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

Peoria Tribe of Indians of Oklahoma, Plaintiff, vs. Stuart D. Campbell; Baxcase, L.L.C., an Oklahoma Limited Liability Corporation; Sneed Lang, P.C., and its successor Sneed Lang Herrold, P.C., Professional Corporations; Doerner Saunders Daniel & Anderson, L.L.P.; et. al. Defendants.	)	Case No. 19-CV-00581-TCK-JFJ JURY TRIAL DEMANDED

PLAINTIFF'S, PEORIA TRIBE, REPLY TO DEFENDANTS', DOERNER SAUNDERS AND CAMPBELL, RESPONSES TO PLAINTIFF'S MOTION TO REMAND AND BRIEF IN SUPPORT

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Plaintiff, the Peoria Tribe of Indians of Oklahoma ("Plaintiff" or "Peoria Tribe"), comes before the Court and replies to the Responses of Defendant Doerner Saunders Daniel & Anderson ("Doerner Saunders") (Doc. #31) and Defendant Stuart Campbell ("Campbell") (Doc. #32) to Plaintiff's Motion to Remand (Doc. #24) this action to the District Court of Ottawa County, Oklahoma.[1]

Before removal is permitted, Defendants' burden is to show the existence of a federal question on the face of Plaintiff's Petition that is based upon "a right or immunity created by the Constitution or laws of the United States." Such federal question 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). This federal question "must be disclosed upon the face of the complaint, unaided by the answer" and must exclude as a basis for jurisdiction portions of "the complaint itself . . . 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.

Although Defendants Campbell and Doerner Saunders in their response briefs acknowledge all of the Peoria Tribe's claims arise under State law and seek relief under State law, they urge that because the legal malpractice and fraud arose out of Indian gaming operations, the four *Grable* criteria[2] for federal question jurisdiction are met. Doerner

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[1] Because the arguments in responses of Defendants Doerner Saunders and Campbell parallel each other, Plaintiff Peoria Tribe files this single Reply.

[2] The factors are conjunctive; the failure of any single factor will deny federal jurisdiction. *See Gunn*, 568 U.S. at 258.

Response, Doc. #31 at 10 and Campbell Response, Doc. #32 at 5. Plaintiff respectfully submits that Defendants cannot establish federal question jurisdiction because the Indian gaming law questions are not "substantial" and the "balance of federal and state judicial responsibilities" will be disrupted. Any questions of federal Indian gaming law in this malpractice case are not important "to the federal system as a whole" and the Oklahoma courts have "great interest" in "maintaining standards among members of the licensed profession." *Gunn v. Minton,* 133 S.Ct. 1059, 1066, 1068, 568 U.S. 251, 261, 264 (2013).

Gunn is a malpractice case involving patent law, the quintessential example of exclusive federal jurisdiction,[3] yet in *Gunn* the Supreme Court determined there was no federal jurisdiction. The point is that mere references to federal statutes in a petition do not confer federal question jurisdiction. *See Becker v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 770 F.3d 944, 948 (10th Cir. 2014) (". . . mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *citing Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 813, 106 S.Ct. 3229 (1986)).

In *Gunn*, Minton's patent was invalidated because the court determined it had been "on sale" for more than a year prior to the patent application. Minton then sued Gunn, his attorney, for failure to advance the argument in the first instance that the "on sale" bar did not apply because Minton's "lease agreement" for the patent was part of ongoing testing of the invention and fell within an "experimental use" exception to on sale bar requirement and was thus waived.

[3] *See* 28 U.S.C.S. § 1338(a).

The Tarrant County District Court granted the attorney summary judgment. The Fort Worth Court of Appeals affirmed. The Texas Supreme Court granted review and reversed on the grounds that federal courts have exclusive jurisdiction in matters involving patents. *Minton v. Gunn*, 355 S.W.3d 634 (Tex. 2011).

The Supreme Court granted certiorari and reversed. The opinion, for a unanimous Court by Chief Justice Roberts, applied the federal question criteria of *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314, 125 S.Ct. 2363 (2005):

> That is, federal jurisdiction over a state law claim will lie if 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. Where all four of these requirements are met, we held, jurisdiction is proper because there is a "serious federal interest in claiming the advantages thought to be inherent in a federal forum," which can be vindicated without disrupting Congress's intended division of labor between state and federal courts.

Gunn, 568 U.S. at 258.

Chief Justice Roberts first determined that a legal malpractice claim does not arise under federal law. *Gunn*, 568 U.S. at 258 (". . . it is clear that Minton's legal malpractice claim does not arise under federal patent law. Indeed, for the reasons we discuss, we are comfortable concluding that state legal malpractice claims based on underlying patent matters will rarely, if ever, arise under federal patent law . . ."). This is true even though resolution of a federal patent question was "necessary" to Minton's case. *Gunn*, 568 U.S. at 259. A malpractice case presents the patent claim as a "case within a case" where it must be proved hypothetically that a different result would have resulted had the malpractice not been committed. *Id*. Even though the hypothetical case involved patent law, that was insufficient to invoke federal question jurisdiction.

In *Gunn*, Chief Justice Roberts found the federal issue was "actually disputed" because ". . . on the merits, it is the central point of dispute. Minton argues that the experimental-use exception properly applied to his lease to Stark, saving his patent from the on-sale bar; petitioners argue that it did not." *Gunn*, 568 U.S. at 259.[4] But despite the relationship of the federal issues to the malpractice action, the patent issues did not meet the "substantiality" or the "balance of federal and state judicial responsibilities" factors under *Grable*. *Gunn*, 568 U.S. at 261-64.

With respect to "substantiality," *Gunn* held the test was not whether the federal law questions were significant or critical between the parties, but whether the questions were of "importance more generally" and concluded:

> . . . the federal issue carries no such significance. Because of the backward-looking nature of a legal malpractice claim, the question is posed in a merely hypothetical sense: If Minton's lawyers had raised a timely experimental-use argument, would the result in the patent infringement proceeding have been different? No matter how the state courts resolve that hypothetical "case within a case," it will not change the real-world result of the prior federal patent litigation. Minton's patent will remain invalid.

Gunn, 568 U.S at 261.

Likewise, state court decisions would not undermine "the development of a uniform body of [patent] law" because Congress ensured such uniformity by vesting exclusive jurisdiction in the Federal Circuit:

> In resolving the nonhypothetical patent questions those cases present, the federal courts are of course not bound by state court case-within-a-case patent rulings . . . . In any event, the state court case-within-a-case inquiry asks what

[4] Unlike *Gunn*, the federal issues in the hypothetical case within a case in Ottawa County are not "necessary" or "actually disputed," or because the contested actions of Campbell involved variations from the Management Agreement which DED changed to conform to the requirements of the NIGC. That the NIGC required these changes as a matter of federal law does not make them federal questions or disputed in consideration of DED's agreement to abide the NIGC requirements.

> would have happened in the prior federal proceeding if a particular argument had been made. In answering that question, state courts can be expected to hew closely to the pertinent federal precedents. It is those precedents, after all, that would have applied had the argument been made. *Cf. ibid.*
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> As for more novel questions of patent law that may arise for the first time in a state court "case within a case," they will at some point be decided by a federal court in the context of an actual patent case, with review in the Federal Circuit. If the question arises frequently, it will soon be resolved within the federal system, laying to rest any contrary state court precedent; if it does not arise frequently, it is unlikely to implicate substantial federal interests.

Gunn, 568 U.S. at 262.

In the instant case, if we accept for purposes of Plaintiff's removal motion only, Defendants' hypothetical "case within a case" involves the Indian Gaming Regulatory Act (25 U.S.C. ch. 29 §2701 *et seq*.) ("IGRA") and the actions of the National Indian Gaming Commission ("NIGC"), whatever resolution is reached in the malpractice, breach of fiduciary duty case, and fraud/concealment case will not affect the findings of the NIGC or federal Indian gaming laws as a whole.

Nor will returning the case to Ottawa County disrupt any federal-state balance. Uniformity is assured because Congress has vested in the NIGC the regulation of Indian gaming within the confines of the IGRA. Moreover, as previously urged in the Motion to Remand, any collateral disturbance of the NIGC's actions by any court <u>is</u> an interference with the choices and procedures selected by Congress.

Finally, the balance of federal-state responsibilities factor cannot be met. In fact, federal court seizure of malpractice litigation impedes "[t]he States, . . . 'special responsibility for maintaining standards among members of the licensed professions.'" *Gunn*, 568 U.S. at 264, citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460, 98 S. Ct. 1912 (1978), and

Goldfarb v. Virginia State Bar, 421 U.S. 773, 792, 95 S. Ct. 2004 (1975). This case properly should be litigated in state court.

Thus, despite an arguable favorable outcome of two of the four criteria (necessary to the case and disputed), no federal jurisdiction exists because of a lack of significance of the hypothetical federal case and interference with the "special responsibility" of the State of Oklahoma's courts.[5]

Moreover, as Plaintiff urged in the initial Motion, because the primary issues of malpractice, breach of fiduciary duty, and fraud/concealment are controlled by the Management Contract and the promises by Direct Enterprise Development, L.L.C. ("DED") that Baxcase would not share revenue from the management fee, even in the absence of a "case within a case," both the first and second criteria are suspect since resolution of federal questions are not necessary to the malpractice case, nor are they disputed in the Petition as a matter of federal law in any way that make a difference to Campbell's action in creating the depreciation add back or the Baxcase involvement.

Since *Gunn*, federal courts have consistently rejected removal of claims of malpractice involving federal issues. In *NeuroRepair, Inc. v. Nath Law Grp*., 781 F.3d 1340 (Fed. Cir. 2015), the Federal Circuit, citing *Gunn*, held that a state court malpractice action in a patent case was improperly removed to federal court because no federal claims were raised and any federal issues raised were not substantial, and a decision by a federal court would usurp the role of state courts in regulating the practice of law. Besides malpractice, *NeuroRepair* raised

[5] Even prior to *Gunn*, the Fifth Circuit held that a district court improperly took jurisdiction and removed a state court involving malpractice in a federal trademark case for failure to introduce evidence of secondary meaning. *Singh v. Duane Morris, L.L.P.*, 538 F.3d 334 (5th Cir. 2008).

additional issues in the state court action of breach of fiduciary duty, breach of written contract, breach of oral contract, breach of implied covenant of good faith and fair dealing, negligent misrepresentation, and false promise.

In ordering a dismissal and remand, the Federal Circuit noted that *Gunn* had been applied to a variety of other claims:

> Since *Gunn*, courts considering alleged violations of a variety of state laws have declined to find federal question jurisdiction notwithstanding the presence of an underlying issue of patent law. *See*, *e.g.*, *Forrester Envtl. Servs. Inc. v. Wheelabrator Techs., Inc.*, 715 F.3d 1329 (Fed. Cir. 2013) (tortious interference with a contractual relationship); *MDS* (*Can.*) [, *Inc. v. AD Source Techs., Inc*., 720 F.3d [833] at 842 [(11th Cir. 2013)] (breach of contract); *Mirowski Family Ventures, LLC v. Bos. Scientific Corp*., 958 F. Supp. 2d 1009 (S.D. Ind. 2013) (breach of patent license agreement); *AirWatch LLC v. Good Tech. Corp*., No. 1:13-cv-2870-WSD, 2014 U.S. Dist. LEXIS 57015, 2014 WL 1651964 (N.D. Ga. Apr. 24, 2014) (defamation); *Bonnafant v. Chico's FAS, Inc*., 17 F. Supp. 3d 1196, 2014 WL 1664554 (M.D. Fla. 2014) (state whistleblower legislation).

NeuroRepair, Inc., 781 F.3d at 1348.

In *Alps South, LLC v. Shumaker, Loops & Kendrick, LLP*, 2018 WL 4522168 (Fed. Cir. 2018), Plaintiff acted on a suggestion from a state judge that he may not have jurisdiction and filed a federal suit for malpractice in a patent case. The district court dismissed for lack of subject matter jurisdiction and the Federal Circuit affirmed. *Dantes v. Greer*, 2019 WL 6690786 (W.D. La. 9/12/2019), involved a malpractice claim for an employment discrimination suit filed in federal court. The magistrate judge citing *Gunn* and *Singh* recommended that the action be dismissed for lack of subject matter jurisdiction. The Magistrate's report was adopted by the district judge. *Dantes v. Greer*, 2019 WL 6693604 (W.D. La. 12/6/2019).

Reder v. A.O.E. Law & Associates, Inc., 2018 WL 3425020 (C.D. Cal. 2018), involved a malpractice and unfair business practice suit removed by the defendant to federal court because it involved malpractice in a bankruptcy proceeding which resulted in adverse actions against the plaintiff. The district court *sua sponte* questioned its jurisdiction and eventually determined the federal bankruptcy questions were "entirely hypothetical" and only affected liability in the malpractice case noting that "The parties in *Gunn* raised similar arguments and the Supreme Court rejected them." The case was remanded.

The Supreme Court has applied the *Gunn*/*Grable* criteria to questions of jurisdiction other than §1331. In *Manning v. Merrill Lynch Pierce Fenner & Smith, Inc*., 772 F.3d 158 (3d Cir. 2014), the Third Circuit granted an interim appeal, reversed the district court and ordered remand of plaintiffs' claim that defendants manipulated the price of a stock via abusive "naked" short sales, even though short sales are subject to detailed federal regulation under Regulation SHO (17 C.F.R. § 242.200 *et seq*.), which was repeatedly mentioned in the state court petition. The sole question on appeal was whether federal-question jurisdiction existed over plaintiffs' state claims. The Circuit found none and ordered the case remanded. The Supreme Court took certiorari on the question of jurisdiction under Section 27 of the Securities Exchange Act of 1934 (Exchange Act), 48 Stat. 992, as amended, 15 U.S.C. § 78a, *et seq.,* and concluded that the *Gunn* analysis would be applied to questions of jurisdiction under §27. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning*, 136 S.Ct. 1562, 1570 (2016) ("Accordingly, we agree with the court below that §27's jurisdictional test matches the one we have formulated for §1331, as applied to cases involving the Exchange Act."). *See also Auto-Owners Ins. Co. v. Ergonomics Plus, Inc*., 63 F. Supp. 3d 754 (E.D.

Mich. 2014) (No federal jurisdiction based on copyright law in underlying declaratory judgment contract action. Federal question is insubstantial. Case dismissed); *Clay v. Wells Fargo Bank*, 2017 U.S. Dist. LEXIS 205849, (S.D. Ala. 2017) (Removal based upon allegations of violations of federal law in disclosure/display of Plaintiff's private banking/financial information to unidentified third parties/public sources.) The Magistrate's report recommending remand was adopted by the district court. 2018 WL 1527854.

Meriter Health Servs. v. Godfrey & Kahn, S.C., 2015 WL 7313883, 2015 U.S. Dist. LEXIS 157483 (W.D. Wis. 2015), was a removed action involving professional negligence claims against plaintiff's lawyers, actuaries and pension plan design consultants, as well as state law breach of contract and declaratory judgment claims against two of its liability insurers involving prior ERISA litigation. Following *Gunn*, the district court remanded back to state court.

It has long been the law that any judgment entered by a court in the absence of subject matter jurisdiction is not just voidable, but *void ab initio.* In a removed case the Tenth Circuit determined that once the district court ruled it lacked subject matter jurisdiction, it was also obligated to vacate its previous substantive rulings before remand. *See Cunningham v. BHP Petroleum Gr. Brit. PLC*, 427 F.3d 1238, 1245 (10th Cir. 2005):

> Moreover, because the district court never had jurisdiction over the case, it had no power to rule on any substantive motions or to enter judgment in the case. "A court may not . . . exercise authority over a case for which it does not have subject matter jurisdiction." *Brown* [*v. Francis*], 75 F.3d [860,] at 866 [(3rd Cir. 1996)]. "Simply put, once a federal court determines that it is without subject matter jurisdiction, the court is powerless to continue." *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 410 (11th Cir. 1999). "[A] judgment is void if the court that enters it lacks jurisdiction over either the subject matter of the action or the parties to the action." *United States v. 51 Pieces of Real Prop.*, 17 F.3d 1306, 1309 (10th Cir. 1994).

> We, therefore, must vacate all the district court's post-removal orders, as other circuits have done in similar circumstances. In *Brown*, for instance, after determining that the district court had improvidently allowed a case to be removed from state court which was then consolidated with a pending case over which the court did have jurisdiction, the Third Circuit held that "any post-removal actions taken by the court in this case were . . . ineffectual." 75 F.3d at 867.

Because of the dire consequences of error, it is no wonder the Supreme Court has suggested courts tread lightly under circumstances of questionable subject matter jurisdiction by advising that removal statutes be construed restrictively and any doubts as to removability should be resolved in favor of remanding the case to state court. *Shamrock*, 313 U.S. at 108-109, 61 S.Ct. at 872.

CONCLUSION

Defendants Doerner Saunders and Campbell have not met their burden to show a federal question extant on the face of Plaintiff's state court petition. The Motion to Remand to the District Court of Ottawa County should be granted.

Respectfully submitted,

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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.

/s/ Louis W. Bullock
Louis W. Bullock