

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

(1) THE QUEENS, LLC; and
(2) CHEROKEE QUEEN, LLC,

Plaintiffs,

v.

Case No.: 19-cv-350-JED-FHM

(1) THE SENECA-CAYUGA NATION
formerly known as the SENECA-
CAYUGA TRIBE OF OKLAHOMA,

Defendant.

**MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION
DUE TO TRIBAL SOVEREIGN IMMUNITY**

COMES NOW the Defendant Seneca-Cayuga Nation (the “Nation”) and by this Motion seeks dismissal of this action on the basis of the Nation’s tribal sovereign immunity, which has not been waived in a legally effective way.¹

I. THE APPLICABLE LAW OF SOVEREIGN IMMUNITY.

Tribes have sovereign immunity.² *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2030 (2014) (“Among the core aspects of sovereignty that tribes possess—

¹ Sovereign immunity is a matter of subject matter jurisdiction which may be challenged by a Motion to Dismiss under Fed.R.Civ.P. 12(b)(1), *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F. 3d 1007, 1009 (10th Cir. 2007).

² The immunity of a sovereign has two distinct components. Initially, in the absence of express waiver by the sovereign or Congress, the sovereign is immune from suit asserting a claim against it. Secondly, even in the event of waiver of immunity from suit as to particular claim, immunity protects the sovereign from suit on the claim in any court for which immunity has not been expressly waived. *See, Pennhurst State Sch. v. Halderman*,

subject, again, to congressional action—is the ‘common-law immunity from suit traditionally enjoyed by sovereign powers.’”) A tribe is subject to suit only when Congress has authorized the suit or the tribe has waived its immunity. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998). Additionally, that immunity includes suits on contracts involving commercial activities made off reservations. *Id.* at 758.

Waivers are judicially disfavored. The tribal waiver must be unequivocally expressed; it cannot be implied. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). That waiver is controlled by tribal law. *See, Native America Distributing v. Seneca-Cayuga Tobacco Company*, 546 F.3d 1288, 1293 (10th Cir. 2008) (relying on the Nation’s Business Committee’s Resolution and the Nation’s Constitution Art. VI); *Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282, 1288 (11th Cir. 2001) (relying on tribal constitution and tribal ordinance to determine that the chief did not have authority to waive sovereign immunity); *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917, 922 (6th Cir. 2009) (“MBF believed that CNI obtained the required approval for this waiver provision—but regardless of what MBF may have thought, board approval was not obtained, and CNI’s charter controls. In short, without board approval, CNI’s sovereign immunity remains intact.”).

The Seneca-Cayuga Nation, its Constitution and by-laws do not authorize the Chief

465 U.S. 89, 99 (1984) (“A State’s constitutional interest in immunity encompassed not merely *whether* it may be sued, but *where* it may be sued.” (emphasis in original.)); *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76, 86 (2nd Cir. 2001) (“[A] sovereign’s interest ‘encompasses not merely whether it may be sued, but where it may be sued.’”)

to waive the Nation's sovereign immunity. *Dilliner v. Seneca-Cayuga Tribe of Oklahoma*, 2011 OK 61, ¶19. Rather, the Business Committee must expressly waive the Nation's sovereign immunity, *see* Exhibits 1 and 2, the Nation's Constitution and Ordinance of Business Committee. In particular, a Nation's Business Committee Resolution granting the Chief authority to sign a contract which contained a limited waiver of sovereign immunity does not waive sovereign immunity. *Id.* at ¶¶ 19-20.

II. THE BUSINESS COMMITTEE HAS NOT WAIVED THE NATION'S SOVEREIGN IMMUNITY AS TO THE CLAIM ALLEGED HERE OR AS TO THIS FORUM TO ADJUDICATE THAT CLAIM.

This action asserts a claim by parties to a contract with the Nation labelled a Memorandum of Agreement (the "MOA"). *See* Complaint at ¶4. Plaintiffs claim that the Nation breached the MOA. *See* Complaint at ¶24. Plaintiffs seek a money judgment for Defendant's failure to pay under the MOA and foreclosure of collateral pledged to secure the Nation's contractual obligation. *See* Complaint, p. 12.

The MOA contains a section addressing limited waiver by the Nation of its tribal sovereign immunity. MOA § 13.01 provides:

Tribe's Limited Waiver of Sovereign Immunity and Consent to Suit. The Tribe hereby agrees to, and hereby does, make a limited waiver of its sovereign immunity for the limited purpose of allowing the terms of this Agreement or any agreements referenced herein to be enforced by all Parties or other Party approved third parties to the Agreement or agreements referenced herein by judicial enforcement in any court of competent jurisdiction in equity or law, pursuant to the following order of priority: (i) in applicable federal courts in the State of Oklahoma with all rights of appeal therein, and (ii) in the event that a federal court in the State of Oklahoma determines that it does not have jurisdiction, first, in the courts

of the State of Oklahoma, with all rights of appeal therein; and (iii) only if the Oklahoma courts determine that they do not have jurisdiction, any other court of competent jurisdiction; provided, however that liability of the Tribe under any judgment shall always be “Limited Recourse,” as defined herein.

Complaint, ¶4.

To be a legally effective waiver consistent with *Dilliner* § 13.01 must have been authorized and its language approved by the Nation’s Business Committee, since that Committee is the only entity legally authorized to act for the Nation. The January 12, 2012 Minutes of the meeting of the Business Committee confirm that the Business Committee has not waived either claim or forum immunity as to this suit. (Exhibit 3, Declaration of Sarah Sue Channing, Secretary of the Nation attaching Minutes and Resolution.) The only January 12, 2012 Resolution whose language comports with those Minutes is the Resolution (with the Resolution number and vote tally) attached to Exhibit 3, as Ex. B to the Nation’s Secretary’s Declaration. That Resolution and the Minutes reflecting its adoption do not reference the MOA or any waiver of sovereign immunity. No other minutes of a meeting of the Business Committee reflect, much less authorize or approve, the limited waiver in MOA § 13.01. In other words, MOA § 13.01 was not authorized and approved and has no legal effect. That section is a legal nullity. Accordingly, the Nation’s sovereign immunity precludes subject matter jurisdiction in this Court of Plaintiffs’ claims against the Nation. Dismissal due to sovereign immunity of the Defendant is appropriate.³

³ The Plaintiffs may claim that two other “resolutions” of the Business Committee waive the Nation’s sovereign immunity. Neither of those other two “resolutions” or their waiver language are mentioned in any Business Committee minutes. *See* Exhibit 3. Suspiciously,

Respectfully submitted,

s/ Graydon D. Luthey, Jr.

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Seneca-Cayuga Nation

those other two “resolutions” bear the same number as the Resolution (attached to Exhibit 3,) whose language is memorialized in the Minutes of the January 12, 2012 meeting of the Business Committee (attached to Exhibit 3.) Those two other “resolutions” claimed to have been adopted at a January 12, 2012 meeting of the Business Committee. More suspiciously, one of those other “resolutions” waive sovereign immunity as to one Plaintiff, while the second waives as to both Plaintiffs. Most suspiciously, those other two “resolutions” dated January 12, 2012 reference and claim to attach the MOA, which was not executed until March 2012.

Since counsel was involved with the transaction documents, including the MOA and perhaps the other two “resolutions,” if Plaintiffs offer a declaration as to the other two “resolutions” actual adoption, discovery of the lawyers, their emails, and their word processing systems will be necessary to determine if the MOA, and the other two “resolutions” were created by the lawyers prior to the January 12, 2012 Business Committee meeting. The fact that the Minutes and Resolution attached to Exhibit 3 do not specifically mention the MOA or quote § 13.01 are consistent with the MOA’s non-existence on January 12, 2012.

CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2019, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Daniel E. Gomez
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s/ Graydon D. Luthey, Jr.
Graydon D. Luthey, Jr.