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 REPLY IN SUPPORT OF RENEWED MOTION TO DISMISS**

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In its response (Dkt. No. 55) to the Sault Tribe's renewed motion to dismiss (Dkt. No. 48), the State acknowledges that the Court must dismiss all of the State's remaining claims against the Tribe. And with good reason. The Sixth Circuit has held that counts 1-3 of the complaint are barred by the Tribe's sovereign immunity and that count 4 is unripe. *Michigan v. Sault Ste. Marie Tribe of Chippewa Indians*, 737 F.3d 1075, 1079-1081 (6th Cir. 2013). Those jurisdictional defects require dismissal of all remaining claims. *See* Fed. R. Civ. P. 12(h)(3).

The only issue raised by the State's response is whether that dismissal should be with or without prejudice. The State maintains (at 1) that the Court should dismiss the remaining claims against the Tribe without prejudice because, it argues, dismissal on ripeness and sovereign immunity grounds "does not reach the merits" and "does not bar a subsequent action on the same claim[s]." The Tribe offers two points in response:

First, the Tribe agrees that dismissal of count 4 as unripe should be *without* prejudice. That conclusion is consistent with the Sixth Circuit's decision, *see* 737 F.3d at 1083 ("At some point the State must be able to obtain a judicial determination of whether one of these provisions [in the Indian Gaming Regulatory Act or the parties' Class III gaming compact] prohibits class III gaming at the Lansing location, before the gaming starts."), as well as Sixth Circuit law and practice, *e.g.*, *Peters v. Fair*, 427 F.3d 1035, 1038 (6th Cir. 2005) (dismissal of unripe claim is ordinarily without prejudice "to reassert[ing] th[e] claim, should it become ripe in the future").

Second, in contrast, the Court's dismissal of counts 1-3 of the complaint should be *with* prejudice because the State will not be permitted to pursue those same claims against the Tribe again. Counts 1-3 seek to enjoin the Tribe from filing a trust submission with the Secretary of the Interior. *See* Compl., Dkt. No. 1, ¶¶ 43, 53, 58. The Sixth Circuit's decision makes clear that the Tribe will never be able to pursue that specific claim for relief under IGRA's limited

abrogation of immunity. The court explained that a claim "to enjoin taking land into trust is not a suit 'to enjoin a class III gaming activity'" within the meaning of 25 U.S.C. 2710(d)(7)(A)(ii). 737 F.3d at 1079; *see Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2032-2033 (2014) ("class III gaming activity" refers to "the stuff involved in playing class III games," or "what goes on in the casino"). No amount of time passing will change that conclusion.

To be clear, the Tribe is not suggesting that dismissal of counts 1-3 with prejudice would bar a future suit to enjoin actual or imminent Class III "gaming activity" on the Lansing property on the theory that such activity violates Section 9 of the compact. The State remains free to bring such a claim if and when it ripens. *See Sault Ste. Marie Tribe*, 737 F.3d at 1081 n.4 (quoting colloquy with counsel). But that is decidedly not the relief sought in counts 1-3 of the State's complaint, and those claims should accordingly be dismissed with prejudice.

Nothing in *Ernst v. Rising*, 427 F.3d 351 (6th Cir. 2005) (en banc), or the other cases relied on by the State (at 3-4, 6) requires a contrary result. Dismissal for lack of subject-matter jurisdiction is "generally … without prejudice" to relitigating the same claims in the future, *Ernst*, 427 F.3d at 367, because the fact that "one court does not have jurisdiction over a dispute does not necessarily mean that another court is precluded from properly exercising jurisdiction," *Wilkins v. Jakeway*, 183 F.3d 528, 533 n.6 (6th Cir. 1999). But dismissal with prejudice is appropriate when the jurisdictional grounds for dismissal would necessarily apply to any future litigation of the same claims. *See, e.g.*, *Loriz v. Connaughton*, 233 F. App'x 469, 474-475 (6th Cir. 2007) (reversing and remanding for entry of "judgment dismissing the entire action with prejudice for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine"). That follows from the well-recognized principle that dismissal for lack of subject-matter jurisdiction is an adjudication on the merits of the jurisdictional question itself. *See* 18 Wright, Miller, *et al.*,

Federal Practice and Procedure § 4402 (2d ed. 2002) (dismissal for lack of jurisdiction "preclude[s] relitigation of the same issue of subject-matter jurisdiction in a second federal suit on the same claim"). Where, as here, the jurisdictional ground for dismissal would always be fatal to the specific claim raised, dismissal with prejudice is appropriate.

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Respectfully submitted,

/s/ Danielle Spinelli

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