

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

BELLE OF SIOUX CITY, L.P.,	)	Case No. CV9254
	)	(CV9316, CV9383, CV045760)
Petitioner,	)	
	)	
v.	)	
	)	BELLE’S BRIEF IN SUPPORT OF
IOWA RACING AND GAMING	)	PETITION FOR JUDICIAL
COMMISSION, SCE PARTNERS, LLC,	)	REVIEW
MISSOURI RIVER HISTORICAL	)	
DEVELOPMENT, INC. and CITY OF	)	
SIOUX CITY,	)	
	)	
Respondents.	)	

Petitioner Belle of Sioux City, L.P. (“Belle”) hereby submits this memorandum in support of its consolidated petitions for judicial review.

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PRELIMINARY STATEMENT

The Hard Rock Sioux City, operated by Sioux City Entertainment (“SCE”) with Missouri River Historical Development, Inc. (“MRHD”) as the non-profit QSO, is an illegal gaming operation. It was licensed by the Iowa Racing and Gaming Commission (“IRGC”) in violation of Iowa gaming law and in contravention of Belle’s due process rights.

The IRGC violated Iowa gaming law by licensing SCE and MRHD to develop the Hard Rock casino because Iowa Code § 99F.7(2)(c) plainly *forbids* the IRGC from doing precisely what it did—issuing a new license for a land-based casino in Woodbury County while the Argosy Casino, an excursion gambling boat casino operated by Belle from 1994 until July 2014, remained licensed.

The IRGC also violated Belle’s due process rights by licensing SCE and MRHD to develop the Hard Rock Casino, and announcing that the Hard Rock Casino would replace the Argosy Casino, before the IRGC even offered, let alone provided, the due process to which Belle was entitled *before* any final license non-renewal decision could lawfully be made. While the IRGC purported to provide “process” to Belle in the form of a contested case hearing in March

2014, the non-renewal of Belle's license was then a foregone certainty—the Hard Rock Casino was already licensed and well on its way to opening. Belle stood no chance of retaining its license. The contested case was devoid of fair process.

Along the way of divesting Belle of its license and replacing the Argosy Casino with the Hard Rock, the IRGC made a number of other decisions that are arbitrary and capricious and subject to reversal. Among them, the IRGC used a purported—yet actually non-existent—“statutory requirement” that Belle have an “operating agreement” with MRHD as the basis to deny Belle's renewal application, and then it repeatedly refused to approve either an extension of Belle's operating agreement with MRHD or any of Belle's alternative proposals for addressing the IRGC's concerns about the expiration of Belle's operating agreement with MRHD. The IRGC's actions and decisions were pretextual, unreasonable, arbitrary and capricious, and were made simply to preserve the IRGC's long-stated intention of ensuring that the Argosy Casino closed before the Hard Rock Casino opened. In addition, the IRGC's award of licenses to SCE and MRHD violated Iowa law because the IRGC permitted SCE to make wholesale amendments to its application long after the application deadline, to the prejudice of the other bidders. The IRGC's decisions and actions that Belle challenges in this judicial review proceeding should be declared unlawful and be reversed.

RELEVANT BACKGROUND

The IRGC's Initial Non-Renewal Of Belle's License. Between 1994 and 2011, Belle operated the Argosy Casino pursuant to a series of licenses that were renewed annually by the IRGC without incident. In December 2011, Belle and its non-profit QSO, MRHD, applied jointly for the renewal of their licenses for the term of April 1, 2012 through March 31, 2013. In a series of actions taken at IRGC meetings in the spring of 2012, the IRGC, citing the pending

expiration on July 6, 2012 of Belle's operating agreement with MRHD, renewed Belle's and MRHD's licenses only through June 7, 2012.

At its meeting on June 7, 2012, the IRGC voted "to approve the license for [Belle] and MRHD through March 31, 2013 pending the agreement of the parties to extend the operating agreement through that date and beyond as jobs would be affected." (Record at 498.)¹ The IRGC also announced that it would permit any interested party to bid for a new license for a land-based casino in Woodbury County. (Record at 496-98.) The IRGC stated that it "would be committed to doing whatever is necessary to keep the [Argosy Casino] open until such time as the new facility opens so that the employees are not impacted." The IRGC also refused to consider Belle's alternative proposal to allow it to partner with a different QSO at the Argosy Casino.

Belle's and MRHD's Licenses "By Operation of Law". According to the IRGC, after June 7, 2012, "the IRGC did not revisit Belle and MRHD's 2012-2013 license applications again and no formal action was ever taken to invalidate or otherwise rescind the parties' conditional licenses prior to the licenses' scheduled expiration date." (IRGC June 20, 2014 Resistance to Application for Stay, Case No. CVCV047791, at 6.) In other words, the IRGC's view is that both Belle and MRHD remained licensed for the full term through March 31, 2013 as a result of the IRGC's failure to have non-renewed their licenses through formal agency action.

The IRGC's position ignores the actions it took at its meetings in July and August 2012. At the IRGC meeting on July 12, 2012, Belle and MRHD notified the IRGC that they had agreed to extend their operating agreement through March 31, 2015 (in fact, they had reached this

¹ Citations to the "Record" refer to the Agency Record submitted to the court in the contested case action regarding Belle's license, Polk County Case No. CVCV047791. Belle will separately submit to the Court an evidentiary appendix in support of its instant request for judicial review in advance of the hearing scheduled for September 26, 2014.

agreement shortly after the IRGC's June 7 meeting). (Record at 624-25, 499.) The IRGC, however, refused to approve that agreement on the grounds that its term was "somewhat arbitrary; the licensing process is in its early stages and it is too early to determine when the land based facility might open." (Record at 625.) Instead, the IRGC voted to "approve an extension of the operating agreement to March 31, 2013 pending an agreement of the parties by the August 23, 2012 Commission meeting" to extend their operating agreement only through March 31, 2013. (Record at 627.) On the same day, the IRGC adopted a timetable and procedures for interested parties to submit applications for the new land-based casino. The IRGC also clarified that its intent was "to insure that the [Argosy Casino] remains open until the new land-based facility is ready to be opened." (Record at 625.)

At the IRGC's meeting on August 23, 2012, Belle moved the IRGC to reconsider its refusal to approve an extension of the Belle/MRHD operating agreement through March 31, 2015. (Record at 512.) After MRHD "repudiated" (to use the IRGC's own word—*see* IRGC Dec. 19, 2013 App. for Appeal at 8) that extension of the operating agreement—even though it had signed it and sought the IRGC's approval of it just weeks before—Belle's motion for reconsideration "die[d] for lack of a motion." (Record at 517.) The IRGC therefore concluded that the condition it had imposed on renewing the Belle/MRHD licenses for the full term had not been met, such that it could not renew those licenses any further. (Record at 517.) The IRGC expressly stated, however, that Belle's and MRHD's request for renewal of their licenses triggered Iowa Code § 17A.18(2). The IRGC's Vice Chairman (who is an experienced attorney) and Executive Director explained the situation as follows:

VICE CHAIRMAN SEYFER: [W]e are now governed by Iowa Code Section 17A.18 which deals with licenses. And just to read a portion of that code section, "When a licensee has made an application for renewal of a license, the existing license does not expire until the application has been finally determined by the

agency, and in case he application is denied or the terms of the new license limited, until the last day for seeking judicial review of the agency order or a later date fixed by order of the agency or the reviewing court.”

What this means is right now the operator will be—the license will continue by operation of law. Not by approval by the Commission but by operation of law under Iowa Code Section 17A.18. That will continue until a hearing is set by the Commission to show cause why the license should not be continued.

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So long story short, the license continues by operation of law until the Commission takes action to deny that application to renew the license. Brian, is that your understanding?

MR. OHORILKO: *That's exactly right, Vice Chairman, yes. You phrased that perfectly.*

(Record at 517-19.)

The IRGC overlooks its actions and statements on August 23, 2012 (and a number of subsequent events that arose directly from them) because they are inconsistent with the IRGC's argument in a companion judicial review proceeding that Belle and MRHD were not licensed “by operation of law” as of December 2012, such that they were required to submit renewal applications at that time if they wanted to retain their licenses for the April 1, 2013-March 31, 2014 term. According to the IRGC (but disputed by Belle), Belle *did* submit a renewal application in December 2012, but it was deficient because MRHD did not sign it, leaving Belle without a QSO. Thus, the IRGC contends, Belle was licensed by operation of law as of April 1, 2013, and would be until a hearing was held and a final determination made on the status of its license, but MRHD was not licensed at all after that time, because it had “abandoned” its license.

Although the events that triggered the application of § 17A.18(2) to Belle's and MRHD's licenses are disputed (though not genuinely, Belle submits), *it is undisputed that as of April 1, 2013 and going forward, Belle was licensed to operate the Argosy Casino by operation of law under § 17A.18(2).* The IRGC has confirmed this many times. Indeed, the IRGC's official

website, which it updates regularly, stated through at least June 2014 that Belle and MRHD remained licensed to operate the Argosy Casino. (Record at 605-606.)

The IRGC's Award of Licenses for the Hard Rock Casino. While Belle was attempting to save its license for the Argosy Casino, the IRGC proceeded with its plans to replace the Argosy Casino with a new, land-based casino in Woodbury County. Between November 2012 and April 2013, the IRGC facilitated an open-bidding process for that new license. In an attempt to salvage its investment in Sioux City and the goodwill it had garnered over decades, Belle submitted applications in this process with a newly-formed QSO, Greater Siouxland Improvement Association. SCE and MRHD submitted another bid, as did a third operator, Warrior Entertainment.

On April 18, 2013, the IRGC selected SCE and MRHD to be the operator and QSO for a new land-based casino in Woodbury County called the Hard Rock Sioux City. As a condition of its licensure, the IRGC required the new Hard Rock Casino to be “substantially completed” no later than September 30, 2014. Over the next several months, the IRGC approved dozens of contracts for the development of the Hard Rock, and the official groundbreaking was held in August 2013.

As IRGC Commissioner Lamberti confirmed in August 2013, it was “never . . . the intention of the IRGC for there to be two facilities operating simultaneously” in Woodbury County. (Record at 675.) Consistent with its long-stated intention to close the Argosy Casino before the Hard Rock Casino opened, in November 2013, the IRGC scheduled a contested case hearing for March 5-6, 2014 on the status of Belle’s license to operate the Argosy Casino. (The IRGC has never provided any explanation for why it waited to hold such hearing until March 2014, even though it first announced Belle’s right to this hearing in August 2012.) That

contested case hearing was held as scheduled, following which the IRGC issued an order requiring the Argosy Casino to be closed by July 1, 2014. After subsequent judicial proceedings and a limited stay of the IRGC's closure order, the Argosy Casino was closed on July 30, 2014. The Hard Rock Casino opened its doors two days later.

ARGUMENT

Iowa Code § 17A.19(10) mandates that a court “shall” grant relief if it “determines that substantial rights of the person seeking judicial relief have been prejudiced” because the agency action was “in violation of constitutional or statutory authority, in violation of agency rules, made by unlawful procedure, or unreasonable, arbitrary, or capricious.” *Iowans For WOI-TV, Inc. v. Bd. of Regents*, 508 N.W. 2d 679, 684-85 (Iowa 1993); Iowa Code § 17A.19(10). As discussed below, the IRGC has violated the law and Belle's constitutional rights, and its challenged actions should be declared unlawful and reversed.

I. THE IRGC'S AWARD OF THE HARD ROCK CASINO LICENSES WAS ILLEGAL.

The IRGC's award of licenses to SCE and MRHD for a land-based casino at a time when Belle still had a license to operate a riverboat casino in the same county was in clear violation of Iowa Code § 99F.7(2)(c), which provides:

A person awarded a new license to conduct gambling games on an excursion gambling boat or gambling structure in the same county as another licensed excursion gambling boat or gambling structure shall only be licensed to operate an excursion gambling boat or gambling structure that is located at a similarly situated site and operated as a substantially similar facility as any other excursion gambling boat or gambling structure in the county.

Iowa Code § 99F.7(2)(c). The statute exists for a common-sense reason: It encourages casino operators to make substantial investments in their facilities knowing they will be protected from competition from a different mode of casino gaming. In reliance on this protection, Belle in fact made substantial investments in the Argosy Casino and the community for many years.

In his December 10, 2013 order granting the Belle's application for a stay of the IRGC's license award to MRHD and SCE, Judge Hanson concluded that the Belle had "made a substantial showing that [the IRGC's] actions to date relating to the granting and/or denial of its gaming license were illegal and/or that they were arbitrary and/or capricious and/or violative of [the Belle's] statutory rights pursuant to Iowa Code Section 99F.7(2)(c) and/or its constitutional rights to due process." (Dec. 10 Order at 4.) In this Court's February 14, 2014 Order on Belle's request for an interim stay, however, the Court concluded to the contrary that Belle was unlikely to succeed on its challenge under § 99F.7(2)(c) because "1) MRHD and Belle's riverboat gambling license had expired, so there was not another licensed riverboat in the county within the meaning of Section 99F.7(2)(c), and 2) in the alternative, if MRHD's license remained in effect, IRGC could approve a conversion of MRHD's license to conduct riverboat gambling to a license to conduct gambling at the land-based casino under Section 99F.4D." (Feb. 14 Order at 18-19.) With due respect, both of this Court's preliminary conclusions are legally and factually incorrect.

A. The Argosy Casino Was Licensed On And After April 18, 2013.

The overwhelming evidence and clear law establishes that the Argosy Casino was a "licensed excursion gambling boat" in accordance with § 99F.7(2)(c) as of April 18, 2013. The IRGC's award of licenses to SCE and MRHD for the Hard Rock Casino on that date was thus in plain violation of that statute.

1. The Undisputed Evidence Establishes That Belle And MRHD Were Licensed On And After April 18, 2013.

In its February 14 Order, the only evidence the Court cited to show that the IRGC reasonably "viewed the [Argosy] license as expired" was the IRGC's August 27, 2013 letter to Belle, in which the IRGC offered Belle a contested case hearing. (*See* IRGC Appx. at 109-110.)

In fact, the IRGC said precisely the opposite. It acknowledged (as it had before) that Belle's license was governed by Iowa Code § 17A.18(2), and it further recognized that "*MRHD is the QSO licensed to conduct gambling games at the Argosy Casino in Sioux City.*" The only reasonable conclusion that can be drawn from the IRGC's August 27, 2013 letter is that both Belle and MRHD remained licensed at the Argosy Casino as of August 2013—just as they had been as of April 2013, when the licenses were awarded for the Hard Rock Casino. The IRGC's letter is just one part of an overwhelming array of evidence showing that all parties recognized that Belle and MRHD were licensed on and after April 18, 2013. To wit:

- On August 23, 2012, the IRGC's presiding Commissioner stated at a public IRGC meeting that the Argosy Casino license "will continue by operation of law . . . until a hearing is set by the Commission to show cause why the license should not be continued." This hearing did not occur until March 2014—long after the Hard Rock licenses were awarded in April 2013.
- In December 2012, the IRGC's Executive Director, Mr. Ohorilko, and its attorney, Mr. Peterzalek, told Belle that Belle and MRHD did not need to submit license renewal applications in December 2012 because "Argosy has a license by operation of law." (Record at 524-527.)
- On April 22, 2013, only three weeks after MRHD's license purportedly expired, MRHD demanded that Belle continue to make monthly revenue payments to MRHD under its "ongoing license arrangement" with Belle. (Record at 500.) MRHD further asserted that the IRGC had "reaffirm[ed]" its "decision concerning the extension of the Belle of Sioux City / MRHD license by operation of law," that MRHD was required to accept statutory payments from the Belle "in order to maintain our license," and that Belle's "continued operation under our license" was dependent upon Belle making these payments.
- On May 10, 2013, MRHD's President, Mark Monson, made similar demands of Belle in light of "the IRGC's decision concerning the extension of the Belle of Sioux City/MRHD license by operation of law." (Record at 501.)
- In a brief filed on June 21, 2013 in a separate lawsuit in this Court between Belle and MRHD, MRHD argued to this Court that "[t]o date, the [IRGC] has not taken any action to discontinue Belle's use of MRHD's license under operation of law since the August 23, 2012 meeting," such that "Belle has continued to utilize MRHD's license to conduct gambling games on its excursion boat." (Record at 504.)

- At the IRGC's August 15, 2013 meeting, Mr. Ohorilko described MRHD as "the qualified sponsoring organization *licensed to conduct gambling games*" at the Argosy Casino. (Record at 565.)
- At his deposition in February 2014, Mr. Ohorilko testified that Belle's license to operate the Argosy Casino had not expired as of that time. (Ohorilko Feb. 25, 2014 Dep. at 114-115.)
- At all relevant times through at least June 2014, the IRGC's website has identified Belle as the "LICENSED BOAT OPERATOR" and MRHD as the "LICENSED NONPROFIT ORGANIZATION" for the Argosy Casino. (Record at 605.)
- Perhaps most obviously, the IRGC permitted gambling to occur at the Argosy through July 2014, and it never earlier ordered that facility to shut down. Of course, gambling in Iowa is only "legal[] when conducted ... by a licensee." Iowa Code § 99F.3. The Argosy's continued operation necessarily means that the IRGC believed the Argosy was licensed.
- Instead of shutting the Argosy down, the IRGC continued to regulate Belle and the Argosy Casino as though they were licensed. Among other things, the IRGC has required Belle to obtain approval of contracts relating to its operation of the Argosy Casino, disciplined Belle for minor infractions of the regulations that apply to licensees, continued to maintain an on-site gaming regulator at the Argosy Casino facility, and required Belle's employees to obtain individual licenses to be employed by Belle. (Ohorilko Feb. 25 Dep. at 189-192; Ohorilko June 4, 2014 Dep. at 57-65.)

In contrast to all this evidence showing that Belle and MRHD remained licensed at the Argosy Casino as of April 2013 and beyond, the record is devoid of a single contemporaneous statement or even suggestion by any relevant party—the IRGC, MRHD, SCE or Belle—that either or both of MRHD's or Belle's licenses for the Argosy Casino had "expired" by April 2013. That conclusion is simply a fiction manufactured by the IRGC to support more recent arguments it has made. It should not, and cannot reasonably, be credited.

Moreover, even if MRHD's license for the Argosy Casino "expired" on March 31, 2013 (and there is no evidence it did), it remains undisputed that Belle's license did not. If Belle alone remained licensed at the Argosy Casino as of April 18, 2013, this would be sufficient to prevent the IRGC from issuing a "new license" to a land-based casino under § 99F.7(2)(c). That statute protects an existing "licensed excursion gambling boat" from facing competition from a newly-

licensed facility that is not “located at a similarly situated site and operated as a substantially similar facility.” Iowa Code § 99F.7(2)(c). The Argosy Casino was indisputably a “licensed excursion gambling boat” as of April 18, 2013—with full and continuous gaming operations that were being regulated to the full extent of the law by the IRGC—and it was therefore entitled to the protections of § 99F.7(2)(c).²

2. Clear Law Compels The Conclusion That Belle And MRHD Were Licensed On And After April 18, 2013.

In addition to being belied by the evidence, it is contrary to law to conclude that Belle and MRHD were not licensed to the full extent of the law as of April 18, 2013. When § 17A.18(2) applies to a license, the existing license “*does not expire*” until the status of the license is finally determined by the IRGC or some later date fixed by the IRGC or a court. Thus, under § 17A.18(2), Belle (and likely MRHD too) did not lose its license until July of 2014, when the Argosy Casino was ordered to be closed.³

Nor is there any support for the argument that Belle and MRHD had something “less” than full, valid licenses during the period when their licenses were governed by § 17A.18(2).

² It also would be unreasonable to conclude that the legislature intended to protect only the non-profit QSOs of existing gambling boats from facing competition from land-based casinos, and not the boat operators as well. It is the operators like Belle who invest all the money and resources in the development and operation of the casinos, employ the staff, manage and operate the facilities and assume all the economic and other risks of operation. As such, it is the operators who stand to suffer from competition from land-based casinos. In contrast, QSOs simply pass on a portion of the operator’s revenues to charitable causes, and in that respect do not stand to suffer any measurable harm from new competition. Any argument that § 99F.7(2)(c) only protects non-profits from “competition” from other non-profits is not a tenable construction of the statute.

³ While this Court has credited the IRGC’s claim that it “mistakenly” applied section 17A.18(2) to Belle’s and MRHD’s licenses based on their December 2011 application, that finding has no bearing on whether Belle was licensed by operation of law based upon its *December 2012* application. The IRGC has never argued, and this Court has never found, that it was a mistake for the IRGC to apply § 17A.18(2) to Belle’s license based on its December 2012 application.

The plain language of § 17A.18(2) says only that an existing license “does not expire.” It does not say anything about the license losing any of the rights or benefits it previously carried with it. Recognizing this, the Bankruptcy Court that presided over Belle’s bankruptcy petition in June concluded—after holding a two-day evidentiary hearing and considering extensive legal and evidentiary submissions by Belle, the IRGC, SCE and MRHD— that “it is incorrect as a matter of law that [Belle’s] ability to continue operation after non-renewal of its license is anything other than pursuant to a License.” (U.S. Bankr. Ct. E.D.P.A., Case No. 14-13904REF, Dkt. 197 at 3.) This Court has relied affirmatively on the Bankruptcy Court’s conclusions on other issues, and it should do so here as well.

Nothing about the licensing scheme created by Chapter 99F or the regulations the IRGC promulgated pursuant to it suggests that there are different classes or types of licenses or that, while operating under § 17A.18(2), a licensee has some sort of “junior varsity” license that contains less than the full panoply of protections and obligations. As noted, *supra* at 10, the IRGC until last month regulated the Argosy just like any other licensee. It would be highly unfair to permit the IRGC to subject Belle to the obligations and responsibilities of a “licensee,” while not permitting it to benefit from the protections that are afforded to licensees, including the protections of § 99F.7(2)(c).

Further, the conclusion that either Belle or MRHD was not fully licensed pursuant to § 17A.18(2) creates unnecessary conflicts between § 17A.18(2) and the Iowa laws providing that gaming is lawful only when operated (or conducted) by licensed entities. *See* Iowa Code § 99F.3 (quoted *supra* at 10); Iowa Code § 99F.15(1)(a) (prohibiting the operation of “a gambling excursion where wagering is used or to be used without a license issued by the commission”);

see also, e.g., IBP, Inc. v. Harker, 633 N.W.2d 322, 325 (Iowa 2001) (agencies must interpret Iowa statutes reasonably, to best effectuate the statutory purpose, and to avoid absurd results).

The factual lesson of the IRGC's two-year implicit acceptance of Belle's licensure, *supra* at 10, coincides with legal truism that if Belle's or MRHD's licenses expired on or before April 1, 2013, then all gaming that occurred at the Argosy Casino since then has been illegal because it has not been operated or conducted by licensed entities. *See* Iowa Code § 99F.3. This absurd result can be avoided by concluding, consistent with the law and the evidence, that Belle and MRHD were fully licensed until the Argosy Casino closed in July 2014.

Likewise, the conclusion that Belle or MRHD were not fully licensed while their licenses were governed by § 17A.18(2) would effectively eviscerate the critical procedural protection the statute affords to an aggrieved licensee—the right to a hearing by the agency *before* the license expires. Indeed, if Belle lost its license, or its rights in it, sometime before the hearing mandated by § 17A.18(2) was held, then that hearing would have meant nothing. In contrast, Belle's position that both it and MRHD remained licensed to the full extent of the law under § 17A.18(2) until the Argosy Casino closed gives meaning to that statute and creates no inconsistencies with other Iowa laws.

B. MRHD Did Not, And Could Not Have, “Converted” Its License From The Argosy Casino To The Hard Rock Casino.

The Court's earlier, alternative conclusion that there is no violation of § 99F.7(2)(c) because MRHD did not require a “new license” for the Hard Rock Casino is likewise incorrect. In support of this conclusion, the Court relied on Iowa Code § 99F.4D, which provides that a licensee authorized to conduct gambling games on a riverboat may convert the gambling license to a land-based structure, with approval of the IRGC.

As an initial matter, and as the Court recognized, it is undisputed that MRHD *did not* avail itself of the license-conversion statute, but instead participated in an open bidding process for a *new license* in Woodbury County, and was ultimately awarded that *new license*. The IRGC has repeatedly and consistently acknowledged that MRHD's license was, in fact, a "new license." Indeed, MRHD (with SCE) was required to pay a \$20 million fee for the receipt of a "new license." Section 99F.7(2)(c) prohibits the award of a "new license," yet that is precisely what occurred.

The Court, however, appears to have concluded that even though MRHD did not actually convert its license, it is sufficient that the IRGC *could have* authorized it to do so. This conclusion too is not supported by fact or law. To be sure, if MRHD "could have," consistent with the law, abandoned Belle for a new operator without having to pay \$20 million and compete in an open-bidding process with a (purportedly) uncertain outcome, it would have done this. But MRHD did not do this, and instead all relevant parties expressly understood and acted as though there was no license "conversion" option.

Moreover, the conclusion that the IRGC "could have" authorized MRHD to convert its license assumes that MRHD had a license as of April 18, 2013 that it could convert. But if MRHD had a license for the Argosy Casino as of April 18, 2013, then Belle did too—there is no plausible interpretation of the facts or law that would result in MRHD, but not Belle, being licensed for the Argosy Casino as that date. And no plausible reading of Chapter 99F would permit a non-profit QSO to "convert" its own license to conduct gaming (*e.g.*, to serve as a non-profit pass-through to charities of a portion of revenues generated by the operator) from a riverboat facility to a land-based casino while leaving its *licensed* boat operator behind, with no ability to continue to operate its facility in the absence of its QSO. Indeed, this would be

tantamount to allowing a QSO to effectively revoke or nullify an operator's gaming license without the IRGC's involvement.

As a practical matter, any interpretation of § 99F.4D that would permit non-profit QSOs to hang their operators out to dry—leaving the operators with losses in excess of \$100 million and putting hundreds of employees out of work—is unreasonable, and would create a perilous precedent in Iowa gaming law. Not surprisingly, there is no precedent in Iowa gaming for a QSO to convert its license for a boat separately from the jilted boat operator. To the contrary, it has been the licensed boat operators themselves that have requested and been approved to “convert” their licenses to land-based facilities. (*See* Ohorilko Feb. 25, 2014 Dep. at 226-227.)

Accordingly, MRHD did not, and could not have, converted its license from the Argosy Casino to the Hard Rock Casino under § 99F.4D. Rather, the IRGC indisputably awarded the only thing it could award: a “new license” to MRHD and SCE in violation of Belle's rights under § 99F.7(2)(c).

II. THE IRGC HAS VIOLATED BELLE'S CONSTITUTIONAL RIGHTS.

Belle, like other license holders, is entitled to due process of law. Unlike other license holders, including holders of a basic driver's license, Belle has not received due process. It did not receive it at the time its license was effectively non-renewed in June 2012 and it has not received it since then. Instead, what Belle received is precisely what was preordained on June 7, 2012 when the IRGC first announced that it would allow the Argosy Casino to stay open only until a new casino opened: an order from the IRGC forcing Belle to close the Argosy Casino to make room for its “replacement.” While a lot of water flowed under the bridge between June 2012 and the closure of the Argosy Casino, none of it amounts to due process because Belle's fate was sealed the entire time.

It has never been contested in this litigation by any party (certainly not by license holders SCE and MRHD) that license holders like Belle are entitled to constitutional due process before their licenses may be non-renewed or revoked. This requirement is long established: Iowa law provides that “[w]here the state confers a license upon an individual to practice a profession, trade, or occupation, such license becomes a valuable personal right which cannot be denied or abridged in any manner except after due notice and a fair and impartial hearing before an unbiased tribunal.” *Gilchrist v. Bierring*, 234 Iowa 899, 912, 14 N.W.2d 724 (Iowa 1944) (quotation omitted) (concluding that license to operate cosmetology school could not be revoked without notice and a hearing). Moreover, where, as here, a licensee has a reasonable expectation of renewal as a result of its investments made in reliance on the continuity of its licenses, and further because license renewals are granted as a matter of course, the due process rights that apply to license revocations apply comparably to license renewals. *See id.*, 234 Iowa at 914-15 (“The state cannot, by issuing only annual licenses, ingeniously thwart these precious rights.”); *Greater Duluth COACT v. City of Duluth*, 701 F. Supp. 1452, 1456 (D. Minn. 1988) (concluding that a gaming organization had a “reasonable expectation of the continuing receipt of the benefit conferred by [its] license,” thus entitling the licensee to due process rights in the renewal of its license, “as a result of [the licensee’s] investment and because the licenses are generally renewed ‘as a matter of course’” (quotation omitted)); *see also Bell v. Burson*, 402 U.S. 535, 539 (1971) (“Once licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood . . . In such cases the licenses are not to be taken away without that procedural due process required” by the Constitution).

The IRGC acknowledged this due process requirement repeatedly through its offerings to Belle of a contested case hearing before a final determination was made about Belle’s license. In

its August 27, 2013 letter to Belle, for example, in which the IRGC provided Belle with official notice of the IRGC's determination not to renew Belle's license, the IRGC stated that Belle "has the right to request an evidentiary hearing before the Commission at which Belle may contest the denial of its application for renewal of its operator's license for the Argosy Casino." And although the timing of *when* Iowa Code § 17A.18(2) applied to Belle's license is disputed, there is no dispute that this statute did apply to allow Belle to challenge the IRGC's non-renewal decision through a contested case hearing. Indeed, the IRGC's agency designee at deposition admitted that one purpose of the contested case hearing was "to provide the Belle with due process before a final decision is made as to whether to nonrenew its license." (Ohorilko Feb. 25, 2014 Dep. at 61:6-23.) Accordingly, the existence of Belle's due process rights in the license it had held in Woodbury County for more than 20 years is beyond reproach.⁴

At a minimum, due process requires that a license holder be given notice and a fair hearing *before* losing its license. Process given *after the fact* is not due process. It is a sham:

A 'fundamental requirement of due process' is that it be provided '*at a meaningful time and in a meaningful manner.*'

Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (emphasis added). Because the IRGC determined to close down the Argosy Casino before a contested case hearing was held (or even offered to the Belle), the "fundamental requirement" of due process—"meaningful time and meaningful manner"—was not satisfied.

Specifically, the IRGC took several actions that effectuated the complete and final non-renewal of Belle's license *before* Belle received a hearing ostensibly to defend its license and

⁴ SCE itself argued that it has due process rights in its license, even when it had held that license for mere months and its license had never been renewed or used to operate a gaming facility. (See SCE Pet. dated Dec. 19, 2013 at 4) (arguing infringement on its license to develop and operate Hard Rock facility not only violates due process, but is in effect "an unconstitutional taking of property").

challenge the IRGC's non-renewal decision. First, on June 7, 2012, immediately following its decision that the Argosy Casino licenses could not be renewed at that time because Belle and MRHD purportedly lacked an operating agreement, the IRGC voted "to open up the Woodbury County license for new applications to build and operate a land-based facility in Woodbury County." (Record at 496.) The IRGC also stated that it "would be committed to doing whatever is necessary to keep the [Argosy Casino] open *until such time as the new facility opens* so that the employees are not impacted." (*Id.*) That is because, as Commissioner Lamberti has stated, the IRGC has "never" intended "for there to be two facilities operating simultaneously." (Record at 675.)

At its next meeting in July 2012, the IRGC clarified that, at its prior June meeting, it had "indicated [its] desire to *insure that the current facility remains open until the new land-based facility is ready to be opened.*" (Record at 625.) The IRGC further adopted a timetable and procedures for interested parties to submit applications for the new land-based casino. Between November 2012 and April 2013, the IRGC facilitated the bidding process for the casino that would replace the Argosy Casino. On April 18, 2013, the IRGC selected SCE and MRHD to develop and operate the Hard Rock Casino. At subsequent meetings, the IRGC approved dozens of contracts relating to the development of the Hard Rock Casino, and accepted millions of dollars in required payments relating to that facility. The IRGC imposed a deadline on SCE's development and opening of the Hard Rock Casino. Simply put, after June 2012, there was no turning back—the IRGC had determined the Argosy Casino would close no matter what happened after then.

While the IRGC went through the motions of providing mandatory "process" to Belle, the only reasonable conclusion to be drawn from the undisputed facts is that this process was a

complete and utter sham. Mr. Ohorilko, the IRGC's Executive Director, admitted that even if Belle were to prevail in its license renewal hearing, there was effectively no way it could retain the license that it was ostensibly being permitted to defend. Rather, if it prevailed, it would have been required to apply for and be granted a "new license," and pay a \$20 million fee for such license. (Ohorilko Feb. 25, 2014 Dep. at 80:12-24, 83:2-25.) Not only does this statement confirm that Belle was given no meaningful and fair opportunity to contest the non-renewal of its license, it also shows that Belle's license non-renewal was a *fait accompli* well before any hearing was held. At that point, the IRGC already had *effectively* revoked the Belle's license to operate Argosy Casino by ensuring that the Argosy Casino *would be closed* and the Hard Rock Casino *would replace it*. The IRGC just needed to plug in the date once the Hard Rock was set to open.

Plainly, what the IRGC should have done to give meaning to Belle's due process rights is hold a hearing on its initial decision, made in June 2012, that Belle was not entitled to renewal of its license because it purportedly lacked a mandatory operating agreement with a QSO. The IRGC could have accomplished this hearing in a matter of weeks and then allowed Belle to appeal any adverse ruling to the courts before the IRGC started down the road of finding Belle's replacement. Instead, the IRGC did everything backwards. Immediately upon concluding that Belle was not entitled to renewal in June 2012 (weeks before Belle's operating agreement with MRHD had even expired) the IRGC announced that it would replace Belle's casino with a new casino. Only later, in August 2012, did the IRGC announce that it would schedule a hearing before a final determination was made on the status of Belle's license. When the IRGC actually gave Belle notice of its right to a hearing in August 2013, the new licenses had been issued to SCE and MRHD. And by the time the IRGC actually purported to provide Belle with a hearing,

the Hard Rock Casino was largely constructed and just months away from opening. Belle never received anything close to a fair hearing at a time when it mattered.

With the Argosy Casino closed and the Hard Rock Casino open, it is unclear how Belle can now get a meaningful due process do-over. But Belle's constitutional rights remain just as strong as they always have been. This Court should attempt to rectify the gross deprivations of Belle's due process rights by declaring that those rights have been violated, ordering the reversal of the licenses granted to the Hard Rock Casino and the restoration of Belle's license for the Argosy Casino, and remanding this proceeding to the IRGC for further proceedings that attempt to give full meaning to Belle's due process rights.

III. THE IRGC'S REFUSALS TO APPROVE BELLE'S OPERATING AGREEMENT OR BELLE'S ALTERNATIVE PROPOSALS TO ADDRESS THE IRGC'S CONCERNS WERE UNREASONABLE, ARBITRARY AND CAPRICIOUS.

Belle also seeks judicial review, and reversal, of the IRGC's refusals of Belle's requests for approval of an extended operating agreement with MRHD and its rejections of Belle's alternative proposals for addressing the IRGC's concerns about the expiration of that operating agreement. The IRGC's actions were contrary to law, unreasonable, arbitrary and capricious, and should be reversed. *See* Iowa Code §§ 17A.19(10)(a)-(n) (requiring reversal of agency decisions that are unconstitutional, arbitrary and capricious, or inconsistent with the law).

A. No Law Required Belle To Have An "Operating Agreement" With MRHD.

Initially, the stated basis for the IRGC's revocation of Belle's license was that Belle was "statutorily ineligible" to operate a casino in Iowa because it lacks an "operating agreement" with a QSO.⁵ This purported statutory requirement—which spawned all the subsequent events

⁵ As Belle has argued elsewhere, the IRGC drastically changed its position over time, and ultimately concluded that Belle was not entitled to renewal not because of its purported lack of an operating agreement, but rather because, operating agreement aside, MRHD simply

leading to today—is a complete fiction. There is no “statute” that requires an operator to have an “operating agreement” with a QSO, nor any law that renders an operator “statutorily ineligible” to operate in the absence of an “operating agreement” with a QSO.

The only references in the Iowa Code to an “operating agreement” are in §§ 99F.5(1) and 99F.6(4)(a)(2). Section 99F.5(1) requires that an operating agreement between a QSO and an operator provides for a minimum distribution to charity “that averages at least three percent of the adjusted gross receipts for each license year.” Similarly, § 99F.6(4)(a)(2) provides that a “licensee to conduct gambling games . . . shall, unless an operating agreement for an excursion gambling boat otherwise provides, distribute at least three percent of the adjusted gross receipts for each license year for” certain specified charitable purposes. Neither of these provisions—nor any other provision—requires that an operator and a QSO have an “operating agreement.” Rather, these provisions simply require that *if* there is an operating agreement, that agreement must comply with the statute’s charitable distribution requirement. The IRGC’s position that Chapter 99F requires an approved operating agreement between a QSO and an operator—without which an operator “statutorily ineligible” to operate a gaming facility—is baseless.

The IRGC’s inaction overwhelms its words. According to the IRGC, Belle’s operating agreement with MRHD expired in July 2012, yet Belle and MRHD remained fully licensed at least through March 31, 2013, and the Argosy Casino remained fully operational through July 2014. That Belle and MRHD remained licensed without a valid operating agreement shows that there is no “statutory requirement” to have an operating agreement in order to operate gaming operations in Iowa.

chose to “abandon” its license. Contrary to the IRGC’s attempt to re-write history, the undisputed facts show that the IRGC’s original (and actual) basis for determining that Belle was ineligible for renewal was its purported lack of an operating agreement with MRHD.

Nor is an “operating agreement” required to ensure that the minimum required percentage of a gaming facility’s revenues are distributed to charity. Indeed, for more than a year, MRHD itself stridently argued in its pending litigation against Belle that Belle is mandated *by law—not by contract*—to pay to it the minimum percentage of Belle’s revenues that are required to be paid to a QSO. (See MRHD Resistance to the Belle’s Petition for Appointment of Receiver, Polk County Dist. Ct. Case No. CL126161, June 21, 2013, at 5 (arguing that “[i]n the absence of an operating agreement, Iowa law mandates the payment of 3% AGR to the qualifying sponsoring organization” (emphasis added))).)

Other provisions of Chapter 99F confirm that the existence of an “operating agreement” between an operator and a QSO is not a statutory requirement. For example, the power to require an operator to have an “operating agreement” with a QSO is not among the IRGC’s many enumerated powers in § 99F.4. Likewise, the existence of an operating agreement is not one of the enumerated “requirements” for “licensing” in § 99F.4D. Nor is an “operating agreement” a “requirement of applicant” set forth in § 99F.6. Similarly, the lack of an “operating agreement” is not one of the enumerated grounds for “revocation” of a license set forth in § 99F.7. Surely if, as the IRGC contends, the existence of an approved operating agreement between an operator and a QSO were a statutory requirement, a statute somewhere would say so. Belle has been penalized—to the tune of losing the entirety of its 20-year old business investment of more than \$100 million in the Argosy Casino and the jobs of hundreds of its employees—because it violated a “statutory requirement” that does not actually exist. To the extent the IRGC’s decision to non-renew Belle’s license was premised on Belle’s alleged failure to comply with this non-existent statutory requirement, the IRGC’s decision violates a number of provisions of Iowa law and should be reversed.

B. The IRGC's Refusals To Permit Belle To Have An Approved Operating Agreement With A QSO Were Unreasonable, Arbitrary And Capricious.

Even if an operating agreement were a "statutory requirement," the only reason why Belle (according to the IRGC) lacked a valid one was because the IRGC refused to permit Belle to have an approved operating agreement with either MRHD or a different QSO. From June 1992 through July 6, 2012, Belle and MRHD were parties to an operating agreement that governed their respective rights and obligations with respect to the operation of the Argosy Casino. On June 7, 2012, prior to the expiration of that operating agreement, the Belle signed an agreement, *which MRHD had prepared and executed*, to extend the existing operating agreement through March 2015. On July 12, 2012, Belle and MRHD jointly presented the extension agreement to the IRGC and requested its approval. The IRGC declined to approve it, however, purportedly on the grounds that its term was too long. Instead, as noted, the IRGC instituted an open-bidding process for a license to develop a land-based casino in Woodbury County.

On August 23, 2012, Belle presented this extension agreement to the IRGC again. By then, MRHD, had turned its focus to developing a new land-based casino with an operator other than Belle pursuant to the IRGC's open-bidding process. To ensure its ability to participate in that process with another gaming company, MRHD disingenuously disavowed the extension agreement that it had signed just weeks before. Based on MRHD's "repudiation" of the extension agreement, the IRGC declined to approve it.⁶

In addition to its operating agreement with MRHD, which Belle contends is valid and binding through March 2015, Belle also signed an operating agreement with non-profit Greater

⁶ While the IRGC apparently agrees with MRHD that as a result of MRHD's disavowal of the extension agreement, that agreement is no longer valid and binding, that question is the subject of Belle's pending litigation against MRHD. Thus, to the extent the IRGC declined to approve the extension agreement on the grounds that it is no longer valid, the IRGC's decision is, at a minimum, premature, and has usurped the judicial function from the courts.

Siouxland Improvement Association (“GSIA”). Belle first proposed to the IRGC that it be permitted to replace MRHD with a different QSO at its June 7, 2012 meeting. The IRGC did not even consider that request—even though Mr. Lamberti had requested at the IRGC’s April 19, 2012 meeting that Belle propose a “Plan B” of this very sort. Later, in connection with Belle’s application to be licensed to develop a land-based casino in Woodbury County, Belle submitted its operating agreement with GSIA for the IRGC’s consideration, and the IRGC accepted that contract for purposes of Belle’s application with GSIA. Nevertheless, the IRGC repeatedly refused Belle’s requests to have that operating agreement approved, and have GSIA licensed, for the Argosy Casino.

Accordingly, contrary to the IRGC’s (initial) stated basis for its decision to non-renew Belle’s license, Belle has had more than one valid operating agreement with a QSO in Iowa who could pass on Belle’s revenues to charity in accordance with Iowa law. The IRGC’s conclusion that Belle was “ineligible” to hold a license to operate the Argosy Casino because it lacked an operating agreement with a QSO was thus not only contrary to law, it was contrary to fact. Rather, the most Belle lacked was an operating agreement that was *approved by the IRGC*.

Under Iowa law, the IRGC cannot manufacture a legal requirement and then unilaterally prevent Belle from complying with it simply to divest Belle of its license. Yet that is precisely what the IRGC did to accommodate the Hard Rock Casino. Indeed, evidence Belle obtained during the course of this proceeding shows that the IRGC never intended to approve an operating agreement of any reasonable duration between Belle and MRHD. For example, in May 2012, when Chairman Lamberti was having *ex parte* discussions with MRHD about its desire to have the Woodbury County license opened for bidding, Mr. Lamberti told others at the IRGC that he “would not be inclined to support a very long extension” of the operating agreement between

Belle and MRHD, because the IRGC had “other constituencies to think about.” (Record at 1160.) Mr. Lamberti also stated his view that “even 5 years would be too long” for an extension between MRHD and Belle. Mr. Lamberti never made these sentiments public or shared them with Belle.

The IRGC’s repeated refusals to approve the extended operating agreement between Belle and MRHD or Belle’s operating agreement with GSIA were arbitrary, capricious and unreasonable. The IRGC never expressed any concerns with the substance of those operating agreements. Nor is it reasonable to conclude that the length of the Belle/MRHD operating agreement—three years—was “too long,” given that the IRGC regularly approves agreements that are decades longer. The IRGC simply determined not to approve any operating agreement between Belle and a QSO, no matter the length, if doing so might undermine its pretextual basis for taking away Belle’s license. To Belle’s knowledge, the IRGC’s disapprovals of Belle’s operating agreements represent the first and only times the IRGC has ever declined to approve an operating agreement between an operator and a QSO *for any reason*. The IRGC may not, however, unilaterally prevent Belle from having an approved operating agreement and then use Belle’s purported lack of an approved operating agreement as the basis for non-renewing Belle’s license to operate the Argosy Casino. Because this is precisely what the IRGC did, its actions violated a number of provisions of Iowa law and must be reversed. *See, e.g.*, Iowa Code §§ 17A.19(10)(a)-(n).

IV. THE IRGC’S AWARD OF LICENSES TO SCE AND MRHD VIOLATED IOWA LAW.

In the course of the application process that led to the IRGC’s award of licenses to SCE and MRHD, the IRGC violated its own selection procedures by improperly allowing SCE to completely restructure its financing proposal and other material aspects of its application. The

IRGC issued its selection procedures and a timeframe for interested parties to build and operate a land-based casino in Woodbury County on approximately July 12, 2012. The IRGC set forth a specific timeline for applications to be submitted. The original deadline for submission of completed applications, November 1, 2012, was later extended to November 5, 2012. Importantly, the IRGC's procedures stated that "[o]nce applications are due, the applications cannot be amended." (emphasis added). This prohibition was unambiguous and provided for no exceptions; the rules of engagement were akin to a sealed bidding process. The IRGC instituted this deadline to create a fair and reasonable playing field for all applicants, and to ensure that all criteria relevant to selection—among which was the economic viability of a proposal—were uniformly addressed.

Following the submission of applications, on November 15, 2012, SCE, Belle, and Warrior Entertainment made multiple presentations concerning the financing structure of their respective proposals. SCE's presentation generated substantial local criticism because of a lack of equity as well as the high cost and tenuous structure of its financing. Indeed, under Iowa law, the IRGC cannot grant a license to an applicant who "has not demonstrated financial responsibility sufficient to meet adequately the requirements of the enterprise proposed." Iowa Code § 99F.7(8)(b). In sharp contrast, because of its balance sheet and access to capital, no financing contingencies or municipal subsidies were needed for Belle's proposals.

On January 11, 2013—a full *67 days* after the application deadline—SCE submitted to the IRGC proposed revisions to its application. The revisions were dramatic. They extensively transformed the financing package. They created a new legal entity to serve as the formal applicant for the gaming license, added a new lender/equity holder, and changed

management. Later on in the process, SCE even amended its hotel construction and design plans.

Both Belle and Warrior Entertainment submitted separate letters to the IRGC objecting to SCE's improper attempt to amend its application. The IRGC, however, chose to consider the new financing, new applicants and new distribution of funds as part of SCE's submission, even after certain IRGC members had previously expressed skepticism about SCE's financing at a public meeting. No finding was made that could justify a waiver of the IRGC's established application procedure.

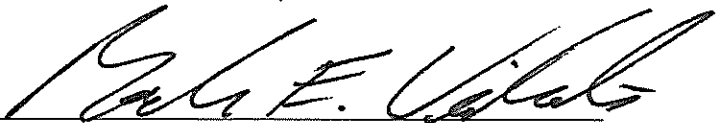
SCE's improper amendments attempted to patch glaring weaknesses in its application, in particular its poor financing structure. While SCE's application remained deficient even with the amendments it proposed, it clearly was deficient in several respects absent consideration of the amendments, as SCE itself obviously recognized. The IRGC's decision to consider SCE's application as revised in these material respects was arbitrary and capricious, inherently unfair, and violated numerous provisions of Iowa Code § 17A.19, including, but not limited to, the prohibition on an action that was taken "without following the prescribed procedure or decision-making process." Iowa Code § 17A.19(d).⁷

CONCLUSION

For the foregoing reasons, Belle's petition for judicial review should be granted.

⁷ As a further demonstration that the IRGC's consideration of SCE's amendments was arbitrary and unfair, when Warrior Entertainment proposed an amendment to its proposal that was nowhere near as significant as SCE's proposed amendments, the IRGC notified it that the amendment would not be approved. As a result, Warrior subsequently withdrew its request.

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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon the parties to this action by serving a copy upon each of the attorneys listed below on Aug 29, 2014 by

- | | |
|---|--|
| ☐ U.S. Mail | ☐ FAX |
| ☐ Hand Delivered | ☐ Electronic Mail |
| ☐ FedEx/ Overnight Carrier | ☒ EDMS |

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