

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

BRUCE E. TASSONE

NO. 3:11-CV-01718-WWE

Plaintiff,

v.

FOXWOODS RESORT CASINO, ET AL.

Defendants.

MARCH 23, 2012

DEFENDANTS' REPLY TO PLAINTIFF'S OBJECTION TO MOTION TO DISMISS

The plaintiff's Objection (Docket Entry 21) to the defendants' Motion to Dismiss (Docket Entry 17) is meritless. The defendants move this court for dismissal of plaintiff's claim because the court lacks subject matter jurisdiction due to tribal sovereign immunity from suit.

In his Objection, the plaintiff continues to insist that this court has subject matter jurisdiction over his complaint pursuant to the Final Mashantucket Pequot Gaming Procedures (hereinafter "Gaming Procedures"), 56 Fed. Reg. 24996 (May 31, 1991). However, as explained in the defendants' Motion to Dismiss, the Gaming Procedures have no application to the plaintiff's claims. See Motion to Dismiss at 5.

Further, the plaintiff's reliance on *Griffith v. Choctaw Casino of Pocola*, 2009 OK 51 (2009), is misplaced. *Griffith* did not address the Final Mashantucket Pequot Gaming Procedures; it addressed the compact entered by the Choctaw Nation and State of Oklahoma (the Choctaw Nation and State of Oklahoma Gaming Compact, hereinafter "Compact"). The Compact and the Gaming Procedures do not contain the same language or terms. The language at issue in *Griffith*, namely the tribe's consent to suit in a "court of competent jurisdiction" is not included in the Gaming Procedures. More importantly, the Gaming Procedures expressly direct that suits against the Mashantucket Pequot Tribal Nation arising from its gaming operation must be brought in a tribal forum. The Gaming Procedures state: "The Tribe will establish reasonable procedures for the disposition of tort claims arising from alleged injuries to patrons of its gaming facilities. The Tribe shall not be deemed to have waived its sovereign immunity from suit with respect to such claims by virtue of any provisions of this Compact, but may adopt a remedial system analogous to that available for similar claims arising against the State or such other remedial system as may be appropriate following consultation with the State gaming agency." See Gaming Procedures at § 1(g) (Emphasis added.).

Further, the Gaming Procedures are not a compact at all. There is no agreement entered by the Tribe and the State of Connecticut but, instead, regulations promulgated by the Secretary of the Interior pursuant to 25 U.S.C. 2710(d)(7)(B)(vii). Accordingly, the court's holding in *Griffith* has no application to the present case.

Regardless, *Griffith* has been overruled since it was decided. See *Choctaw Nation of Okla. v. Oklahoma*, 2010 U.S. Dist. LEXIS 141570, at* 3-4 (W.D. Okla. June 29, 2010)¹ (holding that the Choctaw Nation and State of Oklahoma Gaming Compact did not waive the tribe's sovereign immunity for tort claims arising under the Compact and permanently enjoining the State of Oklahoma from exercising jurisdiction over such claims); and *Santana v. Muscogee (Creek) Nation ex rel. River Spirit Casino*, 2012 U.S. Dist. LEXIS 34866, at *15 (N.D. Okla. Mar. 15, 2012) (dismissing complaint brought by a plaintiff who alleged he had a gambling addiction finding that the compact at issue did not provide "clear, unequivocal evidence of the Defendant's consent to be sued in courts other than its own.").

The plaintiff bears the burden of establishing that the defendants have clearly waived their sovereign immunity from suit in this Court or that Congress unequivocally

¹All unpublished decisions are attached hereto as Exhibit 1.

◇ abrogated it. The plaintiff cannot meet his burden, and his complaint must be dismissed.

The Defendants,

***The Mashantucket Pequot Tribal Nation, and
Mashantucket Pequot Gaming Enterprise
d/b/a Foxwoods Resort Casino***

By: /s/ ct# 28766

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CERTIFICATION

I hereby certify that on March 23rd, 2012, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system, or by mail to those listed below who are unable to accept electronic filing, as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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EXHIBIT 1

**CHOCTAW NATION OF OKLAHOMA and CHICKASAW NATION, Plaintiffs,
vs. STATE OF OKLAHOMA, Defendant.**

No. CIV-10-50-W

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

2010 U.S. Dist. LEXIS 141570

June 29, 2010, Decided

June 29, 2010, Filed

SUBSEQUENT HISTORY: Stay denied by *Choctaw Nation of Okla. v. Oklahoma*, 2010 U.S. Dist. LEXIS 141571 (W.D. Okla., July 16, 2010)

PRIOR HISTORY: *Choctaw Nation of Okla. v. Oklahoma*, 724 F. Supp. 2d 1182, 2010 U.S. Dist. LEXIS 79748 (W.D. Okla., 2010)

COUNSEL: [*1] For Choctaw Nation of Oklahoma, Chickasaw Nation, Plaintiffs: Derek B Ensminger, Drew Neville, Jr, Hartzog Conger Cason & Neville, Oklahoma City, OK; Michael Burrage, Whitten Burrage, Oklahoma City, OK.

For Oklahoma State of, Defendant: Sarah Brune Edwards, Stephen L Cortes, Oklahoma Governor's Office, Oklahoma City, OK.

JUDGES: LEE R. WEST, UNITED STATES DISTRICT JUDGE.

OPINION BY: LEE R. WEST

OPINION

**JUDGMENT CERTIFYING ARBITRATION
AWARD AND GRANTING PERMANENT IN-
JUNCTION**

This matter came before the Court on the Motion for Summary Judgment, as amended, filed pursuant to *Rule 56, F.R.Civ.P.*, by plaintiffs Choctaw Nation of Oklahoma ("Choctaw Nation") and Chickasaw Nation ("Chickasaw Nation") (collectively "Nations") and the response thereto filed by the defendant, State of Oklahoma. On

June 22, 2010, the Court granted the Nations' Motion for Summary Judgment, as amended, in all respects and found that the Nations are entitled to judgment as a matter of law certifying and enforcing the Arbitration Award dated August 25, 2009, *In the Matter of the Joint Referral to Binding Arbitration by the Choctaw Nation of Oklahoma, the Chickasaw Nation, and the State of Oklahoma of Disputes Under and/or Arising From the Choctaw [*2] Nation of Oklahoma and State of Oklahoma Gaming Compact and the Chickasaw Nation and State of Oklahoma Gaming Compact*, against the State of Oklahoma.

Accordingly, the Court pursuant to its Order dated June 22, 2010, hereby CONFIRMS and CERTIFIES the Arbitration Award dated August 25, 2009, and ORDERS that judgment should be and is hereby entered in favor of the Nations.

The Court further found in its Order dated June 22, 2010, that the Nations were entitled to the injunctive relief they had requested against the State of Oklahoma.

Accordingly, the Court pursuant to *Rule 65(d), F.R.Civ.P.*, sets forth the basis for the permanent injunctive relief granted herein, its terms, and the acts permanently restrained through this Judgment:

1. The Nations brought this action against the State of Oklahoma to certify and enforce an Arbitration Award finding, *inter alia*, that the Choctaw Nation and the Chickasaw Nation judicial forums have exclusive jurisdiction over all Compact-based tort claim and/or prize claim lawsuits.

2. The Indian Gaming Regulatory Act, codified at 25 U.S.C. § 2701 *et seq.*, provides that a compact may be

negotiated between a tribal government and a state to govern the conduct of [*3] "Class III gaming" on Indian lands. *E.g., id.* § 2710(d).

3. "[C]lass III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into ... by the Indian tribe that is in effect." *Id.* § 2710(d)(2)(C).

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

5. Part 6 of the model tribal gaming compact addresses and outlines the procedures for prize claim disputes brought by patrons of facilities covered by the compact, *id.* Part 6(B), as well as the procedures for tort claims for personal injury or property damage arising out of incidents that occur at facilities covered by the compact. *Id.* Part 6(A).

6. It also provides that the tribe agreeing to the terms of the compact "consents to suit . . . in a court of competent jurisdiction with [*4] respect to a tort claim or prize claim if all the requirements . . . have been met . . ." *Id.* Part 6(C). And Part 9 of the model tribal gaming compact expressly provides that the "[c]ompact shall not alter tribal, federal or state civil adjudicatory or criminal jurisdiction."

7. Part 6(A)(2) specifically states that "[n]o consents to suit with respect to tort claims, or as to any other claims against the tribe shall be deemed to have been made under th[e] [c]ompact, except as provided in subsections B and C of this Part." *Id.* Part 6(A)(2).

8. Part 12 of the model tribal gaming compact, entitled "Dispute Resolution," provides that arbitration of compact disputes, including "any dispute . . . over the proper interpretation of the terms and conditions of th[e] [c]ompact," *id.* Part 12, is "subject to enforcement or . . . review as provided by paragraph 3 of . . . Part [12] by a federal district court." *Id.*

9. Part 12 of the model tribal gaming compact provides the exclusive means by which compact terms may be interpreted and further instructs that "[t]he remedies available through arbitration are limited to enforcement of the provisions of th[e] [c]ompact." *Id.* Part 12(2).

10. Part 12(2) [*5] provides that "[t]he parties consent to the jurisdiction of such arbitration forum and

court for such limited purposes and no other," *id.*, and that "each waives immunity with respect thereto." *Id.*

11. Part 12(3) of the model tribal gaming compact states that "either party to the [c]ompact may bring an action against the other in a federal district court for the de novo review of any arbitration award," *id.* Part 12(3), and that "[e]ach of the parties . . . waives immunity and consents to suit . . . for such limited purposes, and agrees not to raise the *Eleventh Amendment to the United States Constitution* or comparable defense to the validity of such waiver." *Id.*

12. Part 13(B) of the model tribal gaming compact provides that "[t]h[e] [c]ompact shall constitute a binding agreement between the parties . . ." *Id.* Part 13(B).

13. On November 23, 2004, Chickasaw Nation accepted the State of Oklahoma's offer and entered into the Chickasaw Nation and State of Oklahoma Gaming Compact with the State of Oklahoma, which became effective February 8, 2005, the date of its publication in the Federal Register, following the approval of the Secretary of the Interior.

14. On November 24, 2004, Choctaw Nation [*6] likewise accepted the State of Oklahoma's offer and entered into the Choctaw Nation and State of Oklahoma Gaming Compact with the State of Oklahoma, which became effective February 9, 2005, the date of its publication in the Federal Register, following the approval of the Secretary of the Interior.

15. The terms and provisions of the Chickasaw Nation and State of Oklahoma Gaming Compact and the Choctaw Nation and State of Oklahoma Gaming Compact (collectively "Compacts") for purposes of this lawsuit are identical to the terms and provisions of the model tribal gaming compact, *see* 3A O.S. § 281, and contain the provisions herein set forth.

16. On January 20, 2009, with four Justices dissenting and no majority opinion, the opinions of five Justices of the Oklahoma Supreme Court asserted the existence of state court civil-adjudicatory jurisdiction over a compact-based, Indian country-arising tort lawsuit against the Cherokee Nation of Oklahoma. *See Cossey v. Cherokee Nation Enterprises, LLC*, 2009 OK 6, 212 P.3d 447 (Okla. 2009). The Oklahoma Supreme Court held "that the state court [was] . . . a 'court of competent jurisdiction' as that term . . . [was] used in the [Tribal Gaming] Compact [between [*7] the Cherokee Nation and the State of Oklahoma] executed [on November 16, 2004] . . ." *Id.* at 450.

17. In response thereto, on February 4, 2009, the Choctaw Nation provided a Notice of Dispute to the State of Oklahoma in the form prescribed by the Choctaw Nation of Oklahoma and State of Oklahoma Gaming

Compact over the proper interpretation of the terms and conditions of that Compact, and the Notice of Dispute triggered the dispute-resolution proceedings outlined in that Compact.

18. On that same day, Choctaw Nation also moved to stay two matters then pending in the Oklahoma Supreme Court until completion of the dispute-resolution proceedings between Choctaw Nation and the State of Oklahoma. In those two cases, *Dye v. Choctaw Casino of Pocola, Oklahoma*, Case No. 104,737, and *Griffith v. Choctaw Casino of Pocola, Oklahoma*, Case No. 104,887, the plaintiffs had appealed the dismissal of their state court casino-related tort actions against Choctaw Nation.

19. By Order dated March 3, 2009, the Oklahoma Supreme Court refused to stay the proceedings in *Dye* and *Griffith* pending completion of the dispute-resolution proceedings between Choctaw Nation and the State of Oklahoma.

20. On March 6, [*8] 2009, Chickasaw Nation (a non-party to any state-court compact-based tort litigation), independently invoked the dispute-resolution procedures provided in the Chickasaw Nation and State of Oklahoma Gaming Compact by providing a Notice of Dispute to the State of Oklahoma in the form prescribed in that Compact.

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

22. On June 30, 2009, with four Justices again dissenting, the Oklahoma Supreme Court issued five opinions in *Griffith v. Choctaw Casino of Pocola*, 2009 OK 51, 230 P.3d 488 (Okla. 2009)(per curiam), and three opinions in *Dye v. Choctaw Casino of Pocola*, 2009 OK 52, 230 P.3d 507 (Okla. 2009)(per curiam). In both cases, the Oklahoma Supreme Court held "that Oklahoma district courts are 'courts of competent jurisdiction' as that phrase is used in Oklahoma's statutory model tribal gaming compact and therefore the state courts may exercise jurisdiction over... tort claims against the Choctaw Nation and its casino in Pocola, Oklahoma." *Griffith*, 230 P.3d at 491; e.g., *Dye*, 230 P.3d at 509.

23. [*9] On July 20, 2009, the Nations and the State of Oklahoma executed a *Joint Referral to Binding Arbitration of Disputes Under and/or Arising From the Choctaw Nation of Oklahoma and State of Oklahoma Gaming Compact and the Chickasaw Nation and State of Oklahoma Gaming Compact* ("Joint Referral"). In the Joint Referral, the parties agreed to

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

24. In the Joint Referral, the parties also "agree[d] to the entry of judgment on, and/or review of the resulting Arbitration Award in the United States District Court for the Western District of Oklahoma under the terms and conditions established by Parts 12(2) and 12(3) of th[e] . . . [Chickasaw Nation and State of Oklahoma Gaming Compact and the Choctaw Nation and State of Oklahoma Gaming Compact]."

25. On August 25, 2009, Layn R. Phillips rendered the Arbitration Award certified and [*10] confirmed in this matter and held that the Choctaw Nation and the Chickasaw Nation judicial forums have exclusive jurisdiction over all Compact-based tort claim and/or prize claim lawsuits. As set forth in the Arbitration Award, the term "court of competent jurisdiction" as used in Part 6(C) of the Nations' Compacts cannot properly be interpreted to include the courts of the State of Oklahoma. Rather, this provision in the Compacts refers only to the Nations' tribal courts. Part 9 of the Nations' Compacts makes clear that "[t]his Compact shall not alter tribal, federal or state civil adjudicatory or criminal jurisdiction." As stated in the Arbitration Award, there was no relevant pre-existing state court jurisdiction before the Compacts, and the Compacts did nothing to alter state court jurisdiction. Accordingly, any attempt by any Oklahoma state court, including the Oklahoma Supreme Court, to exercise jurisdiction over a Compact-based tort claim and/or prize claim lawsuit is a violation of the sovereignty of the Nations, and is therefore improper and must be permanently enjoined given the refusal by the Oklahoma Supreme Court to properly construe the terms and provisions of the Nations' [*11] Compacts.

24. After the Arbitration Award was issued, Choctaw Nation filed a Motion to Honor the Arbitration Award with the Oklahoma Supreme Court in *Dye* and *Griffith*. On April 12, 2010, the Oklahoma Supreme Court denied all Petitions for Rehearing and Motions to Honor the Arbitration Award filed by Choctaw Nation.

25. The remedies available at law to the Nations, including monetary damages, are inadequate, and the Nations will suffer irreparable harm if a permanent injunction

2010 U.S. Dist. LEXIS 141570, *

tion is not issued against the State of Oklahoma, including its judicial branch, prohibiting it from exercising jurisdiction over all Compact-based tort claim and/or prize claim lawsuits against the Nations, whether currently pending in any state court in the State of Oklahoma or filed at any point in time in the future.

26. The balance of equities favors the Nations, and the granting of a permanent injunction against the State of Oklahoma as requested by the Nations will not adversely affect the public interest, since tribal forums exist for the resolution of Compact-based, Indian country arising tort lawsuits against the Nations.

Terms of Permanent Injunctive Relief and Actions Enjoined

Accordingly, the Court ORDERS, [*12] ADJUDGES, AND DECREES that the State of Oklahoma and all of its officials, agencies, branches of government (including, but not limited to, the Oklahoma Supreme Court, the Oklahoma Court of Civil Appeals and all state district courts located in the State of Oklahoma), officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with them shall be and are hereby PERMANENTLY ENJOINED, directly or indirectly, from asserting civil-adjudicatory jurisdiction over Compact-based tort claim and/or prize claim lawsuits against the Nations.

The permanent injunctive relief awarded herein applies to all Compact-based tort claim and/or prize claim

lawsuits against the Nations, whether such lawsuits are currently pending in any state court in the State of Oklahoma or are brought in any state court in the State of Oklahoma at any point in time in the future.

The Court retains jurisdiction in this matter for the purpose of enforcing the terms of its Order and Judgment as to all parties.

The State of Oklahoma may petition the Court to modify or vacate the permanent injunction issued this date if applicable federal law relating to the jurisdiction of federal and [*13] state courts as it pertains to the issues in this action changes.

The State of Oklahoma is hereby ORDERED to give immediate notice, as appropriate, of the issuance and terms of this Judgment to all of its officials, agencies, branches of government (including, but not limited to, the Oklahoma Supreme Court, the Oklahoma Court of Civil Appeals and all state district courts located in the State of Oklahoma), officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with them, bound by the terms of this Judgment.

DATED and ENTERED this 29th day of June, 2010.

/s/ Lee R. West

LEE R. WEST

UNITED STATES DISTRICT JUDGE



EDDIE SANTANA, Plaintiff, v. MUSCOGEE (CREEK) NATION ex rel. RIVER SPIRIT CASINO, Defendants.

No. 11-CV-782-JHP-PJC

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

2012 U.S. Dist. LEXIS 34866

March 15, 2012, Filed

PRIOR HISTORY: *Santana v. Cherokee Casino*, 215 Fed. Appx. 763, 2007 U.S. App. LEXIS 2826 (10th Cir. Okla., 2007)

COUNSEL: [*1] Eddie Santana, Plaintiff, Pro se, TULSA, OK.

For Muscogee (Creek) Nation, ex rel. River Spirit Casino, Defendant: Gregory Don Nellis, Michael Albert Simpson, Atkinson Haskins Nellis Brittingham Gladd & Carwile, TULSA, OK.

JUDGES: James H. Payne, United States District Judge.

OPINION BY: James H. Payne

OPINION

OPINION AND ORDER

Before the Court are Defendant Muscogee (Creek) Nation's Motion to Dismiss,¹ Plaintiff's *FRCP Rule 18* [sic] Motion to Add Claims,² Plaintiff's Notice and Motion for *FRCP Rule 20* [sic] Joinder of State of Oklahoma as a Party Defendant,³ Defendant's Motion to Strike Plaintiff's (2nd) Supplemental Response to Motion to Dismiss, and Plaintiff's Objection to Defendant's Motion to Strike and Motion for Leave to Amend Objection to Defendant's Motion to Dismiss.⁴ Plaintiff has responded to the Motion to Dismiss and has also supplemented that response on two separate occasions.⁵ Defendant has responded to each of Plaintiff's filings and has filed a Reply to Plaintiff's Response on the Motion to Dismiss.⁶ The Court considers each of these motions fully briefed and at issue. For the reasons detailed below, Defendant's Motion to Dismiss is **GRANTED**.

- 1 Docket No. 8.
- 2 Docket No. 12.
- 3 Docket No. 13.
- 4 Docket [*2] No.'s 20 and 21.
- 5 See Docket No.'s 11, 14, 16.
- 6 See Docket No.'s 15, 17, 18. Plaintiff has also filed a "Request for Court to Assume Jurisdiction in Place of if not Oklahoma Instead of Tribal Court" in response to Defendant's Notice of Removal. Docket No. 9. This has been treated as a motion and has also been fully considered.

BACKGROUND

Plaintiff, proceeding *pro se*, filed this action in the Tulsa County District Court on November 28, 2011.⁷ In his "Petition," Plaintiff alleges the Tulsa County District Court has jurisdiction pursuant to the general jurisdiction of Oklahoma courts and according to the Model Gaming Compact between Defendant, a federally recognized Indian tribe, and the State of Oklahoma.⁸ Plaintiff further alleges that Defendant has consented to suit under the Model Gaming Compact.⁹

⁷ "Petition" at 1, Docket No. 2-1. Plaintiff's state court petition is actually entitled "Complaint." See *infra* p. 3-4.

⁸ *Id.*

⁹ *Id.*

Plaintiff opens his complaint by stating that he is a gambling addict.¹⁰ Plaintiff alleges that Defendant was unjustly enriched by allowing Plaintiff to gamble at the Defendant's casino.¹¹ Plaintiff further alleges that Defendant's advertising unfairly targets those [*3] with

gambling addiction and that as a result, Plaintiff spent more than \$60,000 in student loan money.¹² Plaintiff also seeks to add a claim of negligence *per se*, for the failure of casino employees to ask him to leave "as is contemplated in Part 5(E)(4) of the Model Gaming Compact" and seeks declaratory relief from this Court that would order the state of Oklahoma to "do what's right" and enter the case to defend its interests under Part 6 of the Compact.¹³ Plaintiff fleshed out this second request in his Federal Rule of Civil Procedure 20 motion to join Oklahoma as a party defendant.¹⁴

10 *Id.* at 2.

11 *Id.*

12 *Id.* at 1-2.

13 Plaintiff's *FRCP Rule 18* [sic] Motion to Add Claims, at 2-3, Docket No. 12. Defendant is a signatory to the Model Tribal Gaming Compact. See Notice of Removal at 5, Docket No. 2.

14 Plaintiff's Notice and Motion for *FRCP Rule 20* [sic] Joinder of State of Oklahoma as a Party Defendant at 1-3, Docket No. 13.

Defendant removed this case to federal court pursuant to 28 U.S.C. § 1441 and 1446(b), claiming that Plaintiff's filing of the action in state court creates a substantial question of federal law and that this Court has jurisdiction under 28 U.S.C. §§ 1331.¹⁵ Specifically [*4] Defendant claims that the question of whether a state may exercise jurisdiction over civil actions against Indians in Indian Country was one of federal law.¹⁶ Plaintiff did not contest removal, and instead pleaded with this Court to assume jurisdiction if the Oklahoma state court lacks jurisdiction.¹⁷

15 Notice of Removal at 6, Docket No. 2. Defendant also predicates jurisdiction on 28 U.S.C. § 1362 which states "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." As the instant action was not brought by Defendant, § 1362 is inapplicable.

16 *Id.* at 3.

17 See Plaintiff's Request for Court to Assume Jurisdiction in Place of if not Oklahoma Instead of Tribal Court 8-11, Docket No. 9.

The Court notes the substantive allegations in Plaintiff's instant state court "Petition" mirror those claims made by the Plaintiff against other tribal casinos, including one owned by the Muscogee (Creek) Nation. This prior suit was filed by the Plaintiff in the Northern District [*5] of Oklahoma.¹⁸ Ultimately, only Plaintiff's

recitation of jurisdiction and inconsequential factual differences distinguish Plaintiff's 2006 Complaint from the instant state court "Petition." In fact, Plaintiff's instant state court "Petition," of which large parts appear to be copied and pasted from the 2006 Complaint, is actually still entitled "Complaint," rather than "Petition." As the Court examines the instant jurisdictional issues, it notes Plaintiff has already tried, and failed, to have the crux of this dispute settled in federal court.

18 Plaintiff's prior suit, brought in federal court, premised federal jurisdiction on the Indian Gaming Regulatory Act. The District Court found that federal jurisdiction was lacking as the IGRA does not create a private cause of action. This decision was upheld on appeal. See *Santana v. Cherokee Casino*, 215 Fed.Appx. 763 (10th Cir. 2007).

DISCUSSION

A. The Propriety of Removal

Defendant has removed the instant case from Tulsa County District Court and Plaintiff does not contest this removal. However, as parties cannot consent to subject matter jurisdiction, the Court must determine the existence of jurisdiction *sua sponte*.¹⁹ Defendant, as the party [*6] invoking federal jurisdiction, bears the burden of establishing the existence of original subject matter jurisdiction.²⁰ Defendant invokes federal jurisdiction solely pursuant to 28 U.S.C. § 1331, which authorizes federal district courts to hear civil actions "arising under the Constitution, laws or treaties of the United States."

19 *Fed. R. Civ. P. 12(h)(3)*.

20 See *Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1290 (10th Cir. 2001).

A case arises under federal law if a well-pleaded complaint establishes either that federal law creates the cause of action or that within plaintiff's state law claim is embedded a substantial question of federal law, the resolution of which is necessary to plaintiff's right to relief.²¹ When reviewing a case for embedded federal claims, the Court must ask if the "state claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities."²²

21 *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 689-90, 126 S.Ct. 2121, 165 L.Ed.2d 131 (2006) (internal quotations omitted).

22 See *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005) [*7] (internal quotation omitted).

Here, the Plaintiff's right to relief and where he may seek it implicates important federal interests in tribal economic development, self-sufficiency, and strong tribal governments.²³ Further, Plaintiff's claim necessarily depends on resolution of a substantial and disputed question of federal law, specifically whether or not Defendant's limited consent to suit in its compact with Oklahoma authorizes an Oklahoma state court to exercise civil-adjudicatory jurisdiction over Plaintiff's tort claims.²⁴ As the answer to this question is predicated on the interpretation of federal law, particularly the IGRA and its progeny compacts, it is therefore a "federal question" for the purposes of §1331.²⁵

23 See *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1548 (10th Cir. 1997) (quoting congressional goals of the IGRA).

24 This dispute is best illustrated in the ongoing litigation in the Western district of Oklahoma. See *Choctaw Nation v. Oklahoma*, 2010 U.S. Dist. LEXIS 141570, 2010 WL 5798663 at *4 (W.D.Okla. June 29, 2010) (granting injunctive relief preventing Oklahoma courts from exercising jurisdiction over any compact-related tort claims).

25 See, e.g. *id.* at 1557 (stating compact is a creature [*8] of both state and federal law); *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997) (holding enforcement of compact arises under federal law).

Considering the importance of the federal interest at stake, and the current state of the law in Oklahoma courts, the Court finds this issue is both disputed and substantial, and that there is a "serious federal interest in claiming the advantages thought to be inherent in a federal forum."²⁶ The Court also finds that there is relatively little danger that the exercise of federal jurisdiction in this narrow matter will upset the congressionally approved balance of federal and state judicial responsibilities. Upon consideration of all these factors, the exercise of federal jurisdiction over Defendant's Motion to Dismiss is warranted.

26 See *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 313, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005)

B. Defendant's Motion to Dismiss

Defendant brings the instant Motion to Dismiss for lack of subject matter jurisdiction under *Federal Rule of*

Civil Procedure 12(b)(1), claiming that Defendant has not waived its sovereign immunity from suit in state courts, and citing [*9] that the jurisdiction of this case lies with the Defendant's tribal courts.²⁷ Plaintiff argues that such immunity has been waived under the Model Gaming Compact.²⁸

27 Defendant's Motion to Dismiss at 20-21, Docket No. 8. Because the Court basis its findings on Defendant's 12(b)(1) claims it need not reach Defendant's 12(b)(6) arguments.

28 "Petition" at 1, Docket No. 2-1.

The applicability of tribal sovereign immunity is a question of subject matter jurisdiction, properly challenged by a motion to dismiss under *Federal Rule of Civil Procedure 12(b)(1)*.²⁹ Where a motion to dismiss challenges the underlying factual basis for subject matter jurisdiction, the Court's decision is not constrained by the pleadings.³⁰ Instead, "the [C]ourt must look beyond the complaint and has wide discretion to allow documentary and even testimonial evidence."³¹ A motion to dismiss is properly converted to one for summary judgment "when resolution of the jurisdictional question requires resolution of an aspect of the substantive claim."³²

29 *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007)

30 *Paper, Allied-Industrial, Chemical & Energy Workers Int'l Union v. Continental Carbon Co.*, 428 F.3d 1285, 1292-93 (10th Cir. 2005) [*10] (internal citation omitted).

31 *Id.*

32 *Pringle v. United States*, 208 F.3d 1220, 1223 (10th Cir. 2000)

Here, Defendant's Motion claims Defendant has not waived its sovereign immunity from suit in state court, thereby challenging the factual basis for subject matter jurisdiction. As such, the Court need neither accept Plaintiff's allegations as true nor confine its review to the pleadings. Further, the jurisdictional issues regarding Defendant's sovereign immunity are not in any way intertwined with the merits of any of Plaintiff's tort claims. Therefore, Defendant's Motion may properly be decided under *Rule 12(b)(1)*.³³

33 See, e.g. *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296 (10th Cir. 2008) (finding subject matter jurisdiction challenge based on sovereign immunity to turn on a question of fact).

Plaintiff brings the instant suit claiming Oklahoma state court jurisdictions exists under Oklahoma's Model Gaming Compact.³⁴ The IGRA provides the statutory basis for all tribal gaming compacts and determines the

permissible scope of such compacts.³⁵ The IGRA prohibits neither waiver of tribal sovereign immunity nor allocation of civil-adjudicatory authority between [*11] a state and a tribe.³⁶ Therefore the limited consent to suit in the Model Gaming Compact comports with the requirements of the IGRA. The Court must now determine whether that limited consent allocates jurisdiction over gaming related tort claims to Oklahoma state courts.

34 "Petition" at 1, Docket No. 2-1.

35 See *Seminole Tribe v. Florida*, 517 U.S. 44, 48-50, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996).

36 See, e.g. *New Mexico v. Pueblo of Pojoaque*, 30 Fed.Appx. 768, 768-69 (10th Cir.2002) (affirming district court's finding possible waiver of tribal sovereign immunity regarding New Mexico's compact claims) (*unpublished opinion cited pursuant to Fed.R.App.P. 32.1*; 10th Cir. R. 32.1(A)); *Muhammad v. Comanche Nation Casino*, 2010 U.S. Dist. LEXIS 114945, 2010 WL 4365568 at *6 (W.D.Okla.2010) ("[T]he Court concludes that IGRA does not prohibit a state and a tribe from negotiating an allocation of civil-adjudicatory authority over tort claims related to gaming operations").

The actual compact between the Muscogee (Creek) Nation and the State of Oklahoma (the Compact) took effect in April of 2005.³⁷ This Compact adopted Oklahoma's Model Gaming Compact so as to easily secure validity under Oklahoma state law.³⁸ The Compact addresses, [*12] and provides limited consent to, two types of potential civil suits between tribal gaming enterprises and gaming patrons: tort claims and prize claims. These issues are discussed at length in Part 6 of the Compact.³⁹

37 See 70 Fed.Reg. 18041-01 (April 8, 2005).

38 See *Defendant's Motion to Dismiss* at 10, Docket No. 8 ("The Model Compact, including the Nation's Compact. . ."); *Okla. Stat. tit. 3A, §281-82* (codifying terms of Model Compact and authorizing tribal state compacts to become effective without state signatory).

39 See Compact at 2, Docket No. 8-1. Defendant's filings included only portions of the Compact. The Court accessed the Muscogee(Creek) Nation Compact in its entirety at: <http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/compacts/Muscogee%20Creek%20Nation%20of%20Oklahoma/muscogeecomp031605.pdf>

In reviewing of Part 6 and the balance of the Compact, the Court finds that the limited consent to suit in the Compact does not grant civil-adjudicatory jurisdiction to

Oklahoma courts. The Court prefaces its analysis of this issue by reiterating longstanding precedent that any waiver of tribal sovereign immunity must be clear and unequivocal.⁴⁰ Further, state courts have no [*13] adjudicatory authority over the conduct of tribal entities on tribal land unless such authority is clearly and unequivocally granted by the tribe.⁴¹

40 See *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001) (citing *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991)).

41 See *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001) (quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991)).

The Court recognizes that Part 6(c) of the Compact waives tribal immunity and consents to suit for tort and prize claims in a "court of competent jurisdiction." However, the phrase "court of competent jurisdiction" is undefined by the Compact, and this language alone does not evince the clear, unequivocal consent to the jurisdiction of Oklahoma's courts required to waive tribal sovereign immunity. As state courts generally lack authority over tribal entities on tribal land, Oklahoma state courts cannot be considered "courts [*14] of competent jurisdiction" under the Compact without unambiguous language demonstrating the clear, unequivocal consent of the tribe to the civil-adjudicatory authority of Oklahoma courts.⁴² The Compact contains no such language.

42 See *Muhammad v. Comanche Nation Casino*, 2010 U.S. Dist. LEXIS 114945, 2010 WL 4365568 at *9 (W.D.Okla. 2010) (citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 222, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987)).

In fact, other provisions of the Compact suggest that Defendant and its courts retain authority for the adjudication of claims like those of the instant Plaintiff.⁴³ For example, Part 6(A) of the Compact tasks the tribal enterprise with ensuring due process for patrons' tort claims.⁴⁴ Part 6(A)(7) states that Defendant's rules and regulations govern said process.⁴⁵ Further, promulgation of these rules and regulations is the province of the Defendant and is expressly required by Part 5(A) of the Compact.⁴⁶

43 See 2010 U.S. Dist. LEXIS 114945, [WL] at *10 (stating other sections of the tribal compact bolster the conclusion that state courts are not

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"courts of competent jurisdiction"). The compact at issue in *Muhammad* was similarly an adoption of Oklahoma's Model Gaming Compact.

44 See *id.*; Compact at 2, [*15] Docket No. 8-1.

45 See *Muhammad*, 2010 U.S. Dist. LEXIS 114945, 2010 WL 4365568 at *10; Compact at 4, Docket No. 8-1.

46 See *id.*; *supra* note 36.

Even if the above provisions do not explicitly vest Defendant's tribal courts with authority over Plaintiff's claims, Plaintiff cannot establish the jurisdiction of state or federal courts. Without clear, unequivocal evidence of the Defendant's consent to be sued in courts other than its own, this Court must conclude that there has been no such consent, and therefore no jurisdiction of non-tribal courts.⁴⁷

47 See *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001) (*internal citations omitted*).

In reviewing the Compact, the Court finds no clear language demonstrating Defendant's consent to outside civil-adjudicatory jurisdiction. Although the Defendant has waived its immunity in some part by providing consent to suit for tort and prize claims, this waiver appears limited to civil action in the Defendant's courts. Because there has been no clear consent to the jurisdiction of outside courts, neither the Oklahoma state court nor this Court can exercise jurisdiction over Plaintiff's claims. Consequently, Plaintiff's [*16] action is dismissed for lack of jurisdiction.

C. Plaintiff's Joinder Motions

Plaintiff's motion to amend his petition to add an additional claim of negligence *per se* and a claim for declaratory relief against the state of Oklahoma, as well as his motion to add Oklahoma as a party defendant are similarly flawed.⁴⁸ Although the Court construes the Plaintiff's *pro se* pleadings liberally,⁴⁹ the amended claims purposed by Plaintiff are subject to dismissal based on the same lack of jurisdiction discussed above. Further, as Plaintiff has not presented any evidence of waiver by the State of Oklahoma, Plaintiff's claims against the State are barred by its *Eleventh Amendment* immunity.⁵⁰ Finally, Plaintiff has not presented, and the court knows of, no authority under which this Court can force the State of Oklahoma to intervene as a party plain-

tiff.⁵¹ As a result, all of Plaintiff's amendments are futile and are therefore **DENIED**.⁵²

48 Plaintiff's *FRCP Rule 18* [sic] Motion to Add Claims, at 2-3; Docket No. 12; Plaintiff's Notice and Motion for *FRCP Rule 20* [sic] Joinder of State of Oklahoma as a Party Defendant at 1-3, Docket No. 13.

49 *Merryfield v. Jordan*, 584 F.3d 923, 924 (10th Cir. 2009).

50 See [*17] *Papasan v. Allain*, 478 U.S. 265, 276 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986); *Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978) (*per curiam*) ("There can be no doubt, however, that suit against the State and its Board of Corrections is barred by the *Eleventh Amendment*, unless Alabama has consented to the filing of such a suit").

51 See *Fed. R.Civ.P.* 24.

52 See *Anderson v. Suiters*, 499 F.3d 1228, 1238 (10th Cir. 2007) ("A district court may refuse to allow amendment if it would be futile. A proposed amendment is futile if the complaint, as amended, would be subject to dismissal") (*internal citations omitted*).

CONCLUSION

For the reasons set forth above, Defendant's Motion to Dismiss is **GRANTED**.⁵³ Plaintiff's *FRCP Rule 18* [sic] Motion to Add Claims⁵⁴ and Plaintiff's Notice and Motion for *FRCP Rule 20* [sic] Joinder of State of Oklahoma as a Party Defendant⁵⁵ are **DENIED**. Defendant's Motion to Strike Plaintiff's (2nd) Supplemental Response to Motion to Dismiss and Plaintiff's Objection to Defendant's Motion to Strike and Motion for Leave to Amend Objection to Defendant's Motion to Dismiss⁵⁶ are **DISMISSED AS MOOT**.

53 Docket No. 8.

54 Docket No. 12.

55 Docket No. 13.

56 Docket No.'s 20 [*18] and 21.

/s/ James H. Payne

James H. Payne

United States District Judge

Northern District of Oklahoma