

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION AT MEMPHIS**

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<b>MEMPHIS BIOFUELS, LLC,</b>	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Civil Action No. 08-2253 Ma
<b>CHICKASAW NATION INDUSTRIES, INC.</b>	)	
<b>and THE AMERICAN ARBITRATION</b>	)	
<b>ASSOCIATION,</b>	)	
	)	
Defendants.	)	

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**DEFENDANT CHICKASAW NATION INDUSTRIES, INC.'S  
REPLY MEMORANDUM  
IN SUPPORT OF ITS MOTION TO DISMISS**

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Comes now Defendant Chickasaw Nation Industries, Inc. ("CNI") and for its Reply Memorandum of Law In Support of Its Motion to Dismiss states as follows:

**I.**

**INTRODUCTION**

In reply to Plaintiff Memphis Biofuels, LLC's ("MBF") Supplemental Memorandum, CNI would show the Court that federal question and diversity jurisdiction do not exist in this case. Plaintiff's arguments fail to establish the required subject matter jurisdiction. Plaintiff misconstrues the relevant law as it relates to authority of the Secretary of the Interior to approve a tribal waiver of sovereign immunity and fails to establish a "clear" waiver in this case.

## II.

### **LAW AND ARGUMENT**

#### **A. Subject Matter Jurisdiction Does Not Exist in this Case.**

##### **1. MBF has not sought substantive relief against the Chickasaw Nation District Court.**

It is true that the question of a tribal court's jurisdiction is a federal question. *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 852-53, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985). However, that argument is completely unavailing to MBF and does not establish federal question jurisdiction in this case for several reasons. First, MBF does not seek substantive relief as to the jurisdiction of the Chickasaw Nation District Court. In its factual and legal arguments, MBF's complaint certainly suggests that the Chickasaw Court lacks jurisdiction, but it does not ask this Court, in either the listed causes of action or the prayer for relief, to make a declaration as to the jurisdiction of the Chickasaw Court. In the absence of such a claim for substantive relief, the Court should decline to exercise jurisdiction over a claim that is not before it.

Second, if MBF had brought such a claim, it is not clear that it would be proper for the Court to render such a decision without adding the Chickasaw Court as a party to this case. *See for example, Auto-Owners Ins. Co. v. Tribal Court of the Spirit Lake Indian Reservation*, 495 F.3d 1017, 1019 (8<sup>th</sup> Cir. 2007) (noting that after the suit had originally been filed between the insurance company and the tribal organization that a question as to the jurisdiction of the tribal court arose and the complaint was amended to add the tribal court as a party. The Eighth Circuit ultimately dismissed the case on jurisdictional grounds.) It is doubtful that this Court would have personal jurisdiction over the Chickasaw Court. Rather, such an action would likely have to be filed in federal district court in Oklahoma.

Even if the Court were to somehow find that it has, in this case, subject matter jurisdiction to determine the jurisdiction of the Chickasaw Court, that does not mean that it has jurisdiction to resolve the disputes between MBF and CNI. Moreover, the *National Union* case cited by MBF makes it clear that the tribal court should ordinarily be given the *first opportunity* to resolve any questions as to its jurisdiction. *National Farmers Union*, 471 U.S. at 856-57. Thus, reliance upon federal question jurisdiction as to the jurisdiction of a tribal court is unavailing in this case.

## **2. There is an Absence of Diversity in this Case.**

In an attempt to establish diversity jurisdiction, MBF cites to *American Vantage Cos., Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1095 n.1 (9<sup>th</sup> Cir. 2002), for the proposition that unincorporated tribes and incorporated arms of tribes are citizens of the states in which the tribe is located. A careful read of that decision shows that it referred to tribal corporations that were incorporated under tribal law or under state law – neither of which apply in this case.

MBF also relies upon two decisions, one from the Eighth Circuit, *In re Praire Island Dakota Sioux*, 21 F.3d 302, 304 (8<sup>th</sup> Cir. 1994), and one from the Sixth Circuit, *Nair v. Oakland County Community Mental Health Authority*, 443 F.3d 469, 476 (6<sup>th</sup> Cir. 2006), to suggest that subject matter jurisdiction and sovereign immunity are separate and distinct issues. They certainly can be. However, neither case cited by MBF dealt with the issue of tribal corporation citizenship within a particular state and its impact on diversity jurisdiction. In fact, the Sixth Circuit case did not involve Indian tribes at all. As set forth in CNI's other memoranda (See CNI's Memo in Support of Motion to Dismiss at pg. 3 – 5 and CNI's Supplemental Memo in Support of Motion to Dismiss at pg. 2- 10), the issues of diversity and immunity are intertwined.

CNI is immune. It has not waived its immunity. The conditions necessary to establish a waiver of immunity have not been met and there is no subject matter jurisdiction in this case.

**B. There is no “Clear” Waiver in This Case.**

It is undisputed that the Chickasaw Nation Industries Board did not vote to approve a waiver of CNI’s immunity. It is also undisputed that there was not specific pledge of assets to secure a limited waiver of immunity. By the very terms of the CNI Charter and pursuant to federal law (See CNI’s Supplemental Memo at pgs. 2 – 10), there can not be a waiver of CNI’s immunity in the absence of these two elements. MBF attempts to get around these case dispositive facts by arguing that the Secretary of the Interior did not have the authority to confer immunity upon CNI and that the warranty contained in the agreement somehow negates the need for Board approval and a specific pledge of assets. Both arguments are fundamentally flawed and fail.

First, CNI does not argue that its immunity came from the Secretary of the Interior. To the contrary, it was the Chickasaw Nation’s inherent immunity and authority to confer that immunity upon CNI that gave CNI immunity. The Chickasaw Nation did so through the act of seeking incorporation under the Oklahoma Indian Welfare Act with a federal corporate charter that contained a limited waiver of immunity. (See CNI’s Memo in Support of Motion to Dismiss at pgs. 7 - 9 and Supplemental Memo at pgs. 2 - 10). If CNI’s immunity were to be waived, it would have been the Chickasaw Nation’s decision to waive that immunity through a broad “sue and be sued” clause. The Chickasaw Nation chose not to include a broad waiver of immunity in the CNI Charter and instead included a more restrictive potential waiver which has not been demonstrated in this case.

MBF's argument that the warranty of authority to waive immunity, which is found in the agreement, acts as a "clear" waiver is circular and fails. In order to find a waiver of immunity, the waiver must be clear. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). Here, the Chickasaw Nation restricted CNI's power to waive immunity by requiring that any such waiver include a CNI Board resolution approving the waiver and that the assets to secure such a waiver be specifically identified and pledged. CNI Charter at § 3.02. Here, there is no board resolution and there was no specific pledge of assets.

If as, MBF argues, a warranty would be sufficient by itself to waive immunity then such a warranty would render the requirement of board approval and a pledge of assets meaningless. It would divest authority to waive from the CNI Board and give it to CNI's management. That is not what the Chickasaw Nation established. Moreover, it would permit companies like MBF to ignore its responsibility to conduct proper due diligence. MBF could and should have asked for a copy of the CNI Board resolution. Moreover, such an argument does nothing to address the requirement that there be a specific pledge of assets.

Despite MBF's circular arguments to the contrary, there simply is no clear waiver of immunity in this case. The express terms contained in the CNI Charter, which are necessary to waive immunity, were not met in this case. MBF cannot clearly establish a waiver of immunity.

### **III.**

#### **CONCLUSION**

There is neither diversity nor federal question jurisdiction here. Without subject matter jurisdiction, this proceeding must be dismissed.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

The undersigned counsel hereby certifies that a true and correct copy of the foregoing pleading has been served upon Plaintiff's counsel, John Branson, Esq., Baker Donelson Bearman Caldwell & Berkowitz, 165 Madison Ave., Ste. 2000, Memphis, TN 38103, via the Court's electronic filing system, this the 26<sup>th</sup> day of June, 2008.

s/ Daniel W. Van Horn

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