IN THE
HO-CHUNK NATION TRIAL COURT

Ho-Chunk Nation, Plaintiff, v. **Money Centers of America, Inc. and MCA of Wisconsin, Inc.,** Defendants.	Case No.: **CV 10-54**

ORDER
(Granting Motion to Dismiss Defendants' Counterclaim)

INTRODUCTION

The Court must determine whether to grant the plaintiff's request for dismissal of the defendants' counterclaims. The defendants have alleged a series of contract breaches and violations of other law in their counterclaim, but the plaintiff requested dismissal based on its inherent sovereign immunity. Although the contract in question contains a limited waiver of sovereign immunity, the plaintiff argues that such a waiver is only valid when made expressly by the Ho-Chunk Nation Legislature (hereinafter Legislature). The Court concurs and grants the plaintiff's request.

PROCEDURAL HISTORY

For purposes of this decision, the Court notes that the defendants, Money Centers of America, Inc. and MCA of Wisconsin, Inc. (hereinafter MCA), filed a timely *Answer with Affirmative Defenses and Counterclaim* on July 23, 2010. On August 9, 2013, the plaintiff, Ho-

Chunk Nation, filed a *Plaintiff's Notice of Motion and Motion to Dismiss Defendants' Counterclaim for Lack Of Subject Matter Jurisdiction* with attached *Memorandum in Support of Plaintiff's Motion to Dismiss Defendants' Counterclaim for Lack of Subject Matter Jurisdiction* (hereinafter "*Motion*"). MCA filed its *Defendants' Response in Opposition to Plaintiff's Motion to Dismiss Defendants' Counterclaim for Lack of Subject Matter Jurisdiction* (hereinafter "*Response*") on August 19, 2013. The Nation filed a *Plaintiff's Reply in Support of Its Motion to Dismiss Defendants' Counterclaim for Lack of Subject Matter Jurisdiction* (hereinafter "*Plaintiff's Reply*") on August 22, 2013.

The Court convened a *Motion Hearing* on August 12, 2013 at 9:00 a.m. CDT. The *Pre-Trial Conference* was held on August 27, 2013 at 9:00 a.m. CDT. The following parties appeared at the *Hearing*: Attorney Christianna L. Finnern and Attorney Michael A. Rosow on behalf of the plaintiff, and Attorney James L. Beausoleil and Attorney Harry M. Byrne on behalf of the defendants.

APPLICABLE LAW

CONSTITUTION OF THE HO-CHUNK NATION

Art. V - Legislature

Sec. 2. Powers of the Legislature. The Legislature shall have the power:

(a) To make laws, including codes, ordinances, resolutions, and statutes;

(i) To negotiate and enter into treaties, compacts, contracts, and agreements with other governments, organizations, or individuals;

Art. VI - Executive

Sec. 1. Composition of the Executive.

(b) The Executive Branch shall be composed of any administrative Departments created by the Legislature, including a Department of the Treasury, Justice, Administration, Housing, Business, Health and Social Services, Education, Labor, and Personnel, and other Departments deemed necessary by the Legislature. Each Department shall include an Executive Director, a Board of Directors, and necessary employees. The Executive Director of the Department of Justice shall be called the Attorney General of the Ho-Chunk Nation. The Executive Director of the Department of Treasury shall be called the Treasurer of the Ho-Chunk Nation.

Sec. 2. Powers of the President. The President shall have the power:

(a) To execute and administer the laws of the Ho-Chunk Nation;

(k) To represent the Ho-Chunk Nation on all matters that concern its interests and welfare;

(l) To execute, administer, and enforce the laws of the Ho-Chunk Nation necessary to exercise all powers delegated by the General Council and the Legislature, including but not limited to the foregoing list of powers.

Art. VII - Judiciary

Sec. 4. Powers of the Judiciary. The judicial power of the Ho-Chunk Nation shall be vested in the Judiciary. The Judiciary shall have the power to interpret and apply the Constitution and laws of the Ho-Chunk Nation.

Sec. 5. Jurisdiction of the Judiciary.

(a) The Trial Court shall have original jurisdiction over all cases and controversies, both criminal and civil, in law or in equity, arising under the Constitution, laws, customs and traditions of the Ho-Chunk Nation, including cases in which the Ho-Chunk Nation, or its officials and employees, shall be a party. Any such case or controversy arising within the jurisdiction of the Ho-Chunk Nation shall be filed in the Trial Court before it is filed in any other court. This grant of jurisdiction by the General Council shall not be construed to be a waiver of the Nation's sovereign immunity.

Art. XII - Sovereign Immunity

Sec. 1. Immunity of Nation from Suit. The Ho-Chunk Nation shall be immune from suit except to the extent that the Legislature expressly waives its sovereign immunity, and officials or employees of the Ho-Chunk Nation acting within the scope of their duties or authority shall be immune from suit, except suits brought in Article IV Section 3(a).

HO-CHUNK NATION LEGISLATIVE RESOLUTION 06-03-08 C

…NOW THEREFORE BE RESOLVED, that the Legislature authorizes the President or his designee to negotiate and execute an Agreement for both cash access and its casinos and training

in the cash access business for long term development of an economic enterprise with Money Center of America.

HO-CHUNK NATION RULES OF CIVIL PROCEDURE

Rule 7. Defenses and Counterclaims.

A defense that alleges new facts excusing the conduct of the defendant if statements in the *Complaint* are true must be affirmatively stated. *Counterclaims* arising from the same facts or circumstances as alleged in the *Complaint* shall be raised in the *Answer*. If a party fails to raise such *Counterclaims*, he/she shall be forever barred from bringing them to the Court in a future action. Other claims against parties in the action may also be raised in the *Answer*. A party may file a response to counterclaims raised in the *Answer*, but is not required to do so.

Rule 18. Types of Motions.

Motions are requests directed to the Court and must be in writing except those made in Court. *Motions* based on factual matters shall be supported by affidavits, references to other documents, testimony, exhibits or other material already in the Court record. *Motions* based on legal matters shall contain or be supported by a legal memorandum, which states the issues and legal basis relied on by the moving party. The *Motions* referenced within these rules shall not be considered exhaustive of the *Motions* available to litigants.

Rule 58. Amendment to or Relief from Judgment or Order.

(A) Relief from Judgment. A *Motion to Amend* or for relief from judgment, including a request for a new trial shall be made within ten (10) calendar days of the filing of judgment. The *Motion* must be based on an error or irregularity that prevented a party from receiving a fair trial or a substantial legal error that affected the outcome of the action.

(B) Motion for Reconsideration. Upon motion of the Court or by motion of a party made not later than ten (10) calendar days after entry of judgment, the Court may amend its findings or conclusions or make additional findings or conclusions, amending the judgment accordingly. The motion may be made with a motion for a new trial. If the Court amends the judgment, the time for initiating an appeal commences upon entry of the amended judgment. If the Court denies a motion filed under this Rule, the time for initiating appeal from the judgment commences when the Court denies the motion on the record or when an order denying the motion is entered, whichever occurs first. If within thirty (30) days after the filing of such motion, and the Court does not decide a motion under this Rule or the judge does not sign an order denying the motion, the motion is considered denied. The time for initiating the appeal from judgment commences in accordance with the *Rules of Appellate Procedure*.

(C) Motion to Modify. After the time period in which to file a *Motion to Amend* of a *Motion for Reconsideration* has elapsed, a party may file a *Motion to Modify* with the Court. The *Motion* must be based upon new information that has come to the party's attention that, if true, could have the effect of altering or modifying the judgment. Upon such motion, the Court may modify

the judgment accordingly. If the Court modifies the judgment, the time for initiating an appeal commences upon entry of the modified judgment. If the Court denies a motion filed under this Rule, the time for initiating an appeal from the judgment commences when the Court denies the motion on the record or when an order denying the motion is entered, whichever occurs first. If within thirty (30) calendar days after the filing of such motion, and the Court does not decide the motion or the judge does not sign an order denying the motion, the motion is considered denied. The time for initiating an appeal from judgment commences in accordance with the *Rules of Appellate Procedure*.

(D) Erratum Order or Re-issuance of Judgment. Clerical errors in a Court record, including the *Judgment* or *Order*, may be corrected by the Court at any time.

(E) Grounds for Relief. The Court may grant relief from judgments or orders on motion of a party made within a reasonable time for the following reasons: (1) newly discovered evidence which could not reasonably have been discovered in time to request a new trial; (2) fraud, misrepresentation or serious misconduct of another party to the action; (3) good cause if the requesting party was not personally served in accordance with Rule 5(c)(1)(a)(i) or (ii), did not have proper service and did not appear in the action; or (4) the judgment has been satisfied, released, discharged or is without effect due to a judgment earlier in time.

Rule 61. Appeals.

Any final *Judgment* or *Order* of the Trial Court may be appealed to the Supreme Court. The *Appeal* must comply with the *Rules of Appellate Procedure*, specifically *Rules of Appellate Procedure*, Rule 7, Right of Appeal. All subsequent actions of a final *Judgment* or Trial Court *Order* must follow the *Rules of Appellate Procedure*.

FINDINGS OF FACT

1. The parties were properly served briefs on this issue.

2. The plaintiff, Ho-Chunk Nation, is a federally recognized Indian Tribe with principal offices located on trust lands at HCN Headquarters, W9814 Airport Road, P.O. Box 667, Black River Falls, WI. *See* 70 Fed. Reg. 71194 (Nov. 25, 2005).

3. The defendant, Money Centers of America, Inc., is a Delaware corporation that maintains its principal office at 700 South Henderson Road, Suite 325, King of Prussia, Pennsylvania, 19406. *Compl.* at 1, *Defendants' Answer* at 1.

4. The defendant, MCA of Wisconsin, Inc., is a Wisconsin corporation that maintains its principal office at 700 South Henderson Road, Suite 325, King of Prussia, Pennsylvania, 19406. *Compl.* at 1, *Defendants" Answer* at 1.

5. The Legislature duly passed *Ho-Chunk Nation Legislature Authorizing the Execution of a Contract with Money Centers of America for Cash Access and Training to Create a Cash Access Business Resolution 6-03-08 C* (hereinafter *Resolution 6-03-08 C)* on June 8, 2008.

6. In the summer of 2008, MCA and the Nation entered into a contract, *Financial Services/Onswitch Agreement* (hereinafter *FSA*).

DECISION

In this motion, the Court must address a provision of the CONSTITUTION OF THE HO-CHUNK NATION (hereinafter CONSTITUTION) that safeguards the independence of the Nation. Specifically, the Court must determine whether the Legislature expressly waived its sovereign immunity as required by ART. XII, § 1 of the CONSTITUTION when it "authorized the President or his designee to negotiate and execute" a contract with the defendant, MCA. *Resolution 6-03-08 C).* For the following reasons, the Court holds that it did not.

No party in this case denies that a provision purporting to be a limited waiver of sovereign immunity was included in the contract negotiated between MCA and representatives of the Executive Branch. *FSA* at 8. In its August 9, 2013 *Motion*, however, the Nation argues that this waiver was ineffective. The Nation argues that the language of the CONSTITUTION requires a clear and unequivocal waiver from the Legislature, specifically an express waiver, and that while the Legislature clearly authorized the negotiation of the contract, the lack of any language within *Resolution 6-03-08 C* pertaining to sovereign immunity means that the

legislative branch retained this immunity. The Executive branch, therefore, had no ability, delegated or otherwise,[1] to include a provision within the contract waiving sovereign immunity. The provision that purports to, according to the Nation's motion, is void, and as a result the Nation is immune from defendants' counterclaims.

Although the Nation's motion is primarily based on the constitutional text ARTICLE XII, § 1, it also supplies a number of Ho-Chunk and foreign court cases standing for general principles in interpreting sovereign immunity. See *Mot.* at 4. Although none of the cited cases address circumstances directly analogous to the ones in this case, they do provide a background of strict construction for any potential waiver of immunity.

It is against this background that the defendants attempt to rebut the plaintiff's motion. The defendant offers two separate theories. First, it argues that the Nation has not properly raised the issue, as it did so too late in the proceedings and as an attachment to a scheduling order. *Response* at 2. Secondly, it argues that the execution of the contract, and in particular its waiver provision, serve as a clear and valid waiver of sovereign immunity. *Id*. at 3.

On the first argument, the plaintiff's response is persuasive to the Court. It points to foreign case law wherein sovereign immunity was raised after trial, and Ho-Chunk case law wherein it was raised at appeal. The defendants argue that the latter case, *HCN Legislature v. George Lewis*, stands only for the proposition that sovereign immunity can be raised for the first time at appeal, and can be distinguished in that *Lewis* involved a significant constitutional issue

[1]The Legislature retains the ability to enact statutes that serve to indefinitely waive sovereign immunity in certain situations. *See, e.g.,* EMPLOYMENT RELATIONS ACT OF 2004, 6 HCC § 5.35. If the Legislature were to micromanage the day-to-day operations of the Nation, then it could essentially halt day-to-day operations of the Nation. The Court believes that the Legislature could similarly waive sovereign immunity through a resolution process, similar to the resolution process that allows the delegation of power to the Executive Branch to enter into contracts. If the Legislature chose to delegate its power or a portion of its power to the Executive Branch, then it could have created a resolution, which indicates that the Nation, for contracting purposes, allows a limited waiver of sovereign immunity. However, the record does not reflect that any such resolution exists.

and that this case does not. *HCN Legislature v. Lewis*, SU 07-02 (HCN S. Ct., June 29, 2007). However, given the centrality of sovereign immunity to both the sovereignty of the Nation and the fact that the question turns directly on a constitutional provision, the Court declines to make the distinction the defendant desires. Furthermore, this Court can see no reason to bar the claim as untimely now, and then proceed to go through the time and expense of adjudicating the merits of the defendants' counterclaims at trial only to finally allow the plaintiff to raise the question of sovereign immunity before the Ho-Chunk Nation Supreme Court. If the plaintiff may raise the issue *after* a trial here, as *Lewis* seems to permit,[2] then it would be senseless to bar it from doing so *before* a trial here.

As for defendants' second argument, the Court also agrees with the plaintiff. Were it not for that fatal footnote, *Lonnie Simplot v. Ho-Chunk Nation Department of Health* would seem to allow for the clear contractual language of the *FSA* to serve as a waiver of sovereign immunity. *See Simplot v. HCN Dep't of Health*, CV 95-26-27, 96-05 (HCN Tr. Ct., Aug. 13, 1999) (citing *Sokaogan Gaming Enter. Corp. v. Tushie-Montgomery Associates, Inc.*, 86 F.3d 656 (7th Cir. 1996), "[t]his Court has not adopted this standard and disclaims any reliance on *Sokaogan*'s rationale"). With the footnote, however, the Court indicates that *Sokaogan*'s rule is merely a survey of how foreign jurisdictions have approached the question of sovereign immunity waivers. Although the defendants rely on the argument, the Court does not find it persuasive.

The defendants are not and do not claim to be unsophisticated parties. The scale of this case alone, both in terms of money damages alleged by both sides and the size of the case file documenting it, are sufficient to demonstrate as much. Other materials imply that the defendants

[2] There is some uncertainty as to whether *Lewis* does grant such an open-ended right, as the majority was clearly reluctant and the concurrence argued that the failure to raise the issue at trial acted as a waiver. However, that concurrence must be read in the light of *Lewis's* extremely unusual circumstances. There, the Legislature itself was a party to the litigation being decided. Since, as the CONSTITUTION reads and the Nation argues here, only the

routinely deal with gaming operations.[4] The inclusion of a sovereign immunity waiver within the FSA, even if it was ultimately ineffective, shows that MCA was aware of the existence and importance of that doctrine. Similarly, the constitutional requirements for a valid waiver of sovereign immunity are longstanding and prominent, written under their own clearly labeled Article.

Given these circumstances, the Court cannot and will not ignore the clear constitutional language of ART. XII, § 1. Even though MCA is correct that this argument has been raised much further into the case than would be ideal, and has the feel of a "last minute attempt to avoid liability,"[5] the Court is bound by the simple and clear black letter law.

BASED UPON THE FOREGOING, the Court grants the plaintiff's request for relief, and dismisses the defendants' counterclaim for lack of subject matter jurisdiction. The Court finds that the Legislature did not expressly waive sovereign immunity pursuant to the CONSTITUTION, ARTICLE XII, § 1. The parties retain the right to file a timely post-judgment motion with this Court in accordance with *HCN R. Civ. P.* 58, Amendment to or Relief from Judgment or Order. Otherwise, "[t]he time for taking an appeal shall begin from the date the judgment is filed with the [Trial Court] Clerk [of Court]." *HCN R. Civ. P.* 57. Since this decision represents a non-final judgment, "[a]n appeal from [this] interlocutory order maybe [*sic*] sought by filing a petition for permission to appeal with the Supreme Court Clerk within ten (10) calendar days after the entry of such order with proof of service on all other parties to an action." *Ho-Chunk Nation Rules of Appellate Procedure*, Rule 8.[6]

Legislature may waive sovereign immunity, the Nation's admittedly late raising of the issue here is not comparable to the logic of the *Lewis* concurrence.

[4] For example, the "Background" section in the FSA contract.

[5] *Reply* at 3.

[6] Parties can obtain a copy of the applicable rules by contacting the Ho-Chunk Nation Judiciary at (715) 284-2722 or (800) 434-4070 or visiting the judicial website at www.ho-chunknation.com.

Ho-Chunk Nation Court System
P.O. Box 70
Black River Falls, WI 54615
(715) 284-2722 or 800-434-4070

IT IS SO ORDERED this 6th day of September 2013, by the Ho-Chunk Nation Trial Court located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.

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Amanda L. Rockman

09/06/2013 06:35:33 am

Honorable Amanda L. Rockman
Associate Trial Court Judge