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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

STATE OF IDAHO, a sovereign State of the United States, Plaintiff, vs. COEUR D'ALENE TRIBE, a federally recognized Indian tribe, Defendant.	Case No. 2:14-cv-00170-BLW **MEMORANDUM IN SUPPORT OF MOTION FOR STAY OF PRELIMINARY INJUNCTION PENDING APPEAL**

Defendant Coeur d'Alene Tribe ("Tribe") respectfully requests this Court to grant its motion for a stay of the Court's September 5, 2014 Order (Dkt. 40) pending appeal to the U.S. Court of Appeals for the Ninth Circuit. On September 5, 2014, Defendant filed a Notice of Appeal from that Order, which granted Plaintiff's Motions for a Preliminary Injunction and Temporary Restraining Order and denied Defendant's Motion to Dismiss.

I. Standard for Stay Pending Appeal

Rule 62(c) of the Federal Rules of Civil Procedure provides that "[w]hile an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction." The standard for granting a stay of a preliminary injunction pending appeal assesses: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Additionally, "[d]eciding whether to grant a stay of a preliminary injunction pending an appeal is an equitable inquiry. Each factor in the analysis need not be given equal weight." *Apple, Inc. v. Samsung Elecs. Co.*, 2012 U.S. Dist. LEXIS 91646, 15 (N.D. Cal. 2012) (citing *Standard Havens Prods. v. Gencor Indus.*, 897 F.2d 511, 512 (Fed. Cir. 1990)); *see also Golden Gate Rest. Ass'n v. City of San Francisco*, 512 F.3d 1112, 1115-16, 1119 (9th Cir. 2008) (citing *Hilton* and staying a district court judgment pending appeal). Thus, for instance, "[w]hen harm to applicant is great enough, a court will not require 'a strong showing' that applicant is 'likely to succeed on the merits.'" *Apple, Inc.*, 2012 U.S. Dist. LEXIS at 15 (quoting *Standard Havens*, 897 F.2d at 512); *see also Golden Gate Rest. Ass'n*, 512 F.3d at 1115-16, 1119 ("[T]he standard for granting a stay is a continuum."); *United States v. 1020 Elect. Gambling Mach.*, 38 F. Supp. 2d 1219 (E.D. Wash. 1999) ("If it is debatable whether the Tribes will succeed on appeal, it cannot be disputed that their cases raise significant questions of law. Since the balance of hardships tips sharply in their favor, a stay is appropriate.").

II. Likelihood of Success on the Merits

The Tribe has a high likelihood of success on the merits because of arbitration being the exclusive remedy available for the resolution of Compact disputes, the lack of subject matter jurisdiction in the absence of waiver or abrogation of tribal sovereign immunity, and the Tribe's right to offer Texas Hold'em as a Class II game under the Indian Gaming Regulatory Act ("IGRA"). Moreover, although the Tribe raised significant disputed issues of material fact as to the Texas Hold'em contests and other forms of poker Idaho allows, the Court never conducted an evidentiary hearing or additional briefing that would allow the Tribe to present evidence that would enable the court to be fully informed before addressing the merits of this dispute.

A. In the Absence of the Tribe's Consent, Binding Arbitration is the Exclusive Remedy to Resolve Compact Disputes.

The Court stated in its September 5 Memorandum and Order that although it had previously stayed this suit pending arbitration, "[a]fterward, the Tribe changed its mind and decided it would prefer to litigate." Dkt. 40 at 1-2. The Tribe, however, has not changed its mind and it has not made any election to litigate. Under Article 21 of the Compact, arbitration remains the exclusive remedy to resolve Compact disputes. Thus, the State is obligated to invoke arbitration if it alleges a Compact violation and this court has no jurisdiction to entertain this suit.

Binding arbitration is the ***only*** method of dispute resolution the parties agreed upon in the Compact and hence the only forum for dispute resolution in the absence of the other party's express consent. *See* Dkt. 3-3 at 35 ("[B]oth parties consent to binding arbitration as provided herein."). The Compact unequivocally states that the procedure set forth in Article 21 "controls

the resolution of ***all disputes*** other than those expressly provided for in Article 6." Dkt. 3-3 at 35 (emphasis added). Further, "if either party believes that the other party has failed to comply with any requirement of this Compact, it shall invoke the following procedure…." *Id.* The required procedures establish a 60-day period after notice of non-compliance for the parties either to resolve the dispute outright or to establish a mutually agreeable procedure whereby the controversy will be resolved. Dkt. 3-3 at 35-37. After the close of the 60-day period either party "***may*** pursue binding arbitration." *Id.* at 35 (emphasis added).

The only way to deviate from the arbitration procedure is by mutual consent. *Id.* at 36-37. The Compact unambiguously provides for binding arbitration as the exclusive remedy to resolve Compact disputes. However, any ambiguity should be resolved in favor of arbitration. *Balen v. Holland Am. Line, Inc.*, 583 F.3d 647, 652 (9th Cir. 2009) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

The Court's decision does not provide any explanation as to why the Court believes the Tribe has chosen to litigate rather than arbitrate, but the Tribe has made no such decision. The Tribe has not filed an Answer to the State's Complaint. The Tribe has not filed any motion seeking relief other than its Motion to Dismiss for Lack of Jurisdiction. *See* Dkt. 15. Although the Tribe has chosen not to invoke arbitration, there is no basis for the Court to construe this choice as the Tribe's consent to litigate.

Under the Compact, although the Tribe may invoke arbitration, it is under no obligation to do so. The Tribe does not allege the State has engaged in a Compact violation at this time,[1] and thus the Tribe has chosen not to invoke arbitration. The Tribe's decision not to invoke arbitration at this time does not mean it has waived its bargained-for right under the Compact to arbitration as the exclusive remedy for resolving Compact disputes in the absence of express

[1] Other than the State having filed this lawsuit rather than complying with Article 21 of the Compact.

consent to the contrary. The Tribe's decision not to invoke arbitration at this time does not constitute express consent to litigation.

If the State alleges a Compact violation, it may invoke arbitration. The State already invoked the Article 21 dispute resolution process, but short-circuited the process by filing this lawsuit for injunctive relief. The Court had already rejected the State's interpretation that Article 21 permits it to avoid arbitration by racing to court. Dkt. 35 at 7. Yet, without the State taking any further action to invoke arbitration and without the Tribe's consent, the Court has rewarded the State for taking a course of action outside the parameters of the parties' agreed upon dispute resolution process. Indeed, whether the State decides to invoke arbitration or not does not change the fact that under the Compact arbitration remains the exclusive remedy for resolving Compact disputes. The State may not forego invoking arbitration and then litigate Compact disputes in the absence of the Tribe's consent. The Tribe has not, nor does it now, consent to this suit.

B. The IGRA Has Not Abrogated and the Tribe Has Not Waived Sovereign Immunity from this Suit.

Even if the Tribe's Texas Hold'em Poker tournaments were Class III gaming, the IGRA's abrogation of immunity does not cure the lack of jurisdiction over the State's suit. The IGRA provides a waiver of tribal sovereign immunity in the limited circumstance of State action "to enjoin a class III gaming activity located on Indian lands ***and*** conducted in ***violation of any Tribal-State compact***…." 25 U.S.C. § 2710(d)(7)(A)(ii) (emphasis added). Thus, when a compact authorizes some Class III games but not others, as in the compact between Idaho and the Coeur d'Alene Tribe, the State may only regulate the Class III games included in the express terms of the compact, leaving the regulation of all other Class III games to the federal government. *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1059-60 (9th Cir.

1997); *see also Dewberry v. Kulongoski*, 406 F. Supp. 2d 1136, 1141-42 (D. Or. 2005). The IGRA's prohibition on state regulation outside the express provisions of a compact ensures the "long-established principle that the jurisdiction of the state and the application of state law do not extend to Indian lands absent the consent of the tribes." *Cabazon*, 124 F.3d at 1060.

In *Cabazon*, the court refused to find an implied promise not to engage in Class III gaming outside what was authorized by the compact simply because unauthorized Class III gaming violates IGRA. *Cabazon*, 124 F.3d at 1059-60. Similarly, Section 6.5.1 of the Tribe's Compact limits the games available to the Tribe under the Compact to those set forth in Section 6.2, but does not expressly prohibit other Class III games. Dkt. 3-3 at 19. The Tribe has not consented to State jurisdiction beyond the express terms of the Compact. The Ninth Circuit clearly stated in *Cabazon*, that a court should "decline to conclude that the [Tribe has] impliedly consented to the extension of state regulatory authority to their tribal lands, beyond the express provisions of the Compact[], simply by entering into the Compact[]." *Id*. at 1060.

C. The Tribe Has the Right to Offer and Regulate Texas Hold'em Tournaments.

The Tribe also has a high likelihood of success regarding its argument that it may offer Texas Hold'em tournaments. The IGRA provides that a tribe may offer any Class II card game permitted by or not explicitly prohibited by the laws of the state. 25 U.S.C. § 2703(7)(A)(ii); *id.* § 2710(b)(1)(A). The Tribe presented significant issues of fact demonstrating that Idaho permits the play of Texas Hold'em Poker within the state. Under the IGRA, "[a]n Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if … such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity." *Id.* § 2710(b)(1)(A).

The Court finds that Texas Hold'em is not permitted in Idaho, citing the Idaho Constitution's general prohibition on poker. Dkt. 40 at 6. But, even when a state has a general prohibition on a particular game, IGRA requires examination of the exceptions in state law. Because the Court never held a hearing or requested additional briefing to examine evidence of poker play in Idaho, the September 5 Order was issued without addressing important disputed issues of material fact as to exactly what the State allows.

The Tribe presented in its briefs evidence that a State prosecutor asserted a "friends and family" exception to its poker prohibition. Dkt. 16 at 2 n.1. The Court was presented with the order of a State court in which Idaho permitted at least these two defendants to play Texas Hold'em Poker in Idaho. *See* Dkt. 16-1 (Supplemental Authority, *State v. Kasper*). Furthermore, the Court's September 5 Opinion dismisses the significance of Idaho's promotional poker and lottery poker games. Instead, the Court relies exclusively on its interpretation of Idaho Code § 18-3801(1) to conclude that Texas Hold'em cannot be authorized under state law because that provision defines gambling as risking money "in whole or in part … upon chance…." Dkt. 40 at 8.

Relying exclusively on the legal definition and not its exceptions and applications, the Court by-passes the inquiry required by the IGRA. The Court instead finds that Idaho law "does not leave room for … an inquiry" into the express exceptions to gambling included in Idaho law that provide the basis for the Tribe to offer Texas Hold'em Poker tournaments.

Idaho Code § 18-3801(1) indeed defines gambling as follows:

> "Gambling" means risking any money, credit, deposit or other thing of value for gain contingent in whole or in part upon lot, chance, the operation of a gambling device or the happening or outcome of an event, including a sporting event, the operation of casino gambling including, but not limited to, blackjack, craps, roulette, poker, bacarrat [baccarat] or keno, ***but does not include***:

> (1) Bona fide ***contests of skill***, speed, strength or endurance ***in which awards are made only to entrants or the owners of entrants***…
> …
> (4) Merchant promotional contests and drawings conducted incidentally to bona fide nongaming business operations, if prizes are awarded without consideration being charged to participants….

Idaho Code § 18-3801(1) (emphasis added). Thus, the definition of gambling under Idaho law expressly does not include bona fide contests of skill in which awards are made only to entrants. Idaho law, therefore, certainly envisions an inquiry into whether a game is one of skill.

Additionally, the Idaho Attorney General has previously indicated that Texas Hold'em is a different game than "poker." Dkt. 15-6. The Attorney General has also recognized that Texas Hold'em is permitted under the exception for merchant promotional contests. Dkt. 15-6. Further, Texas Hold'em is widely played in the State of Idaho. It is played under the promotional contest exception and the lottery offers Texas Hold'em style games, and there are numerous examples of Texas Hold'em games offered throughout the state. *See* Dkt. 16 at 17-18. The fact that the Attorney General has recognized that Texas Hold'em is permitted under the merchant promotional contest exception and that the lottery offers Texas Hold'em style games establishes that the play of Texas Hold'em in Idaho is not merely a matter of failure to enforce the law. Rather, Texas Hold'em tournaments are part of established exceptions to Idaho's prohibition of poker.

Because Texas Hold'em is authorized under Idaho law and played throughout the state, the Tribe has a high likelihood of success on the merits of whether it is permitted to offer Texas Hold'em tournaments. Failure to allow the Tribe to offer Texas Hold'em tournaments would contravene IGRA, which permits tribes to offer games that others can operate.

III. Balance of Equities

The Tribe will be irreparably harmed absent a stay. *See, e.g., 1020 Elect. Gambling Mach.*, 38 F. Supp. 2d at 1219 (finding that tribal economic self-sufficiency was the overriding public interest when weighed against an arguable ongoing violation of federal law).[2] Texas Hold'em tournaments contribute significantly to the Tribe's ability to fund critical government programs, and Tribe and its citizens will be irreparably harmed should the preliminary injunction remain in place pending appeal. IGRA states that its purposes include providing a basis for the operation of gaming by tribes "as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). The Tribe's current gaming operations fulfill these purposes by providing an engine for economic growth, employing tribal members and others, and funding critical government programs. If the preliminary injunction is not stayed pending appeal, there will be immediate and irreparable damage to the Tribe's economy, self-sufficiency, and government.

The State, however, will not be irreparably harmed if the preliminary injunction is stayed. The State has not demonstrated that Texas Hold'em tournaments cause any harm to the State. As the Court stated in its Memorandum and Order, "the State has not directly argued that it has suffered irreparable injury." Dkt. 40 at 22. The Court stresses the State's inability to collect monetary damages, Dkt. 40 at 22, but this interest of the State's does not outweigh the significant harm that the preliminary injunction poses for the Tribe. Further, the State is not left without an effective remedy in the absence of a preliminary injunction. Should the State win on the merits, a permanent injunction will be available.

Finally, the public interest lies with granting the motion for a stay of the preliminary injunction pending appeal. Although the public interest is furthered by upholding state law,

[2] Additionally, in that case, the court found that the Tribe's interest in keeping jobs and funding tribal programs was considered to be irreparable harm.

Idaho law permits Texas Hold'em and the game is already widely played throughout the State. Meanwhile, the Tribe sustains jobs as well as government programs with its gaming revenue. This revenue will be significantly decreased if the Tribe is not allowed to offer Texas Hold'em tournaments pending appeal. As noted by the court in the above-cited *1020 Electronic Gambling* Machines case, an alleged violation of federal law does not overcome the public interest in continuing to maintain tribal jobs. 38 F. Supp. 2d at 1219.

Conclusion

The Tribe has a high likelihood of success on the merits in this case. The Tribe has raised significant issues. Further, the balance of hardships favors granting the motion for a stay of the preliminary injunction pending appeal because the injunction will irreparably harm the Tribe, will not irreparably harm the State, and the public interest favors allowing the Tribe to continue to offer Texas Hold'em tournaments pending appeal. Moreover, the Court never held a hearing to further examine disputed issues of material fact regarding the forms of poker Idaho allows to be played in the state.

Respectfully submitted this 5th day of September, 2014,

/S/ Joseph H. Webster

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CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of the filing to all counsel of record.

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