

**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-WPJ-CDL

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

Defendant.

**DEFENDANT’S RESPONSE TO PLAINTIFFS’
MOTION FOR DETERMINATION OF FEDERAL COURT JURISDICTION**

Plaintiffs’ Motion for Determination of Federal Court Jurisdiction (“Motion”) [Dkt. 32], inviting the Court to do the Plaintiffs’ work for them and dismiss their action, is neither procedurally proper nor constitutionally grounded. Federal Rule of Civil Procedure 12 (b) does not authorize a plaintiff to move for dismissal of Plaintiffs’ Complaint [Dkt. 2] for lack of subject matter jurisdiction.¹ Likewise, no decisional law cited by Plaintiffs supports such a

¹ Fed.R.Civ.P. 12 (b) authorizes motions to dismiss for lack of subject matter jurisdiction as a defense by a defendant, not a plaintiff attacking its own lawsuit. That Rule provides in pertinent part:

How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

XXXX

motion. Rather, if Plaintiffs believe that they filed a jurisdictionally defective action,² they can and should take the initiative and utilize a unilateral notice of dismissal authorized by Fed.R.Civ.P. 41(a).³

With such an easy, non-judicial avenue available to Plaintiffs to cure their self-proclaimed “textbook violation of Rule 11,” the question arises as to why the Plaintiffs have not already used the obvious and inexpensive vehicle of a Rule 41(a) Notice of Dismissal. The apparent answer underscores the constitutional infirmity of Plaintiffs’ Motion.

Plaintiffs recognized that state courts lack subject matter jurisdiction over claims against Indian tribes absent a waiver of sovereign immunity. Plaintiffs’ Memorandum of Agreement (the “MOA”) contains a limited waiver predicated on a condition precedent that Plaintiffs rightly told the Oklahoma Supreme Court that Plaintiffs could not satisfy. [Dkt. 2-1, p.14, § 13.01] To obtain the waiver, Plaintiffs had to obtain an order from a federal court in Oklahoma that it had no jurisdiction. *Id.* In implicitly recognizing that such an order would

² There is no doubt that Plaintiffs believed that this Court lacked subject matter jurisdiction when they filed the Motion. Less than two months before invoking this Court’s jurisdiction by their filing of the Complaint, Plaintiffs told the Oklahoma Supreme Court that filing their Complaint here would be a “baseless filing” and “without a good faith basis for invoking federal court jurisdiction” and therefore “a textbook violation of Rule 11.” (Exhibit A, Petition for Certiorari, p. 9) Nevertheless, Plaintiffs filed their Complaint using specific language in ¶5 that confirmed their anticipated violation stating “[h]aving determined that no good faith basis existed to invoke either federal question or diversity of citizenship jurisdiction in this court, The Queens proceeded to file its case in the District Court of Delaware County, State of Oklahoma.” [Dkt. 2, ¶5]

³ Fed.R.Civ.P. 41 (a)(1)(A)(i) provides:

Without a Court Order. Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment;

be an unconstitutional advisory opinion⁴ and that an action could not be brought to obtain such an order, Plaintiffs told the Oklahoma Supreme Court that filing such a federal action would be a “baseless” action by stating, “a federal court action without a good faith basis for invoking federal court jurisdiction—a textbook violation of Rule 11.” (*See* Exhibit A, Petition for Certiorari, p. 9). In other words, Plaintiffs advised the Oklahoma Supreme Court that they are not entitled to the order they now seek from this Court. Through their MOA, Plaintiffs have voluntarily precluded state court as a forum to litigate that MOA. While Plaintiffs find their current plight unhandy, it was by their own doing.

THE PROPER LEGAL PROCEDURAL PATH FORWARD

This Court’s subject matter jurisdiction has been properly challenged by the Defendant’s Motion to Dismiss, raising Defendant’s sovereign immunity filed over three years ago. [Dkt. 10] Because Plaintiffs chose to attach new evidence, in the form of affidavits, to their Surreply brief [Dkt. 17], Defendant sought limited jurisdictional discovery [Dkt. 18], which Plaintiffs tellingly opposed [Dkt. 19]. That limited discovery should quickly proceed and this Court can then determine the prior proper, authorized Motion to Dismiss for Lack of Subject Matter Jurisdiction which raises the federal law issue of Defendant’s sovereign

⁴ By requiring a case and controversy, the Constitution prohibits an advisory opinion by a federal court. *U.S. v. Muhtorov*, 20 F.4th 552, 607 (10th Cir. 2021). For there to be a case the law must provide “a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued.” *Id.*, quoting *Tutun v. U.S.*, 270 U.S. 568, 577 (1926). Here, Plaintiffs have claimed that the law does provide them a remedy enforceable in this Court according to the regular course of legal procedure and are effectively pursuing no remedy. Rather, they simply want an advisory opinion from this case to aid their enforcement of a commercial contract elsewhere.

immunity.⁵ [Dkt. 10] If tribal sovereign immunity precludes Plaintiffs' claims, then the case is over. On the other hand, if this Court finds that Defendant's tribal sovereign immunity was lawfully waived, then this Court can deny Defendant's Motion to Dismiss [Dkt. 10] and decide whether to provide Plaintiffs the advisory opinion they seek in aid of their commercial activity.

Plaintiffs are wrong to suggest this Court sweep aside Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction Due to Tribal Sovereign Immunity [Dkt. 10].⁶ While Plaintiffs are correct that there is an actual controversy as to Defendant's jurisdictional motion, as shown by Plaintiffs' opposition to it, a controversy does not diminish the importance or primacy of Defendant's motion. And of course, having invoked this Court's jurisdiction by filing their Complaint, Plaintiffs themselves invited and caused the Defendant's Motion to Dismiss, which Plaintiffs' now rightly fear. However, Defendant's motion should not be ignored simply because Plaintiffs object to it and don't want this Court to decide it. Defendant's long pending Motion to Dismiss should be decided.

Alternatively, this Court could give the Plaintiffs the choice of either voluntarily dismissing their case pursuant to Fed.R.Civ.P. 41 (a) or show cause as to why their "textbook violation of Rule 11" should not be addressed by this Court. In any event, Plaintiffs' recently filed Motion [Dkt. 32] should be deferred.

⁵ Tribal sovereign immunity is a defense to subject matter jurisdiction and is properly raised by a motion to dismiss pursuant to Fed.R.Civ.P. 12 (b)(1). *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007). Tribal sovereign immunity is a matter of federal law. *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998).

⁶ No decision cited by Plaintiffs adopts Plaintiffs' circular argument that to determine a motion to dismiss for lack of subject matter jurisdiction due to tribal sovereign immunity this Court must first determine that it has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 or 1332 to decide that subject matter jurisdiction challenge based on sovereign immunity.

s/ R. Trent Shores

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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2022, 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/ R. Trent Shores

R. Trent Shores