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Office of The Attorney General
State of Connecticut

June 1, 2009

The Honorable Stephen D. Dargan, Co-chair
Public Safety and Security Committee
Legislative Office Building
Hartford, Connecticut 06106-1591

Dear Representative Dargan:

You have requested a legal opinion regarding a provision in the Governor's revised budget legalizing the game of Keno. In particular, you ask whether (1) Keno is a lottery game; and (2) legalizing Keno would impact the State's compact and memoranda of understanding (MOUs) with the Mohegan and Mashantucket Pequot Tribes.

As you know, pursuant to Conn. Gen. Stat. § 3-125, the Attorney General can provide legal opinions to legislators only if requested by the Senate President Pro Tempore, Speaker of the House of Representatives or the majority or minority leaders of the Senate or the House. I offer the following information and comments, which hopefully will be useful to you in considering the Governor's proposal.

At this point, there is no definitive answer to the questions you raise. Courts are divided on the issue of whether Keno is a lottery game and the answer may well depend on specific factual details -- not yet available -- as to the specific type and structure of Keno gaming contemplated by the Governor's budget. One critical point seems certain: a possible violation of the Tribal/State slot machine agreements could put at risk more than \$400 million in state revenues. Therefore, after the details are determined as to the Keno game proposal, the most prudent and responsible course, fiscally and legally, would seem to be an amendment to the Mohegan and Mashantucket Pequot slot machine agreements (MOUs). An amendment negotiated with the tribal nations would explicitly authorize the State to operate Keno games, once approved by the legislature pursuant to Conn. Gen. Stat. §3-6c.

Keno gaming has been discussed informally among legislators for several weeks and was recently included in the Governor's revisions to her February proposed budget, through a press release and her accompanying list of budget

revisions. The press release simply states "Introduction of Keno" as a proposed revision. The accompanying document contains only the line item "Implementation of Keno in the state" with estimated revenue of \$20 million for fiscal year 2009-2010 and \$60 million for fiscal year 2010-2011. Completely lacking is any explanation of the operation or structure of such Keno gaming and who would manage it -- two elements essential to a legal analysis and answers to your important questions.

As to your first question -- whether Keno is a lottery game -- our state Supreme Court has never directly addressed this issue. The relevant statute, Conn. Gen. Stat. § 12-801(3), does not resolve it. The Connecticut Supreme Court has "held that a lottery is characterized by three constituent elements, namely, a prize, a chance, and a price." *Farina v. Kelly*, 147 Conn. 444, 449 (Conn. 1960). That definition could arguably encompass Keno, and several courts outside of Connecticut have found that Keno is a lottery game. *See, e.g., Boasberg v. United States*, 60 F.2d 185, 186 (5th Cir. 1932); *Harris v. Missouri Gaming Comm'n*, 869 S.W.2d 58, 64 (Mo. 1994); *Knight v. State*, 574 So. 2d 662, 664 (Miss. 1990); *A.B. Long Music Co. v. Commonwealth*, 429 S.W.2d 391, 394 (Ky. 1968).

Other state courts have held that Keno is not a lottery game. *See, e.g., W. Telcon v. Cal. State Lottery*, 917 P.2d 761 (Cal. 1996); *Eslava v. State*, 44 Ala. 406, 409 (Ala. 1870). The rulings show that the conclusion as to whether a particular Keno game is a lottery game depends on its specific structure and operation, because the term "Keno" can apply to a variety of different games, not all within the definition of lottery. *See, e.g., W. Telecon*, 917 P.2d at 659 (noting that "decisions from other jurisdictions have held 'keno' to be a form of lottery, or stated so in *dictum*, but" concluding that "the game referred to is found to be materially different from [the] keno" at issue in that case); *see also Shakopee Mdewakanton Sioux Community v. Hope*, 798 F. Supp. 1399, 1409 (D. Minn. 1992) (noting the evolution of two distinct forms of Keno, one derived from bingo and the other derived from a lottery game).

In short, in this situation, there is no clarity in the statute, no ruling from our state courts, no unanimity in other state courts, and most important, no relevant specific facts as to the operation and structure of the proposed game or even what type is proposed. Concluding whether the proposed Keno is a lottery game would be more a guess than a legal analysis.

Because rulings are divided and details are lacking, and there are different types of Keno games, we cannot predict what courts would conclude about the type of Keno contemplated in the Governor's budget revisions.

Your second question -- whether legalizing Keno will affect the State's agreements with the Mashantucket Pequot Tribe and the Mohegan Tribe -- likewise presents unsettled issues, directly implicating key agreements with the Mashantucket Pequot and Mohegan Tribes. The MOUs authorize the operation of video facsimile games, particularly slot machines, at the tribal casinos in Ledyard and Uncasville, as long as the Tribes pay the State 25 percent of the gross operating revenues from video facsimile machines. 1993 Conn. Op. Atty. Gen. Letter to Rep. Ritter and Rep Krawiecki (February 11, 1993); 1994 Conn. Op. Atty. Gen. Letter to Sen. Larson, et. al. (May 18, 1994). Last year, these payments totaled over \$411 million. These payments continue "so long as no change in State law is enacted to permit the operation of video facsimiles or other commercial casino games by any other person and no other person within the State lawfully operates video facsimiles or other commercial casino games." Mashantucket Pequot Second Amendment to MOU dated April 25, 1994, pp. 1-2; Mohegan MOU of May 17, 1994, p. 2 (language slightly different but same meaning).

While a strong argument could be made that the state should not be regarded as "any other person," there is no judicial decision or other authority interpreting Connecticut's MOUs to support this position or authoritatively resolve this question. Some courts have found the phrase ambiguous in other contexts. See, e.g. *Fid. & Deposit Co. v. FitzGerald Contrs., Inc.* (In re *Whitaker Constr. Co.*), 439 F.3d 212, 224 (5th Cir. 2006) (analyzing state bankruptcy statute and holding that "ambiguity remains as to the identity of section 9:4822(C)'s 'other person'"): see also Conn. Gen. Stat. § 36a-2(48) (defining "Person" to include the State). Under Connecticut law, contract interpretation focuses on determining the intent of the parties, which "is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction." *Conn. Light & Power Co. v. Lighthouse Landings, Inc.*, 279 Conn. 90, 108 (2006) (quotation marks omitted).

Looking to the intent of the parties when the MOUs were negotiated and enacted, a court might conclude that the parties never contemplated the State operating casino games, including Keno, within the State while receiving 25 percent of slot machine revenue from the Tribal casinos.

Similarly, the State could contend that Keno is not a “commercial casino game,” but a court might disagree because clearly some types of Keno are prevalent in casinos, including the tribal casinos in Connecticut. Courts have been sympathetic to tribal efforts to protect their rights under the Indian Gaming Regulation Act and other federal statutes. See, eg. *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2nd Cir. 1990). Again, specific facts as to the type of Keno -- its structure, operation and management -- might be relevant and significant.

Only after the type of Keno is determined could we assess whether it constitutes a change in state law that permits the operation of commercial casino games by any other person, abrogating the MOU’s and eliminating tribal obligations to pay the state a 25 percent share of slot revenue.¹ No state or federal court -- in Connecticut or elsewhere -- has clearly addressed this issue. We cannot predict how a Connecticut court would decide it, particularly without details about the proposed Keno game.²

If the legislature wishes to pursue the Keno proposal, a prudent and reasonable course would be an amendment to the MOUs to clarify its legal impact. Structuring the operation and types of Keno games -- and other details -- might well affect the practical as well as legal conclusion. The legislature no doubt would wish some assurance that legalizing Keno would neither undermine agreements nor relieve the Tribes of obligations under the MOUs to make contributions to the State. Such an approach would avoid the risk of potentially

¹ In our view, even if the Keno proposal is enacted by the legislature and the Tribes believe that it changes state law to violate the MOUs, the Tribes cannot unilaterally cease making their contributions under the MOUs but are required to seek a court determination as to whether the State’s actions in fact violates the MOUs. Unilateral withholding of payments would violate the gaming procedures (Mashantucket Pequot Tribe) and the Gaming Compact (Mohegan Tribe). The issues would be litigated in federal district court, which might order that the funds be held in escrow pending the outcome, depriving the state of the use of the money during the course of litigation -- which could take years.

² Only one case, decided by a trial court in Michigan, has concluded that allowing Keno by the State of Michigan would not relieve tribes of their obligations to make payments to the State under an MOU. *State of Michigan v. Little River Band of Ottawa Indians*, 2007 U.S. Dist. LEXIS 31213 (W.D. Mich. 2007). This decision is not binding on the Connecticut courts. Whether it would be persuasive to a court in Connecticut would depend on a number of factors, including Michigan’s gaming laws, gaming compact provisions, and the overall circumstances under which the MOUs were negotiated there.

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losing more than \$400 million a year from the Tribes' contributions to gain \$20 to \$60 million in estimated revenues from legalizing Keno.

I would be pleased to address any additional questions, or respond to a formal opinion request at an appropriate time.

Very truly yours,

A handwritten signature in black ink, appearing to read "Richard Blumenthal", written in a cursive style.

RICHARD BLUMENTHAL
ATTORNEY GENERAL