IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

THE STOCKBRIDGE-MUNSEE COMMUNITY,

Plaintiff,

v. Case No. 17-CV-249-JDP

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

Defendants.

STATE DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

INTRODUCTION

Plaintiff Stockbridge-Munsee Community has asserted multiple claims against the Ho-Chunk Nation and against the State of Wisconsin and Wisconsin Governor Scott Walker (collectively, the "State") involving alleged illegalities related to a gambling facility operated by Ho-Chunk in Wittenberg, Wisconsin. The Court has dismissed the claims against Ho-Chunk as untimely, and is currently considering whether to similarly dismiss the claims against the State.

Stockbridge has now moved for leave to amend its complaint to restate its original claims against Ho-Chunk and the State, to assert two new claims, and to advance a new legal theory regarding the timeliness issues already decided by the Court. There is no reason to allow amendment of the complaint

to restate the original claims. The new "ancillary facility" claim against Ho-Chunk fails to cure the timeliness deficiencies of the original complaint to the extent it challenges gaming activities in operation at Wittenberg when this litigation began. The new fraud claim against the State is untimely and has not been pleaded with the required degree of particularity. And the new "public nuisance" legal theory is unnecessary in a complaint, relates only to legal issues that have already been decided by the Court, and does not relate to any pending motion for reconsideration of those issues.

PROCEDURAL BACKGROUND

Stockbridge's original complaint (Dkt. 5) asserted five claims related to Ho-Chunk's gaming facility in Wittenberg—two directed against Ho-Chunk and three directed against the State.[1] Stockbridge simultaneously moved for a

[1] First, the complaint alleged that Ho-Chunk's gaming operations at Wittenberg are being conducted on land that is ineligible for gaming, in violation of 25 U.S.C. § 2719(a) and Sections III and IV of the gaming compact between Ho-Chunk and the State. (Dkt. 5 ¶¶ 65–71.)

Second, the complaint alleged that Ho-Chunk's gaming operations at Wittenberg violate the ancillary facility clause in Section XVI.E. of Ho-Chunk compact. (Dkt. 5 ¶¶ 72–81.)

Third, the complaint alleged that the State, by taking no action to prevent Ho-Chunk's gaming operations at Wittenberg, violated the protections against competition purportedly contained in section XXXII.B. of the gaming compact between Stockbridge and the State. (Dkt. 5 ¶¶ 48–53.)

Fourth, the complaint alleged that, because the State had taken no action to prevent the gaming at Wittenberg, Stockbridge had received no benefit in exchange for its agreement to share revenue with the State, thereby making the revenue sharing requirement an unlawful tax on Stockbridge's gaming revenues, in violation of the Stockbridge compact and of federal law. (Dkt. 5 ¶¶ 54–58.)

preliminary injunction, seeking to prevent a proposed expansion of the Wittenberg facility while this litigation is pending. (Dkt. 7–10.)

Ho-Chunk opposed the preliminary injunction motion (Dkt. 27–28, 30–37), arguing, in part, that Stockbridge's claims were time-barred by the applicable statutes of limitations (Dkt. 37:21–28). On July 24, 2017, pursuant to direction from the Court, Stockbridge and Ho-Chunk filed supplemental briefs on the application of the continuing violations doctrine to the statute-of-limitations issues. (Dkt. 52; 54.)

On August 25, 2017, Ho-Chunk moved for judgment on the pleadings (Dkt. 56–57), arguing, in part, that Stockbridge's claims were time-barred by the applicable statutes of limitations (Dkt. 57:48–55). Briefing of the motion for judgment on the pleadings was completed by September 29, 2017. (Dkt. 58; 62.)

On October 25, 2017, the Court granted Ho-Chunk's motion for judgment on the pleadings, denied Stockbridge's preliminary injunction motion as moot, and dismissed Ho-Chunk from this lawsuit. (Dkt. 67.) The Court reasoned that Stockbridge's claims against Ho-Chunk were barred by the applicable statute of limitations. (Dkt. 67:5–11.) The Court also questioned the timeliness of

---

Fifth, the complaint alleged that the State has not enforced the Ho-Chunk compact in the same way as it previously enforced the Stockbridge compact, and that this disparity constitutes arbitrary and capricious enforcement in violation of Section XX.C. of the Stockbridge compact. (Dkt. 5 ¶¶ 59–64.)

Stockbridge's claims against the State and invited simultaneous filings on that issue. (Dkt. 67:11.)

On November 29, 2017, the State and Stockbridge filed briefs on the timeliness of the claims against the State. (Dkt. 71–72.) The State addressed whether the Court's statute-of-limitations holding also applied to Stockbridge's claims against the State. Stockbridge went beyond that issue and attacked the reasoning in the Court's prior decision, but has not moved for reconsideration.

Stockbridge simultaneously moved for leave to file an amended complaint. (Dkt. 75–76.) The proposed amended complaint repeats the five claims from the original complaint and adds two new claims. First, Stockbridge claims that the proposed Wittenberg expansion, considered apart from gaming in operation there since 2008, will violate the ancillary facility clause in the Ho-Chunk compact. (Dkt. 75-1 ¶¶ 84–92). Second, it claims that, during compact amendment negotiations in 2003, the State and Ho-Chunk fraudulently concealed from Stockbridge the fact that they intended the Ho-Chunk compact's amended ancillary facility clause to allow gaming activities to generate more than fifty percent of an ancillary facility's revenue. That agreement allegedly deprived Stockbridge of market protections in its own compact. (Dkt. 75-1 ¶¶ 93–102.) The new fraud claim also asserts that Stockbridge did not learn of the State's and Ho-Chunk's alleged fraudulent intentions until May 25, 2017. (Dkt. 75-1 ¶ 101.) The proposed amended

complaint additionally alleges that the Wittenberg facility is an illegal gambling house and, therefore, an unlawful public nuisance. However, it does not purport to state a discrete public nuisance claim. (Dkt. 75-1 ¶ 47.)

On November 30, 2017, the Court ordered briefing of Stockbridge's motion for leave to amend the complaint.

ARGUMENT

I. Legal standard for amending the complaint.

A party may amend its pleading once as a matter of course within the time constraints set out in Fed. R. Civ. P. 15(a)(1). After that time, a party may amend its pleading "only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). A court "should freely give leave when justice so requires." *Id.* However, the court may deny leave for a number of reasons, including that the amendment would be futile. *Foman v. Davis*, 371 U.S. 178, 181 (1962); *Perrian v. O'Grady*, 958 F.2d 192, 194 (7th Cir. 1992).

Court have discretion to consider the sufficiency of a proposed amended complaint on a motion for leave to amend, but sometimes find it preferable to defer considering the substantive merits of a claim until a later motion to dismiss. *See Peterson Steels v. Seidmon*, 188 F.2d 193, 194 (7th Cir. 1951). However, it is appropriate to deny leave based on futility, if the proposed amendment advances a claim that is legally insufficient on its face or that fails

to cure an established defect in the original pleading. *Perkins v. Silverstein*, 939 F.2d 463, 471–72 (7th Cir. 1991).

Accordingly, a proposed amended complaint that reasserts a claim on which the court has already ruled should be denied as futile. *See Schmidling v. City of Chicago*, 1 F.3d 494, 501 (7th Cir. 1993). Leave to amend to add a new claim may also be denied if the plaintiff knew the facts on which the new claim is based at the time of the original pleading and there is no excuse for failing to plead those facts at that time. *Pabst Brewing Co. v. Corrao*, 176 F.R.D. 552, 559 (E.D. Wis. 1997).

II. Leave to amend should be denied as to all claims repeated from the original complaint. Alternatively, if leave is granted, all claims already dismissed should remain dismissed.

The proposed amended complaint repeats all five of the claims asserted in the original complaint. (Dkt. 75-1 ¶¶ 50–83.)[2]

The two original claims against Ho-Chunk (Dkt. 5 ¶¶ 65–81) have already been dismissed by the Court as untimely. (Dkt. 67:5–11.) Leave to

[2] Paragraphs 67–76, 78, and 81–83 of the proposed amended complaint appear to be identical to paragraphs 65–74, 76, and 79–81 of the original complaint. Paragraphs 77, 79, and 80 of the proposed amended complaint correspond to paragraphs 75, 77, and 78 of the original complaint, but contain some changes in wording. The changed language in those three paragraphs, however, does not materially alter the substance of the claim in question and, therefore, does not affect the Court's prior dismissal of that claim.

amend a complaint to repeat already dismissed claims should be denied as futile. *See Schmidling*, 1 F.3d at 501. Stockbridge's motion to amend, therefore, should be denied as to those claims.[3] Alternatively, if leave to amend is granted, those claims should remain dismissed from this case for the reasons stated in the Court's October 25 decision. (Dkt. 67: 5–11.)

The question whether the three original claims against the State are also untimely is currently pending before the Court. (Dkt. 71–72.) If those claims are dismissed from the original complaint, then Stockbridge's motion to amend should be denied as to those claims for the same reasons stated above. Alternatively, if leave to amend is granted before the Court resolves the timeliness issue, the original three claims against the State—as repeated in the amended complaint—should be dismissed as untimely for the same reasons that the original claims against Ho-Chunk have been dismissed. (Dkt. 71.)

III. Leave to amend should be denied as to the new "ancillary facility" claim (Count VII), to the extent it challenges gaming activities in operation at Wittenberg when this litigation began.

The proposed amended complaint includes a new Count VII, in which Stockbridge claims that Ho-Chunk's proposed expansion of gaming activities at Wittenberg, considered apart from gaming in operation there since 2008,

[3] Although an amended complaint supersedes the original complaint, a plaintiff is not required to replead claims the court has already rejected, in order to preserve those claims for appeal. *Scott v. Chuhak & Tecson, P.C.*, 725 F.3d 772, 782–83 (7th Cir. 2013).

will violate the ancillary facility clause in the Ho-Chunk compact. (Dkt. 75-1 ¶¶ 84–92.) New paragraph 7 of the proposed amended complaint seems to ask the Court to permanently enjoin the Wittenberg expansion. (Dkt. 75-1 ¶ 7.)

It is not clear which Wittenberg gaming activities this new claim seeks to stop. Some allegations seem to challenge expanded gaming activities at Wittenberg that have not yet commenced or that have commenced since the original complaint was filed. (Dkt. 75-1 ¶¶ 43–46, 78, 82, 87, 89–92.) But other allegations also apparently challenge gaming activities in operation at Wittenberg before the filing of the original complaint. (Dkt. 75-1 ¶¶ 42, 49, 77, 79–81, 88.)

To the extent that the new "ancillary facility" claim challenges gaming activities in operation at Wittenberg before this litigation began, or asks the Court to enjoin any such activities, that claim is untimely for the same reasons that the original complaint's claims against Ho-Chunk were untimely. (Dkt. 67:5–11.) To that extent, leave to amend should be denied as to Count VII on grounds of futility.

The Court's October 25 decision did not discuss the timeliness of a claim that challenges only expanded gaming activities at Wittenberg since this litigation began, and that asks the Court to enjoin only such expanded activities. To the extent that the new "ancillary facility" claim is limited to additional new gaming at Wittenberg, that claim would not be covered by the

discussion in the October 25 decision. If such a claim is added to this case, the State reserves its right to move to dismiss it on timeliness grounds not addressed in the October 25 decision, as well as other appropriate legal grounds.

IV. Leave to amend should be denied as to the new fraud claim (Count VIII) because that claim is untimely and because the fraud allegations are not pleaded with particularity.

The proposed amended complaint also includes a new Count VIII that sounds in fraud. Stockbridge alleges that, during compact amendment negotiations in 2003, the State and Ho-Chunk fraudulently concealed from Stockbridge their intent to amend the Ho-Chunk compact's definition of "ancillary facility" in a way that would deprive Stockbridge of market protections in its own compact. (Dkt. 75-1 ¶¶ 93–102.) The new fraud claim also alleges that Stockbridge did not discover those fraudulent intentions until May 25, 2017.[4] (Dkt. 75-1 ¶ 101.) Leave to add this new fraud claim should be denied, both because the claim is untimely and because the proposed amended complaint does not plead fraud with the required particularity.

[4] The declaration that allegedly alerted Stockbridge to the fraud was actually filed on May 18, 2017, not May 25, 2017. (Dkt. 31; 76:5.) The State will refer to the May 18 date herein, rather than the May 25 date.

A. The new fraud claim is untimely.

The Court's October 25 decision ruled that the time has expired for Stockbridge to file a lawsuit based on the alleged illegality of gaming that has been going on at Wittenberg since it opened in 2008. (Dkt. 67:8–10.) Stockbridge now tries to avoid that ruling by adding a new fraud claim, based on statements allegedly made by the State in 2003, and by asserting that it did not discover the fraud until a declaration in this case was filed on May 18, 2017. The new fraud claim fails to cure the timeliness deficiencies in the original complaint. Instead it gives rise to additional statute-of-limitations problems similar to those already found by the Court. The new claim is untimely, just as were the claims that have already been dismissed.

Like the claims in the original complaint, the new fraud claim rests on the fact that the Ho-Chunk compact's amended definition of "ancillary facility" enabled Ho-Chunk to open the gaming facility at Wittenberg in 2008. Before 2003, the Ho-Chunk compact defined "ancillary facility" as a facility "whose Primary Business Purpose [was] not gaming." (Dkt. 9-10:33.)[5] As amended in 2003, the compact defines "ancillary facility" as "a facility where fifty percent or more of the lot coverage of the trust property upon which the facility is

[5] The Ho-Chunk compact defines "primary business purpose" as "the business generating more than 50 percent of the net revenue of the facility." (Dkt. 9-10:11 (1992 Ho-Chunk Compact, § III.H).) That definition was not amended in 2003 and remains in effect.

located, is used for a Primary Business Purpose other than gaming." (Dkt. 9-13:4.) Stockbridge contends, in both its original and proposed amended complaints, that the 2003 definition of "ancillary facility" deprived it of the benefit of market protections contained in section XXXII.B. of the Stockbridge compact. (Dkt. 5 ¶¶ 19–22, 48–58; 75-1 ¶¶ 20–23, 50–60.)

Stockbridge's new fraud claim adds allegations that Ho-Chunk and the State "concealed from Stockbridge 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" and "conspired to conceal such negotiations by making affirmative representations to Stockbridge . . . that the amendments would not alter the market protections in place that would otherwise restrict Ho-Chunk from operating the Wittenberg Casino in [such] a manner." (Dkt. 75-1 ¶ 99.) Stockbridge further alleges that it relied to its detriment on the State's misrepresentations when negotiating the 2003 amendments to the Stockbridge compact. (Dkt. 75-1 ¶ 100.) All of the events material to the purported fraud are alleged to have occurred in 2003.

In Wisconsin, an action for relief on the ground of fraud must be commenced within six years after the cause of action accrues or be barred. Wis. Stat. § 893.93(1)(b). However, "[t]he cause of action in such case is not

deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud." *Id.*

Stockbridge asserts that it did not discover the fraudulent nature of the State's conduct until May 18, 2017. (Dkt. 75-1 ¶ 101.) On that date, Ho-Chunk filed the declaration of Thomas J. Springer, an attorney who represented Ho-Chunk in its 2003 negotiations with the State. (Dkt. 31.) According to Springer, Ho-Chunk "expressed to the State in the 2003 gaming compact negotiations that it . . . wanted to amend the 'ancillary facility' language in the 1992 Gaming Compact so that the definition of an 'ancillary facility' would be based primarily on lot coverage of the trust parcel and not what type of business activity generates the majority of revenue for the parcel." (Dkt. 31 ¶ 6.) Stockbridge suggests that its fraud claim did not accrue until this disclosure by Springer of the real intent of the State and Ho-Chunk back in 2003.

Stockbridge is wrong. According to Stockbridge's own declarant, the 2003 Ho-Chunk amendment was a matter of public knowledge in the summer of 2003 and Stockbridge became aware of the amended ancillary facility provision at that time. (Dkt. 73 ¶ 3.) The plain language of that provision redefined "ancillary facility" in terms of the percentage of the lot devoted primarily to gaming, rather than the percentage of the facility's total revenue generated by gaming. Stockbridge was thus aware in 2003 of both the old and new "ancillary

facility" definitions in the Ho-Chunk compact, the language of its own compact, and any statements made to it by the State during its own 2003 compact negotiations.

In 2003, therefore, Stockbridge could have compared the State's alleged representations with the actual language of the 2003 Ho-Chunk amendment and easily discerned any misrepresentation by the State. Any claim of fraud arising out of the events alleged by Stockbridge thus accrued in 2003 and is time-barred today under the six-year statute of limitations for fraud in Wis. Stat. § 893.93(1)(b).

B. The proposed amended complaint does not plead fraud with the degree of particularity that is legally required

Leave to amend to add the new fraud claim should also be denied because the proposed amended complaint fails to plead that claim with particularity, as required by Fed. R. Civ. P. 9(b). Leave to amend a complaint may be denied where the proposed amendment does not satisfy the particularity requirement. *See Arazie v. Mullane*, 2 F.3d 1456, 1464–65 (7th Cir. 1993).

"Plaintiffs must provide more than conclusory allegations to satisfy rule 9(b)'s requirement that the circumstances of the fraud be pleaded with particularity." *Robin v. Arthur Young & Co.*, 915 F.2d 1120, 1127 (7th Cir. 1990). Fraud allegations generally must include the identity of the person making the misrepresentation, as well as the time, place, and content of the

misrepresentation, and the method by which it was communicated to the plaintiff. *Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 737 (7th Cir. 2014).[6] Although state law provides the substantive elements of fraud, the claim is still subject to the particularity requirements of Fed. R. Civ. P. 9(b), because it is being advanced in federal court. *Azimi v. Ford Motor Co.*, 977 F. Supp. 847, 852 (N.D. Ill. 1997).

Wisconsin law follows the textbook elements of fraud: (1) the defendant has falsely represented or failed to disclose a material fact; (2) the defendant knows or believes that the representation or disclosure is false or incomplete; (3) the defendant intends that the plaintiff should act on the basis of the representation or disclosure; (4) the plaintiff believes in the truth or completeness of the representation or disclosure; and (5) the plaintiff relies upon the representation or disclosure to his detriment. *See Metavante Corp. v. Emigrant Sav. Bank,* 619 F.3d 748, 766 (7th Cir. 2010) (*citing Kaloti Enters., Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶ 12, 283 Wis.2d 555, 699 N.W.2d 205). In addition, the plaintiff's reliance upon the alleged misrepresentation must be justifiable—that is, not negligent or unreasonable. *Jersild v. Aker*, 766 F. Supp.

[6] S*ee also Katz v. Household Int'l, Inc.*, 36 F.3d 670, 675 (7th Cir. 1994) (fraud allegations failed to identify any instance of fraudulent statements allegedly made by defendant); *Pirelli Armstrong Tire Corp. v. Walgreen Co.*, 631 F.3d 436, 441–42 (7th Cir. 2011) (plaintiff must describe "who, what, where, when and how" of fraud).

713, 719 (E.D. Wis. 1991) (*citing Ritchie v. Clappier*, 109 Wis. 2d 399, 404, 326 N.W.2d 131 (Ct. App. 1982)).

Here, Stockbridge fails to state with particularity the circumstances under which the State falsely represented or failed to disclose a material fact. Stockbridge alleges that Ho-Chunk and the State "concealed from Stockbridge 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" and that the State made "affirmative representations to Stockbridge . . . that the amendments would not alter the market protections in place that would otherwise restrict Ho-Chunk from operating the Wittenberg Casino in [such] a manner." (Dkt. 75-1 ¶ 99.) Those are conclusory allegations, unsupported by any specific facts about the circumstances of the alleged concealment or the alleged misrepresentations. The proposed amended complaint does not identify the persons making statements to Stockbridge, their authority to speak on behalf of the State, or the time, place, or actual content of any such statements.

Stockbridge also cannot argue that more specific facts are alleged in its briefs or other filings outside the proposed amended complaint. A plaintiff cannot cure a pleading deficiency by inserting the missing allegations in a brief or other document that is neither a complaint nor an amended complaint.

See Harrell v. United States, 13 F.3d 232, 236 (7th Cir. 1993). Accordingly, plaintiffs may not rely on affidavits to satisfy the requirement that fraud be pleaded with particularity. *Miller v. Gain Fin., Inc.*, 995 F.2d 706, 709 (7th Cir. 1993).

The proposed amended complaint also fails to allege with particularity how Stockbridge justifiably relied on representations made by the State. Stockbridge does allege that it "relied on such material misrepresentations of the State to the Tribe's detriment in negotiating its own class III gaming compact." (Dkt. 75-1 ¶ 101.) That conclusory allegation, however, is not supported by any particular allegations about the factual circumstances of the alleged reliance or its justifiability.

Stockbridge cannot plausibly allege that, when it was negotiating with the State in 2003, it actually believed that the definition of "ancillary facility" in the 2003 Ho-Chunk amendment was still based on the percentage of a facility's total revenue generated by gaming. The plain language of the 2003 Ho-Chunk amendment—of which Stockbridge was aware (Dkt. 73:2 ¶ 3)—defined "ancillary facility" in terms of the *percentage of the lot* devoted primarily to gaming. Any reliance on a belief that "ancillary facility" was still defined in terms of total revenue, rather than lot coverage, was not justifiable.

For all these reasons, the proposed amended complaint fails to plead fraud with particularity under Fed. R. Civ. P. 9(b) and the motion to amend should, therefore, be denied as to the new fraud claim.

V. The State is not equitably estopped from arguing that Stockbridge's claims are untimely.

Stockbridge also argues that, because the State and Ho-Chunk allegedly concealed their intentions in 2003 from Stockbridge until the date of the Springer declaration in May 2017, the State is now equitably estopped from arguing that Stockbridge's claims are untimely. (Dkt. 75–1 ¶ 102.) The argument lacks merit.

In order to make out a claim of equitable estoppel, Stockbridge must show that it reasonably relied on representations made by the State which induced it to delay bringing its claims until after the limitation period had expired. *See Wosinski v. Advance Cast Stone Co.*, 2017 WI App. 51, ¶ 40, 377 Wis. 2d 596, 901 N.W.2d 797; *State ex rel. Susedik v. Knutson*, 52 Wis.2d 593, 596–97 (1971). Here, no such showing can be made for two reasons.

First, with regard to all of Stockbridge's claims other than the new fraud claim—*i.e.* the claims in the original complaint and the new ancillary facility claim—Stockbridge cannot plausibly argue that any alleged fraud induced it to delay those claims until the alleged fraud was disclosed by the filing of the Springer declaration.

The claims in Stockbridge's original complaint were filed on April 19, 2017. (Dkt. 5.) That fact conclusively establishes that the alleged fraud—which Stockbridge says it did not discover until the Springer declaration was filed on May 18, 2017—did not prevent Stockbridge from filing those claims. The claims accrued in 2008 and the limitations period for them expired in 2014. (Dkt. 67:8–10.) Stockbridge has not alleged that it discovered any fraud between 2014, when the limitation period expired, and April 19, 2017, when the claims were actually filed. Absent any fraud that induced it to miss the 2014 deadline, the estoppel argument fails for all of the original claims.

The argument similarly fails for the new ancillary facility claim. It is true that Stockbridge did not assert that claim until after the Springer declaration had been filed, but that is not enough. The new ancillary facility claim does not arise from any facts that were not asserted in the original complaint. It advances a new legal interpretation of some of those facts (Dkt. 75-1 ¶ 88), and provides a new focus on the "imminent expansion of gaming activities on the Wittenberg parcel" (Dkt. 75-1 ¶¶ 89–90), but all of those facts—including the facts about the proposed expansion—were alleged in the original complaint and in Stockbridge's preliminary injunction motion (Dkt. 5; 7–10), which were filed a month before the Springer declaration.

Because Stockbridge has not alleged any fraud that induced it to delay bringing either its original claims or its new ancillary facility claim until after 2014, the equitable estoppel argument fails for those claims.

Second, the equitable estoppel argument also fails for the new fraud claim, because Stockbridge cannot establish the reasonable reliance element of estoppel.

Fraudulent intent is an element of a common-law fraud claim. Stockbridge has alleged that the State made statements to it in 2003 about the intended purpose of the 2003 Ho-Chunk amendment and that those statements concealed the fraudulent intent of the State and Ho-Chunk. It would have been unreasonable for Stockbridge to rely on such statements, however, when the plain language of the Ho-Chunk compact was a matter of public knowledge and was known to the Stockbridge by the time those statements allegedly were made. *Cf. Bankers Trust Co. v. Old Republic Ins. Co.*, 959 F.2d 677, 684 (7th Cir. 1992) (where information is a matter of public record, allegations of fraud may not be based on information and belief).

Stockbridge essentially argues that, because of the State's representations in 2003, Stockbridge did not realize until May 18, 2017, that the State and Ho-Chunk intended the 2003 Ho-Chunk amendment to mean what its plain language says: that the definition of "ancillary facility" now turns on lot coverage, not total facility revenue. That argument is implausible.

Stockbridge could not reasonably have relied on the alleged statements by the State in 2003, in the face of the plain and known language of the Ho-Chunk compact. Absent such reasonable reliance, the State is not equitably estopped from asserting the untimeliness of Stockbridge's new fraud claim.

VI. Stockbridge's allegation of a public nuisance is not a new claim and does not provide a reason for granting leave to amend the complaint.

Finally, the proposed amended complaint also alleges that the Wittenberg facility is an illegal gambling house and, therefore, an unlawful public nuisance. (Dkt. 75–1 ¶ 47.) Stockbridge does not purport to state a discrete public nuisance claim, but instead offers this allegation to argue that the Court erred in its earlier statute-of-limitations decision by not applying Wisconsin's limitations period for public nuisance claims. (Dkt. 76:8–9.) This is not a persuasive reason for granting leave to amend.

The public nuisance allegation does not include any new facts, but merely supplies a new legal gloss on facts previously alleged. Notice pleading under Fed. R. Civ. P. 8 requires only a plausible short and plain statement of the plaintiff's claim sufficient to notify defendants of the allegations against them. It does not require a precise legal theory or an exposition of legal argument. *See Higgs v. Carver*, 286 F.3d 437, 439 (7th Cir. 2002). The addition of unnecessary legal argument is not a sound reason for granting leave to amend a complaint.

Moreover, Stockbridge has already had multiple opportunities to address statute-of-limitations issues, but failed to raise this argument in any of them. Stockbridge addressed those issues in its reply brief in support of its preliminary injunction motion (Dkt. 39), in its supplemental brief on the application of the continuing violations doctrine (Dkt. 52), and in its response brief in opposition to Ho-Chunk's motion for judgment on the pleadings (Dkt. 58). None of those filings addressed this new public nuisance theory, and so this Court should decline to consider it now.

The Court has already considered extensive briefing and has resolved the statute-of-limitations issues as to the claims against Ho-Chunk. The question of whether that resolution of those issues also applies to the claims against the State is presently before the Court, but that narrow question does not invite reconsideration of the legal reasoning in the Court's October 25 decision. Nor has Stockbridge filed a motion for reconsideration of that decision. There is no sound reason to allow Stockbridge, at this late date, to supplement its complaint with an unnecessary legal theory that does not relate to a pending motion.

CONCLUSION

The State respectfully asks that Stockbridge's motion for leave to amend be denied, except to the extent that Count VII challenges only the legality of expanded gaming activities at Wittenberg that post-date the beginning of this litigation. If the Court grants leave to amend, in whole or in part, the State reserves the right to challenge any aspects of the amended complaint in a subsequent motion to dismiss, motion for judgment on the pleadings or motion for summary judgment.

Dated this 13th day of December, 2017.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

/s/ Thomas C. Bellavia
THOMAS C. BELLAVIA
Assistant Attorney General
State Bar #1030182

MAURA FJ WHELAN
Assistant Attorney General
State Bar #1027974

COLIN T. ROTH
Assistant Attorney General
State Bar #1103985

Attorneys for Defendants
State of Wisconsin and Scott Walker

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8690 (Bellavia)
(608) 266-3859 (Whelan)
(608) 264-6219 (Roth)
(608) 267-2223 (Fax)
bellaviatc@doj.state.wi.us
whelanmf@doj.state.wi.us
rothct@doj.state.wi.us

CERTIFICATE OF SERVICE

I certify that on December 13, 2017, I electronically filed the foregoing *State Defendants' Brief in Opposition to Plaintiff's Motion for Leave to File First Amended Complaint* with the clerk of court using the CM/ECF system, which will accomplish electronic notice and service for all participants who are registered CM/ECF users.

Dated this 13th day of December, 2017.

/s/ Thomas C. Bellavia
THOMAS C. BELLAVIA