

ROSEBUD SIOUX TRIBE
IN TRIBAL COURT

Rosebud Sioux Tribe,

Case No.: Civ. No. CIV 01-230

PLAINTIFF,

VS.

AFFIDAVIT OF CHARLES C.
COLOMBE IN SUPPORT OF
FOR MOTION FOR SUMMARY
JUDGMENT

BBC ENTERTAINMENT, INC.

DEFENDANTS.

Charles C. Colombe, being first duly sworn, herein states as follows:

1. This affidavit is made for the purpose of providing background facts relative to defendant's motion for summary judgment on the remand of this litigation by the Rosebud Supreme Court.
2. Affiant was a primary shareholder, president and a director of defendant, BBC Entertainment, Inc., and was closely involved in the management of BBC during the effective period of the Management Agreement for the Rosebud Casino. BBC hired and paid for its own on-site casino manager who reported to Affiant. Affiant was not the on-site casino manager.
3. All casino accounting functions were delegated to a qualified accounting staff. BBC retained the firm of Crowley and Vogel, CPAs to set up the Rosebud Casino accounting system and to monitor it on a monthly basis. The casino accounting work was done by an in house accounting staff. The Management Agreement established accounting standards and all work done by staff and Crowley & Vogel was required to conform to the Management Agreement and applicable NIGC Regulations and comply with Generally Accepted Accounting Practices ("GAAP") and to be audited annually by outside auditors hired by the Tribe to confirm that it did comply. All decisions on allocating income and expenses and

amounts of distributions were made by the accounting staff, and not by Affiant.

4. The casino accounting system was complex and detailed so that it complied with NIGC Regulations. On a monthly basis, and within 45 days after the applicable month, the accountants provided summaries of the financial results which were compiled in a Balance Sheet, an Income Statement, and a monthly split statement. Exhibit 1 is a copy of the monthly Income Statements which itemized the income and expense for each month. The Income Statements in Exhibit 1 are the combined statement, as the Tribe was also given detailed Income Statements for each department. The Income Statement also provided details of how income and expenses compared to the amounts set forth in the annual budgets which had to be approved by the Tribe each year. They further confirmed that all expenses were properly budgeted. Generally, it took between 30 and 45 days after the end of the month to fully compile all of the accounting records for the month. Two things confirm that the Tribe did receive its share of the profits for each of the 60 months of the management agreement. First, the Tribe depended on the money and would have immediately moved for a breach of the Management Agreement as was illustrated in exhibits admitted at the trial, and second, the annual audits verify the payments.

5. Every month throughout the term of the Management Agreement between BBC and RST, BBC and/or the Rosebud Casino delivered the monthly accounting and split statement, and an oral presentation was made by a BBC representative to the Tribal Council when it was possible. The Tribe was thus informed of and had the opportunity to question or approve casino earnings and financial decisions on a monthly basis as was required in the Management Agreement. As required by the IGRA the Management Agreement also gave the Tribe the right to immediate access to all casino financial records at any time.

6. During the five year term of the Management Agreement there were annual audits performed by outside auditors selected by plaintiff. All of those audits were entered into evidence in this action previously, but copies of the annual audits are also attached as follows:

Exhibit 2 is the audit performed by Reimer Wenande Smits & Co. for the period from August 14, 1994 (Date of Inception to September 30, 1995.

Exhibit 3 represents the results of the audits performed by Joseph Eve & Co. for the years ending September 28, 1996 and September 27, 1997. (Note, the combined years are included merely to save the Court from going through additional documents with the same information).

Exhibit 4 represents the results of the audits performed by Joseph Eve & Co. for the years ending September 26, 1998 and September 25, 1999.

Exhibit 5 is the audit performed by Joseph Eve & Co. for the period ending August 15, 1999 (Date of Termination).

7. The auditors who performed the annual audits were solely selected by the Rosebud Sioux Tribe and paid out of casino funds. Because Joseph Eve had been hired by the Tribe for the last four audits, in 2003 we sought the agreement of the Tribe to taking Mr. Eve's deposition in Billings, Montana where his office is located. Mr. Eve had verbally indicated that he did not desire to come to Rosebud for a deposition. The Tribe would not agree to the deposition, and because of the Rosebud Rules we had no way to subpoena Mr. Eve for a deposition.

8. The Management Agreement required that both the Rosebud Sioux Tribe and BBC agree to make adjustments in previously declared monthly earnings or monthly splits based on any adjustments required by the audits so that the earnings of each party would represent their share of net income based on the fact that BBC was allowed a management fee of 35% of the net earnings, and that the management fee would be based on

the net earnings established and verified by the annual audits.
(Management Agreement § 6.5(c)(1)).

9. BBC was required to strictly comply with the annual casino budgets agreed on by the Tribe. That is the reason that every income statement also contains full details on how expenses for the month conform to the approved budget for the expenses. The interaction between the monthly statements and budgets is shown by the Income Statements in Exhibit 1.

10. BBC offered to supply funding for an operating expense reserve pursuant to section 6.4 (c)(5) of the Management Agreement but the Tribe would not authorize it and the Tribe never authorized deducting payments to that reserve from gross revenues, and that is the reason that none of the casino accounting records, including the monthly income statements or the annual audits show an expense deduction from gross profits for the operating reserve account.

11. After a need for some cash reserve was determined in 1995 when cash became short due to the seasonal decrease in revenues, the Tribe desired to create a cash reserve by delaying payment of 7.5% of monthly distributions of net profits to both the Tribe and BBC. BBC agreed to the proposal. While some people refer to the reserve as a "rainy day fund" the Tribe wanted it to provide an assurance that every month there would be sufficient funds to pay at least most of their share of the income, as pursuant to §6.5(b) of the Management Agreement BBC had the right to make minimum payments of \$12,000 a month. Thus, at times each year throughout the term of the Management Agreement when income would go down, funds that had been set aside for the reserve were utilized for the payment of the splits. For that reason the reserve account usually did not represent the exact amount that had been set aside from net revenues.

12. There was a natural cash reserve created by the lag between the time the earnings arose and the payment of the earnings which could be up to 45 days after the end of the month in which the earnings came

about. If earnings were paid earlier than 45 days after the end of the month, of course cash was reduced. The natural cash reserve in any given month was up to 75 days including 30 days for the month itself plus up to 45 days after the month. During that time the natural cash reserve increased on a daily basis.

13. As Exhibit 2 shows, the amount of the earnings which had not yet been paid to the Tribe and BBC at the time of the audit for the first year were treated as "unappropriated retained earnings." That audit shows that the unappropriated retained earnings at September 30, 1996 were \$459,138. That represented earnings payable to BBC and the Rosebud Sioux Tribe which at the time of the audit were unpaid, and thus extra cash on hand.

14. The Tribe always had an appetite for as much cash as they could get, and they desired that earnings be paid prior to 45 days after the end of the month. We worked at paying the earnings split as soon as the accountants completed the monthly computations to determine net income. The seasonal decrease in casino business and thus earnings as we went into the fall and winter months also reduced cash on hand.

15. Due to less cash on hand the Tribe suggested that we still not budget any funds for an operation reserve to be deducted from earnings or paid by BBC from available loan funds, but rather, as even the Tribe alleged in its Complaint at ¶ 21, to have each party automatically delay payment of 7.5% of their share of net revenue.

16. From the time we started allowing the 7.5% deduction as an interest free loan, cash earnings could still be paid earlier than the 45 days and still allow for a cash on hand balance, and as I indicated, as a source of extra funds for the months when the cash was short.

17. The Tribe hired Joseph Eve & Co. to do the audit for the second year, and they retained them for the duration of the management agreement term.

18. While I am not an accountant, I know that both the BBC accountants and the hired outside auditors allocated every legitimate expense of the casino prior to determining net profits for distribution.
19. To the extent that earnings paid out every month were reduced by the 7.5% deduction, both BBC and the Rosebud Sioux Tribe, as well as all of the accountants and auditors knew that the funds were undistributed income payable to BBC and the Tribe, and in all of the Joseph Eve audits they are shown as exactly that, i.e., "Distributions Payable." See Exhibits 3 - 5).
20. As can be seen from Exhibit 5, page 5, of the August 15, 1999 audit, according to the Tribe's auditor, BBC was paid all of its share of Distributions payable except for \$13,857 which is still unpaid. In the end, BBC was paid less than the 35% to which it was entitled and as the audits clearly establish, BBC was not paid any earnings to which it was not legally entitled so that any reduction based on a non-accounting theory or a theory that does not comply with the Management Agreement would violate the NIGC approved agreement.
21. The audits also establish that the Tribe also received all of the its 65% share of the casino net earnings for the five year term of the Management Agreement. Because the Tribe often used money allocated to its reserves, and because of the delay in payment of distributions, year end totals can not reflect exactly the payment of a given percent of earnings. Audits reflect the financial status of the casino at a given point in time, but when taken together, they confirm that all management fees have been properly paid, and total management fees for the five year term are less than 35% of the total net earnings for that same period. The audits also indicate that the accountants understood that: "'Distributable net income' is defined in the Management Agreement." (Footnote 2, Eve audits, Exhibits 2-5)
22. All of the casino audits had to be approved by the Tribe, and copies forwarded to the NIGC. If BBC had attempted to take more than its share


of net earnings, i.e., more than 35%, that would have been reported on the audits. The Tribe never notified BBC that it had any issues with the allocation of net income, or with the amount of net income paid to BBC, until after the end of the Management Agreement when the Tribe decided to claim the portion of BBC's share of net revenues that had been in reserve. The NIGC never notified BBC that it had any issues with any of the audits.

23. After the end of the term of the Management Agreement when it started this litigation the Tribe also made claims that net earnings were improperly calculated because of depreciation issues. That issue was Count II of the Complaint and the Court ruled that the depreciation was properly calculated. That portion of the decision was not appealed.

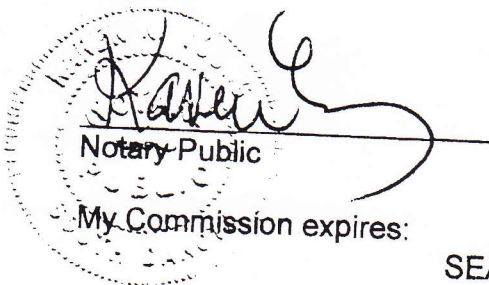
24. Accounting, and Generally Accepted Accounting Principals (GAAP) are not rocket science, but they do require the certification and approval of duly licensed accountants who understand all of the applicable principles.

25. It is unfortunate that the Tribe refused to agree to the deposition testimony of Joseph Eve, but the audits performed by his company confirm beyond any doubt that at the end of the five year term of the Management Agreement total payments to BBC did not exceed 35% of the net earnings of the Rosebud Casino.

Dated this 10th day of April, 2007.


Charles C. Colombe

Subscribed and sworn to before me
this 10th day of April, 2007.


Notary Public
My Commission expires: _____
SEAL