IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

SEMINOLE TRIBE OF FLORIDA,	)	
	)	
Plaintiff,	)	Case No. 4:15-cv-00516-RH-CAS
	)	
v.	)	
	)	
STATE OF FLORIDA,	)	ORAL ARGUMENT REQUESTED
	)	
Defendant.	)	
	)	

MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS COMPLAINT

I. INTRODUCTION

The Verified Complaint ("Complaint") recites at ¶11 the history of the discussions between the State of Florida ("State") and the Seminole Tribe of Florida ("Tribe")[1] that produced a Tribal-State Class III Gaming Compact ("Compact") pursuant to the Indian Gaming Regulatory Act of October 17, 1988, 25 U.S.C. §2701, *et seq*. ("IGRA").

The Compact was executed on April 7, 2010, ratified by the Florida legislature and signed into Florida law on April 28, 2010, and approved by the Secretary of the Interior on July 24, 2010. Notice of the Compact's federal approval was published in the *Federal Register* on July 6, 2010. Complaint ¶11.

[1] The State and the Tribe collectively are known herein as the "Parties."

Upon Compact approval, the Tribe was authorized to (a) conduct certain gaming on various of its tribal lands for a term of 20 years, and (b) exercise an exclusive right to conduct banking or banked card games within the state for five years, after which the Tribe's right to conduct banking or banked card games would expire unless extended through (i) action of the Florida Legislature or (ii) the State's allowing other entities to conduct the same banking or banked card games operated by the Tribe.

The five year tribal authority for operation of banking or banked card games expired as of October 30, 2015, without extension in accordance with the Compact terms identified in the foregoing paragraph.

The Tribe filed this lawsuit on October 26, 2015, alleging that the State has (1) breached the Compact by allowing entities other than the Tribe to conduct banking or banked card games and (2) failed to negotiate with the Tribe in good faith to modify the Compact provisions controlling the tribal conduct of such games – provisions which the Tribe now finds inconvenient.

This Motion to Dismiss is grounded on two primary issues: (a) the Tribe's claims of breach do not present a federal question and (b) there is no federal jurisdiction over those claims.

The legal basis for federal jurisdiction pleaded by the Tribe is IGRA Section 11(d)(7)(A)(i), 25 U.S.C. §2710(d)(7)(A)(i). *See* Complaint ¶3. As discussed *infra*, Section 11(d)(7)(A)(i) establishes federal jurisdiction for a tribal suit only when a state fails to negotiate a Class III Gaming Compact – a predicate not present here. Consequently, the absence of federal jurisdiction means that any alleged Breach of

Compact claim against the State can only be prosecuted in state court, and then only in strict accordance with the specific conditions imposed by the Compact.[2]

IGRA Section 11(d)(7)(A)(i) establishes federal jurisdiction only when a state has failed to negotiate a Class III Gaming Compact in good faith. Here, the State negotiated and concluded the Compact in 2010, and it remains in full force and effect until August 1, 2030. However, nothing in IGRA requires any state to *renegotiate* the terms of an existing Compact. The best that can be said about the Tribe's failure-to-negotiate claim is that it is 15 years premature.

As is well-publicized, the State and the Tribe in fact have been engaged in voluntary discussions related to the Compact. However, voluntary Compact discussions do not satisfy the clear statutory requirements for federal court jurisdiction.

II. DISCUSSION

A. The Tribe's Count I Claim for Breach of Compact Does Not Present a Federal Question.

Subject-matter jurisdiction is a threshold inquiry, and a Court may not proceed until it has satisfied itself that the claims presented fall into its limited jurisdiction. "[B]ecause a federal court is powerless to act beyond its statutory grant of subject matter jurisdiction, a court must zealously insure that jurisdiction exists over a case, and should itself raise the question of subject matter jurisdiction at any point in the litigation where a doubt about jurisdiction arises." *Smith v. GTE Corp.*, 236 F.3d 1292, 1299 (11th Cir.

[2] The only remedy provided in the Compact for any State administrative decision allowing expansion of banking or banked card games to non-tribal entities is that the Tribe may make required exclusivity payments into an escrow account for a period of 12 months, and then if the State fails to act to stop such gaming, the Tribe may stop payments altogether until the gaming ceases. Compact Sec. XII(A). Such expansion would not constitute a breach, because the Tribe's only remedy contemplated in the Compact would be to retain the payments.

2001). The Tribe's Count I presents a simple breach of contract claim that does not give rise to subject-matter jurisdiction in this Court as a matter of law.

It is adjudicated that a Class III Gaming Compact is no more than a specialized contract between two governments (the State and the Tribe), and Class III Gaming Compacts are subject to the same general principles of contract interpretation applied to other contracts. *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1098 (9th Cir. 2006). *See also Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (pre-IGRA case interpreting a Compact between two state governments).

It is also adjudicated that claims for breach of contract do not give rise to federal jurisdiction.[3] *Laurent v. U.S. Tr.*, 196 F. Appx. 740, 743 (11th Cir. 2006). If the relevant statute does not provide a specific federal cause of action, "[c]ontract obligations are creatures of state law." *Giannetti Bros. Const. Corp. v. Lee Cnty., Fla.*, 585 F. Supp. 1214, 1218-19 (M.D. Fla. 1984).

Federal district courts are courts of limited jurisdiction possessing only the power authorized by the Constitution and federal statute. *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 377 (1994). The Tribe has invoked 28 U.S.C. §1331 to support its claim for jurisdiction, which provides for "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States" in the federal district courts.

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[3] In enacting IGRA, Congress expressly provided limited causes of action related to Class III gaming compacts. To this point, 25 U.S.C. §2710(d)(7)(A)(i) allows Tribes to sue states for failure to negotiate Compacts in good faith. Congress did not extend the grant of federal jurisdiction for *post hoc* disputes arising out of the *renegotiation* of terms within an existing Compact. To this point, Congress is presumed to know what it is doing and this Court should not attempt to read into IGRA a provision not found in the law. *Michigan v. Bay Mills Indian Cmty*., 576 U.S. ___, 134 S. Ct. 2024, 2034 (2014) (Courts have "no roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that" Congress may have intended otherwise). *See* Section II.B *infra*.

The Tribe's alleged violation of the Compact is cited as the basis for federal jurisdiction, but this claim does not satisfy the Section 1331 requirements.

In *Mobil Oil Corp. v. Coastal Petroleum Co*., 671 F.2d 419 (11th Cir. 1982), the Eleventh Circuit summarized the standard for determining whether a particular case falls into Section 1331's statutory grant of jurisdiction:

> For a case to arise under federal law, a right or immunity *created by that law* must be an essential element of the plaintiff's claim; the federal right or immunity that forms the basis of the claim must be such that the claim will be supported if the federal law is given one construction or effect and defeated if it is given another.
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> *Id*. (emphasis supplied).

In this case, the Tribe's claim is that the State breached the Compact by authorizing the operation of banking or banked card games by persons other than the Tribe. Complaint at ¶25. However, this claim implicates no federal right or requirement that this Court interpret federal law to reach the truth of the Tribe's claims. Rather, the dispute turns on a finding of fact as to whether the games authorized by the State are "banking or banked card games," a Compact term that does not appear in IGRA. In short, this case presents a question of private contract interpretation, not of federal statutory construction.

Nor does the fact that the Compact is an intergovernmental agreement developed pursuant to IGRA convert an alleged breach of the Compact into a federal question giving rise to jurisdiction in federal court. "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a

dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends." *Id*. (*citing Heirs of Burat v. Bd. of Levee Comm'rs*, 496 F.2d 1336, 1342 (5th Cir. 1974); *cert. denied*, 419 U.S. 1049 (1974)). That the origin of Class III gaming compacts is in federal law is irrelevant to this dispute, because a compact breach alone does not give rise to federal court jurisdiction not otherwise specifically legislated. This conclusion "comports with the fact that there is no federal interest whatever in the resolution of this controversy." *Mobil Oil,* 671 F.2d at 426.

Because the Tribe's breach of contract claim does not fall under any Constitutional or statutory grant of jurisdiction to this Court, the Complaint must be dismissed.

B. The Tribe's Claim for Failure to Negotiate a Compact Is Not Ripe and, Accordingly, There Is No Standing to Prosecute the Claims Presented.

The Tribe lacks Article III standing to bring its Count II "failure to negotiate" claim for the reason that the claim is premature. The relevant section of IGRA upon which the Tribe rests its federal claim provides:

> The United States district courts shall have jurisdiction over… any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith.
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> 25 U.S.C. §2710(d)(7)(a).

The harm recognized by IGRA for a state's failure to negotiate a Class III gaming compact, even if proven, will not accrue here until the expiration of the existing compact

on August 1, 2030. IGRA simply does not give tribes a right to litigate in federal court a dispute over existing Compact provisions.

There is no ambiguity as to the statutory term "negotiate" in IGRA to suggest that the term encompasses renegotiation of an existing compact. While the word "negotiate" has not been examined in the context of Indian gaming, the Eleventh Circuit has addressed its definition in the context of 18 U.S.C. §208(a), a law prohibiting federal government employees from working on projects in which they have a financial interest. *United States v. Schaltenbrand*, 930 F.2d 1554, 1558 (11th Cir. 1991). The court declared that the term "negotiating" is not "exotic or abstruse … requiring detailed etymological study or judicial analysis." Instead, the court found that it is a common word of universal usage: "People of ordinary intelligence would have fair notice of the conduct proscribed by the statute." *Id.*

Similarly, the term "renegotiation" is not ambiguous. The Fifth Circuit has noted that the essence of the term renegotiation is that a negotiation has previously occurred: "The only certainty encompassed by the term 'renegotiation' is that the parties are *permitted* to negotiate about the contents of the plan *once again*." *Mumford v. Glover*, 503 F.2d 878, 881 (5th Cir. 1974) (emphasis added).[4]

To reiterate, there is no IGRA provision providing any federal court jurisdiction over claims that a state has failed to renegotiate terms of an existing compact.

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[4] It is noted that *Mumford* was rendered by the Fifth Circuit some seven years prior to the creation of the Eleventh Circuit on October 1, 1981. *See* the Fifth Circuit Court of Appeals Reorganization Act of 1980, P.L. 96-452 (94 Stat. 1994). And it is established law that the decisions of the Fifth Circuit, as that court existed on September 30, 1981, are binding as precedent in the Eleventh Circuit, the district courts, and the bankruptcy courts in the Circuit. *Bonner v. Prichard*, 661 F.2d 1206, 1207 (11th. Cir. 1981).

Article III standing requires: (1) an injury-in-fact that is "actual or imminent, not 'conjectural' or 'hypothetical,'" (2) a causal connection between the injury and the complained of conduct, and (3) a likelihood that a favorable decision will alleviate the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). A plaintiff seeking to establish Article III standing "must clearly and specifically set forth facts" sufficient to satisfy each of the constitutional requirements. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). On deciding a defendant's motion to dismiss, a federal court "must evaluate standing based on the facts alleged in the complaint, and… may not speculate concerning the existence of standing or piece together support for the plaintiff." *Shotz v. Cates*, 256 F.3d 1077, 1081 (11th Cir. 2001) (citations omitted). In *Whitmore,* the Supreme Court summarized the standing element of injury-in-fact that the case or controversy must not be premature:

> To establish an Art. III case or controversy, a litigant first must clearly demonstrate that he has suffered an "injury in fact." That injury, we have emphasized repeatedly, must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to himself that is "distinct and palpable," as opposed to merely "[a]bstract," and the alleged harm must be actual or imminent, not "conjectural" or "hypothetical."
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> *Whitmore*, 495 U.S. at 155 (citations omitted).

Here, the Tribe has failed to plead Article III standing since it has not alleged any facts establishing that its IGRA claim is "actual or imminent." The Tribe's claim that the State has refused to negotiate in good faith cannot be "imminent" as the Tribe will enjoy the Compact *that it negotiated* for another 15 years. To argue that IGRA Section 2710(d)(7)(a) confers jurisdiction for renegotiation of an existing compact provision is

disingenuous. Indeed, by that logic, any Indian Tribe could repeatedly sue a state for disputes over Compact language no matter how insignificant, and there could never be any resolution or predictability regarding substantive terms of the Compact. The condition precedent for jurisdiction in this Court will ripen upon the expiration of the current Compact on August 1, 2030. Until then, the Tribe's claim is premature.

The Tribe's Complaint states:

> 28. The negotiations that led to the Compact contemplated that the five year authorization for banking or banked card games was an interim agreement and that the parties would enter into good faith negotiations for renewal prior to the end of the five-year period if there was then a history of successful implementation and compliance.

This unsupported claim is insufficient to confer standing. The plain language of the Compact contains no reference to the five-year period as merely *interim*, nor does the Compact require renegotiation. The Compact provides simply that the Tribe's right to offer those games automatically terminates after five years and a 90-day grace period, after which the State is entitled to immediate injunctive relief:

> The Tribe's authorization to offer banked or banking card games shall automatically terminate five (5) years from the Effective Date unless renewed by affirmative act of the Florida Legislature. In the event that the authorization to offer banked and banking card games is terminated, the Tribe shall have ninety (90) days to close such games after which the State shall be entitled to seek immediate injunctive relief in any court of competent jurisdiction. The Tribe expressly waives its right to assert sovereign immunity in such action for immediate injunctive relief.
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> Compact Sec. XVI(C).

The Compact is the single writing memorializing the negotiations that led to its execution, and it expressly designates a 20-year term. Even if the State had suggested that it would consider renegotiation of terms within the existing Compact after five years (as the Tribe alleges was "contemplated" but never memorialized), the fact that no such promise appears within the four corners of the Compact means that it was not part of the bargain between the Parties. "Where the essential terms of a contract are unambiguous, the court will not look beyond the four corners of the document to determine the parties' intent." *Ellinger v. United States*, 470 F.3d 1325, 1338 (11th Cir. 2006) (citations omitted). There is no ambiguity in the Compact's 20-year term.

The Compact is a fully integrated expression of the intention of the Parties, as is unequivocally declared: "[t]his Compact is the only gaming compact between the Tribe and the State." Compact Sec. II(F). The integrity of the written provisions was guaranteed by the provision that any amendment may only be made by written agreement, subject to approval by the Secretary of the Interior and legislative ratification. Compact Sec. XVII(A). Moreover, this provision excludes oral or implied modifications and the courts have made clear that "[o]ral and implied modifications precluded by a written agreement may be enforced only upon 'clear and unequivocal evidence of a mutual agreement.'" *Energy Smart Indus., LLC v. Morning View Hotels-Beverly Hills, LLC*, No. 14-CV-23284-UU, 2015 WL 4086167, at *4 (S.D. Fla. June 3, 2015) (quoting *Fid. & Deposit Co. of Maryland v. Tom Murphy Const. Co.,* 674 F.2d 880, 885 (11th Cir. 1982)).

The Tribe has neither alleged nor identified any evidence of a previous agreement, side deal or subsequent agreement to renegotiate the Compact five years into its 20-year term. Even if the Tribe had identified such evidence, it was never memorialized in the Compact and could not bind the State. The Tribe knew what it was negotiating, and that was to operate banking or banked card games for five years. The Tribe's apparent belief that it could persuade the Florida Legislature to extend the franchise was no more than that.

III. VENUE FOR THE TRIBE'S CLAIMS IS IMPROPER

Venue for the claims alleged by the Tribe is improper in the courts of the Northern District of Florida and, in the event that the Court should find that federal jurisdiction exists for the Tribe's claims, the matter should be transferred to the Middle District pursuant to 28 U.S.C. §1404(a).

Section 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought . . . ." 28 U.S.C. § 1404(a). The purpose of Section 1404 is "to prevent the waste 'of time, energy and money' and 'to protect litigants, witnesses and the public against unnecessary inconvenience and expense.'" *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964) (quoting *Continental Grain Co. v. Barge F.B.L.585*, 364 U.S. 19, 26 (1960).

The State respectfully submits that no federal court has subject matter jurisdiction over the claims pleaded by the Tribe. However, if the Court concludes that there is federal jurisdiction, then it must make the threshold determination as to whether the

Tribe's Complaint "might have been brought" in the Middle District. The Complaint might have been brought in the Middle District because "a substantial part of the events or omissions giving rise to the claim occurred" in the Middle District, as discussed *infra*. 28 U.S.C. §1391(b)(2).

In determining whether to transfer a case, there is no single dispositive factor. *Manuel v. Convergys Corp.,* 430 F.3d 1132, 1137 (11th Cir. 2005). The factors to consider include:

> (1) the convenience of the witnesses; (2) the location of relevant documents and the relative ease of access to sources of proof; (3) the convenience of the parties; (4) the locus of operative facts; (5) the availability of process to compel the attendance of unwilling witnesses; (6) the relative means of the parties; (7) a forum's familiarity with the governing law; (8) the weight accorded a plaintiff's choice of forum; and (9) trial efficiency and the interests of justice, based on the totality of the circumstances.
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> *Id.* at 1135 n.1 (11th Cir. 2005).

The basis of the Tribe's complaint is that the State has permitted gaming to occur in violation of the Compact, but there is no allegation that such gaming occurred in the Northern District. The balance of the factors points clearly to venue in the Middle District, where the operative facts in this litigation arose and, accordingly, where the relevant documents and witnesses may be found. *See* Affidavit of State Compliance Officer Ronald Williams, attached as Exhibit A.

The State has filed a lawsuit in the Middle District to enjoin tribal gaming conducted within that district in breach of the Compact. *See State of Florida v. Seminole Tribe of Florida*, Case No. 02568-VMC-TBM (M.D. Fla. filed Nov. 2, 2015). The

State's complaint specifically alleges that unlawful tribal gaming is occurring within the Middle District of Florida. Trial efficiency is best served by a consolidation of the Tribe's claims into the Middle District litigation. While it is the State's position that the Tribe lacks jurisdiction for its claims in any venue, the Tribe is certainly free to file those claims as affirmative defenses or counterclaims in the Middle District litigation.

IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court dismiss the Tribe's claims for lack of jurisdiction or, in the alternative, to transfer this matter to the Middle District pursuant to 28 U.S.C. §1404.

DATED this 17th day of November 2015.

s/ **William N. Spicola**
William N. Spicola (FL Bar No. 70732)
General Counsel
Department of Business and Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399
Telephone: (850) 488-0063
Facsimile: (850) 922-1278
william.spicola@myfloridalicense.com

Counsel of Record for Plaintiff

OF COUNSEL

Robert W. Stocker II (MI Bar No. P21040)
DICKINSON WRIGHT PLLC
215 S. Washington Square - Suite 200
Lansing MI 48933
Telephone: (517) 487-4715
Facsimile: (517) 487-4700
rstocker@dickinsonwright.com

Dennis J. Whittlesey (DC Bar No. 053322)
DICKINSON WRIGHT PLLC
1875 Eye St, N.W. - Suite 1200
Washington, D.C. 20006
Telephone: (202) 659-6928
Facsimile: (202) 659-1559
dwhittlesey@dickinsonwright.com

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