UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

SEMINOLE TRIBE OF FLORIDA,

Plaintiff,

v.

CONSOLIDATED CASE
CASE NO.: 4:15-cv-516-RH/CAS

STATE OF FLORIDA,

Defendant.
_____/

DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The Defendant, STATE OF FLORIDA (the "**State**"), by and through its undersigned attorneys and pursuant to Rule 56, Federal Rules of Civil Procedure, moves this Honorable Court for the entry of an order granting partial summary judgment against the Plaintiff, SEMINOLE TRIBE OF FLORIDA (the "**Tribe**"), for the following reasons:

(1) There is no genuine dispute as to the material fact that a Class III Gaming Compact has been in effect between the Tribe and the State since 2010 and the Indian Gaming Regulatory Act expressly prohibits any claim that the State has failed to negotiate new compact terms when there is an existing Class III Gaming Compact between the State and the Tribe; and

(2) There is no genuine dispute as to the material facts that (a) the State's waiver of sovereign immunity is limited solely to issues arising under the existing Class III Gaming Compact between the State and the Tribe, and (b) that the State has not consented to be sued by the Tribe for disputes over the Tribe's request for negotiations to enter into either an amended or altogether new compact.

I. Introduction

On April 7, 2010, the Tribe and the State entered into a 20-year Class III Tribal-State Gaming Compact (the "**2010 Compact**") pursuant to which the Tribe was authorized to exclusively offer certain categories of Class III "casino-style" gaming under certain very specific conditions. In exchange for the exclusivity, the Tribe committed to make revenue sharing payments to the State. Both the Tribe and the State waived their right to assert sovereign immunity, but that waiver of sovereign immunity was expressly limited solely to issues arising under the 2010 Compact.

Of the various forms of Class III gaming authorized under the 2010 Compact, only one category is at issue in this case: banking or banked card games. While the term of the 2010 Compact is 20 years, the 2010 Compact provided the Tribe with limited authorization to conduct banking or banked card games in the State of Florida for only the first five years of that 20-year term.

The 2010 Compact, which by its terms is to be construed in accordance with the laws of the State of Florida, does not contain a definition of the term "banking or banked card game." However, the term "banking game" is defined by the Florida Statutes.

As acknowledged in the Tribe's Verified Complaint, the Tribe's limited authorization to conduct banking or banked card games terminated on July 31, 2015. Although the Tribe was only authorized to offer such games for the specified five-year period, and the 2010 Compact explicitly provided that authorization to conduct such games terminated automatically at the end of the five-year period unless renewed by an affirmative act of the Florida Legislature, the Tribe has refused to cease operation of its banking or banked card games. Rather than comply with the 2010 Compact, the Tribe filed this lawsuit asserting that its exclusive right to conduct those games was not adequately protected for the first five years and, therefore, as its remedy, the Tribe may continue to conduct such games indefinitely.

The Tribe filed suit against the State on October 26, 2015, alleging two causes of action. Count I purports to be a state law claim for Breach of Compact. Count II purports to be a cause of action under the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2710, *et seq.* (2012) (the "**IGRA**"). This motion seeks summary adjudication of Count II in favor of the State.

Summary judgment is appropriate on Count II because there is no genuine dispute as to the material fact that the 2010 Compact is in effect (and has been in effect at all times material to this litigation), and the lack of a Tribal-State gaming compact in effect is a threshold element of proof under a claim pursuant to the IGRA's cause of action for failure to negotiate in good faith codified at 25 U.S.C. § 2710. IGRA specifically limits tribal litigation to compel State compact negotiations to cases where no Class III Gaming Compact has been entered into by the parties. *See* 25 U.S.C. § 2710(d)(7)(B)(ii)(I). Because the 2010 Compact exists, as a matter of law the State is entitled to summary judgment on the entirety of Count II.

Additionally, the State is entitled to summary judgment on Count II because the Tribe's cause of action is barred by the State's sovereign immunity. Count II is predicated upon a purported failure of the State to negotiate in good faith when the Tribe requested negotiations over (1) a second, amended compact, and, later (2) a new compact altogether. In both instances, the Tribe requested a different deal than was negotiated in the 2010 Compact. Specifically, it requested a new deal that would authorize the Tribe to offer banking or banked card games without the time limitations imposed by the 2010 Compact. Although the State has waived its sovereign immunity from suit over disputes limited solely to issues arising under the 2010 Compact, the waiver goes no further. Accordingly, because the State's

limited waiver of sovereign immunity does not extend to the dispute presented in Count II, that issue is appropriate for summary adjudication.

II. Statement of Undisputed Facts

There is no genuine dispute regarding the following facts:

1. On April 7, 2010, the parties entered into the 2010 Compact, pursuant to the IGRA. *See* Tribe's Verified Complaint ¶¶ 2, 11, ECF No. 1; State's Answer ¶¶ 2, 11, ECF No. 18.

2. The 2010 Compact is a valid and binding agreement entered into between the State and the Tribe, was duly approved by all necessary state and federal officials, and is enforceable pursuant to its terms. *See* Tribe's Verified Complaint ¶¶ 2, 11, ECF No. 1; State's Answer ¶¶ 2, 11, ECF No. 18; *see also* State's Complaint for Declaratory and Injunctive Relief ¶ 10, Case No. 8:15-cv-02568-VMC-TBM (M.D. Fla.), ECF No. 1; Tribe's Answer ¶ 10, Case No. 4:15-cv-00588-RH-CAS (N.D. Fla.), ECF No. 28.

3. Class III gaming has been conducted by the Tribe continuously since 2010 pursuant to the 2010 Compact. *See* Tribe's Verified Complaint ¶ 12, ECF No. 1; Deposition of Gordon Dickie 56:17–60:11, 94:14–21, ECF No. 39-1; Deposition of Jim Shore 29:6–14, ECF No. 35-1; Deposition of James Allen 61:9–13, ECF No. 30-1.

4. At the time this litigation was filed and continuing through the present, the 2010 Compact has been in effect. *See* Deposition of Gordon Dickie 56:17–60:11, 94:14–21, ECF No. 39-1; Deposition of Jim Shore 24:10–14, ECF No. 35-1; Deposition of James Allen 129:13–17, ECF No. 30-1.

5. The 2010 Compact authorized the Tribe to operate banking or banked card games for the first five years of the 2010 Compact. *See* Tribe's Verified Complaint Exhibit A, at 49, Part XVI.B, ECF No. 1-3.

6. The 2010 Compact provided that the Tribe's authorization to conduct banking or banked card games would automatically terminate five years from the effective date of the 2010 Compact unless renewed by an affirmative act of the Florida Legislature. *See* Tribe's Verified Complaint Exhibit A, at 49, Part XVI.C, ECF No. 1-3.

7. Pursuant to the 2010 Compact, the Tribe's authorization to conduct banking or banked card games terminated on July 31, 2015. *See* Tribe's Verified Complaint ¶ 16, ECF No. 1.

8. The Tribe's authorization has not been renewed by the Florida Legislature, or otherwise. *See* State's Complaint for Declaratory and Injunctive Relief ¶ 14, Case No. 8:15-cv-02568-VMC-TBM (M.D. Fla.), ECF No. 1; Tribe's Answer ¶ 14, Case No. 4:15-cv-00588-RH-CAS (N.D. Fla.), ECF No. 28.

9. The Tribe has continued to operate banking or banked card games without suspension of those gaming activities. *See* State's Complaint for Declaratory and Injunctive Relief ¶ 16, Case No. 8:15-cv-02568-VMC-TBM (M.D. Fla.), ECF No. 1; Tribe's Answer ¶ 16, Case No. 4:15-cv-00588-RH-CAS (N.D. Fla.), ECF No. 28.

10. The 2010 Compact provided the Tribe with a substantial degree of exclusivity, both geographically and with respect to the nature of the Class III games permitted. *See* Tribe's Verified Complaint ¶ 14, ECF No. 1.

11. In consideration for the exclusivity provided under the Compact, the Tribe agreed to pay the State a share of net revenue received by the Tribe from its Class III gaming operations. *See* Tribe's Verified Complaint ¶ 14, ECF No. 1.

12. The Tribe and the State each agreed to limited but express waivers of the right to assert sovereign immunity from suit, and further consented to be sued in federal or state court, provided that the dispute is limited solely to issues arising under the 2010 Compact. *See* Tribe's Verified Complaint Exhibit A, at 45, Part XIII.D(1), ECF No. 1-3.

13. The Compact provides that "[t]he obligations and rights of the State and the Tribe are contractual in nature, and are to be construed in accordance with the laws of the State of Florida." *See* Tribe's Verified Complaint Exhibit A, at 31, Part IX, ECF No. 1-3.

14. The laws of the State of Florida provide the following definition of a banking game in Section 849.086(2)(b), Florida Statutes: "A game in which the house is a participant in the game, taking on players, paying winners, and collecting from losers or in which the cardroom establishes a bank against which the participants play."

III. Legal Standard

A. Summary Judgment Standard.

Rule 56 of the Federal Rules of Civil Procedure provides: "A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party seeking summary adjudication must support each undisputed fact by citing to particular parts of materials in the record or showing that the materials cited do not establish the presence of a genuine dispute. Fed. R. Civ. P. 56(c)(1).

B. Florida Law Governs Interpretation of the Compact.

The Compact provides that the laws of Florida shall apply. "The obligations and rights of the State and the Tribe under this Compact are contractual in nature, and are to be construed in accordance with the laws of the State of Florida."

Tribe's Verified Complaint Exhibit A, at 31, Part IX, ECF No. 1-3. Florida laws applicable to gaming include Chapters 550, 551, 849, Florida Statutes, and Chapter 61-D, Florida Administrative Code.

C. The Indian Gaming Regulatory Act.

IGRA establishes federal 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." 25 U.S.C. § 2710(d)(7)(A)(i). Litigation under Section 2710(d)(7)(A) can only be prosecuted by a tribe when there is no existing Tribal-State Compact, as is plainly stated in Section 2710(d)(7)(B)(ii):

> In any action described in subparagraph (A)(i), upon the *introduction of evidence by an Indian tribe* that–
>
> > (I) *a Tribal-State compact has not been entered into under paragraph (3)*, and
> >
> > (II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,
>
> the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

25 U.S.C. § 2710(d)(7)(B)(ii) (emphasis added).

The citation to paragraph (3) is to Section 2710(d)(3), which establishes the process pursuant to which compacts are developed by tribes and states, and provides, in pertinent part:

> Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

25 U.S.C. § 2710(d)(3)(A); *see also* § 2710(d)(3)(B) (requiring approval of compacts by the Secretary of the Interior) and § 2710(d)(3)(C) (listing seven categories of permissible provisions in compacts).

IV. Argument

A. The State is Entitled to Summary Judgment on Count II Because the Tribe and the State Entered into a Compact in 2010 and the 2010 Compact Remains In Effect.

The State is entitled to summary judgment on Count II of the Tribe's Complaint because a claim for violation of the IGRA's good-faith negotiation requirement mandates proof that a Tribal-State compact does not already exist. It is undisputed that the parties to this case entered into the 2010 Compact in April of 2010. The existence of the 2010 Compact precludes the Tribe's IGRA claim as a matter of law.

The IGRA provides a federal cause of action whereupon a tribe may allege that a state has failed to enter into negotiations with the tribe for the purpose of entering a Tribal-State compact, or failed to conduct such negotiations in good faith. 25 U.S.C. § 2710(d)(7)(A)(i) ("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."). However, while the federal courts may have jurisdiction over such litigation, the tribes are not entitled to judgment until, and unless, they affirmatively can introduce evidence that "a Tribal-State compact has not been entered into . . . ." 25 U.S.C. § 2710(d)(7)(B)(ii)(I).

This is not an issue of first impression. Other courts have held that a claim for failure to negotiate under the IGRA is precluded by the existence of a gaming compact already in effect. *See Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California*, 813 F.3d 1155, 1172 (9th Cir. 2015), *petition for cert. filed*, Case No. 15-1291 (April 18, 2016); *Wisconsin Winnebago Nation v. Thompson*, 22 F.3d 719, 724 (7th Cir. 1994).

In the *Wisconsin Winnebago* case, the Winnebago tribe and the State of Wisconsin had entered into a Tribal-State compact which included a limited authorization for the Winnebago tribe to conduct gaming at certain locations. 22

F.3d at 722. After entering into the compact, the Winnebago tribe sought to expand the scope of its authorization to conduct gaming at a location not authorized under the existing compact. *Id.* at 722. When the State of Wisconsin refused to authorize gaming at the additional location, the Winnebago tribe sued for violation of the IGRA's good faith negotiation requirement. *Id.* at 723.

The Seventh Circuit held that Wisconsin was not required to enter into negotiations to expand the Winnebago tribe's authorization to conduct gaming at the additional location. *Id.* at 724. The court held that the Winnebago tribe "may not at this time seek to obtain in court what it recently bargained away in the compact." *Id.* The court explained that "Section 2710(d)(7) is meant to give Indian tribes a mechanism through which to force a reluctant state government to the bargaining table and require it to negotiate a compact in good faith: it is not intended to be a means by which a tribe may make an end-run around an existing agreement." *Id.*

Similarly, in the *Pauma Band* case, the Pauma tribe entered into a compact with the State of California and ten years later brought a claim for violation of the IGRA's good faith negotiation requirement. 813 F.3d at 1160–61, 1172. The Ninth Circuit held that the Pauma tribe could not succeed in a claim for violation of the IGRA's good faith negotiation requirement because a Tribal-State compact already existed. *Id.* at 1172–73. The court explained that the Pauma tribe's

IGRA claims ignored the IGRA's explicit statutory language which provides a detailed procedure for enforcing the IGRA's good faith negotiation requirements. *Id.* at 1172–73; *see id.* at 1172 ("Specifically, the Native American tribe must first introduce evidence that 'a Tribal-State compact *has not been entered into* under paragraph (3).'" (emphasis in original) (quoting 25 U.S.C. § 2710(d)(7)(B)(ii)(I))).

Specifically, "[t]he detailed procedures set forth in IGRA allow for redress by Native American tribes when a State refuses to negotiate or negotiates in bad faith for a gaming Compact. These procedures, by their own language, simply do not apply when the State and the Tribe have *actually reached a Compact*." *Id.* at 1172 (emphasis in original); *see also id.* at 1173 (explaining that the IGRA does not allow the court to turn back the clock and compel renegotiation of an agreement actually reached ten years ago).

In this case, the Tribe's IGRA claim suffers from the same fatal flaw as the claims brought by the tribes in the *Wisconsin Winnebago* and *Pauma Band* cases. The Tribe cannot meet its initial burden of producing evidence that a compact has not been entered into because in 2010 the Tribe and the State entered into the 2010 Compact which will remain in effect until 2030. *See* Tribe's Verified Complaint at Ex. A, at 49, Part XVI, § B; *see* 25 U.S.C. § 2710(d)(7)(B)(ii)(I); *Wisconsin Winnebago*, 22 F.3d at 723–24; *Pauma Band*, 813 F.3d at 1172–73. The 2010 Compact included limitations on the Tribe's authorization to conduct gaming, and

the Tribe agreed to those limitations. *See Pauma Band*, 813 F.3d at 1173 (explaining that IGRA did not allow the tribe in that case to turn back the clock and compel renegotiation).

The Tribe's current suit is an improper attempt to make an end-run around the bargained-for expiration of the Tribe's authorization to conduct banking or banked card games. The facts are that (1) the 2010 Compact provides that the Tribe's authorization to conduct banking or banked card games would automatically terminate five years after the effective date of the 2010 Compact, (2) if the Tribe requested a renewed authorization, nothing in the 2010 Compact requires the State to grant such a request, and (3) the 2010 Compact requires the Tribe to cease operation of banking or banked card games when the authorization terminated, following a 90-day grace period. *See* Tribe's Verified Complaint Exhibit A, at 49–50, Part XVI, § C, ECF No. 1-3. The 2010 Compact provides that it is effective until 2030 regardless of the renewal status of the Tribe's authorization to conduct banked card games. *See id.* at 49, Part XVI, § B.

Because the 2010 Compact is effective until 2030, the Tribe cannot use the IGRA to compel the State to negotiate an expansion of the scope of the Tribe's authorization to conduct banked card games under the 2010 Compact. When the 2010 Compact was being negotiated, the CEO of the Tribe's gaming operations proposed the five-year limitation on the Tribe's authorization to conduct banked

card games because the State legislature was unwilling to approve a twenty-year authorization. Deposition of James Allen 119:1–123:25, ECF No. 30-1. The Tribe persuaded the State to authorize banked card games by proposing to include in the twenty-year Compact a five-year limitation on the Tribe's authorization to conduct banked card games. Deposition of James Allen, 119:1–121:22, ECF No. 30-1; Tribe's Verified Complaint Exhibit A, at 49, Part XVI, § B, ECF No. 1. While at the Tribe's suggestion the 2010 Compact provided the State with the opportunity to extend the authorization to conduct banking or banked card games through an affirmative act of the Florida Legislature, it is undisputed that the Florida Legislature has not provided such authorization. Neither the 2010 Compact nor the IGRA provides the Tribe with a right to sue the State under these circumstances to secure a different deal than the one it negotiated in 2010. Therefore, the State is entitled judgment as a matter of law on the Tribe's claim for violation of IGRA's good-faith negotiation requirement.

B. The State's Sovereign Immunity Bars the Tribe's IGRA Claim.

The Eleventh Amendment to the United States Constitution bars the Tribe's claim pursuant to the IGRA in Count II. The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity,

> commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

Eleventh Amendment immunity bars any suit against a state in federal court, and can be waived only if (1) the state has voluntarily waived its sovereign immunity, or (2) Congress has expressly abrogated the state's immunity. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 237–40 (1985). A State may effectively waive its constitutional immunity in a contract, a state law, or a constitutional provision. Regardless of the manner of waiver, the Supreme Court has stated that "we require an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment." *Atascadero*, 473 U.S. at 238 n.1.

As discussed below, neither the State nor Congress has waived the State's Eleventh Amendment immunity from the Tribe's Count II claim. More specifically, the State has not waived its sovereign immunity from claims pursuant to the IGRA regarding an alleged failure to negotiate in good faith towards either (1) a renewal of the terminated authorization to conduct banking or banked card games under the 2010 Compact, or (2) a new compact.

1. The State's Sovereign Immunity Bars the Tribe's Claim in Count II, Which Is Not a Dispute Arising Out of the 2010 Compact.

The dispute presented by the Tribe in Count II is not a dispute arising out of the 2010 Compact. Rather, it is a dispute that arises out of the IGRA (a federal law) that the Tribe contends provides a remedy to secure a deal *other than* what is provided in the 2010 Compact.[1] In Count II, the Tribe alleges that it requested negotiations for a deal other than what is provided in the 2010 Compact in two different ways: (1) by requesting an amended compact in letters dated December 30, 2014 and May 1, 2015, and (2) by requesting a new compact altogether in the May 1, 2015 letter. *See* Tribe's Verified Complaint ¶¶ 31, 32, ECF No. 1. In either instance, the State has not waived its sovereign immunity from suit over its response to such requests.

In the 2010 Compact, the State waived its sovereign immunity only in regard to disputes that were "limited solely to issues arising under this Compact." The 2010 Compact states, in pertinent part:

> For purposes of actions based on disputes between the State and the Tribe that arise under this Compact and the enforcement of any judgment resulting therefrom, the Tribe and the State each expressly waives its right to assert sovereign immunity from suit and from enforcement of any ensuing judgment, and further consents to be sued in federal or state court, including the

1. For the reasons stated *supra*, IGRA cannot provide the Tribe the relief it seeks in Count II because there is an existing Tribal-State Compact in effect.

> rights of appeal specified above, as the case may be, provided that:
>
> (1) *the dispute is limited solely to issues arising under this Compact*;

See Tribe's Verified Complaint Exhibit A, at 45, XIII.D, ECF No. 1 (emphasis added).

While Count I of the Tribe's Complaint alleges violations of the State's obligations under the Compact (which were denied by the State, *see* Answer ¶¶ 16–35, ECF No. 18), Count II asserts that the State has failed to negotiate in good faith to enter a second, amended compact or an entirely new compact—not "this Compact."

State waivers of Eleventh Amendment immunity must be express and unambiguous. "In order to be subject to suit in federal court, a state must expressly and unambiguously waive its sovereign immunity, or Congress must clearly and unmistakably express its intention to abrogate the immunity in the language of the particular statute." *Coger v. Connecticut*, 309 F. Supp. 2d 274, 281 (D. Conn. 2004). Here, the State has expressly *retained* its immunity to suits not limited solely to issues arising under the 2010 Compact.

The Tribe's Count II claims do not "arise under" the 2010 Compact and therefore the State has not waived its constitutional sovereign immunity to the

Count II claim. The Tribe alleges in its Complaint that the State agreed to renegotiate the operations of banked card games after five years:

> 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.

See Tribe's Verified Complaint ¶ 28, ECF No. 1.

The State denies the alleged "contemplation" of renewal and also denies the characterization of the 20-year Compact as an "interim agreement." State's Answer ¶ 28, ECF No. 18. Further, there is no evidence of any such contemplated renegotiation for renewal within the four corners of the 2010 Compact. *See* Tribe's Verified Complaint Exhibit A, ECF No. 1-3. The reference to renewal is in Part XVI.C of the 2010 Compact, which states:

> C. 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.

Tribe's Verified Complaint Exhibit A, at 49–50, Part XVI.C, ECF No. 1-3.

Because the State has no obligation in the 2010 Compact to negotiate amendments to the 2010 Compact, the Tribe's "good faith" claims do not arise under the Compact and therefore is outside of the scope of the limited waiver of immunity consented to by the State. The absence of an obligation under the 2010 Compact to re-negotiate is highlighted by the fact that the Tribe brought a claim for Breach of Contract in this lawsuit but notably did not allege in that claim that the State's alleged failure to negotiate an amendment or a new compact was a breach of any provision in the 2010 Compact. That is because there is no provision in the 2010 Compact that obligated the State to enter into such negotiations, which underscores the fact that the dispute outlined in Count II is not a dispute "limited solely to issues arising under" the 2010 Compact. Because the Tribe's Count II claim does not arise solely out of the 2010 Compact, the limited waiver of sovereign immunity in the 2010 Compact does not apply to Count II and summary judgment on Count II is appropriate.

2. The State's Sovereign Immunity Precludes Unconsented "Good Faith" Claims under IGRA.

As discussed *supra*, Congress attempted to create a statutory remedy in the IGRA for tribes proposing Class III gaming in states that refuse to enter into Class III Gaming Compacts, which 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 . . . .

25 U.S.C. § 2710(d)(7)(A). As described below, the United States Supreme Court has already ruled that the State's Eleventh Amendment sovereign immunity and its own state Constitution bar that remedy absent the State's consent.

In 1996, in a dispute involving the very same parties to this case, the United States Supreme Court ruled that Section 2710(d)(7)(A) did not, and could not, abrogate a state's immunity from suit. *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 47 (1996) [hereinafter *Seminole I*]. In that case, the Tribe sued the State and its Governor[2] in the Southern District of Florida. The Tribe's claim that the federal court had jurisdiction over the State was based on Section 2710(d)(7)(A), the same section the Tribe now invokes. In *Seminole I*, the Tribe claimed that the State had refused to enter into any negotiations for a gaming compact. *See* 517 U.S. at 51. The State moved to dismiss the Tribe's complaint on the basis that the Tribe lacked the power to sue the State without its consent due to the State's Eleventh Amendment immunity from suit. *Id*. The district court denied the motion and the State took an interlocutory appeal of the order to the Eleventh Circuit Court of Appeals. *Id*.

2. The Tribe has only named the State in the instant litigation.

The Eleventh Circuit reversed the Southern District, holding that Congress lacked the power to abrogate the State's sovereign immunity under the authority of the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3. *Seminole Tribe of Fla. v. Fla.*, 11 F.3d 1016, 1019 (11th Cir. 1994), *aff'd*, 517 U.S. 44 (1996). The Eleventh Circuit specifically held that—in the absence of a valid waiver—Florida retained its sovereign immunity from the Tribe's suit, and that federal courts therefore lacked subject-matter jurisdiction over the Tribe's unconsented "good faith" claims. *Id*. The Supreme Court granted the Tribe certiorari, 513 U.S. 1125 (1995), to consider two questions: "(1) Does the Eleventh Amendment prevent Congress from authorizing suits by Indian tribes against States for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause?; and (2) Does the doctrine of *Ex parte Young* permit suits against a State's Governor for prospective injunctive relief to enforce the good-faith bargaining requirement of the Act?" *Seminole I*, 517 U.S. at 53. The Court held "that notwithstanding Congress' clear intent to abrogate the States' sovereign immunity, the Indian Commerce Clause does not grant Congress that power, and therefore § 2710(d)(7) cannot grant jurisdiction over a State that does not consent to be sued." *Id*. at 47.

The Court reasoned that "[f]or over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated

by the Constitution when establishing the judicial power of the United States.'" *Seminole I*, 517 U.S. at 54 (quoting *Hans v. Louisiana*, 134 U.S. 1, 15 (1890)). In reaching its conclusion, the Court enumerated the constitutional sources of Congress' power to unilaterally abrogate the States' immunity from suit and determined that it had found such authority only in Sections 1 and 5 of the Fourteenth Amendment and, in one case, in the Interstate Commerce Clause, Art. I, § 8, cl. 3. *Seminole I*, 517 U.S. at 59.

With this, the Court rejected the Tribe's argument that the Indian Commerce Clause granted Congress any power to abrogate state sovereign immunity, and overruled its own holding in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) that the Interstate Commerce Clause granted Congress such power over the states:

> In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction. Petitioner's suit against the State of Florida must be dismissed for a lack of jurisdiction.

Seminole I, 517 U.S. at 72–73.

Since *Seminole I*, the Tribe prospered by operating Class II gaming, and in 2010 the Tribe and the State voluntarily negotiated and entered into the 2010 Compact. Neither those negotiations nor the text of the 2010 Compact waived the State's immunity to suit under the IGRA or modified the applicability of the Court's 1996 holding to the State and the Tribe. Accordingly, the only waiver of the State's immunity to which the State has consented is that provision allowing tribal suits over disputes limited solely to issues "arising under" the 2010 Compact.

V. Conclusion

For the reasons stated herein, the State requests that the Court enter an order granting summary judgment in favor of the State on Count II of the Tribe's Verified Complaint.

WHEREFORE, the Defendant, STATE OF FLORIDA, respectfully requests that this Court enter an order granting summary judgment in favor of the State on Count II of the Verified Complaint filed by the Plaintiff, SEMINOLE TRIBE OF FLORIDA, and granting any further relief this Court deems just and proper.

CERTIFICATE OF WORD COUNT

As required by Local Rule 7.1(F), I certify that the foregoing contains 5,577 words, excluding parts of the document that are exempted by the Rule.

Dated: June 3, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 3, 2016, a true and correct copy of the foregoing was served via regular U.S. Mail, with a courtesy copy served via electronic mail to:

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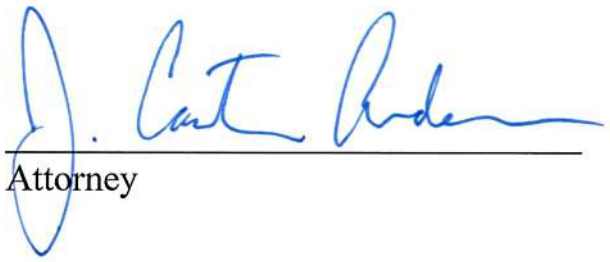

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