UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

STATE OF MICHIGAN, Case No. 1:10-cv-1273

Plaintiff,

v.

BAY MILLS INDIAN COMMUNITY, HONORABLE PAUL L. MALONEY

Defendant

and

LITTLE TRAVERSE BAY

BANDS OF ODAWA INDIANS,

Plaintiff, Case No. 1:10-cv-1278

v.

BAY MILLS INDIAN COMMUNITY HONORABLE PAUL L. MALONEY

Defendant.

BRIEF IN SUPPORT OF MOTION TO STAY INJUNCTION PENDING APPEAL OF RIGHT

EXPEDITED CONSIDERATION REQUESTED

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STATEMENT OF ISSUE PRESENTED

Whether the Court should stay its Order of March 29, 2011, granting the Little Traverse Bay Bands of Odawa Indians' motion for preliminary injunction[1], requiring the Bay Mills Indian Community to cease operating the casino it has been operating on land it purchased in Vanderbilt, Michigan with funds from the Michigan Indian Land Claim Settlement Act Land Trust, P.L. 105-143, pending Defendant's appeal, where (1) the Court erred when it held that it had subject matter jurisdiction, and, even if the Court had jurisdiction, Plaintiff did not establish the right to such an extraordinary remedy, and (2) if not stayed, Defendant and others will suffer irreparable harm.

[1] Because the legal and factual claims made by Plaintiff and the State of Michigan were nearly identical, this Court consolidated the cases. (See, ECF No. 2. (All ECF references are to the 1:10-cv-1273 docket and record, unless otherwise noted.))

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INTRODUCTION

Defendant has appealed this Court's order granting Plaintiff's motion for preliminary injunction closing its casino gaming facility in Vanderbilt, Michigan to the Sixth Circuit Court of Appeals. On appeal, Defendant will argue that this Court lacks jurisdiction to consider the pending case because Defendant Bay Mills Indian Community ("BMIC") has sovereign immunity from suit. Defendant also will argue that this Court erred when, rather than maintaining the status quo while the parties litigate the merits of the case and develop a factual record through discovery, it took the radical step of forcing BMIC to close its business at the outset of this litigation. Because there is a likelihood that BMIC will prevail on one, if not both, of these arguments on appeal; there is significant harm to BMIC and others if the injunction is not stayed; and a much lesser harm to Plaintiff if the stay is granted, this Court should stay the preliminary injunction pending appeal. Defendant seeks an immediate stay of this injunction while it appeals by right, in accordance with 28 U.S.C. §1292(a)(1), this Court's order enjoining Defendant from further operation of its Vanderbilt facility.

ARGUMENT

Title 28 U.S.C. §1331 provides this Court with jurisdiction over civil actions involving a federal question, but does not waive Defendant's defense of sovereign immunity. Title 28 U.S.C. §1362, which allows the Court to adjudicate civil actions involving a federal question brought by an Indian tribe, does not waive Defendant's sovereign immunity. Because the defense of sovereign immunity is jurisdictional, this Court's failure to demonstrate that such defense was abrogated as a precondition to consideration of the merits of Plaintiff's arguments was error. For these reasons, Defendant will likely prevail on appeal on the issue of subject matter jurisdiction alone.

Even if the Sixth Circuit finds that this Court does have jurisdiction, Defendant may prevail on its alternate argument that the Court erred in granting Plaintiff's motion. The granting of a preliminary injunction is a drastic remedy – for that reason, it is one of the few types of orders that can be immediately appealed as of right. *See University of Tex. v. Camenisch*, 451 U.S. 390, 394 (1981) ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held."). The Court's Order turned these traditional notions on their head and there is a good chance that the Sixth Circuit will agree.

The issuance of the injunction in this case has caused, and continues to cause, irreparable harm to BMIC and others. The harm to Defendant and the public should a stay not issue is significant. Plaintiff, on the other hand, will suffer no significant harm, as a stay will simply maintain the status quo of both Plaintiff and Defendant operating casinos pending appeal.

In determining whether a stay should be granted, courts are to consider: (1) the irreparable injury to the moving party absent a stay; (2) the prospect of harm if the court grants the stay; (3) "the likelihood that the party seeking the stay will prevail on the merits of the appeal"; and (4) "the public interest in granting the stay." *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d at 153 (6th Cir. 1991).

I. DEFENDANT IS LIKELY TO PREVAIL ON THE MERITS ON APPEAL

A. THIS COURT ERRED IN HOLDING THAT IT HAS JURISDICTION.

1. BMIC Has Sovereign Immunity

As a federally recognized Indian Tribe, BMIC has the common law immunity from suit enjoyed by all sovereign governments. Judicial recognition of the governmental identity of Indian Tribes is a basic tenet of federal Indian law, enunciated by Chief Justice John Marshall in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). This tenet continues to be the law of the United States, cited favorably by the United States Supreme Court as recently as *C & L*

Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411 (2001) and *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, 523 U.S. 751 (1998).

A basic element of sovereignty is immunity from unconsented suit. Justice Kennedy enunciated in *Kiowa Tribe*, 523 U.S. at 754, a concise statement of this principle: "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." Abrogation of tribal sovereign immunity must be clear and may not be implied. See, e.g., *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *United States v. Testan*, 424 U.S. 392, 399 (1976); *Turner v. United States*, 248 U.S. 354, 358 (1919).

In this case, this Court acknowledged that BMIC has not waved its sovereign immunity, but instead, declared that the Tribe's immunity is waived by 28 U.S.C. §1331 and §1362. ECF No. 33 at 6. Neither statute contains the unequivocal expression of Congressional intent to abrogate tribal sovereign immunity required by the Supreme Court. Inexplicably, although this Court cited that very principle and specifically recognized *Citizen Band Potawatomi* in its opinion as a rationale for finding irreparable harm exists because BMIC is immune from suit for money damages[2], this Court failed to apply this principle to the more general circumstance of this case regarding the Tribe's immunity from suit. There was no discussion by this Court of its conclusions that both 28 U.S.C. § 1331 and §1362 permit this suit even though the BMIC is the named defendant and, as a sovereign, has as an inherent attribute immunity from unconsented suit. If this court had addressed the existence of express Congressional intent to abrogate tribal

[2] ECF No. 33 at 15.

sovereign immunity under either enactment, it would have concluded that no such intent can be found, and the Sixth Circuit may well reach such a conclusion.

2. General Federal Question Jurisdiction under 28 U.S.C. §1331 Does Not Waive Tribal Sovereign Immunity.

Title 28 U.S.C. §1331, does not expressly waive a Tribe's immunity from suit; the statute reads simply "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

In this Circuit, it is clear that an Indian Tribe's sovereign immunity is not waived by filing suit under 28 U.S.C. §1331. As recently as 2009, the Sixth Circuit held that invocation of tribal sovereign immunity requires dismissal of the case for lack of jurisdiction, and that the potential existence of federal question jurisdiction under 28 U.S.C. §1331 does not constitute abrogation of the immunity asserted by a tribal entity. *Memphis Biofuels, L.L.C. v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917, 922 (6th Cir. 2009). Cited for this principle is *Miner Electric, Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1011 (10th Cir. 2007):

> We disagree that federal-question jurisdiction negates an Indian tribe's immunity from suit. Indeed, nothing in §1331 unequivocally abrogates tribal sovereign immunity. In the context of the United States' sovereign immunity, we have held that [w]hile 28 U.S.C. §1331 grants the court jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States, it does not independently waive the Government's sovereign immunity; §1331 will only confer subject matter jurisdiction where some other statute provides such a waiver. Tribal sovereign immunity is deemed to be coextensive with the sovereign immunity of the United States. Therefore, in an action against an Indian tribe, we conclude that §1331 will only confer subject matter jurisdiction where another statute provides a waiver of sovereign immunity or the tribe unequivocally waives its immunity. [citations omitted]

In this case, the Court's reliance on §1331 for jurisdiction is misplaced, as the statute upon which a waiver must be found does not contain the necessary abrogation; nothing in the Michigan Indian Land Claims Settlement Act, P.L. 105-143 ("MILCSA"), can be construed as waiving tribal sovereign immunity.

3. Indian Federal Question Jurisdiction under 28 U.S.C. §1362 Does Not Waive Tribal Sovereign Immunity.

The bar of tribal sovereign immunity from unconsented suit equally applies to analyzing actions filed in federal court by an Indian tribe under 28 U.S.C. §1362[3]. The conclusion that this provision does not waive a defendant government's sovereign immunity has been generally applied by federal courts for 20 years. *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991) (holding that 28 U.S.C. §1362 does not waive a state's Eleventh Amendment immunity from unconsented suit). The Blatchford Court refused to imply an intent to abrogate sovereign immunity from the language of the statute, applying the same requirement that congressional intent to abrogate needed to be unmistakably clear in the statute's language, as is demanded in cases involving tribal sovereign immunity. *Blatchford* at 786, 788.

It is therefore clear that §1362 requires the same clear language abrogating sovereign immunity in order to allow unconsented suit against the Tribe as is required under §1331. Because no such language exists, this Court cannot infer Congressional intent to abrogate sovereign immunity whether the governmental defendant is the United States, see, e.g., *Scholder v. United States*, 428 F.2d 1123 (9th Cir. 1970), *cert. denied*, 400 U.S. 942 (1970); *Western Shoshone Nat. Council v. United States*, 408 F. Supp.2d 1040 (D. Nev. 2005); a State or one of its agencies, *Blatchford*, *supra*, or an Indian Tribe.

In this Circuit, it has long been recognized that an Indian Tribe cannot invoke 28 U.S.C. §1362 to abrogate the sovereign immunity of other Indian Tribes. For example, the Keweenaw Bay Indian Community filed suit in 1991, citing as its sole basis for federal jurisdiction 28

[3] The statute reads: "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

U.S.C. §1362, and claiming that its rights to fish under an 1842 Treaty with the United States were jeopardized by fishing activities of members of the Red Cliff Band of Lake Superior Chippewa Indians and the Bad River Band of Lake Superior Chippewa Indians. *Keweenaw Bay Indian Community v. State of Michigan*, File No. 2:91-cv-28 (W.D. Mich.) In an unreported decision, Judge Bell dismissed the case on the grounds that the absence of the two Tribes as parties required dismissal for failure to join as indispensable parties under Fed.R.Civ.P. Rule 19(b). *KBIC, supra,* docket #65. He observed that the two Tribes could not be joined because their sovereign immunity had not been waived. The dismissal was affirmed by the Sixth Circuit on the grounds that §1362 did not abrogate the sovereign immunity of the two tribes. *Keweenaw Bay Indian Community v. State of Michigan*, 11 F.3d 1341, 1347 (6th Cir. 1993), relying on *Oklahoma Tax Comm. v. Citizen Band Potawatomi Indian Tribe*, *supra*, for this conclusion. The federal question in *KBIC* arose under an 1842 Treaty with the United States, which does not contain any express or implied abrogation of tribal sovereign immunity. In this proceeding, this Court bases its Indian federal question jurisdiction on the MILCSA, which similarly does not expressly or impliedly abrogate BMIC's sovereign immunity.

Given all of the above, there is a significant likelihood that the BMIC will prevail on appeal, with the Sixth Circuit finding that this Court lacks general federal question jurisdiction under 28 U.S.C. §1331 and lacks Indian federal question jurisdiction under 28 U.S.C. §1362 to entertain this action.

B. THE ISSUANCE OF AN INJUNCTION WAS IMPROPER ON THE RECORD BEFORE THIS COURT.

Article III of the Constitution limits federal judicial jurisdiction to actual "cases" and "controversies." U.S. Const. art. III, § 2; see also *O'Shea v. Littleton*, 414 U.S. 488, 493-94 (1974). Absent an actual case or controversy, a plaintiff lacks standing. In this case, as is

demonstrated in Section II below, Plaintiff provided no evidence of an articulable injury and did not show that any purported injury is traceable to BMIC's conduct. As such, Plaintiff lacks standing.

This Court's agreement with Plaintiff's assertion that the statutory language of §107(a)(3) does not authorize the purchase of the Vanderbilt tract is erroneous as a matter of law. The first error is the Court's conclusion that "consolidate and enhance tribal landholdings" has a plain and unambiguous meaning[4]. The record is replete with examples of alternate, reasonable meanings for the phrase, which thereby require the Court to apply the Indian standards of construction; the Court erroneously declined to do so. The second error is the Court's pronouncement that "Bay Mills may use the earnings from the land trust to acquire additional land next to, or at least near, its existing tribal landholdings." ECF No. 33 at 11. This holding is completely unsupported by the existing record, and adds another layer of ambiguity to the phrase "consolidate and enhance". Completely absent is any indication as to what constitutes land "near" existing tribal landholdings—other than the opinion that Vanderbilt is not "near." The creation of additional ambiguity through this Court's interpretation provides another ground for the necessity of applying the Indian standards of construction to the phrase. The third error is the Court's declination to review the circumstances surrounding the development of the Land Trust—both in terms of the legislative history of MILCSA and the circumstances of the Bay Mills Indian Community—prior to issuing this Opinion. The Tribe's interests and fundamental requirements of justice require that the Court refrain from deciding such an important matter prior to the development of a complete factual record after discovery and trial.

[4] "Ambiguous" language is defined as "capable of being understood in two or more senses or ways. *Chickasaw Nation v. United States*, 534 U.S. 84, 90 (2001).

II. PLAINTIFF WILL NOT BE IRREPARABLY HARMED IF A STAY IS GRANTED.

In evaluating allegations of irreparable injury, this Court evaluates the substantiality of the alleged harm, the likelihood of its occurrence, and the proof provided by the movant. *Mercy Health Servs. v. 1199 Health & Human Serv. Employees Union*, 888 F. Supp. 828, 838 (W.D. Mich. 1995). To succeed on its motion, Plaintiff should have been required to show irreparable harm that is "both certain and immediate, rather than **speculative** or **theoretical**." *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991) (emphasis added).

Plaintiff offered no proofs linking BMIC's casino to lost revenue. Aside from a few self-serving unsubstantiated statements from Plaintiff's employees, Plaintiff did not show that it lost any revenue as a result of BMIC's operation. If the impact really were so dramatic, it seems Plaintiff could have found some direct link between BMIC's operation and Plaintiff's lost revenue. *See Sault Ste. Marie Tribe of Chippewa Indians v. United States*, 288 F.3d 910, 916 (6th Cir. 2002) (requiring movant to show actual diversion of business by facts and figures). Plaintiff provided no such evidence of irreparable injury, thus relief must be denied. *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 104 (6th Cir 1982).

III DEFENDANT WILL SUFFER IRREPARABLE HARM IF A STAY IS NOT GRANTED, AND PUBLIC INTEREST FAVORS A STAY.

The imposition of the extraordinary remedy of a preliminary injunction by this Court which closes Defendant's Vanderbilt facility disrupts the status quo and is causing harm to Defendant and others that is irreparable. BMIC has invested more than seven hundred fifty thousand dollars ($750,000.00) in startup costs to begin operations at its facility in Vanderbilt. See Declaration of Rodney Jones ("Declaration") at ¶6, Attached hereto as Exhibit A. This effort and investment have generated significant goodwill that is steadily devaluing and

diminishing due to the facility's closure, and which will soon be worthless should a stay not issue. Declaration at ¶11. The continued closure of the Vanderbilt facility prevents BMIC from recouping these significant expenditures and avoiding harm to its reputation and goodwill.

In addition to its loss of investment and goodwill, BMIC continues to bear costs of employee wages and benefits for seventeen (17) new employees at the rate of approximately thirty thousand dollars ($30,000.00) per month. See Declaration at ¶7. Should this injunction not be stayed, these employees will have to be let go from BMIC's employment to avoid further losses. Declaration at ¶ 10. The injunction further harms the BMIC by losing the fundamental investment—both financial and professional—in its workforce of the extensive training and licensing required to be employed in the technical and highly regulated casino gaming industry. Declaration at ¶8. Most importantly however, this group of people will be abruptly out of work.

The local governments will also suffer from the lack of revenues provided by the BMIC through its revenue-sharing commitments. See, Consent Judgment ¶6, *Sault Sainte Marie Tribe of Chippewa Indians et al. v. Engler*, Case No. 1:90-cv-611, docket #100. These additional revenues have helped to bolster anemic municipal budgets which have been hard hit in this recessionary period. See Declarations of Elizabeth Haus and Ed Posgate, ECF No. 25, Exhibits B and C, respectively. Likewise, the decrease in patronage to local businesses—which have enjoyed an increase in goodwill, market opportunities and value because of the Defendant's operation of its facility in Vanderbilt—will also be impacted on their bottom lines. *Id*. The effects of this reduced economic activity, critical to an area already reeling from a gloomy economy, are and will be indelible.

This Court's analysis of public interest assumed that casino gaming is a zero sum game, concluding that customers gaming at BMIC's facility would otherwise have gamed at Plaintiff's

facility. Because Plaintiff bears the burden of proof to show its losses, the Court cannot assume that Plaintiff is being harmed. This Court failed to recognize that, due to latent demand, it is possible that the BMIC facility could attract new customers that do not decrease the number of players at Plaintiff's casino. Indeed, because Plaintiff fails to present evidence that BMIC's facility causes Plaintiff to lose revenue, this Court must assume that it is possible that the Vanderbilt community could recognize the benefits of BMIC's casino without harming the Petoskey area. Applying that necessary assumption, this Court should have found that the public interest would only be harmed by closing BMIC's business at this preliminary proceeding. In either case, the public interest favors a stay.

CONCLUSION

WHEREFORE, for the foregoing reasons, Bay Mills Indian Community respectfully requests that the Court issue an Order **STAYING** the Order granting preliminary injunction pending resolution of the appeal to the Sixth Circuit and any further appeals.

Respectfully submitted,

BAY MILLS INDIAN COMMUNITY

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CERTIFICATE OF SERVICE

I hereby certify that on April 5th, 2011, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to counsel of record. I hereby certify that I have mailed by United States Postal Service the same to any non-ECF participants.

By /s/ *Chad P. DePetro*

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STATES DISTRICT COURT
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HONORABLE PAUL L. MALONEY

Case No. 1:10-cv-1278

HONORABLE PAUL L. MALONEY

DECLARATION OF RODNEY JONES IN SUPPORT OF DEFENDANT BAY MILLS INDIAN COMMUNITY'S MOTION TO STAY INJUNCTION PENDING APPEAL OF RIGHT

I, Rodney Jones, declare as follows:

1. I have personal knowledge of the facts contained in this Declaration and I am competent to testify in this matter.
2. I am currently employed by the Bay Mills Indian Community, Bay Mills Resort and Casinos, as its General Manager.
3. I have been employed as the General Manager of Bay Mills Resort and Casinos for ten (10) years.

EXHIBIT A

4. In my position as the General Manager I oversee and manage the costs, expenses, revenues, employees and general operations of the Bay Mills Resort and Casinos.
5. In overseeing the Bay Mills Resort and Casinos I am aware of the operational circumstances of Bay Mills Resort and Casinos facility in Vanderbilt, Michigan.
6. The operations at the Vanderbilt facility provide full-time employment for seventeen (17) individuals.
7. Initial startup costs to open the Vanderbilt facility exceeded seven hundred fifty thousand dollars ($750,000.00).
8. Costs to hire, train and license these employees are a significant additional expense to my employer due to the technical and highly regulated nature of the business of casino gaming.
9. The continuing operational costs and expenses of Employee wages and benefits at the Vanderbilt facility exceed fifteen thousand dollars ($15,000.00) on a bi-weekly basis.
10. Should the Vanderbilt facility remain closed providing zero revenues, all 17 newly trained and licensed employees hired to work at the Vanderbilt facility will have to be let go from employment at Bay Mills Resort and Casinos to control costs.
11. Since the opening of the Vanderbilt facility in November of 2010, its operations have generated a significant amount of goodwill. Because the Vanderbilt facility is unable to operate, this goodwill is diminishing and will soon be lost.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 1st day of April, 2011.

Rodney Jones