UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

KEWADIN CASINOS GAMING AUTHORITY, a duly authorized entity created under the laws of the Sault Ste. Marie Tribe of Chippewa Indians,

Plaintiff,

v.

HONORABLE JOYCE DRAGANCHUK, District Judge, State of Michigan, Ingham County Circuit Court, in her Individual and Official Capacities, JLLJ DEVELOPMENT, LLC, a Michigan Limited Liability Company, and LANSING FUTURE DEVELOPMENT II, LLC, a Michigan Limited Liability Company,

Defendants.

Case No. 2:22-cv-00027
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REPLY OF JLLJ AND LANSING FUTURE TO THE RESPONSE OF KEWADIN IN CONNECTION WITH DEFENDANTS JLLJ AND LANSING FUTURE'S MOTION TO DISMISS

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JLLJ and Lansing Future reply to the Response of Kewadin to JLLJ's and Lansing Future's motion to dismiss this litigation. As it has done all-too-often in its filings in this Court, the Ingham County Circuit Court, and the Michigan Court of Appeals, Kewadin's Response asserts positions totally inconsistent with its prior pleadings; and its newest assertion – that its own Commission has voided *ab initio* the contracts which central to the state court proceedings and in this Court – is utterly preposterous.[1]

A. Kewadin's Assertions in its Court Filings Contain Multiple Inconsistencies

In the first lawsuit which they filed in this Court in early 2020, JLLJ and Lansing Future sued Kewadin for breach of the parties' Development Agreements. In that litigation, Kewadin acknowledged that the parties did not regard the Development Agreements as management contracts. PageID 664-Court's Opinion in Case No. 1:20-00231 which included the statement that the parties had agreed that the Turn Key Agreements were not intended to be management contracts. Kewadin relied on the Development Agreements to support its claim that it never waived sovereign immunity. 1:20-00231, PageID 438-445.

In this Court's March 30, 2021 Opinion, Chief Judge Robert Jonker discussed the Development Agreements in detail at pp. 2-3, and then noted at p. 4 that "[t]he parties briefed the issue [of sovereign immunity] based on general principles of tribal sovereign immunity and the particular limited waiver language, and related provisions, in the Turn-Key Agreements."[2] Later

[1] Kewadin obtained additional time from this Court to respond to the pending motion to dismiss, based on Kewadin's representation that it was preparing an amended complaint. Page ID 715-716 Instead, Kewadin prepared and pursued its petition in the Gaming Commission, in a baseless attempt to undermine the proceedings in this Court (and in the state court).

[2] See Ex. 1 to JLLJ's and Lansing Future's February 25, 2022 brief supporting their motion to dismiss. PageID 658 *et seq.* PageID 659 through 661 are pages 2 through 4 of the Opinion. The Development Agreements are sometimes referred to as "Turn-Key Agreements" and include the parties' contracts, executed promissory notes and other transaction documents.

in its Opinion, the Court noted that Development Agreements do not involve contracts to manage actual gaming operations, emphasizing that "the Developers and Kewadin expressly decided not to enter into a management contract." PageID 666. Finally, the Court expressed that the lawsuit does "not attack the Tribe's licensing process or interfere with the Tribe's ability to regulate gaming on federal land. The Developers did not have to obtain any license from the Tribe. Nor did the Developers enter into any management agreement with the Tribe.[3] The claims in this case represent a standard contract dispute and are far removed from any attempt to regulate tribal gaming on tribal land." PageID 668.

After the first federal court lawsuit was dismissed and JLLJ and Lansing Future sued Kewadin in the Ingham County Circuit Court, the Development Agreements were again center stage. Each side relied on different provisions of those contracts, and the state court ultimately determined that Kewadin waived its sovereign immunity in them.[4] Kewadin later filed the instant lawsuit in this Court, seeking, among other things, to enjoin the state court proceedings and asking this Court to declare that JLLJ and Lansing Future cannot enforce the Development Agreements as a matter of federal law.

Most recently, in the petition it filed in its own Sault Ste. Marie Tribe of Chippewa Indians Gaming Commission, Kewadin asserted that the Commission has *exclusive jurisdiction* to determine the validity of the Development Agreements; and as part of its Response to JLLJ's and Lansing Future's pending motion to dismiss, Kewadin attached the Commission's Order,

[3] See, also, Recital H in each of the Turn-Key Agreements, indicating that Kewadin is to have the sole responsibility of operating the casinos once they are built.

[4] *See*, e.g., Kewadin's May 11, 2021 state court motion to dismiss (Ex. 1 to this Reply), in which Kewadin asks the state court to determine that the Development Agreements do not waive Kewadin's sovereign immunity. In its Order, dated February 8, 2022, this Court addresses the specific findings made by the state court in this regard. Page ID 622.

purporting to void *ab initio* the Development Agreements which are at the heart of the state and federal litigation. *See* Ex. B to Kewadin's Response.[5] PageID 806-809. Kewadin, shamefully, seems untroubled by taking inconsistent positions from court to court or by asserting to this Court that Kewadin's own Commission can unilaterally determine the validity of the contracts at issue here.

B. Kewadin's Assertion that the State Court Lacks Jurisdiction is Incorrect

Kewadin insists, incorrectly, that it is the province of this Court to determine that the state court lacks jurisdiction to address the claims asserted by JLLJ and Lansing Future in the Ingham County litigation. Kewadin has filed a summary disposition motion contesting the state court's subject matter jurisdiction (Ex. 11). "Subject-matter jurisdiction…concerns a court's authority to hear and determine a case." *Bowie v. Arder,* 441 Mich 23, 36 (1992). The circuit court's subject matter jurisdiction is presumed unless the constitution or a statute precludes it. *Bowie, supra,* 411 Mich at 38. That authority depends "…on the character or class of the case pending" rather than the particular facts of that case. *People v. Lown,* 488 Mich 242, 268 (2011). A Michigan circuit court has "original jurisdiction in all matters not prohibited by law…." Const 1963, art. VI, §13. The circuit court also has jurisdiction which courts of record possessed at common law as altered by the State's 1963 constitution, the State's laws and the supreme court's rules. M.C.L. 600.601(a). The circuit court has the authority to determine its jurisdiction. *See generally, Fox v. Board of Regents,* 375 Mich 238, 242 (1965).

JLLJ and Lansing Future, both non-tribal entities, did not need to satisfy the tribal exhaustion doctrine, nor did the State of Michigan have to assume general civil jurisdiction over

[5] The petition is attached as Ex. 2 to this Reply, because Kewadin did not provide it to the Court. The contents of the petition have utterly no support in fact or law and refer to provisions of the Tribal Code which do not correspond at all to the assertions stated in the petition.

tribal territory under Section 1322 and 1326 of Title 25, in order to vest subject-matter jurisdiction in the Ingham County Circuit Court to adjudicate disputes between the parties. This is because Kewadin expressly agreed in the Development Agreements that: (1) it "waive[d] all sovereign immunity in regards to all contractual disputes"; (2) the contracts were "executed and interpreted in accordance with the laws of the State of Michigan"; and (3) it "agree[d] to submit to the jurisdiction of the federal and state courts located in the State of Michigan." Kewadin's waiver of sovereign immunity and its consent to litigate in Michigan's state courts, rather than in a tribal forum, was all that was necessary to vest subject-matter jurisdiction in the Ingham County Court. In those contracts, Kewadin also expressly waived the need to exhaust tribal remedies.

Plaintiffs do not dispute the general proposition that "Indian tribes are "domestic dependent nations" that exercise 'inherent sovereign authority'" subject to "plenary and exclusive" control by Congress. *Michigan v. Bay Mills Indian Cmty*., 572 U.S. 782, 788 (2014) (quoting *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla*., 498 U.S. 505, 509 (1991). However, the Supreme Court has long recognized that a Tribe may be "subject to suit * * * where Congress has authorized the suit or the tribe has waived its immunity." *C & L Enterprises, Inc*. v. *Citizen Band Potawatomi Indian Tribe of Okla*., 532 U.S. 411, 416 (2001) (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc*., 523 U.S. 751, 754 (1998)). See also *Bay Mills, supra,* at 789 ("We have time and again treated the doctrine of tribal immunity as settled law and dismissed any sued against a tribe absent congressional authorization (*or a waiver*).")(emphasis added).

A tribe may contractually waive immunity and submit to state court jurisdiction if its waiver is "clear*." C & L Enterprises*, 532 U.S. at 418. In that case, the Supreme Court held that a tribe waived sovereign immunity and consented to state court jurisdiction when it agreed to a contract containing arbitration and choice-of-law provisions. *Id.* at 423. The Court explained that

the arbitration provision "require[d] resolution of all contract-related disputes between the parties by binding arbitration" and that a judgment upon the award "may be entered * * * in accordance with applicable law in any court having jurisdiction thereof." *Id*. The contract's choice-of-law provision stated that the contract was "governed by the law of the place where the Project [wa]s located," which was Oklahoma. *Id*. And Oklahoma gave its court's jurisdiction to enforce arbitration awards. *Id*. at 419–420. On these facts, the Court was "satisfied" that the tribe had "waived, with the requisite clarity, immunity from the suit *C & L Enterprises* brought [in state court] to enforce its arbitration award." *Id.* at 418.

In *Altheimer & Gray*, 983 F.2d 803 (CA7, 1993), the Seventh Circuit held that a non-tribal manufacturing company did not need to exhaust tribal remedies because the tribe had waived sovereign immunity and consented to federal and state jurisdiction. *Id.* at 814-15. The tribe expressly agreed to "waive all sovereign immunity in regards to all contractual disputes," that the contract was "executed and interpreted in accordance with the laws of the State of Illinois," and "to submit to the venue and jurisdiction of the federal and state courts located in the State of Illinois." *Id.* at 807. The court held that compelling exhaustion of remedies in a tribal court would not further comity with tribal courts, noting: "If contracting parties cannot trust the validity of choice of law and venue provisions, [the tribal entity] may well find itself unable to compete and the Tribe's efforts to improve the reservation's economy may come to naught." *Id, at 815.*

And in *Stifel, Nicolaus & Co.* v. *Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184 (CA7, 2015), the Seventh Circuit reaffirmed its position, even in the face of a challenge to the validity of the parties' contract. There, the tribe obtained bond instruments from a nontribal brokerage to finance a casino development. *Id.* at 189. Several instruments contained waivers of sovereign immunity and provided for disputes to be resolved under Wisconsin law in

either federal or state court. *Id.* The tribe tried to distinguish *Altheimer* by raising "significant issues of tribal law" and seeking to void the instruments "under tribal law, [federal law], and the tribal constitution." *Id.* at 197. The Seventh Circuit flatly rejected that logic, holding "the presence of a forum selection clause is dispositive of the exhaustion issue: 'To refuse enforcement of this routine contract provision would be to undercut the Tribe's self-government and self-determination.'" *Id.* at 196 (quoting *Altheimer*, 983 F.2d at 815). It also explained that a general challenge to contract's validity could not negate the forum-selection clause; the tribe would need to prove that the forum-selection clause itself was invalid. *Id.* at 198–99. *see also Enerplus Res. (USA) Corp.* v. *Wilkinson*, 865 F.3d 1094, 1097 (CA8, 2017) ("The tribal exhaustion doctrine does not apply when the contracting parties have included a forum selection clause in their agreement.").[6]

Michigan courts have routinely applied the same approach employed in *C & L Enterprises, supra,* endeavoring to ascertain whether a tribal entity contractually waived sovereign immunity and consented to subject-matter jurisdiction of the Michigan courts, without the need to determine whether there was a tribal election to assume general civil jurisdiction over tribal territory under Section 1322 and 1326 of Title 25. For example, in *Star Tickets v. Chumash Casino Resort*, 2015 WL 6438110 (2015), the Michigan Court of Appeals held:

> Here, the agreement, while not specifically referencing sovereign immunity, indicated that it was enforceable against any party in any court of competent jurisdiction within Kent County, Michigan, that the parties consented and submitted to the personal jurisdiction of Michigan for purposes of enforcing the agreement, and that the agreement was governed by the laws of Michigan. The language clearly, unambiguously reflected a waiver of sovereign immunity, goes beyond the arbitration provision in *C & L Enterprises* . . . (PageID 672).

[6] The instant case is more compelling, because Kewadin explicitly waived exhaustion of tribal remedies. See, p. 2 of Ex. 3 to this Reply (which is part of the Development Agreements).

See, also, *Bates v. 132 Associates, LLC*, 290 Mich. App. 52, 59 (2010) ("Moreover, the waiver in this case is clearer and more explicit than in *C& L Enterprises* because the waiver in that case was simply an arbitration clause contained in a form agreement. In this case. . . the waiver was clear and unequivocal.") Kewadin's waiver of sovereign immunity and the need to exhaust tribal remedies, and its consent to jurisdiction of the state court, are more comprehensive and explicit that those enforced in *C & L Enterprises, Chumash and Bates.*[7] Thus, subject-matter jurisdiction is properly vested in Michigan courts to adjudicate the contractual disputes arising from the Development Agreements, regardless of whether a tribal election to assume general civil jurisdiction under Section 1322 and 1326 of Title 25 ever occurred.

Kewadin argues on PageID 679-770, 777 and 780 of its Response that the exercise of jurisdiction by Michigan state courts in this case is preempted by various United States' treaties with the tribe and by the application of 25 U.S.C. §§ 1321-26. Kewadin relies on *Ute Indian Tribe of the Uintah & Ouray Resr v. Lawrence,* 22 F.4th 892 (CA 10, 2022) to support its claim that Michigan's state courts lack subject-matter jurisdiction because the tribe never consented to state jurisdiction by making a special election. However*, Ute* decision is clearly distinguishable from the instant case.

Section 1322(a) provides one means for state courts to acquire jurisdiction over one category of cases. But it does not bar a tribe from consenting to jurisdiction in a specific case,

[7] Kewadin's waiver and consent state, in part, "[I]n furtherance of the foregoing waiver and with respect to any Claim, the Borrower hereby consents, with respect to any Claim, to be sued in (i) the United States District Court for the Western District of Michigan (and all federal courts to which decisions of the United States District Court for the Western District of Michigan may be appealed), (ii) any court of general jurisdiction in the State of Michigan (including all courts of the State of Michigan to which decisions of such courts may be appealed)[7], and (iii) only if none of the foregoing courts have jurisdiction, or only to permit the enforcement of any judgment, decree or award of any foregoing court, all tribal courts and dispute resolution processes of the Sault Ste. Marie Tribe of Chippewa Indians. See p. 2 of Ex. 3 to this Reply.

which Kewadin did here. *Ute* is also distinguishable because the state court claims asserted by the non-Indian plaintiff arose from events that occurred *on the reservation.*

Section 1322 of Title 25 provides that "[t]he consent of the United States is hereby given to any State not having jurisdiction over civil causes of action * * * to which Indians are a party which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe * * * such measure of jurisdiction over any or all such civil causes of action *arising within such Indian country* * * * to the same extent that such State has jurisdiction over other civil causes of action * * * ." 25 U.S.C. § 1322(a)(emphasis added).

In contrast to *Ute,* the Development Agreements executed by Kewadin contemplate the developing, financing and construction of casino facilities on land not located on the Tribe's reservation. Rather, the parcels are situated in Lansing and Wayne County, Michigan. In a letter dated July 24, 2017 from James Cason, the Associate Deputy Secretary of the Interior, informed the Tribe that its application to have the United States take into trust the Lansing and Sibley parcels was being denied because, among other reasons, the Tribe's headquarters is some 260 miles from the Lansing Parcel, and some 305 miles from the Sibley Parcel. See Ex. 4. Those parcels clearly do not constitute Indian land within the limits of the Reservation.[8]

C. **Kewadin's Reliance on its own Gaming Commission's Order is Misplaced and Ought to be Rejected by this Court**

The state court entered Kewadin's default on April 13, 2022, following a hearing on that date. See Ex. 5. Before that hearing, Kewadin filed a petition in its own Sault Ste. Marie Tribe

[8] The United States District of Columbia Court of Appeals recently determined that the Sibley parcel on which Kewadin was going to construct a casino could not be put into trust with the Department of the Interior. *See Sault Ste. Marie Tribe of Chippewa Indians, v. Haaland*, 25 F.4th 12, 14 (D.C. Cir. 2022). The Tribe had previously agreed that its claim regarding the Lansing parcel was moot. 442. F.Supp3d 53, 60, n. 2 (D. D.C. 2020).

Gaming Commission to declare the Development Agreements and the state court's discovery orders null and void. The petition, dated April 1, 2022, was acted on by the Commission at a putative hearing held four days later. JLLJ and Lansing Future learned of the petition and the hearing after the hearing was held.[9] The purported Order of the Commission, invalidating the Development Agreements and determining that the state court's discovery orders were invalid, was signed by Aaron Payment, who is chairman of the Commission, the Tribe and Kewadin. The Tribal Code and Kewadin's website disclose that the other members of the Commission are also members of the Board of Directors of the Tribe and Kewadin.

Tribal Code, Chapter 42, provides that the Chairman of the Board of the Sault Ste. Marie Tribe of Chippewa Indians is to serve as Chairman of Kewadin and the Commission. See Ex. 7, Sections 42.202, 42.404. Similarly, Kewadin's website shows that the members of the Commission are the same individuals who serve on the Boards of Directors of Kewadin and the Tribe. See Ex. 8. Thus, Kewadin's Petition asks *its own Board members* to adjudicate the claims and defenses which are being litigated between JLLJ, Lansing Future, and Kewadin. Such a proceeding is obviously self-serving and a sham, as the Commission is not an independent tribunal, and the Commission's Order is clearly unenforceable because it was obtained without any semblance of due process safeguards. *See, e.g., Crampton v. Secretary of State,* 395 Mich 347, 351 (1975)(right to an unbiased and impartial decision maker) and *Matthews v. Eldridge,* 423 US 319, 332; 96 S Ct 893, 902; 47 L Ed2d 18 (1976)(right to be heard at a meaningful time and in a meaningful manner).

Due process considerations aside, because Kewadin expressly consented to state court jurisdiction and waived both sovereign immunity and tribal exhaustion, the Commission lacked

[9] The accompanying Affidavit of Jerry Campbell, on behalf of Lansing Future, is attached as Ex. 6. The Affidavit indicates that no hearing notice was ever served on Lansing Future.

jurisdiction over the case and could not force non-Indians JLLJ and Lansing Future to appear before it. In the forum selection clauses at issue here, Kewadin explicitly agreed to resolve disputes arising under the Development Agreements outside of the tribal courts, as long as the federal or state courts are available to hear the disputes; and it waived the need to exhaust tribal remedies. Kewadin was precluded from asserting in the Commission any claims arising from those contracts. *Enerplus Res. (Usa) Corp., supra* (finding injunctive relief to be appropriate, and prohibiting a party and the tribal court, from acting in the face of a sufficient forum selection clause). No tribal exhaustion requirement exists when parties have included a forum selection clause in their contracts. *FGS Constructors v. Carlow*, 64 F.3d 1230, 1233 (CA 8, 1995)(finding that exhaustion of tribal court remedies is unnecessary when a forum selection clause provides for disputes to be litigated elsewhere); and *Larson v. Martin*, 386 F. Supp. 2d 1083, 1088 (D.N.D. 2005) ("when the negotiating parties have agreed to an appropriate forum, exhaustion of tribal remedies is not required").

Kewadin's petition asks its own Commission to declare void the Development Agreements which are at the heart of the pending lawsuit in this Court,[10] and it asserts that, because the Development Agreements are void, "any alleged consent to state court jurisdiction or any waiver of exhaustion of tribal remedies is also void." *Id*, at p. 16. The petition thus seeks a determination from the Commission that directly conflicts with the state court's determination that Kewadin explicitly waived its sovereign immunity and consented to its jurisdiction to address and resolve the parties' disputes. Similarly, the assertions in the petition are contrary to the determination

[10] The Development Agreements' validity and the effect of the parties' undertakings and covenants therein are the subject of this action and the state court action. Kewadin improperly shopped for a favorable and predisposed forum, albeit one which is not a judicial tribunal.

reached by this Court in the Opinion of Judge Jonker, discussed at pp. 1-2, above. It is no wonder why Kewadin did not provide this Court with a copy of the Petition it filed.

The actions of Kewadin and its self-serving Commission do not impact the proper outcome here. JLLJ's and Lansing Future's state court Complaint describes the parties' undertakings and promises in the Development Agreements, and those matters are deemed admitted due to Kewadin's default. The Development Agreements include Kewadin's acknowledgment that this Court's jurisdiction and the state court's jurisdiction trump the jurisdiction of the tribal courts; and Kewadin promised not to look to the tribal courts, and not to require exhaustion of tribal remedies, as long as this Court or the state court exercises jurisdiction over the parties' dispute. *See* fn. 4, *supra*.

The Commission clearly lacked jurisdiction to enter the Order dated April 5, 2022 which purports to impact the instant case because (i) Kewadin expressly consented by contract to state court jurisdiction and waived both sovereign immunity and tribal exhaustion and cannot force non-consenting and non-Indian parties to defend themselves before the Commission, (ii) the Order does not meet rudimentary due process requirements, (iii) the petition contained multiple mischaracterization of facts and incorrect statements of law, and (iv) the self-serving Commission acted in bad faith.[11] Kewadin ought to be judicially estopped from asserting that the Development Agreements are management agreements which are void, and from relying on its own Commission to support that claim.

[11] A good example is this: Contrary to the January 9, 2014 determination of the National Indian Gaming Commission that the Development Agreements are not management contracts – which is a determination solicited by Kewadin and the Tribe several years ago – Kewadin's Chairman, Aaron Payment, acting for the Commission, recently signed an Order finding the Development Agreements to be illegal management contracts. Payment presumably did so to undermine the pending state court and federal court litigation. See Ex. 9 to this Reply.

Moreover, the Commission is not a judicial body, it is not part of the tribal court system, and its decisions are not binding on any court. The narrow purpose of the Commission, set forth in Section 42.102 of the Gaming Ordinance, is to oversee existing gaming establishments where gaming activity is occurring. As shown throughout this Reply, the parties and this Court have determined that Development Agreements do not involve such activities.

The Commission's Order is unenforceable because of lack of fundamental due process protection or independence to afford adequate protection for the rights of non-Indian plaintiffs for off-reservation actions as guaranteed under the Bill of Rights, including, takings without compensation, denial of equal protection, due process, and equal protection. See, also, *National Farmers Union v. Crow Tribe*, 471 U.S. 845 at 856 n. 2 (1985), holding that exhaustion of tribal remedies is not applicable where: (1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) the action is patently violative of express jurisdictional prohibitions; or (3) exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction. Each of these exceptions is applicable to Commission's putative Order. Kewadin's assertion that JLLJ, Lansing Future, and even the state court, are seeking to coerce the tribe and Kewadin to commit civil and criminal violations of the tribe's gaming laws is utter nonsense. Kewadin simply prefers not to comply with the state court's discovery orders. But once Kewadin submitted to the state court's jurisdiction and waived sovereign immunity and tribal exhaustion, Kewadin was required to comply with the state court's orders, and Kewadin's Commission could not obstruct that process. It is not surprising that another federal court sanctioned a party represented by Kewadin's counsel in this case, for engaging in abusive,

improper tactics. See *Becker v. Ute Indian Tribe of the Uintah, Case No. 2:16-cv-579 (D. Utah* Mar. 31, 2021)(Ex. 10).[12]

D. Conclusion

For the above reasons, this Court should grant Plaintiffs' Motion to Dismiss Kewadin's Complaint and permit the state court to address the parties' disputes, including those which Kewadin asks this Court to decide.

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Dated: April 27, 2022

[12] These same issues are pending before the state court as well. See, e.g. Kewadin's recently-filed motion for summary disposition in the state court. Ex. 11 to this Reply. In fact, Kewadin filed that motion earlier in the day it filed its Response in this Court.

CERTIFICATION AS TO WORD COUNT

The undersigned hereby certifies, in accordance with LR 7.2(b)(1), there are 4,261 words in this Reply, exclusive of the caption, cover page, table of contents, index of authorities, and proof of service. The software used to make this determination is Microsoft Word.

/s/ Michael H. Perry
Michael H. Perry

PROOF OF SERVICE

The undersigned hereby certifies that on April 27, 2022, he filed **REPLY OF JLLJ AND LANSING FUTURE TO THE RESPONSE OF KEWADIN IN CONNECTION WITH DEFENDANTS JLLJ AND LANSING FUTURE'S MOTION TO DISMISS** with the Clerk of the Court via the electronic filing system which will send notification of such filing to all counsel of record.

/s/ Michael H. Perry
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