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 SCHEDULED FOR JUNE 17, 2015 (Dkt. 70) **DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS**

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I. DEFENDANTS' SOVEREIGN IMMUNITY REQUIRES DISMISSAL

The amended complaint should be dismissed because defendants—all tribal officers sued for their official-capacity acts—are immune from suit. Def. Br. in Support of Mot. to Dismiss ("Def. Br."), Dkt. 69, at 6-7. The State's contrary arguments are unavailing.[1]

A. The Tribe's Immunity Extends To Tribal Officers

The State's lead argument is that tribal sovereign immunity *never* extends to tribal officers. State's Response to Mot. to Dismiss ("Resp."), Dkt. 71, at 4-6. No case so holds. In fact, to defendants' knowledge, every federal court to have addressed the issue has held that "[t]ribal immunity extends to individual tribal officials." *Cameron v. Bay Mills Indian Community*, 843 F. Supp. 334, 336 (W.D. Mich. 1994); *see also, e.g.*, *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1153-1154 (10th Cir. 2011) ("immunity extends to tribal officials"); *Cohen's Handbook of Federal Indian Law* § 7.05[1][a] & n.14 (2012) (same); Def. Br. 6.

The State's theory (at 5) that *Bay Mills* effectively overruled the unanimous view of the federal courts is wrong, and indeed makes no sense. *Bay Mills* refused to upend the "'settled law'" of tribal sovereign immunity. *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2036 (2014). In doing so, the Court said nothing to support the strange proposition that tribal immunity never extends to tribal officers. To the contrary, the Court noted that, by "analog[y] to *Ex parte Young*," in some circumstances tribal immunity "does not bar … a suit for injunctive relief against … tribal officers." *Id.* at 2035. *Ex parte Young* is an "*exception* to sovereign

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[1] Contrary to the State's position (at 4), Rule 12(b)(1) dismissal is appropriate if a suit is barred by tribal sovereign immunity. *See Michigan v. Sault Ste. Marie Tribe of Chippewa Indians*, 737 F.3d 1075, 1076 (6th Cir. 2013) (a "district court lack[s] jurisdiction" if sovereign immunity applies). Whether the Tribe's immunity extends to its individual officers does not require any "factual inquiry." Resp. 6. The only question is whether the individual defendant is named in an official capacity, as all defendants are here. Def. Br. 4 & n.2.

immunity." *Virginia Office for Prot. & Advocacy v. Stewart* (*VOPA*), 131 S. Ct. 1632, 1642 (2011) (emphasis added). *Bay Mills*' discussion of that exception is coherent only if, contrary to the State's view, the Court understood that tribal officers are presumptively immune from suit.

B. *Ex Parte Young* Is Unavailable Here

The State may not proceed based on *Ex parte Young* because that doctrine: (1) does not permit suits for specific performance of a contract; and (2) may not be used to evade the remedial scheme Congress created in the Indian Gaming Regulatory Act (IGRA). Def. Br. 7-12.

The State argues that those limitations on *Ex parte Young*—which are anchored in longstanding Supreme Court precedent—should not apply when tribal, rather than state, officers are sued. That is so, the State claims, because state immunity is grounded in the Eleventh Amendment, while tribal immunity is not. Resp. 6-8. But that point cuts the other way. It is precisely because Congress "can abrogate [tribal] immunity as and to the extent it wishes," *Bay Mills*, 134 S. Ct. at 2039, that courts should be reluctant to permit invocation of nonstatutory exceptions to tribal sovereign immunity, such as *Ex parte Young* suits. Def. Br. 7 n.3.

At the least, tribal officer immunity should be coextensive with state officer immunity. Comity compels that result. If tribal officials may be subject to suit by analogy to *Ex parte Young*, those officials should be equally protected by the safeguards and limitations that have long governed *Ex parte Young* actions. "[D]isparate treatment" of tribal and state officers would utterly disserve the federal interest in "respect[ing] … tribal sovereignty." *Bay Mills*, 134 S. Ct. at 2041 (Sotomayor, J., concurring). The State cites no authority holding that *Ex parte Young* should be applied in such an unequal manner.[2]

[2] The State's other supposed "differences" between tribal and state officer suits (Resp. 7) are irrelevant. In *Bay Mills*, the Court suggested that tribal officers might be enjoined from operating an illegal casino on state lands. 134 S. Ct. at 2035. And in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, the Court noted that it had

1. Suits to secure specific performance

Ex parte Young "cannot be used to obtain … an order for specific performance" of a sovereign's contract. *VOPA*, 131 S. Ct. at 1639. That is not "dicta" (Resp. 8), but the holding of *In re Ayers*, 123 U.S. 443 (1887). That limitation was recently reaffirmed in *VOPA* and in *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida*, 177 F.3d 1212 (11th Cir. 1999)—an on-point authority the State does not address. *See also Ex parte Young*, 209 U.S. 123, 151 (1908) (plaintiff may not "attempt to make the State itself, through its officers, perform its alleged contract" (citing *Ayers*)); *Westside Mothers v. Haveman*, 289 F.3d 852, 861 (6th Cir. 2002) (*Ex parte Young* suits "seeking to compel … specific performance" are "barred" by *Ayers*). The State turns somersaults to evade this limitation, but its efforts fail.

First, the State contends that the *Ayers* rule bars only suits seeking to compel "*affirmative acts*" of contract performance, not injunctions prohibiting contract breach. Resp. 7-11. As a threshold matter, this argument is baffling because the State *does* seek affirmative relief—namely, an injunction requiring defendants to "withdraw the applications submitted to the Secretary [of the Interior] until … the Tribe has complied with § 9." Am. Compl. 8. Any exception to *Ayers* for injunctions that only prohibit future breaches is thus beside the point.

In any event, there is no such exception. *Ayers* held that a suit to "forbid[] … those acts and doings which constitute breaches of the contract" was "a suit against the State" and barred

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"never held that individual … officers of a tribe are not liable for damages in actions brought by the State." 498 U.S. 505, 514 (1991). Those observations—both dicta—have nothing to do with this case, which is an effort to use *Ex parte Young* to seek specific performance of a contract and to evade a narrowly drawn remedial scheme. The State also suggests (at 7) that there is a "public polic[y]" reason to afford tribal officers less protection than state officers because, it asserts, plaintiffs suing the latter, but not the former, will have "a remedy in state court." However, remedy considerations weigh *against* contorting the *Ex parte Young* doctrine here because the State *does* have a remedy in IGRA for the alleged compact breach, as the Sixth Circuit held. Moreover, the State is wrong that state, unlike tribal, sovereign immunity typically leaves open remedies in state court. *See Alden v. Maine*, 527 U.S. 706, 754-755 (1999).

by sovereign immunity. 123 U.S. at 502. The State argues (at 9) that the Supreme Court drew a different "dividing line" in *Pennoyer v. McConnaughy*, 140 U.S. 1 (1891), and *Georgia Railroad & Banking Co. v. Redwine*, 342 U.S. 299 (1952). But those cases did not overrule *Ayers* or draw the "affirmative acts" distinction the State proposes. Instead, they clarified that *Ayers* does not apply when an official is alleged individually to have violated the plaintiffs' constitutional rights.

In *Pennoyer*, for example, the Court reaffirmed *Ayers*'s holding that suits seeking to "compel [a sovereign] to specifically perform its contracts" are barred. 140 U.S. at 10. The Court pointed out, however, that *Ayers* did not involve threatened "'violation of … personal or property rights'" under the Constitution; in *Pennoyer*, by contrast, the plaintiff sought to restrain "unconstitutional" acts that would "be destructive of his rights and privileges." *Id.* at 17, 18.[3] *Redwine* is to the same effect. It explained that in *Ayers*, the "complainant had *not* alleged that officers threatened to tax its property in violation of its *constitutional rights*. *As a result*, the Court held the action barred as one in substance directed at the State merely to obtain specific performance of a contract with the State." 342 U.S. at 305 (emphasis added). Those cases are inapposite here because the State has not alleged—nor could it—that defendants' breach of compact was "in violation of constitutional rights." *Louisiana State Bd. of Educ. v. Baker*, 339 F.2d 911, 914 (5th Cir. 1964) (construing *Redwine* and *Ayers*).

Second, the State argues that the bar on using *Ex parte Young* to obtain specific performance of a sovereign's contract does not apply here because the compact is "more than a

[3] In *Ayers*, the plaintiffs sought to enjoin state officers from bringing suit for the collection of taxes, allegedly in violation of plaintiffs' contractual right to satisfy their tax obligations with state-issued coupons. 123 U.S. at 486-487. But there was nothing about the individual officers' "mere bringing" of those suits that would violate "any legal or contractual rights of such tax-payers," *id.* at 496, in part because the officers individually were not "parties to [the] contracts at issue," *id.* at 503.

mere contract" (Resp. 12) and is instead comparable to the Medicaid Act (Resp. 12-13) or an interstate compact (Resp. 14-15). Those analogies are misplaced.

As the Sixth Circuit explained in *Westside Mothers*, the Medicaid Act is not a contract at all, but a federal statute. 289 F.3d at 858. Although "the term 'contract'" is sometimes used "metaphorically" to describe the obligations a state undertakes when it agrees to participate in the program in exchange for receipt of federal funds, those obligations "are federal laws." *Id.* A suit to enjoin state officials from violating those conditions is thus not "a suit seeking to compel … specific performance" of a contract, but a suit "to compel state officials to follow federal law." *Id.* at 861. Had the suit in *Westside Mothers* been one to enforce a contract (like the State's suit here), it would have been "barred by *Ayers*." *Id.*

Similarly, "an interstate compact is not just a contract; it is a *federal statute* enacted by Congress." *Alabama v. North Carolina*, 560 U.S. 330, 351 (2010) (emphasis added); *see* U.S. Const. art. I, § 10, cl. 3. *Ex parte Young* is available to enjoin officials from violating an interstate compact because such a compact is positive "federal law." *Entergy, Ark., Inc. v. Nebraska*, 210 F.3d 887, 897-898 (8th Cir. 2000). That is not the case with tribal-state compacts, which are not federal statutes. While tribal-state compacts are authorized and approved under IGRA, that does not transform the compacts themselves into "federal law."

In any event, were the State correct that ordering specific performance of a gaming compact is no different from ordering compliance with IGRA, that would merely highlight the fact that, as discussed below, the State is seeking to enforce rights under IGRA in a manner that evades the specific remedial regime Congress created for such suits, which remains available to the State at the appropriate time. *Cf.* Resp. 16 ("the State is not … bringing an IGRA claim").

2. Suits to evade IGRA's remedial scheme

Independently, the State may not use *Ex parte Young* to circumvent IGRA's remedial scheme. *Seminole Tribe of Fl. v. Florida*, 517 U.S. 44, 74-76 (1996); Def. Br. 9-12. The limitations that Congress imposed on suits to remedy a compact breach are not made "irrelevant" (Resp. 16) by re-captioning a complaint to sue tribal officers instead of the Tribe and recasting alleged IGRA compact breaches as common-law claims. Tellingly, the State does not dispute that each count of its amended complaint rests on the same alleged breach of Section 9 of the compact. IGRA provides the exclusive remedy for addressing *that* putative breach, and the Sixth Circuit has already held that IGRA does not permit the State to sue at this time. *Seminole Tribe* forecloses the State's attempt to rely on *Ex parte Young* to evade that result.

Contrary to the State's position, it does not matter that *Seminole Tribe* involved a suit by a tribe against a state under § 2710(d)(7)(A)(i), rather than a state against a tribe under § 2710(d)(7)(A)(ii). Resp. 16-17. The Court's "logic" applies equally to each. *Los Angeles County v. Humphries*, 562 U.S. 29, 38 (2010) ("[a] holding … can extend through its logic beyond the specific facts of the particular case"). Section 2710(d)(7)(A)(ii) is a narrow and specific abrogation of immunity, making only one type of relief—injunctions enjoining class III gaming on Indian lands in violation of a compact—available to an aggrieved state. That provision, like § 2710(d)(7)(A)(i), creates a calibrated and narrowly drawn remedial scheme that may not be bypassed through the simple expedient of re-captioning a complaint and recasting allegations. *Seminole Tribe*, 517 U.S. at 75-76; *see Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015) ("[T]he 'express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'").[4]

[4] The question is not whether "IGRA has preempted a common law action" (Resp. 17), but whether Congress's establishment of an express remedial scheme for breaches of tribal-state

II. RULE 19 REQUIRES DISMISSAL

The amended complaint should also be dismissed because the Tribe is a necessary and indispensable party under Rule 19 to each of the State's claims, but the Tribe cannot be joined because of sovereign immunity. Fed. R. Civ. P. 12(b)(7); Def. Br. 12-14.

The State's contention (at 17) that this would require dismissal of "most if not all *Ex parte Young*" suits is simply wrong. Defendants are not arguing that tribes are indispensable parties in *any* suit against tribal officers. Rather, they argue only that tribes are indispensable in a suit for breach of contract when the tribe—not its officers—is party to the contract. This should not be controversial: No "'procedural principle is more deeply imbedded in the common law'" than that contractual parties are indispensable to a breach-of-contract action. *Enterprise Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989).

The State contends that *Ex parte Young* "cure[s] any Rule 19 issues." Resp. 17. Again, that is wrong. As the Supreme Court explained in a case involving a foreign sovereign, "not every suit can successfully be pleaded against an individual official alone." *Samantar v. Yousuf*, 560 U.S. 305, 324 (2010). If the sovereign is a required party under Rule 19, and if the sovereign is immune, then "the district court may have to dismiss the suit, regardless of whether the official is immune or not." *Id.* at 324-325. To be sure, officers named in "a typical *Ex parte Young* scenario" may be able to "adequately represent" the sovereign's own interest, such that the sovereign will not be a necessary party. *Vann v. U.S. Dep't of Interior*, 701 F.3d 927, 929-930 (D.C. Cir. 2012). But this is not a "run-of-the-mill *Ex parte Young* action." *Id.* at 930. The State does not seek to enjoin defendants from violating a generally applicable federal law—the traditional domain of *Ex parte Youn*g suits—but to have this Court interpret and enforce the

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compacts precludes resort to *Ex parte Young* to obtain relief not available under the scheme Congress put in place. *Seminole Tribe* dictates that the answer to that question must be yes.

State's compact with the Tribe. The proposition that a breach-of-contract suit may not proceed under Rule 19 absent a contractual party is "hornbook law." *School Dist. of Pontiac v. Secretary of U.S. Dep't of Educ.*, 584 F.3d 253, 303 (6th Cir. 2009) (en banc) (McKeague, J., concurring). Applying that rule here would not affect proper *Ex parte Young* suits at all.

III. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM

The amended complaint fails to state a claim under settled legal principles and should be dismissed on that ground in any event. Fed. R. Civ. P. 12(b)(6); *see* Def. Br. 14-22.

A. Breach Of Contract

Counts 1 and 2 fail to state a claim against defendants for breach of contract because defendants do not have a contract with the State to breach. Def. Br. 15-16. The State does not dispute that contractual privity—a contractual relationship between the parties—is an element of a claim for breach of contract under federal and Michigan law. Nor does the State dispute that the tribal officers are not parties to the contract. The State contends only that *Ex parte Young* somehow bridges this gap in the State's substantive claims. Resp. 19. It does not.

As discussed above, the State is not seeking to enjoin tribal officials from violating a federal statute. The gravamen of counts 1 and 2, instead, is that defendants have violated "state and/or federal common law of contracts and compacts." Am. Compl., Dkt. 67, ¶ 32. The State is wrong, of course, about whether there has been any breach of the compact. Def. Br. 15 n.5. But if there had been, it would be the Tribe's breach alone. Defendants—individual tribal officers who are "not … parties to" the compact—"are not capable in law of committing a breach of it." *Ayers*, 123 U.S. at 503.

B. Conspiracy To Breach A Contract

Count 3 fails to state a conspiracy claim because "[a] simple breach of contract claim, standing alone, does not support a claim for conspiracy." *Specialized Pharmacy Servs., LLC v.*

Magnum Health & Rehab of Adrian, LLC, 2013 WL 1431722, at *4 n.9 (E.D. Mich. Apr. 9, 2013). The State argues that *Owens v. Hatler*, 129 N.W.2d 404 (Mich. 1964), "held" that Michigan law recognizes a tort for conspiracy to breach a contract (Resp. 20), but that is not so. As is clear from the decisions *Owens* cited, *see id.* at 406 (citing, among other cases, *Wilkinson v. Powe*, 1 N.W.2d 539 (Mich. 1942)), in speaking of "other defendants [who] acted and conspired" to violate a contract, the Court was clearly invoking and applying familiar principles of tortious interference with contract. *Hatler* has never been cited by any subsequent court as recognizing the stand-alone conspiracy claim the State pleads here.

Count 3 also suffers from other legal defects. The State concedes that defendants, as officers of the Tribe, cannot conspire among themselves (Def. Br. 17-18), but insists that the amended complaint has alleged a conspiracy with the City of Lansing (Resp. 20). Not so. Shared wrongful intent is an "essential" element of conspiracy and must be pleaded as to "each particular defendant who is to be charged with responsibility." *Rosenberg v. Rosenberg Bros. Special Account*, 351 N.W.2d 563, 569 (Mich. Ct. App. 1984). Count 3 fails to allege the City had any unlawful purpose. Mere knowledge of the compact—all the State asserts (at 20) it could prove—is insufficient as a matter of law to establish that element of the claim. Def. Br. 18 n.8.

Finally, count 3 fails to allege actual damages. Def. Br. 18. The State points (at 21) to conclusory statements that it will "lose the benefit of its bargain" unless it can challenge the Tribe's fee-to-trust submission now (Am. Compl. ¶¶ 36, 42-43). But the Sixth Circuit has already rejected those vague claims of harm. *Sault Ste. Marie Tribe*, 737 F.3d at 1083.

C. Intentional Interference With Contract

Count 4 fails to state a claim for intentional interference because it fails to plead a plausible factual basis that defendants acted with "wrongful purpose" (Def. Br. 19) or that they acted "'solely for their own benefit'" and thus outside the scope of their authority as officers of

the Tribe (Def. Br. 20). In response, the State asserts that the Tribe's trust submissions violated Section 9 of the compact—from which the State leaps to the conclusion that the defendants' conduct was "unauthorized" and "unjustified." Resp. 21-22. But that is merely the State's breach-of-compact theory, repackaged. To state the obvious: The parties disagree about the proper interpretation of Section 9. That contractual disagreement does not mean defendants acted wrongfully in the requisite sense of "'illegal, unethical, or fraudulent conduct.'" *United Rentals (N. Am.), Inc. v. Keizer*, 355 F.3d 399, 413 (6th Cir. 2004). Nor does it mean that the tribal officers acted personally for their own gain. The State's bid to transform a garden-variety contractual dispute into a tort has no basis in law and should be rejected.

IV. THE STATE IS NOT ENTITLED TO ANY REMEDY AGAINST CLASS II GAMING

For the reasons stated above, the amended complaint should be dismissed. If it is not, the Court should make clear that the State's remedies are limited to class III gaming. That would mean that the State's request for a remedy requiring withdrawal of the trust submissions should be stricken, given that the Tribe could conduct class II gaming lawfully on the trust property.

For the first time in this litigation, the State insists that section 9 also applies to class II gaming. That newly minted position is wrong as matter of federal law and compact interpretation. IGRA makes clear that class II gaming is "subject only to tribal regulation and federal oversight by the National Indian Gaming Commission," *Keweenaw Bay Indian Community. v. United States*, 136 F.3d 469, 473 (6th Cir. 1998), and thus is not governed by IGRA's compacting process for class III gaming, 25 U.S.C. § 2710(d). There is no lawful basis for a *class III* compact to regulate *class II* gaming. And even if a class III gaming compact could restrict class II gaming, this compact does not. The single mention of class II gaming in the entire gaming compact is in Section 2(A), where the subject of the compact—"class III gaming activity"—is defined to *exclude* class II gaming. Am. Compl., Ex. A, Dkt. 67-1, § 2(A).

Dated: May 5, 2015

Respectfully submitted,

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