UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

DENIS BERUBE JR., individually and on behalf of all others similarly situated, Plaintiff, v. THE ORIGINAL BAND OF SAULT STE. MARIE CHIPPEWA INDIANS AND THEIR HEIRS d/b/a KEWADIN CASINOS, Defendant.	Case No. 2:25-cv-00061-RJJ-MV Hon. Robert J. Jonker

PLAINTIFF'S BRIEF IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS

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I. INTRODUCTION

Plaintiff Denis Berube Jr. brought this action in Michigan State Court on behalf of himself and all others similarly situated to seek relief for a data breach affecting The Original Band of Sault Ste. Marie Chippewa Indians and Their Heirs d/b/a Kewadin Casinos ("Defendant" or "Kewadin"). *See* Complaint ("Compl.") at ECF No. 1-1 (filed March 4, 2024). Plaintiff has alleged that the Data Breach harmed thousands of Defendant's current and former employees, whom Defendant required to submit their confidential personally identifiable information ("PII") in order to obtain employment. *Id*. ¶ 4. Defendant voluntarily removed this action to this Court, asserting that this Court has jurisdiction based on the Complaint raising issues of interpretation of a federal statute, the Federal Trade Commission Act (the "FTC Act"), 15 U.S.C. § 45. ECF No. 1, PageID.6. Despite removal, Defendant later moved to dismiss the Complaint under Fed. R. Civ. P. 12(b)(1) on the basis of tribal sovereign immunity (the "Motion"). ECF No. 5.

The law is contrary to Defendant's position. Tribal sovereign immunity does not bar this action because (1) Defendant is unquestionably bound by the FTC Act and (2) Defendant's waiver is a question of fact and is improper for resolution at this stage. Accordingly, Plaintiff submits this Memorandum of Law in opposition to the Motion and requests that the Court deny the Motion entirely.

II. FACTUAL BACKGROUND

Defendant is a casino gaming company that provides gaming services to customers in Michigan. Compl. ¶ 2. As part of its regular business activities, Defendant required that Plaintiffs and Class Members provide their confidential PII in order to gain employment or obtain certain employment benefits from Defendant. *Id*. ¶ 4. Defendant profited from using this PII, without which it could not carry on its gaming activities, and assumed legal and equitable duties to

safeguard the PII from improper access. *Id*. ¶ 5. Yet, on or about February 9, 2025, Defendant allowed its systems to be unlawfully accessed and Plaintiffs' and Class Members' names and Social Security numbers stolen by a cybercriminal group, RansomHub. *Id*. ¶¶ 27-29. When RansomHub tried to extort a ransom for the PII, Defendant took no action and instead "determined there is no point in paying their ransom demand." *Id.* Plaintiff and the Class have now suffered and will continue to suffer numerous injuries because of the Data Breach, and Plaintiff has brought suit to remedy those harms.

Chapter 44 of Defendant's Tribal Code provides that sovereign immunity may be waived in the charter of the Tribal entity or by express resolution, which "may be incorporated in the contract documents governing the transaction involved."[1] Here, Defendant has not supplied the Court with the relevant contracts; as such, the Court cannot dismiss this action on the mere basis of defense counsel's argument that Defendant did not waive immunity to suit. Moreover, the law permits suit against Defendant, as explained in detail below.

III. ARGUMENT

A. Legal Standard

The question of a tribe's immunity "is not jurisdictional" and should therefore be resolved under Rule 12(b)(6) for failure to state a claim for which relief can be granted. *Meyers v. Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818, 820 (7th Cir. 2016). A motion to dismiss under 12(b)(6) is properly granted when a complaint provides no "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The factual allegations "must be enough to raise a right to relief above the speculative level." *Id.* (citations omitted). For the purpose of making the dismissal determination,

[1] Sault Ste. Marie Tribe of Chippewa Indians, Tribal Code, Ch. 44, available at https://www.saulttribe.com/government/tribal-code (last visited May 23, 2025).

a court must accept all the well-pleaded allegations of the complaint as true, even if doubtful in fact, and must construe the allegations in the light most favorable to a claimant. *Id.*

"Sovereign immunity is not a freestanding 'right' that applies of its own force when a sovereign faces suit in the courts of another." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 816 (2014) (Thomas, J., dissenting).[2] "[T]o the extent an Indian tribe may claim immunity in federal or state court, it is because federal or state law provides it, not merely because the tribe is sovereign." *Id*. at 816-17 (explaining that unlike States, Indian tribes are not guaranteed immunity by the U.S. Constitution). "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.'" *Indians Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–149 (1973). Thus, a tribe is only immune to the extent Congress says so, and "the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." *N.L.R.B. v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 711 (2001) (explaining that the burden of proving the applicability of an exception "should thus fall on the party asserting it"); *Federal Trade Commission v. AMG Services, Inc., et al.*, No. 2:12-CV-00536-GMN-VCF, ECF No. 559 at 6 (D. Nev. Mar. 7, 2014) ("Defendants bear the burden of establishing their claimed exemption from the FTC Act."). Because it asserts immunity from the FTC Act, Kewadin bears the burden of showing that it is immune here.

B. Argument

1. <u>The FTC Act Abrogated Defendant's Immunity</u>

Whether Congress has abrogated tribal sovereign immunity is a question of law. *Meyers*,

[2] Four justices joined in the dissent in *Bay Mills*, disagreeing with the split opinion that a tribe was immune from suit in that case based on deference to Congress. The different opinions that courts and circuits have employed in determining whether tribal immunity was abrogated further shows that the question is not easily resolved on a pre-discovery motion to dismiss.

836 F.3d at 824; *Demontiney v. U.S. ex rel. Dep't of Interior, Bureau of Indian Affs.*, 255 F.3d 801, 805 (9th Cir. 2001); *In re Coughlin*, 33 F.4th 600, 604 (1st Cir. 2022), *aff'd sub nom. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382 (2023). Although Indian tribes possess some immunity from suit, "this immunity is not without limit." *In re Greektown Holdings, LLC*, 917 F.3d 451, 456 (6th Cir. 2019), abrogated by *Lac du Flambeau*, 599 U.S. 382. "Congress may abrogate [tribal immunity] and thereby authorize suit against Indian tribes" when such abrogation is "unequivocally expressed." *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1056 (9th Cir. 2004), *as amended on denial of reh'g* (Apr. 6, 2004) (citation omitted). However, contrary to Defendant's argument, "Congress need not invoke 'magic words' to abrogate immunity." *Meyers*, 836 F.3d at 824 (citing *F.A.A. v. Cooper*, 566 U.S. 284, 290 (2012)); *Krystal Energy Co.*, 357 F.3d at 1061 ("[T]he Supreme Court's decisions do not require Congress to utter the magic words 'Indian tribes' when abrogating tribal sovereign immunity. Congress speaks 'unequivocally' when it abrogates the sovereign immunity of 'foreign and domestic governments'" which necessarily includes Indian tribes.).

The Supreme Court recently affirmed that in determining abrogation, the "question is simply whether, upon applying 'traditional' tools of statutory interpretation, Congress's abrogation of tribal sovereign immunity is 'clearly discernable' from the statute itself." *Lac du Flambeau*, 599 U.S. at 388; *F.A.A.*, 566 U.S. at 291 (what is required "is that the scope of Congress' waiver be clearly discernable from the statutory text in light of traditional interpretive tools."). Thus, abrogation can be unequivocal and clear even if not expressly stated in a single sentence or on the face of the statute. *See*, *e.g.*, *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73–74 (2000) (holding that Congress clearly expressed its intent to abrogate the sovereign immunity of the states when passing certain amendments to the Age Discrimination Enforcement Act (ADEA) despite abrogation not

clearly appearing on the face of the ADEA); *Osage Tribal Council ex rel Osage Tribe of Indians v. U. S Dep't of Lab.*, 187 F.3d 1174, 1181–82 (10th Cir.1999) (holding that the Safe Drinking Water Act "contains a clear and explicit waiver of tribal immunity" although the court had to piece together various subsections of the statute to reach that conclusion).[3] Using this reasoning, the Supreme Court recently held that tribal sovereignty was abrogated by Congress in another statute because it "categorically abrogated the sovereign immunity of *any* governmental unit that might attempt to assert it" and did not "cherry-pick" among government units. *Lac du Flambeau*, 599 U.S. at 390; *see also Lac du Flambeau*, 599 U.S. at 393 ("Putting the pieces together, our analysis of the question whether the Code abrogates the sovereign immunity of federally recognized tribes is remarkably straightforward. The Code unequivocally abrogates the sovereign immunity of all governments, categorically. Tribes are indisputably governments.") The same reasoning has been applied by courts to conclude that the FTC Act abrogates tribal sovereign immunity and should be applied here.

The FTC Act "grant[s] the FTC broad authority to bring suit against 'any person, partnership, or corporation' for violating 'any provision of law enforced by the [FTC].'" *AMG Services*, at 6 (citing 15 U.S.C. § 45(a)(2)). The statute lists specific entities that are not governed, including banks, common carriers, and Federal credit unions—but entities like Kewadin are not excepted. 15 U.S.C. § 45(a)(2). Thus, like other broadly written federal statutes, the FTC Act is a statute "of general applicability without an exception for Indian tribes that therefore applies to arms of Indian tribes, their employees, and their contractors." *AMG Services*, at 7. Moreover, the

[3] Indeed, Congress can also unequivocally state when a statute does not abrogate tribal immunity. *See* Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 5332 ("Nothing in this chapter shall be construed as . . . impairing the sovereign immunity from suit enjoyed by an Indian tribe . . . ."); USA PATRIOT Improvement and Reauthorization Act of 2005, 18 U.S.C. § 2346 ("Nothing in this chapter shall be deemed to abrogate or constitute a waiver of any sovereign immunity of . . . an Indian tribe . . .").

FTC Act defines "corporation" very broadly to include any company or association "incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members." 15 U.S.C. § 44.

Here, Plaintiffs allege that Defendant is company that operates casinos and "profited from Plaintiff's retained data and used Plaintiff's and Class Members' PII for business purposes." Compl. ¶¶ 13, 16, 217. Further, Chapter 94 of Defendant's Tribal Code specifically states that "[t]he Gaming industry is vitally important to the economy of the Tribe" and that Kewadin's objective is to manage its gaming business and "to provide a fair return to the Tribe on its investments" Sault Ste. Marie Chippewa Tribal Code §§ 94.104 and 94.112, available at https://www.saulttribe.com/government/tribal-code. Thus, because the record clearly shows that Kewadin is a "corporation" as that term is defined by the FTC Act,[4] Kewadin is not immune from suit for violating the FTC Act.

2. <u>Defendant's Waiver is a Question of Fact to Be Resolved After Discovery</u>

Chapter 44 of Defendant's Tribal Code provides that sovereign immunity may be waived in the charter of the Tribal entity or by express resolution, which "may be incorporated into the contract documents governing the transaction involved."[5] By hiring Plaintiffs and the Class Members, Defendant entered into contracts wherein both parties made promises. Despite having the burden on its Motion, Defendant has failed to provide any language from the relevant contracts to show that it did not waive its immunity from suit. Notably, in a recent case against Kewadin, Kewadin moved to dismiss and refused to participate in discovery on the basis that it was immune

[4] To the extent it remains unclear whether Kewadin is a "corporation" under the FTC Act, that only shows that this issue cannot be resolved at this stage but is a question of fact to be resolved by the jury. *See AMG Services*, *supra* at 6-7 n.3 (finding that genuine issues of material fact remain on whether those defendants are corporations).

[5] Sault Ste. Marie Tribe of Chippewa Indians, Tribal Code, §§ 44.105-44.107, available at https://www.saulttribe.com/government/tribal-code (last visited May 23, 2025).

from suit, but the court disagreed and concluded that the language of Kewadin's contract with that plaintiff operated as a waiver. *See Kewadin Casinos Gaming Authority v. Draganchuk*, Case No. 2:22-cv-27, 2022 WL 3643739, at *1 (2022). Despite the trial court's finding of "an express and unlimited, irrevocable waiver of sovereign immunity" in the contract, Kewadin insisted on filing motions and new cases to object to the finding of waiver, ultimately being found in contempt and being ordered to pay $88 million for breaching its casino agreement. *See id.*; *Kewadin Casinos Gaming Authority*, Case No. 2:22-cv-27, ECF No. 10-3.[6] Here, no contracts have been provided to prove that Kewadin has not waived its immunity from suit. Kewadin has merely proposed via its legal counsel in the Motion that there was no waiver—just as it did in *Kewadin Casinos Gaming Authority*.[7] At this stage, the Court must construe the allegations in Plaintiff's favor and should resolve any questions of fact at the appropriate time after discovery has concluded. *See AMG Services*, *supra* at 6-7 n.3.

3. Even if this Court is Found to Lack Subject Matter Jurisdiction, Remand Rather Than Dismissal Is Appropriate

As noted, Defendant voluntarily removed this action to this Court, asserting that this Court has jurisdiction based on the Complaint raising issues of interpretation of a federal statute, the Federal Trade Commission Act (the "FTC Act"), 15 U.S.C. § 45. ECF No. 1, PageID.6. Despite Defendant's removal, Defendant has now moved to dismiss the Complaint under Fed. R. Civ. P. 12(b)(1). ECF No. 5.

But "[a] district court must remand a removed action when it appears that the court lacks subject matter jurisdiction." *Anusbigian v. Trugreen/Chemlawn, Inc.*, 72 F.3d 1253, 1254 (6th Cir.

[6] Indeed, the plaintiffs' counsel there explained that he had yet to find a case where a tribe had admitted to waiving immunity despite the clear language of the contract.
[7] Further, a sovereign entity can waive immunity through litigation like removing the action to federal court. *See Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002).

1996) (citing 28 U.S.C. § 1447(c) (1988) for the language that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded"); *see also Jordan v. Carter*, 719 F. Supp. 3d 775, 784 (S.D. Ohio), *amended on reconsideration*, 739 F. Supp. 3d 647 (S.D. Ohio 2024) (citing 28 U.S.C. § 1447(c) and finding that "the statute orders remand, not dismissal").

Other federal courts take even greater issue with such perceived gamesmanship. *See* Standing Order of the United States District Court for the Northern District of Illinois on Removed Cases.[8] In circumstances such as those here, rather than dismissal, "[i]f a defendant removes an action from state court to this Court, but then raises lack of subject-matter jurisdiction or lack of Article III standing, this Court may summarily remand the action back to state court." *Id.* This standing order further provides:

> On removal, the defendants have the burden of establishing federal jurisdiction. The Court will not permit a defendant to simultaneously assert and challenge the Court's jurisdiction. This behavior wastes the parties' time and money and consumes scarce judicial resources that could be spent elsewhere. Moreover, the Court does not believe this litigation strategy complies with Federal Rules of Civil Procedure 1 and 11(b) and the Rules of Professional Conduct, among other things.
>
> . . . The Court will also order the defendants' counsel to provide a copy of the order to the client, so that the client can address with counsel the payment of attorneys' fees for removing a case to federal court, only to ask that it be sent back to state court.

See id. (also discussing other sanctions to impose on counsel, not the client).

Based on the timing of the present Motion, and Defendant's near-immediate Motion to dismiss for lack of subject matter jurisdiction, it is self-evident that Defendant lacked a good faith belief in the Court's jurisdiction over this Action. *See Nessel on behalf of People of Michigan v. Enbridge Energy, LP*, 104 F.4th 958, 965 (6th Cir. 2024) (finding that a defendant must have a

[8] *See, e.g.*, https://www.ilnd.uscourts.gov/PrintContent.aspx?cmpid=1278.

"good-faith basis for legal arguments in the notice of removal", and citing additional Sixth Circuit caselaw on the requirement of a good-faith basis which applied Rule 11 in the removal context).[9]

As such, if this Court finds that it lacks subject matter jurisdiction, remand rather than dismissal is appropriate.

IV. CONCLUSION

For the reasons asserted above, Plaintiff respectfully requests that the Court deny Defendant's Motion to Dismiss.

Dated: June 11, 2025

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[9] Plaintiff reserves the right to seek costs and fees for this removal which plainly appears to lack a good-faith basis.

CERTIFICATE REGARDING WORD COUNT

Plaintiff, in compliance with W.D. Mich. LCivR 7.2(b)(i)-(ii), used 2,832 words in Plaintiff's foregoing brief. Microsoft Word for Office 365 Business version 1910 is the word processing software used to generate the word count in the attached brief.

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2025, I electronically filed the foregoing brief using the Court's electronic filing system, which will notify all counsel of record authorized to receive such filings.

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