IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

STATE OF WISCONSIN,

Petitioner,

v. **Case No. 12-CV-505**

HO-CHUNK NATION,

Respondent.

HO-CHUNK NATION'S COMBINED BRIEF IN SUPPORT OF MOTION TO VACATE THE ARBITRATION DECISION AND IN OPPOSITION TO THE STATE OF WISCONSIN'S APPLICATION TO CONFIRM THE ARBITRATION DECISION

INTRODUCTION

The State of Wisconsin ("State" or "Wisconsin") and the Ho-Chunk Nation (the "Nation") entered into a Tribal-State Class III Gaming Compact ("Compact") under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701, *et seq*. R. 00005, R. 00008[1] (SOF, [2] ¶¶ 12 and 22). The Nation has a Class II gaming facility in Madison, Wisconsin, formerly known as the DeJope Gaming Facility ("DeJope") *Id.* No Tribal-State compact is required for the Nation to conduct Class II gaming. R. 00005 (SOF, ¶ 9). Class II gaming at DeJope is not governed by the Compact because the Compact only governs Class III gaming. [3] R. 000008 (SOF, ¶ 22).

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[1] "R." means the record, which is attached to the Declaration of Thomas M. Pyper ("Pyper Decl.") filed with this Brief. The record has been consecutively paginated for ease of reference.

[2] "SOF" shall mean the Stipulation of Facts, dated April 26, 2011, and filed with the Arbitrator on May 4, 2011. *See* R. 00004 – R. 00218.

[3] Class II gaming includes bingo and certain card games, but excludes any banked card games, electronic games of chance, and slot machines. R. 000004 (SOF, ¶ 5); *see also* IGRA 25 U.S.C.
(footnote continued)

In November 2010, the Nation began offering non-banked poker through the PokerPro® table system at DeJope. R. 000008 (SOF, ¶ 23). PokerPro® is an electronic gaming table system that facilitates the play of live, non-banked poker (hereinafter "e-Poker").[4] R. 000008 (SOF, ¶ 24). On February 26, 2009, prior to the Nation offering e-Poker at DeJope, the National Indian Gaming Commission ("NIGC") general counsel issued an advisory opinion that the e-Poker "non-banked poker games such as the Nation proposes to offer [at DeJope] are Class II under IGRA when played according to any Wisconsin state rules on hours of operation and the sizes of wagers and pots." R. 000014, R. 000172 – R. 000178 (SOF, ¶ 44 and Exh. F).

The State asserted that e-Poker was Class III gaming and sought to stop the Nation from offering e-Poker at DeJope through arbitration under the Compact's arbitration clause, which provides that only a dispute that "arises between the Parties regarding the interpretation or enforcement of the Compact ..." shall be subject to arbitration. R. 000001 (Implementation of Section XXIII "Dispute Resolution" of Second Amendment To The Compact ("Implementation Agreement"), p. 1). The Nation disputed that e-Poker was a Class III game under IGRA and alleged that the Compact did not control the use of e-Poker at DeJope. *Id.* The Nation expressly disputed that the Compact's arbitration provision controlled because "the dispute with the State

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§ 2703(7). In banked card games, players bet against the house. R. 000004 (SOF, ¶ 6). In contrast, in non-banked card games, the house has no monetary stake in the game itself and the players play and bet against one another. *Id.* Class III gaming includes "all forms of gaming that are not class I ... and class II gaming." R. 000005 (SOF, ¶ 7); *see also* IGRA 25 U.S.C. § 2703(8). It includes the types of games usually associated with Las Vegas-style gambling, such as slot machines and house banked table games. *Id.* Poker may be played in banked and non-banked format. R. 000007 (SOF), ¶ 20. *See* R. 000011 – R. 000012 (SOF, ¶ 24-35) for a description of the non-banked Texas Hold 'Em game offered at DeJope.

[4] E-Poker is an electronic gaming table system that facilitates the play of live, non-banked poker. R. 000008 – R. 000010 (SOF, ¶¶ 24 – 31). E-Poker is not an electronic or electro-mechanical facsimile of the game of poker, but rather it is a technologic aid to poker gaming by the individual players against each other. R. 000010 (SOF, ¶ 31).

over its operation of poker at DeJope does not 'arise[] ... regarding the interpretation or enforcement of the Compact, the Amendment or [the] Second Amendment' and is thus not governed by the Dispute Resolution procedure ...." *Id.* Reserving all claims and defenses, including the Nation's defense of sovereign immunity, the parties proceeded to arbitration before William A. Norris (the "Arbitrator"). R. 000002 (Implementation Agreement, p. 2 at ¶ 5).

In an Opinion dated May 1, 2012, the Arbitrator concluded that "DeJope … is not governed by the Compact." R. 000398 (May 1, 2012 Opinion ("Opinion"), p. 2). He further ruled that the question before him was whether e-Poker was a Class II or III game and that "[a]nswering this question ... requires the analysis and interpretation of both federal law (IGRA) and Wisconsin law." R. 000398 – R. 000399 (Opinion, pp. 2-3). The Arbitrator then concluded that e-Poker is a Class III game, not by interpreting or enforcing any provision or language in the Compact, but solely by reference to, and interpretation of, IGRA and Wisconsin law. *Id*.

The Arbitrator's initial conclusion is consistent with the Nation's position from the outset of this dispute. The Compact has no application to DeJope and the dispute as to whether e-Poker is Class II or III gaming does not involve the interpretation or enforcement of the Compact. Therefore, the Arbitrator had no jurisdiction to issue the Opinion, and thus, the Nation never waived its sovereign immunity with regard to arbitration of the issue decided by the Arbitrator. The Opinion is void as a matter of law, may not be confirmed as requested by the State, and must be vacated under 9 U.S.C. § 10(a)(4).

Even if, however, the Arbitrator had jurisdiction over the dispute, the Opinion must still be vacated. Where, as here, an arbitrator does not interpret or apply the parties' agreement and instead willfully disregards existing law and dispenses his own brand of justice, the arbitration award must be vacated under 9 U.S.C. § 10(a)(4).

FACTS

I. BACKGROUND OF THE COMPACT AND THE DISPUTE.

The Nation has been offering Class II games at DeJope since before 1992. R. 000005, R. 000008 (SOF, ¶¶ 12 and 22). Prior to 1992, the State and the Nation entered into negotiations for the Compact, which included negotiations regarding whether the Nation could conduct Class III gaming at DeJope. *Id.* The State and the Nation entered into a Compact on June 11, 1992, which was subsequently amended on three occasions.[5] R. 000005 – R. 000007, R. 000075 – R. 000148 (SOF, ¶¶ 13-17 and Exhs. B-D). The Second Amendment to the Compact permitted the Nation to conduct Class III gaming at DeJope if a Dane County Referendum authorizing the Nation to do so was passed by Dane County voters in 2004. R. 000007 (SOF, ¶ 18). Because the referendum did not pass, the Nation has made no effort to pursue Class III gaming at DeJope, and DeJope is not a Class III facility subject to the Compact. *Id.*

The NIGC is responsible for instituting enforcement actions to prohibit Class III gaming activities at a location other than a Class III casino in the absence of a Tribal-State compact; therefore, NIGC has the authority to commence an enforcement action against an Indian Tribe to prevent it from conducting e-Poker at a Class II facility if it believes that e-Poker is Class III gaming. R. 000010, R. 000014 (SOF, ¶¶ 33 and 43). On February 26, 2009, the NIGC issued an advisory opinion that the e-Poker at DeJope is a Class II game under IGRA. R. 000014, R. 000172 – R. 000178 (SOF, ¶ 44 and Exh. F). The NIGC indicated it does not intend to take enforcement action to prevent the playing of e-Poker at DeJope. R. 000014 (SOF, ¶ 45).

[5] The Third Amendment to the Compact was inadvertently omitted from the April 26, 2011 SOF. R. 000245 – R. 000259 (4/24/11 Affidavit of Thomas M. Pyper ("Pyper Aff."), ¶ 3). The parties agreed that the Third Amendment should be made part of the record. *Id.*

Despite the NIGC's conclusion that e-Poker is a Class II game that may be played at DeJope, the State challenged the Nation's right to offer e-Poker at DeJope and invoked the Dispute Resolution provisions in the Compact. R. 000001 (Implementation Agreement, p. 1). The Dispute Resolution provision, found in the Second Amendment to the Compact, is limited to disputes arising under the Compact and unambiguously confers jurisdiction on this Court, not the Arbitrator, to decide arbitrability:

> 11. Section XXIII (Dispute Resolution) and Section XXIV (Sovereign Immunity: Compact Enforcement) of the Compact shall be amended by deleting both Sections in their entirety and by substituting in their place the following paragraphs:
>
> Section XXIII. DISPUTE RESOLUTION
>
> If any dispute ***arises between the Parties regarding the interpretation or enforcement of the Compact, Amendment and this Second Amendment***, except as otherwise provided in this Second Amendment, that dispute ("Dispute") shall be resolved in accordance with the following procedure:
>
> * * *
>
> B. Binding Arbitration. If the Parties do not resolve the dispute to their mutual satisfaction through the meet and confer process set forth above, either Party may serve a demand for arbitration on the other Party. In that event, the Parties shall resolve the Dispute by binding arbitration…. The arbitration shall be conducted in accordance with the Federal Rules of Civil Procedure and Evidence…. The Parties shall be bound by any award entered by the arbitrator. The arbitrator shall have the authority to provide such relief and issue such orders as are authorized by the Federal Rules of Civil Procedure. ***Any action to compel arbitration, determine whether an issue is arbitrable or to confirm an award entered by the arbitrator shall be brought in the United States District Court for the Western District of Wisconsin under the Federal Arbitration Act, 9 U.S.C. Sections 1, et seq.***

R. 000136 – R. 000138 (SOF, Exh. D, Second Amendment, pp. 6 -7 at ¶ 11) (emphasis added). The Nation's waiver of sovereign immunity by the Compact was limited to disputes arising under the Compact:

> Section XXIV. SOVEREIGN IMMUNITY
>
> * * *
>
> B. ***Nothing contained herein shall be construed to waive the immunity of the State or the Nation except for suits arising under Sections XXIII and XXIV of this Compact, as amended***. The Nation and the State expressly waive, to the extent the State or the Tribe may do so pursuant to law, any and all sovereign immunity with respect to any claim brought by the State or the Nation to enforce any provision of this Compact, as amended. This waiver includes suits to collect money due to either Party pursuant to the terms of the Compact, as amended; to obtain an order to specifically enforce the terms of any provisions of the Compact, as amended; or to obtain a declaratory judgment and/or to enjoin any act or conduct in violation of this Compact, as amended. This waiver also includes a suit to enforce Section XXIII of this Compact as amended. This waiver also includes a suit under Section XXIV by either Party to restrain actions by the officials of either party that are in excess of their authority under the Compact, as amended. ***This waiver does not extend to other claims brought to enforce other obligations that do not arise under the Compact, as amended,*** or to claims brought by parties other than the State and the Nation.

R. 000138 – R. 000139 (SOF, Exh. D, Second Amendment, pp. 7-8 at ¶ 11) (emphasis added).

The parties disagreed regarding whether the State's objection to the Nation's offering of e-Poker at DeJope was a dispute requiring the interpretation or enforcement the Compact such that Compact's Dispute Resolution provision requiring arbitration was applicable. This disagreement was memorialized in an Implementation Agreement:

> WHEREAS, the State disputes that the Nation is permitted to operate poker at DeJope under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701, *et seq.* ("IGRA") and the terms of the Compact because it is a Class III game, and that such dispute "arises ... regarding the interpretation or enforcement of the

> Compact, Amendment and [the] Second Amendment" so as to be governed by the Dispute Resolution procedure; and
>
> WHEREAS, the ***Nation contends*** that the poker being operated at DeJope is a Class II game, as defined under IGRA, that it is permitted to be operated at DeJope and ***that the dispute with the State over its operation of poker at DeJope does not "arise[] ... regarding the interpretation or enforcement of the Compact, the Amendment or [the] Second Amendment" and is thus not governed by the Dispute Resolution procedure***; ...

R. 000001 (Implementation Agreement, p. 1) (emphasis added).

Since the State invoked the Compact's Dispute Resolution procedure, the Nation reserved all claims and defenses, including the Nation's defense of sovereign immunity:

> 5) By entering into this Implementation Agreement, neither the State nor the Nation is waiving any claim or defense with regard to the dispute, each reserves all claims and defenses available to it under IGRA, any other applicable law, the Compact and all Amendments thereto and in the case of the Nation, the defense of sovereign immunity.

R. 000002 (Implementation Agreement, p. 2 at ¶ 5). Moreover, during the briefing before the Arbitrator, the Nation reiterated its position that the Dispute Resolution procedure under the Compact was inapplicable:

> The State asserts that the Federal Rules of Evidence are applicable to this arbitration pursuant to the Compact. State's Memo, p. 1 and n. 1. However, the Nation has always disputed that the Compact, including the Dispute Resolution procedure set forth in the Second Amendment of the Compact, applies. *See* Implementation of Section XXIII "Dispute Resolution" of the Second Amendment to the Wisconsin Winnebago Tribe, Now Known As the Ho-Chunk Nation, And the State of Wisconsin Gaming Compact of 1992 ("Implementation Agreement"). Consistent with the Nation's position that the Dispute Resolution procedure in the Compact is inapplicable, the Nation relied on Wisconsin's judicial notice rule of evidence, Wis. Stat. § 902.01. However the Federal and State judicial notice rules are similar in material respects. *Compare* Fed. R. Evid. 201 *with* Wis. Stat. § 902.01. To the extent differences exist between Wisconsin State and Federal case law regarding the interpretation of the judicial notice rule, Wisconsin law should apply.

R. 000353 (Ho-Chunk Nation's Response to the State's Motion for Leave to File Objections to Judicial Notice of Fact, p. 2, n.1)

The Arbitrator concluded that DeJope "is not governed by the Compact." R. 000398 (Opinion, p. 2). In deciding whether e-Poker is a Class II or Class III game, the Arbitrator did not interpret or enforce any portion or provision of the Compact. R. 000399 – R. 000405 (Opinion, pp. 3-9). Instead, the Arbitrator found that the question of whether e-Poker being played at DeJope was Class II or Class III gaming "requires the analysis and interpretation of both federal law (IGRA) and Wisconsin law." R. 000399 (Opinion, p. 3). He did not interpret, nor did he find a violation of, any provision of the Compact.

II. THE HISTORY OF GAMING IN WISCONSIN.

After the State entered into the Tribal-State Class III gaming compacts with all eleven Wisconsin Indian tribes, including the Compact with the Nation, Article IV, Section 24 of the Wisconsin Constitution was amended, effective April 1993, to restrict the types of gambling that could be authorized by the state Legislature. R. 000006 – R. 000007 (SOF, ¶ 16). The amendment changed the title of Section 24, from "Lotteries and Divorce" to "Gambling", and amended Article IV, Section 24 (6) by adding new subsections (b) and (c) to the existing language of subsection 6 (which was renumbered as subsection (6)(a)). *Id.* The amendment prohibits: (1) The Legislature from authorizing "gambling in any form," and (2) the State Lottery from playing "as a lottery" the game of poker (and most other casino and other card games). *Id.*

The 1993 Constitutional amendment did not prohibit all forms of gambling. There is no general policy against gambling in Wisconsin. Wisconsin permits pari-mutuel horse and dog race betting. R. 000012 (SOF, ¶ 36); Wis. Const. Art. IV, § 24(5). Any bona fide religious, charitable, service, fraternal or veteran organization may apply for and obtain a license from the State to play the game of bingo within the State. R. 000012 (SOF, ¶ 37); Wis. Const. Art. IV,

§ 24(3). Wisconsin also has a State-run lottery. R. 000006 – R. 000007, R. 000010 – R. 000011 (SOF, ¶¶ 16 and 34); Wis. Const. Art. IV, § 24(6).

Poker is also permitted in Wisconsin in many formats and forums by a variety of people. For example, despite the apparent constitutional prohibition on playing poker as part of the State lottery, since Wisconsin Constitution Article IV Section 24 was amended in 1993, the State lottery has offered a wide variety of scratch-off games. Between 1993 and the present, the State lottery has offered the following poker simulation scratch-off games:

Game Description	Game Number	Start Date
Five Card Stud	69	12/13/93
Straight Poker	225	7/06/98
Wild Draw Poker	261	7/12/99
Poker Night	333	3/16/01
Straight Poker	399	6/03/02
Poker Royale	415	9/13/02
$50,000 Poker Nights	455	5/30/03
Championship Poker	564	3/14/05
Lucky 10 Casino	590	8/15/05
World Championship Poker	604	10/03/05
$75,000 Poker	635	3/13/06
Badger Hold ‘Em	668	10/30/06
Wisconsin Hold ‘Em	701	4/09/07
Casino Royale	698	5/21/07
Championship Hold ‘Em	750	12/10/07
Super Vegas Nights	800	1/28/08

Game Description	Game Number	Start Date
Poker Showdown	817	3/28/08
Badger Hold 'Em	854	8/01/08
Super Vegas Nights	850	10/31/08
Vegas Nights	970	9/06/10

R. 000010 – R. 000011, R. 000150 – R. 000170 (SOF, ¶ 34 and Exh. E).

Video poker machines are operated at taverns throughout Wisconsin, and the possession of five or fewer video poker machines is not a criminal offense. On October 27, 1999, the State enacted the Biennial State Budget Act, 1999 Wisconsin Act 9 ("Budget Act"). R. 000012 – R. 000013 (SOF, ¶ 38). Under the Budget Act, the possession and operation of up to five (5) video gambling machines, which could include video poker machines, by businesses that hold Class B liquor licenses for the serving of alcohol on premises, such as taverns, was changed from a felony to a civil offense subject to a fine of up to $500 per machine per incident. *Id.* For each further gambling machine possessed by a licensee up to a total of five, the forfeiture amount increases in increments of $500. *Id.* Liquor license holders are no longer at risk of having their liquor licenses revoked solely for the possession of five or fewer video gambling machines. R. 000013 (SOF, ¶ 39). A Class B tavern license holder may not be enjoined from offering gambling machines or have his/her license revoked for "knowingly permitting five or fewer video gambling machines to be set up, kept, managed, used or conducted upon the licensed premises." *Id.*

In November 1999, the LRB published Budget Brief 99-6 explaining the history of, and rationale for, the "Decriminalization of Video Gambling." R. 000014, R. 000180 – R. 000181 (SOF, ¶ 46 and Exh. G). The LRB explained that gambling at Indian casinos was believed to

have resulted in a decrease of business at taverns, which in turn resulted in many taverns offering illegal gambling opportunities such as video poker in order to compete for business with casinos. R. 000181 (SOF, Exh. G. at p. 2). As a result, the Wisconsin Legislature decriminalized the possession of video gambling machines. Anyone in Wisconsin over the age of 21 may play video poker at any of the approximately 13,199 Class B licensed taverns if the Class B licensee offers video poker.[6] R. 000013 – R. 000014 (SOF, ¶¶ 40-42). There are approximately 3,258 Class B licensed taverns within a 65-mile radius of the Nation's three Class III gaming facilities and approximately 819 in Dane County, Wisconsin, where DeJope is located. *Id.* The State thus permits Class B licensed taverns within 65 miles of the Nation's three Class III casinos to offer video poker gaming on up to 16,290 video poker machines (3,258 taverns x 5 machines). *Id.* Within Dane County, the State permits gaming on up to 4,095 video poker machines (819 taverns x 5 machines). *Id.*

Finally, poker is permitted in Wisconsin as a result of the Tribal-State compacts with Wisconsin's eleven Indian tribes. The Second Amendment to the Compact expressly authorized the Nation to offer both banked and non-banked poker at its Class III facilities. R. 000007, R. 000131 – R. 000148 (SOF, ¶ 17 and Exh. D). The Nation has Class III casinos in Wisconsin Dells, Black River Falls and Nekoosa, and it offers both banked and non-banked poker gaming at all three casinos. R. 000007 – R. 000008 (SOF, ¶ 21). In 2003, in addition to the Compact with the Nation, the State amended various Class III tribal-state compacts with the other ten Wisconsin Indian tribes, which authorized the playing of poker as a Class III game at facilities eligible to conduct Class III gaming. R. 000007 (SOF, ¶ 20).

[6] Unlike e-Poker offered at DeJope, video poker is an electronic facsimile of poker and is banked. R. 000013 (SOF, ¶ 41).

ARGUMENT

I. THE ARBITRATOR LACKED JURISDICTION TO DECIDE THIS DISPUTE, AND THE NATION DID NOT WAIVE ITS SOVEREIGN IMMUNITY REGARDING THIS DISPUTE.

A. General Legal Standards.

Pursuant to 9 U.S.C. § 10(a)(4), an arbitration award must be vacated where "the arbitrators exceeded their powers ...." "[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes-but only those disputes-that the parties have agreed to submit to arbitration." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). "[I]t is the duty of courts to enforce not only the full breadth of the arbitration clause, but its limitations as well." *New York v. Oneida Indian Nation of New York*, 90 F.3d 58, 62 (2nd Cir. 1996) (interpreting scope of arbitration provision in IGRA Tribal-State Class III gaming compact). When a party to the arbitration contends that the arbitrator acted beyond his designated authority, a reviewing court determines whether the arbitrator abided by the contractual limits placed on him to decide the dispute. *First Options*, 514 U.S. at 943. In assessing whether an arbitrator's award was within the scope of his power, courts must determine whether the award "draw[s] its essence from the contract." *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987).

In *First Options, supra*, the Kaplans denied that their dispute with First Options was arbitrable and filed written objections to that effect with the arbitration panel. The arbitrators decided that they had the power to rule on the merits of the parties' dispute and did so in favor of First Options. The Kaplans' motion to vacate the arbitration award was denied, and the arbitration decision was confirmed. After the Third Circuit Court of Appeals reversed on the grounds that the dispute was not arbitrable, the Supreme Court accepted a *certiorari* petition. *Id.* at 491-92. The Supreme Court addressed the question of whether the power to determine

whether an issue is arbitrable resides with the arbitrator, whose decision is entitled to deference, or to the court to determine arbitrability independently.

The *First Options* Court held that the answer to whether an arbitrator or a court has the authority to decide an arbitrability question is purely a matter of contract interpretation. If the parties agreed to arbitrate arbitrability, then the power resides with the arbitrator. The Court held the opposite to be true as well:

> If, on the other hand, the parties did *not* agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely independently.

Id. at 943 (emphasis in original). The Court then held that it should decide whether the parties agreed to arbitrate a certain matter under "ordinary state-law principles that govern the formation of contracts." The Court further found that:

> Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so.

Id. at 944 (citation omitted). The Court also cautioned that courts should not conclude that the parties intended to submit the arbitrability issue to the arbitrator without other, clear and unmistakable evidence so indicating.

> And, given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.

Id. at 945. *See also Rent-A-Center West, Inc. v. Antonio Jackson,* 130 S. Ct. 2772, 2777 (2010) (citing *First Options, supra*, with approval); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) (citing *First Options, supra,* with approval).

As indicated by the *First Options* Court, the determination as to whether the parties intended to submit the arbitrability issue to the arbitrator is dependent upon state law. Wisconsin follows the same analysis as did the *First Options* Court. "[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. The arbitrators obtain their authority from the contract, and the task of interpreting the contract to determine whether the dispute is arbitrable and whether the arbitrator has jurisdiction is for the court." *Joint Sch. Dist. No. 10 v. Jefferson Educ. Ass'n*, 78 Wis. 2d 94, 101, 253 N.W.2d 536 (1977). The arbitrators may not decide the scope of their own jurisdiction absent a provision in the contract authorizing them to do so.

> Thus the question of substantive arbitrability whether the parties agreed to submit an issue to arbitration is a question of law for the courts to decide. The arbitrator cannot, except by agreement of the parties, be the judge of the scope of his authority under the contract.

Id. at 101-02.

B. The Compact Cannot Answer Whether E-Poker Is Class II Or Class III Gaming Because That Question Is Resolved Exclusively By IGRA And State Law.

"Class II games are 'regulated by the [NIGC],'" not the states. *Seneca-Cayuga Tribe of Okla. V. Nat'l Indian Gaming Comm'n*, 327 F.3d 1019, 1023 (10th Cir. 2003) "At no point does IGRA give a state the right to make particularized decisions regarding a specific class II gaming operation." *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996).

Class III gaming is regulated by Indian tribes and States pursuant to Tribal-State compacting. IGRA 25 U.S.C. § 2710(d); R. 000008 (SOF, ¶ 8). As a matter of federal Indian law, a State's only involvement with Indian gaming is the Tribal-State compacting process for Class III gaming, which compacting process is limited by Congress under IGRA. 25 U.S.C. §2710(a) and (d)(3)(A). *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1060 (9th

Cir. 1997) ("state authority over class III gaming reaches no further than the explicit terms of the tribal-state compacts"). IGRA contains "a list of seven items which '[a]ny Tribal-State compact … may include provisions relat[ed] to.'" *Wis. v. Ho-Chunk Nation*, 512 F.3d 921, 932 (7th Cir. 2008); *see* 25 U.S.C. § 2710(d)(3)(C). Absent from that list is giving a State any control over Class II Indian gaming facilities, defining or limiting what constitutes Class II gaming, or in any way ceding regulation or enforcement of Class II gaming to a state.

C. The Arbitrator Had No Authority To Decide The Dispute Because, As He Ruled, The Dispute Was Governed By IGRA And Wisconsin Law Such That Interpretation Or Enforcement Of The Compact Was Not Invoked.

The Second Amendment to the Compact requires the parties to arbitrate disputes that "arise[] … regarding the interpretation or enforcement of the Compact...." R. 000136 (SOF Exh. D, Second Amendment to Compact, ¶ 11 at pp. 6). The Compact does not, nor could it under IGRA, define what constitutes Class II gaming. 25 U.S.C. §§ 2703, 2710(a) and (d)(3)(A); *Ho-Chunk Nation*, 512 F.3d at 933.

In *Wisconsin v. Ho-Chunk Nation*, 564 F. Supp. 2d 856 (W.D. Wis. 2008) (Crabb, J.), the State brought actions against the Nation seeking to compel arbitration under the same Compact Dispute Resolution arbitration clause at issue here. *Id.* at 858-59. In Counts 1 and 2, the State sought to preclude the Nation from conducting certain games because they were allegedly not being conducted in compliance with IGRA. Noting that there was apparent agreement between the parties that Counts 1 and 2 were not arbitrable, the Court also reasoned:

> Furthermore, because the potential right to enjoin class III gaming is strictly statutory, neither party could frame a reasonable argument that these claims constitute a dispute "regarding the interpretation or enforcement of the Compact."

Id. at 862.

Likewise here, the State is seeking to enjoin the Nation from conducting e-Poker at DeJope by arguing that it is Class III gaming under IGRA. The Arbitrator concluded that DeJope is not governed by the Compact. R. 000398 (Opinion, p. 2). The Arbitrator did not interpret or enforce any provisions of the Compact because the Compact does not define what is Class II as opposed to Class III gaming. Instead, the Arbitrator acknowledged that the answer to the question of whether e-Poker was Class II or Class III gaming required an "interpretation of federal law (IGRA) and Wisconsin law." R. 000399 (Opinion, p. 3). Because whether e-Poker is a Class II game is "strictly statutory, the State could [not] frame a reasonable argument that [its] claim[] constitute[s] a dispute 'regarding the interpretation or enforcement of the Compact.'" *Ho-Chunk Nation*, 564 F. Supp. 2d at 862.

Whether e-Poker is a Class II game that should be enjoined is not a dispute that arises regarding the interpretation or enforcement of the Compact and, therefore, the issue was not arbitrable.[7] *First Options*, 514 U.S. at 943. This dispute is purely a question of IGRA and Wisconsin law interpretation. The Nation did not agree to arbitrate this dispute, and its waiver of sovereign immunity "does not extend to claims brought to enforce other obligations that do not

[7] The Compact does not confer jurisdiction on the Arbitrator to decide whether the e-Poker issue was arbitrable and, instead, specifically confers jurisdiction on this Court to "determine whether an issue is arbitrable". R. 000137 (SOF, Exh. D, Second Amendment, ¶ 11 at p. 7). Thus, the Arbitrator was precluded from deciding the issue. The Nation preserved its argument that the e-Poker dispute was not arbitrable under the Compact in the Implementation Agreement, a copy of which was provided to the Arbitrator at the outset of the arbitration proceeding. R. 000001 (Implementation Agreement, p. 1); *see also* Pyper Decl., ¶ 2. The Nation reiterated its position that the dispute did not invoke the interpretation or enforcement of the Compact in the briefing to the Arbitrator. R. 000353 (Ho-Chunk Nation's Response to the State's Motion for Leave to File Objections to Judicial Notice of Fact, p. 2, n. 1) Raising the issue with the Court in a motion to vacate following the arbitration is appropriate. *First Options*, 514 U.S. at 941. It is for this Court to decide whether the issue was arbitrable, and the Arbitrator had no authority to decide the scope of his powers. *Id.*, and *Joint Sch. Dist.*, 78 Wis. 2d at 101.

arise under the Compact, as amended."[8] R. 000139 (SOF, Exh. D, Second Amendment, ¶ 11 at p. 9). Because the issue is not arbitrable, the Opinion may not be confirmed or enforced as requested by the State. The Opinion must be vacated under 9 U.S.C. § 10(a)(4).

II. EVEN IF THE ARBITRATOR HAD JURISDICTION, THE OPINION MUST BE VACATED.

A. Standard of Review.

Pursuant to 9 U.S.C. § 10(a)(4), an arbitration award should be vacated where the arbitrator exceeded his powers or "so imperfectly executed" his powers "that a mutual, final, and definite award upon the subject matter was not made." An arbitrator's job is to interpret the agreement subject to arbitration, not make public policy. *See Stolt-Nielsen, S.A. v. Animalfeeds Int'l Corp.*, --- U.S. ---, 130 S.Ct. 1758, 1767 (2010). When an arbitrator "strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice,'" the arbitrator's decision is unenforceable. *Id.* (citation omitted) (holding arbitration panel exceeded their powers when they failed to identify and apply a rule of decision derived from the Federal Arbitration Act or maritime or New York law).

Where an arbitrator "knew of the relevant [legal] principle, appreciated that the principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it," 9 U.S.C. § 10(a)(4) has been satisfied and the arbitration award must be vacated. *See Stolt-Nielsen, S.A. v. Animalfeeds Int'l Corp.*, 548 F.3d 85, 95 (2nd Cir. 2008), *reversed and remanded by*, *Stolt-Nielsen, S.A.* --- U.S. ---, 130 S.Ct. at 1767.[9] It is not necessary

[8] *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1045 (8th Cir. 2000) (because sovereign immunity is jurisdictional, it may be raised at any time in a proceeding).

[9] In *Hall Street Associates. LLC v. Mattel, Inc.*, 552 U.S. 576, 584 (2008), the Supreme Court concluded that parties could not alter by contract the scope of judicial review of an arbitrator's decision. In *Hall Street*, the Supreme Court noted in *dicta* that many courts recognize "manifest disregard of the (footnote continued)

for an arbitrator to state that he is deliberately ignoring the law. *Id.* at 92. "If the arbitrator's decision 'strains credulity' or 'does not rise to the standard of barely colorable,' … a court may conclude that the arbitrator 'willfully flouted the governing law by refusing to apply it.'" *Id.* at 92-93 (citations omitted).

B. The Arbitrator Exceeded His Powers And So Imperfectly Executed His Powers That A Mutual, Final, And Definite Award Upon The Subject Matter Was Not Made.

Class II games include "(ii) [non-banked] card games that — (I) are explicitly authorized by the laws of the State, or (II) are not explicitly prohibited by the laws of the State and are played at any location in the State." 25 U.S.C. § 2703(7)(A)(ii). Article IV, Section 24 of the Wisconsin Constitution was amended, effective April 1993. R. 000006 – R. 000007 (SOF, ¶ 16). The amendment changed the title of Section 24, from "Lotteries and Divorce" to "Gambling", and amended Article IV, Section 24(6) by adding new subsections (b) and (c) to the existing

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law" as either a judicially created "further ground" for *vacatur* or a short-hand "judicial gloss" reference to the grounds set forth in 9 U.S.C. § 10 for *vacatur*. *Id.* The *Hall Street* Court declined to decide whether manifest disregard of the law is an independent judicially created ground for *vacatur*. In 2010, the Supreme Court again elected not to decide whether a judicially created "manifest disregard of the law" standard survives after the *Hall Street* decision. *Stolt-Nielsen*, 130 S.Ct. at n.3. There is a split in the circuits regarding whether "manifest disregard of the law" as a judicially created ground for *vacatur* survives in light of *Hall Street*. *See Stolt-Nielsen*, 548 F.3d at 94. The Seventh Circuit has concluded that the "manifest disregard of the law" standard did not survive the *Hall Street* decision. *Affymax, Inc. v. Ortho-McNeil-Janssen Pharm., Inc.*, 660 F.3d 281, 285 (7th Cir. 2011). The Nation acknowledges that this Court is obligated to follow Seventh Circuit precedent. However, the Nation preserves for purposes of further appeal the argument that "manifest disregard of the law" is a judicially created exception that is broader than the grounds set forth in 9 U.S.C. § 10. Nonetheless, the Arbitrator's Opinion does not survive scrutiny under the express standard of review set forth in 9 U.S.C. § 10(a)(4).

Furthermore, the *Hall Street* Court specifically noted that the decision did not "purport to say that they exclude more searching review ***based on authority outside the statute*** [9 U.S.C. § 10] as well." *Hall Street*, 552 U.S. at 590 (emphasis added). For the reasons set forth in Part II.B., *infra*, because the issues in this case implicate a sovereign Indian nation and there is a strong public policy requiring that IGRA be construed in favor of Indian nations, a more searching review of the Opinion is warranted. Even if, however, a more searching review standard is not adopted here, the Arbitrator's decision did not construe or enforce the Compact and he chose not to apply the governing law and rather to "dispense[s] his own brand of justice." *Stolt-Nielsen, S.A.*, 130 S.Ct. at 1767. Accordingly, the Opinion must be vacated under 9 U.S.C. § 10(a)(4).

language of subsection 6 (which was renumbered as subsection (6)(a)). *Id.* The amendment prohibits the Legislature from authorizing "gambling in any form." The Arbitrator concluded that 25 U.S.C. § 2703(7)(A)(ii) and Article IV, Section 24 are both unambiguous. R. 000402 (Opinion, p. 6). According to the Arbitrator, because Article IV, Section 24 prohibits the Legislature from authorizing gambling in any form, Wisconsin law "explicitly prohibit[s]" poker for purposes of 25 U.S.C. § 2703(7)(A)(ii). *Id.* To reach these conclusions, the Arbitrator willfully ignored controlling case law[10] and the undisputed facts, created new Indian law policy and dispensed his own brand of justice. *Stolt-Nielsen, S.A.*, 130 S.Ct. at 1767. As a result, the Opinion must be vacated.

1. Rules of Statutory Construction That Must Be Applied When Interpreting IGRA.

Indian tribes enjoy sovereignty. *Mont. v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985). Therefore, state jurisdiction over affairs on Indian lands is strongly disfavored. *The Barona Group of the Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185, 1190 (9th Cir. 1982). Instead, the federal government has exclusive authority over relations with Indian Tribes. U.S. Const. Art. I, § 8, cl. 3; *Blackfeet*, 471 U.S. at 765. The "canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *Id.* at 766 (citation and internal quotations omitted). The "standard principles of statutory construction do not have their usual force in cases involving Indian law." *Id.* Instead, "statutes passed for the benefit of dependent Indian tribes," like IGRA, "are to be liberally construed, [with] doubtful expressions being resolved in favor of the Indians." *Bryan v. Itasca Cnty., Minn.*, 426 U.S. 373, 392 (1976). *See also Artichoke Joe's*

[10] All of the statutes, case law and argument set forth in the sections that follow were presented to the Arbitrator. *See generally* Briefs filed by the Nation with the Arbitrator at R. 000220 – R. 000244, R. 000295 – R. 000340, R. 000352 – R. 000360, R. 000378 – R. 000391.

Calif. Grand Casino v. Norton, 353 F.3d 712, 730 (9th Cir. 2003) ("IGRA is undoubtedly a statute passed for the benefit of Indian tribes").

It is error to interpret IGRA devoid of statutory and historical context:

> Were the Court to start and end with the ordinary and common meaning of the terms employed in section 20 [of IGRA], devoid of statutory and historical context, it might arrive at the reading advanced by the SNI. However, as the SNI has urged throughout its brief, issues relating to Indian law cannot be considered without historical context.

Citizens Against Casino Gambling in Erie Cnty. v. Hogen, 2008 WL 2746566, *53 (W.D. N.Y. July 8, 2008).

Even when interpreting statutes unrelated to Indian law, "the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Interpretation "must not be guided by a single sentence or member of a sentence, but … to the provisions of the whole law, and to its object and policy." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) (citations and internal quotations omitted). Even if a statute appears to be unambiguous, failure to consider legislative history is judicial error when the legislative history shows that the "plain meaning" interpretation adopted by a court is contrary to the legislative intent shown by the legislative history:

> To the extent that the Court of Appeals excluded reference to the legislative history of the FWPCA in discerning its meaning, the court was in error. As we have noted before: "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" … In this case, as we shall see, the legislative history sheds considerable light on the question before the Court.

Train v. Colo. Pub. Interest Research Grp., Inc., 426 U.S. 1, 10 (1976) (internal citations omitted). *See also United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 361 (8th Cir. 1990)("There are situations, however, when 'reliance on the plain language … alone is not

entirely satisfactory' … and an examination of legislative history can shed light on the intent of Congress in enacting the statutory provision in issue here." (internal citation omitted)); *Civil Aeronautics Bd. v. United Airlines, Inc.*, 542 F.2d 394, 399 (7th Cir. 1976). As set forth in Part II.B.2., *infra*, the Arbitrator willfully ignored these well-established Indian law canons by refusing to follow clear legislative history that demonstrates that his interpretation of IGRA was entirely wrong.

2. Congress Intended For The Definition Of Class II Gaming To Be Read And Interpreted In Conjunction With Other Sections Of IGRA.

In 1987, the Supreme Court decided *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which pre-dated IGRA. In *Cabazon*, the Supreme Court concluded: "In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular .... [Accordingly], ... California [may not] enforce its gambling laws against Indian tribes." 480 U.S. at 211 - 214. *Cabazon* made it clear that a State "cannot regulate and prohibit, alternately, game by game and device by device, turning its public policy off and on by minute degrees." *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 539 (9th Cir. 1994) (citing *Cabazon*).

When Congress enacted IGRA, it relied heavily on the Supreme Court's reasoning in *Cabazon*. *See* S. Rep. No. 100-446, p. 9 (1988) (hereinafter the "Committee Report"). In the Statement of Policy to the Committee Report that accompanied S. 555, which became IGRA, Congress made it plain that the *Cabazon* regulatory/prohibitory test must be used to determine whether Class II games are allowed in a state:

> Finally, the Committee anticipates that Federal courts will rely on the distinction between State criminal laws which prohibit certain activities and the civil laws of a State which impose a regulatory scheme upon those activities to determine whether class II games

> are allowed in certain States. This distinction has been discussed by the Federal courts many times, most recently and notably by the Supreme Court in Cabazon …. [T]he prohibitory/regulatory distinction is used to determine the extent to which State laws apply through the assertion of State court jurisdiction on Indian lands.... Here, the courts will consider the distinction between a State's civil and criminal laws to determine whether a body of law is applicable, as a matter of Federal law, to either allow or prohibit certain activities.

Committee Report at p. 6. *See also Sisseton-Wahpeton Sioux Tribe*, 897 F.2d at 366 (quoting the same and applying the regulatory/prohibitory test to determine whether a card game was a Class II game).

Consistent with Congress's general Statement of Policy, in its explanatory notes to the definition of Class II gaming, Congress explained that it intended the definition of Class II card games in IGRA § 2703(7)(A)(ii)(I) and (II) to be read in conjunction with the "permits" language set forth in IGRA § 2710(b)(1)(A):

> Section (4)(8)(A)(ii) provides that certain card games are regulated as class II games, with the rest being set apart and defined as class III games under section 4(9) and regulated pursuant to section 11(d). The distinction is between those games where players play against each other rather than the house and those games where players play against the house and the house acts as banker. The former games, such as those conducted by the Cabazon Band of Mission Indians, are also referred to as non-banking games, and are subject to the class II regulatory provisions pursuant to section 11(a)(2). **Subparagraphs (I) and (II)** [§ 2703(7)(A)(ii)(I) and (II)] **are to be read in conjunction with sections 11(a)(2) and (b)(1)(A)**[§ 2710(a)(2) and (b)(1)(A)] **to determine which particular card games are within the scope of class II. No additional restrictions are intended by these subparagraphs.** The Committee notes that, while **existing law does not require that Indian card games conform with State law**, it agreed to adoption of bill language to provide that these card games be operated in conformity with laws of statewide application with respect to hours or periods of operation, or limitations on wagers or pot sizes for such card games.

Committee Report at p. 9 (emphasis added).

Thus, whether a card game is "explicitly authorized by the laws of the State" or "not explicitly **prohibited** by the laws of the State and are played at any location in the State," IGRA 25 U.S.C. §§ 2703(7)(A)(ii)(I) and (II) (emphasis added), must be analyzed under the *Cabazon* regulatory/prohibitory test in conjunction with the requirement that Indian Tribes may engage in Class II gaming if such gaming is "located within a State that **permits** such gaming for any purpose by any person, organization or entity," IGRA 25 U.S.C. § 2710(b)(1)(A) (emphasis added). The Arbitrator willfully ignored this express intent of Congress and concluded that he could not look any further than the express language of 25 U.S.C. § 2703(7)(A)(ii), thereby construing "explicitly prohibited" inconsistently with the *Cabazon* regulatory/prohibitory test. R. 000404 (Opinion, p. 8).[11] The Arbitrator also willfully ignored the well-established Indian law canons of construction that obligated him to interpret IGRA in statutory and historical context, which is rooted in the sovereign status of Indian nations. *Sycuan Band of Mission Indians*, 54 F.3d at 539; *Citizens Against Casino Gambling*, 2008 WL 2746566, at *53. The Opinion creates entirely new Indian law policy, policy that is contrary to Congressional intent and decades of Indian law precedent. *Stolt-Nielsen*, 130 S.Ct. at 1767.

3. Wisconsin's Policy Towards Gambling Is Regulatory, Not Prohibitory, And Wisconsin Therefore Does Not Explicitly Prohibit Poker.

Had the Arbitrator not chosen to ignore the express intent and direction of Congress and interpreted the definition of Class II card games, 25 U.S.C. § 2703(7)(A)(ii), in conjunction with 25 U.S.C. § 2710(a)(2) and (b)(1)(A), he could not have concluded that e-Poker is a Class III

[11] While the Arbitrator did not state that he was ignoring Congress's intent that the Class II "prohibited" test is to be determined under the *Cabazon* regulatory/prohibitory test, the legislative history is so clear that the Opinion "strains credulity" and "does not rise to the standard of barely colorable" so that the Court can only conclude that the Arbitrator "willfully flouted the governing law by refusing to apply it." *Stolt-Nielsen, supra*, at 92.

game. This is because this Court and the Seventh Circuit have both conclusively established that Wisconsin's policy toward gaming is regulatory rather than prohibitory.

In determining whether a state's policy toward gaming is prohibitory or regulatory, the fact that gambling law violations are enforceable by criminal as well as civil penalties is not dispositive. *Cabazon*, 480 U.S. at 211 (even though, "*unregulated* bingo, the conduct which attracts organized crime, is a misdemeanor in California," gambling is still regulatory rather than prohibitory due to other permitted forms of bingo and the state lottery) (emphasis in original). *See also Mashantucket Pequot Tribe v. Conn.*, 913 F.2d 1024, 1029 (2nd Cir. 1990), *cert. denied*, 499 U.S. 975 (1991) (state-operated lottery, bingo, jai alai and pari-mutuel betting evidence a regulatory rather than a prohibitory policy toward gaming even though state law outlawed casino games except for fundraising purposes by non-profit organizations). Further, a state may permit gaming "within the meaning of IGRA even if it 'acquiesces, by failure to prevent.'" *Artichoke Joe's Calif. Grand Casino*, 353 F.3d at 722 (citation omitted) (also holding gaming conducted pursuant to a Tribal-State compact could satisfy the IGRA requirement that a state "permit" Class III gaming "for any purpose by any entity" even if Class III gaming were prohibited with respect to all non-Indians).[12]

In *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wis.*, 770 F. Supp. 480, 486-87 (W.D. Wis. 1991), the Court expressly found that the *Cabazon* regulatory/prohibitory test applies to the determination of whether a particular game is Class II gaming:

> The issue between the parties centers on the provision in 25 U.S.C. § 2710(d)(1) that "Class III gaming activities shall be lawful on Indian lands only if such activities are ... (B) located in a state that

[12] *See also McCracken and Amick, Inc. v. Perdue*, 687 S.E.2d 690, 693 (Ct. App. N.C. 2009) (holding a state statute authorizing video poker machines only for Tribes with a Tribal-State compact met IGRA's requirement that Class III gaming be in a state that "permits such gaming for any purpose by any person").

> *permits such gaming* for any purpose by any person, organization, or entity ....
>
> * * *
>
> In *Cabazon*, the Supreme Court held that in determining whether a state's criminal laws would apply to gambling on Indian lands ... , a court must analyze the state's policy toward gambling.... [I]f the state allows some forms of gambling, even subject to extensive regulation, its policy is deemed to be civil-regulatory and it is barred from enforcing its gambling laws on the reservation.
>
> * * *
>
> The Senate Report on [IGRA] makes explicit reference to *Cabazon* in discussing class II gaming, which has the same requirement as class III gaming that the gaming activity be "located within a state that permits such gaming for any purpose by any person, organization, or entity." The Senate committee stated that it anticipated that the federal courts would rely on the *Cabazon* distinction between regulatory gaming schemes and prohibitory laws ....
>
> * * *
>
> Although the Senate committee was speaking of class II activities, its comments are equally applicable to the requirement for class III activities.
>
> * * *
>
> In light of the legislative history and the congressional findings, I conclude that the initial question in determining whether Wisconsin "permits" the gaming activities at issue is not whether the state has given express approval to the playing of a particular game, but whether Wisconsin's public policy toward class III gaming is prohibitory or regulatory.

Id. at 484-86. Applying the *Cabazon* regulatory/prohibitory test to the history of gambling regulation in Wisconsin, the *Lac du Flambeau* Court concluded that Wisconsin's policy towards gambling was regulatory, not prohibitory:

> The original Wisconsin Constitution provided that "[e]xcept as provided in this section, the legislature shall never authorize any lottery ...." For more than a century, this prohibition against "any lottery" was interpreted as prohibiting the operation

> or playing of any game, scheme or plan involving the elements of prize, chance and consideration.
>
> * * *
>
> In 1965, however, the constitution was amended to allow Wisconsin citizens to participate in promotional sweepstakes (by defining "consideration" as not including listening to or watching a radio or television program or visiting a store or other place without being required to make a purchase or pay a fee). The constitution was amended again in 1973 to authorize bingo when played by charitable organizations, and in 1977 to allow raffles for charitable organizations. In 1987 the electorate approved two constitutional amendments: one authorized the state to operate a lottery, with the proceeds going to property tax relief, *Wis. Const. Art. 4, § 24(6)*; the second removed any prohibition on pari-mutuel on-track betting. Art. 4, § 24(5).
>
> When the voters authorized a state-operated "lottery," they removed any remaining constitutional prohibition against state-operated games, schemes or plans involving prize, chance and consideration, with minor exceptions.
>
> * * *
>
> ***The amendments to the Wisconsin Constitution evidence a state policy toward gaming that is now regulatory rather than prohibitory in nature***.

Id. at 486 (emphasis added).

The Wisconsin Constitution was again amended in 1993. After the amendments, it continues to authorize a variety of Class II and Class III gaming. Bingo and raffle games, which are Class II games for purposes of IGRA 25 U.S.C. § 2703(7)(A)(i), may be offered by charitable, religious, service, fraternal or veterans organizations. *See* Wis. Const. Art. IV, §§ 24(3) and (4). Pari-mutuel on-track betting and a state-operated lottery, which are Class III games for purposes of IGRA, are also permitted. *See* Wis. Const. Art. IV, §§ 24(5) and (6).

While Wis. Const. Art. IV, § 24(6)(c) prohibits the State from authorizing "poker" as a lottery, it does not prohibit poker from being played in Wisconsin.[13]

Eleven years after the 1993 amendments to Wisconsin Constitution Art. IV, § 24 (Gambling), in 2004, the Seventh Circuit examined Wisconsin's policy towards gambling in deciding whether IGRA's gubernatorial concurrence provision was constitutional. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. V. United States*, 367 F.3d 650, 654 (7th Cir. 2004). The Seventh Circuit agreed with, and relied on, the *Lac due Flambeau* decision:

> The establishment of a state lottery signals Wisconsin's broader public policy of tolerating gaming on Indian lands. *See California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed. 2d 244, (1987). In *Cabazon*, the Supreme Court held that a state has no authority to enforce its gaming laws on Indian lands if it permits ***any gaming activity*** under state law. *Id.* at 211. Further, because IGRA permits gaming on Indian lands only if they are "located in a State that permits such gaming for any purpose by any person, organization or entity," 25 U.S.C. § 2710(d)(1)(b), ***the lottery's continued existence demonstrates Wisconsin's amenability to Indian gaming***. Although Wisconsin has not been willing to sacrifice its lucrative lottery and to criminalize all gambling in order to obtain authority under *Cabazon* and § 2710(d)(1)(b) to prohibit gambling on Indian lands, Wisconsin once sought (albeit unsuccessfully) to limit Indian gaming to the "identical types of games" authorized for the Wisconsin State Lottery. *See Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin,* 770 F. Supp. 480, 487 (W.D. Wis. 1991) *appeal dismissed for want of jurisdiction,* 957 F.2d 515 (7th Cir. 1992).

Id. at 664 (emphasis added). *See also Mashantucket Pequot Tribe*, 913 F.2d at 1031-32 (2nd Cir. 1990) (upholding the district court's conclusion that Connecticut's policy towards gaming was

[13] Even if poker was entirely prohibited in Wisconsin rather than just the State being prohibited from authorizing poker as a lottery, the overall state policy toward gaming in general governs whether a state can prohibit the playing of that game on Indian sovereign land. *See Lac due Flambeau*, 770 F. Supp. at 486-87.

regulatory as a result of a statute authorizing nonprofits to have "Las Vegas nights," together with other state-sanctioned gambling such as lottery, bingo and pari-mutuel betting).

In determining whether blackjack was a grandfathered Class II game for purposes of IGRA, the Eighth Circuit Court of Appeals relied on IGRA legislative history in concluding that the *Cabazon* regulatory/prohibitory test was determinative as to whether blackjack was a Class II game in South Dakota:

> The Senate Report accompanying the bill ultimately enacted, S. 555, also discussed the difference between a state prohibiting, as opposed to merely regulating, a particular gaming activity:
>
> > The phrase "for any purpose by any person, organization or entity" makes no distinction between State laws that allow class II gaming for charitable, commercial, or governmental purposes, or the nature of the entity conducting the gaming. *If such gaming is not criminally prohibited by the State in which tribes are located, then tribes, as governments, are free to engage in such gaming.*
>
> S.Rep. No. 100-446, supra, at 12, 1988 U.S. Code Cong. & Admin.News 3082 (emphasis added).
>
> * * *
>
> Thus, as a court, our task is to assess whether South Dakota's gaming law is prohibitory or regulatory in nature in order to determine the effect, if any, of State law on the Tribe's blackjack operations.
>
> This prohibitory/regulatory distinction is consistent with congressional perceptions of the relationship between Indian tribes, federal government, and state government. As explained by Senator Evans when S. 555 was considered, the Act must be construed in light of the following principle:
>
> > When [Congress] has chosen to restrict the reserved sovereign rights of tribes, the courts have ruled that such abrogations of tribal rights must have been done expressly and unambiguously.

> ... Therefore, if tribal rights are not explicitly abrogated in the language of this bill, no such restrictions should be construed. This act should not be construed as a departure from established principles of the legal relationship between the tribes and the United States. Instead, this law should be considered within the line of developed case law extending over a century and a half by the Supreme Court, including the basic principles set forth in the *Cabazon* decision.
>
> 134 Cong.Rec. S12654 (daily ed. Sept. 15, 1988); *see also* S.Rep. No. 100-446, supra, at 5.

Sisseton-Wahpeton Sioux Tribe, 897 F.2d at 365-66.

The NIGC—the agency charged by Congress to enforce violations of Class II gaming—has analyzed the Class II definition on many occasions. The NIGC does not mechanically apply IGRA's definitional words in isolation from the remainder of IGRA and without historical context. Instead, the NIGC decides whether a card game is a Class II game by looking to IGRA as a whole and the legislative history of IGRA. For example, in deciding whether technological aids could be used with card games and still classify the game as Class II, the NIGC relied on the Committee Report to conclude that Congress intended Class II card games to be inclusive:

> Congress's policy toward technology notwithstanding, it was emphatic about restrictions on Class II card games. The Senate Report clarifies that Class II card games is meant to be an inclusive category with specific, narrow exceptions. Class II card games, according to the Committee, are non-banked and should be "operated in conformity with laws of statewide application with respect to hours or periods of operation or limitations on wagers or pot sizes for such games." S. Rep. 100-446 at p. A-9. The report also details that the definition of card games is to be read in conjunction with what was to become sections 2710(a)(2) and 2710(b)(1)(A) of IGRA, which specify that Class II gaming can only occur on Indian lands located in a state that otherwise permits such gaming. *Id.* The Committee specified that "*[n]o additional restrictions are intended by* [2703(7)(A)(ii)(I) and (II)]." S. Rep. No. 100-446 at P. A-9 (emphasis added). Deciding that a technological aid to an otherwise Class II card game makes the

> game Class III would create a new restriction on Class II gaming in conflict with Congress's clearly stated intent.

Memorandum from the Nat'l Indian Gaming Comm'n to George T. Skibine, Classification of Card Games Played With Technological Aids, p. 6 (December 17, 2009) (emphasis in original), available at http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gameopinions/Cardgamesplayedwithtechaids121709.pdf.

Prior to the Nation's offering the game, the NIGC determined that the e-Poker card game being played at DeJope is a Class II game because the State does not prohibit poker and poker is being played in the State. The NIGC did so relying on both IGRA §§ 2703(7)(A)(ii) (Class II card games definition) and 2710(b)(1) to analyze the State's public policy towards gaming in general and poker in particular. R. 000172 – R. 000178 (SOF, Exh. F (NIGC's February 26, 2009 Advisory Opinion)).

The Arbitrator's "plain meaning" interpretation of the word "prohibited" in the Class II definition in IGRA § 2703(7)(A)(ii) without considering the *Cabazon* regulatory/prohibitory historical context and legislative history was a willful disregarding of the law. The resulting trampling of the Nation's sovereign rights is the very type of "authority outside [9 U.S.C. § 10(a)(4)]" which requires a "more searching review" under 9 U.S.C. § 10(a)(4). *See Hall Street*, 552 U.S. at 590. Under either 9 U.S.C. § 10(a)(4) or that more "searching review," the Opinion should be vacated.

4. Wisconsin Statutes And The Undisputed Facts Prove That Poker Is Either Explicitly Authorized By The State Or Not Explicitly Prohibited And Played In The State.

The Arbitrator concluded that Wis. Const. Art. IV § 24, ¶ 1 contains a "blanket prohibition on gambling," including poker, so it was irrelevant to him whether poker was being

played in some form in the State. R. 000400 – R. 000402 (Opinion, pp. 4-6).[14] In so holding, the Arbitrator interpreted only a portion of ***one*** State law, *i.e.*, Wis. Const. Art. IV § 24, ¶ 1. The definition of Class II card games requires an analysis of the "the laws of the State," not merely one portion of one law.

Wis. Const. Art. IV § 24 provides in relevant part:

> Except as provided in this section, the legislature *may not authorize* gambling in any form....
>
> * * *
>
> Notwithstanding the authorization of a state lottery under par. (a), the following games, or games *simulating* any of the following games, *may not be conducted by the state as a lottery*: ... (3) poker ....

Wis. Const. Art. IV, §§ 24(1) and (6)(c) (emphasis added). Thus, while the "explicit" language precludes the legislature from authorizing any gambling not within the exceptions in § 24, it "explicitly prohibits" only one thing: the State conducting poker as part of the lottery. State played poker as a lottery is by definition a banked game, which is expressly excluded as Class II gaming under IGRA § 2703(7)(B). IGRA § 2703(7)(A)(ii) describes a non-banked card game as Class II if it is either explicitly authorized or not explicitly prohibited by State law. Nothing in Art. IV, § 24 of the Constitution governing "Gambling" in Wisconsin "explicitly prohibits" the playing of non-banked poker by anyone in Wisconsin, including Indian tribes. The Wisconsin legislature has chosen to state only that the legislature may not authorize gambling other than as explicitly exempted, and the only explicit prohibition against the play of poker, or the simulation of poker, is as banked poker offered by the State as a lottery game. Thus, the Wisconsin

[14] That ruling was in direct disregard of the Court's ruling in *Lac du Flambeau, supra,* and the 7th Circuit's contrary ruling in *Lac Courte Oreilles, supra.*

Constitution has not "explicitly prohibited" the play of non-banked poker for purposes of IGRA § 2703(7)(A)(ii)(II).

Notwithstanding the lack of authority for the legislature to authorize gambling generally, Wis. Const. Art. IV, § 24 enumerates exceptions where the legislature may "explicitly authorize" gambling. Bingo and raffle games, which are Class II games for purposes of IGRA § 2703(7)(A)(i), may be offered by charitable, religious, service, fraternal or veterans organizations. *See* Wis. Const. Art. IV, §§ 24(3) and (4). Because § 24 only prohibits the State from offering banked poker, or a simulation of poker, as a lottery game, the exception permitting charitable and other organizations to conduct bingo and raffle games has enabled them to offer non-banked poker, as discussed more fully below. Allowing charitable and other organizations to conduct non-banked poker is an explicit authorization by Wisconsin for the playing of non-banked poker. *Sisseton-Wahpeton Sioux Tribe*, 897 F.2d at 365. *See also Mashantucket Pequot Tribe*, 913 F.2d at 1030 - 31 (Tribe allowed to conduct casino type gaming because charitable organizations allowed to do so).

Despite the constitutional prohibition against the State offering poker, or a simulation of poker, as a lottery, the State has offered at least 20 scratch-off lottery games that are simulations of poker, including Five Card Stud, Straight Poker, Badger Hold 'Em and a variety of other poker games. R. 000150 – R. 000170 (SOF, Exh. E). The description of these scratch-off paper games are much like Texas Hold 'Em poker played at DeJope. *Compare* R. 000157 (SOF, Exh. E at p. 8) *with* R. 000011 – R. 000012 (SOF, ¶ 35). The State's offering of poker scratch-off lottery tickets demonstrates that it is "not []willing to sacrifice its lucrative lottery ... in order to obtain authority under *Cabazon*" to prohibit Class II gaming on Indian lands. *Lac Courte Oreilles*, 367 F.3d at 664.

Video poker is also commonly played in taverns throughout Wisconsin. In 1999, the Wisconsin Legislature decriminalized possession of five or fewer video gambling machines in taverns, including video poker. R. 000012 – R. 000014 (SOF, ¶¶ 38-42). The State permits Class B taverns within a 65-mile radius of the Nation's three Class III casinos to offer video poker on up to 16,290 video poker machines and up to 4,095 video poker machines in Dane County where DeJope is located. Video gambling machines, including video poker, may be used by players for amusement purposes under certain circumstances without violating any criminal laws.[15] *See State v. Hahn*, 203 Wis. 2d 450, 553 N.W.2d 292 (Ct. App. 1996). Similarly, private gambling such as "low stakes poker games" are "common and generally perceived to cause little harm," and therefore "local law enforcement authorities rarely prosecute noncommercial betting activities." R. 000201 (SOF, Exh. H at p. 17). *See Lac du Flambeau*, 770 F. Supp. at 488 ("[a] state might not prohibit a particular Class III gaming activity, but simply allow it to be conducted, without taking any steps to restrict it in any way ..." thereby permitting it for IGRA purposes). By the decriminalization of possession of video poker machines and/or the failure to explicitly prohibit video poker and private poker play, the State does not "explicitly prohibit" poker for purposes of IGRA, § 2703(7)(A)(ii) and in fact permits poker to be played in Wisconsin for any purpose by any person for purposes of IGRA § 2710(b)(1)(A). *Cabazon*, 480 U.S. at 211; *Artichoke Joe's Calif. Grand Casino*, 353 F.3d at 722.

Both banked and non-banked poker are likewise being played in Wisconsin, pursuant to IGRA §§ 2703(7)(A)(ii)(II) and 2710(b)(1)(A). In *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408, the Court held that the 1993 amendment to the

[15] There is also no prohibition in Wisconsin law on social games of poker, *i.e.*, games that do not involve betting, gambling or prizes.

Wisconsin Constitution did not invalidate the existing Class III gaming compacts and, therefore, the types of games allowed could be expanded under the Compacts notwithstanding the 1993 Constitutional amendment. However, the Compact did not require the State to permit expanded gaming but rather allowed expansion of gaming to take place only if both the State and the Nation agreed. *Id.* at ¶¶ 82-83. The Governor was given the authority to negotiate the terms of the Compact under Wis. Stat. § 14.035. It was within the Governor's authority, acting on behalf of the State, to decide whether to permit poker to be played at Class III facilities. The *Dairyland* Court found only that the Governor's authority to permit poker under the Compacts was protected by the Contract Clause, not that he was required to permit poker. When the Governor chose to agree to expanded gaming to include both banked and non-banked poker at Class III facilities, he was acting on behalf of the State to "permit" such play to take place, which the Nation is doing at its Class III facilities. Thus, Class II non-banked poker is taking place currently "within a state that permits such gaming for any purpose by any person, organization or entity" for purposes of IGRA § 2710(b)(1)(A) and poker is "not explicitly prohibited by the laws of [Wisconsin] and [is] played at any location in [Wisconsin]" for purposes of IGRA § 2703(7)(A)(ii)(II) and under the *Cabazon* regulatory/prohibitory test.

The Arbitrator analyzed only one portion of one section of the Wisconsin constitution and expressly excluded consideration of all of the other state and federal law and facts set forth above. The Arbitrator expressly stated that it did not matter to him that poker is played in some form in the State—*i.e.*, he intentionally chose to ignore the facts and Wisconsin laws, the legislative history of IGRA and its *Cabazon* regulatory/prohibitory context and the entire body of federal cases that have interpreted IGRA in favor of Indian Tribes and contrary to his flawed analysis. R. 000402 (Opinion, p. 6). The Arbitrator "knew of the relevant [legal] principle,

appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it." *See Stolt-Nielsen*, 548 F.3d at 95. The adverse impact to the Nation's sovereign rights requires a more searching scrutiny of the Arbitrator's erroneous legal conclusions under 9 U.S.C. § 10(a)(4). *See Hall Street*, 552 U.S. at 590. The Arbitrator exceeded his powers, created his own public policy and "so imperfectly executed" his powers "that a mutual, final, and definite award upon the subject matter was not made." 9 U.S.C. § 10(4); *Stolt-Nielsen*, 130 S.Ct. at n.8. The Opinion must be vacated.

CONCLUSION

For the foregoing reasons, the Nation respectfully requests that this Court deny the State's Motion to Confirm and grant the Nation's Motion to Vacate.

Dated this 27th day of July, 2012.

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