National Indian Gaming Commission

NOTICE OF PROPOSED CIVIL FINE ASSESSMENT

Ref: CFA-11-01

To: J. Randy Gallo (Via Certified U.S. Mail)
[redacted] b6

Bettor Racing, Inc. (Via Facsimile & Certified U.S. Mail)
3709 S. Grange Avenue
Sioux Falls, SD 57105
Fax: (605) 275-9421

1. Under the authority of Section 2713(a) of the Indian Gaming Regulatory Act (IGRA or the Act), and National Indian Gaming Commission (NIGC) regulations, 25 C.F.R. part 575, the NIGC Chairwoman (Chairwoman) hereby provides notice of her intent to assess a civil fine against Mr. J. Randy Gallo and Bettor Racing, Inc. (collectively "Respondents"), for violations of IGRA, 25 U.S.C. §§ 2710(b)(2)(A), 2710(d)(9), and 2711, and NIGC regulations, 25 C.F.R. §§ 522.4(b)(1), 522.6(c), 573.6(a)(7), as set forth in detail in the attached Notice of Violation, NOV 11-01, issued on May 19, 2011. NOV-11-01, May 19, 2011, Agency CFA Rec. No. 75 (NOV 11-01).

2. The violations cited in the notice of violation are: (1) Respondents managed an off-track betting operation (OTB) at the Flandreau Santee Sioux Tribe's (Tribe's) Royal River Casino without an approved management contract from September 24, 2004, through March 16, 2005; (2) Respondents managed the OTB under two unapproved modifications to a management contract from February 15, 2007, through April 5, 2010; and, (3) Respondents had a proprietary interest in the OTB from August 31, 2006, through April 5, 2010.

3. Pursuant to IGRA, 25 U.S.C. § 2713(a), and NIGC regulations, 25 C.F.R. § 575.4, the NIGC Chairwoman may assess a civil fine, not to exceed $25,000 per violation per day, against a tribe, management contractor, or individual operating Indian gaming for each violation cited in a notice of violation issued under 25 C.F.R. § 573.3. Respondents are management contractors who managed and operated the OTB since September 24, 2004 through April 5, 2010. If noncompliance continues for more than one day, the Chairwoman may treat each daily illegal act or omission as a separate violation. 25 C.F.R. §§ 575.3 and 575.4 (a)(2).

4. NIGC regulations, 25 C.F.R. § 575.5(a), provide that, within 15 days after service of a notice of violation, or such longer period as the Chairwoman may grant for good cause,

the respondent may submit written information about the violation. Further, the regulations provide that the Chairwoman shall consider any information so submitted in determining the facts surrounding the violation and the amount of the civil fine. Respondents submitted written information on June 3, 2011, pursuant to 25 C.F.R. § 575.5. *See* Respondents' submission, June 3, 2011, Agency CFA Rec. No. 76. Respondents' June 3 submission was considered in formulating the proposed civil fine.

5. In arriving at the proposed civil fine, the Chairwoman considered the factors set forth in NIGC regulations, 25 C.F.R. § 575.4, as follows:

i. Economic benefit of noncompliance.

Sections 575.4(a)(1) and (2) of NIGC regulations provide that "[t]he Chair[] 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. The Chair[] may consider the documented benefits derived from the noncompliance or may rely on reasonable assumptions regarding such benefits. If noncompliance continues for more than one day, the Chair[] may treat each daily illegal act or omission as a separate violation."

In Respondents' June 3rd submission they argue that it was actually the Tribe that derived the economic benefit from the noncompliance, because if the Tribe had not agreed to modify the approved management contract, Respondents would have moved the OTB off the Flandreau Santee Sioux Reservation. *See* Respondents' submission, June 3, 2011, p. 3, Agency CFA Rec. No. 76. Had Respondents operated the OTB in South Dakota rather than on the Flandreau Santee Sioux Reservation from 2005 onward, the Respondents argue that they would have derived the same or an even greater economic benefit, and the Tribe would have only received [ ] per year for the term of the approved management contract. *Id.* 64

While this may be true, it is not in fact what occurred. Instead, the Tribe and Respondents together decided to modify the approved management contract to the Respondents' economic benefit. As set forth in the nov, such action without the approval of the NIGC Chair is a violation of IGRA.

The economic benefit to the Respondents is reflected in the annual statements that they provided the Tribe, which they entitled "settlement calculations" or "calculation of split." Respondents provided an annual calculation of the Tribe's share of the net revenues to the Tribe for fiscal years 2005, 2006, 2007, and 2008. Using Respondents' own calculation of the net income of the OTB, Respondents
64 received an additional [ ] over and above what was due them under the approved management contract for fiscal years 2005, 2006, 2007, and 2008. *See* Declaration of Daniel Catchpole at 1-2 ¶ 8, January 12, 2011, Agency CFA Rec. No. 61. Therefore, Respondents derived an economic benefit of at least

[b4] as a result of their noncompliance for fiscal years 2005, 2006, 2007, and 2008.

This is not the total economic benefit gained by the Respondents from their noncompliance. Respondents maintained all of the accounting records pertaining to the OTB, and the NIGC Chairwoman has not obtained records to allow calculation of Respondents' economic benefit beyond that allowed in the management contract for fiscal years 2009 through April 5, 2010. Thus, Respondents economic benefit from their noncompliance with the Act is in all likelihood greater than [ ] b4

ii. Seriousness of the violation.

Section 575.4(b) of NIGC regulations provides that "[t]he Chair[] may adjust the amount of the civil fine to reflect the seriousness of the violation. In doing so, the Chair[] shall consider the extent to which the violation threatens the integrity of Indian gaming."

Managing without an approved contract is a substantial violation of IGRA and NIGC regulations. 25 C.F.R. § 573.6(a)(7). Substantial violations expose tribal gaming operations to potential closure orders, which is the severest penalty allowed under IGRA and NIGC regulations. IGRA requires that tribes obtain the approval of the NIGC Chair to enter into a management contract for the operation and management of a gaming operation. 25 U.S.C. §§ 2710(d)(9), 2711. NIGC regulations reiterate this requirement, mandating that "[s]ubject to the Chair[]'s approval, an Indian tribe may enter into a management contract for the operation of a class II or class III gaming activity." 25 C.F.R. § 533.1.

In Respondents' June 3rd submission they argue that the Chair's conclusion that Respondents profited more from the OTB than did the Tribe was erroneously reached because she did not properly understand the facts. *See* Respondents' submission, June 3, 2011, p. 2, Agency CFA Rec. No. 76. Specifically, Respondents argue the Chair did not understand that the actions of both the Tribe and Respondents were "undertaken with the explicit knowledge, permission, and approval of the Tribe and Bettor Racing." *Id.* Respondents also argue that at least the concept of what the parties were trying to accomplish – a more advantageous split of the profits for the Respondents by paying a bonus through a check-swap – was discussed with former NIGC Chairman Phil Hogen, who at least tacitly, approved of the parties' arrangement. *Id.* at p. 3. Respondents argue that the actions of the Tribe, its legal counsel, and the former NIGC Chairman cannot be minimized and should counteract or negate the seriousness of Respondents' actions. *Id.*

Both the Tribe and Respondents actions violate IGRA. That is why the notice of violation was brought against both the Tribe and the Respondents. Further, the Tribe's actions and conduct demonstrating their approval and participation in the

violations does not lessen the severity of the violation. From September 24, 2004 through March 16, 2005, Respondents managed the OTB without an approved contract. Moreover, from February 15, 2007 through April 5, 2010, Respondents operated and managed the OTB under two unapproved modifications to an approved management contract. Such actions threaten the integrity of Indian gaming by circumventing the management contract review and amendment review processes set forth in IGRA, 25 U.S.C. §§ 2710(d)(9) and 2711, and NIGC regulations, 25 C.F.R. parts 533 and 535, to ensure the suitability of individuals and entities involved in Indian gaming and compliance with the Act.

Significantly, in circumventing the management contract amendment review process, Respondents exceeded the statutory cap set forth in IGRA for payment of management contractors. *See* 25 U.S.C. §§ 2711(c); 2710(d)(9)(applying Section 2711 (c) to Class III management contracts). In so doing, Respondents received more than 70% of the net gaming revenue from the OTB over the [b4] period of the approved management contract.

Respondents' violation of the sole proprietary interest mandate of IGRA is a serious violation. IGRA requires, as one of the necessary conditions for a tribe to open and operate a casino, a gaming ordinance approved by the NIGC Chair. 25 U.S.C. §§ 2710(b)(1)(B); 2710(d)(1)(A). For approval of a gaming ordinance, IGRA requires, among other things, that the tribal gaming ordinance provide that the Tribe have "the sole proprietary interest in and responsibility for the conduct of any gaming activity." *Id.* §§ 2710(b)(2)(A), 2710(d)(1)(A); 25 C.F.R. §§ 522.4(b)(1), 522.6(c). The formal declaration of the policy behind the Act underscores this point by stating that one of the purposes of IGRA is "to ensure that the Indian tribe is the primary beneficiary of the gaming operation." 25 U.S.C. § 2702(2).

Respondents' control of the OTB and the excessive profit they gained from the OTB acting under two unapproved modifications to the management contract constitutes the sole proprietary interest violation. As noted above, Respondents received more than 70% of the net gaming revenue from the OTB over the [b4] b4] period of the approved management contract. Such violation threatens the NIGC's ability to achieve its congressionally mandated goals of shielding the Tribe from corrupting influences; ensuring that the Tribe is the primary beneficiary of the gaming operation; and ensuring that gaming is conducted fairly and honestly by both the operator and players. *See* 25 U.S.C. § 2702(2).

These substantial and serious violations deprived the Tribe of over [b4] b4] of gaming revenue, which the Tribe could have used to fund tribal operations and programs, promote economic development, donate to charitable organizations, or help fund local government agency operations.

iii. History of violations.

NIGC regulations, 25 C.F.R. § 575.4 (c), provide that "[t]he Chair[] may adjust a civil fine by an amount that reflects the respondent's history of violations over the preceding five (5) years." The Respondents do not have a history of prior violations.

iv. Negligence or willfulness.

NIGC regulations, 25 C.F.R. § 575.4(d), provide that "[t]he Chair[] 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."

Respondents began submitting drafts of its management contract with the Tribe to the NIGC for review in March of 2004. After many revisions, Respondents and the Tribe finally submitted a management contract dated February 8, 2005, that was approved by the NIGC Chair on March 17, 2005. Such action demonstrates that they understood the mandate of the Act, that the contract required NIGC approval before management of the Tribe's gaming operation would be lawful. The fact that Respondents knowingly disregarded the Act's mandate by choosing to operate the Tribe's gaming operation from September 24, 2004 through March 16, 2005 without an approved management contract and profit thereby demonstrates a willful violation of federal law.

Moreover, documentation in the notice of violation's record and Respondents' submission indicates that Respondents intended to circumvent the management contract amendment approval process because they knew the Chairwoman would not, and could not under IGRA, approve the contract modifications, because the modifications gave Respondents a greater amount of the net gaming revenue than permitted under IGRA.

In Respondents' June 3 submission, they argue that there was no intent to deceive or avoid the administrative oversight of the NIGC because all of its intentions and business dealings with the Tribe were "wholly transparent" and done with the approval of the Tribe. *See* Respondents' submission, June 3, 2011, p. 2, Agency CFA Rec. No. 76. In support of its argument, Respondents attached as an exhibit a fax transmittal sheet dated November 28, 2005, sent from Terry Pechota to Rollie Samp – attorneys representing the Tribe's Gaming Commission and Tribe respectively. *Id.* The exhibit states:

> There are a couple of things that can be done as I see it. First, Mark Lyons [Respondents' accountant] pointed out that you can pay Randy a consulting fee. . . . Second, the Tribe can do anything it wants with the net profit. If the Tribe feels that it should pay some of its net profits to Randy as a voluntary act in order to keep Randy and his operation at the casino (because the Tribe reeps [sic] other

> rewards), I see no reason that the Tribe could not do this. It's the Tribe's money. This could not be done in the agreement, however. NIGC would not approve something where the Tribe was required to do this as a matter of contract.

Id. at Ex. 1, Agency CFA Rec. No 76.

Further, Mr. Gallo believed the payments were not discretionary. In his deposition, when asked if he was told the bonus payment or check swapping was discretionary, Mr. Gallo stated:

> A. It wasn't discretionary as far as the amendments go. Rollie had always said that it was the Tribe's discretion. And I said to him, I said, well, if the payment -- I mean, if they're not going to swap checks I'll be leaving. Terry is the one that said that we want the business here, there will be a check swap.

See Gallo Deposition., Vol. I, 156:25-157: 11, May 11, 2010, Agency CFA Rec. No. 58.

Instead, the parties negotiated, drafted, and signed a modification to the approved management contract and submitted it for the Chair's approval in February of 2007. The contract modification submitted in February 2007 was never approved by the Chair – yet the parties acted under the modification and Respondents retained a greater amount of net revenue than is allowed in the approved management contract.

Respondents knew that modifications to management contracts must be submitted and approved by the Chair in order to be valid because its original contract was submitted to the Chair in 2004, and subsequently approved by the Chair on March 17, 2005. Respondents also submitted to the NIGC the February 2007 modification to the management contract which was never approved. Thus, the fact that the February 2007 modification was submitted indicates Respondents knew the modification had to be approved prior to the parties acting under it. Even though the modification was never approved, Respondents chose to operate the OTB as if it had been approved, thus demonstrating their willful violation of federal law.

Respondents again disregarded IGRA's mandate that modifications to a management contract be submitted to, and approved by, the Chair when they entered into a second modification in August of 2008.The Tribe's attorney, Rollie Samp, confirmed by letter dated October 31, 2008, that the Tribe's Executive Committee passed a resolution approving the second modification effective as of August 1, 2008. *See* Letter from R. Samp to Whom It May Concern, October 31, 2008, Agency CFA Rec. No. 53(d). The second modification was never submitted

to the NIGC for review and approval. Nonetheless, similar to the February 2007 modification, Respondents and the Tribe acted pursuant to the August 2008 modification through April 5, 2010.

Based on the above, it is clear that Respondents knowingly disregarded the mandates of IGRA and NIGC regulations, and acted willfully when they operated and managed the OTB without an approved management contract and pursuant to two contract modifications that were never approved.

v. Good faith.

The Chairwoman may adjust a fine based on the degree of good faith of the Respondents in attempting to achieve rapid voluntary compliance after a notice of violation is issued.

In Respondents' June 3 submission, they argue that they acted in good faith throughout the term of the approved management contract. *Id.* However, NIGC regulation 575.4(f) requires the consideration the good faith demonstrated by a party to achieve rapid compliance *after* a notice of violation is issued. *See* 25 C.F.R. § 575.4(f).

Respondents have not taken any action to correct the violation of acting under two unapproved contract modifications since the notice of violation was issued. The notice of violation required that within 30 days of its issuance, the Respondents reimburse the Tribe for all the additional amounts of compensation received from the Casino beyond those allowed under the approved management contract. Specifically, as a measure to correct, Respondents were directed to pay the Tribe b4 [redacted] the amount owed the Tribe for fiscal years 2005 through 2008.

6. WHEREFORE, Pursuant to IGRA, 25 U.S.C. § 2713(a), and NIGC regulations, 25 C.F.R. §§ 575.3 and 575.4, fines for continuing violations may be assessed in an amount up to $25,000 (twenty five thousand) per day per violation. Here, each daily illegal act may be deemed a separate violation. *See* 25 C.F.R. §§ 575.3 and 575.4(a)(2).

Managing Without An Approved Contract:

The Chairwoman has determined that one violation occurred each day that the Respondents managed the OTB without an approved contract.

The Chairwoman may assesses a fine in the amount of Four Million Three Hundred and Fifty Thousand ($4,350,000) or $25,000 per day for the 174 day period between September 24, 2004, and March 16, 2005, on the Respondents for managing the OTB without an approved management contract. However, after applying the factors cited above, and noting that during the time Respondents operated the OTB without an approved management contract Respondents paid the Tribe what it would have received under the contract had it been approved, the Chairwoman has determined that a fine in

the amount of $1,000,000 is appropriate. This fine represents an appropriate balancing of the factors cited above including that managing without a contract constitutes a substantial violation of IGRA.

Managing Under Two Unapproved Modifications to A Management Contract:

The Chairwoman has determined that one violation occurred each day that the Respondents acted under the unapproved modifications to a management contract. Respondents acted under the first unapproved modification from February 15, 2007, through July 31, 2008. Respondents acted under the second unapproved modification from August 1, 2008, through April 5, 2010.

The Chairwoman may assesses a fine in the amount of Twenty-Eight Million Five Hundred and Seventy-Five Thousand ($28,575,000) or $25,000 per day for the 1143 day period between February 17, 2007, and April 5, 2010 that the Respondents acted under the two unapproved modifications to a management contract. However, after applying the factors cited above, and noting that Respondents actions were done with the approval of the Tribe, the Chairwoman has determined that a fine in the amount of $2,000,000 is appropriate. This fine represents an appropriate balancing of the factors cited above; including that managing under an unapproved modification to a management contract constitutes a substantial violation of IGRA.

Sole Proprietary Interest:

The Chairwoman has determined that one violation occurred each day that the Respondents had a proprietary interest in and responsibility for the OTB. Respondents had a proprietary interest in and responsibility for the OTB from August 31, 2006, through April 5, 2010.

The Chairwoman may assesses a fine in the amount of Twenty-Eight Million Five Hundred and Seventy-Five Thousand ($32,850,000) or $25,000 per day for the 1314 day period between August 31, 2006, and April 5, 2010 that the Respondents had an unlawful proprietary interest in and responsibility for the OTB. However, after applying the factors cited above, and noting that Respondents actions were done with the approval of the Tribe, the Chairwoman has determined that a fine in the amount of $2,000,000 is appropriate. This fine represents an appropriate balancing of the factors cited above; including that Respondents' unlawful proprietary interest in and responsibility for the OTB constitutes a violation of IGRA.

The total of all fine amounts ($5,000,000) in great part reflects the known economic benefit that Respondents realized [redacted] from their actions, as well as, an appropriate balancing of the other factors including that two of the violations are substantial violations of IGRA. b4

7. Interest shall be assessed at rates established from time to time by the Secretary of the Treasury on amounts remaining unpaid after their due date. 31 U.S.C. § 3717.

8. The above-described amount represents an appropriate balancing of the other factors cited above.

9. The total fine amount of $5,000,000 is not inclusive of the [64] that Respondents were ordered to pay to the Tribe in the Notice of Violation.

10. Pursuant to 25 C.F.R. § 577.3, within 30 (thirty) days after service of this Notice of Proposed Civil Fine Assessment, Respondent may appeal the proposed fine to the full Commission by submitting a notice of appeal to the National Indian Gaming Commission, 1441 L Street, NW, Suite 9100, Washington, DC 20005. Respondents have a right to assistance of counsel in such an appeal. A notice of appeal must identify this Notice of Proposed Civil Fine Assessment. Within ten (10) days after filing a notice of appeal, Respondents must file with the Commission a supplemental statement that sets forth with particularity the relief desired and the grounds therefore and that includes, when available, supporting evidence in the form of affidavits. If Respondents wish to present oral testimony or witnesses at the hearing, Respondents must include a request to do so with the supplemental statement. The request to present oral testimony or witnesses must specify the names of proposed witnesses and the general nature of their expected testimony, and whether a closed hearing is requested and why. Respondents may waive their right to an oral hearing and instead elect to have the matter determined by the Commission solely on the basis of written submissions.

Dated this 10th day of February 2012.

Tracie L. Stevens
Chairwoman

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