UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

THE STOCKBRIDGE-MUNSEE COMMUNITY,

a federally recognized Indian tribe,

Plaintiff,

v.

STATE OF WISCONSIN,

and

SCOTT WALKER, in his official capacity

as the Governor of Wisconsin,

and

THE HO-CHUNK NATION,

a federally recognized Indian tribe,

Defendants.

STOCKBRIDGE-MUNSEE COMMUNITY RESPONSE IN OPPOSITION TO HO-CHUNK NATION'S MOTION FOR SANCTIONS

17-cv-249

Plaintiff Stockbridge-Munsee community ("SMC") submits this Response Brief in Opposition to the Motion for Sanctions filed by Defendant Ho-Chunk Nation ("Ho-Chunk") in this matter. (Docs. 82 and 83).

INTRODUCTION

In a transparent attempt to intimidate and harass, Ho-Chunk Nation ("Ho-Chunk") is asking this Court to sanction counsel for the SMC for pursuing legitimate claims related to Ho-Chunk's unlawful gaming operations at its casino in Wittenberg, Wisconsin (the "Wittenberg

Casino"). Ho-Chunk's motion for sanctions (the "Motion") is vexatious and without merit, and the Court should deny it.

FACTUAL BACKGROUND

While it is not necessary to recount all of the facts relevant to the litigation for purposes of this brief, an overview of the facts and timeline will aid the Court's consideration of the Motion. The factual background set forth herein is provided to establish that legal counsel for Ho-Chunk has engaged in a pattern of threatening sanctions in response to proper legal proceedings adverse to his client and to establish that legal counsel for Ho-Chunk has engaged in a pattern of misrepresentation and conflicting representation that has caused unnecessary delay and pleadings in the instant litigation.

SMC filed its original complaint in this matter on April 19, 2017, seeking injunctive relief against Ho-Chunk, the State of Wisconsin, and Wisconsin Governor Scott Walker (collectively referred to as "State"). SMC's claims stem from Ho-Chunk's unlawful gaming operations at the Wittenberg Casino. At the same time that SMC filed its complaint, SMC also filed a motion for a preliminary injunction to prevent Ho-Chunk from enlarging the scope of its unlawful gaming operations at the Wittenberg Casino while this case was pending.

Less than twenty-four (24) hours after SMC had filed its complaint, Ho-Chunk's legal counsel issued a letter to SMC's legal counsel. *See* Letter from Lester J. Marston to Scott D. Crowell (April 20, 2017) (Doc. 19-6) (the "Marston Letter"). The Marston Letter included substantive responses to SMC's legal claims, as well as threats that Ho-Chunk would file motions for sanctions against SMC's legal counsel, and claims for defamation against SMC's governing officials, unless SMC dropped its lawsuit. The Marston Letter stated:

> Moreover, [SMC] is now on notice that its lawsuit filed to stop the Wittenberg Project is subject to summary dismissal. If [SMC]

> were to go forward with its frivolous causes of action against [Ho-Chunk], [SMC] would be subject to sanctions, pursuant to Rule 11 of the Federal Rules of Civil Procedure, for filing a frivolous lawsuit. If [Ho-Chunk] were to seek sanctions in the form of an award of attorneys' fees and costs incurred by [Ho-Chunk] in responding to the lawsuit, please be advised that the market rate for this office's legal services is currently $600 per hour.

(Doc.19-6). The Marston Letter added that the allegations in SMC's original complaint were false and defamatory, and warned, "court rulings in other states raise serious questions as to whether individual tribal officials would be personally liable for damages arising from defamation and tortious interference with contract…." *id*.

Notwithstanding the fact that Ho-Chunk's legal counsel issued the Marston Letter less than twenty-four hours after SMC had filed its complaint, Ho-Chunk's counsel informed this Court on April 25, 2017 that Ho-Chunk had not yet received copies of SMC's complaint. (Doc. 14).

Then, in a sworn declaration submitted to this Court on May 18, 2017, Ho-Chunk assured this Court and the parties that class III gaming would not be expanded at the Wittenberg Casino until construction activities were completed. Ho-Chunk's Executive Director of Business stated in a declaration to this Court that this would not occur until November of 2017:

> No new revenue from gaming being conducted on the Site from the expansion of [HCN's] Casino will occur until the Project's expanded Casino is completed and has opened its doors for business to the general public, ***which won't occur until November 2017***.

Mudd Decl. ¶ 6 (Doc 33) (emphasis added). Ho-Chunk reiterated this point in its corresponding brief to this Court filed the same day:

> Rather, SMC argues that it will suffer irreparable harm when the Project increases the number of gaming devices operated on the Parcel from 509 to 820. ***That will not occur until after the construction of the expansion Project on the Parcel has been***

> ***completed. The construction is currently scheduled to be completed at the earliest in November 2017.***

Doc. 37 at 4 (emphasis added) (internal citations omitted). Ho-Chunk has not submitted any pleadings, declarations, or statements to this Court since its May 18, 2017 filings, which would indicate that the expanded gaming activities at the Wittenberg Casino would begin on an earlier date.

On Monday, October 1, 2017, in-house counsel for SMC heard a radio advertisement during her commute to work announcing that Ho-Chunk would open its gaming expansion at the Wittenberg Casino on October 12, 2017. Proposed Declaration of Bridget Swanke ("Swanke Proposed Decl.") (Doc. 63-6 at ¶ 2 and Exhibit A thereto). On or about October 1, 2017, Ho-Chunk also advertised the new gaming activities on its website. (Doc. 63-6 at ¶ 3).

On Friday, October 6, 2017, the Shawano Leader published a news article about Ho-Chunk's upcoming October 12th gaming expansion at the Wittenberg Casino. *See* Shawano Leader, *Ho-Chunk opening new Wittenberg gaming area* (October 6, 2017) (Doc. 63-6 at ¶ 4 and Exhibit B thereto). The Shawano Leader article notes:

> Ho-Chunk Gaming in Wittenberg will hold a ribbon-cutting ceremony at 5 p.m. Thursday as a "soft opening" of its new gaming floor area.
>
> The expanded gaming floor includes more slot machines, a non-smoking gaming area, high-limits area and renovation of the bar.

Id.

After correspondence between counsel for Ho-Chunk and SMC regarding Ho-Chunk's changing representations to this Court, Ho-Chunk delayed the opening of its expanded gaming operations at the Wittenberg Casino until November 1, 2017.

On October 25, 2017, this Court issued an order (Doc. 67) denying SMC's motion for a preliminary injunction and dismissing SMC's claims against Ho-Chunk as barred by Wisconsin's statute of limitations as applied by the Court to SMC's claims against Ho-Chunk. Ho-Chunk did not seek entry of a final judgment pursuant to Fed. R. Civ. P. 54(b).

SMC quickly moved to amend its original complaint to include two new claims against Ho-Chunk which arose after this litigation began, and filed a motion for leave to amend its complaint on November 29, 2017 – just one month after this Court's order dismissing SMC's original claims against Ho-Chunk.

ARGUMENT

The Federal Rules of Civil Procedure require attorneys to file only those claims, which have a basis in fact or in law, and to avoid filing claims for any improper purpose. *See* Fed. R. Civ. P. 11. Federal courts are authorized to sanction attorneys who disobey their professional obligations, including requiring attorneys to personally satisfy the expenses incurred in responding to unreasonable and vexatious pleadings. *See* 28 U.S.C. § 1927; and Fed. R. Civ. P. 11(c). In particular, 28 U.S.C. § 1927 states:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Sanctions under § 1927 are reserved for those rare and exceptional instances "in which the parties (or counsel, in the case of § 1927) have acted so outrageously as to be subject to sanctions." *Silicon Graphics, Inc. v. Ati Technologies, Inc*., 569 F. Supp. 2d 819, 832-33 (W.D. Wis., 2008); *see also Hartmarx Corp. v. Abboud*, 326 F.3d 862, 867 (7th Cir. 2003) ("In exercising its discretion, a district court must also bear in mind that such sanctions are to be

imposed sparingly, as they can have significant impact beyond the merits of the individual case and can affect the reputation and creativity of counsel.") (internal quotations omitted).

The Seventh Circuit has explained that a court must first determine that an attorney acted in "bad faith" before awarding sanctions under § 1927. *See Boyer v. BNSF Ry. Co*., 824 F.3d 694, 708 (7th Cir. 2016). A finding that an attorney knowingly engaged in unreasonable and vexatious pleadings (i.e. subjective bad faith) is not necessary; a court may award sanctions based on a determination that the attorney should have known that he was acting with recklessness or indifference to the law. *Id*.

There is no shortage of irony in the fact that Ho-Chunk has filed the Motion for sanctions under § 1927. After all, it was Ho-Chunk's counsel who informed this Court that it had not received a copy of SMC's complaint (delaying proceedings in this case), despite the fact that the same Ho-Chunk counsel issued a detailed and threatening response to SMC's complaint less than twenty-four hours after it was filed with this Court. *See* Marston Letter (Doc. 19-6). Ho-Chunk's counsel also pledged that he would file a motion to dismiss SMC's claims within two weeks of filing Ho-Chunk's brief in response to SMC's April 19, 2017 (Doc. 7) motion for a preliminary injunction. *See* Doc. 37 at 4 ("The Nation will be filing a motion to dismiss based upon the Nation's and the State's sovereign immunity and for failure to join an indispensable party in the next two weeks."). Ho-Chunk never did file such a motion, and it was Ho-Chunk's counsel who informed this Court that expanded gaming at the Wittenberg Casino would not open to the public until January of 2018 and then November of 2017. Doc 37 at 4, *supra*. Despite that representation, Ho-Chunk advertised to the public that it would open its expanded gaming on October 12, 2017, – while SMC's motion for a preliminary injunction was pending before this

Court. *See* Shawano Leader, *Ho-Chunk opening new Wittenberg gaming area* (October 6, 2017) (Doc. 63-6 at ¶ 4 and Exhibit B thereto).

The use of attorney sanctions, or threats to seek attorney sanctions, appears to be a favored tactic of Ho-Chunk and its counsel. The Marston Letter issued to SMC's counsel at the outset of this litigation made it clear that motions for sanctions and claims for tort damages were weapons in Ho-Chunk's litigation arsenal. *See* Marston Letter (Doc. 19-6). In an earlier case, Ho-Chunk (and its current legal counsel) also sought sanctions against the State of Wisconsin for voluntarily dismissing its own appeal after Ho-Chunk had completed work on its answer brief. *Wisconsin v. Ho-Chunk Nation*, 463 F.3d 655, 658 (7th Cir. 2006). The Seventh Circuit denied Ho-Chunk's motion. Ho-Chunk's routine use of motions for sanctions (and threats to file such motions) is the height of vexatious litigation tactics.[1]

SMC has displayed restraint in not burdening this Court with a "tit-for-tat" dispute over the various misrepresentations and threatening statements made by Ho-Chunk and its counsel. Instead, SMC has sought simply to resolve the legal issues relevant to its claims, to present claims to this Court as the facts have become available, and to perfect the record for disposition by this Court and (likely) the Court of Appeals.

Nevertheless, SMC takes Ho-Chunk's instant Motion seriously and is compelled to respond to Ho-Chunk's arguments.

The underlying premise forming the basis of the motion is that somehow SMC's Motion for Leave to file a proposed amended complaint (Docs. 73-76) "is objectively baseless, procedurally and substantively, and vexatiously increases the litigation costs of the Nation." (Doc. 83 at 1). This apparently stems from Ho-Chunk's position in opposition to SMC's motions

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[1] "Vexatious" is defined as "intended to harass." "Vexatious", *Merriam-Webster.com*, 2018. https://www.merriam-webster.com/dictionary/vexatious (2 January 2018).

that SMC is precluded from seeking leave to file an amended complaint, or from seeking reconsideration of the Court's October 25, 2017 Order because dismissal of claims as untimely is dismissal with prejudice. SMC is filing simultaneously herewith, its Reply in Support of its motion for leave to file the proposed first amended complaint, which pleading provides sound colorable argument in response to Ho-Chunk's arguments. In contrast to Ho-Chunk's characterization of SMC's position as "objectively baseless, procedurally and substantively" the arguments presented by SMC on not simply colorable, but SMC contends they are correct. What can be properly considered as "baseless" is Ho-Chunk's contention that the interlocutory October 25, 2017 Order of this Court precludes SMC from seeking leave to file an amended complaint or from seeking reconsideration of the October 25, 2017 Order. SMC refers the Court to its Reply brief filed simultaneously herewith to make its own determination on the merits of the arguments presented, but the reply brief certainly is one submitted in good faith as part of SMC's legal counsels' zealous advocacy of its client's interest.

Moreover, SMC's motion for leave to amend is not "vexatious". To the contrary, as set out in greater detail in its reply pleading filed simultaneously herewith, seeking leave to amend at this juncture is prudent and efficient, properly positioning the litigation so that a single appealable final judgment resolving all claims as to all parties. This is in contrast to the piecemeal fragmented approach advocated by Ho-Chunk.

Contrary to Ho-Chunk's assertions, SMC's proposed first amended complaint does not require this Court to revisit or reconsider the October 25, 2017 Order. The proposed first amended complaint adds two new claims against Ho-Chunk that accept as correct for purpose of the proposed amendment, the Court's October 25, 2017 analysis that claims which were ripe when Ho-Chunk first opened the Wittenberg Casino in 2008 are time barred.

In its brief, Ho-Chunk characterizes SMC's motion for leave to amend as an improper attempt "to use the so-called 'liberal standards' of Rule 15 to seek reconsideration of the October 25 Order." Doc. 83 at 6. Although SMC is perfectly in its right to seek reconsideration of any interlocutory order of this Court prior to the entry of final judgment, nothing in SMC's proposed first amended complaint is intended to litigate matters already resolved by this Court; instead, the proposed first amended complaint is intended simply to set forth all of SMC's claims in a single amended complaint – those which have been resolved by this Court, along with two new claims. To the extent there is confusion on this point SMC has clarified it here. In either instance, an attorney's imprecise or unartful drafting of a pleading should not be used to find "bad faith" in filing the pleading itself. *See Tabrizi v. Village of Glen Ellyn*, 883 F.2d 587, 593 (7th Cir. 1989) (affirming District Court's denial of sanctions where "[t]he district court refused to characterize these 'inartful or incomplete pleadings' as exhibiting 'the sort of reckless indifference to the law that would call for Rule 11 sanctions.' ").

Notably, Ho-Chunk's counsel failed to inform SMC's counsel of its intent to file the motion for sanctions, much less confer with SMC's counsel to attempt to narrow the scope of any dispute. Such conference would likely have resulted in clarification that SMC was not, at this juncture, seeking reconsideration of the October 25, 2017 Order and that the dismissed claims were included in the proposed first amended complaint were being restated for the purpose of preservation for appeal. Ho-Chunk's counsel's failure in this regard is underscored by the fact that it sought and received SMC's assent to its motion (Doc. 78) to extend the deadline for responding to SMC's motion for leave to amend. At no time in seeking such assent did Ho-Chunk's legal counsel inform SMC's legal counsel of its intent to seek sanctions, much less inform SMC of its position that SMC's motion for leave to amend was frivolous. Although

25 U.S.C. § 1927 does not require the safe harbor and opportunity to cure provisions required prior to seeking sanctions pursuant to Fed. R. Civ. P. 11, the Seventh Circuit's standard for sanctions pursuant to 25 U.S.C. § 1927 provided for sanctions when "counsel acted recklessly, counsel raised baseless claims despite **notice** of the frivolous nature of these claims. *Grochocinski v. Brown*, 719 F.3d 785, 799 (7th Cir. 2013) (emphasis added) (citing with approval, *Kotsilieris v. Chalmeers*, 966 F.2d 1181, 1184-85 (7th Cir. 1992). Ironically, where Ho-Chunk provided notice of its position that SMC's motion for preliminary injunction was frivolous, as discussed above, Ho-Chunk did not follow through on its threat. Yet, here it seeks sanctions without providing any notice whatsoever. Although admittedly such notice would not have resulted in the withdrawal of the motion for leave to amend, because counsel for SMC believe in the appropriateness and the merit of the motion for leave to amend, Ho-Chunk's legal counsel's abject failure to provide notice to SMC's legal counsel reinforces that sanctions are not appropriate here.

Ho-Chunk also makes an attempt to compare SMC's motion for leave to amend its complaint with the egregious conduct of the attorneys in *Boyer v. BNSF Ry. Co*., 824 F.3d 694, 708 (7th Cir. 2016). There is no comparison.

Boyer involved successive lawsuits in separate jurisdictions between the same parties regarding the same claims. In *Boyer*, this Court dismissed the plaintiffs' claims in an initial class action lawsuit. The Seventh Circuit affirmed the dismissal. Sixteen months after the Seventh Circuit's opinion, the plaintiffs' attorneys brought the same class action lawsuit in Arkansas state court. The case was eventually removed back to this Court, and appealed back to the Seventh Circuit. The plaintiffs' attorneys acknowledged to this Court that their effort to bring the same claims in Arkansas state court was to obtain review from a "fresh pair of judicial eyes[.]" *Id*. at

699. The Seventh Circuit relied upon this admission of forum shopping, combined with the fact that the attorneys had previously litigated this matter to its end, to find that that the attorneys acted in bad faith under § 1927 and should be sanctioned. *Id*. at 709.

SMC's simple and routine motion to amend its complaint to add new claims is nothing like the plaintiffs' counsel's conduct in *Boyer*. SMC did not wait sixteen months to file its amended complaint. Instead, SMC filed its motion just one month after this Court's October 25, 2017 Order, and contemporaneously with Ho-Chunk's expansion of gaming at the Wittenberg Casino. SMC is not seeking to litigate facts and issues that have already been decided and reduced to final judgment, unlike the plaintiffs in *Boyer*. Finally, SMC is not engaging in forum shopping; it presented its motion in the same court before the same judge presiding over this litigation.

SMC is simply seeking to present to this Court all of its viable claims against the Defendants in a single, amended complaint, and to perfect the record for final disposition by this Court (and likely, the Court of Appeals). The viability and sufficiency of these claims is presently before this Court, but it is clear that SMC has brought these claims in good faith and after careful consideration. It can hardly be argued that SMC's motion for leave to amend its complaint compares to the egregious conduct described in *Boyer*, or that the conduct of SMC's counsel in filing the motion for leave to amend SMC's complaint is outrageous. SMC's motion to amend the complaint is well within the bounds of normal litigation practice, and is a reasonable attempt to resolve all issues relating to Ho-Chunk's Wittenberg Casino in an expeditious manner.

Attorney sanctions are reserved for egregious conduct, and the Seventh Circuit has explained that district courts should impose sanctions "sparingly," *see Hartmarx Corp,* 326 F.3d at 867. Sanctions should not be imposed here.

CONCLUSION

For the foregoing reasons, SMC respectfully requests that this Court deny Ho-Chunk's Motion for sanctions.

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 **STOCKBRIDGE-MUNSEE COMMUNITY RESPONSE IN OPPOSITION TO HO-CHUNK NATION'S MOTION FOR SANCTIONS** 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*)