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April 16, 2012

Steven D. Sandven  
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300 N Dakota Avenue, Ste 106  
Sioux Falls, SD 57104

Oliver J. Seamans  
PO Box 194  
Mission, SD 57555

RE: Rosebud Sioux Tribe v. BBC Entertainment et al  
File No: Civ 09-69

Dear Counsel:

Enclosed please find the Court's Orders and Memorandum Decision in the above-entitled action. I have filed these Orders and Memorandum Decision with the clerk with a copy of this letter.

Best regards.

Sincerely,

  
Patricia A. Meyers

PAM/cdc

Enc.

cc: Rosebud Sioux Tribal Court Clerk

**ROSEBUD SIOUX TRIBE  
IN TRIBAL COURT**

ROSEBUD SIOUX TRIBE

Plaintiff,

vs.

BBC ENTERTAINMENT, INC., CHARLES  
COLOMBE, WAYNE BOYD, and JOHN BOYD

Defendants.

CASE NO: CIV 09-069

**MEMORANDUM DECISION**

**PROCEDURAL HISTORY**

On or about June 14, 1994, the Rosebud Sioux Tribe entered into a management agreement with BBC Entertainment, Inc., a Minnesota corporation owned in part by Charles Colombe, John Boyd and Wayne Boyd - all enrolled members of the Rosebud Sioux Tribe - to manage its gaming operations. The underlying complaint filed in the Tribal Court alleged that BBC Entertainment committed a wide array of actions that resulted in a breach of the parties' agreement. After a trial on the merits, the Tribal Court granted a judgment against BBC Entertainment in the amount of \$399,353.61 plus interest for a total of \$127,793.15.

Unbeknownst to the Tribe, during the course of the litigation the Secretary of State revoked BBC's Articles of Incorporation on November 6, 2006, based upon their failure to file an annual report. Accordingly on February 17, 2009, the Tribe commenced this action against the Defendants seeking to pierce the corporate veil of BBC Entertainment to obtain the judgment ordered in the underlying case.

On or about March 24<sup>th</sup>, 2009, the Tribe requested answers to its Interrogatories, Requests

for Production of Documents and Requests for Admissions from each Defendant. All Defendants were placed on notice that they must respond within thirty (30) days. None of the Defendants responded to the discovery requests nor sought a Protection Order from this Court, and so, on April 29<sup>th</sup>, 2010, the Tribe re-served Defendants with an identical discovery request. Again, the Defendants were informed they must respond within thirty (30) days. Defendants failed to respond. On May 4, 2009, the Tribe filed a Motion to Compel Discovery, but received no response from the Defendants.

All discovery requests were temporarily set aside while the parties argued various Motions to Dismiss filed by the Defendants. Finally, on April 26, 2010, the Court issued an Order Denying Defendant's Motions to Dismiss. Based thereon, the Tribe filed another Motion to Compel Discovery on July 16, 2010. Defendant Columbe filed his Motion in Opposition to Compel Discovery on September 9, 2010. A hearing was conducted on December 13, 2010 and the Court Ordered that the Defendants respond to written discovery by January 22, 2011. Defendants' attorney requested leave to withdraw, because Defendants refused to respond to the Tribe's discovery requests. To date, the Tribe still has not received responses from any of the Defendants and no Protective Order has been issued by this Court.

### **STANDARD OF REVIEW**

It is well established that a Motion for Summary Judgment should be granted only "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 that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 222-323

(1986); Dana Corp. v. Belvedere International Inc., 950 F.2d 1555 (Fed. Cir. 1991). Only disputes over facts that might affect the outcome of the case under the governing substantive law will properly preclude summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

“One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims and defenses...” Anderson, 477 U.S. at 249-50. *See also* Bowlin v. Mantanez, 446 F.3d 817, 819 (8<sup>th</sup> Cir. 2006) Rule 56 directs the Court to determine “whether there is a need for 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 of either party.” Anderson, 477 U.S. at 250. “[T]his standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported Motion for Summary Judgment; the requirement is that there be no genuine issue of material fact.” Id. At 247.

In analyzing whether there is a genuine issue of material fact, all facts and inferences drawn from the facts must be viewed in the light most favorable to the nonmoving party. The burden is on the moving party to establish the absence of genuine issues of material fact and “a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other fact immaterial.” Celotex Corp., 477 U.S. at 323. If the movant meets its burden, then the non-moving party must provide the Court with specific facts demonstrating a genuine issue for trial in order to survive summary judgment. Id. At 323.

## ANALYSIS

### I. REQUESTS FOR ADMISSION.

An initial matter for determination by the Court is whether the Tribe’s Requests for



Admissions should be deemed admitted, as the Tribe requests. The Tribe bases its request on the grounds that the Defendants failed to respond to the Requests for Admission within the timer period prescribed b Rule 26(f) of the Rosebud Sioux Tribe's Rules of Civil Procedure that provides as follows:

If a party fails to respond or appear for discovery as provided in these rules, the opposing party may move the Court for an Order to Compel the non-performing party to perform. The Court may award costs or attorney fees to the non-defaulting party for the necessity of brining the matter before the Court. If a party fails to perform after being ordered to do so by the Court, *the Court may upon motion and notice order that a certain fact, claim, or defense be deemed established or strike part of a claim or defense or dismiss the action or render a judgment by default against the non complying party in am aggravated case.*  
Emphasis added.

In fact, the evidence demonstrates that the Defendants have indeed failed to respond in any fashion to the Tribe's discovery requests. A party's failure to respond to a Request for Admissions may result in material fact being deemed admitted and subject the party to an adverse grant of summary judgment. *See Carney v. Internal Revenue Service*, 258 F.3d 415, 417-418 (5<sup>th</sup> Cir. 2001); *Adventis, Inc. v. Consol. Property Holdings, Inc.*, 124 Fed. Appx. 169, 173 (4<sup>th</sup> ir. 2005); *Langer v. Monarch Life Ins. Co.*, 966 F.2d 786, 803 (3<sup>rd</sup> Cir. 1992). In this case, the Defendants have wholly ignored the Tribe's discovery requests on three (3) separate occasions. Further, the Defendants have determined there was no need to comply with the Court's December 13, 2010 Order. Under these circumstances, the Court concludes that it is appropriate to deem the unanswered requests admitted for the purpose of the Tribe's Motion for Summary Judgment.

## II. MOTION FOR SUMMARY JUDGMENT.

A firmly entrenched doctrine in corporate society is the concept that a corporation is considered a legal entity separate and distinct from its officers, directors, and shareholders until there is sufficient reason to the contrary. 18 Am. Jur.2d *Corporations* §43 (1985); Mobridge Community Industries v. Toure, 273 N.W.2d 128, 132 (S.D. 1978); Farmers Feed and Seed v. Magnum Enterprises, 344 N.W.2d 699, 702 (S.D. 1984); Ethan Dairy Products v. Austin, 448 N.W.2d 266, 230 (S.D. 1989); Baatz v. Arrow Bar, 452 N.W.2d 138, 141 (S.D. 1990).

This case deals with piercing the corporate veil, and because the doctrine is a matter of state law or tribal law if precedent exists, this Court has utilized cases determined by the Courts of the State of South Dakota as guidance in making its determination. The principal exception to the limited liability rule is the doctrine of "piecing the corporate veil." This doctrine is equitable in nature and is used by the courts to disregard the distinction between a corporation and its shareholders to prevent fraud or injustice. See 18 C.J.S. *Corporations* § 10 at 277-78. The general rule which has emerged is that a corporation will be looked upon as a legal entity separate and distinct from its shareholders, officers and directors unless and until sufficient reason to the contrary appears, but when the notion of a legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, then sufficient reason will exist to pierce the corporate veil. 18 C.J.S. *Corporations* § 9.

In deciding whether the corporate veil will be pierced, courts recognize that "each case is sui generis and must be decided in accordance with its own underlying facts." Mobridge, 273 N.W.2d at 132 (quoting Brown Brothers Equipment Co. v. State, 51 Mich. App. 448, 215 N.W.2d 591, 593 (1974)).

Legal precedent has established a number of factors that might justify piercing the corporate veil: (1) was there such unity of interest and ownership that the separate personalities of the corporation and its shareholders, officers, or directors are indistinct or non-existent; and (2) would adherence to the fiction of separate corporate existence sanction fraud, promote injustice or inequitable consequences or lead to an evasion of legal obligations? *See N.L.R.B. v. Greater Kansas City Roofing*, 2 F.3d 1047, 1052 (10<sup>th</sup> Cir. 1993); *Chergosky v. Crosstown Bell, Inc.*, 454 N.W.2d 654, 658 (Minn. App. 1990); *ALMAC, Inc. v. RJH Development, Inc.*, 391 N.W.2d 919, 922 (Minn. App. 1986).

The “separate identity” prong is meant to determine whether the stockholder and the corporation have maintained separate identities. The following four factors are used by the courts to determine whether the first prong is satisfied: (1) undercapitalization; (2) failure to observe corporate formalities; (3) absence of corporate records; and (4) payment by the corporation of individual obligations. If these factors are present in sufficient number and/or degree, the first prong is met and the court will then consider the second prong.

Under the fraud, injustice or evasion of obligations prong of the test the court asks whether there is adequate justification to invoke the equitable power of the court. An element of unfairness, injustice, fraud, or other inequitable conduct is required as a prerequisite to piercing the corporate veil. The showing of inequity necessary must flow from the misuse of the corporate form. The mere fact that a corporation breaches a contract does not mean that the individual shareholders of the corporation should personally be liable. To the contrary, the corporate form of doing business is typically selected precisely so that the individual shareholders will not be liable. It is only when the



shareholders disregard the separateness of the corporate identity and when that act of disregard causes the injustice or inequity or constitutes fraud that the corporate veil may be pierced. Greater Kansas City Roofing, 2F.3d at 1052-1053. The following two factors are considered by the courts in determining whether the second prong has been satisfied: (1) fraudulent misrepresentation by corporate directors; ;(2) use of the corporation to promote fraud, injustice, or illegalities.

Implicit in the first prong of the test is the idea that the person or persons whom the plaintiff wishes to hold individually liable must have exercised such control over the corporation that the notion of a separate legal identity no longer exists. In other words, the corporation must have been used as the mere alter ego or instrumentality through which the defendant was conducting their personal business. The control which is necessary is that which is normally exercised by the shareholders, officers, or directors of a corporation and must be distinguished from the type of control which may be exercised by a corporate manager or employee who merely acts as an agent of the corporation. Thus, a threshold requirement is that the plaintiff must establish that the person which they seek to hold individually liable was in fact a corporate shareholder, officer, or director or similar corporate representative, such that the person could exercise the type of control over the corporation necessary to satisfy the first prong. In this case, the evidence conclusively demonstrates that Defendants Charles Colombe, John Boyd and Wade Boyd served as the dominant and only shareholders and directors of BBC from its inception to its dissolution.

A. The Separate Corporate Identity Prong.

1. Undercapitalization. "Shareholders must equip a corporation with a reasonable amount of capital for the nature of the business involved." See Mobridge, 273 N.W.2d at 132-33



("An obvious inadequacy of capital, measured by the nature and magnitude of the corporation's undertaking, is an important factor in denying directors and controlling shareholders the corporate defense of limited liability.") Curtis v. Feurhelm, 335 N.W.2d at 576 (Shareholders who equip corporation with a reasonable amount of capital have assumed appropriate proprietary risk for the nature of the business involved, and the law has not required more.) In this case, Defendant Columbe was questioning the Boyds' ability to financially contribute to the corporation within a few months of its incorporation. Indeed, the Boyds' ownership was purportedly terminated, because of their failure to financially contribute to the venture. Accordingly, the Plaintiff has presented evidence demonstrating that the Defendants' amount of contribution was inadequate for the operation of the business.

2. Failure to Observe Corporate Formalities. When corporate owners, by their own acts, show that they have ignored the corporate entity, the courts may do likewise. *Annot. Disregarding Corporate Entity*, 46 A.L.R.3d 428 (1972). The evidence in the record demonstrates that the preparation of minutes was sporadic at best, only one shareholder would attend meetings, and Defendant Columbe had informed the Tribe that he is the only shareholder of the corporation despite evidence demonstrating that the interests of the other shareholders were never legally terminated. Of course, the most telling evidence is the fact that the corporation was administratively dissolved for failing to observe corporate formalities.

3. Commingling of Personal Funds with Corporate Funds. Evidence presented by the Tribe demonstrated that BBC would transfer corporate funds to Defendant Columbe's Wife and business Western Events for personal use.

4. Misappropriate of Corporate Assets for Personal Use. Again, the evidence shows that BBC transferred money to Defendant Columbe's Wife and business Western Events for personal use.

Based on the foregoing, the Tribe has satisfied the first prong of the test because it has presented sufficient evidence showing that the Defendants disregarded the corporate identity and treated the corporation as their alter ego.

B. The Fraud, Injustice, or Inequitable Consequences Prong.

As this Court has stated, the piercing doctrine is an equitable remedy. Therefore, the party seeking to pierce the corporate veil must demonstrate that there has been a substantial disregard for the separate corporate identity, and that there is some material equitable reason for the Court to hold the shareholder, officer or director personally liable. Further, the individual who is sought to be charged personally with corporate liability must have shared in the moral culpability or injustice that is found to satisfy the second prong of the test. Greater Kansas City Roofing, 2 F.3d at 1053. It has been stated that:

The alter ego doctrine is not applied to eliminate the consequences of corporate operations, but to avoid inequitable results; a necessary element of the theory is that the fraud or inequity sought to be eliminated must be that of the party against whom the doctrine is invoked, and such party must have been an actor in the course of conduct constituting the abuse of corporate privilege – the doctrine cannot be applied to prejudice the rights of an innocent third party.

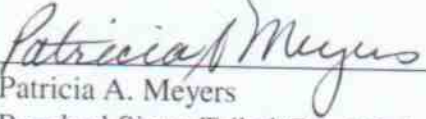
Id.

In this case, the evidence demonstrates that Defendant BBC proposed a management contract with the Tribe who was informed that the corporation consisted of Charles Colome, Wayne Boyd,

and John Boyd. At no time was the Tribe aware that Defendants John and Wayne Boyd had not financially contributed to the corporation. The agreement was submitted to the National Indian Gaming Commission ("NIGC") for its approval. The management agreement itself demonstrated that all three individual Defendants held an ownership interest in BBC. Any change in the corporate structure of BBC would now require the approval of the NIGC. Evidence demonstrates that no submission of such changes was ever made to the federal agency. Without the Tribe's knowledge, the individual Defendants purported to enter into an agreement thereby terminating the ownership interests of Defendants John and Wayne Boyd. When the Tribe discovered the change in corporate structure, the Tribal Council demanded that BBC restructure itself into the corporate structure that existed at the time the management agreement was executed. Evidence demonstrates that the corporation appeared to comply with the Council's directive. However, at the present time, the individual Defendants contend that the Defendant Colombe is, and has been, the sole shareholder, director, and owner of BBC and that the ownership interests of the Boyds was terminated by the agreement executed by the individual shareholders in 1994. In other words, despite the assurances given to the Tribe to induce them to continue with the management agreement, BBC restructured itself without the approval of the Tribe and the NIGC as required by federal law. Surely, this facts demonstrate that the Defendants utilized the corporate structure to conduct their own business, and that the liability incurred in the underlying action arises from the fraud and injustice perpetrated on the Tribe.

Dated this 19<sup>th</sup> day of April, 2012.

BY THE COURT:

  
Patricia A. Meyers  
Rosebud Sioux Tribal Court Judge



**ROSEBUD SIOUX TRIBE  
IN TRIBAL COURT**

ROSEBUD SIOUX TRIBE

Plaintiff,

vs.

BBC ENTERTAINMENT, INC., CHARLES  
COLOMBE, WAYNE BOYD, and JOHN BOYD

Defendants.

CASE NO: CIV 09-069

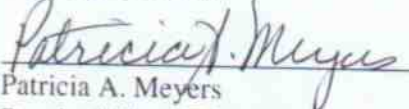
**ORDER REGARDING MOTION  
TO DISMISS**

The above captioned action came before the Court on the Motion of Charles Colombe to Dismiss pursuant to Article X, the Bill of Rights of the Rosebud Sioux Tribal code. Defendant Charles Colombe did not request a hearing on his Motion. Defendant Charles Colombe's Motion was made in writing on March 13, 2012. Defendant Charles Colombe appeared by and through his attorney, O.J. Seamans, on March 13, 2012 at 3:00 p.m. at a hearing on the Motion of the Plaintiff for Summary Judgment. Defendant BBC made an oral Motion and presented the Court with a written Motion requesting Dismissal based on Due Process Right to Speedy Trial and Associated Rights Granted by RST Constitution at the hearing on the Plaintiff's Motion. The Court orally denied the Defendant Charles Colombe's Motion as being untimely and made without notice to opposing counsel and not in conformance with the rules of procedure. The parties then argued the merits of Plaintiff's Motion for Summary Judgment and the Court granted the Plaintiff's Motion for Summary Judgment. Based upon the foregoing and having considered the written Motion of the Defendant Charles Colombe, the Court hereby:

**ORDERS**, that the Motion to Dismiss is **denied**.

Dated this 19<sup>th</sup> day of April, 2012.

BY THE COURT:

  
Patricia A. Meyers  
Rosebud Sioux Tribal Court Judge

**ROSEBUD SIOUX TRIBE  
IN TRIBAL COURT**

ROSEBUD SIOUX TRIBE

Plaintiff,

vs.

BBC ENTERTAINMENT, INC., CHARLES  
COLOMBE, WAYNE BOYD, and JOHN BOYD

Defendants.

CASE NO: CIV 09-069

**ORDER REGARDING MOTION  
FOR SUMMARY JUDGMENT**

The above captioned action came before the Court on March 13, 2012 for a hearing on the Plaintiff Rosebud Sioux Tribe's ("Tribe") Motion for Summary Judgment filed pursuant to Rule 56 of the Rosebud Sioux Tribe Rules of Civil Procedure that provides:

At any time 30 days after the commencement of an action any party may move the Court for summary judgment as to any or all issues presented in the case, and such shall be granted by the Court if it appears that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Such motion shall be served not less than 10 days prior to the hearing on said motion and may be supported by affidavits, discovery material, or memorandum, all of which must be made available to the opposing parties at least 10 days prior to the hearing. The opposition shall have full opportunity to respond to such motion at the time fixed for hearing.

The Tribe's Motion for Summary Judgment was filed on January 22, 2011 and notice for the March 13, 2012 hearing was mailed to interested parties on February 23, 2012.

Plaintiff appeared through its attorney Steven Sandven and Defendant BBC and Charles Colombe appeared through their attorney O. J. Seamans, Defendants Wade Boyd and John Boyd did not appear either personally or through their attorney. The Court having considered the pleadings, Affidavits, Briefs and other evidence presented by the parties and having listened to the argument

Rosebud Sioux Tribe v. BBC Entertainment, Inc et al  
Case No: Civ 09-069  
Order Regarding Motion to Dismiss

of counsel and it appearing there is no genuine issue of material fact and that the Plaintiff is entitled to Judgment as a matter of law it is hereby:

**ORDERED** that Plaintiff's Motion for Summary Judgment is **GRANTED**.

Dated this 19<sup>th</sup> day of April, 2012.

BY THE COURT:

Patricia A. Meyers  
Patricia A. Meyers  
Rosebud Sioux Tribal Court Judge



**ROSEBUD SIOUX TRIBE  
IN TRIBAL COURT**

ROSEBUD SIOUX TRIBE

Plaintiff,

vs.

BBC ENTERTAINMENT, INC., CHARLES  
COLOMBE, WAYNE BOYD, and JOHN BOYD

Defendants.

CASE NO: CIV 09-069

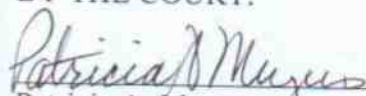
**ORDER**

The above captioned action came before the Court on the motion of BBC to recuse Judge Patricia A. Meyers pursuant to Rule 63b of the Rosebud Sioux Tribal code. Defendant BBC did not request a hearing on its Motion. Defendant BBC's Motion was made in writing on March 14, 2012. Defendant BBC appeared by and through its attorney, O.J. Seamans, on March 13, 2012 at 3:00 p.m. at a hearing on the Motion of the Plaintiff for Summary Judgment. Defendant BBC made an oral Motion requesting Patricia A. Meyers to recuse herself at the time of the hearing on the Plaintiff's Motion. The Court orally denied the Defendant BBC's Motion to Recuse as being untimely and made without notice to opposing counsel and not in conformance with the rules of procedure. The parties then argued the merits of Plaintiff's Motion for Summary Judgment and the Court granted the Plaintiff's Motion for Summary Judgment. The Court then received the written Motion of BBC asking for its recusal, based upon the foregoing and having considered the written Motion of the Defendant BBC, the Court hereby:

**ORDERS**, that the motion to recuse is denied.

Dated this 19<sup>th</sup> day of April, 2012.

BY THE COURT:

  
Patricia A. Meyers  
Rosebud Sioux Tribal Court Judge