UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE STATE OF MICHIGAN,

Plaintiff,

v

AARON PAYMENT, LANA CAUSELY, CATHY ABRAMSON, KEITH MASSAWAY, DENNIS MCKELVIE, JENNIFER MCLEOD, DEBRA ANN PINE, D.J. MALLOY, CATHERINE HOLLOWELL, DARCY MORROW, DENISE CHASE, BRIDGET SORENSON and JOAN ANDERSON,

Defendants.

No. 1:12-cv-00962-RJJ

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STATE OF MICHIGAN'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

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INTRODUCTION

The State filed this lawsuit seeking to enjoin both the Tribe *and its officials* from violating Section 9 of the gaming compact, which prohibits them from applying to have land taken into trust for gaming unless they first obtain an agreement with other Michigan tribes to share the revenue from such gaming. This Court determined that a preliminary injunction was warranted, and in doing so ruled that the State was likely to establish that an application by the Tribe to have land in Lansing taken into trust would violate the gaming compact. The Court dismissed the action against the officials only because it determined that the Tribe was not immune from suit and that the State could obtain all the relief it needed directly from the Tribe.

Since the Court's decision, the State lost one of the 14 defendants sued in its original action because the Sixth Circuit ruled that the Tribe is protected by its immunity until its plans to open a casino have progressed further. At this unknown future date, immunity will be abrogated and the merits of this action can be decided.

Because the Sixth Circuit said the State could sue the Tribe for the compact violation later, when gaming is imminent, the Tribe attempts to cast the action against its officials now as premature and unnecessary. However, just because the Tribe's immunity has not yet been abrogated does not mean that the *cause of action* itself is not ripe. Especially now that the trust application on which the original complaint was based has been submitted to the Secretary of the Interior, along with a second application to take land into trust for gaming in Huron Township – both in violation of § 9. The Tribe could waive its immunity and have the merits of this case decided straightaway without the officials as Defendants, as this Court envisioned, but instead it insists on delaying resolution until it has expended vast resources to move its casino plans forward. Obviously Defendants believe delay gives them an advantage in this litigation, and

they are willing to pay dearly to secure it. But any advantage the Tribe gains by delay harms the State. The State's interests are best served by having the merits decided now, using the tools recently endorsed by the Supreme Court in *Michigan v. Bay Mills Indian Community,* 134 S. Ct. 2024 (2014).

The primary tool, identified by the Supreme Court as an effective means to obtain relief when a tribe shrouds itself with immunity, is an *Ex parte Young*-type action brought against tribal officials, as alleged by the State here. Defendants say it cannot be used to obtain specific performance of § 9. But assuming this defense even applies in the tribal context, it only pertains where a plaintiff seeks to force a government to perform *affirmative acts*, not where it merely attempts to enjoin the violation of a contract as the State seeks here.

And the "contract" here is more than a contract: It is a congressionally-approved compact. Tribal officials do not have authority to act in contravention of its requirements. The Sixth Circuit has rejected a similar argument that a contract originating in federal law is subject to the specific performance defense.

For these and the reasons detailed below, the State respectfully requests that Defendants' motion to dismiss be denied so that the merits of this dispute can be timely decided.

ARGUMENT

I. Legal standard for motion to dismiss.

The standard to be applied by courts to motions to dismiss requires that every reasonable inference be granted in favor of the plaintiff:

> In analyzing the sufficiency and plausibility of the claim, "we construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Directv, Inc. v. Treesh,* 487 F.3d 471, 476 (6th Cir. 2007) (citation omitted). We will affirm the district court's dismissal only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Guzman v. U.S. Dep't of Homeland Sec.,* 679 F.3d 425, 429 (6th Cir. 2012) (citation and internal quotation marks omitted). We need not accept as true "a legal conclusion couched as a factual allegation," [*Bell Atl. Corp. v.*] *Twombly,* 550 U.S. [554] at 555 (citation and internal quotation marks omitted), or an "unwarranted factual inference[ ]," *Treesh,* 487 F.3d at 476 (citation and internal quotation marks omitted).

Handy–Clay v. City of Memphis, 695 F.3d 531, 538-39 (6th Cir. 2012). The recently minted "plausibility" standard requires that a complaint allege claims that "raise a right to relief above the speculative level." *Twombly,* 550 U.S. at 555, 557-58, 570 (2007). Making the plausibility determination is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal,* 556 U.S. 662, 679 (2009).

Here, given the Court's prior determination that the State had shown a likelihood of success on the merits of its claims vis-à-vis the Tribe, there can be little doubt that the State's claims against the tribal officials allege sufficient facts to survive this motion to dismiss. This is particularly true given the Supreme Court's reaffirmation that states do not need to sue tribes directly for their violations of state and federal laws because states have a full "panoply" of remedies that primarily involve obtaining relief from tribal officials or employees. *Bay Mills,* 134 S. Ct. at 2034-35.

II. The Court has subject matter jurisdiction.

Defendants' reliance on Fed. R. Civ. P. 12(b)(1) to support dismissal mistakenly conflates their sovereign immunity affirmative defense with subject matter jurisdiction. This Court clearly has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, as it alleges breach by tribal officials of an IGRA-mandated[1] compact arising under federal common law, *cf.*, *Bay Mills*, 134 S. Ct. at 2029 n.2, 2034-35. Sovereign immunity, which is an affirmative defense and can be waived, does not deny the Court subject matter jurisdiction.

The Court has pendent jurisdiction over the remaining state law claims that arise from the same facts and circumstances as the federal claims. 28 U.S.C. § 1367.

III. Tribal officials are not protected by the Tribe's sovereign immunity.

As best the State can discern, the Supreme Court has never held that tribal immunity extends to a tribe's officials. *Bay Mills*, 134 S. Ct. at 2051 n.4 (Thomas, J., dissenting). Nor has the Sixth Circuit. Defendants cite to no authority from either court to support their assertion that such immunity extends to them.

While some other circuit courts have so held, these decisions are cast in serious doubt by the majority opinion in *Bay Mills,* which went to great lengths to reassure the State that merely because the tribe in that case could not be sued, the State still had access to a "panoply" of remedies under "capacious" authority to shutter an illegal casino, including pursuing tribal officials under state law and under an *Ex parte Young*-type claim. *Id.* at 2034-35. When Justice Thomas pointed out in his dissent that states could have trouble obtaining effective remedies for the illegal conduct of tribes, including a specific reference to lower court rulings that tribal

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[1] Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*

officials enjoyed immunity for actions within the scope of their authority, *id.* at 2051 & n.4 (Thomas, J., dissenting), the majority flatly disagreed:

> In short (and contrary to the dissent's unsupported assertion, see *post*, at 11), the panoply of tools Michigan can use to enforce its law on its own lands—no less than the suit it could bring on Indian lands under §2710(d)(7)(A)(ii)—can shutter, quickly and permanently, an illegal casino.

Id. at 2035. The majority's dismissal of the dissent's concerns indicates that the majority does not favor extending a tribe's immunity to its officials. This is confirmed by the majority's further assertion that criminal law remedies were also available to the State:

> And to the extent civil remedies proved inadequate, Michigan could resort to its criminal law, prosecuting ***anyone*** who maintains—or even frequents—an unlawful gambling establishment. See Mich. Comp. Laws Ann. §§432.218 (West 2001), 750.303, 750.309 (West 2004).

134 S. Ct. at 2035 (emphasis added). "Anyone" would include tribal officials authorized by a tribe to maintain a casino. Yet, if such a casino violated state law, those officials, according to the *Bay Mills* majority, would be subject to state law prosecution – and not based on an *Ex parte Young* analogy. The remedy for violating Michigan Compiled Laws §750.303 is a stiff fine and up to two years in prison, *not* prospective injunctive relief.[2] The logical conclusion is that tribal officials are not immune.

In light of *Bay Mills*, and in the absence of any direction from the Sixth Circuit on this issue, it would not make sense for this Court to create a doctrine that extends tribal immunity to tribal officials under the circumstances posited by this case. Defendants' demand that the State identify some authority for an abrogation of this questionable immunity (Defs' Br. 7) can be

[2] See also *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 514 (1991) ("We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State. See *Ex parte Young*."). This statement only makes sense if the "agents or officers of a tribe" do not have immunity as *Ex parte Young* claims do not permit damages relief.

given little credence. Rather, it is incumbent on Defendants to establish that they are entitled to this common law immunity. They have not done so here.

In any event, even under Defendants' analysis, they would only be entitled to immunity for acts *taken within the scope of their authority*. This inevitably involves a factual inquiry into the nature and scope of any such authority, and possibly into the nature of the acts alleged to violate the law. It would be inappropriate for the Court to dismiss on this ground at this stage of the litigation.

A. At a minimum, Defendants are subject to an action seeking an injunction prohibiting their unlawful conduct.

In a footnote, Defendants note their disagreement that *Ex parte Young*-type actions should be allowed against tribal officials at all. (Defs' Br. 7 n.3.) They do not press this argument for good reason: The Supreme Court unequivocally blessed claims for prospective injunctive relief against tribal officials in *Bay Mills*, as discussed above. Nor was this dicta. The Supreme Court specifically relied on the availability of a remedy against officials to deny the State's request to modify tribal immunity.[3]

Defendants argue, however, that even if such a claim is generally available against tribal officials, it should not be permitted here where the State seeks to enjoin them from taking actions that directly violate their gaming compact. They base their assertion on two grounds, each of which requires the Court to adopt defenses that courts have applied to claims brought against *state officers* in actual *Ex parte Young* cases. There are several reasons not to accept Defendants' argument.

[3] "Adhering to *stare decisis* is particularly appropriate here given that the State, as we have shown, has many alternative remedies: It has no need to sue the Tribe to right the wrong it alleges." *Bay Mills*, 134 S. Ct. at 2036 n.8.

1. There are fundamental differences between the two claims.

The *Ex parte Young* doctrine was developed by the Supreme Court to address a specific concern arising from the Eleventh Amendment that forbade federal courts from exercising jurisdiction over actions brought against states. An analogous claim against tribal officials, though similar in purpose, arises in an entirely different context. Tribes are not protected by Eleventh Amendment immunity, so the immunity being avoided in an action against tribal officials is *common law* immunity as opposed to the *constitutional* immunity afforded states. Likewise, under a traditional *Ex parte Young* action, a plaintiff may only seek enforcement of *federal* law. *Bay Mills* makes it clear that an *Ex parte Young*-type claim is also available when suing tribal officials who have violated *state laws*. *Bay Mills,* 134 S. Ct. at 2035 (describing injunctive relief available to the State under its anti-gambling laws, the Supreme Court stated, "As this Court has stated before, analogizing to *Ex parte Young*, 209 U.S. 123 (1908), tribal immunity does not bar *such a suit* for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct." (emphasis added)).

Given these fundamental differences between the two types of claims, the Tribe's assumption that all defenses to a traditional *Ex parte Young* claim would automatically apply in an action against tribal officials is unwarranted. This misconception is confirmed by the Supreme Court's statement in *Oklahoma Tax Comm'n,* 498 U.S. at 514, that it "never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State. See *Ex parte Young*." In a traditional *Ex parte Young* action, damages cannot be awarded, yet apparently they may in an *Ex parte Young*-type action against tribal officials. They are not the same claim.

Thus, these common law defenses to *Ex parte Young* actions should not be adopted into the context of actions against tribal officials without consideration of the relevant public policies.

In most cases where a plaintiff is denied a remedy against a state and its officials in federal court based on an *Ex parte Young* defense, he or she could still have a remedy in state court, where Eleventh Amendment immunity is not an issue. The same is not necessarily true with respect to tribes, whose common law immunity generally subsists in all courts. It seems likely this lack of a remedy against a tribe, at least in part, fueled the strong statement from the *Bay Mills* Court favoring states' ability to obtain relief against tribal officials when a tribe asserts immunity.[4] Thus, a defense developed in the context of Eleventh Amendment immunity is not necessarily good policy where common law immunity is asserted.

2. The defenses asserted by Defendants are inapplicable.

Even if the Court decides to import the two *Ex parte Young* defenses relied on by Defendants, this motion should still be denied as neither defense is applicable to the facts of this case.

a. The specific performance defense does not govern an action that merely seeks to enjoin unlawful conduct but does not seek affirmative relief.

Defendants assert that the State cannot obtain an injunction against their actions that violate § 9 of the compact because such relief is not available where it grants the plaintiff specific performance of a contract. Defendants rely on dicta from two Supreme Court cases.

Defendants cite first to *Virginia Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632 (2011), a case where the Supreme Court expressly *allowed* the plaintiff to pursue an *Ex parte Young* claim. But in dicta the Court acknowledged a couple of exceptions where the doctrine would not apply, including where specific performance of a contract with a state was sought.

[4] As noted above, the Court declined to modify tribal immunity specifically because the State had "alternative" remedies against tribal officials.

Likewise in *Edelman* v. *Jordan*, 415 U.S. 651 (1974), the plaintiff was not even seeking enforcement of a contract. But the Supreme Court mentioned the specific performance defense in dicta. The Supreme Court provided no discussion of the *scope* of the defense in either case. Neither case creates a blanket exception to relief.

Moreover, the specific performance defense does not apply here because the State simply seeks to enjoin Defendants from taking actions that will impair the State's contractual rights under the gaming compact. Such relief is no different, nor more intrusive on a state's (or tribe's) sovereignty, than the order in *Ex parte Young* itself that enjoined the Minnesota attorney general from enforcing a state law that established rates for railway companies. If state sovereignty is not unconstitutionally infringed by an order enjoining its officials from enforcing a law duly enacted by the people of the state, it is difficult to see how that sovereignty is any more threatened by an order enjoining state officials from violating a congressionally-approved contract.

What the Supreme Court actually means when it says *Ex parte Young* cannot be employed to order specific performance of a state contract by state officials is that orders *requiring affirmative acts from those officials* cannot issue from a federal court. The "dividing line" between contract enforcement cases that don't run afoul of the Eleventh Amendment and those that do was expressly established in *Pennoyer v. McConnaughy,* 140 U.S. 1 (1891). In that case, the Supreme Court allowed injunctive relief to a plaintiff where "[a]ll that [the plaintiff] asks is, that the defendants may be *restrained and enjoined* from doing certain acts which he alleges are violative of his contract made with the State . . . ." *Id.* at 18 (emphasis added). At the same time, the Supreme Court held "that affirmative relief would not be granted against a State officer, by ordering him *to do and perform* acts forbidden by the law of his State, even though

such law might be unconstitutional." *Id.* at 16 (emphasis added). In other words, *Ex parte Young* is available to *stop the actions* of state officials that violate federal law, but cannot be used to force those officials to *perform affirmative acts* even if nonperformance violates federal law. See also *Georgia R. Co. v. Redwine*, 342 U.S. 299, 304-05 (1952) ("Appellant in this case merely seeks the cessation of appellee's allegedly unconstitutional conduct and does not request affirmative action by the State.").

The facts of *Pennoyer* clearly illustrate its ruling. Pursuant to an 1870 state law, the plaintiff's assignor had applied to buy swamp lands from the state, had taken steps to map the land as required by the law, and had paid 20% of the purchase price.[5] 140 U.S. at 19-21. The law required proof of reclamation of the swamp land, and payment of the full purchase price, before patents would be issued to the purchaser. *Id.* Before the contract could be finally consummated, the state passed a second law canceling any contracts for the purchase of swamp land where certain requirements had not been met. *Id.* at 20. The state then canceled the plaintiff's contract and sold some of the lands to third parties. *Id.* at 20-21. The plaintiff sought to enjoin the defendant state officials from selling any additional land to which he claimed title. *Id.* at 18. The lower court granted the relief requested, and the Supreme Court affirmed.

To reach its decision, the *Pennoyer* Court analyzed what at first blush appears to be a number of inconsistent rulings from the Supreme Court on the question of whether specific performance of a state contract can be ordered by a federal court. *Id.* at 9-16. The Supreme Court thoroughly reviewed the numerous cases that had held in favor of such orders, as well as those denying such orders, including *In re Ayers,* 123 U.S. 443 (1887), cited here by Defendants. *Pennoyer,* 140 U.S. at 9-16. The Court concluded that specific performance was inappropriate

[5] Though there was a dispute regarding whether the payment was timely.

only where a plaintiff sought affirmative relief from state officials. With respect to the plaintiff before it, the Court explained:

> It must also be observed that the plaintiff is not seeking any affirmative relief against the State or any of its officers. He is not asking that the State be compelled to issue patents to him for the land he claims to have purchased, nor is he seeking to compel the defendants to do and perform any acts in connection with the subject matter of the controversy requisite to complete his title. He merely asks that an injunction may issue against them to restrain them from acting under a statute of the State alleged to be unconstitutional, which acts will be destructive of his rights and privileges, and will work irreparable damage and mischief to his property rights.

Id. at 18.

There is no basis to distinguish *Pennoyer* from the instant case. The State here is not asking the Court to force Defendants to take any affirmative actions under the compact. For example, the State is not asking the Court to order Defendants to negotiate with other tribes' officials in the manner expected by § 9 of the compact. Rather, the State merely asks the Court to stop Defendants from taking any further actions that are inconsistent with the State's contractual right not to have trust applications submitted to Interior for gaming purposes, unless revenue sharing agreements are first obtained with the other Michigan tribes. This relief fits precisely within the limits established by the Supreme Court for permissible actions seeking to protect rights acquired in a government contract. Defendants' argument that there is a blanket exception to *Ex parte Young* actions that seek enforcement of any contract rights should be rejected.[6]

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[6] Defendants assert that the State admitted in oral argument in *Bay Mills* that *Ex parte Young* does not permit specific performance of contracts. (Defs' Br. 8.) A statement made in another case concerning a legal principle is irrelevant. Moreover, counsel for the State was correct that in traditional *Ex parte Young* actions, such a defense exists, though his statement did not address the limits on the defense as explained here. And, regardless, the Supreme Court seemed unmoved, relying on the ready availability of *Ex parte Young*-type claims to vindicate state and federal laws.

i. Contracts arising under federal law are not subject to the specific performance defense.

There is another reason Defendants' specific performance defense fails here. The gaming compact at issue was fully authorized by IGRA and approved by the Secretary of the Interior. In fact, the compact would not exist but for the enactment of IGRA, which forced states to negotiate with tribes who wanted to operate casinos in Indian country. 25 U.S.C. § 2710(d)(3).

The mechanism of a gaming compact was selected by Congress to be an integral regulatory structure for tribal gaming. The provisions that such a compact "may include" are laid out in IGRA. 25 U.S.C. § 2719(d)(3)(C). Without such a compact, there could be no class III gaming conducted on Indian lands. 25 U.S.C. § 2710(d)(1)(C). The fact that it is mandated by federal law makes it more than a mere contract and not subject to the specific performance defense.

The Sixth Circuit confirmed this in *Westside Mothers v. Haveman*, 289 F.3d 852 (6th Cir. 2002). In that case, the plaintiffs sought to force state officials to implement and pay for certain preventative medical procedures that they contended were required by federal law. *Id.* at 855. The trial court refused the injunction, ruling that because the State had agreed to operate a Medicaid program, but was not required to do so, the relationship between the state and federal governments was merely a contractual one[7] and that *Ex parte Young* could not be used to require specific performance of that contract, just as Defendants claim here. *Id.* at 857. The Sixth Circuit rejected this analysis.

First, relying on *Bennett v. Kentucky Dep't of Educ.,* 470 U.S. 656, 669 (1985), the appeals court made it clear that the Medicaid agreement between the state and federal governments, having originated in and incorporated Medicaid's statutory provisions, was more

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[7] This contract, in the form of the state's plan, must incorporate all requirements of applicable federal Medicaid laws and regulations. 42 C.F.R. § 430.10.

than an ordinary contract: "The fact that these provisions have the binding force of law means that Medicaid and similar federal grant programs are not subject merely to doctrines of contract interpretation." *Westside Mothers,* 289 F.3d at 858.

Next, the Sixth Circuit disagreed, over the objection of the defendant state officials, that the state's immunity precluded prospective injunctive relief:

> [T]he district court asserts that *Ex parte Young* is unavailable because the state "is the real party in interest when its officers act within their lawful authority." *Westside Mothers,* 133 F. Supp. 2d at 562. It has two reasons for finding Michigan the real party in interest. Its first reason follows from its finding that Medicaid is a contract. If Medicaid were only a contract, then this would be a suit seeking to compel a state to specific performance of a contract. Such suits are barred under a nineteenth century Supreme Court case, *In re Ayers,* 123 U.S. 443 (1887), which held that a "claim for injunctive relief against state officials under the Contracts Clause is barred by state sovereign immunity because the state [is] the real party at interest." *In re Ellett,* 254 F.3d 1135, 1145 (9th Cir. 2001) (explicating *In re Ayers*). We have already held that Medicaid is not merely a contract, but a federal statute. This suit seeks only to compel state officials to follow federal law, and thus is not barred by *Ayers.*

Id. at 861. Just as the State was not determined to be the real party in interest in *Westside Mothers*, the Sault Tribe is not the real party in interest here. Just as the State's Medicaid agreement "originate[d] in and remain[ed]" subject to Medicaid's statutory provisions, so too does the gaming compact originate in and remain subject to IGRA. *Id*. at 858 (quoting *Bennett,* 470 U.S. at 669). The Tribe specifically committed in § 4(C) of the compact to abide by IGRA. (Dkt. # 67-1.) It is therefore more than a "mere" contract and cannot be ignored by tribal officials who, like the State officials in *Westside Mothers*, are subject to prospective injunctive relief restraining them from violating a compact entered under federal law.

ii. Even if the defense applies in general, it doesn't here because the rights the State seeks to vindicate arise under a federally mandated compact.

The gaming compact is not unlike an interstate compact authorized by Congress, which courts have determined become the law of the land, U.S. Const. art. 1, §10, cl. 3. The hallmarks of such agreements are that they are between sovereigns and are authorized before or after the fact by Congress. Here, the gaming compact is between two sovereigns and was authorized in advance by Congress, and after the fact by the Secretary of Interior as required by IGRA. At least one court has held that gaming compacts and interstate compacts are analogous because they are between two sovereigns, at least for purposes of determining whether there is a federal question. *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1294 (D.N.M. 1996) ("Interstate compact cases such as [*State ex rel.*] *Dyer* [*v. Sims,* 341 U.S. 22 (1951),] are analogous to the extent they hold that disputes arising under compacts present a question of federal law because here New Mexico is purportedly a party to agreements with other sovereigns just as in the compact cases a state is a party to an agreement with another state."), *aff'd* 104 F.3d 1546 (10th Cir. 1997). See also S. REP. 100-446, 13, 1988 U.S.C.C.A.N. 3071, 3083, where the Senate committee recommending the passage of IGRA "concluded that the compact process is a viable mechanism for settling various matters between two equal sovereigns."

Officials of a sovereign that enters into a compact cannot ignore it. In fact, it is clear that congressionally-approved interstate compacts, which become the "law of the union," *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 566 (1851), can be grounds to enjoin even the conduct of individuals or corporations not a party to the compact, where that conduct is inconsistent with the compact provisions. This was the ruling of the Supreme Court in *Wheeling Bridge Co.*, where it enjoined the bridge company from operating a bridge that

obstructed navigation in violation of a compact signed by Virginia and Kentucky and approved by Congress. The Supreme Court said:

> This compact, by the sanction of Congress, has become a law of the Union. What further legislation can be desired for judicial action? . . . No State law can hinder or obstruct the free use of a license granted under an act of Congress. Nor can any State violate the compact, sanctioned as it has been, by obstructing the navigation of the river.

Id. at 566.

While the gaming compact is not a compact between two states, it is still a congressionally-approved compact between two sovereigns. For purposes of the Supreme Court's decision and analysis in *Wheeling Bridge Co*., the dispositive factor that authorized an injunction against a third party was the congressional sanction, not that the compact was between two states. *See also Cuyler v. Adams,* 449 U.S. 433, 440 (1981) ("[W]here Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States' agreement into federal law under the Compact Clause.").[8] This is evident from the Supreme Court's acknowledgement that a state can't interfere even with a *license* granted by Congress. Placing interstate compacts and licenses granted by Congress in a similar status makes it clear that it is not the names on the compact or license that prevent third parties from violating them – it is the congressional approval.

It does not matter that Defendants' actions were authorized, if at all, by tribal law. If state law can't authorize violations of a congressionally-authorized compact or license, there is

[8] The Compact Clause itself only requires congressional consent and says nothing about the compact becoming federal law. This result was created by the Supreme Court. So the fact that IGRA compacts are not governed by the Compact Clause does not preclude this Court from reaching the same conclusion.

no basis for arguing that tribal law has any greater force or effect. Just as the private bridge company could be enjoined from acting in violation of a congressionally-approved compact or license, this Court can also enjoin Defendants from performing acts that are inconsistent with the gaming compact.

b. The IGRA remedial scheme is irrelevant.

Defendants rely on *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), which limited the application of *Ex parte Young* in actions brought under 25 U.S.C. § 2710(d)(7)(A)(i), an IGRA provision authorizing tribes to sue states for negotiating in bad faith. The *Seminole* Court did not allow a suit against state officials under *Ex parte Young* because it felt Congress had already developed an elaborate remedial scheme for such bad faith suits (see 25 U.S.C. § 2710(d)(7)(B)), and the Court was reluctant to allow a separate *Ex parte Young* remedy against state officials.

Here, however, the State is not even bringing an IGRA claim, so whether there is a remedial scheme in IGRA is irrelevant. Moreover, the "elaborate" remedial scheme referred to in *Seminole* was the process outlined in 25 U.S.C. § 2710(d)(7)(B) that applied only to an action alleging bad faith negotiation by a state brought under the jurisdiction described in § 2710(d)(7)(A)(i). It had nothing to do with claims that one party or the other has *violated* a compact, as the parties there hadn't even signed a compact. While IGRA in 25 U.S.C. § 2710(d)(7)(A)(ii) grants federal courts jurisdiction over actions brought to enjoin gaming on Indian lands in violation of a compact, there is no remedial scheme associated with such an action, let alone the elaborate scheme identified by the *Seminole* Court. It was that elaborate scheme that the Court relied on when it refused to permit an *Ex parte Young* action against state officials:

> But the duty to negotiate imposed upon the State by that statutory provision does not stand alone. Rather, as we have seen, *supra*, at 49-50 [citing 2710(d)(7)(B)(ii)-(vii)], Congress passed § 2710(d)(3) in conjunction with the carefully crafted and intricate remedial scheme set forth in § 2710(d)(7).

Seminole, 517 U.S. at 73-74. Defendants attempt to expand *Seminole*'s ruling to the other jurisdictional provisions in IGRA, but it is clear that the Supreme Court was concerned only with actions against a state refusing to negotiate in good faith. *Id.* at 75 n.17; *Westside Mothers*, 289 F.3d at 862 ("The mechanism established there included timetables, incentives, and 'intricate procedures' to cajole states and Indian tribes to negotiate agreements on gambling."). Thus, Defendants' assertion here that *Seminole* precludes an *Ex parte Young*-type claim to enforce a compact rather than IGRA is groundless.

Furthermore, any notion that IGRA has preempted a common law action to enforce the compact against tribal officials is in direct conflict with the *Bay Mills* ruling that States have a panoply of remedies available to them, including remedies under state law and *Ex parte Young,* when a tribe claims immunity.[9]

IV. The *Ex parte Young* claims cure any Rule 19 issues.

Defendants in this action cannot avoid the request for prospective relief against them by asserting that the Sault Tribe is an indispensable party that cannot be joined because of its sovereign immunity. If the state of the law were as Defendants contend, then as a practical matter, most if not all *Ex parte Young* claims would be dismissed based on Rule 19. This is because this mechanism is a legal "fiction" designed to allow plaintiffs to challenge actions of a sovereign in federal court and ensure the supremacy of federal law without running afoul of the

[9] The *Bay Mills* Court made it clear that IGRA had a very narrow scope, addressing gaming only on Indian lands, and did not at all regulate any other tribal gaming activity. *Bay Mills,* 134 S. Ct. at 2034-35. Given the narrow scope of purpose, and the absence of any indication in IGRA itself that preemption was intended, any preemption argument must fail.

Eleventh Amendment to the Constitution. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984). It is a "fiction" because everyone knows it is the sovereign's interests that are in issue. If the existence of such an interest were truly a defense, every *Ex parte Young* defendant would raise it and that would render the *Ex parte Young* doctrine of little practical use.

There is in fact authority that directly contradicts Defendants' claims. The logic of the State's argument was recently confirmed by the United States Court of Appeals for the District of Columbia Circuit, which held that a tribal official could be sued for prospective injunctive relief, even where the official's tribe was immune from suit. The court rejected the identical argument made by Defendants in the case at hand that the tribe was an indispensable party:

> As a practical matter, therefore, the Cherokee Nation and the Principal Chief in his official capacity are one and the same in an *Ex parte Young* suit for declaratory and injunctive relief. As a result, the Principal Chief can adequately represent the Cherokee Nation in this suit, meaning that the Cherokee Nation itself is not a required party for purposes of Rule 19. By contrast, if we accepted the Cherokee Nation's position, official-action suits against government officials would have to be routinely dismissed, at least absent some statutory exception to Rule 19, because the government entity in question would be a required party yet would be immune from suit and so could not be joined. But that is not how the *Ex parte Young* doctrine and Rule 19 case law has developed.

Vann v. United States Dep't of Interior, 701 F.3d 927, 929-30 (D.C. Cir. 2012). There is no basis for distinguishing *Vann* from the instant case.

Finally, requiring joinder of a tribe whenever an *Ex parte Young* claim is alleged would frustrate the scheme described in *Bay Mills* where such claims were expressly identified as a method for a state to obtain a remedy where tribes could not be sued because of their immunity. Given the firm support for such claims in that opinion, there is no reason to believe the Supreme Court would now eviscerate the *Ex parte Young*-analogous doctrine in the tribal context.

V. The amended complaint states a cause of action for breach of contract.

The amended complaint alleges that Defendants passed formal resolutions and took other actions that caused a breach of § 9 of the Compact. (Corr. Am. Compl., Dkt. #67 at ¶¶ 22, 23, 45, 47 and 48.) Contrary to Defendants' assertion, and as set forth in detail above, *Ex parte Young* permits an action such as this to enjoin violations of contracts entered into by government entities without requiring the defendant officials to formally be parties to the contracts. Moreover, *Bay Mills* makes it clear that tribal officials are proper parties to such a cause of action whether based on state or federal law.

Furthermore, since this gaming compact is authorized by Congress and is between two sovereigns, it is federal law. Any tribal law passed by Defendants or other tribal legislators authorizing violations of the compact is of no force or effect. See *Wheeling Bridge Co*., 54 U.S. at 566. Any person, whether tribal official or not, acting pursuant to such a tribal authorization is subject to injunctive relief. *Id.*

Finally, the Court has already ruled that the State's interpretation of § 9 is more compelling than Defendants' interpretation. The apparent argument that the complaint fails to state a claim for breach of contract because § 9 unambiguously does not apply to the conduct alleged should also be rejected.

Thus the complaint alleges a cause of action for breach of contract/compact.

VI. The amended complaint states a cause of action for conspiracy to breach the compact.

The amended complaint alleges facts showing that Defendants passed resolutions authorizing execution of various contracts with third parties that required the Tribe to obtain

necessary federal approvals to operate a casino in Lansing, including submitting applications to have the Lansing property taken into trust. Those submissions violate §9 of the compact.

Michigan law recognizes the tort of conspiracy to breach a contract, as held by the Michigan Supreme Court in *Owens v. Hatler*, 373 Mich. 289, 292; 129 N.W. 2d 404 (1964) (internal citations omitted):

> First they contend that because Joe Hatler alone was a party to the agreement with plaintiff, it cannot be enforced as against the other defendants who were nonsignatories thereto. Joe Hatler was bound thereby. If the proofs show that the 3 other defendants acted and conspired with him to cause its violation, they are equally liable with him to plaintiff and may be restrained from so doing.

While the Tribe may have signed the compact, it is clear that Defendants, who authorized executing the Comprehensive Development Agreement with Lansing, were actively conspiring with the City to violate § 9. They are therefore liable for the violation of the compact under Michigan law.

Even if Defendants are correct that, to establish a conspiracy, the State must prove that the City knew about the Tribe's compact with the State, that is a factual question. The complaint alleged that Defendants conspired with the City and others to breach the compact. It is certainly implicit that the City knew of the compact. Given that for a motion to dismiss every reasonable inference must be granted the plaintiff, Defendants' argument that the complaint fails to state a claim must be rejected.

Regardless, the facts will show the City was well aware of the compact. The State sent a letter to the City shortly after it learned of the City's intent to sell land to the Tribe to be taken into trust for gaming purposes. This letter warned the City that this conduct would breach the compact and advised it to reconsider its actions. (Letter from Rick Snyder and Bill Schuette to Virg Bernero of 2/7/12, attached as Exhibit A.) If it is necessary to expressly plead the existence of this letter, the State will move to amend its complaint.

The complaint also alleges damages. (Dkt. # 67, ¶¶ 36, 42, 43.) The Tribe agreed not to even apply to have land taken into trust. Even if the State can later sue to shut down an illegal casino, it will still be harmed if § 9 is violated. The Tribe has pulled out all the stops to delay any decision on the merits because it sees delay as an advantage. Any advantage the Tribe gains in this litigation from delay harms the State.

Last but not least, the longer the State waits to enforce the compact, the more likely it will be made out the villain when the harm just described is visited on its victims. Many people may not understand that the Tribe is at fault for delaying resolution of the merits of this case when the State is forced to wait until gaming is imminent before seeking an injunction. While the State will do what needs to be done to enforce the gaming compact and the law, it is no small concern that it may inappropriately be blamed for any harm to the public that may result from closing the casino.

VII. The amended complaint states a cause of action for intentional interference with a contract.

While it is true that generally corporate officers cannot be held liable for interfering with contracts between their corporate employer and a third party, there are exceptions. One is where the officer is acting outside the scope of his or her authority. *Coleman-Nichols v. Tixon Corp.,* 203 Mich. App. 645, 657; 513 N.W.2d 441 (1994) ("Under a claim of tortious interference with an at-will employment contract, where the defendant is an officer of the employer, a plaintiff has the particularly heavy burden of proving that the officer was acting outside the scope of her authority."). Here, the State has shown that the gaming compact is authorized by Congress and approved by the Secretary of the Interior. Actions taken in violation of the compact are outside the authority of the Tribe, which cannot authorize such conduct by its officers. Thus, instigating

violations of the compact is conduct outside the authority of Defendants, and the corporate officer defense is not available.

For the same reason, the complaint does identify conduct that is not justified – the intentional actions taken by Defendants that violate the congressionally- authorized compact. Conduct of officials that violates federal law cannot be justified. Even the Tribe's own gaming ordinance requires compliance with the compact.[10] Conduct that contravenes the Tribe's laws cannot be considered justified, either.

VIII. Section 9's requirements are not limited to class III gaming.

For the reasons discussed above, the State is entitled to an injunction based on Defendants' unlawful conduct. The Tribe's "plan B" that it will conduct only class II gaming at these two casinos if necessary, besides being unbelievable,[11] is irrelevant. Section 9 of the compact requires the Tribe to obtain a revenue sharing agreement before it conducts off-reservation "gaming" without any limitation on whether it is class I, II or III. This was confirmed in the Sixth Circuit amicus brief submitted by the Saginaw Chippewa Indian Tribe, which has the same § 9 language in its compact (excerpts attached as Exhibit C).

The sections of IGRA Defendants cite for the proposition that "Class II gaming activity on Indian lands is not subject to state regulation" (Defs' Br. 22) do not say that class II gaming is within the "exclusive" jurisdiction of the tribe and the NIGC. Section 2710(a) says class I

[10] "This Chapter is enacted pursuant to and intended to be in conformity with the IGRA, NIGC regulations and the Tribal-State Compact. The applicable provisions of IGRA, NIGC regulations and the Compact control over any conflicting provision of this Chapter." Sault Ste. Marie Tribe of Chippewa Indians Tribal Code § 42.104, excerpt attached as Exhibit B.

[11] The Court of Appeals did not give much credence to this claim: "Moreover, the Tribe asserts the conceivable (albeit probably entirely impracticable) possibility that it will only offer class II gaming (i.e., essentially bingo)." *Michigan v Sault Ste. Marie Tribe of Chippewa Indians,* 737 F.3d 1075, 1082 (2013).

gaming is within the "exclusive jurisdiction" of the tribe, but class II is "within the jurisdiction of the Indian Tribes, but shall be subject to the provisions of this Act." Generally, class II gaming is regulated by the NIGC and a tribe, but nothing in IGRA says tribes *can't agree* to share jurisdiction with the state. And in fact, § 2710(d)(3)(C) specifically contemplates the application of state civil laws to Indian gaming activities if the parties reach such an agreement in their compact. If it is permissible to share such jurisdiction over class III gaming, short of an express prohibition of a similar arrangement for class II gaming (which Defendants have not identified), it is reasonable to allow tribes and states to share responsibility for class II gaming as well if that is what they have negotiated.

Finally, § 20 of IGRA, which is key to the operation of § 9 of the compact, prohibits all Indian gaming subject to IGRA on land taken into trust after 1988, not just class III gaming. And one of the main exceptions to this prohibition puts the last word on whether any gaming, including class II gaming, can occur on after- acquired lands *with the governor of the state*. § 2719(b)(1)(A). So it is quite clear that there was never any intention to exclude states entirely from regulating class II gaming, particular where off-reservation gaming, the subject of § 9, is concerned.[12]

[12] The State's suggestion that it would likely be willing to resolve the case through entry of a permanent injunction to class III gaming was not an admission that § 9 doesn't apply to class II gaming. (Defs' Br. 22 n.9.) It was a practical offer. The State continues to believe that the Tribe and its investors will never develop either site if they are precluded from operating class III games.

CONCLUSION AND RELIEF REQUESTED

For these reasons, the State respectfully requests that the motion to dismiss be denied in its entirety.

Respectfully submitted,

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