15-1335

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BETTOR RACING, INC., AND J. RANDY GALLO,

Plaintiffs-Appellants,

v.

NATIONAL INDIAN GAMING COMMISSION,

Defendant-Appellee,

and

FLANDREAU SANTEE SIOUX TRIBE,

Intervenor Defendant-Appellee.

Appeal from the United States District Court for the District of South Dakota
Case No. 13-cv-04051-KES

BRIEF OF FLANDREAU SANTEE SIOUX TRIBE

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STATEMENT OF THE CASE

Appellants Bettor Racing, Inc., and its president, J. Randy Gallo (collectively "Bettor Racing") managed a pari-mutuel betting operation from 2004 through 2010 at the casino owned by the Flandreau Santee Sioux Tribe ("Tribe").[1] The National Indian Gaming Commission ("NIGC"), the federal agency that regulates Indian gaming, found that during this time, Bettor Racing managed the operation without an approved contract as required by federal law, managed it pursuant to two unapproved contract modifications, again contrary to law, and retained so much of the revenue that it held a proprietary interest in the operation, violating federal and tribal laws. For these violations, the NIGC assessed a $5 million civil fine against Bettor Racing. Reviewing the NIGC's decision and fine assessment, the district court found no error. The Tribe urges this Court to affirm the judgment of the district court.

I. Factual Background.

The Tribe is a federally recognized Indian tribe. Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 80 Fed. Reg. 1942, 1944 (Jan. 14, 2015). It owns and operates the Royal River Casino, a gaming facility located on the Tribe's reservation in Flandreau, South

[1] In pari-mutuel betting, players bet on horse races or dog races, by telephone or in person, at off-track facilities. Pari-mutuel operators such as Bettor Racing make their profits by keeping a percentage of the "handle," i.e., the total amount wagered.

Dakota, operating in accordance with the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, and the Tribe's Gaming Ordinances.

IGRA permits Indian tribes to enter into management contracts for their gaming operations, but requires such contracts to be approved by the Chairman of the NIGC. 25 U.S.C. § 2711(a)(1). IGRA and Tribal law govern many of the key provisions that gaming management contracts may contain. Among other things, where the gaming manager's fee is a percentage of gaming revenue, the fee is generally limited to 30% of the net revenue. Under exceptional circumstances, the NIGC Chairman may approve a manager fee of up to 40% of net revenue, the absolute maximum. IGRA and Tribal law also require that the Tribe maintain the "sole proprietary interest" in any gaming operation. 25 U.S.C. § 2710(b)(2)(A).

Gallo approached the Tribe in mid-2003 about relocating Bettor Racing, Inc., which he had operated in Sioux Falls since 1998, from there to the Tribe's Royal River Casino in Flandreau, South Dakota. Bettor Racing desired the move, in part, to avoid South Dakota's 4.5% tax on the handle of pari-mutuel betting businesses. Tribe's Appx. 100-102 (AR 1752:21-1754:6, Gallo deposition). Initially, Bettor Racing sought to lease space at the Royal River Casino. The Tribe submitted a draft lease agreement for review by the NIGC, which, through its General Counsel, informed the Tribe that the lease agreement constituted a management contract, which would be void without the Chairman's review and

approval. Tribe's Appx. 162-165 (AR 1959-62, draft lease agreement), 16-17 (AR 605-06, letter from Penny Coleman, NIGC Acting General Counsel, to Terry Pechota, Tribal attorney, Sept. 12, 2003).

The Tribe and Bettor Racing regrouped and, in March 2004, submitted to the NIGC Chairman a contract for Bettor Racing to manage a pari-mutuel betting operation at the Royal River Casino. Tribe's Appx. 1 (AR 3, submission letter). The Chairman did not approve the management contract until a year later, however.

In the meantime, on September 20, 2004, the Tribe and Gallo entered into an agreement they referred to as a "consulting agreement." Tribe's Appx. 166-167 (AR 2009-10). *See* Tribe's Appx. 115-117 (AR 1784:14-1786:11, Gallo testifying, "There was a delay with the NIGC so this agreement was drawn up"). The consulting agreement was never submitted to or approved by the NIGC Chairman. This two-page agreement states that it "shall not be deemed, construed, or treated as a management agreement," but then states, "Randy Gallo will *manage* the Tribe's pari-mutuel operation pursuant to this agreement…." Tribe's Appx. 166 (AR 2009) (emphasis added). The agreement later provides that Gallo was to "consult, advise, [and] recommend" with respect to a Tribal pari-mutuel betting operation, until NIGC approval of the submitted management contract. *Id.* Gallo's consulting fee was to be one dollar per month. *Id.* Gallo opened the casino's new

pari-mutuel betting operation, Royal River Racing, on September 24, 2004. Tribe's Appx. 113 (AR 1772:11-16, Gallo deposition). Rather than merely providing advice and recommendations, Gallo exercised full management responsibilities. Instead of the Tribe paying Gallo a consulting fee of one dollar per month, as provided in the consulting agreement, Gallo collected the operation's revenue and paid the Tribe a 1% share, partially reflecting the terms of the not-yet-approved management contract. Tribe's Appx. 116-117 (AR 1785:16-1786:4, Gallo: "They went with my proposal and I paid them one percent on my handle."). For six months, Gallo managed the operation without a contract approved by the NIGC Chairman. Tribe's Appx. 113 (AR 1772:13-14, Gallo: "I operated for six months at Flandreau without a contract.").

In March 2005, NIGC Chairman Philip N. Hogen approved the management contract originally submitted in March 2004. Tribe's Appx. 168-172 (AR 2011-16, approval letter), 23-89 (767-833, Management Agreement). Among other things, the Management Agreement set the amount of Bettor Racing's fee. Tribe's Appx. 56-58 (AR 800-802, Management Agreement § 6.4(d)). The fee was structured with two separate calculation methods: (a) a minimum guaranteed payment to the Tribe, and (b) a graduated percentage-based fee. *Id.* Either method (a) or method (b) would apply depending on which provided greater revenues to the Tribe. *Id.*

Under method (a) – the minimum payment – Bettor Racing would pay the Tribe: (i) $300,000 annually (paid in weekly installments); (ii) one percent of all telephone gross handle exceeding $30,000,000 for the year; and (iii) four percent of all gross handle generated by in-person betting. *Id.* The Tribe was guaranteed these amounts regardless of how little revenue the operation generated. *Id.*

Under method (b) – the graduated division of revenues – Bettor Racing would take the following as a management fee: (i) forty percent of net revenue[2] when the annual gross handle was less than $30,000,000; (ii) thirty-five percent of net revenue when the gross handle was between $30,000,000 and $60,000,000; and (iii) thirty percent of net revenue when the gross handle was over $60,000,000. *Id.*; *see* Tribe's Appx. 127 (AR 1815:5-23, Gallo deposition).

In fall 2005, Bettor Racing approached the Tribe seeking to amend the Management Agreement. Tribe's Appx. 128-129 (AR 1821:18-1822:11, Gallo deposition). As Gallo explained:

> I approached them after South Dakota went back to a quarter of a percent tax instead of four and a half percent tax [on gross revenue from pari-mutuel betting].
>
> …
>
> I told them that either an amendment would have to be made to my contract or I would not be staying at

[2] IGRA defines "net revenue" 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 also* 25 C.F.R. § 502.16.

> Flandreau, but I would honor the $300,000 guarantee on $30 million for the remainder of the contract.

Id. (AR 1821:25-1822:8). In 2006, Bettor Racing and the Tribe agreed to reduce the guaranteed minimum payment on gross handle from 1% of the entire gross handle to 1% of the first $30,000,000 and 0.5% of gross handle over $30,000,000 (the "first modification"). Tribe's Appx. 95-97 (AR 956-58, letter from Rollyn H. Samp, Tribal attorney, to Gallo and Mark Allen, Bettor Racing accountant, Mar. 17, 2006, with draft MOU amending Management Agreement), 94 (AR 955, letter from Raymond E. Henry, Bettor Racing manager, to Terry Pechota, Tribal attorney, Nov. 27, 2006), 178-180 (AR 2064-66, Tribal Resolution authorizing first modification, Jan. 19, 2007), 181-184 (AR 2067-70, Modification to Management Agreement, Feb. 15, 2007).

Besides reducing the minimum payment to the Tribe, the first modification also eliminated the Tribe's share of the net revenues by instituting a kickback arrangement. Under this scheme (which was not included in the written modification), 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." Tribe's Appx. 132 (AR 1825:8-11, Gallo deposition).

> Gallo: [T]he Tribe would be entitled to the $300,000 guarantee and I believe at that time a half percent of the remaining handle and that's all the Tribe would receive.

> … [A]nything on the management agreement, on the 40/60 split or the 30/70 split, whatever that figure would be, I would pay the Tribe to be in compliance with the NIGC contract and then they would pay me back in the form of a consulting fee or bonus or reward the exact amount back.
>
> … I said, if that was the case and it's okay with the NIGC it's fine with me. Any other situation and I'm going back to Sioux Falls.

Tribe's Appx. 134 (AR 1829:9-23).

> Melissa Schlichting:[3] Was it your understanding that in doing the check swaps at the end of the year when the audit had finally been complete, that that would result in a reduction of the 60/40, 70/30 split?
>
> Gallo: It would wipe it out.

Tribe's Appx. 156-157 (AR 1894:25-1895:5).

The first modification was retroactive to April, 2006. Tribe's Appx. 138-139 (AR 1846:6-1847:1, Gallo deposition).

The Tribe submitted the first modification to the NIGC Chairman for review and approval, Tribe's Appx. 175 (AR 2061), but later requested the Chairman to hold in abeyance a decision on the modification until litigation regarding the Tribal-State Gaming Compact between the Tribe and the State of South Dakota was resolved. Tribe's Appx. 185 (AR 2071, correspondence from Terry Pechota, Tribal attorney, to Elaine Trimble-Saiz, NIGC Director of Management Contracts

[3] Ms. Schlichting was a staff attorney for the NIGC.

and Investigations, Apr. 13, 2007). The first modification to the management contract was never approved by the Chairman. Tribe's Appx. 196 (AR 2245 ¶ 8, Declaration of Elaine Trimble-Saiz, Dec. 23, 2010).

Bettor Racing managed the pari-mutuel operation pursuant to the first modification from no later than February 15, 2007, until August 2008. Tribe's Appx. 137-143 (AR 1845:17-1847:1, 1856:15-1857:19, 1858:7-1859:20, Gallo deposition), 148 (AR 1870:2-18, Gallo deposition).

In 2008, racetrack fees paid by Bettor Racing increased, and Bettor Racing proposed to make another change to the management fee structure. Tribe's Appx. 90-91 (AR 841-42, letter from Gallo to Flandreau Santee Sioux President Joshua Weston, July 18, 2008, proposing second modification). Bettor Racing and the Tribe acquiesced to the revised terms on August 1, 2008 (the "second modification"). Tribe's Appx. 98 (AR 1506, letter from Rollyn H. Samp, Tribal attorney, to Whom It May Concern, Oct. 31, 2008, confirming second modification). The second modification further reduced the guaranteed minimum payment on gross handle over $30,000,000 from 0.5% to 0.25%, and the growing difference from the net revenue split contemplated in the approved Management Agreement was again reconciled by kickbacks to Bettor Racing. *Id.*, Tribe's Appx. 151-154 (AR 1873:20-1876:4, Gallo deposition).

The second modification was not submitted to, or approved by, the NIGC Chairman. Tribe's Appx. 223 (AR 2514, Notice of Violation). From August 1, 2008 until the pari-mutuel betting operation closed on March 16, 2010, Bettor Racing managed the operation under the unapproved second modification to the management contract. Tribe's Appx. 98 (AR 1506), 157 (AR 1895:12-20, Gallo deposition).

The NIGC conducted a management contract compliance review in August 2009, investigating Bettor Racing and the Tribe for potential IGRA violations in connection with the Management Agreement. Tribe's Appx. 3-5 (AR 31-33, NIGC Notice of Non-compliance, Aug. 27, 2009). *See* Tribe's Appx. 221 (AR 2512, Notice of Violation). For the next several months, Bettor Racing was in frequent contact with the NIGC. Bettor Racing responded to the NIGC's initial findings and provided additional documents to investigators and auditors. Tribe's Appx. 6-15, 18-21 (AR 37-42, 59, 62, 81-82, 608-11, correspondence from Bettor Racing to NIGC officials). Bettor Racing also participated in telephone conversations with NIGC auditors and attorneys concerning the compliance issues. *See* Tribe's Appx. 158-159, 187 (AR 1900:18-1901:4, 2103:9-15, Gallo deposition). In February 2010, Bettor Racing wrote to the NIGC comprehensively explaining its position. Tribe's Appx. 6-15 (AR 608-11). Bettor Racing's general manager gave a deposition in April 2010, with Bettor Racing's attorney in

attendance, *see* Tribe's Appx. 93 (AR 853), and for more than ten hours over two days in May 2010, Gallo gave his own sworn statement. Tribe's Appx. 99 (AR 1738, day one), 186 (AR 2100, day two). Though Bettor Racing could have deposed its own witnesses with a showing of good cause, it did not attempt to do so. 25 U.S.C. § 2715(d); 25 C.F.R. § 571.11(a), (b).

In 2005 through 2008, the time period covered by the NIGC's investigation and audit, the NIGC determined that as a result of the kickbacks, as well as the incorrect deduction of expenses from its net revenues, Bettor Racing was paid $4,544,755 more than it was due under the approved management contract. Tribe's Appx. 209-210 (AR 2258-59, Declaration of NIGC auditor Daniel Catchpole, Jan. 12, 2011), 211-214 (AR 2260-63, Declaration of Daniel Catchpole, Jan. 31, 2011). In 2005, Bettor Racing received 65% of the pari-mutuel betting operation's net revenue. Tribe's Appx. 214 (AR 2263 ¶ 12). In 2006 and 2007, Bettor Racing received 75%. *Id*. In 2008, Bettor Racing was paid 78% of the net revenue. *Id.*

II. Agency Proceedings.

On May 19, 2011, NIGC Chairwoman Tracy L. Stevens issued 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. Tribe's Appx. 219-241 (AR 2510-32). The NOV stated Gallo and Bettor Racing had

violated IGRA and the NIGC's regulations in three ways: (1) they managed a tribal gaming operation without an approved management contract; (2) they managed a tribal gaming operation under two unapproved modifications to a management contract; and (3) they held a proprietary interest in the tribal gaming operation. Tribe's Appx. 219-220 (AR 2510-11.)[4] The NOV ordered Bettor Racing to reimburse the Tribe $3,463,177, representing the $4,544,755 difference between what Bettor Racing was paid under the unapproved modifications and what it was owed under the management contract, less $1,081,578 Bettor Racing had previously paid as a result of the NIGC audit. Tribe's Appx. 239-230 (AR 2530-31); *see* Tribe's Appx. 19-20 (AR 609-10, letter from Gallo to Elaine Trimble-Saiz, describing partial reimbursements paid in 2010).

Bettor Racing appealed the NOV to the full Commission. Tribe's Appx. 242-243 (AR 2542-43). The Tribe petitioned to intervene in the appeal. Tribe's Appx. 244-248 (AR 2545-49). Bettor Racing initially requested an evidentiary hearing. Tribe's Appx. 242 (AR 2542). Anticipating the Chairwoman's filing of a

[4] 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 exceeding the amount allowed under the approved management contract and for a purpose not allowed under IGRA and the Tribe's Gaming Ordinance. Tribe's Appx. 220 (AR 2511). The Tribe and Commission reached a settlement as to the Tribe's portion of the NOV. Tribe's Appx. 249-254 (AR 2611-16).

motion for summary judgment, however, Bettor Racing joined with the Tribe and Chairwoman in a joint motion proposing that the "hearing date, if necessary, will be scheduled after ruling on any motions." Tribe's Appx. 258-262 (AR 2657-61). The Presiding Official adopted this language in her scheduling order. Tribe's Appx. 263 (AR 2662).

On February 10, 2012, the Chairwoman issued a Proposed Civil Fine Assessment ("CFA") against Gallo and Bettor Racing, Inc. Tribe's Appx. 265-273 (AR 2665-73). The Chairwoman proposed that Bettor Racing be fined a total of $5,000,000. Tribe's Appx. 272-273 (AR 2672-73). Bettor Racing appealed the CFA. Tribe's Appx. 285-286 (AR 2942-43). The Tribe again petitioned to intervene, and the Presiding Official consolidated the two appeals. Tribe's Appx. 287-288 (AR 2991-92). Bettor Racing indicated to the Presiding Official that "a hearing on the CFA should be deferred until the [summary judgment] motions have been decided[.]" Tribe's Appx. 288 (AR 2992).

The Chairwoman and the Tribe both moved for summary judgment upholding the NOV. Tribe's Appx. 274-275 (AR 2674-75, Chairwoman's motion), 276-277 (2800-01, Tribe's motion). Bettor Racing opposed both motions and submitted evidence in support of its position. Tribe's Appx. 278-284 (AR 2805-06, 2829-30, 2855-57). Bettor Racing submitted additional briefing in opposition to the CFA. Tribe's Appx. 289 (AR 2999).

The Presiding Official considered the motions and issued a recommended decision on August 13, 2012, recommending that the NIGC grant summary judgment in favor of the Tribe and Chairwoman, upholding the NOV and CFA. Tribe's Appx. 290-316 (AR 3015-41). On September 12, 2012, the NIGC issued its final decision granting judgment in favor of the Chairwoman. Tribe's Appx. 317-333 (AR 3043-59).

III. Judicial Review.

On May 10, 2013, Bettor Racing filed suit in the United States District Court for the District of South Dakota seeking judicial review of the NIGC's final decision. The court granted the Tribe's motion to intervene as a defendant, and the Tribe and Bettor Racing cross-complained against one another for breach of contract.[5] On cross-motions for summary judgment, the Court issued its order on September 19, 2014 upholding the NIGC's decision. Mem. Opinion, Bettor Racing's Addendum at 3-55.[6] The court held the NIGC had not acted arbitrarily or capriciously in determining that Bettor Racing violated IGRA, or in assessing a civil fine appropriate to such violations. *Id.* The court also held that Bettor Racing was not denied due process of law, and that the amount of the civil fine was not so

[5] The contract aspect of the action below remains stayed pending adjudication of similar claims in Flandreau Santee Sioux Tribal Court. *See* Order Granting Motion to Correct Judgment, Bettor Racing's Addendum at 58.

[6] The decision is reported as *Bettor Racing, Inc. v. National Indian Gaming Commission*, 47 F.Supp.3d 912 (D.S.D. 2014).

grossly disproportional as to offend the Eighth Amendment. *Id*. Bettor Racing then filed the instant appeal.

IV. Response to Bettor Racing's Statement of Facts.

Bettor Racing does not dispute the facts described above as the basis for the NIGC's decision. Rather, it identifies certain additional purported facts and argues these facts excuse its violations of law. Several of Bettor Racing's purported facts have no basis in the record. For instance, Bettor Racing states:

> FSST'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.] FSST advised that nothing prohibited Bettor Racing from commencing operations at the Casino. In fact, FSST's counsel advised Bettor Racing that he had spoken directly with the Chairman of the NIGC who approved the same. [Citations to AR.]

Bettor Racing Br. at 4. 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.[7]

[7] Bettor Racing cites the following: AR 723 (Tribe's Appx. 22) is four pages from the draft transcript of Terry Pechota's deposition, containing no reference to the September 20, 2004 consulting agreement. AR 1784-86 (Tribe's Appx. 115-117) are pages from Gallo's deposition transcript, in which he simply identifies the September 20, 2004 consulting agreement. AR 4 (Tribe's Appx. 2) is an April 12, 2004, faxed communication from Terry Pechota to Commission Chairman Phil Hogen, including a handwritten message signed with the initials "PH," presumably for Phil Hogen. It contains no reference to the Tribe or Bettor Racing being allowed to operate without an approved management contract. AR 1762-66

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." Bettor Racing Br. at 5 (emphasis added). The record citation is "*Id.*," which refers to excerpts from AR 1821-22, 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.

Tribe's Appx. 128 (AR 1822) (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.[8] Bettor Racing cites nothing in the record indicating

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(Tribe's Appx. 103-107) 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.

[8] In 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

Bettor Racing would have been unable to stay in business or to maintain its tribal payments if it remained at the Royal River Casino.

Bettor Racing states the Tribe "advised Bettor Racing that it had taken all steps necessary to obtain approval of the Second Modification," Bettor Racing Br. at 7, citing excerpts from the Gallo deposition. Far from supporting the asserted fact, in this passage Gallo states, regarding the first modification (not the second, which is not discussed in this excerpt), "I didn't know what the situation was between the NIGC and the Tribe." Tribe's Appx. 191 (AR 2112:6-7). Immediately following the passage cited by Bettor Racing there is the following exchange:

> Ms. Schlichting: Did anybody tell you that the NIGC did approve it?
>
> Gallo: I never heard the NIGC's name mentioned in this.

Id. (AR 2112:13-16.)

Bettor Racing further states: "FSST received all funds to which it was entitled under Federal law." Bettor Racing Br. at 8. As support Bettor Racing

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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 more material to the Tribe's pending counterclaim 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." Bettor Racing Br. at 5. It is the Tribe's view that the Management Agreement required more of Bettor Racing than simply making the minimum annual payment.

cites AR 1815:14-19 (Gallo deposition, Tribe's Appx. 127) and AR 2017 (the Management Agreement, Tribe's Appx. 174). In the cited section of his deposition, Gallo simply states his understanding of the revenue allocations provided in the Management Agreement. The material cited does not (and cannot) stand for the legal conclusion that the Tribe received all the funds it was due under federal law.

Elsewhere in its brief, Bettor Racing cites AR 2644-45, among other things, for the proposition that the Tribe's attorney, Terry Pechota, viewed the modified fee arrangement – the kickbacks – as consistent with IGRA. Bettor Racing Br. at 40, n.8. The cited document is a scheduling order regarding mediation, unrelated to any statements made by Pechota. Tribe's Appx. 255-256. The district court observed the very same deficiency in Bettor Racing's briefs below, now repeated in this Court. Mem. Opinion, Bettor Racing's Addendum at 26 n.8.

SUMMARY OF THE ARGUMENT

The procedures leading to the NIGC decision did not deny Bettor Racing due process. Bettor Racing had the opportunity to discover and bring to the NIGC's attention all the facts it believed were relevant to its defense. It has never shown a dispute as to any material fact such that an evidentiary hearing was required, rather than the summary judgment the NIGC issued.

The NIGC's conclusion that Bettor Racing committed three violations is reasonable and supported by the record. Bettor Racing undisputedly operated pari-mutuel betting without an approved management contract and with two unapproved contract modifications. Bettor Racing also undisputedly retained nearly three times the revenues the Tribe retained. Regardless of Bettor Racing's state of mind, these actions violated IGRA and Tribal law.

The record also supports the NIGC's analysis of the considerations relevant to assessing a civil fine. The NIGC accounted for the serious nature of the violations, which upset the fundamental purpose of Indian gaming, as well as the Tribe's own role in Bettor Racing's violations.

Finally, the amount of the fine, which is a small fraction of the amount the NIGC could have assessed under IGRA and federal regulations, is not grossly disproportionate to the offense.

ARGUMENT

I. Standard of Review.

This Court reviews *de novo* a district court's decision whether an agency action violates the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, *et seq.* *Friends of the Norbeck v. U.S. Forest Serv.*, 661 F.3d 969, 975 (8th Cir. 2011). Under the APA, a Court will not disturb agency action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."

Id. (quoting 5 U.S.C. § 706(2)(A)). An agency decision fails the "arbitrary and capricious" standard if:

> [T]he agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). While the Court's review of the facts before the agency is "searching and careful," the "standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). If the agency's decision "is supportable on any rational basis," it must be upheld. *Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759, 763 (8th Cir. 2004). The Court defers to an agency's interpretation of a statute it administers. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Further deference is required when an agency interprets its own regulations. *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 799 (8th Cir. 2005).

II. Bettor Racing Was Not Denied Due Process.

Bettor Racing argues it was "denied [its] constitutionally-protected right to be heard." Bettor Racing Br. at i. Bettor Racing claims to identify two ways the NIGC deprived it of due process: "First, because there was no hearing, evidence was never fully developed or tested. Second, the agency overlooked reasonable inferences that could have been drawn from the record." *Id*. at 18. *See also id.* at 19. But the record in this case belies Bettor Racing's arguments.

The fundamental requirement of due process is the opportunity to be heard. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Schmidt v. Des Moines Pub. Schs.*, 655 F.3d 811, 817-18 (8th Cir. 2011). The specific procedures that may be required depend upon, among other things, "the probable value, if any, of additional or substitute procedural safeguards[.]" *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Bettor Racing initially focuses on the period prior to the issuance of the NOV, claiming the NIGC denied Bettor Racing the opportunity to participate in its investigation. Bettor Racing Br. at 19. No authority is cited for the proposition that due process requires participation in a "pre-deprivation" investigation. The decision on which Bettor Racing relies for the bulk of its due process argument points to a contrary conclusion. *Business Communications, Inc. v. U.S. Dept. of Educ.*, 739 F.3d 374 (8th Cir. 2013), *reh'g granted in part*, Mar. 7, 2014.

Business Communications pointedly involved contradictory witness statements concerning the fundamental fact at issue. *Id.* at 378-79. The agency's decision depended on its assessment of "the credibility of individual witness testimony[.]" *Id.* at 380. The Court noted that "'where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses,'" and held that the "total absence of a hearing" did not satisfy the minimum due process requirements in that context. *Id.* at 380, 381 (quoting *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970)). The Court explained that the agency's investigation – gathering facts to support a prima facie case – serves a different function than the proceedings before the decisionmaker, who makes "credibility determinations." *Id.* at 381. If, as Bettor Racing argues, the process due in this case requires the opportunity to confront witnesses and test adverse evidence, participation in the investigation is not the means to that end. *Id. See Brock v. Roadway Express, Inc.*, 481 U.S. 252, 266 (1987).

In any case, ample opportunity existed to participate in the investigation. In addition to the exchange of correspondence and documents described above, Bettor Racing could have deposed its own witnesses upon reasonable notice and a showing of good cause. 25 U.S.C. § 2715(d); 25 C.F.R. § 571.11(a), (b). It 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). Although regulations protect current NIGC personnel from being questioned by deposition, Bettor Racing could have obtained their testimony by written interrogatories. 25 C.F.R. § 571.11(a). Also, 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* 25 C.F.R. §§ 571.3, 571.11(a). Bettor Racing did none of this.

Bettor Racing also claims it was inappropriate for the NIGC to grant judgment in the Chairwoman's favor without holding an evidentiary hearing. It relies largely on *Business Communications*, 739 F.3d 374. As described above, the holding in that case hinged on the fact that when the agency made its decision, there were material facts in dispute. *Id.* at 378-79, 380-81. Witness testimony was in direct conflict, *id.* at 378, and the agency's decision depended on credibility determinations, *id.* at 380.

In this case, on the other hand, no material facts are in dispute. The terms of the written agreements and the existence and timing of governmental approvals were all set forth in writing and never in dispute. It was also clear from the documents, and undisputed, how the money was allocated between Bettor Racing and the Tribe. Bettor Racing's focus is on facts that are not relevant to any material question of law. *See* Bettor Racing Br. at 32 ("Bettor Racing cannot

dispute the dates," and instead "emphasize[s] the circumstances"); *id.* at 36 (asserting "knowledge" and "intent" are relevant). Whereas the witness testimony in *Business Communications* concerned the key factual question on which the resolution of the case depended, in this case the testimony only provided context for the information that was easily gleaned from the documents. The only dispute is the impact, if any, the surrounding "circumstances" should have on the legal questions.

Where there is no dispute concerning a material fact, there is no value in providing any procedural safeguards beyond those that exist in the summary adjudication process. "If the agency and the individual disagree only with respect to the way in which the law applies to an uncontroverted set of facts, additional procedures cannot possibly enhance the accuracy of the factfinding process, simply because the agency does not need to resolve any factual controversies." Richard J. Pierce, Jr., *Administrative Law Treatise* § 9.5, p. 813 (5th ed. 2010).

Bettor Racing cites "only one example" of how the claimed due process deprivation affected its case. Bettor Racing Br. at 24. "Chairman Hog[e]n was never interviewed, deposed, or questioned by the NIGC." *Id.* This is significant, according to Bettor Racing, because "there is evidence in the record that [Hogen] commented upon the parties' relationship and its legality, indicating that the bonus payments were in fact legal." *Id.* Bettor Racing's argument in this regard lacks

any legal or factual basis. Bettor Racing could have deposed Chairman Hogen if it believed such an undertaking would have helped its case. Furthermore, the NIGC reasonably concluded that nothing Chairman Hogen is alleged to have said about the legality of Bettor Racing's fee arrangement could have any legal bearing on the NOV or the CFA. Tribe's Appx. 325 (AR 3051, "[O]ral representations cannot relieve a party of its obligation to comply with statutes and regulations. The Commission is also not aware of any source of law that would relieve the Respondents of responsibility even if what they allege is true."). 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 is hearsay and double hearsay), at most Bettor Racing shows that former Chairman Hogen informally provided an erroneous answer to a hypothetical question about what IGRA allows. This was not affirmative misconduct, and it was not an approval of any management contract or kickback arrangement. *See* 25 C.F.R. § 533.1(b) ("Contract approval shall be evidenced by a Commission document dated and signed by the Chairman. No other means of approval shall be valid.") Bettor Racing still has not identified any legal basis for the relevance of Chairman Hogen's alleged statements.

As the district court explained, Bettor Racing initially requested a hearing, and then agreed that further hearing may not be necessary following determination of the summary judgment motions – *i.e.*, if there were no genuine issues of material fact. *See* Mem. Opinion, Bettor Racing's Addendum at 40. The lack of a subsequent hearing was based on the agency's determination that, because no material facts were in dispute, no hearing to resolve such disputes was necessary. *Id*. Bettor Racing does not point to any substantiated fact or legal argument that would require a contrary conclusion.

III. The NIGC Reasonably Determined that Bettor Racing Violated IGRA.

The Tribe urges the Court to affirm the district court and hold that "the administrative record supports the NIGC's conclusions that Plaintiffs committed three violations of the IGRA." Mem. Opinion, Bettor Racing's Addendum at 43.

A. Statutory Background.

1. Indian Gaming Regulatory Act.

Congress enacted 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*). 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 NIGC'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).

The Tribe enacted a gaming ordinance with NIGC approval, incorporating these mandatory provisions. The Flandreau Santee Sioux Class III 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.

Tribe's Appx. 215 (AR 2384, Flandreau Santee Sioux Class III Gaming Ordinance § 17-6-1 (2) to (4)).

In addition to its general Gaming Ordinance, the Tribe enacted a federally-approved ordinance specific to off-track betting, the Flandreau Santee Sioux Ordinance on Pari-mutuel Betting. *See* Tribe's Appx. 216 (AR 2402). The Ordinance on Pari-mutuel Betting incorporates all the provisions of the general Gaming Ordinance. Tribe's Appx. 217 (AR 2403, Flandreau Santee Sioux Ordinance on Pari-mutuel Betting § 2). It also 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." Tribe's Appx. 218 (AR 2404, Flandreau Santee Sioux Ordinance on Pari-mutuel Betting § 4).

B. First Violation: Bettor Racing Managed the Pari-mutuel Betting Operation for Six Months Without an Approved Management Contract.

It is undisputed that Bettor Racing managed the pari-mutuel betting operation at the Tribe's casino from September 2004 to March 2005 without a duly approved management contract. Gallo readily admits as much:

> Gallo: I operated for six months at Flandreau without a contract.
>
> Ms. Schlichting: Okay. From September –
>
> Gallo: –24th through March 17 of '05.

Tribe's Appx. 113 (AR 1772:13-16).

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

Tribe's Appx. 114 (AR 1780:23-25).

On September 20, 2004, the Tribe and Gallo entered into an agreement whereby Gallo was to "consult, advise, recommend, and undertake such action as reasonably required by the Tribe" in the operation of pari-mutuel betting prior to approval of the Management Agreement. Tribe's Appx. 166-167 (AR 2009-10, consulting agreement), 115-117 (AR 1784:14-1786:1, Gallo deposition). Upon approval of the Management Agreement by the NIGC Chair, the consulting agreement provided that it would be "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." Tribe's Appx. 166 (AR 2009). The consulting agreement 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.

Id.

In fact, Gallo did more than provide advice. From its opening on September 24, 2004, Bettor Racing began *managing* Royal River Racing by accepting wagers from patrons at the casino, accepting wagers placed over the telephone and managing Royal River Racing employees. Tribe's Appx. 118-126, 194-195 (AR 1787:12-1795:22, 2181:11-2182:9, Gallo deposition). Additionally, Bettor Racing determined the amounts of the salaries and bonuses for Royal River Racing employees. Tribe's Appx. 146-147 (AR 1868:21-1869:5, Gallo deposition). Instead of the Tribe paying Gallo one dollar per month, or compensating Bettor Racing pursuant to the net revenue sharing terms of the not-yet-approved management contract (as well as tribal 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.

Tribe's Appx. 117 (AR 1786:3-4). *See also* Tribe's Appx. 160-161 (AR 1903:21-1904:15, Gallo deposition).

Based on these facts, the NIGC reasonably concluded that Bettor Racing managed a tribal gaming operation without an approved management contract from September 2004 to March 2005, in violation of 25 U.S.C §§ 2710(d)(9) and 2711. Bettor Racing does not contest the facts forming the basis for this first violation, but cites a number of facts it alleges establish a "defense that its actions were made in good faith." Bettor Racing Br. at 33.

The NIGC and the district court correctly rejected Bettor Racing's argument that an IGRA violation cannot occur without "wrongful intent" or, at least, "understanding" that the actions taken are unlawful. *See* Bettor Racing Br. at 35. The NIGC concluded that "IGRA does not have a scienter requirement." Tribe's Appx. 324 (AR 3050). The NIGC 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 is based on its construction of IGRA's unambiguous language, which both the agency and Court must effectuate. Even if IGRA were ambiguous on this point, NIGC's conclusion is a reasonable interpretation of IGRA to which the Court must give deference. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 842-43.

Neither IGRA, the NIGC regulations, nor tribal law provide 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. Nor do they 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." Bettor Racing Br. at 34. It is not uncommon, however, for a statutory or regulatory violation to exist in the absence of a "knowing" or "willful" intent to violate the law. For example, under the Age Discrimination in Employment Act, 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 strict liability.

The cases Bettor Racing cites on the subject are inapposite. For example, *Carter v. United States*, 530 U.S. 255, 267-68 (2000) discusses whether a federal bank robbery statute should be read to contain a scienter element. But the necessity of a scienter requirement of some type only applies in the criminal context. *United States v. Project on Government Oversight*, 616 F.3d 544, 549 (D.C. Cir. 2010); *see Ratzlaf v. United States*, 510 U.S. 135, 146 n.16 (1994) (identifying statutes providing for "civil forfeiture without any 'willfulness' requirement"); *Morissette v. United States*, 342 U.S. 246, 270 (1952) (observing that criminal conversion requires intent while the civil tort does not). IGRA is not a criminal statute, and Bettor Racing is charged with civil, not criminal, violations. As the district court noted, "[P]laintiffs have not been charged with violating a criminal offense. Reference to *Carter* in this context is therefore inapposite." Mem. Opinion, Bettor Racing Addendum at 15.[9]

[9] The district court also noted that Bettor Racing had quoted language ostensibly from *Carter* that does not appear in the Supreme Court's opinion. Mem. Opinion, Bettor Racing Addendum at 12 n.5. Bettor Racing commits the same quotation error in its brief on appeal. Bettor Racing Br. at 34.

Furthermore, even if *Carter* applied, the NIGC would have been reasonable in concluding that the facts alleged by Bettor Racing are not a defense to the three violations of IGRA. Applying the rule of *Carter* would only 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 modification. 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. However, Bettor Racing knew it was operating the pari-mutuel betting operation, 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 citations concern federal criminal statutes and causes of action that require a specific intent not found in the laws applicable here. *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. at 136 ("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 those cases, the requirement that Bettor Racing act "willfully" is not found in IGRA, the federal regulations, or the Tribe's gaming ordinances.

In sum, 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.

C. Second Violation: Bettor Racing Managed the Pari-mutuel Betting Operation Under Two Unapproved Modifications to the Management Agreement.

All proposed modifications to a management contract must be reviewed and approved by the NIGC Chair or they are void ab initio. 25 C.F.R. § 535.1(f); *Turn Key Gaming, Inc. v. Oglala Sioux Tribe*, 164 F.3d 1092, 1094 (8th Cir. 1999). It is a violation of IGRA to operate a gaming activity pursuant to a modified management contract that has not been approved by the NIGC Chair. 25 U.S.C. §§ 2711(a)(1), 2710(d)(9); 25 C.F.R. § 535.1(a).

In this case, the Management Agreement, as approved, split the operation'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%. Tribe's Appx. 56-58 (AR 800-802, Management Agreement § 6.4(d)). 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." Tribe's Appx. 109 (AR 1768:19). 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 gross handle. Tribe's Appx. 101 (AR 1753:9-18). The Tribe's minimum share on telephone betting (which accounts for nearly all revenue in pari-mutuel betting) was only 1% of the gross handle. Tribe's Appx. 57 (AR 801). Working with the Tribe also provided Bettor Racing with other benefits such as a secure location at the Tribe's casino. Tribe's Appx. 135-136 (AR 1843:16-1844:17). Gallo explained, "It was still better than any offer I had on the table." Tribe's Appx. 112 (AR 1771:18-19).

Then in 2005, South Dakota reduced its tax rate to just one-quarter percent of gross handle. Tribe's Appx. 128-129 (AR 1821:25-1822:2). 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." Tribe's Appx. 129 (AR 1822:4-8). *See also* Tribe's Appx. 131 (AR

1824:13-17, "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"). In short, Bettor Racing intended to pay the Tribe only the minimum amount unless the Tribe gave it a better deal.

Contrary to Bettor Racing's position in this case, payment of the $300,000 minimum 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. Tribe's Appx. 30, 34, 42 (AR 774, 778, 786, Management Agreement Recital D, art. 2, and § 4.1(b)(19)). It promised to conduct the gaming operation "in the best interest of the Tribe and Manager." Tribe's Appx. 36 (AR 780, § 4.1). To abandon or cut back the operation after less than one year would have constituted a default in the performance of a material condition. Tribe's Appx. 66 (AR 810, § 9.1). This breach of contract would have deprived the Tribe of the revenues due to it from the operation, and of Bettor Racing's best efforts to maximize the operational potential (and the associated benefits) of pari-mutuel betting at the Tribe's casino.

To avoid the negative effects of Bettor Racing leaving the casino, the Tribe's then-attorney and Mark Lyons, Bettor Racing's accountant, devised a check swap arrangement – a kickback. 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." Tribe's Appx. 132 (AR 1825:8-11, Gallo deposition). *See* Tribe's Appx. 137-138 (AR 1845:17-1846:20). The check to Bettor Racing would be "in the form of a bonus to [Gallo] as a consultant or reward on my good work." Tribe's Appx. 133 (AR 1826:12-14). The kickback effectively lowered the Tribe's share of revenues to $300,000 plus 0.5 percent of the gross handle exceeding $30 million, which was still more than the bare minimum $300,000 the Tribe would have received had the Tribe not conceded to Bettor Racing's demands for a modification. The kickbacks allowed Bettor Racing essentially to pay the Tribe a tax on gross handle, as it would if it were operating under state jurisdiction, and to ignore the special protections Congress built into IGRA to protect tribal gaming revenue. With these assurances, Bettor Racing agreed to stay in Flandreau, and the parties operated under the modified contract until 2008.

But in 2008, business conditions changed again for Bettor Racing when horse tracks increased the fees they charged off-track facilities. Tribe's Appx. 148-149 (AR 1870:19-1871:17). 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.

Tribe's Appx. 152-153 (AR 1874:25-1875:17).

In response, the Tribe agreed to further reduce its share of revenues to the $300,000 minimum plus 0.25 percent of gross handle exceeding $30 million. And again the difference between this modification and the approved management contract was reconciled through kickbacks, arranged and agreed to as a condition for Bettor Racing to remain with the Tribe. Bettor Racing managed 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 the NIGC Chair. Gallo understood the NIGC would not have approved the modifications that required increased revenues for Bettor Racing and that the kickback allowed Bettor Racing and the Tribe to "work around" the restrictions of the approved management contract. Tribe's Appx. 193 (AR 2137:1-22, Gallo deposition).

These undisputed facts formed the basis for the NIGC's determination that Bettor Racing managed the gaming operation pursuant to two unapproved modifications to a management contract.

Bettor Racing contends, however, that the NIGC and the district court ignored facts "surrounding the preparation and submission of the Modifications to the NIGC[.]" Bettor Racing Br. at 36. As with the first violation, those facts go to Bettor Racing's state of mind, as well as sketching the outlines of a reliance argument. As discussed above, Bettor Racing's state of mind is irrelevant to whether it managed a tribal gaming operation under unapproved contract modifications. Similarly, Bettor Racing cites no authority at all to establish that Bettor Racing's actions otherwise in violation of IGRA must be excused if it acted in reliance on the Tribe.

In fact, Bettor Racing knew NIGC approval was necessary to comply with federal law. "If … it's okay with the NIGC it's fine with me. Any other situation and I'm going back to Sioux Falls." Tribe's Appx. 134 (AR 1829:20-23). "If I had known the NIGC did not approve of that at the time I would have left there immediately." Tribe's Appx. 145 (AR 1863:13-15). 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 Management Agreement 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…." Tribe's Appx. 39 (AR 783, Management Agreement § 4.1(b)(7)). *See also* Tribe's Appx. 43 (AR 787, Management Agreement § 4.2(c): "Manager shall operate the project in accordance with applicable federal and state laws, … Tribal Ordinances, and rules and regulation of the Tribal Gaming Commission"), 45 (AR 789, § 4.3(a)(2): Bettor Racing warrants it will be "in compliance with all applicable laws"). Bettor Racing averred it possessed the "expertise and operational skills necessary" to manage the operation in accordance with these terms. Tribe's Appx. 31 (AR 775, Management Agreement Recital H). It was neither reasonable nor consistent with its obligations for Bettor Racing to act as though the contract modifications were approved, with no actual indication that the mandatory written approval was ever given. *See* 25 C.F.R. § 533.1(b). Bettor Racing acted under the modifications even though Gallo "never knew whether the NIGC acted on anything." Tribe's Appx. 144 (AR 1861:8-12).

The facts in the record support the NIGC's conclusion that Bettor Racing managed the pari-mutuel betting operation under the terms of two unapproved modifications to the management contract, in violation of 25 U.S.C. §§ 2710(d)(9) and 2711, and 25 C.F.R. § 535.1(a).

D. Third Violation: Bettor Racing Held a Proprietary Interest in the Pari-mutuel Betting Operation.

Based on the undisputed material facts, the NIGC reasonably concluded that Bettor Racing's control over, and receipt of excessive revenues from, the gaming operation violated the sole-proprietary-interest requirement of federal and Tribal law.

"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. Tribe's Appx. 218 (AR 2404, Flandreau Santee Sioux Ordinance on Pari-mutuel Betting § 4), 215 (AR 2384, Flandreau Santee Sioux Class III Gaming Ordinance § 17-6-1(4)). The sole-proprietary-interest requirement advances the primary purposes of IGRA, to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments[,] … to ensure that the Indian tribe is the primary beneficiary of the gaming operation, … and to protect such gaming as a means of generating tribal revenue." 25 U.S.C. § 2702.

Three factors are examined in determining whether a tribe has the sole proprietary interest in a gaming operation: "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." Tribe's Appx. 326 (AR 3052). *See City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 830 F.Supp.2d 712, 723 (D. Minn. 2011). The NIGC's decision focused on the latter two criteria. On appeal, Bettor Racing only takes issue with the NIGC's treatment of the second factor.

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). Management contractor fees are identically limited under the Tribe's gaming ordinance, Tribe's Appx. 215 (AR 2384, Flandreau Santee Sioux Class III Gaming Ordinance § 17-6-1(4)), and federal regulations, 25 C.F.R. § 531.1(*i*).

Bettor Racing retained substantially more of the pari-mutuel betting operation's net revenue than the Tribe did, and far more than allowed by federal and Tribal law. By means of the kickback scheme, Bettor Racing pocketed 65% of the net revenues in 2005, 75% in both 2006 and 2007, and 78% in 2008. Tribe's Appx. 214 (AR 2263 ¶ 12, Declaration of NIGC auditor Daniel Catchpole). Bettor Racing retained nearly twice the absolute maximum manager's fee permitted by law.

Bettor Racing understood that the kickbacks would allow Bettor Racing to retain revenue exceeding the fee provided in the Management Agreement:

> 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.

Tribe's Appx. 156-157 (AR 1894:25-1895:5).

Bettor Racing does not dispute the NIGC's calculations, but argues the NIGC erred in determining the kickbacks were prohibited under IGRA. Bettor Racing Br. at 40-42. Kickbacks, according to Bettor Racing, are authorized by 25 U.S.C. § 2710(b)(2)(B).[10]

The NIGC correctly concluded that IGRA prohibits a management contractor from receiving 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 manager for the purpose of the Tribe's "economic

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[10] 25 U.S.C. § 2710(b)(2)(B) provides:

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

development." First, the NIGC's construction of IGRA is founded on Congress's unambiguous directive, which the NIGC and the Court must effectuate. 25 U.S.C. § 2711(c)(2) (prohibiting approval of management fees exceeding 40% of net revenues); *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). Second, even if IGRA were ambiguous on this issue, the Court must defer to the NIGC's reasonable 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's 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's application of IGRA).

The NIGC's interpretation of IGRA was eminently reasonable. While it is true that IGRA allows a Tribe to use its gaming revenue for economic development, the NIGC reasonably concluded that Congress did not intend to allow Indian tribes to forfeit the bulk of their profits under the guise of a "bonus." Congress's intent is evidenced by its requirement that no management contract can take effect until the NIGC is assured 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 that 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 express 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. Indeed, such a scenario would defeat the entire purpose of Indian gaming itself, which is to ensure that Indian tribes are the primary beneficiaries, economic and otherwise, of their gaming operations. 25 U.S.C. § 2702.

Moreover, Bettor Racing's characterization of the kickback as a voluntary "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, and perhaps should not count as part of Bettor Racing's fee. On the contrary, however, the

kickback payments 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.

Tribe's Appx. 155-156 (AR 1893:25-1894:24).

> 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.

Tribe's Appx. 188-189 (AR 2109:24-2110:15).

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

Tribe's Appx. 192 (AR 2136:6-9). The kickback 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 the Management Agreement.

The NIGC and district court both correctly determined that Bettor Racing having taken home 65 to 78% of the gaming operation's net revenue weighs in favor of finding that it held an unlawful proprietary interest in the operation. Together with the degree of independent control exercised by Bettor Racing, which it does not contest on appeal, the factual record is more than sufficient to support the NIGC's conclusion that Bettor Racing violated the requirement of IGRA and Tribal law that the Tribe alone hold a proprietary interest in the gaming operation.

IV. The NIGC Did Not Abuse Its Discretion or Violate the Eighth Amendment When It Assessed a Civil Fine.

A. The NIGC's Civil Fine Assessment Was Reasonable in Light of the Regulation's Five Considerations.

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, federal Indian gaming regulation, or any NIGC-approved tribal gaming law. 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's regulations prescribes five factors the Chairwoman must consider before assessing a fine. In this case, the NIGC considered the five factors and upheld the Chairwoman's proposed fines of $1 million for the first violation (operating without a management contract), $2 million for the second violation (operating under two unapproved modifications to a management contract), and $2 million for the third violation (violating the sole-proprietary-interest requirement). The NIGC's affirmation of the Chairwoman's proposed civil fine assessment was reasonable and supported by substantial evidence.

The NIGC reasonably applied the first factor: "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. Between 2005 and 2008, Bettor Racing received at least $4,544,755 in net gaming revenue that under law was due to the Tribe. Tribe's Appx. 209-210 (AR 2258-59, Declaration of NIGC auditor Daniel Catchpole). 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.

Bettor Racing Br. at 44-45. 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 kickback scheme by which Bettor Racing collected its unlawful share of revenues was specifically designed to "escap[e] detection," 25 C.F.R. § 575.4(a), with the parties intentionally omitting the kickback obligation from the written modifications in order to "work around" IGRA's requirements, aware that the NIGC would not approve. Tribe's Appx. 193 (AR 2137:1-17, Gallo deposition).

The NIGC reasonably applied the second factor, 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.

Bettor Racing operated without an approved management contract from September 24, 2004 to March 17, 2005, and operated pursuant to unapproved contract modifications from no later than 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 contractors may collect fees in excess of the statutory maximum, defeating the express purposes of IGRA – "tribal economic development, self-sufficiency, and strong tribal governments," ensuring "that the Indian tribe is the primary beneficiary of the gaming operation," and "protect[ing] such gaming as a means of generating tribal revenue." 25 U.S.C. § 2702. Of course, this was the precise result of Bettor Racing's management outside the bounds of IGRA. 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.

Bettor Racing fails to offer any facts suggesting its violations were less than serious. Instead it focuses again on its lack of intent. Bettor Racing Br. at 45-46. Just as Bettor Racing's state of mind is not a defense to the violations themselves, there is no indication the "seriousness" of the violation varies according to the violator's intent. The record supports the NIGC's finding that the second factor, the seriousness of the violations, weighs in favor of affirming the Chairwoman's proposed fine assessment.

The NIGC reasonably applied the third factor: "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. Tribe's Appx. 331 (AR 3057).

The NIGC reasonably applied the fourth factor: "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) indicates, the respondent's fault may arise from "negligence or willfulness." In this case, NIGC reasonably concluded that Bettor Racing bore some degree of fault for its actions, whether due to its intent or recklessness, or simply a lack of ordinary care. Tribe's Appx. 331 (AR 3057). The NIGC allowed that Bettor Racing perhaps "believed their actions were lawful." *Id*. The record shows Bettor Racing was aware of the need for the Chairman's approval of its management contract and all modifications to the contract. Tribe's Appx. 106 (AR 1765:23-24, Gallo: "I knew that they had to okay it before I got the license."). Yet it commenced operations before 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 for a fee structure that paid it far more than the statutory maximum, leaving to the Tribe far less than the minimum share the law requires. Bettor Racing had a separate, affirmative duty to comply with applicable laws. Tribe's Appx. 39 (AR 783, Management Agreement § 4.1(b)(7)). Gallo was a willing party to the consulting agreement and he and his

company were willing participants in the kickback arrangement that diverted to them huge portions of the Tribe's gaming revenues. Bettor Racing announced its intention 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. Tribe's Appx. 129, 155-156, 188-189 (AR 1822:4-6, 1893:25-1894:24, 2109:24-2110:15, Gallo deposition). 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. Bettor Racing's actions support the conclusion that Bettor Racing's role in causing the violations at issue, or failing to correct them, was not insignificant.

Attempting to show error in the NIGC's application of the fourth factor, Bettor Racing identifies two "problematic" comments in the Chairwoman's Proposed CFA. Bettor Racing Br. at 46-47. These characterizations of the facts, however, were not part of the NIGC's final decision. The NIGC determined that even if Bettor Racing acted purely out of ignorance, it failed to exercise ordinary care. Tribe's Appx. 331 (AR 3057). It also noted the fine proposed by the Chairwoman accounted for the fact that the Tribe played a role as well. *Id.*; *see* Tribe's Appx. 271-272 (AR 2671-72, Proposed CFA, reducing Bettor Racing's

fines because its "actions were done with the approval of the Tribe"). The record supports the NIGC's assessment of the fourth factor.

The NIGC reasonably applied the fifth regulatory factor: "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). The NIGC noted that Bettor Racing did not comply with the NOV's corrective measure, which was to reimburse the Tribe the sum that was due under the management contract. Tribe's Appx. 331 (AR 3057). Bettor Racing does not contest this fact. If it had done so, the regulations would have allowed a reduction in the fine, perhaps to zero. It did not, however, and therefore no reduction in the amount of the fine was appropriate pursuant to this factor.

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

B. The Amount of the Fine Was Not Grossly Disproportional to the Offense.

Bettor Racing argues that the civil fine is excessive and violates the Eighth Amendment of the United States Constitution. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. "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 applying the "gross disproportionality" standard, the Eighth Circuit applies "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) (internal quotation marks omitted). The Eighth Circuit has identified a number of factors that may potentially indicate gross disproportionality, depending on the facts of the case. *Id*.

Most importantly, however, there is a strong presumption that fines imposed pursuant to statutory authority are not excessive. *United States v. Bajakajian*, 524 U.S. at 322 ("judgments about the appropriate punishment belong in the first instance to the legislature"). 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 (internal quotation marks omitted). For the same reasons, a fine that is within the range set by Congress and agency 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, Congress authorized the NIGC Chair to fine violators up to $25,000 per violation. 25 U.S.C. § 2713(a)(1). IGRA gives the NIGC additional authority to enact regulations for the assessment and collection of civil fines. 25 U.S.C. § 2706(a)(2). The NIGC's 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 Chairwoman calculated that in this case the maximum statutory fine for all three violations, which continued over several years, was $65,755,000. Tribe's Appx. 331 (AR 3057). 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 asks the court to reject the rule that a fine within the parameters set by Congress is nearly certain to be proportional to the offense. In support it cites *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); and *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003). All three of these cases concern challenges to punitive damage awards under the Due Process Clause of the Fourteenth Amendment. As the district court held, because these are

not Eighth Amendment cases, they "do not provide the applicable legal standard." Mem. Opinion, Bettor Racing Addendum at 53 n.20. *See also id.* at 47-48.

Bettor Racing argues that the gravity of the offense is minimal because "Bettor Racing possessed no intent to violate the terms of the IGRA." Bettor Racing Br. at 55. As discussed above and as recognized by the NIGC, Bettor Racing is culpable even if it did not intend to violate the law. 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. Tribe's Appx. 331 (AR 3057, noting "the Chairwoman reduced the amount of the fine in recognition of the Tribe's part in this matter").

The Chairwoman initially directed Bettor Racing to correct its violation by reimbursing the entire $4.5 million it owed to the Tribe. Tribe's Appx. 239-240 (AR 2530-31, NOV). These are revenues that Bettor Racing received, instead of the Tribe, as a result of its excessive management fee and the unlawful kickbacks. The Chairwoman's $5 million fine, levied against Bettor Racing in lieu of any reimbursement to the Tribe, is plainly related to the economic harm Bettor Racing's actions caused to its victim. Tribe's Appx. 323 (AR 3049, stating, "the remedial measure has been supplanted by the CFA"). Moreover, Bettor Racing's

actions inflicted upon the Tribe the very harms that Congress sought to prevent through IGRA, ousting the Tribe as the "primary beneficiary of the gaming operation." 25 U.S.C. § 2702(2). In the federal blueprint for regulating Indian gaming, diverting gaming revenue from an Indian tribe is among the gravest offenses because it is contrary the express Congressional purpose behind the entire industry.

Bettor Racing again disputes that it owes anything to the Tribe, but this argument goes to the merits of the violation. As discussed above, the NIGC and district court both correctly determined the "bonus payments" Bettor Racing was paid – the kickbacks – were management fees exceeding the amount provided by the approved management contract and the amount allowed by law.

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, the misconduct of the Tribe and Bettor Racing are not equivalent. Bettor Racing gained more than its lawful share of gaming revenue as a result of its violations, while the Tribe's violations involved forfeiting too much of its gaming revenue to Bettor Racing.

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

CONCLUSION

For the foregoing reasons, the Tribe asks the Court to affirm the judgment of the district court.

Respectfully submitted,

Dated: April 27, 2015 by: /s/ Tim Hennessy

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,766 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system on April 27, 2015. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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