IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

(1) **PEORIA TRIBE OF INDIANS OF OKLAHOMA**, Plaintiff, *-vs-* (1) **STUART D. CAMPBELL**; (2) **BAXCASE, L.LC.**, an Oklahoma Limited Liability Corporation; (3) **SNEED LANG, P.C.**, an Oklahoma and its Successor, **SNEED LANG HERROLD P.C.**, Professional Corporations; (4) **DOERNER SAUNDERS DANIEL & ANDERSON, L.L.P.**, et al., Defendants.	**NO. 19-cv-00581-TCK-JFJ**

MOTION TO REMAND
AND BRIEF IN SUPPORT

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MOTION TO REMAND
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Plaintiff, the Peoria Tribe of Indians of Oklahoma (“Plaintiff” or "Peoria Tribe"), comes before the Court and moves this Court to remand[1] this action to

[1] 28 U.S.C. §1446(b)(2)(A) requires that “All defendants who have been properly joined and served must join in or consent to the removal of the action.” There is no separate consent on file as to Defendant Sneed Lang, P.C. (“Sneed Lang”), however the Notice of Removal states that all Defendants have been served and consent to removal. (Doc. 002, ¶ 17; Doc. 004, ¶ V). Plaintiff reserves a procedural objection to the extent that Sneed Lang may not have consented to removal.

the District Court of Ottawa County, Oklahoma for the reason that federal jurisdiction does not exist for removal as stated in the Notice of Removal and Status Report filed by Defendants Stuart Campbell ("Campbell") and Doerner Saunders Daniels & Anderson, L.L.P. ("Doerner Saunders"). (Docs. 002, 004).

I. STATEMENT OF FACTS[2]

The action was brought in the District Court of Ottawa County, Oklahoma by the Peoria Tribe[3] against the Defendants for state law claims of legal malpractice, breach of fiduciary duty, deceit/fraudulent concealment, failure to disclose, money had and received, unjust enrichment as well as an included claim for punitive damages. (Doc. 002-01).

During the applicable period of these claims Defendant Campbell was employed by and a partner/shareholder of law firms Sneed Lang and Doerner Saunders. (Doc. 002-01, ¶ 21). Campbell also was the sole shareholder of Baxcase, L.L.C. ("Baxcase"), a separate law firm that he used as a business entity for the performance of legal services.

Defendants Baxcase, Sneed Lang, and Doerner Saunders are sued for vicarious liability as to their employee Campbell as well as for direct liability they

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[2] This is a brief summary of facts more completely set out in the Petition. (Doc. 002-01).

[3] As asserted in Paragraph 2 of the Petition, the Peoria Tribe maintains and asserts its tribal sovereign immunity as to all other claims and causes of action.

may have had as to Plaintiff's claims in that the action is maintained against Sneed Lang and Doerner Saunders for partnership liability based upon Campbell's actions, firm and partner status, and work done by other employees of the firms that implicated the illegal actions of Campbell as well as a breach of fiduciary duty on the part of those firms in failing to disclose or remediate the fraudulent actions of Campbell.

The claims arose out of an effort by the Peoria Tribe to obtain authorization to operate a casino pursuant to the Indian Gaming Regulatory Act (25 U.S.C. ch. 29 §2701 *et seq*.) ("IGRA") and accompanying regulations. (Doc. 002-01, ¶ 1). Under the IGRA, tribal casino gaming is subject to the approval and control of the National Indian Gaming Commission. ("NIGC").

From 2005 to May, 2018, Defendant Stuart Campbell acted as attorney for the Peoria Tribe in the development and operation of the Tribe's Buffalo Run Casino ("Casino") and also acted as attorney for Direct Enterprise Development ("DED"), the Casino's management firm. DED was to be paid a management fee which was a percentage of the net "Net Gaming Revenue" of the Casino. (Doc. 002-01, ¶ 14).

A Business Plan submitted to the NIGC by DED[4] proposed that Campbell/Baxcase be paid 5% of the management fee received by DED. This

[4] Approval is required by 25 U.S.C. §2710(d)(9) and governed by certain paragraphs of 25 U.S.C. §2711.

gave Campbell/Baxcase a financial interest in the operation of the Casino and federal statutes and regulations required Campbell and Baxcase to undergo a suitability determination before the Agreement could be approved by the NIGC.[5] (Doc. 002-01, ¶ 13).

DED's original Business Plan also provided for treatment of depreciation contrary to the Management Agreement, the IGRA, and applicable NIGC regulations. By taking less than required depreciation,[6] DED's management fee would be inflated. (Doc. 002-01, ¶ 14).

The NIGC informed the Plaintiff, DED, and Campbell of these defects in their Business Plan and withheld approval of the Management Agreement.

In response DED wrote the NIGC a letter dated February 20, 2007 supported by an Affidavit and exhibits that said the compensation provision for Baxcase and Campbell was changed to a monthly fee and would not be based on a percentage of the management fee. (Doc. 002-01, ¶ 15). As a result Baxcase

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[5] *See* 25 U.S.C. §2711 and 25 C.F.R. §533.3(d).

[6] The Plan provided that after all depreciation was taken, non-facility depreciation was added back in as a depreciation adjustment. Taking less depreciation increased the Net Gaming Revenue and the consequential management fee to be paid to DED.

It cannot be said the Tribe also received an increase in revenue from use of the lower depreciation in calculation of the net gaming revenue since the depreciation represented funds the Tribe would have retained under any circumstances as a nontaxable entity. A higher management fee simply meant that the Tribe retained less of the gaming revenue.

and Campbell would no longer be subject to a suitability determination.[7]

DED also submitted a revised Business Plan that specified that DED would use all depreciation in calculating Net Gaming Revenue and the related management fee to be received by DED. (Doc. 002-01, ¶ 16).

As revised, the NIGC approved the Management Agreement for five years. (Doc. 002-01, ¶ 17). The Management Agreement was renewed in 2012. (Doc. 002-01, ¶ 20).

After commencement of the operation of the Tribe's Casino, Campbell produced a memo for DED which reverted to the improper treatment of depreciation. This resulted in an inflated management fee contrary to the requirements made by the NIGC. (Doc. 002-01,¶¶ 22, 23; Ex. 1). In addition, DED and Campbell reverted to an improper calculation of the Management Fee for payment of Campbell and Baxcase.

DED and Campbell failed to disclose these changes to the Peoria Tribe which resulted in a loss of $2,067,561.00 plus an undetermined sum of the excess paid to Campbell, as well as a yet undetermined potential liability of the Peoria Tribe for penalties to the NIGC for violation of regulations and the necessary attorneys fees, costs, and expenses expended by Plaintiff in efforts to

[7] It may be inferred that if a percentage of the management fee was to be paid to either Sneed Lang and/or Doerner Saunders for the services of Campbell and other members of their firms, the law firms themselves might also have been required to undergo a suitability determination.

minimize or mitigate any potential penalty liability.[8] (Doc. 002-01, ¶¶ 24, 25, 26, 27).

On October 30, 2019, Defendants Stuart Campbell and Doerner Saunders filed a Notice of Removal which alleged federal jurisdiction pursuant to 28 U.S.C. §§1331[9] (federal question), 1441[10] (Removal), 1446 (Removal Procedure), and 1367 (Supplemental Jurisdiction). (Doc. 002, ¶¶ 10, 11, 12).

While Section 1441 provides for a right of removal, this is only true if removal is justified by reference to another statutory basis for federal jurisdiction.

Section 1446 does not create a substantive right of removal, but does

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[8] The Chairman of the NIGC has the authority to levy and collect appropriate civil fines, not to exceed $52,596.00 per violation. The NIGC Notice of Violation ("NOV") alleged 77 violations.

[9] 28 U.S.C. § 1331 provides:

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

[10] The only provision of Section 1441 that would appear to fit here is 1441(c):

(c) Joinder of Federal law claims and State law claims.
(1) If a civil action includes—
(A) a claim arising under the Constitution, laws, or treaties of the United States (within the meaning of section 1331 of this title [28 U.S.C. § 1331]). . . ,

Subsections 1441(c)(1)(B) and 1441(c)(2) provides a procedure for remanding a severed removed claim "that has been made nonremovable by statute."

provide for the procedural implementation of removal.

Supplemental Jurisdiction under 28 U.S.C. §1367 is also not a separate independent basis for federal jurisdiction in that it allows adjudication of certain state law claims only after federal jurisdiction is first shown to exist. 28 U.S.C. §1367(a) (". . . in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."). Even if such supplemental jurisdiction exists, this Court may decline to exercise such jurisdiction under subsection (c):

> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—
> (1) the claim raises a novel or complex issue of State law,
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Thus, before removal is permitted, Defendants must show the existence of a federal question on the face of Plaintiff's Petition under 28 U.S.C. § 1331.

II. ARGUMENT

While Plaintiff has no fear of litigating its claims in this Court, there is no basis for federal jurisdiction in this action that can be determined on the face of

Plaintiff's well-pleaded petition.

28 U.S.C. § 1447(c)[11] requires remand or dismissal at any time if the court determines there is no federal subject matter jurisdiction. *Topeka Hous. Auth. v. Johnson*, 404 F.3d 1245, 1247-48 (10th Cir. 2005) ("When the federal court lacks subject-matter jurisdiction over a removed case, the court must remand the case to the state court."); *See also* Fed.R.Civ.P. 12(h)(3) ("*Lack of Subject-Matter Jurisdiction*. If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

Even if the parties consented to litigation in federal court, they cannot manufacture federal jurisdiction by agreement. *Becker v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 770 F.3d 944, 947 (10th Cir. 2014) ("Federal subject matter jurisdiction 'cannot be consented to or waived, and its presence must be established in every cause under review in the federal courts.'" citing *Firstenberg v. City of Santa Fe, N.M.*, 696 F.3d 1018, 1022 (10th Cir. 2012)).

Initiating then ending this proceeding in federal court because of a lack of

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[11] *See* § 1447(C):

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.

subject matter jurisdiction would cause an inappropriate expenditure of "scarce judicial resources" as well as unnecessary litigation costs on both sides. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S. Ct. 2074, 2080 (2011).

Finally, the removal statutes are to be construed restrictively and any doubts as to removability are resolved in favor of remanding the case to state court. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-109, 61 S. Ct. 868, 872 (1941).

Proposition A

PLAINTIFF'S WELL-PLEADED PETITION RAISES NO CLAIMS THAT RELY UPON FEDERAL JURISDICTION.

The burden of establishing federal jurisdiction falls on the party that invokes it. *Salzer v. SSM Health Care of Okla. Inc.*, 762 F.3d 1130, 1134 (10th Cir. 2014) ("The party invoking federal jurisdiction has the burden to establish that it is proper, and there is a presumption against its existence.").

The question of the existence of federal jurisdiction for purposes of removal is governed by the well-pleaded complaint rule "which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S. Ct. 2425, 2429 (1987).

This means that:

. . . in order for a claim to arise "under the Constitution, laws, or

> treaties of the United States," "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Gully v. First National Bank*, 299 U.S. 109, 112 (1936). The federal questions "must be disclosed upon the face of the complaint, unaided by the answer." Moreover, "the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense." *Gully*, *supra*, at 113. *See also Metcalf v. Watertown*, 128 U.S. 586 (1888); *Tennessee v. Union & Planters' Bank*, 152 U.S. 454 (1894); *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908); *Taylor v. Anderson*, 234 U.S. 74 (1914); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950).

Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125, 127-28, 94 S. Ct. 1002, 1003-04 (1974).

Further, "since the plaintiff is 'the master of the complaint,'" the well-pleaded complaint rule enables the plaintiff, "by eschewing claims based on federal law, . . . to have the cause heard in state court.'" *Caterpillar Inc.*, 482 U.S. at 398-399.

In the instant case, the Peoria Tribe pled no federal claims because there are none. Plaintiff recited federal statutes and regulations in its State court petition, but those provisions are not an "essential" "element" of Plaintiff's Petition because the causes of action against the Defendants include state claims of professional negligence, fraud, and failure to disclose, or concealment. *Phillips Petroleum*, *id.*; (Doc. 002).

If the recitation of federal statutes in a state petition constituted grounds for removal, it would justify federal jurisdiction for any malpractice claim when the

underlying matter involved federal law.

Even if it could be said that Plaintiff's claims rely upon federal law, those federal questions must be "substantial" and have more than a token relationship to the underlying cause of action:

> To invoke this so-called "substantial question" branch of federal question jurisdiction, a plaintiff must show that "a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn* [*v. Minton*], [568 U.S. 251,] 133 S. Ct. [1059] at 1065 [(2013)].

Becker v. Ute Indian Tribe of the Uintah & Ouray Reservation, 770 F.3d 944, 947 (10th Cir. 2014).

First, the malpractice alleged by Plaintiff does not arise because of federal statutes or regulations, but instead is related to the fraudulent actions of these Defendants in failing to abide by the approved provisions of the Management Agreement and Business Plan. Whether the provisions of the Agreement or Plan were or were not dictated by federal law is not the question. Instead, the questions on the face of Plaintiff's Petition was the professional negligence, fraud and concealment by Defendants in the implementation of the agreed contract terms however those terms may have been formulated. Thus the alleged federal issues are not "necessarily raised" by the Petition.

For purposes of this action Plaintiff has asserted no dispute with the decisions of the NIGC and, in fact, relied upon them in the implementation of its casino and converted those requirements into contract terms in the Management

Agreement and Business Plan.

Second, if the basis of Defendants' removal is that they disagree with the findings and rulings of the NIGC in the NOV or earlier, these are questions that relate more to a defense that Campbell and the Defendants may claim. This is not raised on the face of the Petition. Besides, if Defendants are trying to create a federal question by objecting to the rulings of the NIGC, it is questionable they have the standing to do so. They are not a party to the administrative enforcement action and cannot insert themselves into it.

Anticipated federal defenses by a defendant are no basis for removal jurisdiction. *Becker*, 770 F.3d at 947:

> Nor can federal question jurisdiction depend solely on "a federal defense, . . . even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393, 107 S. Ct. 2425 (1987); *see Gilmore v. Weatherford*, 694 F.3d 1160, 1173 (10th Cir. 2012) ("To determine whether an issue is 'necessarily' raised, the Supreme Court has focused on whether the issue is an 'essential element' of a plaintiff's claim.' (quoting *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg*., 545 U.S. 308, 315, 125 S. Ct. 2363 (2005))).

In *Becker*, plaintiff's claims were "federal defenses, which do not give rise to federal question jurisdiction under 28 U.S.C. §1331." *Becker*, 770 F.3d at 948.

Since it cannot be said the accuracy or inaccuracy of the NIGC rulings is raised or disputed by Plaintiff on the face of its Petition, it likewise cannot be said that those policies are disputed for purposes of removal under *Becker*.

Nor can it be said that prior to this action Defendants objected to or advised Plaintiff to challenge the NIGC rulings in 2005 or at subsequent renewals of the Management Agreement. Instead, Defendants acquiesced in those rulings including the preparation of a sworn affidavit submitted to the NIGC in remediation of the DED Business Plan and those NIGC requirements became ordinary contract provisions of the Management Agreement and Business Plan. What is alleged is that Defendants chose to circumvent those contract provisions to defraud the Plaintiff. Any newly found "dispute" involving federal law is not as fervently intense as Defendants may now claim and also not part of Plaintiff's well-pleaded complaint.

Third, it is reasonable to conclude Campbell either committed malpractice by failing to advise the Peoria Tribe of the "errancy" of the original NIGC rulings and recommend they be challenged, or committed malpractice by later circumventing those rulings and requirements to defraud the Peoria Tribe. In either instance, the NIGC rulings are merely incidental to the proceeding and Defendants should now be estopped to assert otherwise.

The relationship of the application of the federal statutes and regulations by the NIGC to this case are not substantial and are significantly dominated by the state law claims under the Petition, or are of limited relevance to any federal question, if any such questions exist at all.

Instead the major focus is that Campbell concocted a scheme to obtain

compensation based upon a percentage of the management fee and to increase the management fee based upon an altered depreciation and compensation schedule contrary to the Management Agreement and Business Plan, not because any errancy in the application of federal statutes and regulations by the NIGC.

Fourth, if this Court were to undertake to adjudicate the accuracy of the application of the federal statutes and regulations as applied by the NIGC, it cannot do so without the possibility of subjecting the Plaintiff to differing applications of the statutes and regulations by this Court in contrast to the rulings of the NIGC. Those applicable provisions were the agreement between the parties and because they were part of the Management Agreement and the Business Plan they became simple contract provisions normally litigated as a matter of state law.

To reach a differing outcome from the NIGC in this litigation would be "disrupting the federal-state balance approved by Congress." *Becker*, *id*. If this Court were to undertake Defendants' possible invitation to challenge the NIGC rulings and rule in Defendants' favor, this would be a collateral attack on those rulings and would create a great confusion about the application of federal statutes and regulations. For this Court to adjudicate any issue of the rulings of the NIGC in its absence in this case (and Plaintiff contends this is not appropriate because, as previously argued, malpractice is alleged to exist on the part of

Campbell regardless of the outcome of such a decision), a ruling by this Court that the NIGC decisions are in error would leave the Peoria Tribe in the contradictory position that it may not recover in an action against Campbell and his business associates, while the Tribe is still bound to the NIGC rulings with regard to potential penalties under circumstances created by the Defendants.

Nor would invoking a challenge to NIGC rulings as part of a cross-claim against the NIGC manufacture federal jurisdiction for purposes of removal by Defendants. This is illustrated in the case cited by Defendants Campbell and Doerner Saunders as authority for the "well-pleaded complaint rule." *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830 (2002). (Doc. 002).

Holmes clearly illustrates the application of the well-pleaded complaint rule in that a "counterclaim" that raises exclusive federal jurisdiction may still not be a basis for removal. An analogy to a cross-claim is clear.

In *Holmes*, a petitioner's complaint did not allege a claim arising under federal patent law, but the patent holder's answer contained a patent-law claim. 28 U.S.C. § 1338(a) provided for exclusive federal jurisdiction for original jurisdiction "relating to patents, plant variety protection, copyrights and trademarks." The statute specifically excludes State court jurisdiction, "No State court shall have jurisdiction over any claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights."

Despite this seeming requirement for exclusive federal jurisdiction for patent claims, the Supreme Court refused to allow an answer or counterclaim to be considered along with the original petition to control the existence of removal jurisdiction. *Holmes*, 535 U.S. at 831. ("As we said in *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25, 33 S. Ct. 410 (1913), whether a case arises under federal patent law 'cannot depend upon the answer.' Moreover, we have declined to adopt proposals that 'the answer as well as the complaint . . . be consulted before a determination [is] made whether the case 'arises under' federal law . . . .'").

But even if references to Defendants' Answers were permitted in the determination of a federal question for purposes of removal, a brief review of those Answers suggest Defendants make no serious substantive claims regarding the IGRA statutes and regulations. (Docs. 017, 018, 019 020). Other than the numerous denials or insufficient knowledge responses, nowhere do Defendants state a federal question in controversy that is "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Becker*, 770 F.3d at 947.

A word search reveals that the word "federal" does not appear in any of the Answers. There are no citations to federal statutes or regulations. There are general references to the contract terms of the Management Agreement and the

Business Plan but these are agreed contract terms and not federal questions. There are references to the National Indian Gaming Commission ("NIGC") and the Notice of Violation ("NOV"), but a challenge to a decision of a federal regulatory agency is not part of Plaintiff's well-pleaded petition.

The only specific reference to federal law for Campbell, Doerner Saunders, and Baxcase are the *affirmative defenses* and references to procedural and substantive due process under the Fifth, Eighth, and Fourteenth Amendments, something never mentioned in Plaintiff's Petition. (Doc. 018, ¶¶ 18, 19; Doc. 019, ¶¶ 15, 16; Doc. 020, p. 10). Nor are the Fifth, Eighth, and Fourteenth Amendments listed as federal questions in Defendants' Notice of Removal. (Doc. 002-00).

Sneed Lang made no specific federal constitutional, statutory or regulatory references of any type. (Doc. 017).

If Defendants intended to reveal in their Answers the federal controversies which drove removal, they have failed to do so.

III. CONCLUSION.

Plaintiff's petition sounds in state law claims in malpractice, fraud, and concealment. Plaintiff's claims do not center on federal law because those issues were settled at the time the NIGC rejected the proposed depreciation treatment and Campbell/Baxcase compensation plan. If Defendant Campbell disagreed

with the decisions of the National Indian Gaming Commission at the time the NIGC made its rulings he should have so advised the Peoria Tribe that these decisions should be contested and appealed. But he did not.

The reality is that the NIGC requirements became part of the Management Agreement and Business Plan and are now otherwise ordinary contract provisions under state law. There is no need to refer to federal law for any controversy raised by the well-pleaded petition filed in state court.

This action should be remanded to Ottawa County District Court to proceed in the ordinary course of state court litigation.

Respectfully submitted,

SIGNATURE OF COUNSEL

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CERTIFICATE OF ELECTRONIC SERVICE

I certify that on the day of filing, the foregoing document was electronically transmitted through this Court's ECF filing system to all counsel who have entered an appearance in this case and registered to receive ECF notification via electronic mail.

Micheal Salem

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