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

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

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 and, pursuant to LCvR7.2(h), respectfully submit this reply brief in support of Defendants' motion to dismiss for lack of jurisdiction or, in the alternative, to abstain. For its reply brief addressing new matters raised in Plaintiffs' response brief, Defendants advise the Court as follows.

ARGUMENT AND AUTHORITIES

In its motion, Defendants assert that there exists no clear and explicit waiver of tribal sovereign immunity by either the Nation or the U.S. Congress that would permit this action to continue in this Court. Plaintiffs, in their response, do not dispute this. Rather, Plaintiffs claim that ERISA is a statute of general applicability and, under the "*Tuscarora* rule," such statutes apply to all persons, including Indians. Plaintiffs' reliance on the *Tuscarora* rule is misplaced for several reasons. First, the Tenth Circuit has determined that the *Tuscarora*

rule was merely dictum that has been impliedly overruled by the U.S. Supreme Court in its subsequent decision of *Merrion v. Jicariila Apache Tribe*, 455 U.S. 130, 102 S.Ct. 894, 71 L.Ed. 2d 21 (1982). Plaintiffs fail to address this in their response but, instead, rely on case decisions out of other non-binding federal circuit courts. Second, even if the *Tuscarora* dictum were otherwise found to have application in this instance, the ERISA issues involved in this case concern exclusive rights of tribal self-governance in purely internal tribal matters and, in that instance, *Tuscarora* would not apply. Finally, Plaintiffs fail to distinguish between: (1) the application of a law to a tribe under *Tuscarora* and; (2) whether there exists an abrogation of tribal sovereign immunity. Plaintiffs would have to establish that ERISA applies to the Nation and its entities and that there exists a clear and express waiver of tribal sovereign immunity to bring an action in federal court for such claims. Plaintiffs fail to make such a showing.

Also addressed in Defendants' motion was the requirement that Plaintiffs abide by the tribal exhaustion principle by having this dispute first addressed in the Nation's courts. Plaintiffs, in their response, rely heavily on the reasoning outlined in the *El Paso Natural Gas Co.* case where the U.S. Supreme Court determined inapplicable the tribal exhaustion requirement in light of the pre-emption provision of the Price-Anderson Act. The instant matter is distinguishable for the following reasons. First, the decision in *El Paso* was unique and based heavily on the facts of that case and the reasoning of the federal statute involved—the availability of a federal forum for public liability actions arising out of or resulting from a nuclear accident. ERISA claims are not quite so critically unique. Second, the *El Paso* court did not dismantle the application of the tribal court exhaustion principle. Plaintiffs fail to cite binding precedent that provides for an ERISA claim to bypass the tribal forum. The issues in

the instant case involve significant matters of tribal interests and require application and interpretation of tribal law for the resolution of this dispute. Thus, tribal court exhaustion is appropriate here.

I. The *Tuscarora* Dictum Is Not Applicable In This Case But, Even If It Were, The Exception To The Rule Applies.

In their response, Plaintiffs do not dispute Defendants' assertion that there exists no clear and explicit waiver of tribal sovereign immunity for this case to be heard in this court. Rather, Plaintiffs rely on what is often referred to as the *Tuscarora* rule, a "rule" extracted from dictum in the U.S. Supreme Court case of *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960) and provides that a federal statute of general applicability applies to all person, including Indians. Over the years, *Tuscarora* has been relied on by litigants in an attempt to find a way to abrogate tribal sovereign rights by making applicable against a tribal defendant a statute that, by its terms, does not explicitly mention or exclude tribes. In the instant case, Plaintiffs assert that ERISA is such a statute of general applicability that limits the Nation's sovereign rights under the application of *Tuscarora*. However, since *Tuscarora* was decided, its continued vitality has come into question by subsequent federal court decisions, especially in light of the U.S. Supreme Court's decision of *Merrion* that, as the Tenth Circuit has recognized, essentially is an implicit overruling of the *Tuscarora* dictum. *See e.g., Equal Employment Opportunity Comm. v. Cherokee Nation*, 871 F.2d 937, 938 n.3 (10th Cir. 1989) (holding that the *Tuscarora* rule is fundamentally dictum).

At the outset it should be noted that normal rules of statutory construction do not apply when Indian treaty rights, or even non-treaty matters that involve Indians, are at issue.

See e.g., Montana v. Blackfeet Tribe, 471 U.S. 759, 766, 85 L.Ed.2d 753, 105 S.Ct. 2399 (1985) ("Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."). Moreover, in the post-*Tuscarora* decision of *EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989), the Tenth Circuit determined that Supreme Court precedent further dictated that in cases where ambiguity exists and where there is no clear indication of congressional intent to abrogate tribal sovereign rights, the courts are to apply the special canon of construction to the benefit of the Indians. *Id*. at 939. In the case at bar, precedent mandates the Court interpret the ERISA statute in a way favorable to the interests of the Nation's sovereignty claims.

In *Donovan v. Navajo Forest Products Industries*, 692 F.2d 709 (10th Cir. 1982), the Tenth Circuit considered the application of the *Tuscarora* rule in light of the Supreme Court decision in *Merrion* and held in pertinent part:

> Thus, *Merrion* in our view, limits or, by implication, overrules *Tuscarora*, [] at least to the extent of the broad language relied upon by the Secretary contained in *Tuscarora* that "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests."

Id. at 713. The Tenth Circuit in *Donovan* made this determination, in part, on the *Merrion* court's observation that "an Indian tribe's power to exclude non-Indians from tribal lands is an inherent attribute of tribal-sovereignty, essential to a tribe's exercise of self-government and territorial management.[1]" *Id*. at 712. As far as the law in the Tenth Circuit goes, the

[1] The *Merrion* court did not limit the attributes of tribal sovereignty solely to a tribe's power to exclude non-Indians from tribal lands. Rather, the Court determined the tribe has general authority, as a sovereign, to control and regulate economic activity within its jurisdiction. The basis for the Jicarilla Apache Tribe's taxing authority was derived from the tribe's own constitution that vested certain sovereign powers, including the power to tax, to the tribe's governmental body. *Merrion* 455 U.S. at 136. In the instant case, the Nation's own constitution (attached as Exhibit "B" in the motion to dismiss [Dkt.

Tuscarora "rule": (a) has been effectively overruled by *Merrion, see Donavan*, 692 F.2d at 713; (b) is considered fundamentally dictum, *see EEOC*, 871 F.2d at 938 n.3; and (c) is inapplicable in cases involving Indian treaty rights, *see id*. Thus, due to Indian tribes retaining all aspects of tribal sovereignty not specifically withdrawn, a court's reliance on the *Tuscarora* dictum is misplaced. *Multimedia Games, Inc. v. WLGC*, 214 F.Supp.2d 1131, 1136 (N.D. Okla. 2001) (*citing United States v. Winnebago Tribe of Neb., et al.*, 542 F.2d 1002 (8th Cir. 1976).

The Tenth Circuit has further limited whatever remains of *Tuscarora* by recognizing three major exceptions for when the *Tuscarora* dictum will not apply, to-wit:

(1) the law touches "exclusive rights of self-governance in purely intramural-matters";

(2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or

(3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations."

R.H. Nero, et al. v. Cherokee Nation, et al., 892 F.2d 1457, 1462-63 (10th Cir. 1989). Plaintiffs inappropriately rely on a Seventh Circuit case to support its position that ERISA does not impinge on the Nation's right to self-governance. However, this Court must follow

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No. 12]) vests the jurisdiction of the Nation within the territory of the Nation over all persons, subjects, property, and over all activities that occur within the territory of the Nation. As such, the subject matter in this case falls within the scope of the Nation's inherent sovereign exercise of self-government because it involves an activity that occurred within its territory and, further, Plaintiff Marilynn Vandever has contractually consented to tribal court jurisdiction over her employment disputes. (See Exhibit "A" attached hereto).

the exact language and application of the Tenth Circuit's stated exception and that is whether the law "touches 'exclusive rights of self-governance in purely intramural-matters.'" *Id*.

In the instant case, Plaintiffs' claims under ERISA arose on the Indian country lands of the Nation and 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 and whether such a plan was duly approved by the proper governmental body on behalf of the Nation; (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 newly adopted Constitution in 2006. Moreover, Plaintiff Marilynn Vandever contractually consented with ONE for dispute resolutions to be heard in tribal court using tribal law. (See Exhibit "A" attached hereto). This makes the instant dispute even more so an internal tribal matter. As such, Plaintiffs' claims under ERISA "touches 'exclusive rights of self-governance in purely intramural-matters'" and makes *Tuscarora* inapplicable in this instance.

Assuming, arguendo, that *Tuscarora* applies to make the ERISA statute applicable to Defendants, tribal sovereign immunity from suit still prevents this claim from going forward. "The bare proposition that broad general statutes have application to Native American tribes does not squarely resolve whether there was an abrogation of tribal immunity . . ." *Multimedia Games, Inc. v. WLGC Acquisition Corp.* 214 F.Supp.2d 1131, 1136 (N.D. Okla. 2001) (*citing Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282 (11th Cir. 2001)). Federal court decisions post-*Tuscarora* recognize that sovereign immunity abrogation must

nevertheless be explicit and unequivocal. *See e.g., Florida Paraplegic Ass'n. Inc. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1130-34 (11th Cir. 1999) (holding that the broadly applicable statute did not abrogate tribal sovereign immunity, notwithstanding *Tuscarora*). In their response, Plaintiffs fail to point out to the Court that, not only must the ERISA statutes be determined applicable to Defendants, but that there must also be a clear and explicit abrogation of tribal sovereign immunity for this action to proceed in federal court. Without an express abrogation of tribal sovereign immunity, Defendants are immune from suit. Defendants reiterate the request for this case to be dismissed.

II. The *El Paso* Case Is Factually Dissimilar To This Case And Does Not Do Away With The Tribal Exhaustion Requirement.

Plaintiffs' reliance on the Supreme Court case of *El Paso Natural Gas Company v. Neztososie*, 526 U.S. 473, 119 S.Ct. 1430, 143 L.Ed.2d 635 (1999) is simply misplaced because that case is significantly dissimilar to the facts and applicable law in this case. The preemption provisions in the Price-Anderson Act were considered "unusual" by the *El Paso* Court by transforming any public liability action arising out of or resulting from a nuclear accident into a federal action. *Id*. at 484. Moreover, the Court held that this preemption provision was an "unmistakable preference" by Congress for a federal forum. *Id*. The Court further stated:

> Under normal circumstances, tribal courts, like state courts, can and do decide questions of federal law, and there is no reason to think that questions of federal preemption are any different. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65, 56 L.Ed. 2d 106, 98 S.Ct. 1670 (1978) (tribal courts available to vindicate federal rights). The situation here is the rare one in which statutory provisions for conversion of state claims to federal ones and removal to federal courts express congressional preference for a federal forum.

Id. at 486, n.7 (emphasis added). In the instant case, Plaintiffs fail to cite specific statutory language in ERISA that expressly provides for federal preemption of state or tribal court jurisdiction or that clearly expresses a congressional preference for a federal forum similar to that contained in the Price-Anderson Act.

In *Prescott v. Little Six, Inc.* 897 F.Supp. 1217 (D. Minn. 1995), the question of whether tribal exhaustion applied in ERISA claims was at issue. Finding tribal exhaustion appropriate, the District Court determined:

> [F]ederal courts do not have exclusive jurisdiction to determine whether an ERISA plan exists or whether benefits were wrongfully denied. This is important. The Eighth Circuit has recently explained:
>
> > ERISA nowhere makes federal courts the exclusive forum for deciding the ERISA status vel non of a plan or fiduciary . . . Until [plaintiff] has proven its allegation that ERISA applies, questions of preemption and exclusive federal jurisdiction do not enter this case. Until the preliminary issue of ERISA status is decided, [plaintiff] may not seek the exclusive federal protections available to an ERISA plan.

Id. at 1222 (citing *International Assoc. of Entrepreneurs of Am. v. Angoff*, 58 F.3d 1266, 1269 (8th Cir. 1995). The court in *Prescott* determined that tribal court exhaustion was appropriate to determine in the first instance the applicability of ERISA to the plans in dispute and dismissed the action until tribal remedies were exhausted. *Id*.

The claims asserted by Plaintiffs require interpretation and consideration of the Nation's laws and its employment policies and procedures to determine if ERISA applies. Further, there will have to be consideration given to official governmental acts and to the Congressionally sponsored reorganization of the Nation's own form of government in order to determine the validity of any plan from which the ERISA claims are derived. These are

substantial issues of tribal affairs and should first be addressed in the Nation's own courts for resolution before being heard in the federal forum.

III. Plaintiff Marilyn Vandever Has Consented To Tribal Court Jurisdiction.

Attached as Exhibit "A" is a copy of a Professional Service Agreement (the "Agreement") between Plaintiff Marilyn Vandever and ONE, dated July 1, 2004, governing the terms of the relationship between the parties. Paragraph eighteen of the Agreement specifically provides that Ms. Vandever's employment terms are governed by tribal law and that jurisdiction as to the Agreement lies within the Nation's courts.

By this Agreement, Ms. Vandever has consented to the jurisdiction of the Nation's courts to resolve questions of her employment with the Nation based on the application of the Nation's laws. The instant federal action should be dismissed accordingly.

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 and, pursuant to LCvR7.2(h), respectfully submit this reply brief in support of Defendants' motion to dismiss for lack of jurisdiction or, in the alternative, to abstain. 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,

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

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October, 2006, I electronically filed the foregoing **REPLY BRIEF OF DEFENDANTS OSAGE NATION AND OSAGE NATION ENTERPRISE, INC. IN SUPPORT OF THE MOTION TO DISMISS FOR LACK OF JURISDICTION OR, IN THE ALTERNATIVE, TO ABSTAIN** 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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