IN THE MISSISSIPPI SUPREME COURT

FLORIDA EASH	APPELLANT
VERSUS	DOCKET NO. 2007-SA-02063
IMPERIAL PALACE OF MISSISSIPPI, LLC	APPELLEE

BRIEF OF APPELLEE IMPERIAL PALACE OF MISSISSIPPI, LLC

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ORAL ARGUMENT REQUESTED

IN THE MISSISSIPPI SUPREME COURT

FLORIDA EASH **APPELLANT**

VERSUS **DOCKET NO. 2007-SA-02063**

IMPERIAL PALACE OF MISSISSIPPI, LLC **APPELLEE**

AMENDED CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Mississippi Supreme Court and/or the judges of the Mississippi Court of Appeals may evaluate possible disqualification or recusal.

1. Imperial Palace of Mississippi, LLC
   Appellee

2. Scott E. Andress
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5. Florida Eash
   Appellant

6. Jonathan B. Fairbank
   Counsel for Appellant Florida Eash

7. Paul M. Newton, Jr.
   Counsel for Appellant Florida Eash

8. Mississippi Gaming Commission
   Interested administrative agency

9. Larry K. Gregory
Executive Director
Mississippi Gaming Commission

10. Thomas Mueller
Assistant Attorney General
Counsel for Mississippi Gaming Commission

11. Honorable Joan Myers
Mississippi Gaming Commission Hearing Examiner

12. Honorable Roger T. Clark
Harrison County Circuit Court Judge

13. Manufacturers, distributors, wide area progressive system operators and casino operators licensed in the State of Mississippi

CERTIFICATE OF SERVICE

I, the undersigned counsel, do hereby certify that I have this day served, via U.S. Mail, postage prepaid, a true and correct copy of the Amended Certificate of Interested Persons to:

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Honorable Roger T. Clark
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This the 8th day of July, 2008.

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STATEMENT OF THE ISSUES

The issue before the Mississippi Gaming Commission (hereinafter the "MGC" or the "Commission") was whether Florida Eash (hereinafter "Eash"), as a result of her play of a slot machine at Imperial Palace Casino, was entitled to an award of $1,000,000. Due to a programming error, the slot machine erroneously displayed the amount of $1,000,000 on the electronic screens of the machine after the completion of Eash's game. However, the terms of the wager into which Eash entered with Imperial Palace of Mississippi, LLC (hereinafter "IP"), clearly articulated by the machine's permanent signage at the time she initiated the wager, provided that the maximum amount she could win was $8,000. The Executive Director of the MGC issued a written decision finding that Eash is entitled to an award of $1,000,000. After IP requested review of the Executive Director's decision pursuant to MISS. CODE ANN. § 75-76-161(1),[1] and after a full evidentiary hearing, the Hearing Examiner rendered a decision in favor of IP, finding that Florida Eash is entitled to an award of $8,000. The full MGC reversed the decision of the Hearing Examiner, finding that Eash is entitled to the $1,000,000 award. On appeal, the Circuit Court of Harrison County found that that the MGC's decision was "**arbitrary and maybe arbitrary and capricious, and was made upon unlawful procedure, thereby prejudicing the substantial rights of Petitioner and requiring reversal of the final order of the Commission**." V. 1/59 (emphasis added).

The controlling issues in this review are as follows:

I. Did the MGC's decision ignore relevant contract law and its own precedent in patron dispute decisions, thus rendering a decision that was arbitrary and capricious and not in accordance with law?

II. Did the MGC's decision violate state and federal due process and exceed its statutory authority when the Executive Director

[1]Copies of all authorities cited herein are included in the Addendum of Authorities filed simultaneously herewith.

recommended that the MGC reverse the decision of the Hearing Examiner, which had overturned the Executive Director's own decision?

III. Was the MGC's basis for its decision – "fairness or the perception of fairness" – unsupported by any evidence and in excess of the statutory authority of the MGC?

The answer to each of those questions is "Yes." Based upon the facts of this case, relevant contract law and the arguments presented below, this Honorable Court should uphold the decision of the Circuit Court of Harrison County reversing the final order of the MGC, and render a decision in favor of IP.

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITION BELOW[2]

On February 19, 2006, Eash was playing a $5.00 IGT Double Top Dollar slot machine at Imperial Palace Casino in Biloxi, Mississippi, when she hit a winning combination, with maximum credits wagered. V. 6/8-11 (IP 4). The permanent awards glass on the machine clearly stated that Eash's combination awarded $8,000. V. 6/42, 82-83, 126 (IP 4); Ex. 1/148 (IP 5). However, after Eash's game completed, and **only after** Eash's game completed, the machine's LCD player tracking display showed a hand pay of $1,000,000, the machine's VFD door display read, "Hand Pay Jackpot 200,000 credits," and the LED display showed 200,000 credits. V. 6/11-12, 19, 96, 126 (IP 4). The LCD, VFD and LED displays are all changeable electronic displays that show amounts won **only after** the completion of winning games. V. 6/99-101 (IP 4). IP summoned the MGC to investigate the dispute. V. 27 (IP 6). Subsequently, Eash initiated this patron dispute against IP.

[2] The Clerk's Record on Appeal includes the Record on Review, which consists of the following: six (6) volumes of documents containing separately numbered pages within each volume, referenced herein as "V. ___/____," and two (2) volumes of exhibits (referenced herein as "Ex. ____/____." References to IP's Record Excerpts will appear as "IP ___."

On March 22, 2006, the Executive Director of the MGC issued a written decision finding that as a result of the incident, Eash was entitled to an award of $1,000,000. V. 3/3 (IP 4).

IP timely requested review of the Executive Director's decision pursuant to MISS. CODE ANN. § 75-76-161(1). V. 3/8 (IP 5). The patron dispute was styled *Imperial Palace of Mississippi, LLC v. Florida Eash*, No. 06-0076. A full evidentiary hearing was held on September 13, 2006, before the Honorable Joan Myers, the MGC Hearing Examiner. V. 4/476-463 (IP 6).

On October 16, 2006, the Hearing Examiner rendered her decision, finding that pursuant to established principles of contract law, Eash is entitled to $8,000 rather than $1,000,000, and therefore ruling in favor of IP. V. 4/476-463 (IP 6). The Hearing Examiner found that the terms of Eash's contract with IP, as articulated by the permanent signage on the machine, provided that a combination of three Double Diamond symbols on the payline with two credits wagered would entitle the player to an amount of $8,000, provided that no machine malfunction occurred. *Id.* In her decision, the Hearing Examiner referenced relevant contract law as well as MGC precedent in patron disputes. *Id.*

On October 25, 2006, Eash timely requested review by the full MGC pursuant to MGC Regulation III. H., Section 17. V. 4/483. On November 16, 2006, Eash's request for review appeared on the MGC agenda. V. 4/492 (IP 8). The Executive Director asked that the MGC pass on the item in order to allow the MGC time to review the issue. *Id.* In so doing, MGC Chairman Jerry St. Pé stated that the MGC has "an obligation to go beyond the legal and technical issues and look at it from a perspective of equity and fairness." *Id.* On March 15, 2007, the MGC, believing it was not restricted to the law, voted to reverse the decision of the Hearing Examiner, finding that it has a responsibility "to ensure that reasonable fairness or a perception of fairness prevails." V. 5/572 (IP 9). The Executive Director subsequently sent a

letter to IP's counsel confirming that, upon the Executive Director's recommendation, the MGC voted March 15, 2007, to reverse the decision of the Hearing Examiner, constituting the final order of the MGC. V. 5/565 (IP 10).

Pursuant to the procedure set forth in MISS. CODE ANN. § 75-76-157, *et seq.*, IP timely filed its Amended Petition for Judicial Review in the Circuit Court of Harrison County on April 4, 2007. After briefing by the parties and a hearing on IP's Petition, the Court, the Honorable Roger T. Clark presiding, issued a bench ruling on September 13, 2007 reversing the decision of the MGC, adopting the Hearing Examiner's decision and finding that Eash is entitled to $8,000. V. 2/20-22 (IP 3). In its Order Reversing the Final Order of Mississippi Gaming Commission, the Court found:

> In this case, the Commission based its decision entirely on its perception of fairness, but in doing so wholly ignored its own precedent and the principles of contract law as set forth in its Hearing Examiner's Decision. Although this Court must give deference to the Commission's decision, this Court cannot base its opinion on a perception of fairness standard, nor can this Court ignore the law and the precedent of the Commission's earlier cases, and likewise cannot permit the Commission to base its final order on the perception of fairness while ignoring the law and its own precedent.
>
> As explained in the well-reasoned Decision of the Hearing Examiner, this is a matter to be based on contract law. When a patron sits down to play a slot machine, such as the slot machine at issue, and looks at the payout schedule of that machine, the patron cannot expect the recovery of anything other than what is shown at that time on the faceplate of the machine. The contract between Petitioner and Respondent was formed when Respondent put her money in the machine and agreed to be paid according to the signage on the machine at the time of her wager, which indicated that the machine would pay $8,000 if three Double Diamond symbols appeared on the payline. No signage or other language on the slot machine or in the area indicated at the time of her wager that this machine would pay $1,000,000 if the Double Diamond symbols appeared on the payline.
>
> In ruling otherwise, the Commission ignored the law of contract and its own precedent, and therefore the final order of the Commission was not made in accordance with law, was arbitrary and maybe arbitrary and capricious, and was made upon unlawful procedure, thereby prejudicing the substantial rights of Petitioner and requiring reversal of the final order of the Commission pursuant to *Mississippi Code Annotated* Section 75-76-171(b). . . .

V. 1/58-59 (IP 2). Eash subsequently appealed the Circuit Court's decision to the Mississippi Supreme Court.

II. STATEMENT OF FACTS

On February 19, 2006, Eash was playing a $5.00 IGT Double Top Dollar slot machine, serial number 1706174, asset number 70037, at the Imperial Palace Casino in Biloxi, Mississippi. **The awards glass permanently affixed to the front of the machine (*i.e.*, the machine's signage that does not change) clearly indicated that the maximum amount that could be won was $8,000**.[3] V. 6/42, 82-83, 126 (IP 4); Ex. 1/148 (IP 5). In order to win the $8,000 top award, the awards glass indicated that the reels must align in a combination of Double Diamond, Double Diamond, Double Diamond on the payline, with maximum credits wagered, and no machine malfunction occurring.[4] V. 6/82-83, 126 (IP 4); Ex. 1/148 (IP 5). Eash's play resulted in a reel combination of Double Diamond, Double Diamond, Double Diamond on the payline, which is a winning combination and, with the maximum credits wagered, entitled her to an $8,000 jackpot. V. 6/11, 41-42, 95, 126 (IP 4).

However, **after** Eash initiated her wager, the game concluded, and the winning combination was subsequently displayed, the machine "locked up," the candle began flashing in jackpot mode,[5] the machine's LCD player tracking display showed a hand pay of $1,000,000, the machine's LED display showed 200,000 credits won, and the machine's VFD door display read,

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[3] Although it was possible for a patron to win a maximum amount of $20,025 in the bonus round, such is not relevant in this case. To enter the bonus round, a patron must obtain a Double Top Dollar symbol on the payline of one reel. V. 2/83 (IP 4). In the bonus round, the maximum win, with maximum credits wagered, is $20,000 ($5,000 bonus win, with both "x2" symbols lit). V. 2/84-86 (IP 4). If a player also obtained two cherries on the payline of the other two reels, he would win $20,025. V. 2/85-86 (IP 4). Eash does not claim that she obtained a Double Top Dollar symbol or entered the bonus round.

[4] The machine's signage in the present case alerted patrons that a malfunction would void their game. V. 6/88 (IP 4).

[5] The machine locks up and the candle flashes on any hand pay amount, regardless of the amount of the hand pay. V. 6/106 (IP 4).

"Hand Pay Jackpot 200,000 credits,"[6] which, on a $5.00 slot machine, equals $1,000,000. V. 6/12-13, 19, 96, 126 (IP 4). IP's slot accounting system registered a $1,000,000 win on the machine Eash was playing. V. 6/49 (IP 4); Ex. 1/49 (IP 11). However, the only data input into that system are signals from the slot machines. V. 6/124 (IP 4). In other words, the casino slot accounting system's registering of a $1,000,000 win does not verify whether a $1,000,000 jackpot was the appropriate award according to the rules of the game and the parties' expectations, nor does it conclusively establish a jackpot if the signal received from the slot machine is shown to be in error. V. 6/124-25 (IP 4).

Jeff Lester, IP Slot Shift Supervisor, became aware of the incident involving Eash that evening when he viewed a progressive jackpot of $1,000,000 on the casino slot accounting system screen he was monitoring. V. 6/122-23 (IP 4). He testified:

> Q. What appeared on the screen that you were monitoring; what did that display screen show?
> A. It showed a jackpot that came up on a machine that was not a progressive machine, as a progressive jackpot with a million dollar amount.
> Q. Before [ ][7] each jackpot that it shows, what kind of information does it show?
> A. On all completed credit jackpots, progressive jackpots and our bonus jackpots if they happen on the casino floor, it gives us a machine number where the transaction is, the amount of the jackpot, what type transaction, whatever, at the time of completion of the game.
> Q. You testified that when you saw the million dollars come up on the machine and you saw that something was wrong, that you said "That couldn't be."
> A. Correct.
> Q. Could you explain what caused you to believe that something was wrong?

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[6] A hand pay is an amount won on a slot machine that the machine will not automatically pay the patron but instead requires verification and manual payment by a casino attendant, as well as the withholding of state taxes. A hand pay amount is any amount of $1,200 or more.

[7] As the court reporter who prepared the transcript was not the same court reporter who was present at the hearing, there are various mistakes (such as this one) and inaccuracies throughout the transcript of the hearing. IP's counsel had no opportunity to review and correct the transcript.

> A. Two things. The amount and it saying it was a progressive jackpot.
> Q. Why did you think that amount could not be correct?
> A. The only progressive games we had on the floor were wide-area progressives. None of our machines carried a jackpot like that. None of them came close to that, other than the wide-area progressive machines; the wheel of fortunes and that type game.

V.6/123-24 (IP 4).

An IP employee then came to Eash's machine and explained to her, pointing to the machine, that the signage on the machine showed that a combination of three Double Diamonds pays $8,000. V. 6/12-14, 22 (IP 4); Ex. 1/18 (IP 11).

MGC Agent Daniel Pearson, after being summoned by IP's Surveillance Department, subsequently arrived at the casino. V. 6/27 (IP 4). Pearson inspected the machine. V. 6/36 (IP 4). Pearson performed a series of tests, including a pay table verification, which verified that a combination of three Double Diamond symbols and two credits played paid $8,000 and not $1,000,000. V. 6/43-44 (IP 4).

Further testing of the machine showed that the machine registered the jackpot in accordance with how it had been programmed, and that it had been erroneously programmed during set-up as a stand-alone progressive machine with a $1,000,000 payout rather than as it was intended to be programmed – as an IGT Double Top Dollar stand-alone non-progressive machine with a maximum $8,000 payout, as reflected by the machine's permanent signage. V. 6/60-62, 97-98 (IP 4); Ex. 1/149, 154. The machine's erroneous programming was clearly contrary to IP's intent that the machine operate as a regular non-progressive stand-alone machine. V. 6/102-04, 113-15 (IP 4); Ex. 1/45 (IP 12). The subject machine was not connected to a progressive system. V. 6/51 (IP 4). Also, none of the other seven slot machines in the bank of machines was set for a progressive payout. V. 6/50 (IP 4).

The slot machine played by Eash, besides operating as a regular stand-alone slot machine, has the capability also to be programmed to operate as a progressive game. V. 6/98 (IP 4). A progressive game generally differs from a "regular" game in that the top award is not fixed at a set level as displayed on the awards glass, but increases with every coin and is displayed on a meter, located either on or above the machine, which indicates the continually incrementing amount of the progressive win. V. 6/105 (IP 4). Progressive games can be limited to one machine, one casino or several casinos. The slot machine's game options may be changed internally utilizing what is called a key chip. V. 6/97-99 (IP 4). When the options were programmed during initial set-up on the machine Eash ultimately played, an option was erroneously set for a stand-alone progressive mode, with a base amount of $1,000,000. V. 6/98 (IP 4). Unlike typical progressive slot machines,[8] the base amount was not set to increment, nor was a progressive meter located on or above the slot machine.[9] V. 6/51, 87, 98 (IP 4). No portion of the machine, including the LCD player tracking display and VFD door display, is capable of advertising an available progressive jackpot. V. 6/99-101 (IP 4).[10] Also, the machine's electronic displays are not capable of displaying any amount won prior to the completion of a game, and display the amount of a hand pay jackpot **only after** the reels have landed in their intended positions and the completion of the game results in a hand pay jackpot.

[8] Carlyce McClendon, Casino Services Manager for IGT, the manufacturer and distributor of the machine, testified that, to his knowledge, all progressive machines increment. V. 6/99 (IP 4).

[9] Note that MGC Regulation III. B., Section 2(b) requires that, for all progressive slot machines, "[a] meter that shows the amount of the progressive jackpot must be conspicuously displayed at or near the machines to which the jackpot applies."

[10] McClendon testified that, following the incident involving Eash, he set up a game in IGT's office using the same programs as the machine Eash played. V. 6/101 (IP 4). He set up the machine as a progressive, with no incrementation rate, and played the machine. *Id.* No progressive amount or other available amount was advertised on the machine's electronic displays, and the electronic displays showed amounts won only after the reels landed in their intended positions. V. 6/102 (IP 4).

V. 6/100-01 (IP 4). Further, Eash admitted there was no sign in the area where she was playing that indicated the machine she was playing was a progressive machine. V. 6/17 (IP 4).

IP declined to pay Eash $1,000,000 but instead offered to pay her $8,000, the maximum amount that could be awarded from play of this machine. Eash refused the $8,000 award and subsequently filed this patron dispute with the MGC.

SUMMARY OF THE ARGUMENT

In rendering its decision in favor of Eash, the MGC ignored established contract law supporting IP's position that the terms of Eash's wagering contract with IP, as articulated by the signage on the subject machine, determine the proper award. The MGC also refused to follow several of its prior decisions that involved substantially similar facts and arguments as in the present case. Also, the Executive Director, contrary to MGC procedure as established by the Mississippi Gaming Control Act, recommended that the MGC reverse the Hearing Examiner, thereby upholding his own prior decision. Further, the MGC apparently based its decision on public perception, of which it had no evidence, and which it was not authorized to consider. The decision of the MGC is therefore in violation of constitutional provisions, in excess of the statutory authority or jurisdiction of the MGC, made upon unlawful procedure, unsupported by any evidence, arbitrary or capricious, and otherwise not in accordance with law, thereby prejudicing the substantial rights of IP. This Honorable Court should affirm the decision of the Circuit Court of Harrison County reversing the final order of the MGC, and render a decision in favor of IP.

ARGUMENT

I. STANDARD OF REVIEW

Throughout the Brief of Respondent/Appellant Florida Eash (hereinafter "Eash's Brief"), Eash clearly misstates the standard of review. She repeatedly and erroneously states that the

Court must uphold the decision of the MGC if the Court finds that there is any evidence to support the MGC's decision. *See* Eash's Brief, pp. 6, 7, 8, 10, 11, 13, 14, 15 and 16. However, "unsupported by any evidence" is only one of five possible bases upon which the Court may reverse a MGC decision. The Mississippi Gaming Control Act provides the standard of review for decisions of the MGC:

> The reviewing court may ... reverse the decision if the substantial rights of the petitioner have been prejudiced because the decision is:
> (a) In violation of constitutional provisions;
> (b) In excess of the statutory authority or jurisdiction of the commission;
> (c) Made upon unlawful procedure;
> (d) Unsupported by any evidence; **or**
> (e) Arbitrary or capricious or otherwise not in accordance with law.

MISS. CODE ANN. § 75-76-171(3) (emphasis added). A plain reading of the statute, specifically the use of the disjunctive "or," clearly shows that the "any evidence" standard repeatedly cited in Eash's Brief is only one possible base for reversal of the MGC's decision.[11] Thus, rather than only being able to reverse the MGC's decision if the reviewing Court finds that it is unsupported by any evidence, the Court may reverse the decision if it finds that the decision violated constitutional provisions; is in excess of the statutory authority or jurisdiction of the MGC; is made upon unlawful procedure; is unsupported by any evidence; or is arbitrary or capricious or otherwise not in accordance with the law. Even if the MGC's decision is supported by evidence,

[11] Generally, the word "or" in a statute connotes disjunction. *See, e.g., Mineral Policy Ctr. v. Norton*, 292 F.Supp.2d 30, 42 (D.D.C. 2003) (in statutory construction, word "or" is to be given its normal disjunctive meaning unless such construction renders provision in question repugnant to other provisions of statute or context indicates otherwise); *Brown v. Budget Rent-A-Car Sys., Inc.*, 119 F.3d 922, 924 (11th Cir. 1997) (use of disjunctive in statute generally indicates alternatives and requires that those alternatives be treated separately); *U.S. v. Smeathers*, 884 F.2d 363, 364 (8th Cir. 1989) (the word "or" indicates disjunction unless a disjunctive reading would frustrate a clear statement of legislative intent); *Knutzen v. Eben Ezer Lutheran Hous. Ctr.*, 815 F.2d 1343, 1349 (10th Cir. 1987) (unless context or congressional intent indicates otherwise, use of disjunctive in statute indicates that alternatives were intended); *George Hyman Const. Co. v. Occupational Safety and Health Review Comm'n*, 582 F.2d 834, 840 n.10 (4th Cir. 1978) (normally, use of a disjunctive in statute indicates alternative unless such construction renders provision repugnant); *Azure v. Morton*, 514 F.2d 897, 900 (9th Cir. 1975) (generally, use of disjunctive in statute indicates alternatives and requires that they be treated separately); *Quindlen v. Prudential Ins. Co. of America*, 482 F.2d 876, 878 (5th Cir. 1973) (generally, use of disjunctive in statute indicates alternatives and requires that those alternatives be treated separately).

which IP denies, it is still susceptible to reversal if any other element of MISS. CODE ANN. § 75-76-171(3) is met.

Eash disingenuously cites *Miss. Gaming Comm'n v. Freeman*, 747 So. 2d 231, 241 (Miss. 1999), and *IGT v. Kelly*, 778 So. 2d 773, 775-76 (Miss. 2001), as authority that the standard of review is whether "any evidence" exists upon which the MGC could have made such ruling, and that this "any evidence" standard applies to each of the five separate prongs set forth by MISS. CODE ANN. § 75-76-171(3). *See* Eash's Brief pp. 8 and 10. However, a review of those decisions reveals that the *Freeman* and *Kelly* courts were faced with the determination of whether MISS. CODE ANN. § 75-76-171(3)(d)'s "any evidence" standard or the "substantial evidence" general standard for decisions of other administrative agencies applied, and ruled in favor of the former. The *Freeman* Court firmly establishes from the opinion's beginning that MISS. CODE ANN. § 75-76-171(3), with its five possible bases for reversal, is the applicable standard of review. *See Freeman*, 747 So. 2d at 239-40.

Indeed, if a court were to interpret MISS. CODE ANN. § 75-76-171(3) such that the "any evidence" standard applies to or overrides the other four prongs meriting reversal, then these other prongs would be rendered meaningless, which is contrary to the legislative intent and to canons of statutory construction. *See Gilmer v. State*, 955 So. 2d 829, 835 (Miss. 2007) (court is obliged, whenever reasonable, to reach an interpretation of a statute which gives effect to all the statutory language); *Miss. Pub. Serv. Comm'n v. City of Jackson*, 328 So. 2d 656, 658 (Miss. 1976) (courts are to give all parts of statute effect if possible); *Davis v. Miller*, 32 So. 2d 871, 890 (Miss. 1947) (courts cannot ascribe to any statute a construction which would make a part of

it meaningless and ineffective, if another reasonable construction can be found which will give meaning to all its parts).[12]

Under the applicable standard of review, the decision of the Circuit Court to reverse the decision of the MGC should be upheld because the MGC's decision was in violation of constitutional provisions, in excess of the statutory authority of the MGC, made upon unlawful procedure, unsupported by any evidence, arbitrary or capricious, and otherwise not in accordance with law, thereby prejudicing the substantial rights of IP.

II. EASH'S ARGUMENT THAT IP SUFFERED NO SUBSTANTIAL PREJUDICE FROM THE MGC'S DECISION IS WHOLLY WITHOUT MERIT.

Eash argues that IP "was not prejudiced in any manner by the MGC's Final Order because petitioner/appellee IP is indemnified by IGT for any jackpot in excess of the conceded $8,000 amount."[13] Eash's Brief, p. 9. This argument is preposterous for two reasons: (1) as explained below, IP, the named party in this proceeding, clearly has suffered substantial prejudice as a result of the MGC's decision; and (2) the existence of an indemnity agreement between IP and IGT is irrelevant.[14]

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[12] To further illustrate the nonsensicality of Eash's argument: how could a reviewing court apply the "any evidence" standard, which is a factual standard, to some of the other prongs, such as "made upon unlawful procedure," which is clearly a legal standard? Eash would have a reviewing court compelled to uphold, for example, an MGC decision that violates the federal Constitution, so long as the decision was supported by a single shred of evidence.

[13] IGT is the licensed manufacturer and distributor of the machine. In her brief, Eash erroneously states that "IGT...contends..." Eash's Brief, p. 6. As IGT is not a party to this case, IGT has not "contended" anything.

[14] Eash states that "Imperial Palace's counsel of record actually represent the interests of IGT" and that Imperial Palace's counsel "deliberately omitted IGT – the entity facing all contested liability – from its Certificate to the Circuit Court of Interested Parties." Eash's Brief, p. 10, n.1. First, IP's counsel of record represent IP in this case. Second, as discussed herein, IP is the party "facing liability" for Eash's jackpot in whatever amount ultimately determined through this judicial process. Third, with respect to IP's Certificate of Interested Persons in its brief before the Circuit Court, although IGT may be subject to indemnity in favor of IP, undersigned counsel did not include IGT in the Certificate because IGT is not a party to, nor an affiliate of a party to, these proceedings. No guidance exists in the law as to the degree of interest required to mandate a person's placement upon the Certificate of Interested Persons. Contrary to Eash's assertions, the non-inclusion of IGT in the Certificate was not sinister in nature, and

A. IP Has Suffered Substantial Prejudice Due to the MGC's Decision.

Eash asserts that IP's rights cannot have been prejudiced by the MGC's decision because IP "is liable for $8,000 (and only $8,000)" due to its indemnity agreement with IGT.[15] Eash's Brief, p. 9. **This is completely untrue**. The Executive Director's decision and the MGC's decision were rendered against IP, not IGT, and are enforceable against IP, not IGT. **IP is the party that will be required to pay Eash her jackpot, in the amount ultimately determined by this judicial process, whether that amount is $8,000 or $1,000,000**. Thus, IP's substantial rights clearly have been prejudiced by the MGC's decision.

Further, basic indemnity principles undermine Eash's position. It is an elementary principle of indemnity that an indemnitor is not liable to the indemnitee until the liability of the indemnitee has been established. This long-standing rule was described by the Mississippi Supreme Court in *Gully v. First Nat. Bank in Meridian*, 184 So. 615, 617 (Miss. 1938):

> The contract is one of indemnity and a suit may not be brought by the creditor of the indemnitee against the indemnitor directly until the liability of the indemnitee has been established. An indemnity is more than a promise to pay; it is an agreement here to save harmless not made for the benefit of a third party, but an agreement strictly between the parties. The liability of the new bank [the indemnitor] arises exclusively out of its contract and cannot be extended beyond its terms to "save harmless."

That principle, that the indemnitee must be legally liable before the indemnitor's obligation to pay has been triggered, has been repeatedly upheld by the Mississippi Supreme Court. *See Lloyd's of London v. Knostman*, 783 So. 2d 694, 698 (Miss. 2001) (party seeking indemnity must

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any deficiencies have certainly been cured by Eash's cries of conspiracy (both before the Circuit Court and this Court). Further, IGT would show that every licensed manufacturer, distributor, wide area progressive system operator and casino operator licensed in the State of Mississippi is "interested" in the outcome of this case, given the precendential effect of its determination. Accordingly, IP has before this Court included in its Certificate of Interested Persons "Manufacturers, distributors, wide area progressive system operators and casino operators licensed in the State of Mississippi."

[15] Although Eash points to no record evidence regarding indemnification between IP and IGT, the record provides evidence of such indemnification. Ex. 1/41.

prove (1) that it was legally liable to an injured party, (2) that it paid under compulsion, and (3) that the amount it paid was reasonable); *Smith v. H.C. Bailey Co.*, 477 So. 2d 224, 235 (Miss. 1985) ("the law requires one seeking indemnity to first prove actual legal liability to the party injured"); *Southwest Miss. Elec. Power Ass'n v. Harragill,* 182 So. 2d 220, 223 (1996) (same). Thus, any duty of IGT to indemnify IP arises only when IP becomes legally bound to pay any judgment against it; accordingly, IP's rights have been substantially prejudiced by the MGC's decision.

B. The Existence of an Indemnity Agreement between IP and IGT is Not Relevant.

Further, the indemnity agreement between IGT and IP is not relevant to this proceeding. Eash's argument is directly analogous to arguing to a jury that they should return a verdict against a defendant because the defendant's insurer or indemnitor, not the defendant, will pay the judgment. The existence of insurance or an indemnity agreement has always been considered irrelevant to the issue of liability. *See, e.g., Mid-Continent Aircraft Corp. v. Whitehead*, 357 So. 2d 122, 124 (Miss. 1978) ("the general rule in this jurisdiction is that no reference should be made to the fact that a defendant is covered by liability insurance"); *Herrin v. Daly*, 31 So. 790, 791 (Miss. 1902) (holding that evidence of indemnification "could not conceivably throw any light on the issue, and could have no other tendency than to seduce a verdict on the ground that an insurance company, and not the defendants, would be affected"). This case is a matter of the application of basic contract law to the relevant facts, within the statutory framework established by the Mississippi Gaming Control Act, and not a single relevant fact is impacted by the existence of an indemnity agreement between IP and IGT.

III. THE MGC'S DECISION WAS ARBITRARY OR CAPRICIOUS AND OTHERWISE NOT IN ACCORDANCE WITH LAW AS IT VIOLATED CLEARLY ESTABLISHED CONTRACT LAW.

Two of the bases for judicial review of a MGC decision are if the decision is arbitrary or capricious or otherwise "**not in accordance with law,**" or if it is "made upon unlawful procedure." MISS. CODE ANN. § 75-76-171(3)(c) and (e) (emphasis added). As the Circuit Court found in this case, the MGC's decision was "not made in accordance with law, arbitrary and maybe arbitrary and capricious, and made upon unlawful procedure" as it refused to adhere to relevant contract law and its own prior decisions.[16] V. 1/59 (IP 2).

The MGC has seemingly taken the position that it is not required to follow contract law as set forth by judicial precedent or required to adhere to its own precedent. Indeed, the MGC implicitly recognized that it ignored the law, as MGC Chairman St. Pé stated that the MGC has "an obligation to go beyond the legal and technical issues and look at it from a perspective of equity and fairness" and that the Hearing Examiner "is somewhat restricted in moving toward her judgment and decision." V. 4/492 (IP 8) and V. 5/572 (IP 9).

Courts have ruled that administrative agencies are required to follow judicial precedent in their circuits. *See Acre-Vences v. Mukasey,* 512 F.3d 167, 172 (5th Cir. 2007); *Nat'l Lab. Relations Bd. v. Ashkenazy Prop. Mgmt. Corp.*, 817 F.2d 74, 75 (9th Cir. 1987); *Indus. TurnAround Corp. v. Nat'l Lab. Relations Bd.,* 115 F.3d 248, 254 (4th Cir. 1997); *Lopez v. Heckler*, 572 F.Supp. 26 (Cal. 1983), *aff'd in part, rev'd in part*, 725 F.2d 1489, 1503 (3rd Cir. 1979) *vacated and remanded in light of new legislation*, 469 U.S. 1082 (1984). *See also* 2 AM.

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[16]In her brief, Eash states that the Mississippi Supreme Court has recognized that the administrative process of the MGC is not limited to contract law, citing *Kelly*, 778 So. 2d at 777. Eash's Brief, p. 14. This statement is simply untrue. In *Kelly,* the Court did not make a determination as to whether the MGC is required to adhere to contract law principles; rather, it held that the MGC was not bound by another jurisdiction's decision. *Id.* at 776-77. Also, as Eash neglects to mention, the *Kelly* Court held that the MGC's adherence to MGC precedent was sound. *Id.* at 77.

JUR. 2d *Adminlaw* § 73 (federal agencies are required to abide by the law of the relevant federal judicial circuit). "A decision by the court, not overruled by the United States Supreme Court, is ... binding on all inferior courts and litigants in the [circuit], and also on administrative agencies." *Ashkenazy*, 817 F.2d at 75. The MGC deliberately refused to follow judicial and MGC precedent and instead ruled based on a perceived notion of "reasonable fairness or a perception of fairness." V. 5/572 (IP 9). This was error.

While an agency has the authority to administer the statutes it is entrusted to administer, agencies may not go too far afield from the letter of the law, even if they believe they are furthering the spirit of the law. *See Buse v. Miss. Employment Sec. Comm'n,* 377 So. 2d 600, 602 (Miss. 1979) ("substantive law is not to be thwarted by administrative rules adopted for implementation of legislative intent"); *State ex. rel. Pittman v. Miss. Pub. Serv. Comm'n,* 520 So. 2d 1355, 1358 (Miss. 1987) (even though broad authority and discretion have been given to an agency, the power is not unbridled; the agency's authority to interpret the statutes under which it operates may not conflict with pertinent rules of law); *Pennzoil Co. v. Fed. Energy Regulatory Comm'n*, 789 F.2d 1128, 1142 (5th Cir. 1985) (agency was not entitled to disregard the UCC and general principles therein that applied to state law; **the appropriate contract law to apply to this case is the law that would govern the parties' dealings if there was no regulation of the contract's subject matter**) (emphasis added).

Further, the MGC's inconsistent treatment of similarly situated parties is arbitrary and capricious because, as discussed *infra*, the MGC has consistently ruled against patrons whose claims are identical or strikingly similar to Eash's claim. An agency cannot act in such a way as to result in disparate or inconsistent treatment of similarly situated parties, and to adopt different standards for similar situations. To do so is to act arbitrarily. *See LeClede Gas Co. v. Fed. Energy Regulatory Comm'n,* 722 F.2d 272, 275 (5th Cir. 1984) ("An agency must either conform

to its prior precedent or explain its reason for departure from that precedent"); *Emery Worldwide, A.C.F. Co v. NLRB,* 966 F.2d 1003, 1005 (5th Cir. 2002) (same); *Miss. Valley Gas Co. v. Fed. Energy Regulatory Comm'n,* 659 F.2d 488, 506 (5th Cir. 1981) (same); *Dixie Highway Express, Inc. v. U.S.,* 242 F.Supp. 1016, 1021 (D.C. Miss. 1965) (consistency of administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily).

Eash's Brief makes no absolutely no attempt to counter the Hearing Examiner's and Circuit Court's rulings that the MGC's decision was contrary to contract law and the MGC's own prior decisions. Eash is conceding that the MGC's decision is contrary to contract law and MGC precedent. Pursuant to the applicable standard of review of a decision of the MGC, the MGC's decision is "not in accordance with law" as set forth by established contract law and in numerous patron dispute decisions.[17] Also, the MGC's decision is arbitrary and capricious because, as a result of the MCG's complete and utter disregard of its prior decisions, parties in similar situations have been and will be treated differently.[18] In this case, the Hearing Examiner relied, in part, upon the MGC's prior decisions, and, as the *Kelly* Court held, reliance on the MGC's prior decisions is unassailable.[19] *Kelly*, 778 So. 2d at 777.

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[17]Some of the cases cited herein are from jurisdictions other than Mississippi. While it is true that cases from other jurisdictions are only persuasive authority, it is not uncommon for Mississippi courts to rely on cases from other jurisdictions to make decisions when the subject matter of the case has not been sufficiently developed in Mississippi law. One could reasonably expect Mississippi administrative agencies to act likewise.

[18]Eash references the Commissioners' statements made when rendering the MGC's decision as somehow curing the arbitrary and capricious nature of the MGC's decision. Eash's Brief, pp. 12-13. Such self-serving statements setting the table for the issuance of an arbitrary and capricious decision are irrelevant and do not operate to shroud its infirmities.

[19]Eash asserts that the undersigned counsel's arguments in *Kelly* to the effect that the Hearing Examiner was not bound by the MGC's prior decisions somehow erode IP's arguments in this case regarding prior decisions. This is absurd. Attorneys are not bound by arguments made previous cases. *See* MISS. RULES OF PROF'L CONDUCT 1.7 cmt. ("a lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases"). Also, Eash neglects to mention that *Kelly* affirmatively established the propriety of adherence to MGC precedent; accordingly, IP's position in this case comports with Mississippi Supreme Court precedent.

A. The Terms of the Contract between Eash and IP Provided that the Maximum Amount that Eash Could Win Was $8,000.

When a patron plays a game at a casino, the patron and casino enter into a contractual agreement. *See, e.g., Romanski v. Detroit Etm't, L.L.C.*, 265 F.Supp.2d 835, 845 (E.D. Mich. 2003); Anthony Cabot & Robert Hannon, *Advantage Play and Commercial Casinos,* 74 MISS. L.J. 681, 682-83 (2005); LIONEL SAWYER & COLLINS, NEVADA GAMING LAW 300 (2000).[20] The placing of a wager by the patron forms the contract between the patron making the bet and the casino. *Allen v. Isle of Capri, Vicksburg,* Mississippi Gaming Commission Hearing Examiner Decision, case number 97-00285 at 4-5 (June 24, 1997);[21] *Seamaan v. IGT*, 126 F.App'x. 794, 796 (9th Cir. 2005). *See also* LIONEL SAWYER & COLLINS, *supra* at 300 (**by entering a coin or coins, the patron accepts the casino's offer and creates a unilateral contract**). Thus, Eash entered into her contract with IP when she placed her wager.

Most gaming contracts contain express terms, *i.e.*, terms stated in writing. *See Id. See also* Cabot & Hannon, *supra* at 683. In the case of a slot machine wager, the express terms of the contract between a casino patron and a casino are established by the signage around the machine **at the time that the wager is initiated**. *See Seamaan*, 126 F.App'x. at 796; *Sengel v. IGT*, 2 P.3d 258, 262 (Nev. 2000); *Miller v. Sodak Gaming, Inc.*, 93 F.App'x. 847, 851 (6th Cir. 2004). An example of an express term of a slot machine gaming contract is a statement on a slot

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[20]The Nevada Gaming Control Act served as the blueprint for the Mississippi Legislature in 1990 when it enacted the Mississippi Gaming Control Act, and the Regulations of the Nevada Gaming Commission and the Nevada State Gaming Control Board likewise served as the blueprint for the Mississippi Gaming Commission when it promulgated its Regulations. Many of the provisions in the Mississippi Gaming Control Act and the Mississippi Gaming Commission Regulations are identical to their Nevada counterparts. Thus, the interpretations of the Nevada Gaming Control Act and the Regulations of the Nevada Gaming Commission and the Nevada State Gaming Control Board by Nevada courts, the Nevada Gaming Commission and the Nevada State Gaming Control Board are often consulted by their Mississippi counterparts and are considered persuasive in this state. *See, e.g., Pickle v. IGT*, 830 So. 2d 1214, 1220 (Miss. 2002); *Freeman,* 747 So. 2d at 240-41.

[21] On July 21, 1997, the MGC declined to review this Hearing Examiner decision; thus, this Hearing Examiner Decision became the final order of the MGC. *See* Mississippi Gaming Commission Minutes, July 21, 1997, Item IV. K. 2.

machine's awards glass that three cherries on the pay line pays 10 coins for each coin played. *See* LIONEL SAWYER COLLINS, *supra.*

When Eash wagered her bet on the $5.00 IGT Double Top Dollar machine at Imperial Palace Casino, her contract with the casino was governed by the contract's express terms, *i.e.*, those stated in writing on the machine at the time Eash initiated her wager. Those express terms were that a reel combination of Double Diamond, Diamond Diamond, Double Diamond on the payline, with no malfunction occurring, awarded $8,000. V. 6/42, 82-83 (IP 4). As MGC Agent Pearson, who investigated the dispute, testified:

> Q. So going back to the ten-game recall test the next morning after you reset the machine. Did that ultimately show, that on the game in question, Ms. Eash received a reel combination of three double diamonds?
> A. Correct.
> Q. Did it show that she played the maximum credits?
> A. Correct.
> Q. How many did she play?
> A. Two.
> Q. According to the awards glass, what did that show she was entitled to?
> A. $8,000.00.
> Q. Did that awards glass change in any way?
> A. No. You mean the pay glass?
> Q. Correct.
> A. Does it have a screen on it that's changeable?
> Q. Yes.
> A. No.
> Q. So it is permanent; it's there for the players to see when they walk up to the machine?
> A. Correct.

V. 6/41-42 (IP 4). Nothing on the machine indicated that a player could win more than $8,000 by obtaining a reel combination of three Double Diamond symbols on the payline. V. 6/69, 87 (IP 4). Eash could not possibly have seen any reference to $1,000,000 or 200,000 credits until **after** the completion of her game, because the electronic displays that showed those amounts are only capable of displaying monetary amounts or credits won after the completion of a game. V.

6/102 (IP 4). Further, it is undisputed that there was no progressive meter located on or above the machine.[22] V. 6/17, 87, 118, 127 (IP 4). Clearly, the terms of the contract are that Eash's game entitled her to an award of $8,000, not an award of $1,000,000 or any other "progressive" award.

In *Marquez v. Gold Strike Hotel & Gambling Hall*, Nevada State Gaming Control Board Decision, case number 98-7812L (March 16, 1999), and in *Miller*, 93 F.App'x. at 851, the Nevada State Gaming Control Board and the U.S. Court of Appeals for the Sixth Circuit, respectively, addressed circumstances analogous to the instant case and based their decisions on the terms of the contract as provided by the face of the machine when the wager was initiated. In *Marquez*, upon the patron making a wager, a slot machine's signage indicated a top jackpot of $5,000. However, due to a malfunction, after the player made a wager, the machine's LED screen displayed an award of over $8,000,000. The Nevada State Gaming Control Board found in favor of the casino, as the intended outcome of the play of the particular slot machine was that the machine award $5,000.

Similarly, in *Miller*, the court held that a gambler's contract with the casino controlled the outcome of her play of a progressive slot machine. The signage on the machine provided that the reels on the machine must register five "Wheel of Fortune" symbols on the ninth line of a video display. Miller's reel combination admittedly did not register five "Wheel of Fortune" symbols. However, Miller testified that the machine's lights began blinking, that she heard loud music coming from the machine, and that unnamed casino employees congratulated her. She claimed that Sodak Gaming, Inc. was therefore obligated to pay her a "primary progressive jackpot" of $1,571,862. The court held that under the rules of the game as clearly and conspicuously

[22] Robert Blackman, IP's Director of Slots, explained in his testimony that all progressive machines at Imperial Palace Casino have meters on or above them. V. 6/118 (IP 4). Clearly, IP did not intend for this machine to operate as a progressive game.

provided by the signage of the machine, Miller did not win the progressive jackpot. *Miller*, 93 F.App'x at 851.

Eash's claim to the $1,000,000 jackpot can also be analogized to a lottery winner's claim in *Coleman v. State of Mich., Bureau of State Lottery*, 258 N.W.2d 84 (Mich. Ct. App. 1977). In *Coleman*, state lottery officials erroneously announced the plaintiff as the winner of a $200,000 lottery prize, instead of a $50,000 prize. The Michigan Court of Appeals, holding that a lottery winner's entitlement to a prize is governed by principles of contract law, found that the lottery bureau, by the act of selling lottery tickets, had made a public offer that the purchaser of a lottery ticket would have a chance of winning a prize according to the advertised rules and procedures of the lottery. In purchasing her ticket, the plaintiff had accepted that offer and agreed to the announced rules for determining prize winners. Because the rules of the game (*i.e.*, the terms of the gaming contract) controlled, the court held that the erroneous award was revocable upon discovery of the mistake.

As in *Marquez, Miller, and Coleman*, the terms of Eash's contract with IP govern the amount to which she is entitled. The terms of Eash's contract with IP were established by the rules of the game **as advertised prior to her wager**. *See Lunn v. Peppermill Hotel & Casino*, Nevada State Gaming Control Board Hearing Examiner Decision, case number 2002-1462R (Sept. 5, 2003) at 6 (**the amount that must be acknowledged as provision of wagering contract is amount displayed when wagering contract was entered**). By accepting IP's offer as established by the signage on the machine, Eash agreed to the rules of the game that determine awards from the play of the machine. In this case, as in *Marquez* and *Miller*, the express terms of the contract between Eash and IP were delineated by the signage on the machine at the time that Eash made her wager. *See* V. 6/42 (IP 4). The express terms of the contract between Eash and IP were that a combination of Double Diamond, Double Diamond, Double Diamond on the

payline with maximum credits wagered, absent machine malfunction, would entitle her to a jackpot of $8,000. V. 6/41-42, 82-83, 126 (IP 4). No player of the machine could reasonably expect to win any more than $8,000 on a single wager on this machine (except in the bonus round, which Eash does not claim to have entered), as the machine's signage indicated that the top award was $8,000. *Id.* *See also* Ex. 1/148 (IP 5). Thus, Eash is entitled to the amount established by the terms of the contract as set forth by the signage on the machine – $8,000. *See also Maranga v. Casino Magic, Bay St. Louis*, Mississippi Gaming Commission Hearing Examiner Decision, case number 96-PD, at 2 (March 11, 1996)[23] (patron not entitled to claimed amount because the amount he claimed to have won contradicted the explicit and clear language on the front glass of the machine); *Decker v. Bally's Grand Hotel Casino*, 655 A.2d 73, 75 (N.J. Ct. App. 1994) ("The plaintiff's only contract with any defendant is the obligation of the defendants to pay the posted machine jackpot to the plaintiff immediately after the plaintiff has inserted the requisite coinage if the deposit of coinage registers a jackpot on the particular machine then in use").

The MGC has held that ambiguous signage on a gaming machine may reasonably be interpreted in favor of the patron. *Nancy Kelly v. Treasure Bay and IGT*, Mississippi Gaming Commission Hearing Examiner Decision, case number 96-0092 (December 30, 1997), *aff'd, Kelly*, 778 So. 2d 773. However, *Kelly* is easily distinguishable from the present case, as (1) there was no ambiguity on the machine's permanent signage and (2) there was no ambiguity when the gaming contract was established, *i.e.*, when Eash initiated her wager. In *Kelly*, the patron believed she had hit the primary progressive jackpot on an IGT Pokermania video poker machine, entitling her to an award of $250,136.91. Kelly, wagering the maximum number of

[23] On April 18, 1996, the MGC accepted this Hearing Examiner Decision into the minutes of the MGC; thus, this Hearing Examiner Decision became the final order of the MGC. *See* Mississippi Gaming Commission Minutes, April 18, 1996, Item IV. Z.

credits, had a winning combination, but the dispute concerned whether she was entitled to a primary or secondary ("Mini") progressive jackpot. The awards glass stated in relevant part:

> ROYAL FLUSH (Sequential Hearts) . . . Progressive
>
> ROYAL FLUSH . . . Mini Progressive

Permanent signage to the right of the video screen and adjacent to the coin slot also had a statement about the winning combination. *Kelly,* 778 So. 2d at 775. It stated:

> Sequential heart ROYAL Flush (10, J, Q, K, A) progressive jackpot paid in 20 equal installments. First installment paid upon validation of win.

Kelly's combination resulting from her play was an all hearts "Ace, King, Queen, Jack and 10." The dispute was whether only a left to right "10, Jack, Queen, King, Ace" qualifies for a top progressive award, or whether the other sequential hearts Royal Flush, *i.e.*, "Ace, King, Queen, Jack, 10," would also qualify.

In *Kelly*, the Hearing Examiner found that the machine's permanent signage was inconsistent and thus was ambiguous **prior to and at the time the player entered into her wager**. In the present case, it is undisputed that the signage on the machine at the time Eash placed her wager, *i.e.*, the permanent signage, was unambiguous; it provided that a reel combination of Double Diamond, Double Diamond, Double Diamond on the payline, with maximum credits wagered, absent a machine malfunction, awarded $8,000. V. 6/41-42, 82-83, 126 (IP 4); Ex. 1/148 (IP 5). Thus, *Kelly* differs and is distinguishable from the present case because herein the inconsistent amounts displayed on the machine's LCD player tracking display, LED display and VFD door display appeared **after** Eash initiated her wager and her play was completed.

In the present case, the amount that Eash claims to have won contradicts the explicit and clear language on the awards glass of the machine at the time she initiated her wager and

therefore entered into her agreement with the casino. Accordingly, she is not entitled to an award of $1,000,000.

B. Eash Would Receive the Benefit of Her Bargain by an Award of $8,000.

1. Eash's Reasonable Expectation Was that the Maximum Amount She Could Win Was $8,000.

At the time that Eash and IP entered into the wagering contract, upon Eash accepting the casino's offer by playing her credits on the machine, both parties' reasonable expectations were that if Eash obtained a reel combination of Double Diamond, Double Diamond, Double Diamond on the payline, with maximum credits wagered, absent a machine malfunction, she would be entitled to an award of $8,000. *See* LIONEL SAWYER & COLLINS, *supra* at 301 (if both parties to a gaming contract share a common expectation, the law will give effect to the expectation). Although Eash claims not to have read the signage on the machine, this does not change her reasonable expectation because (1) she has a duty to read the signage on the machine before entering into the gaming contract[24] and (2) as she has admitted, she had no reasonable

[24] At the hearing, Eash claimed that she did not read the signage on the machine. As discussed *supra*, Eash's wager established a contract with IP. Under Mississippi law, parties have an inherent duty to read the terms of a contract prior to entering into said contract and are bound by the contract's terms. *See e.g., MS Credit Ctr., Inc. v. Horton*, 926 So. 2d 167, 177 (Miss. 2006) ("a party may neither neglect to become familiar with the terms and conditions and then later complain of lack of knowledge, nor avoid a written contract merely because he or she failed to read it or have someone else read and explain it"). *See also Bailey v. Estate of Kemp*, 955 So. 2d 777, 783 (Miss. 2007) (a party is required to abide by terms of contract he entered into, regardless of whether he failed to read it); *Titan Indem. Co. v. City of Brandon, Miss.*, 27 F.Supp.2d 693, 697-98 (S.D. Miss. 1997) (same); *Oglesbee v. Nat'l Sec. Fire and Cas. Co.*, 788 F.Supp. 909, 913 (S.D. Miss. 1992) (same); *Pederson v. Chrysler Life Ins. Co.*, 677 F.Supp. 472, 475 (N.D. Miss. 1988) (same); *Cont'l Jewelry Co. v. Joseph*, 105 So. 639 (Miss. 1925) (same); *Cmty. Care Ctr. of Vicksburg, LLC v. Mason*, 966 So. 2d 220, 227 (Miss. Ct. App. 2007) (same). Further, Eash's claim that she had no idea what she could win also seems rather disingenuous, as she is clearly an experienced gambler. From the date of IP's re-opening after Hurricane Katrina, December 22, 2005, to February 22, 2006, a period of only two months, Eash wagered $17,005 on table games and $34,973.63 on slot machines. V. 6/48 (IP 4); Ex. 1/34 (IP 13).

expectation of winning a progressive jackpot, as she testified there was no signage advertising a progressive jackpot. V. 6/17 (IP 4).[25]

Moreover, the testimony of Carlyce McClendon, Casino Services Manager for IGT, established that Eash could not possibly have had a reasonable expectation of winning $1,000,000 or a progressive jackpot when she entered into her wagering contract with IP:

> A. I set up a game in the office using these same programs on page eleven, Exhibit one, with the firmware signature verification, and set up the machine as a progressive, no incrimination rate, and played the machine. And at no time were there any displays advertised for any available amounts.
> Q. When you say they don't advertise any available amount, are you saying that when a patron were to walk up to a slot machine set up in that fashion, that it would not say that there was a progressive amount available or any amount available for a win?
> A. That's correct.
> Q. Would any of the displays, the electronic displays, serve as a meter for a progressive game?
> A. No.
> Q. So Ms. Eash, then, would not have seen any reference of $1,000,000 or 200,000 credits until after the completion of her game?
> A. That's correct.
> Q. Not prior to her wager?
> A. No.
> Q. Not prior to the initiation of the spin of the reels?
> A. No.

V. 6/101-102 (IP 4). Clearly, when Eash entered into the wagering contract, she had no reasonable expectation that she could win $1,000,000 or any other progressive jackpot amount from the play of this game.

2. No Meeting of the Minds Occurred as to the $1,000,000 Award as a Term of the Parties' Contract.

In order for IP to be obligated to pay Eash the $1,000,000, a meeting of the minds must have occurred as to the terms of the contract. *See, e.g., Hunt v. Davis,* 45 So. 2d 350, 352 (Miss.

[25]Eash testified that she has played a progressive machine before and is familiar with its advertisement of the available progressive jackpot. V. 6/17 (IP 4).

1950). To the contrary, IP did not assent to the $1,000,000 being the award for a reel combination of three Double Diamond symbols. The Court must look to IP's intent, which was clearly that the subject machine operate as a regular stand-alone machine with a maximum (non-bonus) payout of $8,000, not $1,000,000. *See Union Planters Bank Nat. Ass'n v. Rogers,* 912 So. 2d 116, 121 (Miss. 2005) (cardinal rule of contract construction is to ascertain the mutual intentions of the parties).

IP's intent should first be sought in an objective reading of the words employed in the contract. *See Id.* Clearly, the machine's signage demonstrated that IP intended that a jackpot on the subject machine would entitle a patron to $8,000. However, if the Court looks to extrinsic evidence to determine IP's intent, ample record evidence demonstrates that IP's intent was to award $8,000 for a reel combination of three Double Diamonds on the payline, with maximum credits wagered, absent malfunction. McClendon testified:

> Q. Are you familiar with the Imperial Palace's order of this particular slot machine?
> A. Yes, sir.
> Q. Did they order the machine to be operated as a progressive play?
> A. No.
> Q. How can you tell?
> A. On page 45 of Exhibit one, there's a copy of the order the Imperial Palace placed to receive the machines. The machine in question is one of the two machines referenced as item 100. There are two lines of information at the bottom of that bill, and one of the items listed specifies no meter.
> Q. I'm sorry. This is about in the middle of page 45, item 100.
> A. Yes.
> Q. And then right before item 200, there are two lines of text?
> A. Yes.
> Q. And what does the phrase "no meter" mean to you?
> A. That the machines as ordered were not to be built with a meter embedded.
> Q. Okay. Does that, in turn, tell you that Imperial Palace did not intend to have this machine operate as a progressive device?
> A. Yes. That and also the fact that there is no controller included in the order.
> Q. What do you mean by controller?

A. A controller is a device used to link multiple slot machines together so that amounts wagered on all those machines contribute to a common progressive jackpot.
Q. So if there's no controller ordered, that means that they didn't intend to link it with other games? And because if there was no meter as a part of the order, they didn't intend to operate it as a stand-alone progressive device?
A. That's correct.
Q. Right before the term "no meter" on that order, there's a term that says "stand alone mega jackpot." What does that mean?
A. The stand-alone portion means the game is not intended to linked to other slot machines. The mega jackpot portion refers to a product that's available for lease or purchase through our mega jackpots division.

V. 6/102-104 (IP 4). *See also* Ex. 1/45 (IP 12).

IP's Director of Slots, Robert Blackman, also testified regarding IP's intent:

Q. Could you please turn to page 45 of Exhibit one. Could you please identify this document?
A. This is a lease agreement from IGT for the machine in question.
Q. Is this where Imperial [Palace] ordered the machine?
A. Yes. We ordered a double top dollar two [credit] $5.00 machine.
Q. Can you identify the subject machine on this order?
A. Yes, I can. It's double diamond top dollar, two credit $5.00 game.
Q. When you say top dollar, you are referring to item number 100; is that correct?
A. Yes.
Q. Can you explain how you would know that this was the machine in question?
A. By being a double top dollar, two credit $5.00 game, Barquest [sic] machine.
Q. And this order is actually for two of these machines, correct?
A. Yes.
Q. But this machine was one of the two machines in question, correct?
A. Yes.
Q. Looking at that order 100, there is a second line of text about midway through the page. There is a notation on here, "[no] meter." What does that notation indicate to you?
A. It indicates that a meter would not be coming with the slot machine for the purpose of making it a progressive game.

> Q. Technically, if you could make it a progressive game, would it indicate it was a progressive machine?
> A. Yes, it would.
> Q. Would a progressive control[ler] or device allow the machine to increment as a progressive game?
> A. Yes.
> Q. So if you intended this machine to be operated as a progressive game, you would have ordered a control[ler] or meter with the machine; is that correct?
> A. Yes, ma'am.

V. 6/113-15 (IP 4). *See also* Ex. 1/45 (IP 12). As there is ample, undisputed evidence of IP's intent that this machine operates as a non-progressive game with an $8,000 top award, there was no meeting of the minds between IP and Eash as to a "progressive" award of $1,000,000 as a term of their contract.

3. An Award of $1,000,000 Would Constitute Unjust Enrichment.

Eash would receive the benefit of her bargain by an award of $8,000; any award over $8,000 constitutes unjust enrichment. In *Krider v. Hard Rock Hotel & Casino,* Nevada State Gaming Control Board Decision, case number 2002-8180L (Jan. 11, 2007), the Hearing Examiner declined to award a patron an amount of over $1,000,000 that was erroneously displayed on the machine she was playing. The Hearing Examiner stated:

> The Petitioner's argument of "what you see is what you get" is not persuasive in light of the fact that she would never have accepted 1.4¢ had ***that*** been the erroneous amount shown, but would have conversely demanded the actual $32.34 amount. Now in the reverse, she demands unjust enrichment through the erroneous amount when she was never entitled to more than $32.34.

Id. at 7 (emphasis in original). *See also Marquez, supra* (there was no evidence presented which indicated that the actual intended outcome of the patron's disputed game could have ever exceeded $400, and thus the patron is not entitled to the unjust enrichment he claimed). The Hearing Examiner in this case found similarly:

> Assume that the circumstances in this case had been reversed: Assume that the machine's awards glass showed unequivocally that

> three Double Diamond symbols on the payline, with two credits wagered, entitled the player to winnings of $1,000,000.00. Assume that Eash wagered two credits and hit a combination of three Double Diamond symbols on the payline, with no machine malfunction. Assume further that the machine had been programmed to award only $8,000.00. Under those circumstances, would the casino be relieved of liability for the $1,000,000.00 award? The answer is obviously "No." The casino would be required to pay Ms. Eash the $1,000,000.00 amount shown on the machine's awards glass. That would be the prize amount Ms. Eash bargained for (for that particular winning combination) when she entered the contract with the casino, and that would be the amount to which she would be entitled. That the machine had been programmed incorrectly or that the LCD display and VFD door display showed that Ms. Eash had won only $8,000.00 would not change the terms of the contract between Ms. Eash and the casino.

V. 4/469-468 (IP 6).

Thus, as a matter of law governed by the principles of contract jurisprudence, Eash is not entitled to an award of $1,000,000 because of her "what you see is what you get" argument. Instead, she is entitled only to an award of $8,000.

C. A Unilateral Mistake Does Not Entitle Eash to an Award of $1,000,000.

Eash is not entitled to the $1,000,000 award because she mistakenly believed she won such award. Under Mississippi law, if only one party is mistaken about facts relating to a contract, the mistake will not prevent formation or enforcement of the contract. 3 *MS Prac. Encyclopedia MS Law* § 21:51. However, if the other party causes the mistake, the court may allow the mistaken party to rescind the contract. *Id.* The Mississippi Supreme Court has held that rescission, not reformation, is the proper remedy for unilateral mistake. *Hemphill Const. Co., Inc. v. City of Laurel,* 760 So. 2d 720, 724 (Miss. 2000). In order to reform a contract based on unilateral mistake, there must be fraud or some other "inequitable conduct on the part of the benefiting party." *McCoy v. McCoy,* 611 So. 2d 957, 961 (Miss. 1992).

Eash claims that she should be entitled to the $1,000,000 award due to the mistake that caused her to believe she is entitled to $1,000,000 rather than the $8,000 to which the terms of

her contract entitled her. Awarding Eash $1,000,000 is not the appropriate remedy; to the extent Eash claims IP caused her "unilateral mistake" regarding the contract, her only remedy is rescission.

In *Marcangelo v. Boardwalk Regency Corp.*, 847 F.Supp. 1222 (D.N.J. 1994),[26] the plaintiff brought suit claiming damages based upon inadequate or defective signage. In ruling for the casino, the court first found that the issue of defective or inadequate signage was in the exclusive jurisdiction of the New Jersey Gaming Commission as opposed to the court's. Nonetheless, the court continued and expounded upon the facts of the case and some legal theories behind it, including analyzing the case as one in which the plaintiff was unilaterally mistaken as to the rules of the game. In the event of a unilateral mistake as to the rules of the game, the contract between the patron and the casino becomes voidable and subject to rescission by the patron. In that instance, if the patron rescinds the contract he could not be awarded damages, but would only be entitled to restitution of the amount that he placed into the machine for that game's wager. *Id.* at 1230.

Even assuming that IP misrepresented the rules of the game to Eash, which it did not, the contract is only voidable; thus, Eash may either rescind or affirm the contract. If rescinded, the patron returns what she received and would only be entitled to restitution in an amount the other party was enriched, *i.e.*, the $10 Eash wagered on the game in question. If Eash chooses to affirm the contract, she would be awarded the $8,000, and would be entitled to the damages required to make her whole. The court in *Marcangelo* expounded on what damages would be required to make the patron whole. The plaintiff in *Marcangelo* paid $1.25 and received over $1,100 in return. As a result, the court found that the plaintiff received full value for his

[26]Although the New Jersey Gaming Control Act is somewhat different than Mississippi's, New Jersey is the other major U.S. gaming jurisdiction besides Nevada, and interpretation of the New Jersey Gaming Control Act by New Jersey courts should be considered persuasive in this state.

investment and would not be entitled to receive any further damages. Any additional damages would constitute a windfall. *Id.* at 1230-31. Similarly, Eash paid $10 and would receive $8,000 in return. Thus, any award over $8,000 would constitute a windfall.

D. The MGCs Decision Contradicted Its Numerous Previous Decisions Holding that an Error Does Not Entitle a Patron to a Jackpot to Which She Would Not Otherwise Be Entitled.

In many previous decisions, the MGC Hearing Examiner has found that a patron may not recover an award to which he believes he is entitled as a result of error. The MGC has an obligation to be consistent with those prior decisions. *See LeClede Gas Co.*, 722 F.2d at 275; *Miss. Valley Gas Co.*, 459 F.2d at 506; *Dixie Highway Express, Inc.*, 242 F.Supp. at 1021. It clearly disregarded this obligation.

In *Pickle v. IGT and Sam's Town Casino*, Mississippi Gaming Commission Hearing Examiner Decision, case number 97-01087 (Aug. 25, 1998), *aff'd*, *Pickle*, 830 So. 2d 1214 (Miss. 2002),[27] the patron, while playing a machine at Sam's Town Casino that was linked to IGT's Wheel of Fortune Progressive System, obtained a nonwinning reel combination. However, due to a malfunction, the machine's secondary notification and celebration indicia erroneously activated, meaning that the machine locked up, its candle began to flash, its mechanical bell began to ring, its imbedded progressive meter locked up at a value of $4,724,891.41, and the overhead progressive meter located above the bank of six IGT Wheel of Fortune dollar progressive slot machines at Sam's Town Casino and the imbedded progressive meters of the other five Wheel of Fortune dollar slot machines reset to the base progressive amount of $1,000,000 and thereafter began incrementing. The Hearing Examiner declined to award the patron the primary progressive jackpot, stating:

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[27] On October 22, 1998, the MGC declined to review this Hearing Examiner Decision; thus, this Hearing Examiner Decision became the final order of the MGC. *See* Mississippi Gaming Commission Minutes, October 22, 1998, Item IV. Y. 1.

> The observable evidence that would lead one to believe a jackpot occurred, lights, bells, etc., occurred as a result of an error. This error is certainly unfortunate and it has been the observation of the hearing examiner that everyone, including the hearing examiner, who heard Ms. Pickle's story has felt sympathy for her; but **it is not the task of the hearing examiner to weigh subjective feelings and decide the issue on the weight of the feeling. Instead, the task is to determine from the credible evidence the result of the play of this game**.

Id. at 15 (emphasis added).

In *Bonds v. Grand Casino, Biloxi,* Mississippi Gaming Commission Hearing Examiner Decision, case number 03-00011 (Sept. 15, 2003),[28] the patron claimed she was entitled to $42,371.00, which was the amount erroneously displayed on the machine's progressive meter, for her winning combination on a progressive nickel slot machine. In finding that she was not entitled to the $42,371.00 award, the Hearing Examiner took into consideration that a jackpot amount of $42,371.00 on that particular machine was completely unrealistic, as it is in the present case. Also, the Hearing Examiner based her decision on the fact that, as in this case, there is no evidence that any erroneous display of the jackpot amount was made to the patron **prior** to her hitting the jackpot, and the machine did not display the incorrect amount until **after** she hit the winning combination. The Hearing Examiner concluded, "Because the amount of $42,371.00 which was shown on the machine's progressive meter display was not the actual amount of the jackpot, but was instead the result of a malfunction, Ms. Bonds is not entitled to that amount." *Id.* at 10.

Nevada authorities have held likewise. The Nevada Supreme Court held in *Snow v. Mandalay Bay Resort and Casino*, Nevada Supreme Court Case No. 44295 (2006), that an error that caused a display of an award of the wrong amount does not entitle the patron to the

[28] On October 22, 2003, the MGC declined to review this Hearing Examiner Decision; thus, this Hearing Examiner Decision became the final order of the MGC. *See* Mississippi Gaming Commission Minutes, October 22, 2003, Item III. Q.

erroneously displayed amount. In that case, the patron, Terri Snow, hit the progressive jackpot on a 25-cent slot machine. According to Snow, at the time of her win, one of the machine's displays, located at the top of the machine, read approximately $1,105 as her win. However, when a casino employee inserted his card into the machine to verify the win, Snow noticed that another of the machine's displays, located near the card reader, showed $42,987,000. Nevada State Gaming Control Board investigators concluded that the display showed the $42,987,000 amount due to an internal malfunction and that the actual amount of Snow's win was $1,105. Snow contested the investigation's results, and the Nevada State Gaming Control Board ultimately issued an order resolving the dispute in favor of the casino. Snow appealed, and the Nevada Supreme Court upheld the Nevada Gaming Control Board's decision. The Court stated:

> [T]he Board's decision is based on some outside evidence, including a report of an investigation conducted by the Board's electronic laboratory and explanations by the manufacturers of the tracking display and game software of what took place after Snow hit the jackpot when the casino employee inserted his card into the card reader to verify his win. All of this evidence indicates that the software on the device that communicates, but does not determine, the amount won was incompatible with the device that tracks the machine's functions, resulting in the improper formatting of the digital data that was received by the tracking device. This improper formatting in turn resulted in erroneous information – the $42 million number – appearing on the tracking board display. **The fact that the manufacturers were able to produce similar results in later tests bolsters their explanations**.

Id. at 5 (emphasis added). In the present case, IGT, the manufacturer of the slot machine, was also able to produce similar results in tests conducted after the incident involving Eash occurred, verifying that the display of the hand pay amounts on the machine's electronic displays can occur only after the completion of a game. *See supra* note 10 and accompanying text.

Although *Pickle, Bonds* and *Snow* concerned mechanical errors and the present case concerns human error, the MGC has ruled in at least four decisions that **a patron cannot be awarded money to which he would not otherwise be entitled due to a casino employee's**

error. In one of those cases, *Williams v. ITT Sheraton Casino Tunica*, Mississippi Gaming Commission Hearing Examiner Decision (June 16, 1996),[29] the patron was playing an IGT slot machine at Sheraton Casino in Tunica. Williams hit a winning combination and won $5,000. As part of the jackpot verification process, a casino slot technician opened the machine to perform tests. The slot technician then closed the door of the machine and used his key to reset the machine, taking the machine out of "jackpot" mode and into normal play mode. Another casino employee, a slot representative, "took it upon herself to decide that the slot technician had not reset the machine," so she used her key to "reset" the machine. This second resetting of the machine took the machine out of normal play mode; it also was not put back into jackpot mode. Instead, the insertion of the slot representative's key caused the machine to go into last game recall mode, allowing the machine to display the last five games played on that machine, starting with the last game.

Following this second resetting of the machine, Williams was asked to play off the jackpot. "Playing off the jackpot" means that, following a patron's winning a jackpot and the subsequent resetting of the machine into normal play mode, the winning patron is requested to play a coin to remove the jackpot combination from the face of the reels. An IGT machine in a last game recall mode will not accept a coin; thus, a patron cannot actually play the machine. Instead, when a coin is inserted, the machine automatically begins the cycling of the last five games played. Thus, when Williams inserted a coin, the machine started its cycling of the last five games played, starting with the winning combination for $5,000 just won by Williams. Williams thought he won two back-to-back $5,000 jackpots. The casino explained that he did not. However, Williams subsequently filed a patron dispute with the MGC, arguing that the fault

[29] On July 18, 1996 the MGC accepted the Hearing Examiner's decision into the minutes of the MGC; thus, this Hearing Examiner Decision became the final order of the MGC. *See* Mississippi Gaming Commission Minutes, July 18, 1996 Item III. H.

lies with an employee of the casino and that therefore he should be paid the money. The Hearing Examiner declined to award the second "jackpot" to Williams stating that a patron cannot be awarded money for a nonwinning jackpot "**because of the false feeling of winning that was caused by an employee's error.**" *Id.* at 5 (emphasis added).

Similarly, in *Minnefield v. Harrah's Casino, Vicksburg*, Mississippi Gaming Commission Hearing Examiner Decision, case number 95-D (April 3, 1995),[30] the Hearing Examiner held that a patron was not entitled to a primary jackpot award, as the patron's belief that he was entitled to such stemmed only from incorrect settings by casino employees. In that case, Minnefield was playing a Magic Carpet Ride progressive slot machine at Harrah's Casino in Vicksburg. Above the bank of progressive slot machines, one of which Minnefield was playing, was a marquee which portrayed the amount of the major jackpot, the name of the promotion (i.e. Magic Carpet Ride) and various colored lights. The marquee also announced the winning of a progressive jackpot. On the play in question, Minnefield inserted his money, and the marquee announced the winning of a major jackpot of $30,191.57. The play of the game required that three genies must be aligned on the payline across the face of the reels to win the major jackpot. If the genies appeared on the reels but were not all aligned on the payline, then the minor jackpot had been won. After Minnefield spun the reels, the genies were not aligned across the payline. Casino officials thus determined that the minor, not the major, jackpot had been won.

Upon investigation, an MGC agent determined that the internal settings of the marquee had been set on "single," incorrectly telling the marquee that there was only one jackpot. The correct setting was "many." Because of the setting of "single," the marquee would display only the major jackpot amount and set off the appropriate bells and whistles for the major jackpot

[30] On April 20, 1995, the MGC accepted this Hearing Examiner Decision into the minutes of the MGC; thus, this Hearing Examiner Decision became the final order of the MGC. *See* Mississippi Gaming Commission Minutes, April 20, 1995, Item IV. M. 5.

when any jackpot was won, major or minor. The Hearing Examiner found that the display of the major jackpot amount and the activation of the bells and whistles announcing the winning of the major jackpot were erroneous, and resulted due to incorrect settings by casino employees. The Hearing Examiner concluded, "However much I sympathize with Mr. Minnefield about the error, **it is not for this hearing examiner to rewrite the rules of the games at casinos or award money on anything but the facts and the law and the rules of the game as approved by the Mississippi Gaming Commission.**" *Id.* at 4 (emphasis added).

In *Reeves v. Riverboat Corporation of Mississippi, d/b/a Isle of Capri, Vicksburg*, Mississippi Gaming Commission Hearing Examiner Decision, case number 95-D (November 2, 1995),[31] another case involving human error, the Hearing Examiner reached a similar result. The player in that decision had obtained from a newspaper a coupon that entitled the holder to one free spin on a slot machine for prizes up to a grand prize of $100,000. She appeared at the Isle of Capri in Vicksburg at an appropriate time to use her coupon. The slot machine to be played was a typical slot machine that normally would operate only upon the dropping of a coin into the machine. For the promotion, an employee of the casino used a special key to override the necessity of a coin being placed into the machine. However, prior to Reeves' turn at the slot machine, a casino employee, for the purpose of an internal audit, opened up the machine to determine the identity of the computer chip in the machine. To obtain the identity, the employee put the machine in "test mode four." The employee then closed the machine without pushing the mode button that would have put the machine back in "operational" or play mode.

"Test mode four," in addition to displaying the chip number, is also used to check the machine's response to jackpot commands from the chip. It does this by a technician causing the

[31] On November 30, 1995, the MGC declined to review this Hearing Examiner decision; thus, this Hearing Examiner Decision became the final order of the MGC. *See* Mississippi Gaming Commission Minutes, November 30, 1995, Item IV. T. 2.

reels to spin. On the first spin, the chip orders the highest award to be given, and the reels line up as they would for the highest award. Normally, nothing would happen if a patron entered a coin into the machine while the machine was in test mode four because the machine would not accept the coin. Prior to Reeves' play, however, the necessity of a coin was "overridden" by the insertion of a key by the casino employee conducting the promotion. Thus, when Reeves caused the reels to spin, the reel alignment, governed by "test mode four," corresponded to the grand prize of $100,000. The Hearing Examiner held that the player was not entitled to the $100,000 award:

> **At first blush, one may be inclined to think that it was the fault of the casino and the casino should bear the cost of the employee's mistake. This is the glamour of emotion and not the judgment of reason.** The hearing examiner is of the opinion that the casino had promised bearers of coupons to one free spin on a functioning machine. They should be held to this promise. Slot machines, like all machines, have failures. If on her turn the machine had malfunctioned with a reel tilt, which is not uncommon, then she would still have been owed a free spin on a functioning machine. In this case the facts are not disputed .... The hearing examiner concludes that the machine was not in the normal mode of the machine and that Ms. Reeves was not entitled to a spin of the reels in test mode four, which meant an automatic win at the highest award possible. This hearing examiner and the Mississippi Gaming Commission will hold a casino accountable for its promotional games and will require a casino to honor the rules of those games. **The casino never agreed to anything but a free spin on a normally operating slot machine**. It should not be required to pay $100,000 or anything less, or be allowed to not pay if a patron won on a normally operating machine.

Id. at 11 (emphasis added).

In *Morrissey v. Beau Rivage*, Mississippi Gaming Commission Hearing Examiner Decision, case number 99-00319 (July 23, 1999),[32] the Hearing Examiner ruled that a **set-up error did not entitle a patron to a primary jackpot award**. In that case, Bernice Morrissey

[32] On September 23, 1999, the MGC accepted this Hearing Examiner Decision into the minutes of the MGC; thus, this Hearing Examiner Decision became the final order of the MGC. *See* Mississippi Gaming Commission Minutes, September 23, 1999, Item IV. X. 1.

was playing a quarter Money Masquerade slot machine at the Beau Rivage Casino in Biloxi when the wild symbols appeared in the "any position." The lights and marquee indicated a progressive win of $10,752.47. Casino employees informed Morrissey that she had not won the progressive amount, as the symbols were in the "any position" rather than on the payline, and Morrissey subsequently filed a patron dispute.

The Money Masquerade machines at the Beau Rivage were linked together to form one progressive game. For each coin played in any of the Money Masquerade machines, the top award incremented slightly, as shown to the patrons on the display marquee. The highest award could be won, as clearly shown on the awards glass, by achieving a reel combination of money masquerade symbol, money masquerade symbol, and money masquerade symbol "on pay line only." The next highest award was money masquerade symbol, money masquerade symbol, and money masquerade symbol in "any position." The awards glass on the Money Masquerade machine showed this secondary award to be a fixed amount of 500 coins ($125). The reels on Morrissey's play clearly did not align on the payline but rather in the any position, indicating that she won the second highest award. However, the marquee and other secondary devices such as lights indicated a win of the top award.

After investigation it was discovered that the Money Masquerade machines were set up using a temporary set 71 chip which allowed the technician to set certain functions, including the notification of a primary or secondary progressive win. Whoever had set these functions in the machine (and several of the other Money Masquerade machines) had set the notification for a signal to be sent for a progressive win on both a primary and a secondary win. Morrissey's game outcome would entitle her to a secondary progressive award in a progressive system with a secondary jackpot, so a jackpot signal was sent because of the set-up error. Since this progressive was in reality designed as a one-jackpot system, the software calculating the jackpot

and displaying the amount to the public had only one jackpot display option, and, upon receiving a signal of a progressive jackpot, displayed the only option it had, the top award. The Hearing Examiner concluded that the patron was entitled to $125:

> The commission will enforce the rules of the game and the wager between a patron and a casino. Beau Rivage would be required by the commission to pay the top award if the outcome of the game were the top award. This was not the case ***as was clearly shown by the reels and awards glass***, and as later confirmed by closer examination of the machine by an expert.

Id. at 5 (emphasis added).

In the instant case, as in *Williams*, *Minnefield*, *Reeves*, and *Morrissey*, the patron's false belief that she won a $1,000,000 jackpot was caused by human error. Also, in the instant case, as in *Pickle, Bonds, Snow, Minnefield, and Morrissey*, the player's erroneous belief that she won the amount she claimed was due to secondary indicia occurring **only after** the wager was initiated (in the present case, the LCD player tracking display, the LED display and the VFD door display), and was not the intended outcome of her play as established by the published rules of the game and further evidenced by the testimony concerning IP's intent for the game to operate as a regular stand-alone machine. As in those cases, the patron in this case should not be entitled to an award which she did not win but only thought that she won because of the display of an erroneous amount that occurred **after** her game was completed. Rather, she should be awarded the amount she is entitled as established by the terms of her contract with the casino and the rules of the game as set forth on the awards glass, $8,000.

All of these Mississippi patron dispute hearing examiner decisions – *Williams*, *Minnefield*, *Reeves*, *Morrissey*, *Bonds* and *Pickle* – were either accepted into the minutes of the MGC (as in the case of *Williams*, *Minnefield* and *Morrissey*), or the MGC declined to review them (as in the case of *Bonds*, *Reeves* and *Pickle*). Thus, notwithstanding Eash's completely erroneous assertion that these decisions became decisions of the MGC "due to lack of any

appeal," (*see* Eash's Brief, p. 16), they all become the final orders of the MGC either by its express affirmance or declination to review or pursuant to MISS. CODE ANN. § 75-76-119(2).[33] The MGC, by ignoring these prior Hearing Examiner decisions, ignored its own precedent and the precedent set by *Kelly*, which upheld the MGC's reliance on its own prior decisions.[34] *See Kell*, 778 So. 2d at 777.

IV. THE MGC'S DECISION VIOLATES STATE AND FEDERAL LAW.

The Executive Director recommended to the MGC that it reverse the decision of the Hearing Examiner. As the Executive Director's March 15, 2007, letter to Scott Andress, counsel for IP, states:

> The Hearing Examiner's recommendation to reverse the decision of the Executive Director and rule in favor of Imperial Palace in the above referenced patron dispute was considered by the Mississippi Gaming Commission at its regular monthly meeting on Thursday, March 15, 2007. Based upon a review of the evidence presented before the Hearing Examiner, **the Executive Director recommended** and the Commission voted unanimously to reverse the recommendation of the Hearing Examiner and find that Florida Eash is entitled to the award of $1,000,000 for her winning jackpot combination. That decision now becomes the final order of the Commission.

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[33] MISS. CODE ANN. § 75-76-119(2) provides in pertinent part: "If the commission decides not to review the hearing examiner's decision and recommendation within thirty (30) days of the hearing examiner's decision, that decision shall become the final order of the commission."

[34] In her brief, Eash argues that *Minnefield, Morrissey, Reeves* and *Williams* should be distinguished from the instant case because in those cases the Hearing Examiner affirmed the decision of the Executive Director. Eash's Brief, pp. 13-14. Her rationale is flawed. The Hearing Examiner decides whether the appealing party has overcome its burden in proving that the Executive Director's decision is in error. In each of *Minnefield, Morrissey, Reeves* and *Williams,* the Hearing Examiner found that the appealing party failed to meet its burden, and, accordingly, both the Executive Director's and the Hearing Examiner's decision in those cases are consistent, applying consistent principles to like issues. Because the Executive Director departed from those consistent principles in the instant case, IP was able to meet the burden for reversal, and the Hearing Examiner so ruled, thereby maintaining MGC precedent. The issue of whether the burden has been met to reverse a decision of the Executive Director is irrelevant to the precedential value of a decision of the MGC. Further, contrary to Eash's argument (Eash's Brief, p. 14), the MGC does not review whether an appellant has met its burden to reverse a decision of the Executive Director – the Hearing Examiner does. The MGC simply reviews the decision of the Hearing Examiner. *See* MISS. CODE ANN. §§ 75-76-119(2) and 75-76-163(1).

V. 5/565 (IP 10) (emphasis added). This recommendation by the Executive Director on whether to reverse or uphold his own decision (a) is in excess of the statutory authority of the MGC and was made upon unlawful procedure, as it violates the Mississippi Gaming Control Act, and (b) violates the federal and state constitutions.

A. The Executive Director's Recommendation to the MGC Conflicts with the Mississippi Gaming Control Act.

The Executive Director's recommendation to the MGC was made upon unlawful procedure and exceeds the statutory authority of the MGC, both of which are bases upon which the Court may reverse the MGC's decision. *See* MISS. CODE ANN. § 75-76-171(3).

As an administrative agency, the MGC and its staff may only act where authorized by statute. In *L. & A. Const. Co. v. McCharen*, 198 So. 2d 240, 243 (Miss. 1967), the Mississippi Supreme Court explained:

> 'Administrative agencies are creatures of statute and their power is dependent upon statutes, so that **they must find within the statute warrant for the exercise of any authority which they claim**. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication.'
>
> 'Official powers cannot be merely assumed by administrative officers, nor can they be created by the courts in the proper exercise of their judicial function. Non-existent powers cannot be prescripted by an unchallenged exercise.'

(emphasis added) (quoting 1 AM.JUR.2d *Administrative Law* § 709 at 866).

The Mississippi Gaming Control Act (hereinafter the "Act"), MISS. CODE ANN. § 75-76-1, *et seq.*, sets forth a specific adjudicatory process for patron disputes. The Act authorizes an express and limited role for the Executive Director. That is, whenever there exists a patron dispute, the Executive Director is to conduct "whatever investigation is deemed necessary and shall determine whether payment be made." MISS. CODE ANN. § 75-76-159(1). If a party wishes to appeal the Executive Director's decision, at that point the MGC appoints a hearing examiner.

See MISS. CODE ANN. § 75-76-161. The Act provides for no other action or participation by the Executive Director in patron disputes.

Further, the Act authorizes only one recommendation to the MGC in patron disputes – that of the hearing examiner. *See* MISS. CODE ANN. § 75-76-161 and 75-76-119. MISS. CODE ANN. § 75-76-161(6) provides that the MGC may review the hearing examiner's decision as provided in § 75-76-119. MISS. CODE ANN. § 75-76-119(2) provides that the hearing examiner, not the Executive Director, make the "recommendation" to the MGC:

> The commission may, upon motion made within ten (10) days after service of a **hearing examiner's decision and recommendation**, or upon its own motion within thirty (30) days of the date of the decision and recommendation, order a hearing before the commission upon such terms and conditions as it may deem just and proper to review the decision and recommendation. After hearing, the commission may reverse, modify, or affirm the hearing examiner's decision. If the commission decides not to review the hearing examiner's decision and recommendation within thirty (30) days of the hearing examiner's decision, that decision shall become the final order of the commission.

(emphasis added.)

In contrast to the express command that the hearing examiner make the recommendation to the MGC in adjudicatory proceedings, the Act expressly authorizes the Executive Director to make recommendations to the MGC in licensing proceedings:

> **The executive director has the authority to recommend to the commission** the denial of any application, the limitation, conditioning or restriction of any licenses, registration, finding of suitability or approval or the imposition of a fine upon any person licensed, registered or found suitable or approved for any cause deemed reasonable by the executive director.

MISS. CODE ANN. § 75-76-29 (emphasis added). Because the Legislature omitted the language regarding the Executive Director making a recommendation to the MGC in the statute concerning adjudicatory proceedings, it is assumed that such omission was intentional. *See, e.g., KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 118 (2004) (where a

legislature includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that the legislature acted intentionally and purposely in the disparate inclusion or exclusion). Accordingly, the Executive Director has no power or authority to make a recommendation to the MGC concerning patron disputes.

Because the Act does not authorize the Executive Director to make a recommendation to the MGC in a patron dispute, the Executive Director's act of making a recommendation to the MGC in this case was improper, and thus the MGC's decision was "made upon unlawful procedure" and is "in excess of the statutory authority" of the MGC. As such, the Court should reverse the MGC's decision.

B. A Recommendation by the Executive Director Regarding Whether to Uphold or Reverse His Own Decision Violates Due Process.

As explained below, the Executive Director's recommendation does not comport with due process of law as guaranteed by the United States and Mississippi State Constitutions.

1. Due Process Requires an Impartial Decisionmaker.

In *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970), the United States Supreme Court held that due process requires an impartial decisionmaker. The Supreme Court explained:

> Finally, the decision maker's conclusions as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing. To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on, though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law. And, of course, **an impartial decision maker is essential**.
>
> We agree with the District Court **that prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker. He should not, however, have participated in making the determination under review**.

Id. (emphasis added). *See also Geotes v. Miss. Bd. of Veterinary Med.*, 986 F.Supp. 1028, 1032 (S.D. Miss. 1997). This due process requirement applies to administrative agencies as well as to

courts. *Withrow v. Larkin,* 421 U.S. 35, 46-47 (1975); *Freeman v. Pub. Employees' Ret. Sys.,* 822 So. 2d 274, 281 (Miss. 2002).

As explained previously herein, the Act provides for an express and limited role for the Executive Director in patron disputes. The statutory scheme governing the MGC expressly provides that the investigation and initial decision function is separate from the review and recommendation function. That is, the Executive Director is to conduct an investigation and make an initial determination regarding the dispute. *See* MISS. CODE ANN. § 75-76-159(1). If a party wishes to appeal the Executive Director's decision, the MGC then appoints a hearing examiner. *See* MISS. CODE ANN. § 75-76-161. The full MGC may then review the decision of the hearing examiner. *See* MISS. CODE ANN. § 75-76-161 and 75-76-119. Nowhere does the Act provide for the Executive Director to make a recommendation to the full MGC. In this case, the Executive Director, who made the recommendation to the MGC that it reverse the decision of the Hearing Examiner, clearly was not impartial, as his recommendation to the MGC influenced the MGC's determination to reverse the Hearing Examiner and thereby uphold the Executive Director's own decision. Regardless of the weight the MGC afforded his recommendation, even the possibility of bias on the part of the MGC is unconstitutional. *In re Murchison,* 349 U.S. 133, 136 (1955) ("Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'") (*quoting Offutt v. U.S.*, 348 U.S. 11, 14 (1954)); *Withrow*, 421 U.S. at 47 ("[V]arious situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable."). Mississippi cases have also held that an appearance of impartiality is a violation of procedural due process, even where there is no evidence of actual bias. *See Jenkins v. State*, 570 So. 2d 1191, 1193

(Miss. 1990) (noting that the test for impartiality is objective rather than subjective). *See also Ryals v. State*, 914 So. 2d 285, 286 (Miss. Ct. App. 2005) (reversing a judge's denial of post-conviction relief where the judge was the prosecutor in the underlying case, despite the lack of objection by the defendant, because "the duty to avoid the appearance of impropriety overrides any waiver").

As explained heretofore, the Executive Director acted in this dispute as both investigator and adjudicator. Such dual roles impede upon his neutrality and are prohibited by federal and Mississippi law. *See Bigby v. Dretke*, 402 F.3d 551, 559 (5th Cir. 2005) (citing *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824-25 (1986)) ("decision makers are constitutionally unacceptable when: (1) the decision maker has a direct, personal, substantial and pecuniary interest in the outcome of the case; (2) an adjudicator has been the target of personal abuse or criticism from the party before him; and (3) a judicial or quasi judicial decision maker has the dual role of investigating and adjudicating disputes and complaints"); *Freeman*, 822 So. 2d 281 (while administrative agencies may perform both investigative and adjudicative functions, those functions cannot be performed by the same person); *Miss. Real Estate Appraiser Licensing and Certification Bd. v. Shroeder*, 980 So. 2d 275, 289-90 (Miss. Ct. App. 2007) (same). In this case, the Executive Director's role in the appeal of his own decision violates IP's right to procedural due process. Once that threshold has been crossed, the potential for bias renders the decision void and subject to reversal. Accordingly, the Executive Director's act in making this recommendation to the MGC is unlawful.

2. Due Process Requires the MGC to Follow Its Own Rules.

In *Bermond v. Casino Magic*, 874 So. 2d 480, 484-85 (Miss. Ct. App. 2004), the Mississippi Court of Appeals held that the Mississippi Workers' Compensation Commission's

failure to follow basic due process procedures set forth in its own rules prevented affirmance of its adjudicatory ruling. The court stated:

> The concern that the Commission follow its own rules is not merely academic, because the failure to abide by recognized discovery rules impacts whether a decision is seen as arbitrary and capricious and a violation of due process .... While administrative agencies are to be given deference in applying their rules, **what conveys due process is the very fact that agencies abide by these rules when making decisions**.

Id. (internal citations omitted).

In the instant case, the MGC failed to follow its own rules regarding the adjudication process for patron disputes as established by the Act and MGC Regulations. In addition to failing to follow its own procedures by the Executive Director making a recommendation to the MGC, the MGC also did not follow its own regulation that limits its review to the evidence before the Hearing Examiner, as discussed more fully in Section V.A. herein. Accordingly, the MGC's action violates IP's due process rights.

V. THE MGC'S BASIS FOR ITS DECISION – "FAIRNESS OR THE PERCEPTION OF FAIRNESS" – IS UNSUPPORTED BY ANY EVIDENCE AND IS IN EXCESS OF THE STATUTORY AUTHORITY OF THE MGC.

The MGC clearly based its decision on a matter outside the record, and one which the MGC had no evidence thereof. Specifically, the MGC based its decision on "fairness" or "the perception of fairness." When Eash's request for review first appeared on the MGC agenda, on November 16, 2006, MGC Chairman Jerry St. Pé stated that the MGC has "**an obligation to go beyond the legal and technical issues and look at it from a perspective of equity and fairness**." V. 4/492 (IP 8) (emphasis added). Then, on March 15, 2007, when the MGC voted to reverse the decision of the Hearing Examiner, Chairman St. Pé stated, "We also recognize that the hearing examiner is somewhat restricted in moving toward her judgment and decisions. **The Commission has a broader responsibility in some cases**, without ignoring the law or

regulations, **to ensure that reasonable fairness or a perception of fairness prevails**." V. 5/572 (IP 9) (emphasis added). Subsequent to the vote, Commissioner Hairston commented that the MGC must "guard the reputation of fairness in our gaming industry." *Id.* Commissioner Canon stated that, "[i]t is the responsibility of the Commission to maintain the public trust and integrity." *Id.* These statements all demonstrate the MGC's consideration of a matter outside the record – public perception or opinion – of which it had no evidence.

A. The MGC Exceeded Its Statutory Authority in Basing Its Decision on "Fairness or the Perception of Fairness."

The Act does not authorize the MGC to base its decision on "fairness or the perception of fairness."[35] Indeed, the MGC's review of a hearing examiner's decision in a patron dispute is limited to review of the record. MGC Regulation III. H, Section 17(2), is unequivocal: "The Commission's review will be limited to the evidence before the hearing examiner." Despite this mandate, the MGC considered "fairness" or the "perception of fairness" in making its decision. Clearly then, the MGC's decision was not limited to the record. Accordingly, the MGC exceeded its authority and must be reversed.

B. No Evidence Supported the MGC's Decision of "Fairness or the Perception of Fairness."

Because there was nothing in the record regarding what might under these circumstances constitute "fairness" or the "perception of fairness," the MGC's decision was not supported by any evidence. The MGC had ample evidence to consider and review, as both parties had the

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[35] Eash relies on the MGC's Mission Statement as the authority for the MGCs decision. *See* Eash's Brief, pp. 9, 12, 15 and 16. This is inapposite, for two reasons. First, the MGC's Mission Statement neither bestows authority upon the MGC nor abrogates its responsibility to act within the confines of its statutory authority. While the MGC has certain latitude in the accomplishment of its mission, the underlying limitation on its authority lies in the statute defining its authority. *Bd. on Law Enforcement Officer Standards and Training v. Rushing,* 752 So. 2d 1085, 1090 (Miss. Ct. App. 1999). Second, the MGC's Mission Statement is outside the record on review. Pursuant to MISS. CODE ANN. §75-76-171(2), the Court's review of the MGC's decision must be confined to the record on review. *See also Hardy v. Brock,* 826 So. 2d 71, 76 (Miss. 2001) (*citing Dew v. Langford,* 666 So. 2d 739, 746 (Miss. 1995 (appellate court may not review matters outside the record).

benefit of a full evidentiary hearing before an experienced hearing examiner. Instead of basing its decision on this record evidence, the MGC considered the "perception of fairness." In other words, the MGC seemingly took into account perceived public opinion and equity. However, nowhere in the record was there any evidence of public opinion or equity regarding Eash's dispute. None of the testimony before the Hearing Examiner purported to establish that fairness or the perception of fairness was relevant in anyone's analysis of the dispute, much less even mentions fairness or the perception thereof. Also absent from the record is the "Mission Statement" of the MGC which contains the phrases "integrity of the State of Mississippi" and "public confidence in ... casino gaming industries." Eash's Brief, pp. 9, 12, 15 and 16. Integrity and fairness are not equivalent to fairness; Eash's reliance upon the "Mission Statement" is misplaced, and, given its absence from the record on review, inappropriate. *See* MISS. CODE ANN. § 75-76-171(2). *See also Hardy*, 826 So. 2d at 76 (Miss. 2001) (citing *Dew v. Langford*, 666 So. 2d 739, 746 (Miss. 1995)).

Actually, the awarding of jackpots that vary from that advertised or are not validly won (as in this case), based upon machine malfunction due to mechanical error, human error or otherwise, creates casino patron uncertainty and therefore erodes the integrity of the State of Mississippi and the public confidence in the gaming industry. It is difficult to maintain integrity and public confidence when jackpots are awarded for reasons outside of and contrary to the rule of law.[36] Accordingly, the MGC's decision was not supported by any evidence and should be reversed.

[36] In fact, public opinion would seem to sway heavily in favor of IP. The *Sun Herald* conducted an online poll following a story regarding Eash's dispute with IP. The poll asked, "Should Eash be awarded $8,000 or $1 million on her slot machine payout?" Sixty-four percent, or 421 out of 658 people, said that she should be awarded the $8,000. Just as the Mission Statement cited by Eash, the results of this poll are outside the record.

CONCLUSION

It is undisputed that a human mistake caused Eash to believe that she was entitled to a jackpot of $1,000,000. Although this mistake is unfortunate, it does not entitle Eash to anything other than the $8,000 award to which Eash's play entitled her. This situation is no different from a cashier at a grocery store mistakenly returning too much change after a customer's purchase, or an employer erroneously depositing an excessively high payroll amount into an employee's bank account, or a casino pit boss announcing a player's "21" when in fact the player has busted. In those situations, clearly the customer, the employee, and the blackjack player are not legally entitled to keep such amounts that exceed what should have actually been paid. Although one empathizes with Eash, she likewise is not entitled to an amount that exceeds what she should have been awarded pursuant to the terms of the contract that she had with IP, or indeed an amount that exceeds her reasonable expectations.

Instead of basing its decision upon the Executive Director's arbitrary, sympathy-based recommendation and the MGC's own unfounded perception of equity and public opinion, the MGC should have, as the statutes regarding patron disputes clearly intend, relied upon the specialized expertise of its hearing examiner and the hearing examiner's evaluation of the witness testimony at the full evidentiary hearing and application of law. The MGC also should continue to, as it has in the past, recognize the value of consistency in its very own decisions and with the decisions of its Nevada counterparts. With its inconsistent treatment of patron disputes, the MGC reverts to the era prior to tort reform when Mississippi was infamous for its "jackpot justice."

Accordingly, the Circuit Court's reversal of the decision of the MGC is warranted in this case and should be affirmed by this Court. IP respectfully requests that this Honorable Court

affirm the Circuit Court decision reversing the final order of the MGC, and render a decision in favor of IP.

Respectfully submitted, this the 8th day of July, 2008.

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CERTIFICATE OF SERVICE

I, the undersigned counsel, do hereby certify that I have this day served, via U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing pleading to:

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