THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
J. Ernest Kinard, Jr., Circuit Court Judge

Case No. 2012-CP-40-00626

The Catawba Indian Nation a/k/a
The Catawba Indian Nation of South Carolina a/k/a
The Catawba Indian Tribe of South Carolina ..... Appellant,

vs.

State of South Carolina and Mark Keel, in
His official capacity as Chief of the South
Carolina Law Enforcement Division ..... Respondents.

RECORD ON APPEAL

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Plaintiff,	)	
vs.	)	ORDER
State of South Carolina and Mark Keel, in his official capacity as Chief of the South Carolina Law Enforcement Division,	)	
Defendants.	)	

Plaintiff Catawba Indian Tribe of South Carolina brings a declaratory judgment action seeking interpretation of a provision in the 1993 Settlement Agreement between the State and Tribe relating to the Tribe's gaming rights on its Reservation. Plaintiff contends enactment of the Gambling Cruise Act of 2005, § 3-11-100 *et seq.*, which authorizes "cruises to nowhere" allowing video gambling *only outside the State's territorial waters*, now enables the Tribe, pursuant to the Settlement, to offer video gaming on the Reservation. This is so, Plaintiff argues, because § 27-16-110(G) of the Settlement permits on the Reservation electronic play devices to "the same extent that the devices are authorized by State law." The Tribe's interpretation is that if state law authorizes video gaming anywhere – even on the high seas – authorization of video gambling on the Reservation is triggered pursuant to § 27-16-110(G).

Specifically, the Tribe urges that *any State authorization of gambling devices* – even for the narrow purpose of transportation of the devices for play in federal territorial waters – is sufficient to trigger a right to the same gaming devices on its Reservation. The Tribe fully acknowledges video gambling is banned in South Carolina, but argues nevertheless that the

Settlement is not specific as to any geographic location. Since the Tribe is "not required to have an ocean" on its Reservation, in order to be given "equivalent" rights under the Gambling Cruise Act, it must have identical video gambling rights on its Reservation. *Plaintiff's Memorandum For Summary Judgment*, at 14-15.

The State argues that § 27-16-110(G) of the Settlement Act, as interpreted in *Catawba Indian Tribe v. State*, 372 S.C. 519, 642 S.E.2d 751 (2007), is dispositive. In *Catawba Tribe*, the Supreme Court ruled the Tribe's Settlement Agreement with the State results in the Tribe's possessing no current right to video gaming on its Reservation. The ruling was based upon the imposition of a "statewide ban" on video gaming by Act 125 of 1999 (§ 12-21-2710). The Court found this "statewide ban" applies equally to the Tribe pursuant to the Settlement. Because the Settlement Act allows gaming "to the same extent the [gaming] devices are authorized by state law," gaming is currently banned on the Reservation, as well as elsewhere in the State.

Thus, in the State's view, nothing has changed since the 2007 Supreme Court ruling. The Gambling Cruise Act was effective when the *Catawba Tribe* action was filed. Moreover, since the "statewide ban" on video gaming remains, the Gambling Cruise Act's authorization of video gaming beyond the territorial limits of South Carolina is irrelevant. In the State's view, the Supreme Court's decision tied the relevant Settlement Act language to § 12-21-2710, deeming all gambling devices *in South Carolina* contraband *per se*. Further, the State argues that the Gambling Cruise Act expressly preserves all laws prohibiting gaming in South Carolina, and prohibits all gaming aboard any "cruise to nowhere" until the cruise vessel is outside state waters.

In addition, the State contends that *Catawba Tribe* operates as *res judicata* and collateral estoppel. The parties and subject matter are the same here. Plaintiff asserts the same cause of action, only employing a different legal theory. Since the Gambling Cruise Act was effective

when the Tribe sued the first time, the State contends Plaintiff could have raised that argument then, but did not. Thus, the first judgment forecloses the bringing of the second.

Both Plaintiff and Defendants seek summary judgment. There is no disagreement that these are solely questions of law. The cross motions were argued on April 2, 2012. For the reasons below, the Court finds that summary judgment for Defendants is warranted.

Law / Analysis

In *Catawba Tribe*, the Supreme Court rejected Plaintiff's right to video gaming on its Reservation under the 1993 Settlement. The Court noted that Congress, in approving the Settlement, provided that "'*all* laws, ordinances, and regulations of the State, and its political subdivisions govern the regulation of gambling devices and conduct of wagering by [the Tribe] on and off its Reservation,' unless the Settlement Agreement and the State Act specifically provide otherwise." 372 S.C. at 591, 642 S.E.2d at 755 (emphasis added). Further, the Court quoted § 27-16-40, deeming the Tribe "subject to the civil, criminal and regulatory jurisdiction of the courts of the State and to the same extent as any other person, citizen, or land of the State ...." Concluding that "the language of § 27-16-110(G) is unambiguous ...," thus making rules of statutory interpretation inapplicable, the Court found the Legislature intended "to limit Respondent's [Tribe's] right to operate video poker devices on its Reservation to *the same extent* state law authorizes such devices." 372 S.C. at 526, n. 6, 642 S.E.2d at 755, n. 6. According to the Court, "the legislative intent was to *circumscribe* Respondent's right to allow video poker devices on its Reservation ... *to the extent that state law allowed the devices.*" *Id.* at 527, 642 S.E.2d at 755. (emphasis added).

Moreover, in the Supreme Court's opinion, "[b]y Congress's express approval of the State Act and by the terms of the Settlement Agreement and the State Act, Respondent relinquished any attributes of sovereignty relating to games of chance *in this state*." 372 S.C. at

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591, 642 S.E.2d at 756. (emphasis added). In short, the Catawbas agreed that the Indian Gaming Regulatory Act or IGRA (25 U.S.C. §§ 2701-2721) is inapplicable; thus, Plaintiff is treated like everyone else *in South Carolina* for purposes of gaming rights. Therefore, Plaintiff's gaming rights are governed by Act 125 of 1999 (§ 12-21-2710). As the Court emphasized, Section 12-21-2710 "presently bans the possession and operation of video poker devices," and "[t]herefore, under the plain language of § 27-16-110(G), Respondent [Tribe] may not currently allow the devices on its Reservation." 372 S.C. at 527, n. 7, 642 S.E.2d 755, n. 7.

Plaintiff seeks to avoid *Catawba Tribe* by relying upon the Gambling Cruise Act. This Act was not argued in *Catawba Tribe*, but existed when the first action was brought. However, the Gambling Cruise Act does not alter the statewide ban on video gambling, and so states. Even in port, the Act requires gaming devices aboard "cruise to nowhere" vessels may not be operated while in the State's territorial waters. See, § 3-11-400(B)(3). Most importantly, the Gambling Cruise Act expressly states it does not repeal or modify state gambling laws. § 3-11-400(B)(1).[1]

While Plaintiff's "non-geographic component" argument relies upon the State's authorized use of video gaming devices *outside the state's territory* to "trigger" gaming rights under Section 27-16-110(G), such a reading comports neither with the language of § 27-16-110(G), nor *Catawba Tribe*. As noted, *Catawba Tribe* construed § 27-16-110(G) ["same

[1] Section 27-16-110(G) of the Settlement Act is clear and unambiguous, according to the Court, and thus "the rules of statutory construction are inapplicable." 372 S.C. at 527, 642 S.E.2d at 755. Plaintiff's efforts here to invoke rules of statutory construction governing ambiguous provisions are, therefore, to no avail. In *Catawba Tribe*, the Supreme Court thus rejected use of the longstanding rule of liberal construction in favor of Indian Tribes. *Id.* Moreover, Section 3-11-400(B)(1) makes clear that the Gambling Cruise Act does not repeal any law relating to gambling. Act 125 of 1999 would, of course, thus not be repealed or modified by the Gambling Cruise Act. In similar circumstances, where there is a non-repealer provision in a subsequently enacted law, the Supreme Court has recognized the Court's duty to honor such provision. As the Court concluded in *Wilson v. City Council of Florence*, 40 S.C. 426, 19 S.E. 4 (1894), where a subsequent act stated that such act "does not repeal any law in force in the City of Florence," the earlier law, authorizing bond issuances, was deemed to stand.

extent"] as requiring authorization of video gaming devices *in the State*, not outside. The Supreme Court tied the Tribe's gaming rights to the fact that "state law presently bans the possession and operation of video poker devices" and, therefore, under the plain language of § 27-16-110(G), "[the Tribe] may not currently allow the devices on its Reservation." 372 S.C. at 527, n. 7, 642 S.E.2d at 755, n. 7. It is thus clear that, pursuant to the Settlement Act, the Tribe is governed by state law [§ 12-21-2710] with respect to "games of chance *in this state.*" 372 S.C. at 528, 642 S.E.2d at 756 (emphasis added).

In short, notwithstanding the Gambling Cruise Act, gambling "devices" are currently not "authorized" by state law in South Carolina. Repeal of § 12-21-2710 would be necessary to "authorize" such devices. In the view of this Court, *Catawba Tribe's* reading is faithful to the Settlement Act language because "same" extent means "identical" or "exact" extent. However, this Court cannot agree with the Tribe's interpretation: that the State in authorizing gaming devices outside the State thereby triggered the Tribe's right to have the same devices on its Reservation. The Tribe's reading does not reflect, for purposes of § 27-16-110(G), the "same extent the devices are authorized by state law" because gaming devices are banned completely, even as to possession, to everyone in this State. See, *Union Co. Sheriff's Office v. Henderson*, 395 S.C. 516, 719 S.E.2d 665 (2011), citing *State v. 192 Coin Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000). The Tribe's construction that "any authorization," regardless of whether outside the State, gives it a similar right on the Reservation is, in this Court's opinion, untenable.

The federal Johnson Act, from which the Gambling Cruise Act originated, reaffirms the bright line distinction between authorization of gaming outside the State and gambling prohibitions within. In *Palmetto Princess, LLC v. Town of Edisto Beach*, 369 S.C. 50, 52, n. 1, 631 S.E.2d 76, 77, n. 1 (2006), the Supreme Court recognized that the Johnson Act, 15 U.S.C.

§ 1175 (b)(1), specifies only that "the possession or transport of a gambling device *within state territorial waters* is not a violation of the prohibition [prohibition against gambling devices] if the device remains on board the vessel and is used only *outside those territorial waters.*" (emphasis added). In short, the Johnson Act recognizes only that the Act "no longer restricts the transport and possession of gambling devices on vessels, provided that those devices are not used while the vessel is *within the boundaries of a state* or possession of the United States." *Casino Ventures v. Stewart*, 183 F.3d 307, 309 (4th Cir. 1999). The Gambling Cruise Act reiterates this distinction. *See* § 3-11-400(B). Thus, neither the Johnson Act, nor the Gambling Cruise Act, alter South Carolina's "statewide ban" against gaming devices. Indeed, both reaffirm such ban.

Further, as *Stardancer Casino v. Stewart*, 347 S.C. 377, 386-87, 556 S.E.2d 357, 362 (2001) emphasized, authorization of cruises to nowhere is not "indicative of any intent to otherwise restrict the scope and application of laws criminalizing gambling activities *in this State.*" (emphasis added). Even though *Stardancer* was not argued to the Court in *Catawba Tribe*, the Supreme Court is obviously aware of its own decisions. See, *People ex rel. McDonough v. Chicago M., St. P. & P. R. Co.*, 188 N.E. 404, 442 (Ill. 1933) [Supreme Court has notice of its decisions]. If the *Catawba Tribe* Court had thought authorization of "cruises to nowhere" made even the slightest difference whatsoever, it would certainly have said so.

Also instructive is *Seminole Tribe of Fla. v. State of Fla.*, 1993 WL 475999 (S.D. Fla. 1993), applying the Indian Gaming Regulatory Act (IGRA), not applicable here.[2] There, the Seminoles argued that Florida permitted certain Class III gaming activities, including "cruises to nowhere." As here, the Tribe sought to operate these same games on Tribal lands. Under IGRA,

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[2] The Indian Gaming Regulatory Act (IGRA) [25 U.S.C.A. §§ 2701-2721] has as its central purpose that of providing "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." § 2702(1). As *Catawba Tribe* points out, the Tribe waived its right to be governed by IGRA in the Settlement Agreement, choosing instead "to be governed by the terms of the Settlement Agreement and the State Act with regard to games of chance." 372 S.C. at 524, 642 S.E.2d at 753.

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a conclusion that the State permitted such games, could have resulted in the State being required to negotiate with the Tribe for purposes of providing such gaming on the Indian lands. The Court rejected the Tribe's argument that permission to operate cruises to nowhere also constituted authorization for the gaming devices on the Reservation. In Florida, state law prohibited "the possession of gambling paraphernalia." The Court concluded that the fact that the State also authorized "cruises to nowhere" was irrelevant because such permission to operate games out of state did not constitute an authorization for gaming to the Seminoles on the Reservation. The Court stated as follows:

> Each case interpreting the IGRA which found permission of a Class III gaming activity presented some form of explicit legislative approval of the activity *within the State's territory*. The Tribe's theory would seem to place an affirmative duty on a state to eradicate means by which its citizens could legally gamble in other jurisdictions in order to demonstrate a public policy prohibiting Class III activities ... . *For the same reason, the Tribe's argument that the State's continued allowance of these cruises to use its ports must fail, especially in light of the fact that no gambling occurs within the State's boundaries. Thus, even when viewing the evidence before the Court in the light most favorable to the Tribe, we conclude that these cruises by foreign flag vessels cannot be fairly said to constitute permission of casino gambling by the State within the State and within the ambit of IGRA.*

Id, at page 14. (emphasis added).

Such analysis governs. The *Seminole Tribe* Court was unwilling to construe authorization of cruises to nowhere in the Indians' favor under IGRA. Likewise, *a fortiori*, the Catawbas' similar argument must fail. This is particularly so in light of the fact that the Supreme Court of South Carolina has deemed both § 27-16-110(G) of the Settlement Act, as well as § 12-21-2710, to be unambiguous and thus not subject to the rules of statutory construction, including a liberal construction in favor of the Tribe. Moreover, the Catawba Tribe does not operate under the more generous IGRA, but is treated similarly for gaming purposes to others in South Carolina.

In this Court's opinion, the Tribe's argument fails to account for the clear difference between the "statewide ban" upon video gaming, established by Act 125 of 1999 (§ 12-21-2710), and applied by *Catawba Tribe*, and the very narrow authorization for cruises to nowhere in waters completely outside South Carolina. The two are not in conflict, but deal with different and separate matters and do not operate to convey gaming rights in South Carolina. Under the express provisions of the Gambling Cruise Act, gaming devices are inoperable until the three mile limit has been passed. See § 3-11-400(B)(3) and (5). Regardless, the Gambling Cruise Act cannot serve to create a right of the Tribe to operate video gaming on the Reservation. As the Court stated in *Seminole Tribe,* authorization of cruises to nowhere "cannot be fairly said to constitute permission of casino gambling by the State within the State."

Video gaming is currently banned in South Carolina and the Tribe's reliance upon legislation regulating "cruises to nowhere" does not lift that ban. If it did, everyone in South Carolina could take advantage of the Gambling Cruise Act to have video gaming in the State. If state law has now "authorized" these devices for the Tribe on the Reservation, it has authorized them for others. The Tribe bargained away its sovereignty for purposes of gaming rights, and thus its gaming rights and those of other citizens are the same under state law. Accordingly, the Court agrees with the Defendants and disagrees with the Plaintiff regarding the Gambling Cruise Act's serving as a "trigger" to § 27-16-110(G) of the Settlement Act. The Tribe has no current right to video gaming on its Reservation.

In addition, Defendants argue that Plaintiff's action is barred by *res judicata* and/or collateral estoppel. This Court agrees. The fundamental purpose of the doctrine of *res judicata* is to ensure that "no one should be twice sued for the same cause of action." *First Nat'l. Bank of Greenville v. U.S. Fid. and Guar. Co.*, 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945). A litigant does not receive a second bite at the same apple. "Res judicata is the branch of the law that defines

the effect of a valid judgment may have on subsequent litigation between the same parties and their privies. Res judicata ends litigation, promotes judicial economy and avoids the harassment of relitigation of the same issues." *Plum Creek Dev. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 108 (1999). As the Supreme Court recently stated in *Judy v. Judy*, 393 S.C. 160, 172, 712 S.E.2d, 408, 414 (2011),

> ... we reiterate and rely on the conceptual framework recognized in *Plum Creek Dev. v. City of Conway*, 334 S.C. 30, 512 S.E.2d 106 (1999), wherein we stated:
>
> > Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. Under the doctrine of res judicata, "[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit. *Id.* at 34, 512 S.E.2d at 109 (citations omitted).

Judy recognized four persuasive indicators to determine applicability of *res judicata.* These are: (1) when there is identity of the subject matter in both cases; (2) when the first and second cases involve the same primary right held by the plaintiff and one primary wrong committed by the defendant; (3) when there is the same evidence in both cases: (4) when the claims arise out of the same transaction or occurrence that is the subject of the prior action. *Id.*, at 172, n. 7, 393 S.E.2d at 414.

These factors fully apply here. The identical two parties, Tribe and State, are before the Court a second time. The subject matter is the same: the identical provision of the Settlement Agreement and Act. Most importantly, the Tribe is asserting the same right it previously asserted: the right to video gaming on its Reservation to the exclusion of all others. However, in *Catawba Tribe*, it was concluded that the Tribe possesses no such right because, pursuant to § 27-16-110(G) of the Settlement Act, the Tribe possesses the same video gaming rights as everyone else. Video gaming devices are currently banned as contraband *per se* throughout

South Carolina. Therefore, the *Catawba Tribe* Court has concluded the Tribe has no current right to video gaming on its Reservation.

Plaintiff's first action was brought on July 28, 2005, almost two months after the Gambling Cruise Act took effect on June 1, 2005. As here, the Tribe relied upon § 27-16-110(G) and asked the Court to determine its rights under the Settlement Agreement and Act with respect to the operation of video poker or similar electronic play devices on its Reservation.

It is true the Tribe made a somewhat different legal argument in the first action than now, contending that the Settlement Agreement and § 27-16-110(G) could not be "amended" by the General Assembly based upon any future ban placed upon video poker. But there, the Tribe *also had the opportunity* to make the same legal arguments it is now presenting. In such circumstances, *res judicata* or collateral estoppel bars the second suit. *See, Eichman v. Eichman*, 285 S.C. 378, 329 S.E.2d 764 (1985) ["There can be no question that the same parties were previously before the Court relative to the same subject matter and that an adjudication was made. Certainly, the husband could have raised the same issue in the former action. Having failed to do so, he is now barred by the doctrines of res judicata and collateral estoppel."]. *See also, Sub-Zero Freezer Co. v. R. J. Clarkson Co.*, 308 S.C. 188, 189, 417 S.E.2d 569, 571 (1992) ["Res judicata also bars subsequent suit by the same parties when the claims arise out of the same transaction or occurrence that is the subject of the prior suit between those parties."]; *Aliff v. Joy Mfg. Co.*, 914 F.2d 39, 43 (4th Cir. 1990) ["The law, however, is well established that res judicata may apply even though the plaintiff in the first suit proceeded under a different legal theory."]; *Plum Creek Dev. Co., supra*, at 36, 512 S.E.2d at 110 ["(F)or purposes of res judicata, 'cause of action is not the form of action in which a claim is asserted but, rather the cause for action , meaning the underlying facts combined with the law giving the party a right to a remedy of one form or another based thereon.'"].

Most recently, in *Yelsen Land Co., Inc. v. State of South Carolina and the State Ports Authority*, Op. No. 27103 (March 14, 2012), the Supreme Court concluded that "newly discovered" evidence of a sovereign grant to tidelands, even if probative, would not entitle appellant to relitigate his claim to the "newly created" highlands. The *Yelsen* Court found that "a defendant may not relitigate title based on newly discovered documents in his chain where those documents predate the first judgment." Thus, the availability of the Gambling Cruise Act as an alternative legal theory on the same claim – that the Tribe possesses video gaming rights on the Reservation pursuant to § 27-16-110(G) of the Settlement Act – cannot defeat applicability of *res judicata* here.

At the Summary Judgment hearing, Plaintiff referenced *Robison v. Asbill*, 328 S.C. 450, 453; 492 S.E.2d 400, 401 (Ct. App. 1997) in support of its argument that neither *res judicata* nor collateral estoppel apply. In *Robison*, the Court pointed to language from 22A Am.Jur.2d *Declaratory Judgments* §§ 239 and 240 (1988) that "'[a] declaratory judgment is not *res judicata* as to matters not at issue and not passed upon." Continuing, the Court further quoted from the same treatise to the effect that the doctrine "is only a bar to matters which were actually litigated, not those that might have been litigated."

Robison, however, is inapposite. It's holding rested upon the well-recognized doctrine that "[w]hen the plaintiff in the earlier declaratory judgment action sought only declaratory relief, the plaintiff may later be permitted to seek additional, coercive relief based on the same claim." In *Robison*, unlike here, Plaintiff had *prevailed* in the first suit, and then later sought coercive relief in further support of its declaratory relief. By contrast, the Tribe was *unsuccessful* in the first action, and now tries again based upon the same claim, but seeking to employ a different legal theory. Thus, *Robison* provides no comfort to Plaintiff.

Moreover, the same year the Court of Appeals decided *Robison*, that Court also rendered the decision in *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997). In *Pye*, an earlier federal declaratory judgment action was deemed to operate as *res judicata* and collateral estoppel with respect to the issue of liability. The Court stated that for *res judicata* to apply, "[t]he parties must be the same or their privies; (2) the subject matter must be the same; and (3) while generally the precise point must be ruled, yet where the parties are the same or in privity, the judgment is an absolute bar not only of what was decided but what might have been decided." 325S.C. at 432, 480 S.E.2d at 458. *Pye* noted that "a fundamental test for comparing causes of action is to determine whether the primary right and duty and the delict and wrong are the same in each action." *Id.*, at 433, 480 S.E.2d at 458. *Pye* defined the "subject matter of the action" for purposes of *res judicata* as "a matter or thing concerning which a wrong has been done, which is ordinarily property, contract, or other thing involved, or main primary right from the breach of which a remedial right arises." *Id.*

Even though the first action involved a declaratory judgment, the *Pye* Court, nevertheless, concluded that *res judicata* applied. As the Court recognized, "[e]ven though the federal action is in the form of a declaratory judgment proceeding and the state action is under the ambit of intentional tort litigation, the subject matter is the same in both actions." 325 S.C. at 434, 480 S.E.2d at 459. Moreover, *Pye* found that the same parties were present and that "[t]he facts at issue in this case are identical to the facts at issue in the declaratory judgment action." *Id.* Inasmuch as there "was a prior adjudication of this issue by a court of competent jurisdiction" regarding Aycock's liability, *res judicata* governed such liability.

Finally, even assuming that *res judicata* applies only as to claims *actually litigated*, the claim the Tribe raises here was actually litigated in the first suit. Here, the Tribe asserts the same primary right as it maintained in the first action; the right pursuant to § 27-16-110(G) to have

video gaming on its Reservation. The fact it now argues a different legal theory – the Gambling Cruise Act – to support the right to gaming under § 27-16-110(G), when that legal theory was available in the first action, does not avoid *res judicata.* Where, as here, Plaintiff "seeks the same declaratory relief against the same defendants ... but presents a different legal theory," on that same claim, *res judicata* applies. *Fogel v. Secretary of the Air Force*, 351 F.Supp. 47, 50 (E.D. N.Y. 2005). As has been stated, "[a]lternative theories of recovery for the same claim may not be brought in different lawsuits ...." 50 C.J.S. *Judgments* § 987.

In short, the governing rule is that "[i]f a declaratory judgment is valid and final, it is conclusive, *with respect to the matters declared* ... ." *Restatement* 2d *Judgments* § 33 (emphasis added). In the first action between the Tribe and State, the Supreme Court declared that "state law presently bans the possession and operation of video poker devices" and thus "under the plain language of § 12-16-110(G), [the Tribe] ... may not currently allow the devices on its Reservation.. "*Catawba Tribe*, 372 S.C. at 527, n. 7, 642 S.E.2d at 755, n. 7. Since that is a matter which was declared in the first declaratory judgment action, it is thus *res judicata* here. *Restatement, Id.*

For the foregoing reasons, summary judgment in favor of Defendants is granted, and as to Plaintiff is denied.

So Ordered.

J. Ernest Kinard, Jr.
Judge, Fifth Judicial Circuit

April 23, 2012

Camden, South Carolina.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
The Catawba Indian Nation a/k/a The Catawba Indian Nation of South Carolina a/k/a The Catawba Indian Tribe of South Carolina,	)	Case No. 2012-CP-40-00210
	)	**COMPLAINT**
	)	**(Declaratory Judgment and Injunctive Relief)**
Plaintiff,	)	
	)	
vs.	)	
	)	
State of South Carolina and Mark Keel, in his official capacity as Chief of the South Carolina Law Enforcement Division,	)	
	)	
Defendants.	)	
	)	

Plaintiff, pursuant to Rule 57 of the South Carolina Rules of Civil Procedure and S.C. Code Ann. §§ 15-53-10, et seq., would respectfully show unto the Court that:

Parties and Jurisdiction

1. Plaintiff Catawba Indian Nation ("the Tribe") is a federally recognized Indian Tribe with its Reservation on lands owned by the United States of America and held in trust for the benefit of the Catawba Indian Tribe. Said Reservation is located within the geographic boundaries of the State of South Carolina.

2. The State of South Carolina is a necessary party to this action and is a party to the Settlement Agreement which is the subject of this action.

3. Defendant Mark Keel is the Director of the South Carolina Law Enforcement Division and is responsible for enforcing gaming laws on behalf of the State of South Carolina. His central office is located within Richland County, South Carolina.

4. Jurisdiction and venue are proper in this Court pursuant to S.C. Code Ann. § 15-77-50. The subject Settlement Agreement was entered into by the parties in Richland County, South Carolina and the state legislative, judicial, and executive actions giving rise to the current question, action, and controversy all occurred within Richland County, South Carolina.

Factual Background

5. In 1993, Congress ratified a Settlement Agreement between the Catawba Tribe and the State of South Carolina. 25 U.S.C. §941 et seq. This Agreement was later codified as The Catawba Indian Claims Settlement Act as S.C. Code Ann. § 27-16-10 et seq. Consistent with the Settlement Agreement, the Federal Settlement Act provides that "[t]he Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) shall not apply to the Tribe." 25 U.S.C. §9411(a). It further provides:

> The Tribe shall have the rights and responsibilities set forth in the Settlement Agreement and the State Act with respect to the conduct of games of chance. Except as specifically set forth in the Settlement Agreement and the State Act, all laws, ordinances, and regulations of the State, and its political subdivisions, shall govern the regulation of gambling devices and the conduct of gambling or wagering by the Tribe on and off the Reservation.

25 U.S.C. § 9411(b). Section 16 of the Settlement Agreement provides:

> Except as specifically provided in the Federal Implementing legislation and this Agreement, all laws, ordinances, and regulations of South Carolina and its political subdivisions govern the conduct of gaming or wager by the Tribe on and off the Reservation.

Section 16.2.

6. Further, the S.C. Code Ann. § 27-16-110(A) states: "Except as specifically provided in the federal implementing legislation and this chapter, all laws, ordinances, and regulations of South Carolina and its political subdivisions govern the conduct of gambling or wager by the tribe on and off the Reservation."

7. The Settlement Agreement vests the Tribe with the right to permit on its Reservation electronic play devices to the same extent that the devices are authorized by State law.

8. The Tribe's non-bingo gaming rights are defined and expanded by any subsequent state legislative enactments affecting electronic play devices.

9. In 2005, the South Carolina Legislature passed the Gambling Cruise Act, S.C. Code Ann. §3-11-100, in which the State delegated to local governments the power to regulate or prohibit gambling aboard gambling vessels while such vessels are outside the territorial waters of the State, when such vessels embark or disembark passengers within their respective jurisdictions for voyages that depart from the territorial waters of the State, sail into United States or international waters, and return to the territorial waters of the State without an intervening stop.

10. The State through the Gambling Cruise Act defines "gambling" or "gambling device" to mean "any game of chance and includes, but it not limited to, slot machines, punchboards, video poker or blackjack machines, keno, roulette, craps, or any other card gambling game." S.C. Code Ann. §3-11-100(2).

11. These gambling devices, in various electronic forms, are currently authorized for play on at least two gambling vessels in South Carolina, with the machines being regularly stored within the territorial limits of South Carolina. At least two counties or municipalities of the State have acted upon the State's authorization and passed ordinances permitting the use of such gambling devices in a manner consistent with the Gambling Cruise Act.

12. The Gambling Cruise Act further permits local governments to regulate, tax, monitor, or prohibit the use of such gambling devices even while outside the territorial waters of

the State. The Act allows local governments to assess a surcharge of up to ten percent of each ticket sold per gambling cruise, and a surcharge of up to five percent of the gross proceeds of each gambling vessel.

13. Said enactment, regulation, taxation, and allowance of gaming under the Gambling Cruise Act amounts to an "authorization" by the State of various forms of gambling and electronic gaming devices as defined in the Gambling Cruise Act.

14. Based upon this subsequent authorization by the State, and pursuant to the express terms of the Settlement Agreement, the Catawba Indian Tribe is now vested with the right to offer identical gaming devices on its Reservation.

Count One

Declaratory Judgment

15. All previous allegations not inconsistent herewith are hereby alleged as if restated verbatim herein.

16. The interpretation of the Settlement Agreement and contractual rights of the parties with regards to the Tribe's gaming rights will resolve the controversy and will remove any existing uncertainties. Further, the Tribe is informed and believes that the State intends to breach its contractual obligations under the Settlement Agreement and will take measures, through local and State law enforcement, to prohibit gaming activities, seize gaming equipment, or otherwise interfere with the Catawba Indian Tribe's gaming rights.

17. Pursuant to Rule 57 of the South Carolina Rules of Civil Procedure and S.C. Code Ann. § 15-53-30, the Plaintiff seeks an order from this Court declaring the rights of the parties under the Settlement Agreement. Specifically, the Tribe seeks a finding that based upon existing

law, the Catawba Indian Tribe is allowed to offer, on its Reservation, all electronic play devices currently authorized by the State through the Gambling Cruise Act.

18. The Catawba Indian Tribe seeks an Order allowing it to continue gaming operations as set forth above, free from intervention, seizure, and prohibition by local and State authorities.

Count Two

Injunctive Relief

19. The South Carolina Supreme Court unequivocally held that the Catawba Indian Tribe has the right to allow gaming devices on its Reservation, to the same extent the devices are authorized by state law. Catawba Indian Tribe of South Carolina v. State of South Carolina, 372 S.C. 519, 642 S.E.2d 751 (2007). As a threshold matter, the Tribe has a likelihood of success on the merits of the case based upon the clear language of S.C. Code Ann. § 27-16-110(G) and the State's subsequent authorization of gambling devices through its passage and implementation of the South Carolina Gambling Cruise Act, S.C. Code Ann. § 3-11-100 et seq. The likelihood of success is further apparent when applying the Canons of Indian Construction and Federal common law which require any ambiguities within 25 U.S.C. § 941 et seq. be construed in a light most favorable to the Tribe as an Indian nation.

20. Without the requested injunctive relief, the Tribe will suffer immediate and irreparable injury, loss, and damage to its business and business relationships unless it is able to commence gaming operations on its Reservation with electronic gaming devices that are currently authorized to other entities by the laws of the State of South Carolina, and applicable to the Tribe through the Settlement Agreement, Settlement Act, and Federal Settlement Agreement. See Affidavit of Chief William Harris attached hereto as Exhibit 1.

21. If the plaintiff Tribe is denied the right to electronic gaming operations, the Tribe will be further delayed from opening for business and will continue to suffer additional economic irreparable harm for which no adequate remedy exists at law.

22. If Tribal members, employees or business associates are arrested or otherwise deprived of their liberty or property interests, the Tribe and its members will suffer irreparable harm with no adequate remedy at law, including but not limited to damage to its reputation in the community, loss of freedom and fundamental personal and tribal rights as otherwise described in the attached affidavit of Chief William Harris, adopted herein by reference.

23. If the Tribe's request for injunctive relief is denied, the Tribe will have no adequate remedy at law because much of the damage described will occur before the parties can be heard on the merits of issue.. See Affidavit of Chief William Harris attached hereto as Exhibit 1.

24. Public policy supports the issuance of a temporary injunction in favor of the Tribe, which has long been denied the benefit of its bargains. See Affidavit of Chief William Harris attached hereto as Exhibit 1. Furthermore, the Tribe has an immediate and substantial need to commence operations, which necessarily benefit both the Tribe, surrounding localities and South Carolina as a whole.

WHEREFORE, Plaintiff demands that the Court declare and issue an Order as set forth above along with any additional injunctive relief as this honorable Court deems just and necessary to protect the rights of the parties and promote the ends of justice.

SIGNATURE PAGE ATTACHED

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Attorneys for Plaintiff Catawba Indian Nation

January 24, 2012

EXHIBIT 1

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
Catawba Indian Nation a/k/a Catawba Indian Nation of South Carolina a/k/a Catawba Indian Tribe of South Carolina,	)	Case No. 2012-CP-40-_____
	)	
Plaintiff,	)	**AFFIDAVIT AND VERIFICATION OF WILLIAM HARRIS**
	)	
vs.	)	
	)	
State of South Carolina and Mark Keel, in his official capacity as Chief of the South Carolina Law Enforcement Division,	)	
	)	
Defendants.	)	
	)	

PERSONALLY APPEARING BEFORE ME, the undersigned deposes and states as follows:

1. My name is William Harris, and I serve as Chief of the Catawba Indian Nation (the "Tribe"), which is sometimes referred to as the Catawba Indian Nation of South Carolina and sometimes as the Catawba Indian Tribe of South Carolina.

2. I have personal knowledge as to the allegations contained in the Tribe's Complaint and this Affidavit, and they are true and accurate to the best of my knowledge.

3. The Tribe is a Federally recognized Indian Tribe, with its primary Reservations in the State of South Carolina and service areas in both North and South Carolina.

4. The Tribe is filing its Complaint to get judicial recognition of the Tribe's gaming rights under its Settlement Agreement with South Carolina, the 1993 South Carolina state and federal Settlement Acts implementing the Settlement Agreement.

5. The State of South Carolina's current violations of the Settlement Agreement, and Settlement Acts, and general breach of promises, have deprived the Tribe of its interests in land

and its legitimate claims to economic prosperity.

6. In treaties with the Crown in 1760 and 1763, the Tribe ceded vast portions of its aboriginal territory in the present States of North and South Carolina in return for guarantees of being quietly settled on a 144,000-acre reservation. These guarantees proved not to be reliable. Through negotiations and alleged agreement in 1840, South Carolina illegally deprived the Tribe of the benefit of these treaties and its Reservation land. See 25 U.S.C. § 941. South Carolina had falsely represented that the Tribe would receive a reservation in North Carolina, which proved to be yet another instance of promises broken.

7. In 1980, the Tribe initiated Federal court litigation to regain possession of its treaty lands. These lawsuits led to substantial economic and social hardship for the Tribe. Congress recognized that if the claims were not resolved, further litigation against tens of thousands of landowners would be likely; that any final resolution of pending disputes through a process of litigation would take many years and entail great expenses to all parties; it would perpetuate economically and socially damaging controversies; it would prolong uncertainty as to the ownership of property; and would seriously impair long-term economic planning and development for all parties involved. 25 U.S.C. § 941.

8. Congress recognized that both Indian and non-Indian parties entered into the settlement to resolve the disputes and to derive certain benefits. And, Congress opined that the parties' Settlement Agreement constituted a good faith effort to resolve these lawsuits and other claims. The settlement required implementing legislation by the Congress of the United States, the General Assembly of the State of South Carolina, and the governing bodies of the South Carolina counties of York and Lancaster.

9. To advance the goals of the Federal policy of Indian self-determination and restoration of terminated Indian Tribes, and in recognition of the United States obligation to the Tribe and the Federal policy of settling historical Indian claims through comprehensive settlement agreements, Congress determined it was appropriate that the United States participate in the funding and implementation of the Settlement Agreement.

10. Thus, after a long struggle, a termination of the Tribe, and deprivation of lands guaranteed by treaty, and only after the Tribe threatened to invoke its treaty rights to 225 square miles of South Carolina, Congress passed the Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993 and South Carolina passed its settlement act. The Federal Act restored the trust relationship between the Catawba Indian Nation and the United States and the two acts implementing the Settlement Agreement settled the Tribe's land disputes with South Carolina.

11. According to the Settlement, "[t]he Tribe may permit on its Reservation video poker or similar electronic play devices to the same extent that the devices are authorized by state law." Settlement Agreement, Section 16.8; accord S.C. Code Ann. § 27-16-110(G).

12. The Tribe's ability to engage in gaming activities is vital to its economic self-sufficiency. As is the case with many Native American tribes, who it cannot be contested suffered attempted genocide, termination of their tribes as governments, suppression of language, religion and culture by the government, subjugation by state and federal supervision, and involuntary assimilation into non-Indian culture, the Catawba Indian Nation struggles with poverty and its related issues. In the 2000 Census, the Catawba Indian Nation had a per capita income of just $11,096. During the most recent study, the estimated unemployment rate among the Catawba was more than double that of the State of South Carolina. In spite of extraordinary

efforts by the Tribe, the Tribe has no viable operating economic development ventures at present.

13. At the time the Settlement Agreement with South Carolina was ratified, video poker was legal in South Carolina. The Tribe had negotiated away its very significant litigation for 144,000 acres of land that could have caused long-term disruption throughout much of South Carolina to be able to provide those games and have a competitive gaming business to improve the Catawba's social, cultural and economic situation through business success and prosperity. But, less than seven years later, video poker's authorization was repealed. When the Tribe mounted a legal challenge to establish its continued right to permit video poker on its Reservation, the South Carolina Supreme Court declared that the Tribe was bound by the subsequent change in State law as to the play of video poker and other similar electronic play devices.

14. About five years after the statewide ban on video poker took effect, the South Carolina legislature passed the Gambling Cruise Act. The Gambling Cruise Act allows the operation of numerous electronic gaming devices. Local and state law enforcement have made the Tribe aware that they will seize these identical electronic gaming machines if operated by the Tribe on the Reservation under the terms of the Settlement Agreement. Since changes in state law which take away gaming rights from the Tribe impact the Tribe, it follows that changes in state law creating gaming rights afford new opportunities to the Tribe.

15. Based upon the fact that the Catawba Tribe is entitled to operate gaming on its Reservation to the extent authorized by state law, the Tribe has the right to have gaming on its Reservation to the extent of the gaming devices authorized by the Gambling Cruise Act. In that regard, the Tribe and its partners have devoted a tremendous amount of time, energy, and financial resources toward capitalizing on the expanded gaming rights clearly afforded by the

Gambling Cruise Act.

16. According to an economic impact study performed on behalf of the Tribe, the positive impact on the Tribe, the State of South Carolina, and the community surrounding the Reservation is undeniable. The closest gaming facilities to the Catawba Reservation are the Cherokee Indian Gaming facilities in the Northwestern corner of North Carolina – roughly a four-hour drive from Charlotte, North Carolina. There is a substantial competitive opportunity for the Catawba Tribe to generate significant market share of the gaming industry by capitalizing on the Reservation's close proximity to Charlotte – all to the benefit of the Tribe, the State, and the local and surrounding communities in North and South Carolina.

17. According to an economic impact study, the construction of the proposed Catawba gaming facility will generate and support more than 4,300 jobs in the York/Lancaster area. More than $174 million in labor income will be generated in the York County area as a result of the construction of the facility. (Attached hereto as Exhibit A.) The total impacts on the York/Lancaster area are expected to be more than $517 million in economic activity during the initial phase of the Catawba gaming facility's development. Once a sustainable facility is constructed and operating, the ongoing permanent positive economic impacts on the York/Lancaster area will obviously be substantial. The proposed gaming facility will generate and support an estimated 3,966 jobs on an annual basis through its direct and indirect impacts. More than $130.3 million in labor income will be generated on an annual basis from the Catawba gaming operations and continue or increase for the life of the same. The total impacts on the York County area will be more than $259 million in economic activity per year once the Catawba gaming operation is in full operation. Finally, if left up to Catawba, the fiscal impacts of the Catawba Gaming Facility operations would have a substantial positive impact on State

government revenues, as the Tribe is committed to being a good citizen of its South Carolina community.

18. In spite of the extent of gaming authorized by state law in the Gambling Cruise Act, it is my understanding that law enforcement will seize gaming devices and can criminally prosecute those involved if gaming operations commence on the Tribe's Reservation. It is profoundly unfair and a clear breach of the Settlment Agreement for this State to authorize gaming on casino boats while the Tribe is threatened with criminal prosecution and/or forfeiture of devices if the Tribe operates those same machines on the Reservation. The Catawba community, social, cultural and governmental efforts have enormous need for economic success, and the Tribe has a right to that business recognized in law and the agreement with the state.

19. Allowing individuals and commercial entities in South Carolina to profit from gaming enterprises but refusing to allow the Tribe the same benefit that it expected from the 1993 Settlement Act violates the Settlement Act and breaches the Settlement Agreement in my view. It is unfair, and deprives the Tribe of an economic advantage that is critical to its economic viability.

20. Without immediate assistance from the Court, the Tribe will suffer immediate and irreparable injury, loss, and damage to its business and business relationships unless it is able to commence gaming on its Reservation as is currently allowed on gambling vessels under the laws of the State of South Carolina. Furthermore, members of the Tribe risk criminal prosecution for the Tribe lawfully availing itself of the rights provided to it under the Gambling Cruise Act.

21. Nothing can take back the unfair, illegal and unconstitutional deprivation of liberty and property that goes along with being illegally and unfairly arrested. The shame, personal hardship, loss of reputation, danger to employment opportunities in this hard economy

and injury to pride cannot be undone at a later date. Native Americans suffer disparate treatment, but the law is supposed to mean we do not get treated differently by the government because of our race, the color of our skin or our unique beliefs, customs and culture. And, we are entitled to those rights and protections guaranteed by the Constitution and the laws of the State of South Carolina and these United States, and our duly negotiated Settlement Agreement.

22. Based upon the expansion of the Tribe's gaming rights by virtue of the Gambling Cruise Act and the substantial and irreparable harm to the Tribe if such rights are not protected, the Tribe is asking the Court to allow the Tribe to immediately possess and operate gaming devices defined by S.C. Code Ann. § 3-11-100(2) and otherwise authorized by the Gambling Cruise Act, and to restrain law enforcement and other governmental officials from interfering with the Tribe's peaceable possession and operation of the aforesaid gaming devices on its Reservation and prohibit seizure of the same.

FURTHER AFFIANT SAYETH NOT.

William Harris
Chief of the Catawba Indian Nation

SWORN TO AND SUBSCRIBED before me
this 19 day of January, 2012.

Notary Public for South Carolina
My commission expires: 12/2/19

EXHIBIT A

1. Introduction and Overview

This report provides an overview of the economic impacts on the economy of the York County area that could be expected from the proposed Catawba Gaming Facility that would be located on the Catawba Nation Reservation in York County, South Carolina. The project will consist of approximately a 220,000 sq/ft gaming facility and two hotels with a combined 750 rooms. Included in the gaming facility will be numerous commercial and retail outlets and restaurants and other entertainment venues. The gaming facility and hotels are expected to be in operation by the year 2013.

This area of South Carolina is in dire need of new job opportunities. As of October 2011, there were 17,728 unemployed people in York and Lancaster counties. The combined unemployment rate for the area was 12.5% -- almost 3% points above the state average of 9.9%.

There is a substantial competitive opportunity for the Catawba's to generate significant market share of the gaming industry in the Southeast. The closest gaming facilities to the Catawba Reservation are the Cherokee Indian Gaming facilities in the Northwestern corner of North Carolina – roughly a four-hour drive from Charlotte, North Carolina.

Figure 1 demonstrates the regional draw of North and South Carolina areas within a 100-mile radius of the proposed site. There is a substantial competitive opportunity for the Catawba's to generate significant market share of the gaming industry. It is estimated that by 2015, there will be more than 7.0 million people living within a 100 miles of the Catawba Reservation. Of this 7.0 million, it is estimated that 4.7 million of them will be 25 years old or older. Within this 100-mile radius, there will be more than 2.6 million households by 2015. The average household income in 2010 was $62,600 and is estimated to be almost $67,000 in 2015.

Figure 1

100-Mile Radius

2. Economic Impacts of the Catawba Gaming Facility

The Catawba Gaming Facility will operate in a similar pattern as other state-of-the-art gaming facilities in the United States. This analysis estimates the impacts of the new Catawba Gaming Facility in two major phases. The first phase will be the construction period during which the facilities are built and infrastructure is developed. This phase will be relatively short term (2 to 3 years) and last only as long as the construction activity lasts.

The second phase is the ongoing permanent impacts of the operations of the Catawba Gaming Facility and hotels. These impacts will be on an annual basis and last as long as the Catawba Gaming Facility and hotels operate.

Total capital investment represented by the Catawba Gaming Facility will be substantial. By the third year the capital investment in the gaming facility and hotels will reach over $339.5 million dollars.

The economic benefits from the construction and operation of the Catawba Gaming Facility are outlined in this section of the report. This analysis utilizes impact models generated by the IMPLAN modeling system.[1] IMPLAN is a nationally recognized system of local economic models that are specifically designed to represent local economies such as the York County of South Carolina. The IMPLAN models are modifications of the national input-output models developed by the Bureau of Economic Analysis, US Department of Commerce.

The IMPLAN models incorporate the most recent data available and are generally 2009 unless otherwise noted[2]. The estimates are based on constant dollars and assume no inflation during the project's buildout. This assumption applies to all estimates in this analysis, including: property values, incomes, sales, construction materials, etc. The assumption of constant dollars assumes revenues and costs will increase at similar rates during the period of analysis.

The IMPLAN model calculates how Catawba Gaming Facility investment dollars impact the local economy. The IMPLAN program uses data from a number of sources, including County Business Patterns, Bureau of Labor Statistics (BLS) Current Employment and Wages Program (CEW), and the Bureau of Economic Analysis (BEA) among others. IMPLAN uses national data and adjusts that data for smaller geographic regions using a methodology developed by the USDA Forrest Service.

These data are then manipulated using proprietary software developed by Minnesota IMPLAN Group (MIG). Input-output (IO) software answers this question: *"If demands of the exogenous sectors were forecast to be some specific amounts next year, how much output from each of the sectors would be necessary to supply these final demands?"* In other words, when the Tribe invests in a Catawba Gaming Facility, what happens to other labor, industries and governments to meet this new demand? It also answers the question: *"If the Catawba Gaming Facility produces "x" jobs per year, what is the impact on the industries that supply goods, services and*

labor to the Catawba Gaming Facility." This is calculated using the Leonfief production functions (Miller & Blair, 2009).

We also want to know which employees, industries (local vendors) and local governments will benefit most from the investment in a Catawba Gaming Facility operation. Our local analysis does just this. IMPLAN applies local data (industry, employment and tax – Local Mix) and calculates the effects in a defined study region (in this study, Lancaster and York Counties).

The local analysis again focuses on the importance of the high-quality local labor needed to operate the Catawba Gaming Facility, and spin-off employment from vendors who will work with and supply the Catawba Gaming Facility. Locally these include food service providers, real estate, retail and wholesale trade. All of these industries are available in the study region. (See Top 10 Industry Impacts in Table 3.)

The process described above produces direct, indirect and induced impacts based on specific and empirical data regarding how wage earners, owners, industries and governments spend resources when there is an economic change.

As the operating and visitor dollars are spent and re-spent in the York County area, additional economic activity is created for those companies and individuals that supply goods and services to the Catawba Gaming Facility. The recipients of this income will spend this income on other goods and services.

Each time, some of the purchases will be for goods and services inside the York County area and the surrounding counties and some will be for goods and services from outside the area (referred to as "leakages"). The well-known "multiplier effect" estimates the aggregate amount of local buying and selling that occurs.

The multipliers used in this analysis estimate three components of total change within the local area:

* *Direct effects* represent the initial change in the industry in question.

* *Indirect effects* are changes in inter-industry transactions as supplying industries respond to increased demands from the directly affected industries.

* *Induced effects* reflect changes in local spending that result from income changes in the directly and indirectly affected industry sectors.

This cycle of spending continues until leakages from the region (spending on goods and services outside the area) stop the cycle. Due to these multiplier effects, the initial, direct investment results in indirect and induced impacts of many more dollars.

Construction Impacts

The construction phase impacts from the Catawba Gaming Facility's initial development and installation will have substantial impacts on the York County economy. These construction impacts will be generated in two construction projects; the gaming facility first, and then the two hotels.

As seen in Table 1, the compounding effects of the multiplier cause the initial direct employment of an estimated 684 employees constructing the Catawba Gaming Facility to result in indirect and induced impacts of an additional 378 more jobs in the York/Lancaster County area – for a total of 1,062 jobs supported during the gaming facility construction phase.

These jobs will generate substantial labor income. During the facility construction period, it is estimated that there will be $25.6 million in direct labor income generated by the construction of the facility. This direct labor income will have indirect and induced impacts of another $15.9 million for a total impact labor income of almost $41.6 million.

Total direct output (total economic activity) generated by the construction phase of the Catawba Gaming Facility will be $79.5 million. The indirect and induced impacts will generate another $42.2 million for a total impact on the local York/Lancaster County area economy of over $121.8 million during the construction phase of the gaming facility.

Table 1

Catawba Gaming Facility
Construction Impacts
(Totals may not equal due to rounding)

Impact Type	Employment	Labor Income	Output
Direct Effect	684	$25,650,466	$79,499,996
Indirect Effect	170	$8,808,300	$20,650,610
Induced Effect	208	$7,110,506	$21,680,572
Total Effect	1,062	$41,569,272	$121,831,179

As seen in Table 2, the compounding effects of the multiplier cause the initial direct employment of an estimated 2,143 employees constructing the Catawba Gaming Hotels to result in indirect and induced impacts of an additional 1,185 more jobs in the York/Lancaster County area – for a total of 3,328 jobs supported in during the gaming hotel construction phase.

These jobs will generate substantial labor income. During the hotel construction period, it is estimated that there will be $82.1 million in direct labor income generated by the construction of the hotels. This direct labor income will have indirect and induced impacts of another $50.9 million for a total impact labor income in of almost $133.0 million.

Total direct output (total economic activity) generated by the construction phase of the Catawba Gaming hotels will be $260.0 million. The indirect and induced impacts will generate another $135.5 million for a total impact on the local York/Lancaster County area economy of over $395.5 million during the construction phase of the hotels.

Table 2

Catawba Gaming Hotels
Construction Impacts
(Totals may not equal due to rounding)

Impact Type	Employment	Labor Income	Output
Direct Effect	2,143	$82,068,515	$260,000,004
Indirect Effect	534	$28,182,106	$66,347,657
Induced Effect	651	$22,750,020	$69,178,157
Total Effect	3,329	$133,000,641	$395,525,818

As seen in Table 3, the combined impacts from the construction of the gaming facility and hotels are substantial. The compounding effects of the multiplier cause the initial direct employment of an estimated 2,827 employees constructing the Catawba Gaming facility and hotels to result in indirect and induced impacts of an additional 1,564 more jobs in the York/Lancaster County area – for a total of 4,391 jobs supported in during the gaming facility and hotel construction phase.

These jobs will generate substantial labor income. During the gaming facility and hotel construction period, it is estimated that there will be $107.7 million in direct labor income generated by the construction of the gaming facility and hotels. This direct labor income will have indirect and induced impacts of another $66.7 million for a total impact labor income in of almost $174.6 million.

Total direct output (total economic activity) generated by the construction phase of the Catawba Gaming facility and hotels will be $339.5 million. The indirect and induced impacts will generate another $177.7 million for a total impact on the local York/Lancaster County area economy of over $517.4 million during the construction phase of the gaming facility and hotels.

Table 3

Catawba Gaming Facility & Hotels
Total Construction Impacts
(Totals may not equal due to rounding)

Impact Type	Employment	Labor Income	Output
Direct Effect	2,827	$107,718,981	$339,500,000
Indirect Effect	705	$36,990,406	$86,998,267
Induced Effect	859	$29,860,526	$90,858,729
Total Effect	4,391	$174,569,913	$517,356,997

Ongoing Permanent Impacts

Once construction activity is completed and the Catawba Gaming Facility begins to ramp up its operations, there will be more permanent, ongoing economic impacts generated in the York County area.

Table 4 summaries the impacts that could be expected in the once the gaming facility and hotels are operational. As seen in Table 4, there will be 3,000 direct jobs at the Catawba Gaming Facility and another 966 jobs supported in the York/Lancaster County area for a total employment impact of 3,966 jobs supported by the Catawba Gaming Facility.

These jobs will generate substantial labor income in the York County area. As seen in Table 4, the direct labor income generated by the operations of the Catawba Gaming Facility will be an estimated $93.6 million a year. This direct labor income will have multiplied impacts in the area and generate an additional $36.7 million in indirect and induced labor income for a total of $130.3 million in total labor income in the York/Lancaster area.

Once the facility is operating and continuing for the life of the Catawba Gaming Facility, there will be more than $150.7 million in annual direct economic activity generated in the York/Lancaster area as a result of the Catawba Gaming Facility's operations. This direct output of $150.7 million will have indirect and induced impacts of an additional $108.2 million for a total impact on the York/Lancaster area of an estimated $259.0 million a year.

Table 4

Catawba Gaming Facility
Ongoing Permanent Impacts

Impact Type	Employment	Labor Income	Output
Direct Effect	3,000	$93,600,000	$150,737,087
Indirect Effect	324	$14,223,846	$39,918,177
Induced Effect	642	$22,508,914	$68,317,499
Total Effect	3,966	$130,332,760	$258,972,763

As seen in Table 5, these indirect and induced impacts will be felt across a wide spectrum of industries in the York/Lancaster economy. There will be additional industries impacted by the operations of the Catawba Gaming Facility, but Table 5 highlights the ones that will be impacted the largest in terms of new jobs.

Table 5

Top Ten Industries Impacted
By the Catawba Gaming Facility

Top 10 Industries Impacted	Total Jobs Supported
Gaming Industires	3,000
Food Service	106
Buidling services	35
Employment services	45
Real Estate	31
Private Households	29
Civic Organizations	55
Legal services	19
Offices of Physicians	18
Accounting Services	18

3. Fiscal Impacts of the Catawba Gaming Facility

In addition to the economic impacts outlined above, the Catawba Gaming Facility will have substantial fiscal impacts on South Carolina. There will be two major sources of fiscal impact that the Catawba Gaming Facility will have on the State: Gaming fees collected by the Catawbas and contributed directly to the State General Fund and sales and income taxes generated by the additional economic activity outlined above.

If the Catawba Gaming Facility has a similar agreement with South Carolina as the Eastern Band of Cherokee Indians has with North Carolina, it is estimated that the State will receive over $100 million a year from gaming revenues.

In addition to the direct gaming revenues that the state will receive, the state will also benefit from the Catawba Gaming Facility by the sales and income taxes generated by the economic activity at the facility. In order to estimate the revenue impacts of this economic activity, the methodology utilized by the South Carolina Coordinating Council on Economic Development in their Benefit-Cost Model is used in this study.[3]

Based on the estimated annual total labor income impacts as indicated in Table 4, there would be an estimated $9.8 million per year generated to the State' General Fund from sales and income taxes generated by the Catawba Gaming Facility. The construction impacts would be short term but would also generate one-time revenue impacts of $13.1 million for the general fund.

Together, these direct payments and sales and income taxes would generate an estimated $109.8 million for the State of South Carolina annually.

4. Summary and Conclusion

Based on this analysis, it is evident that the proposed Catawba Gaming Facility will have a positive economic impact on the York/Lancaster area and the State of South Carolina.

The construction of the proposed Catawba Gaming Facility will generate and support more than 4,300 jobs in the York/Lancaster area. More than $174 million in labor income will be generated in the York County area as a result of the construction of the facility. The total impacts on the York/Lancaster area will be more than $517 million in economic activity during this phase of the Catawba Gaming Facility's development.

Once the Catawba Gaming Facility is constructed and operating, the ongoing permanent impacts on the York/Lancaster area will be substantial. The proposed Catawba Gaming Facility will generate and support an estimated 3,966 jobs on an annual basis through its direct and indirect impacts. More than $130.3 million in labor income will be generated on an annual basis from the Catawba Gaming Facility's operations and continue for the life of the Catawba Gaming Facility. The total impacts on the York County area will be more than $259 million in economic activity per year once the Catawba Gaming Facility is in full operation.

And finally, the fiscal impacts of the Catawba Gaming Facility operations would have a substantial impact on State government revenues. It is estimated that more than $109.8 million would be generated per year from direct payments from the Catawba Gaming Facility as well as sales and income taxes generated by the new economic activity supported by the Gaming Facility.

Notes:

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[1] IMPLAN is regional modeling system developed by MIG, Inc., Stillwater, MN.
[2] The latest data available for the IMPLAN modeling system are for the 2009 calendar year. However, the final dollar impacts estimated in this analysis reflect 2011 prices.
[3] The Coordinating Council for Economic Development's Benefit-Cost Model assumes 7.5% of gross income will be generated in general sales and state income taxes.

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF RICHLAND)	FIFTH JUDICIAL CIRCUIT
The Catawba Indian Nation, a/k/a The Catawba Indian Nation of South Carolina, a/k/a The Catawba Indian Tribe of South Carolina,)	Case No. 2012-CP-40-00626
Plaintiff,)	
vs.)	**ANSWER**
State of South Carolina and Mark Keel, in his official capacity as Chief of the South Carolina Law Enforcement Division,)	
Defendants.)	

South Carolina Attorney General Alan Wilson, on behalf of the State of South Carolina, and on behalf of Mark Keel, in his official capacity as Chief of the South Carolina Law Enforcement Division, in answer to the Complaint, will respectfully show unto the Court that:

FOR A FIRST DEFENSE

I. The Complaint fails to state a claim for which relief can be granted.

FOR A SECOND DEFENSE

II. Plaintiff's action is barred by *res judicata* and collateral estoppel.

FOR A THIRD DEFENSE

III. Defendants assert that the Plaintiff's claims are barred by the doctrines of waiver and estoppel.

FOR A FOURTH DEFENSE

IV. Defendants assert that Plaintiff's claims are barred by the doctrine of *laches*.

FOR A FIFTH DEFENSE

V. Defendants assert that Plaintiff's claims are barred and/or limited by application of the statute of limitations.

FOR A SIXTH DEFENSE

VI. Defendants assert that Plaintiff's claims are barred by the absence of statutory authority for the relief requested.

FOR A SEVENTH DEFENSE

VII. Plaintiff has no constitutional, statutory, contractual, vested or property right or interest which entitles it to operate video poker or similar gaming devices on its reservation.

FOR AN EIGHTH DEFENSE

VIII. Defendants assert that Plaintiff's claims are barred by federal law.

FOR A NINTH DEFENSE

IX. Defendant Keel has not violated any clearly established right of the Tribe of which a reasonable person would have known and Defendant Keel acted in good faith within the course and scope of his official responsibilities at all times and pleads qualified immunity to the extent application in this action.

FOR A TENTH DEFENSE

X. Plaintiff cannot show that it will suffer irreparable injury, show that a substantial right has been threatened, show that Defendants have acted wrongfully or in excess of legal authority and rights, or show that it has no adequate remedy at law sufficient to obtain injunctive relief.

FOR AN ELEVENTH DEFENSE AND BY WAY OF ANSWER

XI. Defendants respond to the opening statement of Plaintiff's Complaint, which

states as follows: "Plaintiff, pursuant to Rule 57 of the South Carolina Rules of Civil Procedure and S.C. Code Ann. §§ 15-53-10, et seq., would respectfully show unto the Court that" by stating that Plaintiff's opening statement appears to be a statement of Plaintiff's case to which no response is required. As to those portions of the referenced opening statement made by Plaintiff to which response is required, denied. As to the remaining portions of Plaintiff's Complaint, Defendants answer each of the allegations of the Complaint by the numbers which correspond or refer to the number of paragraphs of the Complaint as follows. Each allegation of the Complaint not hereinafter specifically admitted, qualified or explained is denied.

1. As to the allegations of Paragraph 1 of Plaintiff's Complaint, it is admitted that the Catawba Indian Nation (the Tribe) is, for certain purposes, a federally recognized Indian Tribe with its reservation on lands owned by the United States of America and held in trust for the benefit of the Tribe. It is further admitted that said reservation is located within the geographic boundaries of the State of South Carolina. The remaining allegations of this paragraph are denied.

2. In response to Paragraph 2 of the Complaint, it is admitted that the State of South Carolina is a party to the Catawba Indian Claim Settlement Act, § 27-16-10, *et seq.* The remaining allegations of Paragraph 2 of Plaintiff's Complaint appear to be a statement of Plaintiff's case to which no response is required. As to those portions of Paragraph 2 of Plaintiff's Complaint to which response is required, denied.

3. The allegations of Paragraph 3 of Plaintiff's Complaint are admitted.

4. In response to Paragraph 4 of Plaintiff's Complaint, reference would be made to S.C. Code § 15-77-50. In further response to Paragraph 4 of Plaintiff's Complaint, the Defendants would crave reference to the Catawba Indian Claim Settlement Act, § 27-16-10, *et* seq. The

remaining allegations in paragraph 4 appear to be a statement of Plaintiff's case to which no response is required. As to those portions of Paragraph 4 to which a response is required, denied.

5. In response to Paragraph 5 of Plaintiff's Complaint, reference would be made to the cited statutory provisions. As to any allegations contained in Paragraph 5 of the Complaint outside of the referenced Code provisions, denied upon lack of sufficient information to form a belief.

6. In response to Paragraph 6 of Plaintiff's Complaint, reference would be craved to S.C. Code § 27-16-110(A). As to any allegations of Paragraph 6 of Plaintiff's Complaint, denied upon lack of sufficient information to form a belief.

7. In response to Paragraph 7 of Plaintiff's Complaint, reference would be craved to the Catawba Indian Claim Settlement Act, § 27-16-10, *et seq.*, Code of Laws of South Carolina (1976, as Amended). As to any allegations of Paragraph 7 of Plaintiff's Complaint, denied.

8. The general nature of the allegations set forth in Paragraph 8 of Plaintiff's Complaint require Paragraph 8 to be denied.

9. In response to Paragraph 9 of Plaintiff's Complaint, reference would be craved to the Gambling Cruise Act, S.C. Code §§ 3-11-100, *et seq.* As to any allegations of Paragraph 9 of Plaintiff's Complaint, denied.

10. In response to Paragraph 10 of Plaintiff's Complaint, reference would be craved to the Gambling Cruise Act, §§ 3-11-100, *et seq.* As to any allegations of Paragraph 10 of Plaintiff's Complaint, denied.

11. In response to Paragraph 11 of Plaintiff's Complaint, reference would be craved to the Gambling Cruise Act, § 3-11-10, *et seq.*, and to matters which are of public record. As to any allegations set forth in Paragraph 11 of Plaintiff's Complaint, denied.

12. In response to Paragraph 12 of Plaintiff's Complaint, reference would be craved to the Gambling Cruise Act, S.C. Code Ann. §§ 3-11-10, *et seq*. As to any allegations of Paragraph 12 of Plaintiff's Complaint, denied.

13. In response to Paragraph 13 of Plaintiff's Complaint, reference would be craved to the Gambling Cruise Act, S.C. Code Ann. §§ 3-11-10, *et seq*. As to any allegations of Paragraph 13 of Plaintiff's Complaint, denied.

14. In response to Paragraph 14 of Plaintiff's Complaint, denied.

15. In response to Paragraph 15 of Plaintiff's Complaint, reference would be craved to Defendants' responses to Paragraphs 1 through 14 above.

16. In response to Paragraph 16 of Plaintiff's Complaint, the first sentence of Paragraph 16 which states, "The interpretation of the Settlement Agreement and contractual rights of the parties with regards to the Tribe's gaming rights will resolve the controversy and will remove any existing uncertainties" appears to be a statement of Plaintiff's case to which no response is required; as to that portion of Paragraph 16 to which a response is required, denied. As to the remaining portions of Paragraph 16 of Plaintiff's Complaint, denied.

17. Paragraph 17 of Plaintiff's Complaint appears to be a statement of Plaintiff's Complaint to which no response is required. As to that portion of Paragraph 17 of Plaintiff's Complaint to which a response is required, denied.

18. Paragraph 18 of Plaintiff's Complaint appears to be a statement of Plaintiff's case to which no response is required. As to that portion of Paragraph 18 of Plaintiff's Complaint to which a response is required, denied.

19. In response to Paragraph 19 of Plaintiff's Complaint, reference would be craved to the cited South Carolina Supreme Court case, Catawba Indian Tribe of South Carolina v. State

of South Carolina, 372 S.C. 519, 642 S.E.2d 751 (2007) and the referenced statutory provisions. As to the allegations of Paragraph 19 of Plaintiff's Complaint, denied.

20. In response to Paragraph 20 of Plaintiff's Complaint, denied.

21. In response to Paragraph 21 of Plaintiff's Complaint, denied.

22. In response to Paragraph 22 of Plaintiff's Complaint, denied.

23. In response to Paragraph 23 of Plaintiff's Complaint, denied.

24. In response to Paragraph 24 of Plaintiff's Complaint, denied.

WHEREFORE, having fully answered the Complaint herein, Defendants demand that the Complaint be dismissed with prejudice, that Defendants be awarded costs and attorneys' fees under applicable statutory provisions and authorities, and that the Court award such other and further relief as deemed just and proper.

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By: _____
ATTORNEYS FOR DEFENDANTS

February 22, 2012.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
The Catawba Indian Nation a/k/a The Catawba Indian Nation of South Carolina a/k/a The Catawba Indian Tribe of South Carolina,	)	Case No. 2012-CP-40-00626
	)	
Plaintiff,	)	**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**
vs.	)	
State of South Carolina and Mark Keel, in his official capacity as Chief of the South Carolina Law Enforcement Division,	)	
Defendants.	)	

Plaintiff, the Catawba Indian Nation (the "Catawba Nation"), hereby submits this Memorandum in Support of its Motion for Summary Judgment.

Factual and Legal History

In the above-captioned action, the Catawba Nation seeks declaratory relief to conclusively vindicate the rights of the Catawba Nation based upon changes in state law as they relate to state and federal settlement acts implementing a Settlement Agreement between the Catawba Nation and the state of South Carolina.[1]

The history leading up to the Settlement Agreement and the State's subsequent treatment of the Catawba Nation following its passage demonstrate a pattern of interference with the Catawba Nation's rights. The Catawba Nation is in urgent need of judicial intervention to prevent further harm.

[1] Notably, the largest gambling operator in South Carolina is the State, which has placed electronic lottery gaming machines throughout the State. See South Carolina Education Lottery Act, 2001 S.C. Act No. 59 (effective June 13, 2001, as codified at S.C. Code Ann. § 59-159-10 et seq.). "Gaming" and "Gambling" are synonymous terms.

Upon arrival on the North American continent, Europeans encountered an indigenous population. In what became the colonies of South and North Carolina, the Europeans encountered the Catawba Nation. In structuring their dealings with indigenous peoples, Europeans reacted generally as they had in Europe by entering into treaties which acknowledged the co-equal sovereign status of the Europeans and the North American Indians. See *Worcester v. Georgia*, 31 U.S. 515, 8 L.Ed 483 (1832).

In 1760 and again in 1763, representatives of the King of England entered into certain treaties with the Catawba Nation, the terms of which granted the Catawba Nation exclusive occupancy of a 15-mile square territory on the northwest frontier of the South Carolina colony free from encroachment by colonists.

Following the American Revolution the rights and obligations to enter treaties passed from the crown to the States. Upon the adoption of the United States Constitution, the original states ceded exclusive authority to deal with Indian Tribes to Congress.

In 1840 the State of South Carolina, without the approval of Congress, purported to enter into a treaty with the Catawba Nation wherein the Catawba Nation would exchange its 144,000 acre reservation for a new reservation in western North Carolina. However, the promise was not kept, and no new reservation was conveyed to the Catawba Nation. Then, in or around 1843, the surviving members of the Catawba Nation were settled on 630 acres located within the 144,000 acres that had been the reservation created by the treaties of 1760 and 1763.

Despite tireless efforts to seek redress for the loss of its land, no progress was made until 1980, when a suit was filed in the U.S. District Court seeking the return of the treaty land and trespass damages. See *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498 (1986). This massive land claim litigation led to a decade's length of negotiations which ultimately resulted in

a settlement. The settlement of the land claim is memorialized in a Settlement Agreement as well as state legislation ("State Act"), S.C. Code Ann. §§ 27-16-10 et. seq., and in turn, was ratified by Congress ("Federal Act"). 25 U.S.C. §§ 941 et. seq. The Federal Act provided that the Settlement Agreement and State Act were to be complied with as if they were federal legislation. 25 U.S.C. § 941b(a)(2).

At issue in this case is a single provision of the Settlement Agreement which provides:

> "[t]he [Catawba Nation] may permit on its Reservation video poker or similar electronic play devices to the same extent that the devices are authorized by state law." Settlement Agreement, Section 16.8; accord S.C. Code Ann. § 27-16-110(G).

Pursuant to the gaming rights set forth in the Settlement Agreement and based upon subsequent changes in state law, which currently authorize video poker and similar electronic play devices, the Catawba Nation has the right to open and operate a gaming facility on its Reservation which offers the identical gaming devices that are now authorized by the South Carolina Gambling Cruise Act, S.C. Code Ann. § 3-11-100 et seq. The Catawba Nation now seeks summary judgment in its favor.

Standard of Review

Summary judgment is appropriate when the Court is satisfied that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56, SCRCP. "The purpose of summary judgment is to obviate delay where there is no material issue of fact." *Loyd's Inc. v. Good*, 306 S.C. 450, 454-55, 412.S.E.2d 441, 444 (Ct. App. 1991). A party opposing a motion for summary judgment must "do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial." *Hedgepath v. AT&T Co.*, 348 S.C. 340, 354, 559 S.E.2d 327, 335 (Ct. App. 2001) (quoting *Baughman v. AT&T Co.*, 306 S.C. 101,

115, 410 S.E.2d 537, 545 (1991)) (internal quotes omitted and emphasis in original). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Id.* at 355, 559 S.E.2d at 336. Further, "[a] party cannot escape summary judgment on the mere hope that something may develop at trial." *Champion Int'l Corp. v. Eubanks*, 291 S.C. 395, 398, 353 S.E.2d 880, 883 (Ct. App. 1987) (quoting *Hammond v. Scott*, 268 S.C. 137, 143, 232 S.E.2d 336, 339 (1977).

Argument

The Catawba Nation is entitled to summary judgment as a matter of law. The Catawba Nation seeks a declaration by the Court of the rights of the parties under the Settlement Agreement. Specifically, the Catawba Nation seeks a finding by the Court that the Agreement and state law permit it to possess and operate on its Reservation all video poker and electronic play devices currently authorized by the State through the Gambling Cruise Act, S.C. Code Ann. §3-11-200.

The Settlement Agreement provides that "[t]he [Catawba Nation] may permit on its Reservation video poker or similar electronic play devices to the same extent that the devices are authorized by State law." Settlement Agreement 16.8; S.C. Code Ann. §27-16-110(G). Since the Settlement Agreement was executed and enacted, the Catawba Nation's gaming rights have marched in lock-step with state law. When the Settlement Agreement was approved in 1993, the Catawba Nation was authorized to offer video poker gaming on its Reservation. Then, in 1999, when the State enacted S.C. Code § 12-21-2710[2], the Catawba Nation sought declaratory relief to interpret their gaming rights under the Settlement Agreement and pursuant to S.C. Code §27-16-110(G). In *Catawba Indian Tribe v. South Carolina*, 372 S.C. 519, 642 S.E.2d 751 (2007),

[2] This statute imposed a general prohibition on certain types of gaming machines, including video poker machines.

the Supreme Court held that the Catawba Nation's gaming rights under the Settlement Agreement were subject to subsequent changes in state law. As a result, the court held that the Catawba Nation could no longer offer video poker on its Reservation.

However, following the initial repeal of video poker, South Carolina has since authorized the use of the same gaming devices through other legislation and state action This triggered new gaming rights under the Settlement Agreement and the Supreme Court's specific interpretation of it. As such, the Catawba Nation is merely seeking the same authorization now permitted under state law, and as set forth below it is entitled to summary judgment on the pending Declaratory Judgment action.

A. The Settlement Agreement and subsequent South Carolina authorization of gambling through the South Carolina Gambling Cruise Act provide the Catawba Nation an explicit right to operate video poker and other similar electronic devices on its Reservation.

1. Catawba Nation Gaming Rights Under the Settlement Agreement

In 1993, Congress ratified a Settlement Agreement between the Catawba Nation and the State of South Carolina. 25 U.S.C. §941 et seq. Consistent with the Settlement Agreement, the Federal Settlement Act provides that "[t]he Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) shall not apply to the [Catawba Nation]." 25 U.S.C. §9411(a). It further provides:

> The [Catawba Nation] shall have the rights and responsibilities set forth in the Settlement Agreement and the State Act with respect to the conduct of games of chance. Except as specifically set forth in the Settlement Agreement and the State Act, all laws, ordinances, and regulations of the State, and its political subdivisions, shall govern the regulation of gambling devices and the conduct of gambling or wagering by the [Catawba Nation] on and off the Reservation.

25 U.S.C. §9411(b). Section 16 of the Settlement Agreement also provides:

> Except as specifically provided in the Federal Implementing legislation and this Agreement, all laws, ordinances, and regulations of South Carolina and its political subdivisions govern the conduct of gaming or wager by the [Catawba Nation] on and off the Reservation.

Section 16.2 (emphasis added); accord S.C. Code Ann. §27-16-110(A) ("Except as specifically provided in the federal implementing legislation and this chapter, all laws, ordinances, and regulations of South Carolina and its political subdivisions govern the conduct of gambling or wager by the [Catawba Nation] on and off the Reservation.").

Although the Settlement Agreement and subsequent Supreme Court interpretation make it clear the State's gaming laws and regulations apply to the Reservation, the Settlement Agreement contains important exceptions. First, the Settlement Agreement contains a number of provisions that provide the Catawba Nation with important rights to offer bingo both on and off of its reservation lands. Sections 16.3 – 16.7 and 16.9; accord S.C. Code Ann. §27-16-110(B)-(F) and (H).

Second, and more importantly for *this motion*, the Settlement Agreement contains a broad exception for "video poker or similar electronic play devices." That provision provides:

> The [Catawba Nation] may permit *on its Reservation* video poker or similar electronic play devices *to the same extent* that the devices are *authorized by State law*. The [Catawba Nation] is subject to all taxes, license requirements, regulations, and fees governing electronic play devices provided by state law, except if the reservation is located in a county or counties which prohibit the devices pursuant to state law, the [Catawba Nation] nonetheless must be permitted to operate the devices on the Reservation if the governing body of the [Catawba Nation] so authorizes, subject to all taxes, license requirements, regulations, and fees governing electronic play devices provided by state law.

Section 16.8 (emphasis added); accord S.C. Code Ann. §27-16-110(G).

When the Settlement Agreement was entered into in 1993, the State permitted video poker. See *South Carolina v. Blackmon*, 304 S.C. 270, 403 S.E.2d 660 (1991). However, that authorization was repealed in 1999. As noted above, the issue of whether the Catawba Nation could continue to operate video poker was litigated in *Catawba Indian Tribe v. South Carolina*, 372 S.C. 519, 642 S.E.2d 751 (2007). In that case, the South Carolina Supreme Court ruled that

the Catawba Nation could no longer offer video poker after the State repealed the statutory authorization for such games. As explained by the Court:

> The first sentence of 27-16-110(G) clearly binds Respondent [Catawba Nation] to any subsequent state legislative enactments affecting video poker devices. The inclusions of the phrase "to the same extent that the devices are authorized by state law" is indicative of the parties' intent for Respondent to be subject to any future changes in state law regarding video poker devices.

372 S.C. at 529, 642 S.E.2d at 756 (emphasis added) (footnote omitted).

While the *Catawba* decision dealt with a law that restricted gaming, its rationale is not limited to the negative. Rather, it applies with equal force to subsequent laws that may expand gaming rights. By ruling that the Catawba Nation is subject to "any subsequent enactments affecting video poker devices," (emphasis added), the decision is clear that the Catawba Nation's gaming rights are not static but vary according to current law. Thus, any future State authorization of video poker or similar electronic gaming immediately triggers an equivalent right to offer those same devices *on its Reservation*. It is apparent that this is exactly the same argument the State proffered to the Supreme Court in efforts to forever bind the Catawba Nation's gaming rights to changes in the law. Specifcially, the State of South Carolina and the Attorney General argued to the Supreme Court in the *Catawba* decision that:

> We submit this is the only reasonable interpretation: regardless of what state law was and is with respect to video gambling, it is equally applicable to the Catawba [Nation]. This reading of the Agreement and ratifying legislation is one entirely consistent with a continuation of the [Catawba Nation]'s placement on equal footing . . .

Reply Brief of The State of South Carolina, *Catawba v. S.C. et al (2007)*; and:

> . . .the "authorized by law" language, as used in § 27-16-110(G), contemplated that future changes in the law concerning video poker would also be applicable to the [Catawba Nation]. . . the "authorized by state law" language, contained in the first sentence, was always present and inextricably ties the Tribe to whatever state law allows or prohibits concerning video poker . . . That "if and when" has now occurred. Such a sensible construction is also entirely in accord with the

> Congressional Act, which provides that "state law shall govern the regulation of gambling devices on and off the Reservation." 25 U.S.C. § 941 (b); *Narragansett, supra.* This construction correctly treats the [Catawba Nation] equally to all South Carolinians.

Final Brief of The State of South Carolina, *Catawba v. S.C. et al.(2007).*

Now that current state law vests the Catawba Nation with the right to operate video poker and similar electronic play devices on its Reservation, these statements would beg the question as to which postion the Attorney General and State will choose in this action, when it was their original effort to inextricably intertwine the Catawba Nation's rights to fluid gaming laws. Restoring the Catawba Nation's gaming rights would satisfy the contractual and ethical obligations to which the State is bound under the Settlement Agreement.

2. Gaming Rights Arguments Available to the Catawba Nation Under Gambling Cruise Act.

As quoted above, the Settlement Act and interpreting Supreme Court opinions provide that "[t]he [Catawba Nation] may permit *on its Reservation* video poker or similar electronic play devices to *the same extent* that the devices are authorized by State Law." S.C. Code Ann. §27-16-110(G) (emphasis added). Notably, this provision appears to allow the Catawba Nation to offer two separate types of games: (1) video poker and (2) similar electronic play devices.

In the case of both "video poker" and "similar electronic play devices," the Settlement Agreement conditions the Catawba Nation's right to offer such games on whether the State has "authorized" those games. The Catawba Nation agrees with the arguments previously advanced by the State and the Attorney General in the 2007 *Catawba* case wherein the South Carolina Supreme Court unequivocally held that the Settlement Agreement makes the Catawba Naiton "subject to any future changes in state law regarding video poker devices." 372 S.C. at 529, 642 S.E.2d at 756. The State's enactment of the Gambling Cruise Act in 2005 has now renewed the

Catawba Nation's right to offer video poker and similar electronic devices *on its Reservation*.

In 2005, the South Carolina Legislature passed the Gambling Cruise Act, S.C. Code Ann. §3-11-100 et seq. Under this Act, the Legislature delegated to local governments

> the power to regulate or prohibit gambling aboard gambling vessels while such vessels are outside the territorial waters of the State, when such vessels embark or disembark passengers within their respective jurisdictions for voyages that depart from the territorial waters of the State, sail into United States or international waters, and return to the territorial waters of the State without an intervening stop.

S.C. Code Ann. §3-11-200(A).

The Gambling Cruise Act defines "gambling" or "gambling device" to mean "any game of chance and includes, but is not limited to, slot machines, punchboards, video poker or blackjack machines, keno, roulette, craps, or any other card gambling game." S.C. Code Ann. §3-11-100(2) (emphasis added). As noted above, the Settlement Agreement allows the Catawba Nation to offer "video poker and similar electronic play devices to the same extent that the devices are authorized by State law." Section 16.8 (emphasis added); accord S.C. Code Ann. §27-16-110(G). In this case, South Carolina has authorized video poker and similar electronic play devices pursuant to the Gambling Cruise Act. Based on the plain language of the Settlement Agreement, the Gambling Cruise Act constitutes "authorization" of gambling devices under state law, including but not limited to, video poker machines.

3. Interpretation of the plain language of S.C. Code §27-16-110(G), as it relates to South Carolina's authorization of gaming under the Gambling Cruise Act, authorizes gaming in favor of the Catawba Nation.

   i. "Authorization" by State Law.

The Supreme Court previously held that "the language of § 27-16-110(G) is unambiguous." *Catawba Indian Tribe v. South Carolina*, 372 S.C. 519, 642 S.E.2d 751 (2007). If a statute's language is plain, unambiguous, and conveys a clear meaning, then "the rules of

statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Therefore, the analysis should end here with the words being given their plain and ordinary meaning. *Tilley v. Pacesetter Corporation*, 355 S.C. 361, 585 S.E.2d 292 (2003). In this case the literal interpretation § 27-16-110(G) dictates that the Catawba Nation's right to resume gaming is immediately defined and triggered by the "authorization" of state law. The Gambling Cruise Act is an "authorization" of gambling devices for purposes of the Settlement Act. Assuming the Statute remains unambiguous as it was previously identifed by our Supreme Court, the literal meaning of the term "authorize" is straightforward. See e.g., Black's Law Dictionary (9th ed. 2009) ("To give legal authority; to empower.... To formally approve; to sanction....").

The State has authority to regulate gambling within the Federal waters that lie just beyond the State waters (the three mile limit) just as the State has certain regulatory authority on the Federal trust lands that constitute the Catawba Nation's Reservation. In the case of the Federal waters, the State has the authority to grant a right to gamble or to deny that right. Pursuant to the Gambling Cruise Act, the State has granted that right. In other words, the State has authorized gaming (including video poker) and with it a gaming regulatory and tax scheme, which operates directly upon the gaming operations during the cruise and upon the related and supporting activities that occur on shore.

South Carolina adopted the Gambling Cruise Act pursuant to authority granted to the states by Congress in 1992 when it amended the Johnson Act, 15 U.S.C. § 1151 et seq., to lift the general federal prohibition against gambling on United States flag vessels. The purpose of this amendment was to use gambling devices to encourage the growth of the United States flag cruise industry. At the same time, recognizing that some states might object to these gambling cruise

vessels being in their ports, Congress granted to states the authority to decide whether any "cruises to nowhere" (by United States or foreign flag vessels) will be permitted from that state's ports. Thus, 15 U.S.C. § 1175(b)(2)(A) provides that such gambling cruises are not permitted "if the State or possession of the United States in which the voyage or segment begins and ends *has enacted a statute the terms of which prohibit . . . use [of gambling devices] on that voyage or segment.*" (Emphasis added). According to Congressman Davis:

> *Individual states are granted or delegated greater authority to enact legislation to prohibit gambling on cruises to nowhere and voyages between two points in the same State even if the vessel leaves State waters.* However, nothing in H.R. 3866 or its limited delegations is to be construed as authorizing a State to enact statutes which discriminate against U.S.-flag vessels.

138 Cong. Rec. H71 (Jan. 28, 1992)(statement of Rep. Robert Davis)(emphasis added).

As noted by the Fourth Circuit in *Casino Ventures v. Stewart*, 183 F.3d 307, 311 (4th Cir. 1999), "by enacting section 1175 Congress *extended the reach of state police power* beyond state territorial waters: that provision permits states to change the content of federal law with respect to cruises to nowhere." (Emphasis added). Quite simply, Congress has extended the State's jurisdiction to include gambling beyond the State's waters, so that the State has the power to decide whether or not to allow such gambling. The power to decide whether to allow an activity falls within the plain meaning of "authorize." This is especially true when considering the State, through the legislature, did not simply "authorize" gaming. Instead, the State went so far as to define what types of gambling vessels would be subject to the Act and set forth a specific regulatory and taxing scheme to profit from the cruises. S.C. Code Ann. §3-11-400(c). Further, the State set forth a definition of "gambling" that includes certain machines, and provides for their operation from the coastal counties of South Carolina These games include, but are not limited to, "slot machines, punchboards, video poker or blackjack machines, keno, roulette,

craps, or any other card gambling game." S.C. Code Ann. § 3-11-100(2).

With the regulation of gambling, what might be legal one minute may be absolutely prohibited by the Legislature the next. See *Joytime Distribs. & Amusement Co. Inc v. State*, 338 S.C. 634, 528 S.E.2d 647 (1999); *Westside Quik Shop v. Stewart*, 341 S.C. 297, 534 S.E.2d 270 (2000). Conversely, what may once be prohibited one minute by the Legislature may be absolutely legal the next, regardless of whether it was done as an intentional effort to thwart the Settlement Agreement or simply a continuing disregard of the Catawba Nation's rights.

This Court should note that the State agreed with these same definitions for "authorize" and the import of this term in the Settlement Agreement and in the previous action when interpreting the parties' rights. A previous definition advanced by the State is telling,

> The "authorized by state law" language is not time-specific to 1993, or to any other time. The word "authorize" means "to grant authority or power to"; "to give permission for." *American Heritage College Dictionary* (3d ed.) Obviously, what is now "authorized" may become "unauthorized," subsequently. What is given permission for, may be revoked. The framers, quite simply, conditioned the Catawba [Nation's] right to video poker upon whether "state law" continued to "authorize" video poker devices. Further, it is well recognized that the term "authorized by state law" includes *future changes in state law. See e.g., Sitz v. Dept. of State Police*, 443 Mich. 744, 506 N.W.2d 209 (1993)

Final Brief of The State of South Carolina, *Catawba v. S.C. et al. (2007)*.

The words of this statutorily adopted Settlement Agreement should be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. The State has clearly "authorized" various forms of gambling through the Gambling Cruise Act. *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 420 S.E.2d 843 (1992).

ii. "Extent."

Also, the Supreme Court's holding that § 27-16-110(G) is unambiguous suggests that this Court should give the term "extent" its literal and ordinary meaning. "[T]he [Catawba Nation] may permit *on its Reservation* video poker or similar electronic play devices *to the same extent* that the devices are authorized by State Law." S.C. Code Ann. §27-16-110(G). In context of the Gambling Cruise Act, the *extent* of games authorized therein included, but was not limited to, "slot machines, punchboards, video poker or blackjack machines, keno, roulette, craps, or any other card gambling game." S.C. Code Ann. § 3-11-100(2).

In *Catawba Indian Tribe v. South Carolina*, 372 S.C. 519, 642 S.E.2d 751 (2007), the Supreme Court defined "permit" as used in the first sentence as meaning "to allow" and cited *Black's Law Dictionary* 1160 (7th ed. 1999) as its source of this definition. Logically, one would expect the Court to use the same source to define another word in the same statutory sentence. The term "extent" is defined as amount, *scope*, range or magnitude. *Black's Law Dictionary* 1160 (7th ed. 1999). While *Black's* does not define the word "scope," the *Random House Dictionary* defines "scope" as "operation" or "activity." Thus, the Catawba Nation may permit *on its Reservation* the same operation or activity as is authorized on the gambling boats which are currently docked in the territorial waters of the State free from any threat of seizure by the State.

iii. State's new interpretation of "authorize" and "extent."

The State now seeks to abrogate statutory rules of construction, and it is attempting to interpolate the Settlement Act to require the Catawba Nation to only conduct the same types of permitted games on its Reservation if it includes non-territorial waters of the State. The Court should disregard that analysis altogether.

First, it would run competely afoul of the doctrine of judicial estoppel as initially

recognized in *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). "Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." *Id.* The purpose of judicial estoppel is to protect the integrity of the courts, not to protect litigants from allegedly improper or deceitful conduct by their adversaries. *Hawkins v. Bruno Yacht Sales, Inc.*, 353 S.C. 31, 42, 577 S.E.2d 202, 208 (2003). Although judicial estoppel in South Carolina generally applies to inconsistent statements of fact, and not inconsistent positions of law, for this Court to allow the State to play fast and loose with its obligations under the Settlement Agreement would be another miscarriage of justice for the Catawba Nation.

The elements of judicial estoppel are as follows: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions are taken in the same or related proceedings involving the same party or parties in privity with one another; (3) the party taking the position must have been successful in maintaining that position and received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. *Cothran v. Brown*, 357 S.C. 210, 215-16, 592 S.E.2d 629, 632 (2004). Unless the State remains consistent in its assertions that §27-16-110(G) relate only to the *legal status* of the games, it will have meet each element of judicial estoppel with remarkable efficiency.

Second, to interpret the word "extent" to include some geographic component would violate a cardinal rule of statutory interpretation by reading in language noticeably absent from the statute. Further, it would completely ignore the remaining portions of S.C. Code §27-16-110(G), which apparently reflects that a geographic component was not controlling so long as the gaming allowed to the Catawba Nation took place on the Reservation. Specifically, the

Settlement Agreement expressly provides that the Catawba Nation can offer authorized gambling devices on its Reservation, even if located in a county that otherwise prohibits such games. This confirms that the location of the authorized gambling is not controlling, as long as the activity itself is authorized by state law.

The Settlement Agreement guaranteed the Catawba Nation certain rights for parity with respect to otherwise authorized gaming devices which are solely conditioned upon it operating these games *on the Reservation*. This is consistent with the legislative intent and stated purpose of the Settlment Agreement to ensure the Catawba Nation had gaming rights on its Reservation that, at a minimum, would be equivalent (to the same extent) to any State authorization of the use of video poker or similar electronic devices. To find otherwise would suggest that the Catawba Nation would be required to have an ocean or some other nonterritorial water on its 600 acre reservation to obtain parity under the Gambling Cruise Act. "If possible, the court will construe the statue so as to escape the absurdity and carry the intention into effect." *Catawba Indian Tribe v. South Carolina*, 372 S.C. 519, 642 S.E.2d 751 (2007)

In short, the provisions of the Settlement Agreement, the State Act and the implementing Congressional legislation must be construed *as they are written*, not as the State would wish they were written. Courts have frequently emphasized over the years, in construing a statute or statutes, the words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. *City of Myrtle Beach v. Juel P. Corp. and Gay Dolphin, Inc.*, 344 S.C. 43, 543 S.E.2d 538 (2001). Statutes, *as a whole*, must receive a practical, reasonable, and fair interpretation consonant with the purpose, design and policy of the lawmakers. *TNS Mills, Inc. v. South Carolina Dep't. of Revenue*, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998).

This reasonable interpretation of the pertinent language is correct from both a legal and moral analysis when considering the State's previous arguments that the Catawba Nation was required to live with the Settlement Agreement as written:

> Thus, the Settlement Agreement places the [Catawba Nation] upon equal footing with all other South Carolinians in terms of any right to video poker. *When video poker is legal, the [Catawba Nation] possesses the rights thereto to the same extent as other citizens*...These cases fully demonstrate that an Indian Tribe, such as the Catawba[] [Naiton], must live with the Settlement it has made with the State. Respondent cannot rewrite the Settlement if it encounters a provision it does not like or regrets having agreed to. Here, the Respondent consented to, and the State and federal governments ratified, a Settlement which clearly subjects the [Catawba Nation] to South Carolina laws making video poker and video gambling illegal. The [Catawba Nation] did not complain about State law when everyone, including the Catawba[] [Nation], had a right to video poker. It most certainly did not complain, indeed, it insisted upon, the State's agreeing to exempt it from the effects of the local option referendum. Respondent only complains now *when video poker has been outlawed for everyone even though it agreed to be subjected to limits upon its video poker rights "to the same extent the devices are authorized by state law."* It now attempts to obtain an exemption from a monopoly in an illegal activity which state law makes a crime for anyone else to be engaged in.

Final Brief of South Carolina, *Catawba v. S.C. et al.* (2007) (emphasis added).

Those words ring hollow when considering that as of today private citizens, corporations and counties in this state are profiting from the State's authorization of video poker and similar electronic devices, while the [Catawba Nation] remains in economic turmoil and is threatened with criminal and civil prosecution if it exercises one of the sole rights it retained for ceding its indigenous lands. The State's actions are suffocating the Catawba Nation's economic future and in direct contravention to the Settlement Agreement and its requirments of good faith and parity.

iv. <u>All Ambiguities Must Be Construed in Favor of the Catawba Nation.</u>

The Supreme Court has clearly held the language of §27-16-110(G) was unambigious when holding that the Catawba Nation's rights were subject to subsequent changes in state law. However, to the extent a Court may determine that a new question warrants a different analysis

of the language contained in §27-16-110(G) such that any portion of it is deemed ambigious, that ambiguity must be construed in favor of the Catawba Nation for two reasons. First, Canons of Indian Construction and Federal common law requires that any ambiguities within 25 U.S.C. § 941 et seq. be construed in a light most favorable to the Catawba Nation as an Indian nation. Second, the purpose and intent of the statutes dictate that the Catawba Nation be granted equivalent rights to operate video poker or other similar electronic gaming devices on its Reservation. Therefore, in the event this Court finds section 27-16-100(G) ambiguous, the Catawba Nation is still entitled to summary judgment on the merits and its motion should be granted.

a. Canons of Statutory Construction Require the Court to Resolve Any Ambiguity in Favor of the Catawba Nation.

The United States Supreme Court has held that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Blackfeet Tribe of Indians, 471 U.S. at 766 (1985). Thus, any decision by this Court interpreting the meaning of any ambiguity in section 27-16-110(G) must be resolved in favor of the Catawba Nation. Such a resolution, moreover, is necessary to comport with Congress's goal of Indian self-determination.

The need to invoke the Indian law canons of construction was recognized by the South Carolina Attorney General. In his 2004 Opinion Letter addressing the potential claims of the Catawba Nation after the State had prohibited video poker in general, articulated an understanding of the deference to be afforded to the Catawba Nation. The Attorney General noted

> alongside the interest of the State in suppressing gambling, particularly video gambling, we note also the strong public policy interest which resolves any ambiguity in a statute regulating Indian matters in the Native Americans' favor. As was said by the United States Supreme Court in *Chickasaw Nation v. U. S.*, 534 U. S. 84 (2001), the canon of construction is often controlling that any

> ambiguity is resolved by construing the provision 'liberally in favor of Indians with ambiguous provisions interpreted to their benefit.' Justice Blackmun, dissenting in *South Carolina v. Catawba Tribe, Inc.*, 476 U.S. 498 (1986) noted that this rule of interpretation 'reflects an altogether proper reluctance by the judiciary to assume that Congress has chosen further to disadvantage a people who our Nation long ago reduced to a state of dependancy.' 476 U.S. at 498.

Opinion Letter, dated April 16, 2004, Henry McMaster, South Carolina Attorney General. Accordingly, any reading of the statutes must be in a light most favorable to the Catawba Nation. See, e.g., *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980) ("Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence."); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (holding that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.").

Congress specifically provided that the Settlement Agreement and the implementing state act are approved, ratified, and confirmed by the United States, and shall be complied with in the same manner and to the same extent as if they had been enacted into Federal law," making it clear that the same methods of construction apply. 25 U.S.C. § 941m(e). See also, *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500-01 (1979) (holding that where a state law is enacted under the authority of a federal law readjusting jurisdiction over Indians, that state law is reviewed under the same standards as if it were a federal law relating to Indians); *State v. Major*, 725 P.2d 115, 121 (Idaho 1986) (applying the preference in favor of Indian tribes to state statute).

b. Common Sense and Fairness Dictate that the Legislature has Restored Gaming Rights to the Catawba Nation through its Authorization of Gaming under the Gambling Cruise Act.

Our Supreme Court in *Catawba* recognized that the Catawba Nation would be allowed to conduct gaming on its Reservation if gaming was subsequently authorized. Further, common

sense and the inherent covenant of good faith and fair dealing which are incorporated into the Settlement Agreement prohibit this exact scenario attempted by the State. More precisely, the intent of the Settlement Agreement could not possibly allow an interpretation where the State can grant lucrative video poker and other gaming rights to some individuals and entities while ignoring its obligation to grant parity to the Catawba Nation on its Reservation.

In its findings, the General Assembly described in stark terms the context for the adoption of the Settlement Agreement and the State and Federal Acts, and the settlement of a disruptive and costly suit seeking the return of respondent's land and trespass damages:

> (1) The Catawba [Nation] has filed lawsuits in both the United States District Court for the District of South Carolina, claiming possessory rights to certain lands in South Carolina and trespass damages and in the United States Court of Federal Claims seeking monetary damages against the United States.
>
> (2) The pendency of these lawsuits has resulted in severe economic and social hardships for large numbers of landowners, citizens, and communities in the State, and therefore for the State as a whole. If these claims are not resolved, further litigation involving tens of thousands of landowners would be likely.
>
> (3) The [Catawba Nation] and the State, acting through the Governor, have reached an agreement in principle to settle their differences which constitutes a good faith effort on the part of all parties to achieve a fair and just resolution of claims which, in the absence of this settlement, could be pursued through the courts for many years to the detriment of the State and all its citizens, including the [Catawba Nation].
>
> (4) The implementation of the settlement requires legislation by the Congress of the United States and by the General Assembly of South Carolina. S.C. Code Ann. § 27-16-20 (Supp. 2005). Congress in its findings noted the parties entered into the settlement "to resolve the disputes raised in these lawsuits and to derive certain benefits." 25 U.S.C. §941(a)(7).

Further, in ratifying the State Act, Congress explicitly noted: "It is the policy of the United States to promote tribal self-determination and economic self-sufficiency and to support the resolution of disputes over historical claims through settlements mutually agreed to by Indian and non-Indian parties." 25 U.S.C.A. § 941l(a)(1). This Court should interpret S.C. Code §27-

16-110(G) as a protection for the Catawba Nation and it should prohibit the State's current attempts to circumvent their obligation to the Catawba Nation while authorizing games to others. Such a decision would be both morally correct and would comport with Congress's intention to promote the Catawba Nation's economic self-sufficiency and to leave the Catawba Nation with a meaningful substitute for the Indian Gaming Regulatory Act. Principles of statutory construction thus require that S.C. Code §27-16-110(G) be given a meaning that fully manifests Congress's intention in ratifying the Settlement Agreement and the State Act.

Based upon the foregoing arguments, the Catawba Nation has demonstrated that summary judgment in its favor is appropriate in the underlying Declaratory Judgment action, and its motion should be granted.

Conclusion

Pursuant to the gaming rights set forth in the Settlement Agreement and based upon subsequent changes in state law which currently authorize video poker and similar electronic play devices, the Catawba Nation has a right to open and operate a gaming facility on its Reservation which offers the identical gaming devices that are now authorized by the South Carolina Gambling Cruise Act, S.C. Code Ann. § 3-11-100 et seq. The State, by and through its law enforcement agents, have clearly indicated their refusal to honor this right and have further expressed their intention to seize machines and prosecute members of the Catawba Nation if they possess and operate the disputed machines. Therefore, based upon the Catawba Nation's arguments and authorities presented herein, this Court should grant the Catawba Nation's motion for summary judgment and prevent the State from breaking the promises it made to the Catawba Nation in the Settlement Agreement between the sovereign parties.

SIGNATURE PAGE ATTACHED

Respectfully submitted,

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1	STATE OF SOUTH CAROLINA	)	IN COMMON PLEAS
2	COUNTY OF RICHLAND	)	COURT
3		)	
4	CATAWBA INDIAN NATION,	)	
5		)	TRANSCRIPT
6	-V-	)	OF
7		)	RECORD
8	STATE OF SOUTH CAROLINA,	)	2012-CP-40-00626
9		)	
10		)	
11	DEFENDANT.	)	

12

13 APRIL 2, 2012

14 RICHLAND, SOUTH CAROLINA

15

16 B-E-F-O-R-E:

17 HONORABLE J. ERNEST KINARD, JUDGE;

18

19 A-P-P-E-A-R-A-N-C-E-S:

20 FOR THE PLAINTIFF:

21 WILLIAM WILKINS, ESQ.

22 GREGORY HARRIS, ESQ.

23 FOR THE DEFENDANT:

24 SUNNIE JONES, ESQ.

25

I-N-D-E-X

COURT REPORTER'S NOTE: THERE WERE NO EXHIBITS ENTERED.

(The following proceedings were held on April 2, 2012.)

MR. JONES: Good morning, Your Honor, good to be back in front of you again.

THE COURT: All right.

MR. JONES: Sunnie Jones from the Attorney General's Office and here at the table with me is Deputy Attorney General Bob Cook -- representing the State of South Carolina in this matter.

Your Honor, although we are the defendants in this case -- was filed by the plaintiff. Since we filed our motion for summery judgment first Mr. Wilkins and I have agreed that probably we should go ahead and proceed first, if that's okay.

THE COURT: I'm listening.

MR. JONES: Okay. Your Honor, the issue in -- and also like to make mention, Your Honor, that Sheriff Bruise Bryant is here today from York and Solicitor Kevin --

What this case is about, Your Honor, is a request by the plaintiffs for a declaratory judgment ruling that they're allowed to have video poker or similar electronic gaming devices on their reservation. The basis of their argument, Your Honor, on the fact that on the settlement agreement and also a recent, what they called a recent, change in state law of the Gambling Cruise Action and based

upon those two laws it is the position of the Catawbas that they're allowed to have gambling on their reservation.

It is the position of the state and the defendants that the Catawba Decision in 2007 is disposed this issue, that there's been no change in the law and, in fact, the Gambling Cruise Act that the plaintiffs are relying upon was actually in play at the time and the right that's set fourth in the Gambling Cruise Act was actually in place since 2001 the Start Answer Case.

And also, Your Honor, there's an issue here that we presented on page 16 of our brief as to res judicata and collateral estoppel. We -- that the Catawba Case is disposited and the Gambling Cruise Act doesn't apply at all and also the issue of res judicata and collateral estoppel could prevent the plaintiffs from -- declaratory judgment relief that they ask for.

It's like Joggy Bear once said, It's deja vu all over again. 2005 Bob Cook and I were in this same courthouse, same issue. We were before the supreme court in 2007 it's the same issue, nothing has changed.

What I would like to do, Your Honor, is our brief is 37 pages which covers all of the issues that we think are in the case --

THE COURT: Well, you know, I read your brief a minute ago, if you recall I'm a speed reader.

MR. JONES: Yes, sir.

THE COURT: So, it took me about five minutes.

MR. JONES: Yes, sir, and --

THE COURT: I fully understand your position.

MR. JONES: Yes, sir.

THE COURT: Now, I didn't get anything from -- but we're looking at the file.

MR. JONES: Yes, sir.

THE COURT: I asked for the files when I got here but they just brought them in. So, if they have filed anything, briefs I have read them that's all.

MR. WILKINS: Well, I regret that. We did file them --

THE COURT: Well, they didn't --

MR. WILKINS: Last Monday --

THE COURT: Well, they didn't send them to me so, you know, it doesn't help me a lot. It won't matter, I mean, once he finds them in here it won't take me a second to read them.

Yes, sir?

MR. JONES: May I proceed, Your Honor?

THE COURT: I'm listening to you.

MR. JONES: So --

THE COURT: Well, our file is not in here, that file. We'll try to get them from the clerk's office.

You can proceed.

MR. JONES: Your Honor, our brief would be from -- my argument would be from the two pages of the table of contents 37 pages in the brief and I'll hit what I think are the high spots for Your Honor and, of course, answer any questions the court might have.

The first matter I would like to cover would be the Catawba Case in 2007 and in that case the same issue was before this court or before a court and before the supreme court in 2007 is whether 27-16-110(G) of the settlement act allowed the Catawbas to have gambling on their reservation and the supreme court said no that gambling had been banned sine the Act 125 of 1999 and that the provision in the settlement agreement 27-16-110(G) says that the Catawbas could have the right to video poker on a reservation the same extent of state law. That the state law was ambiguous, that 27-16-110 was ambiguous and the state law at that time ban video poker.

Briefly, Your Honor, the Catawbas, in, in the earlier case had four arguments. The first one was that a provision in there settlement act said that if poker, video poker, is ban in the county in which they reside that they can still have it. The court said the statue is unambiguous 27-16-110(G) and what the court said was that it was ban in the state and therefore they could not have video poker.

It's important, Your Honor, I would like to -- the provision of the Catawba Case it says that the legislative intent was to circumscribe respondent's rights to allow video poker devices on his reservation either by its own operation or third party operation to the extent state law allow the devices. It's important, Your Honor, if you look at footnotes six and seven in the Catawba Case in there there's no question that the state supreme court referred to a ban on video poker in the State of South Carolina and referred to 12-21-2710 and, Your Honor, that provision says that video poker and similar electronic devices are banned within the state and you probably noticed, Your Honor, during our brief we probably mentioned -- we did mention many, many, time in state and statewide ban I think they were very critical terms that we referred to.

Another argument that the Catawbas made in, in, the earlier case was that that the Bingo provision had a certain phrase that if Bingo ever became ban that there right to have Bingo be ban and should be the same thing with video poker. And the supreme court said once again 27-16-110(G) is unambiguous and an additional argument that we are sovereign and we're different from any other citizen and the supreme court said, no, you bargain to waive that when you did the settlement agreement. You have the same rights that -- and the laws apply to you the same as any

citizen in the State of South Carolina.

And the fourth argument they made, Your Honor, was that by the change in the video porker law that they should have been – that that change should have gone through congress and the supreme court said, no, that was contracted before in 1993 it envisioned subsequent changes. So what's interesting with those four arguments is why and I don't know why that the Catawbas didn't raise the Gambling Cruise Act at that time because when the complaint was filed in the Catawba Case the first one, I believe it was late July, the Gambling Cruise Act was in play in the first of June of '05 and the Start Answer Decision allowing the same type of operation had been in place since 2001. So, based upon just the, the, Catawba Case the supreme court said that 27-16-110(G) is clear unambiguous and it does not allow the Catawbas to have video gambling on their reservation.

Now, the next case very briefly, Your Honor, I would like to talk about is the Start Answer Case it came out in 2001 and the reason it's important to look at the Start Answer Case and that had to do with the court going to the Johnson Act and cruises to nowhere issue as, as, the court reviewed and is within the opinion the authority for the cruises to nowhere the court very specifically said this decision does not affect the current law on the books to finally note the 16-19-50 and 12-21-2710 prohibit gambling,

prohibit gambling, and possession of gambling devices anywhere in the state -- vessels operating a day cruise to nowhere. So, the Start Answer Case which was the genesis of the Gambling Cruise Act was very specific and, and, Justice Pleicones specifically pointed out again in the case, at the end of the case, our decision rest on the intent of the legislator expressed in 1999 Act 125. Nothing in that act is indicative of any intent to otherwise restrict the scope an application of laws criminalizing in gambling actives in the state. So, Your Honor, there's no question that the Start Answer Decision as it allowed cruises to nowhere also recognize that the law on the books was Act 125 of 1999 which prohibited 12-21-2710 video poker and similar electronic play devices in the State of South Carolina.

Now, what I'd like to do, Your Honor, is, is, look at the Gambling Cruise Act and this is the act that they're saying triggered their right to have these gambling machines on their reservation and it points out that all the laws – this is 3-11-400(B)(1) it states that all of the laws as to gambling are still in play in South Carolina and, and, also, Your Honor, in the earlier settlement agreement, 27-16-40 also addresses the same issue. So, what we have here is, is, the Gambling Cruise Act that allows gambling on the high seas. Machines cans leave a, a, municipality or a county that has voted to allow it. They can move the machines to

three mile limit and then they can play the games but it still makes it in that three mile limit that if a person violates it or operates a machine they're not only subjected to a fine from the municipality or county they're subjected to sanctions of the Johnson Act and they're subjected to criminal sanctions and seizure by state law.

So, what, what, the Catawbas are arguing before this court is that they want to be allowed to have something that no other citizen in the state can allow. They're saying because these devices are authorized beyond the three mile limit that they can take that and have gambling on their reservation and what, what -- and what they're asking for and actually they've referenced it -- they site our brief a lot in the earlier case. And, and, one of the provisions that we had in our earlier brief it kind of summarizes what their asking for, this is on page 16 of their brief siting our brief in the 2007 case. It -- now attempts to obtain an exception for the -- an illegal active which state law makes a crime for anyone else to be engaged and that's, that's, what they're asking for video poker is banned in South Carolina. Nothing has changed, been trigger and; therefore, they can't have it.

Also, Your Honor, we think that we addressed this on page 16 of our brief that res judicata and collateral estoppel would be appropriate for a ruling from this court;

otherwise, Your Honor, we can envision -- if they think of another argument down the road when the law hasn't changed on video poker we'll be back in here again in five years. So, we would ask the court to, to, address that. We think that res judicata and collateral estoppel are -- would be appropriate for relief for the state, because it's noted as I mentioned before that Gambling Cruise Act was in play at the time of the first Catawba Case.

And in closing, Your Honor, we mentioned -- well, this issue of whether a cruise to nowhere triggers a right in the state has been addressed in Florida as we've mentioned on page 32 of our brief was addressed in 1993 case in the State of Florida. There they had -- which was a -- right from an Indian tribe that's not in play here. And when the state allowed the cruises to nowhere said well, that, that, allows us to have a right for video poker on our reservation and at page 32 of our brief it kind of summarizes as we refer to that Florida case and the court says -- this is a snippet from there, thus even when viewing the evidence before the court in light most favorable to the tribe we conclude that these cruises by foreign, foreign, flag vessels cannot be fairly and to constitution permission of casino gambling by the state within the state. So, what we have is, is, the tribe saying permission to gamble on the high seas gives them a right to have a reservation in the

State of South Carolina.

Looking at the, at the, plaintiff's brief there wasn't an issue about any ambiguity should be -- should lean toward the Catawbas, that very issue was addressed in the Catawba Case in 2007. There's no ambiguity 27-16-110(G) is unambiguous that law is still on the books and for these arguments and for the arguments we addressed in our brief, Your Honor, the defendants, State of South Carolina, and Chief Keel would ask this court to grant it summery judgment in our case as a matter of law each side agrees that this is a matter of law and deny the declaratory relief and also, Your Honor, rule on the res judicata collateral estoppel issue, thank you.

THE COURT: All right.

MR. WILKINS: I'm Billy Wilkins and with me at counsel table is Grege Harris.

Judge, did you get a copy of our --

THE COURT: I just got a copy of it.

MR. WILKINS: You did, okay. Let me first address the res judicata issue. In the fist Catawba Case the issue was whether or not Act 125 which ban video poker in South Carolina applied to the Catawba Nation Resevation. The other issue is whether or not certian entrances fees had to be paid regarding Bingo active.

This case, this case, involved an issue of whether

the Gambling Cruise Act positively impacts the settlement agreement of the State of South Carolina, the Catawbas entered into which would allow the -- resume video gaming on the reservation.

Now, all of the cases sited by the state regarding res judicata collateral estoppel have absolutely no application to this case.

Declaratory judgments are a different animal from the run-of-the-mill case where you bring a lawsuit seeking damages or other relief and then you try to bring the same action again or one you could have brought.

The court of peals in Robison versus -- are very -- in stating the law it said this, a declaratory judgment is not res judicata as to matters not at issue and not passed on before. The doctrine is only -- to matters which were actually litigated and not those that might have been litigated. So, this declaratory judgment is not -- this action is not bared by res judicata and as a practical matter it couldn't have been brought to start with and I can get into that later but I don't think it's really necessary unless the court wants me to.

Now, here's what the state says, Judge, on page five of the memorandum and all through it and even today the members of the Catawbas Nation should be treated like all other citizens in South Carolina, in fact, they should be

treated just like the state says John Q. Citizen. Well, John Q. Citizen is never relinquished his right to the 15 square miles of real estate, 144,000 acres, that -- and entered into a settlement agreement the State of South Carolina and because they relinquished this right to this real estate and resolved all the disputes up in York County they were given certian rights that John Q. Citizen does not have in this state.

According to the state the settlement agreement, the settlement agreement, gave them nothing more than what they already processed as citizens of this state. That's simply not correct. I was looking at the settlement agreement, yesterday and just a few examples of the rights of the Catawba Nation posses that John Q. Citizen and the rest of us do not posses is the fact they're beneficiaries of a trust fund that has been setup. They can obtain they're hunting and fishing licenses without obtaining a fee. They can impose their own regulations regarding hunting and fishing licenses on the regulation -- on the reservation. Certain income is not taxable by state or federal taxing laws. They can operate Bingo games. Their real property is exempt from state and county taxes. All of the personal property including automobiles is exempt from county and state taxes. Sales on the reservation are not subject to sales tax and that certain property is exempt

from state and federal -- state taxes. And also, the key to this case, section 16.8, another right given to the members of the Catawba Nation is this, the tribe may permit on its reservation video poker or some electronic play devices to the same extent that the devices are authorized by state law.

Now, all of these rights were approved by the United States Congress and memorialized by the general assembly and a statue. The state does not claim -- the state claims that the video gaming is not authorized because in 1999 Act 125 was passed that banned video poker in South Carolina. And in 2007 the Catawba versus The State of South Carolina, our supreme court held the Catawba Indian Nation was bound by subsequent state legislative enactments affecting video poker devices, that is, they were allowed video poker the state law was changed and it affected them as well as everybody else. And if that's all we had, if that's all this court had before it, the state would win and the Catawbas would lose but we got a lot more before the court than just that.

The first thing we have is the Gambling Cruise Act that was passed in the year 2005 and as of the Casino Ventures Case from the fourth circuit explained congress enacted the Johnson Act in doing so it expanded and extended state police jurisdiction to costal states in this country.

The legislature, our legislature, then in response to the Johnson Act passed the Gambling Cruise Act in the year 2005, in that, in that active the general assembly had the authority to prohibit gambling on federal territorial waters or to allow it and regulate it and tax it. The general assembly opted to delegate that authority to the costal counties of this state. Pursuant to that delegation Horry County and City of North Charleston passed ordinances which allowed video gaming in federal territorial waters regulated and it taxed and that's what's happening today to the cruises to nowhere that leave Horry County and North Charleston and they go out to federal territorial waters where they legally participate in video gambling.

We make no assertion that this cruise act somehow modified Act 125 which banned video poker in South Carolina in 1999. What the Gambling Cruise Act did was to trigger the operation for section 16.8 of the settlement agreement which allows, permits, the Catawba Nation on its reservation to do whatever the State of South Carolina has permitted somebody else to do regarding video gaming. The Catawba Nation may permit on its reservation video poker to the same extent that the devices are authorized by state law.

Now, to the same extent does not have a geographic component. Extent means scope. Scope means operation or actives. So, to determine what is the same extent the

question is what is going on? What is, what is, being allowed. Not where it's allowed but what is allowed. And the what is, the what is, video gaming is allowed by South Carolina through the deligation of general -- the deligation, its authority to the costal county to permit video gaming on federal territorial waters. We can answer the questions as to what is allowed by looking at the statue, Gambling Cruise Statue and there it authorizes various types of gaming machines including video poker, slot machines and a variety of others. We can answer the question where is it allowed by going to section 16.8 of the settlement agreement between the State of South Carolina and the Catawbas. And where it's allowed it says, it shall be allowed -- whatever is happening over here it shall be allowed on its reservation.

Now, the state said well, I guess the state could somehow authorize, allow, permit to gambling, gambling in Paris, France. Well, that analogy is simply -- points out the state just misses the bar. South Carolina has no authority, it has no police power, it has no jurisdiction over things that happens over in Paris, France but it has absolute undisputed police power jurisdiction over federal territorial waters of the United States and there it exercises authority to allow video gaming there and if it allows it there to the same extent it must allow it to the

Catawba Nation pursuant to the settlement agreement; for example, if the state legislature passed a law that said well, we're going to allow Roulette Tables and that's all. Well, that's all the Catawbas could do, they could have Roulette Tables on their reservation but, of course, we know that the cruise -- Gamble Cruise Act is very broad as far as allowing various types of gaming to operate.

Within the borders of South Carolina, the settlement agreement did not say that. It says to the same extent the state allows video gaming the Catawbas are allowed to do it on its reservation.

I heard my friend say well, the convince store owner can't do it, you can't allow a video machine in his store. Well, that's true. That's true. But the convince store owner was not a party to the settlement agreement between the State of South Carolina and the Catawba -- members of the Catawba Nation.

As the supreme court said the Catawba Nation and its reservation is subject to subsequent enactments by state law. The ban on video poker, 1999 it was subject to that ban. Later though, in 2005 the cruise -- Gambling Cruise Ship Act was passed that triggering section 16.8 and it's bound, the state is bound, everybody's bound by these subsequent enactments by the state legislature.

Now, I don't believe there's really any ambiguity

here. There's a interplay between section 16.8 or the contract of the Catawbas and the State of South Carolina and the Gambling Cruise Act but to the extent this court may believe there's some ambiguity I would urge the court to follow the -- that has been in place for over 200 years every supreme court decision that has addressed the matters dealing with Native Americas all -- including the case of Catawba versus State of South Carolina that any ambiguity when Native Americans are involved in a contract or statue whatever it may be Native Americans are always -- the ambiguity should always be construed liberally in favor of Native Americans and also interpreted to their benefit. Thank you, Judge.

THE COURT: All right.

MR. JONES: Briefly, Your Honor. What I'm hearing from the plaintiff is they want the solvency of the Catawba Nation to be given back to have a superior right than any other citizen in the State of South Carolina. The Catawba Case, 2007 addressed that very issue that they contacted away that sloven right and in the last pages of the Catawba decision it states that they're subjected like any other citizen to the laws of this state as far as the gambling devices.

What -- it was acknowledged in the Catawba Case by the Catawba Tribe at the time it brought it that there was a

law of prohibition on video poker at that time. As I've mentioned I've heard nothing from the plaintiff that says that the lanuage and footnote six and six that say the ban is still in play has been changed. And it's interesting to note also, Your Honor, that in the Start Answer Case that was a decision by Justice Pleicones and you had Justice Toal, Moore and Waller and you had Justice Burnett who was a very stong decent.

In the Catawba Case Justice Burnett who wrote the decent in Start Answer wrote the Catawba Case you had Goodstein, Pleicones, Moore and Waller. The reason I point those out, Your Honor, is when the Catawba Case was decided the supreme court knew about the Start Answer Case and the Gambling Cruise Act was on the books. As I've -- as the brief said and I've said more than once here today, Your Honor, that the Start Answer Case it said we're not going to do anything that's going to change -- our decision is not going to change the state law Act 125 of 1999; it is banned within the state. So, so, at bottom, the tribe is asking for something that no other citizen has. And if the tribe -- if that argument prevails, Your Honor, myself or Mr. Cook or Chief Keel or Your Honor could have video poker. So, we would ask for the reasons we set fourth in the brief and we've argued today that their motion for summery judgment be denied, ours be granted and that a declaratory

judgment denied, thank you.

THE COURT: Okay. This is how it's a little different, tomorrow I'm going to sit on supreme court on two cases, all right. Each of them has two law clerks. Briefs have been filed for six months. All of those law clerks write briefs on how they think the things should -- they address everything, every case is attached, you know. I've read them all. I don't even need to go down there to rule but I will. I'll give everybody a fair, fair, shake, okay. But then you walk in here and I've got a docket this week more cases than our supreme court will hear in a year actually a bunch of them are summery judgment dismissals and so fourth. Any of them that I grant will be appealed, you know.

So, but fortunately I did read the brief before I came in and I understand whether y'all believe it or not all the issues involved, so. And I will explain that to you at the sidebar not on the record about how easy attuned -- and, of course, supreme court will probably decide and I guess Justice Toal will recuse. She has to recuse because she spent a long time dealing with it as I'm aware, so.

MR. JONES: Yes, sir.

THE COURT: So, I, I, haven't read for instance the Casino Venturers Case which I think might have some deserved reading at least, you know. So, y'all just prepare

orders.

But, Mr. Jones, do not send me a 38 page order. That's not necessary.

MR. JONES: Yes, sir.

THE COURT: Not necessary.

MR. JONES: So noted, Your Honor.

THE COURT: And y'all, y'all, send an order and I assure that I will read, you know, all attachments, all cases and give it my best shot. I think it goes up one way or another. Anyway, that's neither here nor there. I need, I need, orders to address all issues so it won't be sent back down from appellate defense whether I'm right or wrong it doesn't matter. You know, I rule for you or I rule for you court of appeals says he was wrong they appeal and supreme court says, you know, whatever. So, there you go but I do understand the issue.

And I do have a problem with just, off the top now, out in the ocean and being on the reservation being synonymous but that's -- probably overcome that but I need to tell you what's troubling me before we get into it. So, if y'all will step up I'll tell you.

(Whereupon, a bench conference was held off the record.)

END OF PROCEEDINGS

COUNTY OF RICHLAND)

CERTIFICATE OF REPORTER

I, Crystal Holmes, hereby certify that I reported the preceding case entitled Catawba Indian Nation, et al. Vs. State of South Carolina, Case No. 2012-CP-40-0626, at the Richland County Courthouse, April 2, 2012.

I FURTHER CERTIFY that the foregoing pages 1 through 23 constitute a true, accurate and full transcript of said hearing.

I FURTHER CERTIFY that I am not employed by any of the parties hereto and I have no financial interest in the outcome of said case.

IN WITNESS WHEREOF, I have heretofore set my hand and seal at Richland County on this 5th day of April, 2012.

Crystal Holmes, Court Reporter
and Notary Public for the
State of South Carolina my
Commission Expires:
April 21 2014

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
Catawba Indian Tribe of South Carolina,	)	C. A. No.
Plaintiff,	)	
	)	**COMPLAINT**
vs.	)	
The State of South Carolina,	)	
Defendant.	)	

Plaintiff, The Catawba Indian Tribe of South Carolina (the "Tribe"), complaining of defendant alleges as follows:

1. The Tribe is a federally recognized Indian tribe, existing from time immemorial within the present day boundaries of the State of South Carolina.

2. Defendant, the State of South Carolina (the "State"), is a corporate body politic having the power to sue and be sued.

3. Federally recognized Indian tribes, including the Catawba Indian Tribe, are recognized as sovereign governments.

4. Under Article I of the United States Constitution, Congress has plenary power with respect to Indian tribes.

5. In 1980, the Tribe commenced an action against the State of South Carolina to reclaim possession of 144,000 acres reserved to the Tribe in treaties with the King of England in 1760 and 1763, and to recover trespass damages against those in possession of the land wrongfully taken by the State in violation of the Non-intercourse Act of 1790, *codified* as 25 U.S.C. §177. Congress enacted the Non-intercourse Act to protect Indian tribes from land confiscations by non-Indians without federal consent.

6. In 1989, the United States Court of Appeals for the Fourth Circuit rejected the State's argument that the case could not proceed, and, thereafter the Tribe and the State engaged in extended negotiations to settle the Tribe's land claims.

7. In 1993, the negotiations culminated in the execution of a Memorandum of Agreement and an Agreement in Principle (collectively, the "Settlement Agreement"), contingent upon ratification by the South Carolina General Assembly and by the Congress of the United States of America.

8. Acting pursuant to the Congressional delegation of authority, the General Assembly enacted legislation which would otherwise have been impermissible as "special legislation" under the South Carolina Constitution, and, only with the consent of the Tribe, the General Assembly has the authority to amend legislation adopted to settle the Tribe's land claim litigation.

9. On June 14, 1993, the State enacted the Catawba Indian Claims Settlement Act, *codified*, as S.C. Code Ann. §§27-16-40 to 140 (the "State Act") to confirm the terms of the Settlement Agreement. By the terms of the State Act, and because the United States Constitution vest Congress with plenary authority over Indian affairs, neither the State Act nor the Settlement Agreement could become effective without an Act of Congress.

10. On October 27, 1993, Congress enacted the Catawba Indian Tribe Land Claims Settlement Act of 1993, Pub. L. No. 103-116, 107 Stat. 1118, *codified as* 25 U.S.C. §§ 941-941n (the "Settlement Act") in furtherance of its established policy, as set forth in the opening section of the Act, "to promote Tribal self-determination and economic self-sufficiency."

11. In 25 U.S.C. §§ 941-941n, Congress delegated to the State of South Carolina the authority to enact legislation relating to the Tribe, but, at the same time, limited the authority of

the State of South Carolina to amend such state legislation only "if consent to such amendment is given by both the State and the Tribe" pursuant to 25 U.S.C. § 941m(f).

12. Recounting the history of the Tribe's land claims against South Carolina, Congress declared that the "parties' settlement agreement constitutes a good faith effort to resolve these lawsuits." Congress further declared that its purpose was to "approve, ratify and confirm the settlement agreement entered into by the non-Indian settlement parties and the Tribe except as otherwise provided by this Act."

13. In Section 14 of the Settlement Act, *codified* as 25 U.S.C. §941*l*, Congress provided that "[t]he Indian Gaming Regulatory Act (25 U.S.C. §§2701 et seq.) ("IGRA") shall not apply to the Tribe," but instead confirmed that "the Tribe shall have the rights and responsibilities set forth in the Settlement Agreement and the State Act with respect to the conduct of games of chance."

14. Congress further provided that the Settlement Agreement and the State Act are "approved, ratified, and confirmed by the United States... and shall be complied with in the same manner and to the same extent as if they had been enacted into Federal law."

15. The congressionally ratified State Act and the Settlement Agreement provided that:

> (a) The tribe could engage in bingo games, subject to certain conditions, in two locations, S.C. Code Ann. §27-16-110(B) – (F), Settlement Agreement §§16.3 – 16.7, and
>
> (b) "The Tribe may permit on its Reservation video poker or similar electronic play devices to the same extent that the devices are authorized by State law. The Tribe is subject to all taxes, license requirements, regulations and fees, governing electronic play devices provided by State law, except if the Reservation is located in a county or counties which prohibit the devices pursuant to State law, the Tribe nonetheless must be permitted to operate the devices on the Reservation if the governing body of

> the Tribe so authorizes, subject to all taxes, license requirements, regulations, and fees governing electronic play devices provided by State law." S.C. Code Ann. §27-16-110(G); Settlement Agreement §16.8.

16. In recognition of the supremacy of federal law and the plenary authority of Congress with respect to Indian tribes, the Settlement Act provided authorization for subsequent amendments to the Settlement Agreement or State Act with the consent of both the State and the Tribe, providing in 25 U.S.C. §941m(f):

> Consent is hereby given to the Tribe and the State to amend the Settlement Agreement and the State Act if consent to such amendment is given by both the State and the Tribe, and if such amendment relates to
>
> (1) the jurisdiction, enforcement, or application of civil, criminal, regulatory, or tax laws of the Tribe and the State;
>
> (2) the allocation or determination of governmental responsibility of the State and the Tribe over specified subject matters or specified geographical areas, or both, including provisions for concurrent jurisdiction between the State and the Tribe;
>
> (3) the allocation of jurisdiction between the Tribal courts and the State courts; or
>
> (4) technical and other corrections and revisions to conform the State Act and the Agreement in Principle attached to the State Act to the Settlement Agreement.

17. At the time of the Settlement Act, all parties involved – Congress, the Tribe and the State – understood that IGRA functioned to promote Tribal self-determination and economic self-sufficiency for Indian tribes across the country, and by confirming provisions for the Tribe to operate bingo games in two locations and video poker or similar electronic play devices on its Reservation, the Tribe could achieve goals substantially equivalent to IGRA by generating significant governmental revenues. These gaming rights were intended to be competitively superior to those available to others in South Carolina, and along with the monetary payments

provided in the Settlement Agreement, the State Act, and the Settlement Act, constituted the primary consideration for the Tribe's Agreement to dismiss its land claims litigation and for the Tribe's concession that the IGRA would not apply to the Tribe.

18. Pursuant to this compromise, the Tribe is, upon information and belief, one of only six Indian tribes in the country that does not fall within the IGRA.

19. Prior to invoking its Settlement Act right to operate video poker or similar electronic play devices on its Reservation, the Tribe sought to generate governmental revenue and to achieve economic development through bingo gaming operations envisioned by the Settlement Agreement.

20. In 1997, the Tribe commenced bingo games at a single facility in York County, South Carolina. These games generated a significant part of the governmental revenues of the Tribe.

21. In 1998, without the consent of the Tribe, the State by Act No. 334 of 1998 amended the State Act to change the description of bingo allowed under the State Act and to change the manner in which the Tribe could operate its game and the manner in which it was taxed on the game.

22. Commencing in 2001 and in all material times hereafter, the State of South Carolina has pursued large-scale gambling in competition with the Tribe's bingo facility by promoting and operating statewide gambling through the South Carolina Education Lottery (the "Lottery").

23. Said Lottery has drawn customers away from the Tribe's bingo operations by promoting and selling "Classic Bingo" instant ticket games, and by promoting and selling

alternative, more lucrative games, such as Las Vega style casino gambling, including "Vegas Jackpot" and "Vegas Jackpot Red."

24. The State's entry into the gambling business has caused a substantial and irreversible decline in the Tribe's net revenues from bingo and diminished the consideration exchanged for a dismissal of the Tribe's land claims.

25. The dramatic decline in bingo revenues, a primary source of governmental finances for the Tribe, has caused and continues to cause a fiscal crisis for the Tribe.

26. The Lottery, in addition to undermining the economic viability of the Tribe's existing bingo facility, undermines the value of the Tribe's option to pursue a second bingo facility under the terms of the Settlement Agreement.

27. To offset losses experienced by the Tribe as a consequence of the State's entry into the gambling business, the Tribe, with the support of the local government of Orangeburg County, and the Town of Santee, sought to enter into agreements with Congress and the State to operate a federally-regulated bingo facility near Santee, South Carolina. This effort by the Tribe would bring desperately needed jobs and revenues to the area, and has been endorsed by all the elected officials in the region, by the local business community, by the local media, and by the area's Congressman, James Clyburn. Plaintiff is informed and believes however, that State officials have blocked the Tribe's efforts to secure a more competitive bingo game.

28. Lacking the prospects for succeeding with a second bingo operation, and faced with continuing substantial losses in bingo revenue, the Tribe has proceeded to pursue development of its alternative gaming option under the Settlement Act, to wit: video poker gaming on its Reservation.

29. In response to the Tribe's announcement of its plans to pursue video poker and similar electronic games on its Reservation as allowed by the Settlement Agreement, the State Act and the Settlement Act, state officials including the Attorney General have threatened, under color of State law, to seize or authorize the seizure of video poker or similar electronic play devices, to arrest or authorize the arrest of individuals associated with the Tribe's operation of video poker or similar electronic play devices on its Reservation, or to otherwise take action against the Tribe or its agents to prevent the Tribe from operating video poker or similar electronic play devices on its Reservation.

30. Plaintiff seeks a declaratory judgment pursuant to S.C. Code Ann. §§15-53-10 et seq., to determine its rights, status and other legal relations under the Settlement Agreement, Settlement Act and State Act with respect to the conduct of bingo and the unilateral effort by the State to amend the terms of the Settlement Agreement and State Act without the consent of the Tribe.

31. Further, plaintiff seeks injunctive relief pursuant to Rule 65, SCRCP to restrain and enjoin defendant from taking actions inconsistent with plaintiff's rights with respect to bingo and video poker and similar electronic games as provided in the Settlement Act, Settlement Agreement and State Act prior to its unlawful amendment.

AS AND FOR A FIRST CAUSE OF ACTION

32. The Tribe reasserts and realleges the facts and matters contained in paragraphs one (1) through thirty-one (31) above as fully and completely as if restated herein verbatim.

33. An actual controversy exists between the Tribe and the State with respect to the status of the Tribe's rights to operate video poker or similar electronic play devices on its Reservation and the right to conduct the game of bingo at a competitive advantage with non-

tribal bingo operators as provided by the State Act prior to its wrongful amendment by the General Assembly.

34. The Tribe retains the right, as a matter of law, to operate video poker or similar electronic play devices on its Reservation and may proceed to do so.

35. The Tribe retains the right to conduct its bingo games in accordance with the Settlement Act, Settlement Agreement and State Act prior to its wrongful amendment.

36. The Tribe is entitled to judgment in its favor and a declaration that it has the present right to operate video poker or similar electronic play devices on its Reservation and conduct the game of bingo in accordance with the Settlement Act, Settlement Agreement and State Act prior to its wrongful amendment.

AS AND FOR A SECOND CAUSE OF ACTION

37. The Tribe reasserts and realleges the facts and matters contained in paragraphs one (1) through thirty-six (36) above as fully and completely as if restated herein verbatim.

38. As described hereinabove, the State has interfered with the Tribe's conduct of bingo, and threatens to interfere with the Tribe's right to operate video poker or similar electronic play devices on its Reservation.

39. The Tribe faces substantial, immediate and continuing irreparable injury because the State's actions will prevent the Tribe from generating critically needed governmental revenues and, therefore, deter the Tribe from its tribal self-determination and economic self-sufficiency as intended by Congress, and the Tribe has no adequate remedy at law.

40. No harm will come to the State from the issuance of an injunction or other equitable relief to prevent interference with the Tribe's rights to operate video poker or similar

electronic play devices on its Reservation or conduct bingo in accordance with the Settlement Act, the Settlement Agreement and the State Act prior to its wrongful amendment.

41. The Tribe is informed and believes it is entitled to judgment in its favor and an order of the court permanently enjoining and restraining defendant and its agents, employees or representatives from proceeding in any manner to interfere with the Tribe's right to conduct video poker or similar electronic play devices on its Reservation or conduct bingo in accordance with the Settlement Act, the Settlement Agreement and the State Act prior to its wrongful amendment.

AS AND FOR A THIRD CAUSE OF ACTION

42. The Tribe reasserts and realleges the facts and matters contained in paragraphs one (1) through forty-one (41) above as fully and completely as if restated herein verbatim.

43. The State, pursuant to legislation adopted in 1996 and 1998 and codified as Section 12-21-4030 of the South Carolina Code of Laws, without the consent of the Tribe, modified the manner in which bingo was to be conducted by the Tribe by imposing an $18 entrance fee surcharge on the Tribe's bingo operation thereby diminishing the competitive advantage of the Tribe's bingo license that was a significant portion of the consideration given to the Tribe in exchange for the dismissal of the land claim lawsuit notwithstanding the written assurance of the Director of the Department of Revenue that the amendment was not to apply to the Tribe. A copy of the letter of Burnet R. Maybank, III is attached hereto as Exhibit A and incorporated herein by reference.

44. Section 12-21-4030 is an *ultra vires* act and is void as against public policy. The statute, which requires the imposition of an $18 entrance fee, which fee is not remitted to the

State but is mandated to be kept by the holder of a bingo license, provides no benefit to the State and the only beneficiary is an operator to whom the fee is paid.

WHEREFORE, plaintiff prays that this court issue its order declaring that the Tribe has the present right to operate video poker or similar electronic play devices on its Reservation and conduct bingo in accordance with the Settlement Act, the Settlement Agreement and the State Act prior to its wrongful amendment; issue an order restraining and enjoining permanently the State, its agents, employees or representatives from interfering in any manner with the Tribe's right to conduct video poker or similar electronic play devices on its Reservation or conduct bingo in accordance with the Settlement Act, the Settlement Agreement and the State Act prior to its wrongful amendment; issue an order declaring that the Tribe is not obligated to charge nor to pay the entrance fee surcharge imposed against the Tribe's bingo operation; and, award attorney fees and costs together with such other relief as may be appropriate.

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Columbia, South Carolina
July 28, 2005

State of South Carolina

Department of Revenue

DAVID M BEASLEY
Governor

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Director

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May 3, 1996

Wanda George Warren
Executive Director
Catawba Indian Nation
Post Office Box 11106
Rock Hill, SC 29731

Dear Ms. Warren:

As you may know, legislation has been introduced in the South Carolina General Assembly this year that impacts the charitable bingo industry in South Carolina (H.4557). The bill has passed the House of Representatives and is currently being debated in the Senate. The Department of Revenue was involved in drafting this legislation and is strongly supporting its passage.

While the legislation changes the amount and procedures for bingo taxes to be paid, reporting requirements, and other policies affecting the state's charitable bingo industry, let me assure you it was never the intent of the Department to impact in any way the current laws outlining the Catawba Indian Nation's Bingo operations. Simply put, we never considered the Catawba's bingo situation when we drafted the legislation. Consequently, the Department of Revenue never had any intention of altering or amending the guidelines regulating the Tribe's Bingo operations as defined in the Settlement Agreement and The Catawba Indian Claims Settlement Act.

We look forward to working with you to develop your two bingo facilities in the near future and will be glad to assist you in any way we can. If you have any questions, please do not hesitate to contact me.

Yours very truly,

Burnet R. Maybank, III
Director

BRM/afw
cc Harry Miley
Gary Turner
Meredith Cleland

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
J. Ernest Kinard, Jr., Circuit Court Judge

Case No. 2012-CP-40-00626

The Catawba Indian Nation a/k/a
The Catawba Indian Nation of South Carolina a/k/a
The Catawba Indian Tribe of South Carolina ..... Appellant,

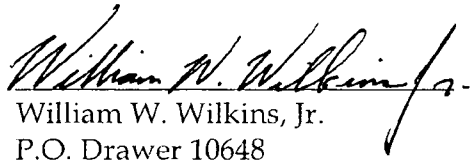
vs.

State of South Carolina and Mark Keel, in
His official capacity as Chief of the South
Carolina Law Enforcement Division ..... Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

NEXSEN PRUET, LLC



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals
Appellate Case No. 2012-212118

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
J. Ernest Kinard, Jr., Circuit Court Judge

Case No. 2012-CP-40-00626

The Catawba Indian Nation a/k/a
The Catawba Indian Nation of South Carolina a/k/a
The Catawba Indian Tribe of South Carolina ..... Appellant,

vs.

State of South Carolina and Mark Keel, in
His office capacity as Chief of the South
Carolina Law Enforcement Division..... Respondents.

PROOF OF SERVICE

I certify that I have served the Record on Appeal by depositing a copy of same in the United States Mail, postage prepaid addressed to Respondents' attorney of record, C. Havird Jones, Jr., Assistant Deputy Attorney General Office of the South Carolina Attorney General, P.O. Box 11549, Columbia, South Carolina 29211.

April 5, 2013

Brigid M. Jones

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