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' SUR-REPLY IN RESPONSE TO DEFENDANT'S MOTION TO DISMISS

The plaintiffs, The Queens, LLC and Cherokee Queen, LLC (collectively "The Queens"), with leave of court (Doc. 16), hereby submit this sur-reply in response to the reply brief (Doc. 14) filed by the defendant, the Seneca-Cayuga Nation, formerly known as the Seneca-Cayuga Tribe of Oklahoma (the "SCN") in support of its motion to dismiss (Doc. 10).

INTRODUCTION AND SUMMARY

The SCN's motion to dismiss did not attach a copy of Business Committee Resolution No. 39-011212 which includes a verbatim recitation of the limited waiver of tribal sovereign immunity in the Memorandum of Agreement ("MOA"). The Queens made it part of the record by and through an attachment to its Complaint (Doc. 2-4) and its response to the motion to dismiss (Doc. 13-2). In its reply brief, the SCN for the first time attacks the authenticity of the resolution but provides no substantive evidence—only speculation. The SCN's only legal argument appears to be that the Resolution was not "authenticated" even though it is signed and attested to by the relevant tribal officials who were in office in 2012 at the time the MOA was voted upon and approved.

To ensure that there is no ambiguity concerning the SCN's agreement to the MOA's limited waiver of tribal sovereign immunity, the sworn affidavits of then Chief LeRoy Howard and then

Secretary-Treasurer John Birkes are attached to this sur-reply by exhibit. These Tribal officials were duly elected members of the SCN's Business Committee in 2012 and are the officials who voted for and who signed the Resolution documenting the Business Committee's approval of the MOA's limited waiver. This evidence establishes—unequivocally—that the Business Committee fully considered the waiver and approved of it verbatim. This fully complies with SCN tribal law as discussed in *Dilliner v. Seneca-Cayuga Tribe*, 258 P.3d 516 (Okla. 2011).

The SCN also included in its reply brief a bizarre argument that this Court should not address its own federal-question or diversity jurisdiction. Although the procedural posture of this case is somewhat unusual, the jurisdictional question is necessary due to a ruling by the Oklahoma Court of Civil Appeals which requires that this Court decline jurisdiction before The Queens can access the state courts. The Queens has appealed that ruling and there is nothing unusual or inconsistent in The Queens' arguments in the state court appeal while protecting its rights in this Court. The SCN's arguments are a transparent attempt by its current leadership to avoid the MOA's limited recourse which was agreed upon by a prior administration. The jurisdictional "loophole" the SCN seeks is simply nonexistent.

ARGUMENT & AUTHORITIES

I. THE MOA'S LIMITED WAIVER OF TRIBAL SOVEREIGN IMMUNITY FULLY COMPLIES WITH TRIBAL LAW.

The *Dilliner* case interpreted SCN tribal law as requiring that the SCN's Business Committee approve limited waivers of tribal sovereign immunity by resolution. The Resolution No. 39-011212 submitted by The Queens (Doc. 2-4; 13-2) recites the MOA's waiver verbatim and therefore complies with tribal law. The SCN's reply brief questions the authenticity of this Resolution referring to it as "unverified" and citing the lack of affidavits. This ignores that the document is duly signed by then Chief Howard and attested to by then Secretary-Treasurer Birkes. The SCN produces

no evidence whatsoever that these signatures are not authentic. However, to resolve any uncertainty, attached hereto by exhibit are the affidavits of Chief Howard and Secretary-Treasurer Birkes that end the inquiry. The Resolution is authentic and accurately reflects that the Business Committee in 2012 approved by a 4-0 vote the MOA and explicitly its limited waiver of tribal sovereign immunity.

The lynchpin of the issues before the Court is that no member of the SCN's current administration was in office in 2012. Thus, none of the current Business Committee members have any knowledge of what was discussed between The Queens and the 2012 Business Committee. Resolutions are enacted to address precisely this set of circumstances. The Resolution formally documented the actions taken by the Business Committee in 2012. The current administration wants to void the deal made by a prior administration and are attempting to use sovereign immunity as a sword, but it simply cannot undo what was formally and properly enacted and documented. Without the ability to guarantee contracting parties with enforceable recourse, they would not do business with Tribes.[1] The 2012 Business Committee explicitly approved of a limited waiver as part of the deal to purchase The Queens' assets and to ensure The Queens that it would have recourse rights in the event of a breach. The SCN has admitted that it breached the MOA. It cannot escape the recourse rights guaranteed to The Queens in the MOA as approved at the time by the duly elected members of the Business Committee in 2012.

The affidavits submitted herewith further dispel any speculative notion argued in the SCN's reply brief that the waiver was not an important consideration when the prior administration approved the MOA. Chief Howard and Secretary-Treasurer Birkes specifically state from their personal knowledge, having participated in the negotiations and meetings, that the Business

[1] *See, e.g.,* 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.").

Committee members knew of, were familiar with, and formally approved of, the limited waiver by voting unanimously and approving the Resolution. The SCN's only evidentiary submission is the affidavit of current Secretary-Treasurer Sue Channing authenticating the meeting minutes from the SCN's records, but this argument was fully addressed in The Queens' response brief.[2] (Doc. 13, at 4-5). Ms. Channing was not in office in 2012 and cannot contradict the sworn affidavits of Chief Howard and Secretary-Treasurer Birkes concerning the discussions that occurred between The Queens and the 2012 Business Committee, nor the intent of the 2012 Business Committee when it approved the MOA and expressly its limited waiver of tribal sovereign immunity.

The affidavits of Chief Howard and Secretary-Treasurer Birkes are dispositive. The current administration does not—and cannot—produce any evidence to the contrary. The MOA's limited waiver of tribal sovereign immunity was properly approved by the 2012 Business Committee in a 4-0 vote which is documented by resolution in accordance with tribal law and is therefore enforceable.

II. THE SCN'S CHARACTERIZATION OF THE STATE COURT APPEAL IS MISLEADING AND ITS LEGAL ARGUMENTS ARE MERITLESS.

The second section of the SCN's reply brief implies that the Court should order The Queens under Fed. R. Civ. P. 11 to voluntarily dismiss this case under Fed. R. Civ. P. 41(a). This argument is meritless on its face for obvious reasons. But more importantly, the argument grossly mischaracterizes the relevance of Rule 11 in the state court appeal. While the procedural stature of

[2] As discussed in more detail in the response, nothing in tribal law requires that a sovereign immunity waiver be stated in meeting minutes, only that it be clearly stated in a resolution. Further, meeting minutes are not transcriptions, but merely shorthand notations of topics discussed. *See Gilmer v. School Dist. No. 26 Noble Cnty.*, 136 P. 1086, 1087 (Okla. 1913). The SCN attempts in a footnote to distinguish *Gilmer*, arguing that "it is not permissible to contradict the record made," but nothing in the minutes contradicts that the specific terms of the MOA were fully considered and approved. The minutes also do not state the purchase price, the payment schedule, the identity of the assets being purchased, the location of the real property, the status of the ongoing business, the insurance requirements, and each and every other important detail of the MOA. It would be absurd to suggest that these terms were not discussed in a two-hour meeting simply because they do not explicitly appear in the one paragraph shorthand meeting minutes on the topic.

this case is somewhat unusual, the basis for this federal lawsuit and the need for a ruling on federal question and diversity jurisdiction is relatively simple.

The SCN breached the MOA in March 2015 when it failed to make a scheduled payment. On April 10, 2015, The Queens sued the SCN in the District Court of Delaware County, Oklahoma ("State Court"), Case No. CJ-2015-53. The SCN moved to dismiss arguing, in part, that the MOA's limited waiver required that the case be filed first in federal court and that a state court action could only be brought if and after "a federal court in the State of Oklahoma determines that it does not have jurisdiction." (Doc. 13, at 2). The Queens responded that its review of federal law was clear that no federal question or diversity jurisdiction existed (Doc. 13, at 6-8), that a filing therefore risked the possibility of violating Rule 11, and that the condition should therefore be disregarded. The State Court judge denied the motion to dismiss, and at a hearing on the motion, in fact invited the SCN's counsel to remove the case to federal court subject to Rule 11 considerations if there was a sufficient question of federal jurisdiction. Unsurprisingly, the SCN did not remove to federal court. The state court case proceeded, and the judge entered a $7 million judgment in favor of The Queens against the SCN on February 14, 2018 (corrected *Nunc Pro Tunc* on August 29, 2018). The SCN appealed.

On February 25, 2019, the Oklahoma Court of Civil Appeals, Division IV ("COCA"), reversed, holding that "it is not clear that a federal court along the chain of an appeal would necessarily find it lacks jurisdiction in such a context, or that it would find an argument for a change in the law to be frivolous." (Doc. 14-2, at 11-2). The Queens has filed a Petition for a Writ of Certiorari (Doc. 14-2, submitted by the SCN in its reply), and requests that the Oklahoma Supreme Court accept the case, reverse the COCA, and reinstate the Delaware County judgment. However, the COCA's decision currently stands, including its holding that this federal court case is not, in its view, "frivolous" but in fact is required by the MOA's limited waiver of tribal sovereign immunity.

This federal court filing was made pursuant to the COCA's mandate, and was necessary

because it is highly unlikely that the appeal to the Oklahoma Supreme Court can conclude before the five-year statute of limitations expires on The Queens' breach of contract claim.[3] If the Oklahoma Supreme Court accepts the appeal and reinstates the Delaware County judgment, this case can be voluntarily dismissed under Rule 41. But *unless and until* the Oklahoma Supreme Court reverses, the COCA has nullified The Queens' Rule 11 concerns. Contrary to the SCN's characterization, there is nothing improper or unusual in alternative pleading. *See, e.g., Cranford v. Bartlett*, 2001 OK 47, 25 P.3d 918 (Okla. 2001) (discussing the common practice of alternative pleading).

The SCN's argument in this regard is a transparent attempt by the SCN's current leadership to strip The Queens of any remedy as agreed to by its prior leadership. If it cannot seek a determination of jurisdiction in this Court as necessitated by the COCA's decision, then The Queens is left without a remedy. This simply is not supported by any meritorious legal theory. The "loophole" the SCN seeks does not exist.

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.

[3] The Queens also is aware of the statistics on the low percentage of cases accepted by the Oklahoma Supreme Court through petitions for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this the 25th day of September, 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