UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIAM CROSS, JR.,

Plaintiff,

v.

KEWADIN CASINOS GAMING AUTHORITY, a political subdivision of the SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, a/k/a SAULT STE. MARIE TRIBAL GAMING AUTHORITY,

Defendant.

CASE NO. 19-CV-11326
HON. ARTHUR J. TARNOW

MAGISTRATE JUDGE
STEPHANIE DAWKINS DAVIS

ORAL ARGUMENT REQUESTED

PLAINTIFF'S RESPONSE BRIEF IN CONNECTION WITH THE COURT'S ORDER TO SHOW CAUSE

CONCISE STATEMENT OF ISSUES PRESENTED

In response to this Court's Order to Show Cause, has the Defendant sustained its burden of establishing the jurisdictional requirements to permit its removal of this litigation from the Wayne County Circuit Court to this Court?

Plaintiff says "No."

Defendant says "Yes."

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I. Introduction and Statement of Pertinent Facts

On April 9, 2019, William Cross, Jr. ("Cross") filed suit against the Kewadin Casinos Gaming Authority, a political subdivision of the Sault Ste. Marie Tribe of Chippewa Indians (the "Authority"), in the Wayne County Circuit Court. Cross alleges in his Complaint that he provided consulting services to the Authority under a contract which he entered into with the Authority in 2009 (the "Contract," attached as Ex. A to this Brief)[1], and the Authority received in excess of $6 Million as a result of those services. Because the Authority failed to pay Cross any of the funds to which he is entitled under the Contract,[2] Cross seeks monetary damages for the Authority's contractual breach and a declaratory ruling as to the parties' rights and obligations under the Contract.

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[1] This exhibit includes the facsimile cover page which was attached to the Contract, so the Court will see that Cross was directed by the Chairman of the Board of the Authority and Tribe to sign the Contract. Cross Affidavit at paragraph 9 (Ex. B to this Brief). The Authority now seeks to avoid the fair consequences of its Chairman's action.

[2] Later in this Brief and in his affidavit, Cross addresses several issues the Authority has raised as to execution of the Contract and Cross's demand for payment. In many instances, the Authority's statements are flatly incorrect. Those matters are not stated at the outset of this Brief because, frankly, Cross believes they are not germane to the jurisdictional issue presently before the Court. However, Cross does not want those misstatements to go unaddressed.

The litigation was filed by Cross in the Wayne County Circuit Court because the parties agreed disputes arising under the Contract must be filed in *that* court. The parties also agreed that, in addressing any contractual dispute brought to it by either of the parties, the circuit court should apply Michigan law.[3]

Instead of answering the Complaint filed in the circuit court and permitting that court to address Cross's claims and the Authority's defenses (both of which the parties expressly agreed in the Contract should occur), the Authority removed the litigation to this Court and then moved to dismiss it on the basis of the doctrine of sovereign immunity. However, this Court subsequently ordered the Authority to show cause why the litigation should not be remanded to the circuit court. The Authority submitted a Response and Brief (referred to hereafter as the "Authority's Brief") on June 7, 2019, and Cross now responds to the subject at hand.

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[3] *See* Ex. A, paragraph 11. The Authority's Brief (filed in response to the Court's Order to Show Cause) makes scant reference of these contractual terms. Authority's Brief at p. 5. Nor does the Authority discuss the decision of the United States Supreme Court in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 532 U.S. 411; 121 S. Ct. 1589 (2001), which deals with the consequence of a Tribe's specific agreement (in a contract just like the Contract here) as to where contractual disputes are to be litigated and what law should apply.

The Authority has the burden of establishing that this Court has subject matter jurisdiction to hear this litigation. *Gonzalez v. Thaler,* 565 U.S. 134; 132 S. Ct. 641 (2012). However, the Authority has not met that burden here for multiple reasons. The Authority (and Tribe) cannot avoid the express forum selection and choice of law provisions of the Contract, dictated by the Chairman of the Authority and Tribe (who was acting with the knowledge of the board and management) and agreed to by Cross. The forum selection and choice of law Contract term likely satisfies the "sue and be sued" provision of the Tribe's Charter (assuming *arguendo* that Cross must point to an explicit sovereign immunity exception in the Charter – which Cross disputes is the case because the Contract at issue here is not governed by IGRA); and the Authority reaped the benefits of the Contract over a number of years, without ever asserting it was invalid and unenforceable.

Because the Authority has not met its burden of establishing that the Court has subject matter jurisdiction, this litigation should be remanded to the Wayne County Circuit Court, so that the court actually selected by the parties in the Contract may be able to address the disputed claims under Michigan law.

II. Argument

A. Federal Court Jurisdiction is Limited.

28 U.S.C. § 1441 provides that any civil case over which the "federal district courts have original jurisdiction" may be removed to a federal district court. This means that only those civil cases which could have originally been brought in federal court by the plaintiff may be removed to federal court by the defendant. *Caterpillar Inc. v. Williams,* 482 U.S. 386, 392; 107 S.Ct. 2425, 2429 (1987). Because removal jurisdiction encroaches on the jurisdiction of the states, statutes conferring removal jurisdiction are to be construed strictly. *Brierly v. Alusuisse Flexible Packaging Inc.,* 170 F.3d 583, 590 (6th Cir. 1999). Therefore, federal jurisdiction should be exercised only where clearly established. *Id.,* at 590.

To determine whether original federal jurisdiction is present, the court will look to the complaint at the time of removal. *Ahearn v. Charter Township of Bloomfield,* 100 F.3d 451, 453 (6th Cir. 1996). Removal is proper only where original federal jurisdiction could have been asserted on the basis of the plaintiff's complaint. *Long v. Bando Mfg. of Am., Inc.,* 201 F.3d 754, 757 (6th Cir. 2000). Federal courts are courts of limited jurisdiction and the law presumes that a cause of

action lies outside this limited jurisdiction. *Vander Boegh v. Energy Solutions, Inc.,* 772 F.3d 1056, 1064 (6th Cir. 2014). The burden of proving the existence of federal subject matter jurisdiction rests with the party seeking removal. *Gonzalez, supra at* 141. As a federal district court in Michigan recently noted, "there is no freestanding jurisdictional grant to federal courts just because a tribe is involved." *Lesperance v. Sault Ste. Marie Tribe of Chippewa Indians,* 259 F.Supp.3d 713, 721 (W.D. MI. 2017).

B. None of the Traditional Bases for Federal Jurisdiction is Present

There are only two theories on which the Authority can assert the existence of federal subject matter jurisdiction: diversity of citizenship or federal question. It is readily apparent that diversity jurisdiction pursuant to 28 U.S.C. § 1332 is improper. As a political subdivision of a sovereign domestic nation, the Authority is not a citizen of any state for purposes of diversity jurisdiction, thereby precluding the existence of diversity of parties as required by 28 U.S.C. § 1332. *Lesperance, supra, at 720.*

The only other basis on which the Authority can assert the existence of federal subject matter jurisdiction is by claiming the existence of a federal question under 28 U.S.C. § 1331. Generally, the

question of whether a case arises under federal law is determined by whether a federal question "necessarily appears in the plaintiff's statement of his own claim." *Gardner v. Heartland Induc. Partners, LP,* 715 F.3d 609, 612 (6th Cir. 2013). No federal question necessarily appears in Cross's Complaint.

The two claims asserted by Cross in his Complaint are for breach of contract and declaratory judgment pursuant to MCR 2.605. Each of those claims clearly sounds in state law. The fact that the Authority seeks to raise a defense sounding in federal law is immaterial to the jurisdictional analysis. That is to say, a defense that Cross's claims are preempted by federal law does not give the Authority the right to remove the litigation to federal court. *Caterpillar, supra,* at 392-93.

In recognition that it cannot sustain its burden under the strict analysis summarized above, the Authority argues that federal subject matter jurisdiction exists because the Contract "is governed with reference to federal law," specifically the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et. seq.* ("IGRA"). The Authority urges that the "complete preemption" doctrine should apply here.

The complete preemption doctrine is an exception to the well-pleaded complaint rule, and will support federal question jurisdiction where what would normally be a state common law claim requires interpretation of a statute that completely preempts state law. *Metropolitan Life Ins.* Co. *v. Taylor,* 481 U.S. 58, 65; 107 S.Ct. 1542, 1547 (1987). "Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar, supra, at 393.*

C. Plaintiff's Contract Claim is Not Completely Preempted by IGRA.

The weakness of the Authority's argument for complete preemption becomes clear when one contrasts the state law claims at issue in the cases cited by Authority (in favor of preemption) with the actual state law claims of Cross in this lawsuit. For example, the Authority cites *Avco Corp. v. AeroLodge No.* 735, *Int'l Ass'n of Machinists,* 390 U.S. 557; 88 S.Ct. 1235 (1968) as an example of a statute that justifies complete preemption of state law claims. Authority's Brief at 13. However, *Machinists* involved a state law injunction claim on the basis of a labor contract. *Machinists,* at 559. This is easily distinguishable from the present issue, not only because the state law claim involved a labor

contract that was clearly regulated by the Labor Management Relations Act ("LMRA"), but also for the reason that 29 U.S.C. § 185 expressly gives the federal district courts original jurisdiction over suits arising out of labor contracts "affecting commerce as defined in [the LMRA]." 29 U.S.C. § 185(c).

In stark contrast to the statute at issue in *Machinists,* in the present matter (involving Cross) the Contract which is at the heart of the dispute has absolutely nothing to do with the regulation of gaming activities authorized by IGRA. The Authority repeatedly asserts that the Contract is "subject to IGRA," but this self-serving conclusion should be rejected by the Court. Indeed, after Cross helped the Authority to raise more than $6 Million for the Authority's future business endeavors, two "turn-key" contracts were entered into by the Authority and third-parties for the purpose of developing, financing, constructing and opening a gaming facility. Those two contracts were then provided to the National Indian Gaming Commission ("NIGC") to determine whether they constitute management agreements regulated by IGRA. The NIGC general counsel determined that, *because the contracts concerned activities prior to the opening of casinos,* the contracts are not regulated by

IGRA. See composite Ex. C to this Brief,[4] and Cross Affidavit at paragraph 12 (i). Obviously, if the two contracts which followed the Contract between Cross and the Authority are not governed by IGRA because they pre-dated any gaming activity, the same conclusion applies to the Contract between Cross and the Authority.

The Authority's argument fails for a second reason as well. IGRA does not grant the federal district courts original jurisdiction over *all* cases arising out of contracts made by entities that are regulated by IGRA. Rather, IGRA grants federal district courts original jurisdiction only for suits brought by Indian tribes to force a state to negotiate a compact, suits to enjoin gambling activities in violation of a gaming compact, and suits brought by the Secretary of the Interior to enforce certain provisions of the statute. It is fair to say that there is no general grant of federal jurisdiction over cases that merely relate to activities of an IGRA-regulated entity. *See* 29 U.S.C. § 2710(d)(7)(A).

The Authority next turns to ERISA as an example of a federal statute that has the effect of complete preemption. Authority's Brief at 14. The Authority cites *Ingersoll-Rand* Co. *v. McClendon,* 498 U.S. 133; 111 S.Ct. 478 (1990) as an example of implied preemption based

[4] This composite exhibit includes the two turn-key contracts and the letter from the NIGC.

on ERISA. However, the conduct at issue in *Ingersoll-Rand,* the alleged firing of an employee to prevent vesting of their ERISA-regulated pension, is expressly regulated by ERISA (29 U.S.C. 1140). This is easily distinguishable from the present matter, as IGRA only regulates contracts that concern management of gaming activities, and not any and all contracts entered into by IGRA-regulated entities. *See e.g.,* 29 U.S.C. § 2711.

As noted above, the Contract upon which Cross bases his lawsuit has nothing to do with gaming activities, and neither it, nor the subsequent turn-key agreements entered into by the Authority, are subject to IGRA.

The cases cited by the Authority that actually involve matters governed by IGRA further illuminate the weakness of its argument. For example, the Authority cites *Gaming Corp. of Am. v. Dorsey & Whitney,* 88 F.3d 536, 544-45 (8th Cir. 1996) for the proposition that IGRA has "extraordinary preemptive power." Authority's Brief at 15. While it is undisputed that IGRA was intended by Congress to have preemptive effect, it was intended to preempt state regulation of Indian gaming activities, not state contract law. *Gaming Corp., supra,* 544-45.

The key question in determining whether or not a particular state law claim is preempted by IGRA is whether the claim "will interfere with

the tribal government of gaming." *Id.,* at 549. The Contract (between Cross and the Authority) concerns consulting services related to the raising of capital to be used for the Authority's business development. While the Authority's business may be gaming, the Contract does not in any way relate to the management of gaming facilities, or the ability of the Tribe to regulate gaming activities on its lands, and it does not reference IGRA.

The Authority argues that allowing Cross's state law claims to proceed would "interfere with the Tribe's governance of its gaming operations." Authority's Brief at 22. However, the Authority's conclusory argument cannot be squared with the terms of the Contract. As is abundantly clear from even a cursory reading, the Contract calls for Cross to assist the Authority in identifying potential investment partners; and his compensation is to be paid when the Authority obtains funding with Cross's assistance. *See* Ex. A, paragraphs 1, 2 and 4. Nothing in the Contract limits or interferes with the Authority's ability to regulate gaming activities; and, in fact, the selection of investment partners remained within the Authority's sole discretion.

The extremely attenuated connection between the Contract and regulatory scope of IGRA is highlighted by contrasting the claims at issue in *Gaming Corp* with the claims in the present matter. In *Gaming Corp,* all of the state law claims at issue related to a law firm's representation of an Indian tribe during a tribal casino management licensing process. *Id.,* at 548. Applying the Supreme Court's decision in *Metropolitan Life,* the 8th Circuit held that the claims were preempted by IGRA because they fell within IGRA's regulatory scope by "interfer[ing] with tribal governance of gaming." *Id.,* at 548-49. The 8th Circuit reasoned that, because the "tribal licensing process is required and regulated by IGRA," claims arising out of the licensing process met the complete preemption exception to the well-pleaded complaint rule. *Id.,* at 549-50.

Unlike the claims in *Gaming Corp,* which clearly implicated activities directly regulated by IGRA, the Contract here has nothing to do with licensing, regulation or management of gaming activities. The Authority's gaming activities may well be regulated by IGRA. But nothing in the Contract concerns those activities. For this reason, this Court should reject the Authority's assertion that the complete

preemption exception to the well-pleaded complaint rule should be applied here.

Likewise, in *Missouri ex rel. Nixon v. Coeur D'Alene Tribe,* 164 F.3d 1102 (8th Cir. 1999), the 8th Circuit followed its prior holding in *Gaming Corp* and held that the complete preemption exception would apply to a state's attempt to regulate Indian gaming. While the outcome in *Missouri ex rel. Nixon* turned on the fact that the activity that gave rise to the state law claims took place outside of tribal lands, and not the relationship between the state law claims and the preemptive scope of IGRA, the Court discussed the analysis mandated by *Gaming Corp Id.,* at 1108-09. Again, the Court noted that not all state law claims tangentially related to IGRA satisfy the complete preemption exception. Rather, the Court reasoned that it had to examine "the specific state law claims at issue to see whether they fell within the preemptive scope of IGRA." *Id.,* at 1108. As established in *Gaming Corp,* this question can be restated to be simply whether the state law claim will "interfere with tribal governance of gaming." *Id.*

Next, the Authority cites *Contour Spa at the Hard Rock, Inc., v. Seminole Tribe of Fla.,* 692 F.3d 1200 (11th Cir. 2012), apparently for the proposition that the need for uniformity of application of tribal

sovereignty requires federal jurisdiction over cases involving sovereign immunity. Authority's Brief at 16. However, the Authority's reliance on *Contour Spa* is misplaced. The plaintiff in that case argued that the Seminole Tribe had waived its sovereign immunity defense simply by removing the lawsuit to federal court. Such an argument has not been made here.

While it is undisputed that tribal sovereign immunity is a doctrine of federal common law, it is equally well established that in our federal system of dual sovereignty, states are presumptively competent to adjudicate claims arising under federal law. *Tafflin v. Levitt,* 493 U.S. 455, 458; 110 S.Ct. 792, 795 (1990). While Congress could have chosen to give federal courts exclusive jurisdiction over claims relating to tribal sovereign immunity, it has not done so. Because the doctrine of tribal sovereignty arises from federal common law and not from an act of Congress, it cannot be argued that Congress intended the federal courts have *exclusive* jurisdiction over cases involving tribal sovereign immunity. *Gulf Offshore Co., Div. of Pool Co. v. Mobil Oil Corp.,* 453 U.S. 473, 478; 101 S.Ct. 2870, 2875 (1981) (holding that Congressional intent of exclusive federal jurisdiction can be derived from (1) explicit statutory directive; (2) unmistakable implication from

legislative history; or (3) clear incompatibility between state-court jurisdiction and federal interests). As noted by this Court in its Show Cause Order, the fact that tribal sovereign immunity has been raised as a defense to Cross's state law contract claims does not, by itself, create federal subject matter jurisdiction over the state law claims. *Lesperance supra.*

The Authority's assertion that this lawsuit is subject to complete preemption under IGRA simply because the Authority is regulated by IGRA makes about as much sense as a labor union claiming that a state law contract claim brought against it by a caterer must be removed to federal court because the catering order was for a lunch meeting to discuss a vote on a labor contract. In other words, not all lawsuits tangentially involving federally-regulated activities give rise to the complete preemption exception to the well-pleaded complaint rule. The present matter is one such case.

Because Cross's state law contract claim in no way implicates the ability of the Tribe or the Authority to regulate or manage gaming activities, the nexus between the dispute over the parties' obligations under the Contract and the preemptive ambit of IGRA is far too remote to support the assertion that Cross's breach of contract claim is

completely preempted by IGRA. No other bases for federal subject matter jurisdiction exist.

D. The parties agreed to litigate disputes in state court under Michigan law

A separate, substantial reason why federal jurisdiction over this case is improper is that the parties expressly agreed in the Contract to litigate any disputes arising out of the Contract in state court in Wayne County. The provision is quoted here, because the Authority has done everything it can to avoid it and to deny its existence:

> This Agreement has been negotiated, executed, and delivered in the State of Michigan, and shall be governed in all aspects by the law of the State of Michigan. The Parties agree that the ... Circuit Court for the County of Wayne, State of Michigan ... shall be the proper venue for any dispute arising under this Agreement. The Client [the Authority] hereby expressly waives the jurisdiction with respect to any dispute or controversy arising out of this Agreement, or regarding the subject matter hereof....
>
> Ex. A, paragraph 11.

This forum selection and choice-of-law provision is similar to the one which was enforced by a unanimous Supreme Court in C & *L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Oklahoma, supra.* There, the Court examined a provision in a contract between a federally recognized Indian Tribe and a company, C & L, for the installation of a roof on a building owned by the Tribe. The parties'

contract included a mandatory arbitration provision, and a provision calling for application of Oklahoma law. The Supreme Court reversed the lower court's determination that the Tribe was protected by sovereign immunity, and instead determined that the arbitration and choice of law provisions were binding and enforceable. The Supreme Court gave short shrift to the Tribe's claim that the contractual language was not a waiver of immunity from suit:

> The provision no doubt memorializes the Tribe's commitment to adhere to the contract's dispute resolution regime. That regime has a real world objective; it is not designed for regulation of a game lacking practical consequences.

C & *L, supra,* at 422. The C & *L* decision recognizes that parties, including Indian Tribes, should be bound by their agreements, and that a sovereign immunity defense cannot be used to avoid those agreements. It is also likely that the forum selection and choice of law provision in the Contract (between Cross and the Authority) satisfies the "sue and be sued" provision in the Tribal Code Section 44.107.[5]

A forum selection clause should be upheld unless there is a "strong showing" that it should not be enforced. *Wong v. PartyGaming,*

[5] The Code is attached as Ex. E to the Authority's Brief. It is likely that the "sue and be sued" provision found in Section (1) (a) is satisfied by the above-quoted forum selection and choice of law provision of the Contract.

Ltd., 589 F.3d 821, 828 (6th Cir. 2009). When determining the enforceability of a forum selection clause, the court should consider the following factors: (1) whether the clause was obtained by fraud or duress; (2) whether the designated forum would ineffectively or unfairly handle the suit; and (3) whether the designated forum would be so seriously inconvenient such that requiring the plaintiff to bring suit there would be unjust. Sec. *Watch, Inc. v. Sentinel Sys. Inc.,* 176 F.3d 369, 375 (6th Cir. 1999).

Rather than address the consequence of the forum selection and choice of law terms of the Contract, the Authority ignores them and focuses on the last sentence of paragraph 11, which indicates that the Authority and Tribe do not waive sovereign immunity. The Authority's position is that the inclusion of that sentence trumps everything else in the paragraph. But such an interpretation is improper under the law (and in any event it should be up to the circuit court, applying Michigan law, to interpret, as *that* is precisely what the Authority agreed would occur!). Indeed, courts always endeavor to interpret a contract in a manner which does not render meaningless any of its terms. *See, e.g. Collins v. National General Ins.* Co., 834 F. Supp.2d

632 (E.D. MI. 2011); and *Bowlers' Alley, Inc. v. Cincinnati Ins.* Co., 108 F. Supp.3d 543 (E.D. MI. 2015).

How then ought this Court reconcile the two apparently competing concepts in play here (i.e. enforcement of the parties' forum selection and choice of law, on the one hand, and sovereign immunity on the other)? Cross suggests the answer is simple: the Court should recognize that the parties agreed any disputes *arising under the Contract* would be litigated in the circuit court under Michigan law, but that non-contractual disputes, such as tort claims, would be subject to the Authority's sovereign immunity defense. *See* Cross Affidavit at paragraph 12 (g). Because the issues in dispute concern the Contract, the circuit court should address them under Michigan law.

E. To the Extent the Court determines that the Reservation of Sovereign Immunity in the Contract is Ambiguous, it Must be Construed Against the Authority

The Authority asserts that the parties together drafted the terms of the Contract. Authority's Brief at 4. The Authority also relies on the existence of paragraph 13 (g) of the Contract, which indicates that, because both sides drafted the document, ambiguities should not be resolved against one party or the other (as the drafter). However, the representation that the Contract was drafted

by both parties is untrue. As Cross attests in his affidavit, the Contract was drafted solely by the Authority, and it was then provided to Cross for his signature.[6] Cross Affidavit at paragraph 12 (a). Cross never participated in drafting any part of the Contract, and the provision in the Contract which indicates that both parties did so was in the document provided to him (which Cross then signed). *Id.,* at paragraphs 8, 10-11, and 12 (a).

Because the Contract was drafted by the Authority, any ambiguity in it should be resolved against the drafter. This rule of construction is recognized in C & *L Enterprises, supra,* at 423 ("In appropriate cases, we apply 'the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it'".) The C & *L* Court found that no ambiguity existed, and thus the Court did not need to resort to construing any contractual ambiguity against the drafter. But the Court made it clear that such a rule of construction would be appropriate in disputes involving a claim of tribal sovereign immunity.

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[6] As noted earlier in this Brief, the Tribe's Chairman of the Board, who was also the Authority's Chairman, provided (through his assistant) the Contract to Cross and told him to sign it. Cross later did so at a meeting with several members of the Tribe's Board of Directors and CFO. Cross Affidavit at paragraph 10.

The decision of the Fourth Circuit Court of Appeals in *Bominflot, Inc. v. The MN Henrich S (IMO No. 9158513) et al,* 465 F. 3d 144, 150 (4th Cir. 2006) is notable for what the court states about an Indian Tribe's attempt to escape its agreement to a choice of law provision. The court writes:

> Were we to conclude otherwise [to accept appellant's argument], we would allow Bominflot to escape its own choice of law clause through the ambiguity and sloppiness of other provisions of its General Conditions.... 'That meaning is generally preferred which operates against the party who supplies the words of from whom a writing otherwise proceeds.'

The Authority was the sole author of the Contract. Cross Affidavit at paragraph 12 (a). The Authority cannot claim the existence of fraud, duress or serious inconvenience, as the selection of the forum for litigating issues arising under the Contract was that of the Authority. The Authority may attempt to argue that the second factor is met on the basis that a Michigan court cannot fairly apply the doctrine of tribal sovereign immunity, but this argument is unavailing because, as noted above, state courts are presumptively competent to apply federal law. *Tafflin v. Levitt,* 493 U.S. 455, 458; 110 S.Ct. 792, 795 (1990).

F. The Sundry Objections of the Authority Regarding the Parties' Contract are Not Germane to the Jurisdictional Dispute

The Authority argues that Cross did not accept the Contract, including the change to his compensation, because he did not initial that change and he did not date the document. However, the Authority has not accurately described what occurred. As the Cross Affidavit describes, Cross received the proposed Contract via facsimile on January 30, 2009. It was transmitted to him by Lona Stewart, who was the assistant to the Tribe's and the Authority's Chairman of the Board, Joe McCoy. The faxed document Cross received contained the change to his compensation, and the document was signed by McCoy. Cross Affidavit at paragraph 8. Cross did not sign the document at that time, but held it for several months. He eventually signed it on November 19, 2009, at the time he was meeting with McCoy and several other members of the Authority and Tribe, including board members of the Authority and Tribe, at a meeting on Mackinac Island. Cross Affidavit at paragraph 10. Cross then handed the signed Contract to McCoy. Cross did not initial the change to his compensation, because he assumed that by signing the Contract (which already included the

change), he agreed to it. Nor did Cross date the Contract, as he did not believe he needed to do so. Cross Affidavit at paragraph 11.

Neither party prepared a list of proposed contacts; but because it was not to be an exclusive list, it is immaterial that none was included. Cross Affidavit at paragraph 12 (b).

Cross never made a demand for payment, because he did not know exactly when the Authority received the funds resulting from his efforts. As Cross explains in his Affidavit, the Chairman of the Board who succeeded McCoy, Aaron Payment, apparently decided not to share that financial information with Cross, despite the fact that the Contract required the Authority to advise Cross of its receipt of funds. Cross Affidavit at paragraphs 12 (d) and (e). Indeed, the Contract also required the Authority to pay Cross from the proceeds of each funding installment it received, Contract at paragraph 5, but the Authority failed to do so in breach of its contractual obligation. Cross Affidavit at paragraphs 12 (d) and (e). Cross did not learn until just recently that the Authority had actually received substantial funds resulting from his consultation services (under the Contract) until he recently obtained a copy of the letter which is attached as Ex. D to this Brief. Cross Affidavit at paragraph 12 (e). Additional evidence that the Authority

received substantial funds from Cross's efforts can be gleaned from Ex. E to this Brief, which includes two addenda to promissory notes, and resolutions, both referring to the funds which the Authority received from Cross's efforts. Cross Affidavit at paragraph 12 (e). As Cross notes in his affidavit, it may well be that the Authority received more than the sum reflected in these documents. Pretrial discovery will be directed at that issue. There is simply no denying that Cross provided substantial services over a number of years, that those services benefitted the Authority, and the Authority now seeks to avoid having to pay Cross that which it agreed to pay him for those services.

III. Conclusion

For the above reasons, this Court should find that the Authority has failed to show sufficient cause why this litigation should not be remanded to the circuit court where it was filed by Cross. An order of remand should be entered so that this lawsuit may continue in the Wayne County Circuit Court, which will address Cross's contractual claims under Michigan law (in line with the parties' explicit agreement in the Contract).

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Dated: June 21, 2019

CERTIFICATION OF SERVICE

The undersigned hereby certifies that on June 21, 2019 she filed PLAINTIFF'S RESPONSE BRIEF IN CONNECTION WITH THE COURT'S ORDER TO SHOW CAUSE with the Clerk of the Court via the electronic filing system which will send notification of such filing to all counsel of record.

/s/ Kelly R. Narring
Kelly R. Narring