UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

FLANDREAU SANTEE SIOUX TRIBE, a federally-recognized tribe,	)	**Civil No. 07-4040**
Plaintiff,	)	
v.	)	**PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR ENTRY OF PROTECTIVE ORDER**
STATE OF SOUTH DAKOTA,	)	
Defendant.	)	

INTRODUCTION

COMES NOW the Plaintiff Flandreau Santee Sioux Tribe ("Tribe") and, pursuant to Fed. R. Civ. P. 26(c)(1) and D.S.D. Civ. LR 37.1, and files this Reply to the State's Resistance to Plaintiff's Motion for Entry of Protective Order. The Tribe has asked the Court to enter a protective order to prevent the Tribe from having to respond to an overly broad, unduly burdensome and procedurally deficient Fed. R. Civ. P. 30(b)(6) Notice of Deposition Duces Tecum ("Notice") (Doc. 171)[1], which seeks information that is outside of the scope of permissible discovery.

The sole cause of action before the Court in this case is the Tribe's claim that the State failed to negotiate a Tribal-State Gaming Compact in good faith accordance with the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2710.[2] While the Tribe does not agree with the

[1] "Doc." refers to the docket sheet number assigned to a particular filing in this case.

[2] The State has asserted that the Tribe "in its motion, alleges that the sole issue in its complaint is whether or not the State improperly applied its policy of limited gaming to the Tribe." (Doc. 186, p.14.) State's assertion is not entirely accurate as the Tribe actually stated in its Motion that "[t]he Tribe's sole remaining claim in this case is that the State has failed to negotiate in good

State's recitation of the parties' negotiations (*see* Doc. 186, pp.2-3, 7-9)[3] and its characterization of what it asserts are the State's "concessions" (*id.* p.3), those issues are not pertinent to the discovery dispute before the Court, and the Tribe will address them at the appropriate juncture.

DISCOVERY DISPUTE

This discovery dispute arises out of the State's Notice of Deposition Duces Tecum (Doc. 171), for which the Tribe has moved for a protective order forbidding inquiry into and disclosure of certain information; requiring that commercial information not be revealed; and/or limiting the scope of disclosure or discovery to certain matters. *See* Fed. R. Civ. P. 26(c)(1). The Tribe has asserted that good cause exists for issuance of a protective order because the Notice is overly broad, unduly burdensome and oppressive, procedurally defective (as the Notice is not stated with reasonable particularity), and seeks private, commercially sensitive information, which is wholly unrelated to the permissible subjects of negotiation under IGRA.

In its Brief in Resistance to the Tribe's Motion for Protective Order (Doc. 186), the State misleadingly asserts that it requested the Tribe to respond "to four narrowly defined topics [sic] to provide a deponent to address each of the four issues." (Doc. 186, p.11.) Even a cursory review of the Notice reveals that it is not limited to "four narrowly defined topics," as the State asserts (Doc. 186, p.11.), as follows:

I. Complaint:

1. The factual basis for complaint filed March 16, 2007;

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faith for a Tribal-State class III gaming compact and the State has thereby violated 25 U.S.C. § 2710(d)(3)(A) of the Indian Gaming Regulatory Act of 1988 ("IGRA")." (Doc. 179, p.2.) The Tribe also stated that it disputes that the State applies a policy of limited gaming to state-licensed, non-tribal gaming, and that the State has only applied limited gaming to Indian tribes in general and the Flandreau Santee Sioux Tribe in particular. (Doc. 179, p.11.)

[3] The reference to "p. or pp." is to the submitting party's pagination.

II. Compact Negotiations:

1. The Tribe's intent, position and goals for negotiation during the following negotiation sessions: September 30, 2005; June 20, 2006; July 26, 2006; August 23, 2005; September 8, 2006; and January 11, 2007.

2. An explanation regarding each of the Tribe's gaming proposals, including related documentation, for inclusion in the State/Tribal compact as put forth during the compact negotiation noted above in Paragraph 1 of section II.

3. Information regarding other proposals made to the State of South Dakota not specifically included in the negotiation sessions listed in Paragraph 1 of section II.

III. Tribal Casino Operation, Management and Disbursements:

1. An explanation of the financial records, audits and bookkeeping related to tribal gaming.

2. The number of individuals receiving financial distributions from tribal gaming and the amount of money received by each.

IV. Related Topics:

1. Communications, other than privileged information, between the Tribe and the individuals named in Plaintiff's Rule 26 Initial Disclosures and/or any individuals likely to have discoverable information.

2. A description of any events and/or documentation surrounding an alleged 'agreement by powers that be with the financial interest in Deadwood that the Tribes are going to be limited to 250 machines and that agreement is holding up today.' (i.e Argument on Discovery Protective Order, page 33, lines 14-18).

(Doc. 171.) In addition, the Notice also requires the deponent to produce "any and all documents," which the State defines to include virtually anything (e.g., "all letters, correspondence, telegrams, paper communications, tabulations, memoranda"), related to all of the above topics. (Doc. 171, p.2 n.1.) Thus, the Notice does not contain four narrowly defined

topics, but at least eight broad-based subjects, some of which are unrelated to the subjects of negotiation under IGRA. Moreover, in regard to Topic III, above, the State fails to mention that the Tribe has continually objected to much of the financial information sought, and the State has never sought a motion to compel the Tribe to provide further responses to such discovery requests.

Here, good cause exists for issuance of a protective order, first, to forbid inquiry into the Tribe's "financial records" and "bookkeeping relating to tribal gaming," as well as "the number of individuals receiving financial distributions from tribal gaming and the amount of money received by each." (*See* Doc. 179 at Topic III, p.3.) As set forth in the Tribe's filings (*see* Docs. 179, 180), such information is confidential and proprietary, and is wholly irrelevant to the sole claim before the Court. Also, good cause exists for issuance of a protective order relieving the Tribe from producing a deponent as to Topic IV(1) and from producing "any and all documents" regarding "each of the . . . topics," because these requests are unduly burdensome and oppressive and, contrary to Rule 30(b)(6), are not described with reasonable particularity. In addition, Topics III, IV(1) and the documents request are overly broad and unduly burdensome because the State's Notice has no temporal limitation. Thus, and, due to this as well as the breadth of the topic, providing such information would be unduly burdensome and oppressive. (Doc. 171 at Topic III, p.3.)

For all of these reasons, as set forth fully below and in the Tribe's Motion (Doc. 179), the Tribe respectfully requests that the Court forbid the disclosure or discovery of Topic III, IV(1) (Doc. 171, p.3), and quash the request to produce "any and all documents" regarding "each of the below topics.

ARGUMENT

I. A Tribal Gaming Establishment's Profitability and Tribal Members' Per Capital Gaming Income Are Not Permissible Negotiation Topics Under IGRA And, Thus, Any Such Discovery is Impermissible

The Indian Gaming Regulatory Act does not condition a state's requirement to negotiate in good faith on a tribal gaming enterprise being *unprofitable* or on tribal members being *indigent*, which is what the State appears to suggest. (Doc. 186, pp.13.) As the State acknowledges (Doc. 186, p.8), the Tribe asserts that the State has failed to negotiate with it in good faith because, *inter alia*, the State has refused to agree to an *any* increase in gaming devices since 1990 (*see* Doc. 103-3 § 8.5) (as well as for other reasons). The State's position (in negotiations and throughout this litigation) appears to be that because the Tribe's gaming facility "has been extraordinarily lucrative for FSST" (e.g., Doc. 186, p.7), the State is not required to negotiate for an increase in gaming devices. However, a tribe's profitability and its member's income is not a permissible negotiation topic and, thus, any discovery related thereto is impermissible. (*See* 28 U.S.C. § 2710(d)(3)(C).)

The State erroneously asserts that it is entitled to the Tribe's financial information because IGRA allows the State to "negotiate over and specifically look at the financial integrity of tribal gaming" and that "[t]ribal gaming financials are specifically set forth in IGRA and therefore are relevant." (Doc. 186, p.13.) The reference to "financial integrity" in IGRA, however, does not refer to *a tribe's* financial integrity, but rather to the states' financial integrity, as follows:

> Congress did not intend to allow States to invoke their economic interests 'as a justification . . . for excluding Indian tribes from" class III gaming; nor did Congress intend to permit States to use the compact requirement "as a justification . . . for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes.' By the same token, however, Congress also did not intend to require that States ignore their economic interests

> when engaged in compact negotiations. Indeed, § 2710(d)(7)(B)(iii)(I) expressly provides that we may take into account ***the 'financial integrity' of the State*** . . . .

In re Indian Gaming Related Cases, 331 F.3d 1094, 1115 (9th Cir. 2003) (internal citations omitted) (emphasis added). The Ninth Circuit has further explained the "financial integrity" reference in IGRA is relevant to a state's attempt to "rebut bad faith by demonstrating that the revenue demanded was to be used for 'the public interest, public safety, criminality, financial integrity . . . ." *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1032 (9th Cir. 2010), *petition for cert. filed*, 79 U.S.L.W 3141 (U.S. Sept. 3, 2010) (No. 10-330). Thus, IGRA cannot be used to justify states' attempt to invade the Tribe's sovereignty by seeking its financial information (as well as its member's).

Furthermore, without any legal support, the State mistakenly contends that "[t]ribal gaming financials are specifically set forth in IGRA and therefore are relevant." (Doc. 186, p.13.) IGRA is devoid of any reference whatsoever to "tribal gaming financials." The only (even tangential) references to financial information are to the allowance of States to "assess[] . . . such amounts as are necessary to defray the costs of regulating such activity," "taxation by the Indian tribe of such activity," and the above. *See* 25 U.S.C. § 2710(d)(3)(C)(iii), (iv). Thus, "tribal gaming financials" are not set forth as allowable subjects of negotiation under IGRA.

The State also contends that it requires financial information to "analyze" per capita income of tribal members as compared to per capita income of South Dakota citizens, but here again such an inquiry is not relevant to good faith pursuant to IGRA. IGRA's legislative history is clear: "It is the Committee's intent that the compact requirement for class III not be used as a justification by a State for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes." S.Rep. No. 100-446, at 13, *as reprinted in* 1988 U.S.C.C.A.N. at 3083-84. The State has not explained

how this analysis would be relevant under IGRA. (Doc. 186, p.13.) Indeed, such information is wholly irrelevant. IGRA does not limit a state's requirement to negotiate in good faith on a tribe and its member's financial necessity. The State's assertion that the Tribe and its members' financial status is relevant is nothing more than economic protectionism and, in and of itself, is evidence of bad faith.

Finally, the State asserts that it requires financial information to respond to the Tribe's assertion "that it would be difficult to secure financing," which was predicated upon, *inter alia*, two letters from financial institutions. (Doc. 186, p.12.) The State ignores that those letters (to which the State presumably refers), address the term (i.e., length) of a compact necessary to obtain financing in the commercial marketplace. (Doc. 1-17 at Ex. 8 thereto; Doc. 1-21 at Ex. 22.) As such, this asserted basis to obtain financial information is illogical.

II. The Tribe Has Continually Objected to Discovery Requests Seeking Any Financial Information Not Provided for In the Compact Because the Information is Private, Commercial Information

Throughout this litigation, the Tribe has continually objected to production of any financial information (aside from audits). The *only* financial information that the Tribe has provided to the State consists of independent audits of the gaming operation. The agreement to provide audits arose out of the parties' original compact, wherein the Tribe was authorized to operate 70 additional gaming devices (over the 180 authorized) if it could establish that it generated a certain dollar amount per device, *inter alia*, as follows: "75 percent of the projected adjusted gross revenue . . . per device per day has been realized on the average on all 180 devices [the projected gross revenue was $85.00 per device per day]." (Doc. 103-3, § 8.5.) Thus, the audits were provided to meet this compact provision. (*See also* Doc. 103-2 ¶ 10 (audit provision).)

Next, the State is mistaken that the Tribe has already requested a protective order "in regard to this material and has been denied." (Doc. 186, p.12.) The Tribe and the State did file a motion for a stipulated protective order to govern the use and scope of confidential documents produced in this litigation, which was not granted, but that stipulation is distinct from the Motion presently before the Court. (*See* Docs. 46; 46-1.; 50-2.) The Motion before the Court is brought pursuant to Fed. R. Civ. P. 26(c)(1) to forbid the State from obtaining the type of documentation and information that it now seeks via the Rule 30(b)(6) Notice.

Also, the State is incorrect that the Tribe has already provided responses to the documents sought. (Doc. 186, p.12.) To the contrary, the Tribe has continually objected to any requests for financial information (other than audits). For example, in its Request for Production of Documents, Set One, dated September 17, 2007, the State asked the Tribe to produce "[a]ll documents relating to the distribution of Royal River Casino's gaming revenue to individual FSST tribal members since 1990," as well as documents summarizing revenues from slot machines, and Class I and II gaming devices. (Tribe Response to State Request for Production, Set One, No. 6, 20, 21, attached hereto as "Exhibit 1.") The Tribe objected to the requests and the *only* financial information provided the State consisted of audits.

In its Request for Production of Documents, Set Two, dated April 1, 2008, the State again asked for various financial documents, including documents related to revenue from pari-mutuel wagering (No. 9), documents related to credit applications/loans, and the like (No. 18). The Tribe objected to providing any financial information (other than the annual audits previously provided). (Tribe Response to State Requests for Production, Set Two, attached hereto as "Exhibit 2.")

As set forth in the Tribe's moving papers, the Tribe considers this information to be confidential, commercially sensitive and proprietary. (Doc. 180, ¶ 3.) For this reason as well as those set forth below, the Tribe asks that the Court forbid the inquiry set forth at Topic III of the Notice and forbid inquiry into the Tribe's financial records (other than audits), bookkeeping, and financial distributions. *See* Fed. R. Civ. P. 26(c)(1).

III. The Areas of Inquiry in the Notice Are Not Described With Reasonable Particularity and Compliance With The Notice Would be Unduly Burdensome and Oppressive

The State's Notice is unduly burdensome and oppressive because it seeks "any and all documents" (the term documents is expansively defined) that have anything to do with the eight subsets of topics contained in the State's Notice, and requires the Tribe designate a witness(es) to testify communications between the Tribe and *anyone* "likely to have discoverable information." (*See* Doc. 171, p.3.) Without support, the State asserts that the Tribe is required to produce witnesses to testify as to the substance of communications between *anyone* likely to have discoverable information and the Tribe. The topic "anyone likely to have discoverable information" cannot be said to be "reasonably particular," and indeed such information is not reasonably available to the Tribe, Fed. R. Civ. P. 30(b)(6). It is virtually impossible to prepare a witness(s) to testify to the substance of *any* communications with *any* individuals that are *likely* to have discoverable information; and to require the deponent to produce *any* documents related thereto. Such a request is the antithesis of "reasonably particular."

Also, the request to produce "any and all documents [which is broadly defined]" that have anything to do with eight subjects of information, without any temporal limitation, is also overly broad and unduly burdensome, as it is virtually impossible to comply with such a request.

CONCLUSION

For the reasons set forth above, the Tribe respectfully requests that the Court enter a Protective Order:

- Relieving the Tribe of the requirement that the Rule 30(b)(6) deponent produce "any and all documents and recording whether by video, audio or other means . . . regarding each of the below topics," (Doc. 171, p.2);

- Forbidding the State from seeking inquiry into the Tribe's "financial records," "bookkeeping relating to tribal gaming," and "[t]he number of individuals receiving financial distributions from tribal gaming and the amount of money received by each," (Doc. 171, Topic III, p.3); and

- Relieving the Tribe of preparing a Rule 30(b)(6) witness(es) to testify as to "[c]ommunications . . . between the Tribe and the individuals named in Plaintiff's Rule 26 Initial Disclosures and/or any individuals likely to have discoverable information" (Doc. 171, Topic IV(1), p.3).

Dated this 28th day of October, 2010.

Respectfully submitted,

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By */s/ Ronald A. Parsons, Jr.*

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Plaintiff's Reply in Support of Motion for Entry of Protective Order was served via the electronic filing system on October 28, 2010 to:

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