STATE OF MICHIGAN

IN THE COURT OF APPEALS

BATES ASSOCIATES, LLC, a
Michigan limited liability company,

Plaintiff/Appellee,

vs.

132 ASSOCIATES, LLC, a Michigan
limited liability company, SAULT STE.
MARIE TRIBE OF CHIPPEWA INDIANS,

Defendants/Appellants.

Docket No. 288826

Wayne County Circuit Court
Case No. 08-113819-CK
Hon. John H. Gillis, Jr.

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APPELLANT'S BRIEF ON APPEAL

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STATEMENT OF BASIS OF JURISDICTION

The Defendant/Appellant has appealed by right the Amended Final Judgment entered by the Wayne County Circuit Court on September 25, 2008, which was entered as a result of the trial court granting Plaintiff/Appellee's motion for summary disposition and denying Defendant/Appellant's cross-motion for summary disposition, and the trial court's order of October 20, 2008 denying the Defendant/Appellant's motion for reconsideration; therefore, this Court has jurisdiction over this matter pursuant to MCR 7.203(A)(1).

STATEMENT OF QUESTIONS INVOLVED

I. Whether the trial court erred in granting Plaintiff/Appellee's motion for summary disposition and entering a judgment against Defendant/Appellant.

Appellant answers: Yes

II. Whether the trial court erred in determining that Defendant/Appellant had waived its sovereign immunity with respect to the Confidential Settlement Agreement from which Plaintiff/Appellee's underlying claims arose.

Appellant answers: Yes

III. Whether the trial court erred in failing to make a determination whether Defendant/Appellant had waived tribal court jurisdiction with respect to the Confidential Settlement Agreement from which Plaintiff/Appellee's underlying claims arose.

Appellant answers: Yes

STATEMENT OF FACTS AND PROCEEDINGS

Defendant 132 Associates, LLC ("132 Associates"), is a limited liability company. Defendant/Appellant, Sault Ste. Marie Tribe of Chippewa Indians ("Appellant" or "Tribe") is a federally recognized Indian tribe organized under § 16 of the Indian Reorganization Act, 25 USC 476.

Greektown Casino ("Greektown") is almost wholly owned by the Tribe [brief in support of Defendant's response to Plaintiff's motion for summary disposition, 7/15/08, p 2]. In 2000, as Greektown was about to open for business in downtown Detroit, it was faced with a shortage of parking for its patrons and employees [brief in support of motion for reconsideration, 10/16/08, p 3]. This shortage was a matter of concern to Greektown and the Michigan Gaming Control Board because of the potential adverse impact on revenues the casino was expected to generate [Id.].[1]

To remedy the problem, the Tribe acquired 132 Associates from its then owner, Charles Mady, Jr. ("Mady"), which it did by assignment from Mady [brief in support of Defendant's response to Plaintiff's motion for summary disposition, 7/15/08, Exh A], and sought to acquire the Bates Garage (hereinafter "Bates Garage" or "Garage") to be used to support Greektown [brief in support of motion for reconsideration, 10/16/08, p 3]. However, 132 Associates did not have the capital necessary to acquire the Bates Garage, and needed a loan to complete the purchase [Id.]. To this end, Bank One agreed to loan $6.151 million to 132 Associates so that 132 Associates could purchase the Garage, but was unwilling to do so in the absence of an entity

[1] The parking shortage was a relatively short-term problem – seven years – because in connection with the build-out of the Greektown Casino site (adding 25,000 additional square feet of gaming space to the casino), Greektown built a large parking structure [id.], and has recently completed the building of a 400 room hotel nearby.

which would guaranty 132 Associates' loan obligation to Bank One [Id.]. That was the situation in November 2000, when the Tribe passed Resolution No. 2000-148 [Id.].

Resolution 2000-148.

Resolution 2000-148 ("Resolution 2000-148" or the "Resolution," a copy of which is attached hereto as Appendix 1 for the Court's convenience) states in the Recitals section that the Tribe owns 90% of Greektown and because of that ownership interest, the Tribe stated its intent to support Greektown by assisting it in acquiring Bates Garage [brief in support of Defendants' response to Plaintiff's motion for summary disposition, 7/15/08, Exh A]. The Resolution authorized the Chairman to do three things: (1) enter into an assignment with Mady to obtain his interest in 132 Associates; (2) vote the Tribe's membership interest in 132 Associates to purchase Bates Garage, and (3) execute a guaranty agreement to guarantee the loan repayment to Bank One, which subsequently loaned the $6 plus million to 132 Associates to purchase the garage [Id.]. Section 2 of the Resolution authorized the Chairman, on behalf of the Tribe, to carry out the transactions referred to in the Recitals [Id.]. Thus, the Chairman was authorized by the Resolution to negotiate and enter into the assignment of 132 Associates and to negotiate and enter into a guaranty agreement with Bank One to secure 132 Associates' loan.

With respect to sovereign immunity, the Resolution, states that "[t]he Tribe hereby expressly waives its sovereign immunity from suit *should an action be commenced on the Guaranty Agreement.*" [brief in support of Defendant's response to Plaintiff's motion for summary disposition, Exh A, Section 3.1 (emphasis added)]. Under the express terms of the Resolution, the Tribe's waiver of sovereign immunity was specifically limited as follows:

This Waiver:

(i) shall terminate upon performance by the Tribe of all of its obligations under the Guaranty Agreement.

(ii) *is granted solely to the Bank One of Michigan, and its assigns;*

(iii) *shall extend only to a suit to enforce the obligations of the Tribe under the Guaranty Agreement.*

(iv) Shall be enforceable against all assets of the property of the Tribe to the extent sufficient to satisfy the tribe's obligations under the Guaranty Agreement.

[Id. (emphasis added)]. Thus, the Tribe's waiver was limited to a suit by Bank One of Michigan to enforce the Tribe's guaranty of 132 Associates' loan from Bank One of Michigan. The waiver of sovereign immunity and consent to jurisdiction provision contained in the Resolution is silent as to the Plaintiff/Appellee, Bates Associates, LLC (hereinafter "Plaintiff" or "Bates Associates") or any legal action by Bates Associates to enforce its rights pursuant to the purchase of the Garage by 132 Associates [brief in support of Defendant's response to Plaintiff's motion for summary disposition, Exh A, Section 3.1].

Transactions Occurring Subsequent to the Waiver Contained in Resolution 2000-148.

Sometime shortly after the Tribe adopted the Resolution, 132 Associates purchased Bates Garage [motion for reconsideration, 10/16/08, p 5]. Bank One made the loan to 132 Associates and 132 Associates secured it with a mortgage on the Garage [Id.].

On November 3, 2000, simultaneous with the acquisition of the Garage, 132 Associates granted an option to Bates Associates, the former owner of the Garage, to re-acquire the Garage for $1.00 [brief in support of Defendants' response to Plaintiff's motion for summary disposition, 7/15/08, Exh C, Sections 2 and 3]. Bates Associates had until November 2007 to

exercise the option [Id.]. Upon exercise by Bates Associates, section 5 to the Option Agreement required the Agreement of Sale attached to the Option Agreement to be the controlling document [brief in support of Defendants' response to Plaintiff's motion for summary disposition, 7/15/08, Exh D]. Pursuant to the Agreement of Sale, at closing certain portions of the Garage were required to be delivered to Plaintiff in "good maintenance and repair" [brief in support of Defendants' response to Plaintiff's motion for summary disposition, 7/15/08, Exh D, Section 7].

Section 13 of the Option Agreement, which is entitled "Guaranty of Performance," contained a promise by the Tribe to guarantee the performance of 132 Associates [brief in support of Defendants' response to Plaintiff's motion for summary disposition, 7/15/08, Exh D, Section 13]. This same paragraph purported to waive the Tribe's sovereign immunity from suit in the event litigation was commenced under the Option Agreement [Id.]. The waiver, however, was not supported by any resolution of the Tribe waiving the Tribe's immunity in accordance with applicable tribal law [brief in support of motion for reconsideration, 10/16/08, p 6]. Additionally, no resolution existed authorizing tribal Real Estate Director, Ms. Fitzpatrick, to sign the Option Agreement or to waive the Tribe's sovereign immunity [Id.].

The Option Agreement stated that in the event Bates Associates exercised the option to repurchase Bates Garage, the attached "Agreement of Sale (Exhibit A) will become automatically binding upon the Parties and be fully enforceable" [brief in support of Defendants' response to Plaintiff's motion for summary disposition, 7/15/08, Exh C, Section 5]. The Agreement of Sale also contained language purporting to waive the Tribe's sovereign immunity [brief in support of Defendants' response to Plaintiff's motion for summary disposition, 7/15/08, Exh D, Section 10]. It stated that the waiver was granted to Bates Associates, the purchaser, and was enforceable in any court of competent jurisdiction [Id.]. The Tribe never signed the

Agreement of Sale [Id.]. More importantly, there is no tribal resolution, as required by tribal law, to support the purported waiver of sovereign immunity from suit in the unsigned Agreement of Sale.

Dispute Regarding the restoration of the Garage to "Good Maintenance and Repair," and the Confidential Settlement Agreement.

As November 2007 approached, Bates Associates exercised its option to repurchase Bates Garage for $1.00. Thereafter, a dispute arose between Bates Associates and 132 Associates as to the condition of the Garage and the cost to remediate certain portions to "good maintenance and repair" [brief in support of Defendants' response to Plaintiff's motion for summary disposition, 7/15/08, p 3].

On January 21, 2008, as a result of negotiations, the parties executed a Confidential Settlement Agreement ("Settlement Agreement") to resolve the dispute concerning the condition of the Garage as it existed in November 2007 [brief in support of Defendants' response to Plaintiff's motion for summary disposition, 7/15/08, p 3; see also Exh E]. Specifically, the Settlement Agreement resolved the disagreement between Bates Associates and 132 Associates regarding the amount of money required to make certain capital improvements to the Garage, consistent with 132 Associates' promise that, at the time of re-purchase by Plaintiff, the electrical, plumbing, HVAC, escalator, elevator, lighting, security systems, roofing and foundation would be in good maintenance and repair pursuant to section 7 of the Agreement of Sale [brief in support of Defendants' response to Plaintiff's motion for summary disposition, 7/15/08, Exh E, p 1, Section 2]. The Settlement Agreement also required 132 Associates to transfer title to the Garage to Plaintiff [brief in support of Defendants' response to Plaintiff's motion for summary disposition, 7/15/08, Exh E, p 1, Section 1], and required real property taxes

to be pro rated pursuant to the terms of section 6 of the Agreement of Sale and Option Agreement [Id.].

Section 7 of the Settlement Agreement, entitled "Guaranty of Performance," contained a promise by the Tribe and Greektown to guarantee the obligations of 132 Associates under that agreement [brief in support of Defendants' response to Plaintiff's motion for summary disposition, 7/15/08, Exh E, p 4, Section 7]. The pertinent language at issue herein provided:

> [t]he Tribe's waiver of sovereign immunity as provided in section 10 of the Agreement of Sale attached to the Option Agreement dated November 3, 2000 is incorporated herein by reference with regard to any action or proceeding by Bates to enforce its rights relating to relating to (sic) this Settlement Agreement, the Tribe's guaranty, the parties' agreements, and/or Bates Garage.

[Id.]. The Settlement Agreement was silent as to the waiver of tribal court jurisdiction [Id.].

The Settlement Agreement was signed by Victor Matson, the Tribe's Chief Financial Officer ("CFO"), on behalf of the Tribe as to the Tribe's guaranty of performance [Id.]. The Tribe, however, never adopted a resolution, as required by tribal law, waiving the Tribe's immunity in connection with this transaction. Indeed, the Tribe never adopted a resolution in connection with the transaction authorizing Matson to execute the Settlement Agreement [brief in support of Defendants' response to Plaintiff's motion for summary disposition, 7/15/08, p 5; see also Exh I].

Procedural Posture.

On May 30, 2008, Bates Associates filed the underlying litigation against 132 Associates seeking damages for breach of contract and injunctive relief due to 132 Associates' breach of the Settlement Agreement [verified complaint, 5/30/08]. Plaintiff named the Tribe as a party-defendant based upon the "Guaranty of Performance" contained in the Settlement Agreement [verified complaint, 5/30/08].

On June 4, 2008, the trial court entered an Order of Preliminary Injunction requiring 132 Associates to deliver title to the Garage, and all required closing documents, to Bates Associates no later than June 13, 2008 [order of preliminary injunction, 6/4/08]. 132 Associates transferred title to the Garage to Bates Associates in accordance with the trial court's Order of Preliminary Injunction [counter-complaint, 6/23/08].

On June 26, 2008, Bates Associates filed a motion for summary disposition pursuant to MCR 2.116(C)(10) and for the entry of a judgment against 132 Associates and the Tribe for money damages under the Settlement Agreement [plaintiff's motion for summary disposition and entry of judgment, 6/26/08].

On July 15, 2008, 132 Associates and the Tribe responded to Bates Associates' motion for summary disposition and entry of judgment, and moved for summary disposition in their favor pursuant to MCR 2.116(I)(2) [brief in support of Defendants' response to Plaintiff's motion for summary disposition, 7/15/08].

On August 27, 2008, Bates Associates filed a reply to Defendants' response, disputing Defendants' arguments and opposing Defendants' motion for summary disposition in their favor [reply brief in support of Plaintiff's motion for summary disposition and in opposition to Defendants' cross-motion for summary disposition, 8/27/08].

On September 2, 2008, Defendants replied to the arguments set forth in Bates Associates' reply brief [Defendants' reply to Plaintiff's reply brief in support of Plaintiff's motion, pp 1-2].

On September 4, 2008, the trial court held oral argument on the parties' cross-motions for summary disposition [transcript, 9/4/08]. The trial court held that it believed there was a valid waiver of immunity, and granted Bates Associates' motion for summary disposition in its entirety [transcript, 9/4/08, p 16]. The trial court only ruled upon the issue of immunity, and

never addressed whether tribal court jurisdiction was waived [Id.]. In fact, the trial court refused to allow defense counsel to finish his argument or make a record with respect to its position regarding tribal court jurisdiction because the court was in the middle of a jury trial:

> THE COURT: Okay. The Court's gonna make a ruling. The Court believes there was a valid waiver of immunity. The Court will grant plaintiff's motion for summary disposition on the issue.
>
> MR. MALIS: May I finish –
>
> THE COURT: I have a jury trial. No more. No more.
>
> MR. MALIS: Yeah, but there's another issue whether this Court even has jurisdiction, because there was no waiver of tribal court jurisdiction.
>
> THE COURT: Okay. I've made a ruling.

[transcript, 9/4/08, p 16].

On September 10, 2008, Bates Associates moved the trial court for entry of a final judgment against Defendants seeking judgment in the amount of $2,240,594.59, which encompassed the $2,201,000 for the amount due under the Settlement Agreement, $28,659.97 for prejudgment interest, $102,553.90 in attorneys fees and costs, less $91,619.28 for pro rated property taxes due 132 Associates [brief in support of Plaintiff's motion for entry of final judgment, 9/10/08, p 2].

On September 22, 2008, Defendants responded to Bates Associates' motion for entry of final judgment disputing the calculation of prejudgment interest, and the reasonableness of Bates Associates' attorneys' fees [brief in support of Defendants' reply to Plaintiff's motion for entry of final judgment, 9/22/08]. Defendants requested an evidentiary hearing to examine and determine the reasonableness and propriety of the fees claims [Id., p 4].

On September 23, 2008, Bates Associates filed a reply in support of its motion for entry of final judgment [Bates' reply in support of its motion for entry of final judgment, 9/23/08].

On September 24, 2008, Defendants filed a supplemental brief in support of its reply to Bates Associates' motion for entry of final judgment [supplemental brief in support of Defendants' reply to Plaintiff Motion for entry of final judgment, 9/24/08].

On September 25, 2008, oral argument was held on Bates Associates' motion for entry of final judgment [transcript, 9/25/08]. During oral argument, Defendants disputed the reasonableness of Bates Associates' attorneys' fees to the extent that they included fees incurred pre-dating the date of any work done to prepare the complaint, and included fees for tasks not related to proceedings in the litigation [transcript, 9/25/08, pp 12-13]. Over Defendants' objections, the Court held that Bates Associates was entitled to pre-filing fees, and granted Bates Associates' motion in its entirety [transcript, 9/25/08, p 15]. A final judgment was entered in Bates Associates' favor and against Defendants in the total amount of $2,241,670.90, plus statutory interest [amended final judgment, 9/25/08].

On October 16, 2008, the Tribe timely filed a motion for reconsideration of the Court's Amended Final Judgment [motion for reconsideration, 10/16/08]. The Tribe requested the trial court to re-examine the purpose and language of the Resolution 2000-148 and transactions resulting therefrom, and to reconsider its ruling on the waiver of sovereign immunity – particularly in conjunction with the conflicting concept of apparent authority [motion for reconsideration, 10/16/08].

On October 20, 2008, the trial court denied the Tribe's motion for reconsideration without oral argument or explanation [order, 10/20/08].

On November 10, 2008, the Tribe timely appealed by right the Amended Final Judgment of September 25, 2008, and the trial court's denial of the Tribe's motion for reconsideration [claim of appeal, 11/10/08].

STANDARD OF REVIEW

The trial court's final amended judgment was based upon its granting of Plaintiff's motion for summary disposition, which was filed under MCR 2.116(C)(10). The standard of review of an order granting a motion for summary disposition brought under MCR 2.116(C)(10) is *de novo*, considering the pleadings, admissions, and any other evidence submitted by the parties in the light most favorable to the nonmoving party. *Latham v Barton Malow Co,* 480 Mich 105, 111; 746 NW2d 868 (2008).

ARGUMENT

A. TRIBAL SOVEREIGN IMMUNITY GENERALLY.

1. Recognition of Tribal Sovereign Immunity and Tribal Jurisdiction Under Federal and Michigan Law.

a. Sovereign Immunity.

The Tribe is a sovereign Indian tribe recognized by both Federal and Michigan governments. See, *Indian Tribal Entities Within the Contiguous 48 States Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs,* 65 Fed. Reg. 13,299, 13,301 (2000); see also Michigan's 12 Federally Recognized Tribes, Michigan Dept. of Human Services website, *www.michigan.gov/dhs/0,1607,7-124-5452_7124_7209-15452--,00.html.*

Federally recognized Indian tribes are considered to be "domestic dependent nations" that exercise inherent sovereign authority over their members and territories. *Oklahoma Tax Comm v Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 US 505, 509; 111 S Ct 905; 112 L Ed 2d 1112 (1991). As sovereign authorities, Indian tribes have sovereign immunity from lawsuits against them unless they clearly waive their immunity or where Congress has authorized an action against them. *Kiowa Tribe of Oklahoma v Mfg Tech, Inc*, 523 US 751, 754; 118 S Ct 1700; 140 L Ed 2d 981 (1998). See also, *Huron Potawatomi, Inc v Stinger*, 227 Mich App 127, 130; 574 NW2d 706 (1997).

Federal recognition of Indian tribes does not bestow sovereignty upon them, but rather recognizes that sovereignty already existed. *United States v Wheeler*, 435 US 313, 322-323; 98 S Ct 1079; 55 L Ed 2d 303 (1978). The powers of Indian tribes are, in general, "*inherent powers of a limited sovereignty which has never been extinguished.*" *Id. quoting* F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945) (emphasis in original). The doctrine of tribal sovereign

immunity is venerable, having been reaffirmed repeatedly by the U.S. Supreme Court, as well as numerous courts of appeal. See *e.g., United States v United States Fidelity & Guaranty Co.*, 309 US 506, 512; 60 S Ct 653; 84 L Ed 894 (1940); *Santa Clara Pueblo v Martinez*, 436 US 49, 58; 98 S Ct 1670; 56 L Ed 2d 106 (1978); *Three Affiliated Tribes of Fort Berthold Reservation v Wold Engineering, PC*, 476 US 877, 890; 106 S Ct 2305; 90 L Ed 2d 881 (1986); *Puyallup Tribe, Inc v Dep't of Game of Wash*, 433 US 165, 167-168, 172; 97 S Ct 2616; 53 L Ed 2d 667 (1977); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 7.05[1][a], at 635-36 (2005); and Sielstad, *The Recognition and Evolution of Tribal Sovereign Immunity under Federal Law: Legal, Historical and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 Tulsa L Rev 661 (2002).

The Supreme Court addressed the issue of whether an Indian tribe's immunity extends to off-reservation, commercial transactions in *Kiowa Tribe of Oklahoma v Mfg Techs, Inc, supra.* There, the Chairman of the Kiowa Tribe's governing body signed a promissory note for the purchase of shares of stock of a non-Indian technology company. The note was delivered to the payee and payments were to be made outside of the reservation. After the Kiowa Tribe defaulted on the note, the payee sued the Kiowa Tribe in state court. The Supreme Court held that tribal sovereign immunity holds even when a tribe or a tribal entity acts outside the boundaries of a tribe's reservation or Indian country, and even when the underlying complaint against the tribe relates to a commercial, as opposed to a governmental, transaction: "[t]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Kiowa*, 523 US at 760.

b. Tribal Court Jurisdiction.

The U.S. Supreme Court has held that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." *Montanal v US*, 450 US 544, 565; 101 S Ct 1245; 67 L Ed 2d 493 (1978); see also *Nat'l Farmers Union Ins Co v Crow Tribe of Indians*, 471 US 845; 105 S Ct 2447; 85 L Ed 2d 818 (1985) (in a suit involving federal question jurisdiction, the U.S. Supreme Court held that the a federal court should stay its hand until after the Tribal Court has a full opportunity to determine its own jurisdiction). In *National Farmers*, the Supreme Court held:

> Exhaustion of Tribal Court remedies is required, however, before petitioners' claim may be entertained by the District Court. The existence and extent of the Tribal Court's jurisdiction requires a careful examination of tribal sovereignty and the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions. Such an examination and study should be conducted in the first instance by the Tribal Court.
>
> Until petitioners have exhausted the available remedies in the Tribal Court, it would be premature for the District Court to consider any relief.

417 US at 845-846.

2. Waiver Of Sovereign Immunity And Tribal Court Jurisdiction.

Chapter 44 of the Appellant-Tribe's Tribal Code (the "Code"), governs the procedure by which the Tribe may waive sovereign immunity and tribal court jurisdiction. Under the Code, "[t]he Tribe has the authority to waive its sovereign immunity, provided it does so in express terms." [brief in support of Defendants' response to Plaintiff's motion for summary disposition, 7/15/08, Exh H, Section 44.102(4)]. There are two provisions in the Code which allow the Tribe to waive sovereign immunity, Sections 105 and 108. "The sovereign immunity of the Tribe, including sovereign immunity from suit in any state, federal or tribal court, is hereby expressly

reaffirmed unless immunity is waived in accordance with Section 44.105 or Section 44.108." [brief in support, 7/15/08, Exh. H, p 44-5, Section 44.104]. Only Section 44.105 of the Code applies to the instant matter, and provides in part as follows:

> (1) The sovereign immunity of the Tribe may be waived:
>
> > (a) by resolution of the Board . . . expressly waiving the sovereign immunity of the Tribe and consenting to suit against the Tribe in any forum designated in the resolution; provided, that such waiver shall not be general but shall be specific and limited as to duration, grantee, transaction, property or funds of the Tribe subject to the waiver . . . . Such waiver shall be strictly construed and shall be effective only to the extent expressly provided and shall be subject to any conditions or limitations set forth in the resolution; or

[brief in support of Defendants' response to Plaintiff's motion for summary disposition, 7/15/08, Exh. H, p 44-5, Section 44.105 (emphasis added)].

Waiver of tribal court jurisdiction is governed by Section 44.109 of the Code. Section 44.109 provides that "the Board of Directors may waive by resolution the jurisdiction of the Tribal Court over any claim or cause of action which arises out of a commercial transaction involving the Tribe, Tribal entity, or a Tribal member . . . ." [brief in support of Defendants' response to Plaintiff's motion for summary disposition, 7/15/08, Exh. H, p 44-8, Section 44.109]. In order to waive jurisdiction of the Tribal Court, the following conditions must be met:

> (a) the commercial transaction is specifically identified in the resolution; and
>
> (b) the resolution contains factual findings supporting the conclusions that:
>
> > i. the waiver is in the best interest of the Tribe, the Tribal entity or the Tribal member; and
> >
> > ii. the transaction could not be consummated without such waiver.

[brief in support of Defendants' response to Plaintiff's motion for summary disposition, 7/15/08, Exh. H, p 44-8, Section 44.109].

Thus, under the Code, in order for the Tribe to validly waive its sovereign immunity and tribal court jurisdiction in connection with the suit against the Tribe, the waiver must be done by a specific resolution of the Tribe's Board of Directors identifying the transaction, and the resolution must contain factual findings to establish that the waiver is in the best interest of the Tribe.

In order to have a valid waiver of sovereign immunity, the waiver must not be implied; rather, the wavier must be clearly and unequivocally expressed in writing. See *Oklahoma Tax Comm v Citizen Bank Potawatomi Indian Tribe of Oklahoma, supra* at 509. See also *Huron Potawatomi, supra* at 130. Consistent with well established Supreme Court decisions, tribal law requires a tribal resolution expressly waiving the immunity of the Tribe in order to effectuate a waiver, provided however, that the waiver is specific, limited as to duration, limited as to grantee of the waiver, limited to an identified transaction, and limited as to the funds or property of the Tribe subject to the waiver.[2] A waiver that is based upon inferences does not constitute a clear and unequivocal waiver. See *Ramey Constr Co, Inc v Apache Tribe of Mescalero Reservation*, 673 F2d 315, 319 (CA 10, 1982). In the absence of a clear and unequivocal expressed waiver of immunity, suits against Indian tribes are barred by sovereign immunity. See *Oklahoma Tax Comm*, supra at 509; *Huron Potawatomi*, supra at 131. If a tribe has waived immunity from suit, the law is clear that the waiver must be "*strictly construed and applied in accordance with any*

[2] Because a waiver of immunity "is altogether voluntary on the part of [a tribe], it follows that [a tribe] may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted." *Missouri River, infra* at 852; citing to *American Indian Agr Credit Consortium, Inc v Standing Rock Sioux Tribe*, 780 F2d 1374, 1378 (CA 8, 1985) (quoting *Beers v Arkansas*, 61 US 527, 529 (1857)).

conditions or limitations on the waiver." *Missouri River Services, Inc v Omaha Tribe of Nebraska*, 267 F3d 848, 852-53 (CA 8, 2001) (emphasis added). See also *Joseph K Lumsden Bahweting Public School Academy, infra.*

3. Michigan's Recognition of a Tribe's Waiver of Sovereign Immunity and Tribal Court Jurisdiction.

In addressing a federally recognized Indian tribe's waiver of sovereign immunity and tribal court jurisdiction, Michigan Courts have consistently recognized that the waiver has to be clear and unequivocal, and supported by a resolution of the tribal board.

In *Huron Potawatomi, Inc. v Stinger, supra*, the plaintiff-tribe contracted with the defendant to perform genealogical research in order for plaintiff to become a federally recognized Indian tribe. 227 Mich App at 128. Shortly thereafter, the tribe underwent new leadership, and the new leadership discharged the defendant. *Id.* The tribe then had to file suit to obtain possession of the genealogical records that defendant refused to return. Defendant filed a counterclaim for damages due to the tribe's failure to pay defendant for services rendered. After the counterclaim was filed, the tribe was certified as a federally recognized Indian tribe, and the trial court dismissed the counterclaim based on the tribe's sovereign immunity.

On appeal, the defendant argued, inter alia, that summary disposition was improper on the basis that the tribe waived its immunity by incorporating pursuant to Michigan's Nonprofit Corporation Act, which provides that a corporation shall have the power to sue and be sued (see MCL 450.2261(1)(b)). The Court disagreed, and held that plaintiff was a federally recognized tribe, to which state laws generally do not apply. The Court further held that plaintiff was not bound by a "sued and be sued" provision of the Indian Reorganization Act of 1934 because the

tribe was not incorporated pursuant thereto. See 25 USC 477.[3] Thus, the Court affirmed the trial court's application of the doctrine of sovereign immunity to the tribe.

In *Sungold Gaming USA, Inc v United Nation of Chippewa*, unpublished opinion per curiam of the Court of Appeal dated April 5, 2002, Docket No. 226524 (Appendix 2),[4] the plaintiff corporations brought suit against the defendants, an Indian tribe and its nonprofit corporation, for claims arising out of an agreement to develop a casino. The trial court granted the defendants' motion for summary disposition based on sovereign immunity. On appeal, the plaintiffs argued *inter alia* that the granting of summary disposition was erroneous because (1) the tribe was not recognized by the federal government until after suit had been filed, and that (2) even if immunity existed, it was waived.

At the outset, the Court of Appeals acknowledged that a tribe's sovereign immunity is inherent in nature, and not bestowed upon them by federal recognition. *Id.* at 1, citing *United States v Wheeler*, *supra*. Based on the fact that sovereignty already exists, the Court of Appeals disagreed with plaintiffs' claim that immunity was retroactively applied. Thus, in order to overturn the trial court's decision, the plaintiffs would have to establish that defendants waived their immunity.[5]

With respect to the waiver issue specifically, the plaintiffs argued that defendants waived their immunity on four bases. First, plaintiffs argued that, by entering into a "valid and binding" development agreement, a waiver could be inferred that the tribe intended plaintiffs to have recourse to enforce the agreement through a state or federal court. The court concluded that this

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[3] Section 477 of the Indian Reorganization Act is not at issue in the instant litigation because the Tribe has never chartered a tribal corporation under that provision.

[4] While an unpublished opinion has no precedential value, the Court of Appeals may follow an unpublished opinion if it finds the reasoning persuasive. MCR 7.215(C)(1); *Zaremba Equipment, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 43 n 10; 761 NW2d 151 (2008).

[5] Plaintiffs in *Sungold* did not contend that Congress authorized their suit. *Sungold*, supra, at 2.

line of reasoning did not qualify as a clear and unequivocal waiver. *Sungold* at 2. Plaintiff next argued that a waiver could be inferred by defendants' entering into agreements that contained a choice of law clause setting the laws of the State of Arizona as the governing law. The Court held that a stand-alone choice of law clause is not sufficiently clear and unequivocal to constitute a waiver of sovereign immunity. The Court also held as insufficient defendants' intention to enter into a future casino management agreement that would include customary and required terms, as well as the fact that the defendants had previously incorporated pursuant to the Michigan Nonprofit Corporation Act, MCL 450.2101, *et seq*. The court concluded that neither the defendant-tribe's intention, nor its previous formation of a non-profit corporation, amounted to a clear and unequivocal express waiver of immunity.

In *Joseph K. Lumsden Bahweting Public School Academy v Sault Ste Marie Tribe of Chippewa Indians*, unpublished opinion per curiam decision of the Court of Appeals dated October 26, 2004, Docket No. 252293 (Appendix 3), the plaintiff-school district filed suit against the defendant-tribe to enjoin a criminal investigation of the plaintiff's administrator and to quiet title to property after the plaintiff improperly disposed of a modular classroom on the defendant's property that was leased to plaintiff. The trial court dismissed the claim for lack of jurisdiction.

On appeal, the plaintiff argued that sovereign immunity was waived during negotiation over amending the lease agreement between the parties, and produced proposed changes to the lease agreement as evidence. Upon reviewing the signed amended lease agreement, which only contained a limited waiver of immunity for disputes over rent only, which were to be heard in tribal court, and *recognizing that the section 44.105 of the defendant's tribal code does not permit a waiver of sovereign immunity except by board resolution*, the Court held that the limited waiver contained in the amended lease agreement that was actually signed governed. The Court

construed the limited waiver in the amendment according to its literal and strict terms and refused to find a waiver for any dispute beyond issues related to pre-paid rent. *Id.* at 3.

B. THE TRIAL COURT ERRED IN HOLDING THAT THE TRIBE WAIVED SOVEREIGN IMMUNITY BECAUSE THE TRIBE'S PURPORTED WAIVER OF SOVEREIGN IMMUNITY WAS NOT SUPPORTED BY BOARD RESOLUTION PURSUANT TO TRIBAL CODE SECTION 44.105, AND WAS, THUS, INVALID.

1. The Tribe's Tribal Code Governs Waivers of Tribal Sovereign Immunity.

The Tribal Code, Chapter 44: Waiver of Tribal Immunities and Jurisdiction in Commercial Transactions, explicitly describes the manner in which the Tribe may waive tribal sovereign immunity. Section 44.105(1)(a) of the Tribal Code provides that, to waive sovereign immunity and jurisdiction, the waiver must be:

> By resolution of the Board of Directors expressly waiving the sovereign immunity of the Tribe and consenting to suit against the Tribe in any forum designated in a the resolution; provided, that such waiver shall not be general but shall be specific and limited as to duration, grantee, transaction, property or funds of the Tribe subject to the waiver, court having jurisdiction and applicable law. Such wavier shall be strictly construed and shall be effective only to the extent expressly provided and shall be subject to any conditions or limitations set forth in the resolution.

Thus, under the Tribal Code, waivers are subject to numerous conditions. They must be express, specific (not general), and limited as to duration, grantee of the waiver, transaction, property or funds of the Tribe subject to waiver.

Michigan courts have specifically recognized the significance of Tribal Code Section 44.105 and fact that the Tribe's waiver of sovereign immunity and jurisdiction must be supported by resolution of the board of directors. See *Lumsden v Sault Ste. Marie Tribe of Chippewa Indians, supra.* In this matter, the purported waiver of tribal immunity and jurisdiction was not supported by the Resolution.

2. The Waiver Contained in the Resolution At Issue Herein Was Expressly Limited to the Guaranty Agreement between the Tribe and Bank One of Michigan Only.

Bates Associates brought suit against the Tribe (and 132 Associates) for claims arising from the Settlement Agreement. While the Settlement included a provision purporting to waive sovereign immunity, the Tribe's sovereign immunity was not lawfully waived because it was not authorized by a resolution of the Tribes' Board of Directors, as required by Tribal Code Section 44.105(1)(a).

The waiver of sovereign immunity that the Settlement Agreement attempts to incorporate was the waiver outlined in Resolution 2000-148. The Resolution is remarkable for what it does and does not state. Clearly, the Tribe wanted to assist 132 Associates to purchase the garage, which it did by guaranteeing a loan that 132 Associates probably would not have received on its own. Without that loan, 132 Associates would have been unable to buy the garage. The Tribe then waived its immunity from suit under the Bank One Guaranty Agreement only, in order to allow Bank One to enforce the Tribe's promise to guaranty the $6 plus million loan in the event 132 Associates did not repay the loan, and waived tribal court jurisdiction for a suit brought to enforce the Bank One Guaranty Agreement. Once the loan was repaid by 132 Associates, the Tribe's obligations under the Bank One Guaranty Agreement ended and the waiver of sovereign immunity and tribal court jurisdiction terminated.

The waiver of sovereign immunity provision contained within the Resolution does not mention any of the following: Bates Associates principals; the terms or conditions of the purchase of the Bates Garage by 132 Associates; or the Bates Associates principals' subsequent option agreement with 132 Associates to repurchase the garage from 132 Associates after the seven-year ownership period expired. Rather, the waiver authorized by the Board's resolution was clearly limited to Bank One only [brief in support of Defendants' response to Plaintiff's

motion for summary disposition, 7/15/08, Exh A, Section 3.1(ii) ("This waiver is granted solely to the Bank One of Michigan, and its assigns.")]. Simply put, Bank One was the only entity authorized by the Resolution to bring suit against the Tribe. Thus, any claim by Bates, whether under the Option Agreement, Agreement of Sale, or Settlement Agreement, was barred. It is not possible to construe the waiver in any other manner.

As a result, there was no basis whatsoever under the Resolution by which Bates Associates could have sued the Tribe in any court for any obligations Bates Associates believed the Tribe accepted in connection with the purchase or repurchase of the Bates Garage seven years after the Tribe passed the Resolution, and the trial court's failure to recognize the Tribe's immunity and tribal court jurisdiction was clear error.

C. THE SETTLEMENT AGREEMENT WAS A CLAIM SEPARATE AND DISTINCT FROM PLAINTIFF'S RIGHT TO EXERCISE ITS OPTION TO REPURCHASE THE GARAGE.

In the trial court, Bates Associates argued that the purported waiver provision contained in the Settlement Agreement, which incorporated the purported waiver contained in the November 3, 2000 Option Agreement, was valid because the Option Agreement waiver purported to extend to the "Option Agreement and/or the accompanying Agreement of Sale, or any document relating to this Option" [reply brief in support of Plaintiff's motion for summary disposition and in opposition to Defendants' cross-motion for summary disposition, 8/27/08, pp 6-7]. Even assuming, arguendo, that the purported waiver contained in the Option Agreement was supported by a Board Resolution (which it was not), it cannot extend to the Settlement Agreement executed more than seven years later because it was a transaction separate and distinct from the Option Agreement and/or Agreement of Sale.

Bates Associates attempts to find a waiver of sovereign immunity by linking the Settlement Agreement to the Agreement of Sale, claiming it to be a document executed "in connection with" the Agreement of Sale. The words "in connection with" can only relate to the "reasonable and customary documents" that the parties were required to execute and deliver at closing under Section 3 to the Agreement of Sale. See brief in support of Defendants' response to Plaintiff's motion for summary disposition, 7/15/08, Exh D, Sections 3 and 10. Instead Plaintiff raised this argument in an effort to save itself under the Settlement Agreement. Plaintiff would have the Court believe that a settlement agreement of disputed claims that arose seven years in the future and which agreement was not negotiated, drafted, or remotely in existence as of November 2000 is an agreement "in connection with" the Agreement of Sale. Of course, the argument that the Settlement Agreement is connected to the Agreement of Sale is beside the point. Even if the documents are connected, neither document is supported by a tribal resolution waiving the Tribe's immunity in accordance with tribal law. Furthermore, under Bates Associates' argument, if in fact the January 2008 Settlement Agreement is "linked to" or was otherwise a part of the purported waiver of immunity under Section 10 of the Agreement of Sale, there would be no reason for Plaintiff to have inserted or otherwise restate any provision relating to the Tribe's waiver of sovereign immunity in the Settlement Agreement. The wavier would have already been provided and granted. If in fact the documents were actually linked, or "connected," the purported waiver language included in the Settlement Agreement would have been wholly unnecessary.

In support of its argument below, Plaintiff relied upon *Texas A & M University-Kingsville v Lawson*, 87 SW3d 518 (Tex Sup Ct 2002). In that case, the plaintiff, a former employee of the university, brought suit for various claims including violations of the state's Whistleblower Act,

and the university disputed jurisdiction on the basis of its sovereign immunity. *Id.* at 518-519. The trial court concluded that with the exception of the claim under the state's Whistleblower Act, all other claims were barred because of the State's immunity from suit. *Id.* at 519. The parties thereafter settled the claim under the Whistleblower Act and entered into a settlement agreement specifying the terms and conditions of their agreement. *Id.* The plaintiff brought a subsequent suit for breach of the settlement agreement, and the university moved to dismiss based on its governmental immunity. The court, however, refused to dismiss the claim to enforce the settlement agreement, and the university appealed. The Texas Supreme Court upheld the trial court's holding, but did so based on the fact that immunity with respect to Whistleblower Acts claims were waived by statute. *Id.* at 521.

Bates Associates' reliance upon *Texas A & M University-Kingsville v Lawson*, is misplaced as it is unrelated to the issues raised in this matter. In the *Texas A & M* case, the university argued that even though the state legislature had waived the university's immunity against claims under the Whistleblower Act, there was no waiver of immunity from suit for claims under a settlement agreement which settled the Whistleblower Act claim. The Texas Supreme Court said:

> [W]e hold that, having waived immunity from suit under the Whistleblower Act, the State may not now claim immunity from a suit brought to enforce a settlement agreement reached to dispose of a claim brought under that Act.

Texas A & M University-Kingsville v Lawson, 87 SW3d at 522-23. Clearly, the Texas decision has no application here since there is no parallel in the instant litigation to the state legislature's waiver of immunity there. Indeed, here the record is clear that the Tribe, unlike the State

legislature, did not waive immunity in accordance with tribal law in favor of Bates Associates, either in the Option Agreement in 2000, or the Settlement Agreement in 2008.[6]

Plaintiff's attempt to link the Settlement Agreement to the Agreement of Sale also fails to recognize Tribal Code Section 44.105(1)(a), which specifically deals with the procedure necessary for the Tribe to waive sovereign immunity. See *supra*. Further, this linkage argument fails to meet the requirement of a clear and unequivocal express wavier of immunity. See *Oklahoma Tax Comm'r v Citizen Bank Potawatomi Indian Tribe of Oklahoma*, *supra* (in the absence of a clear and unequivocal express waiver of immunity, lawsuits against Indian tribes are barred). Bates Associates' attempt to link the Settlement Agreement to the Agreement of Sale fails to address the unequivocal requirements of tribal law, which is a condition precedent to any lawful and effective waiver of tribal immunity from suit.

D. BATES ASSOCIATES' RELIANCE UPON THE THEORY OF APPARENT AUTHORITY IS MISPLACED.

1. Bates Associates' Reliance on the "Apparent Authority" of the Tribe's CFO and/or the Conduct of the Tribe's Counsel was not Reasonable Under the Circumstances and is not Supported by Law.

The doctrine of apparent authority has no application to an Indian tribe, or any governmental authority asserting its immunity from suit. Indeed, the concept of apparent authority is wholly antithetical to the well established doctrine that the only manner in which tribal immunity may be waived is through an express, written, unambiguous waiver contained in a tribal resolution. See cases discussed in Section D(2) hereinafter. Even assuming *arguendo* that apparent authority of a tribal official is sufficient to effectuate a waiver of tribal immunity,

[6] Moreover, since this is a plurality decision (from a sister State) in which no majority of the participating justices agreed concerning the reasoning, the plurality decision is not binding authority under the doctrine of stare decisis. *Allen v State Farm Mutual Auto Ins Co*, 268 Mich App 342; 708 NW2d 131 (2005); *Burns v Olde Discount Corp*, 212 Mich App 576; 538 NW2d 686 (1995); *Summers v Detroit*, 206 Mich App 46; 520 NW2d 356 (1994).

which it is not as a matter of law, the facts in the instant appeal do not support that the Tribe's CFO had the authority to waive the Tribe's immunity.

If an officer or agent of a private corporation is "[e]ntrusted with the general management and control of its business and affairs..." it is generally assumed that the officer or agent "has implied or apparent authority to do acts or make any contracts in its behalf falling within the scope of the ordinary and usual business of the company..." *Champagne-Webber, Inc v Scalawags Golf Club, Inc*, unpublished opinion per curiam of the Court of Appeals dated May 10, 1996, Docket No. 168373 (Appendix 4), *citing Dimmitt & Owens Financial, Inc v Realtek Industries, Inc,* 90 Mich App 429, 434; 280 NW2d 827 (1979).

Under apparent authority, the authority of the agent to act on behalf of the principal arises when "acts and appearances lead a third person reasonably to believe that an agency relationship exists." *Meretta v Peach*, 195 Mich App 695, 698-99; 491 NW2d 278 (1992), *citing* 3 Am Jur 2d, Agency, § 19, p. 524. It "must be traceable to the principal and cannot be established by the acts and conduct of the agent." *Maretta* at 699. A third party may rely on the agent's apparent authority *unless he/she has reason to believe that the agent has no authority to act on behalf of the principal in that matter. Sundell v Nationwide Ins Co*, unpublished opinion per curiam of the Court of Appeals issued August 21, 2007 (Docket No. 268977) (Appendix 5), *citing Nelson v Consumers Power Co,* 198 Mich App 82, 89-90; 497 NW2d 205 (1993) (emphasis added). "If a party has notice of a lack of authority, then that party may not rely on apparent authority to settle." *Shacket v Shacket*, unpublished opinion per curiam of the Court of Appeals issued April 27, 2001 (Docket No. 218791) (Appendix 6), *citing to Nelson, supra,* at 90.

"In determining whether an agent possesses apparent authority to perform a particular act, the court must look to all surrounding facts and circumstances." *Meretta, supra.* The

question ultimately comes down to whether an ordinarily prudent person would be justified in assuming the agent had the authority to act on behalf of the principal in the particular transaction at issue. *Id.*

> Whenever a principal has placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in assuming that such agent is authorized to perform in behalf of the principal the particular act, and such particular act has been performed, the principal is estopped from denying the agent's authority to perform it.

Id. at 699-700.

In this case, Bates Associates' asserted that the CFO had the apparent authority to execute the Settlement Agreement and waive the sovereign immunity on behalf of the Tribe. Bates Associates' position, however, fails in light of the method that is required in order for there to be valid and effective waiver of immunity and jurisdiction. See Section A2 above. The Tribe's website contains a copy of the Tribal Code, and specifically Section 44.150, which outlines the necessary requirements for an effective waiver of immunity. Bates Associates, thus, undoubtedly had notice that a clear and specific tribal resolution was required for any waiver of immunity with respect to the Bates Garage beyond that contained in Resolution 2000-148. Resolution 2000-148, the operative resolution at issue herein, contains no provision authorizing the CFO to sign the Settlement Agreement or waive sovereign immunity with respect to any claim by Bates Associates. As such, under the surrounding facts and circumstances, the apparent authority purported by Bates Associates is not in any way traceable to the Tribe, see *Maretta, supra.* Rather, Bates Associates should have known that the CFO was not authorized to waive

immunity and sign on behalf of the Tribe without a clear authorization by Tribal Board resolution.[7]

In addition, Plaintiff referred to the conduct of the Tribe's attorney, George Malis, in the proceedings below. To the extent Plaintiff claims apparent authority by way of counsel's representations, such claim is unfounded and without merit. George Malis did not execute the Agreement and did not have the authority to bind the Tribe. Further, Mr. Malis owed no duty to the Plaintiff (nor did counsel for the Plaintiff owe any duty to the Tribe). See *Freedman v Dozorec*, 412 Mich 1; 312 NW2d 585 (1981).

2. The Concept of Apparent Authority Conflicts with the Notion of Tribal Sovereign Immunity.

The arguments Bates Associates makes regarding the alleged authority of the tribal CFO, as well as its reliance on the language of the purported waiver contained in the Option Agreement, the Agreement of Sale, and the Settlement Agreement, as the Court might imagine, have been made in virtually every decision concerning tribal sovereign immunity.

For example, in *Sanderlin v Seminole Tribe of Florida*, 243 F3d 1282 (CA 11, 2001), a former tribal employee sued the Seminole Tribe alleging a wrongful discharge under a federal rehabilitation act. The tribe claimed it was immune from suit. Sanderlin claimed, inter alia, that the tribal Chief acted with apparent authority to bind the Seminole Tribe and waive the tribe's immunity from suit when he signed certain contracts with the federal government for the receipt of federal funds. The contracts the Chief signed prohibited the tribe from discriminating against

[7] At a minimum, there is at least a question of fact as to whether apparent authority existed. See *Central Wholesale Co v Sefa*, 351 Mich 17, 26; 87 NW2d 94 (1957) ("The apparent authority of an agent to act as the representative of his principal is to be gathered from all the facts and circumstances in evidence, and *ordinarily this is a question of fact for the jury's determination*") (emphasis added); see also *Graves v Wayne County*, 124 Mich App 36, 42; 333 NW2d 740 (1983).

employees based upon disabilities. The federal court of appeals rejected that argument. The Seminole Tribe had adopted a tribal ordinance much like the one adopted by the Appellant-Tribe herein, which set forth precise standards governing how, in favor of whom, and under what circumstances, the Tribe could waive its immunity. See *id.* at 1287.[8]

> Chief Billie did not have actual or apparent authority to waive voluntarily the Tribe's sovereign immunity from Rehabilitation Act suits. Chief Billie did not somehow become vested with power to waive that immunity simply because he had the actual or apparent authority to sign applications on behalf of the Tribe for federal funding. Such a finding would be directly contrary to the explicit provisions of the Tribal Constitution and Tribal Ordinance C-01-95 which expressly set forth how, when, through whom, and under what circumstances the Seminole Tribe may voluntarily waive its immunity . . . . *Extending authority to waive sovereign immunity to a single individual, at least in this context, would be directly contrary to the Supreme Court's clear statement that "a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'"*

Id. at 1288 (internal citations omitted, emphasis added). *Sanderlin* is directly on point with the case at bar. The Seminole Tribe adopted an ordinance governing how, when, and under what circumstances that tribe could waive its immunity. The Appellant-Tribe herein has a substantially similar ordinance. In *Sanderlin*, the federal court of appeals refused to ignore that ordinance and held that, notwithstanding the Chief's signature on various contracts with the federal government, the Seminole Tribe's immunity had not been waived. The appellate court explicitly rejected the notion that the Chief had the apparent authority to waive the Seminole Tribe's immunity because to do so would have ignored repeated Supreme Court admonitions that waivers of tribal sovereign immunity must be express and explicit and may not be implied, no matter what the circumstance.

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[8] "Sanderlin has not pointed to any duly-enacted tribal resolution purporting to effect a wavier in these circumstances. Nor has Sanderlin pointed to any ordinance or resolution enacted by the Tribal Council granting authority to Chief Billie to waive sovereign immunity for Rehabilitation Act suits on behalf of the Tribe in connection with a request for federal funds." *Sanderlin*, 243 F3d at 1287.

In *World Touch Gaming, Inc v Massena Mgmt, LLC,* 117 FSupp2d 271 (NDNY, 2000), a supplier of gaming machines sued a New York Indian tribe for damages it incurred resulting from the tribe's alleged breach of an agreement to lease, then purchase, and share revenues from certain types of electronic gaming devices to be installed at the tribal casino.[5] The principle of the management company signed a lease agreement and a sales agreement, both of which contained explicit language waiving the tribe's immunity from suit in state court under those agreements. The tribe's Civil Judicial Code, however, required that waivers of tribal sovereign immunity be explicit and be contained in resolutions of the tribe's governing body.[6]

World Touch argued that the tribe had waived its immunity because of the waiver language in the lease and sales documents. The court, however rejected this contention, and concluded that the tribal judicial code required that waivers come from the Tribal Council and be in writing and explicit. World Touch then argued that there was apparent authority in the principal of the management company who signed the documents purporting to waive the tribe's immunity from suit. The court said, however, "regardless of any apparent or implicit, or even express, authority of the Management Company to bind the Casino and the Tribe to contract terms and other commercial undertakings, *such authority is insufficient to waive the Tribe's sovereign immunity.*" *Id.* at 276 (emphasis added).

Both *Sanderlin* and *World Touch* are directly on point and persuasive here. Both tribes in those cases had ordinances governing how the tribes' governing bodies could waive their respective tribes' immunity from suit. Neither tribe, consistent with their laws, had effectuated a

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[5]In addition to naming the St. Regis Mohawk Tribe as a defendant, the plaintiff gaming machine supplier sued the casino and the company hired by the tribe to manage the tribal casino.

[6]"Any such specific waivers of sovereign immunity [made by the Mohawk Tribal Council] as may from time to time be executed must be clear, explicit and in writing; any such waivers shall be interpreted narrowly and limited to the explicit terms of the waivers." *Id.* at 272.

waiver through a resolution by their respective tribal councils. Both tribes had their representatives sign documents which purported to waive their respective tribes' immunity from suit. Both courts declined to find waivers because to do so would ignore the tribes' laws governing how waivers must be effectuated.

In the case at bar, the Appellant-Tribe has an ordinance governing how the Tribe may effectuate waivers of sovereign immunity. The Sault Tribe's Board of Directors must adopt an explicit resolution waiving the Tribe's immunity. The only resolution adopted by the Sault Tribe's Board of Directors was Resolution 2000-148, which waived the Tribe's immunity in favor of Bank One and then only to guarantee the repayment of a loan made by the Bank to 132 Associates. No other waiver exists in this case. There is purported waiver language in three other agreements. The Option Agreement was signed by the Tribe's Real Estate Director, without an accompanying resolution from the Board of Directors waiving the Tribe's immunity. The Agreement of Sale was unsigned by anyone from the Tribe. Finally, the Settlement Agreement was signed by the Sault Tribe's Chief Financial Officer, again without an accompanying tribal resolution from the Tribe's Board of Directors waiving the Tribe's immunity from suit. Without such a waiver resolution in favor of Bates Associates, there has been no waiver of either the Tribe's sovereign immunity from suit or its waiver of tribal court jurisdiction.

Accordingly, the trial court erred in failing to recognize the Appellant-Tribe's sovereign immunity in this matter, and in granting summary disposition and judgment in Plaintiff's favor.

E. EVEN ASSUMING ARGUENDO THAT SOVEREIGN IMMUNITY WAS WAIVED, THE TRIAL COURT ERRED IN ENTERING A JUDGMENT AGAINST THE TRIBE BECAUSE THE TRIBE DID NOT WAIVE TRIBAL COURT JURISDICTION

Even assuming that the Tribe did in fact effectively waive its sovereign immunity, which it did not, the trial court still erred in awarding a judgment in this matter against the Tribe because the Tribe did not waive tribal court jurisdiction and, thus, the trial court lacked the subject matter jurisdiction over the Tribe. In fact, the trial court refused to even make a ruling on the issue of tribal court jurisdiction. See Transcript, 9/4/08, p 16.

Subsection 102(4) of Chapter 44 of the Tribal Code, states that "the Tribe has the constitutional authority to define the jurisdiction of the Tribal Court, and it can waive Tribal Court Jurisdiction in a way that is contractually binding in the future if it does so in clear and unmistakable terms." Further, like sovereign immunity, subsection 109(1) of the Code states that tribal court jurisdiction can only be waived by a resolution of the Board. *Id.*

In the present case, Resolution 2000-148 waives tribal court jurisdiction, but only to claims against the Tribe under its guaranty to Bank One to repay the $6 plus million loan in the event 132 Associates failed to do so [brief in support of Defendants' response to Plaintiff's motion for summary disposition, 7/15/08, Exh A, Section 4.1]. Furthermore, Section 7 to the Settlement Agreement does not even mention, let alone purport to waive, tribal court jurisdiction [brief in support of Defendants' response to Plaintiff's motion for summary disposition, 7/15/08, Exh E, p 4, Section 7]. Even if the Settlement Agreement purported to waive tribal court jurisdiction, it would not be valid unless a new resolution was made by the Board, of which there was none. Therefore, because the claims Bates Associates alleged in its Complaint arose from the Settlement Agreement, the trial court lacked jurisdiction as to the Tribe. Rather, even assuming a waiver of sovereign immunity, tribal court is the proper forum for Bates Associates'

claims. Accordingly, the trial court erred in asserting its jurisdiction and entering a judgment against the Tribe. Contrary to the trial court's ruling, summary disposition should have been entered in favor of the Tribe, and Plaintiff's claims against the Tribe should have been dismissed.

CONCLUSION

Sovereign immunity of Indian tribes is a venerable doctrine in the field of federal Indian law. In addition to being venerable, it serves an important public policy purpose. In the words of the Eighth Circuit Court of Appeals, sovereign "immunity is thought necessary to promote the federal policies of tribal self-determination, economic development, and cultural autonomy." *Am Indian Agr Credit Consortium, Inc v Standing Rock Sioux Tribe, supra* at 1378. Litigants, just like Bates Associates, argue that it is unfair to apply that doctrine to them because the affected tribe typically obtains the benefit of the bargain and then asserts its immunity to bar suits against it for recovery. The Eighth Circuit said "[i]f injustice has been worked in this case, it is not the rigid express waiver standard that bears the blame, but the doctrine of sovereign immunity itself. But it is too late in the day, and certainly beyond the competence of this court, to take issue with a doctrine so well-established." *Id.* at 1379.

The United States Supreme Court and numerous lower federal courts and state courts have repeatedly applied the doctrine to situations just like the one presented here. There simply is no waiver of tribal sovereign immunity in favor of Bates Associates. Any judgment against the Tribe cannot stand and the Tribe must be dismissed from this litigation because the Court lacks subject matter jurisdiction due to the Tribe's immunity. Bates Associates, however, is not without its remedies. It has obtained the garage property back from 132 Associates, pursuant to the Option Agreement.[9] It has signed a Settlement Agreement with Greektown Casino and with 132 Associates regarding the cost to repair the garage, which is enforceable and has been

[9] Indeed, since the pendency of this appeal, it was reported that Bates Associates may sell the Bates Garage yet again to Detroit's Downtown Development Authority at an agreed upon price of $2.5 million. John Gallagher, *Development Authority to buy Bates Garage in Detroit*, Detroit Free Press Online, March 26, 2009 <http://www.freep.com/article/20090326/BUSINESS06/90326048> (accessed March 26, 2009).

enforced by this Court. To the extent Bates Associates seeks what it considers to be a deeper pocket – the Sault Tribe – it may only do that if there is a valid waiver of tribal immunity. Unfortunately for Bates Associates, there is no valid waiver either of the Tribe's immunity from suit or of the Sault Tribe's Tribal Court's jurisdiction.

RELIEF REQUESTED

Based on the foregoing, Appellant respectfully requests this Court to reverse the trial court's grant of the summary disposition in favor of Plaintiff/Appellee, vacate the Amended Final Judgment of September 25, 2008 as it relates to the Appellant-Tribe, and remand this matter to the trial court for entry of an order of dismissal as to Appellant-Tribe with prejudice.

Dated: April 24, 2009

Respectfully submitted,

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