

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

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

**PLAINTIFFS' MOTION FOR DETERMINATION
OF FEDERAL COURT JURISDICTION**

The plaintiffs, The Queens, LLC and Cherokee Queen, LLC (collectively “The Queens”), hereby submit this motion addressing a unique jurisdictional question that is raised in Paragraphs 4-7 of the *Complaint* [Doc. 2]. The Queens believes that a determination of federal court jurisdiction is required before any action is taken on the other pending motions filed by the defendant, the Seneca-Cayuga-Nation (the “Nation”). In support, The Queens states as follows:

1. In this case, The Queens alleges that the Nation breached a Memorandum of Agreement (the “MOA”) through which it agreed to purchase certain real and personal property and ongoing business ventures on Grand Lake O’ the Cherokees (“Grand Lake”) in Northeast Oklahoma. The purchase included an operational marina, and two paddlewheel riverboats which were profitably used for lake cruises. Under the MOA, the Nation was to make payments over time.

2. The MOA also included a limited waiver of the Nation’s sovereign immunity and defined “Limited Recourse” subject to the waiver which was the ability to foreclose upon a portion of the real property and to recover the personal property and business operations.

3. The limited waiver of tribal sovereign immunity appears in § 13.01 of the MOA and reads as follows:

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[.]

4. The Nation defaulted on its payment obligation and The Queens pursued its Limited Recourse. After extensive research, it was determined that federal court jurisdiction was lacking and the case was filed in the District Court in and for Delaware County, Oklahoma (“State Court”). The research included cases holding that the presence of an Indian tribe in a basic breach of contract case does not raise a federal question.¹ The research also revealed unanimity among the federal courts of appeal that an Indian tribe is not a citizen of any state, and that diversity jurisdiction therefore cannot exist where a tribe is a party.² Federal district courts—including in Oklahoma—have consistently

¹ See, *inter alia*, *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 simply because an Indian tribe is a party).

² See *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”). See also *Ninigret Dev. 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)”); *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

held the same.³

5. The State Court agreed that the waiver was effective without first filing in federal court and ultimately granted summary judgment to The Queens. The Nation asserted no substantive defense and has conceded that it failed to make payment and therefore breached the MOA. Its sole defense is its assertion of sovereign immunity.

6. Despite having not removed the state case to federal court, the Nation appealed the judgment against it arguing, in part, that the language of the limited waiver of sovereign immunity required that the case be first filed in federal court.

7. On February 25, 2019, the Oklahoma Court of Civil Appeals, Division IV, (the “COCA”) reversed the judgment 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. A copy of the COCA’s opinion is attached as Exhibit A.⁴ With respect to The Queens’ concerns about federal court jurisdiction the COCA held:

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.”).

³ *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).

⁴ Paragraph 6 of the *Complaint* states that The Queens had filed a Petition for a Writ of Certiorari with the Oklahoma Supreme Court which had not been ruled upon. The Oklahoma Supreme Court has since denied certiorari so the COCA’s decision is final and law of the case.

The limited waiver of immunity in the Agreement regarding an Oklahoma court's enforcement of the Agreement is, thus, expressly conditioned on a federal court "determine[ing] that it does not have jurisdiction[.]" Neither the Queens, the trial court, nor this Court can decide for a federal court what its jurisdiction is or is not. More to the point, [the Nation] only agreed to waive its sovereign immunity to allow an Oklahoma court to hear this matter if a federal court first determines it does not have jurisdiction. Thus, Oklahoma State courts do not have subject matter jurisdiction to presume or predict a determination of a federal court's jurisdiction in this matter.

(COCA Opp., 11-12).

8. The COCA further addressed The Queens' discussion of precedent that indicated a lack of federal court jurisdiction as follows:

Without making any determination with regard to the following, we note, for example, it is discussed in *Cohen's Handbook of Federal Indian Law* that while the lower federal "courts have consistently ruled that tribes are not citizens of any state for diversity purposes and that their presence in a case therefore precludes the exercise of jurisdiction under section 1332," the United States Supreme Court has not addressed the issue.

(COCA Opp., 11 n.20).

9. Thus, to pursue its contractual remedies, and by order of the Oklahoma Court of Civil Appeals, the Complaint was filed in this court and a determination is required on federal question jurisdiction (28 U.S.C. § 1331) or diversity of citizenship jurisdiction (28 U.S.C. § 1332).

10. As courts of limited jurisdiction, federal courts must determine as a threshold matter whether jurisdiction exists before considering any merits of the case. *See Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping Corp.*, 549 U.S. 422, 430-31 (2007) (holding that "[w]ithout jurisdiction the [federal] court cannot proceed at all in any cause[.]") Thus, the jurisdictional question raised herein must be resolved prior to considering the Nation's *Motion to Dismiss for Lack of Subject Matter Jurisdiction Due to Tribal Sovereign Immunity* [Doc. 10] and *Motion for Leave to Conduct Discovery in Support of Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction Due to Tribal Sovereign Immunity* [Doc. 18] because they necessarily involve a fact

inquiry into the merits of the Nation's sovereign immunity defense. Unless this court determines that it has jurisdiction, the sovereign immunity question should be resolved by the State Court.

FOR THE FOREGOING REASONS, The Queens requests that the Court determine before any other matter whether it has federal question or diversity of citizenship jurisdiction (or jurisdiction on any other basis) and enter a ruling accordingly.

Respectfully submitted,

s/ Daniel E. Gomez

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this the 1st day of September, 2022, 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.
R. Trent Shores

s/ Daniel E. Gomez