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

INTRODUCTION

The Little River Band Of Ottawa Indians ("LRB") and Little Traverse Bay Bands Of Odawa Indians ("LTTB") (collectively the "Tribes") entered into Compacts with the State in 1998 that required them to make payments to the State of 8% of the net win from their casinos. LTBB reconfirmed that obligation in a Compact amendment in 2003. Nonetheless, the Tribes have stopped making those payments, thus depriving the State and the Michigan Economic Development Corporation ("MEDC") of more than $30 million. Plaintiffs have consistently contended that before the Tribe's could legally cease making the 8% payments, there must be both a change in law allowing other persons the right to operate commercial casino games, ***and*** the operation of those games must have actually occurred. Thus, even if some person began to lawfully operate or continued to lawfully operate commercial casino games after the Compacts were signed, the Tribes remained obligated to continue to make the payments if there was no change in law permitting such operation.

The Tribes have unequivocally conceded in their response to this motion that ***some change in State law is required*** before they can cease making payments. Thus, the legal issue for the Court is, what amounts to a change in State law? The Tribes say they were entitled to stop the payments, not because the legislature passed a new State law authorizing more commercial casinos, but rather because the Bureau of State Lottery issued an unpromulgated agency directive setting out the rules of play for Club Keno. Defendants' Brief, 23 n. 6. This argument has insurmountable deficiencies. The Compacts, and the 2003 Amendment, speak in terms of a change in "enacted" State law, and there can be no genuine dispute that unpromulgated agency directives are not "enacted law." And since no one has ever suggested here that Lottery did not have full authority to implement Club Keno under statutes in place on

the date the 2003 Amendment was executed, and that no change in "enacted law" was required or occurred prior to the implementation of Club Keno, on this ground alone, Plaintiffs are entitled to judgment. There was no change in law.

Nor would the State have agreed to the 2003 Amendment if a mere change in agency directives could have triggered nonpayment by the Tribes. The 2003 Amendment granting the Tribes a second casino site was signed in July 2003. Club Keno was formally launched in October 2003. No reasonable person could believe that had the State had even an inkling that the implementation of Club Keno three months later would entitle the Tribes to stop making payment, that it would have agreed to the Amendment.

In the event the Court decides that a change in law was not required, or that such a change occurred, the Tribes still must establish that the Lottery Bureau was conducting a "commercial casino game" when it implemented Club Keno, before they can lawfully stop making the 8% payments. They have not met this burden. That Lottery seeks to maximize revenues does not render it a commercial entity. Lottery, like other non-profit organizations that seek to maximize their revenues from charitable gaming, operates Club Keno for a non-commercial purpose. By law, all its net revenues must go to fund schools. Club Keno is not a commercial casino game.

For these reasons, Plaintiffs respectfully request that the Court enter judgment in their favor.

LEGAL ARGUMENT

I. A CHANGE IN LAW MUST OCCUR BEFORE THE TRIBES' PAYMENT OBLIGATIONS TERMINATE, AND NO SUCH CHANGE IN LAW HAS OCCURRED.

Despite spending 18 pages of their brief arguing that conditions (2) and (3) of the exclusivity provision must be read as independent conditions[1] and, therefore, a change in State law is not required to extinguish the Tribes' payment obligations, the Tribes ultimately concede that the 2003 Amendment confirms that a change in law is required. Defendants' Brief, 22-23. The only dispute, then, is what constitutes a change in law such that the Tribes could cease making the 8% Payments.[2]

A. The Plain Language of the 2003 Amendment Requires an Enacted Change in Law Before The Tribes Are Relieved of Their Payment Obligations.

The negotiators of the 2003 Amendment for LTBB and the State agree that the Amendment did not change the exclusivity protection provided to the Tribes by the 1998

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[1] Section 17(B) of the Compacts and § 17(B)(1) of the 2003 Amendment have three conditions: (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).

[2] In any event, the Tribes do not persuasively argue that conditions (2) and (3) are independent. The Tribes' grammar discussion is premised on two conditions connected by the conjunctive "and." They never address the actual grammatical structure of §17(B): three conditions, each connected by "and." Consequently, the Tribes never address the implications of the exclusivity provision's "(1) *and* (2) *and* (3)" structure, which defies proper grammar if read as three independent clauses. See Plaintiffs' brief, 20-22. No matter how the Tribes wish to argue that the independent clause of §17(B) is "the Tribe shall make payment to the State", the Compact actually states as a single independent thought that "so long as there is a binding Class III Compact in effect, the Tribe shall make payment to the State". No amount of hocus pocus alters that fact. See *id.* Finally, the Tribes' assertion that Plaintiffs wish to replace the "and" between conditions (2) and (3) with an "or" is simply false. The Tribes' argument fails to acknowledge the ramifications of condition (1) of §17(B) being phrased as a positive independent prerequisite of the payment obligation, while conditions (2) and (3) are phrased in the negative (if A and not 1 and not 2, then…). It is the *Tribes* who urge this Court to alter the language by arguing that the occurrence of either condition terminates their payment obligations (if A and not 1 *or* not 2, then…). This is simply contrary to the parties' intent, as expressed by the plain language of §17(B). See *id.*

Compacts, but rather clarified it. Wernet dep. at 42 (Ex. 4 to Defendants' Brief); Chingwa dep. at 42 (Ex. A hereto). In their response brief, the Tribes acknowledge that the 2003 Amendment merely confirmed §17(B)'s original meaning.[3] In light of this intent and understanding, it is appropriate to look to the 2003 Amendment to determine what events would permit the Tribes to cease making payments to the State.

The Tribes make a convoluted argument to support their claim that the requirement in the 2003 Amendment that a lottery game be "allowable under State law" means something other than that the game was authorized by already-enacted legislation. Defendants' Brief, 22. However, the "allowable under State law" language of condition (3) only makes sense and must be interpreted as relating back to the "no change in State law is enacted" language of condition (2). In other words, the phrase "expansion of lottery games allowable under State law" in the 2003 Amendment means exactly the same thing as the counterpart language in the 1998 Compact that it confirmed: "no change in State law is enacted."[4] As shown in more detail below, it is counter-intuitive to accept that an unpromulgated agency directive is a "State law." Moreover, §17(B)(1) of the 2003 amendment uses the same phrase, "State law," in both of the relevant clauses, i.e., "no change in ***State law*** is enacted" (condition (2)) and "expansion of lottery games beyond that allowable under ***State law***" (condition (3)). There is no dispute that the "State law" mentioned in condition (2) means actual legislation. The Tribe's explanation of how "State law" morphs into mere agency directives in condition (3) is unsatisfactory, and a natural reading of the two conditions together compels the conclusion that "State law" means the same thing in both cases—that a change in ***enacted*** law is required.

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[3] "Both LTBB and the State…viewed this language simply as confirming section 17(B)'s original meaning; they did not understand it to provide LTBB with exclusivity protection beyond that enjoyed by it and LRB pursuant to the 1998 Compacts." Defendants' Brief, 5-6.

[4] And of course, the games authorized must also be commercial casino games. See below.

The use of the "allowable under State law" language in the next paragraph of the 2003 Amendment underscores that the phrase refers to a statutory enactment. A primary purpose of the 2003 Amendment was to authorize LTBB to open a second gaming facility. Defendants' Brief, 5. The Amendment included a separate exclusivity provision for this potential second facility. That exclusivity provision unequivocally relates the "allowable under existing State law" language to the "no change in State law is enacted" language:

> For the Second Site, 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, ***including expansion of lottery games beyond that allowable under State law*** on the date of execution of this document…."

2003 Amendment, §17(B)(2) (attached as Attachment 6 to the Complaint). This juxtaposition of the two phrases makes clear that "allowable under State law" is the same concept as "no change in state law is enacted." No other conclusion is possible. It is a standard of contractual construction that contracts must be read as a whole. *Wilkie v. Auto-Owners Ins. Co.*, 469 Mich. 41, 61; 664 N.W.2d 776 (2003). When (B)(1) and (B)(2) are read together, the only reasonable conclusion is that the language in the former section must be read the same as in the latter section.

Further, it is truly absurd for the Tribes to contend that the State agreed in July 2003 to language that would have allowed the Tribes to stop making payments in October 2003, when Club Keno was formally put into operation. By July 2003, when the Amendment was signed, Lottery had already signed a contract extension with GTECH that contemplated the addition of Club Keno (Defendants' Brief, 7), and had sent promotional packets for Club Keno to 7,000 liquor licensees in the state. See Affidavit of Thomas M. Weber, attached as Ex. B. The State certainly operated as if Club Keno was "allowable" under state law before the directive was

signed. The State was on the verge of final implementation of Club Keno when the 2003 Amendment was signed; issuance of the directive was just the final step in the process. Knowing this, the State would have never agreed to an exclusivity provision that would have terminated the Tribes' payment obligations the moment the inevitable Club Keno directive issued.

Moreover, it was LTBB that approached the State seeking an amendment to its Compact to allow it the option of conducting gaming at a second location. It is clear that LTBB was willing to make significant concessions, including increasing the amount of the payments to a higher percentage of its net win and limiting the geographic area in which the exclusivity protection applied.[5] LTBB also emphasized its desire to assist the State with its economic difficulties by increasing the level of payments to the state. Chingwa letter to Granholm, 3/7/03, attached as Ex. C. In light of these representations, it is unbelievable that the State would ever agree to language that would extinguish the just-negotiated payments within a few months, when a currently authorized Lottery game was introduced. If the State had understood that the import of signing the Amendment would be to lose the payments, it would have had no incentive to sign. In fact, if the State had understood that the introduction of Club Keno would terminate the Tribes' payment obligations under the 1998 Compact language, the State—which had to agree before LTBB could get a second casino—would have certainly negotiated to modify the exclusivity language to ensure that the increased payments being proposed would in fact continue after Club Keno launched. Otherwise, the exercise was completely fruitless from the State's perspective—the State got nothing and LTBB got a second casino.

[5] In a letter to Governor Granholm dated March 7, 2003, LTTB's Chairman noted: "…LTBB is eager to explore mutually beneficial ways of helping the State through this [budgetary] crisis…LTBB currently provides the State…$3,500,000 annually…LTBB proposes to contribute an additional amount of this magnitude, or perhaps greater…through amending our Compact…to open a gaming facility in the Mackinaw City vicinity.…" Ex. C.

Moreover, the Tribes' interpretation leaves no ascertainable line between those Lottery activities that preserve the Tribes' payment obligations and those that amount to "expansion" of lottery games, thereby triggering nonpayment. Under the Tribes' construction, the 2003 Amendment could be interpreted as triggering nonpayment as soon as Lottery issued a directive setting forth the rules of ***any*** new lottery game. A leap from requiring a statutory enactment to allowing a mere directive to trigger nonpayment surely would have registered as more than a "clarification" with the negotiators in 2003.

The plain language of the 2003 Amendment reveals that the parties intended that only a statutory enactment permitting or intending to permit the conduct of electronic games of chance or commercial casino games would relieve the Tribes of their payment obligations. Because no such statutory enactment has occurred, the Tribes are in default under the Compacts, and Plaintiffs are entitled to judgment in their favor.

B. Even If an Enacted Change in State Law Was Not Required, The Tribes Have Not Established That a Change in State Law Occurred that Relieved Them of Their Payment Obligations.

Under no reasonable interpretation of the Compacts would a simple Lottery directive suffice to trigger nonpayment. The Lottery Act authorizes the Bureau, among other things, to promulgate regulations. M.C.L. §432.11. But as is permitted by M.C.L. §432.11, the regulations do not deal with the specific rules and procedures for conducting individual games. This would be very cumbersome as there are numerous games (as many as 70) implemented every year, see Weber Aff., Ex. B, and getting a new rule promulgated for each game would consume much more energy than necessary. So instead, the Lottery has always issued these game rules as unpromulgated directives, not as regulations. These directives need not be formally promulgated under the Administrative Procedures Act ("APA"), M.C.L. §24.201 *et seq.*, because they do not have the force and effect of law. Therefore, the directives are not

"State law" as contemplated by §17(B). Rather, the issuance of a directive is the exercise of authority that exists by statute.

The Tribes cite *Barney v. Haveman*, 879 F. Supp. 775 (W.D. Mich. 1995), for the apparent proposition that the revision of a promulgated policy constitutes a change in applicable state law. Defendants' Brief, 22. The *Haveman* case is factually distinguishable from the case at hand. In *Haveman*, the agency involved was the Civil Service Commission, which has constitutional powers to promulgate rules to the same effect as executive agencies that promulgate rules under the APA. *Haveman* at 781; *Const*. 1963, art. XI, § 5. The policy change found by the court there was clearly promulgated, *Haveman* at 781, and had the force and effect of a promulgated rule. The directive in the case at hand does not, both because Lottery does not have the same constitutional authority that the Civil Service Commission has and because this directive was never promulgated as a rule.[6]

The APA also specifies what does ***not*** constitute a rule under the Act. Among these, "[t]he provisions of an agency's contract with a public or private entity including, but not limited to, the provisions of an agency's standard form contract" are not "rules" under the APA. M.C.L.

[6]It is well settled that an administrative agency cannot enlarge its lawful authority either by issuing directives or even promulgating rules. *Coffman v. State Bd. of Examiners in Optometry*, 331 Mich. 582, 589, 50 N.W.2d 322 (1951) ("…an administrative agency may not, under the guise of its rule making power, abridge or enlarge its authority or exceed the powers given to it by the statute, the source of its power.") See also, OAG No. 7157 (June 2, 2004)("Generally speaking, the agencies identified in an executive directive can be expected to carry out the policies of the administration as communicated in the directive *to the extent its directions are consistent with applicable law.*") (emphasis added). Club Keno was "allowable under State law" when the 2003 Amendment was signed because Lottery undeniably had authority to operate Club Keno as a matter of its enabling statute. As noted by *Coffman*, any attempt by Lottery to enlarge its authority through adoption of a regulation or directive would have been unenforceable.

24.207(p).[7] When an individual purchases a ticket for a Lottery game, he "accepts the terms of the lottery ticket contract." R 432.15(3). Included in these terms are relevant Lottery directives. *Id*. Thus, the directives govern the contractual relationship between Lottery and ticket holders. *Barnes v. State*, 1997 WL 33344232, *1 (Mich. App. 1997) (copy attached as Ex. D) ("Thus, we must also consider any lottery rules or directives as part of the contract between the parties."); see also, *Coleman v. State*, 77 Mich. App. 349, 351, 258 N.W.2d 84 (1977) ("A lottery winner's entitlement to a prize is governed by the principles of contract law.")[8]

The directives become enforceable conditions under contract law with respect to an individual who purchases a lottery ticket; they do not create an enforceable right standing alone. As such, the issuance of a directive does not constitute a "change in state law" under the Compacts, as contended by the Tribes.

Therefore, issuance of the Club Keno directive did not serve to terminate the Tribes' payment obligations, and Plaintiffs are entitled to judgment in their favor.

II. THE TRIBES HAVE NOT ESTABLISHED, AND CANNOT ESTABLISH, THAT LOTTERY OPERATES "COMMERCIAL" CASINO GAMES.

A. Club Keno and Daily Keno Are the Same Game.

If this Court makes the determination that no change in state law was required to terminate the Tribes' payment obligation, or decides that such a change in state law occurred, Plaintiffs are still entitled to judgment unless the Tribes establish that Club Keno is a "commercial casino game."[9]

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[7] See also, M.C.L. §§24.207(g) and (h) that expressly state that agency "directives" and "guidelines" are not rules under the APA.

[8] Lottery directives also sometimes establish requirements for vendors of Lottery tickets. These too are just contractual provisions that are binding only on the Lottery and their vendors.

[9] Plaintiffs can prevail on this motion merely by showing that no change in state law occurred. On the other hand, for the Tribes to prevail, they must establish both that there was a change in state law and that Club Keno is a commercial casino game.

The Tribes have chosen not to address in the context of the current motion whether Club Keno is a "casino game," nor have they addressed Plaintiffs' argument that Club Keno is no more a commercial casino game than Daily Keno, a game operated by the Lottery before and after the Compacts were executed. The Tribes have never asserted that the operation of Daily Keno entitles them to cease making payments to the State, presumably because they do not believe it is a commercial casino game. The only difference between Daily Keno and Club Keno is the frequency of play, but this difference, as argued in Plaintiffs' main brief, does not make Club Keno a commercial casino game. It is a lottery game just like Daily Keno, but a game that can be played more frequently. The Tribe's failure to point to a meaningful distinction between Daily Keno and Club Keno is itself a basis for this Court to rule that Club Keno is not a commercial casino game, and that Plaintiffs are therefore entitled to judgment in their favor.

B. Club Keno Is Not a Commercial Casino Game.

The Tribes go to great lengths in attempting to demonstrate that Club Keno operated by Lottery constitutes a "commercial" activity. Their efforts fail – and in some cases prove too much. Club Keno is inherently non-commercial, and Plaintiffs are accordingly entitled to judgment in their favor.

The Tribes first argue that Lottery is a commercial entity, and not a non-profit entity, because its activities are aimed at generating a profit. Defendants' Brief, 31-37. The Tribes point to the Lottery's enabling act, which directs Lottery to "produce the maximum amount of net revenues for the state consonant with the general welfare of the people." M.C.L. §432.9(1). The Tribes then contrast Lottery, with its mission of maximizing revenues, with non-profit organizations that conduct charitable gaming, apparently implying that charities do not seek profits. Defendants' Brief, 33-35.

The Tribes' argument proves too much. The very purpose for which non-profit organizations conduct charitable gaming is to maximize revenues.[10] These events are not conducted for the entertainment of their patrons (contra M.C.L. §432.105a (recreational bingo)) or as a service to the public. They are conducted solely and exclusively to raise funds that will be used by the non-profit for its charitable activities.

The Tribes make much of the limitations on millionaire parties as characteristic of non-profit gaming, in contrast to Lottery games. Defendants' Brief, 33-35. Plaintiffs disagree that these differences somehow prove that Club Keno is a commercial casino game, and note that the Tribes completely disregard charitable bingo, which also constitutes charitable gaming. While there are some limitations on how often a charity can hold a millionaire party (four times a year), there are no legal limits on how many bingo occasions a charity may conduct in a week or a year. Affidavit of Michael G. Petersen, attached as Ex. E; M.C.L. §432.105(2) and (3). The Tribes do not and cannot contend that organizations that conduct bingo are "for-profit," despite their intention of maximizing revenues from charitable gaming that is conducted repeatedly week after week. Similarly, the Tribes cannot credibly contend that Lottery's mission of maximizing revenues transforms Club Keno into a commercial casino game.

Thus, whether an entity seeks to maximize revenues does not provide a meaningful basis for distinguishing commercial from non-commercial entities. Such a distinction can be made only by considering ***for what purpose*** the activity is conducted. That is what makes any charity eligible to operate millionaire parties and/or bingo—by law it must use all the proceeds (minus authorized expenses) for its charitable purposes. M.C.L. §432.109. And that is what makes

[10] Indeed, for fiscal year 2006, the total net revenues made by "non-profits" conducting charitable games was over $74 million. A single charity made $1.1 milllion in net revenues in the same year! Petersen Aff., Ex. E.

Lottery every bit as much a non-commercial operator of Club Keno as any charity that runs a bingo seven nights a week. By statute, all revenues generated by Lottery activities fund public education, M.C.L. §§432.33(1) and 432.41(3), while the profits generated by a commercial entity are subject to no requirement that they be used for governmental or charitable purposes.[11] This is the true difference between a commercial and non-commercial entity, and on this basis, Lottery is a non-commercial entity.

The Tribes also contend that even if Lottery is not a commercial entity, the participation of commercial entities in the conduct of Club Keno renders it commercial activity. Defendants' Brief, 40-43. The Tribes first assert that GTECH, a commercial entity with whom Lottery contracts, actually "operates" Club Keno games within the meaning of the exclusivity provision. *Id.* at 40-42. This argument is preposterous.

There can be no question that Lottery "operates" Club Keno. The Lottery Act provides: "The commissioner shall initiate, establish, and ***operate*** a state lottery at the earliest feasible and practicable time." M.C.L. §432.9(1) (emphasis added). Whatever role GTECH plays in the functional operation of Club Keno, it does so as an agent of Lottery. Indeed, GTECH's operation of a lottery game within the State of Michigan would be illegal, because only the Lottery Bureau is invested with that authority.

The Tribes also contend that even if GTECH does not operate Club Keno, the game is nonetheless a commercial activity because GTECH, along with the bars and restaurants at which the game is conducted, participate in the operation of the game and profit from it. Defendants' Brief, 42-43. This argument is similarly unpersuasive. All of the commercial entities involved

[11] The Tribes' example of the Newman's Own company proves nothing on this point. Although Paul Newman chooses to donate all of the company's profits to charitable purposes, he is under no mandate to do so. If the company decided to end those donations, no legal consequence would result. Lottery has no such discretion with respect to the revenues it generates.

in Club Keno serve as agents or licensees of Lottery. State government agencies often contract with commercial entities for numerous purposes, but the activities remain governmental. For example, the State has authority to contract with private companies to operate some of its prisons. M.C.L. §791.220g. No one would argue that operating a prison is a commercial, non-governmental activity. It would be unlawful for a private company to imprison people. Only the government can do that. Yet a private company running a prison undeniably makes a profit.[12]

Under the Tribes' reasoning, the gaming conducted at LRB's casino would not be a governmental function because LRB contracts with a management company to "conduct and direct all business and affairs in connection with the operation, management and maintenance" of the casino. See "Second Amended Restated Management Agreement between the Little River Band of Ottawa Indians and Manistee Gaming LLC," dated 1/4/02, attached as Ex. F. Following the Tribes' logic, the management company's involvement renders the gaming on LRB's trust land non-governmental, commercial activity.

Yet, despite the management company's involvement, LRB included casino gaming in the list of non-commercial "Governmental Functions" in the tax agreement it entered into with the State.[13] This evidences LRB's understanding that the management company's involvement

[12] Moreover, charity gaming does not become commercial merely because there are for-profit entities making money from the games. As shown in the Affidavit of Michael Petersen, attached as Ex. E, for-profit entities made a total of over $26 million in fiscal year 2006 leasing space to non-profits and supplying them with equipment and supplies for charitable gaming purposes. This is no different than bars and restaurants where Club Keno is offered that make a 6% commission from the sale of tickets.

[13] The Tribes assert that the Tax Agreements are inadmissible because they involve subsequent conduct of the parties unrelated to the Compacts. Although subsequent conduct implementing a particular contract is certainly admissible to interpret its provisions, this does not mean that is the only type of subsequent conduct admissible. The Tribes cite no case law that affirmatively found such evidence *inadmissible*. The real test of admissibility is whether the Tribes' insistence that their casino operations were not "commercial" tends to show one way or another what the parties believed this term meant when they signed the Compacts, and later when the 2003 amendment

does not transform the nature of the gaming activities. It remains tribal gaming. Similarly, the involvement of GTECH and bars and restaurants in Club Keno does not transform the inherent governmental nature of the activity.

The Tribes also assert that the 2003 LTBB Amendment confirms that Lottery can operate commercial casino games because the phrase "including expansion of lottery games beyond that allowable under State law on the date of execution" appears after "electronic games of chance or commercial casino games" in condition (3). Defendants' Brief, 37-38. This does not prove, as the Tribes assert, that Lottery as presently authorized by law, can operate commercially. The "expansion of Lottery" discouraged by the Amendment could well be accomplished by changing Lottery's enabling act to allow it to fund private interests, and not just education. This would indeed be an expansion beyond what is currently allowed by State law that could trigger the cease payment provision, as under this hypothetical scenario, Lottery would arguably be functioning in a commercial manner. But that is not what is before the Court in this case. This case is about whether Club Keno implemented under Lottery's current authority is a commercial casino game. One important reason why it is not is because the net revenues from Club Keno go only to the education fund.[14]

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was executed; in other words, whether the evidence is *relevant*, which is not a difficult test to satisfy. Plaintiffs believe that such evidence is relevant. In any event, the tax agreements were signed in 2002, long before the 2003 Amendment was executed, and are no way "subsequent" to that reaffirmation of the parties' intentions with regard to the exclusivity provisions of their Compacts. The State could have reasonably relied on the Tribe's assertion that its own casino operations are not "commercial" when signing the Amendment.

[14]Alternatively, there is no grammatical basis for requiring that the word "including" modify one or the other or both of the terms "electronic games of chance" or "commercial casino games," particularly where the context of the Compact negotiations reveals that the word "including" was referring back to "electronic games of chance," and not "commercial casino games." The Tribes admit that a "subset" of the "larger class" of electronic games of chance or commercial casino games follows the word "including," Defendants' Brief, 37, suggesting that the subset does not include both electronic games of chance and commercial casino games. This is consistent with

In summary, Lottery is a noncommercial entity that operates noncommercial activities.[15] Because Lottery does not operate "commercial" casino games, its conduct of Club Keno did not relieve the Tribes of their obligation to continue making the 8% Payments. Therefore, Plaintiffs are entitled to judgment in their favor.

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the concerns expressed by the Tribes' negotiator William Brooks that proposals had been advanced to introduce video lottery terminals and video poker, each of which would constitute electronic games of chance under the Compacts' definition of that term. Brooks Dep., 23, 36, 37 (attached as Ex. J to Plaintiffs' Brief). The "expansion of lottery gaming" that the Tribes contemplated was the introduction of these electronic games of chance to be regulated by the Lottery. The parties would not have intended that "expansion of lottery gaming" includes commercial casino games because Lottery does not have authority to conduct "commercial" activities. Any inartfulness of the drafting does not prove otherwise.

[15] The Tribes also argue that the "industry" treats lotteries as commercial. Defendants' Brief, n. 13. Plaintiffs disagree that such "evidence" is admissible or relevant, and the source quoted has no apparent foundation. Moreover, the Tribes fail to quote from a document relied on in their expert's report that casts serious doubt on this assertion: "Forty-six states allow charitable gambling, 41 allow betting at racetracks, and 39 states and the District of Columbia operate lotteries. Native American casinos are permitted in 23 states; non-Indian commercial casinos are allowed in 11…the 443 commercial casinos in 11 states nationwide generated more than $27 billion…" *The 2005 Casino and Gaming Market Research Handbook*, 8th ed., p. 8, excerpt attached as Ex. G, cited in the expert report of Michael Jones, attached as Ex. F to Defendants' response to Plaintiffs' motion for preliminary injunction. The Tribes also fail to quote from an article published by Prof. William Thompson (who was previously identified as their expert) in which he states: "[S]tate after state embraced lotteries, charitable gambling, and even casinos either run commercially or by Native American tribes. …Eleven states have legalized commercial gambling, while over twenty five have authorized casino type gambling on Native American reservations." *A Consideration of Political Culture and Gambling Policy: Has Economics Trumped Moralistic Politics?*, excerpt attached as Ex. H. As there is no dispute that only 11 states have non-Indian casino gaming, it is clear from these quotes that it is these casinos that are considered "commercial" by the industry, not Indian casinos, and certainly not state-run lotteries.

Respectfully submitted,

Dated: January 12, 2007

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