IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 08-1298, 08-1305 & 08-1317

BREAKTHROUGH MANAGEMENT GROUP, INC.
v.
CHUKCHANSI GOLD CASINO AND RESORT, ET AL.

APPELLEE/CROSS-APPELLANT'S MEMORANDUM BRIEF

ATTACHMENT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable Marcia S. Krieger

Civil Action No. 06-cv-01596-MSK-KLM

BREAKTHROUGH MANAGEMENT GROUP, INC.,

Plaintiff,

v.

CHUKCHANSI GOLD CASINO AND RESORT,
JEFF LIVINGSTON,
PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS,
THE CHUKCHANSI ECONOMIC DEVELOPMENT AUTHORITY,
RYAN STANLEY, and
VERNON D'MELLO,

Defendants.

OPINION AND ORDER GRANTING, IN PART, MOTIONS TO DISMISS

THIS MATTER comes before the Court pursuant to Defendants Chukchansi Gold Casino and Resort, Picayune Rancheria of the Chukchansi Indians ("the Tribe"), and Chukchansi Economic Development Authority's (collectively, "the Chukchansi Defendants") Motion to Dismiss **(# 19)**, the Plaintiff's response **(# 44)**, and the Chukchansi Defendants' reply **(# 52)**; Defendant Livingston's Motion to Dismiss for Lack of Jurisdiction **(# 23)**, the Plaintiff's response **(# 43)**, and Defendant Livingston's reply **(# 51)**; Defendant Stanley's Motion to Dismiss for Lack of Jurisdiction **(# 28)**, the Plaintiff's response **(# 42)**, and Defendant Stanley's reply **(# 53)**; the Plaintiff's Motion to Convert **(# 41)** the Defendants' motions to dismiss to summary judgment motions pursuant to Fed. R. Civ. P. 12 and 56, the Chukchansi Defendants' response **(# 57)**,

Defendant Livingston's response (# **58**), Defendant Stanley's response (# **59**), and the Plaintiff's reply (# **64**); Defendant D'Mello's Motion to Dismiss (# **61**), the Plaintiff's response (# **67**), and Defendant D'Mello's reply (# **74**); the Plaintiff's Motion to Convert (# **72**) Defendant D'Mello's motion to dismiss to a summary judgment motion, Defendant D'Mello's response (# **75**), and the Plaintiff's reply (# **76**), and Defendant Stanley's Motion to Join (# **80**).

FACTS

According to the Complaint (# **1**), the Plaintiff is a Colorado corporation that provides training and consulting services via online education courses. Defendant Chukchansi Gold Resort and Casino ("the Casino"), is located in Madera County, California, and is owned and operated by the Tribe. The Casino purchased a single license for one of the Plaintiff's courses, ostensibly for the Casino's Director, Defendant Stanley. However, the Casino devised and implemented a scheme to record and transcribe the class, thereby making it available to all of the Casino's 1,300 employees without further payment to the Plaintiff. In doing so, the Casino duplicated the Plaintiff's copyrighted content, and included the Casino's trademark in place of the Plaintiff's.

The Plaintiff asserts fourteen claims in this action: (i) copyright infringement under 17 U.S.C. § 501 against all Defendants; (ii) contributory copyright infringement against the Chukchansi Defendants; (iii) vicarious copyright infringement against the Chukchansi Defendants; (iv) trademark infringement under 15 U.S.C. § 1125(a) against all Defendants; (v) contributory trademark infringement against the Chukchansi Defendants; (vi) vicarious trademark infringement against the Chukchansi Defendants; (vii) a civil RICO claim against all Defendants under 18 U.S.C. § 1961; (viii) a claim for common-law conversion against all Defendants under Colorado law; (ix) a claim for common-law misappropriation against all Defendants under Colorado law;

(x) breach of contract against the Casino based on its breach of the End User License Agreement ("EULA") accompanying the license to use the Plaintiff's product; (xi) breach of the implied covenant of good faith and fair dealing against the Casino based upon that breach; (xii) common-law fraud under Colorado law against all Defendants; (xiii) common-law unfair competition under Colorado law against all Defendants; and (xiv) a violation of the Colorado Consumer Protection Act, C.R.S. § 6-1-105, against all Defendants.

The Chukchansi Defendants move **(# 19)** to dismiss the Complaint against them, arguing: (i) that the Court lacks subject-matter jurisdiction over this action because the Chukchansi Defendants are entitled to sovereign immunity; (ii) that the Complaint fails to state valid copyright claims because it does not allege that the Plaintiff had secured copyright registrations for the contents of the class; (iii) that the Chukchansi Defendants, as governmental entities, are "categorically immune" from RICO; and (iv) that the common-law conversion and misappropriation claims against them are preempted by federal copyright law.

Defendant Livingston moves to dismiss **(# 23)** the claims against him, arguing: (i) that, as a California resident with no connections to Colorado, the Court lacks personal jurisdiction over him; (ii) by acting in the scope of his employment as an employee of the Chukchansi Tribe, he is entitled to sovereign immunity; and (iii) that the proper venue for this action is the Eastern District of California. Defendant Stanley moves to dismiss **(# 28)** the Complaint as against him, alleging effectively identical arguments to those presented by Defendant Livingston, and additionally moving to dismiss the RICO claim, both on the grounds that the Plaintiff fails to plead the existence of a RICO enterprise, and because the Complaint is insufficiently specific as to the

nature of the predicate acts. Defendant D'Mello filed a motion to dismiss **(# 61)** that is substantively identical to Defendant Stanley's motion.[1]

In response to these motions, the Plaintiff moved to convert **(# 41, 72)** each of the motions to dismiss into motions for summary judgment, on the grounds that the defense of sovereign immunity is intertwined with the merits of the case, and that the Plaintiff needs to engage in discovery to respond to it.

ANALYSIS

A. Sovereign immunity

The primary focus of all of the Defendants' motions are an assertion of sovereign immunity, an argument that implicates the Court's subject-matter jurisdiction. *E.F.W. v. St. Stephen's Indian High School,* 264 F.3d 1297, 1302-03 (10th Cir. 2001); *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997). When a challenge is made to the Court's subject-matter jurisdiction, the party asserting the existence of such jurisdiction – here, the Plaintiff – bears the burden of establishing that such jurisdiction exists. *Montoya v. Chao*, 269 F.3d 952, 955 (10th Cir. 2002). Although sovereign immunity is recognized as an affirmative defense, it is

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[1]Defendant Stanley then filed a "request for joinder" **(# 77)** with Defendant D'Mello's motion. This motion is somewhat curious, in that Defendant D'Mello's motion is nearly a verbatim copy of Defendant Stanley's motion, and raises no new issues. In any event, the entire notion of "joining" in another party's motions is not recognized by this Court. For a variety of administrative and substantive reasons, "joining" in another party's motion creates undue burdens on the Court in tracking the relief requested by a party and the reasons therefor. Although needless duplication of content already in the record should certainly be avoided, the preferred means by which to do so is for each party seeking specific relief to make a separate motion for such relief, and incorporate by specific reference those arguments in another party's papers that the movant wishes to assert. In other words, it is permissible to join in another party's previously-asserted argument, but not in another party's motion.

clear that the party seeking to sue a sovereign entity bears the burden of showing that such immunity has been waived. *See e.g. James v. U.S.*, 970 F.3d 750, 752 (10th Cir. 1992).

Motions to dismiss for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1) generally take one of two forms: (1) a facial attack on the sufficiency of the complaint's allegations as to subject matter jurisdiction; or (2) a challenge to the actual facts upon which subject matter jurisdiction is based. *Ruiz v. McDonnell*, 299 F.3d 1173, 1180 (10th Cir. 2002), *citing Holt v. United States,* 46 F.3d 1000, 1002-03 (10th Cir.1995). Where a Rule 12(b)(1) motion challenges the underlying facts of the case, the Court may not presume the truthfulness of the complaint's factual allegations; rather, the Court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts without converting the motion into one for summary judgment under Rule 56. *Sizova v. National Institute of Standards and Technology*, 282 F.3d 1320,1324 (10th Cir. 2002). However, such discretion does not exist, and the Court must convert the motion to one for summary judgment, where the substantive cause of action and the disputed jurisdictional facts are closely intertwined. *Id.* Whether such an intertwining exists depends on whether "resolution of the jurisdictional question requires resolution of an aspect of the substantive claim." *Id.*

The Court need not reach the Plaintiff's motion for conversion because, as explained herein, it is able to determine the issue of sovereign immunity with respect to some Defendants as a matter of law, and must conduct an evidentiary hearing as to the status of the remaining Defendants.[2]

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[2]The Court addresses the Plaintiff's claimed need for discovery below.

First, the Court begins with the Plaintiff's assertion that the Defendants waived sovereign immunity by entering into two license agreements with the Plaintiff. The "eChampion" licensing agreement, attached as Exhibit F to the Plaintiff's response to the Chukchansi Defendants' motion, does not contain any content that expressly waives any sovereign immunity. The agreement consists of three separate paragraphs of text,[3] one entitled "Ethics" and requiring that the student abide by the Plaintiff's rules and regulations; one entitled "Copyright," detailing types of prohibited reproduction of the course's content; and one entitled "Disclaimer," absolving the Plaintiff of liability for errors in the material or failure of the website. The Plaintiff contends that this agreement contains the text "you agree to venue in the State of Colorado," but the Court is unable to locate such text in Exhibit F. The Plaintiff also points to Section 12 of the "eBlack Belt" licensing agreement, reproduced as Exhibit G. That agreement contains a provision reading "The parties agree that the sole and exclusive venue for any and all disputes involving, arising out of or related to this Agreement shall be the state and federal courts located within the state of Colorado, County of Boulder."[4]

The Plaintiff argues that agreement to a forum selection clause, of itself, is sufficient to waive sovereign immunity. In support of this proposition, it relies first on *C&L Enterprises, Inc., v. Citizen Band Potawatomi Tribe*, 532 U.S. 411, 415 (2001). There, the Supreme Court

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[3]The Plaintiff has reproduced this agreement as screenshots from a computer, apparently as it appears to a user. As a result, the agreement in a format consisting of small, somewhat unclear type, spread over several pages. Unless there is some compelling need to present exhibits as they appear *in situ*, the parties are encouraged to present the contents of such exhibits in a way that emphasizes their readability.

[4]The Court assumes, without necessarily finding, that the Tribe itself can be held to the terms of this agreement, even though the agreement was entered into by an agent of the Casino.

explained that, to be effective, a tribe's waiver of its sovereign immunity must be "clear." *Id.* at 418. The Court found that the tribe's contractual agreement to submit any contract disputes to arbitration, there to be decided by Oklahoma law, and to permit any arbitral award to be enforced in "any court having jurisdiction," constituted a clear waiver of sovereign immunity. *Id.* at 415. The Plaintiff here goes on to cite two state court decisions that allegedly reach the same result as *C&L*, finding a waiver of sovereign immunity resulting from agreement to a forum selection clause coupled with an agreement to arbitrate. *Citing Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 107 P.3d 402, 407 (Colo. App. 2004), *and Smith v. Hopland Band of Pomo Indians*, 115 Cal.Rptr.2d 455, 459 (Cal. App. 2002). Although the facts and outcome in *Smith* are indistinguishable from *C&L*, the Plaintiff has misrepresented the applicability of *Rush Creek*. There, the court considered a contractual agreement between the parties that contained a forum selection clause (but no arbitration provision) vesting exclusive jurisdiction in Colorado courts, but did not have occasion to consider whether that clause was sufficient to waive the tribe's sovereign immunity because "[although] the tribe contended in its opening brief that the default clause in the contract did not constitute an express waiver of sovereign immunity, in oral argument it conceded the issue." 107 P.3d at 406.

The Plaintiff then goes on to argue that "mere inclusion of a choice of law provision – standing alone – has been held sufficient to constitute a waiver of tribal immunity." *Citing Building Inspector and Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp.*, 818 N.E.2d 1040 (Mass. 2004). As with *Rush Creek*, the Plaintiff has overstated the holding of *Wampanoag*. There, the court found a waiver of sovereign immunity in an agreement that provided that the Tribe would hold certain lands "in the same manner, and subject to the

same laws, as any other Massachusetts corporation." *Id.* at 1048-49. The court was particularly persuaded by the agreement's use of the first four quoted words, explaining that "the words 'in the same manner' convey a special, known, and obvious meaning" in the sovereign immunity context, because they are the words used by the U.S. government and Commonwealth of Massachusetts to waive their own sovereign immunity. *Id.* Indeed, as in *Rush Creek*, the court in *Wamapanoag* expressly refused to reach the argument the Plaintiff makes here, explaining that "we need not discuss in detail the additional argument that the tribe waived its sovereign immunity by executing a settlement agreement that incorporated by reference the town's zoning bylaw, which, in turn, expressly provides for judicial review and enforcement."[5] *Id.* at 1051.

Whether a forum selection clause, by itself, can operate as a waiver of sovereign immunity is a question that has no clear answer. In *Ninigret Development Corp. v. Naraganset Indian Wetuomuck Housing Auth.*, 207 F.3d 21, 30-31 (1st Cir. 2000), a pre-*C&L* case, the court stated that "whether, and to what extent, an arbitration or forum-selection clause constitutes a waiver of a tribe's sovereign immunity turns on the terms of that clause." It noted that "The courts are not consistent on the degree of specificity that must be employed," and compares *Val-U-Const. Co. v. Rosebud Sioux Tribe*, 146 F.3d 573, 566-68 (8th Cir. 1998) (waiver found where Tribe agreed to arbitration clause) with *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416,

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[5]The court does make a passing observation that "[t]his argument . . . has persuasive force and further supports our conclusion that, with respect to sovereign immunity, the Tribe knowingly bargained for . . . judicial action, where necessary." 818 N.E.2d at 1050. Besides being dicta, this observation is of little persuasive value, as it does not reveal the court's reasoning as to why this aspect of the agreement indicated a waiver of immunity, nor does it indicate whether the court would have been prepared to rule against the Tribe solely on that basis if, as here, the "in the same manner" language did not exist.

418-20 (9th Cir. 1989) (finding no waiver on similar arbitration clause). The juxtaposition between *Val-U* and *Pan American* – courts reaching disparate results on effectively identical facts – confuses, rather than clarifies, the issue.

This Court draws more guidance from *Val-U*'s own discussion comparing its holding to *American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374 (8th Cir. 1985). In *Standing Rock*, the Tribe was party to a promissory note that, among other things, provided that "in the event of a collection action . . . the law of the District of Columbia would apply." *Val-U*, 146 F.3d at 577. In finding this agreement insufficient to waive the tribe's sovereign immunity, the court found that the tribe "did not explicitly consent to submit any dispute . . . to a particular forum, or to be bound by its judgment." The Court in *Val-U* noted that this differed from the situation before it because, unlike *Standing Rock*, "the parties . . . specifically designated an arbitral forum to settle disputes under the contract as well as arbitration rules. . . The parties clearly manifested their intent to resolve disputes by arbitration, and the tribe waived its sovereign immunity with respect to disputes under the contract." 146 F.3d at 577.

From these cases, this Court can discern the outlines of a rule that resolves the issue presented here. First, it is clear from *C&L* that a contractual provision agreeing to arbitrate disputes and agreeing to the rules that will govern the arbitral body constitutes a waiver of sovereign immunity. This rule finds two important components: (i) an agreement to submit disputes to a body for adjudication; and (ii) an agreement as to what particular body will hear such disputes. In this respect, it matches the observation of the Second Circuit in *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76, 86 (2d Cir. 2001), that inquiry into a purported

waiver "encompasses not merely whether it may be sued, but where it may be sued." (Quotation marks omitted, emphasis in original).

Here, the language of the parties' agreement is that "the sole and exclusive venue for any and all disputes involving . . .this Agreement shall be the state and federal courts located within the state of Colorado." (Emphasis added.) Notably, the parties' agreement here speaks only to where a suit may be brought, but it does not expressly or impliedly address whether a suit may be brought. Unlike cases such as *C&L*, the Tribe here did not expressly agree to submit any dispute for adjudication; it merely agreed as to where such adjudication would take place, if an adjudication were to occur. In this respect, the case is more akin to *Standing Rock*, where the tribe agreed that District of Columbia law would apply to any dispute, but did not necessarily agree to submit any such dispute to adjudication.

At first blush, it seems awkward to read a contract to specify where disputes may be resolved, but not to read it as providing whether disputes may be resolved. However, any awkwardness in this interpretation vanishes when one recognizes the peculiar circumstances of this case. Here, unlike the ordinary citizen that the Plaintiff typically enters into contracts with, the Tribe possesses a special cloak of immunity from suit. Thus, language in the Plaintiff's standard contract that would be sufficient to bind ordinary citizens to a particular dispute-resolution mechanism is not necessarily sufficient to bind the Tribe. Put simply, the Plaintiff's EULA does not specifically state that a purchaser agrees to be subject to suit because, in most instances, the purchaser does not otherwise enjoy the ability to avoid suit. This difficulty is compounded by the fact that, by all appearances, the Plaintiff never negotiated the terms of the contract with the Tribe. As the Complaint and supplemental evidentiary material attached to the

motions make clear, the EULA was presented on a take-it-or-leave-it basis before a user could access the Plaintiff's course content. There is no indication that the Plaintiff and the Tribe discussed the unique legal status enjoyed by the Tribe and crafted special contractual terms to account for the Tribe's immunity. As a result, it should not be surprising that the standard terms of the EULA yield seemingly awkward results in this peculiar factual circumstance. Nevertheless, the Court finds that the venue provision of the EULA is insufficient, of itself, to demonstrate that the Tribe clearly waived its sovereign immunity.

This finding is sufficient to grant the Tribe's motion to dismiss, as it indisputably enjoys sovereign immunity. However, the Plaintiff argues that, even if sovereign immunity applies, the remaining Defendants do not enjoy its protection for various reasons. Thus, the Court turns to the issue of which other Defendants, if any, are swept up in the Tribe's immunity.

First, the Plaintiff contends that the Casino and the Tribe's Economic Development Authority do not enjoy the Tribe's immunity, because any judgment against them will not reach the Tribe's assets. In support of this position, the Plaintiff relies on *Runyon v. Association of Village Council Presidents*, 84 P.3d 437, 440 (Ak. 2004), which examined the question of whether a non-profit association of native villages, formed to provide various services to the villages, was entitled to the sovereign immunity that the villages themselves enjoyed. Finding that such immunity extended to subdivisions of tribal government that are "closely allied with and dependent upon the tribe," the court postulated a test which examined whether the entity's "connection to the tribe . . . is so close that allowing suit against the entity will damage the tribal interest that immunity protects." *Id.* In *Runyon*, the court ultimately found that the tribes had

formally insulated themselves from any liability for the non-profit association's acts, and thus, the court held that the association could not avail itself of the tribes' immunity.

This Court notes that the rule in *Runyon* has not enjoyed particularly broad adoption. According to Westlaw, only three cases have ever cited *Runyon,* and only one of them, an unpublished case from the District of Kansas, *Johnson v. Harrah's Kansas Casino Corp.*, 2006 WL 463138 (D. Kan. 2006) (unpublished), comes from a federal court. *Johnson* involved an employment dispute between a casino worker, employed at a casino owned by the Potowatomi Nation, and her employer, a non-Indian entity that managed the casino for the tribe in exchange for payment of a management fee. The employer attempted to invoke the tribe's sovereign immunity to the suit, forcing the court to examine the circumstances under which a non-tribal entity could enjoy the tribe's sovereign immunity. After distinguishing cases awarding immunity to tribal agencies and tribal housing authorities, the court was left to consider those cases that examined the immunity of "subordinate economic organizations" of a tribe. The court found that "[c]ourts have adopted various tests for determining whether" tribal immunity extends to a tribe's subordinate economic enterprise, and that most of the courts examine one or more of 10 separate factors, including economic interdependence.[6] The *Johnson* court treated *Runyon*'s single-issue

[6]The factors are: (i) the announced purpose for which the entity was formed; (ii) whether the entity was formed to manage or exploit specific tribal resources; (iii) whether federal policy protecting Indian assets is furthered by extending sovereign immunity to the entity; (iv) whether the entity is organized under the Tribe's laws or under federal law; (v) whether the entities purposes are similar to or serve tribal government; (vi) whether the entity's governance is drawn mainly from tribal officials; (viii) whether tribal officials exercise control over the organization; (ix) whether the Tribe has the power to dismiss members of the organization's governance; and (x) whether suit against the entity would impact the Tribe's fiscal resources.

analysis of economic interdependence as a threshold issue, such that, if the tribe's assets were potentially at risk, an examination of the remaining nine factors was appropriate.

Obviously, this Court is more persuaded by *Johnson*'s multi-factor analysis than it is by *Runyon*'s single-factor focus, and in the absence of persuasive law suggesting otherwise, this Court will adopt the *Johnson* analysis. Because that analysis is heavily fact-driven, and because the parties' submissions on the instant motions do not address the relevant facts,[7] the Court finds that an evidentiary hearing is necessary to determine whether the Economic Development Authority and the Casino enjoy a connection to the Tribe close enough to enjoy the Tribe's own immunity. The Court will set aside two hours for this hearing on **Tuesday, October 23, 2007** at **1:30 p.m.**[8]

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[7]Attached to the Chukchansi Defendants' brief **(# 33)** is a document purporting to be an affidavit of Dixie Jackson. The document appears to relate the history of the Tribe and/or describe how it came to organize its gaming activities, but the document in the Court's electronic system is largely illegible.

[8]The Court declines to specifically authorize discovery in advance of this hearing. Given the substantial potential that the Defendants at issue may ultimately be entitled to sovereign immunity, the Court is reluctant to chip away at the benefits of such immunity by exposing them to the burdens of unnecessary discovery. *See e.g. Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) (immunity from suit also protects party from burdensome discovery). More importantly, the factual issues to be resolved are simple and not generally the types of facts as to whose existence (*c.f.* significance) the parties can have widely divergent views.

The Court is cognizant of the Plaintiff's position that the Defendants have refused to provide important tribal documents bearing on the issues and that the Defendants feel prejudiced by the lack of access to this information. To ensure that both sides have a full and fair opportunity to examine the relevant documents and prepare their case, the Court will require that no later than 10 days prior to the hearing, the parties exchange copies all exhibits they intend to present. Further, any party intending to subpoena any other documents may direct the production of those documents occur up to three days before the hearing. Objections to the scope of such subpoenas shall be reserved to the date of the hearing, and will be adjudicated mindful of the extent to which the objecting party attempted to comply in good faith with the subpoena's requests.

Finally, each of the individual Defendants seek to invoke the Tribe's immunity for the claims against them. Whether tribal employees enjoy sovereign immunity for their actions turns on the question of whether the relief requested as a result of those employees' actions would run against the Tribe itself. *Fletcher*, 116 F.3d at 1324. Where employees are sued in their official capacities as officers of the Tribe, immunity is available. *Id.* However, sovereign immunity does not protect tribal employees against claims asserted against them in their individual capacities. *Id.* at n. 12. Moreover, an official who might otherwise be entitled to sovereign immunity loses that protection for acts taken outside the scope of the powers that have been delegated to him. *Burrell v. Armijo*, 456 F.3d 1159, 1176 (10th Cir. 2006).

The Plaintiff's Complaint does not clearly indicate whether it is asserting "official capacity" and "individual capacity" claims,[9] but the manner in which the case is captioned and pled, it appears that the Plaintiff is asserting individual capacity claims against the individual Defendants. It alleges that the individual defendants each engaged in discrete tortious acts and statutory violations, and seeks to hold each individual defendant personally liable for such acts. The key to analyzing an official vs. individual capacity issue is to inquire whether, upon the death

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[9]The conceptual difference between these two types of claims are not well-understood by many practitioners. In *Kentucky v. Graham*, 473 U.S. 159, 165 (1985), the Supreme Court explained that an "official capacity" suit is simply an alternative way of pleading a claim against the entity employing the official. The real party in interest is not the named defendant, but the entity employing him or her, and indeed, when the named defendant leaves the office he or she occupies, the defendant's successor automatically assumes his or her predecessor's role in the litigation. *Hafer v. Melo*, 502 U.S. 21, 25 (1991). By contrast, an individual capacity suit names the individual defendant as the real party in interest, and seeks relief against the individual for his or her own conduct. *Id.* at 27. Contrary to common misconception, the individual/official-capacity designation does not turn on what capacity (as an official or as an individual, or within or outside the scope of employment) the individual was acting in when the challenged action occurred. *Id.* at 27-28. For example, an individual admittedly acting within the scope of his or her employment may still be subject to an individual capacity suit. *Id.*

or resignation of one of the individual Defendants, would the action likely continue against his successor. Here, the Court understands the Plaintiff to be challenging the discrete acts of these individual Defendants, not asserting claims against any individual that occupies the position of Casino General Manager or Casino Director. Thus, is it clear to the Court that the Plaintiff is asserting individual capacity claims against the individual Defendants, and sovereign immunity does not extend to such claims.[10]

Accordingly, the motions to dismiss premised upon sovereign immunity are granted in part, insofar as the claims against the Tribe are dismissed on the grounds of immunity; denied in part, insofar as the individual Defendants are not entitled to immunity; and reserved in part pending an evidentiary hearing regarding the Casino and Economic Development Authority.

B. Personal Jurisdiction

The three individual Defendants each assert that this Court lacks personal jurisdiction over them because they do not have the minimum contacts with the State of Colorado.

Faced with a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(2), the Plaintiff bears the burden of establishing that personal jurisdiction exists. *Soma Medical Intern. v. Standard Chartered Bank*, 196 F.3d 1292, 1295 (10th Cir. 1999); *Omi Holdings, Inc. v. Royal Ins. of Canada*, 149 F.3d 1086, 1091 (10th Cir. 1998). The Court may conduct an evidentiary hearing as to any disputed jurisdictional facts, or, if the Court chooses not to conduct a hearing, the Plaintiff need only make a *prima facie* showing of jurisdiction by showing, through affidavits or otherwise, facts that, if true, would support jurisdiction over the defendant. *Omi Holdings*, 149 F.3d at 1091

[10]As the preceding footnote makes clear, the fact that the Plaintiff has alleged that the individual Defendants were acting in the scope of their employment at the time of the challenged acts does not bear on the official vs. individual capacity inquiry.

Soma, 196 F.3d at 1295. The allegations of the Complaint must be taken as true unless contradicted by the defendant's affidavits, *Behagen v. Amateur Basketball Ass'n. of U.S.A.*, 744 F.2d 731, 733 (10th Cir.1984), and to the extent that the affidavits contradict allegations in the Complaint or opposing affidavits, all disputes must be resolved in the Plaintiff's favor and the Plaintiff's *prima facie* showing is sufficient. *Id.*

Here, there is no significant dispute as to the operative facts, thus, the Court need not conduct an evidentiary hearing. It is undisputed that none of the individual Defendants reside in Colorado, have assets in Colorado, or have any connection with the state other than as a result of the specific actions alleged in the Complaint and supporting affidavits. The issue presented is whether any of the actions alleged in the Complaint are sufficient to subject any of the individual Defendants to personal jurisdiction in Colorado.

Colorado's long-arm statute provides that a non-resident party subjects itself to the jurisdiction of Colorado courts for claims arising from the party's "(a) transaction of any business within this state; [or] (b) the commission of a tortious act within this state." C.R.S. § 13-1-124(1)(a) and (b). The statute codifies the "minimum contacts" test of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and extends the courts' jurisdiction to the maximum extent consistent with the Due Process clause of the 14th Amendment. *Brownlow v. Aman*, 740 F.2d 1476, 1481 (10th Cir. 1984). The focus of the court's inquiry is simply whether the exercise of jurisdiction over the individual Defendants comports with the principles of Due Process. *OpenLCR.com, Inc. v. Rates Technology, Inc.*, 112 F.Supp.2d 1223, 1227 (D. Colo. 2000); *Wise v. Lindamood*, 89 F.Supp.2d 1187, 1189 (D. Colo. 1999).

For purposes of personal jurisdiction, due process is satisfied when the defendant has sufficient "minimum contacts" with the forum state to suffice such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Int'l. Shoe*, 326 U.S. at 316. The "minimum contacts" test examines whether the defendant has purposefully directed its activities at residents of the forum state, whether the claims asserted arise out of that purposeful direction of activity, and whether the assertion of jurisdiction under the circumstances is reasonable and fair. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985); *Teierweiler v. Croxton and Trench Holding Co.*, 90 F.3d 1523, 1532-33 (10th Cir. 1996).

Merely entering into a contract with a Colorado resident, without more, does not amount to purposeful activity in the state. *Burger King*, 471 U.S. at 478 ("If the question is whether an individual's contract with an out-of-state party alone can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot.") (emphasis in original); *National Business Brokers, Ltd. v. Jim Williamson Productions, Inc.*, 115 F.Supp.2d 1250, 1254 (D. Colo. 2000), *aff'd*, 16 Fed.Appx. 959 (10th Cir. 2001) (unpublished) ("[t]he law is clear that a party does not submit itself to personal jurisdiction in a distant forum simply by entering into a contract with a party that resides in that forum"), *citing Ruggieri v. General Well Serv., Inc.*, 535 F.Supp. 525, 535 (D. Colo. 1982); *Encore Productions, Inc. v. Promise Keepers*, 53 F.Supp.2d 1101, 1117 (D. Colo. 1999). Indeed, representatives of a defendant can even enter into Colorado to discuss details of the agreement, *id., citing Associated Inns & Restaurant Co. v. Development Assocs.*, 516 F.Supp. 1023, 1026 (D. Colo. 1981); *Encore Productions*, 53 F.Supp.2d at 1117-18, or make telephone calls and direct correspondence into the state without necessarily subjecting themselves to personal

jurisdiction. *Far W. Capital, Inc. v. Towne,* 46 F.3d 1071, 1077 (10th Cir. 1995); *Encore Productions*, 53 F.Supp.2d at 1117; *F.D.I.C. v. First Interstate Bank of Denver*, 937 F.Supp. 1461, 1468 (D. Colo. 1996).

Here, there is evidence that Defendant Stanley went beyond simply entering into a contract with the Plaintiff. Affidavits attached to the Plaintiff's response to Defendant Stanley's motion establish that Defendant Stanley initiated contact with the Plaintiff's offices in Colorado to discuss the purchase of training programs; had other phone discussions with the Plaintiff's employees prior to purchasing a course; called the Plaintiff to purchase a course license for himself; requested that the Plaintiff bill the Casino by invoice sent to Defendant Stanley's e-mail address and caused those invoices to be paid by the Casino; later called the Plaintiff to enroll in two additional courses; physically traveled to Colorado on two occasions to attend the additional courses; and engaged in several other phone calls and e-mail communications concerning the Casino's purchase of the Plaintiff's services.

Of particular significance is Defendant Stanley's physical presence at two courses taught in Colorado. Unlike the contracts in cases like *Encore Productions*, some of the agreements between the Plaintiff and Defendant Stanley called for the Plaintiff's performance to occur in Colorado, and Defendant Stanley's travel to the state was for the purpose of receiving the performance called for by the contract. This is sufficient to permit the Court to find that Defendant Stanley purposefully availed himself of the privileges and protections of transacting business in Colorado, and thus, the exercise of jurisdiction over Defendant Stanley is consistent with due process.

The same cannot be said of Defendants Livingston and D'Mello. The Plaintiff alleges no contact whatsoever between Livingston and itself,[11] and alleges only that D'Mello called the Plaintiff seeking to enroll in a course, sent an e-mail to the Plaintiff accepting a EULA for the course, and received a telephone call from the Plaintiff regarding his failure to complete the course's tests. Unlike Defendant Stanley's regular contacts with the Plaintiff and physical visits to Colorado, Defendant D'Mello's communications with the Plaintiff were limited and sporadic. Although D'Mello entered into a contract with the Plaintiff, that contract called for performance to take place in California (or, presumably, wherever D'Mello chose to log on to the Plaintiff's website), and other than initiating the single transaction, there is no indication that D'Mello ever directed any activities towards the Plaintiff in Colorado. D'Mello's contacts with Colorado consisted of nothing more than entering into a contract with a party that happened to be located in Colorado, and does not rise to the level of purposeful availment of the privileges of doing business in Colorado.

The Plaintiff argues that all three Defendants also committed a tort in Colorado, namely, fraudulent misrepresentation and/or conversion, permitting the exercise of jurisdiction over them pursuant to C.R.S. § 13-1-124(1)(b). Jurisdiction under the statute arises from tortious act committed outside the state of Colorado if that act causes a direct and consequential injury to be felt within the state. *National Business Brokers,* 115 F.Supp.2d at 1255 (D. Colo. 2000). Notably, however, that injury must be something more than a Colorado resident feeling some

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[11]In the Plaintiff's response to Defendant Livingston's motion, the Plaintiff characterizes Defendant Livingston's actions as "having the company he headed contract with BMG," "having his employees attend two weeks of training," and "causing his company to mail checks." None of these actions allege Defendant Livingston himself having any direct contact with Colorado.

economic consequence as a result of the conduct. *Id., citing Amax Potash Corp. v. Trans-Resources, Inc.*, 817 P.2d 598, 600 (Colo. Ct. App. 1991), *and Wenz v. Memery Crystal,* 55 F.3d 1503, 1508 (10th Cir. 1995). Here, both the offending conduct and the direct injury occurred to the Plaintiff in California, where its copyrighted materials were impermissibly used. Its only injury in Colorado arises from the fact that, had the Defendants properly paid for the classes for their employees, that revenue would have flowed to the Plaintiff's headquarters in Colorado. This is precisely the situation found in *National Business Brokers*, *Amax*, and many of the other cases cited therein, and in each instance, the court found that the economic injury was insufficient to confer jurisdiction under C.R.S. § 13-1-124(1)(b).

The Plaintiff cites to *Classic Auto Sales, Inc. v. Schocket*, 832 P.2d 233, 235-36 (Colo.. 1992), a case in which the Colorado Supreme Court found a basis for personal jurisdiction based on a tortious act where an auto dealer in Nebraska had made several misrepresentations of fact over the phone and in writing to a Colorado resident, inducing the Colorado resident to travel to Nebraska and purchase a car. The court held that the various misrepresentations "formed an important part of the basis of the commission of a tortious act," and that they were "received within this state." *Id.* at 236 (internal punctuation omitted). Noting that the auto dealer never left Nebraska, the court nevertheless found that "the misrepresentations were not complete until received . . . in Colorado," and that this was sufficient to find that the tortious act occurred in this state. *Id.*

The Court finds that *Classic Auto* does not warrant exercising personal jurisdiction over Defendants Livingston and D'Mello in Colorado. First, the Court notes that the Complaint does not appear to adequately state any tort claim against Defendants Livingston and D'Mello. The

Plaintiff does not plead the alleged fraudulent statements with any particularity as required by Fed. R. Civ. P. 9(b), and couches most of its factual averments as against "Defendants" generally and collectively. Although the Defendants have not specifically moved to dismiss the tort claims under Fed. R. Civ. P. 9(b) or 12(b)(6), the Plaintiff has relied upon its pleading of these torts to demonstrate personal jurisdiction, and thus, the Court considers whether that pleading is sufficient.

Assuming, however, that the Plaintiff's tort claims are sufficiently pled, the Court finds that *Classic Auto* is distinguishable on its facts. There, the Colorado Supreme Court found that the tort of misrepresentation was committed in Colorado, not that merely the harm was felt here. It observed that the auto dealer made numerous misrepresentations to the buyer, and that "the misrepresentations were not complete until received by Schocket in Colorado." *Id.* at 236. The Plaintiff suggests that each of the individual Defendants made the same sort of misrepresentations to it in Colorado, but the Complaint does not allege that. Although the fraud claim is captioned as being asserted against "All Defendants," its body states only that "Defendants Casino, Stanley, and D'Mello" made false representations; it makes no allegation of a false statement by Defendant Livingston. Moreover, the reference to a false statement by D'Mello is curious, in that there is no substantive allegation anywhere in the Complaint of any false statement having been made by D'Mello.[12] Accordingly, as to these two Defendants, the Court finds that personal jurisdiction

[12]The Complaint makes no mention whatsoever of D'Mello separately agreeing to a EULA and taking a course from the Plaintiff. Although those facts are asserted in the evidentiary material in support of the motion here, the Court will not deem the Complaint to be amended by this evidentiary material. The Court declines to speculate as to whether its findings as to personal jurisdiction over D'Mello might differ if the Complaint were properly amended.

based upon these Defendants' commission of a tort in Colorado is not supported by the allegations in the Complaint.

The Court has considered the remainder of the Plaintiff's arguments with regard to the issue of personal jurisdiction over Defendants Livingston and D'Mello and finds them to be without merit. Accordingly, Defendant Livingston and D'Mello's motions to dismiss for lack of personal jurisdiction are granted, and Defendant Stanley's motion to dismiss on this ground is denied.

C. Sufficiency of pleading specific claims

The Chukchansi Defendants move to dismiss the RICO claim against them, stating that as governmental entities, they are categorically immune from such claims. Defendant Stanley moves to dismiss the RICO claim as insufficiently pled. Because the Chukchansi Defendants' arguments are mooted if the RICO claim is dismissed as insufficient, the Court will address the sufficiency of pleading first.

To plead a claim for civil RICO, the Plaintiff must allege: (i) that the Defendants participated in the conduct; (ii) of an "enterprise"; (iii) through a pattern; (iv) of racketeering activity. *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 838 (10th Cir. 2005); *BancOklahoma Mortg. Corp. v. Capital Title Co.*, 194 F.3d 1089, 1100 (10th Cir. 1999). An "enterprise" is "an entity [comprised of] a group of persons associated together for a common purpose of engaging in a course of conduct," and is shown by "evidence of an ongoing organization, formal or informal, and by evidence that the various associates function a as a continuing unit." *U.S. v. Turkette,* 452 U.S.. 576, 582-83 (1981). "Racketeering activity" is defined as being any one of several violations of law set forth in 18 U.S.C. § 1961(1), among

them acts of mail and wire fraud and criminal copyright infringement. A "pattern" of such activity consists of two or more acts of racketeering activity within a period of 10 years that are related and demonstrate a threat of continued criminal activity. *Duran v. Carris*, 238 F.3d 1268, 1272 (10th Cir. 2001); *Gotfredson v. Larsen LP*, 432 F.Supp.2d 1163, 1174-76 (D. Colo. 2006). Predicate acts are "related" if they share the same or similar purposes, results, participants, victims, or methods of commission. *Gotfredson,* 432 F.Supp.2d at 1174. A threat of continued criminal activity is demonstrated by means of showing either open-ended or closed-ended continuity. *Id.* "Closed-ended continuity" is established by showing a series of related predicate acts extending over a substantial period of time; a pattern of acts over a few weeks or months and threatening no future criminal conduct do not satisfy the requirement. *Id.* "Open-ended continuity" is shown by demonstrating that the predicate acts, by their very nature, involve a distinct threat of ongoing racketeering activity, or that the predicates are a regular way of conducting the business of the Defendants or of the RICO enterprise. *Id.* A set of predicate acts constituting a single scheme to accomplish a discrete goal against a discrete victim, with no potential to extend to other persons or entities, is insufficient to show either type of continuity. *Id.*

The Complaint fails to adequately allege the existence and nature of the enterprise, or a pattern of activity. With regard to the enterprise requirement, the Plaintiff pleads, in six consecutive and otherwise identical paragraphs, "Defendant _____ acquired control, maintained control, conducted, and participated in the conduct alleged in this Complaint through a pattern of racketeering activities." This does not allege an "enterprise," as it does not assert that these Defendants associated together for a common purpose, nor that they functioned as a unit.

Moreover, the Complaint does not allege a pattern of activity, insofar as it does not allege a threat of continuing racketeering activity or either open- or closed-ended continuity of the racketeering activity. Accordingly, the RICO claim is dismissed without prejudice pursuant to Fed. R. Civ. P. 12(b)(6).[13]

The Chukchansi Defendants also move to dismiss the Plaintiff's tort claims of conversion and misappropriation claims as being preempted by federal law. 17 U.S.C. § 301(a) provides that "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright" are preempted by the Copyright Act. Preemption occurs if: (i) the work is within the scope of the "subject matter of copyright" under 17 U.S.C. § 102 and 103; and (ii) the rights granted under state law are equivalent to the exclusive rights established by federal copyright law. *La Resolana Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1199 n. 2 (10th Cir. 2005), *citing Gates Rubber Co. v. Bando Chem. Indus.*, 9 F.3d 823, 847 (10th Cir. 1993). On the other hand, a state-law cause of action which requires an extra element beyond mere copying or preparation of a derivative work – *e.g.* a claim for unfair competition, tortious interference, or breach of contract – is qualitatively different from a copyright claim, and thus, is not preempted. *Id.*

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[13]The Court will not reflexively grant the Plaintiff leave to amend the Complaint to re-plead the RICO claim, as it has some doubt that, under the facts suggested here, a valid RICO claim could ever be alleged. By all appearances, the Plaintiff alleges a single scheme with a discrete goal and a single victim – *i.e.* that the Defendants conspired solely for the purpose of obtaining the Plaintiff's copyrighted content for subsequent re-use without paying for it. As discussed above, this type of single-focus conduct, however unlawful it may be in other respects, does not constitute a RICO violation. If, after full consideration of the governing law and available facts, the Plaintiff still believes that it can assert a viable RICO claim, it may move for leave to amend to do so.

Turning to the first element, the Plaintiff clearly alleges that the content of its courses is within the scope of copyright protection.[14] The Plaintiff's claim for conversion under Colorado law has essentially one element: that the Defendants asserted dominion or ownership over personal property belonging to another. *Glen Arms Assocs. v. Century Mortg. & Inv. Co.*, 680 P.2d 1315, 1317 (Colo. App. 1984). In the context presented here, this claim would be established by showing: (i) that the Plaintiff was entitled to assert control over the contents of the course as the result of its copyright, and (ii) that the Defendants exercised improper dominion over the contents of the course by copying and altering them. There are no additional elements to the claim beyond the existence of a copyright and a copying, and thus, this claim is preempted. Similarly, a claim for misappropriation under Colorado law occurs "when one either wrongfully profits from another's expenditure of labor, skill, or money, or capitalizes wrongfully on commercial values earned over a period of time." *Heller v. Lexton-Ancira Real Estate Fund, Ltd.*, 809 P.2d 1016, 1021 (Colo. App. 1990). Once again, in the context presented here, the only element to be proven on this claim is that the Defendants wrongfully appropriated the Plaintiff's copyrighted content. This claim, too, is thus preempted.

The Plaintiff argues that their claims are not preempted because they allege more than mere copying; that they allege that the Defendants "branded [the Plaintiff's] work as their own and misrepresented to everyone participating in their employee training program that they were the true owners of the content." Although this may be an accurate statement of the Plaintiff's

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[14]The Plaintiff argues that because the Defendants have not answered, it does not know whether they will contest whether the content is copyrightable. This is irrelevant, as a motion to dismiss is based on the allegations in the Complaint. If the Court eventually determines that the content of the courses is not copyrightable, the Plaintiff may amend the Complaint to reassert the common law claims.

position, it is clear from the discussion above that the Defendants' actions of "branding the work as their own" and misrepresenting to others their ownership are not required elements of a claim of conversion or misappropriation. Interestingly, the Plaintiff cites to several cases for the proposition that "palming off claims [are] not preempted." However, neither a conversion nor a misappropriation claim is the equivalent of a "palming off" claim. Accordingly, the conversion and misappropriation claims are dismissed as preempted.

D. Venue

Defendant Stanley moves to dismiss the Complaint for improper venue. Without belaboring the analysis, the Court finds that venue is proper in this District pursuant to 28 U.S.C § 1391(a)(3) and (b)(3), in that Defendant Stanley is subject to personal jurisdiction in this District. The Court does not construe Defendant Stanley's motion as one to transfer venue for convenience under 28 U.S.C. § 1404, and expresses no opinion as to whether such a motion might be appropriate under the facts here.

CONCLUSION

For the foregoing reasons, the Chukchansi Defendants' Motion to Dismiss (**# 19**) is **GRANTED IN PART**, insofar as the claims against Defendant Picayune Rancheria of the Chukchansi Indians are **DISMISSED** on the grounds of sovereign immunity, and insofar as the Plaintiff's common-law claims for conversion and misappropriation are **DISMISSED** as pre-empted by federal law, and **RULING IS RESERVED IN PART**,[15] as to the immunity of Defendants Chukchansi Gold Casino and Resort and Chukchansi Economic Development

[15]For administrative purposes under the Civil Justice Reporting Act, the Clerk of the Court shall deem this motion resolved.

Authority, which will be determined at an evidentiary hearing on **October 23, 2007** at **1:30 p.m.** on the terms set forth herein. Defendant Livingston's Motion to Dismiss for Lack of Jurisdiction **(# 23)** is **GRANTED**, and the claims against Defendant Livingston are **DISMISSED** for lack of personal jurisdiction. Defendant Stanley's Motion to Dismiss for Lack of Jurisdiction **(# 28)** is **GRANTED IN PART**, insofar as the Plaintiff's RICO claim is **DISMISSED** without prejudice pursuant to Fed. R. Civ. P. 12(b)(6), and **DENIED IN PART**, in all other respects; the Plaintiff's Motion to Convert **(# 41)** the Defendants' motions to dismiss to summary judgment motions pursuant to Fed. R. Civ. P. 12 and 56 is **DENIED AS MOOT**; Defendant D'Mello's Motion to Dismiss **(# 61)** is **GRANTED**, and the claims against Defendant D'Mello are **DISMISSED** for lack of personal jurisdiction; the Plaintiff's Motion to Convert **(# 72)** Defendant D'Mello's motion to dismiss to a summary judgment motion is **DENIED AS MOOT**. Defendant Stanley's Motion to Join **(# 80)** is **DENIED AS MOOT**. The caption of the case is **AMENDED** to remove Defendants Picayune Rancheria of the Chukchansi Indians, Livingston, and D'Mello.

Dated this 12th day of September, 2007

BY THE COURT:

Marcia S. Krieger

Marcia S. Krieger
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 08-1298, 08-1305 & 08-1317

BREAKTHROUGH MANAGEMENT GROUP, INC.
v.
CHUKCHANSI GOLD CASINO AND RESORT, ET AL.

APPELLEE/CROSS-APPELLANT'S MEMORANDUM BRIEF

ATTACHMENT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable Marcia S. Krieger

Civil Action No. 06-cv-01596-MSK-KLM

BREAKTHROUGH MANAGEMENT GROUP, INC.,

Plaintiff,

v.

CHUKCHANSI GOLD CASINO AND RESORT,
THE CHUKCHANSI ECONOMIC DEVELOPMENT AUTHORITY, and
RYAN STANLEY,

Defendants.

OPINION AND ORDER DENYING, IN PART, MOTION TO DISMISS, AND DENYING MOTION FOR RECONSIDERATION

THIS MATTER comes before the Court pursuant to Defendants Chukchansi Gold Casino and Resort ("the Casino") and Chukchansi Economic Development Authority's ("the Authority") Motion to Dismiss **(# 19)**, the Plaintiffs' response **(# 44)**, and the Casino and the Authority's reply **(# 52)**. By Order dated September 12, 2007 **(# 83)**, the Court reserved ruling on this motion as it related to the Casino and the Authority, and on October 23, 2007, conducted an evidentiary hearing **(# 103, 104)** to address certain factual disputes relevant to the determination of the motion. Thereafter, the parties filed a stipulation **(# 105)** agreeing to additional relevant facts.

Also pending before the Court are the Plaintiffs' Motion for Reconsideration **(# 99)** of portions of the September 12, 2007 Order, to which no responsive papers have been filed; and the Plaintiff's Motion to Strike **(# 107)** a letter **(# 106)** filed by the Authority purporting to set

forth facts that the Authority believes are undisputed but to which the Plaintiff refuses to agree, the Authority's response **(# 108)** to the Motion to Strike, and the Plaintiff's reply **(# 110)**.

FACTS

The operative facts are set forth in some detail in the Court's September 12, 2007 Order, and to the extent relevant, are deemed incorporated herein. In summary, the Plaintiffs contend that the Casino, an gambling entity operated by the Chukchansi Indians ("the Tribe"); the Authority, the corporate entity through which the Tribe operates the casino; and Defendant Stanley, an individual officer of the Casino, unlawfully reproduced the Plaintiff's online educational programming and distributed it to the casino's staff without the Plaintiff's authorization and without compensation to the Plaintiff. The Plaintiff asserts a variety of claims sounding in federal copyright and trademark law, various common-law torts, breach of contract, and violation of the Colorado Consumer Protection Act, among others.

The Casino, the Authority, and the Tribe, which had been named as a defendant, filed a Motion to Dismiss **(# 19)**, asserting that all three entities were entitled to invoke the Tribe's sovereign immunity. The Plaintiff opposed the motion and requested leave to conduct discovery into the status of the Tribe's immunity. In its September 12, 2007 Order, the Court granted the motion with respect to the Tribe, rejecting the Plaintiff's argument that the Tribe had waived its sovereign immunity by agreed to a venue clause in the Plaintiff's End User License Agreement. Finding that there were disputed questions of fact that bore on whether the Casino and the Authority were entitled to share in the Tribe's immunity, the Court reserved ruling on their portion of the motion to dismiss, and conducted an evidentiary hearing with regard to those factual issues. Having considered the evidence adduced at that hearing, the parties' stipulation

as to additional facts,[1] and the parties' written and oral arguments, the Court is prepared to rule on the Motion to Dismiss as it relates to the Casino and the Authority.

Separately, the Plaintiff moves for reconsideration pursuant to Fed. R. Civ. P. 60(b) of that part of the Court's September 12, 2007 Order that granted the Tribe's Motion to Dismiss on sovereign immunity grounds. The Plaintiff states that the Gaming Compact between the Tribe and the State of California expressly requires the Tribe to waive its sovereign immunity for civil claims arising out of casino operations. The Plaintiff acknowledges that it has yet to obtain a copy of the actual Tribal ordinance that effectuates the promised waiver of sovereign immunity, and requests that the Court vacate that portion of the September 12, 2007 Order that found the Tribe entitled to sovereign immunity, and reserve ruling on that issue until the Plaintiff has had an opportunity to engage in additional discovery.

ANALYSIS

A. Sovereign Immunity as to the Casino and the Authority

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[1]On the same day that the parties filed a stipulation of additional facts, the Authority filed a Letter **(# 106)** with the Court, explaining that it believed that 53 additional facts were not disputed, but that the Plaintiff would not stipulate to those facts. The Authority attached a list of those 53 facts to the letter. The Plaintiff responded by moving to strike **(# 107)** the letter, arguing that the letter constituted a supplemental brief for which leave to file had not been sought or granted, and that it violated certain Local Rules of this Court, including D.C. Colo. L. Civ. R. 7.1(A) and 10.1.

The Court agrees, at least in principle, with the Plaintiff. Regardless of the reasons therefor, if the parties cannot stipulate to the existence of a fact, it is not a fact. Rather, it is a point of dispute that will require resolution by the Court. Thus, a listing of "facts" that are disputed is nothing more than a statement of one side's position – the functional equivalent of a brief. The Motion to Dismiss was already fully briefed, and neither party requested leave to file supplemental written briefing after the evidentiary hearing. Thus, the Court treats the Authority's letter as an unauthorized supplemental brief, and has disregarded it in its entirety. "Striking" of the brief, even if authorized under Fed. R. Civ. P. 12(f) (which, by its terms, applies only to "pleadings"), is unnecessary, as the Court has not considered the document. Accordingly, the Motion to Strike is denied as moot.

The Court reserved ruling on the Casino and the Authority's contention that they – despite being non-Indian entities – were nevertheless entitled to enjoy the Tribe's sovereign immunity. The Court found that question of whether a non-Indian entity could invoke an Indian tribe's sovereign immunity turned on the 10-factor analysis articulated in *Johnson v. Harrah's Kansas Casino Corp.*, 2006 WL 463138 (D. Kan. 2006) (unpublished). Those factors are: (i) the announced purpose for which the entity was formed; (ii) whether the entity was formed to manage or exploit specific tribal resources; (iii) whether federal policy protecting Indian assets is furthered by extending sovereign immunity to the entity; (iv) whether the entity is organized under the Tribe's laws or under federal law; (v) whether the entities purposes are similar to or serve tribal government; (vi) whether the entity's governance is drawn mainly from tribal officials; (viii) whether tribal officials exercise control over the organization; (ix) whether the Tribe has the power to dismiss members of the organization's governance; and (x) whether suit against the entity would impact the Tribe's fiscal resources. The court in *Johnson* treated the final factor – whether the Tribe will be financially liable for legal obligations incurred by the Casino and the Authority – as a threshold matter, reaching the remaining factors only if it were shown that a judgment against the entities would result in financial liability for the Tribe.

The Authority owns and operates the Casino. The Authority is governed by a board whose membership is identical to the council that governs the Tribe. The Tribal ordinance creating the Authority states that the Authority is exempt from all taxes in the same manner as the Tribe, but "for all other purposes . . . the Authority shall be considered a separate entity" from the Tribe. Mr. Graham, the Chairperson of both the Tribal Council and the Authority, explained that lenders were concerned that a default on loans would not be recoverable against

the Tribe. Thus, the Tribe created the Authority as a separate entity that would receive the loans and hold and manage the Casino property. The ordinance creating the Authority contains language protecting the Tribe from claims against the Authority, stating that "For the purpose of all liabilities and obligations incurred in the name of the Authority, the Authority shall constitute a separate entity, and no Tribal party shall be obligated therein." In other words, a judgment imposed against the Authority does not become a liability of the Tribe. Moreover, the ordinance states that "no Authority assets shall be considered owned by the Tribe, and no assets . . . of the Tribe . . . shall be considered those of the Authority."[2]

Thus, revenues derived from the operation of the Casino are deemed to be owned by the Authority, not the Tribe, and the Authority, not the Tribe, owns all of the assets of the Casino. By the terms of the Authority's articles of incorporation, "For the purpose of all liabilities and obligations incurred in the name of the Authority, the Authority shall constitute a separate entity, and no Tribal party shall be obligated therein." Thus, a judgment imposed against the Authority does not become a liability of the Tribe.

The revenues of the Casino flow to the Authority, which, in turn, supplies them to the Tribe. Thus, a successful claim against the Casino or the Authority would reduce the revenue that would be paid by the Authority to the Tribe. However, the evidence indicates that the Authority is obligated to pay over to the Tribe at least $1 million per month, regardless of its actual revenues. Thus, in months where Casino revenues dip or judgments are imposed against

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[2]In 2002, the Tribe modified the ordinance creating the Authority to delete language declaring the Authority "an instrumentality of the Tribe" and replace it with language stating that the Authority is "a wholly owned unincorporated enterprise of the Tribe."

the Casino, the Authority has run a deficit in order to make the required $1 million payment to the Tribe.

Having considered the evidence and the *Johnson* analysis, the Court finds that neither the Casino nor the Authority are entitled to invoke the Tribe's sovereign immunity. Indeed, the record indicates that a judgment against either of the entities will not result in direct financial liability for the Tribe or otherwise imperil the Tribe's assets. Mr. Graham essentially acknowledged that the Authority was created for the purpose of having an entity with assets reachable by creditors, because the creditors would be otherwise unwilling to lend money to the Tribe out of concern that the Tribe's claim of sovereign immunity would be used to defeat any claim arising out of the loans. Indeed, it is somewhat ironic that the Authority, having been formed to create a non-immune entity for creditors, now claims the right to invoke the Tribe's immunity.

In any event, it is evident to the Court that any judgment imposed against the Casino or the Authority will not reach to the Tribe's assets. The Defendants counsel acknowledged in closing argument that the only Tribal asset that would be endangered by a judgment against the Casino or the Authority would be the Tribe's right to receive the profits from the Casino. However, the asset itself – the right to receive profits – would not be threatened by a judgment against the Authority; only the amount of profits that would be available to turn over to the Tribe would be affected. The record reflects that the Tribe is entitled to receive at least $1 million per month from the Authority, regardless of the Casino's profits, but that should the actual profits fall short, the Authority will borrow or run a deficit to ensure that the Tribe receives that which it is entitled to. Thus, while a judgment against the Authority in this case may result in the Tribe

receiving less in profits than it had anticipated, the judgment would neither deprive the Tribe of its asset – the right to receive profits – nor its guaranteed minimum payment. Accordingly, the Court cannot find that a judgment against the Authority or the Casino would constitute a liability against the Tribe, and thus, the Court need not reach the remaining *Johnson* factors.

Accordingly, the Court finds that the Casino and the Authority are not entitled to invoke the Tribe's sovereign immunity, and their Motion to Dismiss on sovereign immunity grounds is denied.

B. Motion for Reconsideration

The Plaintiff seeks reconsideration of the Court's finding that the Tribe itself was entitled to dismissal of all claims against it on the grounds of sovereign immunity. The Plaintiff now points to the terms of the Gaming Compact, which appear to call for the Tribe to waive its sovereign immunity with regard to claims arising from Casino operations.

Although the Federal Rules of Civil Procedure do not expressly contemplate a "motion for reconsideration," Rules 59(e), 60(b), and the Court's inherent authority all permit the Court, in appropriate circumstances, to revisit and revise its rulings if necessary, prior to the entry of final judgment *Price v. Philpot*, 420 F.3d 1158, 1167 n. 9 (10th Cir. 2005). The timeliness of the motion determines whether it is analyzed under Rule 59(e) – if filed within 10 days of the entry of the judgment or order – or Rule 60(b) – if filed later than 10 days. *Id., citing Hawkins v. Evans*, 64 F.3d 543, 546 (10th Cir. 1995). Here, the Defendants' motion was filed more than 10 days after the entry of the Order it seek reconsideration of, and thus, the Court analyzes the motion under Fed. R. Civ. P. 60(b).

Rule 60(b) permits the Court to reconsider an order due to, among other things, a substantive "mistake or law or fact" by the Court, Fed. R. Civ. P. 60(b)(1), *Yapp v. Excel Corp.*, 186 F.3d 1222, 1231 (10th Cir. 1999), "newly discovered evidence that, with reasonable diligence, could not have been discovered [earlier]," Fed. R. Civ. P. 60(b)(2), or as a result of "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). Nevertheless, reconsideration under Rule 60(b) is extraordinary, and may only be granted in exceptional circumstances. *Rogers v. Andrus Transp. Services*, 502 F.3d 1147, 1153 (10th Cir. 2007). Reconsideration is not a tool to rehash previously-presented arguments already considered and rejected by the Court, nor properly used to present new arguments based upon law or facts that existed at the time of the original argument. *FDIC v. United Pacific Ins. Co.*, 152 F.3d 1266, 1272 (10th Cir.1998); *Van Skiver v. United States*, 952 F.2d 1241, 1243-44 (10th Cir.1991).

Here, the Plaintiff has not identified which portion of Rule 60(b) it invokes in seeking reconsideration, but the most likely candidate is Rule 60(b)(2), which permits a party to seek reconsideration as a result of newly-discovered evidence. The Plaintiff's motion does not indicate when the Plaintiff discovered the Gaming Compact, but one can reasonably assume that, because it was not referenced in the Plaintiff's response to the Motion to Dismiss, it was not discovered by the Plaintiff until later. Nevertheless, the fact that evidence was recently discovered by a party does not automatically render it "newly discovered evidence." Under the terms of Rule 60(b) itself, "newly discovered evidence" is that which "with reasonable diligence, could not have been discovered" within 10 days of the date of the Court's Order – that is, within 10 days of September 12, 2007. Moreover, courts recognize that a motion for reconsideration is

not a means to present arguments based on facts that were in existence at the time of initial briefing. *Van Skiver*, 952 F.2d at 1243-44.

Here, the Gaming Compact cited by the Plaintiff is dated September 10, 1999. Certainly, the Compact itself was in existence when the Motion to Dismiss was being briefed in 2007. The Plaintiff has previously described difficulties in obtaining copies of tribal laws and records from the Tribe itself, but nothing indicates that the Gaming Compact could not have been expeditiously obtained from the other party to its terms, the State of California. Thus, in the absence of some indication that the Gaming Compact could not have been discovered by the Plaintiff in time to include it in the Plaintiff's response to the Motion to Dismiss, the Court does not consider it to be "newly discovered evidence" warranting reconsideration under Rule 60(b).

Nor is the Court inclined to grant reconsideration of its sovereign immunity finding at this time based on the terms of the Compact. Admittedly, the Compact does appear to require the Tribe to execute a waiver of sovereign immunity for claims arising from "injuries to person or property . . . in connection with the Tribe's Gaming Operations." Arguably, the claims in this case might fall within those terms, calling into doubt whether the Tribe is, in fact, entitled to sovereign immunity. But the Gaming Compact itself cannot be construed to be a waiver of the Tribe's sovereign immunity, only a promise by the Tribe to execute such a waiver as part of the adoption of a "tort liability ordinance." Without that ordinance itself, the Court cannot determine whether the Tribe did indeed waive sovereign immunity in the manner required by the Compact. If it did, the Plaintiff may be within its rights to seek reconsideration of the dismissal

of the Tribe on sovereign immunity grounds.[3] If it did not, the Tribe may be in breach of the Compact as against the State of California, but it is by no means clear that this breach would permit the Court to impose the terms of the Compact's intended waiver against the Tribe. In either event, reconsideration is inappropriate here until the actual tort ordinance (or an explanation for its absence) is secured.

Accordingly, the Plaintiff's Motion for Reconsideration is denied.

CONCLUSION

For the foregoing reasons, to the extent it seeks dismissal of the Casino and the Authority on sovereign immunity grounds, the Defendants' Motion to Dismiss **(# 19)** is **DENIED IN**

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[3]Admittedly, reconsideration under these circumstances would again be most appropriate under Rule 60(b)(2), in that discovery of the tort ordinance and immunity waiver may constitute newly-discovered evidence that was not available earlier to the Plaintiff because the Tribe refused to supply it. It is also conceivable that the Tribe's assertion in the Motion to Dismiss that it had not waived sovereign immunity in the Motion to Dismiss could be characterized as fraud or misrepresentation warranting reconsideration under Rule 60(b)(3) (and perhaps sanctions under Fed. R. Civ. P. 11). In either instance, however, reconsideration is only permitted within one year of the September 12, 2007 Order, Fed. R. Civ. P. 60(c)(1), a time period soon to expire.

Even assuming that reconsideration under Rule 60(b)(2) and (3) were not available when the tort ordinance is finally obtained, the Court is confident that, in appropriate circumstances, reconsideration could be available under Rule 60(b)(6), or through invocation of the Court's inherent authority.

PART. The Court's September 12, 2007 ruling with regard to the remaining portions of that motion remain effective. The Plaintiff's Motion for Reconsideration **(# 99)** is **DENIED**. The Plaintiff's Motion to Strike **(# 107)** is **DENIED AS MOOT**.

Dated this 5th day of August, 2008

BY THE COURT:

Marcia S. Krieger

Marcia S. Krieger
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 08-1298, 08-1305 & 08-1317

BREAKTHROUGH MANAGEMENT GROUP, INC.
v.
CHUKCHANSI GOLD CASINO AND RESORT, ET AL.

APPELLEE/CROSS-APPELLANT'S MEMORANDUM BRIEF

ATTACHMENT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 06-CV-01596 (MSK-PAC)

BREAKTHROUGH MANAGEMENT GROUP, Inc., a Colorado corporation,

Plaintiff,

v.

CHUKCHANSI GOLD CASINO AND RESORT, an entity organized under the laws of The Picayune Rancheria Of The Chukchansi Indians;
JEFF LIVINGSTON, an adult individual;
PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS, a federally-recognized Indian tribe;
THE CHUKCHANSI ECONOMIC DEVELOPMENT AUTHORITY, an entity organized under the laws of The Picayune Rancheria Of The Chukchansi Indians;
RYAN STANLEY, an adult individual;
VERNON D'MELLO, an adult individual;

Defendants.

AMENDED COMPLAINT AND JURY DEMAND

Plaintiff Breakthrough Management Group, Inc., for its Amended Complaint, alleges as follows:

SUMMARY

1. Plaintiff Breakthrough Management Group, Inc. ("BMG") is one of the world's leading providers of "Six Sigma," "Lean Six Sigma," and "Lean" training and consulting

services, all of which are continuous improvement methodologies. BMG provides classroom and internet-based online education worldwide to individuals and numerous Fortune® 100 and 500 companies. Defendant Chukchansi Gold Resort & Casino (the "Casino") paid for a single person user license to BMG's Six Sigma eChampion® online education class (which is approximately 12 hours of instruction) for a Director at the Casino and also a single person user license to BMG's Six Sigma eBlack Belt online education class (which is over 40 hours of instruction).

2. With the intent to avoid paying for additional users, the Casino and some of its Directors engaged in a scheme to illegally record BMG's eChampion® online education class and create audiovisual works to train all of the Casino's employees and Directors in the Six Sigma methodology. After the Casino illegally copied BMG's online education class, the Casino modified the copied BMG's online education class in an effort to hide the fact that the work was created and owned by BMG. Specifically, a Casino Director rerecorded the audio portion of BMG's eChampion® class and personally read a script that was a word-for-word copy of the script BMG created and used in BMG's eChampion® online education class. The Casino also modified the visual portion of BMG's eChampion® class by removing BMG's name and copyright notice that was displayed continuously when the class was played to students, including a warning that "No portion may be copied, rewritten, reproduced, or published." The Casino replaced BMG's copyright notice in the work and rebranded it with the Casino's name and trademark. All of these actions were also prohibited by the license agreements that the Casino entered into with BMG.

3. A then current employee of the Casino has advised BMG that the Casino intends to train all of its employees with the materials it illegally created from BMG's materials and has, to date, trained at least 2/3 of its over 1,300 employees with these materials. In short, the Casino has avoided paying BMG over One Million Dollars to train all of its employees by purchasing a single person user license to a BMG online class. A then current employee of the Casino repeatedly complained to executives at the Casino about how improper it was to illegally use and copy BMG's online education classes. After those complaints went unheeded, the Casino employee advised BMG of the Casino's illegal actions, prompting the instant action by BMG. The Casino fired the Casino employee immediately after it learned that the employee had informed BMG of the Casino's copyright and trademark infringement.

THE PARTIES

4. Plaintiff Breakthrough Management Group, Inc. ("BMG") is a corporation incorporated under the laws of the state of Colorado, having its principal place of business at 1921 Corporate Center Circle, Longmont, CO 80501 in Boulder County.

5. Defendant Picayune Rancheria of the Chukchansi Indians ("Tribe") is a federally-recognized Indian Tribe organized under the Indian Reorganization Act of 1934, 25 U.S.C. § 476. The Tribe's principal place of business is located in and around Madera County, California.

6. Defendant The Chukchansi Economic Development Authority ("CEDA") is, upon information and belief, an entity organized under the laws of the Tribe to conduct and manage many of the Tribe's economic development activities. CEDA's principal place of business is located in and around Madera County, California.

7. Defendant Chukchansi Gold Casino and Resort ("Casino") is, upon information and belief, an entity organized under the laws of the Tribe. The Casino's principal place of business is located in and around Madera County, California. Upon information and belief, at all relevant times alleged in this Amended Complaint, the Casino was located on lands that are not held in trust by the Federal Government as an Indian Reservation.

8. Defendant Ryan Stanley ("Stanley") is an adult individual who resides in Madera County, California. At all relevant times alleged in this Amended Complaint, Defendant Stanley was an employee of the Casino, acting in the course and scope of his employment with the Casino. At all relevant times alleged in this Amended Complaint, Defendant Stanley was a Director of the Casino.

9. At all relevant times alleged in this Amended Complaint, Defendant Stanley was designated as a "Key Employee" of the Casino under California's Gambling Control Act, Cal. Bus. & Prof. Code §19800 (2006), *et seq.*, because he was employed in the operation of a gambling enterprise at the Casino in a supervisory capacity or empowered to make discretionary decisions that regulate gambling operations. In February and March of 2006, Defendant Stanley was employed in the operation of a gambling enterprise at the Casino in a supervisory capacity and/or empowered to make discretionary decisions that regulate gambling operations.

10. Defendant Vernon D'Mello ("D'Mello") is an adult individual who resides in California. At all relevant times alleged in this Amended Complaint, Defendant D'Mello was an employee of the Casino, acting in the course and scope of his employment with the Casino.

11. Upon information and belief, at all relevant times alleged in this Amended Complaint, D'Mello was employed in the operation of a gambling enterprise at the Casino in a

15. Upon information and belief, Defendants formed, participated in, and aided and abetted a conspiracy to commit the unlawful acts alleged herein. Therefore, the Defendants are jointly and severally liable for the wrongful acts of one another, as alleged herein.

JURISDICTION AND VENUE

16. The Court has jurisdiction of this action pursuant to the Copyright Act, 17 U.S.C. § 100 *et seq.*, 15 U.S.C. § 1121, 28 U.S.C. § 1331, 18 U.S.C. § 1964(a), 28 U.S.C. § 1338 (a) and (b), 28 U.S.C. § 1367.

17. This Court also has original jurisdiction of this action pursuant to 28 U.S.C. § 1332, because the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between citizens of different states. Pursuant to 29 U.S.C. § 1332(c)(1), Plaintiff is, for this jurisdictional purpose, a citizen of Colorado, while none of the Defendants are citizens of Colorado.

18. The Defendants have consented to the jurisdiction of this Court.

19. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 (b), (c) and (d) because the property that is the subject of the action is situated in this District, the injuries complained of herein occurred in this District, Defendants Tribe, Casino and CEDA are, upon information and belief, foreign entities, and/or a substantial part of the events that gave rise to BMG's claims took place in this District.

GENERAL ALLEGATIONS

20. BMG is in the business of providing "Six Sigma," "Lean Six Sigma," and "Lean" training and consulting services, as well as technology-based process improvement solutions to individuals, companies, and government entities worldwide.

21. One of BMG's offerings is "eLearning," which is an internet-based education system where people enrolled in a BMG training course are allowed to access the class by logging in to a secure internet site and providing a user-specific user name and password.

22. On or about February 20, 2006, Defendant Casino purchased a single person user license for BMG's eLearning class entitled "eChampion®" ("the eChampion® class"), which includes original creative images, text, sounds, and artwork.

23. At the request of the Casino, the Casino was invoiced for the eChampion® class as follows: "Chukchansi Casino, 711 Lucky Lane, Coarsegold, CA 93614." The Casino received the invoice for the eChampion® class and subsequently paid BMG for the license to the eChampion® class by way of a check on an account owned by the Casino.

24. The license to the eChampion® class that the Casino purchased only authorized one person, Defendant Stanley, to access and view the materials of that class.

25. BMG protects its intellectual property rights in the eChampion® class by requiring customers to agree to the terms of BMG's standard form of End User License Agreement ("e Champion EULA" or "EULA") before they can access and use the eChampion® class. The eChampion EULA limits the use of the eChampion® class to the specific enrolled person's course work in the class. Customers are specifically prohibited under the eChampion EULA from copying, distributing, and rewriting any portion of the images, audio files, and other materials displayed or provided as part of the eChampion® class.

26. BMG also protects its intellectual property rights in the eChampion® class by having the following proprietary notice ("Proprietary Notice") at the bottom of the visual portion of the user's screen at all times when the class is being accessed through BMG, something to the

effect of: "© 2002-2005 Breakthrough Management Group. All rights reserved. No portion may be copied, rewritten, reproduced, or published" or something of similar wording.

27. On February 20, 2006 at 10:56 a.m. (MST), Defendant Casino accepted the terms of BMG's standard EULA for the eChampion® class. Defendant's acceptance of the eChampion EULA was electronically recorded by BMG. No user of the eChampion can access any portion of the eChampion® class through BMG's learning management system without first accepting the terms of the eChampion EULA.

28. As part of the acceptance of the eChampion EULA and registration into the course, Defendant Stanley was listed as the authorized user and the email address of the authorized user was an email address owned by the Casino.

29. Under the terms of the eChampion® EULA, the Casino agreed that it is "only authorized to view, copy, and print documents contained within this website, subject to the agreement that: (1) Your [the Casino's] use is strictly for the performance of course-work for the course you have officially registered for; (2) You will display all copyright notices and retain copyright and other proprietary notices on all copies you make; (3) You will not reuse any material contained on this website including…; (4) You will not copy any codes or graphics contained in this site, except those graphics used in courses, subject to the above terms; … (6) You have not gained access to this website for the purposes of copying the contents of the courses, the course player or the course delivery system for your personal commercial or noncommercial use or your company's commercial or noncommercial use; (7) you understand that you are subject to the Copyright laws of the United States of America, and will not violate those laws."

30. The eChampion EULA also contained a clause whereby the Casino expressly consented to the jurisdiction of the courts in Colorado.

31. Upon information or belief, Defendant Stanley accepted the terms of the eChampion EULA on behalf of the Casino. Defendant Stanley, as a "Director" of the Casino and a "Key Employee" under the California Gaming Act, had actual authority to bind the Casino to the terms of the EULA or, in the alternative, had apparent authority to bind the Casino to the terms of the EULA.

32. While employed at the Casino, Defendant Stanley reported to and was subordinate to Defendant Livingston. Upon information and belief, while employed at the Casino, Defendant D'Mello reported to and was subordinate to Defendant Stanley.

33. Defendant Livingston is the head of the Casino's "Six Sigma Executive Leadership Council," and Defendant Stanley is a Director who is also on that council. Upon information and belief, one of the roles of the Casino's "Six Sigma Executive Leadership Council" is to promote the use and training of the Six Sigma methodology in various departments and operations of the Casino.

34. Upon information and belief, Defendant Livingston instructed Defendant Stanley to provide instruction in the Six Sigma methodology to Casino's employees.

35. Upon information and belief, Defendants Casino, Livingston, Stanley and D'Mello initiated a scheme to copy BMG's eChampion® class for the purpose of using it to create works that could be used to train Casino's employees in the Six Sigma methodology.

36. Upon information and belief, the Casino has at least one copy of the software program "Camtasia," which can be used to edit and record audiovisual works.

37. Upon information and belief, the Casino has a policy where Casino employees need to obtain permission before loading applications on to their work computer or work station.

38. Upon information and belief, in 2006, Defendant Stanley requested and obtained approval from Casino to have the software program Camtasia loaded onto the computer or workstation that Defendant D'Mello used at work.

39. Upon information and belief, the main reason why Defendant Stanley requested approval for Defendant D'Mello to receive the Camtasia application was for him to make works with the recorded portions of BMG's eChampion® class.

40. Upon information and belief, Defendants used or directed to be used the software program(s) Camtasia and/or "Wire Tap Pro" to capture, record and/or modify the audio and visual portions of BMG's eChampion® class. Defendants' recording of the BMG's eChampion® class breached the terms of the eChampion EULA.

41. Using part of the audio and visual portions of the eChampion® class, Defendants created an audio/visual work ("the White Belt Audio/Visual Work") that plays as a PowerPoint presentation with graphic slides and an audio file that is playable with the work. The White Belt Audio/Visual Work was used to provide training in the Six Sigma methodology to Casino employees.

42. Upon information and belief, the audio portion of the White Belt Audio/Visual Work was created by having a Casino employee record all or part of the audio from the BMG's eChampion® class. Upon information and belief, Defendant Stanley then played back the audio recording of eChampion® class and recorded himself reciting the same words used in the script

to BMG's eChampion® class. This rerecording of the script used in the eChampion® class was done at the specific direction and/or with the knowledge of Defendants Stanley and D'Mello.

43. The audio portion of the White Belt Audio/Visual Work is a verbatim recitation of a portion of the script used in the eChampion® class, or substantially a word-for-word copy, with Defendant Stanley's voice used in the work instead of the voice used in BMG's eChampion® class.

44. The visual portion of the White Belt Audio/Visual Work is comprised of or derived from, in whole or in part, screen shots of BMG's eChampion® class.

45. Upon information and belief, as of August 10, 2006, Defendant Casino had a directory established on the Casino's computer network where members of the Six Sigma and Strategic Initiatives department could save and access computer files for Casino work involving their department ("The Casino's Six Sigma Share Drive"). Upon information and belief, as of at least August 10, 2006, the Casino's Six Sigma Share Drive stored files that contained copies of the audio portion of eChampion® class and/or screenshots taken from BMG's eChampion® class. For example, upon information and belief, as of at least August 10, 2006, there was a file on the Casino's Six Sigma Share Drive named "Ryan_S Slides 03-27-06.doc" that contained exact screenshots from BMG's eChampion® class.

46. Neither BMG's Proprietary Notice nor any BMG trademark are displayed on any portion of the White Belt Audio/Visual Work.

47. Upon information and belief, Defendants removed, cropped the visual image and/or purposefully did not copy BMG's Proprietary Notice and BMG's trademark from the visual portion of the White Belt Audio/Visual Work.

classes dealing with the Six Sigma methodology using portions of the audio tracks, visual displays, and/or the script from BMG's eChampion® class.

62. Defendants used all or part of the eChampion® class to create a work(s) that was used to train all, or substantially all, of the Casino's Directors in a program entitled "Champion."

63. Upon information or belief, Defendant D'Mello had actual authority to bind the Casino to the terms of an agreement or, in the alternative, had apparent authority to bind the Casino.

64. Upon information and belief, all of Defendant Stanley's and D'Mello's actions that are alleged herein were performed at the instruction and/or with the authorization of Defendant Livingston and/or the Casino.

65. In 2006, Defendant Casino purchased a single person user license for BMG's eLearning class entitled "eBlack Belt" ("the eBlack Belt class"), which includes original creative images, text, sounds, and artwork.

66. At the request of the Casino, the Casino was invoiced for the eBlack Belt class as follows: "Chukchansi Casino, 711 Lucky Lane, Coarsegold, CA 93614." The Casino received the invoice for the eBlack Belt class and subsequently paid BMG for the license to the eBlack Belt class by way of a check on an account owned by the Casino.

67. The license to the eBlack Belt class that the Casino purchased only authorized one person, Defendant D'Mello, to access and view the materials of that class.

68. BMG has protected its intellectual property rights in the eBlack Belt class by requiring Defendant Casino agree to the terms of BMG's standard form End User License Agreement ("eBlack Belt EULA"). The eBlack Belt EULA limits the use of the eBlack Belt

class to the specific enrolled person's course work in the class. Customers are specifically prohibited under the EULA from copying, distributing, and rewriting any portion of the images, audio files, and other materials provided or displayed as part of the eChampion® class.

69. BMG also protects its intellectual property rights in the eBlack Belt class by having the following proprietary notice ("Proprietary Notice") at the bottom of the visual portion of the user screen at all times when the class is being accessed through BMG: "© 2002-2005 Breakthrough Management Group. All rights reserved. No portion may be copied, rewritten reproduced, or published" or something of similar wording.

70. Defendant Casino accepted the terms of BMG's standard EULA for the eBlack Belt class ("the EULA" or "eBlack Belt EULA"). Defendant's acceptance of the eBlack Belt EULA was electronically captured by BMG.

71. As part of the acceptance of the eBlack Belt EULA and registration into the course, Defendant D'Mello was listed as the authorized user and the email address of the authorized user was an email address owned by the Casino.

72. Under the terms of the eBlack Belt EULA, the Casino agreed that it may not, among other things: "(c) Create a derivative work that is based on any portion of the eCourse [the eBlack Belt class]; (d) Rewrite any portion of the eCourse or use any portion of the eCourse in connection with creating any work that is similar in function, content or appearance to any portion of the eCourse; (e) Remove any proprietary notice from the eCourse; (f) Copy, reproduce, distribute, or in any way duplicate all or any part of the eCourse (which includes the Training Materials); (g) Use any portion of the eCourse (which includes but is not limited to its' curriculum, any audio/video content, and any Training Materials) to provide any training or

instruction to any other person other than the single person allowed to use the eCourse under this License...."

73. The eBlack Belt EULA also contained a clause whereby the Casino and D'Mello expressly consented to the jurisdiction of the courts in Colorado.

74. BMG has been advised by a then-current Casino employee, who reported to Defendant Stanley, that the Casino intended to sign up an employee or Director for BMG's eBlack Belt class and illegally copy that work in order to provide training to Casino employees.

75. All of Livingston's, D'Mello's and Stanley's acts that are alleged in this Amended Complaint were performed in the course and scope of their employment with the Casino.

76. Defendants Livingston and Casino knew, or should have known, that the Casino had never purchased anything greater than a single named user license to BMG's eChampion® class, and Defendants Livingston and Casino knew, or should have known, that the Casino used portions of BMG's eChampion® class to train a large number of its employees and/or to create works, including the Written WB Materials, Written Champion Materials and the White Belt Audio/Visual Work, and the Champion Audio/Visual Work.

77. Upon information and belief, a Casino employee has made numerous complaints to other Casino employees, and at least one Director, about the impropriety of the copyright infringement alleged in this Amended Complaint, but the Casino did not take any action to cease the infringement or the use of the works that infringe on BMG's copyrights.

78. Defendants have created a number of works based on, or using portions of, BMG's eChampion® class, including, the Written WB Materials, Written Champion Materials and the White Belt Audio/Visual Work, and the Champion Audio/Visual Work. Defendants

or other disposition all materials or tangible items of any kind containing or embodying any work that infringes on any BMG copyright, service mark or trademark.

JURY DEMAND

BMG hereby demands a trial by jury on all claims and issues for which it is entitled to a jury.

Respectfully submitted this 17th day of August, 2006.

MARC PAPPALARDO, # 35339

s/ Marc Pappalardo
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-and-

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 08-1298, 08-1305 & 08-1317

BREAKTHROUGH MANAGEMENT GROUP, INC.
v.
CHUKCHANSI GOLD CASINO AND RESORT, ET AL.

APPELLEE/CROSS-APPELLANT'S MEMORANDUM BRIEF

ATTACHMENT D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT COURT OF COLORADO

Civil Action No. 06-CV-01596-MSK-PAC

BREAKTHROUGH MANAGEMENT GROUP, Inc., a Colorado Corporation,

Plaintiff,

v.

CHUKCHANSI GOLD RESORT AND CASINO, An entity organized under the laws of The Picayune Rancheria of the Chukchansi Indians; JEFF LIVINGSTON, an adult individual; PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS, a federally recognized Indian tribe; THE CHUKCHANSI ECONOMIC DEVELOPMENT AUTHORITY, an entity Organized under the laws of the Picayune Rancheria Of the Chukchansi Indians; RYAN STANLEY, an adult Individual; and VERNON D'MELLO, an adult individual;

Defendants.

CHUKCHANSI GOLD RESORT AND CASINO, PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS, AND THE CHUKCHANSI ECONOMIC DEVELOPMENT AUTHORITYS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICITON, IMPROPER VENUE AND FAILURE TO STATE A CLAIM

COME NOW, Defendants Picayune Rancheria of the Chukchansi Indians, the Chukchansi Economic Development Authority, and the Chukchansi Gold Resort Casino (collectively the "Tribal Defendants"), who move to dismiss the Plaintiff's Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction.

Defendants' have not discussed the grounds for this motion and the relief requested pursuant to D.C.COLO.L.Civ.R 7.1(A), because the pleading deficiencies are not such that Plaintiff can cure them by amendment.

FACTS

The Complaint alleges twelve causes of action against the Tribal Defendants collectively and an additional four causes of action against the Chukchansi Gold Resort Casino ("Resort") all related to the Defendants' purported misuse of the Plaintiff's copyrighted or trademarked property.[1]

ARGUMENT

I. FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1). LACK OF SUBJECT MATTER JURISDICTION.

II.

1. SOVEREIGN IMMUNITY.

The basis of the Tribal Defendants' Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction is the Tribal Defendant's inherent immunity from suit. This issue is discussed fully in the supporting Brief that the Tribal Defendants file concurrently herewith. However, pursuant to MSK Civ. Practice Standard V.H.2 the Tribal Defendants provide a brief explanation of the argument below. The Tribe's 12(b)(1) claims attack the jurisdictional facts underlying the Complaint. The court is not required to

[1] The twelve common causes of action are: (1) Federal Copyright Infringement, (2) Contributory Copyright Infringement, (3)Vicarious Copyright Infringement, (4) Federal Trademark Infringement, (5) Contributory Trademark Infringement, (6) Vicarious Trademark Infringement, (7) Racketeer Influenced And Corrupt Organizations Act violations, (8) Colorado Common Law Conversion, (9) Colorado Common Law Misappropriation, (10) Colorado Common Law Fraud, (11) Colorado Common Law Unfair Competition, and (12) Colorado Consumer Protection Act violations. The four causes of action solely against the Resort include: (1) Breach of the Implied Covenant of Good Faith and Fair Dealing, (2) Breach of Contract, (3) a second claim of Breach of Contract, and (4) a second claim of Breach of the Implied Covenant of Good Faith and Fair Dealing.

presume the truth of allegations within the Complaint and may rely on the evidence submitted in association with the Tribal Defendants' supporting brief.

A. **Burden of proof**: The Plaintiff has the burden of establishing that this Court has subject matter jurisdiction over the claims asserted in the Complaint by a preponderance of the evidence. *Merida Delgado v. Gonzales*, 428 F. 3d 916, 919 (10th Cir. 1006). Additionally, because sovereign immunity is jurisdictional in nature the Plaintiff also bears the burden of establishing a clear and unequivocal waiver of the Tribal Defendant's immunity by a preponderance of the evidence. *EFW v. St. Steven's Indian High School*, 264 F. 3d 1297, 1303 (10th Cir. 2001).

B. **Elements**: To establish a waiver of the Tribal Defendant's immunity the Plaintiff must show that either: (1) Congress abrogated the Tribe's immunity, or (2) the Tribe waived its immunity pursuant to tribal law. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). The waiver must be clear and unequivocal. (*Id*) Courts may not imply a waiver. (*Id.*)

C. **Elements not Supported by Complaint:**

1. The Complaint does not allege that Congress abrogated the Tribal Defendant's Immunity.

2. The Complaint does not allege that an entity or individual authorized by the Tribe waived the Tribe's immunity in accordance with tribal law. The Complaint alleges that employees of the Tribe's Resort waived the Tribe's immunity based on authority the Complaint asserts exists in the California Gambling Control Act. As a matter of law, the California Gambling Control Act does not apply to federally recognized Indian tribes. *California v. Cabazon*, 480 U.S. 202, 221-22 (1987). Moreover, as a matter of law, only Congress or the Tribe, may waive the Tribe's immunity. *Santa Clara Pueblo*, 436 U.S. at 58. State law cannot form the basis of a waiver of tribal sovereign immunity. (*Id*).

3. The Complaint does not allege that the Tribe authorized employees of the Resort to waive the Tribal Defendant's Immunity. The Complaint alleges that Resort employees had the "apparent authority" to waive the Tribal Defendant's immunity. However, as a matter of law, officers or employees of a sovereign cannot waive the sovereign's immunity unless some specific provision of law authorizes them to do so. The Complaint does not allege any such authorizing provision of law.

II. COPYRIGHT CLAIMS (First through Third Causes of Action.) 12(b)(1) and 12(b)(6). Plaintiff's Copyright Claims are discussed in detail in the accompanying Brief in Support of this motion. However, following is a brief explication of the basis for the Tribal Defendants' motion to dismiss Plaintiff's First, Second and Third Causes of Action.

A. **Burden of Proof.** Plaintiff bears the burden of establishing the subject matter for its Copyright claims and supplemental jurisdiction for its state law "conversion" and "misappropriation" claims. *See U.S. ex rel. Hafter D.O. v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1160 (10th Cir. 1999.)

B. **Elements.** As a precondition to any action for Copyright infringement, Secton 411(b) of the the Copyright Act, 17 U.S.C. §§ 101 et seq. mandates that a plaintiff must have secured registration of the claimed copyrights before initiating a lawsuit. 17 U.S.C. § 411(b); *see La Resolana Architechts, Pa v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1200-01 (10th Cir. 2005); *M.G.B. Homes, Inc. v Ameron Homes, Inc.*,903 F.2d 1486, 1488 (11th Cir. 1990.)

C. **Elements not Supported by Complaint.** The Complaint does not assert that the Plaintiff actually received any copyright registrations for their e-classes before filing this action. Plaintiff's assertion that it "owned and controlled" federal copyrights is insufficient and does not satisfy the jurisdictional requirement of 17 U.S.C. 411(b).

///

III. RICO (Seventh Cause of Action) 12(b)(6)

A. **Burden of Proof**: Plaintiff bears the burden of proving violations of RICO by a preponderance of the evidence.

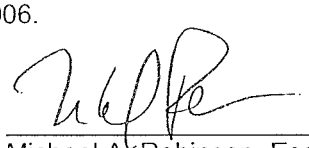
B. **Elements**: To prosecute claims based on a violation of RICO, a Plaintiff must allege the: (1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity.

C. **Elements not Supported By Complaint**: As an initial matter, a Plaintiff must establish that a particular defendant is subject to the provisions of RICO. As a matter of law governmental entities are categorically immune from RICO. *Lancaster Community Hosp. v. Antelope Hosp. Dist.*, 940 F.2d 397, 404 (9th Cir. 1991); *Wood v Incorporated Village of Patchogue, N.Y.*, 311 F.Supp.2d 344, 354 (E.D.N.Y. 2004); *North Star Contracting Corp. v. Long Island R.R. Co.*, 723 F.Supp. 902, 907-08 (E.D.N.Y. 1989). This is so because courts recognize that governmental entities are not capable of forming the intent necessary for liability under RICO. *Id.* Indian tribes, their governmental offices and their business entities are governmental entities. *Multimedia Games, Inc. v. WLGC Acquisition Group*, 214 F.Supp.2d 1131, 1135 (N.D. Okla. 2001.) Therefore, Indian tribes and tribal entities are immune from RICO liability. *Smith v. Babbit*, 875 F.Supp. 1353, 1365-66 n. 11 (D.Minn 1995), *aff'd on other grounds*, 100 F.3d 556 (8th Cir. 1996) (court noted that, even if sovereign immunity did not bar claims against the tribal governmental entity that RICO claims "would fail as a matter of law . . . [because], as a governmental entity, [it] is not capable of forming the criminal intent necessary to support the alleged predicate RICO offenses.")

IV. STATE LAW CLAIMS. (Eighth and Ninth Causes of Action): As with issues pertaining to the issue of sovereign immunity, the Tribal defendant's will address the sum of the state law allegations in the accompanying brief in support of this motion. However, for the Court's convenience the grounds for the Tribal Defendant's objection to the state law claims in

the Complaint is complete preemption by Federal Law. Pursuant to 17 U.S.C. § 301, a state common law or statutory claim is preempted if: (1) the work is within the scope of the "subject matter of copyright" as specified in 17 U.S.C. §§ 102 and 103, and (2) the rights granted under state law are equivalent to any exclusive rights within the scope of federal copyright as set out in 17 U.S.C. § 106. The Complaint alleges that both of Plaintiff's courses, eChampion® and eBlackBelt® fall within federal copyright protection under the above referenced statutes. Further, the state law claims seek relief identical to that provided for in the Copyright Act. Therefore, as a matter of law, federal law preempts the Eight and Ninth Causes of Action.

Respectfully Submitted this 27th day of October, 2006.



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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 08-1298, 08-1305 & 08-1317

BREAKTHROUGH MANAGEMENT GROUP, INC.
v.
CHUKCHANSI GOLD CASINO AND RESORT, ET AL.

APPELLEE/CROSS-APPELLANT'S MEMORANDUM BRIEF

ATTACHMENT E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 06-cv-01596-MSK-PAC

BREAKTHROUGH MANAGEMENT GROUP, Inc., a Colorado corporation,

Plaintiff,

v.

CHUKCHANSI GOLD CASINO AND RESORT, an entity organized under the laws of The Picayune Rancheria of The Chukchansi Indians;
JEFF LIVINGSTON, an adult individual;
PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS, a federally-recognized Indian tribe;
THE CHUKCHANSI ECONOMIC DEVELOPMENT AUTHORITY, an entity organized under the laws of The Picayune Rancheria of The Chukchansi Indians;
RYAN STANLEY, an adult individual; and
VERNON D'MELLO, an adult individual;

Defendants.

BRIEF IN SUPPORT OF DEFENDANT RYAN STANLEY'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION, LACK OF SUBJECT MATTER JURISDICTION, IMPROPER VENUE, AND FAILURE TO STATE A CLAIM

Defendant Ryan Stanley ("Stanley") submits the following brief in support of his motion to dismiss this action in its entirety pursuant to Federal Rules of Civil Procedure ("FRCP") 12(b)(1), 12(b)(2), 12(b)(3), and 12(b)(6).

Pursuant to D.C.COLO.LCivR 7.1(A), counsel has attempted to meet and confer regarding the page limit requirements and the grounds and relief for this motion. Counsel for Stanley left four voicemails with opposing counsel on October 26, 2006 at 8:45am PST, mid-day at Neil Arney's new offices, and two messages on October 27, 2006.

I. INTRODUCTION

A. Summary Of Argument

Plaintiff, Breakthrough Management Group, Inc., a Colorado corporation ("BMG"), filed suit for general and statutory damages and injunctive relief against a federally recognized Indian tribe, Picayune Rancheria of the Chukchansi Indians ("Tribe"), Chukchansi Gold Casino and Resort ("Casino"), Chukchansi Economic Development Association ("CEDA"), and three employees, including Stanley. BMG alleges the Tribe, through employees acting within the course and scope of employment, (1) infringed BMG's copyright and trademarks; (2) breached End User License Agreements; (3) violated the Racketeer Influenced and Corrupt Organizations statute ("RICO"); and (4) violated Colorado common law.

Federal tribal sovereign immunity is a complete bar to BMG's suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).[1] Tribal sovereign immunity extends immunity from suit to employees acting within the course and scope of employment. *Tenneco Oil Co. v. Sac & Fox*

[1] The assertion of tribal sovereign immunity as a defense to liability will be reached, if necessary, upon a motion for judgment on the pleadings, motion for summary judgment, or trial.

Colorado.[17] Stanley does not own any personal or real property located in Colorado.[18] He has no bank accounts located in Colorado and does not own any vehicles registered in Colorado.[19]

BMG limply claims that the EULA, which the Casino entered into with BMG, purportedly through defendants Stanley and D'Mello, has a alleged forum selection clause permitting suit in Colorado.[20] Without purposeful contact with Colorado, this court lacks personal jurisdiction over Stanley, a person who has little contacts with Colorado. Indeed, plaintiff's only contention regarding Colorado is that plaintiff's business resides in Colorado.[21] Plaintiff has not alleged any act by a defendant resulted in a purposeful contact with Colorado.

B. Motion to Dismiss Based on Subject Matter Jurisdiction Of FRCP 12(b)(1).

1. Burden of Proof

"On a motion invoking sovereign immunity to dismiss for lack of subject matter jurisdiction, the plaintiff bears the burden of proving by a preponderance of evidence that jurisdiction exists." *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76, 84 (2d Cir. 2001); *see also, United States ex rel. Stone v. Rockwell International Corp.*, 282 F.3d 787, 797-98 (10th Cir. 2002). Where a motion to dismiss goes beyond the complaint's allegations, the court does not "presume the truthfulness of the complaint's factual allegations but has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolved disputed jurisdictional

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17 Declaration of Ryan Stanley, ¶¶ 3 and 4.
18 Declaration of Ryan Stanley, ¶ 5.
19 Declaration of Ryan Stanley, ¶¶ 6 and 7.
20 Notably, BMG fails to attach a copy of the EULA, which plaintiff claims contains the forum selection clause.
21 Cplt. ¶ 4. In fact, BMG "invoiced" the Casino in Coarsegold, CA. Cplt. ¶¶ 23 and 66.

facts." *E.F.W. v. St. Stephen's Indian High School*, 264 F.3d 1297, 1303 (2001); *see also, Holt v. United States*, 46 F.3d 1000, 1002-03 (10th Cir. 1995).

2. Elements

(a) Damages Claims

Plaintiff must allege facts which support subject matter jurisdiction over a federally recognized tribe; tribes are subject to suit under two circumstances: "where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998). Otherwise, "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Kiowa Tribe of Okla.*, 523 U.S. at 760. Additionally, an agent or employee of a Tribe is protected from suit for damages under the sovereign immunity doctrine when acting within the course and scope of his duties. *Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006); *Tenneco Oil Co. v Sac & Fox Tribe of Indians*, 725 F.2d at 574; *see also, Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-80 (9th Cir. 1985). BMG concedes throughout its Complaint that Stanley acted within the course and scope of his employment and would therefore be protected by the sovereign immunity.[22]

(b) Declaration and Injunctive Relief Claims

If a plaintiff seeks declaratory and injunctive relief, plaintiff must properly plead those causes of action against the tribe's individual employee acting in his official capacity. *Bassett v. Mashantucket Pequot Museum & Research Center, Inc.*, 221 F. Supp. 2d 271, 278-279 (D. Conn. 2002); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. at 59. There are at least two

[22] Cplt. ¶¶ 8, 9, 14 and 75.

qualifications to obtaining injunctive relief: a plaintiff must plead (1) that the law under which it seeks injunctive relief applies substantively to the agency; and (2) that it has a private cause of action to enforce the substantive rule. *Garcia v. Akwesasne Housing Authority*, 268 F.3d at 88. In addition, plaintiff must satisfy the four-prong test for obtaining injunctive relief "(1) that it has suffered an irreparable injury; (2) that remedies at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interested would not be disserved by a permanent injunction." *eBay, Inc. v. Mercexchange, LLC*, 126 S. Ct. 1837, 1839 (2006). Even if plaintiff is able to prove existence of a valid Copyright, and a violation of the Copyright Act, an injunction does not automatically follow. *Id.* at 1840.

3. Elements Not Supported by the Complaint

(a) Damages Claims

BMG failed to allege that: (1) Congress has affirmatively abrogated the rule of sovereign immunity, or (2) the Tribe has unequivocally waived sovereign immunity. BMG unequivocally pleads that defendant Stanley acted within the course and scope of his employment and, therefore, he is protected by the Tribe's sovereign immunity.[23]

Plaintiff did not and cannot plead that Congress affirmatively waived tribal sovereign immunity for recovery based on common law or for copyright and trademark infringement (*see Bassett*, 221 F. Supp. 2d at 272-73) or under the RICO Act (*see Buchanan v. Sokaogon Chippewa Tribe*, 40 F. Supp. 2d 1043, 1047-48 (E.D. Wis. 1999)). These cases reflect the

[23] Cplt. ¶¶ 8, 9, 14 and 75.

established law that Congress must specifically authorize suit against Indian tribes in a statute for the tribe's sovereign immunity to be waived. *Kiowa Tribe of Okla.*, 523 U.S. at 754, 758.

BMG did not and cannot plead that the Tribe unequivocally waived sovereign immunity. A tribe's waiver must be unequivocal, that is, an express waiver of sovereign immunity. *Kiowa Tribe of Okla.*, 523 U.S. at 754. In fact, the Tribe has adopted specific guidelines for the waiver of sovereign immunity under its Constitution, Resolution No. 2002-11 which creates CEDA, Tribal Compact with the State of California, and Tribal Gaming Ordinance. *See Winnebago Tribe of Kansas v. Kline*, 297 F. Supp. 2d 1291, 1303-04 (D. Kan. 2004) (such written, established guidelines for waiver of sovereign immunity were sufficient to plead that the plaintiff tribe had a claim of sovereign immunity). In each instance, the Tribe safeguards its sovereign immunity, requiring an affirmative action to specifically waive sovereign immunity. Alleged assent to a EULA which allegedly contains a forum selection clause by a tribal employee simply does not rise to the level of an affirmative waiver of tribal sovereign immunity. Notably, BMG does not allege that the Tribe affirmatively waived its sovereign immunity. Therefore, as a matter of law, BMG's claims for Conversion, Misappropriation, Fraud, and Unfair Competition fail because of the Tribe's sovereign immunity.

(b) Declaratory and Injunctive Relief Claims

BMG fails to plead equitable relief causes of action against Stanley under *Garcia v. Akwesasne Housing Authority*. Namely, plaintiff must plead that the laws under which BMG seeks injunctive relief apply substantively to the Tribe, Casino, CEDA, and Stanley; and that BMG has a private cause of action to enforce these laws. *Garcia v. Akwesasne Housing Authority*, 268 F.3d at 88. BMG must also plead that it seeks to enjoin Stanley and that it is

entitled to an injunction against Stanley. *Id.; see also, Bassett v. Mashantucket Pequot Museum and Research Center, Inc.*, 221 F. Supp. 2d at 278-79. BMG does not plead the requisites for prospective injunctive relief because it fails to plead that the injunction relief sought can be enforced and that the proper vehicle of enforcement includes Stanley. *See e.g., Bassett v. Mashantucket Pequot Museum and Research Center, Inc.*, 221 F. Supp. 2d at 278-79. Furthermore, plaintiff fails to state a claim under the Copyright Act for which injunctive relief can be sought. Therefore, BMG's Complaint fails as a matter of law under FRCP 12(b)(1).

C. Motion to Dismiss Based on Improper Venue Under FRCP 12(b)(3).

1. Burden of Proof

"'Once venue is attacked, the plaintiff bears the burden to show proper venue.'" *Andrean v. Secretary of the United States Army*, 840 F. Supp. 1414, 1422 (D. Kan. 1993). See also *Ervin & Assoc., Inc. v. Cisneros*, 939 F. Supp. 793, 796 (D. Colo. 1996).

2. Elements

BMG has premised subject matter jurisdiction on both diversity of citizenship and federal question. Under both diversity and federal question jurisdiction, venue is proper, where all defendants reside in the same state, in a district where any defendant resides (28 U.S.C. §§ 1391(a)(1) and 1391(b)(1)); or in a district in which a substantial part of the events or omissions on which the claim is based occurred (28 U.S.C. §§ 1391(a)(2) and 1391(b)(2)). If neither of these two prongs is met, an action may be brought in any district in which any defendant is subject to personal jurisdiction. 28 U.S.C. §§ 1391(a)(3) and 1391(b)(3).

The essential element in each provision of RICO is activity that in some way relates to an "enterprise." ***Plaintiff fails to identify any enterprise.***

Worse, plaintiff alleges that the Casino, individuals Stanley, D'Mello, and Livingston, the Tribe, and CEDA all violated all three of sections 1962(b), (c) & (d).[27] This is throwing the RICO statutes into a blender. Stanley cannot discern, conscientiously, and in good faith, which of the possible permutations BMG has in mind. BMG's Complaint must be dismissed as "shotgun" pleading. For the foregoing reasons, BMG's Complaint must be dismissed. In the alternative, BMG should be required to provide a more definite statement of its claim.

III. JOINDER IN CO-DEFENDANTS' ARGUMENTS

Stanley joins in motions made by defendants Tribe, Casino, CEDA, and Livingston.

IV. CONCLUSION

For the foregoing reasons, Stanley respectfully requests this court dismiss BMG's Complaint in its entirety.

DATED: October __, 2006

Respectfully submitted,

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[27] Cplt. ¶¶ 52-163.

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October, 2006, a true and correct copy of the foregoing **BRIEF IN SUPPORT OF DEFENDANT RYAN STANLEY'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM OR, IN THE ALTERNATIVE, FOR CHANGE OF VENUE** was served electronically to:

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 08-1298, 08-1305 & 08-1317

BREAKTHROUGH MANAGEMENT GROUP, INC.
v.
CHUKCHANSI GOLD CASINO AND RESORT, ET AL.

APPELLEE/CROSS-APPELLANT'S MEMORANDUM BRIEF

ATTACHMENT F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 06-cv-01596-MSK-PAC

BREAKTHROUGH MANAGEMENT GROUP, Inc., a Colorado Corporation,

Plaintiff,

v.

CHUKCHANSI GOLD CASINO AND RESORT, an entity organized under the laws of The Picayune Rancheria Of The Chukchansi Indians;
JEFF LIVINGSTON, an adult individual;
PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS, a federally-recognized Indian tribe;
THE CHUKCHANSI ECONOMIC DEVELOPMENT AUTHORITY, an entity organized under the laws of The Picayune Rancheria Of The Chukchansi Indians;
RYAN STANLEY, an adult individual;
VERNON D'MELLO, an adult individual;

Defendants.

PLAINTIFF'S RESPONSE TO DEFENDANTS CHUKCHANSI GOLD CASINO AND RESORT, PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS, AND THE CHUKCHANSI ECONOMIC DEVELOPMENT AUTHORITY'S MOTION TO DISMISS

Plaintiff Breakthrough Management Group, Inc. ("BMG"), through undersigned counsel, responds in opposition to Defendants Chukchansi Gold Casino and Resort ("Casino"), Picayune Rancheria of the Chukchansi Indians ("Tribe"), and the Chukchansi Economic Development Authority's ("CEDA," collectively, "Tribal Defendants") Motion To Dismiss.

The Tribal Defendants' 5 page motion to dismiss and 13 page brief fails to conform with the rules of this Court.[1] MSK Civ. Practice Standard § V(A). The burden of proof is on the Defendants in contesting this Court's jurisdiction because of the existence of forum selection clauses in the Agreements. M/S Breman v. Zapata Offshore Co., 407 U.S. 1, 10 (1972) (holding "forum selection clauses are *prima facie* valid, and a party contesting that presumption bears a heavy burden of proof"). In a 12(b)(1) motion to dismiss, the Court shall accept as true "all well-pleaded facts in the complaint as distinguished from conclusory allegations." Smith v. Plati, 258 F.3d 1167, 1174 (10th Cir. 2001) (citation omitted). Defendants "may also go beyond the allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends," but where, as here, "the jurisdictional question is intertwined with the merits of the case, the issue should be resolved under 12(b)(6) or Rule 56." Wheeler v. Hurdman, 825 F.2d 257, 259 (10th Cir. 1987) (citations omitted). In a 12(b)(6) motion, the Court must accept all of BMG's well-plead allegations as true and BMG's Amended Complaint should only be dismissed if BMG can prove no set of facts entitling it to relief. Tri-Crown, Inc. v. American Fed. Sav. & Loan Ass'n, 908 F.2d 578, 582 (10th Cir. 1990).

Statement of Facts

Defendant Casino purchased a single-person, user license to BMG's eChampion® class, and Defendant Ryan Stanley ("Stanley"), a Casino "Director," accepted the terms of the end-user license agreement (the "eChampion Agreement") on behalf of the Casino. (Am. Complaint, ¶¶ 21-27 & 31; eChampion Agreement, Ex. F). The Casino also purchased a single-person, user

[1] Defendants did not file any request to exceed the 15 page limit. In addition, Defendants did not confer with BMG prior to filing its 12(b)(6) motion, as is required by this Court's Rules, and BMG could have cured the alleged defects through an amendment. See BMG's Response, Sections IV & V. Defendants also improperly attached copyright search results in support of their 12(b)(6) claim concerning BMG's copyright infringement claims.

license to BMG's eBlack Belt class, and Defendant Vernon D'Mello ("D'Mello"), a manager at the Casino, accepted the terms of the end-user license agreement (the "eBB Agreement") on behalf of the Casino. (Am. Complaint, ¶¶ 65, 67, 70; eBB Agreement, Ex. G). Under both the eChampion Agreement and the eBB Agreement, Defendant Casino consented to jurisdiction of Colorado courts. (eChampion Ag., , Ex. F; eBB Ag., §12, Ex. G; Am. Complaint, ¶¶ 30 & 73).

Using the illegally captured portions of BMG's eChampion class, Defendant Casino created audio/visual works, which it used to train 2/3 of its over 1,400 employees. (Affidavit ("Aff.") of Ms. Sowell, ¶¶ 10-28 & 40, Ex. A). Defendants CEDA and the Tribe knowingly induced, caused, and materially contributed to the torts alleged in the Complaint, as well as supervised and/or had the ability to control the tortfeasors. (See e.g., Am. Complaint, ¶¶ 103-07 & 133-37). Defendants also participated in a conspiracy to commit those acts. (Id., ¶ 15).

Argument

I. THE CHUKCHANSI DEFENDANTS WAIVED ANY IMMUNITY THEY MAY HAVE HAD.

Tribal immunity can be waived by a written agreement. C & L Enter., Inc. v. Citizen Band Potawatomi Indian Tribe, 532 U.S. 411 (2001). In C & L, the Court held that the tribe waived immunity when it entered into an agreement containing an Oklahoma choice of law clause and vague consent to arbitration. The Supreme Court found that the tribe had waived immunity despite the fact that the contract contained no explicit language consenting to either (i) litigation in a foreign jurisdiction or (ii) waiver of tribal immunity. Indeed, the parties in C&L merely consented to arbitration pursuant to AAA rules, and those rules (which were not listed in the contract) provided that the enforcement of any awards could be made "in any court having jurisdiction thereof." Id. at 414. While the C & L Court acknowledged that a waiver of tribal

immunity must be "explicit," it rejected the notion that an agreement must use magic words like "waiver" or "immunity." C & L, 532 U.S. at 420-21; see also Sakaogon Gaming Enter. Corp. v. Tushie-Montgomery Assoc., Inc., 86 F.3d 656, 659-60 (7th Cir. 1996) (finding "[t]he term 'sovereign immunity' is a technical legal term, and anyone who knows what it means can also understand the arbitration clause").

In the wake of C & L, courts have consistently held that forum selection clauses, including consents to arbitration, are sufficiently "explicit" to waive of tribal immunity. See Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe, 107 P.3d 402, 407 (Colo. Ct. App. 2004); Smith v. Hopeland Band of Pomo Indians, 115 Cal. Rptr. 2d 455, 459 (Cal. Ct. App. 2002). The same rule of allowing waiver of immunity through a forum selection clause has been applied to foreign sovereigns. Restatement (Third) Foreign Relations Law § 456 & cmt. a (1987) (noting that "if the state has consented to jurisdiction of a court of a State of the United States, the action may go forward in that court"). Further, a mere inclusion of a choice of law provision – standing alone - has been held sufficient to constitute a waiver of tribal immunity. Building Inspector and Zoning Officer of Aquinnah v. Wampanoag Aquinnah Shellfish Hatchery Corp., 818 N.E.2d 1040 (Mass. 2004) (finding that an agreement "subject to the same laws, as any other Massachusetts corporation" constituted a waiver of tribal immunity).

Here, the Casino contractually consented to both Colorado law and the jurisdiction of Colorado courts on terms far more explicit than the waiver at issue in C & L. The eChampion Agreement, for instance, provided that the Casino could be sued in Colorado: "You understand that you will be held liable for monetary damages for any such wrongful actions you undertake,

and agree to venue in the State of Colorado." (eChampion Agreement, Ex. F). Section 12 of the eBB Agreement has a more detailed consent to jurisdiction. (eBB Agreement, § 12, Ex. G).

A. The Casino Is Bound By The Waiver Because Stanley And D'Mello Had Authority To Enter Into The Agreements.

Stanley and D'Mello had actual authority to bind the Casino to the eChampion Agreement and the eBB Agreement. The Casino made their authority clear when it designated Stanley as a "Director" and statutory "Key Employee" of the Casino and D'Mello when it named him as a manager and a "Key Employee."[2] Cal. Bus. & Prof. Code §§ 19801(h), 19805(t), & 19854; Aff. M. Sowell, ¶¶ 4-5, Ex. A; August 3, 2006 California Gaming Commission Notice, ¶ 19(s), Ex. H; Am. Complaint, ¶¶ 9-10.

1. Tribal Laws Have No Bearing On The Casino's Waiver Of Immunity.

The waiver of immunity issue in this case is governed by federal law, not the Tribe's law. The procedural formalities contained in Tribe's Constitution or ordinances are irrelevant. See Smith, 115 Cal. Rptr. 2d at 462; Waburton/Buttner v. Superior Ct., 127 Cal. Rptr. 2d 706, 720 (Cal. Ct. App. 2002) (holding that tribal law is "not self-enforcing or definitive").

The U.S. Supreme Court has long recognized that immunity cases involving foreign sovereigns are "instructive" in deciding waivers of tribal immunity waiver, and the body of foreign sovereign case law makes clear that a foreign sovereign's waiver of immunity cannot be decided based on foreign law. See Kiowa Tribe of Okla. v. Manufacturing Tech., Inc., 523 U.S. 751, 759 (1998); C & L, 532 U.S. at 421 n.3; Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc., 179 F.3d 1279, 1298 (11th Cir. 1999); Tribal Defendants' Brief, at 7 (relying on foreign

[2] As Mr. D'Mello appears to have been avoiding service of process, little else is known about his position while employed at the Casino. The California Gaming Commission would not produce any documents on him pursuant to a California Public Records Act request. See Response to Public Records Act Request, attached as Exhibit I.

sovereign immunity cases). The court in Aquamar, for instance, held that the Government of Ecuador had waived immunity despite failing to comply with the procedural requirements for a waiver under Ecuadorian law. Aquamar, 179 F.3d at 1298. The Aquamar court recognized that if U.S. Courts were required to interpret foreign laws to determine if a waiver was effective, "both the foreign sovereigns and the parties involved in litigation with them could abuse such a rule" and "would require lengthy, unpredictable, and frequently inconclusive inquiries into conflicting interpretations of foreign law...." Id. The case at bar is illustrative of the Aquamar Court's concern, where the Tribal Defendants insist that BMG's claims fail because it did not comply with a "confidential" tribal Constitution and ordinances that it kept secret and that could not be obtained either by contacting the Tribe, through searching the Native American Law library, or making an official Public Records Request.

Although Aquamar involved a foreign sovereign, its analysis is applicable and has been used in tribal immunity cases. See e.g., Smith, 115 Cal. Rptr. 2d at 459. In Smith, tribal law authorized immunity waivers only through either a resolution or an ordinance passed by the tribal council, nevertheless, the Court found that tribal law was irrelevant in deciding whether immunity was properly waived. Id.; see also Waburton/Buttner, 127 Cal. Rptr. 2d at 711.

2. Defendants Are Estopped From Relying On Hidden Tribal Laws.

Before BMG ever threatened to file this suit, it made two unsuccessful attempts to obtain copies of the Tribe's laws from the Tribe. But the Tribe insisted its Constitution was "Confidential" and could not be disclosed. (Aff. of T. Walsh, ¶ 4, Ex. E). After the Tribe refused to produce its "Confidential" Constitution, BMG's counsel attempted to obtain copies of the Tribe's constitution and laws from The National Indian Law Library ("NILL"), a public law

library devoted to federal Indian and tribal law (which according to its online catalog the "library has more than 500 constitutions, 280 codes, and 50 compacts"). (Print out from the NILL Catalog, Ex. J). Despite its vast collection of Native American laws and Constitutions, the Library does not have either the Tribe's Constitution or the CEDA Ordinance. (Aff. of M. Pappalardo, ¶ 4, Ex. D). The NILL librarian advised BMG's counsel that the Tribe's Constitution was one of the few tribal Constitutions that it did not have and he was unaware of any way to obtain a copy of the Tribe's laws other than making a request to the Tribe. (Id.). BMG, of course, had already tried and failed to obtain a copy from the Tribe. Finally, BMG served a Public Record Act request upon the California Gaming Commission, which also refused to produce any documents. (Response to Public Records Act Request, Ex. I).

It is axiomatic that enforceable laws must be available and open to public view, so that they can serve as shining guideposts for proper action; not a hidden trap to be sprung in the hope of reversing an immunity waiver that is only later undesired. Courts routinely refuse to enforce vague and ambiguous laws. Here, the law was not merely vague, it was completely concealed. Defendants, therefore, should be estopped from relying on what they refuse to disclose.

3. Conflict Of Laws Principles Militate Against The Application Of Tribal Law.

While the Tribal Defendants urge that the waiver of immunity in this case was ineffective under tribal law, the eBB Agreement stipulates that Colorado law, not tribal law, applies. Moreover, conflict of law principles mandate that result. District courts, sitting in diversity, must follow the choice of law rules of the forum state. Klaxon v. Stentor Mfg. Co., 313 U.S. 487, 497 (1941)). Colorado has adopted the Restatement (Second) of Conflict of Laws to resolve conflict of laws issues. Wood Bros. Homes, Inc. v. Walker Adjustment Bureau, 601 P.2d 1369 (Colo.

1979); Dworak v. Olson Constr. Co., 551 P.2d 198, 200 (Colo. 1976). The Restatement (Second) of Conflict of Laws ("Restatement") provides that the "law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue." Restatement § 187 (1989).

Even in the absence of a choice of law provision, conflict of laws principles similarly mandate that Colorado law - not tribal law - be applicable in this case. See Restatement § 188. Under Section 188 of the Restatement, courts are directed to look at the law of the state that has "the most significant relationship to the transaction and the parties," and in particular:

> (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties. These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Id. Here, the place of contracting is Colorado for the agreements contain Colorado choice of jurisdiction clauses and the Casino accepted the agreements BMG by sending electronic messages to BMG employees and BMG's servers, both located in Colorado. (Aff. of J. Schneider, ¶¶ 10 & 27, Ex. B). The place of negotiation was also Colorado because the Casino contacted BMG's Colorado office without any solicitation to make the purchases. (Aff. of M. Vargas, ¶¶ 3-7 & 15, Ex. C). Likewise, the place of performance was located in Colorado because Casino employees attended two weeks of in-person classroom training in Denver and the online materials the Casino employees accessed were housed on servers located in Colorado. (Id. at ¶¶ 9-14; Aff. of J. Schneider, ¶ 27, Ex. B). The subject matter of this dispute is also located in Colorado for BMG's audio/visual work, the eChampion and eBlack Belt classes, are

physically located in Colorado in a fixed medium of expression that are broadcast from servers located in Colorado. Finally, BMG's principal place of business and state of incorporation is Colorado. With respect to the Casino's "place of business," at all relevant times, the Casino was not located on "Indian Lands," as defined by 25 U.S.C. §2703(4) and, instead, was located in California.[3]

4. No Known Tribal Law Limits Waivers Of Immunity By Defendant Casino.

The Tribal Defendants have not presented any tribal Constitution or ordinance that expressly limits how the Casino may waive any immunity, and thus, the waivers in this case do not violate any tribal law. The Casino is a private business enterprise, which is a legal entity that is separate and distinct from both the Tribe and CEDA. Article V of the Tribe's Constitution only addresses waiver of immunity by the Tribe – not waiver by the Casino or CEDA. The Tribe also enacted an Ordinance ("the CEDA Ordinance") that sets forth the requirements of how the separate legal entity CEDA (not the Casino) may waive immunity, which allows it to waive immunity by contract on behalf of itself and the Tribe. (CEDA Ordinance, § 5(k)).

It is also noted that Article V(R) of the Tribe Constitution merely sets forth the powers of the Tribal Council, including the power of the Council to waive immunity – but does not limit the ways that the Tribe or the Casino may waive immunity. If the Tribe intended to so restrict immunity waivers, then the Tribe's Constitution would have included provisions, such as one that states any waiver of tribal immunity "shall only" be made by a majority vote of the Council. Also, Article V of the Tribe's Constitution only implicates waiver of immunity in tribal courts,

[3] Defendants conclusory statement that the Casino is situated on "Indian Lands" fails to address the fact that the land fails to meet the statutory definition of "Indian Lands" under 25 U.S.C. §2703(4), which requires the land to be either (i) held in trust by the federal government or (ii) subject to restriction against alienation by the U.S. government. BMG requests that the Court take judicial notice that neither facts are present with that property.

and not in Federal courts.[4]

5. **Public Policy Favors Finding A Waiver Of Immunity.**

As a casino and resort with over three hundred and fifty million dollars in annual revenues, the Casino is almost certainly a party to a large number of contracts. And as evidenced by this case, few, if any, of those contracts were ever subject to vote by the Tribal Council for an immunity waiver. Thus, if the Court finds that the Tribal Council must approve waivers of immunity in any contract with the Casino, it will effectively render every Casino contract illusory, for the contracts will not be enforceable in any jurisdiction. There is no policy in support of that result. Rather, policy considerations warrant allowing the Casino to freely waive immunity "since the harder it is for a tribe to waive its sovereign immunity the harder it is for it to make advantageous business transactions." Sakaogon, 86 F.3d at 660.

B. Stanley And D'Mello Had Apparent Authority To Waive Immunity.

Even if Stanley and D'Mello lacked actual authority to waive immunity, they had apparent authority to do so. Stanley was a "Director" and a statutory "Key Employee" of the Casino, and D'Mello was a manger and believed to be statutory "Key Employee." Under Colorado law, the doctrine of apparent authority applies when determining waivers of tribal immunity. Rush Creek, 107 P.3d at 408; c.f. Restatement (Third) Foreign Relations § 311(2) & cmt 4 (noting that the "[d]ecision of the Permanent Court of International Justice support[s] the rule that a state is bound by apparent authority where lack of authority is not obvious to outside

[4] While Section 12 of the CEDA Ordinance expressly limits how Defendant CEDA may waive immunity "in any state, federal, or tribal court," the Tribe's Constitution does not indicate that its provisions deals with waivers in foreign jurisdictions - like this Court - and thus should not be so interpreted.

parties"); Aquamar, 179 F.3d 1279.[5]

The Tribal Defendants did not bother to cite the controlling authority of Rush Creek, instead relying on the earlier World Touch Gaming, Inc. v. Massena Mgmt., LLC, 117 F. Supp. 2d 271 (N.D.N.Y. 2000) decision. However, World Touch Gaming is inapposite. Indeed, the business that contracted with the tribe in World Touch Gaming knew or should have known that the negotiating tribe member had no authority to waive immunity without a vote of the tribe:

> as a sophisticated distributor of gaming equipment that frequently deals with Indian gaming enterprises, World Touch should have been careful to assure that either the Management Company had the express authority of the Tribe to waive sovereign immunity, or that the Tribe itself expressly waived sovereign immunity with respect to the Sales and Lease Agreements. World Touch is not a novice in matters relating to Indian gaming enterprises and Indian sovereign immunity, and cannot now rely upon naiveté to expand the reading of the Management Agreement to encompass authority to waive sovereign immunity.

Id. (internal footnote omitted). BMG, on the other hand, had never previously contracted with a Native American entity. (Aff. J. Schneider, ¶ 23, Ex. B; Aff. M. Vargas, ¶ 21, Ex. C).

C. The Casino Ratified the License Agreements And Estoppel Applies.

Even if the validity of the license agreements is disputed, a party may ratify a contract that was not authorized. Jones v. Dressel, 623 P.2d 370, 374 (Colo. 1984); Restatement (Second) of Agency § 82 (1958); Restatement (Second) of Contracts §§ 7, 85 & 380(1) (1981). Moreover, "[a] principal who has accepted the benefits of a contract made by his agent may not ratify only part thereof and reject the rest." Lewis v. Martin, 492 P.2d 877, 881 (Colo. Ct. App. 1971) (citations omitted). Indeed:

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[5] The Tribal Defendants referred the Court to three cases on foreign sovereign immunity as support for their claim that apparent authority is not applicable here, but none of the cases will bear the weight of such a claim. See Case v. Terrell, 78 U.S. 199, 202 (1870) (not addressing apparent authority but instead ruling on whether a court appearance waives immunity); Carr v. United States, 98 U.S. 433, 438 (1878) (same); United States v. Village of Little Chute Wisc., 248 F.2d 228, 231 (7th Cir. 1957) (same).

> an act or contract of a corporation which is within its general corporate powers, which is neither wrong in itself nor against public policy, but which is defective from a failure to observe in its execution a requirement of law enacted for the benefit or protection of a third party or parties, is voidable only. Such an act or contract is valid until avoided, not void until validated, and it is subject to ratification and estoppel.

Mackenzie v. Taggert, 73 P.2d 978, 981 (Colo. 1937) (citations omitted).

Here, the Casino ratified the License Agreement by, among things, (i) mailing three checks to BMG drawn on accounts in the Casino's name, (ii) having a number of its employees access the 12 eChampion modules over 98 times for over 103 hours, (iii) using BMG's works to train 2/3 of its employees, and (iii) having its employees access the eBlack Belt class over 67 hours. (Aff. of M. Sowell, ¶¶ 10-12 & 40, Ex. A; Aff. of J. Schnieder, ¶¶ 14 & 19, Ex. B; Aff. of C. Taylor, Ex. K). Also, BMG reasonably relied to its detriment that D'Mello and Stanley had authority to enter into the agreements, and the Tribal Defendants should be estopped from denying their validity. (Aff. of J. Schneider, ¶¶ 25-26, Ex. B).

III. DEFENDANTS CASINO AND CEDA HAVE NO IMMUNITY BECAUSE THEY ARE NOT GOVERNMENT ENTITIES.

An entity formed by a tribe will take "on tribal immunity only if the tribe or tribes, the sources of sovereign immunity, are the real parties in interest." Runyon v. Association of Village Council Presidents, 84 P.3d 437, 440 (Alaska 2004) (footnote omitted). Under the test set forth by the Runyon court, an entity owned by a tribe will not have immunity "if a judgment against it will not reach the tribe's assets or if it lacks the 'power to bind or obligate the funds of the [tribe]...." Id. at 440 (footnote omitted). In Runyon, the court found that the entity owned by the tribes enjoyed no immunity because the entity's owners were not liable for the debts of the entity. Id. at 441; see also Wright v. Colville Tribal Enter. Corp., 111 P.3d 1244, 1250 (Wash. Ct. App. 2005); Dixon v. Picopa Contr. Co., 772 P.2d 1104, 1109-10 (Ariz. 1989). In

Wright, the court adopted the Runyon test and held that entities owned by tribes had no immunity where the entity's charters had provisions that stated that the entities could not "[o]therwise bind or obligate the Tribes" thereby insulating tribes. 111 P.3d at 1250 & n.5. The court in Dixon similarly held that an entity owned by a tribe had no sovereign immunity because (i) the entities had liability insurance and (ii) the company's charter insulated the tribe from company debts. 772 P.2d at 1109-10. Here, the Tribal Defendants have acknowledged that the Casino has insurance coverage in this case and appear to be claiming that the Casino cannot bind the Tribe.[6] (Aff. of M. Pappalardo, ¶ 6, Ex. D).

III. THE DRY CREEK EXCEPTION TO IMMUNITIES APPLIES.

An exception to tribal immunity occurs where the dispute (i) involves an issue outside of tribal affairs and (ii) the claim cannot be adjudicated in a tribal court. Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980). Here, BMG is unaware of any tribal court where it can bring its claims. Based on the strong public policies favoring protection of copyrights and trademarks, this Court should maintain jurisdiction – to do otherwise would provide all Native American tribes with a license to infringe on trademarks and copyrights.

IV. BMG HAS PROPERLY PLED A RICO CLAIM.

Tribal Defendants assert in their Motion to Dismiss, but not in their Brief, that government entities, such as "municipalities," are immune from RICO. However, both CEDA and the Casino are non-governmental business entities with non-government functions, and thus, they should not be entitled to enjoy the protections that are afforded to governments under

[6] BMG is in need of additional discovery with respect to CEDA and the Tribe's waiver of immunity, which may be present on such grounds as alter-ego theory or general agency principles. As set forth in BMG's separate motion, BMG requests that it be permitted to take discovery in what should be considered a motion under Rule 56.

Respectfully submitted this 20th day of November, 2006.

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Attorneys for Plaintiff Breakthrough Management Group, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of November, 2006, a true and correct copy of the foregoing **PLAINTIFF'S RESPONSE TO DEFENDANTS CHUKCHANSI GOLD CASINO AND RESORT, PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS, AND THE CHUKCHANSI ECONOMIC DEVELOPMENT AUTHORITY'S MOTION TO DISMISS** was served electronically, addressed to:

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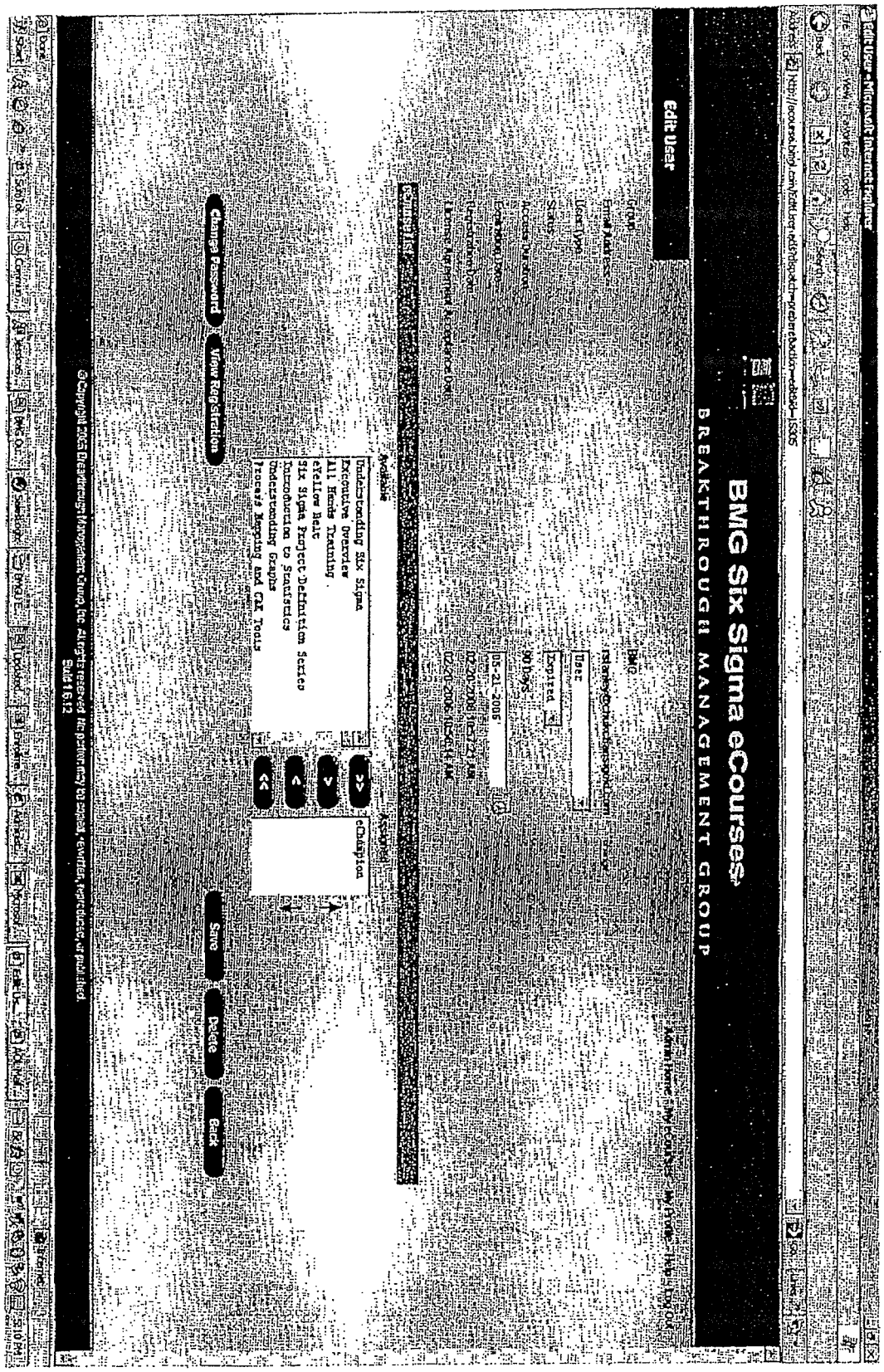
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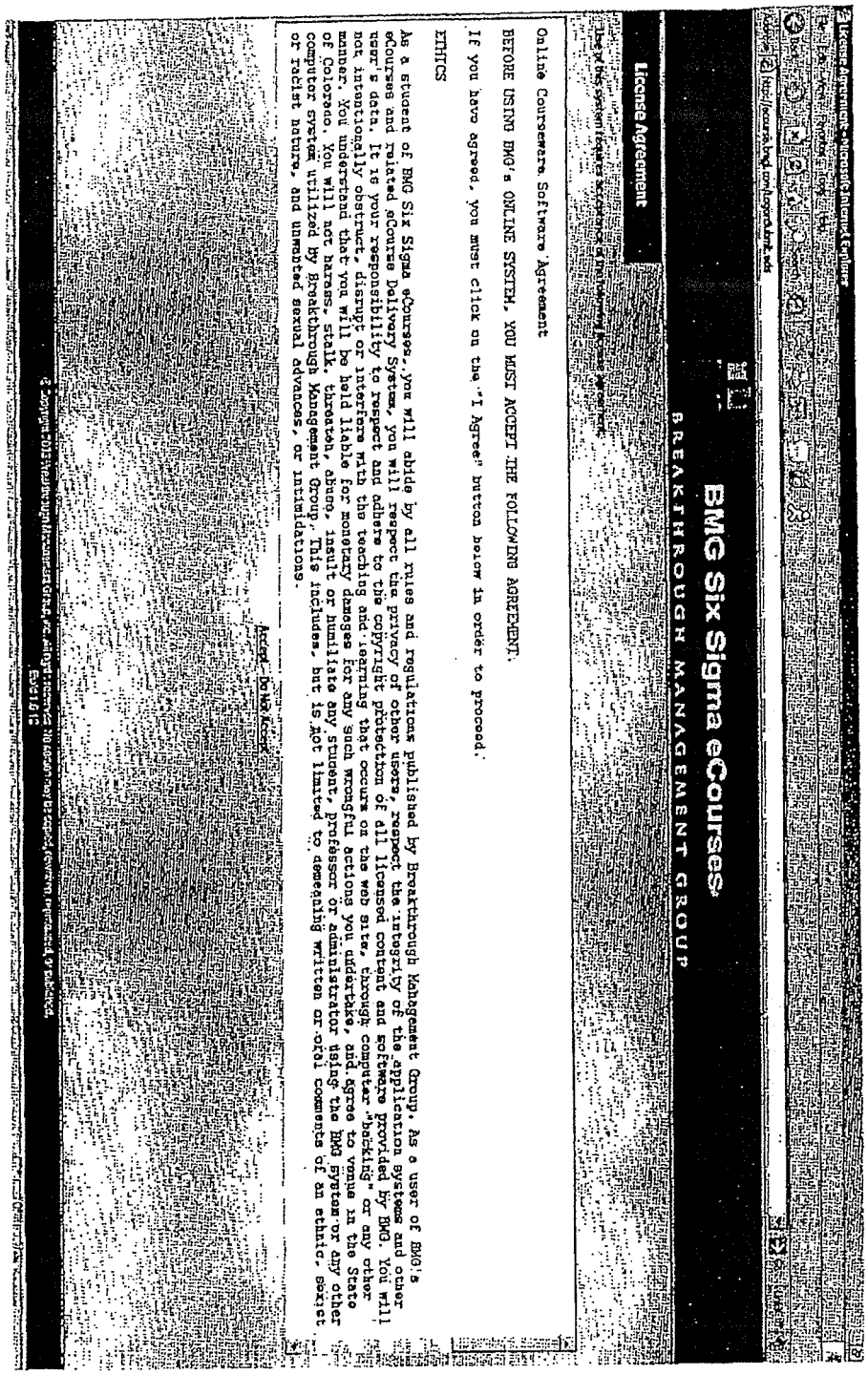
Exhibit F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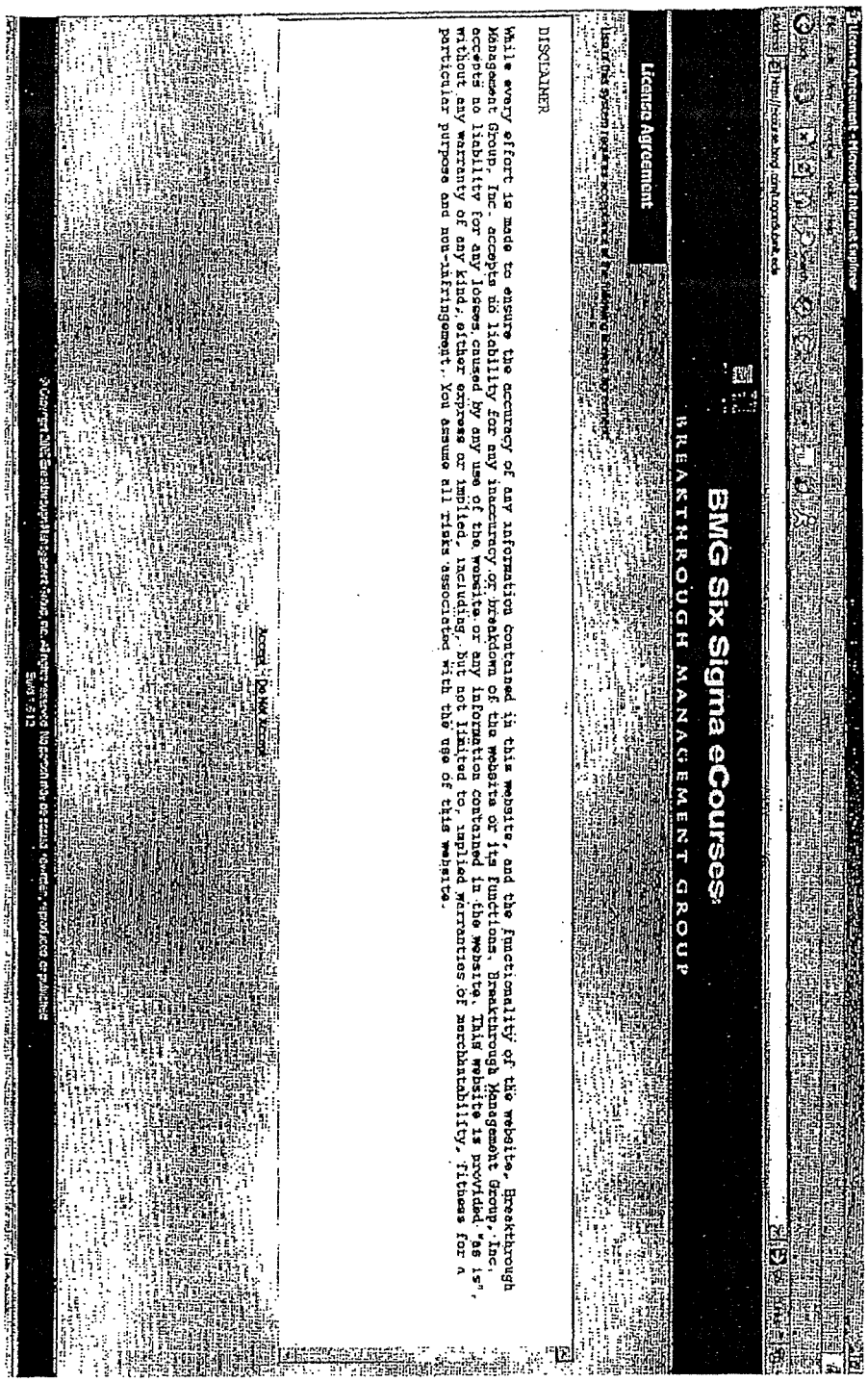
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Exhibit F

From: Support
Sent: Friday, August 11, 2006 2:18 PM
To: Jessica A. Schneider
Subject: FW: ACTION REQUESTED: Enrollment In the new BMGU Online

Jessica received this from Vernon and he also called

From: Vernon D'Mello [mailto:Vernon.D'Mello@chukchansigold.com]
Sent: Friday, August 11, 2006 2:18 PM
To: Support
Subject: RE: ACTION REQUESTED: Enrollment In the new BMGU Online

I ACCEPT the terms of this agreement

Vernon D'mello

Six Sigma Black Belt
Tel: 559 692.5401
Email: vernon.dmello@chukchansigold.com

From: Support [mailto:Support@bmgi.com]
Sent: Thursday, August 03, 2006 4:22 PM
To: Vernon D'Mello
Subject: ACTION REQUESTED: Enrollment In the new BMGU Online

Thursday, August 3, 2006

The new BMGU Online site is now live!

BMG is happy to announce the launch of **BMGU Online**, BMG's new and improved online learning portal, designed to replace our current Web-based systems. The new site includes improved features and a new navigation structure that will greatly enhance your learning experience.

What do I have to do to continue my class?

Exhibit G

Even though most of you have previously agreed to an end user agreement, when we migrate you to the new and improved LMS as a continuing student we will need to have you do it again in a non-automated format. Unfortunately, in the process of migrating you to our new learning portal, your account has been temporarily suspended until we receive this acknowledgement. We have attempted to limit the amount of disruption the launch will cause to you.

If you accept the terms of the agreement, then please send us an email stating: **"I ACCEPT the terms of this agreement."**

After we receive your email acceptance, your account will be reactivated If you are a new student and are unfamiliar with the development of our new site, or if you need a refresher on what the transition means to you, email me at JessicaS@BMGi.com

ELEARNING AGREEMENT

Licensed Course: <Macro1> Chukchansi Gold Casino
eCourse: <Macro2> eBlack Belt

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EXCEPT FOR THE LIMITED DIRECT DAMAGES SPECIFIED ABOVE, TO THE MAXIMUM EXTENT PERMITTED BY LAW, IN NO EVENT SHALL BMG BE LIABLE FOR ANY DAMAGES WHATSOEVER (INCLUDING, WITHOUT LIMITATION, INDIRECT, SPECIAL, INCIDENTAL, EXEMPLARY OR CONSEQUENTIAL OR PUNITIVE DAMAGES, DAMAGES FOR LOSS OF BUSINESS PROFITS OR REVENUES, BUSINESS INTERRUPTION, LOSS OF BUSINESS INFORMATION OR CORRUPTION OR LOSS OF DATA, INACCURACY OF DATA, PROBLEMS ASSOCIATED WITH ANY APPLICATIONS USED IN CONJUNCTION WITH THE eCOURSE, LOSS OF THE USE OF THE eCOURSE, OR ANY ASSOCIATED PRODUCTS OR SERVICES, COST OF SUBSTITUTE GOODS, FACILITIES, OR SERVICES, COST OF CAPITAL, OR OTHER PECUNIARY LOSS ARISING OUT OF OR RELATED TO THIS AGREEMENT) WHETHER OR NOT SUCH DAMAGES WERE FORESEEN OR UNFORESEEN INCLUDING WITHOUT LIMITATION THE USE OF OR INABILITY TO USE THE eCOURSE OR ANY THIRD PARTY eCOURSE, EVEN IF BMG HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

To the maximum extent permitted by applicable law, except as specifically stated in this Agreement, the eCourse and any services are provided and licensed "AS IS." BMG DISCLAIMS ALL OTHER REPRESENTATIONS, WARRANTIES AND CONDITIONS, EITHER EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO IMPLIED REPRESENTATIONS, WARRANTIES OR CONDITIONS OF MERCHANTABILITY, MERCHANTABLE QUALITY, FITNESS FOR A PARTICULAR PURPOSE, DURABILITY, TITLE AND ANY OTHER IMPLIED WARRANTY OR CONDITION ARISING BY STATUTE OR CUSTOM OR USAGE OF TRADE RELATED TO THE eCOURSE. The limited warranties set out in this Agreement give You specific legal rights You may also have other rights that vary by state or province. Some jurisdictions may not allow the exclusion or limitation of implied warranties and conditions. To the extent permitted by law, any implied warranties or conditions relating to the eCourse to the extent they cannot be excluded as set out above are limited to 90 days from the date You first installed any portion of the eCourse on any computer.

BMG SHALL BE LIABLE TO YOU ONLY AS EXPRESSLY PROVIDED IN THIS AGREEMENT BUT, TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, SHALL HAVE NO OTHER OBLIGATION, DUTY, OR LIABILITY WHATSOEVER IN CONTRACT, TORT, OR OTHERWISE TO YOU INCLUDING ANY LIABILITY FOR NEGLIGENCE OR STRICT LIABILITY. THE LIMITATIONS, EXCLUSIONS, AND DISCLAIMERS IN THIS AGREEMENT SHALL APPLY IRRESPECTIVE OF THE NATURE OF THE CAUSE OF ACTION, DEMAND, OR ACTION BY YOU INCLUDING BUT NOT LIMITED TO BREACH OF CONTRACT, NEGLIGENCE, TORT, STRICT LIABILITY OR ANY OTHER LEGAL THEORY AND SHALL SURVIVE A FUNDAMENTAL BREACH OR BREACHES OR THE FAILURE OF THE ESSENTIAL PURPOSE OF THIS AGREEMENT OR OF ANY REMEDY CONTAINED HEREIN.

THE PROVISIONS OF THIS SECTION 9 ALLOCATE THE RISKS UNDER THIS AGREEMENT BETWEEN BMG AND YOU FOR PURPOSES OF THE UNIFORM COMMERCIAL CODE AND OTHER APPLICABLE LAWS. YOU UNDERSTAND THAT BMG'S PRICING IS BASED UPON AND REFLECTS THE ALLOCATIONS OF RISK AND LIMITATIONS OF LIABILITY SPECIFIED HEREIN.

10. **INDEMNITY.** BMG, at its own expense, will defend any action brought against You to the extent that it is based on a claim that any software system used within the scope of this License Agreement infringes any U.S. patent or U.S. copyright, provided that BMG is immediately notified in writing of such claim. BMG shall have the right to control the defense of all such claims, lawsuits and other proceedings. In no event shall You settle any such claim, lawsuit or proceeding without BMG's prior written approval. If, as a result of any claim of infringement against any patent, copyright, license or other property right, BMG is enjoined from using the eCourse, or if BMG believes that the eCourse is likely to become the subject of a claim of infringement, BMG at its option and expense may procure the right for You to continue to use the eCourse, or replace or modify the eCourse so as to make it non-infringing. If neither of these two options is reasonably practicable BMG may discontinue the license granted herein on one month's written notice and refund to You a pro rata portion of the license fees hereunder (based on

Exhibit G

the unused portion of the Term remaining) The foregoing states the entire liability of BMG with respect to infringement of any copyrights or patents by the eCourse or any parts thereof.

11. ENTIRE AGREEMENT. This Agreement shall constitute the exclusive terms and conditions with respect to the licensing of the eCourse and any services under this Agreement, notwithstanding any different or additional terms that may be contained in the form of purchase order or other document used by You in such transaction This Agreement contains the final, complete and exclusive statement of the agreement between the parties with respect to the transactions contemplated herein and all prior written agreements and all prior and contemporaneous oral agreements with respect to the subject matter herein are merged herein. This Agreement may not be amended, supplemented or modified (or any right or power granted hereunder waived) except by written instrument signed by authorized officers of the parties hereto (or in the case of a waiver, signed by the party to be bound), which instrument makes specific reference to this Agreement

12. GENERAL. This Agreement shall be governed by and construed in accordance with the substantive laws of the State of Colorado, U.S.A., without regard to choice of law provisions, except that the United Nations Convention on the International Sale of Goods shall not apply. The parties agree that the sole and exclusive venue for any and all disputes involving, arising out of or related to this Agreement shall be the state and federal courts located within the state of Colorado, County of Boulder. The prevailing party in any litigation arising out of or relating to this Agreement shall be entitled to any award of its reasonable attorneys' fees, expert witness fees, expenses and costs of suit, such fees, expenses and costs to be determined by a court and not a jury. Each party warrants that the person signing or accepting this Agreement is authorized to bind said party If You accepted this Agreement after You initially accessed this Agreement, You acknowledge and agree that this Agreement shall retroactive effect to the date of Your first use. If one or more of the provisions contained in this Agreement is held invalid, illegal or unenforceable in any respect by any court of competent jurisdiction, such holding will not impair the validity, legality, or enforceability of the remaining provisions Failure or delay on the part of any party to exercise any right, remedy, power or privilege hereunder will not operate as a waiver. Sections 2.1, 3, 5, 6, 7, 8, 9, 10, and 12 shall survive the termination or expiration of this Agreement. BMG may supply You with technical data that is subject to export control restrictions. BMG will not be responsible for compliance by You with applicable export restrictions or obligations for such technical data. Each party agrees to comply with any applicable export control laws or regulations.

Exhibit G

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 08-1298, 08-1305 & 08-1317

BREAKTHROUGH MANAGEMENT GROUP, INC.
v.
CHUKCHANSI GOLD CASINO AND RESORT, ET AL.

APPELLEE/CROSS-APPELLANT'S MEMORANDUM BRIEF

ATTACHMENT G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 06-cv-01596-MSK-KLM

BREAKTHROUGH MANAGEMENT GROUP, INC.,
a Colorado corporation,

Plaintiff,

v.

CHUKCHANSI GOLD RESORT AND CASINO, an entity organized under the laws of the Picayune Rancheria of the Chukchansi Indians; JEFF LIVINGSTON, an adult individual; PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS, a federally recognized Indiana tribe; THE CHUKCHANSI ECONOMIC DEVELOPMENT AUTHORITY, an entity organized under the laws of The Picayune Rancheria of the Chukchansi Indians; RYAN STANLEY, an adult individual; and VERNON D'MELLO, an adult individual,

Defendants.

NOTICE OF PROTECTIVE CROSS-APPEAL

NOTICE is hereby given that Breakthrough Management Group Inc. ("Breakthrough Management"), Plaintiff in the above-entitled action, hereby protectively cross-appeals to the United States Court of Appeals for the Tenth Circuit from: (1) the Order entered in this action on September 12, 2007; and (2) the Order entered in this action on August 6, 2008. Breakthrough Management files this notice of protective cross appeal in response to the notice of appeal previously filed by Defendants The Chukchansi Gold Resort and Casino and The Chukchansi Economic Development Authority on August 21, 2008, and the notice of appeal filed by

Defendant Ryan Stanley on August 22, 2008, docketed as Tenth Circuit Appeal Nos. 08 1298 and 08-1305, respectively.

Each of the Appellants filed a motion to dismiss based on tribal sovereign immunity and/or lack of personal jurisdiction. On September 12, 2007, the District Court entered an order that, among other things, rejected Breakthrough Management's argument that Appellants had waived any claim of sovereign immunity by entering into two license agreements with Breakthrough Management. On October 15, 2007, Breakthrough Management filed a motion for reconsideration of portions of the September 12, 2007 order. On August 6, 2008, the District Court entered an order denying Breakthrough Management's motion for reconsideration, but finding that the Appellants could not invoke tribal sovereign immunity.

Breakthrough Management therefore files this notice of protective cross appeal to preserve, as an additional or alternative basis for affirming that portion of the District Court's order of August 6, 2008 finding that Appellants could not invoke tribal sovereign immunity, the issue that Appellants also waived any claim of tribal sovereign immunity by executing the two license agreements with Breakthrough Management.

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DATED this 3th day of September, 2008.

FENNEMORE CRAIG, P.C.

s/Daniel W. Glasser

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Attorney's for Plaintiff/Appellee/Cross-Appellant
Breakthrough Management Group, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2008, I electronically filed the foregoing **Notice of Protective Cross-Appeal** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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