

Case No. 11-1413

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

State of Michigan and Little Traverse Bay Bands of Odawa Indians
Plaintiffs-Appellees,

v.

Bay Mills Indian Community
Defendant-Appellant.

Interlocutory Appeal from the United States District Court
for the Western District of Michigan
Southern Division

MOTION TO STRIKE

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Rules

Federal Rule of Appellate Procedure 271

INTRODUCTION

Defendant-Appellant Bay Mills Indian Community (“Bay Mills”), by and through its counsel, hereby moves this Court, pursuant to Federal Rule of Appellate Procedure 27, to strike portions of Plaintiff-Appellee State of Michigan’s Brief (“State Brief on Appeal”) and Plaintiff-Appellee Little Traverse Bay Bands of Odawa Indians’ (“LTBB”) Brief (“LTBB Brief on Appeal”) (collectively, “Appellees”).

BACKGROUND

This case involves an appeal of the district court’s March 29, 2011 grant of LTBB’s Motion for Preliminary Injunction against Bay Mills. Record Entry (R.) 33, *Order Granting Motion for Preliminary Injunction*. Bay Mills subsequently sought a stay of the preliminary injunction from the district court while it pursued this appeal (R. 40, *Motion for Stay*), but that request was denied on April 14, 2011. (R. 45, *Order Denying Motion for Stay*.) Bay Mills also sought a stay from this Court, which was denied on June 29, 2011. All parties to this appeal have filed Briefs with this Court. Appellees’ Briefs, however, ask this Court to consider materials and legal arguments that were not presented to nor considered by the district court in making the decision currently on appeal. Accordingly, Bay Mills respectfully requests that this Court strike those portions of Appellees’ Briefs that refer to such material.

ARGUMENT

The Sixth Circuit does not allow consideration of materials on appeal that were not considered by the district court. *See Howard v Bouchard*, 405 F.3d 459, 468 (6th Cir. 2005) (citing *Thompson v. Bell*, 373 F.3d 688, 690 (6th Cir. 2004), *rev'd on other grounds*, 545 U.S. 794 (2005)). Moreover, this Court will not consider arguments raised for the first time on appeal. *See United States v. Turnley*, 627 F.3d 1032, 1038 (6th Cir. 2010) (noting that failure to raise an issue with the lower court precludes consideration by the Sixth Circuit). In fact, the Sixth Circuit, in an unpublished order, rejected a similar attempt of a party in *S & H Computer Systems, Inc. v. Sas Institute, Inc.*, 755 F.2d 933 (Table) (6th Cir. 1985). In *S & H Computer*, a party filed an interlocutory appeal of a district court's denial of a preliminary injunction and attempted to introduce evidence that was presented to the district court *subsequent* to the district court's consideration of the preliminary injunction motion. *Id.* As this Court indicated, such practice is not acceptable:

The appeal from the denial of preliminary injunction, meanwhile, proceeded in this court with the filing of briefs and a Joint Appendix. The parties properly included among the record on appeal documentary and other evidence which was presented to the trial judge in connection with the application for preliminary injunction. The parties, however, also included a transcript of much of the testimony which had been presented at the trial on the merits. The parties were in error to have thus supplemented the record without at least first obtaining proper

leave of this court, or seeking further preliminary injunctive relief on the basis of the additional record.

Id. Similarly, Appellees seek, through their respective Briefs, to have this Court consider legal arguments and factual assertions contained in materials that were not presented to, and therefore were not considered by, the district court in connection with the Order currently being appealed.

At the time the court considered LTBB's Motion for Preliminary Injunction and Motion for Stay (R. 4, 40), neither LTBB nor the State had filed their Amended Complaints. Specifically, the district court issued its Order granting the injunction on March 29, 2011 and denied Bay Mills' related Motion for Stay on April 14, 2011. LTBB did not file its Amended Complaint with the district court until **May 20, 2011**. (R. 52, *LTBB Amended Complaint*.) The State did not file its Amended Complaint until **August 9, 2011**.¹ (R. 74, *State Amended Complaint*.) It therefore follows that the district court could not have considered these materials when entering the injunction on appeal and therefore, they may not be considered by this Court in reviewing that ruling. Both Appellees attempt, however, to repeatedly and heavily use and rely upon such pleadings and arguments in their Briefs filed with this Court. Accordingly, Bay Mills respectfully requests that this

¹ In addition, the district court order at issue here was based on LTBB's Motion for Injunctive Relief; thus, the *State's* Amended Complaint cannot provide the basis for a grant of preliminary injunction to LTBB as it was not part of the record considered by the district court. *See S & H Computer, supra*. This Court should disregard the State's arguments on this account as well.

Court strike those portions of the Appellees' Briefs that cite to or rely upon the Amended Complaints, including but not limited to the following pages:

- LTBB Brief: pp. 2, 6, 9 (fn 2), 15, and 23.
 - On page 2, LTBB makes an argument (*i.e.*, that LTBB and the State have provided an alternative basis for jurisdiction) raised in both its Amended Complaint and the State's Amended Complaint. Yet LTBB did not raise this issue or make this argument in its original complaint or in its Motion for Preliminary Injunction.
 - On page 6, LTBB cites its Amended Complaint for the bases of subject matter jurisdiction.
 - On page 9, footnote 6, LTBB again refers to an argument raised in its Amended Complaint.
 - On page 15, section A.2. is based entirely on the alternate basis of jurisdiction argument from LTBB's Amended Complaint.
 - On page 23, LTBB refers to a document not considered by the district court entitled, "Stipulation for Entry of Consent Judgment." This reference should be stricken for the same reason as the references to LTBB's Amended Complaint.
- State Brief: pp. 4, 6, 8, 10-11,² 37-41, 41 (fn 9), 42, 43, 46-52.³
 - On page 4, in its jurisdictional statement, the State cites to 28 U.S.C. § 1367 as a basis for jurisdiction. The State did not include this basis in its original complaint. It was raised for the first time in the State's Amended Complaint, which, again, was filed long after the ruling that is currently on appeal to this Court.

² On page 11, the State refers to R. 67-4, which was an exhibit attached to its Motion to Amend its Complaint. This material must be stricken for the same reasons as all references to the Amended Complaint, namely, it was not before the court at the time of the decision at issue.

³ On page 51, the State refers to R. 71, which was Bay Mills' Response to the State's Motion to Amend. This reference should also be stricken for the same reasons as explained above.

- On page 6, the State refers to relief requested for the first time in its Amended Complaint.
- On page 8, the State references its Complaint and Amended Complaint for its statement of facts. Beginning on page 10 through page 11 of the statement of facts, the State relies on facts presented in its Amended Complaint, not in its original Complaint.
- On pages 37-41, the State for the first time argues that 18 U.S.C. §1161 grants the Court jurisdiction.
- On page 41, footnote 9, the State refers to its action for abatement of a nuisance. This count appeared only in the State's Amended complaint. Page 46 also references the nuisance argument, which should also be stricken.
- On page 42-43, the State refers to its Amended Complaint and an added cause of action that was not raised until the Amended Complaint.
- Beginning on page 46 through 50, section IV.B.2. is entirely based on the State's arguments raised for the first time in its Amended Complaint.
- Beginning on page 50-52, section IV.B.3. is entirely based on the State's Amended Complaint, which added parties to the suit well after the district court's order at issue in this appeal.

CONCLUSION

Appellees' repeated reference to, and reliance upon, arguments and claims made for the first time in their Amended Complaints is impermissible. The district court did not consider these materials or arguments when it decided LTBB's Motion for Preliminary Injunction or Bay Mills' Motion for Stay—the only two ruling currently on appeal to this Court. Appellees cannot raise these issues and arguments as they related to the injunction and stay for the first time on appeal.

Accordingly, Bay Mills respectfully requests that this Court strike any reference to, or argument related to, Appellees' Amended Complaints or other material not considered by the district court.

Respectfully submitted,

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Date: October 17, 2011

CERTIFICATE OF SERVICE

I hereby certify that on October 17, 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.

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