

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

DONALD KELIN,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. CIV-11-1080-M
)	
CARLA ANN GUY)	
)	
Defendant.)	

**PLAINTIFF DONALD KELIN'S SUPPLEMENTAL
RESPONSE TO DEFENDANT'S REPLY BRIEF**

COMES NOW, Plaintiff, Donald Kelin, by and through counsel, and with permission of the Court, responds to new issues of law raised in the Defendant's Reply Brief.

INTRODUCTION

Nothing in this reply brief should be construed to withdraw or waive any argument set forth in Mr. Kelin's initial response. Mr. Kelin still asserts that this Court has diversity jurisdiction over this dispute because it does not involve an intra-tribal dispute and does not interfere with tribal sovereignty or self-government.

Mr. Kelin stands on the statement of facts provided in his initial response as an accurate summary of the events in question.

ARGUMENT & AUTHORITY

I. Assuming *Arguendo* that exhaustion of tribal remedies is required before the District Court may hear the case, dismissal is still not appropriate at this time.

Both *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987) set forth a policy of abstention in favor of Tribal Courts. In each case, the Supreme Court held that it was proper for federal courts to refrain from hearing a dispute involving Indians and arising on Indian reservations until a plaintiff had exhausted all tribal remedies. *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 856 (1985); *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 18 (1987). The Court further held that exhaustion of Tribal Court remedies requires opportunity for the appropriate Tribal Court to first determine whether it has jurisdiction over the dispute. *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 18 (1987).

In both decisions, the Court clearly noted that abstention was based on policies of comity and not on a lack of subject-matter jurisdiction. In *Iowa Mutual*, Justice Marshall likened abstention in favor of Tribal Courts to the *Colorado River* Doctrine.

“As the Court’s directions on remand in *National Farmers Union* indicate, the exhaustion rule enunciated in *National Farmers Union* did not deprive the federal courts of subject-matter jurisdiction. Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite. In this respect, the rule is analogous to principles of abstention in *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d (1976): even where there is concurrent jurisdiction in both state and federal courts, defense to state proceedings renders it inappropriate for federal courts to decline jurisdiction in favor resolution in a non-federal forum. *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 14 (1987) (See Footnote 4).

Thus, the policy underlying abstention in favor of Tribal Courts is that even though concurrent jurisdiction would exist, a Federal Court may abstain from hearing the case out of respect for tribal-sovereignty. *Id.*

Also, *National Farmers Union* provides the proper procedure for such abstention. The Federal Court may “stay its hand until after the Tribal Court has had a full opportunity to determine it’s own jurisdiction.” *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 856 (1985). “Whether the federal action should be dismissed, or merely held in abeyance pending the development of future Tribal Court proceedings, is a question that should be addressed in the first instance by the District Court.” *Id.* Therefore, the District Court is not required to dismiss the action but may merely stay the proceedings pending a jurisdictional ruling from a Tribal Court.

If this Court does find that Mr. Kelin must exhaust Tribal Court remedies the Court should stay the litigation instead of dismissing it. Staying the litigation would eliminate the added expense and time of having to re-file a petition and conduct another status conference in the event that the C.F.R. Court declines jurisdiction over some or all of the issues of the case. Due to the fact that some of the disputed conduct occurred outside the boundaries of Indian Country it is extremely likely that at least part of this case will be litigated in Federal Court.

II. This Court has exclusive jurisdiction over all conduct occurring outside of Indian Country and therefore exhaustion of Tribal remedies is not required.

Title 25 of the Code of Federal Regulations establishes a system of “C.F.R” Courts that have jurisdiction to resolve disputes arising within Indian Country. 25 C.F.R.

§ 11.116. As stated in Mr. Kelin's initial response, the defamatory conduct alleged in the complaint occurred both within and outside of Indian Country. A C.F.R. Court would not have jurisdiction over conduct occurring outside of Indian Country. 25 C.F.R. § 11.116. Because a C.F.R. Court would not have jurisdiction over such conduct, it falls within the scope of diversity jurisdiction pursuant to 28 U.S.C. 1332(1)(a) and would not be subject to exhaustion.

Therefore, the claims asserted in the petition may be severed. Any litigation based on conduct alleged to have occurred outside Indian Country can proceed in Federal Court, even if the conduct that occurred within Indian Country is found to require exhaustion.

III. Defendant's request for attorney's fees and costs is not proper as a matter of law or procedure.

28 U.S.C. § 1919 allows a district court to award "just costs" when an action is dismissed for lack of subject-matter jurisdiction. Just costs are not generally construed to include attorney's fees. See *Wilkinson v. D.M. Weatherly Co.*, 655 F.2d 47 (5th Cir. 1981); *Signorile v. Quaker Oats Co.*, 499 F.2d 142 (7th Cir. 1974). Additionally an award of attorney's fees must generally be based on a statute, rule, or judgment awarding attorney's fees. Fed. R. Civ. P. 54(d)(2)(B)(ii). Such requests must be made pursuant to Federal Rule of Civil Procedure 54(d)(2) and LCvR54.2.

Defendant makes its first request for attorney's fees in its Reply Brief and fails to state any legal basis for the recovery of costs or attorney's fees. Defendant also fails to substantially comply with any of the requirements of the Federal Rules of Civil

Procedure or the Local Rules for the United States District Court for the Western District of Oklahoma. For these reasons Defendant's request is procedurally inappropriate.

Even if this Court does abstain based on policies of comity, an award of just cost would not be appropriate. A dismissal based on comity is different than a dismissal based on lack of subject-matter jurisdiction. As stated above, the issue is not that the Federal Court lacks subject-matter jurisdiction, but that the Federal Court chooses not to invoke its diversity jurisdiction for significant policy reasons. As such an award of just costs based on lack of jurisdiction would be inappropriate.

CONCLUSION

WHEREFORE Plaintiff Mr. Kelin believes all other claims should proceed in Federal Court. If this Court does find that exhaustion is required, exhaustion should only be required as to the claims arising within Indian Country. However, Mr. Kelin still asserts that this Court should have jurisdiction over all claims due to the fact that decision of the case on the merits would not interfere with tribal sovereignty. Additionally, any award of costs or attorney's fees would be inappropriate both as a matter of procedure and as a matter of law.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 6th of July 2012, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF system for filing and transmittal of a Notice of Electronic Filing to all parties of record as follows:

O. Joseph Williams
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Attorney for Defendant

s/John W. "Billy" Coyle, IV
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