No. 13-3408

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CITY OF DULUTH,

Plaintiff-Appellee

v.

FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA,

Defendant-Appellant

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

Brief of Appellee City of Duluth

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STATEMENT OF THE ISSUES

Issue: Whether the district court abused its discretion in denying the Fond du Lac Band of Lake Superior Chippewa's ("Band") motion for retroactive relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure.

The City of Duluth's ("City") position is in the negative. The district court did not abuse its discretion and should be affirmed.

Standard of Review: Abuse of discretion.

Apposite Authority:

Gonzales v. Crosby, 545 U.S. 524 (2005)

Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988)

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

STATEMENT OF THE CASE

1. The 1986 Agreements.

The parties began discussing the development of a casino within the city of Duluth ("Duluth") at a time when the Band did not have reservation property within Duluth. City App. pg. A3 [Dkt. 58]. In joint testimony before the United States Senate Committee on Indian Affairs ("Committee") regarding S.2230, Mayor Gary Doty and Chairman Robert Peacock, informed the Committee that in 1984 the parties began to explore the possibility of creating a joint relationship that would benefit the interests of both parties. While the discussion initially included development of a bingo game to be located on an ore ship, the plans evolved into development of a facility to be located in downtown Duluth. Id.

The parties approached the creation of a relationship as an economic development initiative. Indeed, economic development was the "underlying essence of what [the parties] were trying to do together to assist us in areas where we couldn't do it individually." City App. pg. A9 [Dkt. 210-13, Mayor Fedo Testimony]. Approval of the 1986 Agreements was not easy. Id. pg. A11. In fact, the City's involvement was necessary to obtain approval. Id. pg. A12.

In response to questions of the Duluth City Council ("Council"), Chairman Houle sent a letter to City Council President Paymer, in which Houle advised the Council that:

> "It is Fond du Lac's position that joint economic development is the purpose of this agreement with the City of Duluth and that without the joint economic development element the proposal would not be acceptable to the Secretary of Interior and Fond du Lac.
>
> Additionally I understand there has been a question of the appropriateness of the parking facility. Fond du Lac has two concerns regarding this question: 1) that any parking facility be convenient to all of it's *(sic)* customers which include the elderly and handicapped and therefore must be adjacent and provide a sheltered entrance and 2.) that the location of the gaming and parking facilities be in an area that is a quality commercial district which appeals to the potential customer."

City App. pg. A18 [Dkt 13-12]

By 1986 and "with the assistance of the City, the Band had acquired land, placed it in trust, had it declared a part of its reservation, and finalized an agreement…" City App. pg. A3 [Dkt.58]. The history of these contacts and the work of the City and the Band toward obtaining governmental approval is well set forth in the arbitration testimony of Mayor Fedo. City's App. pg. A7 [Dkt. 210-13]. His telling of that history is not disputed. City and Band officials worked with governmental agencies for months to obtain approval for the placing of the old Sears, Roebuck Building in downtown Duluth in trust for the Band to a have a casino located in that building. Id.

The parties entered into their agreements in 1984, before the land was ever taken into trust. Id. pg. A9. These agreements were subject to the approval by the Department of Interior ("DOI"), which was ultimately obtained in 1985. City App.

pg. A21 [Dkt. 10-3]. The land was taken into trust in 1985 (Band App. pg. 106), and the final agreements formally executed on April 1, 1986. [Dkt. 10-7].

As Mayor Fedo explained in his arbitration testimony, obtaining DOI approval was not easy. This was the first off reservation casino in the country. DOI was not allowing the creation of off-reservation trust lands for casinos. City's App. at A11 [Dkt. 210-13], pg. A19 [Dkt.13-13]. It was only the "joint economic development" nature of this project that won project approval. City's App. at A9 [Dkt. 210-13]. Without the City's consent, cooperation and substantial efforts lobbying governmental officials and agencies, the Fond du Luth Casino would never have happened.

In working with the Band the City took substantial risks. By assisting the Band in creating a reservation in downtown Duluth, the City gave up forever the right to govern a portion of its territory, a portion located in the heart of Old Downtown Duluth. A location which Mayor Doty and Chairman Peacock described to the Committee as the "anchor of the downtown revitalization effort that has been implemented by the City and downtown business owners." City App. at A2 [Dkt. 58]. The City also committed to investing in excess of $2,000,000.00 to the project by acquiring land adjacent to the casino and constructing a parking ramp and street-scaping to service the casino and other businesses in downtown Duluth. City App. at A16 [Dkt. No. 10-1]; A21 [Dkt. 10-

3]. This figure does not include the hours spent by city officials in obtaining the approval of the United States Department of the Interior ("Department"). The City's commitment of its resources to the project was risky and the Department was on record as describing the arrangement as "novel and unique, and that the Bureau by approving the Commission and Development Agreements is not 'warranting' that the commitments made by either party will be totally enforceable." City App. pg A22 [Dkt.10-3]. The effort to create the original agreements involved many months of negotiation, resulting in the creation of a commission, the purpose of which was to enhance the economies of both parties. City App. pg. A3 [Dkt. 58]. During an historic meeting in Washington D.C. on Dec. 6, 1985, the parties posed for a photograph that included Mayor Fedo, Chairman Houle, as well as legal counsel for the Band, Henry Buffalo and Jeff Wallace. City App. pg. A24 [Dkt.10-6].

2. Passage of IGRA and NIGC assistance in amending the 1986 Agreements.

Following the enactment of IGRA, the National Indian Gaming Commission ("NIGC") conducted an extensive review of the 1986 Agreements, and in a letter dated September 24, 1993, Anthony Hope, NIGC Chair, advised the parties that the agreements violated the sole proprietary interest mandate of 25 U.S.C. §2710 (b)(2)(A) and 25 C.F.R. §522.4(b)(1). City App. pg. A-25 [Dkt. 11-1]. Chair Hope also advised the parties that the NIGC would delay enforcement to allow the

parties time to negotiate and resolve the matter. Toward that end, the NIGC made NIGC staff and technical resources available and Hope offered "to coordinate settlement negotiations, including the chairing of a settlement conference…" Id. The parties, in their testimony for the Senate Committee, testified that "the Chairman of the NIGC, Mr. Anthony Hope, offered the parties the services of his staff to mediate the dispute." "We would like to share with the Committee that after nine long hard months of mediation, the Band and the City have resolved our dispute. The resolution of the dispute remains complex, but it has been reviewed by the NIGC and is, in their view, now consistent with the IGRA." City App. pg. A4. "We both would like to share with the Committee members our appreciation for the assistance provided by Chairman Hope and his legal staff for guiding us through uncharted waters to a resolution that both governments can enjoy." Id. at pg. A5.

3. Entry of the Consent Order.

Armed with the amended and NIGC approved agreements, and in reliance upon the assistance and technical advice of the NIGC, the City and the Band returned to the Minnesota District Court. *See*, Fond du Lac Band of Lake Superior Chippewa Indians v. City of Duluth, Civ. No. 5-94-82; Band App. pg. A131. In that proceeding, Chair Hope presented to the district court his Report and Recommendation in a letter dated June 20, 1994. City App. pg. A30 [Dkt. 11-4].

Chair Hope advised the court that "I am writing to report that the settlement agreement recently concluded between the Fond Du Lac Band and the City of DuLuth *(sic)* returns ownership and control of the Fond DuLuth *(sic)* Casino to the Band **and is fully consistent with the IGRA."** Id. *(emphasis added).* Id. A31.

In the Stipulation presented to the district court, the Band stipulated that "the 1994 Agreements restructure the gaming operation on the Band's tribal trust land in the City so that the Band has the sole proprietary interest in the gaming operation." Band App. pg. 134, ¶7 [Dkt.11-7].

In reliance on the approval and recommendation of the NIGC, the City agreed to settle its dispute with the Band and assumed new risks associated with the Casino's development. The City agreed to the cancellation of the parking ramp lease between the City and the Duluth Fond du Lac Economic Development Commission ("Commission"). City App. pg. A32 [Dkt. 12-6]. The City also released the Band and the Commission from "all liability in connection with the construction, operation and maintenance of the parking ramp, and the obligations of the Commission under the Commission Agreement to repay certain debts secured by the aforesaid Agreements to the City have been sidecharged, and the Guaranty obligations of the Band have been released;…." City App. pg. A35 [Dkt.12-7]. The City gave up all lease revenues related to the parking ramp and assumed the entire risk of the debt service associated with the parking ramp,

without any guarantee that the Band would continue to operate a Casino at the Sublease space.

4. The Band's Breach of Contract.

In a letter dated January 28, 2009, Chairwoman Diver advised the City that the Band intended to apply a draft Audit and Accounting Guide for gaming enterprises issued on September 10, 2008 to the entire period of payments the Band previously made to the City. Band App. pg. A317. In this letter Diver advised the City that based on this newly proposed accounting methodology, the Band calculated an overpayment to the City of $561,047.59 for the period since execution of the Sublease in 1994 through the third quarter of 2008. The City was further advised that the Band intended to apply this amount as an offset against future payments to the City. Id. Notably absent from this letter was any claim by the Band that the 1994 Agreements were not valid or that they violated the IGRA. In response the City requested that the Band utilize the dispute resolution procedures of the Sublease. Band App. pg. A321.

In a letter dated August 6, 2009, the Band admitted "that the City has no assertable proprietary interest in the Fond-du-Luth Casino", and that the Band had unilaterally determined to cease all payments immediately. Band App. pg. A330.

As a result of the Band's cessation of payments, the City commenced the current action. On April 21, 2010, the district court granted the City summary

judgment as to liability and ordered trial on the issue of damages. *See,* City of Duluth v. Fond du Lac Band of Lake Superior Chippewa, 708 F. Supp. 2d 890 (D. Minn. 2010)("City of Duluth I").

The Band responded by soliciting the NIGC's review of the 1994 Agreements and requested that the NIGC determine that the agreements violated IGRA. City App. pg. A40 [Dkt 210-2].

The NIGC subsequently accepted the Band's invitation, reviewed the agreements, reversed its prior approval, and issued the Notice of Violation ("NOV") that forms the basis of the Band's motion for relief under Rule 60(b)(6).

5. 8th Circuit Mandate.

This Court previously considered the Band's request for Rule 60(b) relief. *See,* City of Duluth v. Fond du Lac Band of Lake Superior, 702 F.3d 1147 (8th Cir. 2013) ("City of Duluth III"). The earlier appeal dealt with the district court's denial of Rule 60(b)(6) relief with respect to the initial term of the 1994 Agreements and the granting of relief as to the extension term. City of Duluth v. Fond du Lac Band, 830 F. Supp. 2d 712 (D. Minn. 2011)("Duluth II").[1] Both parties appealed.

This Court held that the district court abused its discretion by not considering "all relevant factors" to the question of whether the required

[1] The Honorable Susan R. Nelson, United States District Judge for the District of Minnesota, presiding.

"exceptional circumstances" exist to justify relief under the "extraordinary remedy" of Rule 60(b)(6). City of Duluth III, 702 F.3d at 1155. Included in the "relevant factors" identified by this Court were:

1. "Both the Band and the City voluntarily agreed …"; Id. at 1155
2. "[T]his Agreement was initially endorsed by the NIGC "; Id.
3. "[T]he NIGC does not have the authority to punish a party for obeying a court order." (citing cases); Id.
4. "Congress vested in the NIGC authority for matters related to the regulation of Indian casinos [citation omitted] in order to ensure that the primary beneficiaries of Indian gaming operations are to be the tribes themselves"; Id.
5. "The City was on notice that the NIGC's views on the validity of the 1994 Agreement might well have changed." (noting the advisory letters that were "likely available" and "may well have relevance.") Id.; and
6. "The NIGC issued the NOV on July 12, 2011 changing its earlier position and ordering the Band to cease performance under the Consent Decree." Id.

While the 8th Circuit indicated these factors were to be included as relevant factors to be considered, it *did not suggest it was an exclusive list*. It held that this Court must examine "all relevant factors" including those listed. In fact, this Court did not do the analysis, but remanded the issue to the district court to do that analysis.

This Court, in addressing the validity of the NIGC's action advised that "While the City may question the validity of the NIGC's current position, such

challenges are properly made under the Administrative Procedure Act (APA). The NIGC is not a party to this litigation, and the City has not made a showing that the review process established by Congress in the APA might be circumvented here." City of Duluth III, 702 F.3d at 1153. Since this Court's decision was issued, the City initiated suit against the NIGC on February 26, 2013 in the United States District Court for the District of Columbia and that litigation remains pending. *See*, City of Duluth v. National Indian Gaming Commission, et.al., Case No. 1:13-00246(CKK). Thus, the validity of the NIGC's reversal of its prior approval and the retroactive aspect of the order is a question pending before a different court.

On remand, the district court reviewed a variety of factors, including the factors suggested by this Court, and properly concluded that the Band had failed to demonstrate the existence of extraordinary circumstances justifying Rule 60(b)(6) relief.

SUMMARY OF ARGUMENT

Through its current motion, the Band seeks to use the extraordinary equitable powers of Rule 60(b)(6), powers designed to achieve substantial justice, in order to retain in excess of 10 million dollars owed to the City. Such a result would work a great injustice to the City and to the citizens of Duluth.

The district court did not abuse its discretion by concluding that the Band failed to demonstrate the existence of exceptional circumstances justifying extraordinary relief available under Rule 60(b)(6).

The Band is not the victim of exceptional circumstances over which they had no power to avoid or control. The present circumstances were deliberately sought out by the Band after the district court granted the City partial summary judgment. The Band solicited the NIGC's review and the NIGC's withdrawal of its approval in order to avoid its contractual obligations to the City, obligations that had accrued prior to the NIGC's NOV. Requiring payment is not unjust because (1) the Band did not exercise its right to appeal the NIGC's retroactive application of its new interpretation; (2) the NIGC cannot punish the Band for complying with the 1994 judgment or the district court's grant of partial summary judgment to the City; (3) the NIGC does not have the power to issue a retroactive ruling; thus it acted in an arbitrary and capricious manner; (4) the parties could not anticipate that the NIGC would issue a retroactive NOV; and (5) Congress expressly authorized payments to local governments; thus, intending that local governments benefits from tribal gaming. Denying Rule 60(b)(6) relief will not require the Band to violate federal law; instead, denying such relief will promote the federal interests in finality of judgments and achieve substantial justice.

ARGUMENT

A. Standard of Review

As this Court previously discussed in its prior decision, the district court's decision to deny relief under Rule 60(b) is reviewed for abuse of discretion. City of Duluth III, 702 F.3d at 1152, *citing*, Atkinson v. Prudential Prop. Co., 43 F.3d 367, 371 (8th Cir. 1994); Noah v. Bond Cold Storage, 408 F.3d 1043, 1045 (8th Cir. 2005). The Rule "provides for extraordinary relief which may be granted only upon an adequate showing of exceptional circumstances." Id. *citing* United States v. Young, 806 F.2d 805, 806 (8th Cir. 1986) (per curiam), cert. denied, 404 U.S. 836 (1987). "We will find an abuse of discretion only when the district court's judgment was based on clearly erroneous fact-findings or erroneous conclusions of law." Noah, *supra*. "Reversal of a district court's denial of a Rule 60(b) motion is rare because Rule 60(b) authorizes relief in only the most exceptional of cases." Id. *quoting*, IBEW, Local Union No. 545 v. Hope Elec. Corp., 293 F.3d 409, 415 (8th Cir. 2002).

Here, the district court did not abuse its discretion, it carefully reviewed the relevant factors suggested by this Court, weighed those factors for and against Rule 60(b)(6) relief and properly concluded that the Band failed to demonstrate the existence of exceptional circumstances necessary to support granting extraordinary relief.

B. The District Court Properly Applied the Exceptional Circumstances Standard

1. Entitlement to Rule 60(b)(6) Relief Requires a Showing of Exceptional Circumstances.

The district court properly concluded that Rule 60(b)(6) is "exceedingly rare" and is available only in "extraordinary circumstances." Memorandum Opinion at 6. This conclusion is consistent with this Court's earlier opinion in which it too described relief under the rule as "an extraordinary remedy" for "exceptional circumstances." City of Duluth III, 702 F.3d at 1155, *citing* In re Zimmerman, 869 F.2d 1126, 1128 (8th Cir. 1989). Rule 60(b)(6) is an instrument of equitable power and vest power in the courts to "vacate judgments whenever such action is appropriate to accomplish justice." Klapprott v. United States, 335 U.S. 601, 615 (1949).

Rule 60(b)(6) jurisprudence begins with the adoption of the amended Rule 60(b) in 1948 and its first application in the courts by the United States Supreme Court was in Klapprott. Mr. Klapprott was a naturalized U.S. citizen of German birth. In 1942, the U.S. Attorney brought suit to cancel Klapprott's naturalization certificate and his citizenship. Within the time to answer, Klapprott was arrested on criminal charges and confined to jail. Default judgment in the citizenship case was entered. More than four years later, while still in jail, he petitioned for relief from the judgment under the old rule then in effect. The district court denied the petition. The appeals court affirmed the denial. He was still in jail at the time of

the Supreme Court's decision. The Supreme Court reversed and noted: "the petitioner has now been held continuously in prison for six and one-half years. During that period he served one and one-half years of a penitentiary punishment under a conviction which this court held was improper. He was also held in the District of Columbia jail two years and ten months under an indictment that was later dismissed. It is clear, therefore, that for four and one-half years this petitioner was held in prison on charges that the Government was unable to sustain." Id. at 607. These were the "exceptional circumstances" which, in the view of the Court, justified the first application of Rule 60(b)(6) relief.

Within two years of the Klapprott decision, the same Supreme Court set the parameters for the type of "exceptional circumstances" that would justify relief and the Court set them pretty tight. Ackermann v. U.S., 340 U.S. 193 (1950). Like Mr. Klapprott, Mr. and Mrs. Ackermann and their friend Max were German nationals who were naturalized citizens. In 1942 complaints were filed against all three to cancel their naturalization on the ground of fraud. The cases were tried together, they lost, and judgments were entered cancelling their citizenship. Max appealed, the Ackermanns did not. By stipulation with the U.S. Attorney, Max's case was reversed and the case dismissed. Mr. Ackermann moved for relief under rule 60(b)(6). Id. at 195.

The Supreme Court held that Ackermann's circumstance, unlike those in Klapprott, did not rise to the level of exceptional circumstances justifying 60(b)(6) relief because Ackermann did not appeal, and the Court rejected the effort to use Rule 60(b)(6) as a substitute for an appeal. Id. at 201-202.

Thus, the essential question to be answered when determining whether Rule 60(b)(6) is warranted is not whether exceptional circumstances have been shown, but whether those circumstances justify relief. For the Ackermanns, they did not. For the Band, they do not.

Throughout the history of 60(b)(6) jurisprudence courts have consistently held that 60(b)(6) is an "extraordinary remedy," "rarely given", and only upon a showing of "exceptional circumstances" justifying relief. *See, e.g.*, Klapprott v. U.S., *supra*; Ackermann v. U.S., *supra*; Gonzales v. Crosby, 545 U.S. 524, 537-38 (2005) (A subsequent change in the legal interpretation of statute did not justify Rule 60(b)(6) relief.); In re Zimmerman, 869 F.2d 1126 (8th Cir. 1989) (After a default judgment debtor filed for bankruptcy in order to avoid the judgment the judgment creditor sought Rule 60(b)(6) relief. The court held that appellant failed to show that extraordinary circumstances had prevented her from obtaining relief through available bankruptcy procedures.); Chambers v. Armontrout, 16 F.3d 257, 261 (8th Cir. Mo. 1994) (Absent extraordinary circumstances, Rule 60(b)(6) motions cannot be used to remedy a failure to take an appeal.); Atkinson,43 F.3d at

373 (Exceptional circumstances are not present every time a party is subject to potentially unfavorable consequences as a result of an adverse judgment properly arrived at.); In re Guidant Corp. Implantable Defibrillators Prod. Liab. Litigation, 496 F 3d 863 (8th Cir. 2007) (A litigant's failure to meet critical deadlines does not justify relief.).

2. A Change in the Law, Standing Alone, is not an Exceptional Circumstance.

Changes in the law are not exceptional circumstances justifying Rule 60(b)(6) relief. Agostini v. Felton, 521 U.S. 203 (1997); Gonzales, 545 U.S. at 535. In *Agostini*, the court said, "Intervening developments in the law by themselves *rarely* constitute the extraordinary circumstances required for relief under Rule 60(b)(6). Id. at 239. As the district court noted in its decision, "A clear-cut change in the law is a necessary but insufficient basis for granting relief." Memorandum Opinion at pg. 7, *citing* Ritter v. Smith, 811 F.2d 1398, 1400 (11th Cir. 1987) and at pg. 9, *citing* Collins v. City of Wichita, 254 F.2d 837, 839 (10th Cir. 1958). The district court properly concluded that the NIGC's change of opinion regarding its earlier approval of the 1994 Agreements and recommendation to the Minnesota District Court, standing alone, was an insufficient basis to grant relief under Rule 60(b)(6). Id. It is also consistent with this Court's earlier conclusion that "While the NIGC had the power to change its

position, it does not have the authority to punish a party for obeying a court order." City of Duluth III, 702 F.3d at 1155.

3. Denial of the Band's motion is not unjust.

The Band acknowledges that the rule is intended to "accomplish justice", Band's Brief at 19, and this it is intended to "prevent the judgment from becoming a vehicle of injustice." Id. at 20. It cites, in part, to *Rosebud Sioux Tribe v. A & P Steel, Inc., 733 F.2d 509, 515 (8th Cir. 1984)*. Reliance on *Rosebud* for anything more than a statement of the general principal is misplaced. In that case, the court did not grant relief under Rule 60(b)(6); instead, given the fraudulent and criminal conduct of the Tribe's own members and attorney, including the Tribe's chief, the court concluded that relief from judgment was warranted under Rules 60(b)(2) & (3). Id. ("We also think a fraud has been practiced on the Tribe and on the court, which impinged the integrity of the trial process, and that the Tribe should have been granted a new trial under Rule 60(b)(2) and (3).") Here, there is no allegation and no evidence that the parties, the Band's leaders, the attorneys representing the parties, or the NIGC engaged in any fraudulent or criminal conduct during the mediated negotiations that resulted in the approval of the 1994 Agreements and subsequent entry of the Consent Decree. The record is clear that both the Band and the City relied in good faith upon the guidance and expertise of the NIGC in amending the 1986 Agreements, with the goal of complying with the IGRA's sole

proprietary interest mandate while preserving the economic development goals that served as the foundation of the agreements. *See,* City App. pg. A1 (joint testimony of Mayor Doty and Chairman Peacock before the United States Senate Committee on Indian Affairs).

The Band's citation to *Harley v. Zoesch, 413 F.3d 866 (8th Cir. Minn. 2005)* also does not support their argument. In *Harley*, participants and beneficiaries of a pension plan appealed from the district court's orders denying their motions to vacate its judgments under Rule 60(b). In earlier proceedings, the participants of their employer's retirement income plan brought class actions alleging that the employer had breached its fiduciary duties under ERISA. The district court granted the employer summary judgment after concluding that the plan had been adequately funded and on appeal the judgment was affirmed. Subsequently, the participants moved for relief from judgment on the grounds that the employer had obtained the summary judgments through misrepresentations about the plan's funding. The district court denied the motions, which was affirmed on appeal. Id. at 868. In support of their motion, the participants argued that the employer misrepresented the level of plan funding while the first appeal was pending and only admitted a lack of surplus when the participants' appellate rights were exhausted. Id. at 870.

The court, in discussing the high standard necessary for Rule 60(b) relief, noted that the motion must be grounded in equity and exists "to prevent the judgment from becoming a vehicle of injustice. The rule attempts to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice should be done." Id. *citing* Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2851, at 227 (2d ed. 1995)(internal citation omitted). The court noted that "relief is available under Rule 60(b)(6) only where exceptional circumstances have denied the moving party a full and fair opportunity to litigate his claim and have prevented the moving party from receiving adequate redress. Id. at 871, *citing* Atkinson, 43 F.3d at 373. In denying the motion, the court ultimately concluded that "the policy in favor of finality weighs too heavily here to grant Participants' Rule 60(b) motion." Id. at 872.

Here, there is no allegation or supporting record that any party misrepresented any pertinent fact to the district court in order to obtain approval of the 1994 Consent Decree. Nor did the Band exercise its right to appeal the NIGC's application of its new interpretation to the first term of the contract. The Band has not been denied a full and fair opportunity to litigate the NIGC's retroactive NOV.

The Band also cites to Watkins v. Lundell, 169 F.3d 540 (8th Cir. Iowa 1999). *Watkins* involved a fraudulent transaction for the sale of Iowa farm land and the subsequent entry of default judgment and award of damages, including

punitive damages, against the miscreant seller. The miscreant moved for Rule 60(b) relief challenging the amount of both damage awards. In its discussion of the need to show exceptional circumstances, the court noted that the showing was necessary so that the rule would not be converted into a vehicle used to achieve "an end-run around the entire judicial process." Id. at 545. Ultimately the court concluded that while punitive damages were appropriate in the case, the amount awarded was excessive and remanded. Id. at 547. Here— once again— and unlike the conduct at issue in *Watkins*¸ the Band has presented no argument or evidence that the City has engaged in fraudulent conduct, or any wrongful conduct that would demonstrate that exceptional circumstances exist to support retroactive relief under Rule 60(b)(6) in order to do substantial justice.

The only party who has created the present situation is the Band. As the district court correctly observed, "Extraordinary circumstances rarely exist when a party seeks relief from a judgment that resulted from the party's deliberate choices. Memorandum Opinion at 15, *citing* Ackermann, 340 U.S.at 198-99; Cotlec Indus., Inc. v. Hobgood, 280 F.3d 262, 274 (3rd Cir. 2002) ("courts have not looked favorably on the entreaties of parties trying to escape the consequences of their own 'counseled and knowledgeable' decision").

If Rule 60(b)(6) relief were granted, substantial injustice would be done. Both parties were operating under a contract that the NIGC not only endorsed and

approved, but also represented to the district court as fully consistent with IGRA. The agreements represented a valid judgment when the Band unilaterally decided it would violate the terms. Only the Band unilaterally stopped payments it had agreed to make—payments, the rights to were which vested in the City before the Band ever secured the NIGC's change of position—payments, for which the City obtained summary judgment on the liability issue before the Band ever secured the NIGC's change of position. In none of the cases cited by the Band did the court find exceptional circumstances based upon a change of law that the movant was instrumental in acquiring. Now the Band asks this Court to allow it to be relieved of its breach of contract and keep the money to which the City has a vested right. Such an "end-run" around the judicial process should not be rewarded by granting Rule 60(b)(6) relief. Where is the substantial justice in such a result?

4. The consent decree context of the Band's motion does change the conclusion that granting Rule 60(b)(6) relief will work an injustice.

a. The federal interest in finality of judgments is not advanced by retroactive relief.

But the Band argues, because the judgment at issue involves a consent decree, retroactive application of the NIGC's change of position announced 17 years after-the-fact will achieve substantial justice.[2] It argues that "the consent decree—including any obligations under the decree that have not yet been

[2] The letter by the NIGC's chairman to the district court endorsing the parties' settlement is dated June 20, 1994. The NOV is dated July 12, 2011.

performed—'must….be modified' because they have "become impermissible under federal law." Band Brief at 51, *citing* Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 388 (1992). The obligation yet to be performed is paying to the City the money owed it under the first term of the agreement that ended on March 31, 2011. Band App. A156 (Section 3.1). This argument is just another way the Band seeks to avoid the consequences of its breach of contract.

The real issue is whether the jurisprudence of *Rufo* supports a conclusion that the Band should be excused from its breach of contract on a retroactive basis. *Rufo* was not decided in the procedural context present here. The Band is not seeking prospective relief based upon a change in law, it is seeking retroactive relief from obligations due and owing to the City that vested prior to the change in law. Thus, the general principals announced in *Rufo* do not provide guidance here.

The Band then argues that retroactive relief is required because consent decrees "must be directed to protecting federal interests." Band's Brief at 28, *citing*, Frew v. Hawkins, 540 U.S. 431 (2004). This citation to general principal is not persuasive here because *Frew* did not involve an attempt to retroactively change the obligations of parties under a consent decree, it involved an effort to require compliance with a consent decree. Id. at 435.

In its earlier opinion, this Court properly observed that the NIGC does not have the authority to punish a party for obeying a court order. City of Duluth III,

702 F.3d at 1155. Thus, retroactive relief, which is the exception to the rule, is not required here and does not advance the federal interests in finality of judgments. *See,* Rufo, 502 U.S. at 389 ("To hold that a clarification in the law automatically opens the door for relitigation of the merits of every affected consent decree would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements…").

This Court did not rule on the validity of the NOV. While observing that the NIGC has the authority to define terms by adjudicative decision or formal rule making, City of Duluth III, 702 F.3d 1152-1153, this Court expressly declined to address the City's arguments as to the validity of the NIGC's action and noted that "such challenges are properly made under the Administrative Procedure Act…" Id. at 1153. The City has done exactly what this Court suggested; it has commenced an action under the APA, which is currently pending in the D.C. District Court. Whether the NIGC's action will withstand legal challenge is an open, pending issue. Whether an agency action, which is currently subject to legal challenge, may be used to retroactively relieve a party from obligations mandated by a judgment is a very different question then the question presented in *Rufo* and *Rufo* jurisprudence does not support such relief in the circumstance at issue here.

b. Retroactive application of the NOV will violate federal law.

Granting retroactive relief, rather than serving federal interests, would be a disservice to such interests because it would condone the NIGC's unlawful assumption of authority that violates federal law. The district court correctly concluded that Congress did not grant the NIGC the power to promulgate retroactive rules. Memorandum Opinion at 11.

The NIGC does not have the authority to issue retroactive rulings. In Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988), the Supreme Court held that an administrative agency's power to promulgate regulations is limited to the authority delegated by Congress, saying further:

> "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."
>
> "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."
>
> "By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."

Id. at 208-209.

> " 'The power to require readjustments for the past is drastic. It…ought not to be extended so as to permit unreasonably harsh action without very plain words.'"

Id., *quoting*, Brimstone R.Co. v. United States, 276 U.S. 104, 122(1928).

Congress did not expressly grant to the NIGC retroactive rule-making authority. Section 2706 delineates the powers of the NIGC. *25 U.S.C. § 2706.* Section 2706(b)(10) authorizes the promulgation of rules and guidelines appropriate to implement the provisions of IGRA, but does not suggest that such rules or guidelines can be applied retroactively. Nowhere in Section 2706 is retroactive application of NIGC rulings or regulations authorized at all, much less "expressly authorized."

That Congress did not authorize or intend to authorize retroactive action by the NIGC is clear from Section 2712, which deals with the review of ordinances, management contracts, and collateral agreements that predated the enactment of IGRA. Section 2712(a) directs the NIGC as follows:

> **§2712. Review of existing ordinances and contracts**
>
> **(a)** Notification to submit. As soon as practicable after the organization of the Commission, the Chairman shall notify each Indian tribe or management contractor who, prior to the enactment of this Act [enacted Oct. 17, 1988], adopted an ordinance or resolution authorizing class II gaming or class III gaming or entered into a management contract, that such ordinance, resolution, or contract, including all collateral agreements relating to the gaming activity, must be submitted for his review within 60 days of such notification. Any activity conducted under such ordinance, resolution, contract, or agreement shall be valid under this Act, or any amendment made by this Act, unless disapproved under this section

25 U.S.C.§2712(a).

If the NIGC finds that an ordinance or resolution predating IGRA does not comply with IGRA, Congress directed the NIGC to "provide written notification of necessary modifications to the Indian tribe which shall have not more than 120 days to bring such ordinance or resolution into compliance." 25 U.S.C. §2712 (b)(3).

If the NIGC finds that a management contract or collateral agreement predating IGRA is out of compliance, Congress directed the NIGC to "provide written notification to the parties to such contract of necessary modifications and the parties shall have not more than 120 days to come into compliance. If a management contract has been approved by the Secretary prior to the date of enactment of this Act [enacted Oct. 17, 1988], the parties shall have not more than 180 days after notification of necessary modifications to come into compliance." 25 U.S.C.§2712(c)(3).

Thus, where Congress intended to grant the NIGC retroactive authority, it did so expressly. Section 2712 specifically prohibits retroactive application of the results of such review by providing for the validity of conduct under the ordinance or agreement prior to the review, by providing for the timing within which such ordinances are to be submitted to the commission for review and further saying:

> "Any activity conducted under such ordinance, resolution, contract, or agreement shall be valid under this chapter, or any amendment made by this chapter, unless disapproved under this section."

25 U.S.C. §2712(a).

In accordance with Section 2712, the parties' 1986 Agreements were submitted to the NIGC. The agreements were found to be out of compliance with IGRA. The parties renegotiated the agreements. The NIGC approved the amended agreements. The 1994 Agreements were the result of the proper application of the only retroactive powers granted to the NIGC.

The Band argues that once having asserted authority under Section 2712, the NIGC may continue to assert such authority even after the process contemplated by Section 2712 has been initiated, an amended agreement negotiated, and NIGC approval issued. The Band fails to cite to any statutory authority or regulation of the NIGC that supports this argument, and it cannot because the IGRA grants no authority to the NIGC to conduct a second review of the agreements previously approved pursuant to Section 2712. Once the new agreement is approved, the NIGC's authority under Section 2712 ends. This is so because that authority is expressly limited to ordinances, resolutions, and contracts that existed "prior to the enactment of this Act". 25 U.S.C. §2712(a). Once an ordinance, resolution, or contract is modified, the pre-Act version no longer exists. The NIGC's retroactive authority ends because the object of that authority no longer exists.

The Band relies upon *Minn. Licensed Practical Nurses Ass'n v. NLRB, 406 F.3d 1020 (8th Cir. 2005)*, to support its position that the NIGC has the authority

to issue a retroactive enforcement based upon a new interpretation of law. This case does not provide support for the retroactive action taken here. Whether the National Labor Relations Board had the authority to change a prior interpretation in a matter currently being adjudicated before it was not questioned. Here, however, the NIGC's authority to apply a new interpretation retroactively does not exist. *Minn. Licensed Practical Nurses* might be more on-point if the union had obtained NLRB approval of their contemplated strike delay and relied upon that approval. Whether to then apply a new interpretation retroactively; thus affirming the termination of the striking nurses would have been a very different question. Here, the 1994 Agreements were reviewed and approved by the NIGC, and recommended to the district court by the NIGC. *Minn. Licensed Practical Nurses* does not serve as precedent to the factual context of this case.

Nor is this case a situation where the new rule is being applied in a pending case as was the context of *Minn. Licensed Practical Nurses*. Here, the issue before the NIGC ended in 1994 when the NIGC approved the renegotiated agreements. The NIGC's application of its evolving sole proprietary interest interpretation developed subsequent to the 1994 Agreements does not represent the application of a new rule to a pending matter, it represents the reopening of a closed case to apply a new rule developed in other matters. It is more akin to the context described by this Court in *Minn. Licensed Practical Nurses* that requires retroactivity to be

subject to limitation. This Court noted that "When the Board announces a new rule in one case and then applies that rule retroactively in another case, the result resembles the adoption and application of quasi-legislative agency rules, a process that was subjected to retroactivity limitations in *Bowen*. For this reason, this court and others have considered whether retroactive application of a new rule to other pending cases would be manifestly unjust, examining whether the losing party relied on established Board policy, whether the Board abruptly changed that policy, and the severity of the penalty imposed on the losing party." Id. at 1026.

Here the parties substantially relied upon the NIGC's approval of the 1996 Agreements. While the NIGC's legal counsel has issued advisory letters to other parties seeking initial contract approval involving dissimilar contractual arrangements, none of those matters involved retroactive reversal of a previously approved contract. The NIGC's action here was an abrupt change in policy. The severity of the penalty to be imposed is a substantial loss of revenue to the City.

The Band also relies on *In re Pacific Far East Lines, Inc., 889 F.2d 242 (9th Cir.1989).* The case involved a bankruptcy proceeding and the dispute was over a fee paid by the bankruptcy trustee to the federal government. The trustee sought a partial refund of the fee after Congress enacted a law capping such fees and expressly giving the law a retroactive effect that applied to the case. The trustee had not breached a contract. The trustee did not procure the statutory change. The

case did not involve vested rights. However, with regard to vested rights the court cited to Supreme Court precedent when it observed that "the Supreme Court upheld a bankruptcy court's equitable power to revise its judgments, but only 'before rights have vested on the faith of its action.'" Id., at 247, *quoting*, Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U.S. 131, 57 S. Ct. 382 (1937). Here, a time honored equitable maxim applies: "he who seeks equity must do equity, and the court will be alert to see that its peculiar remedial process is in no way abused." Koster v. Lumbermens Mutual Co., 330 U.S. 518, 522 (1947).

Under *Bowen* and IGRA, granting Rule 60(b)(6) relief to the Band based upon the application of the NOV to the initial term of the 1994 Agreements, would not advance federal interest; instead it would violate the principal purpose of Rule 60(b)(6) to achieve substantial justice, and would condone the NIGC's abuse of its statutory authority. *See, e.g.* Nebraska ex rel. Bruning v. United States DOI, 625 F.3d 501 (8th Cir. Iowa 2010)(NIGC abused its discretion when it exceeded the statutory authority granted to it.)

c. Denying retroactive relief does not violate IGRA

In order to avoid the consequences of the NIGC's arbitrary action, the Band offers another argument as to why retroactive relief would advance federal interests. It argues that embodied in IGRA is Congress's intent that the tribe be the primary beneficiary of the gaming activity. While the Band relied heavily on the

congressional record and the political debate surrounding the enactment of IGRA, the definitive source of Congressional intent is the policy statement actually enacted. In Section 2702, Congress expressed the public policy for the enactment of IGRA as follows:

> The purpose of this Act is--
>
> (1) 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;
>
> (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and
>
> (3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. § 2702

Congress clearly expressed its intent that the tribe be the "primary beneficiary", but it did not, as the Band argues, express the intent that the tribe was entitled to be the sole beneficiary —in fact— the opposite is true. Congress expressly authorized tribal gaming revenues to be expended "to help fund operations of local government agencies." 25 U.S.C. §2710 (2)(b)(v). The Band's argument that "Congress made a clear policy choice in IGRA that the financial

benefits from Indian gaming are to inure to Indian tribes and only to tribes" (Band's Brief at 33) is expressly contradicted by the language enacted by Congress and codified as Section 2710(2)(b)(v).[3]

The Band has failed to demonstrate that payments to local governments violate federal law because Congress clearly intended for local governments to be beneficiaries of tribal gaming. Because payments to local governments are expressly authorized by IGRA, denying the Band Rule 60(b)(6) relief does not violate federal policy.

d. Rule 60(b)(6) relief does not maintain a "status quo" that promotes federal interests.

The Band argues that the *status quo* will be maintained by modifying the consent decree and granting it Rule 60(b)(6) relief. Band's Brief at 37. The "*status quo"* it claims to exist is its retention of the over $10.4 million in accrued payments estimated to be owed to the City. Changing a contractual obligation does not maintain the "*status quo"*. The fact that the Band unilaterally breached the contract is the only reason why the Band still has the money. The Band, if it thought there was a legitimate basis to change the decree, could have gone to the

[3] The Band's argument relies upon parts of the legislative record, but legislative record does not trump the plain language of the statutory text. In *Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 622, 115 L. Ed. 2d 532, 111 S. Ct. 2476 (1991)*, Justice White famously observed that "a committee of Congress cannot take language that could only cover 'flies' or 'mosquitoes,' and tell the courts that it really covers 'ducks.'" Id. at 611 n.4.

district court seeking Rule 60(b) relief prior to breaching the contract. *See, City of Duluth I*, 708 F.Supp. 2d 898 ("the proper mechanisms for seeking relief from the consent decree have not been invoked").

The district court properly rejected this argument when it viewed the consent decree here more akin to the judgments in *Collins v City of Wichita, 254 F. 2d 837(10th Cir 1958); Hall v. Warden, 364 F. 2d 495(4th Cir. 1966).*[4] The district court found that these cases "embody the principle that Rule 60(b)(6) relief is less warranted when the final judgment being challenged has caused one or more of the parties to change his legal position in reliance of that judgment." Memorandum Opinion at 12.

In *Collins*, a final judgment was entered, the litigation ended, and the parties took actions in reliance on the judgment. The court rejected the effort to obtain

[4] The Band again relies upon the unpublished district court decision in *Flexiteek Americas, Inc. v. Plasteak, Inc*., 2012 WL 4564263 (S.D. FLA 2012). *Flexiteek* is a patent infringement case in which, after a verdict and judgment for plaintiff, it was discovered that the patent was invalid because of "anticipation" or "prior publication" of the art of another inventor. The New Zealand patent on which the U.S. patent was based had been revoked five weeks before the U.S. patent was issued. The case did not involve an agency change in law, but the discovery of an error in the underlying facts. The facts here are not in dispute. The NOV was not premised upon a mistake in underlying facts. The Band also previously argued the importance of the *Flexiteek* case to this Court adding it as an additional case supplementing its brief after the briefing was done. When it was brought up during oral argument, presiding Judge Murphy said in words or substance that the case didn't have any application to this case and it was not mentioned in this Court's earlier opinion.

relief from the judgment simply because a litigant in a different case was successful on their appeal and the Collins were not. Collins, 254 F. 2d at 839.

In *Hall*, the criminal defendant, who had previously had his conviction reversed, was retried. The retrial resulted in a mistrial. Subsequently, the correctness of the appellate court's decision was called into question by a Supreme Court decision. The State sought to have the appellate court vacate its earlier decision, which would have had the effect of reinstating the earlier conviction. The court concluded that there was no basis to reopen the finality of the judgment where the parties, in substantial reliance on that judgment, had retried the case.

Here, both parties changed their legal positions in 1994 in reliance on the entry of judgment and then proceeded to operate under the amended agreements for over 17 years. The principal that there should be finality in judgments is not advanced by granting Rule 60(b)(6) relief in this case.

No breach by the City precipitated the Band's unilateral decision to breach the contract. No enforcement action by the NIGC precipitated the Band's breach. The Band simply decided it no longer liked the deal. The Band now claims that because it didn't pay the money it owed, the judgment is not executed and relies on *Ritter v Smith, 811 F. 2d 1398 (11th Cir. 1987).* *Ritter* is clearly distinguishable. In *Ritter*, which involved the imposition of a death sentence, the court held that the circumstances were sufficiently extraordinary to warrant the order granting the

state's rule 60(b)(6) motion because the erroneous judgment requiring the issuance of a writ of habeas corpus or resentencing was set aside before it had been executed, *i.e.* Ritter had not yet been resentenced, nor had a writ of habeas corpus been issued, and the court viewed that as a significant factor in granting relief. Ritter, 811 F.2d at 1402.

Here, the Band's legal obligation to make the first term payments accrued prior to the NIGC's action. Thus, unlike *Ritter*, no change in law had occurred before the Band could make the payments. In addition, *Ritter* did not involve wrongful conduct. Here, the Band ignored its contractual obligations and after losing the initial round of litigation procured the change in law it now relies upon to avoid its obligations. Granting Rule 60(b)(6) by applying the fiction that the payments are prospective in nature does disservice to the fundamental purpose of Rule 60(b)(6), which is to achieve substantial justice.

e. The City's reliance on a share of gaming revenues is reasonable.

The Band argues that the City cannot have relied upon the receipt of gaming revenues and therefore, the Band should be entitled to keep the revenues that should have been paid to the City by March of 2011. This argument relies upon a fictional set of facts. The issue here is not whether when the City agreed to the terms of the consent decree, it could have reasonably relied upon continuing revenues during the entire term of the contract. In the 1994 Agreements, the Band

reserved the right to terminate its gaming activities. But the Band has not terminated it gaming activities, the only thing it has terminated is the payments to the City. It continues to enjoy the benefits of a prime location in downtown Duluth. It continues to receive City services. The City continues to incur the costs of maintaining and operating the parking ramp built expressly for the benefit of the Band's casino. The City continues to incur the costs of providing emergency service response to the casino. The City continues to lose its right to exercise governmental authority over a prime downtown location, including the City's right to collect property tax and city sales tax. The City continues to be burdened by the social costs associated with gaming. As long as the Band continues to operate the casino, the City has a right to rely upon its share of the revenue as provided in the 1994 Agreements.

The City has reasonably relied upon its bargained for, and NIGC approved, share of the casino revenue to fund its general operating fund. In reliance on the receipt of those funds, the City established a community investment trust fund. *Duluth City Charter§ 54(E).*[5] The investment earnings of this fund are transferred annual to the city's general fund. Id.

[5] There is hereby established in the treasury of the city of Duluth a fund designated as the community investment trust fund. The following monies shall be deposited into such fund:

(1) $3,100,000 from pre-1994 profits of the Fund-du-Luth Casino;

f. The City could not have had notice that the NIGC would retroactively invalidate a prior approved agreement.

The Band and the courts believe that the City was somehow on notice that the NIGC's position on the proprietary interest mandates was changing. Whether the NIGC's interpretation of the sole proprietary interest might have been changing misses the point. The issue is not whether the NIGC's interpretation was changing; the issue is whether the NIGC gave notice that it would invalidate previously approved agreements based upon its new interpretation. That such notice does not exist is demonstrated by the Band's own August of 2009 position that the City had no "assertable proprietary interest in the Fond-du-Luth Casino." Band App. pg. A330. If in August of 2009 the Band did not think the City had a proprietary interest, it too was not aware that the NIGC's position on sole proprietary interest would apply retroactively to the 1994 Agreements. The Band has yet to produce a single NIGC advisory letter or final enforcement action

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(2) Net revenues received by the city in 1994 and future years from operation of the Fond-du-Luth Casino. "Net revenues" are revenues less expenses incurred by the city in administering the agreement with the Fond du Lac Band of Lake Superior Chippewa for operation of the casino;
(3) Investment earnings generated by the monies in the fund;
(4) Monies appropriated or transferred to such fund from time to time by the council or donated to such fund.
The accumulated investment earnings of this fund shall be transferred annually to the general fund.
Except for the annual transfer of investment earnings to the general fund, monies in this fund shall only be spent or transferred to another fund of the city by authority of a resolution approved by at least seven members of the council. Duluth City Charter§54(E).

involving an agreement, in which the NIGC was actively involved in assisting the parties in negotiating a contract by providing staff support and technical assistance. The Band has failed to produce any NIGC advisory letter or final enforcement action, in which the NIGC took enforcement action after representing to the parties and a federal district court that the agreements were fully compliant with IGRA. The NIGC's action involved in this case is unprecedented and substantial justice will not be achieved by granting Rule 60(b)(6) relief to the Band.

CONCLUSION

The City requests that the Order of the district court denying the Band's motion for relief under Rule 60(b)(6) be affirmed and this case be remanded to the district court for trial on the merits of the remaining accounting dispute. The City requests equal time during oral argument.

CERTIFICATE OF RULE 32(A) COMPLIANCE AND VIRUS PROTECTION

This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 9,685 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 2010.

This brief complies with the typeface requirements of Fed.R.App.P. (32)(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman typeface.

Undersigned counsel further certifies that the ECF submission of this brief and addendum have been scanned for viruses with the most recent version of a commercial virus scanning program (System Check 2012 Endpoint Protection) and, according to the program, are virus free.

Dated: January 27, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2014, I electronically filed the Brief of Appellee City of Duluth with the Clerk of 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 ECF system.

Dated: January 27, 2014

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