UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re: Iowa Gaming Company, LLC, et al., Debtors.	Chapter 11 Case No. 14-13904 (REF) (Jointly Administered)
Belle of Sioux City, L.P., and Iowa Gaming Company, LLC Plaintiffs v. Iowa Racing and Gaming Commission, Defendant.	Adv. Pro. No. 14-00238 (REF)

JOINT OPPOSITION OF IOWA RACING AND GAMING COMMISSION, MISSOURI RIVER HISTORICAL DEVELOPMENT, INC. AND SCE PARTNERS, LLC TO DEBTORS' CONSOLIDATED MOTION FOR STAY, APPLICATION OF BANKRUPTCY CODE SECTION 108(A), AND PRELIMINARY INJUNCTION

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I. INTRODUCTION

On February 14, 2014, Iowa District Court Judge Eliza Ovrom rejected Belle of Sioux City, L.P.'s request to stay the Iowa Racing and Gaming Commission's (IRGC) issuance of a license to the Missouri River Historical Development, Inc. (MRHD) to conduct gambling games at a new land-based casino in Sioux City, Iowa—the Hard Rock Casino—and a license to Sioux City Entertainment, Inc. (SCE) to operate the new casino. In a thorough 24-page opinion, Judge Ovrom ruled that Belle "is not likely to succeed on the merits of its legal claims" against the IRGC. Judge Ovrom found, among other things, that "Belle's operator license has expired."[1] The judge also ruled that, contrary to Belle's arguments, Iowa law requires an operator of a casino to have an operating agreement with a licensed Qualified Sponsoring Organization (QSO), which Belle does not have.[2]

Debtors Belle of Sioux City, L.P. and Iowa Gaming Company, LLC (collectively referred to as "Belle") not only fail to discuss Judge Ovrom's ruling in their complaint for an injunction or in their consolidated memorandum in support of their stay motions, they seek to bypass the Iowa courts altogether to seek a stay. Iowa law allows Belle to seek a stay from the IRGC and the Iowa courts of the IRGC's closure order and decision not to renew Belle's license. Indeed, Belle has previously sought a stay in the pending consolidated action in Iowa of Belle's four petitions for judicial review that it filed against the IRGC starting in 2012. Now, however, Belle has made the calculation that in light of Judge Ovrom's February 14 ruling, it is highly unlikely to obtain a stay in Iowa under Iowa law. Lacking any solvency issues or need to reorganize,

[1] Ruling Following Remand at 22, 24, *Belle of Sioux City, L.P. v. Iowa Racing and Gaming Commission*, No. CVCV009254, (Iowa Dist. Ct. Feb. 14, 2014), Appendix in Support of Opposition to Motion to Stay, Application of Bankruptcy Code Sections 108(A), and Preliminary Injunction, and in Support of Motion to Dismiss Chapter 11 Case (hereafter "Appendix"), Ex. 1.

[2] *Id.* at 21.

Belle has engaged in forum shopping to seek to misuse the automatic stay to disobey the IRGC's order and to operate a casino in violation of Iowa law. Belle offers no valid explanation as to why it cannot seek a stay from either the IRGC or the Iowa courts in pursuit of its expected fifth petition for judicial review of the IRGC's closure order and license denial.

Belle's motions for a stay and preliminary injunction also should be denied because Belle does not have property rights to be protected by the automatic stay. Judge Ovrom ruled that, as of April 1, 2013, MRHD's license to conduct gaming at the Argosy Casino expired. As Judge Ovrom already found, Belle's derivative operator's license also expired. Belle cannot have a license to operate a gaming facility independent of MRHD's license to conduct gaming at the facility. Further, Belle does not have a residual interest in its, or especially MRHD's, expired license.

Further, the IRGC's orders to close the Argosy Casino and not renew Belle's operator's license clearly fall within Bankruptcy Code section 362(b)(4)'s "police or regulatory power" exception from the the automatic stay. Gambling in Iowa is regulated by the IRGC. *See* Iowa Code Chapter 99F. As Judge Ovrom confirmed, an operator of a casino in Iowa must have an operating agreement with the nonprofit charity QSO, which has a license to conduct gaming. Under Iowa's regulatory framework, only a QSO may be licensed to conduct gaming.[3] The QSO may directly operate the casino or engage a professional operator. *See* Iowa Code section 99F.5.[4] The operator must also be licensed by the IRGC and, as noted, have an operating agreement with the licensed QSO. As set forth in its April 17, 2014 Decision and Order, the

[3] The QSO is an integral and long standing concept in Iowa gaming law. Dog and horse racing was only permitted through non-profit entities. When casino gaming was eventually authorized, a similar structure was put in place. The state eventually required the QSO receive a minimum fee of 3% which is not related in any way to the taxes imposed by the State of Iowa.

[4] Ruling Following Remand at 21, Appendix Ex. 1

IRGC ordered the closure of the Argosy Casino and denied Belle's license renewal because Belle did not have an operating agreement with a licensed QSO and was "statutorily ineligible" to conduct gambling games or operate a casino.[5] It is indisputable that there is no licensed QSO legally authorized to conduct gaming at the Argosy Casino. Belle's operation of the Argosy Casino is thus contrary to the requirements of Iowa Code chapter 99F. The IRGC acted pursuant to its strong regulatory interest in enforcing its licensing authority and ensuring that gaming is conducted in compliance with Iowa law. *See Matter of Alessi*, 12 B.R. 96, 98 (Bankr. N.D. Ill. 1981) (rejecting debtor's argument that automatic stay prohibited gaming authority from continuing proceedings to revoke the debtor's racing license, as "[t]he regulation by the several states of the practice of betting . . . is so widely recognized that the Court may take judicial notice of the prevailing view that this is a proper exercise of the police power reserved to the states").

Belle's argument that the IRGC acted primarily for a "pecuniary purpose" does not withstand scrutiny. The IRGC did not act to collect money. It did not bring an action over Belle's failure to pay MRHD the statutory minimum three percent of adjusted gross receipts. The IRGC did not act as a creditor with a financial claim against Belle. It acted to prevent Belle from continuing to operate the Argosy Casino contrary to Iowa's legal requirements to operate a casino.

Belle's attempt to invoke the two-year tolling period under Bankruptcy Code section 108(a) lacks merit and is a transparent effort to continue to operate the Argosy Casino for years in violation of Iowa law. Belle cites no case law for its naked assertion that judicial review under Iowa Code section 17A.19 is a "commencement of an action," entitling it to the two-year

[5] Findings of Fact, Conclusions of Law, Decision and Order at 11, *In re Belle of Sioux City*, No. 13IRGC020, (IRGC April 17, 2014), Appendix Ex. 2.

toll under Bankruptcy Code section 108(a). The determinative factor of whether an action is the "commencement of an action" versus an "appeal" is the standard of review provided by the applicable state which governs the reviewing court. *See, e.g., In re CGE Shattuck LLC,* 272 B.R. 514, 518 (Bankr. D.N.H. 2001); *In re Vill. at Oakwell Farms, Ltd.*, 428 B.R. 372, 378 (Bankr. W.D. Tex. 2010). To be a "commencement of an action," the standard of review must be *de novo*. The two-year toll under Bankruptcy Code section 108(a) does not apply where the review is that of an "appeal," limited to reviewing an administrative agency's factual findings for legal insufficiency. Belle does not discuss the standard of review under Iowa law for judicial review under Iowa Code section 17A.19. This is not surprising, as Iowa law is crystal clear: the standard of review in a judicial review proceeding under Iowa Code section 17A.19 is an appellate standard. The Iowa Supreme Court has held on numerous occasions that a district court reviewing an administrative agency's action sits "in an appellate, rather than a trial, capacity," a point of law completely omitted by Belle. *See, e.g., Young Plumbing & Heating Co. v. Iowa Natural Res. Council,* 276 N.W.2d 377, 381 (Iowa 1979). Bankruptcy Code section 108(a) does not apply here.

Belle seeks to utilize Bankruptcy Code section 105(a) in a last-ditch effort to obtain what it could not get in Iowa: an injunction of legitimate agency action. Belle's request for an injunction under section 105(a) of the Bankruptcy Code also should be rejected. As an initial matter, the Eleventh Amendment confers sovereign immunity on the IRGC and prevents the issuance of an injunction against the IRGC. *See Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 100-101 (1984). Also, the Court "has been very cautious in exercising [its] powers under § 105(a) in the few instances where it has done so." *In re Amatex Corp.,* 97 B.R. 220, 225 (Bankr. E.D. Pa. 1989) *aff'd sub nom. Amatex Corp. v. Stonewall Ins. Co.,* 102 B.R. 411 (E.D.

Pa. 1989). In particular, bankruptcy courts have refused to enjoin state administrative proceedings based on comity principles. *See In re Go W. Entm't, Inc.*, 387 B.R. 435, 442-43 (Bank. S.D.N.Y. 2008) (denying debtor's request for a preliminary injunction of revocation of liquor license by state based on comity principles with respect "to State administrative proceedings," as federal courts "should generally refrain from enjoining or otherwise interfering in ongoing state proceedings").

Extraordinary circumstances do not exist to warrant the drastic remedy of an injunction. Belle cannot possibly succeed on the merits of its claim. It is undeniable that there is no licensed QSO authorized to conduct gaming at the Argosy Casino and that Belle does not have the legally required operating agreement with such an entity necessary for a license to operate a casino. MRHD's license to conduct games and thus allow Belle to operate expired on April 1, 2013. Allowing Belle to continue to operate the Argosy Casino outside of the law is not an extraordinary circumstance to justify an injunction. Belle cannot now use section 105(a) to create a substantive right (running a casino without an operating agreement with a licensed QSO) that is otherwise unavailable under Iowa law. *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 236 (3d Cir. 2004).

Belle incorrectly argues that the likelihood of success factor should be limited to "the debtor's ability to successfully reorganize." Not only is this incorrect, but, in any event, Belle cannot meet even this factor. As explained below, Belle has filed these cases not to reorganize, but simply to try to gain a tactical advantage in its litigation in Iowa and to significantly extend the period of time it can continue to operate in violation of Iowa law. If Belle somehow were to succeed in its judicial review in Iowa, it will not reorganize. If it loses, as it undoubtedly will, it too will not reorganize.

Finally, Belle cannot meet the factors for a preliminary injunction. It is unlikely to succeed on the merits. Any harm to Belle must be evaluated in the context of closing a casino that would be operating in violation of Iowa law. As Belle's requested relief requires the IRGC to allow the Argosy Casino to operate in violation of Iowa law, the merits of Belle's claims are so weak that any irreparable harm to Belle cannot swing the pendulum in favor of a preliminary injunction. In denying a similar stay request, Judge Ovrom decided not to stay the issuance of the gaming licenses to MRHD and SCE even though she recognized that Belle would suffer irreparable injury without the stay. Also, the harm to third parties and the public interest militate against a preliminary injunction. An injunction will adversely affect the compelling public interest that the IRGC regulate gaming and enforce Iowa's requirements that every casino operator has an operating agreement with a licensed QSO.

Further, SCE would face unlawful competition as customers and tourists would be diverted from downtown to the river-based Argosy Casino, which would be operating in violation of Iowa law. An injunction would interfere with the IRGC's decision to move gaming in Sioux City from a river boat to a land-based casino. Notably, Belle applied to be the operator for the land based casino and lost.

An injunction will harm the efforts of the City of Sioux City to redevelop downtown Sioux City. Sioux City has expended considerable resources to revitalize downtown Sioux City around the Hard Rock Casino, including the issuance of $22 million in municipal bonds to support the SCE Hard Rock Casino project. The project is designed to revitalize downtown Sioux City. Allowing the river-based Argosy Casino to continue to operate will divert customers and pedestrians away from downtown Sioux City. Neither Belle nor this Court should substitute

their interpretation of the health, safety and welfare of the people of Iowa for that of the State and the IRGC. Belle's request for a stay and preliminary injunction should be denied.

II. STATEMENT OF THE FACTS AND RELEVANT BACKGROUND

A. Statutory and Regulatory Framework for Gaming in Iowa

In Iowa, gaming is a highly-regulated industry overseen by the IRGC. Iowa Code § 99F *et seq.* The Iowa legislature granted the IRGC "full jurisdiction" and supervision of "all gambling operations," including the power to "determine the eligibility of applicants for a license and to select among competing applicants for a license the applicant which best serves the interests of the citizens of Iowa." Iowa Code § 99F.4[6] The IRGC has the authority to adopt rules to implement Iowa's statutory gaming requirements. *Id*. The Iowa Supreme Court and Court of Appeals repeatedly have recognized the IRGC's power to interpret various provisions of Iowa Code Chapter 99F. *See, e.g., Nat'l Cattle Cong., Inc. v. Iowa Racing and Gaming Comm'n*, 752 N.W.2d 453 (Iowa Ct. App. 2008) (holding the IRGC is vested with discretion to interpret Iowa Code section 99F.4A(2)); *Alfredo v. Iowa Racing and Gaming Comm'n*, 555 N.W.2d 827 (Iowa 1996) (recognizing the powers and obligations of the IRGC pursuant to Iowa Code sections 99F.4 and 99F.7, and holding that the IRGC has authority to conduct proceedings regarding an applicant's licensure).

In its consolidated memorandum, Belle glosses over the legal framework for gaming in Iowa to portray the role of a QSO such as MRHD to be nothing more than a conduit to impose a three percent tax. However, under Iowa law only a QSO may hold a license to "conduct" gambling games. Iowa Code § 99F.5(1). MRHD, therefore, held the one thing Belle could never obtain on its own, the very privilege to conduct gambling games in Iowa.

[6] *See also* IRGC Brief on Remand, Polk Co. No. 9254, at 2–4, Appendix Ex. 3.

If the QSO decides to engage an operator, the operator must be licensed to "operate" the casino. *Id.* As Judge Ovrom confirmed in her February 14 ruling, a casino operator must partner with a licensed QSO and there must be an operating agreement between that QSO and the operator.[7] In 2004, the Iowa legislature amended section 99F.5 to require that new operating agreements between an operator and a QSO contain a three-percent minimum contribution from the operator. Iowa Code § 99F.5(1).

Pursuant to its legislative mandate, the IRGC has implemented rules for the issuance and renewal of gaming licenses in accordance with the governing statutes, including section 99F.5's requirement that an operator has an operating agreement with a licensed QSO. The IRGC issues standard one-year licenses, and licenseholders must seek renewal on an annual basis. *See* 491 Admin. Code § 1.5(3).[8] After 99F.5 was enacted, the IRGC revised its license applications to require applicants to provide information "describ[ing] the arrangement with the qualified sponsoring organization" and "[i]nclude as an exhibit, any required agreements or assignments."[9]

The Iowa Administrative Procedure Act authorizes any person or party aggrieved or adversely affected by agency action to seek judicial review of such agency action in the Iowa District Court. Iowa Code § 17A.19. Belle can, as a matter of right, obtain judicial review of the IRGC's decision to deny renewal of Belle's license to operate the Argosy Casino. The Iowa District Court may reverse or grant other appropriate relief from any agency action that prejudices the substantial rights of any person that was unconstitutional, taken in violation of any applicable provision of law, or was otherwise unreasonable, arbitrary, or capricious. Iowa

[7] Ruling Following Remand at 16-17, 21, Appendix Ex. 1.
[8] *See also* IRGC Brief on Remand, at 4, Appendix Ex. 3.
[9] *See, e.g.*, Application to Establish a Gambling Structure, at 25, Appendix Ex. 4; *see also* Iowa Code § 99F.5(1) (granting the IRGC broad discretion to prescribe the information applicants must submit with their applications for a gambling license).

Code § 17A.19(10). A party can appeal the District Court's judicial review decision to the Iowa Supreme Court. Iowa Code § 17A.20.

Pursuant to Iowa Code § 17A.19(5)(a), the mere filing of a petition for judicial review does not stay the execution of any agency action. The agency or the District Court may issue a stay pending the disposition of the judicial review proceedings. Iowa Code § 17A.19(5); *see also* 491 Iowa Admin. Code § 4.45 (delineating procedure for requesting stay of agency action or other temporary remedy from the IRGC). Thus, Belle can seek a stay of the IRGC's closure order from the IRGC and the Iowa District Court. As demonstrated in its pending judicial review cases, Belle knows how to avail itself of this procedure.

B. Belle's Renewal Applications, its Statutory Ineligibility, and its Legal Challenges to the IRGC's Actions

Gaming at the site now occupied by the Argosy Casino commenced in 1993, when the IRGC issued MRHD a license to conduct gaming and a license to a former operator, Sioux City Riverboat Corporation ("SCRC"), for the facility then known as "Sioux City Sue."[10] MRHD and SCRC were parties to a Management and Operation Agreement entered on May 27, 1992.[11]

In 1994, Belle assumed all of SCRC's rights and obligations under the 1992 Operating Agreement.[12] On November 18, 1994, IRGC granted licenses to MRHD to conduct gaming and Belle to be an operator at the Argosy Casino. On December 1, 1994, Belle began operations at the Argosy Casino.[13] Licensing terms are from April through March 31 of the following year.

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[10] *See* Chronology of Iowa Racing and Gaming Commission, *available at* http://www.iowa.gov/irgc/CommChronology.htm (last visited May 26, 2014) ("July 2, 1992, a three year license was granted to the Missouri River Historical Development, Inc./Sioux City Riverboat Corp., who began operation as the Sioux City Sue in Sioux City on January 29, 1993."), Appendix Ex. 5.

[11] 1992 Operating Agreement, Appendix Ex. 6.

[12] Belle Petition, Case No. CL 126161, ¶ 8, Appendix Ex. 7.

[13] *See* Chronology of Iowa Racing and Gaming Commission ("November 18, 1994, excursion gambling boat licenses were granted…to the Missouri River Historical Development Inc./Belle of Sioux City, L.P. , began

The last renewal approved by the IRGC without conditions or restrictions was Belle's application to renew its license for the 2011-2012 licensing term.[14] Accordingly, Belle's 2011-2012 license was set to lapse on March 31, 2012.

On December 27, 2011, Belle and MRHD submitted to the IRGC a joint application to renew their respective licenses for the 2012-2013 licensing term.[15] Belle and MRHD's operating agreement was set to expire on July 6, 2012. At the time Belle and MRHD submitted their application, both parties acknowledged that "renewal or extension of an operating agreement pursuant to Iowa Code Chapter 99F through the applicable time period of the requested license ***is necessary***."[16]

At its March 8, 2012 public meeting, the IRGC approved the joint application, but this approval was conditioned on the submission of a new operating agreement by June 7, 2012.[17] IRGC Commissioner Chair Toni Urban explained the conditional approval as follows:

> [Chair Urban] stated that she did not see any way for the Commission to grant a license without a condition due to the fact that the current operating agreement expires in July, necessitating the approval of a new agreement at the June Commission meeting.[18]

Belle's General Manager responded that "Penn/Argosy [understood] that the granting of a one-year license would be conditioned upon the extension of both agreements," one of which was the operating agreement with MRHD.[19] The IRGC informed Belle on March 8, 2012 that if

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operation as the Belle of Sioux City on December 1, 1994 in Sioux City. The Sioux City Riverboat Corporation ceased operation at that time."), Appendix Ex. 5; *see also* Belle Petition, Case No. CL 126161, ¶ 8, Appendix Ex. 7.

[14] *See* IRGC Brief on Remand, at 5, Appendix Ex. 3.

[15] *See* Belle's 2012-2013 License Renewal Application, Appendix Ex. 8.

[16] *See* Belle's 2013-2014 License Renewal Application (emphasis added), Appendix Ex. 8.

[17] March 8, 2012 IRGC Meeting Minutes, at 17, Appendix Ex. 10.

[18] *Id.* at 15.

[19] *Id.* at 14.

no operating agreement was reached, ***"the Commission would be obligated to look elsewhere."***[20] Thus, Belle was aware as of March 8, 2012 that if it did not submit an operating agreement by June 7, 2012, the IRGC would look for alternative licensees.

At the IRGC's next meeting on April 19, 2012, Belle and MRHD still had not reached an agreement.[21] The IRGC encouraged the parties to come to an agreement.[22] IRGC Commissioner Lamberti noted that the IRGC would "need to rapidly move to other ideas and plans" if an agreement between Belle and MRHD was not reached "fairly quickly."[23] Belle's representatives assured the IRGC that the parties could resolve their issues before the June IRGC meeting.[24]

Belle, however, appeared at the IRGC's June 7, 2012 meeting without an operating agreement.[25] Belle informed the IRGC that MRHD had offered to extend the operating agreement to 2015, but Belle refused to accept MRHD's extension offer unless MRHD dismissed federal litigation pending against its parent company, Penn National Gaming, Inc.[26] Belle had not fulfilled the condition for approval of its license. The IRGC then decided to open up Woodbury County for applications to build and operate a land-based casino.[27] Belle then submitted an application with another proposed QSO to operate the new land-based casino.

As noted above, under Iowa law a party may appeal an agency's action by filing a petition for judicial review in Iowa District Court to have the court review the agency's action.

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[20] *Id.* at 15 (emphasis added).
[21] *See* April 19, 2012 IRGC Meeting Minutes, at 3, Appendix Ex. 11.
[22] *Id.* at 6-7.
[23] *Id.* at 7.
[24] *Id.* at 4.
[25] *See* June 7, 2012 IRGC Meeting Minutes, at 4, Appendix Ex. 12.
[26] *Id.* at 3-4.
[27] *Id.* at 7-8.

See Iowa Code § 17A.19. On July 6, 2012, Belle filed its first petition for judicial review, challenging the IRGC's action to accept applications for a land-based casino.[28]

On July 12, 2012, Belle submitted an operating agreement to the IRGC that would extend its operating agreement with MRHD to March 31, 2015.[29] The IRGC had already opened up bidding on a land-based facility, but desired to keep the Argosy Casino open until the land-based facility was ready to open in order to preserve existing jobs.[30] The IRGC thus asked Belle to agree to an extension of its operating agreement only through March 31, 2013.[31] Belle refused to agree to the March 31, 2013 date, insisting on the March 31, 2015 date.[32] The IRGC approved an extension of the operating agreement only through March 31, 2013, on the condition that the parties reach agreement by August 23, 2012.[33] On August 10, 2012, Belle filed its second petition for judicial review in Iowa District Court, this time challenging the IRGC's decision not to approve an extension of the operating agreement through March 31, 2015.[34]

At the IRGC's next meeting on August 23, 2012, the IRGC denied a request by Belle to reconsider its decision not to approve an extension of the operating agreement into 2015.[35] The IRGC informed Belle that its license would continue by operation of law under Iowa Code Section 17A.18 "until a hearing is set by the Commission to show cause why the license should not be continued."[36] The IRGC informed Belle that its "license continues under operation of law

[28] *See* Petition for Judicial Review, Case No. CV9254 (Iowa Dist. Ct. July 6, 2012), Appendix Ex. 13.
[29] July 12, 2012 IRGC Meeting Minutes, at 2-3, Appendix Ex. 14.
[30] *Id.* at 3.
[31] *Id.*
[32] *Id.* at 3-4.
[33] *Id.* at 5.
[34] Petition for Judicial Review, Case No. CV9316, (Iowa Dist. Ct. Aug. 10, 2012), Appendix Ex. 15.
[35] August 23, 2012 IRGC Meeting Minutes at 4, Appendix Ex. 16; Excerpts from Tr. of IRGC Mtg (labeled Aug. 24, 2012), Appendix Ex. 17.
[36] IRGC Tr. at 9, Appendix Ex. 17.

until the Commission takes action to deny that application to renew the license."[37] On September 21, 2012, Belle filed its third petition for judicial review over the actions taken by the IRGC at the August 23, 2013 meeting.[38]

On December 31, 2012, Belle submitted an application to renew its license to operate the Argosy Casino for the 2013-2014 licensing term. The application did not contain signatures from MRHD or any other licensed QSO.[39] Belle did not attach a new operating agreement to its application and also failed to submit a signed copy of the requisite IRGC form seeking a description of key components of its operating agreement. At its meeting on August 23, 2012, the IRGC denied Belle's application due to Belle's lack of an operating agreement with a licensed QSO.[40]

On August 27, 2013, the IRGC informed Belle that it could continue to operate the riverboat casino by operation of law under Iowa Code section 17A.18, and notified Belle of its right to contest the denial of its renewal application.[41] Belle sought a contested case hearing before the IRGC on the denial of its renewal license application. The IRGC scheduled the contested case hearing for March 5 and 6, 2014. The IRGC's actions were entirely consistent with the Iowa Administrative Procedure Act, which authorizes agencies to serve as the presiding officer at contested case hearings. Iowa Code § 17A.11. On February 14, 2014, Belle requested a continuance of the contested case hearing.[42] A continuance would have delayed a final decision by the IRGC and extended the last day for seeking judicial review, thus allowing Belle to continue to operate the Argosy Casino, even though it was not in compliance with the

[37] *Id.* at 10.
[38] Petition for Judicial Review, Case No. CV9383, (Iowa Dist. Ct. Sep. 21, 2012), Appendix Ex. 18.
[39] *See* Belle's 2013-2014 License Renewal Application, Appendix Ex. 9.
[40] IRGC Aug. 15, 2013 Meeting Minutes, at 7-8, Appendix Ex. 19.
[41] Aug. 27, 2013 Ltr. from Ohorilko to George, Appendix Ex. 20.
[42] Ruling Denying Applicant's Motion for Continuance, DIA Doc. No. 13IRGC020 (Feb. 21, 2014), at 1, Appendix Ex. 37.

requirements to operate a casino under Iowa Code section 99F. The IRGC denied the continuance.[43]

The contested case hearing took place on March 5 and 6.[44] On April 17, 2014, the IRGC reported its final decision affirming the denial of Belle's 2013-2014 license renewal and informed Belle that it must close the Argosy Casino by July 1, 2014.[45] The IRGC reiterated that there were deficiencies in Belle's application for renewal of its license to operate the Argosy Casino for the 2013-2014 licensing year because there was no operating agreement with a licensed QSO.[46] Belle was statutorily ineligible to conduct gambling games on its own and could not be granted a license to operate the Argosy Casino in the absence of an operating agreement with a licensed QSO.[47]

C. The IRGC Awards Licenses to MRHD and SCE for a Land-Based Casino as Part of an Effort to Redevelop Downtown Sioux City

After Belle failed to present the IRGC with an operating agreement at its June 7, 2012 meeting, the IRGC proceeded to accept and evaluate applications for a new land-based casino. The IRGC received four applications, including MRHD's and SCE's proposal for the Hard Rock Casino and proposals from Belle and its new proposed QSO for Hollywood Casino Sioux City and Hollywood Casino Siouxland.[48] At its April 18, 2013 meeting, the IRGC discussed each of the proposals and then voted to select a proposal.[49] The final vote was 3-2 in favor of MRHD's

[43] *Id.* at 4.
[44] IRGC Decision and Order at 1-2, Appendix Ex. 2.
[45] *Id*. at 11
[46] *Id.*
[47] *Id.*
[48] IRGC Jan. 10, 2013 Meeting Minutes, at 7-18, Appendix Ex. 22.
[49] IRGC Apr. 18, 2013 Meeting Minutes, at 12-19, Appendix Ex 23.

and SCE's proposal.[50] Belle filed its fourth petition for judicial review challenging the IRGC's grant of licenses to MRHD and SCE.[51]

In reliance on the IRGC's license award, SCE has incurred substantial costs associated with the construction of the Hard Rock casino. As of January 2014, SCE had incurred over $47.5 million in construction costs and paid the first $4 million installment for the gaming license, which will total $20 million after conclusion of five annual installments.[52]

D. Litigation in the Iowa Courts

As noted, Belle filed four petitions for judicial review against the IRGC that have been consolidated into a single action. On September 16, 2013, Belle applied to the Iowa District Court for a stay of the licenses to MRHD and SCE for the Hard Rock Casino. On December 10, 2013, Iowa District Judge Robert Hanson entered a temporary stay of the license issued to SCE and MRHD, even though Judge Hanson found he could not say that there was a probability that Belle would succeed on the merits against the IRGC. [53]

SCE was not a party to the proceedings when Judge Hanson issued the temporary stay. SCE petitioned the Iowa Supreme Court for a writ challenging the stay. On December 19, 2013, the Iowa Supreme Court issued an order staying the district court's December 10 order. On January 8, 2014, the Supreme Court issued a remand for the district court to determine whether it had jurisdiction to stay the license of SCE when SCE was not a party; whether SCE should have been joined as an indispensable party; and if SCE should be joined, allow SCE to present evidence on the stay issues.[54]

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[50] *Id.*
[51] Petition for Judicial Review, Case No. CV45760, (Iowa Dist. Ct. May 17, 2013), Appendix Ex. 35.
[52] Ruling Following Remand, Appendix Ex. 1; Jan. 30, 2014 Hearing Tr. at 64, 72, Appendix Ex. 24.
[53] Ruling Following Remand, at 1-2, Appendix Ex. 1.
[54] *Id.* at 1-2; Order, CV 13-7972 (S. Ct. Iowa Jan. 8, 2014), Appendix Ex. 36.

On January 30, 2014, a hearing was held pursuant to the Supreme Court's remand order before District Judge Ovrom. On February 14, 2014, Judge Ovrom issued her 24-page ruling. Even though she found that Belle would suffer irreparable harm if a stay did not issue, Judge Ovrom denied a stay of the licenses issued to SCE and MRHD. Judge Ovrom found that: (1) MRHD's license to conduct gaming expired and thus Belle's operator license had expired; (2) Iowa law requires an operating agreement between a licensed QSO and an operator; and, (3) Belle did not have an operating agreement with a licensed QSO. Judge Ovrom also found that Belle was unlikely to succeed on the merits.[55]

III. BELLE HAS NO PROTECTED RIGHT TO ITS LICENSE TO OPERATE THE ARGOSY CASINO AND THE IRGC'S ACTIONS ARE EXCEPTED FROM THE AUTOMATIC STAY

Belle now argues that its filing of bankruptcy triggers an automatic stay, and bars what Belle claims is some future "non-renewal" of Belle's license and the closure of the Argosy Casino.[56] As discussed below, Belle has no license to renew and no residual interest in its or MRHD's expired license. Further, the IRGC's actions are excepted from the automatic stay because they are a classic exercise of the IRGC's police power.

A. Belle Does Not Have a License or a Residual Interest in a License

1. Belle's License to Operate the Argosy Casino Expired in 2012

Judge Ovrom found that "Belle's operator license has expired."[57] Belle has not held a gaming license under Code section 99F since its operating agreement expired in 2012.[58] As discussed above, a casino operator must have an operating agreement with a licensed QSO.

[55] Ruling Following Remand, at 24, Appendix Ex. 1.
[56] Belle Br. at 18.
[57] Ruling Following Remand at 22, Appendix Ex. 1.
[58] At a minimum, Belle lost the privilege to operate the Argosy Casino upon MRHD's voluntary abandonment of its license to conduct gambling games at the Argosy after March 31, 2013 when it failed to seek renewal of its own license.

Indeed, Belle's parent, Penn National Gaming, has acknowledged in public SEC filings that "Iowa law requires that a qualified nonprofit organization hold the gaming license. At Argosy Casino Sioux City, we are the operator of the property."[59] Without an agreement with the actual holder of a license to conduct gaming, the IRGC cannot allow gambling to continue at the Argosy. It is undeniable that Belle does not have the required operating agreement with a licensed QSO and does not have a license.

2. Belle Has No Residual Interest in Its Expired License

Belle cites *In re Nejberger* 934 F.2d 1300 (3d Cir. 1991), for the proposition that it retains a residual interest in the expired license.[60] A comparison of the facts here to the facts in *Nejberger* demonstrates that *Nejberger* is of no help to Belle. In *Nejberger*, a liquor board refused to renew the debtor's license for failure to pay owed taxes. 934 F.2d at 1301. The bankruptcy court concluded that the owed taxes were prepetition debts and that the liquor board would have renewed the license but for the inability to pay the taxes. As a result, the bankruptcy ordered the board to issue the license. *Id.* at 1301, 1303.

The district court in *Nejberger* amended this order, finding that the debtor could submit a new application to the liquor board for review so that the board could then "be free to exercise its discretion to grant or deny renewal." *Id.* at 1303. The Third Circuit agreed with the district court's decision and affirmed the order, holding that the bankruptcy court "inappropriately barred the Liquor Board from its statutory obligation to exercise discretion in reviewing a renewal application." *Id.* at 1303-04. The Third Circuit noted that the debtor sought to "take advantage of the opportunity granted by the Code" to renew its license, but that the debtor "must

[59] Excerpts from Penn National Gaming, Inc. Form 10-K at Exhibit 99.1, Appendix Exs. 25-31.
[60] Belle Br. at 16-17.

also accept the statutory requirement of an exercise of discretion by the Board" in applying various factors when deciding whether to grant a license. *Id.* at 1304.

Of particular relevance here, the bankruptcy court recognized that the debtor would not have a continuing right in the liquor license if the Board had other grounds for denying the license that were unrelated to the debtor's inability to pay. *In re Nejberger*, 112 B.R. 714 (Bankr. E.D. Pa. 1990). Pennsylvania law provided a quota for the number of liquor licenses in an area and, while the debtor's license was pending, it did not count toward the quota in that area. *Id.* at 718. The bankruptcy court stated that had another party received a license in that area, thereby meeting the quota, "then the Board must deny the debtor's renewal even upon the debtor's subsequent payment of taxes." *Id.*

Here, the IRGC did not deny Belle's operator's license due to the failure to pay a prepetition debt, which could be cured. Rather, Belle failed to comply with Iowa law by not entering an agreement with a qualified nonprofit organization which had a license to conduct gaming in Woodbury County. [61] The IRGC's requirement was totally unrelated to Belle's failure to pay monies owed.

In January 2014, Belle conceded that the IRGC would close the Argosy "the day the Hard Rock opens[.]"[62] In her February 14, 2014 ruling, Judge Ovrom noted that the Argosy Casino would likely close "before these judicial review actions have made their way through the court system."[63] Judge Ovrom clearly contemplated that her order would result in the closing of the Argosy Casino.

[61] Ruling Following Remand at 21, Appendix Ex. 1.
[62] Jan. 30, 2014 Tr at 147, Appendix Ex. 24.
[63] Ruling Following Remand at 21, Appendix Ex. 1.

B. The IRGC's Actions are Part of the Police Power and are Therefore Excepted From the Automatic Stay

Belle invokes the automatic stay in an effort to evade government action to enforce Iowa gaming law. Bankruptcy Code section 362(b)(4), however, excepts from the automatic stay actions or proceedings by a government agency that enforce the agency's "police or regulatory power." 11 U.S.C. § 362(b)(4). Belle cannot credibly challenge that the IRGC's actions to enforce Iowa's gaming statutes were pursuant to its police power. *See Matter of Alessi,* 12 B.R. 96, 98 (Bankr. N.D. Ill. 1981). In *Alessi*, the Illinois Racing Board continued with its proceedings regarding the debtor's license to race horses after the debtor filed for bankruptcy. *Id*. at 97. The Racing Board's hearing focused on the debtor's issuance of bad checks and failure to pay debts. *Id*. The debtor moved to hold the Racing Board in contempt, arguing that the Board's continuation of the proceedings violated the automatic stay of Section 362. In response, the Racing Board argued that its hearing and denial of debtor's license were excepted from the stay pursuant to Section 362(b)(4)'s police power exception from the automatic stay. *Id.* at 98.

Leaving no doubt that state action in regulating gambling was pursuant to the state's police power, the bankruptcy court stated as follows:

> The regulation by the several states of the practice of betting in general and of betting on horse races in particular is **so widely recognized that the Court may take judicial notice of the prevailing view that this is a proper exercise of the police power reserved to the states.** For our purposes it is not important whether the power is deemed to be derived as a control over the general welfare of the citizens or whether it is a revenue measure. In either event, the states have determined that the running of honest races is an essential adjunct to the entire betting process, and the several states have established elaborate procedures to the end that the running of the races and the betting on the races will be conducted honestly.

Id. (emphasis added); *see also In re Emerald Casino, Inc*., 334 B.R. 378, 390 (N.D. Ill. 2005) *aff'd sub nom. Vill. of Rosemont v. Jaffe*, 482 F.3d 926 (7th Cir. 2007) (holding that Illinois Gaming Board's license revocation proceedings did not violate automatic stay because the Board, in conducting the proceedings, was acting pursuant to its police and regulatory power); *James v. Draper (In re James)*, 940 F.2d 46, 51 (3d Cir. 1991) (holding that a civil forfeiture action was except from the automatic stay under the "police power" exception to section 362(b)(4)). *Word v. Commerce Oil Co.*, 847 F.2d 291, 295 (6th Cir. 1988) (holding that enforcement of a state's water quality control act was within the police power exception).

Here, the IRGC acted to enforce compliance with Iowa gaming law. It denied a license to Belle and ordered the Argosy Casino closed because Belle is not statutorily eligible to operate a casino as it does not have the required operating agreement with a QSO licensed to conduct gaming.

As this Court has recognized, there are two tests to determine whether a government action is excepted from the stay: 1) the "pecuniary purpose" test and 2) the "public policy" test. *In re Minnich*, 449 B.R. 679, 685 (Bankr. E.D. Pa. 2011). Under the pecuniary purpose test, the Court determines whether the government action relates to protection of the government's pecuniary interest in the Debtor's property or to matters of public safety and welfare. *In re Minnich*, 449 B.R. 679, 685 (Bankr. E.D. Pa. 2011); *In re Pollock*, 402 B.R. 534, 536 (Bankr. N.D.N.Y. 2009). The purpose of this test is to "prevent suits that would allow a governmental unit to obtain an advantage over creditors or potential creditors in the bankruptcy proceeding." *City & Cty. Of San Francisco v. PG & E Corp*., 433 F.3d 1115, 1124 (9th Cir. 2006) (quoting *Lockyer v. Mirant Corp*., 393 F.3d 1098, 1109 (9th Cir. 2005)).

Here, the IRGC has taken no action to collect money. Rather, it acted pursuant to its police and regulatory power to enforce compliance with Iowa gaming law.[64] There is an important public interest in the IRGC's orderly regulation over gaming in Iowa. *Alfredo v. Iowa Racing and Gaming Comm'n*, 555 N.W.2d 827, 831 (Iowa 1996) (Iowa Supreme Court acknowledged that legislature empowered and obligated IRGC to regulate all gambling operations); 491 Iowa Admin. Code § 5.1 (regulations for gaming licensees). As described earlier, the Iowa legislature granted the IRGC "full jurisdiction" and supervision of "all gambling operations," including the power to "determine the eligibility of applicants for a license" and to "take any other action as may be reasonable or appropriate to enforce" the powers it is granted and the rules it creates. *See* Iowa Code §§ 99F.4; 99F.4(1); 99F.4(13). Pursuant to these powers, the IRGC ordered that Belle cease its operation of the Argosy Casino and denied Belle's license because Belle was not in compliance with Iowa gaming law.

Belle suggests that the IRGC acted primarily with a pecuniary purpose because the operating agreement results in money going to MRHD. The derivate result of money being paid to a QSO under Iowa's gaming laws does not convert the primary purpose of enforcing the requirement of an operating agreement to be pecuniary. An action can protect safety and welfare and pass the pecuniary purpose test even where the governmental action results in money passing to the state or third parties. *In re Universal Life Church*, 128 F.3d 1294, 1298-99 (9th Cir. 1997) (holding that when the IRS revoked the charitable tax-exempt status of a debtor corporation, it was acting within the regulatory and police powers exception even though the revocation had the pecuniary consequence of imposing liability on the debtor for unpaid taxes); *Thomassen v. Div. of Med. Quality Assurance (In re Thomassen)*, 15 B.R. 907, 910 (9th Cir. B.A.P. 1981)

[64] Ohorilko Decl., Appendix Ex. 44.

(upholding trial court's decision that revocation proceedings against the debtor fell within the police power exception); *SEC v. Towers Fin. Corp.*, 205 B.R. 27 (Bankr. S.D.N.Y. 1997) (holding that the SEC could pursue actions seeking disgorgement of illicit profits).

The incidental pecuniary interest in the enforcement of statutes and regulations does not mean there is a pecuniary purpose. *See, e.g., Universal Life Church*, 128 F.3d at 1298-99. Belle incorrectly cites *Majestic Star* and *Elsinore Shore* for the proposition that enforcement of a government action is stayed where there is a requirement that a debtor pay funds to the government or third party.[65] In *Majestic Star*, a bankruptcy court for the District of Delaware held that a city could not pursue an action to force the debtor to turn funds over to the city. *Majestic Star Casino v. City of Gary, Ind. (In re the Majestic Star Casino, LLC)*, No. 09-14136(KG), 2010 Bankr. LEXIS 1874, *3 (Bankr. D. Del. Apr. 28, 2010). Similarly, in *Elsinore Shore*, a bankruptcy court in the District of New Jersey held that a gaming board could not require a debtor to pay prepetition license fees and taxes as a condition of re-licensure because the fees and taxes were claims. *Elsinore Shore Assoc. v. Casino Control Comm'n (In re Elsinore Shore Assoc.)*, 66 B.R. 723, 738-39, 743 (Bankr. D.N.J. 1986).

These cases concerned governmental units attempting to collect on prepetition claims and thereby gain an advantage over creditors. That is not the case here. The IRGC has not sued Belle for money, like the city in *Majestic Star*, and the IRGC has not conditioned re-licensure on the payment of prepetition debts and fees. Rather, the IRGC required that Belle cease gaming operations at the Argosy because Belle is ineligible to conduct gaming without an operating agreement with a QSO licensed to conduct gambling games at that location.

[65] Belle Br. at 24.

The IRGC's April 17, 2014 ruling refutes Belle's suggestion that it acted primarily with a pecuniary purpose. In denying Belle's license, the IRGC noted that three percent of the Argosy Casino's adjusted gross receipts were being distributed for charitable purposes, even in the absence of an operating agreement with a QSO.[66] The IRGC clearly did not act to collect any unpaid fees. It acted without any, let alone primary, pecuniary purpose. Rather, it acted to enforce the legal requirements to operate a casino and to prevent a casino from operating in violation of those requirements.

The public policy test distinguishes between government actions that effectuate policy and those that adjudicate private rights. *Minnich*, 449 B.R. at 685. Here, the IRGC's actions enforce Iowa law and prevent Belle from unlawfully conducting gaming. In *Minnich*, this Court recognized a government unit could take away a debtor's privilege even when doing so would harm the estate because the debtor failed to comply with statutory requirements that governed that privilege. *Id.* at 685-86. In *Minnich*, the IRS notified the debtor that the debtor could no longer e-file tax returns. *Id.* at 682. The IRS made this decision because the debtor owed taxes and had been assessed civil penalties for being "overly aggressive" in claiming deductions. *Id.* This Court held that the suspension of the debtor's e-filing authorization protected the integrity of the tax system and was in line with the IRS's interpretation of its rules. *Id.* at 685. Similarly, the IRGC has an interest in the integrity of the Iowa gaming regulations and in the orderly regulation of gaming in Iowa.

It is clear that the IRGC acted pursuant to its police powers to enforce compliance with gaming laws and it found Belle to be statutorily ineligible to operate gaming at the Argosy

[66] IRGC Decision and Order at 11, Appendix Ex. 2.

because Belle did not and could not satisfy the legal requirement of an agreement with a licensed QSO. Iowa Code § 99F.5(1).[67]

In tacit recognition that it cannot credibly show that the IRGC acted primarily with a pecuniary purpose, Belle argues that the police power is limited to enforcement of fraud, environmental protection, and consumer protection.[68] But the Third Circuit has held that the police power exception is interpreted "broadly" where the actions fall squarely within an agency's police and regulatory powers. *In re Nortel Networks, Inc.*, 669 F.3d 128, 141 (3d Cir. 2011); *Penn Terra Ltd. V. Dep't of Envtl. Res. (In re McMullen)*, 733 F.2d 267, 277 (3d Cir. 1984); *In re Bankr. Appeal of Allegheny Health, Educ. & Research Found.*, 252 B.R. 309, 326 (W.D. Pa. 1999) (citations omitted) (quoting *Alpern v. Lieb*, 11 F.3d 689 (7th Cir. 1993).

Belle claims that the *Nortel* decision limited *Penn Terra* to interpretation of state laws regulating environmental hazards.[69] But the *Nortel* decision made no such limitation. Rather, it found that the reasoning in *Penn Terra* was not applicable because the proceedings were neither by a government agency nor actions squarely within an agency's police and regulatory powers. *In re Nortel Networks, Inc.*, 669 F.3d 128, 141 (3d Cir. 2011).

The order of the IRGC to cease gaming operations at the Argosy Casino falls squarely within the IRGC's police and regulatory powers. It had nothing to do with the collection of a debt from Belle. In Iowa, gaming is a highly-regulated industry overseen by the IRGC, which has "full jurisdiction" and supervision of "all gambling operations." Iowa Code § 99F.4.; *Nat'l Cattle Cong., Inc. v. Iowa Racing and Gaming Comm'n*, 752 N.W.2d 453 (Iowa Ct. App. 2008) (discussing the IRGC's vested power to interpret Iowa gaming law); *Alfredo v. Iowa Racing and*

[67] Ruling Following Remand, Appendix Ex. 1; IRGC Decision and Order at 8, Appendix Ex. 2.
[68] Belle Mot. at 20, n. 18.
[69] *Id*.

Gaming Comm'n, 555 N.W.2d 827 (Iowa 1996) (recognizing the powers and obligations of the IRGC). The IRGC acted pursuant to these powers to enforce Iowa's gaming laws and to prevent the operation of a casino in violation of Iowa law. The IRGC's actions are, therefore, excepted from the automatic stay under Bankruptcy Code section 362(b)(4). Neither Belle nor this Court can re-write the requirements for a casino in Iowa.

IV. BANKRUPTCY CODE SECTION 108(A) DOES NOT APPLY AND BELLE'S PLOY TO CONTINUE TO OPERATE THE ARGOSY CASINO IN VIOLATION OF IOWA LAW FOR ANOTHER TWO YEARS SHOULD BE REJECTED

Belle acknowledges that its ability to operate under Iowa Code section 17A.18 ends on June 11, 2014, unless that deadline is extended under Bankruptcy Code section 108(a).[70] Belle makes an unsupported argument by combining the Iowa Administrative Procedure Act with Bankruptcy Code section 108 to claim it can continue to operate the Argosy Casino contrary to Iowa law for another two years. For the reasons discussed below, this argument must be rejected as it ignores applicable Iowa law and misconstrues the Bankruptcy Code standard for determining whether Belle's challenge of the IRGC's refusal to renew its license is a "commencement of an action" or an "appeal."

Section 108 of the Bankruptcy Code provides two different tolls which may apply depending on the nature of the pre-petition cause of action or right—section 108(a) of the Bankruptcy Code provides debtors with a two-year toll from the order for relief, while section 108(b) of the Bankruptcy Code provides a shorter sixty-day tolling period. Whether a debtor receives a two-year toll or sixty-day toll solely depends on whether the cause of action or right to be tolled is considered to be "commencement of an action" under section 108(a) or more akin to

[70] Belle Br. at 25.

filing a "pleading, demand, notice, or proof of claim or loss, cure a default, or . . . any other similar act" under section 108(b).

Belle incorrectly asserts that it is entitled to the two-year tolling period under section 108(a), during which section 17A.18(2) of the Iowa Code would allow it to continue to operate the Argosy Casino, notwithstanding Belle's failure to comply with Iowa gaming law. Specifically, Belle claims that section 17A.19(3) of the Iowa Administrative Procedure Act allows for judicial review of the IRGC's nonrenewal of their 2013-2014 license by the Iowa District Court, and that such a judicial proceeding would constitute "commencement of an action" under section 108(a) of the Bankruptcy Code, not an "appeal" under 108(b) of the Bankruptcy Code.

Belle, however, cites no case law to support its misinterpretation of the Iowa Administrative Procedure Act or misapplication of section 108. Instead, Belle relies on two meritless arguments to support its view that judicial review by the Iowa District Court is a "commencement of an action" under section 108(a): (1) that the Iowa District Court will be the first member of the judicial branch or the first judicial body to hear the dispute, as opposed to an administrative agency under the executive branch, and (2) that a case interpreting New Hampshire law that held that judicial review of a tax board's decision constituted "commencement of an action" for purposes of section 108(a) of the Bankruptcy Code. Neither of these arguments have merit.

Courts that have addressed the issue agree that a "commencement of an action" under section 108(a) of the Bankruptcy Code, in the legal sense, "means a lawsuit brought in a court; a formal complaint brought within the jurisdiction of a court of law." *TLI, Inc. v. United States*, 100 F.3d 424, 427 (5th Cir. 1996) *citing* Black's Law Dictionary 28 (6th ed. 1990); *see also In re*

CGE Shattuck LLC, 272 B.R. 514, 518 (Bankr. D.N.H.2001) (finding that "the common and ordinary meaning of the term "action" is "lawsuit."). But the inquiry does not stop there. Courts distinguish "commencement of an action" from an "appeal," which is ***not the commencement of an action*** but rather the "continuation of an action" from a lower tribunal's ruling, and have further held that section 108(b) of the Bankruptcy Code, rather than section 108(a) of the Bankruptcy Code applies to "appeals." *CGE Shattuck*, 272 B.R. at 518; *see also Local Union No. 38, Sheet Metal Workers' Int'l Ass'n, AFL-CIO v. Custom Air Sys., Inc.*, 333 F.3d 345 (2d Cir. 2003).

Courts do not look to the nature of the reviewing body to determine whether a cause of action or right is a "commencement of an action" versus an "appeal." It is irrelevant that the Iowa District Court will be the first judicial body to consider Belle's fifth petition for judicial review of its licensing dispute. Rather, courts look to the standard of review provided by the applicable state law which will govern the reviewing court. *See, e.g., CGE Shattuck*, 272 B.R. at 519-20; *In re Vill. at Oakwell Farms, Ltd.*, 428 B.R. 372, 378 (Bankr. W.D. Tex. 2010).

Review of an administrative agency's decision is considered "commencement of an action" only when the applicable state law provides for *de novo* review. Under a *de novo* review standard, courts have held that, in essence, a new "full-blown lawsuit" is commenced where the reviewing court "looks at evidence afresh" and "is not limited to a review of the findings of fact and conclusions of law made by the [administrative agency]." *Vill. at Oakwell Farms*, 428 B.R. at 377-78 (the court found that a Texas statute which provided taxpayers the right to a full trial *de novo* on the issues of property valuation was "commencement of an action" under section 108(a) of the Bankruptcy Code); *see also CGE Shattuck*, 272 B.R. at 519-20. In these cases, the courts held that it is improper for a court reviewing an administrative agency's action to rely on

or give any weight to the agency's factual findings or legal conclusions and, instead, the court must permit the presentation of all evidence and witnesses on all matters and render an independent ruling thereon. *Vill. at Oakwell Farms,* 428 B.R. at 378.

Conversely, review of an administrative agency's decision is considered an "appeal" under section 108(b) of the Bankruptcy Code when a court's review "is circumscribed by the events that occurred at the [administrative agency]" with the reviewing court only "evaluating [the administrative agency's] factual findings for factual and legal insufficiency." *Id.* at 377-78.

Belle asserts that review of the IRGC's refusal to renew its 2013-2014 license is a "commencement of an action" under section 108(a) of the Bankruptcy Code without citing to any provision of the Iowa Code that discusses the standard of review that applies and is critical to evaluating if section 108(a) applies. Instead, Belle mainly relies on *In re CGE Shattuck,* which interpreted and applied New Hampshire law. Unlike the standard of review in Iowa, the New Hampshire law at issue provided for *de novo* review and was found to provide for a "commencement of an action," even though the New Hampshire statute referred to the review as an "appeal." *GCE Shattuck,* 272 B.R. at 519. New Hampshire law is irrelevant here. The relevant inquiry is the standard of review under Iowa law, about which Belle is conspicuously silent.

Section 17A.19 of the the Iowa Administrative Procedure Act is the exclusive means of judicial review of administrative agency action. *Richards v. Iowa State Commerce Comm'n,* 270 N.W.2d 616, 619 (Iowa 1978). Belle does not contest that the Iowa Administrative Procedure Act, and specifically section 17A.19, governs judicial review of the IRGC's decision to deny Belle's 2013-2014 license. The IRGC's denial of Belle's operator's license arose from the IRGC's conduct of a "contested case" proceeding. *See* Iowa Code § 17A.2(5) (definition of

"contested case"). Therefore, the District Court's review of the denial of Belle's license would be made solely upon the evidentiary record made at the March 5 and 6 hearing before the IRGC, which the IRGC would be required to certify and transmit to the reviewing court. Iowa Code § 17A.6. The Iowa district court does not have authority to hear additional evidence when reviewing a contested case. Iowa Code § 17A.19(7).

The Iowa Supreme Court has held that when a statute outlines specific procedures and pleadings for the review of an administrative agency's decision, the legislature's clear intent was to provide for an appeal, not a new proceeding or action. *Id*.; *see also In re Cmty. Sch. Dist. of Farragut*, 98 N.W.2d 888, 891 (Iowa 1959) ("We must for the purpose of jurisdiction, and of procedure and pleading, except where the statute specifically outlines these matters, view this 'appeal' as merely an original proceeding in the district court to determine the rights of the parties and the legality of the actions of the administrative body."). The Iowa Supreme Court has held on numerous occasions that a district court reviewing an administrative agency's action under section 17A.19 sits ***"in an appellate, rather than a trial, capacity,"*** a point of law completely omitted by Belle. *See, e.g., Young Plumbing & Heating Co. v. Iowa Natural Res. Council*, 276 N.W.2d 377, 381 (Iowa 1979) ("The role of the district court in reviewing administrative action under the Iowa Administrative Procedure Act . . . is of an appellate nature"); *Security Sav. Bank v. Huston*, 293 N.W.2d 249, 251 (Iowa 1980); *Public Emp't Bd. v. Stohr*, 279 N.W.2d 286, 290 (Iowa 1979).

The Iowa Administrative Procedure Act provides for an appellate standard of review for district courts when reviewing an administrative agency's decision. The standard of review in Iowa clearly is not *de novo*. Under Iowa law, when resolution of a controversy has been delegated to an administrative agency, "the district court has no original authority to declare the

rights of parties or the applicability of any statute or rule . . . . Its power to decide such issues is derived from and is dependent upon its authority to review agency action." *Public Emp't Relations Bd.*, 279 N.W.2d at 290. Belle cites no authority which would provide the Iowa district court with the authority to to conduct a *de novo* review of the IRGC's closure order and denial of a license. To the contrary, the district court is expressly bound by the findings and the evidence presented to the IRGC and is specifically prohibited from considering any new evidence.[71]

Under Iowa law, review by the Iowa District Court of the IRGC's nonrenewal of Belle's 2013-2014 license under section 17A.19 of the Iowa Administrative Procedure Act is an "appeal," and thus section 108(a) of the Bankruptcy Code does not apply.

V. THE ELEVENTH AMENDMENT GIVES THE IRGC SOVEREIGN IMMUNITY FROM BELLE'S REQUESTED INJUNCTIVE RELIEF

The IRGC has not consented to either Belle's preliminary injunction motion or the complaint for injunctive relief filed and, therefore, the IRGC is immune from Belle's request for an injunction by virtue of the Eleventh Amendment to the United States Constitution. Without the IRGC's consent, the Eleventh Amendment prevents this Court from enjoining the IRGC from performing its duties to regulate gambling in Iowa. In particular, this Court cannot enjoin the IRGC's duties and authority as they pertain to Belle's ineligibility to receive a license to operate the Argosy Casino. U.S. Constitution, amend. XI.

[71] Because licensing decisions by the IRGC are "contested cases" under section 17A.2(5), 17A.19(7) limits the evidence which may be heard by a district court on review. Specifically, "in proceedings for judicial review of agency action in a contested case, however, a court shall not itself hear any further evidence with respect to those issues of fact whose determination was entrusted by the Constitution or statute to the agency in that contested case proceeding. Before the date set for hearing a petition for judicial review of agency action in a contested case, application may be made to the court for leave to present evidence in addition to that found in the record of the case. If it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the contested case proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court." Iowa Code § 17A.19(7).

The Eleventh Amendment's reference to suits "against one of the United States" encompasses not only suits in which a State is a named defendant, but also certain actions brought against state agents and instrumentalities which may be described as "arms of the state." *Regents of the University of California v. Doe*, 519 U.S. 425, 429-30 (1997). The Eleventh Amendment applies to suits for injunctive relief brought against the states or state agents and instrumentalities. *See Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100-101 (1984).

The Eleventh Amendment confers sovereign immunity from suit upon the IRGC as a state agency. None of the three recognized exceptions to sovereign immunity exist. First, Belle does not name any state officials in their individual capacity. Second, the IRGC has not waived its sovereign immunity. Finally, Bankruptcy Code section 106(a)'s abrogation of sovereign immunity as applied to the regulatory actions taken by the IRGC is unconstitutional. *Central Va. Community College v. Katz*, 546 U.S. 356, 378 n.15 (2006). The Supreme Court indicated that *Katz* was not a holding that all laws labeled bankruptcy could impinge on sovereign immunity. *Id*. Unlike the situation in *Katz*, Belle requests injunctive relief against a regulatory authority and essentially a rewriting of the Iowa laws on gaming. This request is far afield of the in rem concerns of *Katz*. *Id.* at 377-78; *Vill. of Rosemont v. Jaffe*, 482 F.3d 926, 936 (7th Cir. 2007); *Shieldalloy Metallurgical Corp. v. State Dep't of Environ Protection*, 743 F. Supp. 2d 429, 438-440 (D.N.J. 2010). Thus, none of the exceptions to Eleventh Amendment sovereign immunity apply here. The motion for preliminary injunction must be denied and Belle's complaint must be dismissed.

VI. EXTRAORDINARY CIRCUMSTANCES DO NOT EXIST TO WARRANT BELLE'S PROPOSED INJUNCTION UNDER SECTION 105(A)

Belle seeks to utilize section 105(a) of the Bankruptcy Code as an independent basis for obtaining an injunction. This Court, however, "has been very cautious in exercising [its] powers under § 105(a) in the few instances where it has done so." *In re Amatex Corp.*, 97 B.R. 220, 225 (Bankr. E.D. Pa. 1989) *aff'd sub nom. Amatex Corp. v. Stonewall Ins. Co.*, 102 B.R. 411 (E.D. Pa. 1989); *see In re Cherry*, 78 B.R. 65, 73 (Bankr. E.D. Pa. 1987) (A bankruptcy court's powers under section 105 "should be sparingly exercised in only truly extraordinary circumstances"). In those few instances, the movant has successfully shown an "extraordinary set of circumstances." *In re Metro Transp. Co.*, 64 B.R. 968, 974 (Bankr. E.D. Pa. 1986). Further, issuing an injunction under section 105 is a "serious step" and courts must "give great deference to the decision-making process of a state agency even where the actions of the agency threaten the assets of the Debtor[.]" *In re CS Assocs*, No. 88-12842S, 1988 WL 92102 (Bankr. E.D. Pa. Aug. 31, 1988) (citing *Metro Transp.*, 64 B.R. at 972) (internal citations omitted). No "extraordinary set of circumstances" justifies taking the "serious step" that Belle asks the Court to take.

It is well-settled that section 105(a) of the Bankruptcy Code "does not authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity." *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 236 (3d Cir. 2004). Granting the injunction that Belle requests should be denied because it "does not preserve the status quo but expands [the debtor]'s property rights beyond what they would be outside Chapter 11." *In re Prof'l Sales Corp.*, 56 B.R. 753, 764 (N.D. Ill. 1985) ("Whatever authority § 105 may give the bankruptcy court to enjoin regulatory action by the federal government, it does not reach so far [as to expand a debtor's property rights beyond what they would be outside of chapter 11]."); *see also Wilner Wood Products Co. v. State of Me.*,

Dep't of Envtl. Prot., 128 B.R. 1 (D. Me. 1991) (holding that bankruptcy court lacked authority to order state to withhold its denial of air emission license to debtor while debtor appealed denial of license to state authorities). Indeed, granting the injunction would give Belle a substantive right to operate a casino in violation of Iowa gaming law.

Courts have recognized that a likelihood of success on the merits is the "most important preliminary-injunction criteria." *CS Assocs*, 1988 WL 92102, at *2. As Belle cannot possibly demonstrate that it is likely to succeed in its challenge of the IRGC's April 17 Order, Belle instead likens this element to "the debtor's ability to successfully reorganize."[72] However, in assessing the "likelihood of success" element, courts have criticized swapping out an evaluation of the merits of the dispute at issue for an evaluation of whether the chapter 11 cases as a whole are likely to result in a successful reorganization. The Court must look at the merits of the underlying dispute at issue, not at whether Belle is ultimately likely to reorganize in chapter 11. *In re FiberTower Network Servs. Corp.*, 482 B.R. 169, 182-83 (Bankr. N.D. Tex. 2012)[73]; *accord In re Go W. Entm't, Inc.*, 387 B.R. 435, 440 (Bankr. S.D.N.Y. 2008); *Wilner Wood*, 128 B.R. at 4 n. 4; *see also In re Los Angeles Dodgers LLC*, 465 B.R. 18, 30 (D. Del. 2011) (holding that appellant had shown "a strong likelihood of success on the merits of its appeal" where, among other things, "the Bankruptcy Court likely erred in concluding that the 'no shop' provision is unenforceable in bankruptcy").

[72] Belle Br. at 29.

[73] Although the *FiberTower* court granted the debtors' emergency motion barring the Federal Communications Commission's cancellation of their spectrum licenses until a final, non-appealable order adjudicating their rights with respect to the licenses had been issued, the court aptly distinguished *Go West* and *Wilner*, two cases in which injunctions were denied, on the following basis: "Unlike the [Federal Communications] Commission, the agencies sought to be enjoined in *Go West* and *Wilner* were state agencies. The courts in *Go West* and *Wilner* ruled that they lacked the authority to issue the requested injunctive relief because of principles of comity and federalism, as well as the importance of "avoid[ing] needless friction between Federal and State courts." *FiberTower Network Servs*, 482 B.R. at 186 n. 34.

Not surprisingly, Belle seeks to limit "likelihood of success on the merits" to its ability to reorganize because Belle cannot succeed in its judicial review of the IRGC's April 17 decision. Judge Ovrom has already found that Belle's operator's license has expired and that under Iowa law Belle had to have an operating agreement with a licensed QSO, which it does not.

However, even if "likelihood of success on the merits" should be limited to the ability to confirm a plan of reorganization, Belle still cannot satisfy this element. Whether the judicial review is resolved in favor of Belle or not, there will be no reorganization here. Belle states that:

> The nature of the plan … will depend upon the outcome of the license dispute. If Belle's license is preserved, the Debtors will be able to propose a plan that provides for the full payment of their creditors. . . . Conversely, if the license ultimately is terminated . . . the Debtors will propose a plan that provides for the orderly wind-down of their business and liquidation of their estates.[74]

Belle artfully states the obvious that there will not be any need to reorganize regardless of the outcome, as Belle's creditors can be paid in full regardless. Courts have recognized that where a debtor "is unable to propose a meaningful plan of reorganization until its litigation . . . is resolved[,] it is evident that the debtor seeks to use [the bankruptcy] court not to reorganize, but to relitigate." *In re Wally Findlay Galleries (New York), Inc.*, 36 B.R. 849, 851 (Bankr. S.D.N.Y. 1984). Such "impermissible use of Chapter 11 of the Bankruptcy Code" warrants dismissal of the chapter 11 case. *Id.*; *see also In re Newport Assembly Rest., Inc.*, 142 B.R. 22, 23-24 (Bankr. D.R.I. 1992) (finding that the debtor had not established a likelihood of success on the merits and noting, among other things, that the court "would indeed be acting irresponsibly and in direct contravention of federal law if it permitted a Debtor to 'reorganize its affairs' by refusing to comply with statutory liquor license regulations").

[74] Belle Br. at 29-30.

In the highly unlikely event that Belle was successful in the judicial review to obtain a license to operate the Argosy Casino in accordance with Iowa laws, no reorganization will take place. There would be no need for a plan of confirmation as no obligations would be restructured and no discharge of debts would be necessary. In the likely event that Belle will not be able to operate the Argosy Casino in violation of Iowa law, Belle will not be reorganizing, but instead will be winding-down its business and liquidating the estate. Liquidation, *by definition* is not *reorganization*. Because this denial is much more likely to occur, even under Belle's version of the applicable standard, it cannot meet the first prong necessary to obtain the injunction that it seeks.

In an analogous case, *In re Go W. Entm't, Inc.*, the debtor sought a preliminary injunction of the revocation of its liquor license by the New York State Liquor Authority pending its appeal of the revocation in state court. 387 B.R. 435 (Bankr. S.D.N.Y. 2008). In assessing the debtor's likelihood of success on the merits, the court first noted that it "has no power to review or overturn a final State determination of the issues herein." *Id*. at 442-43. In denying the debtor's motion, the court reasoned that an order granting the injunction "would directly violate the principle of comity and avoidance of needless friction between Federal and State courts that has been incorporated in several abstention doctrines[,]" including the *Younger* abstention doctrine, "which instructs that '[f]ederal courts should generally refrain from enjoining or otherwise interfering in ongoing state proceedings." *Id*. (quoting *Spargo v. New York State Comm'n on Judicial Conduct,* 351 F.3d 65, 74 (2d Cir. 2003) and noting that the "same comity principles apply with respect to State administrative proceedings 'in which important state interests are vindicated'").

Here, as in *Go West*, Belle seeks to have this Court enjoin the IRGC, the state agency with exclusive jurisdiction to regulate gaming in Iowa, from acting to ensure compliance with Iowa law, and alter the timetable for judicial review under Iowa law. This Court should not issue an order that would permit Belle to continue operating the Argosy Casino in violation of Iowa law beyond the July 1, 2014 deadline established by the IRGC. Further, Belle should seek a stay of that deadline from the Iowa district court under Iowa law.

Belle also asserts that the fourth element of section 105(a) of the Bankruptcy Code is met because injunctive relief would be in the public interest. In support of this claim, Belle emphasizes that the "Debtors' operations contribute to the state and local communities, by providing tax revenue, jobs and increased commerce."[75] Belle, however, fails to mention or take into account the opening of the Hard Rock Casino, vital to the revitalization of downtown Sioux City. The Hard Rock Casino will employ more workers and provide more tax revenue. Allowing Belle to continue to operate the Argosy Casino in violation of Iowa law would interfere with the IRGC's decision to move gaming to a land-based casino in downtown Sioux City and interfere with the substantial investments of the City of Sioux City and SCE to redevelop downtown Sioux City around the Hard Rock Casino. An injunction would not be in the public interest.

Arguing that an injunction would serve the public interest, Belle fails to mention the clear and well-settled public interest in affording deference to state regulation of gaming. *See, e.g., In re Smith,* 397 B.R. 134, 147 (Bankr. D. Nev. 2008) ("[T]here is an important public interest in preserving confidence and trust in the Nevada gaming licensing process and the Nevada Gaming Control Board itself."). Indeed, there can be little doubt that state legislatures have long

[75] Belle Br. at 33.

recognized society's interest in such regulation and the integrity of the process by which casinos and similar gaming institutions are regulated. Iowa Code §§ 99D.7, 99F.4 (empowering the IRGC "[t]o investigate applicants and determine the eligibility of applicants for a license and to select among competing applicants for a license the applicant which best serves the interests of the citizens of Iowa"). By stripping the IRGC of its statutory authority — and responsibility — to serve the public interest of regulating the Iowa gaming industry, Belle seeks to subordinate societal interests to its financial interests.

VII. INJUNCTIVE RELIEF EXPANDING THE APPLICATION OF THE AUTOMATIC STAY IS NOT WARRANTED.

Even assuming Belle can seek injunctive relief pursuant to section 105, Belle's motion for a preliminary injunction fails because it cannot demonstrate a likelihood of success on the merits of its claim, as any harm to Belle is outweighed by the harm to numerous parties in Sioux City and the public interest.

It is well recognized that a preliminary injunction "is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis original); *Union Trust Phila., LLC v. Singer Equip. Co. (In re Union Trust Phila., LLC)*, 460 B.R. 644, 660 (Bankr. E.D. Pa. 2011). The court may only grant a stay after balancing the following factors:

1. whether the movant has shown a likelihood of success on the merits;
2. whether the movant will be irreparably injured by denial of a stay;
3. whether granting a stay will substantially harm nonmoving parties; and
4. whether granting preliminary relief will be in the public interest.

See Kos Pharms., Inc. v. Andrx Corp., 3669 F.3d 700, 708 (3d Cir. 2004); *Allegheny Energy, Inc. v. DQE, Inc.*, 171 F.3d 153, 158 (3d Cir. 1999). This standard is consistent with those factors analyzed by the Iowa Court. [76]

A. Belle Cannot Show a Likelihood of Success on the Merits of Its Claims

As discussed in the preceding section, Belle incorrectly tries to limit the focus of the likelihood of success factor to "not one what might happen in the enjoined litigation" but "rather what is likely to occur in the bankruptcy itself." It has long been recognized that an injunction under section 105 should be granted only "under the usual rules for the issuance of an injunction." *Commonwealth Oil Ref. Co., Inc. v. U.S. EPA (Matter of Commonwealth Oil Ref. Co., Inc.)*, 805 F.2d 1175, 1188 (5th Cir. 1986) (citations omitted). Where, as here, a debtor "seeks to stay 'government action in the public interest,'" the debtor must meet the higher standard of 'probability of success on the merits.'" *Go W. Entm't*, 387 B.R. at 440 (quoting *N.Y.C. Envtl. Justice Alliance v. Giuliani*, 214 F.3d 65, 68 (2d Cir. 2000); *Plaza Health Labs. V. Perales*, 878 F.2d 577, 580 (2d Cir. 1989)). If a movant fails to establish a probably of success on the merits, then the court will not issue an injunction. *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 800 (3d Cir. 1989) (stating that the failure to demonstrate a likelihood of success on the merits "must necessarily result in the denial of a preliminary injunction"); *D'Angelo v. J.P. Morgan Chace Bank, N.A. (In re D'Angelo)*, 475 B.R. 424, 445 (Bankr. E.D. Pa. 2012) (denying a preliminary injunction because the movant failed to establish a likelihood of success).

Belle cannot prevent the IRGC from carrying out its duties and it cannot operate in contravention of laws being enforced by the IRGC. *See Commonwealth Oil Ref. Co.*, 805 F.2d at

[76] Ruling Following Remand at 15, Appendix Ex. 1.

1188 (holding that the automatic stay did not apply to EPA actions requiring compliance with environmental laws and denying a preliminary injunction because the EPA was likely to succeed on its environmental challenges). The Court must recognize Belle's inability to succeed on the merits of its claims. Just as Judge Ovrom found that Belle was unlikely to succeed on the merits of its claims against the IRGC over the denial of its license and the issuance of a license to SCE and MRHD, Belle's claims here are not likely to succeed.

It is undisputed that Belle does not have an operating agreement with a licensed QSO. Belle's parent, Penn National Gaming, has acknowledged in its public SEC filings: "Iowa law requires that a qualified nonprofit organization hold the gaming license. At Argosy Casino Sioux City, we are the operator of the property."[77] Belle has been in violation of this requirement since 2012. As Judge Ovrom found, the QSO holds the license to conduct gaming in Iowa. Belle cannot succeed on the merits of its claim to be allowed to continue to operate a casino in violation of the requirements in Iowa Code chapter 99F.

To avoid immediate job losses at the Argosy Casino, the IRGC allowed Belle to continue to operate by operation of law pursuant to Iowa Code section 17A.18. This, however, is not a substitute for compliance with legal requirements to operate a casino in Iowa under Iowa Code section 99F. The IRGC allowed Belle to continue to operate until the IRGC made its final determination, which has happened. The period for Belle to seek judicial review expires on June 11, 2014, thus ending the maximum period that Belle can operate under section 17A.18, even assuming that section 17A(18) remains applicable to any of the proceedings. There is no legal basis for Belle to continue to operate the Argosy Casino in violation of Iowa law.

[77] Excerpts from Penn National Gaming Form 10-K at Exhibit 99.1, Appendix Exs. 25-31.

B. Any Harm to Belle Does Not Justify an Injunction

Belle's alleged harm must be evaluated in the context that it has been operating a casino without a valid license and without the required operating agreement with a licensed QSO. Harm resulting from the closure of a casino not in compliance with the law is not the type of harm that justifies the exceptional remedy of an injunction. To soften the impact of lost jobs from the immediate closure of the Argosy Casino, the IRGC has permitted Belle to continue to operate until the imminent opening of the Hard Rock Casino. The Hard Rock is in the process of hiring approximately 500 employees. This will more than offset the 280 jobs at the Argosy Casino. Further, harm to Belle must be balanced with all of the other factors, including its likelihood of succeeding on the merits. Because Belle's claims lack merit, the first factor outweighs any irreparable harm to Belle. *See, e.g.*, *Magee-Womens Hosp. v. Heckler*, 562 F. Supp. 483, 484 (W.D. Pa. 1983) (denying a preliminary injunction because the plaintiff could not establish a substantial likelihood of success on the merits); *D'Angelo*, 475 B.R. at 445 (denying a preliminary injunction because the movant failed to establish a likelihood of success). Judge Ovrom denied Belle's prior request for a stay, even though she found that Belle would suffer irreparable injury without a stay.[78]

C. The Harm to Other Parties Militates Against a Stay

Belle argues that a stay of the IRGC's decision simply maintains the status quo until a full hearing.[79] To the contrary, an injunction drastically changes the status quo. It would prevent the IRGC from enforcing its regulatory powers to ensure compliance with Iowa gaming law, and would allow Belle to operate a casino in defiance of Iowa law. The IRGC's regulatory purpose would be completely frustrated if this Court were to permit an unlicensed operator

[78] Ruling Following Remand at 22-23, Appendix Ex. 1.
[79] Belle Br. at 31.

without a licensed QSO to conduct gaming. This is a violation of Iowa law and is a rewrite of the authorizing legislation. The proposed injunction would force Iowa to permit a wholly unauthorized and unintended license for gaming in its State.

Further, the City of Sioux City has expended considerable resources to revitalize downtown Sioux City around a land-based casino. As Judge Ovrom noted, the City of Sioux City favored construction of a new downtown casino.[80] It issued $22 million in municipal bonds to support the SCE Hard Rock Casino project. It closed and vacated downtown streets, deeded property to SCE and vacated parts of downtown Sioux City.[81] The project is designed to revitalize downtown Sioux City. Allowing the river-based Argosy Casino to continue to operate would divert customers and pedestrians away from downtown Sioux City.

SCE would face unlawful competition as customers and tourists would be diverted from downtown to the river-based Argosy Casino. SCE would lose revenue diverted to the Argosy Casino, which would be operating without a license and without an operating agreement with a licensed QSO.

Also, as Belle argued before Judge Ovrom, Iowa Code section 99F.7(2)(c) provides that only an entity licensed to conduct gambling at one type of facility (river boat or land-based) in a county may be licensed to operate a different type of casino (land-based or river boat) within the county.[82] Belle specifically argued before Judge Ovrom that section 99F.7 prevented the IRGC from issuing a license to MRHD and SCE to operate a land-based casino in Woodbury County, Iowa, since Belle purportedly had a license to operate a river boat casino. Since MRHD and SCE are licensed to conduct gaming at the land-based Hard Rock Casino, Belle may not be

[80] *Id.* at at 23; Jan. 30, 2014 Hearing Trans. at 62-65,68-72, Appendix Ex. 24; *see also* Ohorilko Decl., Appendix Ex. 44.
[81] Ruling Following Remand at 14, Appendix Ex. 1; Jan. 30, 2014 Hearing Trans. at 68, Appendix Ex. 24.
[82] Ruling Following Remand at 18, Appendix Ex. 1.

licensed to operate a river boat casino within Woodbury County. MRHD and SCE will be harmed by the unlawful diversion of revenue away from the Hard Rock to the Argosy, which would be operating in violation of Iowa law.

D. The Public's Interest Will be Adversely Affected by a Stay

As noted above, an injunction would adversely affect the clear and well-settled public interest in affording deference to state regulation of gaming. *Smith,* 397 B.R. at 147. The IRGC has full jurisdiction over gaming in Iowa. It decided to move gaming to a land-based casino in Woodbury County after Belle failed to satisfy the legally required condition for a renewal of its license. An injunction will interfere with the IRGC's regulation of gaming in Woodbury County. Further, an injunction would allow the Argosy Casino to operate in violation of the legal requirements for gaming in Iowa. The injunction will thwart the IRGC's ability to enforce Iowa's gaming laws, which clearly is adverse to the public interest.

VIII. CONCLUSION

For the foregoing reasons, Belle's motions for a stay and preliminary injunction should be denied.

Dated: May 27, 2014

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