UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

STATE OF MICHIGAN AND THE MICHIGAN ECONOMIC DEVELOPMENT CORPORATION,

Plaintiffs,

File No. 5:05-cv-0095
Hon. Wendell A. Miles

v

LITTLE RIVER BAND OF OTTAWA INDIANS AND LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS,

ORAL ARGUMENT REQUESTED

Defendants.
_____/

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS OR, ALTERNATIVELY, FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statues

Michigan Statues and Constitutions

Federal Rules

INTRODUCTION

Plaintiffs State of Michigan ("State") and Michigan Economic Development Corporation ("MEDC") seek a declaration from the Court that Defendants Little River Band Of Ottawa Indians ("LRB") and Little Traverse Bay Bands Of Odawa Indians ("LTBB") (collectively the "Tribes") are obligated to pay the State 8% of the net win from electronic games of chance (i.e. "slot machines") at the casinos operated by the Tribes (the "8% Payments"). The Tribes agreed to make the 8% Payments in the gaming compacts executed by the Tribes and the State in 1998, so long as there was no change in law allowing some other person to play "electronic games of chance" or "commercial casino games." (an undefined team) This provision is referred to by the parties as the "Exclusivity Provision." The MEDC receives a substantial part of its funding from those payments; without them, its economic development efforts would be greatly curtailed.

There is no dispute that the language of the Compacts requires the 8% Payment and that no provision exists for the withholding of payments. The Tribes stopped making the payments in 2004, claiming that, because the Michigan Bureau of State Lottery ("Lottery") had increased the frequency of the draws of its Keno game (which had been in continuous operation long before the Compacts were negotiated and signed), the Lottery was operating "commercial casino games" as referenced in the Exclusivity Clause. To date, the Tribes have withheld over $37 million in such payments.

The Tribes do not and cannot claim that this increase in the frequency of Keno drawings required or resulted from any change in state law after the Compacts became effective. The Tribes do not and cannot claim that the Exclusivity Provision in the Compacts makes any mention of any Lottery game or that the Lottery was discussed by those who negotiated the Exclusivity Provision. The Tribes do not and cannot argue that any new commercial casinos

have opened since the Compacts were signed, or that the State was offering the new Keno game ("Club Keno") within the walls of an existing casino.

The Tribes are thus left to argue that the Compacts somehow implicitly excuse the 8% Payments if Lottery officials exercise their existing authority to modify the frequency of play of an existing lottery game. They mount this argument on a free-floating definition of the phrase "commercial casino games" supplied by supposed experts in the Nevada gaming industry, who were neither involved nor consulted in the negotiation of the Compacts. This fanciful argument cannot succeed.

The present motion should be granted because the unambiguous language of the Compacts does not authorize the Tribes to stop making the 8% Payments. The relevant Compact provision, Section 17(B), states in part:

> So long as there is a binding Class III Compact in effect between the State and Tribe and no ***change in State law is enacted*** which is intended to permit or permits the operation of . . . commercial casino games by any other person . . . and no other person . . . within the State ***lawfully*** operates . . . commercial casino games, the Tribe shall make payments to the State as provided in Subsection (C). [Emphasis added.]

Hence, so long as a compact remains in force (which all parties concede occurs here), the 8% Payments must be paid unless there is both a change in state law that allows another person to operate commercial casino games *and* someone actually operates a lawful commercial casino game. This makes sense because it allowed the State and others to continue to operate under whatever gambling authority was the *status* quo when the Compacts were signed, but tied their hands with respect to any attempts to *enlarge* that authority with regard to the operation of commercial casino games.

The Tribes contend, however, that if *either* of these conditions occurs, they do not have to make the 8% Payments. This interpretation, as shown below, is internally inconsistent and grammatically incorrect. It also leads to the incongruous result that, even before the first 8% Payment was due, the State Lottery could have had to cease operating games it was lawfully operating on the effective date of the Compacts to avoid forfeiture of the 8% Payments.

This motion should be granted for a second and independent reason: Club Keno cannot be considered a "commercial" game because it is not operated for a commercial purpose. When they discontinued payments, Defendants asserted that Club Keno was a commercial casino game. However, Club Keno is no more a "commercial casino game" than the daily game ("Daily Keno") which was operated by the State Lottery for several years before the parties even began negotiations for the Compacts. Daily Keno is virtually identical to Club Keno; both are "pick number" games where players buy a ticket from a licensed lottery retailer for a chance to win a prize. Both are operated by the State Lottery via the same computer terminal that is used for every on-line Lottery game. Neither Daily Keno nor Club Keno is offered in any casino.

Club Keno clearly is not a "commercial" game. State law mandates that the net revenues from Club Keno be paid to the State School Aid Fund, which is decidedly not a commercial purpose. Further, any argument the Tribes would now make to suggest that the State's operation of Club Keno (or any other lottery game) is a commercial enterprise is blatantly inconsistent with the Tribes' insistence that their ***own*** gaming activities are governmental functions rather than commercial activities.

The State did not execute a compact that would have precluded the Lottery from implementing any type of game that it was authorized by law to operate at that time, and the Lottery is not a "commercial casino" under any stretch. By refusing to make the 8% Payments,

the Defendant Tribes are attempting to obtain a concession never discussed by the negotiators, not reflected in the Compact language, and that the State did not agree to at the bargaining table. Plaintiffs' motion should be granted.

FACTS

I. HISTORY OF LOTTERY AND KENO IN MICHIGAN.

A. Michigan Law Before 1972

Until 1972, Art. 4, § 41 of the Michigan Constitution of 1963 prohibited the Michigan Legislature from authorizing lotteries. It stated:

> "The Legislature shall not authorize any lottery or permit the sale of lottery tickets." [1]

Consistent with Art. 4, § 41, Michigan Supreme Court decisions prior to 1972 defined keno[2], bingo and a number of other similar "pick number" games, as "lottery" games, and prohibited their play. See *People v Welch*, 269 Mich 449, 452, 257 NW 859 (1934); *Society of Good Neighbors v. Mayor of Detroit*, 324 Mich. 22, 26, 36 N.W.2d 308 (1949).

B. The Lottery Act

In 1972, the voters of Michigan approved a constitutional amendment that lifted the prohibition on lotteries. Art. 4, § 41 of the 1963 Const. was rewritten to state:

> "The Legislature may authorize lotteries and the sale of lottery tickets in the manner provided by law."

In response to the 1972 constitutional amendment, the Legislature enacted two laws allowing the operation of lottery games: the McCauley-Traxler-Law-Bowman-McNeely Lottery

[1] Similar provisions were contained in the Const. of 1835, Art. 12, § 6, the Const. of 1850, Art. 4, § 27, and the Const. of 1908, Art. 5, § 33.
[2] Keno is a modern day version of an ancient Chinese lottery.

Act ("Lottery Act"), MCL 432.1 *et seq.*, and the McCauley-Traxler-Law-Bowman Bingo Act ("Bingo Act"), MCL 432.101 *et seq.*

The Lottery Act broadly defines the "lottery" or "state lottery" as "…the lottery created pursuant to this Act and operated exclusively by or under the control of the Bureau of State Lottery." MEL 432.3(d). The Lottery Act established the Bureau of State Lottery as an autonomous entity within the Department of Management and Budget[3], under the direction of the Commissioner of the Bureau of State Lottery. MCL 432.5(1) and (2). All net revenue from the State Lotteries' activities is paid to the State School Aid Fund. MCL 432.41(3).

The State Lottery is authorized to conduct games operated through the sale of tickets. For example, Section 11 of the Lottery Act, MCL 432.11, authorizes the Lottery Commissioner to promulgate rules and evidences an intent to empower the Lottery Commissioner to pervasively regulate the price of tickets; the number and size of prizes for winning tickets; the manner of selecting winning tickets; the manner of payment of prizes to the holders of winning tickets; the frequency of the drawings or selection of winning tickets; the type of locations at which tickets may be sold; and the methods to be used in selling tickets.[4] Significantly, licenses to sell Lottery tickets cannot be issued to a person whose entire business would be to act solely as a lottery sales agent. In other words, the Lottery Act contemplates that the Lottery Commissioner will have authority over the frequency of drawings and that State Lottery tickets

[3] Pursuant to Executive Order No. 1991-2 the Bureau was transferred to the Department of Treasury; however, it maintains its status as an autonomous agency.

[4] The significant role of the use of tickets in Lottery games is in stark contrast to casino gaming, where typically chips or tokens are used by players and the players have a more active role in playing the game (*e.g.*, by using chips to place bets or tokens to operate slot machines.) Also, unlike lottery games, casino games are actually "operated" by the players (by rolling dice, playing a hand of cards, pulling the handle or pushing the buttons on slot machines, etc.).

cannot be sold by entities whose primary activity is the sale of lottery tickets.[5] This legislative scheme is critical in peering through the Tribes' obfuscated arguments in this case.

1. Daily Keno

The State Lottery initiated the operation of its keno game on March 26, 1990.[6] Since the Lottery's keno game was a pick number game involving the sale of tickets, no change in law was necessary for its adoption. In playing keno, a player marks any ten (10) of the eighty (80) numbers contained in the wager area on the bet slip or marks the "easy pick" box for the random selection of numbers for the player. The sales agent then gives to the player a ticket showing the player's selected numbers. Drawings (22 numbers are randomly selected by the Lottery) were initially held on Mondays, Tuesdays, Thursdays and Fridays. Prizes were fixed amounts based on how many numbers on the player's ticket matched those drawn. Keno became a daily game in 2002.

2. Club Keno

The State Lottery initiated the game Club Keno on October 27, 2003.[7] Like Daily Keno, Club Keno is a pick number game involving the sale of tickets. No change in law was necessary for its implementation.

Like Daily Keno, Club Keno is purely a game of chance. No skill whatsoever is involved. Players can pick up to 10 numbers. The lottery system draws 20 numbers from 1 to 80. Players win by matching up to 10 numbers. Like Daily Keno, Club Keno prizes are for

[5]This is a key distinction between lottery and casino gaming: lottery involves the sales of tickets at pre-existing businesses where the sales are incidental to their principal business. In contrast, casinos have gambling as their principal purpose.

[6] See Online Directive No. 5, a copy of which is attached as Attachment A to Exhibit L to Plaintiff's Brief in Support of its Motion for Preliminary Injunction Requiring Payment into Court ("Plaintiff's Injunction Motion").

fixed amounts, and vary in size depending upon how many of the player's selected numbers match the numbers drawn.

Club Keno tickets are sold to players in the same manner as Daily Keno tickets. Like Daily Keno, no aspect of Club Keno is controlled or operated by the ticket retailers; they merely sell the tickets. Nor does the player control or activate the game; the player picks the numbers and buys the ticket. Both Daily Keno and Club Keno use a field of 80 numbers with the player picking 10 or fewer numbers. Both are played seven (7) days a week. Prize amounts are fixed rather than of a pari-mutuel nature.[8] The top prize for Club Keno ($2,000,000) is more than that for Daily Keno ($250,000) and both games pay the licensed ticket retailers a commission of 6%. Both use the same terminals, the same software and existing central lottery system for processing wagers. The net proceeds of both games benefit only the K-12 State School Aid Fund.

Thus, Club Keno is played in substantially the same manner as Daily Keno with one exception—winning numbers for Daily Keno are drawn and announced once a day while winning numbers for Club Keno are drawn and announced every five minutes.

C. The Bingo Act

The Bingo Act, MCL 432.101, et *seq.*, authorizes the State Lottery to issue licenses to certain non-profit organizations to conduct games of chance such as Bingo, raffles, and "Millionaire Party" games. At Millionaire Parties "wagers are placed upon games of chance ***customarily associated with a gambling casino***…." MCL 432.1032(8) (emphasis added). The attraction of Millionaire Parties is the operation of true casino-style games that are authorized by

[7] See Online Game Directive No. 14, dated October 27, 2003, attached as Attachment B to Defendants' Brief in Opposition to Plaintiff's Injunction Motion.
[8] Pari-mutuel betting is a form of betting in which the amount wagered, less a deduction by the house, is divided amongst those betting.

the Bingo Act, including craps, blackjack and roulette. MAC R 432.21406(5). Millionaire parties clearly involve casino-style games.

II. HISTORY OF TRIBAL GAMING IN MICHIGAN.

A. The Enactment of IGRA By the U.S. Government

In 1988, in response to the Supreme Court's decision in *California v Cabazon Band of Mission Indians*, 480 US 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987), Congress enacted the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*[9] IGRA made it clear that, consistent with *Cabazon*, if a state prohibits gambling, Indian tribes may not operate gambling in the state. Likewise, if a state allows some forms of gambling, it must allow Indian tribes to operate competing forms of gambling on tribal land. IGRA generally requires that the state and a tribe execute a gaming compact as a condition to lawful tribal Class III gaming.

B. Negotiations Between The State Of Michigan And The First Seven Tribes Requesting Tribal-State Gaming Compacts

At the time of the passage of IGRA, Michigan did not generally allow casino gaming, although as noted above, several forms of gaming were legal. In 1989, the seven Michigan Indian tribes that had been federally recognized (this does not include any of the Defendant Tribes in the case at hand) asserted that, because Michigan law did not unequivocally prohibit casino games, the State must, pursuant to IGRA, engage in compact negotiations. *Indian Gaming Compacts and the Legislature*, at p. 1. Attached as Exhibit A.

In order to compel the State to proceed in accordance with IGRA, the seven tribes seeking compacts filed a lawsuit in federal court in 1990 entitled *Sault Ste. Marie Tribe of Chippewa Indians, et al. v John Engler*, U.S. District Court, Western District, Case No. 1:90-

CV-611. This lawsuit was ultimately settled by entry of a Consent Judgment dated August 20, 1993, a copy of which is attached as Exhibit B. The Consent Judgment imposed an obligation on the tribes to pay to the Michigan Strategic Fund 8% of the net win each casino derived from all electronic games of chance operated at their casinos. The relevant provision in the Consent Judgment appears in the accompanying Stipulation at ¶7, which states in part: "The tribe's obligation to make the payments provided for in ¶ 6 above shall apply and continue only so long as there is a binding Class III compact…and then only so long as the tribes collectively enjoy ***the exclusive right to operate electronic games of chance*** in the State of Michigan…."[10] (Emphasis added.) There is no reference to "commercial casino games" in the Consent Judgment, or in the Compacts executed with the seven tribes.

C. **Detroit Casino Proposal.**

In 1994, the Lac Vieux Desert Band of Lake Superior Chippewa Indians ("Lac Vieux Band"), in conjunction with several partners, developed a plan to establish an off-reservation casino in downtown Detroit. The Governor, however, refused to grant the approval necessary for the Lac Vieux Band to operate an off-reservation casino.

Atwater Entertainment ("Atwater") and Greektown Casino ("Greektown") also proposed to bring gambling to Detroit in 1994. Atwater and Greektown secured sufficient signatures to place two initiatives on the City ballot that would amend the City of Detroit ordinances to (1) repeal the prohibition against casino gambling within the City, and (2) authorize Atwater and Greektown to conduct casino gaming within the City. City of Detroit voters approved these initiatives in 1994. However, casino gambling could still not occur in the City of Detroit because

[9] In *Cabazon*, the Supreme Court held that when a state does not prohibit a gambling activity absolutely and unequivocally, its gambling regulations are not applicable to Indian Tribes.
[10] This will be referred to as the 1993 Exclusivity Provision.

State law prevented it. Subsequently, Atwater and Greektown, among others, sponsored a statewide petition drive to place on the ballot the question of authorizing the operation of three casinos in the City of Detroit[11]. The proposal, Proposal E, was eventually approved by the voters of the State of Michigan.

D. 1995 Negotiations With Defendants Regarding Tribal-State Gaming Compacts.

The Defendant tribes and one other Indian tribe[12] received federal recognition effective September 21, 1994, thus making them eligible to negotiate tribal gaming compacts with the State. See 25 USC § 1300K-2. In approximately June 1995, the State began negotiating with the three newly-recognized tribes.[13] As will be shown below, at the negotiation table, neither lead negotiator for the Tribes ever suggested that § 17 (B) would have any impact on Lottery's authority to operate Lottery games. This is confirmed by the deposition testimony of Frank Ettawageshik, Chairman of the LTBB. In fact, a memo from one of the lead negotiators for the Tribes, Robert Gips, explained that the language "commercial casino games" was lifted directly from a compact he had negotiated on behalf of a tribe in Connecticut, and that the purpose there was to ward off a bid by Mirage Resort to bring in a casino that offered casino table games. See Memo attached as Exhibit C . There is no reason to believe that the importation of this language was intended for anything other than discouraging a change in law that would allow more casinos in Detroit or elsewhere across the State.

As noted above, at this time, the City of Detroit's ordinances had been amended to allow casino gambling, and a statewide initiative to allow casino gaming in Detroit was on the horizon.

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[11] This factual background is discussed in *Lac Vieux Desert Band of Lake Superior Chippewa Indians v The Michigan Gaming Control Board*, 172 F.3d 397, 400 (6th Cir. 1999.)
[12] The third tribe was the Pokagon Band of Potawatomi Indians.
[13] A copy of the initial Compacts exchanged between the parties are attached as Exhibit D.

After only three months of negotiations, on September 25, 1995, then-Governor Engler signed the Compacts with Defendants and one other Indian tribe.[14] Among other things, the 1995 Compacts recognized that under Michigan law, games of chance were allowed for some purposes:

> WHEREAS, the State presently permits and regulates various types of gaming within the State (but outside Indian lands), including ***casino style charitable gaming*** such as craps, roulette, and banking card games, as well as a ***lottery operating instant scratch games, and 'pick number' games,*** most of which would be Class III games if conducted by the Tribe….

(Emphasis added.) A resolution to approve the gaming compacts signed by the Governor in 1995 was submitted to the Legislature, but it was defeated.

In 1997, the Michigan Legislature passed an amended version of Proposal E, the Michigan Gaming Control and Revenue Act, MCL 432.201 *et seq.*, ("MGCRA"). It authorized the Detroit casinos to operate "electronic games of chance." It also allowed the proposed Detroit casinos to play keno. See, *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 371-374 (6th Cir. 1998).

After the approval of Proposal E, further negotiations occurred between the State and Defendants. Ultimately, compacts were executed by the Governor and Defendants dated January 27, 1997, and submitted to the Legislature for approval. Copies of these compacts are attached as Attachment 4 to the Complaint (LRB) and Attachment 5 to the Complaint (LTBB). The 1997 Compacts differed from the 1995 Compacts in that they recognized that Proposal E had authorized commercial casino gaming in the City of Detroit. This was reflected in Section 17(B), the limited exclusivity provision, which was revised as follows:

> (B) So long as there is a binding Class III Compact in effect between the State and Tribe and no change in law is enacted which

[14] Copies of Defendants 1995 Compacts are attached as Exhibit E.

> is intended to permit the operation of electronic games of chance or commercial casino games by any other person ***(except a person operating such games in the City of Detroit pursuant to the Initiated Law of 1996, MCL 432.201 et seq.)*** and no other person (***except*** a federally-recognized Indian Tribe operating pursuant to a valid compact under IGRA or ***a person operating in the City of Detroit pursuant to the Initiated Law of 1996, MCL 432.201***) within the State lawfully operates electronic games of chance or commercial casino games, the Tribes shall make payments to the State as provided in subsection C [i.e., 8% of the net win from electronic games of chance].

(Emphasis added to highlight change from 1995 Compact language.)

In 1998, House Concurrent Resolution No. 115 was passed, approving the Defendants' Compacts, as well as compacts with two other tribes.[15]

E. Subsequent Agreements

1. Tax Agreement with State

In 2002 both Tribes executed tax agreements with the State. The purpose of these agreements was to resolve differences between the State and the Tribes over whether the Tribes and Tribal members can be required to pay certain State taxes. These agreements make it clear that the Tribes consider their own casino operations to be "Governmental Functions"[16] and not "commercial" activities for purposes of determining liability for state sales and use taxes.

2. LTBB Compact Amendment

In 2003, LTBB wanted to amend the limitation in its compact that allowed it to operate only one casino, so that a second casino could be operated by the Tribe. This amendment also modified the language of §17(B) to clarify that the Tribe had to continue making the 8% payments to the State as long as Lottery did not implement any new games that exceeded its

[15] The other tribes whose compacts were approved are the Pokagon Band of Potawatomi Indians and the Nottawaseppi Huron Band of Potawatomi Indians.
[16] See excerpt from 2002 Tax Agreement attached as Exhibit F.

lawful authority as it existed on the date of the signing of the Amendment. See 2003 Amendment attached as Attachment 6 to the Complaint. [17]

F. Circumstances Giving Rise To The Current Dispute.

On October 27, 2003, the State Lottery initiated Club Keno. Approximately seven months later Defendant LRB sent a letter (dated May 28, 2004) to the State asserting that the initiation of Club Keno by the State Lottery relieved that Tribe of its obligation to make the 8% payments. A copy of this letter is attached as Attachment 7 to the Complaint.[18] The letter further states that this conclusion is based upon a "legal opinion which concludes that the State's operation of Club Keno at, and in conjunction with Class C liquor establishments constitutes 'the operation of … [a] commercial casino game' by a person which relieves the Tribe of its contractual obligation responsibility (sic) to make the semi-annual payments to the State."[19] Approximately three months later, Defendant Little Traverse Bay Band sent a similar letter dated

[17] The validity of this amendment was challenged in court. See *Taxpayers of Michigan Against Casinos v. State*, 268 Mich. App. 226, 708 N.W.2d 115 (2005), leave granted 711 N.W.2d 80. Even if the amendment is not confirmed by the Supreme Court, this subsequent language makes it clear that there was never any intention to restrict Lottery from operating any game that it was authorized by law to operate, such as Club Keno.

[18] The letter bears the date of May 28, 2003. This is believed to be a typographical error; the correct date is believed to be May 28, 2004. The Court should also be aware that in response to Plaintiffs' discovery requests, Defendant LRB objected to the admissibility of this letter based on FRE 408. However, this letter does not contain an offer to compromise. Further, it is not being presented to the Court as evidence of an offer to compromise. Rather, it is presented as evidence of the Defendants' purposed legal basis for discontinuing the 8% payments. FRE 408 explicitly states that it "does not require exclusion when the evidence is offered for another purpose..."

[19] During discovery in this lawsuit, Defendant LRB disclosed this letter from attorney Peter Ellsworth to LRB Tribal Counsel Bill Brooks, dated May 17, 2004, which appears to be the "legal review" Defendant LRB relied upon. (A copy of this letter is attached as Exhibit I to Plaintiff's Injunction Motion).

August 31, 2004, which also asserts that its 8% Payment obligation was terminated by the initiation of Club Keno. A copy of this letter is attached as Attachment 8 to the Complaint.[20]

After extensive negotiations between the parties failed to resolve the dispute, Plaintiffs filed this lawsuit on June 22, 2005.

LEGAL STANDARD FOR SUMMARY JUDGMENT

In considering a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), the Court must accept the nonmoving party's factual allegations as true and must construe the pleadings in a light most favorable to the nonmoving party. *Mixon v. Ohio*, 193 F.3d 389, 400 (6th Cir.1999). While the court is to accept as true all well-pleaded material factual allegations, the court need not accept legal conclusions or unwarranted factual inferences as true. *Morgan v. v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987). A motion for judgment on the pleadings must be granted when "no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law." *Nichols v. Moore*, 334 F.Supp.2d 944, 954-55 (E.D. Mich. 2005) (quoting *United States v. Moriarty*, 8 F.3d 329, 332 (6th Cir. 1993)).

Summary judgment pursuant to Fed. R. Civ. P. 56 is properly regarded "not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' Fed. Rule Civ. Proc. 1…" *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). A motion for summary judgment pursuant to Fed. R. Civ. P. 56 is properly granted where no genuine issue exists as to a material fact. *Id*. at 247-48. But "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party…If the evidence is merely colorable…or is not significantly probative…summary judgment may be

[20] Defendant LTBB made the same objection as LRB as to the admissibility pursuant to FRE

granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-250 (1986). Further, the adverse party "may not rest upon the mere allegations or denials of the adverse party's pleading...." Fed.R.Civ.P. 56(e). When ruling upon the motion, the Court must examine the evidence presented in the light most favorable to the non-moving party. *Kraus v. Sobel Corrugated Containers, Inc.*, 915 F.2d 227, 229 (6th Cir. 1990); *Douglas v. Mitzelfeld's, Inc.*, 8 F.Supp.2d 650, 654 (E.D. Mich. 1997).

ARGUMENT

I. THE PLAIN MEANING OF THE COMPACTS COMPELS THE CONCLUSION THAT CLUB KENO DOES NOT IMPLICATE THE EXCLUSIVITY PROVISION IN SECTION 17(B) AND THAT PLAINTIFFS ARE ENTITLED TO JUDGMENT UNDER RULE 12(C).

A gaming compact under IGRA is a contract to be interpreted as such. *Oklahoma v. New Mexico*, 501 U.S. 221, 246 (1991) (concurring opinion). Ordinary rules of contract construction apply. *Id.* Consequently, in addressing questions that may arise concerning the formation of a compact, federal courts look to the relevant state law on contracts. *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1553 (10th Cir. 1997).

Under Michigan law, the first and central goal of contract construction is to discern and enforce the intention of the parties who entered into the contract. *City of Grosse Pointe Park v. Michigan Municipal Liability and Property Pool*, 473 Mich. 188, 197, 702 N.W.2d 106, (2005) ("The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. To this rule all others are subordinate."). Where the words the parties have chosen are unambiguous, they constitute the parties' agreement. *Id.* ("…if the language of the contract is clear and unambiguous, it is be construed according to its plain sense and meaning…").

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408. This objection is also unfounded.

Contracts are to be read as a whole, and meaning is to be given to all the words and phrases the parties chose. *Wilkie v. Auto-Owners Insurance Co.,* 469 Mich. 41, 50, n.11, 664 N.W.2d 776 (2003) ("We read contracts as a whole, giving harmonious effect, if possible, to each word and phrase."); see also *Klapp v. United Insurance Group Agency, Inc.*, 468 Mich. 459, 467, 663 N.W.2d 447 (2003), quoting *Hunter v. Pearl Assurance Co., Ltd.*, 292 Mich. 543, 545, 291 N.W. 58 (1940) (internal quote marks omitted) (courts are obligated to "'give effect to every word or phrase as far as practicable'"). Courts are not permitted to make a new agreement for the parties, nor adopt a construction that would render a part of the contract surplusage or nugatory. *Klapp, supra, 468.* Similarly, courts will not adopt the construction of a contract that leads to an absurd result. *United Rentals (North America), Inc. v. Keizer*, 202 F. Supp. 2d 727, 736 (W.D.Mich. 2002), citing *Port Huron Area Sch. Dist. v. Port Huron Educ. Ass'n.*, 120 Mich. App. 112 , 327 N.W.2d 413 (1982).

The only construction of § 17(B) that is consistent with the foregoing principles excuses the Defendant Tribes from further payment of their 8% obligation only when: (i) there has occurred a change in law allowing the operation of more commercial casino games in Michigan and (ii) the operation of such games has actually occurred. Defendants' alternate construction of this provision violates rules of grammar and common sense, renders important language chosen by the parties surplusage, fails to harmonize the provisions of the compact, and leads to an absurd result.

The exclusivity provision in §17(B) states:

> So long as there is a binding Class III compact in effect between the State and tribe and no change in state law is enacted which is intended to permit or permits the operation of electronic games of chance or commercial casino games by any other person…and no other person… within the state lawfully operates electronic games

> of chance or commercial casino games, the tribe shall make payments to the State….

Thus, the provision sets three conditions on the Tribes' payments:

> (1) there is a compact,
> (2) there is no change in state law that allows another person to operate commercial casino games, and
> (3) no one actually operates a lawful commercial casino game (other than an Indian tribe or the three Detroit casinos).

Surplusage. Defendants read these as three independent conditions and contend that if any one condition is not met, then they are not obligated to make the 8% payment. Hence, the Tribes claim excuse from paying the 8%: (i) if there is a change in law authorizing commercial casino games that no one actually plays, or (ii) if commercial casino games currently authorized by law are lawfully played. However, this interpretation renders an entire clause of § 17(B) surplusage, a result that courts avoid. *Klapp, supra* at 468. Here is why.

If such games are currently authorized, they can be "lawfully operated" under condition 3 above. If a change in law authorizes such games, again they can be "lawfully operated." under condition 3 above In neither case is the phrase "no change in state law" given any meaning. Instead, the Defendants' interpretation has collapsed the inquiry into the single question of whether the playing of the game is lawful at the time it occurs. To express that agreement, the parties need only to have used the phrase "now or hereafter lawful." But the parties did no such thing. The parties specified quite plainly that the Tribes' right to cease payments was tied to a "change in state law."

Thus, the plain meaning of § 17(B) and the fact that conditions (2) and (3) are conjunctive requires they be read as dependent conditions; in other words, both conditions must be triggered in order for Defendants to be relieved of their payment obligation. Because no change in state law occurred (or was necessary) to allow the Lottery Bureau to operate Club

Keno, Defendants remain obligated to make the 8% payment. Therefore, Plaintiffs are entitled to judgment on the pleadings pursuant to Rule 12(c).

Consistency with other provisions of the contract. Under Defendants' construction that reads conditions (2) and (3) as independent conditions, a mere change in state law authorizing the operation of electronic games of chance or commercial casino games would release the Tribes from any obligation to make the 8% Payment. This is clearly not what the parties intended. The stated purpose of the exclusivity provision is "to reduce the proliferation of Class III gaming enterprises in the State." See §17(A) of the Compacts. The mere passage of a state law authorizing the operation of electronic games of chance or commercial casino games serves as no affront to this purpose. After all, it is the actual operation of a gaming enterprise that results in proliferation. For example, the Legislature could enact a law allowing electronic games of chance at racetracks (as was recently proposed). But if no individual or entity ever actually operated electronic games of chance at racetracks, no proliferation in gaming enterprises will have occurred. Indeed, the measure could be defeated at the polls under the process provided by Const. 1963, Art. 2, §9, yet Defendants argue the mere initial passage of the statute would terminate their obligation to make 8% payments without a single slot machine being operated by any other person.

Absurdity. As noted, Defendants ascribe to the State an intention to forego the 8% Payment in circumstances where absolutely no "proliferation of Class III gaming enterprises" exists and not a single electronic game of chance or commercial casino game is actually operational and even arguably competing with Defendants. This is an absurd result that does not pass muster. *United Rentals, supra*. See also *Wembelton Development Co. v Traveller's Insurance Co.*, 45 Mich. App. 168, 172, 206 N.W.2d 222 (1973) ("[C]courts will not interpret a

contract in a manner which would impose an absurd or impossible condition on one of the parties"). By constructing the exclusivity clause in a way to combine the requirements of a change of law and actual proliferation, the parties preserved the *status quo* in effect when the Compacts were signed. In other words, the Exclusivity Provision allowed for the continuation of gambling under whatever authority existed at that time, but tied the State's hands with respect to any attempts to enlarge that authority concerning the operation of commercial casino games. The Whereas Clause of the Compact acknowledges the existence of the State Lottery and specifically identifies "pick number games" such as Keno and Club Keno. Nothing in the Compact suggests that it was intended to alter or restrict the then-existing state of affairs and statutory authority of the State Lottery.

It follows, then, that the condition that no other person lawfully operates electronic games of chance or commercial casino games cannot be read as an independent condition. In other words, the mere lawful operation of *currently-authorized* electronic games of chance or commercial casino games does not relieve Defendants of their payment obligations. This only makes sense. Otherwise, the State as a contracting party, would have had to conduct an immediate examination of all existing authority relative to gaming to determine whether entry into the compact resulted in the *forfeiture* of existing State authority over lawful gaming activities, including the Lottery. The discussion below reveals that the parties did not discuss Lottery or any single lottery game during negotiations. Thus, no consideration was given as to whether the operation of any then-existing game triggered nonpayment immediately. That is because the parties required a change in state law, and only such operation pursuant to a change in state law destroys the exclusivity on which Defendants' payments are premised.

Application of rules of grammar. The construction of § 17(B) urged by the State is confirmed by the structure of the exclusivity provision. In interpreting contract provisions, courts employ the rules of grammar to determine the meaning of the language. *Citizens Ins. Co. of America v. MidMichigan Health ConnectCare Network*, 449 F.3d 688 (6th Cir. 2006) (looking first to grammatical analysis to "unravel" a "linguistic knot" in a contract); *TDS Metrocom, L.L.C. v. Michigan Bell Telephone Co.*, 2005 WL 3535064 (W.D.Mich. 2005); *United Rentals (North America), Inc. v. Keizer*, 202 F.Supp.2d 727 (W.D.Mich. 2002) ("In determining the plain and ordinary meaning of contract language, a court may look to recognized dictionary definitions and ordinary principles of grammatical construction.") (quoting *Allstate Ins. Co. v. Freeman*, 432 Mich. 656, 443 N.W.2d 734 (1989)).

Again, the provision states:

> *So long as there is a binding Class III compact in effect between the State and tribe* and no change in state law is enacted which is intended to permit or permits the operation of electronic games of chance or commercial casino games by any other person…and no other person… within the state lawfully operates electronic games of chance or commercial casino games, *the tribe shall make payments to the State*….

(Emphasis added.) The italicized language ("[s]o long as there is a binding Class III compact in effect between the state and tribe…the tribe shall make payments to the State") constitutes an independent clause. This independent clause clearly stands on its own as a separate and distinct notion because it is an express requirement of IGRA. See Gregg Reference Manual, 9th Ed., p. 553 (defining independent clause)(copy attached as Exhibit G). The comma before the final clause ("the tribe shall make payments to the State") reinforces this notion that it should be read with the introductory clause ("[s]o long as there is a binding Class III compact in effect between the state and tribe"). The seamless connection between these two clauses is apparent from the fact that they can be read in reverse order without changing the meaning of the section. The

meaning is the same regardless of whether §17(B) is read as saying that the Tribe shall make payments to the State as long as a compact is in effect or so long as a compact is in effect, the Tribe shall make payments to the State. The primary importance of the existence of a compact to the 8% payment obligation is directly relevant to the remainder of the language in this section. Without a compact, the remaining conditions in this section do not apply because they depend on the independent clause, *i.e.*, the existence of a compact. See Gregg Reference Manual, *supra* at 553 (explaining that a dependent clause "does not express a complete thought and cannot stand alone as a sentence), Exhibit G.

The underlined language, meanwhile, constitutes two dependent clauses. In contrast to the independent clause, the dependent clauses requiring enactment of a new law and lawful operation are both logically related to each other and conceptually different from the independent clause. The "passing of a law" and the "existence of another person lawfully operating a commercial casino game" are a specific type of dependent clause because they operate as restrictive or essential clauses that, importantly, are not express requirements of IGRA. According to the Gregg Reference Manual, *supra* at 553 (Exhibit G), an essential or restrictive clause is a "dependent clause that cannot be omitted without changing the meaning of the main (independent) clause." The clue in this instance that these dependent clauses are essential or restrictive comes from their lack of punctuation because "[e]ssential clauses are not set off by commas." *Id*.

Under these rules of grammar, § 17(B) must be read to say that the predicate for payments is the existence of a gaming compact. If that gaming compact exists, the payment must be made unless Michigan passes a law authorizing additional electronic games of chance or commercial casino games *and* another entity is operating one or more of those games under the

new law. Had the parties to the Compacts intended to make each clause in §17(B) an independent condition of the 8% payment obligation, they would have done so simply by inserting a comma in place of the first "and" so that § 17(B) would read:

> So long as there is a binding Class III Compact in effect between the State and the tribe**,** ~~**and**~~ no change in state law is enacted…and no other person lawfully operates…

Substituting a comma for the word "and" to allow § 17(B) to be interpreted in this manner is nothing short of re-writing the compact, contrary to all established principles of contractual construction. *Klapp, supra*. But such improper substitution is necessary to make § 17(B) read as Defendants posit.

Moreover, the dependent clauses are expressly conjunctive and are to be read together unless proper sentence structure and punctuation are ignored. Irrespective of the lack of support for contending that Club Keno is a commercial casino game, discussed in the next argument, there has been no change of law enacted, and the plain meaning of § 17(B) alone requires judgment in favor of Plaintiffs under Rule 12(c).

II. PLAINTIFFS ARE ENTITLED TO JUDGMENT UNDER RULE 56 BECAUSE THE ONLY PROPER CONSTRUCTION OF DEFENDANTS' COMPACTS IS THAT CLUB KENO DOES NOT IMPLICATE THE EXCLUSIVITY PROVISION IN SECTION 17(B).

A. Circumstances At The Time Of Signing Make It Clear That The Intent Of § 17(B) Was To Discourage Any Change In Law That Would Permit More Casinos In Detroit Or Elsewhere.

A basic rule of contract interpretation dictates that the parties' intent may be inferred from the circumstances in which they agreed to enter into the contract. *Eberhardt v. Comerica Bank*, 171 B.R. 239 (E.D. Mich. 1994). Therefore, it is appropriate to examine the circumstances prior to and contemporaneous with the making of a contract in determining the parties' intent. *Comshare, Inc. v. Execucom Systems Corp.*, 593 F.Supp. 981 (E.D. Mich. 1984).

In addition, the goal in construing any contract is to ascertain the parties' intent by the use of particular words in the context of their own agreement. *Engler, supra* 146 F.3d at 372; *Piasecki v. Fidelity Corp. of Michigan*, 339 Mich. 328, 337, 63 N.W.2d 671 (1954). In order to ascertain the meaning of a contract, a court must give the words used the plain and ordinary meaning that would be apparent to the reader of the instrument. *Rory v. Continental Insurance Co.*, 473 Mich. 457, 464, 703 N.W.2d 23 (2005). In determining the plain meaning of a word, courts often look to the definition of the word in a recognized dictionary. *Allstate Insurance Co. v Freeman*, 432 Mich. 656, 443 N.W.2d 734 (1989).

The phrase "commercial casino games" is not defined in Defendants' Compacts. But the phrase's meaning, in the context of the surrounding language and the circumstances in which the Compacts were negotiated, is beyond debate. There is no doubt as to the origin or purpose of the phrase "commercial casino games." Robert Gips, the Tribes' chief negotiator, who also had represented the Pequot Tribe in Connecticut with regard to the negotiation of a compact there, proposed this phrase in order to prevent a "two-step" casino opening:

> The second amendment, which allowed the Mohegan Tribe to begin casino operation without terminating the Pequot Tribe's payment obligations, broadened the scope of the cessation of payment triggering event to include legalization of "commercial casino games." *This was designed to cripple a table games only initiative sponsored by Mirage Resorts*, the intent of which was to build a casino while the Pequot Tribe was obligated to continue payments and then throw in slots once open. (Emphasis added.)

See Exhibit C.

This language served the same purpose in Michigan where it was intended to address the potential threat that there would be another change in law allowing the operation of more non-Indian commercial casinos, either in the City of Detroit or elsewhere. This context belies Defendants' position that the term "commercial casino games" somehow metamorphosed from

its plain and understood meaning to one where it prohibits the State Lottery from increasing the frequency of play of a keno game that Lottery had operated long before the Compacts were signed.

In this case, the circumstance that sheds the most light on the parties' intent is the efforts to gain authority to conduct commercial casino gaming in the City of Detroit. At the time negotiations first occurred between the parties to this action (June through September 1995), the Atwater/Greektown initiative had already passed, eliminating the city ordinance that had prohibited the operation of casinos in the City of Detroit. At that same time, it was well known that Atwater and Greektown were promoting the ballot initiative that eventually became Proposal E, which was placed on the November 1996 general election ballot and changed Michigan state law to allow commercial casino gaming in the City of Detroit.[21] Robert Gips, who, as stated, served as the principal negotiator for Defendants in their negotiations with the State of Michigan, acknowledged that he was aware at that time that several proposals were "being tossed around" in Michigan concerning off-reservation gaming, which to him "includes commercial gambling and lotteries and horse tracks and everything else." (Deposition of R. Gips, pp. 48-49, attached as Exhibit I.) William Brooks, who served as general counsel to Defendant Little River Band during the compact negotiations and worked closely with Mr. Gips, similarly referred to a "feeding frenzy" in the state that served as "the backdrop of our requesting broader exclusivity…." (Deposition of W. Brooks, pp. 9, 23, 36, attached as Exhibit J.) In addition to the City of Detroit referenda, Mr. Brooks noted proposals for off-reservation gaming, video poker and video lottery terminals. (Brooks dep, pp. 23, 36, 37, Exhibit J.)

[21] Judicial notice should be taken of this fact based upon the findings of fact of the United States Court of Appeals for the Sixth Circuit in *Lac Vieux, supra*, 172 F.3d at 400.

In light of the Atwater/Greektown efforts, the terms proposed by Defendants for the exclusivity provision differed from the exclusivity language in the 1993 Consent Judgment. The exclusivity language in the 1993 Consent Judgment provided in pertinent part:

> 7. The tribes' obligation to make the payments provided for in paragraph 6 shall apply and continue only so long as there is a binding Class III compact in effect between each tribe and the State of Michigan which provides for the play of electronic games of chance, *and then only so long as the tribes collectively enjoy the exclusive right to operate electronic games of chance in the State of Michigan…*(emphasis added)

In 1995, Defendants proposed the following language specifically to address the threat posed by commercial casinos:

> So long as there is a binding Class III compact in effect between the State and tribe *and no change in state law is enacted which is intended to permit or permits the operation of electronic games of chance or commercial casino games by any other person and no other person (except a federally-recognized Indian tribe operating pursuant to a valid Compact under IGRA) within the state lawfully operates electronic games of chance or commercial casino games, the tribe shall make payments to the State….*

(Draft of gaming compact submitted by Tribes, 6/15/95, §17, attached as Exhibit D (emphasis added).) The new language was not created out of whole cloth. Defendants imported the term "commercial casino games" from Connecticut, where Native American Tribes had previously confronted the prospect of competition from non-Indian commercial casinos. Mr. Gips had represented the Mashantucket Pequot Tribe in its compact negotiations with the State of Connecticut, and had negotiated gaming agreements that contain exclusivity language nearly identical to that proposed by Defendants. (Memorandum of Understanding between State of Connecticut and Mashantucket Pequot Tribe, 1/13/93, and amendments thereto, attached as Exhibit K.) Mr. Gips represented to Defendants during the negotiation of their Compacts that the inclusion of the term "commercial casino games" in the Pequot gaming agreement "was

designed to cripple a table games only initiative sponsored by Mirage Resorts, the intent of which was to build a casino while the Pequot Tribe was obligated to continue payments, and then throw in slots once open"; the language was added in Connecticut because the only circumstance initially addressed was the "operation of video facsimiles" (slot machines), which would have obligated the Pequot Tribe to continue making payments even if Mirage operated table games. (See June 6, 1995 Memo from Robert Gips to Richard McLellan, attached as Exhibit C.) This is similar to the 1993 Compacts in Michigan where "electronic games of chance," *i.e.*, slot machines, were the only gaming that would trigger the exclusivity provision.

Defendants adopted the Connecticut language because they viewed the experience in Connecticut as relevant "to the exact situation in Michigan." (Gips dep, p. 48, Exhibit I). Importantly, Mr. Gips cannot identify any discussion, specific exchange or conversation concerning the term "commercial casino games" during the negotiations of the Compacts at issue in this case, (Gips dep, pp. 65, 68-71, 77, Exhibit I.), nor was there any mention of the Lottery or Lottery games. (Gips dep, pp. 76-77, Exhibit I). Mr. Brooks confirmed that the "commercial casino games" language "really -- was not negotiated, frankly, because the tribes came up with the language..." (Brooks dep, p. 26, Exhibit J.) He also admitted that there was no discussion at the bargaining table with regard to Lottery games. (Brooks dep., p. 27, Exhibit J). As Mr. Gips and Mr. Brooks were the lead negotiators for the tribes (see Gips dep, pp. 20-21, Exhibit I; Brooks dep. p. 9, Exhibit J), the fact that they admit their current interpretation of the term "commercial casino games" was never brought to the attention of the State negotiators renders that interpretation unpersuasive, particularly where it is clear that the context of the negotiations led the State negotiators to believe that the term "commercial casino games" had nothing to do with the State Lottery but was directed at Detroit casinos.

This was confirmed by the testimony of Chairman Ettawageshik who also testified that he could not recall any discussion with the State negotiators where the Tribe's current interpretation of the phrase "commercial casino games" was ever mentioned (Ettawageshik dep., pp. 79-80, Exhibit L), nor was there any discussion with the State about concerns the Tribes now say they had with regard to the offerings of the State Lottery. *Id.* at 84, 86, 88 and 89. Furthermore, as affirmatively stated by the State's negotiator, Judge Christopher Murray, not only were the Tribes' current interpretations never mentioned, had they been raised, the State would have had to involve the Lottery in the negotiation, but this did not occur because Judge Murray had never been informed by the Tribes that the commercial casino games language could have any impact on Lottery games. See Murray Affidavit, Exhibit M at ¶¶ 3-4.

Thus, Defendants adopted the "commercial casino games" language from Connecticut where it was intended to address competition from non-Indian commercial casinos, in a context where Defendants anticipated competition from non-Indian commercial casinos. The parties' intended meaning of "commercial casino games" is further evidenced by the changes made to the 1997 version of the compacts (the ones ultimately approved by the Legislature), which expressly acknowledged the Detroit casinos that had been approved since the 1995 negotiations and excepted them from the exclusivity provision. See Compacts, Attachments 4 and 5 to the Complaint.

The parties' conduct subsequent to the execution of the revised, 1997 Compact confirms the intent that a change in law was understood to be necessary to relieve the Defendant Tribes of their 8% Payment obligation. These final compacts were transmitted to the Legislature with a letter from Governor Engler that expressly informed the Legislature that the exclusivity provision from earlier drafts of the compacts had been modified to "carve out" from the state-

wide exclusivity any "private gambling which may be allowed in the city of Detroit under Proposal E." The letter went on to note that:

> the revised exclusivity provision provided that these four tribes will make 8% payments to the state ***so long as no other change in state law is enacted*** which permits the operation of electronic games of chance or commercial casino games by any other person outside those allowed under Proposal E or on Indian lands. (emphasis added)

See Attachment 1 to Affidavit of Michael Gadola, attached here as Exhibit N.

The importance of this letter cannot be understated. The Governor's representation to the Legislature confirms that the exclusivity provision in the compacts had no impact on the State Lottery's ability to operate games *as long as there has been no change in state law to expand Lottery's authority to operate such games*. Even though the letter was widely circulated, the Defendant Tribes never claimed that the Governor's description of the Compacts was inaccurate, and in fact executed the 1998 Compacts with the State after the Governor's letter had been sent to the Legislature. This understanding was also confirmed by the person who sought legislative approval for the Compacts on behalf of the Governor, Michael Gadola. Gadola Affidavit, Exhibit N at ¶ 5, Attachment 1. This understanding and intent was communicated to the State Legislature, who must be presumed to have relied upon it in approving the Compacts.

Additionally, a different letter authored by the Defendants after the Legislature approved the Compacts confirms that they also understood that their 8% Payment obligation ended only if there was a change in law. See Gadola Affidavit, Exhibit N, ¶ 6, and Attachment 2, that states in relevant part:

> Against this back-drop, the Tribes believe that the very real economic and political benefits to be obtained by this limited market exclusivity supported the payments provisions. The Tribes also negotiated additional protections in the exclusivity language to fill gaps present in the Consent Judgment. First, <u>the payments are</u>

> continued only so long as "no change in State law is enacted which is intended to permit or permits the operation of electronic games of chance or commercial casino games by any person (except a person operating such games in the City of Detroit pursuant to the initiated Law of 1996…)". Thus, the exclusivity is tied to a broader range of gaming than simply the Class III electronic games of chance. Further, the exclusivity language is specifically linked to that portion of the state outside of the City of Detroit. (emphasis added.)

This letter was signed by the tribal attorneys for each of the Defendants.

This same letter refutes the Tribes' commercial casino games analysis. Mr. Brooks sought in this letter to expedite approval of the compacts, in part, with an explanation of §17 language in the context of the then-existing circumstances in Michigan. (Brooks dep., p. 32, Exhibit J). The analysis details the approval of the "three (3) commercial casinos" and the threat presented by "casino gaming." It references the "expansion of non-Indian, commercial gaming" and proposals for other electronic games of chance. (Exhibit N, Attachment 2, p.8.) It gives no evidence of any intention to expand the plain meaning of the phrase "commercial casino game" that was "designed to cripple a table games only initiative sponsored by [a commercial casino]." Exhibit C. The circumstances existing at the time reveal no understanding that State Lottery pick number games were considered "commercial casino games" in any fashion.

B. **Common Sense And The Law Support Plaintiffs' Interpretation Of The Phrase "Commercial Casino Games."**

That the language borrowed from Connecticut "designed to cripple a table games only initiative" addressed changes in state law that would allow more non-Indian commercial casinos to be operated in Detroit or elsewhere in Michigan, and was intended to assure that the legalization and operation of additional non-Indian commercial casinos would end the payment obligation, is consistent with the common understanding of the terms used. The interpretation of

the word "commercial" is critical to the proper construction of the phrase "commercial casino games."

Michigan courts have construed the term "commercial" in a manner that makes sense in this situation: "having profit as a primary aim." *Turner Township of Shelby v. Papesh*, 267 Mich. App. 92, 100, 704 N.W.2d 92 (2005) (quoting Random House Webster's College Dictionary (1992)). See also *Lanski, supra* at 49 ("commercial activity" includes "any type of business activity that is carried on for profit"); Webster's II New College Dictionary, p 225 (2001) (defining "commercial" to mean "of or relating to commerce" or "having profit as a primary aim"). Exhibit O. Because the Lottery Bureau operates games to fund public education[22], it is not a for-profit body and Club Keno is not operated for a commercial purpose. *Turner Township, supra*; see also *United States v. Dakota*, 666 F.Supp. 989 (W.D. Mich. 1985), aff'd 796 F.2d 186 (6th Cir. 1986) (distinguishing between "cases involv[ing] a strictly commercial business for private profit" and gaming run by a tribe where "the profits received were to be invested for the betterment of the Indian communities" and where there are notions of "general tribal benefit").

Club Keno and the Lottery Bureau could not be further from "a table games initiative sponsored by [a commercial casino]."

C. **Subsequent Agreements Between The State And The Tribes Confirm That The Phrase "Commercial Casino Games" Was Never Intended To Impact Lottery's Authorized Operations.**

1. The Tax Agreements

The Tribes now want the Court to believe that while their own casinos are part of their "Governmental Functions," the State Lottery is not a "Governmental Function" but rather a

"commercial" enterprise. This is neither logical nor fair. If their own casino operations are not commercial activities, then it couldn't be clearer that the operation of a state lottery must also *not* be a commercial activity.

Each of the Defendant Tribes has entered into a tax agreement with the State that permits them to exempt certain transactions from certain state taxes, primarily the sales and use taxes. These agreements include the following provision:

> III. SALES TAX AND USE TAX
>
> A. Exemptions
>
> 1. Tribe
>
> a. Purchases by the Tribe or a Tribal Entity of tangible personal property for its use, including but not limited to ***Governmental Functions identified in § III(A)(1)(b), below, and commercial activities*** are exempt from both the sales tax and use tax if the transaction takes place and the property is used exclusively within the Tribal and Trust Lands.
>
> b. Purchases by the Tribe of tangible personal property that is primarily used (95% or more) in performing one of ***the following Tribal Governmental Functions*** is exempt from both the sales tax and use tax if the transaction takes place within the Agreement Area regardless of where the tangible personal property is used:
>
> i. Public Safety and Conservation;
> ii. Environmental Services;
> iii. Tribal Government;
> - Tribal Judiciary
> - Tribal Legislature
> - Tribal Executive Administrative Activity
>
> iv. Public Welfare and Other Social Services;
> v. Education;
> vi. Health Services;
> vii. Housing and Housing Services;
> viii. ***Casino Gaming*** (limited to actual gaming activities); and

[22] All of the net revenues generated by the State Lottery, including any unclaimed prizes, are transferred to the State School Aid Fund. See M.C.L. §§ 432.33(1) and 432.41(3).

ix. Other similar functions ***customarily performed by State or local units of government.***

Exhibit F.

It could not be clearer that the Tribes are enjoying the benefit of an agreement with the State that excludes casino operations of the Tribes from the realm of "commercial' activities, so that these operations escape the State sales and use taxes. This is a significant benefit for the Tribes arising directly out of their governmental status.

There is no reason to believe that this same construction would not apply to the State Lottery. In fact, Chairman Ettawageshik has publicly taken the position hat the LTBB's operation of casinos is the same as the State's operation of the Lottery. Ettawageshik dep., p. 157, Exhibit L. If the Tribes' operation of their casinos is not commercial activity such that purchases made in the furtherance of its operations escape taxation by the State, then the State Lottery's operation of a casino-style game should likewise not be considered a commercial operation that would entitle the Tribes to stop paying the 8%.[23] The Tribes cannot have it both ways.

2. The 2003 Amendment

The LTBB and the State executed an amendment to the LTBB Compact in 2003 that allowed the Tribe to open an additional casino. See Attachment 6 to Complaint. There can be no question that if this amendment is confirmed by the Supreme Court, the Tribe will be obligated to pay the 8% to the State. In that amendment, § 17(B) was clarified to require

[23] It is a basic tenet of contract law that the subsequent conduct of the parties may be consulted when construing an earlier agreement. "Even if the agreement was ambiguous as to whether the duty to account continued, we would look to the intent of the contracting parties, as reflected in their subsequent conduct, to interpret the agreement."
Howell Petroleum Corp. v. Leben Oil Corp., 976 F.2d 614, 619 (10th Cir. 1992).

payment of the 8% as long as no one other than a tribe or the Detroit casinos operated electronic games of chance or commercial casino games "including expansion of lottery games beyond that allowable under State law on the date of execution of this document…" Attachment 6 to Complaint. Thus, under the terms of the Amendment, since there was no change in law necessary to operate Club Keno, the Tribe would have no excuse to stop paying the 8%.

The fact that the 2003 Amendment has been challenged in court by a third party (not the State or the Tribe—both have taken the position in court that the 2003 Amendment is valid) does not end the discussion. This amendment to § 17 is a clarification of what the parties intended when § 17 was originally adopted, i.e., that a change in law authorizing expanded gaming would be required to trigger the cease payment provision. Since no such change in law has occurred, the Tribes cannot legitimize the decision to stop paying the 8%.

Thus, the purpose for which the term "commercial casino games" was imported into Michigan from its Connecticut roots is consistent with its plain meaning and reflects the circumstances in which the Compacts were negotiated. Just as important, it is consistent with how the parties have treated the term in their subsequent agreements.

The State's operation of Club Keno does not constitute the operation of a "commercial casino game." Plaintiffs are entitled to judgment under Rule 56.

III. CLUB KENO AND DAILY KENO ARE THE SAME GAME

Defendants' position in this case boils down to an assertion that by holding more frequent drawings, the Lottery Bureau transformed its Daily Keno game into a "commercial casino game." In truth, Club Keno is no more a "commercial casino game" than Daily Keno, and cannot support the Tribes' decision to stop paying the 8%. Defendants are therefore entitled to summary judgment pursuant to Rule 56.

As noted above, Daily Keno and Club Keno are virtually identical. The only significant difference between the games is the frequency of the draw. Daily Keno winning numbers are drawn once a day, (Online Directive No. 5, Attachment A to Exhibit L to Plaintiffs' Injunction Motion), while Club Keno winning numbers are drawn every five minutes (Online Game Directive No. 14, Attachment B to Defendants' Brief in Opposition to Plaintiffs' Injunction Motion).

At the time the parties negotiated the Compacts, the Lottery Bureau had been operating Daily Keno for several years. Online Directive No. 5, Attachment A to Exhibit L to Plaintiffs' Injunction Motion. The Lottery was operating Daily Keno when Defendants proposed the "commercial casino game" language for the exclusivity provision of their Compacts. Yet, Defendants have never claimed that Daily Keno was a "commercial casino game" or that it relieved Defendants of their obligation to make the 8% payments. Indeed, Defendants made the payments for five years without objection while the Lottery Bureau operated Daily Keno. The Court may consider this subsequent conduct when interpreting the 1998 Compacts. *Howell, supra.* This subsequent conduct makes it clear that neither the Tribes nor the State considered Keno operated by the Lottery Bureau to be a "commercial casino game" or intended that game to trigger nonpayment by Defendants. This is confirmed by the fact that the negotiations surrounding § 17(B) never addressed the Lottery game of Keno, which tribal negotiators "understood to be one of the – you know – the lotto type games or the – that the state was operating." (Brooks, dep., pp. 27, 39-40, Exhibit J)

The Lottery Bureau did not transform Daily Keno—which no one thought was a "commercial casino game"—into such a game by increasing the frequency of the draw or by selling tickets in bars and restaurants. Defendants' decision to stop making the 8% payments

based on these factors has no support in the Compacts. Plaintiffs are entitled to summary judgment under Rule 56.

CONCLUSION AND REQUESTED RELIEF

For the reasons stated above, Plaintiffs respectfully request this Court to enter judgment and:

1. Declare that operation of "Club Keno" by Lottery does not trigger the cease payment provision of the Tribal Gaming Compacts, and, therefore, that the Tribes are illegally withholding the 8% payment owed to the Plaintiffs.

2. Enter an injunction requiring the Tribes to turn over to the Plaintiffs all funds representing the current amount of the 8% due to the Plaintiffs that the Tribes are currently holding in segregated bank accounts.

3. Determine the amount of any additional damages that may be due by ordering an accounting or such other remedy as is necessary to determine the appropriate damage award.

4. Enter a Judgment in the amount of damages against the Tribes.

5. Enjoin the Tribes from gaming in violation of their Tribal Gaming Compacts, as contemplated by 25 U.S.C. § 2710(d)(7)(A)(ii).

Respectfully submitted,

Dated: November 21, 2006

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