UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE STATE OF MICHIGAN, Plaintiff, vs. THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, Defendant.	Case No. 1:12-cv-00962-RJJ Hon. Robert J. Jonker **DEFENDANT'S BRIEF IN SUPPORT OF RENEWED MOTION TO DISMISS**

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Defendant the Sault Ste. Marie Tribe of Chippewa Indians respectfully submits this brief in support of its renewed motion to dismiss for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3). On appeal from this Court's entry of a preliminary injunction, the Sixth Circuit held that this Court lacks jurisdiction over each of the State's claims for relief against the Tribe. *Michigan v. Sault Ste. Marie Tribe of Chippewa Indians*, 737 F.3d 1075 (6th Cir. 2013). After seeking a stay of the appellate court's mandate pending the filing of a petition for certiorari with the Supreme Court, the State now has withdrawn that petition. The appellate mandate has issued, dissolving the preliminary injunction. All that remains is for the Court to dismiss the remaining claims in the case in light of the Sixth Circuit's decision.

BACKGROUND

On September 7, 2012, the State of Michigan filed this lawsuit against the Tribe and members of its Board of Directors, seeking to enjoin them from tendering title to certain property in Lansing, Michigan, to the Secretary of the Interior to be held in trust by the United States on behalf of the Tribe. *See* Compl., Dkt. No. 1, ¶¶ 34, 40-48. At the same time, the State sought a preliminary injunction. PI Mot., Dkt. No. 2, at 2-3. The Tribe moved to dismiss the complaint for lack of jurisdiction and failure to state a claim, and at the same time opposed the preliminary injunction, including on the ground that the State was unlikely to succeed on the merits in light of the jurisdictional defects. Mot. to Dismiss, Dkt. No. 10, at 1; *see also* Br. in Supp. of Mot. to Dismiss, Dkt. No. 11, at 7-13 (sovereign immunity), 13-15 (ripeness); PI Opp., Dkt. No. 9, at 8-10 (same).

On March 5, 2013, this Court granted the Tribe's motion to dismiss, without prejudice, as to all individually named defendants; granted the Tribe's motion to dismiss counts 5 and 6 of the

complaint as to the Tribe itself; declined to dismiss counts 1-4 of the complaint as to the Tribe; and granted the State's motion for a preliminary injunction. *See* Op. & Order, Dkt. No. 37, at 22.

The Tribe appealed the entry of the preliminary injunction. Notice of Appeal, Dkt. No. 39; *see* 28 U.S.C. § 1292(a)(1). On appeal, the Sixth Circuit reversed. *See* 737 F.3d at 1084. The court held that counts 1-3 of the State's complaint are "barred because the Sault Tribe is immune from suit." *Id.* at 1078. "Although the Tribe's [sovereign] immunity is subject to statutory exceptions," the court held that the exception invoked by the State, 25 U.S.C. § 2710(d)(7)(A)(ii), "does not apply." *Id.* at 1079. The court thus held that Section 2710(d)(7)(A)(ii) does not abrogate the Tribe's immunity from suit for counts 1-3 because those counts seek to enjoin the filing of a trust submission, not "a class III gaming activity." *Id.* at 1079-1080.[1] The court separately held that count 4, while "not barred by sovereign immunity," is nevertheless "not ripe for adjudication, and should have been dismissed." 737 F.3d at 1081.

On January 16, 2014, the State petitioned the court of appeals for panel or en banc rehearing. 6th Cir. Dkt. No. 83. The State's petition was denied on February 13, 2014. 6th Cir. Dkt. No. 86. The State subsequently secured a stay of the appellate mandate pending a certiorari petition to the Supreme Court. 6th Cir. Dkt. Nos. 87, 88; *see* Fed. R. App. P. 41(d)(2).

The State filed a petition for certiorari on May 14, 2014. The petition relied in part on arguments the State had presented to the Supreme Court in a then-pending case, *Michigan v. Bay Mills Indian Community*, which also concerned the scope of the abrogation of tribal sovereign immunity in Section 2710(d)(7)(A)(ii). *See* Cert. Pet. 9-11, 15-17, *Michigan v. Sault Ste. Marie Tribe of Chippewa Indians*, No. 13-1372 (U.S. May 14, 2014). On May 27, 2014, the Supreme

[1] The court of appeals also rejected the State's alternative view that the State could satisfy the statutory requirement of a suit "to enjoin class III gaming activity" by seeking to enjoin existing, unrelated gaming activity at the Sault Tribe's casinos in the Upper Peninsula of Michigan. 737 F.3d at 1080; *see* Op. & Order 11.

Court decided *Bay Mills*, holding in part that the term "class III gaming activity" in Section 2710(d)(7)(A)(ii) refers exclusively to "the stuff involved in playing class III games" or "what goes on in the casino," rather than "off-site" activities. *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2032-2033 (2014). On June 4, 2014, after the *Bay Mills* decision, the State withdrew its certiorari petition in this case. *See* Letter from Scott S. Harris, Clerk of the Supreme Court, Dkt. No. 47 (enclosing certified copies of the State's stipulated letter to dismiss petition and the Supreme Court's order of dismissal).

The court of appeals' mandate issued on June 10, 2014. CA6 Dkt. No. 93. Upon issuance of the mandate, the preliminary injunction barring the Tribe from filing a MILCSA trust submission with the Secretary of the Interior was dissolved. *See* Fed. R. App. P. 41(c) (mandate "effective when issued"); Fed. R. App. P. 41 advisory committee notes ("parties' obligations become fixed" upon "issuance of the mandate"); *Bridge C.A.T. Scan Assocs. v. Technicare Corp.*, 710 F.2d 940, 947 (2d Cir. 1983) (order reversed on appeal "remains in effect until issuance of [the appellate] mandate"). The Tribe filed its trust submission for the Lansing property after the mandate issued.

ARGUMENT

In reversing the preliminary injunction, the Sixth Circuit held that counts 1-3 of the State's complaint are barred by the Tribe's sovereign immunity and that count 4 is unripe. *See* 737 F.3d at 1071, 1081. Those jurisdictional holdings are dispositive here and require dismissal of the State's remaining claims.

Under Federal Rule of Civil Procedure 12(h)(3), "[i]f the court determines at any time that it lacks subject-matter jurisdiction, [it] must dismiss the action." Fed. R. Civ. P. 12(h)(3). Sovereign immunity and lack of ripeness are such subject-matter jurisdictional defects. *See, e.g.*,

Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc., 585 F.3d 917, 919-920 (6th Cir. 2009) (sovereign immunity); *Norton v. Ashcroft*, 298 F.3d 547, 554 (6th Cir. 2002) (ripeness). And the Sixth Circuit's decision makes clear that both jurisdictional defects are present in this case and that this Court lacks jurisdiction over the State's remaining claims. *See* 737 F.3d at 1076 (holding with respect to counts 1-3 that "the district court lacked jurisdiction" because IGRA's limited abrogation of immunity did not apply); *id.* at 1081 (count 4 "is not ripe for adjudication. and should have been dismissed"); *see also Bigelow v. Michigan Dep't of Natural Res.*, 970 F.2d 154, 157 (6th Cir. 1992) ("If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed."). Thus, the Court "must dismiss" the remaining claims against the Tribe, counts 1-4 of the complaint. Fed. R. Civ. P. 12(h)(3).

CONCLUSION

The Court should dismiss all remaining counts of the complaint. A proposed order of dismissal is attached hereto as Exhibit A. *See* Local Civil Rule 5.7(g).

Dated: June 10, 2014

Respectfully submitted,

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EXHIBIT A

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[PROPOSED] ORDER

Defendant Sault Ste. Marie Tribe of Chippewa Indians' motion to dismiss (docket # __) is **GRANTED**, and Plaintiff State of Michigan's complaint (docket # 1) is hereby **DISMISSED**.

IT IS SO ORDERED.

ROBERT J. JONKER
UNITED STATES DISTRICT JUDGE

Dated: _____