STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

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. 21-000189-CB-C30

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At a session of said Court held in Lansing, Ingham County, Michigan, on January 3, 2023

PRESENT: Honorable Joyce Draganchuk
Circuit Judge

This case is brought by a group of investors (collectively called Plaintiffs unless otherwise noted) who gave $9 million to Defendant for purposes of building casinos in Lansing and New Boston, outside of Detroit near the Detroit Metropolitan Airport. JLLJ Development, LLC (JLLJ) is the group of investors behind the New Boston casino and Lansing Future Development II, LLC (Lansing Future) is the group behind the Lansing casino. Each group of investors entered into Development Agreements, which are also referred to as Turn Key Agreements, with Defendant (referred to as Kewadin or the Tribe). Multiple promissory notes were executed. The Tribe acquired the land but the land had to be taken into trust by the Department of the Interior in order to proceed with the casino

development. The Tribe's efforts to do that failed. As a result, casinos were never built and the investors wish to have their money back, along with lost profits for the casinos that never came to be.

After a long and torturous history, which will be detailed below, Kewadin was defaulted and a bench trial was held on the issue of damages only. Kewadin was invited to participate, but only did so on a limited basis. Most significantly missing was a trial brief, which was required by the Court's trial notice. Kewadin ignored this requirement, but counsel did make certain legal and factual arguments at trial that the Court will address.

Counsel has asserted that this Court deprived Kewadin of a fair hearing and acted contrary to law by not allowing it to call any witnesses and, presumably, by the fact that a default was entered and only damages were being litigated. Kewadin was not permitted to call witnesses for the simple reason that it never filed a witness list, per the scheduling order requirements. This appears to have been intentional and not neglectful because Kewadin never requested leave to file a late witness list and never put forth any excuse or justification whatsoever for its failure to file the witness list. The reason for the entry of default is much more complicated. The Court will take some time to describe what led to the default in an effort to address counsel's argument and to aid in appellate review.

The Complaint was filed on March 31, 2021. From the inception of this case, Kewadin contested this Court's jurisdiction over a sovereign Tribe. A motion to dismiss was brought under MCR 2.116(C)(1), (C)(4), (C)(7), and (C)(10). At the hearing, Kewadin maintained that this was a "straight-forward" sovereign immunity issue because the

contract only waived sovereign immunity in federal court and not state court.[1] As a secondary reason why the case should be dismissed, Kewadin argued that the contract had a non-recourse provision that only allowed for recovery if there were profits from the casino that never came to be.

This Court noted that there was no briefing on subject matter jurisdiction under MCR 2.116(C)(4) and there was no factual support as required under MCR 2.116(C)(10). Rather, the matter was briefed and argued as an issue of sovereign immunity so the Court was considering it under MCR 2.116(C)(7). This Court ruled that the contractual documents contained clear, irrevocable waivers of sovereign immunity. Additionally, a non-recourse provision in the documents did not prevent JLLJ from obtaining relief. This Court noted that other issues were raised in Kewadin's brief, but they were summarily mentioned in footnotes and not adequately briefed, raised, or addressed. The motion for summary disposition was denied under MCR 2.116(C)(7) (the July 21, 2021 order).

Not pleased with the Court's ruling, Kewadin submitted a second motion to dismiss but this time added to the title "on the facts for lack of jurisdiction and other grounds." Despite this difference in the title, the second brief made the exact same argument about sovereign immunity that the first brief made. The table of contents that summarized the arguments was identical to the first brief. The Introduction section merely added the following: "This Court therefore is required to dismiss this case for lack of subject matter

[1] Kewadin's counsel also expressed his outrage at what JLLJ was trying to do and said they had all but called Kewadin "Indian givers" (Transcript of Motion to Dismiss, June 23, 2021, p. 8). This was alluded to in Kewadin's second motion to dismiss where counsel accused Plaintiffs counsel of making "grossly improper anti-Indian stereotypes" and "[inserting arguments] primarily as a vehicle for Plaintiffs to appeal to anti-Indian stereotypes" (Defendant's Motion and Brief in Support of Motion to Dismiss on the Facts for Lack of Jurisdiction and Other Grounds, filed August 23, 2021, p. 18). Carrying this unjustified theme through to the end, Kewadin's counsel argued in closing at the non-jury trial that "[counsel for Plaintiffs], in his anti-Indian sort of way, says the Tribe could have taken the money and gone off to the Bahamas."

jurisdiction." A procedural section was added and Kewadin argued this time that this Court misstated the contractual language and committed error in its ruling. Other than in the title and introduction, the brief never used the words "subject matter jurisdiction," except when citing a federal case for the proposition that "tribal immunity precludes subject matter jurisdiction in an action against an Indian tribe." This Court dispensed with a hearing and issued a written order stating that Kewadin's second motion was an untimely motion for reconsideration (the September 7, 2021 order).

So began Kewadin's endless claim that this Court never ruled on subject matter jurisdiction. In a motion for reconsideration of the September 7, 2021 order, Kewadin claimed that its second motion to dismiss was "fundamentally different than the first motion to dismiss." Kewadin further claimed that Plaintiffs were revising Kewadin's motions in order to prevent a ruling on subject matter jurisdiction. The Court denied the motion for reconsideration.

A scheduling conference was set for October 18, 2021, but counsel for Kewadin failed to appear. No contact was made with the Court either before or after the scheduling conference to explain or justify the non-appearance. The Court entered a scheduling order that contained deadlines for naming Plaintiff's expert witnesses (1/18/22), naming Defendant's expert witnesses (2/3/22), naming all other witnesses (2/3/22), completion of discovery (3/18/22), and filing of dispositive motions (4/18/22).

Plaintiffs filed a motion to compel discovery responses that was heard on October 27, 2021. Kewadin had refused to provide any discovery answers asserting that sovereign immunity freed it from that obligation. Kewadin's counsel did indeed argue at

the hearing that Kewadin had sovereign immunity from suit and claimed that this Court had refused to rule on that. Counsel went on to say:

> The Tribe and Kewadin have sovereign immunity from suit. And this Court has not ruled upon that. This Court ruled on a factual – on a facial challenge to sovereign immunity. We then brought a factual challenge to sovereign immunity, and the Court refused to rule on that. We also brought challenges based upon jurisdiction, and the Court has not ruled on that. I've been doing this for 30 years. I have never, never, in all of that time, had a court say I will not rule on a motion to dismiss for want of jurisdiction. So we need a ruling on the motion to dismiss for want of jurisdiction so we can appeal this Court's sovereign immunity and jurisdictional decision. Until we can get a decision on jurisdiction, we can't do our appeal. And that's what [Plaintiff's counsel] is working so hard to prevent. He knows that this – the Court's decision regarding sovereign immunity and non-decision regarding jurisdiction are highly suspect. And he's trying to prevent us from taking an appeal in this case. And the Court shouldn't be then working to do that. It shouldn't be working to prevent us from appealing that decision. . . .
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> Again, I've been doing this for a long time. I have done these motions in multiple courts. I've never had a court do something like that where it said I won't rule on jurisdiction. . . .
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> [Plaintiff's counsel] wants to go out and do these personal attacks. He feels like the judge is on his side in the case and he does these personal attacks on counsel, that that somehow eliminates the need to comply with his obligations." (Transcript, Plaintiff's Motion to Compel Discovery, October 27, 2021, p. 7-9).

This Court, having already ruled that sovereign immunity was waived, granted the motion to compel and ordered Kewadin to pay $1,500 in attorney fees and to provide answers to discovery by November 17, 2021 (the October 27, 2021 order).

Kewadin inexplicably filed a claim of appeal with the 30th Judicial Circuit Court on October 3, 2021. On November 16, 2021, the claim of appeal was filed in the Michigan Court of Appeals (appeal #1). It was docketed as an appeal from the July 21, 2021 order denying Kewadin's motion for summary disposition.

On November 17, 2021, a hearing was held on JLLJ's motion to find Kewadin in contempt of court because it still had not answered the discovery that was previously ordered or paid the attorney fees. Kewadin opposed the motion on multiple grounds, including lack of subject matter jurisdiction and procedural irregularities. Kewadin's counsel also asserted that because he had filed a Claim of Appeal the day before the hearing, the Court Rules could not be any clearer that this entire matter was automatically stayed.

This Court indicated that there was no automatic stay in place, but it would not prejudge the merits of an appeal and would allow some time for the Court of Appeals decide what to do. This Court also found some procedural irregularities in the motion for contempt and denied it without prejudice.

On January 25, 2022, the Court of Appeals issued the following Order pertaining to Kewadin's appeal #1:

> The Court orders that the motion for immediate consideration is GRANTED.
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> The motion to dismiss this appeal is also GRANTED. The claim of appeal was not timely filed under MCR 7.204(A)(1) as to either the July 21, 2021 or September 7, 2021 trial court order. In this regard, the trial court motion for reconsideration of the September 7, 2021 order did not extend the time for filing a claim of appeal as to that order because the motion for reconsideration was not filed within 21 days after entry of that order and the trial court did not extend the time for filing the motion for reconsideration. Thus, there is no need to consider whether either the July 21, 2021 order or the September 7, 2021 order would have been appealable of right if a claim of appeal had been timely filed as to either order. Further, neither the October 27, 2021 trial court order nor the October 28, 2021 trial court order is a final order appealable of right. MCR 7.202(6)(a); MCR 7.203(A). As to the October 27, 2021 order, we note that, while it includes an award of attorney fees and costs, it is not a postjudgment order and, thus, is not a final order under MCR 7.202(6)(a)(iv). Dismissal is without prejudice to the filing of a delayed application for leave to appeal under MCR 7.205(A)(4), provided such a filing meets all requirements under the court rules and is not time-barred as to the relevant order(s) at the time of filing.

On February 4, 2022, Kewadin filed a Complaint in the US District Court for the Western District of Michigan entitled *Kewadin Casinos Gaming Authority* v *Honorable Joyce Draganchuk, [District] Judge, State of Michigan, Ingham County Circuit Court, in her Individual and Official Capacities, JLLJ Development, LLC, and Lansing Future Development II, LLC.* The Complaint requested declaratory relief in the form of rulings on sovereign immunity and subject matter jurisdiction, and it sought injunctive relief that would halt this lawsuit. A temporary restraining order and a preliminary injunction were requested.

The injunctive relief was denied in an order dated February 8, 2022. The federal court noted that Kewadin claimed this Court did not rule on subject matter jurisdiction. The federal court said:

> Kewadin makes much about the fact that the state court did not decide the issue of subject matter jurisdiction. This argument is unavailing because Kewadin does not raise any other arguments in its moving brief regarding the state court's subject matter jurisdiction except the issue of sovereign immunity, which the state court ruled on. In other words, Kewadin has not supplied an argument for why the state court lacks jurisdiction."[2]

Plaintiffs, per the comments of the Court about procedural defects at the first contempt hearing, brought the contempt issue up again as a motion to show cause why Kewadin should not be held in contempt. The Court issued an ex parte order to show cause why Kewadin should not be found in contempt (the January 28, 2022 order) and the hearing was set for February 9, 2022.

[2] The denial of injunctive relief did not resolve the entire case. The case lived on until it was dismissed as to all defendants on August 24, 2022. Kewadin filed a Notice of Appeal to the United States Court of Appeals for the Sixth Circuit on September 22, 2022. This Court is represented by counsel and is informed that the case remains pending in the Sixth Circuit.

On the morning of the contempt hearing, Kewadin filed another appeal of right with the Court of Appeals (appeal #2). The appeal was docketed as a delayed application for leave to appeal from the September 7, 2021 order denying reconsideration of the second motion for summary disposition, the October 27, 2021 order granting Plaintiffs' motion to compel, and the January 28, 2022 order to show cause why Kewadin should not be found in contempt. At the contempt hearing, Kewadin's counsel addressed this newest appeal:

> At this point this Court does not have jurisdiction because the Defendants have filed an appeal of right earlier today. And even in their own briefs in this case, the Plaintiff acknowledged that if we filed an appeal on the June 21 – the motion – the first motion to dismiss – if we filed an appeal on that, then that is an automatic appeal.
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> We have filed an appeal on that. Our appeal on that discusses why the appeal is timely, and it is timely because [Plaintiff's counsel] was lying to this Court in an affidavit. He falsely said he had served the order on the tribe when he had not. And you haven't served the order on the tribe and the Court or Kewadin – I'm sorry. If you haven't served the order on Kewadin and the Court didn't serve the order on Kewadin, under the court rules the time for appeal doesn't start.
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> But more importantly, that is an issue for the appellate court. The appellate court decides those issues. Never mind that it will be very bothered by [Plaintiff's counsel's] action and it will say that, yes, the appeal is perfectly timely and that this matter is stayed. But, again, that is an issue for the appellate court to decide, not this Court (Transcript Contempt of Court Show Cause Hearing, February 9, 2022, p. 9)

Kewadin's counsel also raised some procedural defects and then complained that this Court cut him off at the last hearing, but he was going to make his argument anyway. He proceeded to argue that this Court has never ruled on subject matter jurisdiction as it was required to do in ruling on the first and second motions to dismiss. He went on to argue that the discovery could not be provided because this Court has no jurisdiction to order a Tribe to turn over documents – only a Tribal court could do that. He also

mentioned the federal lawsuit and said that if this Court were to find Kewadin in contempt for not providing discovery, that claim would be added to the federal lawsuit.

This Court again explained that there was no automatic stay. This Court also explained that counsel was cut off at the previous hearing on discovery because he was only repeating the oft-made argument about sovereign immunity and/or subject matter jurisdiction and was not addressing the substantive merits of the discovery motion. This Court again proceeded to address sovereign immunity and said:

> I know the tribe disagrees with that and they are entitled to disagree with it, but they are not entitled to then take no valid appeal from it and just refuse to participate in the case because the tribe disagrees with the Court's ruling. I have suggested that the ruling could be appealed instead of just refusing to recognize it as the ruling of this Court.
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> And, instead, the Defendants filed an appeal by right, which was – although I gave them some leeway once they had done that, it was a predictable failure because there was no final order and the proper method would have been an application for leave to appeal.
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> So I gave that opportunity. That's the proper process if you disagree with the Court's ruling. But it's not just to say, "Despite the Court's ruling you can't order us to do anything because of sovereign immunity" (Transcript Contempt of Court Show Cause Hearing, February 9, 2022, p. 23-24).

This Court concluded by addressing Kewadin's refusal to participate in this case from its inception and addressed the prejudice to Plaintiffs that has caused and to the administration of justice in general. Ultimately, Kewadin was found in contempt and fined in the amount of $7,500. The contempt was capable of being purged if Kewadin paid the discovery sanctions of $1,500 by February 11, 2022. Likewise, Kewadin was given until February 23 to provide complete non-objected and full answers to the discovery or else an additional fine of $7,500 would be imposed for that separate contempt. Kewadin never acted to purge its contempt and also never paid the contempt fines.

On March 23, 2022 the case was back before the Court. This time it was Kewadin's motion to confirm that the case is stayed or to issue a stay. At the hearing, Kewadin's counsel again maintained that he had an appeal of right from the July 21, 2021 order and that it resulted in an automatic stay unless the Court of Appeals ruled otherwise. Plaintiff's counsel said that what was pending was actually a delayed application for leave to appeal and there was no automatic stay under the Court Rules. In rebuttal argument, Kewadin's counsel said "there is an appeal [of] right pending at this moment" and that Plaintiff's counsel's statement to the contrary was "just a false statement of fact" (Transcript, Motion to Confirm Case is Stayed, March 23, 2022, p. 17).

This Court ruled that there was no final order in the case and the case was not stayed. This Court explained that the Court Rule relied on by Kewadin applied to rulings that denied governmental immunity to a governmental party and Kewadin was not a governmental party. An order was entered on May 31, 2022.

On April 13, 2022, the Court of Appeals issued an order that disposed of Kewadin's appeal #2 and an emergency motion it had filed about one week earlier asking the Court of Appeals to stay further proceedings. The Court of Appeals ordered:

> The motion for immediate consideration is GRANTED.
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> The motion to file reply brief is GRANTED.
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> The motion to confirm case is stayed or alternative motion for stay is DENIED.
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> The delayed application for leave to appeal is DISMISSED IN PART for lack of jurisdiction. The application is dismissed as to the July 21, 2021 order because appellant failed to file the application within six months of the date of entry of that order as required by MCR 7.205(A)(4)(a). In all other respects, the delayed application is DENIED for failure to persuade the Court of the need for immediate appellate review.

The Court of Appeals order came on the same day as the hearing on Plaintiffs' motion for entry of default against Kewadin. The Court was informed at the hearing that Kewadin had recently obtained an order from the Sault Ste. Marie Tribe of Chippewa Indians Gaming Commission declaring that the Development Agreements in this case are void *ab initio*. Kewadin's position was that this Court was bound by that declaration and made this case "all over but the shouting" (Transcript, Motion for Default Judgment, April 13, 2022, p. 8).

Kewadin's counsel then proceeded to argue that this Court had no jurisdiction over the Tribe and therefore could not order Kewadin to turn over any discovery. Kewadin, he argued, cannot provide discovery. Again, counsel said this Court had "sidestepped that issue, and I'm not sure why because it is such a fundamental issue" (*Id* p. 9). Counsel proceeded to say:

> As we also then discuss, the Court, to date—at times, [Plaintiffs' counsel] tried to slip in that this Court has decided jurisdiction, and we've gone through this history before, and even the federal court—when they went to the federal court, the federal court said this Court hasn't decided jurisdiction. It said—it decided something that was—would—it viewed as leading to the result of (inaudible), but it hasn't decided jurisdiction. (*Id* p. 9-10).

Counsel told the Court that there can be no default until there is a decision on jurisdiction and that is why Kewadin had, that same day as the hearing, filed a motion for summary disposition on grounds of lack of jurisdiction.[3] This Court granted the motion for entry of default after considering all pertinent arguments and the possible sanctions under MCR 2.313(b)(2):

> The possible sanctions under MCR 2.313(b)(2) have been considered, and some of them have already been employed but to no avail. And I'm satisfied that there's no way to get the defendant to participate in this case no matter what this Court does because the defendant will always argue sovereign

[3] The filing was timely, albeit just 5 days before the scheduling order deadline for filing dispositive motions.

> immunity and subject matter jurisdiction. This is a willful course of action. There is a history to it, and it has prejudiced the plaintiff from proceeding. This has all deliberately delayed this case. Other measures have failed, and the defendant has shown no desire to cure any defects or provide discovery, but instead shows open repeated defiance of this Court's orders, even today.

On May 18, 2022, this Court heard argument on Kewadin's motion for summary disposition on grounds of lack of subject matter jurisdiction. This was the first time that Kewadin briefed an argument on subject matter jurisdiction. The basis for the argument was that state courts have no jurisdiction to adjudicate claims arising within reservation boundaries. Kewadin also maintained that the Sault Ste. Marie Gaming Commission had declared the Development Agreements void *ab initio* and that finding was binding on this Court. This Court denied the motion for summary disposition for the reasons stated on the record and further rejected the notion that this Court was bound to follow the ruling of the Tribal Gaming Commission and treat the Development Agreements as void *ab initio*.

On June 21, 2022, Kewadin filed a claim of appeal from the May 31, 2022 order that denied a stay (appeal #3). On July 21, 2022, the Court of Appeals took up Kewadin's appeal #3 and issued the following Order:

> The motion for immediate consideration is GRANTED.
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> The motion to dismiss this appeal is also GRANTED. The May 31, 2022 order appealed from is not a final order under MCR 7.202(6)(a)(v) because the motion for summary disposition that it denied was not based on a claim of governmental immunity. Further, that order is plainly not a final order under the definitions provided by MCR 7.202(6)(a)(i)-(iv). Accordingly, the May 31, 2022 order is not appealable of right. MCR 7.203(A). Dismissal is without prejudice to the filing of a delayed application for leave to appeal under MCR 7.205(A)(4), provided such a filing meets all requirements under the court rules and is not time-barred.[4]

[4] Kewadin filed a motion for reconsideration and Plaintiffs filed a motion for sanctions. Kewadin's motion for reconsideration was denied. Plaintiff's motion for sanctions was granted in the following order:

It is against this background that the default was entered and Kewadin was precluded from calling witnesses. Counsel for Kewadin argued that the trial was conducted contrary to Michigan law. The record described above will ultimately speak for itself.

The case proceeded to a non-jury trial on August 29 and 30, 2022. Plaintiff proceeded on Ct. II (breach of contract), Count III (misrepresentation), and Count IX (implied contract) of its Complaint. As a result of Kewadin's default, the well-pleaded allegations in the Complaint are deemed admitted. *Wood* v *DAIIE*, 413 Mich 573, 578, 321 NW2d 653 (1982).

Paragraph 18 of the Complaint describes the desire of the Tribe to open casinos in Michigan's lower peninsula and gives an overview of the contractual obligations:

> The provisions of JLLJ Contract and the Lansing Future Contract are virtually identical: JLLJ was to act as the Developer to assist the Gaming Authority with the development, financing, and construction of a casino to be operated in Wayne County (near Detroit Metropolitan airport), and Lansing Future was to act as the Developer with respect to the development, financing and construction of a casino to be opened in Ingham County; the Developer in each case was to raise funds which would assist the Gaming Authority to develop, finance and construct a casino after the Tribe acquired land for the casino using interest or other monies from the Self-Sufficiency Fund; the land would then be placed in trust; and thereafter the casino would be constructed on the purchased land; the Gaming Authority (rather than JLLJ and Lansing Future) would then operate the casino; and to compensate JLLJ and Lansing Future for the funds they loaned to the Gaming Authority, and for the thousands of hours their

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The motion for sanctions and other relief against appellant due to filing vexatious appellate proceedings is GRANTED TO THE EXTENT that appellees are awarded actual damages in the amount of their attorney fees and other costs incurred due to this appeal being taken when there was no reasonable basis for claiming an appeal of right. MCR 7.216(C)(1)(a). We REMAND this matter to the trial court to determine and award actual damages against appellant and in favor of appellees as to the taking of this vexatious appeal. MCR 7.216(C)(2).

The hearing ordered by the Court of Appeals was held on December 21, 2022 and this Court awarded to Plaintiffs $9,940.75 in attorney fees and costs.

representatives spent performing their obligations under the respective two contracts, JLLJ and Lansing Future would receive a share of the revenues of the casinos. (footnote omitted).

Additional obligations of the parties are set forth in the Development Agreements, which provided that a temporary casino would be built first that Plaintiffs would finance. Promissory notes would be executed for the financing of pre-effective date expenses, pre-development period expenses, and temporary facility period expenses. The financing would be non-recourse, in that the Tribe's obligation to repay any portion of the financing would flow only from the operating profits. Repayment would be made through a monthly payment of 14% of the operating profits for the prior month. The fee would be payable beginning from the opening of the temporary casino. Plaintiffs were to take no part in the management of the casinos once they were operational.

The parties recognized that millions of dollars would be needed to acquire the land and to carry out their objectives leading up to the successful operation of the completed casinos. To that end, the Turn Key agreements required that there be an approved budget for the funds that would be overseen by a Development Committee.

Plaintiffs' breach of contract claim alleges that Kewadin breached its contractual obligations, in part, by:

- Using funds without first preparing a budget and obtaining Plaintiffs' prior approval
- Failing to appoint a Development Committee which, in turn, would appoint a Development Coordinator to coordinate all aspects of the casinos
- Failing to have the land placed in trust
- Failing to provide the Department of the Interior with necessary documentation to have the land placed in trust and instead to file litigation and expend hundreds of thousands of dollars on that litigation

Plaintiffs' negligent or innocent misrepresentation claim alleges that the Tribe made material representations that it had the right to acquire land and that the land was legally entitled to be placed in trust without satisfying any other preconditions. The Complaint alleges that these representations were false and they were either negligently or innocently made to induce Plaintiffs to enter into contracts with Kewadin. JLLJ relied on the false representations to advance $5,300,000 to Kewadin. Lansing Future relied on the false representations to advance $3,500,000 to Kewadin

Plaintiffs called two witnesses at trial. Dennis Ibold is a principle of Plaintiffs and Robert Levine was called as an expert on damages.

Dennis Ibold testified that he is an attorney and real estate developer. He is a manager of Lansing Futures and the lead manager of JLLJ. He is an investment member in both organizations. He authenticated Exhibits 1-14, which were admitted.

Exhibit 1 is the Development Agreement for the New Boston casino and Exhibit 2 is the Development Agreement for the Lansing casino. Multiple promissory notes were also executed. Kewadin signed promissory notes to JLLJ on September 21, 2010, June 1, 2015, June 2, 2015, and March 4, 2019 (Exhibit 5). There were three promissory notes to Lansing Future consisting of two dated June 1, 2015 and one dated March 4, 2019 (Exhibit 6). Mr. Ibold confirmed that the key to getting the casinos going was that Kewadin was supposed to place into trust the land acquired with Plaintiffs' funds. Kewadin representatives made multiple claims that placing the land in trust was virtually automatic and Plaintiffs relied on these representations. [5]

[5] Although the allegations in the Complaint are taken as true, Exhibit 14 also demonstrates the Tribe's position that placing the land in trust was automatic. In a press release dated June 11, 2014, the Tribe announced its application with the Department of Interior and said: "A 1997 law passed by Congress called the Michigan Land Claims Settlement Act (MILCSSA) requires the U.S. Secretary of the Interior to approve

In fact, Ex. 3, the letter from the United States Department of the Interior to the Chairman of the Sault Ste. Marie Tribe of Chippewa Indians, explains the requirements:

> We agree with the Tribe that MILCSA [Michigan Indian Land Claims Settlement Act] does constitute statutory authority for mandatory land-into-trust acquisition, provided that the statutory requirements are met. One of those requirements is that the acquisition is "for consolidation or enhancement of tribal lands," terms that the Department previously has interpreted with regard to MILCSA. We also are directed by the Department's procedures governing mandatory trust acquisitions, which require evidence demonstrating that the subject parcel (or parcels) meet the requirements for mandatory acquisition. Here, I conclude that, at this time, the Applications lack sufficient evidence to demonstrate that acquisition of the parcels would "consolidate or enhance" tribal lands, as required by MILCSA.

The letter concluded with the statement that the application would remain open so the Tribe could present additional evidence that the acquisitions would enhance tribal lands. That did not happen. In a follow-up letter 6 months later, the Department of Interior said that there has been no new evidence submitted and the applications were denied (Ex. 4).

Mr. Ibold testied that the parties had extensive conversations about the Department of Interior's action. Ultimately, the Tribe opted to appeal instead of following Mr. Ibold's opinion that a different course of action should be taken. [6]

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the trust land applications. . . . 'The law is clear: the secretary is required to accept these parcels in trust,' said Sault Tribe Chairperson Aaron Payment."

[6] The Tribe at least had some initial success when the US District Court for the District of Columbia vacated the Department's decision as being contrary to law and remanded for further proceedings. The Court stated the issue as "who decides whether an Indian tribe acquired land for a permissible purpose—the Federal Government or tribal leaders." The District Court's conclusion went in favor of tribal leaders. *Sault Ste. Marie Tribe of Chippewa Indians* v *Bernhardt*, 442 F Supp 3d 53 (2020). The District Court was reversed in *Sault Ste. Marie Tribe of Chippewa Indians* v *Haaland*, 25 F4th 12 (2022), when the District of Columbia Court of Appeals answered that question in favor of the Federal Goverrnment.

Kewadin adopted the position in its opening statement and throughout this case that it is not liable to Plaintiffs in any amount and damages can *only* be set at zero because of the non-recourse provision in the Development Agreements:

> Section 6.3.7.1: Assets Pledged to Satisfy Enforcement Proceedings. The only assets of the Gaming Authority which shall be available, and which are thus specifically pledged and assigned hereby, to satisfy any enforcement proceedings or judgment in connection with this Agreement or the other Transaction Documents shall be limited to the Operating Profits and the Equipment.

Plaintiffs say that to enforce Section 6.3.7.1 without respect to other contractual provisions would be contrary to the parties' intent.

Plaintiffs point to Section 5.1 of the Development Agreements, which is a "cross-default" provision. Under this provision, a default under one document constitutes a default under the other documents, which would include the promissory notes.

The promissory notes and the Development Agreements also contain an acceleration clause:

> Upon and at any time after the occurrence of any Event of Default, the Lender, at the Lender's option, may declare all principal and interest outstanding hereunder to be immediately due and payable without presentment, demand, notice of nonperformance, notice of protest or notice of dishonor, all of which are expressly waived by the Borrower.

Finally, the Development Agreements provide broad relief to Plaintiffs as a result of Kewadin's breach:

> Section 5.3.1.3. Election of Remedies. Notwithstanding any term or provision of any of the Transaction Documents to the contrary, Developer may exercise any and all rights and remedies existing or available to Developer under any of the Transaction Documents or under applicable law, including, without limitation, the rights and remedies of a secured party with respect to the Operating Profits and Equipment under the Tribe's UCC provisions.

> Section 5.3.3.2. Cumulative Remedies. The remedies provided for in this Section 5.3 shall be cumulative to the extent permitted by applicable law, and may be exercised partially, concurrently or separately. The exercise of one or more remedies shall not be deemed to preclude the exercise of any other remedies.

The primary goal in interpreting contracts is to determine and enforce the parties' intent. *Old Kent Bank* v *Sobczak*, 243 Mich App 57, 620 NW2d 663 (2000). A contract must be construed as a whole, with every provision given effect without treating any provision as surplusage or nugatory. *Klapp* v *United Ins Group Agency, Inc*, 468 Mich 459, 468, 663 NW2d 447 (2003). Here, the nonrecourse provision contemplates that a casino would be built. But the other provisions of the contractual documents cited above contemplate that all amounts would be immediately due in the event of a default. There is no limitation in the acceleration clause that would restrict Plaintiffs' recovery to operating profits. Likewise, the contractual documents provide Plaintiffs with full recourse to all remedies available under the law.

A reasonable interpretation that gives effect to all of these provisions would be that in the event of a default where there were not any revenues from any casinos because the casinos were not yet built, Plaintiffs may accelerate the amounts due and exercise all their available remedies to collect. No reasonable interpretation of the loan documents that took into account all the provisions could possibly conclude that Plaintiffs were giving nearly $9 million to Kewadin in the hope that they would build a casino, but in the event they did not, the loans would be fully forgiven.

A similar result was reached in *JW Gaming Development* v *James*, 2020 WL 353536 (ND CA, 2020), a case which is persuasive and applicable here. In *JW Gaming*, investors and the Tribe signed a promissory note with a limited recourse provision that

said any claim could only be enforced and collected from casino revenues. There were no revenues because the casino was never built. The note in *JW Gaming* had an acceleration clause, but their acceleration clause provided that the note would be immediately due and payable if the casino was not opened within three years. The Tribe in that case argued that they were not liable because of the limited recourse provision and lack of casino revenues. The court rejected that interpretation and said that it would render the acceleration clause meaningless.

The *JW Gaming* note expressly provided for acceleration in the event the casino was not built within three years. The loan documents here do not address the contingency of a casino never being built. However, contract principles remain the same. Every clause of a contract must be given effect. The acceleration clause in this case is not limited to the situation where a casino is never built. It is applicable to any event of default. Default under the loan documents is established in this case. The acceleration clause provides that all amounts are due.

On a related note, Kewadin argued in closing that "there was only one account that the Court could order." This is presumably a reference to the fact that there is only one promissory note that has a stated maturity date. The September 21, 2010 promissory note given to JLLJ has a maturity date of November 18, 2016. Kewadin's argument misses the mark because the above-referenced section 5.1 of the Development Agreements contains a cross-default provision that says a default under any one of the contracts is a default under all the contracts. Kewadin's argument only reinforces the conclusion that, when read as a whole and giving effect to all provisions, the parties intended that repayment would occur even if casinos were never built.

Alternatively, Plaintiffs argue that non-recourse provisions are not enforced when there is evidence that the borrower has not protected the collateral.

All of the cases cited by Plaintiff are distinguishable from this case. *FDIC* v *Prince George Corp*, 58 F3d 1041 (4th Cir 1995) dealt with a carve-out for bankruptcy. *Heller Financial, Inc* v *Whitemark at Fox Glen, Ltd*, 2004 WL 2124942 (ND Ill 2004) dealt with a carve-out that was agreed to by the parties and applied to misappropriation of any funds deriving from the collateral. In *The Nippon Credit Bank* v *1333 North Cal Boulevard*, 86 Cal App 4th 486, 103 Cal Rptr 2d 421 (1st Dist 2001) the issue was whether failure to pay property taxes was bad faith waste, which would then impose personal liability despite the nonrecourse nature of the loan. In *Heller Financial, Inc* v *Lee*, 2002 WL 1888591 (ND Ill 2002), the court enforced the carve-out provision and imposed personal liability.

The issue here is not one of enforcement of a carveout provision—there is no contractual carveout provision. The issue here is not one of waste—there was no asset ever created that could have been subject to waste. The issue is whether this Court should impose a carveout on the non-recourse provision where Kewadin never created the collateral from which the loans would be repaid. [7]

Mehling v *Evening News Assn*, 374 Mich 349, 132 NW2d 25 (1965) is applicable here. A contractual provision in *Mehling* said that when two appraisers disagreed, a third appraiser would be appointed. Before the third appraiser could make a valuation, the parties had to first agree on compensation for the appraiser. Although no agreement on compensation was ever made, the appraiser performed his job and sided with defendant's

[7] The provision at issue here has been referred to as a non-recourse provision. Plaintiffs point out that it is more accurately referred to as a limited recourse provision. The Court agrees with Plaintiffs' characterization, but it is a distinction without a difference as to the issues raised here.

appraiser. Plaintiff claimed that compensation for the appraiser had to be agreed upon before the appraiser could make a valuation. The trial court found that no agreement was ever made because plaintiff refused to meet and agree on compensation. The Court of Appeals affirmed the trial court and said:

> Where a contract is performable on the occurrence of a future event, there is an implied agreement that the promisor will place no obstacle in the way of the happening of such event, particularly where it is dependent in whole or in part on his own act; and where he prevents the fulfillment of a condition precedent or its performance by the adverse party, he cannot rely on such condition to defeat his liability. Id at 352 (cleaned up).

To be clear, this Court has already concluded that the non-recourse provision cannot be read in isolation. The intent of the parties has to include the other contractual provisions that allow acceleration and full recourse to all available remedies in the event of default. But there is another, alternate, reason why the parties did not intend that the loans would be forgiven in the event casinos were never built. The Development Agreements and the promissory notes all evidence that the parties intended that casinos *would be* built. In other words, the parties intended that the promissory notes would be paid by the occurrence of a future event. Kewadin, according to the well-pled allegations in the Complaint, was the obstacle that prevented that from happening. It would be absurd to conclude that the very purpose that all these parties came together for could be thwarted by Kewadin and all parties would just walk away with Kewadin retaining all the funds.

Kewadin argued in its closing argument that any carve-out of the non-recourse provision would be in violation of the *Cherryland Mall* case and the subsequent legislative overruling of that case.

Kewadin is referring to the nonrecourse mortgage loan act, MCL 445.1591, *et seq.*, which was a response to the decision in *Wells Fargo Bank* v *Cherryland Mall Limited Partnership*, 295 Mich App 99, 812 NW2d 799 (2011). In this first *Cherryland Mall* case, the Court of Appeals enforced a carveout provision for insolvency. That ruling presumably triggered enactment of the nonrecourse mortgage loan act. The act provides that nonrecourse loans may not provide a carve-out that relates solely to the solvency of the borrower. MCL 445.1593. After the enactment of the nonrecourse mortgage loan act, the Supreme Court remanded the *Cherryland Mall* case. On remand, the Court of Appeals applied the act and ruled that the carveout was unenforceable and ruled that the act was constitutional. *Wells Fargo Cherryland Mall Limited Partnership (On Remand)*, 300 Mich App 361, 835 NW2d 593 (2013).

All of these – the first *Cherryland Mall* case, the ensuing nonrecourse mortgage loan act, and the *Cherryland Mall* case on remand – are inapplicable to this case. There is no carve-out provision in the loan documents at issue here and there is no issue of solvency.

Finally, Plaintiffs argue that the non-recourse provision cannot preclude it from recovering under its misrepresentation claim. The Court agrees with Plaintiffs that they may recover under their breach of contract claim, but even if they could not, they could recover for misrepresentation.

The non-recourse provisions address *repayment* of the *loans*. These are not waiver provisions, where Plaintiffs could have given up rights to bring certain claims against Kewadin. Rather, the provisions address Plaintiffs' ability to collect in the event of default. Plaintiffs' claim for fraudulent misrepresentation is a tort separate and apart

from the breach of contract. Plaintiffs need not allege or prove that there has been a default under the loan documents and they are not trying to collect on the loans *per se*. Plaintiffs' tort claim, which is established due to the default of Kewadin, stands alone as a basis for recovery. The non-recourse provisions of the loan documents do not apply to this claim.

Having concluded that Plaintiffs are entitled to damages for breach of contract and fraudulent misrepresentation, the Court will turn to a determination of the amount of damages. [8] Plaintiffs are seeking two types of damages: (1) the principal and accrued interest due under the notes, and (2) Plaintiffs' share of the revenues, or lost profits, they would have enjoyed from the operations of the temporary casinos and the permanent casinos.[9]

Plaintiffs presented the testimony of Robert Levine at trial. Mr. Levine is a CPA and financial analyst who does forensic accounting. He has experience reviewing financial statements of casinos and has testified as an expert before about lost profits. He demonstrated a mastery of tribal and non-tribal casino operations. Although he would have found it helpful to review Kewadin's financial information, he was hampered by Kewadin's refusal to provide it. He reviewed the loan documents and he relied on Ex. 23-52, which generally consist of market reports on tribal casino performance, Indian gaming reports made to the Michigan Gaming Control Board from 2010-2021, financial reports of

[8] The Court need not reach Count IX (implied contract) of the Complaint because there is an express contract.

[9] Plaintiffs are also entitled to attorney fees, but they have acknowledged that the determination of attorney fees should occur later.

Detroit-area casinos from 1999-2022, and information from the websites of the three Detroit-area casinos.

There is little to dispute about the mathematical calculation of principal and interest due. Those amounts are based on the loan documents and summarized in Ex. 21, Ex. A, Sched. 1. The supporting documentation for the interest calculation is also contained in Ex. 21 and was explained through Mr. Levine's testimony. The principal amount due to JLLJ is $4,555,177. The principal amount due to Lansing Futures is $2,884.834. The total amount of principal due to Plaintiffs collectively is $7,440,011. The amount of interest due to JLLJ, calculated to the date of trial, is $2,340,723. The amount of interest due to Lansing Futures, calculated to the date of trial, is $1,658,030. The total amount of interest due to Plaintiffs collectively, calculated to the date of trial, is $3,998,753.

The Plaintiffs' share of lost revenue is the final calculation. Mr. Levine calculated lost profits as to the Lansing Future investment as shown in Ex. 21, Schedule E. Integral to his calculation was determining the number of machines that were anticipated in the temporary and permanent Lansing casino. He derived this number through Mr. Ibold, who advised him that this was discussed with the Tribe and 500 machines were planned for the temporary casino and 2,000 were planned for the permanent casino. This was the intent of the parties, but the numbers are also consistent with four other tribal casinos that Mr. Levine used for comparison.

Another factor in Mr. Levine's calculation was the net win per machine. Because Kewadin had refused to provide discovery in this case, Mr. Levine had no financial information obtained directly from Kewadin. He relied instead on the annual Indian Gaming reports published by the Michigan Gaming Control Board. Those reports include

the amount of the payments that the Michigan Tribes made to local units of state government for the casinos throughout Michigan. This revenue sharing payment is set at 2% of the net win.

From those payments, Mr. Levine was able to extrapolate the total net win for the tribal casinos in Michigan. He took four downstate casinos—Gun Lake, Firekeepers, Four Winds, and Soaring Eagle—and averaged a net win per machine for each year in question. Because his calculations were based on actual net win per year, factors such as COVID shutdowns were already reflected.

He also factored in a retail sportsbook net win starting in 2020 when legislative changes allowed for brick and mortar sportsbooks in tribal casinos. Such sportsbooks were launched at all 5 current Kewadin casinos. He turned to the 3 Detroit casinos to develop a proportion of retail sportsbook win to overall net win and applied that to his calculations.

Operating profit was more difficult to determine because Kewadin refused to provide discovery, claiming that sovereign immunity gave this Court no jurisdiction to order discovery. Plaintiffs had requested financial statements, state and federal tax returns, reports filed with the state relating to financial operations, summaries of financial operations, audits regarding financial condition, estimates of operating profits, or market studies for any of its five casinos. Mr. Levine explained that because of that information deficit, he had to look to at the overall industry average to determine a national average of casino profitability. For that, he used a report from Risk Management Association that contained national averages for casinos without hotels (Ex. 43).

Using the national industry averages, Mr. Levine derived the operating profit from which Plaintiffs would have been paid their 14% monthly development fee. He deducted from that the expected salary of a project manager who was to have been paid by Plaintiffs and he then applied a present value analysis to reach the total net development fee for 2018 and 2019, when the temporary casino would have been operating, and 2020 through 2026 for the operation of the permanent casino.[10]

Mr. Levine employed the same methodology for the New Boston location but he calculated that there would have been 750 machines in the temporary casino and 3,000 machines in the permanent casino. However, he presented two alternatives when it came to the lost development fee. In one alternative, shown in Exhibit 21, Exhibit D, Schedule 1, he used the average net win per day per machine from the three Detroit-area casinos under the assumption that the New Boston location would operate similarly. In the alternative, shown in Exhibit D, Schedule 2, he used the average net win per day per machine from a set of comparable tribal casinos based on the Michigan Gaming Control Board reports.

It was Mr. Levine's opinion that Exhibit D, Schedule 1 was the scenario most representative of Kewadin's expectations for the New Boston casino. The Court finds that Exhibit D, Schedule 1 is the best measure of the lost development fee for two reasons. First, as Mr. Levine pointed out, the Tribe expected the New Boston casino to perform better than any of its other casinos. In an Affidavit made by Rick McDowell, Chief Financial Officer, on behalf of the Tribe (Ex. 9), the Tribe's expectations are described:

> 13. The property proposed to be taken into trust in New Boston, Michigan, borders on a major highway with Average Annual Daily Traffic levels in excess of 100,000 vehicles. More than 1.4 million adults live within

[10] Section 3.1 of the Development Agreements provided for a 7-year term.

> 30 minutes of the New Boston Property, and more than 3 million within an hour, which could make the site the closest casino for more than one-half of a million adults—including, again, thousands of members of the Tribe who reside in the area. The proximity to a major international airport, and the major highways, and industrial and commercial centers around the New Boston area all are vastly superior in quality to any property currently in the Tribe's inventory.
>
> 14. Based upon my expertise in the gaming industry both within Michigan and within the gaming industry generally, it is my opinion that both the Lansing property and the New Boston property is substantially superior in economic capacity and gaming capacity to any property available to the tribe for gaming or economic activity currently.

Sault Tribe Chairperson Aaron Payment agreed with these predictions in a press release from June 11, 2014 (Ex. 14):

> Payment said the Huron Township land is a "perfect casino location," with easy access to I-275, I-75 and Metro Airport. The land already includes a large, unfinished building that could easily be converted to gaming use and tribal offices. The casino would create jobs and generate revenues to provide services to Tribal members who live in Metro Detroit.

Not only did the Tribe predict a resounding success in New Boston, but their prediction relied on objectively verifiable factors that would promote that success—access to freeways and an airport, proximity to Detroit, and the demographics of the area.

This Court finds that Mr. Levine's calculations as summarized in Exhibit 21, Exhibit A, Schedule 1, are based on the contractual terms, supported by the credible testimony of Mr. Ibold and other evidence, reinforced by Kewadin's own projections of profitability, and reasonably based on the best available data. That summary is as follows:

JLLJ Development, LLC, et al. v. Kewadin Casinos Gaming
Summary of Damages

Exhibit A
Schedule 1

		JLLJ	LFD	Grand Total
1	Promissory Note Principal [1]	$ 4,555,177	$ 2,884,834	$ 7,440,011
2	Promissory Note Interest [1]	2,340,723	1,658,030	3,998,753
3	**Subtotal - Promissory Notes**	**$ 6,895,900**	**$ 4,542,864**	**$ 11,438,764**
4	Present Value of Lost Development Fee [2]	$ 51,694,000	$ 23,641,362	$ 75,335,362
5	**Total Damages (Line 3 + Line 4)**	**$ 58,589,900**	**$ 28,184,226**	**$ 86,774,127**
6	Pre-Judgment Interest on PV of Lost Development Fee [3]	1,450,651	663,430	2,114,081
7	**Grand Totals (Line 5 + Line 6)**	**$ 60,040,551**	**$ 28,847,657**	**$ 88,888,208**

[1] Refer to Exhibits B & C.
[2] Refer to Exhibit D, Schedule 1 & Exhibit E.
[3] Calculated in accordance with MCL § 600.6013 & 600.6455 from March 31, 2021 through August 29, 2022.

For all the above reasons, the Court finds that damages have been proven in the amounts set forth in Exhibit 21, Exhibit A, Schedule 1. This case shall proceed on the remaining issue of attorney fees.

Joyce Draganchuk
Circuit Judge

PROOF OF SERVICE

I hereby certify that I served a copy of the above Findings of Fact and Conclusions of Law upon the attorneys of record by placing said document in sealed envelopes addressed to each and depositing same for mailing with the United States Mail at Lansing, Michigan, on January 3, 2023.

Michael Lewycky
Law Clerk/Court Officer