IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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

Plaintiff,

v. Case No. 17-cv-249-jdp

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

Defendants.

STATE DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

INTRODUCTION

The Stockbridge-Munsee Community's ("Stockbridge") motion for a preliminary injunction should be denied because Stockbridge shows no reasonable likelihood of success on the merits of its claims against the Ho-Chunk Nation ("Ho-Chunk"). Stockbridge asks this Court to block Ho-Chunk from opening the gaming portion of its expanded multi-use facility in the Town of Wittenberg in Shawano County. But Stockbridge does not meet its burden of showing that the expanded Wittenberg facility likely violates

either the Indian Gaming Regulatory Act (IGRA) or Ho-Chunk's gaming compact with the State of Wisconsin.

Although Stockbridge names the State of Wisconsin and Governor Scott Walker ("State Defendants") as defendants in its complaint, it seeks preliminary injunctive relief against Ho-Chunk only. Although the State Defendants need not respond to the preliminary injunction motion, they do so because Stockbridge's arguments on the merits are intertwined with its claims against the State Defendants.

First, Stockbridge's entire lawsuit rests on an erroneous interpretation of a 1969 deed conveying a parcel of land in the Town of Wittenberg from a church to the Ho-Chunk. The deed contained a "reversionary clause" providing that if Ho-Chunk did not begin housing construction on the parcel within five years, it would revert to the church. Housing allegedly did not commence within five years, and so Stockbridge contends that the land automatically reverted to the church and, under the terms of IGRA, is therefore ineligible for tribal gaming today. The argument fails because the land did not automatically revert to the church as a matter of fact. Nor could the land revert to the church as a matter of law because Wisconsin real estate law is completely preempted by federal law with respect to Indian lands. And, if correct, Stockbridge's argument leads to the inescapable conclusion that this Court does not have jurisdiction over this lawsuit.

Second, Ho-Chunk's gaming compact with the State permits the expansion of the Wittenberg facility. That compact allows Ho-Chunk to operate a facility with gaming operations in Shawano County. If the majority of the trust property on which the Wittenberg facility is located is used for non-gaming purposes, it complies with Ho-Chunk's gaming compact. Stockbridge's contrary argument ignores the Ho-Chunk gaming compact's plain language, its history, and the agreed-upon intent of both compacting parties, Ho-Chunk and the State. Stockbridge offers no facts showing that the expanded Wittenberg facility will violate the Ho-Chunk gaming compact's actual terms. Therefore, Stockbridge cannot obtain a preliminary injunction on those grounds.

LEGAL STANDARD

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (citation omitted). The movant must carry its burden to make this "clear showing" in a two-step process.

The movant first "must make a threshold showing that: (1) absent preliminary injunctive relief, he will suffer irreparable harm in the interim prior to a final resolution; (2) there is no adequate remedy at law; and (3) he

has a reasonable likelihood of success on the merits." *Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015) (citation omitted). If the movant clears this hurdle, it must then show "(4) the irreparable harm [it] will endure if the preliminary injunction is wrongfully denied versus the irreparable harm to the nonmoving party if it is wrongfully granted; and (5) the effects, if any, that the grant or denial of the preliminary injunction would have on nonparties (the 'public interest')." *Id.* Moreover, the balance of harms analysis depends on the movant's likelihood of success: "the more likely he is to win, the less the balance of harms must weigh in his favor; the less likely he is to win, the more it must weigh in his favor." *Id.*

ARGUMENT

I. The State Defendants will address only one factor in the preliminary injunction analysis, the likelihood of success on the merits.

Despite the broad claims alleged against Ho-Chunk and the State Defendants in Stockbridge's complaint, the relief it seeks in its motion for a preliminary injunction is relatively narrow. Stockbridge seeks only an order enjoining Ho-Chunk from opening the Wittenberg expansion's gaming component until this case is resolved. (Pl.'s Mot. for Prelim. Inj. 1–2; Pl.'s Brief ISO Mot. for Prelim. Inj. ("Pl.'s Br.") 33.) It does not seek any injunctive relief against the State Defendants. Thus, because the relief sought by Stockbridge would not directly bind the State Defendants or order them to perform or

refrain from any action, they will make no argument on the equitable factors relevant to this preliminary injunction motion.

However, the merits of Stockbridge's claims against Ho-Chunk in this motion are intertwined with Stockbridge's substantive claims against the State Defendants. (*See, e.g.*, Compl. ¶¶ 52–53, 57, 63–64.) So, the State Defendants offer arguments opposing the preliminary injunction solely on the ground that Stockbridge has no reasonable likelihood of success on the merits of the claims at issue.[1]

II. Stockbridge has no reasonable likelihood of success on the merits of its claims against Ho-Chunk.

Stockbridge will not succeed on the two claims it advances in support of its preliminary injunction motion. First, with respect to its claim that the Wittenberg parcel is not eligible for tribal gaming under IGRA, Stockbridge's legal theory is premised on an erroneous interpretation of the 1969 deed and a failure to acknowledge the supremacy of federal law over Indian lands. Second, with respect to its claim that the Wittenberg facility is not a permissible "ancillary facility," Stockbridge misinterprets the pertinent provisions of

[1] Other claims alleged against the State Defendants in Stockbridge's complaint are not relevant to the pending preliminary injunction motion, and so this brief will not address their merits. (*See* Pl's. Br. 17 n.7; Compl. ¶¶ 48–64.) Moreover, although Stockbridge's complaint is subject to dismissal under Federal Rule of Civil Procedure 12(b), this brief will not discuss those grounds for dismissal. The State Defendants expressly reserve their right to assert Rule 12(b) defenses by their own motion to dismiss at the appropriate time.

Ho-Chunk's gaming compact and offers no facts suggesting that the Wittenberg expansion will violate that compact.

A. Stockbridge will not succeed on its claim that the Wittenberg parcel is not eligible for gaming under IGRA.

A basic premise of Stockbridge's lawsuit is that, under IGRA, gaming activities may not be conducted on the Wittenberg parcel. Stockbridge is wrong. The Wittenberg parcel is Indian trust land. It did not, as Stockbridge contends, revert to the Native American Church in 1974 and lose its trust status. It has retained its trust status since it first went into trust in 1969. And, ironically, if Stockbridge were correct that the parcel lost its trust status in 1974, this Court would have no jurisdiction over this lawsuit.

1. The history of the Wittenberg parcel.

On June 28, 1969, the Native American Church, Half Moon Fire-Place, State of Wisconsin, Inc. ("Native American Church" or "Church") deeded to the United State of America in Trust for the Wisconsin Winnebago Tribe a parcel of land in the Town of Wittenberg. (Dkt. 5-3:3.) The deed provided that the conveyance was "subject to Housing construction which must commence within 5 years from date of approval of this deed or the land will revert to the grantor," i.e., the Church. (Dkt. 5-3:3.)

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.) The

approval was signed by the Acting Area Director for the Minneapolis Area Office "pursuant to authority delegated by Secretarial Order No. 2508 of January 11, 1949 (14 F.R. 258-260) and 10 BIAM 3." (Dkt. 5-3:4.)

Stockbridge allege that housing construction did not commence on the parcel within five years of the deed's approval.

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." (Dkt. 9-11:2.)

The deed was certified by Superintendent Robert R. Jaeger of the BIA Great Lakes Agency on July 1, 1993. (Dkt. 9-11:3.)

In response to an inquiry from the State of Wisconsin in 2008, Superintendent Diane Rosen of the BIA Great Lakes Agency stated that "[t]he title status report has been reviewed and shows that this tract of land has been held in trust for the Wisconsin Winnebago Tribe (Ho-Chunk Nation) since it was acquired in 1969." (McClure Aff. Ex. A.) The BIA is the office of record for land records and title documents regarding Indian lands. 25 C.F.R. § 150.3.

2. The Wittenberg parcel has been in trust status continuously since 1969.

As a general rule, gaming regulated by IGRA "shall not be conducted on lands acquired by the Secretary [of the Interior] in trust for the benefit of an

Indian tribe after October 17, 1988." 25 U.S.C. § 2719(a). Here, the Native American Church conveyed the Wittenberg parcel to the United States of America in trust for the Wisconsin Winnebago Tribe. The deed conveying the property was approved by the BIA on October 3, 1969. (Dkt. 5-3:4.) Thus, the parcel was taken into trust pursuant to 25 U.S.C. § 5108[2] on or around October 3, 1969. (Dkt. 5-3:3.) In 2008, Superintendent Rosen informed the State of Wisconsin that "this tract of land has been held in trust for the Wisconsin Winnebago Tribe (Ho-Chunk Nation) since it was acquired in 1969." (McClure Aff., Ex. A.) Therefore, the Wittenberg parcel has been held in trust for the Ho-Chunk Nation since 1969, long before October 17, 1988. Accordingly, the land was eligible for IGRA-regulated gaming. *See* 25 U.S.C. § 2719(a).

Stockbridge rejects this straightforward analysis. It points to the clause in the 1969 deed stating the conveyance of the parcel was "subject to Housing construction which must commence within 5 years from date of approval of this deed or the land will revert to the grantor." (Dkt. 5-3:3.) Stockbridge allege that housing construction did not commence on the Wittenberg parcel within five years of the approval of the deed, or October 3, 1974. Stockbridge concludes from this alleged fact that "title to the Wittenberg Parcel reverted back to the

[2] The 1969 deed cites 48 Stat. 984 as the statutory authority for the United States of America's acquisition of the land. (Dkt. 5-3:3.) The original United States Code parallel citation for 48 Stat. 984 was 25 U.S.C. § 465. Subsequently, that section was "transferred" to 25 U.S.C. § 5108.

Native American Church by operation of law when Ho-Chunk failed to develop housing on the site within five years." (Pl.'s Br. 18.)

Even assuming Stockbridge's factual allegation is correct, multiple problems with its position remain. First, it is not clear whether the Church intended to create an automatic reversion or a right of reentry upon the nonperformance of the housing condition.[3] The language of the deed could be interpreted either way. *See Saletri v. Clark*, 13 Wis. 2d 325, 329–30, 108 N.W.2d 548 (1961) (comparing similar language from Minnesota and Delaware cases). The Church, as grantor of the parcel, apparently concluded that its interest in the 1969 deed was a right of reentry only. Its decision to convey by Quitclaim Deed on April 15, 1993, "[a]ll right, title and interest, it may have under the reversionary clause" of the 1969 deed to the United States of America in trust for the Wisconsin Winnebago Tribe indicates that the Church did not believe that the Wittenberg parcel had automatically reverted to the Church in 1974. (Dkt. 9-11:2.) If it had, there would have been no reason to convey the reversionary interest to the tribe in 1993.

[3] Language creating a "possibility of reverter" may either give the grantor the right "to maintain an ejectment action" if the grantee fails to satisfy a "condition subsequent," or return the property to the grantor "automatically without any action on his part upon the happening [or non-happening] of the special limitation." *Saletri v. Clark*, 13 Wis. 2d 325, 329–30, 108 N.W.2d 548 (1961).

Second, and most importantly, real estate interests arising under state law cannot defeat the federal trust status of Indian land. State property law is completely preempted by federal law governing Indian trust land. *See* 25 U.S.C. § 177 (the Indian Nonintercourse Act); *Oneida Indian Nation of N.Y. v. Oneida Cty.*, 414 U.S. 661, 673–75 (1974); *id.* at 684 (Rehnquist, J., concurring); *see also Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 n.8 (1987) (explaining *Oneida*'s holding that "state-law complaint that alleges a present right to possession of Indian tribal lands . . . is . . . completely preempted"). None of the authorities Stockbridge cites acknowledge or answer this basic preemption principle.

This complete preemption stems in part from the express terms of the Indian Nonintercourse Act, which prohibits any "conveyance of lands, or of any title or claim thereto . . . unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177. "Section 177 has been interpreted as prohibiting a great deal of [property] transactions absent Congressional authorization." *Chemehuevi Indian Tribe v. Jewell*, 767 F.3d 900, 904 (9th Cir. 2014). In other words, Congress must approve by statute a particular class of land transaction before it can be considered valid under the Indian Nonintercourse Act. *Id.* at 907 (collecting illustrative statutes). Approval of a particular transaction by the Secretary of Interior is not sufficient unless Congress intentionally vested in the Secretary the power

to approve that type of transaction. *Id.* There is no federal statutory authority authorizing the Secretary to approve an automatic reversion of land to a grantor under the circumstances existing here. Therefore, once the Wittenberg parcel was taken into trust by the United States for the Tribe, it did not and could not—as a matter of law—revert back to the grantor.

The fact that the 1969 deed included a reversionary clause does not alter this analysis. The inclusion of a future interest does not affect the trust status of the property. *See United States v. Roberts*, 185 F.3d 1125, 1135 (10th Cir. 1999). The interest is, by definition, "contingent in nature . . . and . . . cannot operate to defeat an otherwise valid exercise of superintending responsibility by the federal government as established by its approval of an acquisition in trust for the benefit of the [Tribe]." *Id.* at 1135-36. And, as stated above, the Secretary's acceptance of the parcel into trust encumbered by this future interest does not render the encumbrance legally effective because Congress did not authorize the Secretary to accept such an encumbrance.

The third problem with Stockbridge's position is that, if its legal analysis of the property question is correct, it has effectively pleaded itself out of court.

Under IGRA, regulated tribal gaming is permissible on off-reservation trust land if the land was already in trust on October 17, 1988, or if the land was taken into trust after that date for gaming purposes with the concurrence of "the Governor of the State in which the gaming activity is to be conducted."

25 U.S.C. § 2719(a), (b)(1)(A).[4] A Tribal-State compact to allow class III gaming on these off-reservation lands may be adopted and approved. *See* 25 U.S.C. § 2710(d). If a tribe violates its compact, IGRA partially abrogates its immunity from suit in federal district court in "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 entered" pursuant to IGRA. 25 U.S.C. § 2710(d)(7)(A)(ii). Significantly, IGRA does not abrogate tribal sovereign immunity for a suit "to stop gaming activity *off* Indian lands." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2032 (2014). Thus, if a tribe believes that another tribe is conducting gaming outside Indian reservation or trust lands in violation of its IGRA compact, "[b]y dint of that theory, a suit to enjoin gaming [on the non-Indian reservation or trust lands] is correspondingly outside § 2710(d)(7)(A)(ii)'s abrogation of immunity." *Id.*

Stockbridge's theory is that the Wittenberg parcel lost its trust status and reverted to the Church in 1974. That means that it was not in trust on October 17, 1988. The land was not thereafter taken into trust for gaming purposes with the concurrence of the Governor of Wisconsin. Stockbridge concludes that the land went back into trust pursuant to the 1993

[4] With exceptions not relevant here. *See* 25 U.S.C. § 2719(a)(1)–(2), (b).

deed.[5] Under Stockbridge's interpretation of this history, the Wittenberg parcel was never eligible for IGRA-authorized gaming, or a Tribal-State compact.

See 25 U.S.C. § 2719(a), (b). If, as Stockbridge insists, the land was not held in trust by the federal government before 1988, any class III gaming activity conducted on the parcel did not and will not take place "on any Indian lands" pursuant to an enforceable compact. 25 U.S.C. § 2710(d)(7)(A)(ii). If that's the case, Stockbridge cannot successfully challenge Ho-Chunk's gaming activity on the Wittenberg parcel. Congress abrogated Ho-Chunk's tribal immunity only with respect to any class III gaming activity conducted on Indian lands in violation of its compact. *Id.* If the parcel is not Indian land, and the class III gaming is not permitted under the compact, tribal immunity is not abrogated and Ho-Chunk has an absolute defense against this lawsuit. *See Bay Mills*, 134 S. Ct. at 2032.

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[5] In the 1993 deed, the Church quitclaimed the Church's "right, title and interest . . . under the [1969 deed's] reversionary clause" in the Wittenberg parcel to the United States of America on behalf of the Tribe. (Dkt. 9-11:2.) From this, Stockbridge concludes that the BIA "acquired the Wittenberg parcel in trust for the benefit of Ho-Chunk" in 1993. (Comp. ¶ 37.) Stockbridge's interpretation of the 1993 deed is erroneous. The 1993 deed did not convey the Church's interest in the land parcel; rather, it quitclaimed the Church's reversionary interest that was included in the 1969 deed. The 1969 deed (not the 1993 deed) conveyed the parcel to the Tribe. Superintendent Jaeger's certification of the deed on July 1, 1993, does not alter this analysis. With that certification, BIA performed a ministerial action of recording the transfer of whatever remaining interest the Church may have had in the parcel already held in trust by the United States. (Dkt. 9-11:3.) Thus, the BIA acquired the Wittenberg parcel in trust for the benefit of the Ho-Chunk in 1969, not 1993.

For all these reasons, Stockbridge's theory that the Wittenberg parcel is not IGRA-eligible trust land is wrong. Therefore, Stockbridge has no reasonable likelihood of success on this claim and this Court should deny the motion for preliminary injunction on these grounds.

B. Stockbridge will not succeed on its claim that the Wittenberg expansion is not a permissible "ancillary facility" under the Ho-Chunk's Gaming Compact.

Stockbridge also has not established a reasonable likelihood of succeeding on its claim that the Wittenberg expansion will violate the "ancillary facility" provision in Section XVI.E. of Ho-Chunk's Gaming Compact. That claim will fail for three reasons. First, Stockbridge's interpretation of "ancillary facility" is contrary to the provision's plain language, and Stockbridge does not show that the proposed Wittenberg expansion will violate the actual terms of that provision. Second, Stockbridge's interpretation of "ancillary facility" ignores how the original 1992 Ho-Chunk Gaming Compact changed when the parties added Section XVI.E. to the compact in 2003. Third, the State of Wisconsin and Ho-Chunk—who are the only parties to the Ho-Chunk Gaming Compact—agree on the interpretation of Section XVI.E. and that agreed-upon interpretation cannot be challenged by a non-party to the agreement.

1. Section XVI.E. of the Ho-Chunk Gaming Compact defines an "ancillary facility."

The provision of the Ho-Chunk Gaming Compact that applies to the Wittenberg facility is Section XVI.E. (Dkt. 9-13:4.) That provision defines "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. 9-13:4.) A "Gaming Facility," by contrast, does not turn on lot coverage—instead, it is simply "a facility whose Primary Business Purpose is gaming." (Dkt. 9-13:4.)

When originally signed in 1992, the Ho-Chunk gaming compact defined an "ancillary facility" differently. Then, an "ancillary facility" was simply one "whose Primary Business Purpose [was] not gaming." (Dkt. 9-10:33.)

Under both definitions of "ancillary facility," a "primary business purpose" is "the business generating more than 50 percent of the net revenue of the facility," as defined in Section III.H. (Dkt. 9-10:11.)

Section XVI.E. specifies the counties in which "gaming facilities" and "ancillary facilities" can be located. (Dkt. 9-13:4.) Shawano County, where the Wittenberg facility is located, may contain an "ancillary facility" but may not contain a "gaming facility." (Dkt. 9-13:4.)

2. Stockbridge's interpretation of "ancillary facility" is contrary to the provision's plain language.

"A compact is a contract, subject to the ordinary rules of contract construction." *Wisconsin v. Ho-Chunk Nation*, 478 F. Supp. 2d 1093, 1098, (W.D. Wis. 2007) (citing *Texas v. New Mexico*, 482 U.S. 124, 128 (1987)), *rev'd in part on other grounds*, 512 F.3d 921 (7th Cir. 2008). "Where the terms of a contract are clear and unambiguous, we construe the contract according to its literal terms." *Tufail v. Midwest Hosp., LLC*, 2013 WI 62, ¶ 26, 348 Wis. 2d 631, 833 N.W.2d 586.

Section XVI.E. of the Ho-Chunk gaming compact provides a clear and unambiguous definition of "ancillary facilities." Under Section XVI.E., an "ancillary facility" means a facility located on trust property where a majority of the lot area is used for business purposes that generate a majority of their net revenue from non-gaming activities. This creates a three-step test for Stockbridge's challenge to the Wittenberg expansion. First, Stockbridge must determine the total size of the trust property on which the Wittenberg facility is located. Second, it must determine the post-expansion portion of the property on which non-gaming activities generate more than half of the net revenue. Finally, it must divide the lot coverage of that non-gaming portion by the total size of the trust property. If the answer is more than half, the expanded Wittenberg facility would be a permissible "ancillary facility."

The Wittenberg trust property currently contains substantial non-gaming business operations. Ho-Chunk already operates a convenience store on the property; after the expansion is completed, the trust property will also contain an 84-seat restaurant and an 86-room hotel. (Pl.'s Statement of Facts ¶ 31; Dkt. 9-17:3.) Additionally, the trust property contains existing gaming operations that will be expanded. (Dkt. 9-17:3.) To show a reasonable chance of success on the merits and obtain a preliminary injunction, Stockbridge must make a "clear showing" that the projected revenue and lot coverage of these non-gaming activities will fail to satisfy the "ancillary facility" provision. *Goodman v. Ill. Dep't of Fin. & Prof'l Regulation*, 430 F.3d at 437 (7th Cir. 2005) (citing *Mazurek*, 520 U.S. at 972).

Stockbridge does not even approach this "clear showing," since it misreads the plain language of Section XVI.E. It contends that "an 'Ancillary Facility' is a facility where gambling does not generate a majority of the revenue." (Pl.'s Br. 22.) But this ignores the explicit lot coverage clause in Section XVI.E. That provision does not define an "ancillary facility" by the proportion of gaming revenue generated on an entire trust property. Instead, it defines an "ancillary facility" by the "primary business purpose" of "fifty percent or more of the lot coverage of the trust property upon which the facility is located." (Dkt. 9-13:4.) So, Stockbridge incorrectly analyzes the share of gaming revenue on the *entire* Wittenberg trust property (Pl.'s Br. 23), even

though Section XVI.E. requires Stockbridge to determine the share of gaming revenue on "fifty percent or more" of the property. (Pl.'s Br. 23.) By ignoring this lot coverage clause, Stockbridge does not correctly apply the compact's actual terms.

Stockbridge also argues that giving effect to the lot coverage clause would, "from a practical standpoint," collapse the distinction between a "gaming facility" and an "ancillary facility." (Pl.'s Br. 24.) This argument assumes that "gaming facilities" and "ancillary facilities" are mutually exclusive, but Section XVI.E. does not define them as such. So long as a majority of the post-expansion Wittenberg trust lot is devoted to a non-gaming "primary business purpose," it will be a permitted "ancillary facility."

Put another way, even if one piece of the Wittenberg trust lot generates a majority of its revenue from gaming—the criterion for a "gaming facility"—it can still qualify as an "ancillary facility." Nothing in Section XVI.E.'s plain language prevents this overlap. Nor does some overlap render either term superfluous. One term turns on the facility's own "primary business purpose," while the other turns on the lot coverage of neighboring non-gaming activities. The State's plain language interpretation preserves this key difference. And whether a "typical Wisconsin gambler" could distinguish between the two kinds of facilities "from a practical standpoint" is not the contractual test.

(Pl.'s Br. 24–25.) The test Stockbridge must apply—but fails to—is the plain language to which the parties agreed in Section XVI.E.

Rather than respect the plain language, Stockbridge asks this Court to rewrite the Ho-Chunk gaming compact to impose different terms. Stockbridge contends that an "ancillary facility" is really "a single business enterprise in which the gaming space is smaller than the other, nongaming, commercial space, and in which the non-gaming revenues from business activities on the parcel exceed the gaming revenues." (Pl.'s Br. 26.) But that is not the term to which Ho-Chunk and the State agreed. The actual term examines whether "fifty percent or more of the lot coverage of the trust property" has a non-gaming "primary business purpose," not whether the *entire* trust property has a non-gaming "primary business purpose." (Dkt. 9-13:4.)

Because Stockbridge misinterprets the "ancillary facility" provision, its proposed factual finding that gambling activities generate a majority of revenue on the Wittenberg trust property is irrelevant. (Pl.'s Statement of Facts ¶ 46.) And Stockbridge offers no other facts showing that the Wittenberg expansion will violate the "ancillary facility" provision, properly interpreted. Because Stockbridge fails to carry its burden, its motion for a preliminary injunction on these grounds should be denied.

3. Stockbridge ignores how the "ancillary facility" provision changed from the original 1992 Ho-Chunk Gaming Compact to Section XVI.E., today.

The history of the "ancillary facility" provision further supports the State's and Ho-Chunk's interpretation of Section XVI.E. In short, a 2003 amendment rendered the Ho-Chunk Gaming Compact more permissive in a way that undermines Stockbridge's restrictive interpretation of an "ancillary facility."

The original 1992 Ho-Chunk Gaming Compact defined "ancillary facilities" more narrowly than Section XVI.E. does now. Then, Section XV.H. defined an "ancillary facility" as one "whose Primary Business Purpose [was] not gaming" and which had to be built next to a facility whose primary business purpose *was* gaming. (Dkt. 9-10:33.)[6] This resembles Stockbridge's interpretation of the present compact language, which (as Stockbridge sees it) would require that "gambling does not generate a majority of the revenue" at the Wittenberg facility. (Pl.'s Br. 22.)

But a 2003 amendment added Section XVI.E. to the Ho-Chunk Gaming Compact. This provision permitted more ancillary facilities—like the Wittenberg facility in Shawano County—and it provided a new, looser definition for them. (Dkt. 9-13:4.) First, the provision discarded the location

[6] The provision only permitted "ancillary facilities" in Sauk and Jackson counties, not also Shawano County where the Wittenberg facility is located.

limitation. New ancillary facilities would no longer need to neighbor full-fledged gaming facilities and could now be independently operated in their own counties. (Dkt. 9-13:4.) More importantly, the provision added the lot coverage clause. (Dkt. 9-13:4.) This changed the "ancillary facility" test in a critical way.

The old Section XV.H. examined a single facility's net revenue to determine whether gaming supplied the majority of the revenue. (Dkt. 9-10:33.) If so, the facility was not "ancillary," regardless of other commercial activity on the same lot. But Section XVI.E., which governs here, supplies a new, broader test for the Wittenberg facility. The provision now examines neighboring non-gaming activities to see whether those activities take up a majority of the trust property. (Dkt. 9-13:4.) This test declines to examine the "primary business purpose" of only the facility itself, which was the abandoned 1992 definition that Stockbridge now seeks to reintroduce.

Stockbridge incorrectly suggests that the State and Ho-Chunk did not intend to materially change the "ancillary facility" meaning by adopting Section XVI.E. (Pl.'s Br. 27.) That makes no sense, because why would the parties add the new lot coverage language in Section XVI.E. if they intended to keep the same meaning as Section XV.H.? Rather than answer that question, Stockbridge cites one ambiguous statement attributed to the then-Secretary of the Wisconsin Department of Administration: "[t]he intent continues to be that these be one-stop shops that sell everything from groceries

to gas[.]" (Pl.'s Br. 27.) As explained above, the "ancillary facility" provision is unambiguous and so this extrinsic evidence cannot be considered. *See Tufail*, 341 Wis. 2d 631, ¶ 26 ("unambiguous contract language controls contract interpretation") (citation omitted). In any event, the Wittenberg facility will continue to be a "one-stop shop" with a convenience store, a restaurant, a hotel, and gaming—in line with both the Secretary's comments and Section XVI.E.'s definition of an "ancillary facility." (Pl.'s Statement of Facts ¶ 31; Dkt. 9-17:3.)

Rather than respect Section XVI.E.'s plain language or the import of the Ho-Chunk gaming compact's 2003 amendment, Stockbridge cites provisions in gaming compacts between the State and other tribes. (Pl.'s Br. 27–29.) These other provisions are irrelevant. They are contained in gaming compacts that are not at issue in this case. Moreover, the language in those provisions differs materially from the "ancillary facility" provision at issue here. (*See* Pl.'s Br. 27–29.) Stockbridge offers no legal authority that a specific contractual term in one contract can be interpreted on the basis of how different terms in different contracts are used and interpreted.

4. The parties to the Ho-Chunk Gaming Compact agree on the interpretation of "ancillary facility"; that agreed-upon interpretation cannot be challenged by a non-party to the compact, like Stockbridge.

Stockbridge's proffered interpretation of Section XVI.E. should be discounted for yet another reason—neither party to the Ho-Chunk Gaming

Compact shares it. It is axiomatic that "[c]ontract interpretation generally seeks to give effect to the parties' intentions" and that "the office of judicial construction is not to make contracts . . . but to determine what the parties contracted to do." *Tufail*, 348 Wis. 2d 631, ¶¶ 25, 29 (citations omitted). This means that "a third party's interpretation of a document does not affect the construction of the document," and the fact that a third-party may "interpret[] the terms differently than the parties intended does not change the intended effect and purpose of the agreement." *Bank of Barron v. Gieseke*, 169 Wis. 2d 437, 458, 485 N.W.2d 426 (Ct. App. 1992).

The only parties to the Ho-Chunk gaming compact's 2003 amendment—the State and Ho-Chunk—agree on what they intended when defining the new kind of "ancillary facility" in Section XVI.E. Neither party intended the provision to turn on revenue from either the facility itself or its entire trust property. Instead, the parties intended "ancillary facilities" to rest on the lot coverage of neighboring non-gaming activities. The contractual language the parties chose clearly reflects this intent.

Now, a third party to the agreement—Stockbridge—offers a new test for an "ancillary facility" that enjoys no textual support in Section XVI.E. (Pl.'s Br. 22, 26.) This third party's novel interpretation is contrary to the shared intent of the parties to the Ho-Chunk gaming compact, as expressed in Section XVI.E.'s plain terms. Stockbridge's attempt to rewrite the provision and block

the Wittenberg expansion fails because a third party's interpretation "does not affect the construction of the document." *Bank of Barron*, 169 Wis. 2d at 458.

* * *

By misreading Section XVI.E. and ignoring its history, Stockbridge has no reasonable likelihood of showing that the expanded Wittenberg facility will violate the Ho-Chunk gaming compact's "ancillary facility" provision. Stockbridge's motion for a preliminary injunction on these grounds should be denied.

CONCLUSION

For the reasons stated herein, this Court should deny Stockbridge's motion for a preliminary injunction.

Dated this 18th day of May, 2017.

Respectfully submitted,

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