UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

THE STOCKBRIDGE-MUNSEE COMMUNITY,

a federally recognized Indian tribe,

Plaintiff,

v.

STATE OF WISCONSIN,

and

SCOTT WALKER, in his official capacity

as the Governor of Wisconsin,

and

THE HO-CHUNK NATION,

a federally recognized Indian tribe,

Defendants.

STOCKBRIDGE-MUNSEE COMMUNITY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

17-cv-249

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Plaintiff STOCKBRIDGE-MUNSEE COMMUNITY ("SMC"), pursuant to Fed. R. Civ. P. 65(a), submits this Memorandum of Points and Authorities in support of its motion for this Court for a Preliminary Injunction that enjoins Defendant HO-CHUNK NATION[1] ("Ho-Chunk") from allowing any gaming activities on lands within the external boundaries of Shawano County, Wisconsin, beyond such gaming activities, both in the context of numbers of games and forms of gaming, actually in operation on April 19, 2017, pending resolution of the instant litigation. Specifically, Ho-Chunk should be enjoined from operating more than 502 gaming machines (class II and class III combined), and from operating any table games, within Shawano County, pending resolution of the instant litigation.

I. OVERVIEW

With full knowledge that the legality of gaming on certain lands in Wittenberg, Wisconsin is in dispute, Ho-Chunk has embarked on a major expansion of its existing gaming facility (the "Wittenberg Casino") in Shawano County. SMC seeks a preliminary injunction to enjoin Ho-Chunk from operating more than the 502 gaming machines (class II and class III combined) currently being operated, and from operating any table games, within Shawano County pending resolution of the instant litigation. Allowing Ho-Chunk to expand its gaming activities at the Wittenberg Casino in excess of what is already operated will devastate SMC's current gaming operations, causing a $22 million loss in critical governmental revenue each year, which equates to thirty-seven percent (37%) of SMC's existing slot revenue and equates to a seventy-four percent (74%) loss in funding of essential tribal programs. That lost revenue will result in significant job losses, and drastic cuts to essential governmental services that SMC currently provides to its Tribal members, its residents and the surrounding community.

[1] The Ho-Chunk Nation was formerly known as the Wisconsin Winnebago Tribe.

All of the elements for the extraordinary relief of a preliminary injunction are present here. The law is clear that the land in Shawano County on which Ho-Chunk is currently offering gaming is not eligible for gaming under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq*., ("IGRA"). The law is equally clear that, even if the land were eligible for gaming, the proposed expansion violates the contractual restrictions set forth in the Ho-Chunk/Wisconsin compact (the "Ho-Chunk Compact"). Moreover, there is a substantial likelihood that SMC will prevail in its claims against the State of Wisconsin (the "State") and related defendants (collectively, the "State Defendants") alleging that the State Defendants must take action to prevent Ho-Chunk from offering gaming at the Wittenberg Facility in any form, or alternatively, to prevent Ho-Chunk from offering gaming in a manner that violates the Ho-Chunk Compact's restrictions on ancillary facilities. The devastating impacts to SMC, its economy, and the surrounding communities are detailed below. Remedies at law, specifically money damages, are unavailable to SMC, and even if available, would be inadequate to restore SMC to the position to which it is entitled as a matter of federal law. Granting a preliminary injunction will impose no significant harm upon Ho-Chunk; therefore, the balance of hardships weighs overwhelmingly in favor of SMC. Further, granting a preliminary injunction will advance the public interest.

II. JURISDICTION

This Court has jurisdiction over SMC's claims against Ho-Chunk[2] under 28 U.S.C. § 1362 and 25 U.S.C. § 2710(d)(7)(A), as is the instant litigation involves a complaint brought by an Indian tribe to enjoin class III gaming in violation of a gaming compact that is in effect. The

[2] This Court has jurisdiction over SMC's claims against the State and its Governor under 25 U.S.C. §§ 1361 and 1362, as the claims are brought by an Indian tribe and arise under federal law, including the United States Constitution and IGRA, 25 U.S.C. §§ 2701, *et seq.* and 28 U.S.C. §§ 2201 and 2202, and as SMC also seeks declaratory relief.

United States Congress has abrogated Ho-Chunk's sovereign immunity from SMC's suit by expressly vesting United States District Courts with jurisdiction over "any cause of action brought by a State or Indian tribe to enjoin a class III gaming activity on Indian lands and conducted in violation of any Tribal-State compact entered into under [IGRA]" pursuant to 25 U.S.C. § 2710(d)(7)(A)(ii).

Venue is proper in this District pursuant to 28 U.S.C. § 1391 in that a substantial part of the events or omissions giving rise to the claims have occurred in this District, and Ho-Chunk is located in this District.

III. STANDARDS FOR THE ISSUANCE OF PRELIMINARY INJUNCTIVE RELIEF

A preliminary injunction is an extraordinary remedy never awarded as of right. *Winter v. NRDC*, *Inc*., 555 U.S. 7, 24 (2008). An equitable, interlocutory form of relief, " a preliminary injunction is an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it." *Roland Mach. Co. v. Dresser Indus.*, *Inc.*, 749 F.2d 380, 389 (7th Cir. 1984). The purpose of a preliminary injunction is to minimize the hardship to the parties pending the ultimate resolution of the lawsuit." *Faheem–El v. Klincar*, 841 F.2d 712, 717 (7th Cir.1988); *Wisconsin v. Stockbridge-Munsee*, 67 F. Supp. 2d. 990, 993 (E.D. Wis. 1999). A motion for preliminary injunctive relief is analyzed in two distinct phases. *Turnell v. Centimark Corp.*, 796 F.3d 656, 661 (7th Cir. 2015). In the initial, threshold phase, the party seeking injunctive relief bears the burden of showing that (1) absent preliminary injunctive relief, it will suffer irreparable harm in the interim prior to a final resolution; (2) there is no adequate remedy at law; and (3) it has a reasonable likelihood of success on the merits. If the court determines that the moving party has satisfied its burden in the threshold phase, the court proceeds to the second, balancing phase. *Id.* at 662. The court then considers "(4) the irreparable harm the moving party will

endure if the preliminary injunction is wrongfully denied versus the irreparable harm to the nonmoving party if it is wrongfully granted", along with "(5) the effects, if any, that the grant or denial of the preliminary injunction would have on nonparties (the 'public interest')." *Id*. *see also Wisconsin Right to Life, Inc.*, 751 F.3d 804, 830 (7th Cir. 2011); *National Waste & Recycling Association v. Warrick County Solid Waste Management District*, 2016 WL 1222353 at *11 (S.D. Ind. 2016); *Wisconsin v. Stockbridge-Munsee Community*, 67 F. Supp. 2d 990, 993 (E.D. Wis. 1999).

To satisfy the "irreparable harm" prong, the moving party must show that the denial of preliminary injunctive relief "will cause harm to him that a final judgment will not be able to rectify." *Illinois League of Advocates for the Developmentally Disabled v. Illinois Department of Human Services*, 803 F.3d 872, 876 (7th Cir. 2015). Laying off or terminating employees constitutes irreparable harm. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States of Am. Inc*., 549 F.3d 1079, 1090 (7th Cir. 2008). SMC's investment in its gaming-related work force, both in terms of time and money, will be lost, as will the work force's accrued knowledge and work capacity. *See Girl Scouts,* 549 F.3d at 1089; *National Waste*, 2016 WL 1222353 at *12.

Moreover, loss of customer good will also constitutes irreparable harm. *See Meridian Mut. Ins. Co. v. Meridian Ins. Grp., Inc*., 128 F.3d 1111, 1120 (7th Cir. 1997) (loss of goodwill can constitute irreparable harm for which a plaintiff has no adequate remedy at law."); *Gateway E. Ry. v. Terminal R.R. Ass'n*, 35 F.3d 1134, 1140 (7th Cir. 1994) ("[S]howing injury to goodwill can constitute irreparable harm that is not compensable by an award of money damages."). If SMC is unable to provide its normal gaming services to customers during the course of this litigation, and then this Court ultimately issues a final judgment in favor of SMC, the loss in

goodwill may make it difficult for SMC to regain those customers lost in the interim. *See National Waste*, 2016 WL 1222353 at *12.

A party satisfies the requirement that there be no adequate remedy at law if only prospective equitable relief is available, as opposed to an award of money damages. *See Gov't Suppliers Consolidating Services, Inc. v. Bayh*, 734 F. Supp. 853, 863 (S.D. Ind. 1990); *National Waste*, 2016 WL 1222353 at *12. If sovereign immunity prevents the moving party from obtaining money damages, then remedies at law are inadequate, justifying the issuance of a preliminary injunction. *Stockbridge-Munsee* at 1019-1020; *Prairie Band of Potawatomi v. Pierce*, 253 F.3d 1234, 1251 (10th Cir.2001); *Kansas Health Care Ass'n Inc. v. Kansas Dep't of Soc. and Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994). Even in the non-Indian context, where monetary damages are possible, courts will still find irreparable harm in situations similar to those currently facing SMC, where the consequences of losses are extremely serious and devastating. *See Doran v. Salem Inn, Inc*., 422 U.S. 922, 932, 95 S. Ct. 2561 (1975); *Commodity Futures Trading Comm'n v. British American Commodity Options Corp.*, 434 U.S. 1316, 1322, 98 S. Ct. 10 (1977); *Tri-State Gen. & Transmission Ass'n. v. Shoshone River Power, Inc.*, 805 F.2d 351, 356 (10th Cir. 1986). The movant need not establish an actual injury or the certainty of an injury occurring; it is enough to show a strong threat of irreparable injury before trial. 11C Wright & A. Miller, *Federal Practice and Procedure* § 2948 at 437-38 (1973).

The threshold for establishing likelihood of success is relatively low. *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 782 (7th Cir. 2011). The moving party must only "present a claim plausible enough that (if the other preliminary injunction factors cut in their favor), the entry of a preliminary injunction would be an appropriate step." *Id.* at 783. Where the movant establishes a substantial likelihood of prevailing on the merits, however, the sliding scale

in the second phase slides substantially in favor of the moving party.

In the second phase, the court uses a "sliding scale" to weigh potential harms against 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." *Turnell*, 796 F.3d. at 661-62*; Wisconsin Right to Life*, 751 F.3d at 830. The court weighs the competing harms to the parties if an injunction is granted or denied and also considers the public interest. *Id.* "The sliding scale approach is not mathematical in nature, rather it is more properly characterized as subjective and intuitive, one which permits district courts to weigh the competing considerations and mold appropriate relief." *Stuller, Inc. v. Steak N Shake Enters*, 695 F.3d 676, 678 (7th Cir. 2012). The district court "sits as would a chancellor in equity" and weighs all the factors, "seeking at all times to minimize the costs of being mistaken." *Id*.; *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992); *See also National Waste*, 2016 WL 1222353 at *19.

The irony is not lost on SMC that it is citing its 1999 litigation with the State, where the State took the exact opposite position that it has embraced here, and prevailed in obtaining an injunction prohibiting SMC from gaming on a parcel of land because the land was ineligible for gaming under IGRA, and because the proposed gaming was in violation of SMC's tribal/state gaming compact (SMC's gaming compact with the State, as same may have been renewed, extended or amended, being referred to as the "SMC Compact") then in effect. *Stockbridge-Munsee*, 67 F. Supp. 2d. at 1021. Here, SMC alleges that Ho-Chunk did not acquire the property until 1993, when the Wittenberg property was quitclaimed to Ho-Chunk, thus rendering the property to be post-1988 acquired property ineligible for gaming under IGRA. In the State's prior litigation against SMC, it alleged that certain property, the Pine Hills property, was

acquired in trust after October 17, 1988, rendering it ineligible for gaming under IGRA. *Id.* at 992. Here, SMC alleges that even if the Wittenberg property is otherwise eligible for gaming under IGRA, Ho-Chunk is violating the Ho-Chunk Compact. In the State's prior litigation against SMC, it alleged that even if the Pine Hills Property was otherwise eligible for gaming under IGRA, SMC was violating its tribal/state gaming compact, which restricted SMC to operating class III gaming within the boundaries of its reservation. *Id.* at 992. The district court found that the State had a substantial likelihood of prevailing on its claim that SMC's reservation had been diminished to exclude the Pine Hills Property, and found that all of the elements for the granting of preliminary injunctive relief had been satisfied. *Id.* at 1021. Here, SMC demonstrates below, *inter alia,* that (1) tribal sovereign immunity and state Eleventh Amendment immunity prevent SMC from recovering damages, rendering remedies at law inadequate; (2) the balance of hardships weighs in SMCs favor because Ho-Chunk cannot be harmed by willfully conducting unlawful acts; and (3) the public interest is served in the granting of the injunction because, *inter alia*, the public has an interest in having State and federal criminal laws enforced. In the State's 1999 litigation against SMC, the State successfully made these very same arguments. *Id.* at 1019-1022. It is inexplicable that the State now fails to take action against Ho-Chunk, defying the very position and analysis it embraced in its prior litigation against SMC.

As demonstrated below, together with the separately filed Statement of Facts and supporting materials, SMC establishes all five elements for the granting of preliminary injunctive relief. The grounds for the granting of preliminary injunctive relief are not simply met, but far exceed the grounds for which injunctive relief was granted in 1999, enjoining SMC's Pine Hills gaming operation.

IV. FACTS RELEVANT TO THE INSTANT MOTION

SMC's separate Statement of Facts, setting forth its proposed record facts together with those facts SMC intends to prove at an evidentiary hearing, if the Court determines that such a hearing is necessary, is filed simultaneously with this motion. A brief discussion is set forth herein to provide context for the Court's deliberation.

The facts and history of Indian gaming in Wisconsin generally, and of SMC and Ho-Chunk gaming specifically, are extensive and diverse. SMC is confident that the further the Court inquires into those facts and circumstances, the stronger SMC's position becomes. A full awareness of the pertinent history provides context, and accordingly, advances deliberation of the issues in this litigation. For prudential purposes, SMC provides the basic facts material to the instant motion for preliminary injunctive relief.

A. Material Facts Regarding SMC and Ho-Chunk Gaming Facilities

Both SMC and Ho-Chunk are federally-recognized Indian tribes. Federal Register /Vol. 82, No. 10 / Tuesday, January 17, 2017 at 4915-18. Both have tribal/state gaming compact agreements in effect with the State, *see* Statement of Facts, ¶¶ 2-3, 23 & 25., and both tribes operate gaming facilities pursuant to those compacts. But the material similarities end there.

In reliance on the protections included in the SMC Compact, SMC secured $48 million in financing and cash flowed $62 million for a total of $110 million to modernize its only class III gaming facility – the North Star Casino Resort – which is located on trust land, in Shawano County, and offers 1,200 gaming machines and 16 table games. *See* Statement of Facts, ¶ 5. SMC's North Star Casino Resort employs more than 460 people, including 56 SMC tribal members. *See* Statement of Facts, ¶ 6. The North Star Casino Resort is the single largest source of revenue for SMC's government. *See* Statement of Facts, ¶ 7. Revenues from the North Star

Casino Resort constitute more than ninety-five percent (95%) of the tribal government's non-grant funding and eighty-six percent (86%) of the tribes total funding[3]. *See* Statement of Facts, ¶ 7. SMC's government provides essential government services to tribal members, including: educational support programs; emergency medical services; public works programs; medical, dental, and wellness programs; natural resource conservation and protection; and others. *See* Statement of Facts, ¶ 13.

SMC directs an overwhelming majority of its gaming revenue to fund tribal government and economic development, and makes a nominal per-capita distribution to its membership on average of approximately $ 500.00 per year. *See* Statement of Facts, ¶ 12. In sharp contrast to SMC, Ho- Chunk derives sufficient revenue from its gaming operations such that it is able to make substantial per-capita payments to its tribal members, reportedly $12,000 per member, per year or more than $ 90 million per year. Ho-Chunk's own ordinance allows for up to seventy-eight and twenty-six one hundreds percent (78.26%) of its total gaming revenue to be allocated to per-capita payments. *See* Statement of Facts, ¶¶ 39 and 40. IGRA provides that an Indian tribe may make "per-capita payments" to distribute gaming revenue directly to tribal members if it submits to, and the Department of the Interior (the "Department") approves, a tribal revenue allocation plan. 25 U.S.C. §§ 2710(b)(3) and 2710(d)(1)(A)(ii). The Department will disapprove any such plan unless there are sufficient revenues set aside to fund tribal government operations and programs, and to provide for the general welfare of the tribe and its members. 25 C.F.R. § 290.12(b)(1).

[3] Grant funds and funds secured through contracts under 25 U.S.C. § 638 are committed funds that can only be used for specific purposes. SMC's discretion in the use of these funds, accordingly, is extremely limited.

Ho-Chunk presently operates six gaming facilities across the State – far more than any other Wisconsin tribe. *See* Statement of Facts, ¶ 37. As discussed in greater detail below, several Wisconsin Indian gaming compacts distinguish "Gaming Facilities," where gaming is the primary business purpose, from "Ancillary Facilities," where gaming is not the primary business purpose. The Ho-Chunk Compact authorizes 4 full-scale class III casino resorts, none of which can be located in Shawano County, in addition to a limited number of Ancillary Facilities, including one Ancillary Facility in Shawano County. *See* Statement of Facts, ¶ 23. Ho-Chunk also operates a large Class II[4] gaming facility in Madison, Wisconsin, and has submitted an application to the United States Department of the Interior for approval of a fifth full-scale class III casino in Beloit, Wisconsin. *See* Statement of Facts, ¶ 37(b). These Ho-Chunk facilities offer a total of 5,151 gaming machines and 96 table games – more than forty percent (40%) of the total gaming machines in the State of Wisconsin. *See* Statement of Facts, ¶ 38. The Wittenberg facility, which opened in 2008, currently operates 502 gaming machines. *See* Statement of Facts, ¶ 31.

On August 16, 2016, Ho-Chunk issued a press release announcing plans to expand the Wittenberg Casino as part of a $153 million investment in its casinos. The press release outlined plans to install a total of nearly 800 slot machines and 10 table games at the Wittenberg Casino, and to construct an 86-room hotel, restaurant and bar, and a high-limit gaming area. *See* Statement of Facts, ¶ 33. As discussed in greater detail below, if the announced expansion is allowed to occur, it will impose a devastating blow to SMC and its gaming operations, which

[4] Class II gaming includes machine gaming that is programmed based on the game of bingo, and that competes with slot machines with the use of electronic aids to widen player participation. *See* 25 C.F.R. § 502.7. Class II gaming, which is governed by IGRA with oversight by the National Indian Gaming Commission, must be played on eligible Indian lands under IGRA, but does not require a Class III compact.

will lose, from machine gaming revenue alone, $22 million per year, a thirty-seven percent (37%) drop from current net win. *See* Statement of Facts, ¶ 48(a). Because many costs associated with financing and operating the facility are fixed, the loss will equate to a seventy-four percent (74%) drop in revenue for essential governmental programs. *See* Statement of Facts, ¶ 48(b) Such a loss will have a devastating impact on SMC's ability to fund essential programs, and will result in a major loss of jobs at both the gaming facility and tribal governmental operations, depriving SMC of the very objectives of self-sufficiency and strong tribal government intended by Congress in the passage of IGRA. 25 U.S.C. §§ 2701(4) and 2702(1).

B. Material Facts Regarding the Status of Lands on which Ho-Chunk's Wittenberg Facility is Operating

On June 28, 1969, a local chapter of the Native American Church conveyed a parcel of land near the Village of Wittenberg, Wisconsin, in Shawano County, to the United States in trust for the Ho-Chunk Nation (the "Wittenberg Parcel"). The Deed of Transfer (the "1969 Deed") expressly stated that the conveyance was subject to a reversionary interest:

> The south 330 feet of the NE fr ¼ of the NE ¼ Section 4, Township 27 North, Range 11 E., Fourth Principal Meridian, containing 10 acres, more or less, subject to valid rights-of-way of record and existing easements of record; ***also 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***.

1969 Deed, *See* Statement of Facts, ¶ 19. (emphasis added). The United States Bureau of Indian Affairs prepared the terms of the 1969 Deed at its local office in Ashland, Wisconsin. *See* Statement of Facts, ¶ 19. Ho-Chunk never commenced housing construction on the Wittenberg Parcel within five years of the 1969 conveyance, which is confirmed by plat maps and aerial photos of the Wittenberg Parcel in 1978 and 1984. *See* Statement of Facts, ¶ 21

On August 29, 1989, the Native American Church approved a resolution stating that its President and Secretary were "authorized to deliver to the Wisconsin Winnebago Tribe a Quit-

Claim Deed which removes the aforementioned reversionary clause" with respect to the Wittenberg Parcel. *See* Statement of Facts, ¶ 22. That Quitclaim Deed was not issued until four years later, on April 15, 1993, and claimed to transfer "All right, title and interest, [the Native American Church] may have under the reversionary clause in the Warranty Deed dated June 28, 1969…." with respect to the Wittenberg Parcel. The 1993 Deed conveyed the Wittenberg Parcel to the BIA, and the BIA certified the 1993 Deed and acquired the Wittenberg Parcel in trust for the benefit of Ho- Chunk. *See* Statement of Facts, ¶ 24. IGRA generally prohibits Indian tribes from conducting gaming activities on lands acquired in trust after October 17, 1988. *See* 25 U.S.C. § 2719.

V. SMC ESTABLISHES EACH OF THE FIVE CRITERIA REQUIRED FOR THE ISSUANCE OF A PRELIMINARY INJUNCTION

A. Phase One Of Preliminary Injunction Analysis

As demonstrated above, in the Seventh Circuit, courts analyze whether to grant preliminary injunctive relief in two phases. In the first phase, the movant must establish: (1) absent preliminary injunctive relief, it will suffer irreparable harm in the interim prior to a final resolution; (2) there is no adequate remedy at law; and (3) it has a reasonable likelihood of success on the merits. SMC establishes all three elements required in the first phase.

1. Absent preliminary injunctive relief, SMC will suffer irreparable harm in the interim prior to a final resolution

As demonstrated above and in the Statement of Facts, If the announced expansion of Ho-Chunk's Wittenberg Casino is allowed to occur, it will result in a devastating blow to SMC and its gaming operations, which will lose from machine gaming revenue alone $22 million per year currently earmarked for essential governmental services. This constitutes a seventy-four percent (74%) drop in Gaming profits for SMC to fund essential governmental services and programs.

Gaming revenues also create a source of strength and stability for all of SMC's economic development activity. The expansion of Ho Chunk's Wittenberg facility would cause measurable, immediate and irreparable harm to SMC, including layoffs at tribal government, SMC gaming and other commercial enterprises, and reductions in governmental services. *See* Statement of Facts, ¶¶ 48-49. The result would cripple SMC's governmental operations and its economy. Statement of Facts, ¶ 50.

The reduction in gaming revenues will have a devastating impact on SMC's non-gaming commercial enterprises, including the Little Star Convenience Store, Mohican LP Gas, and Pine Hills Golf Course and Supper Club. If SMC loses seventy-four percent (74%) from gaming profits for its annual budget, it will be forced to lay off employees throughout all of its businesses, cut funding for essential governmental services, cut or eliminate programs, and delay plans and commitments for future economic growth. *See* Statement of Facts, ¶ 51.

SMC will need to eliminate approximately twenty percent (20%) of its full-time casino jobs (92 employees) and curtail or eliminate capital outlays. The overall quality and reputation of the North Star Casino Resort will suffer, including a loss of goodwill with patrons, eroding SMC's customer base. *See* Statement of Facts, ¶ 52. SMC is the largest employer in Shawano County and the surrounding region, providing 840 Wisconsin residents with employment and employment-related benefits. As an employer, SMC through its governmental and business operations pays a total of $18.8 million in combined annual payroll and benefits, independent of the substantial payroll taxes paid to the State. Statement of Facts, ¶ 9. SMC's loss of over $22 million per year in slot machine net win would cause numerous highly-trained employees to leave their positions with SMC to seek other employment. For others, SMC's inability to

continue to provide solid jobs, career training, and employment-related benefits would force them to rely upon state and federal assistance. *See* Statement of Facts, ¶ 54.

Although a large number of jobs are directly attributable to its casino, SMC's gaming operations also have a significant multiplier effect. There are many off-reservation impacts flowing from SMC's gaming operation, which directly and indirectly generate economic activity within the State through vendor and service agreements, goods and services purchases, and tourism activities. Vendors and contractors who do business with SMC's gaming operation also pay state and local taxes, and purchase goods and services throughout the entire State. *See* Statement of Facts, ¶ 55.

IGRA requires that gaming revenues be used first and foremost to fund tribal government operations or programs. 25 U.S.C. § 2710(b)(2)(B)(i). SMC is fully committed to fulfilling this requirement. SMC receives from its gaming operations $16.7 million annually for essential governmental services and programs. *See* Statement of Facts, ¶ 49. With a thirty-seven percent (37%) decline in slot machine net win revenue, which will translate to seventy-four percent (74%) decline in profits transferred to the Tribe (from $16.7 Million to $4.19 million), essential governmental services and programs would be severely cut and/or eliminated.

Because of SMC's location and long history of contributing to the larger community, its gaming revenues not only allow for the provision of essential governmental services for the benefit of SMC and its tribal members, but also for the entire region (including non-Indian residents, visitors and neighbors), surrounding counties, and, ultimately, the State. *See* Statement of Facts, ¶ 10. SMC's gaming revenues help to provide law enforcement; fire, rescue and other emergency services; water and infrastructure development and maintenance; and community health and wellness services. These services all serve the general public, but would be among the

first impacted by reduced funding. *See* Statement of Facts, ¶ 57.

SMC spends an additional $4,252,791 on tribal member early childhood development, its elders services, social services, community health services, and culture revitalization programs. All of SMC's businesses contribute (through taxes, rents, contributed capital, etc.) to support these programs. Ninety-five percent (95%) of the tribal government's non-grant funding and eighty-six percent (86%) of the Tribe's total funding[5] of these programs comes directly from gaming revenue. *See* Statement of Facts, ¶ 7. If tribal and non-tribal participants from the Shawano County region are unable to use SMC services, these participants will turn to other non-SMC local, county and state sources.

While SMC provides Wisconsin residents with employment and benefits, it also realizes the value of investing in its future workforce, and has made education a top priority, funding higher education and private schooling for tribal members. SMC's Education Department is subsidized sixty-five percent (65%) by gaming revenues. If SMC cannot effectively maintain the revenue stream from its gaming operations, its educational programs will be devastated and the education of all tribal members currently enrolled within the programs will be interrupted. *See* Statement of Facts, ¶ 11. Most of these students would be unable to continue their education without financial assistance from SMC.

2. SMC has no adequate remedy at law

SMC files this action to require both Ho-Chunk and the State to take such actions as are necessary to bring Ho-Chunk's Wittenberg facility into compliance with federal law and the terms of the Ho-Chunk Compact. The State is cloaked with Eleventh Amendment immunity. *Coleman v. Court of Appeals of Maryland*, 566 U.S. 30, 43 (2012). Although the State has

[5] *See* footnote 3.

waived that immunity in an action brought under section XII.E.2 of the SMC Compact, such an action is, by the express terms of the SMC Compact, limited to declaratory and injunctive relief. Moreover, Wisconsin state law requires an aggrieved party to seek a legislative remedy, rather than a legal remedy, when seeking monetary damages. Wis. Stat. § 16.007 (2015-16) and Wis. Stat. § 775.01 (2015-16); *Brown v. State*, 230 Wis.2d 355 (1999).[6] Similarly, Ho-Chunk is cloaked with tribal sovereign immunity. *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014). Congress' abrogation of that immunity in the passage of IGRA, however, is expressly limited to an action "to enjoin a class III gaming activity on Indian lands and conducted in violation of any Tribal-State compact entered into under [IGRA]." 25 U.S.C. § 2710(d)(7)(A)(ii). As discussed in Section III above, those immunity defenses render SMC's remedies at law to be inadequate, thus satisfying the criteria for preliminary injunctive relief.

Moreover, even if money damages were an available remedy, they would still be inadequate. As discussed in Section III above, where the impact is so devastating as to cause a massive loss of jobs and disruption to business such that it will be difficult to recover from the loss even after the entry of a favorable, non-appealable final monetary judgment, monetary damages are an inadequate remedy and the entry of preliminary injunctive relief is appropriate. Certainly, those circumstances are present here. The governmental services that are interrupted, the patrons that are lost, and the general widespread disruption all establish that an award of monetary damages would be inadequate, even if otherwise available.

[6] The State's immunity from monetary damages should not be viewed as barring SMC's claims that it disgorge and return to SMC the substantial payments SMC has paid to the State, if this litigation results in a determination that SMC's payments to the State under the SMC Compact are an illegal tax in violation of 25 U.S.C. § 2710(d)(4). *See Pauma Band of Luiseno Indians v. California*, 813 F.3d 1155 (9th Cir. 2015).

3. SMC will prevail on the merits

The standard for establishing a likelihood of prevailing on the merits in the Seventh Circuit, a "reasonable" likelihood, is a lower threshold than the "substantial" likelihood standard employed by other Circuits. SMC meets and well-exceeds the requisite showing of a reasonable likelihood that it will prevail on the merits of its claims. The strength of SMC's case on the merits also strongly favors SMC in the balancing of hardships, in the second phase of the Court's deliberation of SMC's motion, discussed below. Specifically, SMC will succeed on its claim that the Wittenberg Parcel was not acquired by Ho-Chunk until 1993, rendering it ineligible for gaming under IGRA, and on its claim[7] that the proposed expansion by Ho-Chunk will violate the terms of the Ho-Chunk Compact restricting any Ho-Chunk facility in Shawano County to an "Ancillary Facility."

i. Ho-Chunk's Wittenberg Parcel Was not Acquired Until 1993 and, Accordingly, is Not Eligible for Gaming under IGRA

IGRA generally prohibits Indian tribes from conducting gaming activities on lands that were acquired in trust after October 17, 1988. *See* 25 U.S.C. § 2719. IGRA states, "gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988...." 25 U.S.C. § 2719. The BIA acquired the Wittenberg Parcel in trust for Ho-Chunk on July 1, 1993 pursuant to a quitclaim deed executed on April 15, 1993. Therefore, IGRA prohibits Ho-Chunk from conducting any gaming activities on the Wittenberg Parcel.

[7] Also at issue in this litigation are SMC's claims against the State that its allowing Ho-Chunk to proceed with the expansion defeats any argument that SMC has received a meaningful concession from the State in the form of market protection/exclusivity in exchange for the millions of dollars SMC has paid to the State. That claim against the State, however, is not germane to the instant motion for preliminary injunctive relief against Ho-Chunk.

The Secretary of the Interior did not hold the Wittenberg Parcel in trust for Ho-Chunk on October 17, 1988; instead, title to the property was held by the Native American Church at that time.

The Native American Church initially conveyed the Wittenberg Parcel to Ho-Chunk on June 28, 1969 through a quitclaim deed prepared by the BIA. The 1969 Deed included an express reversionary clause stating, "the land will revert to the grantor" if Ho-Chunk did not commence housing construction within five years of the conveyance. 1969 Deed, *see* Statement of Facts at ¶ 19. The public record, which includes aerial photos of the Wittenberg Parcel from 1978 and 1980, as well as public plats from 1978 and 1984, conclusively demonstrate that Ho-Chunk did not begin to develop housing on the Wittenberg Parcel within five years of the 1969 Deed. *See* Statement of Facts at ¶ 21. Pursuant to the terms of the 1969 Deed itself, title to the Wittenberg Parcel reverted back to the Native American Church by operation of law when Ho-Chunk failed to develop housing on the site within five years. *See* 3-20 Powell on Real Property § 20.02 (2017) ("When the land is no longer used for [the designated] purposes, the transferee's estate terminates *automatically* and the transferor (or his heir) is immediately vested with the possessory interest.") (emphasis added); and, *Saleteri v. Clark*, 13 Wis.2d 325, 331; 108 N.W.2d 548 (Wis. 1961) (explaining that title to property automatically reverted to the original grantor when a school failed to meet the conditions for holding title as set forth in the deed).[8]

[8] In 2008, the Superintendent of the BIA Great Lakes Agency Office in Ashland, Wisconsin issued a three-paragraph letter to the State of Wisconsin stating that a review of BIA records showed the Wittenberg Parcel to have been held in trust continuously since 1969. Letter from Diane Rosen, Superintendent of BIA Great Lakes Agency, to Michael McClure, Legal Counsel to Wisconsin Department of Administration (July 25, 2008). This statement is not determinative as to whether the property reverted back to the Native American Church in accordance with the 1969 Deed, but is instead a summary of the status of the BIA's own property records. The reversion of the Wittenberg Parcel back to the Native American Church occurred by operation of law, and would not necessarily be reflected in the BIA's own property records at that time.

The Secretary of the Interior's acquisition of trust title to the Wittenberg Parcel in 1969 did not cut-off the Native American Church's reversionary interest in that parcel.

The Secretary is authorized to acquire "any interest" in lands "for the purpose of providing land for Indians." 25 U.S.C. § 5108.[9] The Secretary's power includes the power to acquire absolute, unencumbered title to real property, as well as the power to acquire partial interests in real property and title subject to encumbrances and future interests. *See* BIA Fee-to-Trust Handbook Version IV (rev. 1) at 18-19, and 77 (June 28, 2016) (available at https://www.indianaffairs.gov/cs/groups/xraca/documents/text/idc1-024504.pdf) (indicating that the Secretary may acquire trust title to property subject to encumbrances and restrictive covenants).

It is a textbook principle of property law that a grantee only acquires the interest in property that is actually conveyed to him or her. *See, eg*., *William Jones and Sylvester Marsh, Plaintiffs In Error v. William Johnston*, 59 U.S. 150, 155 (1855) (stating that a grantee only acquires the property described in a deed). Here, the Secretary acquired title to the Wittenberg Parcel in 1969, subject to the Native American Church's interest in the reversion. *See* 3-20 Powell on Real Property § 20.02 (2017)("It is useful to view these reverter interests as claims to property that the grantor never gave away.") The Secretary could not have conveyed absolute title to the Wittenberg Parcel free of the Native American Church's reversionary interest. *U.S. v. Tully*, 288 F.3d 982, 986 (7th Cir. 2002) ("Obviously, 'a grantor cannot convey that which he does not own.'") (citation omitted). Thus, the Secretary could not enlarge the Federal Government's interest in the Wittenberg Parcel simply by placing it into trust status. Doing so

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[9] Previously codified at 25 U.S.C. § 465.

would have destroyed the property interests that the Native American Church explicitly reserved for itself in the event that Ho-Chunk failed to use the land for its intended purpose.

Moreover, the acquisition of trust title to Indian lands does not, by itself, forever bar lands from going out of trust status. Indian land can be, and often is, removed from trust status. *See* Pommersheim, *Land Into Trust: An Inquiry Into Law, Policy, and History*, 49 Idaho L. Rev. 519, 539 (citing the BIA's own records to demonstrate that 64,586 acres of trust land was returned to fee-simple ownership in five states between 2000 and 2012). The United States has recently affirmed that federal law allows the Department of the Interior to take land out of trust:

> The Department of the Interior has taken land out of trust in other cases. For example, following the Supreme Court's granting of the petition for a writ of certiorari in *United States Dep't of the Interior v. South Dakota*, 519 U.S. 919 (1996), the case that led to the promulgation of the regulation, codified at 25 C.F.R. § 151.12, that provides for the 30 day notice period before acquiring land into trust to allow for judicial review, the Department of the Interior reversed the land into trust decision because the district court's judgment was vacated. See Land Status: Lower Brule Sioux Tribe, 62 Fed. Reg. 26,551 (May 14, 1997). The Department of the Interior also recently took land out of trust to correct an administrative defect in the publication of the 30 day notice. See December 24, 2012, Joint Status Report, Ex. 4, ECF No.14-4 (Brief in Support of the United States's Amended Motion to Dismiss or in the Alternative for Summary Judgment, at 32-34, *State of South Dakota, v. United States Dep't of the Interior*, ECF No. 13-1, Case No. 10-cv-03006-RAL (D.S.D. 2010)). But see *Prieto v. United States*, 655 F. Supp. 1187, 1192 (D.D.C. 1987) (based on equitable considerations, "the Secretary exceeded his authority in reconsidering and in revoking the trust status of plaintiff's land.").

Brief of United States in *Stand Up for California! v. United States*, No. 1:12-cv-02039-BAH at n.20 (January 18, 2013). This position is consistent with the BIA's understanding of the law in 1969, when it drafted the quitclaim deed conveying the Wittenberg Parcel to the Secretary of the Interior in trust, subject to the reversionary interest retained by the Native American Church.

Nothing in federal law invalidated or destroyed the Native American Church's reversionary interest in the Wittenberg Parcel. Ho-Chunk did not fulfill its obligation to develop housing on the Wittenberg Parcel within five years of the 1969 Deed, and the property reverted back to the Native American Church by operation of law. *See Saleteri*, *supra*. No proclamation or designation of the Wittenberg Parcel as a "reservation" after its reversion to the Native American Church would alter the fact that ownership of the land reverted back to the Native American Church by operation of law five years after the 1969 Deed. *See* 25 U.S.C. § 5110 (authorizing the Secretary of the Interior to proclaim land as an Indian reservation that are already in trust under authority of federal law).

The Wittenberg Parcel belonged to the Native American Church from the date of reversion until 1993, when it once again conveyed title to the United States for Ho-Chunk's benefit. IGRA clearly prohibits Indian tribes, including Ho-Chunk, from conducting gaming activities on lands acquired in trust after October 17, 1988. Therefore, Ho-Chunk may not conduct gaming activities on the Wittenberg Parcel.

ii. Ho-Chunk's Announced Expansion of the Wittenberg Facility Violates the Ho-Chunk Compact's "Ancillary Facility" Restriction

The Ho-Chunk Compact establishes two categories of class III gaming facilities that Ho-Chunk may operate: "Gaming Facilities" and "Ancillary Facilities. A "Gaming Facility" is a large-scale gaming operation that any patron would recognize as a casino or a destination gambling resort – a business where casino gambling is the primary attraction. An "Ancillary Facility" is a smaller-scale operation that a patron would recognize as some other business – such as a gas station or supermarket – that includes limited opportunities for gambling.

The Ho-Chunk Compact defines these two categories. A "Gaming Facility" is defined as "a facility whose ***Primary Business Purpose*** is gaming[.]" Ho-Chunk Compact, Second

Amendment at ¶ 5 (emphasis added). The Ho-Chunk Compact defines the term "Primary Business Purpose" to mean "the business generating more than 50 percent of the net revenue of the facility." Ho-Chunk Compact at §III(H). In short, a "Gaming Facility" is a facility in which gambling generates a majority of the revenue.

The Ho-Chunk Compact also defines the term "Ancillary Facility" to mean "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***." Ho-Chunk Compact, Second Amendment at ¶ 5 (emphasis added). In other words, an "Ancillary Facility" is a facility where gambling does not generate a majority of the revenue.

Under its class III gaming compact with the State of Wisconsin, Ho-Chunk is authorized to operate one "Gaming Facility" in each of the following counties: Jackson, Sauk, Wood, and Dane. Ho-Chunk Compact, Second Amendment at ¶ 5(E). Ho-Chunk is also authorized to operate up to five "Ancillary Facilities" in the following counties: Jackson, Sauk, Monroe, and Shawano. *Id*. Ho-Chunk is not allowed to operate a "Gaming Facility" in Shawano County, and is only allowed to operate an Ancillary Facility in Shawano County under its own class III gaming compact.

The classification of the Wittenberg Casino is best understood by determining what the facility is, rather than what it is not. The Wittenberg Casino is a stand-alone facility that presently contains 502 class III slot machines; and, after Ho-Chunk completes its expansion, will include approximately 800 class III slot machines – making it larger than Ho-Chunk's present

"Gaming Facility" in Black River Falls.[10] Ho-Chunk operates a convenience store in a separate building on the same parcel of land.

There is no doubt that gambling activities presently generate a majority of the revenue for Ho-Chunk's business activities on the Wittenberg Parcel. A gaming facility in a similar location, and of similar size to the Wittenberg Casino, can generate more than $120 per slot machine per day. This would amount to revenue of $96,000 per day for a facility with 800 slot machines, and more than $35 million per year (in addition to the revenue generated by table games). *See* Statement of Facts at ¶ 46. It is nearly impossible to envision a scenario where Ho-Chunk's separate convenience store on the Wittenberg Parcel would generate more than $35 million per year in revenue.

In both its current and its expanded state, Ho-Chunk's Wittenberg Casino would qualify as a "Gaming Facility" because gaming is the "Primary Business Purpose" of the facility. That is the sole characteristic of a "Gaming Facility" under the Ho-Chunk Compact. The Ho-Chunk Compact does not allow Ho-Chunk to operate a "Gaming Facility" in Shawano County; instead, Ho-Chunk may only operate an "Ancillary Facility" in Shawano County.

Nevertheless, Ho-Chunk seeks to demolish the distinction between "Ancillary Facility" and "Gaming Facility" in its Compact. Under its view, the size and scale of the facility's gaming operation is irrelevant so long as there is a separate, non-gaming business located on the parcel that has a larger physical footprint than the space where gaming occurs. This view would allow Ho-Chunk to operate up to nine full-scale casino resorts in six different counties across the entire

[10] According to Ho-Chunk's own website, its "Gaming Facility" in Black River Falls includes 600 slot machines, a hotel, a restaurant, a buffet, and a bar. *See* Ho-Chunk Website for Black River Falls Casino, http://www.ho-chunkgaming.com/blackriverfalls/index.html (last accessed on April 11, 2017).

State of Wisconsin. More importantly, Ho-Chunk's new interpretation simply does not accord with the language of the Ho-Chunk Compact, the State's interpretation of the Ho-Chunk Compact at the time it was negotiated, and the implementation of similar agreements negotiated at the same time as the Ho-Chunk Compact.[11]

First, the construction of a separate commercial building on the Wittenberg Parcel with a larger physical footprint than the casino floor does not, by itself, make the Wittenberg Casino an Ancillary Facility. Such an interpretation would render the distinction between a "Gaming Facility" and an "Ancillary Facility" meaningless, from a practical standpoint. A casino resort, of the size and scope of Ho-Chunk's expanded Wittenberg Casino Resort, usually includes hotels, restaurants, entertainment venues, gas stations, and RV parks that have a larger physical footprint – *i.e.* "lot coverage" – than the physical space where gaming occurs. This was also true in 2003, when Ho-Chunk negotiated with the State to include the present definition of "Ancillary Facility" in its compact. The Department of the Interior has described those types of businesses as ***ancillary to*** tribal gaming enterprises:

> As tribal gaming has matured, many Tribes have developed businesses or amenities that are ancillary to their gaming activities, such as hotels, conference centers, restaurants, spas, golf courses, recreational vehicle parks, water parks, and marinas. These businesses are often located near or adjacent to tribal gaming facilities.

[11] Ho-Chunk's position is not validated by the present Governor's interpretation of language agreed upon fourteen years ago. This new interpretation of longstanding compact provisions is a *de facto* amendment to the Ho-Chunk Compact. IGRA requires the parties to submit gaming compact amendments to the Secretary of the Interior for approval. *See* 25 U.S.C. § 2710(d)(8); and 25 C.F.R. § 293.4. Allowing the parties to "re-interpret" their agreement fourteen years after it was negotiated would allow them to evade Secretarial review, destabilize the enforcement of class III gaming compacts, and invite mischief in the "re-interpretation" of other tribal-state gaming compacts.

Letter from Paula Hart, Director of the Office of Indian Gaming, to Hon. Peter S. Yucupicio, Chairman of the Pascua Yaqui Tribe of Arizona (June 15, 2012) (describing the relationship between tribal gaming and other business activities). *See* Statement of Facts at ¶ 44. Ho-Chunk would argue that its Wittenberg Casino is ancillary to its amenities (because those amenities have a larger physical footprint than the casino floor).

Under that view, a typical Wisconsin gambler would not be able to distinguish Ho-Chunk's "Ancillary Facility" in Wittenberg from its "Gaming Facility" in Black River Falls. Both facilities would have hotels, restaurants, bars, several hundred slot machines, and table games. The distinction between a "Gaming Facility" and an "Ancillary Facility" in the Ho-Chunk Compact would be rendered meaningless and superfluous.

Federal courts have interpreted class III gaming compacts according to ordinary principles of contract interpretation, including relevant state contract law principles. *See Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1098 (9th Cir. 2006) ("We apply general principles of contract interpretation to construe a contract governed by federal law….and we accept [the application of Idaho law] because we discern, and the parties note, no difference between Idaho and federal contract law.") Wisconsin State law directs Wisconsin's courts to give meaning to each provision in a contract, and avoid interpretations that render contractual provisions meaningless or superfluous. *See Ash Park, LLC v. Alexander & Bishop, Ltd.*, 363 Wis.2d 699, 713, 866 N.W.2d 679, 685 (Wis. 2015) ("Interpretations that give reasonable meaning to each provision in the contract are preferred over interpretations that render a portion of the contract superfluous."); and *Foskett v. Great Wolf Resorts, Inc*., 518 F.3d 518, 522 (7th Cir. 2008) ("A contract must be construed so as to give a reasonable meaning to each provision of the contract"

and so as to avoid "render[ing] portions of a contract meaningless, inexplicable or mere surplusage.") (internal quotations omitted).

The more logical reading of the definition of "Ancillary Facility" in Ho-Chunk's gaming compact is a single business enterprise in which the gaming space is smaller than the other, non-gaming, commercial space, ***and*** in which the non-gaming revenues from business activities on the parcel exceed the gaming revenues. This would ensure that the distinction between a "Gaming Facility" and an "Ancillary Facility" is meaningful, as intended by the Ho-Chunk Compact. The relevant compact provision reads, in its entirety:

> LOCATION OF GAMING FACILITIES. Except as otherwise provided for in this Compact, unless the State by amendment to this Compact consents to additional locations, the Class III games authorized under this Compact may be conducted with one Gaming Facility located in each of the following Counties: Jackson, Sauk, Wood and Dane. In addition, the Nation may conduct any of the Class III games authorized under this Compact at five Ancillary Facilities two of which are located in Jackson County and one of which is located in each of the following Counties: Sank, Monroe, and Shawano: As used herein the term Gaming Facility means a facility whose Primary Business Purpose is gaming, and the term Ancillary Facility means 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. All Class III games authorized under this Compact are subject to the days and hours of operation set by the Nation.

Ho-Chunk Compact, Second Amendment at ¶ 5(E). This paragraph, read as a whole, makes it clear that a "Gaming Facility" was intended to be distinct from an "Ancillary Facility". Under this language, the Primary Business Purpose of a "Gaming Facility" is gaming; meaning, that gambling generates most of the revenue. *See* Ho-Chunk Compact, Second Amendment at ¶ 5.

Ho-Chunk would argue that an "Ancillary Facility" could also generate most of its revenue from gambling activities, so long as other non-gaming businesses are located on the

property. This reading would effectively allow Ho-Chunk to operate multiple full-scale casino resorts in Jackson and Sauk Counties, despite the express language in its compact limiting Ho-Chunk to one Gaming Facility in those counties.

The limited nature of gaming at Ancillary Facilities is consistent with the State's understanding at the time it agreed to the Second Amendment of the Ho-Chunk Compact. Marc Marotta, the Wisconsin Secretary of Administration and the State's lead compact negotiator at that time, was quoted in a newspaper article published by the Wittenberg Enterprise shortly after negotiating the gaming compact amendment with Ho-Chunk. According to that article, "State Administration Secretary Marc Marotta said the changes for mini-casinos were meant to do no more than lock in current practice, since several tribes have operated mini-marts with slot machines for some time." *Compacts might spur mini-mart gambling*, Wittenberg Enterprise (November 6, 2003). *See* Statement of Facts at ¶ 27. The Wittenberg Enterprise quoted Secretary Marotta as stating, "[t]he intent continues to be that these be one-stop shops that sell everything from groceries to gas[.]" *Id*.[12]

The limited nature of gaming at Ancillary Facilities is also consistent with similar limitations included in other class III gaming compact amendments the State negotiated the same year it agreed to amend the Ho-Chunk Compact, and the implementation of those agreements.

For example, the 2003 amendment to the Oneida Nation's gaming compact contemplates that the Nation would conduct gaming activities at its convenience stores. Those facilities are classified as "dual purpose facilities," that are operated for other commercial purposes in

[12] *See Town Bank v. City Real EState Dev.*, *LLC*, 330 Wis.2d 340, 793 N.W.2d 476 (2010) ("While 'parol evidence'—the circumstances surrounding the execution of the contract and the practical construction of the parties—may not be introduced to vary the terms of a written contract, it may be introduced to explain ambiguous terms of the written instrument.")

addition to gaming. The language of the Oneida Compact amendment closely tracks the language in Ho-Chunk's compact:

> The Nation shall operate its One-Stop convenience stores located at W180 Highway S4 on a site comprising approximately .5 acres, 790 County Road EE on a site comprising approximately **1.4** acres, Highway 29 and County Road U on a site comprising approximately 1.5 acres, and 2730 West Mason Street on a site comprising approximately 1.5 acres, as dual purpose facilities if the Nation conducts Class III gaming at such facilities. ***For purposes of this Section, "dual purpose facility" means a facility which is operated for retail or other commercial purposes in addition to Class III gaming***. ¶ 16 (emphasis added)

Oneida Nation Compact, Second Amendment at ¶ 16(I) (available at http://www.doa.state.wi.us/Documents/DOG/Indian%20Gaming/Compacts/ONE_Second_Amendment.pdf). The Oneida Nation operates these facilities as convenience stores and gas stations, with approximately 100 slot machines in each. *See* Statement of Facts at ¶ 28.

The St. Croix Tribe's 2003 gaming compact amendment allows the Tribe to operate slot machines at its convenience store in Hertel, Wisconsin. That amendment uses language similar to the 2003 amendment to Ho-Chunk's class III gaming compact:

> The Tribe may continue to conduct class III gaming at the Little Turtle Hertel Express, 4384 State Highway 70, Hertel, WI., 54845, but only so long as that facility is ***operated for commercial purposes other than gaming***, and no more than 50% o f the square footage of a facility on a 1 acre lot at 4384 State Highway 70, Hertel, WI., 54845, is used for gaming purposes. (emphasis added)

St. Croix Chippewa Indians of Wisconsin Gaming Compact, Second Amendment at ¶ 24 (available at http://www.doa.state.wi.us/Documents/DOG/Indian%20Gaming/Compacts/STX_Second_Amendment.pdf). The St. Croix Chippewa Tribe operates this facility as a convenience store and gas station, with approximately 145 slot machines. *See* Statement of Facts at ¶ 29.

Finally, also in 2003, the Stockbridge-Munsee Community agreed to a similar restriction using the same terminology included in the Ho-Chunk Compact:

> Alcohol beverages may be served at locations where games authorized under this Compact are conducted only during the hours prescribed in Wis. Stat. § 125.32(3). Alcohol beverages may not be sold for the purpose of off-premises consumption at locations where games authorized under this Compact are conducted, except that such prohibition shall not extend to the Tribe's ancillary facilities. ***An ancillary facility shall mean a facility that has a primary business purpose other than Class III gaming, where no more than 50% (fifty percent) of the square footage is used for gaming, and the total size of the ancillary facility is not materially greater than the total size of ancillary facilities operated by other Tribes in the State of Wisconsin.*** (emphasis added)

Stockbridge-Munsee Community Gaming Compact, Second Amendment ¶ 4 (available at http://www.doa.state.wi.us/Documents/DOG/Indian%20Gaming/Compacts/STM_Second_Amendment.pdf).

While these contemporaneous agreements vary in their precise language, they evince a clear intent on the part of the State of Wisconsin in 2003 to limit the size and scope of ancillary tribal gaming facilities throughout the State. These limitations are further supported by Secretary Marotta's public characterization of their meaning. Moreover, these limitations are consistent with the language in Ho-Chunk's own class III gaming compact distinguishing between a "Gaming Facility," in which gaming is the Primary Business Purpose, and an "Ancillary Facility," in which non-gaming activities are the Primary Business Purpose.

Ho-Chunk's Wittenberg Casino is clearly intended to be a full-scale casino resort with gaming as its Primary Business Purpose, with gambling generating a majority of the revenue at the facility. Therefore it is a "Gaming Facility," and it violates the express terms of its own class

III gaming compact prohibiting Ho-Chunk from operating a "Gaming Facility" in Shawano County.

B. Phase Two Of Preliminary Injunction Analysis

Having established that: (1) absent preliminary injunctive relief, SMC will suffer irreparable harm in the interim prior to a final resolution; (2) there is no adequate remedy at law; and (3) SMC has a strong likelihood of success on the merits, the Court should now proceed to the second phase to consider: (1) the irreparable harm the moving party will endure if the preliminary injunction is wrongfully denied versus the irreparable harm to the nonmoving party if it is wrongfully granted; and (2) the effects, if any, that the grant or denial of the preliminary injunction would have on nonparties, a/k/a the public interest. As discussed in Section III, SMC's strong showing on the merits should result in a sliding scale that requires Ho Chunk to demonstrate that the balance of harms weighs heavily in its favor in order for the motion to be denied. As discussed below, both the balance of harms and the advancement of the public interest weigh heavily in favor of SMC.

1. Balance of harms

Any harm that will be caused to Ho-Chunk by granting the preliminary injunction is substantially outweighed by the harm that SMC will suffer if the Court does not grant the preliminary injunction. The injunction, if granted, will deprive Ho-Chunk of an expanded employment and governmental revenue pending the resolution of the litigation. SMC expects that Ho-Chunk will attempt to quantify that harm in opposition to SMC's motion. However, when viewed in balance to the irreparable harm that SMC will suffer if injunctive relief is not granted, that balance tips sharply in favor of SMC. Denying the injunction will cause the concrete loss of existing jobs by SMC employees. Granting the injunction will not result in the

loss of employment by any existing Ho-Chunk employee. Only hypothetical, yet-to-be-hired employees will be impacted. Denying the injunction will cause a direct and immediate impact to SMC in that essential SMC governmental programs will be significantly curtailed or terminated. Granting the injunction will not cause any loss in essential Ho-Chunk governmental programs. As demonstrated above, Ho-Chunk distributes $90 million annually in revenue directly to its tribal members pursuant to a Revenue Allocation Plan approved by the Department of the Interior, which means that Ho-Chunk essential governmental programs are already fully funded. SMC, in contrast, has nominal annual "per-capita payments," and otherwise invests all of its gaming revenue back into tribal governmental programs. Denying the injunction will cause a loss $12.5 million per year to SMC's government, a seventy-four percent (74%) decline in revenue. Granting the injunction will cause Ho-Chunk to curtail expansion of one of its six gaming operations in the State, while it may continue the expansion two of its other five other gaming operations and its pursuit of a seventh operation in Beloit, Wisconsin. The devastating impact which denial of the injunction will have upon SMC's existing revenue far outweighs the nominal or marginal impact granting the injunction will have on Ho-Chunk's anticipated future revenues and the rate of increase in its "per-capita payments."

Specific to Indian Country, the prospect of significant interference with tribal self-governance is taken into consideration for preliminary injunctive relief. *See, e.g., Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006); *Poarch Band of Creek Indians v. Hildreth*, 2015 WL 4469479 (S.D. Ala. 2015). Indeed, SMC cited to that case law in the 1999 litigation by the State, and SMC anticipates that Ho-Chunk will cite that same case law in opposition to SMC's motion. But here, both tribes have an interest in protecting against interference with tribal self-governance. When the manifestation of that interference is taken into

consideration, once again, the balance tips sharply in SMC's favor.

Ho-Chunk cannot claim harm, based on a preliminary injunction, on its ongoing construction activities at the Wittenberg Facility as a possible consequence of this Court granting the preliminary injunction. Although SMC believes it would be prudent for Ho-Chunk to stop such construction, it is the addition of new gaming activities that will imposes irreparable harm on SMC. Any decision by Ho-Chunk to proceed with such construction is at its own peril, and with a full awareness and assumption of all the risks that Ho-Chunk will not prevail in this litigation.

2. An injunction will better advance and enhance the public interest

The public interest factor of the preliminary injunction analysis weighs heavily in favor of SMC. In the 1999 litigation brought by the State against SMC, the court held that it was more important to prevent SMC's gaming on lands ineligible under IGRA because of the public interest in seeing that state and federal criminal laws were enforced. *Stockbridge-Munsee*, 67 F. Supp. 2d. at 1019-1021. That line of reasoning was valid against SMC's interests in 1999. It is equally valid in support of SMC's interests in 2017.

IGRA identifies the public policy interests that Congress intended to advance, namely "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). The public interest in assuring the continued presence of economic development and employment, social and educational programs and benefits, and life and public safety services that result from gaming revenue generated on Indian lands is significant. The public also has a genuine interest in helping to ensure tribal self-government, self-sufficiency and self-determination. *Sac and Fox Nation of Missouri v. LaFaver*, 905 F.Supp. 904 908-09 (D. Kansas

1995); *Winnebago Tribe of Nebraska v. Stovall*, 216 F. Supp. 2d 1226, 1233-34 (D. Kansas 2002). Here, however, because two tribes are adverse on the issue, those public interests are impacted whether the injunction is granted or denied, and as discussed in the immediately prior subsection, the impact on SMC is far greater than the impact on Ho-Chunk. Accordingly, IGRA's public interests are better served by granting the requested injunction.

C. Any Requirement for the Payment of a Bond Should be Waived or Be $ 1.00

In the Seventh Circuit, the district court may waive the requirement of posting a bond where the imposing party will not incur tangible harm and/or the bond will impose hardship on applicant. *See Habitat Educ. Center v. U.S. Forest Service*, 607 F.3d 453, 458 (7th Cir. 2010); *Allen v. Bartholemew County Services Dept.*, 185 F. Supp. 3d 1075 (S.D. Ind. 2016). Both grounds are present here. Any requirement upon SMC to post a bond will have result in the immediate and direct reduction of essential governmental services. For that reason and all the reasons for granting preliminary injunctive relief, the bond requirement should be waived.

VI. CONCLUSION

Because the five criteria for granting preliminary injunctive relief have been overwhelmingly established by SMC, this Court should enter a preliminary injunction prohibiting Ho-Chunk from offering more than 502 gaming machines (class II and class III combined), or any table games, within Shawano County pending the resolution of this litigation.

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Respectfully Submitted,

s/ Scott D. Crowell
SCOTT D. CROWELL
pro hac vice
Crowell Law Offices-Tribal Advocacy Group-
1487 W. State Route 89A, Ste. 8
Sedona, AZ 86336

Telephone: (425) 802-5369
Fax: (509) 235-5017
Email: scottcrowell@hotmail.com

Bryan Newland
pro hac vice
Fletcher, PLLC
909 Abbott Road, Suite F
East Lansing, MI 48823
Telephone: (517) 862-5570

Bridget Swanke
Wis. Bar No.: 1026157
Senior counsel
Stockbridge-Munsee Community
P.O. Box 70, N8476 Moh He Con Nuck Road, Bowler, WI 54416
Telephone: (715) 793-4868