

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF CHIPPEWA

**SAULT STE. MARIE TRIBE OF
CHIPPEWA INDIANS,**

Plaintiff/Counter-Defendant,

v.

Case No.: 04-7606-CC
HON. CHARLES W. JOHNSON

BERNARD BOUSCHOR; and **MILLER,
CANFIELD, PADDOCK AND STONE, P.L.C.,**
jointly and severally,

FIFTH AMENDED COMPLAINT

Defendants,

and

DANIEL T. GREEN, et al, jointly and severally,

Defendants/Counter-Plaintiffs.

WILLIAM H. HORTON (P31567)
LINDA M. WATSON (P45320)
Attorneys for Plaintiff/Counter-Defendant
COX, HODGMAN & GIARMARCO, P.C.
Tenth Floor Columbia Center
101 West Big Beaver Road
Troy, Michigan 48084-5280
☎(248) 457-7000

STEVEN J. MORELLO (P27588)
Co-Counsel for Plaintiff/Counter-Defendant
SAULT TRIBE OF CHIPPEWA INDIANS
523 Ashmun Street
Sault Ste. Marie, Michigan 49783
☎(906) 635-6050

P. DAVID PALMIERE (P26796)
Attorney for Defendant Bernard Bouschor
MCCONNELL & PALMIERE, P.C.
P. O. Box 980
Bloomfield Hills, Michigan 48304
☎(248) 225-9952

WILLIAM A. SANKBEIL (P19882)
JOANNE GEHA SWANSON (P33594)
Attorneys for Defendant Miller Canfield
KERR, RUSSELL AND WEBER, PLC
Detroit Center
500 Woodward Avenue, Suite 2500
Detroit, Michigan 48226-3427
☎(313) 961-0200

J. TERRANCE DILLON (P23404)
Attorney for Defendants/Counter-Plaintiffs
Daniel T. Green; Paul W. Shagen; Joseph M.
Paczkowski; David E. Scott; Jolene M.
Nertoli; James M. Jannetta; Daniel J.
Weaver
MYERS, NELSON, DILLON & SHIERK, PLLC
125 Ottawa Avenue NW, Suite 270
Grand Rapids, Michigan 49503
☎(616) 233-9640

MARK L. DOBIAS (P35160)
Co-Counsel for Defendants/Counter-Plaintiffs
Daniel T. Green; Paul W. Shagen; Joseph M.
Paczkowski; David E. Scott; Jolene M.
Nertoli; James M. Jannetta; Daniel J.
Weaver
903 Ashmun Street
Sault Ste. Marie, Michigan 49783
☎(906) 632-8440

FIFTH AMENDED COMPLAINT

NOW COMES Plaintiff and complains of Defendants as follows:

1. Plaintiff is a federally recognized Indian tribe.
2. Defendants Bouschor, Green, Shagen, Paczkowski, Scott, Nertoli, Jannetta

and Weaver are the past chairman of the Tribe and his closest allies, who were senior officials of the Tribe. Specifically, Defendant Bouschor was the Chairman of the Tribe until July 2004. Defendant Green was General Counsel of the Tribe. Defendant Shagen was a Senior Staff Attorney and was, and continues to be, a member of the Tribal Board of Directors. Defendant Paczkowski was the Special Projects Manager. Defendant Scott was the Human Resource Director. Defendant Nertoli was Executive Director. Defendant Jannetta was the Deputy Director of the Legal Department. Defendant Weaver was the Chief Financial Officer. Defendants Green, Shagen, Paczkowski, Scott, Nertoli, Jannetta and Weaver are sometimes referred to as the Employee Defendants.

3. Defendant Miller, Canfield, Paddock and Stone, P.L.C. is a law firm. At the

time of the events complained of in this complaint, Plaintiff and Defendant Miller Canfield had an attorney-client relationship.

4. Defendant Bouschor had been the Tribal Chairman for some time but by 2000 his support had eroded. In the 2000 election, Defendant Bouschor was challenged for the office of Chairperson. Defendant Bouschor won the election, despite allegations of election fraud and subsequent litigation.

5. Sensing that his support was waning, Defendant Bouschor began a course of action which included attempts to shore up his support or, if unsuccessful, to reward his supporters if he lost his position. Among other things, these efforts included rewarding his supporters with protected Tribal jobs. For example, in 2001, Defendant Bouschor began entering into employment agreements on behalf of the Tribe with a number of employees, which included long-term employment, automatic renewals, and large severance payments if the contracts were terminated under certain circumstances. These contracts, although authorized by the Tribal Board in general abstract terms, were not presented to the Tribal Board for its review before they were executed. Defendant Bouschor did not disclose the actual terms to the Board.

6. Thereafter, the Tribal Board restricted Defendant Bouschor's authority. In August 2002, after many employment contracts had been executed by Defendant Bouschor, the Board prohibited Defendant Bouschor from entering into additional agreements because Defendant Bouschor had created numerous employment agreements that contained large and unreasonable severance packages and other terms unfavorable to the Tribe.

7. By 2004, it was becoming more likely that Defendant Bouschor's term as Chairperson would end. The primary election for Chairperson in 2004 was a race among five

candidates. Aaron Payment was the top vote getter, followed by Defendant Bouschor, who was followed closely by the other three candidates. In fact, Defendant Bouschor received only about 1/3 of the total votes cast.

8. After the primary, Defendant Bouschor, combined and conspired with the other Defendants, including Miller Canfield, to accomplish a two-part unlawful plan. First, in an attempt to win the election, they initiated untruthful campaign tactics. Among other things, on information and belief, Tribal members were threatened that if Defendant Bouschor was not re-elected they would lose their jobs, and that a fictitious gay and lesbian organization supported Aaron Payment for chairperson. Second, Defendants, including Defendant Miller Canfield, began to carefully devise a secret plan by which they would improperly take over \$2.6 million from the Tribe in so-called severance compensation if Defendant Bouschor lost the election on June 24, 2004.

9. The second part of Defendants' conspiracy began sometime prior to June 8, 2004. The plan included devising a paper trail which would superficially appear to authorize Defendant Bouschor to terminate the Employee Defendants and secretly pay them severance compensation if Defendant Bouschor lost the election. Sometime in late May 2004, Defendant Miller Canfield began preparing, drafting and negotiating agreements on behalf of both Plaintiff and the Employee Defendants. Defendant Miller Canfield also prepared opinion letters ostensibly authorizing Defendant Bouschor to act on behalf of the Tribe.

10. The severance agreements, drafted by one or more of the Employee Defendants and Defendant Miller Canfield, asserted that each of the employees had the option to be terminated and were to be paid severance compensation pursuant to their employment

agreements. The severance agreements were carefully crafted by Defendants so that if Defendant Bouschor won the election, the agreement could be revoked, but if he lost the election they became effective. Specifically, the severance agreements became effective either on July 9, 2004 —well after the election — or acceptance of the money by the Employee Defendants cashing the check. In addition, the Employee Defendants — but not the Tribe — had the unilateral right to revoke the severance agreement at any time until seven days after all election contests were resolved arising out of the Tribal Chairperson election. Defendant Bouschor and the Employee Defendants signed the severance agreements on June 9, 2004. A copy of a sample of the severance agreements is attached as Exhibit A.

11. The Employee Defendants continued to appear for work at the Tribe even after secretly signing the severance agreements. Sometime between June 8 and June 14, Defendants further implemented the conspiracy by having Defendant Bouschor prepare an authorization which was signed by him to cause the Tribe to pay over \$2.6 million to the Employee Defendants. A copy of that authorization is attached as Exhibit B.

12. On June 14, 2004, Defendant Bouschor caused to be issued Tribal checks, signed by him and Defendant Weaver, payable to the Employee Defendants for severance compensation. Copies of the checks are attached as Exhibit C. These checks were issued in secret without the knowledge of Tribal employees other than Defendants and circumvented the Tribe's normal financial controls. In addition, on information and belief, these checks were not delivered to the Employee Defendants, but were held by one or more of the Defendants to be cashed only if Defendant Bouschor lost the election as Chairperson on June 24. These checks were issued in direct violation of a 1997 Board resolution prohibiting unbudgeted expenditures in

excess of \$50,000.

13. On June 24, 2004, Aaron Payment won the election for Tribal Chairperson; Defendant Bouschor lost.

14. On the morning following the election, June 25, the Defendants took the final step in their unlawful conspiracy and scheme. Defendant Bouschor announced that he had terminated the Employee Defendants (despite their glowing employment evaluations and proclamations of the major contributions they had made to the Tribe) and one or more of the Employee Defendants presented the severance checks to National City Bank, the Tribe's bank, which were immediately cashed because Defendants had drawn the checks on the Tribe's payroll account. The total amount of these checks was over \$2.6 million.

COUNT I

BREACH OF FIDUCIARY DUTY

15. Plaintiff incorporates the above paragraphs by reference.

16. As Tribal Chairperson (Defendant Bouschor), as a member of the Tribal Board (Defendant Shagen) and as high-ranking officers or employees of the Tribe (Defendants Green, Paczkowski, Scott, Nertoli, Jannetta, and Weaver) owed the Tribe a fiduciary duty, which included a duty to act in good faith, in the best interests of the Tribe and with the utmost loyalty to the Tribe.

17. Defendant Bouschor also owed the Tribe a duty to comply with the actions of the Board, including the action in 1997 prohibiting Defendant Bouschor from spending more

than \$50,000 without Board review and approval and the action in 2002 prohibiting Defendant Bouschor from entering into any additional employment contracts. The other Defendants knew, or should have known, of those Board actions.

18. Defendants, in conspiracy with one another and with Miller Canfield, breached their duty to the Tribe by acting in their personal interest rather than in the best interest of the Tribe. In addition, Defendants knew or should have known that their actions breached the Board actions (or were otherwise ultra vires): each was paid more than \$50,000 in violation of the Board action of 1997 and each entered into a severance agreement, which was a new employment agreement, in violation of the Board action of 2002, among other things.

19. As a proximate result of that breach, the Tribe has been damaged in an amount in excess of the \$2.6 million.

WHEREFORE, Plaintiff prays that this Honorable Court enter judgment in its favor and against Defendants, jointly and severally, in an amount to be determined by a jury, plus costs, interest and attorney fees.

COUNT II

LEGAL MALPRACTICE AGAINST DEFENDANTS GREEN, SHAGEN AND JANNETTA

20. Plaintiff incorporates the above paragraphs by reference.

21. Defendants Green, Shagen and Jannetta (“the Attorney Defendants”) are attorneys and were employed by the Tribe to represent the legal interests of the Tribe.

22. The Attorney Defendants owed Plaintiff a duty to act in good faith and in the best interest of Plaintiff and to otherwise comply with the Michigan Rules of Professional Conduct and other applicable canons of ethics.

23. The Attorney Defendants, in conspiracy with the other Defendants, including Defendant Miller Canfield, breached that duty in the following respects:

- A. Failing to disclose or advise Plaintiff regarding the Attorney Defendants' self-dealing and conflicting interests (MRPC 1.7 and 1.8);
- B. Failing to communicate with Plaintiff regarding the negotiation, execution and implementation of the severance scheme (MRPC 1.4);
- C. Failing to advise Plaintiff or proceed as reasonably necessary in the best interest of Plaintiff upon learning that Defendant Bouschor and the Employee Defendants intended to act or were engaging in action that violated other legal obligations to Plaintiff (MRPC 1.13);
- D. Failing to act in a manner designed to protect Plaintiff's legal rights; and
- E. Committing the acts set forth elsewhere in this complaint.

24. As a proximate result of that breach, the Tribe has been damaged in an amount in excess of the \$2.6 million.

WHEREFORE, Plaintiff prays that this Honorable Court enter judgment in its favor and against Defendants, jointly and severally, in an amount to be determined by a jury, plus costs, interest and attorney fees.

COUNT III

LEGAL MALPRACTICE

AGAINST MILLER CANFIELD

25. Plaintiff incorporates the above paragraphs by reference.

26. Defendant Miller Canfield owed a duty to Plaintiff to exercise the knowledge, skill, ability and care ordinarily possessed and exercised by attorneys in the State of Michigan, to communicate with Plaintiff regarding its actions, to act in good faith and in the best interests of Plaintiff and to avoid all conflicts of interest.

27. Defendant Miller Canfield, in conspiracy with the other Defendants, breached that duty by:

- A. Failing to communicate with Plaintiff's Board of Directors regarding the other Defendants' intentions, conduct, and inaction;
- B. Failing to proceed as reasonably necessary in the best interests of Plaintiff upon learning that Defendant Bouschor and the Employee Defendants intended to act or were engaging in action that violated other legal obligations to Plaintiff;
- C. Ignoring or evading duly enacted resolutions of the Tribe regarding the expenditures of Tribal funds and authority regarding rights of the Tribal Board of Directors and limitations of the Tribal Chairman;
- D. Failing to disclose to the Tribe that it was acting for the benefit of the other Defendants or otherwise had a conflict of interest;
- E. Failing to fully advise Plaintiff of its legal rights;
- F. Failing to protect the legal rights of Plaintiff;
- G. Not acting as reasonably competent attorneys should act under the circumstances, including not acting in the best interests of its client, Plaintiff; and
- H. Failing in other ways to comply with the standard of practice and care, the canons of ethics, the Michigan Rules of Professional Conduct, and ethical considerations applicable to attorneys in the

State of Michigan.

28. As a direct and proximate result of Defendant Miller Canfield's breach of its duties, Plaintiff has been damaged in an amount in excess of \$2.6 million.

WHEREFORE, Plaintiff prays that this Honorable Court enter judgment in its favor and against Defendants, jointly and severally, in an amount to be determined by a jury, plus costs, interest and attorney fees.

COUNT IV

CONSTRUCTIVE FRAUD

29. Plaintiff incorporates the above paragraphs by reference.

30. Defendants were in a fiduciary relationship with the Tribe. As such they had a duty to disclose any material transactions between them and the Tribe.

31. Defendants, in conspiracy with one another, including Defendant Miller Canfield, breached that duty by failing to disclose to the Tribe their plan to pay themselves severance compensation if Defendant Bouschor lost the election for Chairperson. Such failure to disclose this material information is a constructive fraud on the Tribe.

32. Defendants received and retained the unmerited benefits of their acts.

33. As a proximate result of that failure to disclose, the Tribe has been damaged in an amount in excess of the \$2.6 million.

WHEREFORE, Plaintiff prays that this Honorable Court enter judgment in its favor and against Defendants, jointly and severally, in an amount to be determined by a jury, plus costs,

interest and attorney fees.

COUNT V

BREACH OF CONTRACT

34. Plaintiff incorporates the above paragraphs by reference.

35. The employment contracts between the Tribe and the Employee Defendants provided that severance compensation was to be paid only under certain circumstances.

36. Among other reasons, severance compensation was not payable if the employee voluntarily resigned.

37. The Employee Defendants voluntarily resigned and were not entitled to severance compensation. Defendants, in conspiracy with one another, including Defendants Bouschor and Miller Canfield, breached their contract with the Tribe.

38. As a proximate result of the breach, the Tribe has been injured in an amount in excess of \$2.6 million.

WHEREFORE, Plaintiff prays that this Honorable Court enter judgment in its favor and against Defendants, jointly and severally, in an amount to be determined by a jury, plus costs, interest and attorney fees.

COUNT VI

TORTIOUS INTERFERENCE

39. Plaintiff incorporates the above paragraphs by reference.

40. The Tribe had employment contracts with the seven Employee Defendants.

41. Defendant Bouschor, in conspiracy with the other Defendants, improperly interfered with those contracts. Defendant Bouschor's interference was per se wrongful or done with malice for the purpose of invading the contractual rights of the Tribe. Defendant Bouschor acted out of a personal motive to harm the Tribe or to reward his political supporters at the expense of the Tribe. These acts were fraudulent, unethical or illegal.

42. As a proximate result of the tortious interference, the Tribe has been damaged in an amount in excess of the \$2.6 million.

WHEREFORE, Plaintiff prays that this Honorable Court enter judgment in its favor and against Defendants, jointly and severally, in an amount to be determined by a jury, plus costs, interest and attorney fees.

COUNT VII

CONVERSION

43. Plaintiff incorporates the above paragraphs by reference.

44. The Employee Defendants wrongfully exerted dominion over Plaintiff's funds in denial of or inconsistent with Plaintiff's rights to such funds. Defendants Bouschor and Miller Canfield conspired with the Employee Defendants.

45. The Employee Defendants obtained such funds without Plaintiff's consent and these Defendants have an obligation to return such funds because they were not entitled to them.

46. The Employee Defendants have not returned the funds.

47. As a result, Plaintiff has been damaged in an amount in excess of the \$2.6 million.

WHEREFORE, Plaintiff prays that this Honorable Court enter judgment in its favor and against Defendants, jointly and severally, in an amount to be determined by a jury, plus costs, interest and attorney fees.

COUNT VIII
VIOLATION OF MCLA 600.2919

48. Plaintiff incorporates the above paragraphs by reference.

49. The Employee Defendants concealed, embezzled or converted Plaintiff's property and money for their own use.

50. Defendants Bouschor and Miller Canfield concealed or aided in the concealment of the embezzlement or conversion with knowledge that such money was embezzled or converted, in violation of MCLA 600.2919. The Employee Defendants conspired with Defendants Bouschor and Miller Canfield.

51. As a result, Plaintiff has been damaged in an amount in excess of \$2.6 million. Plaintiff is entitled to treble damages under MCLA 600.2919.

WHEREFORE, Plaintiff prays that this Honorable Court enter judgment in its favor and against Defendants, jointly and severally, for an amount three times an amount to be determined by a jury (pursuant to MCLA 600.2919a), plus costs, interest and attorney fees.

COUNT IX
CIVIL CONSPIRACY

52. Plaintiff incorporates the above paragraphs by reference.

53. The Defendants combined and conspired to take over \$2.6 million from Plaintiff. Defendants taking of the money was wrongful or done by wrongful means, as described in the preceding counts.

54. As a result of Defendants' conspiracy and wrongful acts, Plaintiff has been damaged in an amount in excess of \$2.6 million.

WHEREFORE, Plaintiff prays that this Honorable Court enter judgment in its favor and against Defendants, jointly and severally, for an amount to be determined by a jury, plus costs, interest and attorney fees.

COUNT X
DECLARATORY JUDGMENT

55. Plaintiff incorporates the above paragraphs by reference.

56. The severance agreements and payments are void, voidable, or otherwise unenforceable because they were not supported by consideration or valid consideration, the payments to the Employee Defendants were not appropriated and were made in violation of Tribal law and were otherwise not authorized or valid.

WHEREFORE, Plaintiffs pray that this Honorable Court do the following:

- A. Declare that the severance agreements are not valid or enforceable;
and
- B. Provide any other relief which is just and equitable.

JURY DEMAND

Plaintiff demands a jury trial.

COX, HODGMAN & GIARMARCO, P.C.

By: _____
WILLIAM H. HORTON (P31567)
LINDA M. WATSON (P45320)
Attorneys for Plaintiff/Counter-Defendant
Tenth Floor Columbia Center
101 West Big Beaver Road
Troy, Michigan 48084-5280
☎(248) 457-7000

Dated: July 25, 2006