UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

City of Duluth,

Plaintiff,

v. Case No. 0:09-cv-02668-SRN-LIB

Fond du Lac Band of Lake Superior Chippewa,

Defendant.

Reply in Support of
Defendant Fond du Lac Band of Lake Superior Chippewa's Motion for Relief from Consent Order and Summary Judgment Order under Rule 60(b)(6)

And so castles made of sand fall in the sea, eventually.

— Jimi Hendrix

It is clear that the City does not like the NOV and would rather continue to milk the cash cow that is the 1994 Agreements. But those Agreements—and this Court's adoption of those Agreements—rested on a faulty foundation. The NIGC has withdrawn its initial endorsement of the deal—endorsement on which the Court conditioned the Consent Order.[1] Now that "the full implications" of IGRA are clear, the NIGC has determined that the Unpaid Rent obligation of the 1994 Agreements is illegal and has directed that the "Band *must cease performance*" of this obligation.[2] Because the Unpaid

[1] *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 702 F.3d 1147, 1151 (8th Cir. 2013).
[2] July 12, 2011 NOV-11-02, *Fond du Lac Band of Lake Superior Chippewa*, Dkt. 208-1 ("NOV"), at 18 (emphasis added).

Rent obligation "has become impermissible under federal law[,]" under controlling precedent, it "must of course be modified[.]"[3]

Argument

I. The law has changed.

At the outset, it is important to recognize the reality of this case: the law has changed. The City argues that the NIGC simply has not "made any definitive or final changes that might affect the contract with the Band"[4] because the NIGC has not completed formal rulemaking concerning the IGRA's sole-proprietary-interest requirement. Of course, the NIGC need not only act by rulemaking. The Eighth Circuit made clear *when considering the effect of the NOV* that "a binding adjudication by a federal agency, which has been tasked with interpreting and enforcing a statute enacted by Congress, represents a change in law for the purposes of Rule 60(b)."[5] And like any other binding adjudication, that law applies to this case.[6]

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[3] *City of Duluth*, 702 F.3d at 1152 (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 388 (1992)); *id.* at 1152 (same).

[4] City Br., Dkt. 269 at 16.

[5] *City of Duluth*, 702 F.3d at 1153. *Contra* City Br., Dkt. 269 at 6 (arguing that "[t]o the extent that the NOV is a change of law, it is not an exceptional circumstance for purposes of Rule 60(b)(6).").

[6] *See Gonzalez v. Crosby*, 545 U.S. 524, 536 (2005) ("[C]onstructions of federal statutes customarily apply to all cases then pending on direct review[.]"); *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("Our general practice is to apply the rule of law we announce in a case to the parties before us[.]") (internal citation omitted). The City's extended discussion of whether the NIGC has retroactive-rulemaking power, City's Br., Dkt. 269 at 10-11, has no importance here because the NIGC has not acted (and need not have acted) by rulemaking.

II. The change in law makes any further performance of the 1994 Agreements illegal and Rule 60(b)(6) relief necessary.

Against this backdrop, the City argues that this Court must consider a host of "relevant factors" to decide the Band's motion,[7] and then itemizes a two-and-a-half-page list of "factors" it deems relevant,[8] though in its own analysis, many of these simply duplicate each other.[9] The City's interpretation of the Eighth Circuit's mandate to simply require a really long list places too much weight on the single sentence reversing this Court's initial 60(b)(6) decision for "not examining all the relevant factors[.]"[10] In context, as the Eighth Circuit explained:

> 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; or when all proper factors and no improper ones are considered, but the court commits a clear error of judgment in weighing those factors.[11]

Unsurprisingly, this motion must be decided by legal analysis, not numerosity.

A. The City's argument prioritizes insignificant factors.

The Eighth Circuit has not only instructed this Court to consider all relevant factors, but to weigh those relevant factors appropriately and to exclude irrelevant ones. It is on these second and third points that the City's argument falters. For example, the City appears to argue that finality concerns caution against granting the Band's requested

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[7] City Br., Dkt. 269 at 2 (citing *City of Duluth*, 703 F.3d at 1155).
[8] *Id.* at 4-7.
[9] *E.g. id*. at 20 (demonstrating that the City's analysis of what it identified as Factor 13 is duplicative of Factor 14, and that its analysis of Factors 15 and 16 is duplicative of Factor 17).
[10] *City of Duluth*, 703 F.3d at 1155.
[11] *Id.* at 1152 (citing *Thatcher v. Hanover Ins. Group, Inc.*, 659 F.3d 11212, 1213 (8th Cir. 2011).

relief.[12] But the Supreme Court has made clear that the fact of Rule 60(b) itself "shows why we give little weight to [a party's] appeal to the virtues of finality. That policy consideration, standing alone, is unpersuasive in the interpretation of a provision whose whole purpose is to make an exception to finality."[13]

It is particularly true that the Court should place little weight on such concerns in this case. As the Supreme Court explained in *Plaut v. Spendthrift Farm, Inc*,

> [t]he finality that a court can pronounce is no more than what the law in existence at the time of judgment will permit it to pronounce. If the law then applicable says that the judgment may be reopened for certain reasons, that limitation is built into the judgment itself, and its finality is so conditioned. [14]

When Judge Magnuson entered the 1994 Agreements as a consent decree, he made that imprimatur "contingent on a determination by the NIGC that it did not violate IGRA."[15] That limitation was built into the judgment itself, so it cannot be true that a change in the condition may not occasion a change in the judgment. It is on this point that the *Flexiteek* case is instructive.[16] The District Court's judgment was predicated on the agency's decision, the agency's decision changed, and on Rule 60(b) review, the Court

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[12] City's Br., Dkt. 269 at 18, 20-21 (arguing the City's position on the "factors" it identified as 8, 15, 16, and 17).

[13] *Gonzalez*, 545 U.S. at 529.

[14] 514 U.S. 211, 234 (1995).

[15] *City of Duluth*, 703 F.3d at 1151.

[16] Judge Murphy's single observation about the case at oral argument, that a patent case is "quite far afield" from this case, demonstrates that the Band did not successfully explain the relevance of the case in the 350 words allowed by Federal Rule of Appellate Procedure 28(j) before oral argument, but she said neither in words nor substance that the case "didn't have any application to this case." *Compare* City Br., Dkt. 269 at 24 *with* Oral Argument, www.ca8.uscourts.gov/oral-arguments, Case No. 11-3883, Nov. 13, 2012, at approx. 9:25.

held that prospective relief from the judgment was appropriate under Rule 60(b)(5), *and* that retroactive relief was appropriate under Rule 60(b)(6). The *Flexiteek* analysis did not hinge on *why* the agency's decision changed, as the City argues without citation, but simply on the fact that it changed.[17]

Put simply, under these circumstances, what happened *before* the NIGC issued the NOV remains relevant but cannot carry the same weight as what happened *after* the NIGC issued the NOV. It is true that the City and the Band consented to the 1994 Agreements,[18] but it is also true that the City will retain the benefit of $75 million that it would not have had without the extraordinary deal,[19] and the fact remains that the parties

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[17] *Flexiteek Americas, Inc. v. Plasteak, Inc.*, No. 08–60996–CIV, 2012 WL 5364247, at *2 (S. D. Fla. Oct. 31, 2012) (responding to the Plaintiffs' argument that "the ′881 patent was not declared void *ab initio* because Claim 1 is still valid" by holding that "Claim 1 was unenforceable, and the current Final Judgment—based on Defendants' infringement of Claim 1—should be vacated.").

[18] The "clear" record the City relies on to color this fact is testimony it offered at the arbitration, where the City rested its case just after the NIGC issued its NOV. The testimony is "undisputed" simply because the arbitrators adjourned the proceeding before the Band could put on its case.

[19] When the arbitration in this case began, the most recent assessed value for the Casino property was $3,791,200, which would yield total taxes in the amount of $99,540. 2011 Summary Appraisal Report, excerpt attached as Ex. 1, at 26. In contrast, under the 19% "rent" arrangement, the Band would have paid over $6,000,000 for the same year, yet received no more from the City than any other business property owner for services that the City was required by law to provide. *Shakopee Mdewakanton Sioux Community v. City of Prior Lake*, 771 F.2d 1153, 1155 (8th Cir. 1985) (upholding injunction prohibiting city from refusing to provide reservation residents with "police, fire, rescue, and other municipal services in the same manner as that in which services are provided other [city] residents.")). But it is also grossly disproportionate to similar revenue agreements between tribes and municipalities. For example, the most recent agreement between the Shakopee Mdewakanton Sioux Community (whose Mystic Lake Casino complex holds more than 4,000 slots, nearly 100 black-jack tables and almost 600 hotel rooms) and the City of Prior Lake provided for annual payments of $360,000 (for 2006 and 2007) in exchange for the City's providing "police, and other local governmental services to the Community at a level not less than that provided to the balance of the City's service area . . . ." Dec. 7, 2005

struck that bargain "at a time when the full implications of [IGRA] were still unclear."[20] That is no longer the case.

As this Court earlier recognized, the NIGC's decision that the 1994 Agreements are illegal under IGRA makes "*any remaining performance* of the contractual terms legally impracticable[.]"[21] The Eighth Circuit agreed with this Court: the Band must "'be relieved of any *further compliance* with its obligations under the 1994 Agreements.'"[22] Under the NOV, the "Band *must cease performance*" of the illegal 1994 Agreement obligations,[23] and the City has not argued (and cannot argue) that the Band can both do this *and* pay the Unpaid Rent obligation. So the most relevant factor that must be given the most significant weight is that the Band *cannot both* perform the Unpaid Rent obligation and comply with the NOV.

Agreement Between the Shakopee Mdewakanton Sioux (Dakota) Community and the City of Prior Lake), attached as Ex. 2. The Forest County Potawatomi Community (whose Milwaukee Casino has 3,100 slots and a variety of table games) makes annual payments to the City and County of Milwaukee in the amount of 1.5% of Class III gaming net win (or, if greater, $3.38 million and $3.24 million respectively). Mar. 2, 1999 Intergovernmental Cooperation Agreement Between the Forest County Potawatomi Tribe of Wisconsin and the City and County of Milwaukee, attached as Ex. 3. The Pokagon Band of Potawatomi Indians has agreed to assess a tribal hotel occupancy tax on any hotel located on its casino development property in the New Buffalo, Michigan, area, and to contribute a portion of that tribal tax to New Buffalo at the same level contributed by other hotel owners in a local assessment area. The Band also agreed to allocate up to 2% of revenue from Class III electronic gaming, with the actual amount determined by State Compact provisions. Local Agreement Between the Pokagon Band of Potawatomi Indians and the City of New Buffalo, attached as Ex. 4. None come even close to the City's deal.

[20] *City of Duluth*, 703 F.3d at 1150.

[21] Order, Dkt. 231, at 21 (emphasis added).

[22] *City of Duluth*, 702 F.3d at 1152 (quoting Order, Dkt. 231, at 29) (emphasis added).

[23] NOV, Dkt. 208-1, at 18 (emphasis added).

B. The City's argument ignores the most significant factor—illegality of performance.

The City appears to concede that it would be exceptional and extraordinary to require the Band to violate the NOV by enforcing the Unpaid Rent obligation, instead playing caselaw Mad Libs to argue that it is not "exceptional circumstances" that are important, but whether those circumstances "justify relief."[24] Of course, that is not the law.[25] But even if it were, the City has not—and cannot—argue that this Court would not be justified in exercising its discretion to relieve the Band of an illegal obligation.

For example, the City faults the NOV for saying that "the agreed amount is too high" and that "the term of these agreements is too long" without offering the City terms that would not violate IGRA.[26] But it is not the NIGC's job to negotiate for the City, and any potential new agreement cannot change that *this* agreement that the City bargained for is illegal. Similarly, the City has returned to its supposition that the Band has a "complete defense" to an enforcement action,[27] but as the Band detailed in its opening motion, a defense to a civil action is not the same as a defense to statutory enforcement powers.[28] Not only does the City fail to respond to those arguments *at all*, it instead pushes against an open door by emphasizing that NIGC regulations cannot apply

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[24] *See* City Br., Dkt. 7-9.

[25] For example, the City argues that "[t]here is no question" that the circumstances of the *Ackermann* case "were 'exceptional' or 'extraordinary' because they dealt with the citizenships of the Ackermanns[,]" *id.* at 8, but that is exactly the question the Supreme Court answered. *Ackermann v. United States*, 340 U.S. 193, 202 (1950) ("Neither the circumstances of petitioner nor his excuse for not appealing is so extraordinary as to bring him within *Klapprott* or Rule 60(b)(6).").

[26] City's Br., Dkt. 269 at 17.

[27] *Id.* at 14-15.

[28] Band's Br., Dkt. 262 at 9-14.

retroactively (apparently to suggest that the NIGC cannot enforce the NOV).[29] The NOV is not a regulation. It is a quasi-judicial enforcement action that carries the weight of significant fines and possible closure.[30] The Band can assume (though it is only an assumption) that that weight has not yet landed because, as the City acknowledges, the Band took steps to comply with the NOV,[31] including seeking immediate relief from this Court, the Eighth Circuit, and this Court again on remand. The City's supposition that "there will not be any sanctions imposed" if the Court compels performance that the NOV forbids is just that—speculation. These *facts* are known to the parties: (1) the 1994 Agreements are illegal; (2) the NIGC forbid the Band from all additional performance; and (3) the NIGC has significant statutory enforcement powers.

Rather than addressing the significant weight of authority that the Band identified in support of its position, the City relies on two Supreme Court cases to argue that a change in law is not an "exceptional circumstance justifying Rule 60(b)(6) relief."[32] Both support the Band's case. In *Gonzales*, a lower court denied a prisoner habeas relief, resting its decision on a statute-of-limitations interpretation of the Antiterrorism and Effective Death Penalty Act that "was by all appearances correct under the Eleventh Circuit's then-prevailing interpretation" of the act.[33] But "after petitioner's case was no longer pending," the Supreme Court interpreted the act in a contrary manner that would

[29] City's Br., Dkt. 269 at 14-15.
[30] *City of Duluth*, 702 F.3d at 1151 (citing 25 C.F.R. §§ 575.3 -575.4).
[31] City's Br., Dkt. 269 at 19 (citing July 27, 2011 Letter from Chairwoman Diver to Chairwoman Stevens, Dkt. 210-11).
[32] *Id.* at 9 (emphasis in original).
[33] *Gonzalez*, 545 U.S. at 536.

not have foreclosed the prisoner's requested relief.[34] The Court refused to apply the later interpretation to a case "long since final."[35] But as to those cases, like this one, that are still live when a change in law is announced, the Court recognized that "constructions of federal statutes customarily apply to all cases then pending on direct review[.]"[36]

Agostini is in accord. In that case, no single decision had changed the legal landscape coloring the consent judgment, but the litigants successfully argued that the Court's "Establishment Clause law has significantly changed" since the consent judgment was entered to make legal what an earlier case had foreclosed.[37] Because "[o]ur general practice is to apply the rule of law we announce in a case to the parties before us . . . even when we overruled a case[,]" the Court held that the change in law that the litigants' Rule 60(b)(5) petition occasioned entitled them to relief from the permanent injunction forbidding certain now-legal activity.[38] Justice Scalia, author of the lead opinion, acknowledged the dissent's criticism that the decision allowed litigants to use Rule

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[34] *Id.*

[35] *Id.* It explained that, in this respect, its decision aligned with the *Ackermann* Court's refusal to apply a later rule of decision to an adverse decision that the litigants decided not to appeal. *Id.* at 537-38 (discussing *Ackermann*, 340 U.S. at 195). The City improperly relies on this language of *Ackermann* to fault the Band for deciding not to appeal the NOV. The "appeal" at issue in *Ackermann* was appeal of the adverse final judgment from which the litigants later sought 60(b) relief. Here, the Consent Order was not "final" but included the embedded requirement that the agreements comply with IGRA, and the Band timely appealed the Court's initial adverse 60(b)(b) decision. The Band was under no obligation to appeal the NOV (which, because it, like the City, is charged with knowledge of the law, it believes to be correct), and its failure to appeal did not deprive the City of any right—the City never had the right to appeal a decision to which it was not subject. 25 C.F.R. § 577.3(a) (granting the *respondent* to an enforcement action a right of appeal).

[36] *Gonzalez*, 545 U.S. at 536.

[37] *Agostini*, 521 U.S. at 237.

[38] *Id.* (internal quotation and alteration omitted).

60(b)(5) "in an unprecedented way—not as a means of recognizing changes in the law, but as a vehicle for effecting them."[39] He responded that "[i]ntervening developments in the law *by themselves* rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)."[40]

But even this dicta acknowledges that, on rare occasion, intervening developments *can* constitute the extraordinary circumstances required for relief under Rule 60(b)(6) when they are paired with some other circumstance. It is on this point that the present case is exceptional:

- Here, as the Eighth Circuit recognized, "Congress vested in the NIGC authority for matters related to the regulation of Indian casinos in order to ensure that the primary beneficiaries of Indian gaming operations are to be the tribes themselves."[41] The NOV exercises the NIGC's congressionally delegated authority to enforce this federal interest, so ignoring the NIGC's changed analysis ignores Congress's direction.

- Here, the intervening development withdrew the approval that was a condition precedent to entry of the Consent Order,[42] changing not only the background law underlying a judgment, but the law embeded within the judgment itself.

- Here, the intervening development did not make legal what once was not, but made *illegal* what once was, triggering the rule the Eighth Circuit twice repeated: "the Court categorically stated in *Rufo* that a 'consent decree *must* be modified if one or more of the obligations placed upon the parties has become impermissible under federal law.'"[43]

- And, of course, here, the intervening development leaves the Band in an untenable double bind: either the Band must cease *all* performance under the 1994

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[39] *Id.* at 238.
[40] *Id.* at 239 (emphasis added).
[41] *City of Duluth*, 703 F.3d at 1155.
[42] *See id.* at 1151 (recognizing that the Decree was "contingent on a determination by the NIGC that it did not violate IGRA.").
[43] *Id.* at 1153 (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 388 (1992)) (emphasis added) (internal alteration omitted); *id.* at 1152 (same).

> 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 daily $25,000-*per-violation-per-day* fines and Casino closure.[44]

It is these facts that the City ignores.

C. The irreconcilable conflict between Consent Order and the illegality of performance requires relief from the Unpaid Rent obligation.

The Eighth Circuit recognized that "[a] change in governing law can represent so significant an alteration in circumstances as to justify both prospective and retrospective relief from the obligations of a court order."[45] The significance of the changed circumstance in this case brings this motion back to where it began: with the Band between a rock and a hard place. Although such cases are indeed rare, "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, [Rule 60(b)(6)] relief has been found to be warranted."[46] Since this motion was first before the Court, the Band has relied on cases recognizing the appropriateness of 60(b)(6) relief to relieve a party of conflicting obligations.[47] But after full briefing before this Court, the Eighth Circuit, and this Court again, the City has yet to address this law.

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[44] 25 U.S.C. § 2713; 25 C.F.R. § 575.3.

[45] *City of Duluth*, 703 F.3d at 1154 (citing *In re. Pacific Far East Lines*, 889 F.2d 242, 250 (9th Cir. 1989) (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).

[46] *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 751 n.6 (5th Cir. 1995) (citations omitted).

[47] *See, e.g.*, Band's Br., Dkt. 262 at 17-19 (citing and discussing cases).

Conclusion

Where a change in law makes illegal what once was not, a consent decree "*must be modified*[.]"[48] There is no evidence that *any* federal body took any more than a casual look at the 1994 Agreements before the NOV. But in 2012, when the NIGC looked closely, the Agreements could not withstand analysis. The City has long enjoyed life in the $75 million castle of the Consent Order, but that castle was built of sand. There is simply no argument around the controlling requirements that "[c]onsent decrees entered in federal court must be directed toward protecting federal interests[,]"[49] and that a federal consent decree must "must further the objectives of the law upon which the complaint was based."[50] The Complaint that occasioned the Consent Decree was based upon IGRA, and IGRA prohibits the Agreements embodied in the Consent Decree. The Band respectfully requests that the Court grant its motion because there is no way to both require performance under the Consent Decree *and* further the objectives of IGRA.

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[48] *City of Duluth*, 703 F.3d at 1153 (quoting *Rufo*, 502 U.S. at 388) (emphasis added); *id.* at 1152 (same).
[49] *Frew v. Hawkins*, 540 U.S. 431, 437 (2004).
[50] *Id*. (citing *Firefighters v. Cleveland*, 478 U.S. 511, 525 (1986)).

Dated: June 13, 2013

FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA

s/ Vanya S. Hogen

Vanya S. Hogen (MN #23879X)
Jessica Intermill (MN #0346287)
Jacobson, Magnuson, Anderson, Hogen & Halloran, P.C.
335 Atrium Office Building
1295 Bandana Boulevard
St. Paul, Minnesota 55108
Tele: (651) 644-4710
Fax: (651) 644-5904
E-mail: VHogen@JacobsonBuffalo.com
JIntermill@JacobsonBuffalo.com

Dennis Peterson (MN #0208036)
Tribal Attorney
Fond du Lac Band of Lake Superior Chippewa Legal Affairs Office
1720 Big Lake Road
Cloquet, Minnesota 55720
Tele: (218)878-2607
Fax: (218)878-2692
E-mail: dennispeterson@fdlrez.com