No. 18-1449

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

STOCKBRIDGE-MUNSEE COMMUNITY, a federally recognized Indian Tribe,

Plaintiff-Appellant,

v.

STATE OF WISCONSIN; SCOTT WALKER, in his official capacity as the Governor of Wisconsin; and THE HO-CHUNK NATION, a federally recognized Indian Tribe,

Defendants-Appellees.

APPEAL FROM THE U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN, NO. 17-CV-249-JDP, THE HONORABLE JAMES D. PETERSON, U.S. DISTRICT JUDGE

RESPONSE BRIEF OF STATE OF WISCONSIN AND SCOTT WALKER

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JURISDICTIONAL STATEMENT

The jurisdictional statement in the brief of Plaintiff-Appellant Stockbridge-Munsee Community ("Stockbridge") is not complete and correct. Defendants-Appellees State of Wisconsin and Scott Walker (the "State") provide a complete jurisdictional statement as follows:

District Court Jurisdiction

With regard to Stockbridge's claims against Defendant-Appellee Ho-Chunk Nation ("Ho-Chunk"), the district court had jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1362 (civil action by an Indian tribe arising under federal law), and 25 U.S.C. § 2710(d)(7)(A)(ii) (actions by an Indian tribe to enjoin class III gaming on Indian lands and conducted in violation of a Tribal-State gaming compact).

With regard to Stockbridge's claims against the State, the district court had jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1362.[1]

[1] Stockbridge's citation to 25 U.S.C. §§ 1361 and 1362 is erroneous, in that no such sections exist. Assuming Stockbridge intended to refer to Title 28, rather than Title 25, the reference to § 1361 would still be erroneous because 28 U.S.C. § 1361 applies only to actions against an officer of the United States. Stockbridge's reference to 28 U.S.C. § 2201 as a source of district court jurisdiction is incorrect. That statute is not an independent source of federal subject matter jurisdiction, and requires an independent basis for jurisdiction. *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 935 (7th Cir. 2008).

Appellate Jurisdiction

This Court has appellate jurisdiction under 28 U.S.C. § 1291 (final decisions of district courts). This appeal seeks review of the judgment in a civil case entered by the district court on February 6, 2018 (Dkt. 89), which granted judgment in favor of the State and Ho-Chunk, and was a final order that disposed of all claims in the case with respect to all parties. The district court case was not decided by a magistrate judge.

Timeliness of Appeal

No motions tolling the time for an appeal were filed in the district court. This appeal was timely filed and docketed on February 27, 2018. (Dkt. 90.)

ISSUES PRESENTED

1. Did the district court correctly hold that Stockbridge's claims against the State are barred by a six-year statute of limitations borrowed from Wisconsin state law governing actions on a contract?

   This Court should answer yes.

2. Did the district court correctly deny Stockbridge's motion for leave to amend its complaint?

   This Court should conclude that Stockbridge has abandoned this issue by presenting no supporting argument in its brief.[2]

[2] In addition to the issues enumerated here, this appeal presents the issue of whether the district court correctly held that Stockbridge's claims against Ho-Chunk are barred by a six-year statute of limitations. Because that issue does not involve the State, it will not be discussed in this brief.

INTRODUCTION

Stockbridge and Ho-Chunk are Indian tribes in Wisconsin, both of which conduct class III gaming activities pursuant to the federal Indian Gaming Regulatory Act (IGRA) and gaming compacts that each tribe has entered with the State (respectively, the "Stockbridge Compact" and the "Ho-Chunk Compact"). Since 1992, Stockbridge has operated a casino on its reservation in Shawano County, Wisconsin. In 2008, Ho-Chunk opened a competing casino in the Town of Wittenberg in Shawano County. Stockbridge expressed concerns to Ho-Chunk about the new casino, but took no legal action.

Years passed. In August 2016, Ho-Chunk announced plans to expand the Wittenberg casino. Finally, in April 2017, Stockbridge filed suit in federal district court against both Ho-Chunk and the State, claiming that Ho-Chunk's gaming activities at Wittenberg violate both IGRA and the Ho-Chunk Compact, and that the State had breached the Stockbridge Compact (1) by taking no action to stop Ho-Chunk's Wittenberg operation; and (2) by continuing to receive gaming revenue-sharing payments from Stockbridge without providing protection against competition that the State allegedly had promised. In addition to declaratory relief, Stockbridge asked to enjoin Ho-Chunk from continuing to violate the Ho-Chunk Compact and IGRA (*i.e.* to shut down the Wittenberg casino), and to enjoin the State from continuing to

violate the Stockbridge Compact (*i.e.* to compel the State to take enforcement action against Ho-Chunk).

The district court dismissed Stockbridge's claims against both Ho-Chunk and the State as time-barred by the applicable statute of limitations. Because federal law contained no express statute of limitations for Stockbridge's claims, the court borrowed Wisconsin's six-year statute of limitations for contract actions. That limitation period, the court found, began running in 2008, when the Wittenberg casino opened, and expired in 2014—almost three years before this suit was filed. Because Stockbridge reasonably could have filed suit during the limitation period, but failed to do so, all of its claims were dismissed as untimely.

On appeal, Stockbridge has failed to provide any grounds for overturning the district court's decision. Stockbridge's status as a tribal sovereign does not make its claims against the State exempt from statutes of limitation. Its claims for declaratory and injunctive relief against the State are subject to statutes of limitation, notwithstanding their equitable character. The district court did not subject Stockbridge to state law, but incorporated a state provision into federal law. The district court also rightly found that Stockbridge's claims against the State are more closely analogous to a contract claim than to a public nuisance claim. And the court properly found that the applicable

six-year statute of limitations began to run in 2008, when the Wittenberg casino opened and the State did nothing to stop it.

The judgment of the district court should be affirmed.

STATEMENT OF THE CASE

I. Factual Background.[3]

A. Stockbridge

Stockbridge is a federally recognized Indian tribe with a reservation located in Shawano County, Wisconsin. (Dkt. 5:3 ¶ 7; 67:1.) Pursuant to IGRA, 27 U.S.C. § 2710(d)(3), Stockbridge and the State entered into the Stockbridge Compact in 1992 (Dkt. 5:5 ¶ 17; 5-1), and executed amendments to that agreement in 1998 (Dkt. 5:5 ¶ 19) and in 2003 (Dkt. 5:5 ¶ 20; 5-2). Since 1992, Stockbridge has conducted class III gaming at a casino on its reservation, pursuant to the Stockbridge Compact. (Dkt. 5:5 ¶ 18; 67:1.)

Section XXXII.C.3 of the Stockbridge Compact, as amended, requires Stockbridge to make specified annual gaming revenue-sharing payments to the

[3] This statement of facts is drawn from the pleadings and the factual findings of the district court. *See Finch v. Peterson*, 622 F.3d 725, 728 (7th Cir. 2010).

State. (Dkt. 50:33 ¶¶ 20–21.)[4] Section XXXII.B. of that Compact provides for specified modifications to Stockbridge's revenue-sharing obligation, if another tribe, pursuant to authorization under 25 U.S.C. § 2719(b)(1)(A), conducts

[4] Section XXXII.C states:

> On or before June 30, 2007, and on or before June 30 of each succeeding year, the Tribe shall make a payment to the State (Annual Payment) as follows. If the Tribe's annual net win from all Class III gaming operations in the previous fiscal year is less than $80,000,000.00, it shall pay to the State 2.25% of the net win from $0 to $35,000,000.00, and 3% of the net win from $35,000,000.00 to $80,000,000.00. If the Tribe's annual net win from all Class III gaming operations in the previous fiscal year is greater than $80,000,000.00, it shall pay to the State 4.5% of all of its net win. If the Tribe's annual net win from all Class III gaming operations is greater than $200,000,000.00, it shall pay to the State 5% of all of its net win.
>
> For purposes of this Section, "fiscal year" shall be defined as the period beginning October 1 of a given year and ending September 30 of the following year. In addition, "net win" means gross gaming revenue from all of the Tribe's Class III gaming activities in Wisconsin, less amounts paid out for prizes, including the actual cost to the Tribe of any noncash prize which is distributed to a patron as the result of a specific, legitimate wager.

(Dkt. 5-2:21.)

class III gaming at an establishment located within 70 miles of Stockbridge's on-reservation casino. (Dkt. 5:5–6 ¶ 21.)[5]

One of Stockbridge's claims against the State is premised in part on prior litigation between Stockbridge and the State. In 1998, Stockbridge began conducting class III gaming at a supper club located on trust land acquired in 1995 that Stockbridge believed was within its reservation and therefore eligible for class III gaming under 25 U.S.C. § 2719(a)(1). (Dkt. 5:7 ¶¶ 28–29.) The State filed suit against Stockbridge in federal court, claiming that class III gaming at the supper club was not authorized under IGRA and the Stockbridge

[5] Section XXXII.B states:

> If any Indian tribe ("tribe"), other than the Stockbridge-Munsee Tribe ("Tribe"), submits an application to the Secretary of the Interior ("Secretary"), under 25 U.S.C. § 2719(b)(1)(A), and receives a determination ("Determination") after January 1, 2003 that a proposed gaming establishment ("Establishment") on off-reservation trust lands acquired by the United States for the tribe, is in the best interest of that tribe and its members and is not detrimental to the surrounding community, and the Governor concurs in that determination, then during any period in which the Establishment conducts Class III gaming within seventy (70) miles of a Class III gaming facility of the Tribe that is within the boundaries of its reservation, the Tribe's obligation to make payments to the State pursuant to subsection C.3. shall be modified as follows. If the Tribe's annual net win from all Class III gaming operations in the previous fiscal year is less than$80,000,000.00, it shall pay to the State 2.25% of the net win from $0 to $50,000,000.00. If the Tribe's annual net win from all Class III gaming operations in the previous fiscal year is greater than$80,000,000.00, it shall pay to the State 4.5% of all of its net win. If the Tribe's annual net win from all Class III gaming operations is greater than $200,000,000.00, it shall pay to the State 5% of all of its net win.

(Dkt. 5:5–6 ¶ 21, 5-2:20.)

Compact. (Dkt. 5:7 ¶ 30.) The district court and this Court ultimately held that the trust land in question was not within the current boundaries of Stockbridge's reservation. (Dkt. 5:7 ¶¶ 30–31.) *See Wisconsin v. Stockbridge-Munsee Cmty.*, 366 F. Supp. 2d 698 (E.D. Wis. 2004); *Wisconsin v. Stockbridge-Munsee Cmty.*, 554 F.3d 657 (7th Cir. 2009).

B. Ho-Chunk

Ho-Chunk is a federally recognized Indian tribe in Wisconsin. (Dkt. 5:4 ¶ 10; 67:2.) Pursuant to IGRA, 27 U.S.C. § 2710(d)(3), Ho-Chunk and the State entered into the Ho-Chunk Compact in 1992 (Dkt. 5:8–9 ¶ 36; 9-10; 67:3), and executed amendments to that agreement in 1998 (Dkt. 5:9 ¶ 38) and 2003 (Dkt. 5:9 ¶ 38; 9-13; 67:3). Notice of the taking effect of the 2003 amendment to the Ho-Chunk Compact was published in the Federal Register on July 3, 2003.[6]

Before 2003, the Ho-Chunk Compact allowed Ho-Chunk to conduct class III gaming at enumerated gaming facilities—defined as a facility whose primary business purpose is gaming—and at ancillary facilities—defined at that time as a facility "whose Primary Business Purpose is not gaming." (Dkt. 9-10:33.)

[6] 68 Fed. Reg. 39964 (July 3, 2003), https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc1-024621.pdf.

The Compact also required that an ancillary facility had to be located next to a facility whose primary business purpose *was* gaming. (Dkt. 9-10:33.)[7]

The 2003 amendment added Section XVI.E. to the Ho-Chunk Compact. That provision allows Ho-Chunk to conduct class III gaming at one gaming facility in each of Jackson, Sauk, and Wood counties. (Dkt. 9-13:4.)[8] It also allows Ho-Chunk to conduct class III gaming at five ancillary facilities, one of which may be located in Shawano County, and eliminates the location limitation, so that ancillary facilities no longer have to neighbor non-ancillary gaming facilities, but instead can be stand-alone operations. (Dkt. 5:9 ¶ 39; 9-13:4; 67:3.)

Most importantly Section XVI.E. provided a new definition of "ancillary facility" as a facility where fifty percent or more of the lot coverage of the trust property upon which the facility is located is used for a primary business purpose other than gaming. (Dkt. 5:9 ¶ 40; 9-13:4; 67:3.) Since the 2003 amendment to the Ho-Chunk Compact, the definition of an "ancillary facility" thus has been based on lot coverage of the trust parcel, and not on what type of business activity generates the majority of revenue for the facility.

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[7] At that time, the Compact permitted ancillary facilities in Sauk and Jackson counties, but not Shawano County where the facility at issue in this case is located.

[8] That provision also refers to class III gaming at a facility in Dane County. Authorization of class III gaming there was subject to approval by a local referendum. That approval was not obtained and, as a result, only class II gaming is authorized at Ho-Chunk's gaming facility in Dane County. (Dkt. 9-13:4; 10:10 ¶ 37.)

C. Wittenberg

On June 28, 1969, a chapter of the Native American Church (the "Church") deeded to the United States of America, in trust for the Wisconsin Winnebago Tribe,[9] a parcel of land in the Town of Wittenberg, Wisconsin (the "Wittenberg parcel"). (Dkt. 5:8 ¶ 32; 5-3:3; 67:2.) The deed provided that the conveyance was "subject to Housing construction which must commence within 5 years from the date of approval of this deed or the land will revert to the grantor," *i.e.*, the Church. (Dkt. 5:8 ¶ 32; 5-3:3; 67:2.) On October 3, 1969, the deed was approved by the United States Department of the Interior, Bureau of Indian Affairs (BIA). (Dkt. 5-3:4.)

According to Stockbridge, housing construction was not commenced on the Wittenberg parcel within five years of the approval of the 1969 deed. (Dkt. 5:8 ¶ 33; 67:2.) Decades passed. (Dkt. 67:2.) On April 15, 1993, the Church issued a deed quitclaiming to the United States of America in trust for the Wisconsin Winnebago Tribe "[a]ll right, title and interest, it may have under the reversionary clause in Warranty Deed dated June 28, 1969 . . ." with respect to the Wittenberg parcel. (Dkt. 5:9 ¶ 37; 5-5:2; 67:2.) The quitclaim deed was certified by the BIA on July 1, 1993. (Dkt. 5:9 ¶ 37; 5-5:3.)

[9] Ho-Chunk was known at that time as the Wisconsin Winnebago Tribe. (Dkt. 5:8 ¶ 35.)

In 2008, Ho-Chunk opened a casino offering class III gaming on the Wittenberg parcel. (Dkt. 5:9 ¶ 41; 67:3.) More than eight years then passed, during which Stockbridge commenced no legal action regarding Wittenberg.

On August 16, 2016, Ho-Chunk issued a press release announcing plans to expand the Wittenberg casino by adding more than 200 slot machines, ten gaming tables, a high-limit gaming area, and a hotel, restaurant, and bar. (Dkt. 5:9–10 ¶ 42; 5-6; 67:3–4.) Within two weeks, Stockbridge sent a letter to Ho-Chunk expressing concerns about the expansion. (Dkt. 5:10 ¶ 43; 67:4.)

The State has not at any time taken action to prevent Ho-Chunk from conducting class III gaming at Wittenberg. (Dkt. 5:11–12 ¶¶ 51–52, 63.)[10]

II. Procedural Background.

Stockbridge commenced this lawsuit on April 19, 2017. (Dkt. 5; 67:4.) The complaint asserted five claims related to Ho-Chunk's gaming facility in Wittenberg—three against the State and two against Ho-Chunk. (Dkt. 5:10–15 ¶¶ 48–81.)

First, the complaint alleged that the State, by taking no action to prevent Ho-Chunk's gaming operations at Wittenberg, violated protections against

[10] Section XXIII of the Ho-Chunk Compact provides dispute resolution procedures, in the event of a dispute between Ho-Chunk and the State regarding the interpretation or enforcement of the Ho-Chunk Compact. (Dkt. 5:11 ¶ 50; 9-10:46.) Ho-Chunk and the State concur that Ho-Chunk's Wittenberg casino is a permissible ancillary facility within the meaning of section XVI.E. of the Ho-Chunk Compact.

competition purportedly contained in section XXXII.B. of the Stockbridge Compact. (Dkt. 5:10–11 ¶¶ 48–53.)

Second, the complaint alleged that, because the State had taken no action to prevent the gaming at Wittenberg, Stockbridge had received no benefit in exchange for its agreement to share revenue with the State, thereby making the revenue-sharing requirement an unlawful tax on Stockbridge's gaming revenues, in violation of the Stockbridge Compact and federal law. (Dkt. 5:11–12 ¶¶ 54–58.)

Third, the complaint alleged that the State has not enforced the Ho-Chunk compact in the same way it previously enforced the Stockbridge Compact, and that this disparity constitutes arbitrary and capricious enforcement, in violation of Section XX.C. of the Stockbridge Compact. (Dkt. 5:12–13 ¶¶ 59–64.)

Fourth, the complaint alleged that Ho-Chunk's gaming operations at Wittenberg are being conducted on land that is ineligible for gaming, in violation of 25 U.S.C. § 2719(a) and Sections III and IV of the Ho-Chunk Compact. (Dkt. 5:13 ¶¶ 65–71.)

Fifth, the complaint alleged that Ho-Chunk's gaming operations at Wittenberg violate the ancillary facility clause in Section XVI.E. of the Ho-Chunk Compact. (Dkt. 5:14–15 ¶¶ 72–81.)

Simultaneous with the complaint, Stockbridge moved for a preliminary injunction, seeking to prevent the proposed Wittenberg expansion while the litigation was pending. (Dkt. 7–10.) Ho-Chunk opposed the preliminary injunction motion (Dkt. 27–28; 30–37), arguing, in part, that Stockbridge's claims were time-barred by the applicable statute of limitations (Dkt. 37:21–28).

On May 18, 2017, Ho-Chunk answered the complaint. (Dkt. 29.) On June 26, 2017, the State answered the complaint and filed a counterclaim seeking a declaration of Stockbridge's liability for annual revenue sharing payments to the State under the Stockbridge Compact. (Dkt. 43.) Following a motion by Stockbridge to strike the State's affirmative defenses (Dkt. 48), the State filed an amended answer on July 14, 2017 (Dkt. 50).

On July 24, 2017, pursuant to direction from the court, Stockbridge and Ho-Chunk filed supplemental briefs on the application of the continuing violations doctrine to the statute-of-limitations issues. (Dkt. 52; 54.)

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

On October 25, 2017, the Court granted Ho-Chunk's motion for judgment on the pleadings, denied Stockbridge's preliminary injunction motion as moot, and dismissed Ho-Chunk from the lawsuit. (Dkt. 67.) The court found that a six-year statute of limitations applied to Stockbridge's claims against Ho-Chunk and that those claims accrued in 2008, when Ho-Chunk began operating the Wittenberg casino. (Dkt. 67:6–8.) Because Stockbridge did not commence this suit within six years of 2008, the court concluded its claims against Ho-Chunk were time-barred. (Dkt. 67:8.) The court also questioned the timeliness of Stockbridge's claims against the State and invited simultaneous filings on that issue. (Dkt. 67:11.)

On November 29, 2017, the State and Stockbridge filed briefs on the timeliness of the claims against the State. (Dkt. 71–72.) The State took the position that Stockbridge's claims against it were untimely and should be dismissed for the same reasons as Stockbridge's claims against Ho-Chunk. (Dkt. 71:1.) Stockbridge simultaneously moved for leave to file an amended complaint. (Dkt. 75–76.) On November 30, 2017, the court issued a text-only order, directing briefing on Stockbridge's motion for leave to amend the complaint.

On February 2, 2018, the district court dismissed Stockbridge's claims against the State as barred by the applicable statute of limitations, and denied Stockbridge's motion for leave to amend its complaint. (Dkt. 88.) Because

federal law did not contain an express statute of limitations for Stockbridge's claims against the State, the district court borrowed Wisconsin's six-year statute of limitations for actions on a contract, Wis. Stat. § 893.43, reasoning that the claims against the State were most closely analogous to breach-of-contract claims. (Dkt. 88:10–11). The court also found that Stockbridge's claims against the State, like those against Ho-Chunk, accrued in 2008, and therefore dismissed those claims as time-barred. (Dkt. 88:12–13.) Finally, because Stockbridge's original jurisdiction claims against the State had been dismissed, the district court dismissed the State's counterclaim without prejudice. (Dkt. 88:13.)

The district court entered final judgment on February 6, 2018 (Dkt. 89), and Stockbridge commenced this appeal on February 27, 2018 (Dkt. 90).

SUMMARY OF THE ARGUMENT

Stockbridge's claims against the state were correctly dismissed as untimely by the district court. Because federal law does not contain an express statute of limitations for those claims, the district court properly borrowed the most closely analogous statute of limitations from Wisconsin state law—*i.e.* the six-year statute of limitations for actions on a contract. The district court also rightly held that Stockbridge's claims against the State rest on the State's refusal to prevent Ho-Chunk from operating the Wittenberg casino, and that those claims accrued in 2008, when that facility opened and the State declined

to take action against it. At that time, all the elements of Stockbridge's claims against the State existed, and Stockbridge reasonably could have sued. But it did not. Instead, for almost a decade, Stockbridge acquiesced in both the operation of the Wittenberg casino and the State's inaction, and continued to make its gaming revenue sharing payments to the State. Under those circumstances, the district court correctly found Stockbridge's claims to be time-barred.

On appeal, Stockbridge has failed to provide any grounds for overturning the district court's decision.

First, Stockbridge's status as a tribal sovereign does not make its claims against the State exempt from statutes of limitation. Stockbridge relies on a common-law principle that statutes of limitation cannot be asserted against a sovereign, but that principle does not apply here because the Wisconsin limitation period borrowed by the district court is applicable to actions brought by a government plaintiff, sovereign immunity was waived in the Stockbridge Compact, and Stockbridge is acting in a proprietary rather than a governmental capacity.

Second, Stockbridge's claims for declaratory and injunctive relief against the State are subject to statutes of limitation, notwithstanding their equitable character. Stockbridge's contention that a statute of limitations should not be allowed to preclude a court from enjoining ongoing unlawful gaming activity

does not apply to Stockbridge's claims against the State because Stockbridge does not seek to enjoin the State from conducting gaming. The alleged legal obligation that Stockbridge seeks to enforce arises, rather, from a contractual agreement between Stockbridge and the State, and an action to enforce that obligation is properly subject to the statute of limitations for an ordinary action on a contract. Moreover, to the extent Stockbridge seeks a judicial declaration of the State's duties under the Stockbridge Compact, its claims are subject to the same limitation period that would apply to a direct claim for affirmative relief.

Third, the district court, as a matter of federal law, properly borrowed the most closely analogous state statute of limitations, and did not apply Wisconsin state law to Stockbridge or to the regulation of tribal gaming. Pursuant to well-established federal precedent, it applied federal law, but incorporated into that federal law a statute of limitations borrowed from state law.

Fourth, the district court correctly borrowed Wisconsin's statute of limitations for actions on a contract rather than one for claims to enjoin a public nuisance. Stockbridge's claims against the State are more closely analogous to a contract claim. An action seeking to compel a party to abide by the terms of a voluntary bargain is closely analogous to an ordinary contract action, not to an action seeking to shut down a gambling house. And Stockbridge is not acting to protect the public morals, welfare, or decency of

the community against injury caused by a gambling establishment, but rather is seeking to eliminate business competition for its own gambling establishment.

Fifth, Stockbridge's claims against the State accrued in 2008, not in 2014. All of the elements of those claims came into existence in 2008 when the Wittenberg casino opened and the State declined to take action against it.

Finally, Stockbridge has not presented any argument in its appellate brief regarding the district court's denial of Stockbridge's motion for leave to amend its complaint and therefore has abandoned any appeal of that denial.

STANDARD OF REVIEW

This Court conducts de novo review of a district court's ruling on a Fed. R. Civ. P. 12(c) motion for judgment on the pleadings, employing the same standard that applies to a Rule 12(b)(6) motion to dismiss. *Buchanan-Moore v. Cty. of Milwaukee*, 570 F.3d 824, 827 (7th Cir. 2009).

This Court also conducts de novo review of a district court's decision to dismiss a claim based on a statute of limitations, again accepting as true the plaintiff's well-pleaded factual allegations and reasonable inferences from them. *Amin Ijbara Equity Corp. v. Vill. of Oak Lawn*, 860 F.3d 489, 493 (7th Cir. 2017); *Perry v. Sullivan,* 207 F.3d 379, 382 (7th Cir. 2000). De novo review is likewise appropriate for other statute of limitations determinations, *Logan v. Wilkins*, 644 F.3d 577, 581 (7th Cir. 2011), including a ruling on the

proper statute, *Bernstein v. Bankert*, 733 F.3d 190, 199 (7th Cir. 2013), the district court's interpretation of the statute, *Cent. States, Se. & Sw. Areas Pension Fund v. Jordan*, 873 F.2d 149, 152 (7th Cir. 1989), and determinations of law in applying the statute, *Strauss v. Chubb Indem. Ins. Co.*, 771 F.3d 1026, 1029 (7th Cir. 2014).

ARGUMENT

I. Stockbridge's status as a tribal sovereign does not make its claims against the State exempt from statutes of limitation.

Stockbridge argues that its claims are exempt from statutes of limitation based on a common-law principle, known as the *nullum tempus* doctrine, under which statutes of limitation cannot be asserted against a sovereign. The argument fails for three reasons. First, sovereigns are not exempt from the Wisconsin statute of limitations that the district court borrowed. Second, the common-law rule does not apply where sovereign immunity has been waived, as in the Stockbridge Compact. Third, the rule also does not apply where, as here, the governmental plaintiff is acting in a proprietary rather than a governmental capacity.

A. *Nullum tempus* does not apply here because the statute of limitations borrowed by the district court applies to actions brought by a government plaintiff.

The doctrine *quod nullum tempus occurrit regi*[11] states that the defense of statute of limitations cannot be asserted against a sovereign. *Guar. Tr. Co. v. United States,* 304 U.S. 126, 132 (1938). This rule derives from the common law principle that immunity from limitations is an essential prerogative of sovereignty. *Id.; see also* 1 William Blackstone, *Commentaries on the Law of England* 247 (1793). It originated historically as one of the personal prerogatives of the King of England, justified on the ground that the king did not have time to bring lawsuits because he was too busy looking after the welfare of his subjects. *N.J. Educ. Facilities Auth. v. Gruzen P'ship*, 592 A.2d 559, 563 (N.J. 1991).

Nullum tempus was inherited in the United States as part of English common law. *City of Colo. Springs v. Timberlane Assocs.*, 824 P.2d 776, 778 (Colo. 1992). In modern law, the doctrine is grounded on considerations of public policy, rather than notions of royal prerogative, *id.* at 778, and is viewed as supported by "the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public

[11] The Latin phrase translates as time does not run against the king. Black's Law Dictionary 1096 (7th ed. 1999).

officers" *United States v. Hoar*, 26 F. Cas. 329, 330 (C.C.D. Mass. 1821) (No. 15,373).[12]

Nullum tempus is closely related to the doctrine of sovereign immunity. *See S.C. ex rel. Condon v. City of Columbia*, 528 S.E.2d 408, 413 (S.C. 2000); *Wash. Suburban Sanitary Comm'n v. Pride Homes, Inc.*, 435 A.2d 796, 801 (Md. 1981); *Shootman v. Dep't of Transp.*, 926 P.2d 1200, 1205 (Colo. 1996); *N.J. Educ. Facilities Auth.*, 592 A.2d at 561. The two doctrines are nonetheless distinct. *See City of Shelbyville v. Shelbyville Restorium, Inc.*, 451 N.E.2d 874, 877 (Ill. 1983); *Dep't of Transp. v. J. W. Bishop & Co.*, 439 A.2d 101, 104 (Pa. 1981). Sovereign immunity uses sovereignty as a shield to protect the government against liability as a defendant for wrongful conduct by government personnel, while *nullum tempus* wields sovereignty as a sword to enable a government to take action as a plaintiff against someone outside that government, even where the government has failed to act in a timely manner.

The common-law principle of *nullum tempus* can be legislatively overruled by enactment of a statute that makes the government subject to limitations.

[12] *See also United States v. Nashville, Chattanooga & St. Louis Ry. Co.,* 118 U.S. 120, 125 (1886); *N.D. ex rel. Bd. of Univ. & Sch. Lands v. Andrus,* 671 F.2d 271, 274 (8th Cir. 1982).

See United States v. Cent. Soya, Inc., 697 F.2d 165, 166 (7th Cir. 1982).[13] Where sovereign immunity has been abrogated or waived for government defendants, *nullum tempus* ceases to apply, and government plaintiffs are bound by statutes of limitation. *See N.J. Educ. Facilities Auth.*, 592 A.2d at 561; *Timberlane Assocs.*, 824 P.2d at 782–83.

When a federal court is applying state limitations law, as the district court did in this case, the applicability of *nullum tempus* is also determined by state law. *See Affiliated FM Ins. Co. v. Bd. of Educ. of Chi.*, 23 F.3d 1261, 1263–64 (7th Cir. 1994). In Wisconsin, *nullum tempus* is inapplicable because the common-law principle has never been applied by Wisconsin courts and, even if it had been applied in the past, it would not apply today because the Wisconsin Legislature has made statutes of limitation applicable to actions by the state.

Stockbridge cites a very early Wisconsin Supreme Court decision, *Baxter v. State*, 10 Wis. 454 (1860), to support the assertion that "Wisconsin courts apply this principle [*i.e. nullum tempus*] to Wisconsin statutes of limitations." (7th Cir. Dkt. 18:16.) That assertion is incorrect. Neither *Baxter* nor any other Wisconsin court decision has applied *nullum tempus* to exempt a government plaintiff from a statute of limitations.

[13] For example, although *nullum tempus* remains alive in federal jurisprudence, its applicability has been limited by federal statutes imposing limitation periods on tort and contract actions, as well as actions for enforcement of any civil fine, penalty, or forfeiture brought by the federal government. *See* 28 U.S.C. §§ 2415, 2462.

In *Baxter*, the State of Wisconsin was a defendant, not a plaintiff, and was asserting the statute of limitations as a defense against a contract claim brought by a private party. *Baxter*, 10 Wis. at 455. The plaintiff argued that the State could not rely on a general statute of limitations that did not expressly name the State. *Id.* at 455–56. In rejecting that argument, the *Baxter* court referred to the maxim of *nullum tempus* and concluded that it provided no support for the plaintiff's position. *Id.* While the court did recognize the maxim in dicta, it had no occasion to actually apply it, because there was no governmental plaintiff in the case.

Stockbridge has cited no other case in which a Wisconsin court has applied *nullum tempus* and the State has been unable to identify a single Wisconsin decision other than *Baxter* that even mentions the doctrine. *Baxter* has been cited a handful of times in later decisions, but never in the context of applying a statute of limitations to a government plaintiff.[14]

Moreover, even if *nullum tempus* ever had been a viable common-law doctrine in Wisconsin, it would not be viable today because the Wisconsin Legislature has made statutes of limitation applicable to actions by the state. Wisconsin Stat. § 893.87 provides that "[a]ny action in favor of the state, if no

[14] *See, e.g., Frankenthal v. Wis. Real Estate Brokers' Bd.*, 3 Wis. 2d 249, 257, 88 N.W.2d 352 (1958); *Frederick v. State*, 198 Wis. 399, 400, 224 N.W. 110 (1929); *McCoy v. Kenosha Cty.*, 195 Wis. 273, 279, 218 N.W. 348 (1928); *Carpenter v. State*, 41 Wis. 36, 42 (1876).

other limitation is prescribed in this chapter, shall be commenced within 10 years after the cause of action accrues or be barred." Under that statute, every action brought by the State has a limitation period—either the period specifically prescribed for that type of action in Wis. Stat. ch. 893, or a default ten-year period, if no specific period has been prescribed.

For breach of contract actions, Wisconsin law prescribes that "an action upon any contract, obligation, or liability, express or implied, . . . shall be commenced within 6 years after the cause of action accrues or be barred." Wis. Stat. § 893.43. The Wisconsin Supreme Court has held that provision applies to the State. *State v. Holland Plastics Co.*, 111 Wis. 2d 497, 500, 331 N.W.2d 320 (1983). The district court thus appropriately borrowed that limitation period in this case.

Contrary to Stockbridge's suggestion, Wisconsin's statute of limitations for contract actions applies to actions brought by a governmental plaintiff. In borrowing that statute of limitations, the district court correctly concluded that it could be applied to Stockbridge's claims against the State.

B. *Nullum tempus* also does not apply because Stockbridge waived its sovereign immunity in the Stockbridge Compact.

The *nullum tempus* doctrine also does not apply to Stockbridge's claims against the State because Stockbridge and the State have waived their sovereign immunity as to those claims. Where a sovereign chooses to set aside

sovereign immunity, it would be incongruous for the sovereign to continue to receive preferential treatment as a plaintiff through a sovereign exemption from statutes of limitations. *See Timberlane Assoc.*, 824 P.2d at 777.

Section XXII.E. of the Stockbridge Compact includes reciprocal waivers of sovereign immunity by Stockbridge and the State for specified types of action in federal court, including claims for declaratory and injunctive relief for any violation of that Compact. (Dkt. 5-2:16.) The language was plainly designed to ensure an equitable and mutual waiver of the protections of sovereignty by both parties to the agreement. (Dkt. 5-2:16.) The claims against the State in Stockbridge's complaint all purport to be claims for declaratory and injunctive relief arising under the Stockbridge Compact. (Dkt 5:10–13 ¶¶ 48–64.) Stockbridge and the State have reciprocally waived their sovereign immunity as to those claims.[15] It would be incongruous and inequitable to conclude that the State has waived its ability to use its sovereignty as a defensive shield,

[15] The State, in its answer to the complaint, admitted that it had waived its sovereign immunity "under the limited circumstances specified in Section XXII.E.2" of the Stockbridge Compact—*i.e.* only as to claims arising under that agreement. (Dkt. 50:5 ¶ 13.) In its affirmative defenses, the State additionally asserted its Eleventh Amendment immunity as a defense against any claims not arising under the Stockbridge Compact. (Dkt. 50:27 ¶ 2.) Count II of Stockbridge's complaint alleges that Stockbridge's revenue-sharing obligation is an unlawful tax on its gaming revenues, in violation of *both* the Stockbridge Compact *and* federal law. (Dkt. 5:12 ¶ 58.) To the extent that this claim by Stockbridge arises under federal law, rather than under the terms of the Stockbridge Compact, the State's sovereign immunity has not been waived and the claim is barred by the Eleventh Amendment.

while Stockbridge has not mutually waived its ability to use its sovereignty as an offensive sword.

C. *Nullum tempus* does not apply where, as here, a governmental plaintiff is acting in a proprietary rather than a governmental capacity.

In addition, *nullum tempus* does not exempt Stockbridge's claims against the State from being time-barred because those claims relate not to Stockbridge's governmental activities, but to its proprietary interests in protecting its casino from business competition.

Numerous courts have held that *nullum tempus* applies only to suits by the government involving governmental functions and public rights, not to government suits involving proprietary governmental operations or rights. *See Champaign Cty. Forest Pres. Dist. v. King*, 687 N.E.2d 980, 982, 984 (Ill. 1997) (holding that statute of limitations applies to a governmental entity suit to recover excessive insurance premiums); *Okla. City Mun. Improvement Auth. v. HTB, Inc.*, 769 P.2d 131, 134 (Okla. 1989) (stating that exemption from limitations depends on whether action is taken in a sovereign capacity and whether the rights at issue rise to the level of public rights); *Rowan Cty. Bd. of Educ. v. U. S. Gypsum Co.*, 418 S.E.2d 648, 654 (N.C. 1992); *N.J. Educ. Facilities Auth.,* 592 A.2d at 561.

Governmental functions are those traditionally recognized as involving the exercise of governmental power and prerogative to promote or protect the

common health, safety, security, or general welfare of the public. *Rowan Cty. Bd. of Educ.*, 418 S.E.2d at 654–56; *see also Dist. of Columbia v. Owens-Corning Fiberglass Corp.*, 572 A.2d 394, 407 (D.C. 1989) (defining governmental acts as discretionary or supervisory acts of government officials or employees resulting in a direct public benefit).

Proprietary functions, in contrast, are less directly related to promoting the common good and more akin to the functions ordinarily engaged in by private corporations, including commercial transactions relating to the purchase or sale of goods and services. *See Fed. Deposit Ins. Corp. v. Harrison*, 735 F.2d 408, 411 (11th Cir. 1984); *Sides v. Cabarrus Mem'l Hosp., Inc.*, 213 S.E.2d 297, 302–03 (N.C. 1975); *Rowan Cty. Bd. of Educ.*, 418 S.E.2d at 655.

The present case involves Stockbridge's proprietary operations managing a commercial gambling business. Ultimately, Stockbridge's concern in this case is to protect its own gambling enterprise against business competition from Ho-Chunk's Wittenberg casino. The management of a casino and protection of its competitive interests is not a traditional governmental function and does not involve discretionary or supervisory acts of government personnel to promote a direct public benefit. Stockbridge suggests that its gambling business should be considered governmental because the revenue it generates supports functions of tribal government. The same could be said, however, about virtually any proprietary operation of a government. If generating

revenue to be used by the government were enough to make a function governmental, rather than proprietary, then the governmental-proprietary distinction would be rendered meaningless.

The proper test is not how the revenue may be used, but whether the governmental activities themselves are governmental or proprietary in character. Under that test, Stockbridge's claims against the State relate to proprietary rather than governmental functions. Those claims are not protected by *nullum tempus*.

II. Stockbridge's claims for declaratory and injunctive relief against the State are subject to statutes of limitation notwithstanding their equitable character.

Stockbridge's second argument is that it is seeking only injunctive relief under 25 U.S.C. § 2710(d)(7)(A)(ii), and that a claim for such equitable relief is not subject to any statute of limitations. This arguments fails in several respects.

First, Stockbridge's contention that a statute of limitations should not be allowed to preclude a court from enjoining ongoing unlawful gaming activity, does not apply to Stockbridge's claims against the State. The IGRA provision Stockbridge relies on authorizes only actions to enjoin class III gaming conducted in violation of a compact. Stockbridge does not seek to enjoin the State from conducting class III gaming, so its claim for injunctive relief against the State does not arise under that statute.

Second, the district court's conclusion that Stockbridge's claims against the State are time-barred did not thwart the public policy of IGRA. Stockbridge seeks an order enjoining the State to comply with purported contractual obligations in the Stockbridge Compact, not with any provision of IGRA.[16] Even if Stockbridge were correct that the Wittenberg casino is being operated in violation of the Ho-Chunk Compact, and that the State promised in the Stockbridge Compact to protect Stockbridge against such activity by another tribe (and the State concedes neither point), there is nothing in the language of IGRA that requires the State to take affirmative action to stop the Ho-Chunk's gaming activity.

Third, it simply is not true that Stockbridge is only seeking injunctive relief. The complaint expressly requests both declaratory and injunctive relief against the State, and expressly invokes the declaratory judgment act, 28 U.S.C. § 2201. (Dkt. 5:4 ¶ 11, 15–16 ¶¶ 1–3, 6.) Every federal circuit to address the issue has held that declaratory judgment actions that would declare a plaintiff's entitlement to some affirmative relief are subject to the

[16] There is nothing in the language of IGRA that expressly creates a cause of action to enjoin a state to comply with a compact. Some courts have nonetheless found that the existence of such a cause of action is implied by the overall structure and purpose of IGRA. *See, e.g., Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1055–56 (9th Cir. 1997). The question of whether IGRA creates a cause of action for the kind of injunctive relief Stockbridge seeks against the State is not currently before the Court. Even if such a cause of action exists, however, it is rightly subject to the six-year statute of limitations for claims to enforce a contract.

same limitations period that would apply to a direct claim for that affirmative relief.[17] This Court has not addressed the issue, but district courts in this circuit have also applied the statute of limitations for the underlying cause of action to claims for declaratory judgment. *See, e.g., Ottaviano v. Home Depot, Inc., USA,* 701 F. Supp. 2d 1005, 1013–14 (N.D. Ill. 2010); *Greenhill v. Vartanian*, No. 15-CV-09585, 2017 WL 5294039, at *6 (N.D. Ill. Nov. 13, 2017). Therefore, to the extent that Stockbridge seeks a judicial declaration of the State's obligations under the Stockbridge Compact, that claim for declaratory relief is subject to the same limitation period that would apply to a direct claim to enforce the State's obligations under that compact—*i.e.* the six-year limitation period for a contract enforcement claim that was applied by the district court.

Fourth, Stockbridge's argument that it is seeking only equitable relief against the State, rather than money damages, is not fully accurate. Stockbridge seeks a judicial declaration that the State is violating a provision of the Stockbridge Compact that would reduce Stockbridge's revenue sharing

[17] *See Gilbert v. City of Cambridge,* 932 F.2d 51, 57–58 (1st Cir. 1991); *118 E. 60th Owners, Inc. v. Bonner Props., Inc.*, 677 F.2d 200, 202 (2d Cir. 1982); *Algrant v. Evergreen Valley Nurseries P'ship*, 126 F.3d 178, 181–85 (3d Cir. 1997); *Int'l Ass'n of Machinists & Aerospace Workers v. Tenn. Valley Auth.*, 108 F.3d 658, 667–68 (6th Cir. 1997); *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688–89 (9th Cir. 1993); *Bechler v. Kaye,* 222 F.2d 216, 220 (10th Cir.1955), *cert. denied,* 350 U.S. 837.

obligations to the State, and a declaration that the Compact's revenue sharing requirements are an unlawful tax on Stockbridge's gaming revenues. The purpose of those judicial declarations thus would be to fix certain monetary obligations between Stockbridge and the State. Moreover, although Stockbridge's complaint does not demand money from the State, Stockbridge has indicated in briefing that the State should be required to disgorge and return to Stockbridge its past revenue-sharing payments. (Dkt. 8:16 n. 6.) Stockbridge's claims for declaratory relief against the State are setting the table for monetary demands, and thus should be subject to the same statute of limitations that would apply to direct demands for monetary relief.

Finally, Stockbridge erroneously relies on *Scherr v. Marriott International, Inc.*, 703 F.3d 1069 (7th Cir. 2013). In *Scherr*, this Court held that the applicable statute of limitations for actions under the Americans With Disabilities Act (ADA) did not bar a claim seeking to require a hotel chain to replace a type of door closer that allegedly did not comply with the ADA, because the ADA expressly provided that a claim for a preventive injunction for an ongoing violation was available to "'any person who is being subjected to discrimination on the basis of disability' or who has 'reasonable grounds for believing that such person is about to be subjected to discrimination.'" *Scherr*, 703 F.3d at 1075–76 (quoting 42 U.S.C. § 12188(a)(1)). That provision, the Court reasoned, allowed a claim to enjoin an alleged ongoing violation of the

ADA, notwithstanding the statute of limitations. *Id.* at 1076. *Scherr* is inapplicable here, for three reasons.

First, unlike the claim in *Scherr*, Stockbridge's claims against the State are not based on federal statutory language specifically providing for injunctions against ongoing activities. Stockbridge argues that 25 U.S.C. § 2710(d)(7)(a)(ii) contains such language, but its claims arise not under that statute, but under the contractual agreement between Stockbridge and the State. Stockbridge has pointed to no language in IGRA that allows a claim to enforce a contractual agreement between a tribe and a state to be brought at any time.

Second, the analogy Stockbridge would draw between the ADA and IGRA is not as strong as Stockbridge suggests. As the district court noted, the ADA provides for injunctions against ongoing acts of discrimination in violation of a civil rights statute—a context in which it is common for actions to enjoin ongoing violations to be allowed, notwithstanding statutes of limitation. (Dkt. 67:10 n.2.) It does not automatically follow that the same policy should be extended to actions to enforce requirements created by a voluntary contractual agreement between a state and a tribe.

Third, the material question is whether the defendant's violation of a federal requirement is ongoing, not whether the plaintiff claims an ongoing injury. For construing statutes of limitation, this Court has recognized the distinction between a violation of a legal rule that treats ongoing acts or

omissions as new violations, where the statute of limitations does not run, and a discrete wrongful act that causes continuing harm, where it does. *See Turley v. Rednour*, 729 F.3d 645, 654 (Easterbrook, C.J., concurring); *Bass v. Joliet Pub. Sch. Dist. No. 86*, 746 F.3d 835, 839–40 (7th Cir. 2014) ("If a discrete wrongful act causes continuing harm, . . . [the limitation period] runs from the date of that event; it does not restart with each new day the harm is experienced.") (*citing Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110–15 (2002)).

In *Scherr,* the defendant's failure to replace the door closers constituted ongoing discrimination in violation of federal law. *Scherr*, 703 F.3d at 1075–76. Here, in contrast, the actionable illegality alleged against the State is not ongoing gaming activity at Wittenberg, it is the State's decision to allow Ho-Chunk to operate the Wittenberg facility. Stockbridge says it is incurring continuing competitive injury from the State's inaction, but any such injury would derive not from an ongoing violation of federal law, as in *Scherr*, but from the discrete events that occurred in 2008 when the Wittenberg casino opened and the state took no action against it. The statute of limitations on Stockbridge's claims thus began to run in 2008.

III. The district court did not apply state law to the regulation of tribal gaming, but applied federal law, which incorporates state statutes of limitation.

Stockbridge's third argument is that IGRA precludes any application of state law to tribal gaming, including the district court's borrowing of a state statute of limitations. Because IGRA does not expressly contain a limitation period, according to Stockbridge, claims under IGRA are not subject to any statute of limitations. Moreover, by borrowing a limitation period from state law, the district court, according to Stockbridge, erroneously allowed state law to regulate tribal gaming. This argument, too, fails.

When Congress creates a cause of action without providing a statute of limitations, it does not mean that Congress intended that there be no time restrictions on claims under that cause of action, unless Congress has indicated such intent. *Bd. of Regents v. Tomasio*, 446 U.S. 478, 488 (1980). Faced with silence on the issue of timeliness and no contrary indication by Congress, the courts will borrow a suitable rule of timeliness from another source, generally by applying the most closely analogous statute of limitations under state law. *Id.*; *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 158 (1983). Here, the district court applied this well-established principle, reasoned that Stockbridge's claims to enforce the terms of its compact with the State were most analogous to an action on a contract under state law, and accordingly

borrowed the six-year limitation period applicable to such actions under Wis. Stat. § 893.43. (Dkt. 67:6–8; 88:11–12.) The district court acted correctly.

Stockbridge is also wrong in suggesting that the district court's application of a state-law limitation period violated the principle that Indian tribes are not subject to state laws. (7th Cir. Dkt. 18:24–29.) The district court did not apply state law to Stockbridge, it applied federal law which incorporates statutes of limitation borrowed from state law. The limitation period applied by the district court derived its legal force from federal law, not state law.

Stockbridge is similarly incorrect in suggesting that borrowing of state statutes of limitation in claims under IGRA would allow states to undermine federal Indian gaming policy by enacting special statutes of limitation that deliberately discriminate against IGRA claims. It is true that the courts will not adopt a state limitation period if it is inconsistent with the policy of a federal statute, but merely establishing some time limit for commencing a federally created claim is not per se inconsistent with federal policy, as long as plaintiffs are able to readily enforce their claims by commencing their actions within the limitation period. *Tomasio*, 446 U.S. at 488.

For example, it is well established in the context of federal civil rights litigation that state statutes of limitation will be applied if they are neither

inconsistent with nor discriminatory against federal policy. *See Occidental Life Ins. Co. of Cal. v. E.E.O.C.*, 432 U.S. 355, 370 (1977); *Palmer v. Bd. of Educ.*, 46 F.3d 6862, 684 (7th Cir. 1995) ("States are not free to endow themselves and their employees with special protection from § 1983 suits"). The mere fact that a state limitation period creates a time bar to some federal claims, however, is not inconsistent with federal policy. *Cf. Robertson v. Wegmann*, 436 U.S. 584 593 (1978) (§ 1983 action abated by application of state survivorship law).

Here, the district court borrowed a reasonable, non-discriminatory, six-year statute of limitations for actions on a contract. The court's action was consistent with both case law precedent and congressional policy.

IV. The district court correctly borrowed Wisconsin's statute of limitations for actions on a contract, rather than for claims to enjoin a public nuisance, because Stockbridge's claims against the State are more closely analogous to a contract claim.

Stockbridge's fourth argument is that, even if it was proper for the district court to borrow a state statute of limitations, the court borrowed the wrong one. According to Stockbridge, the state cause of action most closely analogous to its claims is an action to enjoin a public nuisance, for which the applicable limitation period does not begin to run, if the nuisance is a continuing one. *See Sunnyside Feed Co. v. City of Portage*, 222 Wis. 2d 461, 466, 588 N.W.2d 278, 280–81 (Ct. App. 1998).

Stockbridge's claims against the State are not analogous to an action to enjoin a public nuisance. Those claims do not seek to enjoin gambling activities, as a public nuisance claim would, but instead to compel the State to comply with the terms of the Stockbridge Compact. An action to compel a party to abide by the terms of a voluntary bargain is closely analogous to an ordinary action to enforce a contract under state law, and is not analogous to an action seeking a court order requiring the cessation of a gambling operation. The district court thus correctly chose the most closely analogous state statute of limitations.

Even to the extent Stockbridge is seeking to enjoin the operation of a gambling facility, it still is not acting in furtherance of the public interests protected by a public nuisance action. A public nuisance is "a condition or activity which substantially or unduly interferes with the use of a public place or with the activities of an entire community." *Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.*, 2002 WI 80, ¶ 21, 254 Wis. 2d 77, 646 N.W.2d 777. This definition is consistent with the Restatement (Second) of Torts, § 821B (1979), which defines a public nuisance as "an unreasonable interference with a right common to the general public." *Id.*, ¶ 21 n. 15. The term public nuisance thus comprehends various forms of conduct that interfere with interests of the community or the comfort or convenience of the general public, including interferences with the health, safety, morals, peace, comfort, or convenience of

the public. W. Page Keeton et al., *Prosser and Keeton on Torts* 643–44 (5th ed. 1984). Accordingly, a gambling house is considered a public nuisance because such an establishment is injurious to the public morals, welfare, and decency of the surrounding community. *See State ex rel. Trampe v. Multerer*, 234 Wis. 50, 51, 58, 289 N.W. 600 (1940).

In seeking to enjoin the Wittenberg casino, Stockbridge is not acting to protect the public morals, welfare, or decency of the community against injury caused by a gambling establishment; it is seeking to eliminate business competition for its own gambling establishment. Stockbridge emphasizes that, under Wis. Stat. § 945.01(4)(c), any gambling place is a public nuisance that is subject to abatement under Wis. Stat. ch. 823. But Stockbridge is seeking to promote the interests of its own casino—a gambling place that is just as much a public nuisance as the Wittenberg casino. An action brought by one gambling house operator to shut down a competitor's gambling house is not analogous to an action brought in the name of the state to abate a public nuisance. *Cf.* Wis. Stat. § 823.10.

Of course, Wisconsin's policy that all gambling places are public nuisances is pre-empted by IGRA with regard to a gambling place that is operated by a tribe, on Indian lands, and pursuant to a valid tribal-state gaming compact. *See* 25 U.S.C. § 2710(d)(1). But that is just another reason for concluding that Stockbridge's claims are not analogous to a state-law public nuisance action to

abate a gambling place. Contrary to the policy articulated in Wis. Stat. § 945.01(4), IGRA seeks to *promote* gambling activities conducted by tribes as an instrument to further tribal self-development. IGRA does not provide for actions to enjoin gaming activities because they are harmful to the morals, welfare, or decency of the public. It provides for actions to enjoin certain class III gaming activities on Indian lands that are in violation of a tribal-state gaming compact.

Congress chose to use voluntary agreements between tribes and states as the mechanism for implementing its tribal gaming policy, and it provided for actions to enjoin tribal gaming activities that are conducted in violation of those voluntary agreements. Such actions under IGRA to enforce tribal-state agreements are analogous to actions to enforce a contract under state law.

V. Stockbridge's claims against the State accrued in 2008.

Stockbridge's final argument is that any statute of limitations on its claims against the State did not start to run until 2014, rather than 2008, because during the first six years the Wittenberg casino was open, the State itself could have taken enforcement action against Ho-Chunk to shut down that facility. Stockbridge apparently reasons that its claim against the State for failing to take such enforcement action did not accrue until after the statute of limitations had expired on an enforcement action by the State.

Stockbridge is incorrect. A limitation period generally begins to run from the time the cause of action "accrued." *See, e.g., Hildebrand v. Hildebrand*, 736 F. Supp. 1512, 1517 (S.D. Ind. 1990). A claim accrues "when all its elements have come into existence," *Cathedral of Joy Baptist Church v. Vill. of Hazel Crest*, 22 F.3d 713, 717 (7th Cir. 1994), or when "the plaintiff discovers that he has been injured," *Cada v. Baxter Healthcare Corp*., 920 F.2d 446, 450 (7th Cir. 1990).

Under these principles, Stockbridge's claims against the State accrued in 2008.

In Count I of the complaint, Stockbridge alleges that the State "refused to initiate the dispute resolution procedures in the Ho-Chunk Compact or take other actions to prevent Ho-Chunk from operating the Wittenberg Casino on lands not eligible for gaming under IGRA" and "refused to . . . prevent Ho-Chunk from operating the Wittenberg Casino in violation of the Ho-Chunk Compact's restrictions applicable to Ancillary Facilities." (Dkt. 5:11 ¶¶ 51–52.) These "refusals" allegedly breached the Stockbridge Compact (Dkt. 5:11 ¶ 53.) This claim accrued in 2008, since the alleged breach occurred when the State declined to stop the Wittenberg gaming activity that began in 2008.

Counts II and III of the complaint also arise from alleged unlawful Wittenberg gaming activity that began in 2008, and so those claims likewise accrued in 2008. Count II alleges that, by failing to stop Ho-Chunk's gaming

activity, the State "demand[ed] that the Tribe [*i.e.* Stockbridge] continue to pay a portion of its gaming revenues to the State, without providing a corresponding benefit to the Tribe." (Dkt. 5:12 ¶ 57.) Since the unlawful gaming activity allegedly began in 2008, the State in 2008 failed to provide Stockbridge the benefits owed under its compact, and this claim accrued then. The same is true for Count III, which alleges that the State arbitrarily and capriciously failed to "enforce the Ho-Chunk Compact," again by failing to stop the Wittenberg gaming activity that began in 2008. (Dkt. 5:13 ¶ 64.)

All the elements of these claims came into existence in 2008, so that is when the claims accrued and when the statute of limitations on them began to run.

VI. Stockbridge has abandoned any appeal of the district court's denial of Stockbridge's motion for leave to amend its complaint.

In the statement of issues in its appellate brief, Stockbridge identifies the issue of "Whether the District Court erred in denying SMC's motion for leave to file its proposed first amended complaint." (7th Cir. Dkt. 18:2.) Stockbridge also identifies the standard of review for denials of leave to amend. (7th Cir. Dkt. 18:12–13.) The balance of Stockbridge's brief, however, contains no supporting argument on this issue. By presenting no argument in its brief, Stockbridge has abandoned any appeal of the district court's denial of the motion for leave to amend. *See Medley v. City of Milwaukee*, 969 F.2d 312, 317 (7th Cir. 1992); *Mathis v. N.Y. Life Ins. Co.,* 133 F.3d 546, 548 (7th Cir.1998);

see also Fed. R. App. P. 28(a)(8)(A) (requiring an appellant's brief to include an argument containing "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies.").

CONCLUSION

Defendants-Appellees State of Wisconsin and Scott Walker ask this Court to affirm the judgment of the district court.

Dated this 27th day of June, 2018.

Respectfully submitted,

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), typeface requirements of Fed. R. App. P. 32(a)(5), and type style requirements of Fed. R. App. P. 32(a)(6).

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Dated this 27th day of June, 2018.

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CERTIFICATE OF SERVICE

I certify that on June 27, 2018, I electronically filed the foregoing Response Brief of State of Wisconsin and Scott Walker with the clerk of court using the CM/ECF system, which will accomplish electronic notice and service for all participants who are registered CM/ECF users.

Dated this 27th day of June, 2018.

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