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.	)	

REPLY IN SUPPORT OF THE MOTION OF THE QUAPAW TRIBE OF OKLAHOMA (O-GAH-PAH) TO DISMISS

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September 24, 2010

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REPLY IN SUPPORT OF THE MOTION OF THE QUAPAW TRIBE OF OKLAHOMA (O-GAH-PAH) TO DISMISS

Defendant, the Quapaw Tribe of Oklahoma (O-Gah-Pah) (the "Quapaw Tribe" or the "Tribe"), hereby replies 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 & SUMMARY

Specialty House of Creation, Incorporated ("Specialty"), against the existing body of law, urges the Court to allow this case to proceed on a theory that not all waivers of immunity must be express. In fact, there can be no genuine dispute that Congress may abrogate or waive tribal immunity from suit only through clear and unequivocal language. This rule directly applies to the language in 35 U.S.C. § 271, which does not mention tribes, and, further, which evidences a clear intent by Congress to waive immunity for suits against other sovereigns, but not Indian tribes. This same standard also applies to the Oklahoma tribal-state gaming compacts, which provide only for a limited waiver of immunity for personal injury and property damage tort claims—not for patent claims.

Specialty's arguments with respect to waivers of sovereign immunity contravene both the plain language of the statute and the controlling precedent. Its other arguments—including a frivolous attack on Quapaw sovereignty—similarly are without merit. This action is barred by tribal sovereign immunity, and should be dismissed.

ARGUMENT & AUTHORITIES

I. TITLE 35, SECTION 271 DOES NOT PROVIDE A WAIVER OF TRIBAL SOVEREIGN IMMUNITY FOR PATENT INFRINGEMENT CLAIMS

Acknowledging that the United States patent laws do not mention Indian tribes, Specialty instead urges the Court to hold that 35 U.S.C. § 271 contains an implicit waiver of immunity

simply because it is a statute of general application. However, that Congress has not chosen, in clear language, to provide for a right of private action for patent infringement against Indian tribes ends the analysis. The uniform and longstanding precedent in this area makes plain that statutory abrogation or waiver of tribal immunity cannot be implied by courts, and this rule applies to all federal statutes, including those understood to have a general application.

As Specialty concedes, it is the well-established rule that Congress may abrogate tribal sovereign immunity for particular claims *only* through express and unequivocal statutory language. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59, 98 S. Ct. 1670, 1677 (1978). The Supreme Court has made clear on multiple occasions that 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; *see also, e.g., Seneca-Cayuga Tribe of Okla. v. Oklahoma*, 874 F.2d 709, 715 (10th Cir. 1989) (immunity waivers are strictly construed and cannot be implied). Specialty makes no argument that a clear and unequivocal waiver is present in § 271, and plainly it is not.

To circumvent the requirement for a clear waiver language, Specialty contends that such a waiver may be implied if the statute involved is one of *general applicability*. In fact, this argument has been rejected by the courts that have addressed the issue. Simply because a federal statute might be characterized one of general application and also creates a right of action "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 that although the Americans with disabilities Act applies to Indian tribes, the act does not waive tribal sovereign immunity for private actions); *see also Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2d Cir. 2000) (applying same analysis to copyright claims asserted against Indian tribe). The

consideration that a statute is one of general applicability is only one aspect of the relevant analysis.[1] Such a law must, as the basic rule provides, contain clear and unequivocal language providing a waiver of tribal immunity in order for the courts properly to recognize a right of action against Indian tribes. *See Florida Paraplegic Ass'n*, 166 F.3d at 1131 (applying test to ADA action against tribe).

Contrary to what Specialty proposes, the appropriate analysis focuses on the plain language of § 271, which does not mention Indian tribes and which does not otherwise indicate any intent by Congress to abrogate tribal immunity. In fact, the language of § 271(h) evidences the opposite—an intent to exclude Indian tribes from any general right of private action for infringement. Section 271(h) defines the governments to which the statute applies as including the "states," which demonstrates Congress's understanding in this instance of the need for appropriate language to effect a valid waiver of governmental immunity.[2] By mentioning only states in the language defining the scope of the section, Congress further evidenced its specific intent to provide for a waiver of only *state* sovereign immunity.[3] *See* 166 F.3d at 1133 (noting

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[1] As the Eleventh Circuit has observed, the analysis of whether a statute is one of so-called general applicability simply determines whether the law is broadly applicable. *See Florida Paraplegic Ass'n*, 166 F.3d at 1131. A separate analysis of the specific statutory language is also necessary to determine whether tribal immunity is abrogated. *Id*. at 1131-32.

[2] In fact, as Specialty acknowledges, Congress adopted the Patent and Plant Variety Protection Remedy Clarification Act, including § 271(h), in part in response to decisions holding that state sovereign immunity barred such suits against states. *See Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savs. Bank*, 527 U.S. 627, 632, 119 S. Ct. 2199, 2203 (1999). This could not provide stronger evidence that Congress was aware of the bar of sovereign immunity when it adopted the act, and consciously chose to provide a waiver of immunity only to allow patent infringement actions against states.

[3] The language in § 271, particularly the language in § 271(h), evidencing an intent not to create a right of private action against tribal governments eliminates the need for the additional analyses some courts have applied in determining applicability of statutes to tribes.

express statutory language abrogating state immunity, in the absence of language relating to Indian tribes, demonstrates congressional choice not to include tribes).

The essence of Specialty's position is only a generalization—namely, that it believes the interest in uniform application of the patent laws "advises against exempting tribes" from the scope of § 271. Again, the mere fact that a statute is intended to have a general application does not answer the separate analysis of whether Congress has, by clear language, validly created a right of action against governments shielded by immunity. That the courts have held that Eleventh Amendment sovereign immunity bars suits against states under § 271 makes clear that even provisions in statutes of general application creating rights of private action do not automatically abrogate governmental immunities. *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 bars suits for unfair competition against the states); *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 against states for patent infringement). The result obtained by the application of tribal sovereign immunity in this

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For example, treaty rights, along with other considerations of sovereignty, may prevent the 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"). As the Tribe has noted, its treaties contain the same types of guarantees of the *right to exclude* other nations and tribes that prevent automatic application of general statutes. *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 purpose of Specialty's argument that all of the Quapaw Tribe's treaties all have been abrogated seems to be to try to avoid the legal consequences of such language. Nevertheless, such an analysis is unnecessary in this case, since the express language in § 271(h) provides strong evidence of a congressional intent to create a right of private action only against the states, not Indian tribes.

context does not, as Specialty suggests, result in special treatment for Indian nations. Rather, it simply recognizes tribes' sovereignty as governments. *See Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890, 106 S. Ct. 2305, 2313 (1986) (noting sovereign immunity "is a necessary corollary to Indian sovereignty and self-governance").

As to this last point, the fact that Congress has not chosen to abrogate tribal sovereign immunity in this area does not leave Specialty without a remedy. Having selectively chosen to target a tribal government that was not involved in the transactions alleged in the complaint and that it knew was shielded by sovereign immunity—and at the same time electing not to pursue the manufacturer or manufacturers of the infringing products—Specialty cannot seriously argue that the law is unfair.[4] Section 271 contains no clear and unequivocal waiver of tribal immunity, and, applying the controlling law, the Court should dismiss Specialty's claims.

II. THE QUAPAW TRIBE HAS NOT WAIVED IMMUNITY FOR PATENT INFRINGEMENT SUITS THROUGH ITS GAMING COMPACT

Specialty—again ignoring the importance of the requirement that waivers of immunity must be clear and unequivocal—argues that the Oklahoma tribes have waived immunity for patent infringement suits through the tribal-state gaming compacts. However, the compacts

[4] In a conclusory fashion, Specialty quotes the Fifth Amendment to the United States Constitution, although it fails to make clear what type of constitutional issue it conceives is raised by virtue of the application of the doctrine of sovereign immunity. Sovereign immunity is a right of a sovereign that goes to the power of the courts—not to the subject matter of a particular dispute. *See, e.g.*, *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506, 514, 60 S. Ct. 653, 657 (1940) ("Consent alone gives jurisdiction to adjudge against the sovereign. Absent that consent, the attempted exercise of judicial power is void . . . Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body"); *California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979) (explaining "[s]overeign immunity involves a right which courts have no choice, in the absence of a waiver, but to recognize"). It does not follow that the Court's mere application of tribal immunity raises Fifth Amendment concerns.

contain no broad immunity waiver language, and, instead, compacting tribes have consented to suits only against their *gaming enterprises* for two specific types of tort claims—personal injury or property damages claims—and then only up to the amount of the public liability insurance maintained by the enterprise for the purpose of satisfying such claims.[5] Specialty has neither asserted a claim for *personal injury* or *property damage*, nor has it asserted a claim against a gaming *enterprise* of the Quapaw Tribe.

Specialty is able to craft an argument that a waiver exists under the compact only through a highly selective reading of only a few passages in the compact. The compact clearly provides for a "limited" waiver of tribal immunity *only* for prize claims and for "tort claim[s] for *personal injury or property damage*." (Plf.'s Ex. 2, Pt. 6(A), at 10 (emphasis added).) The compact further provides that "[n]o tort claim shall be paid, or be the subject of any award," in excess of the limits of the public liability insurance that a tribal gaming enterprise is required to carry *for occurrences of personal injuries and for property damages*. (Plf.'s Ex. Pt. 6(A)(1), at 10 (emphasis added).) Therefore, under the clear language of the compact, signatory tribes have consented to suits solely for personal injury and property damage tort claims. Specialty has asserted a claim for *patent infringement*, which is not a claim within the scope of the limited waiver of immunity in the compact.

Additionally, the compacts provide for a waiver for such tort claims only when the claims are asserted against the appropriate tribal gaming enterprise. This limitation appears throughout the relevant section of the compact, and it is even quoted by Specialty. The compact makes plain

[5] These limits reinforce one of the primary underlying concepts of sovereign immunity: the public treasuries of sovereigns, which provide for services such as public safety, health, and education, are not open to generalized lawsuits by third parties without the consent of the sovereign. This is particularly critical for Indian tribes, which are relatively small governments and need to protect their limited fiscs.

that the limited waiver it incorporates relates to "a tort claim for personal injury or property damage *against the enterprise*." (Plf.'s Ex. 2, Pt. 6(A), at 10 (emphasis added).) This is a key limitation on such claims—claims allowed under the waiver in the compact may not exceed the amount of the specific liability insurance that the gaming *enterprise* is required to maintain.[6] (Plf.'s Ex. 2, Pt. 6(A)(1), at 10.) In other words, the compacts provide for a limited waiver of immunity for personal injury and property damages claims, but permit recoveries only against the insurance carried by the gaming enterprise for such claims.[7]

In this case, Specialty has elected to pursue a claim for patent infringement against the *tribal government*, not against the Tribe's gaming *enterprise*. The tribal gaming enterprise identified in Specialty's claims is the Downstream Casino Resort, an independent governmental authority of the Quapaw Tribe, which is not named as a party defendant. (Mot. to Dism. Ex. A, at ¶ 4 & attach.) Under the Class III gaming compacts, the Quapaw Tribe and other tribal governments have consented to suits only against the gaming enterprises to which claims are asserted, subject to the limitations set forth in the compacts. Suits brought directly against the tribes are barred. Even if the suit had been against the gaming enterprise, it still would be barred as outside the scope of the limited waiver of immunity in the compact.

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[6] The language that comprises the limited waiver, in fact, begins by stating that "[t]he Tribe consents to suit *against the enterprise* in a court of competent jurisdiction with respect to a tort claim or prize claim if all requirements [of the compact] have been met . . . ." (Plf.'s Ex. 2, Pt. 6(C), at 14 (emphasis added).)

[7] As Specialty acknowledges, tribal governments have implemented procedures for processing allowed tort claims against their gaming enterprises—further confirmation that the compact language, even if it were not clear, does not provide a waiver of immunity for all federal causes of action. The Quapaw Tribe's gaming ordinance, as approved by the Chairman of the National Indian Gaming Commission, *see* 25 U.S.C. § 2710(e), for example, provides that the Tribal courts have exclusive jurisdiction over tort claims allowed under the compact. (Quapaw Code tit. 17, § 24(A) (Ex. B).) Additionally, among the requirements for such claims is that they must be filed within one year. (Quapaw Code tit. 17, § 24(B) (Ex. B).)

III. PLAINTIFF'S ASSERTION THAT THE QUAPAW TRIBE IS NOT A SOVEREIGN INDIAN NATION IS FRIVOLOUS

Finally, in an all-out attack on the Tribe for exercising its well-recognized legal immunity from suit as a defense, Specialty boldly asserts that the Quapaw Tribe is not a sovereign American Indian Nation, and that there is "currently no treaty in effect between the United States and the Quapaw." This *ad hominem* argument notwithstanding, the Tribe has been recognized by the United States as a sovereign nation for almost two centuries, and such federal recognition continues, and the Tribe today continues to exercise its sovereignty in ways too numerous to list. Specialty's contention lacks any support in history or law, it evidences both a lack of understanding of and a respect for tribal sovereignty, and it is, in short, a frivolous argument.

The Quapaw Nation began government-to-government relations with the United States no later than with the negotiation and conclusion of the Treaty of August 24, 1818, at St. Louis, Missouri, and has continued such relations with the United States through six treaties and agreements in the 19th century, as well as through numerous legislative enactments, agreements, land claims settlements, settlements of litigation, and other government-to-government interactions.[8] The Quapaw Tribe today continues to be a federally recognized Indian nation.[9]

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[8] The Quapaw Tribe entered into five treaties and made an unratified agreement with the United States in the 19th century, including (i) the Treaty of August 24, 1818 (Kappler, 1904, vol. 2, p. 160, 7 Stat. 176), (ii) the Treaty of November 15, 1824 (Kappler, 1904, vol. 2, p. 210, 7 Stat. 232), (iii) the Treaty of May 13, 1833 (Kappler, 1904, vol. 2, p. 395, 7 Stat. 424), (iv) the Treaty of August 24, 1835 (Kappler, 1904, vol. 2, p. 425, 7 Stat. 474), (v) the unratified Agreement of September 13, 1865 (Kappler, 1904, vol. 2, p. 1050), and (vi) the Treaty of February 23, 1867 (Kappler, 1904, vol. 2, p. 961, 515 Stat. 513). Subsequently, Congress has enacted numerous acts relating to the Quapaw Tribe and its reservation.

[9] *See Indian Entities Recognized & Eligible to Receive Servs. From the BIA*, 74 Fed. Reg. 40,218, 40,221 (Aug. 11, 2009) (current annual listing of recognized tribes); *see also* 25 U.S.C. § 479a-1 (requiring listing of recognized tribes). Federal recognition of an Indian tribe means it is an American Indian nation the United States Secretary of the Interior acknowledges

The Tribe has a modern elected government, a court system, and a Tribal Marshals Service, all of which administer Quapaw law. The Tribe exercises its sovereignty and jurisdiction over the lands within its "Indian country"[10] in a wide range of areas similar to that of any government, including from regulation of the environment to taxation, and from education to fire protection and emergency services.

Specialty's contention that the Quapaw Tribe is not a sovereign is based on a numerous misstatements about history, beginning with an assertion that the Quapaw Nation lost its sovereignty because it "sided" with the Confederate States of America in the Civil War.[11] Following the Civil War, the Quapaw Tribe and other tribes in present-day Oklahoma potentially faced penalties by the United States government for having signed agreements with the occupying Confederacy. *See The Quapaw Indians* at 104-04. However, no legislation nor any presidential order ever abrogated the Quapaw treaties.[12] In fact, the Commissioner of Indian

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to exist as an Indian tribe pursuant to Public Law No. 103-454, § 102, 108 Stat. 4791 (1994), which is codified at 25 U.S.C. § 479a.

[10] *See* 18 U.S.C. § 1151; *see also Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 128, 113 S. Ct. 1985, 1993 (1993) (discussing Indian country of Oklahoma tribes).

[11] Specialty's premise, the Quapaw Nation aligned itself with the Confederacy as a committed ally, is an incorrect statement of history. Within three weeks of the Confederate attack on Fort Sumter that launched the Civil War, federal armed forces began evacuating Indian Territory, thus leaving the Quapaw and other Indian nations without protection and support. *See* W. David Baird, *The Quapaw Indians: A History of the Downstream People* at 96, 103-04 (Univ. Okla. 1980) [hereinafter "*The Quapaw Indians*"]. Soon thereafter, the Tribe was forced to evacuate from the Quapaw Reservation, and many Quapaws spent the war in Kansas as refugees. *Id*. at 96-99. In 1861, members of the Quapaw Tribe, along with other Indian nations, did indeed signed a treaty of alliance with the Confederate States. However, this document, far from a military alliance, essentially guaranteed protection by the occupying army, along with an annuity—both obligations to the Tribe on which the United States had defaulted. *Id*. at 96-97.

[12] In 1862 Congress passed legislation that, with respect to any Indian tribe which "shall be in actual hostility to the United States," authorized the president, by proclamation, "to

Affairs acknowledged after the war that the Quapaw Tribe had not, as a nation, engaged in war with the United States, and eventually required only that the Tribe sign a protocol calling for immediate peace. *See The Quapaw Indians* at 104. Specialty's attack on Quapaw sovereignty is thus disproved by only a cursory reading of legal history.

It cannot be seriously argued that all of the Quapaw Tribe's treaties with the United States have been voided, and no good faith legal position exists that the Quapaw Tribe has lost its status as a sovereign American Indian nation. Specialty's attack on Quapaw sovereignty should be viewed for what it is—namely, a baseless effort to discredit an Indian tribe's valid exercise of one of the well-recognized legal attributes of its sovereignty.

CONCLUSION

In defending its suit against a tribal government shielded by sovereign immunity, Specialty makes a number of arguments that either are contrary to controlling precedent or that lack any merit. Title 35, Section 271of the United States Code contains no language clearly and unequivocally abrogating tribal sovereign immunity. Additionally, the Quapaw Tribe has not consented to patent infringement suits, including through the waiver language in its gaming compacts. Under the well-established law, the plaintiff's claims against the Tribe should be dismissed.

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declare all treaties with such tribe to be abrogated by such tribe, if in his opinion, the same can be done consistently with good faith and national obligations." Act of July 5, 1862, ch. 135, § 1, 12 Stat. 528 (1862). Thus, this legislation did not make abrogation of Indian treaties automatic, but rather gave the federal government discretion to take such an action. President Lincoln never issued a proclamation abrogating the Quapaw treaties. *See The Quapaw Indians* at 103-04. Further, the post-Civil War Treaty of 1867 acknowledged the continuity of the previous Quapaw treaties. *See* Treaty of February 23, 1867 (Kappler, 1904, vol. 2, p. 961, 515 Stat. 513).

Respectfully submitted,

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