UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

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

Plaintiff,

v.

STATE OF WISCONSIN,

and

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

and

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

Defendants.

REPLY BRIEF IN SUPPORT OF STOCKBRIDGE-MUNSEE COMMUNITY'S MOTION FOR LEAVE TO FILE PROPOSED FIRST AMENDED COMPLAINT

17-cv-249-jdp

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Plaintiff Stockbridge-Munsee Community ("SMC") submits this Reply Brief, pursuant to Fed. R. Civ. P. 15(a)(2), in Support of its Motion (the "Motion") For Leave to File Proposed First Amended Complaint ("PFAC") in this matter (Docs. 73-76), against Defendant Ho-Chunk Nation ("Ho-Chunk") and Defendants State of Wisconsin and Scott Walker (collectively referred to as "State").

INTRODUCTION

SMC seeks to add two new claims to its initial Complaint in this matter: (1) a new claim that the State's and Ho-Chunk's fraudulent concealment of intent to create amendments to the Ho-Chunk Class III Gaming Compact (the "Ho-Chunk Compact"), which deprive SMC of the intended benefits of SMC's Class III Gaming Compact (the "SMC Compact"), is a violation of the Ho-Chunk Compact's inherent covenants of good faith and fair dealing; and (2) a new claim, pleaded in the alternative, that Ho-Chunk did not breach the "Ancillary Facility" provisions of the Ho-Chunk Compact until sometime after April 19, 2011. Additionally, SMC seeks to add a clarifying factual allegation that the conduct of Ho-Chunk's illegal gaming at its facility located in Wittenberg, Wisconsin (the "Wittenberg Casino") constitutes a public nuisance.

In its Supporting Memorandum, SMC stated that it "has good cause to amend the Complaint in order to correct or clarify deficiencies in the initial Complaint that formed the basis for the Court's decision to dismiss SMC's claims against Ho-Chunk as untimely, and to add a new claim based on revelations made by Ho-Chunk in its pleadings submitted to this Court." (Doc. 76 at 2). By seeking leave to amend, SMC is not seeking reconsideration of this Court's October 25, 2017 Opinion and Order. Rather, SMC's Motion embraces this Court's October 25, 2017 Opinion and Order. Nothing in this Court's analysis is violated by allowing SMC leave to amend. Further, allowing leave to amend the complaint at this juncture is consistent with the

Seventh Circuit's liberal policy for allowing leave to amend "even though the court doubts that plaintiff will be able to overcome the defects in his initial pleading." (Doc. 76 at 3).

In opposition to SMC's Motion, Ho-Chunk, and to a lesser degree the State, argue that this Court's Order of October 25, 2017 is final and binding on SMC, such that SMC is precluded from seeking leave to amend the Complaint (or even from seeking reconsideration of this Court's Order of October 25, 2017). Ho-Chunk, and to a lesser degree the State, also contend that the PFAC (Doc. 75-1) fails to plead fraud with the particularity required by Fed. R. Civ. P. 9(b). Ho-Chunk and the State further contend that the clarifying amendment alleging that the expanded gaming at the Wittenberg Casino constitutes a public nuisance falls within the scope of their respective immunities from unconsented lawsuits. As set forth below, these arguments are unavailing for a request for leave to amend. Accordingly, this Court should grant leave to SMC to file the PFAC.

ARGUMENT

I. PROCEDURAL POSTURE OF CASE: THE OCTOBER 25, 2017 ORDER OF THIS COURT IS INTERLOCUTORY; THE MOTION TO AMEND EMBRACES THIS COURT'S ANALYSIS IN THE OCTOBER 25, 2017 ORDER.

On October 25, 2017, this Court granted Ho-Chunk's motion for judgment on the pleadings and dismissed SMC's claims against Ho-Chunk as untimely filed (Doc. 67). As part of its Order, this Court noted that the State had not sought dismissal of SMC's claims against the State as untimely, and directed SMC and the State to provide supplemental pleadings on that question. (Doc. 67 at 11-12). The October 25, 2017 Order does not contain language suggesting that it constitutes a final judgment, and this Court has not entered final judgment in this matter pursuant to Fed. R. Civ. P. 58. On November 29, 2017, SMC and the State each filed the requested supplemental pleadings on the timeliness of SMC's claims against the State. (Docs. 71

and 72). Simultaneously therewith, SMC filed its Motion, together with the PFAC and supporting memoranda and declarations. (Docs. 73-76). On December 13, 2017, the State filed its opposition to SMC's Motion. (Doc. 80). Notably, the State advocates (and SMC concurs) that its counterclaim against SMC remains valid even if all of SMC's claims against the State are dismissed as untimely. Also on December 13, 2017, Ho-Chunk filed its opposition to SMC's Motion. (Doc. 81). Simultaneously therewith, Ho-Chunk filed a motion for sanctions against SMC's counsel. (Docs. 82 and 83).

Ho-Chunk's opposition to the Motion (as well as Ho-Chunk's motion for sanctions) is grounded in large part on the premise that the October 25, 2017 Order is a final judgment, or that somehow the Order precludes SMC from seeking leave to amend for the purpose of including timely claims (Doc. 80, *passim*). The State's opposition, although with far less hyperbole, similarly suggests that SMC is precluded from seeking reconsideration of the October 25, 2017 Order. (Doc. 81 at 21). Ho-Chunk's motion for sanctions goes so far as to allege that SMC's pleadings are "vexatious." (Doc. 83, *passim*). None of these characterizations are correct or justified based on the posture of this case.

SMC understands that this Court has determined that those claims that were ripe[1] for adjudication when Ho-Chunk first opened its Wittenberg Casino in 2008 are time-barred. SMC, in the context of the PFAC, re-pleads the counts set forth in the original Complaint to preserve them for appeal, because an amended complaint supersedes an original complaint. *See Beal v. Beller*, 847 F.3d 897, 901 (7th Cir. 2017) ("[T]he original pleading, once superseded, cannot be

[1] A claim is not ripe for adjudication if it rests upon ""contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581, 105 S. Ct. 3325, 3333 (quoting 13A Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 3532, p. 112 (1984)).

utilized to cure defects in the amended pleading, unless the relevant portion is specifically incorporated in the new pleading").[2] The mere fact that the PFAC restates those claims which this Court determined in its October 25, 2017 Order should be dismissed as against Ho-Chunk, does not morph SMC's Motion into a motion for reconsideration of the October 25, 2017 Order. As the State suggest in its opposition (Doc. 80 at 7), this Court is able to rule that, even though it is granting leave to file the PFAC, those claims which were dismissed in the October 25, 2017 Order shall remain dismissed.

SMC reasonably interprets the October 25, 2017 Order as being less than this Court's final word on the issue, because this Court did not dismiss SMC's claims against the State *sua sponte,* and instead directed that SMC and the State submit briefs on whether those claims are timely. Accordingly, SMC believes that the prudent manner in which to proceed is to submit the supplemental briefing, together with the Motion, and await this Court's order on those matters before making tactical decisions on how to move forward, including if applicable, (i) seeking reconsideration if judgment is not entered, (ii) seeking to alter or amend judgment pursuant to Fed. R. Civ. P. 59 if judgment is entered, and/or (iii) seeking certification for an interlocutory appeal. Far from being "vexatious," this approach minimizes the burden on this Court's and the appellate court's resources by allowing all related claims to be addressed and resolved in a single judgment that would be properly situated for an appeal. Ironically, if SMC proceeded as Ho-Chunk's and the State's briefs suggest, by seeking reconsideration before this Court has decided whether to dismiss SMC's claims against the State, it would result in piecemeal adjudication that

[2] The State properly cites *Scott v. Chuhak & Tecson, P.C.*, 725 F.3d 772, 782–83 (7th Cir. 2013) for the proposition that as a matter of prudence, restating claims in an amended complaint is not necessary to preserve the issue of dismissal on appeal. Nevertheless, *Scott* does not hold that a party is unable to restate dismissed claims in an amended complaint. *See Beal*, 847 F.3d at 901 (noting there is no rule against duplicative complaints).

interferes with this Court's ability to reach final judgment as to all claims against all parties in this case.

Although SMC is perfectly within its rights under the federal rules to seek reconsideration of the October 25, 2017 Order, it is false to characterize SMC's Motion as seeking such reconsideration. On the contrary, SMC's two new claims are based on the premise that this Court's analysis in the October 25, 2017 Order is correct. SMC, itself being a sovereign government with limited, albeit significant, immunity from unconsented suit, deliberately frames the two new claims to fall within Congress' express abrogation of Ho-Chunk's sovereign immunity and within the State's waiver of its Eleventh Amendment immunity as set forth in the SMC Compact. One new cause of action is the logical response to Ho-Chunk's submission of the Springer Declaration, (Doc. 31), which revealed for the first time that Ho-Chunk and the State had conspired to breach the State's duty of good faith and fair dealing inherent in the SMC Compact when the Second Amendment to the Ho-Chunk compact was negotiated in 2003. The second new cause of action alleges (pleading in the alternative) that Ho-Chunk did not violate the "ancillary facility" provisions of the Ho-Chunk Compact until after April 7, 2014. The two new causes of action are not pendent state law claims for fraud or public nuisance. Rather, they are claims arising out of Ho-Chunk's and the State's breaches of the Ho-Chunk Compact and the SMC Compact. Neither of the two new claims requires reconsideration of the October 25, 2017 Order, because neither claim accrued at the time of Ho-Chunk's 2008 opening of the Wittenberg Casino.

SMC certainly contends that the October 25, 2017 Order was incorrect in its analysis, and SMC identified errors of this Court's analysis in SMC's supplemental pleading regarding the timeliness of its claims against the State (Doc. 72). Depending on how this Court rules on the

timeliness of the SMC's claims against the State, SMC may then seek reconsideration of this Court's yet-to-be-issued order and/or the October 25, 2017 Order. But such reconsideration is not the objective of SMC's instant Motion.

II. EQUITABLE DOCTRINES RAISED BY HO-CHUNK DO NOT PREVENT THIS COURT FROM ALLOWING LEAVE TO AMEND THE COMPLAINT FILED IN THIS ACTION.

Ho-Chunk asserts that four equitable doctrines should bar SMC from amending its complaint: (1) collateral estoppel; (2) claim preclusion; (3) law of the case; and (4) judicial estoppel. (Doc. 81 at 2-11). Ho-Chunk cites a litany of cases to support its central argument: that SMC is forever barred from questioning whether Ho-Chunk is operating the Wittenberg Casino in compliance with the Ho-Chunk Compact. But every single case cited by Ho-Chunk in support of this argument involves subsequent or successive lawsuits, except for one case, *Alexander v. Chicago Park District*, 773 F.2d 850 (7th Cir. 1985), which is readily distinguishable from the circumstances here. None of Ho-Chunk's cited cases apply where a plaintiff is seeking to amend a complaint in ongoing litigation. Ho-Chunk has not cited any case for the proposition that the equitable doctrines prevent a plaintiff from amending its complaint in ongoing litigation – likely because of the overwhelming authority creating a liberal standard for amending a complaint. *See e.g.*, Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave when justice so requires."); *see also* Doc. 76 at 2 and cases and authority cited therein; accord, *Runnion v. Girl Scouts of Greater Chicago and Northwest Indiana*, 786 F.3d 510, 520-21 (7th Cir. 2015) (Error to enter final judgment based on dismissal without first allowing leave to amend).

A. This Court's Order of October 25, 2017 Does Not Have a Preclusive Effect on Subsequent Motions Filed in this Litigation. The Court Retains its Inherent Authority to Reconsider and Revise All Interlocutory Orders Prior to the Entry of Final Judgment.

The Seventh Circuit has long held that, absent a judgment expressly entered pursuant to Rule 54(b), a final judgment requires resolution against all parties and all claims. *See Hollins v. Regency Corporation*, 867 F.3d 830, 833 (7th Cir, 2017); *Arnold v. Indianapolis Airport Authority*, 7 F.3d 238 (7th Cir. 1983); and *Hardy v. Bankers Life and Cas. Co*., 222 F.2d 827 (7th Cir. 1955) (no final judgment even though the four remaining parties had never been served with the complaint).

A federal district court has the inherent authority to reconsider and revise any and all rulings it has made in the case prior to the entry of final judgment. *See Marconi v. Wireless Telegraph Co. of Am. v. United States*, 320 U.S. 1, 47, 63 S. Ct. 1393, 1415 (1943) (finding the trial court has "power at any time prior to entry of its final judgment . . . to reconsider any portion of its decision and reopen any part of the case"); *Peterson v. Lindner*, 765 F.2d 698, 704 (7th Cir. 1985) (District Court has power to reconsider any interlocutory power at any time before final judgment); *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 887 (9th Cir. 2001) ("[A] district court's authority to rescind an interlocutory order over which it has jurisdiction is an inherent power rooted firmly in the common law and is not abridged by" Rule 60(b) which governs final judgments.); *United States v. Jerry*, 487 F.2d 600, 604 (3d Cir. 1973) ("[T]he power to grant relief from erroneous interlocutory orders, exercised in justice and good conscience, has long been recognized as within the plenary power of courts until entry of final judgment and is not inconsistent with any of the Rules."); *Melancon v. Texaco, Inc*., 659 F.2d 551, 553 (5th Cir. 1981) (finding trial court "possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient");

Jackson v. McKay-Davis Funeral Home, 2012 WL 543739 at *1 (E.D. Wis. 2012) (District judges have inherent authority to reconsider an interlocutory order); and *Fisher v. National R.R. Passenger Corp*., 152 F.R.D. 145, 149 (S.D. Ill. 1993) (District courts have practically unbridled discretion to reconsider a previous interlocutory order).

Ho-Chunk improperly conflates the concept of dismissal with prejudice with finality of judgment. SMC does not dispute the proposition that dismissal of claims as untimely is dismissal with prejudice where final judgment has been entered. But, SMC vigorously disputes Ho-Chunk's proposition that dismissal of claims as untimely is dismissal with prejudice, creating a preclusive effect regarding subsequent motions in the same lawsuit. The primary cases which Ho-Chunk employs to support its position (Doc. 81 at 23) involve situations where the court in a subsequent lawsuit prevented the plaintiff from asserting the same claims raised in a prior lawsuit in which the earlier claims had been dismissed as untimely. *See Pavlovsky v. VanNatta*, 431 F.3d, 1063, 1064 (7th Cir. 2005) (barring plaintiff from filing a subsequent habeas corpus action where prior action had been dismissed as untimely); and *Smith v. City of Chicago*, 820 F.2d 916, 918 (7th Cir. 1987) (barring plaintiff from filing a subsequent civil rights action where earlier claim has been dismissed as untimely – plaintiff should have raised claims in the earlier lawsuit). *Smith* is particularly instructive here because the court in the earlier lawsuit had denied plaintiff's motion for leave to amend, and after the earlier case was affirmed on appeal, the plaintiff attempted to characterize the filing of an entirely new lawsuit as an "amended complaint," 820 F.2d at 917. The *Smith* Court rejected the plaintiff's argument. *Id*.

Ho-Chunk also cites *Geier v. Mo. Ethics Comm'n*, 715 F.3d 674 (8th Cir. 2013), but that case actually supports SMC's position. In *Geier*, the district court allowed the plaintiffs to seek leave to file an amended complaint despite its order dismissing the earlier complaint (in its

entirety) as untimely. The Eighth Circuit reasoned that where the prior order in the action dismissed the complaint, and did not dismiss the action (i.e. formal entry of final judgment), the plaintiff may seek leave to amend. *Id.* at 677. The Eighth Circuit affirmed the district court's denial of the motion to amend because the district court properly concluded that there were no circumstances where any amendment could result in claims being timely filed. *Id.*

Ho-Chunk also cites *U.S. v. Ligas*, 549 F.2d 497 (7th Cir. 2008), but that case is inapposite. There, the court dismissed *without* prejudice an earlier lawsuit filed by the United States to enforce a tax lien because the defendant was not properly served, and the applicable statute of limitations had run before the second lawsuit was filed. *Id.* at 503. Moreover, the footnote cited by Ho-Chunk, *id*. at 503, n.2, expressly notes that the reconsideration to reinstate a dismissed claim may also be accomplished pursuant to Rule 60(b).

The remaining cases cited by Ho-Chunk, *Perez v. PBI Bank, Inc*., 69 F. Supp. 3d 906, 909 (S.D. Ind. 2014) and *Kamelgard v. Macura*, 585 F.3d 334, 339 (7th Cir. 2009), merely note that dismissal of claims as untimely is ruling on the merits. These cases are not instructive as to the preclusive effect in either a current or subsequent proceeding.

Breaking down Ho-Chunk's argument reveals two over-arching errors in reasoning. First, Ho-Chunk conflates this Court's interlocutory order of October 25, 2017 with the prejudicial effect of prior causes of action being dismissed as untimely. Second, Ho-Chunk conflates "Dismissal with Prejudice" with "Final Judgment." Nothing in the case law cited by Ho-Chunk or the State support the premise that SMC is precluded from filing motions that may require this Court to reconsider a prior interlocutory order issued in the same litigation.

B. Collateral Estoppel and Claim Preclusion.

Ho-Chunk argues that the doctrine of claim preclusion "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." (Doc. 81 at 6) (quoting *Jones v. Alton*, 757 F.2d 878 (7th Cir. 1985)). Ho-Chunk explains that this doctrine "applies to bar a second suit in federal court…." *id*. (quoting *Kratville v. Runyon*, 90 F.3d 195 (7th Cir. 1996)).

SMC's instant Motion is not a "second suit," and certainly does not raise issues that could have been raised "in a prior action." Rather, SMC's instant Motion seeks leave of this Court to amend the Complaint in this case – the only litigation between the parties regarding Ho-Chunk's Wittenberg Casino. Equally as important, this Court has not yet entered a final judgment in this litigation.

The doctrines of collateral estoppel and claim preclusion each require the issuance of a "final judgment on the merits." *See Best v. City of Portland*, 554 F.3d 698, 701 (7th Cir. 2009) ("Collateral estoppel requires a "final judgment on the merits" in the first suit."); and *Edmonds v. Operating Engineers Local 139*, 620 F. Supp. 2d 966, 972 (W.D. Wis. 2009) ("The three requirements of claim preclusion under federal law are…(3) a final judgment on the merits."). The Seventh Circuit has applied collateral estoppel and claim preclusion where there is less than a formal final judgment in an earlier lawsuit, but even there, the decision needs to be immune, as a practical matter, to reversal or amendment. *See Bell v. Taylor*, 827 F.3d 699, 707 (7th Cir. 2016); *Amcast Indus. Corp. v. Detrex Corp*., 45 F.3d 155, 158 (7th Cir. 1995) ("…res judicata or collateral estoppel is normally asserted in a separate action from the one in which the judgment or ruling sought to be used as a bar to further litigation was rendered…").

C. Judicial Estoppel.

Ho-Chunk also relies upon the doctrine of judicial estoppel to bar SMC's additional claims, stating that SMC is reversing its position in this litigation. (Doc. 81 at 13). SMC is not reversing or changing its position in this litigation. Instead, SMC is simply pleading in the alternative to add an additional claim to its existing Complaint. Ho-Chunk fails to respond to SMC's analysis in SMC's supporting memorandum that the actual date upon which gaming became the primary business purpose of any facilities on the Wittenberg parcel is unknown, such that discovery should occur to establish that date. (Doc. 76 at 7-8). Moreover, the Federal Rules of Civil Procedure explicitly allow pleading in the alternative. *See* Fed. R. Civ. P. 8; and, *Witham v. Whiting Corp*., 975 F.2d 1342, n.3 (7th Cir. 1992) (" Of course, under Federal Rule of Civil Procedure 8(e)(2), parties may plead in the alternative or otherwise take inconsistent positions."). Pleading in the alternative is well within the bounds of accepted litigation practice.

Even if it were unusual for SMC to amend its complaint to include a claim in the alternative, Ho-Chunk's reliance on the doctrine of judicial estoppel is misplaced. Under that doctrine, the party that is estopped from raising a claim must have convinced the first court to adopt its position. *USA v. Hook*, 195 F.3d 299, 306 (7th Cir. 1999). Under judicial estoppel, "[t]he offense is not taking inconsistent positions so much as it is winning, twice, on the basis of incompatible positions." *Astor Chauffeured Limousine Co. v. Runnfeldt Inv. Corp*., 910 F.2d 1540, 1548 (7th Cir, 1990).

D. Law of the Case.

Finally, Ho-Chunk argues that the "law of the case" doctrine bars SMC's new claims, including the claim that Ho-Chunk's expanded gaming operations violate the Ho-Chunk Compact. (Doc. 81 at 10). According to Ho-Chunk, "this Court previously determined that all of

the material facts supporting each element of SMC's claims were known to SMC since 2008." *Id*. This is another instance where Ho-Chunk is attempting to stretch this Court's October 25, 2017 Order beyond its limits by claiming that SMC is forever barred from enforcing compliance with the Ho-Chunk Compact pursuant to IGRA.

The law of the case doctrine ensures that, once a court has decided a matter during the course of a lawsuit, its determination has the force of law for the remainder of the lawsuit. *See Creek v. Village of Westhaven*, 144 F.3d 441, 445 (7th Cir. 1998). The doctrine is not applied broadly, but is instead limited to the issues actually decided by the Court. *See id*. ("…it is essential to determine what issues were actually decided in order to define what is the 'law of the case.'"). It also is intended to be flexible, so as to avoid producing injustice. *See United States v. Mazak*, 789 F.2d 580, 581 (7th Cir. 1986). Moreover, as discussed in subsection A above, the law of the case does not preclude a district court from revisiting any prior interlocutory orders issued in the same case.

E. The *Alexander v. Chicago Park District* Demonstrates that the Doctrines Should Not Be Applied to Preclude SMC's New Claims.

As noted above, all of the cases cited by Ho-Chunk are properly distinguished as applying the doctrines to separate and distinct lawsuits where the earlier lawsuit had been concluded with finality, with one exception: *Alexander v. Chicago Park District*, 773 F.2d 850 (7th Cir. 1985). *Alexander* generally involved allegations regarding the wrongful, discriminatory allocation of the Chicago Park District's funds away from predominantly black neighborhoods. The procedural history was "convoluted". *Id.* at 852. After two interlocutory appeals to the Seventh Circuit, and three amendments to the complaint, the matter was tried in a three-month jury trial, which resulted in a verdict in favor of the defendants (and an advisory verdict in a separate lawsuit consolidated for purpose of trial). *Id.* at 852. The district court subsequently

resolved the remaining counts that were not submitted to the jury by granting summary judgment in favor of defendants on one remaining count, dismissing the two remaining counts. *Id.* The district court expressly entered judgment on less than all claims and all parties pursuant to Fed. R. Civ. P. 54(b), specifically for the purpose of allowing for an appeal to be taken. *Id.* More than four years after the initial filing of the complaint in the matter, and after the protracted three-month trial, rather than seek an appeal (which the district court found would be in the interest of the public), the plaintiffs filed a fourth amended complaint alleging six separate counts. The district court dismissed three of the counts applying the doctrine of *res judicata* to the jury's verdict, and dismissed the three remaining counts for failure to state a claim. *Id*.

On appeal, the plaintiffs contended that the district court erred because the court's order was technically deficient as to finality for res judicata purposes since it lacked the magical words required by Rule 54(b) that there is no just reason for delay. The Seventh Circuit rejected that contention, noting the district court made it quite clear on the face of the order that it was situating the matter "to enable the parties to this cause to appeal." *Id*. at 855, and the district court confirmed its intent during a subsequent conference. *Id.* Importantly, the *Alexander* court noted that the jury verdict, after a three-month trial on the core issue of the discriminatory allocation of funds, was final and inalterable from the date of the verdict. *Id.*

The differences in the procedural contexts between this case and *Alexander* are glaring and undermine Ho-Chunk's analysis. Here, there is no jury verdict that was dispositive of the core issue in the dispute. Here, the case has only been pending for eight months, rather than for more than four years. Here, SMC seeks to file its very first amended complaint, rather than its fourth amended complaint. Here, there is no reference to Rule 54(b) whatsoever, and Ho-Chunk has not sought the entry of judgment as to less than all parties and claims pursuant to Rule 54(b).

Moreover, there is nothing in the October 25, 2017 Order that suggests it is intended to be final and appealable, in contrast to the express language in *Alexander* that an appeal of the order was in the public interest, and a record that the district court expressly informed the parties of its intent that the order be final and appealable.

Even with these differences, the Seventh Circuit in *Alexander* expressed its "reluctance" to find the court order at issue to be final for *res judicata* purposes. *Id.* at 855. *Alexander*, the only case cited by Ho-Chunk that applies the equitable doctrine of issue preclusion in the context of an amended complaint in the same proceeding, demonstrates that the October 25, 2017 Order falls far short of the finality required for the doctrines to apply. The October 25, 2017 Order does not preclude SMC from pursuing the two new claims set forth in the PFAC.

Concluding that the October 25, 2017 Order does not have a preclusive effect on SMC's Motion is consistent and supported by the Seventh Circuit's "common sense" analysis where there are technical deficiencies present regarding the finality of judgment. *See e.g.*, *Local P-171, Amalgamated Meat cutters and Butchers v. Thompson Farms Co*., 642 F.2d 1065, 1072-73 (7th Cir. 1981) (common sense dictates that no useful purpose is served by dismissing an appeal for lack of separate entry of judgment); *Aiello v. City of Wilmington*, 4702 F.Supp. 414, 419 (D. Del. 1979), aff'd 623 F.2d 845 (3rd Cir. 1980) (cited with approval in *Alexander*, 773 F.2d at 855) (although final judgment was not yet entered, district court was bound by principles of res judicata or collateral estoppel to make factual findings consistent with the jury's conclusion); and *Amcast Indus. Corp.* 45 F.3d at 158 (these doctrines can be used to prevent parties from re-litigating the same issue in "collateral proceedings" in the same litigation, such as where a party seeks the award of attorney fees after a matter has been resolved by the court).

III. LEAVE TO AMEND IS WARRANTED TO ALLOW SMC TO MODIFY ITS COMPLAINT BASED ON REVELATIONS IN HO-CHUNK'S PLEADINGS TO THIS COURT THAT HO-CHUNK AND THE STATE INTENDED FOR THE 2003 HO-CHUNK COMPACT AMENDMENTS TO ENABLE HO-CHUNK TO EXPAND GAMING IN A MANNER THAT DEPRIVED SMC OF ITS NEGOTIATED MARKET PROTECTIONS.

As set forth in SMC's Supporting Memorandum (Doc. 76 at 4-7), the Springer Declaration that Ho-Chunk submitted in this litigation to support its Motion for Judgment on the Pleadings to defeat the "ancillary provision" restrictions in place as of 2003 places Ho-Chunk and the State in a classic catch-22 dilemma. Ho-Chunk has stated, via the Springer Declaration that the 2003 Ho-Chunk Compact amendments allow for expanded gaming with impunity at the Wittenberg Casino because Ho-Chunk and the State deliberately pursued and consummated a deal that enabled them to achieve that exact result. Ho-Chunk (and to a far lesser degree the State) now argue that the PFAC does not allege the facts of fraudulent concealment with sufficient particularity, and does not warrant estoppel of a statute of limitations defense. Neither argument defeats the propriety of allowing SMC leave to file the PFAC.

A. The New Claim is Pleaded with Sufficient Particularity.

The State (Doc. 80 at 13-15) and Ho-Chunk (Doc. 81 at 17-26) assert that the PFAC lacks sufficient particularity. The State attempts to frame the new count as a pendant state law claim of fraud (Doc. 80 at 11-12) and Ho-Chunk attempts to frame the new count as a pendant state law claim of fraudulent concealment (Doc. 81 at 17). As discussed above, SMC is only seeking claims that fall within the scope of Congress' abrogation of Ho-Chunk's sovereign immunity and the State's waiver of its Eleventh Amendment immunity; hence, as against Ho-Chunk the new claim is for breach of the Ho-Chunk Compact's inherent covenant of good faith and fair dealing (and as against the State for breach of the SMC Compact). The new claims are not pendant state law claims or federal common law claims for fraud. Accordingly, the

arguments that SMC must plead with any particularity beyond sufficient allegations for the State and Ho-Chunk to be on notice of the nature of the claim are inapposite. Even if they were to apply, however, the PFAC pleads with sufficient particularity the elements put into issue. The Seventh Circuit has reasoned that particularity is satisfied where the complaint alleges the "who, what, when, where, and how of the fraud – the first paragraph of the newspaper story." *See United States ex rel. Presser v. Acacia Mental Health Clinic, LLC*., 826 F.3d 770, 776 (7th Cir. 2016); *United States ex. rel. Lusby v. Rolls Royce Corp*., 570 F.3d 849, 853 (7th Cir. 2009).

The State argues that the PFAC is deficient in pleading with particularity the alleged identity, time, place, content and method of the alleged fraudulent concealment. (Doc. 80 at 13-17). Similarly, Ho-Chunk argues that the PFAC is deficient in pleading with particularity the alleged failure to disclose, duty to disclose, intent to defraud and reliance. (Doc. 81 at 17). There is no ambiguity that SMC's new allegations in the PFAC involve actions of the governmental officials of Ho-Chunk and the State in the specific context of the 2003 Ho-Chunk Compact amendment negotiations. Each and all of the contentions identified by either the State or Ho-Chunk are sufficiently pleaded in the PFAC (Doc. 75-1 at ¶¶ 93-101).

Rather than demonstrate some deficiency in the PFAC to support its argument, Ho-Chunk instead argues the merits of the new count by asserting that it could not have concealed that the negotiated amendments deprive SMC of the intended benefits of the SMC Compact because the Ho-Chunk Compact amendment was published in the Federal Register. (Doc. 81 at 17-18). The State makes a similar argument. (Doc. 80 at 13, "Stockbridge cannot plausibly allege that, when it was negotiating with the State in 2003, it actually believed . . . "). Similarly, Ho-Chunk argues it could not have intended to conceal its intended deal with Ho-Chunk because of the Federal Register publication. (Doc. 81 at 20).

Defendants' arguments are not responsive to the alleged concealment of the fact that the Ho-Chunk Compact amendment reflected the consummation of a deal between Ho-Chunk and the State, with the intended result of depriving SMC of the market protections negotiated in the SMC Compact then in effect. At best, Ho-Chunk's and the State's points should be resolved by deliberating the new claim. Furthermore, the same publication in the Federal Register provides that gaming facilities, the primary business purpose of which is gaming, will not be located in Shawano County. Notably, neither the State nor Ho-Chunk refutes the allegation, as supported by the Terrie Terrio Declaration (Doc. 73), which indicates that the State represented to SMC in 2003 that the 2003 Ho-Chunk Compact amendments did not alter or impact the market restrictions in the compacts then in effect. At trial, SMC will demonstrate that the language of the Ho-Chunk Compact amendments does *not* reveal that Ho-Chunk and the State cut a deal to intentionally deprive SMC of the intended benefits of its own Compact, and that the provisions of the 2003 Ho-Chunk Compact amendments are being applied in a manner that is completely contrary to the State's direct representations to SMC. It is a question of fact as to when SMC discovered the Defendants' fraud.

Rather than demonstrate some deficiency in the PFAC to support its argument, Ho-Chunk instead argues that it had no duty to SMC because SMC is not a third-party beneficiary to the Ho-Chunk Compact. (Doc. 81 at 18-19). But in its own discussion, Ho-Chunk notes that SMC does allege that Ho-Chunk owed a duty to the State not to negotiate in a manner that placed the State in breach of the SMC Compact (or the gaming compact of any other Wisconsin tribes). Ho-Chunk is on notice of the basis for SMC's claims and its responses to the merits of SMC's arguments belie its claim that SMC has not pleaded its new claim with the requisite particularity. Ho-Chunk can present these arguments at a trial on the merits in an effort to convince the fact-

finder otherwise, but the arguments do not defeat the basis for SMC's instant Motion for leave to amend.

Ho-Chunk provides a number of additional arguments on the merits and possible conclusions that can be drawn from the known facts to allege that SMC's new count is deficient. (Doc. 81 at 22-26). For example, Ho Chunk argues that SMC alleges that the State, and not Ho-Chunk, made the false statements to SMC (Doc. 81 at 22), suggesting that this somehow exonerates Ho-Chunk. Ho-Chunk further argues that statements by Ho-Chunk officials regarding its intent for the compact amendment to eviscerate any material restrictions on size and scope of gaming, and statements by Ho-Chunk officials that they had no plans to expand the ancillary facilities, do not demonstrate intent. Ho-Chunk further asserts that there were no market protections to protect during the 2003 compact amendment negotiations, because SMC's 2003 compact amendments were not yet consummated, omitting that the SMC Compact then in effect provided for revenue sharing to the State based upon the market restraints in effect at the time, including but not limited to compacts that restricted ancillary facilities to those with a primary business purpose other than gaming. (Doc. 81 at 23). Ho-Chunk even argues that the express protection to SMC was limited to restricting the Governor's concurrence on two-part determinations to allow gaming on newly-acquired land being taken into trust (similar to Ho-Chunk's pending application for a two-part determination to enable it to offer gaming on lands in Beloit, Wisconsin) (Doc. 81 at 23). That analysis is completely wrong in suggesting that the market protections afforded to SMC wee limited to the context of two-part determinations. Moreover, it underscores SMC's point: that the market protections in the SMC Compact are of no value if a tribe may simply relocate a full gaming facility, the primary business purpose of which is gaming into Shawano County, as if it had already sought and secured a two-part

determination and the Governor's concurrence in that determination. SMC is confident that discovery will produce evidence and that trial will demonstrate that Ho-Chunk and the State undertook actions that will compel the fact-finder to conclude that the 2003 Ho-Chunk Compact amendments were orchestrated in a deliberate manner that allowed Ho-Chunk to lie in the weeds for an amount of time sufficient for the statute of limitations to run, such that Ho-Chunk could expand gaming at the Wittenberg Casino with impunity. Ho-Chunk's argument that the specific facts suggest possible different conclusions are a matter reserved for trial, and demonstrate that the PFAC is appropriate for the Court to consider.

The very fact that Ho-Chunk devotes ten pages of its opposition brief to arguing the merits of the allegations of the elements of fraudulent concealment underscores that the claim is pleaded with sufficient particularity. However, if this Court is in any way inclined to agree that the Complaint fails to plead the new count with sufficient particularity, then further leave to amend should be allowed. *See Dubicz v. Commonwealth Edison Co*., 377 F.3d 787, 793-94 (7th Cir. 2004) (District court erred by denying motion to amend that sought to correct defects as to sufficiency of particularity in pleading fraud); *see also* Doc. 76 at 2 and cases cited therein.[3]

B. The New Claim is Timely.

SMC establishes that the new claim survives this Court's analysis in its October 25, 2017 Order because the Wisconsin law regarding statutes of limitations, which this Court has held applies to SMC's claims, provides that defendants who fraudulently conceal material facts are equitably estopped from asserting the affirmative defense of statute of limitations. (Doc. 76 at 6-

[3] The State cites two cases suggesting that 'particularity' defects in the Complaint cannot be cured by affidavits and other pleading. *Harrell v. United States*, 13 F.3d 232, 236 (7th Cir. 1993) and *Miller v. Gain Fin., Inc.*, 995 F.2d 706, 709 (7th Cir. 1993). Both of those cases dealt with the parties looking outside of the Complaint regarding the issue on appeal, where the defects, if any, cannot be cured by amending the Complaint.

7 and case citations set forth therein). Neither Ho-Chunk nor the State dispute the correctness of SMC's analysis.

Rather, the State argues that it cannot be estopped from arguing timeliness because SMC has not alleged that the State committed a fraudulent act after April of 2014, when the claim otherwise would have expired (Doc. 80 at 18). The analysis is a *non-sequitur* and the State provides no authority whatsoever to support such a proposition. The fraudulent concealment was not discovered by SMC until Ho-Chunk submitted the Springer Declaration. If the State and Ho-Chunk had not engaged in a pattern of conduct to conceal the fact that they intended to enable Ho-Chunk to expand gaming at the Wittenberg Casino with impunity, such that SMC was not previously aware of the actions that compose the elements of the new claim, then the claim is timely. That SMC has not alleged acts of fraud to have occurred after April of 2014 is a red herring manufactured by the State out of thin air, and is not relevant to the issues regarding the Motion.

Rather than providing any argument, Ho-Chunk bootstraps its position regarding the alleged deficiency in alleging the elements of the claim, namely fraudulent conduct and reliance, with sufficient particularity. (Doc. 81 at 26-27). Indeed, in contrast to the State's position, Ho-Chunk cites authority that the concealment must have occurred before the applicable statute of limitations expired. *Id.* As set forth above, the PFAC does plead the identified elements with sufficient particularity.

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

SMC demonstrates in its Supporting Memorandum (Doc. 76 at 7-8) that the date on which Ho-Chunk first violated the "ancillary facility" provisions of the Ho-Chunk Compact is

not known, and accordingly, SMC should be able to plead in the alternative that Ho-Chunk first violated those provisions within the six year statute of limitations applied by the Court in its Order of October 25, 2017. Other than asserting issue preclusion, which is discussed above, neither the State nor Ho-Chunk refute the correctness of SMC's analysis.

The question of when Ho-Chunk first failed to be in compliance with the "ancillary facility" provisions of the Ho-Chunk Compact is a fact-intensive inquiry. Changing the facts may change the outcome of this analysis. It may be true that a casino with five-hundred slot machines and a small snack bar falls within the Ho-Chunk Compact's definition of an "ancillary facility."[4] It may also be true that a casino with more than eight-hundred slot machines, table games, a hotel, a restaurant, and a bar falls outside the Ho-Chunk Compact's definition of an "ancillary facility." SMC is entitled to engage in discovery to ascertain the true date of Ho-Chunk's initial non-compliance. The appropriateness of SMC's new claim, pleaded in the alternative, is underscored by Ho-Chunk's ever-changing version of the facts: Ho-Chunk first announced that its expanded gaming operation would include table games, only to reverse course; Ho-Chunk announced that expanded gaming would not occur until 2018, and later announced that it would occur in October of 2017; and Ho-Chunk ultimately expanded its gaming operations in November of 2017.[5]

Allowing the new claim does not violate this Court's analysis in its Order of October 25, 2017. SMC alleged in its initial Complaint that Ho-Chunk has been in violation of the "ancillary

[4] SMC does not concede this point.

[5] For example, Ho-Chunk's August 16, 2016 Press Release announcing the expansion of gaming at the Wittenberg Casino stated that the facility would include 272 additional slot machines, 10 table games, and a new high-limit gaming area. (Doc. 9-17). After this litigation began, Ho-Chunk announced that the expanded Wittenberg Casino would not include table games. (Doc. 33). Ho-Chunk initially stated that the expanded Wittenberg Casino would not open until January 2018, but issued marketing materials on September 29, 2017 during this litigation indicating that there would be a "soft opening" on October 12, 2017. (Doc. 63-7).

facility" provisions of the Ho-Chunk Compact since it opened the Wittenberg Casino in 2008. That allegation may indeed be correct, in which event the analysis of the October 25, 2017 Order will defeat the new claim as time-barred. But that allegation may indeed be incorrect such that Ho-Chunk was in compliance until sometime after April of 2011, in which event, SMC's new claim would not be barred by the statute of limitations described in the Court's October 25, 2017 Order.

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

In addition to the two new claims against Ho-Chunk and the State, SMC seeks to include in the PFAC the express allegation that the expanded gaming at the Wittenberg Casino is a public nuisance. SMC demonstrates in its Supporting Memorandum (Doc. 76 at 8-9) the fact that the Wittenberg Casino would constitute a public nuisance under Wisconsin law, which weighs on this Court's analysis in determining, borrowing and applying the appropriately analogous state law regarding the applicable statute of limitations. Although the fact that the Wittenberg Casino would be a public nuisance under Wisconsin state law weighs on the correctness of this Court's analysis in its October 25, 2017 Order, SMC addresses this point in a footnote that expressly notes that the initial Complaint should be sufficient to make the same argument, but out of an abundance of caution, SMC is making the express allegation in the PFAC. (Doc. 79 at 9, n.2; *see also* Doc. 72 at 14, n.7). The proposed, amended allegation does not state a new claim.

Ho-Chunk contends that the new allegation is an attempt by SMC to bring a pendant state law claim against Ho-Chunk, which falls outside the scope of Congress' abrogation of Ho-Chunk's immunity, and falls outside the preemptive scope of IGRA (Doc. 81 at 28-33). Those arguments are incorrect. The relevance of the allegation is not a disguised attempt to create a new claim; rather, the relevance is found in this Court's analysis that it should borrow the most

analogous statute of limitations under Wisconsin state law. This argument was briefed in the pleadings regarding Ho-Chunk's Motion for Judgment on the Pleadings (Doc. 58 at, 38-40), and addressed in this Court's Order of October 25, 2017 (Doc. 67 at 7), so SMC is not seeking reconsideration at this juncture[6], but rather, out of an abundance of caution is including the specific allegation for purposes of subsequent motions or for appeal.

Ho-Chunk is correct to assert that IGRA's preemptive force precludes the application of state law, except to the limited degree agreed upon in the context of a tribal/state compact. But IGRA expressly applies Wisconsin gaming laws as a matter of federal law regarding gaming on Indian lands not authorized by a compact. 18 U.S.C. § 1166. The provision (a part of IGRA, but codified under Title 18 of the United States Code rather than Title 25) is similar to the Assimilated Crimes Act, 18 U.S.C. § 13, which does not extend the application of state law to activities occurring on Indian lands, but rather, applies state criminal statutes as a matter of federal law. *See U.S. v. Williams*, 552 F.3d. 592, 593 (7th Cir. 2009). Ho-Chunk is also wrong to argue that it is immune from claims that the Wittenberg Casino constitutes a public nuisance. The Ho-Chunk Compact requires it to conduct gaming activities in compliance with IGRA; hence, operating the Wittenberg Casino in a manner inconsistent with the Ho-Chunk Compact renders the Wittenberg Casino a public nuisance.

Ho-Chunk also repeats (Doc. 81 at 33-38) its arguments set forth in its pleadings that it is immune from SMC's claims despite the fact that Congress expressly abrogated Ho-Chunk's immunity. SMC notes that this Court did not find Ho-Chunk's argument to be persuasive and therefore did not include it as grounds in this Court's October 25, 2017 Order granting judgment

[6] In the context of SMC's supplemental pleading on the timeliness of its claims against the State (Doc. 72 at 12-15), however, SMC does seek such reconsideration, at least to the extent necessary to find that SMC's claims against the State are not time-barred. As discussed above, SMC is not precluded from doing so.

on the pleadings. Rather than repeat its analysis, SMC refers this Court to its Response in Opposition (Doc. 58 at 5-20).

CONCLUSION

For the reasons set forth herein in SMC's Supporting Memorandum (Doc. 76), and in the supporting Declarations (Docs. 73 and 74), SMC's Motion for Leave to File the PFAC should be granted.

DATED: January 3, 2018

Respectfully Submitted,

s/ Scott D. Crowell
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CERTIFICATE OF SERVICE

I, Scott Crowell, hereby certify that on January 3, 2018, I caused the **REPLY BRIEF IN SUPPORT OF STOCKBRIDGE-MUNSEE'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT** to be served upon counsel of record through the Court's electronic service system. To my knowledge all parties are registered for the CM/ECF system and shall be served electronically upon filing.

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