No. 15-1335

IN THE 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.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
No. 13-4051
(Hon. Karen E. Schreier)

BRIEF FOR THE NATIONAL INDIAN GAMING COMMISSION

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SUMMARY OF THE CASE

Plaintiffs-Appellants Bettor Racing, Inc. and its president, J. Randy Gallo, operated the off-track pari-mutuel betting business at Royal River Casino in South Dakota for the Flandreau Santee Sioux Tribe. The Indian Gaming Regulatory Act (IGRA) requires the Chair of the National Indian Gaming Commission (NIGC), a federal agency established by IGRA to implement the statute, to approve all management contracts and contract modifications for operating Indian tribal casinos. IGRA forbids casino management companies from having a proprietary interest in the casino. Here, it is undisputed that, for a period of time, Bettor Racing operated the casino's off-track betting operation without an approved management contract, and later operated the business under unapproved modifications to the approved contract. Bettor Racing also had an unlawful proprietary interest in the casino. NIGC determined that Bettor Racing violated IGRA and NIGC regulations and fined Bettor Racing $5,000,000 for the violations. Bettor Racing filed this lawsuit under the Administrative Procedure Act (APA), challenging the NIGC's findings and the civil fine. The Tribe intervened as a defendant. Consistent with the dictates of APA review, the district court concluded that the NIGC's findings had a factual basis and were not arbitrary or capricious, and that the NIGC did not abuse its discretion or unconstitutionally impose the fine. The district court thus entered judgment for the NIGC and the Tribe. Bettor Racing appeals.

The Court should provide 10 to 15 minutes per side for oral argument.

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INTRODUCTION

Plaintiff-Appellant Bettor Racing portrays itself as an innocent victim of a flawed process. But it is not a victim, and the process was not flawed. Bettor Racing is a sophisticated, multimillion-dollar pari-mutuel betting company. That company violated the Indian Gaming Regulatory Act (IGRA) by operating the Royal River Casino for the Flandreau Santee Sioux Tribe, for a time, without an approved management contract; by operating the casino under unapproved modifications to the approved contract; and by holding had an unlawful proprietary interest in the casino. On appeal, Bettor Racing argues that the National Indian Gaming Commission (NIGC) deprived the company of due process by not providing it with an administrative hearing before finding the company in violation of IGRA and before fining it for the violations. But a hearing would serve no useful purpose. The undisputed facts show that Bettor Racing violated IGRA. Indeed, Bettor Racing's own president, co-plaintiff J. Randy Gallo, admitted to violating IGRA during his deposition before the NIGC.

Because of Mr. Gallo's admissions, Bettor Racing cannot dispute the facts underlying the violations. So Bettor Racing blames the Tribe for its violations, contending that the NIGC should hold a hearing to determine the Tribe's role in the unlawful scheme. Again, a hearing would serve no useful purpose. It is undisputed that the Tribe was complicit in the violations. And, regardless, the Tribe's conduct would not absolve Bettor Racing from its own role in the scheme. While the Tribe has

accepted responsibility and penalties for its violations, Bettor Racing has not. And, even accepting Bettor Racing's self-serving version of events, Bettor Racing was at least negligent for not ensuring its own IGRA compliance before operating in the heavily regulated and closely watched Indian tribal gaming industry. Bettor Racing's unwillingness to accept responsibility for its conduct (which was at the very least negligent) and the large monetary gain that the company received from the substantial IGRA violations that the company's president admitted to committing (if not now regretfully) demonstrate that the NIGC reasonably and appropriately fined the company for violating the law.

STATEMENT OF THE ISSUE

IGRA requires the NIGC's Chair to approve all management contracts and contract modifications for operating Indian tribal casinos and forbids casino-management companies from having a propriety interest in the casino. Here, Bettor Racing admitted to operating pari-mutuel betting at the Tribe's casino, for a time, without an approved management contract and later operating the casino under unapproved modifications to an approved contract. And the undisputed evidence also shows that the company had a proprietary interest in the casino. Did the NIGC violate the company's due process rights or act arbitrarily in finding that Bettor Racing had violated IGRA or in fining Bettor Racing for its multiple IGRA violations?

Most Apposite Authority: 25 U.S.C. §§ 2711-2713; 25 C.F.R. Pts. 573, 575.

STATEMENT OF THE CASE

I. IGRA AND ITS REGULATIONS

Congress enacted IGRA, among other reasons, 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); *see also id.* § 2701(4). Through IGRA, Congress sought to ensure that Indian tribes are the primary beneficiaries of Indian gaming. *Id.* § 2702(2). IGRA and its regulations thus require that a tribe have the sole proprietary interest in its gaming operation. *Id.* § 2710(b)(2)(A), § 2711(d)(2)(A); 25 C.F.R. § 522.4(b)(1), § 522.6(a).

Consistent with these statutory goals, IGRA and its regulations provide that a tribe may enter into a management contract for the operation of gaming, but only if the NIGC's Chair approves the contract. 25 U.S.C. § 2710(d)(9), § 2711(a)(1); 25 C.F.R. § 533.1. Management contracts not approved by the Chair are void *ab initio*. 25 C.F.R. § 533.7; *Wells Fargo Bank v. Lake of the Torches Economic Dev. Corp.*, 658 F.3d 684, 686 (7th Cir. 2011); *accord Colombe v. Rosebud Sioux Tribe*, 918 F. Supp. 2d 952, 957 (D. S.D. 2013) (citing *United States ex. rel. Bernard v. Casino Magic Corp.*, 293 F.3d 419, 424-25 (8th Cir. 2002)). It is *per se* a substantial violation of IGRA for a management contractor to manage an Indian gaming operation without a Chair-approved contract. 25 C.F.R. § 573.6(a)(7). Subject to the Chair's approval, a management contract may be amended. *Id.* § 535.1(a). But amendments must be submitted to the Chair for approval within 30 days of execution. *Id.* § 535.1(b). Amendments not approved by

the Chair are void. *Id.* § 535.1(f); *Colombe*, 918 F. Supp. 2d at 957 (citing *Mo. R. Servs., Inc. v. Omaha Tribe of Neb.*, 267 F.3d 848, 853–54 (8th Cir. 2001)).

Management contracts must meet certain criteria before the Chair may approve them. For example, IGRA generally limits management contracts to five years and caps management fees at 30% of net revenues, unless certain conditions are met. 25 U.S.C. §§ 2711(b)(5)(C). IGRA defines net revenues as "gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees." *Id.* § 2703(9); 25 C.F.R. § 502.16. Management contracts must also provide "a minimum guaranteed payment to the Indian tribe that has preference over the retirement of development and construction costs." 25 U.S.C. § 2711(b)(3).

The Chair may issue a notice of violation (NOV) for any violation of IGRA or its implementing regulations. 25 C.F.R. § 573.3(a). After having issued a notice of violation, the Chair may assess civil fines for violations. *Id.* pt. 575; *United States v. Santee Sioux Tribe of Neb.*, 135 F.3d 558, 563 (8th Cir. 1998). NIGC regulations prescribe procedures for appeal from a notice of violation or assessment of civil fine, including the designation of a presiding official and time limits for hearing. 25 C.F.R. § 577.3 (2011). After the presiding official issues a recommended decision, any party may file objections with the full Commission, which will issue its final decision within 30 days of the recommended decision. *Id.* § 577.14, § 577.15 (2011). The

Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, authorizes judicial review of the NIGC's final decision.

II. FACTUAL BACKGROUND

The Flandreau Santee Sioux Tribe is a federally-recognized Indian tribe with headquarters in Flandreau, South Dakota, about 45 miles north of Sioux Falls.[1] *See* Supplemental Appendix (Supp. App.) 249. The Tribe owns and operates the Royal River Casino on tribal lands near Flandreau, under the Tribe's NIGC-approved gaming ordinance. Supp. App. 190, 238.

J. Randy Gallo is president of Bettor Racing, a pari-mutuel betting business incorporated in South Dakota. Supp. App. 89-90. Bettor Racing offered off-track wagering on dog and horse races, using a "pari-mutuel" system where the bettors' wagers of a particular type are pooled together. Supp. App. 100, 181. In mid-2003, inspired in part by a desire to avoid a 4.5% tax that South Dakota imposed on the

[1] Judicial review of final agency decisions under the APA is limited to the administrative record compiled by the agency. *See Robinette v. Commissioner*, 439 F.3d 455, 459 (8th Cir. 2006). The NIGC compiled and lodged the record before the district court. *See* D. S.D., No. 13-4051, Dkt. # 30 (Sept. 16, 2013). On appeal, Bettor Racing's "Separate Appendix of Appellants" does not contain official administrative record documents, which are stamped "AR00000" in the bottom right-hand corner of the document. The documents in the "Separate Appendix" appear to be the same as, or similar to, official administrative record documents, but for caution's sake this Court should review only those official record documents in the Supplemental Appendices (Supp. App.) of the NIGC and Intervenor Flandreau Tribe.

gross revenue of his business, Mr. Gallo approached the Tribe about relocating Bettor Racing from Sioux Falls to the Tribe's casino near Flandreau. Supp. App. 93-95.

The Tribe submitted a draft agreement between it and Bettor Racing to the NIGC for review on August 27, 2003. Supp. App. 186-89. The NIGC opined that the agreement was a management contract that was subject to the Chair's review and approval, and advised that without the Chair's approval, the agreement was void. Supp. App. 1. Mr. Gallo understood that the parties' agreement constituted a management contract, and he also understood that the Chair's approval was required for a management contract to be valid. Supp. App. 104-05. On March 25, 2004, the NIGC received a management contract between Bettor Racing and the Tribe for final review and approval. Supp. App. 112-13.

A. Bettor Racing operates at the casino without an approved contract.

On September 20, 2004, the Tribe and Bettor Racing entered into an agreement to govern their business relationship while the NIGC Chair reviewed the management contract. Supp. App. 118-20, 195. Around this time, Mr. Gallo re-named his existing pari-mutuel betting operation Royal River Racing, and Bettor Racing began doing business as Royal River Racing. Supp. App. 123,147. On September 24, 2004, Bettor Racing began operating Royal River Racing at the casino without an approved management contract, and Bettor Racing began paying the Tribe its share of the revenue under the terms of the unapproved management contract. Supp. App. 26, 109, 118-20. During a deposition before the NIGC, Mr. Gallo admitted to operating

Royal River Racing at the casino without an approved management contract for nearly six months from September 24, 2004, through March 17, 2005. Supp. App. 109.

B. The NIGC approves the management contract.

On March 17, 2005, the NIGC Chair approved the management contract. Supp. App. 126, 197, 226. The approved management contract provided that Bettor Racing's fee was to be a percentage of the net revenue of Royal River Racing, based on a sliding scale and payable in monthly installments. Supp. App. 74-75. When the gross revenue was less than $30,000,000, Bettor Racing was to receive 40% and the Tribe was to receive 60%. *Id.* When the gross revenue was between $30,000,000 and $60,000,000, Bettor Racing was to receive 35% and the Tribe was to receive 65%. *Id.* When the gross revenue was more than $60,000,000, Bettor Racing to receive 30% and the Tribe was to receive 70%. Supp. App. 69, 71, 128-34.

The approved management contract further provided that "the Tribe's share of the profits shall never be less than 4% of gross public revenue (or handle) generated by the casino's non-telephone or walk-in betting, plus the greater of $5,769.23 per week or 1% of all gross handle generated by telephone betting at the Casino." Supp. App. 70. Thus, the contract guaranteed the Tribe $5,769.23 per week, the equivalent of 1% of $30,000,000 (*i.e.,* $300,000) per year no matter how Royal River Racing performed. Supp. App. 70, 97. And because the approved contract required Bettor Racing to pay the greater of 1% of all gross handle or this guaranteed minimum when the gross handle of Royal River Racing exceeded $30,000,000 per year, the approved

contract required Bettor Racing to continue paying at a rate of 1% on all additional revenue over and above that $30,000,000. Supp. App. 75.

C. Bettor Racing operates at the casino under unapproved modifications to the approved management contract.

In 2005, South Dakota dropped its tax on pari-mutuel gaming operations from 4.5% of net revenue to 0.25%. Supp. App. 94. Based on the potential for greater profits off-reservation because of the newly lowered tax rate, and the potential of losing customers to off-reservation betting operations, Bettor Racing notified the Tribe of its intention to move the operation away from the casino. Supp. App. 136-37. Based on Bettor Racing's stated intent to cease operations at the casino, Bettor Racing and the Tribe agreed to amend the approved management contract (the "First Modification"). *Id.* By 2006, the parties had agreed to reduce the Tribe's guaranteed minimum payment from 1% on all gross revenue to 1% only on the first $30,000,000 and then 0.5% for those amounts in excess of $30,000,000. Supp. App. 3, 136-37, 150-51. This amendment preserved the $5,769.23 per week ($300,000 per year) minimum guarantee, but reduced the percentage the Tribe received on amounts made after the $30,000,000 threshold from 1% on all additional gross revenue to 0.5%. *Id.*

From at least February 15, 2007 when it was executed until July 31, 2008, Bettor Racing managed Royal River Racing at the casino under the unapproved First Modification. Supp. App. 3, 27-28, 149-50, 156-57, 217, 250-51. The Tribe submitted the First Modification to NIGC for review and approval on January 25, 2007. Supp.

App. 83. However, on April 13, 2007, through its legal counsel, the Tribe asked the NIGC to hold in abeyance a final decision on the First Modification pending resolution of litigation regarding the Tribal-State Compact with the State of South Dakota. Supp. App. 7, 47. The NIGC thus took no action on the First Modification, which was never approved. Supp. App. 250-51.

During fiscal year 2006, Bettor Racing compensated the Tribe under this unapproved arrangement. Supp. App. 149-51 The Tribe and Bettor Racing made these unapproved payments through a check-swap scheme at the end of each year. Under this scheme, Bettor Racing first wrote the Tribe a check for the full amount due under the approved management contract. The Tribe then subsequently wrote Bettor Racing another check styled a "bonus," which represented the difference due to Bettor Racing under the unapproved First Modification. Supp. App. 14-25, 139-40, 149-50, 154-55.

In 2008, Bettor Racing again became concerned about the business climate for pari-mutuel betting operations, this time because of an increase in the fees that racetracks charge off-track betting operations. Supp. App. 162-68. On August 1, 2008, the Tribe and Bettor Racing modified the approved management contract for a second time, to further increase Bettor Racing's share of revenues (the "Second Modification"). Like the First Modification, the Second Modification preserved the Tribe's 1% guaranteed payment on annual gross revenue up to $30,000,000, but reduced the Tribe's minimum guaranteed payment from 0.5% to 0.25% on all annual

gross revenue over the $30,000,000 threshold. Supp. App. 27, 32, 165-68, 171-72. The parties did not submit the Second Modification to the NIGC and thus the NIGC Chair never approved it. Supp. App. 55. For more than 20 months from August 1, 2008, to April 5, 2010, the Tribe and Bettor Racing conducted business under the unapproved Second Modification to the approved contract. Supp. App. 79, 177, 247.

Payments made under the unapproved Second Modification were also made using the check-swap scheme. Supp. App. 139-41, 144. In May 2007 and again in June 2008, the Tribe and Bettor Racing swapped checks in the amounts of $752,133.78 and $1,058,853.56, respectively. Supp. App. 14-25, 251. In June 2009, checks were exchanged for a total of $1,435,734.00. Supp. App. 14-25, 81-82, 172-74, 251.

Mr. Gallo admitted the check-swap scheme was a mandatory prerequisite to maintaining Royal River Racing at the casino, and the Tribe had no discretion in the matter. Supp. App. 175-77, 205-06, 209-10. Under the terms of the approved management contract, the Tribe should have received a total of $7,357,320 for 2005, 2006, 2007, and 2008 combined. Supp. App. 215. The following table demonstrates that the Tribe actually received $2,812,565, far less than it was owed under the approved contract and how the check-swapping scheme enriched Bettor Racing.

Year	Net Income On Which Split Is Based	Amount Received By Tribe	Amount Received By Bettor Racing	Percentage Of Revenues Received By Bettor Racing	Percentage Of Revenues Received By Tribe
2004	$1,786,756	$625,241	$1,161,515	65%	35%
2005	$2,262,866	$571,368	$1,691,497	75%	25%
2006	$3,057,549	$754,665	$2,302,885	75%	25%
2007	$3,882,770	$861,292	$3,021,479	78%	22%

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Supp. App. 252.

D. Bettor Racing holds an unlawful proprietary interest in the pari-mutuel betting operation at the casino.

In addition to its disproportionate share of revenues, Bettor Racing also held sole ownership of the pari-mutuel operation and had essentially unfettered authority over its operation, contrary to IGRA. Supp. App. 146-47, 249. Bettor Racing held the simulcast license for Royal River Racing. Supp. App. 147, 249. Bettor Racing had sole access to Royal River Racing's betting information. Supp. App. 124.1-124.2. Royal River Racing also was audited independently from the Tribe's casino by an audit firm hired by Bettor Racing, and Bettor Racing employed their own accountants. Supp. App. 106.1-106.2, 152.1-152.3. Bettor Racing considered their employees to be separate and distinct from those employed at the Tribe's casino; they completed performance reviews solely for Royal River Racing employees and provided them with discretionary bonuses. Supp. App. 161-62, 214.1-214.3, 250. And Bettor Racing reimbursed the casino for providing Royal River Racing employees with the same food and drink discounts that casino employees received. Supp. App. 121, 250.

E. The NIGC finds Bettor Racing in violation of IGRA.

In August 2009, the NIGC conducted a management-contract compliance review. Supp. App. 252. The Tribe assisted in the investigation by submitting extensive documentation and other information to the NIGC. *Id.* On May 19, 2011, the NIGC Chair served the Tribe and Bettor Racing with a Notice of Violation, or NOV. *Id.*; s*ee* 25 U.S.C. § 2713(a)(3); 25 C.F.R. § 573.3. The violation notice alleged that Bettor Racing: (1) managed a tribal gaming operation without an approved management contract; (2) managed a tribal gaming operation under two unapproved modifications to a management contract; and (3) held a proprietary interest in part of a tribal gaming operation, all in violation of the IGRA and NIGC regulations.[2] *Id.* The violation notice stated that Bettor Racing could correct the violations by reimbursing

[2] As to the Tribe, the violation notice asserted four charges. First, the Tribe permitted Bettor Racing to manage Royal River Racing without an approved management contract. Supp. App. 252. Second, it allowed Bettor Racing to operate under two unapproved modifications to the management contract. *Id.* Third, the Tribe failed to submit the management letters prepared by the casino's independent auditors within 120 days after the end of its 2005 and 2006 fiscal years. *Id.* Finally, the notice charged that the Tribe's payments to Bettor Racing violated IGRA's use of net-gaming revenue mandates and the Tribe's gaming ordinance (Supp. App. 229), which similarly requires the Tribe to have the sole proprietary interest in gaming operations, including pari-mutuel gaming operations. *Id.* The NIGC settled with the Tribe. By the terms of the settlement agreement, the Tribe admitted to all the allegations in the violation notice and agreed to take several remedial measures, including providing training and submitting required documents to ensure that the violations did not recur. *Id.* Should the Tribe breach the terms of the settlement, it must pay a fine of $750,000. *Id.*

the Tribe $4,544,755,[3] the amount the Tribe paid Bettor Racing in excess of what the company was owed under the approved management contract. Bettor Racing did not correct the violations. *Id.* In a later-issued Civil Fine Assessment, the Chair fined Bettor Racing $5,000,000 for the three violations. Supp. App. 253.

Bettor Racing appealed the Notice of Violation and Civil Fine Assessment to an NIGC administrative appeal officer under 25 C.F.R. § 577.3 (2011).[4] The Tribe intervened in Bettor Racing's administrative appeal. Supp. App. 253. The Chair and Tribe moved for summary judgment, arguing there was no genuine issue of material fact that Bettor Racing had violated IGRA and that the Chair thus was entitled to judgment as a matter of law. *Id.* The hearing officer agreed with the Chair and Tribe and recommended that the NIGC uphold the Chair's findings and fine. *Id.*

On September 12, 2012, the NIGC issued a final order granting the NIGC Chair's and the Tribe's motions for summary judgment. Supp. App. 247-65. The NIGC finalized the Chair's proposed fine against Bettor Racing in the amount of $5,000,000. *Id.* But the NIGC determined that the civil fine supplanted the monetary

[3] At the time of the violation notice, the NIGC had not yet obtained the records needed to calculate the economic benefit that Bettor Racing had received for fiscal years 2009 through April 5, 2010. Supp. App. 259 n.2.

[4] This brief cites to the NIGC appeal regulations as codified at the time of the NIGC's final decision on September 12, 2012. The regulations have been modified, *see* 77 Fed. Reg. 58,941-01 (Sept. 25, 2012), and can now be found at 25 C.F.R. pt. 580.

remedy set forth in the violation notice, *i.e.*, that Bettor Racing repay the Tribe $4,544,755, thus leaving Bettor Racing to pay only $5 million. *Id.*

III. PROCEEDINGS BELOW

Bettor Racing filed suit in the United States District Court for the District of South Dakota, challenging under the APA the NIGC's final order finding that the company had committed three IGRA violations. App. 88, 97. Bettor Racing also alleged that the NIGC had exceeded its statutory and constitutional authority when assessing the civil fine. App. 97. The Tribe intervened as a defendant in the APA lawsuit. App. 114. Bettor Racing and the Tribe also alleged cross-claims against each other, but those cross-claims are not before this Court. App. 595-604. As relevant to the APA claim, the parties filed cross-motions for summary judgment, and the district court entered judgment for the NIGC and the Tribe. App. 593.

Properly providing due deference to the NIGC's interpretation of IGRA and its regulations (App. 543-44), the district court concluded that the NIGC did not arbitrarily find that Bettor Racing had violated IGRA. App. 590. The court concluded that the record supported the NIGC's findings that Bettor Racing had violated IGRA and its regulations by operating the casino without an approved management contract from September 24, 2004 to March 17, 2005 (App. 547-51); by operating the casino under two unapproved modifications to the approved management contract from February 15, 2007 to December 31, 2009 (App. 552-56); and by improperly possessing a proprietary interest in the casino (App. 556-66). The district court further

concluded that the NIGC did not abuse its discretion or act unconstitutionally in setting the total amount of the civil fine at $5,000,000 for the three violations. App. 566-74, 578-90. And finally, the district court rejected Bettor Racing's arguments that it had been denied due process (App. 574-78), arguments which the court noted were "not presented with a great deal of clarity." App. 574.

SUMMARY OF THE ARGUMENT

The district court correctly affirmed the NIGC's entry of summary judgment against Bettor Racing. There is no genuine dispute over any fact that is material to the NIGC's findings that Bettor Racing violated IGRA. Bettor Racing, through Mr. Gallo, admitted to the facts underlying the violations. Mr. Gallo admitted that Bettor Racing managed the casino's pari-mutuel betting operation, for a time, without an approved contract. Mr. Gallo admitted that Bettor Racing later managed the operation under two unapproved modifications to an approved contract. And Mr. Gallo admitted to the facts establishing that Bettor Racing had an unlawful propriety interest in the casino. Bettor Racing received at least $4,544,755 in economic benefit from the violations. Given the substantial economic benefit that Bettor Racing received from its violations, the violations' serious nature, and the company's negligence or willful blindness that led to the violations, the NIGC reasonably fined Bettor Racing a total of $5,000,000 for three IGRA violations. While Bettor Racing complains that the NIGC did not hold a hearing before finding the company in violation of IGRA, a hearing was unnecessary because Mr. Gallo admitted to the facts underlying the

IGRA violations. There was no dispute over any fact that was material to the NIGC's findings and conclusions. And the amount of the fine was well within any constitutional limitation on the imposition of fines. The district court's judgment upholding the NIGC's decision thus should be affirmed.

STANDARDS OF REVIEW

The APA governs judicial review of agency action, including compliance with IGRA. *See City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 702 F.3d 1147, 1153 (8th Cir. 2013). As relevant here, the APA authorizes courts to "hold unlawful and set aside" final agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). This standard of review is narrow and highly deferential, and an agency's decision is "entitled to a presumption of regularity." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).

A. Review of Agency Decisions

Under the APA's arbitrary or capricious prong, the court is obligated merely to determine whether the agency has considered the relevant data, articulated a satisfactory explanation for its action, and made no clear error of judgment. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1982). A reviewing court ordinarily may reverse an agency action as arbitrary or capricious under the APA only if the agency relied on factors Congress did not intend it to consider, "entirely failed to consider an important aspect of the problem," or offered an explanation

"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." *Id.*

Furthermore, the scope of the court's review is necessarily limited to the administrative record before the decision-maker. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985); *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973); *see also* 5 U.S.C. §706. As long as the record reasonably supports the agency's decision, a court cannot second-guess the agency or substitute its judgment for that of the agency. *See Friends of the Norbeck v. U.S. Forest Serv.*, 661 F.3d 969, 976 (8th Cir. 2011).

B. Review of Agency Factual Determinations

In reviewing a record-based factual conclusion made in the context of an informal adjudication like this one, a factual conclusion may be set aside as arbitrary or capricious only if it is unsupported by substantial evidence. *See Dickinson v. Zurko*, 527 U.S. 150, 164 (1999); *Ass'n of Data Processing v. Bd. of Governors*, 745 F.2d 677, 683 (D.C. Cir. 1984). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *See Dawson Farms v. Risk Mgmt. Agency*, 698 F.3d 1079, 1084 (8th Cir. 2012). Substantial evidence is more than a mere scintilla but less than the preponderance of the evidence. *See Slusser v. Astrue*, 557 F.3d 923, 925 (8th Cir. 2009). Evidence is generally substantial under the APA if it is enough to justify, in a case involving a trial by jury, refusal to direct a verdict on a factual conclusion. *See Coteau Props. Co. v. Dep't of Interior*, 53 F.3d 1466, 1483 (8th Cir. 1995). Thus, because federal agencies are both fact-finders and subject matter experts,

review of agency fact-finding under the substantial evidence standard is "even more deferential" than review of district court fact-finding under the clearly erroneous standard. *See Reynoso-Lopez v. Ashcroft*, 369 F.3d 275, 278 (3d Cir. 2004) (quoting *Concrete Pipe & Prods. of Cal. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602 (1993)); *see also Dawson Farms*, 698 F.3d at 1082-84.

ARGUMENT

I. BETTOR RACING VIOLATED IGRA.

The NIGC found that Bettor Racing had violated IGRA in three ways: (A) by unlawfully managing an Indian gaming operation without an approved management contract; (B) by unlawfully managing an Indian gaming operation subject to unapproved modifications to an approved contract; and (C) by unlawfully possessing a proprietary interest in an Indian gaming operation. Because the record supports each of these findings, this Court should defer to NIGC's findings and affirm the district court's judgment.

A. Bettor Racing unlawfully operated the casino, for a time, without an approved management contract.

IGRA requires the Chair to review and approve all contracts for the management of Indian tribal gaming operations by a management contractor. 25 U.S.C. § 2710(d)(9), § 2711(a)(1). Management contracts not approved by the Chair are void and unenforceable. *Id.* § 2711(a)(1); 25 C.F.R. § 533.7; *see First Am. Kickapoo Operations, L.L.C.*, 412 F.3d 1166, 1176 (10th Cir. 2005); *see also Wells Fargo Bank Nat'l*

Ass'n, 658 F.3d at 699-700; *Colombe*, 918 F. Supp. 2d at 957. Failure to obtain the Chair's approval of a management contract prior to operating under such contract is a *per se* violation of IGRA. 25 U.S.C. § 2713.

Here, the NIGC concluded that the undisputed facts in the record showed that Bettor Racing violated IGRA by managing the casino's pari-mutuel betting operation without an approved management contract. Supp. App. 254-55. In fact, Mr. Gallo admitted to the violation. During Mr. Gallo's deposition before the NIGC, he had the following colloquy with an NIGC staff attorney in which he admitted to operating at the casino without an approved contract for nearly six months:

> Q. But the original agreement started in 2004; correct?
>
> A. I operated for six months at Flandreau without a contract.
>
> Q. Okay. From September
>
> A. 24th through March 17th of '05.

Supp. App. 109. Mr. Gallo confirmed this admission in later testimony:

> Q. Did Mr. Samp or Mr. Pechota tell you what the role of the National Indian Gaming Commission was as far as the legal implications of not having a contract approved by the National Indian Gaming Commission?
>
> A. If they did I don't recall. I know that we operated there six months and everyone was happy.

Supp. App. 114. Mr. Gallo also admitted to knowing that a management contract was necessary to conduct business at the casino, Supp. App. 104-05, and to knowing that a management contract required NIGC approval:

> Q. Okay. And when Mr. Pechota and Mr. Samp explained to you what the NIGC's issues were did you understand what the National Indian Gaming Commission's role was in the contract?
>
> A. As far as what?
>
> Q. As far as the approval process.
>
> A. I knew that they had to okay it before I got the license.

Supp. App. 106. There is no question that Bettor Racing's actions constituted management of an Indian gaming operation under IGRA. Supp. App. 255. Mr. Gallo's admissions thus were sufficient to establish that Bettor Racing violated IGRA.

Because of Mr. Gallo's admissions, there is no genuine dispute that Bettor Racing operated the casino's off-track betting business without an approved contract. So Bettor Racing blames the Tribe for its violation and contends that it did not intend to violate the law, despite Mr. Gallo's admission that he knew that NIGC must approve the contract. But the Tribe's relative blameworthiness and Bettor Racing's culpability are irrelevant. IGRA's regulatory prohibition on managing an Indian gaming operation without an approved management contract does not contain a scienter requirement. Supp. App. 239-40, 253-54. "To the contrary, the regulations unambiguously provide that management contracts and amendments thereto that

have not been approved by the Chair[] are invalid and void." Supp. App. 239. IGRA thus requires that anyone who violates its prohibitions be held strictly liable.

Bettor Racing identifies nothing in IGRA or its legislative history showing that Congress intended to require the NIGC to prove a violator's intent to commit an IGRA violation. Bettor Racing nonetheless contends (at 34) that this Court should infer a culpability requirement because the company is being punished for violating the law. But the primary case on which Bettor Racing relies, *Carter v. United States*, 530 U.S. 255 (2000),[5] states only that a *criminal prohibition* is presumed to contain a scienter element, even where none is explicitly stated. 530 U.S. at 267-68. Better Racing does not face criminal prosecution here. And Bettor Racing identifies no equivalent authority for civil regulatory cases. In fact, "[a]s a general matter, scienter is not required to impose civil penalties for regulatory violations when the regulation is silent as to state of mind." *Northern Wind v. Daley*, 200 F.3d 13, 19 (1st Cir. 1999). "Further, a mens rea element is never presumed for [even criminal] regulatory offenses." *Id.*

Had Congress wished to impose a scienter requirement for IGRA's civil prohibition on unapproved management of gaming enterprises, it could have. But it did not, and Bettor Racing cannot manufacture such a requirement absent any support in IGRA, its legislative history, or its implementing regulations.

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[5] Bettor Racing's other identified cases (at 34-35) involve criminal statutes in which Congress imposed an explicit *mens rea* requirement. Congress did not do so here for civil regulatory IGRA violations, punishable only by a fine.

Furthermore, even if the statute or its regulations were ambiguous, the NIGC through its regulations and through its decision here interpret IGRA not to have a scienter requirement. Supp. App. 253. The NIGC's formal interpretation of IGRA is entitled to controlling weight under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See United States v. Seminole Nation of Okla.*, 321 F.3d 939, 945 (10th Cir. 2002) (holding that the NIGC's interpretations of IGRA, as embodied in its regulations, are entitled to *Chevron* deference). Similarly, if the question is whether the IGRA regulations somehow impose a scienter requirement, where the statute does not, the NIGC's interpretation that the regulations do not require the NIGC to show a violator's culpability is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotations omitted).

In sum, the undisputed facts, most notably Mr. Gallo's own admissions, show that Bettor Racing had unlawfully managed the Tribe's peri-mutuel betting operation at the casino without an approved gaming management contract. Bettor Racing's lack of intent to violate IGRA is not a *material fact* and is irrelevant because IGRA contains no scienter requirement. Accordingly, the NIGC did not arbitrarily conclude that there was no genuine dispute of material fact that Bettor Racing had violated IGRA by operating without an approved management contract.

B. Bettor Racing unlawfully operated the casino subject to unapproved modifications to an approved management contract.

NIGC regulations require the Chair to approve any amendments to an

approved management contract. 25 C.F.R. § 535. Amendments not approved by the Chair are void *ab initio*. *Id.* § 535.1(f); *Colombe*, 918 F. Supp. 2d at 957 (citing *Mo. River Servs.*, 267 F.3d at 853–54). It is *per se* a substantial IGRA violation to operate under a management contract that the Chair has not approved. 25 U.S.C. § 2710(d)(9), § 2711(a)(1).

In granting the Chair's motion for summary judgment as to the second violation, the NIGC found that there were no genuine issues of material fact as to the violation for managing an Indian gaming operation under two unapproved modifications to the approved management contract. Supp. App. 255-56. No genuine issues of material fact exist primarily because Mr. Gallo admitted that Bettor Racing and the Tribe first modified the approved management contract on February 15, 2007, without obtaining the NIGC's approval. Supp. App. 3, 26-27, 149-50, 156-57, 162, 217, 250-51. Mr. Gallo further admitted that from at least February 15, 2007, to July 31, 2008, Bettor Racing managed Royal River Racing under this unapproved amendment to the management contract, which decreased the Tribe's agreed-to share of the net gaming revenue under the approved management contract. Supp. App. 149-50, 155-56, 162, 217. And Mr. Gallo admitted that Bettor Racing and the Tribe executed a second modification on August 1, 2008, which further decreased the Tribe's agreed-to share of the net gaming revenue under the approved management contract. Supp. App. 26, 32, 79, 165-68, 171-72, 177, 247. The undisputed evidence

thus established that from the date of execution through April 5, 2010, the Tribe and Bettor Racing operated under the unapproved second modification.

Bettor Racing contends that it did not know that the NIGC had not approved the modifications, blaming the Tribe for its violations. Bettor Racing argues (at 36) that the NIGC erred in granting summary judgment because fact questions remain unanswered regarding "the knowledge, intent and actions of all parties." But, again, the Tribe's blameworthiness and Bettor Racing's lack of knowledge or intent are irrelevant. Supp. App. 256. As discussed above, IGRA does not require the NIGC to show a violator's knowledge of, or intent to violate, IGRA.

Bettor Racing's liability does not change even if the company reasonably relied on the Tribe's representation that the Chair had approved the modifications because unapproved modifications are void *ab initio*. *Id.* As discussed, Bettor Racing's subjective beliefs are irrelevant because IGRA does not require the NIGC to show a violator's knowledge of, or intent to commit, a violation. *Id.* Managing an Indian gaming operation without an approved contract is a *per se* violation of IGRA. While a violator's relative culpability may impact the amount of the fine, Bettor Racing's alleged lack of culpability is immaterial to whether it committed the violation.

Because of the absence of any disputed material facts related to the second violation, and because Bettor Racing is unable to identify specific facts in the record establishing a genuine issue requiring a hearing before the agency, the NIGC did not arbitrarily or capriciously find that Bettor Racing had violated IGRA.

C. Bettor Racing unlawfully held a proprietary interest in the casino's pari-mutuel betting operation.

IGRA requires that a tribe have the sole proprietary interest in, and responsibility for, the tribal gaming operation to ensure that it receives the primary benefit of its gaming revenue, consistent with IGRA's statutory goals. 25 U.S.C. § 2702, § 2710(b)(2)(A). To that end, Congress limited the amount of net gaming revenues that management contractors may receive for managing tribal gaming operations: 30% of net gaming revenues generally, and 40% only in certain circumstances. *Id.* § 2711(c). IGRA never allows a management contractor to receive more than 40% of net revenues from tribal gaming activity. *Id.* To ensure IGRA compliance, Congress directed the Chair to disapprove management contracts and contract modifications that exceed the net-revenue provisions. *Id.* § 2711(a).

When examining whether a tribe has the sole proprietary interest in the gaming operation, three factors are relevant: "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." *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 830 F. Supp. 2d 712, 723 (D. Minn. 2011) (internal quotations omitted). Here, the large share of revenue kept by Bettor Racing and the high amount of control it exerted over the gaming operation show that Bettor Racing had an unlawful proprietary interest in the casino's pari-mutuel business. As with the other violations, the NIGC relied only on undisputed facts to reach this conclusion.

First, under the check-swap scheme, Bettor Racing received a percentage of net revenue that exceeded the statutory maximum, and thus the company was the primary beneficiary of the tribal gaming operation. Supp. App. 257. And Bettor Racing had exclusive control of Royal River Racing; the company was the sole owner of the enterprise and ran it as a business separate from the casino. Supp. App. 257-58.

On appeal, Bettor Racing cannot and does not dispute that it had sole ownership and exclusive control over Royal River Racing. The ownership and control that Bettor Racing exercised over Royal River Racing demonstrate that Bettor Racing had a proprietary interest in the casino's off-track wagering operation in violation of IGRA. *See* Black's Law Dictionary 1232 (7th ed. 1999) (defining proprietary as "[o]f or relating to a proprietor" or "[o]f, relating to, or holding as property"). But even if that ownership and control were insufficient to show its proprietary interest in the tribal gaming operation, the large share of the gaming revenue that Bettor Racing kept for itself also shows that Bettor Racing had an unlawful interest in tribal gaming.

It is undisputed that Bettor Racing received a majority share of the gaming revenue through the check-swapping scheme under the unapproved modifications to the approved management contract. Regardless of the scheme's legality, the fact that the company retained significantly more than the majority of gaming revenue shows that the company's interest in the pari-mutuel gaming operation was proprietary, and not merely managerial. When coupled with the lack of control that the Tribe had over the gaming operation, the NIGC had a reasonable basis for concluding, based on

undisputed facts, that Bettor Racing, not the Tribe, controlled the pari-mutuel betting at the casino. Supp. App. 256-58. Because Bettor Racing operated the betting operation as the proprietor, it violated IGRA.

Thus, even if the check-swapping scheme was otherwise legal, the NIGC had substantial, undisputed evidence that Bettor Racing had violated IGRA. But the check-swapping scheme was illegal, another factor that shows Bettor Racing had an improper interest in the gaming operation. The scheme permitted Bettor Racing to receive more tribal gaming revenue than IGRA allows. While Bettor Racing spins the scheme as the Tribe merely giving the company a "discretionary bonus" for performing good work, the NIGC properly rejected that spin based on Mr. Gallo's own testimony. Mr. Gallo testified that the check-swapping scheme "wasn't discretionary as far as the amendments go." Supp. App. 175-78. Indeed, Mr. Gallo premised his continued involvement in the enterprise on the check-swapping scheme, testifying that he told the Tribe that "if they're not going to swap checks I'll be leaving" and that "the only reason I was staying there is I was going to be getting a check swap at the end of the year for whatever—to be in compliance with the NIGC. There would be no other reason to stay there." *Id.* Mr. Gallo further testified that the "bonuses" "weren't discretionary and everyone knows it." Supp. App. 210. Thus the so-called "bonus" from the check-swapping scheme was not a bonus at all. The bonus was a scheme to disguise the pari-mutuel gaming operation's revenue, to make it appear that the Tribe was receiving the statutory-minimum revenues that Congress in

IGRA required the Tribe to receive, while ensuring that the bulk of those revenues would be returned to Bettor Racing

Bettor Racing asserts (at 42) that "[t]here is nothing in the NIGC or IGRA regulations that precludes the giving of a bonus." Not so. If check-swapping schemes like that conceived by Bettor Racing and the Tribe here were permissible, the scheme would nullify the hard cap on management revenues that Congress imposed through IGRA. For that reason, Bettor Racing's argument (at 41) that the bonus was a permissible expenditure of revenue to promote "tribal economic development" and "general welfare" must fail. Congress did not set a cap on how much revenue a gaming management company can permissibly receive, only to then allow the Tribe to expend even more of the limited pool of revenue in redundantly compensating that company. Perhaps a tribe could, in certain circumstances, permissibly use gaming revenues to pay a bonus to its management company. But the total payment of fees and bonus could not exceed IGRA's 30% (or in some cases 40%) maximum revenue limit. IGRA's specific cap on management company compensation overrides the general proposition that a Tribe may use its gaming revenue to promote economic development. It is a fundamental legal principle that "specific statutes control over general statutes." *United States v. Sigillito*, 759 F.3d 913, 929 (8th Cir. 2014).

Bettor Racing contends (at 40-41) that the Tribe's former counsel "vetted" the bonus with the NIGC's former Chair. The sole evidence of the former Chair's involvement comes from Mr. Gallo, who testified that a tribal representative told him

that the NIGC's then-Chair had approved the scheme. Supp. App. 145. But this self-serving, double-hearsay statement from Mr. Gallo does not assist Bettor Racing. As the district court noted, the hearsay demonstrated "at best" that the former Chair had issued an informal opinion after being confronted at a trade show by the Tribe's former counsel that, in the abstract, a bonus arrangement could be permissible. App. 555. There is no evidence that the former Chair knew the specifics of this check-swapping scheme, which was being used to circumvent IGRA's cap on the net revenue that a management company lawfully may receive.

More importantly, even if the former Chair knew the scheme's specifics, Bettor Racing should have known that the former Chair's oral assent was legally insufficient. NIGC regulations mandate that those seeking to enter into or amend a management contract must follow specific submission requirements, 25 C.F.R. § 535.1, and the contract approval must be in a signed, dated, and *written* document, *id.* § 533.1(b).

The NIGC never approved the check-swapping scheme. In the end, however, whether the scheme was lawful or not, the undisputed facts show that Bettor Racing had nearly exclusive control of the casino's pari-mutuel betting operation and took a very large share of net revenue. Based on these undisputed facts, the NIGC reasonably concluded that Bettor Racing had violated IGRA by operating the casino's pari-mutuel betting business as the proprietor, and not as a mere manager.

II. THE CIVIL FINE WAS REASONABLE AND APPROPRIATE.

A. The fine was reasonable.

Having found that Bettor Racing had committed multiple IGRA violations, the NIGC fined Bettor Racing the sum of $5,000,000. Supp. App. 248. IGRA authorizes the Chair to levy and collect civil fines up to $25,000 per violation, per day, against a management contractor who violates IGRA. 25 U.S.C. § 2713. NIGC regulations list five factors for the Chair to consider when assessing the amount of the fine.

> (a) Economic benefit of noncompliance. The Chairman shall consider 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.
>
> . . .
>
> (b) Seriousness of the violation. The Chairman may adjust the amount of a civil fine to reflect the seriousness of the violation. In doing so, the Chairman shall consider the extent to which the violation threatens the integrity of Indian gaming.
>
> (c) History of violations. The Chairman may adjust a civil fine by an amount that reflects the respondent's history of violations over the preceding five (5) years.
>
> . . .
>
> (d) Negligence or willfulness. The Chairman may adjust the amount of a civil fine based on the degree of fault of the respondent in causing or failing to correct the violation, either through act or omission.
>
> (e) Good faith. The chairman may reduce the amount of a civil fine based on the degree of good faith of the respondent in attempting to achieve rapid compliance after notification of the violation.

25 C.F.R. § 575.4. The NIGC considered each of these factors in assessing the civil fine and determined a $5,000,000 fine was appropriate. Supp. App. 258-62. The NIGC did not abuse its discretion in levying this fine, and the fine should be upheld.

The record amply supports the amount of the fine imposed. First, Bettor Racing profited from the violations in the amount of $4,544,755, a significant economic benefit. Supp. App. 252, 260. Mr. Gallo testified that without the unlawful check-swapping scheme's economic benefits, he would have abandoned the enterprise. Supp. App. 175-76. Bettor Racing's business model thus depended on the economic benefit it received from the IGRA violations.

Second, managing a tribal gaming operation without an approved management contract is *per se* a substantial IGRA violation. Supp. App. 260; 25 C.F.R. § 573.6(a)(7) (2011). Having an unlawful proprietary interest in the casino also is a significant IGRA violation because it is the declared policy of IGRA "to ensure tribes are the primary beneficiaries of their gaming operations." 25 U.S.C. § 2702(2). Bettor Racing is wrong that its violations are "unsubstantiated." As discussed, Mr. Gallo admitted to the violations. And even if he had not admitted to them, the record contains ample evidence demonstrating the violations. While Bettor Racing had no previous IGRA violations, its first violations of the statute were nevertheless substantial. Supp. App. 261.

Third, while Bettor Racing argues that its violations were not willful, its actions were, at a minimum, negligent, if not willfully blind. *Id.* Mr. Gallo knew that the "bonus" system was not a discretionary bonus. Supp. App. 213. Moreover, Bettor Racing is a sophisticated gaming-management company and knew, or certainly should have known, that the Chair must approve any management contract or amendment.

Bettor Racing repeatedly—both in its original, unapproved contract and in the two later unapproved amendments—operated with no knowledge of whether the Chair had approved the contract or amendments. As Mr. Gallo admitted, he "never knew whether the NIGC acted on anything." Supp. App. 159. And he further admitted, "I never knew where I stood with the Tribe or the NIGC or any communication between the Tribe and the NIGC." Supp. App. 127. Mr. Gallo's admissions show that Bettor Racing's willful blindness or, at a minimum, its negligence led to its IGRA violations.

Bettor Racing downplays its role in the violations by blaming the Tribe. But the NIGC recognized the Tribe's role and reduced Bettor Racing's fine, Supp. App. 261, and penalized the Tribe, Supp. App. 265. As the district court recognized, it is not the court's role to reweigh the relevant factors and determine what fine the court would set. App. 567. Rather, courts must defer to the NIGC's judgment so long as the NIGC's action was not arbitrary, capricious, or an abuse of discretion. *See* Standards of Review, *supra* at 17-19.

IGRA imposes an obligation on those operating casinos for tribes to ensure that the contracts have been approved. Unapproved contracts are void *ab initio*. 25 C.F.R. § 533.7, § 535.1(f). Bettor Racing was a sophisticated gaming-management company knowingly operating in a closely-regulated industry. Even if Bettor Racing lacked the intent to violate IGRA, Bettor Racing was at least negligent in not ensuring

that the NIGC had approved the modifications to the approved contract *before* operating under those modifications.

Indeed, Bettor Racing's failure to ensure its own IGRA compliance is remarkable given the nature of the modifications at issue. Those modifications allowed Bettor Racing to avoid paying the Tribe its statutorily-mandated minimum share of the gaming revenue. The modifications thus not only were unapproved by the Chair, but were unapprovable. The Tribe only agreed to these modifications because Bettor Racing threatened to withdraw from the casino.

Bettor Racing contends that it relied on the Tribe's attorney's view that the parties' check-swapping scheme was legal. But the Tribe's attorney's view is immaterial. The Tribe's attorney is not the NIGC. And given the scheme's unorthodox nature that allowed Bettor Racing to avoid paying the Tribe the IGRA-imposed minimums through the loophole of a so-called bonus, Bettor Racing should have inquired with the NIGC *before* operating under the contract modifications. And, notably, this is not a case where Bettor Racing delayed operating under the modified contract until it was told the NIGC had approved, or even that it will approve, the contract. Rather, Bettor Racing negligently began operating under the unapproved modified contracts immediately, in the absence of any knowledge of the NIGC's approval or any attempt to gain that knowledge from the NIGC.

Bettor Racing argues that its supposed good faith in dealing with the Tribe shows that the NIGC should have reduced the fine. Setting aside whether threatening

to withdraw from the casino unless the Tribe gave up more of its revenue is acting in good faith, Bettor Racing's alleged good faith is irrelevant. The regulation only allows a reduction of a fine with a showing of remedial good faith "after notification of the violations." Where Bettor Racing did not remit complete payment to the Tribe after it received notice of the violations,[6] the regulation's plain language does not allow the NIGC to reduce the fine that was otherwise fully justified under the other factors. The NIGC cannot misread the regulation's plain text to suit Bettor Racing's needs.

Finally, Bettor Racing argues that the fine was excessive because it was larger than that levied against the Tribe. But Bettor Racing profited far more from the scheme than did the Tribe, a point that aptly demonstrates why IGRA prohibits this conduct. Supp. App. 261. Indeed, Congress enacted the IGRA provision that Bettor Racing violated to protect the Tribe's revenue from management contractors' demands for more than what Congress determined to be a contractor's fair share of gaming revenue. 25 U.S.C. § 2702(2). Moreover, the Tribe has accepted responsibility for its violations, while Bettor Racing has not. And the $5,000,000 fine is less than 10% of the $65,800,000 maximum fine that IGRA allows for these violations under

[6] Bettor Racing remitted $1,081,578 to the Tribe before receiving the violation notice, bringing the total balance outstanding to $3,463,177. Supp. App. 242. At the time of the violation notice, the NIGC did not have the records necessary to calculate any additional economic benefit that Bettor Racing may have received between fiscal year 2009 and April 5, 2010. Supp. App. 259 n.2; App. 31. The civil fine is paid to the United States Treasury, 25 C.F.R. § 575.9(c), not to the Tribe.

the $25,000-per-day maximum. App. 589 n.19. Furthermore, most of that fine reflects the substantial and undue economic benefit of $4,544,755 that Bettor Racing had received from its unlawful conduct.[7] Under these circumstances, the NIGC did not act arbitrarily or abuse its discretion in levying a $5,000,000 fine.

B. The fine was constitutional.

Bettor Racing strains its credibility in also asserting that the $5,000,000 civil fine was unconstitutional. The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. Civil fines may be challenged under the Excessive Fines Clause if the imposed fine "can only be explained as serving in part to punish." *Austin v. United States*, 509 U.S. 602, 610 (1993). But a punitive civil fine violates the Eighth Amendment only if it is excessive, meaning that the fine is "grossly disproportional to the gravity of [the] offense." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

There is no gross disproportionality here. A fine is grossly disproportional to the gravity of the offense if it is so excessive that "the punishment is more criminal than the crime." *United States v. Bieri*, 68 F.3d 232, 236 (8th Cir. 1995) (internal

[7] When Bettor Racing contends (at 8) that the Tribe "received all funds to which it was entitled under Federal law," it apparently means that Bettor Racing and the Tribe laundered the funds through the Tribe to make the unlawful check-swapping scheme look legal. Bettor Racing also states (at 48) that "the permissibility of the bonus payment has yet to be examined." That statement is false. The NIGC found that the scheme impermissibly allowed Bettor Racing to receive more money than IGRA permits. Supp. App. 256-57.

quotations omitted). But fines must be significant enough to ensure that the crime (or, here, the civil regulatory violation) does not pay. "[J]udgments about the appropriate punishment for an offense belong in the first instance to the legislature." *Bajakajian*, 524 U.S. at 336. Here, Congress has determined that IGRA violations are punishable by a civil fine "not to exceed $25,000 per violation." 25 U.S.C. § 2713(a)(1); 25 C.F.R. § 575.4. Each day of IGRA non-compliance is a separate violation for purposes of determining the maximum amount of the civil fine. 25 C.F.R. § 575.3.

In this case, the NIGC fined Bettor Racing $5,747 for each of the 174 days it managed Royal River Racing without an approved management contract; $1,747 for each of the 1,145 days it managed Royal River Racing under two unapproved management-contract modifications; and $1,523 for each of the 1,313 days it held an unlawful proprietary interest in Royal River Racing. Supp. App. 261-62. Because the NIGC had the discretion to assess up to $25,000 for each violation on each day, which would have amounted to $65,800,000, App. 589 n.19, the $5,000,000 total fine was far below the statutorily permissible maximum fine. When a fine falls within the permissible statutory range, it "almost certainly is not excessive." *United States v. Moyer*, 313 F.3d 1082, 1086 (8th Cir. 2002) (holding that when a "court-ordered forfeiture was half the amount of the permissible fine," it is presumed not to be excessive). Bettor Racing thus fails to make the *prima facie* showing of gross disproportionality that this Court requires to successfully challenge a civil fine under the Eighth Amendment. *See United States v. Alexander*, 32 F.3d 1231, 1235 (8th Cir. 1994) ("the

defendant has the initial burden of making a prima facie showing of 'gross disproportionality'").

Bettor Racing argues that a civil fine falling within the permissible statutory range can still be excessive. Even if that were true, this is not such a situation. Congress has entrusted the NIGC with broad discretion to impose fines, NIGC has promulgated regulations that guide it in formulating those fines, and, in this case, the NIGC imposed a fine that is a small fraction of the maximum fine it could have permissibly levied. And most of the fine actually levied simply reflects the amount of revenue ($4,544,755) that Bettor Racing unlawfully received from its violations. Bettor Racing has not demonstrated that the $5,000,000 fine was so grossly disproportionate to its offense so as to render the fine unconstitutional.

III. BETTOR RACING RECEIVED ALL THE PROCESS IT WAS DUE.

Notwithstanding Bettor Racing's assertions, the NIGC has treated it fairly throughout the administrative proceedings and gave the company all the process to which it was entitled. Bettor Racing cannot escape Mr. Gallo's admissions or the lack of a culpability requirement for finding civil IGRA violations. While Bettor Racing wants an administrative hearing, the company fails to explain convincingly why the agency owed it a hearing in the circumstances presented here. Indeed, Bettor Racing never identifies the specific evidence that it would offer at a hearing, or how that evidence would be material to the NIGC's proceedings. Thus far, Bettor Racing has

offered only bare accusations of its supposed reliance on the Tribe's representations, accusations which, even if true, are irrelevant to the proceedings.

As Bettor Racing concedes, the amount of process due depends heavily on the particular circumstances of each case. Due process only "calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 333-34 (1976) (internal citations and quotations omitted). Thus, it is not every case in which "a hearing closely approximating a judicial trial is necessary." *Id.* at 333.

In this particular case, a judicial-type hearing was unnecessary because Mr. Gallo admitted to the facts underlying the violations. The material facts thus were not in dispute. Just as a district court's granting of summary judgment without trial under Rule 56(c) of the Federal Rules of Civil Procedure does not deprive litigants of due process where there is no genuine dispute of material fact, an agency foregoing an administrative hearing does not offend due process when no genuine and material factual disputes exist. Indeed, the NIGC relied on Rule 56(c)'s standard in determining that judgment as a matter of law was appropriate. Supp. App. 254.

For these reasons, Bettor Racing misplaces its reliance on *Business Communications, Inc. v. U.S. Department of Education*, 739 F.3d 374 (8th Cir. 2013). There, the Department of Education found that Business Communications Incorporated (BCI), which had entered into contracts to install cable in schools, had unlawfully terminated an employee after he had complained about not being paid the statutorily-mandated wage. 739 F.3d at 376. BCI alleged that it had fired the employee because

he was bad for morale, and not because he complained about the wage. *Id.* at 378. The Department investigated the conflicting allegations by, among other things, interviewing witnesses, including former BCI employees who contradicted BCI's claim that the company had fired the employee to boost morale. *Id.* After finding the terminated-employee's witnesses to be more credible, the Department ordered BCI to reinstate the terminated employee and to give him back pay. *Id.* at 378-79. The Department made its findings and issued its final order without providing BCI a hearing and thus without providing BCI an opportunity to confront and cross-examine the witnesses against it. *Id.* at 379-80. This Court concluded, based on those facts, that BCI should have been provided a hearing prior to the Department's final order. *Id.* at 380-81.

Here, the NIGC did not rely on disputed witness testimony or make adverse credibility determinations without providing an opportunity for cross-examination. Rather, the NIGC relied on Mr. Gallo's own deposition testimony, which provided the NIGC with undisputed evidence that Bettor Racing had committed three IGRA violations. *Business Communications* thus is unhelpful.

Ultimately, nothing prevented Bettor Racing from presenting the NIGC with evidence attempting to show that it did not commit the IGRA violations. As the district court explained, the NIGC's regulations provided Bettor Racing with ample avenues for participating in the process. App. 575-77. Any party, for example, may request to depose a witness or serve Commission officials with interrogatories. 25

C.F.R. § 571.11(a). And Bettor Racing participated in the process when Mr. Gallo and Ray Henry, Bettor Racing's general manager, gave deposition testimony to the NIGC. But Mr. Gallo's testimony demonstrated only that it was undisputed that Bettor Racing did, in fact, commit the IGRA violations – whether it intended to or not.

Much of the additional information that Bettor Racing seeks to discover involves the Tribe's conduct and the Tribe's representations. That evidence may be relevant to the cross-claims that the Tribe and Bettor Racing have filed against each other. App. 97-100, 121-23. Bettor Racing's non-APA civil claims against the Tribe remain pending before the district court. App. 605-07. Those proceedings provide Bettor Racing with an opportunity to conduct the discovery that it seeks. But, whatever Bettor Racing discovers and proves regarding the Tribe's conduct, that information is irrelevant to the company's liability here because, as explained, the Tribe's conduct cannot excuse the company's own IGRA violations.

In the end, Congress did not require the NIGC to hold a hearing prior to finding a gaming operator in violation of IGRA. While NIGC regulations allow for a hearing, 25 C.F.R. § 577.3 (2011), "whether the case goes to hearing is strictly a matter of the outcome on the parties' motions for summary judgment." Supp. App. 244 n.13. During the administrative proceedings, Bettor Racing recognized that a hearing was not mandatory when it stipulated, as part of the joint scheduling motion, that a hearing date be set only "if necessary" after the presiding NIGC official ruled on the summary judgment motions. Supp. App. 235. The stipulation's significance is not that

Bettor Racing affirmatively waived a hearing, but that Bettor Racing recognized that a hearing is not always required. And a hearing was unnecessary here because the NIGC had sufficient undisputed facts before the Commission, by way of Mr. Gallo's admissions, to find that Bettor Racing had violated IGRA. Because the NIGC had ample undisputed evidence to support its conclusions that Bettor Racing had committed three IGRA violations, this Court should uphold those conclusions.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment.

Respectfully submitted,

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CERTIFICATES OF COMPLIANCE

I certify pursuant to Fed. R. App. P. 32(a)(7)(C) that this brief is proportionately spaced, has a Garamond typeface of 14 points or more and contains 10,368 words. I used Microsoft Word 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

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