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**

REPLY IN SUPPORT OF CHAIRMAN MARK WOOMMAVOVAH'S MOTION TO DISMISS

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INTRODUCTION

Despite submitting an initial Complaint and two amended Complaints (totaling 344 pages with 786 paragraphs) and 185 pages of briefing with 106 footnotes (including Plaintiffs' briefing in response to standing motions and also their motions to strike), *nowhere* have Plaintiffs identified *any* concrete injury they have suffered on account of any allegedly defective provision in the 2020 Comanche Compact. Instead, Plaintiffs have offered arguments directly contradicted by their own factual allegations[1] and by the unrebutted evidence of record (properly before the Court under binding D.C. Circuit precedent). In particular, Plaintiffs argue that they have suffered three injuries: (1) the Comanche Nation being "free[d]" from "regulatory requirements," (2) "illegal" games being "permitted" by the 2020 Comanche Compact, and (3) "divest[ure]" of their "zone of exclusivity" due to off-reservation gaming. These supposed injuries are unsupported by the facts and instead rely on mischaracterization of the Second Amended Complaint or unfettered speculation concerning future events.

Plaintiffs' first argument is directly contradicted by their own Second Amended Complaint. There, Plaintiffs allege that the 2020 Comanche Compact is invalid because it *increases*, not decreases, the regulation of the Comanche Nation. In particular, Plaintiffs allege that the 2020 Comanche Compact violates IGRA because it provides Oklahoma with greater regulatory control over Comanche Nation's gaming—requiring the Tribe to have a certain mix of Class II and Class III games and imposing an impermissible tax in the form of "exclusivity fees"

[1] Notably, Plaintiffs sought leave to amend their factual allegations "because [of] events occurring after the Complaint was filed," which included "several decisions" from the Oklahoma Court of Criminal Appeals. ECF 96 at 1, 6-7. Yet, none of these decisions are even discussed in Plaintiffs' response brief. Instead, Plaintiffs continue to force Chairman Woommavovah to play "whack-a-mole" and respond to newly invented standing theories.

that are not supported by a meaningful concession by the state to the Comanche Nation. Because Plaintiffs allege the compact increases regulation on the Comanche Nation, that same compact cannot create a competitive advantage by "free[ing]" the Comanche Nation from regulation.

Plaintiffs' second argument is directly contradicted by the language of the 2020 Comanche Compact, the allegations in the Second Amended Complaint, and the evidence submitted by the Comanche Nation's Chairman. To the extent the alleged "illegal" games include "iLottery," the plain language of the 2020 Comanche Compact does not "authorize" "iLottery" at all and it is simply disingenuous for Plaintiffs to suggest it does. The Compact addresses the impact of "iLottery" on the Comanche Nation's exclusivity provisions—but, Plaintiffs have their own exclusivity provisions that are unaffected by the 2020 Comanche Compact, rendering Plaintiffs uninjured. To the extent the alleged "illegal" games are based on the definition of "Gaming Machine" in the compact, this is a brand new argument that was not pled. Significantly, Plaintiffs' factual allegations do not support the argument—the Compact has been in effect for a year and a half, yet Plaintiffs have not identified a single slot machine at any Comanche casino that Plaintiffs cannot offer at their own casinos. To the extent the alleged "illegal" games are event wagering or house-banked games, Plaintiffs acknowledge that the Comanche Nation is not offering those games, and the Chairman of the Comanche Nation has submitted evidence confirming this fact. Plaintiffs' response that the Comanche Nation might change its mind down the road is pure speculation.

Plaintiffs' third argument is also directly contradicted by the allegations in the Second Amended Complaint and also by evidence submitted by the Comanche Nation's Chairman. Any off-reservation gaming by the Comanche Nation is completely hypothetical at this point. The Comanche Nation has not even begun the lengthy administrative process to take land into trust

for gaming purposes (an administrative process in which Plaintiffs will be able to participate to the extent they are "nearby" any proposed gaming location). Plaintiffs' argument that the Comanche Nation is "pursuing" off-reservation gaming in Grady County is a false representation of Plaintiffs' own Second Amended Complaint, which merely notes that the Comanche Nation owns land (not in trust and not gaming eligible) in Grady County. And, even if the Comanche Nation submitted an application for that land to be taken into trust tomorrow, there is no imminent injury under *Yocha Dehe Wintun Nation v. U.S. Dep't of Interior*, 3 F.4th 427 (D.C. Cir. 2021), due to several regulatory requirements that would take years for the Comanche Nation to meet (if ever). Plaintiffs' sole argument in response is to speculate that the Secretary of Interior will ignore those regulatory requirements. This speculation does not create standing.

For all these reasons, further discussed below, and those discussed previously, Plaintiffs lack standing. Accordingly, the Court lacks subject matter jurisdiction and the official capacity claims against the Comanche Nation's Tribal Chairman, Defendant Mark Woommavovah ("Chairman Woommavovah") must be dismissed.

ARGUMENT

A. Standard of Review.

As discussed at length in Chairman Woommavovah's response to Plaintiffs' Motion to Strike, Plaintiffs' argument that the Court cannot consider matters outside the pleadings in assessing Plaintiffs' standing (and by extension the Court's Article III jurisdiction), ECF 114 at 4-5 & n.3, is frivolous, vexatious, and sanctionable. Binding Circuit precedent holds that the Court may consider matters outside the pleadings in assessing standing, *Coalition for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003), and lower courts "routinely" do so, *Ranchers-Cattlemen Action Legal Fund v. USDA*, 2021 U.S. Dist. LEXIS 187182, at *19 (D.D.C. Sep. 29, 2021).

Plaintiffs' argument to the contrary is premised on *Ferrer v. CareFirst, Inc.*, 265 F. Supp. 3d 50 (D.D.C. 2017) ("*Ferrer I*") and that decision's discussion of *Haase v. Sessions*, 835 F.2d 902 (D.C. Cir. 1987). The *Ferrer I* court subsequently repudiated Plaintiffs' reading of *Ferrer I* in *Ferrer v. CareFirst, Inc.*, 278 F. Supp. 3d 330 (D.D.C. 2017) ("*Ferrer II*"). In *Ferrer II*, the District Judge specifically rejected the notion that *Haase* creates "a categorical rule barring defendants from putting forward evidence to challenge a plaintiff's standing," and noted that "***Mineta* clearly states otherwise**." *Id.* at 332 (emphasis added). Moreover, a complete reading of *Haase* (which was a re-hearing, and thus requires reading of the original opinion) shows that the D.C. Circuit permitted the defendant to submit evidence outside the pleadings for mootness, and was only concerned that the *non*movant plaintiff had submitted evidence outside the pleadings to rebut the defendant's *facial* challenge to standing. *Haase v. Webster*, 807 F.2d 208, 212-213, 215-16 (D.C. Cir. 1986); *Haase*, 835 F.2d at 905.

Indeed, Plaintiffs' argument is not only sanctionable but also hypocritical. Plaintiffs themselves repeatedly cite to and rely on evidence outside the pleadings. ECF 114 at 28 n.23, 34 n.33, 48 n.43; ECF 115-1 at 13 & n.5, 18-19. Accordingly, there can be no question that matters outside the pleadings are properly considered in assessing Chairman Woommavovah's factual challenge to Plaintiffs' standing.

B. Plaintiffs Have No "Competitive Injury."

Plaintiffs' first argument that they have standing rests on the "competitive injury doctrine," under which "economic actors suffer an injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition against them." ECF 114 at 13 (citing *Int'l Bhd. of Teamsters v. U.S. Dep't of Transp.*, 724 F.3d 206, 211-12 (D.C. Cir. 2013)); *see also id.* at 17. Yet, despite the fact that the 2020 Comanche Compact has been in effect for a year and a half, Plaintiffs have not identified a single lost customer, any decreased

market share, or any profits lost to the Comanche Nation. Instead, Plaintiffs attempt to divorce their allegations of injury from their allegations that specific compact provisions violate IGRA, and merely lament the fact that the Comanche Nation games at all.

Plaintiffs' competitive injury arguments fail. As alleged by Plaintiffs, the 2020 Comanche Compact does not "lift" any regulatory restrictions—but instead imposes *additional* regulations. Without any tie to a specific provision of the compact alleged to be illegal, Plaintiffs cannot manufacture standing by merely claiming competition with the Comanche Nation exists (which is itself a dubious proposition given the geography of the parties).

1. Plaintiffs Fail to Tie Any of Their IGRA-Based Allegations to Their Alleged Injury.

Plaintiffs invoke the "competitive injury doctrine" and argue that the federal government has "free[d]" the Comanche casinos from regulation, or "lift[ed]" regulatory restrictions. ECF 114 at 1, 13, 17. The actual allegations of Plaintiffs' Second Amended Complaint, however, paint an entirely different picture. In particular, in their Second Amended Complaint, Plaintiffs allege not that the 2020 Comanche Compact is invalid because it lifts regulations, but because it imposes *too many* regulations. *E.g.*, 2d Am. Compl., ECF 104, ¶¶ 85, 87, 181, 189-190, 192-193, 195-196, 198, 252. In such circumstances, the "competitive injury doctrine" does not apply at all. *See State Nat'l Bank of Big Spring v. Lew*, 795 F.3d 48, 55 (D.C. Cir. 2015) (holding that the "doctrine of competitor standing" did not apply where plaintiff's competitor had a "*greater* regulatory burden") (emphasis in original).

In particular, Plaintiffs allege that the 2020 Comanche Compact is invalid because it permits the state to regulate the Comanche Nation's Class II gaming—while under IGRA, regulation of Class II gaming is limited to federal and tribal governments. 2d Am. Compl., ECF

104, ¶¶ 87, 189-190, 192-193, 195-196, 198. Obviously, adding a third regulatory body is an increase, not a decrease, in regulation.

Similarly, Plaintiffs allege that the 2020 Comanche Compact is invalid because it imposes an unlawful tax on the Comanche Nation. In particular, under the terms of the 2020 Comanche Compact, the Comanche Nation must pay exclusivity fees to Oklahoma, but the Comanche Nation agrees its exclusivity will not be affected by the state's "iLottery." 2d Am. Compl., ECF 104, ¶ 183; ECF 54-8, 2020 Comanche Compact Part 3(B). Accordingly, Plaintiffs allege that the exclusivity fees are not supported by a "meaningful concession" from the state and therefore the fees paid by the Comanche Nation violate IGRA. 2d Am. Compl., ECF 104, ¶¶ 85, 181. Again, the imposition of an unlawful tax is an increase, not a decrease, in regulation.

On this latter point, Plaintiffs once again mischaracterize the allegations in their own Second Amended Complaint. They argue that the exclusivity fees in the 2020 Comanche Compact are 1.5% lower than in the Model Compact (4.5% compared to 6%), and therefore the Comanche Nation will have an increase in revenue, which (accordingly to Plaintiffs) is equivalent to an increase in "competiveness of gaming." 2d Am. Compl., ECF 104, ¶¶ 231n-231o; ECF 114 at 16. This argument completely ignores the fact that IGRA itself does ***not*** mandate any certain amount of exclusivity fees. *See* 25 U.S.C. § 2710(d)(4). Because the amount of fees is not an IGRA violation, any associated "increase in competitiveness of gaming" is not an injury caused by an IGRA violation. In their actual Second Amended Complaint, Plaintiffs alleged that the IGRA violation associated with these exclusivity fees is the lack of a "meaningful concession" from Oklahoma to the Comanche Nation. 2d Am. Compl., ECF 104,

¶¶ 85, 181, 252. The alleged lack of a "meaningful concession" from the state to the Comanche Nation is an injury suffered by the Comanche Nation alone.[2]

2. Plaintiffs' General and Conclusory Claim that the Comanche Compact is "Illegal" Is Not a Competitive Injury.

Unable to articulate any way in which they are actually injured by the terms of the 2020 Comanche Compact that allegedly violate IGRA, Plaintiffs fall back on the vague and generalized grievance that they (according to themselves) must compete with "ten locations" (five of which are Comanche casinos) that conduct gaming at all. ECF 114 at 13-20; ECF 54-2 ¶ 4. As explained previously, however, this grievance about competition from the Comanche

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[2] *Even if* IGRA required equal amounts of exclusivity fees for all tribes (which it does not), lower fees paid by the Comanche Nation would not injure Plaintiffs. As previously explained, most of Plaintiffs' casinos are hundreds of miles away from, and therefore do not compete with, the Comanche casinos. ECF 54-2 ¶ 18. The only Plaintiff with any casinos within a hundred miles of the Comanche casinos is the Chickasaw Nation. The Chickasaw Nation operates twenty-three casinos, including the largest casino in the world, a stone's throw from the fourth largest metropolitan area in the country—Dallas, Texas—and the Chickasaw Nation also operates multiple casinos in the Oklahoma City metropolitan area. ECF 54-2 ¶ 17.

As a result of this advantage, the Chickasaw Nation earns ***eleven times (!!)*** the revenue of the Comanche Nation. ECF 54-2 ¶ 13. Plaintiffs blithely state that it is "basic law of economics" that reduced fees for the Comanche Nation will increased competitiveness. ECF 114 at 16. Yet, it is not "basic" economics at all to assume that a mere 1.5% decrease in fees could enable the Comanche Nation to draw patrons away from a competitor with better locations that earns eleven times as much revenue.

It is also not "basic" economics that construction of a modest 250-game casino in Cache, Oklahoma materially impacts the Chickasaw Nation's behemoth market share. The Chickasaw Nation largely draws patrons in the Oklahoma City and Dallas metropolitan areas, not the 3,000 person town of Cache (which is further way from the Chickasaw casinos than existing Comanche casinos). ECF 107-1 at 7, ECF 54-2 ¶ 17; *Cache, OK*, DATA USA, https://datausa.io/profile/geo/cache-ok#about (last visited Dec. 19, 2021) (showing population of Cache, OK as approximately 2,800). And, Oklahoma already has some 143 casinos, *see Map of Indian Gaming Locations*, NATIONAL INDIAN GAMING COMMISSION, https://www.nigc.gov/map/ (last visited Oct. 21, 2021), so it is not "basic" economics that a mere 250 more machines will alter the market in any significant way.

Nation *in general* (rather than tied to a specific provision of the compact that is allegedly unlawful) is not a cognizable injury and cannot be redressed in this action in any event.

As explained in Chairman Woommavovah's opening brief, Plaintiffs have no legally protected interest in insulating themselves from competition. *See Sokaogon Chippewa Community v. Babbitt*, 214 F.3d 941, 947 (7th Cir. 2000) (noting that the profitability of the plaintiff tribe's casino was not an interest that "resemble[d] any that the law normally protects" and tribes do not have "an affirmative right" under IGRA "to be free from economic competition"). Plaintiffs' *only* response to this indisputable legal truth is to weakly suggest, in a footnote, that Chairman Woommavovah's argument was "briefly-sketched." ECF 114 at 9 n.7. Chairman Woommavovah's argument was three-pages long and well supported—hardly "briefly-sketched." ECF 107-1 at 26-28.

Instead of addressing this point head on, Plaintiffs bluster about their interest in conducting their own gaming. ECF 114 at 7-10. But, *nothing* in the 2020 Comanche Compact impedes Plaintiffs from conducting their own gaming (and for that reason cases such as *Lac du Flambeau* or *Forest County Potawatomie* are distinguishable). Plaintiffs do not argue otherwise. In fact, Plaintiffs do not even allege that competition from the Comanche Nation has increased at all—the 2020 Compact has been in effect for about a year and a half, yet Plaintiffs have not demonstrated any actual harm to their market share or revenue caused by the Compact.[3] Instead,

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[3] To the extent that Plaintiffs allege that competition *will* increase in the future due to the opening of a 250-machine casino in Cache, Oklahoma, that increase in competition is (1) unlikely to harm Plaintiffs' market share given the modest size of the casino, distance to Plaintiffs' casinos, and presence of more than 140 casinos already in the state, *see* ECF 97 at 9, ECF 107-1 at 7, *Map of Indian Gaming Locations*, NATIONAL INDIAN GAMING COMMISSION, https://www.nigc.gov/map/ (last visited Oct. 21, 2021), and (2) unrelated to the allegations of the Second Amended Complaint—Cache is an on-reservation casino, not one of the three off-reservation casinos contemplated by the Compact, and there is no plan to offer event wagering or

Plaintiffs only argue that the competition from the Comanche Nation that *was* lawful up until the point of the 2020 Comanche Compact became unlawful competition the moment that compact went into effect, and assume that if the Comanche casinos' Class III (but not Class II) machines were shut down, Comanche patrons would travel up to several hundred miles to patronize Plaintiffs' casinos. The premise of this argument is inherently flawed—the Comanche casinos can lawful operate Class III games regardless of the outcome of this action.

Plaintiffs' implicit premise is that if the 2020 Comanche Compact is void, then the Comanche Nation has no compact at all and therefore cannot conduct Class III gaming. This argument is wrong for several reasons. Assuming *arguendo* that a provision of the 2020 Comanche Compact is invalid, that invalidity cannot infect the remainder of the compact. The 2020 Comanche Compact is, by its own terms, severable. Plaintiffs respond that the severability clause is itself invalid.[4] However, even indulging that assertion (a legal conclusion that the Court does not have to accept, *Sweigert v. Podesta*, 334 F. Supp. 3d 46, 51 (D.D.C. 2018)), the result is not altered. If every term of the 2020 Comanche Compact is invalid and void, then the provision of the 2020 compact that repealed the Comanche's prior compact is itself invalid and the Comanche's prior compact remains in effect. The Comanche Nation engaged in Class III

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house-banked games at that casino, *see* ECF 97 at 9, 13.

[4] In a footnote in their Notice of Supplemental Authority, Plaintiffs also suggest that IGRA does not permit severance relying on dicta from a footnote in the *West Flagler* case discussing *Amador Cnty. v. Salazar*, 640 F.3d 373, 378 (D.C. Cir. 2011). ECF 119 at 3. Plaintiffs are, again, wrong. *Amador County* concerned whether a tribe had any Indian lands, and therefore the question before the court was binary—either it had Indian lands (in which case it could game) or did not have Indian lands (in which case it could not game). 640 F.3d at 377. In contrast, as Plaintiff Citizen Potawatomi Nation is aware, where a tribe does have Indian lands but the compact has an unenforceable provision (and a severance clause), then the compact is, in fact, severable. *Citizen Potawatomi Nation v. Oklahoma*, 881 F.3d 1226, 1238-41 (10th Cir. 2018).

gaming under IGRA pursuant to the Model Compact since 2004, 2d Am. Compl., ECF 104, ¶¶ 52-53, 55, 57; *see also* ECF 54-2 ¶ 3, and if the 2020 Comanche Compact is void, the Comanche Nation will continue to be able to conduct Class III gaming pursuant to the Model Compact. ECF 107-10 at 24-26.

Plaintiffs' *sole* argument in response is to attempt to misconstrue the phrase "with prejudice." Previously, Plaintiffs, along with several other tribes including the Comanche Nation, brought declaratory judgment claims against the Governor of Oklahoma. These tribes all used the Model Compact, all of which had identical renewal provisions, and they all alleged that their compacts had automatically renewed on January 1, 2020. 2d Am. Compl., ECF104, ¶¶ 69, 74; *Cherokee Nation v. Stitt*, 475 F. Supp. 3d 1277, 1278-79 (W.D. Okla. 2020). The Comanche Nation dismissed its declaratory judgment claim "with prejudice" upon entering into the 2020 Comanche Compact. 2d Am. Compl., ECF 104, ¶ 77. Other plaintiffs continued with their claims and received a favorable judgment—the Model Compact automatically renewed on January 1, 2020 under its terms because governmental action authorized horse racetracks to conduct electronic gaming prior to that date. *Cherokee Nation*, 475 F. Supp. 3d at 1282-83.

Accordingly, by operation of *stare decisis* (or issue preclusion against Oklahoma), the Comanche Nation's prior compact ***also*** automatically renewed on January 1, 2020 and remains in effect if it is true that the 2020 Compact is void. *See Kolbe v. BAC Home Loans Servicing, LP*, 738 F.3d 432, 436, 441, (1st Cir. 2013) ("[U]niform contracts are interpreted uniformly across cases . . . ."); *see also Cherokee Nation*, 475 F. Supp. 3d at 1279 (noting that tribal-state gaming compacts of tribes using the Model Compact are "identical in all material respects" as it concerns renewal). Indeed, Plaintiffs recognize this in their own complaint by stating that the 2020 Comanche Compact only "purported to void" the former compact. 2d Am. Compl., ECF

104, ¶ 57. If the 2020 compact is of no effect, then the prior compact was not voided, superseded, or otherwise revoked or repealed.

By dismissing its claim "with prejudice," the Comanche Nation simply agreed that it would not again sue the Governor of Oklahoma for a declaration that the prior compact renewed. *See Dismissal with Prejudice*, Black's Law Dictionary (9th ed.) (defining "dismissal with prejudice" as "A dismissal . . . after an adjudication on the merits, barring the plaintiff from *prosecuting* any later lawsuit on the same claim.") (emphasis added). "With prejudice" does *not* mean, as Plaintiffs suggest, that the Comanche Nation has waived any arguments or *defenses* (as opposed to an affirmative declaratory judgment claim) that its prior compact renewed on January 1, particularly as such arguments or defenses relate to third-parties such as Plaintiffs.

The leading case on this issue is *Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc.*, 575 F.2d 530 (5th Cir. 1978). In that case, a plaintiff sued a defendant for patent infringement, and the defendant filed its own action seeking a declaration that a different patent ("patent 608") was invalid. *Id.* at 533. The parties agreed to settle both actions, and the defendant dismissed its declaratory judgment claim "with prejudice." *Id.* The plaintiff then sued defendant for infringement of patent 608, and argued that the defendant could no longer raise validity as a defense because it had dismissed its declaratory judgment claim "with prejudice." *Id.* The Fifth Circuit rejected this type of "gotcha" litigation—first holding that claim preclusion could not apply and then holding that issue preclusion did not apply because the validity issue was never actually litigated. *Id.* at 536-40.

Other cases are in accord—dismissal with prejudice of declaratory judgment claims does not bar future litigation of un-litigated issues. *Cf. Allegheny Int'l v. Allegheny Ludlum Steel Corp.*, 40 F.3d 1416, 1428-31 (3d Cir. 1994) (holding that 1985 dismissal of declaratory

judgment claim regarding reimbursement for insurance costs "with prejudice" did not bar action to recover those insurance costs from 1986 onward); *Randel v. Travelers Lloyds of Tex. Ins. Co.*, 2019 U.S. Dist. LEXIS 188029, at *3-4, 6-7 (S.D. Tex. Oct. 30, 2019) (permitting plaintiff to bring breach of contract action premised on same operative facts as prior declaratory judgment claim dismissed "with prejudice" pursuant to agreement).

Accordingly, the Comanche Nation has not relinquished nor waived any rights it has to argue here that its prior compact renewed on January 1, 2020. The Comanche Nation can argue (and is arguing right now) that its prior compact would be revived if its 2020 compact is void, and that compact renewed January 1, 2020. No matter how Plaintiffs wish to twist and turn their arguments, they cannot escape the fact that the Comanche Nation is a federally-recognized Indian tribe with the right to engage in Class III gaming. Any competition that exists between Plaintiffs and the Comanche Nation has existed and will continue to exist regardless of the 2020 Comanche Compact. Accordingly, Plaintiffs lack standing.

C. Plaintiffs' "Exclusivity" Is Not Injured By Any New Games, Because The Comanche Nation Has Not Changed the Types of Games it Offers.

Plaintiffs' next argument is that "illegal" games authorized by the 2020 Comanche Compact is an injury to the "exclusivity" provisions in their own compacts. Plaintiffs' argument is curious because, by their own terms, these "exclusivity" provisions apply only to ***nontribal*** gaming. Okla. Stat. tit. 3A, § 281 (Model Compact) Part 11.E; *see* 2d Am. Compl., ECF 104, ¶ 56 (noting that Plaintiffs use the Model Compact). In any event, the games that Plaintiffs complain of are not being offered, and therefore cannot be injuring Plaintiffs.

1. Plaintiffs Identify No Reason to Support an Assertion that the Comanche Nation Will "Imminently" Offer House-Banked Games or Event Wagering.

As has been discussed previously, Plaintiffs complain that the 2020 Comanche Compact includes "house-banked games" and "event wagering" in the definition of "Covered Games," Nonetheless, Plaintiffs cannot escape the simple fact that the Comanche Nation has decided *not* to offer those games. In response, Plaintiffs claim that the Comanche Nation's decision "may change at any time." ECF 114 at 28 (citation and internal quotations omitted). Yet, Plaintiffs allege no facts suggesting that the decision *will* change any time soon, such that they will be "imminently" injured as is required for them to have standing. *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560 (1992); *Delta Air Lines, Inc. v. Export-Import Bank*, 85 F. Supp. 3d 250, 262 (D.D.C. 2015) ("[i]t remains indispensable . . . that the increase in competition and the corresponding injury are 'imminent' and not merely 'speculative.'").

Unable to find support in the facts, Plaintiffs attempt to fabricate new law, claiming that "the question is not whether the [Comanche Nation is] playing the illegal games now, but whether the Secretary should have disapproved the [2020 Comanche Compact] . . . because they authorize illegal games." ECF 114 at 27. Plaintiffs' understanding of the law is mistaken—assuming *arguendo* that the Secretary did violate some procedure, Plaintiffs still have to show an injury-in-fact. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550 (2016) (holding that a plaintiff "cannot satisfy the demands of Article III by alleging a bare procedural violation" of a statute); *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) ("deprivation of a procedural right without some concrete interest that is affected by the deprivation — a procedural right *in vacuo* — is insufficient to create Article III standing."). Because the games are not being played, Plaintiffs are not injured.

As a last ditch effort, Plaintiffs note that "the Comanche Nation intends to conduct Event Wagering, House-Banked Card Games, and House-Banked Table Games when such games are authorized by state law." ECF 114 at 30. This statement does not create standing for several reasons. First, there is no indication that any change in state law in imminent. Second, if the games are authorized by state law, then they are not illegal and the "injury" is not cognizable. Third, as Chairman Woommavovah explained previously, even if state law changed tomorrow, Plaintiffs have never explained how or why they would lose market share. They all offer non-house banked versions of all house-banked games, such as blackjack, craps, and roulette, and it is unclear why any of their customers would choose to travel additional distances just to play house-banked versions of those same games.

As supposed additional support, shortly after filing their response brief, Plaintiffs filed a Notice of Supplemental Authority that cites *West Flagler Assocs. v. Haaland*, 2021 U.S. Dist. LEXIS 225075 (D.D.C. Nov. 22, 2021). *West Flagler* addresses the standing of a company operating a casino in Florida to challenge a tribal-state compact concerning online sports betting, and is accordingly distinguishable in several respects. *See generally id.* First, the casino had actual evidence of injury—not mere speculation—in the form of a survey of its patrons that demonstrated some of its patrons would shift away from the casino in favor of online sports betting. *Id.* at *14-15. Here, Plaintiffs have had over a year to conduct such a survey and have not done so. Second, the sports betting in the compact at issue in *West Flagler* was ***online***. It was for this reason that the sports betting was competitive with the casino games—travel to a distant corner of the state was not required. *Id.* at *15. The 2020 Comanche Compact does not authorize online sporting betting, and given the distances between the Comanche casinos and Plaintiffs' casinos, ECF 54-2 ¶ 18, it is not fair to merely assume a player would abandon play at

a Plaintiffs' casino to travel to engage in sports betting. Finally, and most fundamentally, *West Flager* did ***not*** concern a tribe that had decided to refrain from sports betting. *West Flager* does not alter the fundamental point that Plaintiffs' have alleged no reason to think that the Comanche Nation will change course and decide to offer event wagering.

2. The Compact Does Not "Authorize" iLottery.

In their desperation to manufacture an injury, Plaintiffs resort to a false statement concerning the 2020 Comanche Compact's provisions concerning "iLottery." In particular, Plaintiffs claim that the 2020 Comanche Compact "authorize[s] the State to conduct the 'iLottery.'" ECF 114 at 24. This is demonstrably false. The 2020 Comanche Compact merely states "[t]he Tribe [i.e., the Comanche Nation] agrees that the substantial exclusivity provided for in this Compact shall not prohibit the operation of iLottery by the State." 2020 Comanche Compact, Part 3(B).

This is the *sole* substantive provision mentioning iLottery in the entire compact—the only other provision mentioning iLottery being the definition. This does not purport to "authorize" anything, but is merely an agreement as to the effect of iLottery on the *Comanche Nation's* exclusivity provisions—a subject that poses no injury to Plaintiffs. Indeed, as Plaintiffs emphasize, they have their own compact with their own exclusivity provisions. ECF 114 at 24-25. Should these provisions ever be breached, Plaintiffs can bring an action against the state and also seek liquidated damages. *See* Okla. Stat. tit. 3A, § 281 (Model Compact) Part 11(E), 12; 2d Am. Compl., ECF 104, ¶ 56 (noting Plaintiffs use Model Compact).

3. Plaintiffs Do Not Identify Any Change in Gaming Machines Offered.

Despite having had three exhaustive Complaints—totaling 344 pages and 786 paragraphs—in their desperate attempt to find an injury, Plaintiffs resort to a new, circuitous, and unplead theory of injury. Specifically, Plaintiffs argue the definition of "Gaming Machine" in

the 2020 Comanche Compact injures Plaintiffs' interest in "substantial exclusivity" from *non*tribal gaming. This theory of standing was not pled and should be rejected for this reason alone. *See Arias v. Marriott Int'l, Inc.*, 217 F. Supp. 3d 189, 194 n.4 (D.D.C. 2016) (stating that a party's pleading must put the opposing party on notice of the legal theory the party seeks to introduce) (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002)). Even if Plaintiffs' argument is considered, it is nonsense—the exclusivity provisions are not implicated by tribal gaming, and the gaming machines offered by the Comanche Nation are the same machines that can be offered by the Plaintiffs under the Model Compact.

The exclusivity section of Plaintiffs' compacts provides:

> In consideration for the covenants and agreements contained herein, the state agrees that it will not, during the term of this Compact, permit the ***nontribal*** operation of any machines or devices to play covered games or electronic or mechanical gaming devices otherwise presently prohibited by law within the state in excess of the number and outside of the designated locations authorized by the State-Tribal Gaming Act.

Okla. Stat. tit. 3A, § 281 (Model Compact) Part 11.E; *see* 2d Am. Compl., ECF 104, ¶ 56 (noting Plaintiffs use Model Compact). On its face, this section is not implicated because it concerns *nontribal* gaming whereas this case concerns *tribal* gaming. Plaintiffs do not explain how or why they believe the exclusivity provisions related to tribal gaming are implicated. To the extent that Plaintiffs invoke this provision due to the provisions in the 2020 Comanche Compact related to "iLottery," the compact plainly does not "authorize" iLottery (as discussed above) and Plaintiffs are simply wrong to state otherwise.

To the extent Plaintiffs actual argument is that the definition of "Gaming Machine" expands the Comanche Nation's gaming beyond tribal gaming, their argument has not been sufficiently explained or articulated to put the Comanche Nation on notice. Plaintiffs note that the 2020 Comanche Compact defines "Gaming Machine" as:

> [A] Covered Game that is a mechanical, electromechanical or an electronic contrivance or machine that uses a random number generator for outcome that, upon insertion of a coin, token or similar object, or upon payment of any consideration in any manner, is available to play or operate a game of chance in which the outcome depends to a material degree on an element of chance, notwithstanding that some skill may be a factor, whether the payoff is made automatically from the Gaming Machine or in any other manner. For purposes of this Compact, Gaming Machine shall not include any machine used to conduct class II gaming, as defined by IGRA.

ECF 114 at 18 (citing 2020 Comanche Compact Part 2.A.19). However, Plaintiffs do not explain how or why this definition enables the Comanche Nation to offer any additional games that Plaintiffs cannot offer under their own compacts.

Indeed, the games that Plaintiffs themselves may offer under their own compacts are defined in an extremely broad manner as:

> [A]n electronic bonanza-style *bingo* game, *an electronic amusement game*, an electronic instant bingo game, nonhouse-banked *card games*; ***any other game***, if the operation of such game by a tribe would require a compact and if such game has been: (i) approved by the Oklahoma Horse Racing Commission for use by an organizational licensee, (ii) approved by state legislation for use by any person or entity, or (iii) approved by amendment of the State-Tribal Gaming Act; and upon election by the tribe by written supplement to this Compact, any Class II game in use by the tribe, provided that no exclusivity payments shall be required for the operation of such Class II game.

Okla. Stat. tit. 3A, § 281 (Model Compact) Part 3(5) (emphasis added); *see* 2d Am. Compl., ECF 104, ¶ 56 (noting Plaintiffs use Model Compact). While the definitions are not identical, Plaintiffs do not explain how one is broader than the other or how they are supposedly disadvantaged by any difference.

Most significantly, Plaintiffs do not allege or explain what games are being offered by the Comanche Nation at its casinos that the Plaintiffs cannot offer at their own casinos. Instead, Plaintiffs merely speculate that the Comanche Nation might hypothetically offer different games due to the non-identical definitions, but do not allege or provide any facts showing that the

Comanche Nation has actually claimed that it can offer different games or actually offered any such games. Therefore, again, Plaintiffs identify no injury-in-fact.

D. Off Reservation Gaming By the Comanche Nation Remains Entirely Hypothetical and Does Not Infringe Any "Zone of Exclusivity."

The Comanche Nation has no casinos in Cleveland County, Grady County, or Love County. Before it may open any such casino it must first obtain Indian lands in those counties through the two-pat determination process—and the two-part determination process to obtain such lands is *years*-long.[5] To the extent Plaintiffs qualify as "nearby Tribes," they will be consulted by the Secretary of Interior before the two-part determination. 25 U.S.C. § 2719(b)(1)(A). And, to the extent any land sought to be placed into trust is within one of the Plaintiffs' reservations, that Plaintiff's written consent will be required. 25 C.F.R. § 151.8. Accordingly, Plaintiffs have no present injury from these hypothetical casinos that may hypothetically receive regulatory approval in the future.

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[5] Plaintiffs note that there have been three approved two-part determinations since April 2020. ECF 114 at 34 n.33. Plaintiffs neglect to mention that these two-part determinations were submitted in 2012, 2014, and 2015. *See, respectively*, *Departmental Gaming Decisions: Ho-Chunk Nation of Wisconsin, April 16, 2020, Two-Part Determination*, U.S. Dep't of Interior, https://www.bia.gov/as-ia/oig/departmental-gaming-decisions (last visited Dec. 10, 2021) (stating original application began in 2012); *Departmental Gaming Decisions: Tejon Indian Tribe, January 08, 2021, Two-Part Determination*, U.S. Dep't of Interior, https://www.bia.gov/as-ia/oig/departmental-gaming-decisions (last visited Dec. 10, 2021) (stating original application began in 2014); *Departmental Gaming Decisions: Little River Band of Ottawa Indians, December 16, 2020, Two-Part Determination*, U.S. Dep't of Interior, https://www.bia.gov/as-ia/oig/departmental-gaming-decisions (last visited Dec. 10, 2021) (stating original application began in 2015). In other words, it may be between five to nine years before the regulatory process is complete, and that the Secretary has approved three applications in the last year and a half is hardly a guarantee that the Secretary will approve any hypothetical application by the Comanche Nation, particularly given Plaintiffs' opposition and the requirement for consultation with nearby tribes under 25 U.S.C. § 2719(b)(1)(A).

Binding precedent forecloses Plaintiffs' standing arguments. S*ee Yocha Dehe Wintun Nation v. U.S. Dep't of Interior*, 3 F.4th 427, 428–32 (D.C. Cir. 2021) (holding intervening Indian tribe did not have standing to defend agency Indian lands opinion because "there [were] several requirements that [had to] be met before that [other] tribe [could] lawfully operate a gaming facility on the approved parcel of land"). Plaintiffs' attempt to distinguish this binding precedent is unavailing (and curiously relegated to one of their *forty-nine* footnotes). Plaintiffs argue that the potential competitor tribe in *Yocha Dehe Wintun* did not have a gaming compact. While that is true, it misses the point, because securing a gaming compact was merely one of the "several" regulatory requirements that the potential competitor tribe had to undertake. *Id.* at 431.

In *Yocha Dehe Wintun*, the potential competitor tribe sought a determination that certain land was eligible for gaming as Indian lands under a "restored lands" exception. *Id.* at 428. The D.C. Circuit held that the intervenor-tribe lacked standing because even if the potential competitor received a favorable Indian lands decision, it still would have to (1) have land put into trust through the Bureau of Indian Affairs' procedure in 25 C.F.R. pt. 151, (2) have all additional regulatory requirements, such as environmental review, met, (3) enter into a tribal-state gaming compact, and (4) enact a gaming ordinance. *Id.* at 431. Here, although the Comanche Nation already has a gaming compact and ordinance, its regulatory route is just as arduous. In particular the Comanche Nation must: (1) obtain a favorable two-part determination from the Secretary of Interior, (2) (for land on another tribe's reservation) obtain the other tribe's written consent, (3) have land put into trust through the Bureau of Indian Affairs' procedure in 25 C.F.R. pt. 151, and (4) have all additional regulatory requirements, such as environmental review, met. Then, the Comanche Nation must also actually construct a casino and have it

succeed enough to actually pose a competitive threat to Plaintiffs, a fact that is "never sure." *Sokaogon*, 214 F.3d at 947

Rather than addressing binding precedent, Plaintiffs simply resort to misrepresentation. Plaintiffs repeatedly suggest that the Comanche Nation "is pursuing the placement of a gaming facility on the Chickasaw Reservation." ECF 114 at 40; *see also id.* at 23 n.18, 29 n.25, 37, 38. This statement is false and not alleged in the Complaint. Instead, Plaintiffs allege that the Comanche Nation purchased land in Grady County. 2d Compl. Am., ECF 104, ¶ 231s. However, Plaintiffs do not (and cannot) allege that the Comanche Nation is "pursuing" gaming at this location because the Comanche Nation has submitted no application to have the land taken into trust for gaming purposes. Accordingly, the process for gaming has not even begun and Plaintiffs have no standing. *See Sokaogon*, 214 F.3d at 946 (ruling tribe lacked standing where administrative process for gaming by another tribe had "barely" begun). And, even if an application were submitted tomorrow, it is still unknown whether the Secretary of Interior would actually grant such an application (particularly given the regulatory requirements for the Chickasaw Nation's consent). *See Ctr. for Democracy & Tech. v. Trump*, 507 F. Supp. 3d 213, 222-23 (D.D.C. 2020) (holding that plaintiff lacked standing where an Executive Order set "a course of government processes into motion" but it was still uncertain whether government would actually issue regulations that would injure plaintiff).

Plaintiffs' last-ditch effort to evade the fact that a years-long, multiple step administrative process stands between the Comanche Nation and any off-reservation gaming under its Compact is to speculate that the Secretary of Interior will simply violate the law and disregard this entire administrative process. This obviously rank speculation cannot manufacture standing. *See Al Odah v. United States*, 62 F. Supp. 3d 101, 109 (D.D.C. 2014) (holding that claim was not ripe

for review where it was "based entirely upon speculation that federal government officials will refuse to carry out their apparent legal responsibilities").

CONCLUSION

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

Dated:

Respectfully submitted,

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