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IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
SIXTH DIVISION

GULFSIDE CASINO PARTNERSHIP **APPELLANT**

v. **CASE NO. 60CV-19-5832**

ARKANSAS DEPARTMENT OF FINANCE AND ADMINISRTRATION AND ARKANSAS RACING COMMISSION **APPELLEES**

APPELLEES' RESPONSE IN OPPOSITION TO APPELLANT'S MOTION FOR CONTEMPT AND ENFORCEMENT

The Arkansas Department of Finance and Administration ("DFA") and the Arkansas Racing Commission ("ARC"), submit this Response in Opposition to Gulfside's Motion for Contempt and to Enforce this Court's May 24, 2020 Order:

1. Pending is Gulfside's Motion to Enforce this Court's March 24, 2020 order and Motion for Contempt of that order. Because Gulfside's motion (1) fails to identify any contemptuous conduct; (2) fails to identify any provision of the order requiring enforcement; and (3) requests relief for claims (a) that fall outside of the scope of their Amended Complaint; (b) that fall outside of the scope of their APA appeal; and (c) over which this court lacks subject matter jurisdiction, then it must be denied.

2. It is the willful disobedience of a valid order that may constitute contempt. *Ivy v. Tom Keith, Judge*, 351 Ark. 269, 92 S.W.3d 671 (Ark. 2002). Before a person can be held in contempt for violating a court order, the order must be definite in its terms, clear as to what duties it imposes, and express in its commands. *Lilly v. Earl*, 299 Ark. 103, 771 S.W.2d 277 (1989). Contempt is a matter between the judge and the litigant, and not between two opposing litigants. *Hickinbotham v. Williams*, 228 Ark. 46, 305 S.W.2d 841 (1957). Contempt is divided into criminal contempt and civil contemp. *Ivy v. Tom Keith, Judge*, 351 Ark. 269, 92 S.W.3d 671 (Ark. 2002). Civil contempt protects the rights of private parties by compelling compliance with orders of the court made for the benefit of private parties. *Id*. at 677.

3. To evaluate Gulfside's request for civil contempt, it is necessary to identify precisely what action it alleges is contemptuous.

4. First, Gulfside essentially maintains that this court ordered the Commission to issue to it a casino gaming license, and the Commission's failure to issue a license on or before May 5, 2020 constitutes contempt of the March 24, 2020 order. Gulfside is mistaken.

5. On March 24, 2020, this court entered three orders, separately addressing each count in Gulfside's Amended Complaint. Concerning Count III, Gulfside's complaint alleged that, in the event only one facially sufficient application for issuance of a casino license is filed during an application period,

any further actions of the Arkansas Racing Commission are purely ministerial, pursuant to Amendment 100 of the Arkansas Constitution. Based on this premise, Gulfside requested that this court remand this case to the Racing Commission with instructions that the Commission is ***required*** to issue it a casino license.

6. This court rejected Gulfside's argument, ruling:

> It is clear from reading Amendment 100 as a whole that **Gulfside's premise is incorrect** and that the Racing Commission is invested by Amendment 100 with both the **privilege and the responsibility of utilizing its discretion as to whether a casino license should be issued to any applicant, regardless of whether such applicant is the only applicant during an application submission period.**
>
> The relief requested in Count III of the First Amended Verified Complaint is denied, except to the extent granted in this *Order*.
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> * * *
>
> This matter is remanded to the Racing Commission to apply the provisions of Amendment 100 and the Racing Commission in considering Gulfside Casino Partnership's casino application on its merits.
>
> Any relief requested in the First Amended Verified Complaint not specifically granted in this *Order* or the court's separate orders concerning Count I and Count II of the First Amended Verified Complaint is denied.

7. Because this court's order did not mandate that the Racing Commission issue Gulfside a casino gaming license, then Gulfside's motion for contempt is wholly without merit. Indeed, the order expressly places the issuance of any casino gaming license within the Racing Commission's privilege and discretion.

8. Gulfside is also mistaken in its assertion that the Commission was required to issue to it (or any other applicant) a casino gaming license on or before May 5, 2020.

9. The Arkansas Racing Commission administers and regulates casino licenses, including their issuance and renewal. Ark. Const. Amend. 100 § 4(a) The Commission is also given the responsibility of administering and enforcing the provisions of Amendment 100. *Id.* Consistent with the authority given to it by Amendment 100, the Commission has adopted rules concerning the "manner in which the Arkansas Racing Commission considers applications for issuance of casino licenses" and "[a]ny other matters necessary for the fair, impartial, stringent, and comprehensive administrative of its duties under [ ] Amendment [100]." Ark. Const. Amend. 100 § 4(e)(2) & (e)(13).

10. Pursuant to Amendment 100, the Commission *shall require* all casino applicants for a casino license in Pope County . . . to demonstrate experience conducting casino gaming. Ark. Const. Amend. 100 § 4(m).

11. Consistent with its constitutional duties and responsibilities, the Arkansas Racing Commission has rules governing the application, licensing, and renewal of casino gaming licenses in Arkansas. Arkansas Casino Gaming Rule (ACGR) 2.13.

12. The casino licensing procedure includes an application and selection process. ACGR 2.13 .4 & 2.13.9. To be sure, the section concerning the application process expressly states, "Applications that have been received and verified by the Commission will be considered based upon the **selection processes set out in these Rules.** ACGR 2.13.4(c).

13. In addition to documentation establishing minimum qualifications and other requirements, casino applicants must submit responses to the Commission's merit criteria in a form and manner prescribed by the Commission. ACGR 2.13.9(a) Additionally, representatives of the casino applicant shall appear before the Commission and the Commission's consultant for an interview regarding the casino applicant's qualifications and proposal for operating a casino in Arkansas. ACGR 2.13.9(a). A review panel comprised of members of the Commission shall evaluate the applications and award points for each merit criterion. ACGR 2.13.9(d). Then, the Commission will notify each applicant of their score and ranking among all casino applicants. ACCR 2.13.9(d).

14. At the conclusion of the process, which includes both the application and selection process, [1] the Commission will award a casino license within thirty (30) business days from the date the Commission announces that the application process[2] has concluded. ACGR 2.13.10(a).

15. Gulfside's argument that the Commission was required to issue to it a license on or before May 5, 2020 is not well founded or supported by the Commission's rules. Nothing in Amendment 100 or the Commission's rules limits the selection processes to a thirty day period. Instead, the thirty day period of time is triggered once the Commission announces the conclusion of the application process, which expressly also includes the selection processes. ACGR 2.13.4(c).

16. Gulfside arbitrarily argues that Court's March 24, 2020 order triggered "the 30-business day window", which it argues expired on May 5, 2020. The plain text of this court's order does not include any time limitations. Rather, the order remanded this matter to the Commission to consider Gulfside's application on the merits. Gulfside's argument conveniently ignores Rule 2.13.4(c), which informs applicants that the entire application process includes the selection processes set out in the Commission's rules. The Commission's selection process as set forth in its rules, includes specifically

[1] ACGR 2.13.4(c).

[2] Application and Selection processes. ACGR 2.13.4(c).

Rule. 2.13.9—the merit based selection process, and it is not limited to a thirty day period. ACGR 2.13.9(a) & (b).

17. Further, Rule 2.13.9 requires casino applicants to appear before the Commission and the Commission's consultant for an interview regarding the applicant's qualifications and proposal for operating a casino. All applicants, including Gulfside, will have an opportunity to appear before the Commission, on June 18, 2020. (Exhibit A) Gulfside has not yet satisfied this step in the selection process, which is ongoing.

18. Importantly, Gulfside is aware that the Commission is actively addressing matters concerning the merit based selection process. As noted in its motion, following this Court's March 24, 2020 order, the Commission considered a request by Cherokee Nation Business (CNB) to submit an application under the Commission's good cause provisions. That application was accepted. During the May 7, 2020 Commission meeting, counsel for Gulfside and CNB participated in discussions concerning the merit based selection processes. That meeting occurred just five days prior to Gulfside filing the pending motion. Certainly, Gulfside was aware ***prior*** to filing the current motion that the Commission was actively considering next steps in the merit based selection process. Because the merit based review is ongoing, then Gulfside's request to have the Commission consider its application on the

merits is completely unnecessary.[3] That reason alone is sufficient reason to reject Gulfside's request for enforcement of this court March 24, 2020 order.

19. Lastly, Gulfside's request that this court order the Commission to "immediately consider Gulfside's application on its merits as the only applicant for a Pope County Casino License as it was during the relevant time period" fails for several reasons.

20. As a threshold matter, this court has already held that, even if Gulfside was the only applicant, the Commission is still not *required* to issue

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[3] Gulfside's reliance on the July 2019 and December 2019 meetings and the reference to a thirty day window from the application "period" is misplaced. The rules clearly indicate that the thirty day licensing period is triggered following the application and selection process and upon an announcement by the Commission that the ***process***, not application **period** has concluded. Gulfside does not assert, nor can it, that the Commission has announced the conclusion of the process. Indeed, the merit based selection process is yet ongoing. More importantly, this court does not have subject matter jurisdiction over claims asserting that a state agency did not properly follow its own rules. *Naturalis, infra*; *Carpenter Farms, infra.*

to it a casino gaming license. The exact argument was presented in Gulfside's Amended Complaint and expressly rejected in this court's March 24, 2020 order.

> It is clear from reading Amendment 100 as a whole that **Gulfside's premise is incorrect** and that the Racing Commission is invested by Amendment 100 with both the **privilege and the responsibility of utilizing its discretion as to whether a casino license should be issued to any applicant, regardless of whether such applicant is the only applicant during an application submission period.**

21. Next, to the extent that Gulfside asks this court to invalidate the Commission's decision to accept CNB's application under its good cause provision and declare Gulfside as the sole casino applicant, that argument violates the separation of powers doctrine.

22. Subject-matter jurisdiction is a court's authority to hear and decide a particular type of case. *Hunter v. Runyan*, 2011 Ark. 43, 382 S.W.3d 643 (Ark. 2011). A court lacks subject-matter jurisdiction if it cannot hear a matter under any circumstances and is wholly incompetent to grant the relief sought. *See, e.g., J.W. Reynolds Lumber Co. v. Smackover State Bank*, 310 Ark. 342, 352–53, 836 S.W.2d 853, 858 (1992). The question of whether a circuit court has subject-matter jurisdiction is based on the pleadings. *Tripcony v. Ark. Sch. for the Deaf*, 2012 Ark. 188, 403 S.W.3d 559 (Ark. 2012); *see also Arkansas Department of Finance and Administration v. Naturalis Health,*

LLC, 2018 Ark. 224, 549 S.W.3d 901 (Ark. 2018)(holding that the circuit court did not have subject matter jurisdiction to review the Medical Marijuana Commission's licensing process, under the Administrative Procedures Act.).

23. Courts, generally, do not have jurisdiction to examine state agencies' administrative decisions. *Id*. at 906 (citing *Tripcony v. Arkansas Sch. For the Deaf*, 2012 Ark. 188, 401 S.W.3d 559 (Ark. 2012)). This limitation is firmly established in the separation of powers doctrine. *See id*. Our constitution divides state government into three branches. *Id*. No branch "shall exercise any power belonging to either of the others." *Id*. (citing Ark. Const. 4 § 2). For that reason, the judicial branch is prohibited from reviewing the day-to-day actions of the executive branch. *Id*. Similarly, the Administrative Procedures Act subjects *limited* agency decisions to circuit court review. *Id*. State agencies act administratively, and at times judicially or quasi-judicially. *Sikes v. Gen. Pub. Co., Inc.*, 264 Ark. 1, 568 S.W.2d 33 (Ark. 1978). It is only with respect to its judicial functions, which are adjudicatory or quasi-judicial in nature, that the Administrative Procedures Act purports to subject agency decisions to judicial review. *Id*.

24. Accordingly, in cases of "adjudication" a person who considers herself injured in her person, business, or property by an agency's final action is entitled to judicial review of that action. Ark. Code Ann. § 25-15-212(a). "Adjudication" is defined as the "agency process for the formulation of an

order." Ark. Code Ann. § 25-15-202(1)(A). An "order" is defined as the "final disposition of an agency in any matter other than rule making, including licensing and rate making, in which the agency is required by law to make its determination after notice and a hearing." Ark. Code Ann. § 25-15-206(6). If the agency has not conducted an adjudication, then there is no reviewable agency action under the Administrative Procedures Act. *Naturalis*, 549 S.W.3d at 906 (citing *Fatpipe, Inc. v. State*, 2012 Ark. 248, 410 S.W.3d 574 (Ark. 2012).

25. The Arkansas Supreme Court has long settled that, decisions like the ones Plaintiffs challenge in this action, are not, as a matter of law, adjudications. *See Sikes v. General Pub. Co., Inc.*, 264 Ark. 1, 568 S.W.2d 33 (Ark. 1978). They are, therefore, not subject to judicial review. *Id*. In *Sikes*, the Arkansas Supreme Court held that it was simply "too clear for argument" that the Printing Board's decision to rescind four printing contracts after the successful bidder failed to secure the required performance bonds, did not constitute an adjudication. 568 S.W.2d at 34, 36. The board was not required by law to make its determination after notice and a hearing. *Id*. at 36. The board heard no testimony, made no findings of fact or conclusions of law, and no copy of any decision or order was served on the parties. *Id*. Rather, the board's decision was purely administrative. *Id*.

26. More than three decades following its *Sikes* decision, the Arkansas Supreme Court again reiterated that a state agency's administrative decisions are not subject to judicial review pursuant to the Administrative Procedures Act and that circuit courts lack subject matter jurisdiction to review administrative decisions. *Fatpipe v. State*, 2012 Ark. 248, 410 S.W.3d 248 (Ark. 2012). There, the Office of State Procurement determined that Fatpipe did not have standing to contest the award of a state contract for broadband services. *Id*. at 578. Relying on the *Sikes* decision, the *Fatpipe* court held that an agency's decision that did not emanate from a hearing, contain findings of fact or conclusions of law, or an order did not fall with the purview of the APA. *Id*. at 578-579. Our appellate courts have applied this well-settled principle of law in various contexts. For example, agency personnel matters, such as hiring and terminations, are not subject to judicial review. *See Tripcony*, *supra*; *see also Arkansas Livestock and Poultry Comm'n v. House*, 276 Ark. 326, 634 S.W.2d 388 (Ark. 1982). Our appeals courts have similarly explained that licensing and application processes facilitated by state agencies are not reviewable under the APA. *See Naturalis*, *supra*; *see also Sears v. Zumwalt*, 2013 Ark. App. 744, 2013 WL 6563096 (Ark. App. 2013)(unreported decision).

27. Following the Arkansas Supreme Court's decisions in *Carpenter Farms, Naturalis, Sikes, Fatpipe,* and *Tripcony*, this court lacks subject matter jurisdiction to examine the Commissions' administrative decision to accept

CNB's application under its "good cause" provision. Plaintiffs do not identify any action by the Commission that would qualify as an adjudication as defined by the Administrative Procedures Act. It is too clear for argument that the Commission's administrative decisions do not constitute an adjudication. *Sikes*, *supra*. The Commission heard no testimony, made no findings of fact, or conclusions of law. *Id*. There were no "parties," and no copy of any "decision or order" was served on any parties. *See id*. Rather than an adjudicatory action, the Commission's decision to accept CNB's application for "good cause" was an entirely administrative function.

28. The same is true for Gulfside's request that this court enter an order directing the Commission to show cause why the Commission has allegedly failed to follow its own rules.

29. First and foremost, the Commission has not failed to follow its own rules as articulated throughout this response because no rule requires the Commission to finalize the selection process within Gulfside's thirty day window.

30. Second, Gulfside new arguments fall outside of the scope of their Amended Complaint and the grounds for their APA appeal. Gulfside cannot circumvent the Arkansas Rules of Civil Procedure or the APA by using the court's March 24, 2020 to raise challenges and obtain relief that fall entirely

outside of its original cause of action; that are not properly exhausted, and that fall outside of this court's jurisdiction.

31. Third, much like the Commission's decision to accept CNB's application for good cause, this court, respectfully, does not have subject matter jurisdiction over a claim that a state agency has failed to follow its own rules. The Arkansas Supreme Court has settled this question in several cases, including *Ark. Dep't of Finance and Admin. v. Naturalis Health,* 2018 Ark. 224, 549 S.W.3d 901 (Ark. 2018) and most recently *Ark. Dep't of Finance and Admin. v. Carpenter Farms Medical Group, LLC*, --- Ark. ---, --- S.W.3d --- (Ark. May 28, 2020) (Exhibit B).

32. In *Naturalis*, the appellees' alleged that the Medical Marijuana Commission had violated its own rules and procedures during the application process and asked the circuit court to invalidate the Commission's results. *Id*. at 907. The Pulaski County Circuit Court did invalidate the results, and the MMC and DFA appealed. *Id*. at 903-904. On appeal, the Arkansas Supreme Court reversed and dismissed the case, holding that the circuit court lacked subject-matter jurisdiction. *Id*. 904. In reaching its conclusion, the *Naturalis* court opined that permitting circuit courts to determine whether a state agency complied with its own rules would largely eliminate the notice and hearing requirements of the APA and would swallow Arkansas Code Annotated § 25-15-212 entirely. *Id*. at 907.

33. On May 28, 2020, the Arkansas Supreme Court again held that circuit courts lack subject matter jurisdiction to review challenges to a state agency's application of its own rules. *Carpenter Farms*, *supra*. An agency's case specific application of its own rules is not subject to judicial review. *Id*. The *Carpenter Farms* decision expressly held, "A court cannot review 'how [an agency] rule should be applied given a particular set of facts or circumstances.'" *Id*.

34. Gulfside dedicates a substantial portion of its motion challenging the manner in which the Commission applies its rules. The court does not have subject matter jurisdiction over these allegations, and as a result, no order to show cause can be issued, requiring the Racing Commission explain the application of its rules to a particular set of facts or circumstances. *Carpenter Farms, supra*.

35. In sum, Gulfside's motion for contempt is without merit. The Commission has not failed to comply with this court's March 24, 2020 order because that order did not require the Commission to issue Gulfside a casino gaming license. Further, the order did not require the Commission to issue a license to Gulfside or any applicant on or before May 5, 2020. More importantly, the Commission is complying with the court's March 24, 2020 order. As Gulfside was and is aware, through its counsel's participation at the Commission's March 7, 2020 public meeting, that the Commission is

considering next steps in the merit based selection process. So, Gulfside's application is being considered on the merits. Furthermore, Gulfside's request for relief that fall outside of the scope of their APA appeal, including the collateral challenge to the Commission's decision to accept CNB's application for "good cause" and the request that this court order the Commission to "show cause" for its alleged rule violations, violates the separation of powers doctrine. The motion presents no grounds upon which an order of contempt or enforcement should be issued.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I Kat Guest, hereby certify that on May 29, 2020, I electronically filed the foregoing with the Clerk of the Court via the court's eflex system, which should send notice to all counsel of record.

/s/ Kat Guest
Kat Guest