IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

THE STATE OF MICHIGAN, Plaintiff, vs. THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, et al., Defendants.	)	Case No. 1:12-cv-00962-RJJ Hon. Robert J. Jonker **MEMORANDUM IN SUPPORT OF MOTION SEEKING LEAVE OF THE COURT TO FILE AN AMICUS CURIAE BRIEF**

John F. Petoskey
Fredericks Peebles & Morgan LLP
NOTTAWASEPPI HURON BAND OF POTAWATOMI INDIANS
2848 Setterbo Rd.
Peshawbestown, MI 49682
Telephone: (231) 631-8558
jpetoskey@ndnlaw.com

William J. Brooks, Chief Legal Counsel
NOTTAWASEPPI HURON BAND OF POTAWATOMI INDIANS
2221 ½ Mile Road
Fulton, MI 49052
Telephone: (269) 729-5151
Wjbrooks1@gmail.com

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COMES NOW, the Nottawaseppi Huron Band of Potawatomi Indians ("NHBPI") and hereby respectfully submits this Brief in Support of its Motion for Leave to File an *Amicus Curiae* Brief in Support of Plaintiff's Response to Motion to Dismiss, Counts 1-3.

I. AUTHORITY OF THIS COURT TO GRANT LEAVE TO FILE AMICUS CURIAE BRIEF

A lower court has the authority to grant leave for entities to appear as *amicus curiae*. *See United States v. State of Michigan, et al.*, 680 F.Supp. 928 (W.D. Mich. 1987)**{** TA \l "*United States v. State of Michigan, et al.*, 680 F.Supp. 928 (W.D. Mich. 1987)" \s "US v. State of MI (1987" \c 1 **}**; *In re Dow Corning Corp.*, 255 B.R. 455 (E.D. Mich. 2000)**{** TA \l "*In re Dow Corning Corp.*, 255 B.R. 455 (E.D. Mich. 2000)" \s "In re Dow Corning" \c 1 **}**. It has further recognized the concept of litigating *amici curiae* in matters relating to federal Indian Tribes. *Unites States of America, et al., v. State of Michigan*, 89 F.R.D. 307, 308 (1980)**{** TA \l "*Unites States of America, et al., v. State of Michigan*, 89 F.R.D. 307, 308 (1980)" \s "US v. State of MI (1980)" \c 1 **}** (where the Federal District Court permitted the Michigan United Conservation Club to file a "litigating amici curiae brief" in a matter involving public issues). The Federal District Court recognized that since November 1975, in an opinion and order dated July 30, 1976 "this court … allowed it [MUCC] to file an amicus brief. The Sixth Circuit Court of Appeals affirmed this order." *Id***{** TA \s "US v. State of MI (1980)" **}** at 308. The recognition of a federal district court's authority to grant an *amici curiae* brief filing was also upheld in *United States of America v. State of Michigan et al.*, 116 F.R.D. 655 (1987)**{** TA \s "US v. State of MI (1987" **}** (litigation over the conditions of state prisoners). This district court, in an opinion by Judge Enslen, recognized that "A district court has the inherent authority to appoint amici curiae to assist it in a proceeding." *See Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir.1982)**{** TA \l "*Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir.1982)" \s "Hoptowit v. Ray" \c 1 **}**. This inherent recognition has been adopted by other district

courts within the sixth circuit. *Sierra Club, et al., v. Chrisopher Korleski Director, Ohio Environmental Protection Agency,* 2009 WL 1969964 (S.D.Ohio)**{** TA \l "*Sierra Club, et al., v. Chrisopher Korleski Director, Ohio Environmental Protection Agency,* 2009 WL 1969964 (S.D.Ohio)" \s "Sierra Club v. Chrisopher" \c 1 **}**. This Court has the authority to authorize the filing of an *amicus curiae* brief. Since no local court rules govern the timing of a filing of an *amicus curiae* brief, NHBPI requests that this Court adopt the standards in FED. R. APP. P. 29**{** TA \l "FED. R. APP. P. 29" \s "Fed. R. App. P. 29" \c 4 **}**.

II. FRAP 29 REQUIREMENTS

FED. R. APP. P. 29{ TA \s "Fed. R. App. P. 29" }, which provides in relevant part:

> "(a) … Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing. (b) **Motion for Leave to File**. The motion must be accompanied by the proposed brief and state: (1) the movant's interest; and (2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case."

A. NHBPI's interest and Reason why an amicus brief is desirable and why the matters asserted are relevant.

The NHBPI is a federally-recognized Indian tribe located in Calhoun County, and a signatory to the Michigan Tribal-State Gaming Compact. The State of Michigan has 12 Tribal-State gaming compacts with similar Section 9 language. The Sault Ste. Marie Section 9 Compact is entitled "Off-Reservation Gaming." The NHBPI Section 9 Compact is entitled "Gaming Outside of Eligible Indian Lands." The NHBPI Compact Section (2)(b) specifically provides a definition of "eligible Indian lands" subject to a revenue sharing agreement. Whereas the Sault Ste. Marie Compact Section (2)(b) provides a definition of "Indian lands" identical to the IGRA statutory definition 2703(4). Finally, the Sault Ste. Marie Compact states "an application to take land into trust for gaming purposes pursuant to Section 20 (25 U.S.C. 2719{ TA \l "25 U.S.C. 2719" \s "25 U.S.C. 2719 (IGRA)" \c 2 }, IGRA) shall not be submitted…absent an…agreement" to share revenues with all tribes. This brief is desirable and relevant to the disposition of this case because NHBPI has an interest in implementation of the Sault Tribe Section 9 provision. The NHBPI currently operates a single casino located in Calhoun County. Section 17 of the NHBPI Compact provides that in exchange for NHBPI revenue-sharing participation between NHBPI and the State of Michigan, the State will provide exclusive geographic gaming opportunities. Given the proximity of Lansing to Calhoun County, an additional casino in Lansing would violate NHBPI's exclusive gaming agreement with the State of

Michigan. NHBPI has not been given an opportunity to assess whether a Section 9 revenue sharing agreement for a Lansing casino is in the interest of NHBPI.

The State of Michigan argues, in its Complaint and supporting brief for preliminary injunction, that any fee-to-trust application by the Sault Tribe is subject to a Section 9 agreement. In support of the State's position, NHBPI also argues that any Sault Tribe application to take land into trust is subject to a Section 9 revenue sharing agreement as a condition precedent to the submission of the fee-to-trust application. NHBPI's interests in a Sault Tribe Section 9 revenue sharing agreement, given its current operation in Calhoun County, are central to the disposition of this case. Sault Tribe argues that the Michigan Indian Land Claims Settlement Act ("MILCSA"), P.L. 105-143, 111 Stat., 2652 (1997)**{** TA \l "P.L. 105-143, 111 Stat., 2652 (1997)" \s "P.L. 105-143, 111 Stat., 2652 (1997) (MILSCA)" \c 3 **}**, is a "mandatory" trust application not subject to Section 9 of the Sault Tribe Compact.

The State of Michigan filed a preliminary injunction request on September 7, 2012 seeking to enforce Section 9 of the Tribal-State Gaming Compact prior to Sault Ste. Marie's submission of an application for fee-to-trust under MILCSA. The Sault Ste. Marie Tribe filed an FED. R. CIV. P. 12**{** TA \l "FED. R. CIV. P. 12" \s "Fed. R. Civ. P. 12" \c 4 **}**(b)(6) Motion on Immunity and also filed an FED. R. CIV. P 12**{** TA \s "Fed. R. Civ. P. 12" **}**(b)(1) Motion on Failure to State a Claim on November 12, 2012, arguing that the Tribe has sovereign immunity. "Defendants' Opposition to the State of Michigan's Motion for a Preliminary Injunction"; "Defendants' Brief in Support of Motion to Dismiss." In response, the State filed the "State of Michigan's Response to Motion to Dismiss" on December 14, 2012. NHBPI files this *amicus curiae* brief in support of the State of Michigan's Response to Motion to Dismiss.

DATED: December 21, 2012

RESPECTFULLY SUBMITTED,

/s/ John F. Petoskey
John F. Petoskey (No. P41499)
Fredericks Peebles & Morgan, LLP
NOTTAWASEPPI HURON BAND OF POTAWATOMI INDIANS
2848 Setterbo Rd.
Peshawbestown, MI 49682
Telephone: (231) 631-8558
jpetoskey@ndnlaw.com

William J. Brooks (P43014)
NOTTAWASEPPI HURON BAND OF POTAWATOMI INDIANS
2221 ½ Mile Road
Fulton, MI 49052
Telephone: (269) 729-5151
Wjbrooks1@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December 2012, a copy of the foregoing was served via the Court Electronic Case Filing System to:

Seth P. Waxman
Edward C. DuMont
Danielle Spinelli
Kelly P. Dunbar
Nicole Ries Fox
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006

R. John Wernet, Jr.
General Counsel
SAULT STE. MARIE TRIBE OF
CHIPPEWA INDIANS
523 Ashmun Street
Sault Ste. Marie, MI 49783

/s/ John F. Petoskey