UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

(1) SPECIALTY HOUSE OF CREATION, INCORPORATED, a New Jersey corporation, Plaintiff, v. (1) QUAPAW TRIBE OF OKLAHOMA, Defendant.	Case No. 10-CV-371-GKF-TLW

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

Plaintiff, Specialty House of Creation Incorporated ("Specialty House"), responds to The Motion of the Quapaw Tribe of Oklahoma (O-GAH-PAH) to Dismiss for Lack of Subject Matter Jurisdiction ("Motion") (Dkt. No. 13) as follows:

Are owners of United States patents to be without judicial recourse for infringements, by federally recognized Indian tribes, of intellectual property rights granted them under the United States Constitution and the United States Patent Act?

The Quapaw Tribe of Oklahoma asks this Court to answer the above question in the affirmative – thereby violating constitutionally guaranteed property rights and literally opening a Pandora's Box with respect to judicially sanctioned intellectual property violations throughout the United States. This appears to be an issue of first impression in the Tenth Circuit and has not been directly addressed by any Circuit Court or the Supreme Court.[1] Specialty House believes that for one or more of the reasons stated herein, the above question should be answered in the

[1] The only opinion plaintiff has identified addressing the issue of tribal immunity with respect to claims brought pursuant to the Patent Act is *Home Bingo Network v. Multimedia Games, Inc.*, No. 05 Civ. 0608, 2005 WL 2098056 (N.D. N.Y. Aug. 30, 2005), discussed *infra*.

negative, thereby preserving the constitutionally protected property rights that are the subject of this action.

I. Background

a. Patent Law

The Patent Clause of the Constitution states that "Congress shall have Power … To promote the Progress of Science and useful Arts, by securing for limited Times to … Inventors the exclusive Right to their … Discoveries[.]"[2] The Patent Clause gives Congress the authority to grant monopolies to inventors "for limited times" to "promote the progress of science and useful arts." The upshot of the Patent Clause is that Congress has enacted the Patent Act[3] which provides that "[e]very patent shall … grant to the patentee … the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States."[4] The Patent Act is a statute of general applicability that protects patents from infringement by granting a private right of action to patentees.[5] Congress has provided that "district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents…. Such jurisdiction shall be exclusive of the courts of the states in patent … cases."[6]

Appreciating the significance of patents, Congress has issued a broad mandate that *anyone* who infringes a patent is subject to a civil action. Congress has unmistakably expressed its intent that the Patent Act applies to everyone – individuals, corporations, foreign nations,[7] States,[8] the United States of America,[9] and, as argued herein, Indian tribes.

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[2] U.S. Const. art. I, § 8, cl. 8.
[3] 35 U.S.C. §§ 1-376.
[4] 35 U.S.C. § 154(a)(1).
[5] "A patentee shall have remedy by civil action for infringement of his patent." 35 U.S.C. § 281.
[6] 28 U.S.C. § 1338(a).
[7] 28 U.S.C. 1605.
[8] 35 U.S.C. § 271(h).

b. Indian Law

The legal foundation for much of the current Indian law was established by Chief Justice John Marshall between 1823 and 1832 in what has since become referred to as "The Marshall Trilogy."[10] The Marshall Trilogy helped legally justify the authority of the United States over Indian tribes,[11] recognized the unique sovereign legal status of Indian tribes,[12] and explicitly ruled that federal power to deal with the Indians excluded states from exercising jurisdiction within Indian territory.[13] U.S. Supreme Court decisions in United States v. Kagama[14] and Lone Wolf v. Hitchcock[15] established that, by nature of the guardian-ward relationship, Congress has plenary, authority over the tribes.

II. Tribal Immunity

An important privilege some tribes retain from their dealings with the federal government is tribal immunity.[16] The doctrine of tribal immunity was directly recognized by the Supreme

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[9] 28 U.S.C. 1498(a).

[10] *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1; *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

[11] "Conquest gives a title which the Courts of the conqueror cannot deny." *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) at 588 (embracing the doctrines of conquest and discovery as bases for U.S. authority over American Indian tribes).

[12] In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) at 17, Chief Justice Marshall specifically distinguished tribal nations from foreign nations:

> They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

[13] *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (upholding right of tribe to govern internal affairs free of state interference).

[14] 118 U.S. 375 (1885).

[15] 187 U.S. 553 (1903).

[16] *See Kiowa Tribe of Okla. v. Mfg. Techs*., 523 U.S. 751 (1998) (upholding tribal sovereign immunity as "settled law," though recognizing that it developed almost by accident); *see also Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991); *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986) ("The common law sovereign immunity … is a necessary corollary to Indian sovereignty and self-governance.").

Court in United States v. United States Fidelity & Guaranty Co.: "[T]he suability of the … Indian Nations … depends upon affirmative statutory authority."[17]

Despite tribal immunity, tribes may be subject to suit in two ways. First, tribes may waive immunity (discussed *infra* with respect to the Quapaw Tribe of Oklahoma).[18] Second, Congress may abrogate tribal immunity.[19] The analysis to determine whether Congress has abrogated tribal immunity differs depending on if the statute is specifically directed at tribes or if the statute is of general applicability.

a. Congressional abrogation of tribal immunity with respect to statutes directed at Indian tribes.

The Supreme Court addressed congressional abrogation of tribal sovereignty, within statutes directed at Indian tribes, in Santa Clara Pueblo v. Martinez.[20] In Santa Clara, Martinez sued the tribe for gender discrimination due to a tribal ordinance denying membership to the children of member mothers and non-member fathers, while allowing membership to the children of member fathers and non-member mothers. Martinez alleged that the ordinance violated the Indian Civil Rights Act (ICRA), which states that no tribe shall "deny to any person within its jurisdiction the equal protection of its laws."[21] ICRA is specifically directed at tribes and does not expressly abrogate tribal immunity. Nevertheless, Martinez argued that the Act impliedly authorized suit against tribes for violations.[22]

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[17] *United States v. U.S. Fid. & Guar. Co*., 309 U.S. 506, 514 (1940) (recognizing that sovereign may consent to suit).
[18] *C & L Enters. Inc. v. Citizen Band Potawatomi Indian Tribe of Okla*., 532 U.S. 411 (2001).
[19] *See Kiowa Tribe*, 523 U.S. at 754 ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."); *U.S. Fid. & Guar. Co*., 309 U.S. at 512 ("These Indian Nations are exempt from suit without Congressional authorization.").
[20] 436 U.S. 49 (1978) (holding that if Congress wanted to abrogate tribal immunity under the Indian Civil Rights Act, a statute specifically directed at Native American tribes, it would have done so explicitly, and thus did not impliedly waive sovereign immunity).
[21] 25 U.S.C. § 1302(8) (2000).
[22] *Santa Clara*, 436 U.S. at 58.

The Court noted that Congress had addressed a number of issues but provided only a single remedial provision, the Writ of Habeas Corpus.[23] Ultimately, the Court concluded: "It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed."[24] This language has led to confusion in lower courts examining statutes of general applicability, as discussed below.

b. Congressional abrogation of tribal immunity with respect to statutes of general applicability.

Since the Supreme Court's decision in Federal Power Commission v. Tuscarora Indian Nation,[25] lower courts have applied language from the case to establish a presumption that federal statutes of general applicability fully apply, unless the statute exempts tribes. Specifically, Tuscarora states: "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests."[26]

The leading case applying and explaining this rule is Donovan v. Coeur d'Alene Tribal Farm.[27] In Donovan, the Ninth Circuit examined whether the Occupational Health and Safety Act applied to the Coeur d'Alene Tribal Farm, "a commercial enterprise wholly owned and operated by the Tribe."[28] An OSHA compliance officer "conducted a consensual inspection of two grain elevators on the Farm," and issued numerous citations.[29] The farm appealed the citations and they were overturned by an Administrative Law Judge.[30] On appeal by OSHA, the tribe argued that Congress did not intend the Act to apply to tribes, and the tribe's inherent sovereignty

[23] *Id*.
[24] *Id*. (internal citations omitted).
[25] 362 U.S. 99 (1960) (finding general grant of authority to New York Power Commission was sufficient to permit the condemnation of Indian lands for a federally-sponsored dam project).
[26] *Id*. at 116.
[27] 751 F.2d 1113 (9th Cir. 1985).
[28] *Id*. at 1114.
[29] *Id*.
[30] *Id*. at 1114-15.

barred its application of the Act without an express congressional statement applying it to tribes.[31] The Court disagreed.[32]

The Donovan Court first noted, "Unlike the states, Indian tribes possess only a limited sovereignty that is subject to complete defeasance."[33] The court then cited Tuscarora for the general principle that generally applicable statutes apply to tribes.[34]

The Court also recognized three exceptions to the general rule of applicability:

> A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches 'exclusive rights of self-governance in purely intramural matters'; (2) the application of the law to the tribe would 'abrogate rights guaranteed by Indian treaties;' or (3) there is proof 'by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations….'[35]

The Ninth Circuit then examined whether any of these exceptions applied to the tribal farm. The farm argued that its activities fit within both of the first two exceptions.[36] Again, the Court disagreed, finding "neither [] applicable in this case."[37]

As to the first exception, the tribe argued that application of OSHA regulations to the farm would "interfere with rights of tribal self-government."[38] The Court noted that the farm employed non-Indians as well as Indians, and sold produce in interstate commerce.[39] The Ninth Circuit was completely unwilling to "bring within the embrace of 'tribal government' all tribal business and commercial activity," and rejected the farm's argument as "far too much."[40] As to

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[31] *Id*. at 1115.
[32] *Id*. at 1114.
[33] *Id*. (citing *Rice v. Rehner*, 463 U.S. 713 (1983)).
[34] *Id*. (citing *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960)).
[35] *Id*. at 1116 (citing *United States v. Farris*, 624 F.2d 890, 893-94 (9th Cir. 1980)).
[36] *Id*.
[37] *Id*.
[38] *Id*.
[39] *Id*.
[40] *Id*.

the second exception, the farm argued that the application of OSHA regulations would infringe tribal treaty rights.[41] This argument was also rejected, as there was no treaty to infringe.[42]

III. Cases cited as support for Defendant's position misinterpreted and misapplied precedent.

Defendant cites Bassett v. Mashantucket Pequot Tribe[43] in support of its proposition that Indian tribes may assert immunity with respect to claims brought against them pursuant to the Patent Act. Bassett sued the Mashantucket Pequot Tribe for copyright infringement, alleging a film produced by the Tribe was illegally based on her copyrighted movie script.[44]

At trial, the district court granted the Tribe's motion to dismiss due to the Tribe's immunity, and Bassett appealed.[45] The Second Circuit first recognized the Tribe's common law immunity, and then cited Santa Clara for the idea "that congressional abrogation of tribal immunity, like congressional abrogation of other forms of immunity, 'cannot be implied but must be unequivocally expressed."'[46]

The Court next adopted the presumption of application of copyright laws as statutes of general applicability.[47] Nevertheless, the court evaded this presumption by exempting tribes from enforcement: "However, the fact that a statute applies to Indian tribes does not mean that Congress abrogated tribal immunity in adopting it."[48] Thus, the Bassett court determined that copyright laws of general applicability apply to tribes, but do not subject tribes to private enforcement suits.

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[41] *Id*. at 1117.
[42] *Id*.
[43] 204 F.3d 343 (2d Cir. 2000)
[44] *Id*. at 346.
[45] *Id*. at 347.
[46] *Id*. at 356 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)).
[47] *Id*.
[48] *Id*. (citing *Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians*, 166 F.3d 1126, 1129-33 (11th Cir. 1999) (finding ADA applied to tribes but did not abrogate immunity for enforcement suits)).

Defendant also cites Home Bingo Network v. Multimedia Games, Inc.,[49] in support of its proposition that Indian tribes may assert immunity with respect to claims brought against them pursuant to the Patent Act. In Home Bingo, the plaintiff sued the defendants for patent infringement. Co-defendant Miami Tribe of Oklahoma Business Development Authority filed a motion to dismiss for lack of jurisdiction as an arm of the Tribe. The District Court first recognized the tribe's immunity from suit.[50] Then, citing Bassett, the Court decided that the Tribe was immune from suit under federal patent laws.[51]

Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians[52] is cited in support of the notion that a statute of general applicability may apply to tribes without subjecting them to private enforcement suits. In Florida Paraplegic, the Eleventh Circuit held that the Americans with Disabilities Act applied to tribes but did not waive their immunity for private enforcement suits.[53] The Court first adopted and applied Coeur d'Alene to find that the statute applied to the tribe.[54] The Eleventh Circuit then departed from Coeur d'Alene, and applied Santa Clara to find that tribal immunity had not been abrogated, so that tribes retained immunity from the ADA's private enforcement suits.

Santa Clara Pueblo v. Martinez[55] should not be controlling in cases interpreting generally applicable statutes. In Tuscarora, the Supreme Court made clear that, in the Indian law context, statutes of general applicability were to be treated differently than statutes specifically aimed at tribes.[56]

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[49] 2005 WL 2098056 (N.D.N.Y. Aug. 30, 2005).
[50] *Id*. at *1 (citing *Kiowa Tribe of Okla. v. Mfg. Techs.*, 523 U.S. 751, 754 (1998)).
[51] *Id*.
[52] 166 F.3d 1126, 1129-33 (11th Cir. 1999).
[53] *Id*.
[54] *Id*. at 1129-30.
[55] 436 U.S. 49 (1978).
[56] *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960).

In Santa Clara, the Supreme Court examined the Indian Civil Rights Act, a statute specifically directed at tribes.[57] ICRA was carefully drafted to extend some limitations of the Bill of Rights to Indian tribes.[58] To this end, several Bill of Rights protections were specifically *excluded*. In this context, abrogation of tribal immunity by implication would have been illogical. However, this is not the case with general statutes, which, by nature, apply to everyone not specifically exempted.

These holdings, if adopted by this court and others, will create an additional burden for Congress by requiring language specifically targeting Indian tribes. This result is proper for the abrogation of state immunity – which is protected by the Eleventh Amendment. It is, however, improper and unnecessary for the abrogation of tribal immunity, as "Congress has always been at liberty to dispense with such tribal immunity or to limit it."[59] These courts improperly applied Indian law precedent to exempt tribes from liability for patent and copyright infringement. Congress has created a system of intellectual property rights and protections and has made clear through several clarification acts that it is to apply uniformly to all.

IV. Indian law should not permit tribes to abrogate federally created property rights in patents.

Tribes should generally be subject to private enforcement suits for infringement of patents. The laws creating and protecting patents under Title 35 of the United States Codes are "general statute[s] in terms applying to all persons."[60] Thus, these statutes – subjecting infringers to suit for damages and injunctive relief – should, as a general rule, "include[] Indians and their

[57] *Id.*
[58] *See Id.*
[59] *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991).
[60] *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. at 116.

property interests."[61] Courts should thus apply the legal framework of Coeur d'Alene to presume applicability to tribes, and to determine whether, in certain rare circumstances, a tribe may be exempted from liability for infringing these federally granted property rights.

As discussed above, the Coeur d'Alene implementation of Tuscarora[62] begins with a presumption that a statute of general applicability applies to Indian tribes.[63] The statute in Coeur d'Alene, the Occupational Health and Safety Act, defined an employer as an "'organized group of persons … engaged in a business affecting commerce who has employees"' and included an exception for "'the United States or any State or political subdivision of a State."'[64] Federal patent statutes generally apply,[65] and do not contain such an explicit exception for the states. Instead, Congress explicitly clarified that States were to be liable for infringement.[66] Even the United States may be liable for infringement of a privately owned patent.[67] Thus, patent statutes are even more generally applicable than the statute at issue in Coeur d'Alene and should begin with a presumption of application to the tribes.

Next, the Coeur d'Alene Court enumerated three exceptions to this general rule.[68] A general statute may not apply to a tribe if the effect of the statute is to infringe "exclusive rights of self-governance" or to abrogate treaty rights, or if there is evidence that Congress intended for tribes to be exempt from the statute.[69] The Court "believe[d] that the tribal self-government ex-

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[61] *Id*.
[62] *Id*. (finding general grant of authority to New York Power Commission was sufficient to permit the condemnation of Indian lands for a federally-sponsored dam project).
[63] *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985).
[64] *Id*. at 1115 n.1 (citing 29 U.S.C. § 652 (1982)).
[65] *See* 35 U.S.C. § 271 ("whoever").
[66] *See* Patent and Plant Variety Protection Remedy Clarification Act, Pub. L. No. 102-560, 106 Stat. 4230 (1992) (codified at 35 U.S.C. §§ 271(h), 296(a)).
[67] *See* 28 U.S.C. § 1498 (2000).
[68] *Coeur d'Alene*, 751 F.2d at 1116.
[69] *Id*. (internal citations omitted).

ception is designed to except purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations."[70]

It is difficult to imagine how preventing a tribe from infringing a patent could infringe these "purely intramural matters." The federal government might have an argument with respect to this issue, as it is the United States that grants the exclusive rights that accompany patents. Tribes, however, have no such argument because they can grant no such rights and should not generally be excused from an infringement action under Coeur d'Alene's first exception.

The second exception from Coeur d'Alene permits a tribe to be excused from the application of a general statute if the effect of the statute would be to infringe upon rights guaranteed to the tribe by treaty.[71] Again, it is difficult to imagine that preventing a tribe from infringing a patent by private suit could abrogate treaty rights. There is certainly no treaty expressly guaranteeing the right of any tribe to infringe patents.

Coeur d'Alene's third exception, exempting tribes from a general statute if there is evidence that Congress did not intend it to apply, is also inapplicable to patent statutes. Patent laws do not expressly abrogate tribal immunity. Nevertheless, Congress powerfully indicated that the patent statutes should apply uniformly – to everyone – by passing the Patent and Plant Variety Protection Remedy Clarification Act ("Patent Clarification Act").[72] The Patent Clarification Act purported to specifically abrogate the sovereign immunity of the states.[73] Although this abrogation was struck down as unconstitutional,[74] the passage of the act remains a strong expression of congressional will for uniformity in the protections afforded by the Patent Act.

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[70] *Id*.
[71] *See Coeur d'Alene*, 751 F.2d at 1116.
[72] Patent and Plant Variety Protection Remedy Clarification Act, Pub. L. No. 102-560, 106 Stat. 4230 (1992) (codified at 35 U.S.C. §§ 271(h), 296(a)).
[73] *Id*.
[74] *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647-48 (1999).

Defendant has argued that the explicit mention of states and state actors may be read as an indication of congressional desire to exclude tribes. However, Congress passed the Patent Clarification Act for the specific purpose of providing a clear expression of congressional intent, "[i]n response to" decisions stating that current "patent laws failed to contain the requisite statement of intent to abrogate state sovereign immunity."[75] This motivation is far too specific to permit an inference that Congress did not mention tribes as an indirect expression of intent to exclude them.

Rather, the congressional labeling of the Patent Clarification Act as a "clarification" act indicates that lawmakers believed that states should already be subject to patent infringement suits – passage of this act was mere reinforcement of what should have already been. The sovereign immunity of states has a clear, constitutional foundation.[76] Accordingly, there are strict limitations on Congress' ability to abrogate the immunity of the states.[77] The same is not true of tribal immunity – which Congress can abrogate for any reason.[78] Given the states' superior sovereignty relative to tribes, coupled with the congressional attempt to abrogate state immunity, it is difficult to envision that Congress intended for tribes to be exempt. Even in striking down the act, the Supreme Court recognized that their "apparent and more basic aims were to provide a uniform remedy for patent infringement."[79] The legislative history of the Patent Act, as well as subsequent legislation, advises against exempting tribes from its application.

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[75] *Id*. at 632.
[76] U.S. Const. amend. XI.
[77] *Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. at 635-38*; *id*. at 637 ("[T]hrough the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and … § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment.") (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59 (1999) (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-56 (1976)).
[78] *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 498 U.S. 505, 510 (noting Congress "is at liberty to dispense with tribal immunity or to limit it").
[79] *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. at 647-48.

As a statute of general applicability, the Patent Act is entitled to Tuscarora's and Coeur d'Alene's presumption of applicability. Thus, tribes should, at least as a general rule, be subject to private suit for infringement of patents.

V. The Quapaw Tribe of Oklahoma is not entitled to assert immunity with respect to claims brought against it pursuant to the Patent Act.

a. The Quapaw Tribe of Oklahoma is not sovereign.

Defendant cites the Treaty of May 13, 1833,[80] as authority for its proposition that the Quapaw Tribe of Oklahoma has "legal independence," i.e., sovereignty. The Treaty of May 13, 1833, however, was dissolved when the Quapaw sided with the Confederates during the Civil War.[81] Therefore, tribal sovereignty with respect to the Quapaw based on the Treaty of May 13, 1833, or otherwise, is absent. Moreover, there is currently no treaty in effect between the United States and the Quapaw.

The Quapaw are a party to the Agreement with the Cherokee and Other Tribes in the Indian Territory, 1865.[82] (Exhibit "1") In this agreement, the Quapaw renounced the so-called Confederate States, with whom they sided during the Civil War, and "acknowledge[d] themselves to be under the protection of the United States of America, and covenant[ed] and agree[d], that hereafter they [would] in all things recognize the government of the United States as exercising exclusive jurisdiction over them…."[83]

Dissolution of the Treaty of May 13, 1833, and endorsement of Agreement with the Cherokee and Other Tribes in the Indian Territory, 1865, demonstrates a complete submission by

[80] *Kappler*, 1904, vol. 2, p. 395, 7 Stat. 424.
[81] *See Quapaw Tribe of Oklahoma v. Blue Tee Corp.*, 653 F.Supp.2d 1166, 1170 (N.D. Okla. 2009) ("During the Civil War, the Tribe aligned with the Confederacy and temporarily terminated its relationship with the United States.").
[82] *Kappler*, 1904, vol. 2, p. 1050, unratified.
[83] *Id*.

the Quapaw to the authority of the United States of America and is contrary to any semblance or definition of sovereignty.

b. To the extent that the Quapaw Tribe of Oklahoma is a sovereign, it has waived immunity.

The claims-in-suit arise out of the operation of Downstream Casino Resort, which is operated pursuant to the Tribal-State Gaming Compact Between the Quapaw Tribe of Oklahoma and the State of Oklahoma ("Compact") filed with the Oklahoma Secretary of State on November 29, 2005. (Exhibit "2") The Compact states that the "Tribe consents to suit on a limited basis with respect to tort claims subject to the limitations set forth…."[84] The Compact further states that the "Tribe consents to suit against the enterprise[85] in a court of competent jurisdiction with respect to a tort claim or prize claim if all requirements … have been met…."[86]

Defendant has waived immunity via the Compact and Plaintiff believes that any "requirements" or "limitations" contained in the Compact that may be purported to constrain its ability to seek a remedy at this time and before this Court are inapplicable due to both the nature of the claims-in-suit[87] and the lack of a voluntary relationship between Plaintiff and Defendant with respect to the claims-in-suit. Defendant should be estopped from asserting that any "requirements" or "limitations" contained in the Compact constrain Plaintiff's ability to seek a remedy at this time and before this Court.

VI. Failure to accept jurisdiction is otherwise unacceptable.

a. Failure to grant a forum to adjudicate this dispute would confound the intent of the U.S. Constitution.

[84] Compact at pg. 10, par. 2.
[85] As defined in the Compact, enterprise includes "the Tribe." Compact at pg. 3, par. 13.
[86] Compact at pg. 14, par. C.
[87] See note 6, *supra*, and accompanying text.

The Preamble of the U.S. Constitution states that: "We the People of the United States, in Order to form a more perfect Union, ***establish Justice*** … do ordain and establish this Constitution for the United States of America."[88] Failure by this Court to accept jurisdiction with respect to the claims-in-suit would leave Plaintiff without a forum to adjudicate its claims and be unfaithful to the "Founders' purpose to 'establish Justice'"[89] – one of the prime tenets of our Constitution and our Republic.

b. Failure to grant a forum to adjudicate would constitute a taking without due process of law in violation of Article 5 of the U.S. Constitution.

"No person shall be … deprived of … property, without due process of law."[90] "[A] patent is personal property."[91] Failure by this Court to accept jurisdiction with respect to the claims-in-suit would leave Plaintiff without a forum to adjudicate its claims and deprive Plaintiff of its property rights without due process of law.

WHEREFORE, Specialty House of Creation, Incorporated respectfully requests that the court DENY The Motion of the Quapaw Tribe of Oklahoma (O-GAH-PAH) to Dismiss for Lack of Subject Matter Jurisdiction.

September 7, 2010

Respectfully submitted,

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[88] Emphasis added.
[89] *See Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 55 (1994).
[90] U.S. Const. amend. V.
[91] *De la Vergne Refrigerating Mach. Co. v. Featherstone*, 147 U.S. 209, 224 (1893); *see also,* 35 U.S.C. § 261.

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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2010, I electronically filed the document entitled *Plaintiff's Response to Defendant's Motion to Dismiss* for the above captioned action with the Clerk of Court for the United States District Court Northern District of Oklahoma using the CM-ECF System, and because of that, the below-listed parties should have been served via the Court's electronic case filing system at the email addresses listed below:

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