UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

PPI, INC. Plaintiff, v. DIRK KEMPTHORNE, in his official capacity as Secretary of the Interior, GEORGE SKIBINE, in his official capacity as Acting Assistant Secretary of the Interior - Indian Affairs and CHARLES CRIST, in his official capacity as Governor of Florida. Defendants.	Civ. No. 4:08-cv-248-SPM/WCS

PLAINTIFF PPI, INC.'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION

INTRODUCTION

In their opposition papers, the Defendants portray a Catch-22 universe in which government actions proceed unrestrained by statutory requirements, and those grievously injured by illegal government action are shunted off to an endless judicial shell game, foreclosed from ever holding government officials accountable for their actions. Fortunately for the nation, that is not what the law requires.

The tribal-state compact (the "Compact") signed by the governor and the Seminole Tribe (the "Tribe"), and approved by the Secretary of the Interior (the "Secretary"), authorizes banked card games that are illegal under Florida law, and thus violates the Indian Gaming Regulatory Act ("IGRA"). Although the governor and the Federal Defendants caused the Compact to take effect, they now disclaim responsibility for their actions. The Secretary

protests that he took no action on the Compact; even if he did, he adds, he only approved it "to the extent it conforms with IGRA." The governor argues that the "Florida Rule" for applying IGRA does not apply in Florida and that despite his many duties enumerated in the Compact, "[n]othing the Governor could do, or be ordered to do, would in any way provide relief to Plaintiff." Outside the Catch-22 universe imagined by the defendants, none of these assertions is true – and none of the assertions bars the remedy sought in this case.

ARGUMENT

I. PPI, INC. HAS A SUBSTANTIAL LIKELIHOOD OF SUCCEEDING ON THE MERITS

A. The banked card games authorized under the Compact violate Florida law.

Defendants do not dispute the central facts: (i) the Compact authorizes the Tribe to engage in banked card games, such as blackjack and baccarat (Compact Part III.E.2); and (ii) such games are prohibited under Florida law. Fla. Stat. §§ 849.01; 849.08. IGRA dictates that a tribe can offer only those Class III games that its host state already permits. 25 U.S.C. § 2710(d)(1)(B). The majority view, the Florida Rule, is that a tribal gaming compact can authorize only those games authorized by the state for some other person or party. *Seminole Tribe v. Florida*, No. 91-6756-Civ-Marcus, 1993 WL 475999 (S.D. Fla. Sept. 22, 1993).[1]

The governor urges this Court to follow, in the State of Florida, the minority "Wisconsin" rule, though it has been rejected by (1) the Southern District of Florida, *id.*, (2) by the Attorney General of Florida (*see* Op. Att'y Gen. Fla. 2007-36 (2007)), and (3) by the Federal

[1] *See United States v. Sisseton-Wahpeton Sioux Tribe,* 897 F.2d 358 (8th Cir. 1990); *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2d Cir. 1990), *cert. denied*, 499 U.S. 975 (1991); *Citizen Band Potawatomi Indian Tribe v. Green,* 995 F.2d 179, 181 (10th Cir. 1993); *United States v. Santa Ynez Band of Chumash Mission Indians,* 33 F. Supp. 2d 862 (C.D. Cal. 1998).

Defendants. *See* Letter from George Skibine, Acting Deputy Assistant Secretary – Policy and Economic Development, to Hon. Bill H. Pryor, Jr., Attorney General of Alabama (March 4, 2008); *see* PPI, Inc.'s Memorandum In Support of Motion for Preliminary Injunction ("PPI, Inc's Memo") at 15-16. Indeed, the Federal Defendants offer no support for the governor's argument on this point. Nothing in the governor's brief alters our analysis of this issue in our opening submission.

Shyly, the governor also suggests that there may be "some evidence" that the State offers banked card games, yet he provides no legal basis for this suggestion. Governor Crist's Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction ("Crist's Opp.") at 19. Florida statutes prohibit banked card games. *See* PPI, Inc's Memo at 4 (*citing* Fla. Stat. §849.086(12)(a)). Operating such games is a crime; a second offense is a felony, punishable by imprisonment for up to five years and a $5,000 fine. *Id.* §§ 849.086(12)(a), (15)(a), 775.082(3)(d), 775.083(1)(c). If the governor believes that banked card games are nevertheless legal, he must offer more than airy references to unexplained lottery games and unmoored suggestions that there is "some question" (Crist's Opp. at 20) whether banked card games are legal.

B. The Secretary's actions are reviewable under the APA.

Launching directly into their judicial shell game without hazarding any defense of their actions, the Federal Defendants deny that those actions can be reviewed under the APA. They insist they have made "no determination regarding IGRA issues." Federal Defendants' Memorandum in Opposition to Plaintiff's Motion for a Preliminary Injunction ("Fed. Ds' Opp.") at 18. And they mischaracterize PPI's claim by transforming PPI's claim into a challenge to the publication of the Compact, rather than to the effective approval of the Compact. Id. at 11-12. Both ploys are unsupported by any controlling authority, and are ultimately unpersuasive.

IGRA gives the Secretary two ways to approve a Compact: (i) by saying so in a formal approval, and (ii) by saying nothing and allowing the Compact to take effect after 45 days pass. 25 U.S.C. § 2710(d)(8)(A)-(C). The Federal Defendants chose the second method of approval here, perhaps for the ability to remain silent while an illegal Compact takes effect. That action does not make their action any less an approval of the Compact. To accept the Federal Defendants' argument on this point would be to hold that the Secretary, faced with a Compact that will take effect in 45 days if he did nothing, could choose to take no action, including not even looking at the Compact. Such an assumption would be both fatuous and entirely unrealistic. Past Secretaries have embraced their affirmative duty to assess whether a compact complies with IGRA. *See, e.g., Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F.Supp.2d 295, 307-308 (W.D.N.Y. 2007). In a letter to the Seneca Nation explaining her decision not to affirmatively act on their proposed compact, but rather to allow it to take effect by operation of law, then-Secretary Norton stated, "[u]nder IGRA the Department must determine whether the Compact violates IGRA, any other provision of Federal law ... or the trust obligations of the United States to Indians." *Id.* (*citing* Letters from Secretary Norton to the Seneca Nation President and the Governor of New York (dated Nov. 12, 2002)). Whether the Federal Defendants here complied with this duty is the heart of this case, and certainly qualifies for the presumption of reviewability under the APA for agency actions that "adversely affect[] or aggrieve[]" a party." 5 U.S.C. §§ 702; 701(a)(1) and (2); *See Taydus v. Cisneros*, 902 F. Supp. 278 (D. Mass. 1995) ("The presumptive entitlement to judicial review under Administrative Procedures Act (APA) applies not only to agency action made reviewable by statute, but also to other final agency action for which there is no other adequate remedy in court.")

The Federal Defendants carry on at considerable length over the use of "may" and "shall" in the key provision of IGRA, desperately trying to construct a statute that both allows the Secretary to permit an illegal compact to take effect, and also insulates that illegal compact from judicial review. *See* Fed. Ds' Opp. at 12-14. But that is not the statute that Congress enacted. Congress specifically stated that a compact that takes effect by operation of law, without the Secretary's formal approval, takes effect only to the extent it is consistent with IGRA. 25 U.S.C. § 2710 (d)(8)(C). That provision contemplates exactly the judicial review we seek in this case. If such a compact is not the product of final agency action (as the Federal Defendants argue), then no court could hear a challenge to a compact (as the Federal Defendants argue), and illegal provisions in compacts can never be declared illegal. The result will be to make into a nullity the statutory provision that illegal compact provisions do not take effect. Unless a court can review the legality of such a compact, that provision will never be enforced, and illegal compact provisions will be forever insulated from review. This Court should not construe the statute in a way that so completely robs it of any meaning (*see United States v. Scrimgeour*, 636 F.2d 1019, 1022 (5th Cir. 1981)), yet that is exactly what the Federal Defendants demand.

In addition, the consequences of the Federal Defendants' decision are undeniable. By effectively approving the Compact and publishing it in the Federal Register, the Secretary authorized the Tribe to engage in Class III gaming, including illegal banked card games. As a direct result, the Seminole Tribe ordered[2] Class-III slot-machines for its gaming facilities and

[2] The Tribe *announced* its plans to go forward with Class III gaming one day after the state dropped a lawsuit filed in the District Court for the District of Columbia that sought to stop the Secretary from approving the Compact. *See* John Holland and Jon Burnstein, *Seminoles begin installing Vegas-style slots*, SOUTH FLORIDA SUN-SENTINEL, Jan. 24, 2008. The Court there held that the state would not be irreparably harmed by the Tribe's Class III gaming because any harm to the state's sovereignty would be

began operating them on January 24, 2008. The Tribe now relies upon the authority of the Compact to authorize its operation of the illegal banked card names.

There is no material difference between affirmative approval of a compact and default approval. "A compact that is either affirmatively approved *or* considered approved by virtue of the Secretary's non-action *takes effect* when notice of the approval is published in the Federal Register." *Citizens Against Casino Gambling in Erie County*, 471 F. Supp. 2d at 307 (citing § 2710(d)(3)(B)) (emphasis added). Addressing this question, the Seventh Circuit found "the Secretary's silence was the functional equivalent of an affirmative approval...By saying nothing, the Secretary has allowed the parties to the compact to behave as if it were lawful in all respects. Had the Secretary rejected the compact, it would be clear ... that the anti-competitive provisions of the agreement have no legal effect." *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton,* 422 F.3d 490, 493 (7th Cir. 2005)[3]. In contrast to these authorities, the Federal Defendants cite no basis for their audacious claim that the Secretary has made "no determination regarding IGRA issues." *See* Fed. Ds' Opp. at 18. By any measure, the Secretary's actions on the Compact represented the "consummation" of its decision-making process, which was neither tentative nor interlocutory in nature. *See Bennett v. Spear,* 520 U.S. 154, 177-78 (1997) (citations omitted).

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temporary. At the time of the Court's pronouncement, the Florida Supreme Court had agreed to put the House Speaker Mark Rubio's suit challenging the validity of the Compact on an expedited schedule.

[3] The Federal Defendants cite the lower court's decision in *Lac Du Flambeau* to support its contention that the Secretary's choice to approve a compact by operation of law is unreviewable (Fed Ds' Opp. at 14; 17). The Defendants fail, however, to alert the court that the Seventh Circuit did not adopt the lower court's reasoning, but rather made findings that would support a finding of reviewability. *Lac Du Flambeau,* 422 F.3d at 502.

Because we do not challenge merely the Compact's publication, the Federal Defendants' heavy reliance on *Kickapoo Tribe* is misplaced[4]. In that case the state supreme court had ruled that the compact in question was invalid. *Kickapoo Tribe,* 827 F. Supp. at 40. The plaintiff tribe nonetheless argued that the compact was legally binding because the forty-five day statutory approval period had elapsed without the Secretary taking any action. *Id.* In response, the court opined that a compact otherwise found to be invalid is not valid just because the Secretary did not disapprove it in the 45-day period. *Id.* at 46. The facts here are entirely different. Despite hearing the House of Representatives' challenge to the Compact on an expedited schedule, the Florida Supreme Court has yet to rule.[5] Moreover, we do not attack the overall validity of the Compact. PPI seeks only a finding that Part III.E.2 of the Compact, the provision authorizing banked card games, is contrary to IGRA and thus illegal.[6]

The Federal Defendants also contend that there is no standard by which this Court can evaluate the Secretary's actions. Fed. Ds' Opp. at 19. To the contrary, the APA and IGRA offer all necessary guidance. The APA dictates that the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be - arbitrary, capricious, an abuse of

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[4] The Federal Defendants' reliance on *Pueblo of Pojoaque v. Norton*, Civ. 03-713 BB/LFG (*see* Fed. Ds' Opp. at 12) is equally unavailing. *Pojoaque* involved (a) a ruling in April 2003 that found the Tribe's pleading inadequate, and (b) *dicta,* in an unreported ruling in February 2004, which held simply that the Tribe (not a third party like PPI) could not challenge elements *in its own Compact*, particularly when the issues it wished to raise were already pending before another court!

[5] PPI, Inc. refrained from bringing suit until now under the reasonable belief that an imminent decision by the Florida Supreme Court could moot the issue. But while the Florida Supreme Court heard oral arguments on January 30, 2008, nearly five months ago, it has yet to issue a decision, forcing PPI, Inc. to bring the instant suit on the eve of the Tribe's unveiling of table games, in an effort to protect its interests.

[6] The impact of the Compact's severability clause on such a ruling (*see* Fed. Ds' Opp. at 27) is a question of contract between the Tribe and the governor and is not before this Court.

discretion, or otherwise *not in accordance with law*." 5 U.S.C. § 706(2)(A) (emphasis added). IGRA provides that Class III gaming is lawful on Indian land, only if: "(1) the governing body of the tribe having jurisdiction over the 'Indian land' on which gaming is to take place authorizes class III gaming by adopting an 'ordinance' or resolution that is then approved by the NIGC Chairman; (2) *the gaming is located in a state that permits such gaming*; and (3) the gaming is conducted in conformance with a "tribal-state compact" that regulates such gaming. *Citizens Against Casino Gambling in Erie County*, 471 F. Supp. 2d at 304 (*citing* § 2710(d)(1)) (emphasis added). Because the Compact allows gaming that Florida does not otherwise permit, it violates IGRA.

The Federal Defendants disavow any responsibility for this undoubted impact of the Compact, arguing the "Secretary's action does not authorize the gaming if the gaming is not lawful under IGRA." Fed. Ds' Opp. at 15. When a compact takes effect because the Secretary took no action on it within 45 days, the compact is deemed to take effect "only to the extent it is consistent with the provisions" of IGRA. 25 U.S.C. § 2710(d)(8)(C). The Secretary argues that PPI suffers no harm because the Secretary's "deemed" approval did not include any illegal provision in the Compact. This defense, yet another "Catch-22" argument, would distort IGRA beyond recognition. The Secretary would have this court believe that even if PPI is correct that the compact illegally authorizes the Tribe to offer banked card games, the Secretary's "deemed" approval of the compact did not actually include that illegal provision, and therefore the Secretary cannot be sued for approving a provision that he should not be deemed to have approved, even though he did approve it and even though it has taken effect and even though the Tribe will be offering blackjack, baccarat and chemin de fer on June 22. This Court should not

adopt the Federal Defendants' fiction that they did not approve the illegal provision in the Compact; the plain reality is that they did.

Defendants also argue that the "Secretary's action is not appropriate for judicial review because he has been accorded standardless discretion by the statute." Fed. Ds' Opp. at 18. But there is a presumption in favor of reviewability, *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), and "absolute discretion" exists only where a statute leaves the courts "no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413 (1971). IGRA provides the necessary standards for this case. Moreover, the factors that generally support unreviewability[7] are not present here.

Although the compact-approval provisions of IGRA confer some discretion upon the Secretary, that discretion is not unfettered, nor does it involve a subject area that requires particular deference. *Artichoke Joe's v. Norton*, a case involving a comparable challenge to a tribal-state gaming compact, persuasively rejected this argument. 216 F. Supp. 2d 1084, 1115 (E.D. Cal. 2002), *aff'd* 353 F.3d 712, 719 n. 9 (9th Cir. 2003). There, like here, the Secretary argued that § 701(a)(2) barred review of plaintiffs' claims. *Id.* at 1115. The Court rejected the argument, explaining that "the plaintiffs seek review of agency action, as opposed to a discretionary decision to forego enforcement of a statute, [so] neither *Chaney* nor § 701(a)(2) bars review of the plaintiffs' claims." *Id. (citing Robbins v. Reagan,* 780 F.2d 37, 45 (D.C. Cir. 1985)) (emphasis added). That holding applies here, as well.

[7] Such factors include political, economic or managerial choices that are inherently not subject to judicial review or agency action that is based on some specialized knowledge or expertise. *See, e.g., Local 2855, AFGE (AFL-CIO) v. United States*, 602 F.2d 574 (3d Cir. 1979).

C. Neither the Tribe nor the State is an indispensable party.

1. The Federal Defendants adequately represent the Tribe.

The Federal Defendants are mandated by law to represent the interests of the Tribe, and have done so diligently in this situation. IGRA requires the Secretary to act in accord with the federal government's trust obligations to tribes. 25 U.S.C. § 2710(d)(8)(B); *see also Artichoke Joe's*, 353 F.3d at 719, n.10. For this Compact, "the Secretary and the Tribe[] have virtually identical interests," as was the held in *Artichoke Joe's*. 216 F. Supp. 2d at 1119.

Defendants' indispensable party argument is undermined by their own actions. The Federal Defendants have been stalwart advocates of the Tribe's interests in securing a gaming compact, and actually threatened to impose a compact on Florida if the state did not sign a compact. Seminole Tribe of Florida's Response to the Petition for Writ of Quo Warranto, *Florida House of Representatives*, SC07-2154, (Dec. 3, 2007) (attaching letter from Carl J. Artman, Assistant Secretary of the Interior – Indian Affairs, to Hon. Charlie Crist (Nov. 5, 2007)) ("Please be advised that the Department will issue Class III gaming procedures if a signed Tribal-State compact is not submitted by November 15, 2007.") The Federal Defendants are vigorously defending the Compact in this case, and have done so in two suits that preceded it. It is also telling that the Tribe has not intervened in all three lawsuits in which the Secretary was a party – plainly because it was content with the Secretary's representation of its interests -- but intervened in other litigation relating to its Compact where the Secretary was not a party. *See, e.g.,* Seminole Tribe of Florida's Motion to Join, *Florida House of Representatives*, SC07-2154, (Nov. 20, 2007).

The defendants cannot plausibly assert that there is a conflict of interest between the Federal Defendants and the Tribe that precludes the Secretary from representing the Tribe here. *Artichoke Joe's*, 216 F. Supp. 2d at 1119. Although the Tribe and the federal government

were previously engaged in a lawsuit over when the government would impose a compact on Florida, that dispute evaporated as soon as the Compact was signed. *See* Order at 2, *Seminole Tribe*, Civ. No. 07-60317 (Nov. 20, 2007). Indeed, the Secretary failed to disclose to this Court that he declared in that lawsuit that "[t]here is presently no case or controversy between the Seminole Tribe of Florida and the [federal] Defendants."[8] Secretary's Memorandum of Supporting Authorities That This Action No Longer Presents An Active Case Or Controversy, Is Moot And Should Be Dismissed at 1, *Seminole Tribe,* Civ. No. 07-60317 (April 16, 2008) at 1. Accordingly, there is no basis in this case for the concern articulated by the District Court in *Gulfstream Park Racing Ass'n v. Crist,* No. 4:07-540-RH-WCS (filed Dec. 28, 2007), that the Tribe might not be adequately represented.

2. Governor Crist Adequately Represents the Interests of the State

Governor Crist executed the compact on behalf of the entire State; indeed, before the Florida Supreme Court he claimed full authority under IGRA and the Florida Constitution to act on behalf of the state. *See, e.g.,* Hon. Charles J. Crist, Jr.'s Response to the Petition for Writ of Quo Warranto, *Florida House of Representatives*, SC07-2154 (Dec. 3, 2007).[9] In this lawsuit, he vigorously defends his actions on behalf of the state. *See, e.g.,* Crist's Opp. at 6 ("The Compact provides significant benefits to the State"). Notably, only the Federal Defendants argue that the governor cannot represent the state in this lawsuit. See Fed. Ds' Opp. at 28 (*citing Kickapoo Tribe*, 43 F.3d at 1498).

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[8] Nor does the Tribe contend that such a controversy exists. The Tribe has asked the court to administratively stay its proceeding in the event the Florida Supreme Court rules that the existing Compact is invalid.

[9] To borrow from a French king, the governor's position has been, "*L'etat c'est moi.*"

The Federal Defendants again rely on *Kickapoo Tribe* on this question (*id.*), and again do so in error. After the state supreme court ruled that the governor could not sign a compact without authority from the state legislature, the governor and the tribe asked a federal court to declare the compact valid. *Kickapoo Tribe*, 43 F.3d at 1494. Under those circumstances, the governor plainly was not an adequate representative of the state. *Kickapoo Tribe v. Babbitt,* 43 F.3d 1491, 1498 (D.C. Cir. 1995). Here, in contrast, the Florida Supreme Court has not issued a ruling on that question. Nothing impairs Governor Crist's position as representative of the state of Florida. Indeed, due to his critical role in negotiating and implementing the Compact, no one is better situated to represent the State's interests with respect to the Compact. Under the Compact, the governor or his designee plays a significant role in the administration and regulation of the Tribe's Class III gaming. See Compact, pts. III.T & VIII.A.

II. PPI, INC. WILL BE IRREPARABLY HARMED BY THE DEFENDANTS' ACTIONS IF INJUNCTIVE RELIEF IS NOT GRANTED

PPI,'s customer survey determined that if the Seminole Casinos offer blackjack, baccarat, and other banked card games, Pompano Park will lose substantial business. *See* PPI, Inc. Memo at 7. This determination accords with commonsense expectations of the real world. The Seminole Tribe paid $50 million, up front, for the right to offer Class III games under the Compact, which include slot machines and banked card games. The Tribe did not pay that money without expecting to siphon substantial business from Pompano Park and others.

The results of the PPI survey reinforce this view, as do public reports about the market for gaming venues in Florida. *See, e.g.,* John Holland, *Seminole Tribe hits jackpot as Broward County tracks stumble – Gap set to widen with table games,,* SOUTH FLORIDA SUN-SENTINEL, June 15, 2008 ("On June 22, the gap gets much wider, as the Seminole tribe exclusively offers blackjack and baccarat at its Hollywood Hard Rock Hotel & Casino. Broward

County's three racetrack casinos, meanwhile, limp into the slow summer months with shallow profits and few immediate prospects for improvement.") (Attached as Exhibit A). Defendants counter with conclusory allegations that poll results are "speculative and based on conjecture." *See* Fed Ds' Opp. at 34-35. Contrary to the Defendants' protestations, determinations with respect to irreparable harm are made on the basis of both record evidence and a court's practical experience with the world. Both of those factors point to the irreparable nature of PPI's injuries. *See, e.g.,* 9 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2948.1 at 153-56 ("the injury need not have been inflicted when application is made or be certain to occur; *a strong threat* of irreparable injury before trial is an adequate basis.")

The Defendants suggest, incorrectly, that an injunction would prove an inadequate remedy. *See* Fed. Ds' Opp. at 10 (Plaintiff's claims are based on "the conjecture that the Tribe would not embark on games based upon an adjudication that is not binding on the Tribe.") To the contrary, the Tribe's spokesman has stated that the Tribe will comply with any legal ruling. *See, e.g.,* Jim Freer, *FL Tracks Wary as Tribal Gaming Expands,* newsbloodhorse.com, posted June 13, 2008 (Attached as Exhibit B). And because the governor is the principal protector of the interests of the entire state in the compact, an injunction against him will eliminate state approval of the illegal games authorized by the Compact. Similarly, an order that the Federal Defendants rescind their publication of the Compact would eliminate its validity.

III. THE BALANCE OF HARMS AND PUBLIC INTEREST WEIGH IN PPI, INC.'S FAVOR.

Ordering public officials to comply with the law imposes no injury on them. IGRA does not give the governor or the Federal Defendants the right to disregard the law in pursuit of other goals, no matter how worthy or politically advantageous they may seem at the moment. *See, e.g., Kickapoo Tribe*, 827 F. Supp. at 46. The public interest will be strongly

served by entering the preliminary injunction requested by PPI. It is always in the public interest to prevent the violation of law. *See Johnson v. USDA*, 734 F.2d 774,788 (11th Cir. 1984). So, too, it is in the public interest to encourage and support open and fair competition. *Mark Dunning Indus. v. Perry*, 890 F. Supp. 1504, 1518 (M.D. Ala. 1995).

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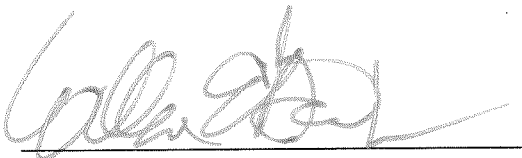
Dated this 19th day of June, 2008.



Wilbur E. Brewton
Florida Bar No.: 110408
Jack M. Skelding, Jr.
Florida Bar No.: 134704
Brewton Plante, P.A.
225 South Adams Street, Suite 250
Tallahassee, Florida 32301
Telephone: (850) 222-7718
Facsimile: (850) 222-8222
e-mail: wbrewton@bplawfirm.net
jskelding@bplawfirm.net
Counsel for Plaintiff

And

OF COUNSEL:

David Overlock Stewart
Amy E. Craig
ROPES & GRAY
One Metro Center
700 12th Street NW, Suite 900
Washington, D.C. 20005-3948
Telephone: (202) 508-4600
Facsimile: (202) 508-4650
e-mail: David.Stewart@ropesgray.com
Amy.Craig@ropes.gray.com

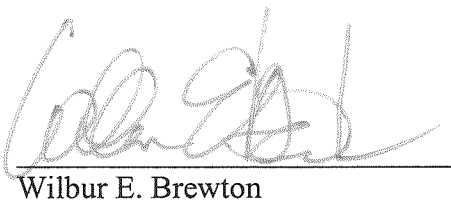
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following parties via electronic notification through the Court's ECF system, this 19th day of June, 2008:

Jody H. Schwarz, Esquire
Environmental and Natural Resources Division
Department of Justice
P.O. Box 663
Washington, D.C. 20044-0663
Email: Jody.Schwarz@USDOJ.gov
Counsel for Dirk Kempthorne and George Skibine

Edward J. Passarelli, Esquire
Environmental and Natural Resources Division
Department of Justice
P.O. Box 663
Washington, D.C. 20044-0663
Email: Edward.Passarelli@USDOJ.gov
Counsel for Dirk Kempthorne and George Skibine

Christopher M. Kise, Esquire
Foley & Lardner, LLP
106 East College Ave.
Suite 900
Tallahassee, FL 32301
Email: ckise@foley.com
Counsel for Governor Crist



Wilbur E. Brewton

Exhibit A

sun-sentinel.com/news/local/broward/sfl-flbgambling0615sbjun15,0,6497578.story

South Florida Sun-Sentinel.com

Seminole Tribe hits jackpot as Broward County tracks stumble

Gap set to widen with table games

By John Holland

South Florida Sun-Sentinel

June 15, 2008

It may not feel like Las Vegas, Atlantic City or even Biloxi, but Broward County has, somewhat reluctantly, become the Southeast's gambling mecca.

Two distinct gambling centers, actually.

One is well-funded, backed by the governor and a source of riches to the Seminole Tribe's 3,200 members. The other consists of financially strapped racetrack casinos, overlooked by tourists andundermined by legislators, some lawmakers and gaming experts charge.

On June 22, the gap gets much wider, as the Seminole tribe exclusively offers blackjack and baccarat at its Hollywood Hard Rock Hotel & Casino. Broward County's three racetrack casinos, meanwhile, limp into the slow summer months with shallow profits and few immediate prospects for improvement.

This year the tribe is expected to make profits of more than $1.2 billion, primarily from its signature hotels in Hollywood and Tampa. Officials at the three racetracks say they are barely breaking even after spending tens of millions of dollars renovating their facilities.

Taxpayers are also getting much less than they bargained for when they approved Amendment 4, authorizing slot machines for Broward County, two years ago. So far this fiscal year, which ends June 30, the casinos have contributed $116 million to state coffers, compared to pre-vote estimates of about $250 million annually.

"The competitive disparity between the Seminoles and the racetracks in Broward County is enormous any way you slice it," said Joe Weinert, vice president of Spectrum Gaming Group in Atlantic City, which analyzes the gambling industry nationwide. "The way it's set up there, they aren't even close."

That's not what was envisioned in 2004, when almost 70 percent of Broward voters approved the slot machine amendment, which was designed to close the gap between racetracks and the tribe. It passed despite strong opposition from then-Gov. Jeb Bush and conservative North Florida legislators.

Unable to defeat the measure, Bush and his allies set out to destroy it, State Sen. Steve Geller, D-Hallandale Beach, and others say. Legislators imposed a 50 percent tax rate, among the highest in the country, and allowed the casinos to open just 12 hours each day, while the Seminoles never close.

"I believe that the Legislature, especially the House, designed the laws and the tax rate to make it impossible for the racetracks to make any money," said Geller, a strong supporter of the tracks. "The Florida Legislature was forced into this by the voters, but they never accepted what the voters told them to do."

A compact reached between Gov. Charlie Crist and the Seminoles late last year estimates that tribe profits from gambling operations are likely to eclipse $2 billion within the next few years. Gulfstream Park and The Mardi Gras Racetrack & Gaming Center, both in Hallandale Beach, and the Isle Casino at Pompano Park, had combined net revenues of just $240 million over the past 12 months, state records show.

According to state records, Gulfstream and Pompano Park have seen monthly revenues from gambling double over a year ago, while Mardi Gras has crept up slightly. Profits remain elusive.

Executives at all three tracks say they are so short of cash they've had to cut advertising and promotion budgets at a time when the tribe is advertising more than ever.

And gamblers have lots of choices.

Jane Allen, of Vero Beach, said she and her husband used to go to Pompano Park, but now come to the Hard Rock on most Saturdays instead. The reason? The Seminoles, flush with cash, give away much more money and more cars in daily drawings than their competitors.

"I really like them both, but the promotions are why we come here," Allen said Saturday. "I've won some things, the most was probably a couple of thousand [dollars]. That's nice."

The situation for casinos worsened late last year when Crist reached an agreement giving the Seminoles exclusive rights to table games and high-stakes poker. In return the tribe will give the state 10 percent of its first $1 billion in gaming revenue, with a guaranteed minimum of $100 million annually.

Weinert, the gaming analyst, said local racetrack operators are partly to blame because they had unrealistic expectations. "If you look around the country, racetracks are never going to be on a par with Indian casinos; they are just different types of operations," Weinert said.

The differences can be seen in the amount of tourists visiting the casinos, local officials said.

"In terms of our research, the racetrack casinos are not primarily a reason people visit Broward," said Francine Mason, spokeswoman for the Greater Fort Lauderdale Convention & Visitors Bureau. "Their target audience is mostly people who live within driving distance.

"The Seminoles, on the other hand, have been more proactive," Mason said. "They've worked with us at trade shows in London and Germany, and they draw people from all over."

John Holland can be reached at jholland@sun-sentinel.com or 954-385-7909.

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Exhibit B

FL Tracks Wary as Tribal Gaming Expands

by Jim Freer
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The Seminole Tribe of Florida is preparing for the June 22 launch of blackjack and baccarat at its Hollywood, Fla., casino located 10 miles from Gulfstream Park, one of the racetracks that filed suits to stop the Seminole gaming expansion.

The Seminoles will be Florida's only casino operator with those two popular table games. They are "gaining another advantage while all we are striving for is a level playing field," said Steve Calabro, vice president of gaming for Gulfstream parent Magna Entertainment Corp.

A compact the Seminoles signed Nov. 17, 2007, with Florida Gov. Charlie Crist gives them exclusive rights to blackjack and baccarat at their seven Florida casinos. The compact also permitted the Seminoles to upgrade from Class II slot machines to Class III Las Vegas-style machines, and requires them to begin paying state government a portion of their gaming revenue.

Gulfstream, harness track Isle Racing & Casino at Pompano Park, and Greyhound track Mardi Gras Race Track and Gaming have Class III machines on which their tax payments to the state are at a higher percentage than the Seminole payments.

The Supreme Court of Florida is preparing to rule on a suit filed against Crist by Florida House Speaker Marco Rubio, in which Gulfstream has an amicus brief. The suit, filed Nov. 19, 2007, seeks to overturn the compact and require the state legislature to approve any agreement with the Seminoles on slots and other gaming.

On June 4, Pompano Park filed a suit in U.S. District Court in the Northern District of Florida seeking an injunction to prevent the Seminoles from offering blackjack and baccarat. Defendants are Crist and two top officials of the U.S. Department of the Interior, which regulates tribal gaming.

Marc Dunbar, an attorney who represents Gulfstream and MEC, said he expects Florida's Supreme Court will rule on Rubio's suit before it begins a five-week recess July 11. That court may not have ruled yet because it might not have a unanimous decision, said Dunbar, a partner in the Pennington law firm.

If the court rules in favor of Rubio, Dunbar expects Crist could call a special session of the legislature to seek approval of his compact or a similar version. Rubio's suit focuses on separation-of-powers issues. But some legislators also believe the Seminoles should pay a higher rate of their revenue to the state.

The Seminoles are not a defendant in either suit. They have installed Las Vegas-style slots at their three South Florida casinos, including the glitzy Seminole Hard Rock Hotel and Casino, where they are putting in their first blackjack tables.

Barry Richard, an attorney representing the Seminoles, said the tribe believed it had a duty to "act expeditiously" in adding new slot machines and table games because of the revenue they will provide to the Florida government. Court rulings that would require the Seminoles to cease their new gaming "are among possibilities," Richard said.

"We will comply with the law," he said, emphasizing that the Seminoles are adding games under an agreement approved by the Interior Department.

Had Crist not signed an agreement with the Seminoles, they would have been able to upgrade to Class III slots without making payments to the Florida treasury. The federal Indian Gaming Regulatory Act allows a tribe to offer any games offered by other casinos in a state.

The Seminoles' payments start at $100 million this year and can rise to as much as 25% of their annual net gaming

revenue in Florida. Indian Gaming Report, which monitors Tribal casinos, estimates the Seminoles had more than $1 billion in gaming revenue in 2006.

Gulfstream and the two other racetrack casinos in Broward County pay the state 50% t of net slots revenue. Calder Race Course would pay that tax rate on slots if parent Churchill Downs Inc. builds a casino at the track in Miami Gardens.

Calder is located six miles from the Seminole Hard Rock. Officials at Calder and Gulfstream maintain that the Hard Rock's expansion is providing it some gaming dollars that local residents might otherwise spend betting on horse races.

In several quarterly earnings reports and during analyst calls, MEC has termed results of Gulfstream's casino as disappointing. But Gulfstream's slots results have been improving this spring, according to the Florida Division of Pari-Mutuel Wagering.

Gulfstream had $26.2 million in slots play on 1,221 machines in May 2007. Its slots play rose to $42.2 million on 823 machines in May 2008, according to state statistics.

Gulfstream opened its casino in November 2006, and has faced a challenge in generating casino traffic in months other than its January-April live racing season. This year, Gulfstream is benefiting from a better mix of slot machines and an improved program for marketing and giveaways of cars and other prizes, Calabro said.

Calabro noted that Gulfstream now offers afternoon simulcasts, including Calder and Belmont Park, and that some racing fans also are playing slot machines. Last spring, it could not begin offering full-card simulcasts until 6 p.m.