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.

ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIM OF DEFENDANTS STATE OF WISCONSIN AND SCOTT WALKER

Defendants State of Wisconsin and Wisconsin Governor Scott Walker (the "State Defendants"), by their undersigned legal counsel, as and for their Answer and Affirmative Defenses to the Complaint for Enforcement of Class III Gaming Compact and Declaratory and Injunctive Relief (the "Complaint") filed in this matter by plaintiff Stockbridge-Munsee Community (SMC), hereby ADMIT, DENY, and ALLEGE as follows:

ANSWER

1. The Tribe is seeking a declaration that the State and the Governor have violated the Class III gaming compact with the Tribe, which is in effect pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq*. ("IGRA").

ADMIT that SMC seeks the relief described, but DENY that SMC is entitled to such relief.

2. The Tribe is seeking a declaration that Ho-Chunk's gaming facility in Shawano County, Wisconsin violates the Wisconsin–Ho-Chunk Nation Class III Gaming Compact.

ADMIT that SMC seeks the relief described, but DENY that SMC is entitled to such relief.

3. The Tribe is seeking a declaration that Ho-Chunk's gaming activities in Shawano County, Wisconsin violate the Indian Gaming Regulatory Act's prohibition against conducting gaming activities on lands acquired in trust after October 17, 1988 at 25 U.S.C. § 2719(a).

ADMIT that SMC seeks the relief described, but DENY that SMC is entitled to such relief.

4. The Tribe is seeking injunctive relief to prevent the State and the Governor from continuing to violate its class III gaming compact with the Tribe.

ADMIT that SMC seeks the relief described, but DENY that SMC is entitled to such relief.

5. The Tribe is seeking injunctive relief to prevent Ho-Chunk from continuing to violate its class III gaming compact with the State, and from continuing to violate the Indian Gaming Regulatory Act.

ADMIT that SMC seeks the relief described, but DENY that SMC is entitled to such relief.

6. In the alternative, in the event that Ho-Chunk is allowed to expand its gaming activities in Shawano County, Wisconsin, the Tribe is seeking declaratory relief that the payments made by the Tribe to the State are an illegal tax and equitable relief requiring return of all such monies paid by the Tribe to the State.

ADMIT that SMC seeks the relief described, but DENY that SMC is entitled to such relief.

7. Plaintiff Stockbridge-Munsee Community is a federally recognized Indian tribe with a reservation located in Shawano County, Wisconsin.

ADMIT.

8. Defendant State of Wisconsin is a State of the United States.

ADMIT.

9. Defendant Scott Walker (the "Governor") is sued in his official capacity as the Governor of the State of Wisconsin. The Governor is the elected chief executive of the State of Wisconsin, and is vested with numerous powers and responsibilities to negotiate and enforce class III gaming compacts with Indian tribes.

ADMIT that Scott Walker is the Governor of the State of Wisconsin. Otherwise, this paragraph consists of legal assertions to which no responsive pleading is required.

10. Defendant Ho-Chunk Nation is a federally recognized Indian tribe with its headquarters located in Black River Falls, Wisconsin.

ADMIT.

11. This Court has jurisdiction over the Tribe's claims against the State and the Governor under 25 U.S.C. §§ 1361 and 1362, as it is a claim brought by an Indian tribe arising under federal law, including IGRA, 25 U.S.C. §§ 2701, *et seq*.; and, this Court has jurisdiction under 28 U.S.C. § 2201, as the Tribe also seeks declaratory relief.

This paragraph consists of legal assertions to which no responsive pleading is required.

12. This Court has jurisdiction over the Tribe's claims against Ho-Chunk under 25 U.S.C. § 2710(d)(7)(A), as it is a complaint brought by an Indian tribe to enjoin class III gaming in violation of a gaming compact that is in effect.

This paragraph consists of legal assertions to which no responsive pleading is required.

13. The State has agreed to waive its sovereign immunity from suit through Section XXII.E.2 of its class III gaming compact with the Tribe, which permits suits for declaratory and injunctive relief.

ADMIT that the State agreed to waive its sovereign immunity under limited circumstances specified in Section XXII.E.2 of its gaming compact with SMC (the "SMC Compact"). Regarding the extent of the State's waiver, ALLEGE that the compact speaks for itself.

14. The United States Congress has abrogated Ho-Chunk's sovereign immunity from the Tribe'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).

This paragraph consists of legal assertions to which no responsive pleading is required.

15. 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 the Defendants are located in this District.

Assertion of venue is a legal conclusion to which no responsive pleading is required. Otherwise, ADMIT factual allegations.

16. The Tribe is a federally recognized Indian tribe with a reservation located in Shawano County, Wisconsin and approximately 25,000 acres of land holdings.

ADMIT that SMC is a federally recognized Indian tribe with a reservation in Shawano County, Wisconsin. LACK knowledge or information

sufficient to form a belief as to the truth of the remaining allegations, and therefore DENY.

17. The Tribe entered into a class III gaming compact with the State in 1992 to govern the Tribe's conduct of class III gaming activities on its Indian lands in accordance with IGRA (the "Stockbridge Compact") (Exhibit A).

ADMIT that SMC and the State entered into the SMC Compact in 1992. ALLEGE that the 1992 SMC Compact speaks for itself.

18. The Tribe began operating class III gaming activities at a single location on its reservation in 1992, in accordance with the Stockbridge Compact.

ADMIT that SMC operates class III gaming activities on its reservation pursuant to the SMC Compact. LACK knowledge or information sufficient to form a belief as to the truth of the remaining allegations, and therefore DENY.

19. The Tribe and the State amended the Stockbridge Compact in 1998 (the "First Stockbridge Amendment"). The First Stockbridge Amendment extended the initial term of the agreement, and required the Tribe to make annual payments to the State (the "Stockbridge Revenue Sharing Payment"). In exchange for the Stockbridge Revenue Sharing Payment, the State agreed to protect the Tribe from some forms of expanded gaming in the State of Wisconsin.

ADMIT that, in 1998, SMC and the State amended the 1992 SMC Compact (the "1998 SMC Amendment"). ALLEGE that the 1998 SMC Amendment speaks for itself.

20. The Tribe and the State amended the Stockbridge Compact again in 2003 (the "Second Stockbridge Amendment").

ADMIT that, in 2003, SMC and the State amended the SMC Compact (the "2003 SMC Amendment").

21. In the Second Stockbridge Amendment, (Exhibit B) the State agreed to further protections for the Tribe's existing gaming operations in exchange for the Stockbridge Revenue Sharing Payment. That agreement is reflected in Paragraph 17 of the Second Stockbridge Amendment:

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

> operations is greater than $200,000,000.00, it shall pay to the State 5% of all of its net win.

ALLEGE that the referenced compact provision speaks for itself. Otherwise, the introductory paragraph consists of legal assertions to which no responsive pleading is required.

22. Paragraph 17 of the Second Stockbridge Amendment also relieves the Tribe of its revenue sharing obligations if the State is authorized to impose a tax fee, assessment, or other charge on the Tribe's class III gaming revenues.

ALLEGE that the referenced compact provision speaks for itself. Otherwise, this paragraph consists of legal assertions to which no responsive pleading is required.

23. In reliance on the protections included in the Stockbridge Compact, the Tribe secured $48 million in financing and cash flowed $62 million for a total investment of $110 million to modernize its only class III gaming facility – the North Star Casino Resort – which is located in Shawano County.

LACK knowledge or information sufficient to form a belief as to allegations in this paragraph, and therefore DENY.

24. The Tribe's North Star Casino Resort employs more than 460 people, including 56 members of the Tribe.

LACK knowledge or information sufficient to form a belief as to the allegations in this paragraph, and therefore DENY.

25. The North Star Casino Resort is the single largest source of revenue for the Tribe's government. Revenues from the North Star Casino Resort constitute more than ninety- five percent (95%) of the tribal government's non-grant funding.

LACK knowledge or information sufficient to form a belief as to the allegations in this paragraph, and therefore DENY.

26. The Tribe distributes only a nominal amount of its gaming revenues directly to members of the Tribe. The Tribe has chosen to use its gaming revenues to fund essential government services in accordance with IGRA's purpose of "promoting…strong tribal governments." 25 U.S.C. § 2702.

LACK knowledge or information sufficient to form a belief as to the allegations in this paragraph, and therefore DENY.

27. The Tribe'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.

LACK knowledge or information sufficient to form a belief as to the allegations in this paragraph, and therefore DENY.

28. In 1995, the United States Bureau of Indian Affairs (the "BIA") acquired the Pine Hills Golf and Supper Club ("Pine Hills") in trust status for the benefit of the Tribe within what the Tribe believed was its existing reservation.

ADMIT that, in 1995, the United States acquired the Pine Hills parcel in trust for SMC. LACK knowledge or information sufficient to form a belief as to the remaining allegations, and therefore DENY.

29. In August 1998, the Tribe began operating approximately 166 class III gaming machines at its Pine Hills Golf and Supper Club ("Pine Hills") under the good faith belief that Pine Hills was located within the Tribe's reservation, and was therefore on lands eligible for class III gaming under IGRA pursuant to 25 U.S.C. § 2719(a)(1).

ADMIT that SMC began operating class III games at Pine Hills approximately in August 1998. LACK knowledge or information sufficient to form a belief as to the remaining allegations, and therefore DENY.

30. In 1998, the State filed a lawsuit against the Tribe in the United States District Court for the Eastern District of Wisconsin alleging that the Tribe's class III gaming activities at Pine Hills were conducted in violation of IGRA and the Stockbridge Compact. *See Wisconsin v. Stockbridge Munsee Community*, 366 F. Supp. 2d 698 (E.D. Wis. 2004).

ADMIT the State in 1998 filed a lawsuit against SMC that was reported in the cited published decision. ALLEGE that all documents related to that lawsuit speak for themselves.

31. The United States District Court for the Eastern District of Wisconsin ultimately held that Pine Hills was not within the Tribe's existing reservation, because the reservation had been diminished.

ALLEGE that, in the referenced lawsuit, both the United States District Court for the Eastern District of Wisconsin and the Seventh Circuit Court of Appeals (*see State of Wisconsin v. Stockbridge-Munsee Community*, 554 F.3d 657 (7th Cir. 2009)) held that Pine Hills was not within the boundary of the

SMC reservation as it exists today. ALLEGE that all documents related to that lawsuit, including all court decisions, speak for themselves.

32. 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") (Exhibit C): 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***. (emphasis added)

ALLEGE that the referenced Deed of Transfer speaks for itself. Otherwise, this paragraph consists of legal assertions to which no responsive pleading is required.

33. Ho-Chunk never commenced housing construction on the Wittenberg Parcel within 5 years of the 1969 conveyance.

LACK knowledge or information sufficient to form a belief as to the allegations in this paragraph, and therefore DENY.

34. 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. (Exhibit D).

ALLEGE that the referenced resolution speaks for itself. Otherwise, this paragraph consists of legal assertions to which no responsive pleading is required.

35. The "Wisconsin Winnebago Tribe" is the former name of the Ho-Chunk Nation.

ADMIT.

36. Ho-Chunk entered into a class III gaming compact with the State of Wisconsin in 1992 (the "Ho-Chunk Compact") to govern its class III gaming activities in accordance with IGRA. The Ho-Chunk Compact defines the term "Primary Business Purpose" as "the business generating more than fifty percent (50%) of the net revenue of the facility." Ho-Chunk Compact at § III(H). The Ho-Chunk Compact also stated that Ho-Chunk may not conduct class III gaming activities on lands not eligible for gaming under IGRA. *See id*. at § III(J) and § IV(B). The Ho-Chunk Compact authorized Ho-Chunk to operate class III gaming activities in Sauk, Jackson, and Wood Counties. *Id*. at § XXVII.

ADMIT that the Ho-Chunk Nation ("Ho-Chunk") and the State entered into a gaming compact in 1992 (the "Ho-Chunk Compact"). ALLEGE that the 1992 Ho-Chunk compact speaks for itself. Otherwise, this paragraph consists of legal assertions to which no responsive is required.

37. The Native American Church executed a Quitclaim Deed on April 15, 1993 claiming 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") (Exhibit E). The BIA certified the 1993 Deed and acquired the Wittenberg Parcel in trust for the benefit of Ho-Chunk.

ADMIT that, on April 15, 1993, the Native American Church executed a quit claim deed relating to the Wittenberg Parcel. ADMIT that, on July 1, 1993, the Superintendent of the Great Lakes Agency of the Bureau of Indian Affairs (BIA) issued a certification relating to that quit claim deed. DENY that the BIA acquired the Wittenberg Parcel in trust in 1993. ALLEGE that the quit claim deed and the BIA certification speak for themselves.

38. The State and Ho-Chunk executed an amendment to the Ho-Chunk Compact (the "First Ho-Chunk Amendment") in 1998.

ADMIT that, in 1998, Ho-Chunk and the State amended the 1992 Ho-Chunk Compact ("the 1998 Ho-Chunk Amendment").

39. The State and Ho-Chunk executed another amendment to the Ho-Chunk Compact in 2003 (the "Second Ho-Chunk Amendment"), which authorized Ho-Chunk to operate an "Ancillary Facility" in Shawano County.

ADMIT that, in 2003, Ho-Chunk and the State amended the Ho-Chunk Compact ("the 2003 Ho-Chunk Amendment"). ALLEGE that the 2003 Ho-Chunk Amendment speaks for itself. Otherwise, this

paragraph consists of legal assertions to which no responsive pleading is required.

> 40. The Second Ho-Chunk Amendment emphasizes the difference between the terms "Gaming Facility" and "Ancillary Facility," and defines the term "Ancillary Facility" to mean a gaming 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 at § XVI(E).

ALLEGE that the 2003 Ho-Chunk Amendment speaks for itself. Otherwise, this paragraph consists of legal assertions to which no responsive pleading is required.

> 41. In 2008, Ho-Chunk began construction of its Ancillary Facility on the Wittenberg Parcel without providing notice to the National Indian Gaming Commission, as required by federal regulations. Ho-Chunk opened its class III Ancillary Facility on the Wittenberg Parcel (the "Wittenberg Casino") later that year.

ADMIT that Ho-Chunk began operating class III gaming on the Wittenberg parcel in 2008. LACK knowledge or information sufficient to form a belief as to the remaining allegations, and therefore DENY.

42. On August 16, 2016, Ho-Chunk issued a press release (Exhibit F) announcing plans to expand the Wittenberg Casino as part of a $153 million investment in its casinos (the "August 16th Press Release"). The August 16th 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, and a restaurant, bar, and high-limit gaming area.

ADMIT that Ho-Chunk issued a press release on August 16, 2016. ALLEGE that the press release speaks for itself.

43. On August 29, 2016, the Tribe issued a letter to Ho-Chunk expressing concerns about its plans to expand the Wittenberg Casino and requesting a meeting between the leaders of the Tribe and Ho-Chunk to resolve those concerns. Ho-Chunk did not respond to the Tribe's letter.

LACK knowledge or information sufficient to form a belief as to the allegations in this paragraph, and therefore DENY.

44. Ho-Chunk has continued efforts to construct the expansion of its Wittenberg Casino, and those efforts are presently ongoing as of the filing of this complaint.

ADMIT.

45. If the Wittenberg Casino is expanded according to the specifications contained in the August 16th Press Release, it will contain more slot machines and hotel rooms than presently exist at Ho-Chunk's class III gaming facility at Black River Falls, Wisconsin, which is not classified as an "Ancillary Facility."

On information and belief, ADMIT that the Wittenberg facility, if expanded according to the specifications in the Ho-Chunk's August 16, 2016, press release, will contain more slot machines and hotel rooms

than presently exist at the Ho-Chunk's gaming facility in Black River Falls. ALLEGE that the 2003 Ho-Chunk Amendment speaks for itself.

46. Ho-Chunk presently operates 6 gaming facilities across the State of Wisconsin, including three full-scale class III casino resorts, and has submitted an application to the BIA for the development of an additional class III gaming facility in Beloit, Wisconsin.

DENY as stated. ALLEGE that the Ho-Chunk conduct class III gaming at five locations in Wisconsin. LACK knowledge or information sufficient to form a belief as to the remaining factual allegations, and therefore DENY. Otherwise, this paragraph consists of legal assertions to which no responsive pleading is required.

47. Ho-Chunk distributes a significant portion of its gaming revenues to its tribal members on a per capita basis, according to a revenue allocation plan approved by the BIA.

LACK knowledge or information sufficient to form a belief as to the allegations in this paragraph, and therefore DENY.

48. The Tribe repeats and re-alleges the allegations set forth in paragraphs 1 through 47 in their entirety.

The State Defendants reallege and reincorporate their answers to all previous paragraphs.

49. The Tribe and the State have agreed to protect the Tribe's interests and rights through the Stockbridge Compact, including the Tribe's interest in avoiding another Indian tribe developing a nearby class III gaming facility on lands acquired in trust after October 17, 1988.

ALLEGE that the referenced provisions of the SMC Compact speak for themselves. ALLEGE that the Wittenberg Parcel was not acquired in trust after October 17, 1988. Otherwise, this paragraph consists of legal assertions to which no responsive pleading is required.

50. Section XXIII of the Ho-Chunk Compact authorizes the State to initiate dispute resolution procedures to enforce the terms of the Ho-Chunk Compact if Ho-Chunk is in violation of that agreement.

ADMIT that section XXIII of the Ho-Chunk Compact provides dispute resolution procedures, in the event of a dispute between the Ho-Chunk and the State regarding the interpretation or enforcement of the Ho-Chunk Compact. ALLEGE that the referenced compact provision speaks for itself. Otherwise, this paragraph consists of legal assertions to which no responsive pleading is required.

51. The State and the Governor have refused to initiate the dispute resolution procedures in the Ho-Chunk Compact or take other actions to prevent Ho-Chunk from operating the Wittenberg Casino on lands not eligible for gaming under IGRA.

ADMIT that State Defendants have not initiated any dispute resolution procedures in the Ho-Chunk Compact with regard to the

Wittenberg parcel. ADMIT that they have taken no action to prevent Ho-Chunk from conducting class III gaming on the Wittenberg parcel. DENY that the Wittenberg parcel is ineligible for gaming under IGRA. Otherwise, this paragraph consists of legal assertions to which no responsive pleading is required.

52. The State and the Governor have refused to initiate the dispute resolution procedures in the Ho-Chunk Compact or take other actions to prevent Ho-Chunk from operating the Wittenberg Casino in violation of the Ho-Chunk Compact's restrictions applicable to Ancillary Facilities.

ADMIT that State Defendants have not initiated any dispute resolution procedures in the Ho-Chunk Compact with regard to the Wittenberg parcel. ADMIT that they have taken no action to prevent Ho-Chunk from conducting class III gaming on the Wittenberg parcel. DENY that Ho-Chunk's gaming activities on the Wittenberg parcel violate the Ho-Chunk Compact. Otherwise, this paragraph consists of legal assertions to which no responsive pleading is required.

53. The State's and the Governor's refusal to enforce the terms of the Ho-Chunk Compact, including the land restrictions in IGRA, constitutes a violation of Section XXXII.B. of the Stockbridge Compact.

DENY.

54. The Tribe repeats and re-alleges the allegations set forth in paragraphs 1 through 53 in their entirety.

The State Defendants reallege and reincorporate their answers to all previous paragraphs.

55. Section XIII.E of the Stockbridge Compact states that the Tribe is not obligated "to make any payments [to the State] unless mutually agreed to by the parties, or otherwise set forth in this Compact."

ALLEGE that the referenced compact provision speaks for itself.

56. Federal law generally prohibits the State from imposing a direct tax on the Tribe, or its gaming revenues.

This paragraph consists of legal assertions to which no responsive pleading is required.

57. The State's and the Governor's demand that the Tribe continue to pay a portion of its gaming revenues to the State, without providing a corresponding benefit to the Tribe, constitutes a tax of the Tribe's gaming revenues in violation of Section XIII.E of the Stockbridge Compact.

DENY all allegations of a violation of Section XIII.E of the SMC Compact. Otherwise, this paragraph consists of legal assertions to which no responsive pleading is required.

58. The Tribe's continued payment of a portion of its gaming revenues to the State, without a corresponding benefit provided by the State, would constitute an unlawful tax of the Tribe's gaming revenues by the State in violation of federal law, including IGRA at 25 U.S.C. § 2710(d)(4).

DENY that the State has violated IGRA. Otherwise, this paragraph consists of legal assertions to which no responsive pleading is required.

59. The Tribe repeats and re-alleges the allegations set forth in paragraphs 1 through 58 in their entirety.

The State Defendants reallege and reincorporate their answers to all previous paragraphs.

60. Section XX.C of the Stockbridge Compact prohibits the State from enforcing the terms of the agreement in an arbitrary or capricious manner.

ALLEGE that the referenced compact provision speaks for itself.

61. The State took action to enforce the terms of the Stockbridge Compact, as well as IGRA's prohibition against tribal gaming on lands acquired in trust after October 17, 1988, in 1998 when the Tribe began conducting limited class III gaming activities on lands it acquired in trust in 1995 that were believed to be within the Tribe's reservation.

ADMIT that, in 1998, the State took legal action to prevent SMC from conducting class III gaming on disestablished, former reservation lands that had been acquired in trust in 1995. LACK knowledge or information sufficient to form a belief as to the remaining factual

allegations, and therefore DENY. Otherwise, this paragraph consists of legal assertions to which no responsive pleading is required.

62. The State expressed uncertainty regarding the status of the Wittenberg Parcel, including whether it was eligible for gaming under IGRA, as early as 2008.

ALLEGE that when Ho-Chunk announced the commencement of gaming at the Wittenberg location in 2008, SMC provided documentation to the Division of Gaming (the "Division") of the Department of Administration regarding the trust status of the Wittenberg parcel. The Division wrote to the BIA, asking if the parcel was eligible for class III gaming under IGRA. The BIA provided a written response to the Division's inquiry stating, in part: "The 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." ALLEGE that this correspondence speaks for itself.

63. Neither the State nor the Governor have taken any action to enforce the terms of the Ho-Chunk Compact, or IGRA's prohibition against tribal gaming on lands acquired in trust after October 17, 1988, with respect to the Wittenberg Casino.

ADMIT that State Defendants have taken no action to prevent Ho-Chunk from conducting class III gaming on the Wittenberg parcel. ALLEGE that the Wittenberg parcel was not acquired in trust after

October 17, 1988. Otherwise, this paragraph consists of legal assertions to which no responsive pleading is required.

64. The State's and the Governor's refusal to enforce the Ho-Chunk Compact on a similar basis as the State's action to enforce the Stockbridge Compact is arbitrary and capricious, and constitutes a violation of Section XX.C. of the Stockbridge Compact.

DENY.

65. The Tribe repeats and re-alleges the allegations set forth in paragraphs 1 through 64 in their entirety.

The State Defendants reallege and reincorporate their answers to all previous paragraphs.

66. Title to the Wittenberg Parcel reverted to the Native American Church by operation of law, when Ho-Chunk did not satisfy the requirements in the 1969 Deed.

DENY that title to the Wittenberg Parcel reverted to the Native American Church at any time after June 28, 1969, whether by operation of law or otherwise. LACK knowledge or information sufficient to form a belief as to the remaining allegations, and therefore DENY. Otherwise, this paragraph consists of legal assertions to which no responsive pleading is required.

67. The Wittenberg Parcel was not placed back into trust status until 1993, when the Native American Church conveyed its remaining interests in the Wittenberg Parcel back to the BIA for the benefit of Ho-Chunk.

DENY. ALLEGE that the BIA approved the June 28, 1969, Deed of Transfer on October 3, 1969, thereby taking the Wittenberg parcel into trust status, and the Wittenberg Parcel has been continuously in trust status since that action.

68. IGRA generally prohibits Indian tribes from conducting gaming activities on lands acquired in trust after October 17, 1988. *See* 25 U.S.C. § 2719(a).

This paragraph consists of legal assertions to which no responsive pleading is required.

69. Ho-Chunk's class III gaming activities on the Wittenberg Parcel constitute a violation of IGRA's prohibition against tribal gaming activities on lands acquired in trust after October 17, 1988. *See* 25 U.S.C. § 2719(a).

DENY.

70. Sections III and IV of the Ho-Chunk Compact prohibit Ho-Chunk from conducting class III gaming activities on lands that are not eligible for gaming under IGRA.

ALLEGE that the referenced compact provisions speak for themselves.

71. Ho-Chunk's class III gaming activities on the Wittenberg Parcel also constitute a violation of Sections III and IV of the Ho-Chunk Compact.

DENY.

72. The Tribe repeats and re-alleges the allegations set forth in paragraphs 1 through 71 in their entirety.

The State Defendants reallege and reincorporate their answers to all previous paragraphs.

73. The Ho-Chunk Compact allows Ho-Chunk to operate an "Ancillary Facility" within Shawano County, and defines an "Ancillary Facility" as a gaming 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 at § XVI(E).

ALLEGE that the referenced compact provision speaks for itself.

74. The Ho-Chunk Compact also 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).

ALLEGE that the referenced compact provision speaks for itself.

75. The Wittenberg Casino presently includes approximately 502 slot machines, a snack area and a small bar within a stand-alone facility on the Wittenberg Parcel and a separate stand-alone convenience store on the parcel with no gaming.

LACK knowledge or information sufficient to form a belief as to the allegations in this paragraph, and therefore DENY.

76. Ho-Chunk intends to develop a full-scale casino resort on the Wittenberg Parcel, which will include a hotel, restaurant, bar, high-limit gaming area, and approximately 800 slot machines and 10 table games.

LACK knowledge or information sufficient to form a belief as to the allegations in this paragraph, and therefore DENY.

77. Ho-Chunk's present gaming activities on the Wittenberg Parcel constitute the Primary Business Purpose of the gaming facility, as the 502 slot machines certainly generate more than fifty percent (50%) of the net revenue of the facility as compared to the snack area and small bar.

LACK knowledge or information sufficient to form a belief as to the allegations in the paragraph, and therefore DENY. Otherwise, this paragraph consists of legal assertions to which no responsive pleading is required.

78. Ho-Chunk's present gaming activities on the Wittenberg Parcel also violate the size restriction for an Ancillary Facility as the size of the facility dedicated to gaming far exceeds the size of the facility dedicated to the non-gaming purpose of a snack area and small bar.

DENY that Ho-Chunk's present gaming activities on the Wittenberg Parcel violate the Ho-Chunk compact. LACK knowledge or information sufficient to form a belief as to the factual allegations in this paragraph, and therefore DENY. Otherwise, this paragraph consists of legal assertions to which no responsive pleading is required.

79. Ho-Chunk's present gaming activities on the Wittenberg Parcel squarely fit the definition of a Gaming Facility under the Ho-Chunk Compact, which is not allowed in Shawano County. A Gaming Facility is defined as a facility with gaming as its Primary Business Purpose, because the majority of the revenue of the present facility is generated by gaming. Ho-Chunk Compact § XVI.E.

DENY that Ho-Chunk's present gaming activities on the Wittenberg Parcel violate the Ho-Chunk compact. ALLEGE that the Ho-Chunk compact speaks for itself. Otherwise, this paragraph consists of legal assertions to which no responsive pleading is required.

80. Ho-Chunk's additional gaming activities on the Wittenberg Parcel at the expanded Wittenberg Casino will continue to define the Primary Business Purpose of the facility because gaming activities are certain to continue to generate more than fifty percent (50%) of the net revenue of the facility.

This paragraph consists of legal assertions to which no responsive pleading is required.

81. Because the Primary Business Purpose of the Wittenberg Casino is gaming, it violates the Ho-Chunk Compact's requirement that any gaming facility owned by Ho-Chunk within Shawano County be limited to an Ancillary Facility.

DENY.

AFFIRMATIVE DEFENSES

1. SMC has failed to state a claim upon which relief may be granted against either the State or Governor Walker.

2. All claims in the Complaint against the State or Governor Walker based on any act or omission that is not an alleged violation of the SMC compact are barred by the State's Eleventh Amendment immunity.

3. The Court lacks subject matter jurisdiction over all claims in the Complaint against the State or Governor Walker based on any act or omission that is not an alleged violation of the SMC compact.

4. One or more of SMC's claims are barred by the doctrines of laches, waiver, and/or estoppel.

5. One or more of SMC's claims are barred by applicable statutes of limitations.

6. SMC has failed to join the United States of America as a necessary party, as required by Fed. R. Civ. P. 19.

7. The State Defendants reserve the right to assert additional defenses that may be revealed in the course of further investigation and discovery.

WHEREFORE, the State Defendants demand that judgment be entered in their favor denying all of the relief requested against them in the Complaint and granting them their costs and such further relief as the Court deems appropriate.

COUNTERCLAIM

The State Defendants, by their undersigned legal counsel, bring this Counterclaim against SMC, pursuant to Fed. R. Civ. P. 13(a), and allege as follows:

I. Introductory allegations.

1. This Counterclaim seeks a declaration of SMC's liability for revenue sharing payments owed to the State under section XXXII.C.3. of the SMC Compact.

2. This Counterclaim does not require adding any other party to this action.

3. This Counterclaim arises out of the same transactions and occurrences that are the subject matter of SMC's claims against the State Defendants in the present action.

4. On November 17, 2016, attorneys representing SMC sent a memorandum to the Secretary of the Wisconsin Department of Administration (DOA), setting out a variety of legal concerns SMC had regarding class III gaming activities conducted by Ho-Chunk on the Wittenberg parcel. (McClure Dec. Ex. AA.)

5. The November 17, 2016, memorandum expressed SMC's view that the State's failure to take action to prevent Ho-Chunk from conducting gaming on the Wittenberg parcel denies SMC the benefit of its bargain with the State in the SMC Compact and "brings into serious question" the lawfulness of SMC's liability for revenue sharing payments to the State under the SMC Compact. (McClure Dec. Ex. AA.)

6. On March 6, 2017, SMC gave the State written notice that: (a) SMC contends the State is in violation of sections XXXII.B., XIII.E., and XX.C. of the SMC Compact; and (b) SMC intends to withhold its revenue sharing payments to the State until the State fully complies with the SMC Compact. (McClure Dec. Ex. BB.) SMC's next revenue sharing payment to the State is due on June 30, 2017.

7. On April 19, 2017, SMC filed the Complaint in the present case. (Dkt. 5.)

8. SMC's Complaint in part seeks declaratory and injunctive relief against the State Defendants declaring that they have violated sections XXXII.B., XIII.E., and XX.C. of the SMC Compact, and enjoining them from any further compact violations. (D. 5:10–13 ¶¶ 48–64.) In the alternative, SMC seeks a declaration that the revenue sharing payments it is required to make to the State under the SMC Compact are an illegal tax, and equitable relief requiring return of past revenue sharing payments paid by SMC to the State. (D. 5:3 ¶ 6.)

9. The claims against the State Defendants in SMC's Complaint mirror the alleged violations of the SMC Compact set forth in the March 6, 2017, letter.

10. On May 11, 2017, the Chairman of the Mohican Gaming Commission sent a letter to DOA, reiterating SMC's intention to withhold its revenue sharing payments to the State under the SMC Compact, pending resolution of SMC's claims in the present case. (McClure Dec. Ex. CC.)

II. Parties.

11. SMC is a federally recognized Indian tribe with a reservation located in Shawano County, Wisconsin.

12. The State of Wisconsin is a State of the United States.

13. Governor Scott Walker is the Governor of the State of Wisconsin.

14. Ho-Chunk is a federally recognized Indian tribe with its headquarters located in Black River Falls, Wisconsin.

III. Jurisdiction and venue.

15. This Court has jurisdiction over the State Defendants' Counterclaim against SMC under 28 U.S.C. § 1367 because the Counterclaim arises from the same case or controversy as the claims against the State Defendants in SMC's Complaint.

16. In the SMC Compact, SMC has waived its sovereign immunity and consented to suit in federal court with respect to claims for monies which may be due and owing pursuant to the terms of the SMC Compact, and with respect to claims for declaratory and injunctive relief for any violation of the SMC Compact. *See* SMC Compact, § XXII.E.2. a. and b.

17. This District is the proper venue for the State Defendants' counterclaim against SMC because SMC's claims against the State Defendants in this case have been filed in this District.

IV. Count 1: Declaratory judgment of SMC's liability for revenue sharing payments.

18. Paragraphs 1 through 17 of the Counterclaim are restated and incorporated herein.

19. Pursuant to IGRA, SMC and the State entered into the SMC Compact in 1992, and executed amendments to that compact in 1998 and 2003.

20. Section XXXII.C.3 of the SMC Compact, as amended, currently states:

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

21. SMC is liable for annual revenue sharing payments to the State, as set forth in section XXXII.C.3 of the SMC Compact.

22. SMC's next annual revenue sharing payment to the State under section XXXII.C.3 of the SMC Compact is due on June 30, 2017.

23. SMC has expressed to the State in writing its intention to withhold its revenue sharing payments to the State, based on alleged violations by the State of sections XXXII.B., XIII.E., and XX.C. of the SMC Compact. (McClure Dec. Ex. BB.)

24. SMC's Complaint and its other communications with the State concerning its revenue sharing payments fail to identify any valid legal basis for SMC to withhold its annual revenue sharing payments under section XXXII.C.3 of the SMC Compact.

25. Under 28 U.S.C. § 2201(a), a federal court "may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."

26. Pursuant to 28 U.S.C. § 2201(a), the State Defendants are entitled to a declaratory judgment by this Court, declaring SMC's liability for annual revenue sharing payments to the State, as set forth in section XXXII.C.3 of the SMC Compact.

WHEREFORE, the State Defendants respectfully request the following relief:

1. Judgment declaring that SMC is liable for all annual revenue sharing payments required under section XXXII.C.3 of the SMC Compact;

2. Attorney's fees and costs of this action; and

3. Any other relief the Court deems appropriate.

[*Signature page follows.*]

Dated this 26th day of June, 2017.

Respectfully submitted,

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