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 OPPOSITION TO PLAINTIFF STOCKBRIDGE-MUNSEE COMMUNITY'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT

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INTRODUCTION

Having had its claims against the Ho-Chunk Nation ("Nation") dismissed, the Stockbridge-Munsee Community ("SMC") has asked the Court for a do-over. SMC seeks leave to file the "(Proposed) Stockbridge-Munsee Community First Amended Complaint for Enforcement of Class III Gaming Compact and Declaratory and Injunctive Relief" ("Proposed Amended Complaint") ECF #75-1. The Proposed Amended Complaint merely restates the dismissed claims as if the Court's October 25, 2017 Opinion and Order ("Order") had no effect, and adds three "new" claims, imminent violation, fraudulent concealment, and public nuisance, that are designed to toll the statute of limitations—to, in effect, overturn the Court's original decision, without the inconvenience of appealing the Court's Order. ECF #67.

SMC's motion to amend its complaint ("Motion") and its brief filed in support of the Motion ("SMC Brief") fails across the board. In this opposition ("Opposition"), the Nation demonstrates that SMC's claims are barred by collateral estoppel, claim preclusion, law of the case, judicial estoppel, and this Court's Order, which precludes the filing of an amended complaint pursuant to Rule 15 of the Federal Rules of Civil Procedure. The Nation also demonstrates that SMC has failed to successfully state a cause of action for fraudulent concealment and nuisance. Finally, the Nation demonstrates that SMC's new claims, common law torts, are barred by the Nation's sovereign immunity from suit. For these reasons, SMC's Motion must be denied.

STANDARD OF REVIEW

Although Federal Rule of Civil Procedure 15 "reflects a liberal attitude towards amendment of pleadings, courts in their sound discretion may deny a proposed amendment if the moving party has unduly delayed in filing the motion, if the opposing party would suffer undue

prejudice, or if the pleading is futile." *Soltys v. Costello*, 520 F.3d 737, 743 (7th Cir. 2008) (internal citations omitted). A proposed amendment is futile if it "merely restates the same facts using different language, or reasserts a claim previously determined," fails to state a valid theory of liability, or could not withstand a motion to dismiss. *Bower v. Jones*, 978 F.2d 1004, 1008 (7th Cir. 1992), *quoting Wakeen v. Hoffman House, Inc.*, 724 F.2d 1238, 1244 (7th Cir.1983); *see also Adams v. City of Indianapolis*, 742 F.3d 720, 734 (7th Cir. 2014). As explained below, SMC's Motion fails under these standards and therefore should be denied.

ARGUMENT

I.

SMC'S MOTION IS BARRED BY THE DOCTRINES OF COLLATERAL ESTOPPEL, CLAIM PRECLUSION, LAW OF THE CASE, AND JUDICIAL ESTOPPEL.

The Court should deny SMC's Motion because all of the causes of action against the Nation set forth therein are barred by the doctrines of collateral estoppel, claim preclusion, law of the case, and judicial estoppel. SMC's Proposed Amended Complaint simply realleges causes of action against the Nation that were squarely and conclusively adjudicated by this Court when it resolved the Nation's motion for judgment on the pleadings in favor of the Nation. SMC's Proposed Amended Complaint also attempts to add new claims that directly conflict with SMC's own position in its original complaint and claims that could have been, but were not, raised when SMC first filed suit. Thus, the causes of action set forth in SMC's proposed amended complaint—both the new and the old—are barred. SMC cannot, as a matter of law, assert the claims set forth in its proposed amended complaint against the Nation and denial of SMC's Motion is, therefore, required.

A. Collateral Estoppel Precludes SMC From Reasserting Claims That The Wittenberg Parcel Is Not Eligible For Class III Gaming And That The Facility Violates The Ancillary Facility Provisions Of The Nation's Compact.

In its Order, this Court determined that "[SMC's] claims regarding the gaming activities that the Ho-Chunk can engage in on the Wittenberg Parcel accrued when the state approved engaging in gaming activities there and the Ho-Chunk first began doing so. That occurred in 2008." ECF 67, pp. 7-8. The Court then concluded that, "under a normal application of the statute of limitations, the Stockbridge-Munsee must have brought their claims against the Ho-Chunk by 2014, and their claims are now time-barred." ECF 67, p. 8.

As a result of the determination that the statute of limitations forever barred all of SMC's claims against the Nation, the Court granted the Nation's motion for judgment on the pleadings and dismissed the Nation from this litigation. As more fully analyzed in Section II, below, the Order effected a dismissal, with prejudice, because when a court dismisses a claim or series of claims as time-barred by the statute of limitations, that dismissal is with prejudice. *Pavlovsky v. VanNatta*, 431 F.3d 1063, 1064 (7th Cir. 2005) (citing cases) ("*Pavlovsky*"); *see also*, Fed. R. Civ. P. 41 (b); *United States v. Ligas*, 549 F. 3d 497, 503, n.2 (7th Cir. 2008). Since "limitations statutes setting deadlines for bringing suit in federal court are not jurisdictional," a dismissal "based on a statute of limitations . . . is a dismissal on the merits . . . ." *Perez v. PBI Bank, Inc.*, 69 F. Supp. 3d 906, 909 (N.D. Ind. 2014), *quoting Miller v. Federal Deposit Ins. Corp.*, 738 F.3d 836, 843 (7th Cir. 2013). A dismissal on the merits is with prejudice. *Kamelgard v. Macura*, 585 F.3d 334, 339 (7th Cir. 2009). *See Smith v. City of Chicago*, 820 F.2d 916, 918 (7th Cir. 1987)["Dismissals based on laches or the running of a statute of limitations preclude a second action based on the same claim brought in the same system of courts." (internal citation omitted)]; *Geier v. Mo. Ethics Comm'n*, 715 F.3d 674, 677 (8th Cir. 2013)["Dismissing a complaint constitutes dismissal of the action . . . when circumstances otherwise indicate that no amendment is possible—e.g., when the limitations period has expired."].

In spite of the Court's determination that SMC's claims were untimely, SMC has, rather than seek appellate review of the Order or request that the Court reconsider, simply realleged two identical counts against the Nation and requested relief that is identical to the relief requested in its dismissed complaint. *See* Proposed Amended Complaint, ECF 75-1, pp. 13-14, Count IV "Ho-Chunk's Violation of its Own Class III Gaming Compact and IGRA's Indian Lands Restrictions"; Proposed Amended Complaint, ECF 75-1, pp. 14-16; Count VI "Ho-Chunk's Violation of the 'Ancillary Facility' Restrictions in its Compact"; and Proposed Amended Complaint, ECF 75-1, p. 20, "Request for Relief," ECF 75-1, ¶¶ 4-5, 8.[1] These claims and requests for relief are identical to those that were dismissed by this Court on the grounds that the statute of limitations has expired and, therefore, the doctrine of collateral estoppel prevents SMC from relitigating the limitations issue on its claims by way of its proposed amended complaint.

"Under the doctrine of collateral estoppel (also known as issue preclusion), 'once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.'" *Carter v. Commissioner*, 746 F.3d 318, 321 (7th Cir. 2014), *quoting Montana v. United States*, 440 U.S. 147, 153 (1979). Collateral estoppel applies when the "party against whom the issue had been resolved must have had, first, a 'full and fair opportunity' to litigate the issue in the previous suit ... and, second, a meaningful opportunity to appeal the resolution of the issue." *DeGuelle v. Camilli*, 724 F.3d 933, 935 (7th Cir. 2013)(internal citations omitted). *See Crowder v. Lash*, 687 F.2d 996, 1009 (7th Cir. 1982). It is, therefore, "[a] fundamental precept of common-law adjudication . . . that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit

[1] The "counts" in SMC's original complaint and its proposed amended complaint are misnumbered in that "Count V" is skipped in both. The counts referred to herein are made to the numbering assigned to them by SMC.

between the same parties or their privies . . . .'" *Montana v. United States*, 440 U.S. at 153, *quoting Southern Pacific R. Co*. v. *United States*, 168 U.S. 1, 48-49 (1897).

Application of the doctrine of collateral estoppel "is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions." *Montana v. United States*, 440 U.S. at 153. "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id*. at 154. Accordingly, "when the conditions for applying collateral estoppel are satisfied, 'the doctrine promotes important goals: it allows a party only one opportunity to litigate an issue thereby conserving the time and resources of the parties and the court; promotes the finality of judgments; preserves the integrity of the judicial system by eliminating inconsistent results; and ensures that a party not be able to relitigate issues already decided against it in prior litigation.'" *Deguelle v. Camilli*, 724 F.3d at 936, *quoting Johnson v. Watkins*, 101 F.3d 792, 795 (2d Cir. 1996).

The Court, in its Order, unequivocally determined that SMC's claims regarding the legal status of the Wittenberg Parcel and the ancillary facility provisions of the Nation's compact ("Compact") were barred by the applicable statutes of limitation—which constitutes a decision on the merits and, by necessity, is with prejudice.[2] SMC is, therefore, collaterally estopped from relitigating that issue here. SMC had a full and fair opportunity to litigate the issue in its first bite at the apple. The statute of limitations issue was distinctly put in issue and directly determined by this Court; allowing SMC to relitigate whether its claims are barred by the statute of limitations[3]

[2] This issue is more fully discussed in Section II, below.

[3] Collateral estoppel also prohibits SMC from relitigating whether its claims are barred by the statute of limitations in its briefing ordered by the Court on the limitations issues with respect to SMC claims against the State of Wisconsin ("State").

would undermine the central purpose for which civil courts have been established—the conclusive resolution of disputes within their jurisdictions. SMC must not be permitted to recontest matters that it had a full and fair opportunity to litigate previously. SMC's claims with respect to whether the Wittenberg Parcel is eligible for gaming under the IGRA (Count IV) and whether the facility violates the ancillary facility provisions of the Compact (Count VI) are, therefore, barred.

B. The Doctrine Of Claim Preclusion Bars SMC's Reasserted Causes Of Action As Well As SMC's "New" Causes Of Action.

"'Claim preclusion' refers to the doctrine that bars litigation of claims and issues that were raised or **could have been raised** in a prior action between the same parties or their privies that has been resolved by final judgment by a court of competent jurisdiction." *Jones v. Alton*, 757 F.2d 878, 879 n.1 (7th Cir. 1985) (emphasis added). "This is the law of merger (the extinguishment of a claim in a judgment for plaintiff) and bar (the extinguishment of a claim in a judgment for defendant)." *Id*. Claim preclusion "applies to bar a second suit in federal court when there exists: (1) an identity of the causes of actions; (2) an identity of the parties or their privies; and (3) a final judgment on the merits." *Kratville v. Runyon*, 90 F.3d 195, 197 (7th Cir. 1996). And, as discussed above, a determination that a cause of action is barred by the applicable statute of limitations is a dismissal on the merits with prejudice. *Pavlovsky v. VanNatta*, 431 F.3d at 1064 (7th Cir. 2005).

"A claim is deemed to have 'identity' with a previously litigated matter if it is based on the same, or nearly the same, factual allegations arising from the same transaction or occurrence." *Kratville v. Runyon*, 90 F.3d at 198. *See Matrix IV, Inc. v. Am. Nat'l Bank & Tr. Co.*, 649 F.3d 539, 547 (7th Cir. 2011)["The second element—whether an 'identity of the cause of action' exists—depends on whether the claims arise out of the same set of operative facts or

the same transaction."] "With respect to the final element, . . . the traditional rule is that a judgment on the merits is one which is based on legal rights as distinguished from mere matters of practice, procedure, jurisdiction, or form." *Bernstein v. Bankert*, 733 F.3d 190, 226 (7th Cir. 2012)(internal citations omitted).

The test established to determine whether a claim is precluded "is an outgrowth of the rule that a party must allege in one proceeding all claims and/or counterclaims for relief arising out of a single occurrence, or be precluded from pursuing those claims in the future." *Id*. at 227. *See* Fed. R. Civ. P. Rule 13(a). Thus, "[w]hen an issue might have been litigated in a former suit but was not, and the former suit precludes the litigation of that issue in a present suit." *Leal v. Krajewski*, 803 F.2d 332, 334 (7th Cir. 1986). *See Alexander v. Chi. Park Dist.*, 773 F.2d 850, 853 n.1 (7th Cir. 1985)["Claim preclusion bars relitigation of claims or issues which were or could have been raised in a prior suit on the merits between the same parties or their privies."]. The justification for precluding claims that were or could have been raised in a prior action "operates to conserve judicial resources and promote finality . . . ." *Bernstein v. Bankert*, 733 F.3d at 225.

Here, the doctrine of claim preclusion bars all of the causes of action set forth in SMC's proposed amended complaint against the Nation. First, with respect to Count's IV and VI, SMC pled the same claims against the Nation in its original complaint and this Court found that the claims were barred by the applicable statute of limitations. That determination is a dismissal on the merits with prejudice and SMC has not appealed or otherwise requested that the Court reconsider its Order. Thus, SMC's re-pled causes of action against the Nation are barred by claim preclusion.

The doctrine of claim preclusion also bars all of SMC's new causes of action against the Nation—imminent violation of the Nation's Compact, public nuisance, and fraudulent concealment—because these claims could have been, but were not, raised in SMC's original complaint. First, with respect to SMC's imminent violation and public nuisance claims, SMC, at the time it filed its original complaint, knew or should have known all of the facts supporting these claims, and SMC nevertheless failed to assert them. Claim preclusion bars SMC from raising these claims now.

With respect to SMC's fraudulent concealment claim, the doctrine of claim preclusion also bars that claim because SMC has known since 2003 (at the time of publication of the Nation's Compact amendment), or at the latest 2008 (at the time gaming began at the Wittenberg Facility), that the Nation and the State, through the amended Compact, intended to permit the Nation to operate an ancillary facility on the Wittenberg Parcel under the terms provided for in the plain language of the ancillary facility provision in the Nation's Compact; that is, where fifty percent or more of the **lot coverage** of the parcel is used for non-gaming purposes. SMC's specious assertion that it only recently "discovered" the alleged facts in support of this claim is unavailing. The plain language of the Nation's Compact, and the unambiguous actions of the Nation (opening the facility in 2008) and the State (not taking any action to stop the Nation's gaming on the Wittenberg Parcel), are sufficient to put SMC on notice of the "facts" alleged in support of its fraudulent concealment claims. Accordingly, SMC had the opportunity to raise these claims in its original complaint, it failed to do so, and claim preclusion now bars the claims.

C. The Doctrine Of The Law Of The Case Prohibits SMC From Relitigating The Claims Raised In SMC's Proposed Amended Complaint.

"Under the doctrine of law of the case, the general maxim is that, 'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case.'" *Payne v. Churchich*, 161 F.3d 1030, 1037 n.8 (7th Cir. 1998) ("*Payne*"), *quoting Arizona v. California*, 460 U.S. 605, 618 (1983). Thus, courts treat decisions on legal issues made at one stage of a case as "precedent to be followed in successive stages of the same litigation." *Payne*, 161 F.3d at 1038.[4]

The law of the case doctrine recognizes that, because litigants have a right to expect consistency, decisions on legal issues are binding in successive stages of litigation "unless some new development, such as a new appellate decision," convinces a judge that the prior decision was incorrect. *Galvan v. Norberg*, 678 F.3d 581, 587 (7th Cir. 2012), *quoting Fujisawa Pharm. Co.* v. *Kapoor*, 115 F.3d 1332, 1339 (7th Cir. 1997). "Emphasizing the practical policies at the foundation of the doctrine, one crafted with the course of ordinary litigation in mind, the Supreme Court pointed out in *Arizona* [*v. California*, 460 U.S. at 619] that 'a fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive.'" *Payne*, 161 F.3d at 1037 n.8.

The presumption created by the law of the case "is not to be lightly disregarded," *Shakman v. Dunne*, 829 F.2d 1387, 1393 (7th Cir. 1987), and the doctrine "should be applied unless unusual circumstances or a compelling reason render it inapplicable." *Parts & Elec. Motors, Inc. v. Sterling Elec.*, 866 F.2d 228, 231 (7th Cir. 1988). *See Evans v. City of Chi.*, 873

[4] Cases applying the law of the case doctrine arise in two distinct circumstances. The first circumstance involves matters which have been raised on appeal and are binding on later stages of a case, including later appeals. In such circumstances, the trial court is bound to proceed in accordance with the mandate and the law of the case as established by the appellate decision. *See, e.g., Goldberg v. Maloney*, 692 F.3d 534, 538 (6th Cir. 2012). The other species of the law of the case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Pepper v. United States*, 562 U.S. 476, 506 (2011), quoting *Arizona v. California*, 460 U.S. 605, 618 (1983). In contrast to the mandate rule, this aspect of the law of the case doctrine does not necessarily limit the court's power, but directs its discretion. *Pepper*, 562 U.S. at 506. Thus, under law of the case doctrine, courts are directed to follow decisions made in a prior holding unless "convinced that it is clearly erroneous and would work a manifest injustice." *Arizona*, 460 U.S. at 618 n.8.

F.2d 1007, 1014 (7th Cir. 1989)[recognizing that the law of the case controls absent "exceptional circumstances"]. "These circumstances include (1) substantial new evidence introduced after the first review, (2) a decision of the Supreme Court after the first review that is inconsistent with the decision on that review, and (3) a conviction on the part of the second reviewing court that the decision of the first was clearly erroneous." *Parts & Elec. Motors, Inc.*, 866 F.2d at 231, *quoting Chi. & N. W Transp. Co. v. United States*, 574 F.2d 926, 930 (7th Cir. 1978)).

Here, the law of the case was established by the Court's Order in which this Court determined that the statute of limitations barred all of SMC's claims against the Nation: "The Stockbridge-Munsee's claims regarding the gaming activities that the Ho-Chunk can engage in on the Wittenberg Parcel accrued when the state approved engaging in gaming activities there and the Ho-Chunk first began doing so." Order, ECF #67, pp. 7-8. There, the Court definitively concluded that, "under a normal application of the statute of limitations, the Stockbridge-Munsee must have brought their claims against the Ho-Chunk by 2014, and their claims are now time-barred." *Id.* at p. 8. Notably, the Court also found that SMC has "known of the facts supporting each element of their claims since 2008." *Id.* at p. 9.

The law of the case doctrine binds the parties in this action to the legal determinations made by the Court in its Order. SMC is not, therefore, permitted to reallege its old causes of action against the Nation, as those causes of action were conclusively determined to be outside of the applicable statutes of limitation.[5] Likewise, the law of the case doctrine additionally prevents SMC from raising its "imminent violation" claims, as this Court previously determined that all of the material facts supporting each element of SMC's claims were known to SMC since 2008.

[5] Despite SMC's attempt to relitigate the statute of limitations issue in its Court-ordered briefing on the applicability of the statute of limitations on its claims against the State, SMC is bound by this Court's determination with respect to those claims, as well.

With respect to SMC's request that leave be granted to allow SMC to "clarify" that SMC is alleging that the Wittenberg Facility is a public nuisance, the law of the case doctrine also prevents SMC from litigating the public nuisance issue twice. SMC Brief, ECF #76, p. 8. SMC argues that it "believes that this Court, in its inquiry to find the most analogous Wisconsin statute of limitations, . . . should have determined that the Wisconsin statute of limitations applicable to claims of public nuisance for illegal gaming is the most analogous statute of limitations to the circumstances here." *Id*. at p. 9. This is precisely the argument that SMC made its in opposition to the Nation's motion for judgment on the pleadings and was specifically rejected by this Court. SMC cannot relitigate this issue by way of its motion to amend its complaint. Thus, SMC's public nuisance claim fails as well based on the doctrines of issue preclusion and law of the case.

Finally, no unusual circumstances exist that would weigh in favor of a finding that the law of the case doctrine should not be followed here. There has been no new evidence introduced since this Court issued its Order; no higher court has issued a decision that is inconsistent with the Order; and there is no support for the contention that the Order was clearly erroneous. Thus, the law of the case doctrine bars the claims raised in SMC's proposed amended complaint and the Court should, therefore, deny SMC's Motion.

D. The Doctrine Of Judicial Estoppel Prohibits SMC From Pleading In The Alternative That The Wittenberg Facility Is Not Now, But Will Be, In Violation Of The Ancillary Facility Provision Of The Nation's Compact.

The "well established" doctrine of judicial estoppel "acts 'to protect the integrity of the judicial process . . . by prohibiting parties from deliberately changing positions according to the exigencies of the moment.'" *Jarrard v. CDI Telecomms., Inc.*, 408 F.3d 905, 914 (7th Cir. 2005)("*Jarrard*"), *quoting New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001). "Judicial estoppel is an equitable doctrine to be applied flexibly with an eye toward protecting the integrity of the judicial process, *see Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 660 (7th

Cir. 2004) (citations omitted), and it serves to 'reduce fraud in the legal process by forcing a modicum of consistency on a repeating litigant.' *Ladd v. ITT Corp.*, 148 F.3d 753, 756 (7th Cir. 1998)." *Jarrard*, 408 F.3d at 914. The doctrine of judicial estoppel "is intended to protect the courts from the litigatory shenanigans that would result if parties could, without limitation or consequence, swap litigation positions like hats in successive cases based on simple expediency or self-benefit." *Id.* at 915. Judicial estoppel is, therefore, intended to "shield[] the courts from being the instrument of such misconduct." *Id. See In re Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990)["Judicial estoppel is a doctrine intended to prevent the perversion of the judicial process."]

"Courts have observed that 'the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle[.]'" *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001), *quoting Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982).

> Nevertheless, several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be clearly inconsistent with its earlier position. . . . Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. . . . A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

New Hampshire v. Maine, 532 U.S. at 750-51 (internal citations omitted).

In its original complaint, SMC expressly alleged that the Nation's "**present** gaming activities on the Wittenberg Parcel violate the size restriction for an Ancillary Facility . . ." Complaint, ECF 5, p. 14, ¶ 78 (emphasis added). SMC's original request for relief asked the Court to declare that the Nation "**is in** violation of Section XVI(E) of the Ho-Chunk Compact,

because **it is** operating the Wittenberg Casino outside of the restrictions placed on Ancillary Facilities." *Id*. at p. 15, ¶ 5 (emphasis added). Thus, at the time of, and prior to, the filing of its original complaint, SMC's legal position has been that the Nation was already in violation of the ancillary facility provisions of the Nation's Compact, and the Court relied upon that representation in its Order.

Now, in its Proposed Amended Complaint, SMC seeks to reverse that position by asserting, in the alternative, that the Nation was not yet violating its Compact prior to SMC filing suit. Rather, SMC now claims that "Ho-Chunk's imminent expansion of gaming activities on the Wittenberg Parcel will cause the Wittenberg Parcel to be operated in a manner" that violates the Nation's Compact. Proposed Amended Complaint, ECF 75-1, p. 17, ¶ 89.

SMC, following dismissal of its original complaint, now seeks to flip its position on a fundamental issue—whether the Nation was or is in violation of the ancillary facility provision—in order to raise a new claim against the Nation that is primarily designed to justify a request that the parties engage in discovery regarding the Wittenberg Facility's finances. *See* Motion for Leave, ECF 75, p. 8 ["Discovery is needed to determine when Ho-Chunk first violated the 'Ancillary Facility' provisions of the Ho-Chunk Compact."]. This is the type of litigious flip-flopping that the doctrine of judicial estoppel is designed to prohibit. SMC has deliberately swapped litigation positions in order to meet the exigencies of the moment. SMC cannot be allowed to change its allegations of fact now, by way of its Proposed Amended Complaint. If permitted to do so, SMC would derive an unfair advantage and impose an unfair detriment on the Nation if not estopped. Accordingly, SMC should not be granted leave to amend its complaint by adding Count VII, "Ho-Chunk's Imminent Violation of the 'Ancillary Facility' Restrictions in its Compact." Proposed Amended Complaint, ECF #75-1, pp. 16-17, ¶¶ 84-92.

II.

RULE 15 OF THE FED. R. CIV. PROC. CANNOT BE USED TO REVIVE A TIME-BARRED ACTION ALREADY DISMISSED BY THE COURT.

SMC has moved for leave to file an amended complaint. *See* ECF #75, #76. Among other things, SMC's Proposed Amended Complaint repleads dismissed claims and adds additional allegations and claims arising from the same nucleus of operative facts. *See* ECF #75-1. The Court, however, has already dismissed the Nation from the case with prejudice. The Court should thus deny SMC's motion as it relates to the Nation.

Early in 2017, SMC commenced this case against the Nation, the State, and Governor Scott Walker. Compl., ECF #5. The Nation then moved for judgment on the pleadings. ECF #56. The Court granted that motion, ruling that SMC's claims were time-barred by the applicable statute of limitations. Order, ECF #67. In its opinion, the Court stated that "[t]he Stockbridge-Munsee's claims against the Ho-Chunk are untimely, so the court will grant the Ho-Chunk's motion for judgment on the pleadings and dismiss them from the case." *Id.* at p. 11. The Court concluded: "IT IS ORDERED that: . . . Defendant the Ho-Chunk Nation is DISMISSED from this lawsuit." *Id.*

The Court's Order dismissing the Nation from the lawsuit precludes SMC from seeking leave to amend under Rule 15. Two principles compel this conclusion.

First, the Court dismissed all causes of action set forth in the complaint against the Nation with prejudice, and the Court's Order dismissed the Nation from the **lawsuit**. The Order effected a dismissal of the causes of action against the Nation with prejudice. As stated above, when a court dismisses a claim or series of claims as time-barred by the statute of limitations, that dismissal is with prejudice. *Pavlovsky*, 431 F.3d at 1064; *see also* Fed. R. Civ. P. 41(b); *Ligas*, 549 F.3d at 503 n.2. Here, the Court dismissed the SMC's claims against the Nation as time-

barred. That dismissal was therefore, on the merits and with prejudice. *Kamelgard v. Macura*, 585 F.3d 334, 339 (7th Cir. 2009).

Dismissal of a case—not just a complaint—precludes granting leave to amend. *Geier v. Mo. Ethics Comm'n*, 715 F.3d 674, 677 (8th Cir. 2013); *Ritacca v. Storz Med., A.G.*, 298 F.R.D. 566, 568 (N.D. Ill. 2014). Indeed, "[g]ranting . . . a motion for leave to amend is inappropriate" if the court has indicated "that dismissal of the complaint also constitutes dismissal of the action . . . ." *Geier*, 715 F.3d at 677 (internal quotation omitted).

The Court's Order dismissed the Nation from SMC's lawsuit. As mentioned above, the law draws a distinction between dismissal of a complaint and dismissal of a case. Here, the Court's Order indicates that SMC's lawsuit against the Nation—not merely its complaint with respect to the Nation—was dismissed. The language of the Court's Order expressly says so. The Court stated that it "will grant the Ho-Chunk's motion for judgment on the pleadings and dismiss them **from the case**" and, on the same page, that "IT IS ORDERED that: . . . Defendant the Ho-Chunk Nation is DISMISSED **from this lawsuit**." Order, ECF #67, p. 11 (Emphases added). The reason for dismissal, moreover, is important in determining whether that dismissal is of the complaint or of the case. Dismissal on statute of limitations grounds is a dismissal of a case. "Dismissing a complaint constitutes dismissal of the action when it states or clearly indicates that no amendment is possible—e.g., when the complaint is dismissed with prejudice or with express denial of leave to amend—or when circumstances otherwise indicate that no amendment is possible—*e.g.*, **when the limitations period has expired**." *Geier*, 715 F.3d at 677 (Internal quotation omitted) (Emphasis added). *See also Smith v. City of Chicago*, 820 F.2d 916, 918 (7th Cir. 1987)["Dismissals based on laches or the running of a statute of limitations preclude a second action based on the same claim brought in the same system of courts." (internal citation

omitted]. Here, again, the Court's Order dismissed SMC's claims against the Nation as time-barred.

Second, a motion for leave to amend is precluded when, like SMC's proposed pleading here, the amended complaint falls within the ambit of the dismissed complaint. *See Ross v. City of Waukegan*, 5 F.3d 1084, 1087-88 (7th Cir. 1993). The only new allegation in the Proposed Amended Complaint is the unfounded and ridiculous "fraudulent concealment" claim, which, as explained above and below, fails as a matter of law and is futile. What is more, SMC baldly asserts that its eleventh-hour "fraudulent concealment" claim somehow saves the causes of action already dismissed by the Court as time-barred, even though it had the Springer Declaration (*i.e.*, SMC's primary "evidence" in support of its fraudulent concealment claim) for over six months before seeking leave to amend its original complaint, and has never sought reconsideration of the Court's Order.

Because the Court's Order dismissed the original complaint against the Nation with prejudice and dismissed the Nation from this lawsuit, SMC cannot use Rule 15 to reinstate an action against the Nation—and certainly not one that contains claims asserted in the original complaint. SMC's only legitimate course of action would be an eventual appeal of the Court's judgment of dismissal.[6] Because Rule 15 of the Fed. R. Civ. P. provides no relief here, the Court should deny SMC's motion for leave to amend on this procedural basis alone.

III.

THE PROPOSED AMENDED COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR FRAUDULENT CONCEALMENT.

Count VIII of the Proposed Amended Complaint is labeled: "The State's and Ho-Chunk's Fraudulent Concealment of Intent to Create Amendments to the Ho-Chunk Compact that

[6] Under the present circumstances, a motion for reconsideration of the Court's Order by SMC now would be unreasonably untimely.

Deprive Stockbridge of the Intended Benefits of Its Own Compact." Count VIII makes reference to an alleged conspiracy between the State and the Nation, violation of an alleged duty on the part of the Nation and the State to act with good faith and fair dealing toward SMC, and fraudulent concealment. It is difficult to determine whether this is intended to be one cause of action or three, but, because SMC has labeled the claim as one for fraudulent concealment, the Nation will address the claim as one based on that theory.[7]

In order to state a cause of action for fraudulent concealment against the Nation, SMC must allege facts that would demonstrate the existence of three elements: (1) failure to disclose a material fact that the Nation had a duty to disclose; (2) intent to defraud on the part of the Nation; and (3) reliance upon the representation by SMC that resulted in damage to SMC. *Staudt v. Artifex Ltd.*, 16 F. Supp. 2d 1023, 1030 (E.D. Wis. 1998); *Studio & Ptnrs., s.r.l. v. KI*, 2006 U.S. Dist. LEXIS 93497, *8-9 (E.D. Wis. 2006); *Ollerman v. O'Rourke Co., Inc.*, 94 Wis. 2d 17, 26, 43 n.26 (1980). SMC fails to properly allege any of these elements.

A. The Nation Did Not Conceal The Inclusion Of The Modified Definition Of "Ancillary Facility" In The Nation's Second Amendment Or The Potential Impact Of That Definition.

First, the change in the definition of "Ancillary Facility" in the Nation's Second Amendment was never concealed. The Second Amendment to the Nation's Compact was executed on April 25, 2003. Affidavit of President Shannon Holsey in Support of Motion for Preliminary Injunction, ECF #9-13, Exhibit 13. Notice of the Secretary of the Interior's approval of the Second Amendment was published in the Federal Register on July 3, 2003. *See* https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc1-024621.pdf. That constituted notice to the world of the existence and contents of the Second Amendment. 44 U.S.C. § 1507.

[7] It is worth noting that, to the extent that SMC's passing reference to a conspiracy is considered, such a claim would be barred, even if pled, by the doctrines of claim preclusion, collateral estoppel, and judicial estoppel, as well as by the Nation's sovereign immunity from suit.

As of July 3, 2003, SMC knew or should have known of the modified definition of "Ancillary Facility." In fact, SMC specifically admits that it knew of the provision during the course of SMC's negotiations of its compact amendment: "In the Summer of 2003, after the Ho-Chunk Compact was made public and SMC became aware of the ancillary facility provision, SMC and the State through Marc Marotta and Mike McClure met at SMC to finalize negotiations on SMC's compact." Declaration of Terrie Terrio in Support of Court Ordered Briefing on Timeliness of Claims Against Defendants State of Wisconsin and Scott Walker ("Terrio Declaration"), ECF #73, p. 2, ¶ 3.

Moreover, the assertion that the Nation and the State concealed their decision to modify the definition of "Ancillary Facility" **during the negotiation** of the Second Amendment is inherently meritless, if not absurd. The modified definition did not become part of the Nation's Compact until the Second Amendment was executed. Before agreement was reached on the Second Amendment, no modification had been made in the definition of "Ancillary Facility," and there was nothing to conceal. SMC's claim is, in effect, that the Nation had a duty to inform SMC of provisions the Nation and the State were considering, before they were actually agreed to. SMC's claim equates confidential negotiation with concealment. SMC's interpretation cannot be taken seriously.

B. The Nation Had No Duty To Disclose The Negotiation Of The Modified Definition.

The Nation also had no duty to disclose to SMC the matters addressed in the course of its negotiation of the Second Amendment with the State in 2003. SMC attempts to conjure a duty by alleging that the Nation had a duty of good faith and fair dealing to SMC arising from the Nation's Compact:

> 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 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.

Proposed Amended Complaint, ECF #75-1, p. 18, ¶ 97.

SMC does not identify any provision of the Nation's Compact that granted to SMC any rights as a third party beneficiary of the Nation's Compact or that imposed a duty of good faith and fair dealing on the Nation with regard to SMC. In fact, a review of the provisions of the Nation's Original Compact and the First Amendment to the Nation's Compact,[8] which constituted the Nation's Compact at the time that the Second Amendment to the Nation's Compact was being negotiated, reveal that the Nation's Compact did not include a provision explicitly imposing a duty of good faith and fair dealing on the Nation with regard to anyone, even the State.[9] The only reference to "good faith" in the Nation's Original Compact relates to the State's obligation to negotiate a successor compact in good faith. Original Compact, ECF #9-10, p. 41, Sec. XXVI.E. The only two references to "good faith" in the First Amendment are also unrelated to the duty alleged by SMC. The first, in paragraph 1, relates to good faith negotiation of renewal of the Compact. First Amendment, EFC #9-12, p. 1. The second, in paragraph 5, which amends Section XXVII.B, relates to good faith negotiation of whether a new site can be enumerated as the Nation's fourth gaming site. *Id*. Neither the Original Compact nor the First Amendment makes any reference to "fair dealing." And neither makes any reference to, let alone imposes upon the Nation, any obligations to any third party under the Compact. SMC's assertion that the Nation owed SMC a duty of good faith and fair dealing in negotiating with the State is demonstrably false.

[8] The Nation's Original Compact was filed with the Court as Exhibit 10 to the Affidavit of President Shannon Holsey in Support of Motion for Preliminary Injunction, ECF #9-10, and the First Amendment to the Nation's Compact as Exhibit 12. ECF #9-12.

[9] Likewise, no provision of the IGRA imposes such duty upon the Nation.

In light of the fact that the Nation did not conceal the modification of the definition of "Ancillary Facility," and, in the absence of a duty to disclose on the part of the Nation applicable to SMC's claim of fraudulent concealment, SMC has failed to allege the first element of fraudulent concealment.

C. SMC Failed To Support Its Claim That The Nation Had Fraudulent Intent.

Putting aside the obvious fact that, in the absence of any concealment of the modification of the definition of "Ancillary Facility," there can be no basis for concluding that the concealment was intended to defraud SMC, the fact that the Second Amendment was published in the Federal Register eliminates any basis for concluding that the Nation intended to defraud SMC. The terms of the Second Amendment were available to SMC, and the implications of the terms of the Second Amendment, if any, could be understood by anyone who read the Second Amendment. Even if SMC's transparently unsupportable assertion that, during the course of compact negotiations, the Nation and the State intended to deprive SMC of its rights under its compact, is accepted, the July 3, 2003 Federal Register notice of the approval of the Second Amendment to the Nation's Compact reveals that SMC's allegation that "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 negotiation of the 2003 amendments until May 25, 2017," SMC Brief, p. 4, is patently false.

In an effort to create a basis for claiming that the Nation intended to defraud SMC, SMC includes in the Proposed Amended Complaint intentionally obscure allegations designed to give the impression that the Nation's representatives made false representations to SMC without actually alleging that the Nation's representatives did so. A good example of this is Paragraph 99 of the Proposed Amended Complaint which states:

> Indeed, **Ho-Chunk and the State 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 Casino in a manner where more than fifty percent (50%) of the revenue is generated from gaming businesses.

(Emphasis added.)

However, Paragraph 100 states, "Stockbridge relied on such material misrepresentations **of the State** to the Tribe's detriment in negotiating its own class III gaming compact." (Emphasis added.) Read together, the two paragraphs do not affirmatively allege that the Nation made any affirmative representations to SMC, only that the State did so. But the two paragraphs are clearly intended to give the impression that the Nation made a material representation intended to defraud SMC.[10] A careful reading of the Proposed Amended Complaint, thus, reveals that SMC does not allege any facts demonstrating the Nation made any specific representation to SMC or intended to defraud SMC in any way.

Nevertheless, SMC identifies two alleged facts that, according to SMC, reveal that the Nation intended to conceal the existence and impact of the modified definition of "ancillary facility." The first, based on the Declaration of Thomas J. Springer in Opposition to Plaintiff's Motion for Preliminary Injunction ("Springer Declaration"), ECF #3-1, is that the Nation intentionally negotiated for the revised definition of "Ancillary Facility." SMC Brief, ECF #76, p. 5. The second is the assertion that representatives of the Nation made statements to the media that were designed to defraud SMC. Terrio Declaration, ECF #73, p. 3, ¶4.

With regard to the Springer Declaration, SMC argues:

[10] In its Motion, SMC attempts this same pleading sleight of hand. While arguing that the Springer Declaration reveals fraudulent concealment, SMC asserts only that State officials made misleading statements to SMC: "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." SMC's Brief, ECF #76, p. 6 (emphasis added).

> 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".

SMC's Brief, ECF #76, p. 5.

Nothing in the Springer Declaration supports the argument that the Nation and its negotiators had any intent to conceal anything from SMC or to defraud SMC. The Springer Declaration reveals that the Nation intended to negotiate a new definition of "Ancillary Facility" that was more advantageous to the Nation than the previous definition in the Nation's Compact and that the Nation's negotiators were successful in doing so. That does not constitute fraud, it constitutes effective negotiation. In light of the fact that SMC negotiated an amendment to its compact after the Second Amendment to the Nation's Compact was executed and approved, any disadvantage SMC suffered is simply a result of its negotiators' failure to protect SMC's interests.

SMC's citation to alleged statements by the Nation's representatives in the Terrio Declaration also fails to reveal an intent to defraud. The Terrio Declaration cites to a newspaper article that summarizes a statement allegedly made by an attorney representing the Nation: "The Ho-Chunk Nation plans to enlarge its truck stop convenience stores in Tomah and Wittenberg to make room for new gaming operations by spring, tribal attorney William Boulware said, though tribal officials haven't decided how big to make them or how many games to offer." Terrio Declaration, ECF #73, p. 3, ¶4, Ex. A. Terrio also cites to a summary of a statement by tribal spokesman Ed Littlejohn: "Ho-Chunk spokesman Ed Littlejohn said no gambling of any kind was currently being offered at any of the tribes' five mini-marts. Besides the Tomah and

Wittenberg expansion next year, he said the tribe hasn't decided whether to add casino games at other sites." *Id.*

These quoted statements provide no support for SMC's position—and they are not even direct quotes, so the accuracy of the summary by the reporter is open to question.[11] Neither statement was made to, or with regard to, SMC. Neither statement makes reference to the Second Amendment to the Nation's Compact. Neither of the statements is misleading in any way. They are consistent with the plain wording of the modified definition of "Ancillary Facility," and they reveal the Nation's intention to conduct gaming at the Wittenberg Facility.

SMC also alleges that its damages arise from violation of the market protection provision set forth in Section XXXII.B of its compact. Proposed Amended Complaint, ECF #75-1, p. 6, ¶ 22; p. 11, ¶ 55; p. 19, ¶ 1. In agreeing to the modified definition of "Ancillary Facility" in the Second Amendment to the Nation's Compact, however, the Nation could not have had any intention to violate SMC's rights under Section XXXII.B, because that provision did not exist at the time that the Second Amendment to the Nation's Compact was being negotiated. *Cf.* Second Amendment to the Nation's Compact, ECF #9-13, p. 13, and the second amendment to SMC's Compact, ECF # 9-3, p. 25.

Finally, the Nation could not have intended to violate SMC's rights under Section XXXII.B, because that section pertains to the loss of revenue arising from the Governor of Wisconsin's concurrence in a two part determination to take land into trust for a tribe within 70 miles of SMC's gaming facility pursuant to 25 U.S.C. § 2719(b)(1)(A). Section XXXII.B does not apply to the gaming conducted by the Nation at Wittenberg, because the Wittenberg Parcel was not taken into trust as a result of a two part determination under 2719(b)(1)(A) of the IGRA.

[11] They also constitute inadmissible hearsay. Fed. R. Evid. 801, 802.

(And SMC does not allege that it was taken into trust pursuant to that Section.[12]) Thus, pursuant to SMC's own argument, the Nation and the State's alleged fraudulent concealment could not have violated Section XXXII.B, or been intended to violate Section XXXII.B, because the rights protected by Section XXXII.B are not implicated by the Nation's gaming on the Wittenberg Parcel.

D. SMC Did Not Rely On The Alleged Concealment.

In SMC's Brief and its supporting declarations and exhibits, SMC reveals clearly that it did not rely on a misunderstanding of the modified definition of "Ancillary Facility" arising from the concealment of the actual terms and effects of the Second Amendment to the Nation's Compact on the part of the Nation. Terrio states that Section XXXII.B of SMC's Compact "was specifically included to protect SMC from gaming at the Wittenberg parcel that is the subject of this lawsuit because it was believed to be acquired after the IGRA passed in 1988." Terrio Declaration, ECF #73, p. 2, ¶ 3. Terrio, thus, admits that SMC took action to mitigate the impact of the modified definition of "Ancillary Facility." If, indeed, SMC insisted on the inclusion of Section XXXII.B in response to the threat of gaming at Wittenberg arising from the modified definition of "Ancillary Facility," it cannot claim that it was unaware of the provision and its implications or that it relied on a different understanding of the definition of "Ancillary Facility."

Undeterred by his own statements, Terrio submits to the Court self-contradicting allegations intended to demonstrate that SMC was unaware of the alleged concealment by the Nation. First, Terrio claims that SMC relied on statements made to the media by representatives of the Nation. Terrio Declaration, ECF #73, p. 3, ¶ 4. As was discussed above, the quoted

[12] As the Court is well aware, SMC has offered a convoluted explanation of how the Wittenberg Parcel was taken into trust in 1969, went out of trust in 1974, and went back into trust in 1993. While SMC's argument is facially untenable, that is SMC's position. SMC has never alleged that the Wittenberg Parcel was taken into trust pursuant to Section 2719(b)(1)(A).

language did not constitute statements by a tribal official upon which SMC was intended to (and could justifiably) rely, since it was merely a summary of two statements allegedly made by an attorney and a tribal spokesman to the press. The quoted language, furthermore, does not in any way conflict with the plain meaning of the 2003 Amendment.

Terrio, furthermore, asserts that it was not until he read the Springer Declaration that he understood the true meaning of the 2003 Amendment and became aware of the fraudulent nature of the statements summarized in the newspaper article:

> I did not become aware of the alleged facts regarding the State and Ho-Chunk's deliberate intent to amend in 2003 the Ho-Chunk compact in a manner that eviscerates the market protections built into the compacts prior to 2003,[13] including the restriction on ancillary facilities until I reviewed the Declaration of Thomas Springer, and I am not aware of any SMC official being informed of those alleged facts prior to the submission of Mr. Springer's Declaration.

Terrio Declaration, ECF 73, p. 3, ¶ 7.

The Springer Declaration merely reveals what SMC has known since 2003, that the Nation successfully negotiated the revised definition of "Ancillary Facility" as part of the Second Amendment. Nothing in the Springer Declaration reveals any concealment or intent to conceal the terms of the 2003 Amendment. There is no new information in the Springer Declaration. As Terrio's admission that SMC included Section XXXII.B in its second amendment in response to the modification of "Ancillary Facility" makes clear, to the extent that the modified definition "eviscerates the market protections built into the compacts prior to 2003, including the restriction on ancillary facilities," SMC knew about the effect of the provision in 2003 and attempted to

[13] This statement is again false on its face and in conflict with SMC's own arguments. SMC's Original Compact and the First Amendment to its compact did not include any market protection provisions. Terrio's assertion that the modified definition of "Ancillary Facility," affected "the market protections built into the compacts prior to 2003" furthermore, is also irrelevant to SCM's claim that the modified definition of "Ancillary Facility" violates SMC's compact. That claim is based on Section XXXII.B, not market protections allegedly included in SMC's Original Compact and First Amendment. Proposed Amended Complaint, ECF #75-1, p. 6, ¶ 22; p. 12, ¶ 55; p. 19, ¶ 1.

mitigate those impacts. Terrio Declaration, ECF #73, p. 2, ¶ 3. SMC did not rely on any statement by an official of the Nation to its detriment, and its claims, therefore, fail.

E. SMC's Claims Do Not Meet The Standard For Tolling The Statute Of Limitations.

The reason that SMC has included the fraudulent concealment claim in its Proposed Amended Complaint is that, under certain circumstances, fraudulent concealment serves to toll the applicable statute of limitations. Because the Court dismissed SMC's claims against the Nation on the grounds that they are barred by the applicable statute of limitations, SMC is attempting to revive those claims by asserting that the applicable statute of limitations is tolled by the Nation's alleged fraudulent concealment. Even if SMC were permitted to revive its claims, which it is not,[14] it has failed to successfully plead the elements necessary to toll the statute of limitations applicable to its claims.

> (1) The doctrine of estoppel may be applied to preclude a defendant from asserting the statute of limitations when he has been guilty of fraudulent or inequitable conduct;
> (2) the aggrieved party must have failed to commence an action within the statutory period because of reliance upon the representation or acts of the defendant;
> (3) the acts, promises or representations must have occurred before the expiration of the limitation period;
> (4) after the inducement for delay has ceased to operate the aggrieved party may not unreasonably delay;
> (5) affirmative conduct of the defendant may be equivalent to a representation upon which the plaintiff may rely to his disadvantage; and
> (6) actual fraud, in a technical sense, is not required.

Boehm v. Wheeler, 65 Wis. 2d 668, 681 (1974). *Accord*, *State ex rel. Susedik v. Knutson*, 52 Wis. 2d 593, 596-97 (1971); *Elliott v. General Cas. Co.*, 337 Wis. 2d 737, *7 (2011).

[14] See Section I, above.

It is apparent that SMC fails to successfully allege three of the required elements. SMC admits that it was fully aware of the modified definition of "Ancillary Facility" and its implications and sought a specific provision to mitigate the impact of the new definition on SMC's gaming. Terrio Declaration, ECF #73, p. 2,¶ 3. There was, thus, no concealment on the part of the Nation; and there was no justifiable reliance on the part of SMC on the belief that the provision did not exist or did not mean what it said. By failing to assert its claims that it was damaged by the inclusion of the modified definition of "Ancillary Facility" against the Nation and the State for 14 years, SMC unreasonably delayed taking action to seek redress for the alleged concealment.

This absence of the elements required to toll the statute of limitations is also reflected in SMC's Proposed Amended Complaint. The Proposed Amended Complaint fails to properly plead the three most fundamental of the required elements. As was demonstrated above, SMC fails to successfully allege that the Nation engaged in fraudulent concealment, or that SMC relied on the fraudulent concealment to its detriment. SMC's Proposed Amended Complaint also reveals that SMC unquestionably failed to take any action in response to the discovery of the alleged fraudulent behavior within a reasonable time. SMC knew, or should have known, of the modified definition of "Ancillary Facility" since, at the latest, July of 2003, the date of the Federal Register Notice approving the Second Amendment of the Nation's Compact. Moreover, the Nation constructed the Wittenberg Facility and began conducting gaming at the facility in 2008. SMC was fully aware of the extent of the Nation's gaming on the Wittenberg Parcel by 2008. SMC's decision not to act on the alleged concealment for 14 years (or nine years) clearly constitutes unreasonable delay in bringing this claim.

IV.

SMC CANNOT ASSERT A CLAIM FOR PUBLIC NUISANCE BECAUSE, UNDER THE NATION'S COMPACT, WISCONSIN'S PUBLIC NUISANCE LAW DOES NOT APPLY TO THE NATION IN THIS CASE.

In its Proposed Amended Complaint, SMC alleges that the Nation's operation of its Wittenberg Facility "constitutes a public nuisance as an illegal gambling house under Wisconsin state law, which is unlawful as a matter of federal law, pursuant to 18 U.S.C. § 1166." Proposed Amended Complaint, ECF #75-1, p. 11. Based upon this allegation, SMC requests that the Court declare that the Nation's operation of its Wittenberg Facility "constitutes a public nuisance." *Id*., p. 20. SMC's claim fails for the simple reason that state law does not apply to the Nation on its Indian lands absent an express provision in a federal statute or the Nation's Compact that makes Wisconsin public nuisance laws applicable to the Nation.

It is a well-settled principle of federal Indian law that states have no jurisdiction or authority to enforce their laws against a federally-recognized Indian tribe while the tribe is engaging in activities within its own Indian country, absent a federal statute that expressly grants a state that authority. *Worcester v. Georgia*, 31 U.S. 515 (1832). In this case, no such federal statute or compact provision exists.

> This is particularly true with respect to state laws regulating a tribe's gaming activities. To the extent that the state seeks to prevent any and all bingo games from being played on tribal lands while permitting regulated, off-reservation games, this asserted interest is irrelevant, and the state and county laws are preempted.

California v. Cabazon, 480 U.S. 202, 220-221 (1987).

Thus, Wisconsin public nuisance laws "are not applicable" to the Nation on its "reservation except where Congress has expressly provided that" Wisconsin public nuisance laws shall apply. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 170-171 (1973).

In this case, the only arguable federal statute that grants the state any authority to enforce its public nuisance laws pertaining to gaming against the Nation on its reservation lands is the IGRA, which preempts the field in the regulation of gaming on Indian lands. *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536 (8th Cir. 1996). The IGRA provides:

> Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to . . . (ii) the allocation of criminal and **civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations**; . . .

25 U.S.C. § 2710(d)(3)(c)(ii)(emphasis added).

The phrase "such laws and regulations" contained in § 2710(d)(3)(c)(ii) refers to the "civil laws and regulations" "directly related to and necessary for the licensing and regulation" of gaming activities referenced in 25 U.S.C. § 2710(d)(3)(c).

Pursuant to § 2710(d)(3)(c)(i), in order for Wisconsin public nuisance laws to apply to the Nation, the state law must: (1) be directly related to and necessary for the licensing and regulation of the playing of a Class III game by the Nation; and (2) be made applicable to the Nation in a provision of the Nation's Compact. Wisconsin public nuisance laws do not meet either of these requirements.

In its Brief, SMC cites to two provisions of Wisconsin law in support of its position that the Nation's gambling at its Wittenberg Casino constitutes a public nuisance. The first is Article IV, Section 24(6)(c) of the Wisconsin Constitution ("Article IV"). That provision simply sets forth the games of chance or gambling that the State cannot play—it does not prohibit tribes, like the Nation and SMC, from conducting gaming pursuant to the IGRA and an approved tribal-state gaming compact. *Dairyland Greyhound Park, Inc. v. Dale*, 2006 WI 107 (2006). Thus, the Nation has the right to play the Class III games it is playing now, even though state law can prohibit the State and other persons, organizations, and entities from playing the same games of

chance. *Id*. Because the Nation has the right under the IGRA and its Compact to play the Class III games it is currently playing, the games of chance that the Nation is playing at its Wittenberg Casino do not constitute a "public nuisance" under Wisconsin state law.

The second law is Wisconsin Statute § 823.20 ("§ 823.20") which provides:

> (1) Any gambling place, as defined in § 945.01(4)(a), is a public nuisance and may be proceeded against under this chapter.
> (2) Any citizen of the County in which such nuisance exits may bring an action, without showing special damages or injury, to enjoin or abate the nuisance . . .

§ 823.20(1) and (2).

Clearly, § 823.20(1) and (2) do not apply to the Nation. First, SMC is not a "citizen" of Wisconsin or any county located in Wisconsin. It is a domestic dependent nation that is recognized by the United States as a tribal government that exercises inherent powers of self-government that have not been extinguished by treaty, federal statute, or that are not inconsistent with the tribe's dependent status. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

Second, a state law declaring that certain forms of gambling are a public nuisance which can be abated by an injunctive relief action brought by any State citizen is not a proper subject of negotiation under the IGRA that could be included in the Compact. To be a proper subject of negotiation under the IGRA, Article IV and § 823.20(1) and (2) would have to be "directly related to and necessary for, the licensing and regulation" of a Class III game. Declaring some forms of gambling a public nuisance has nothing to do with issuing a gaming license to individuals or entities that are involved in the gaming activities or establishing minimum internal control standards or the rules for the playing of Class III games allowed under the Compact.

Finally, in order to be able to enforce any state gambling laws against an Indian tribe under the IGRA, the parties to the Compact have to identify in the Compact those state laws

which are proper subject of negotiation and are applicable to the tribe. *State of Wisconsin v. Ho-Chunk Nation*, 512 F. 3d 921 (7th Cir. 2008); *Sycuan Band of Mission Indians v. Roache,* 54 F.3d 535, 539-540 (9th Cir. 1994).

Section XIX of the Nation's Compact sets forth the allocation of state and tribal jurisdiction and specifies which state laws are enforceable on the Nation's Indian lands.

> This Compact does not change the allocation of civil jurisdiction among federal, state, and tribal courts, unless specifically provided otherwise in this Compact.

Compact, ECF #9-10, Ex. 10, p. 44.[15]

As shown above, Article IV is a provision that prohibits the State and its lottery from playing certain games of chance. Likewise, § 823.20 declares a "gambling place" a public nuisance and authorizes any "citizen" of the County where the gambling house is located to bring an action in Wisconsin State Court to enjoin the gaming activities. Additionally, both Article IV and § 823.20 are civil laws regulating what types of games of chance can be played by both the State and persons, organizations, and entities within the State. As such, these state laws are civil regulatory laws which are not enforceable against the Nation on its Indian Lands. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

Moreover, Section XIX of the Nation's Compact does not mention Article IV or § 823.20, or incorporate them by reference into the Compact. The fact that the Compact does not specify that Article IV and § 823.20 are applicable to the Nation prevents SMC from enforcing those state laws against the Nation. *Sycuan*, 54 F.3d at 539-540[holding state gambling laws unenforceable against Indian tribe "in the absence of a compact providing for state jurisdiction."]

[15] No provision in the First, Second, or Third Amendments to the Nation's Compact change the allocation of civil jurisdiction between the State and the Nation as provided for in Section XIX of the Nation's 1992 Compact. *See* First Amendment to the Nation's Compact, ECF #9-12; Second Amendment to the Nation's Compact, ECF #9-13; and Third Amendment to the Nation's Compact, ECF #9-14.

In addition, since Article IV and § 823.20 are not specifically referenced in the Compact and are not applicable to the Nation, SMC cannot maintain an action against the Nation under 25 U.S.C. § 2710(d)(7)(A) of the IGRA to enjoin the Nation's Class III gaming at its Wittenberg Facility, even if such gaming were subject to the prohibition against gaming set forth in 25 U.S.C. § 2719. The IGRA, 25 U.S.C. § 2710(d)(7)(A)(ii), only grants district courts jurisdiction to enjoin a Class III gaming activity "**conducted in violation of any Tribal-State compact** entered into under paragraph (3) that is in effect." *Id*. (Emphasis added.).

As shown above, the Compact does not make Article IV or § 823.20 applicable to the Nation. A violation of those laws by the Nation, therefore, is not a violation of the Nation's Compact. Under the IGRA, the Court simply has no jurisdiction to enjoin the Nation from violating those state laws since they are not made applicable to the Nation under its Compact.

Even if Article IV and § 823.20 were applicable to the Nation and enforceable against the Nation through the application of 18 U.S.C. § 1166(d), SMC would have no right to bring an action in the District Court to enjoin the Nation's allegedly illegal Class III gaming, because the United States, not SMC, has exclusive jurisdiction to enforce § 1166(d).

> If, as we hold below, the Bands' electronic pull-tab machines are Class III gaming devices, then section 1166(d) makes the State's law against such machines applicable in Indian country. Section 1166(d) also grants the federal government **exclusive** power to enforce that law. Even if there were some other route making that same state law applicable in Indian country, the federal government's right to enforce that law is still **exclusive**.

Sycuan, 54 F.3d at 540 (emphasis added).

In sum, the IGRA preempts the field of regulation of gaming on Indian lands. *Gaming Corp. of America*, 88 F. at 536. Article IV and § 823.20, which prohibit certain games of chance within the State and declare any place where those prohibited games are played a "public nuisance," do not apply to the Nation because: (1) by their very terms they have no application to

the Nation; (2) they are not proper subjects of negotiation under the IGRA that can be included in a Tribal-State Compact; and (3) they are not made applicable to the Nation under the Compact. SMC, therefore, cannot sue the Nation for a violation of those laws. Thus, the Court's prior ruling that the applicable statute of limitation for breach of contract, rather than for engaging in a public nuisance, barring SMC's claims is correct and prevents SMC from asserting any cause of action against the Nation based upon a public nuisance theory. Order, ECF #67, p. 6-8. The Court should, therefore, deny SMC's motion to amend its complaint.

V.

SMC'S CLAIMS ARE BARRED BY THE NATION'S SOVEREIGN IMMUNITY.

In prior pleadings, the Nation has asserted its sovereign immunity as a defense to SMC's claims. It should be no surprise that now, when SMC is seeking to amend its complaint to raise additional claims against the Nation, the Nation has the same response: sovereign immunity bars the claims. Since the sovereign immunity arguments have already been extensively briefed, the Nation will highlight the key points from its prior arguments in analyzing SMC's claims.

Indian tribes possess sovereign immunity from suit and retain their historic sovereign authority until a tribe unequivocally and expressly waives its immunity from suit or Congress clearly and unequivocally expresses its intent to abrogate tribal immunity. *Michigan v. Bay Mills Indian Community*, 572 U.S. __, 134 S. Ct. 2024, 2030-31 (2014); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *C & L Enters., Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418 (2001); *Sokaogon Gaming Enterprises Corp. v. Tushie-Montgomery Assoc.*, 86 F. 3d 659-60 (7th Cir. 1996); *Demontiney v. United States*, 255 F. 3d 801, 811 (9th Cir. 2001); *Kescoli v. Babbitt*, 101 F. 3d 1304, 1310 (9th Cir. 1996).

The Court has no choice but to recognize the Nation's sovereign immunity. *See California v. Quechan*, 595 F.2d 1153. 1155 (9th Cir. 1979)["Sovereign immunity involves a right which courts have no choice, in the absence of a waiver, but to recognize."]. Absent the requisite waiver or congressional abrogation, any suit brought against the Nation by SMC is barred. *Wisconsin v. Ho-Chunk Nation*, 512 F. 3d 921, 928 (7th Cir. 2008) ("*Ho-Chunk Nation*").

A. The Nation Has Not Waived Its Sovereign Immunity.

The Nation has not unequivocally and expressly waived its immunity in this suit in favor of SMC. To the contrary, the Nation has unequivocally and expressly **asserted** its sovereign immunity. In fact, the only waiver of the Nation's sovereign immunity that is potentially relevant to SMC's claims is the waiver set forth in the Nation's Compact; however, that limited waiver expressly states that it is granted only to the State. Thus, the Nation has not waived its immunity in favor of SMC such that any of SMC's claims against the Nation could proceed.

B. Congress Has Not Abrogated The Nation's Sovereign Immunity Against SMC's Claims.

While a federal court can have jurisdiction over an IGRA-based claim, any such claim must fall within the cause of action created by, and abrogation of tribal sovereign immunity effectuated by, Section 2710(d)(7)(A)(ii).[16] Acknowledging that Section 2710(d)(7)(A)(ii) is a Congressional abrogation of tribal sovereign immunity, the Supreme Court also established that

[16] The Nation has argued that the IGRA's grant of federal court jurisdiction does not allow one tribe to sue another, but, assuming that it does, it should be as narrowly construed as the same grant of federal court jurisdiction for a state to sue a tribe under the IGRA: only to enforce those terms of a compact that are **directly related to the gaming activities**. The reason for this is that Congress exercises a trust responsibility when dealing with Indians, and, accordingly, courts presume that Congress' intent toward the tribes is benevolent. As a result, courts construe statutes that affect Indians as not abrogating prior Indian rights. Nonetheless, the IGRA was an erosion of tribal sovereignty because it allowed for states to sue tribes, but only for certain causes of action. *See, e.g., Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 56 (1996)["[IGRA] grants the States a power that they would not otherwise have, viz., some measure of authority over gaming on Indians lands."]. Therefore, if the erosion of tribal sovereignty is to also be construed to include suits by other tribes, the same limitation for causes of action should also apply.

the abrogation is **limited** to a cause of action to enforce certain compact provisions against a tribe. *Bay Mills*, 134 S. Ct. at 2031; *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 758. In fact:

> [A] proper interpretation of § 2710(d)(7)(A)(ii) is not that federal jurisdiction exists over a suit to enjoin class III gaming whenever *any* clause in a Tribal-State compact is violated, but . . . . so long as the alleged compact violated relates to one of these seven items [25 U.S.C. § 2710(d)(3)(C)(i-vii)[17]], a federal court has jurisdiction over a suit by a state to enjoin a class III gaming activity . . . . This interpretation [] ensures that jurisdiction is not conferred for alleged violations of provisions ancillary to the IGRA's purposes.

Ho-Chunk Nation, 512 F.3d at 933-4.

SMC's Proposed Amended Complaint pleads that: (1) the Wittenberg Casino is a public nuisance; and (2) the State and Nation fraudulently concealed their intent to create amendments to the Nation's Compact that deprive SMC of the intended benefits of its compact. Manifestly, as with SMC's original claims, public nuisance and fraudulent concealment (or any other tort action) are claims of violations not addressed within the Nation's Compact; and, even if they were, they are not related to one of the items over which a federal court has jurisdiction. To the extent that SMC is alleging that the claims are violations of the Nation's Compact, and that the Nation's sovereign immunity is abrogated so that it could be sued in federal court for said violations, there is no provision of Section 2710(d)(3)(C)(i)-(vii) that, on its face, purports to authorize inclusion of the provisions in the Nation's Compact. Rather, Section 2710(d)(7)(A)(ii)

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[17] The seven (7) items are:

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
(iii) the assessment of the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
(v) remedies for breach of contract;
(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
(vii) any other subjects that are directly related to the operation of gaming activities.

25 U.S.C. § 2710(d)(3)(C).

only applies in cases where the alleged compact violation relates to one of the seven items in 25 U.S.C. § 2710(d)(3)(C)(i-vii).

Yet, even if there was a provision that made the aforementioned claims actual violations of the Nation's Compact, a tribe's waiver of sovereign immunity for such a claim is ineffective if such a waiver was **not permissibly negotiated** under the IGRA. *See Pueblo of Santa Ana v. Nash*, 972 F. Supp. 2d 1254 (D.N.M. 2013). *Santa Ana* arose from a decision by a state court that a tribe had, through its class III gaming compact, consented to a limited waiver of sovereign immunity and state court jurisdiction in connection with claims for compensatory damages for bodily injury that occurred as a result of the conduct of the gaming enterprise. However, the *Santa Ana* court held that the language of the IGRA limits the scope of proper subjects of compact negotiation to those subjects that are directly related to the gaming itself: "The language and structure of this section of the statute indicate that it is exhaustive, in its list as to what is permitted, as indicated even by its limitation in subparagraph (vii) to those subjects that are 'directly related to the operation of gaming activities.'" *Id*. at 1265. Therefore, the tribe's waiver of sovereign immunity for personal injury actions was ineffective because such a waiver was not permissibly negotiated under the IGRA.

Like *Santa Ana*, any waiver of sovereign immunity regarding SMC's new claims, as well as with respect to SMC's prior claims, is ineffective because such a waiver was not permissibly negotiated under the IGRA. The public nuisance claim is an attempt to provide another tribe with an express cause of action to enjoin gaming that is conducted under an approved tribal-state gaming compact.[18] The fraudulent concealment claim alleges that the Nation's Compact imposed

[18] As to SMC's claim that the Nation's actions constitute a public nuisance as an illegal gambling house under Wisconsin state law and that it is unlawful as a matter of federal law pursuant to 18 U.S.C. § 1166, the statute explains that "[t]he United States shall have **exclusive** jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country" unless the tribal-state gaming compact

on the Nation a duty to act in good faith and fair dealing in its performance of its obligations under the Compact, and to refrain from actions that would cause the State to be in material breach of its compacts with other tribes. Nonetheless, these claims do not relate to the application of criminal and civil laws and regulations, the allocation of criminal and civil jurisdiction, the State's costs of regulating the Nation's gaming, taxation of the gaming by the Nation, remedies for breach of contract, or standards for the operation and maintenance of the Nation's gaming facilities. As for the final item, "other subjects that are directly related to the operation of gaming activities," the Supreme Court has provided clear guidance: "[N]umerous provisions of IGRA show that 'class III gaming activity' means just what it sounds like—the stuff involved in playing class III games. . . . each roll of the dice and spin of the wheel. . . . The 'gaming activit[y]' is (once again) the gambling." *Bay Mills*, 134 S. Ct. at 2032-33. Thus, a common sense reading of Section 2710(d)(3)(C)(vii) compels the conclusion that the phase "other subjects that are directly related to the operation of gaming activities" also does not encompass the grant of authority to sue under 18 U.S.C. § 1166 or the private tort claims made by SMC regarding the negotiation of compacts.

In sum, SMC's Proposed Amended Complaint must be dismissed and judgment entered in favor of the Nation because: (1) the Nation has not waived its sovereign immunity for the purposes of SMC's claims against the Nation; and (2) the limited abrogation of immunity in

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transfers the criminal jurisdiction to the State "with respect to gambling on the lands of the Indian tribe." 18 U.S.C.§ 1166(d) (emphasis added). Thus, 18 U.S.C. § 1166 clearly does not abrogate the Nation's sovereign immunity for purposes of giving SMC standing to seek a declaratory judgment that the Nation's actions constitute a public nuisance. *See Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1294 (11th Cir. 2015)[finding that a state could not bring a public nuisance claim under 18 U.S.C § 1166 because the statute gave no such authority].

Furthermore, the statute provides that "'gambling' does not include class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior . . .". 18 U.S.C. § 1166(c)(2). The gambling here is conducted under a compact approved by the Secretary.

Section 2710(d)(7)(A)(ii) of the IGRA is not applicable to this action because SMC's claims fail to establish the elements required to invoke that abrogation.

CONCLUSION

This Court dismissed all of SMC's claims against the Nation with prejudice and dismissed the Nation from the lawsuit. In a failed attempt to revive its claims against the Nation, SMC has repled its prior causes of action against the Nation that were dismissed and has pled new, frivolous causes of action that SMC could have raised in its original complaint. Those claims are barred by the doctrines of collateral estoppel, claim preclusion, law of the case, judicial estoppel, and the Nation's sovereign immunity. Additionally, SMC's Motion does not meet the requirements of Rule 15. Finally, SMC has failed to successfully plead a cause of action for its new claims.

In the face of these bars to SMC's claims, the Court must deny SMC's motion to amend its complaint.

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Respectfully Submitted,

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