IN THE FLANDREAU SANTEE SIOUX TRIBAL COURT
FLANDREAU, SOUTH DAKOTA

FLANDREAU SANTEE SIOUX TRIBE, Plaintiff, -vs- BETTOR RACING, INC., a South Dakota Corporation, and J. RANDY GALLO, in his Official and Individual Capacities, Defendants,	CIV. 2013-11 MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiff, Flandreau Santee Sioux Tribe (hereinafter referred to as "Tribe"), brought an action for damages for breach of contract and unjust enrichment against Defendants, Bettor Racing, Inc., and J. Randy Gallo. Defendants filed their Answer and Counterclaim for Indemnification, Breach of the Duty of Good Faith and Fair Dealing and Fraud and Deceit. Plaintiff filed its Motion for Summary Judgment. In support of its motion Plaintiff submitted its Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, Declaration of Patrick R. Bergin in Support of Plaintiff's Motion for Summary Judgment and Plaintiff's Separate Statement of Material Facts in Support of Motion for Summary Judgment. Defendants submitted their Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment, Defendants' Objections and Response to Plaintiff's Separate Statement of Material Facts in Support of Motion for Summary Judgment and Affidavit of Counsel in Opposition to Plaintiff's Motion for Summary Judgment. Plaintiff submitted Flandreau Santee Sioux Tribe's Reply Brief in Support of its Motion for Summary Judgment.

Based upon the Parties' oral argument, submissions and record in this case, the Court enters the following memorandum decision and order.

FACTUAL BACKGROUND

The relevant facts in this case, as taken from the submissions by the Parties, are as follows. The Flandreau Santee Sioux Tribe (Tribe) is a federally-recognized Indian Tribe with headquarters in Flandreau, South Dakota. Since 1997 and continuing to present, the Tribe has owned and operated the Royal River Casino (RR Casino) on its tribal lands in Flandreau, South Dakota. The RR Casino is subject to the Indian Gaming Regulatory Act of 1988 (IGRA). J. Randy Gallo is president and sole shareholder of Bettor Racing, Inc., incorporated under the laws of the State of South Dakota. Bettor Racing is a pari-mutuel betting operation and has operated off-track betting (OTB) since 1998.

In 2003, while still operating in Sioux Falls, Gallo approached the Tribe about relocating Bettor Racing's operations from Sioux Falls to RR Casino. Gallo's desire to move was, in part, to avoid a 4.5% tax South Dakota imposed on pari-mutuel betting. On August 27, 2003, the Tribe submitted a proposed lease agreement between the Tribe and Bettor Racing for review by the National Indian Gaming Commission (NIGC). The NIGC advised that the lease agreement constituted a management contract under the Indian Gaming Regulatory Act (IGRA). A management contract for gaming requires the NIGC Chairman's approval. On March 25, 2004, after making changes requested by NIGC, the Tribe submitted a proposed Management Agreement (Management Agreement) for review and approval.

While the Management Agreement was pending review, the Parties entered into an interim agreement which was entitled "Agreement", which was dated September 20, 2004. Under this consulting agreement, Gallo (in his individual capacity) was to act as a consultant on the OTB operations until the Management Agreement was approved by the NIGC Chair. Gallo was to provide consulting services relative to the operation. The consulting agreement provided that Gallo was not managing the operation. The Tribe was to manage the OTB. The consulting

agreement provided that Gallo was to be paid one dollar per month. The consulting agreement was never submitted to NIGC for approval. Even though never approved, the Parties operated under its terms from September 24, 2004 to March 16, 2005. During this period of operation the Tribe was paid its share of the revenue pursuant to the terms of the unapproved Management Agreement.

On March 17, 2005, the NIGC Chair approved the Flandreau Santee Sioux Tribe Management Agreement for Pari-mutual Betting between the Tribe and Bettor Racing. Once the Management Agreement was approved the Parties began operating under its terms. The Management Agreement was for a term of 60 months. The Management Agreement was duly approved by the Tribe, the NIGC and signed by the parties, and therefore, constituted a binding contract.

The Management Agreement, at Article 6.6(d), provided for a revenue spit under which the Tribe and Bettor Racing would allocate net revenues from the OTB. The Management Agreement provided two separate methods for calculating the net revenue split. Under the first method, if the gross handle volume was less than $30,000,000, Bettor Racing would receive 40% of the net revenues and the Tribe would receive 60%. If the gross handle volume was between $30,000,000 and $60,000,000, Bettor Racing would receive 35% of the net revenues and the Tribe would receive 65%. If the gross handle volume was between $60,000,000 and $90,000,000, Bettor Racing would receive 30% of the net revenues and the Tribe would receive 70%. Article 6 further provided a guarantee that the Tribe's share of net revenue shall never be less than 4% of gross public handle generated by non-telephone or walk-in betting at the Casino, plus the greater of $5,769.23 per week or 1% of all gross handle generated by telephone betting

at the Casino. Either method would apply depending on which provided greater revenues to the Tribe.

In 2005, South Dakota reduced its tax on OTB handle from 4.5% to 0.25%. Based upon this change in the law, Bettor Racing approached the Tribe seeking an amendment to the Management Agreement. Gallo informed the Tribe he could not continue the OTB operation at Flandreau without an amendment to the management agreement, or he would take the operation back to Sioux Falls. The Tribe desired to keep the OTB at the casino so it agreed to a modification (referred to as the First Modification). This First Modification reduced the Tribe's guaranteed minimum on all telephone handle over $30,000,000 from 1% to .5%. In addition, it eliminated the Tribe's share of net revenues by a scheme referred to as a "check-swap" whereby Bettor Racing would pay the Tribe its net revenues in accordance with the Management Agreement and the Tribe would turn around and repay this amount to Bettor Racing as a so called "bonus." Although this First Modification was submitted for approval January 25, 2007, it was never approved by the NIGC. However, the parties operated under the modification from February 15, 2007 (or earlier) to July 31, 2008.

In 2008, due to an increase in track fees, Bettor Racing approached the Tribe seeking to modify the Management Agreement a second time (the Second Modification). The Tribe again agreed to this modification. The Second Modification maintained the Tribe's guarantee of $300,000. In addition, the minimum guaranteed payment of telephone handle over $30,000,000 was reduced from .5% to .25%. The Second Modification again eliminated the Tribe's share of net revenue by the use of the "check-swap" method. The Second Modification was executed by the Parties on August 1, 2008. The Second Modification was never submitted to the NIGC Chair, therefore, never approved. The Parties operated under the unapproved Second

Modification from August 1, 2008 to the termination of the Management Agreement on March 16, 2010.

In August 2009, the NIGC conducted a management contract compliance review. The review involved investigating Bettor Racing and the Tribe for potential IGRA violations relating to the Management Agreement. On May 19, 2011, the NIGC issued its Notice of Violation (NOV) wherein Bettor Racing and J. Randy Gallo, in his official and individual capacity, were cited for violations of the IGRA. Specifically, Bettor Racing and Gallo were cited for operating the OTB without an approved management contract from September 24, 2004 through March 16, 2005. In addition the NIGC determined Bettor Racing and Gallo managed the OTB under two unapproved modifications to the approved Management Agreement from February 5, 2007 through April 5, 2010. Furthermore, Bettor Racing and Gallo were also cited for having a proprietary interest in the OTB in violation of the IGRA. In addition, the NOV cited the Tribe with four violations of IGRA. First, the Tribe was cited for allowing Bettor Racing to operate without an approved management agreement. Second, the Tribe allowed Bettor Racing to operate under two unapproved modifications to the management agreement. Third, the Tribe failed to submit management letters prepared by the Casino's independent auditors within 120 days for the years 2005 and 2006. Forth, the Tribe's payments to Bettor Racing violated IGRA rules and the Tribe's gaming ordinance regarding the use of net gaming revenue. On July 20, 2011, the Tribe settled its violations with the NIGC. The Tribe admitted to the allegations and agreed to take remedial measures. In the event the Tribe violates the terms of the agreement, it must pay a fine in the amount of $750,000.

In its NOV, the NIGC determined that Bettor Racing and Gallo owed the Tribe $4,544,755. The NIGC further determined that since Bettor Racing and Gallo already paid an

uncontested $1,081,578, they must pay the Tribe the balance of $3,463,177. Bettor Racing and Gallo appealed the NOV. On September 12, 2012, the NIGC issued its Final Decision and Order wherein it concluded Bettor Racing and Gallo managed the OTB without an approved management contract from September 24, 2004 to March 16, 2005; managed the OTB under two unapproved modifications to the approved Management Agreement; and, possessed a proprietary interest in the OTB. Bettor Racing and Gallo were ordered to pay a civil fine assessment of $5 million to the United States.

In a letter dated November 14, 2012, the Tribe notified Defendants they were in breach of the Management Agreement and directed them to cure their default or take action toward a cure within thirty days. The Tribe directed Defendants to provide an accounting of the revenue collected by Defendants from 2005 to 2010. Defendants have not have not provided the requested accounting. Additional facts in the case will be referred to as needed.

SUMMARY JUDGMENT STANDARD

Plaintiff filed a Motion for Summary Judgment pursuant to § Section 4-15-10 of the Flandreau Santee Sioux Tribe Law and Order Code which provides that the judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judment as matter of law. There is no Flandreau Santee Sioux Tribe case law defining what constitutes a genuine issue of mateial fact which would constitute a need for a trial. The Court finds it is appropriate to look to court decisions from other jurisdictions defining what constitutes a genuine issue of material fact which presents the need for a trial. The party seeking summary judgment bears the burden of demonstrating the lack of any genuine issue of material fact, and all reasonable inferences from the facts are viewed in the

light most favorable to the non-moving party. Railsback v. Mid-Century Ins. Co., 2005 SD 64, ¶ 6, 680 N.W.2d 652, 654. "A trial court may grant summary judgment only when there are no genuine issues of material fact." Estate of Williams v. Vandeberg, 2000 SD 155, ¶ 7, 620 N.W.2d 187, 189, (citing, SDCL 15-6-56 (c); Bego v. Gordon, 407 N.W2d 801 (S.D. 1987)). "In resisting the motion, the non-moving party must present specific facts that show a genuine issue of fact does exist." Estate of Williams, 2000 SD 155 at ¶ 7, (citing, Ruane v. Murray, 380 N.W.2d 362 (S.D. 1986)).

A number of United States Supreme Court opinions have focused on defining what constitutes a genuine issue of material fact which presents the need for a trial. "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp. 475 U.S. 574, 587 (1986). The Court has also held there is no genuine factual issue for trial "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). "The inquiry performed is the threshold inquiry of determining whether there is need for a trial---whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor or either party." Id at 250. "Summary judgment is appropriate where the undisputed facts demonstrate there was (a) a valid contract, (b) breach of that contract, and (c) damage suffered by the non-breaching party. See, e.g., United States v. Basin Elec. Power Co-op., 248 F3d 781, 810 (8th Cir. 2001); Moorhead Const. Co. v. City of Grand Forks, 508 F.2d 1008, 1015 n. 10 (8th Cir. 1975).

DISCUSSION

The Flandreau Santee Sioux Tribe owns and operates the Royal River Casino pursuant to the provisions of the Tribe's 1999 Amended Class III Gaming Ordinance which was duly approved by the NIGC Chairperson. The IGRA provides that an Indian Tribe may operate a Class III gaming activity through a management contract if such contract is approved by the NIGC Chairperson. 25 U.S.C. § 2710(d)(9). The NIGC regulations further provide that such management contracts may be modified, subject to approval by the NIGC Chairperson. 25 C.F.R. § 535.1(a). Furthermore, any modifications to a management contract that have not been approved by the Chairperson are void. 25 C.F.R. § 535.1(f). The Flandreau Santee Sioux Tribe Gaming Ordinance provides that the Tribe receive at least sixty percent (60%) of the net revenues of all gaming activities conducted under the ordinance. Flandreau Gaming Ordinance § 17-6-1(4). In addition, IGRA regulations prohibit the NIGC Chairperson from approving any management contract that provides for a fee based upon a percentage of the net revenues of a tribal gaming activity in excess of 30%. 25 U.S.C. § 2711(c)(1). However, if the [Chairman] is satisfied that capital improvements and income projections require an additional fee the percentage may be approved up to 40%. 25 U.S.C. § 2711(c)(2). In any event, such regulations do not allow a management contractor to receive more than 40% of the net revenue. Id.

TRIBE'S FIRST CAUSE OF ACTION

The Tribe first contends Bettor Racing twice reduced the Tribe's share of net revenues in breach of the management agreement and damaged the Tribe. As an initial matter, there is no issue that the Management Agreement a valid contract between the parties. The Management Agreement was signed by the Tribe and Bettor Racing and approved by the Chair of the NIGC as required by IGRA.

The Management Agreement defines the OTB operation at the casino. Under Article 4 of the agreement the Manager agreed to comply with IGRA, the Compact, applicable federal and tribal law (ordinances), and the rules and regulations of the Tribal Gaming Commission. Section 4.1(b)(7). In addition Section 4.2(c) of the Management Agreement provides:

> Manager shall operate the project in accordance with applicable federal and state laws, including the Internal Revenue Code, the Compact, the Tribal Ordinances, and rules and regulations of the Tribal Gaming Commission authorizing and regulating the conduct of gaming as amended from time to time.

Id. Additionally, Section 6.5 provides:

> Manager and Tribe mutually covenant and agree that they shall use their best efforts to comply with, and assure that the Project is in compliance with the Compact and requirements imposed thereby, all laws of the United States, and any Tribal Ordinances, rules, or regulations and rules and regulations of the Tribal Gaming Commission applicable to the operation of the Project as amended. . . .

Id.

Furthermore, Section 6.3 provides "[The] Tribe and Manager agree that the Project shall be operated in accordance with the Tribe's Ordinances, rules and regulations of the Tribal Gaming Commission and accounting procedures."

The Management Agreement, at Section 6.4, sets out the Manager's responsibilities for the collection, monitoring, handling and payment of proceeds associated with the operation of the OTB. Section 6.4(d), sets out the Manager's fee and the Tribe's share and guarantee of the net revenues of the OTB. This section specifically provides as follows:

> Manager shall receive, as compensation for services rendered hereunder, the following percentages of net revenues as determined by gross handle volume and the Tribe shall receive the remainder, both the Manager's fee and Tribe's share to be paid in monthly installments:

Gross Handle Volumes	Percentage of Net Revenues

	$30,000,000	40% Manager's Fee-60% Tribe's Share
$30,000,000 and	$60,000,000	35% Manager's Fee-65% Tribe's Share
$60,000,000 and	$90,000,000	30% Manager's Fee-70% Tribe's Share

> The remaining net profits after payment of the Manager's fee as set forth above, i.e., sixty percent (60%), sixty five percent (65%), or seventy percent (70%), depending on gross handle volumes, shall be the Tribe's share of net profits, provided that the Tribe's share of net profits shall never be less than four percent (4%) of gross public handle generated by non-telephone or walk-ins betting at the Casino, plus the greater of Five Thousand Seven Hundred Sixty Nine Dollars and Twenty Three Cents ($5,769.23) per week or one percent (1%) of all gross handle generated by telephone betting at the Casino (the guarantee). This guarantee shall have preference over repayment of any development and construction costs.

Id. at P. 30. The crux of the Tribes argument is that Section 6.4(d) provided Bettor Racing the maximum allowable share of net revenues allowed under IGRA which caps the management fee at no more than 30 percent. As noted, the fee may be increase to no more than 40 percent of net revenues with the approval of the NIGC Chairman. See 25 U.S.C. § 2711(c); 25 C.F.R. § 531.1(i).

In 2005, after South Dakota reduced its tax on OTB handle from 4.5% to .25%, Gallo informed the Tribe he could not continue the OTB operation at Flandreau without an amendment to the management agreement or he would take the OTB operation back to Sioux Falls. This is supported by a letter dated February 1, 2010 from Gallo to NIGC wherein Gallo states "I approached the [Tribe] with a proposed amendment to the management agreement to pay 0.5% on incremental handle over $30,000,000 and in turn waive the 60% - 70% of the profit. I told [the Tribe] that I could not proceed without an amendment but I would honor the $30,000,000 guarantee to the FSST for the remaining years of my contract. In order to attract increment handle over $30,000,000.00, the tax rate needed to be at least close to the competitive tax rate of Oregon's 0.25%." In his deposition, Gallo admitted that he informed the Tribe "that either an

amendment would have to be made to my contract or I would not be staying at Flandreau, but I would honor the $300,000 guarantee on $30 million for the remainder of the contract." Gallo Agency Depo., 85:4-8. Gallo's proposal was to modify the approved Management Agreement to reduce the Tribe's minimum guaranteed payment from 1% of the gross handle up to $30,000,000 down to 0.5% of all gross handle over the $30,000,000 and for the Tribe to waive the 60-70% split of the net gaming revenues. On February 15, 2007, the Tribe and Bettor Racing executed the Modification To Management Agreement For Parimutuel Betting. Pursuant to the modification, the Tribe agreed to reduce its minimum guarantee from 1% to 0.5%, however, the Tribe did not waive the 60-70% split because such a waiver would be in violation of the Flandreau Gaming Ordinance and NIGC and IGRA regulations. The modification was submitted to the NIGC for approval, however, in a fax transmittal to the Director of the Management Contracts and Investigations Division for NIGC, the Tribe's attorney requested the approval be held in abeyance pending the outcome of its compact litigation in South Dakota. The proposed first modification was never approved by the NIGC, however, the Parties operated under its provisions from February 15, 2007 to July 31, 2008.

In order to remain in compliance with the approved Management Agreement the Parties agreed to a process in which Defendants annually remitted to the Tribe a check for the full amount of net revenues due to the Tribe. The Tribe would in turn give a check to Defendants in the amount the Tribe received for its share of net revenues. Bettor Racing referred to this as a "check-swap" and the Tribe called it a "bonus" to Defendants for their work.

In 2008 Gallo again approached the Tribe for a modification of the Management Agreement for the reason that horse tracks had increased their fees charged to off-track facilities. Gallo again informed the Tribe he would only stay at Flandreau "if I'm promised that there's no

other expense other than the Tribe getting the guarantee and a quarter of a percent thereafter. [Gallo] said, "I can go back to South Dakota anytime and go with quarter of a percent on my handle." Gallo Agency Depo., 138:1-5. "There would be no reason for me to stay there, okay, unless this would be guaranteed. If it wasn't, then I would give them the $300,000, I would keep $30 million of the business at Flandreau and the remaining, that 140 million I would take it to South Dakota. I had no problem with that." Gallo Agency Depo., 137: 25-138:17; Letter from Gallo to Joshua Weston, July 24, 2008. The Tribe desired to keep the OTB at the Casino for the revenue it generated and the employment it provided, so it agreed to lower its guaranteed minimum from .5% to .25%. This Second Modification was never submitted to NIGC. The Parties operated under the provisions of the unapproved Second Modification from August 1, 2008 through December 30, 2009. The Parties continued to use the "check-swap" method as a way of remaining in compliance with the Management Agreement.

As noted, the First Modification and the Second Modification to the Management Agreement were never approved by the NIGC as required by law therefore Bettor Racing's obligations to the Tribe under the approved Management Agreement were not altered.

Bettor Racing argues that the Tribe proposed or at a minimum, had a significant hand in the negotiations that led to the two modifications of the Management Agreement. Bettor Racing contends that every action taken by the parties was with the approval of the Tribe's attorney, the Gaming Commission's attorney, and most significantly, the Tribal Council. However, the undisputed facts reveal Bettor Racing intended to move the OTB operation back to Sioux Falls unless the Tribe agreed to reduce its share of net revenue. The check swap arrangement was devised to keep this from happening. As noted by the NIGC"[t]he check-scheme was a mandatory prerequisite to maintaining Royal River Racing at the Casino, and the Tribe had no

discretion in the matter." NIGC Final Decision and Order. p.5. Thus, the undisputed facts in this case lead the Court to conclude that Bettor Racing twice reduced the Tribe's share of the net revenues in breach of the Management Agreement.

The Tribe further contends Bettor Racing's demand for an increase of its management fee is in breached of its contractual duty of good faith. Specifically, the Tribe argues that the Management Agreement imposes on Bettor Racing the duty to act in good faith in all respects of the agreement and to deal fairly with the Tribe. See Mgmt. Agmt., § 23.13. Additionally, the Tribe argues the duty of good faith "prohibits either contracting party from preventing or injuring the other party's right to receive the agreed benefits of the [Management Agreement]." Nygaard v. Sioux Valley Hospitals & Health Sys., 731 N.W.2d 184, 193 (S.D. 2007), (quoting Garrett v. BankWest, Inc.. 459 N.W.2d 833, 841 (S.D. 1990) and citing Restatement (Second) of Contracts § 205 (1981). The Tribe contends Bettor Racing breached its duty of good faith by preventing the Tribe from receiving the OTB revenues it was due under the Management Agreement. As the facts reveal, the Parties negotiated and agreed on the terms contained in the approved Management Agreement. As part of the negotiations, the parties agreed to the payment structure as set out in the Management Agreement. However, in 2005 and 2008 Gallo sought to have the Tribe reduce its share of net revenues and, as previously noted, the reductions were not discretionary on the Tribe's part. As the record demonstrates, Gallo approached the Tribe on the two occasions and informed it that if it did not reduce its share of the net revenues he would take the OTB back to Sioux Falls. The Tribe had no discretion but to agree to the modifications and reduce its share of net revenues. Thus the Tribe was prevented from receiving the benefits of the Management Agreement. In response, Bettor Racing contends it did not breach its contractual duty of good faith and fair dealing. As an initial matter, Bettor Racing argues the Tribe cannot

sustain an independent cause of action for good faith and fair dealing. Bettor Racing asserts the Tribe may plead multiple causes of action in the alternative, but the Tribe must elect its remedies and therefore, there are no independent damages for any alleged breach of the covenant of good faith and fair dealing and this action should be dismissed. In reply to this argument the Tribe cites Section 4-3-3 of the FSST Law and Order Code which allows "[r]elief in the alternative or of several different types may be demanded." T.L.O.C. 4-3-3. In addition, the Tribe cites Section 4-15-3 which, as contended, directs the Court to grant relief to a party whether or not the relief has been demanded. T.L.O.C. 4-15-3. The Court is not inclined to dismiss this cause of action. Bettor Racing also contends that if the Court is inclined to consider the claim that it breached its duty of good faith, such questions are inherently questions of fact. However, the record in this case shows there are no genuine issues of fact that Bettor Racing breached its duty of good faith and fair dealing.

The Tribe also contends Better Racing operated the OTB in violation of law thereby indicating it was not concerned with fulfilling its contractual duties. The Management Agreement requires the parties to comply with federal, state and tribal laws. These requirements are set out in several Articles in the Management Agreement. For instance, Article 4 of the agreement provides for Manager's Warranties and Representations. Section 4.1(b)(7) requires the Manager to "[c]omply with IGRA, applicable Federal law, the Compact and all laws and ordinances of the Tribal Gaming Commission and state law (if and where applicable)." Section 4.2(c) provides that the Manager operate the OTB in accordance with applicable federal and state laws, the Internal Revenue Code, the Compact, Tribal Ordinances, and rules and regulations of the Tribal Gaming Commission authorizing and regulating the conduct of gaming. Section 6.3 requires that the OTB "shall be operated in accordance with the Tribe's Ordinances, rules and

regulations of the Tribal Gaming Commission and accounting procedures." Section 6.5 requires the OTB is operated in compliance with the Compact, federal laws, Tribal Ordinances, and rules and regulations of the Tribal Gaming Commission.

The Tribe contends that despite these contractual requirements, Bettor Racing made no attempt to comply with such laws and regulations. The record reveals several instances where Bettor Racing failed to review or comply with federal laws and regulations. For example, when asked what applicable federal and state laws applied to the operation of the OTB, Gallo did not know. Gallo also admitted he did not do anything to determine what his obligations were. Gallo Tribal Depo., 74:9-10; 76:20-22. Gallo admitted he did not look at the Tribe's ordinances and gaming regulations. He had no idea what the Tribe's ordinances were. Gallo Tribal Depo., 80:2-4. Gallo admitted that the only section of the Management Agreement he focused on was § 6.4(d), which sets out the Manager's fee. This was the only page as far as Gallo was concerned. Gallo Tribal Depo., 114:2-10. Bettor Racing's General Manager admitted that he never read the Indian Gaming Regulatory Act although he would have been assigned to do so. Ray Henry Depo., 100:15-23. The only Tribal laws Henry read were the ones that pertained to pari-mutual betting. Henry Depo., 111:8-13. These facts are indicative Bettor Racing was not concerned with fulfilling its duties required by law. Its only concern was the provision in the Management Agreement providing for the Manager's fee. The foregoing facts demonstrated in the record of this case lead the Court to conclude that Bettor Racing operated the OTB in violation of law.

Based upon the foregoing violations the Tribe contends it suffered damages in the amount of the outstanding balance owed to it under the Management Agreement from March 17, 2005, through March 16, 2010. Based partly on Bettor Racing's financial records and reasonable estimates, the amount the Tribe contends it is owed is at least $7,267,497. The financial

analysis contained in the Thorstenson Report supports this argument. See Thorstenson Report, Schedule 1-All Years. The Tribe further contends this figure is subject to adjustment following a full accounting. In its Final Decision and Order the NIGC determined the Tribe should have received a total of $4,544,755 for the years 2005, 2006, 2007 and 2008 combined. NIGC Final Decision and Order, P. 5. The NIGC further determined Bettor Racing received 65% to 78% of the revenues as compared to the Tribe. Id at P. 6. Bettor Racing does not dispute these amounts.

The Tribe contends that in order to ascertain the extent it was damaged by Bettor Racing a final accounting of the OTB operation for years 2005 through 2010 is required. Furthermore, Section 10.2 of the Management Agreement provides "[u]pon termination, the Project Accountant shall render and deliver to the parties a final and accurate accounting of project operations." Mgmt. Agmt. § 10,2. Although the Tribe demanded that Defendants provide a final accounting, to date, the accounting has not been provided. The Court finds the Tribe is entitled to an order directing Defendants to provide such an accounting.

THE TRIBE'S SECOND CAUSE OF ACTION

In the alternative to the breach of contract claim the Tribe contends Bettor Racing and Gallo are liable to the Tribe for restitution based on unjust enrichment. The Tribe contends Gallo is liable for restitution for the amounts he received while the OTB operated under the consulting agreement. The Tribe's claim for restitution is based on Bettor Racing and Gallo receiving a benefit pursuant to an illegal contract between the parties. The illegal contract referred to is the consulting agreement (Agreement) which was not approved by the NIGC Chairman as required by law. The Tribe cites Restatement (Third) of Restitution & Unjust Enrichment for the rule it can have a claim for restitution in connection with an illegal contract.

> A person that renders performance under an agreement that is illegal or otherwise unenforceable for reasons of public policy may obtain

restitution from the recipient in accordance with the following rules:

> (1) Restitution will be allowed, whether or not necessary to prevent unjust enrichment, if restitution is required by the policy of the underlying prohibition.

Restatement (Third) of Restitution & Unjust Enrichment § 32.

First of all, there is no question the consultant agreement and the two modifications to the Management Agreement were not approved by the NIGC Chairman as required by federal law. Thus, the two modifications were not legal. Under the rule, restitution will be allowed where it is required by the policy underlying the prohibition. The IGRA "was enacted . . . to regulate the conduct of gaming on Indian Lands." See Indian Gaming Regulatory Act. The policy of IGRA is (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments; (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players.... IGRA Sec. 2702(2). The IGRA sets forth regulations which carry out the policies regarding tribal gaming operations. For example, IGRA and NIGC regulations require all management contracts for gaming operations have the approval of the NIGC Chairperson. 25 U.S.C. § 271(a)(1); 25 C.F.R. § 533.1. A management contract includes "any contract, subcontract, or collateral agreement between and Indian tribe and a contractor or between a contractor and a subcontractor if such contract or agreement provides for management of all or part of a gaming operation." 25 C.F.R. § 502.15. Management contracts that have not been approved by the NIGC are void. 25 C.F.R. § 533.7. Subject to NIGC approval, a tribe may amend an approved management contract. 25 C.F.R. § 535.1(a). Pending

the approval of the Management Agreement the parties entered into a consulting agreement. The consulting agreement was executed on September 20, 2004. The consulting agreement provided it was not to be treated as a management agreement. The purpose of the consulting agreement was to set out the mutual agreement of the parties pertaining to the conduct of a parimutual betting operation at the Tribe's casino until the pending Management Agreement was approved by NIGC. The consulting agreement provided that all employees of the operation shall be tribal employees. All decisions regarding the operation were to be made by the Tribe. All profits of the operation were to belong to the Tribe. Gallo was to manage the Tribe's parimutual operation pursuant to the consulting agreement and not under the Management Agreement under review by NIGC. Gallo was to be paid the sum of $1.00 per month as a consultant for the OTB operation. In return for the $1.00 per month, Gallo was to consult, advise, recommend, and undertake such action as reasonably required by the Tribe. The consulting agreement provided that the Tribe had the discretion to increase the amount on a monthly basis as net profits may allow. The consulting agreement was signed on September 20, 2004 by the President of the Flandreau Santee Sioux Tribe and J. Randy Gallo, in his individual capacity.

The NIGC determined the consulting agreement was never submitted to the NIGC for approval. Notice of Violation, p. 11, ¶¶ 18-20. The Parties operated under the terms of this non-approved agreement from September 20, 2004 to March 16, 2005. Notice of Violation, p. 11, ¶¶ 18-20. The NIGC determined that Gallo was not operating the OTB in a consultant capacity to the Tribe but was, in fact, managing the OTB. Notice of Violation, p. 11, ¶ 20. For instance, Bettor Racing determined the budget for the OTB operation. Bettor Racing did the hiring and firing of all employees for the operation. Bettor Racing adopted an employee handbook which applied only to the OTB personnel. Bettor Racing made all business decisions regarding the

OTB operation. Notice of Violation, p. 10, ¶ 12. The Tribe contends Gallo took more than the $1.00 per month allowed to him by the Consulting Agreement. The record shows that during the time period from September 24, 2004 through March 17, 2005 Bettor Racing and Gallo paid the Tribe its share of the revenue according to the terms of the unapproved Management Agreement. In support of its argument the Tribe cites The Paul J. Thorstenson Expert Report which reported that the gross revenue of the OTB during this time period was approximately $7,709,263. The Thorstenson Report concluded that from the period September 24, 2004 to December 31, 2004, the Tribe was underpaid $149,303. The report further concluded that the Tribe was underpaid $210,666 for the period starting January 1, 2005 and ending March 16, 2005. For this period of time the Tribe was underpaid a total of $359,969, which is the amount received by Gallo under the unapproved consulting agreement and in violation of IGRA policy. See Thorstenson Report, Schedule 1. Because Gallo signed the consultant agreement in his individual capacity the amount that was under paid to the Tribe is the measure of Gallo's liability.

In addition, the Tribe contends Bettor Racing is liable, in the alternative to the Tribe's breach of contract claim, for the excess amount it received while operating under the two unapproved modifications. The Tribe argues that the First and Second Modifications, being void from the start because they were not approved as required, had no effect on the amount of Bettor Racing's management fee contained in the approved Management Agreement. The Court agrees that the two unapproved modifications did not alter Bettor Racing's obligations to pay the Tribe its share of OTB net revenues as required in the approved Management Agreement. The Thorstenson Report's analysis determined the Tribe was underpaid a total of $7,267,497 from the period starting March 17, 2005 to March 16, 2010. See Thorstenson Report, Schedule 1.

This is the amount is the measure of Bettor Racing's liability to the Tribe. Judgement should be granted to the Tribe for the total amount of $7,627,467.

DEFENDANTS' COUNTERCLAIMS

Bettor Racing brings counterclaims against the Tribe for indemnification, breach of the duty of good faith and fair dealing and for fraud and deceit. As to the first counterclaim the Tribe contends it is entitled to summary judgment on Bettor Racing's claim for indemnification. As previously noted, on September 12, 2012, the NIGC issued its Final Decision and Order wherein it concluded Bettor Racing and Gallo (1) managed the OTB without an approved management contract from September 24, 2004 to March 16, 2005, (2) managed the OTB under two unapproved modifications to the approved Management Agreement, and, (3) possessed a proprietary interest in the OTB. Bettor Racing and Gallo were ordered to pay a civil fine assessment of $5 million to the United States. In its counterclaim against the Tribe, Better Racing alleges Sec. 7.1 of the Management Agreement requires the Tribe to indemnify Bettor Racing for the $5 million dollar civil fine assessed by the NIGC. In support of this argument Bettor Racing cites Sec. 7.1(b) of the Management Agreement which provides "The Tribe shall indemnify and hold manager harmless against any cost, expense or damage incurred by or claimed against the Manager as a result of the willful, or intentional tortious act by the Tribe." Mgmt. Agmt. § 7.1(b). In addition, Bettor Racing argues that Section 23.12 of the Management Agreement requires that the "Manager shall promptly notify the Tribe in writing and the Tribe shall assume defense thereof." Mgmt. Agmt. § 23.12. This Section explicitly requires a reciprocal obligation on the parties to provide prompt written notification in the event indemnification is sought. The Tribe contends Bettor Racing's claim must fail as a matter of contract and of law. In the event of an action for indemnity, as in this case, Section 32.12

explicitly requires the Manager to "promptly notify the Tribe in writing." Id. In his Tribal Deposition Gallo admitted Bettor Racing did not notify the Tribe in writing that it sought indemnification. Gallo Tribal Depo., 202:11-203:10. The Tribal Secretary also verifies the Tribe has never received any correspondence from Bettor Racing or J. Randy Gallo demanding that the Tribe indemnify one or both of them. See Declaration of Leah M. Fyten in Support of Plaintiff's Motion for Summary Judgment. Bettor Racing contends that the Tribe's argument that it failed to promptly notify [the Tribe] of its obligation elevates form over substance in connection with the NIGC action. Bettor Racing cites several insurances cases regarding notice to indemnitor. However, the Court finds that these cases are not persuasive in this case in light of the fact that the Management Agreement specifically requires written notice which Bettor Racing and Gallo did not provide. The Court finds the undisputed facts demonstrate that Bettor Racing's claim for indemnity fails as a matter of law.

Bettor Racing's next claim against the Tribe is for breach of the duty of good faith and fair dealing. Bettor Racing contends that the terms of the Management Agreement, specifically, Article Section 7.1(a) requires that the "Tribe shall act in good faith and take all necessary steps and execute, ratify and endorse all documents, contracts and agreements required of it pursuant to the provisions of this Agreement and shall not unreasonably withhold its approval of any act or thing which such approval may be required hereby." Mgmt. Agmt. § 7.1(a). Furthermore, Bettor Racing contends Section 7.1(c) requires that the Tribe "[agree] to perform all necessary acts and duties in order to expedite Governmental Agency approval of this Agreement and compliance with the National Environmental Policy Act to the extent applicable." Mgmt. Agmt. § 7.1(c). Bettor Racing argues the Tribe prepared both modifications and was obligated to submit them to the appropriate regulatory agency for approval. In addition, the Tribe did submit

the first modification but requested the NIGC that it be held in abeyance pending the outcome of the compact litigation in South Dakota. The Tribe did not submit the second modification to the NIGC. Bettor Racing asserts the Tribe failed to inform Bettor Racing of its actions and instead informed it that the parties were able to proceed under the First Modification as planned. Bettor Racing further alleges the Tribe made material misrepresentations, did not make appropriate disclosures or omitted material information, and Bettor Racing relied on these misrepresentations or material omissions in signing the Management Agreement and the First and Second Modifications.

As to the claim for fraud and deceit, Bettor Racing alleges that the Tribe held itself out as an authority on gaming operations and took on several obligations. This included the obligation to draft all the contractual agreements between the parties, to ensure the contracts complied with federal law and to secure the necessary approvals. Furthermore, Bettor Racing alleges the Tribe represented to Bettor that it had secured the necessary NIGC approval of the Management Agreement as well as the two modifications. Bettor Racing alleges it was induced by these representations to continue the OTB operation at the casino and operate under the two unapproved modifications.

In answer to these allegations, the Tribe argues that it has not waived its sovereign immunity as to these claims. In tribal immunity claims, it has long been held that "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978). Additionally, "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S.751, 754 (1998). It is unquestionable that the Tribe's

waiver must be "clear" and "unequivocal." C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 418 (2001). Furthermore, "[A] tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the tribe." Okla. Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 509 (1991). It has been further held that "the party asserting jurisdiction bears the burden of proving that sovereign immunity has been waived." Sydnes v. United States, 523 F3d 1179, 1183 (10th Cir. 2008). Bettor Racing asserts the Manage Agreement, Article 21(a) provides that "litigation relating to a dispute over the terms, rights, or obligations set forth I this agreement shall first be initiated in Flandreau Santee Sioux Tribal Court." Bettor Racing argues all of the facts alleged in its counterclaim relate to the OTB, its operation, and the split of the profits therefore this Court is the appropriate forum in which to litigate these facts. Bettor Racing cites Article 21(a) of the Management Agreement which provides "Any litigation relating to a dispute over the terms, rights or obligations set forth in this agreement shall first be initiated in Flandreau Santee Sioux Tribal Court." Bettor Racing asserts that nothing in this section states that the this litigation is only that which can be initiated by the Tribe against Bettor Racing, that this Court is the appropriate forum to litigate the facts in this case.

Bettor Racing further asserts that it may file a claim against the Tribe for an offset or recoupment. Citing Rosebud Sioux Tribe v. Val-U Constr. Co. of South Dakota, Inc., 50 F3d 560 (8th Cir. 1995). Bettor Racing contends that the damages flowing from its claims relate to its potential liability in the NIGC action, which relates to the Management Agreement and the validity of any modifications to it. Therefore, Bettor Racing seeks to offset or recoup any amount it may ultimately have to pay. In response, the Tribe argues that in Frederick v. United

States, 386 F.2d 481 (5th Cir. 1967), the Court of Appeals identified three requirements to sustain a claim of recoupment within an implied waiver of sovereign immunity. First, the claim must (1) arise from the same transaction or occurrence as the government's suit; (2) seek relief that is not "different in kind or nature" from the relief sought by the government; and (3) seek an amount not exceeding the government's claim. Id at 488. In applying these requirements for offset or recoupment, there is no doubt that Bettor Racing's claims relate to its potential liability in the NIGC action which is different from the Tribe's claims in this case. To reiterate, the relief sought by Bettor Racing is for the amount of its damages it have to pay in the NIGC action which is different than the relief sought by the Tribe. The amount of Bettor Racing's claim is the fine levied against it by the NIGC. On the other hand, the Tribe seeks damages in the amount that was overpaid to Bettor Racing which is contrary to the amount agreed upon by the parties in the Management Agreement. Because the Court finds that the Tribe has not waived its immunity from suit the Court grants summary judgment on Bettor Racing's counterclaim for breach of the duty of good faith and fair dealing and for fraud and deceit.

CONCLUSION

The undisputed facts show there is no genuine issue of material fact that Bettor Racing breached the Management Agreement and damaged the Tribe. In the alternative, the undisputed facts show there is no genuine issue of material fact that Gallo is liable for restitution for the amount he received while operating under the consulting agreement. Also in the alternative, the undisputed facts show there is no genuine issue of material fact that Bettor Racing is liable for the excess amount it received while operating under the two unapproved modifications to the Management Agreement. In addition, the undisputed facts show there is no genuine issue of fact that the Tribe is entitled to Summary Judgment on Bettor Racing's counterclaim for indemnification. Lastly, the undisputed facts show there is no genuine issue of material fact that

the Tribe is entitled to summary judgment on Bettor Racing's counterclaims for breach of the duty of good faith and fair dealing and for fraud and deceit because the Tribe has not waived its immunity to such claims. There is no issue of material fact that Defendants must provide an accounting to the Tribe for the years 2004 through 2010. Accordingly, it is

ORDERED that the Tribes motions for Summary Judgment are granted.

IT IS FUTHER ORDERED that Defendants provide an accounting to the Tribe for the years 2004 through 2010 sufficient to ascertain gross revenues, net revenues, the amounts paid to each party, and the amounts owing to each party.

IT IS FURTHER ORDERED that Judgment is granted to the Tribe for its costs and disbursements.

Dated this 27th day of August, 2015.

BY THE COURT:

Sherman J. Marshall
Chief Judge

ATTEST:

Clerk of Courts

IN THE FLANDREAU SANTEE SIOUX TRIBAL COURT
FLANDREAU, SOUTH DAKOTA

FLANDREAU SANTEE SIOUX TRIBE, PLAINTIFF,	**CIV 2013-11**
VS	**NOTICE OF ENTRY ORDER**
BETTOR RACING AND RANDY GALLO, in his OFFICIAL AND INDIVIDUAL CAPACITIES, DEFENDANT.)	

TO: THE ABOVE-NAMED

PLEASE TAKE NOTICE that a(n) MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT was duly entered by the Flandreau Santee Sioux Tribal Court, Moody County, South Dakota, the Honorable Sherman J. Marshall, presiding in the above-entitled action on August 27, 2015.

Tribal Clerk of Courts

CERTIFICATE OF MAILING

I, Kristi D. Bietz, Civil Clerk of the Flandreau Santee Sioux Tribal Court, hereby certify that I mailed certified copies of the MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT entitled action to:

PATRICK R. BERGIN, FREDRICKS, PEEBLES & MORGAN LLP, 2020 L STREET SUITE 250, SCRAMENTO, CA 95811

MEREDITH A. MOORE, CULTURE & DONAHOE, LLP, PO BOX 1400, SIOUX FALLS, SD 57101-1400

By first-class mail, postage prepaid on August 27, 2015.

Tribal Clerk of Courts

FLANDREAU SANTEE SIOUX TRIBE
FLANDREAU SANTEE SIOUX TRIBAL COURT:
I HEREBY CERTIFY THAT I HAVE CAREFULLY COMPARED THE WITHIN INSTRUMENT WITH THE RECORD IN MY OFFICE AND THAT IT IS A TRUE AND CORRECT COPY OF THE SAME AND THE WHOLE THEREOF, AND THAT THE ABOVE IS A TRUE AND CORRECT COPY OF THE FILING THEREON.
DATED: August 27, 2015
BY: _____
FSST COURT CLERK