STATE OF INDIANA	)	IN LAKE SUPERIOR COURT
	)SS:	
COUNTY OF LAKE	)	CAUSE NO. 45D01-2101-PL-000056

RODERICK RATCLIFF,

Plaintiff,

v.

INDIANA GAMING COMMISSION; MICHAEL MCMAINS, MARC D. FINE, SUSAN WILLIAMS, JASON DUDICH, and CHUCK COHEN, in their official capacities as Commissioners of the Indiana Gaming Commission; and SARA GONSO TAIT, in her official capacity as the Executive Director of the Indiana Gaming Commission,

Defendants.

BRIEF IN SUPPORT OF MOTION TO DISMISS PURSUANT TO IND. TRIAL RULE 12(B)(1)

Defendant Indiana Gaming Commission (the "Commission"), on behalf of itself and Michael McMains, Marc D. Fine, Susan Williams, Jason Dudich, Chuck Cohen, and Sara Gonso Tait (altogether, the "IGC Parties"),[1] by counsel, for their Brief in Support of Defendants' Motion to Dismiss, states:

[1] The Complaint purports to name the individual Commissioners and the Executive Director as individual Defendants "in their official capacity." That attempt is misguided, and the Commission is the only properly named defendant. *See Bayh v. Sonnenburg*, 573 N.E. 2d 398, 403 (Ind. 1991)("Obviously state officials are literally persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself."). This is why counsel is entering its appearance only for the "Indiana Gaming Commission," and not the individuals named. The issue of correcting the caption can be addressed later, if necessary.

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INTRODUCTION

- *[The Riverboat Gambling Act] is intended to benefit the people of Indiana by promoting tourism and assisting economic development.* ***The public's confidence and trust will be maintained only through****:*

  (1) comprehensive law enforcement supervision; and
  (2) ***the strict regulation of facilities, persons, associations, and gambling operations under this article.***[2]

- *"We recognize an agency has expertise in its field and the public relies on its authority to govern in that area."*[3]

On December 23, 2019 the Commission entered an Emergency Order and a Trustee Order (the "Orders", defined *infra*). On January 4, 2021, Plaintiff Roderick Ratcliff ("Ratcliff") filed an administrative appeal of the Orders. Although Ratcliff was—and is--entitled to request an expedited hearing regarding the validity of these Orders before the administrative law judge, Ratcliff chose to try and bypass this remedy. Instead, on January 19, 2021, Ratcliff filed a Complaint and Verified Petition for Judicial Review, requesting this Court to enjoin the Commission from issuing the Orders. Because Ratcliff has failed to exhaust his administrative remedies, which clearly provide him with the ability to pursue the very same relief that he seeks from this Court (*and on an expedited basis*), the Court does not have subject matter jurisdiction over his complaint and should grant the Commission's Motion to Dismiss.

Ratcliff applied for, and was issued, a gaming license by the Commission. That license does not grant him any property rights.[4] The license represents the Commission's one year approval of

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[2] I.C. §4-33-1-2 ("Legislative intent") (emphasis added).

[3] *West v. Office of Indiana Sec'y of State*, 54 N.E.3d 349, 352-53 (Ind. 2016).

[4] *See* 68 I.A.C. 2-1-10 ("(a) Casino licensees have a continuing duty to maintain suitability for licensure. A casino owner's license does not create a property right, but is a revocable privilege granted by the state contingent upon continuing suitability for licensure. (b) Casino licensees shall notify the commission of a material change in the information submitted in the application, or a

his ownership interest in a licensed gaming company, subject to fulfilling ongoing obligations to remain licensed. This privilege is subject to government oversight through the Commission. The Commission has the right to suspend Ratcliff's license, which it did. Ratcliff then has certain rights to challenge that decision. Those rights do *not* allow Ratcliff to make an end-run around exhausting the administrative remedies available to him, before proceeding in court. But that is precisely what Ratcliff attempts to do here.

Ratcliff's lawsuit is nothing more than a calculated attempt to bypass (1) the Administrative Orders and Procedures Act, Ind. Code § 4-21.5, *et seq*. ("AOPA"), and (2) well-established Indiana precedent requiring Ratcliff to exhaust his administrative remedies and obtain a final agency order before invoking a civil court's jurisdiction to review such an order.[5] Because this Court does not yet have subject matter jurisdiction over the parties' dispute, the case should be dismissed pursuant to Trial Rule 12(B)(1).

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matter that renders the licensee ineligible to hold a casino owner's license."). *See also generally, City of East Chicago, Ind. v. East Chicago Second Century, Inc.*, 908 N.E.2d 611, 623 (Ind. 2010) (riverboat gaming license is not a property right).

[5] Contemporaneously with this Trial Rule 12(B)(1) Motion, the Commission is filing a Motion to Transfer Venue to Marion County. The Commission is also filing a Motion to Vacate Preliminary Injunction Hearing and Convert the February 20 Hearing to Status Conference. Ultimately, the Marion County Court should resolve the issue of subject matter jurisdiction after venue has been transferred. *Bechwith v. Satellite T.V. Center, Inc.*, 699 N.E.2d 319 (Ind.App.1998) (finding that upon the filing of a pleading or motion to dismiss for incorrect venue, the trial court must transfer the case to the county selected by the party which first files such a motion or pleading if the court where the action was initially filed does not meet preferred venue requirements) *N. Texas Steel Co. v. R.R. Donnelley & Sons Co.*, 679 N.E.2d 513, 518 (Ind. Ct. App. 1997) (decision to grant motion to dismiss based upon venue lies within sound discretion of trial court).

BACKGROUND

1. The Parties

The Commission is a state commission established under I.C. § 4-33-3-1 and existing under the laws of the State of Indiana. (Complaint, ¶ 14); *See* I.C. § 4-33-3-1 et seq. The Indiana Legislature has granted various powers and duties to the Commission for the purposes of administering, regulating, and enforcing the system of riverboat gambling throughout Indiana. I.C. § 4-33-4-1. The Commission's expansive statutory powers include, but are not limited to:

(1) All powers specific in I.C. § 4-33 (i.e., the "Riverboat Gambling Act");

(2) All powers necessary and proper to fully and effectively execute the Riverboat Gambling Act;

(3) Jurisdiction and supervision over all riverboat gambling operations in Indiana;

(4) The power to investigate and reinvestigate applicants for licensure to own or manage riverboat gambling operations;

(5) The power to take appropriate administrative enforcement or disciplinary action against a licensee or an operating agent;

(6) The power to investigate alleged violations of the Riverboat Gambling Act;

(7) The power to revoke, suspend, or renew licenses issued under the Riverboat Gambling Act; and

(8) The power to take any reasonable or appropriate action to enforce the Riverboat Gambling Act.

I.C. § 4-33-4-1.

Ratcliff is a "substantial owner" (as defined by 68 Ind. Admin. Code 1-1-86) of Spectacle Gary, LLC ("Spectacle Gary"), by virtue of his ownership interest in Spectacle Entertainment Group, LLC ("SEG"). (Complaint, ¶ 13). As such, the Riverboat Gambling Act requires Ratcliff to hold a Level 1 occupational license (the highest level occupational license), and also requires

Ratcliff to maintain ongoing suitability for licensure. 68 I.A.C. 2-3-4. It is Ratcliff's Level 1 license that was suspended by the Commission. (Complaint, ¶ 13).

2. The Emergency Order

The Riverboat Gambling Act authorizes the Commission to "suspend, revoke, or restrict" an occupational license for any of the following reasons: (1) a violation of the Riverboat Gambling Act; (2) a cause that if known to the Commission that would have disqualified the applicant from receiving the occupational license; or (3) "any other just cause." Ind. Code § 4-33-8-8.

Following months of Commission staff's[6] communications with Ratcliff -- during which he twice refused to present himself to the Commission staff for interviews in connection with a formal investigation into his company, SEG, and certain persons associated with SEG – the Commission held a public hearing on December 23, 2020 and exercised its statutory authority by issuing an Emergency Order, Order No 2020-MS-03 ("Emergency Order"). In the Emergency Order, the Commission articulated numerous specific factual findings supporting Ratcliff's lack of suitability. The Commission set forth the emergency basis for its Emergency Order – including that Ratcliff twice refused to attend interviews with Commission investigators regarding alleged violations of the Riverboat Gambling Act. (*See* Complaint, Ex. 1, pp. 4-7).

In addition to Ratcliff's failure to attend interviews, the Commission further found that new information had emerged within the preceding fourteen (14) days regarding Ratcliff's suitability for licensure. (Complaint, Ex. 1, p. 7). The Commission concluded that Ratcliff's actions were contrary to the expectations, rules, and directives of the Commission, and that Ratcliff has shown

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[6] Sara Gonso Tait is the Executive Director of the Commission ("Director Tait"). (Complaint, ¶ 16). Except as otherwise provided in 68 I.A.C. 1-2-8, the Commission has delegated to Executive Director Tait "all power and authority to act in the name of the [C]ommission with respect to all desirable and proper actions to administer and carry out the executive functions of the [C]ommission or enforce [the Riverboat Gambling Act]." 68 I.A.C. 1-2-7.

blatant disregard for the responsibilities associated with the privilege of maintaining a gaming license. (Complaint, Ex. 1, p. 7). *See West*, 54 N.E.3d at 352-53 ("We recognize an agency has expertise in its field and the public relies on its authority to govern in that area.").

Based on these and other findings articulated in the Emergency Order, the Commission determined that an emergency exists, and that Ratcliff's licensure does not serve to uphold the public confidence or promote the integrity of gaming required by the Riverboat Gambling Act. (Complaint, Ex. 1, p. 7). As a result, the Commission suspended Ratcliff's license, and expressly stated its Emergency Order is effective for 90 days unless renewed pursuant to I.C. § 4-21.5-4-5. (Complaint, Ex. 1, pp. 7-8). The Emergency Order then detailed Ratcliff's appeal rights under the Administrative Orders and Procedures Act, stating:

> IC 4-21.5-4-4 states that upon a request by a party for a hearing on an order rendered under section 2(a)(1) of this chapter, the agency shall, as quickly as is practicable, set the matter for an evidentiary hearing. An administrative law judge shall determine whether the order under this chapter should be voided, terminated, modified, stayed, or continued. Should you wish to request review of the agency action, you may do so through the State of Indiana Office of Administrative Law Proceedings in one of the following ways: 1) go online to www. in.gov/oalp and complete a Petition for Review; 2) mail your request; or 3) personally appear at the Office of Administrative Law Proceedings located at 402 W. Washington Street Rm. W161 / Indianapolis, IN 46204 to file a Petition for Review. You will need this document to complete your request.

(Complaint, Ex. 1, p. 8).

3. The Trustee Order

During the same December 23, 2020 hearing, the Commission also issued its Trustee Order (together with the Emergency Order, the "Orders"). (Complaint, Ex. 3). In its Trustee Order, the Commission articulated several specific factual findings and statutory mandates, including the issuance of the Emergency Order, supporting its decision to temporarily remove Ratcliff from any ability to exercise control, management, or voting related to Spectacle Gary and SEG, consistent

with Ratcliff's own letter of assurance to the Commission, during the pendency of an administrative action. (Complaint, Ex. 3, p. 1). The Trustee Order also recognized the Commission's responsibility to ensure the suitability of license in order to maintain the confidence and trust of the public, stating:

> The Commission is charged with ensuring that gambling operations are conducted with the utmost credibility and integrity. Indeed, the public's confidence and trust can only be maintained through strict regulation of facilities, persons, and associations. A casino owner's license is a privilege, and not a right. Such privilege is jeopardized when a casino owner's licensee has associations that call into question its suitability to hold that license.

(Complaint, Ex. 3, p. 1). *See* I.C. § 4-33-1-2(2)(" The public's confidence and trust will be maintained only through: … (2) the strict regulation of facilities, persons, associations, and gambling operations under this article.").

Based on these and other findings articulated in the Trustee Order, the Commission ordered, *inter alia*, that Ratcliff be removed from any ability to exercise control, management, or voting related to Spectacle Gary and SEG by January 8, 2021, and that Ratcliff be required to amend his trust agreement to replace its current trustee with a person acceptable to the Commission to serve as trustee during the pendency of the Commission's administrative action against Ratcliff. (Complaint, Ex. 3, p. 2). The Commission delegated to Executive Director Tait "the authority to approve or disapprove of the new trustee, the methods selected by Spectacle and Mr. Ratcliff to effectuate this Order, the implementation of such methods selected, and to approve of alternative legal instruments proposed in order to more efficiently comply with the intentions of this Order." (Complaint, Ex. 3, p. 2). Lastly, the Trustee Order imposed four specific conditions on compliance. (Complaint, Ex. 3, p. 2).

4. Ratcliff Initiates An Administrative Appeal Under AOPA

- *The January 4, 2021 Filings Initiating the Appeal*

On January 4, 2021, Ratcliff timely filed an administrative appeal of Orders with an administrative law judge pursuant to AOPA. (**Exhibit 1** hereto, *Ratcliff v. Indiana Gaming Commission*, IGC-0121-000007, Doc. 002 (Petition for Review)).[7] Ratcliff's Petition for Review challenges both Orders on the same basis as his Complaint in this lawsuit. (Ex. 1). Notably, Ratcliff's Petition for Review:

(1) Alleges that "His gaming license has been suspended, his reputation has been tarnished, and his ability to sell his ownership assets in an Indiana casino has been interfered with." (Ex. 1, p. 4).

(2) Asserts that under I.C. § 4-21.5-4-4, "Mr. Ratcliff is entitled to an evidentiary hearing by an administrative law judge." (Ex. 1, p. 4).

(3) Asks for an evidentiary hearing on the merits. (Ex. 1, p. 4).

(4) Asks for a stay of the Emergency Order and Trustee Order. (Ex. 1, p. 4).

(5) Contained a detailed letter written by Ratcliff's same counsel of record in this lawsuit, in which Ratcliff's contested the factual basis for the Emergency Order. (Ex. 1, p. 4).

(6) Advised the ALG on January 4, 2021, that he would be filing a lawsuit. (Ex. 1, p. 4).[8]

- *The Expedited Nature Of Ratcliff's ALJ Proceedings*

The Emergency Order expires by its terms, and by AOPA's provisions, on March 23, 2021 – 90 days after it was issued. (Complaint, Ex. 1, p. 8)(noting Emergency Order is "effective for

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[7] The Commission respectfully requests that the Court take judicial notice of the filings in the ALJ proceeding, which can be found at http://iac/iga.in.gov.iac.iac_title?iact=68&iaca=+Go+. The Court may take judicial notice of legal proceedings and court orders from within the State of Indiana in considering a Motion to Dismiss. Trial Rule 75(A); Ind. Evid. R. 201(a)(2)(C), 201(b)(5); *Christie v. State*, 939 N.E.2d 691, 693 (Ind. Ct. App. 2011).

[8] Any claim by Ratcliff that there is any need for urgent relief is belied by the fact that Ratcliff waited over two weeks to file the lawsuit until January 19, 2021, after threatening to do so on January 4, 2021.

90 days unless renewed per IC 4-21.5-4-5."). Because of the emergency and short-term nature of the emergency order, AOPA's provisions grant Ratcliff the right to an expedited appeal. I.C. § 4-21.5-4-4 ("Upon a request by a party for a hearing on an [emergency order], the agency **shall**, as quickly as practicable, set the matter for an evidentiary hearing.")(emphasis added).

AOPA also contemplates that the Commission can -- while the Emergency Order is in effect, but before it expires – initiate a non-emergency revocation action against Ratcliff, which allows the Commission to seek an extension of the 90 day Emergency Order. I.C. § 4-21.5-4-5(b)("During the pendency of any related proceedings under I.C. § 4-21.5-3 [non-emergency revocations], the agency responsible for the proceeding may renew the [emergency] order for successive ninety (90) day periods….").

The ALJ also has the right to alter, amend, or vacate the Orders being appealed by Ratcliff. I.C. § 4-21.5-4-4.

In short, Ratcliff has at his disposal a method to obtain prompt relief from the Orders. He has chosen not to avail himself of those procedural rights.

- *Ratcliff Has Sat On His Rights Before The ALJ*

The administrative law judge held a pre-trial conference on January 20, 2021, during which Ratcliff's counsel requested that the administrative proceeding be stayed pending the outcome of this lawsuit. (**Exhibit 2** hereto, *Ratcliff v. Indiana Gaming Commission*, IGC-0121-000007, Doc. 007, Preliminary Scheduling Order ("Preliminary Scheduling Order")). Ratcliff did not bother to file a formal motion to stay those proceedings before then, nor did he (or has he yet), sought an "evidentiary hearing" as "quickly as is practicable…." I.C. § 4-21.5-4-4.

On January 21, 2021, the administrative law judge issued a Preliminary Scheduling Order establishing deadlines for expedited briefing on Ratcliff's request to stay the administrative

proceeding. (Exhibit 2, Preliminary Scheduling Order, p. 1). A hearing on the merits of Ratcliff's motion (to be filed January 27) is set for February 10, 2021. (*Id*.).

5. Ratcliff Prematurely Files This Lawsuit

Despite his pending administrative appeal, and the threat on January 4 to file this lawsuit, Ratcliff waited until January 19, 2021 to (improperly) seek judicial review of both Orders, belying his argument that this is an emergency. In addition to several self-aggrandizing yet completely irrelevant statements covering multiple pages -- *see* Trial Rule 8's "short and plain statement" mandate -- Ratcliff makes the following allegations in his Complaint:

(1) Ratcliff does not allege that the Commission lacked the statutory or Constitutional authority to suspend his license. Instead, he admits the Commission's jurisdiction to regulate casino licensing in Indiana and impose penalties upon him: "To be clear, Ratcliff does not take issue with Defendants' right to regulate him and to impose a penalty if he has done something wrong." (Complaint, ¶ 7).

(2) Ratcliff admits that the Commission has the jurisdiction and authority to issue orders without notice or hearing so long as a *bona fide* emergency exists pursuant to Ind. Code § 4-21.5-4-1. (Complaint, □□ 43, 63).

(3) Ratcliff admits sending a letter of assurance to the Commission, but now asserts it is not binding upon him and is unsupported by consideration. (Complaint, ¶¶ 36, 51).

(4) Ratcliff alleges that the Commission improperly declared an "emergency" to exist based on the facts and circumstances. To that end, Ratcliff spends several pages of his Complaint challenging the numerous factual bases upon which the Commission found an "emergency" existed, and disputing that he has continued "to function and exert control on behalf of the casino owner's licensee" in light of his December 22, 2020 agreement. (Complaint, ¶¶ 42-47, 65-67).

(5) Ratcliff alleges that the Commission's understanding of the facts is erroneous because "the assertion that Ratcliff is 'continuing to function and exert control on behalf of the casino owner's license' is not true," and because an emergency "has never existed with respect to Ratcliff's license as Ratcliff's actions can hardly be considered an 'emergency.'" (Complaint, ¶¶ 65-66).

(6) Ratcliff admits that he refused to present himself to the Commission for an interview in June 2020, but then later stated he would make himself available. (Complaint, ¶46).

(7) Ratcliff admits that he refused to present himself to the Commission for an interview for a second time in December 2020, while at the same time claiming he "will continue to cooperate with the Commission's investigation." (Complaint, ¶46).

(8) Ratcliff likewise challenges the Trustee Order on the same factual basis of whether an emergency existed at the time, and whether certain factual contingencies represented in his July 6, 2020 letter of assurance to the Commission have occurred. (Complaint, ¶¶ 51-53, 74).

(9) Ratcliff claims the Commission's Orders cause him irreparable harm because they effectively block his ability to negotiate a sale of his own shares on his terms (Complaint, ¶ 58), despite having alleged a few paragraphs earlier that as of December 22, 2020 – the day before the Commission issued the Orders – he had already (1) "entered into an agreement to sell his shares of Spectacle Gary"; (2) "transferred his shares of Spectacle Entertainment to an escrow account" without contingency; and (3) transferred "his voting rights to a proxy" without contingency. (Complaint, ¶ 38).

(10) Ratcliff also alleges that the value of his shares has been artificially deflated, despite already having purportedly entered into the December 22, 2020 agreement. (Complaint, ¶ 59).

(11) Ratcliff admits that by virtue of his present ownership in Spectacle Entertainment Group, LLC, he is entitled to vote, manage, and exert control over Spectacle Entertainment Group, LLC (which includes Spectacle Gary, LLC). (Complaint, ¶¶ 77-78).

(12) Ratcliff claims that Ind. Code § 4-21.5-5-2(c) excuses him from having to exhaust all administrative remedies before filing this lawsuit. He also asserts the Commission's Orders were issued *ultra vires*, and exhaustion of administrative remedies would be futile. (Complaint, ¶ 20).

(13) Ratcliff requests judicial review of both Orders pursuant to I.C. § 4-21.5-5-8.

On January 20, 2021, Ratcliff filed a Motion for a Preliminary Injunction, despite his pending administrative appeal.

TRIAL RULE 12(B)(1) LEGAL STANDARD

The doctrine of exhaustion of administrative remedies is jurisdictional. The failure to exhaust an administrative remedy divests the court of subject matter jurisdiction. *Honeycutt v.*

Ong, 806 N.E.2d 52 (Ind. Ct. App. 2004); *see also Austin Lakes Joint Venture v. Avon Utilities, Inc.,* 648 N.E.2d 641 (Ind. 1995). Accordingly, the Commission's moves to dismiss Ratcliff's claims pursuant to Trial Rule 12(B)(1).

Judicial review of administrative decisions is governed by the AOPA. I.C. § 4–21.5–2–0.1(a). In reviewing a motion to dismiss for lack of subject matter jurisdiction the relevant question is whether the type of claim presented falls within the general scope of the authority conferred upon the court by constitution or statute. *Metz as Next Friend of Metz v. Saint Joseph Reg'l Med. Ctr.-Plymouth Campus, Inc.*, 115 N.E.3d 489 (Ind. Ct. App. 2018). A motion to dismiss for lack of subject matter jurisdiction presents a threshold question with respect to a court's power to act. *Id*. Actions taken by a court lacking subject matter jurisdiction are void. *Curry v. D.A.L.L. Anointed, Inc.*, 966 N.E.2d 91, 95 (Ind. Ct. App. 2012).

In ruling on a motion to dismiss for lack of subject matter jurisdiction under Trial Rule 12(B)(1), "the trial court may consider not only the complaint and motion but also any affidavits or evidence submitted in support." *City of Fort Wayne v. Sw. Allen Cty. Fire Prot. Dist.*, 82 N.E.3d 299, 303 (Ind. Ct. App. 2017), trans. denied (2018). When exhaustion of administrative remedies is treated as a question of subject matter jurisdiction under Trial Rule 12(B)(1), the trial court can consider affidavits or evidence submitted in support. *Grdinich v. Plan Comm'n for Town of Hebron*, 120 N.E.3d 269, 275 (Ind. Ct. App. 2019).

ARGUMENT

The Indiana Supreme Court has repeatedly expressed the strong judicial preference that a party aggrieved by an agency decision exhaust all options to resolve its issues within the agency process itself before resorting to the courts. That is true even if, as Ratcliff does here, a party to argues constitutional violations and/or *ultra vires* actions were taken against him.

There are numerous, well-articulated reasons for this doctrine. First, the Indiana Supreme Court and other courts in Indiana, "grant deference to the agency's findings of fact." *Nat. Res. Def. Council v. Poet Biorefining-N. Manchester, LLC,* 15 N.E.3d 555, 561 (Ind. 2014). Second, the administrative process allows an agency to correct its errors: "Premature litigation may be avoided, an adequate record for judicial review may be compiled, and agencies retain the opportunity and autonomy to correct their own errors." *State Bd. of Tax Com'rs v. Montgomery*, 730 N.E.2d 680, 684 (Ind. 2000).

Accordingly, "[i]t is well established that, if an administrative remedy is available, it **must** be pursued **before** a claimant is allowed access to the courts." *Barnette v. U.S. Architects, LLP*, 15 N.E.3d 1, 10 (Ind. Ct. App. 2014) (emphasis added) (reversing trial court and ordering dismissal of complaint for failure to exhaust administrative remedies). Until Ratcliff has exhausted the administrative avenues available to him – which include the expedited ability for the ALJ to set an evidentiary hearing – and has obtained a "final order" through those administrative channels, he has no right to be in this Court. To the extent Ratcliff erroneously argues that this is an appeal of a final agency decision – it is not – Ratcliff's failure to exhaust his administrative remedies is fatal to his request for judicial intervention. *See, e.g., LHT Capital, LLC v. Indiana Horse Racing Com'n*, 891 N.E.2d 646, 656-57 (Ind. Ct. App. 2008).

To avoid the requirement that he exhaust his administrative remedies, Ratcliff must show that he lacks an adequate remedy at law to address any purported Commission errors, or that he will suffer irreparable harm if the Court denies judicial review of the Orders now. Ratcliff cannot meet this burden. This failure to do so renders the Court incapable of reviewing a non-final agency decision. *See Indiana Family & Social Servs. Admin. v. Legacy Healthcare, Inc.*, 756 N.E.2d 567

(Ind. Ct. App. 2001) (reversing trial court and finding that trial court lacked subject matter jurisdiction to review non-final agency order).

As a result, the Court lacks subject matter jurisdiction over this matter and should dismiss Ratcliff's claims pursuant to Trial Rule 12(B)(1).

A. RATCLIFF CANNOT OBTAIN JUDICIAL REVIEW OF THE COMMISSION'S NON-FINAL ORDERS

The Commission's Orders are not "final orders." A final order is one that ends the administrative proceedings, leaving nothing further to be accomplished. *Downing v. Board of Zoning Appeals of Whitley County*, 274 N.E.2d 542, 544 (Ind. Ct. App. 1971). "[A]n order is not final if the rights of a party remain undetermined or if the matter is retained for further action." *Id.* Where a suspension issued by an agency or public board is indefinite, and does not address whether reinstatement will occur or leaves other factors related to the suspension unresolved, the order is non-final. *See Dennis v. Board of Public Safety of Fort Wayne*, 944 N.E.2d 54, 59 (Ind. Ct. App. 2011) (holding that indefinite suspension of police offer that left important issues was not a final order; only subsequent order reinstating officer and denying him back pay was a final order subject to judicial review).

Like the initial suspension order in *Dennis*, the Commissions Orders leave numerous issues unresolved and subject to further change. By its own terms, the Emergency Order expires at the end of 90 days, unless renewed (for another 90 days). (Complaint, Ex. 1, Emergency Order, p. 8). The Emergency Order provides that Mr. Ratcliff's suspension may be vacated, modified or revoked by an administrative appeal. (*Id.* at p. 2, ¶ 13). The Emergency Order also provides Ratcliff with a right to appeal, which he has exercised. (*Id.* at p. 8). Ratcliff's Complaint acknowledges the non-final nature of the Emergency Order, by seeking judicial review pursuant to I.C. § 4-21.5-5-2(c). (Complaint, ¶ 17). Likewise, the Commission's Trustee Order is not a final order. It

expressly references and is premised upon the non-final Emergency Order (itself a non-final order), and is now subject to an administrative appeal timely filed by Ratcliff.

I.C. § 4-21.5-5-2(c) provides:

> A person is entitled to judicial review of a nonfinal agency action **only if** the person establishes **both** of the following:
>
> (1) Immediate and irreparable harm;
> (2) No adequate remedy exists at law.

I.C. § 4-21.5-5-2(c)(emphasis added); *See also Legacy Healthcare, Inc.*, 756 N.E.2d at 572.

Obtaining judicial review of a non-final agency order is a significant departure from the well-settled standards that require, in all but the most unique circumstances, exhaustion of administrative remedies prior to seeking judicial review of an agency decision. It stands to reason that such a departure is rarely authorized. "To be excepted from this exhaustion requirement [the party] mush demonstrate *extraordinary circumstances* which show that his remedy under the [Administrative Orders and Procedures Act] is inadequate." *Scott County Fed. of Teachers v. Scott County School Dist. No. 2*, 496 N.E.2d 610, 613 (Ind. Ct. App. 1986) (citation omitted; emphasis in original) (reversing trial court and finding that trial court lacked subject matter jurisdiction to review non-final agency order).

In *Wilson v. Review Bd. Of Ind. Employment Sec. Div.,* 385 N.E.2d 438 (Ind. 1979), the Indiana Supreme Court set forth a list of factors that a party seeking judicial review of a non-final agency order must satisfy to demonstrate that the required "extraordinary circumstances" exist to bypass administrative review. To obtain judicial review, the moving party must demonstrate:

> (1) that the issue is purely a legal, and not factual, issue;
>
> (2) that adequate available administrative channels do not exist to address the issue;
>
> (3) that the moving party faces extensive, immediate, and irreparable harm if forced to pursue administrative remedies; **and**

(4) that judicial intervention will not disrupt the administrative process.

Wilson v. Review Bd. of Ind. Employment Sec. Div., 385 N.E.2d 438 (Ind. 1979). Ratcliff cannot satisfy **any** of these factors, much less **all** of them.

1. Ratcliff Fails The First Wilson Factor

The first *Wilson* factor is satisfied only if the question at issue is a "pure question[] of law." *Portland Summer Festival and Homecoming v. Dept. of Revenue*, 624 N.E.2d 45, 48 (Ind. Ct. App. 1993). Where the court conducting judicial review must determine mixed questions of law and fact – such as applying the facts to determine if they meet statutory definitions – the moving party fails to satisfy the first *Wilson* factor and judicial review should be denied. *Id.* (holding that fact finding was "crucial" to determine whether the party seeking judicial review met the statutory definition of a qualified organization and that, therefore, the first *Wilson* factor was not met and the moving party "may not by-pass the Department's administrative process.").

Ratcliff's Complaint demonstrates that, at best, he is seeking judicial review of the Commission's actions that are a mix of facts and law – not a pure question of law. Notably, Ratcliff does not argue that the Commission lacked the statutory or Constitutional authority to suspend his license. In fact, he concedes that he "does not take issue with Defendants' right to regulate him and to impose a penalty if he has done something wrong." (Complaint, □ 7). He does not challenge the Commission's general right to rely on an "emergency" to issue an Order without formal notice. Rather, he argues that the Commission improperly declared an "emergency" to exist based on the **facts** and **circumstances** at issue in this case.

Specifically, he asserts that an "emergency" as defined by Chapter 4 of the Administrative Orders and Procedures Act "has never existed with respect to Ratcliff's license as Ratcliff's **actions** can hardly be considered an 'emergency.'" (Complaint, ¶ 65). He additionally argues that

the Commission's understanding of the **facts** is erroneous because "the assertion that Ratcliff is 'continuing to function and exert control on behalf of the casino owner's license' is not true." (Complaint, ¶ 66). Ratcliff likewise challenges the Trustee Order on the same basis of whether an emergency existed at the time, and also on whether certain factual contingencies represented in his July 6, 2020 letter of assurance to the Commission have occurred. (Complaint, ¶¶ 51-52). These are, on their face factual challenges, not purely legal ones. Indeed, by requesting an evidentiary hearing Ratcliff concedes that his challenges are factual.

Ratcliff's petition for judicial review falls at the first hurdle and the Defendants' motion to dismiss should be granted on this basis alone.

2. Ratcliff Fails The Second Wilson Factor

Even if Ratcliff could demonstrate that the issues before the Court are purely legal in nature – they are not – that would not be sufficient to vest this Court with subject matter jurisdiction. *Scott County*, 496 N.E.2d at 614.

The complete absence of an administrative channel to address any perceived inadequacies or errors contained in a non-final administrative order weighs in favor of judicial review. *See Indiana Civil Rights Com'n v. Kightlinger & Gray*, 567 N.E.2d 12, 127 (Ind. Ct. App. 1991). (complete absence of avenue for administrative challenge supported judicial review). But that is not the case here. Where a procedural vehicle exists for administrative agency to address its own errors, a court should decline to interfere with the agency process. *See Legacy Healthcare*, 756 N.E.2d at 571 (availability of judicial review after entry of final administrative order precluded judicial review of non-final order); *Scott County*, 496 N.E.2d at 616 (reversing trial court's exercise of judicial review of non-final order and holding that agency "should be given the chance to correct its own errors if it has made any.").

There is no dispute that there is an administrative process through which Ratcliff can seek to have the Commission's alleged errors addressed. He has availed himself of that process. The Emergency Order sets forth the appeal process by which Ratcliff could seek to have an administrative law judge "determine whether the order under this chapter should be voided, terminated, modified, stayed, or continued." (Complaint, Ex. 1, p. 8). *See also* (Indiana Code § 4-21.5-4-4). On January 4, 2021, Ratcliff availed himself of this process and filed an appeal of both the Emergency Order and the Trustee Order to an administrative law judge. (Complaint, ¶47, n. 2, p. 17)). If Ratcliff wanted to do so, he could have asked that the administrative appeal proceed on an expedited basis as expressly required by I.C. § 4-21.5-4-4 ("…the agency shall, as quickly as practicable, set the mater for an evidentiary hearing."). The administrative law judge "shall determine whether the order …. should be voided, terminated, modified, stayed, or continued." I.C. § 4-21.5-4-4. If the administrative law judge agrees with Ratcliff's arguments, and deems the Commission to have acted improperly, and that decision is ratified by the Commission, Ratcliff's request for judicial review will be rendered moot and he will have the relief he seeks.

As the *Scott County* court held, the agency "should be given the chance to correct its own errors if it has made any." 496 N.E.2d at 616. And in the event the administrative law judge agrees with the Commission's Orders, and the Commission affirms that decision per I.C. § 4-21.5-4-4, Ratcliff will then be able to seek judicial review at that time because (1) he will – for the first time – have a <u>final</u> order; and (2) he will – for the first time – have exhausted his administrative remedies. This is exactly the result intended by AOPA.

The second *Wilson* factor also establishes that the Court does not have subject matter jurisdiction over the Commission's non-final Orders, and is an independent basis for dismissal.

3. Ratcliff Fails The Third Wilson Factor

The same is true of the third *Wilson* factor – the threat of extensive, immediate and irreparable harm. In support of his argument that the Orders result in extensive, immediate, irreparable harm, Ratcliff relies on his argument that they "effectively block Ratcliff's ability to negotiate a sale of his shares." (Complaint, □ 58). If Ratcliff is forced to delay – or even forego – selling his ownership interest in Spectacle Gary, LLC and Spectacle Entertainment Group, LLC, he may arguably suffer economic harm in the form of a reduction in value of those interests.

It is well settled, however, that when assessing what constitutes extensive, immediate and irreparable harm for the purposes of obtaining judicial review of a non-final agency order, **economic harm does not suffice**. *See Legacy Healthcare*, 756 N.E.2d at 571 (reversing trial court and dismissing request for stay of non-final administrative order due, in part to the absence of irreparable harm and holding that "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm."); *Portland Summer Festival*, 624 N.E.2d at 49 (affirming trial court's dismissal of complaint for declaratory judgment seeking to overturn non-final agency order and holding "…mere economic injury, such as a loss of funding, does not warrant the granting of equitable relief.").

To qualify as irreparable harm of the sort to satisfy this element of the *Wilson* factors, the harm must be incapable of being corrected by a later order or judicial action. For example, in *Kightlinger & Gray*, the court held that the law firm seeking judicial review of a non-final agency order had demonstrated irreparable harm because, absent judicial review, it would be forced to violate the attorney-client privilege to defend against the discrimination charges brought by one of its partners. *Kightlinger & Gray*, 567 N.E.2d at 127-28 ("The extent or imminence of harm to

Kightlinger if required to pursue administrative remedies is extreme. The necessity of breaching attorney/client confidentiality in order to present any defense to [the] complaint would occur regardless of the outcome of the ICRC investigation."). That is not the case here. If the administrative law judge agrees with Ratcliff (following expedited proceedings), his temporary suspension will be voided, and he can negotiate the sale of his shares without – what he claims – are the consequences of the Orders that result in supposedly depressed share prices.[9]

While on the one hand Ratcliff claims that he cannot sell his shares at fair market value, on the other hand Ratcliff alleges that as of December 22, 2020 – the day before the Commission issued the Orders – he had already (1) "entered into an agreement to sell his shares of Spectacle Gary"; (2) "transferred his shares of Spectacle Entertainment to an escrow account" without contingency; and (3) transferred "his voting rights to a proxy" without contingency. (Complaint, ¶ 38). If Ratcliff has already sold his shares before the Orders were issued, then he has suffered no harm by an order requiring him to sell them. Also, if, as he claims, he has already divested himself of any control by transferring his voting rights to a proxy, how is he harmed by an order requiring him to rid himself of control? Based on his version of events, there is no actual irreparable harm.

Ratcliff argues at length in his Memorandum in Support of his Motion for Preliminary Injunction that the Commission's Orders will cause him irreparable harm. His arguments, however, are entirely unpersuasive. First, and most importantly, Ratcliff does not need judicial intervention to prevent any so-called irreparable harm. He could have sought (and still can) an expedited hearing before an administrative law judge who is capable of voiding, terminating,

[9] The Commission takes exception to Ratcliff's version of events. But again, even if relevant that is for the ALJ to decide, and is not something this Court should tackle at this juncture.

modifying, staying, or continuing the Commission's Orders. Should the administrative law judge find Ratcliff's arguments persuasive, he or she can issue an order alleviating the purported harm to Ratcliff. The availability of an administrative remedy negates Ratcliff's argument of irreparable harm. *Northside Sanitary Landfill, Inc. v. Indiana Envt'l Mgmt. Bd.*, 458 N.E.2d 277, 284 (Ind. Ct. App. 1984) (claim of irreparable harm insufficient to justify petitioner's failure to exhaust administrative remedies).

Moreover, Ratcliff's claims of irreparable harm boil down to repeated assertions that the Commission's actions will cause him economic harm. He argues that the Commission's actions will force him to sell his SEG shares "at a fire sale price," that he will suffer "financial" harm, and that those actions have "slashed the value of Ratcliff's investment." (Mem. In Support of Motion for Prelim. Inj., pp. 19-20). This is the sort of economic harm that was expressly rejected as grounds for the review of non-final orders by *Legacy Healthcare* and *Portland Summer Festival.* It is also not "irreparable" because if Ratcliff prevails on his appeal, he can sell his shares without the pressure he claims depresses the value of the shares.

Relying on the unpublished decision of *Lake Co. Bd. of Zoning Appeals v. Thorn*, Ratcliff also argues that the purported delay in the opening of the Hard Rock Casino Gary project will cause irreparable harm due to purported harm to the Gary community. (*Id.* at 19). *Thorn*, however, is not only a non-citable opinion under Indiana Appellate Rule 65[10], but is entirely inapplicable. 868 N.E.2d 1222 (table) (Ind. Ct. App. July 6, 2007).

[10] As a non-published memorandum decision, *Thorn* is governed by Appellate Rule 65(D) which states: "a memorandum decision shall not be regarded as precedent and shall not be cited to any court except by the parties to the case to establish *res judicata*, collateral estoppel, or law of the case."

In *Thorn*, the appellate court affirmed the trial court's injunction ordering the issuance of building permits to lot owners within a subdivision. In doing so, the appellate court found that the moving party (a residential subdivision developer) had established irreparable harm despite personally suffering only economic harm. The court's determination was based upon the fact that the third-party homeowners (who had already built homes in the failing subdivision) and third-party lot owners (who owned lots, but couldn't construct homes on them absent the injunction) were suffering irreparable harm because without the issuance of building permits within the subdivision, the innocent homeowners were left – through no fault of their own – with houses built in an unfinished, failing subdivision, or residential lots on which they could not build their houses.

In contrast, Ratcliff identifies only speculative losses to unnamed job applicants and amorphous economic harm to the community to support his irreparable harm argument. Unlike the homeowners and lot owner in *Thorn*, aside from the casino owners and investors – who have purely economic interests at stake – no third-party's interests are tied directly to the Hard Rock Casino Gary. Other casinos exist and are operating in Lake County at which job applicants can find casino-based employment. SEG currently owns and operates the Majestic Star Casino in Gary, which is open and providing jobs to the Gary community. The Hard Rock Casino in Gary will replace the Majestic Star Casino. There is simply no parallel between *Thorn* and this matter. The only threatened harm here is to Ratcliff, and that harm is purely economic. Accordingly, there is no irreparable harm.

Ratcliff has failed to satisfy yet another *Wilson* factor necessary to provide the Court with jurisdiction over a non-final agency order, and his Complaint should accordingly be dismissed.

4. Ratcliff Fails The Fourth Wilson Factor

The fourth *Wilson* factor, that judicial intervention will not disrupt the administrative process, weighs most strongly against the Court exercising jurisdiction over Ratcliff's Complaint. Whenever possible, courts should permit the agency process to reach a final conclusion before exercising the right of judicial review. The concept of judicial deference to the agency process is at the core of the doctrine of exhaustion of administrative remedies. "It is well established that, if an administrative remedy is available, it must be pursued before a claimant is allowed access to the courts." *Barnette v. U.S. Architects, LLP*, 15 N.E.3d 1, 10 (Ind. Ct. App. 2014). Accordingly, if judicial review of a non-final order will disrupt the administrative process, a court should not exercise jurisdiction. *See Scott County*, 496 N.E.2d at 616 ("Finally, exhaustion will avoid unnecessary interference with the agency's procedures."); *Legacy Healthcare*, 756 N.E.2d at 571 (reversing trial court and holding that "[t]he trial court's order in this case disrupted the administrative process by addressing the same issues raised in the administrative area.").

Allowing Ratcliff's lawsuit to proceed will disrupt the administrative appeal process that Ratcliff himself initiated as required by the AOPA. As discussed *supra*, Ratcliff's appeal of the Commission's Orders to an administrative law judge under AOPA remains pending, and that appeal can be heard on an expedited basis, should Ratcliff choose to exercise that option. Moreover, the Emergency Order expires on its own terms after 90 days unless renewed by the Commission. Any action by the Court at this point will irrevocably disrupt the agency process and violate the fourth *Wilson* factor.

Recognizing the disruption this lawsuit will have on his already-pending administrative appeal, Ratcliff intends to seek a stay of those administrative proceedings pending the outcome of this lawsuit. But that is the exact opposite of the process Indiana law mandates. Under the AOPA,

this lawsuit must give way to the pending administrative appeal – not the other way around. Ratcliff must first exhaust his administrative remedies and present this Court with a final order.

For the reasons set forth above, Ratcliff cannot satisfy one, much less all four, of the *Wilson* factors necessary for the Court to have subject matter jurisdiction to review a non-final agency order. The Court therefore lacks subject matter jurisdiction over the non-final Commission Orders, and the Court should (1) dismiss Ratcliff's Complaint pursuant to Trial Rule 12(B)(1); and (2) direct Ratcliff to obtain final orders and exhaust his administrative remedies before seeking judicial review. Any other result will be directly contrary to well-settled Indiana law.

B. RATCLIFF'S FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES IS FATAL TO HIS REQUEST FOR JUDICIAL REVIEW

Neither Ratcliff's Complaint nor his associated filings address the foregoing *Wilson* factors or otherwise present an argument that he should be permitted to obtain judicial review of a non-final agency order. And, even if he attempted to satisfy the *Wilson* factors, he is incapable of doing so. This independently deprives the Court of subject matter jurisdiction and requires dismissal of Ratcliff's Complaint.

Nevertheless, the Commission will address Ratcliff's flawed arguments that he is excused from exhausting his administrative remedies because: (1) it would be futile to do so; (2) the Commission's actions were *ultra vires;* and/or (3) his constitutional challenges trump his obligation to comply with AOPA. None of these arguments withstand the most basic of scrutiny.

1. *Ratcliff Has Not Demonstrated that Exhaustion of His Administrative Remedies Would be Futile*

It is axiomatic that the exhaustion requirement "should not be dispensed with lightly on grounds of 'futility.'" *Town Council of New Harmony v. Parker*, 726 N.E.2d 1217, 1224 (Ind. 2000). To prevail upon a claim of futility, "one must show that the administrative agency was

powerless to effect a remedy or that it would have been impossible or fruitless and of no value under the circumstances." *M–Plan, Inc. v. Ind. Comprehensive Health Ins. Ass'n*, 809 N.E.2d 834, 840 (Ind. 2004). The mere fact that an administrative agency might refuse to provide the relief requested does not amount to futility. *Honeycutt v. Ong*, 806 N.E.2d 52,56 (Ind. Ct. App. 2004). Even where an agency or quasi-agency has informed the moving party that "legal action" may be the party's only option, the futility requirement is not met. *M-Plan*, 809 N.E.2d at 840. Rather, to demonstrate futility and thereby avoid the exhaustion requirement, "one must show that ***the administrative agency was powerless to effect a remedy*** or that ***it would have been impossible or fruitless and of no value under the circumstances***." *Id.* (emphasis added).

Ratcliff has not, and cannot, argue that the Commission is "powerless" to effect a remedy, or that it is "impossible" or "fruitless" for him to pursue his appeal of the Commission's Orders through the administrative process. An avenue for administrative review of the Commission's Orders exists. Ratcliff is clearly aware of that fact because he has already availed himself of that process by timely filing an administrative appeal before an administrative law judge. That appeal process can move along expeditiously as required by I.C. § 4-21.5-4-4. It is only through Ratcliff's actions trying to stay those expedited proceeds that they are not moving along quickly. An administrative law judge has been appointed, a telephonic pre-hearing conference has been conducted, and expedited briefing deadlines on Ratcliff's motion to stay (for which *he* has the burden)[11] have been established. (*See supra*).

Proceeding through the appeal process is not futile because the administrative law judge has the statutory authority to "determine whether the order …. should be voided, terminated, modified, stayed, or continued." I.C. § 4-21.5-4-4. That relief can be based on a decision by the

[11] I.C. § 4-21.5-3-14(c)

administrative law judge that the Commission's actions were *ultra vires*, violated Ratcliff's due process rights, or were otherwise not authorized by law. *Ind. Dep't of Envtl. Mgmt. v. Twin Eagle LLC*, 798 N.E.2d 839, 844 (Ind. 2003). In other words, the administrative law judge has the statutory authority to provide the very same remedies that Ratcliff seeks from this Court. And, if the administrative law judge agrees with Ratcliff and vacates the Orders, and that decision is ratified by the Commission,[12] there will be nothing left for Ratcliff to challenge in this Court. Even if Ratcliff is unsuccessful, the hearing will create a complete agency record and the administrative law judge's order may produce a "reasoned explanation" for the Commission's Orders that will aid a court in its judicial review of those final order. The production of a "reasoned explanation" and a complete agency record is one of the benefits of the exhaustion requirement. Ratcliff should not be permitted to deprive the Court of this record. *M-Plan, Inc. v. Indiana Comprehensive Health Ins. Ass'n*, 809 N.E.2d 834, 840 (Ind. 2004); *see also Turner v. City of Evansville*, 740 N.E.2d 860, 862 (Ind. 2001) (one of the benefits of exhaustion of administrative remedies is that a record for judicial review may be created).

Requiring Ratcliff to exhaust his remedies through the agency process is not futile. The administrative law judge may correct errors in the Orders (to the extent any exist), or void or terminate them altogether, and Ratcliff is already engaged in that appeal process. Ratcliff has not shown that the appeal process is "powerless" to provide him with a remedy or is otherwise futile. Accordingly, his failure to exhaust his administrative remedies deprives this Court of subject matter jurisdiction and requires dismissal of his Complaint pursuant to Trial Rule 12(B)(1). *See, e.g., LHT Capital, LLC v. Indiana Horse Racing Com'n*, 891 N.E.2d 646, 656-57 (Ind. Ct. App. 2008).

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[12] I.C. § 4-21.5-3-27

2. *Ratcliff Presents Mixed Questions of Fact and Law that Preclude the Court from Finding the Ultra Vires Exception is Applicable*

Although Ratcliff argues that requiring exhaustion would be futile, the main thrust of his argument is that exhaustion is not required because the Commission's actions were contrary to the law and *ultra vires*. Ratcliff relies on *Indiana Dep't of Envtl. Mgmt. v. Twin Eagle LLC*, 798 N.E.2d 839 (Ind. 2003) to support this argument. (Complaint, ¶ 20). His argument lacks merit, and his reliance on *Twin Eagle* is unpersuasive.

The *Twin Eagle* petitioner's claims centered around whether the Indiana Department of Environment Management ("IDEM") had authority to regulate discharges into certain state waters and, if so, the scope of that authority. The claims fundamentally challenged IDEM's jurisdiction over these discharges. The *Twin Eagle* court excused the petitioner from exhausting its administrative remedies because the court determined that the questions raised were pure questions of law; namely statutory construction. *Twin Eagle LLC*, 798 N.E.2d at 844. Importantly, to resolve the issues at hand, the court had only to determine if IDEM had ***jurisdiction*** over the bodies of water at issue; not whether IDEM's ***application*** of its statutory authority to a certain factual context was proper.

In contrast, Ratcliff admits the Commission has jurisdiction to regulate casino licensing in Indiana and to impose penalties upon him. Ratcliff tell us: "To be clear, Ratcliff does not take issue with Defendants' right to regulate him and to impose a penalty if he has done something wrong." (Complaint, ¶ 7). Instead, Ratcliff argues that the Commission's application of its statutory authority to the particular facts and circumstances involving Ratcliff was improper. Ratcliff also concedes that the Commission has the jurisdiction and authority to issue orders without notice or hearing so long as a *bona fide* emergency exists pursuant to I.C. § 4-21.5-4-1. (Complaint, ¶¶ 43, 63). He argues, however, that the Commission's determination that the facts

and circumstances surrounding the Commission's issuance of the Orders did not meet the statutory definition of an "emergency." (Complaint, ¶¶ 44-48). Thus, unlike in *Twin Eagle*, Ratcliff does not present a pure question of law to the Court. Rather, he asks the Court to determine that the Commission's application of the facts (the circumstances leading up to the December 23, 2020 hearing) to the law (whether there as an "emergency" under the statute) was improper. This renders *Twin Eagle* inapplicable.

Ratcliff's claims are instead most similar to those set forth in *Johnson v. Celebration Fireworks, Inc.*, 829 N.E.2d 979 (Ind. 2005). In *Johnson,* the Indiana Supreme Court distinguished and limited the *Twin Eagle* decision. Yet Ratcliff conveniently ignores this decision in his Complaint. *Id*. at 983-84. In *Johnson*, the trial court found that the issue of whether individual outlets selling fireworks constituted a "wholesaler" under the applicable statutes was not a pure question of law. Rather it was at most a mixed question of law and fact, and there was no question of the Fire Marshal's legal authority to license fireworks wholesalers. *Id*. at 983. The Indiana Supreme Court held that this distinction was dispositive.

The Indiana Supreme Court in *Johnson* held that in cases involving mixed questions of law and fact – and where the agency's jurisdiction was clear – exhaustion of administrative remedies was ***required*** and the failure to exhaust those remedies deprived the trial court of jurisdiction. *Id.* Such is the case here. Ratcliff's argument that the circumstances surrounding the Commission's Orders did not constitute an "emergency" – as defined by statute – requires the Court to examine both the law and the facts (and, specifically, those facts the Commission utilized in finding an emergency exists). *Johnson* requires that in such mixed scenarios, the moving party must first exhaust his administrative remedies. Ratcliff's failure to do so is fatal to his Complaint.

3. *Ratcliff's Assertion of Constitutional Questions Does Not Permit Him to Avoid Exhausting His Administrative Remedies*

To the extent Ratcliff argues that his assertion that the Commission acted unconstitutionally allows him to avoid exhausting his administrative remedies, that argument also fails. It is well-settled that the mere assertion of a constitutional challenge to an agency decision or process is not sufficient to excuse a petitioner from exhausting the administrative process. *Graham v. Town of Brownsburg*, 124 N.E.3d 1241 (Ind. Ct. App.), *reh'g den.* (Aug. 2, 2019), *trans. denied*, 138 N.E.3d 955 (Ind. 2019); *., LHT Capital, LLC v. Indiana Horse Racing Com'n*, 891 N.E.2d 646 (Ind. Ct. App. 2008). This is because, even where "the ground of the complaint is the unconstitutionality of the statute, which may be beyond the agency's power to resolve, exhaustion of administrative remedies may still be required because administrative action may resolve the case on other grounds without confronting broader legal issues." *Johnson.,* 829 N.E.2d 979, 982 (Ind. 2005)

Such is the case here. Ratcliff's claims of unconstitutionality and due process can be resolved without the Court engaging in a premature judicial review of the Commission's actions. Ratcliff claims that his due process rights were violated because he was not afforded a hearing and he was not provided with an opportunity to request an evidentiary hearing. (Complaint, ¶¶ 84-91). However, statutory protections already exist to protect his due process rights. *See, e.g.*, I.C. § 4-21.5. Any emergency order issued by the Commission under I.C. § 4-21.5-4 expires on the earliest of: 1) the date set in the order; 2) the date set by a statute; or 3) the elapse of ninety (90) days. I.C. § 4-21.5-4-5. Furthermore, once a request is made for a hearing related to an emergency order, the agency is required to, as quickly as is practicable, set the matter for an evidentiary hearing before an administrative law judge, who is required to determine whether the emergency order should be voided, terminated, modified, stayed, or continued. I.C. § 4-21.5-4-4.

Ratcliff, therefore, has the opportunity – on an expedited basis – to argue before an administrative law judge that the Commission's Orders were hasty, improper, unfounded or anything else he wishes to argue. If the administrative law judge agrees, he or she may void, terminate, modify, or stay, the Orders. Nothing further is required to satisfy due process. *Wilson*, 385 N.E.2d at 445. More importantly, simply claiming his due process rights have been violated does not permit Ratcliff from avoiding the requirement that he exhaust his administrative remedies. *Graham*, 124 N.E.3d 1241; *LHT Capital, LLC*, 891 N.E.2d 646.

CONCLUSION

For each of the foregoing reasons, this Court lacks subject matter jurisdiction over Ratcliff's Complaint; Ratcliff's Complaint should be dismissed pursuant to Trial Rule 12(B)(1); and Ratcliff should be required to obtain a final order and exhaust his administrative remedies before pursuing relief in this Court, consistent with well-established Indiana law.

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2021 a copy of the foregoing pleading was filed electronically. Service of this filing will be made on all ECF-registered counsel by operation of the court's electronic filing system. Parties may access this filing through the court's system.

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