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 REPLY BRIEF IN SUPPORT OF MOTION TO VACATE

INTRODUCTION

Pursuant to the unambiguous language of the Compact, [1] only this Court, not the Arbitrator, has the authority to decide whether the e-Poker dispute between the Nation and the State was arbitrable under the Compact. R. 000136 – R. 000138 (SOF, Exh. D, Second Amendment, pp. 6-8 at ¶ 11). This Court must decide the issue of arbitrability independently without reference or deference to the Arbitrator's Opinion. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

The Nation agreed to arbitrate disputes only "regarding the ***interpretation or enforcement of the Compact***." R. 000136 (SOF, Exh. D, Second Amendment, p. 6 at ¶ 11) (emphasis added). It is indisputable that the Arbitrator did not interpret or enforce the Compact. The Arbitrator expressly concluded that "DeJope … is not governed by the Compact," and he did not interpret or enforce any provision of the Compact. R. 000398 (Opinion, p. 2). Instead, the

[1] All shorthand references used in the 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 ("Initial Brief") will be used herein and not repeated.

Arbitrator determined that e-Poker is a Class III game for purposes of IGRA, not by interpreting or enforcing the Compact, but by willfully disregarding existing law and dispensing his own brand of justice. *See* 9 U.S.C. § 10(a)(4). The Opinion must be vacated.

ARGUMENT

I. THIS COURT MUST DECIDE ARBITRABILITY OF THE E-POKER DISPUTE INDEPENDENTLY FROM THE ARBITRATOR'S DECISION AS TO WHETHER E-POKER IS CLASS II OR CLASS III GAMING.

Where "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." *First Options of Chicago*, 514 U.S. at 943. "Thus, where one party has clearly preserved the question of arbitrability for judicial determination, and there is no agreement that the arbitrator resolve the issue of arbitrability," the court must decide the issue. *International Ass'n of Machinists and Aerospace Workers, Lodge No. 1777 v. Fansteel, Inc.*, 900 F.2d 1005, 1010 (7th Cir. 1990). Even if an arbitrator attempts to decide the issue of arbitrability where the contract confers that right on a court, a district court must review that decision *de novo*:

> Whether a dispute is arbitrable is for the court to determine. *AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649, 106 S.Ct. 1415, 1418-19, 89 L.Ed.2d 648 (1986); *International Assoc. of Machinists, Local No. 1777 v. Fansteel*, 900 F.2d 1005, 1010 (7th Cir.1990). "While we note that the arbitrator attempted to decide the arbitrability question, the resolution of this question is our responsibility and we will approach this issue *de novo* without deference to the arbitrator's decision." *Fansteel*, 900 F.2d at 1010.

Alberici-Eby v. Local 520, Int'l Union of Operating Eng'rs, 992 F.2d 727, 732 (7th Cir. 1993).[2]

[2] The Arbitrator never addressed the question of whether the dispute as to whether e-Poker is Class II or Class III gaming was arbitrable.

The Compact confers jurisdiction on this Court to "determine whether an issue is arbitrable" under the Compact. R. 000137 (SOF, Exh. D, Second Amendment, ¶ 11 at p. 7). Thus, the Arbitrator was precluded from deciding arbitrability and, correctly, did not even attempt to do so. The Nation preserved its argument that the e-Poker dispute was not arbitrable under the Compact in the Implementation Agreement and during the briefing before the Arbitrator. R. 000001 (Implementation Agreement, p. 1); 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). Pyper Decl., ¶ 2. The State has not argued otherwise.

Throughout its Brief in Opposition to Respondent's Motion to Vacate the Arbitration Decision ("State's Brief"), the State asserts that the Arbitrator's decision must be afforded deference due to the Federal Arbitration Act review standards. State's Br., pp. 2-3. However, the threshold determination of arbitrability was not decided by the Arbitrator and, even if it had been decided by the Arbitrator, this Court's review would be *de novo* rather than deferential. *Alberici-Eby*, 992 F.2d at 732. *See also* Initial Brief, pp. 12-13 and n.7.

II. WHETHER E-POKER IS A CLASS II GAME IS NOT AN ARBITRABLE ISSUE.

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). Those seven items are as follows:

> (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
>
> (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
>
> (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

> (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
>
> (v) remedies for breach of contract;
>
> (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
>
> (vii) any other subjects that are directly related to the operation of gaming activities.

25 U.S.C. § 2710(d)(3)(C). "Significantly, what compels a limited reading of the permitted topics [in 25 U.S. § 2710(d)(3)(C)] is the canon of construction obligating [courts] to construe a statute abrogating tribal rights narrowly and most favorably towards tribal interests." *Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, n.9 (9th Cir. 2010).

Absent from the list above 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. Nor could the Compact do so because "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). In short, the Compact does not, and legally cannot, define what constitutes Class II or Class III gaming, only IGRA does. The interpretation and enforcement of IGRA is for a federal court, not an arbitrator interpreting or enforcing the Compact.

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 p. 6). The Compact does not, nor could it under

IGRA, define what constitutes Class II gaming that may be offered at a Class II facility. 25 U.S.C. §§ 2703, 2710(a) and (d)(3)(A); *Ho-Chunk Nation*, 512 F.3d at 933. The Compact does not govern or control DeJope, which is a Class II facility. The NIGC, not the State, has exclusive jurisdiction over Class II gaming regulation at DeJope. 25 U.S.C. § 2710(b).

The State argues that the Compact, Second Amendment, Section IV Authorized Class III Gaming, defines Class III gaming to include all forms of poker. State's Br., pp. 5-6.[3] However, the parties cannot alter the IGRA definitions of Class II and Class III gaming set forth in IGRA, 25 U.S.C. §§ 2703(7) and (8) through compacting because, as set forth above, IGRA limits the topics that may be included in the Compact. All the parties can do by compact is negotiate what games can be played at a Class III facility, not what games constitute Class II and III games.

Moreover, nothing in the record supports the State's argument that the parties intended non-banked poker to be included in Section IV(A)6 of the Second Amendment. While that section includes "[a]ll forms of Poker" it does so to the extent not included in Section IV(A)5, which refers to "[a]ll other banking, percentage and pari-mutuel card games …." Since that section references "banking" card games in general, the reference in Section IV(A)6 to all poker not included in Section IV(A)5 could reasonably be construed to mean all banking poker games not included in the general reference to banking card games. Forms of poker include five card draw, five card stud, blackjack, Texas Hold 'Em, etc. and does not necessarily refer to banking v. non-banking varieties of such forms. At most the language is ambiguous, and the Court cannot conclude, as a matter of law, that the parties intended the Compact to include non-banked e-

[3] The State did not argue to the Arbitrator that e-Poker is a Class III game because the parties agreed in the Compact that all forms of poker are Class III games. R. 000260-000294 and 000364-000377. If the State truly believed that the Compact controlled the issue, it would have argued that position with the Arbitrator.

Poker as a "form" of Class III gaming notwithstanding IGRA's express inclusion of non-banked card games under the statutory definition of Class II games. IGRA, 25 U.S.C. §§ 2703(7)(A) and (B). Even were that not the case, since the Compact governs only gaming at Class III facilities, as a matter of law, only the federal Class II and III gaming definitions of IGRA govern what can be played at a Class II facility such as DeJope.

The State's argument that the Compact's inclusion of all "forms" of poker as games that could be played at the Nation's Class III facilities makes the issue of whether e-Poker can be played at DeJope arbitrable suffers another fatal flaw. The Dispute Resolution section provides: "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…" by arbitration. R. 000136 (SOF, Exh. D, Second Amendment, p. 6 at ¶ 11) (emphases added). Section XXIV, Sovereign Immunity, of the Second Amendment, requires all disputes concerning Section IV Authorized Class III Gaming to be resolved by this Court, not arbitration:

> Section XXIV. SOVEREIGN IMMUNITY
>
> A. Unless the Parties agree otherwise, ***if a dispute arises regarding compliance with or the proper interpretation of the requirements of the Compact, as amended, under Sections IV (Authorized Class III Gaming)***, XXIII (Dispute Resolution), XXIV (Sovereign Immunity), XXXIV (Payment to the State), and XXV (Reimbursement of State Costs), ***the dispute shall be resolved by the United States District Court for the Western District of Wisconsin***.

R. 000138 (SOF, Exh. D, Second Amendment, p. 8 at ¶ 11) (emphases added).

The State's reliance on Section IV of the Compact to support its argument that this e-Poker dispute is arbitrable is, therefore, wholly misplaced. The Compact unambiguously excludes from arbitration any dispute concerning what is an authorized Class III game under Section IV of the Compact. If the State intended to bring a claim for a violation of Section IV of

the Compact, Second Amendment, which was not a claim raised by the State in the arbitration, under Section XXIV of the Compact, Second Amendment it was obligated to initiate a lawsuit in this Court.

The State attempts to distinguish this dispute from the dispute before this Court in *Wisconsin v. Ho-Chunk Nation*, 564 F. Supp. 2d 856 (W.D. Wis. 2008). State's Br., p. 7. In that case, the State brought actions against the Nation seeking to compel arbitration. *Ho Chunk Nation*, 564 F. Supp. 2d at 858-59. Exactly like the State has attempted to do in this dispute, in the prior case the State brought claims to preclude the Nation from conducting certain games allegedly in violation of IGRA. Noting that there was apparent agreement between the parties that the State's claims 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 (emphases added). The State claims the case is distinguishable because here the State is not seeking injunctive relief under IGRA § 2710(d)(7) like it did in *Ho-Chunk Nation, supra*. State's Br., p. 7. The State is, however, attempting to slice the issue too finely. The State is seeking to enjoin the play of e-Poker at the DeJope Class II facility because it is allegedly a Class III game. As the Court noted, "the potential right to enjoin class III gaming is strictly statutory" because, despite the State's argument to the contrary, IGRA and not the Compact defines what games constitute Class II gaming. Assuming, without conceding, the State has any right to stop the alleged unauthorized gaming at DeJope, the proper mechanism for doing so was for it to have brought an action for an injunction under IGRA § 2710(d)(7). The fact that the State did not pursue an injunction in accordance with IGRA § 2710(d)(7) merely highlights the State's error.

The State also argues that this dispute concerns the Compact because if e-Poker is a Class III game, it cannot be played at DeJope because the Compact does not allow it. State's Br., p. 8. The Compact does not allow or prohibit any gaming at DeJope because it is a Class II facility that is not governed by the Compact, as the parties stipulated and the Arbitrator expressly acknowledged. R. 000007-R. 000008 (SOF, ¶¶ 19 and 22); R. 000398-R. 000399 (Opinion, pp. 2-3). This dispute turns on the definition of Class II gaming in IGRA. The Arbitrator's analysis would have been the same even if the Compact had not existed because, as he acknowledged, the dispute must be resolved by the interpretation of IGRA and Wisconsin law, not the Compact. R. 000399 (Opinion, p. 3). The Compact is irrelevant and no portion or provision of the Compact needs to be, nor should be, interpreted or enforced to reach a decision as to whether e-Poker is a Class II game that can be played at the DeJope Class II facility, which is not governed by the Compact.

The State is attempting to utilize the Compact to inject itself into Class II gaming regulation. The NIGC, not the State, investigates and pursues Class II gaming violations (*i.e.*, Class III games being played at a Class II facility). *See* IGRA § 2713 (authority of the NIGC to enforce IGRA). The State could have, but did not, request that the NIGC investigate the alleged unlawful gaming at DeJope. *See* 25 C.F.R. Part 571. The NIGC has a process in place to investigate alleged violations, and the process includes the right to judicial review of an NIGC decision. *See* IGRA § 2714; 25 C.F.R. Parts 571, 573, 575, and 577. The reason the State does not wish to rely on the NIGC's exclusive enforcement authority over Class II gaming is plain—the NIGC has already determined that e-Poker is a Class II game and it has no intention of initiating an enforcement action against the Nation. R. 000172 – R. 000178 (SOF, Exh. F (NIGC's February 26, 2009 Advisory Opinion)); R. 000014 (SOF, ¶ 45).

The State has not, nor could it, "frame a reasonable argument that [its] claims constitute a dispute 'regarding the interpretation or enforcement of the Compact.'" *Ho-Chunk Nation*, 564 F. Supp. 2d at 862. Even if the Compact were applicable to DeJope, the State was required to file an action in this Court seeking to enjoin the play of e-Poker at DeJope as a violation of the Compact, Second Amendment, Art. IV, pursuant to the Compact, Second Amendment, Art. XXIV and IGRA, 25 U.S.C. § 2710(d)(7). Because this dispute was not arbitrable, the Opinion must be vacated.

III. EVEN IF THE ARBITRATOR HAD JURISDICTION TO DECIDE WHETHER E-POKER IS A CLASS II GAME, THE OPINION MUST BE VACATED.

The State asks this Court to narrowly construe the grounds for vacating an arbitration award in 9 U.S.C. § 10 in deference to the Arbitrator's decision. State's Br., pp. 11-13. However, 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. *See Stolt-Nielsen, S.A. v. Animalfeeds Int'l Corp.*, --- U.S. ---, 130 S.Ct. 1758, 1767 (2010). If an arbitrator's decision does not draw its essence from the contract, he has exceeded the scope of its authority:

> In order to vacate an arbitration award, a reviewing court must determine whether the award "draws its essence" from the contract which the arbitrator was asked to interpret. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960). We have previously interpreted our duty in such cases as follows: "Since the arbitrator's function, ordinarily and in this case, is limited to interpreting the contract, the court asked either to set aside or to enforce his award must make sure that he abided by that limit on his authority, for otherwise the award was made in violation of the agreement to arbitrate." *Chicago Typographical Union v. Chicago Sun-Times*, 935 F.2d 1501, 1505 (7th Cir.1991).

Alberici-Eby, 992 F.2d at 733.

As set forth in Part II, *supra*, the unambiguous language of the Compact limited the Arbitrator's authority to the interpretation and enforcement of the Compact. Based on the parties' Stipulation of Facts, the Arbitrator concluded that the Compact does not govern DeJope, and nothing in the Opinion suggests that the Arbitrator interpreted or enforced the Compact. The Opinion does not "draw its essence" from the Compact. The Opinion is rooted only in IGRA and State law, as the Arbitrator candidly acknowledged. R. 000399 (Opinion, p. 3).

Without addressing the merits of the bulk of the Nation's Initial Brief, pp. 18-35, the State asserts that the Nation failed to demonstrate that the Arbitrator willfully ignored controlling case law, another ground for vacating the Opinion. State's Br., p. 11. According to the State, willful disregard of the law may only be shown if the arbitrator explicitly "acknowledge[s] the legitimacy of the Nation's arguments, and then explicitly ignore[d] them." State's Br., p. 11. This is not the proper analysis for willful disregard because rarely will an arbitrator state "explicitly" that he intended to rule contrary to controlling precedent. *Stolt-Nielsen, S.A. v. Animalfeeds Int'l Corp.*, 548 F.3d 85, 92 (2nd Cir. 2008), *reversed and remanded on other grounds by, Stolt-Nielsen, S.A.* --- U.S. ---, 130 S.Ct. 1758. Instead, if the Opinion "strains credulity" and "does not rise to the standard of barely colorable," this Court should conclude that the Arbitrator "willfully flouted the governing law by refusing to apply it." *Id.*

Here, the Arbitrator interpreted the definition of Class II gaming in isolation from the balance of IGRA and without the aid of IGRA's legislative history. R. 000399-R. 000405 (Opinion, pp. 3-9). Interpreting IGRA devoid of statutory and historical context is the epitome of "willfully flouting" the law. *Citizens Against Casino Gambling in Erie Cnty. v. Hogen*, 2008 WL 2746566, *53 (W.D. N.Y. July 8, 2008); *Train v. Colo. Pub. Interest Research Grp., Inc.*, 426 U.S. 1, 10 (1976); *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 361 (8th

Cir. 1990); *Civil Aeronautics Bd. v. United Airlines, Inc.*, 542 F.2d 394, 399 (7th Cir. 1976). The only way for the Arbitrator to have concluded that poker is a Class III game was by ignoring Congress's directive that the definition of Class II gaming found in IGRA § 2703 be read in conjunction with IGRA § 2710 and in accordance with the regulatory/prohibitory test set forth in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). *See* Initial Br., pp. 21-23; S. Rep. No. 100-446, p. 9 (1988) (hereinafter the "Committee Report"), at pp. 6 and 9.[4] Had the Arbitrator followed, and not willfully ignored, Congress's directive, he would have been obligated to follow the binding precedent of this Court in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480, 486-87 (W.D. Wis. 1991) and *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States*, 367 F.3d 650, 654 (7th Cir. 2004) in which this Court and the Seventh Circuit concluded that Wisconsin's policy towards gambling is regulatory not prohibitory. Under that binding precedent, Wisconsin allows many forms of gambling and, thus, e-Poker is a Class II game under IGRA because it is a non-banked card game that is being played in a state that permits gaming for purposes of IGRA, 25 U.S.C. § 2703(7)(A)(ii) (Class II gaming definition) and § 2710(b)(a)(A) (Class II gaming allowed "within a state that permits such gaming…").

The Arbitrator also 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 and thus regulated rather than prohibited under the *Cabazon* test. R. 000400 – R. 000402 (Opinion, pp. 4-6). 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

[4] *See also* IGRA § 2701(5), Congressional finding that, "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity."

games requires an analysis of the "the laws of the State," not merely one portion of one law. The Arbitrator willfully ignored the undisputed facts that gambling in general and poker in particular are played throughout the State in a variety of forms and formats, including, poker as a lottery, video poker in taverns, charity poker, and poker at Indian casinos.[5] The State glibly concludes that the Arbitrator considered but rejected the Nation's legal arguments. State's Br., p. 11. To the contrary, as set forth at length in the Nation's Initial Brief, 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 State's Brief also ignores that the Supreme Court has concluded that a " more searching review [of an arbitrator's decision] ***based on authority outside the statute*** [9 U.S.C. § 10]" may be warranted in some circumstances. *Hall Street Assocs. LLC v. Mattel, Inc.*, 552 U.S. 576, 590 (2008) (emphases added). This case involves the "unique trust relationship between the United States and the Indians." *Mont. v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). Because IGRA was undoubtedly a statute passed for the benefit of Indian tribes, it must "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 Calif. Grand Casino v. Norton*, 353 F.3d 712, 730 (9th Cir. 2003). Because state jurisdiction over affairs on sovereign Indian lands is strongly disfavored, *see The Barona Group of the Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185, 1190 (9th Cir. 1982), and the federal government has exclusive authority over relations with Indian Tribes, *see* U.S. Const. Art. I, § 8, cl. 3; *Blackfeet*,

[5] IGRA was intended to prevent states from sheltering nontribal gambling. Committee Report, at p. 13. The Arbitrator's decision to ignore the reality of the scope and breadth of gambling and poker play in Wisconsin by looking no further than the language of Wis. Const. Art. IV § 24, ¶ 1, allows Wisconsin to shelter nontribal gambling and nontribal poker play contrary to the Congressional intent of IGRA.

471 U.S. at 765, a more searching review of the Arbitrator's Opinion is warranted. *Hall Street*, 552 U.S. at 590. The blind deference to the Arbitrator's Opinion suggested by the State—an Opinion that is directly contrary to IGRA, federal Indian law, the reality of gambling in Wisconsin and the more searching inquiry required under *Hall Street*, 552 U.S. at 590 where the sovereign rights of the Nation are being infringed by the State—would violate decades of Indian law jurisprudence. Therefore, even if the Opinion were not vacated under the general review standard set forth in 9 U.S.C. § 10, it cannot be sustained under the more searching review warranted by IGRA and federal Indian law.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Initial Brief, the Nation respectfully requests that this Court grant the Nation's Motion to Vacate.

Dated this 7th day of September, 2012.

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