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

BETTOR RACING, INC. and J. RANDY GALLO,

Plaintiffs,

v.

NATIONAL INDIAN GAMING COMMISSION,

Defendant,

and

FLANDREAU SANTEE SIOUX TRIBE,

Intervenor.

Case 4:13-cv-04051-KES

FLANDREAU SANTEE SIOUX TRIBE'S COMBINED MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF THE TRIBE'S CROSS-MOTION FOR SUMMARY JUDGMENT

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This Court granted the Flandreau Santee Sioux Tribe ("Tribe") leave to intervene in this case to support the Final Decision and Order of the National Indian Gaming Commission ("NIGC" or "Commission"), which concluded that Plaintiffs Bettor Racing, Inc. and J. Randy Gallo (collectively "Bettor Racing") violated provisions of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, and assessed against them a $5 million civil fine. The Tribe submits this brief opposing Bettor Racing's motion for summary judgment (Doc. No. 52), and in support of the Tribe's cross-motion for summary judgment on Bettor Racing's claims under the Administrative Procedure Act ("APA").

Bettor Racing bears the heavy burden of showing that the Commission's decision is arbitrary, capricious, or not in accordance with the law under the APA. 5 U.S.C. § 706. Bettor Racing has failed to demonstrate any basis on which the Court should disturb the Final Decision and Order of the NIGC. Based on the undisputed material facts, as a matter of law the Court should enter judgment in favor of the NIGC and against Bettor Racing on Bettor Racing's APA claims.

FACTS AND PROCEDURAL BACKGROUND

I. Undisputed Material Facts

The undisputed material facts are identified in the Tribe's Statement of Material Facts filed concurrently herewith. The facts on which the NIGC relied for its Decision are enumerated at pages 7 to 13 of the Presiding Official's Recommended Decision. AR0003021-27. The NIGC again recited the facts in its Final Decision, essentially mirroring those listed in the Recommended Decision, with minor differences. AR0003045-48. There is no genuine dispute as to any of these facts, and there are no other facts material to the NIGC's Decision that are in dispute.

II. Response to Bettor Racing's Statement of Facts

In its Memorandum of Law in support of its summary judgment motion ("Mem."), Bettor Racing identifies purported undisputed facts in its favor, or disputed facts that it claims should have precluded the agency's summary judgment, none of which are material to the issues before the NIGC. The immaterial facts on which Bettor Racing focuses largely concern whether Bettor Racing knew its actions were unlawful, and whether it intended to violate IGRA and tribal law. Knowledge and intent, however, are not necessary elements of Bettor's violations. The Tribe discusses this issue in more detail in its Argument below.

In addition, Bettor Racing identifies other purported facts that have no basis in the record. For instance, Bettor Racing states:

> The Tribe's counsel advised Bettor Racing that it would take some time for the NIGC to approve the management agreement, but that it could operate under the terms of a consulting agreement pending NIGC approval. [Citations to AR.] 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. [Citations to AR.]

Mem. at 2-3. None of Bettor Racing's citations to the record reflect that the Tribe "advised" Bettor Racing that it would be allowed to operate a gaming activity while the Management Agreement was not approved by the NIGC.[1]

[1] Bettor Racing cites the following: AR0000723 is four pages from the draft transcript of Terry Pechota's deposition, containing no reference to the September 20, 2004 consulting agreement. AR0001784-85 are pages from Gallo's deposition transcript, in which he simply identifies the September 20, 2004 consulting agreement. AR0000004 is an April 12, 2004, faxed communication from Terry Pechota to NIGC Chairman Phil Hogen, including a handwritten message signed with the initials "PH," for Phil Hogen. It contains no reference to the Tribe or Bettor Racing being allowed to operate without an approved management contract. AR0001762-66 are additional pages from the Gallo deposition, in which there appears to be no reference at all to the consulting agreement or the legality of operating under that agreement rather than one approved by NIGC.

As another example, Bettor Racing asserts that when the State of South Dakota reduced its tax on pari-mutuel gaming revenue, 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." Mem. at 3 (emphasis added). The record citation is "*Id*.," which refers to AR0001821-22, pages from Gallo's deposition transcript. There, Gallo recounts his conversation with the Tribe:

> I told them that either an amendment would have to be made to my contract or I would not be staying at Flandreau, but I would honor the $300,000 guarantee on $30 million for the remainder of the contract. I presented figures to Terry and Rollie and showed them that with this move I can expand the handle tremendously, okay.

AR0001822 (emphasis added). In his deposition testimony, Gallo did not indicate Bettor Racing would be unable to generate the expected revenue. He stated that Bettor Racing now had the opportunity to generate "tremendously" higher revenue, if only the Tribe would release it from the terms of the Management Agreement.[2] Bettor Racing cites nothing in the record that indicates Bettor Racing would have been unable to stay in business or to maintain its tribal payments if it remained at the Royal River Casino.

[2] In point of fact, it is more likely that only Bettor Racing's *profits* would have been affected. Bettor Racing could have adjusted its player incentives to match those now possible under the lower South Dakota taxes, thereby maintaining or increasing revenue. The richer player incentives would have increased operating costs with no offsetting decrease in state taxes/tribal fees, reducing the net revenue of which Bettor Racing received a share.

Bettor Racing's characterization that it would "honor the $300,000 guarantee" is misleading as well, though the issue is far more material to the Tribe's suit against Bettor Racing than to Bettor Racing's challenge of the NIGC's Decision. In short, the Tribe vigorously disagrees that payment of the annual minimum would suffice to "honor the existing Management Agreement." Mem. at 3-4. It is the Tribe's view that as a matter of law the Management Agreement required more of Bettor Racing than simply making the minimum annual payment.

III. Procedural History

The NIGC conducted a management contract compliance review in August 2009. See AR0002512. On May 19, 2011, Chairwoman Stevens served a Notice of Violation ("NOV") to Gallo, Bettor Racing, Inc., the Tribe, and the Tribe's Gaming Commission, based on evidence from the NIGC's investigation. AR0002510. As to Gallo and Bettor Racing, the NOV stated they had: (1) managed a tribal gaming operation without an approved management contract; (2) managed a tribal gaming operation under two unapproved modification to a management contract; and (3) held a proprietary interest in the tribal gaming operation. AR0002510-11. Each of these actions violated IGRA and NIGC regulations. *Id.*[3] The NOV ordered Bettor Racing to reimburse the Tribe $4,544,755, the amount paid to Bettor Racing in excess of what was owed under the management contract. AR0002530-31. The parties engaged in mediation which was ultimately unsuccessful. AR0002654.

On February 10, 2012, the Chairwoman issued a Civil Fine Assessment ("CFA") against Gallo and Bettor Racing, Inc. AR0002665-73. The Chairwoman proposed that Bettor Racing be fined a total of $5,000,000. AR0002672-73.

Bettor Racing appealed the NOV and CFA to the full Commission pursuant to 25 C.F.R. Part 577. AR0002540, 2942. The Tribe intervened in the appeals, which the NIGC Presiding Official consolidated to be considered together. AR0002545; *see* AR0002991 (noting Tribe's petition to intervene in CFA appeal and ordering appeals consolidated). The Chairwoman and

[3] The NOV stated the Tribe and its Gaming Commission (1) permitted Bettor Racing to operate without an approved management contract; (2) operated under two unapproved modifications to a management contract; (3) failed to timely submit required management letters; and (4) paid net revenues to Bettor Racing in exceeding the amount allowed under the approved management contract and for a purpose not allowed under IGRA and the Tribe's Gaming Ordinance. AR0002511. The Tribe and NIGC reached a settlement as to the Tribe's portion of the NOV. AR0002611-16.

the Tribe both moved for summary judgment upholding the NOV against Bettor Racing. AR0002674-2803. Bettor Racing opposed both motions and submitted evidence in support of its position. AR0002805-2940. The Chairwoman and the Tribe also moved for summary judgment upholding the CFA, which Bettor Racing again opposed.

The NIGC Presiding Official considered the motions and issued a Recommended Decision on August 13, 2012, recommending that the Commission grant summary judgment in favor of the Chairwoman, upholding the NOV and CFA. AR0003015-42. On September 12, 2012, the Commission issued its Final Decision granting judgment in favor of the Chairwoman. AR0003043-61.

ARGUMENT

I. Legal Standards

A. Administrative Procedure Act Standard of Review

Under 5 U.S.C. § 706, a court reviewing the action of an 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 … arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). "The arbitrary and capricious standard is a narrow one that reflects the deference given to agencies' expertise within their respective fields." *Sugule v. Frazier*, 639 F.3d 406, 411 (8th Cir. 2011).

The court should abide by the agency's factual findings if they are "supported by substantial evidence." 5 U.S.C. § 706(2)(E). This is a "deferential" standard, under which "the agency's findings of fact are not supported by substantial evidence only where the evidence 'not only supports a contrary conclusion but compels it.'" *Sugule v. Frazier*, 639 F.3d at 411 (quoting *Sultani v. Gonzales*, 455 F.3d 878, 881-82 (8th Cir. 2006)). The Court "ask[s] only

whether there is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Dawson Farms v. Risk Management Agency*, 689 F.3d 1079, 1084 (8th Cir. 2012) (quoting *Valkering, USA, Inc. v. USDA*, 48 F.3d 305, 307 (8th Cir. 1995)).

B. Summary Judgment Standard

Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). Evidence is "viewed in the light most favorable to the nonmoving party." *True v. Nebraska*, 612 F.3d 676, 679 (8th Cir. 2010).

To prevail in its motion, Bettor Racing must show that based on the undisputed facts and as a matter of law, NIGC's Decision was arbitrary and capricious. Bettor Racing must show that the evidence before NIGC *compels* a contrary conclusion.

Because NIGC's Decision took the form of a summary judgment, Bettor Racing seeks to show that genuine disputes as to material facts existed at the time of the agency's adjudication, and that this should have precluded NIGC from granting summary judgment to the Chairwoman and the Tribe.[4] In other words, to prevail on its motion Bettor Racing must show that the undisputed facts demonstrate as a matter of law that when NIGC made its Decision, material facts were disputed. A fact is "material" only if it "might affect the outcome of suit under the governing law…. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). *See also Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 892 (5th Cir. 1980) ("A fact is material if it constitutes a legal defense to an

[4] To be precise, the NIGC Final Decision affirmed (pursuant to 25 C.F.R. § 577.15) the Recommended Decision of the Presiding Official (pursuant to 25 C.F.R. § 577.14(a)), which recommended granting the Chairwoman's and Tribe's motions for summary judgment. AR0003015-42, AR0003043-59. The Recommended Decision and Final Decision both analyzed the summary judgment motions using the familiar standards of Fed.R.Civ.P. 56 and associated case law. AR0003020-21, AR0003050.

action.") Where the nonmoving party bears the burden of proof on a dispositive issue, such as Bettor Racing's affirmative defenses before the agency, that party must designate specific facts showing that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). If a nonmovant "cannot present facts essential to justify its opposition," it must show as much by affidavit or declaration specifying the reasons the facts are unavailable, and the court (or in this case the agency) may allow time for discovery or issue other appropriate orders. Fed.R.Civ.P. 56(d).

II. NIGC's Findings Were Based on Substantial Evidence and its Decision Was Reasonable.

A. Statutory Background

1. *Indian Gaming Regulatory Act*

Congress enacted the Indian Gaming Regulatory Act ("IGRA") to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). IGRA also provides "a statutory basis for the regulation of gaming by an Indian tribe adequate to … ensure that the Indian tribe is the primary beneficiary of the gaming operation." 25 U.S.C. § 2702(2). "IGRA effects these goals in part by providing for federal oversight of contracts between tribes and non-tribal entities for the management of tribal gaming operations." *First Am. Kickapoo Operations, LLC v. Multimedia Games, Inc.*, 412 F.3d 1166, 1167-68 (10th Cir. 2005).

The Chair of the NIGC must review and approve all contracts for the management of tribal gaming activities. 25 U.S.C. §§ 2711(a)(1), 2710(d)(9); 25 C.F.R. § 533.1. IGRA mandates that management contracts meet certain criteria. 25 U.S.C. § 2711(b), (c), (g); 25 C.F.R. §§ 531.1, 531.2. For example, IGRA generally caps management fees at thirty percent of the net revenues of the gaming activity, unless certain conditions are present. 25 U.S.C. §

2711(c); 25 C.F.R. § 531.1(*i*).[5] Management contracts that are not approved by the NIGC Chair are void *ab initio* and unenforceable. 25 U.S.C. §§ 2711(a)(1), 2710(d)(9); 25 C.F.R. § 533.7; *Wells Fargo Bank, N.A. v. Lake of the Torches Economic Development Corp.*, 658 F.3d 684, 699-700 (7th Cir. 2011); *First Am. Kickapoo Operations, LLC v. Multimedia Games, Inc.*, 412 F.3d at 1168. A management contractor's operation of a gaming activity without the NIGC Chair's approval of a management contract is a violation of IGRA. 25 U.S.C. §§ 2711(a)(1), 2710(d)(9).

IGRA authorizes the NIGC Chair to levy and collect civil fines against management contractors who violate any provision of IGRA, any NIGC regulation, or any approved tribal gaming ordinance. 25 U.S.C. § 2713(a)(1). The NIGC Chair may fine violators up to $25,000 per daily violation. *Id.*, 25 C.F.R. § 575.4. Fines levied by the Chair are subject to appeal and hearing before the full Commission. 25 U.S.C. § 2713(a)(2). The Commission's decision is subject to judicial review under the APA. 25 U.S.C. § 2714.

2. *Flandreau Santee Sioux Tribal Gaming Ordinances*

IGRA requires that before an Indian tribe can engage in casino-style gaming, it must enact—and obtain NIGC approval of—a tribal gaming ordinance. 25 U.S.C. §§ 2710(b)(1)(B), 2710(d)(1)(A). Among other things, a tribal gaming ordinance must provide that the "Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity," and that net gaming revenues will be used only for the purposes authorized in IGRA. 25 U.S.C. § 2710(b)(2)(A)-(B).

[5] IGRA defines net revenues as "gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees." 25 U.S.C. § 2703(9). *See* 25 C.F.R. § 502.16.

The Tribe enacted a gaming ordinance that incorporates these mandatory provisions and obtained NIGC approval of the ordinance in 1994, with amendments approved in 1999. The Flandreau Gaming Ordinance includes the following relevant requirements:

> All gaming activities shall be conducted under the exclusive control and responsibility of the Flandreau Santee Sioux Tribe.
>
> All proceeds of the gaming activities authorized by this ordinance and received by the Tribe shall be used to promote the health, education and welfare of the Flandreau Santee Sioux Tribe.
>
> The Flandreau Santee Sioux Tribe shall receive at least sixty percent (60%) of the net revenues of all gaming activities conducted pursuant to this ordinance.

Flandreau Gaming Ordinance § 17-6-1(2) to (4); *see* AR0002384.

In addition to its general Gaming Ordinance, the Tribe enacted an ordinance specific to off-track betting, the Flandreau Pari-mutuel Betting Ordinance, which the NIGC approved on June 21, 2004. AR0002394-2430. The Pari-mutuel Betting Ordinance incorporates all the provisions of the general Gaming Ordinance. Flandreau Pari-mutuel Betting Ordinance § 2; *see* AR0002403. The Ordinance expressly reiterates the requirement that "the Flandreau Santee Sioux Tribe shall have the sole proprietary interest in and responsibility for the conduct of pari-mutuel betting on Tribal lands." Flandreau Pari-mutuel Betting Ordinance § 4; *see* AR0002404.

B. NIGC reasonably concluded that as a matter of law Bettor Racing's undisputed actions violated IGRA and tribal law.

1. *First Violation: Bettor Racing managed the Tribe's Pari-Mutuel Gaming Operation without an Approved Management Contract.*

It is undisputed that despite the absence of an approved management contract, Bettor Racing managed the OTB at the Tribe's casino from September 2004 to March 2005. In fact, Gallo admitted as much:

> Gallo: I operated for six months at Flandreau without a contract.

> Melissa Schlichting:[6] Okay. From September –
>
> Gallo: –24th through March 17 of '05.

AR0001772, lines 13-16.

> Gallo: I know that we operated there six months [without a contract approved by NIGC] and everyone was happy."

AR0001780, lines 23-25.

On September 20, 2004, the Tribe and Gallo entered into a consulting agreement whereby Gallo was to merely "consult, advise, recommend, and undertake such action as reasonably required by the Tribe" in the operation of the OTB prior to approval of the management contract. AR0001784, line 14, to AR0001786, line 11; AR0002009-10. Upon approval of the management contract by the NIGC Chair, the consulting agreement was to have "automatically terminated and the pari-mutuel operation at the Royal River Casino will be managed and operated by Randy Gallo pursuant … to the management agreement." AR0002009. The parties were expressly not operating under the terms of the management contract and federal law. The contract contained this provision:

> Randy Gallo will manage the Tribe's pari-mutuel operation pursuant to this agreement and not under the management agreement that is currently under consideration by the National Indian Gaming Commission…. During the time that the pari-mutuel operation at the Royal River Casino is being conducted under this agreement, Randy Gallo shall be paid the sum of $1.00 per month as a consultant who shall be deemed an independent contractor.

AR0002009.

In fact, Gallo did more than provide advice. Upon opening the OTB on September 24, 2004, Bettor Racing began managing the OTB by accepting wagers on behalf of patrons at the Casino, accepting wagers placed over the telephone and managing OTB employees.

[6] Ms. Schlichting is an attorney for the NIGC.

AR0001787, line 12, to AR0001795, line 22; AR0002181, line 11, to AR2182, line 9. Additionally, Bettor Racing determined the amounts of the salaries and bonuses for all OTB employees' salaries. AR0001868, line 21, to AR0001869, line 5. Instead of operating pursuant to the net revenue sharing terms of the not-yet approved management contract (and federal law), Bettor Racing paid the Tribe only one percent of the gross handle.

> Gallo: They went with my proposal and I paid them one percent on my handle.

AR0001786, lines 3-4. *See also* AR0001903, line 21, to AR0001904, line 15.

There is no genuine dispute as to the material facts that support the NIGC's conclusion that Bettor Racing managed a tribal gaming operation without an approved management contract from September 2004 to March 2005. As a matter of law, this constitutes a violation of IGRA. Accordingly, the Commission's judgment in favor of the Chairwoman on the first violation was reasonable.

2. *Second Violation: Bettor Racing Managed the Tribe's Pari-Mutuel Gaming Operation under Two Unapproved Modifications to the Management Contract.*

Once a management contract has been approved by the NIGC Chair, any attempt by the parties to modify the contract is void without further review and approval by the Chair. 25 C.F.R. § 535.1(f); *Turn Key Gaming, Inc. v. Oglala Sioux Tribe*, 164 F.3d 1092, 1094 (8th Cir. 1999). The operation of a gaming activity pursuant to a modified management contract that has not been approved by the NIGC Chair is a violation of IGRA. 25 U.S.C. §§ 2711(a)(1), 2710(d)(9); 25 C.F.R. § 535.1(a).

The approved management contract split the OTB's net revenue between the Tribe and Bettor Racing on a sliding scale. Bettor Racing was to collect a fee of 30 to 40% of net revenue, while the Tribe was to collect 60 to 70%. AR0000800-802. This provided Bettor Racing the

maximum lawful share of the net revenues pursuant to IGRA and tribal law. 25 U.S.C. § 2711(c); 25 C.F.R. 531.1(*i*). Gallo "wasn't happy with [the split] at all." AR0001768, lines 1-24. But he accepted the deal at first because operating at the Tribe's casino allowed Bettor Racing to avoid South Dakota's 4.5% tax on the gross handle of pari-mutuel betting operations. AR0001753, lines 9-18; AR000, lines 3-19. The Tribe's minimum share on telephone betting was only 1% of the gross handle. AR0000801. Working with the Tribe also provided Bettor Racing with other benefits such as a secure location at the Tribe's casino. AR0001843, line 16, to AR0001844, line 17. "It was still better than any offer I had on the table." AR0001771, lines 18-19.

Then South Dakota reduced its tax rate to just one-quarter percent of gross handle. AR0001821, line 25, to AR0001822, line 2. Because Bettor Racing could now get a better deal outside tribal jurisdiction, Gallo approached the Tribe in the fall of 2005 and, in his words, "told them that either an amendment would have to be made to my contract or I would not be staying at Flandreau, but I would honor the $300,000 guarantee on $30 million for the remainder of the contract." AR0001822, lines 4-8. *See also* AR0001824, lines 13-17 ("I would honor my contract for the guarantee and other than that I'd be going back to Sioux Falls where it would be a quarter on everything").

Payment of the "$300,000 guarantee" would not have fulfilled Bettor Racing's contractual obligation to the Tribe. Bettor Racing promised to "operate a minimum of 12 hours per day, Monday through Saturday, 9 hours on Sunday, seven (7) days a week," for a term of 60 months. AR0000774, AR0000778, AR0000786. It promised to conduct the OTB "in the best interest of the Tribe and Manager." AR0000780. To abandon the operation after less than one year would have constituted a default in the performance of a material condition. AR0000810.

This breach of contract would have left the Tribe without the pari-mutuel operation its casino patrons desired, deprived the Tribe of the revenues it expected from an OTB operating with its best efforts, and resulted in an appreciable drop in reservation employment.

Bettor Racing intended to breach the management contract unless the Tribe gave it a better deal. To avoid this result, the Tribe's then-counsel and Mark Lyons, Bettor Racing's accountant, devised a check swap arrangement in which Bettor Racing "would give the Tribe a check to be in compliance with the management agreement and then the Tribe would issue [Bettor Racing] a check back for the same amount." AR0001825, lines 8-11; AR0001828, lines 4-9; AR0001845, line 17, to AR0001846, line 20; AR0002051. The check to Bettor Racing would be "in the form of a bonus to [Gallo] as a consultant or reward on my good work." AR0001826, lines 12-14. The check swap effectively lowered the Tribe's guaranteed minimum to 0.5 percent of the gross handle. AR0001843, lines 10-25. Assured of collecting a greater share of the revenue, Bettor Racing agreed to stay in Flandreau, and operated under the modified contract until 2008.

In 2008, business conditions changed again for Bettor Racing when horse tracks increased the fees they charged off-track facilities. AR0001870, line 19, to AR0001871, line 17. Once again, Gallo told the Tribe:

> I'm only staying here if I'm promised that there's no other expenses other than the Tribe getting the guarantee and a quarter of percent thereafter. I said, I can go back to South Dakota anytime and go with a quarter of a percent on my handle.
>
> Again they promised me, we'll get around it, don't worry about it. There will be a check swap and so on.
>
> I said, you're a hundred percent sure? One hundred percent sure.
>
> There would be no reason for me to stay there, okay, unless this would be guaranteed. If it wasn't, then I would give them the $300,000, I would

> keep $30 million of the business at Flandreau and the remaining, that 140 million I would take it to South Dakota. I had no problem with that.

AR0001874, line 25, to AR0001875, line 17.

The Tribe lowered its guaranteed minimum again, to 0.25 percent of gross handle, and again the difference between this modification and the management contract approved by NIGC was reconciled through the check-swap arrangement. AR0000972; AR0001895, lines 12-20. Bettor Racing operated the pari-mutuel operation pursuant to the second modification from August 1, 2008 to March 16, 2010. Neither the first nor the second modification was approved by NIGC. AR0000733-34. Gallo understood the NIGC would not have approved the modifications that required increased revenues for Bettor Racing and that the check swap allowed Bettor Racing and the Tribe to "work around" the restrictions of the approved management contract. AR0002137, lines 1-22; *see* AR0002051.

In Gallo's words, "it wasn't discretionary" for the Tribe to pay Bettor Racing its so-called bonuses. AR0001894, line 4. "If they're not going to swap checks I'll be leaving." *Id.*, lines 7-9. Gallo made abundantly clear to the Tribe that Bettor Racing required a larger share of the revenues or he would take his business elsewhere, breaching the terms of the management contract. Bettor Racing extracted from the Tribe a promise to give back to Bettor Racing almost all the money due to the Tribe under the NIGC-approved management contract, and for years, the Tribe gave most of the money back to Bettor Racing just as soon as it came to the Tribe. Bettor Racing's protestations that it only acted in good faith are belied by its conduct toward the Tribe, with Gallo twice warning the Tribe he would simply default on Bettor Racing's contract obligations rather than accept the agreed-upon revenue split, which already gave Bettor Racing the maximum share the law allowed.

It is undisputed that Bettor Racing and the Tribe modified the approved management contract in 2006, and that the NIGC Chair never approved this first modification. It is undisputed that Bettor Racing managed the OTB under the first modification from as late as February 15, 2007, to July 31, 2008 (though the modified payments were retroactive to April 2006). There is no genuine dispute as to these material facts. The NIGC reasonably concluded on this basis that as a matter of law, Bettor Racing violated IGRA and tribal law by operating the OTB under this unapproved modification.

Bettor Racing again does not dispute that on August 1, 2008, the management contract was modified a second time. There is no dispute that Bettor Racing operated the OTB pursuant to the second modification from that date through the remainder of the term of the management contract. Furthermore, it is undisputed that the NIGC Chair never approved the second modification. Consequently, the NIGC reasonably decided that Bettor Racing's actions violated IGRA and the Tribe's Gaming Ordinances as a matter of law.

3. *Third Violation: Bettor Racing Held a Proprietary Interest in the Tribe's Pari-Mutuel Gaming Operation.*

"One of the provisions of IGRA requires that an Indian tribe have the 'sole proprietary interest' in any Indian gaming activity authorized by the act, as well as the exclusive control and responsibility for it." *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 702 F.3d 1147, 1150 (8th Cir. 2013) (quoting 25 U.S.C. § 2710(b)(2)(A)). Flandreau Santee Sioux Tribal law provides the same. Flandreau Pari-mutuel Betting Ordinance § 4, *see* AR0002404; Flandreau Gaming Ordinance § 17-6-1(4), *see* AR0002384. The sole proprietary interest requirement promotes the primary purposes of IGRA: 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" and "to ensure that the Indian tribe is the primary beneficiary of the gaming operation." 25 U.S.C. §§ 2702(1) and (2).

Based on the undisputed material facts, the NIGC was correct to conclude as a matter of law that Bettor Racing's receipt of excessive revenues and its level of control over the gaming operation violated the requirement of federal and tribal law that the Tribe must have the sole proprietary interest in and responsibility for the gaming operation.

NIGC's examination of whether the sole proprietary interest requirement has been violated embraces three criteria: "1) the term of the relationship; 2) the amount of revenue paid to the third party; and 3) the right of control provided to the third party over the gaming activity." AR0003052. The Decision in this matter focused on the latter two criteria.

With respect to the third criterion, control, the record is clear that Gallo never believed that he was only a "manager" as that term is understood under IGRA, but rather considered himself the owner of the pari-mutuel gaming operation at the Tribe's casino.

> Ms. Schlichting: When you moved the operations to the casino and opened it as Royal River racing what was your understanding as to who owned the operation?
>
> ...
>
> Gallo: I was told the Santee Sioux Tribe owned it.
>
> Ms. Schlichting: But not Royal River Racing?
>
> Gallo: I owned Royal River Racing.
>
> …
>
> Ms. Schlichting: Was it ever your understanding that the Tribe actually owned the off-track betting?
>
> Gallo: No.

AR0001835, line 13, to AR0001836, line 7.

The NIGC has found violations in prior cases where the consent of third parties was required for decisions that should belong to the Tribe. *See, e.g., In Re Fond du Lac Band of Lake Superior Chippewa*, NIGC, NOV-11-02, p. 8 (Tribe may not modify its gaming ordinance or regulations, or make licensing decisions, without consent of City of Duluth).[7] Bettor Racing's control over the OTB operation in this case is far greater than a mere consent requirement. Gallo not only considers Bettor Racing to have *owned* the OTB, but also admits that Bettor Racing exercised complete control over the OTB operation, hiring and paying employees, adopting unique employment policies, making all accounting and financial decisions, and maintaining a separate bank account. *See* Statement of Material Facts, ¶¶ 21, 22. Bettor Racing essentially operated the OTB independent of the Tribe. This is a level of control held only by one with a proprietary interest in the operation.

Bettor Racing makes the mystifying argument that the NIGC was incorrect to "equate[] ownership with sole proprietary interest." Mem. at 22. Reference to the nearest dictionary shows a "proprietary interest" *is* an "ownership" interest. *See* "Proprietary," www.merriam-webster.com/dictionary/proprietary (as an adjective, "of or like that of an owner"). *See also City of Duluth v. National Indian Gaming Commission*, --- F.Supp.2d ----, 2013 WL 6654079, *9 (D.C. D.C. Dec. 18, 2013) (in deciding to issue NOV for violation of "sole proprietary interest" requirement, "the NIGC necessarily considered the ownership interests of other parties in the gaming operation and whether they were too great"). IGRA requires that an Indian tribe be the sole owner of a gaming activity. Bettor Racing also argues that the Tribe had "access" to the OTB and that "[p]ersonnel of the Royal River Casino had frequent interaction with Bettor Racing personnel." Mem. at 23. These facts do little to diminish the level of control that Bettor

[7] Available at http://www.nigc.gov/Reading_Room/Enforcement_Actions.aspx.

Racing exercised over the operation, and the ways in which the OTB was treated as a separate enterprise from the rest of the Tribe's casino.

The second criterion, revenue, also plainly shows Bettor Racing held a proprietary interest in the OTB. Bettor Racing collected far more of the OTB's net revenue than the Tribe did, and far more than allowed by federal and tribal law. IGRA limits management contractors' fees to 30% of net revenues, or up to 40% for projects involving exceptional risk. 25 U.S.C. § 2711(c). By means of the extra-contractual check swapping scheme, Bettor Racing pocketed 65% of the OTB's net revenue in 2005, 75% of net revenue in both 2006 and 2007, and 78% of net revenue in 2008. AR0002263. In fact, Bettor Racing kept more than twice the maximum share typically allowed for managers under IGRA and the NIGC's regulations. *See* 25 U.S.C. § 2711(c); 25 C.F.R. § 531.1(*i*). Bettor Racing kept nearly twice the share permitted by the Tribe's Gaming Ordinance. Flandreau Gaming Ordinance § 17-6-1(4), *see* AR0002384. Gallo was fully aware the check swap would allow Bettor Racing to receive revenue exceeding the fee allowed by law:

> Ms. Schlichting: Was it your understanding that in doing the check swaps at the end of the year when the audit had finally been completed, that that would result in a reduction of the 60/40, 70/30 split?
>
> Gallo: It would wipe it out.

AR0001894, line 25, to AR0001895, line 5.

Bettor Racing now disputes the conclusion that its fees exceeded the statutory maximum. It argues that the annual bonus paid to Bettor Racing was permissible because "there is nothing in the NIGC or IGRA regulations that precludes the giving of a bonus" and that "the regulation expressly permits the Tribe to use its revenue for economic development." Mem. at 23, 24. In Bettor Racing's view, "[t]here was a genuine issue of fact as to whether the discretionary bonus constituted a legitimate expenditure for the Tribe's economic development." Mem. at 25.

The NIGC correctly concluded that IGRA does not permit a management contractor to receive more than 30% of net gaming revenues (or 40% in exceptional circumstances), even if the excess revenues are characterized as a "bonus" paid to the contractor for the purpose of the Tribe's economic development. The NIGC's construction of IGRA is founded on Congress's unambiguous intent, to which the agency and the Court must give effect. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *Nebraska ex rel. Bruning v. U.S. Dept. of Interior*, 625 F.3d 501, 514 (8th Cir. 2010) (discussing *Chevron* analysis). Even if IGRA were considered ambiguous with respect to this issue, the Court must accept the NIGC's interpretation as a "permissible construction of the statute." *Chevron*, 467 U.S. at 843; *see Citizens Exposing Truth about Casinos v. Kempthorne*, 492 F.3d 460, 465-66 (D.C. Cir. 2007) (deferring to NIGC interpretation of IGRA); *United States v. Seminole Nation of Oklahoma*, 321 F.3d 939, 945 (10th Cir. 2002) (NIGC's interpretation of IGRA entitled to deference); *Shakopee Mdweakanton Sioux Community v. Hope*, 16 F.3d 261, 264 (8th Cir. 1994) (deferring to NIGC application of IGRA).

The interpretation is eminently reasonable. While it is true that IGRA allows a Tribe to use its gaming revenue for economic development, Bettor Racing's interpretation that the gaming revenue could be funneled back to a management contractor would effectively eliminate the statutory maximum share of revenue that may be paid to a management contractor. IGRA was enacted to ensure that Indian tribes, not management contractors, are the primary beneficiaries of their gaming operations. NIGC reasonably concluded that Congress did not intend to allow Indian tribes to give away the bulk of their profits, defeating the entire purpose of Indian gaming itself, to the non-Tribal gaming operator whose fee is capped by law at thirty or forty percent. Congress insisted that no management contract can take effect until the

Commission assures itself that the fee is "reasonable in light of surrounding circumstances," and as a rule not more than 30% of net revenues. 25 U.S.C. § 2711(c)(1). Even raising the fee from 30% to 40% – the absolute maximum – requires the Chair to be satisfied that the additional fee is "require[d]" by the capital investment and the income projections for the gaming activity. 25 U.S.C. § 2711(c)(2). *See First Am. Kickapoo Operations, LLC v. Multimedia Games, Inc.*, 412 F.3d at 1173, fn.3 ("It is only when the NIGC Chairman determines that the capital expenditure and income projections associated with a project justify a higher fee than forty percent may be charged."). If Congress put in place these strict constraints on management contractor fees, and a system for ensuring compliance, with the aim of maximizing Tribal returns on gaming activities, then it is ludicrous to conclude that Congress simultaneously intended to allow a manager to circumvent these constraints, simply by distributing to the Tribe its lawful share of revenues on the condition that the Tribe immediately return most of the money.

Moreover, Bettor Racing's characterization of the payment of excess revenues as a "bonus" is not supported by the record. To call the payments a bonus suggests they were made at the Tribe's discretion, beyond what was promised. These payments, though, were the essence of the Tribe's promise to Bettor Racing in the unapproved modifications; they were not discretionary.

> Ms. Schlichting: Was the bonus payment or check swapping that was done between the Tribe and Bettor Racing, were you ever told that that was discretionary?
>
> Gallo: It wasn't discretionary as far the amendments go. [The tribal attorney] always said that it was the Tribe's discretion. And I said to him, I said, well, if the payment – I mean if they're not going to swap checks I'll be leaving. … So the only reason I was staying there is I was going to be getting a check swap at the end of the year for whatever – to be in compliance with the NIGC. There would be no other reason to stay there.

AR0001893, line 25, to AR0001894, line 24.

> Ms. Schlichting: Was it ever mentioned at any time that the bonus was discretionary?
>
> Gallo: Yes, and I asked what that meant. And they said the Tribe could change its mind anytime they wanted. And I said, well, then I'm not interested in going forward. And he said, that's the way it has to be worded to be in compliance with the NIGC.
>
> Ms. Schlichting: And so you went forward with the discretionary bonus –
>
> Gallo: Because I was promised that I would – there would be a check swap.
>
> Ms. Schlichting: So in your mind, it wasn't discretion, it was agreed to change the compensation under the contract.
>
> Gallo: Right. If there was no check swap I would not have stayed there.

AR0002109, line 24, to AR0002110, line 15.

> Ms. Schlichting: Did you not consider [the check swap payments] to be discretionary?
>
> Gallo: They weren't discretionary and everyone knows it.

AR0002136, lines 6-9. The bonus payments were not made to reward Bettor Racing for its achievements in building the business, but rather to prevent Bettor Racing from prematurely cutting out on the Tribe in breach of their contract.

Additionally, Bettor Racing justifies the receipt of bonus payments because they "permitted Bettor Racing to not only sustain the level of its business, but to increase its business, correspondingly increasing revenue" for both Bettor Racing and the Tribe. Mem. at 24-25. Again, this is not material. Even if it were true that the Tribe benefitted because Bettor Racing received 65% to 78% of the net gaming revenues (and Bettor Racing has not submitted any evidence that this is true), this fact would not alter the mathematics, and it would not alter the level of control exercised by Bettor Racing.

The NIGC was correct to award summary judgment in the Chair's favor on the third violation. The undisputed facts demonstrate that Bettor Racing controlled and collected

revenues from the OTB operation to such a degree that as a matter of law it held a proprietary interest in the gaming operation and thereby violated IGRA and tribal law.

C. NIGC reasonably concluded that Bettor Racing did not show any material fact was in dispute.

Bettor Racing points to a number of purported facts in order to establish various affirmative defenses to the violations found in the NIGC's Decision. It argues that the NIGC impermissibly "fail[ed] to view the evidence in the light most favorable to Bettor Racing, [and] it weighted the evidence and placed itself in the position of the trier of fact." Mem. at 12. Bettor Racing claims it never intended to break the law; that it was led astray by the Tribe, the Tribe's lawyers, and the NIGC's Chairman; that its actions benefitted the Tribe and did not damage it. The NIGC reasonably concluded that as a matter of law, these facts could not alter the conclusion that Bettor Racing's acts violated IGRA and Tribal law.

1. *Bettor Racing's assertions of fact concerning its knowledge or willfulness are not material.*

In its Decision the NIGC concluded that "IGRA does not have a scienter requirement." AR0003050. The Commission agreed with the Presiding Official's finding that Bettor Racing had "cited no statutory or regulatory provision, no legislative history, no provision in the Tribe's gaming ordinance, and no agency or judicial case law interpreting IGRA to require intent to deceive or violate the law to establish the violations. … [T]he Chairwoman is neither expressly nor impliedly required to establish wrongful intent or intent to violate the law. In other words, the lack of knowledge cannot be raised as an affirmative defense to a *per se* violation." *Id.* The NIGC therefore did "not consider the Respondent's lack of knowledge as an affirmative defense." *Id.*

The NIGC's conclusion on this point is again based on its construction of IGRA's unambiguous language, by which both the agency and Court must abide. Alternately, even if

IGRA were ambiguous on this point, NIGC's conclusion is a reasonable interpretation of IGRA to which the Court must defer. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 842-43.

Neither IGRA, the NIGC's regulations, nor tribal law requires that no person may *knowingly* operate and manage a gaming activity without a contract approved by the NIGC. *See* 25 U.S.C. § 2711(a); 25 C.F.R. Part 531. The laws do not state that no management contractor may be compensated greater than 40% of net revenues *in willful violation* of IGRA, or that an Indian tribe shall have the sole proprietary interest in any gaming activity unless some non-tribal party owns an interest *and isn't aware* he is violating the law. Instead, the law imposes strict liability.

Bettor Racing incorrectly argues that the NIGC's "power of punishment … makes knowledge a relevant component of the entirety of the inquiry related to both the NOV and CFA." Mem. at 13. But it is not at all uncommon for a statutory or regulatory violation to exist in the absence of a "knowing" or "willful" intent to violate the law. Under the Age Discrimination in Employment Act, for example, an employment policy that discriminates against protected individuals on the basis of age is a violation, regardless of the employer's state of mind, while a "willful" violation can result in double damages. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 124-25 (1985). The Securities Act of 1933 imposes strict liability for making false statements in certain contexts; there is no scienter requirement. 15 U.S.C. §§ 77k(a), 77*l*(a)(2); *see In re Acceptance Ins. Companies Securities Litigation*, 423 F.3d 899, 903 (8th Cir. 2005). The Indian Arts and Crafts Act "has no scienter requirement and 'imposes strict liability for objectively determinable conduct.'" *Native American Arts, Inc. v. Contract Specialties, Inc.*, 754 F.Supp.2d 386, 392 (D.R.I. 2010) (quoting *Native American Arts, Inc. v.*

Mangalick Ent., Inc., 633 F.Supp.2d 591, 597 (N.D.Ill. 2009)). Congress is aware of the difference between requiring an element of willfulness or intent in a statutory scheme, and imposing strict liability. With respect to the management contract rules in IGRA, Congress chose the latter.

The cases Bettor Racing cites on the subject are inapposite. *Carter v. United States*, 530 U.S. 255 (2000) discusses whether a federal bank robbery statute, 18 U.S.C. § 2113, which contains no explicit *mens rea* requirement, nevertheless must be read to contain some scienter element. *Carter v. United States*, 530 U.S. at 267-68. The court held that when inferring a presumption of scienter in a criminal statute, a court must "read into a statute only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Id.* at 269, citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994).

IGRA is not a criminal statute and Bettor Racing is charged with civil, not criminal, violations. The necessity of a scienter requirement of some type only applies to criminal statutes and regulations. *United States v. Project on Government Oversight*, 616 F.3d 544, 549 (D.C. Cir. 2010); *see Morissette v. United States*, 342 U.S. 246, 270 (1952) (observing that criminal conversion requires intent while the civil tort does not).

Furthermore, even applying the rule of *Carter*, it would only be necessary to infer a requirement of general intent, that is, knowledge with respect to the *acts* which constitute the elements of the violations, i.e., managing or operating a gaming activity in the absence of an NIGC-approved contract or amended contract, and a non-tribal entity collecting so much of the gaming revenue or exerting so much control that the entity acquires a proprietary interest. It is conceivable (if unlikely) that these acts could be accomplished without the actor's knowledge (cf. the sleepwalking bank robber, *Carter* at 269), and an implied general intent would prevent

punishment of such innocent actors. Bettor Racing knew it was operating the OTB, knew the terms of its contracts and modifications, and knew the amount of revenue it was collecting every year. Even if it is true that Bettor Racing did not understand that these acts violated the law, that understanding is not an element of the violations and its ignorance is therefore not material and not a defense.

Bettor Racing's other case citations concern federal criminal statutes and causes of action that require a specific intent not found in the laws applicable to the instant proceeding. *See Bryan v. United States*, 524 U.S. 184, 188-89 (1988) (Firearm Owners' Protection Act, requiring that defendant acted "knowingly" or "willfully"), *Ratzlaf v. United States*, 510 U.S. 135, 136 (1994) ("willfully violating" financial transaction provision gives rise to criminal penalties), *United States v. McNair*, 605 F.3d 1152, 1201 fn. 65 (11th Cir. 2010) (mail fraud jury instruction required that defendant "act knowingly and with the specific intent to deceive someone"); *United States v. Kay*, 513 F.3d 432, 439 (5th Cir. 2007) ("willful" mail fraud and corruption); *United States v. Hansen*, 772 F.2d 940, 943 (D.C. Cir. 1985) ("knowingly and willfully" making false statements). In contrast to the statutes at issue in these cases, the requirement that Bettor Racing have acted "willfully" is not found in IGRA, the NIGC regulations, or the Tribe's gaming ordinances.

Bettor Racing claims the NIGC Decision is rife with negative characterizations, "assign[ing] a nefarious and wrongful intent to Bettor Racing." Mem. at 16. Simply reading the Decision shows this is false. The Tribe is unable to locate in the Decision any discussion at all of Bettor Racing's intent, with the sole exception of the NIGC's consideration of Bettor Racing's "negligence or willfulness" in setting the amount of the fine. AR0003057. And there, the NIGC accepted Bettor Racing's version of the facts – "even assuming Respondents believed their

actions were lawful" – and concluded that as a matter of law Bettor Racing nevertheless acted negligently or willfully. *Id.* Furthermore, the NIGC approved of the Chairwoman reducing Bettor Racing's fine "in recognition of the Tribe's part in this matter." *Id.* In short, though Bettor Racing continues its effort to inject the issue of its intent into the consideration of whether its actions violated IGRA, the NIGC was correct to conclude that intent is simply not material.

2. *The facts intended to show the Tribe or its former attorneys lulled Bettor into noncompliance are not relevant to whether Bettor violated the law.*

Bettor Racing argues that not only was it ignorant of the law, but the Tribe was the cause of its ignorance. It assigns fault to the NIGC's statement that "a rational trier of fact could not find Respondents reasonably inferred they had the requisite written approval of the modifications," arguing that "the reasonableness of any assumptions made by Bettor Racing is a consummate question of fact." Mem. at 19; AR0003052. The NIGC's decision, however, plainly does treat the question of Bettor Racing's reasonableness as a factual question, but concludes Bettor Racing failed to produce evidence that showed any genuine dispute as to the facts necessary to make a finding. "Respondents' assertions raise neither genuine nor material issues of fact and there is no reasonable basis for an expectation that anything but the NIGC's formal written approval could authorize the operation of Royal River Racing." AR0003052. In other words, even accepting Bettor Racing's assertion that the Tribe never informed Bettor Racing the modifications were not approved, it was not reasonable under the circumstances for Bettor Racing to act as if the modifications were approved.

Gallo knew it was necessary to comply with NIGC regulations. "If … it's okay with the NIGC it's fine with me. Any other situation and I'm going back to Sioux Falls." AR0001829, lines 20-23. "If I had known the NIGC did not approve of that at the time I would have left there immediately." AR0001863, lines 13-15. As an experienced participant in the gaming industry,

Bettor Racing knew or should have known that the industry is highly regulated, and that its due diligence should have included independently assuring that its contracts and activities complied with all applicable laws. Furthermore, the approved management contract gave Bettor Racing an independent duty to "comply with IGRA, applicable federal law, the Compact and all laws and ordinances of the Tribe and the rules and regulations of the Tribal Gaming Commission…" AR0000783. Based on all the facts in the record and giving Bettor Racing the benefit of any doubt, Bettor Racing failed to show that it would have been reasonable to act is if the contract modifications were approved, with no actual indication that approval was given. Bettor Racing acted under the modifications even though Gallo "never knew whether the NIGC acted on anything." AR0001861, lines 8-12. The NIGC's Decision to this effect was not arbitrary or capricious.

3. *Bettor Racing Has No Plausible Estoppel Defense.*

Bettor Racing alludes to an estoppel argument in its summary judgment memorandum. *See* Mem. at 4, 16, 24, 25, 31. It hints at estoppel in the context of Bettor Racing's operation of the OTB prior to the approval of the management contract, and the legality of the check-swap agreement. The Tribe will simply note that estopping the government from enforcing its valid laws requires at least a showing of a federal official's "affirmative misconduct." *Office of Personnel Management v. Richmond*, 496 U.S. 414, 421-22 (1990); *Bartlett v. U.S. Dept. of Agriculture*, 716 F.3d 464, 475 (8th Cir. 2013). Even accepting the truth of Bettor Racing's assertions (its evidence for which takes the form of hearsay and double hearsay), at most Bettor Racing shows that former NIGC Chairman Phil Hogen informally provided erroneous advice to the Tribe's former counsel about what IGRA allows. NIGC reasonably gave no consideration to Bettor Racing's suggestion that this should exempt Bettor Racing from any requirement to comply with the law.

4. *Bettor Racing has not shown any other facts exist or are likely to exist that the NIGC failed to consider.*

Bettor Racing claims it "never had any opportunity to actively participate or defend itself during the NIGC's 2-year investigation," and that it had no ability to "conduct its own discovery." Mem. at 7, 8. But nothing prevented Bettor Racing from gathering additional facts and submitting to the Chairwoman all the exculpatory evidence it could muster. Bettor Racing participated in the Chairwoman's depositions. IGRA and NIGC regulations allowed Bettor Racing to subpoena its own witnesses for deposition. 25 U.S.C. § 2715(d); 25 C.F.R. § 571.11. It did not seek to do so. Nothing Bettor Racing has said then or now suggests there is additional information either in Bettor Racing's possession or capable of discovery that puts any material fact in dispute.

D. NIGC reasonably assessed a civil fine against Bettor in accordance with the applicable considerations.

1. *NIGC's assessment of the five regulatory considerations was reasonable.*

The Chairwoman is authorized to levy and collect civil fines up to $25,000 per violation against a management contractor engaged in gaming for any violation of IGRA, any NIGC regulation prescribed pursuant to IGRA, or any tribal gaming law approved by the Chairwoman. 25 U.S.C. § 2713(a)(1). Each day on which a violation occurs may be counted as a separate violation. 25 C.F.R. § 575.4(a)(2). Section 575.4 of the NIGC regulations prescribes five factors the Chairwoman must consider before assessing a fine. After considering each of the five factors, the NIGC upheld the Chairwoman's proposed fines in the amount of $1 million for the first violation, $2 million for the second violation, and $2 million for the third violation. The NIGC's findings based on the undisputed facts and its conclusion to uphold the Chairwoman's proposed civil fine assessment were reasonable and supported by substantial evidence.

The first factor for mandatory consideration is "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." 25 C.F.R. § 575.4(a). The economic benefit to Bettor Racing of operating under the unapproved, noncompliant management contracts is undisputed, and it is substantial. It is uncontroverted that between 2005 and 2008, Bettor Racing received at least $4,544,755 in net gaming revenue that under law was due to the Tribe. AR0002258-59. Bettor Racing does not contest that it received this revenue. Nor does it provide any cogent reason the NIGC's consideration of this factor was unreasonable or unfounded, instead repeating its arguments concerning whether it committed the violations of law. Mem. at 27-28. It is undisputed and indisputable that Bettor Racing obtained a massive economic benefit as a result of its violations of IGRA and tribal law. Moreover, the check swap scheme by which Bettor Racing collected its unlawful share of revenues was specifically designed to "escap[e] detection," with Bettor Racing aware that the obligation "could not be in the agreement" because "NIGC would not approve something where the Tribe was required to do this as a matter of contract." AR0002051. *See also* AR0002136, line 6, to AR0002137, line 17.

The regulations' second factor is the "seriousness of the violation," with regard to which the Chairwoman "shall consider the extent to which the violation threatens the integrity of Indian gaming." 25 C.F.R. § 575.4(b). The regulation specifies that operating without an approved management contract is a "substantial violation" that can result in the closure of the gaming operation. 25 C.F.R. § 573.6(a)(7). In other words, the NIGC has determined that as a rule, this type of violation is among the most serious.

It is undisputed that Bettor Racing operated without an approved management contract from September 24, 2004 to March 17, 2005, and operated pursuant to unapproved contract modifications from at least February 15, 2007 through at least the end of 2009. Managing a tribal gaming operation under a contract not approved by the NIGC Chair circumvents an essential safeguard placed in IGRA by Congress. *See* 25 U.S.C. §§ 2710(d)(9), 2711. In the absence of the required review and approval, management contracts may collect fees in excess of the statutory maximum, and Indian tribes may fail to realize the benefits intended by IGRA – "tribal economic development, self-sufficiency, and strong tribal governments," and ensuring "that the Indian tribe is the primary beneficiary of the gaming operation." 25 U.S.C. § 2702. Of course, this was exactly the result of Bettor Racing's management under an unapproved contract. If the "integrity of Indian gaming" depends on the premise that such gaming primarily benefits the Indian tribes, then Bettor Racing's violations certainly threatened that integrity.

Again, Bettor Racing fails to offer any facts suggesting its violations were less than serious. Instead it focuses on the merits of the violations themselves. Mem. at 28-29. The undisputed facts support the NIGC's finding that the second factor, the seriousness of the violations, weighs in favor of affirming the Chairwoman's proposed assessment.

The third factor enumerated in section 575.4 is "the respondent's history of violations over the preceding five (5) years." 25 C.F.R. § 575.4(c). The Tribe is not aware that Bettor Racing has been cited for any other violations, and as the NIGC noted with approval, the Chairwoman's proposed fines took this factor into account. AR0003057.

The fourth factor is "the degree of fault of the respondent in causing or failing to correct the violation, either through act or omission." 25 C.F.R. § 575.4(d). As the heading of subdivision (d) makes clear, the respondent's fault may arise from "negligence or willfulness."

The undisputed evidence shows that Bettor Racing was aware of the need for NIGC approval of its management contract and all modifications to the contract, and yet it commenced operations before the any contract was approved, then operated pursuant to two unapproved modifications. In addition, Bettor Racing was aware of the statutory limit on a management contractor's share of gaming revenue, and yet it arranged a fee structure that allocated far more than the statutory maximum share to Bettor Racing, leaving to the Tribe far less than the minimum share the law requires. Bettor Racing's willful actions in the face of its demonstrated awareness of its statutory duties support the conclusion that Bettor Racing bears a significant degree of fault for causing or failing to correct the violations. The NIGC Decision is more forgiving, allowing that Bettor Racing perhaps "believed their actions were lawful." AR0003057. Even so, Bettor Racing's actions at best lacked ordinary care. There is substantial evidence in the record to support the NIGC's conclusion that Bettor Racing's degree of fault was something greater than insignificant. *Id.*

Bettor Racing lists its disagreements with NIGC's view of the facts, focusing again on shifting blame to the Tribe with respect to the legality of the check-swapping "bonus" payments. Mem. at 30-31. But the facts Bettor Racing contends the NIGC got wrong are not material to whether Bettor Racing acted with recklessness or, more charitably, without ordinary care. Bettor Racing had a separate, affirmative duty to comply with applicable laws, including IGRA, NIGC regulations and tribal law. AR0000783. Bettor Racing was a willing party to the management contract and a willing participant in the check-swap arrangement that diverted huge portions of the Tribe's gaming revenues to Bettor Racing. AR0002258-59. Bettor Racing threatened to leave the tribal gaming operation in breach of its contract, and later affirmed that it would indeed have left, if its share of the gaming revenues were not increased. AR0001822, lines 4-17;

AR0001893, line 25, to AR0001894, line 24; AR0002109, line 24, to AR0002110, line 15. Bettor Racing began operating the gaming activity and continued to do so with, at best, blithe disregard for whether its actions complied with the law, despite its statutory and contractual duties to ensure its own compliance. In short, the fact that the Tribe was a participant with Bettor Racing in the acts for which both were cited for violations does nothing to reduce Bettor Racing's fault in causing, or failing to correct, the violations arising from its own willing participation. Bettor Racing presents no facts that show the fourth factor should weigh in its favor.

The fifth regulatory factor is "the degree of good faith of the respondent in attempting to achieve rapid compliance after notification of the violation," for which the Chairwoman "may reduce the amount of a civil fine." 25 C.F.R. § 575.4(e). NIGC noted that Bettor Racing did not comply with the NOV's corrective measure and reimburse the Tribe the sum that was due under the management contract. AR0003057. Bettor Racing does not contest this fact. Presumably, Bettor Racing did not reimburse the Tribe because it disputed the occurrence of the alleged violations. If it had done so, the regulations would have allowed a reduction in the fine, perhaps to zero. It did not, however, and therefore the undisputed facts show that no reduction in the amount of the fine was appropriate pursuant to this factor.[8]

The NIGC's analysis of the five factors informing the amount of the proposed civil fine was reasonable and supported by substantial evidence.

[8] The "good faith" factor is not the deprivation of due process Bettor Racing makes it out to be. Mem. at 31, 35 fn. 17. Bettor Racing is not being "punished" when the Commission does not reduce the fine levied against it because Bettor Racing chooses to appeal rather than comply with the Chairwoman's corrective measure. Its choice to appeal is not treated as evidence of bad faith, and does not give the Chairwoman grounds to increase the fine. The regulation simply gives the Chairwoman authority to reduce a violator's fine when the violator corrects its behavior or even makes a good faith attempt to do so. 25 C.F.R. § 575.4(e).

2. *The fine is not "grossly disproportional" to the gravity of the offense and does not violate the Eighth Amendment.*

The Eighth Amendment of the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. "A punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). In the Eighth Circuit, courts "apply a two-pronged approach that first requires the claimant to 'make a prima facie showing of 'gross disproportionality.'' … If the claimant can make this showing, the court considers whether the disproportionality 'reaches such a level of excessiveness that in justice the punishment is more criminal than the crime.'" *United States v. Dodge Caravan*, 387 F.3d 758, 763 (8th Cir. 2004) (quoting *United States v. Bieri*, 68 F.3d 232, 236 (8th Cir. 1995), *United States v. 6040 Wentworth Ave. S.*, 123 F.3d 685, 688 (8th Cir. 1997)). "[T]he relevant constitutional line is 'inherently imprecise,'" but the Supreme Court has identified "general criteria" on which to focus: "the degree of the defendant's reprehensibility or culpability, … the relationship between the penalty and the harm to the victim caused by the defendant's actions, … and the sanctions imposed in other cases for comparable misconduct." *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 434-35 (2001) (quoting and citing *United States v. Bajakajian* at 336-43; other citations omitted). The Eighth Circuit has identified a number of additional factors that are potentially relevant, depending on the case. *See United States v. Dodge Caravan* at 763.

"[J]udgments about the appropriate punishment belong in the first instance to the legislature." *United States v. Bajakajian*, 524 U.S. at 322. Thus, for instance, if a fine in a criminal case "is within or near the permissible range of fines using the sentencing guidelines, the forfeiture almost certainly is not excessive." *United States v. Dodge Caravan*, 387 F.3d at

763. This strong presumption is based on the "view that the sentencing guidelines 'are the product of extensive research, thought, input from commentators, and experience,' and are 'designed to proportion punishments to crimes with even greater precision than criminal legislation,' such that a defendant must 'present a very compelling argument to persuade [a court] to substitute [its] judgment for that of the United States Sentencing Commission.'" *United States v. Hull*, 606 F.3d 524, 529-30 (8th Cir. 2010) (quoting *United States v. 817 N.E. 29th Drive*, 175 F.3d 1304, 1310 (11th Cir. 1999)). For the same reasons, a fine that is within the range set by Congress and by an agency's regulations is very unlikely to be constitutionally excessive. *See, e.g.*, *Sanders v. Szubin*, 828 F.Supp.2d 542, 554 (E.D.N.Y. 2011) (that fine was less than maximum contemplated by regulations supported finding that fine was proportional to offense); *State ex rel Utah Air Quality Bd. v. Truman Mortenson Family Trust*, 8 P.3d 266, 274 (Utah 2000) (fine within the bounds set by administrative agency was not excessive).

In this case IGRA allows the NIGC Chair to fine violators up to $25,000 per violation. 25 U.S.C. § 2713(a)(1). NIGC regulations provide that "[i]f noncompliance continues for more than one day, the Chairman may treat each daily illegal act or omission as a separate violation." 25 C.F.R. § 575.4(a)(2). The Chair calculated that in this case the maximum statutory fine for all three violations, which continued over several years, was $65,755,000. AR0003057. The total fine levied against Bettor Racing was $5 million, which is less than one-twelfth of the statutory maximum. This indicates almost conclusively that the fine was not constitutionally excessive.

Bettor Racing argues that the gravity of the offense is minimal because "Bettor Racing possessed no intent to violate the terms of the IGRA," which eliminates its culpability. Mem. at 35. As discussed above and as recognized by the NIGC, Bettor Racing is culpable even if it did not intend to violate the law. It intended to take the actions that violated the law, and took those

actions willingly. This renders it culpable for the violation. That it acted in order to increase its own monetary profit suggests a greater degree of culpability. At the same time, if Bettor Racing acted with the willing cooperation of its primary victim, the Tribe, this arguably reduces its degree of culpability. The Chairwoman's assessment therefore accounted for the Tribe's participation in the noncompliance. AR0003057 (noting "the Chairwoman reduced the amount of the fine in recognition of the Tribe's part in this matter"). The NIGC reasonably assessed Bettor Racing's culpability in setting a fine proportional to the gravity of its violations.

Bettor Racing conspicuously elides the second of the three considerations the Supreme Court identified: "the relationship between the penalty and the harm to the victim caused by the defendant's actions." *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. at 435; *see* Mem. at 34. The Chairwoman in this case ordered Bettor Racing to correct its violation by reimbursing the Tribe more than $4.5 million. AR0003048. These are revenues that Bettor Racing received, instead of the Tribe, as a result of its excessive management fee and the unlawful check-swap arrangement. The Chairwoman's $5 million fine, which the NIGC levied against Bettor Racing in lieu of any reimbursement to the Tribe, is plainly very closely related to the economic harm Bettor Racing's actions caused to its victim. AR0003049 ("the remedial measure has been supplanted by the CFA"). Bettor Racing's actions inflicted upon the Tribe the very harms that IGRA seeks to prevent.

The less severe sanctions imposed against the Tribe as part of the Tribe's settlement of its NOV does not suggest the fine against Bettor Racing is constitutionally excessive. The penalty imposed pursuant to a settlement agreement cannot be compared with one levied against a non-settling violator; the settlement will *always* result in a smaller penalty. Furthermore, Bettor Racing fails to establish that the Tribe and Bettor Racing should be viewed as having committed

"comparable misconduct." *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. at 435. Bettor Racing gained more than its lawful share of gaming revenue as a result of its violations, while the Tribe's violations involved giving away too much of its gaming revenue to Bettor Racing. Nor does the NIGC's treatment of Bettor Racing "reward the Tribe," as Bettor Racing argues. Mem. at 36. The Tribe gains nothing by Bettor Racing being fined, which is the reason the Tribe seeks to recover its damages in court actions.

Bettor Racing has not made a prima facie showing that the fines levied against it were grossly disproportionate to its offenses. The NIGC's civil fine assessment does not offend the constitution.

CONCLUSION

The Tribe has shown there are no material facts subject to genuine dispute. As a matter of law, the NIGC's Decision concluding that Bettor Racing violated specified provisions of IGRA and Tribal law was not arbitrary or capricious. Therefore the Tribe respectfully requests for judgment in favor of NIGC and against Bettor Racing with respect to Bettor Racing's claims under the APA.

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Respectfully submitted,

FLANDREAU SANTEE SIOUX TRIBE

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WORD COUNT CERTIFICATE

I certify that the foregoing written brief, FLANDREAU SANTEE SIOUX TRIBE'S COMBINED MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF THE TRIBE'S CROSS-MOTION FOR SUMMARY JUDGMENT, complies with the type-volume limitation of Local Rule 7.1(B)(1).

I further certify that according to the word count of the word processing system used to prepare the brief, the brief contains 10,852 words, excluding the cover page, tables, and this certificate.

/s/ Gregory M. Narvaez