



Council of the Cherokee Nation

Cherokee Nation Tribal
Council
17763 S. Muskogee Ave.
Tahlequah, OK 74464

Legislation Text

File #: 15-062, Version: 1

A RESOLUTION AUTHORIZING A LIMITED WAIVER OF SOVEREIGN IMMUNITY

WHEREAS, the Cherokee Nation since time immemorial has exercised the sovereign rights of self-government in behalf of the Cherokee people; and

WHEREAS, the Cherokee Nation is a federally recognized Indian Nation with a historic and continual government to government relationship with the United States of America; and

WHEREAS, Cherokee Nation Businesses, L.L.C. (“**CNB**”) is a for-profit limited liability company organized under the laws of the Cherokee Nation, is wholly owned by the Cherokee Nation and enjoys sovereign immunity from suit under federal law; Cherokee Nation Entertainment, L.L.C. (“**CNE**”) is a for-profit limited liability company organized under the laws of the Cherokee Nation, is wholly owned by CNB and enjoys sovereign immunity from suit under federal law; and CNB’s and CNE’s respective direct and indirect majority owned subsidiaries enjoy sovereign immunity from suit under federal law; and

WHEREAS, CNB, CNE, and their respective direct or indirect majority-owned subsidiaries (collectively referred to herein as the “**Ordering Parties**”) desire to purchase products and order services from Oracle America, Inc. (“**Oracle**”), from Oracle’s subsidiary Micros Fidelio Worldwide, LLC (“**MFWW**”), or from their respective authorized resellers (Oracle, MFWW and such resellers being collectively referred to herein as the “**Sellers**”). Such purchases and orders by Ordering Parties from Sellers are collectively referred to herein as “**Transactions**.” All documents related to the Transactions that are executed by Ordering Parties or expressly incorporated into such executed documents by reference, including without limitation Sellers’ General Terms, all related Schedules, Executable Quotes, Ordering documents, and any amendments and addenda to, or renewals of, any of the foregoing, are collectively referred to herein as the “**Transaction Documents**”; and

WHEREAS, the Sellers have requested that the Cherokee Nation grant an irrevocable limited waiver of sovereign immunity from suit and consent to be sued by the Sellers to enforce the obligations of the Ordering Parties under the Transaction Documents and to seek an award of damages or for equitable relief as hereinafter described and in certain courts as set forth below; and

WHEREAS, the Sellers have further requested that the the limited waiver of sovereign immunity and the Transaction Documents be governed by and construed in accordance with the federal laws of the United States or the laws of the State of Oklahoma, as set forth below.

BE IT RESOLVED BY THE CHEROKEE NATION, that the Tribal Council recognizes that, in order for the Ordering Parties to be able to enter into Transactions with the Sellers upon favorable terms, it is necessary to grant a limited waiver of sovereign immunity as hereinafter set forth; and

BE IT FURTHER RESOLVED BY THE CHEROKEE NATION, that the Tribal Council further recognizes that the remedy available as a result of a waiver of sovereign immunity must be carefully and strictly defined, and therefore desires to establish herein the material terms relating to sovereign immunity that must be included in, or expressly incorporated by reference in, the applicable Transaction Documents; and

BE IT FURTHER RESOLVED BY THE CHEROKEE NATION, that the Tribal Council hereby authorizes the Principal Chief and/or his designee to negotiate as necessary and to expressly waive the sovereign immunity of the Sellers as it applies to the Transactions, and hereby authorizes the Principal Chief to negotiate as necessary and execute limited waivers of sovereign immunity, waivers of jurisdiction and additional waivers and agreements as part of the Transaction Documents, including a Limited Waiver of Sovereign Immunity that contains the following terms:

“The Cherokee Nation, acting by and through its Principal Chief, hereby waives the sovereign immunity of the Ordering Parties, and hereby allows the Ordering Parties to waive their sovereign immunity, in each case to the following limited extent:

1. Limited Waiver. The Cherokee Nation hereby allows Ordering Parties to expressly and irrevocably waive in an executed Ordering Document any and all of their respective defenses based upon sovereign immunity from suit and allows the Ordering Parties to consent to be sued by the Sellers to enforce the obligations of the Ordering Parties with respect to the applicable Transaction Documents; provided, however, that the foregoing shall be limited as follows:

A. Cherokee Nation’s Waiver. The Cherokee Nation’s waiver of the sovereign immunity of the Ordering Parties applies only if, and to the limited extent that, the applicable Ordering Party has executed a Transaction Document that includes, or expressly incorporates by reference, the terms of this Limited Waiver.

B. Who May Bring a Claim. Only parties to the applicable Transaction Document shall be eligible to bring a claim under such document.

C. Applicable Claims. This Limited Waiver is limited to disputes, claims or lawsuits, obligations, and rights arising out of or directly relating to the breach of, or noncompliance with, the applicable Transaction Document in a breach of contract claim.

D. Types of Relief or Damages. This Limited Waiver is specifically limited to an award of actual or liquidated damages or for equitable relief (including injunctive relief) relating to violations of Intellectual Property Laws (hereinafter defined) or resulting from a breach of, or noncompliance with, the applicable Transaction Document. This Limited Waiver does not authorize recovery for indirect, incidental, special, punitive, consequential or exemplary damages, or for any loss of profits, revenue, data, or data use (collectively, “Prohibited Damages”). Furthermore, this Limited Waiver does not authorize any action against, recovery of any kind from, or other remedies against, the Cherokee Nation or any elected officials, officers or employees of the Cherokee Nation, whether for Prohibited Damages, or for court costs or attorneys’ fees, or otherwise.

2. Choice of Forum. Jurisdiction of any action arising from or directly relating to the Transaction Documents and pursuant to this Limited Waiver shall be filed, subject to a court asserting jurisdiction, in a court of competent jurisdiction (including its appellate courts), as follows: first in an appropriate federal court; second, in the event the federal court determines that it does not have jurisdiction over such person or action, then in an appropriate state court; and third, in the event that the state court determines that it does not have jurisdiction over such person or action, then in the tribal courts of the Cherokee Nation. Notwithstanding the foregoing, for claims against the Ordering Parties arising from the Transaction Documents and relating only to violations of 15 U.S.C. §§ 1051 et seq. (U.S. Trademark law), 17 U.S.C. §§ 101 et seq. (U.S. Copyright law), and/or 35 U.S.C. §§ 1 et seq. (U.S. Patent law) (collectively referred to as “Intellectual Property Laws”), the Cherokee Nation and the Ordering Parties expressly agree that the proper venue is the U.S. federal courts and the Ordering Parties agree to submit to the exclusive jurisdiction of, and venue in, the applicable U.S. federal court for such claims. Subject to terms of this Limited Waiver, the Ordering Parties agree to submit to the

jurisdiction of, and venue in, such courts as described in this section, and the Ordering Parties may disclaim and expressly waive in the Transaction Documents (i) the right to commence action in a tribal court, (ii) the right to exhaust tribal court remedies, and (iii) the right to raise the defense of forum nonconveniens in any action allowed by this Limited Waiver.

3. Choice of Law. This Limited Waiver and the Transaction Documents shall be governed by and construed in accordance with federal law of the United States. In the event that federal law is not applicable, then this Limited Waiver shall be governed by and construed in accordance with the substantive and procedural laws of the State of Oklahoma. Nothing in this Limited Waiver, the Transaction Documents or any other document shall subject either the Cherokee Nation or the Ordering Parties to state law to any greater extent than state law is already applicable. Notwithstanding the foregoing, the Cherokee Nation and the Ordering Companies agree that claims relating only to violations of Intellectual Property Laws shall be governed by and construed in accordance with U.S. federal laws.

4. Duration of Waiver. This Limited Waiver is limited to the duration of the particular Transaction Document to which the Limited Waiver is being applied.

5. Cancellation. This Limited Waiver shall not be cancelled, terminated or withdrawn except by agreement of the party entitled to the Limited Waiver under the applicable Transaction Document.”

6. Applicable Documents. For clarification, this waiver of sovereign immunity shall apply only to the Transaction Documents, as defined in Section 13 of the General Terms, and shall not apply to any other agreement or transaction apart from the General Terms and its associated orders, unless the parties expressly agree in writing to its applicability to other agreements.” and

BE IT FINALLY RESOLVED BY THE CHEROKEE NATION, that this Resolution shall in no manner or in any respect operate or be construed to operate to waive or otherwise diminish the sovereign immunity of the Cherokee Nation, except as to allow certain actions against the Ordering Parties as provided herein.