No. 15-3744

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

| | | |
|---|---|---|
| MCZ DEVELOPMENT CORP., SHEFFIELD DEVELOPMENT PARTNERS, LLC, GOLDEN CANYON PARTNERS, LLC, and FLORENCE DEVELOPMENT PARTNERS, LLC, | ) | On Appeal from the United States District Court, Northern District of Illinois |
| Plaintiffs-Appellants, | ) | Case No. 13 CV 6395 |
| v. | ) | Hon. Sharon Johnson Coleman |
| DICKINSON WRIGHT, PLLC and DENNIS J. WHITTLESEY, | ) | |
| Defendants-Appellees. | ) | |

# BRIEF OF DEFENDANTS-APPELLEES DICKINSON WRIGHT, PLLC AND DENNIS J. WHITTLESEY

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May 26, 2016

ORAL ARGUMENT REQUESTED

**CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Appellate Court No: 15-3744

Short Caption: MCZ Dev. Corp. et al v. Dickinson Wright, PLLC et al

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Dickinson Wright, PLLC and Dennis J. Whittlesey

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Jenner & Block LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) List any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

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Attorney's Printed Name: Ashley R. Waddell Tingstad
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## JURISDICTIONAL STATEMENT

Plaintiffs-Appellants' Jurisdictional Statement is not complete and correct. Jurisdiction in the district court was proper and jurisdiction in this Court is proper pursuant to diversity jurisdiction. 28 U.S.C. § 1332(a). Dickinson Wright, PLLC and Dennis J. Whittlesey submit the below complete, correct jurisdictional statement, which is consistent with the corrected jurisdictional statement Dickinson Wright filed with this Court on January 6, 2016. (App. ECF No. 10.)[1]

Specifically, Plaintiffs state in their Jurisdictional Statement that defendant Dickinson Wright, PLLC has offices in Arizona, Nevada, Ohio, Tennessee, Washington, D.C., and *Toronto, Canada*. (Pls.' Br. 2.) Although Dickinson Wright does have an office in Toronto, Canada, that office is not a member of Dickinson Wright, PLLC; it is part of a separate entity and therefore does not affect federal court jurisdiction.

**Dickinson Wright's Circuit Rule 28(b) Corrected Jurisdictional Statement**

**District Court Jurisdiction**

Plaintiffs filed their complaint in the district court on September 6, 2013. The district court had jurisdiction under 28 U.S.C. § 1332(a) because Plaintiffs alleged an amount in controversy exceeding $75,000 exclusive of interest and costs, and because complete diversity existed between the parties at the time of filing. (*See* Compl. ¶¶1-13, A10-12.)

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[1] Citations to "App. ECF No. __" are to this Court's docket in the current appeal, No. 15-3744. Unless otherwise indicated, citations to "ECF No. __" are to the district court docket below: No. 13 CV 6395. Citations to "A__" are to the appendix bound with Plaintiffs-Appellants' Opening Brief, and citations to "Supp. App.__" are to the Circuit Rule 30(e) supplemental appendix bound with this brief.

Plaintiffs assert that: MCZ Development Corp. ("MCZ") is a citizen of Illinois; Sheffield Development Partners, LLC ("Sheffield") is a citizen of Illinois; Golden Canyon Partners, LLC ("Golden Canyon"), which is comprised of Sheffield and Obadiah Development Group, Inc. ("Obadiah") of Florida, is a citizen both Illinois and Florida; and Florence Development Partners, LLC ("Florence"), which is comprised of Golden Canyon and Oklahoma domiciliaries Marcella Giles and Wynema Capps, is a citizen of Oklahoma, Illinois, and Florida. (Compl. ¶¶ 1-8; Pls.' Br. at 1-2.) Furthermore, Dennis J. Whittlesey is domiciled in Washington D.C. and is a citizen of Washington, D.C. for the purpose of diversity jurisdiction. (Compl. ¶¶ 11-12; Pls.' Br. at 5.)

Pursuant to 28 U.S.C. § 1332(c), when the complaint was filed in this case on September 6, 2013, Dickinson Wright was a citizen of Arizona, Maryland, Michigan, Ohio, Tennessee, Virginia, and Washington, D.C. A complete listing of Dickinson Wright's members and their states of citizenship for the purpose of diversity jurisdiction at the time of the complaint is below.

| **Member's Name** | **Member's Citizenship for Diversity Jurisdiction** |
|---|---|
| John E. Anderson, Sr. | Tennessee |
| Thomas C. Arendt | Arizona |
| John A. Artz, Sr. | Michigan |
| John S. Artz | Michigan |
| Brian Balow | Michigan |
| Gary L. Birnbaum | Arizona |
| Richard M. Bolton | Michigan |
| Andrew S. Boyce | Michigan |
| David G. Bray | Arizona |
| William T. Burgess | Michigan |

| Member's Name | Member's Citizenship for Diversity Jurisdiction |
|---|---|
| George P. Butler III | Michigan |
| John G. Cameron, Jr. | Michigan |
| James N. Candler, Jr. | Michigan |
| Spencer W. Cashdan | Arizona |
| Scot L. Claus | Arizona |
| Roger H. Cummings | Michigan |
| Stephen E. Dawson | Michigan |
| Bernadette M. Dennehy | Michigan |
| David R. Deromedi | Michigan |
| Barth X. Derosa | Maryland |
| J. Benjamin Dolan | Michigan |
| Thomas M. Donnell, Jr. | Tennessee |
| Terence M. Donnelly | Michigan |
| Joan Ellis | Maryland |
| Peter H. Ellsworth | Michigan |
| William E. Elwood | Virginia |
| M. Reid Estes, Jr. | Tennessee |
| Geoffrey A. Fields | Michigan |
| James C. Foresman | Michigan |
| Gerald K. Gaffaney | Arizona |
| Steven A. Gibson | Nevada |
| Daniel F. Gosch | Michigan |
| Deborah L. Grace | Michigan |
| Henry M. Grix | Michigan |
| K. Scott Hamilton | Michigan |
| Michael C. Hammer | Michigan |
| Thomas D. Hammerschmidt, Jr. | Michigan |
| Craig W. Hammond | Michigan |
| Mark V. Heusel | Michigan |
| Mark R. High | Michigan |
| Martin D. Holmes | Tennessee |
| Michael R. Holzman | Maryland |
| William H. Honaker | Michigan |
| David J. Houston | Michigan |

| Member's Name | Member's Citizenship for Diversity Jurisdiction |
|---|---|
| Steven G. Howell | Michigan |
| Timothy H. Howlett | Michigan |
| James L. Hughes | Michigan |
| W. Anthony Jenkins | Michigan |
| Richard A. Jones | Michigan |
| Peter F. Klett | Tennessee |
| Jason P. Klingensmith | Michigan |
| Scott R. Knapp | Michigan |
| Michael R. Kramer | Michigan |
| Monica J. Labe | Michigan |
| Kathleen A. Lang | Michigan |
| David L. Lansky | Arizona |
| John K. Lawrence | Michigan |
| Judith Fertel Layne | Michigan |
| James E. Ledbetter | Virginia |
| Leslee M. Lewis | Michigan |
| Samuel D. Littlepage | Virginia |
| James E. Lozier | Michigan |
| Andrew W. MacLeod | Michigan |
| James F. Mauro | Michigan |
| Kenneth J. McIntyre | Michigan |
| Thomas G. McNeill | Michigan |
| Nicole M. Meyer | Virginia |
| Cynthia A. Moore | Michigan |
| John C. Nishi | Michigan |
| William L. Novotny | Arizona |
| Francis R. Ortiz | Michigan |
| Edward H. Pappas | Michigan |
| James H. Patterson | Arizona |
| Richard W. Paul | Michigan |
| James A. Plemmons | Michigan |
| Marlene A. Pontrelli | Arizona |
| Daniel D. Quick | Michigan |
| Lee S. Raatz | Arizona |

| Member's Name | Member's Citizenship for Diversity Jurisdiction |
|---|---|
| Michael T. Raymond | Michigan |
| Jonathan Redway | Virginia |
| Robert F. Rhoades | Michigan |
| Leonce A. Richard | Arizona |
| Stephen E. Richman | Arizona |
| Harlan W. Robins | Ohio |
| Michael S. Rubin | Arizona |
| James A. Samborn | Michigan |
| Jordan S. Schreier | Michigan |
| Robert L. Schwartz | Arizona |
| W. Stuart Scott | Tennessee |
| Colleen M. Shevnock | Michigan |
| William P. Shield, Jr. | Michigan |
| Robert A. Shull | Arizona |
| Kester K. So | Michigan |
| James P. Spica | Michigan |
| Robert L. Stearns | Michigan |
| Robert W. Stocker II | Michigan |
| Timothy A. Stoepker | Michigan |
| Jeffery V. Stuckey | Michigan |
| Theodore B. Sylwestrzak | Michigan |
| Bruce C. Thelen | Michigan |
| Timothy J. Thomason | Arizona |
| Michael G. Vartanian | Michigan |
| Peter H. Webster | Michigan |
| Rhonda D. Welburn | Michigan |
| Richard A. Wendt | Michigan |
| Dennis J. Whittlesey | Washington D.C. |
| Richard A. Wilhelm | Michigan |
| J. Bryan Williams | Michigan |
| Mark E. Wilson | Michigan |
| Steven D. Wolfson | Arizona |
| Kathryn S. Wood | Michigan |
| Paul M. Wyzgoski | Michigan |

| Member's Name | Member's Citizenship for Diversity Jurisdiction |
|---|---|
| L. Pahl Zinn | Michigan |

**Appellate Jurisdiction**

Dickinson Wright and Dennis J. Whittlesey agree that appellate jurisdiction exists pursuant to 28 U.S.C. § 1291, as this is an appeal from a final decision of a district court of the United States. Plaintiffs seek review of the Final Judgment and the Memorandum Opinion and Order entered by the district court on November 12, 2015. (Mem. Op. & Order, ECF No. 42, A2-8.) Plaintiffs timely filed their notice of appeal on December 10, 2015. (Notice of Appeal, ECF No. 44, A22.)

## ISSUES PRESENTED FOR REVIEW

1. Whether the district court properly dismissed Plaintiffs' complaint for legal malpractice because Plaintiffs prevailed in the underlying litigation.
2. Whether Plaintiffs' belated failure-to-disclose claim fails as a matter of law because Plaintiffs did not preserve that theory for appeal and have not pled its essential elements—breach of a duty of care, proximate cause, or damages.
3. Whether the district court abused its discretion in dismissing Plaintiffs' complaint with prejudice because there are no circumstances in which Plaintiffs can state a claim for legal malpractice.

## STATEMENT OF THE CASE

This is an appeal from the dismissal with prejudice of a legal malpractice complaint filed by Plaintiffs MCZ, Sheffield, Golden Canyon, and Florence (collectively, "Plaintiffs") against their attorneys, Dickinson Wright, PLLC, and its member Dennis J. Whittlesey (collectively "Dickinson Wright"). The complaint arose out of legal advice that Dickinson Wright provided Plaintiffs in connection with a casino project on Indian land with, among others, the Kialagee Tribal Town (the "Tribe"). In an underlying federal lawsuit, detailed below, the State of Oklahoma sought to enjoin the casino project. Plaintiffs brought this malpractice action against Dickinson Wright after the federal district court in Oklahoma issued a preliminary injunction stopping construction and gaming at the casino site. When Plaintiffs prevailed in the U.S. Court of Appeals for the Tenth Circuit and the State of Oklahoma's complaint was dismissed in the underlying litigation, the district

court herein dismissed Plaintiffs' complaint in this malpractice action. Plaintiffs appeal from that dismissal.

The facts set forth in this Statement of the Case—and throughout the brief—are taken from Plaintiffs' complaint, the record in the Oklahoma litigation, and matters of which this Court may take judicial notice. *Menominee Indian Tribe of Wisconsin v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998).

## I. The Casino Project In Broken Arrow

In December 2009, MCZ retained Dickinson Wright to provide legal advice and representation relating to construction of a casino in Broken Arrow, Oklahoma. (Compl. ¶ 15, A12; Mem. Op. & Order 2 n.1, A3.) Plaintiffs allege that Dickinson Wright provided advice regarding the legal and regulatory requirements for gaming on the Broken Arrow property, drafted legal documents, met with regulators, and pursued approval of the project. (Compl. ¶ 18, A13.) Over time, the scope of Dickinson Wright's representation broadened to include legal services, not only to MCZ, but also to the remaining Plaintiffs—Sheffield, Golden Canyon, and Florence—all in connection with the casino project in Broken Arrow and the ensuing Oklahoma litigation. (*Id.* ¶ 16, A13.)

The Broken Arrow property, located about 70 miles from the Tribe's headquarters in Wetumka, Oklahoma, was allotted in 1903 to Tyler Burgess, an enrolled Creek Indian of full blood, pursuant to the Dawes Act. *Oklahoma v. Hobia*, No. 12-CV-054-GKF-TLW, 2012 WL 2995044, at *7 (N.D. Okla. July 20, 2012). The property is currently owned by his descendents, Indian sisters Marcella Giles and Wynema Capps ("the Sisters"), as tenants in common, subject to federal restrictions

and restraints against alienation. *Id.* at *9. The Tribe does not have a reservation. *Oklahoma v. Hobia*, 775 F.3d 1204, 1206 (10th Cir. 2014). In May 2011, the Tribe, the Sisters, and Golden Canyon entered into a joint venture with Florence to build and operate a casino on the Broken Arrow property. *Id.* at 1208.

To offer class III gaming (slot machines and card games like blackjack, 25 U.S.C. § 2703(7)(B) & (8)), as the proposed casino at Broken Arrow would, a tribe must have in place both a tribal gaming ordinance and tribal-state compact. *See Bd. of Comm'rs of Cherokee Cty. v. Jewel*, 956 F. Supp. 2d 116, 123 (D.D.C. 2013), (citing *Amador Cty. v. Salazar,* 640 F.3d 373, 376 (D.C. Cir. 2011), and 25 U.S.C. § 2710). After a tribe obtains approval for its ordinance and enters into a compact, the tribe must issue "[a] separate license . . . for each place, facility, or location on Indian lands at which [class III] gaming is conducted" and then "submit to the Chair" of the National Indian Gaming Commission ("NIGC") "a notice that a facility license is under consideration for issuance at least 120 days before opening any new place, facility, or location on Indian lands where . . . gaming will occur." 25 U.S.C. § 2710(b)(1), (d)(1)(A)(ii); 25 C.F.R. § 559.2(a). "'That notice must contain specified information about the location and status of the property on which the facility is to be located, so that the NIGC may determine whether the property is Indian lands eligible for gaming.'" *Jewel*, 956 F. Supp. 2d at 124 (quoting *North Cty. Cmty. Alliance, Inc. v. Salazar,* 573 F.3d 738, 748 (9th Cir. 2009)).

The Tribe is a federally recognized Indian tribe organized under the Oklahoma Indian Welfare Act and the Tribe followed the foregoing procedures.

*Hobia*, 775 F.3d at 1206-08. On October 23, 1997, the NIGC approved the Tribe's Gaming Ordinance (and approved amendments to the Ordinance on April 9, 2009 and September 29, 2011).[2] In 2004, the State of Oklahoma established a model tribal gaming compact, and in April 2011, the Tribe accepted the model compact and entered into a Tribal-State Gaming Compact with the State of Oklahoma. *Id.* at 1207. In July 2007, the Secretary of the Interior approved the Kialegee-State Gaming Compact, which authorized the Tribe to operate gaming "on its Indian lands as defined by the" Indian Gaming Regulatory Act ("the Act"). *Id.* The Broken Arrow property is Indian Land under the Act. *Hobia*, 2012 WL 2995044, at *15.

On January 24, 2011, the Tribe sent the required notice of its intent to issue a new gaming facility license on the Broken Arrow property to the NIGC. *Hobia*, 775 F.3d at 1208. The NIGC did not issue a determination regarding the eligibility of the property for gaming during the 120-day notice period, *id.*, after which, "[o]n or about August 17, 2011, the Tribe issued a gaming license to Florence for the Project." (Compl. ¶ 23, A14.) Plaintiffs assert that the following month, "[o]n September 22, 2011, [Dickinson Wright] issued a written opinion letter to Plaintiffs which stated that [Dickinson Wright has] 'formed the opinion that the August 17, 2011 gaming licensure concluded the applicable regulatory process and Class II and Class III gaming may now be conducted' at the casino." (*Id.* ¶ 24, A14.) Plaintiffs further allege that "[a]t various times prior to commencement of construction

[2] The NIGC approval of the Tribe's Gaming Ordinance and amendments thereto are publicly available on the NIGC's website, http://www.nigc.gov/general-counsel/gaming-ordinances.

activities [Dickinson Wright] advised Plaintiffs that there could not be any legal challenge to the license by a non-tribal party." (Compl. ¶ 25, A14.)

Construction of the casino began in December 2011, and by May 2012, "the structure was up and the inside sprinkler systems were in place." *Hobia*, 775 F.3d at 1208.

## II. The Underlying Federal Litigation In Oklahoma

On February 8, 2012, the State of Oklahoma filed suit against several defendants, including Florence, the Tribal Town King, and the Kialegee Tribal Town Corporation (collectively "Tribal Defendants"), seeking to enjoin construction and operation of the casino. *Id.* at 1206; (Compl. ¶ 31, A15-16). Although each Plaintiff herein was not specifically named in the law suit, Plaintiffs were among the Tribal Defendants by virtue of their relationship with Florence, a named defendant in the Oklahoma litigation. Specifically, James Haft and Michael Lerner are members of plaintiff Sheffield. Sheffield and another entity, Obadiah, are members of plaintiff Golden Canyon. Golden Canyon and the Sisters are members of plaintiff Florence. (Compl. ¶¶ 3-7, A10-11.) The Tribe, the Sisters, and Golden Canyon entered into a joint venture with Florence to build and operate the casino, which was the subject of the Oklahoma litigation. *Hobia*, 775 F.3d at 1208.

In its lawsuit, the State of Oklahoma alleged that the Tribe did not have the requisite tribal jurisdiction over the Broken Arrow property and therefore could not engage in gaming on the site. *Id.* at 1209. Specifically, the State argued that a different tribe—the Muscogee (Creek) Nation—had jurisdiction over the Broken Arrow property because the Muscogee (Creek) Nation was the only successor in interest to the historic Creek Nation. *Hobia*, 2012 WL 2995044, at *15. The Tribal

Defendants countered that "the Kialegee and the (Muscogee) Creek Nation have shared jurisdiction over the [Broken Arrow property] based on Article 4 of the 1833 Treaty, which provided the lands assigned in Oklahoma were to be 'taken and considered the property of the whole Muscogee or Creek nation.'" *Id.* at *16 (quoting the Treaty of Feb. 14, 1833, art. 4, 7 Stat. 417, 419).

After a hearing on May 18, 2012, the Oklahoma district court orally "grant[ed] the State of Oklahoma's motion for a preliminary injunction and enjoin[ed] the [Tribal Defendants] from developing, constructing and operating a gaming facility at the site." (Compl. ¶ 32, A16.) Acknowledging that the Tribe's assertion of shared jurisdiction with the Muscogee (Creek) Nation over the Broken Arrow property was an issue of first impression, the district court concluded that "[t]he Muscogee (Creek) Nation alone . . . has jurisdiction" over the property. *Hobia*, 2012 WL 2995044, at **16, 18. Accordingly, the court determined the Tribal Defendants' efforts to construct and operate a gaming facility on the Broken Arrow property violated the "federally enforceable Kialegee-State Gaming Compact and federal law." *Id.* at *21. On July 20, 2012, the district court issued a written opinion to the same effect, preliminarily enjoining the Tribal Defendants from building or operating the casino, and the Tribal Defendants timely appealed that order. *Hobia*, 775 F.3d at 1206; (Compl. ¶ 34, A16).

The issues on appeal to the Tenth Circuit were whether the Town King, among others, were entitled to sovereign immunity and, if so, whether 25 U.S.C. § 2710(d)—which authorizes a State to sue tribes to enjoin class III gaming activity

on Indian land for violations of a Tribal-State compact—abrogates that immunity. On September 5, 2013, because a similar question was then pending before the United States Supreme Court in *Michigan v. Bay Mills Indian Community*, the Tenth Circuit abated the Tribal Defendants' appeal until the Supreme Court ruled. *See* Min. Entry, *Oklahoma v. Hobia*, Case No. 12-5136 (10th Cir. Sept. 5, 2013). The Supreme Court decided *Bay Mills* on May 27, 2014, holding, in relevant part, that Michigan's suit against the tribe was barred by sovereign immunity, and that 25 U.S.C. § 2710(d)(7)(A)(ii) does nothing to abrogate that immunity from suits seeking to enjoin casinos from operating off of Indian lands. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2032 (2014).

On November 10, 2014, the Tenth Circuit applied the Supreme Court's holding in *Bay Mills* and reversed the Oklahoma district court's order, remanding with instructions to vacate the preliminary injunction and dismiss Oklahoma's complaint with prejudice. *See Hobia*, 775 F.3d at 1214. The Oklahoma district court dismissed the Oklahoma case with prejudice on December 31, 2014. Entry of Judgment, *Oklahoma v. Hobia*, 4:12-cv-00054-GKF-TLW, ECF No. 179 (W.D. Okla. Dec. 31, 2014). The Supreme Court denied the State's certiorari petition on October 5, 2015. *Oklahoma v. Hobia*, 136 S. Ct. 33 (2015).

## III. A Letter From The NIGC

The Act established the NIGC within the Department of the Interior to regulate tribal gaming. 25 U.S.C. §§ 2702. The NICG is comprised of a Chair, appointed by the President and confirmed by the Senate, and two additional commissioners appointed by the Secretary of the Interior. *Id.* at §2704(b)(1). The

NIGC reviews and approves tribal gaming ordinances, *id.* at §§ 2710-12; monitors Indian gaming operations, *id.* at § 2706(b); and enforces the Act and its attendant regulations, *id.* at § 2713. If the NIGC Chair determines there is a statutory or regulatory violation, he or she may issue a temporary closure order to close a gaming facility and/or levy and collect fines, all subject to appeal to the full commission. *Id.* at §§ 2705, 2713. The full commission acts as an appellate body to review decisions of the Chair. *NIGC Commission Final Decisions*.[3] Only after the full commission issues a decision is it considered a final agency action. *Id.* Appeal to a federal district court is permitted only after a final agency action issues. *Id.*

In his or her discretion, the NIGC's General Counsel may issue a land-eligibility determination when the NIGC receives the required 120-day notice that a tribe plans to issue a license. *Jewel*, 956 F. Supp. 2d at 124-125; *see supra* p. 9. The General Counsel issues such opinions "as a courtesy," for "neither [the Act nor the NIGC] regulations require the [General Counsel] to issue a legal opinion on any matter. The legal opinion of the General Counsel is not agency action and the issuance of a legal opinion is a voluntary process, both for the party making the request and the [Office of General Counsel]." *Helpful Hints for Submitting Requests for a Legal Opinion to the NIGC Office of the General Counsel*, 1 (Dec. 2013).[4]

As relevant here, on May 25, 2012—a week after the Oklahoma district court entered the preliminary injunction in the State's favor and approximately 480 days

[3] This publication is available at: http://www.nigc.gov/commission/commission-final-decisions (last visited May 20, 2016).

[4] This publication is available at http://www.nigc.gov/images/uploads/gameopinions/SubmittingRequestforLegalOpinionDec11201.

after the Tribe provided its 120-day notice of intent to issue a gaming license to the NIGC—Tracie Stevens, the then-Chair of the NIGC, sent a letter to the Town King stating her opinion that "the Kialegee Tribal Town does not have jurisdiction over [the Broken Arrow property]" and if the Tribe begins gaming at the site, she "will exercise [her] enforcement authority to issue a notice of violation and temporary closure order." (Compl. ¶ 33, A16; NIGC Letter 2, A20.)

## IV. Plaintiffs' Legal Malpractice Complaint Against Dickinson Wright

Plaintiffs filed this malpractice action on September 6, 2013, while the underlying Oklahoma litigation was pending in the Tenth Circuit. The complaint alleged that Dickinson Wright advised Plaintiffs in connection with the gaming licensure process and work with the Tribe: "From December 2009 through September 21, 2011, [Dickinson Wright] assisted and advised Plaintiffs . . . [to] enable Plaintiffs and the tribal gaming commission involved in the Project . . . to develop, finance, and operate the Project." (Compl. ¶ 21, A13-14.) Plaintiffs further asserted that, "[a]fter the lawsuit was filed by the State of Oklahoma, and throughout the course of that litigation, [Dickinson Wright] repeatedly reassured Plaintiffs that their legal position was sound, that they would prevail in the lawsuit and that the development and construction of the gaming facility should continue." (Compl. ¶ 36, A16.) According to Plaintiffs, Dickinson Wright's representation was negligent and Plaintiffs were injured by the district court's preliminary injunction, which was then in effect, including "the fees and expenses [Plaintiffs] incurred in association with defending the lawsuit . . . and appealing the District Court's ruling." (Compl. ¶ 40, A18.)

The complaint mentions the May 25, 2012 NICG letter only once: "On May 25, 2012, the NIGC issued a memorandum concluding that the requisite tribal jurisdiction over the gaming site does not exist." (*Id.* ¶ 33, A16.) The complaint did not include the NIGC's letter as an attachment. Similarly, the complaint makes one reference to Dickinson Wright's opinion letter and does not attach that letter to the complaint.[5] (Compl. ¶ 24, A14.)

Shortly after filing their complaint, Plaintiffs requested, and Dickinson Wright agreed to, a stay pending resolution of the Tenth Circuit appeal in the underlying Oklahoma litigation. In a motion filed on November 25, 2013, Plaintiffs explained that a stay would reduce the burden on the parties and the court because "the issues and potential damages alleged in this legal malpractice action could be substantially impacted by the Tenth Circuit's decision in the Appeal" and Plaintiffs "believe that a reversal of the District Court's decision in the underlying action by the Tenth Circuit could result in the Project being resumed and the casino gaming facility being opened." (Joint Mot. for Stay ¶¶ 4, 6, Nov. 25, 2013, ECF No. 21, Supp. App. 2-3.) The motion made no mention of the letter from NIGC Chairwoman Stevens. (*Id.*) The district court granted the stay on December 3, 2013. (Min. Entry, Dec. 3, 2013, ECF No. 23.)

[5] The complaint alleges, at paragraph 24, that "[o]n September 22, 2011, Defendants issued a written opinion letter to Plaintiffs which stated that Defendants 'have formed the opinion that the August 17, 2011 gaming licensure concluded the applicable regulatory process and Class II and Class III gaming may now be conducted' at the casino."

On April 10, 2015—after the Tenth Circuit ruled and the Oklahoma district court vacated the preliminary injunction and dismissed the State's complaint with prejudice—Plaintiffs sought to continue the stay, suggesting for the first time that, despite their success in the Oklahoma litigation, their malpractice action remained viable because of the NIGC's May 25, 2012 letter. (Joint Status Report ¶ 3, April 10, 2015, ECF No. 33, Supp. App. 6.) Dickinson Wright objected and asked the district court to dismiss Plaintiffs' complaint in light of their victory in the underlying Oklahoma litigation. (*Id.* at ¶ 5, Supp. App. 6.) The district court lifted the stay on April 13, 2015 and issued a scheduling order for briefing the motion to dismiss. (Min. Entry, April 13, 2015, ECF No. 34.)

In its motion to dismiss, filed on May 11, 2015, Dickinson Wright argued that the complaint failed to state a claim because Plaintiffs prevailed in the underlying Oklahoma litigation, which was the basis of Plaintiffs' malpractice claim. (Defs.' Mot. to Dismiss 5-10, May 11, 2015, ECF No. 37.) Dickinson Wright also asserted that the complaint did not contain facts supporting a cause of action based on the NIGC's letter, much less allege that the NICG's non-final "action" had somehow injured them. (*Id.* at 10-14.) In any event, Dickinson Wright asserted, because its advice on the question of tribal jurisdiction (the subject of the NICG's letter) involved an issue of first impression, that advice was protected by judgmental immunity. (*Id.* at 7.)

Plaintiffs responded that Dickinson Wright's advice on tribal jurisdiction was "wrong" and was not entitled to judgmental immunity because Dickinson Wright's

September 22, 2011 opinion letter "contain[ed] no caveats." (Pls.' Opp'n 5, 8-9, June 8, 2015, ECF No. 38.) Plaintiffs also claimed for the first time that because of the NICG's letter, they were "effectively prohibited from moving forward with the casino" and therefore have incurred millions of dollars in damages. (*Id.* at 6.) Plaintiffs did not attach Dickinson Wright's September 22, 2011 opinion letter to their opposition, but they did attach the NICG's May 25, 2012 letter and asked the district court to take judicial notice of it. (*Id.* at 4 n.2.)

Dickinson Wright asserted in reply that Plaintiffs improperly used their response brief to amend the complaint. (Defs.' Reply 1-2, June 22, 2015, ECF No. 39.) Regardless, Plaintiffs did not state a claim based on the NICG's letter: Dickinson Wright's advice that Plaintiffs were permitted to commence gaming after the Tribe issued the license was correct as a matter of law and Plaintiffs were correctly advised that "there could not be a legal challenge to the license by a non-tribal party." (*Id.* at 3-5; Compl. ¶25, A14.) Further, Dickinson Wright was entitled to judgmental immunity because the issue of tribal jurisdiction was a question of unsettled law in the underlying litigation. (Defs.' Reply 6-8.) Finally, the NIGC's letter did not cause Plaintiffs any injury, for the letter was not a legally-binding final agency action, it did not prevent the casino from opening, and ultimately the NIGC may not take a final action to prevent the casino from operating. (*Id.* at 10-11.)

The district court dismissed Plaintiffs' complaint with prejudice on November 12, 2015. (Mem. Op. & Order, A2-8.) The court concluded that Plaintiffs did not

state a claim based on the underlying Oklahoma litigation because they prevailed in that suit. (*Id.* at 5, A6.) The district court also concluded that the question of tribal jurisdiction "is an unsettled question of law" for which Plaintiffs "cannot establish breach of duty" by Dickinson Wright. (*Id.* at 6. A7.) Finally, the court held, Plaintiffs also failed to state a claim based on the NICG's letter because it "was not a final agency determination nor is there any allegation in the complaint that the NIGC sought to impose any penalty based on that determination," meaning Plaintiffs' claim is "at best premature" and their damages are speculative. (*Id.* at 6-7, A7-8.)

Plaintiffs filed their notice of appeal on December 10, 2015. (Notice of Appeal, A22.)

## SUMMARY OF THE ARGUMENT

Plaintiffs' claim has been a moving target, continually shifting to suit their needs at any given time. The complaint focuses on the district court's preliminary injunction in the underlying Oklahoma litigation, and this suit was even stayed pending resolution of the Oklahoma litigation. (*See* Compl. ¶¶ 22, 25, 39, A14-18.) Thus, for example, the complaint alleges that Dickinson Wright "negligently provid[ed] Plaintiffs with repeated assurances that the State of Oklahoma would be unsuccessful in its lawsuit seeking to enjoin the development, construction, and operation of the gaming facility[.]" (*Id.* at 39(h), A17.) When the State of Oklahoma ultimately lost its lawsuit, Plaintiffs left their complaint intact, declining to amend their pleading either to delete allegations (like the forgoing) that no longer made sense or to raise new allegations. Instead, after Plaintiffs prevailed in the Oklahoma litigation, they attempted to reframe their malpractice theory as one

based on the NIGC's letter, which received only a single, passing reference in their complaint. Now on appeal, Plaintiffs change course again, this time rooting their malpractice claim in Dickinson Wright's purported failure to disclose the effects of a "potential negative decision by the NIGC on the issue of tribal jurisdiction" or the fact that the jurisdictional issue was one of first impression. (Pls.' Br. 19, 23.)

Plaintiffs' claim fails as a matter of law, and the judgment below dismissing the complaint with prejudice should be affirmed. *First*, as Part I explains, Plaintiffs have abandoned any effort to defend their case as pled—as a malpractice claim based on the now-vacated preliminary injunction in the Oklahoma litigation—and such a claim fails as a matter of law now that Plaintiffs have prevailed in that litigation. *Second*, as addressed in Part II, Plaintiffs' belated failure-to-disclose theory likewise fails, is not pled in the complaint, and Plaintiffs did not advance it in the district court, so it is not properly preserved for appeal. (*See* Section II.A.) In any event, the claim fails on the merits because Plaintiffs do not, and cannot, plead the essential elements of a legal malpractice claim based on a purported failure to disclose—breach of a duty of care, proximate cause, or damages. Failure to plead any one of these elements would be fatal to Plaintiffs' claim, and they do not plead any. (*See* Section II.B.) *Third*, as set forth in Part III, the district court did not abuse its discretion in dismissing Plaintiffs' complaint with prejudice because there are no circumstances under which Plaintiffs could successfully re-plead a cause of action for legal malpractice.

Accordingly, this Court should affirm the district court's judgment dismissing the complaint with prejudice.

## STANDARD OF REVIEW

Plaintiffs appeal the district court's order granting Dickinson Wright's Rule 12(b)(6) motion to dismiss the complaint with prejudice for failure to state a claim upon which relief may be granted. This Court reviews a district court's grant of a motion to dismiss *de novo*. *Bravo v. Midland Credit Mgmt., Inc.*, 812 F.3d 599, 601 (7th Cir. 2016). This Court reviews "for an abuse of discretion a district court's decision to treat the dismissal of the complaint as one with prejudice." *Gonzalez-Koeneke v. West*, 791 F.3d 801, 807 (7th Cir. 2015), *reh'g denied* (Aug. 3, 2015), (citing *Indep. Tr. Corp. v. Stewart Info. Servs. Corp.*, 665 F.3d 930, 943–44 (7th Cir. 2012)).

## ARGUMENT

### I. The District Court Properly Dismissed Plaintiffs' Complaint Because Plaintiffs Prevailed In The Underlying Oklahoma Litigation.

The complaint focuses almost entirely on Dickinson Wright's alleged negligence in connection with the Oklahoma litigation. (Compl. ¶¶ 30-40, A15-18.) Paragraphs 1-12 set forth the parties; paragraphs 15-21 describe the scope of their relationship; and paragraphs 22-29 address the gaming license process, including Dickinson Wright's representation in connection with that process. The remainder of the complaint (paragraphs 30-40) details the Oklahoma litigation and Dickinson Wright's allegedly negligent advice related to that litigation, including a purported failure to explain "that the Oklahoma Attorney General could take legal actions to

stop the development and construction of the Project" (Compl. ¶ 30, A15) and alleged assurances that Plaintiffs "would prevail in the lawsuit" (*Id.* ¶ 36, A16). Plaintiffs sought damages "incurred in association with defending the lawsuit" and argued that Dickinson Wright acted negligently in providing "repeated assurances that the State of Oklahoma would be unsuccessful in its lawsuit seeking to enjoin the development, construction and operation of the gaming facility[.]" (Compl. ¶¶ 39-40, A17-18.)

We now know that Dickinson Wright's alleged advice that Plaintiffs would prevail in the Oklahoma litigation was correct. As the Tenth Circuit held, the State of Oklahoma's complaint "fail[ed] on its face to state a valid claim for relief under [the Act]." *Hobia*, 775 F.3d at 1213.

### A. Plaintiffs Do Not Challenge The District Court's Decision To The Extent It Is Based On The Oklahoma Litigation.

Because Plaintiffs prevailed in the Oklahoma litigation, the district court correctly concluded that they failed to state a claim for legal malpractice arising from Dickinson Wright's representation in that litigation. (Mem. Op. & Order 5, A6.) On appeal, Plaintiffs do not dispute that holding. Rather, they attempt to distance their malpractice theory from the Oklahoma litigation, suggesting now that Dickinson Wright's legal services purportedly "pertain[] to transaction-based advice *outside* of litigation." (Pls.' Br. 21 (emphasis added).)

Generally, arguments not raised in the opening brief on appeal are forfeited. *O'Neal v. City of Chicago*, 588 F.3d 406, 409 (7th Cir. 2009). Where the district court dismisses a complaint on multiple grounds, and the appealing plaintiff fails to

address one of those grounds, "any challenge to that part of the district court's holding is also waived." *United Cent. Bank v. Davenport Estate LLC*, 815 F.3d 315, 318 (7th Cir. 2016). Here, the district court granted Dickinson Wright's motion to dismiss because Plaintiffs "prevailed in the underlying Oklahoma Action" and because Plaintiffs "cannot establish breach of duty" in connection with the NIGC's letter. (Mem. Op. & Order 5-6, A6-A7.) By failing to address it in their opening brief on appeal, Plaintiffs forfeit any challenge to the district court's holding that their claim based on the Oklahoma litigation fails as a matter of law. *United Cent. Bank*, 815 F.3d at 318.

### B. Plaintiffs Failed To State A Claim Based On The Oklahoma Litigation In Any Event.

Even if Plaintiffs had challenged the district court's holding that they failed to state a claim against Dickinson Wright arising from the Oklahoma litigation, that holding should be affirmed. To prove an actionable injury from an attorney's performance in an underlying litigation, Plaintiffs must "essentially prove a case within a case." *Multiut Corp. v. Greenberg Traurig, LLP*, No. 10 C 3238, 2011 WL 4431021, at *2 (N.D. Ill. Sept. 22, 2011) (applying Illinois law and citing *Orzel v. Szewczyk*, 908 N.E.2d 569, 575 (Ill. App. Ct. 2009)). Illinois law is clear—"no malpractice exists unless counsel's negligence has resulted in the loss of . . . a meritorious defense if the attorney was defending in the underlying suit." *Nelson v. Quarles & Brady, LLP*, 997 N.E.2d 872, 880 (Ill. App. Ct. 2013). Because Plaintiffs prevailed in the Oklahoma litigation, Dickinson Wright cannot be liable for malpractice related to its work in connection with that suit.

## II. Plaintiffs' New Failure-To-Disclose Theory Does Not Support A Cause Of Action For Legal Malpractice.

On appeal, Plaintiffs assert that, despite prevailing in the underlying Oklahoma litigation, they have a valid claim for legal malpractice because Dickinson Wright failed to disclose the risk of a "negative decision by the NIGC on the issue of tribal jurisdiction" and the risk inherent in the unsettled nature of the governing tribal jurisdiction principles. (Pls.' Br. 10-11, 15, 19, 22-31.) Plaintiffs contend that Dickinson Wright negligently advised in its September 22, 2011 opinion letter—which Plaintiffs did not attach to the complaint or make part of the record—that "'the August 17, 2011 gaming licensure concluded the applicable regulatory process and Class II and Class III gaming may now be conducted' at the casino." (*Id.* at 23 (quoting Compl. ¶24, A14).)

As explained in Section II.A., however, Plaintiffs have forfeited this argument by failing to raise it in their complaint or before the district court. Forfeiture aside, Plaintiffs do not plead—and cannot prove—the elements of a legal malpractice claim on this theory. As set forth in Section II.B.1., Plaintiffs have not pled an actionable breach of duty because Dickinson Wright's advice on whether gaming could occur on the Broken Arrow property after the license issued was correct as a matter of law and the law governing the Tribe's jurisdiction over the property is unsettled, meaning Dickinson Wright enjoys judgmental immunity. Section II.B.2. shows that Plaintiffs have not pled the element of proximate cause because they do not allege they would have done anything differently had they known of the

purportedly undisclosed risks. Finally, as explained in Section II.B.3., Plaintiffs have not alleged actionable damages.

### A. Plaintiffs' New Theory Of Liability Is Not Properly Before This Court.

Plaintiffs now contend that Dickinson Wright failed to disclose certain risks in its September 22, 2011 opinion letter, but the complaint does not allege that these purported risks should have been disclosed in the opinion letter, much less that Dickinson Wright's failure to disclose them breached a duty. The complaint does not attach the opinion letter and mentions it (in passing) only once: "On September 22, 2011, [Dickinson Wright] issued a written opinion letter to Plaintiffs which stated that [Dickinson Wright] 'ha[s] formed the opinion that the August 17, 2011 gaming licensure concluded the applicable regulatory process and Class II and Class III gaming may now be conducted' at the casino." (Compl. ¶ 24, A14.)

The complaint devotes no more attention to the NICG's letter, which Plaintiffs now use as the basis for their claim that Dickinson Wright should have alerted them to the risk of adverse NIGC action. Again, Plaintiffs did not attach this letter to their complaint, and it receives only a single, passing mention: "On May 25, 2012, the NIGC issued a memorandum concluding that the requisite tribal jurisdiction of the gaming site does not exist." (Compl. ¶ 33, A15.) Had Plaintiffs intended to rely on either letter as grounds for a failure-to-disclose theory of malpractice, one would expect that document to receive more attention in the complaint.

Even in opposing the motion to dismiss, Plaintiffs focused on Dickinson Wright's alleged affirmative misstatements rather than a claimed failure to

disclose: Dickinson Wright "advised Plaintiffs that [they] had the right to conduct Class II and Class III gaming at the Project without the requirement of any further governmental approvals or permits" and "assured Plaintiffs that the necessary jurisdiction existed, and that even a negative decision on jurisdiction would not prevent Plaintiffs from opening and operating a casino." (Pls.' Opp'n 2 (quoting Compl. ¶¶ 23, 28, A14-15).)

"[F]ailure to draw the district court's attention to an applicable legal theory waives pursuit of that theory in this court." *Teumer v. Gen. Motors Corp.*, 34 F.3d 542, 546 (7th Cir. 1994). Even when an issue generally is before the district court, a party forfeits a specific argument pertaining to that issue by not raising it before that court and instead advancing it for the first time on appeal. *Domka v. Portage County*, 523 F.3d 776, 783 (7th Cir. 2008). Having never offered authority or legal argument in the district court in support of a claim Dickinson Wright was professionally negligent for a supposed failure to disclose, Plaintiffs' newfound theory is not properly before this Court on appeal. *See Fleishman v. Cont'l Cas. Co.*, 698 F.3d 598, 608 (7th Cir. 2012); *G & S Holdings LLC v. Cont'l Cas. Co.*, 697 F.3d 534, 538 (7th Cir. 2012). This alone is reason to affirm the judgment below.

Furthermore, Plaintiffs' failure-to-disclose argument rests on a misleading description of the purpose and scope of Dickinson Wright's opinion letter. Because that letter is not in the record, Dickinson Wright is unable to rebut this new argument and would be prejudiced by its consideration. *Boyers v. Texaco Ref. & Mktg., Inc.*, 848 F.2d 809, 811-12 (7th Cir. 1988).

### B. Even If Plaintiffs' Failure-To-Disclose Theory Is Properly Before This Court, Dismissal Was Appropriate Because Plaintiffs Did Not Plead And Cannot Prove The Essential Elements Of A Legal Malpractice Claim Based On That Theory—*i.e.,* Breach Of Duty, Proximate Cause, And Damages.

To state a claim for legal malpractice, Plaintiffs must plead and prove that a negligent act or omission by Dickinson Wright constitutes a breach of duty, and that Plaintiffs suffered damages proximately caused by the alleged breach. *Beatty v. Wood*, 204 F.3d 713, 715 (7th Cir. 2000) (citing *Lucey v. Law Offices of Pretzel & Stouffer, Chtd.*, 703 N.E.2d 473, 476 (Ill. App. Ct. 1998)). Not every mistake or error in judgment made by an attorney is an actionable breach. *Biomet Inc. v. Finnegan Henderson LLP*, 967 A.2d 662, 665 (D.C. 2009) (citing *Nat'l Sav. Bank v. Ward*, 100 U.S. 195, 198 (1879)). An attorney, for example, will be liable only when he "fail[s] to exercise a reasonable degree of care and skill, notwithstanding that the exercise of that judgment may have led to an unfavorable result for the client." *Goldstein v. Lustig*, 507 N.E.2d 164, 168-69 (Ill. App. Ct. 1987) (citing *Smiley v. Manchester Ins. & Indem. Co.*, 375 N.E.2d 118, 122 (Ill. 1978)). Where a Plaintiff fails to sufficiently allege any element of a claim for legal malpractice, dismissal is appropriate. *Nelson,* 997 N.E.2d at 880 (citing *Fox v. Seiden*, 887 N.E.2d 736, 742 (Ill. App. Ct. 2008)). Here, the district court properly dismissed the complaint because Plaintiffs failed to plead *three* of the elements of their legal malpractice claim.

### 1. Plaintiffs Have Not Pled A Breach Of Duty Because Dickinson Wright's Statement That Gaming Could Commence Was Correct As A Matter Of Law And The Firm's Advice On Tribal Jurisdiction Enjoys Judgmental Immunity.

At bottom, Plaintiffs' arguments on appeal center on the issue of tribal jurisdiction—Plaintiffs contend that Dickinson Wright failed to disclose that the issue of tribal jurisdiction was one of first impression and that the NIGC could issue a negative decision on jurisdiction, "effectively prohibiting" gaming on the Broken Arrow property. (Pls.' Br. 15, 18-19, 23.) Plaintiffs, however, improperly conflate the issue of tribal jurisdiction with the separate and distinct issue of whether gaming could be conducted on the property after the Tribe issued the gaming license. A proper understanding of this distinction shows that Plaintiffs have not plead a breach of duty for multiple reasons.

#### a. *First*, as a matter of law, there was no breach of duty because the NIGC's letter did not prohibit gaming at the Broken Arrow property.

Plaintiffs contend on appeal that Dickinson Wright failed to disclose the risk that the NIGC could issue a determination "effectively prohibiting" gaming. As an initial matter, however, the premise of Plaintiffs argument—that the NICG's letter "effectively prohibits" gaming—is wrong. As a matter of law, the NIGC's letter was not a final agency action and therefore is not legally binding. *Hobia*, 775 F.3d 1211; (Mem. Op. & Order 7, A8).

As described below, there is a procedure for obtaining a gaming license, which Plaintiffs followed. *See* 25 U.S.C. § 2710; 25 C.F.R. § 559; *see also Hobia*, 2012 WL 2995044, at ¶¶ 15-18. Once a gaming license issues—as occurred here—

the licensure process is concluded and the NIGC has no jurisdiction to stop a duly-licensed gaming facility from opening and commencing gaming; the Act does not provide an avenue by which the NIGC may terminate or revoke a gaming license. *Hobia*, 775 F.3d at 1210; 25 U.S.C. § 2701 *et seq*. Rather, the Chair of the NIGC has jurisdiction to issue a *temporary* closure order or fine a tribe *after gaming commences*, but any such fine or temporary closure order is subject to appeal to the full commission. *Id.* at §§ 2705, 2713. Only after the full commission takes action does a "final agency action" exist. And even then, the action may be appealed to the federal courts. *Id.* § 2714.

Because the NICG's letter was not a final agency action, it was not legally binding and therefore does not prohibit gaming on the Broken Arrow property.

**b. *Second*, gaming was permitted at the Broken Arrow property after the Tribe issued the gaming license.**

Plaintiffs fault Dickinson Wright for stating, in its September 22, 2011 opinion letter, that "the August 17, 2011 gaming licensure concluded the applicable regulatory process and Class II and Class III gaming may now be conducted" without discussing certain potential risks. (Compl. ¶ 24, A14); *see also* 25 U.S.C. § 2710. But Dickinson Wright's advice was correct as a matter of law, and Plaintiffs' assertion on appeal that Dickinson Wright should have advised Plaintiffs "to wait for a decision on jurisdiction before investing" is based on a fundamental misunderstanding of the Indian gaming licensure process. (Pls.' Br. 33.)

The NIGC does not approve gaming licenses, tribes do. *Jewel*, 956 F. Supp. 2d at 123. For a tribe to do so, two things must happen—both of which occurred

here. First, the tribe must adopt a tribal-state gaming compact, approved by the Secretary of the Interior, and a gaming ordinance, approved by the NIGC. *Jewel*, 956 F. Supp. 2d at 122 (citing *Amador Cty.,* 640 F.3d at 376, and 25 U.S.C. § 2710). The Kialegee Tribal-State Gaming Compact was approved by the Secretary of the Interior in July 2011, and the NIGC approved the Tribe's gaming ordinance on October 23, 1997. *Hobia* 775 F.3d at 1207.

Second, the tribe must "submit to the NIGC Chair[] a notice that a facility license is under consideration for issuance at least 120 days before opening any new place, facility, or location on Indian lands where class II or class III gaming will occur." 25 C.F.R. § 559.2(a). "'That notice must contain specified information about the location and status of the property on which the facility is to be located, so that the NIGC may determine whether the property is Indian lands eligible for gaming.'" *Jewel*, 956 F. Supp. 2d at 124 (quoting *North Cty. Cmty. Alliance,* 573 F.3d at 748). During the 120-day notice period, the NIGC may address the eligibility of the lands proposed for gaming and may, but need not, issue a land-determination opinion. *Jewel*, 956 F. Supp. 2d at 124. When the NIGC does offer such an opinion, it is advisory only. *Kansas v. NIGC*, Case No. 15-CV-4857-DDC-KGS, 2015 WL 9272847, at *7 (D. Kan. Dec. 18, 2015). Accordingly, even in the face of a negative NIGC opinion, a tribe may issue a gaming license. *See Hobia*, 775 F.3d 1210-11. Here, the Tribe submitted a notice of intent to issue the license in April 2011. *Id.* at 1208. The NIGC did not issue a land determination or comment on gaming eligibility within the 120-day period. *Id.*

After the 120-day notice period passes, a tribe may issue a gaming license, *Jewel*, 956 F. Supp. 2d at 123, as the Tribe did here on August 17, 2011 (Compl. ¶ 23, A14). At that time, as Dickinson Wright correctly informed Plaintiffs, "the gaming licensure concluded the applicable regulatory process and Class II and Class III gaming [could] be conducted" on the property. (Compl. ¶ 24, A14); *see* 25 U.S.C. § 2710(c)-(d); *Hobia*, 775 F.3d at 1210-11. This is so regardless of whether the NIGC had made a determination on the Tribe's jurisdiction over the Broken Arrow property. The jurisdictional question is a distinct and unsettled legal issue, addressed immediately below, that Plaintiffs mistakenly conflate with the question of when gaming was permitted to begin.

**c. *Third*, Dickinson Wright is entitled to judgmental immunity for its advice on tribal jurisdiction, which involves an unsettled area of law.**

Whether the Tribe had jurisdiction over the Broken Arrow property was (and remains) an unresolved question. Contrary to Plaintiffs' contention (Pls.' Br. at 26-31), the doctrine of judgmental immunity may be applied at the motion to dismiss stage, for courts may determine *as a matter of law* that alleged legal error involved professional judgment on an issue of unsettled law and therefore did not breach the lawyer's standard of care. *Goldstein*, 507 N.E.2d at 168-69.

In the Oklahoma district court, the Tribal Defendants (including Plaintiffs) argued that the Tribe shares jurisdiction over the Broken Arrow property with the Muscogee (Creek) Nation because the Tribe is a successor in interest to the historic Creek Nation. *Hobia*, 2012 WL 2995044, at *16. The State of Oklahoma, in contrast, argued that the Muscogee (Creek) Nation is the sole successor in interest to the

historic Creek Nation and therefore enjoys exclusive jurisdiction over the property. *Id.* at *15. Acknowledging the question of shared jurisdiction was an issue of first impression, the Oklahoma district court agreed with the State. *Id.* at **16-17. The Tenth Circuit reversed on other grounds, meaning the jurisdictional issue remains undecided. *Hobia*, 775 F.3d at 1214. The district court below agreed that this was an issue of first impression (Mem. Op. & Order 6, A7), and Plaintiffs do not (and cannot) argue otherwise.

Judgmental immunity protects attorneys, as they should not have to face liability for allegedly "'being in error as to a question of law on which reasonable doubt may be entertained by well-informed lawyers.'" *Nelson*, 997 N.E.2d at 883 n.3 (quoting *Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker*, 981 P.2d 236, 239-40 (Idaho 1999)). When a legal malpractice claim arises from a lawyer's interpretation on an unsettled point of law—like the question of shared tribal jurisdiction here—the lawyer's exercise of good faith, informed judgment is not actionable as a matter of law because there is no breach of the duty of care. *See, e.g.*, *Biomet*, 967 A.2d at 667-68.

In *Biomet*, for example, the plaintiff brought a malpractice claim against his former law firm for failing to challenge an award of punitive damages in the underlying litigation. 967 A.2d at 664. The district court granted summary judgment for the law firm and the court of appeals affirmed. The court of appeals held that, as a matter of law, the firm's reasoned judgment that a constitutional challenge alleging excessive punitive damages was not viable was a legally

supportable position in an unsettled area of law. *Id.* at 666. The court recognized that "[t]o conclude otherwise, would mean that every losing litigant would be able to sue his attorney if he could find another attorney who was willing to second guess the decisions of the first attorney with the advantage of hindsight." *Id.* "[N]o claim of legal malpractice will be actionable for an attorney's reasoned exercise of informed judgment on an unsettled proposition of law." *Id.* at 668.

Moreover, although the issue of whether a lawyer breached a duty often presents a question of fact, where "'an attorney's judgment or recommendation [is] on an unsettled point of law[, the attorney] is immune from suit, and the attorney has no duty to accurately predict the future course of unsettled law.'" *Nelson*, 997 N.E.2d at 883 n.3 (quoting *Wood v. McGrath, North, Mullin & Kratz, P.C.,* 589 N.W.2d 103, 106 (Neb. 1999)). When the legal "'proposition is one on which reasonable lawyers could disagree,'" the attorney's judgment should not be "'second-guessed by an expert witness.'" *Id.* at 882 (quoting *Hunt v. Dresie*, 740 P.2d 1046, 1055 (Kan. 1987)). Plaintiffs have never alleged—nor could they—that Dickinson Wright's advice was based on anything other than a reasoned exercise of informed judgment, made in good faith.

Plaintiffs' purportedly contrary authority (Pls.' Br. 28-31) is inapposite because the cases cited do not involve legal advice in the face of unsettled law. In *Howard v. Druckemiller*, 611 N.E.2d 1, 5 (Ill. App. Ct. 1993), defending against a legal malpractice claim asserted by his former client, the attorney argued that his allegedly erroneous statement was simply "casual advice from a knowledgeable

acquaintance." The attorney did not invoke the judgmental immunity doctrine, for there was no claim that the legal issues were novel or unsettled. Not surprisingly, the court declined to dismiss the case, finding a question of fact existed with respect to whether the attorney's advice was a breach of the standard of care. *Id.* Similarly, in *Spivack, Shulman & Goldman v. Foremost Liquor Store, Inc.*, 465 N.E.2d 500, 501 (Ill. App. Ct. 1984), a law firm brought an action for unpaid legal fees against its former client, who counterclaimed for legal malpractice arising out of the law firm's representation in an eviction matter, alleging that the attorney provided strategic advice that was contrary to established Illinois law and a guarantee related to that advice. The court denied the firm's motion for summary judgment, finding a question of fact existed regarding whether the firm's advice fell below the standard of care. *Id.* at 505.

*Howard* and *Spivack* did not involve questions of unsettled law; rather the defendant attorneys simply asserted their advice was not actionable. In contrast, there is no dispute here that the issue of shared tribal jurisdiction was one of first impression. Dickinson Wright was not required to accurately predict whether the Oklahoma district court, the NIGC, or anyone else would conclude that shared tribal jurisdiction existed. *Nelson*, 997 N.E.2d at 883 n.3 (collecting cases). Accordingly, even if Dickinson Wright's advice ultimately proves erroneous (an open question), as a matter of law, the firm breached no duty to Plaintiffs. *Biomet*, 967 A.2d at 666.

### 2. The Complaint Alleges No Facts To Support A Finding That Dickinson Wright's Purported Failure To Disclose Proximately Caused Plaintiffs' Alleged Injury.

Plaintiffs assert that the Firm failed to disclose "the potential for a negative decision by the NIGC that would effectively prohibit [Plaintiffs] from opening and operating the casino" or to mention that the Firm's advice regarding tribal jurisdiction involved an unsettled area of law. (Pls.' Br. 25, 27.) But the complaint nowhere alleges that Plaintiffs would have acted differently if they had received such disclosures.

Under Illinois law, to allege proximate cause where a claim of legal malpractice is based on the client's exposure to "a foreseeable risk of which [the client] was not informed," the client must plead that, had the undisclosed risk been known, the client would not have consented to the course of action. *Metrick v. Chatz*, 639 N.E.2d 198, 201-202 (Ill. App. Ct. 1994). Even accepting as true that Plaintiffs were unaware of the risks that Dickinson Wright allegedly failed to disclose—a claim Dickinson Wright would vigorously dispute—Plaintiffs do not allege they would have acted any differently had they known.

Plaintiffs rely on *Metrick* for the proposition that an attorney may be liable for failing to disclose "a foreseeable risk" (Pls.' Br. 24), but that decision makes clear that plaintiffs in such cases must plead that they would have acted differently had they known of the risk. 639 N.E.2d at 202. In *Metrick*, the plaintiffs sued the law firm that represented them in a bankruptcy proceeding, alleging among other things that the firm failed to disclose information on the financial consequences of seeking relief under chapter 11 rather than chapter 7 of the Bankruptcy Code. *Id.* at

200-201. The court affirmed the trial court's decision dismissing "the failure to disclose counts" based on the "absence of any allegation that the plaintiffs would have [proceeded differently]" with more information. *Id.* at 201. Without such an allegation, the plaintiffs failed to plead proximate cause. *Id.* at 202. Plaintiffs' case here suffers from the same fatal flaw, as Plaintiffs contend only that certain risks should have been disclosed (Pls.' Br. 25), not that they would have abandoned the project had they known of these risks.

Nor would such a reaction have made any sense. As explained above, *see* Section II.B.1.a., the NIGC has no obligation to issue a determination on tribal jurisdiction, and even when it does, the determination is non-binding. *See, e.g.*, *Jewel*, 956 F. Supp. 2d at 123-24; *North Cty. Cmty. Alliance*, 573 F.3d at 745-47. Here, the 120-day notice period passed without any action by the NIGC, so the Tribe issued the gaming license. *Hobia*, 775 F.3d at 1208; (Compl. ¶ 23, A14). Contrary to Plaintiffs' contention that Dickinson Wright should have advised them to wait until all challenges were resolved (Pls.' Br. 25-27), after the 120-day notice period passed without issue *there were no pending challenges to resolve*, so construction on the property began. The State of Oklahoma did not file suit until February 2012, approximately six months after the Tribe issued the gaming license, and the NIGC's letter came without warning three months after that. (Compl. ¶¶ 23, 31, 33, A14-16.) Against this legal and factual backdrop, there would have been no reason for Plaintiffs to proceed any differently—even with knowledge of the

risks they now cite—and it is therefore no surprise that Plaintiffs fail to allege proximate cause in their complaint.

In fact, Plaintiffs' position on the record in the underlying Oklahoma litigation shows that knowledge of these risks would not have affected Plaintiffs' decision to proceed with the casino project. "Judicial admissions are defined as deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge." *Shelton v. OSF Saint Francis Med. Ctr.*, 991 N.E.2d 548, 553 (Ill. App. Ct. 2013) (internal citations and quotations omitted). In opposition to the State's motion for a preliminary injunction in the Oklahoma district court, the Tribal Defendants (including Plaintiffs) made a judicial admission that binds them in this case, stating that the risk of having to cease construction of the casino if a permanent injunction were entered was "a risk [they] were willing to take." (Defs.' Resp. to Mot. for Prelim. Inj. at 3, *Oklahoma v. Hobia et. al*, No. 12 CV 054-GFK-TLW (W.D. Okla. Mar. 19, 2012), ECF No. 65, Supp. App. 16.)

### 3. Plaintiffs' Alleged Damages Resulted From The Now-Vacated Preliminary Injunction And Otherwise Are Purely Speculative.

Plaintiffs claim that the NICG's letter caused them to lose "millions" of dollars spent constructing and developing the casino and "four years of loan interest which could have been avoided." (Pls.' Br. 33.) But these alleged damages are not recoverable because they arise from the injunction improperly entered by the Oklahoma district court, not from the NICG's letter. In any event, as the district court correctly found, any damages purportedly related to the NIGC's letter are speculative and therefore non-cognizable. (Mem. Op. & Order 6, A7.) Even if

Plaintiffs had pled a breach of duty and proximate cause, the failure to plead cognizable damages is alone grounds to affirm the judgment dismissing Plaintiffs' complaint.

The complaint alleges three categories of damages: (1) money spent on development and construction "before" these efforts "were enjoined," (2) money associated with Plaintiffs' loan obligations, and (3) fees and expenses incurred in connection with the Oklahoma litigation. (Compl. ¶ 40, A18.) On appeal, Plaintiffs assert only that they "spent millions" when they "incurred four years of loan interest." (Pls.' Br. 32-33.)

The third category of damages—"fees and expenses [] incurred" in the Oklahoma litigation—is not recoverable because Plaintiffs prevailed in that litigation. And Plaintiffs offer no specific argument in support of their entitlement to the first category of damages—"money expended in developing and constructing the gaming facility before they were enjoined from doing so"—although it is unclear from Plaintiffs' pleadings and briefing how, if at all, this category differs from the second, loan interest. Regardless, the Oklahoma injunction stopped construction, so any money expended "developing and constructing the gaming facility before they were enjoined" is a result of the improperly-entered, and now-vacated, injunction. It therefore cannot be attributed to Dickinson Wright.

Plaintiffs now focus exclusively on the second category of alleged damages—"four years of loan interest which could have been avoided[.]" (Pls.' Br. 33.) Plaintiffs are not entitled to such damages as a matter of law, however, because this

is an attempt to recover interest accrued during the pendency of the Oklahoma district court's injunction. And again, Plaintiffs have wisely abandoned their malpractice claim based on the Oklahoma litigation because they ultimately prevailed. *See supra* p. 19.

Moreover, to the extent any of Plaintiffs' purported damages are related to the NICG's letter (something not alleged in the complaint), any such damages "are not yet known" because that letter "was not a final determination[,] nor is there any allegation in the complaint that the NIGC sought to impose any penalty based on that determination." (Mem. Op. & Order 7, A8.) As the district court explained, the Act gives Plaintiffs "the ability to request a hearing before the NIGC once an order of temporary closure has issued or a civil penalty imposed. *Neither of which has occurred.* Plaintiffs could then appeal an adverse decision by the NIGC to the United States District Court." (*Id.* (emphasis added).)

Indeed, there are many circumstances in which Plaintiffs would not sustain any damages flowing from the NIGC's letter. For example, Plaintiffs might decide to open the casino, recognizing that the NICG's letter does nothing legally to prevent this. *See* Section II.B.1.a. If, at that point, the current NIGC Chair[6] determined there is jurisdiction or otherwise decided not to act on the four-year-old NICG letter, the casino would continue to operate and Plaintiffs would have no damages. Even if the current NICG Chair decided to issue a temporary closure order, the full

[6] Tracie Stevens, the Chair of the NICG who sent the May 25, 2012 letter, served until August 2013 and is no longer on the Commission. *See* NIGC website, *Past Commissioners*, http://www.nigc.gov/commission/past-commissioners (last accessed May 23, 2016).

commission could dissolve the order, again leaving Plaintiffs without injury. And even if the full commission decided to issue a permanent closure order, a federal court could reverse that decision. The point is that, because the NICG's letter was not a "final agency action" but only "anticipated the *possibility* of future agency action," any claim that it will harm Plaintiffs is pure speculation. *Hobia*, 775 F.3d at 1210 (emphasis added).

Once again, as with breach and proximate cause, Plaintiffs do not plead, and cannot prove, this essential element of their cause of action for legal malpractice. Dismissal was therefore appropriate.

## III. The District Court Did Not Abuse Its Discretion By Dismissing The Complaint With Prejudice Because There Are No Circumstances Under Which Plaintiffs Could Re-Plead To State A Claim For Legal Malpractice.

Dismissal with prejudice is appropriate where, as here, an amendment to the complaint would be futile. *See Gonzalez-Koeneke*, 791 F.3d at 808. Although Rule 15 ordinarily requires that leave to amend be freely granted, that is only so where "there is a potentially curable problem with the complaint." *Indep. Tr. Corp.*, 665 F.3d at 943. District courts therefore "have broad discretion to deny leave to amend where . . . the amendment would be futile." *Gonzalez-Koeneke*, 791 F.3d at 807 (internal citations and quotations omitted). This Court reviews "for an abuse of discretion a district court's decision to treat the dismissal of the complaint as one with prejudice." *Id.* (citing *Indep. Tr. Corp.*, 665 F.3d at 943–44). "A district court acts within its discretion in denying leave to amend . . . by dismissing a complaint with prejudice . . . when the plaintiff fails to demonstrate how the proposed amendment would cure the deficiencies in the prior complaint." *Id.*

Here, Plaintiffs based their complaint on the underlying Oklahoma litigation, which was then pending. Ultimately, the Tenth Circuit decided that litigation in Plaintiffs' favor. Thus, there is no way for Plaintiffs properly to state a claim based on Dickinson Wright's representation in the Oklahoma litigation. *See supra* Section I.

Nor can Plaintiffs save their failure-to-disclose claim by amendment. There is no changing the fact that gaming was permitted to begin once the Tribe issued the gaming license, and Dickinson Wright's advice on tribal jurisdiction arose in an area of unsettled law. *See supra* Section II.B.1. Likewise, Plaintiffs made clear on the record in the underlying case that they were willing to continue building and assume the risk that the legal process would enjoin construction and development, even as a motion for preliminary injunction was pending in the Oklahoma district court. *Shelton*, 991 N.E.2d at 553 (plaintiff's statements in a verified pleading that are "not the result of mistake or inadvertence constitute[] a binding judicial admission . . ."); *see supra* Section II.B.2. And Plaintiffs' purported damages ("four years of interest") resulted from the improperly-entered injunction, not the NIGC's letter, and any damages purportedly caused by that letter are entirely speculative. In order to save their complaint, Plaintiffs would have to repair all three of these defects, but they cannot repair even one of them.

Moreover, under Rule 15(a)(1)(B), Plaintiffs had the ability to amend their complaint as of right after Dickinson Wright filed its motion to dismiss, but they did not do so. After the district court granted the motion to dismiss, Plaintiffs could

have requested the opportunity to re-plead by moving under Rule 59(e) or Rule 60(b), but again, they failed to do so. In short, Plaintiffs never proposed an amendment that would have cured the deficiencies that the district court identified.

In *Gonzalez-Koeneke*, this Court affirmed the dismissal of the plaintiff's complaint with prejudice because the plaintiff failed in both the district court and on appeal to offer a proposed amended complaint or explain how an amended complaint would cure the deficiencies in the original. 791 F.3d at 808-09. Similarly, in *Independent Trust,* this Court affirmed the district court's dismissal with prejudice and denial of the plaintiff's Rule 59(e) motion to alter or amend the judgment. 665 F.3d at 943–44. In so doing, the Court emphasized that the plaintiff "did not request the opportunity to amend until its motion to amend or alter and, most important, did not offer any meaningful indication of how it would plead differently." *Id.* at 943.

Here, Plaintiffs do not offer an argument against futility, but instead argue that dismissal should have been without prejudice so they can re-file their lawsuit "once [their claim based on the NIGC's letter] accrues." (Pls.' Br. 34.) But like the plaintiff in *Gonzalez-Koeneke*, Plaintiffs have not explained—either in their opposition to the motion to dismiss, in a post-judgment motion for relief from the judgment, or on appeal—how filing a new claim based on the NIGC's letter would cure the deficiencies in their complaint.

Like the plaintiff in *Independent Trust*, Plaintiffs here had multiple opportunities to amend their complaint. Despite allegations in the complaint that

are demonstrably false in the wake of the Tenth Circuit's decision—*e.g.*, that Dickinson Wright "negligently provided Plaintiffs with repeated assurances that the State of Oklahoma would be unsuccessful in its lawsuit seeking to enjoin the development, construction and operation of the gaming facility" (Compl. ¶ 39(h), A17)—Plaintiffs never sought leave to amend the complaint.

The district court did not abuse its discretion by dismissing with prejudice because Plaintiffs did not show that they can state a cause of action for legal malpractice based on the NICG's letter—they cannot get around Dickinson Wright's judgmental immunity for its advice on tribal jurisdiction, their own statement on the record that they were willing to assume the risk of having to halt construction, and the fact that their purported damages arose from the improperly-entered injunction. And having passed on multiple opportunities to amend their complaint before the parties briefed the motion to dismiss and appeal, Plaintiffs should not receive another chance now. Accordingly, the district court's dismissal of Plaintiffs' complaint with prejudice should be affirmed.

## CONCLUSION

For the reasons stated above, Dickinson Wright and Dennis J. Whittlesey respectfully request that this Court affirm the district court's order granting their motion to dismiss and dismissing Plaintiffs' complaint with prejudice.

Respectfully submitted,

Dated: May 26, 2016

DICKINSON WRIGHT, PLLC
and DENNIS J. WHITTLESEY

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## CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,031 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32 and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 12 point Century font for the main text and footnotes.

/s/ Anne P. Ray
Anne P. Ray

Dated: May 26, 2016

## CERTIFICATE OF SERVICE

I, Anne P. Ray, an attorney, hereby certify that on May 26, 2016, I caused the foregoing **Brief Of Defendants-Appellees Dickinson Wright, PLLC And Dennis J. Whittlesey** to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Pursuant to ECF Procedure (h)(2) and Circuit Rule 31(b), and upon notice of this Court's acceptance of the electronic brief for filing, I certify that I will cause 15 copies of the **Brief Of Defendants-Appellees Dickinson Wright, PLLC And Dennis J. Whittlesey** to be transmitted to the Court via hand delivery and two copies of the above named filing to be served upon the party listed below via UPS overnight delivery within 7 days of that notice date.

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/s/ Anne P. Ray
Anne P. Ray

## INDEX TO SUPPLEMENTAL APPENDIX

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**

| | |
|---|---|
| MCZ DEVELOPMENT CORP., SHEFFIELD DEVELOPMENT PARTNERS, LLC, GOLDEN CANYON PARTNERS, LLC, and FLORENCE DEVELOPMENT PARTNERS, LLC,<br><br>Plaintiffs,<br><br>v.<br><br>DICKINSON WRIGHT, PLLC and DENNIS J. WHITTLESEY,<br><br>Defendants. | No.: 13-cv-6395<br><br>The Honorable<br>Sharon Johnson Coleman |

**JOINT MOTION FOR A STAY OF PROCEEDINGS**

NOW COME the Plaintiffs, MCZ Development Corp., Sheffield Development Partners, LLC, Golden Canyon Partners, LLC, and Florence Development Partners, LLC, and the Defendants, Dickinson Wright, PLLC, and Dennis J. Whittlesey, and respectfully move this Court to stay these proceedings pending the outcome of the underlying litigation upon which this legal malpractice case is based. In support of this joint motion, the parties state as follows:

**BACKGROUND**

1. The Plaintiffs in this case are comprised of developers and investors involved in a project to develop an Indian casino gaming facility in Oklahoma (the "Project"). The Defendants are a law firm and one of its partners. On or about December 1, 2009, plaintiff MCZ retained Defendants, Dickinson Wright, PLLC, and Dennis J. Whittlesey to provide legal services in connection with the Project.

2. On July 20, 2012, the District Court for the Northern District of Oklahoma entered an order preliminarily enjoining the development, construction and operation of the gaming facility. On August 20, 2012, a notice of appeal was filed by plaintiff Florence Development Partners and others. The appeal, styled *State of Oklahoma v. Tiger Hobia and Florence Development Partners*, No. 12-5314, is currently pending in the United States Court of Appeals for the Tenth Circuit (the "Appeal"). On September 5, 2013, the Tenth Circuit stayed the Appeal pending resolution of a case currently before the United States Supreme Court, *Michigan v. Bay Mills Indian Comm.*, 695 F.3d 406 (6th Cir. 2012), *cert. granted*, 133 S. Ct. 2850 (2013).

3. On September 6, 2013, the Plaintiffs filed the current lawsuit alleging professional negligence against the Defendants purportedly arising out of the Defendants' representation of the Plaintiffs in connection with the Project. The Defendants do not admit, accept, or agree that the Plaintiffs possess any valid claims or causes of action and the Defendants specifically preserve, and do not waive any, all of their rights and defenses, including the defense of lack of personal jurisdiction, *forum non conveniens*, or related legal or equitable doctrines.

4. Plaintiffs assert the issues and potential damages alleged in this legal malpractice action could be substantially impacted by the Tenth Circuit's decision in the Appeal. For this reason, the parties jointly request a stay of these proceedings until the final disposition of the underlying litigation.

**BASIS FOR A STAY OF PROCEEDINGS**

5. A district court has the inherent power to manage its docket and may use this power to stay proceedings. *Markel American Ins. Co. v. Dolan,* 787 F.Supp.2d 776, 779 (N.D. Ill. May 11, 2011). In deciding whether to stay an action, courts frequently consider the following factors: 1) "whether a stay will simplify the issues in question and streamline the trial;" 2) "whether a stay will reduce the burden of litigation on the parties and on the court;" and 3) "whether a stay will unduly prejudice...the non-moving party." *Id.* Each of these factors weighs in favor of staying these proceedings.

6. The strongest factor in favor of a stay is that of reducing the burden of litigation on the parties and the Court. This is because the Plaintiffs believe that a reversal of the District Court's decision in the underlying action by the Tenth Circuit could result in the Project being resumed and the casino gaming facility being opened. If this were to occur, the Plaintiffs believe they might be in a position to recoup their losses thereby impacting their damages claim against the Defendants. To the extent that this and/or other issues can be narrowed or resolved through the Tenth Circuit's decision, the current litigation also will be streamlined throughout discovery and trial. Moreover, by permitting the underlying litigation to resolve prior to engaging in motion practice and discovery, the financial burden on the parties could be greatly diminished. Likewise, a stay will permit the Court and the parties to preserve their time and resources by relieving them of the need to entertain issues which might later be deemed moot.

7. Finally, the parties agree that they will not be prejudiced by a stay of these proceedings.

**CONCLUSION**

For these reasons, the parties jointly request that this Honorable Court enter a stay of all aspects of this lawsuit until the final disposition of the underlying litigation.

Dated: November 22, 2013

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**

| | | |
|---|---|---|
| MCZ DEVELOPMENT CORP., SHEFFIELD DEVELOPMENT PARTNERS, LLC, GOLDEN CANYON PARTNERS, LLC, and FLORENCE DEVELOPMENT PARTNERS, LLC, | ) | No.: 13-cv-6395 |
| Plaintiffs, | ) | The Honorable Sharon Johnson Coleman |
| v. | ) | |
| DICKINSON WRIGHT, PLLC and DENNIS J. WHITTLESEY, | ) | |
| Defendants. | ) | |

**JOINT STATUS REPORT**

NOW COME Plaintiffs, MCZ Development Corp., Sheffield Development Partners, LLC, Golden Canyon Partners, LLC, and Florence Development Partners, LLC, and Defendants, Dickinson Wright, PLLC, and Dennis J. Whittlesey, and pursuant to this Court's order of December 8, 2014, submit this joint written status report:

1. On December 8, 2014, the parties advised the Court that within the underlying proceedings, the United States Tenth Circuit Court of Appeals had reversed the Northern District of Oklahoma's decision which preliminarily enjoined the current Plaintiffs from developing a gaming facility and conducting Class III gaming on certain property. On remand, the Northern District of Oklahoma dismissed the State of Oklahoma's complaint on December 31, 2014.

2. On March 25, 2015, the State of Oklahoma filed a petition for writ of certiorari with the Supreme Court of the United States. A response to the petition is due April 24, 2015. Plaintiffs therefore assert that one of the issues forming the basis for the Plaintiffs' legal malpractice action has not yet been finally determined. Defendants,

however, assert that the United States District Court for the Northern District of Oklahoma vacated the preliminary injunction and dismissed the State of Oklahoma's complaint with prejudice on December 31, 2014. Therefore, Defendants assert, Plaintiffs' complaint in the instant proceeding is without merit, as the underlying litigation has been resolved in Plaintiffs' favor.

3. Plaintiffs further assert that on May 25, 2012, the National Indian Gaming Commission ("NIGC") issued a letter concluding that the requisite tribal jurisdiction over the gaming site does not exist, prohibiting the Plaintiffs' from developing a gaming facility and conducting Class III gaming. This decision formed an additional basis for Plaintiffs' legal malpractice action. While Plaintiffs have requested that the NIGC reconsider its position, that determination has not yet been made.

4. At this time, Plaintiffs request a continuance of the current stay, as they believe it furthers the objective of reducing the burden of litigation on the parties and the Court.

5. Defendants object to the continuance of the stay at this time. Defendants have requested that Plaintiffs dismiss their complaint, but Plaintiffs have declined to do so. It is Defendants' position that neither the parties nor the Court should need to spend any additional resources on a complaint that is legally and factually baseless. Therefore, Defendants request that the Court dismiss Plaintiffs' complaint without prejudice and grant Plaintiffs 120 days to either (a) seek reinstatement of their complaint, or (b) seek leave to file an amended complaint. Plaintiffs object to Defendants' request for a dismissal.

Dated: April 10, 2015

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

As an attorney of record in this matter, I hereby certify that, on April 10, 2015, I caused a copy of the foregoing to be filed with the Court's CM/ECF system, which provides service via electronic mail on the following counsel of record:

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By: /s/ Anne P. Ray

**UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OKLAHOMA**

| | | |
|---|---|---|
| **STATE OF OKLAHOMA,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **vs.** | ) | **Case No. 12 CV 054-GFK-TLW** |
| | ) | |
| **(1) TIGER HOBIA, as Town King and member of the Kialegee Tribal Town Business Committee, et al.;** | ) | |
| | ) | |
| **Defendants.** | ) | |

**RESPONSE OF TIGER HOBIA, LYNELLE SHATSWELL, AND FLORENCE DEVELOPMENT PARTNERS, L.L.C. TO PLAINTIFF'S MOTION AND BRIEF FOR PRELIMINARY INJUNCTION**

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March 19, 2012

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**CASES**

**STATUTES**

Defendants Tiger Hobia, as Town King and member of the Kialegee Tribal Town Business Committee, Lynelle Shatswell, and Florence Development Partners, L.L.C. file this response to Plaintiff's motion and brief for preliminary injunction. (Dkt # 6) These Defendants specifically object to the motion for preliminary injunction as served on them in that they are not proper parties to this lawsuit, as briefed in their respective motions to dismiss. Because they are not proper parties, there is nothing to preliminarily enjoin. In any event, given that Plaintiffs have no Article III standing to bring this lawsuit and because there is no case or controversy, it is self-evident that Plaintiff does not have any, let alone substantial, likelihood of success on the merits. As this court noted in Dkt # 61, "jurisdictional issues should be resolved by this Court prior to consideration of Plaintiff's Motion for Preliminary Injunction." Finally, Plaintiff has wholly failed to show that it will be injured unless a preliminary injunction is granted.

## INTRODUCTION

Plaintiff is seeking to preliminarily enjoin construction on property located in Broken Arrow. Plaintiff claims that is has standing to seek such an injunction because of its Class III Gaming Compact with the Kialegee Tribal Town. Nothing in the Compact relates to or addresses construction, but rather it relates solely to Class III gaming. (Dkt # 6, Ex. 8) Plaintiff cannot enjoin construction on this property for the purpose of blocking what it *believes may be a future violation* of a Compact when the Compact itself does not cover construction. Additionally, these Defendants are not proper parties to the lawsuit and have no authority over any activity taking place on the subject property. Shatswell has no authority over any of the activity taking place on the subject property. Hobia has acted only in his official capacity on behalf of the Tribe and is therefore exempt from suit by virtue of the Tribe's sovereign

immunity. Florence Development has no Compact or contract with the State such that the State can enjoin any activities of Florence Development.

**1. Under the Standards For Preliminary Injunction, Plaintiff Cannot Prevail**

The State is seeking a preliminary injunction to block construction activity that does not violate a single state or federal law and is not even mentioned in the Compact (which exclusively regulates gaming). The State's rationale for this request apparently is: "No gaming can be conducted in a building that is not built -- don't build it and nobody can come." It is noteworthy that the foundation of the State's entire case is its own unbriefed, unargued and unadjudicated theory as to when federal Indian Allotment land in restricted fee status does and does not qualify for gaming under federal law. This clearly is not a case for which preliminary injunctive relief is appropriate.

"A preliminary injunction is an extraordinary remedy; it is the exception rather than the rule." *GTE Corp. v. Williams*, 731 F.2d 676, 678 (10th Cir. 1984). Its purpose is to "preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395, 68 L. Ed. 2d 175, 101 S. Ct. 1830 (1981). In making the equitable determination to grant or deny a preliminary injunction, courts grant preliminary relief only if the plaintiff shows "(1) a substantial likelihood of success on the merits of the case; (2) irreparable injury to the movant if the preliminary injunction is denied; (3) the threatened injury to the movant outweighs the injury to the other party under the preliminary injunction; (4) the injunction is not adverse to the public interest." *Kikumura v. Hurley*, 242 F.3d 950, 955 (10th Cir. 2001). A party's right to injunctive relief must be "clear and unequivocal." *Penn v. San Juan Hosp.*, 528 F.2d 1181, 1185 (10th Cir. 1975).

Plaintiff has not articulated in its Complaint or any of its numerous court filings any irreparable harm or injury to its interest that would occur if construction goes forward. The State will not be harmed by the completion of construction; in fact, it is the specter of Class III gaming which has led the State to file suit for what appears to be a means of soliciting public approval of various elected officials. *See Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1172 (7th Cir. 1997) ("a plaintiff who cannot show any irreparable harm at all from the withholding of a preliminary injunction is not entitled to the injunction however strong his case on the merits, for he has no need for preliminary relief in such a case, no need therefore to short circuit the ordinary processes of the law.").

Plaintiff is seeking to preliminarily enjoin construction and operation of a casino in Broken Arrow. (Dkt No. 6, p. 2) Plaintiff claims that the construction activity will adversely affect the area surrounding the property which notably is zoned for commercial and light industrial development. There is no irreparable harm that will be suffered by Plaintiff. In fact, the only potential harm will be that which may be suffered by Defendants for expending money on construction that Plaintiff claims is not allowed. That is a risk Defendants are willing to take. In short, all of the factors regarding a preliminary injunction weigh in support of Defendants and not in support of Plaintiff.

In determining whether to grant a preliminary injunction the Court considers and balances four factors: 1) whether the movant has a substantial likelihood of success on the merits; 2) whether the movant will suffer irreparable harm unless the injunction issues; 3) whether the threatened injury to the movant outweighs any harm the proposed injunction may cause the opposing party; and 4) whether the public interest will be served by an injunction. *Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163, 1171 (10th Cir. 1998).

Plaintiff has no likelihood of success on the merits.

Defendants are exempt from suit by sovereign immunity as discussed below. In fact, the *Kiowa Indian Tribe of Oklahoma v. Hoover* case which was cited in Plaintiff's brief supporting motion for preliminary injunction (Dkt 6, p. 7) granted the Kiowa Indian Tribe an injunction against Defendants based on the sovereignty of the Tribe and finding the state court in that case had no jurisdiction to order the Tribe to pay a money judgment on a breach of contact claim. The state court's refusal to grant the Tribe a preliminary injunction was reversed as was the federal district court's dismissal of the Tribe's Section 1983 action regarding its sovereign immunity. The Court in *Kiowa Indian Tribe* stated:

> The Tribe should not be compelled "to expend time and effort on litigation in a court that does not have jurisdiction over them." [citations omitted] The Tribe's full enjoyment of its sovereign immunity is irrevocably lost once the Tribe is compelled to endure the burdens of litigation. [citations omitted]

*Id.* at 1172.

Plaintiff will not suffer irreparable harm and is therefore not entitled to preliminary injunction.

In fact, Plaintiff identifies no irreparable harm. It simply uses the words "irreparable harm" with the assumption that nothing more is required. The only parties who may suffer harm are the Defendants with their expenditure of funds to continue construction. If by the time construction is completed Defendants are blocked from using the constructed property for Class III gaming, that is a risk Defendants are taking. Plaintiff suffers no risk by Defendants continuing construction.

There is no threatened injury to the State and it certainly does not outweigh the harm to Defendants.

The Gaming Compact under which Plaintiff has filed suit only covers gaming. It does not cover construction. Even assuming Plaintiff could interfere with Defendants' sovereignty rights, it could do so only with respect to alleged violations of the Compact and only to the extent sovereignty is waived in the Compact. Any other activities conducted at the site are not subject to the State's jurisdiction. Enjoining Defendants'activity at this early stage harms Defendants; conversely, not enjoining Defendants does not harm Plaintiff.

The public interest is not served by an injunction.

Plaintiff wants to enjoin alleged illegal activity before any activity subject to the State or this Court's jurisdiction has even taken place, legal or otherwise. If this injunction is granted, the State could file a lawsuit for preliminary injunction against every person in the state, regardless of sovereignty issues, and enjoin them before they committed what the State considers a future possible illegal act.

**2. Plaintiff Has No Likelihood of Success on the Merits**

The State attempts to confuse the issue of this Court's jurisdiction by alleging that the Kialegee Trial Town does not have jurisdiction over the Broken Arrow Property. This Court need not decide that issue because the State has no standing to raise any of these issues. The State argues that the NIGC has not approved construction or operation of a casino on the property. Again, the State has no standing to raise issues on behalf of the NIGC. The State is not entitled to a preliminary injunction because the State cannot establish standing, a case or controversy, or overcome the barrier of tribal sovereign immunity.

## I. Plaintiff Cannot Prevail Because It Has No Article III Standing to Litigate this Case Because There is No Case or Controversy

The Complaint asserts that current construction on the Indian allotment at issue violates the Compact, and demands both preliminary and permanent injunctions to stop the construction and any other development on the land. Significantly, the Complaint does not specify the Compact provision allegedly being violated. This is because there is no such provision.

The Compact exclusively concerns the *actual tribal conduct* of Class III gaming. (Dkt # 6, Ex. 8) At no place in the Compact does the State have any oversight or control over potential gaming operations, nor does the State have any oversight or control over any non-gaming activity on the land, including construction of a building. The Compact is not applicable to construction work and the erection of buildings and other structures.

Neither of the two Compact provisions allowing State action against the Tribe is satisfied by the issues presented in this litigation. Absent a specific and unequivocal waiver of tribal sovereign immunity -- which does not exist in this case -- the Tribe cannot be sued. Neither can any of the Tribal officials.

### A. The Legal Standard for Article III Standing

The law is well-established and beyond debate. Only a year ago, the Supreme Court reiterated the jurisdictional requirement for Article III standing imposed on all parties seeking to prosecute claims in federal courts: "To obtain a determination on the merits in federal court, parties seeking relief must show that they have standing under Article III of the Constitution." *Arizona Christian Sch. Tuition Org. v. Winn*, __ U.S. ___, 131 S. Ct. 1436, 1440 (2011).

The issue of standing is of primary importance "[b]ecause it involves the court's power to entertain the suit." *Jordan v. Sosa,* 654 F.3d 1012, 1019 (10th Cir. 2011) (quotations omitted).

Under Article III, "the Federal Judiciary is vested with the 'Power' to resolve not questions and issues but 'Cases' or 'Controversies.'" *Arizona Christian,* 131 S. Ct. at 1441.

"To state a case or controversy under Article III, a plaintiff must establish standing." *Arizona Christian,* 131 S. Ct. at 1442 (citation omitted). "Standing is determined as of the time the action is brought." *Jordan,* 654 F.3d at 1019 (quotations omitted); *see also Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1263 (10th Cir. 2004) ("Standing doctrine addresses whether, at the inception of the litigation, the plaintiff had suffered a concrete injury that could be redressed by action of the court").

The minimum constitutional requirements for standing are clear:

> First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not "conjectural" or "hypothetical." Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

*Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992) (citations, quotations and footnote omitted).

In this case, there is no injury the State can claim it is suffering from construction at the site. Indeed, none is even alleged.

**B. The State proposes to enjoin construction of a building**

The Complaint (Dkt # 1) and the preliminary injunction motion (Dkt # 6) make clear that the only current activity occurring on the Indian Land at issue is construction of a building, but nowhere do they explain the legal basis for enjoining that construction:

Complaint ¶1 repeatedly makes clear that "construction" is the only activity currently underway:

> This action seeks declaratory and injunctive relief to prevent Defendants… from proceeding with construction … in direct violation of both the April 12, 2011 Gaming Compact between [the Tribe] and the State of Oklahoma [] and the Indian Gaming Regulatory Act, 25 U.S.C. §§2701-2721.
>
> Defendants are actively engaged in the construction of …Red Clay Casino…
>
> The Defendants' on-going actions to inject gaming into the Broken Arrow community by constructing and placing in operation the proposed casino…. violate the federally enforceable Compact and federal law….

Complaint ¶3 does the same:

> The Defendants' activities further … violate federal requirements because the construction … will violate the federally approved Gaming Compact … which expressly limits the [Tribe] to conducting gaming only on "its Indian lands"….

Complaint ¶5 also makes clear that the Court is being asked to stop construction of a building:

> This Court should declare that the Defendants' efforts to construct … a [building] are unauthorized by the State Gaming Compact and federal law, and the Court should … enjoin … development, construction or operation….

To this same point, the remainder of the Complaint contains so many statements about construction that they need not be specifically cited. While the Complaint also seeks to enjoin Class III gaming on the same Indian allotment land on which it concedes no gaming is currently being conducted, it does not explain how potential gaming activity could possibly be prohibited by any federal or state law so as to establish Article III standing. In this regard, there are numerous claims that future Class III gaming at the site would be illegal based on speculative allegations, such as (1) that the land can never qualify for gaming as a matter of unadjudicated law, (2) that the land does not qualify for gaming based on the State's informal, unilateral and unadjudicated theory that the land is not within the Tribe's jurisdiction or government control,

and (3) the potential exercise of Class III gaming on the land is a current violation of IGRA and the Compact. Still, there is no competent explanation as to how this Court can entertain litigation challenging gaming that may not ever be conducted for reasons unrelated to this litigation. The State is seeking an injunction and preliminary injunction for a hypothetical, alleged illegal activity that has not occurred and may never occur, based on a unilaterally developed theory of first impression that is unbriefed, unargued and unadjudicated. There is no present case or controversy.

Construction is not prohibited on this land, and the State simply fails to explain the statutory basis for asking this Court to enjoin that activity.

### C. IGRA neither prohibits the construction of any building nor authorizes litigation seeking to enjoin any gaming not already "being conducted"

The State alleges at Complaint ¶6 that it has statutory authority to prosecute this litigation to enjoin construction when no Class III gaming is being conducted by virtue of IGRA's provisions found at 25 U.S.C. §2710(d)(7), which provides in pertinent part:

> **(7)(A)** The United States district courts shall have jurisdiction over --
>
> * * *
>
> **(ii)** any cause of action initiated by a State or Indian tribe to enjoin a Class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3)(A) that is in effect....
>
> [Emphasis supplied.]

The authority is clear and unequivocal: the statute regulates gaming activity being conducted and not potential gaming that may be conducted in the future. Moreover, the State has neglected to call the Court's attention to the fact that its own Compact preempts any judicial challenge to gaming disputes with the Tribe, as is discussed at Subsections D and F below, by rigidly defining the process for resolving the very dispute before this Court.

As for IGRA itself, there is no cause of action when no gaming is being conducted.

**D. The Compact neither regulates nor prohibits construction of any building.**

The Compact is attached to Plaintiff's Brief on Preliminary Injunction. (Dkt # 6, Ex. 8) Its purpose and scope is plainly stated in the Preamble:

> This Compact is made and entered into by and between the Kalegee Tribal Town, a federally recognized Indian tribe (tribe), and the State of Oklahoma (state), with respect to the operation of covered games (as defined herein) on the tribes [sic] Indian lands as defined by [IGRA].
>
> [Emphasis supplied.]

Nothing in the Compact otherwise addresses, or even purports to pertain to, activities occurring prior to the commencement of "the operation of covered games." And, as discussed at Subpart F below, all disputes concerning any element of gaming or the Compact -- including whether a gaming site qualifies as "Indian land" -- must be resolved in accordance with the requirements of the Compact's **Part 12 - DISPUTE RESOLUTION** provisions. When the parties agreed to be bound by Part 12, they contracted (with enforceability) as to the specific and limited manner for resolution of any and all disputes over matters covered by the Compact. There is no allegation in the Complaint that the Dispute Resolution provisions were invoked or followed by the State for the simple reason that they have not been.

**E. The State has not cited a single federal or state law prohibiting construction of any building, regardless of its prospective use**

Nothing in any of the State's numerous filings in this litigation cited a single federal or state law giving it a legal basis for enjoining construction. Moreover, counsel for Defendants are not aware of any such law.

**F. The State cannot litigate any claims under the Compact until and unless it has complied with the Compact's specific Dispute Resolution provisions**

The Compact was written by the State and all of its provisions had to be accepted by the Tribe as a condition of being allowed to conduct Class III gaming, as plainly stated by the Complaint ¶28:

> 28. In 2004, Oklahoma established a model tribal gaming compact that is essentially a "pre-approved" offer to federally recognized tribes in the State ("Model Compact"). If a tribe accepts the Model Compact, obtains approval by the Secretary of the Interior, and complies with the requirements of the Compact and the IGRA, the tribe can operate gaming facilities on "its Indian lands," Model Compact, Part 5(L), i.e., lands in which the tribe has a possessory interests [sic] and over which the tribe has jurisdiction and exercises governmental powers.

(Dkt # 6, Ex. 8)

Having unilaterally written and imposed its Compact on the Tribe, the State apparently now believes that it is free to ignore the very strict process for dispute resolution that it legislated and offered to tribes on a "take it or leave it" basis.

To reiterate, the Compact is applicable only when gaming has been commenced. At no place in the document does it purport to extend the State's authority to gaming that may or may not be conducted at some future date. If there is no Class III gaming to regulate, then there can be no dispute under the Compact, and -- in turn -- no case or controversy, and that simple reality is by the State's own hand and dictate.[1]

Critical to any assessment of the State's right to sue the Tribe is the fact that the Compact contains only two circumstances under which the Tribe has agreed to waive its tribal sovereign immunity: (1) a Part 6 limited waiver as to claims associated with torts and prizes, and (2) a Part

[1] While counsel to the Defendants are not aware of any Tribal-State Class III Gaming Compact in the country that purports to regulate pre-gaming development and construction activities, it is possible that the Secretary of the Interior would approve a Compact providing for such regulation. However, this issue is moot for the simple reason that the State did not impose such regulation in its unique "pre-approved" offer to Oklahoma tribes seeking to conduct Class III gaming.

12 limited waiver solely applicable to judicial enforcement of an award rendered through formal arbitration. The first is not relevant to this matter, but the second is controlling. Of additional interest is Compact **Part 9. JURISDICTION**, which states *in toto*: "This compact shall not alter tribal, federal or state civil adjudicatory or criminal jurisdiction." The Tribe therefore kept all defenses of sovereign immunity and objections to jurisdiction except for the narrow instances and procedures allowed in the Compact.

In writing its Compact (Dkt # 6, Ex. 8), the State carefully crafted the Dispute Resolution process found at Part 12, and this Court should accept the State at its own words:

> **Part 12. DISPUTE RESOLUTION**
>
> In the event that either party to this compact believes that the other party has failed to comply with any requirement of this compact, or in the event of any dispute hereunder, including, but not limited to, a dispute over the proper interpretation of the terms and conditions of this Compact, the following procedures may be invoked:
>
> * * *

Part 12 then proceeds to spell out the only process available for dispute resolution -- including judicial -- if the complaining party wishes to pursue it.

> **The Three Step Dispute Resolution process is as follows:**
>
> Paragraph 12.1 provides that the first step in resolving a dispute over interpretation of a Compact provision -- such as whether the Indian allotment land qualifies for gaming -- must be resolved "amicably and voluntarily whenever possible" and requires that the complaining party first serve "written notice" on the other party, which notice shall "identify the specific Compact provision alleged to have been violated or in dispute and shall specify in detail the asserting party's contention and any factual

basis for the claim." And it requires the parties to meet within 30 days of receipt of the notice in an effort to resolve the dispute.

Paragraph 12.2 provides for formal arbitration pursuant to the rules of the American Arbitration Association, with detailed requirements for the conduct of that activity that the parties shall equally bear the expenses incurred.

Paragraph 12.3 provides for federal district court litigation, but specifically restricts such litigation to a *de novo* review of any arbitration award under Paragraph 12.2 with the further provision that the district court decision shall be subject to appeal. Significantly, the State imposed the following language on the Tribe through its "pre-approved" offer of the Compact:

> Each of the parties hereto waives immunity and consents to suit therein for such limited purposes, and agrees not to raise the Eleventh Amendment to the United States Constitution or comparable defense to the validity of such waiver.
>
> [Emphasis supplied.]

The Compact plainly defines the exclusive manner in which the State can raise the issues it is seeking to have this Court adjudicate. For reasons that are not readily apparent to be legal in nature, the State now proposes to ignore the dispute resolution requirements it wrote. In effect, the State believes that the Compact is irrelevant when its requirements are inconvenient.

The State made this bed, but now chooses not to lie in it. The implicit argument that its own Compact is irrelevant is both disingenuous and pettifogging.

## II. Plaintiff Cannot Succeed on the Merits Because the Tribe and Tribal Officials Have Sovereign Immunity

The Class III Gaming Compact was executed by the federally recognized Indian Tribe, Kialegee Tribal Town.[2] No other tribal entity, including the federally-chartered Tribal Town Corporation, is party to that Compact or otherwise has any role in the development of the Indian Allotment land at issue in this litigation. Indeed, the Complaint correctly alleges that only Indian tribes may engage in Class III Gaming pursuant to IGRA, without even suggesting that the Tribal Town Corporation can somehow be involved in any gaming activities. Complaint ¶25. Still, the State alleges that the Tribal Town Corporation's Charter has waived tribal Sovereign immunity (Complaint ¶14) without attempting to connect the corporation to the tribe as a matter of applicable federal law.

This is not the first time that a party has attempted to plead that a "sue or be sued" clause in a tribal corporation charter issued pursuant to the Oklahoma Indian Welfare Act of June 26, 1936, 25 U.S.C. §§501-510 (49 Stat. 1967) ("OIWA") constituted a tribal waiver of sovereign immunity. While such an argument has to ignore the facts that the OIWA Tribe was organized and federally recognized separately from the incorporation of the OIWA Tribal Town Corporation, the courts have not. The inconvenient truth is that this very argument has been advanced and rejected.

Simply stated, the argument that the "sue and be sued" clause in OIWA Tribal Town Corporation Charters waives the tribal sovereign immunity has been rejected in previous litigation, including litigation to which the State was a party. *See* Subsection D below and *Seneca-Cayuga Tribe of Okla. v. State of Okla.*, 874 F.2d 709, 715 n. 9 (10th Cir. 1989).

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[2] *See* Compact at Preamble ("This Compact is made and entered into and between the Kialegee Tribel, a federally recogized Indian Tribe (tribe), and the State of Oklahoma....") and Signature Page ("APPROVED: KIALEGEE TRIBAL TOWN [by] Tiger Hobia, Mekko").

Finally, in recycling its theory of tribal-waiver-through-corporate-charter, the State ignores the well-established body of law that tribal waivers must be (i) made by the tribe itself, (ii) clearly and unequivocally stated and (iii) unquestionably applicable to the claims before the court. And to insure that the waivers are applicable to the claims present, all tribal waivers must be strictly construed by the court for the waiver determines the bounds of the court's jurisdiction.

**A. The State's claims as waiver of tribal sovereign immunity**

**The only sovereignty waivers executed by the Tribe are in the Compact**

As discussed above, there are limited waivers of tribal sovereign immunity agreed to by the Tribe at Parts 6 (claims for tort and prize claims) and 12 (Dispute Resolution). However, nothing in the Compact even suggests that the Tribal Town Corporation is a party to that document or that the Tribal Town Corporation has somehow executed a broad -- even general -- waiver of tribal sovereign immunity consenting on behalf of itself, the Tribe and various tribal officials to this lawsuit.

The State affirmatively has avoided and ignored the Compact restrictions as to waiver of tribal sovereign immunity, apparently because they clearly do not apply to this litigation. Yet, the State simultaneously and aggressively invoked the Compact in stating its causes of action. alleging that the Tribe is violating various of its provisions. As a matter of law, it is difficult to imagine the legal and factual arguments that possibly could reconcile this disconnect.

**The only sovereignty waiver cited by the State is the "sue and be sued" clause of the Town Corporation Charter**

That the State cannot invoke the narrow tribal waivers in the Compact is demonstrated by its allegations at Complaint ¶14, attempting to resurrect an already judicially-rejected theory that a broad and general tribal waiver of sovereign immunity can be found in the Corporate Charter of the Tribal Town Corporation:

> 14. Any sovereign immunity from suit of the Kialegee Tribal Town or the Town corporation is not a defense to this suit because the action is against the officers and [Tribal Business] Committee members of such entities sued in their official capacities, and Article 3(b) of the corporate charter of the Town Corporation provides that it has the power "to sue and be sued."

The State in briefing before this Court has identified and cited to The Tribal Town Corporate Charter as "Doc. 6, Ex. 2" at page 2 of its Document 51, but that citation is erroneous. Doc. 6, Ex. 2 is the "Registration Information for Florence Development Partners, LLC, registered April 5, 2011, in the State of Oklahoma as an Oklahoma limited liability company." The State has not made the Corporate Charter a part of the record. Nevertheless, attached hereto for the Court's convenience is the Corporate Charter. (Ex. 1)

**B. The applicable provisions of the Tribal Town Corporation Charter**

Section 3 of the Corporate Charter identifies the Corporate Powers reserved to the Tribal Town Corporation; however, nothing in Section 3 purports to cede the enumerated corporate powers to any other entity or person. Indeed, the Section's pertinent language makes clear that it is not establishing broad and general rights for any third party:

> *Corporate Powers.*
>
> 3. The Kialegee Tribal Town, subject to any restrictions contained in the Constitution and laws of the United States or in the Constitution and By-Laws of the tribal town, and to the limitations of sections 4 and 5 of this Charter shall have the following corporate powers as provided by section 3 of the Oklahoma Indian Welfare Act of June 26, 1936:
>
> * * *
>
> (b) to sue and be sued; to complain and defend in any courts: *Provided, however,* That the grant or exercise of such power shall not be deemed a consent by the tribal town or by the United States to the levy of any judgment, lien, or attachment upon the property of the tribal town other than income or chattels specially pledged or assigned.

This section only details the powers retained by the Corporation, including the corporate right to initiate litigation and waive its corporate sovereignty for the purposes of contracting. The Tribal Corporation cannot waive the Tribe's sovereign immunity and there is nothing to establish that it has done so.

The Tribal Town Corporation is not the Tribe. Moreover, the Tribal Constitution (Dkt # 6, Ex. 4) does not even purport to establish a waiver of tribal sovereignty. Indeed, if there was a general waiver such as the one suggested by the State, then logic says that the limited waivers in the Compact are superfluous. Moreover, the logic goes further, in that the lack of any sovereign immunity would extend to every Oklahoma Indian tribe that organized under the Oklahoma Indian Welfare Act, a universal waiver that would come as a great surprise to all those tribes as well as the United States Department of the Interior and its Bureau of Indian Affairs. Equally surprising would be the realization that the waiver determination sought likely would negate the tribal sovereign immunity of hundreds of Indian tribes in the United States currently conducting business through tribal corporations with similar "sue and be sued" provisions in their corporate charters without any further waiver of tribal sovereign immunity.

**C. Statement of federal law controlling waivers of tribal sovereign immunity**

The State is urging this Court to articulate a principle that there can be an inadvertent broad and general waiver of tribal sovereign immunity that is simply contrary to one of the most important and consistently-protected tenets of Indian Law in this country. Bluntly stated, the State is distorting the law, for it well-established that waivers of tribal sovereignty must be unequivocally expressed and strictly construed in accordance with the specific language used by the tribe.

It is a "fundamental principle of Indian law that Indian tribes are sovereign entities." *Seneca-Cayuga Tribe of Okla. v. State of Okla.*, 874 F.2d 709, 714 (10th Cir. 1989). It has "long been settled law that retained tribal sovereign immunity is co-extensive with that of the United States." *Id.* at 715 (citations omitted). A federal court has no jurisdiction "over a suit against a tribe absent either an effective waiver or consent by the tribe . . . " *Id.* (quotation and citation omitted).

While tribal sovereign immunity "is not absolute, waivers of sovereign immunity are *strictly construed." Id.* (citing *Ramey Const. Co., Inc. v. The Apache Tribe of the Mescalero Reservation,* 673 F.2d 315, 320 (10th Cir. 1982)) (emphasis added). Stated another way, "a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Ramey,* 673 F.2d at 318 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). When that consent to be sued is given, "the terms of the consent establish the bounds of a court's jurisdiction." *Id.* at 320.

The requirement that a waiver of tribal immunity "be 'clear' and 'unequivocally expressed' is not a requirement that may be flexibly applied or even disregarded based on the parties or the specific facts involved." *Ute Dist. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998) (citation omitted), *aff'd in part and remanded in part, Ute Distrib. Corp. v. Sec'y of the Interior,* 584 F.3d 1275 (10th Cir. 2009), *cert. denied, Ute Distrib. Corp. v. Salazar,* 130 S. Ct. 3285 (2010). More precisely, absent a "clearly expressed waiver by . . . the tribe . . . , the Supreme Court has refused to find a waiver of tribal immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case." *Id.*

Tribal sovereign immunity "extends to subdivisions of the tribe, including Tribal business and commercial enterprises." *Swanda Bros., Inc. v. Chasco Constructors, Ltd., L.L.P.,* 2010 U.S.

Dist. LEXIS 30699, *6 (W.D. Okla. Mar. 30, 2010) (citing *Native Am. Dist. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1292 (10th Cir. 2008)). Absent an express waiver by an Indian tribe, "sovereign immunity deprives the federal courts of jurisdiction to entertain lawsuits against [the] tribe, its subdivisions and business entities, as well as its officials acting in their official capacities." *Id.* (citing *Native Am. Dist.*, 546 F.3d at 1293; *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994)).

**D. The courts have rejected claims that "sue and be sued" clauses in tribal corporate charters constitute waivers of tribal sovereign immunity**

The State has lost this argument in the past. Yet, it is now presenting the same issues without even mentioning -- let alone distinguishing -- case law of which it is or should be fully aware.

The State mistakenly thinks that the relevant phrase is intended to be some kind of blanket waiver of tribal sovereign immunity. However, the courts have reviewed this very corporate charter language and found otherwise. In the process, they have explained the reason the relevant clause was written in the first place.

The Tenth Circuit has addressed this specific point, stating that tribal corporate charters "usually include a 'sue and be sued' clause to enable the tribes to engage in commercial activity as corporations without losing their sovereign immunity as tribes." *Seneca-Cayuga Tribe of Okla. v. State of Okla., supra,* 874 F.2d at 715 n. 9 (10th Cir. 1989). "[tribal] corporate charters usually include a 'sue and be sued' clause to enable the tribes to engage in commercial activity as corporations without losing their sovereign immunity as tribes." Continuing, the *Seneca-Cayuga Court* stated, "[t]his court has held that the presence of such a clause in a tribal corporate charter does not waive the tribe's immunity as a tribe." *See Ramey Constr. Co., supra, 673 F.2d at 320 (emphasis added); see also Kenai Oil & Gas, Inc. v. Department of Interior, 522 F.Supp.*

*521 (C.D. Utah 1981), aff'd and remanded, 671 F2d 383 (10th Cir. 1982). See also Gold v. Confederated Tribes of the Warm Springs Indian Reservation, 478 F. Supp. 190, 196 (D.Or. 1979); Boe v. Fort Belknap Indian Community, 455 F. Supp. 462 (D.Mont. 1978), aff'd, 642 F.2d 276 (9th Cir. 1981); Atkinson v. Haldane, 569 P.2d 151 (Alaska 1977); but see Martinez v. Southern Ute Tribe, 150 Colo. 504, 374 P.2d 691 (1962)* (construing "sue and be sued" clause as rendering tribe amenable to suit in Colorado state court under Colorado constitution); *cf. Fontenelle v. Omaha Tribe of Nebraska, 430 F.2d 143 (9th Cir. 1970)* (tribe/corporation distinction not raised).

As discussed above, this provision is designed to allow tribes to engage in commercial activities as corporations without losing their tribal sovereignty and otherwise inadvertently waiving their tribal sovereign immunity. The State's jurisdictional claims are simply wrong.

**3. Shatswell Is Not a Member or Secretary of the Committee and Has No Authority That Needs to Be or Can Be Preliminarily Enjoined**

As briefed in Shatswell's motion to dismiss, Shatswell has no authority over this project at all. She cannot be preliminarily enjoined from doing something that she is not doing. In order to conserve the Court's time, Shatswell refers the Court to all her arguments in Dkt # 63, rather than repeating them here.

**4. Hobia, in His Capacity as Mekko and a Member of the Committee Has No Individual Liability For Actions of the Tribe and There Is Nothing That Can Be Preliminarily Enjoined**

As briefed in Hobia's motion to dismiss, Hobia should be dismissed as a party. In order to conserve the Court's time, Hobia refers the Court to all his arguments in Dkt # 62 rather than repeating them here. As shown above, there is nothing for the Court to preliminarily enjoin with respect to Hobia.

**5. Plaintiff Has No Claim Against Florence Development Partners, L.L.C. and There is Nothing That Can Be Preliminarily Enjoined**

As briefed in Florence Development Partners L.L.C.'s motion to dismiss, Florence Development Partners, L.L.C. should be dismissed as a party. In order to conserve the Court's time, Florence Development Partners, L.L.C. refers the Court to all its arguments in Dkt # 64 rather than repeating them here. In any event, there is nothing, as shown above, for this Court to preliminarily enjoin with respect to Florence Development.

## CONCLUSION

These Defendants respectfully request that the Court deny Plaintiff's motion for a preliminary injunction for the reasons stated above.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 19th day of March, 2012, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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