

Law Offices Of

RAPPORT AND MARSTON

An Association of Sole Practitioners

405 W. Perkins Street
Ukiah, California 95482
e-mail: marston1@pacbell.net

David J. Rapport
Lester J. Marston
Scott Johnson
Mary Jane Sheppard
Darcy C. Vaughn

Phone (707) 462-6846
Facsimile (707) 462-4235

April 20, 2017

Scott D. Crowell
Crowell Law Offices
1487 W. State Route 89 A, Ste. 8
Sedona, Arizona 86336

Re: Opposition to the Ho-Chunk Nation's Wittenberg Ancillary Gaming Facility
Our File No. 97-9.19

Dear Scott;

Our office is special counsel to the Ho-Chunk Nation ("Nation"). I am writing to demand that for the reasons set forth below, the Stockbridge-Munsee Community ("Band") immediately dismiss the allegations in the complaint that was filed against the Nation in *Stockbridge-Munsee Community v. Ho-Chunk Nation*, United States District Court for the Western District of Wisconsin, Case No. 17-cv-249.

First, the Nation has never interfered with the Band's sovereign activities, including gaming and other economic development enterprises on its sovereign lands. The Nation has always respected the sovereignty and independence of other tribes and their right to make decisions that are in their best interests with respect to the use and development of their reservation land. The Band, in contrast, is attempting to directly interfere with the Nation's use and development of its Wittenberg trust lands.

Second, the Band alleges in its complaint that the Nation's plans for expansion of the Wittenberg Project violates the provisions of the Nation's Compact with the State. That is demonstrably false. The Nation's plans for the expansion of the Wittenberg Project strictly comply with the requirements of the 2003 Amendments to the Nation's Compact. As I am sure you are aware, in October of last year, Department of Administration Secretary Scott Neitzel, concluded that the Nation's expansion of its Wittenberg Project complies with the terms of the 2003 Amendment to Nation's Compact. As you also know, Governor Walker has definitively acknowledged that the expansion of the Wittenberg Project is in compliance with the Nation's Compact and that he has no

authority to prevent the Nation from going forward with the development and operation of that project. The Band's interpretation of the Compact is irrelevant. The Band is not a party to the Compact. The parties to the Compact, the Nation and the State, are in agreement as to the proper interpretation of the definition of an ancillary facility and they agree that the Wittenberg Project falls within that definition. It is the parties' interpretation of the Compact, not the Band's that is binding on the courts. "The ultimate aim of all contract interpretation is to ascertain the intent of the parties.' The intent of the contracting parties can be evinced through the plain language of the Original Compacts and the history of the compact negotiations." *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, P 81 (2005), citing, *DeWitt Ross & Stevens, S.C. v. Galaxy Gaming & Racing Ltd. P'ship*, 2004 WI 92, P44.

Third, I am sure that you are aware that the Nation, like the Band, enjoys sovereign immunity from suit. Any lawsuit filed against the Nation challenging the expansion of the Wittenberg Project would be subject to summary dismissal. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Likewise, if the Band were to file suit against the United States seeking to enjoin the Wittenberg Project or seeking a determination that the Nation's development of its Wittenberg site is in violation of the Nation's Compact, the Nation would move to intervene in the matter as an indispensable party. Once the Nation is granted intervention, the Nation would file a motion to dismiss the action, because the Nation is an indispensable party that cannot be joined because the Nation enjoys sovereign immunity. The law in this area is well settled. Such a motion to dismiss will be granted. See, *Lac Du Flambeau Band v. Norton*, 422 F.3d 490 (7th Cir. 2005). The Nation would also not be subject to federal court jurisdiction under the IGRA. *State of Wisconsin v. Ho-Chunk Nation*, 512 F. 3d 921 (7th Cir. 2008).

In addition, the Nation cannot, because of its sovereign immunity from suit, be sued under the Indian Gaming Regulatory Act, 25 U.S.C. ¶ 2701, et. seq., ("IGRA") for violations of the IGRA since the grant of jurisdiction is only to enjoin violations of the Compact provisions that are proper subjects of negotiation. *State of Wisconsin v. Ho-Chunk Nation*, 512 F. 3d 921 (7th Cir. 2008). Furthermore, the State has not waived its Eleventh Amendment immunity to be sued over violations of the Nation's Compact and thus, any causes of action alleged in the Band's complaint for alleged violations of the Nation's Compact would have to be dismissed for failure to join an indispensable party. *Lac Du Flambeau Band v. Norton*, 422 F.3d 490 (7th Cir. 2005).

Moreover, the Band is now on notice that its lawsuit filed to stop the Wittenberg Project is subject to summary dismissal. If the Band were to go forward with its frivolous causes of action against the Nation, the Band would be subject to sanctions, pursuant to Rule 11 of the Federal Rules of Civil Procedure, for filing a frivolous lawsuit. If the Nation were to seek sanctions in the form of an award of attorneys' fees and costs incurred by the Nation in responding to the lawsuit, please be advised that the market rate for this office's legal services is currently \$600 per hour.

Fourth, the reason that the Band is attempting to challenge the Nation's Wittenberg Project is that the Band is concerned that it will lose a portion of its current market share of gaming revenue, not because the Band has a principled objection to the Wittenberg Project based on a failure on the part of the Nation to comply with its Compact or the requirements of the IGRA. The Wittenberg site was taken into trust before the IGRA was enacted, so the Nation has the right to engage in gaming on the site without a two part determination pursuant to 25 U.S.C. 2719(b)(1)(A). The Department

of Administration's conclusion makes it clear that the Nation's expansion is being carried out in conformity with the restrictions and requirements of the 2003 Amendment to the Nation's Compact. The Band has long been aware of the provision of the 2003 Amendment setting forth the requirements for the Nation's ancillary sites. The fact that the Wittenberg Project might reduce the market share of the North Star Mohican Casino Resort is simply a reality of a highly competitive gaming market. Rather than engaging in futile efforts to convince State officials that the Wittenberg Project is in violation of the Nation's Compact and to damage the Nation's reputation, the Band should invest its resources in making its gaming facility more competitive and, therefore, more profitable.

Finally, as stated above, the Band has repeatedly asserted in correspondence with the State, in press releases and in its complaint, that the Wittenberg site was not taken into trust until after the IGRA was enacted, and is not, therefore, eligible for use for gaming purposes. The Band has also repeatedly claimed and now alleged in its Complaint that the Nation's plans for the expansion of the existing Wittenberg facility violate the Nation's Compact. Those statements are knowingly false. The State has repeatedly informed the Band that the Wittenberg parcel was taken into trust in 1969, based on the BIA's determination that "[t]he title status report has been reviewed and shows that this tract of land has been held in trust for the Wisconsin Winnebago Tribe (Ho-Chunk Nation) since it was acquired in 1969." Moreover, the Secretary of the Interior proclaimed the Wittenberg site a formal Indian Reservation well before the enactment of the IGRA. Gaming on the parcel is not, therefore, dependent on a two part determination pursuant to 25 U.S.C. 2719(b)(1)(A). Again, the State has repeatedly informed the Band that the Wittenberg Project is fully consistent with Section XVI.E of the Nation's Compact, as amended, which sets forth the definition of "ancillary facility."

Knowing that these statements are false, the Band's officials continuing to make these false statements and the false allegation in the Complaint appear to be intended for the purpose of damaging the Nation's business reputation and to interfere with the Nation's contractual relations with the State arising from the Nation's Compact. Such actions are well beyond the authority granted to the Band's tribal officials under the Band's Constitution.

It is now well settled that if a Tribal Official acts beyond the authority that the tribe had the power to legally confer, the official may be sued for declaratory and injunctive relief to enjoin the unauthorized acts. *Ex Parte Young*, 209 U.S. 123 (1908); *Santa Clara Pueblo v. Martinez*, 436 U.S. 59; *Baker v. Elec. Co-op., Inc. v. Chaske*, 28 F. 3d 1466, 1471-72 (8th Cir. 1994); *Tenneco Oil v. Sac and Fox Tribe*, 725 F. 2d 572, 574-75 (10th Cir. 1984).

In addition, while the courts of Wisconsin have not directly addressed the issue, court rulings in other states raise serious questions as to whether individual tribal officials would be personally liable for damages arising from defamation and tortious interference with contract, since those tortious actions would not fall within a tribal official's official duties.

Cosentino's claims, however, are not based on Defendants' reliance on questionable information, their failure to perform an adequate investigation, or their erroneous interpretation of a legal standard. Rather, Cosentino alleges Defendants engaged in intentional misconduct and revoked his license without cause to retaliate against him.

Defendants presented no authority, and we have found none, that extends tribal sovereign immunity to an intentional abuse of authority.

Cosentino v. Fuller, 237 Cal. App. 4th 790, 1055 (Cal. App. 4th Dist. 2015). See, also, *Turner v. Martire*, 82 Cal. App. 4th 1042, (Cal. App. 4th Dist. 2000).

Also, despite the Band's assertions, as set forth in its October 16, 2016 press release that: "The Stockbridge - Munsee Tribe is committed to positive relations between all tribes and believes in each Tribal Nation's right to self-determination in accordance with federal and state Indian gaming regulations," the Band's campaign has had the opposite effect. It has damaged inter-tribal relations and tribal solidarity. It has also revealed that the Band is willing to interfere with the economic development activities and self-determination of other tribes where the Band's leadership concludes that it is in the Band's interest to do so. At the same time, it has given ammunition to opponents of Indian gaming who seek to portray tribal gaming as unfair, dishonest and contrary to the interests of the citizens of Wisconsin.

At your earliest opportunity, please advise me as to whether the Band will be : (1) complying with the Nation's demand that it dismiss the allegations alleged in the Complaint against the Nation; (2) cease making false statements about the Nation's development of its Wittenberg Project and (3) cease engaging in conduct designed to interfere with the Nation's gaming activities pursuant to its Compact with the State. I look forward to your prompt reply.

If you or the Band's Tribal Attorney have any questions regarding this letter, please direct those questions to me, rather than my clients, at the above-listed address, telephone number, or email address.

Yours very truly,

A handwritten signature in cursive script that reads "Lester J. Marston". The signature is written in black ink and is positioned below the typed name.

Lester J. Marston, Special Counsel

cc: Wilfrid Cleveland, Ho-Chunk President, and Members of the Ho-Chunk Legislature
Dennis Puzz, Stockbridge-Munsee General Counsel
Honorable Scott Walker, Governor