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

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STATE OF WISCONSIN,

Plaintiff,

v. Case No. 13-C-334

HO-CHUNK NATION,

Defendant.

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PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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## INTRODUCTION

Defendant Ho-Chunk Nation ("the Nation") currently offers a form of electronic poker at its Ho-Chunk Gaming facility in Madison, Wisconsin ("HCG Madison"). The dispute in this litigation is whether such poker is a Class II or a Class III game under federal law. If it is a Class II game it is not subject to regulation by the plaintiff, the State of Wisconsin ("the State"). If it is a Class III game it must be conducted in accordance with the provisions of the tribal-state gaming Compact that the parties entered.

The Nation asserts that the electronic poker it is offering is a Class II game under federal law, while the State asserts that it is Class III game. Because the Compact between the parties does not authorize Class III gaming at HCG Madison, the State's position is that this activity is a violation of the Compact and must be enjoined by the Court. The Court should grant the State's motion for summary

judgment and enter an order permanently enjoining the playing of the electronic poker now being played at HCG Madison.

## BACKGROUND FACTS AND PROCEDURAL STATUS

The background facts and procedural posture of this dispute have been detailed to this Court in numerous proceedings and are articulated in the parties' Joint Statement of Stipulated Facts, as well. Therefore, the State presents this condensed summary of the facts and procedure of this matter.

In 1992, the parties entered into a compact ("the Compact") regarding the conducting of certain types of gambling (specifically, Class III gaming) on tribal lands. (Joint Statement of Stipulated Facts ("JSOSF"), ¶ 13). The Compact authorized the Nation to conduct Class III gaming on the Nation's lands in Sauk, Jackson, and Wood counties and at a fourth location as specified by the parties. *Id.* In 1993, an amendment to the Wisconsin Constitution took effect that limited the types of gambling that could be authorized by the Legislature. (*Id.*, ¶ 15). *See also* Wis. Const. art. IV, § 24.

In 2003, the Nation and the State executed the Second Amendment to the Compact, which expressly authorized the Nation to offer both banked and non-banked poker at the Nation's Class III gaming facilities. (JSOSF, ¶ 16). It also permitted the Nation to conduct Class III gaming at HCG Madison if Dane County voters passed a referendum authorizing the Nation to do so. (*Id.*, ¶ 17). The referendum, held on February 17, 2004, failed, however, by a wide margin, and no subsequent action has been taken to approve or authorize Class III gaming at HCG

Madison. (*Id.*). Thus, Class III gaming is not currently authorized at HCG Madison under the Compact.

In November 2010, the Nation began offering a form of non-banked electronic poker ("e-poker") at HCG Madison. (*Id.*, ¶ 23). The mechanics of how e-poker is played are described in the parties' JSOSF. (*Id.*, ¶¶ 24-30). This type of e-poker is not house-banked, *i.e.*, players bet against each other but not against the house. (*Id.*). HCG Madison (the house) collects a "rake" from the players' wagers (the pot) for each hand. (*Id.*). The State objected to the conduct of this form of gambling at HCG Madison on the grounds that it is a Class III game and is, therefore, not authorized to be played at HCG Madison under the Compact.

The State eventually made an arbitration demand, and the matter was heard by retired federal Ninth Circuit Court of Appeals Judge William A. Norris ("Arbitrator Norris"), who held in favor of the State, finding that the e-poker in question was, in fact, a Class III game under the law. (Plaintiff's Statement of Proposed Facts ("PSOPF"), Dkt. #19, ¶¶ 1-2). The arbitration award was vacated by this Court, however, on the grounds that the arbitrator had exceeded his authority. (*See* Dkt. #18-2).

The State then brought this action under the federal Indian Gaming Regulatory Act ("IGRA") to enjoin what it asserts is Class III gaming being conducted in violation of the Compact between the parties.

## JURISDICTION

IGRA, 25 U.S.C. § 2710(d)(7)(A)(ii), grants this Court jurisdiction over actions by states to enjoin gaming activities conducted in violation of a tribal-state gaming compact. The Court has jurisdiction over this action because the State is seeking to enjoin Class III gaming at the Nation's HCG Madison facility that is being conducted in violation of the Compact between the parties. (*See* Dkt. #1, ¶ 1).

The Nation is conducting what the State asserts is Class III gaming at HCG Madison, and the State seeks an order from this Court enjoining the referenced gaming pursuant to the Court's authority under 25 U.S.C. § 2710(d)(7)(A)(ii) of IGRA. Because the Nation's actions are in violation of the Compact between the parties, federal question jurisdiction is present pursuant to 25 U.S.C. § 2710(d)(7)(A)(ii) of IGRA, which states:

> The United States district courts shall have jurisdiction over—
>
> . . . .
>
> (ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect[.]

As noted by the Seventh Circuit in *State of Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921 (7th Cir. 2008), a dispute such as the one in this case, wherein the State seeks to enjoin Class III gaming based on a violation of the Compact, provides federal court jurisdiction "so long as the alleged compact violation relates to [the seven items enumerated in 25 U.S.C. § 2710(d)(3)(C)(i-vii)]." *Id.* at 934. Here, the alleged violations fall under the following statutory item regarding "(vii) any other

subjects that are directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(vii).

This Court has held that it has jurisdiction to review the State's claim that the Nation is violating the Compact by offering a Class III game at HCG Madison in the context of the State's arbitration confirmation action. On December 12, 2012, the Court held: "With respect to jurisdiction, a review of petitioner's arbitration demand and brief shows that at least part of its claim was that respondent was violating the compact by offering a Class III game at DeJope. Dkt. #6-6 at 7, 35. That is sufficient to fall under § 2710(d)(7)(A)(ii)." (Dkt. #18-2 at 5; *see also* PSOPF, ¶ 4). Jurisdiction similarly lies to consider the State's instant claim.

## RELEVANT STATUTES

IGRA, 25 U.S.C. § 2701, *et seq.*, was enacted by Congress in October 1988. IGRA creates three classes of gaming that an Indian tribe may conduct on Indian lands, each with differing regulatory roles for tribal, federal, and state governments. Class I gaming includes "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. § 2703(6). Class I gaming is regulated exclusively by Indian tribes. 25 U.S.C. § 2710(a)(l).

Class II gaming includes bingo and certain card games that otherwise satisfy the requirements of IGRA, but excludes any banked card games, electronic games of chance, and slot machines:

> (A) The term "class II gaming" means–
>
> > (i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)–
>
> . . . .
>
> > (ii) 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, but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.
>
> (B) The term "class II gaming" does not include–
>
> > (i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or
> >
> > (ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

25 U.S.C. § 2703(7). If a card game falls within this definition it must also meet the requirements of 25 U.S.C. § 2710(b)(1)(A), which is applicable to card games and all other Class II games, that it be "located within a State that permits such gaming for any purpose by any person, organization or entity."

Class III gaming includes "all forms of gaming that are not class I . . . and class II gaming." 25 U.S.C. § 2703(8). Class III gaming is legal only if conducted pursuant to a tribal-state gaming compact negotiated with the State, and is subject

to regulation by both the tribe and the State to the extent defined in the Compact. 25 U.S.C. § 2710(d)(1)(C).

## STANDARD OF REVIEW – SUMMARY JUDGMENT

The standard of review for summary judgment is well-known. Summary judgment is appropriate if, viewing all facts in the light most favorable to the non-moving party, there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986).

Here, there are no disputes of material fact. The only questions for the Court to resolve are legal ones, *i.e.*, whether the e-poker being offered by the Nation at its HCG Madison facility is a Class III game and, if so, whether it is being done in violation of the Compact between the parties, which would entitle the State to have such activity enjoined by the Court under 25 U.S.C. § 2710(d)(7)(A)(ii).

## ARGUMENT

### I. THE POKER BEING OFFERED AT HCG MADISON IS A CLASS III GAME UNDER FEDERAL LAW.

As noted above, Class III gaming includes all forms of gaming that are not Class I or Class II gaming, 25 U.S.C. § 2703(8), and such gaming must be conducted pursuant to a tribal-state gaming compact negotiated with the State. 25 U.S.C.A. § 2710(d)(1)(C). The Nation asserts that the e-poker being offered at HCG Madison is a Class II game. The definition of a Class II game with respect to card games is a game that is: (1) "explicitly authorized by the laws of the State;" or (2) is "not

explicitly prohibited by the laws of the State" *and* is "played at any location in the State[.]" 25 U.S.C. § 2703(7)(A)(ii).

Therefore, to prevail on their assertion that the e-poker being offered at HCG Madison is not a Class III game, the Nation must show that e-poker is either: (1) explicitly authorized (which it is not); or (2) not explicitly prohibited *and* is played legally in the State. Because the Nation cannot make either showing, the inescapable conclusion is that e-poker is a Class III game under federal law.

A. Poker is a card game that is not explicitly authorized by the laws of Wisconsin, but rather it is "explicitly prohibited by the laws of [Wisconsin]," 25 U.S.C. § 2703(7)(A)(ii)(II).

Nowhere in the Wisconsin Statutes or Constitution is there explicit authorization for the playing of poker in any form. Therefore, the threshold inquiry as to whether the game of poker (including the non-banked e-poker offered at HCG Madison) meets the definition of a Class II game is whether poker is "explicitly prohibited by the laws of [Wisconsin]." *Id.*

The above-referenced language from IGRA is clear on its face that the first step in determining if poker is a Class II game is to look to the specific provisions of the "laws of the State" to see if those laws "explicitly prohibit" the playing of poker. If an explicit prohibition exists in the laws of Wisconsin, poker is simply not a Class II game. The inquiry need not proceed further. Once it is determined that poker is explicitly prohibited, no other provisions of IGRA are relevant to the determination in this case whether e-poker is a Class II or Class III game. If

e-poker is explicitly prohibited by Wisconsin law, it is a Class III game and must be conducted pursuant to the terms of the Compact between the parties.

Both the Wisconsin Constitution and the Wisconsin Statutes include such explicit prohibitions. Article IV, § 24 of the Wisconsin Constitution specifically prohibits gambling:

> Gambling. SECTION 24. (1) Except as provided in this section, the legislature may not authorize gambling in any form.

It is undisputed that the e-poker being conducted at HCG Madison is gambling. Poker has long been regarded by the courts as a form of gambling.[1] Poker is, therefore, explicitly and unambiguously prohibited by the Wisconsin Constitution.

In addition, the exceptions referenced in the Wisconsin Constitution do not include poker. The exceptions specified by the Constitution include certain bingo games and types of raffles, pari-mutuel on-track betting, and the state lottery. In fact the constitutional provision anticipates efforts to circumvent the prohibition of gambling card games (such as poker) by specifying that such games (including a specific reference to poker) cannot be conducted under the guise of being a "lottery." Wis. Const. art. IV, § 24(6)(c).

Arbitrator Norris, a distinguished retired federal circuit judge, found that Wisconsin law explicitly prohibits poker. He said in his Opinion, "[e]ven if poker was being played in some form in the State, Wisconsin law nevertheless 'explicitly prohibit[s] it." (Dkt. #18-1 at 6; *see also* PSOPF, ¶ 3).

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[1]*See State v. Morrissy*, 25 Wis. 2d 638, 131 N.W.2d 366 (1964) (Wisconsin Supreme Court decision affirming conviction for commercial gambling in a case where tavern owner was conducting poker games).

The state constitutional prohibition on e-poker is reinforced by Wis. Stat. § 945.02(1), a specific criminal statute that proscribes betting.[2] It is undisputed that the e-poker being played at HCG Madison involves betting. (JSOSF, ¶¶ 24-30). Because e-poker involves betting it is, therefore, explicitly prohibited under the Wisconsin Statutes.

Furthermore, poker in any form, *by definition*, involves betting. Webster's New Collegiate Dictionary defines "poker" as "one of several card games in which a player bets that the value of his hand is greater than that of the hands held by others., in which each subsequent player must either equal or raise the bet or drop out, and in which the player holding the highest hand at the end of the betting wins the pot." WEBSTER'S NEW COLLEGIATE DICTIONARY 881 (1979).

Likewise, Merriam-Webster Dictionary Online[3] defines "poker" as "any of several card games in which a player bets that the value of his or her hand is greater than that of the hands held by others, in which each subsequent player must either equal or raise the bet or drop out, and in which the player holding the highest hand at the end of the betting wins the pot." "Poker." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 13 Feb. 2014. <*http://www.merriam-webster.com/dictionary/poker*>. There is no question that

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[2]The statute defines a "bet" as "a bargain in which the parties agree that, dependent upon chance even though accompanied by some skill, one stands to win or lose something of value specified in the agreement." Wis. Stat. § 945.01(1).

[3]The Seventh Circuit has cited this online dictionary in recent decisions. *See, e.g.*, *Aeroground, Inc. v. CenterPoint Properties Trust*, 738 F.3d 810, 814 (7th Cir. 2013); *GE Betz, Inc. v. Zee Co., Inc.*, 718 F.3d 615, 629 (7th Cir. 2013); *EEOC v. Thrivent Financial for Lutherans*, 700 F.3d 1044, 1050 (7th Cir. 2012).

Wisconsin's prohibition on betting in Wis. Stat. § 945.02(1) explicitly prohibits the playing of games like poker, which, by definition, involve betting.

A fundamental principle of statutory construction is that courts begin "with the language of the statute itself" and "where . . . the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989).[4]

The language of IGRA, the language of the Wisconsin Constitution, and the language of the Wisconsin Statutes are all unambiguous. Under IGRA, Class II games include non-banking card games that "are not explicitly prohibited by the laws of the State." Given the express and unambiguous prohibition on betting in the Wisconsin Statutes and the express and unambiguous prohibition in Wisconsin's Constitution that precludes "the legislature [from] authoriz[ing] gambling *in any form*," poker in *any* form (which is gambling in that it involves betting) cannot satisfy Class II's requirement that the game is "not explicitly prohibited by the laws of the State." It is explicitly prohibited.

[4]*See also Kelley Co. v. Marquardt,* 172 Wis. 2d 234, 247, 493 N.W.2d 68 (1992) (when construing a statute, the Court's aim is to ascertain the intent of the Legislature, and to that end it will first consider the statutory language); *Village of Shorewood v. Steinberg,* 174 Wis. 2d 191, 201, 496 N.W.2d 57 (1993) (if the language of the statute is clear and unambiguous, the Court's inquiry ends, and it simply applies the language to the facts of the case).

B. The gaming activities being conducted pursuant to tribal-state gaming compacts between the State and various tribes (including the Nation) do not negate the explicit prohibition of poker and other forms of gambling under state law.

As noted above, the laws of the State of Wisconsin explicitly prohibit gambling (with certain exceptions that do not include poker), and explicitly prohibit betting, which is a core element of the game of poker. The fact that the Wisconsin Supreme Court has grandfathered the pre-constitutional amendment provisions in the contractual agreements between the parties[5] that permit certain Class III gaming (including poker) does not negate the explicit prohibition of such gambling activities under the laws of Wisconsin. Regardless of whether such activities are preserved for the Nation via the Compact and the contract clauses of the Wisconsin and U.S. Constitutions, for purposes of determining whether the poker in question is a Class II or Class III game the threshold question remains whether poker is explicitly prohibited under the laws of the State of Wisconsin. Because poker *is* explicitly prohibited, it is a Class III game.

The Wisconsin Supreme Court's holding in *Dairyland* did no more than preserve contractual rights that existed prior to the 1993 constitutional amendment, including the right to conduct certain forms of Class III games, and to

[5]*See Dairyland Greyhound Park v. Doyle*, 2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408 (constitutional amendment was not retrospective in operation with respect to pre-existing tribal-state gaming compacts, and the amendment was not intended to invalidate the compacts).

amend the Compact to include additional games consistent with the law in effect at the time of the contract's formation:

> We conclude that the 1993 Amendment to Article IV, Section 24 of the Wisconsin Constitution does not invalidate the Original Compacts. . . .
>
> The essence of what is at issue here is whether Wisconsin should break treaties with Tribes by walking away from its contractual obligations. Rules of contract interpretation and the Contract Clauses of the United States and Wisconsin Constitutions compel us to conclude that the State must honor its contractual obligations in their entirety.

*Dairyland Greyhound Park v. Doyle*, 2006 WI 107, ¶¶ 2-3, 295 Wis. 2d 1, 719 N.W.2d 408 (footnotes omitted). The *Dairyland* holding left undisturbed pre-existing contractual rights, which, as the *Dairyland* court noted, is the result compelled by the Contracts Clauses in the United States and Wisconsin Constitutions. This is simply preservation of a pre-existing contract.

Consequently, the state-tribal compacts do not alter state law, but are a limited exception to the application of otherwise valid state laws. Protected contractual rights are often necessarily adverse to the laws of a state. Otherwise, protection from the state law would not be required. The purpose of the Contracts Clauses is not to elevate private contractual rights to state policy, but rather "to protect contract rights from the 'fluctuating policy' of the state." *Id.*, ¶ 54 (citation and internal quotation marks omitted).

The court's holding in *Dairyland* simply prevents the application of otherwise valid state law to a discrete set of contractual rights. This is an extremely limited exception to the applicability of state law and does not otherwise restrict the application or validity of the state law. The fact that the United States and

Wisconsin Constitutions protect the legitimate expectations of the parties to a contract regarding Class III gaming does not change the fact that poker is prohibited by the laws of Wisconsin. There is absolutely no basis, either in the text or legislative history, for concluding that an express prohibition in state constitutional and statutory law is nullified by the fact that constitutionally protected contractual rights to conduct Class III gaming may also exist.

There is a difference between a state law which, by its terms, exempts certain things from its application, and contractual rights protected from the application of state law.[6] Undersigned counsel is aware of no authority for the proposition that a protected contractual right that is contrary to state law is equivalent to, or has the force and effect of, state law. Tribal-state gaming compacts are contracts, not the laws of the State. *See State of Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 939 (7th Cir. 2008) (a compact is interpreted pursuant to state contract law principles); *Cachil Dehe Band of Wintun Indians, et al. v. California*, 618 F.3d 1066, 1073 (9th Cir. 2010) (compacts are interpreted pursuant to general contract law

[6]The advisory opinion issued by the National Indian Gaming Commission ("NIGC") (JSOSF, ¶ 42 & Ex. G) on this issue misses this important distinction. The NIGC letter states that the poker in question is a Class II game based, in part, on its conclusion that poker is not explicitly prohibited in light of the fact that it is played in the State pursuant to the *Dairyland* holding under provisions of tribal-state compacts that pre-date the 1993 amendment to the State Constitution. Not only is this analysis wrong for the reasons stated above, the opinion is purely advisory in nature (JSOSF, Ex. G at 7) and as such, is not entitled to the deference that accompanies a formal agency action, but is entitled to deference only to the extent it has the power to persuade. *Catskill Development, L.L.C. v. Park Place Entertainment Corp.*, 547 F.3d 115, 127 (2d Cir. 2008) (rejecting opinion letter in part because it was "inconsistent with congressional design," and citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

principles); *Am. Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1080-81 (D. Ariz. 2001) (a compact pertaining to tribal land is not a treaty or state law), *vacated on other grounds*, 305 F.3d 1015 (9th Cir. 2002). *See also Citizen Band Potawatomi Tribe of Oklahoma v. Green*, 995 F.2d 179, 181 (6th Cir. 1993) (where Oklahoma law makes electronic games illegal, authorization to conduct electronic games in a compact does not make Oklahoma a "State in which gambling devices are legal" for purposes of 25 U.S.C. § 2710(d)(6)).

Contract rights are not the laws of the State. The fact that the courts have preserved the certain rights of the Nation and other tribes to conduct gambling activities under the tribal-state gaming compacts between the tribes and the State does not alter the fact that such activities remain explicitly prohibited under the laws of the State.

### C. E-poker is not legally "played at any location in [Wisconsin.]" 25 U.S.C. § 2703(7)(A)(ii)(II).

As previously noted, the definition of a Class II game with respect to card games is a game that is: (1) "explicitly authorized by the laws of the State;" or (2) is "not explicitly prohibited by the laws of the State" *and* is "played at any location in the State[.]" 25 U.S.C. § 2703(7)(A)(ii). Because, as argued above, e-poker is explicitly *prohibited* by the laws of Wisconsin, it is not necessary to reach the next

prong as to whether it is played at any location in Wisconsin.[7] Nonetheless, even if one assumes *arguendo* that the poker being offered at HCG Madison is not explicitly prohibited by the laws of Wisconsin, poker is not being legally played at any location in Wisconsin.

1. "Played at any location within the State" must be read to mean "played *legally* at any location within the State."

As an initial matter, the phrase "played at any location in the state" must be presumed to refer to the *legal* playing of the game. It would be nonsensical to argue that the illegal playing of poker somewhere in the State would therefore satisfy this statutory criterion so as to render the game as a Class II game everywhere else. Courts will not construe a statute in a way that leads to absurd results. "It is an elementary rule of construction that 'the act cannot be held to destroy itself.'" *Zbaraz v. Madigan*, 572 F.3d 370, 387 (7th Cir. 2009) (quoting *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 20 (1995)). *See also Treadway v. Gateway Chevrolet Oldsmobile Inc.*, 362 F.3d 971, 976 (7th Cir. 2004) ("'Nonsensical interpretations of contracts, as of statutes, are disfavored . . . [n]ot because of a judicial aversion to nonsense as such, but because people are unlikely to make contracts, or legislators statutes, that they believe will have absurd consequences.'") (quoting *FutureSource L.L.C. v. Reuters Ltd.*, 312 F.3d 281, 284-85 (7th Cir. 2002)).

[7]This point was noted by Arbitrator Norris in the arbitration of this matter. As he stated, "[b]ecause 'not explicitly prohibited by the laws of the State' is unambiguous, there is no need to consider whether poker is being 'played at any location in the State.' Even if poker was being played in some form in the State, Wisconsin law nevertheless 'explicitly prohibit[s]' it." (Dkt. #18-1 at 6*; see also* PSOPF, ¶ 3).

2. Wisconsin Lottery scratch-off games are not poker.

Wisconsin Lottery scratch-off games are not poker. As noted in the stipulated facts, the Wisconsin Lottery has offered a number of scratch-off games with a poker theme. (JSOSF, ¶ 33). This, however, does not constitute the playing of poker anymore than a scratch-off lottery ticket with a football theme constitutes the playing of football. The scratch-off poker games do not come close to representing the dictionary definitions of poker, or for that matter, the poker being offered at HCG Madison. Poker, by definition, involves betting. (*See* Argument section I-A, above). A scratch-off lottery ticket does not involve betting, only scratching.

In a scratch-off game, a person's winnings are simply determined by what hand is revealed when the person scratches off a limited number of hidden cards. These games are all played in fundamentally the same way—the consumer buys a card with preprinted symbols, and uncovers these symbols to determine if he/she qualifies for a prize by matching pre-designated combinations. These games do not use a deck of cards so there is no interactive element of chance to determine winners. Rather, winners are pre-determined when the instant scratch-off cards are printed. There are no strategic decisions made by players regarding wagers, folding, etc., and the amount to be won is pre-determined by the lottery, not wagering interaction amongst the players. There is no 52-card deck involved, there is no playing one's hand against the hands of other players, there is no draw of cards, and there is no placing of bets. One can imagine the outrage a high-stakes

gambler might display if he or she sat down at a poker table and, instead of being dealt cards, was simply handed a scratch-off ticket. Poker-themed scratch-off games do not constitute the playing of poker under even the most liberal of interpretations.

In fact, this very question was considered in *Coeur d'Alene Tribe v. State of Idaho*, 842 F. Supp. 1268 (D. Idaho 1994), *aff'd* 51 F.3d 876 (9th Cir. 1995). The tribe argued that because the state lottery used games with casino gaming themes the tribe was entitled to conduct casino games, a proposition the district court dismissed due to the differing nature of the lottery games and proposed activities, which were prohibited by Idaho law. *Id.* at 1279-80. The same analysis applies here. Lottery scratch-off games do not constitute the playing of poker.

3. Video poker machines do not constitute the "play[ing]" of poker under 25 U.S.C. § 2703(7)(A)(ii)(II).

As is the case with the scratch-off Wisconsin Lottery games, the use of video poker machines likewise does not constitute the "play[ing]" of poker under 25 U.S.C. § 2703(7)(A)(ii)(II). A video poker machine is a slot-machine style of electronic game of chance with the game outcome determined by a random number generator, which simulates random distribution of playing cards. (JSOSF, ¶ 39). It is simply a poker-themed slot machine that operates no differently than any other slot machine. In this case, the spinning figures are simply replicas of playing cards as opposed to fruits or other common slot machine themes. As is the case with any other typical slot machine, there are no other players and any winnings the player

earns are paid by the house. (*Id.*). The only decision made by a player on a video poker machine is whether to "draw" up to 5 cards to replace the original 5 designated by the machine. (*Id.*). The player's winnings are determined solely by the cards in the player's final hand. (*Id.*). As is the case with any slot machine, certain results ("hands") entitle the player to certain pre-determined amounts of winnings. The player's hand is not matched against or compared to any other players' hands to determine whether the player wins. As noted in the Joint Statement of Stipulated Facts, this does not describe the e-Poker played at HCG Madison. (*Id.*). Video poker slot-style machines do not constitute the playing of poker under 25 U.S.C. § 2703(7)(A)(ii)(II).

4. The use of video poker machines at taverns in Wisconsin is illegal if bets and payments are made.

Even if one were to (erroneously) assume that video poker slot-style machines constitute the "play[ing]" of poker under 25 U.S.C. § 2703(7)(A)(ii)(II), the use of such video poker machines for gambling purposes is prohibited by Wisconsin law, resulting in civil or criminal penalties depending upon the circumstances of use. Despite the Legislature's decision in 1999 to reduce the penalties for possession of 5 or fewer machines,[8] it is still a criminal misdemeanor to play a video gambling machine (Wis. Stat. § 945.02), the machines are still subject to seizure or removal (Wis. Stat. §§ 66.051 and 968.13), and all other criminal penalties remain in place. Thus, any argument that the use of video poker machines satisfies the provisions of

[8]*See* 1999 Wisconsin Act 9, § 3191bf.

25 U.S.C. § 2703(7)(A)(ii)(II) (*i.e.*, that it is the "playing of poker") must be rejected, as such activity is illegal under the laws of Wisconsin.

D. The Compact Defines "All forms of Poker" As Class III Games.

In 2003, the State and the Nation amended the Compact to authorize the Nation to conduct banked and non-banked poker as a Class III game. (JSOSF, ¶ 16). Section IV of the Compact, as amended by the Second Amendment, refers to the authorization of Class III gaming, and lists the specific activities (*i.e.*, Class III games) authorized under the Compact. The Nation's assertion that the non-banking poker being offered at HCG Madison is a Class II game is completely inconsistent with the language of the Compact, which states (emphasis added):

> IV. AUTHORIZED CLASS III GAMING. The States of Illinois, Iowa and Michigan authorize within their borders a full range of casino games. In order to make Wisconsin Indian gaming facilities competitive with these surrounding States, the Parties have agreed that the Nation can offer for play the games authorized by this Section IV. . . .
>
> A. The Tribe shall have the right to operate the following Class III games during the term of this Compact *but only as provided in this Compact*:
>
> 1. Electronic games of chance with video facsimile displays;
> 2. Electronic games of chance with mechanical displays;
> 3. Blackjack;
> 4. Pull-tabs or break-open tickets when not played at the same location where bingo is being played;
> 5. All other banking, percentage and pari-mutuel card games;
> 6. ***All forms of Poker***, to the extent that these games are not included in the previous subsection;
>
> . . . .

> 15. Any other game, whether played as a table game or played on an electronic or mechanical device, including devices that operate like slot machines, which consist of the elements of prize, chance and consideration[.]

(Compact, § IV. A. (as amended in 2003); Dkt. #17-4 at 1; *see also* JSOSF, ¶ 15 & Ex. D). Thus, the plain language of the Compact specifies that "All forms of Poker" are Class III games.[9]

While it is true that the language of the Compact is not dispositive as to what is a Class III game under IGRA, the language that the parties agreed to clearly reflects their understanding and interpretation as to what kind of gaming activities would require a tribal-state gaming compact. The Nation clearly regarded "[a]ll forms of Poker" as Class III games until it decided it wanted to offer poker at HCG Madison. The Nation cannot have it both ways.

## II. THE NATION IS CONDUCTING GAMBLING IN VIOLATION OF THE COMPACT BETWEEN THE PARTIES.

### A. The e-poker being offered at HCG Madison is a Class III game, which requires authorization under a tribal-state gaming compact, and the Compact between the parties does not authorize Class III gaming at HCG Madison.

The Compact between the State and the Nation does not authorize the conduct of Class III games at the Nation's HCG Madison facility. (JSOSF, ¶¶ 12-13, 17 & Exs. B, C, D, and E). Cognizant of the requirement under 25 U.S.C. § 2710(d)(1)(C) that Class III gaming cannot be conducted without an authorizing

[9]The phrase "to the extent that these games are not included in the previous subsection" that follows "All forms of Poker" does not limit the definition, but rather expands it to make it clear that *all* forms of poker (which includes banked and non-banked) are included under the Compact's definition of what constitutes Class III games.

tribal-state gaming compact, the Nation entered into negotiations with the State to authorize Class III gaming at certain locations in Wisconsin. (JSOSF, ¶ 13). The resulting compact between the parties authorized Class III gaming at three locations, but not at HCG Madison. (*Id.*, ¶¶ 12-13, 17).

Following additional negotiations and litigation over the issue, the parties executed the Second Amendment to the Compact in 2003. (*Id.*, ¶ 16). That amendment specified that Class III gaming could be conducted at HCG Madison only if a Dane County Referendum authorizing the Nation to do so was passed by Dane County voters in 2004. (*Id.*, ¶ 17; *see also id.*, Ex. D at 5). The State and the Nation amended the Compact to allow the Nation to conduct Class III gaming at the HCG Madison facility if approved by the voters of Dane County. (*Id.*). The voters rejected this proposition by a margin of almost 2 to 1. (*Id.*). Thus, the Nation is without authority under the Compact to conduct Class III gaming at HCG Madison.

Subsection C of Section IV of the Compact explicitly states that: "The Tribe *may not operate any Class III gaming not expressly enumerated in this section of this Compact* unless this Compact is amended pursuant to section XXX." (Emphasis added). (JSOSF, ¶ 13, Ex. B at 7; *see also id.,* Ex. B. at 43-44). Therefore, the Nation's offering of a Class III game at HCG Madison violates the specific terms of the Compact.

In addition, the Seventh Circuit has held that the Compact between the parties "controls gaming not only at the locations specifically named, but also at

other locations including the Dane County site." *Wisconsin Winnebago Nation v. Thompson*, 22 F.3d 719, 724 (7th Cir. 1994).

The Compact governs the Nation's ability to conduct Class III gaming at HCG Madison, and its language could not be more explicit: "Given these facts, the Parties agree that, rather than pursue an off-reservation site, at this time, as its fourth location, the Nation's Site at [HCG Madison] can be the Nation's fourth location for conducting Class III gaming, subject to the following conditions[.]"[10] (JSOSF, ¶ 16, Ex. D at 5). It is clear from its language that the Compact constitutes an agreement between the parties specifying where Class III games can be played, and that the necessary conditions for the conducting of Class III games at HCG Madison have not been met.

The offering of a Class III game, e-poker, at a location not authorized by the Compact violates the Compact.

B. Because the Nation is conducting gambling in violation of the Compact, such activity must be enjoined.

The Compact between the State and the Nation does not permit the conduct of Class III games at the Nation's HCG Madison facility. The Nation's offering of non-banked electronic poker at the HCG Madison facility constitutes Class III gaming in violation of the Compact between the parties. Despite the explicit provisions of the Compact, however, the Nation has continued to conduct Class III gaming at HCG Madison. The State now seeks an order from this Court enjoining

[10]Those conditions, as noted above, were never satisfied. The 2004 Dane County authorizing referendum failed. (JSOSF, ¶ 17).

the referenced gaming via the Court's authority under 25 U.S.C. § 2710(d)(7)(A)(ii). Because the Nation's actions are in violation of the Compact between the parties, this Court has jurisdiction to enjoin such actions pursuant to 25 U.S.C. § 2710(d)(7)(A)(ii) of IGRA, which states:

> The United States district courts shall have jurisdiction over—
>
> . . . .
>
> (ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect[.]

As noted by the Seventh Circuit in *Ho-Chunk Nation*, 512 F.3d 921, a dispute such as the one in this case, wherein the State seeks to enjoin Class III gaming based on a violation of the Compact, provides federal court jurisdiction "so long as the alleged compact violation relates to [any of the items under 25 U.S.C. § 2710(d)(3)(C)(i-vii)"]. *Id.* at 934. The Court should exercise its jurisdictional authority and enjoin the conduct of e-poker, a Class III game, at the Nation's HCG Madison facility.

## CONCLUSION

The non-banked electronic poker being offered by the Nation at its HCG Madison facility is explicitly prohibited by the laws of the State of Wisconsin and is, therefore, a Class III game under federal law. Class III gaming at the HCG Madison facility is not authorized by the Compact between the parties. Therefore, the Nation is conducting Class III gaming in violation of the Compact, and this Court should enjoin that activity. For the reasons stated herein, the State

respectfully requests that the Court grant its summary judgment motion and permanently enjoin the e-poker being played at the Nation's HCG Madison facility.

Respectfully submitted this 17th day of February 2014.

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