Case No. DF-105,300

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Loyman Cossey,
Plaintiff/Respondent,

v.

Cherokee Nation Enterprises, L.L.C., formerly known as Cherokee Nation Enterprises, Inc., and Cherokee Nation Enterprises, Inc.,
Defendants/Petitioners.

REPLY BRIEF OF DEFENDANTS/PETITIONERS CHEROKEE NATION ENTERPRISES, L.L.C. AND CHEROKEE NATION ENTERPRISES, INC.

Appeal from the District Court of Rogers County
The Honorable Dynda Post, Presiding

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SEAN BURRAGE, OBA # 15078
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February 26, 2008

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SUBJECT INDEX

The Cherokee Nation has not consented to suit in state court and, indeed, cannot - even if it were so inclined.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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REPLY BRIEF OF DEFENDANTS/PETITIONERS

COME NOW the Defendants/Petitioners, Cherokee Nation Enterprises, L.L.C., formerly known as Cherokee Nation Enterprises, Inc., and Cherokee Nation Enterprises, Inc. (collectively, "CNE"), and offer this Reply to the "Response Brief of Plaintiff/Respondent, Loyman Cossey" ("Plaintiff's Response").

OVERVIEW

This case is before this Court on a Petition for *Certiorari* for interlocutory review of the Trial Court's denial of CNE's Motion to Dismiss for lack of subject matter and personal jurisdiction. Although CNE is an "arm of the tribe" and is entitled to assert the sovereign immunity of the Cherokee Nation, it is not necessary to determine whether CNE is entitled to such immunity in order to dispose of this case;[1] rather, this case must

[1]Mr. Cossey concedes that any liability CNE may have is limited by and subject to the terms of the "Tribal Gaming Compact between the Cherokee Nation and the State of Oklahoma", OR:66-94 (the "Compact").

be dismissed for lack of jurisdiction in accordance with 12 Okla.Stat.(Supp.2007) §2012(B)(1) and (2) and (F)(3), because this case arose in the Cherokee Nation's Indian Country and the courts of the Cherokee Nation have exclusive civil adjudicatory jurisdiction in its Indian Country.[2] As the Supreme Court of the United States has said, "It is immaterial that respondent is not an Indian. He was on the Reservation [in Indian Country] and the transaction with an Indian took place there." *Williams v. Lee*, 358 U.S. 217, 223, 79 S.Ct. 269, 272 (1959).

Unlike the "Dram Shop Liability" facts which were at issue in this Court's recent decision in *Bittle v. Bahe*[3] and which – as the dissenters pointed out – did not arise in "Indian Country" and did not involve a state-tribal gaming compact,[4] this case involves premises liability for an incident which allegedly occurred only in "Indian Country" and strictly subject to the terms of the Compact. The fundamental issue in this case is not who or what entity is responsible for any damages, but where the cause arose and what forum may properly decide. The question for this Court, therefore, is one of jurisdiction.

The Plaintiff's Response, however, focuses almost exclusively on tribal *sovereign immunity* which – though important – is only one part of the analysis which is necessary

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[2]This case should, therefore, be resolved in the same way as *Muscogee (Creek) Nation Gaming Commission, et al. v. The Honorable Mary Fitzgerald*, Okla.Sup.Ct. Case No. 104,726 (July 2, 2007) (unpublished).

[3]2008 OK 10, ___ P.3d ___, 2008 WL 314902.

[4]*Id.*, 2008 OK 10 ¶2, fn 1 (Kauger J., dissenting).

to decide the *jurisdictional* issues in this case. It is perhaps more accurate and more appropriate to first consider the tribe's *sovereignty* as opposed to its sovereign immunity.

By now there should be no debate about the Cherokee Nation's status as a federally recognized Indian tribe having all rights of self-government.[5] The Compact even says as much.[6] The United States Supreme Court has explained the status of Indian tribes this way:

> Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government. [Citations omitted]. Although no longer "possessed of the full attributes of sovereignty," they remain a "separate people, with the power of regulating their internal and social relations." [Citations omitted]. They have power to make their own substantive law in internal matters, [Citations omitted], ***and to enforce that law in their own forums***, [Citation omitted]. [Emphasis added].

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56, 98 S.Ct. 1670, 1675 (1978) quoting, in part, *Worcester v. Georgia*, 6 Pet. 515, 31 U.S. 515 (1832).

These powers of self-government include "all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; . . . ." 25 U.S.C. §1302(2). In exercising the powers of "self-government", an Indian tribe is constrained only by Congress, which requires compliance with the Indian Civil Rights

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[5]*See, Bittle v. Bahe*, 2008 OK 10 ¶¶15-16, ___ P.3d ___ (Mandate Pending on Motion for Rehearing filed February 25, 2008).

[6]*See, Compact*, Part 2(1), which provides: "The tribe is a federally recognized tribal government possessing sovereign powers and rights of self-government." OR:66.

Act, 25 U.S.C. §1301, *et seq.*, and which specifically requires that each tribe provide due process and equal protection to all people "within its jurisdiction". 25 U.S.C. §1302(8).

Unless a state has complied with federal law, specifically 25 U.S.C. §§1322(a) and 1326, the state can have no jurisdiction in Indian Country.[7] Oklahoma has not done so. "There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation [Indian Country] affairs and hence would infringe on the right of the Indians to govern themselves." *Williams v. Lee*, 358 U.S. at 223. So long as Mr. Cossey's rights are protected in the Cherokee Nation's court system, he has no right to go outside of Indian Country and seek redress in state court.

ARGUMENT AND AUTHORITY

REPLY TO PLAINTIFF'S PROPOSITION I:

Although this proposition ignores the jurisdictional issue, the Cherokee Nation Enterprises, L.L.C. (formerly known as Cherokee Nation Enterprises, Inc.) is, nonetheless, an "arm of the tribe" and, as such, is entitled to assert the sovereign immunity of the Cherokee Nation.

The Cherokee Nation is the sole owner/member of Cherokee Nation Businesses, L.L.C., which is the sole owner/member of Cherokee Nation Enterprises, L.L.C., and – before its form of organization was changed from a tribal corporation formed under tribal

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[7] *See, Kennerly v. District Court of the Ninth Judicial District of Montana*, 400 U.S. 423, 429, 91 S.Ct. 480, 483 (1971) (in order to exercise jurisdiction, the state must have complied with federal law requiring consent by a majority vote of the members of the tribe and not merely a vote of the tribal council).

law to a tribal limited liability company formed under tribal law – was the owner/sole shareholder of Cherokee Nation Enterprises, Inc. It is incorrect to suggest that this business structure somehow waives the sovereign immunity of the tribe and its businesses. There can be no implied waiver of sovereign immunity or of jurisdiction. *See generally*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677 (1978); *United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 1502 (1969); and *United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 953 (1976).

Moreover, whether CNE is a tribal entity or not, the jurisdictional issue is the same: May the courts of Oklahoma exercise civil adjudicatory jurisdiction over parties to a lawsuit, the subject matter of which arose entirely within Indian Country? The Plaintiff has attempted to recast this issue as one of tribal sovereign immunity in an effort to avoid exclusive tribal court jurisdiction, but to no avail.

A. The exclusive jurisdiction of the tribal court has not been changed by the Compact.

That jurisdiction in tribal court is exclusive is thoroughly addressed in CNE's Brief-in-Chief at pages 14-19 and elsewhere. The Plaintiff has offered no direct response. Instead, the Plaintiff offers the *non sequitur* that the Cherokee Nation is not a party to the suit and CNE is not entitled to assert the Cherokee Nation's sovereign immunity.

The Compact provides that "[t]he tribe consents to suit on a limited basis with respect to tort claims", *Compact*, Part 6(A)(2), OR:75, but only "against the enterprise

in a court of competent jurisdiction", *Compact*, Part 6(C), OR:79. With respect to certain claims, the Compact specifically requires compliance with the "notice ***and hearing***" requirements of "the ***tribe's*** tort law." [Emphasis added]. *Compact*, Part 6(D)(4), OR:80. Although a specific "court of competent jurisdiction" is not identified, the Compact also provides that the "Compact shall not alter tribal, federal or state civil adjudicatory or criminal jurisdiction." *Compact*, Part 9, OR:83. In order for any court to be a "court of competent jurisdiction" it must have been a court of competent jurisdiction before the Compact came into being; otherwise, the Compact would have had to confer jurisdiction where none previously existed – in violation of federal law – and Part 9 specifically says that no such change is intended.

"Perhaps the most basic principle of all Indian law, supported by a host of decisions, is that those powers which are vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress. Rather, these are inherent powers of a limited sovereignty which have never been extinguished– what is not expressly limited remains within the domain of tribal sovereignty. [Footnote omitted]. *Enterprise Mgmt. Consultants, Inc. v. State ex rel. Okla. Tax Comm'n*, 1988 OK 91¶1, 768 P.2d 359, 364 (Kauger, J., joined by Opala, J., concurring). The question cannot be: Did Oklahoma Courts have jurisdiction because of the Compact? Rather, it must be: Did Congress or the Cherokee Nation give-up the tribe's exclusive jurisdiction in its own Indian Country? Of course, the answer to these questions is that neither Congress, the Cherokee Nation,

nor the State of Oklahoma has done anything – through the Compact or otherwise – to change jurisdiction in Indian Country which is exclusively that of the Cherokee Nation tribal courts.

The Plaintiff argues that a "court of competent jurisdiction" cannot mean a tribal court because that term is never used to refer to a tribal court anywhere else in the Oklahoma statutes. *Plaintiff's Resp.*, p. 4. This conclusion is illogical on its face. Moreover, as a matter of pre-emptive federal law, a "court of competent jurisdiction" as used in the Compact can only refer to a tribal court since only tribal courts have jurisdiction in Indian Country.

It is far more likely that the term "court of competent jurisdiction" was used by the drafters of the "Model Tribal Gaming Compact"[8] as a mere convenience instead of attempting to identify every tribal court name imaginable. For example, the "court of competent jurisdiction" for tort claims for the Cherokee Nation generally is the Cherokee Nation District Court[9] with appeals to the Cherokee Nation Supreme Court,[10] while the "court of competent jurisdiction" for the Chickasaw Nation is the Chickasaw Nation

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[8]3A Okla.Stat.(Supp.2007) §281.

[9]Courts have identified the Cherokee Nation District Court by that name since territorial days. *See e.g., Hastings v. Whitmer*, 2 Ind.Terr. 335, 51 S.W. 967 (enforcement of a judgment of said court); and *Ex parte Hudson*, 1910 OK CR 18, 107 P. 735 (discussing the jurisdiction of said court).

[10]The Cherokee Nation Supreme Court was formerly known as the Cherokee Nation Judicial Appeals Tribunal. *See, Cherokee Nation v. Nation's Bank*, 67 F.Supp.2d 1303 (E.D.Okla. 1999) (discussing rules for collection of judgments).

Court of Indian Offenses. The Oklahoma Legislature simply refers to "any court of any federally recognized Indian nation, tribe, band or political subdivision thereof, including courts of Indian offenses." 12 Okla.Stat.(2001) §728(A). Similarly, this Court has, by rule, identified tribal courts as "any court or constitutionally established tribunal of any federally recognized Indian nation, tribe, pueblo, band, or Alaska Native village, duly established under federal law or tribal law, including courts of Indian offenses ...." Okla.Dist.Ct.R. 30(A)(1). The Administrative Office of the Courts lists seventeen (17) tribal courts which have notified this Court of a willingness to grant reciprocity pursuant to this Court's rule including the courts of the Cherokee Nation, the Chickasaw Nation Court of Indian Offenses, and the Kaw Nation Supreme Court.

The Cherokee Nation District Court has exclusive jurisdiction of this case.

B. CNE, as an arm of the tribe, is entitled to assert the tribe's sovereign immunity.

As discussed above, it is not necessary for CNE to show that it is entitled to sovereign immunity in order for jurisdiction to be limited to tribal court. Nevertheless, CNE is an arm of the tribe and, therefore, entitled to assert the tribe's sovereign immunity as discussed in CNE's Brief-in-Chief at pages 19-26. The Trial Court offered no analysis to support its conclusion to the contrary and neither does the Plaintiff.

The clearest statement on this issue is found in *Wright v. Colville Tribal Ent. Corp.*, 159 Wash.2d 10, 147 P.3d 1275 (2006) (*en banc*) in which Washington's highest court held, "Tribal sovereign immunity protects a tribal corporation owned by a tribe and

created under its own laws, absent express waiver or immunity by the tribe or Congressional abrogation." 159 Wash.2d at 111, 147 P.3d at 1278. A number of cases are cited in CNE's Brief-in-Chief and still others are cited by the Washington court in *Wright*.

The Plaintiff argues only that "[t]ribal gaming is widespread in Oklahoma" and "is an expansive enterprise in Oklahoma." *Plaintiff's Resp.*, p. 4. While these statements may be true, there is no basis for finding jurisdiction in state court just because the enterprise is large. There is no "bigness" exception to exclusive tribal court jurisdiction nor for tribal sovereign immunity.

The Plaintiff's statement that CNE "provides funds to the Cherokee Nation if a profit is made", *Plaintiff's Resp.*, p. 5 misconstrues the requirements of the Compact[11] and of the federal Indian Gaming Regulatory Act.[12] If the "net revenue" from gaming is not

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[11] *See, Compact*, Part 2(5) ("The ***tribe*** desires to offer the play of covered games, ..., as a means of generating revenues for purposes authorized by the Indian Gaming Regulatory Act, ..., including without limitation the support of ***tribal*** governmental programs, such as health care, housing, sewer and water projects, police, corrections, fire, judicial services, highway and bridge construction, general assistance for ***tribal*** elders, day care for the children, economic development, educational opportunities and other typical and valuable governmental services and programs for ***tribal*** members." Emphasis added).

[12] *E.g.*, 25 U.S.C. §2702(1) ("The purpose of this chapter is (1) to provide a statutory basis for the operation of gaming by ***Indian tribes*** as a means of promoting ***tribal*** economic development, self-sufficiency, and strong ***tribal*** governments; ...." Emphasis added); and 25 U.S.C. §2710(b)(2)(B)(i)-(v) ("[N]et revenues from any ***tribal gaming*** are not to be used for purposes other than (i) to fund ***tribal*** government operations or programs; (ii) to provide for the general welfare of the ***Indian tribe*** and its members; (iii) to promote ***tribal*** economic development; (iv) to donate to charitable organizations; and (v) to help fund operations of local government agencies; ...." Emphasis added).

strictly used for ***tribal*** purposes, the ***tribe*** risks loss of its authority to conduct gaming. Whether the gaming is conducted by a corporation, limited liability company, or other enterprise entity is entirely irrelevant.

The Plaintiff then cites two cases to suggest that a "tribally-affiliated corporation" and an "Indian-based organization" were subject to suit in state court. *Plaintiff's Resp.* pp. 6-7. Neither of these cases support the Plaintiff's proposition and both are distinguishable on their facts.

Maxa v. Yakima Petroleum, Inc., 83 Wash.App. 763, 924 P.2d 372 (Wash.App. 1996) was a contract dispute between a member of the Yakima Indian Nation who owned a corporation incorporated under tribal law and a non-Indian employee of the business. The Washington Court of Appeals specifically found that "the facts here do not support a finding that the cause of action arose on the reservation or that it affects reservation affairs." 83 Wash.App. at 767, 924 P.2d at 373. The Washington court also noted that its state legislature had not sought authority under federal law (25 U.S.C. §1322(a)) to exercise civil adjudicatory jurisdiction on the reservation without the consent of the tribe and that the tribe "has never requested state assumption of jurisdiction. [Citation omitted]. 83 Wash.App. at 767, 924 P.2d at 374. Finally, that court observed that, "[i]f the dispute involving the contracts arose on the reservation, deferral of the case to the tribal court would be appropriate." [Citation omitted]. 83 Wash.App. at 768, 924 P.2d at 374. The present case involves a tort claim in Indian Country by a non-Indian against a tribally

owned entity operated solely for the benefit of the tribe, not an individual. Consequently, it has no application to this case.

Runyon v. Ass'n of Village Council Presidents, 84 P.3d 437 (Alaska 2004) is a tort suit against an Alaska corporation, the Association of Village Council Presidents ("AVCP"), "consisting of fifty-six Alaska Native villages ..., each a federally recognized tribe." *Id.* at 438. "AVCP operates a wide range of traditionally governmental programs designed to benefit the member tribes, almost exclusively with state and federal funding." *Id.* The entity in that case was found not to be an "arm of the tribe" or even an arm of its fifty-six member tribes and was, therefore, not entitled to assert sovereign immunity. *Id.* at 441. The Alaska court's view of sovereign immunity in that case is as follows:

> A subdivision of tribal government or a corporation attached to a tribe may be "so closely allied with and dependent upon the tribe" that it is effectively an "arm of the tribe." It is then "actually a part of the tribe per se, and, thus, clothed with tribal immunity." Tribal status similarly may extend to an institution that is the arm of multiple tribes, such as a joint agency formed by several tribal governments. Whether the entity is formed by one or several, it takes on tribal sovereign immunity only if the tribe or tribes, the source of the sovereign authority and privilege, are the real parties in interest. [Footnotes omitted]

Id., at 439-40.

The *AVCP* case is distinguishable under the Alaska court's analysis because CNE is a corporation, owned by the tribe – albeit indirectly, operated strictly for tribal purposes, with the net revenues inuring to the benefit of the tribe. In addition, CNE operates pursuant to the Compact to which only the Cherokee Nation is a party. If the

Compact is violated, any consequences fall on the Cherokee Nation. If the State of Oklahoma violates the Compact, the Cherokee Nation must seek its enforcement. Moreover – and perhaps more importantly – the Alaska court was not asked to determine the proper forum in which to bring the case. The court found, instead, that the individual member tribes under Alaska state law "are not ... liable ... on [the corporation's] obligations." [Internal quotation marks omitted, brackets in original]. *Id.* at 441 quoting Alaska Stat. §10.20.051(b).

The Plaintiff next quotes *Dixon v. Picopa Constr. Co.*, 772 P.2d 1104 (Ariz. 1989) for the proposition that "sovereign immunity was 'never meant to protect entities conducting non-tribal business' and that the activities in question were 'independent of any activity connected with tribal self-government or the promotion of tribal interests.' *Id.* at 1109." *Plaintiff's Resp.*, p. 9. *Dixon* is inapposite as it involved a tort committed "off-reservation" by an entity which was found – under the facts of that case – not to be a "subordinate economic organization" even though the tribe was the sole stockholder. *Dixon*, 160 Ariz. 251, 252, 772 P.2d at 1105. In addition, two courts – including an inferior court of the same state – have refused to apply *Dixon* in the tribal gaming context.

In *Filer v. Tohono O'Odham Nation Gaming Enterprise*, 212 Ariz. 167, 129 P.3d 78 (Ariz.App. 2006), *rev. denied*, the Arizona intermediate appellate court found the purpose of the "Gaming Enterprise" was "'to achieve economic self-sufficiency' and to provide gaming within the Nation that is conducted with 'honesty and integrity.' On this

record, we cannot say those purposes are 'purely commercial,' as Filer urges." *Id.*, 212 Ariz. at 172, 129 P.3d at 84¶17. The Arizona court's view was not altered by the availability of insurance. *Id.* at ¶18.

Another case refusing to follow *Dixon* is *Trudgeon v. Fantasy Springs Casino*, 71 Cal.App.4th 632 (1999). In that case, the court found that tribal sovereign immunity extended to the for-profit corporation formed by the tribe to operate a casino under the three-part test of *Gavle v. Little Six, Inc.*, 555 N.W.2d 284 (Minn. 1996).

None of the cases cited by the Plaintiff suggest that Oklahoma state courts can exercise civil adjudicatory jurisdiction in Indian Country and none even sustain the argument that CNE is not entitled to sovereign immunity since all are distinguishable on the law and facts.

REPLY TO PLAINTIFF'S PROPOSITION II:

The Cherokee Nation has not consented to suit in state court and, indeed, cannot – even if it were so inclined.

The Plaintiff insists that "[t]he Cherokee Nation and [CNE] consented to suit regarding tort claims, prize claims and disputes under the Compact." *Plaintiff's Resp.*, p. 10. This statement is only partially correct. Neither the Cherokee Nation nor CNE consented to suit in state court and disputes concerning the Compact are to be resolved by arbitration, not litigation. *See, Compact*, Part 12, OR:89-90 ("In the event that either party to this Compact believes that the other party has failed to comply with any requirement of this Compact, or in the event of any dispute hereunder, including, but not

limited to, a dispute over the proper interpretation of the terms and conditions of this Compact, ... either party may refer [such] a dispute ... to arbitration ....").

As CNE has argued throughout, the rights of the parties are governed by the Compact. Any liability CNE has to the Plaintiff is limited to the liability imposed on an "enterprise", as defined in Part 3(13) the Compact, under Part 6 of the Compact which requires "[t]he enterprise" to "ensure that patrons of a facility are afforded due process in seeking and receiving just and reasonable compensation for a tort claim for personal injury or property damage against the enterprise arising out of incidents occurring at a facility, ..." *Compact*, OR:75. The Compact also requires CNE to obtain certain limits of insurance and requires the Cherokee Nation to waive its sovereign immunity to the extent of such insurance. *See, Compact*, Part 6(A), (C), and (D), OR:75-80.

But this "agreed" liability has nothing whatever to do with the civil adjudicatory jurisdiction of the state court. "There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation [Indian Country] affairs and hence would infringe on the right of the Indians to govern themselves." *Williams v. Lee*, 358 U.S. at 223.

Implied in the Plaintiff's arguments is the notion that the Cherokee Nation – which the Plaintiff insists is not a party – has "consented" to state-court jurisdiction. Nothing in the Compact compels this assertion. Indeed, as CNE has explained, the Supreme Court of the United States has held that tribal governments cannot consent to civil adjudicatory

jurisdiction in state court, unless it has complied with federal law, specifically 25 U.S.C. §§1322(a) and 1326. *See, Kennerly v. District Court of the Ninth Judicial District of Montana*, 400 U.S. 423, 429, 91 S.Ct. 480, 483 (1971) (tribal consent to civil adjudicatory jurisdiction "must be manifested by majority vote of the enrolled Indians within the affected area of Indian country. Legislative action by the Tribal Council does not comport with the explicit requirements of the Act." [Footnote omitted]).

Until the State of Oklahoma obtains civil adjudicatory jurisdiction in the manner required by Congress and until the Cherokee Nation cedes its civil adjudicatory jurisdiction in the manner required by Congress, no Oklahoma state court can have jurisdiction under the Compact or otherwise.

Plaintiff argues that these requirements of federal law were not raised in the Trial Court. *Plaintiff's Resp.*, p. 16. While CNE did not expressly raise these federal statutes, its Motion to Dismiss is predicated on the absence of jurisdiction in state court. Moreover, issues of jurisdiction may be raised at any time, even for the first time on appeal. *See, State ex rel. Okla. Tax Comm'n v. Bruner*, 1991 OK 77, 815 P.2d 667, 669 (issue not raised previously would be addressed "as 'it relates to the jurisdiction of the court and may be raised for the first time on appeal.'") quoting *La Bellman v. Gleason & Sanders, Inc.*, 1966 OK 183, 418 P.2d 949, 954.

REPLY TO PLAINTIFF'S PROPOSITION III:

CNE has not waived sovereign immunity by implication through any of the myriad acts listed by the Plaintiff.

The Plaintiff begins this portion of his argument by mischaracterizing this Court's recent decision in *Bittle v. Bahe*, 2008 OK 10, ___ P.3d ___, 2008 WL 314902, as broadly abrogating tribal sovereign immunity. He further mischaracterizes the majority opinion as involving "activity [which] occurred in an Indian casino. *Plaintiff's Resp.*, p. 17.

In fact, the motor vehicle accident in *Bittle* occurred on Highway 9 and was not in Indian Country. Whether or not the plaintiff or decedent in that case had been served alcohol as alleged in the petition was apparently assumed for purposes of the motion to dismiss. The only issues decided by *Bittle* are that a tribe can incur Dram Shop Liability if an injury occurs outside of Indian Country and that 18 U.S.C. §1161 authorizes the states and Indian tribes to regulate alcoholic beverages. Neither of these issues is present in the case at bar.

Apparently attempting to equate some activity by CNE with the state alcoholic beverage license in *Bittle* , the Plaintiff claims *Bittle*-like waiver (A) by registering with the Secretary of State as a corporation and later as a limited liability company, (B) by converting to a limited liability company, (C) by agreeing to be regulated in the Compact, (D) by obtaining alcoholic beverage licenses, and (E) by being a plaintiff in state court.

Before examining each of these claims and finding them wanting, it must be borne

in mind that the issue is whether or not the courts of the State of Oklahoma have civil adjudicatory jurisdiction over tort claims arising in Indian Country. If they do not, the immunity of the Cherokee Nation or of CNE is never reached. If – as CNE contends – the only forum available to Mr. Cossey is the Cherokee Nation District Court, then he must go there to press his claim. If the state courts have no civil adjudicatory jurisdiction, this Court cannot forecast the outcome.

In addition, even if the sovereign immunity issue is reached, there can be no implied waiver as the Plaintiff suggests. The New York Court of Appeals has explained the matter succinctly saying, "[b]ecause preserving tribal resources and tribal autonomy are matters of vital importance, the United States Supreme Court has repeatedly stated that a waiver of tribal sovereign immunity cannot be implied but must be unequivocally expressed. [Internal quotation marks omitted]. *Ransom v. St. Regis Mohawk Educ. and Commun. Fund, Inc.*, 86 N.Y.2d 553 (N.Y. 1995) quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677 (1978) in turn quoting *United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 1502 (1969); *see also, United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 953 (1976).

Nevertheless, for the convenience of the Court, CNE will respond to Plaintiff's specific arguments.

A. Registration with the Secretary of State is not a waiver of sovereign immunity.

In *Gavle v. Little Six, Inc.*, 555 N.W.2d 284 (Minn. 1996), the Supreme Court of

Minnesota found that "[a]bsent an express and unequivocal waiver of sovereign immunity, a tribal business entity possessing the affirmative defense shall not be deemed to have waived it. Registration with the Secretary of State as a foreign corporation is not such a waiver." *Id.*, at 286 (Syllabus by the Court ¶3). There are doubtless many practical reasons for registering a commercial entity including preserving the name, providing a service agent, giving notice of authority to transact business, and the like.

Similarly, New York's highest court rejected such registrations together with other factors as failing to "satisfy the high threshold for a valid waiver of immunity." *Ransom, supra*, 86 N.Y.2d at 563.

B. Converting to a limited liability company is not a waiver of sovereign immunity.

In *Ransom, supra*, the plaintiff insisted that the tribal entity had waived its immunity by including a statement in its articles of incorporation that it could "exercise all power or authority granted to it under the District of Columbia Nonprofit Corporation Act" which included a provision that such corporations may "sue or be sued", and by qualifying to do business in New York as a "foreign corporation". 86 N.Y.2d at 563. Even taking these together the court rejected the suggestion of a waiver of immunity. To the contrary the court found, quoting other authorities, that such statutes mean "only that the entity has the status and capacity to enter our courts, and does not signify a waiver of sovereign immunity against suit [internal quotation marks omitted, citations omitted]." *Id.*

The Plaintiff's argument is that the State of Oklahoma can, by indirection and without ever mentioning tribal sovereign immunity, do what it cannot do directly – abrogate the sovereign immunity of an Indian nation. No judicial authority has been found to support such a proposition and the Plaintiff offers none. The conflation of statutes, *Plaintiff's Resp.*, p. 18, are very similar to the statutes cited by the plaintiff in *Ransom* and should be rejected just as the *Ransom* court rejected them. 86 N.Y.2d at 563.

C. Agreeing to be regulated by the Compact does not waive sovereign immunity.

The Plaintiff's premise that the Cherokee Nation agreed to be regulated by entering into the Compact is incorrect. The State-Tribal Gaming Act, 3A Okla.Stat.(Supp. 2007) §261, *et seq.*, provides for regulation of certain gaming conducted at horse racing facilities and does not provide for regulation by the Oklahoma Horse Racing Commission or any other state agency of tribal gaming. The Compact requires the compacting tribe to police itself. *See e.g., Compact*, Part 5, OR:71-75.

There should be no doubt that the State of Oklahoma was only required to offer a compact to an Indian tribe if it wanted to allow any Class III gaming in the state. If it did, then it had no choice but to make compacts available. The Indian Gaming Regulatory Act leaves states with no options once they choose to allow Class III gaming. *See*, 25 U.S.C. §2701, *et seq.*, especially §2710(d)(1).

Even though the IGRA requires compacts for Class III gaming, *see* §2710(d)(1)(C) and (d)(3), and allows some "allocation of criminal and civil jurisdiction", it does so ***only***

as "necessary for the enforcement of such laws and regulations; ...." §2710(d)(3)(C)(ii). The Compact at issue in this case has made that narrow choice by providing for tort claims to be brought in a "court of competent jurisdiction" under Part 6 while leaving the civil adjudicatory jurisdiction of the state, federal, and tribal courts as it has been for decades under Part 9.

Other regulatory issues are left to specified state and tribal entities, but no state agency has control of gaming activities at a facility. *See e.g., Compact*, Part 5, OR:71-75.

The Compact can be read – and should be read – as a coherent whole by simply finding that the "court of competent jurisdiction" applies only to tribal courts, regardless of name (whether a "district court" or "court of Indian offenses" or otherwise).

D. Obtaining alcoholic beverage licenses does not waive sovereign immunity.

In this argument, the Plaintiff tries to bootstrap his premises liability tort claim for injuries allegedly sustained from falling from a stool into the Dram Shop Liability case decided by this Court in *Bittle*. The Court's decision in that case is really premised on two notions: First, that there is no tradition of tribal regulation of alcoholic beverages, 2008 OK 10 ¶19, and second, that Congress authorized the states to heavily regulate alcoholic beverages by 18 U.S.C. §1861, 2008 OK 10 ¶¶31-38.

There is nothing in the *Bittle* decision to suggest that the limited waiver found in that case for Dram Shop Liability applies to any other claim or cause of action.

E. Being a plaintiff in state court does not waive sovereign immunity.

In *Beecher v. Mohegan Tribe of Indians of Conn.*, 282 Conn. 130, 918 A.2d 880 (April 24, 2007), the plaintiff complained, as Mr. Cossey now complains, that the tribe had sued in state court and should not be allowed to escape the same court's jurisdiction when it is a defendant. As the Connecticut court explained, "[t]he perceived inequity of permitting the tribe to recover from a non-Indian for civil wrongs in instances where a non-Indian allegedly may not recover against the [t]ribe simply must be accepted ... much in the same way that the perceived inequity of permitting the United States or North Dakota to sue in cases where they could not be sued as defendants because of their sovereign immunity also must be accepted." [Internal quotation marks omitted, brackets in original]. *Id.*, 918 A.2d at 887.

There are many immune entities which may sue but not be sued. This must be accepted for the Cherokee Nation and CNE just as it is accepted under certain circumstances for other states, the United States, and foreign nations.

REPLY TO PLAINTIFF'S PROPOSITION IV:

CNE has never claimed that Tribal Sovereignty is without limits.

The Plaintiff engages in some rhetorical hyperbole when he claims that CNE has taken the position that "the Cherokee Nation, and all its corporate entities, are completely shielded from liability and judgment in state courts. [CNE's] argument is contrary to this Court's decision in *Bittle* and other cases addressing the issue." *Plaintiff's Resp.*, p. 21.

CNE is content to leave for another day the drawing of all of the boundaries which must eventually be set as a matter of state-tribal relations. It is sufficient to reiterate, if reiteration is necessary, that the courts of this state have no civil adjudicatory jurisdiction over premises liability tort claims which arise in Indian Country. Further, the Cherokee Nation – and CNE by extension – are entitled to assert tribal sovereign immunity in the Courts of this state and, for that matter, in its tribal courts, ***except as limited by the Compact.***

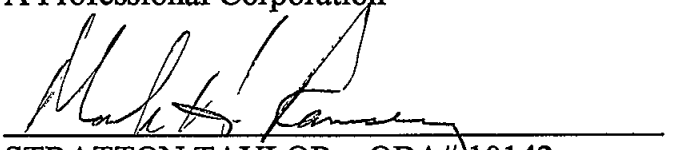
CONCLUSION

Mr. Cossey – like any tort claimant – is entitled to press his tort claim in the district court of the Cherokee Nation where he is entitled to due process under the Compact and federal law. If he is unsatisfied with the results, he may appeal to the Cherokee Nation Supreme Court. If he obtains an award of damages and it is not paid for whatever reason, he may seek to enforce the judgment and may even take his judgment to state court if CNE were found to have assets subject to the state court's orders, because the tribal court judgment is entitled to full faith and credit. In short, while he may prefer a state forum, he will receive all he is due in tribal court.

On the other hand, if the state court is allowed to exercise civil adjudicatory jurisdiction it simply does not have, the right of the Cherokee Nation to self-determination and self-government will be diminished – rights zealously guarded by the United States Supreme Court since 1832. Until Congress or the tribe cedes civil

adjudicatory jurisdiction to the state, this case must be heard in tribal court.

Respectfully submitted,
Taylor, Burrage, Foster, Mallett, Downs & Ramsey
A Professional Corporation



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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing Entry of Appearance was mailed this 27th day of February, 2007, to:

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by depositing it in the U.S. Mails, postage prepaid.

Mark H. Ramsey