No. COA08-812 TENTH DISTRICT

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NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA, ex rel. ROY COOPER, Attorney General of North Carolina, Plaintiff-Appellant v. SENECA-CAYUGA TOBACCO COMPANY, an unincorporated arm of The Seneca-Cayuga Tribe of Oklahoma, and SENECA-CAYUGA TRIBAL TOBACCO CORPORATION, a successor in interest to Seneca-Cayuga Tobacco Company, Defendants-Appellees	)	FROM WAKE COUNTY No. 07 CVS 16565

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DEFENDANT-APPELLEES' BRIEF

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QUESTIONS PRESENTED

The "Questions Presented" section of the State's brief does not adequately state the issues in this appeal. The Defendants, the Seneca-Cayuga Tobacco Company ("SCTC") and the Seneca-Cayuga Tribal Tobacco Corporation ("SCTTC") (collectively, the "Tribal Tobacco

Companies"), Tribal Tobacco Companies re-state the questions presented as follows:

I. **WAS IT PROPER FOR THE TRIAL COURT TO DISMISS THE STATE'S COMPLAINT, BASED ON THE TRIBE'S SOVEREIGN IMMUNITY, WHERE THE COMPLAINT NEVER ALLEGED A WAIVER OF THAT IMMUNITY AND WHERE AN AMENDMENT TO THE COMPLAINT WOULD HAVE BEEN FUTILE?**

II. **WAS IT PROPER FOR THE TRIAL COURT TO DISMISS THE STATE'S COMPLAINT, BASED ON THE TRIBE'S SOVEREIGN IMMUNITY, WHERE THE DOCUMENTS SUBMITTED BY THE STATE FAILED TO SHOW THE WAIVER NECESSARY FOR THIS LAWSUIT TO PROCEED?**

INTRODUCTION

This case involves a conflict between two sovereigns: the State of North Carolina and the Seneca-Cayuga Tribe of Oklahoma. By its lawsuit, the State seeks to impose on the Tribe millions of dollars in penalties as well as an order that the Tribe pay nearly a million dollars into escrow. Although the Tribe disputes the validity of the State's demand, there is no need to delve into the merits of the underlying dispute. The State's lawsuit must die at the threshold because the Tribe is protected by sovereign immunity. The State has neither pled nor proven a waiver of that immunity. Thus, there is no subject matter jurisdiction, and the trial court correctly dismissed the State's complaint. While the Tribe is willing to continue its efforts to

resolve its disagreement with the State on an amicable basis, the judgment of the trial court must be affirmed.

STATEMENT OF THE CASE

Omitted from the "Statement of the Case" section of the State's brief are several procedural matters that are pertinent to the disposition of this appeal.

The Complaint contains no *allegation* that the Tribe waived sovereign immunity so as to permit this lawsuit. In its *request for relief*, the Complaint *asks* "that the Court declare that the Defendants have waived any sovereign immunity that might otherwise apply." R. 9 (Complaint at 8). However, the Complaint fails to support that request with any facts allegedly constituting such a waiver.

Attached to the Complaint as Exhibit 1 – but ignored by the State in its brief – is an Escrow Agreement which expressly addresses the issue of sovereign immunity. In the Escrow Agreement, "the Tribe grants a *limited* waiver of its sovereign immunity, but *solely* with respect to amounts that *are held* in or previously *have been held* in the applicable Beneficiary State's sub-account..." R. 28 (Complaint, Ex. 1 at 17) (emphasis added). By its own terms, this limited waiver only applies to funds *now* or *previously* held in escrow; it does not apply to funds *never* held in escrow. Yet, it is

precisely such "non-waived" funds that the Complaint seeks to compel the Tribe to pay.

Although the State made an oral motion to amend its Complaint at the March 6, 2008 hearing, the State never *filed* any Amended Complaint and never *tendered* to the trial court the amendment it wished to make.

Both parties provided the trial court with various documents that were outside the pleadings and that were relevant – or purportedly relevant – to the issue of subject matter jurisdiction. *See* R. 58-90 (Plaintiff's Ex's 1-5) and R. 91-101 (Defendants' Ex's A-C). The trial court considered these documents in reaching its decision to dismiss the State's claim. *See* R. 102 (Order).

STATEMENT OF FACTS

The Tribal Tobacco Companies also must take issue with the "Statement of Facts" recited by the State. On some points, the State overlooks key facts; on other points, the State is simply mistaken. The necessary additions and corrections include the following:

On December 3, 2003, the Business Committee of the Tribe adopted a resolution requiring the consent of the Business Committee in order for there to be a waiver of sovereign immunity. While the State acknowledges the

resolution (*see* State Br. at 6), it does not state its pertinent terms. Those terms provide:

> WHEREAS: Article VI of the Constitution [of the Tribe] established the Business Committee... and empowered the Business Committee to transact business and otherwise speak or act on behalf of the Tribe in all matters on which the Tribe is empowered to act; and
>
> WHEREAS: the Seneca-Cayuga Tribe of Oklahoma has the right to assert sovereign immunity as a defense in an action brought against the Tribe, NOW
>
> THEREFORE, BE IT RESOLVED, that no waiver, either expressed or implied, of the right to assert sovereign immunity as a defense...shall be valid without the consent of the Business Committee expressed by resolution.

R. 77, 91 (Plaintiff's Ex. 2; Defendants' Ex. A).

The State correctly notes that the Certification of Compliance dated April 30, 2004, was authorized by the Business Committee in a resolution adopted on December 2, 2003. *See* State Br. at 5-6. However, the State is mistaken when it suggests that the Certification of Compliance and/or the December 2, 2003 resolution contained a waiver of sovereign immunity by the Business Committee. *See id.* The Certification of Compliance is a standard form that the State requires from all non-participating manufacturers in order for their brands to be eligible for sale in North Carolina. Not surprisingly, nothing in that form refers to sovereign

immunity. *See* R. 59-66. Nor does the December 2, 2003 resolution make any reference to sovereign immunity. *See* R. 74-76.

Absent from the State's recital of facts is any mention of the Escrow Agreement, which *does* mention sovereign immunity and which expressly *limits* any waiver of that immunity to funds *already* deposited in SCTC's escrow account, thereby foreclosing the case at bar. *See supra* at p. 3 (discussing Complaint, Ex. 1 at 17).

The Escrow Agreement – including its express limitation on any waiver – is attached to and forms a part of the Certification of Compliance. *See* R. 65, ¶¶ 9(a) and 9(b) (requiring attachment of escrow agreement). Thus, the Certification of Compliance, when read with its required attachment, clearly *withholds* the type of waiver that the State needs to bring this lawsuit.

None of this should come as any surprise to the State. In filing its Certification of Compliance, SCTC reminded the State of their previous discussions, noting: "ESCROW AGREEMENT WAS ORALLY APPROVED BY YOUR OFFICE." R. 65, ¶ 9(a).

There is no evidence in the record that the State ever changed its mind and disapproved of the Escrow Agreement or that it ever sought a broader waiver than the very limited one that it was given.

Finally, the State notes that "[o]n 10 June 2006, defendant Seneca Cayuga Tribal Tobacco Corporation ('SCTTC') was incorporated according to tribal ordinance and became a successor in interest to SCTC." State Br. at 6 (citing R. 81-83). While apparently not contested by the State, it also should be noted that SCTTC was expressly imbued with the sovereign immunity of the Tribe. *See* R. 93, § IV, ¶ 2 (Tribal Corporation Ordinance, stating that "Each Tribal corporation shall have tribal sovereign immunity from liability..."); R. 100, ¶ 8 (Articles of Tribal Incorporation, stating that SCTTC is "to act with tribal sovereign immunity, unless expressly waived by the corporation or by the Tribe.").

ARGUMENT

I. THE TRIBAL TOBACCO COMPANIES ARE PROTECTED BY SOVEREIGN IMMUNITY.

A. The Tribe Is Protected By Sovereign Immunity.

Sovereign immunity is a familiar doctrine as it applies to the States. It is settled law that the States cannot be sued – for either damages or injunctive relief – absent waiver or a valid Congressional abrogation. *See, e.g., Seminole Tribe v. Florida.*, 517 U.S. 44 (1995). Indeed, sovereign

immunity is a doctrine that has been invoked – and invoked successfully – by the Attorney General of North Carolina.[1]

Also well-settled – and familiar to this Court – is the law of sovereign immunity as it applies to federally-recognized Indian tribes.[2] "Tribal sovereign immunity is a matter of federal law.... An Indian tribe... is subject to suit *only* where Congress has authorized the suit or the tribe has *expressly and unequivocally* waived its tribal sovereign immunity." *Welch Contr., Inc. v. N.C. DOT*, 175 N.C. App. 45, 53-54, 622 S.E.2d 691, 697 (N.C. Ct. App. 2005) (emphasis added) (citing, *inter alia, Kiowa Tribe v. Manufacturing Techs.*, 523 U.S. 751, 755-60 (1998); *Oklahoma Tax Com. v. Potawatomi Tribe*, 498 U.S. 505 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Eastern Band of Cherokee Indians v. Lynch*, 632 F.2d 373 (4th Cir. 1980)).

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[1] *See, e.g., Stewart v. North Carolina*, 393 F.3d 484 (4th Cir. 2005); *South Carolina State Ports Auth. v. FMC*, 243 F.3d 165 (4th Cir. 2001); *In re Secretary of the Dep't of Crime Control & Pub. Safety*, 7 F.3d 1140 (4th Cir. 1993).

[2] This is not to imply that the immunity enjoyed by Indian tribes is coextensive with the immunity possessed by States. *See, e.g., Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991) (distinguishing state sovereign immunity from tribal sovereign immunity on grounds that the tribes were not present at the Constitutional Convention and thus were not parties to the concessions made there by the States). Even so, state sovereign immunity may serve as a helpful analogy for the broad principle of tribal immunity implicated here.

Firmly rooted in our history, these legal principles continue to serve vital interests. "Indian tribes enjoy immunity because they are sovereigns predating the Constitution, ... and because immunity is thought necessary to promote the federal policies of tribal self-determination, economic development and cultural autonomy." *American Indian Agric. Credit Consortium v. Standing Rock Sioux Tribe,* 780 F.2d 1374, 1378 (8th Cir. 1985) (citing *United States v. United States Fidelity & Guaranty Co.,* 309 U.S. 506, 512-13 (1940); *Turner v. United States*, 248 U.S. 354, 357-58 (1919); Felix S. Cohen, *Handbook on Federal Indian Law* 324-28 (1982); Note: *In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. 1058, 1073 (1982)).

B. SCTC and SCTTC – and Their Commercial Activities – Are Protected by Sovereign Immunity.

The sovereign immunity defense is not affected by the fact that, instead of suing the Tribe by name, the Attorney General has named as defendants the "Seneca Cayuga Tobacco Company" and the "Seneca Cayuga Tribal Tobacco Corporation." The Attorney General concedes that SCTC and SCTTC are arms of the Tribe. R. 3 (Complaint, ¶ 3).[3] As arms

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[3] The "federally recognized" status of the Tribe is well-settled. *See, e.g., Seneca-Cayuga Tribe v. Town of Aurelius*, Case No. 5:03-CV-00690 (NPM), 2004 U.S. Dist. LEXIS 17481 (N.D.N.Y. Sept. 1, 2004) (describing

of the Tribe, SCTC and SCTTC enjoy the full extent of the Tribe's immunity from suit.

As explained by the United States Supreme Court, the doctrine of sovereign immunity contains no exception when an Indian tribe acts through a corporation or engages in commercial activity outside of tribal territories. *See Potawatomi*, 498 U.S. at 511 (finding that a convenience store owned by a tribe enjoyed sovereign immunity). Indeed, it has been held repeatedly that a corporation organized under tribal laws and controlled by the tribe can assert the tribe's immunity as a defense. As noted by one North Carolina federal court, "Tribal councils are clearly entitled to sovereign immunity... and this Court can find no reason to distinguish among tribal councils, gaming boards, and *business owned and operated by the Tribe*," *Thomas v. Dugan*, Case No. 2:97CV177-C, 1997 U.S. Dist. LEXIS 20850 at *7 (W.D.N.C. Nov. 14, 1997) (emphasis added).[4]

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the Seneca-Cayuga Tribe of Oklahoma as "a federally recognized Indian Tribe") (citing 68 Fed. Reg. 68, 180 (Dec. 5, 2003)).

[4] Other courts have agreed. *See, e.g., Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 29 (1st Cir. 2000) (holding that 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."); *Multimedia Games, Inc. v. WLGC Acquisition Corp.*, 214 F. Supp. 2d 1131, 1141 (N.D. Okla. 2001) ("[I]ncorporating under the laws of a

The U.S. Supreme Court also has made it clear that sovereign immunity remains intact even when an Indian tribe conducts commercial activity outside of its reservation. *Kiowa Tribe of Oklahoma v. Manufacturing Tech. Inc.*, 523 U.S. 751 (1998), involved a commercial lawsuit arising out of the failure of a federally-recognized Indian tribe to make timely payments on a promissory note. Sued in Oklahoma state court, the Kiowa tribe asserted sovereign immunity and moved to dismiss for lack of jurisdiction. The trial court denied the motion and entered judgment for the noteholder. The Oklahoma appellate court affirmed on the theory that Indian tribes are subject to suit in state court for breaches of contract involving off-reservation commercial conduct. The United States Supreme Court reversed, holding:

> Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. Congress has

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state does not amount to an express waiver of tribal sovereign immunity."); *Cohen v. Little Six, Inc.*, 543 N.W.2d 376, 380 (Minn. Ct. App. 1996) ("By registering in Minnesota as a foreign corporation, the [federally-recognized Indian tribe] did not unequivocally waive sovereign immunity."); *Elliott v. Capital Int'l Bank & Trust*, 870 F. Supp. 733, 733-35 (E.D. Tex. 1994) (dismissing, on immunity grounds, an action against a limited liability bank, which was chartered, governed, and owned by an Indian tribe); *Namekagon Dev. Co. v. Bois Forte Reservation Hous. Auth.*, 395 F. Supp. 23, 26 (D. Minn. 1974) (acknowledging tribes can confer immunity upon tribally-owned and tribally-created corporations), *aff'd,* 517 F.2d 508 (8th Cir. 1975).

> not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case.

Id. at 760. As in *Kiowa*, it does not matter here that the manufacture and distribution of cigarettes is a commercial activity. Nor does it matter whether aspects of the commercial activity occur *on* tribal lands (*e.g.*, manufacturing) or *off* those lands (*e.g.*, distributing).[5] The point is that Congress has not abrogated the Tribe's sovereign immunity, nor has the Tribe waived it. Thus, the Tribe's sovereign immunity remains intact.

In *Kiowa,* the Supreme Court also explained an important distinction between (i) the authority of a State to regulate the activities of tribes occurring off Indian lands, and (ii) the ability of a State to enforce its regulations by a lawsuit:

> We have recognized that a State may have authority to tax or regulate tribal activities occurring within the State but outside Indian country. To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit.... There is a difference between the right to demand compliance with state laws and the means available to enforce them.

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[5] The Tribe does not concede that the tribal tobacco products eventually sold in North Carolina were sold *by the Tribe* outside of tribal lands.

Kiowa, 523 U.S. at 755 (citations omitted).[6] In other words, there is a distinction between (i) *legislative* authority to impose regulations on the commercial activity of an Indian tribe, and (ii) *judicial* authority to make a tribe subject to court orders and processes. Even where legislative authority may exist, judicial authority does not exist absent tribal waiver or congressional abrogation.[7]

Finally, although damage to a tribe is not an essential component of a tribal claim of sovereign immunity, it is clear nevertheless that the attempt by North Carolina to impose millions of dollars of liability on the Tribe

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[6] So crucial is this distinction that it applies even where an Indian tribe has been made subject to generally applicable *federal* legislation. *See, e.g., Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2d Cir. 2000) (dismissing federal copyright claim against Indian tribe and noting that "the fact that a statute applies to Indian tribes does not mean that Congress abrogated tribal immunity in adopting it.").

[7] Based on *Kiowa*, legislative jurisdiction also appears to be lacking here. For example, nothing in *Kiowa* suggests that a State has legislative authority to regulate tribal commercial activities by calling for an escrow payment when an essential element of the targeted activity – here, cigarette manufacturing – occurs *on tribal lands within the boundaries of another State*. Similarly, nothing in *Kiowa* suggests that one sovereign (the State) has legislative authority to *punish* another sovereign (the Tribe) by the imposition of monetary penalties. Because these distinctions implicate the jurisdiction of the North Carolina legislature – rather than the jurisdiction of its courts – they appear to be outside the scope of the instant motions to dismiss. However, to the extent that these points may be deemed pertinent to these motions, the Tribal Tobacco Companies maintain that North Carolina lacks the authority to impose such regulation or punishment upon them.

would greatly damage the Tribe and thereby interfere with "Congress'... overriding goal of encouraging tribal self-sufficiency and economic development." *Potawatomi*, 498 U.S. at 510 (internal quotation marks and citations omitted).

C. Sovereign Immunity Extends to Tribal Tobacco Enterprises.

The general principles governing tribal sovereign immunity contain no exception for tribal tobacco enterprises. On the contrary, it was in the context of a tribal tobacco enterprise that those principles received their most emphatic explanation. In *Potawatomi*, discussed *supra* at page 10, the State of Oklahoma was attempting to enforce a $2.7 million tax assessment against the Potawatomi tribe for cigarette sales made in tribal convenience stores to non-members. Oklahoma was also seeking an injunction to prevent the Potawatomis from selling cigarettes in the future without collecting and remitting state taxes on those sales. 498 U.S. at 507-08. Responding to the tribe's claim of sovereign immunity, Oklahoma argued that sovereign immunity should not be allowed to "insulat[e] tribal business ventures from the authority of the States to administer their laws." *Id.* at 510. The United States Supreme Court rejected Oklahoma's argument and upheld the Potawatomi claim of sovereign immunity.

Recognizing the long pedigree of tribal sovereign immunity, the Supreme Court noted that Congress *could* intervene to authorize tax suits against a tribe, but that it has *never* done so. As the Court explained:

> Congress has always been at liberty to dispense with such tribal immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian tribes, *it has never authorized suits to enforce tax assessments*. Instead, Congress has consistently reiterated its approval of the immunity doctrine.
>
> * * * * *
>
> Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity.

Id. at 510 (emphasis added).

So, too, Congress has never authorized suits of the sort brought against the Tribe by the State of North Carolina. Using a lawsuit to enforce an escrow obligation for past sales of Tribe-manufactured tobacco products is barred by sovereign immunity. Also barred is the attempt to impose a monetary penalty on the Tribe in connection with those sales. Given such sovereign immunity, the trial court was correct to dismiss the lawsuit.

D. A Waiver Sovereign Immunity May Not Be Implied.

The U.S. Supreme Court has been emphatic that a waiver of immunity is not to be readily found. "It is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Santa Clara*

Pueblo, 436 U.S. at 58-59 (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976), quoting *United States v. King*, 395 U.S. 1, 4 (1969)). The State collects a list of cases in which various tribal statements and actions have been found to constitute a waiver of tribal sovereign immunity. Yet, the State fails to show how any of those cases are analogous to the case at bar.

For example, the State cites several cases where a tribe was held to have waived sovereign immunity through a *"sue-and-be-sued"* clause. State Br. at 9-10 (citing *Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974, 978-79 (9th Cir. 2006); *McCarthy & Assoc. v. Jackpot Junction Bingo Hall*, 490 N.W.2d 156 (Minn. Ct. App. 1992); *Val/Del, Inc. v. Superior Court*, 703 P.2d 502 (Ariz. Ct. App. 1985); *Duluth Lumber and Plywood Co. v. Delta Development, Inc.*, 281 N.W.2d 377 (Minn. 1979)). But, the cases cited by the State reflect a minority viewpoint. "Most courts have reasoned that tribal adoption of a charter with such a [sue-and-be-sued] clause simply creates the power in the corporation to waive immunity, and that adoption of the charter alone does not independently waive tribal immunity." Felix S. Cohen, *Handbook of Federal Indian Law* § 7.05(1)(c) (2005 ed.). Moreover, in the case at bar, the State does not rely on a "sue-and-be-sued" clause.

The State says that a tribe waives suit as to *counterclaims* by filing its own suit. State Br. at 9 (citing *Berrey v. Asarco, Inc.*, 439 F.3d 636 (10th Cir. 2006)). But the Tribe did not file suit against North Carolina, and the Complaint that is at issue here was not a counterclaim.

The State cites several cases where a tribe was held to have waived immunity by agreeing to a contract with an *arbitration clause*. State Br. at 9-10 (citing *Rosebud Sioux Tribe v. Val-U Constr. Co.*, 50 F.3d 560 (8th Cir. 1995); *Smith v. Hopland Band of Pomo Indians*, 115 Cal. Rptr. 2d 455 (Cal. Appp. 1st Dist. 2002); *Nenana Fuel Co. v. Native Village of Venetie*, 834 P.2d 1229 (Alaska 1992); *Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983)). But there is no arbitration clause in the case at bar.

The State also cites a case where there was an express waiver of immunity in a contract signed by the CFO of the tribe. State Br. at 9-10 (citing *Rush Creek Solutions, Inc. v. Ute Mt. Ute Tribe*, 107 P.3d 402 (Colo. Ct. App. 2004)). But there is no such contract provision here.[8]

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[8] *Rush Creek* also involved whether a tribal agent must have actual authority to waive sovereign immunity, or whether "apparent authority" is enough. While the court in *Rush Creek* was satisfied with apparent authority, its decision is against the weight of authority. With Indian tribes – as with federal and state governments – the agent must have actual authority. *See, e.g., Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947) ("Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately

Finally, the State cites *South Fork Band of the Te-Moak Tribe of W. Shoshone Indians of Nevada v. Sixth Judicial Dist. Court*, 7 P.2d 455 (2000). State Br. at 10. In that case, the court found that "the purchase of reservation land subject to previously adjudicated water rights constituted an express waiver of sovereign immunity, and the Tribe's actions in benefiting from and abiding by the [court decree] for more than five decades served to ratify this waiver." *Id.* at 458. Nothing of the sort occurred here.

In sum, the State's listing of waiver cases – all of which are quite different from the case at bar – only reinforces the Tribe's position that there has been no waiver of immunity here.

II. THE STATE'S "WAIVER" ARGUMENT MUST FAIL.

Invoking Rules 12(b)(1) and 12(b)(6), the Tribal Tobacco Companies moved to dismiss the Complaint for "lack of jurisdiction over the subject matter and on grounds of tribal immunity." R. 55 (Motion to Dismiss). The

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ascertained that he who purports to act for the Government stays within the bounds of his authority); *World Touch Gaming, Inc. v. Massena Mgmt., LLC,* 117 F. Supp. 2d 271, 276 (N.D.N.Y 2000) ("[A]ny argument that subsequent acts, or acquiescence in carrying out the contract entered into with apparent authority, estop the Tribe from claiming sovereign immunity must fail.") (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982); *Santa Clara Pueblo*, 436 U.S. at 58-59). Moreover, in its brief, the State does not purport to rely on apparent authority.

Complaint does not comply with either rule, and each rule furnishes a compelling reason to affirm the trial court's decision to dismiss.

Sovereign immunity applies unless there is "a clear waiver by the tribe or congressional abrogation." *Potawatomi*, 498 U.S. at 509. The State does not argue that there has been a congressional abrogation at work here. Instead, the State argues that the trial court erred when it dismissed the case in the face of its assertion that sovereign immunity had been waived.

The State's argument is flawed on several levels. With respect to the Rule 12(b)(6) motion to dismiss, the Complaint does not allege waiver. Indeed, when read with its attachments, the Complaint affirmatively alleges the exact opposite: the Tribe did *not* grant a waiver allowing this lawsuit to proceed. While the State may have wanted to amend its Complaint, it never filed any amendment and, in any event, any amendment would have been futile.

With respect to the Rule 12(b)(1) motion to dismiss, the trial court allowed the parties to present documentary evidence outside of the pleadings. Yet, those documents did not show that there was a waiver of sovereign immunity allowing this lawsuit to proceed. On the contrary, those documents confirmed that there was no such waiver. The trial court was correct to dismiss the State's claim just as, a few days later, a Virginia trial

court dismissed a similar claim brought by the Virginia Attorney General against the Tribal Tobacco Corporations.

A. Under Rule 12(b)(6), the Complaint Must Be Dismissed.

Standard of Review: In order to survive a motion to dismiss under Rule 12(b)(6), the complaint must allege facts allowing relief to be granted. Specifically, "the complaint must provide sufficient notice of the events and circumstances from which the claim arises, and must *state allegations* sufficient to satisfy the substantive elements of at least some recognized claim." *Harris v. NCNB National Bank of North Carolina*, 85 N.C.App. 669, 670-71, 355 S.E.2d 838, 840-41 (1987) (emphasis added) (citation omitted). Moreover, as the North Carolina Supreme Court has explained:

> Dismissal of a complaint under Rule 12(b)(6) is proper when one of the following three conditions is satisfied, [1] when the complaint on its face reveals that no law supports plaintiff's claim; [2] when the complaint on its face reveals the absence of facts sufficient to make a good claim; [3] when some fact disclosed in the complaint necessarily defeats plaintiff's claim.

Jackson v. Bumgardner, 318 N.C. 172, 175, 347 S.E.2d 743, 745 (1986) (citations omitted). This Court reviews de novo the trial court's dismissal of the Complaint under Rule 12(b)(6). *Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (2005) (citing *Lea v. Grier*, 156 N.C. App. 503, 507, 577 S.E.2d 411, 414 (2003) (other citation omitted)).

1. The Complaint Fails to State a Claim Against the Tribal Tobacco Companies Because It Does Not Allege a Waiver of Immunity that Would Allow Relief to Be Granted.

In the case at bar, the Complaint meets the criteria for dismissal set forth in *Jackson*. This is so for two reasons: (a) The Complaint fails to allege the necessary waiver of sovereign immunity. Thus, there is an "absence of facts sufficient to make a good claim." (b) When the Complaint is read together with its attached Exhibit 1, there is a fact disclosed which "necessarily defeats plaintiffs claim." Each defect will be discussed in turn.

First, nowhere on the face of the Complaint does the State make any *allegation* that sovereign immunity was waived. *See* R. 2-10 (Complaint). The State asks the Court to overlook this omission on the theory that, in its *prayer for relief*, it asked the trial court to *declare* that there had been such a waiver. *See* State Br. at 11-12. But clearly this will not do. *See, e.g.*, Rule 10(b) ("All averments of claim... shall be made in numbered paragraphs..." – thus, not in the separate prayer for relief); *Gunter v. Anders*, 114 N.C. App. 61, 66, 441 S.E.2d 167, 171 (1994) (failure to allege waiver of immunity in complaint resulted in dismissal under Rule 12(b)(6)).

A plaintiff cannot omit a key allegation of his case and then cure the omission by asking the court to find in his favor anyway. For example, a plaintiff who fails to allege that his contract was breached cannot maintain

an action for breach of contract. Likewise, a plaintiff who fails to allege that he was damaged cannot seek damages. And, here, a plaintiff who fails to allege that there was a waiver of sovereign immunity cannot maintain a suit against the sovereign. Indeed, it is well-established such discrepancies between the allegations and the prayer for relief *support* a Rule 12(b)(6) motion to dismiss. The State wants to turn this legal principle on its head and use that discrepancy as a basis to *survive* such a motion. But this is not the law.

Moreover, even if it were appropriate to search the prayer for relief to find elements missing from the plaintiff's allegations, the Complaint still would be deficient. It takes more than the bare assertion that sovereign immunity has been waived to survive a Rule 12(b)(6) motion to dismiss. "For purposes of a Rule 12(b)(6) motion, the well-pleaded material allegations of the complaint are taken as admitted; but *conclusions of law or unwarranted deductions of fact are not admitted.*" *Hooper v. Liberty Mutual Insurance Company*, 84 N.C. App. 549, 551-52, 353 S.E.2d 248, 250 (1987) (citations omitted) (emphasis added). This is particularly true with respect to a plaintiff's attempt to overcome a defense of sovereign immunity. Thus, in *Dalenko v. Wake County Dep't of Human Servs.*, 157 N.C. App. 49, 578 S.E.2d 599 (2003), even though the complaint included an allegation

that the actions of the defendant, a government employee, were "outside the scope of her authority" and therefore not protected by governmental immunity, the Court refused "to treat this allegation of a legal conclusion as true" and affirmed the trial court's dismissal on immunity grounds. *Id.* at 56, 578 S.E.2d at 604 (internal quotation, citation and alteration omitted). The same rule applies here. Nowhere on the face of the Complaint – not even in its prayer for relief – does the State allude to any material facts that would permit the deduction that sovereign immunity has been waived. The claim of waiver is nothing more than an "allegation of a legal conclusion." The necessary materials facts – the who, what, when, where and how of the alleged waiver – are wholly absent. For this reason, too, the Complaint cannot survive scrutiny under Rule 12(b)(6).

Second, although nothing within the four corners of the Complaint makes any allegation about waiver, the Complaint does attach an Escrow Agreement, which expressly addresses the issue of sovereign immunity. *See* R. 28 (Complaint, Ex. 1 at 17). Ignored by the State in its brief, this exhibit further undermines the State's case. The Escrow Agreement states that "the Tribe grants a *limited* waiver of its sovereign immunity, but *solely* with respect to amounts that *are* held in or previously *have been* held in the applicable Beneficiary State's sub-account..." *Id.* (emphasis added). This

limited waiver does not encompass funds that are *not* now held in escrow and that have *never been* held in escrow. Nor does it address penalties. Yet, it is precisely such "non-waived" funds – and such penalties – that the Complaint seeks to compel the Tribe to pay.

The law is clear that, when a sovereign waives immunity, it does so on its own terms. *E.g., Lane v. Pena*, 518 U.S. 187, 192 (1996) (holding that a waiver of sovereign immunity is "strictly construed, in terms of its scope, in favor of the sovereign."); *United States v. Sherwood*, 312 U.S. 584, 586 (1941) ("[The] sovereign... is immune from suit save as it consents to be sued... and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit."). Because the Tribe did not unequivocally waive immunity for the claims the State seeks to bring – and, indeed, because the Tribe unequivocally *limited* its waiver to a much narrower class of claims – the State's case must fail. Moreover, the State, in effect, *alleged* that the Tribe's waiver was thus limited when it attached the Escrow Agreement to its Complaint. In other words, the express limitation on the Tribe's waiver constitutes a "fact disclosed in the complaint [which] necessarily defeats plaintiff's claim." *Jackson,* 318 N.C. at 175, 347 S.E.2d at 745. Thus, the Complaint cannot survive a motion to dismiss under Rule 12(b)(6).

2. The Trial Court Correctly Denied the State's Motion To Amend Its Complaint.

Standard of Review: This Court's review of a trial court's motion to amend a pleading is based upon an abuse of discretion. "[A] motion under Rule 15(a) is addressed to the sound discretion of the trial judge and the denial of such motion is not reviewable absent a clear showing of an abuse of discretion." *Edwards v. Edwards*, 43 N.C. App. 296, 298, 259 S.E.2d 11, 13 (1979). "A judge is subject to reversal for abuse of discretion *only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason.*" *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980) (emphasis added); *see also Gunter*, 114 N.C. App. at 66, 441 S.E.2d at 170 (trial court denied motion for leave to amend complaint to add allegations regarding waiver of sovereign immunity; decision would not be reversed on appeal unless it was "so arbitrary that it could not have been the result of a reasoned decision").

The bases for denying a party's motion to amend include: (a) undue delay, (b) bad faith, (c) undue prejudice, (d) *futility of amendment*, and (e) repeated failure to cure defects by previous amendments. *Mosley & Mosley Builders, Inc., v. Landin Ltd.*, 97 N.C.App. 511, 516, 389 S.E.2d 576, 578 (1990) (emphasis added). There was no abuse of discretion in this case. The State's proposed amendment would have been futile.

In order to determine futility, a court looks to determine if the proposed pleading would withstand a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). *Smith v. McRary*, 306 N.C. 664, 671, 295 S.E.2d 444, 448 (1982). The amendment sought by the State – insofar as the content of that amendment can be determined from the record – would not have survived a Rule 12(b)(6) motion to dismiss. This is so for at least two reasons.

First, the State says that it made an oral motion to allege "in further detail" that the Defendants waived their sovereign immunity. State Br. at 12. However, the record does not reveal any details about the wording of that motion. Indeed, the record only shows that the State sought "to affirmatively allege a waiver of sovereign immunity." R. 102 (Order). Such a sweeping, conclusory allegation would not survive a Rule 12(b)(6) motion to dismiss because it runs afoul of the rule that "conclusions of law or unwarranted deductions of fact are not [treated as] admitted." *Hooper,* 84 N.C. App. 551-552, 353 S.E.2d at 250.

Second, any general allegation that sovereign immunity was waived would have to be read alongside the specific limitations on waiver found in Exhibit 1, which also forms part of the Complaint. This would wholly defeat the State's lawsuit because the relief the State seeks is more than

those limitations would allow. *See supra* at p. 23-24. Thus, allowing an allegation of a waiver of immunity would not have saved the Complaint.

The State argues in its brief that the trial court lacked authority to deny its oral motion to amend the Complaint. *See* State Br. at 12-14. The State is mistaken. By placing itself before the Court and asking for leave to amend, the State subjected itself to the trial court's discretion to grant or deny its motion. "[A] motion under Rule 15(a) is addressed to the sound discretion of the trial judge." *Edwards*, 43 N.C. App. at 298, 259 S.E.2d at 13. Interestingly, the State cites *Beck v. City of Durham* 154 N.C. App. 221, 573 S.E.2d 183 (2002), to support the State's bold assertion that the trial court could not have denied its motion to amend; however, in *Beck*, the facts were quite different. This Court determined that:

> *The record in the instant case clearly indicates that plaintiff filed his amended complaint approximately four minutes after the hearing on defendants' motion to dismiss began.* Prior to the hearing, defendants had only filed a motion to dismiss, which is not a responsive pleading. It is unlikely that the drafters of Rule 15(a) intended "any time" to encompass plaintiff serving his amended complaint during a hearing. Nevertheless, defendants' failure to present a record of objections to this last minute act by plaintiff or provide a verbatim transcript indicating whether the court took issue with the amended complaint compels this Court to conclude that in this case the complaint was timely filed.

154 N.C. App. at 227, 573 S.E.2d at 188 (emphasis added). In other words, the plaintiff in *Beck* simply filed an amended complaint; he did not seek court approval or otherwise rely on the trial court's discretion. In sharp contrast, the State did not *file* an amended complaint. Instead, the State waited until the middle of a hearing on the Defendants' Motion to Dismiss, then made an oral motion *seeking leave to amend,* and never tendered to the court a copy of the amendment it sought to make. *Beck* is therefore distinguishable, and it does not support the proposition that the trial court did not have the authority to deny the State's motion. In fact, this case is more similar to *Gunter*, in which the plaintiffs *moved to amend* their complaint at the hearing on the defendants' Rule 12(b)(6) motion, seeking to add the allegation "that the defendants... had... waived their immunity." 114 N.C. App. at 64, 114 441 S.E.2d at 169. The trial court denied the motion and granted the defendants' motion to dismiss, and this Court concluded that there was no abuse of discretion.

In sum, the Complaint does not state a claim on which relief can be granted against the Tribal Tobacco Companies because it does not allege the necessary waiver of immunity and, in fact, alleges that this lawsuit is beyond the scope of any waiver. The general allegation of waiver that the State belatedly sought to make was both insufficient to state a claim and within

the discretion of the trial court to deny. Dismissal under Rule 12(b)(6) was warranted, and the trial court's decision to dismiss should be affirmed.

B. Under Rule 12(b)(1), the Complaint Must Be Dismissed.

Standard of Review: A Rule 12(b)(1) motion tests a court's subject matter jurisdiction. "Unlike a Rule 12(b)(6) dismissal, the court need not confine its evaluation [of a Rule 12(b)(1) motion] to the face of the pleadings, but may review or accept any evidence, such as affidavits, or it may hold an evidentiary hearing." *Smith v. Privette*, 128 N.C. App. 490, 493, 495 S.E.2d 395, 397 (N.C. Ct. App. 1998) (quoting 2 James W. Moore et al., *Moore's Federal Practice*, § 12.30[3] (3rd ed. 1997)). "[T]he standard of review on a motion to dismiss under Rule 12(b)(1) for lack of jurisdiction is de novo." *Country Club of Johnston County, Inc. v. United States Fid. & Guar. Co.*, 150 N.C. App. 231, 237, 563 S.E.2d 269, 274 (2002) (citing *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001)). "[T]o the extent the trial court resolves issues of fact" in considering a Rule 12(b)(1) motion, "*those findings are binding on the appellate court* if supported by competent evidence in the record." *Smith*, 128 N.C. App. at 493, 495 S.E.2d at 397 (emphasis added).

At the March 6, 2008 hearing, the State introduced several documents in the hope that they would support its argument that the Tribe had waived

its sovereign immunity. *See* R. 58-90 (Plaintiff's Ex's 1-5). The Tribal Tobacco Companies introduced some of the same documents, but no others. *See* R. 91-101 (Defendants' Ex's A-C). The trial court considered this evidence, (*see* R. 102 (Order)); but, none of these documents show the sort of waiver of immunity that the State needs in order to bring the instant lawsuit. On the contrary, those documents affirmatively show there was no such waiver.[9] The trial court properly rejected the State's argument and dismissed the case.

A review of the documents – all introduced by the State – confirms the wisdom of the trial court's ruling. In a nutshell, they show the following:

1. The Constitution of the Tribe vests in its Business Committee the power "to speak or act on behalf of the Tribe in all matters on which the Tribe is empowered to act." R. 77, 91 (Plaintiff's Ex. 2; Defendants' Ex. A).

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[9] Once it is shown that the defendant is a sovereign, the burden is on the plaintiff to prove there was a waiver of immunity. *Welch v. United States*, 409 F.3d 646 (4th Cir. 2005) ("[I]t is the plaintiff's burden to show that an unequivocal waiver of sovereign immunity exists."); *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 84 (2d Cir. 2001) ("On a motion invoking sovereign immunity to dismiss for lack of subject matter jurisdiction, the plaintiff bears the burden of proving by a preponderance of evidence that jurisdiction exists.") (applying principle to immunity of Indian tribe); *Morgan v. Coushatta Tribe of Indians of La.*, 2001 U.S. Dist. LEXIS 25291 (E.D. Tex. Sept. 21, 2001) (same).

2. By a resolution adopted on December 3, 2003, the Business Committee explained that "no waiver, either expressed or implied, of the right to assert sovereign immunity as a defense... shall be valid without the consent of the Business Committee expressed by resolution." *Id.*

3. The only document in the record where any waiver of sovereign immunity can be found is the Escrow Agreement attached as Exhibit 1 to the Complaint. That waiver of immunity is so limited in scope – and so patently inadequate for the State's purposes here – that the State does not even mention it. Specifically, the Escrow Agreement states that: "the Tribe grants a *limited* waiver of its sovereign immunity, but *solely* with respect to amounts that *are held* in or previously *have been held* in the applicable Beneficiary State's sub-account...." R. 28 (Complaint, Ex. 1 at 17) (emphasis added). This language does not allow the instant lawsuit because the State seeks to impose obligations on the Tribe with respect to funds that *are not now* and *never have been* held in escrow. Moreover, it is clear that the Tribe is the master of its own waiver. *See supra* at p. 8-9, 24 (citing authorities). The State may wish it had been given a broader waiver, but the Tribe never granted one.

4. The State tries to read a broad waiver into the Certification of Compliance, filed by the Tribe on April 30, 2004. But that form document

makes no mention of sovereign immunity. *See* R 59-76. Instead, the Certificate of Compliance refers to the Escrow Agreement. *See* R. 65, ¶¶ 9(a) and 9(b). And, as noted above, the Escrow Agreement provides only a limited waiver that falls short of allowing the instant lawsuit.

5. Finally, the Certification of Compliance shows that the State *approved* the Escrow Agreement. *See* R. 65, ¶ 9(a). In giving its approval, the State necessarily approved the limited waiver language found in that agreement. The State should not now be heard to claim that it has a broader waiver than the one it approved.[10]

The trial court's decision to dismiss the case after reviewing these documents was not only correct, it was emulated by a Virginia trial court just a few days later in a parallel case involving the Tribal Tobacco Companies and the Virginia tobacco escrow laws. *See Commonwealth of Virginia v. Seneca-Cayuga Tobacco Company and Seneca-Cayuga Tribal Tobacco Corporation,* Case No. CL06-6693, Slip Op. (Richmond Cir. Ct. March 19, 2008) (copy attached in Appendix).

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[10] Perhaps the State did not demand a broader waiver because the Attorney General correctly recognized that he had no authority to make such a demand. In any event, it is clear that the Tribe never gave the State the waiver that it would need to bring the instant lawsuit.

The Virginia Attorney General made waiver arguments virtually identical to the ones made by the North Carolina Attorney General, and the Virginia court very properly rejected those arguments. As the Virginia court explained, tribal immunity cannot be waived by anyone other than the Business Committee, and the Business Committee emphatically did not do so. Taking each step in turn, the Virginia court first reviewed the facts on which the Virginia Attorney General relied:

> The Commonwealth's basis for its claim of waiver relies on letters from the Tribe's attorneys which acknowledge the statutory requirements to be authorized to sell cigarettes and its assurances that it intended to comply. The Tribe obtained the Commonwealth's approval to sell cigarettes by having its business manager represent to the Commonwealth under oath, that the Tribe had appointed an agent for the acceptance of process and subjected the tribe to this court's jurisdiction; and by the making of payments into the escrow fund and of penalties for late payments.

Virginia v. SCTC, Slip Op. at 5. These are some of the same arguments made here; however, they are insufficient for the same reasons that they failed in Virginia. As the Virginia court explained:

> Without any doubt, the conduct of these agents would serve to bind obligations and waive rights of a private entity. A federally recognized Indian Tribe, however, is not a private entity. It is a sovereign. As such, it enjoys the immunity from being sued as do other sovereigns. Generally, sovereign immunity cannot be waived by agents of the sovereign.

Id. at 5.

Any decision to waive immunity must be made by the Tribe, acting through its tribal legislature, known as the Business Committee:

> Waiver is the prerogative of the sovereign itself. The Commonwealth has provided no information by which the court could determine that the Tribe delegated its authority to waive its immunity to an agent. To the contrary, the Tribe submitted a resolution of the "Business Committee" dated December 3, 2003 which states in pertinent part
>
> > "that no waiver, either expressed or implied, of the right to assert sovereign immunity as a defense...shall be valid without the consent of the Business Committee expressed by resolution."
>
> Article VI of the Tribe's Constitution empowers the Business Committee to transact business in all matters in which the Tribe is empowered to act. Here, only the Business Committee is authorized to waive the Tribe's sovereign immunity.

Id. at 5-6. Finding no such action by the Business Committee, the Virginia court dismissed the case against the Tribal Tobacco Companies on the grounds of sovereign immunity. *Id.* at 6. The North Carolina trial court had already reached the same result. It is a result this Court should affirm.

Although the State does not mention the decision by the Virginia trial court, it cites three other cases that it believes should govern the outcome here. *See* State Br. at 17-19. None are relevant. First, the State cites *Marlowe v. Piner,* 119 N.C. App.125, 458 S.E.2d 220 (1995), for the

proposition that, at the summary judgment stage, "the defendant's *mere assertion in his answer* ... failed to meet his burden of proving that his immunity had not been waived." State Br. at 18 (emphasis added). The analogy fails for a variety of reasons: (a) *Marlowe* was decided at the summary judgment stage, where the operative standard is whether there is a genuine dispute of a material fact. Even under such a standard, the Tribe should prevail. *See supra* at p. 29-32 (showing that the Tribe's sovereign immunity is intact, based solely on documents introduced by the State). (b) Even so, the case at bar was not decided on summary judgment. It was decided on a motion to dismiss under Rule 12(b)(1), where the trial court may *resolve* factual disputes related to the existence of subject matter jurisdiction. *See Smith*, 128 N.C. App. at 493, 495 S.E.2d at 397. (c) In *Marlowe,* neither party offered evidence on whether sovereign immunity had been waived. *Id.* at 127, 458 S.E.2d at 222. In the case at bar, *both* parties introduced evidence, and the evidence shows that the Tribe never granted the waiver the State needs for its lawsuit to proceed. *See supra* at p. 4.

The State also misses the mark in citing *Hunt v. N.C. Department of Labor*, 348 N.C. 192, 194, 499 S.E.2d 747, 748 (1998). The State cites *Hunt* in support of its argument that it was improper for the trial court to resolve a factual dispute with respect to the waiver of sovereign immunity on a motion

to dismiss. Again, the State's argument is deeply flawed: (a) There is no record that the State objected to the trial court's consideration of evidence whether there had been a waiver of sovereign immunity. Indeed, the trial court considered such evidence in part because the State *asked* the court to do so when it submitted Plaintiff's Exhibits 1-5 at the March 6, 2008 hearing. (b) Even if the State had made an objection at the hearing, that objection now would be waived because the "Assignments of Error" listed by the State do not include any objection to the consideration of such evidence. *See* R. 108-109. (c) Even if the State had made and preserved an objection, the State's argument would still be without merit. In *Hunt*, the North Carolina Supreme Court remarked that the lower tribunal did not "consider[] depositions or other evidence in its deliberations," 348 N.C. at 195 n.1, 499 S.E.2d 748 n.1. But *Hunt* did not say that it would have been error if the lower tribunal had done so. Indeed, as the State elsewhere concedes, "[m]atters outside the pleadings may be taken into consideration by the court in its evaluation of whether subject matter jurisdiction exists." State Br. at 8 (citing a post-*Hunt* decision, *Harris v. Matthews*, 361 N.C. 265, 643 S.E.2d 566 (2007)).

For its third case, the State cites a California decision, *Warburton/ Buttner v. Superior Court of San Diego County,* 127 Cal. Rptr. 2d 706, 722-

23 (Cal. App. 2002). As explained by the State, *Warburton* held that the trial court erred when it "fail[ed] to allow plaintiff to *conduct discovery* on whether tribe had waived its sovereign immunity so as to confer subject matter jurisdiction on the trial court." State Br. at 19 (emphasis added). But what does discovery have to do with the case at bar? The State never says. Indeed, the State points to nothing in the record showing any effort to take discovery, no motion by the State that it be allowed to do so, no suggestion to the trial court that a decision on subject matter jurisdiction was premature and no assignment of error relating to discovery. *Warburton* is wholly irrelevant.

CONCLUSION

The Tribal Tobacco Companies enjoy sovereign immunity as a matter of federal law, and that immunity has not been waived. Thus, the trial court correctly dismissed the Complaint. That decision should be affirmed.

This the 29 day of December, 2008.

TROUTMAN SANDERS LLP

By: _____
Gary S. Parsons

By: _____
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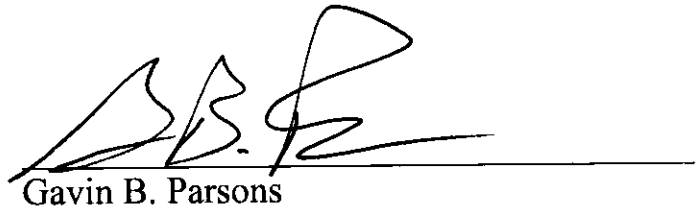
CERTIFICATE OF COMPLIANCE WITH RULE 28(j)(2)(A)2

The undersigned counsel for Defendants-Appellees hereby certifies that the foregoing brief complies with Rule 28(j)(2)(A)2 of the Rules of Appellate Procedure in that, according to the word processing program used to produce this brief (Microsoft Word 2002), the document does not exceed 8750 words, exclusive of cover, table of contents, table of authorities, certificate of compliance, certificate of service, and exhibit.

This the 29 day of December, 2008.



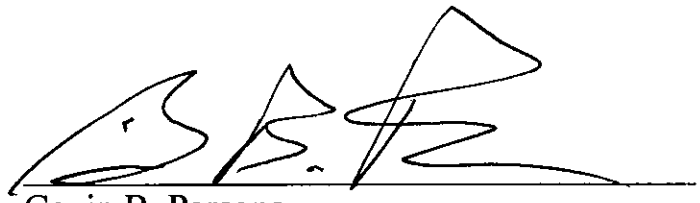
Gavin B. Parsons

CERTIFICATE OF SERVICE

The undersigned counsel for Defendants-Appellees hereby certifies that on this day the foregoing was served upon the attorneys of record for the parties in this action by depositing a copy thereof in the United States mail, First Class, postage pre-paid, and addressed as follows:

Richard L. Harrison
Special Deputy Attorney General
Melissa L. Trippe
Special Deputy Attorney General
North Carolina Department of Justice
Special Litigation Section
Post Office Box 629
Raleigh, North Carolina 27602

This the 29 day of December, 2008.



Gavin B. Parsons

No. COA08-812 TENTH DISTRICT

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NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA, ex rel. ROY COOPER, Attorney General of North Carolina, Plaintiff-Appellant v. SENECA-CAYUGA TOBACCO COMPANY, an unincorporated arm of The Seneca-Cayuga Tribe of Oklahoma, and SENECA-CAYUGA TRIBAL TOBACCO CORPORATION, a successor in interest to Seneca-Cayuga Tobacco Company, Defendants-Appellees	)	FROM WAKE COUNTY No. 07 CVS 16565

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APPENDIX TO
DEFENDANTS-APPELLEES BRIEF

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CONTENTS OF APPENDIX

Virginia:

In the Circuit Court of the City of Richmond, John Marshall Courts Building

COMMONWEALTH OF VIRGINIA, ex rel.
ROBERT F. MCDONNELL,
ATTORNEY GENERAL,

Plaintiff

v. Case No. CL06-6693

SENECA-CAYUGA TOBACCO COMPANY,
An unincorporated arm of the Seneca Cayuga
Tribe of Oklahoma,

and

SENECA-CAYUGA TRIBAL TOBACCO CORPORATION,
in its own right and as successor in
interest to Seneca-Cayuga Tobacco Company,

Defendants

ORDER

This matter is before the court on the defendants' Motion to Dismiss. The plaintiff, Commonwealth of Virginia, sues the defendants Seneca-Cayuga Tobacco Company and Seneca-Cayuga Tribal Tobacco Corporation, a cigarette manufacturer, which sells cigarettes in the Commonwealth of Virginia. The Commonwealth complains that defendants failed to comply with Va. Code §3.1-336.2.

This section of the Code requires that cigarette manufacturers that were not a part of the Master Settlement Agreement and which sell cigarettes to consumers in the Commonwealth become "participating manufacturers" or to

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deposit monies into an escrow fund as prescribed in Va. Code §3.1-336.2(A)(2).

Defendants began to sell cigarettes in the Commonwealth in 2002 or 2003 and, after prodding by the Commonwealth, filed the required documents and paid into the escrow fund in the years 2003 and 2004. The Commonwealth alleges that defendants failed to make the required deposit in 2005. The Commonwealth sues to require the defendants to make the required deposits so as to qualify to continue business in the Commonwealth and for the court to assess penalties for defendants' failure to make the payments.

Defendants began operation in Virginia under the name of Seneca-Cayuga Tobacco Company (an unincorporated association) which was later incorporated under the name Seneca-Cayuga Tribal Tobacco Corporation (hereafter referred to as the "Tribe"). At all times the sole owner of the original entity and the successor entity was the Seneca-Cayuga Tribe of Oklahoma which is a federally recognized Indian Tribe. It moves that the complaint be dismissed as it claims to enjoy sovereign immunity and this court is, therefore, without subject matter jurisdiction.

The Commonwealth argues that Tribe's sovereign immunity is not applicable to its activities beyond its

reservation and that, even if it enjoys sovereign immunity, that immunity has been waived by its prior course of dealing in the Commonwealth.

The first question is whether the Tribe enjoys immunity for conduct outside of the reservation. This question is answered in Kiowa Tribe of Oklahoma v. Manufacturing Technologies Inc. 523 U.S. 751 (1998).

In Kiowa, an Indian tribe made a promissory note which was exchanged for its purchase of certain stock from a corporation. None of the activity concerning the note, the purchase and payments on the note occurred on the reservation. The note holder sued the tribe in state court when the tribe defaulted on payments.

When the tribe was sued in state court, it pled that it enjoyed sovereign immunity and was not subject to suit. The state courts overruled the plea on the basis that Indian tribes are subject to suit in state court for breaches of contract involving off reservations commercial conduct.

The U. S. Supreme Court reversed stating "Tribes enjoy immunity from suits on contract...whether they are made on or off a reservation." Supra @ 751.

Similarly, the Supreme Court has held that while a state may impose a tax on the off-reservation activities of

an Indian tribe, the tribe is immune from suit by the state to collect the tax. Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla., 498 U.S. 505 (1991).

A claim based on the Tribe's failure to comply with the tobacco settlement agreement scheme seems to logically fall between two concepts of contract and tax collection. In this action the Tribe enjoys the immunity of a sovereign. That immunity is applicable to the conduct complained of by the Commonwealth and, unless waived, deprives this court of subject matter jurisdiction to consider the Commonwealth's Bill of Complaint.

Has the Tribe waived its sovereign immunity? The Commonwealth concedes that the Tribe did not waive sovereign immunity by an action of the Tribe's governing body. Instead, it argues that by course of dealing and specific acts of its attorneys and business agent it has waived its immunity.

The parties do not dispute that a tribe's sovereign immunity may be waived provide it do so by a "clear waiver." See Potawatomi @ 509.

The Commonwealth's basis for its claim of waiver relies on letters from the Tribe's attorneys which acknowledge the statutory requirements to be authorized to sell cigarettes and its assurances that it intended to

comply. The Tribe obtained the Commonwealth's approval to sell cigarettes by having its business manager represent to the Commonwealth under oath, that the Tribe had appointed an agent for the acceptance of process and subjected the tribe to this court's jurisdiction; and by the making of payments into the escrow fund and of penalties for late payments.

Without any doubt, the conduct of these agents would serve to bind obligations and waive rights of a private entity. A federally recognized Indian Tribe, however, is not a private entity. It is a sovereign. As such, it enjoys the immunity from being sued as do other sovereigns. Generally, sovereign immunity cannot be waived by agents of the sovereign.

Waiver is the prerogative of the sovereign itself. The Commonwealth has provided no information by which the court could determine that the Tribe delegated its authority to waive its immunity to an agent. To the contrary, the Tribe submitted a resolution of the "Business Committee" dated December 3, 2003 which states in pertinent part

> "that no waiver, either expressed or implied, of the right to assert sovereign immunity as a defense...shall be valid without the consent of the

Business Committee expressed by resolution."

See Resolution attached. Article VI of the Tribe's Constitution empowers the Business Committee to transact business in all matters in which the Tribe is empowered to act. Here, only the Business Committee is authorized to waive the Tribe's sovereign immunity.

There is no basis to hold that these agents of the Tribe had the authority to waive its sovereign immunity.

The Commonwealth makes no argument that the defendants are not the alter egos of the Tribe and are, therefore, entitled to the Tribe's immunity. That issue is not addressed here.

This court is without subject matter jurisdiction to consider this case.

It is, therefore, ORDERED that defendants' Motion to Dismiss is sustained and the Bill of Complaint is hereby Dismissed for lack of subject matter jurisdiction.

The objections of the Commonwealth are noted.

Copies of this order are mailed this day to counsel of record.

ENTER: 4/27/07

T. J. Markow, Judge

A Copy,
Teste: BEVILL M. DEAN, CLERK
BY: _____ D.C.

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