IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

MGM RESORTS INTERNATIONAL GAMING DEVELOPMENT, LLC, *Plaintiff*,	:	No. 3:15-cv-01182-AWT
v.	:	
DANNEL P. MALLOY, in his official capacity as Governor of Connecticut, DENISE W. MERRILL, in her official capacity as Secretary of the State of Connecticut, and JONATHAN A. HARRIS, in his official capacity as Commissioner of the Connecticut Department of Consumer Protection, *Defendants*.	:	DECEMBER 23, 2015

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

I. THE CLAIMED BENEFIT FROM SA 15-7 IS TOO SPECULATIVE TO SUPPORT STANDING

SA 15-7 could not be clearer; it does not authorize anyone to operate a commercial casino in Connecticut. Nor does it remotely guarantee that anyone will ever be able to operate a commercial casino in Connecticut. That should be fatal to MGM's attempt to establish standing.

MGM does not cite a single case finding standing under analogous circumstances, because there are none. Without any authority that supports its position in a similar context, MGM primarily relies on cases in the bidding context that hold that where "'the government erects a barrier that makes it more difficult for members of one group **to obtain a benefit** than it is for members of another group,' the disadvantaged group's 'inability to compete on an equal footing'

constitutes an 'injury in fact.'" *Opp.*, p. 1 (quoting *NE Fla. Chapter of Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) ("*Jacksonville*") (emphasis added)); *see also Opp.*, pp. 25-27.

The problem for MGM is that in all of the cases MGM cites there was a non-speculative benefit being conferred to the "advantaged group" that provided a basis for standing—here there is not. For example, there was no question in *Jacksonville* that the city would award contracts or in *KG Urban* that the state would either enter into a "Tribal-State gaming compact with an Indian tribe" in Region C or other "private entities" could apply for and obtain a casino license in that region. *KG Urban Enterprises, LLC v. Patrick*, 839 F. Supp. 2d 388, 394 (D. Mass.), *aff'd in part and vacated in part*, 693 F.3d 1 (1st Cir. 2012). No further legislative action was necessary for someone to obtain the benefit at issue. By contrast, here SA 15-7 expressly provides that further legislative action is necessary before anyone can operate a Connecticut commercial casino and it would be pure speculation to conclude at this point that such legislative action and approval will ever occur, let alone to hypothesize as to the form any such legislation that managed to pass would take and the legal issues—if any—that legislation would raise.

The Supreme Court has made clear that an "alleged injury is [too] . . . conjectural or hypothetical" to support standing where it "depends on how legislators respond" to future circumstances and how those legislators exercise their "policy judgment committed to the broad and legitimate discretion of lawmakers, which the courts cannot presume either to control or to predict." *DaimlerChrysler*

Corp. v. Cuno, 547 U.S. 332, 344-45 (2006) (quotation marks omitted). That should be dispositive in this case.

None of the cases MGM cites are to the contrary. Indeed, they actually undermine MGM's argument. MGM mistakenly (and surprisingly) relies on *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995), but there the Court noted the limits to bidder standing and was careful to point out that the bidder had standing only because it had "made an adequate showing that sometime in the relatively near future it will bid on another Government contract" involving the challenged benefit based on evidence that contracts raising the issue were let "at least once per year" and that the plaintiff was "very likely to bid on each such contract." *Id.* MGM has not made—and cannot credibly make—any similar allegations here. The possible future commercial casino at issue has not yet been authorized and may never be authorized, and, even if it were, MGM cannot credibly allege that it would compete for "each such" opportunity because MGM admits that it could not bid on a casino in most of Connecticut because of the 50-mile radius restriction. *See id.*; *see also Opp.*, p. 8. To find injury here would stretch the concept of imminence underlying standing far "beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is '*certainly* impending.'" *Adarand*, 515 U.S. at 211 (1995) (quotation marks omitted, emphasis in *Adarand*); *see also Construction & General Laborers' Union*, 153 F. Supp. 2d 156, 162 (D. Conn. 2001) (Thompson, J.).

MGM claims it is injured simply by being excluded from the procedure set

forth in SA 15-7. *Opp.*, pp. 25-27. But claimed procedural injuries can support standing only if they are tied to a concrete interest; the Supreme Court has held that "deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). MGM has no concrete interest here, only a speculative interest in competing for a casino opportunity that may never exist. If no Connecticut commercial casino is ever authorized (which is entirely possible), the Tribes will have expended resources to conduct the SA 15-7 process and received no benefit. There is no conceivable way that would harm MGM. Therefore, MGM's claimed harm is purely speculative and cannot support standing.

II. SA 15-7 DOES NOT EXCLUDE MGM FROM TAKING STEPS TOWARD A CONNECTICUT COMMERCIAL CASINO

MGM argues that SA 15-7 "injures MGM because it allows only the Preferred Tribes to take steps to develop a new commercial casino," but that argument has no basis in SA 15-7 or otherwise in Connecticut law and is contradicted by both SA 15-7's legislative history and MGM's own allegations in this action. *Opp.*, p. 15.

Tellingly, MGM points to nothing in SA 15-7's text that expressly precludes MGM from taking steps toward developing a new commercial casino. As to SA 15-7's legislative history, MGM simply disregards the legislative history speaking directly to the issue. Specifically, in the lengthy colloquy referenced at page 16 of Defendant's Memorandum, Representative Dargan—whose views MGM argues are "entitled to particular weight and careful consideration," *Opp.*, p. 16 n.7 (quotation

marks omitted)—stated that even without SA 15-7 the Tribes (and *a fortiori* MGM) would be able to negotiate with municipalities for possible off-reservation casino developments. *House Tr.*, pp. 23-25 (Exh. 1). Senator Fasano explicitly echoed the same point. *Senate Tr.*, pp. 19-20 (Exh. 2). MGM makes a weak attempt to dismiss his comments but grudgingly acknowledges—as it must—that they are entitled to weight. *Opp.*, p. 16 n.7. Those consistent statements by both a proponent and an opponent of SA 15-7 stating that SA 15-7 was not necessary to authorize steps toward development of a casino shed much more light on the General Assembly's intent than the, at best, ambiguous general statements on which MGM relies.

Not surprisingly, Representative Dargan and Senator Fasano's shared view of existing Connecticut law was correct. MGM does not dispute that municipalities have general contracting authority and the very case law on which MGM relies recognizes that municipalities also have the authority to take actions that are "a necessary incident to the proper exercise of an expressly granted power." *Wellswood Columbia, LLC v. Town of Hebron*, 295 Conn. 802, 815 (2010). So, if MGM actually wanted to "negotiate and enter into a casino-development agreement with a municipality" to present to the General Assembly for review and approval, MGM would be free to do so. *Opp.*, p. 16.

Contrary to MGM's argument that any such contingent agreement would be void (*Opp.*, p. 18), the Connecticut Supreme Court has made clear that contracts are unenforceable only in "situation[s] in which enforcing a noncompliant contract would thwart the purpose of the statute or invite violations thereof." *D'Angelo Dev.*

& Const. Co. v. Cordovano, 278 Conn. 237, 250 (2006). There is no basis to argue that a development agreement that would expressly be conditioned on the passage of future legislation authorizing that very agreement would somehow "thwart the purpose of the statute." *Id.*

SA 15-7 makes clear that MGM may compete for a Connecticut commercial casino, and the legislative history removes any rational doubt. But even if SA 15-7 were unclear and MGM's constitutional claims had any merit (they do not), that still would not help MGM here for two reasons. First, Connecticut courts have a "duty to interpret statutes in a manner that avoids placing them in constitutional jeopardy" that could lead a Connecticut court to construe SA 15-7 to not exclude MGM. *State v. DeJesus*, 288 Conn. 418, 455 (2008). Second, to the extent this Court believes that SA 15-7 is materially unclear, this Court should either abstain or certify the relevant questions to the Connecticut state courts. *See, e.g.*, *Expressions Hair Design v. Schneiderman*, __ F.3d __, 2015 WL 8537667, at *12-17 (2d Cir. Dec. 11, 2015).[1] Ultimately, Connecticut law did not, and does not, prevent MGM from taking steps toward developing a Connecticut commercial casino; MGM acknowledged as much when it took such steps. *AC*, ¶¶ 41, 44 & 47.

III. SA 15-7 DOES NOT PRECLUDE MGM FROM COMPETING ON AN EQUAL BASIS

MGM acknowledges that even if the bidder standing cases applied here

[1] MGM argues that Defendants waived an abstention argument but Defendants raised the issue multiple times and, in any event, the Supreme Court has held that *Pullman* abstention cannot be waived. *Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 480 n.11 (1977); *see Opp*, pp. 31-33.

despite the absence of any non-speculative benefit being conferred on any entity (they do not), "to establish standing" MGM needs—at a minimum—to "demonstrate that it is able and ready to complete for a casino-development project and that a discriminatory policy prevents it from doing so *on an equal basis*." *Opp*., p. 14 (quotation marks omitted; emphasis in *Opp*.). Put differently, MGM cannot establish standing to challenge SA 15-7 unless SA 15-7 puts MGM at a disadvantage relative to the Tribes.

It does not. SA 15-7's evolution and text make that clear. The original version of SB 1090 (which became SA 15-7) would have allowed the Tribes—and only the Tribes—to apply for licenses for up to three additional casinos. The General Assembly then modified SA 15-7 to remove any preferential treatment the Tribes would have enjoyed under the original version, and instead adopting a very cautious approach in light of the complex and uncertain legal questions unique to the Tribes. SA 15-7 does not authorize the Tribes to engage in any gaming off of Indian lands. Rather, it provides that if the Tribes want to move toward such gaming under SA 15-7 they need to follow specific steps that will *inter alia* serve to ensure that the General Assembly, other state officials and entities, and the public have considered and had their voices heard on all of the issues arising out of the State's unique historic and legal relationship with the Tribes. At the end of that process, SA 15-7 makes clear that the Tribes are entitled to nothing more than MGM—like MGM, they still need to convince the State to change the law to allow for a new casino.

MGM could have gotten to the same place in much faster, more direct and less costly ways. Unlike the Tribes, MGM did not have to partner with its most direct competitor and register a new business entity with the State. In the over two months while the Tribes were engaging in those steps, MGM could have gotten a head start by issuing its own RFP, or taking whatever other steps it chose to take toward developing a competing proposal. MGM's advantage from its head start would have been magnified by MGM's flexibility—unlike the Tribes operating under SA 15-7, MGM was under no constraints as to how it proceeded toward a proposal or a requirement that it conduct the process in the public eye.

MGM argues that SA 15-7 places MGM at a disadvantage in two ways: that it somehow "signals" government backing of a tribal casino, and that it requires that the DCP post the Tribal Business Entity's ("TBE") RFP on the DCP's website. *Opp.*, pp. 19-21. Neither argument has any merit.

As to the "signaling" point, the signal SA 15-7 sends could not be clearer; it expressly states that any development agreement must be contingent on changes to state law authorizing a casino operation (SA 15-7, § 1(c) (Exh. 3)), and reiterates that the TBE "may not establish a casino gaming facility in the state until the General Assembly has amended state law to provide for the operation of and participation in a casino gaming facility by such tribal business entity." *Id.* at § 1(d). Any municipality, investor or member of the public who read the law would know that any investment they make in the SA 15-7 process may come to naught. MGM's speculation that SA 15-7 has led municipalities to respond more favorably to

the TBE's RFP than they would have responded to a proposal by MGM has no basis in the text and cannot overcome SA 15-7's clear language. *See, e.g.*, *Worth v. Jackson*, 451 F.3d 854, 859-60 (D.C. Cir. 2006) (drawing distinction for standing purposes on claimed benefits on the face of the statute and those that are not, and holding that the latter cannot support standing and also are unripe). And MGM's speculation is just that—MGM makes no allegation that it prepared and issued a RFP, let alone that it was rebuffed by a municipality because of SA 15-7.

As to posting the RFP on the DCP's website, that is part of SA 15-7's broader framework placing constraints on how the Tribes must proceed under the Act in light of their unique historical and legal status. MGM concedes that if the bidder standing analysis applies the relevant question is whether SA 15-7 precludes MGM from competing "*on an equal basis*." *Opp.*, p. 14 (quotation marks omitted; emphasis in *Opp.*). In measuring equality, the Court must consider SA 15-7 as a whole. So viewed, the requirement that the TBE post its RFP on the DCP's website is not a benefit (as the TBE's use of a separate website illustrates) and, even if it could somehow be construed as a benefit, it certainly does not outweigh the other clear burdens SA 15-7 imposes on its face. *See, e.g.*, *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 731 (2013) (rejecting the argument that "the mere assertion that something unlawful benefited the plaintiff's competitor" could satisfy Article III and noting that "[w]e have never accepted such a boundless theory of standing").

Different treatment alone is not enough to establish standing; MGM must "identify some [more than speculative] disadvantage to meet the constitutional

requirement of standing." *Youth Alive v. Happauge Sch. Dist.*, 2012 WL 4891561, at *3 (E.D.N.Y. 2012). MGM has not identified any such non-speculative disadvantage here. MGM asks this Court to assume that MGM will be disadvantaged but such "assumption[s are] too abstract and conjectural to confer jurisdiction on" this Court. *Jaghory v. New York State Dept. of Educ.*, 131 F.3d 326, 330 (2d Cir. 1997). The end result of SA 15-7 is to put the Tribes "in precisely the same position" MGM would occupy if it actually took steps to issue a RFP and/or negotiate an agreement, namely, the positon to present a proposal to the General Assembly for consideration. *Id.*[2] Given that, the differences in the path MGM takes to reach that point are insufficient to support standing. *Id.*[3]

IV. CONCLUSION

For the above reasons and those set forth in Defendants' earlier briefing and materials, Defendants respectfully request that this Court dismiss this action.

---

[2] Of course, as discussed in Defendants' earlier briefing, MGM's voluntary agreement to the radius restriction precludes MGM from actually competing on an equal basis and is an independent reason why MGM cannot establish standing.

[3] MGM's argument that it can rely on post-filing events to establish standing elides the key distinction. *Opp.*, p. 10. "The state of things and the originally alleged state of things are not synonymous," *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 473 (2007), so a plaintiff may amend its Complaint to add facts to support its claim of standing but "[t]he initial standing of the original plaintiff is assessed at the time of the original complaint, even if the complaint is later amended." *S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1153 (10th Cir. 2013); *see also Jones v. Schneiderman*, 101 F. Supp. 3d 283, 292 (S.D.N.Y. 2015) (appeal pending) (citing cases holding that post-commencement events cannot support standing, including *Fenstermaker v. Obama*, 354 Fed. Appx. 452, 455 n. 1 (2d Cir. 2009)). Therefore, MGM "cannot rely on factual developments after [August 4, 2015]—the date on which [it] commenced this action—to establish standing." *Jones*, 101 F. Supp. 3d at 292. *Travelers Ins. Co. v, 633 Third Assocs.*, 973 F.2d 82, 87-88 (2d Cir. 1992), is not to the contrary—it was a diversity action raising an issue of statutory standing under New York state law, *id.* at 83, and therefore easily distinguishable.

Respectfully submitted,

DEFENDANTS

GOVERNOR DANNEL P. MALLOY

SECRETARY OF THE STATE
DENISE W. MERRILL

COMMISSIONER JONATHAN A.
HARRIS

GEORGE JEPSEN
ATTORNEY GENERAL

BY: */s/ Robert J. Deichert*
Robert J. Deichert (ct24956)
Assistant Attorney General
Attorney General's Office
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
860-808-5020 (phone)
860-808-5347 (fax)
Robert.Deichert@ct.gov

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2015, a copy of the foregoing was electronically filed. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Robert J. Deichert
Robert J. Deichert
Assistant Attorney General