IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NORTH DAKOTA

IN RE:	)	
	)	Chapter 7
RACING SERVICES, INC.,	)	
	)	Bankruptcy No. 04-30236
Debtor.	)	

RULING ON CLAIM

This matter came before the Court by telephonic hearing.[1] Doug Anderson appeared for the State of North Dakota (the "State"). Michael Raum appeared for Susan Bala ("Bala") and Racing Services, Inc. ("RSI"). Kip Kaler appeared for himself as the Chapter 7 Trustee (the "Trustee"). Leanna Anderson, Martin Foley, and Michael Lubic appeared for PW Enterprises ("PWE"). The Court heard argument and allowed post-trial briefing. All papers have been submitted and the case is ready for decision. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

STATEMENT OF THE CASE

The Court held a status conference to determine how the parties wanted to proceed after the BAP reversed this Court's order finding that claims made by the State of North Dakota, on behalf of a private entity, are barred by the doctrine of

[1] The Honorable Thad J. Collins, Chief Judge of the United States Bankruptcy Court for the Northern District of Iowa, sitting by designation.

laches. The State of North Dakota filed yet another Amended Proof of Claim just hours before the hearing. (Claim 51-2). The State informed the Court that it wanted to proceed with another evidentiary hearing to address its new claim. Bala argued in response that the Court should rule on the record as it exists from the May 30, 2019 hearing without taking more evidence. Bala asserted that the BAP's reversal was limited solely to the Court's application of the doctrine of laches and does not reverse any of the Court's factual findings or allow for any additional evidence. The State argues that the BAP's remand order opens up consideration of any newly filed claim and allows for, if not requests, new evidence to be taken.

BACKGROUND

The background and history giving rise to this case has been thoroughly stated in a number of prior opinions. See In re Racing Services, Inc., 482 B.R. 276 (Bankr. D. N.D. 2012); In re Racing Services, Inc., 595 B.R. 334 (Bankr. D. N.D. 2018). The Court will not run through all the background facts. However, some context is necessary to understand the precise issues now before this Court.

The State's claim that is now before the Court is an unusual claim (to say the least) in an already very unusual case. The case was filed almost 17 years ago. Claims filing deadlines came and passed over 16 years ago. The bankruptcy case admittedly was tipped on its head 11 years into the case (6 years ago) when PWE won an adversary claim against the State. PWE sued on behalf of the bankruptcy

estate acting as the Trustee. More than 10 years into the case, PWE won its case against the State—and the State was ordered to return all tax money it has collected from Debtor on certain gambling transactions. This totaled more than $15 million.

After some negotiations, PWE, the Trustee, and the State agreed to a lump sum of $15,872,000.00. Part of that agreement required the State to waive any claim it had. The funds came back to the estate. PWE, another regular gambler, and Susan Bala all moved to amend their claims—substantially raising these claims. The State made no claim and raised no issues about protecting Team Makers or any other charities. Team Makers did not file a new claim. The Court made clear that any party that had a new or amended claim needed to get it before the Court with the others.

The Court held a week-long evidentiary hearing in Fargo with the express intent of bringing closure to all claims issues. Neither the State nor Team Makers participated. Near the end of November 2018, the Court issued its final ruling on claims. It denied PWE's new claim, another professional bettor's claim, and most of Susan Bala's new claims.

Despite all of this, on December 31, 2018, more than 14 years into this case, the State filed a new Proof of Claim (the "Claim"). (Claim 51-1). PWE, for reasons of pure self-interest, backed the State's new claims. Bala and the Trustee

objected for a variety of reasons. (ECF Docs. 961, 966). The Court held an evidentiary hearing on May 30, 2019 in Fargo, North Dakota. (ECF Doc. 993). The Court received testimony, admitted documents, and heard oral argument.

At the close of evidence and after Bala and the Trustee rested their cases, the State orally moved to amend the Claim again to add a new claim for breach of contract. Bala opposed the oral motion to amend and the Court heard argument. At the close of argument, the Court took all of the issues under advisement—timeliness of amendments, the merits, and the findings necessary.

Ultimately, the Court disallowed all the State's bases for its claims. The Court first found that the State lacked *parens patriae* authority to assert of the Claim. The Court then found that the equitable doctrine of laches barred the State from asserting the Claim on behalf of Team Makers Club, Inc. ("Team Makers"). (ECF Doc. 1015). Team Makers was a charity that stood to benefit from the Claim. Team Makers gave the State the consent to pursue the Claim on its behalf first before the evidentiary hearing. The State appealed the Court's denial of the Claim to the BAP. (ECF Doc. 1017). PWE, which had joined the State's arguments in favor of its new claims—and took the laboring oar on many arguments for the State—also joined in the appeal.

PWE's pursuit of the Claim on behalf of the State was eventually explained. PWE had entered into an agreement with the State that PWE would get one-half of

the Claim the State recovered for Team Makers with PWE's help. It is unclear whether Team Makers agreed to any of this. It was unclear for most the day's proceedings because PWE initially claimed that any agreement was protected by "attorney-client" privilege and could not be disclosed.

The BAP denied PWE's request to participate on appeal. The BAP issued its ruling on September 16, 2020, affirming in part and reversing in part the Court's disallowance of the Claim with an order directing the case to be remanded for a determination on the merits. See N.D. ex rel. Stenehjem v. Bala (In re Racing Servs.), 619 B.R. 681 (B.A.P. 8th Cir. 2020). The BAP affirmed on this Court's *parens patriae* ruling but reversed on the issue of laches.

This Court held a status conference on October 6, 2020 to determine how to proceed on remand. (ECF Doc. 1059). Hours before the conference, the State filed another new claim—Claim 51-2—which purported to formally include the breach of contract claim the State had attempted to assert by oral amendment of the Claim at the end of the May 30, 2019 evidentiary hearing. The State also requested that the status conference address the procedure to be followed for trial on the new Claim 51-2. (ECF Doc. 1061). The Court heard argument and again took the issue under advisement.

The parties have submitted their post-hearing briefs. Bala argues that the Court should rule on the record as it exists from the May 30, 2019 evidentiary

hearing. Bala asks the Court to deny the State's Proof of Claim in its entirety. Bala argues that the Court should deny the State's Motion to Amend at trial but should deny on the merits even if the Court allows amendment post-trial (*i.e.* Claim 51-2). The State argues that the BAP's broadly worded remand order permits consideration of Claim 51-2. The State asks for an evidentiary hearing or, at a minimum, that the exhibits attached thereto be offered to supplement the May 30, 2019 record. PWE again dutifully supports the State's arguments per the claim-splitting agreement.

For the following reasons, the Court finds that determination on the merits of the State's new claims is limited to the record as it exists from the May 30, 2019 hearing. On that record, the Court further finds and holds that the Claim is denied in its entirety.

DISCUSSION

The case before the Court involves two distinct bases for the State's claims: (1) the State's "statutory claim" purporting to be made under certain provisions of the North Dakota Administrative Code, North Dakota Century Code, and North Dakota Constitution, and (2) the State's purported additional breach of contract claim that it offered by oral amendment after the evidentiary hearing, and then formally filed as new Claim 51-2 in its Motion to Amend. The second claim—alleging breach of contract—raises two additional procedural questions before

even getting to its merits. The first is whether to allow another amendment to the Claim on remand, and consider it as Claim 51-2, and if so, whether to allow more evidence to support the new claim. The Court will address the procedural issues first.

I. Motion to Amend Claim to Add Contract Claim

The State, dutifully supported by PWE, suggests that its motions to amend the Claim orally at the close of the evidence—and more recently in writing after remand from the BAP—were proper and should be granted. The State and PWE believe that the BAP's opinion concludes that there is a statute of limitation on claims—which provides no limit here, that the equitable doctrine of laches does not apply, and that its "tardily-filed claims" must be allowed because they "are filed in time to permit distribution under § 726(e) [of the Bankruptcy Code]." The State and PWE essentially state that any claim (and this amended claim) can be filed any time (even after trial, appeal, and remand) as long it is "filed in time to permit distribution." It is undisputed that the amended claim is in time to permit distribution, thus the State and PWE conclude the claim must be considered under the BAP's very broad ruling.

This Court agrees with the State and PWE that the BAP's language is so broad that it might be read to permit claim filing in all cases at any time before

distribution without any exception. However, this Court does not believe this is what the BAP intended, or what the applicable law actually supports.

Thus, this Court first backs up to determine what the BAP actually decided, and what it requires this Court to do. On that question, it is clear the BAP found the equitable doctrine of laches is not applicable. The BAP held laches could not apply because there is a statute of limitation provision on claims. According to the BAP, that provision states that a claim is not eliminated from consideration if it is filed any time before final distribution. In other words, the BAP concludes there is no limit to the time for filing until distribution—and this lack of a limit is in fact a statute of limitation. The BAP builds on this questionable logic by thus concluding laches is not available if a statute of limitation applies and has not run.

The BAP position leads to an endless loop that reinforces itself. The Trustee delays distribution because a new or amended claim is filed. Then the party filing the delayed claim argues that it can file it late because no distribution has occurred. If the Court decides that claim, and a party does not like the ultimate affect on the possible distribution, that party is then allowed to file a new claim or amended claim as long as it beats the trustee's distribution. If it is filed before distribution, the trustee then delays distribution awaiting the resolution of the claim.

This broad idea of late claim filing the BAP endorses allows parties to abuse the system, take directly contrary positions to those taken years before in substantial litigation, and to suffer no consequences at all while legal fees and court resources are endlessly expended. This is exactly what has happened here. There is now money in the estate that was not previously contemplated or expected and the parties have decided to essentially start all over and litigate anew, with new positions, and new fees. If that is indeed what the BAP intended, that is very unfortunate.

This absurd process is exactly what got this case to this point. The State did not like the result of the November 2018 claims decision—to which it was not a party—but resulted in the probability that Susan Bala would receive a good sum of money. The Trustee was awaiting final determination of the claims. The State, however, exploited the above-referenced process—and filed its **new** claim before that claims decision was final (it was on appeal) and then argued that it had a right to file a new claim because final distribution had not occurred. The BAP held this Court could not block the "new" claim because distribution had not occurred.

On the remand from the BAP, the State amended its claim again and makes the same argument—no final distribution has occurred. The absurdity of this process plods forward and the State asserts it does so with the BAP's blessing.

This Court thus will not apply laches, although this Court continues to believe very strongly that the doctrine should apply to end the runaway litigation that has arisen.

The State and PWE are essentially trying to restart the entire claims process—15 years into the case—and to boldly take new positions contradicting their previous positions in the case. The original adversary claim filed by PWE, acting as trustee on behalf of the bankruptcy estate and against the State, that resulted in $15,872,000.00 being returned to the bankruptcy estate demonstrates this vividly. PWE sought the return to the estate of all or some part of the revenue the State had collected from RSI for gambling tax debts. In response, the State argued **it** was entitled to **all** that money. It never argued Team Makers, or any other charity had any right to that money. PWE also made no arguments—even during the adversary—that it believed the State should keep some of that money to fund "obligations" to Team Makers or any charity. It is undisputed that the State and PWE both knew about Team Makers and all the theoretical claims it could assert.

When PWE's claim prevailed against the State, PWE did not simply agree to take payment on its then-existing claim of nearly $2,000,000.00—the claim it had asserted through all the years of adversary litigation. PWE did not advocate that all amounts collected above its claim be paid to other estate claims—which is of course what PWE argued it was trying to do when it asserted it was stepping into

the shoes of the Trustee and acting on behalf of all claimants to pursue the adversary. PWE instead suddenly realized there was much more money to go after—12 years into the case. After PWE won that adversary case in the biggest possible way, PWE suddenly asserted that it actually held a claim for millions more than originally asserted. PWE then moved for permission to amend its claim to try assert a new claim for almost all of the money being returned. Once PWE did so, other parties that had not previously asserted claims, or had asserted smaller claims, asked to amend their long-standing claims. Because of the unique nature of this case—where $15,872,000.00 came back into the estate 10 years into the case—the Court held a hearing on any new or amended claim that a party to the case wanted to pursue.

The Court held that hearing—13-plus years after the case was filed and the same number of years after the claims deadline. PWE, Bala, and one other party had filed motions to allow their "second-chance" claims. Importantly, the State did not amend its claim (which it had the right to do) and did not file any purported claim on behalf of any charitable party. The State knew it was paying millions back into the estate. The State knew what the North Dakota State Constitution and the North Dakota statutes said about the net proceeds of gambling. The State knew Team Makers was a charity that benefited from the RSI operation. Team Makers

itself knew it was a charity that it had a second chance to file a claim. In spite of all of that, neither the State nor Team Makers made any claims at all.

The Court eventually held a week-long evidentiary hearing to finally address and resolve all new or newly amended claims. The State and Team Makers declined the opportunity—a second time—to participate or assert anything.

After the week-long trial on claims in Fargo, North Dakota, and receiving extensive post-trial briefing, the Court issued a 99-page opinion to address, once and for all, the claims made in this long, drawn-out bankruptcy case. In re Racing Servs., 595 B.R. 334 (Bankr. D.N.D. 2018). PWE appealed that order.

A month **after** this Court issued the final claims decision, and before it became final, the State of North Dakota filed a new claim. The Court implored the State to explain why it should be able to do so—after 14-plus years, and after letting all the opportunities pass to assert this claim. The State answered by noting that it decided to file a claim because it realized that so much of the money would be going back to Ms. Bala. The State's only argument was that gambling was allowed only when the net proceeds would go to charity—not Ms. Bala. The State had no arguments of any form to support that initial filing.

PWE—previously having no interest in the State's claim or any other parties' claims—suddenly came rushing to the State with rationale supporting the State's claim. The Court inquired as to why PWE should be heard. PWE's

response was that it might be advantageous to PWE in its appeal of the 99-page ruling of In re Racing Servs., 595 B.R. 334 (Bankr. D.N.D. 2018). This Court expressed doubt.

Nevertheless, the Court said—again—it would come to Fargo to have a hearing and receive any evidence the State had before deciding the issue. At the hearing in Fargo, attempting to carry the laboring oar for the State, PWE had Mr. Foley—the lead attorney for PWE through 14 years of the case, and the lawyer suing the State for millions—suddenly take the stand as the star witness for the State's claim. Mr. Foley would not answer questions on the stand about his bias as a witness, asserting from the stand that his bias was protected from examination by some form of "attorney-client" privilege (presumably based on some joint defense or claims prosecution agreement). It was eventually disclosed later in the hearing that the parties had agreed to split the recovery 50/50 and they did have some joint interest agreement. In the end, PWE's position now is that the State should, in fact, receive much of the money PWE got the federal courts to disgorge from the State. The State similarly now believes that PWE should get more than full payment on its original claim—**only** because it was providing additional lawyering to assist the State's very shaky presentation of its case.

While this Court will not try to apply "laches" again in direct defiance of the BAP, it does believe some limitation to claim filings should apply. In spite of the

BAP's ruling, this Court has the right and inherent authority to limit a party's right to serial filing and amendment of its positions. See, Blue Cross & Blue Shield of N.C. v. Jemsek Clinic, P.A. (In re Jemsek Clinic, P.A.), 441 B.R. 756, 786 (Bankr. W.D.N.C. 2010) ("Federal courts have the inherent authority to control various aspects of the cases before them so that they can protect their proceedings and judgments in the course of discharging their traditional responsibilities."). See also Chase v. Epps, 74 F. App'x 339, 343 (5th Cir. 2003) ("A district court has 'inherent power to control its docket and prevent undue delays in the disposition of pending cases.'"); Martin v. Automobili Lamborghini Exclusive, Inc., 307 F.3d 1332, 1335 (11th Cir. 2002) ("Courts have the inherent authority to control the proceedings before them . . ."); Boudwin v. Graystone Ins. Co., 756 F.2d 399, 401 (5th Cir. 1985) (same).

> As the first of the Federal Rules of Civil Procedure reflects, the public has an overriding interest in securing "the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. Orderly and expeditious resolution of disputes is over great importance to the rule of law. By the same token, delay in reaching the merits, whether by way of settlement or adjudication, is costly in money, memory, manageability, and confidence in this process. We defer to the district court's judgment about when delay becomes unreasonable "because it is in the best position to determine what period of delay can be endured before its docket becomes unmanageable." Moneymaker v. CoBen (In re Eisen), 31 F.3d 1447, 1451 (9th Cir. 1994).
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> "District courts have an inherent power to control their dockets. In the exercise of that power they may impose sanctions including, where appropriate, default or dismissal." Thompson v. Hous. Auth. Of City of Los Angeles, 782 F.2d 829, 831 (1986) (per curiam). "It is incumbent

> upon us to preserve the district court's power to manage their dockets" without being subject to endless non-compliance with case management orders. Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir. 1992) (as amended).

Allen v. Bayer Corp. (In re Penylpropanolamine (PPA) Prods. Liab. Litig.), 460 F.3d 1217, 1227 (9th Cir. 2006).

The Court retains that inherent authority to limit these proceedings and section 105(a) of the Bankruptcy Code provides any additional authority necessary. That section specifies that courts have all equitable powers necessary to manage a case with some sense of fairness and judicial economy in mind. See 11 U.S.C. § 105(a). This Court thus proceeds under that authority to manage what has become a runaway process. Considering those concepts, the Court finds the State's attempts to modify its claim after the evidence was closed and after remand are out of order, unfairly prejudice Bala, and are part of a runaway process that must stop. The Court's ability to reach any final adjudication on these issues without any additional amendments going forward is at issue here. Under the Court's inherent authority to manage its own docket, the Court finds the State has had enough opportunity to make this claim over the last 16 years. Enough is enough. The State's motion to add a contract claim at this very late stage is denied.

II. Even if the Court Considers the Contract Claim (Claim 51-2) the Evidentiary Record is Closed

The State has also argued that if the Court considers Claim 51-2, the record should be reopened. The State has attached "new evidence" to its "new claim" and asks that the new evidence be considered at a new evidentiary hearing.

In the absence of an overt directive from the appeals court, it is up to the Court to decide whether reopen the evidentiary record on remand. In re Mesaba Aviation, Inc., 350 B.R. 105, 111 (Bankr. D. Minn. 2006) (citations omitted); see also Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 331-32 (1971) ("The determination whether to reopen the record on remand is committed to the trial court's discretion."). Here, the BAP reversed on the grounds "that laches does not apply to tardily-filed claims that are filed in time to permit distribution under § 726(a) [of the Bankruptcy Code]." See In re Racing Servs., 619 B.R. at 15. The case was remanded for reconsideration of the Claim and any objections thereto. Id. At no point in time did the BAP order—or even suggest—this Court reopen the record or even address the "contract claim." The Court must, therefore, exercise its discretion to decide whether reopening is appropriate. Mesaba Aviation, Inc., 350 B.R. at 111.

There is no compelling justification for reopening the record here. The parties were instructed at the time of the original evidentiary hearing, that the Court considered it "[a] put up or shut up hearing." (Trial Tr. 44:22-45:22). The

parties understood that the time had come to produce the evidence necessary to prove or disprove any remaining claim asserted by the State—or any other party. The parties had time to prepare. The Court travelled to Fargo and conducted a full-day hearing. The Court stated it was liberally admitting each and every document offered by the State, and the testimony offered so there would be no need for more proceedings in case of remand.

A remand order standing alone does not require alterations to a closed evidentiary record. The State's request to submit additional evidence is nothing more than an improper attempt at a second-bite at the apple. The Court notes that the evidence the State wants to offer now was available to the State at the time of the original hearing. In fact, the State's argument—at the end of the evidentiary hearing—was that its request to amend was simply a request to conform the Claim to the evidence offered at the hearing. The Court concludes the evidence is all in. The record is closed.

III. Merits of the State of North Dakota's Claim

The State's first "new" claim was filed December 31, 2018—more than 14 years after the case began and more than a month after the Court issued what was thought to be its final ruling on any and all claims remaining in this case. Nevertheless, the State's new claim essentially states that under the North Dakota Constitution and the North Dakota statutes, the net proceeds of gambling must go

to a charity—not back to Susan Bala or any other party. In its simplest terms, the State argues that the remaining funds were "statutorily" required to go to a charity and thus—the beneficiary charities should split the remaining funds.

The State initially, however, made the claim based only on its *parens patriae* authority—without specifying all the charities at issue. The State mentioned only one charity by name—Team Makers. Following initial objections by the Trustee and Bala to the State's ability to even assert such a claim, the State entered into a Consent and Assignment Agreement with Team Makers to pursue the Claim. The State has **never** even argued that Team Makers was unable to make its own claim. The State's reasons for actively pursuing a claim for a private party—initially even without the private party's consent—remains unclear.

The State's "partnership" in pursuing the Team Makers' claim with PWE is also puzzling. If the State is really arguing that "all" net proceed **must** go to charities under clear North Dakota law, it remains entirely unexplained why the State would agree to split any amount of "net proceeds" it recovered for Team Makers with PWE—an entity that is **not** a charity. Under the State's own argument, its joint-prosecution agreement with PWE seems to violate North Dakota law or is invalid on its face. Nevertheless, PWE has supported the State's "new" claim—and even provided the laboring oar during the course of the legal proceedings on this claim.

PWE's participation in the claims proceedings has, in fact, acted to help produce the second part of the State's claim for Team Makers (and PWE it seems). PWE's counsel was the **only** witness the State/PWE offered at the evidentiary hearing on the new claim held in Fargo on May 30, 2019. PWE's lead counsel, Mr. Foley, was offered as a witness to explain how he prepared an exhibit the State offered. The exhibit showed the total money RSI had paid to Team Makers over the years. In the course of explaining how that document was prepared, Mr. Foley attempted to pivot and quickly explain how much he thought RSI in fact should have paid to Team Makers and how much he thought RSI still owed Team Makers under the contracts in place between them. This "testimony" from Mr. Foley was the entire testimony offered to support the State's claim.

A. Merits of Statutory Claim

The State argues that North Dakota law allows gambling only to the extent the entire "net proceeds are devoted to educational, charitable, patriotic, fraternal, religious, or other public-spirited purposes." N.D. Const. art XI, § 25. In other words, RSI's retention of the funds would result in a violation of North Dakota law because "[the] **net proceeds** of gambling would be diverted from their intended public-spirited purposes to the interest holders of RSI in violation of state gambling laws." (Claim No. 51, at 4).

The "gambling laws" referred to by the State include not only the North Dakota Constitution, but also provisions of the North Dakota Century Code and North Dakota Administrative Code addressed at regulating parimutuel horse racing. The State asserts that those provisions set forth the only legitimate means for ensuring that the constitutional requirements for state-sanctioned parimutuel horse racing are satisfied.

Judge Riley, former Chief Judge of the Eighth Circuit, provided the background on these provisions in the appeal on the adversary in which PWE was suing the State for the return of tax money to the RSI bankruptcy estate:

> In 1987, the North Dakota legislature authorized parimutuel betting for live horse races in North Dakota. See N.D. Cent. Code § 53-06.2-10 (1987); 1987 N.D. Laws ch. 618, § 10. In what the state calls the "Takeout Statute," N.D. Cent. Code § 53-06.2-11, the legislature established formulas for deducting from the wager pool to (1) offset the licensed service provider's expenses, and (2) make revenue payments to the state treasurer—i.e., taxes. See 1987 N.D. Laws ch. 618, § 11. The balance of the pool went to the winning bettors. Id. Beginning in 1989, the state allowed "off track" parimutuel wagering for races inside and outside of North Dakota—later reclassified as "simulcast wagering"—and modified the takeout formulas to include this new type of wagering. See N.D. Cent. Code § 53-06.2-10.1 (1989); 1989 N.D. Laws ch. 624, § 8; 1991 N.D. Laws ch. 556, §§ 5, 6.
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> In 2001, the state legislature authorized "account wagering," which is "a form of parimutuel wagering in which an individual deposits money in an account and uses the account balance to pay for parimutuel wagers." 2001 N.D. Laws ch. 466, § 1. But, as the state concedes, the legislature did not amend § 53-06.2-11 to include deductions for account wagering. Id. The legislature adjusted the takeout formulas in 2003 and 2005, but again did not amend the statute to include account

> wagering. See 2003 N.D. Laws ch. 452, § 1; 2005 N.D. Laws ch. 469, § 1.

PW Enters., Inc. v. N.D. (In re Racing Servs.), 779 F.3d 498, 500-01 (8th Cir. 2015). The legislature did not amend the takeout statute until 2007. See 2007 N.D. Sess. Laws, ch. 448, § 6. Up to that point, the takeout statute simply did not include account wagering.

The North Dakota Racing Commission (the "Commission") was established for the purpose of enforcing these provisions, and its simulcasting regulations made a distinction between a "simulcast operator" and a "simulcast service provider":

> 12. "Simulcast operator" means an eligible organization licensed by the commission to offer, sell, case, redeem, or exchange parimutuel tickets on races being simulcast from a sending track.
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> 13. "Simulcast service provider" means a person engaged in providing simulcasting services to a simulcast operator and establishing, operating, and maintaining the combined parimutuel pool, but does not include persons authorized by the federal communications commission to provide telephone service or space segment time on satellite transponders.

N.D. Admin. Code § 69.5-01-11-01 (1990). The regulations also established the parties' respective duties:

> 1. A simulcast operator shall conduct the parimutuel wagering at a simulcast site approved by the commission.
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> * * * *

> 5. The provisions of [N.D. Cent. Code §] 53-06.2-11 are applicable to simulcasting and off track parimutuel wagering. The simulcast operator is responsible for the payment of the state takeout, the North Dakota breeders fund, and the North Dakota purse fund provided by the [C]ommission.

N.D. Admin. Code § 69.5-01-11-06 (1990). Despite this, RSI (the simulcast service provider) entered into an agreement with Team Makers (a simulcast operator) whereby RSI assumed the responsibility of paying any taxes due to the State.

The State's rationale is that simulcast site operators (charities) were statutorily required to participate in account wagering; the takeout statute applied to account wagering; the simulcast site operators owned the takeout pursuant to the takeout statute; the simulcast site operators were legally required to pay the taxes under the takeout statute; and although RSI paid the taxes on behalf of the simulcast site operators, the returned taxes are "net proceeds" and must be returned to the simulcast site operators after payment of qualifying expenses. See N.D. Cent. Code § 53-06.2-11(5) ("After paying qualifying expenses, the licensee shall use the remainder of the amount so withheld only for eligible uses allowed to charitable gambling organizations").

Bala argues that subsection (5) of the takeout statute—as it existed at the time the funds were deducted—does not apply to account wagers because subsection (5) is limited to expenses and wagers identified in subsections (1) and

(2), which are live and simulcast wagering. Subsection (5) provides, in relevant part:

> A licensee may not use any of the portion deducted for **expenses under subsections 1 and 2** for expenses not directly incurred by the licensee in conducting parimutuel [sic] racing under the certificate system. After paying qualifying expenses, the licensee shall use the remainder of the amount so withheld only for eligible uses allowed to charitable gambling organizations under subsection 2 of section 53-06.1-11.

N.D. Cent. Code § 53-06.2-11(5) (2001) (emphasis added). Bala argues that because there are no amounts deducted from account wagers for expenses under subsections 1 and 2, subsection (5) does not apply.

Bala also argues that while simulcast site operators may be required to participate in simulcast wagering, simulcast wagering is not the same as account wagering. Bala asserts that the language contained in the legislative authorization of account wagering supports her position:

> An account wager made on an account established by this state **may only be made through the licensed simulcast service provider** authorized by the commission to operate the simulcast parimutuel wagering system under the certificate system.

N.D. Cent. Code § 53-06.2-10.1 (2001) (emphasis added); see also United States v. Bala, 489 F.3d 334, 337 (8th Cir. 2007) (discussing the difference between simulcast wagering and account wagering). As a result, Bala argues, the legislature neither authorized nor intended to authorize simulcast service operators to participate in account wagering.

More fundamentally, the State's entire statutory argument relies on the idea that "net proceeds" of gambling must go to charities. As Bala points out, the Eighth Circuit also dealt extensively with this very issue of "net proceeds" in the reversal of Susan Bala's conviction. There, the Eighth Circuit noted:

> The North Dakota constitutional term "net proceeds" is inherently vague. The parimutuel statute that cross references § 53-06.1-11.1(2) [dealing with payment of net proceeds] does not even use the term net proceeds. See § 53-06.2-11(5). The Games of Chance statues define "net proceeds," but the definition is vague and may not apply to parimutuel horse racing revenues. See § 53-06.1-01(13).

U.S. v. Bala, 489 F.3d at 339. The State has not challenged this conclusion (other than to say it was unfortunate), nor has it made any attempt to explain how it is that this Court would even go about calculating the "net proceeds" the State claims are payable to Team Makers. Even more fundamentally, the State has not even attempted to define what "net proceeds" means in this context.

"When a creditor files a proof of claim that satisfies the requirements of the Bankruptcy Rules, it is presumed valid unless an objection is filed." In re Zierke, Ch. 13 Case No. 14-00586, 2015 Bankr. LEXIS 1048, at *11 (Bankr. N.D. Iowa Apr. 1, 2015) (citing McDaniel v. Riverside Cnty. Dep't of Child Support Servs. (In re McDaniel), 264 B.R. 531, 533 (B.A.P. 8th Cir. 2001); Fed. R. Bankr. P. 3001(f) ("A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim"). "Any objection that is filed must be supported by substantial evidence to 'deprive the

proof of claim of presumptive validity.'" Id. (quoting Brown v. IRS (In re Brown), 82 F.3d 801, 805 (8th Cir. 1996)). Thus, it is the objecting party that bears the burden of proving that the claim is not valid. Id.

Having reviewed the entire record, the Court finds that Bala has met her initial burden. Bala objected to the Claim on the grounds that the State failed to articulate an enforceable right to payment or to fully define how net proceeds were not properly paid. In so doing, Bala raised serious questions as to the validity of the Claim—questions the State has failed to answer. The State offers separate-but-related provisions of the North Dakota Century Code, North Dakota Administrative Code, and the North Dakota Constitution as grounds for enforceability. Rather than identifying any single provision as providing a basis of recovery however, the State asks the Court to traverse a series of inferential chutes and ladders. Meanwhile, Bala has clearly identified authorities undermining this theory, namely the plain language of the statutes and prior pronouncements from the Eighth Circuit concerning the non-applicability of the takeout statute in the context of account wagering. See, e.g., In re Racing Services, Inc., 779 F.3d 498, 500 (8th Cir. 2015) ("[A]s the state concedes, the legislature did not amend § 53-06.2-11 to include deductions for account wagering.").

Again, the State is fundamentally unable to show—even in its broadest terms—that it has a claim under the statutes and constitution because there are "net

proceeds" left over. The Eighth Circuit specifically noted that "net proceeds" has been left largely undefined and inherently vague under North Dakota law. The State has entirely failed to demonstrate why payments already made to Team Makers are not sufficient "net proceeds." Moreover, the State failed to show what amount, if any, constitutes "net proceeds" under the Statute, and to which Team Makers is entitled.

On balance then, the Court finds that Bala has submitted stronger and more persuasive evidence. The Court thus concludes that Bala's Objection to Proof of Claim No. 51 ("the statutory claim") is sustained.

B. Merits of Breach of Contract

Even if the Court were to consider the State's breach of contract claim on behalf of Team Makers, it has no merit.[2] "Under North Dakota law, a breach of contract is 'the nonperformance of a contractual duty when it is due.'" Ahlgren v. Morrison (In re McM, Inc.), 609 B.R. 511, 516 (Bankr. D.N.D. 2019) (citing Serv. Oil, Inc. v. Gjestvang, 2015 ND 77, ¶ 15, 861 N.W.2d 490, 496; see also Sanders v. Gravel Prod., Inc., 755 N.W.2d 826, 830 (N.D. 2008); Restatement (Second) of Contracts § 235(2) (1981). A cause of action for breach of contract requires "'(1) the existence of a contract; (2) breach of the contract; and (3) damages which flow

[2] While the Court has already decided the contract claim should not be considered, the Court will address it nonetheless in case that denial of the Motion to Amend is reversed on appeal.

from the breach.'" Id. (internal citations omitted); see also U.S. v. Basin Elec. Power Co-op, 248 F.3d 781, 810 (8th Cir. 2001); WFND, LLC v. Fargo Marc, LLC, 730 N.W.2d 841, 848 (N.D. 2007). The party asserting the claim for breach of contract has the burden of proof. In re McM, Inc., 609 B.R. at 516.

The State's breach of contract claim purports to be based on the simulcast parimutuel wagering service agreements between RSI and Team Makers. On the basis of those agreements—and subsequent amendments thereto—the State argued that RSI was required to pay Team Makers a larger portion of the account wagering than it actually already received. Specifically, the State asserts that the contract stated that 4% of the gross handle was to be paid to Team Makers, and an amendment to the contract stated that .125% or .25% was to be paid in addition to the original 4%.

The State believes that the evidence produced at the May 30, 2019 hearing amounted to a prima facie case for a contractual rate above what was actually paid to Team Makers. That is, that the State has made a claim for 4.25% or 4% in addition to what was in those contracts. That evidence amounts to a copy of the alleged contract and testimony from Mr. Foley, an attorney for PWE. There was no testimony from any party to the contract. No one from Team Makers appeared in court.

The State has failed to prove a single element necessary to prove its claim for breach of contract. The State's production of a contract without providing testimony from any individual with personal knowledge of the agreement is insufficient to prove the existence of an applicable contract that specified payment rates that the State says existed between RSI and Team Makers. The State also entirely failed to offer any evidence demonstrating a breach of the existing agreement or any differently intended agreement. It also failed to present any evidence at all on the issue of damages. The State simply asks the Court to infer or assume that all of the proof is somewhere in the record.

To the extent the Court needs to consider Mr. Foley's testimony on any of this, the Court specifically finds his testimony to be not credible. He had no knowledge of the discussions or lead up to the contract between RSI and Team Makers being signed or what was intended. He offered only his naked assertion that the contract should now be best read in a way favorable to his client and the State.

On the basis of the record, the Court finds that that State has failed entirely to meet its burden of proof. While the State presented evidence of **a contract**, it presented no witnesses with personal knowledge of the consummation, circumstances, or intent of the contract. The State also presented no credible evidence on the issues of breach or damages. In fact, aside from the alleged

contract itself, no credible evidence was offered whatsoever. Mr. Foley is neither an expert nor a party to the contract; he is an attorney for PWE—a party having a vested interest in the outcome of the litigation of the State's Proof of Claim. In light of these clear and pervasive evidentiary deficiencies, the Court has no choice but to find that the State has failed to meet its burden of proof on its claim for breach of contract.

CONCLUSION

IT IS HEREBY ORDERED that Susan Bala's Objection to Proof of Claim No. 51 is **SUSTAINED**.

IT IS FURTHER ORDERED that the State's claim for breach of contract is **DENIED**.

Dated: April 23, 2021

THAD J. COLLINS
BANKRUPTCY JUDGE
SITTING BY DESIGNATION