UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CHEROKEE NATION, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, DEB HAALAND, in her official capacity as the Secretary of the Interior, et al., Defendants.	)	Case No. 1:20-CV-02167 (TJK) **ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW IN SUPPORT OF CHAIRMAN MARK WOOMMAVOVAH'S MOTION TO DISMISS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Plaintiffs are oligopolists who control the gaming markets in the largest urban areas in Oklahoma—Oklahoma City, Norman, Tulsa—and also the market for patrons who come across the Oklahoma border from Dallas, Texas. Collectively, Plaintiffs earn nearly 70% of all Indian gaming revenue in Oklahoma. In late-2019, a dispute arose between the state of Oklahoma and Indian tribes located within the state concerning the "model" tribal-state compact. That dispute culminated in several of the Plaintiffs in this case commencing a lawsuit against the Oklahoma Governor in which the Comanche Nation intervened. The Comanche Nation, which is based in Lawton, Oklahoma and earns only about 3% of the gaming revenue in the state, then decided to settle its claims in that lawsuit by entering into a new tribal-state gaming compact with Oklahoma (the "2020 Comanche Compact"). Upset that the Comanche Nation broke ranks with them, Plaintiffs have now commenced this action seeking to invalidate the 2020 Comanche Compact and eliminate any gaming by the Comanche Nation, even on its own reservation.

The radical relief Plaintiffs seek is not supported by their allegations—in fact, Plaintiffs do not even have standing to bring their claims because the 2020 Comanche Compact causes them no injury. Plaintiffs' allegations concerning the 2020 Comanche Compact are scattershot but essentially fit into three categories: (i) alleged technical violations of the Indian Gaming Regulatory Act ("IGRA") (such as allegations that the compact impermissibly regulates Class II gaming, impermissibly authorizes iLottery, and lacks a "meaningful concession" by the state for exclusivity fees); (ii) alleged violations of Oklahoma state law (such as allegations that the compact could not include provisions related to event wagering or house-banked cards); and (iii) allegations concerning possible future off-reservation gaming by the Comanche Nation in three Oklahoma counties. None of these allegations has any nexus to any harm to Plaintiffs.

With respect to Plaintiffs' alleged IGRA violations, IGRA's provisions regarding the tribal-state compacting process are designed to protect the compacting tribe itself (here, the Comanche Nation). Accordingly, any alleged IGRA violations harm only the Comanche Nation, and not any of the Plaintiffs. With respect to Plaintiffs' alleged violations of state law relating to event wagering or house-banked cards, the Comanche Nation does not even offer such games, and will not do so until they are authorized by state law. With respect to Plaintiffs' allegations concerning possible future off-reservation gaming, the lengthy regulatory process for such gaming has not even begun. It is complete speculation that such regulatory process will occur, will result in approval for off-reservation gaming, and will result in the construction of a casino capable of competing with Plaintiffs' large, established operations. Plaintiffs' standing arguments on this point are precluded by recent binding authority *Yocha Dehe Wintun Nation v. U.S. Dep't of Interior*, 3 F.4th 427 (D.C. Cir. 2021).

Recognizing their inability to demonstrate any specific harm stemming from any specific term of the 2020 Comanche Compact, Plaintiffs' allegations in the First Amended and Supplemented Complaint ("Second Amended Complaint"), ECF 104, resort to vague statements and general platitudes about "illegal competition" or "equal footing." However, these generalized statements do not create standing. These allegations rest on the incorrect notion that the Comanche Nation is prohibited from gaming in its entirety—which is false. The Comanche Nation has a sovereign right to engage in Class II gaming without a compact. The Comanche Nation's current compact with the state authorizes Class III gaming, and is severable both under its own terms and at law. And, even if the 2020 Comanche Compact were void, the Comanche's prior compact would be operative and authorize the Tribe to engage in Class III gaming. Because these vague allegations about "illegal competition" or "equal footing" are not tethered

to any specific terms of the compact, Plaintiffs' allegations are, at bottom, merely a complaint about the fact that the Comanche Nation has casinos. Insulating themselves from competition, however, is not the type of interest that IGRA was designed to protect. *See Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 947 (7th Cir. 2000). Accordingly, Plaintiffs lack standing and the Court must dismiss their official capacity claims against the Chairman of the Comanche Nation, Mark Woommavovah ("Chairman Woommavovah").

BACKGROUND

1. Indian Gaming is an Important Economic Development Tool for Indian Tribes and is a Cottage Industry in Oklahoma.

Indian gaming has become an important source of revenue, employment, and economic development for Indian tribes in the United States. *See* Matthew L.M. Fletcher, *The Comparative Rights of Indispensable Sovereigns*, 40 GONZ. L. REV. 1, 112 n.1167 (2004-2005) ("Indian gaming was preceded by decades of poverty and high unemployment on often geographically remote reservations.") (internal quotations omitted). Indian gaming has become a source for commercial revenue for tribes since the 1970s, beginning with high stakes bingo operations. 1 *Cohen's Handbook of Federal Indian Law* § 12.01 (2019) ("*Cohen's*"). Indian tribes have the right to offer gaming outside of the regulatory regime of states, as confirmed by the U.S. Supreme Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207-214 (1987).

In the wake of *Cabazon*, Congress enacted IGRA, which creates three "classes" of gaming—Class I (social games for minimal value or traditional forms of gaming related to tribal ceremonies or celebration), Class II (bingo and card games permitted under state law except house banked cards), and Class III (all other forms of gaming). 25 U.S.C. §§ 2703(6),(7),(8). IGRA permits Class III gaming but only if the tribe enters into a gaming "compact" with the

state in which it is located. 25 U.S.C. § 2710(d)(1). The state-tribal compacting procedure allows states an avenue to negotiate with tribes for concessions such as assessment of amounts paid to the state to defray costs of regulating gaming, allocation of jurisdiction, and standards of play for games, among other things. 25 U.S.C. § 2710(d)(3)(C).

IGRA also governs where gaming may occur. Under IGRA, Class II and Class III gaming is permitted only on a tribe's "Indian lands." 25 U.S.C. §§ 2710(b)(1),(d)(1). However, IGRA prohibits gaming on Indian lands acquired after October 17, 1988, with several exceptions. 25 U.S.C. § 2719. One such exception is where the Secretary of Interior determines (and the governor of the state concurs) "after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes" that "a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A). This is known as the "two-part determination."

Since the enactment of IGRA, gaming has become a cottage industry in Oklahoma. As the former "Indian territory," Oklahoma is home to a whopping thirty-eight federally-recognized Indian tribes. *Cohen's* § 4.07(a). As a result of this large number of tribes, the state is also home to a total of 143 casinos.[1] While many tribes operate casinos within the state, as discussed below, it is Plaintiffs who dominate the gaming industry in the state. ECF 54-2 ¶ 12.

2. Location, Location, Location - Plaintiffs Dominate Gaming in Oklahoma Because They Have Casinos Near Large Urban Areas.

Plaintiffs earn the lion's share of gaming revenue in Oklahoma, approximately 70% of the revenue generated by Indian gaming in the state. ECF 54-2 ¶ 12. Plaintiff Chickasaw Nation

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[1] *Map of Indian Gaming Locations*, NATIONAL INDIAN GAMING COMMISSION, https://www.nigc.gov/map/ (last visited Oct. 21, 2021).

is the single most dominant tribe in the state, earning approximately 35% of the state's gaming revenue. *Id.* The other three Plaintiffs, the Choctaw Nation, Cherokee Nation, and Citizen Potawatomi Nation earn 19%, 12% and 3% respectively. Location plays a key role in profitability due to the localized nature of gaming, which must be done in person at a tribe's casino. Plaintiffs' dominance of the market is based on their advantageously located "Indian lands," and the locations of these lands are attributable to historical differences with other tribes in the state. Plaintiffs Cherokee Nation, Choctaw Nation, and Chickasaw Nation are three of the "Five Civilized Tribes" that were removed to reservations in Oklahoma from the American South in the late 19th Century. *Cohen's* § 4.07(1)(a); Carla D. Pratt, *Tribes and Tribulations: Beyond Sovereign Immunity and Toward Reparation and Reconciliation for the Estelusti*, 11 Wash. & Lee Race & Ethnic Anc. L. J. 61, 76 (2005). The Five Civilized Tribes engaged in chattel slavery and contributed soldiers to the Confederacy in the Civil War. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2483 (2020) (Roberts, C.J., dissenting)). After the Civil War, the Five Civilized Tribes signed Reconstruction treaties with the United States in which they ceded portions of their territory that were then opened for non-Indian settlement. *Id.* The cession of land by the Five Civilized Tribes also allowed the federal government to remove additional tribes, such as Plaintiff Citizen Potawatomi Nation, to Oklahoma, near present day Oklahoma City. *See Removal of Tribes to Oklahoma*, OKLA. HISTORICAL SOC'Y, https://www.okhistory.org/research/airemoval (last visited Oct. 20, 2021).

As a result of this history, Plaintiffs' territories abut the Oklahoma City metropolitan area, which includes not only the state's largest city (Oklahoma City), but also its third largest

city (Norman) and several other of the state's largest cities (Moore, Edmond, Midwest City).[2] Increasing Plaintiffs' good fortune, their "Indian lands" are also located near the second largest city in the state (Tulsa), and just across the Texas border from the fourth largest metropolitan area *in the country* (Dallas-Fort Worth). ECF 54-2 ¶¶ 14-17. As a result of these beneficial locations, Plaintiffs have built lucrative gaming empires. For example, Plaintiff Chickasaw Nation operates twenty-three casinos. ECF 54-2 ¶ 17. Among these is the largest casino in the world—the WinStar casino. *About Us*, WINSTAR, https://www.winstar.com/footer/news-and-media-hub/ (last visited Oct. 20, 2021). WinStar is located only about thirty miles north of the Dallas-Fort Worth area, and eighty-three miles north of downtown Dallas. ECF 54-2 ¶ 18. Each of the Plaintiffs offers Las Vegas-style games such as roulette, black jack, baccarat, and craps at some of their casinos.[3] In total Plaintiffs collectively have *sixty* casinos. ECF 54-2 ¶¶ 14-17. As a result of Plaintiffs' oligopoly, the remaining thirty-four tribes in Oklahoma earn only about 30% of the gaming revenue generated in the state. *Id.* at 54-2 ¶ 12.

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[2] *See, e.g., Oklahoma Cities by Population*, CUBIT, https://www.oklahoma-demographics.com/cities_by_population (last visited Oct. 21, 2021); *Native American Tribes' Reservation Boundaries Now on Google Maps*, ABC 5 NEWS (Sept. 25, 2020), https://www.5newsonline.com/article/news/local/native-american-tribes-reservation-boundaries-now-on-google-maps-cherokee-nation-choctaw-nation-osage-nation-muscogee-creek-nation-and-chickasaw-nat/527-15209f63-3953-40a2-bbd8-4da98f450de1.

[3] *See, e.g., Casinos*, VISIT CHEROKEE NATION, https://visitcherokeenation.com/attractions/casinos (last visited Oct. 20, 2021); *Try Your Luck at These Casinos*, CHICKASAW COUNTRY, https://chickasawcountry.com/casinos (last visited Oct. 20, 2021); *Casinos & Resorts*, CHOCTAW NATION, https://www.choctawcasinos.com/ (last visited Oct. 20, 2021); *Gaming*, CITIZEN POTAWATOMI NATION, https://www.potawatomi.org/enterprises/ (last visited Oct. 20, 2021).

3. The Comanche Nation's Modest Gaming Operations Are Limited to its Reservation in Southwestern Oklahoma.

One of the tribes in Oklahoma which is not part of Plaintiffs' oligopoly is the Comanche Nation, which earns about 3% of the state's gaming revenue. *Id.* at 54-2 ¶ 12. Unlike other tribes that were removed to Oklahoma, the Comanche Nation is indigenous to Oklahoma and shares a reservation with two other tribes in southwestern Oklahoma known as the Kiowa-Comanche-Apache Reservation or "KCA Reservation." ECF 54-4 ¶ 6; Treaty with the Kiowa and Comanche, Oct. 21 1867, 15 Stat. 581, art. 2; 15 Stat. 581, 589. The KCA Reservation is centered around the Lawton-Fort Sill area in Oklahoma. *Tribal Jurisdictions in Oklahoma*, OKLA. DEP'T OF TRANSP., https://www.ok.gov/health2/documents/map_tribal_jurisdictions.pdf (last visited Oct. 20, 2021). The Comanche Nation currently has five casinos, three of which are in the Lawton area.[4] The Comanche Nation is also in the process of constructing a sixth casino, which will also be in the western Lawton area (Plaintiffs' territories are located to the east of Lawton). 2d Am. Compl. at 113 ¶ 231.r; ECF 54-2 ¶¶ 4, 8; Cache, Oklahoma, Google Maps, http://maps.google.com (search "Cache, Oklahoma"). The Comanche Nation's other casinos are located in the southern portion of the KCA Reservation near the Texas border, across the Red River from Wichita Falls, Texas. *See Casino Map*, *supra* n.4. The Comanche casinos are all more than 79 miles from downtown Oklahoma City, and over 160 miles from downtown Dallas. ECF 54-2 ¶ 8. The Plaintiff Tribe with the closest casinos to the Comanche casinos is the Chickasaw Nation, and its three largest casinos are all more than seventy miles away from the Comanche Nation's flagship casino. ECF 54-2 ¶ 18.

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[4] *See Casino Map,* COMANCHE NATION ENTERTAINMENT, https://comanchenationentertainment.com/map-of-oklahoma-casinos/ (last visited Oct. 20, 2021).

The Comanche Nation has engaged in gaming since it began offering bingo in the 1980s. ECF 54-2 ¶ 3. As noted above, under IGRA, tribes may engage in "Class III" gaming (e.g., slot machines, house-banked games, sports betting, lotteries) pursuant to a state-tribal "compact." 25 U.S.C. § 2710(d); 25 C.F.R. § 502.4. The Comanche Nation's first tribal-state compact was approved in 1999. ECF 54-2 ¶ 3. The Comanche renegotiated its compact in 2004, which was later amended in 2018. *Id.* As discussed below, the Comanche Nation then entered into a new compact with Oklahoma in 2020, which is the subject of this lawsuit filed by the Plaintiffs.

4. The Comanche Nation Enters into a New Compact With Oklahoma in 2020 to Address an Existing Dispute and Avoid Potential Future Disputes Between the Tribe and the State.

In Oklahoma, the state legislature has promulgated a "model" state-tribal compact. 3A OK Stat § 3A-280 (2020); ECF 54-9. Prior to January 1, 2020, a dispute arose between the Indian tribes in Oklahoma and the state of Oklahoma concerning whether this "model" compact that the tribes had entered into with the state expired on January 1, 2020 or automatically renewed on that date. *Cherokee Nation v. Stitt*, 475 F. Supp. 3d 1277, 1279 (W.D. Okla. 2020). On December 31, 2019, Plaintiffs here, except the Citizen Potawatomi Nation (who later intervened), commenced suit against the Governor of Oklahoma in the U.S. District Court for the Western District of Oklahoma, seeking a declaration that their compacts had automatically renewed. *Cherokee Nation v. Stitt,* No. 5:19-cv-01198-D, (W.D. Okla. filed Dec. 31, 2019). On February 21, 2020, the Comanche Nation intervened in that action. 2d Am. Compl. ¶ 74.

As part of a court-mandated settlement conference in that action, the Comanche Nation and Governor of Oklahoma negotiated a new compact for the Comanche Nation, the 2020 Comanche Compact. 2d Am. Compl. ¶¶ 74-77; *Treat v. Stitt*, 473 P.3d 43, 44 (Okla. 2020) ("*Treat I*"). The new compact obviated the dispute concerning renewal by expressly addressing duration and termination. ECF 54-8, 2020 Comanche Compact, Part 12. In addition, the 2020

Comanche Compact lowered (in certain circumstances) the exclusivity fees that the Comanche Nation pays to the state for its existing casinos within the KCA Reservation in southwestern Oklahoma. *Id.*, Part 10; ECF 54-4 ¶ 6; ECF 96-2 ¶ 231n. The 2020 Comanche Compact also required certification that at least 45% of the Comanche's gaming revenue is from "Class III" games (as opposed to "Class II" games). ECF 54-8, 2020 Comanche Compact, Part 3(D).

The new compact also prophylactically addressed several areas of potential future dispute. For instance, the compact included terms concerning sports betting[5] and house-banked table games *in the event* that Oklahoma authorizes those games in the future. ECF 54-8, 2020 Comanche Compact, Part 2(A)(7) (defining "Covered Game" to include house-banked games and event wagering "if such game has been approved by the [State Compliance Agency]"). Oklahoma, however, does not currently authorize those games. Accordingly, the Comanche Nation does not currently offer those games, and has no intention to offer them unless and until state law changes. ECF 54-2 ¶ 7; 2d Am. Compl. ¶ 140.

The 2020 Compact also included the Governor's agreement to concur to off-reservation gaming by the Comanche Nation, *if* the Nation were to ever seek to acquire Indian lands for gaming outside the KCA Reservation in Grady, Love, or Cleveland Counties. ECF 54-8, Part 4(J)(2)(a). The Comanche Nation does not currently have any "Indian lands" in these counties, and therefore would have to seek and obtain regulatory approval to obtain lands for gaming in any of these counties, ECF 54-4 ¶ 8 ("the Comanche Nation does not currently have any trust lands in Grady . . . Love or Cleveland counties"); 25 U.S.C. § 2719, which agency action may

[5] At the time of execution of the 2020 Comanche Compact, the U.S. Supreme Court had recently paved the way for states to legalize sports betting in *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018). Oklahoma has yet to do so.

itself trigger additional regulatory requirements, *e.g.*, 40 C.F.R. §§ 1500.3, 1501.3. In the 2020 Comanche Compact, the Comanche Nation and State also bargained for provisions addressing the potential "iLottery" in Oklahoma. In particular, the State agreed such games would not simulate casino games and, in exchange, the Comanche Nation agreed that such games would not impact the exclusivity provisions of the compact. ECF 54-8, Part (2)(A)(25), Part 3(B).

ARGUMENT

A. Standard of Review

"A court must dismiss a case pursuant to Rule 12(b)(1) if it lacks subject-matter jurisdiction." *Woodruff v. United States*, 2020 U.S. Dist. LEXIS 107761, at *4 (D.D.C. June 18, 2020). Under Federal Rule of Civil Procedure 12(b)(1), a defendant may challenge a plaintiff's basis for subject matter jurisdiction in one of two ways: a "defendant may make a factual attack" by raising facts to defeat a plaintiff's purported basis for subject matter jurisdiction, or a defendant may assert a "facial attack based solely on the complaint." *Oregonians for Floodplain Prot. v. U.S. DOC*, 334 F. Supp. 3d 66, 74 n.4 (D.D.C. 2018) (quoting *Finca Santa Elena, Inc. v. U.S. Army Corps of Eng'rs*, 873 F. Supp. 2d 363, 368 (D.D.C. 2012)). In deciding whether to dismiss a case based on a factual attack under Rule 12(b)(1), "the district judge is not obliged to accept the plaintiff's allegations as true and may examine the evidence to the contrary and reach his or her own conclusion on the matter." *Finca Santa Elena*, 873 F. Supp. 2d at 368 (internal quotations and citations omitted).

In other words, when a defendant "challenge[s] the factual basis of the court's jurisdiction, the court may not deny the motion to dismiss merely by assuming the truth of the facts alleged by the plaintiff and disputed by the defendant." *Phoenix Consulting, Inc. v. Republic of Angl.*, 216 F.3d 36, 40 (D.C. Cir. 2000); *see also Oregonians for Floodplain Prot.*, 334 F. Supp. 3d at 74 n.4; *Richards v. Duke Univ.*, 480 F. Supp. 2d 222, 231–32 (D.D.C. 2007).

"Instead, the court must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss." *Phoenix Consulting,* 216 F.3d at 40; *see* also *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987) ("In 12(b)(1) proceedings, it has been long accepted that the judiciary may make appropriate inquiry beyond the pleadings to satisfy itself on authority to entertain the case.") (internal quotations omitted); *see also* ECF 81 at 2–3 (citing *TJGEM LLC v. Republic of Ghana*, 2015 U.S. App. LEXIS 10396, at *5 (D.C. Cir. June 9, 2015); *Al-Owhali v. Ashcroft*, 279 F. Supp. 2d 13, 20 (D.D.C. 2003)). Thus, to withstand a factual attack on subject matter jurisdiction, "a plaintiff bears the burden of establishing jurisdiction by a preponderance of the evidence." *Fiberlight, LLC v. Amtrak*, 81 F. Supp. 3d 93, 106 (D.D.C. 2015).

B. The Plaintiffs Lack Standing to Assert their Claims against Chairman Woommavovah.

As noted above, Plaintiffs' allegations fall into three categories: (i) complaints that certain provisions of the 2020 Comanche Compact violate IGRA (allegedly by requiring a certain Class II-Class III mix, lacking a "meaningful concession" for exclusivity fees, and including provisions concerning iLottery); (ii) complaints that certain provisions of the 2020 Comanche Compact violate Oklahoma state law (allegedly by including provisions related to event wagering and house-banked cards); and (iii) complaints that the 2020 Comanche Compact provides the Governor's concurrence to off-reservation gaming. Yet, none of these provisions harms Plaintiffs in any way. And, any harms allegedly suffered by Plaintiffs (such as mere competition from the Comanche Nation) are not redressable through Plaintiffs' claims in any event.

A party has standing if (1) it has suffered the "invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent;" (2) its "injury is fairly

traceable to the challenged action of the defendant and not the result of independent action by a third party not before the court;" and (3) a favorable decision would likely redress the injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotations, alterations, and citations omitted). It is "axiomatic" that for a party to invoke federal jurisdiction, it must have suffered an injury-in-fact, not some conjectural, hypothetical, or speculative injury. *Deutsche Bank Nat'l Trust Co. v. FDIC*, 717 F.3d 189, 193 (D.C. Cir. 2013); *see also Lujan*, 504 U.S. at 560 (explaining that a "conjectural or hypothetical" injury is not an injury-in-fact). Here, the alleged injuries to Plaintiffs are hypothetical and conjectural. Plaintiffs' theories about "illegal competition" are all speculation contrary to both law and facts. The speculative nature of the harm from each of the three categories of allegations are considered in turn below.

1. Plaintiffs Have No Standing to Challenge the Comanche Nation's Gaming Within its Own Reservation Based on Alleged Technical IGRA Violations.

A tribal-state compact is, as the name suggests, a form of agreement between two parties—the state on one hand and an Indian tribe on another (in this case, the state of Oklahoma and the Comanche Nation). Therefore, it should come as no surprise that non-parties to that compact, such as Plaintiffs here, have no injury traceable to the terms of that agreement. The majority of Plaintiffs' allegations concerning the 2020 Comanche Compact identify a hodgepodge of alleged technical violations of IGRA that concern the Comanche Nation's gaming operations within its own reservation: (1) that the 2020 Comanche Compact permits the state to regulate the Comanche Nation's Class II gaming, 2d Am. Compl ¶¶ 81, 87; (2) that the Comanche Nation did not receive a "meaningful concession" from Oklahoma in exchange for exclusivity fees, 2d Am. Compl. ¶ 85; and (3) that the Comanche Nation consented to Oklahoma engaging in "iLottery," 2d Am. Compl. ¶ 248. Of course, none of these alleged violations has

anything to do with Plaintiffs, their casinos, or their reservations, and therefore causes them no harm or injury.

The alleged technical defects of the 2020 Comanche Compact – even if they existed - cause no harm to Plaintiffs. The tribal-state compacting process under IGRA was designed to protect the compacting tribe (here, the Comanche Nation), as evidenced by the statutory language repeatedly referring to "any [or an] Indian tribe" wishing to conduct Class III gaming on its own "Indian lands." *See, e.g.*, 25 U.S.C. § 2710(d)(2)(A), 25 U.S.C. § 2710(d)(2)(D)(i), 25 U.S.C. § 2710(d)(3)(B), 25 U.S.C. § 2710(d)(8)(A). The statutory text makes clear that the role of federal government is to protect *the* compacting tribe itself from corrupting influences and ensure the tribe complies with its own laws. 25 U.S.C. § 2710(d)(2). If there are any technical violations of IGRA (which Chairman Woommavovah does not concede) within the compact, the only affected tribe is the Comanche Nation itself. Plaintiffs' allegations that certain compact provisions violate IGRA are merely generalized grievances that the compact violates the law, of which Plaintiffs have no standing to complain. *United States v. Hays*, 515 U.S. 737, 743 (1995) ("[W]e have repeatedly refused to recognize a generalized grievance against allegedly illegal governmental conduct as sufficient for standing.").

With respect to Plaintiffs' allegations that the compact improperly permits the state to regulate the *Comanche Nation's* conduct of Class II gaming, Plaintiffs have no legal interest in the Comanche Nation's own sovereign right to conduct Class II gaming. Simply put, Plaintiffs are not injured if another tribe is unlawfully regulated by the state. To the contrary, given Plaintiffs' repeated invocation of supposed "competition," Plaintiffs would stand to benefit from this alleged regulation. The 2020 Comanche Compact requires that the Comanche Nation certify that at least 45% of its revenue comes from Class III (as opposed to Class II) gaming. If

Plaintiffs believe this mix between Class II and Class III games is suboptimal, they are not constrained by the Comanche Nation's compact, and may offer any mix of Class II and Class III games they desire.

With respect to Plaintiffs' allegations concerning exclusivity fees, neither IGRA nor the model state-tribal compact in Oklahoma require any certain level of fees. *See* ECF 54-9; 25 U.S.C. § 2710(d)(3)(C). Therefore, Plaintiffs cannot, and do not, allege that the amount of fees in the 2020 Comanche Compact is an IGRA violation. Instead, they argue that the exclusivity fees violate IGRA because the Comanche Nation did not receive a "meaningful concession" from Oklahoma in exchange for promising to pay exclusivity fees. 2d Am. Compl. ¶ 85; ECF 72 at 24. Obviously, whether or not the Comanche Nation received a "meaningful concession" from the state is an alleged harm that impacts the Comanche Nation alone, *not* Plaintiffs.

For the same reasons, Plaintiffs are not harmed by any provisions in the Comanche Nation compact concerning "iLottery." Plaintiffs allege "iLottery" is a form of Class III gaming *by the state* that is impermissibly authorized by the 2020 Comanche Compact. 2d Am. Compl. ¶ 248. However, as any one that has been to Las Vegas or Atlantic City can attest—states have the sovereign prerogative to authorize any form of gaming they wish. *Murphy v. NCAA*, 138 S. Ct. 1461, 1468–70 (2018) (detailing the history of state laws authorizing gambling activities). And the Comanche Nation, of course, is not in a position to authorize any sort of gaming by the state. The true gravamen of Plaintiffs' complaints concerning iLottery is the bargain the Comanche Nation decided to strike with the state: the Comanche Nation agreed that iLottery would not infringe the Comanche Nation's exclusivity rights, in exchange for the state's agreement that iLottery would not "simulate" the Comanche Nation's Class III games. ECF 54-8 at Part 2(A)(25). Whether or not this bargain was beneficial or not for the Comanche Nation is of *no*

concern to Plaintiffs, and certainly does them no harm. Each of the Plaintiffs has its own tribal-state compact with its own exclusivity provisions, and each Plaintiff may enforce those exclusivity provisions against the state if that exclusivity is violated in its territory by iLottery or otherwise.

None of the alleged technical IGRA violations within the Comanche Compact that concern the Comanche Nation's on-reservation gaming injures the Plaintiffs. Accordingly, Plaintiffs have no standing to bring claims concerning those violations, and the Court has no subject matter jurisdiction to rule on those alleged IGRA violations.

2. Games That Are Not Offered Do Not and Cannot Confer Standing.

Plaintiffs next complain about the provisions of the 2020 Comanche Compact that discuss sports betting and house-banked table games. Plaintiffs can have no injury from these games because they are not being offered by the Comanche Nation at all. The Comanche Nation is not offering house-banked card games, house-banked table games, or event wagering, and does not intend to do so unless authorized by state law.[6] ECF 54-2 ¶ 7; *see also* 2d Am. Compl. ¶ 247. Plaintiffs do not dispute this fact, but instead merely allege that these statements by the Comanche Nation are "not binding and *may* change at any time." 2d Am. Compl. ¶¶ 140, 146 (emphasis added). Obviously, this allegation is nothing more than pure speculation—Plaintiffs allege no facts to support an inference that the Comanche Nation's position *will* change such that the alleged injury to Plaintiff Tribes is "imminent."

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[6] As alleged by Plaintiffs, the Oklahoma Supreme Court considered the issue of whether the Governor had authority to authorize the additional games in the compact, and concluded that he did not. Am. Compl. ¶ 96; *Treat v. Stitt*, 473 P.3d 43, 44-45 (Okla. 2020). The Comanche Nation was not a party to that case and is therefore not bound by it. Nevertheless, the Comanche Nation has made the business decision not to offer house-banked card games, house-banked table games, or event wagering. ECF 54-2 ¶ 7.

More fundamentally, even if the Comanche Nation did change its position and offer these games, any potential injury to the Plaintiff Tribes is also completely speculative. Assuming *arguendo* that the Comanche casinos began offering house-banked games and event wagering, there is no reason to conclude it would affect Plaintiffs' dominant market share. For the most part, Plaintiffs' casinos are hundreds of miles away from the Comanche casinos, ECF 54-2 ¶¶ 14 –18, and Plaintiffs offer no reason to suggest a patron would travel such a distance merely to play house-banked games or event wagering. Indeed, even for the closer casinos, such as the Chickasaw casinos, it is still speculative to assume a patron would travel to a Comanche casino merely because of a game offering when the Chickasaw casinos (like the other Plaintiffs casinos) already offer competitive substitutes for house-banked games and event wagering. Plaintiffs' casinos offer non-house banked versions of traditional house-banked games like roulette, baccarat, craps, and black jack, and offer horseracing.[7] The differences between these games and their house-banked counterparts does not have a significant impact on the experience of a player. Either way, a casino patron is playing the same game.

From the perspective of a blackjack, roulette, craps, or baccarat player, there would be no reason to go to a Comanche casino to play the same game merely because it is "house-banked" instead of "non-house-banked," particularly given the distances between the Plaintiffs' and Comanche Nation's casinos. Similarly, for event wagering, Plaintiffs point to the large market for unlawful sports betting. 2d Am Compl. ¶ 151. However, because Plaintiffs do not currently offer any event wagering, none of this market share is their own. Therefore, there is no "market share" for sports betting that Plaintiffs stand to lose. For all these reasons, Plaintiffs lack

[7] *See* various websites for Plaintiffs' casinos, *supra* n.3.

constitutional standing to challenge the definition of "Covered Games" in the 2020 Comanche Compact.

3. Future Off-Reservation Gaming is Also Too Speculative to Confer Standing.

In addition to Plaintiffs' allegations concerning the Comanche Nation's on-reservation gaming, Plaintiffs also raise the specter of potential future off-reservation gaming in three Oklahoma counties: Love, Grady, and Cleveland. 2d Am. Compl. ¶ 206. In particular, in the 2020 Comanche Compact, the Governor of Oklahoma promised to provide his concurrence to any future two-part determinations in certain areas in these counties. ECF 54-8, Part 2(A)(5), 2(A)(21), 2(A)(27). Any competitive injury alleged by Plaintiffs from this provision of the compact, however, is speculation layered on top of speculation. Appellate authority on this issue, including precedent in this Circuit, has explicitly held that tribes lack standing to complain of hypothetical future gaming by other tribes. *See, e.g., Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 947 (7th Cir. 2000) ("any detrimental impact from the proposed Four Feathers casino on the St. Croix reservation's economy is pure speculation at this point"); *Yocha Dehe Wintun Nation v. U.S. Dep't of Interior*, 3 F.4th 427, 431–32 (D.C. Cir. 2021) (declining to grant Article III standing when the alleged injury was too remote and speculative); *cf. Crow Creek Sioux Tribe v. Brownlee*, 331 F.3d 912, 917 (D.C. Cir. 2003) ("unsupported conjecture does not constitute injury in fact"). The same result is compelled here. Regulatory approval would be needed before any off-reservation gaming could commence. If that approval were hypothetically received, it is speculation to assume that the new gaming facilities would be successful enough to divert customers from Plaintiffs' more established casinos. And, even if the casinos were successful, the alleged harm to Plaintiffs is not redressable here because the Comanche Nation will always have the ability to seek off-reservation gaming regardless of the 2020 compact.

(a) **The Law is Clear that Plaintiffs Lack Standing Where the Alleged Injury Depends on Hypothetical Agency Action Based on Speculative Market Competition.**

The D.C. Circuit has held that a plaintiff lacks standing where the alleged injury is contingent on future regulatory action. *See El Paso Nat. Gas Co. v. FERC*, 50 F.3d 23, 27 (D.C. Cir. 1995) (holding that "the hypothetical premise that [a state regulator] may someday promulgate regulations that favor [state]-regulated entities over [federal]-regulated entities" did not "portend[] sufficiently imminent injury to confer standing on the [natural-gas company]"). And, in fact, the D.C. Circuit has even considered whether potential future gaming by one tribe confers standing on a potential competitor tribe. In *Yocha Dehe Wintun Nation*, a plaintiff-tribe challenged an agency opinion in an effort to develop a casino, and a potential competitor tribe with an existing casino sought to intervene. 3 F.4th at 428–29. The D.C. Circuit held that the intervenor-tribe lacked standing; no imminent injury could come from the challenge to the agency opinion because "there [were] several requirements that [had to] be met before that tribe [could] lawfully operate a gaming facility on the approved parcel of land." *Id.* at 431. Among such requirements was that the land be taken into trust and also receive environmental review under the National Environmental Policy Act. *Id.*

The law in other Circuits is in accord. The Seventh Circuit considered standing of a third-party tribe to challenge potential future gaming by another tribe in *Sokaogon Chippewa Cmty*, 214 F.3d at 943. In *Sokaogon*, three out-of-area tribes sought to purchase a greyhound race track in Hudson, Wisconsin (close to Minneapolis, Minnesota) for the purpose of having the land taken into trust for a casino. 214 F.3d at 943. The three out-of-area tribes brought suit against the Department of Interior after a denial of their application based on *ex parte* political pressure, and another tribe with a casino on its nearby reservation, the St. Croix Chippewa Indians of Wisconsin, sought to intervene to prevent a settlement. *Id.* at 945. The Seventh

Circuit held that the St. Croix tribe did not have a sufficient interest to intervene under Fed. R. Civ. P. 24 (an interest that would have also conferred Article III standing). *Id.* at 945–49. The Seventh Circuit noted that "St. Croix asks us to assume that if and when the [proposed Hudson] casino is built it will necessarily destroy the St. Croix's gaming business. But . . . in a competitive market, success is never sure. Maybe the [proposed Hudson] casino will dominate, or maybe it will be a flop." *Id.* at 947.

The Sixth Circuit has likewise held that a third-party tribe lacked standing to challenge a casinos by a potential competitor tribe. *Sault Ste. Marie Tribe of Chippewa Indians v. United States*, 288 F.3d 910 (6th Cir. 2002). In that case a plaintiff tribe challenged the Department of Interior's approval of another tribe's ("LTB") application to place fee land into trust to operate a casino. 288 F.3d at 914. LTB had purchased a five-acre tract of land in Northern Michigan approximately 40 miles away from a gaming facility operated by the plaintiff tribe. *Id.* at 912. After the Department of the Interior approved LTB's application to place the fee land into trust and operate a gaming facility, the plaintiff tribe sued to challenge that decision. *Id.* at 913. The Sixth Circuit held that the plaintiff tribe lacked standing. *Id.* at 917. In particular, instead of submitting "affidavits or similar evidence supporting its claim of competitive injury," the plaintiff tribe asked the court to take judicial notice of the fact that its casino was only forty miles away from LTB's casino. *Id.* at 915. The Sixth Circuit held that this fact, without more, was not enough to support a finding that the two tribes' casinos shared the same market or that the LTB casino would divert business from the plaintiff tribe's casino. *Id.* at 916.

Just as in *Yocha Dehe Wintun*, *Sokaogon*, and *Sault Ste. Marie*, Plaintiffs, who are strangers to the 2020 Comanche Compact, lack standing to challenge potential off-reservation gaming by the Comanche Nation, which remains a speculative prospect at best. In particular, the

Comanche Nation cannot simply build a casino that will compete with Plaintiffs in any of the three counties tomorrow. They must first seek and obtain approval by the Secretary of the Interior in a two-part determination, obtain any other regulatory approvals (such as environmental review), construct that hypothetical casino, followed by the hypothetical success of that casino to the hypothetical detriment of Plaintiffs. Each of these steps is fraught with speculation.

(b) **Future Off-Reservation Gaming by the Comanche Nation is Speculative.**

Obtaining the regulatory approval for off-reservation gaming is hardly a guaranteed outcome for the Comanche Nation. In fact, only three two-part determinations for off-reservation gaming have *ever* been granted in the history of Indian gaming. *Off-Reservation Gaming*, U.S. DEPT. OF THE INTERIOR, https://www.doi.gov/ocl/reservation-gaming-0 (last viewed Oct. 20, 2021). And, to the extent that Plaintiffs allege that this off-reservation gaming will occur on the Chickasaw Reservation, Plaintiff Chickasaw Nation has the ability to withhold its consent and preclude the land from being taken into trust. 25 C.F.R. § 151.8.

Plaintiffs' only allegation that attempts to salvage its claims from their speculative nature is that "the Comanche Nation has already purchased land in Grady County that is within the Chickasaw Reservation and fulfills all the requirements of the future concurrence provisions in its Agreement." 2d Am. Compl. ¶ 231s. However, Plaintiffs do not, and cannot, allege that the Comanche Nation has sought to place this land into trust. Therefore, it remains speculation that (i) the Comanche Nation will do so, (ii) the Department of Interior will approve placing land in trust, particularly in light of the requirement for the Chickasaw Nation's consent under 25 C.F.R. § 151.8, (iii) that other regulatory hurdles, such as environmental review and approval, *see Yocha Dehe Wintun Nation*, 3 F.4th at 431, will be obtained and (iv) that a casino will be built.

(c) **Successful Competition by any Hypothetical Off-Reservation Casino is Also Speculative.**

Even if the Comanche Nation were to have any land taken into trust in those three counties, it is entirely speculative that any of those hypothetical casinos would divert customers from any existing casinos owned by the Plaintiffs. On this point, *Sokaogon* and *Sault Ste. Marie* are instructive. Just as in *Sault Ste. Marie*, Plaintiffs ask the Court to merely presume competitive injury due to location. The sole fact that Plaintiffs have alleged (and the only fact they can allege because the hypothetical casinos do not yet exist) is that the casinos (if ever built) will be located near interstate highways in Love, Grady, and Cleveland Counties, and therefore possibly be located in some proximity to casinos operated by Plaintiff Chickasaw Nation and Plaintiff Citizen Potawatomi Nation. However, there are some 143 casinos in Oklahoma. Plaintiffs themselves acknowledge that there are other tribes, not parties to this proceeding, that already operate casinos in or near the counties where the Comanche Nation may eventually seek to open new casinos. 2d Am. Compl. ¶¶ 207-209 & n.9. Plaintiffs in their Second Amended Complaint fail to explain why the hypothetical future Comanche casinos will necessarily divert *Plaintiffs'* customers rather than customers from the casinos of one of the other thirty-plus Indian tribes in Oklahoma. Instead, Plaintiffs merely speculate that the hypothetical future Comanche casinos will be located such that they will draw patrons from their own casinos rather than the casinos of other tribes.

Furthermore, even if the casinos were located proximately to any of the Plaintiffs' casinos, it is *still* speculation to assume that the casino will necessarily divert customers from Plaintiffs. As the Seventh Circuit observed regarding Indian gaming, "in a competitive market, success is never sure." *Sokaogon*, 214 F.3d at 947. Here, Plaintiffs allege that the market is not just competitive, but "highly competitive." 2d Am. Compl. ¶ 230. Given the established nature,

brand and customer loyalty of patrons of the existing casinos, it is hardly assured that a hypothetical future Comanche casino would be able to divert customers from existing casinos. This is particularly true because both the size and location of any hypothetical future casino is currently unknown. Plaintiffs operate sixty casinos, including the *largest casino in the world*, and have by magnitudes larger revenues than the Comanche Nation. Plaintiffs collectively earn some 70% of all the gaming revenue in the state. Whether or not the Comanche Nation could dent that market share, even with an urban casino located near Oklahoma City, is a matter of complete speculation. Indeed, a future hypothetical Comanche casino may end up being quite modest (such as the 250-game Cache Casino currently under construction, *see* 2d Am. Compl. ¶ 231r). It is hardly clear how such a modest casino could divert customers from Plaintiffs' large casino operations offering thousands of slot machines and table games.

(d) **Regardless of the 2020 Compact, Comanche Nation May Seek Off-Reservation Gaming.**

Finally, even if Plaintiffs could demonstrate that a hypothetical Comanche casino in one of those three counties would cause an injury to any of the Plaintiff Tribes, that injury would not be redressable through this action. As Plaintiffs themselves allege, even under the Comanche's old compact, or the Model Compact, the Comanche Nation is not limited in the geographic scope in which it may conduct gaming. 2d Am. Compl. ¶ 65; *see generally* ECF 54-9. In other words, even if Plaintiffs are successful in this action in all respects and the 2020 Comanche Compact is invalidated, the Comanche Nation would still be entitled to apply for a two-part determination anywhere in Oklahoma. Moreover, it is the Governor's prerogative to consent to land being taken into trust for gaming by the Comanche Nation anywhere in Oklahoma (if the Secretary of Interior determines it will benefit the Comanche Nation and not be detrimental to the surrounding community). 25 U.S.C. § 2719(b)(1)(A).

Accordingly, even if the Court were to invalidate the 2020 Comanche Compact – and it should not – the Comanche Nation would still pose the same (hypothetical) competitive injury to Plaintiffs because it could still apply for land to be taken into trust in Oklahoma outside of its reservation. Accordingly, Plaintiffs cannot demonstrate any concrete, imminent, or redressable injury, and they lack standing to challenge the provisions of the 2020 Comanche Compact concerning the Governor's consent to hypothetical future two-part determinations.

4. The Mere Fact of Potential Competition by the Comanche Nation is Not a Cognizable Injury to Plaintiffs.

Perhaps recognizing the defects in their standing discussed above, Plaintiffs' Complaint resorts to general platitudes about illegal competition rather than focusing on any specific nexus between any alleged violations of law and any specific injury to Plaintiffs. Evidently, Plaintiffs' theory of standing is that these alleged technical violations in discrete areas somehow nullify the entire 2020 Comanche Compact, and transform the mere existence of the Comanche Nation's casinos into unlawful competition. Plaintiffs frame this argument in several ways—alleging the existence of "illegal competition," and that they cannot compete on "equal footing" because their compacts (allegedly) comply with IGRA whereas the Comanche Nation's (allegedly) does not. 2d Am. Compl. ¶¶ 5, 152, 231v. Unsurprisingly, this radical suggestion (that the Comanche Nation cannot engage in gaming at all) is fraught with problems—it assumes competition without factual support and ignores the severability of the 2020 Comanche Compact (both under its own terms and at law). Fundamentally, this extreme position is repugnant to IGRA, and fails to establish the invasion of any legally protectable interest of Plaintiffs; they simply have no right to abuse IGRA to insulate themselves from competition.

a. Competition Between Plaintiffs and the Comanche Nation is Speculative.

As a threshold matter, Plaintiffs do not allege any facts from which to infer that there is competition between Plaintiffs' casinos and Comanche casinos in the first place. Plaintiffs allege that they compete for patrons from the Oklahoma City and Dallas-area markets. 2d Am. Compl. ¶ 231v, 231y. Notably, they do *not* allege that the Comanche Nation competes in these markets. In fact, the Comanche casinos are all located in the area of either Lawton, Oklahoma or in Cotton County, Oklahoma across the border from Wichita Falls, Texas. ECF 54-2 ¶¶ 4-8. The sole allegation that Plaintiffs offer of any potential competition between the Comanche Nation and Plaintiffs is a single statement from a former attorney for the Comanche Nation stating that sports betting would provide the Comanche Nation a competitive advantage, including in the Dallas market. 2d Am. Compl. ¶ 231o. However, as discussed elsewhere, the sports betting provision was ruled contrary to Oklahoma state law and sports betting is not being offered by the Comanche Nation casinos. Accordingly, Plaintiffs have not even alleged a factual basis from which to infer that the Comanche Nation competes with Plaintiffs for patrons in the Oklahoma City or Dallas areas in the first place.

b. The Comanche Nation Has the Right to Game, Irrespective of the 2020 Comanche Compact.

Even if the Comanche Nation did compete against Plaintiffs for customers from Dallas (or Oklahoma City), that competition is not illegal or unlawful. As discussed above, Plaintiffs are not harmed by the provisions of the compact regardless of their complaints. Accordingly, Plaintiffs' argument is that these provisions somehow infect the entire compact, void the compact, and transform the Comanche Nation's entire gaming enterprise into an illegal act. This chain of logic is flawed at every step.

First, it is patently wrong to suggest that any and all potential competition from the Comanche Nation is unlawful. Even if the 2020 Comanche Compact were invalid—as Plaintiffs allege—the Comanche Nation would still be able to offer all of its Class II games pursuant to its inherent sovereign rights as recognized by IGRA without a compact. 25 U.S.C. § 2710(a),(b); *see also Cabazon*, 480 U.S. at 207-214. With respect to Class III gaming, IGRA requires a tribal-state compact, but even if Plaintiffs are correct that some provision in that compact violates IGRA (which they are not), the 2020 Comanche Compact includes a severability clause. ECF 54-8, 2020 Comanche Compact, Part 13(B) ("If any clause or provision of this Compact is subsequently determined by any federal court to be invalid or unenforceable under any present or future law, including but not limited to the scope of Covered Games, the remainder of this Compact shall not be affected thereby."). Moreover, assuming that the severability clause is itself invalid (an argument not even Plaintiffs try to make) and the 2020 Comanche Nation Compact is void *en toto*, the Comanche Nation nonetheless would continue to have the right to conduct Class III gaming under its pre-2020 compact with the state.

The 2020 Comanche Nation Compact is not the first compact that the Tribe and state have entered into. Prior to the 2020 compact, the Comanche Nation had a compact with the state that was in effect. ECF 54-2 ¶ 3; *see* 2d Am. Compl. ¶ 74 (noting Comanche Nation intervened in lawsuit concerning terms of its prior compact). That prior compact was then superseded by the 2020 Comanche Nation Compact under its own terms. ECF 54-8, 2020 Comanche Compact, Part 12(A) ("The previous gaming compact entered into by and between the Tribe and the State . . . is hereby agreed and stipulated by the Parties to be superseded by this Compact."). Therefore, if those terms are determined to be void, the prior compact will no longer have been superseded and would still be in effect. In any event, Plaintiffs cannot use alleged technical defects in the

Comanche Nation's compact, alleged defects do not affect them at all, to attempt to shoehorn in a ruling that will eliminate the Comanche Nation's gaming enterprises all together.

c. IGRA Does Not Permit Plaintiffs to Attempt to Insulate Themselves from Competition.

Though they may desire to do so, Plaintiffs cannot reach past their own borders, into the borders of the KCA Reservation, to attempt to insulate themselves from competition from the Comanche Nation. Injury-in-fact for the purposes of standing requires the "invasion of a *legally protected* interest." *Lujan*, 504 U.S. at 560. Therefore, injuries to interests not protected by the law do not confer standing. *See State of W. Va. v. United States HHS*, 145 F. Supp. 3d 94, 102 (D.D.C. 2015) (declining injury-in-fact based on alleged harm to "political accountability").

Here, not only is Plaintiffs' interest in insulating themselves from competition not "legally protected," but Plaintiffs' standing theory, which seeks to thwart the Comanche Nation's gaming in its entirety, is abhorrent to every notion of tribal economic development, self-determination, and sovereignty—the very things IGRA was enacted to promote and protect. 25 U.S.C. §§ 2701, 2702. The Comanche Nation has a right to game on its "Indian lands," which is defined to include its own reservation. 25 U.S.C. §§ 2703(4), 2710(b)(1),(d)(1). Plaintiffs cannot eliminate that right—the right derives from the Comanche Nation's inherent sovereignty and federal law. Therefore, to the extent they view the Comanche Nation as a competitive threat, that threat will always exist, regardless of the merits of Plaintiffs' claims.

While IGRA was enacted to promote strong tribal government and economic development, it was certainly not a statute designed to insulate tribes from competition—particularly where that competition is coming from other tribes. The Seventh Circuit recognized this principle in *Sokaogon*: the court in that case noted that the profitability of the plaintiff tribe's casino was not an interest that "resemble[d] any that the law normally protects." In that regard,

the court concluded that "[a]lthough the IGRA requires the Secretary to consider the economic impact of proposed gaming facilities on the surrounding communities, it is hard to find anything in that provision that suggests an affirmative right for nearby tribes to be free from economic competition." 214 F.3d at 947. This rationale applies with additional force to the Plaintiff Tribes, who already have the lion's share of the gaming market in Oklahoma. Protecting their dominant market position does not resemble any interest that the law normally protects, and is certainly not an interest that is found anywhere within the text or legislative history of IGRA.

Plaintiffs attempt to circumvent this simple proposition with vague and conclusory allegations regarding their ability to compete on "equal footing." 2d Am. Compl. ¶¶ 5, 25, 67, 128. However, as Plaintiffs have previously conceded, "equal footing" does not require that every tribal-state compact have the same terms. ECF 72 at 15. Rather, equal footing, which traces its origin to *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, a case that Plaintiffs cite in their pleadings,[8] means that the compacting process cannot be abused to engage in anticompetitive conduct targeting another tribe. 422 F.3d 490, 496-98 (7th Cir. 2005). In *Lac du Flambeau*, one tribe (the Ho Chunk Nation) entered into a tribal-state compact with Wisconsin that would have required Wisconsin to indemnify the Ho Chunk Nation if the Governor concurred in a pending two-part determination for another tribe (the Lac du Flambeau). *Id.* at 494-95. Therefore, the Lac du Flambeau Tribe had standing to challenge the

[8] *See* 2d Am. Compl. ¶ 129. Plaintiffs also cite *Forest County Potawatomi Cmty. v. United States*, 317 F.R.D. 6 (D.D.C. 2016), which concerned a very similar fact pattern as *Lac du Flambeau* and relied on *Lac du Flambeau* to reach the same result. *See id.* at 12 ("The requested relief, if granted, would, as a practical matter, impede the Menominee [tribe]'s efforts to obtain a gubernatorial concurrence and would thereby impede their efforts to develop a[n off-reservation] gaming facility in Kenosha"). Therefore, *Forest County* is distinguishable for the same reasons as *Lac du Flambeau*.

Ho Chunk compact *because* the compact directly deprived the Lac du Flambeau of an equal opportunity to compete in the market. *Id.* at 502.

Here, unlike the defendant tribe's compact in *Lac du Flambeau*, **nothing** whatsoever in the 2020 Comanche Compact targets Plaintiffs. In other words, Plaintiffs are competing on equal footing with the Comanche Nation—if anything, Plaintiffs have a competitive advantage due to their geographic locations. That Plaintiffs are not constrained is confirmed by the fact that they can each pursue the same conduct that they complain the Comanche Nation is pursuing, or might hypothetically pursue in the future. For instance, Plaintiffs are free to pursue off-reservation gaming themselves (not that they need to given their current proximity to urban centers). ECF 26 ¶ 65. Plaintiffs can also offer *any* Class III game that is authorized by state legislature. ECF 71-2, Part 3(5); ECF 71-3, Part 3(5); ECF 71-4, Part 3(5); ECF 71-5, Part 3(5). Therefore, Plaintiffs can offer house-banked table games and event wagering when authorized by state law—the same as the Comanche Nation intends to do. Plaintiffs' compacts do not require them to have any particular Class III-II mix, and they can alter their mix to compete with the Comanche Nation's 45-55 mix in its compact if they deem that necessary. And, as discussed above, IGRA does not mandate any particular exclusivity fees, so Plaintiffs are free to negotiate for lower fees by agreeing that exclusivity will not be impacted by iLottery (as the Comanche Nation did). Accordingly, any argument by Plaintiffs that they are not competing on "equal footing" is meritless.

CONCLUSION

For the foregoing reasons, Plaintiffs lack standing to pursue their claims against Chairman Woommavovah. Accordingly, the Court lack subject matter jurisdiction over Plaintiffs' claims and the Court should dismiss them.

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Respectfully submitted,

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