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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH DAKOTA

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| BETTOR RACING, INC. and J. RANDY GALLO,<br><br>Plaintiffs,<br><br>v.<br><br>NATIONAL INDIAN GAMING COMMISSION,<br><br>Defendant,<br><br>and<br><br>FLANDREAU SANTEE SIOUX TRIBE,<br><br>Intervenor. | No. 4:13-cv-04051-KES<br><br>NIGC'S REPLY BRIEF IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT |

## INTRODUCTION

As discussed in NIGC's cross-motion for summary judgment, to prevail in this suit under the Administrative Procedure Act Plaintiffs must carry the high burden of demonstrating that NIGC's Final Decision was arbitrary and capricious. *See JPW Consultants, Inc. v. NIGC*, No.

00-10017, at 4–5 (11th Cir. April 12, 2001) (unpublished) (attached as Exhibit A) ("Courts review the Commission's decision and its findings under the 'arbitrary and capricious' standard."); *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 702 F.3d 1147, 1153 (8th Cir. 2013) (holding that challenges to NIGC positions must be brought under the APA). The factual findings of an agency adjudication "will be sustained if they are supported by substantial evidence. Substantial evidence is a deferential review standard, requiring only the presence of such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Syverson v. U.S. Dep't of Agriculture*, 601 F.3d 793, 800 (8th Cir. 2010) (internal quotations and citations omitted).

Plaintiffs' primary argument, in both their opening brief—(ECF No. 53) ("Pls.' Br.")—and their response to NIGC's cross-motion—(ECF No. 64) ("Pls.' Resp.")—is that the Final Decision was arbitrary and capricious because NIGC allegedly ignored facts relied on by Plaintiffs. As discussed in NIGC's opening brief—(ECF No. 57-1) ("NIGC Br.")—there are certainly facts about which NIGC and Plaintiffs would disagree: Plaintiffs' insistence, for instance, that the NIGC's then-Chairman approved Plaintiffs' check swap scheme is nearly entirely without support in the record. The crucial distinction, however, is that none of these facts is material. As discussed below, the record before this Court fully supports NIGC's decision and establishes that the facts underlying that decision are truly uncontested, while the facts on which Plaintiffs attempt to rely are simply irrelevant to the factors that NIGC was required to consider under IGRA. Plaintiffs have not established that the Final Decision was in any way arbitrary and capricious.

## ARGUMENT

Plaintiffs challenge the Final Decision and Order, which upheld NIGC's Notice of Violation ("NOV") on four separate violations and also upheld NIGC's Civil Final Assessment ("CFA") for those violations. The Final Decision was based on a series of simple facts that remain uncontested. Those uncontested facts include: Plaintiffs operated the pari-mutuel betting operation at the Tribe's casino without an approved management contract; they later operated the betting operation under two unapproved amendments to the management contract; and they had a proprietary interest in the operation, as evinced by multiple factors, most notably including the large share of the operation's revenues they received (partially through their check swap "bonus" scheme).

As to both the NOV and the CFA, Plaintiffs' primary argument is that the Commission disregarded some of Plaintiffs' factual allegations, such as Plaintiffs' continued insistence that the IGRA violations were instigated by the Tribe. *See, e.g.*, Pls.' Resp. at 5. As discussed below, these arguments are unavailing. First, NIGC did in fact consider each of the factual allegations Plaintiffs set forth in their brief. More importantly, as NIGC found in the Final Decision, those factual allegations are simply irrelevant under the clear statutory and regulatory requirements that bound NIGC in reaching its decision under IGRA and NIGC regulations. Plaintiffs have not established that NIGC was in any was arbitrary and capricious, and accordingly NIGC is entitled to summary judgment.

### I. The Commission was not arbitrary and capricious in granting the Chair's Motion for Summary Judgment as to the notice of violation, NOV 11-01.

The NOV identified three separate violations of IGRA: (1) unlawfully managing an Indian gaming operation without an approved management contract, (2) later unlawfully

managing an Indian gaming operation subject to un-approved modifications to that contract, and (3) unlawfully possessing a proprietary interest in an Indian gaming operation. *See* NIGC's Br. at 14. As discussed below, Plaintiffs do not and cannot contest the facts that NIGC recognized in finding these violations. Instead, Plaintiffs attempt to rely on other facts that are irrelevant under IGRA, and for which Plaintiffs have advanced no legal basis for consideration.

**A. Substantial evidence supported the Commission's reasonable conclusion that the first violation occurred; there is no genuine issue of material fact as to Plaintiffs' management of an Indian gaming operation without an approved management contract.**

As discussed in NIGC's cross-motion, the Commission's decision upholding the first violation was based on a single uncontested fact: Plaintiffs operated Royal River Racing at the Tribe's Casino without an approved management contract from September 24, 2004, to March 15, 2005. NIGC's Br. at 15. Plaintiffs admitted to this fact. *Id*. (citing AR0001772:11–14, AR0001780:15–25, and Pls.' Br. at 12). Plaintiffs have not ever denied operating the gaming operation during that period, nor have they alleged that the management contract was approved prior to March 15, 2005. No other facts are necessary to establish the violation. Notably, IGRA contains no scienter element for this violation. *See* NIGC's Br. at 16–17.

In their Response, Plaintiffs present extensive factual allegations about the Tribe's alleged role in the unlawful operation of Royal River Racing in the absence of an approved management contract. Pls.' Resp. at 5–6. NIGC addressed these facts in its cross-motion, establishing that they are entirely irrelevant in the absence of any scienter requirement under IGRA. NIGC Br. at 16–17. In their Response, Plaintiffs state that NIGC "argues that Bettor Racing has simply 'assumed' that the NIGC was required to 'demonstrate' some level of scienter as part of the prima facie case for this violation. Bettor Racing has assumed nothing. It expected

that NIGC would take into consideration *all of the facts*." Pls.' Resp. at 6 (internal citation omitted, emphasis added). But the summary judgment standard does not require consideration of "all of the facts"; it requires the arbiter to determine that there are no disputed *material* facts. Plaintiffs have cited absolutely no legal basis for NIGC or for this Court to find that Plaintiffs' "state of mind" is in any way material to the legal elements of the First Violation. Accordingly, they have not established that the Commission was arbitrary and capricious in sustaining the First Violation.

**B. Substantial evidence supported the second violation; no genuine issues of material fact existed as to Plaintiffs' management of an Indian gaming operation under two un-approved modifications to an approved management contract.**

After the initial management contract between Plaintiffs and the Tribe was approved by the NIGC Chair in 2005, Plaintiffs and the Tribe amended that contract twice, in 2007 and 2008. NIGC Br. at 18. They operated under these amendments without ever obtaining the Chair's approval of the amendments. *Id*. These facts are uncontested and, as discussed in NIGC's cross-motion, these facts are sufficient to establish the Second Violation. As with the First Violation, no other facts are necessary, or even relevant, to the inquiry. *Id*.

Plaintiffs' response is that "[i]t results in manifest injustice not to consider Gallo's state of mind and whether his reliance upon the Tribe and its counsel was reasonable." Pls.' Resp. at 7. Plaintiffs identify no legal basis for this alleged injustice. They go on to point out that the "Tribe was not obligated to take any of these actions," *id*. at 9, and further imply that the Tribe somehow induced Plaintiffs to violate the law. But this too is immaterial because, again, neither the Tribe's nor Plaintiffs' state of mind is relevant to the question of whether Bettor Racing

operated Royal River Racing subject to un-approved amendments to the previously-approved management contract.

Finally, Plaintiffs point out that "the stated purpose [of IGRA] is the prevention of crime and corruption" and that "one cannot simply presume that because a modification was not approved that crime, corruption or other nefarious intent is afoot." Pls.' Resp. at 9. But NIGC did not assume, and did not need to consider whether, "crime, corruption or other nefarious intent" were "afoot" when Bettor Racing violated IGRA. Indeed, as Plaintiffs also recognized, "[t]he intent and purpose of the IGRA is to provide for punishment and to punish any party which violates its provisions." *Id*. In this case, Bettor Racing violated IGRA by operating under the un-approved amendments. The only fact material to that inquiry is whether Bettor Racing did, in fact, operate under the unlawful amendments.

**C. Substantial evidence supported the third violation; no genuine issues of material fact existed as to Plaintiffs' unlawful proprietary interest in the pari-mutuel gaming operation.**

As discussed in NIGC's cross-motion, three factors are examined to determine whether a tribe has the sole proprietary interest in its gaming operation, as Congress required through IGRA: "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." NIGC Br. at 20 (quoting *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 830 F. Supp. 2d 712, 723 (D. Minn. 2011)). The Commission examined each factor and determined that all three factors were met. Notably, Plaintiffs had received a share of net revenue (via the check-swapping scheme) that exceeded the statutory maximum set by Congress. Furthermore, they maintained the right of control over the Royal River Racing operation as the enterprise's sole owners.

In Response, Plaintiffs again attempt to obfuscate the relevant issues by focusing on facts that are entirely irrelevant. First, they infer that the Commission was biased against Plaintiffs "before even having given Bettor Racing an opportunity to defend itself" because NIGC referred to the check-swapping agreement as a "scheme." Pls.' Resp. at 11–12. But it is, in fact, a scheme: It was devised by Bettor Racing and the Tribe for the unlawful purpose of providing Plaintiffs with an impermissibly-large share of gaming revenue. *See* AR0001893–94 (In which Mr. Gallo testified that he told the Tribe that "if they are not going to swap checks I'll be leaving" and that "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."). Calling a scheme a scheme does not reflect any sort of bias by the Commission.

Plaintiffs go on to state that it is "rather paternalistic to suggest that a tribe cannot not [sic] make its own decisions with regard to the use of its gaming revenue and is deprived of its basic right of contract." Pls.' Resp. at 12. But the whole point of IGRA is to constrain the contracting rights of tribes in Indian gaming to protect the tribes and the integrity of their gaming operations. Plaintiffs' apparent newfound concern about Indian tribes' freedom to contract under IGRA is misplaced and without legal basis. Furthermore, the Commission's decision did not place limitations on the Tribe's use of the revenue it received. Instead, it found that the Tribe had been denied revenue beyond the legally permissible maximum because the revenue had been diverted to Plaintiffs via the check swap scheme, which Mr. Gallo admitted under oath was not discretionary under the amendments. AR0000893–94 (Stating that the scheme "wasn't discretionary as far as the amendments go."). Because the total amount of revenue given to Plaintiffs exceeded the statutory cap set by IGRA, the Commission could not have reached any

conclusion other than the one it did: that Plaintiffs had an unlawful proprietary interest in the gaming operation.

Plaintiffs also claim they are exculpated because "[t]he Tribe proposed the bonus arrangement" and the Tribe "further told Bettor Racing that its counsel had talked with NIGC Chairman Phil Hogen and received approval for the bonus concept." Pls.' Resp. at 12–13. Assuming, *arguendo*, that these factual allegations are both true, they are simply immaterial. It does not matter whether Plaintiffs or the Tribe devised the check swap scheme, because in either case the scheme resulted in Plaintiffs receiving a share of revenues that was impermissible under IGRA. And any alleged statement by then-Chair Hogen is irrelevant because the NIGC Chair has no statutory or regulatory authority to contravene the plain language of IGRA, which requires that management contractors receive no more than the statutory maximum of gaming revenue.[1] These alleged tentative, preliminary comments by the then-Chair cannot outweigh the Commission's interpretation of its own organic act. Accordingly, even if the allegations were true, they would not be material to the Commission's inquiry.

Finally, as to the third factor (right of control over the gaming activity), Plaintiffs assert that their ownership of the pari-mutuel gaming operation was "necessary" because "Gallo had the connections, the experience, the expertise, and the necessary approvals and licensures to operate." Pls.' Resp. at 14. However, Plaintiffs do not identify any "necessity" exception to this

[1] Furthermore, as discussed in NIGC's cross-motion, the only evidence of the alleged preliminary comment by the then-Chair is flimsy at best: Hearsay or double-hearsay testimony characterizing the alleged statement. *See* NIGC Br. at 22–23. No reasonable trier of fact would rely on this evidence in the face of the far more substantial evidence supporting the Commission's ultimate conclusion that Plaintiffs and the Tribe structured their unlawful amendments to evade the statutory revenue cap.

factor. The only relevant fact is whether Plaintiffs' control over the operation, combined with the other two factors, evinced an unlawful proprietary interest. The uncontested material facts demonstrate that Plaintiffs did have an impermissible proprietary interest, and they have not identified any other material fact that would demonstrate the Final Decision and Order was arbitrary and capricious.

## II. The Commission was not arbitrary and capricious in granting the Chair's Motion for Summary Judgment as to the civil fine, CFA 11-01.

Based on the violations identified in the NOV, the Commission also upheld the imposition of a civil fine. As discussed in NIGC's cross-motion, the Final Decision was supported by extensive factual findings based on clear and uncontested material facts as to each of the four factors set forth under the NIGC's regulations and examined in the Final Decision.[2] NIGC Br. at 24 (quoting 25 C.F.R. § 575.4).

As to the first factor, Plaintiffs' economic benefit from non-compliance with IGRA, Plaintiffs complain in their response brief that "[i]t is offensive to suggest that [Plaintiffs'] business model was premised upon bilking the Tribe." Pls.' Resp. at 16. Setting aside the inflammatory language (which is the Plaintiffs', not NIGC's), the record establishes that Plaintiffs realized substantial economic benefit from the violations, in the form of over-collection of gaming revenues above the statutory maximum. *See* NIGC Br. at 24–25. Indeed, Mr. Gallo himself conceded in his testimony that he would have ceased his association with the Tribe's Casino were it not for the unlawful amendments. *Id*. Plaintiffs respond with indignation, but they do not identify any fact or legal principle that was ignored or misapplied by NIGC.

[2] Although the regulations set forth five factors, one of them—the violator's history of previous violations—did not serve to increase the fine assessed against Plaintiffs, as the NIGC found that Plaintiffs "have no previous violations."

As to the second factor, the seriousness of the violation, NIGC properly found that under the regulations, management of a gaming operation outside an approved management contract is a "substantial violation" as a matter of law. NIGC Br. at 25. Plaintiffs claim there is a distinction between a "substantial" and "serious" violation, but they cite no legal basis for that distinction between the two terms, which would seem synonymous in this context. The NIGC regulations properly recognize that *any* management of a gaming operation outside an approved management contract is *per se* substantial because NIGC's approval power is at the heart of its role as a regulator. *See* 25 C.F.R. § 573.4(a)(7) (identifying management without an approved contract as a substantial violation of IGRA). A violation of that role is not just substantial but also very serious. Plaintiffs go on to claim that their violation was less serious because some of the terms of the previously-approved management contract continued to be observed under the unapproved amendments to that contract. Pls.' Resp. at 16–17. But the regulations make no such distinction, as they explicitly forbid operating under an amendment to a previously-approved management contract, no matter how extensive the amendment is. 25 C.F.R. § 573.4(a)(7). Furthermore, this argument ignores the fact that Plaintiffs managed the gaming operation in 2003 and 2004 subject to an *entirely* unapproved management contract.

As to the fourth factor, Plaintiffs contest NIGC's finding that Plaintiffs' conduct violated IGRA. They claim that "NIGC did not conduct sufficient investigation of or present sufficient analysis on" Plaintiffs' violation of IGRA. Pls.' Resp. at 17. They state that "[t]he ramifications stemming from this matter are far too serious for Bettor Racing to have been denied a hearing on the CFA." *Id.* But they do not cite any legal authority requiring a hearing, nor do they rebut the substantial body of undisputed material facts that led the Commission to conclude that Plaintiffs' conduct was unlawful. *See* NIGC Br. at 25.

Finally, as to the fifth factor, Plaintiffs claim that Bettor Racing "is being punished for exercising its right to due process (which it never received) under the NIGC's own rules." Pls.' Resp. at 18. This is a smokescreen, which Plaintiffs have deployed because they cannot allege that they have demonstrated *any* "good faith upon notification of the violation[s]" identified in the NOV. *See* 25 C.F.R. § 575.4. In the absence of such evidence, NIGC properly did not reduce the fine for good faith, and it could not have done so. *See* NIGC Br. at 26.

In sum, the Final Decision and Order set forth a robust factual basis for its findings on the four factors with which Plaintiffs take issue, yet Plaintiffs have not identified any material fact that was ignored or misapplied by the Commission. Plaintiffs have not carried the high burden necessary to establish that the Final Decision was arbitrary and capricious in upholding the CFA.

## III. The fine imposed by the Commission was far from excessive under the Eighth Amendment.

In their Response, Plaintiffs concede that the fine imposed by the CFA falls within the range permitted by IGRA, and there "may be a presumption of constitutionality if a fine falls within the permissible statutory range." Pls.' Resp. at 19. The Eighth Circuit has spoken clearly in holding that there is a presumption that a statutorily-permissible fine—such as the CFA in this case—is also constitutionally permissible. *See United States v. Moyer*, 313 F.3d 1082, 1085 (8th Cir. 2002). Indeed, the fine in this case is less than 1/13th of the statutory maximum. There is a strong presumption under binding case law that this fine is not excessive under the Eighth Amendment.

In their Response, Plaintiffs argue that the fine in this case was disproportional to the gravity of the offense. Pls.' Resp. at 19—20. They again attempt to paint the Tribe as having been the instigator of the check swap scheme. *Id*. They protest that their conduct "cannot be

categorized as intentional or reprehensible." *Id*. at 20. But these points are red herrings, because the Commission's affirmation of the CFA was not premised on "intentional or reprehensible" conduct by Plaintiffs, but rather on their (plainly demonstrated) violations of IGRA. Furthermore, the first two Violations (finding management of the gaming operation under un-approved management contracts) are substantial violations as a matter of law, regardless of the Tribe's conduct. Even if Plaintiffs' allegations about the Tribe's alleged bad conduct are entirely accurate, they do not demonstrate that the CFA, which is a tiny fraction of the statutory maximum available under IGRA, was unconstitutionally excessive.

Finally, Plaintiffs rely heavily on their assertion that NIGC "was the prosecutor, judge and jury." Pls.' Resp. at 20. But the Supreme Court has recognized that agencies often permissibly serve dual enforcement and adjudicatory roles. *See Withrow v. Larkin*, 421 U.S. 35, 51–52 (1975). There is no constitutional bar on that role, and it is often "very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings." *Id*. at 56. A general presumption of regularity applies to agency decisions in those circumstances, where decisionmakers are assumed to possess "conscience and intellectual discipline," and to be "capable of judging a particular controversy fairly on the basis of its own circumstances." *Id*. at 55.

In sum, contrary to Plaintiffs' allegation to the contrary, there is no indication here that the CFA in this case has violated the Excessive Fines Clause's "goal of preventing the Government from abusing its power to punish." *See* Pls.' Resp. at 20 (quoting *Browning-Ferris Indus of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275 (1989)). Instead, the Court is left with the strong presumption under Eighth Circuit case law that a statutorily-permissible fine,

such as this one, is also constitutionally permissible. Having provided no basis to overcome that presumption, Plaintiffs cannot show the fine violated their Eighth Amendment right against excessive fines.

**CONCLUSION**

Under the APA, Plaintiffs must demonstrate that the Final Decision was arbitrary and capricious or otherwise contrary to law. As discussed in this brief and in NIGC's opening brief in support of its cross-motion for summary judgment, Plaintiffs have not carried that high burden as to any of their claims. Accordingly, NIGC respectfully requests that this Court deny Plaintiffs' motion for summary judgment and grant NIGC's cross-motion for summary judgment on all counts.

Respectfully Submitted,

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