UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE STATE OF MICHIGAN, Plaintiff, vs. AARON PAYMENT, LANA CAUSELY, CATHY ABRAMSON, KEITH MASSAWAY, DENNIS McKELVIE, JENNIFER McLEOD, DEBRA ANN PINE, D.J. MALLOY, CATHERINE HOLLOWELL, DARCY MARROW, DENISE CHASE, BRIDGET SORENSON, and JOAN ANDERSON, Defendants.	Case No. 1:12-cv-00962-RJJ Hon. Robert J. Jonker ORAL ARGUMENT REQUESTED **DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT**

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INTRODUCTION

The State's halfhearted bid to continue this litigation, already more than two years old, should be rejected. On appeal, the Sixth Circuit held that tribal sovereign immunity currently bars the State from pursuing its claim that, by tendering land to the Secretary of the Interior to be taken into trust under the Michigan Indian Land Claims Settlement Act (MILCSA), the Tribe has breached its gaming compact with the State. The court was equally clear, however, that this did not leave the State remediless: If and when class III gaming activity is imminent on the MILCSA properties, the State may pursue the only remedy that the Indian Gaming Regulatory Act (IGRA) permits, namely, a suit to enjoin class III gaming activity on the properties.

The amended complaint fails to acknowledge that appeal ever happened. Instead, to evade the carefully limited remedial scheme Congress established in IGRA as well as the Sixth Circuit's application of those limitations in this case, the State now seeks to revive the *identical* breach-of-compact claims it previously sought to litigate against the Tribe, now against officers of the Tribe. The Court should reject the State's naked effort to make an end-run around IGRA and the Sixth Circuit's decision and should dismiss the amended complaint for multiple reasons.

To begin with, sovereign immunity bars this suit. The Tribe itself, of course, is immune from suit at this time, as the Sixth Circuit held and as this Court recognized in dismissing all claims against the Tribe. The State may not circumvent the Tribe's immunity by changing the caption of its complaint to sue tribal officers for the same alleged breach of compact. Contrary to the State's prior position, *Ex parte Young*, 209 U.S. 123 (1908), does not sanction that incursion on sovereign immunity. In particular, as a matter of law, *Ex parte Young* may not be used to seek specific performance of a contract—which is the only remedy the State seeks with respect to each of the four counts in the amended complaint. Nor may *Ex parte Young* be invoked where, as here, Congress has already established a comprehensive scheme in IGRA to

remedy alleged breaches of IGRA gaming compacts. Thus, at least with respect to the particular claims asserted by the State, tribal officers remain cloaked in the sovereign immunity of the Tribe itself.

That is a sufficient basis for dismissing the amended complaint in its entirety. But quite apart from sovereign immunity, the amended complaint should be dismissed for other reasons. The core allegation underlying each of the State's four claims is that the Tribe's MILCSA submissions breached the gaming compact between two parties, the State *and the Tribe*. It is a matter of both law and common sense that such a compact dispute cannot properly be litigated when one contractual party (the Tribe) is not present in the case because it is immune. The complaint should thus be dismissed for failure to join a necessary party. Beyond that, under simple and black-letter rules of contract and tort law, each count of the amended complaint fails to state a claim under Federal Rule of Civil Procedure 12(b)(6) for the reason set forth below.

BACKGROUND

A. Prior Proceedings

In 2012, the State sued the Tribe as well as thirteen tribal officers. Compl., Dkt. 1, ¶¶ 3-16. The gravamen of the complaint was that the Tribe's submission to have land in Lansing, Michigan taken into trust pursuant to MILCSA would violate the class III gaming compact between the State and the Tribe—a compact entered into under IGRA. Count 1 alleged that the proposed MILCSA submission would violate Section 9 of the compact, *id.* ¶¶ 35-48; count 2 alleged that the submission would violate Section 4 of the compact, *id.* ¶¶ 49-55; and count 3 alleged that the submission would constitute a "common law breach of contract," *id.* ¶¶ 56-59.[1]

[1] In addition, count 4 alleged that class III gaming on the Lansing property would violate IGRA, and counts 5 and 6 alleged that class III gaming on the land would violate state law. Compl. ¶¶ 60-75. The State acknowledged that those claims were not ripe.

Each individual defendant was named only in his or her official capacity as a member of the Tribe's Board of Directors. Compl. ¶¶ 4-17. The complaint contained no meaningful allegations regarding any specific individual tribal official. Its sole allegation regarding the officials was that, "[b]ecause submission of an application to take land into trust in violation of … the Sault Tribe compact violates the Sault Tribe's gaming ordinance …, any Directors or their designees who caused such an application to issue would exceed their authority and they are therefore subject to prospective relief Ordered by this Court." *Id.* ¶ 34.

The Tribe and the individual defendants moved to dismiss the complaint for lack of subject-matter jurisdiction on sovereign immunity and ripeness grounds, as well as for failure to state a claim. Dkts. 10, 11. As to the Tribe, defendants argued that the Tribe was immune from suit and that nothing in IGRA abrogated that immunity. With respect to the claims against tribal officials, defendants explained that such officials, when sued in their official capacity, are cloaked in the Tribe's own sovereign immunity, and that the State could not obtain prospective injunctive relief against them under *Ex parte Young*, 209 U.S. 123 (1908).

The Court subsequently dismissed all claims against the individual defendants without prejudice. Op. & Order, Dkt. 37, at 22. Because this Court held that IGRA abrogated the Tribe's sovereign immunity against suit, the Court declined to address whether an equivalent doctrine to *Ex parte Young* might be available in the tribal sovereign immunity context, noting that "[t]he Sixth Circuit has not decided" the question. *Id.* at 12. The Court entered a preliminary injunction against the Tribe barring it from filing its trust submission. *Id.* at 22.

The Sixth Circuit reversed the Court's holding with respect to the Tribe's immunity and dissolved the preliminary injunction. The court held that, "[b]ecause the State is not suing to enjoin a class III gaming activity, but instead a trust submission under MILCSA, … IGRA does

not abrogate the Tribe's sovereign immunity, and the district court lacked jurisdiction" over counts 1-3. *Michigan v. Sault Ste. Marie Tribe of Chippewa Indians*, 737 F.3d 1075, 1076 (6th Cir. 2013). The Sixth Circuit also held that "[t]he issue of whether class III gaming on the [Lansing] property will violate IGRA if the Tribe's MILCSA trust submission is successful," raised in count 4, "is not ripe for adjudication because it depends on contingent future events that may never occur." *Id.* The court thus reversed the entry of the injunction. *Id.* at 1084.

After the preliminary injunction was dissolved, the Tribe filed a submission to have the Lansing property taken into trust under MILCSA. It also filed a second submission to have land in New Boston, Michigan, taken into trust under MILCSA.

B. The Amended Complaint

After this Court dismissed the original complaint, Dkt. 65, the State filed the amended complaint that is the subject of the motion to dismiss, Am. Compl., Dkt. 67.

The amended complaint names as defendants the same thirteen individuals named in the original complaint. Am. Compl. ¶¶ 3-15.[2] Like the original complaint, it contains no meaningful allegations of individual action by any defendant. Instead, it alleges that "the Defendants caused" each MILCSA submission to be filed, *id.* ¶¶ 22, 23, and that "[t]he Defendants do not have, and the Tribe cannot give them, the authority to violate the congressionally approved compact between the Sault Tribe and the State," *id.* ¶¶ 33, 41.

[2] Factual allegations regarding the Tribe's officers—apparently copied from the original complaint—are inaccurate and outdated. Denise Chase is now Vice-Chairwoman of the Board, not Lana Causley. Am. Compl. ¶¶ 4, 13. Dennis McKelvie is now Treasurer, not Keith Massaway. *Id.* ¶¶ 6-7. Bridgett Sorenson is now Secretary, not Cathy Abramson. *Id.* ¶¶ 5, 14. Debra Ann Pine, D.J. Malloy, and Joan Anderson are no longer members of the Board. The current composition of the Board is publicly available at http://www.saulttribe.com/government/board-of-directors/29-government/board-of-directors/109-board-members-and-reports.

The amended complaint pleads four claims against all defendants. Each claim is premised on the same alleged breach of Section 9 of the tribal-state gaming compact that was the subject of the State's initial complaint against the Tribe:

- **Count 1—Breach of contract/compact.** The State alleges that the Tribe's MILCSA submissions "are a breach of § 9 of the Sault Tribe compact." Am. Compl. ¶ 32.
- **Count 2—Breach of contract/compact.** The State alleges that the violation of Section 9 pleaded in the first count also constitutes a breach of Section 4(C), requiring "[a]ny violation of this Compact" to be corrected. Am. Compl. ¶¶ 38-39.
- **Count 3—Conspiracy to breach compact**. The State alleges the defendants conspired to cause the MILCSA submissions that allegedly violated Sections 9 and 4(C). Am. Compl. ¶ 44.
- **Count 4—Intentional interference with compact.** The State alleges the defendants "intentionally caused the Tribe to breach its compact" by causing the MILCSA submissions that allegedly violated Sections 9 and 4(C). Am. Compl. ¶ 50.

STANDARD OF REVIEW

Defendants move for dismissal of the amended complaint for lack of subject-matter jurisdiction, Fed. R. Civ. P. 12(b)(1), failure to join a necessary party, Fed. R. Civ. P. 12(b)(7), and failure to state a claim, Fed. R. Civ. P. 12(b)(6). When a party seeks dismissal based on the facial inadequacies of the complaint without introducing additional evidence, motions under Rules 12(b)(1) and (b)(7) are treated like Rule 12(b)(6) motions. *See, e.g.*, *Dickson v. Wojcik*, 22 F. Supp. 3d 830, 834 (W.D. Mich. 2014) (subject-matter jurisdiction); *Davis Cos. v. Emerald Casino, Inc.*, 268 F.3d 477, 479 n.2 (7th Cir. 2011) (joinder). Under that standard, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). To be plausible, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Well-pled factual allegations are assumed to be true for these purposes. *Id.* However, that "tenet … is inapplicable to legal conclusions," and "[t]hreadbare recitals of the elements of a cause of

action, supported by mere conclusory statements," do not state a plausible claim for relief. *Iqbal*, 556 U.S. at 678.

ARGUMENT

I. THE AMENDED COMPLAINT SHOULD BE DISMISSED FOR LACK OF JURISDICTION

A. Sovereign Immunity Bars This Suit

As "'separate sovereigns pre-existing the Constitution,'" Indian tribes possess the "'common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2030 (2014). Such immunity may be abrogated only by a clear and unequivocal congressional statement to that effect. *Id.* at 2031. Where tribal sovereign immunity applies, dismissal for lack of subject-matter jurisdiction is required. *See Michigan v. Sault Ste. Marie Tribe of Chippewa Indians*, 737 F.3d 1075, 1076 (6th Cir. 2013) (when a tribe is immune from suit, a "district court lack[s] jurisdiction"); *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 919-920 (6th Cir. 2009) (similar).

The sovereign immunity of an Indian tribe extends to the official-capacity acts of tribal officers. Because an Indian tribe—like a state or the federal government—can act only through its officers, the immunity of a tribe presumptively extends to officers "when they act in their official capacity and within the scope of their authority." *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fl.*, 177 F.3d 1212, 1225 (11th Cir. 1999); *see, e.g., Native Am. Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296 (10th Cir. 2008) ("'the interest in preserving the inherent right of self-government … is equally strong when suit is brought against individual officers … as when brought against the tribe itself'"). Nothing in IGRA abrogates the immunity of the Tribe or its officers from this suit. Indeed, the Sixth Circuit has already held that sovereign immunity bars the State from proceeding with compact claims, based on IGRA as well as the common law, against the Tribe. *See Sault Tribe*, 737 F.3d at 1079; *supra* pp. 3-4.

Because the State does not identify any additional ground for an abrogation of immunity in its amended complaint, the Court should dismiss the amended complaint for lack of jurisdiction.

B. *Ex Parte Young* Does Not Apply

The State has previously maintained that it can sue tribal officers even when the Tribe itself is immune by analogy to *Ex parte Young*, which is a narrow exception to state sovereign immunity that permits prospective injunctive relief against state officers for violations of federal law in certain circumstances. The State is wrong. The *Ex parte Young* doctrine does not apply here as a matter of law for two reasons.[3]

1. *Ex parte Young* does not permit suits for specific performance

At bottom, each of the four claims in the amended complaint is an attempt to enforce through equitable relief what the State views as the requirements of Section 9 of the compact. *See* Am. Compl. ¶¶ 32, 38-39, 44, 50. Indeed, the State expressly seeks specific performance of the compact by seeking an order compelling defendants "to withdraw the applications submitted to the Secretary [of the Interior] until … the Tribe has complied with § 9 of its compact." *Id.* 8; *see Restatement (Second) of Contracts* § 357 cmt. a (1981) ("An order of specific performance is intended to produce as nearly as is practicable the same effect that the performance due under a

[3] It is defendants' position that *Ex parte Young* should not apply at all in the tribal immunity context. *See* Tribe Opp. to Rule 54(b) Mot. 6 n.1, Dkt. 58. To be sure, the Supreme Court suggested in dicta in *Bay Mills* the possibility that tribal sovereign immunity may not bar suits against individual officers and employees engaged in illegal gaming on State lands, 134 S. Ct. at 2034-2035, but that suggestion in passing does not fairly represent a holding that the *Ex parte Young* doctrine applies wholesale and without qualification in the context of tribal sovereign immunity. This Court need not address the issue, however: Even if official-capacity suits may sometimes be brought against tribal officers by analogy to *Ex parte Young*, such an action may not be maintained here for the specific reasons identified in the text. The relevant dicta in *Bay Mills* is in no way inconsistent with the rules that *Ex parte Young* may not be used to seek specific performance of a sovereign's contract or work an evasion of IGRA's remedial scheme. *See, e.g.*, *Oklahoma v. Hobia*, 775 F.3d 1204, 1256 (10th Cir. 2014) (*Bay Mills* "did not discuss whether a state could file suit against individual tribal officers for violating an IGRA-mandated tribal-state gaming compact").

contract would have produced."). Requests for specific performance of a sovereign's contract have always fallen well beyond the scope of *Ex parte Young*.

As the Supreme Court has recently reiterated, "*Ex parte Young* cannot be used to obtain … an order for specific performance of a [sovereign's] contract." *Virginia Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1639 (2011). This limit on the scope of injunctive relief under the *Ex parte Young* doctrine (or its analog) is longstanding and recognizes the "important distinction" between contracts among individuals and contracts with a sovereign entity. *Ex parte Ayers*, 123 U.S. 443, 504-505 (1887). Indeed, the State itself specifically acknowledged this well-established limitation in *Bay Mills* in the Supreme Court, explaining that "[i]t's well settled that you can't get specific performance on the contract … in an *Ex Parte Young* action." Tr. 10:4-8, *Bay Mills*, No. 12-515 (U.S. Dec. 2, 2013) (Michigan Solicitor General).

That rule is dispositive here—as the Eleventh Circuit has held with respect to analogous efforts to enforce a gaming agreement. In *Tamiami Partners*, the court held that "[t]he doctrine of *Ex parte Young* may not be used" to bring "a thinly-disguised attempt … to obtain specific performance of the Tribe's obligations under [a gaming agreement with a corporation]." 177 F.3d at 1225-1226. The court reasoned that "[i]t is well established that *Ex parte Young* does not permit individual officers of a sovereign to be sued when the relief requested would, in effect, require the sovereign's specific performance of a contract." *Id.* at 1226; *see also New Jersey Educ. Ass'n v. New Jersey*, 2012 WL 715284, at *6 (D.N.J. Mar. 5, 2012) ("Although Plaintiffs have creatively characterized their claims, in substance they ask this Court to mandate the specific performance of a contract …. [This] cannot serve as a basis for an end-run around a state's sovereign immunity protections."). That same reasoning applies here, where the relief

sought by the State would require the Tribe to bring its conduct into conformance with the State's view of the meaning of Section 9 of the compact.

For those reasons, the State's effort to enforce Section 9 of the compact by suing individual officers does not fall within the bounds of *Ex parte Young* as defined by longstanding precedent. Indeed, compelling the Tribe's officers to perform under the compact—which they could do only by convening a meeting of the Tribe's Board and voting to rescind the tribal resolutions authorizing the MILCSA submissions—would strike at the core of this limitation on the scope of *Ex parte Young*. Such a remedy would impermissibly interfere with "the course of [the Tribe's] public policy and the administration of [the Tribe's] public affairs" and subject the Tribe's decisions and governmental actions to "control[]" and micromanagement "by the mandate[] of judicial tribunals, without [the Tribe's] consent." *Ayers*, 123 U.S. at 505; *cf. Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 703 (1949) (federal sovereign immunity barred suit against federal officer for injunctive relief in contract dispute). The *Ex parte Young* doctrine thus supplies no basis for the State's claims here.

2. *Ex parte Young* cannot be used to evade IGRA's limitations

Ex parte Young is inapplicable for a second, independent reason: The Supreme Court has made clear that the *Ex parte Young* exception may not be used to circumvent the limitations of a comprehensive remedial scheme enacted by Congress, such as IGRA. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74 (1996), the Supreme Court reaffirmed the general principle that, "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." Based on that principle, the Court held that, in § 2710(d)(7) of IGRA, Congress created such a remedial scheme, rendering *Ex parte Young* "inapplicable." *Id.* at 75-76. The upshot of *Seminole Tribe* is

that, where Congress has crafted a mechanism for tribes to sue states to remedy IGRA violations but that remedial scheme is unavailable, tribes may not circumvent that limitation by suing state officials for the *same* alleged IGRA violations. *Id.*

The analysis applies fully here, where the State seeks to enforce an IGRA compact outside the remedial scheme in § 2710(d)(7). Although *Seminole Tribe* involved a suit against a state and state officers, the Court's reasoning was not limited to one specific clause of § 2710(d)(7) but applies equally to suits against tribes and tribal officers. The Court explained that "Congress did not intend" to "authorize federal jurisdiction under *Ex parte Young* over a cause of action" broader than the "remedial scheme" Congress established in § 2710(d)(7), which "would be superfluous" if *Ex parte Young* were available. 517 U.S. at 75 & n.17. The Court reasoned that, by narrowly limiting the parties who may sue and be sued, the circumstances in which such suits may occur, and the scope of permissible relief, Congress intended in § 2710(d)(7) to impose only a "significantly more limited" form of liability than an *Ex parte Young* suit. *Id.* at 75-76; *see Michigan Corr. Org. v. Michigan Dep't of Corr.*, 774 F.3d 895, 905 (6th Cir. 2014) ("*Seminole Tribe* refused to evade the statute's private remedy with a remedy not mentioned in the statute."). Those principles apply equally whether defendants are officers of a state (as in *Seminole Tribe*) or a tribe (as here). In either case, *Ex parte Young* may not be used to evade a specific and limited remedial scheme established by Congress, because allowing such suits would render that remedial scheme largely superfluous. *See Oklahoma v. Hobia*, 775 F.3d 1204, 1213 (10th Cir. 2014) (state could not proceed on an *Ex parte Young* theory "against individual tribal officers for violating an IGRA-mandated tribal-state gaming compact"); *cf. Crosby Lodge, Inc. v. National Indian Gaming Ass'n*, 2007 WL 2318581, at *4

(D. Nev. Aug. 10, 2007) (*Ex parte Young* inapplicable because "IGRA contemplates a multitude of specific causes of action" and none was applicable).

The State's amended complaint has not cured these problems; if anything, it is an even more egregious effort to evade IGRA's strictures. The State has conceded it "cannot in good faith pursue an IGRA claim against [tribal] officials at this time," given the Sixth Circuit's holdings. State Rule 54(b) Reply 8-9, Dkt. 60. Yet it attempts to pursue the *exact same* claims for putative breach of an IGRA gaming compact by suing under the guise of common law violations rather than IGRA itself. All four counts of the amended complaint are predicated on the same purported violation of Section 9, and all four counts seek relief not authorized by IGRA—withdrawal of the MILCSA submissions, rather than an injunction of "class III gaming activity located on Indian lands." 25 U.S.C. § 2710(d)(7)(A)(ii). Now that the parties have litigated for more than two years whether the State may pursue its claims for breach of compact against the Tribe and the Sixth Circuit has held that IGRA does not permit that result now, it would represent an intolerable evasion of IGRA's remedial scheme and the Sixth Circuit's decision to permit the State to pursue the very same claims against tribal officials.

*** * ***

For these reasons, sovereign immunity bars the State's amended complaint as a matter of law. Although a straightforward application of legal precedent requires that result, it bears emphasis that dismissal will work no practical hardship on the State. The Sixth Circuit drew a clear path for the State to follow to litigate its claims regarding Section 9: The State can sue the Tribe itself under IGRA for an injunction against class III gaming purportedly in violation of the compact if such a suit ever ripens—that is, if class III gaming is "imminent." *Sault Ste. Marie Tribe*, 737 F.3d at 1082. In the interim, there is no legal basis—or practical need—for an *Ex*

parte Young action, which the State described in *Bay Mills* as "preordained to create friction between a state and tribe" by intruding on the exercise of tribal sovereignty and self-government. Reply Br. 20, *Bay Mills*, No. 12-515 (U.S. Nov. 22, 2013). Indeed, the Sixth Circuit expressly rejected the State's prior position that it would be injured by waiting until that time: "The State will not be harmed because it will have the opportunity to bring this claim against the Tribe at a later time, and will not suffer any immediate consequences as a result of the delay." *Sault Tribe*, 737 F.3d at 1083. The amended complaint should thus be dismissed on sovereign immunity grounds.

II. THE AMENDED COMPLAINT SHOULD BE DISMISSED BECAUSE THE TRIBE IS A NECESSARY PARTY AND CANNOT BE JOINED UNDER RULE 19

The amended complaint should also be dismissed for failure to join a necessary and indispensable party under Federal Rule of Civil Procedure 19—namely, the Tribe. *See* Fed. R. Civ. P. 12(b)(7), 19. As explained above, the amended complaint is based entirely on alleged violations of the tribal-state gaming compact. But the *Tribe*, not individual *tribal officers*, is the party to the compact. And it is well settled that when a sovereign entity such as the Tribe is a necessary party but cannot be joined because of immunity, the suit must be dismissed.[4]

The Rule 19 necessary-party inquiry mandates a "three-step process." *Glancy v. Taubman Ctrs., Inc.*, 373 F.3d 656, 666 (6th Cir. 2004). First, the court must decide whether the absent party "is a necessary party under Rule 19(a)." *Id.* Second, if so, the court must determine whether joinder is "feasible," that is, whether the court can exercise personal and subject-matter

[4] The Court may dismiss on these grounds without first addressing the sovereign immunity of the named defendants. *See Nair v. Oakland County Cmty. Health Auth.*, 443 F.3d 469, 476-477 (6th Cir. 2006) (unlike other issues of subject-matter jurisdiction, sovereign-immunity may be raised "as an alternative defense," and a sovereign may "express whatever preference it wishes" about the order in which its defenses are considered). The Tribe has no objection to the Court reserving the question of the tribal officers' sovereign immunity in favor of dismissing for failure to join a necessary party or failure to state a claim.

jurisdiction if the absent party is joined. Fed. R. Civ. P. 19(b). "Third, if joinder is not feasible because it will eliminate the court's ability to hear the case, the court must analyze the Rule 19(b) factors to determine whether the court should 'in equity and good conscience' dismiss the case because the absentee is indispensable." *Glancy*, 373 F.3d at 666.

Application of those factors compels dismissal of the amended complaint. The first step in the Rule 19 inquiry is easily resolved. The Tribe itself, not the tribal officers, is party to the compact. *See, e.g.*, Compact 1, Am. Compl. Ex. A, Dkt. 67-1 ("THIS COMPACT is … entered into … by and between the SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS … and the STATE OF MICHIGAN[.]"). And "[i]t is hornbook law that all parties to a contract are necessary in an action challenging its validity or interpretation." *School Dist. of Pontiac v. Secretary of U.S. Dep't of Ed.*, 584 F.3d 253, 303 (6th Cir. 2009) (en banc) (McKeague, J., concurring); *see, e.g.*, *Enterprise Mgmt. Consultants Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989) (describing this rule as a "'deeply imbedded'" common law principle). Counts 1 and 2 of the amended complaint allege a breach of the Tribe's compact. Counts 3 and 4 allege other causes of action but depend critically on the same breach-of-contract premise—namely, that the Tribe's MILCSA submissions violated Section 9 of the compact. However creatively pled, all of the State's claims would require interpretation of the *Tribe's* compact.

The second Rule 19 factor is also satisfied here: Joinder of the Tribe itself is "not feasible" under Rule 19(b) because the Tribe is immune from suit. This is thus a case in which an absent tribe "cannot be joined" for Rule 19 purposes "because of tribal sovereign immunity." *Keweenaw Bay Indian Cmty. v. Michigan*, 11 F.3d 1341, 1347 (6th Cir. 1993); *see* 7 Wright, Miller, et al., *Federal Practice and Procedure* § 1617 n.18 (3d ed. 2001) (collecting cases).

Finally, this suit cannot "in equity and good conscience" proceed without the Tribe. For one, parties to a contract are generally both necessary and indispensable to a suit for breach of that contract. *See Onyx Waste Servs., Inc. v. Mogan*, 203 F. Supp. 2d 777, 787 (E.D. Mich. 2002) ("[A] contracting party is the paradigm of an indispensable party." (internal quotation marks omitted) (collecting cases)); *Russian Collections, Ltd. v. Melamid*, 2009 WL 4016493, at *6 (S.D. Ohio Nov. 18, 2009) ("[T]he indispensable parties in a breach of contract action are the parties to the contract."). Moreover, "'there is very little room for balancing'" other factors under Rule 19(b) once a sovereign is determined to be a necessary party because protecting sovereign immunity is "one of those interests 'compelling by themselves.'" *Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1496 (D.C. Cir. 1995); *see Republic of Phil. v. Pimentel*, 553 U.S. 851, 867 (2008) ("A case may not proceed when a required-entity sovereign is not amenable to suit."). And lastly, there is no doubt that the State "would have an adequate remedy if the action were dismissed for nonjoinder," Fed. R. Civ. P. 19(b)(4), because the Sixth Circuit has already made clear the State may pursue its breach-of-compact theory at a later date under IGRA, if such a claim ever ripens, *Sault Tribe*, 737 F.3d at 1080-1081.

In sum, the State may not, consistent with Rule 19, pursue an action for breach of the tribal-state gaming compact when the very party bound by the compact and alleged to have breached it—the Tribe, not its officers—is absent. After the Tribe successfully vindicated its sovereign immunity, Rule 19 does not permit the State to sidestep that immunity by proceeding with the same breach of compact theory against other defendants.

III. THE AMENDED COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM

In the alternative, the amended complaint should be dismissed for failure to state a claim. Fed. R. Civ. P. 12(b)(6). Each of the four claims is legally defective—failing to allege a

necessary element of the putative cause of action invoked by the State or "supported by mere conclusory statements" that are insufficient to withstand dismissal. *Iqbal*, 556 U.S. at 678.

A. Counts 1 And 2 Fail To State A Claim For Breach Of Contract

In count 1, the State asserts a claim for "breach of contract/compact" predicated on the Tribe's alleged breach of Section 9. In count 2, the State pleads essentially the same breach-of-contract claim, which is alleged to also violate Section 4(C) of the compact. Am. Compl. ¶¶ 32, 39. Counts 1 and 2 fail to state a claim for a simple reason: The individual tribal officers are not parties to the tribal-state gaming compact and thus are not liable for any breach of it.[5]

One of the fundamental elements of a claim for breach of contract is a contractual obligation "which *the other party*" to the contract breached. *Miller-Davis Co. v. Ahrens Constr., Inc.*, 848 N.W.2d 95, 104 (Mich. 2014) (emphasis added). Under federal law, a breach of contract action may be brought only against parties to the contract. *See, e.g.*, *Ayers*, 123 U.S. at 503 ("The [officers], as individuals, not being parties to that contract, are not capable in law of committing a breach of it. There is no remedy for a breach of a contract, actual or apprehended, except upon the contract itself, and between those who are by law parties to it."); *Downriver*

[5] In addition, Section 9 of the compact unambiguously does not apply to a MILCSA submission, and the Court could dismiss the amended complaint on that ground as a matter of law. Section 9 refers to "[a]n application to take land in trust for gaming purposes pursuant to § 20 of IGRA." Compact 12. It was intended to apply only to an application to the Secretary to take land into trust pursuant to a two-part determination for off-reservation gaming under 25 U.S.C. § 2719(b)(1)(A), as indicated by the compact's references to "*off-reservation*" gaming and as confirmed by other intrinsic and extrinsic evidence of the parties' contractual intent. *See* Substitute Br. for Appellant 38-43, Dkt. 19, *Sault Tribe*, No. 13-1438 (6th Cir. May 31, 2013). At a minimum, Section 9 was not intended to apply to the Tribe's trust submission under MILCSA, which had not been enacted at the time of the gaming compact and which requires the Secretary to take eligible land into trust without considering the purpose for which it might be used. Such a submission is not a "§ 20 application" and is not an application to take land into trust "for gaming purposes," and certainly not for class III gaming. *See id.* 43-46. However, the Court need not resolve these issues in light of the numerous defects in the amended complaint independently requiring dismissal.

Internists v. Harris Corp., 929 F.2d 1147, 1149 (6th Cir. 1991) (unlike in tort, "the privity requirement must still be met" in any contract suit). Michigan law is to the same effect: "[c]ontractual privity" between the suing party and the party sued "is an essential element of a breach of contract claim." *Montgomery v. Kraft Foods Global, Inc.*, 2012 WL 6084167, at *17 (W.D. Mich. Dec. 6, 2012).[6] Those decisions all reflect a general rule that only a *party* to a contract may be held liable for a *breach* of that contract.

The State has a gaming compact with the Tribe, not its officers, and thus may sue only the Tribe for breach of that compact. The individual defendants named in the complaint do not owe the State any contractual duty. Indeed, the amended complaint does not even allege any such duty, claiming instead that the defendants are not authorized "to violate the congressionally approved compact *between the Sault Tribe and the State*." Am. Compl. ¶ 33 (emphasis added). To be sure, conduct by tribal officers might put the Tribe in breach of its compact, but the party liable for the breach or nonperformance in that circumstance is the Tribe, not the individual officers. By analogy, the officers of a corporation may not be sued for breach of the corporation's contracts, unless they have individually agreed to be bound by the contract. *See, e.g.*, *DK Joint Venture 1 v. Weyand*, 649 F.3d 310, 314 (5th Cir. 2011) (federal law); *Steinberg v. Federal Home Loan Mortg. Corp.*, 901 F. Supp. 2d 945, 954 (E.D. Mich. 2012) (Michigan law). Counts 1 and 2 of the amended complaint fail to state a claim for breach of contract by the defendants because the individual defendants do not have a contract with the State to breach.

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[6] For purposes of this motion, defendants assume for the sake of argument, without conceding, that Michigan contract law might apply. However, the purpose of *Ex parte Young* is to vindicate *federal* law, and thus the doctrine does not encompass alleged violations of *state* law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984); *accord* Tr. 10:6, *Bay Mills*, No. 12-515 (U.S. Dec. 2, 2013) ("you can't enforce a State law in Federal court" under *Ex parte Young*) (Michigan Solicitor General).

B. Count 3 Fails To State A Civil Conspiracy Claim

In count 3, the State alleges defendants conspired to cause the Tribe to breach its gaming compact. Am. Compl. ¶ 44. That claim fails as a matter of law for at least three reasons.[7]

First, a civil conspiracy claim requires an agreement to commit a tort or some other wrongful act; neither Michigan nor federal law recognizes a claim for conspiracy to breach a *contract*. "'[N]o independent tort claim arises solely from a defendant's failure to perform his contractual obligations,'" and allegations that a defendant breached its contract "may not be elevated beyond a simple failure to perform a contractual obligation" into a conspiracy claim. *Specialized Pharmacy Servs., LLC v. Magnum Health & Rehab of Adrian, LLC*, 2013 WL 1431722, at *4 (E.D. Mich. Apr. 9, 2013); *see Kevelighan v. Trott & Trott, P.C.*, 771 F. Supp. 2d 763, 780 (E.D. Mich. 2010) (granting motion to dismiss where "plaintiffs' civil conspiracy claims … are based on allegations sounding in contract," because Michigan law requires "an underlying actionable tort"); *see also All Erection & Crane Rental Corp. v. Acordia Nw., Inc.*, 162 F. App'x 554, 560 (6th Cir. 2006) ("[A] contract claim cannot form the basis of a conspiracy claim." (applying Ohio law) (internal quotation marks omitted)). Count 3 alleges only that the defendants took steps to cause a breach of contract and thus does not state a claim for civil conspiracy.

Second, the defendants cannot conspire among themselves or with the Tribe as a matter of law. "'It is basic in the law of conspiracy that you must have two persons or entities to have a

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[7] In addition to the Rule 12(b)(6) defects identified here, the State does not offer any reason to think that common-law claims for civil conspiracy or tortious interference with contract could be brought under *Ex parte Young*, which is limited to prospectively enjoining ongoing violations of federal law. The State does not seek an order enjoining the defendants from conspiring or interfering, but rather seeks the sort of retrospective relief for an alleged past violation of law that *Ex parte Young* does not permit. *See also supra* n.6 (*Ex parte Young* does not permit suit to enjoin alleged violations of *state* law).

conspiracy.'" *Doherty v. American Motors Corp.*, 728 F.2d 334, 339 (6th Cir. 1984). "[W]here 'all of the defendants are members of the same collective entity, there are not two separate 'people' to form a conspiracy.'" *Amadasu v. The Christ Hosp.*, 514 F.3d 504, 507 (6th Cir. 2008); *see, e.g.*, *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1298 (10th Cir. 2008) (tribal entity and its employees); *Schroeder v. Dayton-Hudson Corp.*, 448 F. Supp. 910, 915 (E.D. Mich. 1977) (corporation and its officers), *amended on other grounds*, 456 F. Supp. 650 (E.D. Mich. 1978). Each of the individual defendants is named only for his or her actions as an officer of the Tribe. The civil conspiracy claim thus fails as a matter of law to allege a legally distinct group of co-conspirators.[8]

Third, "[t]o state a claim for civil conspiracy, [the plaintiff] must also prove actual damages," meaning that "'if a plaintiff suffers no actual damages from the underlying unlawful act, there can be no successful civil conspiracy action.'" *Lawyers Title Co. v. Kingdom Title Solutions, Inc.*, 592 F. App'x 345, 355 (6th Cir. 2014); *see Fenestra Inc. v. Gulf Am. Land Corp.*, 141 N.W.2d 36, 48-49 (Mich. 1966) ("[A]t the core of an actionable civil conspiracy is a question of damages…. The conspiracy standing alone without the commission of acts causing damage would not be actionable."). Count 3 does not allege that the State suffered any actual damages—or, indeed, any injury at all—from the alleged conspiracy to breach Section 9. Nor would any such allegation be plausible in view of the Sixth Circuit's holding that the State could

[8] The amended complaint alleges defendants "acted in concert with the City of Lansing." Am. Comp. ¶ 44. If the State is accusing one of its municipalities of being a civil co-conspirator, then that conspiracy claim would also fail. The State does not allege, as it must, that Lansing had any knowledge of Section 9 of the compact, much less a wrongful intent to cause an alleged breach of that provision. *See, e.g., Rosenberg v. Rosenberg Bros. Special Account*, 351 N.W.2d 563, 569 (Mich. Ct. App. 1984) ("It is essential that each particular defendant who is to be charged with responsibility shall be proceeding tortiously, which is to say with intent to commit the tort or with negligence. One who innocently does an act with furthers the tortious purpose of another is not acting in concert with him.").

remedy any compact violation at a later time under IGRA and would suffer no harm from delay. *See Sault Tribe*, 737 F.3d at 1083. The amended complaint thus fails to state a necessary element of a claim for civil conspiracy.

C. Count 4 Fails To State A Tortious Interference With Contract Claim

Finally, count 4 alleges the defendants intentionally interfered with the tribal-state compact by causing the Tribe to file the MILCSA submissions. Am. Compl. ¶ 50. This count also fails as a matter of law for two independent reasons.

First, the amendment complaint fails to plead a "wrongful purpose." To state a claim for tortious interference, the State must establish, among other things, "an unjustified instigation of the breach by the defendant." *Health Call of Detroit v. Atrium Home & Health Care Servs. Inc.*, 706 N.W.2d 843, 849 (Mich. Ct. App. 2005). "[O]ne who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another." *Feldman v. Green*, 360 N.W.2d 881, 891 (Mich. Ct. App. 1984). "A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under any circumstances. If the defendant's conduct was not wrongful per se, the plaintiff must demonstrate specific, affirmative acts that corroborate the unlawful purpose of the interference." *Badiee v. Brighton Area Sch.*, 695 N.W.2d 521, 539 (Mich. Ct. App. 2005) (citations and internal quotation marks omitted).

The amended complaint does not allege any "wrongful per se" conduct or any "unlawful purpose" at all by the defendants. The State alleges that the "instigation of the breach of the compact was not justified," Am. Compl. ¶ 51, but that is merely a recital of an element of the claim, not a plausible factual basis to proceed. *See Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.");

e.g., *Collins v. Choi Kwang Do Martial Arts Int'l, Inc.*, 2011 WL 3566615, at *4 (E.D. Mich. Aug. 15, 2011) (absent any allegation that defendants "'did anything illegal, unethical, or fraudulent,' a claim for tortious interference fails").

At most, the amended complaint suggests that the Tribe, the individual defendants, and the State disagree about the proper scope of Section 9 of the compact. But that type of contractual disagreement, common in commercial settings, is not a "wrongful purpose": A party acting out of a belief (even if later proven to be mistaken) that his or her conduct was authorized under a contract lacks the intent necessary to establish a claim for tortious interference. *See, e.g.*, *Saab Auto. AB v. General Motors Co.*, 770 F.3d 436, 443 (6th Cir. 2014) ("intentional interference requires more than purposeful or knowing behavior" and therefore "the element certainly would require more than a mistake …, if one had even been made"). Put simply, there is a wide gulf between good-faith disagreement about the meaning of a *contract* and the type of intentional wrongdoing (or malice) that is necessary to state a claim for *tortious* interference. At most, the amended complaint alleges the former, not the latter.

Second, even if the intentional interference claim did recite a sufficient factual predicate for allegations of wrongful purpose, the claim would fail as a matter of law because defendants, as officers of the Tribe, cannot interfere with contracts of the Tribe itself. "To maintain a cause of action for tortious interference with a contract, a plaintiff must establish … that the defendant was a 'third party' to the contract[.]" *Dzierwa v. Michigan Oil Co.*, 393 N.W.2d 610, 613 (Mich. Ct. App. 1986). It is "settled law that corporate agents are not liable for tortious interference with the corporation's contracts unless they acted solely for their own benefit with no benefit to the corporation." *Reed v. Michigan Metro Girl Scout Council*, 506 N.W.2d 231, 233 (Mich. Ct.

App. 1993) (per curiam). The amended complaint contains no allegation that the individual defendants acted for personal benefit, and thus fails to state a claim.

This point of law, in some respects, reflects the same policy underlying the legal principles discussed above concerning necessary parties and intra-corporate conspiracies: When a collective entity such as a corporation is alleged to have breached its contract, the proper defendant is the collective entity itself. An ordinary breach-of-contract claim may not be transformed into a conspiracy or tortious interference claim against corporate officers merely to avoid suing the corporation. The same principle logically extends to tribal officers. Under the State's theory of count 4, the individual tribal officers "interfered" with the Tribe's contract by taking precisely the same steps that, in the State's view, breached the compact. Allowing the State's claim to proceed would transform any ordinary claim for breach of contract by a tribe (or State) into a tort against its officers. That is not, and should not be, the law.

IV. IN THE ALTERNATIVE, THE STATE IS NOT ENTITLED TO A REMEDY ORDERING WITHDRAWAL OF THE MILCSA SUBMISSIONS

If any of the State's claims survive dismissal, the Tribe requests that the Court narrow the dispute by making clear that the injunctive relief requested in the amended complaint is unwarranted and overbroad. In particular, the amended complaint supplies no factual basis to support the State's request for an order "requiring Defendants to withdraw the applications submitted to the Secretary until such time as the Tribe has complied with § 9 of its compact." Am. Compl. 8; *accord id.* at 9, 11. The Tribe's submissions may lead to class II gaming or even to non-gaming activities, although the Tribe intends to use the lands for class III gaming if permitted. The Sixth Circuit recognized as much in holding that the State's IGRA claim to enjoin class III gaming activities is presently unripe. *Sault Tribe*, 737 F.3d at 1082, 1083.

The State does not and could not allege that any part of the parties' *class III* gaming compact would be violated by *class II* gaming activities.[9] Class II gaming activity on Indian lands is not subject to state regulation and is not governed by tribal-state compacts. *See* 25 U.S.C. § 2710(a)(2), (b)-(c) (exclusive regulation of class II gaming activities on Indian lands by tribes and the National Indian Gaming Commission); *Oneida Tribe of Indians of Wis. v. Wisconsin*, 951 F.2d 757, 759 (7th Cir. 1991) (class II gaming "cannot be regulated by the State"). Thus, even if the State's theory of Section 9 were correct and even if the State could pursue that theory now against tribal officers—defendants dispute both premises—the State will never be entitled to anything more than an injunction against class III gaming activities at the Lansing or New Boston properties in the absence of an intertribal revenue-sharing agreement covering that particular class III gaming activity. *See Sault Tribe*, 737 F.3d at 1080 n.4 (quoting colloquy with Tribe's counsel). The request for an order requiring withdrawal of the MILCSA submissions accordingly should be struck, if the complaint is not dismissed in its entirety.

CONCLUSION

For the reasons set forth above, this Court should dismiss the amended complaint. In the alternative, the Court should strike the State's request for a remedy ordering withdrawal of the Tribe's MILCSA submissions.

[9] The State effectively conceded this on appeal. In response to the Tribe's argument about the possibility of class II gaming, the State offered to stipulate to a permanent injunction limited to "operating class III games" on the property. State Br. 38 n.6, Dkt. 22, *Sault Tribe*, No. 13-1438 (6th Cir. June 17, 2013).

Dated: March 20, 2015

Respectfully submitted,

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