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

REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PURSUANT TO FED R CIV P 12(b)(1)

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Plaintiff presents only two arguments in response to Kewadin's Motion to Dismiss: (1) the FTC Act abrogates Kewadin's sovereign immunity despite no express language from Congress showing the same; and (2) Kewadin somehow waived its sovereign immunity simply by employing Plaintiff. In doing so, Plaintiff attempts to shift the burden of proving sovereign immunity, which is, and has always been, on the party seeking to show waiver.

Plaintiff also asks this Court, with no statutory analysis, to usurp the most recent United States Supreme Court precedent in such a way as to all but eliminate tribal sovereign immunity. Plaintiff does so by asking this Court to deviate from the studious precedent set forth in *Lac du Flambeau* to read that so long as a statute does not specifically exclude an Indian tribe in its plain language, that statute unequivocally waives sovereign immunity. This flies in the face of decades of Supreme Court precedent holding that any waiver must be express and unequivocal. This is why the Court in *Lac du Flambeau* made it clear that to find abrogation without including the specific language of "Indian tribes", a statute must have an all-encompassing, "extensive list" whereby there can be no question that Congress intended to include Indian tribes therein. The FTC Act contains no such language.

The following will show that this matter should be dismissed because the Tribe and Kewadin enjoy sovereign immunity that has not been waived or abrogated.

II. LAW & ARGUMENT

A. The Plain Language of the FTC Act Does Not Abrogate Tribal Sovereign Immunity.

Plaintiff's attempt to akin the FTC Act to the Bankruptcy Code cries foul. In *Lac du Flambeau*, the Supreme Court thoroughly analyzed the U.S. Bankruptcy Code and found abrogation only because of its all-inclusive language read ***in conjunction*** with the very specific abrogation section contained therein. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 389-90 (2023). Importantly, the Court noted that to find an abrogation of sovereign immunity is a "demanding standard." *Id*. at 388. "If there is a plausible interpretation of the statute that preserves sovereign immunity, Congress has not unambiguously expressed the requisite intent." *Id.* at 388 (quoting *FAA* v. *Cooper*, 566 U. S. 284, 290 (2012)). It was under this threshold that the Court was tasked with determining "whether the abrogation provision in §106(a) and the definition of 'governmental unit' in §101(27), ***taken together***, unambiguously abrogate the sovereign immunity of federally recognized tribes." *Id.* at 387 (emphasis added).

Applied to this case, *Lac du Flambeau's* specific holding precludes a finding that sovereign immunity has been abrogated by the FTC Act.

i. The Supreme Court in Lac du Flambeau found a waiver because of the all-encompassing language found in the Bankruptcy Code.

The Court's decision in *Lac du Flambeau* was a very narrow, very specific holding. The Court began its analysis by noting the comprehensive list of governmental entities Congress intended to be subject to the Bankruptcy Code. *Id.* at

388. Starting with the definition of "governmental unit" in §101(27), the Court stated that the same "exudes comprehensiveness from beginning to end. Congress has rattled off a ***long list*** of governments that vary in geographic location, size, and nature." *Id.* (emphasis added). Specifically, §101(27) states:

> The term "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

11 U.S.C. §101(27). But the analysis did not stop there. The Court was intentional in noting the "catchall phrase" Congress included at the end of that section, "or other foreign or domestic government":

> The catchall phrase Congress used in §101(27) is also notable in and of itself. Few phrases in the English language express all-inclusiveness more than the pairing of two extremes. "Rain or shine" is a classic example: If an event is scheduled to occur rain or shine, it will take place whatever the weather that day might be. Same with the phrase "near and far": If people are traveling from near and far, they are coming from all over the map, regardless of the particular distance from point A to point B.
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> The pairing of "foreign" with "domestic" is of a piece with those other common expressions. For instance, if someone asks you to identify car manufacturers, "foreign or domestic," your task is to name any and all manufacturers that come to mind, without particular regard to where exactly the cars are made or the location of the companies' headquarters. Similarly, at the start of each Congress, a cadre of newly elected officials "'solemnly swear'" to "'support and defend the Constitution of the United States against all enemies, foreign and domestic.'" 5 U. S. C.

> §3331. That oath—which each Member of Congress who enacted the Bankruptcy Code took—indisputably pertains to enemies anywhere in the world. Accordingly, we find that, ***by coupling foreign and domestic together, and placing the pair at the end of an extensive list***, Congress unmistakably intended to cover all governments in §101(27)'s definition, whatever their location, nature, or type.

Id. at 390 (emphasis added). After acknowledging the all-encompassing intent of Congress, the Court then turned to §106(a), which is the specific section with the sole purpose of abrogating sovereign immunity for governmental units.

The Bankruptcy Code's abrogation of sovereign immunity in §106(a) is very specific: "Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following". 11 U.S.C. §106(a). Taking this in conjunction with the broad definition of foreign and domestic in §101(27), coupled with the fact that §106(a) plainly applies to ***all*** "governmental units", meant that Congress did not "cherry-pick *certain* governments from §101(27)'s capacious list". *Id.* at 390 (emphasis in original). Instead, the abrogation of sovereign immunity was clearly meant to encompass all governments, both foreign and domestic. *Id.* at 390. This led to the Court's final inquiry: whether Indian tribes are governmental units.

In holding in the affirmative, the Court concluded as follows:

> Federally recognized tribes exercise uniquely governmental functions: "They have power to make their own substantive law in internal matters, and to enforce that law in their own forums." *Santa Clara Pueblo*, 436 U. S., at 55-56, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (citations omitted). They can also "tax activities on the reservation." *Plains Commerce Bank* v. *Long Family Land & Cattle Co.*,

> 554 U. S. 316, 327, 128 S. Ct. 2709, 171 L. Ed. 2d 457 (2008).
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> It is thus no surprise that Congress has repeatedly characterized tribes as governments. And this Court has long recognized tribes' governmental status as well. See, *e.g.*, *Bay Mills*, 572 U. S., at 788-789, 134 S. Ct. 2024, 188 L. Ed. 2d 1071; *Santa Clara Pueblo*, 436 U. S., at 57-58, 98 S. Ct. 1670, 56 L. Ed. 2d 106. We have done so generally and also in the specific context of tribal sovereign immunity. Tribal sovereign immunity, "we have explained, is 'a necessary corollary to Indian sovereignty and self-governance.'" *Bay Mills*, 572 U. S., at 788, 134 S. Ct. 2024, 188 L. Ed. 2d 1071; see also *id.*, at 789, 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (discussing immunity as an example of tribes' "governmental powers and attributes").
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> Putting the pieces together, our analysis of the question whether the Code abrogates the sovereign immunity of federally recognized tribes is remarkably straight forward. The Code unequivocally abrogates the sovereign immunity of all governments, categorically. Tribes are indisputably governments. Therefore, §106(a) unmistakably abrogates their sovereign immunity too.

Id. at 392-93.

In summary, the Court did a thorough analysis of the Bankruptcy Code and found that it expressly abrogated sovereign immunity for "all" governments, both "foreign and domestic", to which Indian tribes were included. The FTC Act has no such language. In fact, the FTC Act fails to mention either Indian tribes **or** governmental units, and it further fails to include any section abrogating sovereign immunity of any kind.

ii. The FTC Act is not akin to the Bankruptcy Code, and no waiver can be implied, much less clearly expressed.

Before turning to the specific language of the FTC Act, it is important to recognize what language is glaringly absent. Fatally for Plaintiff, the FTC Act is completely devoid of any language abrogating sovereign immunity for governments, entities, or the like. That is enough to stop this inquiry and Plaintiff's claims in their tracks. The *Lac du Flambeau* Court only found an express and unequivocal waiver by reading §101(27) of the Bankruptcy Code (the definition of a governmental unit) ***in conjunction*** with §106(a) (the section containing an express abrogation of sovereign immunity). It is puzzling to see how Plaintiff can claim there is an express waiver contained within the FTC Act when the necessary language—that is, a section containing abrogation—does not exist.

Regardless, Plaintiff relies on §45(a)(2) of the FTC Act to assert that it abrogates tribal sovereign immunity. (ECF No. 16, PageID.149-150). Section 45(a)(2) of the FTC Act states:

> The Commission is hereby empowered and directed to prevent ***persons, partnerships, or corporations***, except banks, savings and loan institutions described in section 18(f)(3) [15 U.S.C. § 57a(f)(3)], Federal credit unions described in section 18(f)(4) [15 U.S.C. § 57a(f)(4)], common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958 [49 U.S.C. §§ 40101 *et seq*.], and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C. §§ 181 *et seq*.], except as provided in section 406(b) of said Act [7 U.S.C. § 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

15 U.S.C. §45(a)(2) (emphasis added). As demonstrated by the clear language of the statute, this is not analogous to the language of the Bankruptcy Code the Court analyzed in *Lac du Flambeau*.

This inquiry can begin and end with the entities subject to the FTC Act—"persons, partnerships, or corporations". 15 U.S.C. §45(a)(2). Pursuant to *Lac du Flambeau*, the Tribe is a governmental unit. *Id.* at 392-93.[1] The Tribe cannot be both a governmental unit and a person, partnership, or corporation. That is enough to be the end of the inquiry; however, Plaintiff further, but again fatally, argues that Kewadin is a corporation and thus subject to the FTC Act. ECF No. 16, PageID.149-150. This argument is misplaced because Kewadin enjoys the Tribe's immunity, and it is that immunity that Congress must unequivocally waive. Because no such waiver can be found, sovereign immunity remains, and this matter should be dismissed.

iii. Congress must unequivocally waive the Tribe's sovereign immunity, not the sovereign immunity enjoyed by one of the Tribe's wholly owned entities.

Plaintiff fails to recognize the most basic principle of tribal sovereign immunity; that is, that it is rooted in Indian tribes. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.") (internal citations omitted); *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788

[1] By no way does the Tribe use this as a broad admission that it is always included as a governmental unit under a statutory analysis. The Tribe expressly reserves and does not waive any and all rights pertaining to sovereign immunity.

(2014) ("As dependents, the tribes are subject to plenary control by Congress . . .yet[,] they remain separate sovereigns preexisting the Constitution. . . [U]nless and until Congress acts, the tribes retain their historic sovereign authority."). The analysis is not whether Kewadin is a "corporation" under the FTC Act, which it is not, but instead whether the FTC Act abrogates the Tribe's sovereign immunity that Kewadin enjoys.

Kewadin is a wholly owned subsidiary of the Tribe,[2] not a person, partnership, or corporation. See ECF No. 6, PageID.98. This is confirmed by the United States Supreme Court in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, where the Court labeled entities such as Kewadin as "Tribal enterprises," not "persons, partnerships, or corporations." *See* 523 U.S. 751, 758 (1998) ("Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians"); 15 U.S.C. §45(a)(2). Quite simply, Kewadin is not a "corporation" under the non-exhaustive and unclear language of the FTC Act, and Plaintiff's arguments to the contrary are "[t]endentious, junk-drawer arguments **. . .** best left out of a brief." *Michigan v. Bay Mills Indian Cmty.*, 695 F.3d 406, 416 (6th Cir. 2012) (dismissing meritless waiver of immunity argument).

Make no mistake, the proper analysis is whether Congress unequivocally abrogated the Tribe's sovereign immunity. But even if Plaintiff's argument that the FTC Act waived Kewadin's immunity was proper, it still falls flat. Neither the Tribe

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[2] Because Plaintiff does not dispute that Kewadin enjoys the Tribe's sovereign immunity, that will not be readdressed here. Instead, the Tribe and Kewadin incorporate ECF No.6 PageID.98-101 by reference as if fully restated herein.

nor Kewadin is a person, partnership, or corporation, and the broad and unclear language of the FTC Act cannot be read to unequivocally abrogate the Tribe's sovereign immunity. This is especially true when the FTC Act does not even include an abrogation section. Put simply, no express and unequivocal language exists to abrogate the Tribe's sovereign immunity that Kewadin enjoys.[3]

iv. There is no private cause of action available in the FTC Act.

Another striking difference between the FTC Act and the Bankruptcy Code is how both can be utilized by a private party. The plaintiff in *Lac du Flambeau* was a natural person seeking the protection of the Bankruptcy Code against an Indian tribe. *Lac du Flambeau*, 599 U.S. at 386 ("Coughlin alleges that Lendgreen was . . . aggressive in its efforts to contact him and collect the money . . . Coughlin eventually filed a motion in Bankruptcy Court, seeking to have the stay enforced against Lendgreen, its parent corporations, and the Band"). Importantly, the Bankruptcy Code allowed the individual plaintiff to file a private action to avail himself of the protection of the Bankruptcy Code. Here, Plaintiff, a private party, cannot file an action under the FTC Act because it does not give rise to such a private cause of action. *Sharwell v. Selva*, 4 F. App'x 226, 227 (6th Cir. 2001); *Weng v. Nat'l Sci. Found.*, Case No. 1:22-cv-998, 2023 WL 3579357, at *2 (W.D. Mich. May 22, 2023) (quoting *Montgomery v. Kraft Foods Glob., Inc.*, No. 1:12-cv-00149, 2012 WL 6084167,

[3] *See also Florida Paraplegic Assoc., Inc. v. Miccosukee Tribe of Indians of Florida, 166 F.3d 1126, 1129–34 (11th Cir.1999)* (finding that tribal restaurant and casino were commercial enterprises which were not exempt from provisions of Americans with Disabilities Act, but that tribal sovereign immunity applied).

at *1, n.2 (W.D. Mich. Dec. 6, 2012), aff'd, 822 F.3d 304 (6th Cir. 2016)). This provides further support that no express and unequivocal waiver of sovereign immunity can be found in the FTC Act.[4]

B. It Is Plaintiff's, Not The Tribe's Or Kewadin's, Burden To Show A Waiver Of Sovereign Immunity.

Plaintiff boldly, albeit incorrectly, asserts that the Tribe and Kewadin have the "burden of showing that it is immune here." ECF No.16, PageID.147, 150. Plaintiff doubles down on this burden-shifting attempt to allege that Kewadin has the burden to provide "language from the relevant contracts to show that it did not waive its immunity from suit." ECF No. 16, PageID.147, 150. This argument misses the mark and ignores black-letter law. Unless Plaintiff can prove an express and unequivocal waiver of sovereign immunity, this Court does not have subject matter jurisdiction to hear this matter, and it must be dismissed.

Plaintiff has the burden to show an express and unequivocal waiver of the Tribe's or Kewadin's sovereign immunity. *Farmer Oil & Gas Props., Ltd. Liab. Co. v. S. UTE Indian Tribe*, 899 F. Supp. 2d 1097, 1108 (D. Colo. 2012) ("Because Farmer has the burden of showing that subject matter jurisdiction exists, it bears the burden of showing that the Tribe unequivocally and expressly waived its immunity"); *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 84 (2d Cir. 2001) ("On a motion invoking

[4] Plaintiff also argues briefly that the Tribe or Kewadin waived sovereign immunity upon removal. Although that may be true of Eleventh Amendment immunity, it is not true of sovereign immunity. See *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla.*, 692 F.3d 1200, 1208 (11th Cir. 2012) ("the Tribe's removal of the case to federal court did not, standing alone, waive the Tribe's sovereign immunity from suit").

sovereign immunity to dismiss for lack of subject matter jurisdiction, the plaintiff bears the burden of proving by a preponderance of evidence that jurisdiction exists"); *Buchwald Cap. Advisors, LLC v. Papas (In re Greektown Holdings, LLC)*, 559 B.R. 842, 856 (Bankr. E.D. Mich. 2016) ("Plaintiff cannot but fail to meet the high burden of proving the required express, unequivocal, unmistakable, and unambiguous waiver. . . Plaintiff bears the burden of proving jurisdiction in order to survive a motion to dismiss").

Plaintiff has not and cannot do so here. Neither can Plaintiff show that fact discovery is appropriate.

C. Discovery Is Not Appropriate.

Plaintiff has not pled any facts to warrant discovery on waiver. Plaintiff's only claim that Kewadin has waived sovereign immunity is through employing Plaintiff. ECF No. 16, PageID.150-151. ("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"). Again, it is not Kewadin's burden to show that it did not waive immunity, it is Plaintiff's burden to show that it has. In a desperate, all-in, Hail Mary attempt to keep this case alive, Plaintiff asks for discovery to show waiver. But discovery is inappropriate because: 1) the same would be futile; and 2) Plaintiff failed to plead the specific facts required to allow this Court to order even limited discovery.

Only if a complaint includes non-conclusory allegations of fact that will

overcome sovereign immunity is limited discovery appropriate. See *MacDonald v. Symons*, Case No. 5:99-CV-139, 2000 U.S. Dist. LEXIS 9435, at *5-6 (W.D. Mich. June 21, 2000) ("When the defense of qualified immunity is asserted, the complaint must 'include the specific, non-conclusory allegations of fact that will enable the district court to determine that those facts, if proved, will overcome the defense of qualified immunity.'") (internal citations omitted). This is supported by Sixth Circuit precedent. See *Veney v. Hogan*, 70 F.3d 917, 922 (6th Cir. 1995) ("Accordingly, when a plaintiff pleads his claim in generalized 'notice' form, and the defense of qualified immunity is asserted through a motion to dismiss, the plaintiff is required to respond to that defense. If his original complaint is deficient in that regard, he must amend his complaint to include the specific, non-conclusory allegations of fact that will enable the district court to determine that those facts, if proved, will overcome the defense of qualified immunity.").

When a defendant asserts immunity in a motion to dismiss, a district court may not permit discovery against immunity-asserting defendants before it has determined that the plaintiff has pleaded sufficient facts to overcome the defense. *Carswell v. Camp*, 37 F.4th 1062, 1067 (5th Cir. 2022). This is because a plaintiff is required to plead a plausible claim, including sufficient allegations to overcome an immunity defense. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (directing that a plaintiff must "state a claim for relief that is plausible on its face" — excluding statements that are "no more than conclusions" which are "not entitled to the assumption of truth"). Without plausibly pled allegations sufficient to survive

dismissal on the basis of immunity, there can be no discovery. Plaintiff has failed to do so here.

D. This Case Must Be Dismissed, Not Remanded.

Remand is only appropriate if this Court finds that it does not have federal question jurisdiction. Although both federal question jurisdiction and sovereign immunity fall upon an analysis of subject matter jurisdiction, they are nonetheless different analyses. *Ashley v. Clay Cnty.*, 125 F.4th 654, 660 (5th Cir. 2025) (“‘immunity is a threshold question, to be resolved as early in the proceedings as possible”); *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 919-20 (6th Cir. 2009) (“[I]f [the tribe] enjoys tribal-sovereign immunity, we need not address the issues of diversity jurisdiction and federal-question jurisdiction.”).

Plaintiff’s entire cited jurisprudence relates to federal question jurisdiction, not subject matter jurisdiction as a result of a sovereign immunity analysis. ECF No.16, PageID.151-153. This Court has already spearheaded the difference.

At the Rule 16 conference, this Court stated that it would first decide whether it has federal question jurisdiction, and if so, it would then move to an analysis of sovereign immunity. Although the Tribe and Kewadin believe this Court can decide sovereign immunity pursuant to *Memphis Biofuels, supra,* it does not change the fact that if this Court moves to a sovereign immunity analysis at any time, this case should be dismissed, not remanded. *Buchwald Capital Advisors, LLC v. Papas (In re Greektown Holdings, LLC)*, 559 B.R. 842, 857 (Bankr. E.D. Mich. 2016) (dismissal based on sovereign immunity); *Spurr v. Pope*, 936 F.3d 478, 489 (6th Cir. 2019)

(affirming dismissal based on sovereign immunity). This is a simple issue. If this Court finds that the Tribe and Kewadin enjoy sovereign immunity from suit, then dismissal, not remand, is appropriate.

III. CONCLUSION AND REQUEST FOR RELIEF

Plaintiff has not and cannot provide or allege an express and unequivocal waiver of sovereign immunity by either the Tribe or Kewadin. Neither does the FTC Act does not contain an abrogation of tribal sovereign immunity. The Tribe and Kewadin thus enjoy their sovereign immunity, this Court lacks subject matter jurisdiction, and this matter should be dismissed with costs and fees to Defendant.

Respectfully submitted,

DATED: July 10, 2025

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Reply Brief was created using Microsoft Word, and that it contains 3,718 words in the text and footnotes exclusive of the case caption, cover sheets, table of contents, table of authorities, signature block, attachments, exhibits, and this certificate.

Respectfully submitted,

DATED: July 10, 2025

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CERTIFICATE OF SERVICE

On July 10, 2025, I e-filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send electronic notice to all attorneys of record.

Respectfully submitted,

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