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

TODD MARTIN, an individual,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 13-cv-143-CVE-FHM**
	)	
THE QUAPAW TRIBE OF OKLAHOMA,	)	**Hon. Claire V. Eagan**
	)	
Defendant.	)	

REPLY OF THE DEFENDANT IN SUPPORT OF MOTION TO DISMISS

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THE QUAPAW TRIBE OF OKLAHOMA
(O-GAH-PAH)

May 7, 2013

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The defendant, the Quapaw Tribe of Oklahoma (O-Gah-Pah) (the "Tribe"), hereby files this reply in support of its motion to dismiss and brief in support (Docs. 8 & 9).

INTRODUCTION & SUMMARY

As revealed by his response to the motion to dismiss, the plaintiff, Todd Martin ("Martin"), is attempting to pursue a tort claim against an Indian tribe without following the mandatory legal processes for doing so. Most notably, Martin has sued the Quapaw Tribe directly, even though no waiver of sovereign immunity exists for such a claim. The tribal-state gaming compact between the Tribe and the State of Oklahoma (the "Compact") makes plain that the only such waiver extends to tort suits against the Tribe's "gaming enterprise." In response, Martin offers no legally recognized basis for such a suit, and no excuse for his failure to name the gaming enterprise, which was plainly identified on the notice of the denial of his claim.

Similarly, Martin asserts a number of reasons why he believes a tribal court might not fairly adjudicate his claim, but none have any legal validity. Prevailing federal law has interpreted the Compact waiver to extend *exclusively* to tribal courts, and Martin has provided no basis for the Court to diverge from these decisions, including his challenge to tribal court jury procedures. The doctrines of tribal exhaustion and abstention preclude a preemptive challenge to tribal court procedure. This case should be dismissed in its entirety.

ARGUMENT & AUTHORITIES

I. THE QUAPAW TRIBE, AS THE ONLY NAMED DEFENDANT, IS IMMUNE FROM SUIT ON THE CLAIMS IN THIS CASE

Martin's response does not dispute the applicability of tribal sovereign immunity to this case, but instead relies on various misconstructions of the Compact. Tribal-state gaming

compacts fundamentally are a form of contract and are to be interpreted according to their terms.[1] Where, as here, a contract contains precise definitions that are not susceptible to varying interpretations, they are unambiguous as a matter of law, and those terms must be given effect. *See Gillogly v. Gen. Elec. Capital Assurance Co.* 430 F.3d 1284, 1290 (10th Cir. 2005). Contrary to Martin's contentions, the Compact unambiguously delineates the strict limitations attached to the waiver of sovereign immunity granted for tort claims. In other words, the waiver of immunity in the Compact is subject to limitations that must be followed.

In particular, Part 6(C) of the Compact limits suits to those brought "against the enterprise." Part 3 provides the dispositive definition of the entity for which the limited waiver applies: The term "Enterprise" is defined to mean "the tribe *or* the tribal agency or section of tribal management *with direct responsibility for the conduct of covered games*." Okla. Stat. 3A, § 281, Part 3(13) (emphasis added). Martin misconstrues this definition by arguing that it includes not only a tribe itself *but also* any tribal enterprise that conducts gaming. This argument ignores the unambiguous use of the disjunctive "or" when defining the "gaming enterprise," and implies that the definition is inclusive of the enterprise *and* the Tribe itself. The argument is contrary to the plain language of the definition of the entity for which immunity is waived.

Further, Martin mischaracterizes the Tribe's positions in two primary respects. The Tribe has not, as Martin contends, asserted that its gaming enterprise has not waived its immunity pursuant to the Compact. The Tribe has also not argued that "the entity that is operating the casino cannot be held liable because it is a 'governmental subdivision' of the tribe and, as such, it is immune from suit." To the contrary, the Tribe's arguments are faithful to the language of

[1] *See Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1558 (10th Cir. 1997); *Texas v. New Mexico*, 482 U.S. 124, 128, 107 S. Ct. 2279, 2283 (1987).

the Compact, which provides a limited waiver of immunity for claims against either a tribe or a tribal enterprise, whichever entity is operating the gaming enterprise and which is also carrying the required liability insurance.

By recharacterizing the Tribe's arguments, Martin seeks to obscure his own failure to follow the requirements of the Compact. Under the bargain the Oklahoma Indian tribes struck with the state in the Compact, the tribes agreed to provide limited waivers of immunity to ensure that gaming patrons had available adequate remedies for injuries and property damage sustained in Indian country. However, the waiver was made valid only if such claims are prosecuted in tribal courts, and only if they are pursued against the tribal entity that carries the liability insurance required under the Compact.[2] In some instances the entity conducting gaming and carrying the required insurance may be the tribe itself, and in others—as here—it is a separate entity established by the tribe. The notice of the denial of Martin's tort claim plainly identified the responsible entity as the Downstream Development Authority of the Quapaw Tribe of Oklahoma (O-Gah-Pah) (the "Authority"). (Doc. 14-1, at 3.)

The Authority is undisputedly the "gaming enterprise" for purposes of the Compact's limited waiver of sovereign immunity. (Doc. 9, at 2; Doc. 9-1, at 2-3.) By application of the unambiguous language of the Compact, immunity has been waived only for the enterprise and such does not extent to the Tribe itself.[3] Thus, regardless of any other facts presented in this

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[2] Okla. Stat. tit. 3A, § 281 Part 6(C)(1). The referenced "limit of liability" is defined in Part 6(A).

[3] The Tribe is the signatory to the Compact because it is the tribal government, and thus the entity that has the authority to grant limited waivers of immunity for its arms and subdivisions. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760, 118 S. Ct. 1700, 1705 (1998) (noting sovereign immunity belongs to a tribe and extends to its business enterprises). Thus any waiver of that immunity is for the Tribe itself to grant and, in this case, it

case, there is no means by which a suit can be maintained against the Tribe.[4]

II. THE APPLICABLE WAIVER OF TRIBAL SOVEREIGN IMMUNITY WITH RESPECT TO THE TRIBE'S GAMING ENTERPRISE IS STRICTLY LIMITED TO EXCLUSIVE TRIBAL COURT JURISDICTION

Even if Martin had sued the correct entity, he still did not follow the requirements of the Compact in a timely manner. The Compact's immunity waiver is expressly applicable only to actions brought "in a court of competent jurisdiction[,]" which has been adjudicated to mean solely a tribal court.[5] This result was based, in part, on Part 9 of the Compact, which states that "[t]his Compact shall not alter tribal, federal or state civil adjudicatory or criminal jurisdiction" and the established preexisting law that tribal courts have exclusive jurisdiction over claims against tribal enterprises for claims arising in Indian country. *See, e.g., Williams v. Lee*, 358 U.S.

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has done so only for the Authority, subject to the express limitations stated in the Compact. Martin's argument that the waiver necessarily extends to the Tribe itself, notwithstanding the limitations on such waiver, is unavailing. The waiver is expressly limited to the Authority as the "gaming enterprise" defined in the Compact.

[4] Martin's additional argument and citation concerning disregard of the corporate veil is not germane to this case. The relevant doctrine is tribal sovereign immunity, which is an absolute bar to suit absent a waiver. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 1677 (1978); *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509, 111 S. Ct. 905, 909 (1991). Waivers of tribal sovereign immunity cannot be implied, but rather must be "unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58-59, 98 S. Ct. at 1677; *see also Seneca-Cayuga Tribe of Okla. v. State of Okla.*, 874 F.2d 709, 715 (10th Cir. 1989) (immunity waivers are strictly construed and cannot be implied). The Compact provides the only waiver of immunity in this case, and it is expressly and unequivocally limited to suits against the gaming enterprise.

[5] *See Santana v. Muscogee (Creek) Nation ex rel. River Spirit Casino*, No. 11-CV-782-JHP-PJC, 2012 WL 896243 (N.D. Okla., Mar. 15, 2012), *aff'd*, No. 12-5046, 2013 WL 323223 (10th Cir. Jan. 29, 2013); *Harris v. Muscogee (Creek) Nation*, No. 11-CV-654-GKF-FHM, 2012 WL 2279340, *4 (N.D. Okla., June 18, 2012); *Muhammad v. Comanche Nation Casino*, No. CIV-09-968-D, 2010 WL 4365568 (W.D. Okla. Oct. 27, 2010). *See also Choctaw Nation of Okla. v. Okla.*, 724 F. Supp. 2d 1182, 1187 (W.D. Okla. 2010); *Choctaw Nation of Okla. v. State of Okla.*, No. CIV-10-50-W, 2010, 2010 WL 5798663, *5 (W.D. Okla. June 29, 2010); *Comanche Nation et al. v. State of Okla.*, No. CIV-10-1339-W (W.D. Okla., Dec. 28, 2010).

217, 79 S. Ct. 269 (1959). Again, as in all instances in which a waiver of governmental immunity is necessary for a lawsuit to proceed, the Compact places requirements on the waiver that a tort claimant must follow.

Exclusive tribal court jurisdiction is a requirement not only of the Compact, but also of Quapaw law. Martin initiated his tort claim by properly acknowledging the tort provisions of the Quapaw Tribal Gaming Ordinance, Quapaw Code tit. 17, § 24. (Doc. 14-2.) His claim was then timely processed and denied based on the administrator's determination that the Resort was not liable for the injury. (Doc. 14-1, at 3.) On the condition that all other requirements are satisfied (including all requirements of the Compact, which are expressly adopted), the ordinance provides that the Tribal Court has exclusive jurisdiction to adjudicate compact-based tort claims. *See id*. at § 24(A)(2). The Ordinance makes clear that "[a]ll claims for personal injury or property damage arising from or relating to the operation of any Tribal Gaming Operation shall be resolved exclusively in the Quapaw Tribal Court, and in no other venue or locale." *Id*. at § 24(A)(1).

Having invoked the Tribe's jurisdiction over tort claims, Martin cannot now avoid the remainder of that mandatory process, which requires that suit be filed in *tribal court*. Martin, in fact, filed an identical action in the tribal court. This case should be dismissed, and the Quapaw courts should be allowed to proceed on adjudicating Martin's claim.

III. THE DOCTRINES OF TRIBAL EXHAUSTION AND ABSTENTION PRECLUDE A PREEMPTIVE CHALLENGE TO TRIBAL COURT PROCEDURE

Recognizing the importance of tribal courts to the federal policy of self-governance and self-determination, the Supreme Court has mandated the application of two doctrines in cases such as this—tribal exhaustion and abstention. In this case, Martin has sought to avoid exclusive

tribal court jurisdiction by prematurely challenging the tribal court's jury procedure. Indeed, the Supreme Court has rejected arguments virtually identical to those Martin has made, which seek an exception to tribal jurisdiction through a preemptive challenge to the competence or speculative bias of a tribal court. Since Martin has yet to pursue his claim in tribal court, he is precluded from challenging tribal court procedures.

The doctrines of tribal exhaustion and abstention have been universally accepted and applied since the Supreme Court's landmark rulings in *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845, 105 S. Ct. 2447 (1985), and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 107 S. Ct. 971 (1987). In *LaPlante*, the Court held that it had

> "repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government. This policy reflects the fact that Indian tribes retain 'attributes of sovereignty over both their members and their territory,' to the extent that sovereignty has not been withdrawn by federal statute or treaty.
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> . . . .
>
> Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development. Although the criminal jurisdiction of the tribal courts is subject to substantial federal limitation, their civil jurisdiction is not similarly restricted. If state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law."

Id. 480 U.S. at 14-15, 107 S. Ct. at 975-76. The Tenth Circuit has also recognized and applied these doctrines, holding that "as a matter of comity, a federal court should not exercise jurisdiction over cases arising under its federal question or diversity jurisdiction, if those cases are subject to tribal jurisdiction, at least until the parties have exhausted their tribal remedies."[6]

[6] The court further outlined the three federal policy concerns behind the tribal exhaustion rule: "(1) to further the congressional policy of supporting tribal self government; (2) to promote the orderly administration of justice; and (3) to obtain the benefits of tribal expertise." *Id.* at 1042 (quoting *Zah*, 5 F.3d at 1377-78, and citing *Nat'l Farmers Union*, 471

United States v. Tsosie, 92 F.3d 1037, 1041 (10th Cir. 1996) (quoting *Texaco Inc. v. Zah*, 5 F.3d 1374, 1376 (10th Cir. 1993)).

The Supreme Court has also rejected the challenge Martin makes to the competence of tribal court procedures. In *LaPlante*, the Court noted that

> "[p]etitioner also contends that the policies underlying the grant of diversity jurisdiction—protection against local bias and incompetence—justify the exercise of federal jurisdiction in this case. We have rejected similar attacks on tribal court jurisdiction in the past. The alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement established in *National Farmers Union*, and would be contrary to the congressional policy promoting the development of tribal courts."

480 U.S. at 18-19, 107 S. Ct. at 978 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. at 65 & n.21, 98 S. Ct. at 1680 & n.21). Moreover, the Supreme Court recognized that such challenges appropriately are considered as claims under the Indian Civil Rights Act, 25 U.S.C. § 1302 (the "ICRA"), which guarantees certain basic rights to individuals within tribal jurisdiction. *See id.* 480 U.S. at 19, 107 S. Ct. at 978; *see also* 25 U.S.C. § 1302(a)(8) & (10).

Notably, review of a preemptive challenge to tribal court procedure in the federal courts is precluded not only by tribal exhaustion and abstention, as described above, but would also be precluded in this case for lack of ripeness or justiciability. In *McCurdy v. Steele*, 506 F.2d 653, 656 (10th Cir. 1975), a challenge to tribal election procedures under the ICRA was brought in a federal court prior to any attempt to pursue tribal remedies. The court held that a challenge under the ICRA in federal court was "premature" because "[t]he matter sought to be brought

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U.S. at 856, 105 S. Ct. at 2454). While affirming that tribal court jurisdiction is a federal question, the Supreme Court in *Iowa Mutual* found that "considerations of comity direct that tribal remedies be exhausted before the question [of whether a tribal court has jurisdiction over a matter] is addressed by the District Court." *Iowa Mutual*, 490 U.S. at 15 (discussing *Nat'l Farmers Union Ins. Cos.*)). "Where comity concerns are present, '[j]urisdiction presumptively lies in the tribal court . . . unless Congress has expressly limited that jurisdiction.'" *Tsosie*, 92 F.3d at 1041 (quoting *Smith v. Moffett*, 947 F.2d 442, 444 (10th Cir. 1991)).

before the court prior to a final tribal decision does not present a controversy in justiciable form." *Id*. (citing *Flast v. Cohen*, 392 U.S. 83, 94-95, 88 S. Ct. 1942, 1949-50 (1968)). A court "cannot or should not make a decision in the absence of a clear case or controversy." *Id*. (citing *United States v. Fruehauf*, 365 U.S. 146, 155-57, 81 S. Ct. 547, 553-54 (1961), and *Rescue Army v. Municipal Court*, 331 U.S. 549, 568, 67 S. Ct. 1409, 1419 (1947)).

The same result is required in this case because Martin cannot preemptively challenge the tribal court's jury procedure prior to a tribal court adjudication. The doctrines of tribal exhaustion and abstention require that the tribal court be allowed first to adjudicate a matter. Further, having yet to subject himself to any tribal court processes, Martin has not presented a justiciable controversy under the ICRA. Martin has failed to establish any exception to this law, and this case should be dismissed.

IV. MARTIN'S "DUE PROCESS" ARGUMENTS ARE MERITLESS AND PROVIDE NO BASIS FOR AN EXCEPTION TO EXCLUSIVE TRIBAL COURT JURISDICTION

Not only is Martin's challenge to the tribal court's jury procedure not justiciable and subject to tribal exhaustion, but it also fails to state even a theoretical violation of due process. Martin's challenge is essentially a claim that the tribal court's jury procedure could violate the due process and jury requirements of the ICRA. The courts, however, have noted that in civil cases, nothing in the ICRA requires a jury at all, nor is the constitutional jury requirement applicable in general in suits against a sovereign.

Martin's argument purports to rest on the Compact's requirement that patrons be afforded "due process . . . in seeking and receiving just and reasonable compensation for a tort claim[.]" Okla. Stat. 3A, § 281, Part 6(A). But the Compact lists the necessary requirements for "due process," and none of its provisions require that a jury decide tort claims. Further, the ICRA

requires a jury *only* in criminal cases "punishable by imprisonment[.]" 25 U.S.C. § 1302(a)(10). In this regard, it has been noted that while ICRA "tracks to some extent the language of the United States Constitution," it "does not necessarily mean that the terms 'due process' or 'equal protection' as used in the Act carry their full constitutional impact." *McCurdy*, 506 F.2d at 655.

In *Lohnes v. Cloud*, 366 F. Supp. 619, 620-21 (D.N.D. 1973), a claimant argued that a tribal court, whose rules stated that civil trials would be "without a jury" violated the ICRA and the Seventh Amendment. The court examined congressional enactment of the ICRA and held that it could not "find a Congressional intent to impose all the procedural and substantive safeguards of a federal forum upon a tribal court." *Id*. at 621. Since the ICRA did not expressly impose the Seventh Amendment's right to a jury trial in civil cases to tribal courts, such is not required.

Furthermore, the general law holds the Seventh Amendment inapplicable to claims against a sovereign government.[7] The reason is that suits against a sovereign were "unknown at common law[,]" including trials by jury, and "[h]ence, a jury trial need not be accorded where a sovereign waives its immunity[.]" *Sparks v. Wyeth Labs., Inc.*, 431 F. Supp. 411, 418 (W.D. Okla. 1977). Thus, Martin has necessarily failed to establish a denial of due process based on a perceived deficiency in the tribal court's jury procedure, because a jury is not required.

Martin's additional challenge—that tribal members have "a clear financial interest" in the litigation and are therefore biased and "incompetent" to serve as jurors—has no basis in law or

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[7] *See Osborn v. Haley*, 549 U.S. 225, 252, 127 S. Ct. 881, 900 (2007) (noting "Seventh Amendment, which preserves the right to a jury trial in suits at common law . . . does not apply to proceedings against the sovereign"); *Holmes v. Potter*, 384 F.3d 356, 362 (7th Cir. 2004) (holding jury right exists only where expressly part of the sovereign's consent to be sued); *Johnson v. City of Shorewood*, 360 F.3d 810, 816 (8th Cir. 2004) (holding lack of jury right "derives from the sovereign power . . . to limit when and how it may be sued").

fact. From a legal standpoint, and with respect to a tribe or tribal subdivision as a defendant, this argument has been rejected in nearly identical circumstances.[8] Only a "direct" financial interest can preclude a juror from service, and, as outlined above, a citizen's interest in the sovereign is too remote to require disqualification.[9] *See Vasey v. Martin Marietta Corp.*, 29 F.3d 1460, 1466-68 (10th Cir. 1994). Moreover, the *Vasey* decision evidences the fact-intensive nature of the analysis, which underscores the prematurity of Martin's challenge to a theoretical juror panel. Martin must first pursue his tribal court remedy, including the applicable jury process, before a federal court can review that process.

CONCLUSION

Martin has established no basis for divergence from the unambiguous terms of the Compact which require, in this case, dismissal of his claim. Martin's broader challenge to tribal court jury procedures is premature and otherwise lacks merit. For the reasons set forth herein, the Court should grant the Tribe's motion to dismiss.

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[8] *See, e.g., Eklund v. Wheatland County*, 212 P.3d 297, 300-01 (Mont. 2009) (finding no due process or fair trial violation in jury service by county residents because possibility of increased taxes to cover award was too "remote"); *see also Wilson v. Morgan*, 477 F.3d 326, 346 (6th Cir. 2007) (finding "no authority" for disqualification of jurors residing in county on basis of their financial interest in avoiding county liability); *City of Holdenville v. Deer*, 132 P.2d 928, 930 (Okla. 1943) (noting "Citizens of a municipality are not disqualified as jurors in an action against the municipality merely by reason of such citizenship").

[9] Martin's citation to stockholder cases is distinguishable because, as was held in *Vasey*, stockholders have a "direct" financial interest in suits against the company. *See id.* at 1468. The *Vasey* court distinguished that situation from more remote financial interests. *See id*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 7th day of May, 2013, I electronically transmitted a full, true, and correct copy of the above and foregoing instrument, the "REPLY OF THE DEFENDANT IN SUPPORT OF MOTION TO DISMISS," to the Clerk of Court using the Electronic Case Filing System (the "ECF System") for filing and transmittal of a Notice of Electronic Filing to the filing following ECF registrants (names only):

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