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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ELEM INDIAN COLONY OF POMO INDIANS,

Plaintiff,

v.

PACIFIC DEVELOPMENT PARTNERS X, LLC, et al.,

Defendants.

**Case No. C-09-01044 CRB**

**DEFENDANTS' NOTICE OF MOTION T0 VACATE OR MODIFY ARBITRAL AWARD**

Hearing Date: April 30, 2010
Time: 10:00 a.m.

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**NOTICE OF MOTION**

Defendants hereby move pursuant to sections 10(a)(4) and 11(b) of the Federal Arbitration Act, 9 U.S.C. §§ 10(a)(4) and 11(b), to vacate or modify the Award issued by Arbitrator Mahlon B. Brown in an arbitration administered by the American Arbitration Association ("AAA") (AAA No. 74-181-Y001184-08) in which Defendants in this case, Pacific Tribal Partners, LLC ("PTP") and Pacific Development Partners X, LLC ("PDPX"), were Claimants and Plaintiff in this case, Elem Indian Colony of Pomo Indians (the Tribe"), was the Respondent. This Motion is scheduled be heard at 10:00 a.m. on Friday, April 30, 2010, before the Honorable Charles R. Breyer, United States District Judge, in Courtroom 8, 19th Floor, U.S. Courthouse and Federal Building, 450 Golden Gate Avenue, San Francisco, California.

**RELIEF REQUESTED**

Defendants request an order vacating the Award under 9 U.S.C. § 10(a)(4) as exceeding the Arbitrator's power. Alternatively, the Award should at least be modified under 9 U.S.C. § 11(b) by striking the attorneys' fee award because no request for any such fee award was ever submitted by Respondent, and the Arbitrator lacked power to make such fee award in any event. Claimants further seek the option of pursuing before a different arbitrator or new arbitral panel whatever issues may remain after vacation of the Award.

**ISSUES PRESENTED**

1. Whether the Award should be vacated under 9 U.S.C. § 10(a)(4) as exceeding the Arbitrator's powers because he disregarded the parties' formal factual stipulations (post-hearing) which are dispositive of what he viewed as the pivotal issue in the arbitration, and furthermore, as the Arbitrator expressly stated in the Award, the stipulated facts compel the result that Claimants should have prevailed in the arbitration had the Arbitrator properly applied the stipulated facts.

2. Whether the Award should be vacated under 9 U.S.C. § 10(a)(4) as exceeding the Arbitrator's powers because he manifestly disregarded the law by (1) holding that unlike other sovereigns, Indian tribes are somehow not subject to the doctrines of equitable estoppel and retroactive ratification even when a tribe's general council formally decides to accept substantial benefits under a contract that it later renounces without just cause, (2) subordinating the Arbitrator's own previously expressed judgment on Indian gaming regulatory matters to an informal advisory opinion of counsel for the National Indian Gaming Commission ("NIGC") that the Arbitrator had previously rejected, and to which courts do not defer, and (3) applying restrictive federal law, rather than liberal California law which the parties had chosen to govern their Memorandum of Agreement ("MOA"), to contract severance issues relating Indian gaming matters in which California had a primary role.

3. Whether the Award should be modified under 9 U.S.C. § 11(b) by striking the award of attorneys' fees to Respondent Tribe because the Tribe never even requested any such award, and the Arbitrator lacked power to make any such award after he determined that the Tribe's General Council had never validly authorized the Tribe's entry into the MOA.

**SUMMARY OF FACTS**

A detailed post-hearing Stipulation Regarding Undisputed Facts, entered into by the parties on October 6, 2009, is included among other record materials attached to the accompanying Declaration of Timothy W. Bergin (the undersigned) ("Decl."). A helpful summary of facts is also set forth in the Court's June 23, 2009 Order compelling arbitration in this case (pp. 2-3). A brief overview of relevant facts is presented here.

The Tribe, led by the Chairman of its Executive Committee, Raymond Brown, Sr., was interested in developing a gaming casino during the relevant period, from October 2006 through

mid-2008. Chairman Brown and other Tribal members negotiated primarily with Daniel J. Kerrigan, Jr., the principal of PTP and PDPX, from October 2006 through the summer of 2007 over the terms of a MOA intended as a preliminary agreement leading to negotiation of a more comprehensive casino development agreement and eventually a casino management agreement (subject to NIGC approval) to govern actual operation of a Tribal gaming casino. The Tribe's General Council approved entry into a MOA with PTP or an affiliate on August 4, 2007. The Tribe's Executive Committee approved a final draft of the MOA on September 3, 2007, and it was executed on the following day (when the formation of PDPX was completed) by Chairman Brown for the Tribe and Mr. Kerrigan on behalf of PDPX.

PDPX thereupon undertook to implement the MOA, including an initial $10,000 payment to the Tribe (acknowledged at the November 10, 2007 meeting of the Tribe's General Council) and substantial environmental preparation work over several months at considerable expense. A number of Tribal members were employed by a PDPX subcontractor in this regard. However, for reasons never explained, the General Council abruptly terminated the MOA at a March 22, 2008 Special meeting. At the time, as noted in the Court's June 23, 2009 Order (p. 3) in this case, Tribal power struggles led to the recall of Chairman Brown.

On June 26, 2008, the Tribe sent an *ex parte* letter to the NIGC seeking an informal advisory opinion from NIGC counsel whether the MOA was void for lack of NIGC approval under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq*., but without informing the NIGC that the Tribe had already terminated the MOA. Instead, the Tribe represented to the NIGC (Decl., attachment 11, pp. 2-3) that it would seek the NIGC's approval of the MOA if NIGC counsel advised that the MOA constituted a gaming "management contract" that would be void absent such approval. The Tribe failed to do so after it finally received such a

response from NIGC counsel on March 30, 2009.

PTP and PDPX filed their arbitral claims against the Tribe for breach of the MOA in late December 2008. The Tribe filed this action on March 10, 2009, seeking to enjoin the arbitration and obtain a ruling declaring the MOA void, either as an alleged tribal gaming "management contract" (a term of art under NIGC regulations) that lacked required approval by the Chairman of the NIGC, or in any event as a contract that allegedly lacked required prior authorization by the Tribe's General Council (the Tribe's legislative body consisting of all adult members of the Tribe). In the Court's June 23, 2009 Order in this case, however, the Court granted Defendants' motion to compel arbitration of those claims.

The arbitral evidentiary hearing took place on September 3, 2009, following discovery and pre-hearing briefing. The parties arrived at a Stipulation Regarding Undisputed Facts (Decl., attachment 2) on October 6, 2009. The parties thereafter submitted their respective proposed findings of fact and conclusions of law, written closing arguments, and reply briefs. The arbitral Award (Decl., attachment 1) was issued on December 7, 2009. As discussed in detail below, the Award declared that the MOA was void, but on a theory -- contrary to the parties' stipulations to undisputed facts -- that the draft of the MOA that was approved by the Tribe's Executive Committee on September 3, 2007 for execution the following day was supposedly substantially different from the MOA that was executed on September 4, 2009. The Award required the Tribe to reimburse Claimants PDPX for a $10,000 payment they had made to the Tribe pursuant to the MOA shortly after its execution, but required Claimants to bear all of the costs of the arbitration and pay the Tribe's attorneys' fees (in an amount yet to be determined by the Arbitrator).

## ARGUMENT

### I. THE AWARD SHOULD BE VACATED AS EXCEEDING THE ARBITRATOR'S POWER, AND IN MANIFEST DISREGARD OF LAW

The Ninth Circuit has recognized that federal courts "will not confirm an arbitration award that is legally irreconcilable with the *undisputed* facts" and that "an arbitrator's failure to recognize undisputed, legally dispositive facts may properly be deemed a manifest disregard for the law." *Coutee v. Barington Capital Group, L.P.*, 336 F. 3d 1128, 1133 (9th Cir. 2003) (emphasis added), citing *American Postal Workers Union v. United States Postal Service*, 682 F. 2d 1280, 1283-84 (9th Cir. 1982). The clearest example of "undisputed facts" is a formal factual stipulation between the parties, which effectively withdraws the matters that are stipulated from the factual issues to be determined by the arbitrator. Following a one-day arbitral hearing, the parties entered into a formal Stipulation Regarding Undisputed Facts (Decl., attachment __) to govern the remaining arbitration proceedings.

The Award (pp. 7-8, quoted below) candidly acknowledges the Arbitrator's confusion regarding what the Arbitrator viewed as the pivotal issue -- whether the draft MOA approved by the Tribe's Executive Committee on September 3, 2007 was substantially the same as the MOA executed by the Tribe's Chairman, Raymond Brown, Sr., the following day. This purported issue should have been resolved in the affirmative on the basis of the parties' stipulation no. 41 ("[o]n September 3, 2007, Dan Kerrigan [on behalf of Claimants] met with EEC [the Elem Executive Committee] to review and discuss the Final MOA Draft …. Ex. C-15") and stipulation no. 44 ("[o]n September 4, 2007, [Chairman] Raymond Brown executed a version of the MOA that had been put onto the Tribe's letterhead and *the text of which was essentially if not exactly the same as the Final MOA Draft* …. Ex. C-15; Ex. C-18") (emphasis added). *See* Decl., attachment 2, p. 5 (stipulations), attachment 7 (Ex. C-15) ("8.29.2007 Final MOA Draft")

(quoting footer), and attachment 9 (Ex. C-18) (executed MOA).

The Arbitrator exceeded his powers by disregarding those stipulations. Instead, for reasons unexplained, the Arbitrator speculated that an earlier draft of the MOA, set forth in Ex. C-11 (a draft MOA dated October 15, 2006) or Ex. C-12 (a draft MOA denominated as Version 3, anticipating a July 17, 2007 effective date),[1] had been presented by Mr. Kerrigan to the Tribe's Executive Committee for approval on September 3, 2007. The Arbitrator's Award states in this regard:

> It should be noted that for purposes of this ruling the Arbitrator refers to Version 3 as that document designated as Claimants' Exhibit 11 and 12, not Claimant's Exhibit 10 and 15[2] and assume [sic] the Respondent does likewise. … The document Claimant refers to that was stipulated to in Stipulation No. 44 is in fact Claimant's Exhibits 10 and 15 and therefore not a concern of this ruling. *The Arbitrator is at a loss* as to where Exhibits 10 and 15 fit within the timing of the various dates. The Arbitrator has ruled on Claimant's Exhibits 11 and 12. **If the contrary is true, i.e., Exhibits 10 and 15 were in front of the EEC on September 3, 2007 then the Claimants would be correct in asserting the import of Stipulation No. 44 and Respondent Tribe's argument would/should be dismissed**. The Arbitrator finds no evidence that this is true.

Decl., attachment 1 (Award), pp. 7-8 (emphasis added).[3]

[1] *See* Decl., attachments 5 (Ex. C-11) and 6 (Ex. C-12). *See also* note 9, *infra*.

[2] Claimants' Exhibit 10 (Ex. C-10) is a draft MOA dated April 24, 2007 (indicating changes negotiated "at meeting: Friday, April 20, 2007") (quoting caption). *See* Decl., attachment 4. Claimants' Exhibit 15 (Ex. C-15), as indicated above, is the "8.29.2007 Final MOA Draft" (quoting footer). *See* Decl., attachment 7.

[3] On this basis, the Arbitrator concluded that: "the MOA of September 4, 2007, because of the extensive changes and substantial alterations to the Version 3 MOA it should have received NIGC approval before it became operative, it should have received General Council approval (it did not) and as a result the MOA is void, unenforceable, and gives no support to any claims for damages." *Id*. at 10. Yet the Arbitrator had previously opined that the MOA as executed did not require approval by the NIGC. *See* Decl., attachment 14 (Claimants' Proposed Conclusions of Law), p. 3, attachment 13 (Arbitrator's September 18, 2009 post-hearing memorandum), pp. 2-3, attachment 17 (Rebuttal to Respondent's Hearing Brief), pp. 1-7. In the Award, the Arbitrator mentions such issue only in passing, and does not treat it as an issue distinct from whether *any* substantial changes were made in the MOA after it had been approved by the Tribe's Executive Committee on September 3, 2007 for execution the following day. The Arbitrator indicated that because he believed (contrary to the parties' stipulations) that this had occurred, he therefore

However, the Arbitrator apparently overlooked the fact that the parties had **stipulated** that Claimants' Exhibit 15 was "in front of the EEC on September 3, 2007." *See* Decl., attachment 2, p. 5 (stipulation no. 41) ("[o]n September 3, 2007, Dan Kerrigan [on behalf of Claimants] met with EEC to review and discuss the **[8.29.2007] Final MOA Draft …. Ex. C-15**") (emphasis added). As the Arbitrator expressly recognized, Claimants were therefore "correct in asserting the import of Stipulation No. 44" (Award, p. 8) -- that "[o]n September 4, 2007, [Chairman] Raymond Brown executed a version of the MOA … the text of which was essentially if not exactly the same as the Final MOA Draft …. Ex. C-15; Ex. C-18." *See* Decl., attachment 2, p. 5 (stipulation no. 44). The Arbitrator expressly declared that if this were the case (and the parties had stipulated that it was), the "**Tribe's argument would/should be dismissed**" (Award, p. 8). It follows that the Award should be vacated under 9 U.S.C. § 10(a)(4)[4] because the Arbitrator exceeded his authority by failing to adhere to the parties' stipulations, and expressly declared that in his view, Claimants would otherwise prevail.

The Arbitrator had framed the "primary question before us" as "[w]hether or not the [Tribe's] General Council *or its authorized agents* approved the "Final Draft" of the MOA signed by Chairman Brown on September 4, 2007 … according to the mandates of the Tribe's Constitution and By Laws," and found in this regard that the "authorization of the General Council's directive of August 4, 2007 was *transferred to the EEC* meeting of September 3, 2007." Award (Decl., attachment 1), p. 6 (emphasis added). The Tribe's Executive Committee

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believed that it would be appropriate to require NIGC approval simply to protect the Tribe generally. *See* Award, p. 9 ("Tribe members … did not pay proper attention to what was going on … and what any of the documents, signed or otherwise, said" -- supposedly the "reasons for the creation of the [NIGC]," irrespective of the nature of the contractual provisions at issue).

[4] [T]he United States court in and for the district wherein the [arbitration] award was made may make an order vacating the award upon the application of any party to the arbitration … [w]here the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." *Id.*

had authorized Chairman Brown on July 22, 2007 to pursue "either a letter of intent, MOU/MOA with [Claimants] to exclusively work toward development of a casino contract." Decl., attachment 2, p. 4 (stipulation no. 31).[5] The Arbitrator recognized that such authorization permitted Chairman Brown to "approve a Letter of Intent … some time in the future." Award, p. 4 (¶ 8).

The Tribe's Executive Committee sought and obtained the concurrence of the Tribe's General Council on August 4, 2007. Decl., attachment 2, p. 4 (stipulation nos. 33-34).[6] At the time, Chairman Brown characterized the role of the General Council in this regard as deciding whether "to accept this organization" (*i.e.*, PTP or an affiliate thereof). *Id.*, p. 5 (stipulation no. 37). The Arbitrator recognized that the General Council's approval permitted Chairman Brown to enter into an agreement with Claimants "some time in the future" (Award, p. 4 (¶ 9)), subject to approval by the Executive Committee (*id.*, pp. 6-8) (quoted above).

On September 3, 2007, the Tribe's Executive Committee passed a resolution authorizing and directing Chairman Brown to execute the MOA with PDPX on behalf of the Tribe. *See* Decl., attachment 2, pp. 4-5 (stipulation nos. 35 [meeting minutes],[7] 42 and 43), attachment 8

[5] While the minutes of the Executive Committee's July 22, 2007 meeting referenced "First Nations Capital" as the party with whom some form of agreement was contemplated in this regard (*see id.*), the Arbitrator found that such reference was a "misnomer" on the part of the author of the minutes, and was intended to refer to Claimants PTP and PDPX, companies with whom Mr. Kerrigan had a current or contemplated affiliation at the time. *See* Award (Decl., attachment 1), p. 5. (Contrary to some imprecise language in the Award, Mr. Kerrigan, while a principal of the Claimants, was not himself a Claimant in the arbitration).

[6] The minutes of the August 4, 2007 General Council meeting state in this regard: "The executive committee seeks approval by the general council to authorize Chairman Brown to sign either a letter of intent or MOU with [Claimants], this will be the preliminary business agreement between the Elem Indian Colony and [Claimants] as we work towards the development of a casino contract. " *Id.* (stipulation no. 34).

[7] The minutes of the September 3, 2007 meeting reflect the Executive Committee's contemplation that the MOA would be signed by Chairman Brown on the following day (*id.*), when the formation of PDPX (as a wholly-owned subsidiary of PTP) would be finalized. *See* Decl., attachment 1 (Award), p. 4 (preceding ¶ 6). The MOA was accordingly executed on September 4, 2007. *See* Decl., attachment 9 (Ex. C-18).

(Ex. C-17) (resolution adopted).[8] The Tribe's Executive Committee thus determined that execution of the MOA was within the authorization conferred by the Tribe's General Council at its August 4, 2007 meeting. As demonstrated above, the Arbitrator's hedged conclusion that the Tribe's Executive Committee did not in fact approve the MOA on September 3, 2007 (on the baseless theory that the draft approved was substantially changed overnight) (Award, p. 9) is directly contrary to the parties' stipulations by which the Arbitrator was bound.[9] The Court should therefore vacate the Award in order to effectuate the Arbitrator's determination (Award, p. 8) that "[i]f the contrary is true" -- in that the "8.29.2007 Final MOA Draft" (Exhibit C-15) was "in front of the EEC on September 3, 2007" as the parties had *stipulated* (nos. 41 & 44) -- then "*the Tribe's argument would/should be dismissed*" and Claimants would/should prevail.

Further, Claimants demonstrated fully to the Arbitrator that because the Tribe's General Council voted at its November 10, 2007 meeting to accept a $10,000 payment from Claimants pursuant to the MOA (*see* Decl., attachment 2, p. 6 (stipulation no. 50), attachment 10 (Ex. C-19)), and various members of the General Council thereafter accepted employment relating to

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[8] The resolution was drafted by Mr. Kerrigan and forwarded to Chairman Brown prior to the September 3, 2007 meeting (*see* Decl., attachment 2, p. 5 (stipulation nos. 38 and 40)), and emphasized the Tribe's waiver of sovereign immunity under the MOA. *See, e.g., id*., attachment 8 (Ex. C-17), pp. 1-2 (carry-over paragraph). So long as a tribal representative is authorized to enter into a contract on the tribe's behalf, the representative is likewise authorized under controlling federal law to waive the Tribe's sovereign immunity, even apart from any resolution by the tribal council. *See, e.g*., *Warburton/Buttner v. Superior Court*, 103 Cal. App. 4th 1170, 1188-90 (2002), citing *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001); Decl., attachment 14 (Claimants' Proposed Conclusions of Law), pp. 3-5 (¶¶ 1-2) (citing similar authorities). The Arbitrator expressly declined to rule otherwise. *See* Award (Decl., attachment 1), p. 6 (final sentence).

[9] The Arbitrator's speculation that the so-called "Version 3" draft of the MOA (or a similar October 15, 2006 draft, Ex. C-11) was before the Tribe's Executive Committee on September 3, 2007 makes no sense in any event. Contrary to the Arbitrator's statements, the "Version 3" draft (Ex. C-12) is not "dated … September 3, 2007" (Award, p. 2), and does not "contain[] the name Pacific Development Partners X, LLC" (Award, p. 4, ¶10), nor was it "prepared on April 24, 2007" (Award, p. 6). Indeed, the "Version 3" draft does not reflect changes made in the draft MOA that the parties stipulated (no. 23) *was* prepared on April 24, 2007 (prior to the August 4, 2007 General Council meeting) -- Ex. C-10 -- which the Arbitrator viewed as akin to Ex. C-15 (Award, pp. 7-8), which the parties stipulated *was* before the Tribe's Executive Committee on September 3, 2007. The "Version 3" draft sets forth at the outset (and in ¶ VII.5) an outdated Connecticut address for PTP, rather than the South Carolina address reflected in all other drafts of the MOA since the February 15, 2007 draft (Ex. C-4) (Decl., attachment 3).

Claimants' implementation of the MOA (stipulation nos. 46-48), the General Council had thereby further approved the MOA (confirming its approval of the MOA on August 4, 2007) on a *retroactive* basis under black letter law (Restatement, Third, of Agency), including California law, by which the MOA was expressly governed (Decl., attachment 9, ¶ VII.3). *See* Decl., attachment 14 (Claimants' Proposed Conclusions of Law), ¶¶ 13-18.[10] Moreover, Claimants likewise demonstrated fully that for similar reasons, the Tribe was equitably estopped (under both federal and California law) from denying that it had duly authorized execution of the MOA with Claimant PDPX. *See id*. (attachment 14), ¶¶ 13, 19-25 *et seq*.[11]

Although the Arbitrator acknowledged that Claimants presented a "very compelling argument" that the Tribe's General Council had ratified the MOA, he concluded that despite the "great merit" of the argument otherwise, it did not apply in "the world of Indian Gaming" where "to ratify or to rely on a contract with an Indian Tribe with regard to a gaming project requires first that the Tribe's General Council must give its prior approval" in accord with Tribal law.

[10] *See also* Decl., attachment 15 (Claimants' Reply to Respondents' Closing Argument and Proposed Findings of Fact and Conclusions of Law) (limited by the Arbitrator to five pages), p. 3 n. 8.

[11] Claimants equitable estoppel argument applied as well to assertions by the Tribe in the arbitration that the MOA was void for lack of NIGC approval. Claimants urged in this regard that "[s]uch defense, if permitted in the circumstances presented …, would permit any Indian Tribe to commit wholesale fraud by accepting substantial payments under gaming-related agreements, and inducing very substantial expenditures and efforts by counter-parties relying on such agreements, and then simply walking away from its agreements without any responsibility for the harm imposed by its false and/or broken promises." Decl., attachment 16 (Claimants' Pre-Hearing Brief), p. 9. (At the time of Claimants' post-hearing submission, this issue had seemingly been resolved by the Arbitrator in Claimants' favor. *See* Decl., attachment 14, p. 3 & ¶ 30 ("[t]he only challenge to the MOA is based on a misnomer"); note 3, *supra*). Claimants emphasized in this regard that after terminating the MOA on March 22, 2008, the Tribe sent an *ex parte* letter to the NIGC seeking an informal opinion from NIGC counsel that the MOA was void for lack of NIGC approval -- without ever informing the NIGC that the Tribe had in fact already *terminated* the MOA (much less that it supposedly lacked requisite Tribal authorization to start with). Instead, the Tribe misrepresented in the letter that if it received such informal opinion from NIGC counsel, the Tribe would then seek such approval (which it failed to do, and which Claimants were not permitted to do). *See* Decl., attachment 16 (brief), pp. 6-9 & n.4, attachment 11 (letter), pp. 2-3. Even if the MOA was somehow deemed to require NIGC approval as a supposed "gaming management contract", it complied with substantive regulatory requirements. *See* Decl., attachment 16, p. 8 & n. 3. The Award ignored all this. *See id*., pp. 7-8, 11-13 (requesting the Arbitrator to rule for Claimants on such grounds, as he initially did (*see* note 3, *supra*)).

Award (attachment 1), pp. 5-6. The Arbitrator reached the same conclusion regarding Claimants' equitable estoppel argument, which the Arbitrator fundamentally mischaracterized.[12] *See id.* (attachment 1) at 6. In both respects, the Arbitrator manifestly disregarded well-established and controlling law that was presented to him. The law is plainly applicable to Indian Tribes no less than to other sovereigns. *See, e.g.*, Decl., attachment 14, ¶ 13 (doctrines of ratification and estoppel applicable to Indian tribe), ¶ 22 & n. 8 (sovereign immunity does not extend to estoppel based on authorized acts of federal, state, or tribal governments). *See also id.*, ¶¶ 1-2 (federal law governs tribal waiver of sovereign immunity).[13]

For these reasons as well, the Award should be vacated. *See, e.g., Comedy Club, Inc. v. Improv West Associates*, 553 F. 3d 1277, 1290, 1293 (9th Cir. 2009) (arbitral award should be vacated for manifest disregard of law where arbitrator ignored applicable law or "interpreted it in a way to render it inapplicable"); *Bosack v. Soward*, 586 F. 3d 1096, 1105 (9th Cir. 2009) (recognizing same principle). As demonstrated at the outset, the Award was further in manifest disregard of the law in view of the Arbitrator's "failure to recognize undisputed, legally

[12] In the latter regard, the Arbitrator asserted that "Claimants continue to argue that Chairman Brown's knowledge is the General Council's knowledge and what he intended so must they intend." *Id.* at 6. To the contrary, Claimants emphasized to the Arbitrator that they were *not* contending that the Tribe's General Council was bound by any assertedly unauthorized act of Chairman Brown, but rather that the General Council was bound by its own acts in authorizing acceptance of the benefits of the MOA. *See* Decl., attachment 14, ¶¶ 22-23, 27.

[13] The Award reflects manifest disregard of law in at least two other respects. First, while the Arbitrator initially rejected reliance on the informal opinion of NIGC counsel both procedurally and substantively (*see* note 3, *supra*; Decl., attachment 12 (letter from NIGC counsel)), the Award indicates -- without any analysis of MOA provisions or regulatory factors -- that "whether one agrees … or not" the informal opinion of NIGC counsel is "controlling." Decl., attachment 1, p. 9. As the Arbitrator initially recognized (*see* note 3, *supra*), however, it is well-established that no deference is owed to such informal opinions of NIGC counsel. *See* Decl., attachment 16 (Claimants' Pre-Hearing Brief), p. 7 n.2, attachment 17 (Claimants' Rebuttal), p. 3 & n.3. Second, in the event that any particular MOA provision were deemed to require NIGC approval, the Award apparently rejects any severance of such provision based on pre-IGRA federal law. *See* Decl., attachment 1, p. 9. However, the MOA is expressly governed by California law (*see* Decl., attachment 9, ¶ VII.3), which has a primary role in regulating gaming contracts under IGRA, and has favored severance in a closely analogous context (and would otherwise provide Claimants with *quantum meruit* recovery). *See* Decl., attachment 16 (Claimants' Pre-Hearing Brief), pp. 11 n.6, 13-15, attachment 17 (Claimants' Rebuttal), p. 11-13. "Arbitrators act beyond their authority if they fail to adhere to a valid, enforceable choice of law clause agreed upon by the parties." *Coutee*, *supra*, 336 F. 3d at 1134.

dispositive facts." *Coutee*, *supra*, 336 F. 3d at 1133. Vacatur is warranted on both of these grounds.

## II. THE AWARD SHOULD AT LEAST BE MODIFIED BY STRIKING THE AWARD OF ATTORNEYS' FEES BECAUSE NO REQUEST FOR ANY SUCH FEES WAS EVER SUBMITTED BY RESPONDENT, AND THE ARBITRATOR LACKED POWER TO AWARD ANY SUCH FEES IN ANY EVENT.

The Award provides that "payment of attorney fees must fall to the unsuccessful party to the arbitration and therefore the Claimant must be held responsible for all attorney fees associated with these proceedings." Decl., attachment 1, p. 11. Respondent Tribe's Request for Modification of Arbitration Award to Include a Specific Award of Attorneys' Fees to Respondent (specifying the amount of fees awarded), submitted to the Arbitrator on December 24, 2009, remains pending.[14] The Award should in any event be modified by the Court under 9 U.S.C. § 11(b)[15] (if not vacated entirely under 9 U.S.C. § 10(a)(4)) by striking the award of attorneys' fees for the reasons set out below.

First, in the Arbitrator's Post Award Ruling in Response to Respondent's Post Award Request for Modification of Award, issued January 26, 2010 ("Post-Award Ruling") (Decl., attachment 18), addressing certain matters relating to the Tribe's above-referenced Request, the Arbitrator confirmed that:

> Respondent's claim for attorneys' fees, which were not proven up nor was evidence offered at the hearing on this matter nor in the

[14] That Request was submitted to the Arbitrator pursuant to Rule R-46 of the Commercial Arbitration Rules and Mediation Procedures of the American Arbitration Association ("AAA Commercial Arbitration Rule"). That Rule provides in pertinent part: "Within 20 days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. …"

[15] "[T]he United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration … [w]here the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted." *Id.*

> pleadings presented, is now the question presented to the Arbitrator.
> …
>
> … [Claimants] argue further that *Respondents failed to ask for … attorneys fees during the arbitration proceedings. This is correct*.

Decl., attachment 18, p. 2 (emphasis added). Nor did Respondent Tribe quarrel with Claimants' assertion in this regard that

> in no instance in this arbitration, or in the related court proceedings before Judge Breyer, did Respondent ever assert any claim for recovery of its attorneys fees. This was apparently a tactical choice on the part of Respondent, designed to preserve its positions (asserted in the related court proceedings) on sovereign immunity and nonarbitrability -- positions that could have been waived if the Tribe had requested any affirmative relief in this arbitration proceeding.

Claimants' Response to Respondent's Request for Modification of Arbitration Award, submitted to the Arbitrator on January 11, 2010 (attachment 19), p. 2,[16]

Under the Federal Arbitration Act, the Arbitrator lacks any inherent authority (apart from any contractual or statutory authority) to award any attorneys' fees in derogation of the traditional "American" rule that each party bears its own legal fees.[17] The Arbitrator accordingly lacked

[16] *See, e.g., Oglala Sioux Tribe v. C. & W. Enterprises*, Inc., 542 F. 3d 224, 231 (8th Cir. 2008) ("we hold that … where there are contractual arbitration agreements and a tribe actively participates in that arbitration, and in the course of that arbitration raises its own affirmative claims involving a clearly-related matter, the Tribe voluntarily and explicitly waives any immunity respecting that related matter"); *Lesser Towers, Inc. v. Roscoe-Ajax Construction Co., Inc.*, 271 Cal. App. 2d 675, 702 (1969) (a respondent in arbitration who "requests that an additional issue or issues be arbitrated" may not thereafter take an inconsistent position on arbitrability). Now that an Award has issued in favor of the Tribe, however, it has aggressively sought attorneys' fees, leading the Arbitrator to admonish the Tribe: "Respondents initiated these proceedings [before this Court] and lost and the Arbitrator also finds he has no jurisdiction to award or even consider the award of attorneys fees in a Federal Court proceeding. Post-Award Ruling (attachment 18), p. 2.

[17] *See, e.g., Stanton Road Associates v. Lohrey Enterprises*, 984 F.2d 1015, 1018 (9th Cir. 1993) ("under the American Rule, a prevailing party cannot recover attorneys' fees in the absence of congressional authority"); *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240, 247, 270 (1975) (under "the 'American Rule,'" the "prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser;" because the rule is "deeply rooted in our history and in congressional policy," it is "not for [tribunals] to invade the legislature's province by redistributing litigation costs"); *cf.* Claimants' Response to Arbitrator's Post-Award Ruling, and Response to Tribe's Response Thereto, submitted March 4, 2010 (attachment 20), p.2 n. 2.

power to award attorneys' fees to a party that had not even requested them. *See, e.g., Matza v. Oshman, Helfenstein, & Matza*, 823 N.Y.S. 2d 47, 49-49 (App. Div. 2006) (vacating as unauthorized an arbitrator's award of attorneys' fees to a party who had never requested them); *Totem Marine Tug & Barge, Inc. v. North American Towing, Inc.*, 607 F. 2d 649, 651-52 (5th Cir. 1979) (arbitrators exceeded their authority by injecting an issue not submitted by the parties, thereby improperly dispensing their "'own brand of … justice'") (quoting *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960)). By the same token, any award of attorneys' fees to Respondent in this proceeding is contrary to AAA Commercial Arbitration Rule R-43(d)(ii) (available at www.adr.org) -- providing that (in the absence of any contractual or statutory authority) an arbitrator may award attorneys' fees only if "*all* parties have requested such an award" -- and contrary to the well-established common law that underlies that Rule in this regard.[18]

Further, the Arbitrator has confirmed that: "There is no award for attorneys fees in the arbitration proceedings based on the Memorandum of Agreement." Post-Award Ruling (attachment 18), p. 3.[19] In other words, "the initial award of attorney fees … does not rely on the

[18] *See also Goldberg v. Thelen Reid Brown Raysman & Steiner LLP*, 860 N.Y.S. 2d 93, 94 (App. Div. 2008) ("*mutual* demands for counsel fees in an arbitration proceeding constitute, in effect, an *agreement to submit* the issue to arbitration, with the resultant award being valid and enforceable"); *Dunhill Franchisees Trust v. Dunhill Staffing Systems, Inc.* 513 F. Supp. 2d 23, 33-34 (S.D.N.Y. 2007) (applying AAA Commercial Rule 43(d)(ii) where both parties "affirmatively requested an award of attorneys' fees," thus providing each other with "sufficient notice" and "opportunity to challenge" the other's claim); *Cords, Inc. v. PPX Enterprises, Inc.*, 776 N.Y.S. 2d 269, 270 (App. Div. 2004) (similar).

[19] No provision of the MOA would survive a determination that the MOA was not duly authorized by the Tribe. *See, e.g., Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444-46 & n. 1 (2006) (reserving application of "substantive federal arbitration law" in circumstances where [as here] contract providing for arbitration is allegedly entered into without requisite authority); *District of Columbia v. Bailey*, 171 U.S. 161, 173-79 (1898) (arbitration award unenforceable because based on purported contract lacking requisite legislative authorization); *Three Valleys Municipal Water District v. E.F. Hutton & Co., Inc.*, 925 F. 2d 1136, 1140-41 (9th Cir. 1991) ("the question of whether a particular individual has authority to bind a party must be determined by the court, not by an arbitrator"); *In re Globe Seaways, Inc., et al.*, 337 F. Supp. 26, 28 (S.D.N.Y.) ("If there had never been any contracts, the arbitrator was without power, and his awards are nullities"), *aff'd*, 451 F. 2d 1159 (2d Cir. 1971). As indicated by the

MOA/Contract, but on merit for work performed." *Id.* The Arbitrator assessed attorneys' fees against Claimants only "because of their failure to prove their case" and because Claimants has initiated the arbitration. *Id*. at 2. In sum, therefore, the Arbitrator's award of attorneys' fees to Respondent Tribe exceeded his authority, and stands in manifest disregard of the fundamental "American rule" that absent an applicable fee-shifting contract or statute, each party generally bears its own legal fees. *See Schoenduve Corp. v. Lucent Technologies, Inc.*, 442 F. 3d 727, 735 (9th Cir. 2006) (where "'an arbitrator recognizes that a statute providing attorneys … fees is not applicable, but awards such fees anyway, the arbitrator manifestly disregards the law'"); *Bacardi Corp. v. Congreso de Uniones Industriales de Puerto Rico*, 692 F. 2d 210, 214 (1st Cir. 1982) ("arbitrator's opinion cites no provision of the contract authorizing punitive damages or attorney's fees" and "gives no rationale for these awards;" arbitrator further exceeded his authority absent "anything in the record to show that the grieving union made any claim for such damages"). In any event, therefore, the Award should be modified under 9 U.S.C. § 11(b) by striking the award of attorneys' fees as exceeding the Arbitrator's power.

## CONCLUSION

The entire Award should be vacated under 9 U.S.C. § 10(a)(4) as exceeding the Arbitrator's power. Alternatively, the Award should be modified under 9 U.S.C. § 11(b) by striking the attorneys' fee award because no request for any such fees was ever submitted by Respondent, and the Arbitrator lacked power to award any such fees in any event. Claimants further seek the option of pursuing before a different arbitrator or new arbitral panel whatever

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Ninth Circuit in *Three Valleys* (and by the Supreme Court in the *Buckeye* footnote), this Court was apparently overly broad in its reading of *Buckeye* and *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), in its June 23, 2009 Order in this case at p. 4:24-26 ("Whether former Chairman Brown exceeded his authority in entering into the MOA with PDP" is "exactly the type of argument that the Supreme Court directs to arbitration in the first instance"), although compelling arbitration of that issue nevertheless appears appropriate on the estoppel theory that Claimants advanced.

issues may remain after vacation of the Award.[20]

Respectfully submitted,

/s/ Timothy W. Bergin

Counsel for Defendants

[20] *See, e.g.*, *Totem Marine*, *supra*, 607 F. 2d at 653 ("We vacate the award without prejudice to the resubmission of the dispute between the parties before a new arbitration panel in accordance with the terms of the contract").