IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Veronica Muhammad,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 09-0968-D
	)	
Comanche Nation Casino,	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION FOR LEAVE
TO FILE A NOTICE OF SUPPLEMENTAL AUTHORITY

Defendant, Comanche Nation Casino, requests leave to file a Notice of Supplemental Authority in the form attached hereto as Exhibit 1. L.Cv.R. 7.1(k). The proposed Notice would provide the Court with additional case law in support of Defendant's Motion to Dismiss (Doc. No. 4) and Response to Plaintiff's Motion to Remand (Doc. No. 13). On June 29, 2010, Muhammad's counsel advised via e-mail that he objects to this Motion.

RELIEF REQUESTED

Defendant requests an order granting leave to file its Notice of Supplemental Authority within seven (7) days of the date of entry of an Order granting such request.

Respectfully submitted,

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Attorneys for Defendant Comanche Nation Casino

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2010, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for (1) filing and (2) transmittal of a Notice of Electronic Filing to the following ECF registrants:

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Veronica Muhammad,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 09-0968-D
	)	
Comanche Nation Casino,	)	
	)	
Defendant.	)	

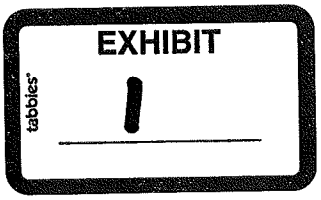
DEFENDANT'S
NOTICE OF SUPPLEMENTAL AUTHORITY

Defendant, Comanche Nation Casino, respectfully submits this Notice of Supplemental Authority in support of its Motion to Dismiss (Doc. No. 4) and Response to Motion to Remand (Doc. No. 13). Defendant files this Notice to bring to the Court's attention a recent order, entered after the briefing closed on the pending motions in this case, by the Honorable Lee R. West of the United States District Court for the Western District of Oklahoma. The order, entered in Choctaw Nation v. Oklahoma, No. CIV-10-50-W, on June 22, 2010, is attached as Exhibit 1.[1]

In Choctaw Nation, the court granted a permanent injunction[2] ordering the State of Oklahoma to comply with the terms of an Arbitration Award entered on August 25, 2009, in Class III Gaming Compact Jurisdiction-Related Disputes Jointly Referred to Binding Arbitration by the Choctaw Nation of Oklahoma, the Chickasaw Nation, and the State of

[1] On June 28, 2010, three proposed intervenors filed a Notice of Appeal to the denial of the Choctaw Nation order. The Notice of Appeal is attached as Exhibit 2.

[2] The court allowed the State to "petition the Court to modify or vacate the permanent injunction if applicable federal law relating to the jurisdiction of federal and state courts as it pertains to the issues in this action changes." (Id. at 9).



Oklahoma. (Id. at 9). The Arbitration Award is attached as Exhibit 3. In the Arbitration Award, Honorable Layn R. Phillips, acting as sole arbitrator, found that under federal law and the terms of the Gaming Compacts between Oklahoma and the Choctaw and Chickasaw Nations, state courts lack jurisdiction over tort claims against those Nations' gaming facilities. (See Ex. 3 at 17– 20). The Arbitration Award declared that "no Oklahoma state court is a 'court of competent jurisdiction' within the meaning of Part 6(C) of those Compacts," (Ex. 3 at 20), and that Part 9 "incorporates by reference . . . the controlling [federal] law establishing the limits of the Indian-country civil-adjudicatory jurisdiction of both tribal courts and Oklahoma's state courts."

Like the Comanche Nation in this case, the Choctaw Nation faced attempts by state courts to exercise jurisdiction over tort claims against its gaming facilities. (Ex. 3 at 4–7). The court's order prohibits state courts from exercising such jurisdiction. Given that the relevant provisions of the Choctaw and Chickasaw Nation's Gaming Compacts—Parts 6 and 9—are identical to the terms of the Comanche Nation's Gaming Compact (Doc. No. 1-3), the order provides further persuasive authority supporting Defendant's claim that state courts lack subject-matter jurisdiction over Muhammad's action. (Mot. to Dismiss, Doc. No. 4 at 3–14). The court's certification of the Arbitration Award—which grounds its analysis in federal law and finds that federal law preempts state court jurisdiction (Ex. 3 at 16–18)—also supports Defendant's case for removal. (Resp. to Mot. to Remand, Doc. No. 13 at 6–24).

Dated this ____ day of _____, 2010.

Respectfully submitted,

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Attorneys for Defendant Comanche Nation Casino

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CHOCTAW NATION OF OKLAHOMA and CHICKASAW NATION,

Plaintiffs,

vs.

STATE OF OKLAHOMA,

Defendant.

No. CIV-10-50-W

ORDER

This matter comes before the Court on the Motion for Summary Judgment, as amended, filed pursuant to Rule 56, F.R.Civ.P., by plaintiffs Choctaw Nation of Oklahoma and Chickasaw Nation (collectively "Nations"). Defendant State of Oklahoma ("State") has responded.

Summary judgment as requested by the Nations "should be rendered if . . . [the record] show[s] that there is no genuine issue as to any material fact and that the movant[s] . . . [are] entitled to judgment as a matter of law." Rule 56(c)(2), F.R.Civ.P. An issue of fact is genuine if the issue could be decided in favor of either party, e.g., Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), and a fact is material if it might reasonably affect the outcome of the case. E.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

The Nations commenced this action against the State, seeking certification and enforcement of an Arbitration Award dated August 25, 2009. In the Matter of the Joint Referral to Binding Arbitration by the Choctaw Nation of Oklahoma, the Chickasaw Nation, and the State of Oklahoma of Disputes Under and/or Arising From the Choctaw Nation of

Oklahoma and State of Oklahoma Gaming Compact and the Chickasaw Nation and State of Oklahoma Gaming Compact. Based upon the record, the Court makes its determination with regard to the Nations' entitlement to the relief it has requested.

The Indian Gaming Regulatory Act ("Act"), 25 U.S.C. § 2701 et seq., provides that a compact may be negotiated between tribal governments and states to govern the conduct of "Class III gaming" on Indian lands. E.g., id. § 2701(d). The Act further provides that "[C]lass III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into . . . by the Indian tribe that is in effect." Id. § 2710(d)(2)(C).

Oklahoma State Question 712, adopted November 2, 2004, by a vote of the citizens of the State of Oklahoma, proposed a model gaming compact as an offer to federally-recognized tribes in the State of Oklahoma to engage in "Class III gaming" on tribal lands within these tribes' Indian country under the terms and conditions of the proposed compact. See 3A O.S. § 281 (codification of State Question 712, Model Tribal Gaming Compact).

On November 23, 2004, Chickasaw Nation accepted the State's offer and entered into the Chickasaw Nation and State of Oklahoma Gaming Compact ("Compact"), which became effective February 8, 2005. On November 24, 2004, Choctaw Nation of Oklahoma likewise accepted the State's offer and entered into the Choctaw Nation of Oklahoma and State of Oklahoma Gaming Compact ("Compact"), which became effective February 9, 2005. Pursuant to these Compacts, the Nations have conducted and continue to conduct "Class III gaming" on tribal lands within their Indian County in conformity with the terms and conditions of their respective compacts.

Part 12 of the Compacts entered into by the Nations is entitled "Dispute Resolution," and it provides that

> in the event of any dispute . . . ., including, but not limited to, a dispute over the proper interpretation of the terms and conditions of th[e] Compact, the following procedures may be invoked . . . ."

3A O.S. § 281, Part 12. The procedures outlined in the Compacts require the "party . . . seeking an interpretation of th[e] Compact [to] first . . . serve written notice on the other party[,]" id. Part 12(1), and permit "either party . . . [to] refer a dispute arising under th[e] Compact to arbitration . . . , subject to enforcement or pursuant to review as provided by paragraph 3[1] of . . . Part [12] by a federal district court." Id. Part 12(2).

Part 12(2) of the Nations' Compacts further provides that "[t]he remedies available through arbitration are limited to enforcement of the provisions of th[ese] Compact[s]," id., and that "[t]he parties consent to the jurisdiction of such arbitration forum and court for such limited purposes and no other, and each waives immunity with respect thereto." Id.

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[1]Part 12(3) provides:

> Notwithstanding any provision of law, either party to the Compact may bring an action against the other in a federal district court for the de novo review of any arbitration award under paragraph 2 of . . . Part [12]. The decision of the court shall be subject to appeal. Each of the parties hereto waives immunity and consents to suit therein for such limited purposes, and agrees not to raise the Eleventh Amendment to the United States Constitution or comparable defense to the validity of such waiver.

On January 20, 2009, the Oklahoma Supreme Court[2] asserted state court civil-adjudicatory jurisdiction over a compact-based, Indian country tort lawsuit brought by Loyman Cossey against Cherokee Nation Enterprises, L.L.C., formerly known as Cherokee Nation Enterprises, Inc., and Cherokee Nation Enterprises, Inc., for injuries he sustained while a customer at the Cherokee Casino in Roland, Oklahoma. Cossey v. Cherokee Nation Enterprises, LLC, 212 P.3d 447 (Okla. 2009). In so doing, the court held "that the state court [was] . . . a 'court of competent jurisdiction' as that term . . . [was] used in the [Tribal Gaming] Compact [Between the Cherokee Nation and the State of Oklahoma] executed [on November 16, 2004] . . . . Id. at 450.

In response thereto, on February 4, 2009, Choctaw Nation of Oklahoma provided a Notice of Dispute to the State in the form prescribed by the Choctaw Nation of Oklahoma and State of Oklahoma Gaming Compact over the proper interpretation of that compact, and such Notice of Dispute triggered the dispute-resolution proceedings outlined in the Choctaw Nation of Oklahoma and State of Oklahoma Gaming Compact.

On that same date, Choctaw Nation of Oklahoma moved to stay two matters then pending in the Oklahoma Supreme Court until completion of the dispute resolution proceedings between Choctaw Nation of Oklahoma and the State, which had been triggered by the Notice of Dispute. In those two cases, Dye v. Choctaw Casino of Pocola,

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[2]Oklahoma Supreme Court Justice Joseph M. Watt wrote the published opinion, in which Justice James R. Winchester concurred. Vice Chief Justice Steven W. Taylor likewise concurred, but wrote separately. Justice Marian P. Opala joined in Justice Taylor's concurrence.

Justice Tom Colbert concurred specially in a separate written opinion; Justice Yvonne Kauger, joined by Chief Justice James E. Edmondson, concurred in part and dissented in part, and Justices Rudolph Hargrave and John F. Reif, writing separately, dissented.

Case No. 104,737,[3] and Griffith v. Choctaw Casino of Pocola, Case No. 104,887,[4] the plaintiffs had appealed the dismissal of their state court tort actions against Choctaw Nation of Oklahoma.[5] By Order dated March 3, 2009, the Oklahoma Supreme Court denied the Motions to Stay and refused to abate the proceedings.

On March 6, 2009, Chickasaw Nation provided a Notice of Dispute to the State in the form prescribed by the Chickasaw Nation and State of Oklahoma Gaming Compact over the proper interpretation of that compact, and such Notice of Dispute triggered the dispute-resolution proceedings outlined in the Chickasaw Nation and State of Oklahoma Gaming Compact.

On June 11, 2009, the Oklahoma Supreme Court denied the Petition for Rehearing filed by the Cherokee Nation of Oklahoma in Cossey and issued its mandate, directing the state district court to proceed on the merits of the tort action.

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[3]In Dye v. Choctaw Casino of Pocola, Case No. 104,737, Danny Dye was struck by a casino shuttle cart driven by a casino employee. He and his wife sued the Choctaw Casino of Pocola, Oklahoma, and Choctaw Nation of Oklahoma in the District Court for LeFlore County, Oklahoma, and claimed that the defendants' negligence had caused their injuries.

[4]In Griffith v. Choctaw Casino of Pocola, Case No. 104,887, the plaintiff stepped into a flowerbed and fell. She sued the Choctaw Casino of Pocola, Oklahoma, and Choctaw Nation of Oklahoma in the District Court for LeFlore County, Oklahoma, and claimed that the defendants' negligence had directly caused her injuries.

[5]The state district judge in both Griffith and Dye "concluded that tribal courts and federal courts ha[d] jurisdiction over Indian tribes but state courts [did] . . . not and dismissed the action[s]." Griffith v. Choctaw Casino of Pocola, 230 P.3d 488, 490 (Okla. 2009)(per curiam); e.g., Dye v. Choctaw Casino of Pocola, 230 P.3d 507, 509 (Okla. 2009)(per curiam).

On June 30, 2009, the Oklahoma Supreme Court issued five opinions[6] in Griffith v. Choctaw Casino of Pocola, 230 P.3d 488 (Okla. 2009)(per curiam), and three opinions[7] in Dye v. Choctaw Casino of Pocola, 230 P.3d 507 (Okla. 2009)(per curiam). The state supreme court held in both cases "that Oklahoma district courts are 'courts of competent jurisdiction' as that phrase is used in Oklahoma's statutory model tribal gaming compact and therefore the state courts may exercise jurisdiction over . . . tort claims against the Choctaw Nation and its casino in Pocola, Oklahoma." 230 P.2d at 491; e.g., id. at 509.

On July 20, 2009, the Nations and the State entered into a Joint Referral to Binding Arbitration Disputes Under and/or Arising From the Choctaw Nation of Oklahoma and State of Oklahoma Gaming Compact and the Chickasaw Nation and State of Oklahoma Gaming Compact and agreed to

> submit to binding arbitral interpretation in light of controlling extrinsic law the issue of whether, under the Choctaw Nation of Oklahoma and State of Oklahoma Gaming Compact and the Chickasaw Nation and State of Oklahoma Gaming Compact, jurisdiction over all Compact based tort claim and/or prize claim lawsuits lies exclusively in Choctaw Nation or Chickasaw Nation forums.

On August 25, 2009, the Arbitration Award, sought to be certified and enforced in this matter, was issued. Immediately thereafter, Choctaw Nation of Oklahoma filed a

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[6]Vice Chief Justice Taylor, by separate writing, Justice Opala, by separate writing, and Justices Watt, Winchester and Colbert concurred. Justice Kauger, by separate writing, concurred in part and dissented in part. Justice Hargrave dissented, and Justice Reif, by separate writing in which Chief Justice Edmondson joined, likewise dissented.

[7]Vice Chief Justice Taylor and Justices Opala, Watt, Winchester and Colbert concurred. Justice Kauger in a separate writing concurred in part and dissented in part. Justice Hargrave dissented, and Justice Reif, by separate writing, in which Chief Justice Edmondson joined, likewise dissented.

Motion to Honor the Arbitration Award with the Oklahoma Supreme Court in Dye and Griffith.

On September 2, 2009, the state court directed the plaintiffs in Dye and Griffith to respond not only to the Petitions for Rehearing filed by the Choctaw Nation of Oklahoma on July 20, 2009, but also to the Motions to Honor the Arbitration Award filed by the Choctaw Nation of Oklahoma. On April 12, 2010, the Oklahoma Supreme Court denied both the Petitions for Rehearing and the Motions to Honor the Arbitration Award.[8]

The Nations have argued before this Court that they are entitled to summary judgment pursuant to Part 12 of the parties' Compacts and thus, entitled to certification of the Arbitration Award. The State has not disputed any of the facts outlined by the Nations in their Motion for Summary Judgment, as amended, and it has not asserted any affirmative defenses or arguments that would preclude certification in this case. The State has stated in its response that if Part 12 of the parties' Compacts, which authorizes the submission of disputes over the terms and conditions of the Compacts to arbitration, is valid, then the Arbitration Award should be deemed valid and certified. The Court agrees.

Based upon the record, the Court finds that there are no genuine issues of material fact that preclude summary judgment in the Nations' favor and that the dispute resolution clauses of the parties' Compacts are valid, thereby making arbitration the proper forum to interpret the phrase "court of competent jurisdiction." Accordingly, the Nations are entitled to judgment as a matter of law to the extent that the Court hereby certifies the Arbitration Award dated August 25, 2009.

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[8]Chief Justice Edmondson, Vice Chief Justice Taylor and Justices Opala, Watt, Winchester and Colbert concurred. Justices Hargrave, Kauger and Reif dissented.

The Nations have also contended that they are entitled to permanent injunctive relief to prevent further harm by the State in its continued violation of the terms of the Arbitration Award. Proof of each of four equitable factors is required before a permanent injunction may issue. A party must establish "'(1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest.'" Prairie Band Potawatomi Nation v. Wagnon, 476 F.3d 818, 822 (10th Cir. 2007)(quoting Fisher v. Oklahoma Health Care Authority, 335 F.3d 1175, 1180 (10th Cir. 2003)).

Because there is no dispute among the parties that certification of the Arbitration Award is warranted, the Court finds that the Nations have shown actual success on the merits. The Court likewise finds that the remedies available at law, including monetary damages, are inadequate and that the Nations will suffer irreparable harm if the injunction does not issue. The Court further finds that the balance of equities favors the Nations and that granting an injunction as requested by the Nations will not adversely affect the public interest, since tribal forums exist for the resolution of Compact-based, Indian country tort lawsuits against the Nations. Because the factors weigh in favor of permanent injunctive relief, the Court finds that the Nations are entitled to the relief they have requested.

Accordingly, the Court

(1) GRANTS the Nations' Motion for Summary Judgment [Doc. 10] filed on April 16, 2010, and amended on April 21, 2010, see Doc. 14;

(2) in so doing, CERTIFIES the Arbitration Award dated August 25, 2009, In the Matter of the Joint Referral to Binding Arbitration by the Choctaw Nation of Oklahoma, the

Chickasaw Nation, and the State of Oklahoma of Disputes Under and/or Arising From the Choctaw Nation of Oklahoma and State of Oklahoma Gaming Compact and the Chickasaw Nation and State of Oklahoma Gaming Compact;

(3) FINDS that an permanent injunction shall be entered in this matter and that the State of Oklahoma is hereby ORDERED to comply with the terms of the Arbitration Award, but may petition the Court to modify or vacate the permanent injunction if applicable federal law relating to the jurisdiction of federal and state courts as it pertains to the issues in this action changes;

(4) RETAINS jurisdiction in this matter for the purpose of enforcing the terms of this Order as to all parties; and

(5) DIRECTS the parties to confer and submit within (7) days a judgment that conforms not only with Rule 58, F.R.Civ.P., but also with the requirements of Rule 65(d), F.R.Civ.P.

ENTERED this 22nd day of June, 2010.

LEE R. WEST
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CHOCTAW NATION OF OKLAHOMA and CHICKASAW NATION, Plaintiffs,	)	
vs.	)	Case No. 5:10-cv-00050-W
STATE OF OKLAHOMA, Defendant,	)	

NOTICE OF APPEAL

COME NOW the proposed Intervenors, Jeanette Bryant, Danny Dye and Pat Dye, and give their Notice of Appeal to the Order dated June 18, 2010, denying their Motion to Intervene, and to the Order granting the Plaintiffs and the Defendants Motion for Summary Judgment entered on June 22, 2010.

RESPECTFULLY SUBMITTED,

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ATTORNEYS FOR JEANETTE BRYANT

BY: /S/ DAN GEORGE

CERTIFICATE OF MAILING

I, Dan George, do hereby certify that on this the 28th day of June, 2010, I mailed a true and correct copy of the above and foregoing pleading, postage prepaid, to the following:

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/S/ DAN GEORGE

CLASS III GAMING COMPACT JURISDICTION-RELATED DISPUTES JOINTLY REFERRED TO BINDING ARBITRATION BY THE CHOCTAW NATION OF OKLAHOMA, THE CHICKASAW NATION, AND THE STATE OF OKLAHOMA

In the Matter of the Joint Referral to Binding Arbitration by the Choctaw Nation of Oklahoma, the Chickasaw Nation, and the State of Oklahoma of Disputes Under and/or Arising From the Choctaw Nation of Oklahoma and State of Oklahoma Gaming Compact and the Chickasaw Nation and State of Oklahoma Gaming Compact

August 25, 2009

Oklahoma City, Oklahoma

ARBITRATION AWARD

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I.

INTRODUCTION

This Arbitration Award ("Award") is the final and binding Award resolving disputes jointly referred to me on July 20, 2009, as sole arbitrator, by the Choctaw Nation of Oklahoma ("Choctaw Nation"), the Chickasaw Nation (jointly, "the Nations" or "the Arbitrating Nations"), and the State of Oklahoma (collectively, "the Arbitrating Compacting Parties"). *See* Joint Referral, APPENDIX 1. The disputes are over the proper interpretation of the terms and conditions of the Choctaw Nation of Oklahoma and State of Oklahoma Gaming Compact and the Chickasaw Nation and State of Oklahoma Gaming Compact (jointly, "Compacts" or "Class III Compacts"), as construed in light of controlling extrinsic law.

In particular, the Arbitrating Compacting Parties have asked me to interpret the Compacts, "in light of controlling extrinsic law" on "the issue of whether under the Choctaw Nation of Oklahoma and State of Oklahoma Gaming Compact and the Chickasaw Nation and State of Oklahoma Gaming Compact . . . jurisdiction over all Compact-based tort claim and/or prize claim lawsuits lies exclusively in Choctaw Nation or Chickasaw Nation forums." The Arbitrating Compacting Parties have also agreed, "that the Arbitrator may resolve such ancillary factual and/or legal issues as the Arbitrator deems necessary to the resolution of this dispute." *See* Joint Referral, APP. 1 at 1 (first ¶).

These disputes were proximately generated by three 2009 Oklahoma Supreme Court decisions (discussed below), in which five Justices of that Court concluded, over invocations of tribal sovereign immunity, that Oklahoma state courts have the power to adjudicate certain tribal Class III casino-arising patron claims against Class III Compacting Indian tribes. Thus,

the issue I am called upon to resolve pursuant to Part 12 of the Compacts is whether or not an Oklahoma state court and/or an Arbitrating Nations' tribal court is properly interpreted to be a "court of competent jurisdiction" within the Arbitrating Nations' limited consent to suit for tort claims and prize claims as set forth in Part 6(C) of the Compacts.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. Class III Gaming On Tribal Lands In Oklahoma And Past Oklahoma State Court Litigation.

The federal Indian Gaming Regulatory Act[1] ("IGRA") provides that Indian tribes may conduct "Class III gaming"[2] on "Indian lands"[3] within their "Indian country"[4] if conducted in conformity with a tribal/state Compact.[5] Shortly after Oklahoma Governor Brad Henry first assumed office in 2003, tribal and state representatives began new discussions about the potential benefits of compacted tribal Class III gaming within Oklahoma. Current State Treasurer Scott Meacham served as Director of the Office of State Finance during 2003 and 2004, and at Governor Henry's direction now-Treasurer Meacham served as the State's lead Class III gaming Compact negotiator. On May 19, 2004, Governor Henry signed Senate Bill 1252, the final version (as agreed to by the state and tribal negotiators) of what would become

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[1] Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 18 U.S.C. §§ 1166 to 1168 and 25 U.S.C. § 2701 *et seq.*).

[2] *See* 25 U.S.C. § 2703(8) (defining "class III gaming").

[3] *See* 25 U.S.C. § 2703(4) (defining "Indian lands" for IGRA purposes).

[4] *See* 18 U.S.C. § 1151 (defining "Indian country").

[5] *See* 25 U.S.C. § 2710(d)(1)(C).

Oklahoma's Model Class III gaming Compact.[6] The proposed Model Compact and its companion legislation were approved as State Question No. 712 in a statewide referendum on November 2, 2004, and the State's Model Class III Compact offer to Oklahoma's tribes took the form of a state statute.[7]

The Choctaw and Chickasaw Nations both accepted the State's Model Compact offer, and those Nations' Compacts became effective, respectively, on February 9 and February 8, 2005 (the dates of their publication in the Federal Register).[8] Those Compacts have been in continuous force since then, and pursuant to IGRA, Class III gaming activities by the Choctaw and Chickasaw Nation on their tribal lands and within their Indian country are now "fully subject to the terms and conditions of [their] Compact[s]. . . ."[9]

Part 12 of those Compacts contains their dispute-resolution procedures. The first sentence of Part 12 authorizes any Compacting Party to unilaterally invoke the Part 12 procedures that follow if the invoking Compacting Party in good faith[10] believes that the opposite Compacting Party "has failed to comply" with any Compact requirement, "or in the event of any dispute hereunder, including, but not limited to, a dispute over the proper interpretation of the terms and conditions of [the] Compact."[11]

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[6] *See* Brief of Amici Curiae Brad Henry, Governor of the State of Oklahoma, and Scott Meacham, Treasurer of the State of Oklahoma, in Support of Defendants'/Petitioners' Petition for Rehearing, at 1-6 (and attached affidavits of Governor Henry and Treasurer Meacham), *Cossey v. Cherokee Nation Enterprises, LLC,* No. 105,300 (Okla. Sup. Ct., filed Mar. 9, 2009).

[7] *See* OKLA. STAT. tit. 3A, §§ 280, 281.

[8] *See* 25 U.S.C. § 2710(d)(3)(B); *see also* Compact pt. 16.

[9] *See* 25 U.S.C. § 2710(d)(2)(C); *see also id.* § 2710(d)(3)(B).

[10] *See* Compact pt. 12(2).

[11] See Compact pt. 12.

Parts 6(A) and 6(B) of the Nations' Compacts impose on the Nations' gaming "enterprises" (in both substance and form, on the Nations themselves[12]) the obligation to provide a due process forum for casino patrons wishing to pursue covered tort or prize claims.

Parts 6(A) and 6(B) contain limited tribal sovereign-immunity waivers with respect to such claims, but in addition to containing their own limitations on the waivers, Parts 6(A) and 6(B) also incorporate the additional sovereign-immunity-waiver limitations of Compact Part 6(C). Part 6(C) begins:

> The tribe consents to suit against the enterprise *in a court of competent jurisdiction* with respect to a tort claim or a prize claim if all requirements of paragraph 9 of subsection A or all requirements of paragraph 11 of subsection B of this part have been met; provided that such consent shall be subject to the following *additional* conditions and limitations: . . .[13]

In their Arbitration Statement, the Choctaw and Chickasaw Nations urge that because of Compact Part 9, no Oklahoma state court could possibly be within the category of "a court of competent jurisdiction" for Compact Part 6(C) purposes. Part 9 provides in material part: "This Compact shall not alter tribal . . . or state civil adjudicatory . . . jurisdiction."[14]

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[12] With one exception irrelevant herein, Compact Part 3(13) defines "enterprise" as "the tribe or the tribal agency or section . . . with direct responsibility for the conduct of covered games . . . ." Compact Part 3(13) continues: "In any event, the tribe shall have the ultimate responsibility for ensuring that the tribe or enterprise fulfills the responsibilities under this Compact.").

[13] Compact pt. 6(C) (emphasis added).

[14] Compact pt. 9.

The Arbitrating Nations maintain that Oklahoma state courts' Indian-country civil-adjudicatory jurisdiction over monetary suits against tribes was federally preempted from the time of Oklahoma statehood to the present date, and that because Oklahoma's courts lacked such jurisdiction *before* the Compact, given Part 9 they lacked it *after* the Compact as well. Because Oklahoma courts lacked material civil-adjudicatory jurisdiction as a matter of preemptive federal law, the Nations reason, no Oklahoma court is "a court of competent jurisdiction" for purposes of any Compact Part 6 tribal sovereign-immunity waiver. In further consequence, they conclude, the only Compact sovereign-immunity waiver is applicable only in the Nations' own designated forums, not in any Oklahoma state court.

The first two-and-a-half years' experience under Oklahoma's Class III gaming Compacts suggested that both tribal courts and Oklahoma's state courts viewed things exactly the same way. Tribal courts (sometimes preceded by tribal administrative adjudications) began to adjudicate patron claims shortly after the first Class III Compacts' 2005 entry-into-force, and when patrons sought to bring Class III casino-related claims in state district courts, the state courts dismissed them on civil-adjudicatory jurisdiction/tribal sovereign-immunity grounds.[15] In the one state district court decision that had "gone the other way" (without opinion) as of the summer of 2007,[16] the Oklahoma

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[15] *See, e.g., Patrick v. Cherokee Nation Enterprises, Inc.,* No CJ-2006-180 (D. Ct. Rogers County, Okla., May 17, 2006); *Loggings v. Cherokee Nation Enterprises, LLC,* No. CJ-2006-203 (D. Ct. Rogers County, Okla., May 25, 2006); *Dye v. Choctaw Casino of Pocola,* No. CJ-2007-207 (D. Ct. LeFlore County, Okla., May 10, 2007); *Griffith v. Choctaw Casino of Pocola,* No. CJ-2006-85 (D. Ct. LeFlore County, Okla., June 21, 2007).

[16] *See Manwarring v. Muscogee (Creek) Nation Gaming Comm'n,* No. CJ-2007-745 (D. Ct. Tulsa County, Okla., Apr. 16, 2007) (Order denying Motion to Quash and Dismiss).

Supreme Court, on a 6-to-3 vote, had in *Muscogee (Creek) Nation Gaming Commission v. Fitzgerald* assumed original jurisdiction and issued the following July 2, 2007 Writ of Prohibition:

> A writ is hereby issued prohibiting the respondent district judge from proceeding further in *Manwarring v. Muscogee (Creek) Nation Gaming Commission, et al.*, Tulsa County District Court Case No. CJ-2007-745. *The Muscogee (Creek) Nation District Court has exclusive jurisdiction over plaintiff's claim.*[17]

Twenty-five months ago, the matter seemed well-settled — in favor of the exclusivity of tribal-forum jurisdiction over all Class III casino-related patron claims, and the absence of any tribal sovereign-immunity waiver effective in Oklahoma's state courts.

But the state-court plaintiffs in two LeFlore County cases[18] had appealed the state district court's dismissals, and despite the Oklahoma Supreme Court's July 2, 2007 *Fitzgerald* Writ of Prohibition,[19] a panel of the Oklahoma Court of Civil Appeals reversed one of the LeFlore County dismissals in October 2007 (based on reasoning that the Oklahoma Supreme Court has now unanimously rejected[20]). And in late 2007, a different Rogers County District Court Judge than the one who had dismissed two similar cases in 2006 decided to exercise civil-adjudicatory jurisdiction over a Class III-casino patron tort claim against

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[17] *See Muscogee (Creek) Nation Gaming Comm'n v. Fitzgerald,* No. 104,726 (Okla. Sup. Ct., July 2, 2007) (Writ of Prohibition) (emphasis added).

[18] *See supra* at 5 & note 15.

[19] *See* supra at 5-6 & note 17.

[20] *See Dye v. Choctaw Casino of Pocola,* 2009 OK 52 (all opinions).

the Cherokee Nation.[21] That District Court Judge certified the Compact jurisdictional/sovereign immunity question to the Oklahoma Supreme Court, and the latter granted certiorari.

The net result was that *Cossey v. Cherokee Nation Enterprises, LLC,*[22] bypassed the Court of Civil Appeals and "leapfrogged" the two Choctaw Nation cases[23] that had been the "leading" (at least post-*Fitzgerald*) state-court appeals of Class III casino-claim dismissals.

On January 20, 2009, in five separate opinions supporting four different outcomes, five Justices of the Oklahoma Supreme Court decided in *Cossey v. Cherokee Nation Enterprises, LLC,*[24] that Oklahoma state courts had either exclusive jurisdiction (four Justices)[25] or jurisdiction concurrent with tribal courts (one Justice)[26] to adjudicate Class III-casino patron claims.

The *Cossey* Court issued no Mandate on January 20, 2009, presumably because of the availability to the Cherokee Nation of a possible Petition for Rehearing. Asserting that the *Cossey* opinions (even if not Mandated) had ripened a Compact Part 12-cognizable "dispute over the proper interpretation of the terms and conditions of [the] Compact," and maintaining its standing objection to state courts' power to render any binding Compact interpretations,

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[21] Because there is no legal difference between any of the Indian Nations in question and their gaming "arms," any "arm(s)" will be referred to hereinafter as the respective Nation.

[22] No. 105,300 (Okla. Sup. Ct., pet. for cert. granted Jan. 7, 2008).

[23] *Dye v. Choctaw Casino of Pocola,* No. 104,737 (Okla. Sup. Ct., pet. for cert. granted Mar. 3, 2008); *Griffith v. Choctaw Casino of Pocola,* No. 104,887 (Okla. Sup. Ct., reassigned to Okla. Sup. Ct. docket Mar. 25, 2008).

[24] 2009 OK 6.

[25] *See id.* (Opinion of WATT, TAYLOR, OPALA, and WINCHESTER, JJ.).

[26] *See id.* (Opinion of COLBERT, J.).

the Choctaw Nation "triggered" Compact Part 12's dispute-resolution procedures on February 4, 2009 through the Compact-prescribed method for providing a Notice of Dispute to the State.

Also on February 4, 2009, the Choctaw Nation moved to stay state-court proceedings pending Compact Part 12 dispute resolution procedures in *Dye v. Choctaw Casino of Pocola* and *Griffith v. Choctaw Casino of Pocola,*[27] its two (now-trailing) state-court appellate cases. On March 3, 2009, without comment, the Oklahoma Supreme Court denied the Choctaw Nation's two Motions to Stay. On March 6, 2009 — three days after the Oklahoma Supreme Court refused to stay *Dye* and *Griffith* in deference to invoked Compact Part 12 dispute-resolution procedures — the Chickasaw Nation (a nonparty to any state-court Compact-related litigation), also concerned about the possibly imminent reversal by the Oklahoma Supreme Court of its *Fitzgerald* approach in *Cossey, Dye,* and/or *Griffith,* independently invoked Compact Part 12 by delivering its own Notice of Dispute to the State. Informal discussions ensued between representatives of the Choctaw Nation, the Chickasaw Nation, and the State of Oklahoma.

On March 9, 2009, the Governor of the State of Oklahoma, Brad Henry, and the Treasurer of the State of Oklahoma, Scott Meacham, filed an amicus brief in *Cossey* supporting the Cherokee Nation's Petition For Rehearing. In support of their amicus brief, Governor Henry and Treasurer Meacham submitted affidavits stating that when they were involved in negotiating the Model Tribal Gaming Compact with Oklahoma Indian tribes, they did not

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[27] *See* Mot. to Stay Proceedings Pending Compact Part 12 Dispute-Resolution Procedures, *Dye v. Choctaw Casino of Pocola,* No. 104,737 (Okla. Sup. Ct., filed Feb. 4, 2009); Mot. to Stay Proceedings Pending Compact Part 12 Dispute-Resolution Procedures, *Griffith v. Choctaw Casino of Pocola,* No. 104,887 (Okla. Sup. Ct., filed Feb. 4, 2009).

intend or understand the phrase "a court of competent jurisdiction" as used in Part 6(C) of the Compacts to include Oklahoma state courts.[28]

On June 11, 2009, without comment, the Oklahoma Supreme Court denied the Cherokee Nation's Petition for Rehearing in *Cossey,* thereby allowing its cluster of five *Cossey* opinions to stand for what they had cumulatively held; the same day, that Court also issued the Mandate directing the state district court to proceed.

On June 30, 2009, the Oklahoma Supreme Court issued five opinions in *Griffith v. Choctaw Casino of Pocola,*[29] and three in *Dye v. Choctaw Casino of Pocola.*[30] (*Dye* contained no independent reasoning of its own, but relied on *Griffith's* reasoning/authority to support its conclusions.)

In *Griffith* and *Dye* (unlike in *Cossey*), the Oklahoma Supreme Court assembled five-Justice majorities, and in the *Griffith* and *Dye* per curiam opinions that Court concluded that under the Compact, Oklahoma state courts had the power to adjudicate Class III-casino patrons' claims against the Choctaw Nation concurrently with tribal *and* federal courts. The *Griffith* and *Dye* per curiam opinions abandoned the *Cossey* plurality's theories[31] that a material tribal sovereign-immunity waiver could be found anywhere other than in the Class III Compacts.[32]

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[28] *See, e.g.,* Brief of Amici Curiae Brad Henry, Governor of Oklahoma, and Scott Meacham, Treasurer of the State of Oklahoma, in Support of Defendants'/Petitioners' Petition for Rehearing, *Cossey* (Mar. 9, 2009), *passim* (and affidavits attached thereto).

[29] 2009 OK 51.

[30] 2009 OK 52.

[31] See, e.g., *Cossey* (Opinion of WATT, J.) ¶¶ 6, 21-38.

[32] *See Griffith,* 2009 OK 51 (per curiam opinion) *passim; Dye,* 2009 OK 52 (per curiam opinion) *passim.*

The Choctaw Nation timely petitioned for rehearing in *Griffith* and *Dye* on July 20, 2009. Also on July 20, the Choctaw Nation, the Chickasaw Nation, and the State of Oklahoma executed a Joint Referral to Binding Arbitration pursuant to Part 12(1), and/or Parts 12(2) and (3), of the Nations' respective Class III gaming Compact(s) with the State.[33] Citing Sections 2 and 3 of the Federal Arbitration Act ("FAA"),[34] the Choctaw Nation thereafter moved the Oklahoma Supreme Court to stay all state-court proceedings in *Griffith* and *Dye* pending arbitration.

B. <u>This Arbitration</u>.

The Arbitrating Compacting Parties have appointed me Sole Arbitrator pursuant to Part 12 of the Compacts, and I have accepted that appointment. The Arbitrating Compacting Parties have also agreed to the submission of these disputes on the basis of a paper Record and without a hearing or the taking of in-person testimony. I concur in the Arbitrating Compacting Parties' shared judgment that submission of these Compact disputes, and the necessarily-related issues regarding controlling extrinsic law, are susceptible to accurate resolution on the Record and without personal testimony.

The Choctaw and Chickasaw Nations submitted a joint Arbitration Statement (with extensive Appendices) on August 3, 2009. The Arbitrating Nations also submitted a proposed Award. In conformity with the established Schedule, the State timely objected to some specific components of the Arbitrating Nations' proposed Award, and the Arbitrating Nations timely responded thereto.

With the consent of the Arbitrating Compacting Parties, I established the Schedule for this Arbitration in conformity with their "shared desire that this

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[33] *See* Joint Referral, APP. 1.

[34] *See* 9 U.S.C. §§ 2, 3.

arbitration proceed as expeditiously as the Arbitrator deems appropriate in light of the importance of the issues subject to arbitration." *See* Joint Referral, APP. 1, at 2.

In the interests of prompt and efficient resolution of these disputes, the Arbitrating Compacting Parties have not required me to provide an exhaustively-documented or reasoned Award herein. Nevertheless — in the interests of transparency as well as efficiency — in Section III of this Award I provide a summary of my most pivotal findings and conclusions.

In providing the findings and conclusions I enumerate in Section III, I have remained mindful of the fact that the Arbitrating Compacting Parties have jointly decided that, subject only to the review contemplated by Parts 12(2) and 12(3) of the Compacts (and if and only if such is requested by an Arbitrating Compacting Party), they intend that this Award be binding and promptly enforced. Thus, I present my factual recitations and citations to legal authority in summary form. But by the same token, I am also aware that *de novo* review of my Award may be sought by the Choctaw Nation, the Chickasaw Nation, or by the State of Oklahoma in the United States District Court for the Western District of Oklahoma (subject to further federal-court appeal of that Court's decision if requested by an Arbitrating Compacting Party).[35] In simultaneously bearing those possibilities in mind, I have sought to strike an appropriate timeliness/efficiency/transparency balance in providing the findings, conclusions, and authority that constitute Section III.

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[35] *See* Joint Referral, APP. 1, at 1 (first ¶); *id.* at 2 (last ¶); *cf.* Compact pts. 12(2), 12(3).

III.

FINDINGS AND CONCLUSIONS

A. Summary Of Findings And Conclusions.

As set forth in greater detail below, I conclude that the term "court of competent jurisdiction" as used in Part 6(C) of the Compacts should not be interpreted to include Oklahoma state courts, but should be interpreted to include the Arbitrating Nations' tribal courts. Before the Compacts were entered into, the claims for which the Arbitrating Nations consented to suit in Part 6 of the Compacts could not have been brought in Oklahoma state courts, although they could have been brought in tribal courts. Thus, the only way in which state court jurisdiction could be proper would be if in Part 6 of the Compacts the Arbitrating Nations explicitly consented to such state court jurisdiction. While it is true that the Compacting Parties could have specified that the claims at issue could only be brought in a tribal court, they also could have specified that a "court of competent jurisdiction" includes an Oklahoma state court. Thus, at best for those who have argued in favor of state court jurisdiction, the expression is in and of itself textually ambiguous.

Part 9 of the Compacts is very significant in providing that "[t]his Compact shall not alter tribal, federal or state civil adjudicatory or criminal jurisdiction." Since there was no relevant pre-existing state court jurisdiction before the Compacts, there was no new, altered state court jurisdiction after the Compacts.

This conclusion is bolstered whether contract interpretation or statutory interpretation analysis is employed to resolve the textually ambiguous phrase "court of competent jurisdiction." If contract interpretation principles are employed and the focus is on implementing the intent of the parties, it is evident from the positions taken by the Arbitrating Nations and the amici briefs

submitted by Governor Henry and Treasurer Meacham before the Oklahoma Supreme Court that the parties who negotiated the Compacts did not understand or intend the phrase "court of competent jurisdiction" to include Oklahoma state courts. And, as a matter of contract law generally, waivers are to be construed narrowly.

In terms of statutory interpretation, it is established that waivers of tribal sovereign immunity are to be read narrowly, and therefore must be explicit. At best, the phrase "court of competent jurisdiction" is ambiguous as used in the Compacts, and this hardly constitutes the kind of express waiver that the law requires. Congress has not deprived tribes of sovereign immunity in state court actions as part of IGRA. Relevant laws and tribal agreements are also to be construed so as not to infringe upon tribal sovereignty more than necessary.

B. <u>Specific Findings And Conclusions</u>.

1. To the extent that Sections I and/or II of this document reflect findings and/or conclusions not repeated in this Section III, Sections I and II are incorporated into this Section III.

2. The Choctaw Nation of Oklahoma and the Chickasaw Nation are both federally-recognized Indian tribes.

3. Federally-recognized Indian tribes, including the Choctaw and Chickasaw Nations, have sovereign immunity from suit unless explicitly abrogated by a federal statute or unequivocally waived, in whole or in part, by the tribe.

4. While some differences exist between the sovereign immunity from suit enjoyed by tribes, states, and the federal government,[36]

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[36] One example concerns the permissible sources of the federal power to statutorily abrogate the immunity. While Congress may only abrogate states' "Eleventh Amendment" immunity from suit when exercising the "implementing powers" of the Civil War Amendments, *see Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996), or the Article I Bankruptcy Power, *see Central Virginia Community College v. Katz,* 546 U.S. 356 (2006), the

those distinctions are immaterial to the issues presented by these disputes.[37]

5. As is the case with respect to asserted waivers of states' sovereign immunity, where a tribe's sovereign-immunity waiver is asserted to be effective in any court other then its own, the sovereign-immunity waiver must be express and unequivocal as to the courts of the other sovereign.[38]

6. As is the case with asserted waivers of states' sovereign immunity, there are no federal-law cognizable "implied waivers" of tribal sovereign immunity from suit.[39]

7. In consequence of the above tribal-immunity-waiver principles, and in further consequence of the "Indian law canons of

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congressional power to abrogate tribal immunity from suit is not limited to those sources, *cf. Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 758-59 (1998).

A second difference stems from the fact that states but not tribes were represented in the 1787 Constitutional Convention. Because of that, the United States Supreme Court has held that states consented to be sued by each other "in the plan of [that] Convention," but because of the absence of mutuality states did not consent to be sued by tribes in that plan. *See Blatchford v. Native Village of Noatak,* 501 U.S. 775, 782 (1991). (That principle also works in reverse. *See, e.g., Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe,* 498 U.S. 505 (1991).)

[37] *Cf., e.g., Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1295 (10th Cir. 2008) ("We see no reason to treat tribal immunity any differently than federal sovereign immunity in this context.").

[38] *See, e.g., Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 99 (1984) (states); *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 82 (2nd Cir. 2001) (tribes); *Kizis v. Morse Diesel,* 794 A.2d 498, 503 (Conn. 2002) (tribes).

[39] *See, e.g., College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 527 U.S. 666, 680 (1999) (overruling — for arguably the third time — the "implied waiver" approach of *Parden v. Terminal Ry.*, 377 U.S. 184 (1964)); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58-59 (1978) ("It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." (internal quotation marks omitted)); *Native American Distributing,* 546 F.3d at 1293 (same).

construction,"[40] material, non-contrived Compact ambiguities with respect to the sweep of any tribal sovereign-immunity waiver would necessarily be resolved in the manner least intrusive to the sovereignties of the Choctaw and Chickasaw Nations.

8. There is no congressional abrogation of either the Choctaw or Chickasaw Nations' sovereign immunities that would permit any patron of either of those Nations' Class III Compact-governed gaming facilities to bring a state-court tort or prize award suit against either of those Nations.

9. In consequence, the only basis on which the Choctaw Nation or the Chickasaw Nation (or their gaming enterprises) might be subjected to such a suit — in any court — is to whatever extent (and in whatever court) those Nations have expressly waived their sovereign immunity (or that of their gaming enterprises) in their respective Class III gaming Compacts.

10. No waiver of the sovereign immunity of either the Choctaw Nation or the Chickasaw Nation applicable to any Class III casino patron tort or prize suit (or any Class III casino-related suit by any other person) in any court is to be found anywhere in the Choctaw or Chickasaw Nations' Compacts outside of Part 6 thereof.

11. Parts 6(A) and 6(B) of the Choctaw and Chickasaw Nations' Class III gaming Compacts, read *in pari materia* with other Compact provisions, impose the obligation to provide a due process forum for covered tort and prize claims on the Choctaw and Chickasaw Nations.

12. The references to sovereign-immunity waivers in Parts 6(A) and 6(B) of the Choctaw and Chickasaw Nations' Class III Compacts do not operate independently of Part 6(C) thereof, but rather are textually qualified by Parts 6(A)(2), 6(A)(9), 6(B)(1), and 6(B)(11) (*inter alia*), which also incorporate all of the limitations contained in Compact Part 6(C) — including the "in a court of competent jurisdiction" limitation on the court(s) in which those Nations' Part 6 sovereign-immunity waivers are effective.

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[40] *See, e.g., Montana v. Blackfeet Tribe,* 471 U.S. 759, 766 (1985).

13. The phrase "court of competent jurisdiction" is at least in and of itself textually ambiguous.[41] The term is not defined in Part 3 of the Compacts, which defines a number of other terms.

14. Unlike as is the case with respect to New Mexico's Model Class III gaming Compact (which explicitly defines "courts of competent jurisdiction" to include state courts[42]), Oklahoma's Model Class III gaming Compact contains no definition of "a court of competent jurisdiction" in the latter's definitional Part 3.

15. The types of cases as to which the Choctaw and Chickasaw Nations' limited Compact Part 6 tribal-sovereign-immunity waivers apply are monetary tort and prize claims that arise on Choctaw or Chickasaw tribal lands, within Choctaw or Chickasaw Indian country, at Choctaw or Chickasaw Class III Compact-governed gaming facilities, and which are brought or would be brought against the Choctaw or Chickasaw Nations and/or any of their gaming "arms" or enterprises.

16. Part 9 of the Choctaw and Chickasaw Nations' Compacts[43] adopts and incorporates into those Compacts by reference the body of law that controls Oklahoma state courts' civil-adjudicatory jurisdiction over Indian country-arising monetary claims against those Nations, their gaming "arms," or enterprises.

17. The Oklahoma Enabling Act required Oklahoma to disclaim jurisdiction over Indian lands as a condition of achieving statehood.[44]

18. While federal common-law principles may also result in the denial of state jurisdiction (of any type) absent a specifically-authorizing

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[41] *See, e.g., United States v. Morton,* 467 U.S. 822, 828 (1984).

[42] *See Doe v. Santa Clara Pueblo,* 154 P.3d 644, 647-48 & n.3 (N.M. 2007) (discussing and citing N. MEX. MODEL COMPACT §§ 8(A), 8(D) (codified at N. MEX. STAT. ANN. § 11-13A-1 *et seq.*).

[43] *See* Compact pt. 9 ("This Compact *shall not alter* tribal, federal or state civil adjudicatory or criminal jurisdiction." (emphasis added)).

[44] *See, e.g., Washington v. Yakima Indian Nation,* 439 U.S. 463, 481 & n.25 (1979); *cf.* OKLA. CONST. art. I, § 3.

federal statute, "a state will certainly be without jurisdiction if its authority is preempted under familiar principles of preemption."[45]

19. "Implied" preemption, "obstacle" preemption, "conflict" preemption, and "express" preemption are all "familiar" forms of Supremacy-Clause-cognizable federal preemption.[46]

20. In 1953, the adoption of "Public Law 280"[47] — in which Congress granted five States Indian-country criminal jurisdiction and civil-adjudicatory[48] jurisdiction, and provided the exclusive method for states not explicitly granted such jurisdiction by Public Law 280 or another federal statute to acquire it[49] — preempted Oklahoma courts' Indian-country civil-adjudicatory jurisdiction in the subject-areas in which the Oklahoma-specific federal statutes had not granted it. Oklahoma is not a Public Law 280 state.[50]

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[45] *New Mexico v. Mescelero Apache Tribe,* 462 U.S. 324, 333-334 (1983).

[46] *See, e.g., Crosby v. Foreign Trade Council,* 530 U.S. 363 (2000); *Gade v. National Solid Waste Mgm't Ass'n,* 505 U.S. 88 (1992); *Hines v. Davidowitz,* 312 U.S. 52 (1941).

[47] Act of Aug. 15, 1953, ch. 505, 67 Stat. 588. At the time of its 1953 enactment, Public Law 280 applied to five states, California, Minnesota, Nebraska, Oregon and Wisconsin. It was later applied to Alaska upon statehood.

[48] *See, e.g., Bryan v. Itasca County,* 426 U.S. 373, 377-93 (1976) (distinguishing state "civil"-*adjudicatory* jurisdiction from state *regulatory* or *taxation* jurisdiction for Public Law 280-applicability purposes).

[49] *See, e.g., Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g,* 476 U.S. 877, 884-85 (1986); *Bryan,* 426 U.S. at 386; *Kennerly v. District Ct.,* 400 U.S. 423, 424-25 (1971); *Williams v. Lee,* 358 U.S. 217, 221 (1959) ("Significantly, when Congress has wished the States to *exercise* this [criminal and civil-adjudicatory] power, it has *expressly granted* them the jurisdiction which *Worcester v. State of Georgia* had denied." (emphasis added)).

[50] *See supra* note 49 (citing cases); *cf. Oklahoma Tax Comm'n v. Sac & Fox Nation,* 508 U.S. 114, 125 (1993) (noting Oklahoma's status as a "non-Public Law 280" state).

21. The 1968 amendments to Public Law 280[51] required tribal consent to any future state acquisition of Public Law 280 civil-adjudicatory jurisdiction,[52] and there has been no such tribal consent in Oklahoma.

22. Because tribal courts have civil-adjudicatory jurisdiction over Indian country-arising monetary suits against tribes and/or tribal members[53] (and putting aside for the moment the separate issue of tribal sovereign immunity), such courts are within the category of "a court of competent jurisdiction" within the meaning of Compact Part 6(C).

23. Because Part 9 of the Choctaw and Chickasaw Nations' Class III gaming Compacts preserves the civil-adjudicatory jurisdiction *status quo ante,* and because before the Compacts those Nations' designated forums had such jurisdiction over Indian country-arising monetary suits against the Nations but Oklahoma's state courts did not, *in pari materia* construction of Parts 6(C) and 9 results in the conclusion that those Nations' Compact Part 6(C) sovereign-immunity waivers are applicable only in the Nations' own designated forums.

24. In light of the preceding findings and conclusions, "a court of competent jurisdiction" as used in Compact Part 6(C) means "a court which at the time the Compact was entered into would have otherwise had civil adjudicatory jurisdiction to hear and decide the types of cases as to which the tribe's sovereign immunity is being waived, or a court which was expressly granted that civil adjudicatory jurisdiction pursuant to the Compact." I conclude that an Oklahoma state court does not fit into this meaning of "court of competent jurisdiction," while an Arbitrating Nations' tribal court does.

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[51] *See* Pub. L. No. 90-284, tit. IV, §§ 402, 403, 82 Stat. 78 (1968) (codified in material part at 25 U.S.C. § 1322 and 28 U.S.C. § 1360 note).

[52] *See* 25 U.S.C. § 1322.

[53] *See, e.g., Williams v. Lee,* 358 U.S. 217 (1959); *see also, e.g., Griffith,* 2009 OK 51 (Opinion of KAUGER, J.) ¶ 5 n.4 (collecting cases).

The specific declaratory relief based on the above findings and conclusions is provided in Part IV, below.

IV.

DECLARATORY RELIEF GRANTED

I award to the Choctaw and Chickasaw Nations relief in the form of the following Declarations.

1. Preemptive federal law provides that the Class III gaming activities and facilities of the Choctaw and Chickasaw Nations are subject to the terms and conditions of those Nations' Class III gaming Compacts.

2. There is no congressional abrogation of the Choctaw or Chickasaw Nations' sovereign immunities in the Indian Gaming Regulatory Act (or elsewhere in federal law) that would permit any monetary tort or prize claim to be brought against the Choctaw Nation or the Chickasaw Nation, or any gaming "arm," thereof, in any Oklahoma state court.

3. Federal law requires that any cognizable tribal waiver of sovereign immunity be unequivocally expressed, not implied.

4. No waiver of the Choctaw or the Chickasaw Nations' sovereign immunities from any Class III casino-related money damages tort, prize, or other suit in any Oklahoma state court is to be found *outside of* Part 6 of those Nations' Class III gaming Compacts with the State of Oklahoma.

5. The references to tribal (and/or enterprise) sovereign-immunity waivers found in Parts 6(A) and 6(B) of the Choctaw and Chickasaw Nations' Class III gaming Compacts with the State of Oklahoma are not independent or separate waivers that permit the limitations found in Compact Part 6(C) to be ignored, but rather the Part 6(A) and 6(B) waiver references are textually qualified by Parts 6(A)(2), 6(A)(9), 6(B)(1), and 6(B)(11), which incorporate

all of the additional sovereign-immunity-waiver limitations contained in those Compacts' Part 6(C).

6. The tribal (and/or enterprise) sovereign-immunity-waiver references in Parts 6(A) and 6(B) of the Choctaw and Chickasaw Nations' Class III gaming Compacts are therefore subject to Part 6(C)'s additional waiver limitations — including Part 6(C)'s "in a court of competent jurisdiction" limitation on the forum(s) in which any tribal (and/or enterprise) sovereign-immunity waiver is effective.

7. The phrase "court of competent jurisdiction" in Part 6(C) of the Choctaw and Chickasaw Nations' Class III gaming Compacts is in and of itself textually ambiguous, and is not defined in those Compacts' definitional Part 3.

8. Part 9 of the Choctaw and Chickasaw Nations' Class III gaming Compacts preserves, adopts, and incorporates by reference into those Compacts the controlling law establishing the limits of the Indian-country civil-adjudicatory jurisdiction of both tribal courts and Oklahoma's state courts.

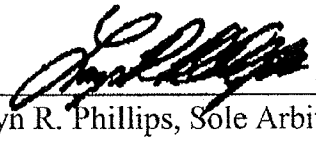
9. Because Part 9 of the Choctaw and Chickasaw Nations' Class III gaming Compacts with the State of Oklahoma leaves Oklahoma courts' civil-adjudicatory jurisdiction precisely where it was before the Compacts (*i.e.*, absent), no Oklahoma state court is a "court of competent jurisdiction" within the meaning of Part 6(C) of those Compacts.

10. Because nowhere in the Choctaw and Chickasaw Nations' Class III gaming Compacts is there any material tribal sovereign-immunity waiver except "in a court of competent jurisdiction," and because Part 9 preserved, adopted, and incorporated-by-reference the jurisdictional *status quo ante,* there is no express waiver anywhere in the Compacts of either the Choctaw Nation's

or the Chickasaw Nation's sovereign immunity from any relevant Indian country-arising Class III casino-related lawsuit in any Oklahoma state court.

11. Tribal courts (and tribally-designated forums) have civil-adjudicatory jurisdiction over relevant Indian country-arising Class III casino-related lawsuits against Indian tribes (including the Choctaw and Chickasaw Nations), and may exercise jurisdiction over such cases to the extent permitted by (and under the conditions established by) those Nations' sovereign-immunity waivers in the Compacts.

The foregoing components of the Declaratory Relief ordered herein shall be binding upon all Arbitrating Compacting Parties immediately upon issuance of this Award.



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JOINT REFERRAL TO BINDING ARBITRATION OF DISPUTES UNDER AND/OR ARISING FROM THE CHOCTAW NATION OF OKLAHOMA AND STATE OF OKLAHOMA GAMING COMPACT AND THE CHICKASAW NATION AND STATE OF OKLAHOMA GAMING COMPACT

July 20, 2009

OKLAHOMA CITY, OKLAHOMA

HON. GREGORY E. PYLE
CHIEF, CHOCTAW NATION OF OKLAHOMA

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APPENDIX 1

The Choctaw Nation of Oklahoma, the Chickasaw Nation, and the State of Oklahoma [hereinafter collectively, "the Arbitrating Compacting Parties"], agree to this joint referral to binding arbitration, as provided herein. The Arbitrating Compacting Parties submit to binding arbitral interpretation in light of controlling extrinsic law the issue of whether, under the Choctaw Nation of Oklahoma and State of Oklahoma Gaming Compact and the Chickasaw Nation and State of Oklahoma Gaming Compact ["the Compacts" or "those Compacts"], jurisdiction over all Compact-based tort claim and/or prize claim lawsuits lies exclusively in Choctaw Nation or Chickasaw Nation forums. The Arbitrating Compacting Parties further agree that the Arbitrator may resolve such ancillary factual and/or legal issues as the Arbitrator deems necessary to the resolution of this dispute. As provided herein, the Arbitrating Compacting Parties also agree to the appointment of a named Arbitrator, the procedures for arbitration, and the place of and time for arbitration. The Arbitrating Compacting Parties agree to arbitration outside of AAA requirements, rules, and administration, and agree to the entry of judgment on, and/or the review of the resulting Arbitration Award in the United States District Court for the Western District of Oklahoma under the terms and conditions established by Parts 12(2) and 12(3) of those Compacts.[1] The Arbitrating Compacting Parties further agree that the ultimately resulting federal court judgment, subject only to Part 12(2) and (3)-provided review, shall be binding on all courts, and that the ultimately resulting federal court judgment deriving therefrom may be enforced (but may not be re-reviewed) by any other court.

Pursuant to Part 12(1) and/or Parts 12(2) and (3) of the Compacts, the Arbitrating Compacting Parties have agreed to dispense with any AAA role in Arbitrator appointment, the AAA Rules, and AAA administration of this Arbitration.[2]

The Arbitrating Compacting Parties hereby appoint the Hon. Layn R. Phillips, formerly Judge of the United States District Court for the Western District of Oklahoma, as the sole Arbitrator. The Compacting Parties agree that Judge Phillips is exceptionally well qualified [3] to arbitrate this matter.

The procedures for this Arbitration shall be those mutually agreeable to the named Arbitrator and to all Arbitrating Compacting Parties. In the event of any disagreement, the procedures prescribed by the Arbitrator shall be final as to any area(s) of disagreement.

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[1] The Choctaw and Chickasaw Nations provided Compact Part 12(1) Notices of Disputes over interpretations of their Compacts to the State of Oklahoma, as required by Compact Part 14, on February 4, 2009, and March 6, 2009, respectively. The Arbitrating Compacting Parties have been engaged in informal dispute-resolution discussions since then pursuant to Part 12(1) of their Compacts. This Joint Referral is agreed to by the Arbitrating Compacting Parties under Compact Part 12(1) and/or Compact Parts 12(2) and (3).

[2] Without deciding that any particular set of AAA rules might have otherwise applied, the Arbitrating Compacting Parties note that Rule R-1(a) of the AAA Commercial Arbitration Rules provides that "[t]he parties, by written agreement, may vary the procedures set forth in these rules."

[3] Judge Phillips has also sat by designation on panels of the United States Court of Appeals for the Tenth Circuit. Judge Phillips is now in full-time legal practice (specializing in arbitration and mediation) with the firm of Irell & Manella, LLP. Judge Phillips founded, and now heads, that firm's ADR Center in Newport Beach, California.

The Arbitrating Compacting Parties express their shared desire that this arbitration proceed as expeditiously as the Arbitrator deems appropriate in light of the importance of the issues subject to arbitration.

The place of this arbitration shall be deemed to be Oklahoma City, Oklahoma, and within the jurisdiction of the United States District Court for the Western District of Oklahoma, and in no other place, whether or not the representatives of the Arbitrating Compacting Parties physically signed this arbitration agreement in that location, and whether or not the Arbitrator deems it appropriate to perform research, conduct arbitration-related business, and/or transmit the Arbitration Award to the Arbitrating Compacting Parties from any other place.

Hon. Gregory E. Pyle
CHIEF, CHOCTAW NATION OF OKLAHOMA

Hon. Bill Anoatubby
GOVERNOR, CHICKASAW NATION

Hon. Brad Henry
GOVERNOR, STATE OF OKLAHOMA

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County of Bryan)
) ss
State of Oklahoma)

AFFIDAVIT OF GREGORY E. PYLE

COMES now affiant, Gregory E. Pyle, of lawful age and duly sworn under oath, and states the following:

1. My name is Gregory E. Pyle, and my business address is 16th and Locust Streets, Durant, OK 74702.

2. I am the Chief of the Choctaw Nation of Oklahoma.

3. The document captioned "Joint Referral to Binding Arbitration of Disputes Under and/or Arising From the Choctaw Nation of Oklahoma and State of Oklahoma Gaming Compact and the Chickasaw Nation and State of Oklahoma Gaming Compact" is a true, correct, and authentic copy of the Arbitration Agreement personally signed by me in my capacity as Chief of the Choctaw Nation of Oklahoma on July 20, 2009.

FURTHER AFFIANT SAYETH NOT.

Gregory E. Pyle

Subscribed and sworn to before me this 30th day of July, 2009.

JEANNE PORTER NOTARY #06002712 PUBLIC STATE OF OKLAHOMA

Notary Public

My commission expires: 3-13-2010

County of Pontotoc)
) ss
State of Oklahoma)

AFFIDAVIT OF BILL ANOATUBBY

COMES now affiant, Bill Anoatubby, of lawful age and duly sworn under oath, and states the following:

1. My name is Bill Anoatubby, and my business address is P.O. Box 1548, Ada, OK 74820.

2. I am the Governor of the Chickasaw Nation.

3. The document captioned "Joint Referral to Binding Arbitration of Disputes Under and/or Arising From the Choctaw Nation of Oklahoma and State of Oklahoma Gaming Compact and the Chickasaw Nation and State of Oklahoma Gaming Compact" is a true, correct, and authentic copy of the Arbitration Agreement personally signed by me in my capacity as Governor of the Chickasaw Nation on July 20, 2009.

FURTHER AFFIANT SAYETH NOT.

Bill Anoatubby

Subscribed and sworn to before me this 20 day of July, 2009.

Notary Public

My commission expires: 4-27-10

Tammy L. Gray
State of Oklahoma Notary Public
County: Pontotoc
Commision Number: 06004258
Expires: April 27, 2010

County of Oklahoma)
) ss
State of Oklahoma)

AFFIDAVIT OF LISA TIPPING DAVIS

COMES now affiant, Lisa Tipping Davis, of lawful age and duly sworn under oath, and state the following:

1. My name is Lisa Tipping Davis and my business address is 2300 N. Lincoln Blvd., Room 212, Oklahoma City, OK 73105.

2. I am the general counsel for Governor Brad Henry, Governor of the State of Oklahoma and have served in that capacity since October 2003.

3. The document captioned "Joint Referral to Binding Arbitration of Disputes Under and/or Arising From the Choctaw Nation of Oklahoma and State of Oklahoma Gaming Compact and the Chickasaw Nation and State of Oklahoma Gaming Compact" is a true, correct and authentic copy of the Arbitration Agreement signed by Governor Brad Henry in his capacity as Governor of the State of Oklahoma on July 20, 2009.

FURTHER AFFIANT SAYETH NOT.

Lisa Tipping Davis

Lisa Tipping Davis

Subscribed and sworn to before me this 20th day of July, 2009.

Floy L. Smith

NOTARY SEAL PUBLIC

FLOY L. SMITH
Notary Public
State of Oklahoma
Commission # 03013100 Expires 10/24/11

CERTIFICATE OF MAILING

On this 25th day of August, 2009, I mailed copies of this Arbitration Award to counsel for the Arbitrating Compacting Parties herein:

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Meg Lettington
Meghan Lettington

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