UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CITY OF DULUTH, Plaintiff, v. FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA, Defendant.	Civ. No. 0:14-cv-00912 SRN/LIB (Related Case Nos.: 5-89-163, 5-94-82 and 09-cv-2668) **REPLY MEMORANDUM IN IN OPPOSITION TO MOTION OF FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA TO DISMISS THE COMPLAINT**

I. INTRODUCTION

The plaintiff City of Duluth (herein "Duluth") asserts two distinct causes of action in its Complaint. [Doc. No. 1]. Both involve breach of contract theories and both are asserted against the Defendant Fond du Lac Band of Lake Superior Chippewa (herein "Band").

The breach of contract alleged in Count I is based on the 1986 Commission Agreement between Duluth and the Band. [Doc. No. 13-3]. Duluth's claim involves the Band's application to the Secretary of the Interior (Secretary) to place a parcel of land located in Duluth, and which the Band owns in fee, into trust for the Band's benefit and to manage the parcel as reservation land. The parcel in question is located in the heart of downtown Duluth at 17-27 North Second Avenue East (herein "Carter parcel").

The breach of contract alleged in Count II is based on the 1994 Agreement. [Doc. No. 13-5]. Duluth's claims involves the Band's lobbying of the National Indian Gaming

Commission (NIGC) following the court's grant of summary judgment in the related case of City of Duluth v Fond du Lac Band of Lake Superior Chippewa, D. Minn. 09-cv-2668; *See*, 708 F.Supp. 2d 890.

The Band's motion to dismiss, which is asserted under Fed.R.Civ.P. 12(b)(6), should be denied because the Band has failed to demonstrate that Duluth's Complaint does not contain sufficient factual matter to state a claim to relief that is plausible on its face or that Count II is barred by *res judicata* or *collateral estoppel*.

II. FACTUAL HISTORY

Duluth has provided the court with a detailed factual history both in its complaint [Doc. No. 1] and in its memorandum of law supporting its motion for preliminary injunction [Doc. No. 23]. To avoid repetitive briefing, Duluth adopts and incorporates, as if fully set forth herein, the facts and legal arguments presented by Duluth in its Complaint and its Motion for Preliminary Injunction and supporting documents.[1]

III. ARGUMENT

A. Legal Standards

1. Rule 12(b)(6) requires the court to apply a plausibility standard.

When evaluating a motion to dismiss, the court assumes the facts in the complaint to be true and construes all reasonable inferences from those facts in the light most favorable to the plaintiff. Morton v. Becker, 793 F.2d 185, 187 (8th Cir. 1986); Rasmusson v. Chisago County, 2014 U.S. Dist. LEXIS 3102, 7 2014 WL 107067

[1] Doc. Nos. 1, 21, 23, 24 w/ex. (Eng Affidavit), 25 w/ex. (Johnson Affidavit), 28 w/ex.

(D. Minn. 2014)(SRN). Although a pleading need not contain detailed factual allegations, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). "[R]easonable inferences supported by the facts alleged" must be granted in favor of a plaintiff. Id. at 595. "This tenet does not apply, however, to legal conclusions or formulaic recitation of the elements of a cause of action..." Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 594 (8th Cir. 2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Id. (quoting Twombly, 550 U.S. at 570). The complaint must provide "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. While the Court ordinarily does not consider matters outside the pleadings, *see* Fed. R. Civ. P. 12(d), it may consider exhibits attached to the complaint and documents that are necessarily embraced by the pleadings, Mattes v. ABC Plastics, Inc., 323 F.3d 695, 697 n.4 (8th Cir. Iowa 2003), and public records, Levy v. Ohl, 477 F.3d 988, 991 (8th Cir. Mo. 2007); Rasmusson , 2014 U.S. Dist. LEXIS 3102, 9, 2014 WL 107067.

2. Minnesota Contract Interpretation Standards.

Under Minnesota law, when a court is called upon to interpret contractual language it first determines whether the language is ambiguous, and if it is unambiguous, the court is to construe the contract as a matter of law. Cherne Contr. Corp. v. Marathon Petroleum Co., 578 F.3d 735, 740 (8th Cir. Minn. 2009), *citing,* Denelsbeck v. Wells

Fargo & Co., 666 N.W.2d 339, 346 (Minn. 2003). Whether a contract is ambiguous is a question of law for this court to decide. Id. *citing* Art Goebel, Inc. v. North Suburban Agencies, 567 N.W.2d 511, 515 (Minn. 1997). A contract is ambiguous when the language is susceptible of more than one reasonable interpretation. Dykes v Sukup Mft. Co., 781 N.W.2d 578, 582 (Minn.2010). In determining the question of ambiguity, "the court is not to give words cramped, unnatural, or out-of-context readings but to assess 'the meaning assigned to the words or phrases in accordance with the apparent purpose of the contract as a whole.'" Cherne Contr. Corp., 578 F.3d at 740, *quoting*, Art Goebel, Inc., 567 N.W.2d at 515. The court assigns unambiguous contract language its plain meaning. Savela v City of Duluth, 806 N.W. 2d 793, 796 (Minn.2011). Ultimately, the goal is to "ascertain and enforce the intent of the parties." Valspar Refinish, Inc. v Gaylord's, Inc., 764 N.W.2d 359, 364 (Minn.2009). The court must look to the contract language when determining the parties' intent, but in order to ascertain intent, the court must also look to the contract as a whole — "the terms of a contract are not read in isolation." Halla Nursery, Inc. v City of Chanhassen, 781 N.W. 2d 880, 884 (Minn.2010). To understand the parties' intent, the court places itself "in the position of the parties at the time the agreement was negotiated and executed and, upon consideration of the agreement as a whole and the plain meaning of the language used, viewed in the light of the surrounding circumstances, endeavoring to arrive at what the parties must have reasonably contemplated." Midway Center Assc. v. Midway Center, Inc., 306 Minn. 352, 356, 237 N.W.2d 76, 78 (Minn.1975). Courts should also avoid a construction that would render one or more provisions meaningless. Current Technology Concepts, Inc. v

Irie Enterprises, Inc. 530 N.W. 2d 539, 543 (Minn.1995). Intent is not ascertained "by a process of dissection in which words or phrases are isolated from their context, but rather from a process of synthesis in which the words and phrases are given a meaning in accordance with the obvious purpose of the contract *** as a whole." Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc., 666 N.W.2d 320, 324 (Minn.2003) *quoting*, Republic Nat'l Life Ins. Co. v Lorraine Realty Corp., 279 N.W.2d 349, 354 (Minn. 1979) (alteration in original). And, the court cannot assume that the parties intended an illogical result. Id. at 326. The law does not presume that the parties intended a result that is "incredible, inequitable, and contrary to the obvious purpose" and intent of the contract. Kane v Oak Grove Co., 221 Minn. 500, 503, 22 N.W.2d 588, 590 (Minn.1946). " '* * * Words which admit of a more extensive or more restrictive signification must be taken in that sense which will best effectuate what it is reasonable to suppose was the real intention of the parties.' " Id., *quoting*, 12 Am.Jur., Contracts, s 231.

B. Analysis

1. Count I (Breach of the 1986 Commission Agreement).

The Band asserts three reasons in support of its argument that Duluth's claim presented in Count I of the Complaint fails to state a claim. It argues that (1) despite Duluth's factual allegation, it is not seeking to create "Indian Country" as that term is defined in paragraph 3(a) of the 1986 Commission Agreement; (2) even if Section 10 of the 1986 Commission Agreement applied to the Band's application, its effect is made dormant by the 1994 Agreements; and (3) the Court should allow the Department of

Interior to exercise its primary jurisdiction over any challenge to the Band's trust application.

a. Duluth has presented sufficient factual allegation, supported by the public record, to demonstrate that the Band intends to create "Indian Country" and that Duluth's statement of its claim satisfies the plausibility standard of Rule 12(b)(6) .

The Band maintains that the definition of "Indian Country" found in paragraph 3(a) of the 1986 Commission Agreement limits the consent requirement of Section 10 to those situations where the Band seeks to add trust land to its reservation under 25 U.S.C. §467, and does not apply to the initial trust application under 25 U.S.C. §465. It also argues that Duluth's allegation that one of the Band's purposes is to reestablish its reservation land base is unsupported.

Assuming for argument only that Section 10 is only implicated if the Band seeks reservation status for previously converted trust land, the Band's argument that it only seeks trust status is refuted by the Band's own position presented in its trust application. [Doc. No. 13-10]. In its application, the Band justified the conversion of the Carter parcel on several grounds. [Doc. No. 13-10, pg. 2] As the first purpose for the application, the Band advised the Secretary that "Acquisition of the Subject Property would serve three primary purposes: (1) reestablishing the Band's reservation land base lost as a result of federal policies…" Id. Duluth's allegation that the Band is seeking to expand its reservation is not unsupported —Duluth is simply choosing to believe the Band's own representation to the Secretary.

That one of the Band's purposes for the application is "reestablishing the Band's reservation land base lost as a result of federal policies" is also the understanding of the Bureau of Indian Affairs-Minnesota Agency (BIA-MA). When the BIA-MA first notified Duluth of the Band's application in its December 16, 2011 letter, it advised Duluth that "[a]cquisition of the Subject Property would serve three primary purposes: (1) reestablishing the Band's reservation land base lost as a result of federal policies following the 1854 Treaty of LaPointe between the United States and the Lake Superior Chippewa;…" [Doc. No. 13-11, pg. 1).

The BIA-Midwest Regional Office (BIA-MR) shares the same understanding of the Band's purpose and intent. In its July 10, 2012 letter to the Advisory Council on Historic Preservation the BIA-MR advised the council that "the Band wants to have the property taken into trust to enable its Reservation Business Committee to manage its as Reservation land." [Doc. No. 13-14, pg.1]. The BIA-MR also shared the Band's intent with Duluth. [Doc.No. 26, Ex. 4]. The BIA- Minnesota Agency also shared this same understanding with Duluth. [Doc. No. 25-1, Ex.2].

Duluth has presented sufficient factual allegations in the Complaint that supports its claim that the Band has violated Section 10 of the 1986 Commission Agreement. Duluth's allegations are supported by the Band's own representations to the Secretary and the department's administrative agencies. *See, Complaint* [Doc. No. 1¶¶ 52, 54, 55, 56, 57, 58]. Under the Rule 12(b)(6) standards discussed above, the court must assume these facts to be true and resolve all inferences in Duluth's favor. These factual allegations are sufficient to conclude that the Band's purpose for seeking trust status for

the Carter parcel is to add the parcel to its reservation land base and to manage the land as reservation land. Even under the Band's own interpretation of Section 10 and paragraph 3(a), Duluth has presented sufficient factual assertions to support a plausible conclusion that the Band has breached the 1986 Commission Agreement.

b. Before applying for trust status Section 10 required the Band to obtain Duluth's consent.

The Band argues that Duluth's claim is not ripe because the Band has not sought a reservation proclamation under 25 U.S.C. § 467. It claims that the contract allows it to remove all the land it wants from Duluth's control by placing it into trust status but need only obtain Duluth's consent when it seeks to add the land to its reservation. This interpretation of Section 10 would render the contract language meaningless because it would not serve to protect Duluth from the harms it sought to avoid; namely, the removal of land from its governmental control.

Both parties are bound to the contract language and the fact is that the contract is silent as to the timing for Duluth's consent. Interpretation of an ambiguity may be appropriate at the summary judgment stage, but is not an appropriate role for the court to assume to determine a 12(b)(6) motion. At this stage, the only issue for the court to determine is whether the contract language is ambiguous. Cherne Contr. Corp. 578 F.3d at 740 (The existence of an ambiguity is a question of law). The Band's interpretation cannot be correct because the result would be that the parties intended the consent requirement to operate only after the harm Duluth sought to avoid was sustained. Such an interpretation renders Section 10 meaningless. An interpretation that renders a

provision of a contract meaningless violates a central rule of contract interpretation; namely, that courts should also avoid a construction that would render one or more provisions meaningless. Current Technology Concepts, Inc., 530 N.W. 2d at 543.

Both the City and the Band agree that the creation of Indian Country involves a two-step process. Trust status is step one and the reservation declaration is step two—neither exists in isolation. The Band does not dispute that Section 10 required Duluth's consent; thus, the dispute here is one of the timing of Duluth's consent —prior to the commencement of the process or halfway through the process. It would be meaningless to Duluth for the Band to obtain consent only after the land was converted to trust land because the harm to Duluth's governmental interests occurs when the land is placed into trust status, not when it is added to the reservation. It is at the beginning point that Duluth, under federal statute and regulation, would lose the right to tax and regulate the land. *See, 25 U.S.C. §465; 25 C.F.R §1.4(a).*

If the Band's interpretation is an accurate expression of the parties' intent, then Section 10 would have been written differently. The parties agreed that "the creation of Indian Country, as defined herein, is dependent upon the approval of the creation of Indian Country, as defined herein, by the City of Duluth, and that, without the approval and consent of the City of Duluth, Indian Country, as defined herein, cannot be created…" *1986 Commission Agreement, ¶10, at pg. 15,* [Doc. No. 13-3]. This language, read with paragraph 3(a), demonstrates that the parties were discussing the two step trust/reservation process and the requirement for Duluth's consent at both stages of

the process. This intent was expressed in the very first consent given by Duluth. In paragraph 10(a) Duluth consented as follows:

> The City of Duluth hereby agrees to approve the transfer by the Fond du Lac Band of the land described on Exhibit A attached hereto, which the Fond du Lac Band has purchased, to the United States of America to hold in trust for the Fond du Lac Band, pursuant to 25 U.S.C. §465 and the making of such land part of the Fond du Lac Reservation pursuant to 25 U.S.C.§467.

Id.

If as the Band contends, the parties intended that Duluth's consent to a conversion to Indian Country was only required when trust land was declared part of its reservation, then Duluth's initial consent to the trust conversion of the casino parcel, as expressed in paragraph 10(a) would have been unnecessary. But the parties deemed Duluth's consent to the initial trust conversion necessary in 1986 and so, consent is required today.

The Band's interpretation also requires the court to ignore the apparent purpose of the contract as a whole. The rules of contract interpretation do not allow the court to put blinders on and ignore the contract's purpose. Halla Nursery Inc., 781 N.W.2d at 884, *citing*, Art Goebel Inc., 567 N.W.2d at 515. "The cardinal purpose of construing a contract is to give effect to the intention of the parties as expressed in the language they used in drafting the whole contract." Art Goebel, 567 N.W.2d at 515.

The essential purposes of the 1986 Commission Agreement are presented in Paragraphs A and B of the agreement, which provide as follows:

> A. The City of Duluth and the Fond du Lac Band desire to encourage economic development and growth within the City of Duluth.

> B. By combining the talents and resources of the City of Duluth and the Fond du Lac Band, economic development activities not otherwise possible may be accomplished.

[Doc. No. 13-3 at pg. 1]

Creating economic development that benefitted both parties was the purpose of the agreement. The parties also agreed that joint economic activities required the creation of "Indian County" and this process required the "consent and approval of the City of Duluth." *Id.* at ¶*D*. The parties also agreed that Duluth's consent was "an essential element to the operation of the Commission". *Id.*, ¶*E).*

Duluth demonstrated its concern over the loss of it governmental authority in paragraph 10(c). The Band agreed to "adopt and make applicable all zoning regulations, building codes, fire codes and life safety codes applicable in the City of Duluth, on all Indian Country, as defined herein." *Id.*¶*10(c).* The clear purpose of the Commission Agreement was to create an entity that jointly engaged in economic development initiates in the city of mutual benefit to Duluth and the Band. The clear purpose of Section 10 was to prevent Duluth's loss of tax base and regulatory control over land within the city unless Duluth consented. It would be a hollow and meaningless protection if the parties intended to allow the Band to create as much trust land in the city as it wanted, but only required the Band to obtain Duluth's consent if the trust land was subsequently added to the Band's Reservation. That result is absurd.

The Secretary has broad authority to add trust land to reservations. 25 U.S.C. § 476. The federal regulatory processes provide Duluth with only a limited ability to stop additions to the Band's Reservation without initiating litigation. *See,* Doc. No. 28-1, Ex.

3. Duluth protected itself by negotiating for the right to consent at the beginning of the two-phase process because it is at the beginning of the process rather than the mid-way point where Duluth has a meaningful opportunity to protect itself from unbeneficial losses of its tax base and regulatory control. The Band's interpretation would leave Duluth with a meaningless power and would deprive it of the protections that it bargained for, clearly something the parties did not intend.

c. The dormancy clause of the 1994 Agreement is not currently operative because the lease has been cancelled.

The Band argues that Section 10 is currently made dormant by Section 2 of the 1994 amendments to the Commission Agreement because the dormancy clause applies to Section 10 "for so long as the Sublease is in effect". *See,* Doc. No. 13-7, Ex. 7. In its memorandum supporting its motion for preliminary injunction [Doc. No. 23], Duluth fully addressed the fact that the Sublease is not in effect at the current time and that the Section 2 is not currently operative. Thus, the Band's arguments about dormancy are moot because the dormancy clause was rendered inoperative by the Secretary's cancellation of the lease. *See,* [Doc. No.28-1, Ex. 18].

The amendments to the Commission Agreement addressed the impact of the cancellation of the sublease prior to the end of the term in Section 3. That section provides that "[i]f the Sublese is terminated before the expiration of its Term, Sections 1 through 4, 9 through 13 and 15 through 38 of the 1986 Commission Agreement shall thereafter become effective and binding on the City and the Band, subject to federal law." [Doc. No. 13-7, Ex. 7, pg. 3]. The Band does not cite to any federal law that prohibits the

Band from entering into a contract in which it agrees to obtain the consent of an impacted local government prior to initiating a fee-to-trust-reservation process. No such prohibition is provided in §465 or in §467. No such prohibition exists in the §465 implementing regulations. No such prohibition is found in 25 U.S.C. Ch. 3 (contracts with Indians). The Band is currently pursuing a trust application without the consent of Duluth. The Band is engaged in an ongoing breach of contract.

Band argues no agreements are currently operative. This argument ignores the fact that the parties foresaw the possibility that the commission would cease to exist and addressed the Band's ongoing obligations in that circumstance. In Section 10 the parties agreed that "the provisions of this Article 10 apply whether or not the Commission is in existence." [Doc. No. 13-3, pg. 15]. Thus, the Band agreed that even if the existence of the commission ended, it would be bound by the provision that required it to obtain Duluth's consent.

This argument also ignores the fact that the 1986 Commission Agreement was more than an agreement to develop a casino. The NIGC's NOV did not address the entirety of the scope of the agreement and did not invalidate all of the provisions of the 1986 Commission Agreement, including Section 10. The NIGC's NOV was expressly limited to "performance under the 1994 Agreements of those provisions identified in this NOV as violating IGRA." [Doc. No. 13-8, Ex. 8, pg. 18.] The NIGC did not invalidate the 1986 Commission Agreement in its entirety, including Section 10, nor could it since it has no jurisdiction over contracts that do not involve gaming. *See*, Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n, 466 F.3d 134, 135 (D.C. Cir. 2006)("The

Commission has the authority to investigate and audit certain types of Indian gaming, to enforce the collection of civil fines, and to "promulgate such regulations and guidelines as it deems appropriate to implement the provisions" of the Act.") Thus, the agreement, to the extent it does not relate to the Band's gaming activities remains in existence.

d. Section 10 was not made dormant by the 1994 agreements which limited application of the dormancy clause to the casino parcel.

Even if one assumes that the dormancy clause is operative despite the Secretary's action, the clause does not apply to the Carter parcel because the dormancy clause was limited by its express terms to be operative only at the "Sublease space". The section reads as follows:

> "Section 2. Sections 1 through 4, 7(a), 9 through 13 and 15 through 38 of the 1986 Commission Agreement, insofar as they pertain to gaming activities and Ancillary Businesses **at the Sublease space**, shall be dormant and of not force or effect for so long as the Sublease is in effect."

[Doc. No. 13-7, Ex. 7, pg. 3]

By this express language the parties limited the operation of Section 2 to gaming activities and ancillary businesses "at the Sublease space". The Carter parcel is not the location of the "Sublease space". *See,* [Doc. No. 13-6, Ex. 6, pg. 5 (defining "Sublease space" as the "Premises, which are subleased to the Band…"). The Carter parcel is not an "Ancillary Business", which by its definition is limited to "businesses operating or to be operated at the Sublease space". Id., pg. 2. The Band attempts to make the dormancy clause applicable to the Carter parcel by arguing that the phrase "pertains to" includes anything the Band might do which has a beneficial impact on the "gaming activities and Ancillary Businesses at the Sublease space." Later in this memorandum, Duluth

discusses the Band's efforts to utilize the interpretive canon of *noscitur a sociis*, a canon that "counsels that a word is given more precise content by the neighboring words with which it is associated." Maracich v. Spears, 133 S. Ct. 2191, 2201 (2013). Duluth argues, *infra*, that the Band's use of the canon is misplaced. However, that canon is properly applied here to limit the phrase "pertains to" to the context and purpose of the 1994 Agreements. Duluth refers the court to Duluth's full argument, *infra*, and limits discussion here to Duluth's contention that the phrase "pertains to" does not have the expansive meaning given to it by the Band.

In Maracich, the Court was required to determine the scope of the phrase "in connection with" provided in a section of the statute providing exceptions to the otherwise prohibited uses of license data under the Driver's Privacy Protection Act of 1994 (DPPA), 18 U.S.C. § 2721 et seq. In its discussion, the Court utilized the canon and its application to the statutory provision under consideration as follows:

> "[i]f considered in isolation, and without reference to the structure and purpose of the DPPA, (b)(4)'s exception allowing disclosure of personal information 'for use in connection with any civil, criminal, administrative, or arbitral proceeding,' and for 'investigation in anticipation of litigation,' is susceptible to a broad interpretation. That language, in literal terms, could be interpreted to its broadest reach to include the personal information that respondents obtained here. But if no limits are placed on the text of the exception, then all uses of personal information with a remote relation to litigation would be exempt under (b)(4). The phrase 'in connection with' is essentially 'indeterminat[e]' because connections, like relations, "'stop nowhere'."

Id. at 2200.

Here, the phrase "pertains to" has the same indeterminate meaning as "in connection with" and like that phrase would stop nowhere without consideration of "the

neighboring words with which it is associated." Id. at 2201. The words used in association with "pertains to" provide the precise meaning of the phrase. The phrase is associated with "gaming activities" and "Ancillary Businesses" "at the Sublease space". It does not apply to any initiative of the Band that may be motivated by a desire to protect or improve its casino investment.

The purpose of the 1994 Agreements was to resolve the dispute over the effect of the IGRA on the 1986 Agreements. *See,* [Doc. No. 13-5, Ex. 5, pg.2 ¶¶D &F]. Thus, the dormancy clause was drafted to adjust the agreements to resolve that dispute. Limiting the meaning of "pertains to" to the gaming activities and ancillary businesses at the Sublease space is consistent with the historical context of the 1994 negotiations and the purpose for the 1994 Agreements.

Because the dormancy clause does not apply to the Band's Carter parcel trust application, Section 10 of the 1986 Commission Agreement is operative and prohibits the Band's ongoing efforts to convert land within the city without first obtaining Duluth's consent.

e. The primary jurisdiction doctrine does not apply to this matter.

The Band's reliance on the primary jurisdiction doctrine is misplaced because the doctrine has no applicability to the dispute between the parties. The issue raised in Count I of the Complaint, which deals with the Band's breach of Section 10 of the 1986 Commission Agreement, is a separate issue from whether the Carter parcel is eligible to be placed into trust pursuant to 25 U.S.C. §465. Because these are two separate issues,

and because the Secretary has no jurisdiction over the applicable of Section 10 of the 1986 Commission Agreement, the doctrine is inapplicable.

Primary jurisdiction is a common-law doctrine that is utilized to coordinate judicial and administrative decision making. Red Lake Band of Chippewa Indians v. Barlow, 846 F.2d 474, 476 (8th Cir. 1988). "'[W]hen a court and an agency have concurrent jurisdiction to decide a question, the most common reason for a court to hold that the agency has primary jurisdiction is that the judges, who usually deem themselves to be relatively the generalists, should not act on a question until the administrators, who may be relatively the specialists, have acted on it.'" Id. *quoting*, K. Davis, Administrative Law Treatise, § 22:1 (1983). The doctrine is invoked sparingly, as it often results in 'added expense and delay.' Id., *quoting*, United States v. McDonnell Douglas Corp., 751 F.2d 220 (8th Cir. Mo. 1984). There is no fixed formula that courts use to determine whether to apply the doctrine. Access Telecomms. v. Southwestern Bell Tel. Co., 137 F.3d 605, 608 (8th Cir. Mo. 1998). Each case presents the question on an *ad hoc* basis, and the court considers "whether the reasons for the doctrine are present and whether applying the doctrine will aid the purposes for which the doctrine was created." Id. "'The principle is firmly established that 'in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over.'" Id., *quoting*, Far East Conference v. United States, 342 U.S. 570, 574, 96 L. Ed. 576, 72 S. Ct. 492 (1952).

Here, the Band argues that the doctrine should be applied "so that the City's objections to the proposed trust acquisition can be addressed by the Secretary of Interior, who is the federal official delegated with the exclusive authority to decide tribal trust land applications." [Doc. No. 12, pg. 20]. The Band's argument misses the point. Duluth's claim presented in Count I of the Complaint, does not involve the merits of the Band's trust application. The merits of the application are certainly presently before the Secretary and the subject of Duluth's objections presented to the Secretary. But the merits of the application are not the subject of Duluth's claim presented in Count I of the Complaint. Count I involves whether the Band breached the contract by making the application in the first instance and its continued pursuit of trust status without obtaining the City's consent. The claim does not involve the merits of the application under federal law and regulation. The Secretary has no jurisdiction to construe and rule on Section 10 nor does the Secretary have any agency expertise on the issue of the interpretation of contracts and the intent of the parties at issue in this case.

While Duluth may ultimately be successful in its objection to the Band's application, the point is that Duluth should not have been put in the position of having to assert its objection in the first place. Indeed, had the Band come to Duluth and presented its reasons for the application and its plans for the parcel, the Band and Duluth may very well have come to an agreement and the Band would have obtained Duluth's consent. But, the Band did not follow the contract procedure and continues to pursue its application in violation of the contract. Because the issues of Duluth's consent and the merits of the trust application are distinct issues that do not involve concurrent

jurisdiction of a federal agency and the court, the doctrine of primary jurisdiction has no application to this case.

2. Count II-Breach of the 1994 Agreement.

The Band asserts that Duluth, in Count II of the Complaint, fails to state a claim and advances three reasons: (1) Section 13 of the 1994 Agreement does not prohibit the Band from seeking an enforcement action from the NIGC; (2) such a prohibition would be void as contrary to public policy; and (3) the claim is barred by claim preclusion and issue preclusion. The Band's first argument essentially advances a competing interpretation of the contract language thus creating a factual issues which cannot be resolved by the Band's motion to dismiss under Rule 12(b)(6). Essentially, the Band is advancing a different interpretation of the contract then that advanced by Duluth. If the contract language is ambiguous, the Band's argument necessarily creates a question of fact as to the parties' intent that cannot be resolved through a 12(b)(6) motion.

The second and third arguments raise legal defenses that are properly rejected.

a. Section 13 prohibited the Band from lobbying for a change in the law.

The Band first argues that the language of Section 13 is limited to efforts to change the Indian Gaming Regulatory Act (IGRA), *25 U.S.C. §2701* et. seq. or other federal statutes and was not intended to address changes to federal law initiated through regulatory action. The express language of Section 13 does not provide such a limitation. The section reads as follows:

> The City and the Band agree not to seek, directly or through the use of paid lobbyists or other agents, any amendment to the Indian Gaming Regulatory

> Act of 1988, 25 U.S.C. §2701, et seq., or any other federal law, that would alter or abrogate, or cause the alteration or abrogation, of this Agreement or any of the Exhibits thereto.

[Doc. No. 13-5]

The Band does not argue that the phrase "any other federal law" cannot include regulatory action, nor can it since the 8th Circuit held that the NIGC's change in position on the parties 1994 Agreement constituted a change in law. City of Duluth v Fond du Lac Band of Lake Superior Chippewa, 702 F.3d 1147, 1153 (8th Cir. Minn. 2013) ("We agree with the district court that a binding adjudication by a federal agency, which has been tasked with interpreting and enforcing a statute enacted by Congress, represents a change in law…"). Nor does the Band deny that it lobbied the NIGC to change its position on the legality of the agreements. Instead, the Band is arguing that the contract language can only mean that when the parties drafted the language "any other federal law" they meant any other *statutory* law not any other *regulatory* law. The Band presents no evidence to support its interpretation of the phrase "any other federal law". Of course, the Band fails to present such evidence because it does not want to create a factual dispute that cannot be resolved by a motion under Rule 12(b)(6) since at this stage of the proceeding, all factual inferences must be resolved in favor of Duluth. Morton, 793 F.2d at 187 ("When evaluating a motion to dismiss, the Court assumes the facts in the Complaint to be true and construes all reasonable inferences from those facts in the light most favorable to Plaintiff.").

Instead, the Band argues that the language of Section 13 can have only one interpretation. Unfortunately for the Band, its interpretation of the language of Section

13 is not supported by the express contract language. Section 13 is not ambiguous and Duluth has presented sufficient facts to support a plausible claim under Rule 12(b)(6) that the Band violated the section.

The Band asserts that the phrase "or any other federal law" means "or any other federal *statutory* law". To support its efforts to add the word "statutory" to the express contract language the Band relies on a canon of construction known as *noscitur a sociis* . It relies upon Maracich, 133 S. Ct. 2191; and Utility Elec. Supply v. ABB Power T & D Co., 36 F.3d 737 (8th Cir. 1994). The canon "counsels that a word is given more precise content by the neighboring words with which it is associated." Maracich,133 S. Ct. at 2201.

As discussed, *supra,* in Maracich, the Court applied the canon while construing statutory language. The Court did not, as the Band does here, use the canon as a means to add a word to the extant language at issue. The case involved a suit asserting violations of the Driver's Privacy Protection Act of 1994 (DPPA), 18 U.S.C. § 2721, *et seq*. The plaintiffs alleged that the attorney defendants violated the DPPA by obtaining personal information from a state motor vehicle department to solicit the owners' participation in a lawsuit. The DPPA generally prohibits the disclosure of personal information except under exceptions provided in 18 U.S.C. §2721(b)(1)-(14). The case involved the interpretation of the exception provided in subsection (b)(4). The exception in (b)(4) permits obtaining personal information from a state DMV for use "in connection with" judicial and administrative proceedings, including "investigation in anticipation of

litigation." § 2721(b)(4). The question presented was whether an attorney's solicitation of clients for a lawsuit falls within the scope of (b)(4). Maracich, 133 S.Ct. at 2195-2196.

The exception in question authorized the use of protected data as follows:

> For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

18 U.S.C. §2721(b)(4).

The attorneys argued that they were entitled to use the data for solicitations because the solicitations were "for use in connection with any civil, criminal, administrative, or arbitral proceeding," and for "investigation in anticipation of litigation.." Id. at 2199. The Court agreed that the language, in literal terms, could be interpreted to its broadest reach to include the personal information that respondents obtained..." Id. at 2200. But, the Court, recognizing that the purpose of the DPPA was to restrict access to protected data, rejected such a broad interpretation of the (b)(4) exception and used the canon of *noscitur a sociis* to define the appropriate limits of the phrases "in connection with" and "investigation in anticipation of litigation". Id. at 2201 ("The exclusion of solicitation from the meaning of "in connection with" litigation draws further support from the examples of permissible litigation uses in (b)(4).")

Unlike the Band's efforts here, the Court did not use the canon to **add** language or delete words from the statute; instead, it used the canon to define the limits of the extant language so that the protective purposes of the DPPA were not swallowed by the exception.

Similarly, in Utility Elec. Supply, the canon was not used to add or change statutory language; rather, it was used to define the limits of the extant language. In that case, the issue was whether the electrical products distributed by the plaintiff and manufactured by the defendant were "industrial equipment" under the South Dakota Franchise Act. Id. 36 F.3d at 739. The plaintiff argued that, taken separately, the words "industrial" and "equipment" encompassed defendant's electrical products. The court noted that "the words do not stand alone, but derive meaning from their context; the words must be read in their context." Id. at 740. The court then reviewed the legislative history and concluded that the phrase "industrial and construction equipment" was limited by the other vehicle-type machines listed in the Act and that the legislature did not intend for the phrase to include electrical equipment. Id.

Here, if Duluth was using Section 13 to prevent the Band from lobbying to amend or alter any other federal law unrelated to the Indian Gaming Regulatory Act of 1988, implementing regulations, or the agreements, use of the canon would be appropriate because in that circumstance Duluth would be attempting to expand the phrase "or any other federal law" beyond its intended limitation given the context of the language. But that is not what Duluth is doing. It is limiting its claim to the limits of the contractual language given the context in which the language is used; namely, the IGRA and other federal law implementing the IGRA.

The Band's argument that the phrase must include the word "statutory" would result in an absurd interpretation. Under the Band's interpretation the language would be changed to read as follow:

> The City and the Band agree not to seek, directly or through the use of paid lobbyists or other agents, any amendment to the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §2701, et seq., or any other federal ~~law~~ **statute**, that would alter or abrogate, or cause the alteration or abrogation, of this Agreement or any of the Exhibits thereto.

The Band fails to identify the other federal statutes that would "cause the alteration or abrogation, of this Agreement..." If as the Band argues the word "statute" should be substituted for the word "law", then what "statute" did the parties intend?

The precedents cited by the Band do not support its position that the canon of *noscitur a sociis* can be used to change the extant language of a contract. It is clear that the Band lobbied the NIGC for a change in its prior legal conclusion that the agreements complied with the IGRA. The NIGC, following the Band's lobbying efforts changed its position. The 8th Circuit held that the NIGC's action constituted a change of law. Section 13 expressly prohibited the Band from doing what it did. Duluth has asserted a plausible claim which is supported by sufficient factual allegation that the Band breached the agreement.

b. Section 13 does not violate public policy.

The Band seeks to avoid its obligations under Section 13 by arguing that the anti-lobbying provision violates public policy. This argument ignores the factual context in which the Band engaged in its breach of Section 13. Given the context of the Band's breach, Section 13 does not violate public policy.

The overriding public policy related to the enforcement of contracts favors "holding parties to their agreements, which a court in similar circumstances has described as the 'dominant policy in contract cases . . . the better to promote commerce.'" Minn.

Supply Co. v. Mitsubishi Caterpillar Forklift Am., Inc., 822 F. Supp. 2d 896, 910-911 (D. Minn. 2011) (SRN/TNL), *quoting*, Servewell Plumbing, LLC v. Fed. Ins. Co., 439 F.3d 786, 791 (8th Cir. 2006) (emphasis in original).

Here, Duluth has alleged in its Complaint that the Band initiated its lobbying for a change in law only after this court granted Duluth partial summary judgment and concluded that the 1994 Agreements were valid enforceable agreements. City of Duluth v Fond du Lac Band of Lake Superior Chippewa, 708 F.Supp. 2d 890, 900 (D.Minn. 2010) ("The Court concludes that the Band has failed to demonstrate a cognizable change in the law.").

Following that ruling, on May 17, 2010, Chairwoman Diver wrote to the NIGC chair and requested the NIGC to mediate the percentage of revenue issue related to the second term of the agreements. Complaint ¶ 32. The Band also sought a stay of the pending litigation. Id. ¶33; *See also, Civ. No. 09-02668, Doc. No. 75.* The NIGC initially agreed to mediate the issue. Id. ¶34.

Then, on July 12, 2010, Magistrate Judge Erickson issued his Report and Recommendation denying the Band's motion for a continuance. *See. Civ. No. 09-2668, Doc. No.92.* In his report, Magistrate Erickson noted that "nothing in the NIGC's recent letter suggests that the NIGC intends to address the legality of the underlying 1994 Agreements." *See, Id. at pg. 17.* Magistrate Erickson also observed as follows: "Most importantly, we find the Band's contention, that we should continue this action based merely upon the potentiality of a **threat** of an enforcement action, to be very remote, if not entirely unlikely. The NIGC participated in the negotiation of the 1994 Agreements,

and the parties represented, along with the NIGC Chairman, that the 1994 Agreements complied with the provision of the IGRA……We seriously doubt that the NIGC would collaterally attack the very Judgment, which it elicited from the District, and to which the parties agreed while being represented by legal counsel, particularly when the District Court has ruled, as a matter of law, that a direct attack on the Court's Judgment is precluded by the doctrine of res judicata." *See, Id at 21.(emphasis in original).*

The NIGC next addressed its position on the 1994 Agreements on August, 2010 and advised the parties that "Based on a review of the opening statements provided by both parties, it does not appear that mediation is likely to be productive. Rather, binding arbitration appears to be the most appropriate and efficient mechanism given that the only issue to be decided under the Sublease is the appropriate percentage of gross revenue to be paid by the Tribe to the City from April 1, 2011, to March 31, 2036……It is my sincere hope that the Band and City come to a suitable agreement." *See, Civ. No. 09-2668, Doc. No.100-1.*

Thus, at the time the Band directly asked the NIGC to change its position, the NIGC was already aware that a dispute existed, the NIGC had already engaged in a review of the agreements as part of its mediation process, and the NIGC had chosen not to change its prior approval of the agreements.

This matter does not involve a circumstance where a party is engaged in whistleblowing, or making an initial report of criminal activity, or requiring an employer to rehire an employee who had engaged in grossly negligent conduct that implicated public safety considerations. The agreement did not prevent the NIGC from fulfilling its

regulatory obligations or acting on its own accord. Instead, by the agreement, the parties agreed to not engage in conduct that would cause the abrogation of an agreement that had the endorsement of the NIGC and the approval of the Secretary. Such an agreement does not do disserve to the public policy expressed through the IGRA, especially since law authorizes tribe to share gambling proceeds with local governments. *See*, 25 U.S.C. §2701(2)(b)(v). The parties agreed to remain neutral before the NIGC, and given the efforts of the parties in renegotiating these agreements, a neutrality clause served to resolve the dispute and allow the parties to move forward. Resolution of disputes through negotiation does not violate public policy and the neutrality clause in the 1994 Agreement did not impair the NIGC's ability to perform is public duties.

c. Duluth's Section 13 claim is not barred by collateral estoppel or res judicata.

Duluth's breach of contract claim presented in Count II of its Complaint is based on the Band's breach of Section 13. It is not barred by *res judicata* or *collateral estoppel.* The Band's breach of its obligation under Section 13 involves a separate breach of contract than the breach at issue in the related matter pending between the parties. The breach at issue here is not the same issue that has been previously decided by the court in the related pending matter.[2]

The Band first relies upon Lane v Peterson, 899 F.2d 737 (8th Cir. 1990) to support its *res judicata* defense. In Lane, after discussing the Restatement (Second) of Judgments, the court summarized the doctrine with the familiar rule that "a claim is

[2] The related pending matter is City of Duluth v Fond du Lac Band of Lake Superior Chippewa, (D. Minn. Civ. No. 09-2668 (SRN/LIB).

barred by res judicata if it arises out of the same nucleus of operative facts as the prior claim." Id. at 741. Whether res judicata applies involves three elements issues: (1) whether the prior judgment was rendered by a court of competent jurisdiction; (2) whether the prior judgment was a final judgment on the merits; and (3) whether the same cause of action and the same parties or their privies were involved in both cases. Id.

The Lane court also addressed the factors relevant to a determination of whether the present claim and the prior claim constitute the same claim. It instructed as follows: "we consider whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations . . . ." Id. at 742.

After discussing these general principles, the court then concluded that the claims were barred because "The cases involve precisely the same nucleus of operative facts: the Lane Companies' reorganization in bankruptcy, the establishment of the panel, the stock transfer agreement and Declaration of Trust, and the sale of the Lane Companies to Tyson. The gist of all of the claims in this case and those in Lane I is that the defendants wrongfully acquired and sold the Lane Companies and should now be made to disgorge the proceeds." Id. at 743.

The claim at issue here, contrary to the Band's assertions to the contrary, does not involve the same nucleus of operative facts nor has there been a final judgment in the earlier related action.[3] While both claims involve the same origin, *i.e.* the contract, the

[3] The related case is not yet subject to a final judgment; however Duluth has chosen to proceed with the current claim under a different suit because the actions that constitute

claims relate to different times, conduct and motivation. In the related claim, Duluth sued the Band for its failure to pay rent pursuant to the contract, a breach which occurred in 2009. The claim at issue here arises out of the Band's conduct occurring in 2010 and involves the Band's lobbying resulting in the NIGC's change of position after this court determined that the contract was valid and granted summary judgment to Duluth. Unlike Lane, Duluth's two suits involve different conduct by the Band, different motivations and different time periods. While both matters involve breach of the same contract, that is where the similarity ends.

Nor is Duluth attempting to re-litigate the same claim under a new theory as is asserted by the Band. The only similarity in theory is that both claims involve breach of contract. The underlying conduct is completely different. Thus, unlike Lane, Duluth is not taking the same conduct as issue in the related case (failure to pay rent) and applying a new theory to that conduct. Because the claims involve different matters, Duluth's claim is not barred by *res judicata.*

3. Collateral Estoppel does not bar Duluth's claim.

The Band also argues that Duluth's claim is barred by collateral estoppel and claims that Duluth's breach of contract claim was "actually and necessarily decided …in

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the breach are distinct, occurred at different times, and because the stage of the proceeding in the first proceeding is sufficiently advanced that amendment at this time would not conserve judicial resources and would delay resolution of Duluth's entitlement to payment of rent for the period 2009-2011.

The Band argues that the Rule 60(b) decision is preclusive as to prospective relief; however, Duluth's claim does not involve prospective relief, Duluth seeks damages caused to it by the Band's breach of contract that occurred during the first term of the agreement.

concluding that the availability of Rule 60(b) relief was not affected by the City's allegations about the Band." *Doc No. 12 at pg. 30.* Duluth's claim is not barred by issue preclusion because the issue of the Band's breach of Section 13 was not decided as part of the court's Rule 60(b) decision in the related case.

Issue preclusion bars re-litigation of an issue if the same issue was involved in both actions; the issue was actually litigated in the first action after a full and fair opportunity for litigation; the issue was actually decided in the first action on the merits; the disposition was sufficiently final; and resolution of the issue was necessary in the first action. John Morrell & Co. v. Local Union 304A of United Food & Commercial Workers, 913 F.2d 544, 562 n. 16 (8th Cir. S.D. 1990), *citing*, 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4416, at 137-38 (1981).

Here, Duluth raised the Band's action in the 60(b) motion as a basis to argue that the Band was not entitled to equitable relief because it had acted with unclean hands. The court ultimately did not decide that issue. Instead, the court declined to address Duluth's argument. City v Fond du Lac, 830 F.Supp. 2d 712, 717 n.2. In dicta, while discussing the Band's efforts at lobbing the NIGC, the court indicated that it could not "conclude that the Band lacks the clean hands for equitable relief" and that the Band's actions didn't change the fact that the NIGC changed its conclusion as to the validity of the agreement. Id. The court plainly did not view Duluth's Section 13 claim as necessary to the resolution of the Band's Rule 60(b) motion, nor was this claim actually litigated or decided. Whether the Band is liable to Duluth for its breach, which occurred during the

first term, is a separate question from whether the Band should be able to avoid ongoing rent obligations as a result of the NIGC's decision.

Because Duluth's new claim arises out of a separate set of facts constituting breach of contract, because the parties have not litigated that breach, and because no court has necessarily decided the issue of the Band's breach, the claim is not barred by either *res judicata* or *collateral estoppel.*

CONCLUSION

Dismissal of Duluth's action is not appropriate. The Complaint presents sufficient factual assertions to state a claim to relief that is plausible. The Complaint also provides sufficient factual content supporting a reasonable inference that the Band is liable for the misconduct alleged by Duluth. The claims are plausible and are not barred by either *res judicata* or *collateral estoppel.*

Dated this 23rd of June, 2014

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