UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE STATE OF MICHIGAN,

Plaintiff,

v

THE BAY MILLS INDIAN COMMUNITY,

Defendant.

_____/

Consolidated Cases No. 1:10-cv-01273-PLM; 1:10-cv-1278-PLM

Hon. Paul L. Maloney

STATE OF MICHIGAN'S BRIEF IN SUPPORT OF MOTION TO AMEND COMPLAINT AND TO JOIN ADDITIONAL PARTIES

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STATE OF MICHIGAN'S BRIEF IN SUPPORT OF MOTION TO AMEND COMPLAINT AND TO JOIN ADDITIONAL PARTIES

The State of Michigan (State) brought this lawsuit seeking an Order closing a casino owned and operated by Defendant Bay Mills Indian Community (Bay Mills) in Vanderbilt, Michigan (Vanderbilt casino), which is more than 100 miles from Bay Mills' Reservation. In response, Bay Mills has asserted, among other things, that this Court does not have jurisdiction under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* (IGRA) and that Bay Mills cannot be sued because it is protected by sovereign immunity. While this Court and the U.S. Court of Appeals for the Sixth Circuit have both preliminarily indicated – in the context of Bay Mills' motions for a stay of this Court's preliminary injunction – that Bay Mills is not likely to succeed on the merits of these defenses, the State is asking that it be allowed to amend its Complaint by adding counts that provide additional grounds both for the Court's jurisdiction and for rejecting Bay Mills' assertion that it cannot be sued in this action because of its sovereign immunity.

The Amended Complaint accomplishes this by: (1) alleging an express waiver of sovereign immunity adopted by the Tribe in its gaming ordinance that pertains to actions involving non-Reservation lands, (2) adding Tribal officials in their official capacity as additional defendants and asserting that these officials have maintained a public nuisance by operating an illegal casino, (3) adding the Tribal Gaming Commission which has authority to permit and close Tribal casinos but which exceeded that authority when it licensed the Vanderbilt casino to operate outside Indian lands, and by (4) adding a federal common law claim that seeks an injunction and a declaration that Bay Mills exceeded its authority under federal law when it opened a casino outside Indian country.

The Amended Complaint also includes a pendent state law claim for forfeiture of the

gaming equipment used and the gross receipts obtained by Bay Mills during the operation of the illegal casino.

The Court Rules indicate that leave to amend should be granted freely when justice requires. This is the first request by the State to amend its complaint, and the request is timely as the case is only approximately seven months old, no discovery has been conducted yet, trial is more than a year away and the request to amend comports with the date set for such requests in the Case Management Order. For these reasons, Bay Mills cannot show any prejudice from having to respond to the Amended Complaint.

Nor are these amendments futile. As shown below, they are a reasoned response to the defenses raised by Bay Mills in its pleadings and motions in this Court and in the Sixth Circuit. Each of the proposed amendments has solid support in the law and provides additional grounds for this Court to decide the question of whether a Tribe can open and operate a casino outside Indian country in violation of state and federal law without concern that a federal court will enjoin such operation.

ARGUMENT

I. Factors controlling the decision on a motion to amend

Fed.R.Civ.P. Rule 15(a)(2) states that a court should grant a motion to amend when justice so requires. There is no reason that the State should not be allowed to pursue the additional claims and parties identified in the Amended Complaint. The Court's Case Management Order specifically contemplated amendment of pleadings and joinder of parties, setting a date for the filing of such motions on or before July 15, 2011. Since the primary consideration for determining whether justice requires granting leave to amend is whether the opposing party will somehow be unfairly prejudiced, which generally considers whether that

party will have time to adequately respond to the new allegations,[1] the fact that the Court already established a schedule that chose July 15 as a reasonable date for filing amended pleadings negates any legitimate argument that allowing the amendments will prejudice Bay Mills. Of course, Bay Mills will be required to substantively address the additional allegations, and may be found liable based on the new claims, but this would be true if the allegations had been included in the original Complaint. The issue of prejudice requires a showing that the filing of the amended complaint somehow unfairly impacts the defendant based on the point in time during the litigation that the amended complaint is filed. Since no discovery has been conducted, and since Bay Mills was ordered to close the casino pending final resolution of the case (it cannot claim any kind of reliance or decision making based on the state of the original Complaint), Bay Mills cannot show any prejudice arising from the filing of the Amended Complaint.

Plaintiff expects that Bay Mills will oppose this motion by claiming that the amendments are futile. For the reasons briefly discussed below, this claim is not persuasive.

II. The claims alleged in the Amended Complaint are not futile

A. The Tribe has waived its sovereign immunity in the limited circumstances applicable here

The law is clear that Indian Tribes can waive their sovereign immunity from suit. *C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001). In addition to the waiver/abrogation of sovereign immunity found in IGRA that is alleged in the original Complaint, Bay Mills has expressly waived its immunity, at least in the limited circumstance where an action arises in respect to lands falling outside the exterior boundaries of its Reservation. This waiver is included in the gaming ordinance Bay Mills adopted for the

[1] *Wade v. Knoxville Utils. Bd.*, 259 F.3d 452, 458-459 (6th Cir. 2001) ("Notice and substantial prejudice to the opposing party are critical factors in determining whether an amendment should be granted.")

regulation of its gaming enterprises (attached to the Proposed Amended Complaint as Ex. C), which was approved by the National Indian Gaming Commission (NIGC) as required by IGRA (specifically, 25 U.S.C. § 2710 (d)(1)(A)).

Section 4 of this ordinance creates a Tribal Gaming Commission. The Commission is delegated extensive authority[2] over the operation of tribal gaming enterprises, including the authority "to sue or be sued in courts of competent jurisdiction within the United States and Canada. . . ." (Proposed Amended Complaint, Ex. C, Section 4.18(Y)). This authority is "subject to the provisions of this Ordinance and other tribal laws relating to sovereign immunity." *Id.* The waiver of sovereign immunity in the Gaming Ordinance does reference the "sue and be sued" provision, noting:

> Neither the power to sue and be sued provided in Subsection 4.18(Z),[3] nor any express waiver of sovereign immunity by resolution of the Tribal Commission shall be deemed . . . a consent to suit *in respect of any land within the exterior boundaries of the Reservation* . . . ." [4]

The language of the waiver of sovereign immunity itself clearly suggests that the "sue and be sued" clause is a waiver of sovereign immunity as it is paired with an actual express waiver by the Tribe in the sentence quoted above "Neither the power to sue and be sued provided in Subsection 4.18(Z), nor any express waiver of sovereign immunity by resolution of the Tribal Commission shall be deemed . . . a consent to suit. . . ." This sentence treats **both** the "sue and be sued" clause and the express waiver as actual waivers, but limits their application to lands outside the Reservation. There would be no reason to include the "sue and be sued" clause in this sentence if it wasn't a waiver at all since if that were the case, it *already* could not act as a

[2] As set forth in Section 4.18(A-KK), and in other sections of the gaming ordinance. Proposed Amended Complaint, Ex. C.
[3] This probably should refer to Subsection 4.18(Y).
[4] Proposed Amended Complaint, Ex. C, § 4.7 (emphasis added).

waiver with respect to lands either inside or outside the Reservation.

For the "sue and be sued" provision to have any meaning, it must contemplate that the Commission will be subject to suit in federal court for some purposes. Similar provisions have been interpreted to act as a waiver of sovereign immunity by a tribe.[5] It appears that this is still an undecided issue in the Sixth Circuit.[6] However, there is no reason to distinguish the situation where a tribe adopts a "sue and be sued" ordinance from the adoption of such a provision by the federal government. In *Dolan v. United States Postal Serv.*,[7] the Supreme Court held that the federal government had waived its immunity from suit when it enacted the Postal Reorganization Act[8] which included a "sue and be sued" clause. It is well established that the federal government does not waive its immunity except by a clear and express waiver, just as in the case of Indian tribes.[9] If a "sue and be sued" clause in a federal statute can operate as a waiver for the Postal Service, there is no good reason that it should not operate as a waiver of a tribe's sovereign immunity.

This is especially true where the waiver can be narrowly applied. The State acknowledges that Bay Mills' gaming ordinance requires an express waiver of sovereign immunity before the Tribe or the Commission can be sued, and that such waivers are very narrow, but the "sue and be sued" provision is express and it is very narrow – it cannot pertain to land within the exterior boundaries of the Reservation. These restrictions make sense as the

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[5] *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 921 (6th Cir. 2009) ("Some courts have held that a broad sue-and-be-sued clause does waive tribal-sovereign immunity. See Validity and Construction of Indian Reorganization Act, 28 A.L.R. Fed. 2d 563 at § 27 (citing cases). . . .").
[6] *Id.* at 922 ("Thus, even if we were to conclude that a broad sue-and-be-sued clause waives tribal-sovereign immunity, this clause is insufficient to do the job.")
[7] *Dolan v. United States Postal Serv.*, 546 U.S. 481, 484 (2006).
[8] 39 U.S.C. § 401 (1).
[9] *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 33 (1992).

Tribe did not want to subject its land in Indian country and its assets on that land to suit in any court. Of course, in the case at hand, the issue this Court must decide is whether the land on which the Vanderbilt casino is located is on the Reservation as Bay Mills contends, or not, as the State contends. If the Court agrees with the State, then the waiver in the Gaming Ordinance would be an additional basis for finding that this Court has jurisdiction to enter an Order permanently closing the Vanderbilt casino.

The claim against the Tribal Gaming Commission and the Tribe based on this waiver is well grounded in the law and is not futile.

B. The allegations against Tribal officials in their official capacity are not futile

The Amended Complaint adds the individual members of the Tribal Gaming Commission and the Tribal Executive Council as parties defendant in their official capacities. The Gaming Commission is authorized by the Gaming Ordinance to license all Tribally-owned and operated casinos, and has the authority to close them should they violate Tribal law. Proposed Amended Complaint, Ex. C, Section 4.18(B, X). The Executive Council is apparently the governing body for the Tribe that made the decision to open and operate the Vanderbilt casino.

Federal law is clear that tribal officials can be sued for prospective declaratory and injunctive relief under a doctrine which is similar to that established in the case of *Ex parte Young*, 209 U.S. 123 (1908). The extension of this principle to tribal officials was probably first noted by the Supreme Court in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (U.S. 1991), a case where the Court refused to allow Oklahoma to sue a tribe because of its sovereign immunity, but based its decision in part on the Court's view that the State would have other remedies, including an *Ex parte Young*- type suit. "We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State. See *Ex parte Young . . . .*" *Oklahoma*, 498 U.S. 514. As noted by Professor Cohen "When

tribal officials act outside the bounds of their lawful authority, however, most courts would extend the doctrine of *Ex parte Young* (footnote omitted) to allow suits against the officials, at least for declaratory or injunctive relief." *Cohen's Handbook of Federal Indian Law* § 7.05.

Here, it is clear that if the Vanderbilt casino is not on Indian lands, as asserted by the State, the Bay Mills' Tribal Officials who are named in the Amended Complaint, have acted "outside the bounds of their lawful authority." *Id.* The Gaming Ordinance only allows licensing and operation of a Tribal casino on Indian lands. Proposed Amended Complaint, Ex. C, Section 5.5 (as amended by Tribal Resolution No. 10-7-30). If the State is correct that the Vanderbilt casino is not on Indian lands, then these officials have all violated their own Tribal ordinance, which is the source of any authority they have to act on behalf of the Tribe. It could not be clearer that such actions subject these officials to an action such as this for prospective declaratory and injunctive relief.[10] It is thus entirely appropriate for these officials to be joined as parties to this litigation in their official capacities.

C. Federal common law provides grounds for challenging actions by Tribes that exceed the scope of their authority under federal law

Count IV of the proposed Amended Complaint alleges that Bay Mills did not have authority under federal law to take action that does not comport with the dictates of IGRA and which violates the State's anti-gambling laws. This Count in effect asserts a violation of federal common law that has been developed by the courts to address issues involving Indians that are not directly resolved through application of federal statutory law. While the State believes IGRA does directly address the issues in this case and prohibits operation of the Vanderbilt casino, this Count is made in the alternative should a contrary decision be reached.

Federal courts can exercise jurisdiction under 28 U.S.C § 1331 when a cause of action

[10] As noted above, the Supreme Court in *Oklahoma* seemed to be suggesting that such officials could also be liable for damages where they have acted in excess of their authority.

arises under the "laws" of the "United States." *Id.* This includes federal common law as well as federal statutes such as IGRA. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985). In *National Farmers*, a tribal court had entered a judgment against a non-tribal school. The school sought an injunction from the federal court which was granted by the trial court, and reversed by the Court of Appeals which held that the federal court did not have jurisdiction of the action.

The Supreme Court disagreed. It noted that federal courts were frequently called upon to determine issues concerning a tribe's authority. *Id.* at 851-852. These and other federal court decisions addressing tribal issues comprise the body of federal Indian common law.

A similar issue arises in the case at hand. Can a tribe open a casino on non-Indian lands with no concern as to whether a state can seek an injunction from a federal court to curtail the unlawful exercise of tribal authority within the state's sovereign territory? This is very similar to the question addressed by the Court in *National Farmers* concerning the authority of the tribal court over non-Indians. Since federal courts have traditionally made determinations regarding the authority of Tribes to take specific actions, it is clear that this case presents an issue that can be decided by the Court.

D. The pendent state law claims are related to the federal claims and are not futile

Count V asserts a claim arising under the Michigan Gaming Control and Revenue Act, M.C.L. 432.201 *et seq.* and Count VI asserts a claim based on Michigan common law of public nuisance. Count V asserts that the operation of an illegal casino subjects the operators to an action for forfeiture of gross receipts obtained as a result of that operation, and of gaming equipment used in the casino. M.C.L. 432.220. Count VI asserts that operation of a casino that violates State, federal and Tribal law creates a public nuisance. It is clear that both of these

Counts "are so related to claims in the action within [the] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367. Because these claims directly concern the operation of the Vanderbilt casino by Bay Mills, they are appropriately within the supplemental jurisdiction of the Court.

These claims are not futile. Bay Mills will likely assert that it is not subject to State law prohibiting the operation of casinos that are not on Indian lands and that have not been licensed by the State. The State believes that when a Tribe violates a State's criminal laws outside Indian country, the Tribe is subject to State law that provides civil remedies for such violations, such as in the case of M.C.L. 432.220. In any event, if the Tribe claims it has sovereign immunity to such an action, the State's response is that Bay Mills has waived this immunity in its Gaming Ordinance because the activity in question is not occurring on Reservation lands. Thus, the State is entitled to seek forfeiture of illegal gaming proceeds and equipment under State law.

Likewise, the State should be permitted to argue that Tribal officials who have exceeded their authority are subject to State public nuisance laws when they operate a casino outside Indian lands without a State-issued license. Sovereign immunity of the Tribe cannot prevent entry of a prospective Order declaring that such operation by these officials is illegal and will be enjoined. Such an action is clearly not futile.

III. Joinder of the Gaming Commission and the named Tribal officials is appropriate

Fed.R.Civ.P. Rule 20 provides that new defendants may be joined to an existing action if a right to relief is asserted against them which arises out of the same transaction or occurrence alleged in the complaint and if there are questions of law or fact common to all the defendants.

Here, the members of the Gaming Commission and the Executive Council are being added because they made decisions which directly led to the opening and operation of the Vanderbilt casino, and because they have the power to close this casino. Since the relief

requested in the Complaint and proposed Amended Complaint is in response to the opening and operation of the Vanderbilt casino and seeks closure of that casino, there is no question that there are questions of law and fact that are common to the claims in both the original Complaint and in the Proposed Amended Complaint. Joinder of these defendants is therefore appropriate.

CONCLUSION

Bay Mills cannot show prejudice from the filing of the proposed Amended Complaint. No discovery has been conducted and no dispositive motions have been filed. The trial is scheduled a year from now. The proposed amendments are a reasonable response to the defenses Bay Mills has raised in this Court and in the Sixth Circuit. And, Bay Mills cannot show that the proposed amendments would be futile.

Likewise, the proposed Amended Complaint asserts rights and requests relief that arise out of the same transactions and occurrence described in the original Complaint, and relies on facts and law that are common to both Complaints. It is therefore appropriate to grant the motion to join the additional parties.

For these reasons, the State respectfully requests that it be granted leave to file the proposed Amended Complaint.

Respectfully submitted,

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Dated: July 15, 2011

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 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/ Louis B. Reinwasser

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