**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

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| WAUKEGAN POTAWATOMI CASINO, LLC, an Illinois limited liability company, | ) | |
| Plaintiff, | ) | Case No. 1:20-cv-750 |
| v. | ) | Judge John F. Kness |
| CITY OF WAUKEGAN, an Illinois municipal corporation, | ) | |
| Defendant. | ) | |

**DEFENDANT CITY OF WAUKEGAN'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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## I. INTRODUCTION

On October 17, 2019, the City of Waukegan City Council voted to certify the casino proposals of North Point, Full House, and Rivers, but voted against certifying the casino proposal by Plaintiff Waukegan Potawatomi Casino ("WPC"). SOF ¶¶47-48.[1] Later that night, steadfast in their belief that Michael Bond was dictating the results of the casino selection process, the Potawatomi [redacted]. Response to Plaintiff's SAF ¶25 (citing Defendant's SJ Exhibit 37 at RD_0006942).[2] [redacted] *Id.* The grand suspicions of influence-peddling fell flat. [redacted] from the night of October 17, 2019 is a fitting microcosm, illustrating that the allegations of favoritism allegedly flowing between Michael Bond and the City of Waukegan were just that: unfounded allegations.

Recent events provide additional and unassailable proof that these allegations of favoritism and influence were unsubstantiated. On December 8, 2021, the Illinois Gaming Board ("IGB") took the formal step of issuing a casino license for the City of Waukegan by making a finding of preliminary suitability in favor of Full House Resorts, Inc. *See* Illinois Gaming Board, Board Meeting of December 8, 2021 at 21:00-31:47, available at https://www.igb.illinois.gov/ViewMeetingVideo.aspx?BoardDate=12/8/2021%2012:00:00%20AM (last visited Jan. 26, 2022). The IGB's decision to find Full House preliminarily suitable came at the expense of the Michael Bond-North Point venture, meaning the IGB passed over the casino

[1] The "SOF" refers to Defendant City of Waukegan's Statement of Material, Undisputed Facts, filed on September 21, 2021 as Doc. 116.
[2] Defendant's additional exhibits have been attached to its Response to Plaintiff's Statement of Additional Material Facts ("SAF").

associated with the political benefactor, and for whose benefit the entire casino certification process had been allegedly "manipulated." *See* Doc. 128 at 1.

[redacted] and the IGB's preliminary selection of Full House mandate summary judgment because Michael Bond is *the centerpiece* of WPC's entire theory of the case. Their brief in opposition to the motion for summary judgment contains over 80 references to Bond. *See* Doc. 128. The proposed Second Amended Complaint contains more than 130 references to Bond. Doc. 85. This theory of Michael Bond's influence predates both the completion of the City's certification process and this lawsuit, and has long been in development despite any direct or persuasive circumstantial evidence.

[redacted] This memorandum was only the start. [redacted] The Potawatomi have been quixotically pursuing Bond for the better part of two years. But they are tilting at windmills. The Court should grant the City of Waukegan's motion for summary judgment.

## II. THE SO-CALLED BOND CONNECTIONS ARE NOT MATERIAL

WPC's opposition is replete with references to Michael Bond and his so-called connections to Waukegan politics. In bold lettering, WPC highlights the "Bond-Cunningham Connection," and the "Bond-Cunningham Collaboration." Doc. 128 at 2, 5. WPC also details the contacts and campaign contributions between Michael Bond and various City Council members, attempting to

suggest improper influence by the very nature of these contacts and contributions. Doc. 128 at 2-5. There is nothing improper about appropriately disclosed campaign contributions.

Our political system, "for better or worse, runs on campaign donations." *Nekrilov v. City of Jersey City*, 528 F. Supp. 3d 252, 278 (D.N.J. 2021). So "whether we like it or not," campaign contributions are part of the political process. *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 230-31 (7th Cir. 1975). The United States Supreme Court has repeatedly reinforced these notions, holding it is not unlawful for legislators to support legislation furthering the interests of some of their constituents "shortly before or after campaign contributions are solicited and received from those beneficiaries. . ." *McCormick v. United States*, 500 U.S. 257, 272 (1991). WPC's argument – that campaign contributions and corruption are synonymous – is "unrealistic" and fails to appreciate that "election campaigns are financed by private contributions . . . [and] have been from the beginning of the Nation." *Id.* "Ingratiation and access are not corruption." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 192 (2014).

WPC's arguments are wrong on the law and also wrong on the facts. WPC argues four "City Council members voted precisely as [Mayor] Cunningham had directed." Doc. 128 at 1. This is not the case. For all of the evidence – twenty-eight fact witness depositions and over seventy-five thousand documents – there is no reference to any directive from Mayor Cunningham to the four city council members to vote a certain way. To the contrary, each of these four aldermen testified to their independence.

Alderman Bolton testified no one from the City shared any concerns about the Potawatomi's proposal with her. Response to Plaintiff's SAF ¶69.[3] Alderman Seger testified no

[3] The additional deposition transcripts cited within this Reply have been compiled as Defendant's SJ Exhibit 46.

one influenced his vote or told him how to vote. Response to Plaintiff's SAF ¶69. Alderman Kirkwood testified he does not let people influence the way he votes and he "can't be bought and [] can't be sold." Response to Plaintiff's SAF ¶69. Even Alderman Turner testified he voted independently and no one influenced his vote. Response to Plaintiff's SAF ¶69. Raymond Vukovich, one of the Potawatomi's own consultants, echoed these remarks, testifying that Aldermen Bolton, Seger, Kirkwood, and Turner were all honest people and people of integrity. Response to Plaintiff's SAF ¶69. Aldermen Bolton, Seger, Kirkwood, and Turner voted their conscience and provided reasons explaining their vote for the various casino applicants. *See* SOF ¶¶49-52. [redacted] WPC's efforts to transform this lawsuit into a sprawling public corruption case fails.

Alderman Turner's reference to what Mayor Cunningham wanted does not change this analysis. *See* Doc. 128 at 1, 16. Mayor Cunningham did not vote and had no power to influence the votes of the City Council. Whatever votes Mayor Cunningham may have wanted are therefore irrelevant since he had no mechanism for ensuring the vote would come out the way he wanted and there is no evidence showing the aldermen's votes followed the Mayor's dictates. Indeed, Aldermen Rivera, Florian, and Taylor voted against *all* of the applicants, and Aldermen Moisio and Newsome voted for WPC. SOF ¶¶48, 53; Doc. 128 at 17.

Finally, the alleged conspiracy is completely unwieldy and illogical. If the City of Waukegan intended to favor Michael Bond and North Point casino, then it made no sense to certify North Point *and two of its competitors*. SOF ¶¶47-48. The IGB's recent decision bears this out,

since the IGB selected Full House, and not North Point, to develop the casino in Waukegan. WPC has no ability to establish a viable conspiracy absent improper heaping of inferences on inferences.[4] WPC's extensive arguments related to Michael Bond are immaterial, illogical, and do not defeat summary judgment.

## III. THE CIRCUIT COURT OF COOK COUNTY'S DECISION PROVIDES ADDITIONAL SUPPORT FOR SUMMARY JUDGMENT

Count II of this lawsuit raises a claim under the Illinois Gambling Act. On December 7, 2021, the Circuit Court of Cook County found WPC was unlikely to prevail on the merits of its claim under the Illinois Gambling Act. This decision, while not precedential, provides additional support for summary judgment. *See Kolowski v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, No. 07-CV-4964, 2008 WL 4372711, at *2 (N.D. Ill. Mar. 20, 2008) (noting Illinois Circuit Court decisions may be accorded persuasive value).

On November 15, 2021, the IGB posted the agenda for a special meeting on November 18, 2021. Response to Plaintiff's SAF ¶68. The IGB agenda included "Consideration of Matters Related to the Pending Applications for the Owners License to Be Located in Waukegan," and "Determination of Preliminary Suitability." Response to Plaintiff's SAF ¶68. The next day, WPC filed a Verified Complaint for Declaratory and Injunctive Relief in the Circuit Court of Cook County, alleging a single claim for Declaratory and Injunctive Relief for violation of the Illinois Gambling Act. Response to Plaintiff's SAF ¶68. As here, WPC's Circuit Court complaint alleged the City manipulated the casino certification process. Response to Plaintiff's SAF ¶68.

On December 7, 2021, the Circuit Court of Cook County rejected WPC's request for a temporary restraining order, finding WPC was unlikely to prevail on the merits of its claim under

[4] *See* Doc. 114 at 2 n.1.

the Gambling Act. Response to Plaintiff's SAF ¶68. In doing so, the Circuit Court found WPC was unlikely to prove it had standing to complain about the IGB's purported lack of compliance with the Gambling Act and found WPC was unlikely to prove the Gambling Act provided a private cause of action. *Id.* On December 16, 2021, the Illinois Court of Appeals promptly declined to review the Circuit Court's injunction ruling. Response to Plaintiff's SAF ¶68. The Circuit Court's rejection of WPC's positions is both persuasive and telling.

## IV. THE CITY'S LEGAL ARGUMENTS SUPPORT SUMMARY JUDGMENT

WPC chides the City for attempting to "barricade itself behind supposed legal defenses." Doc. 128 at 1. This criticism is misplaced because the very purpose of summary judgment is to evaluate the moving party's legal defenses and to determine whether "the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

### A. WPC Cannot Manufacture Factual Disputes By Resorting to Speculation and Accusations of Lying

WPC's opposition rests on bare assumptions, presumptions and credibility determinations. For instance, WPC argues that Bond texted Cunningham "presumably" to speak before certain requirements went into effect. Doc. 128 at 6. In another section, WPC presumes that a discussion about the Milan Banquet Hall related to Bond's interest in developing the casino, even though Bond's exchange with Cunningham does not contain a single reference to a casino and Cunningham's deposition testimony reveals the reasons for their exchange: Bond's interest in a new office location. Doc. 128 at 6-7, 26; Defendant's Response to Plaintiff's Statement of Additional, Material Facts at ¶33.

WPC starts with speculation and finishes with fabrication, arguing a jury could find "City officials made false and leading misleading statements to obscure Bond's influence or otherwise benefit North Point." Doc. 128 at 32. WPC then argues Mayor Cunningham gave "false

testimony" in the Waukegan Gaming litigation and that *all four* of the so-called "Bond-backed City Council members *testified falsely in this case.*" Doc. 128 at 32 (emphasis added). WPC's reliance on presumptions and accusations of "deliberate falsehoods" is telling and betrays a desperation in its arguments.

The Seventh Circuit agrees. "[I]t is well-settled that speculation may not be used to manufacture a genuine issue of fact." *Springer v. Durflinger*, 518 F.3d 479, 484 (7th Cir. 2008). By the same token, WPC cannot evade summary judgment by arguing that "witnesses [are] not worthy of belief." *Cichon v. Exelon Generation Co.*, 401 F.3d 803, 815 (7th Cir. 2005). WPC cannot rely "on the hope that the jury will not trust the credibility of [certain] witnesses." *Id.* The prospect of challenging a witness's credibility is not sufficient to avoid summary judgment. *Slabon v. Sanchez,* No. 15-CV-8965, 2021 WL 4146909, at *5 (N.D. Ill. Sept. 13, 2021), *appeal filed*, No. 21-2729 (7th Cir. Sept. 21, 2021).

### B. WPC's State Law Claims are Barred by the Illinois Tort Immunity Act[5]

#### 1. WPC Lacks Standing to Complain about the Certification Process

WPC argues its claims fall outside the Tort Immunity Act because it is alleging a violation of certain statutory requirements following the City Council's certification votes. Doc. 128 at 20-22. This legal argument is not convincing. WPC filed this lawsuit because the City of Waukegan failed to certify WPC's proposal to the Illinois Gaming Board. The very foundation of this lawsuit stems from the failure by a municipality to issue a "certificate, approval, order or similar authorization," and therefore falls within the ambit of the Tort Immunity Act. *See* 745 ILCS 10/2-104.

[5] WPC is correct that the Illinois Tort Immunity Act does not apply to its §1983 claim. *Hampton v. City of Chicago, Cook Cty., Ill.*, 484 F.2d 602, 607 (7th Cir. 1973).

WPC tries to recast its claim as one focused on the post-certification resolutions called for the Gambling Act. Doc. 128 at 20. WPC has no standing to make such an argument, even assuming the City failed to follow the proper statutory provisions. To establish the necessary standing, WPC must show it suffered an actual injury, the City of Waukegan caused the injury, and this injury can be redressed by its requested judicial relief. *Thornley v. Clearview AI, Inc.*, 984 F.3d 1241, 1244 (7th Cir. 2021). WPC cannot make this showing. Any shortcomings in the *post-certification* resolutions or agreements with the *other applicants* had no impact on WPC because the City of Waukegan had already decided not to certify WPC. Any order finding the City of Waukegan failed to issue statutorily-compliant resolutions with the successful applicants would have no impact on WPC. No amount of haggling over the exact contours of the City's post-certification resolutions will change the fact that the City Council already had *twice voted* against certifying WPC. The Circuit Court of Cook County agreed, expressing its doubts that WPC had "standing to complain about the [defendant's] purported lack of compliance with the statute" when nothing about the "purported noncompliance affects it." Response to Plaintiff's SAF ¶68 (quoting Defendant's SJ Exhibit 43 at SR1470). WPC cannot satisfy the demands of Article III by alleging a bare procedural violation of the Gambling Act. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 342 (2016).

WPC looks to *Village of Itasca* as a case on point. Doc. 128 at 20-22 (citing *Vill. of Itasca v. Vill. of Lisle*, 817 N.E.2d 160, 164 (Ill. App. Ct. 2004)). As an initial matter, *Village of Itasca* found the plaintiff lacked standing to pursue certain claims because the relief requested would not cure its injury. 817 N.E.2d at 165. Such is the case here (as noted above). To be sure, *Village of Itasca* also found that dismissal based on immunity defenses had been premature. *Id.* at 172. But the Illinois Court of Appeals did so based on the *allegations* of a proposed amended complaint.

*Id.* at 165. This case is far beyond the motion to dismiss stage. *Village of Itasca* does not help WPC.

Finally, WPC argues its Gambling Act claim does not require "inquiry into underlying motive or process." Doc. 128 at 21. This argument is curious since the proposed Second Amended Complaint is littered with allegations of an improper and "manipulated" process, Doc. 86 at ¶¶8, 13, 175, with specific allegations that the City's certification "process did not comply with the Illinois Gambling Act," Doc. 86 at ¶154; *see also* Doc. 86 at ¶¶54-62 (referring to the City's Sham Casino Review Process). WPC's complaint in the Circuit Court of Cook County is also replete with allegations of an improper and flawed certification process. Defendant's SJ Exhibit 41 at ¶¶2, 3, 29, 32, 35, 37. WPC's current opposition brief also refers to the "sham RFQ process." Doc. 128 at 23. WPC's arguments against application of the Tort Immunity Act are unavailing.

**2. WPC's Lawsuit Is Largely About Damages**

WPC argues the Tort Immunity Act only bars claims for damages. Doc. 128 at 22. This is true. *Rivera v. City of N. Chicago*, No. 19-CV-5701, 2021 WL 323794, at *9 (N.D. Ill. Feb. 1, 2021). But WPC claims hundreds of millions of dollars in damages. *See* Defendant's SJ Exhibit 36 at 7; Doc. 116-36 at 7. The claims for injunctive relief, meanwhile, have already been rejected by the Illinois state courts. *See* Defendant's SJ Exhibit 44. This case is about damages.

WPC argues its claim for a refund is a form of injunctive relief. Doc. 128 at 22-23. This argument is not supported. The proposed Second Amended Complaint includes a single reference to the non-refundable $25,000 application fee, Doc 86 at ¶67, but never requests a refund of this fee. There is no claim for restitution among the various forms of relief requested by either the First Amended Complaint or Second Amended Complaint. Doc. 56 at 30-36; Doc. 86 at 44-45. Finally, a claim for restitution is not always a claim for equitable relief. *Mondry v. Am. Fam. Mut.*

*Ins. Co.*, 557 F.3d 781, 806 (7th Cir. 2009). Restitution is a legal remedy when sought in a case at law and an equitable remedy when sought in an equity case. *Id.* WPC makes no effort to explain where its claim for restitution falls on this legal-equity line. WPC's arguments about its equitable relief are unsupported and undeveloped.[6]

### C. The City of Waukegan Is Entitled to Summary Judgment on the §1983 Claim

#### 1. WPC Cannot Sue Under §1983

WPC concedes it is an arm of the Potawatomi Tribe and concedes its previous briefing stated "Indian tribes do not qualify as a 'person' who may sue under §1983." Doc. 128 at 23, 24 n.7. But now WPC argues that a sovereign entity may sue under §1983 as long as it does not seek to vindicate a sovereign right. Doc. 128 at 23-25. The case law does not support their position.

"[A]n arm of the state" is no different than the state itself, and "cannot bring suit under" section 1983. *Virginia Off. for Prot. & Advoc. v. Reinhard*, 405 F.3d 185, 190 (4th Cir. 2005). The same must be said of an arm of a sovereign tribe, because "Indian sovereignty, like that of other sovereigns, is not a discretionary principle subject to the vagaries . . . or the equities of a given situation." *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989). WPC cannot bring a §1983 action as an arm of a sovereign.

WPC cannot bring this §1983 action because it is asserting sovereign rights, putting aside any blanket prohibition. The damages in this case, which are based on the lost opportunity from operating a Waukegan casino, would go to the Potawatomi Tribe for the benefit of the Potawatomi Tribe and its members. *See* SOF ¶85; *see* Defendant's SJ Exhibit 36 at 7; Doc. 116-36 at 7. This

[6] It bears noting that over the course of this entire litigation, the Potawatomi never sought any temporary, preliminary or permanent injunctive relief by a proper motion. By failing to do so, they have waived any claim for injunctive relief at this late date. *See generally Savis, Inc. v. Cardenas,* 528 F. Supp. 3d 868, 884 (N.D. Ill. 2021).

lawsuit is an exercise of sovereign rights because it seeks damages that would "inure to the benefit of the Tribe" and which would directly fill the "sovereign Tribe's treasury." *See Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006). WPC cannot bring a §1983 claim.

**2. WPC Cannot Prove It Was Similarly Situated or the City of Waukegan Acted Irrationally**

**a. The Casino Applicants Were Not Similarly Situated**

WPC must prove that it was similarly situated to the other casino applicants. *FKFJ, Inc. v. Vill. of Worth*, 11 F.4th 574, 588 (7th Cir. 2021). To be similarly situated, WPC and the other applicants must be "*prima facie* identical in all relevant respects or directly comparable in all material respects." *Id.*

The City of Waukegan was tasked with selecting which applicants' casino proposals would be considered by the Illinois Gaming Board for a casino license. Doc. 128 at 1. The City of Waukegan City Council was not, therefore, considering a process – it was considering proposals. These proposals were not identical or directly comparable in all material respects. *See FKFJ*, 11 F.4th at 588; *Miller v. City of Monona*, 784 F.3d 1113, 1120 (7th Cir. 2015). WPC readily concedes this point. WPC admits that Full House and North Point's proposals featured phases that could include a hotel. Doc. 128 at ¶29 (admitted). WPC admits that Full House and North Point's proposals featured an entertainment complex and the option for creating a temporary casino. Doc. 128 at ¶¶30-31 (admitted). At the same time, WPC admits that its proposal did not include a hotel, did not include an entertainment complex, and did not include a temporary casino. Doc. 128 at ¶32 (admitted). WPC admits that each applicant's proposed casino differed in size and gaming positions, with WPC proposing a casino with the most square footage and the most gaming positions. Doc. 128 at ¶¶36-39 (admitted in relevant part). WPC admits the estimated development costs varied among the different applicants. Doc. 128 at ¶¶36-40 (admitted in

relevant part). WPC admits each applicant proposed different terms to acquire the Fountain Square property. Doc. 128 at ¶25 (admitted in relevant part). Finally, WPC admits North Point's casino operator (Warner Gaming), Full House, and Rush Street Gaming had experience operating casinos in multiple states, whereas the Potawatomi have operated casinos only in Wisconsin. Doc. 128 at ¶¶9-11 (admitted in relevant part), ¶¶13-15 (admitted). These admissions concede WPC was not similarly situated to the other casino applicants in "all material respects." *Miller*, 784 F.3d at 1120.

WPC argues it was a credible applicant and that the City's consultant found all of the teams included seasoned professionals. Doc. 128 at 27-28. These arguments and platitudes do not seriously rebut the above admissions, and even WPC concedes there "were differences among the applicants and their proposals." *Id.* WPC highlights a series of disparate facts in five bullet points. Doc. 128 at 26. But none of these purported facts (which are not material here but the City disputes) speaks to the similarities between WPC and the other applicants. WPC's repeated efforts to focus on the *RFQ process* rather than the actual proposals that were the source of the City Council's vote are unpersuasive and contrary to Seventh Circuit precedent. WPC has not met its heavy burden of showing it was identical to the other applicants in all relevant respects. *See FKFJ*, 11 F.4th at 588 (noting class-of-one "claimants carry a heavy burden."). The City of Waukegan is entitled to summary judgment on WPC's class-of-one claim. *Id.* at 589 ("[I]f the plaintiff can't identify a similarly situated person or group for comparison purposes, it's normally unnecessary to take the analysis any further; the claim simply fails.").

**b. *Crosby* Is a Compelling Precedent**

WPC argues *Crosby* is contrary to governing Seventh Circuit precedent because *Crosby* extended the Supreme Court's *Engquist* decision beyond its public employment context. Doc. 128 at 28-29. That is not the case. The Seventh Circuit has consistently applied *Engquist* beyond the

public employment context, including with respect to corporate plaintiffs. *See e.g., FKFJ, Inc.*, 11 F.4th at 588-91 (finding summary judgment appropriate because restaurant had not presented sufficient evidence of any similarly situated businesses); *LaBella Winnetka, Inc. v. Vill. of Winnetka*, 628 F.3d 937, 942 (7th Cir. 2010) (finding dismissal appropriate because restaurant had not presented sufficient evidence of any similarly situated restaurants). In *Miller*, a decision cited by WPC, the Seventh Circuit cited *Engquist* before finding the plaintiff had not come forward with examples of similarly situated development projects. *Miller*, 784 F.3d at 1120 (affirming dismissal of plaintiffs' class-of-one claim). *Crosby* is nothing more than the application of established class-of-one principles to a casino licensing decision. *See Caesars Massachusetts Mgmt. Co., LLC v. Crosby*, 778 F.3d 327, 337 (1st Cir. 2015). *Crosby* remains a compelling precedent.

**c. The City of Waukegan's Decision was Rational**

Even if a Court disagrees with a "*decision* made by local officials," there will be "no class-of-one claim unless the plaintiff is able to show that there was no rational basis for the *officials' actions*." *Miller*, 784 F.3d at 1120 (emphasis added). "All it takes to defeat [a class-of-one] claim is a conceivable rational basis for the difference in treatment." *Id* at 1121. A decision may be rational even if the decision is wrong or based on a mistaken fact. *See Moore v. Frazier*, No. 3:18-CV-1023 PPS-MGG, 2020 WL 4451095, at *3 (N.D. Ind. Aug. 3, 2020).

The City of Waukegan highlighted a number of conceivable and rational reasons for its decision not to advance WPC's proposal to the Gaming Board. Doc. 114 at 22-23. As previously noted, the City could have decided WPC's proposal was too large for the market. *Id.* The City could have decided it wanted its casino to include a hotel, entertainment venue, or temporary casino – amenities that were all absent from WPC's proposal. *Id.* The City could have decided it wanted to maximize the amount of money it received for the Fountain Square property, making

WPC's offer of +/- 15% of the appraised value the least attractive of the proposals. *Id.* The City could have decided the Potawatomi Tribe lacked the necessary experience to run a commercial casino in Illinois, its previous experience limited to tribal casinos in Wisconsin. *Id.* Finally, the City could have decided the Potawatomi Tribe were not fully committed to a casino in Waukegan because they feared taking opportunities and revenue from their flagship Milwaukee casino. *Id.*

WPC does not attack any of these reasons as irrational or inconceivable. Instead, WPC argues – in circular logic – that the City's discriminatory treatment of the Potawatomi was irrational. Doc. 128 at 29. WPC also attacks the RFQ process as unfair and opaque. Doc. 128 at 29-30. These arguments are insufficient to survive summary judgment. The class-of-one plaintiff must show there was no rational reason supporting the *challenged decision*. *Miller,* 784 F.3d at 1120. The challenged decision at issue here is the City Council's decision not to certify WPC, and WPC has not met its burden to refute the City's several rational and conceivable grounds for its vote. *See FKFJ*, 11 F.4th at 588 ("[A] class-of-one plaintiff must, to prevail, negative any reasonably conceivable state of facts that could provide a rational basis for the classification.").

**d. Any Purported Animus is Not an Issue**

WPC argues there is "compelling" evidence of improper motive and that this evidence of animus provides powerful evidence of the City's irrational conduct. Doc. 126 at 30-32. This is not correct – either legally or factually.

There was no animus as a matter of fact. WPC argues Michael Bond's campaign donations support a finding of animus. Doc. 128 at 31-32. As noted previously, WPC's arguments about campaign contributions ignore the realities of our modern political system that involve campaign

donations.[7] *See Nekrilov*, 528 F. Supp. 3d at 278. WPC argues Johnson Consulting's rankings were vague and uncertain, Doc. 128 at 32, but the alderman testified these rankings were not the basis for their vote. Response to Plaintiff's SAF ¶¶60, 75. Finally, WPC argues the City officials made false and misleading statements to obscure Bond's influence. Doc. 128 at 32. But WPC cannot evade summary judgment by arguing that "witnesses [are] not worthy of belief." *Cichon*, 401 F.3d at 815.

Facts aside, any alleged animus is legally irrelevant. When the Court can "come up with a rational basis for the challenged action, that will be the end of the matter – animus or no." *Miller*, 784 F.3d at 1122; *Fares Pawn, LLC v. Indiana Dep't of Fin. Institutions*, 755 F.3d 839, 845 (7th Cir. 2014). The City of Waukegan has put forward several rational reasons for its decisions. WPC's arguments about animus are factually unsupported and legally irrelevant. There is "no needle" in WPC's haystack. *Fares Pawn, LLC*, 755 F.3d at 849.

### D. The City of Waukegan is Entitled to Summary Judgment on the Gambling Act Claim

#### 1. The Gambling Act Does Not Provide a Private Right of Action

WPC argues the Gambling Act provides a private right of action. Doc. 128 at 33-36. But WPC fails to explain how it satisfies the four-factors that speak to whether a statute provides a private right of action. WPC fails to explain how the statute was enacted for its benefit, how its injury was one the statute was designed to prevent, how a private right of action is consistent with the statute, and how a private right of action is necessary to provide an adequate remedy. *See Patel v. Zillow, Inc.*, No. 17-CV-4008, 2017 WL 3620812, at *6 (N.D. Ill. Aug. 23, 2017), *aff'd*, 915

[7] WPC takes this argument to the extreme, reading animus into Alderman Bolton's desire to "support businesses in her ward." Doc. 128 at 32. WPC offers no explanation for why Alderman Bolton's desire to help her constituents violates the Equal Protection Clause.

F.3d 446 (7th Cir. 2019). The Circuit Court of Cook County recently found as much, noting its concerns about whether the statute provided for a private right of action. Response to Plaintiff's SAF ¶68 (citing Defendant's SJ Exhibit 43 at SR1468-1469). In particular, the Circuit Court noted that WPC was not a resident of Waukegan or Illinois and therefore was not "an entity that the statute was designed to protect. . ." Response to Plaintiff's SAF ¶68 (quoting Defendant's SJ Exhibit at SR1471). WPC has not advanced any arguments to the contrary.

WPC cites *Keefe-Shea Joint Venture* and *Stanley Magic-Door*. Doc. 128 at 33-36 (citing *Keefe-Shea Joint Venture v. City of Evanston*, 773 N.E.2d 1155 (Ill. App. Ct. 2002) and *Stanley Magic-Door, Inc. v. City of Chicago*, 393 N.E.2d 535 (Ill. App. Ct. 1979)). Each of these cases was concerned with bidding on public contracts. *Keefe-Shea*, 773 N.E.2d at 1157; *Stanley Magic-Door*, 393 N.E.2d at 535. This is not a public contract bidding case. The City of Waukegan engaged in an RFP process that is legally distinct from a competitive bidding process. *See Am. Health Care Providers, Inc. v. Cty. of Cook*, 638 N.E.2d 772, 774-75 (Ill. App. Ct. 1994) ("The [RFP] procurement process used by the County in securing the new contracts indisputably did not constitute competitive bidding."). Finally, *Keefe-Shea* and *Stanley Magic-Door* have nothing to say about implying a private right of action – the two cases do not contain a single reference to "private right of action." WPC's cases do not establish the Gambling Act provides a private right of action.

**2. WPC Could Have Exhausted Its Administrative Remedies**

WPC argues it could not have exhausted its administrative remedies because it was not a party aggrieved by an action of the Illinois Gaming Board. Doc. 128 at 36-37. As noted in its opening brief, the term "'administrative agency' is defined to include not only administrative agencies of the State of Illinois but also political subdivisions of the state and municipalities that

have the power to make administrative decisions." Doc. 114 at 27. And as recent actions indicate, the Potawatomi have had no problem pursuing lawsuits and remedies against the Illinois Gaming Board when they have so desired. *See* Defendant's SJ Exhibit 41.

### E. The City of Waukegan is Entitled to Summary Judgment on the Open Meetings Act Claim

#### 1. The October 17, 2019 Vote to Certify Certain Casino Applicants Complied with the Open Meetings Act

WPC concedes the October 17, 2019 meeting was a special meeting, but argues there is no "separate rule for special meetings" that would excuse the requirement for audience time. Doc. 128 at 38. This is incorrect. There is a separate rule for special meetings – section 2.37 and that section explicitly states that after the call for assembly is read "*no business other than that set forth in the call and in such notice shall be acted upon at such meeting.*" Code of Ordinances of Waukegan, Illinois §2.37 (Special meetings) (emphasis added). Section 2.37 does not provide for audience time. WPC's failure to address the plain language of §2.37 is telling.

#### 2. The October 21, 2019 Vote on the Motion to Reconsider Complied with the Open Meetings Act

WPC argues the City of Waukegan improperly refused to put the reconsideration request on the October 21, 2019 meeting agenda, and argues this notice would have allowed "City Council members and the public to prepare for discussion and investigate the merits of agenda items." Doc. 128 at 39. These arguments are insufficient to prevent summary judgment.

WPC does not explain how it was harmed from the lack of notice and makes no attempt to address the *Miller* decision. *See* Doc. 114 at 32 (citing *Miller v. Phelan*, 845 F. Supp. 1201, 1209 (N.D. Ill. 1993)). Nor could it. The October 21 meeting involved a vote on a motion for reconsideration. *See* SOF ¶¶59-61. It concerned an issue the City Council had *already* considered, rather than a novel issue that needed extensive preparation and investigation. *See* SOF ¶¶47-48.

Finally, the City Council was well aware of the Potawatomi's desire for reconsideration of the vote. The Potawatomi delivered a letter to the City of Waukegan on October 18, 2019, and Jeffrey Crawford and Malcolm Chester met with Aldermen Florian and Rivera on October 21, 2019. SOF ¶¶54-56. The City Council was well aware of WPC's interest in reconsideration of the certification vote and any failure to formally place the motion for reconsideration on the agenda was both immaterial and harmless.

**3. Waukegan Potawatomi Casino Cannot Void the City Council's Action**

The Open Meetings Act permits a Court to grant appropriate relief, including "declaring null and void any final action taken at a *closed* meeting in violation of this Act." 5 ILCS 120/3(c). An open meeting cannot be voided. *See id.* WPC argues it can void the City Council's actions on October 17, 2019 and October 21, 2019 because the question of whether those meetings "were truly 'open' is an open question" and a jury could find the meetings were not truly open. Doc. 128 at 39. Illinois law does not support this argument.

The term "open" in the Open Meetings Act means "not restricted to a particular group or category of participants." *In re Foxfield Subdivision*, 920 N.E.2d 1102, 1110 (Ill. App. Ct. 2009). This definition of "open" controls and there is no evidence the City of Waukegan restricted either the October 17, 2019 meeting or the October 21, 2019 meeting to a particular group of participants. *See United States v. Jackson*, 5 F.4th 676, 681 (7th Cir. 2021) (noting statutory interpretation presents a legal question for the court, not a question of fact for the jury). WPC cannot void the City Council's decisions.

## V. CONCLUSION

Enough is enough. The Potawatomi have imposed horrific costs on a budget-constrained Illinois city through unwarranted litigation in two forums, all while admittedly reaping [redacted]

[redacted] gaming revenues unimpaired by a competitive casino in Waukegan. This Court should grant the City of Waukegan's motion for summary judgment.

Dated: January 31, 2022

Respectfully submitted,

CITY OF WAUKEGAN

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**CERTIFICATE OF SERVICE**

The undersigned, an attorney of record, states that he caused to have electronically filed with the Clerk of the Court, the foregoing pleading, and caused the same to be served on all attorneys of record via CM/ECF on January 31, 2022 via the Court's electronic filing system.

*/s/ Glenn E. Davis*