

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

INTERNATIONAL BANK OF)
COMMERCE, a Texas State)
Banking Association,)
)
Plaintiff,)

v.)

Case No. CIV-12-627-C

(1) THE COMANCHE NATION,)
(2) THE COMANCHE BUSINESS)
COMMITTEE,)
(3) ROBERT TIPPECONNIE,)
(4) JOHNNY C. WAUQUA, TRIBAL)
CHAIRMAN,)
(5) EDWARD H. ESCHITI,)
(6) WILLIAM OWENS,)
(7) YONEVEA TERRY,)
(8) RONALD RED ELK,)
(9) ROBERT KOMACHEET,)
(10) DARRELL KOSECHEQUETAH,)
)
Defendants.)

MOTION TO DISMISS AND BRIEF IN SUPPORT

COMES NOW the Comanche Nation ("**Nation**"), the Comanche Business Committee ("**CBC**" or "**Business Committee**"), and the following individual Defendants in their official capacities: Edward Eschiti, Robert Tippeconnie, Ronald Red Elk, Yonevea Terry, Darrell Kosechequetah, and Robert Komacheet (collectively "**Business Committeemen**"), by and through the undersigned counsel, to respectfully request that this Court **DISMISS**, pursuant to Fed. R. Civ. P., Rule 12(b)(1), for lack of subject matter jurisdiction. This Court lacks subject matter jurisdiction because the Nation and its officers are entitled to sovereign immunity, which bars this interpleader action, and which

has not been waived nor abrogated. Additionally, this Court lacks subject matter jurisdiction because the dispute in question is an internal tribal dispute, which should be resolved in a tribal forum.

In support of this Motion, the Business Committeemen offer the following:

ARGUMENTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

I. Binding precedent in the Tenth Circuit holds that the sovereign immunity of the Nation and its officers extends to this type of interpleader action.

"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); Crowe & Dunlevy, P.C. v. Stidham, 640 F.3d 1140, 1153 (10th Cir. 2011) (same (*quoting* Santa Clara Pueblo)); Nahno-Lopez v. Houser, 627 F. Supp. 2d 1269, 1282 (W.D. Okla. 2009) ("As sovereign powers, federally-recognized Indian tribes possess immunity from suit in federal court" (*quoting* Native Am. Distrib. v. Seneca-Cayuga Tobacco Co., 546 F.3d 1288, 1292 (10th Cir. 2008))). A tribe does not shed its immunity from suit by engaging in commercial activities outside of its reservation. Kiowa Tribe of Okla. v. Mfg. Tech., Inc., 523 U.S. 751, 760 (1998) ("Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation."). Instead, a tribe sheds its sovereign immunity only when that tribe clearly and expressly waives its immunity, or when that immunity is abrogated by Congress. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla., 498 U.S. 505, 509 (1991) ("Suits against Indian

tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.").

The Tenth Circuit has expressly held that this immunity extends to interpleader actions such as this. In Bank of Oklahoma v. Muscogee (Creek) Nation, 972 F.2d 1166 (10th Cir. 1992), Bank of Oklahoma ("**Bank**") filed an interpleader action against the Muscogee (Creek) Nation and Indian Country U.S.A., Inc. ("**ICUSA**"). 972 F.3d at 1168. The district court dismissed both the interpleader and ICUSA's cross-claim, citing tribal sovereign immunity and the principle of tribal exhaustion. Id. In a detailed and well-reasoned opinion, the Tenth Circuit affirmed, rejecting one by one each of the Bank's attempts to carve out an exception. Id. at 1169-71.

Additionally, tribal sovereign immunity protects each of the tribal officials named as a defendant in this action. The Tenth Circuit has repeatedly held that tribal sovereign immunity "extends to tribal officials, so long as they are acting within the scope of their official capacities." Crowe & Dunlevy, 640 F.3d at 1154; see also Native Am. Distrib., 546 F.3d at 1296 ("It is clear that a plaintiff generally may not avoid the operation of tribal immunity by suing tribal officials Accordingly, a tribe's immunity generally immunizes tribal officials from claims made against them in their official capacities."); Kenai Oil and Gas, Inc. v. Dep't of Interior, 522 F. Supp. 521, 531 (D. Utah 1981) ("Tribal immunity may not be evaded by suing tribal officers"), *aff'd* 671 F.2d 383 (10th Cir. 1982). Because the Business Committeemen are elected officials of the Nation and the Nation's governing body, as official representatives of the Nation, each of the Business Committeemen is cloaked in the Nation's sovereign immunity.

"Tribal sovereign immunity is a matter of subject matter jurisdiction, which may be challenged by a motion to dismiss under Fed. R. Civ. P. 12(b)(1)." Miner Elec., Inc. v. Muscogee (Creek) Nation, 505 F.3d 1007, 1009 (10th Cir. 2007). International Bank of Commerce ("**IBC**" or "**Plaintiff**") offers no argument why this Court should not be bound by the Tenth Circuit's decision in Bank of Oklahoma. Nor does Plaintiff assert that the Nation has waived, or that Congress has abrogated, the Nation's sovereign immunity. Thus, because each of the Business Committeemen is immune from suit in this Court, and because none has waived immunity, this Court lacks subject matter jurisdiction and must **DISMISS**.

II. Even if the Nation and its officers are not entitled to sovereign immunity, which they are, this Court lacks jurisdiction to resolve a purely internal tribal dispute, which should instead be resolved in an appropriate tribal forum.

Plaintiff asserts, without support or analysis, that the Court of Indian Offenses for the Comanche Nation ("**CFR Court**") "does not have jurisdiction over the Plaintiff or the funds in the Accounts." Pl.'s Pet. at 6, ¶ 27. However, the Tenth Circuit in Bank of Oklahoma made clear that the question of the CFR Court's jurisdiction is one that must be answered in the first instance by the CFR Court itself:

The law of this circuit is that a federal court should not hear a challenge to tribal court jurisdiction until tribal court remedies have been exhausted. Tillet v. Lujan, 931 F.2d 636, 640-41 (10th Cir. 1991); Superior Oil Co. v. United States, 789 F.2d 1324, 1328-29 (10th Cir. 1986). . . . The law is thus quite clear: for reasons of comity, federal courts should abstain from hearing cases that challenge tribal court jurisdiction until tribal court remedies, including tribal appellate review, are exhausted.

Bank of Oklahoma, 972 F.2d at 1169-70. Although the Bank raised multiple objections to tribal court jurisdiction and to the doctrine of tribal exhaustion, the Tenth Circuit rejected each of those arguments in turn. Id. Ultimately, the court held, "[u]nless and until the Bank has sought resolution in tribal court, its claim of having no available remedy rings hollow." Id. at 1170.¹

Plaintiff acknowledges, and no party contests, that the dispute this case seeks to resolve is an intratribal dispute. See Pl.'s Pet. at 4-6, ¶¶ 12-26, 28. Plaintiff also acknowledges that action already has been initiated in the CFR Court to resolve this dispute. Id. at 6, ¶ 26. The Tenth Circuit's decision in Bank of Oklahoma, then, compels this Court to dismiss at least until the CFR Court has had an opportunity to resolve the dispute.

Conclusion

The Tenth Circuit has expressly held that Indian tribes, such as the Nation, are immune from this precise type of lawsuit. Only the Nation or Congress may set aside the

¹ This holding is consistent with the long-standing policy in the Tenth Circuit that "a federal court has no jurisdiction over an intratribal dispute." Kaw Nation ex rel. McCauley v. Lujan, 378 F.3d 1139, 1143 (10th Cir. 2004); see also Tillett, 931 F.2d at 640 ("as a matter of comity, a federal court should not exercise jurisdiction over cases arising under its federal question or diversity jurisdiction, if those cases are also subject to tribal jurisdiction, until the parties have exhausted their tribal remedies"); Motah v. United States, 402 F.2d 1, 2 (10th Cir. 1968) (affirming dismissal of "an internal controversy among Indians over tribal government"); Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364, 366 (10th Cir. 1966) ("there is no federal jurisdiction to settle intratribal controversies"); Prairie Band of Pottawatomie Tribe of Indians v. Puckkee, 321 F.2d 767, 770 (10th Cir. 1963) (affirming dismissal of "an intra-tribal controversy, over which Federal court jurisdiction has been traditionally denied").

Nation's immunity, and neither has done so. The Nation's immunity also extends to its officers acting in their official capacities. Thus, each of the Business Committeemen is immune from this suit. Consequently, this Court lacks subject matter jurisdiction over the Defendants. Additionally, the Tenth Circuit has repeatedly held that purely internal tribal disputes, such as this, must be resolved by tribal courts, not federal courts. A case that would resolve this dispute already has been initiated in the Court of Indian Offenses for the Comanche Nation. Thus, this Court should dismiss until the Plaintiff has exhausted its tribal remedies.

WHEREFORE Business Committeemen request that this Court **DISMISS** this case for lack of subject matter jurisdiction.

s/James M. Burson
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ATTORNEY FOR DEFENDANTS,
1) The Comanche Nation²;

² Despite statements to the contrary made to this Court by Attorney Michael Salem and Comanche Nation Chairman Wallace Coffey, the law firm of Hobbs, Straus, Dean & Walker, LLP ("**Hobbs Straus**") remains the constitutionally-selected Tribal Attorney for the Nation. The Constitution of the Comanche Nation specifies, at Article V, Section 10, that the Tribal Council has exclusive authority to hire the Tribal Attorney. Dkt. #31-1, at 5. Hobbs Straus has served as Tribal Attorney since 1999, and the Tribal Council on April 21, 2012, voted 255 to 95 in favor of retaining Hobbs Straus. Scott Rains, Comanche Ballot Set, LAWTON CONST., April 22, 2012, at 1A, 5B (attached Ex.1).

- 2) The Comanche Business Committee;
- 3) Robert Tippeconnie;
- 5) Edward H. Eschiti;
- 7) Yonevea Terry;
- 8) Ronald Red Elk,
- 9) Robert Komacheet and
- 10) Darrell Kosechequetah.

Contrary to the representations of Chairman Coffey and Attorney Salem, the Nation has not terminated the services of Hobbs Straus. Attorney Salem invokes a resolution from a disputed meeting purporting to terminate the employment of Hobbs Straus, and allegedly adopted by unanimous vote at a June 2, 2012 "continuation" of the Tribal Council meeting. Dkt. #37, at 4. However, that resolution has no force, because the June 2 meeting was not a continuation, as no business remained from the April 19 Tribal Council meeting, but was instead an unlawfully called, invalid "special meeting," which lacked sufficient notice and/or inclusion of the matter of Tribal Attorney hiring on the agenda – a matter addressed decisively on April 19, 2012, at a duly called and convened meeting. Moreover, even were the resolution valid, which it is not, the contract between the Nation and Hobbs Straus requires sixty (60) days notice. Finally, Attorney Salem offers no support for his assertion, implicit in his Special Entry of Appearance, that he represents the Nation, Dkt. #37, at 1, in light of the fact that he has not been hired by the Tribal Council in accordance with Comanche Const. art. V, § 10, and none of the individuals he purports to represent possess the unilateral authority to hire counsel for the Nation. This Court should consider Attorney Salem as merely the personal attorney for Mr. Coffey, Mr. Owens, and Mr. Wauqua.

CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2012, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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s/James M. Burson