

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIAM CROSS, JR.,

Plaintiff,

v.

C.A. No. 2:19-cv-11326-AJT-SDD

KEWADIN CASINOS GAMING
AUTHORITY, a political subdivision of
the SAULT STE. MARIE TRIBE OF
CHIPPEWA INDIANS, a/k/a
SAULT STE. MARIE TRIBAL
GAMING AUTHORITY,

SENIOR U.S. DISTRICT JUDGE
ARTHUR J. TARNOW

U.S. MAGISTRATE JUDGE
STEPHANIE DAWKINS DAVIS

Defendant.

**DEFENDANT KEWADING CASINOS GAMING AUTHORITY'S
REPLY BRIEF TO PLAINTIFF'S RESPONSE
TO ORDER TO SHOW CAUSE**

ORAL ARGUMENT REQUESTED

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Dated: June 28, 2019

STATEMENT OF ADDITIONAL ISSUES PRESENTED

1. Does this Court have sufficient removal federal question jurisdiction under the complete preemption corollary to the well-pleaded complaint rule to retain this matter, where:
 - a) Plaintiff's state common-law claim of breach of contract (as well as Plaintiff's derivative declaratory judgment claim for breach and damages) is undisputedly connected, as Plaintiff's own affidavit and exhibits demonstrate, to identifying potential investors and financing for two planned Class III gaming casinos, and thus requires to this Court interpret or to apply provisions of the Indian Gaming Regulatory Act, 25 U.S. § 2701 *et seq.* ("IGRA") and applicable regulations and the Sault Ste. Marie Tribe of Chippewa Indians' ("the Tribe") Constitution, Gaming Authority Charter, Gaming Ordinance and related ordinances;
 - b) this Court must resolve substantial and disputed issues of federal law relating to the purported contract; thus the Court has sufficient federal question jurisdiction. *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 314, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005), *Michigan v. Bay Mills Indian Community*, 695 F.3d 406, 413 (6th Cir. 2012, *affirmed* 134 S.Ct. 916 (2014));
 - c) the Tribe, as all other tribes, has an interest in having the disputed federal issue of waiver of sovereign immunity articulated as a matter of federal law and in federal rules of decision (see Kewadin's Removal Petition, Doc. 1, Pg ID 6-7, ¶¶ 9-11), particularly in a state where state courts disregard federal rules of decision on non-waiver, as here;
 - d) the National Indian Gaming Commission does not limit its authority (and the Bureau of Indian Affairs' authority) to review and discern the status of contracts other than management contracts under the IGRA;

Kewadin answers, "Yes."

Plaintiff presumably answers, "No."

2. Does this Court have sufficient removal federal question jurisdiction to address the federal issue of non-waiver of sovereignty immunity, where:
 - a) Plaintiff cites an inapposite Supreme Court case (*C & L Enterprises, Inc. v Citizen Band Potawatomi Indian Tribe of Oklahoma*, 521 U.S. 386 (2001));
 - b) Contrary to Sixth Circuit precedent, Plaintiff cites venue, choice of laws, and jurisdiction provisions in the contract that he claims are sufficient to waive sovereign immunity on the part of the Tribe (again as if this briefing were addressing a defense, and not simply sufficient removal jurisdiction for this Court to retain this case) and erroneously labels “ambiguous” the unambiguous non-waiver of sovereignty (containing similar language held to be unambiguous under Sixth Circuit precedent), *Bay Mills*, 695 F.3d at 414-15;
 - c) Contrary to Sixth Circuit and other precedent requiring a clear and unequivocal waiver of tribal sovereign immunity (see Kewadin’s Removal Petition, Doc. 1, Pg ID 6-7, ¶¶ 9-10), Plaintiff relies upon implied waiver by conduct, claiming that he is entitled to rely on the apparent authority of a former chairperson of the Tribal Board and the Kewadin Management Board, contrary to the Tribe’s Constitution, the Gaming Charter and the Gaming Ordinance approved by the NIGC Chair, and the Tribe’s waiver of tribal sovereignty ordinance;
 - d) Contrary to Sixth Circuit precedent, see *Memphis Biofuels*, 588 F.3d at 922-23, Plaintiff simply assert a non-existent contract/tort distinction for sovereignty immunity to imply a waiver of tribal sovereignty from conduct when the law requires a clear and unequivocal waiver (see Kewadin’s Removal Petition (Doc. 1, Pg. ID 7, ¶ 10).

Kewadin answers, “Yes.”

Plaintiff presumably answers, “No.”

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ADDITIONAL SIGNIFICANT OR CONTROLLING AUTHORITY

Buchwald Capital Advisors, LLC, v. Sault Ste. Marie Tribe of Chippewa Indians et al., 584 Bankr. Rptr. 706 (E.D. Mich. 2018), affirmed *In re Greektown Holdings, LLC*, 917 F.3d 451(6th Cir 2019)

Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing, 548 U.S. 308, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005)

Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998)

Memphis Biofuels, LLC v. Chickasaw Nation Industries, 585 F.3d 916 (6th Cir. 2009)

Michigan v. Bay Mills Indian Community, 695 F.3d 406 (6th Cir. 2012), affirmed 134 S.Ct. 916 (2014)

Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991)

Indian Gaming Regulatory Act, 25 U.S. § 2701 *et seq.* (“IGRA”)

Constitution and By-Laws of Sault Ste. Marie Tribe of Chippewa Indians

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TABLE OF AUTHORITIES cont.

Indian Gaming Regulatory Act, 25 U.S. § 2701 <i>et seq.</i>	1 <i>et passim</i>
28 U.S.C. § 1331	2, 6-7
Nat'l Indian Gaming Comm's, Bulletin No. 1993-3	6
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INTRODUCTION

Without waiving sovereign immunity, Defendant Kewadin Casinos Gaming Authority (the “Authority”), a governmental instrumentality of the Sault Ste. Marie Tribe of Chippewa Indians (the “Tribe”), submits this reply brief as permitted by this Court’s Order dated June 26, 2019.

In his response, Plaintiff appears to argue that “field preemption” cases are inapposite, but does not materially dispute the methodology followed in those case. While he does recognize the preemptive sweep of the Indian Gaming Regulatory Act, 25 U.S. § 2701 *et seq.* (“IGRA”) and related applicable regulations and related tribal law of the Tribe (all of which are available on the Tribe’s Web site as cited in the Tribe’s response),¹ Plaintiff suggests that only management contracts fall within IGRA’s comprehensive scheme, and that his contract is too attenuated from gaming activities to fall within IGRA’s ambit. He also relies on what he terms is the “apparent authority” of a past tribal chairperson who chaired the Tribe’s Board and the Management Board to enter into contracts

¹ Plaintiff attests that he is an enrolled tribal member of the Little River Band of Ottawa Indians. His own tribe’s similar constitutional, gaming and sovereign immunity provisions are available on that tribe’s Web site at www.lrboi-nsn.gov/government/tribal-code. See, e.g., the Constitution, Art. IX, and the Gaming Commission Ordinance, §§ 4.01 (subject to IGRA), 4.03 (no waiver of sovereign immunity except by express resolution of Tribal Council, and 4.04 (express non-waiver of sovereign immunity of Plaintiff’s tribe, similar to the express non-waiver in Section 6 of Plaintiff’s purported contract.)

without having to follow tribal ordinances. Significantly, he does not dispute that one purpose of IGRA is to protect a tribe's gaming operations from organized crime and other corrupting influences that might finance casino-related activity.

As discussed in detail below, each of Plaintiff's assertions is contrary to Supreme Court and/or Sixth Circuit or other appellate law. This Court has sufficient federal question jurisdiction under 28 U.S.C. § 1331 and the complete preemption corollary to the well-pleaded complaint rule to retain this matter.

ARGUMENT

I. This Court Must Interpret or Apply IGRA to Resolve Issues of Federal Law Arising from Plaintiff's Purported Contract.

As Plaintiff's own affidavit and the exhibits attached thereto demonstrate, Plaintiff's purported consulting contract (and thus his state common-law claim of breach of contract and his Plaintiff's derivative declaratory judgment claim) is undisputedly connected to his identifying potential investors from his "cultivated relationships" and to secure financing for two planned Class III gaming casinos (see Plaintiff's Exs. C-1 and C-2 as projects for which he claims finder's fees based on 2011 non-recourse promissory notes recently amended).²

² Kewadin notes that Plaintiff tries to excuse his failure to provide expenses and reports to the Tribe even to this very day by a reduction in information from the Tribe in 2012; however, the final exhibit he provides is correspondence on which he was not addressed or cc'd and which he apparently received from one of the addresses.

In order to evaluate the legal conclusions in Plaintiff's affidavit (beyond his ken as a layperson) and assertions in his response, this Court must interpret and/or apply the statute and resolve issues of federal law vis-a-vis the purported contract. First, in light of Plaintiff's affidavit, this Court must evaluate the legal issue of apparent authority of the chairperson and perhaps two other tribal officers with whom he allegedly met on Mackinaw Island to create a consulting contract to find investors, financing parties, and potential management entities for Class III gaming casinos, in a manner contrary to the Tribe's Constitution and By-laws and other tribal law (Ex. F, submitted herewith, and Exs. B-E, previously submitted). The Supreme Court has long required, including in the context of contracts, that the party seeking to enforce a commercial contract against a tribe must demonstrate a clear and unequivocal waiver of immunity by a tribe, see *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509, 111 S.Ct. 905, 112 L. Ed.2d 112 (1991). Based on that requirement, the Sixth Circuit has expressly rejected claims of apparent authority by tribal officials where tribal law required, as here, that the tribe's board of directors pass a resolution waiving sovereign immunity. *Memphis Biofuels, LLC, v. Chicasaw Nation Industries*, 585 F.3d 917, 921-23 (6th Cir. 2009). In this case, the Tribe's sovereign immunity ordinance also requires that a

board resolution containing the waiver meet certain requirements and be attached to the contract (see Def. Ex. D, §§ 44.107(2) and 44.110).

Second, this Court must also evaluate the legal issue of whether the absolute absence of any provision in Plaintiff's purported contract submitting the dispute to final and binding arbitration under AAA rules subject to enforcement (because such arbitral awards are not self-executing) in state court under a state arbitration statute completely distinguishes this case from *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001), a case on which Plaintiff so heavily relies. Significantly, Justice Ginsburg, writing for the Court, noted that such an arbitration agreement, *completely absent here*, was *not* present in *Kiowa*, 532 U.S. at 1592 and 1494-95. Plaintiff claims that the forum selection clause and choice of law provision in *C & L Enterprises, Inc.* had independent significance there and here (Pl. Brf, Doc 9, Pg ID 444-46) and in effect should be used to read the non-waiver of sovereign immunity right out of the purported contract, rendering it meaningless and nugatory. However, in *Oglala Sioux Tribe v. C&W Enterprises, Inc.*, 542 F.3d 224, 232-33 (8th Cir. 2008), the Eighth Circuit rejected that reading that other clauses like a choice of laws clause proved dispositive and in any way impacted the analysis of the final and binding arbitration provision in *C & L Enterprises* and its progeny. Contrary to Plaintiff's assertion that the "sue and be sued" clause

effects a legal waiver of immunity, the Sixth Circuit expressly rejected such an argument. *Michigan v. Bay Mills Indian Community*, 695 F.3d 406, 416 (6th Cir. 2012), a case arising under IGRA.

Third, this Court must evaluate a legal issue completely asserted by Plaintiff in his brief, i.e., that the non-waiver is confined to tort cases only and not to contract cases (Pl. Brf., Doc. 445-447). That argument has been soundly rejected. In *Buchwald Capital Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians*, 594 Bank. Rptr. 706, 714-17 (E.D. Mich. 2018), *aff'd In re Greektown Holdings, LLC*, 917 F.3d 451(6th Cir 2019)the Litigation Trustee made the same suggestion, and Judge Borman rejected that argument on appeal from Judge Shapero's decision, noting that there, as here, the Litigation Trustee cited no authority for the proposition, and that neither *Memphis Biofuels*, 588 F.3d at 922-23 (rejecting claims of waiver and apparent authority), nor the cases on which Judge Cole relied in that decision made such a distinction.

Fourth, Plaintiff struggles mightily to convince the Court that the completely clear and unambiguous non-waiver of sovereign immunity at the end of Paragraph 11 of his purported agreement is "ambiguous" (see Pl. Brf., Doc. 9 Pg ID 447-49). The sentence at issue clearly resembles the non-waiver of sovereign immunity held to be an unambiguous non-waiver in *Bay Mills*, 695 F.3d at 416 (there, "Nothing in this Ordinance, nor any action of the Tribal

Commission shall be deemed or construed to be a waiver of sovereign immunity from suit of the Tribe.”). Here, the last sentence of Paragraph 11 (which Plaintiff argues contains a venue clause, a choice of laws clause and a jurisdiction clause) is equally clear and unambiguous: “Nothing contained herein shall be construed to be a waiver of the Client’s [i.e., Kewadin’s], or Client’s parent governmental entity’s [i.e., the Tribe’s] sovereign immunity.” (Def. Ex. 1, Pg. ID 23, ¶ 11).

II. This Court Has Sufficient Federal Question Jurisdiction over Federal Issues of Law Arising from This Dispute.

This Court must resolve substantial and disputed issues of federal law relating to the purported contract. Contrary to Plaintiff’s assertion that the contract is too attenuated to be subject to IGRA and federal regulation, the NIGC indicates in sub-regulatory guidance that it has authority to review such contracts, in order to determine the nature of the contract. If the NIGC determines that the contract is not subject to approval of the NGIC, the submitter of the contract is notified of that fact and the NIGC forwards the agreement to the Bureau of Indian Affairs for its review. See Nat’l Indian Gaming Comm’s, Bulletin No. 1993-3. As the Sixth Circuit has held, a federal court has sufficient federal question jurisdiction under 28 U.S.C. § 1331 to review claims raising significant issues under federal common-law, even if this Court were to construe Plaintiff’s claims relating to a casino-related financing contract (with undenied implications for individuals connected with organized crime or other organizations in need of

laundering money through investments) as state-law or common-law claims.

Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing, 545 U.S. 308, 314, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005); see *Bay Mills*, 695 F.3d at 413 (rejecting Michigan's argument that its federal common-law and state-law claims were not within the purview of federal question jurisdiction in a case under IGRA< and finding federal question jurisdiction under 28 U.S.C. § 1331.

Contrary to Plaintiff's suggestion that state courts can also address such issues, the Tribe has previously suffered when a state court refused to apply *Memphis Biofuels* in following the Tribe's requirements sovereign immunity waiver.

CONCLUSION

For the reasons stated above and in its initial Response to this Court's Order to Show Cause, Kewadin hereby respectfully requests that this Court should vacate its Order to Show Cause.

Dated: June 28, 2019

Respectfully submitted,

/s/ Diane M. Soubly

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LOCAL RULE 5.1 CERTIFICATION

I, Diane M. Soubly, certify that this document complies with Local Rule 5.1(a), including: double-spaced (except for quoted materials and footnotes); at least one-inch margins on the top, sides, and bottom; consecutive page numbering; and type size of all text and footnotes that is no smaller than 10-1/2 characters per inch (for non-proportional fonts) or 14 point (for proportional fonts). I also certify that it is the appropriate length. Local Rule 7.1(d)(3).

/s/Diane M. Soubly

~~CERTIFICATE OF SERVICE~~

I hereby certify that, on June 28 2019, I caused the forgoing documents to be filed electronically by CM/ECF, which caused notice to be sent to all counsel of record.

/s/Diane M. Soubly