovereign. *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998); *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991); *Santa Clara Pueblo*, 436 U.S. 49 (1978); *U.S. v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506 (1940); and *Turner v. U.S.* 248 U.S. 354, 358 (1919) (holding that without authorization from Congress, an Indian Tribe cannot be sued "in any court" without its consent).

This sovereign immunity extends to economic entities owned by tribes. *Kiowa Tribe*, 523 U.S. at 756 (tribal immunity applies whether the tribal activity occurred on or off reservation or was commercial or governmental activity); *Multimedia Games Inc. v. WLGC Acquisition Corp.*, 214 F. Supp. 2d 1131, 1135 (N.D. Okla. 2001), *citing*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). As an economic entity wholly owned by the Tribe and operated by the Tribal Business Committee, SCTC enjoys the full extent of the Tribe's immunity from suit. *See, e.g., Ninigret Development Corp. v. Narragansett Indian Wetuomuck Hous Auth.*, 207 F.3d 21, 29 (1st Cir. 2000) ("[defendant], as an arm of the Tribe, enjoys the full extent of the Tribe's sovereign immunity."); *Dillon v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581, 584 (8th Cir. 1998) ("Because the [tribal agency] did not explicitly waive its sovereign immunity, we lack jurisdiction to hear this dispute."); *Frazier v. Turning Stone Casino*, 254 F. Supp. 2d 295, 305 (N.D.N.Y.

2003) (immunity bars claims related to tribe's alleged misuse of boxer's image for commercial purposes): *Barker v. Menominee Nation Casino*, 897 F. Supp. 389, 393-94 (E.D. Wis. 1995) (tribal casino business chartered under tribal law had tribal immunity "because 'an action against a tribal enterprise is, in essence, an action against the tribe itself.'"), *quoting, Local IV-302 v. Menominee Tribal Enter*., 595 F. Supp. 859, 862 (E.D. Wis. 1984). A tribe does not shed its immunity by embarking on a commercial enterprise. *American Vantage Cos., Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1099-1100 (9th Cir. 2002).

Relying largely on the U.S. Supreme Court case *Kiowa Tribe of Okla.* as well as the Tenth Circuit case of *Ramey Constr. Co., Inc. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315 (10th Cir. 1982), the District Court in this case properly concluded that "SCTC is a tribal entity that is 'clothed with the sovereign immunity of the Tribe' absent an express waiver of such immunity." *Quoting Ramey Constr. Co.*, 673 F.2d at 320.[3] Having correctly resolved this threshold issue, the court then went on to examine whether the SCTC had expressly and unequivocally waived its immunity from plaintiffs' lawsuit.

[3] In addition, the District Court noted that "Plaintiffs do not contend that SCTC was never entitled to sovereign immunity due to its lack of affiliation with the Tribe. Plaintiffs contend that SCTC has expressly waived immunity . . . ." (Aplt. App. at 379)

III. The Court Properly Found That The Tribe Had Not Expressly and Unequivocally Waived Immunity As To Any Claims Brought by Plaintiffs.

U.S. Supreme Court precedents recognize only two exceptions to Tribal sovereign immunity – express, unequivocal, and unambiguous waiver by the Tribe, without resort to implication, or through federal abrogation. *See, e.g., Kiowa Tribe of Okla.,* 523 U.S. at 754, *citing Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering,* 476 U.S. 877, 890 (1986), *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978), and *United States v. USF&G Co.*, 309 U.S. 506, 512 (1940) (Federal law allows the suit, "only where Congress has authorized the suit or the tribe has waived its immunity.")[4] In this case, the parties agree that there is no federal legislation giving plaintiffs the right to sue SCTC. Thus, plaintiffs must prove, by a preponderance of the evidence, that SCTC expressly and unequivocally waived immunity from plaintiffs' lawsuit. *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 84 (2d Cir. 2001). The lower court properly found, based on the record before it, that the plaintiffs failed to meet their burden of proof to rebut the strong presumption against waiver of tribal immunity.

[4] The *Kiowa Tribe* case also rejects the plaintiffs' notion that tribal immunity does not apply to commercial activities by a tribal entity, leaving any such limitation to future Congressional action. 523 U.S. at 755-59 ("our cases have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred"). *See Haile v. Saunooke,* 246 F.2d 293 (4th Cir.) cert. denied 355 U.S. 893 (1957) (tribe immune from suit arising from injuries at on-reservation tourist attraction).

A waiver of tribal immunity from suit "may only be found if the clause unequivocally and expressly indicates the [Tribe's] consent to waive its sovereign immunity." *Pan American Co.*, 884 F.2d at 418, *citing, Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (other citations omitted). "Absent an affirmative textual waiver in the terms of a contractual agreement or tribal constitution, federal courts have consistently declined to find tribal consent to federal jurisdiction." *Id.* (emphasis added). There is a strong presumption against waiver of tribal sovereign immunity. *Demontiney v. U.S.*, 255 F.3d 801, 811 (9th Cir. 2001), *quoting Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) and *citing , Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Pan American Co.*, 884 F.2d at 419.

A. The District Court Properly Held That SCTC Is An Enterprise Of The Tribal Constitutional Entity So That The "Sue And Be Sued" Clause In The Corporate Charter Does Not Constitute An Explicit Waiver Of SCTC's Immunity.

Plaintiffs do not contend that SCTC waived its immunity from this lawsuit by virtue of any clause contained in any agreement between NAD and SCTC. The written agreement between NAD and SCTC – the International Distributor Agreement – does not contain a bargained for waiver, limited or otherwise, of tribal sovereign immunity. (International Distributor Agreement (Aplt. App. 30-36)). NAD instead contends that SCTC waived immunity from this lawsuit by

virtue of a "sue and be sued" clause contained in the Corporate Charter of the Tribal Corporation named "the Seneca-Cayuga Tribe of Oklahoma." (the "Tribal Corporation"), issued by the U.S. Secretary of Interior on May 29, 1939, pursuant to 25 U.S.C. § 477 (Corporate Charter (Aplt. App. 82-89)).

Under Tenth Circuit law, so-called "sue and be sued" clauses, like the one in the Corporate Charter, can function as waivers of sovereign immunity; however, such clauses apply only to the activities of the Tribal corporation, and do not extend to the actions of the Tribe in its governmental capacity. *Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1268 (10th Cir. 1998). *See Ramey Const. Co.*, 673 F.2d at 320 (the presence of a "sue and be sued" clause in a corporate charter does not affect the immunity of the Tribe as a constitutional entity). The Department of the Interior has recognized that a tribal governmental organization "may have as broad or broader economic powers as its business corporation counterpart." (Aplt. App. 18) *citing* Opinion No. M-36545, *Timber as a Capital Asset of the Blackfeet Tribe* (1958).[5]

[5] Appellants complain, without any basis in law or fact, that "[m]anufacturing cigarettes, which degrade the health of the Tribe and the general public, cannot be an 'essential governmental function.'" Plaintiffs miss the point – the question considered by the District Court was whether SCTC is an enterprise of the Tribe. Plaintiffs' assertion that a sovereign cannot own and operate a business enterprise that certain segments of the public may find repugnant is nonsensical. State-run lotteries to fund education and other governmental concerns are now commonplace. Moreover, foreign sovereigns run state-controlled tobacco

The District Court framed the issue as: "whether SCTC in its dealings with plaintiffs, functioned as an enterprise of the Tribe or the Tribal Corporation. If SCTC is an enterprise of the Tribe (as a governmental entity), immunity has not been waived." (Aplt. App. 385.)

Based on the record before it, the District Court properly found SCTC is an enterprise of the tribal constitutional government rather than the corporate tribal entity. The District Court's conclusion is supported in the documents submitted by the parties: Affidavit of Chief Paul Spicer (Chief of the Seneca-Cayuga Tribe of Oklahoma) (Aplt. App. 46-47); Affidavit of John Dillner (an officer of NAD and Tribe member) (Aplt. App. 89-91); Second Affidavit of John Dillner (Aplt. App. 244-46); the Corporate Charter of the Seneca-Cayuga Tribe of Oklahoma (issued by the U.S. Secretary of Interior on May 29, 1939) (Aplt. App. 82-89); and the Constitution and Bylaws of the Seneca-Cayuga Tribe of Oklahoma (approved by the U.S. Secretary of the Interior on April 26, 1937) (Aplt. App. 48-54);

Most importantly, the District Court analyzed Resolution # 03-070699 (the tribal legislation creating the Seneca-Cayuga Tobacco Company) (Aplt. App. 55-

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monopolies that manufacture and sell cigarettes (e.g. state-owned China National Tobacco Corporation is the largest single manufacturer of tobacco products in the world). *See* http://en.wikipedia.org/wiki/China_National_Tobacco_Co. The U.S government has not limited tribal governments' methods of raising revenue for the benefit of their people.

57). The Resolution states SCTC would be an economic enterprise of the Tribe, not a separate and distinct corporate entity: "[T]he Seneca-Cayuga Tribal Business Committee hereby creates an operating division of the Tribe, a tribal enterprise to engage in (a) the manufacture, sale, and distribution of tobacco products; and (b) any other lawful commercial activity; and declares such Tribal enterprise and its activities as essential governmental functions . . . ." (Aplt. App. at 55) (emphasis added). *See Roff v. Burney*, 168 U.S. 218 (1897) (tribes have the power to make their own substantive laws).[6]

Based largely on the undisputed text of Resolution # 03-070699, the District Court found that SCTC is an enterprise of the constitutional entity named the Seneca-Cayuga Tribe of Oklahoma, and not of the corporate tribal entity named the Seneca-Cayuga Tribe of Oklahoma (as defined in 25 U.S.C. §477). *Id*. at 393. The Court held that because SCTC is an enterprise of the constitutional entity, the "sue and be sued" clause in the corporate charter of the Tribal Corporation could not apply to SCTC and does not constitute an explicit waiver of SCTC's immunity from plaintiffs' lawsuit. *Id*.

[6] Consistent with SCTC's essential governmental nature, the Tribe's Chief served as SCTC's Chief Executive Officer; SCTC's tobacco product manufacturing occurred wholly on Indian Land (as defined in 18 U.S.C. §1151) held in trust by the U.S. government for the benefit of the Tribe; SCTC's plant was one of the largest and highest-paying employers of tribe members in Eastern Oklahoma; and proceeds generated from SCTC funded on-reservation social welfare programs.

In light of Tenth Circuit law and the undisputed facts, the District Court properly concluded that SCTC is immune from suit, and SCTC did not waive its immunity. The Court properly concluded that it lacked subject matter jurisdiction and dismissed the case.

B. The District Court Properly Concluded That Policy Concerns Have No Place In Sovereign Immunity Analysis.

Courts have repeatedly declined to find waivers of tribal sovereign immunity based on "policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of the case." *Multimedia Games Inc.*, 214 F. Supp. 2d at 1140, *quoting, Ute Distr. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998). "Waiving sovereign immunity does not arise through silence, implication or innuendo . . . . The courts have consistently held that the waiver of immunity must be beyond doubt, whether it applies to the government or to the tribe itself." *Multimedia Games*, 214 F. Supp. 2d at 1140, citing, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148, n. 14 (1982) (emphasis added). "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." *Pan American Co.*, 884 F.2d at 418, *citing, United States v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506 (1940).

In light of the foregoing undisputed legal principles, it is clear that the District Court properly concluded that policy considerations, as a matter of law, had no place in its analysis of sovereign immunity in this case.

C. The District Court Did Not Abuse Its Discretion By Affirming The Magistrate's Order Denying Plaintiffs' Motion for Discovery On Jurisdictional Issues.

Plaintiffs also appeal from the Order of the District Court affirming Magistrate Judge McCarthy's Order denying plaintiffs' motion for discovery on jurisdictional issues. (Order of Hon. Terrence Kern (Aplt. App. 213-14), *aff'g*, Order of Magistrate Frank H. McCarthy (Aplt. App. 194-200)). Magistrate McCarthy ruled that "Plaintiffs have not explained how the requested discovery would even arguably demonstrate the expression of an unequivocal waiver of sovereign immunity as to them . . . ." *Id*. at 197 (emphasis in original). The District Court held that the Magistrate Judge's Order "is not clearly erroneous or contrary to the law." *Id*. at 213.

Plaintiffs have failed to show and cannot show that the District Court abused its discretion by affirming Magistrate Judge Frank H. McCarthy's Order denying plaintiffs' motion for discovery on jurisdictional issues. The District Court had "wide discretion" to consider evidence to resolve disputed jurisdictional facts under Rule 12(b)(1). As set forth in detail above, the District Court considered countless documents to resolve the jurisdictional facts in this case.

Moreover, plaintiffs still have not shown and cannot show how discovery would have assisted them in demonstrating a clear, express and unequivocal waiver of sovereign immunity. Given the legal requirement that waiver must be express and unambiguous, it is only common sense that any waiver of sovereign immunity would be contained in a document put before the Court, by plaintiffs, who should have bargained for the waiver and included it in an agreement with the Tribe. The District Court simply determined the legal effect of all documents – none are alleged to be absent – related to the transactions at issue and found none contained a waiver of tribal immunity..

For all the foregoing reasons, this Court should affirm the ruling of the District Court in all respects.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of FED.R.APP.P. 32(a)(7)(B), because this brief contains 5,570 words, excluding the parts of the brief exempted by FED.R.APP.P. 32(a)(7)(B).

This brief also complies with the typeface requirements OF FED.R.APP.P. 32(a)(5) and type style requirements of FED.R.APP.P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Word 2003, in 14 pt. Times New Roman typeface.

/s/James W. Tilly
James W. Tilly

CERTIFICATE OF DIGITAL SUBMISSION

I, James W. Tilly, hereby certify on this 29th day of October, 2007, that:

(1) all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and;

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/s/James W. Tilly
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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 2007, a true and correct copy of the foregoing *Brief of Defendants/Appellees*, was mailed by first class mail, postage prepaid, to**:**

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