The Grand Traverse Band of Ottawa and Chippewa Indians

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December 14, 2004

Tribal Court Clerk
GTB Appellate Court
2605 N. West Bayshore Drive
Peshawbestown, MI 49682

Re: *Wilson v. GTB Economic Development Corporation et. al.*
Appellate Court Case No. 04-08-566-CV-APP

Dear Court Clerk:

Enclosed for your filing purposes are the originals of the following document(s) plus four (4) extra copies of the brief per Section 9.308(B) of the Rules of Appellate Procedure:

1. Respondents' Brief; and
2. Certificate of Service.

Please note that as of December 15, 2004 the Legal Department has been assigned new telephone numbers in accordance with the new Tribal telephone system; the main telephone number for the Legal Department will be (231) 534-7610. If you have any questions or concerns please do not hesitate to contact our office.

Sincerely,

Ruth Dudley-Chippewa

Ruth Dudley-Chippewa
Administrative Assistant/Paralegal

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Enclosures

cc: Lee Hornberger, Esq.

GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS

COURT OF APPEALS

DONNA LOU WILSON,

Plaintiff-Appellant,

Appellate Court Case No.: 04-08-566-CV-APP

v.

Tribal Court Case No.: 04-03-205-CV

GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS ECONOMIC DEVELOPMENT CORPORATION; CHRIS BUSSEY, Assistant Executive Officer, in his individual and official capacities; and RON OLSON, Chief Executive Officer, in his individual and official capacities,

Defendants-Respondents.

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STATEMENT OF JURISDICTION

Defendants-Respondents concur in the Plaintiff-Appellant's Statement of Jurisdiction. *See* Plaintiff-Appellant's Brief on Appeal at iv.

STATEMENT OF RELIEF SOUGHT

Defendants-Respondents Grand Traverse Band of Ottawa and Chippewa Indians Economic Development Corporation, Chris Bussey, and Ron Olson respectfully request this Court to uphold the decision of the lower court, *Wilson v. Grand Traverse Band of Ottawa and Chippewa Indians Economic Development Corporation*, No. 04-03-205-CV, Amended Tribal Court Decision and Order Concerning Defendant's Motion to Dismiss Based Upon Sovereign Immunity of the Economic Development Corporation and Its Officer (Grand Traverse Band Tribal Ct., Oct. 12, 2004), and dismiss with prejudice all of the Plaintiff-Appellant's claims.

STATEMENT OF QUESTIONS INVOLVED

I. Should the Plaintiff-Appellant's Claims Be Dismissed Based on Tribal Sovereign Immunity?

Plaintiff-Appellant's Answer: No

Defendants-Respondents' Answer: Yes

Tribal Court's Answer: Yes

STANDARD OF REVIEW

Under MCR 9.400(E), this Court's standard of review in reviewing the tribal court's decision to grant a motion to dismiss is *de novo*. *See Anderson v. Grand Traverse Band of Ottawa and Chippewa Indians*, No. 00-03-114-CV at 1 (Grand Traverse Band Tribal Ct., July 10, 2000) (noting the adoption of the Michigan Court Rules on an interim basis).

STATEMENT OF FACTS

In 1997, the Grand Traverse Band Tribal Council ("Tribal Council") acted to charter the Grand Traverse Band Economic Development Corporation ("EDC") in accordance with Section 17 of the Indian Reorganization Act, codified at 25 U.S.C. § 477. *See* Tribal Council Resolution # 96-14.412 (April 22, 1997). In 1998, the Secretary of the Interior formally issued a certificate of approval of the charter of the EDC. *See* FEDERAL CHARTER OF INCORPORATION OF THE GRAND TRAVERSE BAND ECONOMIC DEVELOPMENT CORPORATION Art. XIX. The EDC replaced the Grand Traverse Band's Economic Development Authority ("EDA"), which had dissolved. *See* EDA Resolution #95-002 (Feb. 8, 1995).

The EDC is the business entity owned by the Grand Traverse Band that owns all of the business assets of the Grand Traverse Band, including without limitation the Turtle Creek Casino, the Leelanau Sands Casino, and the Grand Traverse Resort & Spa. The Tribal Council chartered the EDC for the express purpose of managing economic affairs and enterprises of the Grand Traverse Band in accordance with Article IV, Section 1(m) of the Grand Traverse Band Constitution. One of the legal purposes for chartering the EDC was to allow the EDC to fall under Internal Revenue Service Revenue Ruling 94-16, 1991-4 C.B. 19 (March 1994) that exempts Section 17 corporations from federal and state income taxes. *See* Tribal Council Resolution #96-14.412 (April 22, 1997). Another legal purpose was to protect the Grand Traverse Band's non-business assets. *See id.*

The process for the EDC to take official action is streamlined in comparison the process for the Tribal Council to take action. The Chief Executive Officer is authorized to "control all the business and affairs of the Corporation on a day-to-day basis." 15 GTBC

§ 243(a). The EDC Board of Directors manages "the general affairs and business of the Corporation." 15 GTBC § 229(a). The EDC Board of Directors is authorized to take action even outside the confines of an official Board meeting, as long as the Board ratifies the action at a later meeting. *See* 15 GTBC § 237. In contrast, the Tribal Council may only take action by "motion, resolution, or ordinance" during an official, public meeting. GRAND TRAVERSE BAND CONST. Art. III, § 5(e)(1). There is no analog in the Grand Traverse Band Constitution for a Chief Executive Officer to act on behalf of the Tribal Council. *Compare* GRAND TRAVERSE BAND CONST. Art. III, § 3(a) (describing the limited powers of the Tribal Council Chairperson), *with* 15 GTBC § 243(a) (granting authority to EDC Chief Executive Officer to handle "day-to-day" affairs of the EDC). Moreover, Tribal Council decisions are made in the context of an open, public meeting, anticipating tribal member comment and participation in the decision-making process. *See* GRAND TRAVERSE BAND CONST. Art. III, § 5(d)(1) ("All meetings … shall be open to tribal members and tribal members shall have a reasonable opportunity to be heard…."). No such requirement exists for EDC decision-making. *See, e.g.*, 15 GTBC § 222 (noting that "special meetings" of the EDC can be called without notice to the tribal member public); § 230(b) (noting that Director's meetings can be called without notice).

Consistent with the business purposes of chartering the EDC and the non-public character of EDC, the EDC provides only limited tribal court review of adverse employment actions against tribal *enterprise* employees. *See* EDC Personnel Manual § 11.4 (effective August 1, 2002; approved with revisions through May 18, 2004) ("The decision of the Board shall be final."); *see also* Administrative Hearing for Employment Discharges (effective May 4, 2004) (same). Nevertheless, the EDC provided due process

to the Plaintiff-Appellant during an administrative hearing phase by allowing her to challenge the discharge before a panel composed of six non-exempt employees, six exempt, non-managerial employees, and six managers. *See id.* The current policy, adopted by the EDC Board of Directors in 2004, provides for a review of employment discharged by a panel composed of four front-line employees and three managers. *See* Administrative Hearing for Employment Discharges (effective May 4, 2004).

The Grand Traverse Band government, on the other hand, provides exceptionally broad due process rights for tribal *government* employees. For example, the Grand Traverse Band Personnel Policy provides for a detailed process for the review of adverse employment decisions by an Administrative Appeals Board. *See* Grand Traverse Band Personnel Policy § 606.1 *et seq.*; *see also Stewart v. Grand Traverse Band of Ottawa and Chippewa Indians*, No. 02-01-784-CV (Grand Traverse Band Tribal Ct., Oct. 21, 2002) (discussing the limited waiver of immunity by the Grand Traverse Band for the benefit of tribal government employees).

Plaintiff-Appellant Donna Lou Wilson was an employee of the EDC until the EDC terminated her employment on March 5, 2003 for disclosing confidential information to her non-employee sister. The information was "whether or where there was going to be a slot drawing." Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss at 2. Plaintiff-Appellant appealed her discharge to the EDC employment review panel, which rejected her appeal on March 25, 2003. *See* Letter from Michelle Kappie to Donna Wilson (March 25, 2003).

Plaintiff-Appellant brought suit in the Grand Traverse Band Tribal Court alleging violations of the Indian Civil Rights Act and the Grand Traverse Band Constitution,

Article X, Section 1(h). Plaintiff-Appellant named the Grand Traverse Band Economic Development Corporation as a defendant, as well as Chris Bussey, Assistant Executive Officer of the EDC, in his individual and official capacities. Defendant EDC hired Ron Olson as Chief Executive Officer in February 2004 and the Plaintiff-Appellant added him as a defendant in his individual and official capacities during the pendency of this litigation.

At no time did the Grand Traverse Band Tribal Council or the Board of Directors of the EDC consent to a waiver of the sovereign immunity of the EDC or its officers. *See* Amended Decision and Order at 4-5; Brief in Support of Motion to Dismiss Based on Sovereign Immunity of the Economic Development Corporation and Its Officer at 1-2. For this reason, the tribal court dismissed Plaintiff-Appellant's claims with prejudice. *See Wilson v. Grand Traverse Band of Ottawa and Chippewa Indians Economic Development Corporation*, No. 04-03-205-CV, Amended Tribal Court Decision and Order Concerning Defendant's Motion to Dismiss Based Upon Sovereign Immunity of the Economic Development Corporation and Its Officer at 7 (Grand Traverse Band Tribal Ct., Oct. 12, 2004) ("Amended Tribal Court Decision and Order").

SUMMARY OF ARGUMENT

Tribal sovereign immunity serves to preclude Plaintiff-Appellant's claims in their entirety. Neither the EDC nor the Tribal Council has acted to waive the immunity of the EDC and its officers from suit. This Court's precedents teach that tribal sovereign immunity can be waived only if the waiver is express and follows the strict procedures of Article XIII and the Grand Traverse Band Code. No such waiver is present in this case.

Moreover, strong tribal public policy supports the preservation of the separation of the Tribal Council and EDC while simultaneously preserving the EDC's sovereign immunity. The EDC is a Section 17 corporation. The purposes of chartering a Section 17 corporation include this system of separating the corporation from the tribe while maintaining sovereign immunity.

Plaintiff-Appellant argued before the lower court that the Indian Civil Rights Act and Article X of the Grand Traverse Band Constitution served to waive the immunity of the EDC. When confronted with this Court's precedents, the tribal court correctly dismissed the claims. *See* Amended Decision and Order at 7. At the suggestion of the tribal court, *see id.*, Plaintiff-Appellant argues on appeal that United States Supreme Court precedents dictate to this Court that the EDC and the Grand Traverse Band are one and the same and that, therefore, the EDC's immunity has been waived. This argument fails for at least two reasons. First, the Supreme Court precedent at issue is wholly unrelated to and non-cognizant of the relationship between the Grand Traverse Band the EDC; and second, it is not (nor should it be) a tribal court precedent.

Finally, the Plaintiff-Appellant argues for the first time on appeal that 18 GTBC § 601 extends tribal court jurisdiction over the named Defendants-Respondents. This

argument fails for two reasons. First, the issue of tribal sovereign immunity is an independent jurisdictional issue that cannot be waived absent the consent of both the Tribal Council and the EDC; and second, the larger ordinance under which this statute appears expressly reserves tribal sovereign immunity. *See* 18 GTBC § 407.

ARGUMENT

I. The EDC Enjoys the Sovereign Immunity of the Grand Traverse Band.

The Grand Traverse Band of Ottawa and Chippewa Indians is immune from suit in all courts, absent an express waiver. *See* GRAND TRAVERSE BAND CONST. Art. XIII. And, under tribal common law, the Grand Traverse Band enjoys immunity from suit. *See Novak Construction Co., Inc. v. Grand Traverse Band of Ottawa and Chippewa Indians & Leelanau Sands Casino*, No. 00-09-423-APP at 2-3 (Grand Traverse Band Ct. App., Nov. 26, 2001); *Sliger v. Stalmack*, No. 99-10-490-CV at 2 (Grand Traverse Band Tribal Ct., Feb. 14, 2000). Under tribal common law, waiver of the immunity of the Grand Traverse Band must be express and not implied. *See Novak Construction* at 2 (*citing Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877 (1986)); *Sliger* at 3 (**"Waiver of sovereign immunity must be clear and unequivocally expressed."**) (emphasis in original). The sovereign immunity of the Grand Traverse Band can be waived only in accordance with the express terms of the Grand Traverse Band Constitution. *See* GRAND TRAVERSE BAND CONST. Art. XIII(2).

Moreover, the Grand Traverse Band has expressly extended its sovereign immunity to the Economic Development Corporation. *See* 15 GTB § 216(a). In accordance with the *constitutional* procedure of Article XIII, the Grand Traverse Band

Tribal Council created a *statutory* procedure by which the Tribal Council and the EDC could waive the sovereign immunity of the EDC. *See* 15 GTBC § 218. Following these *statutory* procedures, the EDC and the Tribal Council have, at times, waived the immunity of the EDC. See EDC Resolution #03-003 (March 3, 2003) (relating to the purchase of the Grand Traverse Resort and Spa) and Tribal Council Resolution #03.21.1211 (March 3, 2003) (same) for a representative conforming resolutions effectively waiving the immunity of the EDC.

In the instant case, neither the EDC nor the Tribal Council has acted to waive the immunity of the EDC in accordance with Section 218. The lower court relied upon that fact to correctly dismiss this case with prejudice. *See* Amended Tribal Court Decision and Order at 7. This Court's precedents compel the affirmation of the lower court's decision.

A. The Grand Traverse Band's Sovereign Immunity Extends to the Grand Traverse Band Economic Development Corporation.

It has long been decided by this Court that the Grand Traverse Band Economic Development Corporation is well within the blanket of immunity from suit provided by the Grand Traverse Band of Ottawa and Chippewa Indians. *See Shananaquet v. Grand Traverse Band of Ottawa and Chippewa Indians Economic Development Corporation*, No. 00-05-299-CV at 2 (Grand Traverse Band Ct. App., March 18, 2003). This opinion is consistent with numerous decisions from the Grand Traverse Band Tribal Court that other tribal subordinate organizations remain within the blanket of immunity of the Grand Traverse Band, such as the Grand Traverse Band Gaming Commission, *see Yannett v. Grand Traverse Band of Ottawa and Chippewa Indians & Grand Traverse Band Gaming Commission*, No. 95-11-147-CV at 2 (Grand Traverse Band Tribal Ct., Jan. 19, 2004);

the former Grand Traverse Band Housing Authority, *see Melvin Wilson v. Grand Traverse Band of Ottawa & Chippewa Indians Housing Authority*, No. 01-06-375-CV at 2 (Grand Traverse Band Tribal Ct., March 12, 2002); and the Leelanau Sands Casino, *see Turner v. Leelanau Sands Casino*, No. 99-11-562-CV at 3 (Grand Traverse Band Tribal Ct., July 12, 2000).

This Court in *Shananaquet* already decided the very issues raised by the Plaintiff-Appellant in this case. *Shananaquet* concerned a claim brought by Michael Shananaquet, a former employee of the EDC, for wrongful discharge from his position as general manager of the Leelanau Sands Casino, owned by the EDC. *See Shananaquet* at 1. This Court noted that 15 GTBC § 216(a) expressly extends the sovereign immunity of the Grand Traverse Band to the EDC. *See id.* at 2 (*citing* 15 GTBC 216(a)). Following tribal common law precedents, this Court held that "[t]he EDC's immunity from suit is an absolute bar to the Plaintiff-Appellant's lawsuit unless there is a waiver of the EDC's immunity from suit." *Id.* The plaintiff in *Shananaquet* made two arguments that the EDC had waived its immunity. First, the plaintiff argued that the "sue and be sued" clause of the EDC's charter, *see* 15 GTBC § 211(s), operated to waive the immunity of the EDC. This Court rejected that argument, noting that the "sue and be sued" clause would become operative only when the immunity waiver procedures in 15 GTBC § 218 – that is, conforming resolutions from both the EDC and the Tribal Council expressly waiving the EDC's immunity – were followed. *See Shananaquet* at 3. Second, the plaintiff argued that the Indian Civil Rights Act ("ICRA"), codified at 25 U.S.C. §§ 1301 – 1303, and Articles X and XIII of the Grand Traverse Band Constitution applied to the actions of the EDC. This Court rejected that argument as well, noting that the EDC charter "goes to

great lengths to make it perfectly clear that the EDC is a separate and distinct entity from the Grand Traverse Band." *Shananaquet* at 3 (*citing* 15 GTBC §§ 202; 203; and 206(a)). This Court concluded, "A finding to the contrary by this Court would effectively obliterate the distinction between what is tribal and what is corporate in character." *Id.* at 4.

As the lower court acknowledged, the case at bar is a carbon copy of *Shananaquet*. *See* Amended Tribal Court Decision and Order at 7 ("[T]he issues raised herein fall squarely within the Court of Appeals holding in *Shananaquet*...."). Like the plaintiff in *Shananaquet*, the Plaintiff-Appellant here was an employee of the Leelanau Sands Casino, which is still owned by the EDC. Like the plaintiff in *Shananaquet*, the Plaintiff-Appellant here makes a claim for wrongful discharge and alleges due process violations. Like the plaintiff in *Shananaquet*, the Plaintiff-Appellant here alleges that ICRA creates a cause of action to file suit for wrongful discharge. In fact, the Plaintiff-Appellant in this case makes no allegations materially different from the allegations made by the *Shananaquet* plaintiff. As such, the *Shananaquet* decision must control and this Court must affirm the decision of the lower court.

In any event, the Indian Civil Rights Act does not operate to waive sovereign immunity. The Tribal Court has ruled on numerous occasions that ICRA is not a waiver of immunity. *E.g.*, *Yannett* at 2 (*citing McCormick v. Election Committee of the Sac & Fox Tribe*, No. CIV-79-S1, 1 Okla. Trib. 8, 1980 WL 128844 (Sac & Fox Ct. of Indian Offenses, Feb. 1, 1980) (Browning Pipestem, M.J.)); *Bonacci v. Tribal Council of the Grand Traverse Band of Ottawa & Chippewa Indians*, No. 00-04-176-CV at 2-3 (Grand Traverse Band Tribal Ct., Jan. 9, 2003) (same). The United States Supreme Court long

ago decided that ICRA did not operate to waive tribal sovereign immunity in federal courts. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). That rule should also apply in tribal courts. Disregarding this persuasive authority would create a conflict in the interpretation of ICRA. *See Yannett* at 2. The Tribal Court has repeatedly stated, "'It would be [a] contradiction of *Santa Clara* to hold on the one hand that the Indian Civil Rights Act is ineffective to waive tribal sovereign immunity by implication in the federal courts and on the other hand to hold that the same legislative enactment is effective to waive the sovereign immunity by implication in the tribal courts.'" *Yannett* at 2 (*quoting McCormick* at 19). As such, even if this Court were to find that the Tribal Council and the EDC were the same entity (which it should not), there is no waiver of sovereign immunity to be found.

Plaintiff-Appellant nevertheless appears to be reiterating that the EDC, in fact, has the same legal duties and responsibilities as the Grand Traverse Band in plain contravention of the Grand Traverse Band Constitution. This Court, as it has done repeatedly, should reject this conclusion.

B. As a Matter of Tribal Public Policy, the EDC Must Remain Separate From the Grand Traverse Band While Retaining the Immunity From Suit.

The tribal public policy purposes of chartering a Section 17 corporation such as the EDC compel this Court to find that the EDC retains immunity from suit absent a valid waiver. This Court in *Shananaquet* affirmed the critical principle that the EDC must operate in its corporate capacity independent from the Grand Traverse Band in its governmental capacity. This Court wrote:

> This Court is not convinced that the EDC in making a personnel decision in its corporate capacity as a private employer is in fact exercising the powers of self-government of an Indian tribe. We are not ready to ignore the explicit provisions of the EDC's federal charter as codified in the Grand Traverse Band Code to conclude that the EDC was exercising the powers of tribal self-government in terminating Plaintiff's employment because it might be thought to be responsive to a particular view of enlightened governmental policy.

Shananaquet at 5. The tribal court also wrote, in the context of the EDC's predecessor, the EDA, that "[i]t is separate from tribal government so that it can function effectively in the business world, and to remove it from the political considerations in the community. The EDA must be able to make sound business decisions based solely upon business considerations." *Adams v. Grand Traverse Band of Ottawa and Chippewa Indians Economic Development Authority*, No. 89-03-001-CV at 1-2 (Grand Traverse Band Tribal Ct., June 18, 1992), *aff'd*, No. 89-03-001-CV (APP) (Grand Traverse Band Ct. App., August 19, 1993).[1]

The purpose of Section 17 of the Indian Reorganization Act, under which the EDC was formed, was to allow Indian tribes to engage in business activities separate from their governmental activities. *See* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 325-27 (Rennard Strickland ed., 1982) ("COHEN HANDBOOK"). While the original purpose of many tribal corporate charters was to allow the Section 17 corporation to waive its sovereign immunity with the inclusion of a "sue and be sued"

[1] The Tribal Court in *Adams* concluded that the EDA had expressly waived its immunity as a condition of accepting a loan from the federal government. *See Adams* at 3. No such express waiver is to be found in this matter.

clause, *see* COHEN HANDBOOK at 326-27, modern Section 17 charters, including the EDC charter, require more than the existence of a "sue and be sued" clause to waive the immunity of the corporation. *See Shananaquet* at 3 ("The 'sue and be sued' clause of the EDC's charter is not absolute since it must be exercised in conformity with Article VII of the EDC's federal charter."); *see also* COHEN HANDBOOK at 327 ("If the corporation is an arm of the tribal government or a wholly owned corporation chartered by the tribe, the tribe should be able to confer its immunity on it."). One continuing purpose of chartering Section 17 corporations is to protect the assets of the tribal business enterprises. *See* COHEN HANDBOOK at 327 ("This limitation allows a tribal corporation to enter business transactions but requires that the party contracting with the corporation seek a pledge in advance of whatever security it may require, since general assets of the corporation cannot be reached."); *see also Maryland Cas. Co. v. Citizens Nat. Bank of West Hollywood*, 361 F.2d 517, 521 (5th Cir.) ("It is in [commercial] enterprises and transactions that the Indian tribes and the Indians need protection."), *cert. denied*, 385 U.S. 918 (1966).

Moreover, Congress intended from the beginning that Section 17 corporations be completely separate entities from tribal governments. The Solicitor for the Department of Interior wrote in 1958 that:

> The purpose of Congress in enacting section 17 of the Indian Reorganization Act was to empower the Secretary to issue a charter of business incorporation to such tribes to enable them to conduct business through this modern device, which charter cannot be revoked or surrendered except by act of Congress. This corporation, although

> composed of the same members as the political body, is to be a separate entity, and this more capable of obtaining credit and otherwise expediting the business of the tribe, while removing the possibility of federal liability for activities of that nature. As a result, the powers, privileges and responsibilities of these tribal organizations differ.

Interior Solicitor's Opinion No. M-36515, 65 Interior Decisions 483, 484 (Nov. 20, 1958), *quoted in Atkinson v. Haldane*, 569 P.2d 151, 172 (Alaska 1977). In other words, Section 17 corporations exist for an entirely different purpose than tribal governments and are, in fact, a tool for generating revenues that fund tribal government programs and services.

For the Grand Traverse Band, the EDC avoids the potential problem of tribal government bureaucracy impeding tribal economic development. As professors David Haddock and Robert Miller (Eastern Shawnee Tribe of Oklahoma) recently wrote, "It is ... almost an axiom that business developers hate bureaucracies because bureaucrats can cause high business start-up costs, a difficult and slow start-up, and low productivity for existing businesses." David D. Haddock & Robert J. Miller, *Can A Sovereign Protect Investors From Itself? Tribal Institutions to Spur Reservation Investment*, 8 J. SMALL AND EMERGING BUS. L. 173, 210 (2004). Moreover, separating business decisions from tribal politics is a critical element of reservation economic development. Professor Stephen Cornell wrote, "The first institutional factor in the effective exercise of tribal sovereignty is the separation of politics from day-to-day business management. ... When it comes to running a business, what we want are the best business people we can find, people who know how to make those businesses succeed so that they become lasting

sources of income, jobs, and productive livelihood for our people." Stephen Cornell, *Sovereignty, Prosperity and Policy in Indian Country Today*, 5 COMMUNITY REINVESTMENT 5 (Federal Reserve Bank of Kansas City 1997), *reprinted in* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 721, 723-24 (4th ed. 1998). For the EDC, the ability to maintain a dependable workforce and to make quick and necessary employment decisions is critical to maintaining profitability. For example, in the highly competitive gaming-related entertainment field, reliance on hearsay evidence to make adverse employment decisions is justified. *E.g.*, *Eldred v. Mashantucket Pequot Gaming Enterprise*, No. MPTC-EA-2001-109, 2001.NAMP.0000022 at ¶¶ 49-68 (Mashantucket Pequot Tribal Ct., Sept. 6, 2001), *available at* www.tribal-institute.org/opinions/2001.NAMP.0000022.htm (visited November 24, 2004). In *Eldred*, a gaming employee's off-duty conduct sufficiently implicated the legitimacy of the gaming operation to justify discharge. *See id.* at ¶¶ 65-68. Here, the Plaintiff-Appellant is alleged to have provided confidential and proprietary business information to a close relative. The EDC and named Defendants-Respondents (excluding Ron Olson, who was not an employee of the EDC at the time of the Plaintiff-Appellant's discharge from employment) complied with the EDC's employee discharge review procedures relying on information similar in character to the evidence relied upon in *Eldred*. Any employee conduct that implicates the legitimacy of the EDC's gaming establishments must be seriously examined.

In sum, the EDC exists to operate tribal businesses in a competitive gaming business world with a potential for greatly diminishing returns, *see* Becky Yerak, *State Sees Slow Growth in Indian Casinos*, DET. NEWS, June 1, 2003, *available at*

www.detnews.com/2003/business/0306/01/b01-179499.htm (visited November 30, 2004), whereas the tribal government exists outside of that sphere. In the experience of the Grand Traverse Band, this separateness has allowed the EDC to raise millions in revenues that allow the tribal government to provide social services, educational opportunities, health care, housing, and untold other benefits. *See Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western Dist. of Mich.*, 198 F. Supp. 2d 920, 924 (W.D. Mich. 2002), *aff'd*, 369 F.3d 960 (6th Cir. 2004). After careful study and consideration of the impact on tribal businesses, the Tribal Council has invoked its legislative powers (powers that the EDC does not have) and enacted a tort claims act, *see* 6 GTBC §§ 101 *et seq.*, and a contract claims act, *see* 6 GTBC §§ 201 *et seq.* to provide remedies for customers and vendors of the EDC while at the same time recognizing the governmental interests of the Grand Traverse Band. This Court should not choose to upset the delicate balance established by the Tribal Council in favor of Plaintiff-Appellant's "particular view of enlightened governmental policy." *Shananaquet* at 5.

C. Article XIII Does Not Supply a Waiver of Immunity to Plaintiff-Appellant Against the EDC or the Named Defendants-Respondents.

Article XIII simply does not apply to the EDC and, even if it did, Plaintiff-Appellant has not complied with the express language of Article XIII. In *Shananaquet*, this Court noted that Article XIII, Section 2(a) of the Grand Traverse Band Constitution "provides for a waiver of sovereign immunity from suit in Tribal Court for the Grand Traverse Band and Tribal Council members in their official capacities." *Shananaquet* at 4. Plaintiff-Appellant has sued neither the Grand Traverse Band nor any of the Tribal

Council members, but instead has sued the EDC and two EDC employees. *Shananaquet* made explicitly clear that Article XIII Sections 1 and 2(a) do not apply to the EDC. *See id.* Plaintiff-Appellant nonetheless insists that Article XIII does apply. *See* Appellant's Brief on Appeal at 5-6. Ironically, now that the Plaintiff-Appellant has apparently received prodding from the lower court to rely on the *LeBron* case, *see* Amended Tribal Court Decision and Order at 7 ("Had this case come to the Court prior to the Court of Appeals decision in Shananaquet, this Court would follow LeBron...."), Plaintiff-Appellant appears to be shifting her position to allege a cause of action against entities and individuals *that are not parties to this matter.* Nor could they be as the Grand Traverse Band and the members of the Tribal Council took no official action in this matter.

As a threshold matter, this Court is not authorized or empowered to award money damages against the Grand Traverse Band or its Tribal Council members. As this Court and the Tribal Court have long held, members of the Grand Traverse Band may maintain a cause of action against the Grand Traverse Band and Tribal Council members in their official capacity by strictly following the procedures included in Article XIII, Section 2. *E.g.*, *Shananaquet* at 4; *Stewart* at 3; *Shomin v. Grand Traverse Band of Ottawa and Chippewa Indians*, No. 92-05-002-CV at 2 (Grand Traverse Band Tribal Ct., July 7, 2000). However, "[t]ribal members shall not be entitled to an award of damages, as a form of relief, against the Grand Traverse Band or its Tribal Council members...." GRAND TRAVERSE BAND CONST. Art. XIII, § 2(b). As long-time Chief Judge Michael Petoskey had repeatedly warned, actions for money damages are "**expressly prohibited by the Tribal Constitution.**" *Yannett* at 3 (emphasis in original); *Hawkins v. Grand*

Traverse Band of Ottawa & Chippewa Indians, No. 98-04-148-CV at 3 (Grand Traverse Band Tribal Ct., Feb. 7, 2000) ("**The Constitution bars the award of damages.**") (emphasis in original).

The Plaintiff-Appellant attempts to circumvent the plain language of the law by arguing that the EDC and the Grand Traverse Band are the same entities by attempting to artificially lasso the two legal entities together. Plaintiff-Appellant's entire argument hinges on a United States Supreme Court case entitled *LeBron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995). *LeBron* involved a First Amendment claim against AMTRAK by a private citizen. *See id.* at 377. Because Congress first created and then retained control of AMTRAK by appointing its Board of Directors, the United States Supreme Court held that AMTRAK was a governmental entity that was constrained by the prohibitions of the First Amendment. *See id.* at 400. The tribal court took a superficial view of the relationship between AMTRAK and the federal government and concluded by analogy that the EDC was to the Grand Traverse Band as AMTRAK was to the federal government. *See* Amended Tribal Court Decision and Order at 7. But the tribal court ignored the purposes of the creation of AMTRAK. As Justice Scalia noted in *LeBron*, "Congress established Amtrak in order to avert the threatened extinction of passenger trains in the United States." *LeBron* at 383. Justice Scalia also noted that, while Congress had once conceived of AMTRAK as a for-profit enterprise, Congress had ratcheted down its expectations of the profitability of the business. *See id.* at 384-85. If one compares the purpose of creating AMTRAK to the purpose of creating the EDC, the "analogy" breaks down completely. No one considers the revenues generated by AMTRAK (if any) as a means to fund important governmental services, whereas 80 to 90

percent of the tribal government's programs are funded directly by the revenues generated by the EDC. *See Grand Traverse Band*, 198 F. Supp. 2d at 924. Moreover, as noted by the Interior Solicitor almost half a decade ago, Congress intended for Section 17 corporations to be separated from tribal governments, *even where the corporation's board of directors include the elected tribal government leadership*. *See Atkinson*, 569 P.2d at 172 (*quoting* Interior Solicitor's Opinion M-36515) (emphasis added). In fact, the federal government agencies, consistent with Congressional intent to allow tribes to charter Section 17 corporations for business purposes, actually provided much of the start-up costs for many tribal gaming operations in Michigan, including the Grand Traverse Band's. *See United States v. Bay Mills Indian Community*, 692 F. Supp. 777, 779, 881 (W.D. Mich. 1988); Amicus Brief of the Grand Traverse Band of Ottawa and Chippewa Indians *et al.* at 3-5, *Taxpayers of Michigan Against Casinos v. State of Michigan*, 685 N.W.2d 221 (Mich. 2004), *available at* http://courts.michigan.gov/supremecourt/Clerk/03-04/122830/122830-Amicus-GrTraverse.pdf (visited November 24, 2004). Plaintiff-Appellant's reliance on the fact that the members of the Tribal Council and the EDC board of directors are the same people rings hollow and ignores the important tribal policy underlying the chartering of the EDC.

Finally, the consequences of adding restrictions on the ability of the federal government to operate a for-profit business are radically different than restricting the ability of the Grand Traverse Band to operate a for-profit business. Unlike federal and state governments, Indian tribes such as the Grand Traverse Band do not have a tax base upon which to draw in order to fund important governmental services. *See Pueblo of*

Santa Ana v. Hodel, 663 F. Supp. 1300, 1315 n. 21 (D. D.C. 1987) ("[T]he Indians have no tax base and a weak infrastructure. Therefore they, even more than the states, need to develop creative ways to generate revenue."); Note, *In Defense of Tribal Sovereign Immunity*, 95 HARV. L. REV. 1058, 1073 (1982). Once tribal business revenues decline, there is no ready replacement. *See Atkinson*, 569 P.2d at 169 ("[O]nce the tribal property is dissipated by tort judgments, it is very difficult to replace. In municipal cases, the burden from the cost of accidents is spread throughout the community because the community can tax to replace the lost funds."). Imposing the rigid requirements of the Tribal Constitution's Article X onto the EDC invites more bureaucracy and inefficiency into the Grand Traverse Band's business enterprises, a situation that will serve to directly reduce EDC revenues and impact tribal governmental services. This, then, is a zero-sum game – every dollar lost by the EDC through tort and contract claims are dollars that are not transferred to the tribal government to fund health care, education, social services, and per capita payments for the tribal membership.

The Plaintiff-Appellant's analysis of the *LeBron* case misses the mark on another level as well. *LeBron* involved a claim for a violation of *federal* civil rights. *See LeBron* at 377. Under federal law, plaintiffs bringing a constitutional tort action against the federal government may do so under the Federal Tort Claims Act (FTCA). *See* 28 U.S.C. § 1346 & 2674.[2] The FTCA contains an express waiver of sovereign immunity for money damages against the federal government. Absent Congress's express waiver of immunity to suit for civil rights violations embodied in the FTCA, the federal government's sovereign immunity would foreclose any suits for money damages. *See United States v.*

[2] Under United States Supreme Court precedent, there is no implied cause of action against the federal government for First Amendment violations. *See Bush v. Lucas*, 462 U.S. 367 (1983). As such, no *Bivens* action could have been brought in *LeBron*. *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

Lee, 106 U.S. 196, 204 (1882). The Court in *LeBron* proceeded largely because it was already known by the parties that Congress had already waived its immunity to suit for First Amendment violations. There is no such analogous waiver of immunity here. As has been noted repeatedly, the Grand Traverse Band and the EDC have not waived the EDC's immunity from suit.

Finally, *LeBron* can also be distinguished on yet a more fundamental level. *LeBron* is not tribal law, it does not involve a matter arising out of a tribal transaction, and it does not implicate tribal policy. As a matter of tribal public policy, Grand Traverse Band tribal courts should refrain from incorporating federal or state law into tribal common law. *See Raphael v. Grand Traverse Band of Ottawa and Chippewa Indians*, No. 90-01-001 at 2-3 (Grand Traverse Band Tribal Ct., April 16, 1996) ("External rules and interpretations do not apply to the internal matters of the tribe. Application of such is recognized as inappropriate by the law. It would destroy the unique traditional, cultural and community attributes of tribal communities. In addition, uniform application of external measurements would destroy the diversity that exists among the many tribal communities themselves."), *aff'd*, No. 90-01-CV (Grand Traverse Band Ct. App., October 15, 1999). *LeBron* is a First Amendment case in which the United States Supreme Court relied upon Anglo-American jurisprudence relating to freedom of speech. Even in the event the Grand Traverse Band had chartered the EDC for the purpose of propping up a sagging Indian gaming industry (which it most assuredly did not), *LeBron* is a non-tribal case involving free speech concerns that are not implicated in this case.

In short, Article XIII does not provide a waiver of immunity as to the EDC or the named Defendants-Respondents. Plaintiff-Appellant's argument suffers from numerous

faults, not the least of which is that she chose not to sue either the Grand Traverse Band or the Tribal Council members. Moreover, the Plaintiff-Appellant's reliance on the purely superficial similarities between *LeBron* and the instant matter is misplaced.

II. 18 GTBC § 601 Does Not Operate to Waive the Official Immunity of the Named Defendants-Respondents.

Title 18, Section 601 of the Grand Traverse Band Tribal Code does not serve to waive the immunity of Defendants-Respondents Ron Olson and Chris Bussey from suit. Plaintiff-Appellant's reliance on section 601 is misplaced.

The Tribal Court has jurisdiction in this matter only for the purposes of determining whether the Tribal Council and the EDC have effectively waived the immunity of the EDC and its officers from suit. The defense of tribal sovereign immunity is a jurisdictional defense. *See* Kirsten Matoy Carlson, *Towards Tribal Sovereignty and Judicial Efficiency: Ordering the Defenses of Tribal Sovereign Immunity and Exhaustion of Tribal Remedies*, 101 MICH. L. REV. 569, 581 (2003) ("[S]overeign immunity acts a bar to the court's exercise of jurisdiction.") (footnote omitted); *see also Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 28 (1st Cir. 2000) ("[T]ribal sovereign immunity is jurisdictional in nature."). As such, according to Professor Carlson (Cherokee), whether the tribe has waived sovereign immunity should be determined first for purposes of judicial efficiency when possible. *See* Carlson at 581-82. In fact, the defense of sovereign immunity can be raised on appeal and can even be raised by judges on their own motion. *See* Carlson at 582 n. 67 (*quoting* Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative*

Action: Some Conclusions from the Public-Lands Cases, 68 MICH. L. REV. 867, 880 (1970)). Therefore, the Tribal Court only has jurisdiction to determine whether the defense of sovereign immunity remains extant or whether it has been waived. *E.g.*, *TBI Contractors, Inc. v. Navajo Tribe of Indians*, No. A-CV-28-85, 1988.NANN.0000010 at ¶ 12 (Navajo Nation Sup. Ct., Aug. 12, 1988), *available at* http://www.tribal-institute.org/opinions/1988.NANN.0000010.htm (visited November 30, 2004) ("This Court must address three issues in this appeal. The first issue is whether the district court had subject matter jurisdiction over this cause of action pursuant to one of the exceptions set forth in the 1980 Navajo Sovereign Immunity Act"). That, then, is the extent of the tribal court's jurisdiction.

Plaintiff-Appellant improperly conflates the jurisdiction language in 18 GTBC § 601 with the jurisdictional elements of the defense of sovereign immunity. Section 601's purpose is to ensure that the tribal court and the tribe will have jurisdiction over the nonmember licensees and employees of the EDC-owned gaming operations (most employees of the EDC's gaming operations are nonmembers). Under federal Indian law, a tribal court and an Indian tribe only have civil regulatory and adjudicatory jurisdiction over nonmembers if they have expressly consented to such jurisdiction. *See Montana v. United States*, 455 U.S. 544, 565-66 (1981). Section 601 is intended to codify the understanding that all gaming licensees and employees have expressly consented to tribal court and tribal jurisdiction. Section 601 does not operate to and was not intended to provide a general grant of jurisdiction to the tribal court sufficient to waive the immunity of the EDC or its officers.

Moreover, Plaintiff-Appellant quotes 18 GTBC § 601 completely out of context, ignoring that 18 GTBC § 407 expressly preserves the sovereign immunity of the Grand Traverse Band, the EDC, and the officers of both. It must be understood that sections 407 and 601 are part of the same Tribal Council ordinance, known as the Gaming Code, enacted on October 1, 1993. *See* 18 GTBC §§ 407 & 601, History. These statutes are to be read in context with each other. As section 407(b) states:

> Except as provided in § 408 below, nothing *in this code* nor any action of the Tribal Commission shall be deemed or construed to be a waiver of sovereign immunity from suit of the Tribe, or to be a consent of the Tribe to the jurisdiction of the United States or of any state or of any other tribe with regard to the business or affairs of the Tribal Commission or the Tribe, or to be a consent of the Tribe to any cause of action, case or controversy, or to the levy of any judgment, lien or attachment upon any property of the Tribe; or to be a consent to suit in respect to any Indian land, or to be a consent to the alienation, attachment or encumbrance of any such land.

15 GTBC § 407(b) (emphasis added); *see also* 6 GTBC chapters 1 & 2 (waiving the immunity of the tribe in limited circumstances). As section 408 applies only to the tribal gaming commission, it does not provide the requisite waiver required for the Plaintiff-Appellant to bring suit against the Defendants-Respondents. Section 601 simply does not constitute a waiver of immunity.

In sum, section 601 does not confer jurisdiction on the tribal court to the extent that the immunity of the EDC's officials is waived.

Conclusion

Defendants-Respondents respectfully request this Court to affirm the decision of the lower court and dismiss the Plaintiff-Appellant's claims with prejudice.

Dated: December 15, 2004

Respectfully submitted,

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GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS
TRIBAL APPELLATE COURT

DONNA LOU WILSON,

Plaintiff, Case No. 04-08-566-CV-APP

v.

GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS ECONOMIC DEVELOPMENT CORPORATION, and CHRIS BUSSEY, ASSISTANT EXECUTIVE OFFICER, in his individual and official capacities, and RON OLSON, CHIEF EXECUTIVE OFFICER, in his individual and official capacities,

Defendants.
_____/

CERTIFICATE OF SERVICE

I, Ruth Dudley-Chippewa, certify that on this day, December 14, 2004, I hand delivered the signed original and four (4) copies of the *Respondents' Brief* to the Tribal Court Clerk, GTB Tribal Court, 2809 N. West Bayshore Drive, Peshawbestown, Michigan 49682; and that I mailed a true and correct copy of the *Respondents' Brief* via a properly stamped envelope through the United States Postal Service regular mail to Mr. Lee Hornberger, 310 West Front Street, Suite 407, Traverse City, MI 49684-2279.

Dated: December 14, 2004

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