Nos. 11-3883 and 11-3884

UNITED STATES COURT OF APPEAL
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 Judge Susan Richard Nelson

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SUMMARY OF THE CASE

The National Indian Gaming Commission (the "NIGC") issued a final agency action against the Fond du Lac Band in July 2011. The NIGC found that certain terms in a 1994 sublease between the Band and the City (the "Sublease") regarding the Fond-du-Luth Casino (the "Casino") violated the Indian Gaming Regulatory Act and ordered the Band to stop complying with those terms—including paying any rent to the City beyond the $75 million that had been paid by the time the action issued—or face extensive fines and possible closure of the Casino.[1]

Because the Sublease was the subject of a 1994 Consent Order and the Band could not comply with both the Consent Order and the NOV, the Band sought relief from the Consent Order under Rules 60(b)(5) and (6). Judge Nelson appropriately found that the NOV constituted a change in law or circumstances justifying prospective relief from the Consent Order.[2] But she misapplied Rule 60(b)(6) to conclude that the Band must still pay the City $10.3 million in rent payments that the Band had set aside, but not paid to the City by July 2011.

Given the complicated factual history and regulatory structure surrounding this dispute, the Band requests 20 minutes of oral argument.

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[1] July 12, 2011 Novice of Violation ("NOV") at 19, Band's Addendum ("Add.") at 48.
[2] Add. at 1.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

Jurisdiction in the District Court was based on retained jurisdiction under a 1990 Stipulation and Consent Order (the "Consent Order").[3] The District Court granted in part and denied in part the Band's motion for relief from the Consent Order under Rules 60(b)(5) and 60(b)(6) on November 21, 2011. The Band's appeal, filed on December 21, 2011, is from that portion of the District Court's order denying relief under Rule 60(b)(6) with respect to $10.3 million in rent payments withheld during 2009-2011. That portion of the order is appealable under *Kansas City S. Ry. Co. v. Great Lakes Carbon Corp.*[4]

[3] Add. at 49; *see also Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 35 (1994).

[4] 595 F.2d 431, 433 (8th Cir. 1979) (noting that it is "firmly established that the denial of a Rule 60(b) motion is an appealable order" in the Eighth Circuit). The City moved to dismiss the Band's appeal (and the City's own cross-appeal) because it is interlocutory, but that motion was denied.

STATEMENT OF THE ISSUES

1. Did the District Court misapply Rule 60(b) by ruling that the Band could not get Rule 60(b)(6) relief from paying $10.3 million in rent that had already accrued because it was "retroactive" relief even though Rule 60(b)(6) is not limited to prospective relief?

Ind. Lumbermens Mut, Ind. Co. v. Timberland Pallet & Lumber Co., 195 F.3d 368 (8th Cir. 1999)

Mayhew v. Int'l Marketing Group, 6 Fed. Appx. 277 (6th Cir. 2001).

Pacific Far East Lines, Inc. v. Wyle, 889 F.2d 242 (9th Cir. 1989).

2. In the alternative, to the extent that the District Court actually considered whether the Band was entitled to retroactive relief under Rule 60(b)(6), did the District Court abuse its discretion by relying on irrelevant factors and ignoring the fact without Rule 60(b) relief, the Band cannot comply with conflicting orders that both force it to make payments and forbid it from paying?

Thatcher v. Hanover Ins. Group, Inc. 659 F.3d 1212 (8th Cir. 2011)

Klapprott v. United States, 335 U.S. 601 (1949)

Batts v. Tow-Motor Forklift Co., 66 F.3d 743 (5th Cir. 1995)

Frew v. Hawkins, 540 U.S. 431 (2001)

STATEMENT OF THE CASE

In 1986, the City of Duluth and the Fond du Lac Band of Lake Superior Chippewa entered into a series of agreements (the "1986 Agreements") to form a joint venture on a parcel of land in downtown Duluth that the U.S. Department of the Interior had taken into trust for the Band and declared to be part of the Band's reservation.[5] The primary purpose of the venture, which operated through a joint City-Band commission (the "Joint Commission") was to jointly own and operate a casino, the Fond-du-Luth Casino, on the site. But two years later, Congress passed the Indian Gaming Regulatory Act ("IGRA"),[6] which required that tribes have the "sole proprietary interest" in their gaming operations. After being sued by the Band and having the NIGC threaten to close down the Casino because the arrangement violated the sole-proprietary-interest rule, the City finally agreed to renegotiate the 1986 Agreements.

In 1994, the parties entered into a series of agreements (the "1994 Agreements") that allegedly gave the Band sole ownership of the Casino, but also provided for the City to get 19% of the Casino's gross revenues—about a third of Casino profits—until 2011, and a to-be-determined percentage of gross revenues

[5] *See* Band's Appendix at 1-121. Citations to the Band's Appendix will be designated A-___.
[6] 25 U.S.C. §§ 2701-2721.

from 2011 – 2036, the second "term."[7] Although the Casino site was held in trust for the Band, these gross-revenue payments were termed "rent" because the Band had leased the Casino site to the Joint Commission in 1986 and then "subleased" it back from that Commission (whose rights were assigned to the City) as part of the 1994 settlement. Judge Magnuson adopted the 1994 Agreements in full in a 1994 Consent Order.

In 2009, the Band ceased payments to the City because it was concerned that, in light of a series of advisory opinions and enforcement actions issued by the NIGC regarding other tribal transactions, the ongoing rental payments violated IGRA's sole-proprietary-interest rule. The City promptly sued the Band for breach of contract. In April 2010, Judge Montgomery granted the City summary judgment with respect to payments owed during the first term (ending on March 31, 2011), finding that because the NIGC had not taken an enforcement action against the Band, the rental payments were still owed.[8] She declined to grant summary judgment with respect to payments the Band might owe during the

[7] *See* A-136-348.

[8] *See* A-376-377. The parties disputed $561,049.09 of these payments, called "contra-revenues," based on various accounting interpretations, and Judge Montgomery ruled that summary judgment was inappropriate to determine whether any "contra-revenue" offsets to the "rent" otherwise due were permissible under the Sublease. A-378-379.

second 25-year term of the Sublease because the Sublease provided a mechanism (culminating in arbitration) for determining the amount of those payments.[9]

The parties proceeded on a dual track toward a trial on the amount of back rent owed and toward arbitration on the amount of rent to be paid under the second 25-year term of the Sublease. The Band also sought review of the 1994 Agreements from the NIGC to determine whether the agreements comply with the NIGC's interpretation of the sole-proprietary-interest rule.[10] The City fully participated in the agency process, arguing that the agreements didn't violate the rule. The process culminated in the NIGC issuing a Notice of Violation to the Band, concluding that several terms of the Sublease violated the sole-proprietary-interest rule, and ordering the Band to cease performance with those provisions. The most significant of these illegal provisions was the "rent" term of the Sublease.

Because the issuance of the NOV constituted a "change in circumstances" under Rule 60(b)(5) and rendered this an "extraordinary" case under Rule 60(b)(6), the Band promptly filed a motion for relief from the Consent Order and other prior orders in this case. Specifically, the Band asked to be relieved from (a) completing arbitration, (b) paying any more "rent" to the City, (c) performing under any other

[9] *Id.* at A-379.

[10] While that review was pending, the Band moved to stay the District Court proceedings and forestall what could be unnecessary arbitration, but the Court declined, and ultimately issued an order compelling arbitration. *See* Add. at 5.

terms of the 1994 Agreements that the NIGC had ruled were illegal, and (d) the Summary Judgment Order requiring the Band to pay withheld rent and precluding the Band from moving forward on its counterclaims to recover "rent" already paid.[11]

Judge Nelson ruled that the issuance of the NOV constituted a change in law justifying relief under Rule 60(b)(5), and relieved the Band from completing arbitration or making any payments to the City for the second term of the Sublease.[12] She denied the Band's request for relief from paying the rent that the Band withheld from 2009 -2011, finding that relieving the Band from that payment would constitute "retroactive" relief not available under Rule 60(b)(5). And she denied that same request for relief under Rule 60(b)(6), finding that a party cannot get relief under Rule 60(b)(6) if he does not meet the criteria for relief under another subpart of Rule 60(b).

[11] *See* A-381-384.
[12] Add. at 19, 21.

STATEMENT OF FACTS

1. The 1986 Joint Venture

In 1986, the Band and the City of Duluth 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.[13] The primary objective of the 1986 Agreements was to jointly own and operate a gaming facility on the trust site through the Joint Commission, and the parties opened the Fond-du-Luth Casino that same year.[14] The Band leased the site to the Joint Commission, and the parties agreed to split the Casino revenues so that the Band would get 25.5% of the profits, the City would get 24.5%, and the Joint Commission would get 50% to reinvest in other projects on the Band's reservation and in Duluth.[15]

2. Congress's Mandate

In 1988, Congress enacted IGRA, which it made applicable to all Indian-gaming operations, including those—like the Fond-du-Luth Casino—that pre-dated IGRA's enactment.[16] Among many other requirements, IGRA mandated that

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[13] *See* A-362.
[14] *Id.*
[15] *Id.*
[16] Congress made clear that it intended to apply the statute retroactively to pre-existing arrangements. For example, the Act required tribes with existing operations to submit pre-existing tribal gaming ordinances and management contracts to the NIGC, and, where necessary, to modify the ordinances and contracts to conform to the statute's requirements. 25 U.S.C. §§ 2712.

any tribe conducting class II (bingo and related games) or class III gaming (slot machines and house-banked card games)[17] enact a tribal gaming ordinance that must be approved by the Chairman of the NIGC.[18] Every tribal gaming ordinance must require that the tribe "have the sole proprietary interest and responsibility for the conduct of any gaming activity."[19] And the NIGC has authority to enforce tribal gaming ordinances by imposing civil fines or closure orders.[20]

3. The First Round of Regulatory Review and Litigation

Because it believed that the parties' joint-venture arrangement had been made illegal by IGRA, the Band soon tried to convince the City to renegotiate the 1986 Agreements. But the City refused, so in 1989 the Band filed a declaratory-judgment action against the City in Federal District Court alleging that the 1986 Agreements violated IGRA's sole-proprietary-interest rule.[21] The Band asked the Associate Solicitor for Indian Affairs to review the 1986 Agreements and opine on whether they were compliant with IGRA. In November 1990, the Associate Solicitor issued an opinion to the Assistant Secretary – Indian Affairs concluding that the 1986 Agreements violated IGRA's sole-proprietary-interest requirement.[22] Specifically, the Associate Solicitor found that "the City, through its

[17] 25 U.S.C. §§ 2703(7) and (8).
[18] 25 U.S.C. §§ 2710(a) and (d).
[19] 25 U.S.C. § 2710(b)(2)(A).
[20] 25 U.S.C. § 2713.
[21] A-363.
[22] *Id.*

representatives on the [Joint Commission] has substantial control over the gaming facility," and that "[t]he City's share of the net revenues does not constitute compensation for services rendered as the management contractor for the Band's casino but rather constitutes the City's share of the profits as a co-owner of the gaming facility."[23]

The City responded to the Band's lawsuit and the Associate Solicitor's decision by asserting that "only the chairman of the newly created National Indian Gaming Commission may review the agreements."[24] At the City's urging,[25] Judge Magnuson noted that any judgment would "not terminate the controversy because the Chairman [of the National Indian Gaming Commission] retains the ability to review the agreements," and concluded that "the public interest is best served by allowing the Federal regulatory authority established by the IGRA [i.e., the NIGC] to review the gaming operation and make its recommendation."[26] Judge Magnuson dismissed the action without prejudice to allow the NIGC to review the contracts.[27]

The Band sought review of the agreements before the NIGC and in September 1993, the NIGC Chairman commenced an enforcement action after determining that the 1986 Agreements violated IGRA's sole-proprietary-interest

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[23] A-123.
[24] A-126.
[25] *Id.*
[26] A-130, A-131.
[27] *Id.*

requirement.[28] The 1993 enforcement action tracked closely with the Associate Solicitor's Decision, finding that the 1986 Agreements established a joint venture between the City and the Band to own and operate the Casino in violation of IGRA's sole-proprietary-interest requirement and improperly gave the City "a significant ownership interest in the gaming operation and . . . substantial control over operations."[29]

4. The 1994 Agreements

Faced with the threat of closure, the Band and City negotiated the 1994 Agreements.[30] These were intended to shift ownership and control of the Casino operations from the Joint Commission to the Band, but retained a revenue-sharing arrangement and certain measures of control for the City. Central to the 1994 Agreements is the Sublease, by which the Band subleased its own Reservation property back from the Joint Commission.[31] The Sublease calls for the Band to pay the City "rent" of 19% of gross revenue from slot machine operations[32] (which in net gaming revenues as defined in IGRA has ranged between 26.59% and 33.49% over the past 17 years),[33] even though the Band owns the property and the appurtenant structure and the City makes no capital or other contributions to the

[28] A-133.
[29] A- 134.
[30] *See* A-136-A-348.
[31] A-154.
[32] A-157.
[33] A-357.

operation of the facility. The City's share of Casino revenues was actually higher under the Sublease than it had been under the 1986 Agreements, even though the City no longer had any operational role in the Casino and continued to have no capital investment in it.[34] In other words, the City did less but got more under the 1994 Agreements. From June 1994 through August 2009, the Band paid the City approximately $75,874,407.66 in "rent" under the Sublease.[35]

The parties submitted the 1994 Agreements to the NIGC for approval, and just three days later, on June 16, 1994, the NIGC's then-Chairman informed the parties of the agency's conclusion that the revised agreements "return[ed] full ownership and control of the Fond du Luth Casino to the Band and [were] consistent with the requirements of IGRA."[36] The Chairman also sent a letter, titled "Report and Recommendation of the National Indian Gaming Commission," to the District Court expressing approval of the 1994 Agreements.[37]

To dispose of the earlier claims, the parties commenced a new action and memorialized the renegotiated agreements in a proposed "Stipulation And Consent Order."[38] That document recited a brief history of the arrangement and dispute, incorporated the 1994 Agreements as the terms of the proposed Consent Order, and

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[34] *Compare* A-73 to A-157.
[35] A-359.
[36] A-349.
[37] A-351.
[38] Add. At 49.

specifically noted that "[t]he National Indian Gaming Commission has reviewed the 1994 Agreements and has concluded that these agreements are in conformance with the Gaming Act."[39] Judge Magnuson signed the prepared "Order" portion of the Stipulation, without any modification or explanation.[40] The Court did not conduct an independent analysis of the terms of the Agreements or their propriety under IGRA.[41]

Under the 1994 Agreements (and so under the Consent Order), the parties reorganized the structure of the Fond-du-Luth arrangement to technically eliminate the joint venture between the parties. But the 1994 Agreements continued a series of ongoing obligations that tied the City and the Band, including:

- Requiring the Band give the City a substantial portion of the proceeds generated by the casino as "rent" over a total term of 42 years, even though the Band owns the property and the building, and despite the fact that the City made and makes no capital or other contributions to its operation.
    - For the period from 1994 to 2011, the Agreements (and so the Consent Order) required the Band to pay the City 19% of gross revenue from slot machine operations.[42]
    - The Agreements required the parties to renegotiate the percentage-of-gross-revenue payment for the 2011-2036 term.[43]
- Requiring the Band to allow the City to access casino records.[44]

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[39] Add. at 53
[40] Add. at 54.
[41] *See generally* Add. at 49-54.
[42] A-157.
[43] A-159.

- Affording the City continued regulatory control over the Casino, including the power of consent over changes to the Band's gaming ordinance and regulations,[45] and the right to review and object to licensing decisions.[46]

5. The Agency's Refinement of the Sole-Proprietary-Interest Rule

Beginning approximately 10 years ago, the NIGC began to give greater attention to the sole-proprietary-interest rule because, as the then-NIGC Chairman put it to the Chairman of the Senate Indian Affairs Committee in 2005, the agency "became more and more concerned about contracts that included egregious terms benefitting outside parties rather than tribes."[47] In the early 2000s, the NIGC's Office of General Counsel began issuing a series of opinion letters regarding particular transactions and finding that various agreement structures—particularly those involving payment of a percentage of gaming revenues over a long period of time—violated the sole-proprietary-interest requirement.[48] Specifically, the Office of General Counsel concluded that where a contractor takes little risk and receives compensation disproportionate to the services provided, the contractor is not

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[44] A-236.
[45] A-234.
[46] A-244
[47] http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/SolePIL/Contract%20review%20and%20the%20IGRA's%20sole%20proprietary%20interest%20requirement_2-1-05.pdf at 2 (last visited Feb. 22, 2012).
[48] A sample of these letters dating back to 2004 is available at http://www.nigc.gov/Reading_Room/Sole_Proprietary_Interest_Letters.aspx (last visited Feb. 20, 2011). *See also* Add. at 42. ("Further, since 2003 the OGC issued over 50 legal opinions analyzing the [sole-proprietary-interest] mandate.").

receiving a bargained-for fee for services, she is receiving an ownership interest in a tribe's gaming activity.[49] More recently, the Chair of the NIGC has taken enforcement actions based on violations of the sole-proprietary-interest requirement.[50]

As the NIGC gained experience and began to publicize its sole-proprietary-interest reasoning, it became apparent that the 1994 Agreements remained problematic under IGRA. So, in 2009 the Band's leadership—which has a fiduciary obligation to its members—decided to stop payment under the 1994 Agreements because it believed that continued payment was illegal under IGRA and jeopardized the Band's operation of the Casino.[51]

6. The 2010 District Court Action

The City filed suit in District Court to enforce the 1994 Agreements,[52] and in response the Band raised the defense of the illegality of the 1994 Agreements and asserted counterclaims against the City.[53] The City moved for summary judgment to establish its claim to 19%-of-gross-revenue payments for 2009, 2010, and 2011

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[49] *See e.g.*, June 5, 2003 Letter from P. Coleman to M. Cypress, A-385, and October 5, 2005 Letter from J. Shyloski to J. Gray, A-421.
[50] *See e.g.*, Final Decision and Order *In the Matter of Ivy Ong and Carlo Word Wide Operations, LLC*, A-399 and NOV 11-01, *Bettor Racing, Inc. and J. Randy Gallo, h*ttp://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2f readingroom%2fenforcementactions%2fflandeausanteesiutribe%2fNOV11-01redacted.pdf&tabid=124&mid=774 (last visited Feb. 20, 2011).
[51] A-353.
[52] A-361.
[53] A-361-362.

(the "Unpaid Rent"),[54] and the Court ruled for the City on *res judicata* grounds, relying on the Consent Order.[55] In reaching this conclusion, the Court—like the 1994 Court—refused to address the question of whether the Agreements violate IGRA. Instead, the Court reasoned that "[i]t may be that the arrangement between the Band and the City violates the IGRA in the eyes of the NIGC. But until the NIGC initiates an enforcement action regarding the Fond du Luth Casino and proceeds with that action to a final decision on the substantive issue of proprietary interest, this Court's view would constitute an advisory opinion."[56] Judge Montgomery acknowledged that "a consent decree may be reopened under certain circumstances,"[57] and instructed that the proper way to challenge the validity of the 1994 Agreements, which were the subject of the Consent Order, was through a motion under Rule 60(b).[58]

7. The NIGC's 2010-2011 Review of the 1994 Agreements

Because the 1994 Agreements were so dramatically inconsistent with the NIGC's sole-proprietary-interest opinions, the Band asked the NIGC to review the

[54] The rent that accrued between August 2009 (when the Band stopped paying it) and the end of the first Sublease term, March 31, 2011, was $10, 392,412.40. A-412.
[55] A-361-380.
[56] A-377.
[57] A-369 (citing *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367 (1992)).).
[58] *Id.*

1994 Agreements to determine whether they still complied with IGRA.[59] The NIGC Chairwoman granted the Band's request to review the Agreements and requested briefing from both the Band and the City.[60] Both parties submitted extensive briefs to the NIGC and fully participated in the NIGC's review of the 1994 Agreements.[61]

While the NIGC review was ongoing, the Band requested a continuance pending that review, but the Court denied the motion[62] and later compelled the parties to submit to binding arbitration to determine the percent-of-gross-revenue payment for the second 25-year term of the Sublease.[63]

On July 12, 2011, the second day of the court-ordered arbitration, "[b]ased on a thorough review of the parties' submissions and the 1994 Agreements," the NIGC Chairwoman "conclude[d] that the 1994 Agreements, as written and as implemented, violate IGRA's mandate that the Band retain the sole proprietary interest in and responsibility for its gaming activity[,]"and entered the NOV against the Band.[64] Whereas Chairman Hope's 1994 approval of the agreements "d[id] not contain any substantive analysis of the issues to support his statement

[59] Add. at 4.
[60] A-414
[61] Add. at 35.
[62] Add. at 4-5.
[63] *Id.* at 5.
[64] *Id.* at 36.

that the agreements were consistent with IGRA[,]"[65] the 19-page single-spaced NOV took pains to detail the NIGC's authority to enforce IGRA, the law regarding the sole-proprietary-interest standard, the history of the parties' relationship, and the offending terms of the Agreements.[66]

The NIGC Chairwoman concluded that the 1994 Agreements are illegal because a totality of circumstances under the Agreements afford the City an impermissible proprietary interest in the Fond-du-Luth Casino.[67] Specifically, the Chairwoman found the following aspects of the 1994 Agreements unlawful, both as written and as implemented: [68]

- The share of profits taken by the City from 1994 forward, including:
  - the high amount of the City's ongoing share of gross revenues, which is not commensurate with the services the City provided to the Band;
  - the fact that the arrangement is characterized as "rent" even though the Band owns the Casino building on trust land;
  - the fact that "rent" payments are available to be spent on the general operations of the City without regard to any provision of services by the City for the Band;
  - the absence of any financial or other risk to the City;

[65] Add. at 31. *See also id.* at 34 n.4 (describing that "[a]s part of our review of this matter, NIGC staff members performed a search of Commission records and were unable to locate any analysis associated with [the 1994 Hope] letter.").
[66] *See generally* Add. at 30-48.
[67] *Id.* at 44-47.
[68] *Id.*

- the fact that the 1994 Agreements do not convey any substantial benefits to the Band; and
- the fact that the Casino receives the same level of municipal services that any other citizen or business located within the City would receive;

- The long term of the Agreements (the first term runs from September 30, 1993 until March 31, 2011, and the second from March 31, 2011 until 2036);
- The requirement that any change in the Band's gaming ordinance or regulations will only be effective after the City has consented in writing, unless the change is required by federal law or tribal-state compact;
- The requirement that the City be afforded a right to review and object to the Band's decisions regarding licensing of Casino employees; and
- The requirement that the City be afforded access to and a right to review and copy any and all records of the gaming operation.

In light of these violations, the Chairwoman directed the Band to "cease performance under the 1994 Agreements of those provisions identified in this NOV as violating IGRA. This applies to the entire 42 year term of the 1994 Agreements."[69]

Thus, the NOV expressly repudiated the NIGC's support of the 1994 Agreements—support that was a basic predicate of both the 1994 Agreements and the Consent Order that memorialized them. Moreover, the NOV—the *only* decision of either the NIGC or a court to conduct a detailed analysis of the 1994 Agreements—concluded that the 1994 Agreements are illegal under IGRA. Under

[69] *Id.* at 47 (emphasis added).

IGRA, if the Band continues to perform even one of the obligations the NOV identifies as unlawful, the Band will be subject to sanctions, including substantial fines and possible closure of the Casino.[70]

8. The District Court's Rule 60(b) Ruling

Because the Band could not comply with both the NOV and the District Court's Consent and Summary-Judgment Orders and the order compelling arbitration, the Band moved for relief from those orders under Rules 60(b)(5) and (b)(6). Judge Nelson agreed with the Band that relief from complying with the provisions of the 1994 Agreements that the NIGC had found violate IGRA was appropriate under Rule 60(b)(5) from the date of the NOV forward.[71] She relieved the Band from making any "rent" payments to the City for the second term of the Sublease and from proceeding to arbitrate the amount of rent for the second term.[72] The Band had also requested relief from the Summary Judgment Order under either Rule 60(b)(5) or (b)(6) from paying the Unpaid Rent, and under Rule 60(b)(6) to pursue its originally pleaded counterclaims aimed at return of the $75 million in rent the Band had paid before the NOV issued.[73] Judge Nelson denied those requests for relief.

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[70] *Id*. at 48. 25 U.S.C. § 2713.
[71] Add. at 21.
[72] *Id*. at 21-25.
[73] A-381.

SUMMARY OF ARGUMENT

The District Court granted the Band's request for relief from the Consent Order under Rule 60(b)(5), which is limited to prospective relief from prior orders, and ordered that the Band did not have to continue complying with those terms of the 1994 Agreements that the NIGC found violate IGRA. But it refused to consider the Band's separate request for retroactive relief from paying $10.3 million that the Band had been withholding because it believed the Sublease was illegal even though Rule 60(b)(6) is not limited to prospective relief, and even though the NIGC ordered the Band not to make *any* further payments under the Sublease. In so doing, the District Court incorrectly applied the Federal Rules.

After ruling that Rule 60(b)(6) was not available for the type of relief the Band was requesting (i.e. not having to pay $10.3 million in contravention of the NOV), the District Court spent one paragraph noting that it did not believe that relieving the Band from a business deal or requiring the City to return payments would be equitable. If this paragraph can be considered an actual application of Rule 60(b)(6), the District Court abused its discretion because the Band's earlier agreement and payments are irrelevant to the pending $10.3 million, and because the Court did not consider that the conflicting obligations the Band now faces-fines

for violating a final agency order or contempt for violating a consent order—is precisely the type of situation to which Rule 60(b)(6) is addressed.

ARGUMENT

I. Although Rule 60(b)(6) decisions are most often reviewed under an abuse-of-discretion standard, the District Court's interpretation of Rule 60(b)(6) should be reviewed *de novo* because it only addressed a purely legal question; its limited application of Rule 60(b)(6) should be reviewed for an abuse of discretion.

While grants and denials of Rule 60(b) relief are committed to the discretion of the district court,[74]

> the discretion vested in the court is a judicial and not an arbitrary one . . . . That is, when we say that a decision is discretionary, or that a district court has discretion to grant or deny a motion, we do not mean that the district court may do whatever pleases it. The phrase means instead that the court has a range of choices, and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law.[75]

Accordingly, a court abuses its discretion

> when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.[76]

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[74] *Atkinson v. Prudential Prop. Co., Inc.*, 43 F.3d 367, 371 (8th Cir. 1994) (internal quotation omitted).
[75] *Kern v. TXO Prod. Corp.*, 738 F.2d 968, 970 (8th Cir. 1984).
[76] *Thatcher v. Hanover Ins. Group, Inc.*, 659 F.3d 1212, 1213 (8th Cir. 2011).

A district court similarly "would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence."[77]

So while the discretionary factors of a Rule 60 decision are reviewed for abuse of discretion, "to the extent its ruling was based on its findings of fact and conclusions of law, . . . we apply the traditional review reserved for those determinations—clearly erroneous for the findings of fact and de novo for the legal conclusions."[78] And as this Court has repeatedly recognized, "[i]nterpreting the Federal Rules of Civil Procedure . . . presents a question of law subject to de novo review." [79] Under *de novo* review, the District Court's failure to consider the Band's alternative 60(b)(6) motion was error because it incorrectly refused to apply Rule 60(b)(6) to a situation not enumerated in Rule 60(b)(1) - (5). But to the extent that that the District Court *did* give cursory review to the Band's 60(b)(6) motion, it abused its discretion by refusing to consider the legal implications of compelling the Band's performance in violation of the NOV, which is a "relevant

[77] *Menz v. New Holland N. Am., Inc.*, 440 F.3d 1002, 1005-06 (8th Cir. 2006) (quotation omitted).
[78] *In re Ebel*, 120 F.3d 270 (10th Cir. 1997) (internal citations omitted).
[79] *Ind. Lumbermens Mut. Ins. Co. v. Timberland Pallet & Lumber Co.*, 195 F.3d 368, 374 (8th Cir.1999). *See also, e.g., Kuelbs v. Hill*, 615 F.3d 1037, 1041 (8th Cir. 2010) ("We . . . review de novo [both] the district court's interpretation of the Federal Rules of Civil Procedure[.]").

factor that should have been given significant weight[,]"[80] and by giving "significant weight" to irrelevant and improper factors[81] like the fact that the Band initially agreed to the Consent Order and an assessment of the equities of the Band's Counterclaims. Properly considering only the relevant factors, the District Court's refusal to afford the Band Rule 60(b)(6) relief regarding the Unpaid Rent should be reversed.

II. The Band's request for Unpaid Rent relief stands separate and apart from the request for Renewal Term relief, and so may be awarded under Rule 60(b)(6).

As the District Court correctly explained, the Band requested Rule 60(b) relief as to three separate periods:

> (1) 1994-2008, (2) 2009-2011, and (3) 2011-2036. With respect to the first period, the Band already has paid the City in satisfaction of the bulk of its obligations under the Initial Term, but seeks the return of the bulk of those funds [the "Counterclaims"]. With respect to the second period, the Band is withholding payment even though its obligation already became due and owing for 2009, 2010, and 2011 [the "Unpaid Rent"]. With respect to the third period, the existing Consent Order provides a process by which the parties shall determine the rental rate for the second term, culminating, if the other means prove unsuccessful, in arbitration [the "Renewal Term].[82]

Each of these categories of relief is separate and divisible. And though the Band's motion for relief regarding payments from 1994 to 2008 could only have been granted under Rule 60(b)(6), the Band moved to modify the separate portions of

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[80] *Thatcher*, 659 F.3d at 1213.
[81] *Id.*
[82] Add. at 20.

the Consent Order (and supporting orders) aimed at the Unpaid Rent and the Renewal Term payments under *either* Rule 60(b)(5) or Rule 60(b)(6).[83]

The Supreme Court stated in *Liljeberg v. Health Services Acquisition Corp.* that

> Rule 60(b)(6) grants federal courts broad authority to relieve a party from a final judgment 'upon such terms as are just,' provided that the motion is made within a reasonable time and is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5).[84]

And though it appears that a court should only grant particularized relief under a single subsection of Rule 60(b),[85] parties *may* present alternative motions to the Court for relief from judgment under two or more of the subsections. As the Fifth Circuit has explained, under the Rule, "the first five clauses of Rule 60(b) and the sixth are mutually exclusive," but that does not mean "that simply moving under Rule 60(b)(5) prevented the award of relief under Rule 60(b)(6) if the court ruled that relief was unavailable under (b)(5)."[86] The peculiar facts of this case present the unique circumstance where different subsections of the Rule apply to different discrete parts of the judgment at issue. So even though *Liljeberg* suggests that the

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[83] *See generally* A-381.
[84] *Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 863 (1988) (internal quotation omitted).
[85] *See id.*
[86] *Hess v. Cockrell*, 281 F.3d 212, 215 (5th Cir. 2002). *Accord Lindy Inv. III v. Shakertown 1992 Inc.*, 360 F. App'x 510, 513 (5th Cir. 2010) (affirming grant of relief under Rule 60(b)(6) by relying on district court's reasoning granting relief under Rules 60(b)(5) and (6)).

best practice is to grant relief regarding any particular issue under only a single subsection of Rule 60(b), *Liljeberg* does not prohibit courts from applying different subsections of the Rule to two different aspects of the judgment where, as here, the facts demonstrate that those portions of the judgment are separate and divisible.[87]

III. The District Court committed reversible error in refusing to consider the Band's Rule 60(b)(6) motion concerning the Unpaid Rent based on an erroneous application of the Federal Rules of Civil Procedure.

Over the course of 25 pages, the District Court detailed the facts and reasoning supporting its conclusion that the Band is entitled to Rule 60(b)(5) relief from its obligations regarding the 2011 to 2036 Renewal Term, or what it termed "Prospective Relief,"[88] because "it is impossible to reconcile the terms of the 1994 Agreements and the NOV, thereby rendering any remaining performance of the contractual terms legally impracticable[.]"[89] The District Court next termed the Band's requests for Counterclaim and Unpaid Rent relief "retroactive," and so held

[87] *See e.g.*, *Klugh v. U.S.*, 620 F. Supp. 892, 900 n.13 (D.S.C. 1985) ("In the case at bar, relief is sought and granted under two different subsections of Rule 60(b)[, Rule 60(b)(4) and (b)(6)]. The well established concept of mutual exclusivity, *see generally* 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2864 (1973) (and cases cited therein) is not violated, however, because the court awards certain classes of plaintiffs *individual* relief from the challenged judgments and such relief, in each instance, is based upon a different subsection of Rule 60(b)."") (emphasis in original), *rev'd on jurisdictional grounds*, 818 F.2d 294 (4th Cir. 1987).

[88] Add. at 1-25.

[89] *Id.* at 21.

Rule 60(b)(5) inapplicable to either category[90]— a result the Band does not challenge. But the District Court concluded by entirely refusing to consider the Band's alternate grounds for Unpaid Rent relief: Rule 60(b)(6).

In a single paragraph, reproduced here in its entirety, the District Court stated:

> Here, while recognizing that Rule 60(b)(5) "is limited to prospective relief," the Band contends that Rule 60(b)(6) "isn't." But 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 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 relief under Rule 60(b)(6). Although Rule 60(b)(6) is textually open-ended, this Court doubts that Congress imposed specific limits on relief under Rule 60(b)(5) (or any other specific Rule 60(b) bases for relief), only to then allow a movant to circumvent such limitations simply by requesting that same relief under Rule 60(b)(6).[91]

This purely legal interpretation of Rule 60(b), which forbids alternative pleading and forecloses Rule 60(b)(6) relief in situations not addressed by Rule 60(b) (1) - (5) must be reviewed under a *de novo* standard.[92] And it is wrong.

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[90] *Id.* at 25-27.
[91] *Id.* at 27-28 (internal citations omitted).
[92] *Ind. Lumbermens Mut. Ins. Co.*, 195 F.3d at 374.

A. Rule 60(b)(6) is an open-ended "catch-all" provision that allows courts to consider bases for relief other than those enumerated in Rules 60(b)(1) - (5).

Under the District Court's reasoning: (1) the part of the Band's motion addressed to the Unpaid Rent requested retroactive relief;[93] and (2) Rule 60(b)(5) does not apply because it concerns *prospective* equities;[94] so Rule 60(b)(6) *also* does not apply because Congress intended the limitations of Rule 60(b)(1) – (5) to also apply to Rule 60 (b)(6).[95] But the Court did not cite a single authority to support this conclusion, and it does not follow the text of the rule.

Rule 60(b) states:

> Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

[93] Add. at 25-27.
[94] *Id.* at 27-28.
[95] *Id.* at 28.

(6) any other reason that justifies relief.[96]

The first five subsections set out independent bases that Congress determined could justify relief from judgments and orders, and the last offers a final *additional* ground *independent* of the first five.[97] That is, "Rule 60(b)(6) applies in extraordinary circumstances *not otherwise addressed* by Rule 60(b)(1) – (5) in order to 'vest power in courts adequate to enable them to vacate judgment whenever such action is appropriate to accomplish justice.'"[98] So, "[c]learly it broadens the grounds for relief from a judgment set out in the five preceding clauses."[99]

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[96] Fed. R. Civ. P. 60(b).

[97] *E.g., In re Rodeo Canon Dev. Corp.*, BAP No. CC–10–1089–MkHD, 2010 WL 6259764, at *10 (B.A.P. 9th Cir. Oct. 28, 2010) ("Civil Rule 60(b)(6) often is referred to as a 'catch-all' provision, and applies when 'any other reason . . . justifies relief' *not covered by the other five* numbered clauses of Civil Rule 60(b)."") (citations omitted) (emphasis added); *Greater St. Louis Const. Laborers Welfare Fund v. Adams Landscaping, Inc.*, 4:09 CV 742 CDP, 2011 WL 4550210, at *3 (E.D. Mo. Oct. 3, 2011) ("*In addition to* the specific grounds for vacating a judgment listed in Rule 60(b)(1) through 60(b)(5), Rule 60(b)(6) allows a court to alter a final judgment for 'any other reason that justifies relief.' Fed. R. Civ. P. 60(b)(6).") (emphasis added); *United States v. Armstrong*, 3:04-CV-1852-H, 2005 WL 937857, at *3 (N.D. Tex. Apr. 21, 2005) *report and recommendation adopted*, CIV.A.3:04CV1852-H, 2005 WL 1214669 (N.D. Tex. May 20, 2005) (Rule 60(b)(6) "is a catch-all provision that encompasses circumstances *not covered by the other enumerated provisions* of Rule 60(b).").

[98] *Tucson Herpetological Soc. v. Kempthorne*, No. CV-04-0075 PHX-NVW, 2006 WL 2788643, at *5 (D. Ariz. Sept. 27, 2006) (quoting *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949)) (emphasis added).

[99] 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2864 (2d ed. 2011).

Certainly, by requiring movants to demonstrate an "other reason" under Rule 60(b)(6), the Rule requires courts to evaluate circumstances that clearly fit within subsections (1) through (5) according to the terms of those subsections. For example, as the Supreme Court made clear in *Klapprott v. United States*, Rule 60(c)(1)'s "one year limitation would control if no more than 'neglect' [addressed by Rule 60(b)(1)] was disclosed by the petition. In that event the petitioner could not avail himself of the broad 'any other reason' clause of 60(b)[(6)]."[100] But where a circumstance *does not* clearly fit within any of subsections (1) through (5), Rule 60(b)(6) specifically affords litigants a separate safety net untethered to the strictures of subsections (1) through (5). Thus, immediately after stating that movants must follow Rules 60(b)(1) – (5) if their circumstances fit clearly within those rules, the *Klapprott* Court continued:

> But petitioner's allegations set up an extraordinary situation which cannot fairly or logically be classified as mere 'neglect' on his part . . . Under such circumstances petitioner's prayer for setting aside the default judgment should not be considered only under the excusable neglect [rule, 60(b)(1)], but also under the 'other reason' clause of 60(b)[(6)], to which the one year limitation provision does not apply.[101]

So as the District Court itself recognized, Rule 60(b)(6) expressly "permits reopening when the movant shows any reason justifying relief from the operation of the judgment *other than* the more specific circumstances set out in Rules

[100] 335 U.S. at 613.
[101] *Id.* at 613-14.

60(b)(1) – (5).”[102] Stated differently, “[i]n simple English, the language of the ‘other reason’ clause, for *all reasons except the five particularly specified*, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.”[103]

Although it gave lip service to this textual distinction, the District Court’s conclusion that a litigant may only employ Rule 60(b)(6) if it *also* meets the criteria of one of Rules 60(b)(1) through (5) was error because it rendered the entirety of Rule 60(b)(6) meaningless.[104] “[H]aving rejected [] retroactive relief pursuant to Rule 60(b)(5),” the District Court “decline[d] to open any escape hatch that would permit such relief under Rule 60(b)(6).”[105] But that is not the law, and an independent basis for relief under the Federal Rules is not fairly characterized as an “escape hatch.” Rule 60(b)(6) specifically allows backward-looking relief—even though Rule 60(b)(5) does not.[106]

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[102] Add. at 27 (quoting *Gonzales v. Crosby*, 545 U.S. 524, 528-29 (2005)) (internal quotation and alteration omitted) (emphasis added).
[103] *Klapprott*, 335 U.S. at 614-15 (1949) (emphasis added).
[104] Add. at 28.
[105] *Id*.
[106] *E.g.*, *Mayhew v. Int’l Mktg. Group*, 6 Fed. Appx. 277, 279 (6th Cir. 2001) (“Rule 60(b)(6) has no ‘prospective application’ requirement and allows relief for ‘any other reason justifying relief from the operation of the judgment.’”). *Accord Pac. Far East Lines, Inc. v. Wyle*, 889 F.2d 242, 250 (9th Cir. 1989) (ordering refund of referee compensation made pursuant to a stipulation where Congress amended the relevant statute to cap referee compensation at $200,00— $576,000 less than was paid under the stipulation).

There would simply be no purpose of a "catch-all" to address "other reason[s]"[107] if before it may use the catch-all, a litigant must *first* meet the "specific limits on relief under Rule 60(b)(5) (or any other specific Rule 60(b) bases for relief)."[108] But just as "words employed in a statute should not be discarded as being mere surplusage or being meaningless[,]"[109] neither should entire subsections of the Federal Rules of Civil Procedure be read out of the Rules. The District Court's conclusion that Rule 60(b)(6) could not reach retrospective equitable relief because Rule 60(b)(5) does not reach prospective equitable relief was based on an erroneous view of the law, and so must be reversed under either a *de novo* or abuse-of-direction standard.[110]

B. Because Rules 60(b)(1) – (5) are not addressed to the circumstances present concerning the Unpaid Rent, the District Court's failure to analyze the Band's 60(b)(6) request concerning the Unpaid Rent was reversible error.

The Band's alternative motion for *either* Rule 60(b)(5) or 60(b)(6) relief from paying the Unpaid Rent under the Consent Order did not raise any question under Rules 60(b)(1) – (4), so only rules 60(b)(5) and (6) are at issue here. And as

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[107] Fed. R. Civ. P. 60(b)(6).
[108] Add. at 28.
[109] *United States v. Lamere*, 980 F.2d 506, 513 (8th Cir. 1992).
[110] *Menz*, 440 F.3d at 1005-06 (8th Cir. 2006); *Ind. Lumbermens Mut. Ins. Co.*, 195 F.3d at 374.

the District Court recognized, the three enumerated bases for relief under Rule 60(b)(5) are independent alternatives,[111] and in this case,

> [w]ith respect to Rule 60(b)(5), there is no contention that the judgment has been satisfied, released or discharged, or that it is based on a now-reversed or -vacated earlier judgment. Accordingly, any potential relief under that provision would be confined here to situations where applying the 1994 Consent Decree "prospectively is no longer equitable.[112]

That is, this case clearly *does not* fit within either of the first four subsections of Rule 60(b), or the first two clauses of Rule 60(b)(5), so the Band could not seek relief under any of those provisions. Further, because the District Court determined that the relief from the Unpaid Rent period of the Judgment would be "retroactive,"[113] Rule 60(b)(5) cannot apply to the Unpaid Rent portion of the Judgment.[114] So by the Court's own calculus, although it properly evaluated the Band's request for relief concerning the Renewal Term under Rule 60(b)(5), no clause of Rule 60(b)(5)—or of Rule 60(b)(1) through (4)—apply to the Band's request for relief concerning the Unpaid Rent portion of the Judgment.

In this circumstance, "Rule 60(b)(6) applies in extraordinary circumstances not otherwise addressed by Rule 60(b)(1) – (5) in order to 'vest power in courts adequate to enable them to vacate judgment whenever such action is appropriate to

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[111] Add. at 12, n.7 (citing *Horne v. Flores*, ___ U.S.___, 129 S.Ct. 2579, 2597 (2009)).
[112] *Id.* at 11-12.
[113] *Id.* at 25.
[114] *Id.* at 27.

accomplish justice.'"[115] The Band has not sought to "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)."[116] The limits of Rules 60(b)(1)-(5) do not apply here because, as the District Court concluded, the scenarios described by the text of those rules are not present here. So here, like in *Klapprott*, the District Court should have considered that portion of the Band's motion that falls outside of Rules 60(b)(1) – (5)—its request for relief regarding the Unpaid Rent—"under the 'other reason' clause of 60(b)[(6)]"[117] because "for *all reasons except the five particularly specified*, [Rule 60(b)(6)] vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice."[118] The District Court's refusal to even consider the Band's request for relief from the Unpaid Rent portion of the judgment under Rule 60(b)(6) was based on an erroneous view of the law, and must be reversed under either a *de novo* or abuse-of-direction standard.[119]

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[115] *Tucson Herpetological Soc.*, 2006 WL 2788643, at *5 (quoting *Klapprott*, 335 U.S. at 614-15).
[116] Add. at 28.
[117] *Klapprott*, 335 U.S. at 613-14.
[118] *Klapprott*, 335 U.S. at 614-15 (1949) (emphasis added).
[119] *Menz*, 440 F.3d at 1005-06 (8th Cir. 2006); *Ind. Lumbermens Mut. Ins. Co.*, 195 F.3d at 374.

IV. To the limited extent that the District Court considered the Band's motion under Rule 60(b)(6), its denial of relief concerning the Unpaid Rent was an abuse of discretion because it entirely failed to consider a relevant factor and improperly gave irrelevant factors significant weight.

In the second of just two paragraphs analyzing the Band's alternative motion for Rule 60(b)(6) relief, the District Court states, in full:

> The Band argues that the 1994 Agreements required it to pay rent for use of property it owned and that the amount of such rent was grossly excessive compared to what it received from the City in terms of goods or services. 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. Finally, ordering the City to return seventeen years of funds that it received in good faith—and, of course, already has spent on public service—would hardly be equitable.[120]

In this paragraph of dicta addressing the equities of the Band's Rule 60(b)(6) motion after denying the motion in the immediately preceding paragraph on procedural grounds, the District Court essentially reaches three conclusions. First, that the equities concerning the Unpaid Rent and the Band's Counterclaims weigh against the Band because when those obligations arose, "they were legal under the

[120] Add. at 28-29.

NIGC's then-existing understanding of IGRA."[121] Second, that the Band's fairness arguments lack merit because the Band entered into the Consent Decree freely.[122] And finally, that the equities weigh against the Band because the City has relied on payment of the rent at issue under the Band's Counterclaims. Each of these conclusions either failed to consider a relevant factor that should have been given significant weight or gave irrelevant factors significant weight, and so was an abuse of discretion.

A. The Rule 60(b)(6) standard is squarely applicable to the Band's request for relief from the Unpaid Rent period under the Consent Order.

Under Rule 60(b)(6), the District Court could have granted the Band relief from the Consent Order for "'any . . . reason justifying relief from the operation of the judgment' other than the more specific circumstances set out in Rules 60(b)(1)-(5)."[123] While the rule is used sparingly, its purpose is "to prevent the judgment from becoming a vehicle of injustice[,]" and it "is to be given a liberal construction" and "construed liberally to do substantial justice."[124] The rule recognizes that, upon occasion, unforeseen changes in circumstances make

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[121] *Id.*
[122] *Id.*
[123] *Gonzalez v. Crosby*, 545 U.S. 524, 528-29 (2005) (quoting Fed. R. Civ. P. 60(b)(6)).
[124] *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 733 F.2d 509, 515 (8th Cir. 1984). *See also Watkins v. Lundell*, 169 F.3d 540, 544 (8th Cir. 1999) ("Rule 60(b)(6) enables a court to accomplish justice") (citing *Klapprott* 335 U.S. 601)).

continued enforcement of a judgment unjust, and "[t]he 'other reason' clause . . . vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice."[125] Thus, when exceptional circumstances bar adequate redress through other mechanisms, relief under Rule 60(b)(6) is appropriate.[126]

Notwithstanding that Rule 60(b)(6) motions are denied more often than they are granted, "the fact that we have such a rule on the books means that district courts must have some discretion to grant relief from their judgments."[127] Importantly, courts across the country have consistently applied the rule to relieve parties from judgments where, as here, those judgments place a party at risk of inconsistent obligations.[128] For example, "courts have granted post-judgment relief in 'same accident' cases to harmonize the legal outcome for victims of the same motor vehicle accident, and also to harmonize the results for parties of a common

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[125] *Atraqchi v. F.B.I.*, 959 F.2d 740 (8th Cir. 1992) (quoting *Klapprott*, 335 U.S. at 614-15).

[126] *See In re Guidant Corp. Implantable Defibrillators Prod. Liab. Litig.*, 496 F.3d 863, 868 (8th Cir. 2007).

[127] *In re Blue Diamond Coal Co.*, No. 3:93-CV-473, 1998 WL 1802907, at *3 (E.D. Tenn. Nov. 4, 1998).

[128] *E.g., WRS, Inc. v. Plaza Entm't, Inc.*, No. CIV. A. 00-2041, 2008 WL 2323991 (W.D. Pa. June 5, 2008) (granting Rule 60(b)(6) motion because "this case presents exceptional circumstances due to the very real possibility of inconsistent judgments.").

contractual transaction."[129] And though such cases do not arise frequently, "where the subsequent court decision is closely related to the case in question," or "where two cases arising out of the same transaction result in conflicting judgments, [Rule60(b)(6)] relief has been found to be warranted."[130] Put simply, if, after the judgment, circumstances place a party at risk of inconsistent obligations, Rule 60(b)(6) is the vehicle to set right the cart and relieve the party of its inconsistent obligations.[131] But although the Band raised these points below and they were unrebutted—the District Court didn't address any of this precedent. And by entirely failing to consider that continuing to require the Band to pay the Unpaid Rent under the Consent Order places it in violation of the NIGC's NOV, the District Court abused its discretion.

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[129] *Blue Diamond*, 1998 WL 1802907, at *3 (E.D. Tenn. Nov. 4, 1998) (citing *Gondeck v. Pan Am. World Airways, Inc.*, 382 U.S. 25 (1965); *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1976, en banc); and *First Am. Nat'l Bank of Nashville v. Bonded Elevator, Inc.*, 111 F.R.D. 74 (W.D. Ky. 1986)).

[130] *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 751 n.6 (5th Cir. 1995) (citations omitted). *See also Underwriters at Lloyd's of London v. OSCA, Inc.*, CIV.A.H-00-3442, 2003 WL 25740144 (S.D. Tex. Sept. 5, 2003) *aff'd in part, rev'd in part on other grounds sub nom. Underwriters at Lloyd's London v. OSCA, Inc.*, 03-20398, 2006 WL 941794 (5th Cir. Apr. 12, 2006) (affording Rule 60(b)(6) relief where "[i]f the Court were not able to correct its final judgment, the ultimate ruling on the amount of liability in this case would be wholly inconsistent with the Court's findings, which would constitute an extraordinarily absurd result.").

[131] *E.g., Ameritech Corp. v. Int'l Broth. of Elec. Workers, Local 21*, 543 F.3d 414, 419 (7th Cir. 2008) (describing propriety of Rule 60(b)(6) relief where arbitration award is inconsistent with ensuing arbitration award); *Mayhew v. Int'l Mktg. Group*, 6 F. App'x. 277, 279 (6th Cir. 2001) (reversing denial of Rule 60(b)(6) motion as an abuse of discretion where a federal statute "directly conflict[ed] with the holding of the district court.").

B. The District Court abused its discretion by failing to consider that the Band cannot lawfully comply with *both* the Unpaid Rent portion of the Consent Order *and* the NIGC's NOV.

In conclusorily weighing the equities of the Band's Rule 60(b)(6) request for relief, the District Court first determined that relief is not appropriate because when the Unpaid Rent and Counterclaim obligations arose, "they were legal under the NIGC's then-existing understanding of IGRA."[132] But this measures the legality at the wrong point in time. Even if the Unpaid Rent was legal *when it accrued* (a conclusion the NIGC Chairperson disputes[133]), there can be no dispute that it would violate federal law for the Band to *today* tender payment of that Unpaid Rent. Indeed, the City *did not* dispute this, and the District Court itself agreed that:

- "[T]he NIGC clearly has changed course on whether the particular terms of the 1994 Agreements satisfy the IGRA."[134]
- "[T]he NIGC's understanding of the 'sole proprietary interest' requirement under the IGRA has not only changed, but changed sufficiently to result in an agency opinion that is directly contrary to its earlier opinion on whether the 1994 Agreements comply with IGRA."[135]
- "The NIGC . . . has now issued th[e] final decision regarding 'sole proprietary interest' and it is squarely contrary to the agency's earlier approval of the 1994 Agreements."[136]
- "The NOV . . . evaluated the validity of the 1994 Agreements as a whole and found that the parties' agreement violates the IGRA."[137]

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[132] Add. at 28.
[133] Add. at 47.
[134] Add at 16.
[135] *Id.* at 17.
[136] *Id.* at 17 n.11.

- "[T]he NIGC's decision is a single conclusion regarding the entirety of the parties' relationship, not individual objections to particular aspects of the various agreements."[138]

- "The NIGC thus ordered the Band to cease performance under the 1994 Agreements or face sanctions, including fines and the possible closure of the casino."[139]

- "[W]hile performance was lawful from 1994 until the NIGC's 2011 decision, further performance of the bulk, if not the entirety, of the 1994 Agreements would be unlawful."[140]

- "The NOV concluded that, in order to correct the violations of the IGRA that it found, '[t]he Band must cease performance' of any provision of the Agreements that violated the IGRA, and further stated that '[t]his applies to the *entire 42 year term* of the 1994 Agreements,' that is, not only the Extension Term scheduled to begin on April 1, 2011, but also the entirety of the now-completed, seventeen-year Initial Term. (Doc. No. 202, at 21 (emphasis added).)"[141]

- "[T]he Court concludes that . . . it is impossible to reconcile the terms of the 1994 Agreements and the NOV, thereby rendering any remaining performance of the contractual terms legally impracticable[.]"[142]

The NOV was clear: "[t]he Band must cease performance."[143] That does not just mean that the Band may not pay the City rent during the Renewal Term. The District Court recognized that the NOV expressly "'applies to the *entire 42 year term* of the 1994 Agreements[.]'"[144] So the District Court understood that the

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[137] *Id.* at 19.
[138] *Id.*
[139] *Id.* at 5.
[140] *Id.* at 20 n.13.
[141] *Id.* at 25.
[142] *Id.* at 21.
[143] Add. at 47.
[144] Add. at 25 (quoting NOV, Add. at 47) (emphasis in original).

NIGC forbade the Band from paying the City *any* more rent for *any* reason *whenever* that rental payment accrued. And after carefully evaluating the terms of the 1994 Agreements, the initial NIGC approval, and the reasoning of the NOV,[145] the District Court agreed that without Rule 60(b) relief, the Band is left in a double bind: either it must cease performance under the 1994 Agreements, as the NIGC has directed it (but in violation of the Consent Order), and risk court sanction, or it can pay the City as the Consent Order requires (but in violation of the NOV), and risk fines of up to $25,000 per day and potential closure of the Casino.

The problem is that the District Court stopped short. Though the fact that "further performance of . . . the 1994 Agreements would be unlawful"[146] is clearly relevant to Rule 60(b)(5) request for relief from the Renewal Term, it is also relevant to—if not dispositive of—the Band's Rule 60(b)(6) request for relief from the Renewal Term. The District Court's failure to apply its own reasoning to the facts of the Unpaid Rent, and in particular its failure to even consider that forcing the Band to pay the Unpaid Rent leaves the Band obliged to perform "legally impracticable"[147] contractual terms in violation of federal law was an abuse of discretion that should be reversed.

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[145] *See* Add. at 1-21.
[146] *Id.* at 20 n.13.
[147] *Id.* at 21.

C. The District Court abused its discretion by placing undue weight on the fact that the Unpaid Rent obligation arose under a consent decree.

Ignoring that the Band cannot *both* pay the Unpaid Rent *and* comply with the NOV, the District Court justified its refusal to afford the Band relief concerning the unpaid rent under Rule 60(b)(6) by noting that "the Band agreed to those terms," and that even if the Consent Order was "[a] bad bargain," it was "one that the Band entered into without coercion."[148]

First, the Band doesn't just think the deal was a bad bargain: the NOV makes clear that it is an illegal one. As the Band emphasized below, the whole point of its Rule 60(b) motion was to ensure, to the greatest extent possible, the parties' compliance with federal law. And the Band *wants* to follow the law. But just as the NOV forbids the Band from paying rent under the Renewal Term, it also forbids the Band from paying the Unpaid Rent.[149] So the District Court's refusal to grant 60(b)(6) relief regarding the Unpaid Rent leaves the Band in the same situation that precipitated its motion: if the Rule 60(b) relief is not extended to the Unpaid Rent, the Band *still must violate federal law one way or the other*.

The fact that the Unpaid Rent accrued under a consent decree doesn't change this. A federal court's authority to enter and subsequently enforce a

[148] Add. at 28.
[149] Add. at 47-48.

consent decree is governed by well-established rules.[150] "Consent decrees entered in federal court must be directed toward protecting federal interests."[151] Accordingly, a federal consent decree must "spring from, and serve to resolve, a dispute within the court's subject-matter jurisdiction; must come within the general scope of the case made by the pleadings; and must further the objectives of the law upon which the complaint was based."[152]

These controlling principles make two points clear. First, "'the district court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce,' not from the parties' consent to the decree."[153] As a result, although parties to a consent order may agree to undertake broad obligations, "[t]his is not to say that the parties may agree to take action that conflicts with or violates the statute upon which the complaint was based."[154]

This leads inexorably to the second point: where the consent decree requires the performance of obligations that now conflict with the statute upon which it is predicated, it must be modified—regardless of whether the parties initially agreed

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[150] Although a consent decree embodies an agreement of the parties, "that agreement is 'reflected in, and [is] enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees.'" *Frew v. Hawkins*, 540 U.S. 431, 437 (2004) (quoting *Rufo*, 502 U.S. at 378).
[151] *Id.* at 437.
[152] *Id.* (citing *Firefighters v. Cleveland*, 478 U.S. 511, 525 (1986)).
[153] *Firefighters v. Stotts*, 467 U.S. 561, 576 n.9 (1984) (quoting *Railway Employees*, 364 U.S. at 651).
[154] *Cleveland*, 478 U.S. at 525.

to the requirements. Obviously, in such circumstances the decree no longer "further[s] the objectives"[155] of the law that permitted its entry in the first place. Put simply, the parties cannot agree to violate the law,[156] and a federal court should not assist the parties in trying.[157] So the fact of the parties' initial agreement is irrelevant where a court later is "satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong."[158]

That is precisely the situation here. As the District Court recognized, "it is impossible to reconcile the terms of the 1994 Agreements and the NOV, thereby rendering any remaining performance of the contractual terms legally impracticable[.]"[159] The Consent Order expressly rests on IGRA and the parties' compliance with that federal statute, but the circumstances that led to the decree's adoption no longer exist. Enforcing it (or the Summary Judgment Order) to require performance of the Unpaid Rent obligations that the NIGC—the agency specifically charged with enforcement and administration of IGRA—has now found are illegal under IGRA by definition conflicts with the statute rather than furthers its objectives. Under these circumstances, it does not matter whether the parties initially agreed to the contractual terms. The District Court abused its

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[155] *Frew*, 540 U.S. at 437.
[156] *Cleveland*, 478 U.S. at 525.
[157] *Stotts*, 467 U.S. at 576 n.9.
[158] *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932).
[159] Add. at 21.

discretion by placing undue weight on the fact that the Unpaid Rent obligation arose under a consent decree.

D. The District Court abused its discretion by placing undue weight on the equities of the Band's Counterclaims when considering whether to award Rule 60(b) relief regarding the Unpaid Rent.

The District Court similarly abused its discretion by placing undue weight on what it considered the equities of the Band's request to proceed on its Counterclaims in deciding whether to allow the Band relief from the Unpaid Rent.[160] Throughout its opinion, the Court lumped the over $75 million that the Band has already paid the City during the Initial Term with the additional approximately $10.3 million of *Unpaid* Rent that has accrued under the Initial Term, but that the Band has set aside pending this litigation,[161] analyzing the two items together as the "retroactive relief."[162] Addressing the two separate issues as one, the District Court opined that it "could not equitably permit the Band to rewrite the agreement so as to allow it to recoup rent payments already made[,]"[163] and that "ordering the City to return seventeen years of funds that it received in good faith—and, of course, already has spent on public services—would hardly be equitable."[164]

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[160] *Id.* at 25-27.
[161] *Id.* at 25-29.
[162] *Id.* at 25.
[163] *Id.* at 26
[164] *Id.* at 29.

But the Court's conclusions regarding whether it would be equitable to allow the Band's counterclaims concerning the already-paid $75 million are *immaterial* to the separate question of whether it is equitable to relieve the Band of the Unpaid Rent obligation. Indeed, the facts of the Unpaid Rent demonstrate that any reliance the City professes regarding the Unpaid Rent is unreasonable because:

- the Band has not yet paid the Unpaid Rent, so relieving the Band of the Unpaid Rent obligation would not allow the Band to "recoup" anything, but would only maintain the *status quo*;
- the City would not have "return" even a single year of Unpaid Rent because it hasn't actually received the money—and, of course, because it has not received the money, has not spent a dime of the money on public services;
- the City has known since 2009 that the Band disputed the legality of the Unpaid Rent; and
- even though the District Court ordered payment of the Unpaid Rent in its Summary Judgment Order, that order was expressly subject to offset pending a "contra-revenue" trial that has not yet occurred,[165] was entered before the NOV issued, and is not yet a final appealable order,[166] so remains open to appeal.

By grafting its consideration of the equities of the Band's request to proceed on counterclaims regarding its already-performed payments onto the Band's separate request for relief regarding the to-be-performed Unpaid Rent, the District Court

[165] A-377-379

[166] *See e.g., Porter v. Williams,* 436 F.3d 917, 919 (8th Cir. 2006)("Generally, partial summary judgments are not final and appealable.")

gave "an irrelevant or improper factor . . . significant weight."[167] This was an abuse of discretion, and it should be reversed.[168]

E. The District Court abused its discretion because, when all proper factors, and no improper ones, are considered, the District Court committed a clear error of judgment in denying the Band's Rule 60(b)(6) request for relief regarding the Unpaid Rent.

Contrary to the District Court's decision, Rule 60(b)(6) *does* reach requests for relief for retroactive obligations,[169] including monetary payments.[170] And though the District Court did not address any of it, an entire body of law supports the conclusion that Rule 60(b)(6) relief is not only available, but entirely appropriate to relieve a party from inconsistent obligations that arise after entry of judgment.[171] Admittedly, Rule 60(b)(6) is used sparingly, but its purpose is "to

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[167] *Thatcher*, 659 F.3d at 1213.
[168] *See id.*
[169] *Mayhew*, 6 Fed. Appx. at 279.
[170] *E.g Pacific Far East Lines*, 889 F.2d at 250.
[171] *E.g.*, *Ameritech Corp.*, 543 F.3d at 419 (describing propriety of Rule 60(b)(6) relief where arbitration award is inconsistent with ensuing arbitration award); *Mayhew*, 6 F. App'x. at 279 (reversing denial of Rule 60(b)(6) motion as an abuse of discretion where a federal statute "directly conflict[ed] with the holding of the district court."); *Batts*, 66 F.3d at 751 n.6 (5th Cir. 1995) ("[W]here the subsequent court decision is closely related to the case in question," or "where two cases arising out of the same transaction result in conflicting judgments, [Rule 60(b)(6)] relief has been found to be warranted.") (citations omitted); *Pacific Far East Lines*, 889 F.2d at 250 (relying on Rule 60(b)(6) to order the refund of referee compensation made pursuant to a stipulation where Congress amended the relevant statute to cap referee compensation at $200,00—$576,000 less than was paid under the stipulation.); *WRS, Inc.*, 2008 WL 2323991 (W.D. Pa. June 5, 2008) (granting Rule 60(b)(6) motion because "this case presents exceptional circumstances due to the very real possibility of inconsistent judgments."); *Underwriters at Lloyd's of*

prevent the judgment from becoming a vehicle of injustice[,]" and it "is to be given a liberal construction" and "construed liberally to do substantial justice."[172]

Justice demands that the parties follow the law.[173] And the Band *wants* to follow the law. But the District Court's denial of Rule 60(b)(6) relief regarding the Unpaid Rent leaves the Band *unable* to follow the law. Under the Consent Order, the Band must pay the Unpaid Rent.[174] But under the NOV, "[t]he Band must cease performance" of the 1994 Agreements' rent provisions that are incorporated into the Consent Order.[175] So without Rule 60(b) relief, the Band *must violate federal law one way or the other*. That is not just, and it is not required by the Federal Rules.

London, 2003 WL 25740144 (S.D. Tex. Sept. 5, 2003) (affording Rule 60(b)(6) relief where "[i]f the Court were not able to correct its final judgment, the ultimate ruling on the amount of liability in this case would be wholly inconsistent with the Court's findings, which would constitute an extraordinarily absurd result."); *Blue Diamond*, 1998 WL 1802907, at *3 (E.D. Tenn. Nov. 4, 1998) ("[C]ourts have granted post-judgment relief in 'same accident' cases to harmonize the legal outcome for victims of the same motor vehicle accident, and also to harmonize the results for parties of a common contractual transaction.") (citing *Gondeck v. Pan Am. World Airways, Inc.*, 382 U.S. 25 (1965); *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1976, en banc); and *First Am. Nat'l Bank of Nashville v. Bonded Elevator, Inc.*, 111 F.R.D. 74 (W.D. Ky. 1986)).

[172] *Rosebud Sioux Tribe*, 733 F.2d at 515.

[173] *Hedges v. Dixon County*, 150 U.S. 182, 192 (1893) ("[W]herever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim 'equitas sequitur legem' is strictly applicable."); *Petersen v. E.F. Johnson Co.*, 366 F.3d 676, 680 (8th Cir. 2004) (stating "equity follows the law").

[174] Add. at 54.

[175] Add. at 47.

The City is sure to complain that *even though* there is no way for the Band to comply with both the Consent Order and the NOV (a point it has yet to dispute) it would be inequitable to deprive the City of the $10 million dollars of Unpaid Rent—money it could use for street maintenance and repair—so the "fair" way to resolve this conflict would be for the NOV to yield to the Consent Order, not the other way around. But this argument must fail. As an initial matter, though the Band applied to the Court immediately for Rule 60(b) relief upon receiving notice of the NOV, the City has yet to file an Administrative Procedures Act action challenging the NOV[176]—the obvious step if it actually desired resolution of this conflict that would preserve the Consent Order. But even if it did, a reviewing court must afford the NOV—the final decision of the agency charged with administering and enforcing IGRA—substantial deference.[177] Under controlling law, "a court may not substitute its own construction of a statutory provision for a

[176] *See* 5 U.S.C. §§ 701-706; 33 C. Wright & C. Koch, *Federal Practice and Procedure § 8291* (2006 ed.).

[177] *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 837-45 (1984). When it enacted IGRA, Congress expressly established the "National Indian Gaming Commission . . . to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue." 25 U.S.C. § 2702(3). Unlike NIGC Opinion Letters, Notices of Violation are final agency actions. *Id.* at § 2714. Thus, the NOV's interpretation of IGRA is entitled to substantial deference. *See e.g., Miami Tribe of Oklahoma v. United States*, 5 F. Supp. 2d 1213, 1217 (D. Kan. 1998) (affording the NIGC Chairman's disapproval of a management contract, a final agency decision under 25 U.S.C. § 2714, *Chevron* deference).

reasonable interpretation made by the administrator of an agency."[178] So even if the City availed itself of the remedy open to it, the Court's precedent would still direct it to defer to the NIGC's interpretation of IGRA, as expressed in the NOV.

But more fundamentally, there's nothing "fair" about requiring the Band to make an illegal payout—regardless of what the City would spend the money on.[179] The City has already "enjoyed many years of rental income and other benefits"[180] from the now-illegal Agreements, including the $75 million of payments, the time value of those payments, 25 years of interest on those payments, and an unparalleled partner in the City's redevelopment efforts.[181] And the City will retain *all* of those benefits even if it is not able to pocket an *additional* $10 million. But the NIGC has said that enough is enough and has made clear that any additional payment *will* violate IGRA, subjecting the Band to heavy potential fines

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[178] *Chevron*, 467 U.S. at 843-44.

[179] Because the Agreements have funneled an exorbitant amount of the Casino's profits to the City for the past 25 years, a number of the Band's own governmental needs have gone unmet. A-418-419. But this Court need not decide whose governmental interests are more important because Congress has already determined that an overriding purpose of IGRA—and by extension the overriding purpose of revenue generated by Indian gaming conducted pursuant to IGRA—is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments[,]" 25 U.S.C. § 2702(1), not to give neighboring municipalities a cash cow.

[180] Add. at 10.

[181] A-419-420.

and the possibility of closure.[182] So the fact remains that without Rule 60(b)(6) relief from the Unpaid Rent, the Band *cannot comply with both* the NOV and the Consent Order. So here, considering all of the relevant factors and no improper ones, the facts and the law both point to a single conclusion: the District Court's denial of Rule 60(b)(6) relief from the Unpaid Rent obligation was an abuse of discretion.[183]

CONCLUSION

In large measure, the District Court properly addressed the Band's motion for Rule 60(b) relief. The Court recognized the irreconcilable conflict between the Consent Order and the NOV, recognized the propriety of deferring to the NIGC's interpretation of IGRA, and recognized that justice demanded that the Band be relieved from complying with the Consent Order during the Renewal Term of the Sublease. The problem is that the District Court stopped short. The Band has not appealed the District Court's refusal to allow the Band to proceed on its counterclaims to seek return of the payments it already made under the Consent Decree. But requiring performance of the Unpaid Rent obligations leaves the Band in the same double bind as the Renewal Term: the Band cannot *both* pay the Unpaid Rent as the Consent Order demands *and* cease performance as the NOV

[182] Add. at 48.
[183] *See Thatcher*, 659 F.3d at 1213.

requires. By misconstruing Rule 60(b), failing to consider factors that should have been afforded significant weight, and placing undue emphasis on irrelevant factors, the District Court based its ruling on an erroneous view of the law and abused its discretion. As to the Unpaid Rent portion of its opinion, it should be reversed.

Dated: February 22, 2012

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this brief contains 12,829 words, exclusive of the items set forth in Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure, based on the word count that is part of Microsoft Office Word 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2012, I electronically filed the Appellant/Cross-Appellee Fond du Lac Band of Lake Superior Chippewa's Brief of Appellant with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the ECF system. Participants in the case who are registered with ECF will be served by the CM/ECF system.

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