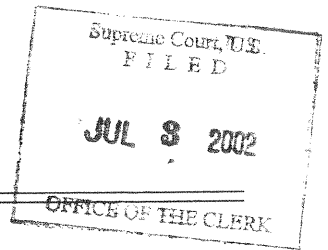


No. 01-1786



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In the  
**Supreme Court of the United States**

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SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS  
D/B/A SAULT STE. MARIE TRIBE ECONOMIC  
DEVELOPMENT COMMISSION,  
*Petitioner,*

v.

ERNEST I. YOUNG,  
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI  
TO THE MICHIGAN SUPREME COURT

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**RESPONDENT'S BRIEF IN OPPOSITION**

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

This case involves a dispute over a failed joint venture to expand an automotive parts manufacturing company. In late 1994 and early 1995, Respondent Ernest, I. Young ("Young"), and Petitioner, the Sault Ste. Marie Tribe of Chippewa Indians d/b/a the Sault Ste. Marie Tribe Economic Development Commission ("the EDC"), entered into a series of agreements to form the joint venture, including a Joint Venture Master Agreement ("JVMA") and an Employment Agreement. Both the JVMA and the Employment Agreement contained provisions requiring Young's employment by the joint venture for a fixed period at a fixed minimum compensation rate. The JVMA also include an arbitration clause and an express waiver of sovereign immunity in which the EDC waived its immunity with regard to any suit to enforce the provisions of the JVMA and all other agreements executed and delivered at the closing, including the Employment Agreement.

The petition raises the following issues:

- I. Did the Michigan courts err when they rejected the EDC's claims of sovereign immunity where the EDC expressly waived its immunity with regard to suits to enforce the provisions of the JVMA and all other agreements executed and delivered at the closing; where the Employment Agreement was one of the agreements executed and delivered at the closing; where the key terms of the Employment Agreement were expressly set forth in the JVMA; and where the Employment Agreement incorporated by reference all of the applicable provisions of the JVMA?

## RULE 29.6 STATEMENT

- II. Did the Michigan Court of Appeals err when it awarded statutory judgment interest to Young where the parties agreed that their dispute would be resolved by application of Michigan law and Michigan law expressly provides for the award of statutory judgment interest?

Respondent Ernest I. Young has no corporate affiliations. Petitioner provided their statement in the Petition for Writ of Certiorari

Respondent Young objects to the “larger question” identified in the petition. Petitioner attempts to style this case as one involving state court encroachment on federal law governing Indian sovereign immunity. In reality, however, this case involves an almost purely factual dispute concerning the interpretation and application of contractual language between two parties acting in commercial capacities. The “larger question” posed in the petition was neither raised nor addressed in the lower court proceedings.

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**RESPONDENT YOUNG’S  
BRIEF IN OPPOSITION TO THE  
PETITION FOR WRIT OF CERTIORARI**

**COUNTER-STATEMENT OF THE CASE**

In the Petition for Writ of Certiorari, the EDC sets forth an incomplete recitation of facts. Because Young believes the dispute in this case is almost purely factual, a more complete recitation of the relevant facts follows.

**I. The Formation of the Joint Venture.**

In 1974, Respondent Ernest I. Young formed Special Plastic Products, Inc. (“SPP, Inc.”), a manufacturer of injection molded plastic products, primarily for sale to the automotive industry. During the 20-year period between 1974 and 1994, Young built SPP, Inc. into an enterprise with annual sales of approximately \$9 million.

In 1994, Young and SPP, Inc. entered into negotiations with Petitioner, the Sault Ste. Marie Tribe of Chippewa Indians d/b/a the Sault Ste. Marie Tribe Economic Development Commission (“the EDC”), to form a joint venture. The joint venture was to consist of three companies. Special Plastic Products, L.L.C. (“SPPLLC”) would be formed to continue and expand upon the manufacturing operations of SPP, Inc. Two additional companies would also be formed, one to own the real property of the joint venture, and the other to perform engineering services for SPPLLC.

**II. The Joint Venture Master Agreement.**

By late 1994, the parties had negotiated an acceptable deal, and on December 15, 1994, they entered into a Joint

Venture Master Agreement (“JVMA”). The JVMA contained four key provisions which are relevant to this case. First, the JVMA required that Young be employed as the Chief Executive Officer of the joint venture companies:

9. Implementation. The promises and agreements of the parties are further conditioned upon and subject to the terms and provisions of the following documents to be executed and delivered at Closing:

...

**B. Young Employment Agreement.** Young shall be employed as Chief Executive Officer of each of the Companies for at least a five year term, under the direction and supervision of their respective Management Boards, at compensation of \$145,000 per year plus benefits, bonus of 2% for gross sales exceeding \$12,500,000 in 1995, and for 1996 and thereafter 2% of the amount by which the year’s gross sales exceeded the previous year’s gross sales, plus expenses, and upon the other conditions stated in an Employment Agreement.<sup>1</sup>

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<sup>1</sup> Contrary to the EDC’s assertion, the JVMA did not merely “contemplate” that Young would be hired by the joint venture companies. Rather, by its own language, the JVMA expressly provided that it would be “subject to the terms” of the Employment Agreement. Young’s employment was mandatory (“Young shall be employed . . .”), and was a condition precedent to the entire joint venture.

(*See*, App. to Br. in Opp. pp.3b-4b).

Next, the JVMA included a provision requiring any disputes arising out of or relating to the joint venture to be submitted to binding arbitration:

**14.2 Arbitration.**

- (a) Any controversy or claim arising out of or relating to this Agreement, or the breach of this Agreement, shall be resolved by arbitration administered by the office of the American Arbitration Association located in Oakland County, Michigan, in accordance with its then current commercial arbitration rules. Except as provided in sub. (b), arbitration shall be the exclusive remedy of the parties. Judgment upon the award rendered by the arbitration may be entered in any court having jurisdiction. . . .

(App. to Br. in Opp. pp. 5b-6b).

The JVMA also included an express waiver of the EDC’s sovereign immunity with regard to any disputes between the parties relating to the joint venture:

**14.3 Waiver of Sovereign Immunity and Consent to Suit.** The EDC hereby waives its immunity from suit to enforce the provisions of this Agreement, and all Agreements executed and delivered at the Closing and/or pursuant to this Agreement,

and consents to the exercise of jurisdiction over such suit by any court which may have jurisdiction over the subject matter, subject to the following conditions and limitations:

- (a) the waiver is granted solely to the parties and the Companies, their representatives, agents, trustees, successors, and assigns, and does not extend to third parties;
- (b) the governing law shall be the law of the State of Michigan;
- (c) the waiver shall extend only to the enforcement of the obligations of the EDC under this Agreement (including the agreement to arbitration), or to damages for breach of this Agreement by the EDC;
- (d) this waiver shall expire six years after the termination of the Companies or successor entities; and
- (e) the waiver shall be enforceable solely against the assets of the EDC, as provided in Sault Ste. Marie Tribal Code § 40.108(1).

(App. to Br. in Opp. pp. 6b-7b).

Finally, the JVMA included an "interpretation" clause which instructed that the JVMA was to be construed in light of the other joint venture agreements:

**20.7 Interpretation.** This is the entire agreement with respect to its subject matter, except for those Agreements expressly referenced herein. All prior and contemporaneous representations are merged herein. Terms used shall be in the singular or plural where appropriate.

(App. to Br. in Opp. p. 7b).

### III. The Employment Agreement.

On approximately January 15, 1995, the parties entered into a series of additional agreements relating to the joint venture. Key among these was the Employment Agreement, pursuant to which Young was hired as the Chief Executive Officer of the joint venture companies. In addition to setting forth Young's duties and compensation, the Employment Agreement included two provisions addressing the relationship between the Employment Agreement and the JVMA:

**13.5 Incorporation.** This Agreement is one of the documents executed at the Closing as part of the transaction governed by the Joint Venture Master Agreement. This Agreement does not supersede, replace or abrogate any provision of the Joint Venture Master Agreement or any other document executed as part of the transaction governed by the Joint Venture Master Agreement. Any



inconsistency between this Agreement and any other such document as to any facet of Young's employment by the Company, SPELLC, and NABGLLC shall be governed by this Agreement. All provisions of the Joint Venture Master Agreement and other documents executed as part of the transaction governed by the Joint Venture Master Agreement survive execution of this Agreement.

**13.6 Entire Agreement.** Except for those documents referred to in Section 13.6 [sic] or specifically referenced elsewhere in this Agreement, whose applicable provisions are incorporated as if set forth herein, this Agreement shall constitute the entire agreement of the parties with respect to its subject matter. All prior agreements, statements, or representations between the parties and their agents and/or employees, whether written or oral, are expressly merged herein and, if not contained in this Agreement, are of no force and effect. This Agreement shall not be modified, changed, altered, or discharged whatsoever, except by an agreement in writing executed by all parties hereto.

(App. to Br. in Opp. pp. 20b-21b).

The Employment Agreement was signed by Young on the one hand, and by a Tribal official on the other hand.  
(App. to Br. in Opp. pp. 22b-23b).

#### IV. The Failure of the Joint Venture.

In the months following the formation of the joint venture, Young successfully procured an automotive parts production program from General Motors that would result in up to \$40 million in additional annual sales for SPPLLC. In order to produce the parts, however, it would be necessary for the joint venture to rapidly complete the expansion contemplated in the JVMA.

By early 1996 the joint venture was experiencing financial difficulties as a result of the expansion. In February 1996, through a series of questionable maneuvers, the EDC gained control of the management boards of each of the joint venture companies. Young was soon replaced as chairman of the management boards by Bernard Bouschor, the Sault Ste. Marie Tribal Chairman, who had little or no experience in the automotive industry. Young was also subsequently stripped of a significant portion of his day-to-day management authority.

In September 1996, while the company continued to struggle under the EDC's control, Young's employment was terminated. The termination letter was printed on Tribal stationery and was signed by the Tribal Chairman. (App. to Br. in Opp. pp. 24b-25b).

By April 1997, the joint venture was out of business, and the EDC had sold all of the remaining assets of SPPLLC. In less than two years the EDC had destroyed the company Young spent 20 years building.

## V. The Arbitration.

In October 1996, Young and SPP, Inc. filed a demand for arbitration pursuant to the terms of the JVMA. On January 13, 1998, Young and SPP, Inc. filed their First Amended Arbitration Claim. Among other things, Young and SPP, Inc. requested an award of damages against all of the respondents in the arbitration, including the EDC, for breach of the JVMA and breach of the Employment Agreement.

An arbitration hearing was conducted on January 21, 22, 23 and February 4, 1998. On the first day of the hearing, Young and SPP, Inc. submitted their arbitration brief which included more than seven pages of argument, as well as numerous exhibits, in support of their contention that the EDC should be held liable for breaching the Employment Agreement. (App. to Br. in Opp. pp. 26b-36b). The EDC responded with its own arbitration brief, in which it specifically addressed its liability relating to the Employment Agreement. (App. to Br. in Opp. pp. 37b-39b). Several weeks after the hearing, the EDC also submitted a closing brief in which it once again addressed its liability under the Employment Agreement. (App. to Br. in Opp. pp. 40b-43b).

On April 10, 1998, the arbitrators issued their Award of Arbitrators. The arbitrators found that the EDC and SPPLLC were liable to Young for breach of the Employment Agreement and awarded Young damages in the amount of \$546,351.33.<sup>2</sup> (App. to Br. in Opp. pp. 44b-46b).

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<sup>2</sup> The arbitrators found no cause for action with regard to Young's claim for breach of the JVMA and the SPPLLC Operating Agreement. The arbitrators also found no cause for action on the EDC's counterclaim seeking to recoup its entire

## VI. The Oakland County Circuit Court Confirms the Arbitration Award in a Judgment, but Refuses to Award Statutory Interest to Young.

In the months after the arbitration award was issued, Young and the EDC filed a number of motions in the Oakland County (Michigan) Circuit Court. Young sought confirmation of the arbitration award in a judgment and requested an award of statutory judgment interest. The EDC, on the other hand, moved to vacate the arbitration award or to have it modified to delete the award of damages against the EDC for breach of the Employment Agreement.

At a hearing on July 22, 1998, the Oakland County Circuit Court rejected the EDC's arguments and ordered entry of a judgment confirming the award. In its oral ruling, the Circuit Court held that the EDC had unequivocally waived its sovereign immunity with regard to all of the agreements executed and delivered at the joint venture closing, including the Employment Agreement. (App. to Br. in Opp. pp. 55b-56b).

The Circuit Court also held that the EDC had agreed to arbitrate any claims arising out of or relating to the JVMA, that the Employment Agreement arose out of and related to the JVMA, and that the Employment Agreement was expressly included in the JVMA. Consequently, the Circuit Court held, the EDC had agreed to arbitrate any claims relating to the Employment Agreement. The Circuit Court also held that the arbitrators did not exceed their authority since Michigan law provided substantial legal support for the award. (App. to Br. in Opp. p. 56b).

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investment in the joint venture.

Finally, the Circuit Court declined Young's request for statutory judgment interest. On August 12, 1998, the Final Judgment Confirming Modified Award of Arbitrators was entered.<sup>3</sup>

**VII. The Michigan Court of Appeals Affirms the Circuit Court's Confirmation of the Arbitration Award and Reverses the Ruling Regarding Statutory Interest.**

On September 2, 1998, the EDC filed an appeal of right in the Michigan Court of Appeals. The EDC essentially raised the same arguments that had previously been rejected by the arbitrators and the Circuit Court. Young also filed a cross-appeal with regard to the statutory interest ruling.

Like the arbitrators and the Circuit Court, the Court of Appeals rejected the EDC's arguments. Recognizing that the JVMA stated that it would be "subject to the terms" of the Employment Agreement, and that Employment Agreement was one of the agreements executed and delivered at the closing referred to in the JVMA, the Court of Appeals held that the agreements should be construed together. Construing the agreements together, the Court of Appeals rejected the EDC's sovereign immunity argument. (App. to Br. in Opp. pp. 60b-66b).

The Court of Appeals further noted that since the parties had agreed that any disputes would be resolved by application of Michigan law, and since statutory judgment interest is mandatory under Michigan law, the Circuit Court

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<sup>3</sup> The Final Judgment also modified the Award of Arbitrators to correct a clerical error by the arbitrators.

erred by refusing to award statutory interest to Young. (App. to Br. in Opp. pp. 66b-70b).

**VIII. The Michigan Supreme Court Denies the EDC's Application for Leave to Appeal.**

Unsatisfied with the Court of Appeals ruling, the EDC filed an application for leave to appeal with the Michigan Supreme Court on June 11, 2001. On March 4, 2002, the Michigan Supreme Court entered an order denying the EDC's application. (App. to Br. in Opp. pp. 71b-72b). Shortly thereafter, the EDC filed its Petition for Writ of Certiorari with this Court.

**REASONS FOR DENYING THE WRIT**

**I. The EDC Has Failed to Articulate a Compelling Reason to Justify Discretionary Review by this Court.**

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

In its Petition, the EDC has failed to demonstrate any compelling reason for this Court to exercise its discretionary review in this case. Contrary to the EDC's assertions, this case does not involve any issues of critical importance to federal law and Indian sovereignty. Rather, this case involves what is essentially a factual dispute concerning the interpretation of a contract.

In the JVMA, the EDC waived its sovereign immunity not only with regard to the JVMA, but also with regard to all of the agreements executed and delivered at the closing. The Employment Agreement was one of the agreements executed and delivered at the closing, and its key terms were expressly set forth in the JVMA. Furthermore, by its own language, the JVMA specifically provided that it would be “subject to the terms” of the Employment Agreement. Based on these facts, the determination by the Michigan courts that the EDC waived its sovereign immunity with regard to the Employment Agreement can hardly be characterized as the type of error requiring intervention by this Court.

As if the EDC’s express waiver of sovereign immunity weren’t enough, the EDC also agreed to arbitrate any disputes arising out of or relating to the JVMA, and to allow entry of judgment in a Michigan court on any award rendered in such an arbitration. Based on this Court’s recent decision in *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001), this agreement to arbitrate is sufficient to constitute an express waiver of the EDC’s sovereign immunity. Because the Employment Agreement clearly arises out of or relates to the JVMA, Young’s claim for breach of the Employment Agreement clearly came within the scope of the EDC’s waiver. Accordingly, the Michigan courts did not err when they rejected the EDC’s claim of sovereign immunity.

## II. The EDC Clearly and Unequivocally Waived its Sovereign Immunity with Regard to Disputes Arising out of or Relating to the Joint Venture, Including Disputes Relating to the Employment Agreement.

Although the EDC attempts to style this case as one involving issues of state court encroachment on tribal sovereignty, the real issue in this case boils down to a simple question of contract interpretation: Did the EDC’s waiver of sovereign immunity in the JVMA extend to disputes relating to the Employment Agreement? Three tribunals, the arbitrators, the Oakland County Circuit Court, and the Michigan Court of Appeals, have already determined that the EDC unequivocally waived its sovereign immunity. When the relevant agreements are examined, it becomes quite evident that those tribunals did not err.

### A. The Employment Agreement Clearly Arises out of and Relates to the JVMA.

Section 20.7 of the JVMA, entitled “Interpretation”, provides a logical starting point for the sovereign immunity analysis. The language of the interpretation clause makes it clear that the JVMA is not to be considered in isolation. The relevant language of the interpretation clause provides that the JVMA “is the entire agreement with respect to its subject matter, *except for those Agreements expressly referenced herein.*” (App. to Br. in Opp. p. 7b) (emphasis added).

Among the agreements expressly referenced in the JVMA is the Employment Agreement. In Section 9, the JVMA indicates that it will be “subject to the terms and provisions” of a number of agreements to be executed and

delivered at the closing, including, specifically, the Employment Agreement. The key terms of the Employment Agreement are also expressly set forth in Subsection 9.B.:

Young shall be employed as Chief Executive Officer of each of the Companies for at least a five year term, under the direction and supervision of their respective Management Boards, at compensation of \$145,000 per year plus benefits, bonus of 2% for gross sales exceeding \$12,500,000 in 1995, and for 1996 and thereafter 2% of the amount by which the year's gross sales exceeded the previous year's gross sales, plus expenses, and upon the other conditions stated in an Employment Agreement.

(App. to Br. in Opp. pp. 3b-4b).

The interrelationship between the JVMA and the Employment Agreement is further demonstrated by numerous provisions of the Employment Agreement. For instance, Section 13.5 of the Employment Agreement provides that it "is one of the documents executed at the Closing as part of the transaction governed by the Joint Venture Master Agreement." (App. to Br. in Opp. pp. 20b-21b).

Section 13.6, in turn, expressly incorporates all applicable provisions of the JVMA into the Employment Agreement: "Except for those documents referred to in Section 13.6 [sic] or specifically referenced elsewhere in this Agreement, whose applicable provisions are incorporated as if set forth herein, this Agreement shall constitute the entire agreement of the parties with respect to its subject matter. . . ." (App. to Br. in Opp. p. 21b).

All of these provisions clearly demonstrate that not only was the Employment Agreement part of the JVMA, but the JVMA was part of the Employment Agreement. The JVMA and the Employment Agreement are so intertwined that the Michigan Court of Appeals properly held that they should "be construed as one agreement." (App. to Br. in Opp. pp. 64b-65b).

**B. The EDC Explicitly Waived its Sovereign Immunity with Regard to All Agreements Executed and Delivered at the Closing, Including the Employment Agreement.**

In Section 14.3 of the JVMA, the EDC expressly waived its immunity from suit "to enforce the provisions of this Agreement, and all Agreements executed and delivered at the Closing and/or pursuant to this Agreement . . . ." The EDC argues, however, that its waiver should be limited by Subsection 14.3(c), which states, "the waiver shall extend only to the enforcement of the obligations of the EDC under this Agreement (including the agreement to arbitration), or to damages for breach of this Agreement by the EDC[.]" The EDC contends this language limits its waiver to disputes relating solely to the JVMA.

If the EDC's proposed interpretation of Subsection 14.3(c) is accepted, the EDC's argument would nevertheless fail. As set forth above, the key provisions of the Employment Agreement are included in the express language of the JVMA, and by its express language, the JVMA was subject to the terms of the Employment Agreement. Thus, even if the waiver of sovereign immunity was limited to claims arising out of or relating to the JVMA, Young's claim

relating to the Employment Agreement would come within the scope of the EDC's waiver.

It should also come as no surprise that the Michigan courts rejected the arguments advanced by the EDC. Under Michigan contract law, courts are to avoid interpreting a contract in a manner that renders a portion of the agreement meaningless. *Burton v. Travelers Ins. Co.*, 341 Mich. 30, 32; 67 N.W.2d 54 (1954).<sup>4</sup> If the EDC's proposed interpretation were accepted, it would render the language extending the waiver of sovereign immunity to "all Agreements executed and delivered at the Closing and/or pursuant to this Agreement" completely meaningless.

There are several possible alternative interpretations of Subsection 14.3(c) that would avoid rendering a portion of the JVMA meaningless. For instance, Subsection 14.3(c) may have been intended to make it clear that the waiver of sovereign immunity was to be limited to the EDC, and was not to be extended to any of the other Sault Tribe entities. This construction would give Subsection 14.3(c) meaning, and would avoid rendering meaningless the language extending the waiver to "all Agreements executed and delivered at the Closing and/or pursuant to this Agreement".<sup>5</sup>

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<sup>4</sup> The JVMA and the Employment Agreement each provide that they are to be construed in accordance with Michigan law. (App. to Br. in Opp. pp. 7b, 21b).

<sup>5</sup> This is not necessarily the interpretation sought by Young. It is merely suggested to demonstrate that there are alternative interpretations available which, unlike the interpretation suggested by the EDC, avoid rendering other portions of the agreement meaningless.

On the other hand, even if the EDC's proposed interpretation was accepted, it would not be given any effect. Michigan contract law also provides that if an agreement contains conflicting clauses, the clause which appears first will be given effect, and the clause which appears later will be rejected. *Klever v. Klever*, 333 Mich. 179, 188; 52 N.W.2d 653 (1952). If the EDC's interpretation of Subsection 14.3(c) were accepted, it would directly conflict with the language extending the waiver to "all Agreements executed and delivered at the Closing and/or pursuant to this Agreement". Thus, it would not be given effect pursuant to Michigan contract law.

**C. The EDC Waived its Sovereign Immunity by Agreeing to Arbitrate Any Claims Arising out of or Relating to the Joint Venture Master Agreement.**

In addition to its explicit waiver of sovereign immunity, the EDC also waived its sovereign immunity by agreeing to arbitrate any disputes arising out of or relating to the JVMA. The arbitration provision of the JVMA provides in pertinent part as follows:

- (a) Any controversy or claim arising out of or relating to this Agreement, or the breach of this Agreement, shall be resolved by arbitration administered by the office of the American Arbitration Association located in Oakland County, Michigan, in accordance with its then current commercial arbitration rules. Except as provided in sub. (b),

arbitration shall be the exclusive remedy of the parties. Judgment upon the award rendered by the arbitration may be entered in any court having jurisdiction. . . .

(App. to Br. in Opp. p. 5b).

In *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001), this Court addressed a dispute concerning the waiver of sovereign immunity in a case involving an arbitration clause very similar to the one set forth above. The arbitration clause in *C&L Enterprises* required the parties to a construction contract, including an Indian Tribe, to submit any disputes arising out of or relating to the contract to binding arbitration pursuant to the Construction Industry Arbitration Rules of the American Arbitration Association. *Id.* at 415. Both the arbitration clause and the applicable arbitration rules provided that judgment could be entered on an award rendered by arbitration in any court having jurisdiction. *Id.* Furthermore, Oklahoma, the state in which the dispute arose, had adopted a Uniform Arbitration Act that permitted entry of judgment on an arbitration award in any court having jurisdiction. *Id.* This Court ruled that by agreeing to resolve any disputes relating to the construction contract in this manner, the Indian tribe had waived its sovereign immunity.

Applying a similar analysis to the present case, it is clear that the EDC likewise waived its sovereign immunity. The arbitration clause in the JVMA provides for arbitration pursuant to the American Arbitration Association's commercial arbitration rules. The arbitration clause and the commercial arbitration rules both provide that judgment may be entered on an award in any court having jurisdiction. Like

Oklahoma, Michigan has adopted a Uniform Arbitration Act, Mich. Comp. Laws § 600.5001, et seq., that provides for entry of judgment on arbitration awards in Michigan's circuit courts.

By agreeing to resolve any disputes in this manner, the EDC, like the Indian tribe in *C&L Enterprises*, waived its sovereign immunity with regard to any disputes arising out of or relating to the JVMA. Because the Employment Agreement clearly arises out of and relates to the JVMA (its key terms are included in the JVMA), it is clear that the EDC also waived its sovereign immunity with regard to disputes arising out of or relating to the Employment Agreement.

**D. The EDC Waived its Objections to Arbitrability by Participating in the Arbitration.**

In addition to clearly waiving its sovereign immunity, the EDC also waived its right to object to the arbitration of the Employment Agreement claim by willingly participating in the arbitration of that claim. Under Michigan law, a party may not challenge the arbitrability of an issue after it has consented to and participated in arbitration of the issue:

If a party to an arbitration agreement wants to object to the arbitrability of a specific issue, he should do so at the earliest opportunity. He should raise the objection before the issue is submitted for a hearing on its merits, because he may not voluntarily submit an issue to arbitration and then, if he suffers an adverse decision, move to set aside the adverse award on the ground that it was not an arbitrable issue.

*American Motorists Ins. Co. v. Llanes*, 396 Mich. 113, 114-115; 240 N.W.2d 203 (1976) (citing *Participation in Arbitration Proceedings as Waiver of Objections to Arbitrability*, 33 A.L.R.3d 1242, 1244).

In the present case, Young's First Amended Arbitration Claim clearly set forth the claim for breach of the Employment Agreement against all of the respondents in the arbitration, including the EDC. Thereafter, the EDC voluntarily participated in the arbitration of the claim relating to the Employment Agreement. The EDC presented arguments concerning the Employment Agreement in its Arbitration Brief and its Closing Statement. The EDC did not raise any objections to the arbitrability of the Employment Agreement claim until it filed its Closing Statement on March 2, 1998, nearly one month after the arbitration hearing was concluded. By that time, the EDC had already waived its right to object. *American Motorists Ins.*, *supra*.

**E. The Michigan Courts Did Not Err When They Rejected the EDC's Claims of Sovereign Immunity.**

From the foregoing, it can be seen that the Michigan Courts did not err when they rejected the EDC's arguments concerning its waiver of sovereign immunity. To summarize, the key facts are as follows:

- The EDC expressly waived its sovereign immunity with regard to the JVMA and all agreements executed and delivered at the Closing.

- The Employment Agreement was one of the agreements executed and delivered at the Closing.
- The EDC agreed to arbitrate any claims arising out of or relating to the JVMA.
- The key terms of the Employment Agreement were included in the JVMA, and the JVMA was "subject to the terms" of the Employment Agreement.
- The terms of the JVMA were incorporated by reference into the Employment Agreement.
- The EDC willingly participated in the arbitration of Young's claims relating to the Employment Agreement.

Young's claim relating to the Employment Agreement clearly arose out of or related to the JVMA and/or the agreements delivered at the Closing. As such, Young's claim came within the scope of the EDC's waiver of sovereign immunity. The EDC essentially acknowledged this when it willingly participated in the arbitration. Accordingly, the Michigan courts did not err when they rejected the EDC's arguments and confirmed the arbitration award.



III. The Michigan Judgment Interest Statute Was Properly Applied in this Case Because the EDC Agreed That Any Disputes Would Be Resolved by Application of Michigan Law.

Finally, the Michigan Court of Appeals did not err when it awarded statutory judgment interest to Young. In the JVMA, the EDC expressly agreed that the resolution of any disputes would be governed by Michigan law. The relevant portion of the JVMA provides as follows:

14.3 Waiver of Sovereign Immunity and Consent to Suit. The EDC hereby waives its immunity from suit to enforce the provisions of this Agreement, and all Agreements executed and delivered at the Closing and/or pursuant to this Agreement, and consents to the exercise of jurisdiction over such suit by any court which may have jurisdiction over the subject matter, subject to the following conditions and limitations:

...

(b) the governing law shall be the law of the State of Michigan . .

..

(App. to Br. in Opp. pp. 6b). The Employment Agreement also expressly provided that it was to “be governed by and construed according to the laws of the State of Michigan . . . .” (App. to Br. in Opp. pp. 21b).

Among other things, “the law of the State of Michigan” provides for the mandatory award of judgment

interest in civil actions, including actions to confirm arbitration awards. *Holloway v. Board of County Road Commissioners*, 450 Mich. 608, 618; 543 N.W.2d 923 (1996). Under controlling Michigan case law, when a party files an action to confirm an arbitration award, it is entitled to recover statutory interest from the date the arbitration award is entered through the date the judgment confirming the award is satisfied. *Gordon Sel-Way, Inc. v. Spence Bros., Inc.*, 438 Mich. 488, 506-510; 475 N.W.2d 704 (1991); *Holloway, supra* at 618. Applying Michigan law to the present case, it is clear that Young is entitled to recover statutory interest from the EDC.

In its Petition, the EDC argues that the “no interest rule” applicable to the United States government should be applied to Native American tribes. The “no interest rule” bars interest awards against the United States government unless the government has specifically waived its immunity with regard to interest, either by contract or by statute. *Library of Congress v. Shaw*, 478 U.S. 310, 314-316 (1986).

There are several problems with the EDC’s argument, however. First, the EDC has not cited any case in which any court has ever extended the “no interest rule” beyond the federal government. In fact, this Court has stated in the past that the “no-interest rule” is to be applied “only where the United States’ liability for interest is at issue.” *Missouri v. Jenkins*, 491 US 274, 281, n. 3 (1989).

Next, the EDC ignores one of the primary exceptions to the “no interest rule”. As this Court noted in *Shaw, supra* at 317, n. 5 “[t]he no-interest rule is . . . inapplicable where the Government has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise.” In this case, the EDC “cast off the cloak of sovereignty and

assumed the status of a private commercial enterprise” when it entered into the joint venture with Young. Accordingly, the “no-interest rule” does not apply.

Finally, the EDC’s argument fails to address the fact that the EDC specifically agreed that any disputes would be resolved by the application of Michigan law. As noted above, Michigan law requires an award of interest in an action to confirm an arbitration award. *Gordon Sel-Way, supra; Holloway Construction, supra*. Applying the analysis of the *C&L Enterprises* case, it is clear that by agreeing to resolve any disputes according to Michigan law, which includes mandatory interest, the EDC has waived its sovereign immunity with regard to the interest issue.

The practical effect of allowing the EDC to avoid statutory interest would be to reward the EDC for tying up the arbitrators’ award in this case for more than 4 years. Not only would this be unfair to Young, it is also contrary to the underlying purpose of arbitration - to provide for the quick and inexpensive resolution of legal disputes. Accordingly, the Michigan courts did not err when they awarded mandatory statutory interest to Young.

### CONCLUSION

The EDC has failed to identify a single compelling reason for this Court to exercise its discretionary jurisdiction in this case. Contrary to the EDC’s arguments, this case does not involve important federal questions concerning state court encroachment on tribal sovereignty. Rather, it involves a private contractual dispute in which a tribal entity that expressly waived its sovereign immunity is attempting to avoid its contractual obligations by asserting sovereign immunity simply because it was not happy with the results of

an arbitration. This clearly does not involve any important questions of federal law. Accordingly, the Petition should be denied.

Respectfully submitted,

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