

IN THE UNITED STATES DISTRICT COURT
For The
DISTRICT OF MINNESOTA

CITY OF DULUTH,

Plaintiff,

vs.

FOND DU LAC BAND OF LAKE SUPERIOR
CHIPPEWA,

Defendant.

Civil Action No.: _____
(Related Case Nos.: 5-89-163 and 5-94-52)

COMPLAINT

Plaintiff City of Duluth, (herein "City"), for its Complaint against Defendant Fond du Lac Band of Lake Superior Chippewa (herein "Band") states and alleges the following:

NATURE OF ACTION

1. This is an action for breach of contract and declaratory and injunctive relief determining and enforcing the rights of the parties under a certain Proposed Stipulation and Consent Order ("Consent Order") jointly filed by the City and the Band in the action entitled Fond du Lac Band of Lake Superior Chippewa Indians v. City of Duluth, Civil Action Number 5-89-163 (D. Minn. 1994).

2. The Consent Order was approved on July 28, 1994 by this Court and incorporated by reference a series of agreements (herein "1994 Contracts").

3. This Court, in the Consent Order approving the 1994 Contracts, retained jurisdiction for the purpose of ensuring the obligations of the parties to comply with all provisions of the 1994 Contracts.

PARTIES

4. The City is a municipal corporation organized under the laws of the State of Minnesota with its government offices located at 402 City Hall, Duluth, Minnesota, County of St. Louis.

5. The Band is a federally recognized Indian tribe organized under a constitution approved by the Secretary of the Interior pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 et. seq.

6. The governing body of the Band is the Reservation Business Committee with its government offices at Fond du Lac Reservation, 1720 Big Lake Road, Cloquet, Minnesota, County of Carlton.

JURISDICTION AND VENUE

7. This Court specifically retained jurisdiction of this matter through the Consent Order as recognized by Kokkonen v. Guardian Life Insurance Company of America, 511 U.S. 375, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). Under the retained jurisdiction, this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1362 (original jurisdiction of civil actions brought by recognized Indian tribes or bands), and 28 U.S.C. § 2201 (declaratory judgment).

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 (b).

BACKGROUND FACTS GIVING RISE TO CITY'S CLAIMS

A. Original Joint Venture of City and Band

9. The City was hit hard in the late 1970s and early 1980s by a downturn in the economy, in particular the shipping and steel industries.

10. In response to the economic downturn, the City decided to pursue the development of tourism as a way to strengthen its local economy.

11. At around the same period, the Band was enjoying success in the operation of a high stakes bingo game at its reservation located approximately 25 miles southwest from the boundary of the City.

12. In 1984, representatives of the City and the Band came together to explore the creation of a joint relationship that would benefit the interests of both parties.

13. The initial focus of those early discussions included the development of a high stakes bingo parlor located on an iron ore ship to be permanently docked in one of the water slips located within the boundaries of the City.

14. These discussions evolved into the development of a land-based facility to be located in the downtown area of the City.

15. In 1986, with the assistance of the City, the Band acquired land in the downtown area of the City, had it placed it in trust, and had it declared by the Secretary of Interior a part of its reservation.

16. The City also acquired land adjacent to the new reservation land through condemnation, and built a parking ramp which would service both the casino and other businesses in the downtown area.

17. This joint venture of the City and Band resulted in the 1986 agreements ("1986 Contracts") approved by the Secretary of the Interior and provided for the creation of the Duluth Fond du Lac Economic Development Commission ("Commission") comprised of seven members, with four members being Band appointees and three being City appointees.

18. The 1986 Contracts also provided that the Commission could only take action on a six-sevenths (6/7ths) vote.

19. The Commission was delegated the authority to operate gaming within the Band's facility.

20. The revenue from the facility would be split between the Band (25.5%), the City (24.5%), and the Commission (50%).

21. The revenues retained by the Commission were to be used for economic development both on the Band's reservation southwest of the City and that within the downtown area of the City.

22. The doors of the Fond du Luth Casino were opened in September of 1986.

B. Indian Gaming Regulatory Act and 1989 Litigation

23. In 1988, the United States Congress enacted the Indian Gaming Regulatory Act (herein "IGRA"). 25 U.S.C. § 2701, et. seq.

24. IGRA required that all gaming conducted in Indian country be conducted only by an Indian tribe which shall have "the sole proprietary interest and responsibility for the conduct of any gaming activity." 25 U.S.C. § 2710(b)(2)(A).

25. In 1989, the Band sued the City alleging that the City's purported joint ownership of the Fond du Luth Casino under the 1986 Contracts violated the IGRA. Fond du Lac Band v. City of Duluth, et. al., No. 5-89-163 (D.Minn 1990).

26. In an unpublished decision this Court by Order dated December 26, 1990 dismissed the case without prejudice and referred the parties to the National Indian Gaming Commission (herein "NIGC") for a report and recommendation.

27. Following this decision the Band filed a petition with the NIGC seeking an expedited review of the legality of the 1986 Agreements in light of the enactment of the IGRA.

28. On September 24, 1993, the NIGC issued a determination that the operation of the Fond du Luth Casino under the 1986 Agreements violated the IGRA. The NIGC deferred the commencement of any enforcement action in order to allow for resolution between the parties and offered its services to mediate.

C. Settlement and 1994 Contracts

29. In November 1993, negotiations commenced between the City and the Band in a number of sessions in Washington D.C. and Minneapolis under the auspices of the Chairman of the NIGC.

30. The negotiations were designed to restructure the arrangement between the City and the Band in order to bring it into compliance with the IGRA.

31. The City and the Band reached an agreement that restructured the ownership and control of the gaming operation at the Fond du Luth Casino.

32. The settlement arrangement was set forth in an “Agreement Between the City of Duluth and the Fond du Lac Band of Lake Superior Chippewa Indians Relating to the Modification and Abrogation of Certain Prior Agreements” (herein “1994 Contracts”).

33. The settlement agreement was comprised of six key elements.

34. First, pursuant to a Sublease and Assignment of Gaming Rights Agreement (herein “Sublease”), the Band began to sublease the Fond du Luth Casino from the Commission and the Band began to “own operate and regulate” all gaming at the Fond du Luth Casino. The rent to be paid by the Band was assigned by the Commission to the City of Duluth.

(a). The Band, pursuant to the Sublease was required each quarter to pay the City nineteen (19%) percent of the “Gross Revenues from Video Games of Chance” as rent for the Band’s sublease of the entire facility during the Initial Term of the Sublease.

(b). The Sublease defined “Gross Revenue from Video Game of Chance” as being “total revenues minus pay-outs to players (such pay-outs to include accruals for progressive games, provided, however, that such accruals shall be deducted only once).”

(c). The Initial Term of the Sublease runs through March 31, 2011. An Extension Term was added by the City and the Band which runs from March 31, 2011 to March 31, 2036.

(d). The City's percentage of "Gross Revenues from Video Games of Chance" has not been established for the Extension Term. The Sublease requires that the City and the Band meet and negotiate in good faith this percentage for the Extension Term on or before January 1, 2010. Unsuccessful negotiation would be followed by mediation in Washington D.C., and if necessary by binding arbitration.

35. Second, the Band became the owner and operator all of the "ancillary businesses," such as the food and liquor concessions, gift shop, etc. at the Fond du Luth Casino.

36. Third, the Commission was restructured permanently to become a two-person entity consisting of the City's Mayor (or his designee) and the Chair of the Band (or their designee). The Commission could take no action without the affirmative vote of both the Mayor and the Chair. The Chair's vote requires the consent of the Band's Reservation Business Committee.

37. Fourth, all funds held in escrow and other assets of the Commission as of September 30, 1993 were distributed one-third to the City and two-thirds to the Band. The City separately received funds held in escrow for the parking ramp. Through this distribution, the Band became the owner of all net assets and equipment located at the Fond du Luth Casino.

38. Fifth, the lease of the parking ramp from the City was cancelled and the City resumed ownership and operation of the parking ramp. The Band was released from its parking ramp guaranty to the City.

39. Sixth, the City and the Band entered into a "Tribal-City Accord" to govern gaming at the Fond du Luth Casino. Like tribal-state compacts over Class III gaming, the Tribal-

City Accord established certain regulatory standards and requirements. The Band maintained licensing authority, subject to its agreement to be bound by any objection of the NIGC to object to a license applicant.

40. The settlement was implemented through seven new contracts ("1994 Contracts"). The documents were structured as one umbrella or "framework" agreement, with the other six new contracts serving as "exhibits" to the main settlement.

41. The main umbrella agreement is titled "Agreement between the City of Duluth and the Fond du Lac Band of Lake Superior Chippewa Indians Relating to the Modification and Abrogation of Certain Agreements." This agreement sets forth the overall principles for the new arrangement, and the six specific agreements contain the details.

42. The City and the Band entered into and filed with this Court a Stipulation and Consent Order seeking the United States Federal District Court approval of the settlement agreement comprised of the 1994 Contracts.

43. The NIGC determined that the restructuring of the Fond du Luth Casino and the 1994 Contracts fully complied with the IGRA and recommended the 1994 Contracts to this Court, by filing separately a Report and Recommendation for approval.

44. The 1994 Contracts at the time of submission of the Stipulation and Consent Order to this Court had been approved by the Secretary of the Interior.

45. This Court accepted the settlement agreement based on the Stipulation and Consent Order which contained the 1994 Contracts and specifically retained jurisdiction over the 1994 Contracts for the purpose of ensuring the obligation of the parties to comply with all provisions of the 1994 Contracts through the 1994 Consent Order.

D. Defendant's Breach of 1994 Agreements

46. On or about January 28, 2009, the Band, through its Chairwoman, advised the City that the Band allegedly overpaid the City \$561,047.59 under the Sublease (herein "January Letter"). The Band alleged that this overpayment related back to the time of the execution of the Sublease in 1994 through the third quarter of 2008.

47. The Band alleged that certain promotional expenditures, such as coupons, cash, and other quantifiable perks, were required to be reclassified as being "contra-revenue" rather than operating expenses and should reduce gross revenue before calculating the City's 19% of "Gross Revenue from Video Games of Chance."

48. In the January Letter, the Band alleged that it believed that \$561,047.59 in contra revenue was given between 1994 and 2008. The Band unilaterally deducted the \$561,047.59 from rent due the City on January 30, 2009.

49. In making the \$561,047.59 deduction, the Band failed to follow the express contractual definition of "Gross Revenue from Video Games of Chance" and failed to follow the dispute notice, and procedural requirements contained within the 1994 Contracts.

50. The Band expressly advised the City that it would be offsetting this new contra-revenue deduction on an ongoing basis against future payments due to the City.

51. On or about April 23, 2009 and May 12, 2009, as required by the 1994 Contracts, the City put the Band on notice that the Band failed to follow the 1994 Contracts and requested that \$561,047.59 plus interest be paid to City and that no further funds be withheld.

52. On or about August 6, 2009, the Band through its Reservation Business Committee unilaterally and without notice of default to the City passed Resolution #1316/09 immediately ceasing all payments to the City due under the 1994 Contracts.

53. The Band alleged that the 1994 Contracts “were entered into by the Band under the erroneous understanding that the City’s Consent was necessary to the creation of reservation land within the City, and to the operation of a casino by the Band on that reservation land.”

54. On August 12, 2009 and again on August 26, 2009 , the City put the Band and the Commission on notice that the Band’s enacting of Resolution #1316/09 constituted a default of the 1994 Contracts.

55. More than thirty days have elapsed from the notice letters. The Band has not taken any steps to correct any of the defaults.

COUNT I – BREACH OF CONTRACT

56. The City restates and realleges paragraphs 1 through 55 listed above.

A. First Breach

57. The Band breached the 1994 Contracts by unilaterally deducting the \$561,047.59 from rent due the City on January 30, 2009.

B. Second Breach

58. The Band repudiated or anticipatorily breached the 1994 Contracts by advising the City that it would offset the contra-revenue deduction on an ongoing basis against future payments due to the City.

C. Third Breach

59. The Band repudiated or anticipatorily breached the 1994 Contracts by unilaterally passing Resolution #1316/09 immediately ceasing all payments to the City due under the 1994 Contracts.

60. The Band failed to respond or cure any of the breaches of contract after receiving notice having an opportunity to cure.

61. As a direct and proximate result of the Band's First Breach, the City has been damaged in the principal amount of Five Hundred Sixty-One Thousand and Forty-Seven Dollars and Fifty-Nine Cents (\$561,047.59) together with interest as provided by the 1994 Contracts.

62. As a direct and proximate result of the Band's Second and Third Breaches, calculated at current revenue rates, the City will be damaged in an amounts estimated to be in excess of Twelve Million Dollars (\$12,000,000.00) more or less through March 31, 2011 and Two Hundred Million Dollars (\$200,000,000.00) more or less through March 31, 2036.

COUNT II –DECLARATORY JUDGMENT - VALIDITY OF 1994 CONTRACTS

63. The City restates and realleges paragraphs 1 through 62 listed above.

64. The City will be irreparably harmed if the Band may unilaterally disregard the 1994 Contracts and this Court's 1994 Consent Order.

65. This Court should issue an Order declaring the validity of the 1994 Contracts and further declaring the 1994 Consent Order approving the same was a final resolution of the controversy between the Band and the City both as to facts and law.

COUNT III – INJUNCTIVE RELIEF

66. The City restates and realleges paragraphs 1 through 65 listed above.

67. The 1994 Contracts constitute valid and enforceable contracts which were a Court approved settlement agreement/Consent Order.

68. The City has duly performed all of the conditions required of it under the 1994 Contracts and the 1994 Consent Order.

69. The City has already been damaged in the amount of Five Hundred Sixty-One Thousand and Forty-Seven Dollars and Fifty-Nine Cents (\$561,047.59), together with interest as contemplated by the 1994 Contracts.

70. The City will continue to be harmed by the Bands' current and anticipatory breach of the 1994 Contracts by failing to cure defaults and pay future quarterly rent due under the 1994 Contracts.

71. The City requests an injunction requiring the Band to cure existing and anticipatory breaches, and further requiring the Band to comply with the terms and conditions of the 1994 Contracts.

PRAYER FOR RELIEF

WHEREFORE, City prays that this Court issue an Order:

1. Declaring that the 1994 Contracts between the City and the Band constitute valid and enforceable contracts.

Breach of Contract

2. Declaring that the Band currently breached the 1994 Contracts.

First Breach

3. Granting judgment in favor of the City against the Band in the amount of Five Hundred Sixty-One Thousand and Forty-Seven Dollars and Fifty-Nine Cents (\$561,047.59) together with interest as required by the 1994 Contracts.

Second and Third Breaches Injunctive or Alternative Relief Injunctive Relief

4(a) Enjoining the Band from continuation of announced breaches by requiring the Band to comply with the terms and conditions of the 1994 Contracts, or

Alternatively

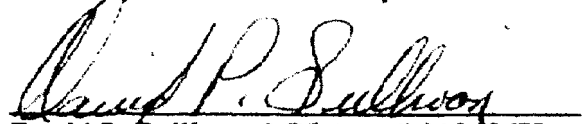
4(b) Given the Band's complete repudiation of the 1994 Contracts, as alternative relief, the City may request that this Court declare that all future payments are presently due and hold a hearing to establish an accelerated award of damages for the balance of the Initial Term in

an amount estimated to exceed Twelve Million Dollars (\$12,000,000.00) more or less for the Initial Term through March 31, 2011 and an amount estimated to exceed Two Hundred Million Dollars (\$200,000,000.00) more or less for the Extension Term through March 31, 2036.

5. For such other and further relief as the Court may deem appropriate.

Dated this 29th day of September, 2009.

Attorneys for Plaintiff City of Duluth



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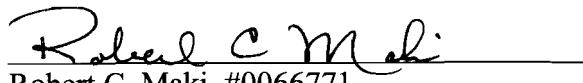
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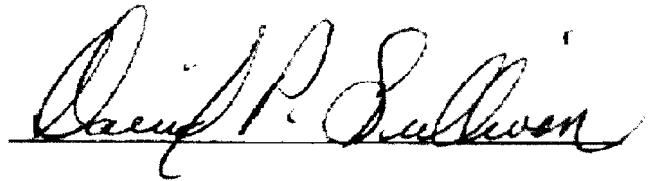
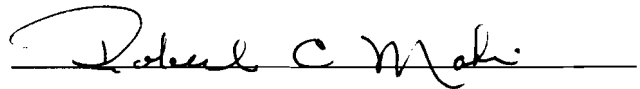
sreed@makiandoverom.com

ACKNOWLEDGEMENT

Pursuant to Federal Rules of Civil Procedure Rule 11(b), the undersigned acknowledges as follows:

- (1) The foregoing matter is not being presented for an improper purpose;
- (2) The claims, defenses, and other legal contentions are warranted by existing law or by a non-frivolous argument for the extension, modification or reversal of existing law or establishment of new law;
- (3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, likely to have evidentiary support after reasonable opportunity for further investigation or discovery;
- (4) The denials of factual contentions are warranted on the evidence, or if specifically so identified, are reasonably based on lack of information or belief.

The undersigned further acknowledges that costs, disbursements, and reasonable attorneys fees may be awarded to the opposing party or parties for violation of Federal Rules of Civil Procedure Rule 11(b).

A handwritten signature in cursive script, appearing to read "David P. Sullivan", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Robert C. Mahi", written over a horizontal line.