

**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.

_____ /

STATE OF FLORIDA’S MEMORANDUM ON IMMUNITY

The Defendant, STATE OF FLORIDA (the “**State**”), by and through its undersigned attorneys, submits the following memorandum on the State’s Eleventh Amendment and sovereign immunity from Count II of the Complaint filed by the Plaintiff, SEMINOLE TRIBE OF FLORIDA (the “**Tribe**”).

I. OVERVIEW

The State’s sovereign immunity entitles it to dismissal of Count II of the Tribe’s Complaint (“**Count II**”), and no agreement between the parties or action by the State in this litigation has waived that immunity. For the reasons stated below, recasting Count II as a counterclaim in the State’s case would not defeat the State’s immunity. The State has retained (1) its Eleventh Amendment immunity from suit in this forum and (2) its sovereign immunity from liability for the claim at issue under Florida law.

II. COUNT II DOES NOT CONSTITUTE A COMPULSORY COUNTERCLAIM.

As a threshold matter, Count II does not meet the criteria outlined in Rule 13 for compulsory counterclaims. The Tribe's claim that the State has failed to respond in good faith to the Tribe's demand for negotiations towards a new or different gaming compact is not a claim that "arises out of the transaction or occurrence that is the subject matter of the [State]'s claim." See Fed. R. Civ. P. 13(a)(1)(A).

The Eleventh Circuit has adopted a "logical relationship" test to determine whether a counterclaim is compulsory under Rule 13. *Republic Health Corp. v. Lifemark Hosps. of Fla., Inc.*, 755 F.2d 1453, 1454–55 (11th Cir. 1985). Under that test, a counterclaim is compulsory 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." *Id.* (citing *Plant v. Blazer Financial Servs., Inc.*, 598 F.2d 1357, 1361 (5th Cir. 1979)).

Count II also clearly fails other, more specific tests of whether a counterclaim is compulsory in Florida, including (1) whether the same evidence supports (or refutes) both the claim and counterclaim, and (2) whether failure to bring the counterclaim in the instant litigation would have a *res judicata* effect. *Montgomery Ward Dev. Corp. v. Juster*, 932 F.2d 1378, 1381 (11th Cir. 1991). The evidence and testimony for Count II are substantially different from the State's

evidence and testimony. Further, the Tribe's failure to bring Count II as a counterclaim does not have a *res judicata* effect because adjudication of the State's claims does not involve the same operative facts as the Tribe's good faith claim.

The State's claims are based on the Tribe's conduct of banking or banked card games without authorization. The Tribe's Count II alleges that the State failed to negotiate in good faith for a new or amended gaming compact in 2015, and the Tribe argues that it has an affirmative statutory right provided by the IGRA. But Count II does not involve a dormant right "activated" by the filing of the State's Complaint. Thus, the evidence supporting (or refuting) the State's claims is different than the evidence supporting (or refuting) the Tribe's Count II, and the State's claims and the Tribe's Count II have different operative facts. See *Montgomery Ward*, 932 F.2d at 1381. For these reasons, Count II is not a compulsory counterclaim.

III. THE STATE DID NOT WAIVE ELEVENTH AMENDMENT FORUM IMMUNITY TO COUNT II.

While in some circumstances filing a complaint in federal court will waive a state's right to invoke Eleventh Amendment immunity, such a waiver does not extend to all plausible counterclaims that the defendant might later assert. *Massachusetts v. Wampanoag Tribe of Gay Head*, 98 F. Supp. 3d 55 (D. Mass. 2015) (citing *Woelffer v. Happy States of Am., Inc.*, 626 F. Supp. 499, 502 (N.D.

Ill. 1985) (recognizing that a state plaintiff who files a federal complaint “does not waive its sovereign immunity with respect to all plausible counterclaims”). A state’s voluntary appearance in the federal forum will waive its Eleventh Amendment immunity to compulsory counterclaims *only* when those claims (1) arise from the same event underlying the state’s claim, and (2) attempt defensively, by way of recoupment, to defeat or diminish the state’s recovery rather than obtain an affirmative judgment. *Id.* at 73. Count II does not meet this test.

As noted above, Count II does not arise out of the transaction or event that is the subject matter of the State’s complaint. The State’s claims and the Tribe’s Count I arise from the same transaction or event: the parties’ execution of the 2010 Compact, an agreement that each side asserts was later breached by the other.¹ In contrast, Count II arises from the Tribe’s desire for a new and different deal than the one memorialized in the 2010 Compact.

Additionally, Count II is not a defensive recoupment counterclaim that seeks to defeat or diminish the State’s recovery. *See Tohono O’odham Nation v. Ducey*, 2016 WL 1241888, No. CV-15-1135-PHX-DGC, at *5 (D. Ariz. Mar. 30, 2016) (“A counterclaim sounds in recoupment if it seeks to ‘defeat or diminish recovery

¹ Notably, the Tribe does not assert in its breach of compact claim that any term in the 2010 Compact obligated the State to come back to the negotiating table when the Tribe’s five-year authorization to conduct banking games expired, or that the same failure to negotiate alleged in Count II constituted a breach of the 2010 Compact by the State.

by the sovereign,’ but not if it seeks affirmative relief.”); *see also Berry v. Asarco, Inc.*, 439 F.3d 636, 643 (10th Cir. 2006) (“Claims in recoupment arise out of the same transaction or occurrence, seek the same kind of relief as the plaintiff, and do not seek an amount in excess of that sought by the plaintiff.”).

Rather than asserting a defensive recoupment claim, Count II asserts an affirmative, stand-alone claim that seeks a mandatory injunction ordering the State to enter into negotiations for a new compact.² That requested relief is inconsistent with the concept of recoupment. *See U.S. v. Ownbey Enterprises, Inc.*, 780 F. Supp. 817, 820 (N.D. Ga. 1991) (quoting *F.D.I.C. v. Corning Sav. & Loan Ass’n*, 696 F. Supp. 1245, 1247 (E.D. Ark. 1988) (recognizing that recoupment is “the right of the defendant to have the plaintiff’s monetary claim reduced by reason of some claim the defendant has against the plaintiff arising out of the very [action] giving rise to the plaintiff’s claim”); *see also Tohono O’odham Nation*, 2016 WL 1241888, at *6 (“The Supreme Court has described the equitable recoupment exception as applying where the counterclaim seeks to ‘recoup . . . an amount

² The Tribe also has raised failure to negotiate in good faith as an affirmative defense to the State’s claim against the Tribe for violation of IGRA. *See* Tribe’s Second Affirm. Def., ECF No. 28 (Case No. 4:15-cv-00588-RH-CAS). Contrasting the Tribe’s second affirmative defense with Count II shows that Count II is not a defensive or setoff claim for recoupment. Count II is an offensive claim for a declaration and injunctive relief. The Tribe’s second affirmative defense fails as well because allegation of a failure to negotiate in good faith is not a defense to the State’s claim that the Tribe violated IGRA by conducting Class III gaming not authorized under a Tribal-State compact.

equal to the principal claims, and has never applied the exception to counterclaims seeking relief other than damages. Several federal courts have also concluded that the exception is limited to counterclaims seeking to reduce a sovereign's recovery of money damages.") (emphasis in original); *Ownbey Enters.*, 780 F. Supp. at 820 ("A request for injunction, however, cannot be a recoupment claim because, as stated above, recoupment is a defensive action which can only reduce a plaintiff's monetary award, while an injunction is an affirmative request for relief. . . . A recoupment claim can be asserted only when the plaintiff is seeking damages for a defendant's actions and the defendant counterclaims seeking to reduce any potential damage award because of the plaintiff's actions.").

Because Count II does not arise from the same transaction underlying the State's Complaint and is not a defensive recoupment counterclaim, it does not fall within the equitable recoupment exception to Eleventh Amendment immunity.

IV. THE STATE DID NOT WAIVE SOVEREIGN IMMUNITY FROM LIABILITY FOR THIS TYPE OF CLAIM.

Even if the Court were to find a waiver of Eleventh Amendment immunity from suit in this forum, the State would be entitled to dismissal of Count II based on its sovereign immunity from liability. *See Stroud v. McIntosh*, 722 F.3d 1294, 1301 (11th Cir. 2013) (holding that "a state, if it chooses, can retain immunity from liability for a particular claim even if it waives its immunity from suit in federal

courts”); *see also id.* at 1302 (“[N]othing in *Lapides* suggests that a state waives any defense it would have enjoyed in state court—including immunity from liability for particular claims.”); *id.* at 1298 (citing Erwin Chemerinsky, *Federal Jurisdiction* 422 (6th ed. 2012) (“[T]he Eleventh Amendment is neither a source of nor a limitation on states’ sovereign immunity from suit. Rather, it is a recognition of states’ sovereign immunity in federal court.”)).

It is undisputed that the State’s waiver of sovereign immunity from suit in federal or state court was limited to disputes limited solely to issues arising under the 2010 Compact. *See* Tribe’s Verified Compl. Ex. A at 45, Part XIII, § D(1), ECF No. 1-3. Whether or not the State waived its Eleventh Amendment immunity, it has never waived its sovereign immunity from liability from Count II. For that reason, Count II should be dismissed.

Dated: September 28, 2016

Respectfully submitted,

Jason Maine
Florida Bar No. 091833
General Counsel
Department of Business and Professional
Regulation
2601 Blair Stone Road
Tallahassee, Florida 32399
Telephone: (850) 717-1241
Facsimile: (850) 922-1278
jason.maine@myfloridalicense.com

William N. Spicola
Florida Bar No. 0070732
General Counsel
Executive Office of the Governor
William.Spicola@eog.myflorida.com
Counsel for Defendant

/s/ J. Carter Andersen
J. Carter Andersen, Esq.
Florida Bar No. 0143626
candersen@bushross.com
Anne-Leigh Gaylord Moe, Esq.
Florida Bar No. 018409
amoe@bushross.com
BUSH ROSS, P.A.
1801 North Highland Avenue
P.O. Box 3913
Tampa, Florida 33601-3913
Telephone: (813) 224-9255
Fax: (813) 223-9620
Local Counsel for Defendant

OF COUNSEL:

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

Dennis J. Whittlesey, Esq.
DC Bar No.: 053322
dwhittlesey@dickinsonwright.com
Patrick M. Sullivan, Esq.
DC Bar No.: 1018119
psullivan@dickinsonwright.com
DICKINSON WRIGHT PLLC
1825 Eye St, N.W. - Suite 900
Washington, D.C. 20006
Telephone: (202) 659-6928
Facsimile: (202) 659-1559
Pro Hac Vice Counsel for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 28, 2016, the foregoing was filed electronically with the Clerk of the United States District Court for the Northern District of Florida using the CM/ECF system which will send a notice of electronic filing to the following parties:

Barry Richard, Esquire
Greenberg Traurig, P.A.
101 East College Avenue
Tallahassee, FL 32301
Email: richardb@gtlaw.com;
trammellc@gtlaw.com
flservice@gtlaw.com

Joseph H. Webster, Esquire
Hobbs Straus Dean & Walker, LLP
2120 L Street, N.W., Suite 700
Washington, D.C. 20037
Email: jwebster@hobbsstraus.com

/s/ J. Carter Andersen
Attorney