Case No. 12-5046

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Eddie Santana

vs.

Muscogee (Creek) Nation ex. rel.

River Spirit Casino

Appeal from United States District Court
for the Northern District of Oklahoma

Honorable James H. Payne Presiding

Case number 4:11-cv-00782-JHP -PJC

APPELLANT'S OPENING BRIEF

Eddie Santana
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STATEMENT OF RELATED CASES

There are no prior or related appeals in this case.

JURISDICTION STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331. On March 15, 2012, the district court entered an order granting the Defendant/Appellee Muscogee (Creek) Nation and River Spirit Casino's motion to dismiss thus terminating the case. Plaintiff-Appellant Eddie Santana timely filed his notice of appeal on March 16, 2012. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. In the Oklahoma Tribal Gaming Compact ("Compact") between Muscogee (Creek) Nation ("MCN") and the State of Oklahoma is the Appellee Muscogee (Creek) Nation's waiver of sovereign immunity from lawsuits in state, federal and tribal courts clear and unequivocal regarding tort claims?

2. Regarding Part 6 tort claims stated in the Oklahoma Compact, are state and federal courts a "court of competent jurisdiction" as to non-Indians?

3. Does patronizing an Indian casino satisfy the Montana Exceptions as laid out in *Montana v. United States*, 450 U.S. 544, 564 (1981), giving tribal courts jurisdiction over a non-Indian's Compact tort claim?

4. Can Muscogee (Creek) Nation unilaterally deny their Compact consent to suit by reason of denying the validity of a Compact tort claim if that claim meets all the filing deadlines in the Compact?

5. Are Oklahoma casino patrons referred to in the tort claim provision of the Compact intended third-party beneficiaries of the Compact, (with the same rights and defenses as the principal) since the Compact gives patrons the right to sue?

6. Should the district court have allowed the joining of the State of Oklahoma either as an indispensable party or permissive joining?

7. Can Oklahoma refuse to help Appellant Eddie Santana uphold the provisions of Part 6 as stated in Compact Part 13 since Oklahoma waived its Eleventh Amendment immunity for litigation purposes of the Compact?

STATEMENT OF THE CASE

I, the Plaintiff-Appellant am trying to prosecute a Compact tort claim against the Defendant-Appellee River Spirit Casino (an enterprise of Muscogee (Creek) Nation) but the U.S. district court for the Northern District of Oklahoma has ruled that jurisdiction over the action lies only in tribal court. Appellant Eddie Santana seeks from this Court a review of whether there is in fact jurisdiction and if the state of Oklahoma has a contractual duty to intervene in my Compact action.

STATEMENT OF THE FACTS

I, the Appellant Eddie Santana have a documented mental condition which has caused me to consistently lose incredible sums of money for the last eight or nine years in a row at the Appellee River Spirit Casino. This money came mostly from student loans which have to be repaid (to the Department of Education). When I realized my dilemma I filed a tort claim according to the Oklahoma Tribal Gaming Compact with the Appellee River Spirit Casino which was denied. I then timely filed an action in Tulsa County (Oklahoma) District Court (according to the Compact procedures). The action was removed to the U.S. District Court for the Northern District of Oklahoma.

PROCEDURAL BACKGROUND

Appellant Eddie Santana filed an action in Tulsa County District Court which was removed by Appellees River Spirit Casino and Muscogee (Creek) Nation ("Appellees") to U.S. District Court in the Northern District of Oklahoma ("the District Court"). The District Court granted Appellee's motion to dismiss for lack of jurisdiction. Appellant appeals from that decision.

SUMMARY OF THE ARGUMENT

My argument is that the district court should not have granted dismissal of my case for lack of subject matter jurisdiction because for non-Indians there is jurisdiction in federal or state court or both but not tribal court (because of Montana vs. United States). Also, according to Part 13(B) of the Compact the state of Oklahoma as a party to the Compact has a duty to defend any breaches of the Compact and Appellant Eddie Santana's tort claim in federal or state court.

ARGUMENT

I. By The Clear Language Of The Oklahoma Tribal Gaming Compact ("Compact") Muscogee (Creek) Nation ("MCN") Waives Its Sovereign Immunity Regarding Tort Claims Clearly And Unequivocally.

A. Standard of Review of Dismissal For Lack of Subject Matter Jurisdiction and Waiver of Immunity.

Questions of subject matter jurisdiction are reviewed de novo. Pillow v. Bechtel Const., Inc., 201 F.3d 1348, 1351 (11th Cir. 2000). The court gives no deference to the lower court's decision and applies the same standard as the district court. Whatley v. CNA Ins. Co., 189 F.3d 1310, 1313 (11th Cir. 1999).

Defendants Muskogee (Creek) Nation ("MCN") and River Spirit Casino waive their immunity according to the terms of the Compact and the reasons to be stated. The language in the Compact assuring compensation for casino torts is just empty words if MCN's insurance company just denies people and sends them on their way without a remedy. The Oklahoma Supreme Court has opined in relevant part, in *Griffith v. Choctaw Casino of Pocola, 2009 OK 51, 230 P.3d 488,* "... *¶16 As to suits on tort claims, the tort claimant is permitted to maintain a judicial proceeding for any cause arising from a tort claim subject to the limitations in Part 6(C), and the tribe consents to suit subject to the monetary limits and procedural conditions in*

Part 6(A) and Part 6(C). The tribe also consents to suit against the enterprise in a court of competent jurisdiction, the language at issue here. In other words, the tribe consents to suit two times. The first time the tribe consents to suit without any mention of a court in Part 6(A)(2), and the second time it consents to suit against its enterprise with mention of a court of competent jurisdiction in Part 6(C). Even if we were to find that our state courts are not competent to entertain a suit against the tribe's enterprise in Part 6(C), the tribe has also consented to be sued in Part 6(A)(2). We find no part in the compact where the tribe consents to suit "in tribal court only." It is noteworthy to point out that the court refers to the claims as "tort" claims, and not "personal injury" or "property" claims.

In *San Manuel Indian Bingo and Casino v. NLRB, 475 F.3d 1306, 1315 (D.C. Cir. 2007)*, the D.C. Circuit Court of Appeals held the operation of a casino is not a traditional attribute of self-government, but was virtually identical to purely commercial casinos across the United States. It also held that most of the casino's employees and customers were not tribal members and lived off the reservation. For those reasons, it held its sovereignty was not called into question because the tribe was not simply engaged in internal governance of its territory and members.

II. Regarding Part 6 Tort Claims Stated In The Oklahoma Compact, State And Federal Courts Have To Be "Courts Of Competent Jurisdiction" As To Non-Indians If Montana Exceptions Do Not Apply.

In the Oklahoma Tribal Gaming Compact ("Compact"), entered into in 2005 by Oklahoma and MCN, MCN give "limited consent" to suit in Part 6(A)(2) subject to the conditions in Part 6(C) as well. There are no other conditions to consent to suit in the Compact. The only real question is what the "court of competent jurisdiction" would be. Even the dissent in *Cossey v. Cherokee Nation Enterprises, LLC.,2009 OK 6*, states, " ¶*10 The gaming compact provides for notice of tort claims to the tribal compliance agency (TCA) or the tribal enterprise for investigation and approval or denial. It also specifically declares that the tribe consents to suit on tort claims. Part 6(A)(2) states that the "tribe consents to suit on a limited basis with respect to tort claims subject to the limitations set forth in this subsection" and further 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 this Compact, except as provided in subsections B and C of this Part." Part 6(A)(9) declares that "[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" under specified circumstances. This language in the gaming compact is far too plain for an Indian tribe to deny*

that it consents to suit on Indian-country arising tort claims at its casino...¶18 The dissent relies on Part 9 - "This compact shall not alter tribal, federal or state civil adjudicatory or criminal jurisdiction." - for the proposition that the tribal court is the only court with jurisdiction over the Indian tribe's activity on its tribal land. When the Legislature passed the referendum to send the State-Tribal Gaming Act to a vote of the people in 2004, three overarching principles determined the civil jurisdiction of a tribal court over alleged tortious injury to a non-tribal-member in Indian country: 1) the jurisdiction of the tribal court does not extend to non-members who come onto tribal land except as may be necessary to preserve the Indian tribe's right to self-governance or its right to control its internal relations, Montana v. U.S., 450 U.S. at 564 (1981); 2) tribal courts are not courts of general jurisdiction, Nevada v. Hicks, 533 U.S. at 367 (2001); and 3) an Indian tribe's attempt to exercise civil authority over activities of nonmembers is presumptively invalid. Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645, 659 (2001). The language in Part 9 safeguards these Indian law principles, but it does not diminish the unequivocal consent to suit on a tort claim against the Indian tribe or its casino in a court of competent jurisdiction in Part 6. "

In this case there is a statutory torts personal injury remedy for casino patrons as a result of Part 6 of the Oklahoma gaming compact. The only real problem is who has jurisdiction to hear the disputes, the Tribal, State or Federal governments. Until that is settled, then the Part 6 provision of the Compact is only a token clause with good intentions but little or no effect.

The Compact also states in Part 9 that the usual jurisdiction applies to the parties, so that should mean that under *Montana v. United States*, 450 U.S. 544 (1981) tribes would not have jurisdiction over non-Indians unless the Montana Exceptions apply. Therefore, at least for non-Indians, State and federal courts, not tribal court should have jurisdiction to hear a Compact tort claim case. This takes us back to the argument of whether there has been clear and unequivocal waiver of immunity by the Tribe. If there has been, Montana says without the existence of the "Exceptions" tribal court has no jurisdiction over non-Indians, so that would leave only state or federal court as competent jurisdictions (for Compact tort claims brought by non-Indians).

The U.S. Supreme Court decision Montana vs. United States and others make clear, there is a presumption against tribal court jurisdiction over non-Indians and, in the absence of a congressional delegation (a rare thing), the burden is on a tribe to show that the Montana exceptions, as

construed by the court, applies. In support of this statement the Oklahoma Supreme Court states in the dissent in *Cossey v. Cherokee Nation Enterprises, LLC.,2009 OK 6*, in relevant part, "...¶7 *Rather than set aside state interests in Indian-country gaming activities catering to the state's residents and visitors, IGRA authorizes the extension of state law over class III gaming activities in Indian country. Rather than set aside the rights of Oklahoma's residents and visitors to state-law protections while they patronize an Indian casino, IGRA allows the casino patrons to retain their state-law protections as provided in the tribal-state compact. There is no language in IGRA that prohibits the extension of state court jurisdiction over a tort claim arising out of activity at a tribal casino against the Indian tribe or its casino. Further, as the majority finds, there is no language in IGRA that explicitly or implicitly extends tribal court jurisdiction over non-consenting casino patrons.*"

III. Patronizing An Indian Casino Does Not Satisfy The Montana Exceptions As Laid Out In *Montana v. United States*, 450 U.S. 544 (1981), Therefore Tribal Courts Do Not Have Jurisdiction Over A Non-Indian's Compact Tort Claim.

Similar to the facts in Oklahoma Supreme Court ruling in *Cossey v. Cherokee Nation Enterprises, LLC., 2009 OK 6*, ___ *P.3d* ___, I the Appellant, visited the casino as an invitee on Indian lands. I entered into no

consensual relationship with the Muscogee (Creek) Nation "through commercial dealing, contracts, leases, or other arrangements" by entering the casino as a customer. The Oklahoma Tribal Gaming Compact represents a consensual relationship between the Tribe and the State, but I the Appellant was not a party to it. If the Nation cannot regulate what I do then it could not have jurisdiction according to the Montana Exceptions in *Montana v. United States, 450 U.S. 544 (1981)* and later *Plains Commerce bank v. Long Family Land & Cattle Co., Inc., 554 U.S. ___, 128 S.Ct. 2709, 2720, 171 L.Ed.2d 457, 76 (2008)*. Further, my presence at the casino on reservation lands was not conduct which "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." (*Montana, 450 U.S. at 566 (1981)*). Since neither Montana exception would apply to me by visiting the casino, jurisdiction for me as a non-Indian does not lie in tribal court.

A. The Montana Rule and Exceptions

In Montana v. United States, the U.S. Supreme Court held that the treaties between the United States and the Crow Tribe establishing the Tribe's Montana reservation did not give the Tribe authority to regulate non-Indian fishing on the Big Horn River, which flows through the heart of the Tribe's reservation. In rejecting the argument that the Tribe's inherent

sovereign authority supported its regulatory jurisdiction, the Court relied on *Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, (1978)* and *United States v. Wheeler, 435 U.S. 313, (1978)*, decisions in which the Court had described tribes' "diminished status as sovereigns" resulting from their incorporation into the United States and treaties with the federal government. Conceding the retention of certain inherent tribal powers, the Court denied that these went beyond "what is necessary to protect tribal self-government or to control internal relations." The power to regulate non-Indian activities, the Montana Court declared, was beyond the tribes' scope of authority, with two exceptions. First, even on fee lands within reservation boundaries, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." Second, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Consensual relationships supporting regulatory jurisdiction under the first Montana exception extend not only to the tribe but to any member of the tribe, and the scope of such relationships includes not only commercial

dealings, contracts, and leases, but also "other arrangements." Even in the absence of a consensual relationship, tribes could exercise regulatory jurisdiction under the second Montana exception provided only that the regulated conduct have "some direct effect" on the "economic security" or on the "health or welfare" of the tribe. These undefined, vague terms suggested a vast sphere of non-Indian conduct subject to tribal jurisdiction. The evolution of the Montana rule occurred in a series of decisions in which the Court, while never abandoning its 1981 decision, qualified, amended, and fundamentally reinterpreted it to severely limit tribal jurisdiction. In its 1989 decision in *Brendale v. Confederated Tribes, 492 U.S. 408 (1989)*, the Court, applying Montana, held that, ...A tribe's general interest in regulating reservation land use could not, according to the court, support its jurisdiction under the second Montana exception. The issue in *Strate v. A-1 Contractors, 520 U.S. 438 (1997)* was tribal court jurisdiction over claims brought by tribe members against a nonmember arising from a motor vehicle accident on the Fort Berthold reservation. First, the Court extended the Montana rule, previously applied to tribal regulatory authority, to a tribe's adjudicatory authority, holding that the scope of a tribe's adjudicatory authority could not exceed the scope of its regulatory authority. Second, the Court effectively held that the exceptions to the general Montana rule really weren't

exceptions at all. Conceding that "[r]ead in isolation, the Montana rule's second exception can be misperceived," the Court declared as the "key" to its proper application the underlying principle that a tribe's authority does not extend beyond what is necessary to protect tribal self-government or to control internal relations. In other words, circumstances that seemed to satisfy one of the two Montana exceptions still would not support tribal jurisdiction if the exercise of such jurisdiction would run afoul of the general Montana rule. Because the authority to adjudicate a motor vehicle dispute between individuals, even when a tribal member is involved, was unnecessary to the Tribe's right to govern its internal affairs, the Court concluded that jurisdiction was unwarranted. Two cases decided in 2001, *Atkinson Trading Co. v. Shirley - 532 U.S. 645 (2001)* and *Nevada v. Hicks, 533 U.S. 353 (2001)*, solidified the limitations on the Montana exceptions announced in Strate. In Atkinson, the Court held that acceptance of tribal governmental services by a nonmember-owned hotel, on fee land within reservation boundaries, did not constitute a consensual relationship within the first Montana exception, and that a consensual relationship with a tribe would support regulatory jurisdiction only if the regulation arose out of a consensual relationship. Hicks reinforced the post-Strate weakness of the second Montana exception, holding that tribal jurisdiction over a suit against

state wardens arising from a search and seizure on reservation land was not necessary to tribal self-governance and must, therefore, be rejected.

B. The Plains Commerce Bank Case.

In *Plains Commerce bank v. Long Family Land & Cattle Co., Inc., 554 U.S. ___, 128 S.Ct. 2709, 2720, 171 L.Ed.2d 457, 76 (2008)*, Plains Commerce Bank (the bank), a bank owned by non-Indians and located in Hoven, South Dakota, had a long-term relationship with the Long Family Land and Cattle Company (the company), a South Dakota corporation owned by Cheyenne River Sioux Tribe (CRST) members Ronnie and Lila Long and located on the Tribe's reservation. Beginning in 1989, the bank made various loans to the company guaranteed by the Bureau of Indian Affairs. Many of the bank's meetings with the company took place on the reservation. The non-Indian father of one of the company's owners pledged fee land within reservation boundaries to secure one of the loans. When the company defaulted, the bank foreclosed on the land but later entered into new agreements under which the company received additional loans and an option to buy back the foreclosed property within two years. When the company proved unable to exercise the option, the bank sold the land to non-Indians. The company sued the bank in the tribal court, alleging that the bank had discriminated against the company based on the race of its owners

when it offered terms to the non-Indian purchasers that were more favorable than those offered the company. The tribal court found for the company and the Longs and awarded damages of $750,000. In a later supplemental judgment, the court ordered the bank to give the company an option to purchase the parcel it still occupied on the terms offered to the non-Indian purchasers. The CRST Court of Appeals affirmed. The bank brought a federal action challenging the tribal court's jurisdiction. The district court, citing the first Montana exception, held that the bank's consensual relationship with the company supported tribal court jurisdiction. The Eighth Circuit Court of Appeals affirmed. On June 25, 2008, the U.S. Supreme Court reversed. While previous cases involving tribal adjudicatory jurisdiction had focused on the second Montana exception relating to conduct on fee lands that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," Plains Commerce Bank focused on the first Montana exception, which permits a tribe to exercise jurisdiction over "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." The company argued that the bank's longstanding consensual relationship and the reservation locus of the land and many of the parties' dealings supported tribal jurisdiction. In a

5-4 decision authored by Chief Justice Roberts, the Court held otherwise. The Court's decision relies on 1) a narrow construction of the "activities of nonmembers" for purpose of the first Montana exception, and 2) an emphasis on the tribe's diminished sovereignty and Montana's general rule against the exercise of sovereignty beyond what is necessary for self-government. With respect to the first point, according to Justice Roberts, the bank's activities to which the plaintiffs objected were nothing more than the bank's alleged discriminatory sale of fee land to a third party. Because a tribe has no authority to regulate the sale of fee lands, there could be no jurisdiction: "According to our precedents, 'a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction.'... We reaffirm that principle today and hold that the Tribal Court lacks jurisdiction to hear the Longs' discrimination claim because the Tribe lacks the civil authority to regulate the bank's sale of its fee land." With respect to diminished sovereignty, Justice Roberts emphasized the primacy of Montana's general rule over its exceptions: "[T]he tribes have, by virtue of their incorporation into the American republic, lost the right of governing persons within their limits except themselves." Any assertion of tribal jurisdiction must be justified by its effect on tribal self-rule: "The logic of Montana is that certain activities on non-Indian fee land (say, a business enterprise employing tribal

members) or certain uses (say, commercial development) may intrude on the internal relations of the Tribe or threaten tribal self-rule. To the extent that they do, such activities or land uses may be regulated." While acknowledging that "noxious uses" of fee land might meet the standard, the Court held that a mere sale does not: "Once the land has been sold in fee simple to non-Indians and passed beyond the tribe's immediate control, the mere resale of that land works no additional intrusion on tribal relations or self-government." Although the key holding in the Court's decision was the lack of tribal jurisdiction over fee land, Justice Roberts took the opportunity to narrow the Montana exceptions in other respects. Implicit in the first Montana exception is the notion that the described "consensual relationships" with the tribe or its members per se satisfy the principal rule, that is, they are relationships that affect the tribe's right of self-government to a degree sufficient to support tribal jurisdiction. Justice Roberts suggested a stricter consent requirement: "Indian courts differ from traditional American courts in a number of significant respects.... And nonmembers have no part in tribal government – they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may fairly be imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. Even then, the regulation

must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." While conceding that the bank "may reasonably have anticipated that its various commercial dealings with the Longs could trigger tribal authority to regulate those transactions," a question the Court expressly declined to decide, the Court insisted that there is no reason the Bank should have anticipated that its general business dealings with respondents would permit the Tribe to regulate the Bank's sale of land it owned in fee simple." In dicta, Justice Roberts also suggested a stricter standard for applying the second Montana exception, noting that "[t]he conduct must imperil the subsistence of the tribal community.... One commentator has noted that 'the elevated threshold for application of the second Montana exception suggests that tribal power must be necessary to avert catastrophic consequences.'" The distance between the "catastrophic consequences" standard proposed by Justice Roberts and the "some direct effect" language used in the Montana case is obvious.

C. Principles Governing a Tribe's Jurisdiction Over Nonmembers Today.

Justice Stewart's 1981 formulation of the Montana exceptions does not aptly describe the rules that the U.S. Supreme Court actually applies to

matters of tribal jurisdiction today. The following principles are nonetheless offered as a rough summary of the current law, based on the Plains Commerce Bank case and the antecedent Strate, Atkinson, and Hicks decisions:

For purposes of the first Montana exception, there must be a nexus between the non-Indian's consensual relation with a tribe or its members and the conduct being regulated or adjudicated. There is no tribal counterpart to state court "general jurisdiction" based on systematic contacts unrelated to the dispute at bar. Consensual relationships with a tribe or tribe member squarely within the first Montana exception may nonetheless be insufficient to establish tribal jurisdiction in the absence of an identified sovereignty interest relating to self-governance. The tribe's general interest in protecting the interests of its members does not satisfy this sovereignty interest requirement.

A tribe's right to regulate a reservation-based business enterprise that employs tribe members, a reservation-based commercial development, or other nonmember activity depends on whether these activities "intrude on internal relations" or "threaten tribal self-rule."

Whether a non-Indian "has consented either expressly or by his actions" to tribal jurisdiction is relevant to the court's authority to exercise

its jurisdiction. The reasonableness of a non-Indian's anticipation of tribal regulation is pertinent to this inquiry. It follows that if the tribe enacts and publishes commercial laws governing a non-Indian's dealings with members, the non-Indian might reasonably anticipate being regulated by the tribe, thus satisfying the Plains Commerce Bank "consent by action" requirement and supporting the case for tribal jurisdiction.

For a tribe to establish jurisdiction over non-Indians on fee land under the second Montana exception, it will have to show that the conduct being regulated imperils the subsistence of the tribal community. As the Strate decision illustrates, a tribe's desire to protect its members from non-Indians' reckless operation of motor vehicles on the reservation will not meet this standard.

Although a tribe's jurisdiction over non-Indians on trust land is broader than on fee lands, trust lands over which a tribe has ceded a landowner's right of control, for example, by granting a right of way, are the equivalents of fee lands.

IV. Muscogee (Creek) Nation Should Not Be Unilaterally Able To Deny Their Compact Consent To Suit By Reason Of Denying The Validity Of A Casino Patron's Compact Tort Claim If That Tort Claim Meets All The Filing Deadlines of The Compact

The Tribe waives its immunity expressly or implicitly to suit in three or four places in the Compact: Part 6(A)(2); Part 6(B) (although this part refers to Part 6(C) as well); Part 6(C), and in Part 12, where the Tribe implicitly, clearly and unequivocally waives its sovereign immunity [to suit] when it agrees to arbitration and possible litigation. (See *C & L Enterprises, Inc. V. Citizen Band Potawatomi Indian Tribe Of Oklahoma, 532 U.S. 411 (2001)).* Part 6(A) of the Compact states in relevant part, *"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…"* It further states in Part 6(C) of the types of tort claims allowed, "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; provided that such consent shall be subject to the following additional conditions and limitations: 1. For tort claims, consent to suit is granted only to the extent

such claim or any award or judgment rendered thereon does not exceed the limit of liability." I have previously averred and affirmed that I have fulfilled all requirements of filing a tort claim and further that my claim of $49,000.00 does not exceed the $ 250,000.00 liability limit in the Compact. In Part 6 the Tribe mentions "a limited consent to suit," and then, according to the Compact, describes the conditions of the limitations, according to the "plain language" of the Compact as set forth in Part 6(C) of the Compact. Nowhere in the Compact does it state, "limited consent to suit means if Tribe feels patrons have a valid claim or not." Further, nowhere in the Compact, definitions, Part 6 or otherwise does it expressly define a valid tort claim. It does say in the Compact, though, that if the [tort] claim or prize claim lines up with time deadlines, and if the claim amount is within the claim limits (Part 6(C)) then it should be assumed to be a valid claim. Further, just because the Tribe's insurance company does not approve a tort claim does not invalidate a tort (personal injury) claim. As a matter of fact, that is why so many tort claim cases were filed; because the tribal insurance company initially denied the claimants' tort claims. In Cossey, supra, it states, *"¶4 CNE contends the Cherokee Nation tribal court is the only court of competent jurisdiction to hear a claim which arose in Indian Country against the Tribe... CNE does not dispute the fact that the Tribe consented*

to suit under the Compact with respect to tort claims but argues that there are limitations on that consent and on the extent of its liability." So basically the Tribe consents to suit, but only in a court of competent jurisdiction, and that's fine. But still, the Compact does not say that the consent is not valid without a valid tort claim. I believe that whether my claim is a Compact tort or not is not just an arbitrary assertion the Nation can make but a question of interpretation of the Compact and a determination of the courts. Unless it is shown that my tort claim was not properly or timely filed then MCN has waived immunity and a motion to dismiss should be denied or at best tabled until the question of whether I properly filed my claim is answered.

V. Oklahoma Casino Patrons Referred To In The Tort Claim Provision Of The Compact Are Intended Third-Party Beneficiaries Of The Compact (With The Same Rights And Defenses As The Principal) Since The Compact Gives Patrons The Right To Sue.

I contend that because of the negotiation of the contracting parties, patrons of the casino, Indian and non-Indian alike are intended third-party beneficiaries of the Compact between the Nation and Oklahoma not only because of Part 6, but because Part 6 talks about administrative remedies before taking any dispute to court. So injured patrons would be acting in the place of one of the parties to the Compact in enforcing their Part 6 remedies

for harm. (And just a hint, if we weren't supposed to be able to go to court if we need to, then the idea shouldn't be 'put out there').

VI. The District Court Should Have Allowed The Joining Of The State Of Oklahoma Either As An Indispensable Party Or In A Permissive Joinder.

If for some reason casino patrons are not meant to be intended third-party beneficiaries of the Oklahoma-Tribe Compact then patrons wouldn't have standing to effectively enforce the Compact in which case one would need a party to the Compact (in this case State of Oklahoma) to help the injured patron enforce the Compact.

VII. Oklahoma Should Not Be Able To Refuse To Help Appellant Eddie Santana Uphold The Provisions Of Part 6 In The Compact Since Oklahoma Waived Its Eleventh Amendment Immunity For Litigation Purposes Of The Compact, In Part 13.

Part 13(B) of the Compact states, "Each party hereto agrees to defend the validity of this Compact and the legislation in which it is embodied. This Compact shall constitute a binding agreement between the parties and shall survive any repeal or amendment of the State-Tribal Gaming Act." Not only MCN, but Oklahoma has a duty to uphold the Compact, not only because it is codified in Oklahoma law, Oklahoma agreed to uphold and enforce the Compact. Oklahoma should not be able to turn a deaf ear or blind eye to my

(Appellant's) defense of terms of the Compact just because it does not directly affect them. Just as the United States would intervene for certain Indian cases Oklahoma should intervene for its citizens in Compact cases if the need arises or the citizen requests it. The parties' sovereign immunities should not be applicable regarding the enforcement of Compact terms as per the Compact.

CONCLUSION

In a recent Opinion and Order of a Northern District Of Oklahoma case, *Oklahoma vs. Tiger Hobia, et. al., case no. 12-CV-054-GKF-TLW,* (WD OK 2012), the issues in this case have been touched upon. In the State of Oklahoma's Complaint against Tiger Hobia and Kialegee Tribal Town Oklahoma states in relevant part," the State has an interest in protecting its citizens from unauthorized and inappropriate gaming operations…" The "citizens" indirect interest which Oklahoma allegedly so diligently protecting from a "future casino" is secondary to the direct interest of a citizen who actually has a claim against a real and present casino, which the district court said "it knows of no law which says Oklahoma must be a party to a casino tort claim (paraphrased). Whether I am an intended third-party beneficiary or not the U.S. district court should have subject matter jurisdiction over my Compact tort claim pursuant to 25 U.S.C. § 2710(d)(7). The Opinion and Order states, "*Additionally, Congress has abrogated tribal immunity from suits involving gaming activities. IGRA explicitly provides that the United States district courts shall have jurisdiction over "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into" pursuant to the IGRA. 25 U.S.C. §*

2710(d)(7)(A)(ii). See also Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S 751, 758 (1998) (citing 25 U.S.C. § 2710(d)(7)(A)(ii) as an example of Congressional restrictions of tribal immunity).

Upon examining the district court's opinion and reasoning in this case, I, the Appellant, made certain observations and contentions which I described in my argument in this brief. Among the observations and contentions are that the district court (in its written opinion) expounded on its basis of jurisdiction, the removal action. Then the district court states that the defendant Tribe did not waive its immunity to suit in State court. The issue at bar should have been whether the district court itself had subject matter jurisdiction, not State court, since the removal action was not contested. (Although if the Tenth Circuit decides on State court jurisdiction I would certainly welcome that ruling as well). The district court continues to use State court jurisdiction as the basis of deciding the defendant Tribe's motion to dismiss (district court opinion, at page 7). The district court makes it clear that State courts are not a court of competent jurisdiction as mentioned in the Compact. The district court further states that, "*Plaintiff cannot establish jurisdiction of the State or Federal courts.*" I believe the Tribe's consent to suit in the Compact establishes jurisdiction in the federal

courts and tribal court, if not in State court. The district court did not consider the Montana Exceptions (Montana vs. United States) in deciding whether tribal court was a court of competent jurisdiction [over non-Indians], when it relied on the civil jurisdiction shift allowed by the IGRA. So if we're allowing tribal jurisdiction where none existed before because of the IGRA and Compact, then the State should have jurisdiction as well. Otherwise it is a very convenient double-standard. Even if the Tribe's consent to suit is not valid in State court, it must be valid in federal court if it pertains to casino tort and prize claims, since Congress has given federal courts plenary jurisdiction over Tribal affairs. The defendant Tribe uses Part 9 of the Compact to affirm its sovereign rights, which Part 9 also grants jurisdiction to federal court with the consent to suit given in the Compact. The Compact is set to run until the year 2020, but the parties are free to end and renegotiate the Compact before then. Other States have put in their Compacts that the court of competent jurisdiction for casino tort claims will be tribal court only. Oklahoma could have done the same. Casino patrons had no part in the Compact negotiation process so had no say in what court tort claims were to be handled if necessary. If the district court and Tribe are so adamant that "court of competent jurisdiction" refers to the Tribe only,

and if this is so important and dear to the Tribe, one would think it would have been spelled out in no uncertain terms in the Compact.

I believe the Tribe did waive immunity for Compact purposes, and since the Montana Exceptions are not met and Tribal Court has no jurisdiction (concerning a non-Indian) in this case the case should proceed in the district court if not remanded back to Oklahoma state court.

The State of Oklahoma, under its interest in the Compact and under Part 13 should be able to be joined as a party.

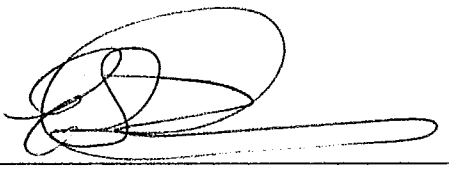
STATEMENT REGARDING ORAL ARGUMENT

Pro Se Appellant Eddie Santana requests oral argument. This is a case with issues not yet heard before the United States Supreme Court regarding Tribal Gaming Compacts and I believe the Court's disposition of this case would be aided by oral presentation to this Court.

CERTIFICATION OF COMPLIANCE

I, the Appellant Eddie Santana hereby certify that I have complied with the appellate rules and this brief has 6,719 words.

Dated: May 21, 2012



Eddie Santana

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Eddie Santana, Appellant, vs. Muscogee (Creek) Nation ex. rel. River Spirit Casino, Defendants.	

CERTIFICATE OF HAND DELIVERY

I, Eddie Santana hereby certify that on May 22, 2012 I personally hand delivered a copy of my brief and appendix of record to:

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