

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

(1) PEORIA TRIBE OF INDIANS OF)
OKLAHOMA,)

Plaintiff,)

vs.)

Case No. 19-CV-00581-TCK-JFJ

(1) STUART D. CAMPBELL;)

(2) BAXCASE, L.L.C., an Oklahoma Limited)
Liability Corporation;)

(3) SNEED LANG, P.C., and its Successor,)
SNEED LANG HERROLD, P.C.,)
Oklahoma Professional Corporations;)

(4) DOERNER, SAUNDERS, DANIEL &)
ANDERSON, L.L.P.; and)

(5) Other unknown persons or entities as may be)
determined by discovery and acting in concert)
or joint participation with Campbell, or)
otherwise vicariously liable for the wrongful)
acts alleged,)

Defendants.)

**DEFENDANTS STUART D. CAMPBELL AND BAXCASE, L.L.C.’S RESPONSE
TO PLAINTIFF’S MOTION TO REMAND**

COME NOW Stuart D. Campbell and Baxcase, L.L.C. and respond to Plaintiff’s Motion to Remand (Dkt. No. 24). In responding, Defendants adopt, as if set forth herein, the Response to Plaintiff’s Motion to Remand filed by Defendant Doerner, Saunders, Daniel & Anderson, L.L.P. (Dkt. No. 31). Defendants further state:

INTRODUCTION

Plaintiff filed its 18 page Petition in Ottawa County, setting forth some 40 paragraphs of factual allegations, and asserting causes of action for legal malpractice, breach of fiduciary duty, deceit/fraudulent concealment and failure to disclose, money had and received, and unjust enrichment. Pursuant to 28 U.S.C. §§1331, 1367, 1441, and 1446, Defendants timely removed the case to this Court on October 30, 2019 (Dkt. No. 2). Plaintiff now seeks remand, suggesting that its petition raises no claim that relies upon federal jurisdiction. On its face, the Petition demonstrates otherwise.

Plaintiffs' Petition shows that every single one of its claims arises out of, and depends upon whether Stuart D. Campbell can be found liable for legal malpractice vis-a-vis not only *his* understanding of, application of and compliance with the following, but also the NIGC's interpretation and application of the same:

- The National Indian Gaming Commission's regulations, requirements and review of a third party's contract with the Peoria Tribe of Indians of Oklahoma
- The Indian Gaming Regulatory Act
- 25 U.S.C. §575.4
- 25 U.S.C. §2710(d)(9)
- 25 U.S.C. §2711
- 25 U.S.C. §2713(a)(1)
- 25 C.F.R. §533.3(d)
- 25 C.F.R. §§535.1(b) & (c)(4)

As stated in Plaintiff's Motion, Plaintiff is "the master of the complaint." Dkt. No. 24, p. 10. Having elected to spell out the lawsuit's dependency upon the NIGC's interpretation and application of several federal regulatory and statutory provisions as opposed to a simple "notice pleading" petition alleging generically that malpractice was

committed, Plaintiff cannot now avoid the “well-pleaded” nature of its Petition. It is a Petition that sets forth issues that are “necessarily raised,” “actually disputed,” “substantial,” and “capable of resolution in federal court without disrupting the federal-state balance approved by Congress.” *Gunn v. Minton*, 568 U.S. 251, 258 (2013). Accordingly, this Court has Federal Question jurisdiction under the four-part test set forth in *Grable & Sons Metal Products, Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308 (2005), and *Gunn v. Minton*, 568 U.S. 251 (2013).

I. THE ISSUES ARE “NECESSARILY RAISED.”

Plaintiff suggests that the malpractice it alleges “does not arise because of federal statutes or regulations, but instead is related to” alleged fraudulent actions of the Defendants in failing to abide by the Management Agreement and Business Plan.” Dkt. 24, p. 11. This argument is inconsistent with a reading of the Petition and seems nothing but an attempt at circumventing the language Plaintiff heavily relies upon in its substantive allegations. Plaintiff’s theory of professional negligence is grounded in both its and the NIGC’s application and interpretation of federal statutes and regulations. Plaintiff purposefully relies upon federal law in the following allegations:

- Campbell had a continuous duty to exercise the ordinary skill, due care and knowledge of an attorney purporting to have **specialized knowledge in the areas of Indian law and particularly Indian gaming, a highly regulated industry**. Those duties included **protecting the Peoria Tribe and the Casino from injury, including from violations of the agreements approved by the NIGC, the promises made to NIGC to obtain those approvals, as well as IGRA and its accompanying regulations** and reporting any violations to the Business Committee. Petition at ¶21.
- **Campbell misrepresented the requirements of . . . IGRA and regulations of the NIGC**. Petition at 22.

- Campbell made it possible for both himself and Baxcase to operate without **required oversight by the NIGC. . .**” Petition at 24.
- **In violation of IGRA and the regulations of the NIGC, DED and Campbell concealed from the NIGC and the Peoria Tribe the changes in the calculation of the Net Gaming Revenue¹ and the resulting management fees. . .**” Petition at 26.
- Campbell had a professional duty as well as a duty on behalf of those law firms to exercise ordinary skill, due care and knowledge of an attorney purporting to have **specialized knowledge in the areas of Indian law and particularly Indian gaming, a highly regulated industry.** Petition at ¶42.
- The use of the unlawful depreciation scheme and Campbell’s receipt of a percentage of the management fees were **material facts implicating millions of dollars of revenue and possible sanctions of the Casino operations by NIGC.**² Petition at ¶54.
- Plaintiff incorporates via citation the Notice of Violation (NOV) dated May 10, 2019. The NOV is entirely dependent upon a host of federal regulations and interpretation and application of those regulations, but makes no mention of any state law or regulation. Petition at ¶36 and fn 2.

Plaintiff argues that anticipated federal defenses do not provide a basis for removal. Perhaps Plaintiff has misunderstood Defendants’ position. The language contained in Plaintiff’s Petition is what forms the basis for removal.

Plaintiff alleges not once, but twice, that its case arises out of Indian gaming, “a highly regulated industry.” Petition at ¶¶ 21 and 42. The Petition is devoid of a citation to any state gaming law or regulation, but is replete with citations to federal law.

Plaintiff also alleges that Campbell misrepresented requirements of the IGRA and regulations of the NIGC, and incorporates the Notice of Violation (“NOV”) that forms

¹ Net Gaming Revenue is defined at 25 C.F.R. §502.16.

² Defendants do not waive an argument that Plaintiff’s claims are premature.

the basis of its claims of malpractice. Petition at ¶¶ 22, 36 and fn 2. The NOV, found at <https://www.nigc.gov/images/uploads/enforcement-actions/NOV-19-03.pdf>, does not refer to Oklahoma state law, but cites to no less than 10 federal statutory and regulatory provisions upon which the Chairman relies for the determination that the Peoria Tribe committed certain violations. Interpreting the requirements of the IGRA and regulations of the NIGC, and correlating Mr. Campbell's representations with respect to the same, are subject to this Court's jurisdiction. "The IGRA is a federal statute, the interpretation of which presents a federal question, suitable for determination by a federal court." *Pueblo of Santa Ana v. Nash*, 972 F.supp.2d 1254, 1262. *See Seneca-Cayuga Tribe of Okla. v. Oklahoma*, 874 F.2d 709, 712-13 (10th Cir. 1989)("federal law, federal policy, and federal authority are paramount in the conduct of Indian affairs in Indian Country").

Plaintiff also alleges that Campbell concealed changes in calculation of the Net Gaming Revenue (a term defined by federal regulation) from the NIGC. Petition at 26. Plaintiff thereby asserts that Mr. Campbell was involved in an unlawful depreciation scheme, receiving a percentage of management fees, all of which "were material facts implicating millions of dollars of revenue and possible sanctions of the Casino operations by NIGC." Petition at ¶54. These alleged "material facts" relate directly to vindication of a right that "*necessarily turn[s] on some construction of federal law.*" *Merrell Dow Pharms. v. Thompson*, 478 U.S. 804, 808-09 (1986).

Jurisdiction in federal court is proper where state law claims (such as legal malpractice) are predicated on violations of federal statutes governing complex, nationwide regulatory schemes for which uniformity is essential. *See, e.g., PNC Bank*,

N.A. v. PPL Elec. Utils. Corp., 189 F. App'x 101, 104 n.3 (3d Cir. 2006) (state law claim based on violation of Internal Revenue Code “gives rise to federal-question jurisdiction” under *Grable*); *Broder*, 418 F.3d at 196 (state law claims premised on violations of Communication Act’s uniform rate requirement satisfy “*Grable* test for federal-question removal jurisdiction”); *NASDAQ OMX Grp., Inc. v. UBS Sec., LLC*, 770 F.3d 1010, 1031 (2d Cir. 2014) (state law claims premised on violations of Exchange Act “necessarily raise disputed issues of federal law of significant interest to the federal system as a whole”); *New York ex rel. Jacobson v. Wells Fargo Nat’l Bank, NA*, 824 F.3d 308, 315–18 (2d Cir. 2016) (state law claims based on defendant’s alleged violation of Internal Revenue Code satisfy *Grable*); *Ranck v. Mt. Hood Cable Regulatory Comm’n*, 2017 WL 1752954, at *5 (D. Or. May 2, 2017) (state law claims based on violations of Cable Communications Policy Act satisfy *Grable*). There is no dispute that the IGRA is a complex, nationwide regulatory scheme for which uniformity is essential.

In sum, the Petition sets forth a host of federal laws, regulations and actions upon which Plaintiff relies for vindication. Thus, Plaintiff’s Petition arises under the laws of the United States for purposes of federal district court subject matter jurisdiction. *Grable, supra*, 545 U.S. 308. These laws are complex, involving nationwide regulatory schemes for which uniformity is essential. Jurisdiction is proper in this Court.

II. THE ISSUES ARE “ACTUALLY DISPUTED.”

Plaintiff seemingly takes the position that even if the NIGC got it wrong, Plaintiff still can recover from Defendants based upon the NIGC’s incorrect conclusions. That is

nonsensical. If the NIGC got it wrong, which *is* something this Court has jurisdiction to determine, then Mr. Campbell stands vindicated and Plaintiff's malpractice claim fails.

Specifically, Plaintiff contends, "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 Defendants may claim." Dkt. No. 24 at p. 12. Suggesting that the NIGC rulings are "merely incidental to the proceeding," Plaintiff argues that the Petition does not raise or dispute the accuracy or inaccuracy of the NIGC rulings, therefore that there is no dispute sufficient for removal. Dkt. 24, pp. 12 and 13. Plaintiff even argues "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." Dkt. 24, p. 14.

Plaintiff's concern over inconsistent outcomes is exactly why this Court's involvement is appropriate. Jurisdiction in federal court is proper where state law claims (such as legal malpractice) are predicated on violations of federal statutes governing complex, nationwide regulatory schemes for which uniformity is essential. *PNC Bank, NA, supra*.

Next, Defendants do not know whether Plaintiff acted to protect its rights by appealing the NOV. Its careful wording ("possibility of subjecting the Plaintiff to differing applications of the statutes and regulations") suggests that the rulings contained in the NOV might not be final. Recall also that Plaintiff's Petition alleges that the Notice of Violation (NOV) upon which its case is premised "has not been resolved as of the date

of this filing.” Petition at ¶ 38. If an appeal to this Court was taken or if Plaintiff were to seek an injunction against enforcement, then Plaintiff and Defendants stand to benefit from consistent application of the statutes and regulations by this Court. Alternately, if Plaintiff elected not to appeal or pursue other options before this Court, Plaintiff might be subject to penalties assessed by the NIGC. But, its self-imposed predicament does not detract from Defendants’ right to ask this Court to ensure uniformity in the outcome of state law claims of malpractice that are predicated on violation of the federal statutes at issue.

The issue is not whether Defendants may claim a defense, but the proper interpretation of the applicable federal statutes and regulations that relate to such a defense. Because Plaintiff’s claims are predicated on violations of federal statutes governing complex, nationwide regulatory schemes, for which uniformity is essential, jurisdiction in federal court is proper. *PNC Bank, N.A., supra*.

III. THE ISSUES ARE SUBSTANTIAL.

The IGRA “provides a comprehensive regulatory framework for gaming activities on Indian country which seeks to balance the interests of tribal governments, the states, and the federal government.” *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1548 (10th Cir. 1997) (internal citations omitted). Exercising federal-question jurisdiction in such cases “captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues.” *Grable*, 545 U.S. at 312.

Federal issues are sufficiently substantial where they raise “questions [that] involve aspects of . . . complex federal regulatory scheme[s] . . . as to which there is a serious federal interest in claiming the advantages thought to be inherent in a federal forum.” *Broder v. Cablevision Sys. Corp.*, 418 F.3d 187, 194 (2d. Cir. 2005). In enacting the IGRA, Congress was mindful of the distinct federal interest inherent in the regulation of Indian gaming:

In determining what patterns of jurisdiction and regulation should govern the conduct of gaming activities on Indian lands, the Committee has sought to preserve the principles which have guided the evolution of Federal-Indian law for over 150 years. In so doing, the Committee has attempted to balance the need for sound enforcement of gaming laws and regulations, with the strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian land. The Committee recognizes and affirms the principle that by virtue of their original tribal sovereignty, tribes reserved certain rights when entering into treaties with the United States, and that today, tribal governments retain all rights that were not expressly relinquished.

S. Rep. No. 446, 100th Cong., 2d Sess. 5 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3075. Given Congress' decision, “consistent with its plenary power over Indian affairs, to balance competing policy interests and to adjust, where appropriate, the jurisdictional framework for regulation of gaming on Indian lands,” *Gaming Corp.*, 88 F.3d at 546 (quoting S. Rep. No. 446, 100th Cong., 2d Sess. 3 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3073), any decision by a court concerning the appropriate duties exercised in representing the Tribe in Gaming Agreements necessarily implicates federal interests of the highest order, such that the issues are “substantial.”

IV. THE ISSUES ARE CAPABLE OF RESOLUTION IN FEDERAL COURT WITHOUT DISRUPTING THE FEDERAL-STATE BALANCE APPROVED BY CONGRESS.

The “congressionally approved balance of federal and state judicial responsibilities” as to Indian tribes is heavily weighted on the federal side. *Grable, supra* at 314. In the area of jurisdiction over and regulation of gaming on Indian tribal lands, Congress has made the federal interest clear and has provided states a very limited role – essentially, to negotiate a tribal-state compact governing the conduct of Class III gaming activities in good faith. *Massachusetts v. Wampanoag Tribe of Gay Head*, 36 F.Supp.3d 229 (2014), *citing* 25 U.S.C. §2710(d)(3) and Cohen’s Handbook of Federal Indian Law §12.02 (2012). Any compact between Plaintiff and the State of Oklahoma is not at issue in this lawsuit. Instead, the issues are dependent upon assessment and application of federal laws and regulations that serve as the underlying basis of Plaintiff’s Petition. The balance weighs heavily in favor of this Court’s exercise of jurisdiction, for which there is no disruption of the federal-state balance approved by Congress.

V. CONCLUSION

It is telling that Plaintiff believes a finding in its favor requires this Court to affirm the accuracy of the NIGC’s rulings. Plaintiff argues “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.” Dkt. 24, p .14. An assessment of the NIGC’s rulings, therefore, is

unquestionably necessary to Plaintiff's case; and it is likewise unquestionable that this Court is vested with jurisdiction to conduct that assessment.

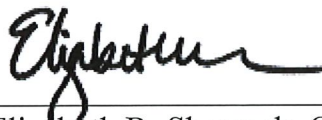
Plaintiff has raised issues of federal import. Those issues are actually disputed and substantial. This case is capable of resolution in federal court. Removal was proper and should stand.

WHEREFORE, Defendants Stuart D. Campbell and Baxcase, LLC request the Court to deny Plaintiff's Motion to Remand, and to issue such other and further relief as the Court may deem just and proper.

Dated: December 16, 2019

Respectfully submitted,

*PIERCE COUCH HENDRICKSON
BAYSINGER & GREEN, LLP*

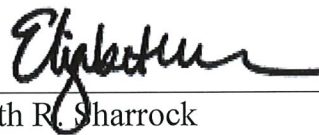


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CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2019, the foregoing document was transmitted electronically 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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