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

THE QUEENS, LLC; and CHEROKEE QUEEN, LLC, Plaintiffs, v. THE SENECA-CAYUGA NATION formerly known as the SENECA-CAYUGA TRIBE OF OKLAHOMA, Defendant.	)	Case No. 19-cv-350-JED-FHM

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS

The plaintiffs, The Queens, LLC and Cherokee Queen, LLC (collectively "The Queens" or "Plaintiffs"), hereby respond to the motion to dismiss filed by the defendant, the Seneca-Cayuga Nation, formerly known as the Seneca-Cayuga Tribe of Oklahoma (the "SCN" or "Defendant").

INTRODUCTION AND SUMMARY

The SCN agreed through a Memorandum of Agreement (the "MOA") to purchase from the Queens certain real and personal property, and agreed to operate related lakeside businesses. The Queens retained counsel well-versed in Indian law and therefore secured a waiver of tribal sovereign immunity, not only in the MOA, but also in a resolution approved by the SCN's Business Committee to ensure the waiver was validly approved and enforceable. *See Dilliner v. Seneca-Cayuga Tribe*, 258 P.3d 516 (Okla. 2011). The SCN—under different leadership than that which originally entered into the MOA—defaulted owing nearly $7 million, and the Queens in this and in related state court litigation is exercising its limited recourse right to recover parts of the real and personal property and the right to run the lake businesses returned to it by foreclosure and replevin.

Based on the clear and unequivocal sovereign immunity waiver, this Court should deny the SCN's motion to dismiss which is based solely on its assertion of tribal sovereign immunity. This

Court must then address whether it has federal question or diversity of citizenship jurisdiction. As described herein, this jurisdictional ruling is necessitated by a decision of the Oklahoma Court of Civil Appeals which has denied The Queens access to state court until federal jurisdiction is resolved. Unless that ruling is overturned by the Oklahoma Supreme Court, this jurisdictional ruling is key to The Queens' ability to assert its rights under the MOA.

JURISDICTIONAL FACTS

1. The MOA (Doc 2-1; attached hereto as Exhibit 1) contains a clear and unequivocal limited waiver by the SCN of its tribal sovereign immunity by and through § 13.01 which states:

> **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[.]

2. Pursuant to *Dilliner* (a case cited by the SCN in its motion to dismiss), the SCN's Business Committee approved the MOA by and through Resolution #39-011212, which includes the limited waiver of tribal sovereign immunity verbatim. (Doc. 2-4; attached hereto as Exhibit 2).

3. As set forth in the Complaint (Doc. 2), the SCN—after a change in leadership—defaulted on its payment obligations under the MOA in 2014 and owes The Queens nearly $7 million. Having determined that no good faith basis existed to invoke either federal question or diversity of citizenship jurisdiction in this Court (see Section II, below), and in light of the clear and unequivocal sovereign immunity waiver, The Queens filed its case in the District Court of Delaware County, State of Oklahoma, Case No. CJ-2015-53. The SCN filed a motion to dismiss citing tribal

sovereign immunity and the need to file first in federal court under the MOA's waiver language. The state court ruled in favor of The Queens and denied the SCN's motion to dismiss.

4. The SCN later admitted liability on the merits in the state court litigation, and summary judgment was awarded to The Queens against the SCN on February 14, 2018 (corrected *Nunc Pro Tunc* on August 29, 2018).

5. The SCN appealed and on February 25, 2019, the Oklahoma Court of Civil Appeals, Division IV, reversed, holding that the sovereign immunity waiver required The Queens to first file in federal court and for the federal court to decline jurisdiction before the state court could adjudicate the matter. The Queens has filed a Petition for a Writ of Certiorari asking that the Oklahoma Supreme Court reverse that decision, and as of the date of this Response, that Petition is pending.

ARGUMENT & AUTHORITIES

I. THE MOA CONTAINS A VALID CONSENSUAL WAIVER OF THE SCN'S TRIBAL SOVEREIGN IMMUNITY.

It is well-settled that sovereign Indian nations enjoy sovereign immunity but can voluntarily waive that immunity in contracts through clear and unequivocal language. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.,* 523 U.S. 751, 754 (1998). Contrary to the SCN's argument that "[w]aivers are judicially disfavored[,]" contractual waivers that are clear and unequivocal are judicially enforceable and constitute an act of sovereignty in support of tribal economic development and self-governance. *See* Lorie Graham, *Securing Economic Sovereignty Through Agreement*, 37 New Engl. L. Rev. 523, 534 (Spring 2003) ("[T]he trend has been toward limited waivers of tribal immunity as a means of stimulating economic development.") As long as the contractual waiver is "clear" and "unequivocal" and compliant with tribal law, it should be enforced as consistent with a tribe's sovereign right to enter into enforceable business arrangements on terms to which the tribe expressly agreed.

In *Dilliner*, the Oklahoma Supreme Court interpreted Seneca-Cayuga tribal law and held that

a business committee resolution authorizing a contract that contains a waiver of tribal sovereign immunity must clearly identify the contract and the waiver. 258 P.3d at 520. Apparently, the SCN's Business Committee and The Queens' counsel were aware of this requirement, as evidenced by the specificity of Business Committee Resolution #39-011212. (Ex. 2). The Resolution includes verbatim the language of the MOA's limited waiver of the SCN's sovereign immunity. By including such specificity, the parties clearly sought to ensure that the contract was enforceable and that the limited waiver of tribal sovereign immunity complied with *Dilliner* and tribal law.

The SCN—through its current leadership—makes two arguments to try and evade the deal made by its prior administration. The SCN first argues that the *minutes* of the January 12, 2012 meeting are somehow relevant in determining that the SCN did not waive sovereign immunity, but this argument has no basis in law or fact. The *Dilliner* case requires a "resolution" supporting the sovereign immunity waiver—it makes no reference whatsoever to meeting minutes. Resolution # 39-011212 here is controlling and documents that the Business Committee *explicitly* approved the sovereign immunity waiver as required by *Dilliner*. The SCN cites no law—and none exists—that requires the waiver to be expressed verbatim in meeting minutes.

Second, the upshot of the SCN's first argument is implausible, if not absurd. The SCN attaches an affidavit if its current secretary-treasurer and a copy of the meeting minutes from the January 12, 2012 meeting of the Business Committee. (Doc. 10-3; attached hereto as Exhibit 3). Importantly, the current secretary-treasurer did not hold that position in January 12, 2012, and therefore was not in attendance at that meeting. The minutes are attested to by the then secretary-treasurer John Birkes. Accordingly, her affidavit provides no first-hand account of what was actually discussed at that meeting. She merely states that the *minutes* of that meeting were found in the SCN's files and attaches them by exhibit.

In reviewing the minutes, it is immediately apparent that they provide merely shorthand

notations, not verbatim transcription of the details of the discussion. The minutes show that the meeting was called to order at 10:40 a.m. and adjourned at 12:35 p.m. Despite lasting nearly two hours, the minutes are half a page long and consist of only two substantive paragraphs. There can be no question that more discussion occurred over two hours than what is written into these minutes. The minutes simply note that the terms of the transaction were discussed, and it would be nonsensical to suggest that these tribal leaders agreed to a multi-million-dollar purchase without discussing the contract's terms and conditions. Resolution # 39-011212 is the relevant proof of the Business Committee's official action. The resolution approves the details of the transaction set forth in the MOA, and explicitly approves the sovereign immunity waiver as required by SCN tribal law.

The Oklahoma Supreme Court's decision in *Gilmer v. School Dist. No. 26 Noble Cnty.*, 136 P. 1086, 1087 (Okla. 1913), is on point. Addressing the minutes of a school board meeting, the court found that "[t]he minute made by the clerk appears on its face to be a mere brief abstract of what the clerk conceived to be the substance of the various things done at the meeting." *Id*. The court further found that "[n]othing like a report in full of the proceedings is attempted" and that no law required any such detail. *Id*. Adopting precedent from another court, it was held that a validly enacted resolution was superior evidence of the board's official action. *Id*. The same is true here where Resolution # 39-011212 evidences an official act of the SCN's Business Committee clearly and unequivocally approving the MOA's limited waiver of tribal sovereign immunity.

The SCN's second argument concerns its attachment of a shorter resolution bearing the same number as evidence that immunity was not waived, but this ignores the more thorough resolution which includes the sovereign immunity language verbatim. The SCN provides no basis to dispute the validity of the more thorough resolution other than its argument concerning the meeting minutes. The existence of the resolution containing the waiver language is conclusive evidence that the Business Committee considered and validly approved the MOA's sovereign immunity waiver.

Both versions of the resolution include the vote (4 for, 0 against, 2 absent), both are signed by then Chief LeRoy Howard, and both are attested by then Secretary/Treasurer John Birkes. There is no inconsistency between the two versions of the resolution such that one might be deemed to invalidate the other. One only expresses with the required clarity the Business Committee's agreement to the limited waiver of tribal sovereign immunity. And to the extent one is general and the other specific (i.e., one explicitly approves the MOA and its sovereign immunity waiver while the other merely approves of the purchase), the more specific language controls as a matter of law. *See, e.g.,* Restatement (2d) Contracts § 230(c) ("specific terms and exact terms are given greater weight than general language"); *Jones v. State ex rel. Office of Juvenile Affairs*, 268 P.3d 72, 76 (Okla. 2011) ("Where a matter is addressed by two statutes, one specific and the other general, the specific statute governs over the general provision.").

The SCN has provided no basis to avoid the MOA's clear and unequivocal limited waiver of tribal sovereign immunity. The SCN's motion on that basis should therefore be denied.

II. THIS COURT MUST DETERMINE WHETHER IT OTHERWISE HAS FEDERAL QUESTION OR DIVERSITY JURISDICTION.

There being no jurisdictional problem with sovereign immunity, this Court must then address whether it has federal question or diversity jurisdiction. Federal courts are courts of limited jurisdiction and there is a presumption against its existence. *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974). Even if it were not raised by a party, a federal court must address this question on its own. *City of Albuquerque v. Soto Enters., Inc.*, 864 F.3d 1089, 1093 (10th Cir. 2017). In the somewhat unusual circumstances of this case, The Queens did not believe that federal question or diversity jurisdiction existed when it initiated litigation in Oklahoma state court. However, the decision of the Oklahoma Court of Civil Appeals has necessitated this filing for The Queens to avoid any loss of rights to limitations or otherwise while The Queens' state court appeal

is pending. State and federal litigation on the same question may properly proceed in both courts "at least until judgment is obtained in one of them which may be set up as res judicata in the other[.]"[1] *Predator Int'l, Inc. v. Gamo Outdoor USA, Inc.*, 793 F.3d 1177, 1188 (10th Cir. 2015).

The Queens filed in state court, instead of federal court, based on its reading of extensive federal law. The Queens' claims against the SCN involve a simple breach of contract alleging that the SCN failed in its payment obligations under the MOA. Federal courts have routinely held that these types of claims do not raise a federal question. *See Mescalero Apache Tribe v. Martinez*, 519 F.2d 479, 482-83 (10th Cir. 1975) (holding that a "simple breach of contract case" does not present a federal question where an Indian tribe is party); *Iowa Mgmt. & Consultants, Inc. v. Sac & Fox Tribe of the Miss. in Iowa*, 207 F.3d 488, 489 (8th Cir. 2000) (holding that "a routine contract action involving a Tribe" did not present a federal question.); *Peabody Coal Co. v. Navajo Nation*, 373 F.3d 945, 951 (9th Cir. 2004) (holding that claim against Indian Tribe that "sounds in general contract law" does not present federal question); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians,* 999 F.2d 503, 507 (11th Cir. 1993) (finding no federal question jurisdiction where plaintiff only presented facts establishing a breach of contract claim); *Tribal Smokeshop, Inc. v Alabama-Coushatta Tribes of Texas ex rel. Tribal Council*, 72 F. Supp. 2d 717, 719 (E.D. Tex. 1999) (holding that "mere contract claims do not constitute federal questions" where Indian tribe is a party).

Case law on diversity jurisdiction also is extensive. Every circuit court of appeals to hear this issue—including the 1st, 2nd, 7th, 8th, 9th, 10th, and 11th— has held that an Indian tribe is not a citizen of any state and, therefore, its very presence defeats diversity jurisdiction. *See Ninigret Dev.*

[1] If the Oklahoma Supreme Court accepts the case and reinstates The Queens' judgment, res judicata will then set up in the state court proceedings and this case can be voluntarily dismissed. But as of the filing of this Response, the Oklahoma Court of Civil Appeals has reversed the judgment and held that The Queens must first file in federal court.

Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21, 27 (1st Cir. 2000) (holding that "the presence of an Indian tribe destroys complete diversity" because "[a]n Indian tribe ... is not considered to be a citizen of any state"); *Romanella v. Hayward*, 114 F.3d 15, 16 (2d Cir. 1997) (per curiam) ("an Indian tribe is not a citizen of any state for purposes of diversity jurisdiction"); *Wells Fargo Bank, Nat. Ass'n v. Lake of the Torches Economic Dev. Corp.*, 658 F.3d 684, 692-93 (7th Cir. 2011) ("[M]ost courts agree that Indian tribes are not citizens of any state for purposes of the diversity statute and therefore may not sue or be sued in federal court under § 1332."); *Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974) ("an Indian tribe is not a citizen of any state for purposes of diversity jurisdiction"); *Am Vantage Cos., Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1098 (9th Cir. 2002) ("[a]n unincorporated Indian tribe is not a citizen of any state within the meaning of § 1332(a)(1)"); *Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993) ("available authority holds that Indian tribes are not citizens of any state for purposes of diversity jurisdiction"); *Miccosukee Tribe of Indians of Florida v. Kraus–Anderson Constr. Co.*, 607 F.3d 1268, 1276 (11th Cir. 2010) ("[T]he majority view—followed by every court of appeals that has addressed the issue—is that unincorporated Indian tribes cannot sue or be sued in diversity under 28 U.S.C. § 1332(a)(1) because they are not citizens of any state."); *see also* 13D Charles Alan Wright et al., Federal Practice and Procedure § 3579 (3d ed. 2011) ("the better view—adopted by every court of appeals to address the question—is that a tribe is not a citizen of any state.").

Federal trial courts are also in agreement—including in Oklahoma. *See Ponca Tribe of Indians of Okla. v. Cont'l Carbon Co.*, 439 F. Supp. 2d 1171 (W.D. Okla. 2006) ("Indian tribes are not citizens of any state for purposes of diversity jurisdiction"). A non-exhaustive sampling of additional federal trial court decisions includes: *Standing Barker–Hatch v. Viejas Group Baron Long Capitan Grande Band of Digueno Mission Indians*, 83 F.Supp.2d 1155, 1157 (S.D. Cal. 2000) ("Indian tribes are not citizens of any state for purposes of diversity jurisdiction"); *Calumet Gaming*

Group–Kansas, Inc. v. Kickapoo Tribe, 987 F. Supp. 1321, 1324–25 (D. Kan. 1997) (holding that court lacked diversity jurisdiction over gaming consultant's state law claims against Indian tribe for breach of consulting agreement and default on loan); *Abdo v. Fort Randall Casino*, 957 F. Supp. 1111, 1112 (D.S.D. 1997) (holding that neither Indian tribes nor a tribally owned and operated casino are citizens of state for purposes of diversity).

Based on these precedents, The Queens did not believe a good faith basis existed to file this case initially in federal court. This matter has been filed solely because of the ruling by the Oklahoma Court of Civil Appeals holding that The Queens must first file in federal court and obtain a ruling on subject-matter jurisdiction. The Queens therefore requests that the Court determine whether federal question or diversity of citizenship jurisdiction exists in this case.

CONCLUSION

For the foregoing reasons, The Queens requests that the Court deny the SCN's motion to dismiss on the basis of tribal sovereign immunity, and that the Court then address whether federal question or diversity jurisdiction exist over The Queens' claims.

Respectfully submitted,

s/ Daniel E. Gomez
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this the 28th day of August, 2019, the foregoing document was filed with the Clerk of Court using the court's CM/ECF system and that the following participant(s) in this case are registered CM/ECF users and will be served using the CM/ECF system.

Graydon D. Luthey, Jr.

s/ Daniel E. Gomez
Daniel E. Gomez