IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

FSS DEVELOPMENT CO., LLC, a Delaware limited liability company,	)	
Plaintiff,	)	
v.	)	Case No. CIV-17-661-R
APACHE TRIBE OF OKLAHOMA, a federally recognized Indian tribe; **APACHE BUSINESS COMMITTEE**, an arm of the Apache Tribe of Oklahoma; **BOBBY KOMARDLEY**, an individual; **CHERYL WETSELLINE**, an individual; **JUSTUS PERRY**, an individual; **DONALD KOMARDLEY**, an individual; and **TOM JULIAN**, an individual,	)	
Defendants.	)	

DEFENDANTS' COMBINED REPLY IN SUPPORT OF THEIR MOTION TO STAY AND MOTION TO DISMISS

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Plaintiff FSS Development Co., LLC ("FSS") did not file this action under the federal question statute. 28 U.S.C. § 1331. FSS filed this action as a diversity case involving simple contract disputes: breach of contract, tortious interference, and declaratory judgment regarding the alleged contract's status. But FSS concedes in its Combined Response this Court lacks diversity jurisdiction. Comb. Resp. to Mots. to Stay and Dismiss, 3(Doc. 25) ("Combined Response").

FSS now argues this Court has federal-question jurisdiction over its breach of contract claim (and supplemental jurisdiction over its tortious interference and declaratory judgment claims). *See* Combined Resp. to Mots. to Stay and Dismiss, 4 (Doc. 25). But there are no federal questions here. The face of the Amended Complaint (Doc. 8) shows all causes of action present simple contract disputes, over which a federal court normally lacks subject-matter jurisdiction without complete diversity.

The Apache Tribe has raised certain issues under the Indian Gaming Regulatory Act, Pub. L. 100–497, 102 Stat. 2467(Oct. 17, 1988), in its CFR Court action, *Apache Tribe v. FSS Development, LLC,* (Doc. 21-1). Those issues, however, can properly be resolved in CFR Court, a federally administered court. Moreover, the Apache Tribe's central claim in that case is FSS failed to comply with tribal law (not federal law) in obtaining its alleged public contract. Federal courts have not found federal-question jurisdiction over those tribal law disputes. This action should be stayed pending exhaustion of tribal court remedies or dismissed for lack of subject-matter jurisdiction, failure to join, and failure to state a claim for which relief can be granted.

FSS's case before this court presents a run-of-the-mill contract dispute. FSS is fully

capable of counterclaiming and litigating those issues in the CFR Court, which has subject-matter jurisdiction over the Apache Tribe's action. FSS raises no federal issues in its Amended Complaint (Doc. 8). This case should be stayed pending exhaustion of tribal court remedies or, alternatively, dismissed for lack of subject-matter jurisdiction.

1. Establishing federal-question jurisdiction requires a high burden of persuasion, which FSS has not met.

The Tenth Circuit has noted statutes conferring federal jurisdiction must be strictly construed, with any doubts resolved against federal jurisdiction. "Federal courts are courts of limited jurisdiction. A court's jurisdiction is therefore presumed not to exist absent a showing by the party invoking federal jurisdiction. Moreover, 'statutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction.'" *U.S. ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1543–44 (10th Cir. 1996) (internal citations omitted); *see also Calumet Gaming Grp.-Kansas, Inc. v. Kickapoo Tribe of Kansas*, 987 F. Supp. 1321, 1325 (D. Kan. 1997) ("In this regard, the court notes that statutes conferring federal jurisdiction are to be *strictly construed*, and doubts are to be resolved *against federal jurisdiction.*") (emphases added).

"The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). There exists "an 'independent corollary' to the well-pleaded complaint rule, known as the 'complete pre-emption' doctrine. On occasion, the Court has concluded that the pre-emptive force of a statute is so 'extraordinary' that it

'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Id.* at 393 (internal citations omitted). A party cannot create federal question jurisdiction, "merely by injecting a federal question into an action that asserts what is plainly a state-law claim . . . .". *Id.* at 399 (emphasis in original) (holding in a removal action that defendant could not convert the state law breach of contract claims into a federal question for purposes of removal).

A district court may exercise federal question jurisdiction "when the cause of action is *created by* federal law or turns on a *substantial question* of federal law." *Morris v. City of Hobart*, 39 F.3d 1105, 1111 (10th Cir. 1994) (emphases added). FSS's breach-of-contract action is not created by federal law. It is simply a state (or tribal) law claim.[1] No substantial question of federal law exists because FSS's breach-of-contract action does not require any interpretation of the Indian Gaming Regulatory Act. FSS alleges the contract exists as a matter of tribal law and the Apache Tribe breached the contract. FSS does not allege the contract required approval by the National Indian Gaming Commission under the Indian Gaming Regulatory Act. FSS only claims the contract was properly entered into under tribal law, which is a claim untethered from any federal question. If FSS does not believe its contract required federal action under federal law, it should not believe its breach-of-contract claim creates a federal question.

"A court examining whether a case turns on a question of federal law should focus

[1] FSS cites no authority for the proposition that the Indian Gaming Regulatory Act preempts *tribal* law—as opposed to state law. The central allegations of the Apache Tribe's CFR Court complaint are that the alleged contract was not properly approved as a matter of *tribal* law. The federal preemption analysis does not even apply to tribal law regarding how the tribe enters into contracts and conducts its own internal affairs.

on whether Congress evidenced an intent to provide a federal forum." *Id.* ("Turning to Title VII, we find no suggestion that Congress intended to confer federal question jurisdiction over contract disputes arising out of private settlements."). FSS cites nothing in the Indian Gaming Regulatory Act showing Congress *intended* to turn state (or tribal) law breach-of-contract claims into federal questions. In fact, Congress did nothing of the sort. Congress created specific and limited causes of action for resolving disputes between tribes and states and actions to enforce the Secretary's procedures initiated by the Secretary. 25 U.S.C. § 2710(d)(7). But Congress did *not* create an explicit federal cause of action for simple breach of contract claims between a vendor and a tribe.[2]

The "majority of courts who have decided the issue," have found "that IGRA provides no private right of action against the Tribe, the State, the federal government or any official or agency thereof." *Hartman v. Kickapoo Tribe Gaming Comm'n*, 176 F. Supp. 2d 1168, 1175 (D. Kan. 2001), *aff'd*, 319 F.3d 1230 (10th Cir. 2003). Violations of a federal statute alone do not create a private right of action under a statute." *Id.* (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979) ("[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person.") (internal citations omitted).

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[2] The only other references to federal court in the Indian Gaming Regulatory Act specify exactly what types of actions Congress intended to be brought in federal court. *See* 25 U.S.C. § 2711(d) (tribe suing the Chairman); § 2713(c) (appeal of a fine issued by the Chairman); § 2714 (appeal of decisions made by the Commission); § 2715(c) (Commission's subpoena power). The Supreme Court explained '[a] frequently stated principle of statutory construction[:] when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." *National R.R. Passenger Corp. v. Nat'l Assoc. of R.R. Passengers*, 414 U.S. 453, 458, 94 S.Ct. 690, 693, 38 L.Ed.2d 646 (1974). Here, the Court should not expand the causes of action created by the Indian Gaming Regulatory Act to include a vendor's-breach of-contract claim.

The remedies for violations of the Indian Gaming Regulatory Act "do not include the right for a private individual to sue for lack of compliance with IGRA. Had Congress intended a private cause of action under IGRA, it would have provided for it explicitly." *Id.* at 1175. "When legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." *National R.R. Passenger Corp. v. National Assoc. of R.R. Passengers,* 414 U.S. 453, 458.

2. FSS's breach-of-contract claim does not raise a substantial federal question.

The only cause of action FSS argues creates federal-question jurisdiction is its breach-of-contract claim. (Comb. Resp., Doc. 25 at 9). "FSS's state law breach of contract claim is considered as presenting a federal question under 28 U.S.C. § 1331 and should not be dismissed." (*Id.*). According to FSS, all other causes of action (tortious interference and declaratory judgment) are only in federal court based on supplemental jurisdiction. *Id.* So, if FSS is wrong that the breach of contract claim creates a federal question, all other claims must also be dismissed.

Other federal district courts have held that a gaming vendor's breach-of-contract claim does not create federal question jurisdiction. "In its state law claims, Calumet seeks state law remedies for breach of a consulting agreement and default on a loan. Such claims are not created by IGRA, nor do they turn on a substantial question involving that statute." *See, e.g., Calumet Gaming Grp.-Kansas, Inc. v. Kickapoo Tribe of Kansas,* 987 F. Supp. 1321, 1325 (D. Kan. 1997) (rejecting federal-question jurisdiction over claims brought against Indian tribe by gaming vendor) ("Here, however, the dispute concerns a consulting agreement that

is not subject to IGRA, and the statute need not be interpreted or applied. Accordingly, Calumet's state law claims do not raise a federal question.").

Even the Eighth Circuit, which had previously found complete preemption over disputes involving Indian gaming regulation, has rejected federal-question jurisdiction over breach-of-contract actions by vendors against tribes. *Iowa Mgmt. & Consultants, Inc. v. Sac & Fox Tribe of Mississippi in Iowa*, 207 F.3d 488, 489 (8th Cir. 2000) (affirming dismissal of vendor's complaint for lack of subject-matter jurisdiction). "The presence or absence of federal [ ] question jurisdiction is governed by the 'well-pleaded complaint' rule, which provides that the plaintiff's claim itself must present a federal question unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose." *Id.* (internal quotations and citations omitted). In *Iowa Mgmt.* the court found the vendor's claim presented a "routine contract action involving the Tribe, a matter over which federal courts do not have jurisdiction . . . . *Iowa Mgmt.* held "the vendor's anticipatory contention that the Tribe may invoke the provisions of IGRA as a defense is insufficient to confer federal question jurisdiction on this court." *Id.* (citing *TTEA v. Ysleta del Sur Pueblo,* 181 F.3d 676, 681 (5th Cir. 1999)).

Similarly, the Eleventh Circuit has found routine contract actions do not create federal question jurisdiction, even where the Indian Gaming Regulatory Act might be implicated. *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida*, 999 F.2d 503, 506–08 (11th Cir. 1993) (finding no federal question jurisdiction where complaint only alleged state law contract based claims). And the Ninth Circuit has held a dispute involving a contract with an Indian tribe does not necessarily create federal-question jurisdiction. *Stock W., Inc. v.*

Confederated Tribes of the Colville Reservation, 873 F.2d 1221, 1225–26 (9th Cir. 1989) ("[F]ederal question jurisdiction does not exist merely because an Indian tribe is a party or the case involves a contract with an Indian tribe. Otherwise the federal courts might become a small claims court for all such disputes."). This Circuit has also recognized that federal-question jurisdiction is not created simply because an Indian tribe is a party to a contract or because a contract was federally approved on behalf of an Indian tribe. *Martinez v. Southern Ute Tribe,* 249 F.2d 915, 917 (10th Cir. 1957) (finding federal-question jurisdiction does not exist simply because an Indian is a party or because the lawsuit involves Indian property or contracts), *cert. denied,* 356 U.S. 960 (1958). *See also Jackson v. United States,* 485 F. Supp. 1243, 1247 (D. Alaska 1980) (determining that merely because the Secretary of the Interior approved a contract entered into with an Indian tribe did not render a lawsuit arising from the contract one that presented a federal question); *Rumsey Indian Rancheria of Wintun Indians of Cal. v. Dickstein*, No. 2:07-CV-02412GEBEFB, 2008 WL 648451, at *6 (E.D. Cal. Mar. 5, 2008) (finding breach-of-contract and related claims do not arise under a necessary federal question or the Indian Gaming Regulatory Act); *U.S. ex rel. The Saint Regis Mohawk Tribe v. President R.C.--St. Regis Mgmt. Co.*, 451 F.3d 44, 51 n.6 (2d Cir. 2006), *as corrected* (June 27, 2006) (quoting *Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians,* 94 F.3d 747, 753 (2d Cir.1996)) (declining "to hold that regulation of Indian gaming contracts under IGRA creates federal question jurisdiction over any contract claim relating to Indian gaming. In other words, "we reject the proposition that statutory requirements governing federal approval of certain contracts between Indians and non-Indians give rise to federal common law governing such contracts.").

3. The central case FSS relies on for complete preemption does not require preemption here.

The central case FSS relies on for its theory that federal-question jurisdiction exists because of the doctrine of complete preemption is *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 539 (8th Cir. 1996). But *Gaming Corp.* did not hold that contract disputes between a tribe and a gaming developer were completely preempted. Instead, *Gaming Corp.* found IGRA "completely preempts the field of Indian gaming *regulation*," in a case involving a question of whether the state's or the tribe's regulatory authority applied. *Id.* Regulation of gaming by the Indian tribe's gaming commission was the issue subject to complete preemption. Regulation of gaming by the Apache Tribe's gaming commission (or by the state) is not what is at issue in this action. Here, the only claim FSS argues creates a federal question based on complete preemption is its breach of contract claim against the Apache Tribe.

As *Gaming Corp.* explained, not all state (or tribal) law claims are preempted even where complete preemption is found. "To be completely preemptive, a statute must have 'extraordinary pre-emptive power,' a conclusion courts reach reluctantly. The term 'complete preemption' is somewhat misleading because *even when it applies, all claims are not necessarily covered.*" *Id.* "Any claims based on Dorsey's duty to the nation during the licensing process would appear to fall within the scope of IGRA's complete preemption. Such preempted claims may not be remanded to state court under 28 U.S.C. § 1367(c) even though they purport to raise only issues of state law." *Id.* at 550. *Gaming Corp.* did not hold a purported gaming developer's breach-of-contract claim was within those claims completely preempted by the Indian Gaming Regulatory Act. The heart of the dispute at issue in

Gaming Corp. was the relationship between state and tribal regulation of gaming activities, which is not an issue in FSS's breach of contract action.

When discussing the Gaming Corp. decision and those from district courts similar to it, the Eastern District of California explained that those decisions only apply complete preemption where state law claims interfere with processes mandated and regulated by the Indian Gaming Regulatory Act, which is not the situation presented by FSS's claims. "Specifically, these courts have found that complete preemption applies in this context only if state law claims interfere with processes mandated and regulated by the IGRA—i.e., tribal governance of gaming on Native lands, or tribal decisions as to which gaming activities are allowed on Native territories." *Osceola Blackwood Ivory Gaming Grp., LLC v. Picayune Rancheria of Chukchansi Indians*, No. 117CV00394DADBAM, 2017 WL 3190325, at *5, *7 (E.D. Cal. July 27, 2017) (holding plaintiff's contract claims do not require resolution "of a substantial question of federal law, and that the court therefore lacks original jurisdiction over any claims asserted in plaintiff's complaint.").

Further, based on a Westlaw search by undersigned counsel, it appears no other Circuit Court of Appeals has found the Indian Gaming Regulatory Act completely preempts all state (or tribal) law claims. Nor has the Supreme Court. The Gaming Corp. complete preemption analysis does not reach FSS's breach-of-contract claim. This action should be dismissed.

4. The Amended Complaint does not allege a claim against the CFR Court's jurisdiction.

Defendants concede that federal-question jurisdiction exists over challenges to a

tribal court's jurisdiction over non-Indians. However, FSS has not stated a cause of action challenging the tribal court's jurisdiction in its Amended Complaint. Even if FSS had alleged such a cause of action, the doctrine of exhaustion of tribal court remedies would apply to require this case be stayed until FSS exhausts its tribal court remedies.

While it may be possible for FSS to craft other causes of action in this dispute that would create federal-question jurisdiction, it fails to do so in the Amended Complaint, which only raises claims for breach of contract, tortious interference, and declaratory judgment. Moreover, even in such actions, federal courts must normally stay their hand until the claimant exhausts its tribal court remedies, which has not yet happened here.

5. Defendants' immunity defenses are not meritless.

FSS argues Defendants' sovereign immunity defense is "meritless." Comb. Resp. (Doc. 25 at 10). But the Apache Tribe alleges in its CFR Court action that the waiver of sovereign immunity FSS relies on was not actually signed or validly approved under *tribal* law. That issue does not create a federal question and only the CFR Court has authority to resolve it. If the CFR Court holds the waiver of sovereign immunity was not properly approved under tribal law, then there has been no waiver and the Defendants' reliance on the doctrine of sovereign immunity can hardly be considered "meritless."

With respect to FSS's argument that the Tribe's General Council's directive to the Apache Business Committee to conduct business with FSS, the Apache Tribe alleges in the CFR Court that no such General Council meeting ever occurred and no such directive was ever lawfully given. Whether tribal law was followed is an issue for the CFR Court to resolve, not any other court. It is not a federal question and it is not a state law question.

Tribal courts, such as the CFR Court, are the only proper forums for resolving such questions of tribal law, as FSS admits. (Doc. 25 at 20) ("[I]t is true that tribal courts generally have exclusive jurisdiction to decide questions of tribal law"). The Individual Defendants are entitled to the protections of sovereign immunity against FSS' tortious interference claims because they were acting within the scope of their authority as tribal officials and tribal employees. Sovereign immunity protects them from FSS's action and they should be dismissed.

6. FSS names the Individual Defendants because they serve in an official capacity.

Contrary to FSS' argument that it is not suing the Individual Defendants *because* of their official capacities (Doc. 25 at 14), FSS names the Individual Defendants *precisely because* they served on the Apache Business Committee or served as a consultant to the Apache Business Committee. Officials are immune from such claims. *See Native Am. Distrib. v. Seneca-Cayuga Tobacco, Co.*, 546 F.3d 1288, 1296 (10th Cir. 2008). "[T]ribal officials are immunized from suits brought against them *because of* their official capacities—that is, because the powers they possess in those capacities enable them to grant the plaintiffs relief on behalf of the tribe." *Id.* If the Individual Defendants had simply been tribal members with no official powers, they would not have been named in this action.

FSS's arguments that officers of a company can properly be sued for tortious interference with their principal's or employer's contracts (Doc. 25 at 15) have no bearing here. The Individual Defendants are elected officials of a sovereign government, not a private company. Every case FSS cites regarding this novel tortious interference theory

applies only to private companies. Here, we are dealing with government, or public, contracts. It is black letter law that "unauthorized or illegal public contracts are void and unenforceable, and such contracts raise no implied promise by a public authority to pay for benefits received under them." 73A C.J.S. *Public Contracts* § 8. A private vendor doing business with a governmental entity must protect itself by ensuring it properly follows the government's contracting laws. Any missteps necessarily void the public contract.

Further, Individual Defendants have only been tribal elected officials and a tribal contractor for approximately one and a half years. Before that, there were different officials FSS could have pressed to pursue whatever agreements it thought it needed from the Bureau of Indian Affairs or National Indian Gaming Commission (*see* Doc. 25 at 16), but it failed to do so. Naming these Individual Defendants now is disingenuous.

7. Rule 19 requires dismissal.

In its argument regarding Rule 19 dismissal, FSS appears to refer to the Apache Tribe as a "third-party to the contract." (Doc. 25 at 18). "Any liability the Individual Defendants have to the Tribe for their conduct is separate from the liability they may have to FSS. A contrary finding would mean that no plaintiff could pursue a tortious interference claim without also naming as a defendant the third party to the contract. That is clearly not the rule." (*Id.*). The Tribe is not a "third party to the contract" in any reasonable meaning of that phrase. The Tribe is the actual party to the alleged contracts with FSS. The Tribe is a necessary and indispensable party, which cannot be joined due to the doctrine of tribal sovereign immunity. This case should be dismissed for failure to join a necessary and indispensable party under Rule 19.

CONCLUSION

Based upon the foregoing and upon the Motions to Stay and to Dismiss, Defendants respectfully request this Court stay this action, or dismiss this case pending resolution of matters before the Tribal Court, including tribal court appellate proceedings.

Submitted this 20th day of November, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2017, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for (1) filing and (2) transmittal of a Notice of Electronic Filing to the following ECF registrants:

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