UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STATE OF MICHIGAN,

Plaintiff,

v.

THE SAULT STE. MARIE TRIBE of CHIPPEWA INDIANS, *et al.*,

Defendants.
_____/

CASE NO. 1:12-CV-962

HON. ROBERT J. JONKER

OPINION AND ORDER

This matter is before the Court on Plaintiff State of Michigan's (the "State") Motion for Preliminary Injunction (docket # 2) and Defendants Sault Ste. Marie Tribe of Chippewa Indians (the "Sault Tribe") and the named Tribal Directors' Motion to Dismiss under FED. R. CIV. P. 12(b)(1) and 12(b)(6) (docket # 10). The Court heard oral argument on the motions on December 5, 2012 and January 23, 2013. The motions are fully briefed. The Court has thoroughly reviewed the record and carefully considered the applicable law. The motions are ready for decision.

Background

1. The Sault Tribe

The State brings this lawsuit against the Sault Tribe, a federally recognized Indian Tribe, and thirteen Directors of the Sault Tribe, in their official capacities. (Compl., docket # 1.) The Sault Tribe "is the modern day political organization of the Chippewa bands which inhabited the eastern portion of the Upper Peninsula of Michigan since before the coming of Europeans." *Sault Ste. Marie Tribe of Chippewa Indians v. United States*, 576 F. Supp. 2d 838, 840 (W.D. Mich. 2008) (internal

quotation marks omitted). The United States formally acknowledged the Sault Tribe in 1972, and in 1975 the Sault Tribe established a governmental structure consistent with the Indian Reorganization Act, 25 U.S.C. § 476. *Id.* at 841. A Board of Directors governs the Sault Tribe. The Sault Tribe has its tribal offices and all of its reservation in the Upper Peninsula of Michigan. (Compl., docket # 1, at ¶ 18.)

2. IGRA

The Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701, *et seq*. permits Class III gaming activities (casino-style gaming) on Indian lands only if certain requirements are met. *State of Michigan v. Bay Mills Indian Community*, 695 F.3d 406, 410 (6th Cir. 2012) (citing 25 U.S.C. § 2710(d)). An Indian Tribe that wants to conduct gaming activity on Indian lands must adopt a Tribal Gaming Ordinance and obtain approval from the National Indian Gaming Commission. *Id.* (citing 25 U.S.C. § 2710(d)(1)(A)). The Tribe must also have land taken into trust, and must then negotiate a Tribal-State compact that will govern the gaming. *Id.* (citing 25 U.S.C. § 2710(d)(3)). Once a Tribal-State compact is entered, the gaming must conform to the compact. *Id.* (citing 25 U.S.C. § 2710(d)(1)(C)).

IGRA bars Class III gaming on lands acquired in trust by the Secretary after October 17, 1988, subject to certain specified exceptions. 25 U.S.C. § 2719. Those exceptions include, among others, lands taken into trust as part of a settlement of a land claim. 25 U.S.C. § 2719(b)(1)(B)(i). The implementing regulations establishing criteria for meeting the requirements of the "settlement of a land claim" exception provide, among other things:

> Gaming may occur on newly acquired lands if the land at issue is . . . [a]cquired under a settlement of a land claim that resolves or extinguishes with finality the tribe's land claim in whole or in part, thereby resulting in the alienation or loss of

> possession of some or all of the lands claimed by the tribe, in legislation enacted by Congress.

25 C.F.R. § 292.5(a) (2012).

3. The 1993 Compact

In August 1993, the Sault Tribe and the State entered into a Tribal-State governing compact (the "Compact") under IGRA. (Compl., docket # 1, at ¶ 19.) After concluding the Compact, the Sault Tribe passed a Tribal Gaming Ordinance. (*Id.* at ¶ 20 and Ex. B.) The Secretary of the Interior (the "Secretary") approved the Compact on November 19, 1993. (*Id.* at ¶ 19.) Under the Compact and Tribal Gaming Ordinance, the Sault Tribe conducts Class III gaming in several casinos it operates on Indian lands in the Upper Peninsula. (*Id.* at ¶ 22.)

Section 9 of the Compact includes a forward-looking provision that addresses the potential for off-reservation gaming on lands taken into trust under IGRA Section 20 in the future:

> Off-Reservation Gaming
>
> An application to take land into trust for gaming purposes pursuant to § 20 of IGRA (25 U.S.C. § 2719) shall not be submitted to the Secretary of the Interior in the absence of a prior written agreement between the Tribe and the State's other federally recognized Indian Tribes that provides for each of the other Tribes to share in the revenue of the off-reservation gaming facility that is the subject of the § 20 application.

(*Id.* at Ex. A.) This provision is at the heart of the present dispute.

4. Casino Plans for Off-Reservation Gaming in Lansing

In 1997, Congress enacted the Michigan Indian Land Claims Settlement Act ("MILCSA"), Pub. L. No. 105-143, 111 Stat. 2652 (1997). The purpose of MILCSA was to allocate funds to Indian Tribes in Michigan, to satisfy judgments that the Indian Claims Commission had entered in favor of the Tribes. *Bay Mills*, 695 F.3d at 410 (citing MILCSA § 102). MILCSA directs the Sault

Tribe to use the funds allocated to it to establish a trust fund for the benefit of the Sault Tribe, known as the Self-Sufficiency Fund. MILCSA § 108(a)(1). MILCSA provides that Self-Sufficiency Fund income shall be distributed for any of five uses, including "for consolidation or enhancement of tribal lands." *Id.* at § 108(c)(5). MILCSA provides further that "[a]ny lands acquired using amounts from interest or other income of the Self-Sufficiency Fund shall be held in trust by the Secretary for the benefit of the Tribe." *Id.* at § 108(f). The Sault Tribe believes lands purchased with income of the Self-Sufficiency Fund meet one of the Secretary's regulatory criteria for a land claim settlement exception under Section 20 of IGRA.

January 2012, the Sault Tribe approved a resolution stating that the Sault Tribe intends to open a casino in the City of Lansing, Michigan. (*Id.* at ¶ 24.) The same month, the Sault Tribe entered a Comprehensive Development Agreement ("CDA") with the City of Lansing. (*Id.* at ¶ 26.) The CDA reflects that the Sault Tribe will use earnings from the Self-Sufficiency Fund to purchase certain parcels of property (the "Casino property") within the City of Lansing. (*Id.* at ¶ 25 and Ex. D.) The CDA also provides that the Sault Tribe will build and operate two casinos on the Casino property. (*Id.*) On November 1, 2012, the Sault Tribe completed the purchase of the initial parcel the CDA covers. (Def.'s Br. in Support of Mot. to Dismiss, docket # 11, at 6.) The Sault Tribe intends to apply to have the Secretary take the Casino property into trust for the benefit of the Sault Tribe, a necessary step in the Sault Tribe's process of moving forward lawful casino gaming on the Casino property. (*Id.* at ¶ 28.)

It is undisputed that the Casino property is off-reservation and not eligible for gaming unless an IGRA Section 20 exception applies. It is also undisputed that the Sault Tribe and the State's other federally recognized Indian Tribes have not entered into any agreement providing for each of the

other Tribes to share in the revenue of the casinos the Sault Tribe aspires to operate on the Casino property. In the absence of such a revenue sharing agreement, the State asserts that the Sault Tribe's application to have the Casino property taken into trust would breach Section 9 of the Compact and violate IGRA. (*Id.* at ¶¶ 35-59.) Several other Tribes agree. (Amicus Curiae Br. of Amicus Saginaw Chippewa Indian Tribe of Michigan, docket # 26; Amicus Curiae Br. of Amicus Nottawaseppi Huron Band of Potawatomi Indians, docket # 32.) The Sault Tribe disagrees, contending among other things that Section 9 of the Compact is no barrier to its proposed trust acquisition under the MILCSA, because Congress mandated trust acquisition of lands purchased under the Act.

5. This Lawsuit

The State filed this lawsuit on September 12, 2012. The State seeks a declaration that any submission by the Sault Tribe of an application to the Secretary to have the Casino property taken into trust necessarily implicates Section 20 of IGRA, and therefore violates the Compact and IGRA, because the Sault Tribe has not secured the revenue sharing agreement Section 9 of the Compact requires. (*Id.*, Counts I - III.) The State seeks injunctive relief to prevent such a violation. The State also seeks a declaration that it is unlawful under federal and state law for the Sault Tribe to operate Class III gaming on the Casino property, and an injunction on the operation of any Class III gaming on the Casino property. (*Id.*, Counts IV, V.) Finally, the State brings a nuisance claim asserting that any continued operation of a casino on the Casino property by the Sault Tribe would be a public nuisance. (*Id.*, Count VI.)

The State now seeks a preliminary injunction preventing the Sault Tribe from applying to have the Casino property taken into trust during the pendency of the case unless and until the Sault Tribe secures the required revenue sharing agreement. Two other Tribes support the State's request.

(Amicus Curiae Br. of Amicus Saginaw Chippewa Indian Tribe of Michigan, docket # 26; Amicus Curiae Br. of Amicus Nottawaseppi Huron Band of Potawatomi Indians, docket # 32.) The Sault Tribe opposes any preliminary injunction. In addition, the Sault Tribe moves to have the case dismissed altogether under FED. R. CIV. P. 12(b)(1), based on the asserted absence of any waiver of its sovereign immunity, or under FED. R. CIV. P. 12(b)(6).

Legal Standards and Analysis

I. Sovereign Immunity and Jurisdiction

A. The Sault Tribe

"Indian tribes are immune from suit except in specific, limited circumstances." *Bay Mills*, 695 F.3d at 413-14 (citing *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998)). An Indian Tribe enjoys immunity from suit unless "Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe*, 523 U.S. at 754. "An abrogation of tribal immunity 'cannot be implied but must be unequivocally expressed.'" *Bay Mills*, 695 F.3d at 414 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)).

IGRA explicitly provides that "[t]he United States district courts shall have jurisdiction over . . . (ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact . . . that is in effect[.]" 25 U.S.C. § 2710(d)(7)(A)(ii). *Bay Mills* has distilled the test of federal jurisdiction under section 2710(d)(7)(A)(ii) into five elements:

(1) the plaintiff is a State or Indian tribe;
(2) the cause of action seeks to enjoin a class III gaming activity;
(3) the gaming activity is located on Indian lands;
(4) the gaming activity is conducted in violation of a Tribal-State compact; and

> (5) the Tribal-State compact is in effect.

Bay Mills, 695 F.3d at 412. IGRA defines Indian lands as:

> (A) all lands within the limits of any Indian reservation; and
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4).

There is no dispute that the first and fifth jurisdictional requirements *Bay Mills* describes are present here. The plaintiff is a State, and the Tribal-State compact is in effect. The Sault Tribe argues that the case does not satisfy the remaining jurisdictional requirements because there is no Class III gaming presently occurring on Indian lands in Lansing, and there cannot be any such gaming before the Secretary actually takes land into trust for the Sault Tribe. The State and Amicus Tribes disagree, claiming the Court has jurisdiction because this action seeks to prevent the Sault Tribe's plans for Class III gaming in Lansing that would necessarily be on Indian lands and necessarily violate Section 9 of the Compact now in effect if the anticipated trust application is filed without the required revenue sharing agreement. Alternatively, if the Court concludes the challenged Class III gaming must be presently occurring to satisfy IGRA's jurisdictional grant, the State asserts that it would amend its preliminary injunction request, and move to stop existing Class III gaming on the Sault Tribe's Indian lands in the Upper Peninsula. This would allow, in the State's view, an indirect route to address the Casino property in Lansing and ensure that no trust application occurs before the Sault Tribe honors Section 9 of the Compact.

The core jurisdictional dispute between the parties hinges on what, if any, temporal requirement should apply to the challenged Class III gaming on Indian lands. Specifically, does the statute permit federal jurisdiction over a claimed breach of a current compact as long as the State's objective is to stop prospective Class III gaming on prospective Indian lands? Or does the statute limit federal jurisdiction to challenges to existing Class III gaming on existing Indian lands, even for claims seeking to enforce a forward-looking provision in an existing compact?

The starting point, of course, is the statutory text itself. The statutory text plainly includes a temporal requirement for one jurisdictional element: namely, that the compact at issue must be presently in effect. But the statute includes no similar temporal requirement for any other element, requiring only that the ultimate purpose of the lawsuit be to enjoin Class III gaming activity on Indian lands in violation of a currently effective compact. That is, of course, exactly what the State seeks to do here. Indeed, given the centrality of the Compact to the operation of Class III gaming, 25 U.S.C. § 2710(d)(1)(C), the most natural reading of the jurisdictional grant is that Congress intended to give the federal courts jurisdiction over a State's claim that a Tribe breached a compact because any such breach would necessarily mean the Class III gaming was unlawful and subject to injunction.

This is the same conclusion reached in *State of Arizona v. Tohono O'odham Nation*, No. CV11-0296-PHX-DGC, 2011 U.S. Dist. LEXIS 64041 (Az. Dist. June 15, 2011), the only decision that the parties and the Court have been able to find that addresses the issue in a similar context. In *Tohono*, the defendant Indian Tribe (the "Nation") purchased a parcel of land and petitioned the Secretary to take a portion of the land (the "Parcel") into trust for the benefit of the Nation. *Tohono*, 2011 U.S. Dist. LEXIS 64041, at *2. The Nation had stated its intention to open a casino on the

Parcel it purchased. *Id.* at *3. At the time of the *Tohono* decision, the Secretary had made a final decision to take the Parcel into trust but had not decided whether the Parcel was eligible for gaming under IGRA. *Id.* An appeal of the trust decision was pending before the U.S. Court of Appeals for the Ninth Circuit, with the transfer of the Parcel into trust stayed pending the outcome of the appeal. *Id.* The State of Arizona sought to enjoin the planned casino, arguing it would violate a Tribal-State compact. *Id.* at *2.

The Nation moved to dismiss for lack of subject matter jurisdiction under FED. R. CIV. P. 12(b)(1). *Id.* at *7. The Nation argued that because the Parcel "ha[d] not yet been taken into trust by the [Department of the Interior] and therefore [was] not 'Indian lands,' . . . IGRA's narrow abrogation of sovereign immunity [did] not apply." *Id.* at *8. The court rejected this argument. *Id.* The court explicitly acknowledged that the Parcel had not yet been taken into trust. *Id.* But the court emphasized that Congress included just "one temporal limitation on [the] abrogation of tribal sovereign immunity – it required that the suit concern a compact 'that is in effect.'" *Id.* at *9. "Congress did not include a similar temporal limitation on when the land at issue in the suit must become Indian lands. Instead, it focused only on the nature of the claim: 'to enjoin a class III gaming activity located on Indian lands.'" *Id.* at *9-10. The court found that IGRA's abrogation of sovereign immunity applied though the Parcel had not yet been taken into trust.

Such a reading is not only faithful to the statutory text, but also makes practical sense. IGRA uses the Tribal-State compact as a vehicle for managing and regulating the interests of the State and the Tribe in Class III gaming activities. *See* 25 U.S.C. § 2710(d)(1)(C). It is critical, then, that interested parties have the right to enforce the terms of the compact once a compact is in effect. Thus, the temporal requirement of an existing compact is necessary. But as this case illustrates,

terms of a compact may naturally address future activity, just as other bilateral agreements often do. Indeed, in a gaming compact, it is entirely natural that the parties would address whether, how, and under what conditions future gaming establishment could take place. And if and when the parties have a dispute about such a provision that affects existing or proposed Class III gaming on Indian lands, there needs to be a forum for resolving the dispute. Otherwise, the parties cannot enforce the benefit of their bargain. As long as injunctive relief is otherwise appropriate under the normal requirements governing such relief – including without limitation the need to prevent some real and imminent harm – there is no reason to wait for the harm to actually occur before recognizing a basis for federal jurisdiction consistent with the statutory text.

The Sault Tribe objects that *Bay Mills* forecloses this reading of the statute. The Court disagrees. *Bay Mills* involved a challenge to a casino the Bay Mills Indian Community wished to operate in Vanderbilt, Michigan, more than 100 miles away from the Tribe's reservation. Among other things, the State claimed that operating the casino would violate an existing Tribal-State compact between the Bay Mills Indian Community and the State. But in contrast to this case, in *Bay Mills*, the plaintiff State of Michigan affirmatively alleged that the casino being challenged in that case was not, and never would be, located on Indian lands. *Id.* Indeed, in *Bay Mills* the State's claim for breach of compact depended upon the casino never being located on Indian lands. *See id.* (emphasizing that if the casino were on Indian lands, its operation would not violate the compact). Under that very unusual fact pattern, the court concluded that the jurisdictional requirement that the challenged activity take place on Indian lands was not, and could not, be satisfied in that case, because by the State's own admission it was not seeking to enjoin gaming activity on Indian lands. In contrast to *Bay Mills*, this case involves a stated intention to have the land at issue – the Casino

property – taken into trust for the benefit of the Sault Tribe and for eventual Class III gaming on the trust property. The Sault Tribe has already acquired one parcel with the intention of having the land transferred into trust, paving the way for Class III gaming under the land settlement exception of Section 20 of IGRA.

The Court would also have jurisdiction under IGRA if the State pursued its alternative path of seeking to enjoin existing gaming at the Sault Tribe's casinos in the Upper Peninsula of Michigan. Even under the narrowest reading of IGRA's jurisdictional grant, all elements necessary for jurisdiction would be present: the cause of action would seek to enjoin existing Class III gaming activity located on existing Indian lands conducted despite an alleged breach of an existing compact. *See Bay Mills*, 695 F.3d at 412. It is immaterial that the alleged breach is to Section 9 of the Compact, rather than to some aspect of the existing Class III gaming. The point is that the Sault Tribe has the right to conduct Class III gaming only in accordance with the terms of the entire Compact. 25 U.S.C. § 2710(d)(1)(C). If it violates or proposes to violate the forward looking provisions of Section 9 of the Compact, then its right to conduct Class III gaming is properly in jeopardy. Whether based upon the case as currently framed, or on the State's proposed alternative, the Court has jurisdiction under IGRA.

B. Ex Parte Young

The State named all of the Sault Tribe's Directors on the theory that even if the Court concluded the Sault Tribe had sovereign immunity from suit, the State could sue the Tribal Directors for prospective relief under *Ex Parte Young*, 209 U.S. 123 (1908). In *Ex Parte Young*, the Court concluded that a private plaintiff could sue a state officer to restrain his illegal conduct under color of law even though the state itself enjoyed sovereign immunity. The State argues that the same

principle applies here. The Sault Tribe disagrees. The Sixth Circuit has not decided whether a plaintiff may sue tribal officers for relief under an *Ex Parte Young* theory. Other Circuits considering the question have concluded that plaintiffs may proceed with such suits. *Dunlevy v. Stidham*, 640 F.3d 1140 (10th Cir. 2011); *Vann v. Kempthorne*, 534 F.3d 741, 750 (D.C. Cir. 2008); *Vann v. U.S. Dept. of the Interior*, 701 F.3d 927, 928 (D.C. Cir. 2012). Ultimately, the Court need not address the issue, because the Court has jurisdiction over the Sault Tribe under IGRA. Accordingly, the Court will dismiss the defendant Tribal Directors without prejudice.

C. Ripeness

Counts V and VI raise state law claims on the assumption the Sault Tribe actually begins Class III gaming on the Casino property. Count III raises an IGRA claim that seeks to enjoin any Class III gaming on the Casino property, once it is in trust, on the theory that the property would not in fact qualify for any IGRA Section 20 exception permitting gaming. As even the State acknowledges, Counts V and VI are not yet ripe because the Sault Tribe has not begun any gaming activity on the property. Accordingly, the Court dismisses Counts V and VI without prejudice. But Count IV is ripe to the extent it puts directly at issue a current controversy between the parties over the possible application of an IGRA Section 20 exception to the Casino property that the Sault Tribe intends to have taken into trust. This is an issue at the core of the parties' current dispute and not subject to dismissal at this time. In addition, Count IV would be the natural vehicle to implement the State's alternative request to enjoin existing Class III gaming under the existing Compact, if such an alternative request is necessary to support jurisdiction.

II. Preliminary Injunction

The State seeks a preliminary injunction preventing the Sault Tribe from submitting an application to have the Secretary take the Casino property into trust for gaming unless and until the Sault Tribe secures the revenue sharing agreement Section 9 of the Compact requires. In the State's view, Section 9 of the Compact plainly compels this result:

> An application to take land into trust for gaming purposes pursuant to § 20 of IGRA (25 U.S.C. § 2719) shall not be submitted to the Secretary of the Interior in the absence of a prior written agreement between the Tribe and the State's other federally recognized Indian Tribes that provides for each of the other Tribes to share in the revenue of the off-reservation gaming facility that is the subject of the § 20 application.

(Compl., docket # 1, Ex. A.) The Sault Tribe contends that Section 9 of the Compact does not read on an application to have the Casino property taken into trust in this case because MILCSA mandates trust acquisition of property acquired under its terms. The Sault Tribe acknowledges that its position is that such an acquisition would trigger an IGRA Section 20 land settlement exception to the general rule prohibiting gaming on such property. But the Sault Tribe says that is just the inevitable consequence of MILCSA, and not the exercise of Secretarial discretion, which in the Sault Tribe's view is all that Section 9 of the Compact covers. The Sault Tribe also argues that there is no imminent risk of harm anyway, because the State may seek an injunction later, if and when Class III gaming actually begins on the Casino property.

A. Applicable Standard

The first question is whether IGRA displaces the normal requirements for a preliminary injunction and effectively mandates a preliminary injunction when the State articulates a good faith claim within the IGRA's jurisdictional grant. The State asserts that IGRA does precisely this, and

that the Court need not – in fact, must not – weigh the traditional preliminary injunction factors. There are, of course, some statutes that have been construed to do this. *See, e.g., CSX Transportation, Inc. v. Tennessee State Board of Equalization,* 964 F.2d 548, 555 (6th Cir. 1992) (construing 49 U.S.C. § 11503); *United States v. Szoka*, 260 F.3d 516, 523 (6th Cir. 2001) (construing 47 U.S.C. § 401(b)); *United States v. Estate Pres. Servs*., 202 F.3d 1093, 1098 (9th Cir. 2000) (construing 26 U.S.C. § 7408). But the Court is not persuaded IGRA should be one of them. The State has not identified, and the Court is not aware of, any case that has construed IGRA's jurisdictional grant in this manner. There is certainly nothing explicit in the statutory text that displaces the traditional preliminary injunction analysis. Nor does the statute by its terms articulate an alternative test. Indeed, the statute does not even address preliminary injunctions at all. The best reading of the statute is that it is simply a jurisdictional grant, and not a remedial provision at all. It simply authorizes one category of relief – injunctive – as opposed to traditional money damages, leaving the ordinary equitable standards to apply in deciding what, if any, injunctive relief is appropriate. The Court therefore finds no basis to depart from the traditional preliminary injunction framework and will apply it here.

A preliminary injunction is a temporary remedy designed "merely to preserve the relative positions of the parties until a trial on the merits can be held." *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007) (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)). The plaintiff seeking a preliminary injunction bears the burden of establishing his entitlement to it. *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009). A court addressing a motion for a preliminary injunction considers four factors: "(1) the likelihood that the movant will succeed on the merits; (2) whether the movant will suffer irreparable harm without

the injunction; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest will be advanced by issuing the injunction." *Certified Restoration,* 511 F.3d at 541. A plaintiff need not win on every factor to obtain a preliminary injunction. *Id.* Instead, the factors "are to be balanced against each other." *Id.* (quotation omitted). The court "is not required to make specific findings concerning each of the four factors used in determining a motion for preliminary injunction if fewer factors are dispositive of the issue." *Id.* at 542 (quotation omitted). The court should, however, "analyze all four of the preliminary injunction factors." *Id.* (quotation omitted).

B. The Propriety of Injunctive Relief

1. Likelihood of Success

To demonstrate the first prong of the test, Plaintiff must "show more than a mere possibility of success." *Id.* at 543 (quotation omitted). "It is ordinarily sufficient if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation." *Id.* (quotation and alteration omitted). The State has raised such questions here. An entirely reasonable construction of Section 9 of the Compact – in fact, the most plausible construction offered by either party so far – is that the Sault Tribe must secure the required revenue sharing agreement before submitting an application for a trust acquisition that has the stated purpose and inevitable effect of triggering an IGRA Section 20 exception to the general prohibition on gaming that otherwise applies. There is no dispute that the Sault Tribe intends to use the Casino property for Class III gaming. There is no dispute that the Sault Tribe has not secured and does not intend to secure a revenue sharing agreement with other Tribes. And there is no dispute that, in the Sault Tribe's view, the trust acquisition will inevitably trigger an

IGRA Section 20 exception that permits gaming that would otherwise be prohibited. Therefore, the State's claim that the Sault Tribe would inevitably violate Section 9 of the Compact by submitting its trust application has substantial merit. Two other Indian Tribes, both of which negotiated Tribal-State compacts containing similar language to the language of Section 9, support the State's construction of the language. (Amicus Curiae Br. of Amicus Saginaw Chippewa Indian Tribe of Michigan, docket # 26; Amicus Curiae Br. of Amicus Nottawaseppi Huron Band of Potawatomi Indians, docket # 32.)

The Sault Tribe protests that Section 9 of the Compact applies only to trust applications that the Secretary has discretion to grant or deny, and has no application to what the Sault Tribe terms "mandated" applications. According to the Sault Tribe, MILCSA requires the Secretary to take land acquired with MILCSA funds into trust as long as the land is part of a consolidation or enhancement of tribal land, and regardless of any planned use for the land. But even assuming this is true, the Sault Tribe's argument that Section 9 of the Compact has no bearing on such a trust acquisition is weaker than the State's argument to the contrary. In the first place, nothing in the language of Section 9 of the Compact draws any explicit distinction between so-called discretionary applications and so-called mandatory applications. The language of Section 9 focuses on the intended purpose of the trust acquisition, not on the Secretary's discretion or lack of discretion in the process. Here, the purpose – or at least a significant purpose – of the proposed acquisition is for gaming that can only be allowed "pursuant to [IGRA Section] 20." Second, the inevitable effect of any trust acquisition here will be, at least in the Sault Tribe's view, to trigger an IGRA Section 20 exception based on settlement of a land claim. 25 U.S.C. § 2719(b)(1)(B)(i). Indeed, under the implementing regulations for this exception, something like a MILCSA is a necessary part of the Secretary's

qualification of the IGRA Section 20 land settlement exception. 25 C.F.R. § 292.5 (2012). Finally, the Sault Tribe's construction of Section 9 of the Compact would allow one Tribe to circumvent the mechanism the State and all originally compacting Tribes devised to control the expansion of off-reservation gaming under Section 20 of IGRA. A construction that undermines the mechanism originally accepted by the parties is unconvincing.

The State has established a likelihood of success on the merits.

2. Irreparable Harm

The second factor is whether the State will suffer irreparable injury without the preliminary injunction. A "plaintiff's harm from the denial of a preliminary injunction is irreparable if it is not fully compensable by monetary damages." *Certified Restoration,* 511 F.3d at 550 (quotation omitted). In this case, the harm the State seeks to avert is in no way compensable by monetary damages, because Congress has not provided any economic remedy for the State. The State can obtain only equitable relief. This is a paradigm case for injunctive relief. *See, e.g., Performance Unlimited, Inc. v. Questar Publishers*, 52 F.3d 1373, 1382 (6th Cir. 1995) (noting that impending loss of plaintiff's business could not be undone through monetary damages and was therefore "precisely the type of harm which necessitates the granting of preliminary injunctive relief").

But the Sault Tribe protests that the State could wait to see whether Class III gaming on the Casino property is ever authorized, and then move to enjoin the gaming. Until that time, argues the Sault Tribe, there may be apprehension on the part of the State but no real harm. The problem with this argument, however, is that it effectively reads Section 9 out of the Compact, leaving the State without the benefit of its bargain. And if the language has no enforceable independence in this Compact, then presumably it does not in any of the other compacts between the State and other

Indian Tribes with similar language. The likely result of such a reading would be market uncertainty and instability. Moreover, draining Section 9 of the Compact of any potential for independent enforcement would create perverse incentives: it would reward with increased leverage those Tribes willing to flout the Section 9 obligation and penalize those Tribes that choose to honor their Section 9 obligation. In the world of Indian gaming under IGRA, negotiating leverage is what makes the process work. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 48-51 (1996) (describing IGRA's "elaborate remedial scheme designed to ensure the formation of a Tribal-State compact"). And, in fact, the gateway to exercise of the negotiating leverage and eventual compact forcing measures of the Secretary's regulations is the taking of land into trust. 25 U.S.C. § 2710(d)(3)(A); 25 C.F.R. §§ 291.1 - 291.15 (2012). So Section 9 of the Compact addresses a critical, practical stage on the road to Class III gaming. When the parties strike a bargain on such a matter in a compact governing Class III gaming, preliminary injunctive relief is appropriate to protect the bargained for position.

This prophylactic function is a routine feature of a preliminary injunction. It arises often, for example, in the context of non-competition agreements. Common law and some statutes naturally protect an employer against a departing employee who steals company secrets, discloses trade secrets, or otherwise unfairly competes. But an employer need not wait for the actual harm to fall before seeking relief; instead, the employer can seek preliminary relief to prevent the harm. In addition, the employer can secure a non-competition agreement from an employee that as a matter of contract prevents the employee from even working for a competitor for a reasonable time, and may then enforce the contract right with a preliminary injunction. The point in both situations is to prevent harm from happening before it occurs. The courts regularly enforce such agreements to

prevent competitive harm. *See, e.g., Basicomputer Corp. v. Scott*, 973 F.2d 507, 511-12 (6th Cir. 1992) (affirming grant of preliminary injunction to enforce non-competition agreements when departing employees removed documents containing customer information and began soliciting business from plaintiff's customers); *Gateway 2000 v. Livak*, 19 F. Supp. 2d 748, 753 (E.D. Mich. 1998) (finding imminent risk of irreparable harm where defendant accepted employment from direct competitor of plaintiff in alleged breach of non-competition and separation agreements). The same holds true for Section 9 of the Compact: the Court can enforce the provisions of Section 9 as the parties' own agreed prophylactic measure regarding the risk of off-reservation gaming expansion even before any Class III gaming actually comes to fruition on prospective Indian lands in Lansing. Congress gave the Court power to enjoin Class III gaming altogether in the face of a compact breach. Surely that grant of power permits equitable enforcement of the Compact provisions themselves, all of which must be honored as a condition of any lawful Class III gaming. 25 U.S.C. § 2710 (d)(1)(C).

The State has demonstrated an imminent risk of irreparable harm.

3. Risk of Harm to Others

The balance of risk of harm also weighs in favor of a preliminary injunction. In fact, an injunction is likely to protect, rather than hurt, third parties. By its terms, Section 9 of the Compact is devoted to the protection of third parties: namely, other federally-recognized Tribes. This case affects not only the State and the Sault Tribe, but all of Michigan's federally-recognized Indian Tribes. Two of those Tribes have filed amicus briefs detailing, among other things, the risk of harm the Sault Tribe's proposed reading presents for them. (docket ## 26, 32.) They note that the language in Section 9 of the Compact attempts to balance the potentially competing interests of all of the federally-recognized Indian Tribes in Michigan, and that the Sault Tribe's proposed

interpretation of Section 9 threatens that balance, jeopardizing interests of all of the other federally-recognized Tribes. Moreover, if the Sault Tribe proceeds with its trust application while the meaning of Section 9 of the Compact is being contested, other private and public actors may begin to change their own positions in reasonable expectation that Class III gambling will come to the Casino property before that issue is actually resolved. A preliminary injunction, therefore, will not hurt third parties, but will actually serve to prevent harm that may otherwise occur in the absence of a preliminary injunction.

4. Public Interest

The State has also established that the requested preliminary injunction would serve the public interest. Under the IGRA framework, the Tribal-State compact becomes the key bargain that protects and enforces the interests of the State and the Tribes in Class III gaming. There is no independent federal or state statute that regulates Class III gaming on Indian lands. The compact becomes the substitute vehicle for a State to protect its interests. For the system Congress created through IGRA to function, all sides must have confidence that the agreed terms of the compact are meaningful and enforceable. The State has no other means of enforcing its interests in the gambling that occurs on Indian lands within its borders. The Tribal-State compact is the sole vehicle establishing and protecting State and tribal interests in Class III gaming in Michigan. It therefore benefits the public to enforce all of the terms of the Compact, including Section 9.

Each of the four preliminary injunction factors favors the State's request for a preliminary injunction preventing the Sault Tribe from applying to have the Casino property taken into trust during the pendency of the case unless and until the Sault Tribe secures the required revenue sharing

agreement. The Court therefore concludes that the State is entitled to the preliminary injunction it requests.

III. Failure to State a Claim

FED. R. CIV. P. 8(a)(2) requires that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Detailed factual allegations are not necessary. *See, e.g.*, FED. R. CIV. P. Form 11 (describing a complaint for negligence); *cf. Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To survive a motion to dismiss under FED. R. CIV. P. 12(b)(6), a plaintiff "must allege facts that, if accepted as true, are sufficient 'to raise a right to relief above the speculative level,' and to 'state a claim for relief that is plausible on its face.'" *Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007) (internal citations omitted)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

The State easily satisfies the threshold showing necessary to survive a motion to dismiss under Rule 12(b)(6). The State's claims of breach of compact and related breach of IGRA are plausible on their face. Indeed, for the reasons stated in the preliminary injunction analysis, the State has the stronger argument on the merits of these claims. There is no dispute that the State and the Sault Tribe entered the Compact in accordance with IGRA. The State proposes a reasonable interpretation of Section 9 of the Compact. No one disputes that if the State's interpretation of Section 9 of the Compact prevails, the Sault Tribe's planned trust acquisition application and development of the Casino property without a revenue sharing agreement would violate the Compact and IGRA. Dismissal under FED. R. CIV. P. 12(b)(6) is not warranted.

Conclusion

For these reasons, the Court concludes that the State is entitled to the preliminary injunction it seeks, and further concludes that dismissal for lack of jurisdiction or failure to state a claim is not appropriate.

ACCORDINGLY, IT IS ORDERED:

1. Plaintiff State of Michigan's Motion for Preliminary Injunction (docket # 2) is **GRANTED** to the extent consistent with this Order and is **DENIED** in all other respects. Defendant Sault Ste. Marie Tribe of Chippewa Indians is **PRELIMINARILY ENJOINED** during the pendency of this action from applying to have the Casino property taken into trust unless and until it obtains a written revenue sharing agreement with the other federally-recognized Indian Tribes in Michigan.

2. Defendants Sault Ste. Marie Tribe of Chippewa Indians and Tribal Directors' Motion to Dismiss (docket # 10) is **GRANTED** to the extent the motion seeks dismissal of the named Tribal Directors without prejudice; is **GRANTED** to the extent the motion seeks dismissal of Plaintiff State of Michigan's Counts V-VI without prejudice; and is **DENIED** in all other respects.

Dated: March 5, 2013

/s/ Robert J. Jonker
ROBERT J. JONKER
UNITED STATES DISTRICT JUDGE