

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
CENTRAL DIVISION

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**CHARLES COLOMBE**,  
Individually and as an Officer  
of BBC Entertainment, Inc., a dissolved  
Minnesota corporation,

Plaintiff,

v.

**ROSEBUD SIOUX TRIBE, ROSEBUD  
SIOUX TRIBAL COURT, and JUDGE  
SHERMAN MARSHALL**, in his Official and  
Individual Capacities,

Defendants.

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Civ. 11-3002

**PLAINTIFF'S MEMORANDUM OF LAW  
IN SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT**

**INTRODUCTION**

In its July 20, 2006, decision, the Supreme Court of the Rosebud Sioux Tribe reversed the January 12, 2004 decision and judgment of Special Judge Jones and remanded the case for further proceedings. The two issues on appeal as stated by the Rosebud Supreme Court were:

- A. Whether the mutual oral modification of the Management Contract as how to fund the OER account is void as a matter of federal law for failure to comply with the Indian Gaming Regulatory Act and its implementing regulations; and
- B. If the Management Contract modification is void, what is the appropriate remedy for the failure to comply with the contract modification provisions of IGRA.

(Rosebud Supreme Court Memorandum Opinion and Order, July 20, 2006, p. 3 – Ex. 4, Affidavit of Counsel, February 11, 2011 (Doc. 9-4, p.5)).

Rosebud Supreme Court did not have jurisdiction to consider whether the mutual oral modification of the Management Contract was void as a matter of federal law under IGRA because such a determination is solely within the jurisdiction of the NIGC. Because the Rosebud

Supreme Court did not have jurisdiction on this issue and because the Rosebud Supreme Court's July 20, 2006 decision is based solely on this issue, the Rosebud Supreme Court's July 20, 2006 decision is void and unenforceable. Thus, all further proceedings in tribal court after the Rosebud Supreme Court's July 20, 2006 decision are void and unenforceable. Specifically, the trial court's October 16, 2007 judgment on remand is void and unenforceable against BBC and cannot be a basis for a personal judgment against Plaintiff.

For these reasons, summary judgment in favor Plaintiff is appropriate.

### **FACTUAL BACKGROUND**

In August 2001, the Tribe commenced litigation in its tribal court against BBC Entertainment, Inc. (BBC), alleging eight causes of action against BBC. (Rosebud Supreme Court Memorandum Opinion and Order, July 20, 2006, p. 2 – Ex. 4, Affidavit of Counsel, February 11, 2011 (Doc. 9-4, p.4)). Only two causes of action related to breach of contract actually made it to trial. (Judgment and Memorandum Decision of Special Judge B.J. Jones, January 12, 2004, p. 1 – Ex. 2, Affidavit of Counsel, February 11, 2011 (Doc. 9-2, p. 3)).

The Tribe's theory at trial was two-fold: 1) that the management agreement only permitted BBC to withdraw its initial contribution from the "Operation Expense Reserve" ("OER") and that BBC's withdrawal of 35% of the monies contributed was a violation of the management agreement; and 2) that Defendant breached the management agreement by permitting monies to be taken out of net revenue and placed in the OER. *Id.* at p. 3 (Doc 9-2, p. 5).

#### ***1st Tribal Court Judgment – January 12, 2004***

Special Judge Jones ruled, after a full evidentiary hearing, that the OER agreement was a mutual agreement that did not violate the Management Agreement. (Judgment and

Memorandum Decision of Special Judge B.J. Jones, January 12, 2004 – Ex. 2, Affidavit of Counsel, February 11, 2011 (Doc. 9-2)). Judge Jones awarded judgment to the Tribe and against BBC in the amount of \$1,028.40. *Id.*

***Appeal to Supreme Court of Rosebud Sioux Tribe***

The Tribe appealed Judge Jones' January 12, 2004 decision to the Rosebud Supreme Court. The Tribe only appealed on Count I of its Complaint which dealt with the OER. (Rosebud Supreme Court Memorandum Opinion and Order, July 20, 2006, p. 2 – Ex. 4, Affidavit of Counsel, February 11, 2011 (Doc. 9-4, p.4)). The Tribe, which had alluded to the issue of contract modification in closing arguments at trial, formally raised the issue of a NIGC violation for the first time on appeal:

As the sole issue on appeal, the Tribe now seeks review of the Trial Court's denial of relief under Count I of its Complaint, concerning BBC's violation of certain obligations towards the Tribe that were strictly defined by the terms of the approved Management Agreement. The Tribe bases its appeal on the trial court's legal decision to enforce against the Tribe a supposed oral amendment to the NIGC-approved Management Agreement. That ruling is in direct and irreconcilable conflict with governing federal law that denies any effect to an oral amendment, to any amendment that lacks NIGC approval.

(Rosebud Sioux Tribe's Brief on Appeal, December 7, 2005, pp. 2-3 – Ex. 1, Affidavit of Counsel in Support of Plaintiff's Motion for Summary Judgment).

“In response, BBC argued, *inter alia*, that the tribal court had no jurisdiction to rule that there had been an illegal modification of the Management Agreement as that was under the exclusive jurisdiction of the NIGC, and further that the IGRA created no private right of action.” (BBC Entertainment, Inc. Brief on Appeal to the Supreme Court of the Rosebud Sioux Tribe, December 23, 2005, p. 11 – Ex. 3, Affidavit of Counsel, February 11, 2011 (Doc. 9-3, p. 14)).

The Rosebud Supreme Court ruled:

[T]he oral agreement of the parties to fund the OER through mutual monthly contributions of 7.5% for their net profits was a modification of the Management Contract. Such a modification expressly requires approval of the NIGC. 25 U.S.C. § 2711. Failure to obtain the required NIGC approval for any management contract modification renders the modification “void.”

(Memorandum Opinion and Order, July 20, 2006, p. 5 – Ex. 4, Affidavit of Counsel, February 11, 2011 (Doc. 9-4, p. 7)).

The Rosebud Supreme Court, without any discussion of its jurisdiction or authority, placed itself in the position of the NIGC and found that there had been a modification of the approved contract, and that the modification was void. *Id.*

The Tribe then sought a rehearing, and a rehearing en banc asking the Supreme Court “to enter an order correcting its mistakes of fact and law, on the grounds that the Court’s per curiam (sic) opinion and order is based on fundamental mistakes of fact and law, and so misapprehends and misunderstands essential points of law and fact.” (Petition for Rehearing; Request for Rehearing En Banc, August 3, 2006, p. 4 – Ex. 2, Affidavit of Counsel in Support of Plaintiff’s Motion for Summary Judgment). The Tribe’s petition was granted and the parties were allowed to file supplemental briefs if they chose to do so.

BBC filed its Optional Brief on Rehearing on September 8, 2006 to respond to the issue framed by the RST Supreme Court, which was: “What is the appropriate remedy for the illegal modification of the Rosebud Sioux Casino’s management contract provision dealing with the establishment and funding of the Operation Expense Reserve account?” BBC’s first argument was that the RST Supreme Court “did not discuss the jurisdictions issues raised by BBC in its Appeal Brief. That is unfortunate because BBC understands that the IGRA does not create jurisdiction for any Court to determine that issue. The Court reasoning on how it has jurisdiction to rule on that issue would thus have been helpful in framing this memorandum.” (BBC

Optional Brief on Rehearing, September 8, 2006, p. 1 – Ex. 5, Affidavit of Counsel, February 11, 2011 (Doc. 9-5, p. 1)). BBC then again explained its jurisdictional argument. *Id.* at 1-5.

On October 2, 2006, the full five-member Rosebud Supreme Court filed its Summary Order as its decision on the rehearing en banc. (Summary Order, October 2, 2006 – Ex. 6, Affidavit of Counsel, February 11, 2011 (Doc. 9-6)). Like its first decision, the Rosebud Supreme Court failed to discuss jurisdiction. *Id.* The Supreme Court then affirmed its previous opinion and remanded the case. *Id.*

### ***Post-Appeal Litigation***

A second hearing was held in front of Judge Jones. On October 16, 2007, Judge Jones entered judgment against BBC in the amount of \$339,353.61 plus interest of \$127,793.15. (Judgment, October 16, 2007 – Ex. 7, Affidavit of Counsel, February 11, 2011 (Doc. 9-7, p. 2)). The October 16, 2007 judgment has been used by the Tribe as the basis for an action against Plaintiff in tribal court seeking to pierce the corporate veil. At a short hearing held on March 13, 2012 a newly appointed tribal court judge entered summary judgment against Plaintiff. (Memorandum Decision, April 19, 2012 – Ex. 3, Affidavit of Counsel in Support of Plaintiff’s Motion for Summary Judgment).<sup>1</sup> Subsequently the Tribe has been working at cancelling Plaintiff’s land rights on the Rosebud Reservation.

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<sup>1</sup> Plaintiff had no previous notice of the appointment of the tribal court judge who appeared at the March 13, 2012 hearing, and has not yet been able to determine if she was validly appointed under the old tribal law for appointing judges. Plaintiff is confident that the judge was not validly appointed under the Rosebud Constitution, Article XI – Tribal Court, as the Tribe has admitted that it has not passed the ordinances required by Article XI. (See Defendants’ Answers to Interrogatories and Requests for Admissions, May 10, 2012 – Ex. 4, Affidavit of Counsel in Support of Plaintiff’s Motion for Summary Judgment).

*Colombe v. Rosebud Sioux Tribe, et al.*

### **STANDARD OF REVIEW**

“Summary judgment is proper if, after viewing the evidence and drawing all reasonable inferences in the light most favorable to the nonmovant, no genuine issues of material fact exist and the movant is entitled to judgment as a matter of law.” *Davis v. Union Pacific R. Co.*, 598 F.Supp.2d 955, 955 -956 (E.D.Ark. 2009)(quoting *Nelson v. Corr. Med. Servs.*, 533 F.3d 958, 961 (8th Cir.2008) (citing Fed.R.Civ.P. 56; *Brown v. Fortner*, 518 F.3d 552, 558 (8th Cir.2008))). “When the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate.” *Id.* (quoting *Boyle v. Anderson*, 68 F.3d 1093, 1097 (8th Cir.1995).

### **ARGUMENTS & AUTHORITIES**

Defendants are improperly proceeding with an action against Plaintiff in tribal court to pierce the corporate veil of BBC to collect on an invalid tribal court judgment. Plaintiff asserts that the October 16, 2007 judgment is invalid because the Rosebud Supreme Court had no jurisdiction or authority to rule that there had been an illegal modification of the Management Agreement because the exclusive jurisdiction to make such a decision lies with the NIGC. Because the Rosebud Supreme Court’s July 20, 2006 decision is void and unenforceable, everything that happened in tribal court after July 20, 2006 is also void.

#### ***St. Regis – No Jurisdiction to Consider Whether Approval Required***

The Second Circuit Court of Appeals addressed a similar issue in *U.S. ex rel. The Saint Regis Mohawk Tribe v. President R.C.--St. Regis Mgmt. Co.*, 451 F.3d 44 (2d Cir. 2006). The Saint Regis Mohawk Tribe brought an action in federal court to declare a construction contract null and void on the grounds that the construction contract was not approved by the NIGC as required by IGRA. The Court of Appeals determined that by predicating its declaratory

judgment action on an alleged failure to comply with the regulatory regime set out in IGRA, the Tribe's case presented a threshold issue of exhaustion of administrative remedies available through the NIGC even though the Management Agreement provided that disputes between the parties would be brought in federal court. *Id.* at 46, 49-50. The Court concluded that “the statutory exhaustion requirement could not be more plain.” *Id.* at 50. “If the Tribe is correct in its contention that the Construction Contract required approval pursuant to IGRA, then the administrative remedy available to the Tribe would be submission of the Construction Contract for approval pursuant to 25 U.S.C. § 2711(b).” *Id.* “Similarly, if the Tribe wished to void the Construction Contract on the ground that it was a contract not submitted for approval as required by IGRA, or in which an individual held an improper interest, then the Tribe could request a hearing before the Chairman on the matter pursuant to § 2711(f), after which appeal could be taken pursuant to § 2714.” *Id.* at 50-51. The Court ultimately concluded: “By proceeding directly to the district court in an action nowhere authorized under IGRA, the Tribe impermissibly sought a determination outside the administrative review scheme crafted by Congress.” *Id.* at 51. “As it is, this Court, like the district court below, is without jurisdiction to order any form of relief because the Tribe failed to comply with the mandatory, statutorily prescribed remedies that must be exhausted before proceeding to the federal courts.” *Id.*

The Second Circuit plainly and accurately explained that if a tribe wishes to “void” a contract “on the ground that it was a contract not submitted for approval as required by IGRA . . . then the Tribe could request a hearing before the Chairman on the matter pursuant to § 2711(f), after which appeal could be taken pursuant to § 2714.” *Id.* at 50-51. If the Tribe wished to recover money from BBC under the theory that its admitted mutual agreement regarding the

OER was void for want of NIGC approval, then the Tribe's remedy was to request a hearing before the Chairman of NIGC.

***Montgomery – No Private Right of Action***

The Tribe's claims in its lawsuit against BBC in tribal court arguing that the agreement to fund the OER was a violation of IGRA is also prohibited by the law of this district and this circuit prohibiting a private right of action for an alleged IGRA violation. In *Montgomery v. Flandreau Santee Sioux Tribe*, 905 F.Supp. 740, 745 (D.S.D. 1995), Judge Piersol ruled that the IGRA does not provide a private right of action. *Id.* at 745 (citing *Maxam v. Lower Sioux Indian Community of Minnesota*, 829 F.Supp. 277, 281 (D.Minn.1993) (holding that, by engaging in gaming, Tribe waives sovereign immunity for narrow purpose of determining Tribe's compliance with the IGRA)). Again, the proper venue to seek a remedy for a claimed IGRA violation is the NIGC.

**CONCLUSION**

Plaintiff respectfully requests that this Court enter an Order vacating the judgment against BBC and ordering the dismissal of the Tribe's tribal court claims. The Tribe has failed to comply the mandatory statutory duty under IGRA and therefore the Rosebud Supreme Court was without jurisdiction to reverse the judgment of the Rosebud Tribal Court.

Dated this 9<sup>th</sup> day of July, 2012.

/s/ Clint Sargent

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