UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES, et al., Plaintiffs, v. STATE OF MICHIGAN, et al., Defendants.	Case No. 2:73 cv 26 HONORABLE PAUL L. MALONEY

MEMORANDUM OF THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS IN OPPOSITION TO THE COALITION TO PROTECT MICHIGAN RESOURCES' MOTION FOR LEAVE TO FILE *AMICUS CURIAE* RESPONSE BRIEF

This Court should deny with prejudice the Motion of the Coalition to Protect Michigan Resources ("CPMR") for leave to file an *amicus curiae* brief because (1) it is not properly before the Court, as CPMR did not attempt to obtain concurrence from other parties in violation of Local Rule 7.1(d); and (2) it is adversarial, unhelpful, and violates CPMR's confidentiality obligations regarding settlement discussions.

I. ARGUMENT

A. CPMR's Motion is not properly before the Court because CPMR has not complied with Local Rule 7.1(d).

Local Rule 7.1(d) states that "[w]ith respect to all motions, the moving party shall ascertain whether the motion will be opposed" by means of "confer[ring] in a good-faith effort to resolve the dispute" and filing a certificate describing "the efforts of the moving party to comply with the obligation created by this rule." CPMR did not confer with the Sault Tribe before filing its motion, and has not filed the required certificate indicating that it conferred with the other

parties. This failure alone is sufficient to deny CPMR's request for leave to file its advocacy piece dressed in purported amicus clothes.

This Court explained in detail the purpose of Local Rule 7.1(d) in *Harshaw v. Bethany Christian Servs.*, No. 1:08-CV-104, 2010 WL 11530764, at *1–2 (W.D. Mich. July 2, 2010) (Maloney, C.J.). There, the court denied defendants' motion for reconsideration as the motion was "not properly before the court" because defendants' motion and brief did not "say anything about whether defense counsel attempted to obtain concurrence from plaintiffs' counsel, as required by our Local Rules, before filing the motion." *Id.* at *1. "This alone warrants denial of the defendants' motion." *Id.*; *see also Yetman v. CSX Transp., Inc.*, No. 1:08-CV-1130, 2009 WL 35351, at *1 (W.D. Mich. Jan. 6, 2009) (Maloney, C.J.) (a failure to follow Local Rule 7.1(d) "provides a sufficient basis in itself" to deny a motion).[1]

"'The importance of the communication required by this rule . . . cannot be overstated.'" *Harshaw*, 2010 WL 11530764, at *1 (quoting *ECM Converting Co. v. Corrugated Supplies Co., LLC*, 2009 WL 385549, *2 (W.D. Mich. Feb. 13, 2009) (Wendell Miles, J.)). The normal remedy for failure to seek concurrence under Local Rule 7.1(d) is denial of the motion without prejudice. *Id.* at *2 (quoting *Yetman*, 2009 WL 35351, at *1). In this instance, however, CPMR's tactical decision to file its motion at the eleventh hour without complying with the local rule is grounds for denying the request with prejudice. Even if CPMR belatedly attempted to address its failure

[1] *See also Brown Bark I, L.P. v. Traverse City Light & Power Dep't*, No. 1:09-CV-572, 2010 WL 11691728, at *3 (W.D. Mich. Oct. 4, 2010) (Maloney, C.J.) (denying defendants' motion for reconsideration due to failure to comply with Local Rule 7.1(d)); *Paro v. Weber & Olcese, P.L.C.*, No. 1:10-CV-134, 2010 WL 3001336, at *1 (W.D. Mich. June 29, 2010) (denying motion for attorney fees for failure to comply with Rule 7.1(d)); *Harshaw v. Bethany Christian Servs.*, No. 1:08-CV-104, 2010 WL 2011313, at *1-2 (W.D. Mich. May 18, 2010) (Maloney, C.J.) (denying motion for leave to file supplemental brief for failure to comply with Rule 7.1(d)); *Aslani v. Sparrow Health Sys.*, No. 1:08-cv-298, 2008 WL 4642617, at *1-2 (W.D. Mich. Oct. 20, 2008) (Maloney, C.J.) (denying motion to dismiss without prejudice for failure to comply with Rule 7.1(d)); *Kim v. U.S. Dept. of Labor*, No. 1:06-cv-68, 2007 WL 4284893, *1 (W.D. Mich. Dec. 4, 2007) (Brenneman, M.J.) ("[T]he court properly denied plaintiff's motion for judgment on the pleadings because he failed to seek concurrence under the local court rule, W.D. Mich. LCivR 7.1(d). . . .").

to follow the local rules on an expedited basis, the parties' briefs in response to the motion would come on or about the date on which the 2000 Consent Decree is set to expire. *See* Local Rule 7.3(c). This would leave the parties with no meaningful opportunity to respond to the motion.

This Court should deny CPMR's motion because it is not properly before the Court. The denial should not allow CPMR to file a revised motion because doing so would be ineffectual in light of the resulting briefing due date on the eve of expiration of the Decree.

B. This Court should deny CPMR's Motion because its proposed brief is adversarial, not useful, and violates CPMR's confidentiality obligations regarding settlement discussions.

Even if CPMR's motion *were* properly before the Court (it is not), the Court should deny the motion because CPMR's proposed brief is not a proper *amicus* brief. Instead, it is adversarial, not helpful, and improperly discloses and speculates about the parties' confidential settlement discussions.

The traditional role of amici in litigation is "not to provide a highly partisan account of the facts, but rather to aid the court in resolving doubtful issues of law." *United States v. Mich.*, 940 F.2d 143, 165 (6th Cir. 1991). When this Court denied CPMR's motion to "confirm status as *amicus curiae*" (ECF No. 1864) in October of 2019, this Court emphasized that "CPMR's involvement in this case as a traditional amicus is within the Court's discretion." ECF No. 1875 at 2, PageID.2144 (citing *United States v. Mich.*, 940 F.2d 143, 165 (6th Cir. 1991)). In this role, CPMR is "limited to a very narrow, non-adversarial role that does not rise to the level of 'the full litigating status of a named party or a real party in interest.'" ECF No. 1875 at 2, PageID.2144 (citing *United States v. Mich.*, 940 F.2d at 165-166). Therefore, amici may not "initiat[e] legal proceedings, fil[e] pleadings, or otherwise participat[e] and assum[e] control of the controversy in a totally adversarial fashion." *Mich.*, 940 F.2d at 165. CPMR's brief is wholly at odds with these limitations, and purposefully so.

In its Motion, CPMR plainly admits that it is taking an adversarial position: "CPMR supports the six party motion for an extension" and "opposes the motion of the Sault Tribe." ECF No. 1886 at 2, PageID.10698. Furthermore, CPMR fails to explain why this issue requires

additional briefing from a *non-party* when the *parties* who are seeking to negotiate a new decree have already presented briefs on this matter.

Nor is CPMR's brief helpful in any of the ways expected of an amicus. The parties' motions and responses addressed the length of the extension and whether the Decree should continue in its current form during the extension or instead requires removal of the tribal exclusive zones from the Decree (an intertribal allocation issue). *See* ECF Nos. 1880; 1883; 1887; 1890. In contrast, CPMR's brief is focused on issues regarding *state-tribal* allocation. *See generally* ECF No. 1886-1. The Sault Tribe's brief has nothing to do with state-tribal allocation, and does not seek to adjudicate the tribal treaty share. *See* ECF No. 1883. CPMR appears to be attempting to advance the issue of state-tribal allocation—which is not currently before the Court—under the guise of adversarial amicus briefing, once again seeking to have the Court consider a non-justiciable issue.

The Sault Tribe's motion seeks extension of all of the terms in the Decree by 90 days, and requests that the Court remove only the exclusive zone provisions from the Decree if the Court grants a longer extension because those provisions will have expired and there is not unanimous consent to them continuing beyond that time. ECF No. 1883 at 10-14, PageID.10688-10692. The Sault Tribe's motion does not address or propose to change the existing state-tribal allocative framework within the Decree regardless of the length of the extension. By way of example, if under the current Decree *one* tribe is permitted to harvest 40% of fish within a zone and State fishers are permitted to harvest 60%, removal of the zone would mean that all *five* tribes are permitted to harvest 40% of fish within that zone; the State's 60% would be unaffected. *See* ECF No. 1883 at 13, PageID.10691 ("there is no legal basis to exclude any tribe from an area and a resource to which all five tribes have an indivisible right").

Also troubling is CPMR's disclosure of purported discussions during strictly confidential settlement negotiations. CPMR's assertions regarding what has or has not been said during negotiations harm the confidentiality of the settlement process. It also misrepresents the Sault Tribe's positions and the law of the case. *Compare, e.g.*, ECF No. 1886-1 at 6, PageID.10708

(incorrectly stating that all parties have always accepted the resource is allocated 50-50 between the State and tribes and that this forms the basis of the decrees in the case) *with United States v. Michigan*, 12 ILR 3079, 3085 (1985) (rejecting a proposed decree with a 50-50 allocation between the State and tribes because "the tribes would be limited to 50 percent of the TAC, and could thus suffer a substantial loss in the harvest," and adopting a plan providing for 60 to 70 percent of the allocation to tribes, thereby "preserv[ing] the tribal right to fish in ceded waters."). This kind of shadow advocacy is not within the proper, narrow limits of the role afforded to an amicus as recently articulated by this Court.

In short, CPMR's Motion seeks leave to file a brief that is irrelevant and unhelpful in deciding the narrow procedural issues regarding the extension of the current Consent Decree. CPMR should not be granted leave to file its proposed brief.

II. CONCLUSION

For the reasons set forth above, this Court should deny CPMR's Motion for leave to file an *amicus curiae* brief without leave for that motion to be renewed.

Respectfully submitted this 22nd day of July, 2020.

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CERTIFICATE OF COMPLIANCE

I certify that in compliance with LCivR 7.3(b)(i), I used Microsoft Word 2010 to calculate that there are 1,597 words contained in this Memorandum.

DATED: July 22, 2020, at Seattle, Washington.

s/Lauren J. King
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