IN THE UNITED STATES DISTRICT COURT FOR
THE 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

Hon. Hala Y. Jarbou

DEFENDANT HON. JOYCE DRAGANCHUK'S REPLY BRIEF

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DEFENDANT HONORABLE JOYCE DRAGANCHUK'S REPLY BRIEF

Defendant Honorable Joyce Draganchuk, by her attorneys, Cohl, Stoker & Toskey, P.C., submits this Brief in Reply to Plaintiff's Brief in Opposition to Motions to Dismiss (ECF No. 31, PageID.761-799).

INTRODUCTION

Judge Draganchuk ruled that Plaintiff waived its sovereign immunity in the underlying State Court litigation currently pending in the Ingham County Circuit Court. There is no serious question that the Circuit Court has general jurisdiction over contract matters upon such a waiver, which jurisdiction was clearly contemplated by the parties in the express language of the waiver.

The Federal Court previously ruled that it lacked subject matter jurisdiction over the Developers' contract claims against Plaintiff. Under the express terms of the Plaintiff's contracts with the Developers, as determined by Judge Draganchuk, if jurisdiction did not lie in Federal Court, then the parties could resort to litigation in State Court.

As for the presiding Circuit Court Judge (Judge Draganchuk) continuing as a named party to this litigation, she is merely the presiding judge in a matter of business litigation, ruling on motions, enforcing discovery orders, etc.

Judge Draganchuk may not argue the merits of either party's positions. She is simply serving in her official judicial capacity, making rulings on the record before her. Any perceived errors in rulings in the litigation are subject to review by the Michigan Court of Appeals and the Michigan Supreme Court, in which the Plaintiff and the Developers may argue their respective positions, without Judge Draganchuk's involvement. Judge Draganchuk should not be made to defend her rulings in this Court.

REPLY TO PLAINTIFF'S ARGUMENTS

A. Plaintiff Did Not Properly Raise the Issue of Subject Matter Jurisdiction in the Circuit Court.

Plaintiff's primary argument in response to Defendants' Motions to Dismiss is that the Circuit Court lacks subject matter jurisdiction, which Plaintiff argues is a separate and distinct issue from the waiver of sovereign immunity, i.e., they are "different animals." (ECF No. 31, PageID.769). The problem presented is that Plaintiff failed or refused to prosecute or litigate the issue of subject matter jurisdiction in the State Court proceedings in its various motions. Rather, the issues and arguments presented to Judge Draganchuk in Plaintiff's initial "Motion to Dismiss," and later on Plaintiff's "Second Motion to Dismiss" and Motion for Reconsideration, were limited to the waiver of sovereign immunity, and contract interpretation. (ECF No. 14-3, PageID.490-491; ECF No. 1-10, PageID.167; ECF No. 14-4, PageID.504-510.)

In her initial ruling, Judge Draganchuk expressly noted:

> Well, as I indicated at the beginning, this is the Defendant's Motion to Dismiss. It is, in actuality, a Motion for Summary Disposition. According to the motion, it's brought under (C)(4), subject matter jurisdiction. But that – I could not find any briefing on that, so I'm not considering it under (C)(4).
>
> It was also brought under (C)(10), according to the motion. But it wasn't briefed, again, as a (C)(10) motion, and it wasn't properly supported as a (C)(10) motion, so I'm not considering it a (C)(10) motion.
>
> What it is is a (C)(7) motion, which is how it was briefed, and that is that the – the assertion of sovereign immunity with respect to the Tribe. So proceeding on those grounds I think it would be wise to start with some guiding principles in this area.

(ECF No. 14-3, PageID.490-491.)

Although Plaintiff complained in its subsequent motions that Judge Draganchuk failed or refused to consider its arguments on subject matter jurisdiction, Judge Draganchuk found "no fundamental difference from the original motion; both filings challenged this Court's jurisdiction

based on sovereign immunity." (ECF No. 14-4, PageID.505.) Thus, the issue as to whether the underlying litigation should be dismissed for lack of subject matter jurisdiction, i.e., based on the arguments that Plaintiff now makes in this litigation, has not yet been brought before much less considered by Judge Draganchuk.

However, following its February 4, 2022, filing of this litigation, on April 13, 2022, Plaintiff filed a Motion for Summary Disposition Due to Lack of Subject Matter Jurisdiction in the Circuit Court. Plaintiff's Motion is presently scheduled for hearing before Judge Draganchuk on May 18, 2022. (See Register of Actions, attached as Exhibit A.) Judge Draganchuk will review the parties' briefs and arguments on Plaintiff's Motion, and issue an appropriate ruling at that time. Judge Draganchuk will not and should not argue the merits of the parties' arguments on that issue in this litigation.

B. <u>The Federal Court Has Already Ruled that It Lacks Subject Matter Jurisdiction</u>.

For purposes of the present Motions to Dismiss and/or for Summary Judgment in this Court, Plaintiff is apparently arguing that notwithstanding its waiver of its sovereign immunity, its contracts with the Developers cannot be enforced in State Court (ECF No. 31, Page ID.770), and that this is true even though the Federal Court has ruled that it lacks subject matter jurisdiction over a contract action between these non-diverse parties. (ECF No. 14-2, PageID.459-469).[1] However, the cases cited by Plaintiff on page 3 of its Brief, e.g., *Quality Tooling, Inc. v. United States*, 47 F.3d 1569 (Fed. Cir. 1995) and *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008 (9th Cir. 2007), refer only to the subject matter jurisdiction of the Federal Court, which is limited to cases over which it is statutorily authorized to exercise jurisdiction, as opposed to a Michigan

[1] Plaintiff's arguments as to the Circuit Court's alleged lack of subject matter jurisdiction would effectively render the contracts nonsensical or meaningless, i.e., unenforceable under any circumstances, without any remedy to a non-breaching party.

Circuit Court which has broad general subject matter jurisdiction, e.g., over contract actions where the amount in controversy exceeds $25,000.00, i.e., what Plaintiff describes as "plain vanilla claims for contract, quasi-contact, and equitable relief." (ECF No. 31, PageID.776.)

Contrary to Plaintiff's assertions, the Circuit Court does not exercise jurisdiction by stipulation, but rather by law pursuant to the Constitution and statutory authority set forth in Defendant's initial Brief. (ECF No. 23, PageID.694.) See Mich. Const. 1963, art. 6, §1; Mich. Comp. L. §600.605; *Winkler by Winkler v. Marist Fathers of Detroit, Inc.*, 500 Mich. 327, 334; 901 N.W.2d 566 (2017); *Joy v. Two-Bit Corp.*, 287 Mich. 244, 253-254; 283 N.W. 45 (1938).

C. <u>This Court Has Already Denied Plaintiff's Motion for Preliminary Injunction</u>.

Judge Draganchuk issued orders in the underlying case consistent with contract litigation, and consistent with the Court's exercise of judicial authority in a case that falls within its jurisdiction. Plaintiff otherwise complains that compliance with Judge Draganchuk's discovery Orders would compel Tribal officers and employees to act contrary to Tribal law.[2] But the essence here is that Judge Draganchuk ruled that Plaintiff waived its sovereign immunity, and further, that that issue is subject to review on appeal to the Michigan Court of Appeals. Moreover, this Court has already denied Plaintiff's Motion for a temporary restraining order and preliminary injunction, in part on the grounds that a stay of the State Court proceedings would be contrary to the Anti-Injunction Act, 28 U.S.C. §2283, not falling within any claimed exception to the general rule prohibiting an injunction. (ECF No. 15, PageID.624-626.) As this Court noted:

> "Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in

[2] Plaintiff did not object in this Court upon the Circuit Court's denial of its Motions for Summary Disposition, or after the Circuit Court issued orders compelling discovery, but only when Plaintiff's contempt for those orders was brought to the Circuit Court's attention in motions by the Developers.

> an orderly fashion to finally determine the controversy." *Atl. Coast Line R.R. Co. v. Bhd. Of Locomotive Engineers*, 398 U.S. 281, 297 (1970).

(ECF No. 15, PageID.624.)

Plaintiff also argues that the *Rooker-Feldman* doctrine is inapplicable, on the basis that no final judgment has been entered. Judge Draganchuk acknowledges that there has been no final judgment rendered in the underlying Circuit Court litigation, although Plaintiff has filed appeals from her Orders in the Michigan Court of Appeals. (ECF No. 23-2, PageID.709-713.)

Even so, Plaintiff misleads this Court in its citation to *In re Smith*, 349 F. App'x. 12 (6th Cir. 2009). (ECF No. 31, PageID.774-775, quoting extensively from Judge Sutton's dissent.) Plaintiff argues that, "The Sixth Circuit Court of Appeals [in *Smith*] held that *Rooker-Feldman* did not apply because the plaintiff's injury was caused by state officials, not the state court judgment denying his petition." (ECF No. 31, PageID.774, quoting from *Smith, supra*, at 18, Sutton, J., dissenting in part). But contrary to Plaintiff's assertion, the actual holding in *Smith* was that the *Rooker-Feldman* doctrine did apply: "We hold that the district court lacked jurisdiction on the basis of the *Rooker–Feldman* doctrine, and DISMISS this action." *In re Smith*, 349 F. App'x. at 12.

With regard to the issue as to whether there is a Federal question as argued by Plaintiff, as to either subject matter jurisdiction or as an exception to the Anti-Injunction Act, Judge Draganchuk does not view her rulings as intruding on Plaintiff's claimed "exclusive right to regulate gaming activity on Indian lands…" (ECF No. 31, PageID.778, 785, quoting 25 U.S.C. §2701(5)). There are no Indian tribal lands at issue here, such that Plaintiff's citation to *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661; 94 S. Ct. 772; 39 L.Ed.2d 73 (1974) is misplaced and misleading. (ECF No. 31, PageID.779.)

The Federal Court already determined that it lacked subject matter jurisdiction over claims arising under the contracts between Plaintiff and the Developers, i.e., there is no Federal question. This Court apparently did not view the contracts as "necessarily federal in character," as now argued by Plaintiff (ECF No. 31, PageID.778), such that State adjudicatory jurisdiction is preempted by federal law. Otherwise, Plaintiff's arguments as to preemption pursuant to *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968) might have some relevance. (ECF No. 31, PageID.778.) But, it appears that Plaintiff wants it both ways – no Federal Court jurisdiction, and no State Court jurisdiction.

In this light, the cases cited on page 14 of Plaintiff's Brief (ECF No. 31, PageID.781) are inapposite, as they involve the issue of whether State statutes apply on an Indian reservation, or whether tribal courts have jurisdiction over non-Indians. See, e.g., *Ute Indian Tribe of the Uintah and Ouray Reservation v. Lawrence*, 875 F.3d 539, 543 (10th Cir. 2017). It would appear that the underlying Circuit Court litigation cannot be found to be contrary to Federal law where the Federal Court has disclaimed jurisdiction. The underlying case is a mere contract action where the Court determines the rights, obligations and remedies negotiated by the parties on a claim of breach by one of the parties. None of Plaintiff's cited cases are contract claims.

If Plaintiff prevails on the grounds that a federal question precludes State Court jurisdiction, then it would appear that the Federal Court must, of necessity, assume jurisdiction over the Developers' claims (which jurisdiction this Court has already disclaimed). The Developers resorted to State Court only after the Federal Court dismissed their claims for lack of subject matter jurisdiction.

D. Judge Draganchuk Should Be Dismissed as a Party.

In any event, Judge Draganchuk must be dismissed as a party to this litigation. She did not act in the complete absence of all jurisdiction, i.e., the Circuit Court has general jurisdiction over the "plain vanilla" contract action where Plaintiff waived its sovereign immunity from suit. Plaintiff bases its challenge to Judge Draganchuk's jurisdiction (and judicial immunity from suit) on preemption grounds. The presiding judge derives her authority and powers under Michigan law and the Constitution. Had this Court taken jurisdiction of the Developers' claim, the case would likely never have been filed in State Circuit Court.

Judge Draganchuk acknowledges that Plaintiff makes no claim against her for monetary damages. Nevertheless, there is no basis in law for Judge Draganchuk to be a party, even if this Court has the authority to enjoin the State Court proceedings. This Court has already ruled that the Anti-Injunction Act applies to prevent this Court from staying the State Court litigation, and that no exceptions are applicable. (ECF No. 15.) Plaintiff's renewed efforts to find an exception to the AIA are misplaced. This case does not appear to involve the Tribe's gaming operations or the operation of a licensed casino. No gaming operations or gaming activities are at issue. Cf. *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994), *Seneca-Cayuga Tribe of Oklahoma v. Oklahoma*, 874 F.32d 709 (10th Cir. 1989).

Dismissal of Judge Draganchuk as a party, particularly as to Plaintiff's claim for declaratory relief, may be based on the reasoning in *Lindke v. Tomlinson*, __ F.4th ___; 2022 WL 1090188 (6th Cir., April 12, 2022), where the plaintiff brought a claim under 42 U.S.C. §1983 against a State Probate Judge to enjoin enforcement of Michigan's Personal Protection Order (PPO) statute. The District Court dismissed the claim against the Judge for lack of subject matter jurisdiction, and the Sixth Circuit affirmed.

In *Lindke*, the Probate Judge determined that the Plaintiff had violated a PPO. Rather than appeal the Judge's decision to the Court of Appeals, the plaintiff sued the Judge in Federal Court. The Sixth Circuit noted that the District Court had found instructive the case of *Lindke v. Lane*, 523 F. Supp. 3d 940, 943 (E.D. Mich. 2021), which had concluded that the judge's role was to act "in an adjudicatory capacity when she construed and applied" the PPO statute in the underlying action. *Lindke, supra*, at *1.

In affirming dismissal of the plaintiff's claims, including those for declaratory relief against the Probate Judge, the Sixth Circuit also relied on *In re Justices of Supreme Ct. of Puerto Rico*, 695 F.2d 17 (1st Cir. 1982), in which a declaratory action against the Justices was dismissed for failure to state a claim, as the judges were acting purely in their adjudicative capacity, and not as an enforcer or administrator. *Lindke, supra*, at *3. Thus, the Judge in *Lindke* was found not to be a proper party for declaratory relief, as the Judge was not an adverse party. Absent a live case or controversy, there was no Article III jurisdiction. As stated in *In re Justices of the Supreme Court of Puerto Rico*, judges sit as arbiters. 695 F.2d at 21. They have no stake in the outcome of the case, and are not an adversary to either party.

Here Judge Draganchuk acted as she would in any other contract case – sit as an adjudicator, finding facts and determining law in a neutral and impartial judicial fashion. The Judge did not initiate the underlying proceedings, and is required to follow binding legal precedent in making her rulings. In such circumstances, no case or controversy exists, such that Plaintiff has either failed to state a claim under Rule 12(b)(6), or there is a lack of jurisdiction under Art. III.

Plaintiff acknowledges that if Judge Draganchuk were dismissed as a party, its claims would proceed against the Developers. (ECF No. 31, PageID.781.) Regardless, Plaintiff is not

without a remedy as to any claims of error by Judge Draganchuk. As noted in *Lindke*, the plaintiff there should not have sued the Probate Judge:

> Rather than seek review in federal court, we note that he could have appealed Judge Tomlinson's decision to the Michigan Court of Appeals. Indeed, he did so in another case involving another PPO issued by another judge, resulting in a published opinion by the Michigan Court of Appeals holding that the PPO was too broad.

Lindke, supra, at *6 n 2. As previously noted, Plaintiff has sought review of Judge Draganchuk's Orders in the Court of Appeals, and retains the right to file further appeals from any final Judgment or Order.

CONCLUSION AND RELIEF

For all the foregoing reasons and those stated in her initial Brief, Defendant Honorable Joyce Draganchuk respectfully requests that this Honorable Court grant Judge Draganchuk's Motion to Dismiss and/or for Summary Judgment, dismiss Plaintiff's Complaint, and grant Judge Draganchuk such other and further relief as may be required.

Respectfully submitted,

COHL, STOKER & TOSKEY P.C.

Date: April 27, 2022

/s/ Timothy M. Perrone

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CERTIFICATE OF COMPLIANCE

Timothy M. Perrone (P37940) certifies, under L.Civ.R. 7.2(c), that this Brief contains 2,679 words, inclusive of headings, footnotes, citations and quotations, as counted by Microsoft Word 365, the word processing software used to create this Brief.

Dated: April 27, 2022

By: /s/ Timothy M. Perrone
Timothy M. Perrone (P37940)

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