

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

MARILYNN G. VANDEVER and )  
CHARLES VANDEVER, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
OSAGE NATION ENTERPRISE, INC. )  
and OSAGE NATION, )  
 )  
Defendants. )

Case No.: 06-CV-380-TCK-SAJ

**MOTION OF DEFENDANTS OSAGE NATION AND OSAGE NATION  
ENTERPRISE, INC. TO DISMISS FOR LACK OF JURISDICTION  
OR, IN THE ALTERNATIVE, TO ABSTAIN AND OPENING BRIEF IN SUPPORT**

COMES NOW Defendants Osage Nation (the “Nation”) and Osage Nation Enterprise, Inc., (“ONE”) (collectively, “Defendants”), without waiving any aspect of tribal sovereign immunity or any right available to Defendants under applicable law appear specially pursuant to Federal Rules of Civil Procedure Rule 12 to move the Court to dismiss the Complaint or, in the alternative, to abstain from hearing the matter to allow the dispute to be considered and resolved in the courts of the Nation. In support of its motion, the Nation advises the Court as follows.

**BACKGROUND**

1. The Nation is a federally-recognized Indian tribe with a governing body duly recognized by the Secretary of the United States Department of the Interior and maintains its governmental offices and jurisdiction within the Osage Reservation established for the Nation by the Act of June 5, 1872, ch. 310, 17 Stat. 228 (1872). The Osage Reservation is the Indian Country of the Nation within the meaning of 18 U.S.C. § 1151 and shares its

geographical boundaries with that of Osage County, Oklahoma. See Oklahoma Enabling Act, § 21, Act of June 16, 1906, ch. 3335, 34 Stat. 267, 277 (1906).

2. ONE was created as a political subdivision of the Nation organized under the Nation's Corporation Code and for the purpose of engaging in economic relations with individuals and entities outside the Nation. A copy of Tribal Resolution No. 31-810 establishing ONE is attached hereto as Exhibit "A."

3. The supreme law of the Nation is the Osage Nation Constitution (2006). Article II of the Nation's Constitution provides that the Nation's territorial jurisdiction encompasses the entire Osage Reservation. The Nation's jurisdiction extends over "all persons, subjects, property, and over all activities within the territory of the Osage Nation and over all Osage citizens, subjects, property and activities outside such territory affecting the rights and laws of the Osage Nation." Osage Constitution art. II, § 2. A copy of the Nation's Constitution is attached hereto as Exhibit "B."

4. The judicial powers of the Nation are vested in one Supreme Court, in a lower Trial Court and in such inferior Courts as the Osage Nation Congress may ordain and establish for the development, maintenance and administration of the Tribal Justice System. Art. VIII, § 1. The judicial branch shall be responsible for interpreting the laws of the Nation and its powers will include, but not necessarily be limited to, the trial and adjudication of certain civil and criminal matters, the redress of grievances, the resolution of disputes and judicial review of certain holdings and decisions of administrative agencies and of the Trial Court. Id. The Nation's courts shall have jurisdiction over all cases and controversies arising within the jurisdiction of the Nation. Id. at § 5.

5. Article XIX of the Nation's Constitution specifically provides that the Nation and all of the Nation's "administrative offices, departments, agencies, and instrumentalities" shall be immune from suit or process except if waived by the Nation's Congress.

### **ARGUMENT AND AUTHORITIES**

#### **I. The Complaint Should Be Dismissed For Lack Of Jurisdiction.**

Rule 8(a) of the Federal Rules of Civil Procedure ("FRCP") requires the plaintiff's complaint to set forth "a short and plain statement of the grounds upon which the court's jurisdiction depends . . . ." The complaint, standing alone, must be legally sufficient to state a claim upon which relief may be granted. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995); *Swoboda v. Dubach*, 992 F.2d 286, 289 (10th Cir. 1993). Pursuant to Rule 12(b)(1) of the FRCP the Plaintiffs' Complaint fails to establish that subject matter jurisdiction exists as to Plaintiffs' claims due to the Defendants' status as one that comes under the protection of tribal sovereign immunity.

As a matter of well-established federal law, Indian tribes enjoy the same immunity from suit enjoyed by sovereign powers and are "subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754, 140 L. Ed. 2d 981, 118 S. Ct. 1700 (1998). "To abrogate tribal immunity, Congress must 'unequivocally' express that purpose," and "to relinquish its immunity, a tribe's waiver must be 'clear.'" *C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418, 149 L. Ed. 2d 623, 121 S. Ct. 1589 (2001) (citations omitted).

Plaintiffs' Complaint alleges this Court has jurisdiction to adjudicate claims against Defendants under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29

U.S.C. § 1001, et seq., and the Consolidated Omnibus Budget Reconciliation Act (“COBRA”), 29 U.S.C. § 1161, et seq. However, neither ERISA nor COBRA provides an unequivocal expression by Congress that those acts apply to Indian tribes and tribal entities or that Congress expressly abrogated tribal sovereign immunity for such claims to be heard in federal court.

Moreover, the Complaint fails to establish that the Defendants have expressly waived their tribal sovereign immunity for these claims to be brought against Defendants in this Court. Even though Tribal Resolution No. 31-810 references ONE as capable of being sued, that resolution was enacted by the Nation’s former government and prior to the Nation’s 2006 Constitution that specifically recognizes the Nation and its governmental entities as having sovereign immunity from suit or process unless waived by the Nation’s Congress. See Art. XIX. The Savings Clause in Article XXII of the Nation’s Constitution does recognize that laws and acts of the former government will remain in full force and effect but only to the extent such laws and acts are consistent with the new Constitution. Tribal Resolution No. 31-810 does not have a waiver of sovereign immunity provision approved by the Nation’s Congress acting under authority of the new Constitution, and so that resolution’s waiver of sovereign immunity as to ONE does not apply here.<sup>1</sup> Thus, this Court lacks subject matter jurisdiction over these claims, and the Complaint should be dismissed with prejudice.

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<sup>1</sup> Even if there is a valid argument concerning whether the waiver of tribal sovereign immunity in Tribal Resolution 31-810 applies here, it pertains only as to ONE and not the Nation. Moreover, the resolution of such questions will be based on the application and interpretation of the constitution and laws of the Nation and, as explained in Part II of this motion, such matters are best left for the Nation’s courts to decide in the first instance.

## II. The Court Should Abstain To Have The Dispute Adjudicated In The Nation's Own Courts.

If this Court assumes jurisdiction over the claims brought in Plaintiffs' Complaint, the Nation, in the alternative, moves the Court to abstain from hearing the case in order for Plaintiffs to first adjudicate the claims in the Nation's own courts. The Plaintiffs' claims as asserted on the face of the Complaint raise substantial questions as to: (1) the nature and scope of the Defendants' own health insurance plan as it was established under the Nation's own laws<sup>2</sup>; (2) the Nation's own personnel policy and administrative procedure for asserting such claims; (3) the role of the Nation's employees and, possibly, the Nation's own governmental officials in alleged discrimination practices; and (4) the role of the Nation's new form of government, and the laws applicable to the Nation and its entities, duly established by the Nation's Constitution in 2006. Plaintiffs' claims require substantial consideration and interpretation of tribal laws and matters of tribal governance and, thus, should first be brought in the Nation's own courts.

Under the rule of comity and exhaustion of tribal remedies established by the U.S. Supreme Court in *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985) and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 14, 15-17 (1987), Plaintiffs' claims should be first be heard in the Nation's own courts. "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" arising on Indian

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<sup>2</sup> Moreover, there is some issue as to whether Plaintiff Marilyn Vandever's employment was under the Nation or under ONE since there was a transitional period when certain programs, and the employees in those programs, were transferred administratively by the Nation to be under the direct line authority under ONE. As such, there needs to be consideration of the Nation's laws and administrative policies and procedures to determine how, if at all, this transition affected Plaintiff's status under the plan based on her employment with Defendants.

lands. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978); *Iowa Mut.*, 480 U.S. at 18. The tribal exhaustion principle is expressly intended to further the Congressional policy of promoting tribal self-government and to develop tribal judicial systems and tribal control over matters arising on tribal lands that affect tribal interests. *Iowa Mut.*, 480 U.S. at 16-17. Civil jurisdiction over activities on Indian lands “presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.” *Id.* at 18.

In the instant case there are no treaty or statutory limitations to the Nation’s own courts exercising jurisdiction to consider the Plaintiffs’ claims. Moreover, Plaintiffs’ residence was within the exterior boundaries of the Osage Reservation and Plaintiff Marilyn Vandever’s employment, termination, and the alleged violation of ERISA and COBRA occurred on the Osage Reservation and while associated as a government employee of the Nation. Plaintiffs do not allege in the Complaint that any attempt has been made to adjudicate this dispute in the Nation’s forum under applicable laws and regulations. Judicial adjudication on the rights, if any, under ERISA and COBRA for employees of Defendants clearly invoke tribal interests and interpretation of tribal law and, under well-established federal law, adjudication should first be exhausted in the tribal courts.

Whether, and to what extent, a tribal court has jurisdiction over a matter must be examined, in the first instance, in the tribal court itself. *National Farmers Union*, 471 U.S. at 856. “[T]he federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a ‘full opportunity to determine its own jurisdiction.’” *Iowa Mut.*, 480 U.S. at 16 (quoting *National Farmers Union*, 471 U.S. at 857). To hold contrary would allow civil litigants to run to federal court for claims arising on Indian lands and that involve interpretation of tribal laws and policy and would, consequently, place the

federal courts “in direct competition with the tribal courts, thereby impairing the latter’s authority over reservation affairs.” *Id.* Indeed, the Nation’s own Constitution provides that the judicial branch has the authority to interpret the laws of the Nation and “its powers will include, but not necessarily be limited to, the trial and adjudication of certain civil and criminal matters, the redress of grievances, the resolution of disputes and judicial review of certain holdings and decisions of administrative agencies and of the Trial Court.” Art. VIII, § 1. As a governmental employee of Defendants, Plaintiffs’ claims likely are subject to certain administrative policies and procedures with judicial review to be had by the Nation’s courts. In any case, the Nation’s courts should first consider the claims to determine the scope of jurisdiction over such claims based on applicable law and, if proper, to adjudicate the dispute on the merits.

The Supreme Court made clear in *Iowa Mutual* that after this dispute has been put before the tribal courts and if the tribal court determines that the matter falls within its jurisdiction and proceeds to adjudicate the dispute on the merits, Plaintiffs then must exhaust appellate remedies in the tribal courts. Afterwards, Plaintiffs may, if they so choose, return to federal court to challenge the jurisdiction of the Nation’s courts. However, if it is ultimately decided that this matter was properly within the Nation’s jurisdiction, the federal courts have no role in reviewing the merits of the decision of the Nation’s courts. *Iowa Mut.*, 480 U.S. at 19.

In *Bank of Oklahoma, N.A. v. Muscogee (Creek) Nation*, 972 F.2d 1166 (10<sup>th</sup> Cir. 1992), the Tenth Circuit held that a determination of tribal court jurisdiction over non-Indians in civil cases must first be made in tribal courts and further stated:

The law of this circuit is that a federal court should not hear a challenge to tribal court jurisdiction until tribal court remedies have been exhausted. *Tillett v. Lujan*, 931 F.2d 636, 640-41 (10th Cir. 1991); *Superior Oil Co. v. United States*, 798 F.2d 1324, 1328-29 (10th Cir. 1986). The Supreme Court has defined exhaustion of tribal court remedies to include appellate review within the tribal court system. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987). The law is thus quite clear: For reasons of comity, federal courts should abstain from hearing cases that challenge tribal court jurisdiction until tribal court remedies, including tribal appellate review, are exhausted. The Bank claims that there is no tribal jurisdiction in this case because the banking activity in question took place off tribal land. As stated in *National Farmers*, *Tillett*, and *Superior Oil*, however, this jurisdictional argument should first be heard in tribal court.

*Bank of Oklahoma, N.A.* at 1169-70. In *Bank of Oklahoma, N.A.* the Tenth Circuit required tribal exhaustion even though the activity in question took place off tribal land. *Id.* In the instant case, Plaintiffs' claims involve employment activity that occurred on tribal land. Tribal exhaustion is clearly appropriate here.

The claims asserted in Plaintiffs' Complaint clearly arose on tribal land, invoke tribal interests, and require interpretation and consideration of the Nation's laws, its employment policies and procedures, official governmental acts, and the reorganization of the Nation's own form of government. These are substantial issues of tribal affairs and should be addressed in the Nation's own courts.

### **CONCLUSION**

WHEREFORE Defendants Osage Nation and Osage Nation Enterprise, Inc., without waiving any aspect of tribal sovereign immunity or any right available to Defendants under applicable law appear specially pursuant to Federal Rules of Civil Procedure Rule 12 to move the Court to dismiss the Complaint or, in the alternative, to abstain from hearing the matter to allow the dispute to be considered and resolved in the courts of the Nation for the reasons provided hereinabove. Further, the Nation respectfully requests the Court issue an



order awarding to Defendants attorney's fees, costs, and all other relief, legal or equitable, available under law.

Respectfully submitted,

PITCHLYNN & ASSOCIATES, P.A.

s/ O. Joseph Williams

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ATTORNEYS FOR DEFENDANTS OSAGE  
NATION AND THE OSAGE NATION  
ENTERPRISE, INC.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 27th day of September, 2006, I electronically filed the foregoing **MOTION OF DEFENDANTS OSAGE NATION AND OSAGE NATION ENTERPRISE, INC. TO DISMISS FOR LACK OF JURISDICTION OR, IN THE ALTERNATIVE, TO ABSTAIN AND OPENING BRIEF IN SUPPORT** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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s/ O. Joseph Williams

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