UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

TARANCE CRAWLEY; DEBRA ROTH, TRACI BROWNLEE and WILLIAM KIVIMAKI Plaintiffs, vs. CLEAR CHANNEL OUTDOOR, INC.; and BALLY GAMING INC.; Defendants.	)	Case No.: 8:10-cv-01238-EAK-MAP

LIMITED INTERVENOR SEMINOLE TRIBE OF FLORIDA'S MOTION TO DISMISS FOR FAILURE TO JOIN AN INDISPENSABLE PARTY AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT THEREOF

Limited Intervenor Seminole Tribe of Florida, by and through its undersigned counsel and pursuant to Federal Rules of Civil Procedure 12(b)(7) and 19 and Local Rule 3.01, hereby moves to dismiss Plaintiffs' Second Amended Complaint in the above-captioned matter with prejudice.[1] Plaintiffs' Second Amended Complaint should be dismissed for the following reasons:

I. INTRODUCTION

Plaintiffs' case, while based in part on a claim arising under the Florida Statutes, is also a collateral attack on the validity of the Tribe's 2007 Gaming Compact with the State of Florida

[1] The Tribe has moved to intervene in this case for the sole and limited purpose of filing this motion to dismiss pursuant to Fed. R. Civ. P. 19 and has expressly reserved its immunity from suit. *Citizens Against Casino Gaming in Erie County v. Kempthorne,* 471 F.Supp.2d 295 (W.D.N.Y. 2007) citing *Lebeau v. United States*, 115 F.Supp.2d 1172 (D.S.D. 2000), *Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001). The only manner in which the Tribe may lawfully waive its immunity is by resolution duly enacted by the Tribal Council of the Seminole Tribe of Florida sitting in legal session. *See* Seminole Tribe of Florida Ordinance C-01-95 (Exhibit A). No such resolution has been adopted.

("the 2007 Compact"),[2] and hinges on the validity of Plaintiffs' assertion that this Compact was void. The legality of a gaming compact under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 et seq., is a federal question, and without a ruling from this Court on the legality of the Tribe's 2007 Compact, Plaintiffs' claims cannot succeed. As a party to that Compact, the Tribe is a necessary and indispensable party to this case. Because the Tribe has not consented to suit or otherwise waived its immunity, it cannot be joined and this lawsuit must be dismissed.

II. BACKGROUND

Plaintiffs' case is based upon their inaccurate assertion that the Seminole Tribe of Florida's 2007 Gaming Compact with the State of Florida was "held void" by the Florida Supreme Court, Plaintiffs' Response at 13, and that therefore the banked card games conducted pursuant to that Compact were illegal. Plaintiffs' Response To Motions To Dismiss at 2 (citing *Fla. House of Representatives v. Crist*, 999 So.2d 601, 614 (Fla. 2008)). Relying on this false statement, Plaintiffs characterize their claims as only affecting the interests of the named defendants, and aver that "[t]his case will not affect any property interest of the Tribe or the Tribe's ability to govern itself." Plaintiffs' Response at 13. This statement is also false.

To the contrary, the Florida Supreme Court in *Fla. House of Representatives v. Crist* did not declare the Compact to be void and Plaintiffs' citation to the text of that decision does not support their assertions. Instead, the court only addressed the limited question of the Governor's authority. It did not address the separate federal question of whether the 2007 Compact, which had been deemed approved by the Secretary of the Interior on January 7, 2008, was still in effect for purposes of federal law. In fact, the court expressly disavowed any intent of doing so: "Whether the Compact violates IGRA, however, is a question we need not and do not resolve."

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[2] Notice of Deemed Approved Tribal-State Class III Gaming Compact, 73 Fed. Reg. 1229 (Jan. 7, 2008).

Fla. House of Representatives, 999 So.2d at 615. Plaintiffs' assertions to the contrary, whether a compact remains in effect as a matter of federal law is a completely separate legal question. This question has not been decided by the Florida Supreme Court or any other court, and would have to be resolved by this Court before it could rule in this case.

It has been and still is the Tribe's position that the 2007 Compact remained in effect until the new 2010 Compact took effect on July 6, 2010. Significantly, the U.S. Department of the Interior (the "Department") expressly adopted this position in its decision to approve the 2010 Compact. In that decision, the Department concluded that the 2007 Compact "is in effect under Federal law" and for that reason decided that the Tribe's payment to the State of revenue shares under the 2007 Compact, that had been held in escrow, was lawful. Letter from Assistant Secretary-Indian Affairs to Chairman Cypress of June 24, 2010 at 2 (Exhibit B); *compare, e.g.*, *Langley v. Edwards*, 872 F.Supp. 1531, 1535 (W.D.La. 1995), *aff'd*, 77 F.3d 479 (5th Cir. 1996) (holding that a gaming compact under the IGRA approved by the Secretary of the Interior remained valid as a matter of federal law even though a state court had ruled that the governor of the state lacked authority to enter into it).[3]

This Court need not and should not, however, resolve the legal status of the 2007 Compact. Since the 2007 Compact was not declared void by the Supreme Court of Florida or any other court, it is sufficient for purposes of this motion that the Plaintiffs' claim cannot be

[3] Although Plaintiffs make the point that the Legislature declared that nothing in its approval of the 2010 Compact "legitimize[d], validate[d], or otherwise ratif[ied]" the 2007 Compact or the tribe's previous operation of Class III games, Plaintiffs' Response at 13, the Legislature, by necessary implication, ratified the 2007 Gaming Compact and the Tribe's prior operation of Class III games when it recognized that the Tribe "has been and is currently conducting Class III Gaming with substantial exclusivity prior to the Effective Date" of the 2010 Compact, required the Tribe to keep making the same payments under the 2007 Compact, and required the Tribe to release all of the prior payments it had made under the 2007 Compact (which had been held in escrow) to the State. 2010 Gaming Compact Between the Seminole Tribe of Florida and the State of Florida at Part XI (E) & (F).

upheld unless this Court were to determine that the 2007 Compact was void. Because the Tribe claims an interest in that Compact, it is settled law that it would be inappropriate for this Court to make such a determination in the Tribe's absence. This follows from the general rule that it is improper to litigate the status of any contract when one party to the contract is not a party to the case and cannot be joined due to its sovereign immunity. That rule applies with added force with respect to the 2007 Compact because of the far reaching potentially negative effects that would result from a decision that the 2007 Compact was somehow voided by the decision of the Supreme Court of Florida. As detailed below, a determination by this federal court that the Tribe's 2007 Compact was void could have significant negative repercussions for the Tribe.

III. ARGUMENT

The Seminole Tribe of Florida is a necessary and indispensable party in this action because it is a party to the 2007 Compact that Plaintiffs erroneously claim is void. As Plaintiffs recognize, courts routinely hold that tribes are indispensable parties to suits to "invalidate, enforce, or interpret a contract to which the tribe was a party." Plaintiffs' Response at 11-12, n.4 (collecting cases). Plaintiffs argue this widely held rule is inapplicable in this case because the 2007 Compact the Tribe claims an interest in has already been declared void. This is an incorrect statement of fact that is based on a misinterpretation of the Court's ruling. The Florida Supreme Court never held that the 2007 Compact was void as a matter of federal law under the IGRA, and the Tribe has always maintained and still maintains that the 2007 Compact remained in effect as a matter of federal law despite that Court's ruling. Because the Tribe has an undisputed interest in the Compact and has not consented to suit or otherwise waived its sovereign immunity, it cannot be joined and this suit must be dismissed for lack of jurisdiction under Rule 19.

The Tribe is both a "necessary" party under Rule 19(a) and "indispensable" under Rule 19(b). The courts employ a two-part inquiry in determining whether a party is both necessary and indispensable:

> Rule 19 states a two-part test for determining whether a party is indispensable. First, the court must ascertain under the standards of Rule 19(a) whether the person in question is one who should be joined if feasible. If the person should be joined but cannot be (because, for example, joinder would divest the court of jurisdiction) then the court must inquire whether, applying the factors enumerated in Rule 19(b), the litigation may continue.

Focus on the Family v. Pinellas Suncoast Transit Authority, 344 F.3d 1263, 1279-80 (11th Cir. 2003) citing *Challenge Homes, Inc. v. Greater Naples Care Ctr., Inc.,* 669 F.2d 667, 669 (11th Cir.1982). Under Rule 19(a) a party is "necessary" if "in the person's absence complete relief cannot be accorded among those already parties," or if "that person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may … as a practical matter impair or impede the person's ability to protect that interest." Fed. R. Civ. P. 19(a)(1) and (2).[4] Under Rule 19(b), determining whether a party is "indispensible" involves a determination of "whether in equity and good conscience the action

[4] Rule 19(a) provides:

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." Fed. R. Civ. P. 19(b).[5]

It is a longstanding rule that parties to an agreement like a compact are not only "necessary" but also "indispensable " in actions in which claims are made regarding the validity of that agreement. "No procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable." *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975) *cert. denied* 425 U.S. 903 (1976) (emphasis added) (citing *Broussard v. Columbia Gulf Transmission Co.*, 398 F.2d 885 (5th Cir. 1968); *Keegan v. Humble Oil & Refining Co.*, 155 F.2d 971 (5th Cir. 1946); *Tucker v. National Linen Service Corp.*, 200 F.2d 858 (5th Cir. 1953)); *see also, e.g.*, *Enterprise Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir. 1989) quoting *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537 (10th Cir. 1987); *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 547 (2nd Cir. 1991). "The general rule is that Joint obligees (the parties to a contract whom an obligation is owed) are not only necessary, but indispensable." 7C Wright, Miller, and Kane, Federal Practice and Procedure § 1613 (3d ed. 2007); *see also, e.g.*, *Harrell v. Sumner Contracting Co., v. Peabody Peterson Co.,* 546 F.2d 1227, 1228-29 (5th Cir. 1977) ("The rule generally applied by

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[5] R 19(b) provides:

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

federal courts is where two or more parties are joint obligees, they are indispensable parties in an action for enforcement of that obligation."); Plaintiffs' Response at 12, n.4, collecting cases.

The courts have therefore recognized that tribes that are parties to challenged contracts, including gaming compacts,[6] are therefore necessary and indispensable parties. *See, e.g.*, *Wilbur v. Locke*, 423 F.3d 1101, 1113-14 (9th Cir. 2005) *cert. denied*, 546 U.S. 1173 (2006) (holding that Indian tribes were necessary and indispensable parties to a gaming compact and noting that "the general rule is … all parties to a contract are necessary in litigation seeking to decimate that contract") *overruled on other grounds*, 130 S.Ct. 2323 (2010); *American Greyhound Racing v. Hull*, 305 F.3d 1015 (9th Cir. 2002) (holding that Indian tribes who were parties to gaming compacts in Arizona were both necessary and indispensable parties to a case involving a challenge to the legality of gaming under that compact and dismissing the case under Rule 19); *United States ex rel. Hall v. Tribal Dev. Corp.*, 100 F.3d 476 (7th Cir. 1996) (Indian tribes necessary parties to actions seeking to rescind contracts to which they were parties); *Fluent*, 928 F.2d 542 (2nd Cir. 1991) (tribe an indispensable party to action seeking to invalidate leases to which it was a party); *McClendon v. United States*, 885 F.2d 627, 633 (9th Cir. 1989) (tribe an indispensable party to an action to enforce a lease agreement signed by the tribe); (*Enterprise Mgmt. Consultants,* 883 F.2d at 894 (tribe an indispensable party to an action seeking to validate a contract where the tribe had sought to invalidate that same contract in a separate action).

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[6] The fact that the agreement at issue in this case is a compact does not lessen the import of this general rule. A compact is a contract. *Texas v. New Mexico*, 482 U.S. 124, 128 (defining a compact as a contract which when approved by Congress has the force of federal law); *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1556 (10th Cir. 1997), *cert. denied*, 522 U.S. 807 (1997) ("A compact is a form of contract."); *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wash.2d 734, 749 (Wash. 1998) ("Tribal-state gaming compacts are agreements, not legislation, and are interpreted as contracts.")).

As discussed below, the courts have long recognized that Indian tribes have a sovereign right not to have their legal rights and obligations judicially determined without their consent. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). As a result, courts have routinely dismissed cases attempting to challenge agreements to which tribes are parties even though doing so would leave plaintiffs without an adequate forum to bring their case, noting that tribal immunity outweighs the interests of plaintiffs in litigating their claims. *See infra* at 16.

1. The Tribe is a "necessary" party and may not be joined

As a party to the 2007 Compact, the Tribe is a necessary party to this case. Any adverse determination by this Court as to the legal status of the 2007 Compact would have significant present and future repercussions for the Tribe, even though the 2007 Compact has been superseded by the Tribe's 2010 Compact. Because the Tribe has not waived its immunity in this case, it may not be joined.

a. The Tribe is a necessary party

As a party to a challenged gaming compact, the Tribe has a compelling "interest" in this litigation that will be impaired "as a practical matter," rendering it a necessary party. *Am. Greyhound*, 305 F.3d at 1023 (*quoting* Fed. R. Civ. P. 19(a)(2)). Plaintiffs argue that the Tribe has no legally protected interest in this case that is "directly implicated" asserting that Plaintiffs "do not – and need not – seek a declaration as to the validity of the Tribe's prior compact" because "[t]hat compact has already been held void in a separate suit." Response at 13. Plaintiffs further claim that "the Tribe cannot claim a legally protected interest in a void and defunct compact that is not the subject matter of Plaintiffs' suit." *Id.* But Plaintiffs' entire case is premised on their claim that the 2007 Compact is "void and defunct" as a result of the decision of the Supreme Court of Florida – a claim that incorrectly characterized what the Court decided and

that the Tribe disputes. Plaintiffs' assertion is also contrary to the decision of the Department of Interior in its letter of June 24, 2010 where the Department ruled that the 2007 Compact "is in effect under Federal law." Exhibit B. This claim is very much in dispute in this case. *See* Clear Channel Outdoor, Inc.'s Motion to Dismiss Plaintiff's Amended Complaint at 6-7. Plaintiffs may not simply gloss over this material issue in dispute in this case in order to claim the Tribe lacks an interest in this case.

This is the very situation faced by the United States Court of Appeals for the Ninth Circuit in the *American Greyhound* case. In that case, Plaintiffs attempted to argue that tribes who were parties to a gaming compact were not necessary to a case involving a claim that the gaming was unlawful under the Compact because it was outlawed by the State and because the Governor lacked authority to enter into the compact. *Am. Greyhound*, 305 F.3d at 1024. According to the Court, the Tribe need not *establish* that it has a legally protected interest before it can satisfy the necessary party standard under Rule 19, but need only *claim* that it has such an interest. *Id.* Under Rule 19(a) "[i]t is the party's *claim* of a protectable interest that makes its presence necessary." *Id.* (emphasis in original); *see also Dewberry v. Kulongoski*, 406 F.Supp.2d 1136, 1147 (D.Or. 2005). It would be circular to say the least to hold that a party claims no interest in an action under Rule 19(a) because it has not yet established that interest. *Id.*; *see also Clinton v. Babbitt*, 180 F.3d 1081, 1088-89 (9th Cir. 1999) (holding tribes were necessary parties in a case challenging leases to which the tribes were parties before the leases went into effect as a matter of law). The fact that ultimate resolution of the Tribe's rights under the 2007 Compact depends on the legal status of that Compact does not alter this analysis. *See, e.g., Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456 (9th Cir. 1994) (rejecting the argument that tribes were not

necessary parties because their status depended on a determination as to the legality of the statute that created their rights).

What is critical for this analysis is whether the Tribe's "interests may well be affected *as a practical matter* by the judgment that its operations are illegal." *Am. Greyhound,* 305 F.3d at 1024 (emphasis in original); *see also Dewberry*, 406 F.Supp.2d. at 1147 (holding that tribes are necessary parties to a lawsuit challenging whether state law prohibits gaming activities and whether the Governor had the authority to enter into the compact and dismissing the case because they could not be joined due to their immunity).

The fact that Plaintiffs seek no relief directly against the Tribe in this case does not lessen the Tribe's interest in this case.[7] A determination that the Tribe's 2007 Compact was void could mean that the Tribe's banked card games were conducted illegally for at least some period of time prior to July 6, 2010. Such a determination could have dire and immediate consequences for the Tribe, even though the 2007 Compact has been superseded by the 2010 Compact.

First, such a determination would greatly damage the Tribe's business reputation and credibility. While the 2008 decision by the Florida Supreme Court created some confusion in the gaming industry about the status of the 2007 Compact, the Tribe, acting on advice of counsel, consistently maintained its position that the Compact remained in effect as a matter of federal law and represented this position to its vendors. A contrary determination by this Court would necessarily undermine the Tribe's credibility and make it more difficult for vendors to rely on the Tribe's representations in the future.

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[7] The Tribe does not claim an interest in the case because Plaintiffs are seeking damages against the Tribe. Rather, the Tribe is claiming an interest in this case because it depends on resolving whether a contract the Tribe was a party to was voided or not. As a party to that contract, the Tribe claims an interest in this case, which is all that is required to qualify as a necessary party under Rule 19(a).

Second, a determination that the 2007 Compact was void could limit the gaming vendors available to provide equipment and services for the Tribe's gaming facilities, since the licenses of those vendors who supported the Tribe's operations could be jeopardized in other jurisdictions, such as Nevada and New Jersey. *See* Nev. Rev. Stat. §§ 463.715, 720 (2009); N.J. Admin. Code §19:51-1.10 (2010). If vendors who supported the Tribe's gaming operations have their licenses revoked or suspended, then the Tribe could lose the services of its vendors. Without those vendors, the Tribe's gaming operations would have great difficulty operating and certainly would be far less successful due to the lack of games and technical support.

Third, a determination that the Tribe's banked card games were conducted under a void compact could jeopardize the ability of the Tribe and its employees to be licensed in other gaming jurisdictions. As the Tribe seeks to diversify, there are likely to be a number of other instances where the Tribe might desire to invest in gaming opportunities or conduct gaming under the laws of other jurisdictions. A negative determination in this case could compromise the "suitability" of the Tribe and its employees for licensing for years to come.

Finally, contrary to the assertion of the plaintiffs, this suit does "directly implicate[] the tribe's governing authority …" Response at 11. The banked card games at issue in this suit were approved as lawful by the Seminole Tribal Gaming Commission, which operates pursuant to a gaming ordinance approved by the Chairman of the National Indian Gaming Commission on July 10, 2006. *See* http://www.nigc.gov/Portals/0/NIGC%20Uploads/ReadingRoom/gamingordinances/seminoletribefl/seminoleflamend071006.pdf. Under the Tribe's gaming ordinance, the Tribe's Gaming Commission has the responsibility to "promulgate rules governing the conduct of all games authorized by a compact or Secretarial procedures or IGRA … ." Seminole Gaming Ordinance

Sec. 2-1.15. The rules governing banked card games authorized by the 2007 Compact were approved by the Tribal Gaming Commission on May 20, 2008. (Exhibit C). A determination in this case that the 2007 Compact was void would effectively reverse the approval of those rules by the Gaming Commission and thus undermine the authority of the Gaming Commission to regulate gaming on the Tribe's lands.

b. The Tribe Cannot Be Joined Because it Has Not Waived Its Immunity

The Tribe has not waived its immunity from suit either in this case or with regard to the 2007 Compact, and it may not be joined in the suit. As general matter, the Tribe enjoys sovereign immunity from suit. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo*, 436 U.S. at 58. Suits against Indian tribes are precluded unless the tribe explicitly waives its sovereign immunity or Congress expressly abrogates it. *See Kiowa Tribe v. Manufacturing Techs., Inc.*, 523 U.S. 751, 754 (1998); *Oklahoma Tax Comm'n v. Citizen Band Potowatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940); *see also, e.g. Perry v. Seminole Tribe of Florida*, 2009 WL 2365892 at *1 (M.D.Fla. 2009) (Kovachevich, J.).

The Tribe has not waived its immunity in this case, nor has Congress abrogated it. In enacting the IGRA, Congress abrogated tribal immunity only to a limited extent by authorizing states to sue tribes for the limited purpose of seeking to "enjoin a Class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact." 25 U.S.C. § 2710(d)(7)(A)(ii). Congress also provided that state gambling laws could be enforced against tribes where applicable, but only by the federal government. 25 U.S.C. § 2710(d)(7)(A)(iii). There is no private right of action to enforce a gaming compact under IGRA or to enforce state

gambling laws against tribes in the absence of a compact, *see, e.g., Hein v. Capitan Grande Band of Diegueno Mission Indians*, 201 F.3d 1256, 1260 (9th Cir. 2000); *Florida v. Seminole Tribe,* 181 F.3d 1237 (11th Cir. 1999); *Dewberry*, 406 F.Supp.2d at 1145-46, and whether a compact is in effect is purely a question of federal law. *Cabazon Band of Mission Indians v. Wilson,* 124 F.3d 1050, 1055-56 (9th Cir. 1997).

Congress has not, therefore, abrogated the Tribe's immunity from having the legality of its Compact collaterally challenged in a lawsuit. *Dewberry*, 406 F.Supp.2d at 1146. (Plaintiffs apparently recognize this, as they have not sought to bring their claims directly against the Tribe, but rather sought an end around the Tribe's immunity by seeking relief from the Tribe's vendors). Because the Tribe has not waived its immunity and in the absence of abrogation of that immunity by Congress, it may not be joined.[8]

2. The Tribe is an Indispensable Party under Rule 19(b)

Under Rule 19(b), when a necessary party cannot be joined, the court must determine whether "in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." Fed. R. Civ. P. 19(b). In doing so, the courts will look at the following equitable factors:

- first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties;
- second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided;
- third, whether a judgment rendered in the person's absence will be adequate; and
- fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Id.

[8] As discussed in the Tribe's Motion to Intervene, the courts have recognized tribes' right to move to intervene for the limited purpose of seeking dismissal under Rule 19 without waiving their immunity as to the substantive claims in the case.

When a case involves a necessary party with sovereign immunity, however, the court's discretion to examine these equitable factors is significantly diminished. The Tribe has an interest in "its sovereign right not to have its legal duties judicially determined without consent." *Enterprise Mgmt. Consultants* 883 F.2d at 894 (citations omitted) ("[i]n addition to the effect this action would have on the Tribe's interest in the contract, the suit would also abrogate the Tribe's sovereign immunity by adjudicating its interest in that contract without its consent."). "There is very little room for balancing of other factors set out in Rule 19(b) where a necessary party under Rule 19(a) is immune from suit because immunity may be viewed as one of those interests compelling by themselves." *Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1496 (D.C. Cir. 1995); *Fluent*, 928 F.2d at 548; *see also*, e.g. 3A Moore's Federal Practice ¶ 19.15 at 19-266 n.6 (1984). "The rationale behind the emphasis placed on immunity in the weighing of rule 19(b) factors is that the case is not one 'where some procedural defect such as venue precludes litigation of the case. Rather, the dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent.'" *Fluent*, 928 F.2d at 548. To the extent there is any room for balancing the Rule 19(b) factors at all in this case, they all weigh strongly in favor of dismissal.

The first factor, prejudice to the parties, includes prejudice to the absent party. *Am. Greyhound*, 305 F.3d at 1024; *Dewberry*, 406 F.Supp.2d at 1148. Because the Tribe has a legally protected interest in the validity of its 2007 Compact, that interest will be irrevocably impaired if this case is adjudicated in the Tribe's absence. *Id.*; *see also, e.g. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 327 F.Supp.2d 995, 1001(W.D. Wis. 2004) ("[a]ny judgment touching on the validity of the [gaming] compact would be prejudicial to the Nation and to the state because of their strong interests as parties to the compact at issue."). As

discussed above, a declaration by a federal court that the Tribe's 2007 Compact had been invalidated could cause significant present and future injury to the Tribe. The fact that this case involves the import of a prior decision does not lessen the prejudice to the Tribe. *See Confederated Tribes of the Chehalis Reservation v. Lujan*, 928 F.2d 1496 (9th Cir. 1991) (rejecting argument that the Tribe would be prejudiced because the action seeks only to enforce prior decisions and dismissing the case because the Tribe was an indispensable party).

The second factor asks whether relief in this case can be tailored in such a way as to lessen the prejudice. It cannot. Plaintiffs' entire case hinges on the presumption that the Tribe's 2007 Compact was invalidated by the Florida Supreme Court's decision, a presumption that is incorrect and which the Tribe very much disputes. If Plaintiffs succeed in establishing that predicate, the Tribe will be severely prejudiced as a result, and any relief fashioned in this case "would not protect the tribes from other potential effects of the declaration that the gaming conducted by the tribes pursuant to their compacts is illegal." *American Greyhound*, 305 F.3d at 1025.

As to the third factor, because Plaintiffs' case relies upon establishing the legal predicate that the 2007 Compact is void as a matter of federal law, no adequate remedy may be fashioned in the Tribe's absence. The Tribe as a sovereign has a sovereign right not to have its rights adjudicated in its absence. Plaintiffs have attacked the validity of a gaming compact entered into by the Tribe and any ruling on that score would have adverse effects on the Tribe. *Lomayaktewa*, 520 F.2d at 1326 ("[t]he adverse effects of the invalidation of the lease will be visited upon the Hopi Tribe").

Finally, although there is no adequate forum available to Plaintiffs to bring this case in the absence of a waiver of the Tribe's immunity, that factor does not outweigh the others. As

courts have ruled time and again, "this result is a common consequence of sovereign immunity, and the tribes' interest outweighs the plaintiffs' interest in litigating their claims." *Dewberry*, 406 F.Supp.2d at 1148 (quoting *Am. Greyhound*, 305 F.3d at 1025); *see also Pit River Home & Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1102-03 (9th Cir. 1994). The courts have "regularly held that the tribal interest in immunity overcomes the lack of an alternative remedy or forum for the plaintiffs." *Am. Greyhound*, 305 F.3d at 1025; *see also, e.g.*, *Lac du Flambeau*, 327 F.Supp.2d at 1001 ("[t]he principle of sovereign immunity overrides plaintiffs' interests in suing") *Confederated Tribes of the Chehalis Reservation,* 928 F.2d at 1500 (same); *Fluent*, 928 F.2d at 547 (same); *Enterprise Mgmt. Consultants* 883 F.2d at 894 (same).

IV. CONCLUSION

For the foregoing reasons, the Second Amended Complaint must be dismissed for lack of jurisdiction.

CERTIFICATE OF CONFERENCE

I hereby certify that I have conferred with counsel of record in compliance with Local Rule 3.01(g) in a good faith effort to resolve the issues raised by this motion, and state: (1) counsel for plaintiffs object to such filing; and (2) counsel for defendants Bally Gaming, Inc. and Clear Channel Outdoor, Inc. do not object to the filing of the motion.

Respectfully submitted this 23rd day of November, 2010

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed on this court's CM/ECF website this 23rd day of November, 2010, which will cause service to be made upon the following:

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