UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

City of Duluth,

Plaintiff,

v.

Fond du Lac Band of Lake Superior Chippewa,

Defendant.

Case No. 0:09-cv-02668-ADM-RLE
Honorable Ann D. Montgomery

Defendant Fond du Lac Band of Lake Superior Chippewa's Answer and Counterclaim

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Defendant Fond du Lac Band of Lake Superior Chippewa (the "Band"), for its Answer to the Complaint of Plaintiff the City of Duluth (the "City"), states and alleges by reference to the paragraph numbers of that Complaint as follows:

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).

ANSWER: **Neither admit nor deny this statement, as it is a summary of the nature of the City's Complaint.**

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

ANSWER: Admit the Consent Order was approved on July 28, 1994. Deny the

remainder of paragraph 2 because it is a legal conclusion.

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.

ANSWER: Deny paragraph 3 because it is a legal conclusion.

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.

ANSWER: Upon information and belief, admit.

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.

ANSWER: Admit.

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.

ANSWER: Admit.

JURISDICTION AND VENUE

7. The 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).

ANSWER: Deny paragraph 7 because it is a legal conclusion.

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

ANSWER: Admit.

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.

ANSWER: The Band is without sufficient information to admit or deny paragraph 9.

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

ANSWER: The Band is without sufficient information to admit or deny paragraph 10.

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.

ANSWER: The allegation is too vague for the Band to either admit or deny.

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.

ANSWER: Admit that in 1984, the City and the Band began discussing a joint business relationship. Deny the remainder of paragraph 12.

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.

ANSWER: Admit.

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

ANSWER: Admit.

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

ANSWER: Admit that the Band purchased land in the downtown area of the City, had it placed in trust, and had it declared by the Secretary of Interior a part of its reservation. Deny the remainder of paragraph 15.

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.

ANSWER: Deny. The relevant agreements relating to the City's land acquisition and the parking ramp speak for themselves.

17. The 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.

ANSWER: Deny that the 1986 Contracts were "approved by the Secretary of the

Interior." Admit remainder.

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

ANSWER: Deny. The 1986 Contracts speak for themselves.

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

ANSWER: Deny. The 1986 Contracts speak for themselves.

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

ANSWER: Deny. The 1986 Contracts speak for themselves.

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 within the downtown area of the City.

ANSWER: Deny. The 1986 Contracts speak for themselves.

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

ANSWER: Admit.

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.

ANSWER: Admit.

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).

ANSWER: Admit.

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).

ANSWER: Admit.

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.

ANSWER: Deny. The unpublished decision speaks for itself.

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.

ANSWER: Admit that the Band filed a petition with the NIGC. Deny remainder, as the petition speaks for itself.

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 commencement of any enforcement action in order to allow for resolution between the parties and offered its services to mediate.

ANSWER: Admit that the Chairman of the NIGC issued a September 24, 1993 determination. Deny the remainder of paragraph 28 as that determination speaks for itself.

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.

ANSWER: Admit.

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.

ANSWER: Admit.

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.

ANSWER: Deny. The agreement between the City and the Band speaks for itself.

32. The settlement agreement 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").

ANSWER: Admit.

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

ANSWER: Deny. The settlement agreement speaks for itself.

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.

ANSWER: Admit the parties entered the Sublease. Deny remainder, as the Sublease speaks for itself.

(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.

ANSWER: Deny. The Sublease speaks for itself.

(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)."

ANSWER: Deny. The Sublease speaks for itself.

(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.

ANSWER: Deny. The Sublease speaks for itself.

(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.

ANSWER: Deny. The Sublease speaks for itself.

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.

ANSWER: Deny. The relevant agreements speak for themselves.

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.

ANSWER: Deny. The relevant agreements speak for themselves.

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.

ANSWER: Deny. The relevant agreements speak for themselves.

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.

ANSWER: Deny. The relevant agreements speak for themselves.

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.

ANSWER: Admit that the Band and the City entered into a "Tribal-City Accord." Deny the remainder of paragraph 39.

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.

ANSWER: Admit.

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.

ANSWER: Admit first sentence. Deny second sentence because the Agreement and attached specific agreements speak for themselves.

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.

ANSWER: Admit.

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.

ANSWER: Admit that the Chairman of the NIGC issued a determination regarding the 1994 Contracts. Deny the remainder of paragraph 43 as that determination speaks for itself.

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.

ANSWER: Deny. The 1994 Contracts speak for themselves.

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.

ANSWER: Deny. The Court's Consent Order speaks for itself.

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.

ANSWER: Admit that the Band's Chairwoman sent a letter to the City in January 2009. Because the letter speaks for itself, deny remainder of paragraph 46.

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."

ANSWER: Because the January letter speaks for itself, deny paragraph 47.

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.

ANSWER: Because the January letter speaks for itself, deny paragraph 48.

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.

ANSWER: Deny.

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.

ANSWER: Because the January letter speaks for itself, deny paragraph 50.

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.

ANSWER: Admit that the Band received letters dated April 23, 2009 and May 12, 2009 alleging that the Band had failed to follow the 1994 Contracts. Deny remainder of paragraph 51.

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.

ANSWER: Admit that the Band Reservation Business Committee passed Resolution #1316/09. Because the Resolution speaks for itself, deny remainder of paragraph 52.

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."

ANSWER: Deny. The Band's Resolution speaks for itself.

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.

ANSWER: Deny that the Band's enacting of Resolution #1316/09 constituted a default of the 1994 Contracts. Admit remainder of paragraph 54.

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

ANSWER: Admit that more than 30 days have elapsed from the notice letters. Deny remainder of paragraph 55.

COUNT I - BREACH OF CONTRACT

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

ANSWER: The Band restates its Answers to 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.

ANSWER: Deny.

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.

ANSWER: Deny.

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.

ANSWER: Deny.

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

ANSWER: The Band admits that it received the City's notices, but denies that it had any obligation to respond or cure any of the alleged breaches of contract.

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.

ANSWER: Deny.

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.

ANSWER: Deny.

COUNT II -DECLARATORY JUDGMENT - VALIDITY OF 1994 CONTRACTS

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

ANSWER: The Band restates its Answers to 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.

ANSWER: Deny.

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.

ANSWER: No response required, as this paragraph calls for a legal conclusion. Deny that the City is entitled to any such relief.

COUNT III - INJUNCTIVE RELIEF

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

ANSWER: The Band restates its Answers to paragraphs 1 through 65 listed

above.

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

ANSWER: Deny.

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

ANSWER: No response required, as this paragraph calls for a legal conclusion.

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.

ANSWER: Deny.

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.

ANSWER: Deny.

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.

ANSWER: No response required, as this paragraph calls for a legal conclusion. Deny that the City is entitled to any such relief.

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.

ANSWER: No response required, as this paragraph calls for a legal conclusion. Deny that the City is entitled to any such relief.

Breach of Contract

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

ANSWER: No response required, as this paragraph calls for a legal conclusion. Deny that the City is entitled to any such relief.

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.

ANSWER: No response required, as this paragraph calls for a legal conclusion. Deny that the City is entitled to any such relief.

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

ANSWER: No response required, as this paragraph calls for a legal conclusion. Deny that the City is entitled to any such relief.

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.

ANSWER: No response required, as this paragraph calls for a legal conclusion. Deny that the City is entitled to any such relief.

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

ANSWER: No response required, as this paragraph calls for a legal conclusion. Deny that the City is entitled to any such relief.

BAND'S DEFENSES

1. The City has failed to state a claim for which relief can be granted under Fed. R. Civ. P. 12(b)(6).

2. Key provisions of the 1994 Contracts, including regarding the amount of rent paid under the Sublease, are void, unenforceable, and unconscionable because the City failed to offer sufficient consideration in exchange for rental (and other) payments received from the Band.

3. Key provisions of the 1994 Contracts are void and unenforceable because they are the product of mutual mistake of the parties because the City's consent was not necessary to permit the Band to conduct gaming at the Fond du Luth Casino.

4. Key provisions of the 1994 Contracts are void and unenforceable because they are illegal under federal law and violate public policy.

BAND'S PRAYER FOR RELIEF ON THE CITY'S COMPLAINT

WHEREFORE, the Band prays for the following relief:

1. That the City's Complaint be dismissed with prejudice;

2. That the City take nothing by its Complaint;

3. That the Court enter judgment that the Band has not violated the 1994 Contracts;

4. That the Court declare that certain terms of the 1994 Contracts were void *ab initio* and reform the 1994 Contracts to comport with the IGRA and other applicable law;

5. That the Band be awarded its reasonable costs and attorney's fees; and

6. That the Court award the Band such other relief that this Court deems just and proper.

BAND'S COUNTERCLAIM AGAINST THE CITY

1. The Band hereby counterclaims against the City. This is a compulsory counterclaim under Fed. R. Civ. P. 13(a). It arises out of the transaction or occurrence that is the subject matter of the City's claims against the Band and does not require adding another party over whom the court cannot acquire jurisdiction. Because this is a compulsory counterclaim, the Court has ancillary subject-matter jurisdiction over it. *See Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 469 n. 1 (1974).

2. The Band expressly incorporates paragraphs 4-6 and 8 of the City's Complaint regarding the parties and venue.

3. In 1986, the Band and the City entered a series of agreements (the "1986 Contracts") that purported to authorize the Band to game at a location in downtown Duluth that is located on land held in trust by the United States for the Band.

4. One of the 1986 Contracts was the "Commission Agreement," which created a seven-person, Duluth-Fond du Lac Economic Development Commission (the "Commission") as a joint venture between the City and Band to jointly manage the gaming operation, which was named the Fond du Luth Casino

5. The 1986 Contracts split profits between the Band and the City, with each to receive roughly 25%, and the Commission, which was to receive 50%.

6. The 1986 Contracts also included a lease agreement from the Band to the Commission for the Fond du Luth Casino site (the "1986 Lease").

7. The 1986 Lease had an initial term of 25 years, and the Commission exercised an option to extend the 1986 Lease for an additional 25 years, or until 2036.

8. In 1988, Congress passed the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq*. ("IGRA"), which required that each tribe enact a gaming ordinance. Among the requisites that each tribal gaming ordinance must include is a provision requiring that the tribe will have "the sole proprietary interest and responsibility for the conduct of any gaming activity." 25 U.S.C. § 2710 (b)(2)(A).

9. Because the Commission Agreement in the 1986 Contracts gave the Commission (and not the Band) the responsibility to conduct gaming at Fond du Luth Casino and 50% of the profits of the Casino, amongst other problems, it was illegal under the IGRA, and in 1989, the Band initiated litigation against the City regarding the 1986 Contracts.

10. The Band also sought the review of the 1986 Contracts by the Secretary of the Interior and the newly formed National Indian Gaming Commission ("NIGC").

11. On November 2, 1990, Associate Solicitor for Indian Affairs issued a letter opining that the Commission Agreement violated the IGRA.

12. On September 24, 1993, NIGC Chairman Anthony Hope issued a letter also opining that the Commission Agreement violated the IGRA.

13. Thereafter, in 1994, the Band and the City entered a settlement agreement that 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," which incorporated various new contracts (the "1994 Contracts").

14. The 1994 Contracts again concerned the ownership and operation of the Fond du Luth Casino.

15. The 1994 Contracts included a "Commission Amendment," which restructured the Commission into a two-person entity consisting of the mayor of the City of Duluth and the Chair of the Band (or their respective designees).

16. The parties entered a 1994 Sublease from the Commission back to the Band.

17. The Sublease required the Band to pay the Commission rent equal to 19% of the gross revenues of the slot machine at the Fond du Luth Casino, which rent was permanently assigned to the City.

18. The overall term of the Sublease (including an option to extend that was exercised at the same time) was through 2036, 50 years, with an opportunity to renegotiate the rent in 2011.

19. Under the 1986 and 1994 Contracts, the Band has paid the City more than $80 million.

20. Under just the 1994 Contracts, just the rental payments the Band has paid the City total approximately $75,527,708.

21. The Band has also paid the City additional lump sums under the 1994 Contracts.

22. In exchange for the rental and other payments, the City has provided little in the way of services beyond those normally provided to other Duluth businesses.

23. For these and other reasons, and regardless of any purported approvals or agreement at that time, certain terms in the 1994 Contracts are void and unenforceable.

24. In particular, terms in the 1994 Contracts still violate the requirement that Indian tribes have "the sole proprietary interest and responsibility for the conduct of any gaming activity" at their gaming operations. *See* 25 U.S.C. §§ 2710(b)(2)(A), (d)(1)(A)(ii).

25. Terms of the 1994 Contracts also violate IGRA's prohibition against "a State or any of its political subdivisions" imposing "any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity." *See* 25 U.S.C. § 2710(d)(4).

26. Terms of the 1994 Contracts are also the functional equivalent of an unauthorized tax on the Band reservation lands upon which the gaming operation sits, which are tax-exempt lands held in trust by the United States under 25 U.S.C. §§ 465 and 467 (providing for the creation of reservation trust land). 25 U.S.C. § 465 states that "[t]itle to any lands or rights acquired pursuant to sections . . . 466 to 470, . . . of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation."

27. For the same reasons, terms of the 1994 Contracts violate the Supremacy Clause of the United States Constitution, Article VI, clause 2.

28. Terms of the 1994 Contracts are also void, unenforceable, and unconscionable because the City failed to offer any sufficient consideration in exchange for receiving rental and other payments from the Band.

29. Terms of the 1994 Contracts are also void and unenforceable because they are the product of mutual mistake regarding the need for City approval for the gaming contemplated thereunder.

30. Specifically, in 1994 and under the IGRA, the City did not have any authority to either approve or disapprove the development or maintenance of the gaming operation that is the subject of the 1994 Contracts.

31. Under the IGRA and other federal law, the City has no legal right to retain any portion of the rental and other payments that was not directly tied to an actual service or good that the City provided to the Band.

32. Under the IGRA and other federal law, the City has no legal right to receive any more money under the 1994 Contracts that is not directly tied to an actual service or good that the City will provide to the Band.

COUNT I: DECLARATORY RELIEF

33. The Band realleges paragraphs 1-32 of its Counterclaim.

34. Because certain of the 1994 Contracts' terms are illegal under federal law and because there was a lack of sufficient consideration from the City, rendering certain terms unconscionable, including those relating to the amount of rental and other payments to the City, this Court should issue an order declaring the invalidity of certain terms of the 1994 Contracts.

COUNT II: UNJUST ENRICHMENT (INSUFFICIENT CONSIDERATION; UNCONSCIONABILITY)

35. The Band realleges paragraphs 1-34 of its Counterclaim.

36. The Band has conferred on the City a significant benefit in the form of more than $75,527,708 in rental payments and other payments under the 1994 Contracts.

37. The Band received insufficient consideration in return for this benefit from the City because the City had no actual authority to either approve or disapprove the Band's gaming operation and the City offered nearly no other consideration.

38. The City's consideration was so insufficient that it was unconscionable.

39. The City knowingly accepted and retained the benefit of the rental and other payments without rendering anything substantive in return.

40. It would be inequitable for the City to retain any amounts not directly tied to goods or services the City provided to the Band.

41. The City has been unjustly enriched in an amount greater than $75,000.

COUNT III: UNJUST ENRICHMENT (MUTUAL MISTAKE)

42. The Band realleges paragraphs 1-41 of its Counterclaim.

43. The Band has conferred on the City a significant benefit in the form of more than $75,527,708 in rental and other payments under the 1994 Contracts.

44. The City and the Band made a mutual mistake regarding the City's authority to either approve or disapprove the Band's gaming operation and the sufficiency of the other consideration the City offered.

45. The City knowingly accepted and retained the benefit of the rental and other payments without rendering anything substantive in return.

46. It would be inequitable for the City to retain any amounts not directly tied to goods or services the City provided to the Band.

47. The City has been unjustly enriched in an amount greater than $75,000.

COUNT IV: UNJUST ENRICHMENT (ILLEGAL CONTRACT PROVISIONS)

48. The Band realleges paragraphs 1-47 of its Counterclaim.

49. The Band has conferred on the City a significant benefit in the form of more than $75,527,708 in rental and other payments under the 1994 Contracts.

50. Key terms of the 1994 Contracts are illegal under federal law (including, but not limited to, the IGRA, 25 U.S.C. § 465, and the U.S. Constitution), including those that relate to

the amount of rental and other payments to the City.

51. The City knowingly accepted and retained the benefit of the rental and other payments without rendering anything substantive in return and despite the illegality of those payments under federal law.

52. It would be inequitable for the City to retain any amounts not directly tied to goods or services the City provided to the Band and which payments were illegal under federal law.

53. The City has been unjustly enriched in an amount greater than $75,000.

BAND'S PRAYER FOR RELIEF ON ITS COUNTERCLAIM

WHEREFORE, the Band prays for the following relief:

1. That the Court declare that certain terms of the 1994 Contracts were void *ab initio* and reform the 1994 Contracts to comport with the IGRA and other applicable law;
2. That the Court render restitution to the Band of such sums as the Band has disbursed to the City as rental or other payments under the 1994 Contracts that were not directly tied to any goods or services the City provided in an amount to be proved with certainty at trial;
3. That the Band be awarded its reasonable costs and attorney's fees; and
4. That the Court award the Band such other relief that this Court deems just and proper.

Dated: October 22, 2009

FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA

s/ Sara K. Van Norman

Henry M. Buffalo, Jr. (MN #236603)
Mark A. Anderson (MN #0002203)
Vanya S. Hogen (MN #23879X)
Sara K. Van Norman (MN #0339568)
Jacobson, Buffalo, Magnuson, Anderson & Hogen, P.C.
1360 Energy Park Drive, Suite 210
St. Paul, Minnesota 55108
Tele: (651) 644-4710
Fax: (651) 644-5904
E-mail: hmb@jacobsonbuffalo.com;
maa@jacobsonbuffalo.com;
vhogen@jacobsonbuffalo.com;
svannorman@jacobsonbuffalo.com

Dennis Peterson (MN #0208036)
Tribal Attorney
Fond du Lac Band of Lake Superior Chippewa Legal Affairs Office
1720 Big Lake Road
Cloquet, Minnesota 55720
Tele: (218)878-2607
Fax: (218)878-2692
E-mail: dennispeterson@fdlrez.com

Certificate of Service

I hereby certify that on October 22, 2009, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to the following:

Attorneys for the City of Duluth:

David P. Sullivan (MN # 010694X)
Attorney at Law
31 West Superior Street #402
Duluth, MN 55802
Tele: 218-726-0805

717 Sunset Cove
Madeira Beach. FL 33708
Tele: 727-319-6965
dave@sullivanadr.com

Robert C. Maki (MN #0066771)
Shawn B. Reed (MN #0279043)
31 West Superior Street, #402
Duluth, MN 55802
218-726-0805, ext. 114
bmaki@makiandoverom.com
sreed@makiandoverom.com

and I hereby certify that there are no non-ECF participants listed in the case that require service by U.S. mail.

s/ Sara K. Van Norman
Sara K. Van Norman (MN #0339568)
Jacobson, Buffalo, Magnuson, Anderson & Hogen, P.C.
1360 Energy Park Drive, Suite 210
St. Paul, Minnesota 55108
Tele: (651) 644-4710
Fax: (651) 644-5904
E-mail: svannorman@jacobsonbuffalo.com