UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

APPEAL NO. 12-5046

EDDIE SANTANA,

Appellant,

v.

MUSCOGEE (CREEK) NATION, ex rel. RIVER SPIRIT CASINO

Appellee.

Appeal from United States District Court for the Northern District of Oklahoma
Honorable James H. Payne, Presiding
Dist. Ct. No. 11-CV-782-JHP

BRIEF FOR APPELLEE

Oral Argument Not Requested **June 25, 2012**

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STATEMENT OF RELATED APPEALS

There are no prior or related appeals specifically as to this case; however, Mr. Santana has filed a similar appeal before this Court in Appeal No. 06-5210. *See* 215 Fed. Appx. 763 (10th Cir. 2007).

JURISDICTIONAL STATEMENT

Appellant, Eddie Santana, brought suit against the Muscogee (Creek) Nation (the "Nation"), in the District Court for Tulsa County, Oklahoma on November 28, 2011, claiming "unjust enrichment" from the Nation. The Nation timely filed a Notice of Removal on December 16, 2011, to transfer the suit to the United States District Court for the Northern District of Oklahoma, pursuant to 28 U.S.C. §§1331, 1441 & 1446, because Mr. Santana's suit against the Nation raised a federal question of state adjudicatory jurisdiction over an Indian sovereign. (Compl., Doc. No. 2-1, at 8.) The Nation then moved to dismiss claiming (1) sovereign immunity from suit in the federal and state courts, and (2) Mr. Santana's complaint failed to state a claim. (Mot. to Dismiss, Doc. No. 8.)

The district court entered an order and judgment on March 15, 2012, dismissing the case in its entirety. (Doc. Nos. 22 & 23.) Mr. Santana filed a timely appeal to this Court on March 16, 2012. 28 U.S.C. §§ 1291, 1294(1); Fed. R. App. Proc. 4(a)(1)(A). (Doc. No. 24.)

STATEMENT OF THE ISSUES

1. The district court correctly ruled the Nation's removal was proper.

2. The district court correctly ruled the Nation was immune from suit in state court.

3. The district court did not abuse its discretion in denying Mr. Santana's motion to join the State of Oklahoma into the lawsuit.

STATEMENT OF THE CASE

Mr. Santana filed a Complaint in the District Court for Tulsa County, Oklahoma alleging the Nation had been unjustly enriched by his gambling losses at its River Spirit Casino in Tulsa, Oklahoma. (Compl., Doc. No. 2-1.) The Nation then removed this case to the United States District Court for the Northern District for Oklahoma. The basis for removal was that Mr. Santana's Complaint raised a federal question because he sought state adjudicatory jurisdiction over a tribal sovereign, which he based on the Nation's Tribal Gaming Compact with the State of Oklahoma (the "Compact"), which, in turn, is governed by the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701, *et seq*. (Notice of Removal, Doc. No. 2.)

Shortly after removal, the Nation moved to dismiss, arguing the state (and federal) courts lacked subject matter jurisdiction (and that Mr. Santana had failed to state a claim). (Mot. to Dismiss, Doc. No. 8.) The district court issued an opinion and order on March 15, 2012, dismissing the lawsuit based on a lack of subject matter jurisdiction. In so ruling, the district court also addressed the propriety of removal *sua sponte*, and determined that, because a federal question

was raised by Mr. Santana's Complaint, removal was proper. Mr. Santana appeals from this opinion and order and the related final judgment.

STATEMENT OF FACTS

The Muscogee (Creek) Nation ("Nation") is a federally recognized Indian tribe. 75 Fed. Reg. 60810, 60811 (Oct. 1, 2010). The Nation and the State of Oklahoma entered into the Compact in 2005, which authorizes the Nation to engage in "Class III" gaming pursuant to the IGRA. *See* 70 Fed. Reg. 18041 (Apr. 8, 2005). The Tribal Gaming Compact is virtually identical to the Model Tribal Gaming Compact ("Model Compact") enacted by the Oklahoma Legislature in 2004, which is codified in Title 3A, section 281 of the Oklahoma Statutes.[1]

This case originated when Mr. Santana brought suit against the Nation for unjust enrichment, seeking repayment of gambling losses he incurred at the Nation's River Spirit Casino in Tulsa, Oklahoma ("Casino"). (Compl. ¶¶7-18, 25, Doc. No. 2-1.) Mr. Santana admitted in his pleading he had used student loan and Pell Grant money to make more than $60,000 in bets at the Casino starting in 2003.

[1] In Oklahoma, the Model Compact is unilaterally offered by the State to all tribes that comply with the IGRA, and the Model Compact is deemed accepted once it is signed by a tribe's chief executive. 3A Okla. Stat. §280. While the Nation only placed the relevant portions of the Compact in the record before the district court, the entire text of the document is contained in the codified Model Compact. *Id.* §281 (attached as Appendix A).

(*Id.* ¶7.)[2] In his Complaint, Mr. Santana alleged the Nation should not have induced Mr. Santana to gamble because of his "mental dysfunction causing a gambling addiction".[3] (*Id.* ¶9.)

The Complaint alleges the Oklahoma state courts have subject matter jurisdiction because of a limited sovereign immunity waiver in the Model Compact authorized by the State of Oklahoma. (*Id.* at p.1 (intro. para.)). Mr. Santana recognizes the Casino "was a business run by the [Nation] in Tulsa County, upon its land" in Oklahoma. (*Id.* ¶2.)

As for the allegations of the unjust enrichment claim asserted by Mr. Santana, he "concedes that the Creek Nation has the right to run its [Casino] operations." (*Id*. ¶17.) Mr. Santana primarily alleged, however, that the Casino's advertising induced him to gamble and that, because of his "abnormally weak

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[2] Prior to filing his suit, Mr. Santana filed a "Tort Claim Notice" with the Casino on July 31, 2011. (*Id*. ¶10.) Mr. Santana attached a printout to the Tort Claim Notice that listed various federal direct student loan and Pell Grant payments he claims he gambled away at the Casino.

[3] 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. That lawsuit was dismissed against the Nation and other tribes because of sovereign immunity. Mr. Santana also filed a similar claim in the United States District Court for the Northern District of Oklahoma in 2006. That claim was also dismissed, which this Court affirmed on appeal. *Santana v. Cherokee Casino*, 215 Fed. Appx. 763 (10th Cir. 2007).

frame of mind," the Nation should be liable to return "some or most" of the money, i.e., student loans and grant funds, he spent in the Casino. (*Id*. ¶¶17-18.)

The Nation timely removed this Complaint to the United States District Court for the Northern District of Oklahoma after being served with process. (Notice of Removal, Doc. No. 2.) Mr. Santana did not file a motion to remand the case; in fact, he filed a "Request for Court to Assume Jurisdiction in Place of If Not Oklahoma Instead of Tribal Court" arguing in support of federal jurisdiction (over tribal jurisdiction) if the district court found the Oklahoma state courts lacked jurisdiction over the Nation. (Doc. No. 9.)

Shortly after filing the removal, the Nation filed a motion to dismiss Mr. Santana's Complaint, *inter alia*, because the state (and federal) courts lacked subject matter jurisdiction over Mr. Santana's claim against a tribally owned casino. (Mot. to Dismiss, Doc. No. 8, at 2-5, 7-13.)[4] This argument focused on the Compact entered into between the Nation and the State, which reads in relevant part:

[4] The Nation also moved to dismiss because Mr. Santana's claim was untimely under the notice and limitations periods set forth in the Compact, and because Mr. Santana's "unjust enrichment" claim failed to state a claim. (*Id.* at 5-7, 13-14.) Due to its ruling that the state and federal courts lacked subject matter jurisdiction over Mr. Santana's claim, the district court did not have to address these additional issues. (*See* Op. & Order, Doc. No. 23 at 6-10.)

PART 6. TORT CLAIMS; PRIZE CLAIMS; LIMITED CONSENT TO SUIT

A. Tort Claims. The enterprise shall ensure that patrons of a facility are afforded due process in seeking and receiving just and reasonable compensation for a tort claim for personal injury or property damage against the enterprise arising out of incidents occurring at a facility, hereinafter "tort claim", as follows:

* * *

2. The tribe consents to suit on a limited basis with respect to tort claims subject to the limitations set forth in this subsection and subsection C of this Part. No 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 this Compact, except as provided in subsections B and C of this Part;

* * *

9. A judicial proceeding for any cause arising from a tort claim may be maintained in accordance with and subject to the limitations of subsection C of this Part only if the following requirements have been met:

a. the claimant has followed all procedures required by this Part, including, without limitation, the delivery of a valid and timely written tort claim notice to the enterprise,

b. the enterprise has denied the tort claim, and

c. the claimant has filed the judicial proceeding no later than the one-hundred-eightieth day after denial of the claim by the enterprise; provided, that neither the claimant nor the enterprise may agree to extend the time to commence a judicial proceeding[.]

* * *

B. Prize Claims. The enterprise shall ensure that patrons of a facility are afforded due process in seeking and receiving just and reasonable compensation arising from a patron's dispute, in connection with his or her 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, hereafter "prize claim", as follows:

1. The tribe consents to suit on a limited basis with respect to prize claims against the enterprise only as set forth in subsection C of this Part; no consents to suit with respect to prize claims, or as to any other claims against the tribe shall be deemed to have been made under this Compact, except as provided in subsections A and C of this Part;

* * *

11. A judicial proceeding for any cause arising from a prize claim may be maintained in accordance with and subject to the limitations of subsection C of this Part only if the following requirements have been met:

a. the claimant has followed all procedures required by this Part, including without limitation, the delivery of a valid and timely written prize claim notice to the enterprise,

b. the enterprise has denied the prize claim, and

c. the claimant has filed the judicial proceeding no later than one hundred eighty (180) days after denial of the claim by the enterprise; provided that neither the claimant nor the enterprise may extend the time to commence a judicial proceeding[.]

* * *

C. Limited Consent to Suit for Tort Claims and Prize Claims. The tribe consents to suit against the enterprise in a court of competent jurisdiction with respect to a tort claim or prize claim if all

> requirements of paragraph 9 of subsection A or all requirements of paragraph 11 of subsection B of this Part have been met[.]
>
> * * *
>
> Part 9. JURISDICTION
>
> This Compact shall not alter tribal, federal or state civil adjudicatory or criminal jurisdiction.

(Ex. 1 to Mot. to Dismiss, Doc. No. 8-1, at pgs. 20-29, 33). In the motion to dismiss, the Nation argued Mr. Santana's claim for unjust enrichment was neither a tort claim nor a prize claim. In one of his subsequent responses to the motion, Mr. Santana stipulated he was not pursuing a "prize claim" against the Nation pursuant to the Compact. (Supp. Obj. to Mot. to Dismiss, Doc. No. 14 at ¶7.) Thus, Mr. Santana's only basis for pursuing a claim under the Compact would be if his Complaint could be construed to allege a "tort" claim against the Nation.

After the Nation filed the motion to dismiss, Mr. Santana also filed a motion for leave to amend his Complaint (Doc. No. 12), and a motion to join the State of Oklahoma as a necessary party (Doc. No. 13). The motion to amend sought to add a negligence *per se* claim against the Nation, and a declaratory judgment claim against the State of Oklahoma, subsequent to the joinder request. The Nation objected to these motions on the basis that the proposed amendment and joinder were "futile", and the district court subsequently denied the motions for this reason.

Based on his statement of issues and legal argument, Mr. Santana challenges the district court's decision on the joinder motion, but has waived any appeal of the denial of his motion to amend, particularly as to the proposed negligence claim against the Nation. (*See* Opening Br. at 7-8, 32-34.)

SUMMARY OF LEGAL ARGUMENT

The district court correctly ruled that the Nation's removal of the case to federal court was proper (which Mr. Santana does not dispute). The Complaint raised a substantial federal question of state adjudicatory authority over a tribally owned casino, and, therefore, required federal intervention to enforce the jurisdictional provisions of the IGRA-authorized Compact.

The district court properly dismissed this case for lack of subject matter jurisdiction based on the Nation's sovereign immunity *vis a vis* the limited waiver of that immunity in the Compact between the Nation and the State of Oklahoma. The limited waiver simply did not apply to Mr. Santana's claim for purely economic loss against the Nation. The district court correctly interpreted the Compact's terms as allowing claims against an Indian tribal-owned casino to be brought only in the tribe's own court system.

Finally, the district court did not abuse its discretion in denying Mr. Santana's motion to join the State of Oklahoma into this case. Mr. Santana cited

no authority allowing the federal courts to compel the State to join the case as a party, and any such compulsion would have been barred by the Eleventh Amendment. Thus, the request to join was futile.

LEGAL ARGUMENT

I. Removal was proper for the reasons stated by the district court.

A. Standard of Review

Though Mr. Santana has not challenged removal in either the district court or this Court, the Nation recognizes federal courts must evaluate their jurisdiction *sua sponte*, and, therefore, addresses this issue in support of the district court's ruling on removal. The propriety of removal is reviewed *de novo*. *Lovell v. State Farm Mut. Auto. Ins. Co.*, 466 F.3d 893, 897 (10th Cir. 2006).

B. Removal was proper due to the presence of a federal question.

In filing his Complaint in the District Court for Tulsa County, the Plaintiff expressly alleged the State court has jurisdiction over the Nation and the subject matter. (Compl., Doc. No. 2-1, at p. 1.) Federal law determines whether a state may exercise jurisdiction over civil actions against Indians in Indian Country. *Williams v. Lee*, 358 U.S. 217, 217-218, 222 (1959) (holding federal law prohibits state courts from exercising jurisdiction over civil actions arising in Indian Country against Indians). The Complaint, therefore, raises a federal question.

Federal authority to allocate jurisdiction in Indian Country stems from the Indian Commerce Clause of the United States Constitution. U.S. Const. art. I, § 8, cl. 3. The Indian Commerce Clause divests the states of "virtually all authority over Indian commerce and Indian tribes." *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 62 (1996).

As for Oklahoma, Congress conditioned Oklahoma's statehood on disclaiming jurisdiction over Indians in Indian Country. Oklahoma's Enabling Act prohibits the State Constitution from "limit[ing] or affect[ing] the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights." Act of Congress, June 16, 1906, 34 Stat. 267-78.

The Oklahoma Constitution reflects the State's compliance with the Enabling Act. Article I, Section 3, "forever disclaims" all rights to tribal lands and agrees that "until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal and control of the United States." The Court has recognized that the Enabling Act preserves federal and tribal jurisdiction over Indians in Indian Country, exclusive of the State. *Indian Country, U.S.A., Inc. v. Oklahoma*, 829 F.2d 967, 976-968 (10th Cir. 1987) (holding that Oklahoma had not acquired civil jurisdiction over Indians in the Creek Nation's Indian Country); *accord 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).

Congress has established a process for states to acquire jurisdiction over civil actions arising in Indian Country against Indians. *See* Act of Aug. 15, 1953, 67 Stat. 588 (repealed and reenacted 1968) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-1326, and 28 U.S.C. § 1360, commonly referred to as "Public Law 280"). Oklahoma has not acquired such jurisdiction. *See United Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170, 1178 n.17 (10th Cir. 1991). Until the State of Oklahoma satisfies Public Law 280's requirements, it cannot assert civil adjudicatory jurisdiction over Indians in Indian Country. Thus, Oklahoma's courts are not "courts of competent jurisdiction" for such actions.

Mr. Santana's Complaint also cites the "Indian Gaming Act of 1988 (25 U.S.C. §2701)," which is actually the IGRA, as legal support for his claim. (Compl., Doc. No. 2-1, ¶25.) In the IGRA, however, Congress only authorized the states to acquire **limited** civil jurisdiction over Indian Country via the tribal-state compacting process. 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").

That authorization, however, does not include the transfer of jurisdiction over an individual patron's civil actions against Indian tribes. Even if the IGRA allows such a change, the State and the Nation have agreed that their Compact does not do so. (Compact, Ex. 1 to Mot. to Dismiss, Doc. No. 8-1, at § 9 (stating the "Compact shall not alter tribal, federal or state civil adjudicatory ... jurisdiction")).

Mr. Santana's act of filing a state court action against the Nation, therefore, required federal intervention to enforce the IGRA-authorized Compact, which generated a federal question under 28 U.S.C. §§ 1331, 1362. "IGRA is a federal statute, the interpretation of which presents a federal question suitable for determination by a federal court." *Pueblo of Santa Ana v. Kelly,* 104 F.3d 1546, 1557 (10th Cir. 1997). Federal courts, therefore, have jurisdiction to enforce obligations arising under compacts created pursuant to the IGRA. *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 933-934 (7th Cir. 2008) (finding federal-question jurisdiction to review IGRA compact allocation of jurisdiction); *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997) (explaining that IGRA gaming compacts "quite clearly are a creation of federal law," and holding that Band's action to enforce compact arises under federal law for purposes of 28 U.S.C. §§ 1331 & 1362); *Wells Fargo Bank, N.A. v. Sokaogon Chippewa Community*, 787 F. Supp. 2d 867, 874-875 (E.D. Wis. 2011) (declaratory judgment

action pertaining to loans undertaken by Indian casino regulated by IGRA raises federal question).

The absence of an express federal cause of action in an initial pleading is not dispositive as to whether federal question jurisdiction is raised therein. *Nicodemus v. Union Pacific Corp.,* 440 F.3d 1227, 1233 (10th Cir. 2006) (discussing *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Manuf'g,* 545 U.S. 308 (2005)). Thus, in cases such as this one where the complaint raises a federal issue, but not a private cause of action specifically based on federal law, the determination of federal question jurisdiction involves "the question of whether the 'state law claim necessarily raises 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.'" *Id.* (quoting *Grable & Sons*).

For the reasons set forth above, the Complaint contains a contested, substantial, and dispositive issue of federal law – whether the State court has jurisdiction over a tort action against the Nation arising in the Nation's Indian Country. A cause of action arises under federal law for purposes of federal question jurisdiction if the dispositive issues stated in the complaint require the application of federal law, including federal common law. *See Ivy Broadcasting*

Co. v. AT&T Co., 391 F.2d 486, 492 (2nd Cir. 1968). Under federal common law, the State cannot exercise jurisdiction over civil actions against Indians arising in Indian Country absent specific Congressional authorization. *Williams,* 358 U.S. at 221, 222. Mr. Santana clearly contests this result. (*See* Request to Assume Juris., Doc. No. 9.) Mr. Santana's attempt to invoke state court jurisdiction via the Compact, therefore, raises a contested and substantial federal question making the action appropriate for removal under 28 U.S.C. § 1441(b).

Finally, this federal issue does not disturb the "balance" between federal and state court responsibilities discussed in *Nicodemus*. As the district court held, the issue of state court jurisdiction over an Indian tribe is an important federal interest. (*See* Op. & Order, Doc. No. 22 at 5.) Further, the Nation's legal position that tort and prize claims brought against its Casino must be filed exclusively in the Nation's court system would equally eliminate the responsibility of state and federal courts to hear such claims. Thus, weighing on the ability of state or federal courts to adjudicate such claims versus tribal court does not disturb the federal-state "division of labor" discussed in *Nicodemus*. 440 F.3d at 1237. Accordingly, the district court correctly ruled that removal of Mr. Santana's claim was proper.

II. The district court correctly ruled it lacked subject matter jurisdiction.

A. Standard of review

Issues related to immunity are questions of law. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001), *receded from on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009). Accordingly, the legal underpinnings of questions of immunity and subject matter jurisdiction are reviewed by this Court *de novo*. *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.,* 546 F.3d 1288, 1293 (10th Cir. 2008).

B. The Nation did not waive its immunity as to Mr. Santana's claim.

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 (1985); *see also Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 14 (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 (1998). *Accord Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

"Tribal immunity extends to subdivisions of a tribe, and even bars suits arising from a tribe's commercial activities." *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1292 (10th Cir. 2008). In fact, in 2010, this Court 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, 1195-1196 (10th Cir. 2010). Ultimately, 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).

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 (2001) (citations omitted). In other words, an immunity waiver "cannot be implied but must be unequivocally expressed." *Native American Distrib.*, 546 F.3d at 1293.

In this case, the Nation's Compact provides only a limited waiver of immunity for "tort" and "prize" claims asserted by casino patrons. (Ex. 1 to Mot. to Dismiss, Doc. No. 8-1, 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 addition, the Compact expressly limits a "tort claim" to claims for "personal injury or property damage". (Ex. 1 to Mot. to Dismiss, Doc. No. 8-1 at pt. 6, §A.) Thus, Mr. Santana has no tort claim against the Nation that waives immunity under the Compact because his unjust enrichment claim does not sound in tort, and seeks purely economic losses (as does his later-proposed negligence claim).

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. Rather, Mr. Santana alleged he was induced to compulsively gamble by the Casino's advertising campaign. (Compl., Doc. No. 2-1 at ¶¶9, 17-18.) This is not a claim for a specific prize or refund as contemplated by the plain language of the Compact, and Mr. Santana even admitted to the district court he was not alleging a prize claim. (Supp. Obj. to Mot. to Dismiss, Doc. No. 14 at ¶7.)

The Compact only waived the Nation's immunity from suit for claims falling within the definition of a "tort" or "prize" claim. With no viable "tort" or prize" claim set forth in Mr. Santana's Complaint, the Compact, therefore, did not waive the Nation's immunity as to Mr. Santana's claim.

C. The district court properly held that patron claims authorized by the Compact may only be brought in tribal courts.

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, 1385-1386 (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 in the IGRA (or elsewhere in federal law) 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. Mr. Santana claims the Compact waived the Nation's immunity as to his suit, and bases his argument largely on two decisions by the Oklahoma Supreme Court in 2009, which held Oklahoma state courts are among the "courts of competent jurisdiction" having adjudicatory jurisdiction over tribal casino patron's claims.

The first of these cases, *Cossey v. Cherokee Nation Enterprises, LLC*, 2009 OK 6, 212 P.3d 447, was a fractured plurality decision that resulted in four different opinions. While five justices agreed in *Cossey* that state courts have adjudicatory jurisdiction under the Model Compact, 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, 212 P.3d at 469. 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, 212 P.3d at 482, and dissenting op. by Reif and Hargrave, JJ. at ¶5, 212 P.3d at 483. 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.

Mr. Santana's argument in this case hinges on the four-Justice plurality opinion in *Cossey*, which relied upon *Montana v United States*, 450 U.S. 544 (1981), and its progeny relating to "non-Indian jurisdiction", for the proposition that a non-Indian engaging in gaming in a tribal casino is *never* subject to tribal jurisdiction. *Montana* 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.[5]

[5] Mr. Santana also cites to *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306 (D.D.C. 2007), for the proposition that Indian casinos are not integral to tribal self-government, particularly when the majority of their employees and patrons are non-Indian. There are at least two distinct problems with this citation. First, this dicta from *San Manuel* conflicts the law of this circuit that tribal economic enterprises are entitled to sovereign immunity based on completely different factors relating to the tribe's intent in setting up the enterprise. *See generally Breakthrough Mgmt. Gp., Inc.*, 629 F.3d 1173.

Further, *San Manuel* involved the issue of federal regulatory authority, not state authority, over a tribal entity. As noted above, Congress is empowered to abrogate a tribe's immunity; *San Manuel*, therefore, involved a review of whether the federal labor laws at issue were with within the rule that "a general [federal] statute in terms applying to all persons includes Indians and their property interests." 475 F.3d at 1311 (quoting *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960)). This appeal involves interpretation of the Compact's limited waiver of immunity from private suit, an immunity which is otherwise presumed.

Completely missed by the four-Justice plurality (and Mr. Santana) is that 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). Clearly, entering a tribal-owned casino in Indian Country to engage in gaming is also a consensual, commercial relationship with an Indian tribe subject to *Montana*'s first exception. 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.

Apparently recognizing these complications, shortly after deciding *Cossey*, a majority of the Oklahoma Supreme Court held in the second case relied upon by Mr. Santana, *Griffith v. Choctaw Casino*, 2009 OK 51, 230 P.3d 488, that *any* state *or* tribal court (and, therefore, presumably any federal court) can retain jurisdiction

pursuant to the Model Compact as "courts of competent jurisdiction" over a non-Indian's tort claim against an Indian tribe or its casino enterprise.[6]

Ultimately, as noted above, federal law – not state law – determines whether a state may exercise jurisdiction over civil actions against Indians in Indian country. *Williams*, 358 U.S. at 217-18, 222. Thus, this Court is not bound to follow *Cossey* or *Griffith*.

Further, in *Cossey* and *Griffin*, the Oklahoma Supreme Court misinterpreted the federal law noted above that a tribal sovereign immunity waiver, including a waiver to be sued in a particular court, "must be 'clear'", *C & L Enters., Inc.,* 532 U.S. at 418, and "unequivocally expressed." *Native Am. Distrib.*, 546 F.3d at 1293. 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, 230 P.3d at 498.

The federal cases cited above, however, hold 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,

[6] A companion case, *Dye v. Choctaw Casino*, 2009 OK 52, 230 P.3d 507, reached the same holding.

federal or state civil ... jurisdiction" would be rendered **completely meaningless**. Similarly, as the district court pointed out in its opinion, other provisions in the Compact also point to exclusive tribal jurisdiction:

> For example, Part 6(A) of the Compact tasks the tribal enterprise with ensuring due process for patrons' tort claims. Part 6(A)(7) states that [the Nation's] rules and regulations govern [said] process. Further, promulgation of these rules and regulations is the province of the [Nation] and is expressly required by Part 5(A) of the Compact.

(Op. & Order, Doc. No. 22, at 9 (footnotes omitted)).

While not yet addressed by this Court, three different federal district judges in Oklahoma (including the district court's decision in this appeal) have now agreed with this analysis. The Nation recognizes these authorities are not binding on the Court, but emphasizes them to the Court because the familiarity of the local district judges with the Oklahoma Model Compact regime, and the unanimity of their decisions makes their rulings highly persuasive.

For instance, in a 2010 decision, the United States District Court for the Western District of Oklahoma 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).[7] In so ruling, the Western District reasoned the IGRA

[7] Ms. Muhammad voluntarily dismissed her appeal of this decision to this Court. (*See* Appeal No. 10-6266.)

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 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.

Further, Chief Judge Gregory Frizzell of the Northern District of Oklahoma recently issued another decision finding the Nation's Compact does not authorize patron suits to be brought in state court. *Harris v. Muscogee (Creek) Nation*, 2012 WL 2279340 (N.D. Okla. June 18, 2012). In this decision, Judge Frizzell agreed with the Nation's analysis questioning the validity of *Cossey* and *Griffith*, and also concurred with *Muhammad* and the district court's opinion in this case. *Id.* at *3-4. In so ruling, Judge Frizzell again noted the lack of an "unequivocal" and "clear" waiver in the Nation's Compact as to immunity from suit in the Oklahoma state courts. *Id.* at *3, 4-5.

In sum, the federal and state courts should defer to the jurisdiction of the Nation's courts. Mr. Santana has filed a suit directly against a sovereign Indian

tribe 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 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 the Oklahoma-based federal district courts have unanimously ruled to date in *Muhammad*, *Harris*, and this case, the Model Compact does not provide a "clear, unequivocal" waiver of the sovereign immunity of any Indian tribe in Oklahoma, including the Nation, such that casino claimants may sue tribes outside of tribal courts. Accordingly, the district court properly dismissed this case for lack of subject matter jurisdiction.

III. The district court's denial of Mr. Santana's motion to join the State of Oklahoma was correct.

A. Standard of review

"Rulings on the joinder of parties are reviewed for abuse of discretion." *Acevedo v. Allsup's Convenience Stores, Inc.,* 600 F.3d 516, 520 (5th Cir. 2010),

cited in Nasious v. City & County of Denver-Denver Sheriff's Dept. 415 Fed. Appx. 877, 882 (10th Cir. 2011).

B. The district court did not abuse its discretion in denying Mr. Santana's motion to join the State of Oklahoma as a necessary party.

Similar to the immunity issues raised by the Nation, any proposed claim in federal court by Mr. Santana against the State as an entity is barred by the Eleventh Amendment of the Constitution, unless the State has somehow waived that immunity in the context of this case. *E.g., Kentucky v. Graham*, 473 U.S. 159, 167 n.14, 105 S. Ct. 3099, 3106 n.14 (1985). Mr. Santana has never shown a waiver of this immunity (there is none), and has never explained how Federal Rule of Civil Procedure 19 would authorize him to join the State as a necessary party. The district court, therefore, did not abuse its discretion when it ruled it lacked subject matter jurisdiction to hear Mr. Santana's proposed claim against the State of Oklahoma, and that the joinder request was "flawed". (Op. & Order, Doc. No. 22 at 10-11.)

CONCLUSION

The Nation's removal of this case was proper because of the substantial federal question raised by Mr. Santana's Complaint, namely his assertion of State court adjudicatory authority over the Nation. Nonetheless, the state and federal

courts lacked subject matter jurisdiction over Mr. Santana's claim because (1) he never asserted a "tort" or "prize" claim within the limited waiver of sovereign immunity in the Compact and, alternatively, (2) the Compact does not authorize such claims to be brought outside of the Nation's courts. Finally, the district court clearly did not abuse its discretion in denying Mr. Santana's effort to join the State of Oklahoma, which enjoys Eleventh Amendment immunity, as an alleged necessary party to this case. Accordingly, the Court should affirm the judgment of the district court.

ORAL ARGUMENT STATEMENT

Oral argument is not necessary in this appeal. The facts of this case are simple, and Mr. Santana does not raise any novel legal question that would require the Court to hear oral argument to better understand his positions. Further, Mr. Santana is a habitual litigant against tribal casinos, and, while the merits of his underlying claims are not directly at issue in this appeal, those claims are frivolous. The Nation further notes that, while Mr. Santana requests oral argument before the Court (which would most likely occur in Denver), the additional expense that request will cause contradicts his *in forma pauperis* status in this appeal.

Respectfully Submitted,

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Certificate of Service

This is to certify that on the 25th day of June 2012, a true, correct, and exact copy of this Brief and Appendices was sent via regular mail to:

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