

4th Civil No. D058674

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

THE YAVAPAI-APACHE NATION,

Plaintiff and Appellant,

vs.

IIPAY NATION OF SANTA YSABEL FKA THE SANTA YSABEL
BAND OF DIEGUENO MISSION INDIANS,

Defendant and Respondent.

Respondent's Brief

Appeal from the Superior Court for the County of San Diego
Case No. 37-2010-00068711-CU-BC-EC
The Honorable Randa Trapp, Tel. (619) 456-4015

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE		Court of Appeal Case Number: D058674
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APPELLANT/PETITIONER: The Yavapai-Apache Nation RESPONDENT/REAL PARTY IN INTEREST: Iipay Nation of Santa Ysabel		FOR COURT USE ONLY
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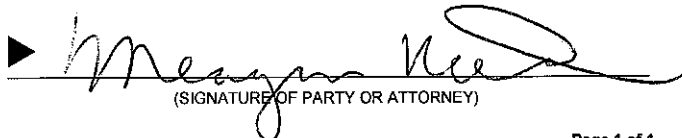
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Date: April 12, 2011

MEAGAN J. REED

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I. INTRODUCTION

May a plaintiff haul a federally-recognized Indian tribe before the courts of the State of California without a clear and unequivocal waiver of that Tribe's sovereign immunity? The Superior Court answered this question correctly when it dismissed Yavapai-Apache Nation's ("YAN") lawsuit for failure to establish jurisdiction due to the lack of any clear and express waiver of Iipay Nation of Santa Ysabel's ("Iipay" or "Tribe") sovereign immunity to the courts of the State of California.

This case is about a federally-recognized Indian tribe that is entitled to sovereign immunity by law, a right which cannot be waived by mere implication or presumption. As such, the well-developed field of Indian law governs the facts of this case. Despite YAN's attempts to convince this Court otherwise, this case is not about a foreign nation, nor is it about the scope of authority of an international official or corporate president. As such, the authority cited by YAN has no application to the case at hand.

When filing an action, the burden of proof lies with a plaintiff to establish that the court's jurisdiction is proper. *See Lawrence v. Barona Valley Ranch Resort* (2007) 153 Cal. App. 4th 1364, 1369. YAN has not met this burden and has, instead, attempted to shift the burden of proof by arguing that Iipay must provide evidence that the acts of its Tribal Chairman are not presumptively valid. However, YAN fails to cite to any applicable law to support this proposition and has ignored relevant tribal law. Instead, YAN borrows heavily from international law and law governing corporate officials, which directly contradicts well-established legal precedent governing waivers of tribal sovereign immunity.

Moreover, with respect to acts of tribal officials, the United States Supreme Court (and Iipay's own tribal law) clearly states that acts of officials waiving sovereign immunity are NOT presumptively valid, a

finding that is completely at odds with the position YAN now takes before this Court. See *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506 (1940). Thus, if this Court were to arrive at such a determination, mainly that acts of a Tribal Chairman are presumptively valid, including purported waivers of the Tribe's sovereign immunity, the Court would be creating entirely new and unprecedented law, overturning the vast controlling legal authority pertaining to waivers of tribal sovereign immunity.

YAN claims that Iipay authorized its Tribal Chairman to enter into the Fourth Amendment and that the evidence shows the Fourth Amendment was executed and approved. However, those facts alone cannot and do not constitute a clear and unequivocal waiver of Iipay's sovereign immunity, a requirement of both federal and state laws. In other words, YAN is asking this Court to imply that Iipay's Chairman had the requisite authority to waive sovereign immunity and that he did waive sovereign immunity despite the fact that there is no clear and unambiguous language executed by the Iipay legislature vesting the Chairman with that authority. Because a waiver of tribal sovereign immunity cannot be implied, presumed or assumed, YAN has failed to demonstrate that a valid waiver existed in order to subject Iipay to suit in California.

The evidence entered into the record clearly demonstrates that tribal law requires the Iipay legislature to expressly vest Iipay's Chairman with the specific authority to waive sovereign immunity, and this evidence, along with the course of dealings between the parties over some four years, demonstrates that the Superior Court did not err in its determination that YAN had the burden of proof that a valid waiver of sovereign immunity existed and that YAN failed to establish proper jurisdiction over the matter and over Defendant Iipay. As such, for this Court to find as a matter of law that the acts of Iipay's Chairman are presumptively valid and resulted in the

waiver of the Tribe's sovereign immunity would result in overruling decades of established Indian law.

Moreover, it is disingenuous for YAN to imply that it would be denied its day in court should this Court affirm the Superior Court's ruling, when it currently is a party to an action before the courts of the State of Arizona involving the same parties and subject matter. (See 4 Appellant's Appendix ("AA") 794:25-795:2.) As such, there is no "prejudicial error" because virtually the same case is before the courts of the State of Arizona, and, further, even if litigation occurred in California, pursuant to the agreements, Arizona law would be applied because the contracts contain Arizona choice of law provisions.¹ As such, YAN would not experience prejudicial error with the dismissal of its complaint before the courts of the State of California because the same action arising from identical documents and between the same parties is currently pending in the courts of the State of Arizona.

II. STATEMENT OF FACTS

A. The Loan Agreement.

Iipay is an Indian tribe located on its reservation in Santa Ysabel, a small rural town within San Diego County. (1 AA 249:14-15.) Iipay attempted to achieve economic self-sufficiency through the development, construction, marketing and operation of a casino pursuant to the Indian Gaming Regulatory Act ("IGRA") 25 U.S.C. § 2701, *et seq.* and its gaming compact with the State of California. (1 AA 249:15-19.) Such attempts included entering into various agreements with YAN, also a federally recognized Indian tribe, and JP Morgan Chase Bank and National City Bank to obtain permanent financing for the construction of a tribal casino

¹ (1 AA 86) ("Section 15.01 Choice of Law. THE LOAN DOCUMENTS ... SHALL BE CONSTRUED IN ACCORDANCE WITH THE INTERNAL LAWS OF THE STATE OF ARIZONA...")

on Iipay Nation's reservation. (1 AA 249:19-23.) The relationship between the parties involves a complex set of transactions wherein various contracts were executed between the parties at different times. (1 AA 249:23-25.) Each contract involves a unique set of jurisdictional provisions, waivers of sovereign immunity, rights and remedies. (1 AA 249:25-26.)

Despite YAN's contention otherwise, it is very much disputed whether the original loan agreement effectively waived Iipay's sovereign immunity. (*See Appellant's Opening Brief*, ("Opening Brief") 2.) There is currently an action in Arizona State court, involving these same parties and same contracts. (4 AA 794:25-795:2.) In the Arizona action, the effectiveness of Iipay's waiver of sovereign immunity contained within the original loan agreement is a central issue in dispute. (4 AA 794:25-795:2.)

B. Iipay's Tribal Law and Motion to Quash.

Furthermore, there is ample evidence in the record explaining Iipay's tribal law as it applies to waivers of sovereign immunity and upon which the Superior Court made its decision to dismiss YAN's complaint. Numerous pieces of Iipay legislation, in conjunction with a Declaration by Iipay's former Chairman, all explain in detail the legislative process required to effectuate a valid waiver of the Tribe's sovereign immunity. (4 AA 789:17-793:10, 793:14-16, 793:17-794:4); (Iipay's General Council Resolution 05-09 (4 AA 812) ("Be it further resolved, that the General Council of the Santa Ysabel Band of Diegueno Mission Indians as the supreme governing body of the Tribe ... consents to the jurisdiction of the Yavapai-Apache Tribal Court ..."); Resolution 05-64 (4 AA 831) ("Be it further resolved, that the General Council of the Santa Ysabel Band of Diegueno Mission Indians as the supreme governing body of the Tribe ... after due notice and discussion, confirms and irrevocably agrees to ... a limited waiver of the Tribe's sovereign immunity..."; Resolution 06-44 (4

AA 882, ¶2) (“Tribal Council was authorized to execute and deliver such documents ... however, **no waiver of the Tribe’s sovereign immunity, consent to binding arbitration, and/or consent to the jurisdiction of any judicial forums may be granted without the approval of the General Council of the Tribe...**”)(emphasis added); Resolution 07-03 (4 AA 890) (“...Tribal Council, approved and the Chairman has executed and delivered Casino Documents that, in certain cases, confirm and approve the Tribe’s: (i) limited waiver of the Tribe’s sovereign immunity...”); Resolution 07-31 (4 AA 862) (“...the Chairman may not waive the Tribe’s sovereign immunity, consent to binding arbitration, and/or to the jurisdiction of any judicial forums without the approval of the General Council of the Tribe in accordance with the custom and tradition of the Tribe.”). This evidence and the statements contained in the declaration of Iipay’s Chairman demonstrates that tribal legislation in the form of a resolution with express language authorizing the Chairman to waive Iipay’s immunity is required before the Chairman may validly waive the Tribe’s immunity and consent to a court’s jurisdiction. (*Id.*) This evidence is also consistent with the formal course of dealing between the two tribes over the four years of financial transactions at issue here: tribal resolutions were executed granting the Chairman authority to waive the Tribe’s immunity through contract. *Id.*

YAN relies heavily upon the fact that the Superior Court sustained its objections to Iipay’s Constitution being admitted into evidence. (Opening Brief 3, 7.) However, YAN incorrectly asserts that *no* evidence was entered into the record requiring approval by Iipay’s legislature. (*Id.* at 3.) Contrary to YAN’s assertions, there is an abundance of evidence that illustrates Iipay’s tribal legislative process needed to effectuate a valid waiver of sovereign immunity. (4 AA 789:17-793:10, 793:14-16, 793:17-794:4; 4 AA 812; 4 AA 831; 4 AA 882, ¶2; 4 AA 862.) Iipay submitted

numerous pieces of tribal legislation in the form of tribal resolutions, the declaration of its former tribal Chairman and established the formal course of dealing between the parties, all evidence that demonstrates the legal process for authorizing a waiver of the Tribe's immunity. (*Id.*)

Consequently, the agreements and the Tribal Resolutions entered into the record not only establish the fact that an amendment to the loan agreement was always accompanied by a Tribal Resolution expressly waiving sovereign immunity, but the record, when viewed in its entirety, clearly establishes a course of dealing between the parties whereby a Tribal Resolution by Iipay's legislature explicitly waiving sovereign immunity always accompanied an amendment to the loan agreements. (4 AA 793:20-27; 5 AA 1109.) When viewed as a whole, the record establishes that the Fourth Amendment was lacking the requisite Tribal Resolution by Iipay's legislature waiving sovereign immunity, as had been the case with all prior executed amendments to the loan documentation. (4 AA 793:20-27.)

Tribal Council Resolution 06-44, explains,

...no waiver of the Tribe's sovereign immunity, consent to binding arbitration, and/or consent to the jurisdiction of any judicial forums may be granted [sic] without the approval of the General Council of the Tribe in accordance with [sic] the [sic] custom and tradition of the Tribe.

(4 AA 882, ¶2) (Emphasis added). This Resolution was executed and signed by all members of Iipay's Tribal Council. (4 AA 884.)

Further, General Council Resolution 07-03, 4 AA 913, ¶1, states:

... the Chairman may not waive the Tribe's sovereign immunity, consent to binding arbitration, and/or consent to the jurisdiction of any judicial forums without the approval of the General Council of the Tribe in accordance with the custom and tradition of the Tribe... (Emphasis added).

Also, General Council Resolution 05-64 states:

BE IT FURTHER RESOLVED, that the General Council of the Santa Ysabel Band of Diegueno Mission Indians as the supreme governing body of the Tribe, on behalf of and in the name of the Tribe ... confirms and irrevocably agrees to ... a limited waiver of sovereign immunity...

(4 AA 831.)

Also noteworthy is the fact that the Superior Court overruled the majority of YAN's objections to the statements contained within the Declaration of Chairman Hernandez, which was proffered in support of Iipay's Motion to Quash. (5 AA 1106.) Therein, Iipay's Chairman referred to the fact that disputes arising under the loan agreements and the loan & guaranty agreements were contracted to take place before YAN tribal court or the courts of the State of Arizona and to be governed by Arizona law and he refers to the accompanying Resolutions authorizing such a waiver of immunity. (4 AA 789:17-792:23.) The Superior Court also admitted direct evidence that the Fourth Amendment "was unaccompanied by legal opinions, certifications and tribal resolutions authorizing the requisite waivers of sovereign immunity as had been the standard practice of the parties throughout the lending relationship." (4 AA 793:24-27.)

In contrast to the extensive tribal law discussed above, LB 07-08, a document that YAN so heavily relies upon to support its assertion that Iipay's Chairman had authority to waive Iipay's sovereign immunity, makes no mention of waiving the Tribe's sovereign immunity. (4 AA 916.) Every agreement entered into between the parties was accompanied by a corresponding resolution executed by Iipay's legislature expressly waiving sovereign immunity *except* the Fourth Amendment. (4 AA 793:24-27.) These documents already admitted into evidence also contain Arizona choice of law provisions. (1 AA 86 ("Section 15.01 Choice of Law.))

Not only did the Fourth Amendment attempt to introduce the California State jurisdiction without a waiver, it attempts to introduce California law without a waiver, waive all of Iipay's defenses, known and unknown, without a waiver, indemnify the contracts drafting attorneys without a waiver, effects major modifications to the Senior Loan Documents and Security Agreement without a waiver, attempts to introduce new payment priorities without a waiver, and authorized payments to a construction contractor pursuant to a settlement agreement without a waiver. (1 AA 196-211.) The Fourth Amendment was inconsistent with the parties' prior acts and well-established course of dealings and is, as a result, a further indication that sovereign immunity was not properly waived. 4 AA 789-793.)

Thus the Superior Court did not err when it concluded, based upon the evidence already entered into the record, that no jurisdiction exists over YAN's action in California state court. 5 AA 1107-1109.) YAN contends that "at most" Iipay established that custom and tradition require approval before the Chairperson waives a tribe's sovereign immunity. (See Opening Brief 25.)

While the October 8, 2008 Iipay Legislation ("LB 07-08") did grant the Chairman the ability to negotiate and execute amendments to casino loan documents, it makes no mention of authorizing Iipay's Chairman to waive the Tribe's immunity to suit in the courts of the State of California. (4 AA 916.)

C. Service.

Proper service of process has not occurred in this case and Iipay has consistently maintained this fact (3 AA 772:21-773:5.) As explained in the Declaration Michelle Baay (3 AA 780-782), which was attached in Support of Iipay Nation's Motion to Quash, because Iipay Nation never waived its sovereign immunity to California state courts, substituted service at the

tribal office and service on the Chairman were insufficient. (1 AA 25:11-288; 3 AA 780-782.)

D. Superior Court's Order.

The Superior Court found that this case presented facts similar the facts presented in *Hydrothermal Energy Corp. v. Fort Bidwell Indian Community Council* (1985) 170 Cal. App. 3d 491, *World Touch Gaming, Inc. v. Massena Management, LLC* (N.D.N.Y. 2000) 117 F. Supp. 2d 271, and *Danka Funding Co. v. Sky City Casino* (N.J. Super. Ct. Law Div. 1999) 747 A. 2d 837. (5 AA 1109.) These cases demonstrate that a court cannot entertain a suit if the party filing the action against an Indian tribe is unable to establish that the tribe clearly, effectively and unequivocally waived its sovereign immunity, in accordance with tribal law. (5 AA 1109.) As such the Superior Court's decision was directly on target with respect to this case law, as demonstrated in the transcript of the record ("Reporter's Transcript" ("RT")) wherein Honorable Judge Trapp poses this question for YAN:

"What is the unequivocal language in the agreement itself that says that the chairman has the authority to waive immunity?" RT 4:14-16.

YAN could point to no such language.

Further, the Superior Court demonstrated that it correctly applied the existing law governing the issues of tribal sovereign immunity during the hearing when it stated:

"My reading of the case law is that the Chairman has to have the authority in order to waive immunity. If you are arguing that, there's been a waiver and the Chairman had authority, it is your burden to show me that." RT 5:11-15.

E. YAN's Petition for Writ of Mandate.

On October 4, 2010, as YAN conveniently failed to note in its opening brief, it filed a Petition for Writ of Mandate requesting a three-judge panel to vacate the Superior Court's decision, which was almost immediately denied without any request by the Court for briefing by Iipay.

III. STANDARD OF REVIEW

YAN contends that it met its burden by proving by a preponderance of the evidence that a waiver occurred. However, the standard of review is limited to whether the Superior Court erred in its interpretation of the law.

Based on the evidence entered into the record, the Superior Court did not err in its interpretation of the law. YAN claims that case law establishes the existence of a "presumption" that Iipay's Chairman possessed the requisite authority to waive Iipay's sovereign immunity simply because it is "presumed" that he acted within the course or scope of his duties. This theory is flawed in numerous ways, as explained further below, one reason being that a waiver of sovereign immunity may never be implied. Also relevant is the fact that the Chairman's regular course of duties did not include waiving the Tribe's sovereign immunity, as that is a task requires express approval by Iipay's legislative branch, which is demonstrated clearly in the evidence in the record. *See* Resolutions 05-09 (4 AA 812), 05-64(4 AA 831), 06-44 (4 AA 882, ¶2), 07-03 (4 AA 890), 07-31 (4 AA 862); (4 AA 789-792.)

While this Court does review the law *de novo*, YAN attempts to introduce new legal argument in its opening brief that it did not raise in its pleadings before the Superior Court. It failed to argue in the Superior Court that actions of tribal officials are presumptively valid, including any purported waivers of sovereign immunity. YAN failed to make this argument and cite the case law, which it now heavily relies upon and therefore it should not be permitted the opportunity to introduce new arguments not made before the Superior Court. "The rule is well settled

that the theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant.” *Forman v. Chicago Title Ins. Co.* (1995) 32 Cal.App.4th 998, 1015-16 (quoting *Richmond v. Dart Industries, Inc.* (1987) 196 Cal. App.3d 869, 874). (internal quotations omitted.) Therefore, YAN should not be entitled to make new arguments with new law that were not rightfully presented to the Superior Court.

IV. THE TRIAL COURT DID NOT ERR IN DISMISSING THIS ACTION

As YAN itself admits, the central issue in question is whether YAN has satisfied its burden of proving that the courts of the State of California have jurisdiction. To establish jurisdiction, YAN is required to prove that Iipay waived its sovereign immunity to suit in California. A valid waiver of sovereign immunity requires clear and unequivocal consent to suit. No such waiver exists because the tribal legislation LB 07-08 (4 AA 793:24-27; 4 AA 916.) does not explicitly authorize Iipay’s Chairman to waive Iipay’s immunity and therefore, the Fourth Amendment does not validly waive Iipay’s immunity.

A. YAN Bears the Burden of Proving that California Courts Have Jurisdiction.

The Superior Court did not err in holding that YAN, as plaintiff in the action, bears the burden of proving by a preponderance of the evidence that jurisdiction exists. *See Lawrence, supra* 153 Cal. App. 4th 1364 at 1369. The Superior Court’s rationale depicted in the ruling and during the hearing corresponds with the legally established standard that, in every

action, the plaintiff bears the burden of demonstrating that jurisdiction exists over the subject matter and over the defendant in a case. As such, the Superior Court did not err when it determined that it was YAN's burden to prove that Iipay's Chairman actually possessed the proper authority to execute a waiver of sovereign immunity. Without the proper authority, a valid waiver would not exist and there would be no California jurisdiction. Thus, it is not Iipay's burden to demonstrate that its Chairman lacked the authority to waive Iipay's sovereign immunity because Iipay does not bear the burden of demonstrating that the Superior Court had jurisdiction over the matter. *Id.*

B. Federal and State Indian Law Never Allow A Waiver of Sovereign Immunity To Be Presumed

YAN may not presume a waiver of Iipay's sovereign immunity. A tribe is subject to suit only when Congress has authorized the suit or the tribe has clearly and unequivocally waived its sovereign immunity. *See C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.* (2001) 532 U.S. 411, 418 (quoting *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.* (1991) 498 U.S. 505, 509 ("[T]o relinquish its immunity, a tribe's waiver must be 'clear.'")); *Kiowa Tribe of Okla. v. Mfr Techs., Inc.* (1998) 523 U.S. 751, 754 ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity").

Extensive Supreme Court precedent has held that Indian tribes are immune from suit absent explicit tribal consent or Congressional authorization. *See Santa Clara Pueblo*, 436 U.S. at 58 ("It is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" (quoting *United States v. Testan* (1976) 424 U.S. 392, 399)). Furthermore, Courts must construe waivers of sovereign immunity narrowly. *McClendon v. United States* (9th Cir. 1989) 885 F.2d

627, 630 (“a tribe’s waiver of sovereign immunity may be limited to the issues necessary to decide the action brought by the tribe; the waiver is not necessarily broad enough to encompass related matters, even if those matters arise from the same set of underlying facts.”).

“Sovereign immunity involves a right which courts have no choice, in the absence of a waiver, but to recognize. It is not a remedy . . . which is within the discretion of the court.” *California ex rel Dep’t of Fish & Game v. Quechan Tribe of Indians* (9th Cir. 1979) 595 F.2d 1153, 1155. Numerous California cases hold that tribal sovereign immunity bars state court jurisdiction over Indian tribes. *Trudgeon v. Fantasy Springs Casino, et al.* (Cal. Ct. App. 1999) 71 Cal. App. 4th 632, 636 (noting that an Indian tribe’s sovereign immunity is not limited to governmental activities, but extends to commercial activities as well).

In determining whether a valid waiver of sovereign immunity has occurred, courts must note that tribal officials cannot effectively waive a tribe’s sovereign immunity without the necessary authorization from the tribe’s governing body. *Hydrothermal Energy Corp. v. Fort Bidwell Indian Community Council* (Cal. Ct. App. 1985) 170 Cal. App. 3d 491, 496 (holding that a Tribal Chairwoman’s signature on a contract could not operate to waive the tribe’s immunity from suit unless the tribe expressly delegated the chairwoman that power). A contract signed by the tribal chairman, secretary, and treasurer did not waive the tribe’s sovereign immunity because the officers lacked the powers to waive the tribe’s immunity. *Id.* (citing *Red Lake Band of Chippewa Indians v. American Arbitration Association, et al.* (D.Minn. 1981) Civ. No. 4-81-262, 8 Indian L.Rep. 3114).

Courts have held that unauthorized acts of tribal officials are insufficient to waive tribal-sovereign immunity. *Sanderlin v. Seminole Tribe of Fla.* (11th Cir.2001) 243 F.3d 1282, 1288 (rejecting argument that

tribal representative had actual or apparent authority to waive immunity because “[s]uch a finding would be directly contrary to the explicit provisions of the Tribal Constitution and Tribal Ordinance . . . which expressly set forth how, when, through whom, and under what circumstances the Seminole Tribe may voluntarily waive its immunity.”); *World Touch Gaming, Inc. v. Massena Mgmt., LLC* (N.D.N.Y.2000) 117 F.Supp.2d 271, 276 (holding that a senior vice president's signature to an agreement with an express waiver of sovereign immunity provision did not waive sovereign immunity because that right was reserved exclusively to the tribal council); *Danka Funding Co. v. Sky City Casino* (1999) 329 N.J.Super. 357, 747 A.2d 837, 841-42, 844 (holding that a controller's signature on a contract containing a forum selection clause was insufficient to waive sovereign immunity, in part, because the right to waive immunity was reserved to the tribal council).

This extensive case law governing tribal waivers of sovereign immunity illustrates the requirements for a waiver to be found valid. Specifically, the waiver must be clear and unequivocal and the individual executing the waiver must have authority to do so. In the case at hand, LB 07-08 (4 AA 916) does not provide a clear and unequivocal waiver to suit in California and fails to vest Iipay's Chairman with the authority to waive the Tribe's immunity and thus the Fourth Amendment does not contain a valid waiver of suit. (4 AA 792:15-23.) YAN cannot prove that Iipay's legislative branch authorized the Chairman to waive the Tribe's sovereign immunity, nor can it prove that the Fourth Amendment contained a valid waiver. Therefore, YAN has failed to meet its burden of proof that jurisdiction exists in California.

1. YAN is Attempting to Imply a Waiver of Sovereign Immunity, Which is Prohibited by Law.

YAN has the burden to prove jurisdiction exists in California and there is no law establishing otherwise. YAN would have the Court believe that a "presumption" exists in case law that would implicitly vest Iipay's Chairman with the requisite authority to waive tribal sovereign immunity simply because he is the Chairman of an Indian tribe. However, this argument contravenes well-established federal and state Indian law which explicitly states that a "presumption" cannot create a valid waiver because a presumption is, by definition, an assumption.² Presumptions of sovereign immunity violate the tenets of existing Indian law. It is an established and well-developed aspect of the law, as discussed above, that a tribe's waiver of sovereign immunity cannot be implied and must be unequivocally expressed. See *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58; *Chemehuevi Indian Tribe v. California State Board of Equalization* (9th Cir. 1985) 757 F.2d 1047, 1052-53³; *Great Western Casinos, Inc. v. Morongo Band of Mission Indians* (Cal. Ct. App. 1999) 74 Cal. App. 4th 1407, 1417. The legal requirement for a clear and unequivocal waiver of sovereign immunity prevents waivers from being presumed. Therefore, YAN is ostensibly asking this Court to overturn extensive federal and state law regarding waivers of tribal sovereign immunity.

An assumption would not constitute a valid waiver of sovereign immunity because an assumption is not clear, express or unequivocal as required pursuant to Indian law principles. The language in Iipay

² "Presumption," as defined by Black's Law Dictionary (Second Pocket Edition) is "a legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts. A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption."

³ *Chemehuevi Indian Tribe v. California State Board of Equalization* was later reversed; however, the reversal was on grounds unrelated to the tribe's sovereign immunity.

legislation LB 07-08 (4 AA 916-917), stating that the Chairman may negotiate and execute amendments to the Iipay's loan agreements and perform requisite actions by or on behalf of Iipay, does not contain express or unequivocal language waiving sovereign immunity and, more importantly, this language does not specifically or expressly vest the Chairman with the authority to waive Iipay's sovereign immunity. Therefore, the Chairman lacked the authority to waive sovereign immunity pursuant to the Fourth Amendment (4 AA 792:15-23) because he never received the authority to waive Iipay's immunity. As a result, YAN has failed to meet its burden of establishing a proper waiver because neither the Fourth Amendment nor Iipay legislation LB 07-08 contains a valid waiver of immunity. Therefore, the Superior Court did not err when it granted Iipay's Motion to Quash because YAN failed to establish that jurisdiction existed in the State of California.

2. YAN Is Attempting to Shift the Burden of Proof onto Iipay, Which Is Not Supported By Law.

YAN failed to meet its jurisdictional burden because it cannot point to a clear and express waiver of Iipay's sovereign immunity to California Court jurisdiction. Instead, as stated above, YAN relies upon Iipay legislation LB 07-08 (4 AA 916-917) executed nearly four months before the Fourth Amendment (1 AA 196) as evidence of the Chairman's authority to execute the contract and waive Iipay's sovereign immunity. However, this argument ignores the formal course of dealing established between the tribes over four years.

Upon review of LB 07-08 (4 AA 916-917), it does not expressly state that the Chairman may waive sovereign immunity, a federal and state law requirement before finding a proper waiver of sovereign immunity. Moreover, LB 07-08 explains the purpose for which the Iipay Legislature was authorizing the Chairman to execute amendments to the loan

documents. *Id.* (That legislation was enacted for the primary purpose of authorizing the disbursement of funds to settle a legal dispute with one of Iipay Nation's construction contractors, Bayley.)⁴ Thus, the purpose behind the Iipay Nation legislation was to amend the Loan Documents to settle the Bayley dispute and not to authorize a waiver of Iipay Nation's sovereign immunity to suit in the courts of the State of California, a jurisdiction to which Iipay had never waived its sovereign immunity during the four years of financial transactions between the two tribes. *Id.* YAN has disingenuously ignored such legislative intent.

LB 07-08 states that "Chase Bank has refused to release funds unless the Nation amends various loan agreements." *Id.* at 916. As such, the sole purpose of this tribal legislation was to authorize Iipay's Chairman to amend those agreements only, not to vest the Chairman with the authority to waive sovereign immunity to a completely new state jurisdiction. (4 AA 792:15-23. This proposition is supported by the fact that in every single transaction, prior to the Fourth Amendment, Iipay Nation was extremely careful to authorize explicit waivers of sovereign immunity with respect to jurisdiction. (4 AA 789:25-792:23, 793:20:27.) In fact, in its prior dealings, Iipay Nation clearly and expressly explained, "[T]he Chairman

⁴ LB 07-08 (4 AA 916-917.) that YAN repeatedly cites to in support of its claim that Iipay Nation did waive its sovereign immunity, instead, clearly explains the purpose:

A legal dispute over the Casino Project has developed between Bayley and the Nation, and it is in the best interest of the Nation to resolve this dispute in an appropriate and cost effective manner; and [d]espite the identification of certain funds in the original loan agreements to pay Bayley for the final costs of construction, and the agreement of Yavapai-Apache Nation (the guarantor of the loan) to release the funds, Chase Bank has refused to release such funds unless and until the Nation amends the various loan agreements.

may not waive the Tribe's sovereign immunity, consent to binding arbitration, and/or consent to the jurisdiction of any judicial forums without the approval of the General Council of the Tribe" (4 AA 792:8-14.)

The process that was used by both tribes throughout all of the previous transactions was to pass tribal legislation explicitly granting the tribal chairperson the ability to waive the tribe's immunity. 4 AA 789:17-792:23, 793:20-27.) Tribal legislation was typically passed weeks before the execution of the contracts, not months prior. *Id.* Thus, YAN's reliance on the tribal legislation from October 2008 is misplaced because it fails to provide the necessary authority for the Chairman to execute the Fourth Amendment four months later. Most importantly, it does not include the authority to waive Iipay's sovereign immunity to suit in the California State courts. *Id.* at 792:15-23.)

Instead of providing the Superior Court with a valid waiver of sovereign immunity, YAN is attempting to side-step the law and "presume" into existence a valid waiver of sovereign immunity. YAN contends that "the burden of proof is on the party challenging the validity of such acts to show that they are not effective." (Opening Brief 1.) Again, this assertion is contrary to well-established Indian law demonstrating that the plaintiff in the action must demonstrate a waiver exists, which means YAN was required to, but failed, in demonstrating that its reliance upon language contained within LB 07-08 and the Fourth Amendment constituted a valid waiver. As such, in order to prove that this language was in fact a valid waiver, YAN was required to establish that the Chairman possessed the authority to properly effectuate a waiver. To do so, YAN would have to demonstrate that Iipay's Chairman had the authority to waive sovereign immunity because without this authority, a proper waiver could not have been effectuated. Because YAN did not prove that the Chairman possessed this authority, YAN failed to demonstrate a valid waiver occurred.

Throughout its opening brief, YAN alleges that the case law, which relates to foreign officials and corporations, creates a “burden shift;” however, this purported burden shift is not supported by existing Indian law principles. In fact, the burden shift that YAN has fashioned is wholly inapplicable to the case at hand. The cases YAN relies heavily upon deal with foreign government officials and foreign countries, *not* Indian Tribes, which are unique sovereign entities governed by Indian law. Tribal waivers of sovereign immunity are central to the core of a tribe’s sovereign power and as such it would be inappropriate to construe every action by any tribal official relating to a waiver to be deemed automatically valid and within the scope of the official’s duty. Waivers of tribal immunity go to the heart of a tribe’s sovereign status and therefore they may not be presumed or implied due to the damage that could befall tribal self-determination and autonomy.

The United States Supreme Court has held that acts of officials in waiving sovereign immunity are not presumptively valid. See *U.S. v. U.S. Fidelity & Guaranty* (1940) 60 S. Ct. 653. The *U.S. Fidelity & Guaranty* court stated:

“It is a corollary immunity from suit on the part of the United States and the Indian Nations in tutelage that this immunity cannot be waived by officials. If the contrary were true, it would subject the government to suit in any court in the discretion of responsible parties. This is not permissible.”

Id. at 658. In the absence of a clearly expressed waiver by a tribe or by Congress, the United States Supreme Court has continually refused to find a waiver of tribal sovereign immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case. See *Ute Distribution Corp. v. Ute Indian Tribe* (10th Cir. 1998) 149 F. 3d 1260, 1267.

Moreover, Iipay is not an international country, but rather is a federally-recognized Indian tribe with unique Indian law principles

governing the very issue of waivers of sovereign immunity. The Chairman is not the average “public officer” of a foreign government, but is the Chairman of a tribe protected by a distinctive body of case law and legal authority specifically governing tribal sovereign immunity. The Chairman’s scope of authority is not “limitless” and YAN fails to provide any legal authority to support this contention.

i. The Historical Cases Cited By YAN Do Not Govern Tribal Waivers of Sovereign Immunity.

The “historical” cases YAN relies upon for the proposition that acts of officials are presumptively valid are inapplicable here because these cases pertain to foreign officials of international governments and not to federally-recognized Indian tribes. YAN has chosen to ignore an entire body of law pertaining specifically to the unique relations between the United States and Indian Tribes. The field of Indian law is a vast and well-developed area of the law. In particular, one of its foundational principles is that Indian tribes are not foreign nations, instead, they are considered domestic dependant nations. *See Cherokee Nation v. State of Ga*, (1831) 30 U.S. 1. “The condition of the Indians, in relation to the United States, is perhaps unlike that of any other two people in existence. In general, **nations** not owing a common allegiance are foreign to each other. The term *foreign nation* is with strict propriety applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else....They may more correctly perhaps be denominated domestic dependent **nations**.” *Id.* at 2. (emphasis in original.) Therefore, the law that YAN provides is wholly inapplicable to the actions of Iipay’s tribal Chairman, which are actions of a *tribal* governmental official, not that of an international official acting on behalf of a foreign nation.

YAN's reliance on historical law governing relations between international officials evidences its inability to locate any modern case law pertaining to Indian tribes, which supports its unreasonable position. As such, it would be inappropriate for this Court to apply the cases YAN cites to this case because these cases do not involve Indian tribes or the actions of tribal officials.

As subsequent case law clearly demonstrates, a waiver of tribal sovereign immunity cannot be achieved by an alleged "presumption" that a "public officer" acted within his or her authority. Instead, as previously explained, the law requires waivers of tribal sovereign immunity to be executed by clear and express language. As such, any doubt in whether a waiver exists should be weighed in favor of the Tribe because sovereign immunity is a paramount right. Moreover, "a state official may waive the state's immunity only where specifically authorized to do so by that state's constitution, statutes or decisions." *See Danka Funding Company*, 747 A.2d 837, 843 (citing *Santee Sioux Tribe of Nebraska* (8th Cir. 1997) 121 F.3d 427).

YAN's overly broad view as to the existence of a "presumption" is misguided as is its reliance upon *Payne v. Treadwell*. YAN relies on *Payne v. Treadwell* (1860) 16 Cal. 220 to assert the proposition that official acts of officers, in the course of their *ordinary and accustomed duties*, and within the *general scope of their powers* will be presumed to have been done by lawful authority. *Id.* at 226. As discussed herein, YAN has the burden of proof to demonstrate a valid waiver occurred. As such, YAN failed to demonstrate that it is within the Chairman's "ordinary and accustomed duties" to waive sovereign immunity on behalf of the entire Tribe, and YAN failed to demonstrate that the Chairman acted within the "scope of [his] powers" by waiving sovereign immunity in addition to simply negotiating and executing amendments to the loan agreements. *Id.*

Further, the *Payne* court addresses the issue of a grant or concession of land made by a foreign government or its officers, which then creates the legal presumption that acts of such agents are within sphere of his or her duty. *Id.* at 227. The *Payne* court determined that “no proof of title” was required with respect to land. *Id.* at 231. As such, YAN attempts to broadly apply this presumption, which corresponds with a grant or concession of land made by an officer under a foreign government to Indian tribes. The application of this presumption with respect to grants or concessions of land is not proper pursuant to the legal principles governing a waiver of sovereign immunity because the law demonstrates that tribal sovereign immunity cannot be implied nor waived with a presumption that the Chairman had the requisite authority when he signed the Fourth Amendment.

ii. The Modern Cases Cited By YAN Do Not Govern Tribal Waivers of Sovereign Immunity.

YAN’s reliance upon its “modern” authority is equally misguided. In its brief, YAN attempts to summarize the court’s rationale in *In re White* (9th Cir. 1998) 139 F. 3d 1268, by offering its own interpretation of the court’s reasoning and applying a “two-step analysis”, the existence of which is unsupported by case law. YAN stated,

Put another way, giving effect to the ancient presumption of validity of official acts, the court placed the burden on the tribe to first prove that a waiver was not valid ... [b]ecause the tribe failed to satisfy the first step of the analysis, the court found the waiver valid.

(Opening Brief 16.) The *White* court did not “shift the burden”, but distinctly found that the Tribe waived its sovereign immunity by having participated as a creditor in a previous bankruptcy case. *In re White*, 139 F. 3d 1268, 1273. This case does not apply a burden shift, nor does it reference that one must occur or YAN’s “two-step analysis” must be

applied, despite the fact that it indicates that there is nothing in the record indicated that tribal approvals are necessary. *Id.* at 1271. YAN completely misconstrues the *White* court's reasoning with respect to evidence entered into the record and assumes that the court would have shifted the burden or applied a "two-step" analysis. On the contrary, the *White* case has no bearing on the instant case as the court found that the tribe consented to jurisdiction by initiating a claim in a bankruptcy action.

Another case cited to by YAN, *Grummet v. Fresno Glazed Cement Pipe Co.* (1919) 181 Cal. 509, also fails to support YAN's contention that the Chairman was "presumed" to possess the requisite authority. This case addressed the issue of whether a plaintiff could make out a *prima facie* case with respect to evidence of the authority of a corporation president to contract for services. *Id.* The court found that there was sufficient evidence of the president of the corporation to contract for the services in question. *Id.* 513. In the *Grummet* case, unlike here, there was evidence in the record that the president possessed the requisite authority. Further, this is a case dealing with a corporation and not an Indian tribe. Again, unique principles of Indian law govern waivers of tribal sovereign immunity, which would not in essence apply equally to the actions of corporate officers.

B. The Authorities Relied Upon By the Superior Court Support The Court's Determination to Dismiss this Case for Lack of Jurisdiction.

The Superior Court did not err with respect to its interpretation of the case law. The Superior Court found that this case was similar to the three cases discussed below because waivers in these cases all required compliance with tribal law. Here, as in the cases below, a valid waiver had not been executed with proper authority of the Tribe, as required by tribal law.

In *World Touch Gaming v. Massena Management, LLC*, *supra*, 117 F. Supp. 2d 271, the court found that granting authority to execute agreements is not the equivalent to authorizing a full waiver of tribal sovereign immunity. The *World Touch* court found that “giving authority to operate a Casino is not equivalent to authorizing the Management Company to waive the Tribe’s sovereign immunity.” *Id.* at 275. The *World Touch* court stated that:

[A]s 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.

Id. at 275.

In the case at hand, each loan agreement was accompanied by the requisite legislation, except the Fourth Amendment, which is the only agreement that purportedly waived Iipay’s immunity to suit in California. Further, YAN, as an Indian tribe itself, is well-aware of the importance of sovereign immunity and how it cannot be presumed waived. YAN, like World Touch, should have been careful to assure that Iipay’s Chairman had the express authority of the Tribe to waive sovereign immunity, or that the Tribe itself expressly waived sovereign immunity with respect to the agreements. *Id.* YAN, also like World Touch, is not a novice in matters relating to Indian gaming enterprises and sovereign immunity, and cannot now rely upon naiveté to expand the language of LB 07-08 to encompass authority to waive sovereign immunity. *Id.* Therefore, the Superior Court’s interpretation of case law is correct with respect to the burden falling upon YAN to provide evidence that Iipay’s Chairman possessed the authority to waive sovereign immunity.

Similarly, in *Danka Funding Co., v. Sky City Casino, supra*, the court held that a forum selection clause in a lease with a tribe did not waive its sovereign immunity from suit. 747 A. 2d 837. The plaintiffs' reliance upon a form lease with a forum selection clause and the signature of the Comptroller of Sky City Casino was insufficient to establish the unequivocal waiver necessary to extinguish the tribe's sovereign immunity. *Id.* at 844. The *Danka* court relied upon *Pan American Co. v. Sycuan Band of Mission Indians* (9th Cir. 1989) 884 F. 2d 416 in reaching its decision. Specifically, the court stated, "The circuit court specifically noted that a formal resolution expressly waiving sovereign immunity as the type of waiver favored by the Supreme Court ..." *Danka*, 747 A. 2d 837, at 844.⁵

This case was cited by YAN; however, is more supportive of Iipay's position than YAN's because the *Danka* court found that the plaintiffs could have insured that they received the proper waiver by resorting to tribal law. YAN's reliance upon the ambiguous language in LB 07-08 and the Fourth Amendment, which lacks the proper tribal resolution as

⁵ The *Danka* court went on to explain,

Other courts, too, have declined to find a waiver of immunity where contractual provisions suggested that the parties intended that legal recourse would be available in the event disputes were to arise. In *American Indian Agricultural Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1379 (8th Cir.1985), the court declined to find a waiver of immunity even when the tribe permitted the plaintiff by contract to reserve its rights and remedies as provided by law and the contract also contained clauses providing for attorneys fees and choice of law. The court found that these provisions were insufficient to represent an unequivocal waiver. See also *Ramey Construction Co., Inc. v. Apache Tribe of the Mescalero Reservation*, 673 F.2d 315 (10th Cir.1982) (Consent to partial summary judgment on retainage claim was insufficient to constitute a waiver of sovereign immunity as to other matters).

Danka, 747 A. 2d 837, at 844.

demonstrated by the parties' course of dealing and language contained within other resolutions entered into the record, is, like the *Danka* plaintiffs, faulty and no waiver could properly be found by the Court.

Finally, in *Hydrothermal Energy Corp.*, *supra*, 170 Cal. App. 3d 491, the Tribal Chairwoman of the Fort Bidwell Indian Community signed a contract with Hydrothermal Energy Corp. that contained an arbitration clause. *Id.* at 493. When a dispute arose concerning the contract, Hydrothermal Energy Corp. proceeded to arbitration and received an award. *Id.* at 491. It then brought the arbitration award to Superior Court for confirmation. *Id.* The Tribe argued that the State of California lacked jurisdiction because the Tribe never waived its sovereign immunity from suit. *Id.* Although the Tribal Chairwoman did sign the contract, she lacked the authority to waive the Tribe's sovereign immunity because she had not been expressly delegated that duty. *Id.* at 496. The California Court Appeals for the Second District agreed with the Tribe that the Chairwoman's signature on the contract did not effectuate a valid waiver of the Tribe's sovereign immunity because she lacked the authority. *Id.*

As in *Hydrothermal Energy Corp.*, a case relied upon correctly by the Superior Court, Iipay has not waived its sovereign immunity and has not consented to be sued in California courts. The Fourth Amendment is the sole document that purportedly provides the courts of the State California jurisdiction over disputes involving the contracts because the Tribal Chairman signed the agreement. However, he did so without the requisite authority to waive the Iipay Nation's sovereign immunity. Furthermore, dispute YAN's contentions otherwise, the Chairman was not given "carte blanche" to do whatever he wanted with respect to negotiating and executing documents. (See Opening Brief 24.) On the contrary, Iipay's Chairman was required to abide by tribal law and custom which is specifically referred to in the Chairman's declaration provided in support of

the Motion to Quash , as well as the Resolutions 05-64, 06-44 and 07-03, all of which were admitted into evidence. (4 AA 789:17-793:10, 793:14-16, 793:17-794:4); (Iipay's General Council Resolution 05-09 (4 AA 812); Resolution 05-64 (4 AA 831); Resolution 06-44 (4 AA 882, ¶2); Resolution 07-03 (4 AA 890); Resolution 07-31 (4 AA 862).) YAN attempts to overly broaden the extent of the authorization given to the Chairman by Iipay's legislature, which never expressly vested the Chairman with the requisite authority to waive sovereign immunity.

In sum, sovereign immunity cannot be waived by implication, but must be by *express* waiver and the language relied upon by YAN is not an *express waiver of sovereign immunity*. To read anything more into this language than what is supported by the law is a deviation from well-established legal authority and the principles governing sovereign immunity because waivers must be unambiguous, unequivocal and express. The corporation and foreign official cases that YAN cites to support its proposition that acts of officials are presumptively valid cannot overcome the clear legal authority that requires tribal waivers of sovereign immunity to be clear and unequivocal. The law is clear in this regard: waivers of sovereign immunity may not be presumed.

V. CONCLUSION

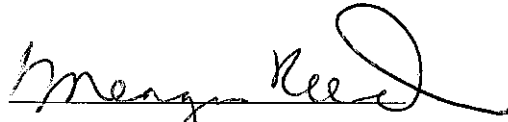
For the reasons stated above, Iipay respectfully submits that this Court affirm the Superior Court's decision to grant Iipay's Motion to Quash and deny YAN's request to vacate the Superior Court's order of October 1, 2010.

Further, Iipay Nation respectfully requests attorneys fees and costs associated with the response to YAN's appeal.

Dated: April 12, 2011

ROSETTE & ASSOCIATES, PC

By:

A handwritten signature in black ink, appearing to read "Meagan Reed", written over a horizontal line.

Robert A. Rosette

Meagan J. Reed

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Certificate of Compliance

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 8,351 words, including footnotes, is proportionately spaced, and has a typeface of 13 points or more. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By:



Meagan Reed

CERTIFICATE OF SERVICE

I, Kimberly Corcoran, declare as follows:

I am over the age of 18 years and not a party to this action. My place of employment and business address is 193 Blue Ravine Road, Suite 255, Folsom, CA 95630.

On April 12, 2011, I served the following documents:

RESPONDENT'S BRIEF

☐ **by mail**—on the following party(ies) in said action, in accordance with Code of Civil Procedure §1013(a), by placing a true copy thereof enclosed in a sealed envelope with postage prepaid in my place of business' designated area for outgoing United States Mail. I am readily familiar with the business practice at my place of business for collection and processing of outgoing United States Mail. Mail placed in that designated area is picked up the same day, in the ordinary course of business by the United States Postal Service.

☐ **by personally delivering**—a true copy thereof, in accordance with Code of Civil Procedure §1011, to the person(s) and at the address(es) set forth below.

☒ **by overnight delivery**—on the following party(ies) in said action, in accordance with Code of Civil Procedure §1013(c), by placing a true copy thereof enclosed in a sealed envelope, with delivery fees paid or provided for, in a designated area for outgoing overnight mail, addressed as set forth below. Mail placed in that designated area is picked up that same day, in the ordinary course of business, for delivery the following business day.

☐ **by facsimile transmission**—in accordance with Code of Civil Procedure §1013(e), to the following party(ies) at the facsimile number(s) indicated below.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on April 12, 2011.

Kimberly Corcoran
KIMBERLY CORCORAN

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