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

EDDIE SANTANA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 11-CV-782 JHP PJC**
	)	
MUSCOGEE (CREEK) NATION ex rel. RIVER SPIRIT CASINO,	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION TO DISMISS
WITH COMBINED BRIEF

Respectfully submitted,

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Defendant, Muscogee (Creek) Nation, by its undersigned counsel, moves to dismiss this case pursuant to Federal Rule of Civil Procedure 12(b)(1) & (6) for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted, and states in support:

I. Plaintiff's Allegations and Pertinent Jurisdictional Facts

1. Plaintiff, Eddie Santana, brings suit against the Muscogee (Creek) Nation ("Nation") for unjust enrichment seeking repayment of gambling losses he incurred at the River Spirit Casino ("Casino"). (Compl. ¶¶7-18, 25.) Mr. Santana admits he used student loan and Pell Grant money to make more than $60,000 in bets at the Casino starting in 2003. (*Id.* ¶7.) The Complaint alleges the Nation should not have induced Mr. Santana to gamble because of his "mental dysfunction causing a gambling addiction".[1] (*Id.* ¶9.)

2. As relevant herein, the Complaint alleges the State courts have subject matter jurisdiction because of the limited sovereign immunity waiver in the Model Tribal Gaming Compact ("Model Compact") authorized by the State of Oklahoma. (*Id.* at p.1 (intro. para.)). A copy of the relevant excerpts from the Nation's Tribal Gaming Compact ("Compact") are attached as Exhibit 1. Mr. Santana recognizes the Casino "was a business run by the [Nation] in Tulsa County, upon its land" in Oklahoma. (*Id.* ¶2.)

3. Prior to filing his suit, Mr. Santana filed a "Tort Claim Notice" with the Casino on July 31, 2011, which is attached as Exhibit 2. (Compl. ¶10.) The Tort Claim Notice stated that Mr. Santana's gambling losses occurred on September 20, 2010. Mr. Santana attached a printout to the

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[1] Mr. Santana filed the same exact claim against the Nation, Million Dollar Elm (the Osage Tribe) and Cherokee Nation Enterprises in the District Court for Tulsa County in 2007 (Case No. CJ-2007-3276). That lawsuit was dismissed against the Nation because of its sovereign immunity.

Tort Claim Notice that listed various federal direct student loan and Pell Grant payments he claims he gambled away at the Casino.[2]

4. As for the merits of the unjust enrichment claim asserted by Mr. Santana, he "concedes that the Creek Nation has the right to run its [Casino] operations." (Compl. ¶17.) Mr. Santana claims, however, that he "has a mental defect that causes uncontrollable betting and gambling," which gives the Casino more than the standard "edge" on games. (Compl. ¶¶14-15.) Mr. Santana primarily claims, however, that the Casino's advertising induces him to gamble and that, because of his "abnormally weak frame of mind," the Nation should be liable to return "some or most" of the money, i.e., student loans and grant funds, he spend in the Casino. (Compl. ¶¶17-18.)

II. Legal Argument

A. The Nation's sovereign immunity is not waived as to Mr. Santana's unjust enrichment claim.

All issues related to immunity, including sovereign immunity, are threshold questions of law. *See Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151 (2001), *receded in part on other grounds*

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[2] A motion to dismiss filed under Rule 12(b)(1) is "a 'speaking motion' and can include references to evidence extraneous to the complaint without converting it to a Rule 56 motion." *Wheeler v. Hurdman*, 825 F.2d 257, 259 n.5 (10th Cir. 1987). In addition, "if a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on motion to dismiss." *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997). In this case, Mr. Santana alleges the Nation is subject to the jurisdiction of state courts pursuant to the Compact. In addition, Mr. Santana references that he submitted an administrative tort claim notice to the Nation prior to filing this suit. This pleaded fact shows Mr. Santana's recognition that any valid claim against the Nation must comply with the administrative remedies in the Compact as a necessary condition precedent to bringing suit. *See* 3A O.S. §281; Ex. 1 at pt. 6 §9, ¶6. Accordingly, the exhibits attached to this motion do not convert it into a Rule 56 motion because the exhibits are relevant to the Nation's arguments as to subject matter jurisdiction, including sovereign immunity and failure to exhaust remedies.

by Pearson v. Callahan, 555 U.S. 223, 129 S. Ct. 808 (2009). Tribal sovereign immunity deprives a court of subject matter jurisdiction to decide any of the other matters between the parties. *See Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007).

The Supreme Court has repeatedly recognized Congress's commitment to a "policy of supporting tribal self-government and self-determination." *National Farmers Union Ins. Cos. v. Crow Tribe,* 471 U.S. 845, 856, 105 S. Ct. 2447 (1985); *see also Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 14, 107 S. Ct. 971 (1987) (citing cases). Thus, Indian tribal governments, such as the Nation, enjoy the same immunity from suit enjoyed by other sovereign powers and are "subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Manufacturing Techs., Inc.,* 523 U.S. 751, 754, 118 S. Ct. 1700 (1998).[3] *See also Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 111 S. Ct. 905 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670 (1978). That immunity also extends to "sub-entities or enterprises of a tribe." *Native American Distrib. v. Seneca-Cayuga Tobacco Co.*, 491 F. Supp. 2nd 1056, 1064 (N.D. Okla. 2007), *aff'd*, 546 F.3d 1288 (10th Cir. 2008). In fact, in late 2010, the Tenth Circuit Court of Appeals reaffirmed that tribal casinos enjoy sovereign immunity unless the immunity is otherwise waived. *Breakthrough Mgmt. Gp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1195-96 (10th Cir. 2010).

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[3] Federal courts have recognized that Oklahoma's Enabling Act preserves federal and tribal jurisdiction over Indians in Indian country, exclusive of the State. *See, e.g., Indian Country, U.S.A., Inc. v. Oklahoma*, 829 F.2d 967, 976-968 (10th Cir. 1987) (holding Oklahoma has not acquired civil jurisdiction over Indians in the Nation's Indian country); *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1446 (D.C. Cir. 1988) (noting that "under current law, Oklahoma has no jurisdiction over Indians" in Indian country).

As for any assertion a tribe has waived its immunity, the "tribe's waiver must be 'clear.'" *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.,* 532 U.S. 411, 418, 121 S. Ct. 1589 (2001) (citations omitted). In other words, an immunity waiver "cannot be implied but must be unequivocally expressed." *Native American Distrib.*, 491 F. Supp. 2nd at 1064.

The Model Compact, including the Nation's Compact, only provides a limited waiver of immunity by Indian casinos for tort and prize claims asserted by casino patrons within strict time limits. (Ex. 1 at pt. 6, §C.) Under Oklahoma law, a claim for unjust enrichment is not a "tort" claim, but a claim sounding in equity for restitution of money. *N.C. Corff Partnership, Ltd. v. OXY USA, Inc.*, 1996 OK CIV APP 92, ¶25, 929 P.2d 288. In fact, the Compact defines a tort claim as one for "personal injury or property damage". (Ex. 1 at pt. 6, §A.) Thus, Mr. Santana has no tort claim against the Nation that waives immunity under the Compact.

The only other type of claim to which immunity is waived under the Compact is a prize claim, which is defined as a claim arising from "play of any covered game, the amount of any prize which has been awarded, the failure to be awarded a prize, or the right to receive a refund or other compensation." (*Id.* at pt. 6, §B.) While Mr. Santana's unjust enrichment claim seeks a refund of monies he gambled at the Casino, as noted above, the Complaint does not allege the claim directly results from Mr. Santana's play of any individual game, but results from Mr. Santana's allegation that he was induced to compulsively gamble by the Casino's advertising campaign. (Compl. ¶¶9, 17-18.) This is not a claim for a specific prize or refund as contemplated by the plain language of the Compact, and therefore, the Compact does not waive the Nation's immunity as to Mr. Santana's claim.

In addition, a claim for refund of gambling losses is not recognized in Oklahoma under any theory unless the winning party utilized fraud to obtain the winnings. *Grim v. Cheatwood*, 1953 OK 129, ¶¶6-7, 257 P.2d 1049; *see also Jamgotchian v. Scientific Games Corp.*, 371 Fed. Appx. 812, 813 (9th Cir. 2010) (explaining California law does not recognize claim for gambling losses); *Nelson v. MGM Grand Hotel, LLC*, 287 Fed. Appx. 587, 589 (9th Cir. 2008) (Nevada does not recognize common law claim to recover gambling losses). Thus, under the common law, Mr. Santana's claim is simply not cognizable. Without any cognizable claim under the Compact, the Nation's sovereign immunity is not waived and no court has subject matter jurisdiction to hear Mr. Santana's suit.

B. The Nation retains sovereign immunity because Mr. Santana's claim notice was untimely filed pursuant to the Compact.

As noted above, the Nation enjoys sovereign immunity, subject only to Congressional abrogation or a waiver. (*Supra*, part II.A.) The Compact requires the Nation to consent to suits by casino patrons only when they comply with the notice and limitations provisions contained in Part 6 of the Compact. As with similar notice provisions contained in the Government Tort Claims Act (51 Okla. Stat. §156), which the Compact notice provisions resemble, the obvious intent of the Compact's claim notice provision is to provide the tribal casino with sufficient detail of the claim so that it may, among other things, investigate the claim while the evidence is fresh, facilitate settlement, and have the chance to repair any defective condition. *See, e.g., Tice v. Pennington*, 2001 OK CIV APP 95, ¶17, 30 P.3d 1164, 1168. Further, compliance with the timing requirements for filing a claim is a condition precedent to filing suit against the governmental entity involved. *See Girdner v. Board of Comm'rs*, 2009 OK CIV APP 94, ¶19, 227 P.3d 1111.

Similarly, under the Federal Tort Claims Act, "federal jurisdiction over damages suits against the United States depends upon a claimant presenting to the appropriate federal agency" (1) a written statement sufficiently describing the injury to enable the agency to begin its own investigation, and (2) a sum certain damages claim.'" *Staggs v. United States*, 425 F.3d 881, 884 (10th Cir. 2005) (quoting *Cizek v. United States*, 953 F.2d 1232, 1233 (10th Cir. 1992)). Under federal law, these notice requirements are jurisdictional and cannot be waived, *Cizek*, 953 F.2d at 1233, and compliance with the requirements is a question of law. *Estate of Trentadue v. United States*, 397 F.3d 840, 852 (10th Cir. 2005). These notice provisions require the claimant to (1) "serve[] due notice that the agency should investigate the possibility of particular (potentially tortious) conduct" and (2) provide sufficient underlying facts and circumstances to allow the agency in question to investigate the claim. *Staggs*, 425 F.3d at 884.

The Nation, as a sovereign entity ordinarily entitled to immunity, is clearly entitled to similar notice under the Compact. As noted above, Mr. Santana filed a "tort claim notice" with the Nation depicting his claim for a refund, but Mr. Santana's claim is not a "tort" because no personal injury or property damage is involved. Thus, if Mr. Santana had any valid claim against the Nation, it should have been filed as a "prize" claim.

Part 6, section B, paragraph 3 of the Compact, however, requires a claimant's notice for a prize claim to be filed "within **ten (10) days** of the event which is the basis of the claim." (Ex. 1 at p. 25) (emphasis added). Mr. Santana filed his claim notice on July 31, 2011, which was over ten **months** after he claims to have lost his money as the Casino's gambling tables. (Ex. 2)

Part 6, section B, paragraph 11 of the Compact requires the claimant to follow "all procedures required by this Part" before any judicial proceeding may be brought. (Ex. 1 at p. 27.)

In providing a claim notice after the applicable deadline, Mr. Santana failed to comply with "all procedures" in Part 6, section B, before filing his claim. Accordingly, the Nation's consent to suit was never invoked pursuant to the Compact, and its sovereign immunity remains intact as to Mr. Santana's claim.

C. Jurisdiction over this case lies in the Muscogee (Creek) Nation courts.

As noted above, the Nation enjoys sovereign immunity unless waived by Congress or the tribe. In the legal realm relating to tribal casinos, the IGRA only authorizes states to acquire **limited** civil jurisdiction over Indian country via the tribal-state compacting process when directly necessary for regulation of gaming activity itself. 25 U.S.C. § 2710(d)(3)(C)(ii) (permitting compacts to allocate civil jurisdiction "necessary for the enforcement" of laws "that are directly related to, and necessary for, the licensing and regulation of [gaming] activity"). *See Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379, 1385-86 (10th Cir. 1997) (noting the IGRA only waives tribal sovereign immunity "in the narrow category of cases where compliance with IGRA's provisions is at issue and where only declaratory or injunctive relief is sought"). Thus, no Congressional waiver of tribal immunity exists as to tort or prize claims against Indian tribes or tribal enterprises that own or operate tribal casinos.

The only waiver, therefore, of the Nation's immunity as to tort or prize claims accruing at the Casino are through the limited provisions of the Compact. In a 2009 decision, *Cossey v. Cherokee Nation Enterprises, LLC*, the Oklahoma Supreme Court held that the Oklahoma state courts are "courts of competent jurisdiction" to hear third-party tort claims by a non-Indian (meaning a non-member of a particular tribe) brought against tribal casinos.[4] 2009 OK 6, 212 P.3d 447. The

[4] At this time, the Nation is not aware that Mr. Santana is among its enrolled members.

phrase "courts of competent jurisdiction" comes from the Model Compact (set forth in 3A O.S. § 281), which requires tribal casinos to provide limited consent to tort suits in such "courts of competent jurisdiction". The Nation's Compact (Ex. 1) is nearly identical to the Model Compact (with one slight modification not relevant to this case).

Cossey was a fractured plurality decision that produced four different opinions. While five justices agreed in *Cossey* that state courts have competent jurisdiction, four of these justices implied that tribal courts may *not* be courts of competent jurisdiction when a tort claim is brought by a non-Indian. In his opinion specially concurring with these four justices, Justice Colbert decided that state and tribal courts have concurrent jurisdiction over such a claim, leaving a non-Indian plaintiff with the option to choose his or her forum. *See* 2009 OK 6, specially concur. op. at ¶13. The other four justices reasoned that a tribal court is, or may be, the *only* court of competent jurisdiction for a non-Indian tort claim against a tribal casino. *See id.*, partial dissenting op. by Kauger and Edmonson, JJ. at ¶38, and dissenting op. by Reif and Hargrave, JJ. at ¶5. Accordingly, five justices in *Cossey* held that tribal courts have jurisdiction to hear cases such as this one, with four justices agreeing that tribal courts are the only court with jurisdiction.

The four-Justice plurality opinion in *Cossey* relied upon *Montana v United States*, 450 U.S. 544, 101 S. Ct. 1245 (1981), and its progeny relating to "non-Indian jurisdiction", for the proposition that a non-Indian engaging in gaming in a tribal casino is not subject to tribal jurisdiction.[5] *Montana*

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[5] The status of the land on which the non-Indian's dealings or conduct occurs is not controlling, but is a strong factor, in determining whether *Montana* jurisdiction applies. *Nevada v. Hicks*, 533 U.S. 353, 360, 121 S. Ct. 2304 (2001). The Casino sits on tribal "trust" land, which is the purest form of "Indian country" in Oklahoma. *See Indian Country, U.S.A.,* 829 F.2d at 970. Mr. Santana claims the Nation was unjustly enriched by his gambling, i.e., commercial activity with the tribe, after voluntarily entering on tribal land, which strongly favors the Nation's courts having jurisdiction over Mr. Santana's claim.

holds that Indian tribes retain jurisdiction over a non-Indian only when the non-Indian enters a "consensual relationship" with the tribe, or engages in activity that "directly affects the tribe's ... economic security, health, or welfare." 450 U.S. at 565-66, 101 S. Ct. 1245.

Completely missed by the four-Justice plurality is that most cases involving tribal jurisdiction over non-Indians following *Montana* almost entirely concern non-Indian *defendants*. As noted by the Ninth Circuit in *Smith v. Salish Kootenai College*, however, "where the nonmembers are the *plaintiffs*, and the claims arise out of commercial activities within the reservation, the tribal courts may exercise civil jurisdiction." 434 F.3d 1127, 1132 (9th Cir. 2006). Further, in dicta discussing the second *Montana* test, the *Smith* court noted that, in cases involving a non-Indian plaintiff's tort claim against a tribe, "[d]enying jurisdiction to [a] tribal court would have a direct effect on the welfare and economic security of the tribe insofar as it would seriously limit the tribe's ability to regulate the conduct of its own members through tort law." 434 F.3d at 1136. Clearly, entering a tribal-owned casino in Indian Country to engage in gaming is a consensual, commercial relationship with an Indian tribe.

Apparently recognizing these complications, shortly after deciding *Cossey*, a majority of the Oklahoma Supreme Court held in *Griffith v. Choctaw Casino of Pocola*, 2009 OK 51, 230 P.3d 488, and *Dye v. Choctaw Casino of Pocola*, 2009 OK 52, 230 P.3d 507, that *any* state *or* tribal court (and, therefore, presumably any federal court) can retain jurisdiction pursuant to the tribal-state gaming compact as "courts of competent jurisdiction" over a non-Indian's tort claim against an Indian tribe or its casino enterprise.

Ultimately, federal law determines whether a state may exercise jurisdiction over civil actions against Indians in Indian country. *Williams v. Lee*, 358 U.S. 217, 217-18, 222, 79 S. Ct. 269 (1959).

The Oklahoma Supreme Court misinterprets the federal law noted above that an immunity waiver, including a waiver to be sued in a particular court, "must be 'clear'", *C & L Enters., Inc.,* 532 U.S. at 418, 121 S. Ct. 1589, and "cannot be implied but must be unequivocally expressed." *Native Am. Distrib.*, 491 F. Supp. 2nd at 1064. Applying that rule, *Griffith* incorrectly holds that the compact waives immunity outside of tribal courts because the compact does not expressly limit jurisdiction to "tribal court only." 2009 OK 51, ¶27. The federal cases cited above, however, hold that the opposite conclusion should apply – that state courts cannot exercise jurisdiction over Indian tribes unless they are expressly defined as a "court of competent jurisdiction" in the Compact, thereby clearly and unequivocally waiving a tribe's immunity in state court. Otherwise, Part 9 of the Compact, which states the Compact does "not alter tribal, federal or state civil ... jurisdiction" would be rendered **completely meaningless**.

Based on this misreading of the Model Compact by the Oklahoma Supreme Court, the Choctaw Nation and Chickasaw Nation demanded arbitration in 2009 with the State of Oklahoma pursuant to the arbitration clause in the Model Compact, as authorized by IGRA. The arbitration sought a declaratory ruling as to whether the Model Compact (as signed by those two tribes) allows Indian tribes operating "Class III" gaming facilities to be sued in State court for tort and prize claims. The arbitrator issued a reasoned award on August 25, 2009, that determined the Model Compact did not waive tribal sovereign immunity such that State courts could exercise civil jurisdiction over non-Indians' claims against Indian casinos. (Arbitration Award at pp. 12-13, 19-21, attached as Exhibit 3.) Most important, the arbitration award agreed that State civil jurisdiction over such claims did not exist before the Compact and that section 9 of the Compact expressly states that civil jurisdiction remains unaltered after the Compact. (*Id.* at p. 20.) *See also Choctaw Nation v. Oklahoma*, 724 F.

Supp. 2d 1182, 1184-1186 (W.D. Okla. 2010) (discussing history of the above-mentioned Oklahoma Supreme Court decisions and the subsequent arbitration).

After receiving this award, the Choctaw Nation moved for the Oklahoma Supreme Court to reconsider its decisions in *Dye* and *Griffith*, which the Oklahoma Supreme Court declined to do. *See Choctaw Nation v. Oklahoma*, 2010 WL 5798663 at *4, ¶24 (W.D. Okla. June 29, 2010). The Choctaw Nation and Chickasaw Nation then filed suit in the United States District Court for the Western District of Oklahoma seeking an injunction preventing all Oklahoma state courts from exercising jurisdiction over tribal casino tort claims against them.

The Western District agreed and issued a Judgment and Permanent Injunction on June 29, 2010, that prevents the State, including all State courts, "from asserting civil-adjudicatory jurisdiction over Compact-based tort claim ... lawsuits against the Nations." *Id.* at *5. In its reasoning, the sister court stated that "any attempt by any Oklahoma state court, including the Oklahoma Supreme Court, to exercise jurisdiction over a Compact-based tort claim ... lawsuit is a violation of the sovereignty of the Nations". *Id.* at *4, ¶23.

The same court has since entered a similar judgment in favor of the Osage Nation, Comanche Nation, Delaware Nation, and the Wichita and Affiliated Tribes. (Judgment, Case No. CIV-10-1339-W (W.D. Okla. Dec. 28, 2010), attached as Exhibit 4.) That order again affirms an arbitration ruling that the Model Compact does not expressly waive an Indian casino's sovereign immunity from suit in any Oklahoma state court. (*Id.* at 6-7, ¶¶25-28.)

Though the Muscogee (Creek) Nation was not a party to these arbitrations or their enforcement proceedings before the Western District, all Indian tribes in Oklahoma must agree to the Model Compact set forth in 3A O.S. §281 to place "Class III" games in their casinos as

authorized in IGRA. In other words, the Nation's Compact is the same as the Compact at issue in *Cossey, Dye*, *Griffith*, *Choctaw Nation*, and the Osage/Comanche/Delaware/Wichita arbitration. Thus, the reasoning in the arbitration awards and the permanent injunctions apply equally to the Muscogee (Creek) Nation (and all other "Class III" Indian casinos).

In fact, in a case quite similar to this one, the Western District has also ruled that the Model Compact does **not** waive tribal sovereign immunity such that claims may be brought in the State's courts. *Muhammad v. Comanche Nation Casino*, 2010 WL 4365568 at *7-*11 (W.D. Okla. Oct. 27, 2010).[6] In so ruling, the Court reasoned that IGRA provides an Indian tribe the option, in negotiating an IGRA-authorized compact, to allow a state to have civil adjudicatory jurisdiction over conduct within the tribe's casino, but any such agreement must be affirmatively stated in the compact. *Id.* at *9. Interpreting the Model Compact as a whole, the Court determined that the Model Compact makes no such affirmative extension of State adjudicatory jurisdiction. *Id.* at *9-10. Accordingly, the Court ruled that the Model Compact only waives a tribe's immunity from suit for civil actions brought in the tribe's own courts. *Id.* at *11.

In this case, this Court (and the State's courts) should defer to the jurisdiction of the Nation's courts. Mr. Santana has filed a suit directly against a sovereign tribal entity with whom he engaged in consensual, commercial activity by attending the Casino. As *Smith* notes, the Nation's courts – not this Court or Oklahoma state courts – should be responsible for regulating the tribal casino's employees through tribal tort law. 434 F.3d at 1136. Just as a federal agency with limited immunity would expect to be sued in federal court, and a State agency with limited immunity would expect

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[6] Ms. Muhammad voluntarily dismissed her appeal of this decision.

to be sued in a state court, the Nation expects to be sued – in claims authorized under the Compact – in its own courts.

Further, as has now been conclusively established by (1) the judgment in *Choctaw Nation*, *supra*, (2) the judgment enforcing the Osage/Comanche/Delaware/Wichita arbitration award (Ex. 4), and (3) *Muhammad*, *supra*, the Compact does not waive the sovereign immunity of any Indian tribe in Oklahoma, including the Nation, such that claimants may sue tribes outside of tribal courts. Accordingly, the Court should dismiss this case so that Mr. Santana may bring his claim against the Nation in the Nation's own courts.

D. Mr. Santana cannot state a justiciable claim for unjust enrichment.

Even if the Court finds the Nation's sovereign immunity is waived and the Court has subject matter jurisdiction, Mr. Santana has nonetheless failed to state a plausible cause of action in his Complaint.

The only theory of liability advanced by Mr. Santana against the Nation is unjust enrichment. As noted above, in Oklahoma, a claim for unjust enrichment is not a "tort" claim, but a claim sounding in equity for restitution of money. *N.C. Corff Partnership, Ltd.*, 1996 OK CIV APP 92, ¶25, 929 P.2d 288. To show entitlement to unjust enrichment, a plaintiff must show "enrichment to another, coupled with a resulting injustice." *City of Tulsa v. Bank of Oklahoma*, 2011 OK 83, ¶19, __ P.3d __. This means the defendant must have money "that, in equity and good conscience, it should not be allowed to retain." *Harvell v. Goodyear Tire & Rubber Co.*, 2006 OK 24, ¶18, 164 P.3d 1028. *Accord Oklahoma Dept. of Securities v. Blair*, 2010 OK 16, ¶22, 231 P.3d 645.

In his Complaint, Mr. Santana admits the Nation has a right to pursue its gambling business at the Casino. (Compl. ¶17.) Further, Mr. Santana recognizes that casino games are designed to give

the casino an "edge" over the player, and that gambling losses are, therefore, expected. (*Id.* ¶14.) At the same time, Mr. Santana fails to make any allegation the Casino knew of his claimed addiction to gambling. Thus, in his own words, Mr. Santana essentially admits it is not inequitable or unjust for the Casino to retain the funds he lost at the Casino while legally gambling there. At its core, Mr. Santana's unjust enrichment claim in nothing more than an attempt to rescind a gambling contract, which, as noted above, is a claim not recognized by Oklahoma law (without allegations of fraud). *Grim*, 1953 OK 129, ¶¶6-7, 257 P.2d 1049.

In addition, as another jurisdiction has ruled, a claim for refund of gambling losses where gambling is legal is essentially a breach of contract claim because a gambling transaction consists of money exchanged for the consideration of potential winnings. *In re Chomakos*, 69 F.3d 769, 771 (6th Cir. 1995) ("Where gambling is lawful ... the placing of a bet gives rise to legally enforceable contract rights."). In Oklahoma, a plaintiff may not pursue an unjust enrichment claim when the plaintiff has an adequate remedy at law. *Harvell*, 2006 OK 24, ¶18, 164 P.3d 1028 (citing *Robertson v. Maney*, 1946 OK 59, ¶7, 166 P.2d 106).

Though the Nation maintains it is immune from Mr. Santana's claim, should the Court find otherwise, Mr. Santana also fails to state a claim for unjust enrichment under this "adequate remedy" rule. As noted above, if Mr. Santana possesses any valid claim against the Nation, the claim would be regulated by the prize claim provisions in the Compact. Thus, because Mr. Santana had a potential remedy available under the Compact, he does not have a claim for unjust enrichment.

III. Conclusion

The Compact does not waive the Nation's sovereign immunity as to Mr. Santana's claim for unjust enrichment seeking restitution of the $60,000 in student loans and Pell Grant funds he

allegedly lost playing blackjack at the Casino. Similarly, the Nation's immunity is not waived because, even if Mr. Santana had a valid prize claim under the Compact, he failed to comply with the administrative remedy provisions in the Compact. Further, according to applicable federal law, any valid claim Mr. Santana has made in the Complaint should be pursued in the Nation's courts. For any of these reasons, the Court should rule it lacks subject matter jurisdiction over this case.

Finally, in the alternative, Mr. Santana has no valid claim for unjust enrichment against the Nation. Oklahoma law does not recognize a claim for unjust enrichment to recapture gambling losses. This is especially true in this case because the Compact provided Mr. Santana with an adequate remedy, which he failed to pursue in a timely manner. Thus, the Compact fails to state a plausible claim and should be dismissed.

WHEREFORE, Defendant, Muscogee (Creek) Nation, respectfully demands the Court dismiss this case pursuant to Federal Rule of Civil Procedure 12(b)(1), or, alternatively, Rule 12(b)(6), and award it such other relief the Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF MAILING

This is to certify that on this, the 22nd day of December 2011, a true, correct, and exact copy of the above and foregoing instrument was mailed, with postage thereon fully paid, to:

Mr. Eddie Santana
731 E. 43rd St. N.
Tulsa, Oklahoma 74106
Plaintiff pro se

/s/Michael A. Simpson

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