UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MGM RESORTS INTERNATIONAL GLOBAL GAMING DEVELOPMENT, LLC,	:	
Plaintiff,	:	Civil No. 3:15-cv-1182(AWT)
v.	:	
DANNEL P. MALLOY, in his official capacity as Governor of Connecticut; DENISE W. MERRILL, in her official capacity as Connecticut Secretary of the State; and JONATHAN A. HARRIS, in his official capacity as Commissioner of the Connecticut Department of Consumer Protection,	:	
Defendants.	:	

RULING ON MOTION TO DISMISS

The plaintiff, MGM Resorts International Global Gaming Development, LLC ("MGM"), brings this case challenging the constitutionality of Connecticut Special Act 15-7, "An Act Concerning Gaming" (the "Act"). The plaintiff seeks declaratory and injunctive relief. The defendants move to dismiss the case for lack of jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(1). For the reasons set forth below, the motion to dismiss is being granted.

I. FACTUAL BACKGROUND

"The complaint, which [the court] must accept as true for purposes of testing its sufficiency, alleges the following circumstances." Monsky v. Moraghan, 127 F.3d 243, 244 (2d Cir. 1997).

In June 2015, Governor Dannel P. Malloy ("Governor Malloy") signed the Act into law. The Act provides for the creation of the "tribal business entity" and outlines steps that the tribal business entity must take in order to be authorized to operate and participate in a casino gaming facility in the state of Connecticut. The tribal business entity is "the business entity registered with the Secretary of the State to do business in the state and owned exclusively by both the Mashantucket Pequot Tribe and the Mohegan Tribe of Indians of Connecticut" (collectively, the "Tribes")[1]. SA 15-7(1). Once the tribal business entity is formed, it may then issue a request for proposals ("RFP") to municipalities regarding the potential development of a casino gaming facility. When it issues the RFP, it must also submit its RFP to the Department of Consumer Protection ("DCP"), which then must post the RFP on its website. The tribal business entity must also

> submit, in accordance with the provisions of section 11-4a of the general statutes, on or before the twenty-fifth day of each month, not later than one month after the issuance

[1] The plaintiff refers to the Tribes as the "Preferred Tribes."

> of a request for proposals, a report for the calendar month immediately preceding summarizing the activities of the tribal business entity with regard to such request for proposals to the president pro tempore of the Senate, the majority leader of the Senate, the minority leader of the Senate, the speaker of the House of Representatives, the majority leader of the House of Representatives, the minority leader of the House of Representatives, the joint standing committee of the General Assembly having cognizance of matters relating to public safety and to the Attorney General.

SA 15-7(3)(e).

Any "development agreement with a municipality regarding the establishment of a possible casino gaming facility in such municipality" entered into by the tribal business entity must be "contingent upon amendments to state law enacted by the General Assembly that provide for the operation of and participation in a casino gaming facility by such tribal business entity." SA 15-7(3)(c). "The tribal business entity 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 and such law has taken effect." SA 15-7(3)(d).

The plaintiff alleges that "[a]ll benefits of the Act--including the formation of the tribal business entity, issuance and dissemination of a request for proposals, and negotiation of a development agreement--are reserved exclusively for the Preferred Tribes." (First Amended Complaint for Declaratory and Injunctive Relief (Doc. No. 35) ("Amended Complaint") ¶ 30.) The

plaintiff also alleges that the Act "signals, at a minimum, that the State plans to consider the Preferred Tribes' casino development proposal" and "makes it more likely that third parties--such as municipalities, investors, and others integral to the casino development process--will support the Preferred Tribes' efforts to develop a casino and participate in the Preferred Tribes' casino development activities." (Id. ¶ 31.) The plaintiff further alleges that "all other entities that want to develop a casino in Connecticut are, at best, put at a competitive disadvantage because Connecticut law forbids operation of commercial casino gaming facilities." (Id. ¶ 32.)

The plaintiff alleges that it completed a preliminary feasibility study to analyze the viability of a potential casino development in Connecticut and concluded that "such a development is both feasible and desirable for MGM and [its parent company]." (Id. ¶ 47.) The plaintiff further alleges that it has the resources and expertise to create a competitive proposal for a Connecticut casino. On July 22, 2015, MGM attempted to "register the tribal business entity contemplated by the Act with the Secretary of the State of Connecticut." (Id. ¶ 52.) On July 23, 2015, the Secretary of the State rejected the attempted registration, stating the following reason:

> THE BUSINESS ENTITY DESCRIPTION AT SECTION #2 DOES NOT COMPLY WITH CONNECTICUT LAW. SECTION l(A)(l) OF SPECIAL ACT 15-7 DEFINES "TRIBAL BUSINESS ENTITY" AS A BUSINESS ENTITY

> REGISTERED WITH THE SECRETARY OF THE STATE TO DO BUSINESS IN THE STATE AND OWNED EXCLUSIVELY BY BOTH THE MASHANTUCKET PEQUOT TRIBE AND THE MOHEGAN TRIBE OF INDIANS OF CONNECTICUT. YOU INDICATE IN THE COVER LETTER YOU HAVE NO AFFILIATION WITH EITHER OF THESE TRIBES.

(Id. ¶ 53) (capitalization in original).

On August 24, 2015, the Secretary of the State approved the tribal business entity, "MMCT Venture, LLC" ("MMCT Venture"), formed by the Tribes. The Tribes announced the approval of MMCT Venture on September 10, 2015 at a ceremony that was attended by Lieutenant Governor Nancy Wyman. MMCT Venture submitted an RFP to DCP on September 30, 2015, and DCP put it on its website later that day. The plaintiff alleges that "municipalities in Connecticut have taken steps to convince the Preferred Tribes to engage in discussions with them about a casino development agreement." (Id. ¶ 62.) The plaintiff further alleges that "the Preferred Tribes intend to enter into an agreement with a municipality and submit it to the legislature for approval at the start of the next scheduled legislative session in February 2016." (Id. ¶ 64.)

The plaintiff alleges that "it is unlikely that subsequent legislation would allow MGM or other entities to compete for a Connecticut casino" and that "even if MGM and others were allowed to compete for a Connecticut casino, they would be at a competitive disadvantage given that the Preferred Tribes would already have reached an agreement with a municipality and have

made other preparations to gain a preferred market position." (Id. ¶ 66.) The plaintiff alleges that consequently it "has suffered, and will continue to suffer, irreparable harm, for which MGM has no adequate remedy at law, as a result of the Act's exclusive, no-bid process, which allows only the Preferred Tribes to move forward with developing a casino in Connecticut." (Id. ¶ 67.)

The plaintiff brings four claims against the defendants, Dannel P. Malloy, in his official capacity as Governor of Connecticut; Denise W. Merrill, in her official capacity as Connecticut Secretary of the State; and Jonathan A. Harris, in his official capacity as Commissioner of the Connecticut Department of Consumer Protection.

In Count One, the plaintiff alleges that the Act violates the Equal Protection Clause of the United States Constitution because it fails to withstand strict scrutiny. The plaintiff alleges that the Act treats potential casino developers differently on the basis of race and/or national origin and that it does not serve a compelling government interest. The plaintiff also alleges that even if the Act did serve a compelling government interest, it is not narrowly tailored to such an interest.

In Count Two, the plaintiff alleges that even if subjected only to rational basis review, the Act violates the Equal

Protection Clause of the United States Constitution because it discriminates on the basis of race and/or national origin and is not reasonably related to a legitimate governmental purpose.

In Count Three, the plaintiff alleges that the Act violates the dormant Commerce Clause because "on its face" it discriminates against interstate commerce by "prohibit[ing] all out-of-state entities, including MGM, from competing to develop a Connecticut casino and reserv[ing] those development opportunities to the Connecticut-based Preferred Tribes," (Id. ¶ 86), and "Connecticut cannot make any showing that the Act is the only means available to advance a legitimate local interest" (Id. ¶ 88).

In Count Four, the plaintiff alleges that "the Act also violates the dormant Commerce Clause because it imposes a burden on interstate commerce disproportionate to any local benefit." (Id. ¶ 93.) The plaintiff alleges that "[t]he burden of excluding all out-of-state entities from competing to develop a Connecticut casino is excessive in comparison to the sole purported in-state benefit of having additional revenue flow to the in-state Preferred Tribes." (Id. ¶ 95.)

II. LEGAL STANDARD

"A district court properly dismisses an action under Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction if the court 'lacks the statutory or constitutional power to

adjudicate it,' such as when . . . the plaintiff lacks constitutional standing to bring the action." Cortlandt St. Recovery Corp. v. Hellas Telecomms., 790 F.3d 411, 416-17 (2d Cir. 2015) (citation omitted) (quoting Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000)). The party asserting subject matter jurisdiction "bears the burden of proving subject matter jurisdiction by a preponderance of the evidence." Aurechione v. Schoolman Transp. Sys., Inc., 426 F.3d 635, 638 (2d Cir. 2005). When reviewing a motion to dismiss for lack of subject matter jurisdiction, the court may consider evidence outside the pleadings. See Makarova, 201 F.3d at 113.

III. DISCUSSION

The defendants argue that the Eleventh Amendment to the United States Constitution bars the plaintiff's claims as alleged against Governor Malloy. "MGM does not oppose Defendants' motion with respect to Governor Malloy." (MGM's Opposition to Defendants' Motion to Dismiss Amended Complaint (Doc. No. 46) ("Opposition") at 37 n. 16.) Therefore, the motion is being granted with respect to claims against Governor Malloy.

The defendants also argue that the plaintiff lacks standing and that its claims are neither constitutionally nor prudentially ripe. The court concludes that the plaintiff does not have standing. Therefore, it does not consider the issue of ripeness.

"To establish Article III standing, an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147 (2013) (quoting Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 148 (2010)). The defendants argue that the plaintiff lacks standing because (1) it has not suffered a concrete, particularized, and actual or imminent injury; and (2) any injury it may have suffered is not redressable by a favorable ruling in this case.

The plaintiff contends that it has been injured in two ways: (1) the Tribes have been given an exclusive right to move forward with developing a casino gaming facility in Connecticut, and (2) even if the Act does not give the Tribes an exclusive right to move forward with developing a casino gaming facility, it gives the Tribes a competitive advantage over MGM. The court concludes that the plaintiff has not adequately alleged an injury and, therefore, does not consider the issue of redressability.

A. Exclusive Right

The plaintiff alleges that it is injured by the fact that "the Act's exclusive, no-bid process . . . allows only the Preferred Tribes to move forward with developing a casino in Connecticut." (Amended Complaint ¶ 67.)

The defendants argue that Act does not create an exclusive, no-bid process. They argue that, in fact, the Act "does not allow the Tribes or municipalities to do anything they (or MGM) could not already do before [it] was enacted" and that nothing in the Act prevents MGM from taking steps to develop a casino in Connecticut. (Memorandum of Law in Support of Defendants' Motion to Dismiss Amended Complaint (Doc. No. 44-1) ("Defendants' Memorandum") at 16.) The defendants argue that "MGM is free to create a business entity (just not a tribal business entity), register it with the Secretary of the State, issue a RFP, negotiate a development agreement with a municipality and ask the state to make the changes to the law that would be necessary for the agreement to be approved and for MGM to operate a casino." (Id. at 15.) Furthermore, unlike the tribal business entity, MGM can take these steps "without being forced to partner with a direct competitor to create and register a new business entity, without having to include specific information in its RFP and post its RFP on a state website and without having to send monthly public reports to twelve separate state entities detailing the progress of its negotiations toward a development agreement." (Id.)

The plaintiff contends that if the defendants' interpretation of the Act were adopted, then much of the Act would be rendered superfluous. The plaintiff argues instead that

the Act provides the only legal process by which an entity may enter into a casino development agreement with a municipality and that this process is only open to the Tribes. More particularly, the plaintiff asserts that the Act prevents a municipality from entering into a casino development agreement with any entity other than the tribal business entity. Although Conn. Gen. Stat § 7-194 provides municipalities with a general power to enter into contracts, the plaintiff argues that if Conn. Gen. Stat. § 7-194 is read to include the power to enter into casino development agreements, then "the Act's authorization of those steps would be meaningless." (Opposition at 16.) The plaintiff contends, therefore, that the court must adopt an interpretation of the Act that avoids such redundancy. The plaintiff posits that, by negative implication, the Act constrains municipalities' general contractual powers such that they may only enter into casino development agreements by following the process outlined in the Act.

However, the premise of the plaintiff's argument is flawed. Conn. Gen. Stat. § 7-194 and the Act do not present an "either-or proposition." Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253 (1992). It is true that both statutes provide municipalities with a power to enter into contracts. However, "[r]edundancies across statutes are not unusual events in drafting, and so long as there is no 'positive repugnancy' between two laws, Wood v.

United States, 16 Pet. 342, 363, 10 L. Ed. 987 (1842), a court must give effect to both." Connecticut Nat. Bank, 503 U.S. at 253. Here, there is no positive repugnancy and, despite their overlap, each statute provides something that the other does not. See id. at 253 ("Section 1291 confers jurisdiction over appeals from 'final decisions of the district courts' acting in any capacity. Section 158(d), in contrast, confers jurisdiction over appeals from final decisions of the district courts when they act as bankruptcy appellate courts under § 158(a), and also confers jurisdiction over final decisions of the appellate panels in bankruptcy acting under § 158(b). Sections 1291 and 158(d) do overlap, therefore, but each section confers jurisdiction over cases that the other section does not reach."). Conn. Gen. Stat. § 7-194 provides municipalities a power to enter into contracts that extends beyond the power to enter into casino development agreements, and the Act sets forth specific requirements for when a municipality and the tribal business entity enter into a casino development agreement. Because there is no positive repugnancy between the two laws and "giving effect to both [Conn. Gen. Stat. § 7-194 and the Act] would not render one or the other wholly superfluous," Connecticut Nat. Bank, 503 U.S. at 253, the Act should not be read as cabining, by negative implication, the power of municipalities to enter into contracts. Thus, the court

concludes that the Act does not preclude municipalities from entering into casino development agreements with entities like MGM.

The plaintiff also argues that even if the Act does not limit a municipality's right to contract, a casino development agreement with MGM would be void because Connecticut law prohibits gambling, see Conn. Gen. Stat. §§ 53-278a, 53-278b, and "[a] contract made for or about any matter or thing which is prohibited and made unlawful by statute is a void contract." (Opposition at 18) (quoting Solomon v. Gilmore, 248 Conn. 769, 785 (1999)). The plaintiff contends that even an agreement between MGM and a municipality that was contingent upon an amendment to state law would be for or about casino gambling and would, therefore, be void. Such a contract is not before the court, and the court will not rule on the validity of a non-existent, hypothetical contract. Cf. Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 240-41 (1937) ("A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the

law would be upon a hypothetical state of facts." (citations omitted)). Because the texts of the relevant statutes do not prohibit the plaintiff from negotiating and entering into a casino development agreement with a municipality, the court cannot conclude that the plaintiff has suffered an injury on this basis.

The plaintiff also argues that the defendants' interpretation of the Act is "flatly inconsistent with the General Assembly's own understanding of the Act." (Opposition at 16.) The plaintiff cites several statements by state legislators that, in its view, demonstrate that "the Act's purpose is to change the status quo by giving the Preferred Tribes, and only the Preferred Tribes, 'the ability' to negotiate and enter into a casino-development agreement with a municipality." (Id.) Although a court may take judicial notice of statements made on the floor of the legislature as indicators of strong legislative intent, see Winchester Woods Assocs. v. Planning & Zoning Comm'n of Town of Madison, 219 Conn. 303, 310-11 (1991), Connecticut law provides:

> The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.

Conn. Gen. Stat. § 1-2z. Here, the meaning of the text of the Act is plain and unambiguous and does not yield an unworkable result. The Act outlines the steps that steps that the tribal business entity must take in order to be authorized to operate and participate in a casino gaming facility in the state of Connecticut. Nothing in the text of the Act itself confers on the Tribes an exclusive ability to negotiate and enter into a casino development agreement with a municipality. Nor does reading the Act in relationship to other statutes suggest that the Act confers on the Tribes such an exclusive ability. Therefore, the court does not consider extratextual evidence as to the meaning of the statute.[2]

Accordingly, the court concludes that the plaintiff has not sufficiently alleged an injury on the basis that the Act confers an exclusive right on the Tribes.

B. Competitive Advantage

The plaintiff also argues that even if it could lawfully negotiate and sign a casino development agreement, "the Act

[2] The court notes that in the Amended Complaint and the Opposition, the plaintiff relies on statements by legislators that it contends demonstrate legislative intent to provide an exclusive benefit to the Tribes. However, the defendants aptly point out that legislators also made statements conceding that nothing in the Act prohibits the Tribes from individually negotiating with municipalities to enter into development agreements for off-reservation casinos and that the Tribes could do so without the Act as well. (See Defendants' Memorandum at 16-17.)

still grants the Preferred Tribes a competitive advantage, and thereby injures MGM . . .” (Opposition at 19.) Injury can be demonstrated “[w]hen 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[.]” Ne. Florida Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville, Fla., 508 U.S. 656, 666 (1993). “The ‘injury in fact’ in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.” Id. Accordingly, a plaintiff challenging the barrier “need not allege that he would have obtained the benefit but for the barrier in order to establish standing.” Id. In the context of a government set-aside program, for example, a plaintiff challenging the program “need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis”; it need not allege that it would have gotten the contract but for the government-erected barrier. Id.

The plaintiff cites several cases in which standing was established on the basis of an injury resulting from a government-erected a barrier that prevented competition on equal footing. For example, in General Contractors, the Court found that the plaintiff had standing to challenge an ordinance that “required that 10% of the amount spent on city contracts be set

aside each fiscal year for so-called 'Minority Business Enterprises[.]'" 508 U.S. at 658. In KG Urban Enters., LLC v. Patrick, the court found that the plaintiff had standing to challenge a statute providing for authorization of gaming licenses when the number of licenses issued would be reduced if the state entered into a "Tribal-State gaming compact with an Indian tribe" and the statute also provided $5 million to the Governor of Massachusetts "to facilitate the 'negotiation and execution' of a Tribal-State compact." 839 F. Supp. 2d 388, 394 (D. Mass) aff'g standing and rev'g on other grounds by 693 F.3d 1 (1st Cir. 2012); 393 F.3d at 16 n.13. In La Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board, the court found that the plaintiff had standing to challenge a city ordinance that established a process by which developers could compete for casino development agreements when the ordinance also provided for a preference to developers who met particular criteria and only two developers were able to meet that criteria. 172 F.3d 397 (6th Cir. 1999).

The plaintiff argues that the Act imposes two barriers that make it more difficult for MGM, as compared to the Tribes, to compete for a commercial casino. First, the plaintiff argues that "the Act makes the State an active partner in the Preferred Tribes' casino-development efforts from beginning to end, signaling to municipalities, investors, and the public that

those efforts--and only those efforts--are backed by the government." (Opposition at 19.) Second, the plaintiff argues that "the Act grants the Preferred Tribes the exclusive right to have their RFP posted to the Department of Consumer Protection's website--a provision that by itself renders the Act unconstitutional." (Id. at 20.) These alleged "barriers," however, are materially different from those that have been recognized by courts as violating the Equal Protection Clause. In the cases discussed above, a competitive benefit was conferred on one group to the detriment of those against whom it was competing. The Act, however, does not establish a governmental preference for a casino gaming facility owned by the tribal business entity to the detriment of other entities against whom it may be competing, like MGM. The Act does not establish a process to be followed by everyone who wants to develop a proposal for and petition the General Assembly to authorize a casino gaming facility, nor does it provide that only the Tribes can do so. Rather, the Act simply sets forth the procedural steps the tribal business entity must take in order to be authorized to operate and participate in a casino gaming facility in the state of Connecticut. Although the Act requires that the DCP post the tribal business entity's RFP on its website, the plaintiff has failed to allege facts sufficient to support an inference that the DCP doing so is a barrier to MGM

competing on an equal footing, as opposed to an additional burden on the tribal business entity. Based on the facts alleged, the court cannot conclude that the posting of the RFP on the website is a barrier that prevents MGM from competing on equal footing.[3]

As to the "signaling effect" of the Act, any such alleged effect is abstract, subjective, and speculative. The plaintiff is asking the court to speculate as to what might factor into a municipality being receptive to an RFP or what might sway legislators to amend state law. "Abstract injury is not enough. The plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983). The court's function is not to predict how municipalities or the General Assembly might respond to RFPs or petitions from MGM or the tribal business entity. Consequently, any injury alleged by MGM is too speculative to confer standing. See Worth v. Jackson, 451 F.3d 854, 860 (D.C. Cir. 2006) (finding that the white male plaintiff did not have standing

[3] The plaintiff asserts that the requirement that the DCP post the tribal business entity's RFP on its website is an injury that alone is sufficient to confer standing. The court does not agree because the plaintiff has failed to allege facts sufficient to support the inference that this injures MGM.

when he "challenges no statute, regulation, or written policy committing HUD to favoring minorities or women, resting his claim instead on speculation, untethered to any written directive, about how HUD is likely to make future employment decisions. But we have no way of knowing how or even whether HUD will continue taking race or gender into account . . .").

IV. CONCLUSION

For the reasons set forth above, the defendants' Motion to Dismiss Amended Complaint (Doc. No. 44) is hereby GRANTED.

The Clerk shall close this case.

It is so ordered.

Signed this 23rd day of June 2016, at Hartford, Connecticut.

/s/
Alvin W. Thompson
United States District Judge