UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

STATE OF MICHIGAN and the MICHIGAN ECONOMIC DEVELOPMENT CORPORATION,

Plaintiffs,

v.

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

Defendants.

File No. 5:05-cv-95
Hon. Wendell A. Miles
Hon. Hugh W. Brenneman

DEFENDANT TRIBES' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS OR FOR SUMMARY JUDGMENT

INTRODUCTION

The gaming Compacts entered into between Plaintiff State of Michigan and Defendants Little River Band of Ottawa Indians ("LRB") and Little Traverse Bay Bands of Odawa Indians ("LTBB") (collectively, the "Tribes") provide that, with certain limited exceptions, the operation of "commercial casino games" by non-tribal entities within the State will terminate the Tribes' obligations to make revenue sharing payments under the Compacts. In this litigation, the Tribes claim that the State has introduced a "commercial casino game" known as Club Keno into Michigan, thereby terminating their payment obligations. Plaintiffs have moved for judgment under Rule 12(c) and/or Rule 56 on three separate grounds. First, they claim that only commercial casino games introduced pursuant to a statutory enactment can trigger the termination of the Tribes' payment obligations, such that Club Keno, which was introduced pursuant to an administrative directive, does not qualify. Second, they argue that all Lottery Bureau offerings, including Club Keno, are inherently non-commercial. Third, they argue that only the operation of stand-alone casinos by others can end the payment requirement.

In all three instances, Plaintiffs' arguments contravene the plain language of the Compacts, which is dispositive of the parties' intent under Michigan law. Moreover, even if extrinsic evidence regarding the parties' intent is considered, that evidence amply confirms the clear meaning of the Compacts' terms. Accordingly, the Tribes respectfully request that the Court enter partial summary judgment on all three issues in favor of the Tribes, leaving as the only issue for trial the question whether Club Keno is in fact a casino game.

STATEMENT OF FACTS

A. The 1993 Compacts and Consent Judgment.

On August 20, 1993, Judge Gibson entered a consent judgment settling litigation in this District between the then-seven federally-recognized Tribes in Michigan (which did not include LRB or LTBB) and then-Governor Engler over the State's duty to negotiate gaming compacts under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.* ("IGRA"). *See* Doc. No. 158, Att. 2. Coincident with the entry of the consent judgment, the Governor and the seven Tribes executed compacts establishing the terms under which the Tribes would operate casino gaming facilities and authorizing the Tribes to offer the following games at those facilities: (1) craps and related dice games; (2) wheel games; (3) roulette; (4) banking and certain non-banking card games; (5) electronic games of chance; and (6) keno. Ex. 1 at § 3(A). According to the State's lead negotiator, Michael Gadola, this "list of authorized games [consisted] of the casino games that the compacting tribes either were offering or desired to offer at their casinos." Ex. 2, Gadola Dep. at 125:20-24.

The consent judgment required that each compacting Tribe make semi-annual payments to the Michigan Strategic Fund ("MSF") equal to 8% of the net win (essentially, gross revenues) from its electronic games of chance, but "only so long as the tribes collectively enjoy the exclusive right to operate electronic games of chance in the State of Michigan[.]" Doc. No. 158, Att. 2 at 5. Mr. Gadola understood that under this language the operation of such games by the State, including the State Lottery, would destroy the Tribes' collective exclusivity and terminate their payment obligations. Ex. 2, Gadola Dep. at 120:11-121:7.

B. The 1995 Negotiations and Compacts.

In 1994, three additional Michigan Tribes—LRB, LTBB, and the Pokagon Band of Potawatomi Indians, gained federal recognition. In 1995, these Tribes negotiated their own gaming compacts with the State, which the Governor and the Tribes executed on September 25, 1995. *See* Doc. No. 158, Att. 5. The list of authorized games in these 1995 compacts was identical to that found in the 1993 compacts, and hence continued to expressly refer to keno as one of the games that the Tribes had bargained for the right to offer at their casinos. *Id*. at § 3(A).

Like the 1993 Consent Decree, the 1995 compacts required the Tribes to make 8% payments to the MSF in exchange for gaming exclusivity. Section 17(B) established the conditions precedent to those payments and provided:

> 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 as provided in Subsection (C).

Id. A "person" for purposes of section 17(B) was expressly defined to include the State.[1]

Section 17(B) expanded the scope of the exclusivity protection afforded the Tribes beyond that enjoyed by the Tribal parties to the 1993 Consent Judgment. One of the most significant ways in which it did so was by including the operation of "commercial casino games" within the ambit of that protection. Representatives of the State and Tribes agreed at their depositions that they understood the term "casino games" to refer to games "that you would

[1] "'Person' means a business, individual, . . . company, corporation, association, committee, *state*, local government, *government instrumentality or entity*, or any other organization or group of persons acting jointly." *Id.* at § 2(D) (emphasis added).

typically play in a casino." Ex. 2, Gadola Dep. at 133:2-8.[2] They further agreed that "casino games could be played within a traditional stand-alone casino or in other venues," such that the operation of commercial casino games would terminate the payment obligation "regardless of whether [others] were operating those games within a stand-alone casino or in another venue[.]" *Id*. at 132:8-133:1. These understandings are fully consistent with the manner in which the term "casino game" is commonly understood in the gaming industry. *See* Doc. No. 70, Att. 7, Report of Michael Jones ("Jones Report") at 17. The representatives likewise agreed that they utilized the term "commercial" in order to "exempt out charitable gaming from the promise of exclusivity being made to the tribes[.]" Ex. 2, Gadola Dep. at 136:12-19.

C. The 1998 Compacts and Their Approval.

The 1995 compacts provided by their own terms that they had to be approved by concurrent resolution of the Michigan Legislature, but such a resolution was not forthcoming immediately. On November 5, 1996, the Michigan electorate adopted Proposal E, authorizing the licensing and operation of three casinos in Detroit. *See* MCL § 432.201, *et seq*. The parties then added express language to section 17(B) providing that the operation of the Detroit casinos would not terminate the Tribes' payment obligations. The parties agree that aside from the insertion of this language, the substantive meaning of the compacts as negotiated and executed in 1995 did not change. Ex. 2, Gadola Dep. at 97:1-13. The compacts as so modified (hereafter

[2] Mr. Gadola, the State's lead negotiator in 1993, had a more limited role in the 1995 negotiations, in which Christopher Murray served as the State's lead negotiator. Nevertheless, Mr. Gadola still played a part in those negotiations, *see* Doc. No. 158, Att. 13 at 2, and after Mr. Murray's departure from the Governor's office again became the Governor's lead representative with respect to the Compacts. As such, he had responsibility for negotiating further language changes to section 17(B) (discussed below) and for securing Legislative approval of the compacts. Ex. 2, Gadola Dep. at 96:5-25. Mr. Murray testified at his deposition that he has no recollection of what the compacting parties intended by their use of the term "commercial casino games" or of how he understood the term at the time. Ex. 3, Murray Dep. at 87:5-10; 90:8-17. This brief accordingly focuses on Mr. Gadola's recollections.

"the 1998 Compacts") were re-executed by the parties and approved by concurrent resolution of the Legislature on December 11, 1998.

Pursuant to section 2710(d)(8) of IGRA, gaming compacts do not become effective unless the Secretary of the Interior either expressly approves them or declines to disapprove them. In letters dated February 9, 1999, the Interior Department expressed concerns about whether the exclusivity provided by section 17 was substantial enough to justify the Tribal payments. *See* Doc. No. 154, Att. 2 at 1-2. The Department accordingly declined to approve the Compacts, but allowed them to go into effect "only to the extent [they are] consistent with the provisions of IGRA." *Id.* at 1. The Compacts took effect on February 18, 1999, 64 Fed. Reg. 8111 (1999), and each Tribe opened a gaming facility thereafter.

D. The July 2003 Amendment to the LTBB Compact.

In July 2003, LTBB and the State executed an amendment to that Tribe's Compact. *See* Doc. No. 1, Att. 6. A principal purpose of the amendment was to allow LTBB the option of opening an additional gaming facility. The amendment also resulted in the following italicized changes to section 17(B):

> [S]o long as there is a binding Class III Compact in effect between the State and Tribe… 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, *including expansion of lottery games beyond that allowable under State law on the date of execution of this document by the Tribe and State*, the Tribe shall continue to make payments to the State as provided in subsection (C).

Id. at 2 (emphasis added). Both LTBB and the State, as evidenced by the deposition testimony of the State's lead negotiator, John Wernet, 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 already enjoyed by it and LRB pursuant to the 1998 Compacts. Ex. 4, Wernet Dep. at 42:10-19; 68:9-19.

E. The Introduction of Club Keno in Michigan.

In 1994, the Michigan Lottery undertook a short-lived inquiry into the possibility of adding a frequent draw keno game to its offerings. Scott Matteson, the Lottery's Deputy Commissioner for Administration at the time, was charged with soliciting information from vendors about such a game. Like Michael Gadola, he understood frequent draw keno to be "a game played in the Nevada casinos," Ex. 5, Matteson Dep. at 35:19-25, and in his correspondence with the vendors he left no doubt that it was this Nevada casino game, which he referred to as "club-style keno," that the Lottery was seeking to introduce into Michigan:

> My use of the term "club-style keno" was intended to convey an understanding that we seek a frequent draw keno game played much like the game is played in Las Vegas as well as a growing number of lotteries.

Ex. 6 at 1; *see also* Ex. 5, Matteson Dep. at 34:25-36:17. Governor Engler, however, had little interest in the introduction of such a game, Ex. 2, Gadola Dep. at 87:1-25, and the Lottery did not pursue the idea very far.

On January 20, 1998, the Lottery entered into a contract with the GTECH Corporation under which GTECH was to "[f]urnish, install, and operate the Lottery's On-Line gaming system." Ex. 7, 1998 Contract Abstract at 1. In responding to the Lottery's request for contract proposals, GTECH declared that its system could support "[e]xtensive non-traditional game offering[s], including Club Keno." Ex. 8, GTECH Proposal at 3.5.7-1. It further explained that Club Keno, the registered trademark name for its frequent draw keno game, "was the first true attempt to bring the popular casino-style game to the lottery market." *Id*. at 3.5.7-9.

In 2003, the Lottery considered anew adding Club Keno to its mix of games. Ex. 5, Matteson Dep. at 40:24-41:9. Scott Matteson, still the Deputy Commissioner for Administration, was part of the three person "executive team" responsible for evaluating the game at the Lottery. *Id.* at 73:13-74:5. On January 29, 2003, his office circulated a document that clearly reflects the continued understanding that Club Keno replicates the keno game played in casinos, and is not a traditional lottery game:

> *Quick draw Keno is identical in nearly all respects to the Keno game played in some casinos. The game is much more fast-paced than traditional lottery products, with drawings held every five minutes. This game is not well-suited to be played in traditional lottery outlets (convenience stores, grocery stores, gas stations, etc) but does best in sit-down environments such as restaurants and lounges.*

Ex. 9 at 1(emphasis added); *see also* Ex. 5, Matteson Dep. at 54:7-56:9.

In June 2003, the GTECH contract was amended in order to add Club Keno to the on-line games that GTECH operates for the Lottery. Ex. 10, 2003 Contract Abstract. On October 27, 2003, the Lottery issued On-line Game Directive No. 14, which authorized qualified bars, restaurants, and related establishments to offer Club Keno, and which established the game's rules of play and operation. *See* Doc. No. 70, Att. 3. Club Keno can now be found in approximately 2,000 liquor-serving establishments in Michigan. Doc. No. 70, Att. 4 at 8.

F. Club Keno Game Characteristics.

Unlike traditional lottery games, tickets for which are sold largely at non-social venues including gas stations and convenience stores, Club Keno is offered exclusively at establishments that pour alcohol by the glass. Ex. 11, Huber Dep. at 31:16-21. These establishments represent "an entirely new lottery venue," Ex. 12, Shafer Dep. at 22:6-8; *see also* 20:18-21:4, and the game is marketed to Club Keno establishments accordingly:

> The Michigan Lottery is pleased to offer your business the opportunity to sell a brand new lottery game, Club Keno. Club Keno is being offered exclusively to new retailers

> only. It's designed with your kind of social establishment in mind. It will not be sold at existing lottery retail outlets.

"Watch Your Business Grow," Doc. No. 70, Att. 10 at 1. [3]

Club Keno features far more rapid draws than traditional daily or weekly on-line Lottery games. Club Keno is played every five minutes between 6:05 a.m. and 1:45 a.m., for approximately 237 draws every day. *See* Doc. No. 70, Att. 3 at ¶ 6. Club Keno also offers a higher payout than traditional lottery games. *See id.* at ¶7; Ex, 13, Weber Dep. at 28:2-14.

These three features – extended stay social venues, frequent draws, and a higher payout percentage – work together to facilitate the repeat play that is common to casino games and essential to their profitability. *See, e.g.*, Jones Report at 17-18, 25-26. Tom Weber, another member of the Club Keno "executive team," understood well this critical interplay between extended-stay venues, high draw frequency, and high payout:

> Q: Do those three factors [social setting, 65 percent pay-out, and frequent draws] work together to encourage repeat play?
>
> A: Yes.

Ex. 13, Weber Dep. at 31:21-23. Scott Matteson and other Lottery officials shared in this understanding. Ex. 5, Matteson Dep. at 64:7-65:5; Ex. 12, Shafer Dep. at 21:10-22.

With its frequent draws, high payout, and extended-stay social settings, Club Keno replicates in virtually all respects the frequent-draw keno game that has been a fixture in the Nevada casinos since they were first legalized in the 1930s. *See, e.g.*, Jones Report at 17-18, 25-26. The Lottery has marketed Club Keno to retailers accordingly, emphasizing that they can "FEATURE CASINO-STYLE ACTION" and stating:

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[3] Lottery games had been available at bars and restaurants prior to the launch of Club Keno only "[o]n a very limited basis" due to a mutual lack of interest between the Lottery and bar and restaurant owners. Ex. 5, Matteson Dep. at 66:11-67:13.

> Your customers will love Club Keno. It's fast-paced, it's fun and it has lots of ways to win. The action is continuous…with a new drawing every five minutes.

Ex. 14, "Win With Club Keno" at 1.

Public statements made by Lottery Commissioner Gary Peters at the time of Club Keno's introduction suggest that the State, which had promised gaming exclusivity for the Tribes' casinos in exchange for the section 17 payments, introduced Club Keno in an effort to compete with those very same casinos:

> [L]ottery Commissioner Gary Peters said it is becoming increasingly difficult for the state lottery games to compete with Michigan's 20 casinos, which turn gambling into a social occasion rather than a convenience or grocery-store stop. Lottery officials hope to give customers some of the feeling they get at casinos through Club Keno . . . in bars and restaurants, Peters said.

Doc. No. 70, Att. 5 at 2. And several months after the State launched Club Keno, Commissioner Peters attributed the new game's success to its ability to compete for casino gaming dollars:

> It seems people like the opportunity to have gaming right in their neighborhood instead of going to a casino, and we hear restaurants like it, especially the ones who lost business to casinos that opened nearby.

Doc. No. 70, Att. 6 at 1.

Subsequent to the introduction of Club Keno, the Tribes concluded that the launch of the new game had terminated their payment obligations. Each Tribe accordingly notified the State of their decision to suspend their section 17 payments. This litigation followed.

LEGAL STANDARDS

A. Judgment on the Pleadings and Summary Judgment.

"[W]ithin such time as not to delay the trial, any party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). Such a motion should be granted when no material issue of fact exists and the moving party is entitled to judgment as a matter of law. *U.S. v. Moriarty*, 8 F.3d 329, 332 (6th Cir. 1993). Summary judgment is likewise proper where "the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

"A special interpretive framework applies when a court entertains a summary judgment motion in a breach of contract case." *United Rentals (North America), Inc. v. Keizer*, 355 F.3d 399, 406 (6th Cir. 2004). As the Sixth Circuit has made clear:

> [A] contract can be interpreted by the court on summary judgment if (a) the contract's terms are clear, or (b) the evidence supports only one construction of the controverted provision, notwithstanding some ambiguity. . . . If the court finds no ambiguity, it should proceed to interpret the contract – and it may do so at the summary judgment stage. If, however, the court discerns an ambiguity, the next step – involving an examination of extrinsic evidence – becomes essential. . . . Summary judgment may be appropriate even if ambiguity lurks as long as the extrinsic evidence presented to the court supports only one of the conflicting interpretations.

Id. at 406 (quoting *GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 818 (6th Cir. 1999)); *see also UAW Local 540 v. BVR Liquidating, Inc.*, 190 F.3d 768, 772 (6th Cir. 1999). Thus, summary judgment is permissible in a contract case where (a) the language of the contract is unambiguous, and also where (b) the language is ambiguous but extrinsic evidence leaves no genuine issue of material fact and permits interpretation of the agreement as a matter of law.

B. Contract Interpretation.

The Compacts are contracts formed in Michigan, and Michigan law accordingly governs their interpretation. *Sault Ste. Marie Tribe of Chippewa Indians v. Engler ("Engler II")*, 271 F.3d 235, 237-38 (6th Cir. 2001); *TOMAC v. State of Michigan*, 685 N.W.2d 221, 241 (Mich. 2004). "The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. To this rule all others are subordinate." *City of Grosse Pointe Park v. Michigan Mun. Liab. and Prop. Pool*, 702 N.W.2d 106, 113 (Mich. 2005) (quotations omitted). *See also Sault Ste. Marie Tribe of Chippewa Indians v. Engler ("Engler I")*, 146 F.3d 367, 372 (6th Cir. 1998)

("Under Michigan law, the primary goal in the construction or interpretation of any contract is to honor the intent of the parties.") (internal quotations omitted).

To ascertain intent, Michigan courts look first and foremost at the words used in the contract. *Id*. (courts "must look for the intent of the parties in the words used in the instrument") (quoting *Michigan Chandelier Co. v. Morse*, 297 N.W. 64, 67 (Mich. 1941)); *Engler II*, 271 F.3d at 238 (same). "A fundamental tenet of [Michigan] jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written*." *Rory v. Cont'l Ins. Co*, 703 N.W.2d 23, 30 (Mich. 2005) (emphasis in original); *see also Wonderland Shopping Center Venture v. CDC Mortgage Capital, Inc.*, 274 F.3d 1085, 1092 (6th Cir. 2001) ("If the parties' intent is unambiguously clear from the language of the written agreement, the court must enforce the parties' intent as expressed in the writing."). Accordingly, "[a] court 'does not have the right to make a different contract for the parties or to look to extrinsic testimony to determine their intent when the words used by them are clear and unambiguous and have a definite meaning.'" *Engler I*, 146 F.3d at 373 (quoting *Michigan Chandelier*, 297 N.W. at 67); *see also Universal Underwriters Ins. Co. v. Kneeland*, 628 N.W.2d 491, 494 (Mich. 2001) ("Absent an ambiguity or internal inconsistency, contractual interpretation begins and ends with the actual words of a written agreement."). Where the terms of a contract are ambiguous, however, a court may look to extrinsic evidence of the parties' intent in determining the contract's meaning. *Engler I*, 146 F.3d at 373. Furthermore, "Michigan law has consistently recognized that extrinsic evidence which is consistent with the language of the agreement is always admissible." *Grand Traverse Band v. U.S. Attorney*, 198 F. Supp. 2d. 920, 939 (W.D. Mich. 2002), *aff'd*, 369 F.3d 960 (6th Cir. 2004).

ARGUMENT

I. SECTION 17(B) PLAINLY DOES NOT REQUIRE AN ENACTED CHANGE IN STATE LAW TO EXTINGUISH THE TRIBES' PAYMENT OBLIGATIONS UNDER THE COMPACTS

Plaintiffs' principal argument in support of their motion is that the compacts require a change in statute as a prerequisite to termination of the Tribes' payment obligations. Accordingly, since the introduction of Club Keno was not accompanied by a statutory change, plaintiffs assert that the Tribes must continue their compact payments even if Club Keno constitutes a "commercial casino game." Plaintiffs' argument runs directly counter to the plain language of section 17(B). Accordingly, either judgment on the pleadings or summary judgment should be entered in favor of the Tribes on this issue. *See Williams v. Int'l Paper Co.*, 227 F.3d 706, 716 n.6 (6th Cir. 2000); *Grand Rapids Plastics Inc. v. Lakian*, 188 F.3d 401, 407 (6th Cir. 1999) (proper for district court to enter summary judgment *sua sponte* in favor of party that did not move for summary judgment); *Markva v. Haveman*, 168 F. Supp. 2d. 695, 706-07 (E.D. Mich. 2001) ("Thus, when a party has moved for summary judgment, and the Court agrees that there is no genuine dispute of material fact, but believes that judgment as a matter of law is appropriate for the non-moving party, the Court is free to so declare."). Even if this Court were to look beyond the plain language of section 17(B), moreover, the extrinsic evidence overwhelmingly confirms the Tribes' reading of that section. Accordingly, summary judgment on this issue would still be appropriate in the Tribes' favor. *Id.*; *United Rentals*, 355 F.3d at 410.

A. Section 17(B) Clearly Establishes Three Independent Conditions for the Tribes' Payment Obligations.

Section 17(B) provides in full that:

> ***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 (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 Tribe shall make payments to the State*** as provided in subsection (C).

See 1998 LTBB Executed Compact, Doc. No. 1, Att. 5 at § 17(B) (emphasis added).

This language sets forth three prerequisites for tribal payments. Subject to express exceptions (discussed below), it plainly requires that the Tribes shall make payments *so long as*:

(1) A binding Class III Compact is in effect between the State and the Tribe; "*and*"

(2) No change in State law is enacted which permits or is intended to permit operation of the identified games by any other person; "*and*"

(3) No other person lawfully operates such games within the state.

Nothing in the text suggests that the three conditions are intended to be treated as other than independent grammatical equals. There is no difference in the punctuation separating the conditions – indeed, there is no punctuation between them at all. The three conditions are instead joined by the same conjunctive term – "and." That term (as discussed in detail below) makes it very plain that *all* three of the conditions must remain in effect to sustain the payment obligation. *See, e.g., OfficeMax, Inc. v. United States*, 428 F.3d 583, 588-89, 591 (6th Cir. 2005) (characterizing conjunctive meaning of "and" as "*requiring all items*"). Accordingly, under the plain text, lawful operation by non-exempted persons of electronic games of chance or commercial casino games terminates the payment obligation notwithstanding a valid Compact and despite no enacted change in State law.

B. Plaintiffs Ask the Court to Interpret the Word "And" Disjunctively and, in So Doing, to Materially Rewrite Section 17(B).

The parties agree that section 17(B) places three conditions on the Tribes' payment obligations. *See* Pl. Br. at 17. Moreover, the parties agree that failure of condition (1), a binding Compact, terminates the obligation. *See id*. at 20. The dispute here centers on the relationship between conditions (2) and (3). The Plaintiffs assert that the payment obligation is terminated "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." *Id*. at 16. That is, Plaintiffs argue that a failure of *both* conditions (2) and (3) is required to terminate the obligation. *See id*. at 17-18. To arrive at this conclusion, Plaintiffs reason that "the fact that conditions (2) and (3) are conjunctive requires that 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." *Id*. at 17. This quite plainly is an error of logical reasoning.

Plaintiffs are correct that conditions (2) and (3) are conjunctive – the word "and" between them makes this patently clear. However, Plaintiffs' error of reasoning arises when they *restate* the payment obligation in terms of what terminates it (thereby inverting its operative meaning) while continuing to rely on section 17(B)'s conjunctive "and." Plaintiffs assert that because "conditions (2) and (3) are conjunctive . . . both conditions must be *triggered* in order for the Defendants to be *relieved* of their payment obligation." *Id*. (italics added). However, section 17 does not frame the payment obligation in terms of what terminates it, but rather in terms of what sustains it: *i.e.*, "so long as" (2) "and" (3) "*remain in effect*, the Tribe *will* make semi-annual payments to the State[.]" Doc. No. 1, Att. 5 at § 17(B)-(C). That is, both conditions must *not* fail in order for the obligation to continue. That is the plain meaning of section 17(B).

By asserting that the survival of *either* condition – (2) *or* (3) – sustains the payment obligation, the Plaintiffs are in effect asking this Court to interpret that obligation as follows: so long as (2) ~~**and**~~ ***OR*** (3) remain in effect, the Tribes shall make payments to the State. This is the inescapable textual consequence of Plaintiffs' argument. However, had the parties intended that the survival of either condition would sustain the payment obligation, they would surely have used the word "or" between conditions (2) and (3). But the parties did not do so, and their deliberate use of the conjunctive should be honored here. *See United Rentals*, 355 F.3d at 407 ("When the contract terms are plain and unambiguous, a court will construe the contract as it is written and presume the parties' intent is consistent with the ordinary meaning of the terms in the contract.") (applying Michigan law).

In asking this Court to interpret the Compact as though the parties had intended their express use of the word "and" to mean "or," the Plaintiffs are asking this Court to override a longstanding emphatic presumption to the contrary. *See OfficeMax*, 428 F.3d at 588-92 (stating that "dictionary definitions, legal usage guides and case law compel us to start from the premise that 'and' usually does not mean 'or'" and extensively discussing those sources in support of same); *accord U.S. v. Martin*, 438 F.3d 621, 630-31 (6th Cir. 2006) ("the ordinary meaning of 'and' is a conjunctive one" and that meaning "is the most natural one"); *In re Fred Hawes Org., Inc*. 957 F.2d 239, 243-44 (6th Cir. 1992); *State Mut. Life Assur. Co. v. Heinz*, 141 F.2d 741,746 (6th Cir. 1944); *Niles Twp. v. Berrien Cty. Bd. of Comm'rs*, 683 N.W.2d 148, 154 (Mich. App. 2004)("and" and "or" "are not interchangeable"); 1A Sutherland Statutory Construction § 21:14 (6th ed.) (citing Michigan case law).

Plaintiffs have not argued that the parties mistakenly used "and" instead of "or" in the Compacts. Nor can they make such an argument because they agree (indeed, emphasize) that the

parties intended the relationship between conditions (2) and (3) to be "conjunctive." Pl. Br. at 17. Plaintiffs simply misunderstand the logical implications of that fact. Otherwise, what they are really asking the Court to do is to construe section 17(B) as though it predicated the Tribes' payment obligation on the survival of condition (1) and condition (2) *or either of them*. The Supreme Court has rejected such an argument out of hand. In *Crooks v. Harrelson*, 282 U.S. 55 (1930), the Court declined to interpret the term "and" as used in a tax statute in the disjunctive, and in doing so explained:

> The meaning of the provision in question, considered by itself, does not seem to us to be doubtful. The value of the interest of the decedent is not to be included unless it 'is subject to the payment of the charges against his estate and the expenses of its administration' – *not one or the other, but both*. We find nothing in the context or in other provisions of the statute which warrants the conclusion that the word 'and' was used otherwise than in its ordinary sense; and to construe the clause as though it said, 'to the payment of charges and expenses, *or either of them*,' as petitioner seems to contend, *would be to add a material element to the requirement*, and thereby to create, not to expound, a provision of law.

Id. at 58 (emphasis added). Similarly, the meaning of section 17(B) is not doubtful. The Tribes' obligations hinge on the survival of conditions (2) *and* (3) – "not one or the other, but both." *Id*. To construe section 17(B) as though it said (2) and (3) *or either of them* "would be to add a material element to the requirement, and thereby to create, not to expound," a provision of the Compact. *Id.*; *Equitable Life Assur. Soc. v. Poe*, 143 F.3d 1013, 1016 (6th Cir. 1998) (applying Michigan law and stating "courts should not rewrite contract language for the parties").

C. Plaintiffs' Analysis Rests on Assumptions with No Support in the Plain Language and Fails to Address Language Fatal to that Analysis.

Asking the Court to read conditions (2) and (3) in the disjunctive is not the only instance where the Plaintiffs are asking the Court to read meaning into section 17(B) that simply is not there. Plaintiffs posit that condition (3) refers only to operation of identified games "pursuant to" a statutory enactment referenced in condition (2). *See, e.g.*, Pl. Br. at 19. But section 17(B) says

no such thing. Condition (3) provides that the Tribes shall make payments so long as no other person "lawfully operates" the identified games – that is, so long as no other person operates the games under any applicable law. This makes good sense because without the modifier "lawfully," the Tribes could terminate payments on the event of illegal gambling by anyone in the State. However, to infer that "lawfully operates" means "lawfully operates *pursuant to a new state statutory enactment*" is once again to insert a material element into section 17(B) not found in its plain language.

This attempted construction of section 17(B) is undermined by the express exemptions contained in that section. Condition (2) expressly exempts from its reach persons operating the identified games in Detroit under MCL § 432.201. Condition (3) expressly exempts those Detroit persons as well as federally-recognized Tribes operating the identified games under a valid IGRA Compact. The Plaintiffs replace these exemptions with ellipses in quoting section 17(B), *see* Pl. Br. at 16, and nowhere grapple with the consequences of those exemptions for their argument.

If the operation of the identified games under condition (3) refers to operation *pursuant to* a statutory enactment referred to in condition (2), then there would exist absolutely no reason for having two separate parenthetical statements of exemption – all exemptions could have been expressed in a single parenthetical at the conclusion of what Plaintiffs posit as one integrated condition, rendering the first parenthetical utter surplusage. This, of course, contravenes bedrock principles of textual construction. *See, e.g., Klapp v. United Insur. Group Agency*, 663 N.W.2d 447, 468 (Mich. 2003) ("[C]ourts must . . . give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory."). Viewed from a different perspective, but with equally damning results, if conditions

(2) and (3) are in fact one integrated condition, then the exemption for the Detroit operators in the second parenthetical is surplusage because that exemption would, under Plaintiffs' interpretation, be fully effectuated by the exemption of those operators contained in the first. Furthermore, it would have been pointless to expressly exempt Tribes with IGRA compacts from the integrated condition. Such Tribes conduct their gaming pursuant to *federal* law, not state law. *See* 25 U.S.C. § 2701, *et seq*. Accordingly, there would, under Plaintiffs' construction, have been no need to exempt those Tribes' gaming operations from the ambit of section 17(B)'s payment conditions, as the requirement of a state statutory enactment would already have effected that exemption.

By contrast, the Tribes' construction of section 17(B) gives each exemption full meaning and effect. The Detroit operators are exempted from both conditions (2) and (3) because the conditions are independent. Federally-recognized Tribes are exempted only from condition (3) because that condition is not limited to conduct occurring pursuant to a change in a State statute. This renders the Tribes' construction far superior to Plaintiffs' wholesale relegation of important clauses to the realm of the entirely unnecessary. *Klapp,* 663 N.W. 2d at 468*; United Rentals (North America) Inc., v. Keizer*, 202 F. Supp. 2d 727, 735 (W.D. Mich. 2002) ("In construing a contract, the court will select the construction that gives meaning to each of the provisions") (applying Michigan law), *aff'd*, 355 F.3d 399 (6th Cir. 2004).

The Plaintiffs' discussion of section 17(B) likewise ignores the existence of the phrase "or intends to permit" in condition (2). The Plaintiffs assert that an enacted change in law alone will not suffice to terminate the payment obligation; actual lawful operation under that law is *required*. Pl. Br. at 18. If Plaintiffs are correct, then the phrase "intends to permit" is surplusage because no actual lawful operation can occur under a law that "intends to permit" operation that

would not also be allowed by a law that "permits" such operation. Again, this relegation of Compact language to surplusage contravenes bedrock principles of textual interpretation.

By contrast, under the Tribes' interpretation of section 17(B), the phrase "intends to permit" serves an important independent purpose. Under that interpretation, an enacted change in State law can terminate the Tribes' payment obligation regardless of whether actual operation of the identified games has begun under that law. This clearly serves as a significant disincentive to the Legislature to enact measures authorizing the proliferation of gaming in Michigan.[4]

D. Plaintiffs Misconstrue the Rules of Grammar.

The Plaintiffs attempt to buttress their reading of section 17(B) with a grammatical analysis. Pl. Br. at 20-22. That entire analysis is infected with incurable errors. As discussed below, the phrase "the Tribe shall make payments to the State" is the grammatically independent clause in section 17(B). Plaintiffs attempt to establish that condition (1) is a part of that independent clause by virtue of the express requirements of IGRA:

> The . . . 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

[4] Plaintiffs call the result that payments could be triggered on an event short of actual operation "an absurd result that does not pass muster." Pl. Br. at 18. That very result certainly passed muster in the Sixth Circuit when it construed the language of the 1993 Consent Judgment to extinguish the affected tribes' payment obligations the moment a license was issued to another entity to operate electronic games of chance – that is, on an event short of actual operation. *See Engler I*, 146 F.3d at 373.

Plaintiffs have also characterized the Tribes' interpretation of section 17(B) as risking "*forfeiture* of existing State authority over lawful gaming activities." Pl. Br. at 19. This is a red herring. The State remains perfectly free to act on gaming as it sees fit within the confines of State law. The only consequence for the State imposed by section 17(B) relates to the loss of Tribal payments. Moreover, section 17(B) self-evidently does not affect the Lottery's ability to innovate with respect to the games that have formed its backbone since its inception, including daily numbers games, interstate lotteries, and instant games. The section pertains only to electronic games of chance and commercial casino games.

> notion because it is an express requirement of IGRA. . . . [Conditions (2) and (3)], meanwhile, constitute two dependent clauses."

Id. at 20-21, citing *The Gregg Reference Manual* 9th Edition at 553.

However, the express requirements of IGRA alter the rules of grammar not a whit. Moreover, the argument is without consequence. Plaintiffs draw an illusory distinction between condition (1) (as supposedly part of section 17(B)'s independent clause) and conditions (2) and (3) (as dependent clauses) in an attempt to show that (2) and (3) are somehow not *in*dependent of each other. In doing so, Plaintiffs labor under the false impression that a grammatically dependent *clause* cannot also be an *in*dependent *condition*. That a clause in a sentence is grammatically dependent says nothing about whether it is a dependent or independent condition *vis-à-vis* other conditions. In section 17(B), all three conditions are dependent clauses. They also each constitute an independent condition. *The Gregg Reference Manual* makes these matters quite clear.[5]

Gregg provides the following illustration of independent and dependent clauses: "I will go (*independent clause*) if I am invited (*dependent clause*)." *See* Doc. No. 158, Att. 7 at 553. An independent clause, as seen in this illustration, expresses a complete thought and can stand alone as a sentence. *See id*. A dependent clause, by contrast, does not express a complete thought, cannot stand alone as a sentence, and depends on the independent clause for its meaning. *See id*.

Accordingly, the independent clause in section 17(B) is: "the Tribe shall make payments to the State." This is the equivalent of "I will go." It expresses a complete thought and can stand

[5] The ensuing grammatical analysis is entirely consistent with the authoritative grammatical text *Cambridge Grammar of English* (Cambridge Univ. Press 2006) Ex. 15 at 315 (§ 166), 553-54 (§§ 305-06), 556-57 (§§ 307-08), 558 (§ 310) and 842 (§ 506d).

alone. The dependent clauses in section 17(B) are: (1) so long as there is a binding Compact; and (2) no change in State law is enacted; and (3) no other person lawfully operates. These clauses are the equivalent of "if I am invited." Each expresses an incomplete thought and cannot stand alone, as each depends on the independent clause for its meaning.

Moreover, these clauses are "coordinate" dependent clauses; that is, "*[c]lauses of the same rank*." *Id*. *Gregg* provides the following illustration of coordinate dependant clauses:

> *When you have read the user's manual* and *you have mastered all the basic operations*, try to deal with these special applications. (Coordinate dependent clauses).

Id. This is precisely the grammatical structure of section 17(B). Textually, just as the conditional "when" attaches equally to each dependent clause ("you have read the user's manual" and "you have mastered all the basic applications") in the *Gregg* illustration, the conditional "so long as" attaches equally to each dependent clause (the three conditions) in section 17(B). In the illustration, the coordinate (same rank) dependent clauses appear without punctuation, are joined by the conjunctive "and," and are separated from the independent clause – "try to deal with these special applications" – by the sole comma in the sentence. Likewise, in section 17(B), the coordinate dependent clauses appear without punctuation, are joined by the conjunctive "and," and are separated from the independent clause – "the Tribe shall make payments to the State" – by the sole comma. In the *Gregg* illustration, the speaker unambiguously intends that as a predicate to dealing with the special applications, the listener will read the user's manual "*and*" master the basic applications – not one or the other, but both. By the same token, in section 17(B) *all* of the conditions must be fulfilled as a predicate to the payment condition.

In sum, in section 17(B) as in the *Gregg* illustration, each dependent clause is also an *in*dependent condition. Invoking the *deus ex machina* of IGRA to somehow transport condition

(1) over section 17(B)'s sole comma and graft it onto the independent clause is an exercise in futility. Conditions (2) and (3) remain "clauses of the same rank." They are dependent clauses and independent conditions; if either fails, the payment obligation terminates.

E. The Plain Language of the 2003 LTBB Amendment Confirms that Conditions (2) and (3) are Independent.

The LTBB Compact Amendment added the following italicized language to condition (3): so long as "no other person . . . lawfully operates electronic games of chance or commercial casino games, *including expansion of lottery games beyond that allowable under State law on the date of the execution of this document by the Tribe and State*, the Tribe shall make payments to the State[.]" Doc. No. 1, Att. 6 at § 17(B). The Plaintiffs argue that this added language makes clear that the parties intended "that a change in [statutory] law authorizing expanded gaming would be required to trigger the cease payment provision." Pl. Br. at 33.

This simply does not follow. While condition (2) clearly refers to changes in statutory law ("so long as . . . no change State law *is enacted*"), the amendment to condition (3) refers to State law more generally, and Plaintiffs err in conflating the two concepts. In *Barney v. Haveman*, 879 F.Supp. 775 (W.D. Mich. 1995), for example, a party argued that the phrase "a change in State or local law" found in a federal statute was limited to enactments, and hence did not include changes in agency policies. Judge McKeague dismissed this argument out of hand.

> Plaintiffs argue that a "change in the severance policy did not require a change in law[.]" Plaintiffs offer no authority supporting their theory that the phrase "State or local law" refers solely to legislative enactments. . . . The common usage of the word "law" does not constrain it as plaintiffs would have this Court do. *See, e.g., U.S. Fidelity & Guaranty Co. v. Guenther*, 281 U.S. 34, 37 (1930) (in its generic sense, "law" means "the rules of action or conduct" duly prescribed by controlling authority, and having binding legal force). And neither does the Michigan State Constitution limit the definition of "law" strictly to legislative enactments. *See, e.g.*, Mich. Const., Art. VII, § 2 (county charter provides general law for the county).
>
> Furthermore, it is undisputed that . . . the [Agency] promulgates administrative rules . . . pursuant to constitutional authority, Mich. Const., Art. XI, § 5, and that the

> challenged policy and its subsequent amendment were promulgated pursuant to [Agency] Rule 5-1.1. This, too, leads the Court to conclude that a change in the challenged policy required a change in applicable State law.

Id. at 781. Far from supporting Plaintiffs' argument, then, the Amendment's broader reference to State law in condition (3) compared with the narrower reference to statutory law contained in condition (2) underscores that the two conditions are distinct from one another. [6]

F. The Extrinsic Evidence Confirms the Plain Language of Section 17(B).

The plain language of section 17(B) makes it clear that the parties intended that three independent conditions would be necessary to sustain the Tribes' payment obligations. Nothing in that language or in the rules of interpretation and grammar governing its construction supports Plaintiffs' argument that an enactment is required to terminate those obligations. Plaintiffs' interpretation ignores the clear symmetry of section 17(B)'s conditions and would reduce critical parts of that section to mere surplusage. Under Michigan law, where the language of a contract is unambiguous, the language is dispositive as to the parties' intent. *See* discussion at pp. 11-12, *supra*. Accordingly, the Tribes request judgment on this issue under Rule 12(c) and Rule 56. *Williams*, 227 F.3d at 716 n. 6; *Lakian*, 188 F.3d at 407.

However, even if this Court were to examine the extrinsic evidence surrounding section 17(B), summary judgment would still be appropriate in favor of the Tribes. The Plaintiffs have demeaned the Tribes' interpretation of section 17(B)'s conditions as "absurd," "obfuscated," and

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[6] The Amendment was executed in July of 2003. Club Keno was introduced by On-line Game Directive No. 14 on October 27, 2003. Accordingly, Club Keno was not allowable under State law when the Amendment was executed because the directive – which sets forth eight detailed pages of rules of action and conduct governing the operation and play of the game – had not yet issued. *See* Doc. No. 70, Att. 3 at ¶¶1-17. As *Barney v. Haveman*, makes clear, the issuance of these rules of conduct constituted a change in applicable State law. *Barney v. Haveman*, 879 F. Supp. at 781. *See also* MCL § 432.11 (requiring Lottery to promulgate rules pursuant to Administrative Procedures Act of 1969 and setting forth appropriate topics for rules which mirror items addressed in Directive No. 14) *and* MI ADC 432.15(2)("The rules governing a particular lottery game are set forth in bureau of state lottery directives.").

lacking in "common sense." Pl. Br. at 18, 6 and 16. They have argued that theirs is "[t]he *only* construction of § 17(B) that is consistent with" sound principles of contract interpretation. *Id*. at 16 (emphasis added). They have made these assertions notwithstanding two documents – one authored by a then-key member of Governor Engler's staff, the other by a current member of the Attorney General's office – that clearly endorse the Tribes' interpretation of section 17(B) and flatly contradict their own.

1. September 20, 2002 Memo from Lance Boldrey to Governor Engler.

On September 20, 2002, Lance Boldrey, who then served as Deputy Legal Counsel to Governor Engler and as his key point person on State-Tribal relations (Mr. Boldrey occupied the same position previously occupied by Michael Gadola and Christopher Murray) authored a detailed memorandum to Governor Engler analyzing whether a number of proposals pending at the time would relieve the Tribes of their payment obligations under the Compacts. Included among these were bills that would have authorized racetrack licensees to offer either Keno or electronic games of chance at their facilities, as well as proposals that would have allowed for video lottery terminals or other gaming machines at the racetracks and at liquor-serving establishments under the auspices of the Lottery. Ex. 16 at 2-3.[7]

The Boldrey memorandum gives extensive consideration to the language and history of the Compacts and to applicable gaming law. In doing so, it explicitly contradicts Plaintiffs' current interpretation of section 17(B) as requiring a statutory enactment in order to terminate the Tribes' payment obligations:

> Authorization either by a new law or under existing statutes would end the tribal obligation; the second part of the exclusivity language ("no other person within the state lawfully operates") terminates the payment obligation if any person (other than a Detroit casino licensee) legally operates electronic or commercial casino games *even in the*

[7] Plaintiffs produced this document to the Tribes in discovery.

> *absence of a statutory change*. *Notes from the compact negotiations suggest that the tribes insisted upon this language out of concern that Lottery's administrative rules would be altered to permit gaming competition.* Some of the tribes would likely argue – perhaps truthfully – that this language was directly aimed at [video lottery terminals].

Id. at 5 n.9 (emphasis added). Tellingly, Mr. Boldrey not only construes the Compact language in a manner directly undercutting Plaintiffs' position, but he identifies the principal rationale for the inclusion of condition (3) as being the Tribes' concern that the "Lottery's administrative rules would be altered to permit gaming competition." *Id*. at 5. This, of course, is exactly what happened with the introduction of Club Keno by Lottery directive. Thus, in 2002, Governor Engler's key lawyer and liaison for Tribal affairs expressed the very understanding of section 17(B)'s conditions advanced by the Tribes here and derided by the Plaintiffs as absurd.[8]

2. October 8, 2004 Letter from Todd Adams to LTBB.

The Tribes' interpretation of section 17(B) is likewise confirmed by an October 8, 2004 Letter to LTBB from Assistant Attorney General Todd Adams, written at the direction of Attorney General Mike Cox. *See* Doc. No. 145, Att. 3. This letter was issued in response to LTBB's decision to cease payments.[9] In it, Mr. Adams, who remains one of the State's attorneys of record in this matter, describes the structure of section 17(B) as follows:

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[8] Mr. Boldrey goes on in the memorandum to characterize Keno as a casino game and to note that while an argument could be made that the introduction of Keno under the auspices of the Lottery would not be "commercial," "the smart money would be on the tribes" in any ensuing litigation over the Tribes' obligations to continue making payments. Ex. 16 at 6-7.

[9] Whether communications between the State and Tribes made in furtherance of settlement in this case are privileged is the subject of a motion pending before this Court. Doc. No. 145. The Tribes have taken the position that "any communications made in furtherance of settlement are privileged." *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc*., 332 F.3d 976, 983 (6th Cir. 2003). However, regardless of whether the Court ultimately agrees with the Tribes or not, Plaintiffs have attached the Adams letter in briefings to the Court (Doc. No. 145, Att. 3), and in so doing have waived the privilege. *See* Ex. 17, Transcript of Oral Argument before Hon. Hugh W. Brenneman, Jr. at 52:22-24 ("Maybe [the Adams'] letter is truly a settlement document but then they've waived it, as you point out."); *see also id*. at 16:4-8, 25:7-11.

> (1) "So long as there is a binding Class III Compact in effect between the State and Tribe," and
>
> (2) "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 (except a person operating such games in the City of Detroit pursuant to the Initiated Law of 1996, MCL 432.201 et seq.)," and
>
> (3) "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," then
>
> (4) "the Tribe shall make payments to the State as provided in subsection (C)." 1998 Gaming Compact at p. 17.
>
> As a preliminary matter, *the parties agree that all of the first three conditions must be met* prior to LTBB having an obligation to make its payment under subsection (C) to the State.

Att. 3 to Doc. No. 145 at 3(emphasis added). Thus, Mr. Adams conveyed to the Tribes exactly the same understanding of section 17(B)'s conditions that Plaintiffs now criticize as a rewriting of the Compacts. He further expressed the purpose behind independent condition (2) in terms the Plaintiffs now disparage as "absurd." Pl. Br. at 18:

> [C]lause (2) of subsection 17(B) makes the enactment of a change in state law *sufficient* to relieve LTBB of its responsibility to make payments to the State under subsection (C). Given the lead times necessary to build casinos or to roll out new games, this saves large amounts of money for LTBB and responds to the situation presented in *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F 3d [3]67 (CA 6 1998).

Att. 3 to Doc. No. 145 at 4 (emphasis added).

In sum, representatives of both the Governor's office and the Attorney General's office have expressed precisely the same view of section 17(B)'s independent conditions that the Tribes have understood all along. By contrast, the only extrinsic evidence proffered by Plaintiffs in support of their interpretation of section 17(B) is an affidavit from Christopher Murray which asserts his unilateral subjective understanding of section 17(B), and excerpts from two letters

which, when viewed in context, shed no light on the parties' understanding of section 17(B)'s conditions. These pieces of extrinsic evidence in no way suffice to upend the unambiguous language of section 17(B).

3. The Murray Affidavit.

In his affidavit, Judge Murray asserts that "[i]f it had been suggested that § 17(B) would relieve the Tribes of their payment obligation based on the operation of games by the Lottery Bureau under already-existing authority, it would have been an issue of significant negotiation." Murray Affidavit, Doc No. 158, Att. 12 at ¶4. He further asserts that "representatives of the State Lottery were not involved in the negotiations because I did not believe the Compact could affect its operations." *Id*. at ¶4.

However, the existence of condition (3) as an independent prerequisite to tribal payments was far more than "suggested" by the compact negotiations. It was expressed in the plain language of the compacts that Judge Murray himself negotiated. Judge Murray's affidavit is thus no more than a disavowal of mutual assent based on his own *subjective* understandings. But "[t]he unilateral subjective intent of one party cannot control the terms of a contract. It is beyond doubt that the actual mental processes of the contracting parties are wholly irrelevant to the construction of contractual terms. Rather, the law presumes that the parties understand the import of a written contract and had the intention manifested by its terms." *Burkhardt v. Bailey*, 680 N.W.2d 453, 464 (Mich. App. 2004) (quotations omitted); see *also United Rentals*, 355 F.3d at 407; *Cochran v. Ernst & Young*, 758 F. Supp. 1548, 1554 (E.D. Mich. 1991) (rejecting party's "affidavit indicating his subjective understanding [of] the agreement," granting summary judgment on plain terms of contract, and stating that under Michigan law "[i]f a written contract exists . . . neither party may avoid the effects thereof by claiming that such effects failed to

comport with its subjective understanding of the contract language"); *Zurich Ins. Co. v. CCR and Co.*, 576 N.W. 2d 392, 395 (Mich. App. 1997).

Section 17(B) clearly provides for three independent conditions on the Tribes' payment obligations. The Compacts further clearly define the persons who may operate games triggering the termination of those obligations to include the State. *See* Doc. No. 1, Att. 5 at § 2(D). If the State had wished to carve out the Lottery from the exclusivity protections being afforded the Tribes, including, specifically, condition (3), it was incumbent upon the State, not the Tribes, to raise the issue. Hence, Plaintiffs' (and Judge Murray's) repeated mention of the fact that the Lottery was not discussed during the negotiations, *see* Pl. Br. 19, 26, and 27, works to undercut, not to buttress, Plaintiffs' position. That the State did not make an effort to exempt the Lottery from the ambit of section 17 cannot now serve as a basis for undoing the plain language of its agreement with the Tribes, any more than can Judge Murray's subjective statements of belief about Lottery officials and the significance of their absence from the negotiations.

4. The Engler and Brooks Letters.

Plaintiffs further rely on a January 29, 1997 letter from then-Governor Engler to State legislative leaders regarding the Compacts.[10] *See* Doc. No. 158, Att. 13 (Att. 1 to Gadola Affidavit). Plaintiffs describe this document as subsequent conduct that "confirms the intent that a change in law was understood as necessary to relieve the Defendant Tribes of their 8% obligation." Pl. Br. at 27. The letter confirms no such thing. Its clear purpose was to explain that the passage of Proposal E required the Governor to renegotiate and modify the Compacts,

[10] The Engler and the Brooks letters (discussed below) were submitted as attachments to the affidavit of Michael Gadola. In that affidavit, Mr. Gadola does not discuss his understanding at the time of the negotiations regarding conditions (2) and (3), but references in very brief form the two letters. As explained in the text, those letters shed no light on the interaction between section 17(B)'s conditions.

and to describe those modifications in summary fashion. The Governor nowhere purports to explain comprehensively section 17(B)'s conditions or the interplay between them. Indeed, he does not even mention condition (1) in his letter. His failure to do so surely does not eliminate that condition from the Compacts, any more than the absence of any discussion regarding condition (3) can be read to delete that provision. The Engler letter simply cannot bear the weight that Plaintiffs seek to put on it.[11]

The Plaintiffs also point to the December 28, 1998 letter from Tribal counsel William Brooks to the Interior Department for the proposition that the Tribes "also understood that their 8% Payment obligation ended only if there was a change in law." Pl. Br. at 28. Again, the letter does not stand for this proposition. As its introductory paragraph states, the letter addresses specific differences between the 1998 Compacts and the 1993 Compacts and Consent Judgment. The key language quoted by Plaintiffs appears in the context of describing "additional protections in the exclusivity language to fill gaps present in the Consent Judgment." *See* Doc. No. 158, Att. 13 (Att. 2 to Gadola Affidavit) at 8. That is clearly the focus of the Brooks discussion, which then goes on to reproduce condition (2) without reproducing conditions (1) and (3).

[11] Plaintiffs point to the fact that "[e]ven though the letter was widely circulated, the Defendant Tribes never claimed that the Governor's description of the Compacts was inaccurate[.]" Pl. Br. at 28. However, by omitting mention of condition (1), the Governor's iteration of Section 17(B) is incomplete by the terms of *Plaintiffs' own brief*, which acknowledges a binding compact as an independent and necessary condition. Pl. Br. at 17, 21. That *no one* took issue with the Governor's description makes sense only if it was understood that the Governor (as the context of the letter makes quite clear) was not attempting a comprehensive description of section 17(B)'s conditions. Any responsible legislator seeking to understand the terms of the Compacts surely would not have relied simply on the Governor's two-page communication, but would have looked to the language of the Compacts themselves.

The two paragraphs preceding the paragraph highlighted by Plaintiffs make very clear that the principal gap-filler being highlighted by Mr. Brooks' quote of condition (2) was the addition of "commercial casino games" as a component of exclusivity. Those paragraphs describe the implications of the diversifying array of interests seeking opportunities to conduct gaming in Michigan. "Against *this backdrop*," the key paragraph states:

> The Tribes also negotiated additional protections in the exclusivity language to fill gaps present in the Consent Judgment. First, the payments are 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 [.]" *Thus, the exclusivity is tied to a broader range of gaming than simply the Class III electronic games of chance*.

Id. at 8. (emphasis added). The word "Thus" and the sentence that follows it make sense only if the preceding quotation of condition (2) was set forth to highlight the addition of "commercial casino games" to the ambit of the exclusivity protection. If, as Plaintiffs assert, Mr. Brooks' quotation of condition (2) was set forth to explain that a change in State law was required to trigger termination, then "Thus" and the words that follow it would be a complete *non sequitur*.

As with Governor Engler, then, Mr. Brooks utilized a summary iteration of section 17(B)'s conditions in a letter focused on other purposes. And as with the Governor, Mr. Brooks' omission of a specific mention of condition (3) can no more be read to eliminate that condition than can his omission of a specific mention of condition (1). In the face of the plain language of the Compacts and analyses from both the Governor's office and the Attorney General's office specifically confirming the Tribes' reading of that plain language, the extrinsic evidence cited by the Plaintiffs is to no avail. This Court should hold that, under section 17(B), the lawful operation of commercial casino games by non-exempted persons terminates the Tribes' payment obligations regardless of whether that operation takes place pursuant to a change in state statutory law.

II. THE TERM "*COMMERCIAL* CASINO GAMES" PLAINLY INCLUDES CASINO GAMES OFFERED BY THE MICHIGAN LOTTERY

Plaintiffs argue that any games offered by the Lottery are inherently non-commercial, as the profits from those games go to governmental purposes. Hence, they argue that the term "commercial casino games" in section 17(B) does not extend, by definition, to Lottery offerings, including Club Keno, even if those offerings otherwise qualify as "casino games." Plaintiffs' arguments flatly contravene both the plain language of the compacts and unequivocal extrinsic evidence, and the Tribes respectfully request partial summary judgment on this issue. *Williams*, 227 F.3d at 716 n.6; *Lakian*, 188 F.3d at 407.

A. The Plain Meaning of the Term "Commercial" Refers to Activities Aimed at Generating a Profit, which is Precisely the Mandate of the Lottery.

The term "commercial" clearly encompasses casino games run by the Lottery. The term commonly is defined to refer to activities having profit as their primary aim, which is exactly the Lottery's mandate. Thus, Webster's defines "commercial" as "from the point of view of profit[,] having profit as the primary aim," Ex. 18, Webster's Third New International Dictionary ("Webster's Third") at 456.[12] The Michigan courts have construed the term "commercial" in the same fashion. *See, e.g.*, *Terrien v. Zwit*, 648 N.W.2d 602, 606-07 (Mich. 2002) ("Commercial" is commonly defined as "able or likely to yield a profit") (citing Random House Webster's College Dictionary (1991)); *Lanski v. Montealegre*, 104 N.W.2d 772, 774-75 (Mich. 1960).

Plaintiffs agree with this definition. *See* Pl. Br. at 30 ("Michigan courts have construed the term 'commercial' in a manner that makes sense in this situation: 'having profit as a primary

[12] Other dictionaries are in accord. *See, e.g.*, American Heritage Dictionary of the English Language: Fourth Edition, (2000), Ex. 19 at 1 ("[h]aving profit as a chief aim"); Black's Law Dictionary (6th ed. 1990), Ex. 20 at 270 (defining "commercial activity" as "any type of business or activity which is carried on for a profit"). Dictionary definitions are accepted as useful aids under Michigan law in determining the plain meaning of contractual language. *Cowles v. Bank West*, 719 N.W.2d 94, 112 (Mich. 2006).

aim.'"). They then claim, however, that the Lottery is a not-for-profit, and hence non-commercial, entity. *Id.* This assertion demonstrates a fundamental misunderstanding of the concept of "profit" and of the Lottery's mission.

"Profit" is commonly defined as: "the excess of returns over expenditure in a transaction or series of transactions . . . net income," Ex. 18, Webster's Third at 1811; *see also* Ex. 21, American Heritage Dictionary ("[t]he return received on a business undertaking after all operating expenses have been met."); *Swaney v. Derragon*, 274 N.W. 741, 741 (Mich. 1937) ("Profits are usually defined as the net gain made from an investment or from the prosecution of some business after payment of all expenses incurred.").

The very mission of the Lottery is to maximize profit or net income. Thus, the Lottery's enabling act (the McCauley-Traxler-Law-Bowman-McNeely Lottery Act, MCL § 432.1 *et seq.*) provides:

> The commissioner shall initiate, establish, and operate a state lottery at the earliest feasible and practicable time. *The lottery shall produce the maximum amount of net revenues for the state* consonant with the general welfare of the people.

Id. at § 432.9(1) (emphasis added). *As a matter of its own organic law*, then, the Lottery is charged with generating the greatest amount of "net revenues" for the State – that is, with maximizing the excess of returns over expenditures – which is to maximize "profits."

The Lottery itself has emphasized this point:

> The Michigan Lottery, unlike any other state agency in Michigan, operates as a retail and marketing organization. The Bureau's mission is unique – to maximize profits for public education in Michigan. Therefore, the Lottery must compete in the marketplace for the consumers' discretionary dollar and must remain sensitive to the needs and interests of its players.

Ex. 22, 1992 Annual Report at 11. That the Lottery's profits are then used to fund public purposes does not somehow convert them into something other than profits, or the Lottery into a non-profit entity, *see* Pl. Br. at 30, any more than a company like Newman's Own would be

deemed not to make profits, or to be non-commercial, because it donates one hundred percent of the profits from the sale of its many products to charitable purposes. *See* Ex. 23 ("Paul Newman and the Newman's Own Foundation donate all profits and royalties after taxes for educational and charitable purposes.")

The inescapable fact is that if the Lottery were to cease maximizing its net income or profits it would be in violation of its own statutory mandate. Indeed, the Lottery Act accords the Lottery broad flexibility precisely so that it may maximize net revenues, allowing the Lottery considerable discretion in entering into contracts for its "operation" and "promotion." *See* Ex. 24, Lottery Overview of 1974 at 8 ("The Lottery Act was well written, providing flexibility and direct, central responsibility and administration, *allowing the Bureau to operate as a 'business.'*") (emphasis added). There can be no doubt, then, that the Lottery is a commercial entity.[13]

The Lottery's commercial purpose and flexibility contrast sharply with the character of charitable gaming in Michigan, which is governed by the Traxler-McCauley-Law-Bowman Bingo Act. MCL § 432.101, *et seq*. ("Bingo Act"). The Lottery Act and the Bingo Act were

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[13] Where a contract includes terms used in a specific industry, courts may look to the standards and practices of that industry in discerning the meaning of those terms. *City of Wyandotte v. Consol. Rail Corp.*, 262 F.3d 581, 586 (6th Cir. 2001). Consistent with the ordinary meaning of the term, the gaming industry treats state lotteries as "commercial" entities. For example, in *The Business of Risk: Commercial Gambling in Mainstream America*, state lotteries are described as:

> the purest example of . . . the "economic imperative" in the evolution of commercial gambling—the tendency for the revenue and economic purposes of gambling legalizations to dominate all other considerations. [footnote omitted] In obedience to the revenue imperative there began a still-continuing series of State-initiated changes in the structural characteristics of lottery games that have made these lotteries competitive in nearly all segments of the market, and currently perhaps *the most aggressive form of commercial gambling in America*.

Ex. 25 at 57 (emphasis added). *See also* Ex. 26, *Building the Future of the Minnesota State Lottery*, 2004 Report to Minnesota Governor at 19 ("The Lottery is a business draped in government clothing").

enacted by the legislature together just after the Michigan Constitution was amended to permit lotteries. Both acts are implemented by the Lottery Commissioner.[14] However, whereas the Lottery Act at its inception contained the express legislative mandate that the Lottery produce the maximum amount of net revenues for the state, the Bingo Act at its inception required the commissioner to ensure that games operated under the Bingo Act "shall be consistent with the with the legislative objective that [the games] be conducted in a friendly, social, and *noncommercial* manner." MCL § 432.113(3) (1999) (emphasis added).[15]

Consistent with that legislative objective, the Bingo Act is replete with limits that ensure the games operated pursuant to it are conducted in a noncommercial manner. Only an organization organized "not for pecuniary profit" is eligible for a license to conduct gaming under the Act. *Id*. at § 432.103 (1)-(10). Expenditures by and compensation of participants is strictly limited, *id*. at § 432.109-110, § 432.110a(e), as are the frequency and duration of events (*e.g*.., an organization may conduct only four millionaire party events per year). *Id*. at § 432.110b(1) and § 432.105.

That these two very different types of state-sanctioned gaming, one clearly "for profit" and one clearly not, formed the backdrop of the compact negotiations belies Plaintiffs' claim that the term "commercial" was intended to exempt the Lottery and its revenue-maximizing activities from the exclusivity protections being afforded the Tribes in section 17(B). In contrast to the charitable gaming authorized under the Bingo Act, the Lottery exists to "produce the maximum

[14] Games operated under the Bingo Act are not "state lottery games" and are not operated by the Michigan Bureau of State Lottery. 2006 Mich. OAG No. 7190, 2006 WL 690823 (Mich.A.G.).
[15] This language appeared in the Bingo Act from 1973 until 1999, at which time MCL § 432.113 was simplified to one sentence, providing for the promulgation of rules pursuant to the Administrative Procedures Act.

amount of net revenues for the state" and, as a result, clearly satisfies the ordinary definition of the term "commercial."

In the *United States v. Dakota* litigation, *see* 666 F.Supp. 989 (W.D. Mich. 1985) (Miles, J.), *aff'd* 796 F.2d 186 (6th Cir. 1986), this Court and the Sixth Circuit drew this very type of distinction between commercial and non-commercial gaming in Michigan. There, a tribe had issued a license to tribal members to operate a private casino on tribal lands. In enjoining the operation as violating Michigan's then-existing prohibition on commercial gambling, both this Court and the Sixth Circuit identified the casino games authorized under the Millionaire Party provision of the Bingo Act as exemplars of non-commercial casino gaming in Michigan:

> Defendants' argument that the Michigan statutory scheme does not draw a distinction between commercial and noncommercial casino gambling is without merit. Defendants make much of the fact that Michigan allows "qualified organizations" to conduct "millionaire parties" at which wagers are placed upon games of chance customarily associated with a gambling casino[.] However, Michigan only permits such games to be conducted in a noncommercial manner.

Dakota, 796 F.2d at 189 (citing MCL § 432.113(3) (Supp. 1986)).

In so doing, this Court elaborated on the elements that accounted for the noncommercial character of the Millionaire Party casino games:

> The Millionaire Party Act authorizes the same games [that are authorized in Las Vegas and at the Dakotas' casino], but it limits the amount of winnings on a single game or in a single evening; it prohibits the operation of games by non-members of the charity, and it limits compensation for those running the games. With these limitations, the games take on a very different characteristic from the games played in Las Vegas[.] The limitations are part and parcel of the activity. They cannot be separated. . . . Gambling without these safeguards is against the public policy of the state. Michigan regulates non-commercial casino gambling. It prohibits commercial casino gambling.

Dakota, 666 F.Supp. at 999. The games offered by the Michigan Lottery, including Club Keno, share none of these characteristics. Thus, Club Keno patrons may place wagers every five minutes between 6:05 a.m. to 1:45 a.m., for as many days as they wish. *See* Att. 3 to Doc. No.

70. There is no ceiling on those total wagers or on their winnings. *Id.* The game's operators, as discussed below, are for-profit entities whose unlimited compensation is based on commissions. *See infra* at 43-44. As such, the game tracks the elements that this Court emphasized in finding that the Dakotas' casino was a commercial gaming enterprise then prohibited under Michigan law:

> The differences between the Dakotas' gambling operations and games authorized by the Millionaire Party Act are neither minimal nor inconsequential. The [Tribe's] regulations and the Dakotas' operation . . . do not restrict the number of occasions [per year] upon which gambling activities may be conducted; do not restrict the scope or content of advertising of the licensed activity; do not limit the individual's winnings or the aggregate winnings to be paid out in a 24-hour period; do not impose restrictions on the work force to members of the tribe; and do not restrict the compensation which may be paid to those who operate the gambling activities. These activities are in direct contravention of Michigan prohibitory law.

Dakota, F. Supp at 999-1000. Thus, *Dakota* strongly reinforces the Tribes' position—grounded in the widely accepted definition of the term—that the games offered by the Lottery are "commercial."[16]

The Sixth Circuit, indeed, has treated as self-evident the fact that a state lottery is a "commercial enterprise." In *U.S. v. Laton,* 352 F.3d 286, 293 (6th Cir. 2003), the Circuit held that the interstate commerce element of the federal anti-arson statute was met in a prosecution arising from the burning of a town's fire station. In so holding, the Circuit explained: "The reality that the core functions of government are not exclusive of interstate commerce does not only hold true when a government operates a *commercial enterprise, such as a post office,*

[16] Plaintiffs cite this Court's decision as supporting their position that the Lottery by definition cannot conduct "commercial" games because, in the course of its opinion, this Court noted a distinction between gaming conducted strictly for private profit and gaming where "the profits received were to be invested for the betterment of the Indian communities." *Dakota,* 666 F. Supp at 1000. But this distinction was far from central to the dichotomy identified by the Court between "commercial" and "non-commercial" gaming. At the heart of that distinction was the panoply of stringent restrictions the Court discussed as existing with respect to charitable gaming —restrictions that were "part and parcel of the [gaming activity.]" *Id.* at 999.

lottery, or liquor store . . . . [but when] government institutions . . . provide core public services." *Id.* at 294 (emphasis added). Consistent with the accepted definition of the term "commercial," then, the Sixth Circuit gave clear recognition to the fact that governments can run profit-making businesses such as lotteries, and that when they do so there is no doubt that those enterprises are "commercial" in nature. [17]

B. The LTBB Amendment Confirms that Lottery Games Can Qualify as Commercial Casino Games.

The July 2003 LTBB amendment added the following italicized language to section 17(B): so long as "no other person . . . lawfully operates electronic games of chance or commercial casino games, *including expansion of lottery games beyond that allowable under State law on the date of the execution of this document by the Tribe and State*, the Tribe shall make payments to the State[.]" Doc. No. 1, Att. 5 at § 17(B). This language clearly confirms that the compacting parties did not understand lottery games to be *per se* non-commercial.

As used in the amended section 17(B), the term "including" plainly indicates that the particular class of lottery games that follows it is a subset of the larger class of electronic games of chance or commercial casino games that precedes it. *See Chickasaw Nation v. U.S.*, 534 U.S. 84, (2001) ("To 'include' is to 'contain'"); *Davidson v. Hare*, 87 N.W.2d 131, 133 (1957) ("We

[17] Consistent with *Dakota* and *Laton*, the federal courts have treated state lotteries as commercial enterprises in a variety of settings. Thus, for First Amendment purposes, state lottery advertising has been deemed "commercial speech" subject to lesser protections than other types of constitutionally guaranteed expression. *U.S. v. Edge Broadcasting Co.*, 509 U.S. 418, 426 (1993); *cf. Bd. of Tr. of State Univ. of New York v. Fox*, 492 U.S. 469, 473-74 (1989) (commercial speech is speech that "propose[s] a commercial transaction"); *Greater New Orleans Broad. Ass'n, Inc. v. U.S.*, 527 U.S. 173, 184-96 (1999) (applying same test as applied in *Edge* to restriction on advertising for commercial gambling casinos). In the dormant Commerce Clause context, state lotteries have likewise been described as commercial entities. In *Chance Mgmt., Inc. v. South Dakota*, 97 F.3d 1107, 1110-11 (8th Cir. 1996), for example, the Eighth Circuit held that the South Dakota Lottery is a "market participant" that is "actively running a business in the gaming market."

cannot deny to the word 'including' its natural meaning. It connotes the idea that the items . . . immediately thereafter enumerated are included within the meaning of the preceding definition."); *see* Ex. 18, Webster's Third at 1143 (2002)(defining "include" as "to place, list, or rate as a part or component of a whole or of a larger group [or] class"). Accordingly, the parties clearly understood in agreeing to the Amendment that far from being inherently non-commercial, lottery games can fall within the ambit of "commercial casino games" for purposes of section 17(B) if they otherwise satisfy the requirements of that term (*i.e.*, if they are casino games).

The Plaintiffs have unequivocally asserted that the amended language of section 17(B) "reflected the intent and understanding of the parties when they executed the 1998 [Compacts]." Amended Complaint (Doc. No. 37) at ¶76. The States' sole negotiator of the Amendment likewise made very clear in his testimony that he did not understand the added language in section 17(B) to change the meaning of the original compacts or to increase the scope of the Tribes' exclusivity protection.

Q: You did not view that language as being a concession being made by the state?

A: No.

Q: You didn't view it as altering the original compacts?

A: No.

Ex. 4, Wernet Dep. at 42:15-19. The Amendment amply confirms, then, that for purposes of both the LTBB Compact and the 1998 LRB Compact, the term "commercial" should be construed according to its well-accepted meaning, and hence squarely applies to games offered by the Lottery.

C. Undisputed Testimony Confirms that the Term "Commercial" was not Meant to Exempt the State Lottery from the Purview of the Non-Payment Conditions.

The plain language of the Compacts decisively refutes Plaintiffs' claim that Lottery games are inherently non-commercial and renders partial summary judgment for the Tribes appropriate on this issue. *United Rentals*, 355 F.3d at 406; *Wonderland Shopping*, 274 F.3d at 1092; *Rory*, 703 N.W.2d at 30. Should this Court go beyond the plain language to examine evidence of the parties' intent, that evidence fully supports the Tribes' reading of the term "commercial." Both State and Tribal representatives agreed in their deposition testimony that they understood the term to exempt charitable casino gaming from the scope of the Tribes' exclusivity protection, rather than to give the State carte blanche to introduce casino games through the Lottery while still demanding payments from the Tribes.

Thus, Tribal negotiator Peter Ellsworth testified that during the negotiations he explained to the State representatives the meaning of the term "commercial" (the Tribes having authored the "commercial casino games" language, *see* Ex. 27, Gips Dep. at 53:24-54:5) as follows:

> [C]ommercial casino gaming means the types of games that are played in casinos, commercial means other than as under the authority of the Charitable Gaming Act. Now basically the commercial casino gaming would mean casino games that are being played other than by qualified organizations that were licensed, and so forth, by the Bureau of Lottery to conduct charitable gaming.

Ex. 28, Ellsworth Dep. at 75:17-76:4. *See also* Ex. 29, Brooks Dep. at 22:8-18, 49:9-50:21.

Michael Gadola has testified in his deposition that he agreed with Mr. Ellsworth's understanding "that the use of the term commercial in the compact. . . was meant to exempt out charitable gaming from the promise of exclusivity being made to the tribes[.]" Ex. 2, Gadola Dep. at 136:12-19. Mr. Gadola further testified that he understood in the mid-1990s that: "there were significant limitations of the type Mr. Roberts has catalogued here imposed upon charitable

gaming, including limitations regarding prize and wager amounts and the hours of operation"; "the net effect of those regulations was to ensure that charitable gaming was conducted in a friendly, social, and noncommercial manner"; "the significant limitations imposed on charitable gaming distinguished it from other forms of gaming within the state"; and that those limitations "[c]ertainly distinguished it from the noncharitable gaming side of the State Lottery." *Id*. at 134:11-136:11.[18] The testimony of the compact negotiators, then, is fully consistent with the accepted meaning of the term "commercial," and compels rejection of Plaintiffs' sweeping and ahistorical claim that all Lottery games are inherently non-commercial and hence exempt from the scope of the "commercial casino games" protection.

D. The Active Participation of Commercial Entities in Operating and Offering Club Keno Renders it a "Commercial Casino Game" Regardless of the Lottery's Status.

Even if this Court agrees with the Plaintiffs that the Lottery is inherently non-commercial, that would not render Club Keno a non-commercial game. This is so for two independent but related reasons. First, the Compacts provide that the Tribes shall make payments so long as "no other person . . . within the State lawfully operates . . . commercial casino games." The undisputed testimony in this case establishes that the Lottery's vendor, the GTECH Corporation, which is decidedly a commercial entity, "operates" Club Keno, bringing the game squarely within the purview of section 17(B)'s third condition regardless of the Lottery's status.

The plain meaning of the term "operate" is "to cause to function . . . to manage, and put or keep in operation," Ex. 18, Webster's Third at 1580-81; *see also* Ex. 30, American Heritage

[18] Again, the State's other negotiator witness, Christopher Murray, has disclaimed any recollection of what the parties intended by their use of the term "commercial casino games," or of how he understood the term at the time. Ex. 3, Murray Dep. at 86:6-9, 90:8-17.

Dictionary of the English Language: Fourth Edition, 2000 ("[t]o control the functioning of; run . . . [t]o conduct the affairs of; manage"), and the negotiators used the term consistent with its common meaning. Michael Gadola understood the term to mean "[o]ffers to the public," "[r]uns a game," "[m]anages the game," Ex. 2, Gadola Dep. at 138:16-24, and Christopher Murray likewise testified that it meant that someone was "offering [games] to be played by people," "running the games." Ex. 3, Murray Dep. at 105:10-20.

Under these standard definitions of "operate," it is apparent that GTECH "operates" Club Keno, and both GTECH and State Lottery officials testified unequivocally to this effect in their depositions. Mark Kanik, GTECH's operations manager in Michigan, testified that there are two basic types of contracts GTECH enters into with state lotteries: "product sales contracts," under which "the government lottery acquires [the] lottery system from GTECH. . .[a]nd then operates the system itself," and "facilities management contracts," under which "GTECH constructs and installs a lottery system, retains ownership of that system, and then operates lottery games for the government lottery on that system." Ex. 31, Kanik Dep. at 26:4-8, 25:10-26:3. GTECH's contract with Michigan is a "facilities management contract." Accordingly, Mr. Kanik testified that GTECH "has constructed a lottery system for the Michigan lottery . . . installed that lottery system . . . [and] retained the ownership [of it]." *Id*. at 26:21-27:5. He then further testified that *"GTECH operates various online games for the Michigan Lottery on that system,"* and that *"one of those online games [is] the Club Keno game*." *Id*. at 27:6-10 (emphasis added).

Mr. Kanik elaborated in detail on the various elements involved in GTECH's operation of Club Keno. In brief, GTECH installs and services all elements of the Club Keno technology (except the communications infrastructure) found in Club Keno bars and restaurants, including a terminal, a graphics storage device, and the Club Keno monitor. GTECH runs the game from its

Michigan headquarters in Lansing, where it hosts the computer system for the game and runs its random number generator. Ex. 31, Kanik Dep. at 28:17-37:6, 13:20-24. GTECH also provides training for the bars and restaurants that offer the game, *id.* at 41:10-42:12; updates all operations and service manuals, *id.* at 42:13-17; and runs the GTECH hotline, which receives repair requests, dispatches GTECH technicians, and tracks their activities. *Id.* at 44:13-45:6. It is not surprising, then, that the Lottery's former Deputy Commissioner of Administration, Scott Matteson, agreed that GTECH "operates" Club Keno, as it has "princip[al] responsibility for the day-to-day management and running of the Club Keno game." Ex. 5, Matteson Dep. at 14:13-25; 21:23-22:6. Accordingly, a commercial entity very decidedly is operating Club Keno in Michigan, rendering it a commercial game regardless of the Lottery's status.

Second, even if one accepts that it is the Lottery that operates Club Keno, and that the Lottery is not a commercial enterprise (both incorrect premises based on the above analysis), it does not follow that Club Keno is not a "commercial casino game" within the meaning of the Compact. To the contrary, both GTECH and the Club Keno bars and restaurants actively participate in offering the game to the public, and profit handsomely from their involvement with it. Their heavy participation in the game again renders it "commercial" regardless of the Lottery's status.

Naturally, both GTECH and the Club Keno bars and restaurants—private, for-profit corporations—are in the Club Keno business "from the point of view of profit: having profit as the primary aim." Ex. 18, Webster's Third at 456. In fact, the Lottery requires that each Club Keno retailer be "established as a for-profit business not merely for the sale of Lottery tickets." Ex. 32, Bureau of State Lottery Retailer Directive No. 9 at 3 (5a. incorporating 4d.). The most recent Annual Report of the Michigan Lottery details that Club Keno revenues were

$332,356,000 in 2005. Doc. No. 70, Att. 4 at 13. GTECH and the retailers combined received a minimum of $26 million in revenue (based on their 8% total commissions) from their involvement in the game. Consistent with these numbers, the Lottery and GTECH have always promoted Club Keno to retailers as a profit-making product, pure and simple:

> Your profit is built right into the game. And the potential is unlimited. With Club Keno, you earn 6% sales commission on all tickets sold, plus 2% cashing bonus on winning tickets up to $600, plus 2% bonus commission on any winning ticket of $601 to $100,000 sold in your location and redeemed by the lottery. It adds up fast!

Watch Your Business Grow, Doc No. 70, Att. 10.

> Looking for some specific reasons about how being a Club Keno retailer can benefit you? How about money in your pocket? Estimated Club Keno commissions paid to retailers in 2003 were $19 million! That's an average of $10,550 per year, per individual retailer! …Clearly, Club Games are a winner for Michigan bar and restaurant owners.

Ex. 33, *Club Games Huge Success in First Year* at 1. There is accordingly no question, judging both from the profits earned and from these descriptions, that Club Keno is very much a "commercial casino game," the operation of which terminated the Tribes' payment obligations.[19]

[19] The 2002 memorandum discussed above from counsel Lance Boldrey to Governor Engler anticipated precisely this conclusion. In that memorandum, Mr. Boldrey explained that keno "would need to be something other than 'commercial' to avoid ending the MSF [revenue-sharing] payments," and warned:

> To best avoid triggering the termination of tribal 8% payments, the games should also be authorized in such a manner that they are not "commercial" in nature. If the Lottery Bureau is the operator of the games and the [race] tracks receive only a fee or rent, it could be argued that the games are "governmental" or "charitable" rather than "commercial." *The more the tracks received, however, the less persuasive this argument would be*.

Ex. 16 at 5-6 (emphasis added).

E. The Tax Agreements Do Not Undermine the Plain Language of the Compacts or the Unequivocal Extrinsic Evidence Relating to Them.

Plaintiffs argue that the characterization of tribal gaming as a "governmental function" in the Tribes' respective 2002 Tax Agreements with the State supports the notion that the compact term "commercial casino games" was not intended to include casino games offered by the Lottery. Pl. Br. at 30-32. By Plaintiffs' reasoning, if the Tax Agreements treat tribal gaming as a "governmental function," then the Lottery's gaming should be treated as "non-commercial." But the Tax Agreements cannot and do not operate to undercut the plain meaning of the Compacts at issue here.

First, the Tax Agreements are inadmissible in connection with Plaintiffs' instant motion. *See Smoot v. United Transp. Union*, 246 F.3d 633, 649 (6th Cir. 2001) ("[I]t is well settled that only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment.") (quotations omitted). Plaintiffs purport to offer the Agreements as "subsequent conduct" of the parties which is relevant to the interpretation of the Compact. Pl. Br. at 32, n.23. But Plaintiffs' understanding of the doctrine of "subsequent conduct" is entirely mistaken. The doctrine pertains to, and admits as relevant, evidence of subsequent conduct interpreting or in performance of *the contract at issue*, not conduct unrelated to that contract.[20]

Clearly, the Tax Agreements, while literally "subsequent" to the Compacts, do not constitute performance under the Compacts, and do not evidence the parties' subsequent

[20] *See, e.g., McLouth Steel Corp. v. Jewell Coal & Coke Co.*, 570 F.2d 594, 603 (6th Cir. 1978) (where a contract is ambiguous, Michigan law permits courts to consider "evidence pertaining to [the parties'] contemporaneous and subsequent expressions and actions *interpreting the document*") (emphasis added); *Terry Barr Sales Agency, Inc. v. All-Lock Co.*, 96 F.3d 174, 180 (6th Cir. 1996)(same with respect to "course of conduct *under the contract*")(citing *Ford Motor Co. v. Northbrook Ins. Co.*, 838 F.2d 829, 832 (6th Cir. 1998) and *Detroit Greyhound Employees Fed. Credit Union v. Aetna Life Ins. Co.*, 167 N.W.2d 274, 275-76 (Mich. 1979)(same with respect to parties' conduct in "*carrying it* [the contract] *into effect*")).

interpretation of those Compacts. Instead, they were the product of an independent set of hard-fought, unrelated negotiations between the State and *all twelve* of Michigan's federally recognized Tribes, most of whom have nothing to do with the Compacts at issue here. As such, the Tax Agreements do not bear on the parties' intent *in the context of their own agreement*, a rule of interpretation upon which Plaintiffs themselves rely elsewhere in their brief. Pl. Br. at 23. Accordingly, the Tax Agreements are inadmissible and should not be considered here.

Even were the Court to examine the Tax Agreements, they fall far short of contravening the plain meaning of the Compact language and the unequivocal testimony regarding the intent behind that language. The Agreements provide a tax exemption in connection with certain governmental functions, but only where that exemption inures solely to the benefit of a tribe or entities "wholly owned" by a tribe. Ex. 34 at II.J, M; III.A.1. In the case of Club Keno, however, not only the State but private entities including GTECH and the retailers participate in and benefit from the game. Accordingly, the Tax Agreements are not only inadmissible but are inapposite.

The plain language of the Compacts and the unequivocal testimony of the Compact negotiators compel the rejection of Plaintiffs' argument that Club Keno is inherently a non-commercial game. The Tribes respectfully request partial summary judgment on this issue.

III. SECTION 17(B) CLEARLY PROMISES THE TRIBES PROTECTION FROM THE OPERATION OF COMMERCIAL CASINO GAMES REGARDLESS OF VENUE

Plaintiffs' final argument in support of summary judgment is that because Club Keno is not found within the four walls of a traditional casino, its operation does not fall within the ambit of section 17(B)'s payment conditions. This argument is again undercut by the plain language of section 17(B), which provides that the operation of "commercial casino *games*," not simply of

commercial *casinos*, terminates the Tribes' payment obligations. The argument suffers even further at the hands of the LTBB Amendment which, as discussed above, makes it patently clear that commercial casino games can include games offered by the Lottery, again without regard to location. Because the Compact language unambiguously refutes Plaintiffs' venue-based argument, the Tribes are entitled to partial summary judgment on this issue. *Lakian*, 188 F.3d at 407; *Markva v. Haveman*, 168 F. Supp. at 706-07.

Once again, the extrinsic evidence, should this Court choose to examine it, confirms the plain meaning of the Compacts. The negotiators testified without contradiction that they understood that casino games could be located within *or without* the four walls of a traditional casino, and that they intended the operation of commercial casino games to trigger the termination of the Tribes' payment obligations regardless of whether those games were being operated at traditional casinos or in other venues such as bars, restaurants, and racetracks. Michael Gadola again indicated his full assent to the tribal negotiators' understandings in this regard:

> Q: [W]e discussed this morning the fact that you understood in this time period that casino games could be played within a traditional stand-alone casino or in other venues, correct?
>
> A: Yes.
>
> Q: I take it then that you shared in Mr. Ellsworth's understanding . . . that under the commercial casino games language, if others within the state, and let's talk about private entities first, private entities began to operate commercial casino games, the tribes' payment obligations would expire regardless of whether they were operating those games within a stand-alone casino or in another venue?
>
> A: Yes.

Ex. 2, Gadola Dep. at 132:8-133:1; *see also id*. at 60:18-61:5. Judge Murray, while generally disclaiming any recollection as to his understanding of the term "commercial casino games" in

1995, likewise testified that he understood that casino games could be offered either within stand-alone casinos or at other venues. Ex. 3, Murray Dep. at 83:23-84:9; *see also id*. at 42:8-43:7; Doc. No. 154, Att. 1, Ettawageshik Dep. at 159:7-160:7; Ex. 28, Ellsworth Dep. at 72:21-73:21.

Plaintiffs assert that the Tribal negotiators' understanding of the commercial casino games language "was never brought to the attention of the State negotiators." Pl. Br. at 26. Plaintiffs cite the Gips and Brooks testimony in support of this remarkable assertion. *Id*. However, Mr. Gips and Mr. Brooks simply testified that they could not recall, eleven years after the fact, specific discussions regarding the meaning of the language. Ex. 27, Gips Dep. at 71:4-12; 66:24-67:5; 68:19-71:19; Ex. 29, Brooks Dep. at 26:14-27:11. Peter Ellsworth, meanwhile, expressly testified that he shared his understanding of the commercial casino games clause with the State negotiators and that no one demurred at his explanation. *See supra* at 39; Ex. 28, Ellsworth Dep. at 75:17-76:4. Michael Gadola described Mr. Ellsworth as a man of "absolute integrity," Ex. 2, Gadola Dep. at 7:17-21, and it is inexcusable for Plaintiffs to ignore Mr. Ellsworth's testimony in making their representations to this Court. Pl. Br. at 26. Even more fundamentally, Plaintiffs' suggestion is irrelevant when it comes to the question whether the clause was directed only at stand-alone casinos or instead at the operation of commercial casino games regardless of location – as demonstrated above, the understanding of the State and the Tribal representatives was uniform in this regard and is fully consistent with the plain meaning of the clause.

Nothing about the context in which the Compacts were negotiated undercuts the plain meaning of the Compact language or the uniform testimony of the negotiators. In positing the efforts to bring casinos to Detroit as the only relevant gaming development in Michigan in the

mid-1990s, *see* Pl. Br. at 24-25, Plaintiffs again ignore critical elements of the factual record in this case. That record demonstrates unequivocally that concerns regarding the proliferation of gaming in Michigan at the time of the compact negotiations extended not only to traditional casinos but just as forcefully to casino gaming in other venues. Not only did the Tribal negotiators testify at length about those concerns in their depositions, *see, e.g.,* Ex. 29, Brooks Dep. at 23:4-17, 36:12-38:8, 46:5-49:2, 49:9-50:4, but they made express reference to them in the letter they wrote to the Secretary of Interior urging approval of the Compacts and describing the protection against gaming competition that section 17(B) would afford them:

> The entire political climate under which these Tribes' compacts were negotiated involved factions in the State Legislature concerned with conflicting goals which included: (1) preventing further expansion of gaming in Michigan; (2) protecting Detroit's future gaming market and, (3) *interests seeking to extend the economic opportunities presented by casino gaming to other economically depressed areas of the State and economic sectors such as horse/harness track owners, tavern owners and bowling alleys.*

Doc No. 158, Att. 13 (Att. 2 to Gadola Affidavit) at 8 (emphasis added).[21]

[21] Remarkably, Plaintiffs suggest that this letter confirms that the Tribes understood the commercial casino games language to refer only to stand-alone casinos. Pl. Br. at 29. Plaintiffs' assertion simply cannot be squared with the quoted language, which Plaintiffs nowhere acknowledge in their brief.

Plaintiffs' desperation to find some extrinsic evidence supporting their revision of section 17(B) is also amply illustrated by their heavy reliance on the June 6, 1995 facsimile cover sheet authored by Tribal negotiator Rob Gips. Doc. No. 158, Att. 3. In that *cover sheet*, which by its nature could not purport to be comprehesive, Mr. Gips described the genesis of the commercial casino games language in the context of Connecticut compact negotiations as being related to a proposal in that State to introduce a table-games only casino. Mr. Gips did not state, however, that this was the only purpose of the language. At his deposition, Mr. Gips testified that the commercial casino games language in Connecticut was meant to "prohibit…any kind of games that would be customarily found in a casino." Ex. 27, Gips Dep. at 81:1-20. Mr. Gips was abruptly cut off in several attempts to explain the broader context in which the "commercial casino games" language arose in the 1995 negotiations in Michigan. Plaintiffs' counsel rebuffed the insistence by counsel for the Tribes that Mr. Gips be allowed to finish his answer. *See, e.g., id*. at 65:20-67:20. Hence, Mr. Gips has provided that explanation in a Declaration. *See* Ex. 35, Decl.

Once again, Michael Gadola concurred with the Tribal negotiators "that there were factions in the legislature interested in extending casino gaming to depressed areas of the state and economic sectors such as horse/harness track owners, tavern owners and bowling alleys," Ex. 2, Gadola Dep. at 143:2-6, and that the Tribes "would have been right to be concerned about potential competition" from a wide variety of entities and groups in the mid-1990s. *Id*. at 84:1-15.

Official reports from the time likewise document the widespread recognition that casino games might be offered in Michigan outside the four walls of a traditional casino. For example, in 1994, Governor Engler charged a Blue Ribbon Commission on Michigan Gaming with formulating recommendations on a series of gaming related issues including:

> Whether the state's pari-mutuel horse racing tracks need to have the ability to offer electronic computerized games of chance (video gaming terminals and video slot machines) *and/or other forms of casino gaming* in conjunction with pari-mutuel wagering on horse race results, in order to compete against existing and future casinos in and around the state and in order to continue in business.

Ex. 36 at 6 (emphasis added). The Commission responded that the racetracks "should not be given the ability to offer electronic computerized games of chance. . . and/or other forms of casino gaming…." *Id.* Consistent with this recommendation, Governor Engler opposed the expansion of casino games into other venues, and section 17(B) was intended by both the State and the Tribes to serve as a disincentive to such expansion:

> The tribes wanted a broad reference that pulled in basically any proliferation of gaming outside of the charitable gaming kind of context. That was very consistent with what Governor Engler's representatives had been told to do. Governor Engler wanted the same kind of broad anti-proliferation provision. He wanted it and the state's people told me this, that he wanted to have – he wanted to build into these compacts a disincentive for the legislature or anybody else, you know, to authorize or engage in casino style or electronic gaming.

Ex. 28, Ellsworth Dep. at 125:13-126:6.

In sum, then, section 17(B) explicitly hinges the termination of the Tribes' payment obligations on the operation by others of commercial casino games, regardless of whether those games are offered in traditional casinos. Consistent with this plain language, the compact negotiators uniformly understood that casino games could be offered in a variety of locations and intended section 17(B) to protect the Tribes against such proliferation. The Tribes accordingly request partial summary judgment rejecting Plaintiffs' claim that only the operation of stand-alone casinos can terminate the Tribes' payment obligations.

CONCLUSION

For the foregoing reasons, the Tribes respectfully request partial summary judgment on the three issues raised by Plaintiffs in their Motion. If the Court so rules, the only issue remaining for trial will be the question whether Club Keno is a "casino game" as that term is used in the Compacts. While the Tribes view this as inherently a factual issue, and hence chose not to move for summary judgment, they firmly believe that at trial they will be able to adduce facts, including those discussed in the Statement of Facts above, demonstrating unequivocally that Club Keno is indeed a casino game, such that they were fully justified in terminating their payments under the Compacts.

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Respectfully submitted,

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