UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

THE STOCKBRIDGE-MUNSEE COMMUNITY,

Plaintiff,

v.

Case No. 17-cv-249

STATE OF WISCONSIN, SCOTT WALKER, and THE HO-CHUNK NATION,

Defendants.

DEFENDANT HO-CHUNK NATION'S REPLY TO PLAINTIFF'S OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS

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INTRODUCTION

In the Stockbridge-Munsee Community Response in Opposition to Ho-Chunk Nation's Motion for Judgment on the Pleadings**,** ECF #58, ("Opposition"), Plaintiff Stockbridge-Munsee Community ("SMC") attempts, primarily through the assertion of legal conclusions as facts, the avoidance of the uncontroverted facts, and the mischaracterization of Defendant Ho-Chunk Nation's ("Nation") arguments (including the legal authority cited in support of those arguments), to demonstrate that its claims against the Nation should not be dismissed. That effort fails.

In its Memorandum of Points and Authorities in Support of Defendant Ho-Chunk Nation's Motion for Judgment on the Pleadings, ECF #57 ("Memorandum"), the Nation demonstrated in comprehensive detail that SMC's claims against the Nation must be dismissed. The Nation will not repeat those arguments here. Rather, the Nation will focus only on SMC's arguments addressing the essential grounds supporting the Nation's Motion for Judgment on the Pleadings.

I. THE MATERIAL ALLEGATIONS OF SMC'S COMPLAINT AGAINST THE NATION ARE LEGAL CONCLUSIONS, NOT WELL-PLED FACTUAL ALLEGATIONS, AND THE COURT CAN IGNORE THEM FOR PURPOSES OF THIS MOTION.

At the outset, SMC argues that the Nation fails to meet Rule 12(c)'s standard for judgment on the pleadings. It argues the Nation ignores "material factual allegations in the Complaint" that require further development before the Court enters judgment. *See* Opposition, p. 4. However, the material allegations of SMC's complaint against the Nation amount to legal conclusions, not well-pled factual allegations. And SMC's legal conclusions do not preclude this Court from granting Nation's Rule 12(c) motion.

Whereas factual allegations are accepted as true on a Rule 12(c) motion, legal conclusions are not. *U.S. Bank Nat. Ass'n v. Sun Life Assur. Co. of Canada*, No. 14-CV-562-WMC, 2015 WL 3645700, at *2 (W.D. Wis. 2015), *aff'd sub nom. Sun Life Assurance Co. of Canada v. U.S. Bank Nat'l Ass'n*, 839 F.3d 654 (7th Cir. 2016) (quoting *Adams v. City of Indianapolis*, 742 F.3d 720, 728 (7th Cir.2014)). Instead, following the Supreme Court's pleading rulings in the *Twombly* and *Iqbal* cases, courts must simply ignore legal conclusions. *See Kolbe & Kolbe Millwork, Co. v. Manson Ins. Agency, Inc.*, 983 F. Supp. 2d 1035, 1042 (W.D. Wis. 2013). To that end, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to defeat a Rule 12(b)(6) or Rule 12(c) motion. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009); *see Katz-Crank v. Haskett*, 843 F.3d 641, 646 (7th Cir. 2016).

A legal conclusion is any "statement that expresses a legal duty or result but omits the facts creating or supporting the duty or result." *Black's Law Dictionary* (10th ed. 2014) (defining "legal conclusion"). Although spotting a legal conclusion often requires only common sense and reflection, courts have pointed to specific examples of legal conclusions to which no deference is given on a Rule 12(b)(6) or 12(c) motion. In *Twombly*, for example, the Supreme Court rejected as a legal conclusion an allegation that merely recited the Sherman Act's language – the defendants "ha[d] entered into a contract, combination or conspiracy to prevent competitive entry." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 551, 555 (2007). So, too, did this Court reject an allegation that "[a]t all times [the defendants] acted within the scope of its agency, on behalf of Travelers." *Kolbe & Kolbe Millwork*, 983 F. Supp. 2d at 1042. The Seventh Circuit has ruled that the following were all legal conclusions:

- The defendant "has an unwritten custom, practice and policy to afford lesser protection or none at all to victims of domestic violence";

- "[T]here is no rational basis" for the defendant's purported policy; and
- The defendant, "through its agents, employees and/or servants, acting under color of law, at the level of official policy, practice, and custom, with deliberate, callous, and conscious indifference to [the plaintiff's] constitutional rights, authorized, tolerated, and institutionalized the practices and ratified the illegal conduct herein detailed, and at all times material to this Complaint, [the defendant] had interrelated *de facto* policies, practices, and customs.

McCauley v. City of Chicago, 671 F.3d 611, 617–18 (7th Cir. 2011).

Two propositions underlie SMC's complaint against the Nation. First, SMC argues that the Wittenberg Parcel was not held in trust and was not the Nation's reservation land on October 17, 1988, when the IGRA became effective, because the Nation did not own the property. SMC offers the following support for this assertion: "Title to the Wittenberg Parcel reverted to the Native American Church by operation of law, when Ho-Chunk did not satisfy the requirements in the 1969 Deed." Stockbridge-Munsee Community Complaint for Enforcement of Class III Gaming Compact and Declaratory and Injunctive Relief, ECF #5 ("Complaint"), ¶ 66.[1] This is a legal conclusion, not a well-pled factual allegation. Indeed, every material allegation in Count IV ("Ho-Chunk's Violation of Its Own Class III Gaming Compact and IGRA's Indian Lands Restrictions") of SMC's Complaint constitutes a legal conclusion and must be ignored. *See* Complaint, ¶¶ 66 – 71.[2]

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[1]The only factual allegation offered by SMC in its Complaint related to its "automatic reversion" claim is that "Ho-Chunk never commenced housing construction on the Wittenberg Parcel within 5 years of the 1969 conveyance." Complaint, ¶ 33. While the Nation denied this allegation in its Answer, the assertion material to this Motion is the legal conclusion that "[t]itle to the Wittenberg Parcel reverted to the Native American Church by operation of law," based on SMC's erroneous interpretation of the 1969 Deed, the meaning and effect of which are, of course, questions of law. *See E.T. Prod., LLC v. D.E. Miller Holdings, Inc.*, 2017 WL 4159615, at *2 (7th Cir. Sept. 20, 2017) ("Issues of contract interpretation and enforceability are questions of law.").

[2] One legal conclusion regarding the effect of the 1993 deed that SMC couches as a fact merits further examination: "[T]his Court must accept as true. . . the allegations at ¶¶ 37 and 67 [in the Complaint] that the parcel did not go back into trust status until 1993, when the Native American Church deeded its (reverted) interest back to the United States to be held in trust status for Ho Chunk." Opposition, p. 4. This is not a fact that the Court must accept as true for the purposes of the Nation's Motion. It is a legal

Second, SMC's other cause of action against the Nation is based on the assertion that the Nation is violating the "Ancillary Facility" provision in its gaming compact with the State of Wisconsin. *See* Complaint, ¶¶ 73 – 81. However, to arrive at this pure legal conclusion, SMC *interprets* the "Ancillary Facility" and other provisions of the Nation's gaming compact–which are questions of law, not fact.[3] *See E.T. Prod, LLC*, 2017 WL 4159615, at *2. Again, like SMC's other cause of action against the Nation, every allegation material to SMC's "Ancillary Facility" claim is a legal conclusion, not a well-pled factual allegation, and the Court should not accept any of these allegations as true. *See* Complaint, ¶¶ 77 – 81.

In considering a motion under Rule 12(c), this Court has previously stated that "allegations in the form of legal conclusions are insufficient to survive." *U.S. Bank Nat. Ass'n*, 2015 WL at *2 (internal quotation omitted). The Nation finds it ironic that SMC accuses it of "obfuscation" when SMC, in its Opposition, has attempted to re-characterize legal conclusions as disputed "factual allegations" in order to avoid an unfavorable judgment. Thus, contrary to SMC's assertions, the Nation has met the "difficult" standard for a successful Rule 12(c) motion.

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conclusion, and an incorrect one. In the 1993 deed, the Church, in fact, quitclaimed its "right, title and interest . . . under the [1969 deed's] reversionary clause" in the Wittenberg parcel to the United States of America on behalf of the Tribe. 1999 Deed, ECF# 9-11, p. 2. From this, SMC concludes that the BIA "acquired the Wittenberg parcel in trust for the benefit of Ho-Chunk" in 1993. Complaint ¶ 37. SMC's legal interpretation of the 1993 deed is wrong. The 1993 deed did not convey the Church's interest in the Wittenberg Parcel; rather, it quitclaimed only the Church's reversionary interest that was included in the 1969 deed, to the degree that the Church retained any such interest. The 1969 deed (not the 1993 deed) conveyed the parcel to the Tribe. The BIA's certification of the deed on July 1, 1993, does not alter this analysis. With that certification, the BIA performed a ministerial action of recording the transfer of whatever remaining interest the Church may have had in the parcel already held in trust by the United States. 1999 Deed, p. 3.

[3]Not only does SMC unilaterally *interpret* the "Ancillary Facilities" provision of the Nation's and the State of Wisconsin gaming compact, it also contrives a meaning that is different than the intent of the actual parties to the compact. *See* Ho-Chunk Nation's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Preliminary Injunction, dkt. 37, pp. 37 – 42 (or ECF pp. 44 – 49).

II. BECAUSE THE WITTENBERG PARCEL IS WITHIN THE BOUNDARIES OF NATION'S RESERVATION, GAMING ON THE PARCEL IS LAWFUL UNDER THE IGRA AND THE NATION'S COMPACT.

As the Nation demonstrated in its Memorandum, pp. 12-15, gaming on the Wittenberg Parcel is lawful under the IGRA and the Nation's Compact because the land was proclaimed as part of the Nation's reservation pursuant to 25 U.S.C. § 5110, part of the Indian Reorganization Act, 25 U.S.C. § 5101 *et seq.*, ("IRA"). *See* Request for Judicial Notice ("Request"), Exhibit B thereto, "Wisconsin Winnebago Tribe; Establishment of Reservation," 51 Fed. Reg. 41669-41671 (November 18, 1986), ECF #56-3, ("Proclamation"). The Wittenberg Parcel, therefore, meets the definition of "Indian lands" in 25 U.S.C. § 2703(4) and gaming on the parcel is not prohibited by 25 U.S.C. § 2719. As a result, as will be demonstrated in detail below, SMC's complaint fails to state a claim under 25 U.S.C. § 2710(d)(7)(A)(ii) and the Nation is entitled to judgment as a matter of law.[4]

SMC argues that the Nation "is operating the Wittenberg Casino in violation of the Ho-Chunk Compact because it … violates the § 2719 prohibition against gaming on lands acquired in trust after October 17, 1988." Opposition, p. 13.

25 U.S.C. § 2719(a) provides:

> (a) Prohibition on lands acquired in trust by Secretary. Except as provided in subsection (b), gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, **unless**—
> (1) **such lands are located within or contiguous to the boundaries of the reservation** of the Indian tribe on October 17, 1988;

(Emphasis added.)

[4] In its Memorandum, the Nation demonstrated that SMC's claim that the Wittenberg Parcel was not in trust on October 17, 1988 also fails, because SMC failed to alleged sufficient facts to state a cause of action based on that claim and because the uncontroverted evidence before the Court demonstrates that the parcel has been in trust continuously since 1969. It is not necessary to repeat those arguments here, because the reservation status of the parcel makes SMC's claim concerning the trust status of the land irrelevant. Nevertheless, the Nation does not concede in any fashion that the parcel was not in trust on October 17, 1988.

Under § 2719, therefore, gaming is prohibited on land acquired by the Secretary in trust for a tribe after October 17, 1988 only if the land was outside of the boundaries of the tribe's reservation on October 17, 1988. If the land that is taken into trust after October 17, 1988 is within the boundaries of the tribe's reservation, then the land does not fall within the scope of § 2719's prohibition.

The Wittenberg Parcel was uncontrovertibly within the boundaries of the Nation's reservation on October 17, 1988 because, on November 18, 1986, the Wittenberg Parcel was proclaimed as an addition to the Nation's reservation by the Assistant Secretary–Indian Affairs pursuant to the direction of Congress in Section 5110 of the IRA. *See* Proclamation, Exhibit B to the Request. Even assuming, *arguendo*, that SMC's legal conclusion that the Wittenberg Parcel was not in trust in 1988 is correct, its claim that § 2719 prohibits gaming on the Wittenberg Parcel fails. The prohibition in § 2719 does not apply to the Wittenberg Parcel because the Parcel is within the boundaries of the Nation's reservation as established by the Proclamation.

On numerous occasions, SMC has affirmatively represented to the Court that it is not challenging the validity of the Proclamation:

> SMC does not challenge the Department of the Interior's decision to place the Wittenberg Parcel into trust status in 1969 and again in 1993, and SMC does not challenge the Department of the Interior's subsequent proclamations or statements concerning the status of the Wittenberg Parcel.

Opposition, p. 38.

> …SMC is not challenging the status of the Wittenberg Parcel as trust land and does not seek to alter the status of the land vis-à-vis the United States' or Ho-Chunk's interests in the property.

Opposition, p. 34.

> … [I]t is not necessary for SMC to challenge any final agency action of a federal agency. SMC does not challenge the Department of the Interior's decision to place the Wittenberg Parcel into trust status in 1969, and again in 1993; and, it is

> not necessary to challenge the Department of the Interior's subsequent proclamations or statements concerning the status of the Wittenberg Parcel in order to succeed on its claims.

ECF #39, Stockbridge-Munsee Community Reply Memorandum in Support of Motion for Preliminary Injunction, p. 39.

SMC's Complaint does not state any claim regarding, or request any relief with respect to, the Proclamation. Nor does the Complaint include any claims against the United States or the Department of the Interior (or its officers), the agency that took the federal action to proclaim the Wittenberg Parcel as part of the Nation's reservation pursuant to the IRA. For the purposes of this litigation, therefore, SMC has conceded that the Proclamation is valid and that the Wittenberg Parcel is within the boundaries of the Nation's reservation. Thus, class III gaming on the Wittenberg Parcel is permitted under both the Nation's Compact and the IGRA. SMC cannot claim otherwise now.

In spite of SMC's admissions, it now argues that the Proclamation "had no legal effect" and is void, based solely upon SMC's legal conclusion that ownership of the Wittenberg Parcel reverted to the Native American Church. Opposition, p. 43, 45. Even if SMC is permitted by the Court to reverse its position now, its challenges to the validity and effect of the Proclamation, fail as a matter of law.

First, SMC cannot make the claim that the Proclamation is invalid in this litigation because such a claim is a collateral attack on the Department of the Interior's actions taken pursuant to the IRA. The only potential vehicle for a claim that the Proclamation was unlawful is through an action against the Department of the Interior (and the appropriate officer) under the

Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA").[5] Section 704 of the APA makes "final agency action for which there is no other adequate remedy in a court … subject to review." Under the APA, courts are to "decide all relevant questions of law" and may "hold unlawful and set aside agency action, findings, and conclusions found to be…in excess of statutory jurisdiction, authority, or limitations, or short of statutory right…." 5 U.S.C. § 706.

Numerous courts have expressly held that final agency actions taken by the Secretary of the Interior pursuant to the authority granted to the Secretary under the IRA are reviewable under the APA. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 220, 132 S. Ct. 2199, 2208 (2012)[A challenge to a decision made by the Secretary of the Interior pursuant to the IRA is "a garden-variety APA claim."]; *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1291 (11th Cir. 2015)["The proper vehicle for Alabama to challenge the Secretary's decisions to take land into trust for the Tribe [under the authority of the IRA] is an APA claim."]; *Big Lagoon Rancheria v. California*, 789 F.3d 947, 953 (9th Cir. 2015)["The proper vehicle to make such a challenge [to the Secretary's actions taken under the IRA] is a petition for review pursuant to the APA, and that is the typical method employed in prior litigation challenging entrustment decisions [made under the IRA]."][6]

SMC is not asserting a claim under the APA against the Department of the Interior or the Secretary of the Interior seeking to set aside the Proclamation as action in excess of statutory authority. Rather, SMC is attempting to mount a collateral attack on the Proclamation in an effort to skirt the statutory requirements of the APA. Courts have expressly held that litigants cannot

[5] SMC asserts, without analysis, that the United States is not a necessary and required party. Opposition, p. 27, 34. Clearly, in any challenge to either the reservation status of the Wittenberg Parcel or the trust status of the parcel on October 17, 1988, the United States would be an indispensable party.

[6] The authority of the Secretary of the Interior to take land into trust in these cases is found, like the Proclamation at issue in the instant case, in the IRA. Thus, for the purposes of determining what procedural vehicles are available, and what barriers exist, to the challenge of agency action taken under the IRA, the same analysis applies to decisions to take land into trust and decisions to proclaim land as additions to Indian reservations because both actions are made pursuant to the IRA.

collaterally challenge agency actions taken pursuant to the IRA outside of an action against the Secretary of the Interior under the APA:

> The proper vehicle for Alabama to challenge the Secretary's decisions to take land into trust for the Tribe [under the IRA] is an APA claim. We hold that Alabama cannot raise in this lawsuit a collateral challenge to the Secretary's authority [under the IRA] to take the lands at issue into trust.

Alabama v. PCI Gaming Auth., 801 F.3d at 1291 (internal citations omitted).

> …[California] necessarily argues that the BIA exceeded its authority when it took the eleven-acre parcel into trust [under the IRA]. The proper vehicle to make such a challenge is a petition for review pursuant to the APA, and that is the typical method employed in prior litigation challenging entrustment decisions [made pursuant to the IRA].…Allowing California to attack collaterally the BIA's decision [made under the IRA] to take the eleven-acre parcel into trust outside the APA would constitute just the sort of end-run that we have previously refused to allow, and would cast a cloud of doubt over countless acres of land that have been taken into trust [under the IRA] for tribes recognized by the federal government.

Big Lagoon Rancheria v. California, 789 F.3d at 953-954.

SMC's challenge to the Proclamation set forth in the Opposition fails because SMC has not brought an APA action in this case and cannot collaterally attack the Proclamation through these proceedings.

SMC, furthermore, cannot amend its complaint to add an APA claim or join the Department of the Interior, because the statute of limitations for filing an APA action challenging the Proclamation has long since expired. 28 U.S.C. § 2401(a) creates a general six-year statute of limitations for actions brought against the United States, "[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401 clearly "applies to actions brought under the APA." *Wind River Mining Corp. v. United States*, 946 F.2d 710, 713 (9th Cir. 1991). Collateral attacks made outside of the APA challenging agency actions taken pursuant to the IRA

cannot be revived through amendment of the complaint if the APA action that should have been brought would be time barred:

> Perhaps tacitly recognizing that we can review the Secretary's authority [under the IRA] to take lands into trust only under the APA, Alabama argues the district court should have permitted it to amend its complaint to add the Secretary as a party and assert an APA claim. Even assuming, *arguendo*, that Alabama properly sought leave from the district court to amend its complaint to add an APA claim against the Secretary, we cannot say that the district court abused its discretion when it denied Alabama the opportunity to amend its complaint because amendment would have been futile….
>
> ***
>
> Because Alabama could have brought a timely APA challenge, we will not carve out an exception to the six-year statute of limitations….We are in no position, given the procedural posture of this case, to disturb the Secretary's long-ago decisions to take the lands in question into trust [pursuant to the IRA]—decisions which Alabama could have but chose not to challenge at the time.

PCI Gaming Auth., 801 F.3d at 1292-1293.

> Moreover, even if California had brought an APA claim, such an action would be time barred. 28 U.S.C. § 2401(a) creates a general six-year statute of limitations for actions brought against the United States….Therefore, California's arguments that the BIA does not properly hold the eleven-acre parcel in trust [under the IRA] for Big Lagoon Rancheria fail, both because the state has failed to file the appropriate APA action and because such an APA challenge would be time-barred.

Big Lagoon Rancheria, 789 F.3d at 954.

The six year statute of limitations governing APA claims expired in 1992, six years after the Proclamation was issued. SMC cannot challenge the Proclamation in these proceedings.

Importantly, SMC's arguments with respect to the Proclamation also fail because the Court has no authority to alter the boundaries of the Nation's reservation. "Changes in the boundaries of reservations created by Executive order, **proclamation**, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress." 25 U.S.C. § 398d

(emphasis added). SMC has not alleged nor submitted any evidence that Congress has taken any action to diminish the boundaries of the Nation's reservation land.

Finally, in the event the Court wishes to address SMC's argument that the Proclamation is invalid—based on the legal conclusion that the land was not in trust at the time of the Proclamation—that argument is equally meritless. When creating Indian reservations through proclamations issued pursuant to the IRA, or by taking land into trust pursuant to the IRA, the Secretary of the Interior is acting pursuant to express congressional statutory authority to do so. *See* 25 U.S.C. § 5110["The Secretary of the Interior is hereby authorized to proclaim new Indian reservations…."]. This is not a process that is undertaken on a whim, as suggested by SMC's curious "Lambeau Field" analogy. It can only be accomplished by following specified procedural requirements. See *Acquisition of Title to Land Held in Fee or Restricted Fee* Status, Release # 16–47, Version IV (rev. 1), issued June 28, 2016. And, as was demonstrated above, a challenge to such a proclamation can only be accomplished through the APA.

SMC's has presented no legal basis to support the argument that the Proclamation is not valid. None of the cases cited by SMC support its claim that the Proclamation is invalid. The cases in SMC's Opposition relate to the validity of contracts or leases with Indian tribes and discuss issues involving federal approval of those contracts and leases under the federal leasing statutes.[7] None of the cases dealt with reservation proclamations issued pursuant to the IRA and none support the argument that a proclamation issued pursuant to the IRA can be set aside as invalid without a party following the proper procedural steps to make such a challenge.

[7] SMC also conveniently omits important points from the cases it cites. For example, SMC cites to *United States v. Haddock*, 21 F.2d 165 (8th Cir. 1927), for the proposition that Secretarial approval of a void lease does not "give it life." Opposition, p. 43. The full quote from the *Haddock* case, however, provides: "Of course, if the lease was void, the approval of the Secretary of the Interior or the Superintendent for the Five Civilized Tribes could not give it life, as the court stated in the Deskins Case. **We do not think it void. The act of approval was part of the lease. It was not a valid lease without such approval. The act of approval was not an attempt to give life to a dead thing. It was a part of the leasing.**" *Id.* at 167-168.

In sum, the Wittenberg Parcel constitutes Indian lands upon which the Nation is authorized to conduct gaming because the Parcel is within the limits of the Nation's reservation. Section 2719's prohibition of gaming on off-reservation lands does not apply to the Wittenberg Parcel. SMC has not demonstrated that the Proclamation is invalid or that the Proclamation did not validly include the Wittenberg Parcel within the Nation's reservation. The Nation, therefore, is not conducting gaming in violation of its Compact. SMC has failed to state a cause of action pursuant to Section 2710(d)(7)(A)(ii) and the Nation's sovereign immunity has not, therefore, been abrogated by Section 2710(d)(7)(A)(ii).

III. SMC'S CLAIMS REGARDING THE ANCILLARY FACILITY PROVISIONS IN THE NATION'S COMPACT FAIL AND THE NATION IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

As set forth in the Nation's Memorandum, pp. 56-58, the Nation is entitled to judgment as a matter of law on SMC's claims that the Wittenberg facility is being operated, and will in the future be operated, in violation of the ancillary facility provisions of the Nation's Compact. The Nation has demonstrated that SMC cannot offer its own interpretation of the ancillary facility provision because it is not a party to the Nation's Compact and because both the State and the Nation interpret the provision in a manner contrary to SMC's interpretation. The Nation has also demonstrated that, on its face, SMC's interpretation of the ancillary facility provision of the Nation's Compact is clearly contrary to the unambiguous language in the Compact.

In response to the Nation's detailed arguments, SMC simply rehashes its attempt to re-write the language of the Nation's Compact, Opposition, pp. 21-22, and states that, despite not being a party to the Nation's Compact, it can offer its own interpretation because "Congress can modify common law rules that would otherwise apply to agreements between states and Indian tribes" and did so through 25 U.S.C. § 2710(d)(7)(A). Opposition, pp. 41-42. SMC did not respond to the Nation's argument that, because the State and the Nation—the only parties to the

Nation's Compact—agree on the meaning of the ancillary facility provisions, that meaning is controlling. That point has been effectively conceded. In any event, SMC's arguments do not rebut the fact that: (1) SMC cannot offer its own interpretation of the Nation's Compact; and (2) SMC's interpretation of the meaning of the ancillary facility provisions is clearly contrary to the plain wording of the Compact.

The Court cannot consider SMC's claims with respect to the interpretation of the ancillary facility provisions in the Nation's Compact because SMC is not a party to the Compact. "A party wishing to enforce a contract must either be a party to that contract or a third-party beneficiary." *Becker v. Crispell-Snyder, Inc.*, 316 Wis. 2d 359, 366 (Ct. App. 2009), *citing Schilling v. Employers Mut. Cas. Co.*, 212 Wis. 2d 878, 886-87 (Ct. App. 1997). SMC is not a party to the Nation's Compact. Nor is SMC a third party beneficiary of the Compact, since nothing in the Compact indicates any intent by the State or the Nation to directly and primarily benefit SMC. *See also* Compact § XXIV(B)[waiver of Nation's immunity does not "extend...to claims brought by parties other than the State and the Nation."].

SMC's argues that, despite not being a party to the Nation's Compact, it nevertheless has "standing to bring" its ancillary facility claim because "[t]ribal-state gaming compacts are not typical private contracts enforceable under common law" and Congress changed the "common law rules that would otherwise apply to agreements between states and Indian tribes" when it adopted the IGRA. Opposition, pp. 41-42. This argument directly conflicts with SMC's previous argument that "a plaintiff tribe bringing a claim for injunctive relief under § 2710(d)(7)(A)(ii) must first demonstrate that it has standing." Opposition, p. 8. Congress either changed the common law standing rules with regard to claims like SMC's or it did not. SMC cannot have it

both ways. The Court should, therefore, reject SMC's invitation to interpret the Compact in the manner SMC desires.

The Court also cannot entertain SMC's interpretation of the ancillary facility provisions of the Nation's Compact because the parties to the Compact, the Nation and the State, agree that the provisions are unambiguous and they interpret the provisions in the same way. "Contract interpretation generally seeks to give effect to the parties' intentions" and "the office of judicial construction is not to make contracts . . . but to determine what the parties contracted to do." *Tufail v. Midwest Hosp., LLC*, 348 Wis. 2d 631, 642-643 (2013) (internal citations omitted). If contract language is unambiguous, Wisconsin courts afford "great weight" or "great force" to the practical construction given to it by the parties. *Martinson v. Brooks Equip. Leasing, Inc.*, 36 Wis. 2d 209, 219, 152 N.W.2d 849, 854 (1967). As a result, "the court will normally adopt that interpretation of the contract which the parties themselves have adopted." *Zweck v. D. P. Way Corp.*, 70 Wis. 2d 426, 435, 234 N.W.2d 921, 926 (1975). "[A] third party's interpretation of a document does not affect the construction of the document," and the fact that a third-party may "interpret[] the terms differently than the parties intended does not change the intended effect and purpose of the agreement." *Bank of Barron v. Gieseke*, 169 Wis. 2d 437, 458 (Ct. App. 1992).

Here, the Nation and the State agree on what the Compact's ancillary facility provisions mean—so long as fifty percent of the lot coverage is used for a primary business purpose other than gaming, the Wittenberg facility is a permissible ancillary facility. *See* Section XVI.E. The parties' intent with respect to the meaning of the ancillary facility provision can be derived from the term's unambiguous language regarding lot coverage. Neither the Nation nor the State intended the provision to turn on revenue from either the facility itself or the entire parcel upon

which the Ancillary Facility is located. The Nation and the State intended "ancillary facilities" to rest on the lot coverage of the non-gaming activities on the parcel in question. The contractual language the parties chose clearly reflects this intent and SMC is barred from offering its own competing interpretation of what the provisions mean.

Finally, even if SMC were in a position to suggest its own interpretation of the ancillary facility provisions, which it is not, the interpretation SMC offers is clearly contrary to the language in the Nation's Compact. Section XVI.E. of the Nation's Compact provides a clear and unambiguous definition of "ancillary facilities." Under Section XVI.E., an "ancillary facility" means a facility where a majority of the **lot area** is used for business purposes that generate a majority of their net revenue from non-gaming activities. Thus, so long as more than fifty percent of the lot coverage of the Wittenberg Parcel is used for business purposes that generate a majority of their net revenue from non-gaming activities, which it is, the facility qualifies as an Ancillary Facility. SMC's attempt to re-write the language of the Nation's Compact, therefore, fails, as it clearly contradicts the plain meaning of the ancillary facility provisions.

For these reasons, the Nation is entitled to judgment as a matter of law on SMC's ancillary facility claims.

IV. SMC'S CLAIMS AGAINST THE NATION MUST BE DISMISSED PURSUANT TO RULE 19.

SMC attempts to rebut the Nation's demonstration that the Court is compelled to dismiss the claims against the Nation pursuant to Rule 19 of the Federal Rules of Civil Procedure ("Rule 19") by making four arguments: (1) the State has waived its sovereign immunity with regard to those claims, or at least it could wave its sovereign immunity, and the Nation cannot assert sovereign immunity on the State's behalf; (2) the Nation failed to demonstrate that the State is a necessary and required party; (3) even if the State cannot be made a party, SMC's inclusion of

the Governor pursuant to *Ex parte Young*, 209 U.S. 123 (1908) ("*Ex parte Young*") would allow the Court to address SMC's claims, and (4) the Nation has failed to demonstrate that equity and good conscience weigh in favor of dismissal. None of these arguments has merit.

A. The State Defendants Did Not Admit That The State Waived Its Sovereign Immunity.

SMC claims that "the State has acknowledged that it expressly waived its Eleventh Amendment immunity with respect to SMC's claims." That is demonstrably false. The State and the Governor ("State Defendants") admitted in their answer that "that the State agreed to waive its sovereign immunity under limited circumstances specified in Section XXII.E.2 of its gaming compact with SMC . . . . Regarding the extent of the State's waiver, ALLEGE that the compact speaks for itself." ECF #50, Amended Answer, Affirmative Defenses, and Counterclaim of Defendants State of Wisconsin and Scott Walker ("Answer"), p. 5, ¶ 13. The State Defendants, thus, merely admit that the State has waived it sovereign immunity under the "limited circumstances" stated in Section XXII.E.2,[8] and that the extent of that waiver is evident from the terms of the SMC compact. The cited admission makes no reference to SMC's claims against the Nation. The interpretation of the State's waiver is, therefore, a legal question for the Court. The Court does not have to assume the truth of SMC's legal conclusion that the State's waiver extends to its claims.

As the Nation demonstrated in its Memorandum, the provisions of SMC's compacts that SMC claims to have been violated by the State Defendants, and which might be encompassed by the State's waiver of sovereign immunity, do not apply to SMC's claims against the Nation. Section XXXIIB, cited as the violation underlying SMC's claim relating to the status of the

[8] ECF# 5-2, 2003 Amendment to SMC's Compact, ("SMC 2003 Amendment"), Section XXII.E.2.

Nation's lands,[9] relates exclusively to a circumstance in which land has been taken into trust for gaming purposes for another tribe with the concurrence of the Governor within 75 miles of SMC's gaming facility, pursuant to 25 U.S.C. § 2719(b)(1)(A). The Nation's Wittenberg Parcel was not taken into trust pursuant to Section 2719(b)(1)(A), and gaming on the parcel is not being conducted pursuant to that provision. With regard to SMC's claim concerning the definition of "Ancillary Facility," that claim is premised on a violation of the Nation's Compact, not SMC's compact. The State's waiver in SMC's compact only extends to violations of SMC's compact, not to alleged violations of other tribes' compacts. See SMC 2003 Amendment, Section XXII.E.2.

It is self-evident from the State Defendants' Answer that SMC's claim that the Nation is improperly asserting the State's Eleventh Amendment immunity on behalf of the State is also false. The State has asserted sovereign immunity as its second affirmative defense, "All claims in the Complaint against the State or Governor Walker based on any act or omission that is not an alleged violation of the SMC compact are barred by the State's Eleventh Amendment immunity." Answer, p. 27.

B. The Nation And The State, As Parties To The Compact, Are Necessary And Required Parties Pursuant To Rule 19.

In its Memorandum, the Nation cited to extensive legal authority demonstrating that, as parties to the Nation's Compact, the Nation and the State are necessary and required parties to this litigation and, because they cannot be joined, the claims against the Nation must be dismissed. SMC responds by summarizing the facts of each case and then repeats the assertion that those cases do not support the Nation's Rule 19 analysis because the plaintiffs in those cases sought to invalidate a provision of the compact or contract at issue. SMC does not include a

[9] Complaint, p. 5, ¶ 21, p. 11, ¶ 53, and p. 15, ¶ 1.

single quote from any of those decisions that states that the court's rulings were based on or restricted to a claim seeking to invalidate a provision of a compact or contract. Those decisions were based on the fundamental premise that it was the fact of the litigant's status as a party to a contract and that its interests under the contract would be affected, not to the specific relief requested by the plaintiff, that was the basis for the court's ruling. This was made crystal clear in Judge Crabb's decision in *Lac Du Flambeau Band v. Norton*, 327 F. Supp. 2d 995, 1000 (W.D. Wis. 2004):

> If the grant of intervention were not enough to establish that the Nation is a necessary party to this litigation, the Nation has shown that it is a party to a contract that plaintiffs want voided or at least modified. It is obvious from this fact that the Nation's interests are at stake. Plaintiffs argue that they want only to void one portion of the contract and that their doing so would not have much effect upon the parties to the contract and even if it did, the parties would be free to re-negotiate. This argument cannot be taken seriously. The state and the Nation negotiated a contract made up of many parts. If one part is changed or deleted the entire contract is changed. One side or the other will lose some aspect of the contract for which it bargained. It is for this reason that courts require that the parties to a contract be joined in any suit brought upon that contract.

Accord, *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975); *Jicarilla Apache Tribe v. Hodel*, 821 F. 2d 537, 540 (10th Cir 1987).

Even if SMC's interpretation of the decisions cited in the Nation's Memorandum is accepted, those decisions nevertheless support the granting of the Motion because SMC is seeking to invalidate provisions of the Nation's Compact. Although SMC asserts that "SMC does not seek to strike or invalidate the Ho-Chunk Compact or any provision therein. SMC simply asks that Ho Chunk and the Governor abide by federal law[10] when acting under the Ho-Chunk Compact and the SMC Compact," Opposition, p. 28, the relief that SMC is requesting would invalidate two provisions of the Nation's compact. By seeking a declaration that the

[10] "Almost any litigation . . . can be characterized as an attempt to make one party or another act in accordance with the law." *Am. Greyhound Racing, Inc. v. Hull*, 305 F. 3d 1015, 1026 (9th Cir. 2002).

Nation "is operating the Wittenberg Casino in violation of 25 U.S.C. § 2719(a), and Sections III and IV of the Ho-Chunk Compact, because it is conducting gaming activities on lands not eligible for gaming," Complaint, p. 16, ¶ 4, and an order enjoining "Ho-Chunk from continuing to violate the Ho-Chunk Compact and IGRA," *Id.*, ¶ 7, SMC is seeking to invalidate the provision in Section XVI(E) of the Compact that authorizes the Nation to conduct Class III gaming at its Ancillary Facility located in Shawano County—the Wittenberg Facility. By seeking a declaration that "Ho-Chunk is in violation of Section XVI(E) of the Ho-Chunk Compact, because it is operating the Wittenberg Casino outside the restrictions placed on Ancillary Facilities," *Id.*, ¶ 5, and an injunction based on that determination, SMC is seeking to invalidate the definition of "Ancillary Facility" set forth in Section XVI.E, replace it with the definition proposed by SMC, and thereby reduce the scope of the gaming at the Wittenberg Facility that was agreed to by the parties to the Compact.

Because, "[n]o procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable," *Lomayaktewa*, 520 F. 2d at 1325, the Nation and the State are necessary and required parties to this litigation.

C. SMC's Claims Against The Governor Do Not Qualify For The *Ex Parte Young* Exception.

SMC argues that, even if the State has not waived its Eleventh Amendment immunity, its claims against the Nation cannot be dismissed pursuant to Rule 19 because the Governor is a named defendant who is subject to the Court's jurisdiction pursuant to *Ex parte Young*, and he will be able to protect the interests of the State. SMC's arguments on this issue, too, fail.

As was discussed in detail in the Memorandum, *Ex parte Young* is a narrow exception to the States' Eleventh Amendment immunity that was premised on the existence of a state statute

that conflicts with federal law and on the enforcement of that state statute on the part of the defendant state official:

> The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.

Ex parte Young, 209 U.S. at 159-160. *See Green v. Mansour*, 474 U.S. 64, 68 (1985).

Ex parte Young has been the subject of considerable analysis, much of it addressing the nature of the relief that falls within the *Ex parte Young* exception. The Supreme Court has denied application of the *Ex parte Young* doctrine where the plaintiff sought retrospective relief or monetary relief. See *Papasan v. Allain*, 478 U.S. 265, 277-78 (1986); *Edelman* v. *Jordan*, 415 U.S. 651, 677 (1974). It has ruled that *Ex parte Young* does not apply where the plaintiff asserts a claim based on a violation of state law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) ("*Pennhurst*"). The Supreme Court has also narrowed the application of the *Ex parte Young* doctrine under specific circumstances. See, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74-75 (1996); *Idaho v. Coeur d' Alene Tribe of Idaho*, 521 U.S. 261, 288 (1997).

The Supreme Court has interpreted *Ex parte Young* to extend to claims seeking to enjoin orders of State officials acting in their official capacities without always requiring that the state official be enforcing a state statute. *Verizon Md., Inc. v. PSC*, 535 U.S. 635 (2002) ("*Verizon*"). The Supreme Court has, nevertheless, consistently emphasized that permissible *Ex parte Young*-

based claims must be based on specific actions of State officials that violated specific federal rights:

> [T]he injunction in *Young* was justified, notwithstanding the obvious impact on the State itself, on the view that sovereign immunity does not apply because an official who acts unconstitutionally is "stripped of his official or representative character," *Young*, 209 U.S., at 160. . . . [T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to "the supreme authority of the United States." *Young, supra*, at 160. As JUSTICE BRENNAN has observed, *"Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution." *Perez* v. *Ledesma*, 401 U.S. 82, 106 (1971). . . . Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights. See, *e. g.*, *Quern* v. *Jordan*, 440 U.S., at 337; *Scheuer* v. *Rhodes*, 416 U.S. 232, 237 (1974); *Georgia Railroad & Banking Co*. v. *Redwine*, 342 U.S. 299, 304 (1952).

Pennhurst, 465 U.S. at 104-105.

This is where SMC's claim fails. SMC has not identified any specific action taken by the Governor that is unconstitutional or that violates any federal law. SMC challenges the Governor's **inaction** in response to SMC's claims that the State violated SMC's compact by not properly enforcing the provisions of the Nation's Compact. There is no order or action of the Governor to be prospectively enjoined.

SMC claims that the Governor is violating SMC's compact, because he is not enforcing provisions of the Nation's Compact, a gaming compact to which SMC is not a party and for which it has no standing to sue. A violation of a compact does not equate to a violation of the IGRA. The only violation of the IGRA alleged by SMC is that the gaming on the Wittenberg Parcel violates the Section 2719(a) prohibition. Complaint, p. 16, ¶ 4. That alleged violation of the IGRA is an act of the Nation, not the Governor. That is clear from SMC's Complaint, as SMC does not seek to enjoin a violation of the IGRA on the part of the Governor. Complaint, p.

15-16, ¶¶ 1-8. There is, thus, no federal right being threatened by any action of the Governor. "*Edelman* did not hold that suits against state officers who are not alleged to be acting against federal or state law are permissible under the Eleventh Amendment if only prospective relief is sought." *Cory v. White*, 457 U.S. 85, 91(1982). Federal court action in this case is not needed to "vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Ex parte Young***,** 209 U.S. at 160.

Not only has the Governor taken no action relating to SMC's and the Nation's compacts that would violate federal law, no Wisconsin statute or regulation would authorize the Governor to take any action with regard to Indian gaming that would be relevant to the *Ex parte Young* exception. The sole statute that grants any authority to the Governor relating to Indian gaming is Wis. Stat. § 14.035 ["The governor may, on behalf of this state, enter into any contract that has been negotiated under 25 U.S.C. 2710(d)."]. That statute only authorizes the Governor to enter into gaming compacts. Wis. Stat. § 14.035 grants no specific authority to the Governor to enforce gaming compacts.[11] "In making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party." *Ex parte Young*, 209 U.S. at 159-160.

[11] To the degree that any Wisconsin official has any authority to regulate gaming compacts, it would be officials of the Department of Administration, including the Director of Indian Gaming Division of Gaming. *See*, Wis. Stat. § 569.02(1) and (2). The Department of Administration has no authority to order an Indian tribe to halt gaming conducted pursuant to a gaming compact. *See*, Wis. Stat. § 569.03. That authority rests with the NIGC, see Section V. The Director of Indian Gaming and other officials of the Department of Administration would, nevertheless, not be subject to suit under *Ex parte Young*, since SMC has not identified a State statute that is in conflict with federal law in this case that is being enforced by any State official.

Verizon, cited by SMC, does not provide any support for SMC's assertion that *Ex parte Young* applies to its clams.[12] In that case, *Verizon* sought to enjoin an order issued by the members of the Maryland Public Service Commission, pursuant to their authority under state law, that was alleged to have violated the plaintiff's rights under a specific federal statute, the Telecommunications Act of 1996. "Here *Verizon* sought injunctive and declaratory relief, alleging that the Commission's order requiring payment of reciprocal compensation was pre-empted by the 1996 Act and an FCC ruling. The prayer for injunctive relief -- that state officials be restrained from enforcing an order in contravention of controlling federal law -- clearly satisfies our 'straightforward inquiry.'" *Verizon*, 535 U.S. at 645. In this case, in contrast, SMC has not alleged that the Governor has issued any order or taken any specific action that can be enjoined and SMC has not identified any federal statute or Constitutional provision that is being violated by the Governor.

SMC has failed to allege the required elements of the *Ex parte Young* exception. The Governor cannot be made a defendant pursuant to *Ex parte Young*. He cannot, therefore, protect the State's interests in this matter, and the claims against the Nation must be dismissed for failure to join a required party, the State.

D. Equity And Good Conscience Do Not Favor Denial Of The Motion.

SMC argues that, despite its inability to join the State and the Nation, its claims should not be dismissed because equity and good conscience favor denial of the motion. SMC's argument fails, for several reasons.

First, three of the four Rule 19 factors favor dismissal. Clearly, a judgment rendered in the absence of the State and the Nation will prejudice those entities because it would have a

[12] In the only other case cited in support of this argument, *Idaho v. Coeur d' Alene Tribe of Idaho*, the Supreme Court ruled that *Ex parte Young* did not apply.

significant impact on their rights and obligations under the Nation's Compact, including the Nation's right to conduct gaming on its reservation lands. It is equally clear that there is no way to avoid prejudice to the State and the Nation by shaping relief or other measures. The purpose of this suit is to stop the Nation's gaming on the Wittenberg Parcel. Even if a judgment was issued that restricts the Nation's gaming, as opposed to prohibiting the gaming entirely, that would still profoundly prejudice the Nation's and the State's rights under the Compact. Finally, it is beyond question that a judgment rendered in the Nation's and the State's absence would be inadequate, since the parties to the Nation's Compact would not be subject to the judgment.

The only Rule 19 factor that even arguably supports denial of the Motion is the availability of a remedy. Under its compact, SMC is permitted, under certain circumstances, to withhold and/or reduce revenue sharing payments to the State, where the State agrees to concur in a two part determination pursuant to 25 U.S.C. § 2719(b)(1)(A). SMC 2003 Amendment, Section XXXII.B.

More importantly, federal courts have regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs. *See, e.g., United States ex rel. Hall v. Tribal Dev. Corp.*, 100 F.3d 476, 480 (7th Cir. 1996) ["A plaintiff's inability to seek relief, however, does not automatically preclude dismissal, particularly where that inability results from a tribe's exercise of its right to sovereign immunity."]; *Dawavendewa* v. *Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1162 (9th Cir. 2002). Federal courts have consistently found that "tribes' interest in maintaining their sovereign immunity outweighs the plaintiffs' interest in litigating their claims." *Am. Greyhound Racing*, 305 F.3d at 1025; *United States ex rel. Hall*, 100 F.3d at 480 ; *Pit River Home & Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1102-03 (9th Cir. 1994); *Clinton v. Babbitt*, 180 F.3d 1081, 1090 (9th Cir.

1999). "[D]ismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent." *Wichita & Affiliated Tribes v. Hodel*, 788 F. 2d 765, 777 (D.C. Cir. 1986). Some courts have gone so far as to rule that sovereign immunity forecloses in favor of tribes the entire balancing process under Rule 19(b). *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991). When a necessary party under Rule 19(a) is immune from suit, "there is very little room for balancing of other factors" set out in Rule 19(b), because immunity "may be viewed as one of those interests 'compelling by themselves.'" *Wichita & Affiliated Tribes*, 788 F.2d at 777 n. 13; *Enterprise Management Consultants, Inc. v. United States*, 883 F.2d 890, 894 (10th Cir. 1989). [13]

Finally, the equities weigh in favor of the Nation. As was discussed above, the State and the Nation have a profound interest in this case arising from the fact that SMC's claims are intended to alter and reduce the State's and the Nation's interests under the Nation's Compact. SMC's claims also threaten another significant interest of the Nation. By attempting to stop the Nation from using its reservation land as the Nation sees fit, "[t]he relief sought in this case would prevent the absent [tribe] from exercising sovereignty over the [reservation] allotted to [it] by Congress. It is difficult to imagine a more 'intolerable burden on governmental functions.'" *Shermoen v. United States*, 982 F. 2d 1312, 1320 (9th Cir. 1992), citing *State of Washington v. Udall*, 417 F. 2d 1310, 1318 (9th Cir. 1969).

In contrast, the interest that SMC has in this case is its interest in protecting its market share from gaming. That is not a protectable interest. "Although the IGRA requires the Secretary to consider the economic impact of proposed gaming facilities on the surrounding communities, it is hard to find anything in that provision that suggests an affirmative right for

[13] SMC's argument that dismissing the claims against the Nation would "effectively read the *Ex parte Young* exception out of existence in this case," Opposition, at p. 35, does not deserve serious examination. As was demonstrated immediately above, SMC's claims do not fall within the *Ex parte Young* exception.

nearby tribes to be free from economic competition." *Sokaogon Chippewa Community v. Babbitt*, 214 F.3d 941, 947 (7th Cir. 2000). Moreover, as a non-party, SMC has no protectable interest in the Nation's Compact, so no weight should be given to its claims under the Nation's Compact. "Particularly in light of the plaintiffs' interest in the contracts that form the basis for this suit--an interest that is, at best, 'tenuous and indirect,'. . . the fourth factor should not weigh heavily." *United States ex rel. Hall*, 100 F.3d at 4.

V. SMC HAS WAIVED ESSENTIAL ARGUMENTS CONCERNING THE NATION'S INTERPRETATION OF SECTION 2710(d)(7)(A)(ii).

In its Memorandum, the Nation analyzed Section 2710(d)(7)(A)(ii) in detail and argued that there are a variety of reasons why that provision should not be interpreted to authorize Indian tribes to sue other tribes seeking to enjoin the defendant tribe from conducting gaming allegedly in violation of its compact on its Indian lands, or to abrogate tribal sovereign immunity for that purpose. The Nation's analysis demonstrated that such an interpretation conflicts with the structure and purpose of Section 2710 as well as other provisions of the IGRA, it conflicts with the Supreme Court's longstanding determination that waivers and abrogations of tribal sovereign immunity must be explicit, *Michigan v.Bay Mills Indian Community*, 572 U.S. __,134 S. Ct. 2024, 2034 (2014), *C & L Enters., Inc. v. Citizen Band Potawatomi Tribe of Okla*., 532 U.S. 411, 418 (2001), *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), and it conflicts with Congress' intent in enacting the IGRA. Relying on *Bay Mills Indian Community v. Little Traverse Bay Bands of Odawa Indians*, 1999 U.S. Dist. LEXIS 20314 (W.D. Mich. 1999), SMC responds to the Nation's arguments with the blithe assertion that the provision is unambiguous and, therefore, no further analysis is merited. Opposition, pp. 5-8. SMC does not offer a meaningful response or rebut the Nation's analysis.

One issue arising from Section 2710(d)(7)(A)(ii) that was addressed in the Memorandum requires further discussion. Section 2713(b)(1) of the IGRA grants the NIGC broad authority to order the temporary or permanent "closure of an Indian game for substantial violations of the provisions of this chapter,[14] of regulations prescribed by the Commission pursuant to this chapter, or of tribal regulations, ordinances, or resolutions approved under" 25 U.S.C. § 2710 or 25 U.S.C. § 2712.

Pursuant to this authority, the NIGC has adopted comprehensive regulations ("Regulations") entitled "Compliance and Enforcement" that establish a process by which the NIGC ensures that the provisions of the IGRA and any compact entered into pursuant to the IGRA are not violated. 25 C.F.R. §§ 573.1 – 573.5.

When the NIGC has reason to believe a violation of the IGRA or a compact has occurred, the Regulations authorize the NIGC to issue: a "Letter of Concern" to obtain voluntary compliance with the IGRA and/or a compact; a "Notice of Violation" containing the corrective measures that need to be implemented to correct violations of the IGRA and/or a compact; temporary closure orders of all or part of an Indian gaming operation until violations have been corrected; and a permanent closure order issued by the full Commission when on-going violations are not corrected. *Id.* In addition, the NIGC has adopted civil fine regulations ("Fine Regulations") that authorize the NIGC to levy civil fines and penalties on tribes and management companies that violate the IGRA or the provisions of a compact. 25 C.F.R. §§ 575.1–575.7. Both the Regulations and Fine Regulations contain provisions establishing a settlement process by which the NIGC can settle enforcement actions. 25 C.F.R. § 573.1 and 25 C.F.R. § 575.6.

[14] The chapter referred to in the Section is Chapter 29 of Title 25 of the United State Codes that encompasses all of the provisions of the IGRA, including those pertaining to Tribal-State Compacts.

SMC's interpretation of Section 2710(d)(7)(A)(ii) would conflict with the provisions of 25 U.S.C. § 2713, the Regulations, and the Fine Regulations in a number of ways. First, it would usurp the authority of the NIGC to enforce the IGRA and the provisions of gaming compacts, and vest that authority in every single Indian tribe throughout the United States, regardless of whether any of those tribes were engaging in gaming or not. Second, SMC's interpretation creates the potential for subjecting a tribe to two simultaneous enforcement actions, one initiated by the NIGC and a second by another Indian tribe. Third, an action brought by another Indian tribe has the potential for interfering with the ability of the NIGC to settle a violation under its Regulations. Finally, SMC's interpretation of Section 2710(d)(7)(A)(ii) could lead to conflicting decisions between an enforcement action brought by the NIGC and a federal court addressing claims filed pursuant to Section 2710(d)(7)(A)(ii) by the other Indian.

Reading Section 2713 together with Section 2710(d)(7)(A)(ii), the proper interpretation of Section 2710(d)(7)(A)(ii) is that it only authorizes tribes that are parties to a compact to file suit in the district court for violations of its compact by a state, by a management company authorized to conduct gaming on the tribe's Indian lands pursuant to 25 U.S.C. § 2711 of the IGRA, or by individual Indians licensed to conduct gaming pursuant to § 2710(b)(4)(A) of the IGRA.

At the end of the day, the Nation has presented the Court with arguments that, at a minimum, call into question the assumption that Congress, in enacting Section 2710(d)(7)(A)(ii), explicitly waived a defendant tribe's sovereign immunity when one tribe (or tribes) sues another over the latter's gaming compact with a state. If the Court determines that the provision is sufficiently unclear, or that the broad waiver of tribal sovereign immunity urged by SMC is contrary to Congressional intent in enacting the IGRA, and, as it should, proceeds with a full

examination of the "waiver" question, SMC has not offered any arguments to rebut the Nation's legal and policy-based reasons to circumscribe the abrogation of tribal sovereign immunity in Section 2710(d)(7)(A)(ii). "Failure to respond to an argument . . . results in waiver." *Bonte v. U.S. Bank, N.A.*, 624 F. 3d 461, 466 (7th Cir. 2010). *See United States v. Farris*, 532 F. 3d 615, 619 (7th Cir. 2008) ["Farris failed to respond to the Government's argument in a Reply Brief, and accordingly, we find that Farris waived his sufficiency of the evidence challenge[.]"]; *Kirksey v. R.J. Reynolds Tobacco Co.*, 168 F.3d 1039, 1042 (7th Cir. 1999) ["If [judges] are given plausible reasons for dismissing a complaint, they are not going to do the plaintiff's research and try to discover whether there might be something to say against the defendants' reasoning."]; *see also County of McHenry v. Ins. Co. of the West*, 438 F. 3d 813, 818 (7th Cir. 2006) ["When presented with a motion to dismiss, the non-moving party must proffer some legal basis to support his cause of action.") (internal quotations omitted).] Accordingly, the Court can consider the Nation's arguments standing alone, and the Nation submits that Section 2710(d)(7)(A)(ii) does not authorize Indian tribes to sue one another to enjoin gaming conducted in violation of a gaming compact or abrogate tribal sovereign immunity for that purpose.

VI. SMC'S CLAIM THAT THE NATION'S CURRENT CLASS III GAMING ON THE WITTENBERG PARCEL VIOLATES THE NATION'S COMPACT IS BARRED BY THE APPLICABLE STATUTES OF LIMITATION.

In response to the Nation's argument that SMC's claims are barred by the applicable statutes of limitation, SMC states that "[f]ederal statutes of limitations [*sic*] do not have any bearing on SMC's claims, because it is not necessary for SMC to challenge any final agency action of a federal agency." Opposition, p. 38. SMC then goes on to assert, without citation to any legal authority, that state "statutes of limitations [*sic*] for breach of contracts are also inapplicable to SMC's claims" because "the most analogous state statute of limitations would be

found in public nuisance law, not breach of contract law." Opposition, pp. 38-39. From this premise, SMC claims that "[s]tatutes of limitation are not applicable to state governments enforcing state public nuisance laws." Opposition, p. 39. Neither of these responses have merit.[15]

SMC's causes of action clearly implicate final agency actions of the Department of the Interior. SMC's claims involve the federal government's actions with respect to when, whether, and how the Wittenberg Parcel was taken into trust by the United States. Additionally, and as described in detail in Section II, above, SMC's claims clearly implicate the federal government's actions with respect to the Proclamation that formally added the Wittenberg Parcel to the Nation's reservation. These are claims that had to be brought against the appropriate federal agencies within the applicable statute of limitations, including, but not limited to, the statutes of limitation applicable to the APA and the Quiet Title Act, 28 U.S.C. § 2409a. SMC did not do so and its claims are now barred.

Furthermore, with respect to Wisconsin's statutes of limitation, SMC's argument that the "most analogous state statute of limitations would be found in public nuisance law, not breach of contract law," Opposition, p. 39, is demonstrably false. SMC has sued the Nation alleging that the Nation has breached its Compact with the State by violating the Compact's terms. A compact is a contract between a tribe and a state—SMC is bringing a breach of contract claim, not a nuisance claim. Furthermore, IGRA's jurisdictional grant cannot be used as a subterfuge for a nuisance claim. 25 U.S.C. § 2710(d)(7)(A)(ii) contemplates an action to enjoin gaming conducted in a manner that violates a tribal-state compact—*i.e.* in a manner that breaches the contract. The most analogous state law is clearly a breach of contract cause of action and Wisconsin's statute of limitations for such a claim expired many years ago.

[15] SMC also rehashes its previous arguments regarding continuing violations. The parties have briefed that issue *ad nauseam* and the Nation, therefore, incorporates by this reference its previous arguments on the issue as if set forth here in full.

Even if the Court were to consider SMC's unsupported assertion that a public nuisance claim was the most analogous state statute, SMC's claims would nevertheless fail. Under SMC's theory, statutes of limitation are, conveniently, "not applicable to state governments enforcing state public nuisance laws," Opposition, p. 39, because *nullum tempus occurrit regi*—literally, "no time runs against the king." Unfortunately for SMC, it is not a state government attempting to enforce a state public nuisance law against a public nuisance within SMC's reservation. SMC is an Indian tribe in Wisconsin that sued another Wisconsin tribe in an attempt to suppress business competition through an allegation that the competing tribe breached its gaming compact with the State. There is no basis to conclude that SMC's claims can be considered public nuisance claims and, even if they were, the statute of limitations has, nevertheless, run.

For these reasons, SMC's claims are barred by the applicable statutes of limitation and the Nation is entitled to judgment as a matter of law.

CONCLUSION

For all of the foregoing reasons, the Ho-Chunk Nation respectfully requests that the Court grant its Motion for Judgment on the Pleadings.

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Respectfully Submitted

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