UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

SAYBROOK TAX EXEMPT INVESTORS, LLC and LDF ACQUISITION, LLC,

Plaintiffs,

v.

LAKE OF THE TORCHES ECONOMIC DEVELOPMENT CORPORATION; STIFEL, NICOLAUS & COMPANY, INC.; STIFEL FINANCIAL CORP.; and GODFREY & KAHN, S.C.,

Defendants.

Case No. 12-cv-255

Hon. William M. Conley

DEFENDANT LAKE OF THE TORCHES ECONOMIC DEVELOPMENT CORPORATION'S OPENING MEMORANDUM REGARDING FEDERAL-QUESTION JURISDICTION

INTRODUCTION

For the plaintiffs to prevail against the Lake of the Torches Economic Development Corporation (the "EDC"), their first jurisdictional hurdle—as acknowledged by the agreement to brief the issue before proceeding further—is to demonstrate that their claims present a federal question. If they succeed, as the EDC believes they should, the Court can move on to the next hurdle, which will be for them to demonstrate that the EDC has explicitly and effectively waived its sovereign immunity from suit in a valid document for their particular claims.

The EDC is wholly owned by and chartered under the laws of the Lac du Flambeau Band of Lake Superior Chippewa Indians, a federally recognized Indian tribe in Wisconsin (the "Tribe"). Complaint, dkt. 1, at ¶ 3. As such, it shares the Tribe's

sovereign immunity from suit. *See Wells Fargo v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 689 n.7 (7th Cir. 2011). The EDC operates the Lake of the Torches Resort Casino in Lac du Flambeau, Wisconsin (the "Casino"). *Id.* at ¶ 14.

In January 2008, the EDC issued $50 million in bonds to refinance Casino debt and invest in a project in Natchez, Mississippi. *Id.* at ¶¶ 15-16, 21. The bond transaction was governed by an indenture, which contained the EDC's agreement to repay the bonds, but also contained what Judge Randa and the Seventh Circuit later held were impermissible terms that gave the bondholders management authority over the Casino in violation of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA"). Because contracts providing for management of tribal casinos are void as a matter of law if not approved by the Chairman of the National Indian Gaming Commission (as the indenture was not), Judge Randa and the Seventh Circuit both declared that the bond indenture was void *ab initio*. *See Wells Fargo v. Lake of the Torches Econ. Dev. Corp.*, 677 F. Supp. 2d 1056 (W.D. Wis. 2010) ("*Wells Fargo I*"), *aff'd in part and rev'd in part*, 658 F.3d 684 (7th Cir. 2011) ("*Wells Fargo III*"); Complaint at ¶ 40.

Along with the bond indenture, the EDC, the initial purchaser of the bonds, and the indenture trustee entered into a series of other agreements related to the issuance of the bonds (the "Bond Documents"). *See, e.g.,* Complaint at ¶ 30. Plaintiffs Saybrook Tax Exempt Investors, LLC ("Saybrook") and LDF Acquisition, LLC ("LDF Acquisition") (together, "Plaintiffs") now base their claims on these Bond Documents. But these claims are not new. Plaintiffs brought these identical claims before Judge Randa in the prior case in the Western District of Wisconsin, Case No. 09-cv-768, and before the Waukesha County Circuit Court, Case No. 12-cv-187.

In fact, this case represents the *sixth* time that the Plaintiffs have filed or caused to be filed a complaint with a questionable jurisdictional basis. As explained in greater detail below, Plaintiffs filed the following complaints in the following courts against the EDC:

1. **December 21, 2009** – Complaint, W.D. Wis. Case No. 09-cv-768, attached hereto as Exhibit A.

2. **February 8, 2010** – Proposed First Amended Complaint, W.D. Wis. Case No. 09-cv-768, attached hereto as Exhibit B.

3. **December 23, 2011** – Revised First Amended Complaint, W.D. Wis. Case No. 09-cv-768, attached hereto as Exhibit C.

4. **December 23, 2011** – Proposed Second Amended Complaint, W.D. Wis. Case No. 09-cv-768, attached hereto as Exhibit D.

5. **January 16, 2012** – Complaint, Waukesha County Circuit Court Case No. 12-cv-187, attached hereto as Exhibit E.

6. **April 9, 2012** – Complaint, W.D. Wis. Case No. 12-cv-255, dkt. 1.[1]

First, Wells Fargo Bank, N.A. ("Wells Fargo"), as trustee under the indenture and on behalf of these Plaintiffs, filed a complaint in federal court on diversity grounds. *See* Ex. A at ¶ 3. That lawsuit was before Judge Randa, sitting by designation in the Western District of Wisconsin, Case No. 09-cv-768. As noted, Judge Randa found the indenture to be void *ab initio* as an unapproved management contract and, because there could be no valid waiver of sovereign immunity by the EDC, dismissed the Complaint. *Wells Fargo I,* 677 F.Supp.2d 1056.

[1] For the Court's convenience, attached hereto as Exhibit I is a chart describing each of the different complaints filed by or on behalf of the Plaintiffs, the parties thereto, the filing date, and the claims and jurisdictional bases alleged therein.

Second, following dismissal, Wells Fargo moved to vacate the judgment and sought leave to amend its Complaint, filing a proposed First Amended Complaint alleging additional causes of action and claims regarding other of the Bond Documents with its motion. *See* Ex. B. Judge Randa denied Wells Fargo's motions on the grounds that amendment would be futile. *Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.*, No. 09-cv-768, 2010 WL 1687877, at *8 (W.D. Wis. 2010) ("*Wells Fargo II*"). Wells Fargo appealed both rulings to the Seventh Circuit, which affirmed in part and remanded the case with instructions for the District Court to grant Wells Fargo leave to amend its complaint. *Wells Fargo III,* 658 F.3d 684.

Third, after the Seventh Circuit remanded the case back to Judge Randa, Wells Fargo filed a Revised First Amended Complaint that impermissibly added non-diverse parties, including the Plaintiffs and a new defendant, the Tribe. Consequently, Plaintiffs expressly alleged that the Court no longer had diversity jurisdiction. *See* Ex. C at ¶ 6. Plaintiffs took the position that, despite over two years of litigation, Judge Randa *never* had subject-matter jurisdiction over the case. Plaintiffs argued that because the "real parties in interest" on whose behalf Wells Fargo had brought the lawsuit, Saybrook and LDF Acquisition, were not diverse from the EDC, Wells Fargo's citizenship was irrelevant to the diversity analysis. *See* Ex. G (dkt. 103) at 2, 11-13. Wells Fargo further alleged that the Court did not have federal-question jurisdiction, despite having taken

the exact opposite position in previous litigation over the identical issues with a different Indian tribe.[2] *See* Ex. G (dkt. 103) at 2-3, 7, 10, 13; Ex. H (dkt. 118) at 3, 8, 9.

Plaintiffs argued that there was no federal-question jurisdiction over the Revised First Amended Complaint, which alleged the identical causes of action by these same Plaintiffs against the EDC as in this case. For example, Plaintiffs alleged:

- "the claims asserted in the First Amended Complaint are insufficient to confer federal-question jurisdiction," Ex. G (dkt. 103) at 1-2;
- "well-established case law provides that federal-question jurisdiction under 28 U.S.C. § 1331 cannot be predicated on the possibility that a federal regulation will be interposed as a defense," *id.* at 7;
- "Under the well-pleaded complaint rule, federal jurisdiction is not created by the mere possibility that a defendant may raise a defense based on the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, or its regulations," *id.* at 13;
- "Federal-question jurisdiction does not exist because the First Amended Complaint does not invoke it; the complaint asserts only state-law causes of action," *id.*;
- "In sum, Plaintiffs' First Amended Complaint does not satisfy the well-pleaded complaint rule," *id.* at 17;
- "Settled rules of federal law further reflect that Plaintiffs' complaint does not confer federal-question jurisdiction," Ex. H (dkt. 118) at 3;
- "Plaintiffs' First Amended Complaint contains no such [federal] question—it asserts only state-law causes of action," *id.* at 8;
- "Plaintiffs' First Amended Complaint presents no federal question," *id.* at 9.

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[2] *See Wells Fargo Bank, N.A. v. Sokaogon Chippewa Cmty.*, 787 F. Supp. 2d 867 (E.D. Wis. 2011) ("*Mole Lake*").

Fourth, Wells Fargo and the Plaintiffs filed a motion for leave to amend their complaint a second time to add Stifel Nicolaus & Co., Inc. ("Stifel"), Stifel Financial Corp. ("Stifel Financial"), and Godfrey & Kahn, S.C. ("Godfrey"), as additional defendants, attaching a proposed Second Amended Complaint that is virtually identical to the Complaint in this case, minus Wells Fargo as a plaintiff and the Tribe as a defendant. *See* Ex. D.

Shortly thereafter, Judge Randa issued an Order to Show Cause as to why the Plaintiffs should not be sanctioned for failing to file an amended complaint that complied with the Seventh Circuit's mandate and his subsequent order. *See* Ex. F (Order to Show Cause, dkt. 120). Specifically, Judge Randa demanded that the Plaintiffs explain why they should not be sanctioned for "violat[ing] this Court's order to file an amended complaint that is consistent with the mandate of the Seventh Circuit" by "attempting to bring additional parties into this case and thereby destroy the Court's subject matter jurisdiction." *Id.* at 3. Judge Randa further ordered Plaintiffs to file a new amended complaint that was consistent with the Seventh Circuit's mandate and his Order or face dismissal with prejudice. *Id.* at 5. Rather than file an amended complaint as ordered by Judge Randa, the Plaintiffs responded to the Order to Show Cause by voluntarily dismissing their case under Rule 41 on April 9, 2012, and re-filing a nearly identical complaint against nearly identical defendants in the same court that same day, *i.e.*, the current lawsuit.

Fifth, during the pendency of the federal case before Judge Randa, Wells Fargo and these same Plaintiffs filed a new and separate state case in Waukesha County Circuit Court, Case No. 12-cv-187, alleging the identical causes of action against the identical defendants as appear in this case, minus the Tribe. *See* Ex. E. The Plaintiffs

alleged in the complaint that the state court did *not* have jurisdiction over the complaint (at least with respect to the claims against the EDC and the Tribe) because waiver language in the Bond Documents stated that claims could only be brought in state court if the federal court "declined to exercise jurisdiction"—something the Plaintiffs acknowledged the federal court had not yet done. *Id.* at ¶ 16.

Sixth, as mentioned above, the same day the Plaintiffs dismissed their two-and-a-half-year-old case before Judge Randa, the same parties, with the exception of Wells Fargo, filed this lawsuit. In this, their fifth complaint filed with this Court against the EDC, Plaintiffs allege that there is no diversity jurisdiction. Plaintiffs reference federal-question jurisdiction but express doubt about this court's jurisdiction to hear this case. Complaint at ¶ 7.

ARGUMENT

Plaintiffs Have the Burden to Demonstrate the Existence of Subject-Matter Jurisdiction.

"Plaintiff has the burden of proof to demonstrate at the outset that the federal court has the authority to hear the case." *Robinson v. Miscellaneous*, 09C0148, 2009 WL 2568027 (E.D. Wis. Aug. 18, 2009) (citing *McNutt v. Gen. Motors Acceptance Corp. of Ind.,* 298 U.S. 178, 182-89 (1936)); *see also Int'l Harvester Co. v. Deere & Co.,* 623 F.2d 1207, 1210 (7th Cir.1980). But while Plaintiffs have alleged the existence of a federal question, and therefore subject-matter jurisdiction, they also make the following jurisdictional "observation":

> A number of federal courts have held that federal-question jurisdiction under 28 U.S.C. § 1331 extends to state-law claims implicating the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq*. Plaintiffs therefore bring their claims against EDC pursuant to 28 U.S.C. § 1331. *Because there is a split of authority on this threshold issue, however, Plaintiffs believe it should be resolved at the outset of this litigation.* There

> is no diversity jurisdiction pursuant to 28 U.S.C. § 1332 in this case, because at least one member of LDF Acquisition, LLC, and at least one Defendant are citizens of the State of Wisconsin.

Complaint at ¶ 7 (emphasis added).

Given the prior inconsistent positions Plaintiffs have taken regarding the existence of federal subject-matter jurisdiction, particularly where Plaintiffs strenuously argued against the existence of federal-question jurisdiction regarding these claims to this Court, *see, e.g.,* Ex. G at 2, 7, 13, 17, Ex. H at 3, 8, 9, it is unclear what position Plaintiffs intend to take here. The Complaint alleges the existence of federal-question jurisdiction, *see* Complaint at ¶7, and the EDC agrees.

Judge Griesbach of the Eastern District of Wisconsin found federal-question jurisdiction to exist in *Mole Lake,* a strikingly similar case. In that case, Wells Fargo, as trustee, sued the Mole Lake Tribe for default under a trust indenture and bonds and sought a receiver. *See Mole Lake,* 787 F. Supp. 2d 867. Just as the EDC did before Judge Randa, the Mole Lake Tribe responded that the court lacked jurisdiction because the indenture, which contained a waiver of the tribe's sovereign immunity, was a management contract and therefore void under IGRA.

While Judge Griesbach ultimately found critical differences between the Mole Lake indenture and the EDC's indenture, and denyied Mole Lake's motion to dismiss, he agreed with Wells Fargo's assertion that federal-question jurisdiction existed because elements of Wells Fargo's causes of action relied on the framework provided by IGRA, namely the validity of the documents sued upon. *See id.* at 873-75 (holding that a plaintiff invokes federal-question jurisdiction when it asserts claims against a tribal corporation and a tribe that do not present a routine contract dispute but rather "a specific issue under a highly regulated area of federal law[, such as IGRA]") (citing

Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians, 317 F.3d 840, 848 (8th Cir. 2003)).

The same reasoning applies here: Plaintiffs assert claims for breach of the bonds, *see, e.g.*, Complaint at ¶¶ 97-107, so the validity of the bonds is an element of Plaintiffs' claim. And as in *Mole Lake*, whether the bonds are valid hinges on an interpretation of federal law—IGRA. *See also Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005) (holding that a state-law claim may "arise under" federal law—and therefore present a federal question—if it "necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.").

CONCLUSION

Plaintiffs bear the burden of demonstrating that subject-matter jurisdiction exists. If Plaintiffs argue in favor of the existence of federal-question jurisdiction here, the EDC does not contest that position.

Dated: May 25, 2012

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