Nos. 11-3883 and 11-3884

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CITY OF DULUTH,

Appellee/Cross-Appellant

vs.

FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA,

Appellant/Cross-Appellee.

Appeal from the United States District Court
District of Minnesota – Civil Docket Case No. 09-CV-02668
The Honorable Susan Richard Nelson, District Judge

Principal and Response Brief of Appellee / Cross-Appellant City of Duluth

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SUMMARY OF THE CASE

The City brought this case to enforce a 1994 Judgment (herein "Consent Order") of the United States District Court in 2009 after the Band unilaterally, and without seeking any court relief, ceased making payments to the City. The District Court granted the City partial summary judgment declaring the 1994 Agreements and Consent Decree valid and enforceable leaving a single accounting practices fact issue for trial.

The District Court also issued its order compelling arbitration as to the second or Extension Term of the Agreements (April 1, 2011 to March 31, 2036). The Arbitration Hearing began on July 11, 2011. Trial was set to begin on July 26, 2011.

On July 12, 2011, the National Indian Gaming Commission ("NIGC"), following the Band's request for an enforcement action, issued a Notice of Violation ("NOV") stating the original NIGC approval of the 1994 Agreements between the parties now violates the Indian Gaming Regulatory Act ("IGRA"). On July 22, 2011, the Band filed a Rule 60(b) motion for relief based upon the NOV.

The District Court denied Rule 60(b) relief with respect to the Initial Term of the 1994 Agreements and granted relief as to the Extension Term. Both parties appealed.

The City requests 30 minutes for oral argument to address the cross appeals.

TABLE OF CONTENTS

SUMMARY OF THE CASE 2

TABLE OF AUTHORITIES 6

I. JURISDICTIONAL STATEMENT 9

A. District Court Jurisdiction. 9

B. Court of Appeals Jurisdiction. 9

C. Filing Dates of Appeals. 10

D. Finality of Order or Other Jurisdictional Information. 10

II. STATEMENT OF ISSUES. 11

A. Issues – City's Principal Brief. 11

B. Issues – City's Response Brief. 11

III. STATEMENT OF THE CASE. 12

IV. STATEMENT OF RELEVANT FACTS. 14

V. SUMMARY OF ARGUMENTS 32

A. In Support of the City's Principal Brief in the Cross-Appeal. 32

B. In Support of the City's Response to Band's Appeal. 33

ARGUMENT AND AUTHORITIES 34

VI. THE CITY'S PRINCIPAL BRIEF. 34

A. There Were No Significant Changes in Factual Conditions Justifying Relief From The 1994 Consent Order. 34

1.The Changed Conditions Do Not Make Compliance With The Decree Substantially More Onerous. 36

2.There Are No Unforseen or Unforeseeable Changes Warranting Rule 60(b)(5) relief. 37

B.The NOV Is Not a Change in Decisional or Statutory Law Warranting Rule 60(b(5) Relief. 40

1. There Have Been No Changes in Statutory or Decisional Law. 40

2.The District Court Cites No Authority to Support the Conclusion That a Change in Agency Position or Interpretation Constitutes a Change in the Law. 41

3. Assuming the Change in Agency Position to be a Clarification, There was No Misunderstanding of the Governing Law. 43

C. The District Court Erred by Granting Rule 60(b) Relief Based on a Federal Agency Ruling That Was Obtained by Significant Political Pressure by the Party Seeking Rule 60(b) Relief 47

D. The District Court Erred In Allowing The 1994 Consent Order To Be Reviewed On Its Merits On The Rule 60(B) Motion. 49

VII. ARGUMENT IN RESPONSE TO THE BAND'S PRINCIPAL BRIEF. 55

A. The District Court Did Not Abuse Its Discretion In Denying The Band Relief Under Rule 60(B)(6) Of The Federal Rules Of Civil Procedure.....55

1. The District Court Did Not Misapply Rule 60(b)(6) as to the Band's Claims. 57

a. The Band's Requested Relief Were Not "Separate and Distinct." 57

b. The District Court Properly Applied Rule 60(b). 59

2.The District Court Properly Applied the Proper Factors and Determined that "Exceptional Circumstances" were not Present. 61

a. There are no "inconsistent obligations" creating an "exceptional circumstance." 63

b. There is no quandary creating an "exceptional circumstance" nor did the District Court place undue weight on the fact that the obligation arose under the Consent Order. 66

c. Undue weight – consideration of $75 Million and Unpaid Rent. ...68

d. The Unpaid Rent is not an "illegal payout." 70

e. The Absence of an Administrative Procedures Action is Irrelevant. 71

VIII. CONCLUSION. 71

CERTIFICATE OF COMPLIANCE 73

TABLE OF AUTHORITIES

Cases

Ackermann v. United States, 340 U.S. 193, 199-202 (1950)..... 12, 41, 63, 65

Agostini v. Felton, 521 U.S. 203 (1997) 11, 41

Alternate Fuels, Inc. v. Cabanas, 435 F.3d 855 10

Angela R. By Hesselbein v Clinton, 999 F.2d 320 (8th Cir. 1993),.....64

Atkinson v. Prudential Property Co., Inc., 43 F.3d 367 (8th Cir. 1994) 58

at 386-387, n. 8 49

Broadway v. Norris, 193 F.3d 987, 989 (8th Cir. 1999)..... 11, 50

Browder v. v. Director, Dept. of Corrections of Illinois, 434 U.S. 257, 263, n.7 (1978)..... 9, 55

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837 (1984).....45

Demma Fruit Co. v. Old Fashioned Enterprises, 236 F3d 422 (8th Cir. 2000).....45

EEOC v Product Fabricators, Inc., 666 F.3d 1170 (8th Cir. 2012).....64

Franklin v. I.N.S., 72 F.3d 571 (8th Cir. 1996).....45

Friends of Boundary Waters v. Bosworth, 437 F.3d 815 (8th cir. 2006) 45

Gonzalez v. Crosby, 545 U.S. 524 (2005) 63

Illinois v. Illinois Central R. Co., 184 U.S. 77 (1902).....55

In re Zimmerman, 869 F.2d 1126 (8th Cir. 1989) 12, 62, 65

Kentucky Ass'n of Health Plans v. Miller, 538 U.S. 329 (2003).....43

Kincade v. City of Blue Springs, 64 F.2d 389 (8th Cir. 1995).....10

Kokkonen v. Guardian Life Insurance Company of America, 511 U.S. 375 (1994).9

Laborers' Int'l Union of N. Am., AFL-CIO v. Foster Wheeler Corp., 26 F.3d 375 (3rd Cir. 1994)..... 11, 48

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) 12, 58

Lyon v. Augusta S.P.A., 252 F.3d 1078 (9th Cir. 2001).....58

Martinez v. City of St. Louis, 539 F.3d 857 (8th Cir. 2008) 37, 68

Middleton v. McDonald, 388 F.3d 614 (8th Cir. 2004) 58

Murphy v. State of Arkansas, 127 F.3d 750 (8th Cir.1997) 10

Neb. Beef, Ltd. v. Greening, 398 F.3d 1080 (8th Cir. 2005).....10

NLRB v. Iron Workers, 434 U.S. 335 (1978).....43

NLRB v. Weingarten, 420 U.S. 251 (1975) 43

O'Sullivan v. City of Chicago, 396 F.3d 843 (7th Cir. 2005)..... 35, 67, 71

Prudential Ins. of America v. National Park, 413 F.3d 897 (8th Cir. 2005).....42

Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992)..... 11, 35, 38

Salazar v. District of Columbia, 729 F. Supp. 2d 257 (D. D.C. 2010).....55

Sanders v. Clemco Indus. 862 F.2d 161, 169 (8th Cir. 1988).....50

Shakman v. City of Chicago,426 F.3d 925, 931 (7th Cir. 2005) 68

U.S. v. Mead Corp., 533 U.S. 218 (2001).....45

Statutes

25 U.S.C. §2701.....18

25 U.S.C. §2710..... 51, 52, 54

28 U.S.C. § 1331.....9

28 U.S.C. § 1362.....9

28 U.S.C. § 2201.....9

28 U.S.C. §2719.....30

Rules

Fed.R.Civ.Pr. Rule 60(b)(5).....45

Fed.R.Civ.Pr Rule 60(b)(6)…….....58, 59, 62, 63

I. JURISDICTIONAL STATEMENT.

A. District Court Jurisdiction.

The District Court specifically retained jurisdiction of this matter through the Consent Decree,[1] as recognized by *Kokkonen v. Guardian Life Insurance Company of America*, 511 U.S. 375 (1994). Under the retained jurisdiction, the District Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1362 (original jurisdiction of civil actions brought by recognized Indian tribes or bands, and 28 U.S.C. § 2201 (declaratory judgment).

B. Court of Appeals Jurisdiction.

This Court ruled it has jurisdiction to hear these appeals in its Order of January 31, 2012.[2] This Court has jurisdiction over this matter as an appeal from a denial of a Rule 60(b) motion. *Browder v. Director, Dept. of Corrections,* 434 U.S. 257, n. 7 (1978).

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[1] Stipulation and Consent Order. Band's Add. at p. 49.

[2] Order dated January 31, 2012 (denying the City's motion to dismiss appeals for lack of jurisdiction). City's App. at p. 1.

C. Filing Dates of Appeals.

Both parties filed their Notices of Appeal on December 21, 2011. This was within 30 days of the District Court Order of November 21, 2011 from which the appeals are taken.

D. Finality of Order or Other Jurisdictional Information.

This Court has pendent jurisdiction to consider issues that are "closely related" or are "inextricably intertwined" with an issue properly on appeal. *Alternate Fuels, Inc. v. Cabanas,* 435 F.3d 855, (8th Cir. 2006)(*citing Neb. Beef, Ltd. v. Greening,* 398 F.3d 1080, 1083 & n. 2 (8th Cir.2005), *petition for cert. filed,* 73 U.S.L.W. 3719 (U.S. May 31, 2005) (No. 04-1611); *Murphy v. State of Arkansas,* 127 F.3d 750, 753-54 (8th Cir.1997).

Both of the appeals arise from the District Court's Order dated November 21, 2011. Both appeals involve the same issues. The City's cross-appeal is "inextricably intertwined" with the Band's appeal. These appeals involve the District Court's decision arising from a single motion impacting both parties. In such cases, the appellate court has jurisdiction to hear both. *Kincade v. City of Blue Springs,* 64 F.2d 389, 394 (8th Cir. 1995).

II. STATEMENT OF ISSUES.

A. Issues – City's Principal Brief.

1. Did the District Court err in finding the NOV to be a change in the law sufficient to grant Rule 60(b)(5) prospective relief, thereby allowing a federal agency to reopen and rescind the Consent Order?

The City's position is in the affirmative. The District Court erred. The District Court should be **reversed** on that part of its Order. Standard of Review: *De novo* review of whether the requirements of Rule 60(b) have been met which is a question of law.

Apposite authorities:

Cases:

Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992)

Agostini v. Felton, 521 U.S. 203 (1997)

Broadway v. Norris, 193 F.3d 987, 989 (8th Cir. 1999)

Laborers' Int'l Union of N. Am., AFL-CIO v. Foster Wheeler Corp., 26 F.3d 375 (3rd Cir. 1994)

Statutes:

25 U.S.C. §2710 (b)(2)(v)

B. Issues – City's Response Brief.

1. Did the District Court abuse its discretion in denying relief from the 1994 judgment retroactively to vacate obligations performed or arising prior to the date of the NIGC's NOV on July 12, 2011?

The City's position is in the negative. The District Court did not abuse its discretion. The District Court should be **affirmed** on that part of its Order.

Standard of Review: Abuse of discretion.

Apposite Authority:

Cases:

Ackerman v. United States, 340 U.S. 193 (1950)

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988)

In re Zimmerman, 869 F.2d 1126 (8th Cir. 1989)

III. STATEMENT OF THE CASE.

The City brought this case to enforce the Consent Order after the Band unilaterally, and without seeking any court relief, ceased making payments to the City as required by the Consent Order and the 1994 Agreements. The District Court, through Judge Montgomery, granted the City partial summary judgment declaring the 1994 Agreements and Consent Order valid and enforceable.[3] This left a single fact issue, involving accounting practices regarding contra revenue, for trial.

[3] Memorandum and Opinion Order dated April 21, 2010 at p. 19. Band's App. at p. 379.

The District Court also issued its order compelling arbitration as to the Extension Term of the 1994 Agreements (April 1, 2011 to March 31, 2036) in accordance with the arbitration clause of the 1994 Agreements. The Arbitration Hearing began on July 11, 2011. Trial was set to begin on July 26, 2011.

On July 12, 2011, the NIGC issued a NOV stating that the 1994 Agreements between the parties violate the IGRA and that the Band must cease performance of any and all obligations under the 1994 Agreements. The ruling purported to apply to the entire 42 year term of the 1994 Agreements.[4]

On July 22, 2011, the Band filed a Rule 60(b) Motion for relief from the 1994 Consent Order, the Summary Judgment Order and the Order Compelling Arbitration.

The District Court, through Judge Nelson, denied Rule 60(b) relief with respect to the Initial Term of the 1994 Agreements (ending March 31, 2011) and granted relief as to the Extension Term (April 1, 2011 to March 31, 2036). As to the Initial Term, the court ordered the trial to go forward and that judgment for the amounts owed the City for unpaid rent (including past unpaid amounts for 2009, 2010 and 2011) would be ordered following the trial on the issue of contra revenue. As to the Extension Term, the court ordered that the parties are relieved

[4] Notice of Violation at p. 18. Band's Add. at p. 47.

of any further prospective compliance with their obligations under the 1994 Agreements and Order.

Both parties appealed this Order.

IV. STATEMENT OF RELEVANT FACTS.

This is *not* a fact-intensive case. Actually, it is not a factually disputed case. While there are numerous facts in the record relating to the 25 year relationship of these parties, *they are not disputed.* The dispute here is over the factual inferences and the legal conclusions to be drawn from those undisputed facts. The legal issues include the right of parties to enter into binding contracts; the right to settle a court case with finality; the sanctity of such a settlement reduced to a consent judgment of the court; the significance of the parties' settlement being approved by the U. S. Department of the Interior and the National Indian Gaming Commission; the ability of an appointed agency chair to change the parties' settlement and the court's judgment; for the agency to do so in response to repeated pressure from one of the parties; the propriety of the Court in turning the parties' rights under the judgment Consent Order over to the federal agency whose policies are admittedly subject to change and are subject to outside political pressure; and more.

While the facts should not be in dispute, the City takes issue with some of the fact statements made by the Band in its Brief which are misleading or untrue. The Band suggests that the parties' Agreements were entered into regarding land

that had already been taken into trust as a part of its reservation. This is untrue. The parties entered into their agreements in 1984 at a time when the Band had no reservation property in the City.[5] The Band and the NIGC in its NOV suggest that the original approval by the NIGC was done without the necessary time or analysis it deserved. This is not true. Parties who *were* present at the time have testified to the contrary.[6]

The relevant facts are:

HISTORY PRECEEDING THE CASINO.

In the early 1980's, the leadership of the Fond du Lac Band approached the leaders of the City of Duluth about locating an Indian Gaming Casino within the City of Duluth. At that time the Band had a casino/bingo hall on its reservation about twenty miles west of Duluth but it lacked the population to maximize its production and so the Band sought a location with a greater population source of potential gamblers.

The history of their contacts with each other, their work toward obtaining governmental approval is well set forth in the arbitration testimony of former

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[5] *See infra*, Statement of Relevant Facts.

[6] *Id*. and Affidavits of Jan McKeag and Gary Doty cited therein. City's App. at p. 2 and p. 6.

Mayor John Fedo.[7] His telling of that history is not disputed. City and Band officials worked with governmental agencies for months to obtain approval for the placing of the old Sears, Roebuck Building in downtown Duluth in trust for the Band to a have a casino located in that building.[8] The Band states that in 1986 the parties entered into a series of agreements to create a joint venture on tribal trust land in downtown Duluth that *had been* designated as part of the Band's reservation. (Emphasis added.) [9] While technically true, this statement is misleading. The parties entered into their agreements in 1984, before the land was ever taken into trust.[10] These agreements were subject to the approval by the U. S. Department of Interior (DOI) which was ultimately obtained in 1985[11], the land taken into trust in 1985,[12] and the final agreements formally executed on April 1, 1986.[13]

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[7] Transcript of Proceedings – Mayor John Fedo Testimony. City's App. at p. 32.

[8] *Id.*

[9] Band's Brief at p.7.

[10] Transcript of Proceedings – Mayor John Fedo Testimony. City's App. at p. 32.

[11] DOI Memorandum approving trust, June 6, 1985. City's App. at p. 40. DOI Memo directing land be taken into trust, June 13, 1985. City's App. at p. 42.

[12] Trust Deed, June 14, 1985. City's App. at p. 43.

[13] 1986 Commission Agreement. Band's App. at p. 41. 1986 Business Lease Agreement. Band's App. at p. 1. Transcript of Proceedings – Mayor John Fedo Testimony. City's App. at 32.

GOVERNMENT APPROVAL, CREATION AND DEVELOPMENT OF FOND DULUTH CASINO WITHIN THE CITY.

As Mayor Fedo explained in his arbitration testimony which was part of the record before Judge Nelson on the Rule 60(b) motion, obtaining DOI approval and authorization of the taking of the land in trust for the Band for a casino was not easy. This was the first off reservation casino in the country. DOI was not allowing the creation of off-reservation trust lands for casinos.[14] It was only the "joint economic development" nature of this project that got it approval.[15] Without the City's consent, cooperation and substantial efforts lobbying governmental officials and agencies, the Fond du Luth Casino would never have happened.[16]

With the final formation of what became known as the 1986 Agreements, the Fond du Luth Casino was developed and began operation in Duluth. Photographs of the Fond du Luth Casino and its location in downtown Duluth near the shore of Lake Superior were supplied to the district court.[17] Copies are included in the Addendum hereto.

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[14] Superior Evening Telegram article on DOI forbiddance of satellite Indian bingo parlors, February 15, 1986. City's App. at p. 44.

[15] Transcript of Proceedings – Mayor John Fedo Testimony. City's App. at p. 32.

[16] *Id.*

[17] Photographs of Fond du Luth Casino and nearby attractions. Exhibit 26 to Plaintiff's motion for summary judgment filed on December 10, 2009. City's Add. at 1.

By these Agreements, the City gave up forever the right to govern a portion of the City forever and the Band and City got economic benefits by the arrangement. The location of the casino has proved to be a success in giving the Band what it originally sought, a location with a better population from which to attract people interested in gaming.

In this litigation, the Band seeks to keep the casino and retain all of its profits beginning now instead of waiting to the end of the term during which it has agreed to pay the City. The Band can close the casino any time. It can build a casino in another location but it wants this casino in this location within the City because of the financial benefits of the location to which the City agreed at the time the contracts were agreed upon.

INDIAN GAMING REGULATORY ACT, 1988.

In 1988, Congress enacted the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §2701 et seq, which purported to promote tribal economic development, tribal self-sufficiency and strong tribal government; shield tribes from organized crime and other corrupting influences; and to ensure that the tribe is the primary beneficiary of the gaming operation.

1989 LITIGATION, District Court Case No. 5-89-163.

Following the enactment of IGRA, the Band brought suit in U.S. District Court, District of Minnesota, seeking to declare the 1986 Agreements to be in

violation of IGRA.[18] The District Court, Magnuson, J., granted the City's motion for summary judgment, dismissing the Complaint without prejudice and recognizing the value in allowing the National Indian Gaming Commission (NIGC) to "review the gaming operation and make its recommendations."[19]

DOI AND NIGC REVIEW, NEGOTIATIONS AND SETTLEMENT.

On review, the NIGC and the DOI found that the 1986 Agreements violated IGRA.[20] The NIGC Chair urged the parties to negotiate and reach an agreement. He offered to help and make staff and technical resources available to the parties.[21] While the Band in its Brief[22] and the current NIGC Chair in her Notice of Violation (NOV)[23], suggest that the NIGC Chair did not spend much time on analyzing the agreement the parties ultimately reached before approving it, this is not true. Chairman Hope became involved in the fall of 1993 and worked with the parties for months until an agreement was reached. He was familiar with the details of the agreement and how they involved a compromise that met the

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[18] Complaint in Case No. 5-89-163. City's App. at p.46.

[19] Memorandum and Order of Dismissal dated December 26, 1990. Band's App. at p. 126.

[20] NIGC Letter dated September 24, 1993. (Dkt. 11-1). Band's App. at p. 133.

[21] *Id*.

[22] Band's Brief at p.11.

[23] NOV at p. 5. Band's Add. at p. 30.

requirements of IGRA as noted by a fellow NIGC Commissioner who was there at the time,[24] and by former Duluth Mayor Gary Doty who also was there at the time.[25]

The 1994 Agreements were executed as of June 20, 1994 by the parties and by the Secretary of the Interior.[26]

1994 STIPULATION AND CONSENT ORDER.

Upon reaching their agreement and obtaining NIGC and DOI approval, the parties submitted the agreement to the district court by the Band filing a new action for declaratory judgment and simultaneously filing a stipulation of settlement with a stipulated Consent Order for the district court's approval and adoption.[27]

1994 AGREEMENTS.

The 1994 Agreements and Consent Order of the district court removed the joint enterprise or joint venture character of the 1986 agreements and thus met the requirements of IGRA. They retained but revised the Fond du Luth Economic

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[24] Affidavit of former NIGC Commissioner Jana McKeag dated July 29, 2011. City's App. at p. 62. She was there. The current NIGC Chair and Band's current lead counsel were not.

[25] Affidavit of Gary Doty dated August 2, 1011. City's App. at p. 6.

[26] 1994 Main Agreement. Band's App. at p. 136.

[27] Stipulation and Consent Order dated June 22, 1994 and July 29, 1994. Band's Add. at p . 49.

Development Commission.[28] The Commission then sublet the Casino property to the Band with rent to be paid to the Commission of $1.00 per month in advance for the entire term of the Sublease and to the City in the amount of 19% of gross revenue from video games of chance (to equate to approximately 30% of net profit from all revenues) for the first term through March 31, 2011 and in an amount to be agreed upon or determined by arbitration for the Extension Term[29], April 1, 2011 through March 31, 2036.[30]

Again, by the 1994 Agreements, the City gave up its right to govern the Casino property within the city limits. The option for the Extension Term was exercised, extending the term an additional 25 years to 2036.[31] These Agreements are an accord or treaty between these parties that lasts forever. The portion involving payment to the City is only the first 42 years beginning in 1994. During that time, the City is to be paid 19% of gross revenues from video games of chance

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[28] Amendments to Commission Agreement. Band's App. at p. 329.

[29] The Band repeatedly refers to this as the "Renewal Term." *See*, *e.g.*, Band's Brief at pp. ii, 23, and 24. This term is not used in the 1994 Agreements or anywhere else in this litigation but begins in the Band's Brief. It is properly referred to in the Agreements as the "Extension Term" and has been alternately referred to in this litigation as the "second term."

[30] Sublease and Assignment of Gaming Rights at §§4.1, 4.2.1, 4.2.2.2, and 4.2.2.5. Band's App. at p. 156-159.

[31] Attachment 7 to the 1994 Sublease and Assignment of Gaming Rights. Band's App. at p. 226.

calculated to approximate 30% of net profit from all revenues. That percentage has held fairly steady throughout the life of the Agreements so far.[32] The City has been paid approximately $75 Million from 1994 through the first two quarters of 2009 when the Band stopped making any payments.[33] The $75 Million represents approximately 30% of the *net* profits of the Casino during that period. The remaining 70%, for the same period, the Band has received $175 Million over and above all expenses.

Again in 1994, the parties entered into a permanent arrangement in which the Band received a steady stream of substantial income for 42 years. The City also received a stream of income for public purposes for 42 years. After which, the Band would have received 100% of the income forever.

THE BAND'S CESSATION OF PAYMENTS, 2009.

On January 28, 2009, the Band wrote Duluth Mayor Don Ness that it was entitled to a contra revenue deduction before calculating the City's rent that it had not taken and that it would deduct the amount for the previous fifteen years from its next quarterly payment to the City.[34] A deduction of $540,047.59 was taken from the payment submitted on January 30, 2009.

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[32] Aff. of Kurt D. Larson at ¶7. Band's App. at p. 357.

[33] Aff. of Vicki Radtke at ¶. Band's App. at p. 359.

[34] Chair Karen Diver Letter dated January 28, 2009. City's App. at p. 64.

On August 6, 2009, the Band's Reservation Business Committee (RBC) Chair Karen Diver again wrote to Mayor Ness announcing that the Band was ceasing all payments to the City under the 1994 Agreements.[35] On that same day, the RBC adopted Resolution #1316-09 resolving to cease all payments to the City.[36]

No court action was brought by the Band seeking relief from the 1994 Consent Order, under Rule 60(b), by independent action, or otherwise.

PRESENT LITIGATION District Court Case No. 09-2668 (SRN/LIB)

Upon the Band's contra-revenue deductions and its cessation of all payments, the City commenced this litigation to enforce the 1994 Consent Order and the 1994 Agreements.[37]

The City sought a declaration that the 1994 Agreements were valid and enforceable, judgment for rent past due and for arbitration of the amount of the Extension Term rent.[38] The lower court, Montgomery, J., granted partial summary judgment to the City ruling that the 1994 Agreements were valid and enforceable and ruling that the contra revenue issue involved a fact question relating to

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[35] Chair Karen Diver Letter dated August 6, 2009. Band's App. at p. 353.

[36] RBC Resolution 13-16-09 dated August 6, 2009. City's App. at p. 65.

[37] Complaint filed September 29, 2009. City's App. at p. 67.

[38] *Id*.

accounting practices and should continue for trial.[39] Trial was ultimately scheduled for a two-day trial beginning July 26, 2011.[40]

The District Court also ordered the parties to proceed to arbitration according to the 1994 Sublease to determine the City's percentage of gross profits from video games of chance to be paid to it during the Extension Term of the Sublease from April 1, 2011 through March 31, 2036.[41]

ARBITRATION FOR EXTENSION TERM (April 1, 2011 – March 31, 2036).

Pursuant to the District Court's Order compelling arbitration, the parties commenced an arbitration hearing in Duluth on July 11, 2011 before arbitrators Sam Hanson, Brian O'Neill and Thomas Thibodeau to determine the percentage of gross revenues from video games of chance to be paid to the City as rent for the Extension Term from April 1, 2011 through March 31, 2036.

On the second day of the arbitration hearing, immediately after the City had rested its case-in-chief, the Band brought to the attention of the arbitrators a Notice of Violation ("NOV") from the NIGC issued by it that day.[42] The Arbitration

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[39] Memorandum and Opinion Order dated April 21, 2010. Band's App. at p. 361.

[40] Order Canceling Trial dated July 18, 2011. City's App. at p. 80.

[41] Order Lifting Stay dated June 6, 2011. City's App. at p. 81.

[42] NOV dated July 12, 2011. Band's Add. at p. 30.

proceedings were suspended until the courts could determine the effect, if any, of the NIGC Notice of Violation.[43]

NIGC NOTICE OF VIOLATION, July 12, 2011.

The history behind the NIGC's issuance of its NOV in the middle of the arbitration hearing and a few short weeks before the scheduled trial herein is worthy of note, especially in light of the law controlling the circumstances under which Rule 60(b) relief from a judgment is appropriate.

The Band has repeatedly asked the NIGC and pressured it with repeated requests and demands actually asking that it, the Band, be found in violation of IGRA and be subject to sanctions.[44] The first such contact that we have in the record before the District Court and this Court is October 19, 2009 when the Band's lead counsel contacted the NIGC sending the City's Complaint in preparation for an October 20, 2009 telephone conference between NIGC attorneys Penney Coleman and Michael Gross and the Band's lead counsel Vanya Hogen.[45]

This contact was followed by contacts by or on behalf of the Band with the NIGC on December 21, 2009, December 22, 2009, May 17, 2010, August 16,

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[43] Aff. of Shawn Reed and select exhibits dated August 5, 2011. City's App. at p. 9.

[44] *Id.*

[45] *Id.*

2010, August 31, 2010, September 16, 2010, September 29, 2010, and September 30, 2010.[46] These are only the written communications that were revealed by pre-trial discovery requests by the City. Presumably, they do not include all communications or meetings that may have taken place.

During the time of these communications, the NIGC Chair wrote to the parties' counsel on August 13, 2010, declining to mediate the dispute for the Extension Term saying in part:

> "The Sublease was approved by the United States District Court of Minnesota pursuant to the above referenced consent order.
>
> …it does not appear that mediation is likely to be productive. *Rather binding arbitration appears to be the most appropriate and efficient mechanism* given that the only issue to be decided under the Sublease is the appropriate percentage of gross revenue to be paid by the Tribe to the City from April 1, 2011 to March 31, 2036.
>
> I do not arrive at this decision lightly or without concern for the continued relationship between the parties. *It is my sincere hope that the Band and City come to a suitable agreement*."[47]

On August 16, 2010, Band counsel responded to NIGC Chair Stevens. The Band requested that the NIGC take action against it. Band counsel stated in part that:

> "I write on behalf of the Fond du Lac Band . . .the Band now formally requests that the NIGC perform a full review of the 1994 Agreements.

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[46] *Id*.

[47] NIGC Letter to Counsel dated August 13, 2010. City App. at p. 83.

> Time is of the essence in this review. In the current federal litigation, the Court recently ruled that the 1994 consent decree that recognized the parties' settlement as embodied in the 1994 Agreement remains in place and granted partial summary judgment to the City. *It did not reach any aspect of the underlying legality of the 1994 Agreements under current federal gaming law, a conclusion that does not bind the NIGC.*
> ***
> *The Band ultimately seeks as relief an enforcement action that in which the NIGC: (1) declares that the 1994 Agreements do not comply with the IGRA; (2) orders that the Band be ordered to cease any further payments to the City; and 93)[sic] orders that the payments made to the City violated IGRA* as of at least 2001 based upon the NIGC's sole-proprietary-interest opinions.**"**[48]

On December 6, 2010, counsel for the City, Robert Maki filed a written Freedom of Information Act (FOIA) request with the FOIA Officer of NIGC seeking communications between the Band and NIGC regarding this case.[49] On March 22, 2011, the FOIA Officer wrote to Band counsel to "obtain assistance" to determine any exemptions that might apply.[50] The FOIA request was not honored until July 11, 2011, the first day of the arbitration hearing and the day before the NIGC issued it NOV.[51]

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[48] Henry Buffalo Letter to NIGC dated August 16, 2010. City App. at p. 13.

[49] Robert Maki Letter to NIGC dated December 6, 2010. City App. at p. 17.

[50] NIGC Letter to Attorney Hogen dated March 22, 2011. City App. at p. 18.

[51] Aff. of Shawn Reed and select exhibits dated August 5, 2011. City's App. at p. 9.

The NOV states: "the original NIGC approval was completed over the course of three days without substantive analysis."[52]

Not true. The truth is: NIGC Chair Anthony Hope spent months working with the parties analyzing the ways in which the agreements could be brought into compliance with IGRA. He was well aware of the details of the negotiations and the final agreement terms as were other members of his staff.[53]

The NOV states: "[t]he City's reliance on exclusivity granted in the 1994 Agreements is particularly dubious. The 250 mile area of exclusivity could not prevent another Indian tribe or a non-Indian entity from operating gaming because the City's jurisdiction does not extend beyond the City's limits."[54] The NOV further states:

> "25. Under section 3 of the 1994 Commission Amendments, the City has agreed not to enter any agreement with another tribal government within 250 miles of the Duluth City Hall that is similar to the one entered into with the Band without prior approval of the Band.

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[52] NOV dated July 12, 2011 at p.2-3. Band's App. at pp. 31-32.

[53] Aff. of Jana McKeag dated July 29,2011. City's App. at p. 2. Aff. of Gary Doty dated August 2, 2011. City's App. at p. 6. Robert Maki letter to NIGC Counsel Alan Fedman dated June 3, 1994. City's Add. at p. 3.

[54] NOV dated July 12, 2011 at p.10. Band's Add. at p. 39.

> "26. No other federally recognized tribe has lands eligible for gaming within 250 miles of the Duluth City Hall and no other gaming comparable to the Band's is permissible in Duluth."[55]

Not true. The truth is: the author of the NOV does not understand the exclusivity clause. It was requested by the Band. It prevented the City officials from dealing with or assisting other tribes regarding gaming on their lands or in other municipal off reservation sites, within 250 miles of Duluth, not just in Duluth. The City officials had just established that they had the skills and governmental contacts to do so successfully.[56] There are many federally recognized Tribes within 250 miles of Duluth, many of whom now conduct gaming on their lands.[57]

The NOV suggests that no other tribes exist within 250 miles of Duluth who could be eligible for off-reservation gaming facilities that would involve taking land into trust as was done in Duluth. Section 2719 of IGRA specifically authorizes gaming on such after acquired lands when the Secretary determines that it is in the best interest of the Tribe, would not be detrimental to the surrounding

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[55] *Id.* at p.17. Band's Add. at p. 46.

[56] Transcript of Proceedings – Mayor John Fedo Testimony at p. 63, lines l through 14 and p. 67, lines l through 9. City's App. at p. 38-39. Aff. of Shawn Reed dated August 5, 2011. City's App. at 9.

[57] Aff. of Shawn Reed dated August 5, 2011. City's App. at p. 9.

community and the governor concurs in that determination. 28 U.S.C. §2719 (b) (1) (A).

The NOV fails to recognize the many other Indian gaming agreements across the country which involve revenue sharing with governmental entities.

The truth is: the NIGC is aware of every Indian gaming casino because they are all required to pay an annual fee to NIGC based on revenues.[58] There are more than 200 gaming agreements with Indian tribes throughout the country. Most involve payments to governmental entities, including states and municipalities.[59] For example, the Forest County Potawatomi Community has a casino in Milwaukee, Wisconsin with substantial revenue sharing with the City of Milwaukee and Milwaukee County.[60]

A comparison of the Fond du Luth Agreements to other Indian gaming agreements across the country in the areas of revenue sharing, term length, termination, access to records and restrictions on changing gaming regulations shows that the Fond du Luth 1994 Agreements fall well within the range of other tribes' agreements across the country. Particularly with regard to the amounts

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[58] NIGC Regulations 25 CFR ,Chapter III.

[59] Aff. of Dr. Alan Meister, November 16, 2010. City's App. at p. 85.

[60] *Id*. City's App. at p. 85.

being paid to the City of Duluth, which seems to be the driving issue here, the payment falls within the range of other agreements. Some are higher. Some are lower.[61]

BAND'S RULE 60(b) MOTION.

The Band filed its motion on July 22, 2011 representing to the District Court that the NIGC had issued its NOV ordering the Band to "cease complying with those portions of the 1994 Agreements . . . that the commission had concluded violate the Indian Gaming Regulatory Act."[62]

The Band then moved for relief from certain portions only of the 1994 Agreements, "[s]o that it may comply with the commission's Order."[63] The Band sought to reverse the Consent Order which disposed of the prior NIGC enforcement action between the same parties.

The Band did not seek any relief from the NIGC and ask for a full Commission hearing. Nor did it appeal the NOV. Rather, it adopted Resolution #1242/11 adopting the NIGC ruling, ceasing all activities under the 1994

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[61] Aff. of Dr. Alan Meister, November 16, 2010. City's App. at p. 85.

[62] Band's Rule 60(b) Motion dated July 22, 2011. Band's App. at p. 381.

[63] *Id*.

Agreements, and repealing its 1994 Gaming Regulations that had been approved by NIGC and DOI.[64]

When the City petitioned to intervene before the NIGC, Band counsel wrote to NIGC on July 29, 2011 objecting to such intervention on the ground the City has no standing because the Band did not appeal, there was no appeal pending and "the only party with standing to appeal—the Band—is not appealing."[65]

Thereafter the NIGC rejected the City's petition to intervene because the Band did not appeal.[66]

On November 22, 2011, the District Court granted in part and denied the Band's Rule 60(b) motion. The instant appeal followed.

V. SUMMARY OF ARGUMENTS.

A. In Support of the City's Principal Brief in the Cross-Appeal.

No change of law or factual circumstance has been shown as required to justify Rule 60(b) relief.

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[64] Chair Diver Letter to NIGC dated July 27, 2011. City App. at p. 20.

[65] Attorney Hogen Letter to NIGC dated July 29, 2011. City App. at p. 25.

[66] NIGC Letter to Counsel for the City Shawn Reed dated August 15, 2011. City App. at p. 109.

The District Court erred in granting Rule 60(b)(5) relief as to the Extension Term of the 1994 Agreements and the Consent Order. By granting that relief, the District Court surrendered its 1994 Consent Order to the discretion of a politically appointed agency subject to political pressures that the court is not.

Allowing the NOV to control the Consent Order is to allow the review of that underlying judgment which is not permitted on a Rule 60(b) motion.

B. In Support of the City's Response to Band's Appeal.

The District Court did not abuse its discretion in denying retroactive relief for the Initial Term of the 1994 Agreements under Rule 60(b)(6). The District Court properly applied Rule 60(b)(6) and ultimately determined that the extraordinary circumstances required for the rare use of Rule 60(b)(6) were not present.

No change of the law or change of circumstance has been shown to justify Rule 60(b)(6) relief for the Initial Term of the 1994 Agreements. The only change in circumstance was foreseen by the parties and was voluntarily generated by the Band requesting a finding of a violation of law for purposes of bringing a request for Rule 60(b) relief.

ARGUMENT AND AUTHORITIES

VI. THE CITY'S PRINCIPAL BRIEF.

A party seeking modification of a consent decree bears the burden of establishing a significant change of circumstances warranting relief. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992). This initial burden may be made by showing either a significant change in factual conditions or in law. *Id.* 502 U.S. at 384 (1992).

The District Court erred in determining that the Band met this burden. There was neither significant change in factual conditions or in law. Rather, there was only significant pressure placed upon an agency and an improper review of the Consent Decree based upon the merits.

A. There Were No Significant Changes in Factual Conditions Justifying Relief From The 1994 Consent Order.

The *Rufo* court held that a modification of a consent decree may be warranted "when changed factual conditions make compliance with the decree substantially more onerous." *Id.* 502 U.S. at 384. The *Rufo* court further stated that:

> "[m]odification may also be appropriate when a decree proves to be unworkable because of *unforeseen* obstacles….Ordinarily, however, *modification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree*."

Id. (Emphasis supplied). However,

> "[i]f it is clear that a party *anticipated* changing conditions that would make performance of the decree more onerous but nevertheless agreed to the decree, that party would have to satisfy a heavy burden to convince a court that it agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of the undertaking under Rule 60(b)."

Id. at 385.

The Band, in seeking Rule 60(b) relief, asserted that the NOV constituted a change of factual conditions. The Band argued:

> "[i]n this case, we have a definite and unequivocally applicable change in circumstances: the agency approval on which the Consent Order was based has been rescinded, and the Band is subject to substantial fines and closure of its Casino if it complies with the Consent Order. Given the unique nature of this case, the NIGC's issuance of the Notice of Violation constitutes both a change in circumstances justifying relief from the Consent Order under Rule 60(b)(5) and an "extraordinary" case justifying relief under Rule 60(b)(6)."[67]

At the underlying motion hearing, the Band stated:

> "…we agree that under that under case law there hasn't been a change in the law, but it's fairly obvious that there has been a change in the circumstances."[68]

The District Court did not base its decision upon a significant change of factual circumstances. It did, however, note that

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[68] Band's Mem. dated July 22, 2011 p. 9 of 25.

[68] Transcript of Proceedings dated August 31, 2011 at p. 6, lines 17 through 20. Entry ID 3887946. City App. at p. 115.

> '[a]lthough this Court views the 2011 NOV as a change in the law, the result would likely be the same if the NOV were viewed as a changed in factual circumstances." [69]

Applying *Rufo* to the instant matter, it is clear that there are no significant changes in factual conditions warranting Rule 60(b)(5) relief.

1. The Changed Conditions Do Not Make Compliance With The Consent Order Substantially More Onerous.

The Band claims that it cannot comply with the Consent Order because of the issuance of the NOV. [70] This argument ignores, just as the Band ignored throughout the course of this litigation, the fact that the Consent Order remained valid unless and until the District Court vacated or modified it. *See O'Sullivan v. City of Chicago*, 396 F.3d 843, 865 (7th Cir. 2005)(holding that changes in factual or legal predicates upon which a consent decree is based is not grounds for ignoring or defying the decree).

Stated another way, the Band cannot be punished for compliance with a valid court order. *See, e.g. Martinez v. City of St. Louis*, 539 F.3d 857, 861 (8th Cir. 2008)(stating that compliance with a valid Title VII remedial consent decree until it was dissolved is a complete defense).

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[69] Order dated November 21, 2011, p. 16, n. 10. Band's Add. at p.16.

[70] Band's Brief at p. 41.

The District Court found that the Consent Order and the 1994 Agreements were legal valid when made.[71] The 1994 Agreements and Consent Order remained valid unless and until vacated or modified. On the Rule 60(b) motion consideration, the Consent Order was valid and binding and the NOV does not and cannot make compliance with it "more onerous."

2. There Are No Unforeseen or Unforeseeable Changes Warranting Rule 60(b)(5) relief.

The NOV cannot be the basis for Rule 60(b)(5) relief if it was foreseen or foreseeable by the parties at the time of their agreement. *Rufo* 502 U.S. at 384. In 1986 and again in 1994, the parties actually *did* foresee the possibility of a change by an administrative agency, like the NIGC, and specifically provided for such an outcome in their contracts. The District Court erred by failing to address the foreseeability of the NOV.

Section 35 of the 1986 Commission Agreement is entitled "Change of Federal Law, Judicial or Administrative Determination of Invalidity."[72] There, parties specifically provided what would happen if "a final administrative decision

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[71] Order dated November 21, 2011 at p. 20, n. 13. Band's Add. at p.20.

[72] Commission Agreement dated April 1, 1986. Band's App. p. 103.

or ruling" prohibited or prevented the City from participating in the Commission in any manner. That section stated, in part, that:

> "[i]n the event that…a final judicial or administrative decision or ruling is made by any court or governmental agency having binding jurisdiction over the Commission, City or Band, the effect of which is to prohibit the City of Duluth from participating in the Commission in any manner, the Commission shall terminate . . .unless one or more of the following options is exercised by the City of Duluth…."[73]

In the 1994 Agreements, this provision was carried forward but was dormant as long as the 1994 Sublease remains in effect.[74] So, while the provisions of Section 35 of Commission Agreement were dormant, it is clear that the parties foresaw an event akin to the NOV and made provision for it.

More importantly, the parties not only foresaw such an event, but took steps to address it by virtue of the Non-alteration and Abrogation clauses in 1994 Agreements. There the parties both agreed:

> "…not to seek, directly or through the use of paid lobbyists or other agents, any amendment to the Indian Gaming Regulatory Act of 1988, or any other

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[73] *Id.* Band's App. pp. 103-05. The options included the City and Band continuing the agreement upon acceptable terms and conditions; requiring the Band to purchase the City's interest in the profits of the Commission; the City electing to impose a license fee for the use of the ramp; or, electing that the City's 24.5 % of the net proceeds remain with the Commission subject to the control of the City appointed Commission members.

[74] 1994 Amend. to Commission Agreement, §§ 2 and 3. Band's App. at p. 332.

> federal law, that would alter or abrogate, or cause the alteration or abrogation, of this Agreement or any of the Exhibits thereto."[75]

Thus, the City and the Band had a contractual interest prohibiting the parties seeking a change that would abrogate or alter the 1994 Agreements. The Band did exactly that, it sought change that would cause the alteration or abrogation of the 1994 Agreements. In fact, the Band requested it.

On August 16, 2010, three days after the NIGC directed the parties to arbitrate the terms of the Extension Term, [76] the Band requested that the NIGC take action against it. Band counsel stated in part that:

> "[t]ime is of the essence in this review.
> ***
> *The Band ultimately seeks as relief an enforcement action that in which the NIGC: (1) declares that the 1994 Agreements do not comply with the IGRA; (2) orders that the Band be ordered to cease any further payments to the City; and 93)[sic] orders that the payments made to the City violated IGRA* as of at least 2001 based upon the NIGC's sole-proprietary-interest opinions."[77]

The Band, in response to the NIGC directing them to arbitrate, did exactly what they and City contracted against. They sought an abrogation or an alteration. The Band sought the very change they now rely upon to avoid the Consent Order. This was not an unforeseen change of factual conditions that gives rise to Rule

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[75] 1994 Main Agreement, Section 13. Band's App. at p. 141.

[76] NIGC correspondence dated August 13, 2010. City's App. at p. 83.

[77] Attorney Buffalo correspondence dated August 16, 2010. City's App. at p. 13.

60(b)(5) relief under *Rufo*. The Band cannot engage in a "voluntary, deliberate, free untrammeled choice" only to claim that the resulting change of circumstances was unforeseen change warranting Rule 60(b)(5) relief. *See Ackermann v. United States*, 340 U.S. 193, 200 (1950). *Supra*.

B. The NOV Is Not a Change in Decisional or Statutory Law Warranting Rule 60(b(5) Relief.

The *Rufo* court held that a "…modification of a consent decree may be warranted when the *statutory or decisional law* has changed to make legal what the decree was designed to prevent." *Rufo*, 502 U.S. at 388. The United States Supreme Court later stated that, "[a] court may recognize subsequent changes in either statutory or decisional law." *Agostini v. Felton*, 521 U.S. 203,215 (1997).

1. There Have Been No Changes in Statutory or Decisional Law.

There have been no changes in statutory law. IGRA remains the same since the entry of the Consent Order. Likewise, there have been no changes in decisional law. No cases on the subject are cited or exist since the entry of the Consent Order.

In other words, the law remains the same.[78] The NOV is the only change claimed. It is neither statutory nor decisional law as required by *Rufo* and *Agostini*.

2. The District Court Cites No Authority to Support the Conclusion That a Change in Agency Position or Interpretation Constitutes a Change in the Law.

In the absence of any change to statutory or decisional law, the District Court concluded:

> "*[a]lthough the underlying statute remains the same*, the NIGC clearly has changed course on whether the particular terms of the 1994 Agreements satisfy the IGRA. The Court finds that this change in agency position or interpretation constitutes a change in the law that could warrant relief under Rule 60(b)(5)."[79]

The District Court, in the admitted absence of an actual change of law, concluded that there was a change of law. The District Court cited to no authority to actually support this conclusion.

The District Court cites this Court's decision in *Prudential Ins. of America v. National Park*, 413 F.3d 897 (8th Cir. 2005), as its authority when it held that the NOV "constitutes a change in the law that could warrant relief under Rule

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[78] The Band agrees. *Supra* at n. 69. In addition, no law or regulation exists that specifically authorizes the NIGC to reopen previously closed enforcement action involving the same parties that resulted in an agreement and a consent decree.

[79] Order dated November 21, 2011 at p. 16. (Emphasis supplied). Band's Add. at p. 16.

60(b)(5).[80] The *Prudential* case does not support the District Court's conclusion. In that case, the change of law which this Court used to support Rule 60(b) relief was a decision of the United States Supreme Court in *Kentucky Ass'n of Health Plans v. Miller*, 538 U.S. 329 (2003). It was a decisional case, just like *Agostoni.* It did not deal with a change in agency interpretation.

Nor did the District Court cite to any authority to support the proposition that an agency decision can ever constitute a change in statutory or decisional law. The District Court later referred to *NLRB v. Weingarten*, 420 U.S. 251, 265 (1975) and *NLRB v. Iron Workers*, 434 U.S. 335, 351 (1978) for the proposition that an agency may define terms in particular disputes and that an agency may "chang[e] its mind."[81] Both of these cases, however, are not *Rufo* cases. Nor are they Rule 60(b) cases.

In the absence of a change of law, in the absence of any authority, the District Court erred in granting prospective Rule 60(b)(5) relief.

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[80] Order dated November 21, 2011, p. 16. Band's Add. at p. 16

[81] *Id.*at p. 18.

3. Assuming the Change in Agency Position to be a Clarification, There was No Misunderstanding of the Governing Law.

The *Rufo* court held that, "[w]hile a decision that clarifies the law will not, in and of itself, provide a basis for modifying a decree, *it could constitute a change in circumstances that would support modification if the parties had based their agreement on a misunderstanding of the governing law*." *Rufo* 502 U.S. at 390. (Emphasis supplied).

As noted, a clarification in the law does not automatically open the door for relitigation of the merits of every affected consent order. Here, that is exactly what the Band has sought to do in this litigation and before the NIGG. That is, to relitigate the merits of the 1994 Agreements and the Consent Decree. *Supra*.

Rather, there must have been evidence that the "parties had based their agreement on a misunderstanding of the governing law." The District Court confirmed that "the 1994 Agreements were not illegal when made."[82] The parties, the NIGC, the DOI, and the District Court did not misunderstand the governing law.

Even if the NOV constituted a change in agency position and a "clarification" of the law, in the absence of any "misunderstanding" this cannot

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[82] *Id* at pp. 19-20, n. 13. Band's Add. at pp. 19-20.

satisfy the requirements of *Rufo*. The District Court erred in granting prospective Rule 60(b)(5) relief.

Reference is made in argument, even by the District Court, to the giving of deference to agency rulings.[83] Such arguments are based on *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984). But that analysis is never reached in this Rule 60(b) case. The question is not agency deference but whether to modify a court order under Rule 60(b).[84]

Rule 60(b)(5) permits a court to provide relief from a judgment if: "prospectively is no longer *equitable*…." Fed.R.Civ.Pr. Rule 60(b)(5)(2007)(Emphasis supplied). The Band, in an effort to argue that the 1994 Agreements are no longer equitable, argues, in essence that it paid a lot for

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[83] *See*, *e.g.*, citation to *NLRB* cases. *Id.* at p.18.

[84] *Chevron* cases deal with judicial review of agency decisions to see what or how much deference is to be given them by the courts. No *Chevron* case involves a prior judgment from which a moving party seeks relief under Rule 60(b). *Chevron* deference and the *Chevron* analysis are not before the court on a Rule 60(b) motion where a change in law or facts must be shown that warrants relief from the judgment. *See*, *U.S. v. Mead Corp.*, 533 U.S. 218 (2001) (No Rule 60(b) motion, no underlying judgment); *Franklin v. I.N.S.*, 72 F.3d 571 (8th Cir. 1996) (direct review of INS decision to 8th circuit, no Rule 60(b) motion, no underlying judgment); *Friends of Boundary Waters v. Bosworth*, 437 F.3d 815 (8th cir. 2006) (U.S. Forest Service, appeal of summary judgment order, no Rule 60(b) motion, no underlying judgment); *Demma Fruit Co. v. Old Fashioned Enterprises*, 236 F3d 422 (8th cir. 2000) (Bankruptcy, no Rule 60(b) motion, no underlying judgment).

nothing.[85] Stated one other way, the Band claims that the City did not furnish any consideration.

The City gave its consideration in 1984 through 1986 and again in 1994. The Band now seeks to avoid its obligations to perform in consideration of what the City did while keeping the valid and valuable consideration the City parted with many years ago and parts with every year by expending its tax revenues tp keep the City a premiere tourist attraction in the state. If the City did not remain a major population center for the Band, the Band would have exercised its right to terminate long ago and focus on its other casino. That consideration included:

1) The City worked to achieve approval of the casino project for the band. Without the City's efforts and support, the approval would not have occurred. The band would not have the Casino, would not have received the $175 Million it has received since 1994 and would not be getting income into the future and forever.

2) The City gave up the right to govern a portion of the city itself forever. Duluth was one of the first cities in Minnesota to adopt a no-smoking ordinance that prohibited smoking in public buildings. Duluth City Ordinance No. 01-017-0,

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[85] *See* Answer and Counterclaim ¶ 28, p. 21 of 26. City App. at p. 172.

adopted May 29, 2001; codified in 28 Duluth City Code, Art. VII.[86] The City Council made findings:

> " . . . tobacco smoke is a major contributor to indoor air pollution which causes disease, including lung cancer in non-smokers. At special risk are children, elderly people . . .' Id.

But for the fact that the Casino is in Indian country and part of the Band's Reservation, no smoking would be allowed in the Casino. Other city laws are similarly unenforceable as to the Band such as zoning, lighting, snow removal, etc., laws which all other citizens of Duluth must follow.

3) Under the Agreements' exclusivity clauses, the City gave up the right to work with other Indian tribes to develop Indian Gaming Casinos anywhere within 250 miles of Duluth. The City could have helped another tribe develop a casino in a city or near a city and obtain DOI approval to take land in trust. This could include Superior, Wisconsin across the river from Duluth. The City could have participated in profits or been paid a fee for this help.

Additionally, the City could have worked with another tribe to develop an anchored gambling boat on Lake Superior on either the Duluth side or Wisconsin side.

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[86] The City's ordinance has since been replaced by Minnesota's Clean-Air Act which is enforceable in the City of Duluth by Duluth Law Enforcement and the City Attorney's office.

To allow the Band to now stop paying for the consideration it has already received and continue to receive is like deciding after the fact that a mortgage payment is too high, although it was perfectly legal at the time, relieving the mortgagor home owner from paying in the future but allowing him or her to keep the house. It is a retroactive application of the change. As the claimed offense was the amount of payment – it is zero – that is what the arbitration was to establish.

This is a one of a kind case. No amount of research will disclose a single case in which an agency was asked by a party to find that it, the requesting party, was engaged in illegal activity for purpose of vacating the payment provisions of a contract while retaining the right to revenue provisions. But, that is what happened here. These circumstances cannot be ignored in determining what was foreseen, foreseeable, and equitable for these parties.

C. The District Court Erred by Granting Rule 60(b) Relief Based on a Federal Agency Ruling That Was Obtained by Significant Political Pressure by the Party Seeking Rule 60(b) Relief"

The courts have recognized the differences between agencies and courts when dealing with agency retrospective changes to the law. In *Laborers' Int'l Union of N. Am., AFL-CIO v. Foster Wheeler Corp.*, 26 F3d 375 (3rd Cir. 1994), the court said:

> "… courts insulated from the dynamic political pressures agencies face should jealously guard their protective power to watch over agencies, so that agencies' retrospective changes to the law do not brand conduct that was legal when performed illegal when challenged when to do so would cause "manifest injustice."

Id., at 386-387, n. 8.

The evidence is replete with documentation establishing that the Band voluntarily and deliberately engaged in communication with the NIGC culminating in the creation of the NOV. As noted above, the communications primarily commenced *after* the City initiated litigation to enforce the Consent Decree. The Band did not seek the NIGC's input before ceasing payment due under the 1994 Agreements.

The intensity of the communications increased after the NIGC directed the parties to arbitrate the Extension Term. As noted above, the Band actually requested that it be found in violation of IGRA. The NOV was eventually issued in the middle of the parties' arbitration hearing for the Extension Term and two weeks before trial for the Initial Term.

Judge Nelson recognized that the 1994 Agreements were legal when the parties made them and when they were incorporated into the district court's 1994

Consent Order.[87] Allowing the NOV to change these contracts now is to give retrospective relief to the NOV that Rule 60(b)(5) does not permit.

It is the duty of the court to protect this Consent Order from subsequent retroactive change in the rights of the parties. It is error to turn the rights of the parties, established by contract and court judgment, over to the NIGC, an agency which is subject to "dynamic political pressures."

D. The District Court Erred In Allowing The 1994 Consent Decree To Be Reviewed On Its Merits On The Rule 60(B) Motion.

The underlying judgment is not open for review on a Rule 60(b) motion on appeal or at the district level. *Sanders v. Clemco Indus.* 862 F.2d 161, 169 (8th Cir. 1988); *Broadway v. Norris*, 193 F.3d 987, 989 (8th Cir. 1999).

But that is what happened here. That is what this litigation has been about from the beginning. [88] That is what the NOV did.[89] That is what the District Court

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[87] Order dated November 21, 2011 at p.28. (Dkt. 231). Band's Add. at p. 28.

[88] In its Answer and Counterclaim, the Band alleged that the 1994 Agreements were void for lack of consideration, mutual mistake and illegal and sought declaratory judgment that 1994 agreements "were void *ab initio*." Answer and Counterclaim at p. 24 of 26. City App. at p. 175.

[89] As noted by the District Court, the NOV is "directly contrary" to the NIGC's earlier opinion on whether the 1994 Agreements comply with IGRA. Order dated November 21, 2011 at p.17. Band's Add. at p. 17. The NOV states that it applies to "the entire 42-year term of the 1994 Agreements. NOV at p. 18. Band's Add. at p. 47.

allowed the NOV to do.[90] But the elements of the 1994 Agreements have been held to comply with IGRA and that 1994 holding by the District Court is not subject to review here.

The 1994 Agreements modified the 1986 Agreements in many ways including removing the operation of the casino from the Duluth-Fond du Lac Economic Development Commission to the Band and changing the structure, amount and purpose of the payments to the City. These changes were designed by the parties, NIGC and DOI to comply with IGRA.

For example, IGRA, in setting forth the "sole proprietary interest" requirements for approval of a tribal ordinance, gives special attention to the purposes for which revenues may be used. One of which includes the use of them "to help fund operations of local government agencies.'' 25 U.S.C. §2710 (b)(2)(B)(v). Section 2710 (b)(2) states:

> "[t]he Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that—
>
> (A) except as provided in paragraph (4), the Indian tribe shall have *the sole proprietary interest* and responsibility for the conduct of any gaming activity;
>
> (B) net revenues from any tribal gaming are not to be used for purposes other than—
>
> (i) to fund tribal government operations or programs;

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[90] *Id*.

(ii) to provide for the general welfare of the Indian tribe and its members;
(iii) to promote tribal economic development; (iv) to donate to charitable organizations;
(v) *to help fund operations of local government agencies;*"

25 U.S.C. §2710 (b)(2) (Emphasis added). The City is such a local government agency and the payments made to the City are to be used solely for funding the operations of the City.

In negotiating the revision of the 1986 Agreements to satisfy the NIGC and the Court, the Band and the City took great pains to assure that the 1994 Agreements provided that payments to the City would be used solely to help fund City operations in accordance with 25 U.S.C. §2710 (b)(2)(B)(v).

The 1994 Agreements consist of a main document,"[91] and several attached exhibits including the Sublease and the Tribal-City Accord. The main Agreement provides in part:

"Section 12: City Use of Funds.

Pursuant to a letter attached as Exhibit I, the City represents that it shall *use all funds received* under this Agreement and the Exhibits thereto *solely to fund the operating and capital fund budgets associated with the operation of local government agencies and departments of the City of Duluth*."

[91] 1994 Agreements Main agreement. Band's App. at p. 136.

(Emphasis added.)[92]

Attached to that Agreement as Exhibit I is a letter dated June 3, 1994 from the City's private counsel, Robert Maki, to Mr. Alan Fedman at the NIGC, stating in part:

> "The City use of revenues from tribal gaming which are paid to the City pursuant to the Sublease and Assignment Agreement *will be utilized* to fund the operating and capital fund budgets associated with *the operation of local government agencies and departments of the City of Duluth*."[93]

The agreement language and this letter are one of the ways in which the parties, their counsel, and the NIGC revised the prior agreements to conform to IGRA. This was carefully thought out and agreed upon by the parties.[94]

The 1986 Agreements were extensive, the result of many hours and months of negotiation regarding the casino development in downtown Duluth. The 1994 Agreements are no less extensive, involving many more hours and months of work by counsel for both parties and the NIGC. The 1994 Agreements were very carefully drafted with IGRA in mind. The 1994 Agreements include over

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[92] *Id.* at p. 5. Band's App. at p. 141.

[93] This letter was inadvertently left out of the City's Summary Judgment exhibits but was communicated to the District Court as part of the City's argument and brief and is part of the record as a part of District Court File No. 5-94-82. A copy of the letter is included in the city's Addendum hereto. City's Add. at p. 3.

[94] A thorough review of the 50 opinions cited by the District Court as the basis to support the NOV discloses not one opinion or word of analysis of §2710(b)(2).

140 pages of contracts and exhibits and more than 400 separately numbered sections.

Neither the Band nor the NIGC cited any rulings or advisories that address or in any way attempt to change the law regarding the restricted use of the funds paid to the City to which both parties agreed. The use of these funds for any of the stated purposes of 25 U.S.C. §2710(b)(2)(B) is expressly permitted by IGRA as a proper use of gaming revenues. Such use does not, in any way, affect the Band's sole proprietary interest as payment to the City is a purpose for which the Band is expressly authorized by statute to spend its money.

The NOV, and the request for it, became an improper review of the 1994 Consent Decree on its merits. The NOV states that the terms of the 1994 Agreements violate IGRA and that this ruling applies to the entire 42 year term of the Agreements.

The Consent Decree holding that the 1994 Agreements comply with IGRA because the funds paid to the City are to be used to fund local government operations of the City is not subject to review by NIGC today or by the court on a Rule 60(b) motion. It is one of the reasons why the 1994 Agreements *do* comply with IGRA and the court has so ruled.

On Rule 60(b) motions, the reason the underlying judgment is not open for review on its merits is so the finality of such judgments and such settlements in the

case of consent decrees can be protected. *Salazar v. District of Columbia*, 729 F. Supp. 2d 257 (D. D.C. 2010). [95]

We not only settled this case but agreed not to petition the NIGC to void that settlement. The Stipulation was filed June 22, 1994 in Civil Action 5-94-82.[96] Our signatures on the stipulation of settlement are below:

Accordingly, the parties respectfully request that the Court approve the proposed Stipulation and Consent Order, and hereby dismiss the case pursuant to its terms.

Respectfully submitted,

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[95] *See, also, Browder v. v. Director, Dept. of Corrections of Illinois*, 434 U.S. 257, 263, n.7 (1978). Justice Ginsburg's dissent in *Agostini v. Felton*, 521 U.S. 203 (1997) in which she cited *Illinois v. Illinois Central R. Co.*, 184 U.S. 77, 91-92 (1902) (cautioning against successive appeals of legal questions allowing speculation on changes in a court's members).

[96] Joint Mem. in support of Proposed Stipulation and Consent Order dated June 22, 1994. *See also* Stipulation and Consent Order. (Dkt. 11-7). Band's App. at p. 49.

Had there been any idea that the agreement not to seek a change in agency law so as to change the judgment would not be honored, there would not have been a settlement. Had there been any idea that the Band would repudiate its agreement, there would not have been a settlement. Had there been any idea that the NIGC would succumb to pressure and reopen a fifteen year old decision, there would not have been a settlement. Had there been any idea the District Court would not uphold our settlement and its own judgment, we never would have accepted this compromise settlement or given up the defenses and legal arguments we were prepared to make.

Either the original 1986 Agreements would have been upheld or there would be no Fond du Luth Casino. Not for the last eighteen years . . . not forever.

VII. ARGUMENT IN RESPONSE TO THE BAND'S PRINCIPAL BRIEF.

The Band argues that the District Court abused its discretion in denying Rule 60(b)(6) relief regarding rent due and owing the City for the years 2009 through 2011. There are no exceptional circumstances warranting Rule 60(b)(6) relief. The District Court did not abuse its discretion.

A. The District Court Did Not Abuse Its Discretion In Denying The Band Relief Under Rule 60(B)(6) Of The Federal Rules Of Civil Procedure.

The Band raises several related arguments alleging that the District Court abused its discretion in denying relief pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure with respect to rent due and owing the City for the years of 2009 through 2011, or as the Band characterized it, "Unpaid Rent relief."[97]

The arguments can be broken into three essential arguments. First, whether the Band's request for Unpaid Rent relief is separate and distinct from its request for relief from the Extension Term or as the Band characterized it, the "Renewal Term." Second, and related to the first argument, the Band argues that the District Court misapplied, or failed to apply Rule 60(b)(6) to the Unpaid Rent. Finally, the Band argues that the District Court did not properly consider factors or considered irrelevant factors in reaching its decision.

Each of these arguments and the resulting conclusions drawn are incorrect. But ultimately, these arguments do not carry the day. The question which the Band completely failed to address was whether "exceptional circumstances" were present warranting the "extraordinary remedy" of Rule 60(b)(6). The District Court properly concluded that such circumstances were not present.[98]

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[97] Band's Brief, p. 15.

[98] Order dated November 21, 2011 at p. 28. (Band's Add. at p. 28).

1. The District Court Did Not Misapply Rule 60(b)(6) as to the Band's Claims.

Relief under Rule 60(b)(6) is mutually exclusive from the relief available under clauses (1) through (5). *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863-864 (1988). Rule 60(b)(6) is also commonly referred to as the "catch-all" provision of Rule 60(b). *See Atkinson v. Prudential Property Co., Inc.*, 43 F.3d 367, 373 (8th Cir. 1994). Thus, if the reason for which relief is sought fits within clauses (1) through (5) and fails to meet the requirements of those clauses, the "catch-all" will not permit relief. *See Middleton v. McDonald*, 388 F.3d 614, 617 (8th Cir. 2004)(*citing Lyon v. Augusta S.P.A.*, 252 F.3d 1078, 1088-89 (9th Cir. 2001) *cert. denied*, 534 U.S. 1079 (2002)).

a. The Band's Requested Relief Were Not "Separate and Distinct."

The Band sought relief under Rule 60(b)(5) and (6).[99] Regarding clause (5), the Band argued:

> "[t]his issuance of the NOV, which directs that '[t]he Band must cease performance under the 1994 Agreements of those provisions identified in

[99] *See generally* Band's Motion for Relief dated July 22, 2011. Band's App. at p. 381.

> this NOV as violating IGRA, is a significant change in 'factual conditions' that justifies modifying the Consent Order under Rule 60(b)(5)."[100]

As to clause (6), the Band argued that a change of factual conditions constituted an "inconsistent obligation":

> "[t]oday, without relief from the Consent Order, the Band is left in a double bind: either it can cease performance under portions of the 1994 Agreements, as the NIGC has directed it (but in violation of the Consent Order), and risk the sanctions of this Court, or it can pay the City as the Consent Order requires (but in violation of the NOV)…"[101]

When challenged as to the apparent retroactive nature of the requested relief, the Band later characterized the NOV as:

> "…direct[ing] *prospective correction of a past wrong*. The City well recognizes that "one cannot 'cease' prior performance[,] so the suggestion that the NOV's direction to cease performance is retroactive is contrary to language and logic."[102]

Therefore, Band treated the requested relief as seeking relief from performance under the Consent Decree based upon a change in factual conditions that created a purported inconsistent obligation.

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[100] Band's Mem. in Support of Motion for Relief dated July 22, 2011 at p. 13 of 25 (internal footnote omitted).

[101] *Id.* at pp. 18 and 19 of 25.

[102] Band's Reply Mem. in Support of Motion for Relief dated August 12, 2011 at p. 16 of 30 (internal footnote omitted). City App. at p. 193.

The requested relief sought the "prospective correction of a past wrong" by relieving the Band of its obligations to arbitrate, to pay rent, and to disgorge funds from the City. The requested relief is not separate and divisible. The request for relief from paying the Unpaid Rent is not divisible from the request from relief from the Extension Term. Both are, as the Band characterized, "prospective corrections of a past wrong."

b. The District Court Properly Applied Rule 60(b).

The District Court properly denied relief from paying rent under Rule 60(b)(5). The District Court stated, in part, that:

> "[a]lthough the Band asserts that 'the NOV makes clear that it applies prospectively,' the Band nevertheless argues that the NOV 'directs prospective correction of a past wrong.' Thus, while claiming that 'the NOV itself is purely prospective, . . . the Band has requested that the Court order both future- and past-looking relief' pursuant to the Federal Rules of Civil Procedure.
>
> ***
>
> [T]he Band may not obtain, pursuant to Rule 60(b)(5), retroactive relief from any obligation under the 1994 Agreements that it already has performed or avoid any obligation that it already should have performed. *Accordingly, the Band may not withhold from the City the proper amount of rent due and payable for any portion of the now-completed Initial Term.*"[103]

[103] Order dated November 21, 2011 at p. 26-27. Band's Add. at pp. 26-27.

The District Court went on to properly deny relief from recovering rent already paid to the City under Rule 60(b)(6). The District Court stated that:

> "…a party seeking relief under Rule 60(b) may not employ Rule 60(b)(6) simply to evade the limits on relief that, but for the applicable limit, would be available under Rule 60(b)(1)-(5). The remainder of the relief the Band presently seeks consists of its request to recoup the bulk, if not the entirety, of the rent payments it already has made to the City during the Initial Term. *But having rejected such retroactive relief pursuant to Rule 60(b)(5), the Court declines to open any escape hatch that would permit such relief under Rule 60(b)(6).*"[104]

Thus, in addressing the Band's request for disgorgement of past paid rent, the District Court properly denied the Band's Rule 60(b)(6) requested relief from Unpaid Rent as being impermissibly retroactive. As the District Court ruled it improper under Rule 60(b)(5), the Band may not withhold from the City the proper amount of rent due and payable for any portion of the now completed Initial Term under Rule 60(b)(6).

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[104] *Id.* (Emphasis supplied).

1. The District Court Properly Applied the Proper Factors and Determined that "Exceptional Circumstances" were not Present.

The Band argues, to the extent that the District Court actually applied Rule 60(b)(6) to the Unpaid Rent requested relief, the District Court considered irrelevant factors or improperly weighted the factors.[105]

The Band argues that the District Court did not consider the creation of the "inconsistent obligation" presented by the Consent Decree and the NOV.[106] Related to that, the Band argued that the District Court did not address the Band's quandary of complying with both the Consent Decree and the NOV. Third, the Band argued that District Court placed undue weight on the fact that the obligation arose under the Consent Decree.[107] The Band argued that the Court placed "undue weight on the equities" when it considered the relief from the Unpaid Rent together with the prior rent paid in the amount of "$75 Million."[108]

The District Court's consideration of these various factors, or weighing the equities, is exactly what is required of the District Court. The District Court must

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[105] Band's Brief at p. 34.

[106] *Id.* at p. 37.

[107] *Id.* at p. 41.

[108] *Id.* at p. 44.

determine whether "exceptional circumstances" exist warranting the extraordinary remedy of Rule 60(b)(6).

Rule 60(b)(6) relief is an extraordinary remedy. *In re Zimmerman,* 869 F.2d 1126, 1128 (8th Cir. 1989). It is an extraordinary remedy available "only where 'exceptional circumstances prevented the moving party from seeking redress through the usual channels." *Id.* (*citing Ackermann v. United States,* 340 U.S. 193, 199-202 (1950)). The *Zimmerman* court, citing the district court, noted:

> "[t]he integrity of the court[s] is protected not only by not allowing parties to manipulate one court against the other, but also by requiring parties to avail themselves of available procedures."

Id. Applying the foregoing to the instant matter, the District Court properly determined that there were no "exceptional circumstances" present warranting Rule 60(b)(6) relief.[109] The District Court, in reaching that conclusion, noted that the 1994 Agreements, in part:

> "…emanates from a consensual business transaction that has financially benefited both parties. Under such circumstances, the Court could not

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[109] Although the Band did not specifically assert a "change of law" it is worth noting that "[c]hanges in the law, 'by themselves[,] rarely constitute the extraordinary circumstances required for relief" under Rule 60(b)(6). *Agostini v. Felton*, 521 U.S. 203, 239 (1997) and *Gonzalez v. Crosby*, 545 U.S. 524, 536 (2005).

equitably permit the Band to rewrite that agreement so as to allow it to recoup rent payments already made.

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But the Court cannot conclude that justice requires or warrants such relief where the Band agreed to those terms, and the NIGC approved the parties' deal in 1994. In short, at the time those agreements were entered into, they were legal under the NIGC's then-existing understanding of IGRA. Moreover, the fact that the Band now believes the 1994 Agreements were unfair is no basis to retroactively invalidate those agreements. A bad bargain perhaps, but one that the Band entered into without coercion."[110]

a. There are no "inconsistent obligations" creating an "exceptional circumstance."

The Band desperately tries to construe the instant case in the same light as those cases where there are inconsistent judgments requiring harmonization of the results between accident victims or common contractual transaction arising out of the same matter.[111] This argument must be disregarded.

First, this case does not involve two judgments. Rather, it involves a Consent Order and the NOV.[112] Second, the instant case does not involve a

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[110] Order dated November 21, 2011 at pp. 26 and 28-29. Band's Add. pp. 26 and 28-29.

[111] Band's Brief at p. 36.

[112] In *Angela R. By Hesselbein v Clinton*, 999 F.2d 320, 324 (8th Cir. 1993), the court made clear that a consent decree is a judicial act. Most recently in *EEOC v Product Fabricators, Inc.*, 666 F.3d 1170, 1172 (8th Cir. 2012) the Eighth Circuit again observed that a consent decree offers more security to the parties than a

multitude of parties in different cases. The City and the Band are both parties subject to the Consent Order involved in the same litigation. No harmonization is required.

Finally, the Band's cited cases are further inapposite as the Band deliberately and voluntarily chose to seek the NOV. Unlike the Band, the parties in the Band's cited authority did not deliberately seek an inconsistent judgment.

The United States Supreme Court held that, "[b]y no stretch of the imagination can ... voluntary, deliberate, free, untrammeled choice" be considered exceptional circumstances. *Ackermann v. United States*, 340 U.S. 193, 200 (1950). Likewise, the Eighth Circuit has held that exceptional circumstances cannot be created through manipulation of one court against another and through the failure to avail oneself of available procedures. *In re Zimmerman*, 869 F.2d at 1128. *Supra*.

Here, the Band actively sought out the enforcement action and the NOV. It asked to be fined.[113] It did so after the commencement of this litigation and after

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settlement agreement. It represents the court's independent conclusion that the terms of the settlement comport with federal law and advances federal interests.

[113] Attorney Buffalo correspondence dated August 16, 2010. City's App. at p. 13.

the NIGC directed the parties to arbitrate the dispute under the 1994 Agreements.[114] This was a voluntary, deliberate, and free choice.

Once the NOV was issued, the Band chose not to avail itself of all procedures and appeal the NOV to the full commission of the NIGC.[115] This was a voluntary, deliberate, and free choice.

The Band, in correspondence to the NIGC, then used the absence of the appeal as means to object to the City's petition to intervene "so as to assert an appeal and request a full hearing together with testimony."[116] Attorney Hogen stated:

> "…there is no appeal from NOV-11-02 pending, *nor will there be*, because the only party with standing to appeal – *the Band – is not appealing.*"[117]

This too, was a voluntary, deliberate, and free choice. On August 15, 2011, the NIGC denied the City's petition to intervene. The NIGC stated, "…the Band did

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[114] NIGC correspondence dated August 13, 2010. City's App. at p. 83.

[115] Chair Diver correspondence to the NIGC dated July 27, 2011. City's App. at p. 20.

[116] Attorney Hogen's correspondence dated July 29, 2011. City's App. at p. 25.

[117] *Id.*

not appeal the NOV within the time permitted and, therefore, there is no proceeding before the Commission."[118]

As the Band sought out and obtained the NOV, there is not an "inconsistent obligation." The foregoing does not constitute the "exceptional circumstances" contemplated to warrant Rule 60(b)(6) relief.

b. There is no quandary creating an "exceptional circumstance" nor did the District Court place undue weight on the fact that the obligation arose under the Consent Decree.

Despite seeking and obtaining the NOV, the Band argues that the District Court creates the quandary of the Band having to choose between ceasing performance under the NOV or paying the unpaid rent. The Band argues that:

> "…there can be no dispute that it would violate federal law for the Band *today* to tender payment of Unpaid Rent."[119]

The Band argues that the District Court "measured the legality [of the 1994 Agreements] at wrong point in time."[120]

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[118] NIGC correspondence dated August 15, 2011. City's App. at p. 109.

[119] Band's Brief at p. 37 (Italics in original).

[120] *Id.*

This argument ignores the fact that consent decrees are lawful and binding until said otherwise.[121] This argument further ignores the fact that the Band ignored its obligation to abide by the Consent Order until relieved of that obligation by the District Court.[122] Finally, the Band ignores the separation of powers doctrine. As the District Court properly noted:

> "…an agency may not – consistent with the separation of powers doctrine – 'take action that would effectively vacate a court's final judgment.'***As the City contends, the 'NIGC has no authority to tell the Court whether its 1994 Consent Decree is to be reopened or vacated.'***That decision is solely for this Court, and one governed by Rule 60(b)."[123]

There is no quandary. The Band, rather than violating the terms of the 1994 Agreements and ignoring the Consent Decree, should have paid the Unpaid Rent when due. That payment was lawful then under the Consent Order and continues to be lawful. Payment of the Unpaid Rent is not a violation of federal law.

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[121] *O'Sullivan v. City of Chicago*, 396 F.3d 843, 865 (7th Cir. 2005)(stating that "[a]lthough changes in the factual or legal predicates on which a consent decree is based are not grounds for ignoring or defying the decree…("[W]e believe that the court expressed the usual course ... when it wrote that a 'continuing respect for the valid decrees of a court commands that they be obeyed until changed.'"

[122] *Shakman v. City of Chicago*,426 F.3d 925, 931 (7th Cir. 2005)(stating that "[t]he Supreme Court-clearly established that parties could not ignore consent decrees that they believed had become outdated in some manner.") *See, e.g. Martinez v. City of St. Louis*, 539 F.3d 857, 861 (8th Cir. 2008). *Supra*.

[123] Order dated November 21, 2011 at p. 26. Band's Add. at p. 26. (Internal quotations omitted).

For the same reasons, the Band is incorrect in arguing that the District Court placed undue weight on the fact that the Unpaid Rent obligation arose under the Consent Order.[124] There is no quandary. There are no exceptional circumstances. The payment of the Unpaid Rent is lawful under Consent Order.

c. Undue weight – consideration of $75 Million and Unpaid Rent.

The Band argues that the District Court erred when it "lumped the over $75 million that the Band already paid the City during the Initial Term with the approximately $10.3 million of *Unpaid* Rent…" that has accrued and "set aside" pending this litigation.[125] The District Court analyzed both amounts together as "retroactive relief."[126]

The "retroactive relief," of course, is a proper characterization by the District Court. The Unpaid Rent had already come due during the Initial Term under a valid and lawful consent decree. The Band was not at liberty to simply ignore the valid and lawful Consent Decree by "setting aside" the Unpaid Rent while it

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[124] Band's Brief at p. 40.

[125] Band Brief at p. 43-44. It is worth noting that the Band did not pay these amounts when lawfully due under the Consent Decree. The Band simply chose to ignore the Consent Decree.

[126] Order dated November 21, 2011 at p. 28. Band's App. at p. 28.

sought out some means to justify its breach. Any relief from the Unpaid Rent would, indeed, be retroactive.

But the Band's focus, however, was not on the "lump[ing]" of these two amounts together as retroactive relief. Rather, the Band focuses on the lumping of the equities. The Band would have this Court address the "separate question of whether it is equitable to relieve the Band of the Unpaid Rent obligation."[127]

In an effort to construe the equities in its favor, the Band argues that it has not paid the Unpaid Rent. Thus, relieving the Band of this obligation would "maintain the status quo." [128] The Band argues that City would not have to "return" anything as it "hasn't actually received the money."[129] The Band argues that the City knew the Band disputed the legality of the Unpaid Rent since 2009. [130] Finally, the Band argues that the Unpaid Rent may be subject to an off-set for contra revenue and is still subject to an appeal. Each of these arguments must be rejected.

Each of the arguments fails to recognize that the Band had an obligation to abide by the District Court's Consent Order. Ignoring a valid and enforceable

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[127] Band's Brief at p. 44.

[128] *Id*.

[129] *Id*.

[130] *Id*.

consent decree cannot and should not strike equities in one's favor.[131] The District Court did not commit error.

d. The Unpaid Rent is not an "illegal payout."

The Band argues that it "*wants* to follow the law."[132] The Band argues that it cannot pay the Unpaid Rent and comply with the NOV.[133] Thus, the Band construes the Unpaid Rent as an "illegal payout."[134] This argument must fail.

The Band fails to recognize that it has an obligation to abide by the District Court's Consent Order.[135] The Consent Order was valid and enforceable when the Unpaid Rent became due. The Consent Order remains valid and enforceable as to the Unpaid Rent. The District Court properly noted that:

> "[t]here is no legal obligation on this Court, whether under Rule 60(b) or otherwise, to grant relief commensurate with what the NIGC would find approvable under the IGRA."[136]

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[131] *See* Band's Brief, n. 173.

[132] Band's Brief at pp. 46-47. (Italics in original).

[133] *Id.*

[134] *Id.* at p. 48.

[135] *See O'Sullivan v. City of Chicago*, 396 F.3d 843, 865 (7th Cir. 2005) and *Shakman v. City of Chicago*,426 F.3d 925, 931 (7th Cir. 2005). *Supra*.

[136] Order dated November 21, 2011 at p. 26. Band's App. at p. 26.

Quite simply, the Unpaid Rent is not an "illegal payout" nor can it be as it is authorized by the Consent Order.

d. The Absence of an Administrative Procedures Action is Irrelevant.

The Band argues that the City has not yet brought an Administrative Procedures Action to challenge the NOV and that the NOV is entitled to *Chevron* deference.[137] But that analysis is never reached in this Rule 60(b) case. The question is not agency deference but whether to modify a court order under Rule **60(b).**[138]

VIII. CONCLUSION.

This Court should reverse the district court's granting of Rule 60(b)(5) relief for the Extension Term of the 1994 Agreements confirmed by the Consent Decree and send the case back to the arbitrators.

This Court should affirm the District Court's denial of Rule 60(b)(6) relief for the First Term of the 1994 Agreements in the Consent Order and send the case back for trial and the entry of judgment accordingly.

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[137] *Id.* at p. 47.

[138] *Supra*.

Dated this 30th day of March, 2012.

Respectfully submitted,

s/ Shawn B. Reed

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 28.1(e)(3) and 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned hereby certifies that this brief complies with the type-volume limitation of Federal Rules of Civil Appellate Procedure Rule 28.1(e)(2)(B) because it contains 11,798 words, exclusive of the items identified in Rule 32(a)(7)(B)(iii) of the Federal Rules of Civil Appellate Procedure. This is based upon a word count using Microsoft Word 1997-2003.

This brief complies with the typeface requirements of Federal Rules of Civil Appellate Procedure Rule 32(a)(5) and the typeface requirements of Federal Rules of Civil Appellate Procedure Rule 32(a)(6) because the brief was prepared in a proportionally spaced typeface using Microsoft Word 1997-2003 in Times New Roman with a 14 point font.

s/ Shawn B. Reed
Shawn B. Reed
Counsel for Appellee/Cross-Appellant City of Duluth

CERTIFICATE OF SERVICE

I, Shawn B. Reed, pursuant to Circuit Rule 25A(d), hereby certify that on March 30, 2012, I caused the following documents:

1. Principal and Response Brief of Appellee / Cross-Appellant City of Duluth.

to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the Cm/ECF system. I hereby certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. ECF will send an e-notice of the electronic filing to the following:

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I further certify that I caused a copy of the foregoing documents and the notice of electronic filing to be mailed by first class mail, postage paid, to the following non-ECF participants:

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