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

CHOCTAW NATION OF OKLAHOMA, Plaintiff, v. OCCIDENTAL FIRE AND CASUALTY COMPANY OF NORTH CAROLINA; and GENERAL STAR INDEMNITY COMPANY, Defendants.	Case No. 14–CV–182–KEW Removed from Bryan County Case No. CJ–2014–49

PLAINTIFF'S REPLY TO OCCIDENTAL'S AND GENERAL STAR'S RESPONSES TO PLAINTIFF'S MOTION TO REMAND

This is a case about two insurers, General Star Indemnity Company ("General Star") and Occidental Fire and Casualty Company of North Carolina ("Occidental") and whether their contract with the insured, the Choctaw Nation of Oklahoma ("Nation"), allows them to assert Nation's sovereign immunity without its consent. This case does not become subject to federal court jurisdiction simply because Nation has tribal sovereign immunity: some aspect of sovereign immunity that is governed by federal law must be in dispute. No such dispute is presented by Nation's Petition.

A. No Aspect of Sovereign Immunity Governed By Federal Law Is In Dispute.

Certain aspects of sovereign immunity are governed by federal law—its application and waiver—but none of those aspects are disputed in this case. There is not a dispute about the scope of Nation's sovereign immunity—the parties agree that sovereign immunity would bar the claims of bus crash victims against Nation. There is not a dispute about whether the potentially liable entity is an arm of the tribe entitled to the protection of sovereign immunity. And there is

not a dispute about whether the tribe, or an authorized member of the tribe, has waived sovereign immunity. This dispute arises solely from the contractual relationship between Nation and Defendants. The dispute is about what was provided for by contract. The issue is whether Nation is *contractually* bound to maintain its sovereign immunity for the benefit of Defendants or whether Nation would breach the *contract* by giving a limited waiver of sovereign immunity.

Occidental's comparison between this case and a discriminatory restrictive covenant is misleading. In such a case, the dispositive issue would be whether the Equal Protection Clause of the United States Constitution invalidates the contract. No party to this action is questioning the validity of a contract, let alone the contract's validity under federal law. Instead, the parties contest the interpretation of the terms of the contract. Moreover, federal question jurisdiction is only appropriate if the federal law is disputed and must be interpreted; it does not arise simply because clearly established federal law might be applied to some issue in the suit. *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 313 (2005).

Occidental offers up a red herring, framing their argument around an imagined dispute about sovereign immunity itself. Occidental believes that sovereign immunity has talismanic power that will automatically grant access to federal court and distract the Court from the true dispute in this case: whether the insurance contract allows Defendants to assert Nation's sovereign immunity without its consent. By framing the issue as "who" can assert tribal sovereign immunity, Defendants assume that the principles governing which tribal individuals and entities may assert or waive sovereign immunity also apply to them. Such cannot be the case. Nation's claims are distinct from other cases that discuss "who" can assert or waive a tribe's sovereign immunity. Federal law governs the determination of whether certain tribal subdivisions are sufficiently related to the tribe to share in its immunity. *E.g.*, *Breakthrough*

Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173, 1182–1183 (10th Cir. 2010). Similarly, federal law governs the determination of which tribal members have the authority to waive sovereign immunity and expose the tribe to litigation. *E.g.*, *Dillner v. Seneca-Cayuga Tribe*, 2011 OK 61, ¶¶12–20, 258 P.3d 516, 519–520. Though federal law governs these matters, such federal law is inapplicable in this case because Defendants are alleging that they have some claim to Nation's sovereign immunity protection and waiver authority *solely because of a contract*. In the cases relied on by Occidental, the authority to assert or waive the tribe's immunity is tied to the entity's or individual's status—determined by application federal common law—and not by a contract term—defined and interpreted by application of state law.

The cases cited by Occidental to support its argument for federal court jurisdiction are not applicable to the question of jurisdiction before this Court. Occidental cites *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), and *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (2014), in support of the proposition that sovereign immunity is governed by federal law. Indeed, both cases say as much. These cases, however, do not support Occidental's claim that federal-question jurisdiction exists here because the existence of Nation's sovereign immunity is not disputed. The sovereign immunity issue addressed by both *Kiowa Tribe* and *Bay Mills* does not arise here. In *Kiowa Tribe*, the United States Supreme Court held that tribal sovereign immunity applies to all tribal conduct, regardless of its location or economic character. *Id.* at 754–755. That the dispute arose from the breach of a contract is of no significance. The Court's recent decision in *Bay Mills* was merely a reaffirmation of *Kiowa Tribe*'s holding that the commercial character of the tribe's activity does not divest the tribe of immunity. The disputed issue in both *Kiowa Tribe* and *Bay Mills* was whether the tribe's

sovereign immunity was broad enough to bar suit against the tribe based on commercial activities—a far cry from the issues before this Court.

Occidental's reliance on *Normandy Apartments, Ltd. v. United States Dep't of Housing & Urban Development*, 554 F.3d 1290 (10th Cir. 2009), is similarly misplaced. The existence of federal question jurisdiction was neither discussed nor decided in *Normandy Apartments*. Instead, the question was whether a tribe effectively waived sovereign immunity, an issue governed by federal law like the scope of sovereign immunity in *Kiowa Tribe* and *Bay Mills*. However, none of the parties to this action claim that such a waiver has occurred, let alone whether such a waiver is effective. Neither party has alleged that Nation waived any right created by federal law. Instead, Defendants have alleged that the *terms of the insurance contract* prevent Nation from waiving sovereign immunity without Defendants' permission. The only law applicable to this contract interpretation dispute is state contract law. The only evidence required in this case is the insurance contract.

Again, Occidental's reliance on *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), distorts the issues presented by Nation's Petition. *Crow Tribe* is inapplicable because the dispute was whether a sovereign state could be hailed into a tribal court. *Id.* at 852–853. Federal jurisdiction was appropriate because the federal government is the only sovereign that had the authority to resolve a dispute between and bind the state and the tribe. *See In re Otter Tail Power Co.*, 116 F.3d 1027, 1214 (8th Cir. 1997). *Crow Tribe* is akin to cases that determine the scope of sovereign immunity—the scope of state sovereign immunity—because the question was whether states were immune from suit in all courts: federal, state, and tribal. Indeed, Occidental "misses the point" that the ruling in *Crow Tribe* is inapplicable here:

the dispute in this case does not require resolution of a jurisdictional question between two sovereigns—it is a contract question between a sovereign and two private corporations.

Unlike each of the cases relied upon by Occidental, "the governing rule of decision" in this case is provided by state contract law governing the interpretation of contractual language. *See* [Doc. # 26, p. 4]. Defendants have not pointed to a single case where a court found federal question jurisdiction under circumstances similar to those in this case. Because they have failed to meet their burden and all "uncertainties are resolved in favor of remand," this Court should grant Nation's motion and remand this case to the District Court of Bryan County.

B. The Characterization of Sovereign Immunity as a Personal Defense That Cannot Be Asserted Without Nation's Consent is Governed by State Law.

Defendants misapprehend Nation's argument that its sovereign immunity is a personal defense. Occidental strains to avoid the persuasive value of *Smith Plumbing Co. v. Aetna Casualty & Surety Co.*, 720 P.2d 499 (Ariz. 1986), by attempting to distinguish this case. First, Occidental draws a false distinction between suretyship contracts and insurance contracts. But, in Oklahoma, a suretyship contract is simply one kind of insurance contract. 36 Okla. Stat. § 1250.2. The same rules of contract interpretation apply to surety contracts and insurance contracts alike. 15 Okla. Stat. § 374; 18 Okla. Stat. § 483. Thus, *Smith*'s discussion of defenses available to a surety is on point. Second, Occidental highlights factual distinctions between *Smith* and the case at bar that are without a legal difference. The existence of a federal question in this mater certainly does not turn on whether Nation, Occidental, or both are defendants in the underlying lawsuits related to the bus crash. [Doc. #26, p. 5].

The personal nature of Nation's sovereign immunity defense is not "unlike any other defense" as Occidental has alleged. [Doc. # 26, p. 3]. Other such personal defenses unavailable to a surety or insurer, for example, include the principal's discharge in bankruptcy, *A.T. Clayton*

& Co. v. Hachenberger, 920 F. Supp. 2d 258, 269 (D. Conn. 2013) (citing Restatement (Third) Suretyship and Guaranty § 34 (1996)), and lack of capacity, *Centraal Stikstof Verkoopkantoor, N. V. v. Ala. State Docks Dep't*, 415 F.2d 452, 458 (5th Cir. 1969). Personal defenses are granted by law to all members of a class as a matter of public policy, and "[t]he personal defense attaches to the [class's] status." *La. Land & Exploration Co. v. Amoco Prod. Co.*, 878 F.2d 852, 855 (5th Cir. 1989) ("Hence parents, children, husbands, wives, governmental units, charitable organizations, bankrupts, lunatics, interdicts, vessel owners, and the like possess a defense denied their respective insurers.") (quoting *Alcoa S. S. Co. v. Charles Ferran & Co.*, 251 F. Supp. 823, 831 (E.D. La. 1966), *aff'd*, 383 F.2d 46 (5th Cir. 1967)).

Two inquiries are presented by Nation's Petition: First, whether Oklahoma principles defining personal defenses preclude Defendants from asserting Nation's sovereign immunity without the consent of Nation. And second, whether Nation can provide a limited waiver of its sovereign immunity up to its policy limits under the insurance contract as interpret under Oklahoma law. Occidental repeatedly highlights the controlling nature of the contract language in its response to Nation's Motion to Remand. [Doc. # 26, p. 3, 5]. Occidental argues its rights under a state-law-governed insurance contract as grounds for removal jurisdiction. Such arguments about Occidental's rights under the contract only emphasize that state law controls the disputed issue in this case. The only dispute—the only thing giving rise to an actual controversy in Nation's Petition—is about the terms of the insurance contract.

C. If There Is a Disputed Federal Issue, It Does Not Appear on the Face of the Complaint Under *Skelly Oil*.

Occidental's Response to Nation's Motion to Remand mischaracterizes Nation's argument. Clearly, Occidental does not seek to assert sovereign immunity as a defense against Nation. Nation's argument is grounded in the idea that the *form* of the action as one for a

declaratory judgment should not supersede the *substance* of the action. To determine whether a federal question appears on the face of the complaint, the Court must consider how the federal issue would arise in a coercive action. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950); *see also Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 18–19 (1983) (applying *Skelly* to state declaratory judgment actions). *Skelly*'s recasting rule developed because litigants were pre-emptively filing declaratory judgment actions asking federal courts to declare the validity of their federal defenses in order to avoid the well-pleaded-complaint rule. *See, e.g.*, *Skelly Oil*, 339 U.S. 673–674. These would-be defendants argued that the federal issue was on the face of the complaint even though it would normally appear in an answer. The Court in *Skelly* recast the action as one for damages or specific performance instead of declaratory relief and determined that removal was improper under the well-pleaded complaint rule. *Id.* at 672.

When this suit is recast as one for coercive action, the alleged federal issue does not appear on the face of the complaint. In the case at bar, coercive relief could be sought in a number of configurations. One possibility would be for Nation to bring a breach of contract claim against Defendants for failure to pay the bus crash victims under their insurance policies with Nation. In that case, the "issue" of sovereign immunity would only arise in Defendants' answers, where they would argue their *contractual right* to assert Nation's sovereign immunity. Alternatively, Defendants could have brought suit against Nation for breach of contract, as they have threatened, for Nation's refusal to enforce the full scope of its sovereign immunity *as required by contract*. In such a case, Nation would assert as a defense that the *contract* did not give Defendants the right to control Nation's sovereign immunity. There is no configuration of coercive action between the parties where the controlling "disputed issue" is both governed by

federal law and appears on the face of the complaint. Thus, even if there were a substantial and disputed federal issue, the well-pleaded complaint rule would still require remand.

D. Remand is Proper Because Defendants' Notice of Removal Was Procedurally Defective and Nation Timely Objected to the Defect.

The removal statute, 28 U.S.C. § 1446(a)(2)(A), mandates that all properly served defendants must "join in or consent" to the removal of the suit within thirty days of service. Removal jurisdiction is defined by statute and is strictly construed. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108–109 (1941). All doubts must be resolved in favor of remand. *Fajen v. Found. Reserve Ins. Co.*, 683 F.2d 331, 333 (10th Cir. 1982). Although courts disagree over the required method of consent under § 1446, the majority rule is that defendants must independently and unambiguously file written consent to removal. Charles Alan Wright, et al., *Federal Practice and Procedure*, § 3730 (4th ed.) (collecting cases); *see also Kozel v. Okla. Dep't of Pub. Safety*, CIV–12–274–FHS, 2012 WL 3101403 (E.D. Okla. July 30, 2012). General Star did not properly consent to removal within thirty days of service of Nation's Petition. Although General Star tried to correct this defect by filing an affidavit and opposing Nation's Motion to Remand, these efforts were not timely. Nation has timely raised a procedural defect that justifies remanding this case to the District Court in Bryan County.

The cases cited by the Defendants fail to provide persuasive authority that would justify abandoning the majority rule that requires all defendants to submit written consent to the removal action. The majority rule has been followed by both the Eastern and Western District Courts in Oklahoma. *Forsythe v. City of Woodward, Okla.*, CIV-13-710-C, 2013 WL 5230005, *2 (W.D. Okla. Sept. 16, 2013); *Kozel*, 2012 WL 3101403 at *2. General Star argues that Occidental's allegation of consent in the Notice of Removal is sufficient to meet the procedural requirements of 28 U.S.C. § 1446(a). In fact, the court in *Tresco, Inc. v. Continental Casualty*

Co., cited extensively by General Star, acknowledges that its position that alleging unanimous consent is procedurally sufficient is "contrary to the weight of authority on this subject." 727 F. Supp. 2d 1243, 1254. Further, the majority of district courts within the Tenth Circuit follow the majority rule requiring independent and unambiguous consent to removal in writing. *See Swanson v. U.S. Bank*, No. 2:10–CV–01258–DS, 2011 WL 1585134, *2 n.1 (D. Utah April 26, 2011) (dismissing *Tresco*'s reasoning as unpersuasive); *McShares, Inc. v. Barry*, 979 F. Supp. 1338, 1342–1343; *see also Forsythe* and *Kozel*, *supra*.

General Star's insistence that its failure to consent to the Notice of Removal is a procedural defect is, again, a distinction without a legal difference. Procedural defects, including the failure of all defendants to properly consent to the Notice of Removal are grounds for remand under 28 U.S.C. § 1447(c). The fact that the defective notice is a procedural defect simply means that it is waivable. *Farmland National Beef Packing Co., L.P. v. Stone Container Corp.*, 98 Fed. Appx. 752, 756 (10th Cir. 2004). A remand motion based on a procedural defect must be filed within thirty days of the filing of the notice of removal. 28 U.S.C. § 1447(c). Nation has not waived this procedural defect because it raised the defect in its Motion to Remand on June 2, 2014, twenty one days after the Notice was filed on May 12, 2014.

General Star's Response to Nation's Motion to Remand], adopted by Occidental, [Doc. #26, p. 8], misconstrues the cases discussing procedural defects. General Star's analysis of *SpiritBank v. McCarty*, No. 08–CV–0675–CVE–PJC, 2009 WL 1606535 (N.D. Okla. 2009), implies that the absence of a filed consent to removal is not grounds for remand. [Doc. #24, p. 2–3]. To the contrary, in *SpiritBank*, Judge Eagan explains that the absence of a filed consent to removal did make the Notice of Removal defective. 2009 WL 1606535, *1 n.2. She goes on to explain that the failure to raise the issue in a Motion to Remand within thirty days of the Notice

of removal waived the procedural defect. *Id.* Similarly, the Tenth Circuit in *Farmland* found that, because the motion to remand was untimely filed, the court did not have the ability to consider procedural defects under § 1447(c). 98 Fed. Appx. 752, 756. These holdings are not relevant here because Nation's Motion to Remand was timely. Thus, the failure of General Star to independently and unequivocally consent to Occidental's Notice of Removal is appropriate grounds for remand in this case because Nation timely raised the defect in its Motion to Remand.

Occidental's Response to Nation's Motion to Remand argues that General Star somehow cured the defective consent through by filing routine documents such as entries of appearance and consent to the United States Magistrate Judge's jurisdiction with the Court. [Doc. #26, p. 8]. Under 28 U.S.C. § 1446(b)(2)(B), each defendant has a thirty days after service of a petition—the document that allegedly gave notice of a potential federal question—in which to file a Notice of Removal. "While not stated explicitly in the statute, in cases with multiple served defendants, all defendants must consent to removal prior to the expiration of the thirty day period." *Spoon v. Fannin Cnty. Cmty. Supervision & Corr. Dep't*, 794 F. Supp. 2d 703, 705 (E.D. Tex. 2011) (citing *Gillis v. Louisiana*, 294 F.3d 755, 759 (5th Cir.2002)). All non-removing defendants, therefore must consent to removal within thirty days of service upon the last-served defendant. Occidental was served on April 15, 2014. [Doc. #3–3]. General Star's filings after May 15, 2014, are irrelevant and untimely under 28 U.S.C. § 1446(b)(2)(B). Moreover, even if untimely subsequent filings could cure a procedurally defective removal, General Star's actions here were not sufficient to satisfy the consent requirement. *State Farm Fire & Cas. Co. v. Dunn-Edwards Corp.*, 728 F. Supp. 2d 1273, 1278 n.19 (D.N.M. 2010). This Court should grant Nation's Motion to Remand because the absence of a timely filed written consent to Occidental's Notice of Removal is proper grounds for remand under 28 U.S.C. § 1447(b).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of June, 2014, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing which forwards a copy to the following ECF registrants:

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