UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

BETTOR RACING, INC. and J. RANDY GALLO, Plaintiffs, vs. NATIONAL INDIAN GAMING COMMISSION, Defendant, and FLANDREAU SANTEE SIOUX TRIBE, Intervenor.	Case: 4:13-cv-04051-KES **PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT/BRIEF IN SUPPORT OF COMPLAINT FOR JUDICIAL REVIEW OF ADMINISTRATIVE ACTION**

COMES NOW Bettor Racing and J. Randy Gallo, by and through their counsel of record, and hereby submit this Memorandum of Law in Support of Complaint for Judicial Review of Administrative Action.

PRELIMINARY STATEMENT

Bettor Racing and J. Randy Gallo shall be collectively referred to as "Bettor Racing" where appropriate. The National Indian Gaming Commission shall be referred to as the "NIGC". The Flandreau Santee Sioux Tribe shall be referred to as the "Tribe." The Notice of Violation entered by the NIGC on May 19, 2011 against Bettor Racing and the Tribe shall be referred to as NOV-11-01. The Notice of Proposed Civil Fine Assessment entered by the NIGC on February 10, 2012, against Bettor Racing shall be referred to as CFA-11-01. Citations to the Administrative Record in this matter shall be designated as "AR" with reference made to the appropriate page and paragraph if appropriate.

FACTUAL BACKGROUND

In 2003, Bettor Racing and the Tribe entered into discussions regarding the relocation of Bettor Racing's pari-mutuel gaming business at the Royal River Casino. AR0001753:1-15; AR0001754:1-14. At the outset of the parties' business relationship in 2003 and 2004, the Casino provided a more hospitable environment for the operation of Bettor Racing's off-track betting operation than that available under South Dakota law because the State's applicable wager pool fees and taxes were higher. AR0001753:16-23. Both parties desired an arrangement wherein Bettor Racing would operate at the Casino. Id. The parties discussed several types of contractual arrangements for the location and operation of Bettor Racing at the Casino, ultimately arriving at the vehicle of a management agreement. AR0000722, 5:21-25; p. 6:1-23; AR0000723, 12:3-9.

During the entirety of these preliminary discussions, and the entirety of its relationship with the Tribe, Bettor Racing was not represented by an attorney. AR0001762:21-24; AR0001763:1-2; AR0001766:4-7. The Tribe was represented by counsel who drafted all of the preliminary documents, contracts and modifications thereto, as well as the necessary Tribal resolutions approving of said agreements.[1] AR0001762:12-15, 21-24; AR0000722, 6:15-16. The Tribe's attorneys advised Bettor Racing regarding the process, albeit no formal attorney-client relationship was memorialized in writing.

The Tribe prepared and submitted a proposed management agreement to the NIGC in March 2004. AR0000723, 11:12-23; AR0001778:22-25; AR0001179:1-14. The Tribe's counsel advised Bettor Racing that it would take time for the NIGC to approve the management agreement, but that it could operate under the terms of a consulting agreement pending NIGC

[1] Rollyn Samp represented the Flandreau Santee Sioux Tribe itself. AR0000558, 8:22-25; AR0000559, 9:23-25, 10:1-10. Terry Pechota represented the Flandreau Santee Sioux Tribal Gaming Commission. AR 0000721, 4:16-25; AR0000722, 5:1-12.

approval. AR0000723, 12:3-9; AE0001784:14-25; AR0001785:1-25; AR0001786:1-4. The Tribe advised that nothing prohibited Bettor Racing from beginning operations at the Casino. In fact, the Tribe's counsel advised Bettor Racing that he had spoken directly with the Chairman of the NIGC who approved the same. AR4; AR0001762-1766. Bettor Racing, doing business as Royal River Racing, began operating at the Royal River Casino in September 2004. AR0001772:11-16.

Following commencement of operation, Bettor Racing made payments to the Tribe as provided for in the consulting agreement and proposed management agreement. AR0000139-0000153; AR0000371-456; AR0001785: AR0001786:1-4; AR0003170; AR0003192; AR0003202-3288; AR0003293-3345. After submission of the management agreement to the NIGC, the NIGC requested a number of changes. AR0000723, 11:18-25, 12:1-10. The parties made the changes and, on February 8, 2005, the parties executed the Management Agreement. The Management Agreement memorialized the various responsibilities for the parties of day-to-day operations and set out the compensation structure and schedule, all of which were consistent with NIGC and IGRA regulations. AR0002017. The NIGC approved the Management Agreement on March 17, 2005. AR0001811:1-22; AR0002011.

In 2005, the State of South Dakota reduced its tax on pari-mutuel gaming revenue from 4.5% to 0.25%. AR0001753:16-21; see also SDCL § 42-7-102. Following the change in tax structure, Bettor Racing notified the Tribe of its intentions to re-locate the business outside of the Royal River Casino so as take advantage of the change in South Dakota law. AR0001821:18-25; AR0001822:1-17. Bettor Racing's president, J. Randy Gallo, knew that Bettor Racing would be unable to generate its predicted and promised revenue if it continued to operate at the Casino as it would lose players to other pari-mutuel operations with lower fees. Id. Notably, even though Bettor Racing had no choice but to re-locate it operations, Bettor Racing advised that it would

honor the existing Management Agreement for its full term, guaranteeing the Tribe an annual payment of $300,000, which was the required minimum payment due under the Contract. Id.

The Tribe's counsel expressed to Bettor Racing that it was critically important for the Tribe to retain Bettor Racing's business at the Royal River Casino. AR0001822:4-17; AR0001880:18-23. The Tribe's counsel further advised all parties involved that the Tribe had the ability to do whatever it wanted to do with the net profits it received from the operation of Bettor Racing, indicating that the Tribe could pay Bettor Racing a bonus or consulting fee for services rendered. AR0000727; AR0000728; AR0001824:18-25; AE0001825:1-17. The Tribe's counsel discussed the concept of a bonus and/or consulting fee with NIGC Chairman Phil Hogan, who advised that such arrangements were acceptable so long as they were not specifically set forth in contract. Id. The Tribe's counsel thereafter prepared a modification to the 2005 Management Agreement, which modification was approved by the Tribe, and then formally executed by the parties on February 15, 2007 (the "First Modification"). AR0000733, 49:24-25, 50:1-4; AR0001551-1552; AR0002061; AR0003475.

The Tribe advised Bettor Racing that it would submit the First Modification to the NIGC for approval and did so; however, the Tribe later requested that the NIGC hold its review of the First Modification in abeyance, citing ongoing litigation with the State of South Dakota over modifications to its Gaming Compact. AR0002071; AR0000725, 18:19-25, 19:1-25, 20:1-25; AR0000963. The Tribe did not notify Bettor Racing of its request to hold approval of the First Modification in abeyance. AR0000725, 19:9-15. During Bettor Racing's operations at the Casino, it increased the revenue it generated significantly, thereby resulting in even more profitability to the Tribe. Consistent with the parties' discussions regarding the First

Modification, the Tribe paid Bettor Racing a bonus for its efforts on an annual basis. AR0000455.

In 2008, an industry wide increase in fees charged by race tracks to off-track betting operations occurred. This significant increase in fees prompted concern of a chilling effect on Bettor Racing's volume of business. AR0001870:2-25; AR0001871-1875; AR0001876:1-4. The parties again discussed a modification to the Management Agreement. AR0001870-1873; AR0001876:5-11. The Tribe's counsel again emphasized that it was important to retain Bettor Racing's business and that it was willing to make appropriate modifications to the Management Agreement to do so. Id. The Tribe's counsel drafted the second modification arrangement and made appropriate arrangements for the approval of the same. The second modification was executed on August 1, 2008 (the "Second Modification"). AR0000834-835; AR0000967; AR0001886:3-23.

The Tribe assumed responsibility for submitting the Second Modification to the NIGC; however, it never did so. AR0000733-734; AR0000963. The Tribe advised Bettor Racing that it had taken all steps necessary to obtain approval of the Second Modification. AR0002111:19-25; AR0002112:1-3, 5-12. It failed to advise Bettor Racing that the Second Modification had neither been submitted to nor approved by the NIGC. Id.

The modifications were executed following thorough discussions of the financial arrangements and formal approval at the necessary Tribal levels. The Tribe took it upon itself to submit the documented modifications to the NIGC for review and approval. AR0000963. The Tribe received all funds to which it was entitled under Federal law. AR0001815:14-19; AR0002017. The Tribe represented that it had the discretion to pay to Bettor Racing a bonus and

did so. AR0000455-456.[2] These bonuses were approved by the Tribe and never contested until much later in the NIGC's investigation.

During the entirety of the parties' relationship, the Tribe submitted audits to the NIGC, showing the parties' exact financial arrangements. AR0002521, ¶12. The Management Contract also called for retention of an independent auditor, which auditor completed an annual report of those amounts due to the respective parties pursuant to the Management Agreement. AR0002408-2509. These audits were properly completed at the conclusion of each fiscal year and submitted to the Tribe and the NIGC. Id. The auditor, and accordingly the audit reports, including an "agreed upon procedures" statement, which explained and recognized the bonus payment (described as a "check swap" process in NOV 11-01) agreed upon by the Tribe and Bettor Racing as a valid financial transaction. AR0002929-2940. The audits clearly demonstrated the financial arrangements between the parties and stated that they were in full compliance with NIGC regulation. No challenge was ever made to the audits by either party. AR0001820:6-19.

In August 2009, the NIGC conducted a compliance review of the Management Contract. AR0003048. On August 27, 2009, the NIGC issued a Notice of Non-compliance to Bettor Racing. Id. The Notice stated that Bettor Racing had failed to pay the Tribe the percentage of gaming revenue required by federal law. Id. From August 2009 through May 2011, the NIGC conducted an investigation, issuing subpoenas to the parties and various other entities, conducting depositions and completing its own audits. While the Tribe and Bettor Racing produced documents and gave deposition testimony in response to subpoenas, neither party had

[2] Counsel for the Tribe prepared a resolution indicating that: "The Flandreau Santee Sioux Tribe Gaming Commission attorney Terry Pechota has provided written documentation that said payments are not in violation of any NIGC statutes, rules, or regulations." AR0000456-456.

the ability to actively participate in the investigation or conduct its own discovery. The NIGC's investigation culminated in the issuance of a Notice of Violation to both the Tribe and Bettor Racing on May 19, 2011 ("NOV 11-01"). AR0002510.

The NIGC determined that Bettor Racing committed three violations of the Federal Indian Gaming Regulatory Act ("IGRA"), specifically:

1. First Violation: 25 U.S.C. § 2710(d)(9) and 25 C.F.R. § 573.6(a)(7)[3] (managing a tribal gaming operation without an approved management contract);

2. Second Violation: 25 U.S.C. § 2711 and 25 C.F.R. 573.6(a)(7) (operating under unapproved modifications to an approved management contract), and

3. Third Violation: 25 U.S.C. § 2710(b)(2)(A), (d)(1)(A)(ii) and 25 C.F.R. § 522.6(c) and Flandreau Pari-mutuel Betting Ordinance §4 (a non-tribal entity holding the proprietary interest in the pari-mutuel betting operation at issue).

AR0002510-2511. The NIGC determined that the Tribe committed four violations of the IGRA, specifically:

1. First Violation: 25 U.S.C. §§ 2710(d)(9) and 25 C.F.R. § 573.6(a)(7);

2. Second Violation: 25 C.F.R. § 573.6(a)(7);

3. Third Violation: 25 C.F.R. § 571.13(a), and

4. Fourth Violation: 25 U.S.C. §§ 2710(b)(2) and 3 and 25 C.F.R. 522.6 and Flandreau Gaming Ordinance § 17-6-1(3).

AR0002511. As part of NOV 11-01, the NIGC demanded that Bettor Racing pay the Tribe $4,544,755.00 in revenues which the NIGC claimed the Tribe should have received during years 2005, 2006, 2007, and 2008. AR0002530.

[3] Section 573.6 was re-designated as § 573.4 on August 9, 2012.

Bettor Racing filed a Notice of Appeal of the entirety of NOV 11-01 on June 20, 2011. AR0003048. It later submitted a Supplemental Statement of Appeal on June 30, 2011, and requested a hearing. Id. The Tribe intervened in the administrative agency appeal. AR0003049.

During summer 2011, the Tribe reached a settlement of the violations levied against it, entering into an agreement with the NIGC whereby the Tribe was required to participate in gaming education classes and pay a set penalty if it failed to comply with the terms of its settlement. AR0003048. Following appeal and prior to motion practice, the parties participated in mediation in December 2011. AR0002644-2645.

On February 10, 2012, the NIGC issued a Notice of Proposed Civil Fine Assessment against Bettor Racing in the amount of $5,000,000.00 ("CFA 11-01"). AR0003049; AR0002665. On March 9, 2012, Bettor Racing appealed CFA 11-01. AR0003049. The Tribe intervened in the Notice of Proposed Civil Fine Assessment. Thereafter, NOV 11-01 and CFA 11-01 were consolidated into one appeal. Id.

The NIGC moved for summary judgment. The Tribe joined in the NIGC's Motion. AR0003049. Bettor Racing vigorously resisted the Motion, insisting that it was entitled to a hearing given that it had never had any opportunity to actively participate or defend itself during the NIGC's 2-year investigation. AR0003049; AR0002805-2828; AR0002829-2854; AR0002855-2940; AR0002944-2952. The NIGC's and Tribe's Motions for Summary Judgment were granted and thereafter affirmed by the NIGC on September 12, 2012 (the "Final Decision"). AR0003043. In its Final Order, the NIGC concluded the following:

1. There are no genuine issues of material fact regarding the first violation for managing an Indian gaming operation without an approved management contract and it therefore grants summary judgment to the Chairwoman on this violation.

2. There are no genuine issues of material fact regarding the second violation for operating under two unapproved modifications to an approved management contract and it therefore grants summary judgment to the Chairwoman on this violation.

3. There are no genuine issues of material fact regarding the third violation for possession a proprietary interest in Royal River Racing and it therefore grants summary judgment to the Chairwoman on this violation.

4. There are no genuine issues of material fact regarding the civil fine assessment and it therefore grans summary judgment to the Chairwoman on the civil fine assessment. Therefore, [Bettor Racing and J. Randy Gallo] are ordered to pay the civil fine assessment of $5,000,000 as set forth in the Proposed Civil Fine Assessment.

AR0003043-3044.

ARGUMENT AND ANALYSIS

I. Standard of Review.

There are two issues before this Court: (1) the sustainability of the NIGC's NOV 11-01 and (2) the sustainability of the NIGC's CFA 11-01.

The Administrative Procedures Act provides for judicial review of "final agency action for which there is no other adequate remedy in a court." Sierra Club v. U.S. Army Corps of Eng'rs, 446 F.3d 808, 813 (quoting 5 U.S.C. § 704). Title 5, Section 706 of the United States Code provides that a court reviewing the action of an administrative agency "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." The reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (e) unsupported by substantial evidence[;] and (f) unwarranted by the facts to the extent that the facts are subject to trial de novo by the

reviewing court." 5 U.S.C. § 706(2)(A), (B), (C), (E) and (F). "The court should abide by the agency's factual findings if they are 'supported by substantial evidence' and affirm the agency's orders so long as there is a rational connection between the facts found and the choice made." See Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n, 383 F.Supp.2d 123, 131 (D. D.C. 2005) (quoting Midwest ISO Transmission Owners v. FERC, 362 U.S. App. D.C. 314, 373 F.3d 1361, 1368 (D.C. Cir. 2004)). While the standard of review is narrow, "inquiry into the facts is to be searching and careful[.]" South Dakota v. Ubbelohde, 330 F.3d 1014, 1031 (8th Cir. 2003) (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)).

The imposition of a civil fine or penalty is reviewed using the abuse of discretion standard. "The assessment of penalties is not a finding but the exercise of a discretionary grant of power. And while the court has jurisdiction to review and power to modify, the test of a penalty within the statutory range must be whether the [agency] abused its discretion." Fuhrman v. Dow, 540 F.2d 396, 398 (8th Cir. 1976) (quoting Brennan v. Occupational Safety & Health Comm'n, 487 F.2d 438, 442 (8th Cir. 1973)).

II. The NIGC's Grant of Summary Judgment on NOV 11-01 and CFA 11-01 is in error.

Both the Recommended Decision issued by the Office of Hearings and Appeals, as well as the Final Decision issued by the NIGC either fail to take into consideration or misapprehend certain facts critically important to a thorough and full understanding of the issues in this matter. The entirety of the NIGC's argument as related to all alleged violations identified in the NOV is premised upon two presumptions: (1) Bettor Racing had full knowledge that its contractual relationship with the Tribe was unlawful and void and (2) there is a clear and causal correlation between the alleged "*per se*" violation and the damages the NIGC has awarded to the Tribe in

NOV 11-01. A review of the facts in the administrative record, however, illustrates how the NIGC's analysis is superficial and simplistic at best, and factually inaccurate at worst.

In its Final Decision the NIGC took great pains to paint this matter as black and white, stating that Bettor Racing was the sole wrongdoer and the Tribe was but its victim.[4] Such recitation of the facts could not be further from the truth, particularly given that the NIGC's grant of summary judgment on all counts of the NOV and CFA deprived Bettor Racing of its fundamental right to defend itself.[5] Taking full measure of the NIGC's one-sided analysis of the facts yields the inescapable conclusion that its decision is not supported by substantial evidence. The NIGC abused its discretion and erred in issuing the NOV and CFA in the first place, let alone sustaining the same on a motion for summary judgment.

A. There are genuine issues of material fact which precluded a grant of summary judgment on the three violations alleged in NOV 11-01.

Pursuant to 25 C.F.R. §§ 573 and 575, the NIGC bears the burden of proof in establishing that a violation occurred and that said violation is supported by the record. Moreover, the standard of review in this case is, in essence, twofold because the NIGC must show that its grant of summary judgment on both NOV 11-01 and CFA 11-01 were appropriate in order to meet the test of 5 U.S.C. § 706(2). This Court is more than familiar with the standard for summary judgment; however, it bears repeating because the NIGC failed to follow the well-known standards.

[4] While the NIGC also filed a NOV against the Tribe, the consequences for the Tribe are virtually nonexistent compared to those for Bettor Racing.

[5] The record in this matter consists of the documents collected pursuant to NIGC subpoena, depositions transcripts of that testimony compelled by the NIGC and the parties' pleadings introduced at the administrative appeal of the NOV and CFA. AR0003016. None of the documents have ever been submitted to a formal examination nor have any of the deponents and witnesses been subjected to cross-examination.

In reviewing a motion for summary judgment, "the court must view the facts in the light most favorable to the nonmoving party, and all justifiable inferences are to be drawn in its favor." Id. at 255; see also Raschick v. Prudent Supply, Inc., 830 F.2d 1497, 1499 (8th Cir. 1987). The reviewing court's "function is not to weigh the evidence, but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986), Summary judgment is not an appropriate result if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.; See also Fenny v. Dakota, Minn. & E. R.R. Co., 327 F.3d 707, 711 (8th Cir. 2003) (holding that an issue is genuine "if the evidence is sufficient to allow a reasonable jury to return a verdict for the non-moving party").

In this case, the NIGC's Decision is not wholly consistent with the regulatory scheme set forth in 25 U.S.C. 2701 *et seq.* and it is without justification in fact. Not only did the NIGC fail to view the evidence in the light most favorable to Bettor Racing, it weighed the evidence and placed itself in the position of the trier of fact. Accordingly, the NIGC's issuance of NOV 11-01 and its Decision affirming the same must, in all respects, be deemed unlawful pursuant to 5 U.S.C. § 706(2)(a)-(f) and thereafter be withdrawn and rescinded.

1. First Alleged Violation: First Alleged Violation: 25 U.S.C. § 2710(d)(9) and 25 C.F.R. § 573.6(a)(7): Managing an Indian Gaming Operation Without An Approved Management Contract

The NIGC concluded that Bettor Racing "violated IGRA and NIGC regulations by managing Royal River Racing without an approved management contract from September 24, 2004 to March 17, 2005." AR0003051. The NIGC further concluded that "[Bettor Racing does] not offer any evidence to controvert the assertions or show there is any dispute to the material facts supporting the violation." Id. While it is true that the dates on which Bettor Racing began to operate at the Casino are uncontroverted, the inquiry does and cannot end there. An analysis of

the negotiations leading up to the opening of Bettor Racing's operations, as well as the knowledge and intent of the parties, is wholly relevant. The NIGC rejected any knowledge or intent argument out of hand, asserting that any claims as to what Bettor Racing did or did not know or whether it relied about the Tribe's counsel have no bearing on its analysis.

Contrary to the analysis employed by the NIGC, the knowledge, and extent thereof, of Bettor Racing in this matter is a consummate question of fact. The NIGC's dismissal of this issue is in part based on the rationale contained in the Presiding Official's Recommended Decision issued on August 13, 2012. AR0003015-AR0003042.

In the Recommended Decision, the Presiding Official discussed the supposed distinction between civil and criminal law and concluded that no knowledge requirement need be shown to establish a violation of a civil penalty. AR0003027. This is not a correct statement of the law. Moreover, the entirety of the NOV and CFA are predicated upon a regulatory scheme, specifically the IGRA, the intent of which is to punish any party which violates it. See 25 U.S.C. § 2713; 25 C.F.R. § 573.3(a).

The purpose of the IGRA is to shield a tribe from crime and corruption and otherwise protect tribal gaming as a means of generating tribal revenue under 25 U.S.C. § 2702(3). Congress vested with the NIGC the power of enforcement and the power of punishment. See 25 U.S.C. § 2702. That element of punishment makes knowledge a relevant component of the entirety of the inquiry related to both the NOV and CFA. See, e.g., Carter v. United States, 530 U.S. 255, 268-270 (2000) (holding that "intent to do the things that constitute elements of the offense is required" and further holding that even a general intent crime requires that the accused "kn[ow] that [his act] ha[s] the characteristics that make the acts unlawful); Bryan v. United States, 524 U.S. 184, 191 (1998) (holding: "[I]n order to establish a 'willful' violation of a

statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful."); Ratzlaf v. United States, 510 U.S. 135, 137, 142 n. 10 (1994) (holding: "to establish that a defendant 'willfully violat[ed]' the anti-structuring law, the Government must prove that the defendant acted with knowledge that his conduct was unlawful"); United States v. McNair, 605 F.3d 1152, 1201 n. 65 (11th Cir. 2010) (holding that "a finding of specific intent to defraud necessarily excludes a finding of good faith."); United States v. Kay, 513 F.3d 432, 454 (5th Cir. 2007) (indicating that a requirement that the defendant acted "corruptly" would be inconsistent with "good faith"); United States v. Hansen, 772 F.2d 940, 947 (D.C. Cir. 1985) (holding "good faith is a defense to the 'willful filing of false statements.")(citation omitted)).

As evidenced by the facts, Bettor Racing and the Tribe entered into a consulting and Management Agreement, both of which were drafted by the Tribe's counsel who represented to Bettor Racing that said agreements complied with Tribal law and NIGC regulations. AR0001762:21-25; AR0001763:1-2; AR0001764:2-6; AR0001765:16-24; AR0001780:18-25; AR0001865:3-18. The consulting and management agreement were presented to the Tribe by its counsel and all of them were approved. AR0002957; AR0002061; AR0002072; AR0003293-3302. The Tribe's counsel advised that the parties should proceed with opening Royal River Racing in 2004.[6] The Tribe's counsel advised that they had consulted with the NIGC Chairman

[6] In his sworn statement Mr. Gallo testified as follows:

> Q: When you finally executed the [2005 Management Agreement] with the Tribe did you go to the tribal office to execute the document or was it executed by you here in Florida and then set up there?
> A: No, I was in Flandreau and they had a conference room and there was eight or ten people in the room, including Terry and Rollie [the Tribal Gaming Commission and Tribe's counsel, respectively].
> Q: And original contract was signed in 2004 - -
> A: Yes.
> Q: --with Leonard Eller as the tribal president.

himself on behalf of their clients. AR0000563, 26:9-25, 27:1-4; AR0001781-1785. Mr. Gallo had no reason to believe that what he was doing was in violation of law.

The Recommended Decision dismissed these arguments, asserting that Bettor Racing's reliance upon an advice of counsel defense is incorrect. This is not an advice of counsel defense; rather, it is *good faith defense* illustrating a lack of knowledge of wrongful action and a lack of intent to deceive the Tribe or violate the law. There can be no violation of the law without the establishment of wrongful intent or, at a minimum, a demonstration that Bettor Racing understood that his conduct in opening and operating Royal River Racing was unlawful. See, e.g., Carter v. United States, 530 U.S. 255, 269 (2000) (holding that "intent to do the things that constitute elements of the offense is required" and further holding that *even a general intent crime* requires that the accused "kn[ow] that [his act] ha[s] the characteristics that make the acts unlawful[.]") (emphasis added); Bryan v. United States, 524 U.S. 184, 191 (1998) (holding: "In other words, in order to establish a 'willful' violation of a statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful."); Ratzlaff v. United States, 510 U.S. 135, 137, 142, n.10 (1994) (holding: "to establish that a defendant 'willfully

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A: Uh-huh.
Q: But there was a subsequent contract that was executed in February of 2005 that was signed by Mark Allen; is that correct?
A: He was no longer the president, Mr. Eller. Mark Allen I believe was voted in or however they do it.
Q: And did Mr. Samp or Mr. Pechota tell you why you need to have a subsequent contract executed?
A: No.

AR0001781:1-23.

Q: And did Mr. Samp and Mr. Pechota know that you were operating in September of 2004?
A: Yes.

AR0001781:1-4.

violat[ed]' the anti-structuring law, the Government must prove that the defendant acted with knowledge that his conduct was unlawful[.]"; United States v. McNair, 605 F.3d 1152, 1201 n. 65 (11th Cir. 2010) (holding that "a find of specific intent to defraud necessarily excludes a finding of good faith."); United States v. Kay, 513 F.3d 432, 454 (5th Cir. 2007) (indicating that a requirement that the defendant acted "corruptly" would be inconsistent with "good faith[.]"); United States v. Hansen, 772 F.2d 940, 947 (D.C. Cir. 1985) (holding "good faith is a defense to the 'willful filing of false statements[.]'" (citations omitted)).

The great majority of both the Recommended Decision and the NIGC's Final Decision paint Bettor Racing as a corrupting and criminal influence. They assign a nefarious and wrongful intent to Bettor Racing. While said characterization of Bettor Racing's conduct assists the NIGC in assessing blame and sustaining the NOV, the analysis ignores a record replete with disputes of fact as to Bettor Racing's intent. The administrative record also establishes that the NIGC was aware of ongoing communications between Bettor Racing and the Tribe and had communications directly with the Tribe. See, e.g., AR0001781:1-4; AR0001784:14-25; AR0001785:1-15; AR0001762-1766; AR0000005. The statement that the Chairman of the NIGC indicated that Bettor Racing could open its operations at the Casino is relevant. Not only does it raise questions of the parties' knowledge and intent, it raises questions regarding waiver of the NIGC's ability to enforce its own regulations. Governmental agencies are not above the law.

An "agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42-43, (1983) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)). The NIGC dismissed facts relevant to the questions at issue in this case. The connection that it established between

the facts and its conclusion is neither logical nor sustainable in light of a review of all of the relevant facts.

2. Second Alleged Violation: 25 U.S.C. § 2711 and 25 C.F.R. 573.6(a)(7): Operating Under Two Unapproved Modifications to the Approved Management Contract.

The Second Violation relates to the initial Management Agreement, which Agreement was approved by NIGC Chairman Phil Hogen on March 17, 2005, and its two subsequent modifications of February 15, 2007, and August 1, 2008, respectively. In its Final Decision the NIGC concluded that there was no dispute that Bettor Racing "operated Royal River Racing under two separate, unapproved modifications to the management contract from February 15, 2007, to December 3, 2009[.]" AR0003052. Its analysis ended here. As with the first violation, the NIGC overlooked numerous facts related to the extent of Bettor Racing's knowledge and its intent.

a. The First Modification (February 15, 2007)

In 2005, the relevant South Dakota statute relating to gaming tax was amended, resulting in a significant reduction in the applicable tax. See SDCL § 42-7-102. Because of the change in South Dakota law, J. Randy Gallo notified the Tribe of his intentions to re-locate his business outside of the Royal River Casino. AR0001821:25; AR0001825:1-17. However, Mr. Gallo advised that he would honor the existing Management Contract. Id. The Tribe, through its attorneys, expressed to Mr. Gallo that it was critically important for the Tribe to retain Bettor Racing's business.[7] AR0001880:18-23. The Tribe's counsel further advised that the Tribe had

[7] Randy Gallo recalled that when he informed the Tribe's counsel of the need for a modification, he stated as follows:

> A: Once South Dakota went to their quarter percent I had received calls from New Zealand, Australia, all over the country with people interesting in playing. I

the ability to do whatever it wanted to do with the net profits it received from the operation of Bettor Racing. AR0000727: 25-28; AR0000728, 29, 30:1-10; AR0001824:18-25; AR0001825:1-17; AR0002277; AR0002644-2645. Specifically, he advised that the Tribe could pay to Bettor Racing a bonus or consulting fee[8], both of which concepts were discussed with NIGC Chairman Phil Hogan, who advised that such arrangements were acceptable so long as they were not specifically set forth in contract. AR0000726, 22:13-25; AR0000727, 25:15-25; 26:1-14; 28:3-25; AR0000732, 45:19-25; AR0000170; AR0000976; AR0001513; AR0002227; AR0002051; AR0002644-2645. The Tribe's counsel thereafter prepared a modification to the 2005 Management Agreement, which modification was approved by the Tribe, and then formally executed by the parties on February 15, 2007. Id.; AR0000733, 49:24-25; 50:1-4; AR0001551-1553. Under the First Modification the Tribe received all amounts as required by federal law. AR0000728, 31:25, 32, 33:1-5.

> mentioned it to Rollie and Rollie said, what do we have to do to keep your business here.

AR0001822:12-17.

[8] In his sworn statement, Terry Pechota testified as follows:

> Q: Then the tribe had to pay – if they were going to pay a bonus, had to pay it from the tribe to Bettor Racing?
>
> A: Yes, after they had got the computation under the management agreement. So the accountants do the computation. They make the split however they're going to do it, however the agreement, you know, said. And then the tribe got its 60 percent, puts it in its account. At that point in time, the tribe has gotten everything that it is required to give - - or required to get under the management agreement. Then the tribe would have to pay any bonus that they wanted to do would come from the – you know, the 60 percent.

AR0000728, 31:22-25, 32:1-9.

b. The Second Modification (August 1, 2008)

The August 2008 modification was prompted by an industry-wide increase in fees charged by race tracks to off-track betting operations, which increase threatened to negatively impact Bettor Racing's volume of business. AR0001870:2-25; AR0001871-1875; AR0001876:1-4. Mr. Gallo approached the Tribe to propose a second modification to the Management Contract. AR0001870-1873; AR0001876:5-11. Again, the Tribe's counsel emphasized that it wanted to retain Bettor Racing's business and was willing to make appropriate modifications to the Management Agreement. AR0001880:18-23. In fact, the Tribe's counsel indicated to Mr. Gallo that it looked forward to his continued efforts to increase the revenues reaped by the Tribe from Royal River Racing. AR0000170; AR0000976; AR0001513; AR0002051. The modification arrangement was again drafted by the Tribe's counsel and the Tribe approved the same. AR0000834-835; AR0000967; AR0001886:3-23. The second modification was executed on August 1, 2008. Id. Under the Second Modification the same methodology was followed for providing payment to the Tribe and the Tribe received all amounts as required by federal law. AR0000728, 31:25, 32, 33:1-5.

With both modifications the NIGC again jettisoned Bettor Racing's contention that the extent of its knowledge is relevant to a determination that a violation conclusively exists, stating that "[w]here unapproved management contracts and modifications are void *ab initio*, a rational trier of fact could not find [Bettor Racing] reasonably inferred they had the requisite written approval of the modifications." Id. Simply stated, the reasonableness of any assumptions made by Bettor Racing is a consummate question of fact.

Both modifications were undertaken with the full knowledge and understanding of the parties. The modifications were executed following thorough discussions of the financial arrangements contemplated by all involved and formal approval at the necessary Tribal levels.

In the instances of both modifications, the Tribe, according to its resolutions, took it upon itself to submit the documented modifications to the NIGC. AR0000963. The Tribe's counsel did submit the first modification to the NIGC; however, same counsel later requested NIGC to hold review in abeyance pending the resolution of litigation ongoing between the Tribe and the State of South Dakota in relation to the State Compact (resolution of this litigation occurred in July 2011). The Tribe's counsel did not advise Bettor Racing of its request to the NIGC that its review and approval of the First Modification be held in abeyance. AR0000725, 19:9-25, 20:1-3. To the contrary, the Tribe's attorneys again advised Mr. Gallo that there was no issue operating under the First Modification and that the NGIC was fully aware of the situation. To date, it remains unknown whether the Tribe's counsel ever submitted the second modification to the NIGC. However, it is undisputed that in neither instance did the Tribe's counsel inform Mr. Gallo or Bettor Racing that there were any problems with the modifications or that they had not been formally approved by the NIGC.[9] AR0002111:19-25; AR0002112:1-3, 5-12.

The Tribe has never denied approving the modifications, passing the necessary resolutions for the same, or executing the Management Agreement and modifications thereto. Rather, it has been suggested that Bettor Racing "intimidated" or "strong-armed" the Tribe; revisionist history and backpedaling at its absolute best. In addition to finding appeal in the

[9] Mr. Gallo testified:

> Q: When we went over the documents yesterday about the unapproved modification in 2006, which was the memorandum of understanding which was submitted to us, the NIGC for approval but wasn't approved, what was your understand as to why they were needing to document?
>
> A: I didn't know it was unapproved or, as I told you yesterday, I wouldn't have gone on.

AR0002111:19-25; AR0002112:1-3.

Tribe's innuendo, the NIGC has largely ignored the significance of the Tribe's conduct and the Tribe's own lack of denials on many of the issues giving rise to the NOV.[10] The supposition that that *no* reasonable trier of fact could reach a conclusion different than that of the NIGC is clear error. Accordingly, an award of summary judgment is inappropriate given the existence of these factual disputes.

3. Third Alleged Violation: 25 U.S.C. § 2710(b)(2)(A), (d)(1)(A)(ii) and 25 C.F.R. § 522.6(c) and Flandreau Pari-mutuel Betting Ordinance §4: Violation of the Requirement that the Tribe have the Sole Proprietary Interest in the Gaming Operation.

The Third Violation relates to which party possessed the "sole proprietary interest in, and responsibility for, the tribal gaming operation[.]" AR0003052. The NIGC acknowledged that there are three factors that must be examined in determining whether a tribe maintains the sole proprietary interest in a gaming operation: "1) the term of the relationship; 2) the amount of the revenue paid to the third party; and 3) the right of control provided to the third party over the gaming activity." AR0003052 (quoting City of Duluth v. Fond du Lac Band of Lake Superior Chippewa, 830 F.Supp.2d 712, 723 (D.Minn. 2011) (quoting *In Re Fond du Lac Band of Lake Superior Chippewa*, NIGC, NOV-11-02, p. 2)). The NIGC's Final Decision relies upon analysis of the latter two factors, with a particular emphasis on revenues received by the parties. Id.

The NIGC concluded that Bettor Racing was "the primary [beneficiary] of the tribal gaming operation. The Tribe received only a minority percentage of the total profits. Using the "check swap scheme . . . the Parties were able to style payments under their arrangement as a bonus to increase the flow of money to [Bettor Racing] beyond the 40% permitted by IGRA." AR0003053. The NIGC reached this conclusion by ignoring facts in the record. More

[10] The Tribe was also charged with violations in NOV 11-01; however, the mere fact that the Tribe was also charged with violations does not negate the significance of the facts surrounding the negotiation and execution of the contracts at issue in this case nor does it excuse the NIGC refusal to view the facts in a light most favorable to Bettor Racing.

importantly, the very testimony cited by the NIGC in its Final Decision, which testimony was also cited in the Presiding Official's Recommended Decision, is that of Terry Pechota's. That testimony establishes that the Tribe was compensated consistently with the edict of the IGRA and that the NIGC did not object to the payment of a bonus so long as the Tribe received its portion of the revenues from Royal River Racing. AR0000728, 32:1-9; AR0002227; AR0002644-2645. The record establishes that this is exactly what happened. AR0000061; AR0000068; AR0000145-153.

The NIGC also concluded that "[Bettor Racing] controlled Royal River Racing, running it as a business separate from the Casino." AR0003053, 11. This conclusion equates ownership with sole proprietary interest. Given the nature of the business at issue, the NIGC's attempt to equate the two concepts is too simplistic and far too broad. The very nature of the pari-mutuel betting business, i.e., its industry requirements, its licensure requirements, did not permit the Tribe to be identified as the owner of the business. Mr. Gallo was licensed to operate a pari-mutuel operation. AR0001747:2-6; AR0001836:4-12. However, the Tribe understood this at the outset of the parties' relationship. Id. The IGRA does not preclude a management agreement between tribal and non-tribal entities, which is exactly what was done in this particular case. AR0001842:15-25; AR0001843:1-5. The IGRA also does not define the term management or manager, meaning that there is nothing that precludes the type of relationship had between Bettor Racing and the Tribe as described by the approved Management Agreement.[11] The record establishes that the Tribe's counsel prepared all of the agreements relating to the management of

[11] In fact, in the Recommended Decision, the Presiding Official pointed out that IGRA "regulations demonstrate that a 'necessary condition for a management contract is that it grant to a party other than the Indian tribe some authority with regard to a gaming operation.'" AR0003018 (quoting Machal, Inc. v. Jena Band of Choctaw Indians, 387 F.Supp.2d 659, 665 (W.D.La. 2005). There is no discussion of the degree to which authority may be granted or elucidation of the way in which the operation must be managed and by whom.

Royal River Racing and advised the Tribe with regard to the drafting, resolution, and passage of ordinances related to that Management Agreement. AR0000723, 10:1-23. The Tribe had access to Royal River Racing's facilities, its books, its safe and its general operations at any time it desired. AR0001858:2-6; AR0002168:24-25; AR0002169:1-25. Personnel of the Royal River Casino had frequent interaction with Bettor Racing personnel. Id. Simply because the Tribe chose not to exercise the rights it had under the Management Agreement does not mean that it did not have the proprietary interest in the business.

The record evidence demonstrates that the Management Agreement and modifications thereto provided that the Tribe would receive the requisite amount of net revenue from the OTB's operation. AR0000728, 31:22-25, 32:1-20. The record evidence also demonstrates that the requisite payments were made to and received by the Tribe. In fact, there appears to be no dispute of fact on this issue. The NIGC, however, takes issue with the decision by the Tribe to make bonus payments to Bettor Racing. In its NOV, it states that the bonus payments exceeded the statutory limitations for the revenue to be received by a party such as Bettor Racing. AR0002528, ¶83. However, the citations to authority upon which it relies reference only the law relating to which party must have the sole proprietary interest in the operation and the percentage of revenue to be received by the Tribe. There is nothing in the NIGC or IGRA regulations that precludes the giving of a bonus. In fact, the Tribe's counsel discussed the concept with the Chairman of the NIGC who approved of the same.[12] AR0000727, 28:3-25.

[12] In his sworn statement, Terry Pechota confirmed his conversation with NIGC Chairman Phil Hogen. He stated:

In his sworn statement, Mr. Gallo testified as follows:

The implication of the NIGC's argument is that the Tribe was deprived of revenues which were, by regulation, to be used for certain purposes. See 25 U.S.C. § 2710(b)(2)(B)(i)-(v). The regulation cited by the NIGC provides in relevant part:

> (2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that—
>
> (B) net revenues from any tribal gaming are not to be used for purposes other than—
>
> (i) to fund tribal government operations or programs;
> (ii) to provide for the general welfare of the Indian tribe and its members;
> (iii) to promote tribal economic development;
> (iv) to donate to charitable organizations; or
> (v) to help fund operations of local government agencies[.]

As evidenced by its very language, this particular regulation actually provides support for the payment of a bonus, as the regulation expressly permits the Tribe to use its revenue for economic development. Moreover, the record demonstrates that the chairman of the NIGC did not believe such a compensation structure was illegal. The NIGC has never addressed this issue. The changes in both South Dakota state law and the increase in track fees threatened to have a chilling effect on Bettor Racing's business, thereby threatening the potential revenue of both parties. The bonus permitted Bettor Racing not only to sustain the level of its business, but to

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> A: And I said to [Pechota], well, are you sure that's okay with the NIGC? And he said to me, quote, unquote, Randy, nobody tells the Tribe what to do with their money. They can do whatever they want with their money.
> Q: And who said that to you?
> . . . .
> A: Terry was – excuse me, it was Terry that said it. Rollie nodded his head.

AR0001824:24-25; AR0001825:1-22.

increase its business, correspondingly increasing revenue.[13] Each time the parties discussed a modification of the agreement, Mr. Gallo indicated that he was working on increasing the volume of business, nearly doubling it in several instances. AR0001842:23-25; AR0001843:1-5. There was a genuine issue of fact as to whether the discretionary bonus constituted a legitimate expenditure for the Tribe's economic development. There is also a genuine issue of material fact as to whether the NIGC approved of this concept as evidenced by its Chairman's actions. The NIGC's failure to even consider either of these arguments is in and of itself error.

B. There are genuine issues of material fact which precluded a grant of summary judgment on the civil fine set by the NIGC in CFA 11-01.

There is no dispute that the NIGC and its Chairwoman may assess civil fines in connection with the issuance of a Notice of Violation in accordance with 25 C.F.R. § 575.4. However, if the NOV is unsustainable so must be the CFA. Moreover, even if the NOV is sustained, there is reason for independent review of the CFA. Section 575.4 provides:

> The Chairman may assess a civil fine, not to exceed $25,000 per violation, against a tribe, management contractor, or individual operating Indian Gaming for each notice of violation issued under § 573.3 of this chapter after considering the following factors:
>
> (a) Economic benefit of noncompliance. The Chairman shall consider the extent to which the respondent obtained an economic benefit from the noncompliance that gave rise to a notice of violation, as well as the likelihood of escaping detection.
>
> (1) The Chairman may consider the documented benefits derived from the noncompliance, or may rely on reasonable assumptions regarding such benefits.
>
> (2) If noncompliance continues for more than one day, the Chairman may treat each daily illegal act or omission as a separate violation.

[13] In his sworn statement, Mr. Gallo testified that Mr. Pechota indicated to him that the payment of the bonus was permissible and because of this arrangement he and the Tribe were looking forward to the "Tribe reaping the rewards of the players you're going to be bringing in." AR0001830:1-6.

> (b) Seriousness of the violation. The Chairman may adjust the amount of a civil fine to reflect the seriousness of the violation. In doing so, the Chairman shall consider the extent to which the violation threatens the integrity of Indian gaming.
>
> (c) History of violations. The Chairman may adjust a civil fine by an amount that reflects the respondent's history of violations over the preceding five (5) years.
>
> (1) A violation cited by the Chairman shall not be considered unless the associated notice of violation is the subject of a final order of the Commission and has not been vacated; and
> (2) Each violation shall be considered whether or not it led to a civil fine.
>
> (d) Negligence or willfulness. The Chairman may adjust the amount of a civil fine based on the degree of fault of the respondent in causing or failing to correct the violation either through act or omission.
>
> (e) Good faith. The Chairman may reduce the amount of a civil fine based on the degree of good faith of the respondent in attempting to achieve rapid compliance after notification of the violation.

The NIGC assessed civil fines totaling $5,000,000.[14] AR0002672.

The NIGC erred in its analysis of the facts and law giving rise to the alleged violations and further erred in the application of the above-referenced factors to each of the alleged violations, thereby exacerbating what was already a wholly inequitable and unjust result. To the extent that any violation set forth in NOV-11-01 is determined to have been made in error, as a matter of law, there can be no fine assessed pursuant to 25 C.F.R. § 574.3 as the legitimacy of

[14] These amounts include fines assessed for the alleged violations set forth in NOV-11-01, which includes the alleged violations of the following: (1) First Alleged Violation – a fine of $1,000,000.00; (2) Second Alleged Violation – a fine of $2,000,000.00; and (3) a fine of $2,000,000.00. The Chairwoman recommended, and the NIGC concluded, that the respective amounts comprising the total fine represented an appropriate balancing of all factors included in 25 C.F.R. 575.4.

the CFA is ultimately predicated upon the legitimacy of the NOV. The fines must withstand not only the scrutiny of the IGRA, but also the Eighth Amendment.

The NIGC agreed with its Chairwoman's findings: "Respondents received a substantial economic benefit of at least $4,544,755.00; the violations of managing without an approved contract and holding a proprietary interest in the gaming facility were serious and substantial; the violations were willful and; Respondents did not act in good faith to correct the violations after issuance of the NOV." AR0003055. These statements again ignore the facts of this case.

1. When the five factors set forth in 25 C.F.R. § 574.5 are applied to the facts of this case, many of which are contested, the assessed fines are unsustainable.

The factors to be considered are: (1) the economic benefit of noncompliance, (2) the seriousness of noncompliance, (3) any history of violations, (4) negligence or willfulness and (5) good faith. See 25 C.F.R. § 574.3.

a. Economic Benefit of Noncompliance.

The NIGC dismissed out of hand each and every argument made by Bettor Racing at the administrative agency appeal level, stating that not one of them was relevant. AR0003056. This analysis grossly oversimplifies the facts of this matter, as it fails to take into consideration (1) that Bettor Racing did not engage in any intentional or deceptive conduct in its dealings with the Tribe, (2) the Tribe took it upon itself, through its legal counsel and Tribal Resolutions, to submit the Management Contract and subsequent modifications to the NIGC, and represented to Bettor Racing that it had done so, (3) the Tribe realized exactly that amount for which it contracted and (4) that exists no law precluding the Tribe's payment of a discretionary bonus to Bettor Racing. See generally AR0001785:1-15 (evidencing representations from Tribe's counsel that the parties could operate under the terms of the consulting agreement pending approval); AR0000005; AR 0000727; 0000728; AR0001762-1766 (evidencing representations from the Tribe's counsel that

he had spoken with NIGC Chairman Phil Hogan, who advised that Bettor Racing could commence its operations absent an NIGC approved agreement); AR0001781:1-4 (evidencing knowledge of Tribe and NIGC that Bettor Racing operated at the Royal River Casino from September 2004 through March 2005 and believed that it had permission to do so); AR0000139-153; AR0000371-452; AR0003170; AR0003192; AR0003202-3288; AR0003293-3345 (evidencing payments made as provided in the consulting agreement and as otherwise agreed upon between the parties); AR0000727, 25:15-25, 26:1-14, 28:3-25, 29:1-25, 30:1-13, 31:22-25, 32:1-12; AR0000746; AR0000977 (evidencing representations from NIGC Chairman Phil Hogan and Tribe's counsel that nothing precluded payment of discretionary bonus to Bettor Racing); AR0000834-835; AR0000967; AR0001795:3-23 (evidencing Tribe's representations that it would seek necessary approval); AR0000732, 45:18-25; 46:13-19 (evidencing Tribe's failure to notify Bettor Racing that it had requested approval of modification be held in abeyance). Both parties realized a financial benefit from Royal River Racing and it was the exact benefit for which they had contracted.

b. Seriousness of the Violation.

The NIGC claims that Bettor Racing failed to dispute the seriousness of the violations of which it was accused. AR0003056. This statement could not be further from reality. As evidenced by the entirety of the agency record, the NIGC has always defined the issues in this case and Bettor Racing has never had an opportunity to present its own testimony, evidence, conduct discovery or cross-examine the witnesses in this case. Bettor Racing has, however, always demonstrated great candor as to the history of this matter and has consistently attempted to set the record straight about what it knew and when.

The entirety of the NIGC's argument as related to all alleged violations identified in the NOV is premised upon two presumptions: (1) Bettor Racing had full knowledge that its contractual relationship with the Tribe was unlawful and void and (2) there is a clear and causal correlation between the alleged "per se" violation and the damages the NIGC has awarded to the Tribe in NOV 11-01. Bettor Racing disputes that the NIGC has established either of these two presumptions, therefore making the initial NOV 11-01 unsubstantiated, which necessarily invalidates CFA 11-01. AR0001762:21-25; AR0001763:1-2; AR0001881:21-25; AR0001882:11-19; AR0001884:7-25; AR0001885:1-3; AR0001865:7-18; AR0002200:8-10 (evidencing the facts that it was the Tribe's attorneys which drafted and memorialized all discussions between the parties and represented that the agreements were compliant with NIGC and IGRA regulations); AR0000455-56; AR0002439-2509; AR0002957; AR0002061; AR0002072; AR0002431-32; AR0003293-3302 (evidencing that all agreements were presented to the Tribe by its counsel and were approved); AR0001795:8-10 (evidencing that Mr. Gallo was unaware that he was in any way committing a violation of the NIGC's regulations).

c. History of Violations.

The NIGC acknowledges that Bettor Racing has no history of violations. AR0003057. This acknowledgment constitutes the whole of the NIGC's analysis on this issue, thereby making it impossible to determine whether the NIGC truly considered Bettor Racing's reputation in the racing industry. Mr. Gallo has consistently served as an advisor on issues of operations, compliance and ethics to various racing boards and organizations. As evidenced by his extensive and candid deposition testimony, Mr. Gallo did not intend to operate Royal River Racing contrary to NIGC or IGRA regulations or to do any disservice to the Tribe. AR0001861:8-23.

d. Negligence or Willfulness.

The NIGC concluded that Bettor Racing's belief that its actions were consistent with the law cannot create a genuine issue of material fact. AR0003057. In fact, the NIGC argues that "[t]he facts of record negate the possibility a reasonable trier of fact could find [Bettor Racing's] violations were not negligent (i.e., a result of a lack of ordinary care) or wilful (i.e., purposeful and intention, or reckless)." Id. This one-side view of the facts is entirely inconsistent with the obligation to view the facts in a light most favorable to the non-moving party.

In its CFA, the NIGC noted that the administrative record in this matter demonstrates that "respondents intended to circumvent the management contract amendment approval process because they knew the Chairman would not, and could not under IGRA, approve the contract modifications, because the modifications gave Respondents a greater amount of the net gaming revenue than permitted under IGRA." AR0002669. The NIGC then notes that the Respondents clearly "disregarded IGRA's mandate that modifications to a management contract be submitted to, and approved by, the Chair" when they entered into both modifications to the 2005 Management Agreement. AR0002670. Simply stated, this interpretation of the facts in the administrative record is unequivocally and flatly incorrect. AR0001824:18-25; AR0001825:1-17; AR0001829:8-25; AR0001831:1-6, 7-12 (establishing that it was not Bettor Racing that demanded a modification, but the Tribe's counsel which desired Bettor Racing's to continue its operations and therefore devised the plan of a discretionary bonus and relayed it to Bettor Racing); AR0000728, 29:1-25, 30:1-13, p. 31:22-25, 32:1-12 (evidencing that it was the Tribe's counsel that approached NIGC Chairman Phil Hogen and discussed the propriety and viability of the bonus payment and received confirmation that such arrangement was legal); AR0001581-1583 (evidencing Tribe's acknowledgement that even with the implementation of a bonus

payment, the Tribe would still receive the amount required by regulation and contract); AR0000977; AR0000834-35; AR0000967; AR0001886:3-23 (evidencing that it was the Tribe that prepared the modifications, presented it to the Tribal Council and obtained approval); AR0000732, 45:18-25, 46:13-19; AR0001861:8-23 (evidencing that Tribe's counsel failed to pursue the approval process to fruition and failed to tell Randy Gallo that it had not obtained approval). Moreover, the permissibility of the bonus payment has yet to be examined, particularly when this concept was deemed acceptable by the Chairman of the NIGC itself.

e. Good Faith

The NIGC concluded that Bettor Racing is not charged with a lack of good faith in dealing with the Tribe, but rather that Bettor Racing acted in bad faith in not immediately complying with the corrective measures required by the NIGC's NOV. AR0003057. This statement is entirely inconsistent with the whole of the NIGC's analysis in this matter, including a great number of the statements made in the Final Decision.

Assuming that the NIGC's statement that Bettor Racing did not act in bad faith until after issuance of the NOV, which assumption undercuts a great deal of the NIGC's analysis on other issues, Bettor Racing cannot be punished for exercising its right of due process under the NIGC's own rules. Bettor Racing was entitled to the most basic of rights: the opportunity to be heard, the opportunity to present evidence, and the opportunity to challenge the credibility of the witnesses and evidence against it. Without such opportunity for hearing, the question of the appropriateness of the fine at issue cannot be decided as a matter of law, particularly on this record, and the NIGC abused its discretion in sustained the same.

The determination of whether the amount of a civil penalty is appropriate constitutes the consummate question of fact. See, e.g., U.S. v. Ekco Housewares, Inc., 62 F.3d 806, 816 -

817 (6th Cir. 1995) (holding that "[t]he reasonableness of a penalty . . . is a fact-driven question, one that turns on the circumstances and events peculiar to the case at hand."). Questions of good faith almost always invoke a reasonableness test which is necessarily a factually intensive inquiry. The NIGC abused its discretion in awarding the fine that it did and further erred when it granted summary judgment on the issue without permitting adequate development of the record.

2. The Assessed Fines are Excessive in Violation of the Eighth Amendment

Bettor Racing raised this constitutional issue at the agency level; however, both the Presiding Official and NIGC agreed that they did not have jurisdiction to address constitutional claims. AR0003058. Accordingly, this issue is ripe for review and determination by this Court.

The fines alleged in this case are not only unsupported by the facts, but also unsustainable under law. The Eighth Amendment applies to both criminal and civil fines alike. See Austin v. United States, 509 U.S. 602, 610 (1993) (holding that the inquiry of whether Eighth Amendment applies to an assessed penalty focuses on whether the law and its penalty is remedial or punitive not whether it is criminal and civil as the Eighth Amendment applies to both). The Excessive Fines Clause contained within the Eighth Amendment is intended to ensure equity and fairness.[15] A review of relevant law demonstrates that the fines imposed in this case do not survive such Eighth Amendment scrutiny and that the NIGC clearly erred in awarding such fines.

The purpose of the Excessive Fines Clause is to "prevent[ ] the Government from abusing its power to punish." United State v. Kruse, 101 F.Supp.2d 410, 413 (E.D. Va. 2000) (citing Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 275 (1989) (holding that "[t]he Framers . . . did not aim to prevent large remedial damages; rather they

[15] The Excessive Fines Clause of the Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

constructed the Excessive Fines Clause with the goal of preventing the Government from abusing its power to punish."). The test for invoking the Excessive Fines Clause of the Eighth Amendment focuses on two factors: (1) whether the recovery sought is remedial or punitive and (2) whether the fine is grossly disproportionate to the gravity of the offense. United States v. Bajakajian, 524 U.S. 321, 334 (1998).

a. The regulations at issue are punitive in nature.

The analysis begins with examination of the text of the relevant regulation. Both the text, which provides for a per occurrence penalty, as well as the factors to be applied in determining the amount, demonstrate that 25 U.S.C. § 2713(a) and 25 C.F.R. §§ 575.3 and 575.4 are punitive in nature or reveal a punitive purpose. See United States v. Halper, 490 U.S. 435, 446 (1989), *abrogated on other grounds*, Hudson v. United States, 522 U.S. 93 (1989) (noting that kickback statute permitted a "per occurrence penalty" which is the equivalent of a punitive fine and that the enabling legislation emphasized that fines were intended as a deterrent to future bad acts). As set forth above, 25 C.F.R. § 574.4 grants the NIGC the authority to impose a penalty not to exceed $25,000 per violation, per day. This penalty may be assessed in addition to whatever remedy the NIGC imposes in connection with any notice of violation it issues. The penalty is not intended to be remedial as the penalty is not paid to the Tribe[16] nor is there any authority suggesting that it is intended as reimbursement for the NIGC's investigation. See, e.g., Bajakajian, 524 U.S. at 342, 334 (noting that civil penalties, the express purpose of which is to reimburse the Government, are not subject to the Excessive Fines Clause). Moreover, the NIGC

[16] In this instance, the NOV originally ordered Bettor Racing to pay to the Tribe over $4,000,000.00 the NIGC claimed should have been paid to the Tribe under the Management Agreement. AR0002530-2531. In its Final Decision, the NIGC ordered only that Bettor Racing pay the $5,000,000.00 fine. AR0003043-3054. The Tribe thereafter filed a Motion for Clarification on this issue and the NIGC issued a ruling indicating that its decision to supplant the correct measure stood. AR0003062-3064; AR0003066-3068.

itself is specifically charged with determining whether violations of IGRA have been committed and whether penalties should be imposed for the same. See 25 U.S.C. § 2702(2), (3) (providing that the IGRA establishes that the Chair of the NIGC is tasked with "shield[ing] [tribes] from organized crime and other corrupting influences" and to otherwise protect tribal gaming revenue); see also 25 U.S.C. § 2713(a) (providing NIGC with authority to impose civil penalty). The NIGC is not the purportedly injured party nor is it acting as such. In this context, the law clearly establishes that the NIGC acts in a prosecutorial role when it applies the provisions of the IGRA. The Eighth Amendment is applicable to the fine assessment in the instant case.

b. **The $5,000,000.00 fine is constitutionally excessive.**

The inquiry next turns to whether the penalty is constitutionally excessive. Such determination is made by analyzing the "degree of the defendant's responsibility or culpability; . . . and the sanctions imposed in other cases for comparable misconduct." Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001); see also BMW of North America, Inv. v. Gore, 517 U.S. 559, 574 (1996); State Farm Mut. Auto. Ins. Vo. v. Campbell, 538 U.S. 408, 418 (2003)). It is of critical importance to note that although a fine may be within the maximum penalty prescribed by federal regulation, it may still be deemed excessive. United States v. American Elec. Power Service Corp., 218 F.Supp.2d 931, 941-42 (S.D. Ohio 2002) (citing United States v. Valley Steel Prods. Co., 765 F.Supp. 752 (C.I.T. 1991)). To that end, the NIGC's statements that the fine could have been much higher than what was imposed cannot sustain the fine in this case.

The fine in this case is disproportionate to the injury suffered and the seriousness of Bettor Racing's conduct. With regard to the seriousness of Better Racing's conduct, the NIGC was required to analyze the degree of responsibility or culpability of the party against which the

penalty is assessed. The NIGC relied repeatedly on the regulation that managing an Indian gaming operation without a management contract is a substantial violation. Reliance upon that principle alone is insufficient to justify this fine on this record. Simply stated, Better Racing does not have such a level of culpability as to justify a $5,000,000.00 fine. Bettor Racing believes that the record on its face establishes its lack of culpability. That clarity of record represents an abuse of discretion on the NIGC's part. At a minimum, however, there were disputes of fact with regard to the NOV that did not justify a grant of summary judgment on the CFA.[17]

Bettor Racing possessed no intent to violate the terms of the IGRA. It communicated its intentions in regard to the operation of the OTB on a regular basis. It was transparent and candid in its actions. In fact, when Bettor Racing contemplated moving its operations from the Royal River Casino in Flandreau to a location off of tribal land, it offered to honor the terms of the parties' Management Agreement for the remainder of its term. AR0001821:25; AR0001822:1-17. It was only at the insistence of the Tribe and its attorneys that Bettor Racing remained at the Casino's location and continued its operations. Id.; AR0001880:18-23. As evidenced by Mr. Gallo's testimony, had he known that there were any potential or actual violations of the law, he would have ceased operations immediately. AR0002112:1-23. Such statements can hardly be

[17] The CFA focuses on Bettor Racing's lack of compliance with the remedy ordered by the NIGC in the NOV. Such charge is tantamount to a deprivation of due process rights. Pursuant to the IGRA, Bettor Racing was legally entitled to appeal the NOV. It had a right to avail itself of a process that would permit it to litigate its position and defenses – an opportunity it was denied at the summary judgment stage. In that regard, there is a question as to whether Bettor Racing in fact possesses a substantive due process claim. Substantive due process claims which do "not involve[e] fundamental rights are reviewed under the rational basis standard." Kruse, 101 F.Supp.2d at 415 (citing Washington v. Glucksberg, 521 U.S. 702, 728 (1997)). The purpose of such an inquiry is to determine whether there is a rational relationship between the legislation and its purposes. Cf. Kruse, 101 F.Supp.2d at 415 (noting that defendant had several opportunities to contest amount of kickbacks – prior to plea hearing, during sentencing and in his response to government's complaint action).

characterized as evidence of nefarious intent on the part of Bettor Racing. See, e.g., BMW of North America, Inc. v. Gore, 517 U.S. 559, 575 (1996) (holding that "some wrongs are more blameworthy than others); TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 462 (1993) (holding that "trickery and deceit" are more reprehensible than negligence). When Bettor Racing later learned of the potential legal problems, it ceased operating at Royal River Casino almost immediately.

A comparison of the penalties assessed against both Bettor Racing and the Tribe is warranted. The Tribe was also charged with many of the same alleged violations as Bettor Racing, namely 25 C.F.R. §§ 573.6(a)(7), 571.13(a), 522.5, and 25 U.S.C. § 2710(d(9). Yet, remarkably, the Tribe's punishment was the equivalent of rudimentary classes regarding the IGRA's gaming regulations and the imposition of certain compliance responsibilities for the next several years. AR0002570-2576; AR0003048. While the Tribe could face a fine of $750,000.00 if it violates its settlement agreement, its punishment pales in comparison with the penalties exacted from Bettor Racing. The IGRA's goal is laudable - it is intended to protect the Tribe from outside fraud – but the fine levied against Bettor Racing does nothing to further that goal. Here, the Tribe, represented by counsel, actively participated and guided the process and reaped rewards it would otherwise not have received.

Assessing fines of this degree of harshness in light of Bettor Racing's candor and the Tribe's own conduct constitutes an abuse of the discretion accorded the NIGC under federal law. Considering Bettor Racing's conduct and the disparity between the penalties meted out by the NIGC, the fine violates the Excessive Fines Clause contained within the Eighth Amendment. While the intent of the IGRA was to protect Native American Tribes, it should not be applied in such a manner as to reward the Tribe for questionable conduct; nor does the IGRA permit the

NIGC to circumvent the application of the Excessive Fines Clause. Finally, the NIGC is tasked with protecting the Tribe; its inherent bias in and of itself demands that the fine should have been subject to the highest of scrutiny.

CONCLUSION

To the extent an error in analysis exists, it pervades the whole of the NIGC's Decision and weakens its foundation to the point where the NOV and CFA are ultimately unsupported by the record. The NIGC erred when it awarded summary judgment on every element contained within the NOV and CFA. Bettor Racing's actions as they related to the operation of the Class III gaming operation at the Flandreau Royal River Casino can neither be characterized as a willful intent to deceive nor an intentional effort to avoid the administrative oversight of the NIGC. To the contrary, throughout the entirety of its business relationship with the Flandreau Santee Sioux Indian Tribe, Bettor Racing made all of its intentions and dealings with the Tribe wholly transparent. While the facts of this matter are novel and the case law sparse, at a minimum, Bettor Racing and J. Randy Gallo should never have been deprived of their right to a hearing in this matter such that they could present evidence and challenge the credibility of the evidence and witnesses against them. A conclusory and self-serving statement of the facts does not a viable motion for summary judgment nor a viable Final Decision make.

Bettor Racing respectfully requests that this Court direct that the NIGC's Final Order and Decision of September 12, 2012 be withdrawn and rescinded. Even if this Court is inclined to uphold that portion of the Final Decision related to NOV-11-01, Bettor Racing submits that the NIGC abused its discretion in assessing the fine that it did and in awarding summary judgment on the CFA without an opportunity for Bettor Racing to defend itself. Accordingly, Bettor Racing respectfully requests that the CFA be rescinded.

Dated this 14th day of February, 2014.

/s/ Meredith A. Moore

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CERTIFICATE OF COMPLIANCE

I, Meredith A. Moore, certify that Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment/Brief in Support of Complaint for Judicial Review of Administrative Action complies with Local Rule 7.1(b)(1).

I further certify that in preparation of this Memorandum, I used Microsoft Office Word 2010, and that this word processing program has been applied specifically to include all text, including headings, footnotes and quotations in the following word count.

I further certify that the above-referenced Memorandum contains 11,744 words.

/s/ Meredith A. Moore