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

(1) KAREN HARRIS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 11-CV-654-GKF-FHM**
	)	
(2) MUSCOGEE (CREEK) NATION d/b/a RIVER SPIRIT CASINO, and	)	
(3) HUDSON INSURANCE COMPANY	)	
	)	
Defendants.	)	

DEFENDANT MUSCOGEE (CREEK) NATION'S
REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

Defendant, Muscogee Creek Nation d/b/a River Spirit Casino ("Nation"), by its counsel, Gregory D. Nellis and Michael A. Simpson of Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C., provides this Reply Brief in support of its Motion to Dismiss (Doc. No. 11):

A. Ms. Harris cites the wrong standard of review.

In the Standard of Review section of Ms. Harris's Response Brief (Doc. No. 16 at pgs. 4-5), Ms. Harris sets forth the standards for this Court to review a motion to dismiss for failure to state a claim made pursuant to Federal Rule of Civil Procedure 12(b)(6). The Nation's motion, however, is made pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction.

Under Rule 12 (b)(1), the Court may examine not only a jurisdictional challenge to the face of the pleading, but any other facts necessary to determine if subject matter jurisdiction exists. *See Davis v. United States*, 343 F.3d 1282, 1295-96 (10th Cir. 2003).

> In addressing a factual attack, the court does not "presume the truthfulness of the complaint's factual allegations," but "has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)." The Court is empowered to dismiss the action when it appears

> "clear that no relief could be granted under any set of facts that could be proved consistent with the allegations."

*Cheyenne-Arapaho Gaming Comm'n v. National Indian Gaming Comm'n ,*214 F. Supp. 2d 1155, 1160 (N.D. Okla. 2002) (citations omitted).

As noted in the opening brief, issues of sovereign immunity, are questions of law. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151 (2001), *receded in part on other grounds by Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808 (2009). The Court, therefore, is not obligated to give deference to Ms. Harris's pleading in evaluating whether it retains subject matter jurisdiction. *See Cheyenne-Arapaho Gaming Comm'n*, 214 F. Supp. 2d at 1164 ("Because immunity is assumed until proven otherwise, the plaintiff bears the burden of proving that the sovereign has waived its immunity and that the Court has the jurisdictional right to hear the case.").

B. This Court cannot "modify or vacate" *Choctaw Nation.*

Ms. Harris introduces the legal argument in her Response Brief by requesting the Court to "modify or vacate the permanent injunction ordered in *Choctaw Nation v. Oklahoma*, 724 F. Supp. 2d 1182 [(2010)]" and instead follow the Oklahoma Supreme Court decisions in *Cossey v. Cherokee Nation Enterprises, LLC*, 2009 OK 6, 212 P.3d 447, *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.

There are multiple problems with this request. First, *Choctaw Nation* was decided by the Western District of Oklahoma, and this Court obviously lacks the power to modify or vacate an injunction issued by a sister federal district court. Second, as the quote from *Choctaw Nation* in footnote 1 of Ms. Harris's brief reveals, Judge West ruled that the **State of Oklahoma**, not a casino patron claiming harm, could petition the Western District to modify or vacate the injunction. Judge

West also authorized such a petition only "if applicable federal law ... changes" on the issue of tribal court jurisdiction over an Indian casino patron's claims.

Ms. Harris does not indicate how, if at all, federal law has changed in her favor on this issue since the decision in *Choctaw Nation*. To the Nation's knowledge, the law has not changed. In fact, Ms. Harris's Response Brief also does not address *Muhammad v. Comanche Nation Casino*, 2010 WL 4365568 at *7-*11 (W.D. Okla. Oct. 27, 2010), which is cited by the Nation as on point with the jurisdictional issue in this case. *Muhammad* ultimately ruled that the Model Tribal Gaming Compact only waives an Indian casino's immunity in its own tribal courts. *Id.* at *11. Accordingly, *Choctaw Nation* and *Muhammad* are good law, which this Court should apply as highly persuasive authority in favor of exclusive jurisdiction in the Nation's tribal courts.

C. Ms. Harris misreads the Oklahoma Supreme Court decisions, which agree tribal courts have jurisdiction to hear tort claims by non-Indians against tribal casinos.

In her Response Brief, Ms. Harris also relies heavily on the dicta in *Cossey*'s lead opinion, which reasons that tribal casinos do not have jurisdiction over non-Indian casino patrons. As noted in the opening brief, however, that particular reasoning in *Cossey*'s lead opinion was a **minority** position of only four Justices. In fact, the Oklahoma Supreme Court made clear in *Griffith* and *Dye* that it viewed state **and** tribal courts as possessing concurrent jurisdiction over a non-Indian's tort claim against an Indian tribe or its casino enterprise because both court systems are "courts of competent jurisdiction" pursuant to the Model Tribal Gaming Compact.

The ultimate arbiters of tribal court jurisdiction, however, are the federal courts because tribal jurisdiction is a question of federal law. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324, 128 S. Ct. 2709, 2716-2717 ("whether a tribal court has adjudicative

authority over nonmembers is a federal question"). As noted above, while it is a question of first impression in this district, the Western District has ruled the Model Tribal Gaming Compact, used statewide by tribes with "Class III" gaming under the Indian Gaming Regulatory Act, waives a tribe's immunity **only** in its own tribal courts; thus, the State's courts do not have subject matter jurisdiction over casino patron claims. *Muhammad*, 2010 WL 4365568 at *11. This decision is highly persuasive to this Court's decision on the Nation's motion because it involves the same Model Tribal Gaming Compact and the same rules of federal law concerning tribal jurisdiction. As such, this Court should agree with *Muhammad* and rule that Ms. Harris's claim should proceed in the Nation's courts by dismissing this case without prejudice.

Respectfully Submitted,

ATKINSON, HASKINS, NELLIS, BRITTINGHAM, GLADD & CARWILE
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CERTIFICATE OF MAILING

This is to certify that on this, the 12th day of December 2011, a true copy of the foregoing instrument was filed with the Court via ECF and sent via regular mail, postage prepaid to:

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