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

SPECIALTY HOUSE OF CREATION, INCORPORATED, a New Jersey corporation,	)	
Plaintiff,	)	
v.	)	**Case No. 10-cv-371-GKF-TLW**
QUAPAW TRIBE OF OKLAHOMA, a federally recognized Indian nation,	)	
Defendants.	)	

BRIEF IN SUPPORT OF THE MOTION OF THE QUAPAW TRIBE OF OKLAHOMA (O-GAH-PAH) TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

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August 16, 2010

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MOTION OF THE QUAPAW TRIBE OF OKLAHOMA (O-GAH-PAH) TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Defendant, the Quapaw Tribe of Oklahoma (O-Gah-Pah) (the "Quapaw Tribe" or the "Tribe"), files this brief in support of its motion to dismiss the claims asserted against it in this action (dkt. # 13) pursuant to Fed. R. Civ. P. 12(b)(1) and/or (b)(6).

INTRODUCTION

On its face, the complaint in this case alleges claims for patent infringement and false marking arising under Title 35 of the United States Code, and, ordinarily these would be claims within the jurisdiction of a federal court. However, the plaintiff, Specialty House of Creation, Incorporated ("Specialty"), has named as the defendant a federally recognized Indian nation, the Quapaw Tribe of Oklahoma (O-Gah-Pah), which, under well-established law, is recognized as a sovereign that enjoys immunity from unconsented suits. Congress has not waived tribal sovereign immunity—or state sovereign immunity—for the claims stated in the complaint, and this Court therefore lacks jurisdiction over this action.

JURISDICTIONAL FACTS

The defendant in this action, the Quapaw Tribe, is a sovereign American Indian nation that has had government-to-government relations with the United States since at least 1818, including formal relations through six treaties and agreements, and through numerous laws, compacts, and inter-governmental agreements.[1] The Quapaw Tribe has ongoing formal recognition by the United States, and thus is a "federally recognized" Indian nation. *See* 74 Fed. Reg. 40,218, 40,221 (Aug. 11, 2009) (annual listing of recognized tribes); *see also* 25 U.S.C.A.

[1] *See Quapaw Tribe of Okla. v. Blue Tee Corp.*, 653 F. Supp. 2d. 1166, 1170-73 (N.D. Okla. 2009) (discussing Quapaw Tribe's relationship with the United States).

§ 479a-1 (West 2001) (providing for listing of federally recognized tribes).

Specialty House, a corporation organized under the laws of the State of New Jersey (Complaint ¶ 2), alleges that one of the Quapaw Tribe's governmental enterprises, the Downstream Casino Resort (the "Resort"), purchased or otherwise acquired counterfeit versions of a gaming industry novelty item known as a "card holder," a small device typically worn at the end of a lanyard by customers in casinos to hold players club cards. (Complaint ¶ 17.) The Resort is an unincorporated governmental subdivision of the Tribe, created and wholly owned and operated by the Tribe to generate governmental revenues to fund tribal services. (Ex. A, ¶ 4.) As such, the Resort is a governmental arm of the Tribe for purposes of applicable law.

The Quapaw Tribe has a written code of laws and administrative regulations, as adopted by the Tribal government. To date, the Tribe has not by law adopted any general waivers of its immunity from suit to permit patent infringement claims, false marking claims, and other similar claims. (Ex. A, ¶ 5.) Likewise, the Tribal laws chartering the governmental subdivision that operates the Resort contain no waivers of immunity for these claims, and there are no contractual agreements that provide waivers of immunity by the Tribe or any of its arms for the benefit of Specialty House. (Ex. A, ¶ 6.)

For purposes of this action, then, there is no genuine dispute of fact that: (1) the Quapaw Tribe, the named defendant in this action, is a federally recognized Indian nation; (2) the Resort is a governmental arm of the Tribe; and (3) the Tribe and the Resort have granted no waivers of their immunity from suit for the claims asserted in this action.

APPLICABLE STANDARDS OF REVIEW

The question of whether sovereign immunity applies to bar an action is a jurisdictional or quasi-jurisdictional issue that is ripe for determination pursuant to a Rule 12(b)(1) or (b)(6) motion. *See Ramey Constr. Co. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982). Therefore, unless a tribal government has waived its immunity from suit, or unless Congress has clearly and unequivocally abrogated tribal immunity for the particular claims alleged, a federal court lacks jurisdiction to hear claims against the tribe. *See Fent v. Oklahoma Water Res. Bd.*, 235 F.3d 553, 557-59 (10th Cir. 2000) (holding that once effectively asserted sovereign immunity is a jurisdictional bar to the exercise of federal subject matter jurisdiction).

Once jurisdiction has been challenged, the party asserting that subject matter jurisdiction exists—in this case the plaintiff, Specialty House—bears the burden of establishing its existence by a preponderance of the evidence. *See, e.g., Boudreau v. United States*, 53 F.3d 81, 82 (5th Cir. 1995) (noting burden on plaintiff to establish jurisdiction); *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 507 (2d Cir. 1994) (noting burden of proving jurisdiction on party asserting jurisdiction). As a result it is Specialty House's burden to prove that a valid tribal or congressional waiver of immunity exists to permit the claims in this case against the Quapaw Tribe. *See Bally Exp. Corp. v. Balicar, Ltd.*, 804 F.2d 398, 401 (7th Cir. 1986) (noting when defendant United States moved to dismiss for lack of subject matter jurisdiction, plaintiff was required to show waiver of federal sovereign immunity). As with other motions challenging the Court's subject matter jurisdiction, a motion seeking a dismissal on the basis of sovereign

immunity must be addressed before the merits of the case are litigated.[2]

SUMMARY OF ARGUMENT

It is well-established that Indian tribes are sovereign nations that possess the same immunity from unconsented suit traditionally enjoyed by other sovereigns. In order for there to be a valid waiver of tribal sovereign immunity, either the tribe itself must authorize the suit for the particular claims asserted or Congress must abrogate the tribes' immunity through clear and unequivocal statutory language. Therefore the claims in this case must be dismissed if there is no tribal or congressional waiver of immunity for the specific claims asserted in the complaint.

As the starting point in this analysis, there can be no genuine dispute that the Quapaw Tribe—along with its arms and officials—are shielded by tribal sovereign immunity as a matter of law. It is further undisputed that the Quapaw Tribe has not consented to suits for the claims asserted in this action. As a result, this Court lacks jurisdiction unless Congress has provided for a clear and unequivocal waiver of tribal immunity in the federal patent laws. However, nothing on the face of the relevant provisions of Title 35 of the United States Code, under which the

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[2] In view of the importance of the doctrine, a challenge to a federal court's jurisdiction on the basis of tribal sovereign immunity ordinarily is raised at the start of litigation, and an order denying the defense is immediately appealable. *See, e.g., Osage Tribal Council ex rel. Osage Tribe of Indians v. United States Dept. of Labor*, 187 F.3d 1174, 1179-80 (10th Cir. 1999) (applying collateral order doctrine to administrative order rejecting tribal sovereign immunity defense); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 63 F.3d 1030, 1050 (11th Cir. 1995); *see also Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147, 113 S. Ct. 684, 689 (1993); *Garramone v. Romo*, 94 F.3d 1446, 1452 (10th Cir. 1996). Without such interlocutory review, the value of the immunity to the sovereign could be lost. *See, e.g.*, 17A *Moore's Federal Practice* § 123.51, at 123-153 (noting an immediate appeal is necessary "because the value of immunity would be lost as litigation proceeds past motion practice"); *see also Puerto Rico Aqueduct & Sewer Auth.*, 506 U.S. at 146, 113 S. Ct. at 689 (noting immediate appeals of denials of immunity are necessary to ensure that sovereigns' interests are fully vindicated); *Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163, 1172 (10th Cir. 1992) (noting "Tribe's full enjoyment of its sovereign immunity is irrevocably lost once the Tribe is compelled to endure the burdens of litigation").

federal claims in this case are brought, contains provides for a congressional abrogation of tribal sovereign immunity.

Indian tribes, then, like states, are shielded by sovereign immunity from patent infringement and related claims. As a result, this Court lacks subject matter jurisdiction over the claims asserted in the complaint.

ARGUMENT & AUTHORITIES

I. THE QUAPAW TRIBE HAS NOT WAIVED ITS IMMUNITY FOR THE CLAIMS ASSERTED IN THIS CASE

It is the settled law that an Indian tribe is immune from suit in both state and federal courts, unless either the tribe has waived its immunity from suit for the particular claims or unless Congress has authorized the suit.[3] Immunity from suit has long been recognized as a fundamental aspect of American Indian nations' inherent sovereignty. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 1677 (1978); *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509, 111 S. Ct. 905, 909 (1991). The doctrine is based on federal law and on the treatment of Indian tribes as separate and distinct sovereign nations that maintained their inherent attributes of sovereignty when the United States was founded.[4] *See Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782, 111 S. Ct. 2578, 2583 (1991) (holding "it would be absurd to suggest that the tribes surrendered

[3] *See, e.g., Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754, 118 S. Ct. 1700, 1702 (1998); *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 512, 60 S. Ct. 653, 656 (1940); *Dry v. United States*, 235 F.3d 1249, 1253 (10th Cir. 2000); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982).

[4] Tribal sovereign immunity "is a necessary corollary to Indian sovereignty and self-governance." *See Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877, 890, 106 S. Ct. 2305, 2313 (1986). In its effect and operation, it is not unlike the immunity from suit enjoyed by the states and which is recognized under the Eleventh Amendment.

immunity in a [constitutional] convention to which they were not even parties"); *see also* U.S. Const. Art. 1, § 8.

The shield of tribal sovereign immunity extends not only to a tribes' governmental activities, but also to the quasi-commercial activities that Indian tribes use raise revenue for tribal governmental services and to create a substitute for the tax bases enjoyed by other governments, and it applies to tribal activities occurring both on and off a tribe's reservation or trust lands. *See Kiowa*, 523 U.S. at 760, 118 S. Ct. at 1705; *Sac & Fox Nation v. Hanson*, 47 F.3d. 1061, 1064-65 (10th Cir. 1995). Tribal sovereign immunity bars suits against individual tribal officials and employees acting in their representative capacity and within the scope of their authority. *See, e.g., Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-80 (9th Cir. 1985). As it applies to tribal officials and tribal employees acting in their representative capacity and within the scope of their authority, this immunity is identical to that enjoyed by the tribe itself. *See Romanella v. Hayward*, 933 F. Supp. 163, 167 (D. Conn. 1996).

Tribal governments and arms of tribal governments and tribal enterprises, then, enjoy broad immunity from suit unless the tribe has expressly and unequivocally waived its immunity for the particular claims alleged. *See, e.g., Santa Clara Pueblo*, 436 U.S. at 58-59, 98 S. Ct. at 1677; *Multimedia Games, Inc. v. WLGC Acquisition Corp.*, 214 F. Supp. 2d 1131, 1135 (N.D. Okla. 2001) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)). Such waivers of tribal sovereign immunity cannot be implied, but must be "unequivocally expressed." 436 U.S. at 58-59, 98 S. Ct. at 1677; *Seneca-Cayuga Tribe of Okla. v. State of Okla.*, 874 F.2d 709, 715 (10th Cir. 1989) (immunity waivers are strictly construed and cannot be implied). Without a valid, unequivocal waiver of tribal immunity, the claims against a tribe, its arms, and its officials are

barred.

With respect to the claims in this case, the government of the Quapaw Tribe has legislated no blanket statutory waivers of tribal immunity for any claims, including the claims under Title 35 alleged in Specialty House's complaint. (Ex. A ¶ 5.) Similarly, the entity that was established to develop and operate the Resort was created as a Tribal authority under Tribal law—a governmental subdivision of the Tribe—and it was cloaked with sovereign immunity not only by operation of law but expressly in its charter. (Ex. A ¶ 6.)

Under the controlling law, the Quapaw Tribe itself is thus protected by sovereign immunity, and the Resort, as a governmental arm of the Tribe, likewise enjoys the protection of tribal immunity from suit. Both entities, as well as their officials, are immune from suit for the claims asserted by Specialty House. Since the Tribe has not waived its immunity for the claims asserted in this case, Specialty House's claims are therefore barred by the doctrine of tribal sovereign immunity.[5]

II. CONGRESS HAS NOT ABROGATED TRIBAL SOVEREIGN IMMUNITY FOR CLAIMS AGAINST TRIBES UNDER TITLE 35

Of course Congress may, subject to any applicable constitutional or other limitations under law, abrogate tribal sovereign immunity. *See Kiowa Tribe*, 523 U.S. at 758-59, 118 S. Ct. at 1705; *Santa Clara Pueblo*, 436 U.S. at 58-59, 98 S. Ct. at 1677. But Congress rarely has done so, and then only in limited circumstances. As the complaint in this case makes plain, the

[5] The party named in the complaint in this case is the Quapaw Tribe, which is the tribal government itself, and therefore this is a suit *against the Tribe* itself. The Resort is operated and managed by a separate, autonomous Tribal authority. (Ex. A, ¶¶ 4 & 6.) As an arm of the Tribal government for purposes of federal and other law the Resort is shielded by tribal sovereign immunity, and the analysis in this motion would apply equally to the Resort if the Resort or its officers had been named as the defendant in the suit instead of or in addition to the Tribe.

claims alleged by Specialty House are for patent infringement and for false product marking, and thus all arise under Title 35 of the United States Code. The plain language of the relevant statutes does not mention Indian tribes, much less identify Indian tribes as parties that may be sued for infringement or for other claims related to patents, and therefore Congress has provided no waiver of tribal immunity for the claims in this case.

As to the claims for patent infringement, the relevant language in Title 35, Section 271 provides that "whoever" engages in certain listed actions—including selling patented inventions without authority—may be made liable for patent infringement. *See* 35 U.S.C.A. § 271(a)-(c) (West 2001). In the statute, as adopted, Congress included language facially making *states* potentially liable for patent infringement on the same basis as private entities.[6] Yet this language is addressed to *states*—not Indian tribes—and it thus lacks any apparent intent by Congress to waive *tribal* sovereign immunity. Similarly, § 292 also imposes potential liability on "whoever" places a patent number on or otherwise misindentifies patented goods with the intent of counterfeiting or imitating the mark of the patentee, without any language remotely suggesting that the language is intended to waive tribal sovereign immunity. *See* 35 U.S.C. § 292(a).

As the United States Supreme Court has held, congressional abrogation of tribal immunity—as is the case with congressional abrogation of other forms of sovereign immunity—"cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58,

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[6] The statute expressly provides that "whoever" includes

> "any *State*, an instrumentality of a *State*, and any officers or employee of a *State* or instrumentality of a *State* acting in his official capacity. Any *State*, and any instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity."

Id. § 271(h) (emphasis added).

98 S. Ct. at 670 (internal quotation marks and citations omitted). The language of Title 35 does not contain any language approaching that which would be necessary for a clear and express waiver of tribal sovereign immunity. *See Multimedia Games, Inc. v. Home Bingo Network*, No. 05-cv-608, 2005 WL 2098056, at *2 (N.D. N.Y. Aug. 30, 2005) (holding patent infringement claims are barred by tribal sovereign immunity). Thus patent infringement claims and claims of false marking against Indian tribes are barred by tribal sovereign immunity.[7]

Applying this same analysis, the Second Circuit has held that the Copyright Act contains none of the clear and unequivocal language necessary for a waiver of tribal immunity. *See Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357-58 (2d Cir. 2000) (noting that "[n]othing on the face of the Copyright Act 'purports to subject tribes to the jurisdiction of the federal courts in civil actions' brought by private parties") (quoting *Santa Clara Pueblo*, 436 U.S. at 59, 98 S. Ct. at 1670). That the patent and copyright laws may have a general application while not providing for private rights of action against Indian tribes does not create a special exception for tribes. In fact, the federal courts have held that the patent laws and the Lanham

[7] That the United patent laws contained in Title 35 might be characterized as a statute of general application "does not mean that Congress abrogated tribal immunity in adopting it." *Florida Parapelgic Assn., Inc. v. Miccosukee Tribe*, 166 F.3d 1126, 1129-33 (11th Cir. 1999) (holding the Americans with disabilities Act applies to Indian tribes, but that the act does not waive tribal sovereign immunity); *see also Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2d Cir. 2000) (applying same analysis to Copyright Act claims asserted against Indian tribe). The treaties between the Quapaw Tribe and the United States confer on it the *right to exclude* other nations and tribes, thus guaranteeing the Quapaw Nation's legal independence. *See* Treaty of May 13, 1833 (Kappler, 1904, vol. 2, p. 395, 7 Stat. 424) (setting forth promise by the United States to protect the Quapaw Nation "against all interruption or disturbance from any other tribe or nation or Indians or from any person or persons whatever"). The Tenth Circuit has recognized that such treaty rights prevent the automatic application to a tribe of federal statutes that otherwise have a general application. *See Donovan v. Navajo Forest Prods. Indus.*, 692 F.2d 709, 712 (10th Cir. 1982) (holding that application of OSHA to a tribal enterprise would abrogate treaty rights to exclude and would "dilute the principals of tribal sovereignty and self government recognized in the treaty").

Act similarly contain no waiver of Eleventh Amendment immunity to permit private suits against the states and their arms and officials. *See College Savs. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 691, 119 S. Ct. 2219, 2223 (1999) (holding Eleventh Amendment immunity of the states bars suits for unfair competition under the Lanham Act); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savs. Bank*, 527 U.S. 627, 647, 119 S. Ct. 2199, 2211 (1999) (holding Eleventh Amendment immunity bars suits for patent infringement). The common thread in these decisions is that the shield of sovereign immunity is waived only when Congress do so clearly and explicitly and pursuant to its powers.[8]

Nothing on the face of the patent infringement and false marking statutes "purports to subject tribes to the jurisdiction of the federal courts in civil actions" brought under those laws by private parties. *Santa Clara Pueblo*, 436 U.S. at 59, 98 S. Ct. at 1670. The plaintiffs' claims should therefore be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and/or (b)(6).

CONCLUSION

No waiver of tribal sovereign immunity exists for the plaintiffs' claims against the Quapaw Tribe of Oklahoma (O-Gah-Pah). The claims asserted in the complaint against the Tribe are thus barred, and this Court lacks subject matter jurisdiction over this action. The Court should therefore dismiss this action.

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[8] Further, this result does not leave the plaintiff in such cases without a remedy. As the courts have long recognized, a plaintiff may choose which alleged infringers to sue. *See Mashantucket Pequot Tribe*, 204 F.3d at 358; 7 C. Wright et al., *Federal Practice & Procedure* § 1614, at 227 (3d ed. 2001) (explaining "a suit for infringement may be analogized to other tort actions" and "all infringers are jointly and severally liable"). The plaintiff in this case consciously chose to sue solely the ultimate governmental party, and for whatever reasons, strategic or otherwise, elected not to name the actual makers of the allegedly counterfeit products.

Respectfully submitted,

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