

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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BELLE OF SIOUX CITY, L.P.,	)	Case Nos. CVCV009254
	)	CVCV009316
Petitioner,	)	CVCV009383
	)	CVCV045760
vs.	)	
	)	<b>RESPONDENT IRGC’S</b>
IOWA RACING AND GAMING	)	<b>RESISTANCE TO WARRIOR</b>
COMMISSION,	)	<b>ENTERTAINMENT, LLC’S</b>
	)	<b>PETITION IN INTERVENTION</b>
Respondent.	)	

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Respondent, Iowa Racing and Gaming Commission [IRGC], submits the following resistance to Warrior Entertainment, LLC’s March 13, 2014 petition to intervene.

**INTRODUCTION**

At its June 7, 2012 meeting, the IRGC voted to accept new applications from all interested parties to build and operate a land-based gaming facility in Woodbury County. Pursuant to the IRGC’s request for casino proposals, Siouxland Strong, Inc. applied to the IRGC in November 2012 for a license to conduct gambling games in Sioux City as a Qualified Sponsoring Organization (QSO). See Exhibit 1 (Application Signature Page and Supporting Affidavits). Siouxland Strong partnered with petitioner Warrior Entertainment, LLC [Warrior] to operate its proposed casino. See Exhibit 1. Three additional casino proposal were also submitted by other entities to the IRGC for consideration.

The IRGC subsequently voted at its April 18, 2013 meeting to award licenses to Sioux City Entertainment, Inc. [SCE] and Missouri River Historical Development, Inc.,

[MRHD] to develop and open a Hard Rock Hotel and Casino in downtown Sioux City [Hard Rock Project]. Siouxland Strong's and Warrior's application was formally denied by the IRGC on June 6, 2013.

Belle of Sioux City, L.P. [Belle], the operator of the existing excursion gambling boat Argosy Casino and co-applicant with Greater Siouxland Improvement Association on two of the four land based casino projects, filed multiple judicial review actions that have been consolidated into the pending case. Belle challenges various actions of the IRGC relating to the IRGC's decision to solicit applications for a new casino in Woodbury County and the eventual award of licenses to the developers of the Hard Rock Project. Warrior has not filed a petition pursuant to Iowa Code section 17A.19 seeking judicial review of the IRGC's decision to deny it a license to operate a casino in Sioux City with its partnering QSO, Siouxland Strong.

**I. WARRIOR EXPRESSLY WAIVED ANY CLAIM IT IS ATTEMPTING TO MAKE THROUGH BELLE'S JUDICIAL REVIEW ACTION.**

Warrior, with its proposed QSO partner filed an application for new licenses to develop a land based casino in Sioux City. See Exhibit 1. That application was signed by Lance Morgan, a director for Warrior, and Kenneth A. Beekley, Vice-president of Siouxland Strong. Id. Both of these persons also signed a notarized affirmation that, among other things, they had read the application, they knew the contents thereof and affirmed the application materials submitted were true. Id.

The application signed by Director Morgan contained the express language that Warrior “expressly waive[s] any claim for loss, expense or damage, against the [IRGC], its members, staff and personnel, resulting from the application process. Applicants further covenant and agree to hold harmless and indemnify the Iowa Racing and Gaming Commission from any claim arising from an action of the commission in connection with said application.” Id. Warrior further agreed to “accept all risks of adverse public notice, public opinion, embarrassment, criticism, or financial loss which may result from action with respect to an application.” Id.

Waiver is, “the voluntary or intentional relinquishment of a known right.” Scheetz v. IMT Ins. Co., 324 N.W.2d 302, 304 (Iowa 1982). Further, “waiver can be shown by the affirmative acts of a party, or can be inferred from conduct that supports the conclusion waiver was intended.” Id. Here, Warrior affirmatively expressed its intention to waive all of the claims it apparently seeks to assert as an intervener in this action against the IRGC.

## **II. WARRIOR’S INTERVENTION IS BARRED BY THE DOCTRINE OF LACHES AND/OR THE DOCTRINE OF ESTOPPEL BY ACQUIESCENCE.**

The primary agency action that serves as the underlying basis to the above-captioned judicial review action occurred in April 2013 with the award of new gaming licenses to SCE and MRHD for the development of the Hard Rock Project. Inherent in that decision was the denial of Warrior and Siouxland Strong’s licensing applications.

Warrior's license application was formally denied in June 2013. Unlike Belle, however, Warrior did not immediately seek judicial review concerning the IRGC's Woodbury County licensing actions. Not until the pending petition for intervention did Warrior even raise a question as to its purported interests and injuries at the IRGC's hand in this matter. In the intervening time, Warrior expressed no objection to SCE's and MRHD's construction of their proposed Hard Rock Project, nor did Warrior seek to prevent the City of Sioux City from issuing millions of dollars in bonds, closing streets, moving utilities, and deeding property to assist in the construction and development of the Hard Rock Project.

The doctrine of laches "is founded on a lack of diligence and good faith in invoking the court's jurisdiction on what then becomes a stale claim." In re Thompson Trust, 801 N.W.2d 23, 27 (Iowa Ct. App. 2011) (citation omitted). This doctrine "operates as a bar when the claimant knew or should have known of an alleged breach but sits on [its] rights." Id. In this case Warrior did not challenge the IRGC's licensing decisions around the time the IRGC made them, but rather waited nearly one year to belatedly assert its speculative interests. The doctrine of laches bars this action for judicial review.

Related to the doctrine of laches is that of estoppel by acquiescence. The Iowa Supreme Court has stated, "estoppel by acquiescence occurs when a person knows or ought to know of an entitlement to enforce a right and neglects to do so for such a time as

would imply an intention to waive or abandon that right.” In re Thompson Trust, 801 N.W.2d at 26-27 (citing In re Marriage of Fields, 508 N.W.2d 730, 731 (Iowa 1993)). “Although the doctrine bears an ‘estoppel’ label, it is, in reality a waiver theory.” Markey v. Carney, 705 N.W.2d 13, 21 (Iowa 2005) (citation omitted). “Unlike equitable estoppel, estoppel by acquiescence does not require a showing of detrimental reliance or prejudice.” Id. “Estoppel by acquiescence applies when (1) a party has full knowledge of his rights and material facts; (2) remains inactive for a considerable time; and (3) acts in a manner that leads the other party to believe the act [now complained of] has been approved.” Id. (quoting 28 Am. Jur. 2d Estoppel and Waiver § 63, at 489–90 (2000)).

The first two elements of this doctrine are indisputable. The third element is clearly met by many of the actions noted in support of the IRGC’s laches claim. See supra. Warrior’s attempt to intervene is accordingly barred by the doctrine of estoppel by acquiescence.

### **III. WARRIOR MAY NOT ASSERT INDEPENDENT CLAIMS AGAINST THE IRGC UNDER THE GUISE OF INTERVENTION.**

Warrior appears to be seeking the right through its intervention petition to impermissibly piggyback their independent claims against the IRGC onto Belle’s case. See Sioux City Brick & Tile Co. v. Employment Appeal Bd., 449 N.W.2d 634, 638 (Iowa 1989) (Finding in a case where five persons had similar claims, but were not coparties to a single agency action, a petition which only mentioned one person “did not

invoke the judicial review jurisdiction of the district court over any agency action other than that in [that one person's] contested case. . . . [T]he agency action in the cases other than [that one person's] was not a matter pending before the court.”). To invoke the judicial review jurisdiction of the Court over its own particular independent circumstances and claims, Warrior should have instead filed and timely served its own petition for judicial review against the IRGC had its rights truly been prejudiced as a consequence of the IRGC's actions.

#### **IV. WARRIOR'S LIMITED INTERESTS ARE ADEQUATELY REPRESENTED BY BELLE.**

Iowa Rule of Civil Procedure 1.407(4) vests the District Court with considerable discretion to deny a petition for intervention. When persons are seeking to intervene as a matter of right, the Court may decline if “the applicant's interest is adequately represented by existing parties.” Belle will undoubtedly assert that the IRGC's application process was flawed and that the chosen applicant failed to demonstrate the necessary good character and financial viability required by Iowa Code chapter 99F. To this end, Belle's and Warrior's positions appear identical.

Regardless, all parties appear in agreement that the IRGC's licensing decisions that are presently before the Court constitute “other agency action” and are not “contested cases” within the context of Iowa Code chapter 17A. The Iowa Administrative Procedure Act only confers an unconditional right of intervention upon persons who participated as a “party of record” in a contested case held before an agency. Iowa Code § 17A.19(2).

Thus, Warrior does not have a statutory right to participate in this case. Likewise, Iowa Rule of Civil Procedure 1.1603(2) is only applicable to “proceedings for judicial review of agency action in a contested case . . . .” Iowa R. Civ. P. 1.1603.

In cases of permissive intervention, the District Court may “grant or deny the application as the circumstances require.” Iowa R. Civ. P. 1.407(4). Although Warrior participated in the IRGC’s application process for a new casino in Sioux City, it is questionable whether Warrior has an actual legal right or liability that will be directly affected by the pending litigation. Warrior does not have, nor has it ever had an existing state issued license to operate a casino in Woodbury County that may be impacted by the outcome of this case. Nor was Warrior selected to receive a new licenses like SCE and MRHD that may be invalidated through this action. Whether Warrior would be the “logical recipient of the Casino project license” should a remand occur will not be answered through the pending judicial review action. See Iowa Code §§ 99F.4(1), 99F.7(1) (“The commission shall decide the number, location, and type of gambling structures and excursion gambling boats licensed under this chapter.”). At most, Warrior can only hope that IRGC is ordered to reconsideration of its prior licensing decisions. Warrior’s speculative and indirect interest does not warrant its participation in the pending judicial review action.

## **CONCLUSION**

For the above stated reasons, Warrior’s request for intervention should be denied.

THOMAS J. MILLER  
IOWA ATTORNEY GENERAL

/s/ Jeffrey C. Peterzalek  
JEFFREY C. PETERZALEK  
Assistant Attorney General  
Department of Justice  
Administrative Law Division  
Hoover Building, 2<sup>nd</sup> Floor  
1305 E. Walnut  
Des Moines, Iowa 50319  
Ph: (515) 281-4213  
Fax: (515) 281-4209  
E-mail: [jpeterz@ag.state.ia.us](mailto:jpeterz@ag.state.ia.us)

/s/ John R. Lundquist  
JOHN R. LUNDQUIST  
Assistant Attorney General  
Department of Justice  
Administrative Law Division  
Hoover Building, 2<sup>nd</sup> Floor  
1305 E. Walnut  
Des Moines, Iowa 50319  
Ph: (515) 281-3658  
Fax: (515) 281-4209  
E-mail: [jlundqui@ag.state.ia.us](mailto:jlundqui@ag.state.ia.us)  
ATTORNEYS FOR IOWA RACING &  
GAMING COMMISSION

All parties served electronically