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November 26, 2019

Bill Anoatubby
Governor of the Chickasaw Nation
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Ada, Oklahoma 74821

Gary Batton
Chief of the Choctaw Nation
Post Office Box 1210
Durant, Oklahoma 74702

Chuck Hoskin, Jr.
Chief of the Cherokee Nation
Post Office Box 948
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Dear Governor Anoatubby, Chief Batton, and Chief Hoskin:

The Chickasaw, Choctaw, and Cherokee Nations (the "Tribes") have requested my opinion as to the legality of Class III gaming after January 1, 2020, under the Tribes' gaming compacts with Oklahoma. Those compacts (as you know) authorize the Tribes to operate class III games, and allocate a share of the gaming revenues to Oklahoma. I understand the Tribes' view to be that the compacts will automatically renew by their terms when their initial 15-year terms expire on January 1, 2020. This summer, however, Oklahoma Governor Kevin Stitt announced his belief that the compacts will not automatically renew on January 1. The Tribes therefore engaged WilmerHale—which had no prior involvement with the compacts—to review them and other relevant materials, and provide our independent opinion regarding whether the compacts will automatically renew on January 1, 2020. I write now to convey my views to you; you are of course free to share these views with others as you deem fit, including any operators of tribal-gaming enterprises within your jurisdiction.

To my knowledge, Governor Stitt's office has not provided a full written explanation of its reading of the compacts. Based on my review of the compacts and other materials, however, that reading is incorrect. First and most importantly, the

reading conflicts with the compacts' unambiguous language, which provides for automatic renewal when certain conditions have been satisfied—which they unquestionably have been. The inconsistency between the compacts' plain text and the reading adopted by Governor Stitt's office is sufficient reason to reject that reading. And even if there were any ambiguities in the compacts' language, they would have to be construed against Oklahoma because it is the party that drafted the compacts. In short, I do not believe that the reading apparently adopted by Governor Stitt's office is defensible.

I. Background

A. Tribal Gaming Under IGRA

In 1988, Congress enacted the Indian Gaming Regulatory Act, or IGRA. It did so in response to a Supreme Court ruling—*California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987)—that restricted states' ability to regulate gaming on Indian lands. IGRA explained that 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." 25 U.S.C. § 2701(5).

In enacting IGRA, Congress "established a comprehensive scheme for the regulation of gaming on Indian lands." *United Keetoowah Band of Cherokee Indians v. State of Okla. ex rel. Moss*, 927 F.2d 1170, 1176 (10th Cir. 1991) (quoting *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 743 F. Supp. 645, 648 (D.Wis.1990)). IGRA divided gaming activities into three categories, with different regulatory consequences for each. Class I games are traditional and social games that tribes themselves regulate. Tribes also regulate class II games, which include bingo and non-banked card games, subject to the oversight of the federal government. And finally, "class III" games—such as roulette, slot machines, and house-banked card games—can be operated on Indian lands under IGRA only pursuant to a compact negotiated between the tribe and the state. *See* 25 U.S.C. § 2710(d)(1).

IGRA was designed to advance "a principal goal of Federal Indian policy," namely, "to promote tribal economic development, tribal self-sufficiency, and strong tribal government." 25 U.S.C. § 2701(4). As such, the statute generally requires that tribal-gaming profits be used to benefit tribes and their members. *See id.* § 2710(b)(2)(B). The statute's success in achieving those goals is clear: Tribes have

used gaming revenues to fund education and infrastructure, increase government services, diversify their economies, and increase their independence from the federal government. *See* Alex Tallchief Skibine, *The Indian Gaming Regulatory Act at 25*, 60 Federal Lawyer 35, 37 (2013); Chris J. Thompson, *Internet Gambling*, 37 Am. Indian L. Rev. 229, 229 (2012-2013).

States have also benefited from the gaming compacts that IGRA generated. Although IGRA prohibits states from imposing taxes on Indian gaming, *see* 25 U.S.C. § 2710(d)(4), the Interior Department allows tribes to share a portion of gaming revenues with states in exchange for a "meaningful concession" by the state that provides a substantial economic benefit to the tribe, *see* Government Accountability Office, *Indian Gaming: Regulation and Oversight by the Federal Government, States, and Tribes*, at 19 (June 2015) ("GAO Report").[1] As a result, many tribal-state gaming compacts provide that states will receive a portion of a tribe's gaming revenue in exchange for offering substantial exclusivity, or some other benefit, to the tribe. Such revenue-sharing arrangements have promoted significant "economic development within the states." Skibine, *supra*, at 37. For example, a number of states, including Oklahoma, use their share of gaming revenue to fund education. *See* Okla. Gaming Compliance Unit, Annual Report, at 4 (2018) (education-reform fund receives 88% of state's share of gaming revenue). Tribal gaming also leads to broader economic opportunities within states by (among other things) increasing tourism and creating jobs, which are often held by non-Indians. *See* Skibine, *supra*, at 37. One report, for instance, found that tribal gaming supported nearly 50,000 jobs in Oklahoma in 2015 and brought more than 18 million visitors into the state. *See* Oklahoma Indian Gaming Ass'n, *Summary of the 2016 Annual Impact Report* (2016).[2] These substantial benefits beyond revenue sharing help explain why close to 40% of tribal-state gaming compacts do not provide for any revenue sharing at all, *see* GAO Report, *supra*, at 18.

B. The Tribes' Gaming Compacts With Oklahoma

In early 2004, the Oklahoma legislature enacted the State-Tribal Gaming Act and sent it to a referendum vote. Voters approved the act later that year, in a measure known as State Question 712. The act "approved casino-style gambling at horse race tracks and

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1 *Available at* https://www.gao.gov/assets/680/670603.pdf.

2 *Available at* https://oiga.org/wp-content/uploads/2018/01/OIGA-Executive-Summary-2016.pdf.

in Indian country." *Griffith v. Choctaw Casino of Pocola*, 230 P.3d 488, 493 (Okla. 2009), *overruled on other grounds by Sheffer v. Buffalo Run Casino, PTE, Inc.*, 315 P.3d 359 (Okla. 2013). The act also described the types of games that could be offered and laid out a model tribal-state gaming compact, which permitted the state to receive a portion of the compacting tribes' gaming revenue.

In addition to bolstering state finances, the State-Tribal Gaming Act was designed to protect Oklahoma's struggling horse-racing industry. Indeed, the statute expressly acknowledges Oklahoma's desire "to encourage the growth, sustenance, and development of live horse racing in this state and of the state's agriculture and horse industries." Okla. Stat. tit. 3A § 262(C). Contemporaneous statements by lawmakers likewise reveal concern for the state of the horse-racing industry and a belief that legalizing casino-style gambling would benefit it. *See, e.g.*, Oklahoma State Senate, *Senate Votes to Save Horse Racing Industry, Provide State Regulation of Tribal Gaming*, Feb. 18, 2004 (explaining—in discussing earlier version of the act—that it would "boost purses at Oklahoma's ... horse racing facilities," and quoting the bill's author as saying that it would help "sav[e] the more than 50,000 jobs in Oklahoma's horse industry, which is on the verge of collapse");[3] Marie Price, *House OKs Gaming Bill*, Tulsa World, Feb. 27, 2004 (quoting lawmakers who supported an earlier version of the act).[4] Consistent with that goal, that act provided that if at least four Indian tribes executed the model compact laid out by the act, Oklahoma could then authorize "organization licensees"—that is, entities licensed to conduct horse racing—to offer the same kinds of games as tribes. *See id.* § 262.

As the State-Tribal Gaming Act makes clear, the model compact was an "offer" by "[t]he State of Oklahoma" to "all federally recognized Indian tribes" in the state. Okla. Stat. tit. 3A § 280. If accepted, the act also provides, that offer would "constitute a gaming compact between this state and the accepting tribe for purposes of the Indian Gaming Regulatory Act," with no further action required by Oklahoma. *Id.*

Each of the Tribes (along with dozens of other tribes) accepted that offer, executing a compact that was subsequently approved by the Secretary of the Interior as a

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3 *Available at* http://www.oksenate.gov/news/press_releases/press_releases_ 2004/pr20040218.html.

4 *Available at* https://www.tulsaworld.com/archives/house-oks-gaming-bill/article_8fcb4ce1-ba86-5aeb-bfa9-292a236f929b.html.

tribal-state compact within the meaning of IGRA. Those compacts took effect in early 2005. (Because the Tribes' compacts with the state, as executed, are materially identical to the model compact provided in the Act, this letter will cite throughout to the model version.)

Under the compacts, the Tribes enjoy "substantial exclusivity" to operate games in Oklahoma (sharing that ability only with licensed horse-racing operators). Okla. Stat. tit. 3A § 281 (hereafter "Compacts") Part 11(A). "[I]n consideration thereof," i.e., as a quid pro quo for the exclusivity rights, the Tribes make exclusivity payments to Oklahoma, ranging from 4 to 10 percent of revenue. *Id.* The average payment—6 percent—is close to the national median. *See* Sean Murphy, *In Oklahoma, Governor Tests Power of Tribal Gaming*, Associated Press, Oct. 16, 2019.[5] Tribes made nearly $140 million in exclusivity payments to Oklahoma last year, *id.*, and those payments have totaled more than $1.5 billion since 2004, *see* Barbara Hoberock, *Tribal Gaming 101*, Tulsa World, Jul. 20, 2019.[6]

"Each party" to a tribal-state compact "agrees to defend [its] validity." Compacts Part 13B.

C. The Compacts' Renewal Provision

Part 15(B) of the compacts—the provision at issue here—sets out the agreements' duration:

> This Compact shall have a term which will expire on January 1, 2020, and at that time, if organization licensees or others are authorized to conduct electronic gaming in any form other than pari-mutuel wagering on live horse racing pursuant to any governmental action of the state or court order following the effective date of this Compact, the Compact shall automatically renew for successive additional fifteen-year

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5 *Available at* https://www.washingtonpost.com/business/in-oklahoma-governor-tests-power-of-tribal-gambling/2019/10/16/de5782f4-efcc-11e9-bb7e-d2026ee0c199_story.html.

6 *Available at* https://www.tulsaworld.com/news/tribal-gaming-what-you-need-to-know-as-tribal-gaming/article_1d42d1c0-40ef-5fb6-b6b7-01afb867a2f9.html.

> terms; provided that, within one hundred eighty (180) days of the expiration of this Compact or any renewal thereof, either the tribe or the state, acting through its Governor, may request to renegotiate the terms of subsections A and E of Part 11 of this Compact [dealing with exclusivity and fees].

Under their plain language, therefore, the compacts renew automatically on January 1, 2020, so long as the condition set out—that "organization licensees or others are authorized to conduct electronic gaming in any form other than pari-mutuel wagering on live horse racing pursuant to any governmental action of the state or court order following the effective date of this Compact"—is satisfied.[7]

II. THE COMPACTS WILL RENEW AUTOMATICALLY ON JANUARY 1

I understand that Governor Stitt's office takes the position that the compacts will expire on January 1, and that its automatic-renewal provision has not been triggered. In my view, that position—which to my knowledge has not previously been taken by any state official—is wrong. The plain text shows that the compact will renew automatically, and that conclusion is supported by evidence regarding the parties' intent as well as by the rule that any ambiguities in contracts are construed against the drafting party, which here is Oklahoma.

A. The Compacts' Text

A gaming compact, as a creation of IGRA, "is a form of contract," the interpretation of which "presents a question of federal law." *Citizen Potawatomi Nation v. Oklahoma*, 881 F.3d 1226, 1238 (10th Cir. 2018). Thus, "in interpreting the Compact ... [courts] look to the federal common law" of contracts. *Id.*

The proper interpretation of a contract "must be discerned within its four corners." *Citizen Potowatomi Nation*, 881 F.3d at 1239 (quoting *Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 560-561 (9th Cir. 2016)). In other words, "if the terms of a

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[7] "Pari-mutuel" wagering is not defined in the compacts, but the state's Horse Racing Act defines it as "a form of wagering on the outcome of horse races in which those who wager purchase wagers of various denominations on a horse or horses and all wagers for each race are pooled and held by the organization licensee for distribution." Okla. Stat. tit. 3A § 200.1(10).

contract are not ambiguous, [a] court determines the parties' intent from the language of the agreement itself." *Id.* Hence, "[i]f the contract is unambiguous its language is the *only* legitimate evidence of what the parties intended, and [courts] will not rely on extrinsic evidence to vary or alter the plain meaning." *Gamble, Simmons & Co. v. Kerr-McGee Corp.*, 175 F.3d 762, 767 (10th Cir. 1999) (emphasis added) (citation omitted). Where the contract's terms are clear, the inquiry is at an end. *See Citizen Potowatomi Nation*, 881 F.3d at 1240.

1. The relevant contractual language is unambiguous, leading inexorably to the conclusion that the automatic-renewal provision has been triggered.

The compacts provide that they "*shall* automatically renew" if the specified conditions are met. Compacts Part 15(B) (emphasis added). As the Supreme Court has explained, "the word 'shall' usually creates a mandate." *Murphy v. Smith*, 138 S. Ct. 784, 787 (2018). And that presumption is particularly compelling here given that the compacts provide later in the same sentence that the tribe or state "may" request to renegotiate certain subsections of the compact related to revenue-sharing rates. The juxtaposition of "shall" against the permissive term "may" confirms that "'shall' imposes a mandatory duty." *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016) (citing *United States ex rel. Siegel v. Thoman*, 156 U.S. 353, 359-360 (1895)). Thus, if the condition precedent in Part 15(B) is satisfied, the compacts must renew automatically.

The condition precedent, in turn, has two components: *first*, that "organization licensees or others are authorized to conduct electronic gaming in any form other than pari-mutuel wagering on live horse racing," and *second*, that this gaming authorization flow from "any governmental action of the state or court order following the effective date of this Compact." Compact Part 15(B). This language is both broad and clear.

The first element requires only that as of January 1, 2020, some entity ("organization licensees *or others*") be permitted to conduct "any" kind of electronic gaming other than a certain type of wagering on horse racing. The Supreme Court has repeatedly instructed that the word "any" has "an 'expansive meaning.'" *Republic of Iraq v. Beaty*, 556 U.S. 848, 856 (2009) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)). As used in the Compacts, therefore, the word provides "no warrant to limit the class of" electronic games that might qualify. *Id.* Hence, as long as anyone in Oklahoma is authorized to conduct some form of electronic gaming—other than pari-mutuel betting on horse races—this element is satisfied.

The second element is similarly broad: the authorization just discussed must be "pursuant to any governmental action of the state or court order" post-dating the compacts. Again, the use of "any" reveals the parties' intent to place no limits on the kinds of governmental actions and court orders that qualify.

The automatic-renewal inquiry thus boils down to three simple questions: (1) Is anyone authorized as of January 1, 2020, to conduct some kind of electronic gaming in Oklahoma that is not pari-mutuel horse wagering? (2) If so, is that authorization pursuant to a state action or court order? And (3) if so, did that state action or court order come after the effective date of the compacts?

The answer to each question is indisputably yes. Take, as just one example, Global Gaming RP, LLC, an organization licensee that owns the Remington Park racetrack and casino in Oklahoma City. That entity is authorized to operate a variety of electronic games in its Oklahoma casino for calendar year 2020. *See* Order Granting Conditional Racetrack Gaming Operator License, No. 2019-OHRC-013, at 1, 3-4 (Okla. Horse Racing Comm'n Oct. 17, 2019). And nothing in the company's authorization limits those electronic games to ones related to pari-mutuel horse wagering. To the contrary, the company may conduct any "authorized gaming," *id.* at 19, which under Oklahoma law includes certain types of electronic bingo and a range of other electronic games, *see* Okla. Admin. Code § 325:80-1-2 (defining "[a]uthorized games" to include, among others, "Electronic Amusement Games," "Electronic Bonanza-Style Bingo Games," and "Electronic Instant Bingo Games," all as defined in the State-Tribal Gaming Act); Okla. Stat. tit. 3A, § 269 (defining "[e]lectronic amusement game" to mean "a game that is played in an electronic environment in which a player's performance and opportunity for success can be improved by skill that conforms to the standards set forth in this act"). Consistent with this authorization, the Remington Park casino offers a variety of electronic games unrelated to horse racing, including slot machines and video card games.

Global Gaming's 2020 gaming authorization was "pursuant to [a] governmental action of the state"—specifically, an order by the Oklahoma Horse Racing Commission. And that order came after the effective date of the compacts at issue here. Indeed, *all* of the organization licensees' gaming authorizations—even their initial ones—post-dated the effectiveness of the compacts at issue here. *See* Order Granting Conditional Racetrack Gaming Operator License, No. 2005-OHRC-008 (Okla. Horse Racing Comm'n Aug. 11, 2005) (granting one of the state's first two gaming licenses to organization licensees); Order Granting Conditional Racetrack Gaming Operator License,

No. 2005-OHRC-009 (Okla. Horse Racing Comm'n Aug. 11, 2005) (granting the other). Hence, the prescribed condition in Part 15(B) is satisfied, meaning that the compacts "shall" automatically renew on January 1.

Annual license renewals, however, are not the only relevant "governmental action[s] of the state" for purposes of the automatic-renewal provision; organization licensees such as Global Gaming have also been subject to other state regulatory actions that post-date the effectiveness of the compacts. Consider, for example, the Oklahoma Horse Racing Commission's promulgation of regulations governing racetrack gaming in 2005, 2006, 2008, 2009, and 2013. *See generally* Okla. Horse Racing Comm'n, Rules for Racetrack Gaming (Sept. 2013) (noting past revisions). Organization licensees' "authoriz[ation] to conduct electronic gaming" is undoubtedly "pursuant to" these regulations—which (for example) impose conditions on the issuance of racetrack gaming licenses—just as surely as their authorization is "pursuant to" the licenses themselves. *See* Merriam-Webster Online (defining "pursuant to" to mean "in conformity with" or "according to"). And some of those regulations post-date the effective date of the compacts. The three-part inquiry described above is therefore satisfied.[8]

2. In his July 5, 2019, letters to each of you, Governor Stitt expressed the view that "there has been no governmental action of the State, or court order authorizing electronic gaming in the State, since the effective date of the Compact" with the Chickasaw Nation. Although Governor Stitt did not explain the basis for that view, Attorney General Hunter advanced an argument to 31 tribal leaders on October 28, 2019, that provided some insight into the Governor's textual position. I understand that argument to be that the compacts do not automatically renew because (a) the compact's statement that its "term ... will expire" on January 1 must be interpreted to have meaning, and (b) the only "authorization" the state has provided for electronic gaming is the State-Tribal Gaming Act, which was enacted prior to the "effective date" of any compact (and hence does not satisfy Part 15(B)'s conditions). In my view, these arguments provide no support for a conclusion that the compacts will not automatically renew on January 1.

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[8] The inquiry is likewise satisfied by the state legislature's 2017 passage of H.B. 1836, which extended the hours during which licensees could operate electronic games. This was a "governmental action of the state," and as a piece of legislation governing the operation of organization licensees, licensees' authorization was necessarily "pursuant to" that action. And finally, the bill's passage came after the compacts took effect.

a. Contrary to the attorney general's suggestion, the compact's language providing that the "term … will expire" does have clear meaning under the interpretation described above. Put simply, the term *will* indeed expire on January 1, and it will automatically renew only if the condition precedent is met. Thus, if the condition precedent is *not* met on January 1, the compacts will no longer have any effect. That the condition precedent has clearly been satisfied does not remotely mean that the "will expire" language has no meaning.

Equally infirm is the suggestion that the compact's general reference to an "authoriz[ation] to conduct electronic gaming … pursuant to any governmental action of the state" covers only the State-Tribal Gaming Act. To begin with, while that act "authorize[d]" electronic gaming by organization licensees, that authorization had no legal effect until after the state-tribal gaming compacts took effect. *See* Okla. Stat. tit. 3A, § 262 ("*If* at least four Indian tribes enter into the model tribal-state compact … the Oklahoma Horse Racing Commission … *shall license* organization licensees … to conduct authorized gaming as that term is defined by this act[.]" (emphases added)). More crucially, however, the attorney general's reading does not comport with the provision's text. As explained, the phrase "any governmental action of the state" is extremely broad; it cannot be read to encompass only *one particular* action of the state, i.e., passage of the State-Tribal Gaming Act). In fact, numerous "government actions of the state" have authorized electronic gaming within the meaning of Part 15(B)'s requirement.

b. Some public statements by others have alternatively suggested that automatic renewal is triggered under Part 15(B) only if the "authoriz[ation]" at issue "expanded" non-tribal gaming operations beyond what was lawful at the time the compacts took effect. *See, e.g.*, Oklahoma Tribal Compact Facts, https://twitter.com/tribalfacts?lang=en (stating that the compact "renews ONLY if there is an AUTHORIZATION of *expanded* electronic gaming after the compacts were signed" (emphasis added)). Under this view, the renewal of an existing license to conduct gaming operations would not trigger automatic renewal unless it provided for some previously unlawful form of gaming. *See id.* For several reasons, this reading of the compacts is incorrect.

As an initial matter, the reading overlooks the fact that non-tribal gaming operations *have* been "expanded" since the compacts took effect. For example, in 2017, the Oklahoma legislature expanded the days and hours during which organization licensees could operate electronic games by removing previous restrictions on the days

and hours that electronic gaming could occur. *See* H.B. 1836 (2017). With that expansion, the legislature not only ratified (once more) the conduct of electronic gaming by organization licensee, but also went a step further in broadening those gaming operations.

More fundamentally, however, the reading again cannot be reconciled with the compact's text. Part 15(B) makes no reference to an "expansion" of gaming beyond what is lawful at the time a compact is executed. It instead provides for automatic renewal so long as, on January 1, 2020, there is an "authoriz[ation] to conduct electronic gaming in *any* form" (not an "additional," "expanded," or "previously unlawful" form) "pursuant to *any* governmental action" (not an action "expanding" the scope of electronic gaming). Interpreting this language to require an expansion of gaming operations would impermissibly read in language that is not there, and also impermissibly fail to give meaning to the broad language that *is* there.

Furthermore, other language in the compacts shows that when the parties wanted to condition a contractual obligation on whether gaming operations were expanded beyond what was lawful at the time of execution, they did so quite clearly—using language unlike the language in 15(B). Specifically, Part 11(A) provides that tribes will pay certain exclusivity fees "so long as the state does not change its laws after the effective date of this Compact to permit the operation of any *additional* form of gaming by any … organization licensee, or change its laws to permit any additional electronic or machine gaming within Oklahoma." (emphasis added). That the parties did not use similar language in Part 15(B) confirms that they did not intend the automatic-renewal provision to hinge on an expansion of gaming operations. *See Terra International, Inc. v. Mississippi Chemical Corp.*, 119 F.3d 688, 693 (8th Cir. 1997) (where other contractual language indicated that party knew how to speak explicitly on a subject when it wanted to, courts should not read such language into the provision at issue); *cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.12 (2004) (noting the "usual rule" in statutory interpretation that "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended" (quoting 2A N. Singer, Statutes and Statutory Construction § 46.06, p.194 (6th rev. ed. 2000))).[9]

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[9] It would be particularly anomalous to conclude that the compacts' automatic-renewal provision is triggered only if the state authorized a new form of gaming by non-

In sum, the text of the compacts does not support the reading apparently adopted by Governor Stitt's office. The text unambiguously provides that the compacts must automatically renew if, as of January 1, 2020, any entity is authorized to conduct electronic gaming in any form (other than a particular kind of wagering on horse racing) pursuant to any state action or court order post-dating the compacts' effectiveness. This broad condition has clearly been met, so the compacts will automatically renew.[10]

B. Construing Contract Language Against The Drafter

While the language of Part 15(B) is unambiguous, if there were any textual ambiguity, it would have to be resolved according to *contra proferentem*, i.e., the general principle of contract interpretation "that a contract should be construed most strongly against the drafter." *United States v. Seckinger*, 397 U.S. 203, 210 (1970). Courts apply this principle because "[w]here one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party" and is "more likely than the other party to have reason to know of uncertainties of meaning." *Restatement (Second) of Contracts* § 206 (1981). The principle is particularly

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tribal entities or approved new non-tribal gaming venues beyond those allowed in the State-Tribal Gaming Act; in either case the compacts' exclusivity provisions would have been breached. In the first scenario, the Tribes would have no obligation to continue sharing revenue with the state, *see* Compacts Part 11(A), and in the second, the state would owe significant liquidated damages to the Tribes, *see id.* Part 11(E). In other words, such an interpretation would mean the compacts automatically renewed with no revenue-sharing obligation by the Tribe, or with a state obligation to pay damages (or both). It is implausible that the state, which drafted the compacts, would have included language so unfavorable to its own interests.

[10] Governor Stitt asserted in an interview that his reading must be correct because "you can't have a contract that in perpetuity continues forever on one side." *Governor Stitt Challenging Indian Tribes On Gaming Compacts*, https://www.news9.com/clip/14872342/governor-stitt-challenging-indian-tribes-on-gaming-compacts. Governor Stitt cited nothing to support that assertion, and I am not aware of any principle of contract law prohibiting parties from ever adopting a contract of perpetual duration. Such a contract, of course, could be revised at any time by mutual agreement of the parties. In any event, the compacts do not state that they "continue[] forever." To the contrary, they expressly state that they expire on January 1, 2020—but that if a condition precedent is met, then the compact automatically renews.

applicable where the non-drafting party "does not have the opportunity to negotiate or bargain." *Employers Reinsurance Corp. v. Mid-Continent Casualty Co.*, 358 F.3d 757, 767 (10th Cir. 2004) (applying *contra proferentem* as a matter of Oklahoma law); *see also Royal Insurance Co. of America v. Orient Overseas Container Line Ltd.*, 525 F.3d 409, 423-424 (6th Cir. 2008) (applying *contra proferentem* against the party that "pre-determined" the contract's terms and treated them as "not open for negotiation").

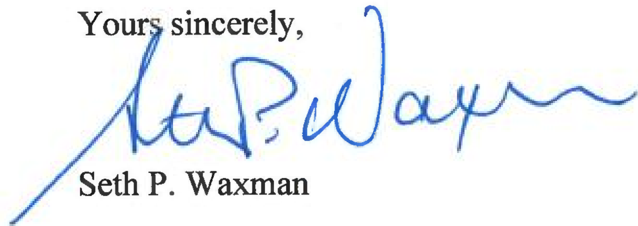
Here, the terms of the model gaming compact—the language of which is materially identical to the compacts at issue here—were chosen by Oklahoma. That is clear from the State-Tribal Gaming Act, which labels the model compact an "offer" by "[t]he State of Oklahoma" to "all federally recognized Indian tribes" in the state. Okla. Stat. tit. 3A § 280. The Act thus expressly indicates that the compact's terms came from Oklahoma, meaning that ambiguity should be resolved against it and in favor of the reading embraced by the Tribes, i.e., the plain-text reading described above. Moreover, the Act provides that the model compact, "if accepted, shall constitute a gaming compact between this state and the accepting tribe," with "[n]o further action by the Governor or the state … required before the Compact can take effect." In other words, "the model compact is offered, all or none, to the Indian tribes of Oklahoma." *Griffith*, 230 P.3d at 493. That further confirms that any ambiguity should be interpreted against Oklahoma.

* * *

The renewal provision in the Tribes' gaming compacts with Oklahoma is not ambiguous. Under that provision's plain language, the compacts will renew automatically when they expire on January 1, because the provision's sole condition precedent for automatic renewal is unquestionably satisfied. Each of the contrary arguments I have seen to date simply cannot be squared with fundamental principles of contract interpretation.

If you have any questions regarding the foregoing, please let me know.

Yours sincerely,



Seth P. Waxman