

**IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS  
DIVISION TWELVE**

PRAIRIE BAND POTAWATOMI NATION,	)	
Plaintiff,	)	
	)	
	)	
v.	)	Case No. 08-C-1184
	)	
	)	
HARRAH'S ENTERTAINMENT, INC.,	)	
HARRAH'S OPERATING COMPANY, INC.,	)	
HARRAH'S KANSAS CASINO CORPORATION,	)	
HARRAH'S SUMNER INVESTMENT COMPANY,	)	
LLC, and HARRAH'S SUMNER MANAGEMENT	)	
COMPANY, LLC,	)	
Defendants.	)	
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**MEMORANDUM DECISION AND ORDER**

This case is before the Court on the Plaintiff's Motion for Temporary Restraining Order and Temporary Injunction filed on August 18, 2008. On that date, the Honorable Charles E. Andrews denied a request to issue an *ex parte* temporary restraining order and the motion was set for hearing in Division 12. An evidentiary hearing was held before this Court on August 29, 2008. Prior to the hearing, the parties briefed the issues presented. The parties also submitted a written Stipulation of Facts and Exhibits pursuant to Kansas Supreme Court Rule 163. Thus, since the issues presented have been fully briefed and argued, the Motion for Temporary Restraining Order and Temporary Injunction is deemed to be submitted to the Court for decision.

## I. FINDINGS OF FACT

Although additional facts will be discussed as necessary in the Analysis and Legal Conclusions section of this Memorandum Decision and Order, the parties have stipulated to the following facts, which are adopted as the findings of the Court:

1. The Plaintiff, Prairie Band Potawatomi Nation (the “Nation”), is a federally recognized Indian tribe that developed a Class III Gaming facility which conducts commercial activities including, but not limited to, Class III Gaming, a hotel/resort, food and beverage services, and the sale of alcohol, gifts and souvenirs.

2. Defendant Harrah’s Kansas Casino Corporation is a Nevada corporation registered with the Kansas Secretary of State as a foreign corporation and authorized to do business in the State of Kansas.

3. Defendant Harrah’s Entertainment, Inc. is a corporation duly organized under the laws of the State of Delaware.

4. Defendant Harrah’s Operating Company, Inc. is a Delaware corporation registered with the Kansas Secretary of State as a foreign corporation and authorized to do business in the State of Kansas.

5. Defendant Harrah’s Sumner Investment Company, LLC is a Delaware limited liability company.

6. Defendant Harrah’s Sumner Management Company, LLC is a Delaware limited liability company.

7. In 1997, the Nation and Harrah’s Kansas Casino Corporation agreed to a

Management Agreement, together with subsequent amendments, to manage and operate the Prairie Band Casino and Resort (collectively “Management Agreement”). (A copy of the Management Agreement is attached as Exhibit “A” to the Petition.)

8. In the Fourth Amendment to the Management Agreement, the parties negotiated the language found in Section 3.12, which is entitled Exclusivity of Manager and Non-Compete Agreement. This provision states:

Manager and its Affiliates covenant and agree that each shall not 1) during the Term of the Management Agreement, the Term of any Amendment thereto, and for one year thereafter, take any steps to develop, promote or encourage the expansion of any casino gaming in the State of Kansas other than that conducted by the Nation; and 2) during the Term of the Management Agreement, the Term of any amendment thereto, and for two years thereafter own, operate, manage or otherwise engage in any casino business located in the State of Kansas operating any game or games that are the same as those made available to the public at the Facility provided the Management Agreement expires naturally, or if it is terminated by the Nation due to a material breach by Manager.

9. The term “Manager” is defined in the Definitions section of the Management Agreement as “Harrah’s Kansas Casino Corporation.”

10. The term “Affiliate” is defined in the Definitions section of the Management Agreement as follows:

**“Affiliate”** means as to Manager of the [Nation], any corporation, partnership, limited liability company, joint venture, trust, department or agency or individual controlled by, under common control with, or which controls, directly or indirectly Manager or the [Nation].

11. Pursuant to a Management Transition and Termination Agreement (“Termination Agreement”) entered into by Harrah’s Kansas Casino Corporation,

Harrah's Operating Company, Inc., and the Nation, it was agreed that the termination date of the Management Agreement for the purposes of Section 3.12 would be January 13, 2008. (A copy of the Termination Agreement is attached as Exhibit "B" to the Petition.)

12. On October 3, 2007, Harrah's Sumner Investment Company, LLC and Sumner Gaming and Resorts, L.C. entered into a joint venture to form Sumner Gaming Joint Venture, L.C., a Kansas limited liability company. (It should be noted that Sumner Gaming and Resorts, L.C. and Sumner Gaming Joint Venture, L.C. are not parties to this lawsuit.)

13. On or about November 13, 2007, Sumner Gaming Joint Venture, L.C., submitted an Application to the Kansas Lottery Commission to develop and manage a state-owned casino in Sumner County, Kansas (the "Harrah's Kansas Project"). (A copy of the Application is attached as Exhibit "D" to the Petition.)

14. On or about May 24, 2008, Sumner Gaming Joint Venture, L.C. and the Kansas Lottery Commission negotiated the terms of a Lottery Gaming Facility Management Contract ("Lottery Contract") pursuant to Kansas Expanded Lottery Act. (A copy of the Lottery Contract is attached as Exhibit "F" to the Petition.)

15. In the Lottery Contract, Sumner Gaming Joint Venture, L.C. agreed to develop and manage the planned Harrah's Kansas Project.

16. According to public records, Sumner Gaming Joint Venture, L.C. is to receive 73% of the revenues from the state-owned casino under the Lottery Contract.

17. The remaining 27% of the revenues are to be allocated to state and local government, specifically including the problem gambling and addiction fund.

18. As part of the application process, Sumner Gaming Joint Venture, L.C. took

part in a presentation before the Kansas Lottery Gaming Facility Review Board in support of its plan for developing and managing the casino in Sumner County. (Copies of the slide show and the presentation of Sumner Gaming Joint Venture, L.C. to the Review Board were admitted into the record as Plaintiff's Exhibits 10 and 11.)

19. On August 22, 2008, Sumner Gaming Joint Venture, L.C. was chosen by the Review Board to develop and manage the state-owned casino in the south-central gaming zone, as defined by the Kansas Expanded Lottery Act.

20. The Lottery Contract is currently under review by the Kansas Racing and Gaming Commission as required by K.S.A. 74-8736(e).

## **II. ANALYSIS AND LEGAL CONCLUSIONS**

### **A. Standard of Review.**

“A temporary injunction merely preserves the status quo until a final determination of a controversy can be made.” *Steffes v. City of Lawrence*, 284 Kan. 380, 394, 160 P.3d 843 (2007). In Kansas, “there are five factors to be considered before granting a temporary or preliminary injunction.” *Idbeis v. Wichita Surgical Specialists, P.A.*, 258 Kan. 485, 491, 173 P.3d 642 (2007). These factors are: “a substantial likelihood of eventually prevailing on the merits; a reasonable probability of suffering irreparable future injury; the lack of obtaining an adequate remedy at law; the threat of suffering injury outweighs whatever damage the proposed injunction may cause the opposing party; and the impact of issuing the injunction will not be adverse to the public interest.” 258 Kan. 485, Syl. 1.

### **B. The Kansas Expanded Lottery Act.**

In order to determine the status quo, or existing state of affairs, it is appropriate to briefly look to the history of the Kansas Expanded Lottery Act (KELA), K.S.A. § 74-8733 et seq. This act was passed by the Kansas Legislature during the 2007 legislative session, and became effective on April 19, 2007. “It generally provides for gaming in casinos and parimutuel racetracks in four gaming zones. [Citations omitted.] The four zones are the northeast gaming zone, consisting of Wyandotte County; the southeast zone, consisting of Crawford and Cherokee Counties; the south-central zone, consisting of Sedgwick and Sumner Counties; and the southwest zone, consisting of Ford County.” *State ex rel. Six v. Kansas Lottery*, \_\_\_\_ Kan. \_\_\_\_, 186 P.3d 183 (2008).

In the *Kansas Lottery* case, the Kansas Supreme Court upheld the constitutionality of KELA. In doing so, it was held that “[t]he legislature and citizens amended the constitution in order to provide a mechanism for raising revenue for the state and for promoting economic growth, goals that KELA is structured to accomplish.” 186 P.3d at 194. Furthermore, the Kansas Supreme Court noted that under KELA, the Kansas Legislature established a procedure in which the income from the four state-owned casinos “flows to the State of Kansas, and the proceeds are distributed by the State of Kansas.” 186 P.3d at 193.

KELA authorizes the State of Kansas to enter into contractual agreements with third parties “to manage or to construct and manage gaming facilities on behalf of the state and subject to the operational control of the state.” 186 P.3d at 193, citing K.S.A. 74-8734. In order to be selected as a gaming facility manager, an applicant must first be endorsed by a city or county governing body. K.S.A. 74-8734(h)(10). Next, in order to

receive a management contract, an endorsed applicant must be found by the Kansas Lottery Gaming Facility Review Board to have presented a proposal for a particular gaming zone which “best maximizes revenue, encourages tourism and otherwise serves the interest of the people of Kansas.” K.S.A. 74-8736(b). Thereafter, the casino management contract is submitted to the Kansas Racing and Gaming Commission for a comprehensive background check of the applicant and for a vote on whether to approve the Review Board’s recommendation. K.S.A. 74-8736(e).

It is undisputed that the Sumner Gaming Joint Venture, L.C. has successfully completed the first two steps of the KELA approval process for the management of a state-owned casino in the south-central region. Specifically, on August 22, 2008, Sumner Gaming Joint Venture, L.C. was chosen by the Review Board to develop and manage a state-owned casino to be built in Sumner County, Kansas. As indicated above, the contract between Sumner County Joint Venture, L.C. and the Kansas Lottery Commission is currently under review by the Kansas Racing and Gaming Commission.

**C. Application of Temporary Injunction Factors.**

*1. Substantial Likelihood of Prevailing on Merits.*

The Plaintiff is not required to establish with absolute certainty that it will ultimately prevail against the Defendants in this action. Rather, it must establish that there is “a reasonable probability of success” on the merits. *Idbeis*, 285 Kan. at 492. After reviewing the evidence presented by the parties, the Court finds that there is a substantial likelihood the Plaintiff will prevail on the merits of this case to the extent that it seeks to protect the proprietary customer information which was obtained by Harrah’s Kansas Casino Corporation when it served as the manager of the Harrah’s

Prairie Band Casino located in Jackson County, Kansas. The evidence strongly suggests that the parties intended for Harrah's to be prohibited from using this proprietary customer information to solicit or otherwise entice customers to another casino business located in the State of Kansas for a period of two (2) years following the termination of the Management Agreement.

Because the Defendants have taken the position that the provisions of the Non-Compete Agreement are ambiguous, it is appropriate for this Court to consider evidence outside the four corners of the contract. In doing so, the Court finds the testimony of James Potter was persuasive regarding the intent of the parties when they entered into Section 3.12 of the Fourth Amendment to the Management Agreement. Mr. Potter testified that the intent of the parties was "to allow [the Nation] the time to establish that market data base for ourselves . . . and to allow enough time to pass so that it couldn't be used against us. . . ." Mr. Potter further testified that Harrah's still has the Nation's "customer data base within their larger customer data base" and "can still market to those individuals." Moreover, Mr. Potter recognized the prohibitions set forth in the Non-Compete Agreement are limited to the geographic boundaries of the State of Kansas and to a period of two (2) years following January 13, 2008.

2. *Reasonable Probability of Irreparable Injury.*

From a review of the evidence presented in this action, the Court finds that there is a reasonable probability that the Plaintiff will suffer irreparable harm unless a temporary injunction is issued to prevent the Defendants from using the proprietary customer information obtained at the Prairie Band Casino to directly or indirectly solicit customers

to the state-owned casino to be built in Sumner County, Kansas. However, the Court does not find the evidence presented by the Plaintiff to be sufficient to establish a reasonable probability of any other irreparable harm at this point in time. It is also important to recognize that the Plaintiff continues to have the right to assert a breach of contract claim against one or more of the Defendants in arbitration, which is the forum mutually agreed upon by the parties for the resolution of such disputes.

3. *Lack of Adequate Remedy at Law.*

At the evidentiary hearing, a substantial amount of evidence was presented regarding the sophisticated customer tracking procedures used by Harrah's Kansas Casino Corporation during the time it served as the manager of the Nation's casino. In particular, evidence was presented regarding the "Total Rewards" program which is used by the Harrah's entities to obtain detailed information about customers and their preferences. Based on this evidence, the Court finds that the only adequate remedy to protect the Plaintiff's proprietary customer information during the two (2) year period covered by the Non-Compete Agreement would be to enjoin the Defendants from using or sharing such information obtained at the Prairie Band Casino to solicit or otherwise entice customers to the Sumner County casino.

4. *Threat of Injury versus Danger to Opposing Parties.*

The Plaintiff has expressed a legitimate concern regarding the potential use of customer information obtained by Harrah's while managing the Prairie Band Casino to solicit customers for the casino to be built in Sumner County. This potential harm must be weighed against the potential harm to the Defendants. According to the testimony presented by John Frieden at the evidentiary hearing, the relief requested by the Plaintiff

would effectively destroy the ability of Sumner Gaming Joint Venture, L.C.'s to fulfill its contractual obligation to develop and manage a state-owned casino in the south-central region. This would result in harm not only to the Defendants but also to Sumner Gaming Joint Venture, L.C. and Sumner Gaming and Resort, L.C. - neither of which have been named as parties in this lawsuit. Thus, it is appropriate for the Court to use caution in imposing a temporary remedy in this case that protects the rights Plaintiff while balancing the rights of the Defendants and the other owners of Sumner Gaming Joint Venture, L.C.

5. *Impact on the Public Interest.*

From a review of the evidence presented by the parties, the Court finds that it would not be adverse to the public interest to grant a temporary injunction limited to protecting the Plaintiff's proprietary customer information during the two (2) year period agreed upon by the parties. Although the people of the State of Kansas certainly have an interest in the development of a casino in Sumner County, the public also has an interest in seeing that contractual agreements are enforced. Thus, the Court has attempted to balance the legitimate interests of the parties and the people of the State of Kansas.

**CONCLUSION**

Therefore, the Court hereby temporarily restrains and enjoins the Defendants, and each of them, from using or sharing of any information obtained from the customers of the Prairie Band Casino to market, solicit or otherwise entice customers to the casino to be opened in Sumner County, Kansas. The Court further finds that the Plaintiff should not be required to post a bond. Finally, the Court directs the parties to participate in private mediation, no later than thirty (30) days from the date of this Memorandum Decision and Order, in a good faith attempt to resolve their disputes without the need for

further litigation or arbitration.

This Memorandum Decision and Order shall serve as the judgment of the Court on the Plaintiff's Motion for Temporary Restraining Order or Temporary Injunction. No further Journal Entry is required.

IT IS SO ORDERED.

Entered on this \_\_\_\_ day of September, 2008.

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David E. Bruns  
District Court Judge

### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the \_\_\_ day of September, 2008, she served a true and correct copy of the above and foregoing document by fax or e-mail to:

Jere D. Sellers  
Zachary H. Hemenway  
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