

STATE OF INDIANA)
) SS:
COUNTY OF MARION) CAUSE NO.: 49D05-2104-PL-013434

END GAME HOLDINGS, LLC;
LAELAPS, LLC; MD TWENTY-
TWENTY LLC; DANIEL J. HASLER;
STEPHEN C. HILBERT; MATTHEW
D. WHETSTONE; WINDY CITY H&C
INVESTORS, LLC,

Plaintiffs,

v.

INDIANA GAMING COMMISSION,
MICHAEL MCMAINS, in his official
Capacity as Chairman of the Indiana
Gaming Commission; SARA GONSO
TAIT, in her official capacity as
Executive Director of the Indiana
Gaming Commission,

Defendants.

**INDIANA GAMING COMMISSION'S OPPOSITION
TO PLAINTIFFS' PETITION FOR "STAY" AND FOR TRO**

The Indiana Gaming Commission (the "Commission") and its Chairman and Executive Director, by their attorneys, submit this Opposition to plaintiffs' April 30 "petition for stay" or for a temporary restraining order seeking to suspend a fully authorized and properly adopted Emergency Rule that has been in effect for over one month and applies to all casino licensees and applicants in Indiana, as well as their substantial owners.

As shown below, the only requirement imposed on plaintiffs by the Rule is to file timely applications for licensure. And the Commission has offered to extend the due date for plaintiffs' applications by a full 30 days.

If and when plaintiffs apply for licenses, their applications will be reviewed and considered, like all others. If the Commission staff, based on the information submitted, finds some reason to suggest that an applicant is unsuitable to hold a license, then the Rule would require the *casino owner licensee* in which that applicant owns an interest either to redeem the ownership interest or risk failing to qualify for continued licensure to operate. None of this has happened or may ever happen. The Commission has not reviewed or formed a judgment about any plaintiff's suitability; it has taken no action against any plaintiff; it has not threatened to deny any license to anyone; and it has not "taken" or threatened to take anyone's property. Nor could the Commission address anyone's suitability for licensure without numerous steps and due process to all parties involved. In other words, it would have to create a record and take agency action suitable for judicial review.

For the reasons explained below the plaintiffs' motion fails to meet any of the requirements for injunctive relief and should be denied. The Commission submits this opposition without waiving its argument that the Court lacks subject matter jurisdiction to hear this case.

BACKGROUND AND RELEVANT FACTS

In passing the Riverboat Gaming Act, the Legislature “intended to benefit the people of Indiana by promoting tourism and assisting economic development. **The public’s confidence and trust will be maintained only through:**

- (1) Comprehensive law enforcement supervision; and
- (2) **The strict regulation of facilities, persons, associations, and gambling operations** under this article.

I.C. § 4-33-1-2 (emphasis added). The Seventh Circuit has observed that “everything’s different in a regulated industry, and it’s even more different in a super-regulated, explosively charged business like legal gambling. There’s a lot of politics involved in this sort of undertaking and a lot of minefields to traverse before the prize – a license to engage in legal gambling – is won.” *Mays v. Trump Indiana, Inc.*, 255 F.3d 351, 353 (7th Cir. 2001) (addressing the Riverboat Gaming Act).

The Commission has important regulatory duties and has been granted broad power by the Legislature to fulfill those responsibilities. Among other things:

- The Commission has “all powers necessary and proper to fully and effectively execute” the Act, including in determining the eligibility of applicants for licenses. I.C. § 4-33-4-1.
- In doing so the Act mandates that the Commission “**shall** consider” persons who directly or indirectly control a licensed casino. I.C. § 4-33-6-4(a)(1)(B) (emphasis added).
- The Commission “**shall** adopt standards” for the licensure of persons regulated under Indiana Code article 4-33. I.C. § 4-33-4-5 (emphasis

added). This specifically includes a duty to assess the suitability of persons with direct or indirect interests. *See* I.C. § 4-33-6-4(a)(1)(B).

- Because timely and accurate disclosure of information is paramount, the Commission “**shall** require” that records—including financial statements—be maintained in a manner prescribed by the Commission. I.C. § 4-33-4-6 (emphasis added).
- To do its job as regulator, the Commission may require the submission of an array of types of information, including “**any other information the commission considers necessary** for the effective administration of the Article.” I.C. § 4-33-5-1(15) (emphasis added).
- The Commission “**shall** ... [a]dopt rules” the Commission determines necessary to protect or enhance the credibility and integrity of operations pursuant to the Act. I.C. § 4-33-4-3(a)(1) (emphasis added).
- The Commission “**shall** ... [a]dopt emergency rules” if it determines the need is immediate and substantial and the rule is likely to address the need. I.C. § 4-33-4-3(a)(8) (emphasis added).
- The Commission “**shall** determine” the occupations that require a license. I.C. § 4-33-8-1 (emphasis added).
- A casino owner’s license is a revocable privilege and “**is not a property right.**” I.C. § 4-33-6-17.
- Because an applicant is seeking a privilege, he or it assumes and accepts any and all risk of adverse publicity, notoriety, embarrassment, criticism, or other action **or financial loss that may occur in connection with the application process** or the public disclosure of information requested. 68 IAC 2-1-4(b)(1).

Since early 2020, Indiana’s gaming industry has been the subject of widely reported derogatory information concerning entities in which these plaintiffs hold ownership. The information includes the federal indictment of a licensed Indiana casino owner and executive, concerning references to another licensed casino owner and executive in

court documents, casino ownership transfers hidden from the Commission, and undisclosed ties to lobbyists. These events have cast a shadow over the industry and served to undermine its reputation and integrity. Refusal to provide information for licensure creates a blind spot in the Commission's ability to ascertain the nature of casino transactions, the associations of casino owners, and the overall suitability to hold ownership interest. Despite the Commission's best efforts to assist the casino licensees in achieving compliance with statute, key requirements of licensure remain unresolved. This is untenable given the responsibilities of the Commission set forth in law. As the Act makes clear, public trust requires strict regulation, which demands adequate information and transparency concerning casino ownership and operations. The Commission is the regulator with the duty to ensure that such demands are adequately met.

When a need for regulatory action arises and the extended time needed for ordinary rulemaking will not afford an adequate solution, the Commission is, as noted above, directed to act through emergency rules. In this instance the Commission, despite no requirement under law to do so, shared the proposed Emergency Rule to industry stakeholders and sought comments and input. Affidavit of Sara Gonso Tait, para. 2. Licensees expressed support for the Rule, and also offered feedback and clarifying language. *Id.* para. 2. Several licensees, including Spectacle Entertainment,¹ submitted written

¹ The plaintiffs own shares or units in Spectacle Entertainment Group, LLC and/or its affiliates, including Lucy Luck Gaming, LLC. Verified Petition ¶ 2.

comments and proposed changes to the Rule. *Id.* para. 3. Many of those changes were incorporated into the Emergency Rule ultimately adopted by the Commission. *Id.*

The Commission approved the Emergency Rule at a properly noticed meeting on March 23, 2021, and the Rule became effective the next day, March 24. *Id.* paras. 4-6. The version of the Rule prepared by Legislative Services Agency is attached as Exhibit D to the Verified Petition. The central requirement of the Rule is that (a) any holder of an equity interest in a casino owner's licensee or applicant that is not publicly traded and (b) any holder of an equity interest in its substantial owner, with voting rights, regardless of equity percentage, is required to hold a Level 1 occupational license. This means that affected owners of licensees and applicants must disclose significant information about their suitability to be involved in the business and must themselves qualify for licensure. If such a person does not comply or upon review is deemed unsuitable, then the *casino owner licensee* faces a choice: either redeem the ownership interest of the unsuitable person or cease to qualify as a licensee. No plaintiff is a casino owner licensee; they are all investors.

On March 31, 2021, the Commission sent written implementation memos to casino operators including Spectacle and Lucy Luck. Affidavit of Danielle Leek, para. 2. The due dates for license renewal applications by those entities were May 14 for Lucy Luck and June 2 for Spectacle. *Id.* para. 3. Spectacle and Lucy Luck have complied with the requirements of the Rule, as have other subjects of the Rule to date. *Id.* para. 4. The submissions

by Spectacle and Lucy Luck demonstrate that they have acted under the Rule to change their corporate charters to provide for the redemption of the ownership interest of any person who may in the future be deemed unsuitable to participate. *Id.*

No action of any kind has been taken by the Commission, or threatened by the Commission, against any of the plaintiffs under the Rule. Tait Aff. para. 9.

Plaintiffs are required to submit applications by Friday, May 7, 2021, unless the due date is extended upon request to the Commission. Leek Aff. para. 5. If an application is submitted and, after review, Commission staff recommends denial for suitability reasons, no denial could occur before a public meeting of the Commission, subject to formal advance notice and appeal rights after the Commission acts. *See* IC 4-33-4-17. Specifically:

- The Indiana Office of Administrative Law Proceedings (“OALP”) would docket the matter and assign an Administrative Law Judge to conduct further proceedings;
- After a hearing, the ALJ would make a case disposition decision;
- The Commission, as final authority, would accept or reject the decision of the ALJ; and
- If the ALJ decision is adverse to the applicant, and the Commission accepts it, the aggrieved party may then pursue judicial review.

In this case, each of the plaintiffs could very well satisfy the requirements for licensure and be approved. In fact, one of the plaintiffs, Steven Hilbert, was a previous Level 1 licensee. *Id.* para. 6. Two other plaintiffs have, within the past year, completed

and submitted full Level 1 applications; those applications would have been reviewed and acted upon if they had not been withdrawn by the sponsoring casino licensee. *Id.*

In their effort to paint a picture of threatened harm, plaintiffs' motion for injunctive relief misstates several facts and relies on unsupported assertions about the Commission's presumed "intentions" or actions it supposedly has "threatened," including that:

- The Commission "has identified no basis for an emergency rule" (Motion, ¶ 13(a)). Incorrect. The Commission's justifications for the Emergency Rule were articulated in a public, transcribed meeting, included in a formal written Resolution and explained to licensees and applicants. Tait Aff. para. 5.
- The Commission "intends to reject" the license applications of the plaintiffs (Motion, ¶ 10). Unsupported and incorrect. The Commission has formed no such intention and taken no such action. Indeed, it cannot responsibly act on an application until the application is received and reviewed. *Id.* para. 8.
- The Commission "threatens to revoke the license of a pending casino project in Vigo County, Indiana, in retaliation for" plaintiffs filing this lawsuit. (Motion, ¶ 11). Unsupported and incorrect. The Commission has made no such threat, and any such action would require the Commission to vote at a public meeting and provide for full appeal rights by the licensee if necessary. *Id.* para. 10.
- The Commission supposedly "called an executive session on Thursday, April 29, 2021 10:00 a.m. to address the filing of this action," (Motion, ¶ 6), implying that notice was not properly given. This is incorrect. Notice of that executive session properly was posted on April 26, 2021, at about 9:30 a.m. *Id.* para. 11.
- The Commission is forcing "redemption offers" to the plaintiffs in an amount described as "unreasonably low." (Motion, ¶ 8). Incorrect. The Commission has not made or required any redemption offer to these plaintiffs, at any price. *Id.* para. 12. And, as noted above, no person has a property interest in a casino license.

- The Commission’s “current composition is improper” because in recent months it “has consisted of only six (6) members.” (Motion, ¶ 15). Actually the Commission has been acting with five members following two resignations in recent months. *Id.* para. 13. But under Indiana Code section 4-33-3-20, only four affirmative votes are required for the Commission to take official action, and this occurred in the approval of the Emergency Rule.

In short, the Commission has taken no “agency action” whatsoever against plaintiffs, let alone action sufficient to warrant a petition for judicial review. The Commission is not threatening to take any plaintiff’s property.² Nor is there anything resembling an emergency here. **If some action is taken against them in the future**, plaintiffs will receive the due process required by AOPA, including the opportunity to address the Commission, and an Administrative Law Judge, to develop a record, to exhaust their rights to appeal, and then to seek judicial review if they are unsuccessful in that process.

Until then, there is no issue for this Court to review. Indeed, defendants will demonstrate in a separate motion to dismiss the reasons why plaintiffs’ petition fails to invoke this Court’s jurisdiction or to present any ripe issue for resolution.

LEGAL STANDARD

“The power to issue a preliminary injunction **should be used sparingly**, and such relief should not be granted **except in rare instances in which the law and facts are**

² Based on their allegations, plaintiffs are in negotiations with the entities in which they hold ownership interests for the potential redemption of those interests. That is their choice and the subject of a private negotiation. Parties should not invoke judicial action in an effort to influence private negotiations.

clearly within the moving party's favor." *Reilly v. Daly*, 666 N.E.2d 439, 443 (Ind. Ct. App. 1996) (emphasis added).

To obtain preliminary injunctive relief, "the moving party must demonstrate by a preponderance of the evidence: (1) a reasonable likelihood of success at trial; (2) the remedies at law are inadequate; (3) the threatened injury to the movant outweighs the potential harm to the nonmoving party from the granting of an injunction; and (4) the public interest would not be disserved by granting the requested injunction." *Cent. Ind. Podiatry, P.C. v. Krueger*, 882 N.E.2d 723, 727 (Ind. 2008). Demonstrating the first element—a *prima facie* case—requires a plaintiff to show "that success on the merits is probable." *Bowling v. Nicholson*, 51 N.E.3d 439, 444–45 (Ind. Ct. App. 2016).

Plaintiffs face an even higher burden here because an injunction would adversely affect the public's interest in strict regulation of the gaming industry, which is necessary for all the reasons above. Where an injunction "will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff." *Wells v. Auberry*, 429 N.E.2d 679, 684 (Ind. Ct. App. 1982) (quoting *Yakus v. United States*, 321 U.S. 414, 440–41 (1944)). "In cases where the public interest may be adversely affected courts are and, as pointed out in *Yakus*, should be much more reluctant to grant preliminary mandatory relief than if only private interests are involved." *Id.* There is no bond that can compensate

for hampering the Commission's interests in implementing effective, necessary regulation.

ARGUMENT

1. Plaintiffs' claims have no likelihood of success on the merits.

No count in plaintiffs' complaint has any likelihood of success on the merits. Indeed, each and every count of the complaint is subject to dismissal—either for lack of subject matter jurisdiction, failure to state a claim, or both.

1.1 Count I fails because rulemaking is not “agency action.”

The judicial review provisions of the Administrative Orders and Procedures Act (“AOPA”) apply **only** to “agency action.” I.C. § 4-21.5-5-1. “Agency action” is a defined term in the AOPA, and the definition does not include rulemaking. I.C. § 4-21.5-1-4. As our Supreme Court has confirmed: “Rulemaking is not subject to judicial review under the provisions of [AOPA].” *Indiana State Bd. of Public Welfare v. Tioga Pines Living Ctr., Inc.*, 622 N.E.2d 935, 939 (Ind. 1993).

Plaintiffs attempt to invoke a limited exception for judicial review of nonfinal actions. (Compl. ¶ 21) The exception does not apply here because it addresses “nonfinal agency action.” I.C. § 4-21.5-5-2(c). Again, rulemaking is not “agency action.” *See* I.C. § 4-21.5-1-4. Even if the exception somehow applied, plaintiffs have—for all the reasons stated herein—failed to make the required showing that no adequate legal remedy exists.

Additionally, plaintiffs cannot seek judicial review because they have failed to exhaust their administrative remedies. *See* I.C. § 4-21.5-5-4 (“A person may file a petition for judicial review under this chapter only after exhausting all administrative remedies available within the agency whose action is being challenged and within any other agency authorized to exercise administrative review.”). Plaintiffs do not allege that they have made any attempt to exhaust their administrative remedies. They make no effort to explain—in their complaint or in their request for a TRO—why they have not attempted to avail themselves of the exception in the rule that permits deviations upon a written request. Plaintiffs have made no showing of “extraordinary circumstances” sufficient for an exception to the exhaustion requirement. *Scott Cty. Fed. of Teachers v. Scott Cty. Sch. Dist. No. 2*, 496 N.E.2d 610, 613 (Ind. Ct. App. 1986); *see also Wilson v. Review Bd. of Ind. Employment Sec. Div.*, 385 N.E.2d 438 (Ind. 1979) (providing requirements for demonstrating “extraordinary circumstances”).

1.2 Each of the declaratory judgment counts fails.

None of the declaratory judgment counts is proper under the Declaratory Judgment Act. Plaintiffs are not “persons who may obtain declaratory judgment” under Indiana Code section 34-14-1-2 because the Rule is not a “statute, municipal ordinance, contract, or franchise.” Moreover, each of the declarations plaintiffs seek is contrary to the purpose of the Declaratory Judgment Act, which is “remedial.” I.C. § 34-14-1-12.

Plaintiffs have not identified anything that needs remedying; they have not even attempted to make the applications required by the Rule.

1.2.1 Count II and III fail because the Commission properly invoked its emergency rulemaking authority.

The Commission had specific statutory authority to adopt the Emergency Rule pursuant to Indiana Code sections 4-33-4-2 and 4-33-4-3. The Commission properly exercised that authority for articulated reasons. It found, specifically, that “measures to enhance the accountability of privately held companies must be executed immediately” for the Commission to fulfill its statutory responsibilities and that the Emergency Rule was “necessary to update and enhance the oversight of privately owned casino licensees” — all in accordance with the Commission’s mandate “to ensure the integrity of gaming in Indiana.” Tait Aff. para. 5. Count II is a misguided, impermissible effort to challenge the Commission’s determination that an emergency rule was warranted. Even in a properly initiated AOPA appeal, “[t]he court may not try the cause de novo or substitute its judgment for that of the agency.” I.C. § 4-21.5-5-11.

Plaintiffs make no mention of the fact that the Emergency Rule is completely consistent with the Commission’s authority to require licensure of the equity holders and to make unsuitability findings and deny casino involvement for private companies. *See* I.C. § 4-33-6-4 (subjecting all persons who directly or indirectly control casinos to Commission jurisdiction); 68 IAC 2-1-4 (requiring Level 1 applications “for a substantial owner,

key person, **or other person that the commission deems necessary**” (emphasis added)); 68 IAC 5-2-5 (regulations regarding unsuitability findings).

1.2.2 Counts IV and V fail because there has been no taking of plaintiffs’ property.

Counts IV and V are not ripe because plaintiffs do not allege that they have lost anything. Each count proceeds on a hypothetical theory that plaintiffs might be forced to “accept an unreasonably low offer in exchange for their shares in the event they do not apply for an Occupational License.” (Motion ¶ 8) Plaintiffs do not allege that they have submitted applications. Moreover, no one has a property interest in a gaming license because participating in Indiana’s regulated gaming industry is a privilege, not a right. 68 IAC 2-3-9(a) (“An occupational license does not create a property right, but is a revocable privilege granted by the state contingent upon continuing suitability for licensure.”).

1.2.3 Count VI fails because the Commission may act upon four affirmative votes.

This count is baseless. There is no private right of action to compel the Governor to appoint additional members of the Commission, and no credible argument that the Commission is unable to function without seven members. By statute, four members constitute a quorum, and the Commission may take “official action” upon only four affirmative votes. I.C. § 4-33-3-20.

2. Plaintiffs are not facing immediate or irreparable harm.

Plaintiffs face no irreparable harm because the application process remains open to them. Because Level 1 licenses are available to them, the lack of an injunction does not lead to irreparable harm. *See Second City Music, Inc. v. City of Chicago*, 333 F.3d 846, 850 (7th Cir. 2003) (“If the license can be had, then the lack of an injunction does not lead to irreparable harm. Injury caused by failure to secure a readily available license is self-inflicted, and self-inflicted wounds are not irreparable injury. Only the injury inflicted by one’s adversary counts for this purpose.”).

Plaintiffs’ entire complaint proceeds on a hypothetical fear that their Level 1 applications will be rejected and that the licensee in which they hold equity will repurchase their shares. Plaintiffs do not allege that they have submitted Level 1 applications, and there is no legally recognized harm in complying with the Rule by making an application. Indeed, plaintiffs’ applications may all be approved. If not, plaintiffs would have administrative remedies before the Commission, which they would have to exhaust before seeking judicial review. I.C. § 4-33-4-17 (permitting aggrieved party to request Commission hearing). In any event, financial loss in connection with the application process is not a cognizable claim for damages. 68 IAC 2-3-4(b)(1) (“An applicant is seeking a privilege and assumes and accepts any and all risk of adverse publicity, notoriety, embarrassment, criticism, or other action or financial loss that may occur in connection with the application process or the public disclosure of information requested. The applicant expressly

waives any claim for damages that may result from the application process.”). Nor would such a loss serve as a basis for an injunction because “mere economic injury is insufficient to establish irreparable harm.” *E.g., Ind. Family & Social Svcs. Admin. v. Legacy Healthcare, Inc.*, 756 N.E.2d 567, 571 (Ind. Ct. App. 2001).

3. The balance of harms strongly favors the Commission.

On the other side of the ledger, the Commission has determined that it needs to proceed with the Rule for the integrity of the gaming industry in Indiana. Interrupting that process will interfere with its regulatory mission and would amount to an improper exercise of control by the judiciary over the statutory authority and discretion of an agency charged with maintaining the public’s trust in the in the “super-regulated, explosively charged business like legal gambling.” *Mays*, 255 F.3d at 353; *see also* Tait Aff. paras. 14-16.

4. Suspending rules ensuring transparency and integrity of licensees would disserve the public interest.

Transparency and integrity are paramount. That is why applicable regulations require any regulatory uncertainty to be resolved in favor of an interpretation that “would provide: (1) the greater assurance of integrity in either the operation or regulation of casino gambling; or (2) heightened public confidence in the regulation or regulatory processes relating to casino gambling.” 68 IAC 1-2-1. The public policy of this State is clear from the statutes granting the Commission authority to do exactly what plaintiffs are

trying to prevent – exercising oversight in an industry that, for long-established reasons, must be subjected to intensive and detailed regulatory scrutiny.

CONCLUSION

For all of these reasons, Plaintiffs’ motion for a temporary restraining order should be denied.

Respectfully submitted,

/s/ Jefferson S. Garn

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing document using the Indiana E-filing System (IEFS) and that the foregoing document was served upon the following counsel of record via IEFS on May 5, 2021:

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