UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

THE TULALIP TRIBES OF WASHINGTON

Plaintiff,

v.

STATE OF WASHINGTON; WASHINGTON STATE GAMBLING COMMISSION; CHRISTINE GREGOIRE, Governor of Washington, in her official capacity; and RICK DAY, Director of the Washington State Gambling Commission, in his official capacity.

Defendants.

Case No.: 2:12-CV-688-RAJ

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT

Note on Motion Calendar:

November 16, 2012

Oral Argument Requested

I. INTRODUCTION

This is a dispute between the Tulalip Tribes of Washington ("Tulalip" or "Tribe"), a federally recognized Indian tribe, and the State of Washington ("State") regarding enforcement of a Tribal-State Gaming Compact pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701, *et seq.*

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Congress enacted IGRA in 1988 "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." *Id*. at § 2702(1). IGRA recognizes three classes of gaming. Slot machines, video lottery gaming devices and other lottery and casino-style games are Class III games. Under IGRA, a tribe may conduct Class III gaming activities only pursuant to a Tribal-State Compact negotiated between the tribe and the state within which the tribe's land is located. *Id*. at § 2710 (d)(1)(C). Congress intended the IGRA tribal-state compacting process to reflect the negotiated interests of "two equal sovereigns." *See* S. REP. NO. 100-446, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083.

Among other matters, the Compact at issue here sets forth the terms on which the Tribe may conduct Class III gaming at the gaming facilities on its reservation. A "Most-Favored-Tribe" clause in the Compact sets forth a promise by the State in clear and unambiguous terms that "the Tribe shall be entitled" to certain "more favorable" compact terms to which the State agrees with another tribe. As shown below, the State has agreed to such more favorable terms with the Spokane Tribe, but has refused to extend those terms to Tulalip, thereby disavowing its Most-Favored-Tribe promise. The Tribe brings this suit because "Congress, in passing IGRA, did not create a mechanism whereby states can make empty promises to Indian tribes during good-faith negotiations of Tribal-State compacts, knowing that they may repudiate them . . . whenever it serves their purpose." *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997).

The Tribe seeks a declaration that the State is in violation of the Compact and an injunction to enforce it. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1362. The State has waived sovereign immunity to this suit by RCW § 9.46.36001 and

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by Section 12 of the Compact. As explained below, there exists no genuine issue of material fact and the Tribe is entitled to judgment as a matter of law. The Tribe respectfully moves this Court for summary judgment in its favor pursuant to Federal Rule of Civil Procedure 56(c).

II. FACTUAL BACKGROUND

A. The Tulalip Compact and the Tribal Lottery System

On August 2, 1991, the Tribe and State executed The Tribal-State Compact for Class III Gaming between the Tulalip Tribes of Washington and the State of Washington. *See* Giampetroni Dec. at Attachment 1 (August 2, 1991 Tribal-State Compact (as amended)).[1] In November 1998, the Tribe and State executed an amendment to the Compact authorizing the Tribe to operate a Tribal Lottery System as part of its Class III gaming offerings. The amendment included an appendix ("Appendix X") describing the Tribal Lottery System and setting forth the rules and other provisions governing its operation. *See id*. at Appendix X (fourth amendment). In 2007, the Tribe and State executed another amendment to the Compact, adding an additional appendix ("Appendix X2") as a supplement to the Tribal Lottery System provisions of Appendix X. *See id*. at Appendix X2 (seventh amendment).

The Tulalip Tribal Lottery System authorized by Appendices X and X2 operates within the Tribe's two casino gaming facilities and utilizes stand-alone electronic Player Terminals with video displays that allow players to purchase chances to play "electronic scratch ticket lottery" games. In appearance and play, the Player Terminals resemble video slot machines.

[1] The declarations of David Giampetroni and Douglas L. Bell (including all attachments) have been filed in both electronic and hard-copy format. Attachments 1 and 2 to the Giampetroni Declaration are large documents and the hard-copy versions of them are tabbed for ease of reference.

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The Tribe began operation of its Tribal Lottery System in July of 1999. Since then, the Tribe's Lottery System has been vital to the Tribe's successful efforts to strengthen its tribal government and crucial to its ability to generate economic benefits for its members, surrounding communities and the State of Washington.

B. Player Terminal Allocation under the Compact and the TAP Procedure

Section 12 of Appendix X2 sets forth the terms of the Tribe's allocation of Player Terminals for its Lottery System. Under that provision, the Tribe is authorized to operate a base allocation of 975 Player Terminals. The Compact gives the Tribe the right to increase that number, up to a maximum of 4,000 terminals across its two facilities, by purchasing additional terminal allocation rights from any Washington tribe that has entered into a compact authorizing the operation of a Tribal Lottery System ("Eligible Tribe"). *See id*. at Appendix X2 (seventh amendment) at §§ 12 – 12.2.2

Section 12 of Appendix X2 requires that the Tribe obtain such additional allocation rights from other Eligible Tribes pursuant to a terminal allocation plan ("TAP") that sets forth the uniform requirements and limitations by which Eligible Tribes may enter agreements to transfer Player Terminal allocation rights. This procedure is hereafter referred to as the "TAP Procedure." *See id.* (seventh amendment) Appendix X2 at § 12.2.

Under the TAP Procedure, Eligible Tribes that do not operate a Tribal Lottery System, or Eligible Tribes that do so utilizing less than their full base allocation of terminals, may transfer their unused allocation rights to a tribe such as Tulalip that wishes to operate a number of terminals in excess of its base allocation. The price for obtaining such rights is negotiated directly between the two tribes involved in the transaction.

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The present dispute between the State and Tribe concerns whether the Tribe is entitled to utilize a second mechanism, in addition to the TAP Procedure, by which it may obtain additional terminal allocation rights above its base allocation of 975 terminals.

C. The Compact's Most-Favored-Tribe Guarantee

Sections 12.5 of Appendix X and 12.4 of Appendix X2 both include a Most-Favored-Tribe ("MFT") guarantee. Under those provisions, the State promised as follows:

> [I]n the event that the State agrees (or is required by law or a court ruling to agree) to permit an allocation of Player Terminals to a tribe which is greater, or is on terms which are more favorable, than as set forth herein, the Tribe shall be entitled to such greater Allocation or more favorable terms.

Giampetroni Dec. at Attachment 1 (Tulalip Compact Appendix X (fourth amendment) § 12.5 ("MFT") and Appendix X2 (seventh amendment) § 12.4 ("MFT")). This is the key Compact promise at issue in this suit.[2]

D. The Spokane Inter-Tribal Fund

In 2007-08, the State and the Spokane Tribe entered into a Tribal-State Compact under IGRA that, as amended, includes provisions authorizing a Tribal Lottery System substantively identical to those authorized in the Tulalip Compact, as described above. *See* Giampetroni Dec. at Attachment 2 (Spokane Compact (as amended)). The Spokane Compact, like Tulalip's, permits the Spokane Tribe to operate a base allocation of up to 975 Player Terminals. *See id*. (first amendment) at Appendix X2 § 12.1. And like Tulalip's Compact, the Spokane Compact allows the Spokane Tribe to increase its Player Terminal allocation above 975 by recourse to the TAP Procedure, as described above. *See id*. at § 12.2.

[2] Section 12.5 of Appendix X was subsequently amended to add reference to additional electronic gaming devices ("EGDs") not relevant to this dispute.

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However, the Spokane Compact, unlike the Tulalip Compact, permits the Spokane Tribe to acquire Player Terminal allocation rights from other Eligible Tribes by a mechanism in addition to the TAP Procedure. Under the Spokane Compact, if the Spokane Tribe is unable to acquire additional allocation rights under the TAP Procedure after making reasonable efforts to do so, it may obtain such rights by making quarterly payments into an Inter-Tribal Fund ("ITF"). *See id*. (Appendix Spokane § 7). The payments are based on a set dollar amount per day for each Player Terminal above the Tribe's base allocation. *See id*. at § 7(B). The monies in the ITF are distributed quarterly among Eligible Tribes by a formula set forth in Appendix Spokane. *See id*. at § 7(C).

By contrast, under Tulalip's Compact, Tulalip may acquire the rights to operate Player Terminals in excess of its base allocation only by acquiring those additional rights through the TAP Procedure. If Tulalip is unable to meet its Player Terminal needs by that procedure, the Compact provides no other means to meet those needs.

In sum, under the Spokane Compact, the Spokane Tribe may acquire rights to operate Player Terminals in excess of its base allocation by recourse to not one but *two* methods – (1) the TAP procedure, and (2) the Spokane ITF – while Tulalip has recourse only to the first of these methods under its existing Compact.

E. The State's Disavowal of the Compact's MFT Guarantee

On September 14, 2010, Tulalip notified the State that the allocation of player terminals provided for in the Spokane Compact – providing not one but two means to exceed the 975 terminal base allocation – is on "terms which are more favorable" than those governing the "allocation of Player Terminals" set forth in the Tulalip Compact. Tulalip requested an amendment to the Compact to reflect the Tribe's entitlement to the more favorable ITF terms. The Tribe invoked the MFT guarantees of Appendices X and X2 of the Compact, as well as

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Section 15(d)(i) of the Compact, which permits the Compact to be amended by mutual agreement of the parties. *See* Bell Dec. at ¶¶ 1-3.

Representatives of the Tribe and State met several times between October 19, 2010 and August 10, 2011 to discuss the Tribe's desire to amend the Compact to include an ITF. The parties did not reach agreement. Throughout the process, the State insisted that it was not bound by the MFT guarantees to execute an amendment to the Tulalip Compact establishing an ITF based on the more favorable terms of the Spokane ITF. *See* Bell Dec. at ¶¶ 4-6.

On October 25, 2011, the Tribe invoked the Dispute Resolution procedures of Section 12(b)(i-ii) of the Compact (Eighth Amendment). Pursuant to those procedures, the State and Tribe met several times and/or exchanged proposed draft amendments between October 25, 2011 and February 29, 2012. Throughout that process, the State consistently refused to amend the Tulalip Compact to incorporate the more favorable ITF terms found in the Spokane Tribe's compact. *See* Bell Dec. at ¶¶ 7-8.

On January 17, 2012, the Tribe provided the State with a proposed Compact amendment including ITF terms tracking the more favorable ITF terms to which the State had agreed with the Spokane Tribe. That proposed amendment is included at Attachment 1 to the Complaint in this matter. *See* Giampetroni Dec. at Attachment 3. The State refused to incorporate that proposed amendment into the Compact. *See* Bell Dec. at ¶¶ 9-10.

On February 29, 2012, the State presented the Tribe with a proposed amendment to the Tulalip Compact. That proposed amendment, which the State has attached to its Answer in this action, contained terms permitting Tulalip to operate an Inter-Tribal Fund. *See* Giampetroni Dec. at Attachment 4 (Attachment 1 to State's Answer to Complaint (Doc. No. 8-1)). However, the terms of the State's proposed ITF did not reflect the more favorable terms of the Spokane

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ITF. Instead, the State's proposed ITF contained very significant limitations and restrictions not contained in the Spokane ITF. *See* Bell Dec. at ¶¶ 10-12.

F. The Present Action

The Compact provides that in the event the parties have engaged in dispute resolution under Section 12(b)(i-ii) of the Compact, and a party is dissatisfied with the results after 20 days have passed since original notice was given under section 12(b)(i), then it may initiate litigation in an appropriate United States district court seeking resolution of the dispute. *See* Giampetroni Dec. at Attachment 1 (Tulalip Compact (eighth amendment) § 12(d)). The Tribe filed this suit on April 20, 2012, more than 20 days after the Tribe's notice to the State on October 25, 2011. Tulalip accordingly seeks a declaration that the State's refusal to amend the Compact to reflect Tulalip's entitlement to the "more favorable terms" of the Spokane ITF constitutes a breach of the MFT guarantees in the Compact. The Tribe also seeks an injunction requiring the State to execute an amendment to the Compact to incorporate the more favorable Player Terminal allocation terms of the Spokane ITF as reflected in Attachment 3 to the Declaration of Giampetroni.

III. ARGUMENT

A. Summary Judgment Standard

Summary judgment is appropriate if there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Pro. 56(c). Courts view disputed facts favorable to the non-movant and grant summary judgment if disputed material facts viewed in this manner, coupled with the undisputed material facts, establish that the moving party is entitled to judgment as a matter of law. *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000). "A scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact. . . . There must be enough doubt for a

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'reasonable trier of fact' to find for [the non movant] in order to defeat the summary judgment motion." *Id*. (citations omitted). Courts deciding a summary judgment motion defer to neither party in resolving purely legal questions. *See Bendixen v. Standard Ins. Co.*, 185 F.3d 939, 942 (9th Cir. 1999).

B. There are No Genuine Issues of Material Fact

"A 'material' fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). Here, there are only three material facts, and all are undisputed:

1. The parties agreed to the terms of the Compact, including the terms of Appendix X and X2, which include the following guarantee:

> [I]n the event that the State agrees (or is required by law or a court ruling to agree) to permit an allocation of Player Terminals to a tribe which is greater, or is on terms which are more favorable, than as set forth herein, the Tribe shall be entitled to such greater Allocation or more favorable terms.

See Giampetroni Dec. at Attachment 1 (Appendix X (fourth amendment) at §12.5 and Appendix X2 (seventh amendment) at § 12.4). This fact is undisputed. *See* Complaint at ¶ 26; Answer at ¶ 26;

2. The State has entered into a compact with the Spokane Tribe that contains terms governing the Spokane Tribe's allocation of lottery Player Terminals that include a second method by which the Spokane Tribe may acquire such terminals that is not present in the Tulalip Compact. *See* Giampetroni Dec. at Attachment 2 (Appendix Spokane §7). This fact is also undisputed. *See* Complaint at ¶¶ 28-30; Answer ¶¶ 28-30; and

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3. The State has refused to incorporate into the Tulalip Compact without additional restrictions the terms of the Spokane Compact providing for a second method to acquire additional terminals. This fact is also undisputed. *See* Bell Dec. at ¶¶ 10-12; Giampetroni Dec. at Attachment 4 (Attachment 1 to State's Answer to Complaint (Doc. No. 8-1)).

The issues in this suit are accordingly limited to questions of law; namely, the interpretation of the MFT language in Tulalip's Compact and the terminal allocation provisions to which the State has agreed with Tulalip and the Spokane Tribe. *See* Combined Joint Status Report and Discovery Plan (Doc. No. 9) at 3 ("The parties view this case as a dispute primarily over the meaning of contractual and/or statutory language"). Therefore, there exists no genuine issue of material fact. As demonstrated next, Tulalip is entitled to judgment as a matter of law.

C. Tulalip is Entitled to Judgment as a Matter of Law

1. Principles of Compact Interpretation

In the Ninth Circuit, Tribal-State Class III gaming compacts entered pursuant to IGRA are governed by federal law and subject to applicable principles of contract interpretation. *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1098 (9th Cir. 2006). State law rules of contract interpretation of the state in which the compact was formed are applicable if those rules are consistent with federal common law. *Id*. The Tribe discerns no relevant difference between Washington and federal law in terms of the relevant general principles of contract interpretation.

In Washington, "the touchstone of the interpretation of contracts is the intent of the parties." *Contractors Equip. Maintenance Co. v. Bechtel Hanford, Inc*., 514 F.3d 899, 904 (9th Cir. 2008) (quoting *Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc*., 844 P.2d 428, 432 (1993). The parties' intent is "'determined from the actual words used.'" *Id*. (quoting *Hearst Communications, Inc. v. Seattle Times, Co.*, 115 P.3d 262, 267 (2005)). Courts impute to the

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parties an intention that corresponds with the plain, ordinary and reasonable meaning of the words used in the contract unless the entirety of the contract clearly demonstrates a contrary intent. *Hearst*, 115 P.2d at 267. Finally, "[s]ummary judgment is appropriate if a contract is unambiguous[.]" *BP Land & Cattle LLC v. Balcom & Moe, Inc.,* 86 P.3d 788 (Wash. App. 2004). A contract provision is not ambiguous simply because the parties suggest opposing meanings, and courts do not read ambiguity into a contract where it can reasonably be avoided. *Mayer v. Pierce County Med. Bureau, Inc.*, 909 P.2d 1323 (Wash. App. 1995).

2. The Most-Favored-Tribe Language is Unambiguous

The MFT provisions at issue in this case are unambiguous. The MFTs in both Section 12.5 of Appendix X and Section 12.4 of Appendix X2 provide, in pertinent part, as follows:

- In the event that the State agrees
- to permit an allocation of Player Terminals to a tribe
- which . . . is on terms which are more favorable, than as set forth herein,
- the Tribe shall be entitled to such . . . more favorable terms.

There is no reasonable interpretation of this language other than that the parties intended Tulalip to enjoy the benefit of any terms pertaining to Player Terminal allocation agreed to between the State and another tribe that are more favorable than the terms pertaining to Player Terminal allocation contained in the Tulalip Compact. The sole remaining question, then, is whether the terminal allocation terms creating an Inter-Tribal Fund to which the State agreed with the Spokane Tribe are "more favorable" than those contained in the Tulalip Compact. Again, as discussed below, the Compact provisions are unambiguous in this regard.

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3. The State Agreed to "More Favorable" Terminal Allocation Terms with the Spokane Tribe

Section 12 of Appendix X2 to the Tulalip Compact governs lottery Player Terminal acquisition and operation. *See* Giampetroni Dec. at Attachment 1 (Tulalip Compact Appendix X2 (seventh amendment) § 12). Subsection 12.1 establishes that the Tribe may operate up to an initial allocation of 975 Player Terminals. Subsection 12.2 is entitled "Further Conditions" and sets forth the terms under which the Tribe may increase its allocation of Player Terminals above its initial allocation of 975. As described above, the Tribe may do so by purchasing allocation rights from another Eligible Tribe pursuant to a Terminal Allocation Plan that a majority of Eligible Tribes have approved and had an opportunity to participate in formulating. *See* Giampetroni Dec. at Attachment 1 (Tulalip Compact Appendix X2 (seventh amendment) §§ 12.2 and 12.2.2. Those provisions, as noted, establish the "TAP Procedure." The TAP Procedure is the sole means under the Compact by which the Tulalip Tribe may increase its allocation of Player Terminals above its base allocation of 975.

The Spokane Tribe is also a signatory to Appendix X2, and therefore also benefits from the TAP Procedure set forth in Sections 12.2 and 12.2.2 of Appendix X2. *See* Giampetroni Dec. at Attachment 2 (Spokane Compact (first amendment) Appendix X2 at §§ 12.1 and 12.2-12.2.2). However, the TAP Procedure is not the sole means by which the Spokane Tribe can exceed its base allocation of 975 terminals. In Appendix Spokane the State agreed to permit the Spokane Tribe to utilize an additional means to acquire Player Terminals above its base allocation.

Both Spokane and Tulalip are limited to a base allocation of 975 Player Terminals, and they may increase that number by recourse to the TAP Procedure. But under the Spokane Compact, the Spokane Tribe may also increase that number via recourse to the ITF should it be

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unable to obtain additional terminals via the TAP Procedure. By contrast, if the Tulalip Tribe is unable to obtain additional terminal allocation rights via the TAP Procedure, it has no other recourse under its Compact to acquire them.

Terminal allocation rights are beneficial rights. It is self-evident that in a finite and competitive market for such rights, having access to a second feasible means to obtain them, as provided by the Spokane ITF, is more favorable than having just one such means, as provided in the Tulalip Compact. In agreeing to an ITF with the Spokane Tribe, the State has agreed to a terminal allocation "on terms which are more favorable" than those contained in the Tulalip Compact. Accordingly, under the unambiguous MFT language in both Section 12.5 of Appendix X and Section 12.4 of Appendix X2, Tulalip "shall be entitled to such . . . more favorable terms."

4. The Tribe's Proposed Amendment Reflects its MFT Rights

Attachment 3 to the Giampetroni Declaration is the Tribe's proposed amendment to the Tulalip Compact establishing a Tulalip Inter-Tribal Fund, which Tulalip provided to the State on January 17, 2012.[3] The operational terms of Tulalip's proposed ITF are set forth in section 12.2.5.2 of that document and are drawn substantively verbatim from the more favorable operational terms of the Inter-Tribal Fund to which the State agreed with the Spokane Tribe. *Compare* Giampetroni Dec. at Attachment 3 at § 12.2.5.2 ("Inter-Tribal Fund") *with* Attachment 2 (Appendix Spokane, § 7 ("Inter-Tribal Fund")).

The Spokane Compact includes certain numeric limitations and other restrictions on Player Terminals (unrelated to the operation of the ITF) that are not included in Tulalip's proposed amendment. *See, e.g.*, Giampetroni Dec. at Attachment 2 (Appendix Spokane at §

[3] Attachment 3 to the Declaration of Giampetroni is included as Attachment 1 to Tulalip's Complaint.

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6(B)) (requiring renegotiation of Player Terminal provisions on third anniversary of compact and limiting Player Terminal operation during renegotiation period). However, Tulalip is not required to accept such unfavorable restrictions under the MFT. The plain and unambiguous language of Tulalip's entitlement to "such . . . *more favorable* terms" does not reasonably encompass a concomitant obligation to also accept *un*favorable terms from another tribe's compact. *See, e.g.*, *Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1100-1102 (9th Cir. 2006) (granting summary judgment for Tribe and rejecting argument by State that most-favored compact provision entitling Tribe to operate "those same additional games" (if subsequently authorized in other tribes' compacts) could be read to include numeric and other restrictions on those games agreed to by the other tribes as a condition of being authorized to operate them).

Nor is Tulalip required to accept the unfavorable restrictions contained in the State's proposed amendment attached to its Answer. For example, under the State's proposal, Tulalip's access to its ITF and the price it must pay per terminal are both contingent upon the approval or disapproval of a majority of Eligible Tribes. *See* Attachment 1 to State's Answer at §§ 12.2.2 and 12.2.5.1(b). In other words, the State has proposed an ITF for Tulalip subject to the veto power of other tribes. No such restriction is imposed on Spokane's access to its ITF and Tulalip is not required to accept such restrictions in its own. *See Shoshone-Bannock Tribes*, 465 F.3d at 1100-1102. The State's proposed amendment contains numerous other unfavorable limitations and restrictions that clearly do not fall within the plain meaning of the MFTs' unambiguous promise of "more favorable terms." *See* Dec. of Bell at ¶¶ 10-12.

In sum, the State promised Tulalip that "in the event that the State agrees . . . to permit an allocation of Player Terminals to a tribe which . . . is on terms which are more favorable than as set forth herein, the Tribe shall be entitled to such . . . more favorable terms." Giampetroni Dec.

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at Attachment 1 (Tulalip Compact at § 12.5 of Appendix X and § 12.4 of Appendix X2). The State agreed to such more favorable terms with the Spokane Tribe. Tulalip's proposed amendment precisely reflects its contractual entitlement under the MFTs to those more favorable terms. Tulalip is accordingly entitled to judgment as a matter of law.

D. Conclusion

For the foregoing reasons, the Tribe respectfully requests a declaration that the State is in violation of the Compact and an injunction requiring the State to execute an amendment with Tulalip incorporating into the Tulalip Compact the terms of Attachment 1 to the Tribe's Complaint.

Respectfully submitted,

Dated: October 25, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2012, I electronically filed this Motion for Summary Judgment and Memorandum in Support with the Clerk of the Court using the CM/ECF system, which will send notice of the filing to all parties registered in the CM/ECF system for this matter.

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