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VIA ELECTRONIC AND U.S. MAIL
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RE: "CONCEPT" LANGUAGE FOR PLAYER-DEALER ROTATION

Dear Director Shimazu and Ms. George:

As the elected leaders of our respective nations, we write to provide our nations' comments on the "concept" language the Bureau of Gambling Control released on December 3, 2019 with respect to the rotation of the player-dealer position in California cardrooms. We also respond to some of the written comments submitted by cardroom representatives regarding the proposed regulation's perceived failures.

1. THE CONCEPT LANGUAGE

As an initial matter, we applaud the Bureau for taking this action. The proposed regulation, even if just a concept at this point, acknowledges what the tribes have said for most of the last decade: The cardrooms have been playing illegal banked games by failing to rotate the player-dealer position as the law requires.

While the concept language is a good start, it could go further. The proposed regulation requires rotation every two hands, but the law is more exacting. Penal Code section 330 prohibits any "banking" game played with cards, and by definition that is any game where one person bets against all others at the table, paying the winners and collecting from the losers. *Sullivan v. Fox*, 189 Cal. App. 3d 673, 678 (1987). Notwithstanding the provisions of Penal Code section 330.11, we submit that allowing a person to bank even a

single hand in a cardroom still results in an illegal banked game.

That said, we understand how the Bureau arrived at the concept's two hand rotation. After all, the *cardrooms themselves* established mandatory rotation every two hands as an industry standard and they specifically acknowledged that such rotation is required by law. We previously explained to the Bureau that our representatives painstakingly examined every single blackjack rule – 208 of them – on the Bureau's website. That examination revealed that fully 98 percent of those rules specifically required that the player-dealer position be offered or actually rotate every two hands. Here is an example of the rotation language in those rules:

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The Player-Dealer position must rotate in a continuous and systematic fashion, and cannot be occupied by one person for more than two consecutive hands. There must be an intervening player-dealer so that no single player can continually occupy the player-dealer position within the meaning of *Oliver v. County of Los Angeles* (1998) 66 Cal. App. 4th 1397, 1408-1409. If there is not an intervening person occupying the Player-Dealer's position, the game will be "broke" or stopped, as required by the California Penal Code.

This rule language effectively tracks that of the concept under consideration. As a tribal representative remarked at the Bureau's December 18, 2019 workshop, neither the Bureau nor the tribes drafted the rule language. The cardrooms did. Thus, the concept language does nothing more than reflect the *cardrooms' own understanding* of the legal rotation requirements. As such, the cardrooms have no valid basis to complain about the concept language.

In light of Penal Code section 330.11, we assume the Bureau will not altogether prohibit player-dealer games in cardrooms. In that case, we have little in the way of substantive comments about the concept, because it is generally well-drafted and we believe that if enacted (and adequately enforced) it would limit the banking of games to no more than two hands. The concept includes two options under section (a)(2). We believe the first option ("until that person accepts the player-dealer position") is the only one consistent with section 330.11. Under that section, the player-dealer position "must be continuously and systematically rotated amongst *each* of the participants during the play of the game." That necessarily means *all* players at the table must take the position. While section 330.11 has an exception to this rule, it applies *only* if the Bureau finds the rules of the game "render the maintenance of or operation of a bank impossible by other means." If the Bureau uses the first option in the concept, a player will be excluded from the game until he or she accepts the player-dealer position, unless the cardroom can prove to the

Bureau that the "maintenance or operation of a bank is rendered impossible by virtue of the game rules." In other words, the concept language tracks exactly what section 330.11 requires.

One other minor matter bears discussion. Section (a)(6) in the concept references regulation 12200 subdivision (a)(16). We believe that instead should be (b)(16).

2. REBUTTAL OF CARDROOM COMMENTS

We will not address in detail the myriad comments the Bureau has received from cardroom employees, owners and beneficiaries (including third party proposition player ("TPP") companies and the various municipalities which derive tax revenue from the illegal gaming) claiming the proposed regulatory action will economically harm them. Suffice it to say that the Bureau is a law enforcement agency, and thus should not be concerned with public policy arguments about how enforcing the law will affect one or another group. Those are policy issues for the Legislature or the people of the state to address. Moreover, the fact that many people profit from the illegal conduct in California cardrooms does not mean the State should not stop it.

There are relatively few substantive comments supporting the cardrooms' position. That is understandable, because no one can seriously contend that position is legally tenable.

A. The Bureau *Is* Authorized To Regulate Illegal Gaming

In their December 12, 2019 letters, Jarhett Blonien and Kyle Kirkland, in his role as the President of the California Gaming Association, assert that the Bureau lacks the authority to promulgate regulations to prevent banked games. According to Mr. Blonien, the "plain language" of Business and Professions Code section 19826(g), "limits the Bureau's authority to restrictions on how **a** game is played, not how all games must be played." (Emphasis in original.) Mr. Blonien reasons that because the concept addresses *all* player-dealer games, it is beyond the Bureau's authority. Mr. Kirkland takes a broader approach than Mr. Blonien by citing many cases and statutes which he claims prove the Bureau "lacks authority to promulgate regulations prohibiting or restricting, on a statewide basis, previously approved games."

We trust the Bureau does not question its authority to enforce gaming laws, including the promulgations of regulations to that end. Otherwise, we doubt the Bureau would have started this process in the first place. Regardless, it appears Messrs. Blonien and Kirkland hoped their forceful assertion would deter anyone at the Bureau from actually reading the authority they cite. One need look no further than section 19826 of the Gambling Control Act – the very section upon which Mr. Blonien relies – to conclude the Bureau has all the authority it needs. That section tasks the Bureau with a number of "responsibilities," including: "(f) To adopt regulations reasonably related to its functions

and duties in this chapter." In case there is any doubt about whether those "functions and duties" include game regulation, the very next subsection, 19826(g), requires the Bureau to "[a]pprove the play of any controlled game, including placing restrictions and limitations on how a controlled game may be played." This is the section Mr. Blonien claims allows the Bureau to regulate a single game, but not all games. Setting aside that Mr. Blonien's argument makes no sense, it also demonstrates that he conveniently chose to ignore the first part of the sentence which specifically extends the Bureau's authority to "***any*** controlled game."

One final point: In this section of his letter, Mr. Kirkland claims the "Bureau's concept language would effectively revoke existing game approvals for cardrooms' player-dealer games." As noted above, however, the cardrooms' own existing game rules already provide for the concept's two hand rotation. Thus, the concept should have no effect on those rules.

B. Section 330.11 And "Mandate[d] Acceptance"

Messrs. Blonien and Kirkland, as well as Jimmy Gutierrez (in his December 16, 2019 letter), claim the concept language violates section 330.11. As Mr. Blonien puts it:

> The newly proposed language forces every player to either accept the position of player-dealer or sit out of the game. This is a mandate [*sic*] acceptance of the player-dealer position by every person at the table or the game cannot be played. This is inapposite to the plain language of Penal Code 330.11.[1]

This assertion is incorrect. Preliminarily, nothing in section 330.11 prohibits a regulation from mandating acceptance of the deal by every player at a table. The statute simply clarifies that the Legislature did not *intend* mandated acceptance by all if – but only if – the Bureau found the rules of the game in question made the maintenance of a bank impossible by other means. Stated otherwise, if the Bureau cannot conclude the rules of the game prevent the maintenance of a bank by means other than mandated rotation among all players, then that mandated rotation is perfectly appropriate.

In any event, the concept does not do what the cardroom representatives claim. As noted above, the concept mandates acceptance of the player-dealer position, but it includes a carve-out where the cardroom "submit[s] information to the Bureau to establish how the

[1] Similarly, Mr. Gutierrez asserts that the "proposed regulation requires acceptance of the deal by every player, even if the division finds that the rules of the game render the maintenance of or operation of a bank impossible by other means."

maintenance or operation of a bank is rendered impossible by virtue of the game rules." Thus, the concept is *exactly* consistent with section 330.11.

C. The Four Cases (Plus *Oliver*)

In his lengthy letter, Mr. Kirkland cites four decisions from California appellate courts which he claims "have held that player-dealer games are not banking games." Those cases are *Bell Gardens v. County of Los Angeles*, 231 Cal. App. 3d 1563 (1991), *Huntington Park v. County of Los Angeles*, 206 Cal. App. 3d 241 (1988), *Walker v. Meehan*, 194 Cal. App. 3d 1290 (1987), and the above-referenced *Sullivan v. Fox*. According to Mr. Kirkland, in "these four cases, the practice was to offer the *opportunity* to be the player-dealer every two hands in clockwise order to each active player." (Emphasis in original.) Mr. Kirkland may have – again – hoped the Bureau would not actually read what he cited. Stated succinctly, *none* of the four decisions even remotely supports the notions that the games played in cardrooms are (1) "not banking games," or (2) legal as long as they "offer the opportunity" to take the deal.

We will not belabor the point, because the Bureau's representatives can read the cases as easily as anyone else. However, we note that *Sullivan* and *Walker* ultimately addressed percentage games, not banking games, and thus rotation of the player dealer position was not at issue. *See Sullivan*, 189 Cal. App. 3d at 684 ("the undisputed evidence of plaintiff Sullivan's 'Pai Gow manager' and the San Jose police investigator establishes that plaintiff Sullivan is operating a percentage game as we have defined that term."); *Walker*, 194 Cal. App. 3d at 1304 ("We conclude that the *Sullivan* definition is not unconstitutionally vague and that it is supported by legislative history as well as commonly accepted definitions of the term 'percentage game.'")

Huntington Park and *Bell Gardens* are no more helpful to the cardrooms. In the first, the lower court made a specific factual finding that the dealer position in the pai gow game at issue "continually and systematically rotates among each of the participants" in the game and the house did not participate in the game or have any interest in its outcome. 206 Cal. App. 3d at 245. Based on that finding, the appellate court concluded that "under the present facts pai gow is not a banking game proscribed under section 330 since the record does not establish that either plaintiffs (the house) or any other entity maintains or operates a 'bank.'" 206 Cal. App. 3d at 250. *Huntington Park* might support the cardrooms if the player-dealer position in their games *actually rotated* continually among each of the players. As we all know, that is hardly what happens in the cardrooms. Rather, the TPP banks the game the entire time and the player-dealer position *never* rotates. As an aside, Mr. Kirkland suggests the TPPs' show of offering the player-dealer position in the cardrooms legitimizes their games. None of the cases Mr. Kirkland cites supports that proposition. Indeed, its only support is the now thoroughly discredited "Lytle Letter." We assume even Mr. Kirkland will no longer wish to reference that letter as support for anything.

In *Bell Gardens*, the county attempted to re-litigate the exact issue decided in *Huntington Park*. As such, the court reached the same result and sanctioned the county for its conduct. Notably, the *Bell Gardens* court explained that the result could be different if the game rules were changed: "For example, if a rule change permitted a player to take on all comers, pay all winners, and collect from all losers, the game would, under the *Sullivan* definition, be a banking game." 231 Cal. App. 3d at 1569. That is precisely how the TPPs operate in cardrooms today – they take on all comers and thus operate an illegal bank.

Mr. Kirkland also continues a troublesome trend by cardroom interests to misrepresent the holding in *Oliver v. County of Los Angeles*, 66 Cal. App. 4th 1397 (1998). Quoting dicta from that decision, Mr. Kirkland's letter suggests the applicable rotation standard is "a long time." Apparently, this means that if a player holds the deal "a long time," the game is banked, but if the deal rotates in something less than "a long time," the game is legal. Mr. Kirkland is not the only one pushing this proposition. At the Bureau's workshops in 2018 and 2019 various cardroom owners and attorneys repeated this notion several times, perhaps hoping that doing so would have a talismanic effect and make it true. It is anything *but* true. The actual holding of *Oliver* – which can be determined because the court used the words "we now hold" – is that "a game will be determined to be a banking game if under the rules of that game, it is possible that the house, another entity, a player, or an observer can maintain a bank or operate as a bank during the play of the game." 66 Cal. App. 4th at 1408. In the case of the Newjack game at issue in *Oliver*, the rules did not actually require rotation, so the court found it was illegal. The primary significance of *Oliver* is that it conclusively proves the cardrooms play illegal banked games.

Mr. Kirkland also accuses the tribes of asserting that *Oliver* requires rotation every two hands. We are unware of any tribe making such an assertion. Rather, as the cardroom game rule quoted above demonstrates, it was the cardrooms themselves that seemed to have interpreted *Oliver* to have required rotation every two hands and therefore that is the industry standard the cardrooms created.

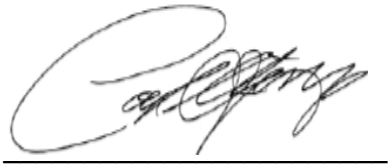
Thus, the lesson all parties can draw from the cases Mr. Kirkland cited, as well as the overlay of the later-enacted Penal Code section 330.11, is that the player-dealer position must *actually rotate*, and must do so *continuously*. The Bureau's only task, then, is to define "continuously" and in the concept it understandably chose to adopt the cardrooms' own two-hand standard.

There is a final point we would like to make. Mr. Kirkland reveals that the illegal games "comprise approximately 65-70% of the gaming activity and revenue at California cardrooms" and that stopping that illegal gaming will have an "impact of over $5.6 billion." Those remarkable figures show only one thing: The scope of the harm to the

tribes the cardrooms have caused. The cardrooms have no right to benefit from patently illegal conduct.

We look forward to the Bureau's next steps in implementing the regulations to finally enforce the law and preclude further harm to the tribes.

Sincerely,



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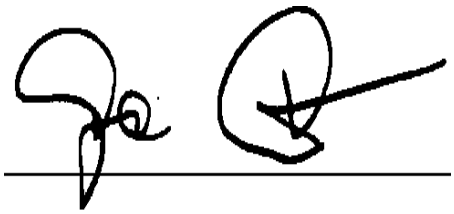

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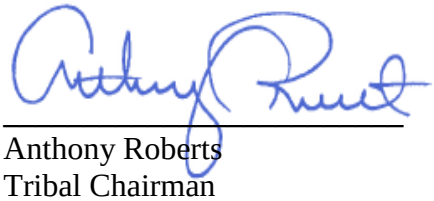

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