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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 **COMBINED (1) REPLY TO RESPONSE TO MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND (2) RESPONSE TO MOTION TO DISMISS**

INTRODUCTION

Defendant Coeur d'Alene Tribe ("Tribe") responds to the pending motions for a temporary restraining order or, alternatively, a preliminary injunction under Dist. Idaho Loc. Civ. R. 7.1(c)(1) (Dkt. 16) and through a separate motion to dismiss under Fed. R.

Civ. P. 12(b)(1), (3) and (6) (Dkt. 15). Plaintiff State of Idaho ("Idaho" or "State") submits a combined reply in support of its motions and a response to the Tribe's motion.

The Tribe raises jurisdictional, forum and merits- and pleading-based arguments in the response to the State's motions and in support of its motion.

- As to jurisdiction, it contends that the grant of jurisdiction in 25 U.S.C. § 2710(d)(7)(A)(ii) has no application because poker—and specifically Texas Hold'em—embodies Class II gaming as to which "the Tribe has reserved its sovereign authority" to regulate under the parties' 1992 tribal-state compact (Dkt. 3-3). Dkt. 15-1 at 9; *see id.* at 12 ("the Tribe's new Class II game is appropriately not mentioned in the Class III compact[] because it lies within the exclusive jurisdiction under the IGRA"). It therefore apparently concedes that this Court possesses the authority to determine *whether* non-banked poker is Class II gaming under Idaho law in the context of addressing the existence of § 2710(d)(7)(A)(ii)-grounded jurisdiction. Dkt. 15-1 at 9 ("[t]he State's claim that jurisdiction exists over this dispute first requires the Court to agree with the State's primary argument—that the gaming taking place is Class III gaming").

- The Tribe argues as to forum that, even assuming § 2710(d)(7)(A)(ii) jurisdiction, the Court may not entertain Idaho's claim because "the State has already agreed to an alternative remedy—the right of binding arbitration under Article 21—to assure that Compact provisions are complied with." Dkt. 15-1 at 9; *id.* at 10 (characterizing Article 21 as "the State's exclusive remedy"); *id.* at 13 ("the State's remedy is limited to the dispute resolution provisions").

- As to the merits, the Tribe asserts that Texas Hold'em is excluded from the definition of "gambling" under Idaho Code § 18-3801 through the "bona fide contests of skill" in subsection (1). It does not contend that *no* chance is involved in Texas Hold'em (or any other poker variant) but, rather, quotes a gaming research journal for the proposition that "'[o]ver the long run everybody gets the same proportion of good and

bad cards'" and that "'expert players use their skills to minimize their losses on their bad hands and maximize their profits on their big hands.'" Dkt. 16 at 15. The Tribe thus predicates its skill-exception reliance on construing the § 18-3801 to allow at least some variants of poker even though (1) an element of chance through random card-draws exists and (2) the provision's introductory expressly prohibits poker. It then devotes a page to citing various websites advertising Texas Hold'em events in the State. *Id.* at 17-18.

• The Tribe argues in its motion to dismiss that the complaint does not state a claim because, as pled, it fails Fed. R. Civ. P. 8(a) "plausibility" standards articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Dkt. 15-1 at 16-18.

A temporary restraining order or a preliminary injunction should be granted and the motion to dismiss denied. *First*, as the Tribe implicitly acknowledges, the jurisdictional issue turns on whether poker constitutes Class III gaming. The answer to that question is plainly yes. This Court has previously identified the permissible scope of Class III gaming in the prior *Coeur d'Alene Tribe* litigation[1] and because the same state-law "permits" requirement exists for purposes of Class II gaming ordinance approval and Class III tribal-state compact validity purposes. 25 U.S.C. §§ 2710(b)(1)(A) and 2710(d)(1)(B). The Tribe is precluded from now arguing that certain forms of poker are actually permitted under Idaho law. Beyond claim preclusion or, alternatively, law-of-the-circuit principles, the Tribe espouses a construction of Article III, Section 20 of the Idaho Constitution and § 18-3801 that ignores their explicit language. The existence of websites that may invite participation in poker gambling does not alter that language or the activity's illegality. *Second*, the arbitration provision in Article 21 is not exclusive; it instead precludes a party from initiating a civil action after having invoked the processes

[1] *Coeur d'Alene Tribe v. Idaho*, 842 F. Supp. 1268 (D. Idaho 1994), *aff'd*, 51 F.3d 876 (9th Cir.), *cert. denied*, 516 U.S. 916 (1995). *See* Dkt. 3-1 at 15-16.

in Article 21.3. Idaho has not invoked the arbitration process; it has consistently taken the position that it would be agreeable to resolving the parties' dispute pursuant to the arbitration provision *if* the Tribe terminated the poker gaming pending completion of the arbitral process. The Tribe, just as consistently, has refused to suspend the gaming. Finally, the complaint clearly alleges the elements required to state a claim under § 2710(d)(7)(A)(ii) because it is entirely "plausible" that any variant of "poker"—including Texas Hold'em—constitutes Class III gaming not authorized under the parties' Compact.

ARGUMENT

I. THIS COURT'S JURISDICTION UNDER § 2710(d)(7)(A)(ii) AND THE DISPUTE'S MERITS TURN ON THE SAME ISSUE: WHETHER POKER IS PROHIBITED UNDER IDAHO LAW

A. Claim Preclusion. The Tribe accurately observes that it "has reserved its sovereign authority over Class II gaming and has not waived its immunity from suit" in the Compact. Dkt. 15-1 at 9. That observation, however, begs the core question raised by Idaho's invocation of this Court's jurisdiction under § 2710(d)(7)(A)(ii)—the legality of poker of any type under state law. So, if one assumes that it is unlawful, it is not Class II gaming and therefore constitutes Class III gaming permissible only if allowed under the Compact. The Tribe, needless to say, cannot evade § 2710(d)(7)(A)(ii) jurisdiction by deeming *ipse dixit* Class III gaming as Class II gaming. *See Crow Tribe v. Racicot*, 87 F.3d 1039, 1043 (9th Cir. 1996) ("[a] holding that the Commission has jurisdiction to interpret the compact would undermine the express grant of jurisdiction to the United States District Courts to enjoin gaming on Indian lands not permitted under a compact"). The Tribe does not contend that the Compact so allows and, indeed, could not do so in light of the earlier *Coeur d'Alene* judgment. Although arguing that the parties' prior litigation did not address whether "different types of card games than those litigated are classified as Class II games" (Dkt. 16 at 19), it overlooks two settled rules.

The issue resolved in *Coeur d'Alene*, albeit litigated in the context of resolving the

scope of Class III gaming subject to the good faith requirement in § 2710(d)(3)(A), was the scope of *all* types of gambling permitted under Idaho law. *See Coeur d'Alene*, 842 F. Supp. at 1280 ("the Idaho Constitution expressly forbids those engaging in the three carefully limited exceptions from employing any form of casino gambling including, but not limited to, blackjack, craps, roulette, poker, baccarat, keno and slot machines, or from employing any electrical or electromechanical imitation or simulation of any form of casino gambling"); *id.* at 1283 ("*Cabazon* and IGRA clearly restrict gaming on Indian lands to those types of games permitted by the state and/or those games which do not violate the law and public policy of the state") (citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987)). The Tribe could have argued, but did not, that card games or poker in particular is permitted under the "skill" provision in § 18-3801(1) or, for that matter, under § 18-3801(2) or (3). *E.g.*, *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001).

The Tribe's position further ignores the "basic canon of statutory construction . . . that identical terms within an Act bear the same meaning." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992). No daylight exists between §§ 2710(b)(1)(A) and 2710(d)(1)(B) with respect to the scope of Class II and III gaming that may be lawfully included in a Class II gaming ordinance or a Class III compact. *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 724 (9th Cir. 2003). Simply put, a decision definitively determining the permissible scope of all gaming necessarily controls for both Class II and Class III purposes. Whether the Tribe intended it or not, in submitting the Class III good-faith negotiation issue for judicial disposition, it received a judgment that simultaneously precluded any contention that Class II gaming in Idaho could include any card games.[2]

[2] It warrants noting that the same result exists under no less controlling law of the circuit principles. The *Coeur d'Alene* litigation established the scope of permissible gambling in Idaho.

B. Contests of Skill Exception. The Tribe essentially advocates for a construction of § 18-3801 that, notwithstanding the categorical prohibition in the provision's opening paragraph of "risking . . . [any] thing of value for gain contingent in whole or part upon . . . chance" and the "operation of casino gambling including, but not limited to . . . poker," the Idaho Legislature actually meant to say that except when the poker involves "awards are made only to entrants or the owners of entrants." This proposed reading of an otherwise clear statute comes with a good deal of baggage that it cannot shoulder.[3]

As a threshold matter, the Tribe tellingly fails to mention, much less come to grips with, Article III, Section 20. The constitutional provision leaves no doubt about what forms of gambling are permissible in Idaho. It was clear twenty years ago to this Court and the Ninth Circuit, and its language has not changed in the interim. A strong presumption exists that the Legislature crafts its laws to maintain fidelity with relevant constitutional mandates. *E.g.*, *Citizens Against Range Expansion v. Idaho Fish and Game Dep't*, 285 P.3d 32, 36 (Idaho 2012). One therefore must presume that the Legislature did not intend to authorize conduct through the subsection (1) exception conduct not encompassed within Article III, Section 20. This presumption takes on added weight because §§ 18-3801 and -3802 were adopted in direct anticipation of the constitutional article's adoption by the electorate at the November 1992 general election. *See* Dkt. 3-1 at 4. They must be read *in pari materia*. The Tribe's proposed interpretation does precisely the opposite and, in effect, asks this Court to endorse

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That determination would bind this Court even were parties other than Idaho and the Tribe before it. *See United States v. Washington*, 593 F.3d 790, 798 n.9 (9th Cir. 2010).

[3] The Tribe also argues that the merchant promotion drawing exclusion in Article III, Section 20(4)(a) and § 18-3801(4) has been construed as authorizing activities like Texas Hold'em. Dkt. 16 at 16. The exclusion's premise is that such promotional activities are not gambling at all because no "money, credit, deposit or other thing of value for gain contingent in whole or in part upon lot, chance" is placed at risk—as reflected in the requirement that any prizes must "be awarded without consideration being charged to participants."

obviously impermissible legislative sleight-of-hand. *See Syringa Networks, LLC v. Idaho Dep't of Admin.*, 305 P.3d 499, 505 (Idaho 2013) (governmental agency "may not do indirectly what it is prevented by law from doing directly").[4]

The Tribe also focuses laser-like on a single term—"skill"—in subsection (1). In so doing, it neglects to place that term into its overall context that includes the words "bona fide contests," "speed," "strength," "endurance," "awards," "entrants," and "owners of entrants." In theory, a poker game might be characterized as "bona fide contest" to the extent it is played without a fixed deck and that the gamblers are deemed "entrants" seeking to win an "award" in the form of a pot. But that is at best a linguistically farfetched attempt to shoehorn poker, or any card game, into a vernacular that departs from ordinary usage. A more apt understanding of the subsection derives from application of the *noscitur a sociis* canon—*i.e.*, "a word is known by the company it keeps." *State v. Hammersley*, 10 P.3d 1285, 1290 (Idaho 2000); *see Rosebrock v. Mathis*, 745 F.3d 963, 976 (9th Cir. 2014) ("[i]t is an elementary principle of legislative interpretation that words of a feather flock together"). The Legislature plainly attempted to capture competitive events whose outcome is determined not by chance but by the expertise and performance of the entrants even though the conditions under which the particular activity is performed are outside the control of participants and may vary during the contest. Myriad examples present themselves: golf or tennis tournaments, marathons, auto racing, outdoor football or baseball games, *etc*. They bear no resemblance to poker where chance is an essential element of the game and whose

[4] The Tribe's reliance on the recent magistrate court decision in *State v. Kasper*, Nos. CRMD20139859 & CRMD20139864 (Idaho 4th Jud. Distr. Ct., Magistr. Div., May 15, 2014) (Dkt. 16-1), adds nothing to determining § 18-3801(1)'s scope. Although the decision's reasoning is less than pellucid, it appears to turn on the proposition that "friends and family" poker is excluded from the prohibition in § 18-3801. The statute, however, draws no distinction between social and non-social poker or gambling in general. If the ruling had turned on the status of poker as a "contest of skill" under § 18-3801(1), any such distinction would have been immaterial.

management, under the Tribe's view, spells the difference between success and failure over the long haul of a tournament.[5]

C. Existence of Unlawful Poker Gambling. The Tribe points to its "basic internet search" as showing that Texas Hold'em is played widely in Idaho. Dkt. 16 at 17. The fact that the law is violated commonly, however, does not eliminate the illegality. Were the contrary true, speed limits would become legal fictions. Moreover, as the *Kasper* prosecution itself reflects, poker prosecutions do occur. The Lottery Commission, while having no direct enforcement authority under §§ 18-3801 and -3802, has advised public and not-for-profit organizations that "casino nights" or other forms of gambling other than bingo and raffles are unlawful. *See* Dkts. 25-1 ¶¶ 4-6, 25-2, 25-3, 25-4. The Lottery itself, notwithstanding the Tribe's contrary suggestion (Dkt. 16 at 2, 17), does not offer Texas Hold'em for play. Dkt. 25-5 ¶ 4. At most, the Tribe shows that unlawful poker gaming occurs in Idaho, not that any official policy of non-enforcement exists. Yet every court knows that "[t]he exercise of prosecutorial discretion in a world of limited resources may entail choosing upon which crimes to focus." *United States v.*

[5] The Tribe's effort to bring poker generally, or Texas Hold'em specifically, within the scope of § 18-3801(1), aside from ignoring the section's explicit prohibition, ignores the essential role that chance plays in that game. As two commentators whom the Tribe cites favorably (Dkt. 16 at 15) recognize, "[p]oker is predominately a game of skill, although chance plays a role." Anthony Cabot and Robert Hannum, *Poker: Public Policy, Law, Mathematics, and the Future of an American Tradition*, 22 T.M. Cooley L. Rev. 443, 465 (2005); *see United States v. Dicristina*, 886 F. Supp. 2d 164, l97 (E.D.N.Y. 2012) ("[f]ederal courts have generally treated poker as a game of chance and characterized it as gambling"), *rev'd*, 726 F.3d 92 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 1281 (2014). Any attempt to distinguish Texas Hold'em from other forms of poker fails because (1) no question exists that Texas Hold'em is a poker variant (*id.* at 172-73) and (2) it would be a fool's errand to attempt distinguishing among the various forms of poker on the basis of the relative proportion of chance to skill in determining short- or long-term outcomes (*id.* at 224). The Tribe's off-handed dismissal of the NIGC Acting General Counsel's December 2004 classification opinion, which deemed the "Trips or Better" poker variant proscribed in Idaho (Dkt. 3-7 at 13), as not addressing "the unique attributes of the very different game at issue here" (Dkt. 16 at 12) misses the very point of the opinion—*i.e.*, that *all* forms of poker are prohibited in this State.

Conley, 859 F. Supp. 909, 933 (W.D. Pa. 1994); *cf. Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 603-04 (2008) (recognizing the need for selective enforcement, without equal protection liability, for traffic officer "stationed on a busy highway where people often drive about the speed limit" given the fact that "not all speeders can be stopped and ticketed").

II. COMPACT ARTICLE 21.3 DOES NOT PRECLUDE EXERCISE OF THIS COURT'S JURISDICTION UNDER § 2710(d)(7)(A)(ii)

Article 21 of the Compact provides a dispute resolution process when Idaho or the Tribe "believes the other party has failed to comply with any requirement of this Compact." Dkt. 3-3 at 35 (Art. 21.2). The aggrieved party initiates the process by notifying the other party in writing of the claimed non-compliance—a notice that triggers a 10-day period within which the parties must meet "in an effort to resolve the dispute." *Id.* (Art. 21.2.1). That meeting took place here on May 12, 2014 (Dkt. 15-1 at 7) following Idaho's May 1, 2014 notice (Dkt. 3-9 at 2). A 60-day period for requesting binding arbitration commenced once Idaho tendered the May 1 notice. Dkt. 3-3 at 35 (Art. 21.2.2). No such notice has been given. Instead, Idaho conditioned its willingness to initiate the arbitration process under Article 21 upon the Tribe's suspension of the poker gaming. Dkt. 3-9 at 2. The Tribe, as well, conditioned its willingness to proceed to arbitration on not suspending the gaming pending the arbitration's outcome. The parties, in a word, reached impasse on the matter of arbitration.

The Tribe's rather extended analysis of the Article 21 process fails to acknowledge not only the absence of the arbitration process's initiation but also, given the lack of such initiation, the effect of the second sentence in Article 21.3: "Once a party has given notice of intent to pursue binding arbitration and the notice has been sent to the non-complaining party, the matter in controversy may not be litigated in court proceedings." Dkt. 3-3 at 36. That sentence refutes any contention that the Article 21.3 process is

exclusive. The parties plainly gave either party the option of proceeding through available judicial remedies or arbitration. For most disputes, this option has no practical meaning; sovereign immunity bars unconsented suit against either party for most compact breaches. *E.g.*, *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1057 (9th Cir. 1997); *cf. A.K. Mgmt. Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785, 789 (9th Cir. 1986) (tribal immunity against unconsented suit to enforce bingo management contract).

This is the unusual case. Section 2710(d)(7)(A)(ii) unequivocally confers jurisdiction on this Court to enjoin gaming activity that violates an existing tribal-state compact. Congress has unambiguously abrogated tribal sovereign immunity for suit where such relief is sought. *Michigan v. Bay Mills Indian Cmty.*, No. 12-515, 2014 WL 2178337, at *7 (U.S. May 27, 2014) ("IGRA partially abrogates tribal sovereign immunity in § 2710(d)(7)(A)(ii)"). Article 21.3 did not foreclose Idaho from electing that remedial course and, having chosen, to pursue it to conclusion. This matter, in other words, may "be litigated in court proceedings" because it commenced before either party gave and sent "notice of intent to pursue binding arbitration." The Tribe's reliance on authority under the Federal Arbitration Act, 9 U.S.C. §§ 1-16, for a contrary result goes astray for this simple reason. Dkt. 15-1 at 13. As the Court of Appeals explained recently:

> [A]rbitration is a matter of contract," . . . and there is "a liberal federal policy favoring arbitration agreements." . . . "In line with these principles, courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms."

Goldman, Sachs & Co. v. City of Reno, 747 F.3d 733, 739 (9th Cir. 2014). Here, the parties did not commit resolution of compact disputes exclusively to the arbitral process in Article 21.3.

III. THE COMPLAINT SATISFIES RULE 8(a)'S REQUIREMENT THAT A COMPLAINT CONTAIN A "SHORT AND PLAIN STATEMENT" OF CLAIM SHOWING ENTITLEMENT TO THE RELIEF

The Tribe contends that "proffer assumption, not facts, regarding the Tribe's Texas Hold'em tournament play." Dkt. 15-1 at 16. It adds that Idaho's "claims are based upon the conclusion that the Tribe is offering or intends to offer forms of poker that are not within the Tribe's authority to offer Class II games." Dkt. 15-1 at 17. The complaint, the Tribe concludes, "lacks the factual development that would allow the court to infer anything more than a mere possibility that the State might be entitled to the relief it seeks." Dkt. 15-1 at 17-18.

The Court of Appeals recently reiterated the fair notice and plausibility pleading standards required under Rule 8(a) in light of *Twombly* and *Iqbal*:

> "First, to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation."

Eclectic Properties E., LLC v. Marcus & Millichap Co., No. 12-16526, 2014 WL 1797676, at *3 (9th Cir. May 7, 2014) (quoting *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011)). The Tribe does not challenge that the complaint gives it adequate notice of the underlying facts—the commencement of poker gaming—underlying Idaho's claim. It instead argues that the complaint does not plausibly establish that the poker gaming constitutes Class III activity not authorized under the Compact.

The complaint, however, more than adequately alleges a "plausible" claim under § 2710(d)(7)(A)(ii). It alleges the existence of a tribal-state compact that is in effect. Dkt. 1 ¶ 7. It alleges that the *Coeur d'Alene* litigation determined the full range of Class III gaming permitted under Idaho law and, therefore, under the Compact. Dkt. 1

¶¶ 9-11. It alleges that the scope of such permissible gaming has not changed except for the authorization of tribal video gaming machines under Idaho Code §§ 67-429B and -429C. Dkt. 1 ¶ 12. And it alleges, upon information and belief, that the Tribe intended to commence poker gaming at its reservation casino on or about May 2, 2014, and that such gaming is neither Class I nor Class II gaming—thereby making the gaming Class III under the Indian Gaming Regulatory Act. Dkt. 1 ¶¶ 14-15. The complaint, in sum, alleges (1) Class III gaming in the form of poker (2) conducted, or about to be conducted, (3) on Indian lands subject to IGRA (4) in violation of an existing tribal-state compact. It accordingly states "a 'straightforward' case" (*Sheppard v. David Evans & Assoc.*, 694 F.3d 1045, 1050 (9th Cir. 2012)) under the no less straightforward § 2710(d)(7)(A)(ii). *See Bay Mills*, 2014 WL 2178337, at *7 & *8 n.6 (detailing the requirements of a claim cognizable under § 2710(d)(7)(A)(ii)). Any variant of "poker" is plausibly, indeed necessarily, encompassed within these allegations.[6]

CONCLUSION

Idaho's motion for temporary restraining order or, alternatively, for preliminary injunction should be granted. The Tribe's motion to dismiss should be denied.

[6] The Tribe briefly addresses the balance-of-hardships issue, contending in part that "[i]n the absence of a clear showing that the games at issue constitute Class III gaming under IGRA, the State's asserted sovereignty interests are certainly not greater than the sovereignty interests that the Tribe has at stake." Dkt. 16 at 18. This statement serves principally to confirm that the Tribe agrees with the proposition that the same state-law "permits" requirement exists for Class II and Class III gaming and that Idaho is entitled to injunctive relief if it establishes a likelihood of success on the merits; *i.e.*, if the poker games do not constitute Class II gaming, they are Class III gaming prohibited under the Compact subject to being enjoined under § 2710(d)(7)(A)(ii). The Tribe's claimed sovereignty interests, in short, are circumscribed by IGRA's substantive limitations on permissible gaming and the Compact.

DATED this 28th day of May 2014.

STATE OF IDAHO
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of May 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system that sent a Notice of Electronic Filing to the following Persons:

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