

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION**

BETTOR RACING, INC. and J. RANDY  
GALLO,

Plaintiffs,

v.

NATIONAL INDIAN GAMING  
COMMISSION,

Defendant.

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FLANDREAU SANTEE SIOUX TRIBE,  
a federally recognized Indian tribe,

Intervenor.

Civ. 13-4051

**ANSWER AND  
COUNTERCLAIM OF INTERVENOR  
FLANDREAU SANTEE SIOUX TRIBE**

(Fed. R. Civ. P. 24)

Proposed Intervenor Flandreau Santee Sioux Tribe (“the Tribe”), a federally-recognized Indian tribe, submits this Answer to the Complaint by Plaintiffs’ Bettor Racing, Inc. and its President J. Randy Gallo (“Bettor”), and Counterclaims. The Tribe specifically denies each and every allegation of the complaint not otherwise expressly admitted, qualified or denied in this Answer.

**THE PARTIES**

1. The Tribe admits the allegations contained in paragraphs 1 through 3.
2. The Tribe admits the allegation contained in paragraph 4 that it is a federally recognized Indian tribe, has been granted a federal charter, and owns and operates the Royal River Casino located in Flandreau, South Dakota pursuant to a Tribal–State Compact, but denies that it was acting in its corporate capacity.

### **JURISDICTION**

3. The allegations contained in paragraph 5 are conclusions of law to which no response is required. To the extent that a response is required, the Tribe denies the allegations in paragraph 5.

### **FACTUAL ALLEGATIONS**

4. The Tribe admits the allegations contained in paragraphs 6 and 7.

5. The Tribe admits the allegations contained in Paragraph 8 that it was represented by attorneys and that its attorneys drafted the management contracts, modifications thereto and resolutions. The Tribe lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 8 and on that basis denies them.

6. The Tribe admits the allegations in paragraph 9 that its attorneys advised Bettor that any management contract agreed upon by the parties required approval by the National Indian Gaming Commission ("Commission") and that it prepared and submitted the contract. The Tribe denies the remaining allegations in this paragraph and affirmatively alleges that Bettor had a full opportunity to review and approve the management contract before it was submitted to the Commission.

7. The Tribe denies the characterization of advice given by the Tribe's attorneys contained in paragraph 10. The Tribe admits that Bettor began operating pursuant to consulting agreement at Royal River Casino in September 2004 and affirmatively alleges that the consulting agreement was not approved, as required, by the Commission. The Tribe denies the remaining allegations to the extent they constitute anything other than opinion, argument or legal conclusions requiring no response.

8. The Tribe generally admits the allegations contained in paragraph 11 except to the extent that the allegations constitute opinion, argument and legal conclusions, requiring no response.

9. The Tribe admits the allegation in paragraph 12 to the extent that it was the Chairman of the Commission, Philip Hogen, who approved the Management Contract on or about March 17, 2005.

10. The first sentence of the allegations contained in Paragraph 13 purport to recount, changes to South Dakota law, which speak for themselves and which require no response. The Tribe lacks knowledge or information sufficient to form a belief as to the truth of the second sentence and on that basis denies it. The Tribe generally admits the allegations in paragraph 13, but denies them both to the characterization of the communication between Bettor and the Tribe and to the extent that the allegations constitute opinion, argument and legal conclusions, requiring no response.

11. The Tribe admits the contained in paragraph 14 that the parties discussed a modification of the Management Contract but denies the characterization of the advice given by the Tribe's attorneys. To the extent any further response is required; the Tribe denies the remaining allegations in paragraph 14.

12. The Tribe admits that its attorney discussed the concept of a bonus with Chairman Hogen, but denies the remaining allegations contained in paragraph 15.

13. The Tribe admits that its attorneys prepared a modification ("First Modification") to the Management Contract, which was formally executed by the parties. To the extent any further response is required; the Tribe denies the remaining allegations contained in paragraph 16.

14. The Tribe admits the allegation in paragraph 17 that it did submit the First Modification to the Management Contract for approval to the National Indian Gaming Commission and affirmatively alleges that because the First Modification was not approved by the Commission, the First Modification was void from the beginning. The Tribe denies the allegations in paragraph 17 to the extent that they constitute opinion, argument and legal conclusions, requiring no response. The Tribe denies all other allegations in paragraph 17.

15. The Tribe denies the allegations contained in paragraph 18 to the extent that they constitute opinion, argument and legal conclusions, requiring no response and affirmatively alleges that from February 15, 2007 to July 31, 2008, Bettor managed the pari-mutuel operation pursuant to the approved Contract and the unapproved First Modification, which resulted in decreases to the Tribe's share of the net gaming revenue that was agreed to under the approved Contract. The Tribe denies all other allegations in paragraph 18.

16. The Tribe denies the allegations contained in paragraph 19 to the extent they constitute anything other than opinion, argument and legal conclusions, requiring no response. The Tribe lacks sufficient information or knowledge to form a belief as to the truth of the remaining allegations and on that basis denies them.

17. The Tribe admits the allegation in paragraph 20 that its attorneys prepared a second modification ("Second Modification") to the Management Contract, which was formally executed by the parties, but denies the characterization of the communication between Bettor and the Tribe's attorneys. The Tribe denies all other allegations in paragraph 20.

18. The Tribe admits that the Second Modification had not been submitted to the Commission, but denies all other allegations in paragraph 21. The Tribe affirmatively alleges that because the Second Modification was not approved by the NIGC, the Second Modification

was void from the beginning. Furthermore, the Tribe affirmatively alleges that from August 1, 2008 to April 5, 2010, Bettor managed the pari-mutuel operation pursuant to the approved Contract and the unapproved Second Modification, which resulted in further decreases to the Tribe's share of the net gaming revenue that was agreed to under the approved Contract.

19. The Tribe avers that paragraph 22 reasserts and incorporates the allegations contained in the previous paragraphs and therefore no response is necessary.

20. The Tribe denies the allegations contained in paragraph 23 to the extent they constitute anything other than opinion, argument and legal conclusions, requiring no response. The Tribe affirmatively alleges that (1) the total net gaming revenue of the pari-mutuel operation in calendar year 2005 was \$1,786,756, of which Defendants received \$1,161,515 (65%) and the Tribe received \$625,241 (35%); (2) the total net gaming revenue of the pari-mutuel operation in calendar year 2006 was \$2,262,866 of which Defendants received \$1,691,497 (75%) and the Tribe received \$571,368 (25%); (3) the total net gaming revenue of the pari-mutuel operation in calendar year 2007 was \$3,057,549 of which Defendants received \$2,302,885 (75%) and the Tribe received \$754,665 (25%); and, (4) the total net gaming revenue of the pari-mutuel operation in calendar year 2008 was \$3,882,770 of which Defendants received \$3,021,479 (78%) and the Tribe received \$861,292 (23%).

21. The Tribe admits the allegations contained in paragraphs 24 through 26, but denies the allegations to the extent they constitute anything other than opinion, argument and legal conclusions, requiring no response.

22. The Tribe admits that it terminated the attorney-client agreement with its attorney and retained new counsel, but denies the allegations in paragraph 27 to the extent they constitute anything other than opinion, argument and legal conclusions, requiring no response.

23. The allegations in paragraph 28 purport to recount the violations of the Indian Gaming Regulatory Act of 1988 found to have been committed by Bettor, which speak for themselves and which require no response. Nonetheless, the Tribe denies any allegations in this paragraph inconsistent with the Findings of the Commission.

24. The allegations in paragraph 29 purport to recount the Orders the Commission, which speak for themselves and which require no response. Nonetheless, the Tribe denies any allegations in this paragraph inconsistent with the Orders of the Commission.

25. The Tribe admits the allegations contained in paragraphs 30 through 33 to the extent that the facts and chronology of events, as reflected in the Administrative Record, are accurately set forth.

26. The Tribe admits that mediation occurred and was unsuccessful, but denies the remaining allegations contained in paragraph 34 to the extent they constitute anything other than opinion, argument and legal conclusions, requiring no response.

27. The Tribe admits the allegations contained in paragraphs 35 through 38 to the extent that the facts and chronology of events are accurately set forth.

28. The Tribe denies the allegations contained in paragraph 39 to the extent they constitute anything other than opinion, argument and legal conclusions, requiring no response.

29. The Tribe admits the allegations contained in paragraph 40 to the extent that the facts and chronology of events, as reflected in the Administrative Record, are accurately set forth.

30. The Tribe admits the allegations contained in paragraph 41 to the extent that the facts and chronology of events are accurately set forth, but denies that the Tribal Court action was brought against Randy Gallo solely in his individual capacity.

31. The Tribe denies the allegations contained in paragraphs 42 and 43 to the extent they constitute anything other than opinion, argument and legal conclusions, requiring no response.

32. The Tribe avers that paragraph 44 is a conclusion of law and therefore requires no response, but affirmatively alleges that on September 12, 2012, the Commission issued a Final Decision and Order, which concluded that Bettor had managed the pari-mutuel operation without an approved management contract from September 24, 2004 through March 16, 2005; managed the pari-mutuel operation under two unapproved modifications to a management contract from February 15, 2007, through April 5, 2010, and held a sole proprietary interest in the pari-mutuel operation, all in violation of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721. To the extent that a response is required, the Tribe denies paragraph 44.

33. The Tribe denies the allegations contained in paragraph 45 to the extent they constitute anything other than opinion, argument and legal conclusions, requiring no response.

34. The remaining paragraphs are calls for relief. The Tribe denies that Plaintiffs are entitled to any of the relief or costs requested.

## **INTERVENOR'S AFFIRMATIVE DEFENSES**

### **First Affirmative Defense**

1. The Complaint should be dismissed because the Plaintiffs have failed to state a claim upon which relief may be granted.

### **Second Affirmative Defense**

2. The Plaintiffs' damages, if any, as alleged in its Complaint are, in whole or part, the result of its own action or inaction over which the Tribe had no control.

### **Third Affirmative Defense**

3. Although the Tribe does not presently have specific facts in support of its remaining defenses, Bettor is hereby put on notice that the Tribe raises the affirmative defenses set forth in Fed. R. Civ. P. 8 should subsequent discovery disclose facts that support those defenses. The Tribe further reserves the right to plead any and all affirmative defenses that be may become applicable.

WHEREFORE, the Tribe respectfully requests judgment dismissing the Plaintiffs' Complaint herein, together with all costs and reimbursement for defense of this action and for such other relief as the Court deems just and proper.

### **TRIBE'S COUNTERCLAIM AGAINST PLAINTIFFS**

1. The Tribe hereby counterclaims against Bettor. 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 Bettor's claims 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) ("If a counterclaim is compulsory, the federal court will have ancillary jurisdiction over it even though ordinarily it would be a matter for a state court...")

### **PARTIES, JURISDICTION AND VENUE**

2. The Tribe expressly incorporates paragraphs 1, 2 and 4 of Bettor's Complaint and paragraphs 1 and 2 of the Tribe's Answer herein regarding the parties.

3. This Court has jurisdiction over the Tribe's claims arising under the laws of the United States under 28 U.S.C. § 1331. This action involves a claim arising under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2720. The Court has jurisdiction over actions



brought by federally recognized Indian tribes under 28 U.S.C. § 1362 for claims arising under the laws of the United States.

4. Pursuant to 28 U.S.C. § 1391(e), venue is proper in this Court, the United States District Court for the District of South Dakota, because a substantial part of the events or omissions giving rise to the claims occurred in this judicial district. 28 U.S.C. § 1391(b)(2).

#### **FACTUAL ALLEGATIONS**

5. The Tribe operates the Royal River Casino on its tribal lands in Flandreau, South Dakota pursuant to a Tribal-State gaming compact and the Indian Gaming Regulatory Act of 1988 (“IGRA”), 25 U.S.C. §§ 2701-2720.

6. The Tribe relies on gaming revenues to fund important governmental services and infrastructure, to provide health care, housing and education of its people; and to develop a strong, diverse future economic base.

7. IGRA established the National Indian Gaming Commission (“NIGC”) as an independent federal agency to oversee and regulate tribal gaming. 25 U.S.C. § 2704.

8. IGRA requires approval by the Chairman of the NIGC of all contracts for the management of class II and class III tribal gaming operations. 25 U.S.C. §§ 2711(a)(1), 2710(d)(9). All modifications of such contracts also require NIGC approval. 25 C.F.R. § 535.1.

9. Among the requirements for NIGC approval of management contracts are the requirements that (i) the management contractor’s fee must not exceed 30% of the net revenues of the tribal gaming activity or, under limited circumstances, 40% of net revenues. 25 U.S.C. § 2711(c) and (ii) the Tribe must have the sole proprietary interest in the tribal gaming activity. 25 U.S.C. §§ 2710(b)(2)(A), 2710(d)(1)(A). A management contract or amendment not approved by the NIGC is *void ab initio*. 25 U.S.C. § 2711(a)(1); 25 C.F.R. §§ 533.7, 535.1(f).

10. In mid-2003, J. Randy Gallo approached the Tribe about relocating his pari-mutuel betting business, Bettor, from Sioux Falls, South Dakota to the Royal River Casino.

11. Gallo sought to relocate Bettor from Sioux Falls to the Tribe's reservation in an effort to avoid the 4.5 percent tax the State of South Dakota was then charging on the gross gaming revenue of pari-mutuel betting operations.

12. On or about March 22, 2004, the Tribe and Defendants submitted a Management Contract to the Chair of the NIGC for approval.

13. On or about September 20, 2004, with the Management Contract not yet approved by the NIGC, the Tribe and Defendants entered into a consulting agreement whereby Gallo was to provide advice and recommendations to the Tribe on operating the pari-mutuel betting operation at Royal River Casino, known as Royal River Racing (the "OTB") prior to the approval of the management contract. A true and correct copy of the September 20, 2004 consulting agreement is attached hereto as Exhibit A.

14. As an agreement providing for the management of a gaming operation, the September 20, 2004 consulting agreement constituted a management contract which required approval by the NIGC.

15. The September 20, 2004 consulting agreement was not approved by the NIGC.

16. On or about September 24, 2004, Defendants began managing the OTB by accepting wagers on behalf of patrons at the Casino, accepting wagers placed over the telephone and managing OTB employees.

17. Between September 2004 and March 2005, Defendants managed the OTB without an approved management contract.

18. From its opening on September 24, 2004, through March 17, 2005, the gross revenue of the OTB was approximately \$8,125,435.

19. From September 24, 2004 through March 17, 2005 Bettor received a share of the net OTB revenue from September 24, 2004 through March 17, 2005 which was more than the maximum 40% permitted by IGRA, 25 U.S.C. § 2710(d)(9).

20. Following the parties' March 2004 submission of the Management Contract to the NIGC for approval, the NIGC requested a number of changes. The Tribe and Defendants revised the contract, incorporating the requested changes, and executed the revised version (the Contract) on or about February 8, 2005. A true and correct copy of the Management Contract is attached hereto as Exhibit B.

21. The Contract is a management contract requiring NIGC approval. 25 U.S.C. §§ 2711(a)(1), 2710(d)(9); Contract § 3.1.

22. On or about March 17, 2005, NIGC Chairman Philip Hogen approved the Contract.

23. The Contract provides that Bettor's management fee was to be a percentage of the net revenue of the OTB based on a sliding scale: (a) when the gross handle volume (that is, the annual gross revenue from wagers) was less than \$30,000,000, Bettor's management fee was to be 40% of the net revenue; (b) when the gross handle volume was \$30,000,000 or greater but less than \$60,000,000, Bettor's management fee was to be 35% of the net revenue; and (c) when the gross handle volume was above \$60,000,000, Bettor's management fee was to be 30% of net revenue. Contract § 6.3(d).

24. The Contract provides that Tribe's share of the net revenue from the OTB was based on a corresponding sliding scale: (a) when the gross handle volume was less than

\$30,000,000, the Tribe's share was to be 60% of the net revenue; (b) when the gross handle volume was \$30,000,000 or greater but less than \$60,000,000, the Tribe's share was to be 65% of the net revenue; and (c) when the gross handle volume was above \$60,000,000, the Tribe's share was to be 70% of net revenue. Contract § 6.3(d).

25. The Contract provides that the Tribe's minimum guaranteed payment would never be less than 4% of gross handle generated by walk-in betting at the OTB, plus the greater of \$5,769.23 per week or 1% of the gross handle generated by telephone betting at the OTB. Contract § 6.3(d).

26. Walk-in betting is a minor revenue generator for the OTB; nearly all revenue derives from telephone betting.

27. In 2006, the State of South Dakota reduced its 4.5% tax on pari-mutuel gaming revenue to 0.25%. See South Dakota Codified Law, section 42-7-102. In response to the now-favorable tax conditions in the State of South Dakota, Gallo informed the Tribe he intended to relocate from the Royal River Casino (breaking the Contract) unless the Tribe agreed to a new deal that provided Bettor more money.

28. Stating he would desert the Tribe and leave it without the agreed-upon pari-mutuel betting operation and the associated benefits to casino business and employment, in breach of the Contract, Gallo coerced the Tribe to reduce the guaranteed minimum payment on gross handle stated in the approved management Contract from 1% of the entire gross handle to 1% of the first \$30,000,000 and 0.5% of gross handle in excess of \$30,000,000 ("the First Modification"). A true and correct copy of the First Modification is attached hereto as Exhibit C.

29. The First Modification was not approved by the NIGC.

30. Because it was not approved by the NIGC, the First Modification was void from the beginning.

31. From February 15, 2007 to July 31, 2008, or approximately these dates, Defendants managed the OTB pursuant to the approved Contract and the unapproved First Modification, which resulted in decreases to the Tribe's share of the net gaming revenue as provided in the approved Contract.

32. On or about August 1, 2008, in response to an increase in the fees racetracks charged to off-track facilities, Defendants again threatened to break the Contract and leave Flandreau. Defendants demanded, and the Tribe acquiesced to, another modification ("the Second Modification") to the approved Contract, making a second reduction in the minimum guaranteed payment on gross handle over \$30,000,000 from 0.5% to 0.25%.

33. The Second Modification was not approved by the NIGC.

34. Because it was not approved by the NIGC, the Second Modification was void from the beginning.

35. From August 1, 2008 to April 5, 2010, or approximately these dates, Defendants managed the OTB pursuant to the approved Contract and the unapproved Second Modification, which resulted in further decreases to the Tribe's share of the gaming revenue.

36. Gallo pressured the Tribe to join Defendants in a check-swap scheme designed to reconcile the difference between the parties' respective shares under the approved Contract and their shares under the First and Second Modifications, to maintain the appearance of compliance with the approved Contract.

37. Under the check-swap arrangement, Defendants periodically remitted to the Tribe a check for the full amount due under the approved Contract, and the Tribe then issued Bettor a

check, styled as a bonus, that reduced Bettor's payment to the rates provided in the First and Second Modifications.

38. The check-swap arrangement was not done at the Tribe's discretion; Defendants made it a mandatory condition of their remaining in business with the Tribe. Despite the Contract's allocation of net revenue at no more than 40% for Bettor and no less than 60% for the Tribe, during the years the Contract was in effect Defendants collected management fees far exceeding the maximum share allowed by the Contract and by applicable laws, and the Tribe collected far less than its minimum share allowed by the Contract and applicable laws.

39. The total net gaming revenue of the OTB in calendar year 2005 was \$1,786,756, of which Defendants received \$1,161,515 (65%) and the Tribe received \$625,241 (35%).

40. The total net gaming revenue of the OTB in calendar year 2006 was \$2,262,866 of which Defendants received \$1,691,497 (75%) and the Tribe received \$571,368 (25%).

41. The total net gaming revenue of the OTB in calendar year 2007 was \$3,057,549 of which Defendants received \$2,302,885 (75%) and the Tribe received \$754,665 (25%).

42. The total net gaming revenue of the OTB in calendar year 2008 was \$3,882,770 of which Defendants received \$3,021,479 (78%) and the Tribe received \$861,292 (23%).

43. On information and belief, in 2009 and 2010 Bettor received a percentage of the net OTB gaming revenue in excess of the amount permitted by the Contract and by tribal laws and the Indian Gaming Regulatory Act, including its implementing regulations.

44. In August 2009, the NIGC conducted a management contract compliance review. The Tribe assisted in the investigation by submitting extensive documentation and other information.

45. On or about August 27, 2009, the NIGC issued a “Notice of Non-compliance” to Bettor, a copy of which is attached hereto as Exhibit D. In this letter, NIGC stated that Bettor was “not distributing the correct percentage of the net gaming revenue to the Flandreau Santee Sioux Tribe ... as required under the management contract and IGRA, 25 U.S.C. § 2711(c).” The letter detailed the NIGC’s findings that Bettor had improperly calculated net revenues by wrongfully claiming certain operating expenses, among other things. NIGC suggested “that Bettor Racing make full restitution to the Tribe in the amount of \$2,986,091 [for the years 2006, 2007 and 2008].”

46. Bettor responded to the NIGC in letter dated September 7, 2009, a copy of which is attached hereto as Exhibit E. Bettor admitted to miscalculating the net gaming revenues by improperly including several items within Bettor’s operating expenses, such as the salaries paid to Gallo, several of his family members, and others, and the costs attributed to employee and transmittal errors. Bettor proposed to reimburse the Tribe \$802,434 for the years 2006, 2007 and 2008.

47. On May 19, 2011, the NIGC Chairwoman served Bettor with a Notice of Violation based on the evidence from the investigation, a copy of which is attached hereto as Exhibit F. The Notice stated that Bettor underpaid the Tribe a total of \$4,544,755 for the years 2005, 2006, 2007, and 2008. As Bettor had already paid an “uncontested” \$1,081,578 to the Tribe, the NIGC ordered Bettor to reimburse the Tribe the balance of \$3,463,177 as a remedial measure within 30 days.

48. On June 20, 2011, Bettor appealed the Notice of Violation. The Tribe intervened in the administrative appeal.

49. After considering the arguments set forth in Bettor's submission, the NIGC Chairwoman issued a Notice of Proposed Civil Fine Assessment on February 10, 2012 that assessed a fine against Bettor in the amount of \$5,000,000, a copy of which is attached hereto as Exhibit G.

50. On March 9, 2012, Bettor appealed the Notice of Proposed Civil Fine Assessment. The two administrative appeal proceedings were subsequently combined.

51. On September 12, 2012, the NIGC issued a Final Decision and Order, which concluded that Bettor and Gallo had managed the OTB without an approved management contract from September 24, 2004 through March 16, 2005; managed the OTB under two unapproved modifications to a management contract from February 15, 2007, through April 5, 2010, and held a sole proprietary interest in the OTB operation, all in violation of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721. Bettor and Gallo were ordered to pay a civil fine of \$5 million to the United States. A true and correct copy of the Final Decision and Order is attached hereto as Exhibit H.

52. The NIGC considered the Civil Fine Assessment to supplant the remedial measure to reimburse the Tribe \$4,544,755, and the NIGC's Final Decision and Order did not consider did not direct Bettor and Gallo to pay any reimbursement or other damages to the Tribe.

53. On November 14, 2012, by a letter of that date from its legal counsel, the Tribe sent a Notice of Default to Defendants, pursuant to section 9.7 of the Contract, notifying Bettor of its breach of the Contract and of Bettor's obligation to cure its default or take action toward a cure (namely, to provide an accounting of the revenue collected and distributed to Bettor and Tribe from 2005 to 2010) within thirty days. A true and correct copy of the Notice of Default is attached hereto as Exhibit I.



54. The Tribe on December 12, 2012 extended Bettor's time to provide the requested accounting to December 31, 2012. True and correct copies of this letter and related correspondence from Bettor's and Gallo's legal counsel are attached hereto as Exhibits J and K, respectively.

55. Bettor has not cured its default and breach of the Contract, and has not provided the requested accounting.

56. The Tribe fulfilled all the obligations the Contract required of it, or was excused from such obligations.

57. All conditions required by the Contract for Bettor's performance had occurred or were excused.

58. In partial payment of its obligation to the Tribe, Bettor paid the Tribe \$1,081,578, which may be offset against the Tribe's damages alleged herein.

59. As Bettor's President at the time of the events alleged herein, Gallo was knowingly, directly and actively responsible for Bettor's conduct.

#### **COUNT I: BREACH OF CONTRACT**

60. The Tribe adopts and incorporates by reference paragraphs 1 through 60 of its Counterclaim, as if fully set forth herein.

61. The approved Contract obligated Bettor to share the revenues of the OTB as provided therein.

62. Because the First Modification and the Second Modification were both void from the beginning, as they lacked the approval of the NIGC as required by law, neither the First Modification nor the Second Modification altered Bettor's obligations under the approved Contract.

63. From March 17, 2005 to April 5, 2010, Bettor collected more than the maximum management fee it was permitted to collect under the approved Contract and federal and Tribal laws.

64. From March 17, 2005 to April 5, 2010, Bettor failed and refused to pay the Tribe its full share of the OTB revenues as required by the approved Contract and federal and Tribal laws.

65. Bettor's collection of management fees in excess of the amount allowed by the approved Contract and federal and Tribal laws constitutes a breach of Bettor's obligations under the Contract.

66. Bettor's failure and refusal to pay the Tribe its share of the OTB revenues as required by the approved Contract constitutes a breach of Bettor's obligations under the Contract.

67. Bettor's breach of its obligations under the Contract caused monetary damage to the Tribe in an amount equal to the difference between the Tribe's share of revenue as it should have been calculated under the Contract and the smaller share the actually retained by the Tribe.

## **COUNT II: UNJUST ENRICHMENT**

68. The Tribe adopts and incorporates by reference paragraphs 1 through 68 of its Counterclaim, as if fully set forth herein.

69. The federal and Tribal laws regulating Indian gaming, including the laws limiting management fees to 30 percent or 40 percent of the net gaming revenue, the laws requiring the sole proprietary interest in every Indian gaming activity to belong to an Indian tribe, and the laws requiring valid management contracts to have the approval of the Chair of the NIGC, are intended to benefit the Tribe, in furtherance of policies that include promoting tribal economic

development, self-sufficiency, and strong tribal governments, shielding the Tribe from corrupting influences, and ensuring that the Tribe is the primary beneficiary of the gaming operation.

70. During the entire period Defendants operated the OTB, including the periods of operation without an approved management contract, pursuant to the approved Contract, and pursuant to unapproved modifications, Defendants collected management fees exceeding the amount allowed by federal and Tribal laws.

71. During the entire period Defendants operated the OTB, including the periods of operation without an approved management contract, pursuant to the approved Contract, and pursuant to unapproved modifications, Defendants deprived the Tribe of the sole proprietary interest in the gaming activity.

72. The benefits obtained by Defendants as a result of their operation of a gaming facility without a contract approved by the Chair of the NIGC, and their collection of a greater share of the net OTB revenues than the maximum share allowed by federal and Tribal laws, and their depriving the Tribe of the sole proprietary interest in the gaming activity, constitute unjust enrichment of Defendants at the expense of the Tribe.

73. The Tribe is entitled to an accounting of the revenues received by Bettor and Gallo during these periods, and restitution of the benefits unjustly gained by Bettor and Gallo, at the Tribe's expense, during these periods.

#### **REQUEST FOR RELIEF**

Wherefore, Plaintiff requests the following relief:

1. An accounting of the OTB gaming revenue for the years 2004-2010 sufficient to ascertain gross revenues, net revenues, the precise amounts retained by each party, and the amounts owing to each party pursuant to the Contract; and
2. Money judgment in an amount sufficient to provide the Tribe the full benefit of the Contract for the years 2005-2010, including not less than \$4,544,755 for the years 2005-2008, or such higher amount as may be shown at trial, plus prejudgment interest thereon; and
3. Judgment requiring payment by Bettor and Gallo to the Tribe as restitution of all benefits unjustly gained by Bettor and Gallo at the Tribe's expense during the years 2004-2010, including not less than \$8,125,435 for the period of September 2004 through March 17, 2005, or such higher amount as may be shown at trial; and
4. Plaintiff's costs and attorney's fees; and
5. Such other and further relief as the Court may find proper.

Dated: June 17, 2013

Respectfully submitted,

FLANDREAU SANTEE SIOUX TRIBE,

By Tracey Zephier

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