UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

City of Duluth, Plaintiff, v. Fond du Lac Band of Lake Superior Chippewa, Defendant.	Case No. 14-cv-912 (SRN/LIB) **MEMORANDUM OPINION AND ORDER**

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SUSAN RICHARD NELSON, United States District Judge

I. INTRODUCTION

This matter is before the Court on Defendant's Motion to Dismiss the Complaint [Doc. No. 10] and Plaintiff's Motion for Preliminary Injunction [Doc. No. 21]. For the reasons set forth below, the Court grants Defendant's Motion and denies Plaintiff's Motion as moot.

II. BACKGROUND

This lawsuit arises from a series of agreements entered into between Plaintiff City of Duluth (the "City") and Defendant Fond du Lac Band of Lake Superior Chippewa (the

"Band"), a federally recognized Indian tribe. (See Compl. [Doc. No. 1] ¶¶ 4–5.) According to the Complaint, the City and the Band began exploring the creation of a gaming facility in Duluth, Minnesota in 1984, and the City helped the Band to acquire land for that purpose in downtown Duluth (the "Casino Property"). (Id. ¶¶ 10–11.) In 1986, the parties entered into several agreements for the purposes of creating an economic development entity known as the Duluth-Fond du Lac Economic Development Commission (the "Commission") and developing a gaming facility on the Casino Property (the "1986 Agreements"). (Id. ¶ 12.) One such agreement was the Commission Agreement, which provided, inter alia:

> C. In order for this project to proceed, Indian Country, as defined herein, has to be created.
>
> D. As a practical matter, Indian Country, as defined herein, cannot be created without the consent and approval of the City of Duluth.
>
> E. The consent and approval by the City of Duluth of the creation of Indian Country, as defined herein, is an essential element to the operation of the Commission.

(Id. ¶ 13.) Section 10 defined the approval necessary for the creation of Indian Country:

> The City of Duluth and the Fond du Lac Band agree that the provisions of this Article 10 apply whether or not the Commission is in existence. The Fond du Lac Band acknowledges that the creation of Indian Country, as defined herein, is dependent upon the approval of the creation of Indian Country, as defined herein, by the City of Duluth, and that, without the approval and consent of the City of Duluth, Indian Country, as defined herein, cannot be created, and the activities to be conducted by the Commission could not be done.
>
> a. Initial Approval. The City of Duluth hereby agrees to approve the transfer by the Fond du Lac Band of the land described on Exhibit A attached hereto [the Casino Property], which the Fond du Lac Band has purchased, to the United States of America to hold in trust for the Fond du

> Lac Band, pursuant to 25 U.S.C. §465 and the making of such land part of the Fond du Lac Reservation pursuant to 25 U.S.C. §467.
>
> b. Subsequent Approval. The City of Duluth shall approve the creation of additional Indian Country, as defined herein, whenever the Mayor and the City Council of the City of Duluth determine that such additional land is essential to the activities of the Commission, and the making of such additional land Indian Country, as defined herein, will not be detrimental to the City of Duluth. The City, in its sole discretion, shall have the right to disapprove the creation of additional Indian Country, as defined herein. The Fond du Lac Band shall not create any additional Indian Country, as defined herein, unless the City of Duluth approves the creation of additional Indian Country as provided in this Paragraph b.

(Id. ¶ 15.) And, "Indian Country" was defined in Section 3 as:

> For purposes of this Agreement, "Indian Country" shall mean all land located within the corporate limits of the City of Duluth which is transferred by the Fond du Lac Band to the United States of America to hold in trust for the Fond du Lac Band pursuant to 25 U.S.C. §465, and which is made part of the Fond du Lac Indian Reservation pursuant to 25 U.S.C. §467, and all buildings and structures located on such land.

(Id. ¶ 14.) The Secretary of the Interior approved the 1986 Agreements and declared the Casino Property to be part of the Band's reservation. (See id. ¶¶ 12, 16.) As a result, the Fond du Luth Casino (the "Casino") opened on the Casino Property and is currently owned and operated by the Band. (Id. ¶ 17.)

After the federal Indian Gaming Regulatory Act ("IGRA") was enacted in 1988, the Band filed a petition with the National Indian Gaming Commission ("NIGC") for review of the legality of the 1986 Agreements under the IGRA. (Id. ¶¶ 18–19.) The NIGC determined that operation of the Casino under the 1986 Agreements violated the IGRA. (Id. ¶ 20.) However, the NIGC deferred any enforcement action in order to allow the parties to attempt to resolve the issue, and, in 1994, the City and the Band entered into several

agreements under which they restructured the ownership and control of the gaming operations (the "1994 Agreements"). (Id. ¶¶ 20, 22.) These Agreements became the basis of a Consent Order from this Court, which approved the parties' stipulation that the 1994 Agreements complied with the IGRA. (Id. ¶ 28.) Under the Consent Order, this Court retained jurisdiction for purposes of ensuring the parties' compliance with the 1994 Agreements. (Id.)

Two of the 1994 Agreements are particularly relevant to the present matter. The first is the Umbrella Agreement. (See id. ¶ 26.) Under Section 13 of the Umbrella Agreement, the parties agreed "'not to seek, directly or through the use of paid lobbyists or other agents, any amendment to the [IGRA], or any other federal law, that would alter or abrogate, or cause the alteration or abrogation, of this Agreement or any of the Exhibits thereto.'" (Id. ¶ 37.) The second agreement is Exhibit C to the Umbrella Agreement, which amended the 1986 Commission Agreement (the "Amended Commission Agreement"). (See id. ¶ 26.) Section 2 of the Amended Commission Agreement (the "Dormancy Clause") states:

> Sections 1 through 4, 7(a), 9 through 13 and 15 through 38 of the 1986 Commission Agreement, insofar as they pertain to gaming activities and Ancillary Businesses at the Sublease space, shall be dormant and of no force or effect for so long as the Sublease is in effect.

(Buffalo Aff. [Doc. No. 16] ¶ 2 & Ex. 7 § 2.) The "Sublease space" is the Casino Parcel. (See id. ¶ 2 & Ex. 5 § 1.) The Secretary of the Interior approved the 1994 Agreements, (Compl. ¶ 23), and the NIGC stated that "the 'agreement returns full ownership and control of the Fond du Luth Casino to the Band and is consistent with the requirements of the IGRA,'" (id. ¶ 24; see id. ¶ 25).

In January 2009, the Band informed the City that the Band had failed to offset certain expenditures against revenue and had consequently overpaid the City under the contract. (Id. ¶ 29.) The City disagreed, (id.), and in August 2009, the Band notified the City that it was ceasing all rent payments to the City under the 1994 Agreements, (id. ¶ 30). The City subsequently commenced a lawsuit in this District. (Id.) After the court denied in part the City's summary judgment motion, the Band requested that the NIGC mediate the dispute regarding the amount of revenues owed to the City. (Id. ¶¶ 31–32.) By letter dated August 2010, the NIGC declined to do so and, instead, referred the parties to binding arbitration. (Id. ¶¶ 36, 39.) In response, the Band requested that the NGIC review the 1994 Agreements and declare that they were not in compliance with the IGRA. (Id. ¶¶ 39–40, 43.) The Band forwarded supporting information and requested a meeting with the NIGC. (Id. ¶¶ 41, 43.) That meeting was held in October 2010, after which the NIGC directed the Enforcement Division and the Office of General Counsel to review the agreements. (Id. ¶¶ 44–45.)

On July 12, 2011, the NIGC issued a Notice of Violation finding that certain provisions of the 1994 Agreements violated the IGRA and NIGC regulations. (Id. ¶ 46.) The NIGC ordered the Band to cease its performance of those provisions, including the payment of rent. (Id.) The Band thereafter approved a resolution to cease all activities under the 1994 Agreements and filed with this Court a Rule 60(b) motion for relief from the consent order, summary judgment order, and order compelling arbitration. (Id. ¶¶ 47, 49.) The Court granted the Band prospective relief from the Consent Decree, and the Eighth Circuit Court of Appeals affirmed. (Id. ¶ 50.)

In October 2011, the Band authorized a trust application for a parcel of land located adjacent to the Casino Property (the "Parcel"). (See id. ¶ 51.) The Parcel contains a building known as the Carter Hotel, which is currently unoccupied and which the Band seeks to demolish. (Id. ¶ 57.) The Band did not notify the City of its intent to pursue the application nor seek the City's consent. (Id.) According to the City, the first notice it received of the Band's November 2011 application was a letter from the U.S. Department of the Interior stating that the Band had filed an application. (Id. ¶ 53.) In the application, the Band states that it acquired the Parcel in December 2010 in order to "reestablish[] the Band's reservation land base," "enhanc[e] existing Reservation economic activity," and "protect[] existing Reservation trust resources from the impact of noxious adjacent land use." (Buffalo Aff. ¶ 2 & Ex. 10 at 2; see Compl. ¶ 54.) As further explanation, the application states:

> Acquisition of the Subject Property in trust for the Band will . . . serve to enhance the Band's economic activities, which fully occupy the adjoining Reservation land.
>
> . . . .
>
> . . . . The Subject Property is occupied only by a vacant, derelict, resident hotel and automotive repair shop. . . .
>
> The adjoining Reservation land is fully occupied by the Band's government gaming enterprise and, so, the Band is unable to create a buffer development that can help to insulate its gaming enterprise from noxious adjacent uses. The land uses surrounding the Reservation have a detrimental effect on the Band's on-Reservation activities by reducing the level of enjoyment and sense of security for its guests and employees. Acquisition of the Subject Property would allow the Band to provide the necessary attention and commitment that has been lacking in the past in order to rehabilitate one of the parcels adjoining the Reservation. This will help enhance the Band's

> on-Reservation activities by remediating deleterious adjoining land uses and enhancing safety.

(Buffalo Aff. ¶ 2 & Ex. 10 at 4–5.)

The City filed its Complaint in this matter on April 2, 2014, raising three causes of action related to these events. In Count I, Plaintiff alleges that "[t]he Band breached Article 10 of the [1986] Commission Agreement by making application to place the Parcel into trust without first obtaining the consent of the City." (Id. ¶ 69.) Count II alleges that the Band breached the 1994 Umbrella Agreement by seeking from the NIGC a change in its interpretation of federal law and regulation when it asked the NIGC to review the 1994 Agreements in 2010. (See id. ¶¶ 71–75.) Finally, in Count III, the City seeks an injunction requiring the Band to cure its breach of the 1986 Commission Agreement by withdrawing its application to place the Parcel into trust and ordering the Band to obtain the City's consent prior to making any future applications to place land located in Duluth into trust. (See id. ¶¶ 76–79.)

The Band filed its Motion to Dismiss the Complaint on June 2, 2014 [Doc. No. 10], and the City filed its Motion for Preliminary Injunction on June 12, 2014 [Doc. 21]. The motions have been fully briefed [Doc. Nos. 12, 16, 23–28, 32–39], and the matter was heard on July 28 [Doc. No. 40].

III. DISCUSSION

A. Standard of Review

The Band moves to dismiss the City's Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be

granted. When evaluating a motion to dismiss under Rule 12(b)(6), the Court assumes the facts in the Complaint to be true and construes all reasonable inferences from those facts in the light most favorable to the plaintiff. Morton v. Becker, 793 F.2d 185, 187 (8th Cir. 1986). However, the Court need not accept as true wholly conclusory allegations, see Hanten v. Sch. Dist. of Riverview Gardens, 183 F.3d 799, 805 (8th Cir. 1999), or legal conclusions the plaintiff draws from the facts pled, Westcott v. City of Omaha, 901 F.2d 1486, 1488 (8th Cir. 1990). In addition, the Court ordinarily does not consider matters outside the pleadings on a motion to dismiss. See Fed. R. Civ. P. 12(d). The Court may, however, consider exhibits attached to the complaint and documents that are necessarily embraced by the pleadings, Mattes v. ABC Plastics, Inc., 323 F.3d 695, 697 n.4 (8th Cir. 2003), and may also consider public records, Levy v. Ohl, 477 F.3d 988, 991 (8th Cir. 2007).[1]

To survive a motion to dismiss, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Although a complaint need not contain "detailed factual allegations," it must contain facts with enough specificity "to raise a right to relief above the speculative level." Id. at 555. "Threadbare recitals of the elements of a cause of action, supported by mere

[1] Several exhibits have been submitted by the parties, including the April 1986 Commission Agreement (the "1986 Agreements"), (Buffalo Aff. ¶ 2 & Ex. 3); the June 1994 Agreement Relating to the Modification and Abrogation of Certain Prior Agreements (the "1994 Agreements"), (id. ¶ 2 & Ex. 5); Exhibit C to the 1994 Agreements—the Amendments to the Commission Agreement (the "Amended Commission Agreement"), (id. ¶ 2 & Ex. 7); and the Band's Application to Place Land in Trust, (id. ¶ 2 & Ex. 10). The Court may properly consider these documents because they are referred to in the Complaint and so are necessarily embraced by the pleadings.

conclusory statements, do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Twombly, 550 U.S. at 555). In sum, this standard "calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [the claim]." Twombly, 550 U.S. at 556.

B. The Claims

All three of the City's claims are premised on a breach of contract. Under Minnesota law, contract construction is a question of law for the Court, unless a disputed provision is ambiguous. Art Goebel, Inc. v. N. Suburban Agencies, Inc., 567 N.W.2d 511, 515 (Minn. 1997). In determining whether contract language is ambiguous, "a court must give the contract language its plain and ordinary meaning." Current Tech. Concepts, Inc. v. Irie Enters., Inc., 530 N.W.2d 539, 543 (Minn. 1995). "[T]he terms of a contract are not [to be] read in isolation," Halla Nursery, Inc. v. City of Chanhassen, 781 N.W.2d 880, 884 (Minn. 2010), and a construction that would render a provision meaningless should be avoided, see Current Tech. Concepts, Inc., 530 N.W.2d at 543. "The cardinal purpose of construing a contract is to give effect to the intention of the parties as expressed in the language they used in drafting the whole contract." Art Goebel, Inc., 567 N.W.2d at 515 (emphasis added). Thus, "[e]xtrinsic evidence of the parties' subjective intent cannot be used to create contractual ambiguity where none exists on the face of the [contract]." In re SRC Holding Corp., 545 F.3d 661, 666 (8th Cir. 2008) (citing In re Hennepin Cnty. 1986 Recycling Bond Litig., 540 N.W.2d 494, 498 (Minn. 1995)).

1. Count I: Breach of the 1986 Commission Agreement

The Band argues that Count I of the Complaint fails because: (1) the plain language of Section 10 of the Commission Agreement does not require the Band to obtain the City's consent for land to be taken into trust; (2) even if Section 10 did require that consent, it was rendered dormant by the 1994 Agreements; and (3) the Court should allow the Department of the Interior to exercise primary jurisdiction over the City's challenge to the trust application. (Def.'s Mem. in Supp. of Mot. to Dismiss the Compl. [Doc. No. 12] ("Def.'s Mem.") at 11.) The Court finds that Section 10 of the 1986 Agreement was rendered dormant by the Amended Commission Agreement. However, as a practical matter, even if it was not rendered dormant, the plain language does not prevent the Band from seeking to place land into trust without the City's approval. For these reasons, the Court finds that Count I fails to state a claim upon which relief can be granted, and it need not address the Band's primary jurisdiction argument.

a. Dormancy clause

As noted above, the Dormancy Clause of the 1994 Amended Commission Agreement states:

> Sections 1 through 4, 7(a), 9 through 13 and 15 through 38 of the 1986 Commission Agreement, insofar as they pertain to gaming activities and Ancillary Businesses at the Sublease space, shall be dormant and of no force or effect for so long as the Sublease is in effect.

(Buffalo Aff. ¶ 2 & Ex. 7 § 2 (emphases added).) According to the Band, even if Section 10 of the 1986 Commission Agreement would otherwise have required the Band to obtain the City's consent to apply for trust status, the plain language of the Dormancy Clause rendered

Section 10 "dormant and of no force or effect" as of November 2011, when the Band applied to have the Parcel taken into trust, as long as (1) Section 10 was invoked in relation to gaming at the Casino Property and (2) the Sublease was in effect. (Def.'s Mem. at 15.) Regarding the former requirement, the Band asserts that "pertains to" means to "'relate' to" or "'to concern,'" (id. (quoting Webster's New Universal Unabridged Dictionary 1447 (1996); Black's Law Dictionary 1260 (9th ed. 2009)), and that the Parcel relates to the Band's gaming activities because—as evidenced by the application to place the Parcel into trust—it affects guests' and employees' enjoyment and sense of security at the Casino Property, and the Band's acquisition of the Parcel will allow it to rehabilitate the Parcel and "enhance the Band's on-reservation activities," (Buffalo Aff. ¶ 2 & Ex. 10 at 5; see Def.'s Mem. at 16–17). The Band also notes that Section 10 governs the approval of "additional Indian Country," so reading the Dormancy Clause to invalidate Section 10's application to activities "at" the Sublease space is nonsensical because the Sublease space is already Indian Country. (Def.'s Mem. at 17 n.9.) Regarding the latter requirement, the Band asserts that the Sublease was in effect in November 2011 pursuant to the Court's 1994 Consent Order. (Id. at 17.) Accordingly, the Band argues, Section 10's consent requirement was dormant. (Id.)

The City, on the other hand, argues that the Dormancy Clause does not apply because it is currently inoperative due to the Department of the Interior's cancellation of the Sublease in May 2012. (See Pl.'s Reply Mem. in Opp. to Def.'s Mot. to Dismiss the Compl. [Doc. No. 32] ("Pl.'s Opp.") at 12; see Pl.s' Mem. of Law in Supp. of Mot. for

Prelim. Inj. [Doc. No. 23] ("Pl.'s Inj. Mem.") at 22–23; Lutterman Aff. [Doc. No. 28] ¶ 13 & Ex. 18.) At any rate, the City contends, the Dormancy Clause would not render Section 10 dormant because the Dormancy Clause relates only to activities at the Sublease space. (See Pl.'s Opp. at 14–16.) Relying on the U.S. Supreme Court's opinion in Maracich v. Spears, 133 S. Ct. 2191 (2013), the City argues that the phrase "pertains to" must be limited by the words surrounding it and by the purpose of the 1994 Agreements, which was to address the effect of the IGRA on the 1986 Agreements. (Id. at 15–16.) Therefore, the City concludes, the Dormancy Clause does not apply because "pertains to" must relate only to gaming activities and ancillary businesses "at the Sublease space," and the Parcel is not at the Sublease space. (Id. at 14, 16.)

The Court is not persuaded by the City's arguments. First, the relevant time period for purposes of determining whether the Dormancy Clause rendered Section 10 dormant is when the breach allegedly occurred, which, according to the City, was when the Band applied to place the Parcel into trust—i.e., November 2011. At that point in time, the Sublease was in effect under the Court's 1994 Consent Order. Therefore, the fact that the Department of the Interior cancelled the Sublease in May 2012 is of no import.

Second, the plain language of the Dormancy Clause is unambiguous and is not limited to actions that occur at the Sublease space, but rather includes actions that "pertain to gaming activities and Ancillary Businesses at the Sublease space." The plain meaning of "pertains to" is "relates to," and the Band's stated purpose for seeking to place the Parcel into trust—i.e., to rehabilitate the land directly adjacent to the Sublease space, thereby

improving guests' and employees' enjoyment and sense of security at the Sublease space and "enhance[ing] the Band's on-reservation activities"[2]—relates to the gaming activities at the Sublease space.

Contrary to the City's argument, Maracich does not mandate a different interpretation. In that case, the Court determined that the phrase "in connection with," as used in a federal statute, should not "considered in isolation" because it could be susceptible to an overly-broad interpretation. 133 S. Ct. at 2199. Rather, the phrase should be interpreted in light of the structure and purpose of the statute and the other statutory provisions. Id. at 2199–2200. Here, however, the only interpretation of the contract language at issue that has been proposed by the City does not comport with the other relevant contractual provisions. By its own terms, Section 10 applies to the creation of "additional Indian Country" and so would never apply to the Sublease space itself, which is already Indian Country. Accordingly, there would be no reason to ever invalidate Section 10's application to the Sublease space. Rather, including Section 10 in the Dormancy Clause only makes sense if "pertains to" means "relates to," and Section 10 is thereby invalidated to the extent that it is invoked to create Indian Country that "relates to" the Sublease space. In other words, the City's proposed interpretation renders meaningless the inclusion of Section 10 in the Dormancy Clause. Under Minnesota law, such a construction should be avoided.

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[2] The City disputes only the Band's interpretation of the Dormancy Clause; it does not allege or argue that the Dormancy Clause is violated because the Band intends to use the Parcel for some purpose other than that stated in the application. (See, e.g., Def.'s Mot. to Dismiss Hr'g Tr. [Doc. No. 42] ("Tr.") 21:15–22:25.)

For these reasons, the Court finds that the plain language of the Dormancy Clause rendered Section 10 "dormant and of no force or effect" at the time the Band applied to have the Parcel taken into trust, and the Band was not required to obtain the City's consent.

b. Section 10

The Band argues that, even absent the Dormancy Clause, the Band would not have been required by the plain language of the 1986 Agreements to obtain the City's consent to apply for trust status for the Parcel. As noted above, Section 10(b) states that the Band "shall not create any additional Indian Country, as defined herein, unless the City of Duluth approves the creation of additional Indian Country . . . ." (Buffalo Aff. ¶ 2 & Ex. 3 § 10(b) (emphasis added).) "Indian Country" is defined as land in the City of Duluth "which is transferred by the Fond du Lac Band to the United States of America to hold in trust for the Fond du Lac Band pursuant to 25 U.S.C. §465, and which is made part of the Fond du Lac Indian Reservation pursuant to 25 U.S.C. §467 . . . ." (Id. § 3(a) (emphasis added).) According to the Band, this definition unambiguously provides for a two-step process, and Indian Country is not created—and the City's consent is not required under Section 10—unless both steps are taken. (See Def.'s Mem. at 12–14.) Because the Band has only taken the first step, it argues, the City fails to state a claim for breach of Section 10, and the claim is not ripe for review. (See id. at 12–14 & n.7.)

While the City admits that it is "bound to the contract language," it argues that the contract is silent—and, therefore, ambiguous—as to the timing of the required consent. (Pl.'s Opp. at 8.) Relying on Section 10(a), in which it agreed to approve an initial transfer

of specific land into trust and the making of that land part of the Band's Reservation, the City argues that its consent is needed at each step of the process. (Id. at 9–10.) The City also asserts that the Band's interpretation contravenes the purpose of the contract, which was to create economic development for the benefit of both parties, (see id. at 10–11), and that the "[the Band's] interpretation of Section 10 would render the contract language meaningless because it would not serve to protect Duluth from the harms it sought to avoid; namely, the removal of land from its governmental control," (id. at 8). The City claims that the parties could not have intended such a result. (See id. at 12.)

The Court agrees with the Band. The plain language of Section 10 requires that the Band obtain the City's consent only when the Band "create[s] any additional Indian Country," and, by definition, "Indian Country" is only created when land is both taken into trust under 25 U.S.C. § 465 and made part of the Band's Reservation under § 467. Accordingly, the Band was not required to seek the City's approval for taking the first of the two steps because it was not creating Indian Country as defined by the Agreement. While the City could have drafted the contract to require consent at each stage of the process, it did not do so. And, because the plain language is clear, the Court will not consider extrinsic evidence or argument regarding the parties' intent.

For these reasons, the Court finds that, even if the Dormancy Clause did not render Section 10 dormant at the time the Band applied to have the Parcel taken into trust, the Band still was not required by Sections 10 to obtain the City's consent to apply for trust status for the Parcel. Accordingly, Count I fails to state a claim upon which relief can be granted.

2. Count II: Breach of the 1994 Umbrella Agreement

The Band argues that Count II of the Complaint fails because: (1) the plain language of Section 13 of the 1994 Umbrella Agreement does not prevent the Band from requesting that the NIGC determine whether the Band's gaming activities violate federal law; (2) if such a prohibition were present in the Agreement, it would be void as contrary to public policy; and (3) the claim is barred by claim and issue preclusion because the City already raised it as a defense in the Rule 60(b) proceedings. (Def.'s Mem. at 22–23.) The Court finds that Section 13 of the 1994 Umbrella Agreement does not prevent the Band from seeking review of its compliance with federal law and that, if it did, Section 13 would be contrary to public policy. Accordingly, Count II fails to state a claim upon which relief can be granted, and the Court need not address the Band's claim and issue preclusion argument.

a. Plain language

As discussed above, the parties agreed in Section 13 of the 1994 Umbrella Agreement, "not to seek, directly or through the use of paid lobbyists or other agents, any amendment to the [IGRA], or any other federal law, that would alter or abrogate, or cause the alteration or abrogation, of this Agreement or any of the Exhibits thereto." (Buffalo Aff. ¶ 2 & Ex. 5 § 13.) The Band argues that Section 13 prohibits the parties only from seeking an amendment to the IGRA or another federal statute that would affect the 1994 Agreements, not from seeking the NIGC's review of the 1994 Agreements' compliance with current federal law. (Def.'s Mem. at 23–24.) Accordingly, the Band asserts, Count II

fails because the City neither alleges nor argues that the Band sought an amendment to the IGRA or another federal statute. (Id. at 23, 25.)

The City, on the other hand, argues that the express language of Section 13 is not limited to the parties' efforts to change the IGRA or anther federal statute, but also applies to efforts to change regulatory law. (Pl.'s Opp. at 19–20.) The City points to the Eighth Circuit's holding, in a prior lawsuit between the parties, that "'a binding adjudication by a federal agency, which has been tasked with interpreting and enforcing a statute enacted by Congress, represents a change in law.'" (Id. at 20 (quoting City of Duluth v. Fond du Lac Band of Lake Superior Chippewa, 702 F.3d 1147, 1153 (8th Cir. 2013)).) Based on this language, the City argues that "the [Eighth] Circuit held that the NIGC's change in position on the parties' 1994 Agreement constituted a change in the law," and that the Band breached Section 13 by lobbying the NIGC for that change. (Id.) According to the City, the Band's proposed interpretation merely creates a fact issue not properly resolved on a motion to dismiss. (See id. at 19, 21–24.)

The Court finds that, even under the City's proposed interpretation of Section 13—i.e., that "any other federal law" encompasses both statutory and regulatory law—the City has failed to state a claim. The plain meaning of "any other federal law" may encompass statutes and regulations—and a court's interpretation thereof—but it does not encompass a court's application of a statute or regulation to a particular set of facts. The Eighth Circuit's opinion in the prior lawsuit is not to the contrary. That case arose in the context of the Band's Rule 60(b) motion to dissolve the 1994 Consent Decree based on the NIGC's

issuance of the 2011 Notice of Violation stating that certain provisions agreed upon in the Consent Decree violated the IGRA's "sole proprietary interest" rule. City of Duluth, 702 F.3d at 1151. While the court did state that "a binding adjudication by a federal agency . . . represents a change in law," the court was simply confirming that a "change in law" for purposes of a Rule 60(b) motion is not limited to changes in a statute or judicial precedent, but may also include regulatory action. Id. at 1153. The court's subsequent holding that, "[i]n the situation here, the NIGC's change in the law governing Indian gaming made illegal what the earlier consent decree was designed to enforce" id. (emphasis added), confirms that the "change in law" that the court was referring to was the change in the federal agency's interpretation of the IGRA, not the agency's application of its interpretation of the IGRA to the Consent Decree.[3] Therefore, by seeking review of its compliance with current federal law, the Band did not seek to change the IGRA or "any other federal law" in violation of Section 13.[4]

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[3] So, too, does the court's description of the NIGC's evolving interpretation of the IGRA:

> By the time the Band began withholding rent in 2009, the City was on notice that the NIGC's views on the validity of the 1994 agreement might well have changed. That was because after its initial approval of that agreement, the NIGC issued several advisory letters pointing out that similar arrangements between other tribes and casinos had been found to violate the sole proprietary interest rule.

City of Duluth, 702 F.3d at 1155.

[4] In addition, although the City focuses on the phrase "change in law," the Court notes that Section 13 uses the phrase "amendment to" the law. The plain meaning of "amendment" encompasses a revision or addition to the language of, e.g., an existing statute or regulation. See Black's Law Dictionary 94 (9th ed. 2009) (defining "amendment" as "[a] formal revision or addition proposed or made to a statute, constitution, pleading, order, or

b. Public policy

The Band argues that, even if the express language of Section 13 could be interpreted to prohibit the Band from seeking the NIGC's review of the 1994 Agreements' ongoing compliance with the IGRA, such an interpretation would be contrary to public policy. (Def.'s Mem. at 25–26.) According to the Band, "[n]othing in section 13 should be read as closing the courthouse doors to the parties, or the doors to the NIGC." (Id. at 28.) In opposition, the City argues that public policy favors holding parties to their agreements and that, "[g]iven the context of the Band's breach, Section 13 does not violate public policy." (Pl.'s Opp. at 24.) The City argues that "[t]he parties agreed to remain neutral before the NIGC," and that the NIGC could have acted on its own accord, but had chosen not to. (Id. at 27.)

It is true that public policy favors holding parties to their agreements. However, as the Eighth Circuit noted, "Indian gaming is an area subject to intense federal oversight, and the City does not explain how the government's regulatory interest would be protected if the Duluth casino were somehow exempted from the NIGC's most recent interpretation of the sole proprietary interest rule." City of Duluth, 702 F.3d at 1153. Because the City's reading of Section 13 would preclude the Band from seeking review—by the agency authorized to interpret and enforce the IGRA—of the 1994 Agreements, even if the Band

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other instrument; specif., a change made by addition, deletion, or correction; esp. an alteration in wording"); Merriam-Webster's Collegiate Dictionary 39 (11th ed. 2003) (defining "amendment" as "the act of amending," and "amend" as "to alter formally by modification, deletion, or addition"). The plain meaning of "amendment" does not encompass new judicial or agency adjudications regarding the application of a changed interpretation of a law to a particular set of facts.

had a good faith belief that the law had evolved and that it was now a party to an illegal agreement, the Court finds that the City's interpretation of Section 13 is contrary to public policy.[5]

3. Count III: Injunctive Relief

Because the Court rejected the City's proposed interpretation of the 1986 Commission Agreement—and its claim for breach of that Agreement—under Count I, the City likewise has no claim under Count III for injunctive relief requiring the Band to cure its alleged breach or to comply in the future with the City's proposed interpretation of the contract language. Accordingly, Count III is also dismissed for failure to state a claim, and the City's Motion for Preliminary Injunction is denied as moot.

THEREFORE, IT IS HEREBY ORDERED THAT:

1. Defendant's Motion to Dismiss the Complaint [Doc. No. 10] is **GRANTED**;

2. Plaintiff's Complaint [Doc. No. 1] is **DISMISSED WITH PREJUDICE**; and

3. Plaintiff's Motion for Preliminary Injunction [Doc. No. 21] is **DENIED AS MOOT**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: December 22, 2014

s/Susan Richard Nelson
SUSAN RICHARD NELSON
United States District Judge

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[5] It turned out that the Band was correct. As the Eighth Circuit explained in the prior litigation between the parties, the NIGC's change in its interpretation of the sole proprietary interest rule "made illegal what was previously legal." City of Duluth, 702 F.3d at 1153. Consequently, the 1994 Agreements contained provisions that—although previously permissible—are now contrary to the law.