IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

JLLJ DEVELOPMENT, LLC, A MICHIGAN LIMITED LIABILITY COMPANY; AND LANSING FUTURE DEVELOPMENT II, LLC, A MICHIGAN LIMITED LIABILITY COMPANY Plaintiffs, v. KEWADIN CASINOS GAMING AUTHORITY, A DULY AUTHORIZED ENTITY CREATED UNDER THE LAWS OF THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS Defendant.	)	No. 1:20-cv-231 Judge Robert J. Jonker

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DEFENDANT KEWADIN CASINOS GAMING AUTHORITY'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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DISCUSSION OF LAW

In its opening brief, the Kewadin Casinos Gaming Authority (Kewadin) provided a legally correct discussion of why Kewadin's *limited* waiver of sovereign immunity is not applicable to Plaintiffs' claims in this case. Because Plaintiffs' claims are not within the *limited* scope of that waiver, Plaintiffs' claims must be dismissed.

Plaintiffs JLLJ Development, LLC and Lansing Future Development II, LLC (hereinafter Plaintiffs) do not offer any meaningful response to that legal argument. Instead, Plaintiffs use *ad homonym* attacks and attempt to shift the focus to a question of whether there is *any* waiver of sovereign immunity in the contracts, instead of discussing the issue presented--whether there is a waiver of sovereign immunity which applies to Plaintiffs' claims.

Contrary to Plaintiffs' attacks on Kewadin and Kewadin's attorneys, Kewadin knows the law regarding *limited* waivers of sovereign immunity. That law is not complex as applied to this case, and it simply requires that Plaintiffs' claims must be dismissed. Also contrary to Plaintiffs' response argument, Kewadin also knows the difference between a Rule 12(b)(1) motion, a 12(b)6 motion, and a summary judgment motion. Plaintiffs mis-state the distinctions between those different types of motions.

I. PLAINTIFFS' ATTEMPT TO APPEAL TO EQUITY IS BOTH IMMATERIAL AND INCORRECT.

The issue presented is an issue of law: Are Plaintiffs' claims within the limitations that Kewadin chose to place upon its waiver of sovereign immunity? Although Plaintiffs admit that the issue presented is a legal issue, Resp. Br. at 6, they begin their response brief with an unseemly discussion of their view that the tribal entity is somehow not being fair to the non-Indian venture capital investors. That argument is immaterial. "Indian sovereignty, like that of other sovereigns, is not a discretionary principle subject to the vagaries of the commercial bargaining process or the equities of a given situation." *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419

(9th Cir. 1989) (citing *United States v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506, 513 (1940)). *See also Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917 (6th Cir. 2009) (equitable doctrines do not apply when determining whether a tribe has waived immunity); *Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1267 (10th Cir. 1998) (holding that there can be no "waiver of tribal immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case"); *Amer. Indian Agr. Credit Consortium v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378–79 (8th Cir. 1985).

While Kewadin need not respond further to Plaintiffs' immaterial revisionists claims on the equities, Kewadin will briefly respond to Plaintiffs' incorrect attempt to impugn Kewadin's integrity.

A. PLAINTIFFS' ATTEMPT TO AVOID THE RISK FLOWING FROM PLAINTIFFS' BUSINESS DECISION TO ENTER INTO A POTENTIALLY HIGHLY LUCRATIVE AGREEMENT MUST BE REJECTED.

Plaintiffs entered into contracts that had relatively high risk, and which had the potential for very high reward. Plaintiffs assert that they contributed less than $9,000,000,[1] as part of what they knew would be a very long and difficult process for the Sault Saint Marie Tribe to open casinos in downstate Michigan.[2] In their own complaint, Plaintiffs allege that if that risky venture had worked out, they would have received profits "in excess of $124,000,000" over a period of seven years. Compl. ¶73. Through their claims in this case, Plaintiffs assert that they should receive the amount of profit that could have been generated only if the risk had panned out. They

[1] Kewadin's understanding is that Plaintiffs have not invested "close to $9,000,000." The amount of the investment would be shown by an audited financial statement, which Plaintiffs have not provided.

[2] In their response brief, Plaintiffs now claim that they subjectively expected the casinos to be open within four years. That factual allegation is immaterial. In the integrated contract that Plaintiffs signed, they did not negotiate a provision for a remedy, other than related to extensions, if the casinos were not opened by a specific date. Besides being immaterial, the assertion is also implausible, given the numerous legal and other hurdles to opening a downstate casino.

make that claim even though they admit that their choice to stop taking the risk deprives them of the potential future bonanza reward. Def. Br. at 8.[3]

The risk that Plaintiffs decided to take is stated in the contracts in black and white. Plaintiffs would only be able to recover their investment, and only have the potential for a bonanza profit, if they provided the capital for the contemplated long process *and* if that contemplated long and risky process worked as everyone hoped it would. Dkt. 1-2,[4] recital I (the parties acknowledge the multiple difficult hurdles that would have to be cleared in order for the downstate casinos to generate money which was to be the sole sources for repayment); *id.* at §4.3 ("Under no circumstances shall the Tribe or the Gaming Authority be responsible or liable in any way, shape or form for the payment of the development fee from any other sources" than the operating profits after the downstate casinos open); *id.* at §6.3.3 (reiterating that the sole source for payment is the operating profits and equipment).

There were no guarantees, and in fact there was a known risk that all of the money that Plaintiffs *and* Kewadin invested would ultimately be completely lost. *E.g.*, Resp. Br. at 8 n. 11 (Plaintiffs admit that their investment was a "risk," and assert this was the reason that, if it had panned out, Plaintiffs would receive a large return); Dkt. 1-2, §4.1.3 (stating that because of the "*risks*, obligations, and liabilities" Plaintiffs were taking, they would receive 14% of the operating profits from the downstate casinos for seven years) (emphasis added). Plaintiffs knowingly and expressly agreed to a limitation that they would only be able to be paid from a single, specified,

[3] Immediately after admitting that their choice to stop taking risk deprives them of any money which would come in after the date that they chose to stop taking the risk, Resp. at 8 (citing Turn-Key Agreement, §5.3.2.), Plaintiffs make the assertion that the "obligation to repay . . . is not extinguished." As discussed below, Defendant disagrees.

[4] Citations in this brief are to the contract with JLLJ. The paragraph numbering and cited provisions in the Lansing Future contract are identical.

and completely contingent income stream. They knew the potential single income stream would not exist unless the Tribe or Kewadin were able to open the downstate casinos. Similarly, all of the money that Kewadin was putting into the hoped-for downstate casino would also be lost if the venture did not pan out.

In each contract, Kewadin limited its waiver of sovereign immunity solely to that one potential income stream: the potential future "Operating Profits and the Equipment" from that downstate casino. Plaintiffs are forced to make the fatal admission that this is so: Plaintiffs admit that the contract terms "would only have permitted JLLJ and Lansing Future to be repaid from the revenue of the casinos." Resp. Br. at 4, ¶14;[5] Resp. Br. at 11 (admitting that the waiver was limited and citing section 6.3.1 of the Turn-Key agreement which expressly states that the waiver is limited); Compl. ¶10 (Plaintiffs state that "JLLJ and Lansing Future were to be repaid their advances and profits from Casino revenues."); *id.* at ¶18 (noting that any compensation to Plaintiffs would come from "a share of the revenues of the [downstate] casinos."); *id.* at ¶40 (admitting: "as a *consequence* [of the downstate casinos not yet being authorized] neither JLLJ nor Lansing Future has been repaid the funds advanced or received the substantial revenues JLLJ and Lansing Future were to be paid from the revenues of the temporary casino") (emphasis added); *id.* at ¶43. That sole possible stream is dry. Plaintiffs further admit that they eventually decided to stop providing their *quid pro quo*—the risky capital investments. Plaintiffs' attempt to have this Court dramatically re-assign risk and accelerate what is clearly a contingent reward now must be rejected.

[5] After making that fatal admission, Plaintiffs attempt to avoid the fatal consequences by citing to a paragraph of their complaint in which they make an allegation which is contrary to the admitted contract term. The well-established law, discussed below, is that the Court is not bound by allegations by the Plaintiffs which are contrary to the admitted contract language.

B. ENTITIES OTHER THAN INDIAN TRIBES ALSO RESTRICT REMEDIES AND ASSETS, USING METHODS THAT ARE SIMILAR TO AND SOMETIMES EXCEED THOSE THAT TRIBES CAN USE.

Plaintiffs assert that Kewadin's attempt to enforce the contracts as written is an example of an Indian Tribe taking advantage of a non-Indian. That argument fails for multiple reasons.

First, Plaintiffs were well aware, at the time that they entered into the contract, that Kewadin had sovereign immunity, and that any suit outside the limited waiver of sovereign immunity would be barred as a matter of law. They knowingly entered into the contract, and are now merely complaining that Kewadin is holding them to their bargain. There have been cases in which judges have expressed disappointment that the law requires them to dismiss claims against naïve plaintiffs who might not have realized the need to negotiate scope of waiver of tribal immunity, but the Plaintiffs entering into this contract knew what they were doing, and they agreed to the narrow waiver discussed above.

Second, Plaintiffs' argument that Kewadin or the Tribe is doing something that others cannot do is incorrect. States and the United States also have sovereign immunity from suit. Private corporations can also segregate assets by creating wholly owned subsidiary corporations, or by providing capital to wholly separate corporations to protect an established enterprise, or by negotiating limited recourse contract remedies. Individuals or families can create corporations to define and limit the assets available in a business venture; and in fact Lansing Future and JLLJ are examples of exactly that. Corporations and individual use these corporate structures and contracting options to accomplish the same purpose that Kewadin did here—to protect its existing enterprises from the high-risk new venture.

Kewadin is a department of the Sault Ste. Marie Tribe, and is the entity that, under the Tribe's laws, would be required to operate the contemplated down-state casinos.[6] It cannot readily use subcorporations or new corporations to segregate and protect its existing businesses and the capital those businesses need to continue to operate and to continue to fund the Tribe's governmental operations. But it can rely upon the settled legal rule that it has sovereign immunity, and that it is only subject to claims for which it has clearly and unequivocally waived that immunity. Plaintiffs are wrong to castigate the tribal entity for using the process that tribes use to protect the government assets that the Tribe needs to provide governmental services to its member, while still also seeking to create new businesses.

II. PLAINTIFFS' CLAIMS ARE NOT WITHIN THE LIMITED SCOPE OF KEWADIN'S WAIVER OF SOVEREIGN IMMUNITY.

In its brief in support of its motion to dismiss, Kewadin showed that it has sovereign immunity from unconsented suit, and it showed that its claim of sovereign immunity is a jurisdictional issue, which is properly raised by a 12(b)(1) motion. Plaintiffs do not dispute these points (although, as discussed in section III, *infra*, Plaintiffs argue that this Court should decide the 12(b)(1) motion as if it were a 12(b)(6) motion).

Kewadin also provided a detailed discussion showing Plaintiffs' claim are not within the limited scope of the waiver of immunity. Plaintiffs do not have any substantive response to that argument. Instead, Plaintiffs assert that Kewadin's motion should be denied because Kewadin has waived immunity for some purposes. Plaintiffs fail to understand that existence of *a* waiver is insufficient. "[W]hether a waiver of sovereign immunity has occurred is an inquiry separate and

[6] The contracts contemplated casinos subject to the Indian Gaming Regulatory Act. Under SSM law, Kewadin is the department of the Tribe that operates all such IGRA regulated casinos.

distinct from a waiver's scope." *In re Greektown Holdings, LLC*, 917 F.3d 451, 466 (6th Cir. 2019).

Therefore, Plaintiffs have the burden, at this time, to show that their claims are within the *limited scope* of the waiver in this contract. *Spurr v. Pope,* 936 F.3d 478, 483 (6th Cir. 2019). In this case, as in many contract claims against a tribe or tribal entity, the issue is scope of the waiver.

Concomitant with a tribe's authority to retain or waive sovereign immunity, it has the authority to impose absolutely any condition or limitation on its waiver of its sovereign immunity.

> Because a waiver of immunity is altogether voluntary on the part of a tribe, it follows that a tribe may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted.

Mo. River Services, Inc. v. Omaha Tribe of Nebraska, 267 F.3d 848, 852 (8th Cir. 2001) (quoting in part *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857)). *See also Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978); *Ute Indian Tribe v. Utah*, 790 F.3d 1000 (10th Cir. 2015); *California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1154 (9th Cir. 1979) (Indian sovereign immunity is subject to all conditions and limitations the sovereign imposes); *Namekagon Dev. Co. v. Bois Forte Reservation Hous. Auth.*, 517 F.2d 508, 509 (8th Cir. 1979); c*f. Block v. North Dakota*, 461 U.S. 273, 287 ("A necessary corollary of this rule [that a sovereign cannot be sued without its consent] is that when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed.").

In *Ute Indian Tribe*, the Tribe had brought suit against Utah and several of its counties. The counties then brought counterclaims, which the Tribe moved to dismiss based upon sovereign immunity. The Tribe asserted that it had the right, discussed above, to impose any condition or limitation on its waiver that it chose, and that the Tribe's conditions and limitations were defined by the scope of the Tribe's complaint. Then Judge Gorsuch, writing for the Court, agreed with the Tribe, and remanded with order to dismiss the counterclaims. 790 F.3d at 1009-10.

Scope of the waiver is resolved using the same presumptions and standards used to determine whether there is a waiver. "[I]f a tribe 'does consent to suit, any conditional limitation it imposes on that consent must be strictly construed and applied.'" *Mo. River Services, Inc.*, 267 F.3d at 852 (quoting *Namekagon Dev. Co*., 517 F.2d at 509). *See also Ute Indian Tribe*, 790 F.3d at 1010.

Most of Plaintiffs' claims are off-the-contract claims. In its opening brief, Kewadin discussed that off-the-contract claims must be dismissed because there is no waiver for any off-contract claims.[7] Plaintiffs' only response is their incorrect assertion that if there is any waiver, then Plaintiffs can bring any claims they want to bring.[8]

In its opening brief, Kewadin also discussed in detail that any claims on the contract were limited to claims arising within this Court's jurisdiction,[9] and seeking monetary relief from a specific income stream; and claims for specific performance or injunctions to stop violations of the contract. Plaintiffs have not brought claims within that limitation. Their counterargument that

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[7] Those claims also would not appear to be claims within this Court's jurisdiction even if Plaintiffs cleared the first jurisdictional threshold of establishing an applicable waiver of sovereign immunity. *Spurr,* 936 F.3d at 483 (sovereign immunity is the first jurisdictional hurdle, and federal question or diversity is the second).

[8] Several of Plaintiffs' off-contract claims seek a lien. Those claims are barred because they are not on the contract, as discussed in the body of this brief. They are also barred because Plaintiffs, expressly agreed they could not assert a lien against any tribal or Kewadin property. Doc. 1-2, §6.3.7.2.

[9] Many waivers of immunity provide a potential secondary forum if the federal court concludes it does not have jurisdiction. In contrast, the present contract expressly excludes suit in any other forum. Parties, of course, cannot confer jurisdiction on this Court, and Plaintiffs assert, without explanation, that their claims arise under federal law. Their claims appear to be contract claims, tort claims, and other claims which do not raise any federal question even if the claims were to come within the limited waiver of sovereign immunity. Plaintiffs correctly note that tribal sovereign immunity and the scope of a waiver of tribal immunity are federal questions; but the well-pled complaint rule establishes that a potential or actual defensive assertion of sovereign immunity cannot be used as a basis for federal court jurisdiction. *E.g.*, *Stillaguamish Tribe of Indians v. Wash.*, 913 F.3d 1116 (9th Cir. 2019); *Iowa Mgmt. & Consultants, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, 207 F.3d 488 (8th Cir. 2000).

they can bring claims beyond those narrowly defined by the scope of the waiver must be rejected and this matter must be dismissed based upon Kewadin's sovereign immunity from suit.

III. PLAINTIFFS' ARGUMENT THAT THE TRIBE "MISUNDERSTANDS" THE DIFFERENCES BETWEEN MOTIONS UNDER RULE 12(B)(1), 12(B)(6), AND RULE 56 IS IRONIC: PLAINTIFFS ARE THE ONES WHO MISSTATE THE LAW GOVERNING THOSE DIFFERENT MOTIONS.

Plaintiffs concede that Kewadin's claim of sovereign immunity presents a jurisdictional issue. But after making that concession, Plaintiffs assert that all of the allegations of its complaint "must be assumed true for purposes of the Gaming Authority's pending motion." Resp.Br. at 2. Plaintiffs are wrong.

Kewadin's claim of sovereign immunity, like other jurisdictional issues, is a threshold question of law. Because it is a threshold issue, "that means we must address it—and must do so first." *Spurr v. Pope,* 936 F.3d 478, 483 (6th Cir. 2019). *See also Chemehuevi Indian Tribe v. Cal. St. Bd. of Equalization*, 757 F.2d 1047, 1051 (9th Cir. 1985), *rev'd. on other grounds*, 474 U.S. 9 (1985) (holding that a court "must address it first and resolve it irrespective of the merits of the claim"). "[I]f [the tribe] enjoys tribal-sovereign immunity, we need not address the issues of diversity jurisdiction and federal-question jurisdiction." *Memphis Biofuels*, 585 F.3d at 919-920.

This is so because sovereign immunity is "an *immunity from suit* rather than a mere defense to liability," *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985). "The Tribe's full enjoyment of its sovereign immunity is irrevocably lost once the Tribe is compelled to endure the burdens of litigation." *Kiowa Indian Tribe of Oklahoma v. Hoover,* 150 F.3d 1163, 1172 (10th Cir. 1998). For example, discovery in this case cannot occur until the threshold claim of immunity is resolved. *E.g., Liverman v. Comm. On The Judiciary,* 51 F. App'x 825, 828 (10th Cir. 2002) (discovery was properly stayed pending resolution of sovereign immunity motion). In fact, because of the importance of resolving a claim of immunity before any other action is taken in a case, a tribal

entity has authority to appeal an order denying a motion to dismiss on sovereign immunity, using the collateral order doctrine. *E.g. Ute Indian Tribe*, 790 F.3d 1005.

In support of its assertion to the contrary, Plaintiffs cite *Mayer v. Mylod*, 988 F.2d 635 (6th Cir. 1993). That case only discusses the standard that applies to a 12(b)(6) motion, but Plaintiffs themselves admit that the issue regarding scope of the waiver of sovereign immunity is a jurisdictional issue under 12(b)(1). Resp. Br. at 6 (citing *Memphis Biofuels,* 585 F.3d at 919-920).

The settled case law is that on a 12(b)(1) motion, the Court is not bound by the allegations of the complaint. Instead, Plaintiffs are required to prove, through admissible evidence, the facts which would support their claim of jurisdiction.[10]

Additionally, *Mayer* would not apply to most of Kewadin's challenges to allegations in Plaintiffs' complaint because most of those Kewadin's challenges are based upon the contract language. Whether under 12(b)(1) or 12(b)(6), the Court does not rely upon allegations of "fact" which are contrary to material language in a contract or other similar documents.

Finally, Plaintiffs reliance on *Mayer* is misplaced because that case predates the Supreme Court's holdings in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Those cases clarify that a court must dismiss a claim unless a plaintiff alleges facts which would make a claim "plausible," not merely possible or conceivable.

[10] Plaintiffs also mistakenly claim that a request to dismiss with prejudice cannot be addressed on a 12(b)(1) motion but must be addressed under Rule 56. Although a court would ordinarily dismiss for want of jurisdiction without prejudice, courts can exercise their inherent authority to dismiss with prejudice under Rule 12(b)(1) claims that have no basis in federal jurisdiction: here, Plaintiffs assert federal preemption jurisdiction of their non-federal claims outside the scope of Kewadin's limited waiver of tribal sovereignty that will "go nowhere in any court." *Beauchamp v. Sullivan*, 21 F.3d 789, 790-91 (7th Cir. 1994).

Plaintiffs have the burden to establish jurisdiction and to establish a waiver of Kewadin's sovereign immunity. *E.g., Spurr*, 936 F.3d at 483. For each of the reasons above, their asserting that the allegations of their complaint must be rejected.

IV. PLAINTIFFS ASSERTION THAT THE CONTRACT SHOULD BE CONSTRUED AGAINST DEFENDANT IS WRONG ON THE FACTS AND ON THE LAW.

In their response brief, Plaintiffs assert that the contracts should be construed in favor of Plaintiffs because, they assert, Kewadin drafted the contracts. Their argument is wrong on both the facts and the law.

A. PLAINTIFFS ARGUMENT MUST BE REJECTED BECAUSE IT IS FACTUALLY UNSUPPORTED

In their response brief, Plaintiffs assert, without any citation, that Kewadin drafted the contracts. That unsupported assertion is insufficient on the facts for two reasons. First, as discussed above, in the current Rule 12(b)(1) context, Plaintiffs are required to prove facts regarding jurisdiction. Plaintiffs have not provided any factual support for their assertion that Kewadin drafted the agreements. Because the factual predicate is missing, the Court need not consider the dependent legal argument.

Second, even if the Court were assuming the facts in the complaint to be true, the complaint does not even allege that Kewadin drafted the agreement, and the complaint therefore does not go to the required next step of alleging facts which would support that Kewadin drafted the agreement.[11]

[11] Kewadin's understanding is that Plaintiffs, not Kewadin, were the primary drafters of the contracts; and that this is why Plaintiffs have not alleged (in either the complaint or their brief) facts supporting their attorney's contention that Kewadin drafted the contracts.

B. PLAINTIFFS' ARGUMENT MUST BE REJECTED ON THE LAW.

As Kewadin discussed in its motion to dismiss, and as Plaintiffs admit, there are innumerable cases that hold that a claimed waiver of sovereign immunity must be strictly construed in favor of the sovereign, and there is a strong presumption against waiver. *E.g.*, *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001).

Although Plaintiffs admit that legal rule, Plaintiffs turn around and assert that the alleged waiver in this case must be construed against the sovereign. Plaintiffs are wrong. *Id.* They ground their argument upon their misinterpretation of a statement from *C& L Enterprises, Inc.* As noted above, *C & L Enterprises* reiterates the settled rule that a waiver of sovereign immunity must be narrowly construed in favor of the sovereign. The Citizen Band Potawatomi Tribe *also* asserted that the waiver had to be construed in favor of the Tribe because the opposing party had drafted the contract. It was in that context of a *tribe* asserting the presumption in favor of the tribe that the Supreme Court stated that it applies the rule of construction against the drafter in an appropriate case, but the Court held that the rule did not apply in *C & L Enterprises*.

This Court must apply the numerous cases that hold that contract language waiving immunity must be construed in favor of the sovereign. Plaintiffs' argument that *C & L Enterprises* is contrary to those numerous cases is wrong. In fact, *C & L Enterprises* is one of the Supreme Court cases which holds that a waiver of immunity must be construed narrowly, in favor of the sovereign.

In this case there is no ambiguity in the waiver of sovereign immunity. The parties agreed that the waiver applied only to a federal court suit regarding a specific, potential, income stream; and that the waiver would only apply to that income stream if Plaintiffs continued to provide their *quid pro quo* until that income stream started flowing, and to non-monetary claims for specific performance or injunction to stop non-compliance. But, even if we assumed, arguendo, that there

was ambiguity, that ambiguity must be construed in favor of the sovereign entity. Plaintiffs argument to the contrary is without merit.

CONCLUSION

Plaintiffs entered into a high risk/high reward contract. Plaintiffs have chosen not to continue to take the risk, based upon their conclusion that there is no chance that the income stream will ever flow. Resp. Br. at 3 (asserting that their "right to be paid from" the potential income stream is now "utterly worthless."); Comp. ¶11 (same). Although Kewadin cannot know what the future holds, its legal claim to operate casinos downstate is legally supported, and Kewadin therefore expects that it will ultimately prevail. But it is possible that Plaintiffs are right. Perhaps Plaintiffs would have been throwing good money after bad. But they cannot then bring suit against Kewadin, because Kewadin did not waive sovereign immunity for this suit, and therefore this Court is required to dismiss this case for lack of jurisdiction.

Dated this 18th day of June, 2020

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CERTIFICATE OF COMPLIANCE

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June 18, 2020

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