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

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

TABLE OF CONTENTS

The plaintiffs in this action, J. Randy Gallo and Bettor Racing, Inc. (collectively "Bettor Racing"), seek review under the Administrative Procedure Act ("APA") of the Final Decision and Order issued by the defendant National Indian Gaming Commission ("NIGC") on September 12, 2012, AR0003043-61, and have moved for summary judgment in their favor. Docket 52, 53. Flandreau Santee Sioux Tribe ("Tribe"), as an intervenor, and the NIGC have each filed cross-motions for summary judgment in favor of the NIGC and opposed Bettor Racing's motion for summary judgment. Docket 57, 58, 59, and 60. The Tribe has also filed a statement of material facts. Docket 61. Bettor Racing's responses to the Tribe's cross-motion and statement of material facts (Docket 62 and 63) confirms that there is no genuine dispute as to any material fact and that as a matter of law the NIGC's decision was not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. *See* 5 U.S.C. § 706(2)(A); Fed. R. Civ. P. 56(a).

INTRODUCTION

Bettor Racing's response, like its motion, relies upon immaterial or unsupported facts; misconstrues the Indian Gaming Regulatory Act; misapplies Eighth Amendment case law; and generally complicates a straightforward case. Plaintiffs cannot and do not dispute the fact that they managed the Tribe's pari-mutuel gaming operation without a management contract approved by the Chairman of the NIGC, thereafter managed the operation under two unapproved amendments to that management contract, and received so much of the tribal gaming operation's revenue as to hold a proprietary interest in the gaming operation. The NIGC correctly determined that each of these actions constitutes a violation of the Indian Gaming Regulatory Act of 1988 ("IGRA"), the NIGC's regulations and the Tribe's gaming ordinance. Furthermore, Bettor Racing has declined the opportunity to tackle these facts and the law on the merits, but instead argues that other facts – immaterial to the pertinent legal issues – should have been considered.

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be entered for a party if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Under the Indian Gaming Regulatory Act ("IGRA"), judicial review of NIGC decisions regarding management contracts is conducted pursuant to the APA. 25 U.S.C. § 2714. Judicial review is thus limited to questions of law, as applied to the administrative record, to determine whether the NIGC's Decision should be set aside under the standards set forth in 5 U.S.C. § 706. In other words, the Court must decide a very narrow issue – whether there was a legal basis for the NIGC's decision to grant summary judgment on the three violations and civil fine assessment.

The material facts with respect to the motions before the Court are the facts found by the NIGC and recited in its Decision. AR0003045-48. As to those facts, there is no genuine dispute. Moreover, Bettor Racing does not contend that the NIGC's factual findings are unsupported by substantial evidence.[1]

Bettor Racing does contend, however, that the NIGC "failed to consider all of the facts," and furthermore that it failed "to view those facts" – the ones it did not consider – "most favorably to the nonmoving party." Bettor Resp. at 5. The facts alleged to have been incorrectly ignored primarily concern Bettor Racing's state of mind. These facts, even accepted in full just as Bettor Racing asserts them, would not have changed the NIGC's legal conclusions. The

[1] Bettor Racing's MSJ Brief does at one point assert the NIGC's "decision is not supported by substantial evidence." MSJ Brief, Docket 53 at 11. Its arguments, however, do not seek to discredit NIGC's factual findings, but instead question the NIGC's alleged failure to consider additional material facts. *Id.* at 16 (as to first violation, NIGC's "analysis ignores a record replete with disputes of fact as to Bettor Racing's intent"); 17 (as to second violation, "NIGC overlooked numerous facts related to the extent of Bettor Racing's knowledge and its intent"); 21 (as to third violation, "NIGC reached this conclusion by ignoring facts in the record"); 27 (as to civil fine, NIGC's "statements again ignore the facts of this case").

NIGC reasonably and correctly determined the plaintiffs' state of mind was not material to the legal issues before it.

The material facts are undisputed, and the disputed facts are not material. Bettor Racing has not shown that NIGC's legal conclusions were arbitrary or capricious, an abuse of its discretion, or otherwise not in accordance with the law. The Court should therefore grant summary judgment affirming the NIGC's Decision.

ARGUMENT

I. The NIGC's Investigation and Adjudication of Plaintiffs' Violations Was Not Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law.

Bettor Racing primarily bases its case on one issue: the NIGC's alleged failure to consider certain facts. Bettor Racing also raises some secondary issues: chiefly, the NIGC's alleged failure to consider certain legal arguments, and the NIGC's alleged procedural errors in the investigation and adjudication of the violations. None of Bettor Racing's claims compel the conclusion that the NIGC's final agency action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

A. The NIGC Properly Determined That Facts Related to Bettor Racing's Knowledge and its Intent to Violate the Law Were Not Material.

In its Final Decision and Order, the NIGC addressed Plaintiffs' "overarching argument" that they "had no knowledge their actions constituted violations of IGRA, and had no intent to deceive the Tribe or violate the law." AR0003049-3050. The NIGC found that "IGRA does not have a scienter requirement" and refused to consider Bettor Racing's lack of knowledge as an affirmative defense. AR0003050.

In Bettor Racing's response, it attempts to keep this overarching argument alive throughout its attack on all three of the charged violations and the CFA. *See, e.g.*, Bettor Resp.

at 6 (Docket 62) ("Gallo's state of mind, whether it is identified as 'intent,' 'knowledge,' or by some other similar name is relevant."); *Id.* at 13 ("the intent and knowledge held by Bettor Racing in this matter is vitally important to proper analysis of the facts and application of the law").

Bettor Racing claims "the NIGC dismissed out of hand the element of knowledge, stating that it was immaterial." Bettor Resp. at 14. The "out of hand" characterization is incorrect. The NIGC's Decision discussed the Presiding Official's analysis of this issue and agreed with the Presiding Official that nothing in IGRA or any other legal authority expressly or impliedly required the Chairwoman to establish that a violator possessed "wrongful intent or intent to violate the law." AR0003050; *see* Recommended Decision, AR0003027-28. The NIGC also addressed the issue in terms of "detrimental reliance" on the Tribe's former attorney, again reiterating the Presiding Official's findings and concluding there is "no source of law that would relieve the Respondents of responsibility even if what they allege is true. AR0003051; *see also* AR0003052 (IGRA provides "no reasonable basis for an expectation that anything but the NIGC's formal written approval could authorize the operation of Royal River Racing.").

Bettor Racing provides no legal authority in support of its contrary view of IGRA's requirements. Instead it elects to ground its arguments in *non sequitur* assertions at odds with the plain language of IGRA and the NIGC's regulations. *See* Bettor Resp. at 14. *See* 25 U.S.C. § 2711(a); 25 C.F.R. Part 531.

As the Tribe explained in its initial brief, the NIGC was correct to determine that intent is simply not an element of the charged violations. *See* Docket 59 at 22-26. Even if the complete absence of a scienter requirement in IGRA were seen as ambiguous, the NIGC's reasonable

interpretation of the statute it is charged with enforcing is entitled to deference. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

Because IGRA's prohibitions on managing an Indian gaming activity without an approved contract, managing under an unapproved amendment to a contract, and depriving a Tribe of the sole proprietary interest in its gaming activity are all subject to strict liability, any factual questions concerning what Bettor Racing knew, who it relied on for that knowledge, and whether it intended to break the law, were not material to the legal issues the NIGC had to answer to reach its decision. The NIGC was therefore correct to "not consider [Bettor Racing's] lack of knowledge as an affirmative defense." AR0003050. Nearly all the facts Bettor Racing claims the NIGC should have considered are relevant only to the issue of Bettor Racing's knowledge or intent. The Tribe discerns the following discrete facts Bettor Racing identifies in its response brief:

- The Tribe's former "counsel drafted both the consulting agreement and the Management Agreement." Bettor Resp. at 5.
- The Tribe's former "counsel undertook the responsibility of submitting all agreements to the NIGC." *Id.*
- "The Tribe never told Gallo that he could not commence operations with the Tribe." *Id.* at 6.
- "The Tribe's [former] counsel was aware that Bettor Racing had begun its operations…." *Id.*
- "Payments were made as provided in the consulting agreement and Management Agreement and as otherwise agreed upon between the parties." *Id.*
- Gallo "was unaware that he was in any way committing a violation of the NIGC's regulations." *Id.*
- "The Tribe proposed [the first modification's kickback] arrangement, which arrangement Bettor Racing accepted." *Id.* at 7.
- "The Tribe represented that such arrangement was agreeable to the NIGC Chairman and compliant with NIGC laws." *Id.*

- "The Tribe prepared the First Modification, along with [Tribal] authorizing resolutions and represented that it would submit the First Modification to the NIGC for approval." *Id.* at 7-9.

- "[T]he Tribe wanted Bettor Racing to stay and it would say or do whatever it deemed necessary to keep that business." *Id.* at 9.

- "[T]he Tribe represented to Bettor Racing that the agreement was compliant with NIGC regulations and that the Tribe would submit the agreement to the NIGC for approval." *Id.* at 9.

- "The Tribe is the one who devised the idea of a bonus and took it to the Chairman of the NIGC for consideration and approval." *Id.* at 9.

- Gallo did not understand that the NIGC would not have approved the modifications that required increased revenues for Bettor Racing. *Id.* at 10.

- The Tribe's former "counsel proposed the bonus arrangement." *Id.*

- The Tribe "represented to the NIGC in writing that the bonus was awarded to Bettor Racing at its discretion." *Id.*

- "The Tribe's [former] counsel represented that the NIGC Chairman himself indicated that a bonus was permissible." *Id.* at 13.

Bettor Racing is urging the Court to find that these facts are true in order to establish that the Tribe lulled or convinced Bettor Racing into managing the off-track betting operation ("OTB") without an approved management contract, and into managing the OTB under two unapproved contract modifications, and that the Tribe freely chose to kick back to Bettor Racing several million dollars of gaming revenue causing Bettor Racing's effective fee to far exceed the statutory maximum, while the Tribe assured Bettor Racing that this was all legal, and based on these assurances Bettor Racing believed it was all legal. The thing is, of course, it doesn't matter. These facts, even if they were all supported by the record, do not establish a legal basis to set aside the NIGC's Decision.

For purposes of establishing whether Bettor Racing violated IGRA, the law does not care whether the Tribe cajoled Bettor Racing into acting. IGRA is concerned only with Bettor

Racing's actions, regardless of the reasons.[2] The NIGC's ruling on this question was a reasonable implementation of IGRA. Neither Bettor Racing's motion nor its response brief advances a compelling argument otherwise, or any contrary authority. The NIGC's determination to disregard the knowledge and intent facts Bettor Racing urged in support of its overarching argument was not arbitrary or capricious.

B. The Record Does Not Support Bettor Racing's Presentation of the Facts.

Bettor Racing's factual arguments are disjointed and unpersuasive. First, Bettor Racing argues that the Tribe received all the revenues it was due under IGRA because the kickback scheme (also known as "the check-swap" or "the bonus") was an entirely discretionary act of the Tribe. *See, e.g.*, Bettor Resp. at 10 ("[The Tribe] represented to the NIGC in writing that the bonus was awarded to Bettor Racing at its discretion. The Tribe prepared annual authorizations indicating that it had evaluated Bettor Racing and deemed its performance to be worthy of a bonus. AR0001927-1929."). This argument is belied by Gallo's own testimony that the kickback scheme was not discretionary, and that Bettor Racing would have relocated back to Sioux Falls had the kickbacks not been paid.

> **Q:** 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 as the amendments go. Rollie had 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.

[2] Furthermore, the approved management contract itself 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. In addition, as experienced participants 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.

. . .

Q. Okay. So your – what was your understanding of what was actually discretionary then?

Gallo: Discretionary is the only way they get it done through the NIGC or whoever they were working with. They said the Tribe could do whatever they wanted with their money.

Gallo Depo. 156:25-157:18. (AR0001893, line 25 to AR0001894, line 18)(emphasis added). Even the pages of Gallo's deposition transcript cited by Bettor Racing in its response brief demonstrate that Gallo considered the kickback payments a mandatory condition of Bettor racing remaining at the Royal River Casino:

Gallo: I don't have any problem with the word discretion if you go forward and they come up to me and say, Randy, we're not happy, we're not – going forward we're not giving you any bonus. I would have left.

Gallo Depo. 191:14-18 (AR0001928, lines 14 to 18) (emphasis added).

Bettor Racing also argues that the NIGC erred in finding that Bettor Racing had a proprietary interest in the off-track betting operation because its "ownership" of Royal River Racing is merely one factor in the "sole proprietary interest" inquiry, to which NIGC gave excessive weight. Bettor Resp. at 11-12 ("the question of ownership does not in and of itself equate to sole proprietary interest"). Wrong. To own something is to have an interest in it that is proprietary. Gallo considers himself and Bettor Racing to have been the owners – the *proprietors* – of the OTB. It would have been reasonable for the NIGC to rely entirely on this fact, still proudly undisputed, to conclude Bettor Racing held a proprietary interest in the gaming activity. But the NIGC did not rely only on this. *Control* was the relevant factor in the NIGC's analysis. "Respondent's statements of ownership do bear on the analysis of sole proprietary interest as it speaks to the level of control." AR0003054. The NIGC listed seven additional undisputed facts that demonstrated Bettor Racing "exercised near total control of Royal River Racing, such as an owner would, and such control is impermissible under IGRA." AR0003053-

540. Astoundingly, Bettor Racing defends its ownership of the off-track betting operation by arguing "there was a necessity for that ownership," because "[t]he Tribe did not have nor was it eligible for the simulcast licenses required to operate a pari-mutuel [*sic*]." Bettor Resp. at 12. The assertion of the Tribe's ineligibility is unsupported by any authority or evidence in the record, and it also goes nowhere in showing the NIGC's findings on these topics lacked substantial evidence. The fact that Gallo can give a reason he, rather than the Tribe, owned the off-track betting operation, does not excuse him from the requirements of IGRA, and does not decrease the level of control he and his company exerted over the gaming activity.

Lastly, two aspects of Bettor Racing's Objections and Responses ("Obj.", Doc. 63) to the Tribe's statement of material facts ("SMF") also warrant a brief response. First, Bettor Racing consistently fails to provide evidentiary support in compliance with Fed. R. Civ. P. 56(c). To raise a genuine dispute of material fact, a party opposing a properly supported motion must cite to particular parts of materials in the record to contradicting the movant's evidentiary submission. "If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may … consider the fact undisputed for purposes of the motion [and] grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it." Fed. R. Civ. P. 56(e). Several of Bettor Racing's "facts" do not comply with Rule 56(c).

For example, it is undisputed that Gallo understood that the NIGC Chairman's approval was required for the management agreement. SMF ¶ 8. Gallo Depo. 28:16-24 (AR00001765, lines 16-24). In its Objections and Responses, Bettor Racing counters that Gallo was only aware that the management agreement "needed to be submitted to the NIGC" and that the Tribe "was

responsible for all items related to approval." Obj. ¶ 8. These statements are unsupported by any citation to the Administrative Record.

It is also undisputed that Gallo operated at the Tribe's gaming facility without an approved management contract under the auspices of a consulting agreement. SMF ¶¶ 13 and 16, Gallo Depo. 47:14 to 49:11 (AR0001784, line 14, to AR0001786, line 11); Consulting Agreement, Sept. 20, 2004 (AR0002009-10). It is further undisputed that rather than consult on the establishment and operation of the off-track betting operation, Gallo and his company simply began operating. Gallo Depo. 35:11-16; 43:18-25 (AR0001772, lines 11-16; AR0001780, lines 18-25). In its Objections and Responses, Bettor Racing attempts to dispute these facts, stating without citation to the record, "The Tribe advised that nothing prohibited Bettor Racing from beginning operations at the Casino." Obj. ¶¶ 13, 15 and 16. In each of these responses, Bettor Racing next asserts, "In fact, the Tribe's counsel advised Bettor Racing that he had spoken directly with the Chairman of the NIGC who approved the same," and cite to four pages of deposition testimony. *Id.*, citing AR0001762-66. None of these four pages remotely support the purported facts. None of the testimony concerns the consulting agreement or addresses the NIGC's approval of operating the gaming activity before the management agreement was approved. In fact, nowhere in the Administrative Record is there any evidence that the NIGC approved or would have approved Bettor Racing managing the gaming activity without an approved management agreement. Bettor Racing's unsupported factual assertions should be disregarded. *See*, *e.g.*, Obj. ¶¶ 26, 37

Second, Bettor Racing's objections to the Tribe's SMF are replete with legal arguments and discussion of facts that do not call the Tribe's facts into question, in an attempt to create the impression that genuine disputes exist as to the material facts. Bettor Racing bears the burden of

setting forth specific facts showing there is a genuine issue for trial, and it cannot do so by conjuring "sham issues of fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *RSBI Aerospace, Inc. v. Affiliated FM Ins. Co.*, 49 F.3d 399, 402 (8th Cir.1995). Bettor Racing has not demonstrated the existence of any genuine dispute as to the material facts.

C. The NIGC Did Not Fail to Consider Bettor Racing's Legal Arguments.

Bettor Racing is wrong when it claims, referring to Bettor Racing's argument that IGRA allows Indian tribes to give kickbacks to management contractors raising the manager's fee above the statutory maximum, that "the NIGC did not even consider the argument in its Final Decision." Bettor Resp. at 12-13. The NIGC agreed with the Presiding Official's analysis of this issue, and adopted the Presiding Official's conclusion in the Decision. AR0003056. The Presiding Official identified the issue, stated the parties' arguments, and found in favor of the Chairwoman and the Tribe:

> [Respondents] argue that the Tribe received the amounts prescribed by the Management Contract 'and modifications thereto,' and that '[t]here 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 the same. … In Respondents' view, the 'bonuses' are permissible under the regulations because they were nothing more than a means of fostering economic development for the Tribe. They reason that the 'bonus' payments 'permitted Bettor Racing to increase its business, thereby increasing its revenue, thereby permitting the Tribe to reap the rewards of its efforts….' … They conclude there is a genuine issue of fact 'as to whether the discretionary bonus constituted a legitimate expenditure for the economic development of the Tribe.'
>
> The Chairwoman counters that the Tribe's agreement to accept less than it was entitled to under the approved Management Contract does not change the unchallenged fact that Respondents profited more than the Tribe, or change the equally unchallenged fact that unapproved modifications are null and void *ab initio*. … The Tribe argues that Respondents' efforts to cloak the 'bonuses' they received 'would effectively eliminate the statutory maximum share of revenue that may be paid to a management contractor' that protects tribes' right to be the primary beneficiaries of their gaming operations. … The Chairwoman's and the Tribe's arguments are well founded.

AR0003032-33. In its Decision the NIGC did not reiterate the arguments with the same level of detail, but it acknowledged that Bettor Racing had raised the issue and agreed with the Presiding Official's conclusion.[3] "Respondents argued … no law exists precluding the Tribe's payment of a discretionary bonus to Bettor Racing. … As the Respondents do not deny or challenge the amounts of economic benefits the Chairwoman determined they received for noncompliance, the Commission agrees with the Presiding Official's analysis of this factor." AR0003056.

There is no need to disturb the NIGC's Decision on the alleged ground that further analysis of this issue would compel a different result.

II. The NIGC's Investigation and Adjudication Was Not Contrary To Law and Did Not Involve Procedural Error.

A. Bettor Racing Participated in the Compliance Investigation and Declined to Take Advantage of Opportunities to Question Witnesses.

In a "due process" argument connected with alleged "questions of estoppel[,] … waiver, conflict and bias," Bettor Racing complains it was "never afforded an opportunity to conduct discovery or actively participate in the investigation conducted by the NIGC." Bettor Resp. at 11, 15-16; *see also id.* at 2. Such complaints are inconsistent with the record in this case. First, Bettor Racing and Gallo exchanged many letters and documents with NIGC investigators and auditors during the course of the compliance investigation.[4] Through many of these letters,

[3] The Presiding Official addressed the issue as part of the discussion of the Chairwoman's recommendation that Bettor Racing reimburse the Tribe as a remedial measure. Because the NIGC Decision treated the civil fine as supplanting the remedial measure, *see* AR0003049, the Final Decision addresses this issue in its discussion of the "economic benefit" of Bettor Racing's noncompliance, one of the factors relevant to the assessment of the fine. The NIGC's rejection of the argument that the kickback was legally permissible has the same effect regardless of whether the issue was examined in connection with the fine, or the remedial measure, or (as Bettor Racing situates the argument in its motion and response brief), the amount of revenue Bettor Racing received as an indication of whether it possessed a proprietary interest.

[4] *See, e.g.*, Letter, NIGC Notice of Non-Compliance to Bettor Racing and the Tribe, dated August 27, 2009 (AR0000031-33); Letter, Bettor Racing to NIGC in Response to the Notice of

Bettor Racing responded to requests for information and documents from the NIGC. AR0000059, AR0000062, AR0000081-112, AR0002260-2263. For example, in its initial response to the Notice of Non-Compliance, dated September 7, 2009, Bettor Racing acknowledged that its personnel met with the NIGC during an on-site compliance review at the Tribe's gaming facility and were notified that certain operating expenses were going to be disallowed. AR0000038. Subsequent to that meeting, Bettor Racing provided a detailed written response in justification of the impermissible operating expenses. AR0000038-42. This letter resulted in an exchange of correspondence concerning additional documents and justification for specific actions. AR0000055-58, AR0000062, AR0000063, AR0000079-80, AR0000081-82, and AR0000083-112. Bettor Racing also participated in telephone conversations with NIGC auditors and attorneys concerning the compliance issues. *See* Gallo Depo. 220:9-15, AR0002103, line 9-15; 163:18-164:4, AR0001900, line 18 to AR0001901, line 4. Following this correspondence and exchange of documents, Bettor Racing wrote to the NIGC auditors explaining its position and requesting a meeting. AR0000608-11.

Second, both Gallo and Bettor Racing's General Manager, Ray Henry, were deposed by NIGC attorneys – during which deposition each provided considerable information to the NIGC.

Non-Compliance, dated September 7, 2009 (AR0000037-42); Letter, NIGC to Bettor Racing in response to 9/7/2009 letter from Bettor Racing, dated September 24, 2009 (AR0000055-58); Fax, Bettor Racing to NIGC concerning documents in response to NIGC's 9/24/09 letter, dated September 20, 2009 (AR0000059); Letter, Bettor Racing to NIGC in further response to 9/24/2009 letter, dated October 15, 2009 (AR0000062); Letter, Bettor Racing to NIGC in response to last request (with attachments), dated November 23, 2009 (AR0000081-82), (AR0000083-112); Letter and transmittal email, Bettor Racing to NIGC, dated May 13, 2010 (AR0000225-226); Letter, Bettor Racing to NIGC regarding contract between Royal River Racing and FSST, dated February 1, 2010 (AR0000608-618); Declaration of Daniel Catchpole, NIGC auditor acknowledging documents provided by Bettor Racing, dated January 31, 2011 (AR0002260-2263); and Letter, NIGC Notice of Violation NOV-11-01 to Bettor Racing and Tribe, dated May 19, 2011 (AR0002510-2532).

See Deposition of J. Randy Gallo, dated May 11-12, 2010 (AR0001738-1953, AR0002100-2226); Deposition of Ray Henry, dated April 20, 2010 (AR0000853-950). In fact, Gallo identified and discussed seventy-one exhibits during his ten hour, two-day deposition. AR0001740, AR0002102. Mr. Henry identified and discussed thirty-eight exhibits to his deposition. AR0000855-56. Not only were these depositions complete and thorough, but both deponents were given a fair opportunity to add information to the record.

> **Q:** We don't have any other questions for you. Is there anything you would like to tell us that –
>
> **Gallo:** I think we've been over everything that I can say.

Gallo Depo. 339:2-6 (AR0002222, lines 2-6).

> **Q:** Is there anything else that you would like to tell me or can tell me about Bettor Racing and its contract with the tribe?
>
> **Henry:** Not that I can think of.

Henry Depo. 106:20-23 (AR000948, lines 20-23).

Third, despite their participation in the investigation, Bettor Racing did not avail itself of other opportunities to add facts to the record. For example, Bettor Racing could have deposed its own witnesses with just reasonable notice and a showing of good cause. 25 U.S.C. § 2715(d); 25 C.F.R. § 571.11(a), (b). Bettor Racing could have taken depositions of witnesses who were previously interviewed by the NIGC, as well as those who were not, such as former NIGC Chairman Philip Hogen.[5] Although the regulations protect current NIGC personnel from being questioned by deposition, Bettor Racing could still have obtained their testimony by written interrogatories. 25 C.F.R. § 571.11(a). It did none of this.

[5] Comments and advice purportedly offered by former NIGC Chairman Philip Hogen play heavily in Bettor Racing's version of events. *See, e.g.*, Gallo Depo. 254:15-23, AR0002137, lines 15-23.; *see also* footnote 1 of Bettor Resp. pp. 7-8.

Fourth, while discovery of the NIGC's records is not permitted during the investigation phase, nothing prevented Bettor Racing from requesting those records under the Freedom of Information Act, 5 U.S.C. 522. *See also* 25 C.F.R. §§ 571.3, 571.11(a).

Finally, Bettor Racing further complains that once the Notice of Violation was issued by the Chairwoman "there were truly no opportunities" to participate in the investigation. Bettor Resp. at 15. The Tribe concedes that once the Chairwoman's investigation concluded and the notice of violation was issued, all opportunities to participate in the investigation ceased. However, Bettor Racing did participate in the investigatory process for nearly two years between the issuance of the Notice of Non-Compliance on August 27, 2009, and the Notice of Violation, issued on May 19, 2011. AR0000143, AR0002510.[6]

B. The NIGC Was Not Required to Hold an Oral Evidentiary Hearing.

Neither IGRA nor APA standards required the NIGC to convene an oral evidentiary hearing before issuing its Final Decision and Order, an argument to which Bettor Racing frequently returns. Bettor Resp. at 11, 13, 15, 16. IGRA requires that the NIGC, "by regulation, provide an opportunity for an appeal and hearing before the Commission on fines levied and collected by the Chairman." 25 U.S.C. § 2713(a)(2). In cases where the substantive statute requires adjudications "to be determined on the record after opportunity for an agency hearing," the APA requires the agency to "give all interested parties opportunity for – (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and (2) … hearing and decision

[6] During the investigatory phase, Bettor Racing was represented by legal counsel at least as early as April 20, 2010, when Bettor Racing's counsel attended the deposition of Ray Henry. Attorneys for Bettor Racing apparently were not present at subsequent depositions, including Gallo's. Bettor Racing's attorney of record made herself known to the NIGC on June 3, 2011, just after the Notice of Violation was issued. AR0002533-2537. The NIGC agency record was filed and submitted to Bettor Racing's counsel on July 12, 2011. AR0002606.

on notice and in accordance with sections 556 and 557 of this title." 5 U.S.C. § 554(a), (c). Among other things, § 556 provides that "the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." 5 U.S.C. § 556(d).

Reflecting the same preference for agency discretion and flexibility seen in the APA, IGRA gives the NIGC discretion with respect to when and whether it will hold a hearing. Sitting as the full Commission, the NIGC "***may hold such hearings***, sit and act at such times and places, take such testimony, and receive such evidence ***as the Commission deems appropriate***." 25 U.S.C. § 2706(b)(8) (emphasis added). The NIGC's regulations provide a process for requesting a hearing, as well as an alternative process for electing to have the NIGC decide the matter at issue on the basis of written submissions. 25 C.F.R. § 577.3.[7] Furthermore, whether oral testimony and documentary evidence is permitted at a hearing is at the discretion of the Presiding Official. 25 C.F.R. § 577.7(a). In other words, reading both IGRA and the NIGC's regulations, the NIGC does not have the non-discretionary obligation in every instance to provide an oral evidentiary hearing. *See, e.g., Chemical Waste Management, Inc. v. U.S. E.P.A.*, 873 F.2d 1477, 1482 (D.C. Cir. 1989) (statutory reference to "hearing" does not preclude agency from conducting informal adjudications on written submissions).

Moreover, even if the APA's formal adjudicatory procedures applied, the NIGC did not unlawfully deny Bettor Racing the opportunity for a hearing before the Commission. Instead, the evidence submitted by the parties led the NIGC reasonably to conclude that it could resolve the legal issues without oral argument or an evidentiary hearing. This procedure satisfies the APA. *Doolin Sec. Sav. Bank, F.S.B. v. F.D.I.C.*, 53 F.3d 1395, 1401 (4th Cir. 1995); *Puerto*

[7] On September 25, 2012, the NIGC published in the Federal Register new rules for Appeal Proceedings before the Commission, 77 Fed. Reg. 58945. In doing so, the NIGC reserved Part 577 and installed new appeal procedures at Parts 580-585.

Rico Aqueduct and Sewer Authority v. U.S. E.P.A., 35 F.3d 600, 605-06 (1st Cir. 1994); Richard J. Pierce, Jr., *Administrative Law Treatise* § 8.3 at 715 (5th ed. 2010) ("Even when an agency is required by statute or by the Constitution to provide an oral evidentiary hearing, it need do so only if there is a dispute concerning a material fact. An oral evidentiary hearing is never required if the only disputes involve issues of law or policy."); *see Codd v. Velger*, 429 U.S. 624, 627 (1977) (noting that a hearing mandated by the Due Process Clause only serves a "useful purpose" when there is "some factual dispute" between the parties). As discussed herein, the Presiding Official carefully considered whether a hearing was necessary, based on the Federal Rules' standard for summary judgment, and concluded that it was not. AR0003016. The full Commission agreed. AR0003043-44. Under these circumstances, no oral evidentiary hearing was required.

C. Bettor Racing Agreed That an Evidentiary Hearing May Be Unnecessary After the Summary Judgment Motions.

Bettor Racing initially requested an evidentiary hearing pursuant to 25 C.F.R. § 577.3.[8] AR0002542, AR0002558. However, prior to the briefing of the parties' motions for summary judgment on the Notice of Violation before the Presiding Official, Bettor Racing agreed that an evidentiary hearing should occur only if necessary after a ruling on the motions for summary judgment. On January 26, 2012, Bettor Racing, the NIGC and the Tribe filed a Joint Motion to Request Deferral of Hearing and Proposed Scheduling Order. AR0002657-2661. The Joint Motion sought to defer the hearing "for no less than 90 days, with the exact date to be set after rulings on any motions." AR0002658. Attached to the Joint Motion was a Proposed Scheduling Order which provided, in pertinent part, "The February 10, 2012 hearing date is deferred for not less than 90 days, and a hearing date, ***if necessary***, will be scheduled after ruling on any

[8] Now renumbered as 25 C.F.R. § 584.3. *See* footnote 7.

motions." AR0002661 (emphasis added). This proposed language was adopted by the Presiding Official in her Scheduling Order, dated January 27, 2012. AR0002662. Bettor Racing's agreement that a hearing may not be necessary undercuts its argument that it was denied the opportunity for an evidentiary hearing.

On February 20, 2012, the Chairman issued the Civil Fine Assessment ("CFA"), CFA-11-01. AR0002665-73. In response, Bettor Racing filed a Notice of Appeal and Request for Hearing on March 9, 2012, and a Supplemental Statement on March 19, 2012. AR0002941-43, AR0002944-52. In both documents, Plaintiffs requested a hearing. *Id.* Once again, however, Bettor Racing agreed to forgo an evidentiary hearing until the motions for summary judgment on the CFA were decided. In her order consolidating the NOV and CFA proceedings, the Presiding Official addressed the scheduling of further briefs and any hearing, stating, "On April 6, 2012, [Bettor Racing] replied electronically, indicating a hearing on the CFA should be deferred until the motions have been decided, and that further briefing is necessary." AR0002992. The Presiding Official therefore ordered that a "hearing in the consolidated appeals will be scheduled after the cross motions for summary judgment in [the NOV appeal] are decided, as provided in my order dated January 27, 2012." *Id.* As explained above, the earlier Order contemplated the scheduling of a hearing only "if necessary." AR0002661.

The NIGC allowed Bettor Racing to submit any relevant information it wished to tender. Bettor Racing corresponded with NIGC auditors through letters and emails, provided substantive deposition testimony and supplemented the record. When Bettor Racing appealed the NOV and CFA that resulted from the investigation, it was given the opportunity to submit all available exculpatory facts and argument to the NIGC. As part of the agency's process, to which Bettor Racing agreed, the NIGC's reasonable finding that the parties' written submissions did not raise

any questions of material fact eliminated the need for an oral evidentiary hearing. Bettor Racing received all the process it was due under IGRA, the NIGC's regulations and the APA. Bettor Racing has not demonstrated that it was denied the opportunity to speak meaningfully to the issues in this case, and thus the Court must hold that the NIGC did not abuse its discretion in not holding a hearing.

III. Bettor Racing's Claims of Bias, Estoppel, Waiver and Conflict of Interest Are Without Merit.

Bettor Racing's supposed entitlement to a hearing is tied to the notion that it has raised "questions of estoppel[,] … waiver, conflict and bias," which require the resolution of factual disputes. Bettor Racing suggests that the NIGC "has an inherent bias in this matter." Bettor Resp. at 2.[9] It is a mystery what bias the NIGC holds in this matter. The NIGC's primary mission is to work within the framework created by IGRA for the regulation of gaming activities conducted by tribes on Indian lands to fully realize IGRA's goals: (1) promoting tribal economic development, self-sufficiency and strong tribal governments; (2) maintaining the integrity of the Indian gaming industry; and (3) ensuring that tribes are the primary beneficiaries of their gaming activities. 25 U.S.C. § 2702. These statutory obligations do not create an inherent bias against gaming managers such as Bettor Racing. Nevertheless, Bettor Racing would be required to make a substantial showing of bias to justify an argument that an agency adjudicative process was unfair. *South Dakota v. U.S. Dept. of Interior*, 787 F.Supp.2d 981, 1000 (D.S.D. 2011)

[9] Bettor Racing also claims the Tribe shares this "inherent bias." Bettor Resp. at 2. The Tribe readily admits it has an interest in this case, as it did in the agency proceedings, that is, contrary to Bettor Racing's interest. It was to protect this interest that the Tribe intervened in both actions. Since the Tribe is not the decision-maker here and did not make the agency decision now subject to review, accusations of "bias" on the part of the Tribe mean very little. Nevertheless, it apparently bears mentioning that the statements of a litigant should not be "disregarded out of hand" simply because the party "stands to gain greatly" if the court grants its motion. Bettor Resp. at 2.

(citing *United States v. O'Rourke*, 213 F.2d 759, 765 (8th Cir. 1954)). A party claiming bias on the part of an administrative tribunal must overcome "a presumption of honesty and integrity in those serving as adjudicators." *Id*. (citing *In re Morgan*, 573 F.3d 615, 624 (8th Cir.2009)). Bettor Racing fails to make any showing of bias and rests instead on unsupported assertions. Bettor Racing's reference to "conflict" is also unexplained. The Tribe addressed the estoppel argument in its initial brief, and Bettor Racing's response sheds no new light on it. *See* Tribe's Mem. at 27; Bettor Resp. at 15. The unexplained reference to "questions of waiver" is presumably related and fails together with estoppel.

Bettor Racing also attempts to paint the NIGC enforcement action as having been unfairly taken against it alone. But as the Final Decision and Order references, the Chairwoman also asserted four counts against the Tribe in her Notice of Violation. AR0003048. Rather than appeal, the Tribe settled the Notice of Violation with the NIGC Chairwoman. Settlement Agreement, Tribe and NIGC, SA-11-01, dated July 20, 2011, AR0002611-16.

IV. The Civil Fine Assessment Was Both Constitutional and Reasonable.

The NIGC's Civil Fine Assessment reflects the agency's reasonable consideration of the five factors set forth in the regulations. Bettor Racing's response does not identify any disputed questions of fact that would compel a different analysis as to any one of these factors, nor any legal reason the agency should have reached a different conclusion. Nor has it shown the fine was unconstitutionally severe. As to these issues, its arguments really only dispute the premise that Bettor Racing was responsible for committing any violations. Bettor Racing has not made a sufficient showing to set aside the Civil Fine Assessment.

CONCLUSION

Bettor Racing bears the heavy burden of establishing any deficiencies in the administrative decision. It has failed to do so. The NIGC's decision is neither arbitrary nor

capricious, and substantial evidence supports the administrative determination. For the reasons set forth above, the Tribe respectfully requests that the Court grant the Tribe's and the NIGC's Cross-Motions for Summary Judgment and deny Bettor Racing's Motion for Summary Judgment.

Respectfully submitted,

Dated: May 9, 2014

FLANDREAU SANTEE SIOUX TRIBE

By /s/ Gregory M. Narvaez

John M. Peebles, *Pro Hac Vice*
Patrick R. Bergin, *Pro Hac Vice*
Gregory M. Narvaez, S.D. Bar No. 4381
FREDERICKS PEEBLES & MORGAN LLP
2020 L Street, Suite 250
Sacramento, California 95811
Telephone: (916) 441-2700
Fax: (916) 441-2067
jpeebles@ndnlaw.com
pbergin@ndnlaw.com
gnarvaez@ndnlaw.com