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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

THE PICAYUNE RANCHERIA OF
CHUKCHANSI INDIANS,

Plaintiff,

v.

RABOBANK, a national banking association,
REGGIE LEWIS, CARL BUSHMAN, and
CHANCE ALBERTA,

Defendants.

Case No.: 1:13-CV-00609-LJO-MJS

**DEFENDANT RABOBANK'S
OPPOSITION TO PLAINTIFF'S
MOTION FOR A TEMPORARY
RESTRAINING ORDER**

Date: TBD
Time: TBD
Crtrm: 4, 7th Floor

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1 Defendant Rabobank, a National Banking Association (“Rabobank”), respectfully submits
2 this opposition to Plaintiff’s motion for a temporary restraining order (“TRO”).

3 **I. INTRODUCTION**

4 Plaintiff’s motion asks this Court to enforce an interim order issued by a tribal court whose
5 legitimacy is in question and which lacked jurisdiction to issue that order. This interim order,
6 moreover, directly conflicts with an order by a rival tribal court, which court has held that the court
7 issuing the order at issue here is illegitimate. Plaintiff’s claim of irreparable injury, moreover, is
8 baseless. This court should deny Plaintiff’s motion.

9 Over the last year, a dispute arose among members of the Picayune Rancheria of the
10 Chukchansi Indians (the “Tribe”) about who are the Tribe’s proper members and governing
11 counsel. As a result, the Tribe split into two factions, one includes Nancy Ayala (the “Ayala
12 Faction”) and the other includes Reggie Lewis (the “Lewis Faction”). Each faction formed its own
13 governing council, each of which contended that the other governing council was illegitimate. The
14 rival factions also formed separate tribal courts in which they brought actions against one another
15 and against the banks that provided business to the Tribe.

16 For the last several years, Rabobank was the depositor bank for the Picayune Tribe’s casino,
17 the Chukchansi Gold Resort & Casino (the “casino”). Casino receipts are deposited into one
18 account at Rabobank, and casino expenses are paid out of other accounts. After the Picayune
19 Tribe’s split occurred, each faction tried to take control over the Rabobank casino accounts, and
20 each faction’s tribal court issued conflicting orders to Rabobank.

21 The Ayala Faction’s court—the “Ayala Court”—ordered Rabobank to interplead the money
22 in the Tribe’s accounts with it, and to take direction regarding the accounts only from Ayala Faction
23 members. The Lewis Faction’s court—the “Lewis Court”—ordered Rabobank to have nothing to
24 do with the Ayala Faction or the Ayala Court. Thus, Rabobank’s complying with one “court’s”
25 orders would violate the other’s.

26 The plaintiff here is the Ayala Faction, and its lawsuit asks for this Court to enforce the
27 Ayala Court’s preliminary injunction order against Rabobank. Its motion for a TRO seeks such
28 enforcement on an expedited basis. The Court should deny Plaintiff’s motion.

1 ***Plaintiff Has No Likelihood of Success On The Merits:*** Plaintiff has no likelihood of
 2 success on the merits.

3 First, comity of tribal court orders should be declined when the tribal court lacked
 4 jurisdiction to issue the orders at issue, and/or when those orders conflicted with a valid forum
 5 selection clause. The Ayala Court lacked jurisdiction to issue the orders Plaintiff now asks this
 6 court to enforce, under both its own tribal constitution, and under a contract the Tribe signed with
 7 Rabobank, which had forum selection clauses barring suits in tribal court.

8 Second, comity principles preclude enforcement of non-final tribal court orders, like the
 9 order the Ayala Faction seeks to enforce here, which conflicts with another non-final tribal court
 10 order.

11 Third, the Ayala Court denied Rabobank due process when it issued the order it asks this
 12 Court to now enforce, and any enforcement by this Court of that order or its equivalent would
 13 violate public policy. The competing tribal courts here each claim legitimacy and have issued
 14 conflicting orders to Rabobank. No neutral court or other governing body has determined which
 15 faction, or associated court, if either, is legitimate. The Ayala Court's issuing its preliminary
 16 injunction order under those circumstances denied Rabobank due process, since following that order
 17 would require Rabobank to violate orders of the competing Lewis Court. Similarly, this Court's
 18 enforcing those Ayala Court's orders against Rabobank would be fundamentally unfair, and thus
 19 violate public policy, because Rabobank's complying with the Ayala Court's order would cause it
 20 to violate the Lewis Court order.

21 ***Plaintiff Cannot Show Immediate Irreparable Injury:*** Plaintiff's claims of irreparable
 22 injury are completely baseless. It contends it needs the relief its motion requests—namely, sole
 23 access to and control over all of the Tribe's accounts at Rabobank—so it can pay the operating
 24 expenses of the Tribe and its casino. However, it admits that it has more than enough money to
 25 make those payments without accessing the Tribe's accounts at Rabobank. Even putting that issue
 26 aside, its complained-of injuries are self-inflicted and thus cannot provide a basis for a TRO. Also,
 27 it unduly delayed seeking this TRO, which, standing alone, is enough reason to deny it.
 28

The Balance of Hardships Tips Against Plaintiff: The balance of hardships tips against Plaintiff, also. Enforcing the Ayala Court's interim tribal court order against Rabobank would place it in jeopardy of violating the Lewis Court order, and the Lewis Court may be found to be legitimate. Plaintiff would suffer no cognizable hardships were its requested TRO denied, since it would merely have to abide by forum selection clauses it agreed to.

II. BACKGROUND

A. The Tribe and CEDA

The Tribe is a federally recognized Indian Tribe (Declaration of Geoffrey M. Hash In Support of Specially-Appearing Proposed Intervenor Defendant the Picayune Rancheria of the Chukchansi Indian's Motion to Intervene (FRCP 24) (Dkt. No. 10) ("Hash Dec."), Exhibit H (Dkt. No. 10-2) (Resolution No. 2012-05) at 1; *see also* Complaint for Declaratory and Injunctive Relief and Money Damages (Dkt. No. 1) ("Federal Complaint") ¶ 5) governed by a Tribal Council which is empowered to, among other things, manage the Tribe's finances. Federal Complaint, ¶ 8, *see also* Hash Dec., Exhibit H at 1. In 2001, the Tribal Council established the Chukchansi Economic Development Authority ("CEDA"), an unincorporated enterprise of the Tribe, to own and operate the casino, and to manage that casino's finances. Hash Dec., Exhibit C (Dkt. No. 10-1) (Ordinance of the Picayune Rancheria Establishing and Governing the Chukchansi Economic Development Authority ("CEDA Ordinance")) at §§ 2, 3, 4; *see also* Federal Complaint ¶11.

B. CEDA's Issuance of New Notes

CEDA issued roughly \$310 million in bonds to finance the casino's construction and operation. Hash Dec., Exhibit F (Dkt. No. 10-2) (General Council Resolution GC-001) at 1-2; *see also id.*, Exhibit G (Dkt. No. 10-2) (Resolution #2012-78) at 1-2. In 2012, CEDA restructured those debts. This restructuring involved exchanging the existing bonds (the "Old Notes") for new ones (the "New Notes"), which notes CEDA would issue under an indenture between CEDA and Wells Fargo, National Association ("Wells Fargo"). Hash Dec., Exhibit F at 1-2; *see also id.*, Exhibit G at 1-2; Declaration of Colin West In Support of Defendant Rabobank's Opposition to Plaintiff's Motion for a Temporary Restraining Order ("West Dec."), Exhibit A (Indenture) at 1.

1 The Indenture required that CEDA deposit all revenues from the casino's operation into
 2 deposit accounts at a "Qualified Bank", which the Indenture identified as Rabobank. West Dec.,
 3 Exhibit A at 17-18 (defining "Gross Revenues"); 29 (identifying Rabobank as a Qualified Bank); §
 4 4.25 (requiring deposit of Gross Revenues into accounts). The Indenture also required that CEDA,
 5 Rabobank and Wells Fargo execute a "Deposit Account Control Agreement, or "DACA". *Id.* at 6
 6 (defining Collateral Documents as including the DACA), 11 (defining the DACA); Hash Dec.,
 7 Exhibit G at 3.

8 The parties executed the DACA on the same day as the Indenture's execution. *See* West
 9 Dec., Exhibit A at 1 (date of execution), 11 (the DACA will be executed the same day as the
 10 Indenture); Hash Dec., Exhibit E (Dkt. No. 10-1) (DACA) at 1 (date of execution).

11 The DACA, as its name suggests, governs who has control over CEDA's several bank
 12 accounts with Rabobank (the "Accounts"). *See id.* The DACA also contains forum selection
 13 clauses, in which CEDA agreed "to irrevocably and unconditionally submit, for itself and its
 14 property, to the *exclusive jurisdiction* [of New York or California courts] . . . any action or
 15 proceeding *arising out of or relating to* [the DACA]." *Id.* § 10(a)(iii) (emphasis added). In the
 16 DACA, CEDA also agreed "that it *shall not* institute any action in its own tribal court system in
 17 respect of any claim or cause of action *arising out of or relating to* [the DACA] . . . or the
 18 transactions contemplated hereunder and thereunder, but shall instead resort to the [New York and
 19 California courts] set forth above." *Id.* at § 10(a)(iv) (emphasis added). The DACA further
 20 provides that "[t]o the extent that any provision in this Agreement conflicts with any provision in
 21 any other agreement between Bank and Depositor, the provision in this Agreement shall control."
 22 *Id.* at § 11. CEDA's authority to enter into these forum selection clauses was approved by tribal
 23 resolutions. Hash Dec., Exhibit H at 3 (the DACA may contain the Tribe's "consent to have
 24 disputes resolved in non-tribal courts or by arbitration").

25 **C. The Tribe Establishes a Tribal Court, Which Specifically**
 26 **Excludes Actions Against Signatories to the DACA Like**
 27 **Rabobank.**

28 In March, 2012, the Tribe passed a resolution approving a "Tribal Court Ordinance". *See*

1 Declaration of Michael Wynn in Opposition to the Proposed Intervenor Defendant's Motion to
 2 Intervene (Dkt. No. 13-11) ("Wynn Dec."), Exhibit 1 (Dkt. No. 13-12) (Resolution 2012-45) at 1.
 3 That Ordinance, among other things, established a tribal court and established that court's
 4 jurisdiction. Wynn Dec., Exhibit 1 (Tribal Court Ordinance) at § 2 (establishing the tribal court), §§
 5 4, 5 (specifying court's territorial and subject matter jurisdiction). The Ordinance did not purport to
 6 appoint any judges or other court personnel.

7 That same month, the Tribe passed an amendment to the Tribal Court Ordinance, which
 8 exempted certain transactions, and persons, from the tribal court's reach. The amendment provided
 9 that the Tribal Court Ordinance "shall not apply to any cause or right of action of any kind, or any
 10 claim, liability, damages, obligation or dispute of any nature arising in respect of or related in any
 11 matter to a Transaction, a Transaction Document, or to . . . *a party or beneficiary of a Transaction*
 12 *Document*". Wynn Dec., Exhibit 2 (Dkt. No. 13-13) (Resolution 2012-53) at 2 (emphasis added).
 13 The amendment defined "Transaction Documents" as those "effecting, implementing, evidencing,
 14 securing or otherwise related to any one or more Transactions". *Id.* The amendment defined
 15 "Transactions" as "the issuance of New Notes"—i.e. the aforementioned restructuring of the Tribe's
 16 debt¹—and "any transaction relating to the foregoing". *Id.* at 2-3.

17 This amendment meant, among other things, that Rabobank was not subject to tribal court
 18 jurisdiction. The DACA was a "Transaction Document," since it effected and was related to the
 19 issuance of "New Notes." Specifically, "New Notes" were issued pursuant to an Indenture, which
 20 in turn required the DACA to which Rabobank is a party. *See supra*, Section II.B.

21 **D. The Tribe Splits into Two Factions, Each of Which Establishes Its**
 22 **Own Tribal Court.**

23 As alleged in their respective complaints, early this year, a dispute arose between members
 24 of the Tribal Council of the Tribe, breaking down between the Ayala Faction and the Lewis Faction.
 25 *See* Federal Complaint, Exhibit N (Dkt. No. 1-15) (Amended Complaint for Declaratory and
 26 Injunctive Relief and Money Damages ("Ayala Court Complaint")) ¶¶ 10, 15-16; *see also* West
 27 Dec., Exhibit B (Lewis Court Complaint) at 1, ¶¶ 25-26. Each Faction established its own

28 ¹ *See supra*, Section II.B.

1 competing “tribal court.”

2 **The Ayala Court:** The Ayala Faction’s suit against Rabobank in the Ayala Court alleges
 3 that by honoring checks on CEDA’s accounts at Rabobank that were presented by individuals
 4 affiliated with the Lewis Faction, and not by those affiliated with the Ayala Faction, Rabobank
 5 breached an unspecified and unidentified “Agreement” with the Tribe, implied covenants in that
 6 Agreement, and interfered with the Tribe’s self-governance. Federal Complaint, Exhibit N ¶¶ 22-32,
 7 38-42. On March 15, 2013, the Court issued a TRO, and on March 29, 2013 a preliminary
 8 injunction order, both of which purported to order Rabobank to interplead the money in the
 9 accounts with it, and to take direction regarding the accounts only from Ayala Faction members.
 10 See Federal Complaint, Exhibit M (Dkt. No. 1-14) (TRO), Exhibit R (Dkt. No. 1-19) (preliminary
 11 injunction order) (collectively, the “Ayala Court Orders”). Rabobank specially appeared to oppose
 12 the preliminary injunction order, and moved to dismiss Plaintiff’s complaint, both times arguing
 13 that the tribal court lacked jurisdiction over the case. See West Dec., Exhibit C (Rabobank’s
 14 Opposition to Ayala Faction Motion for Preliminary Injunction); Exhibit D (Rabobank’s Motion to
 15 Dismiss Ayala Court Complaint). Rabobank also appealed the preliminary injunction order, and
 16 timely filed its opening brief on appeal. See West Dec., Exhibit E (Brief of Appellant). The
 17 deadline to Plaintiff’s opposing brief on appeal passed on May 28, and Plaintiff filed no such brief.
 18 See West Dec. ¶ 7.

19 **The Lewis Court:** The Lewis Faction’s March 27, 2013 complaint in the Lewis Court
 20 accuses Rabobank of violating several tribal resolutions by appearing in the Ayala Court—which it
 21 contends is illegitimate. See West Dec., Exhibit B ¶ 44. Unlike the Ayala Court Complaint, which
 22 was brought ostensibly on behalf of the Tribe itself, the Lewis Court Complaint was brought
 23 ostensibly on CEDA’s behalf. See *id.* at caption page. On March 27, 2013, that Court issued a
 24 TRO which determined that the Ayala Court *was* illegitimate and which ordered Rabobank to have
 25 nothing to do with the Ayala Faction or the Ayala Court. See West Dec., Exhibit F (Lewis Court
 26 Order). The Lewis Court has yet to rule on the Lewis Faction’s preliminary injunction motion,
 27 which would extend the TRO, or Rabobank’s motion to dismiss the complaint, which, like
 28

Rabobank's opposition to the Lewis Faction's preliminary injunction motion, argued that the tribal court lacked jurisdiction. West Dec. ¶ 11, Exhibit G (Rabobank's Opposition to Lewis Faction Motion for Preliminary Injunction); Exhibit H (Rabobank's Motion to Dismiss Lewis Court Complaint).

E. The Ayala Faction's Federal Suit in This Court Against Rabobank.

The Ayala Faction's complaint in this court, filed on April 25 of this year, asks, in relevant part, for this court to enforce the preliminary injunction order it obtained in the Ayala Court against Rabobank. Federal Complaint at Prayer For Relief ¶¶ 1-3. The Lewis Faction has moved to intervene in this suit, which motion will be heard on June 7. *See* Notice of Motion and Motion to Intervene (FRCP 24) (Dkt. No. 8); May 8, 2013 Minute Order (Dkt. No. 12).

III. THIS COURT SHOULD DENY PLAINTIFF'S REQUEST FOR A TEMPORARY RESTRAINING ORDER

A temporary restraining order "is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in original). The standard for granting a TRO is the same as for a preliminary injunction. *See Liegmann v. California Teachers Ass'n*, 395 F. Supp. 2d 922, 925 (N.D. Cal. 2005). The "traditional" criteria for preliminary injunctive relief requires the Plaintiff to show (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to Plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the Plaintiff, and (4) advancement of the public interest (in certain cases). *Save Our Sonoran v. Flowers*, 408 F.3d 1113, 1120 (9th Cir. 2005) (citations omitted). Alternatively, a court may grant the injunction if the Plaintiff demonstrates either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor. *Id.*

Under either test, the plaintiff cannot succeed absent a fair likelihood of success on the merits. *See Johnson v. California State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995). Moreover, a "mandatory" injunction (i.e., one which requires affirmative action by the party

1 enjoined, rather than maintaining the status quo²) should be denied “unless the facts and law clearly
 2 favor the moving party.” *Stanley v. University of Southern California*, 13 F.3d 1313, 1320 (9th Cir.
 3 1994) (citations omitted). Plaintiff seeks a mandatory injunction here, since it would require
 4 Rabobank to, among other things, interplead certain funds. *See* Federal Complaint, Exhibit R at 2.

5 Plaintiff cannot meet these burdens here.

6 **A. Plaintiff Has No Likelihood of Success On the Merits.**

7 Plaintiff has no likelihood of success on the merits of its suit, which seeks to have this Court
 8 enforce the Ayala Court Orders. For this reason alone, this Court should deny Plaintiff’s motion.

9 **1. The Ayala Court Orders Were Obtained In Violation of Due**
 10 **Process and Enforcing Them Would Violate Public Policy.**

11 The decision whether to enforce tribal court orders is governed by principles of comity. *See*
 12 *Wilson v. Marchington*, 127 F.3d 805, 809, 813 (9th Cir. 1997) (applying principles of comity to
 13 tribal court judgments). Comity to such orders must be denied when, as here, the Tribal Court
 14 denied the defendant due process, and should be denied when, as here, enforcing the order would
 15 violate public policy. *Id.* at 810.

16 The competing tribal courts here each claim legitimacy and have issued conflicting orders to
 17 Rabobank. No neutral court or other governing body has determined which faction, or associated
 18 court, if either, is legitimate. The Ayala Court’s issuing the preliminary injunction order against
 19 Rabobank under those circumstances denied Rabobank due process, since following that order
 20 would require Rabobank to violate an order of the competing Lewis Court, and would provide
 21 Rabobank with no protection if the Lewis Court ultimately is determined to be legitimate. *See*
 22 *Western Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 75 (1961) (“the holder of . . . property is
 23 deprived of due process of law if [a court compels him to relinquish the property] without assurance
 24 that he will not be held liable again in another jurisdiction or in a suit brought by a claimant who is
 25 not bound by the first judgment”).

26 Similarly, this Court’s enforcing the Ayala Court Orders against Rabobank would be
 27 fundamentally unfair, and thus violate public policy, because Rabobank’s complying with the Ayala

28 ² *See Dahl v. HEM Pharm. Corp.*, 7 F.3d 1399, 140 (9th Cir. 1993).

1 Court's orders would cause it to violate the Lewis Court Order. *Sea Dragon, Inc. v. Gebr. Van*
 2 *Weelde Scheepvaartkantoor B.V.*, 574 F. Supp. 367, 372 (S.D.N.Y. 1983) (public policy prohibits
 3 subjecting a party to conflicting court orders).

4 **2. The Ayala Court Orders Conflict With The Lewis Court**
 5 **Order, and Thus Should Not Be Enforced Here.**

6 The decision to enforce a non-final tribal court judgment is a matter of discretion
 7 (*MacArthur v. San Juan County*, 497 F.3d 1057, 1060 (10th Cir. 2007)), and federal courts need not
 8 extend comity to tribal court orders that conflict with "another final judgment that is entitled to
 9 recognition." *Marchington*, 127 F.3d at 810. Because the Ayala Court Orders directly conflict with
 10 the Lewis Court Order, this Court should deny the Ayala Court Orders comity. While the Lewis
 11 Court order granting a TRO is not a final judgment, neither are the Ayala Court Orders granting a
 12 TRO and preliminary injunction. And, the Ayala Court Orders and the Lewis Court Order are
 13 equally entitled to recognition. This Circuit has recognized the predicament created by recognition
 14 of one of several conflicting orders, and this Court should exercise its discretion to deny
 15 enforcement of the Ayala Court Orders here.

16 **3. The Tribal Court Lacked Jurisdiction To Issue The**
 17 **Orders Plaintiff Seeks To Enforce.³**

18 Comity of tribal court orders should be declined when the tribal court lacked jurisdiction to
 19 issue the orders at issue, and/or when those orders conflicted with a valid forum selection clause.
 20 *Marchington*, 127 F.3d at 810. The Ayala Court lacked jurisdiction to issue the orders Plaintiff now

21 ³ Typically, courts must follow a deferential exhaustion rule that gives examination of the
 22 jurisdictional question in the first instance to the tribal court system. *Strate v. A-I Constrs.*, 520
 23 U.S. 438, 448-49 & n.7. Thus, a party can challenge in federal court a tribal court's assertion of
 24 jurisdiction only after that party has exhausted the remedies available in the tribal court system.
 25 Here, however, "tribal exhaustion is not at issue because Plaintiffs—not Defendants—filed suit in
 26 this court, requesting, among other things, that this court enforce the Tribal Court Orders."
 27 *Macarthur v. San Juan County*, 2000 U.S. Dist. LEXIS 16859, at *15 n. 7 (D. Utah Oct. 30, 2000)
 28 (vacated in part on other grounds by *MacArthur v. San Juan County*, 309 F.3d 1216 (10th Cir.
 2002); *see also MacArthur v. San Juan County*, 566 F. Supp. 2d 1239, 1250 (D. Utah 2008)
 ("having made the strategic choice to pursue enforcement of the Navajo court orders in federal court
 before the tribal court proceedings had been fully concluded, plaintiffs . . . short-circuit[] the usual
 exhaustion of Navajo tribal remedies, including review by the Navajo Supreme Court").

1 asks this court to enforce.

2 a. **The Tribal Court Ordinance Exempts Rabobank**
3 **From the Court's Jurisdiction.**

4 As discussed above, the Tribe's constitution exempted Rabobank, among others, from its
5 tribal court's jurisdiction. *See supra*, Section II.B. That part of the Tribe's constitution was passed
6 before the intratribal dispute arose, and has not been amended. *See id.* Thus, the Ayala Court
7 lacked jurisdiction to issue its preliminary injunction order against Rabobank, and thus this Court
8 should not enforce that order here. *Cf. Texaco, Inc. v. Zah*, 5 F.3d 1374, 1377 (10th Cir. 1993)
9 (analyzing tribe's law and order code's jurisdictional limitations to determine whether tribe
10 exceeded jurisdiction in issuing order sought to be enforced in federal court); *DeMent v. Oglala*
11 *Sioux Tribal Ct.*, 874 F.2d 510, 516-17 (8th Cir. 1989) (same).

12 b. **The DACA's Forum Selection Clause Governs**
13 **Plaintiffs' Claims.**

14 The DACA's forum selection clauses govern the claims Plaintiff asserted before the tribal
15 court. Those claims fall within the scope of those forum selection clauses, and those clauses are
16 valid. Thus, the tribal court lacked jurisdiction to issue the preliminary injunction order, and this
17 Court should decline to enforce that order here through Plaintiff's requested TRO.

18 (1) **Plaintiff's Claims Fall Within the Scope of**
19 **the DACA's Forum Selection Clauses.**

20 The claims in Plaintiff's complaint before the tribal court fall within the scope of the
21 DACA's forum selection clauses. As noted, those clauses provide that the Tribe "shall not institute
22 any action in its own tribal court system in respect of *any* claim or cause of *action arising out of or*
23 *relating to* this Agreement, the Indenture and the transactions contemplated hereunder," but shall
24 instead institute such claims in state or federal court in New York, or, if those courts decline
25 jurisdiction, state or federal court in California, and if those courts decline jurisdiction, before an
26 arbitration panel. Hash Dec., Exhibit E at §§ 10(a)(iii), (iv) (emphasis added). Clauses governing
27 claims or causes of action that "arise out of or relate to" a particular agreement have a very broad
28 scope. *Schoenduve Corp. v. Lucent Technologies, Inc.*, 442 F.3d 727, 732 (9th Cir. 2006) ("arising
out of or relating to" as used in arbitration clause to be interpreted broadly); *see also Doe v.*

1 *Network Solutions, LLC*, 2008 U.S. Dist. LEXIS 7397, at *14 (N.D. Cal. Jan. 22, 2008) (forum
2 selection clause that applied to disputes “under, arising out of, or related in any way to” agreement
3 was intended to be applied broadly).

4 Here, the Plaintiff’s claims strongly relate to the DACA:

- 5 • Plaintiff motion for a TRO contends that it seeks relief in this Court “pursuant to” the
6 DACA. Plaintiff’s Memorandum of Points and Authorities in Support of Motion For
7 Temporary Restraining Order (Dkt. No. 16-1) (“Motion for TRO”) at 1-2.
- 8 • The Ayala Court Complaint identifies all the accounts in the DACA as the accounts
9 in dispute. *Compare* Federal Complaint, Exhibit N ¶ 10 with Hash Dec., Exhibit E at
10 1, Recital A.⁴
- 11 • Both Plaintiff’s claims in the Ayala Court and the DACA address the Tribe’s
12 indebtedness to Wells Fargo Bank for a loan to construct and operate the Tribe’s
13 casino. *Compare* Federal Complaint, Exhibit N ¶ 9 with Hash Dec., Exhibit E at 1,
14 Recital A.
- 15 • The central issue in Plaintiff’s complaint, and every cause of action in it that is
16 asserted against Rabobank, is who should control those accounts. *See* Federal
17 Complaint, Exhibit N ¶¶ 22-42. Such control is also the prime focus of the DACA.
18 *See* Hash Dec., Exhibit E ¶ 1; *see also id.* at § 1(d) (CEDA “shall be entitled to
19 present items drawn on or otherwise to withdraw or direct the disposition of funds
20 from the” accounts).
- 21 • The suit seeks to hold Rabobank liable for failing to follow instructions from the
22 Ayala Faction regarding the Accounts. Federal Complaint, Exhibit N ¶¶ 24, 30, 40.
23 The Bank’s liability for following instructions regarding the accounts is a key focus
24

25 ⁴ The Ayala Court Complaint also identifies additional accounts besides those in the DACA as those
26 in dispute. *See* Federal Complaint, Exhibit N ¶ 10. However, the DACA specifically applies to
27 “renumbered or successor accounts” (*see* Hash Dec., Exhibit E at 1), and, moreover, the accounts
28 identified in the DACA are the only ones with substantial funds in them. *See* West Dec., Exhibit I
(Declaration of Darrel Hyatt) ¶ 3. The additional accounts listed in the Complaint are used merely
to facilitate transactions to and from the accounts listed in the DACA. *Id.*

1 of the DACA. *See* Hash Dec., Exhibit E at § 2(a) (under certain conditions “the
 2 Bank shall not have any liability to [CEDA] . . . for losses or damages resulting from
 3 any failure to comply with instructions relating to the [accounts] or delay in
 4 complying with such instructions”).

5 Courts have properly found forum selection clauses to govern disputes having a far less
 6 substantial relationship with the dispute. For example, in *Lombardozzi v. Debroux*, 1992 WL
 7 246872, at *1 (N.D.N.Y.) (Munson, J.) the court remanded a case to state court based on a forum
 8 selection clause in a settlement agreement which gave the state court “exclusive jurisdiction over
 9 any dispute arising out of or relating to the Settlement Agreement.” Although none of the plaintiff’s
 10 claims were based on the settlement agreement, one of the defendant’s affirmative defenses invoked
 11 that agreement. The court held that “since at least one portion of the dispute ‘arises out of’ or
 12 ‘relates to’ the Settlement Agreement, the forum selection clause in that Agreement is clearly
 13 implicated.” *Id.* at *4.

14 Here, the DACA is central to the dispute at the heart Plaintiff’s complaint, and clearly
 15 “relates to” that dispute. Thus, the DACA’s forum selection clauses govern Plaintiff’s claims.

16 (2) The Forum Selection Clauses Bind Plaintiff.

17 The claims in Plaintiff’s suit before the Ayala Court are brought on behalf of the Picayune
 18 Rancheria of the Chukchansi Indians, not CEDA, the party to the Accounts and the DACA.
 19 However, Plaintiff’s claims are still governed by the DACA’s forum selection clauses.

20 Non-parties to a contract are subject to that contract’s forum selection clause if they, *or* the
 21 claims they assert in the complaint, are “closely related to the contractual relationship” containing
 22 the forum selection clauses. *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 514 n.5
 23 (9th Cir. 1988) (“a range of transaction participants, parties and non-parties, should benefit from
 24 and be subject to forum selection clauses.”); *see also Gross v. Silverberg*, 2010 U.S. Dist. LEXIS
 25 131580, 2010 WL 5147594, at *3 n.4 (D. Colo. Dec. 13, 2010) (“Plaintiffs do not dispute
 26 defendants’ arguments that defendants who were not signatories to the notes are entitled to the
 27 benefit of the forum selection clauses therein. Nor could they.”).

Here, the Plaintiff, and its claims asserted in tribal court, are both closely related to the DACA. As for the Plaintiff's relationship with the DACA, as noted, the signatory to the DACA, CEDA, is a wholly-owned unincorporated enterprise of the Picayune Rancheria of the Chukchansi Indians, the ostensible Plaintiff here. *See supra*, Section II.A. The DACA was signed by Nancy Ayala, the alleged leader of the Plaintiff Tribe, as Vice Chairperson of the Tribe. *See* Hash Dec., Exhibit E at signature page. Indeed, the DACA refers to CEDA as "the Tribe." *Id.* at 1.

Plaintiff's tribal court claims are closely related to the DACA, too. As discussed in the preceding Section, the DACA and Plaintiff's claims concern the same subject matter. *See supra*, Section III.A.3.b.1. Moreover, as noted, Plaintiff's claims all concern its supposed right to control the accounts. *See id.* However, to the extent Plaintiff has any right to control those accounts, it is through CEDA, the parties to those accounts (and the DACA). Thus, Plaintiff's claims are closely related to the DACA.

(3) The Forum Selection Clauses Are Valid.

Forum selection clauses in commercial contexts are "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972); *see also Argueta v. Banco Mexicano*, 87 F.3d 320, 325 (9th Cir. 1996). This exception is viewed narrowly, providing that a forum selection clause is unreasonable only if (1) its incorporation into the contract was the result of fraud, undue influence, or undue bargaining power, (2) the selected forum is so gravely difficult and inconvenient that the complaining party will for all practical purposes be deprived of its day in court, or (3) enforcement of the clause would contravene a strong public policy of the forum in which the suit is brought, as declared by statute or judicial decision. *Argueta*, 87 F.3d at 325. The party challenging the forum selection clause bears a "heavy burden" in establishing one of the grounds for rejecting enforcement. *Id.*

Plaintiff does not even contend that the forum selection clauses are unreasonable under any of these tests, and could not. There is no allegation of "fraud, undue influence, or undue bargaining power" anywhere in Plaintiff's Ayala Court Complaint, and, more importantly, Plaintiffs presented

no evidence of it. Litigating in New York or California courts, or in arbitration, the forums Plaintiff agreed to, would be neither gravely difficult nor inconvenient. *Fireman's Fund Insur. Co. v. M/V DSR Atlantic*, 131 F.3d 1336, 1338 (9th Cir. 1998) ("serious inconvenience" of litigating in Korea did not render clause "unreasonable"); *Flake v. Medline Industries, Inc.*, 882 F. Supp. 947, 949-950 (E.D. Cal. 1995) (clause requiring California plaintiff to litigate in Illinois upheld). Plaintiff, moreover, points to no statute or judicial decision of this forum or of the Ayala Court reflecting any public policy against forum selection clauses. Indeed, as noted, the Tribe passed a resolution approving such clauses in their contracts. *See supra*, Section II.B. Thus, the DACA's forum clauses are valid, and should be enforced.

4. **The Tribe Will Not Suffer Irreparable Injury Without A TRO.**

Even if Plaintiff could demonstrate likelihood of success on the merits, which it cannot, it fails to show that "immediate" irreparable harm is likely to occur absent a TRO. *Caribbean Marine Services Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988); *see also Winter v. National Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

To begin with, Plaintiff's contention that it needs a TRO to avoid irreparable injury is baseless. It says it needs access to the Rabobank accounts—which accounts the Lewis Faction contends Plaintiff has no right to—to pay the Tribe's and the casino's operating expenses, including making its loan payment. Motion for TRO at 9-10. However, Plaintiff admits that it "has more than sufficient revenue to pay its operating expenses in the form of checks totaling over Seven Million Dollars." *Id.* ¶ 34. Plaintiff asserts—citing to no evidence—that it has access to no bank accounts, but offers no clue why it cannot simply open another account with that \$7 million, and pay its expenses out of that.

Plaintiff, moreover, provides no evidence that it cannot deposit these amounts into the Rabobank accounts. If it did, as it has in the past, Wells Fargo has the right under the DACA to direct that the loan payment, and other casino expenses, be paid. Hash Dec., Exhibit E § 1(e).

1 Plaintiff's baseless claim of irreparable injury strongly suggests that their request for
 2 relief here is not about paying the Tribe's and the casino's debts, but instead about trying to keep
 3 money away from the rival Lewis Faction.

4 Also, because Plaintiff's supposed harm is self-inflicted, it cannot qualify as
 5 irreparable. *E.g., Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F3d 828, 839 (3rd Cir.
 6 1995) ("Because defendants have acted to permit the outcome which they find unacceptable. . . such
 7 an outcome is not an irreparable injury."). Plaintiff's supposed injury here results from its persistent
 8 inability to resolve its dispute with the rival Lewis Faction regarding who has the right to control the
 9 Rabobank accounts. Plaintiff could have resolved this issue long ago by complying with the DACA
 10 and submitting that issue before the forums the DACA selected, instead of taking months to pursue
 11 litigation in an inappropriate tribal forum.

12 Moreover, Plaintiff's allegations of irreparable injury are contradicted by Plaintiff
 13 having unduly delayed in seeking a TRO, and this Court is entitled to deny Plaintiff's motion solely
 14 on this ground. *See* E.D. CA L.R. 231(b). Plaintiff urges this Court to issue a TRO because of the
 15 urgency of the need to pay the tribe's and the casino's bills. However, Plaintiff waited a month
 16 before seeking enforcement of those orders in federal court, and over two months before seeking
 17 this TRO. *See* Federal Complaint ¶¶ 31, 37 (tribal court issued the TRO on March 15, 2013 and
 18 issued the preliminary injunction on March 29, 2013). Moreover, on May 6, 2013 Rabobank filed
 19 an appeal to the tribal court's preliminary injunction, which Plaintiff failed to oppose. *See* West
 20 Dec. ¶ 7, Exhibit E. Plaintiff's delay in seeking this TRO demonstrates that Plaintiff will not suffer
 21 irreparable injury absent a TRO, and this Court should therefore deny Plaintiff's motion.

22 **5. Because A TRO Would Cause Substantial Harm, The**
 23 **Equities Weigh Strongly Against One.**

24 The balance of hardships analysis looks at "the degree of harm that will be suffered
 25 by the plaintiff or defendant if the injunction is improperly granted or denied." *Scotts Co. v. United*
 26 *Industries Corp.*, 315 F.3d 264, 284 (4th Cir. 2002) (emphasis omitted).

27 Plaintiff's requested TRO would cause Rabobank substantial hardship. The Lewis
 28 Court has issued a temporary restraining order directing Rabobank not to deal with the Ayala Court

1 in any way, or with anyone from the Ayala Faction. *See* West Dec., Exhibit F. If this Court issues
2 a TRO mandating that Rabobank comply with the Ayala Court's orders, it will put Rabobank in
3 legal jeopardy from the Lewis Court. As discussed, that would be fundamentally unfair. *See supra*,
4 Section III.A.1. Rabobank did not create the intratribal dispute that has arisen within the Tribe.
5 However, as a result of that dispute, it faces the impossible situation of having two courts issuing
6 inconsistent orders.

7 Plaintiff, on the other hand, faces little to no cognizable hardship if the TRO is
8 denied. As noted, its claim of irreparable injury is baseless. If this Court denied the TRO, Plaintiff
9 would merely need to abide by its contracts and submit the underlying dispute to the appropriate
10 forum, selected by the agreement Plaintiff seeks to enforce here.

11 **IV. CONCLUSION**

12 Rabobank respectfully requests that the court deny Plaintiff's motion for a temporary
13 restraining order.

14
15 DATED: June 3, 2013

16
17 Bingham McCutchen LLP

18
19 By: /s/ Thomas F. Gede

20 Thomas F. Gede
21 Attorneys for Defendant Rabobank.
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