UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

SEMINOLE TRIBE OF FLORIDA,

Plaintiff,

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

v.

STATE OF FLORIDA,

Defendant.

SEMINOLE TRIBE'S MEMORANDUM ON STATE'S WAIVER OF SOVEREIGN IMMUNITY

I. THE STATE HAS WAIVED ITS SOVEREIGN IMMUNITY FOR COUNT II OF THE TRIBE'S COMPLAINT ALLEGING VIOLATIONS OF IGRA

Although the Eleventh Amendment of the United States Constitution preserves states' sovereign immunity from suit in federal court, "[a] [s]tate remains free to waive its Eleventh Amendment immunity from suit in a federal court." *Lapides v. Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 618 (2002). One way in which a state waives such sovereign immunity is by voluntarily invoking the jurisdiction of a federal court. *Id*.

In *Lapides*, the Supreme Court held that a state cannot avail itself of a federal court and at the same time assert its Eleventh Amendment immunity to deny the federal court the ability to fully hear the case. 535 U.S. 613 (2002). The

Supreme Court stated that "a constitution that permitted [s]tates to follow their litigation interests by freely asserting both claims in the same case could generate seriously unfair results." *Id.* at 619. Thus, when a state "*voluntarily* becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment." *Id.* (quoting *Gunter v. Atl. Coast Line R. Co.*, 200 U.S. 273, 284 (1906)). In *Lapides*, the state had already waived its sovereign immunity for the suit in its state court, and the Supreme Court found the state's act of voluntarily removing the case to federal court qualified as a form of voluntary invocation of federal court jurisdiction sufficient to waive the state's sovereign immunity within the federal court. *Id.* at 624.

In the instant case, the State of Florida's act of voluntarily invoking federal court jurisdiction over its IGRA and Compact claims served to waive its sovereign immunity for the Tribe's intertwined and interrelated IGRA claim. From time to time, Congress enacts a law that is carefully designed to balance competing interests, and it does so by creating interdependent rights and remedies for the competing interests. IGRA is one of those laws. IGRA is the sole source of a state's power to prohibit gaming on Indian lands and the source of federal court jurisdiction required to enforce such a prohibition. The power to prohibit class III gaming arises from 25 U.S.C. § 2710(d)(1)(C), which allows such gaming only

pursuant to a compact. But that power is conditioned on the duty of the state to negotiate a compact in good faith as required by 25 U.S.C. § 2710(d)(3).

The ability of states to enforce a prohibition of gaming on Indian lands in federal court is set forth in 25 U.S.C. § 2710(d)(7)(A)(i), which grants jurisdiction to federal courts to enjoin class III gaming conducted in violation of a compact. But the power of a state to seek federal court help is conditioned on the concomitant power of the tribe to invoke the jurisdiction of the federal court to enforce its right to good faith bargaining, found in 25 U.S.C. § 2710(d)(7)(A)(ii). As a result, courts have not permitted IGRA to form the basis of an injunction to bar a tribe from carrying out un-compacted gaming when the state has refused to negotiate in good faith. *United States v. Spokane Tribe of Indians*, 139 F.3d 1297 (9th Cir. 1998); *see also Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1245–50 (11th Cir. 1999) (finding state had no right of action under IGRA to enjoin gaming without compact in place). It is patently clear from the language and structure of IGRA that Congress did not intend to empower one party to invoke the jurisdiction of a federal court to enforce a conditional right but to deny the other party the right to invoke federal court jurisdiction to enforce the condition.

When the State filed suit in federal court seeking enforcement of 25 U.S.C. § 2710(d)(1)(C) and asserted federal jurisdiction under 25 U.S.C.

§ 2710(d)(7)(A)(ii), it knew or should have known that it was empowering the Court to enforce all provisions of the integrated section. This includes the Tribe's claim for enforcement of IGRA's good faith negotiation requirement found in 25 U.S.C. § 2710(d)(3)(A) pursuant to the grant of federal court jurisdiction found in 25 U.S.C. § 2710(d)(7)(A). The State's effort to convince the Court to take jurisdiction to enforce its IGRA power to enjoin allegedly unauthorized gaming but to deny the Tribe's right to enforce IGRA's requirement for good faith compact negotiation would require the Court to disassemble Congress's carefully balanced IGRA structure, and it would be an egregious example of the unfairness condemned by the Supreme Court in *Lapides*. This argument was more fully set forth in the Tribe's Memorandum in Opposition to State's Motion for Partial Summary Judgment. ECF No. 44 at 5–7.

The State cites cases that are distinguishable by the fact that the states had been involuntarily hauled into court to defend themselves rather than taken the voluntary action of initiating suit themselves in federal court. For example, in *Stroud v. McIntosh*, put forth by the State, a terminated employee sued a state for violation of a federal statute in state court, and the state removed the case to federal court. 722 F.3d 1294 (11th Cir. 2013). The Eleventh Circuit held that a state's removing a case to federal court when it has preserved its sovereign immunity from suit in the underlying state court case amounts to a waiver of sovereign

immunity for federal court jurisdiction to hear the suit but not a waiver of sovereign immunity for a defense from liability for a particular claim. *Id.* at 1301. According to the Court, "[w]e do not understand *Lapides* to require the state to forfeit an affirmative defense to liability simply because it changes forums." *Id*. at 1302. Importantly, *Stroud* involved the state being involuntarily sued in state court, and the state's only voluntary act during the litigation was removal to federal court.

The present action is entirely distinguishable from the rule in *Stroud*. Here, the State has voluntarily invoked federal jurisdiction by bringing its own suit in federal court alleging violations of IGRA and thus has waived its sovereign immunity for all aspects of the Tribe's intertwined IGRA claim, including immunity from federal court jurisdiction and immunity from liability.

II. THE STATE HAS WAIVED ITS SOVEREIGN IMMUNITY FOR A COUNTERCLAIM BY THE TRIBE ALLEGING VIOLATION OF IGRA

If count II of the Tribe's Complaint is dismissed, the Tribe should be permitted to file its good faith claim as a compulsory counterclaim to the State's Complaint alleging violation of IGRA's good faith negotiation requirement, as the State has waived its sovereign immunity for such a counterclaim.

A. The State Waived its Sovereign Immunity for Compulsory Counterclaims and Such Waiver Is Not Limited to Recoupment

As discussed above, by voluntarily invoking federal jurisdiction a state waives its sovereign immunity respecting the adjudication of all aspects of the case. *Lapides*, 535 U.S. at 644. This waiver's application is particularly clear for counterclaims to a claim initiated by a state in federal court, especially when those counterclaims are compulsory. *Bd. Of Regents of Univ. Of Wisconsin Sys. v. Phoenix Int'l Software, Inc.*, 653 F.3d 448, 461–62, 464, 471 (7th Cir. 2011) (noting that a State may waive its immunity by filing an original action in federal court under *Lapides*); *Regents Of Univ. Of New Mexico v. Knight*, 321 F.3d 1111, 1126 (Fed. Cir. 2003) (holding that the University of New Mexico waived its immunity from any compulsory counterclaims when it filed suit in federal court seeking a declaration of patent ownership and inventorship). In the case of intertwined IGRA claims, it has been held that sovereign immunity for counterclaims is waived. *See, e.g., New York v. Oneida Indian Nation of New York*, No. 1:95CV554 (LEK/RFT), 2007 WL 2287878 (N.D.N.Y. 2007).

The State cited several cases as supplemental authority that stand for the proposition that a waiver of sovereign immunity for counterclaims is limited to actions claiming setoff or recoupment. All but one of the cited cases that addressed the issues of setoff or recoupment were decided before *Lapides*. For example, *Georgia v. Bell* limited the waiver of sovereign immunity for counterclaims to

those counterclaims seeking recoupment meant to defeat or diminish the state's requested recovery. *Georgia Dep't of Human Res. v. Bell,* 528 F. Supp. 17, 26 (N.D. Ga. 1981). In *State of Alaska v. O/S Lynn Kendall*, the State was not held to have waived its sovereign immunity for counterclaims for money damages by bringing suit. 310 F. Supp. 433 (1970). In *Woelffer v. Happy States of Am., Inc.*, also cited by the State, the court held that a waiver of sovereign immunity did not encompass a counterclaim requesting injunctive relief, finding that the prospective relief requested was more intrusive than money damages and was a "close question." 626 F. Supp. 499, 503 (N.D. Ill. 1985). Even so, however, the court was careful to note that a counterclaim for declaratory relief would have been permissible.

The one case cited by the State that was decided after *Lapides*, and that follows the pre-*Lapides* courts that had limited counterclaims to recoupment or setoff is *Massachusetts v. Wampanoag Tribe of Gay Head*, 98 F. Supp. 3d 55 (D. Mass 2015). There, the State filed suit in State court and the case was removed by the Tribe to federal court. Unlike the present case, the State of Massachusetts did not affirmatively seek jurisdiction to enforce federal claims in federal court that are inextricably intertwined with the counterclaims the Tribe seeks to bring. The court held that the state had not voluntarily submitted to federal jurisdiction and

mentioned in dicta that, even if it had, one of its claims for affirmative relief would run afoul of the recoupment limitation cases.[1]

More recently federal courts, particularly those decided after *Lapides,* have moved away from the recoupment theory and allowed other relief for counterclaims. *Bd. Of Regents of Univ. Of Wisconsin Sys.,* 653 F.3d at 469–70; *Regents Of Univ. Of New Mexico*, 321 F.3d at 1124–25 (holding that "when a state waives its sovereign immunity by litigation conduct, that waiver opens the door to counterclaims regarded as compulsory within the meaning of Federal Rule of Civil Procedure 13(a)"); *Arecibo Cmty. Health Care, Inc. v. Commonwealth of Puerto Rico*, 270 F.3d 17, 27 (1st Cir. 2001) (holding that "a state waives its Eleventh Amendment immunity by availing itself of the jurisdiction of the federal courts."). Courts examining whether states have waived their sovereign immunity for IGRA counterclaims have allowed for equitable and declaratory relief, finding that such relief does not offend principles of sovereign immunity. *Oneida Indian Nation of New York*, 2007 WL 2287878, at *9.

[1] The court mentioned *Lapides* for the proposition that "[a] state that files a federal complaint or removes a case to federal court has likely waived its immunity, at lead in part," but made no effort to explain why the recoupment theory still makes sense after *Lapides*.

B. A Counterclaim Brought by the Tribe Alleging Violation of IGRA's Good Faith Negotiation Requirement Can Properly be Considered a Compulsory Counterclaim to the State's Complaint

According to FRCP Rule 13, a compulsory counterclaim is a claim that "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim" and "does not require adding another party over whom the court cannot acquire jurisdiction." Fed. R. Civ. P. 13(a)(1). The relief sought in a counterclaim may exceed in amount or differ in kind from the relief sought by the opposing party. Fed. R. Civ. P. 13(c).

The Eleventh Circuit applies the "logical relationship" test to determine whether a counterclaim is compulsory. When there is a "logical relationship" between the counterclaim and the main claim, the counterclaim arises out of the same transaction or occurrence and is considered compulsory. *Republic Health Corp. v. Lifemark Hosps. of Florida, Inc.*, 755 F.2d 1453, 1455 (11th Cir. 1985).

There is a logical relationship when "the same operative facts serve as the basis of both claims or the aggregate core of facts upon which the claim rests activates additional legal rights, otherwise dormant, in the defendant." *Republic Health Corp.*, 755 F.2d at 1455 (quoting *Plant v. Blazer Financial Services, Inc.*, 598 F.2d 1357, 1361 (5th Cir. 1979)). Proof of the same or identical facts is not necessary, but rather both claims must arise out of the same aggregate operative

facts. *John Alden Life Ins. Co. v. Cavendes*, 591 F. Supp. 362, 365 (S.D. Fla. 1984).

The State's and Tribe's IGRA claims are interwoven and dependent upon each other. The State cannot prevail under its claims if the Tribe is correct that the State did not negotiate in good faith for reauthorization of the very games the State complains of. Therefore, the Tribe's IGRA good faith negotiation claim has a logical relationship to the State's claims that the Tribe's operation of banked card games violate the Compact and IGRA because the claims arise from the same aggregate operative facts.

In *Oneida Indian Nation of New York*, the court found that when a state invokes federal court jurisdiction to enjoin a tribe from conducting a game because the compact does not properly authorize the game, the tribe's counterclaims that the games are permitted and that the state failed to negotiate in good faith were compulsory counter claims for which the state waived its sovereign immunity by filing its initial suit. 2007 WL 2287878, at *8. Like the Eleventh Circuit, the court applied the logical relationship test and held that the tribe's claim was a compulsory counterclaim. *Id.* The court held that "allowing the counterclaims to go forward does not offend the principle animating sovereign immunity," noting that the Tribe was not seeking an affirmative recovery, but rather seeking a declaration of its rights under the Compact. *Id* at *9.

Here, the State has alleged the Tribe is conducting games not authorized under the Compact in violation of IGRA, and the Tribe has alleged both that the Compact does authorize the games and that the State has failed to negotiate in good faith as required by IGRA for reauthorization of those very games. The facts of the cases mirror each other, and the Tribe's good faith negotiation counterclaim qualifies as a compulsory counterclaim for which the State has waived its sovereign immunity.

III. CONCLUSION

The Tribe therefore respectfully urges the Court to find the State waived its sovereign immunity for the Tribe's IGRA count II good faith negotiation claim or, in the alternative, for a counterclaim alleging the same claim.

CERTIFICATE OF WORD COUNT

As required by Local Rule 7.1(F), I certify that the foregoing contains 2,439 words per Microsoft Word count.

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