UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

THE STOCKBRIDGE-MUNSEE COMMUNITY, a federally recognized Indian tribe,

Plaintiff,

v.

STATE OF WISCONSIN,

and

SCOTT WALKER, in his official capacity as the Governor of Wisconsin,

and

THE HO-CHUNK NATION, a federally recognized Indian tribe,

Defendants.

STOCKBRIDGE-MUNSEE COMMUNITY MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE PROPOSED FIRST AMENDED COMPLAINT

17-cv-249-jdp

Plaintiff Stockbridge-Munsee Community ("SMC") submits this Memorandum of Points and Authorities in support of its Motion, pursuant to Fed. R. Civ. P 15(a)(2) seeking leave to file its Proposed First Amended Complaint ("PFAC"), attached as Exhibit A to Motion for Leave to File the Proposed First Amended Complaint, in this matter against Defendant Ho-Chunk Nation

("Ho-Chunk") and Defendants State of Wisconsin and Scott Walker (collectively referred to as "State")[1].

I. SUMMARY OF ARGUMENT

This Court on October 25, 2017 issued an Opinion and Order (Doc. 67) granting Ho-Chunk's Motion for Judgment on the Pleadings on the grounds that SMC's claims against Ho-Chunk are untimely. That same Order also directed SMC and the State to submit briefs on whether SMC's claims against the State are untimely. SMC's brief on its position that its claims against the State are timely is filed simultaneously herewith, and should also be reviewed and considered in this Court's deliberation on whether to grant leave to file the PFAC.

SMC seeks leave to amend the Complaint to include two new claims against Ho-Chunk and one new claim against the State. The amended Complaint is attached to the Motion for Leave as Exhibit A. SMC's Motion easily exceeds the liberal standard for allowing leave to amend. SMC has good cause to amend the Complaint in order to correct or clarify deficiencies in the initial Complaint that formed the basis for the Court's decision to dismiss SMC's claims against Ho-Chunk as untimely, and to add a new claim based on revelations made by Ho-Chunk in its pleadings submitted to this Court.

II. STANDARD FOR DELIBERATION OF MOTIONS FOR LEAVE TO FILE AMENDED COMPLAINTS.

Fed. R. Civ. P. 15(a)(2) governs when court approval is needed to amend a pleading: "The court should freely give leave [to amend] when justice so requires." The Seventh Circuit recognizes a strong presumption to provide a plaintiff at least one opportunity to amend its Complaint where the Court has dismissed claims based on perceived deficiencies in the initial

[1] SMC has informed counsel for all parties of its intent to file the Motion for Leave to File the Proposed First Amended Complaint and does not assent at this juncture.

complaint. *Runnion v. Girl Scouts of Greater Chicago*, 786 F.3d 510, 519 (7th Cir. 2015); *Luevano v. Wal-Mart Stores, Inc*., 722 F.3d, 1014, 1024 (7th Cir. 2013); *Bausch v. Stryker Corp*., 630 F.3d 546, 562 (7th Cir. 2010); *Foster v. DeLuca*, 545 F.3d 582, 584 (7th Cir. 2008). *See also Forman v. Davis*, 371 U.S. 178, 182 (1962), (reversing denial of leave to amend by citing to Fed. R. Civ. P. 15(a)(2)'s mandate to freely give leave to amend and stating "this mandate is to be heeded"). The Seventh Circuit expressly endorses the reasons for this practice given by Professors Wright and Miller:

> The federal rule policy of deciding cases on the basis of the substantive rights involved rather than on technicalities requires that plaintiff be given every opportunity to cure a formal defect in his pleading. This is true even though the court doubts that plaintiff will be able to overcome the defects in his initial pleading. Amendment should be refused only if it appears to a certainty that plaintiff cannot state a claim. The better practice is to allow at least one amendment regardless of how unpromising the initial pleading appears because except in unusual circumstances it is unlikely that the court will be able to determine conclusively on the face of a defective pleading whether plaintiff actually can state a claim.

Runnion, 786 F.3d at 520; B*arry Aviation Inc. v. Land O'Lakes Municipal Airport Comm'n*, 377 F.3d 682, 687 (7th Cir. 2004), quoting 5 A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (2d ed. 1990).

III. LEAVE TO AMEND IS WARRANTED TO ALLOW SMC TO MODIFY ITS CLAIMS BASED ON REVELATIONS OF HO-CHUNK IN ITS PLEADINGS TO THIS COURT.

The PFAC includes as a new Count VIII: the State's and Ho-Chunk's fraudulent concealment of intent to create amendments to the Ho-Chunk Compact that deprive Stockbridge of the intended benefits of its compact**.** The specific new allegations include the following:

- The Stockbridge Compact imposes a duty on the State to act in good faith and fair dealing in the performance of its obligations of under the Stockbridge Compact, and to refrain from actions that would deprive Stockbridge of the intended benefits of its compact in effect in 2003; namely market protections that prevent

the Wittenberg Casino from expanding to a scope where more than fifty percent (50%) of its revenues are generated from gaming activities.

- Pleaded in the alternative, the 2003 amendments to the Ho-Chunk Compact allow Ho-Chunk to operate the Wittenberg Casino in a manner where more than fifty percent (50%) of the revenue is generated from gaming activities. Such amendments deprive Stockbridge of the intended benefits of its compact in effect in 2003, namely market protections that prevented the Wittenberg Casino from expanding to a scope where more than fifty percent (50%) of its revenues are generated from gaming activities.

- Pleaded in the alternative, the State violated its duty to Stockbridge to act in good faith and fair dealing by negotiating the 2003 amendments to the Ho-Chunk Compact to allow Ho-Chunk to operate the Wittenberg Casino in a manner where more than fifty percent (50%) of the revenue is generated from gaming activities.

- The Ho-Chunk Compact in effect at the time of the negotiation of the 2003 amendments imposes on Ho-Chunk a duty to act in good faith and fair dealing in its performance of its obligations of under the Compact; and, to refrain from actions that would cause the State to be in material breach of its Compacts with Stockbridge and other Tribes with Indian lands in Wisconsin.

- Pleaded in the alternative, Ho-Chunk violated its duty to act in good faith and fair dealing by negotiating the 2003 amendments to the Ho-Chunk Compact to allow Ho-Chunk to operate the Wittenberg Casino in a manner where more than fifty percent (50%) of the revenue is generated from gaming activities.

- Pleaded in the alternative, Ho-Chunk and the State concealed the fact that they were negotiating the 2003 amendments to the Ho-Chunk Compact to allow Ho-Chunk to operate the Wittenberg Casino in a manner where more than fifty percent (50%) of the revenue is generated from gaming activities. Indeed, they conspired to conceal such negotiations by making affirmative representations to Stockbridge (and other Wisconsin Tribes) that the amendments would not alter the market protections in place that would otherwise restrict Ho-Chunk from operating the Wittenberg facility in a manner where more than fifty percent (50%) of the revenue is generated from gaming activities.

- Stockbridge relied on such material misrepresentations of the State to its detriment in negotiating its own class III gaming compact.

- Stockbridge did not become aware of Ho-Chunk's and the State's intentions to negotiate the 2003 compact amendments to deprive Stockbridge of the market protections in place at the time of the negotiations of the 2003 amendments until May 25, 2017.

- Ho-Chunk's and the State are equitably estopped from asserting that Stockbridge's claims set forth in this First Amended Complaint are untimely.

The proposed new Count VIII is submitted because Ho-Chunk provided argument and a formal declaration (Doc. 31) of the attorney who represented Ho-Chunk during the negotiations of 2003 amendment to the Ho-Chunk Compact, Thomas J. Springer, which disputes SMC's allegation that the Wittenberg gaming facility cannot be lawfully operated in a manner where gaming is the primary business purpose of the physical facilities on the Wittenberg parcel. Mr. Springer advocates that SMC's allegations must be wrong because Ho-Chunk and the State deliberately did away with the requirement that gaming be the primary business purpose of a facility where more than fifty percent (50%) of the revenue is generated from non-gaming sources, with the intended result of enabling Ho-Chunk to operate an "ancillary facility" that has no meaningful difference from "gaming facility". Ho-Chunk advocates:

> The history of the negotiation of Paragraph 5 of the Second Amendment reveals that the current Ancillary Facility and the expanded Ancillary Facility fulfill the Nation's and the State's intentions in negotiating Paragraph 5. Springer Declaration, pp. 2-3, ¶¶ 4-8. The Nation and the State also agree that the parties intended that the definition of Ancillary Facility be focused on the lot coverage and not the amount of revenue generated from gaming on the Parcel. *Id.* . . . .

Doc. 37 at 38-39: . . .

> The unique definition of "Ancillary Facility" in the Nation's Compact was an intended result of the Nation's planning and negotiation strategy. Springer Declaration, pp. 2-3.

Doc. 37 at 40-41. Those assertions are alarming to SMC, because SMC was being told at all times material to the consummation of its own 2003 Compact amendment that the State desired to delay the negotiation of amendments with SMC (and other Wisconsin tribes with smaller gaming operations), while the State negotiated compact amendments with tribes that operated larger gaming operations, including Ho-Chunk (*see* Terrie Terrio Declaration at ¶ 2). Indeed,

SMC was not aware of such fraudulent concealment until Mr. Springer filed his Declaration in this litigation. (*See* Terrie Terrio Declaration at ¶¶ 2-3). Moreover, SMC and other Wisconsin tribes were being assured by representatives of the State that the negotiations with the tribes with larger gaming operations did not change, and would not change, the ancillary facility provisions and other provisions that impacted the protection of the smaller tribes' gaming markets (the Compact's consideration for substantial revenue-sharing/ tax payments to the State). (*See* Terrie Terrio Declaration at ¶ 3). SMC relied upon those representations to its detriment. (*See* Terrie Terrio Declaration at ¶ 5).

If Ho-Chunk's assertions of the facts surrounding the negotiations of the 2003 Compact amendments are correct, Ho-Chunk and the State are liable to SMC for deliberately conspiring to deprive SMC (and several other Wisconsin tribes) of the intended benefits of gaming market protection reflected in the compacts then in effect. If Ho-Chunk is correct as to the intended result, Ho-Chunk and the State are now in a proverbial Catch-22. Either the amendment language was poorly drafted wherein SMC is correct to allege that the Ho-Chunk Compact, by its terms, prohibits the use of the Wittenberg facility in a manner where gaming is the primary business purpose of the facilities, or Ho-Chunk and the State are liable for defrauding SMC of the intended benefits of its Compact.

This development directly impacts the analysis regarding the timeliness of SMC's claims, because Wisconsin state law provides that defendants who fraudulently conceal material facts are equitably estopped from asserting the affirmative defense of statute of limitations. *See City of Madison v. Hyland, Hall & Co.*, 73 Wis.2d 364, 383. 243 N.W.2d 422 (1976); *City Federal Sav. And Loan Ass'n v. Crowley*, 393 F.Supp. 644, 659 (E.D. Wis. 1975); *Peters v. Kell*, 12 Wis.2d 32, 46, 106 N.W.2d 407 (1960); *State ex rel. Susedik v. Knutson*, 52 Wis.2d 593, 598 (1971);

Wosinski v. Advance Casy Stone Co., 377 Wis.2d 596, 901 N.W.2d 797 (Ct. App. 2017); *Elliott v. General Cas. Co. of Wisconsin*, 337 Wis.2d 7737, 807 N.W.2d 33 (Ct. App. 2011). The Springer Declaration evidences the conspiracy to defraud SMC, far exceeding any threshold requirement to establish that the facts material to the equitable estoppel argument be genuinely in dispute.

IV. LEAVE TO AMEND IS WARRANTED TO ALLOW SMC TO PROCEED TO DISCOVERY TO DETERMINE WHEN THE WITTENBERG CASINO FIRST VIOLATED THE 'ANCILLARY FACILITY' PROVISIONS OF HO-CHUNK'S COMPACT.

The PFAC includes as a new Count VII: Ho-chunk's imminent violation of the "ancillary facility" restrictions in its Compact. The specific new allegations include:

- The Ho-Chunk Compact allows Ho-Chunk to operate an "Ancillary Facility" within Shawano County, and defines an "Ancillary Facility" as a gaming facility "where fifty percent or more of the lot coverage of the trust property upon which the facility is located, is used for a Primary Business Purpose other than gaming." Ho-Chunk Compact at § XVI(E).

- The Ho-Chunk Compact also defines the term "Primary Business Purpose" to mean "the business generating more than 50 percent of the net revenue of the facility." Ho-Chunk Compact at § III(H).

- Ho-Chunk intends to develop a full-scale casino resort on the Wittenberg Parcel, which will include a hotel, restaurant, bar, high-limit gaming area, and approximately 800 slot machines and 10 table games.

- Pleaded in the alternative, Ho-Chunk's present gaming activities on the Wittenberg Parcel do not constitute the Primary Business Purpose of the gaming facility, as the 500 slot machines do not generate more than fifty percent (50%) of the net revenue of the facility as compared to the snack area and small bar.

- Ho-Chunk's imminent expansion of gaming activities on the Wittenberg Parcel will be in operated in a manner where the Primary Business Purpose of the gaming facility, where the gaming activity will generate more than fifty percent (50%) of the net revenue of the facility.

- Ho-Chunk's imminent expansion of gaming activities on the Wittenberg Parcel will squarely fit the definition of a Gaming Facility under the Ho-Chunk Compact, which is not allowed in Shawano County. A Gaming Facility is defined

> as a facility with gaming as its Primary Business Purpose, because the majority of the revenue of the present facility is generated by gaming. Ho-Chunk Compact § XVI.E.
>
> - Because the Primary Business Purpose of the Wittenberg Casino will be gaming, it will violate the Ho-Chunk Compact's requirement that any gaming facility owned by Ho-Chunk within Shawano County be limited to an Ancillary Facility.

SMC did assert that current (at the time of the Complaint) gaming was already the primary business purpose of the Wittenberg facility, generating more than fifty percent (50%) of the revenue, (Doc. 5, Complaint ¶ 77), but Ho-Chunk denied that allegation, (Doc. 29, Answer at ¶ 77). This Court concluded that SMC is asserting that Ho-Chunk has violated the ancillary facility provision of the Ho-Chunk Compact since it opened in 2008 (Doc. 67 at 10), but SMC did not make that specific assertion. It is certainly plausible that prior to the most recent expanded gaming facilities, Ho-Chunk operated the Wittenberg Casino in a manner where activities other than gaming were the primary business purpose of the facilities, generating more than fifty percent (50%) of the revenue. The precise moment at which Ho-Chunk began to violate the "Ancillary Facility" provisions in the Ho-Chunk Compact is not yet known. The new count pleads in the alternative that Ho-Chunk did not operate the Wittenberg facility in a manner where its primary business purpose was gaming until some point within six (6) years of April 19, 2017. Discovery is needed to determine when Ho-Chunk first violated the "Ancillary Facility" provisions of the Ho-Chunk Compact.

V. LEAVE TO AMEND IS WARRANTED TO CLARIFY THAT SMC IS ALLEGING THAT THE WITTENBERG CASINO IS A PUBLIC NUISANCE.

The PFAC includes as a new allegation:

> Ho-Chunk's operation of the Wittenberg facility in a manner where more than fifty percent (50%) of the revenue is generated from gaming activities constitutes is a public nuisance as illegal gambling house under Wisconsin State law, which is unlawful as a matter of federal law pursuant to 18 U.S.C. § 1166

SMC believes that this Court, in its inquiry to find the most analogous Wisconsin statute of limitations, applying the Indian canon of construction liberally but reasonably within its discretion, should have determined that the Wisconsin statute of limitations applicable to claims of public nuisance for illegal gambling is the most analogous statute of limitation to the circumstances here. SMC, a sovereign government, is seeking prospective equitable relief to abate the ongoing harm of illegal gaming activity at Ho-Chunk's Wittenberg facility. Under Wisconsin state law, if a nuisance is ongoing and capable of abatement, an action to enjoin the activity is not barred by the statute of limitations; but, if the nuisance is permanent, an action must be brought within the applicable statute of limitations period. A nuisance is continuing if it is ongoing or repeated but can be abated. A permanent nuisance is one act that causes permanent injury. *Sunnyside Feed Co., Inc. v. City of Portage*, 222 Wis.2d 461, 588 N.W.2d 278 (Ct. App. 1998). Wisconsin courts have long-recognized that illegal gambling activity is a public nuisance[2]. *See State ex rel Trampe v. Multerer*, 234 Wis. 50, 289 N.W. 600 (1940); *State v. Nixa*, 121 Wis.2d 160, 164, 360 N.W.2d 52 (Ct. App. 1984) (if one of a dwelling's primary purposes is to allow gambling, it is a public nuisance). Indeed, Wisconsin statutes expressly declare that illegal gambling houses are a public nuisance. Section 823.20 Wis. Stats. Moreover, Article IV, Section 24 (6)(c) of Wisconsin's Constitution expressly prohibits any forms of gaming anywhere in the State that is not authorized by a Tribal/State gaming compact. IGRA, codified at 18 U.S.C. § 1166, specifically provides that state gaming laws apply as a matter of federal law to gaming on Indian lands not authorized by a gaming compact.

[2] The Complaint's allegation that Ho-Chunk's gaming is illegal is sufficient for the defendants to be on notice that SMC is alleging the Wittenberg facility is a public nuisance. IGRA, codified at 18 U.S.C. § 1166, specifically provides that state gaming laws apply as a matter of federal law to gaming on Indian lands not authorized by a gaming compact. However, in an abundance of caution, the PFAC at ¶ 49 includes the specific allegation that gaming at the Wittenberg facility constitutes an illegal public nuisance.

CONCLUSION

The grounds for allowing the filing of the PFAC far exceed the liberal thresholds of Fed. R. Civ. P. 15(a)(2) as regularly applied by the Seventh Circuit. The new Count VIII is warranted as the necessary consequence of the Ho-Chunk, in the context of attempting to defeat SMC's Motion for Preliminary Injunction advocated facts previously unknown to SMC that evidence Ho-Chunk's and the State's deliberate intent to deprive SMC of the market protections in its Compact in effect at the time of the 2003 amendments. Similarly, the new Count VII is warranted as the necessary consequence of Ho-Chunk's denial that it operated the facility in a manner where more than fifty percent (50%) of the revenue was generated by non-gaming activity on the Wittenberg parcel. Discovery should proceed to determine when, if ever, Ho-Chunk generated more than fifty percent (50%) of the revenue from gaming activities on the Wittenberg parcel. Finally, SMC should be allowed to clarify that it is indeed alleging that the Wittenberg Casino is a public nuisance for this Court to properly deliberate on what Wisconsin limitations law is most analogous and applicable to SMC's claims. Accordingly, SMC should be granted leave to file the PFAC.

DATED: November 29, 2017

Respectfully Submitted,

s/ Scott D. Crowell
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CERTIFICATE OF SERVICE

I, Scott Crowell, hereby certify that on November 29, 2017, I caused the **MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE PROPOSED FIRST AMENDED COMPLAINT** to be served upon counsel of record through the Court's electronic service system. To my knowledge all parties are registered for the CM/ECF system and shall be served electronically upon filing.

s/ *Scott D. Crowell*
SCOTT CROWELL (admitted *pro hac vice*)