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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : CIVIL TERM : Part 45

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WELLS FARGO BANK, N.A., AS TRUSTEE,

Index: 652140/13

Plaintiff,

-against-

CHUKCHANSI ECONOMIC DEVELOPMENT  
AUTHORITY, THE BOARD OF THE CHUKCHANSI  
ECONOMIC DEVELOPMENT AUTHORITY, THE  
TRIBE OF PICAYUNE RANCHERIA OF THE  
CHUKCHANSI INDIANS, THE TRIBAL COUNCIL OF  
THE TRIBE OF PICAYUNE RANCHERIA OF THE  
CHUKCHANSI INDIANS, THE PICAYUNE  
RANCHERIA TRIBAL GAMING COMMISSION  
RABOBANK, N.A., GLOBAL CASH ACCESS, INC.,  
NANCY AYALA, TRACEY BRECHBUEHL, KAREN  
WYNN, CHARLES SARGOSA, REGGIE LEWIS,  
CHANCE ALBERTA, CARL BUSHMAN, and BANK  
OF AMERICA, N.A.,

Defendants.

-----x

60 Centre Street  
New York, New York 10007  
July 2, 2013

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Senior Court Reporter

Michael A. Ranita - Senior Court Reporter

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Michael Ranita  
Senior Court Reporter

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(The following takes place in open court, on the record, after an off-the-record conversation among all parties.)

THE COURT: On the record. We are going to remove two names of payees from the list of vendors, um, on the list which is Exhibit A to the -- to the order that is being negotiated by the parties. The two names that are being deleted are, Mr. Marston?

MR. SHAPIRO: If I could just say, Mr. Marston is not admitted in this court. We filed a motion electronically yesterday having him admitted, so I just wanted to make clear --

THE COURT: Yes, there's --

MR. SHAPIRO: -- that it's the Court's pleasure to --

THE COURT: There is a little snafu on that, but I'm allowing him to be admitted and then you will cleanup the paperwork.

MR. SHAPIRO: Thank you, your Honor.

MR. MARSTON: Thank you, your Honor. It's an honor and pleasure to be in Court.

MR. MALIONEK: The two names, your Honor, are PRCI -- this is Robert Malione on behalf of the trustee -- PRCI and TGC.

THE COURT: So PRI and TGC?

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MR. MALIONEK: PRCI and TGC.

THE COURT: Are deleted from the list. And you can update this on a weekly basis. You'll have another week. I understand you already had two weeks to look at it and you picked up two. If there is something that you don't like, you come back.

I am going to order that the casino manager be assigned. I don't think I'm weighing into the dispute. I think that it's the most professional way to do it. That casino manager, if there is any issue at all, you could come right back here and we'll deal with that as it is. I'm not weighing into the dispute, but I also don't want either faction involved in signing these checks, and I also don't want the cumbersome nature of having both factions having signed the checks. I think that is just as much weighing in, and it's just too cumbersome.

MR. MARSTON: Thank you very much.

MR. MALIONEK: Thank you.

MR. HOCHMAN: Your Honor, this raises an important issue though. The reason we were hoping to have signatory authority -- and I understand your Honor's ruling -- is to provide a check and balance on what was being done by the Ayala Faction and the casino management they installed.

If the casino management is going to be signing checks, we, the Lewis group now have no oversight mechanism.

## Proceedings

1  
2 When you say if they are doing something wrong we could come  
3 running in, they can be doing it all under the covers now  
4 and we are not going to be able to find out. You've taken  
5 away, by giving the signature authority to the casino  
6 manager, our ability to have any transparency here. So I  
7 would ask that if you are going to do it that way, and I  
8 understand why the Court want to, please, impose weekly  
9 reporting obligations so that we can see every check that's  
10 being issued and have the chance to bring to your Honor any  
11 problems that we have.

12 THE COURT: That sounds appropriate.

13 MR. MALIONEK: Your Honor, on behalf of the  
14 trustee, I discussed that matter with Mr. Marston and I  
15 understand there would be no objection from the Ayala  
16 Faction to providing copies of the checks, or a report with  
17 respect to the checks that are issued.

18 THE COURT: Perfect.

19 MR. HOCHMAN: And your Honor, just so that we are  
20 all clear on the record, we will have the opportunity,  
21 weekly, to object to any of these vendors, because since  
22 this wasn't part of the order to show cause, we didn't -- I  
23 mean, we looked at this list, obviously, and we found things  
24 we had problems with, but we didn't flyspeck it and we  
25 didn't make sure -- it's a very long list. We didn't make  
26 sure that we were satisfied or approving of every single

## Proceedings

1  
2 vendor. We thought there would be a process following to do  
3 that. So I just want to make sure I'm understanding  
4 correctly that we are all on the same page that on a weekly  
5 basis that we could now come back, next week, and say, okay  
6 we found seven other things that we don't know why you are  
7 writing checks to, like The Sacramento Bee, the paper where  
8 Ms. Ayala has taken out full page ads supporting her  
9 political issues with respect to the tribe, and things like  
10 that. We want to make sure that is being done.

11 THE COURT: All right. If it gets too out of hand,  
12 we will have to appoint a referee.

13 MR. HOCHMAN: That would be fair enough.

14 MR. MARSTON: It's not going to get out of hand.  
15 First of all, let me just say this, I've just spoken with  
16 Ms. Markoe. First of all, providing them with the actual  
17 checks is cumbersome, but we could provide them with a list  
18 of every payee; that's number one.

19 Second of all, if they have any questions on the  
20 list, I invite them to ask their questions and we'll provide  
21 them with an explanation, because we may very well be paying  
22 The Sacramento Bee, but not for Ms. Ayala's immediate  
23 campaign, but for advertising for the casino.

24 So if they simply -- you give them the weekly list  
25 of the vendors that we paid. If they have any questions  
26 that -- regarding the legitimacy of those vendors or that

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1  
2 somehow the Tribal Government under the Ayala Faction is  
3 using those vendors to further their rents, they could ask  
4 their questions and we'll respond. You could order us to  
5 respond within a reasonable period, like 24 hours or 48  
6 Hours, and then if they dispute that, then they could come  
7 in and file objections with the Court regarding that payee,  
8 and then the Court can resolve the objection.

9 MR. HOCHMAN: Your Honor, that all sounds nice, and  
10 we'd certainly take that, but in addition, I think that we  
11 should have some official reporting from Rabobank. For  
12 example, we should at least get duplicates of the bank  
13 statements so at the ends of the month we could reconcile  
14 and make sure that no one inadvertently waives off any  
15 payments to their brother-in-law or anything of that nature.

16 MR. MARSTON: We have no objection of providing  
17 copies of bank statements.

18 THE COURT: That's fine. What we've got -- I want  
19 to clarify. We are on the record now, so we are getting  
20 some things done that should be memorialized.

21 First, what do you call, politically, the manager  
22 that we are going to put into that?

23 MR. MARSTON: Giffen Tan.

24 THE COURT: And what is his title?

25 MR. MARSTON: General manager.

26 THE COURT: General manager of the --

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MR. MARSTON: Chukchansi Gold Resort and Casino.

THE COURT: Of the casino. All right. Then, what we've also said is that we are going to have the weekly review of the list of payees.

What do we want from Rabobank?

MR. HOCHMAN: Certainly, your Honor, at least monthly bank statements, and, you know, I would like some latitude as to requesting other information that might be reasonable or appropriate for us -- for us to see what is going on in that account.

THE COURT: Monthly bank statements from Rabobank submitted to the parties.

MR. MARSTON: And we will offer, at the time that we do our check runs, to also provide them with a list, at the end of the week, of each vendor that we pay.

THE COURT: Yes. That's -- we started with that. Now, I don't know, do we need to put that -- we should really put that into the order.

MR. MALIONEK: Your Honor, this is Robert MalioneK again. I believe that we intentionally should put that into the order so that there is no dispute.

One issue I do want to raise, I've just spoken to Mr. Scott Bedford, who is with the Bingham law firm who represents Rabobank, who is in the courtroom today, and I asked him the question as whether, as a procedural matter,



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Rabobank requires two signatories on the checks, just as a procedural matter. He indicated that he was checking with that.

Of course, your Honor, I believe that if the Court were to issue an order saying that the checks shall be signed by Mr. Tan, that that should be sufficient. To the extent there is any issue with respect to that from Rabobank's perspective, if we could have, as a backup, to say that the checks would be signed either by Mr. Tan or by two individuals, Mr. Tan and another member of management, could we please work that into the proposed order as well, just as a contingency?

MR. MARSTON: I would agree. The actual agreement between the CEDA board and the bank only required one signature, but the casino's internal control standards require two. And it would be inappropriate for -- in my opinion, your Honor, I think in violation of the casino's internal controls, to have Mr. Tan signing his own check. Under their internal controls, the casino, not the bank, requires two signatures. So I think, your Honor, if we had Mr. Tan sign the signatures, along with one other casino employee that would remain nameless that would be designated by Mr. Tan, that would have the right to sign those checks consistent with the casino's minimum internal control standards and general accepting accounting principles.

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MR. MALIONEK: And that, your Honor, would satisfy the issue that I just raised with Rabobank's Counsel.

THE COURT: All right. One second. I'm putting a footnote next to Giffen Tan, general manager of the casino, footnote five, which will say, "Together with one other member of casino management."

All right. Now, I want to get back to the issue of the weekly basis is in there. I have 4A, footnote 4A: Rabobank shall provide, to all parties, monthly statements of all payments made pursuant to this paragraph.

I think that does it. All right. Why don't we move on.

MR. MALIONEK: Thank you, your Honor. If we remember the handout and if we could go back to the handout.

THE COURT: Oh, yes.

MR. MALIONEK: Slides eight and nine.

(Whereupon, there is a brief pause in the proceedings.)

MR. MALIONEK: This also relates to paragraphs eight and nine of the proposed order, your Honor. This issue relates to unauthorized actions that have been filed against the trustee and against the holders.

MR. HOCHMAN: I'm sorry, your Honor. Before we move on, there was still part of the other issue that wasn't quite resolved, at least I don't think so, which is I raised

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the issue about the definition of excluded assets, because it's really the mirror image of the fact that CEDA and the tribe had been removed from the vendors list, which means they can't get paid out of the Rabobank account.

We have to also make sure that they don't get paid before the Rabobank account. So in some of the stipulations that were circulated among the parties, there was a parenthetical that said "excluded assets to the extent that the Lewis Faction and Ayala Faction agree on what constitutes excluded assets." I think that is just an important proviso to have in there to make sure that, essentially, the Ayala Faction, it doesn't help themselves before funds even get to the Rabobank account.

MR. MALIONEK: Your Honor, if I may, first -- this is Robert Malione. There's -- this is not an issue. The term "excluded assets," which is simply mirrored in our proposed order, is something that comes directly out of the indenture. All we are saying is that the parties shall deposit the funds that are required specifically, explicitly by the terms of the indenture, and that is that the gross revenues and cash, other than operating cash and other than excluded assets, shall be deposited into the Rabobank account.

There is no issue with respect to "excluded assets" because, your Honor, the parties all agree to exactly what

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that means. Mr. Lewis, himself, as I mentioned before, is a signatory to the indenture. He understands exactly what that term means.

THE COURT: I don't think he is concerned about what it means. He just wants it in here.

MR. MALIONEK: It is, your Honor, and that's my point. That's why I say it is a non-issue, is that what the proposed order states is that.

THE COURT: Where is --

MR. MALIONEK: The following --

THE COURT: What paragraph?

MR. MALIONEK: The beginning of paragraph -- this is paragraph one and it's paragraph two.

MR. HOCHMAN: Your Honor, we have --

MR. MARSTON: One second. I would like to respond. Your Honor, what opposing counsel wants you to do is rewrite the indenture and rewrite the DACA, and you can't do that. The DACA is very clear. The gross revenues have to go into the operating account first. That's what the indenture says. And the indenture defines gross revenues in no uncertain, unambiguous terms. It also defines what excluded assets are. So to make it clear, what doesn't need to go into the operating account.

So what Wells Fargo is simply doing is bringing this action, once again, to have you order the parties to

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1  
2 comply with the indenture and the DACA, and we would agree  
3 with that. You can't rewrite the indenture or the DACA.

4 THE COURT: I understand that.

5 MR. MARSTON: Thank you, your Honor.

6 MR. HOCHMAN: Your Honor, if I could, I think I  
7 could explain, in a jiffy, why there is a problem with this.  
8 The indenture, and its definition of excluded assets, was  
9 perfectly fine when there was a single Tribal Government  
10 with no dispute about who the legitimate control people of  
11 that government were. The problem now is that under the  
12 blue brick of excluded assets, the -- there are two things  
13 in that definition, subparagraphs six and seven. One is  
14 payments to the Tribal Gaming Commission, of which there are  
15 now two, the Ayala Tribal Gaming Commission and the Lewis  
16 Tribal Gaming Commission. Also are all personal property of  
17 the authority, which is defined as CEDA, and that is funds  
18 to -- for the tribe's provision of customary central  
19 government services.

20 So the issue here is that the Ayala Faction, in  
21 their, you know, attempted manifestation as the government  
22 of the tribe, should not be able to take money on its way to  
23 Rabobank and say, well, this is excluded assets, we could  
24 spend it on ourselves. That's why I raise the issue, your  
25 Honor.

26 THE COURT: What would you do about it?

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1  
2 MR. HOCHMAN: All I would say is that the  
3 definition of excluded assets that is in this order should  
4 just be added to with a parenthetical that says, to the  
5 extent that both factions agree that those are properly  
6 excluded assets, so to the extent that the Ayala Faction  
7 wants to designate money for itself, we could at least be  
8 heard on that and say no, that's not appropriate.

9 THE COURT: You could do that at any time. It's a  
10 defined term.

11 MR. HOCHMAN: But your Honor, it's a defined term  
12 which works fine when there is a single government, but  
13 there isn't.

14 THE COURT: I understand that. Meaning that there  
15 may be disputes.

16 MR. HOCHMAN: But again, we won't see it. We won't  
17 see what's not coming in. It's another reporting issue. We  
18 won't see what's not coming into the Rabobank account,  
19 because now we are having a reporting about what happened in  
20 the Rabobank accounts, but this is after the casino  
21 generates this revenue and they've got this bundle of cash,  
22 or whatever form it's held in, they could essentially direct  
23 money to themselves under these two provisions saying these  
24 are excluded assets. Under the indenture, we don't even  
25 have to bring those to Rabobank. And I'm concerned that we  
26 need some sort of check and balance as to what's going on

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there. It's important.

MR. MALIONEK: Are you done? I didn't want to interrupt.

MR. HOCHMAN: I am.

MR. MALIONEK: Your Honor, we've been talking about preserving the status quo, which we describe it in our papers as the status quo ante. Which is the status of the parties prior to any disputes.

What the Lewis Faction's Counsel is talking about is rewriting the indenture. The indenture is clear. These are defined terms, and the proposed order simply tracks that.

All the trustee is asking for is that the indenture be complied with. That we think there is no ambiguity with respect to the definition of excluded assets. I will note that Mr. Schindler --

MR. HOCHMAN: Hochman.

MR. MALIONEK: Mr. Hochman has misquoted the definition of excluded assets. It doesn't say that excluded assets are payments to the Tribal Gaming Commission. What it says, under paragraph six of the excluded assets definition, is that any personal property constituting assets of the Tribal Gaming Commission will not otherwise be deposited into Rabobank.

There's no issue with respect to whether the

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personal property of the Tribal Gaming Commission is going to be deposited into the Rabobank account. That's not an issue here. So we think that this is much adieu about nothing and that the terms of the indenture speak for themselves here. And it's absolutely true, your Honor, if there are disputes that arise, just as if there are disputes that arise with respect to payments that are going out, those can be raised with a meet and confer, and if there are issues between the factions with respect to those, or with respect to the -- or with the trustee, which, again, has no dog in the fight other than to want to ensure that the indenture is complied with, that that can be brought to the Court's attention.

THE COURT: Can you get some kind of a report?

MR. HOCHMAN: Thank you, your Honor.

MR. MARSTON: Yes. The answer to that is yes.

Having said that, I also just want to add that the indenture sets up a priority of payments. The tribe doesn't get any money under the indenture. If there's not sufficient revenue to first pay the bond, deposit into the operating account the amount of money necessary to make the biannual payment or annual payment to the bondholders, and then, second of all, pay the operating expenses of the casino.

So opposing Counsel's statement that the tribe is going to somehow take the money first, you know, before



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1  
2 making -- for itself before it deposits in the operating  
3 account, is just wrong. And obviously, if the Ayala Faction  
4 or Lewis Faction, or anybody else tried to do that, it would  
5 be a violation of the indenture to the DACA, and Wells Fargo  
6 will immediately be coming, running into the Court and  
7 saying, your Honor, they are not putting all the money in  
8 the account that they are supposed to be putting in the  
9 accounts. That's number one.

10 Number two, this is a very slippery slope that  
11 opposing Counsel wants you to go down, because if you start  
12 -- what he wants you to do is, he is saying, we want you now  
13 to start making decisions about whose Gaming Commission is  
14 the right Gaming Commission. And to do that, obviously, you  
15 have to interject yourself into the intertribal dispute, and  
16 you don't have the authority to do that.

17 So as my colleague has said, we are here once  
18 again, your Honor, to enforce the agreements that were  
19 entered into by the parties, and the agreements are clear,  
20 they are unambiguous. It specifies what money we have to  
21 put into that accounts, and we are going to put that money  
22 into the accounts because the bondholders deserve to be  
23 paid, and the operating expense of the casino have to be  
24 paid.

25 THE COURT: When we talk about a slippery slope,  
26 does that include giving him a report of what went in?

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MR. MALIONEK: Your Honor, may I address that?

THE COURT: Yes.

MR. MALIONEK: The trustee is in favor of transparency here in this process, so one of the provisions that we have in the proposed order, based on some breaches of the indenture as it stands, is that the financial statements of the casino need to start to flow again, need to start to be shared with the trustee and with the bondholders. Perhaps, although I'm jumping ahead somewhat with respect to the provisions of the proposed order, because the statement of cash flows of the casino will show exactly how the cash is treating the issue of excluded assets, perhaps those statements can be shared as part of this proposed order with the Lewis Faction as well so that they do get reports with respect to how the assets are being treated.

MR. HOCHMAN: Your Honor, that's fine. I think that's a good start. But they can't be annual like financial reports.

THE COURT: Quarterly.

MR. MALIONEK: This is quarterly, your Honor.

MR. HOCHMAN: I would ask for monthly, your Honor.

MR. MALIONEK: The trustee, obviously, has no objection to that.

THE COURT: All right. Let's -- we will get to it

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when we get to it, but we are coming up on it.

Okay. Where are we?

MR. MALIONEK: Let's move on, your Honor. Slides eight and nine of the handout and provisions eight and nine of the proposed order, these relate to, as I was indicating previously, some unauthorized actions that were filed by CEDA, by the two factions, against the trustee and against holders.

The indenture provides that the tribal parties must use New York courts, in the first instance, to bring any action that arises in any way out of the indenture or the related agreements, the security agreement or the DACA.

The indenture also provides that the tribal parties would not, under any circumstance, institute any action in their tribal court systems, with respect to the indenture or the other agreements, but on April 18th and April 26th, CEDA, through the Lewis Faction, instituted just such proceedings in their Tribal Gaming Commission and in their tribal court, filed against not only the Ayala Faction with respect to their disputes, but also against Wells Fargo as trustee and against one of the secure note holders.

The issues in those proceedings related to the trustee's actions under the DACA and the security agreement and the indenture with respect to how the Rabobank account was being used. And so those actions were in violation,

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specifically, of the indenture.

As we cited in our papers, there is ample authority for the proposition that a court can enjoin parties from filing further actions when those actions are in violation of the contractual agreements between them. We do not think there's any opposition to this request for relief. I will note that the Lewis Faction, in the submission that they filed with the court, did not address this issue one way or the other. So we believe that there is no opposition to this. These are -- this is paragraph nine in the proposed order.

THE COURT: Right. Do you have an objection?

MR. MALIONEK: There is a separate issue that I will raise with respect to the non-disparagement.

MR. HOCHMAN: Your Honor, we have co-counsel here whose admission and papers have been submitted, Rob Rosette from the Rosette law firm. He has represented, certainly, the Lewis defendants and the tribe for many years. I was wondering if he could address at this point.

THE COURT: Yes.

MR. ROSETTE: Your Honor, if you look at the tribal court complaint, we did not file a lawsuit under the terms of the indenture for breach of contract. Actually, the Ayala Faction filed those papers against Rabobank in violation of the indenture.

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Our lawsuit was under an aiding and abetting theory of law with regard to some clear cut evidence that we had. We did dismiss that action without prejudice. The fact of the matter is that once the Bureau of Indian Affairs or the Federal Government resolved this governance issue, those issues will be very applicable to what's gone on in this case. And we wouldn't want to be prejudiced by this court to bring future lawsuits under that theory; not under these agreements, not under the indenture, but instead, under the actions that have occurred between the Ayala Faction and the trustee.

MR. MALIONEK: Your Honor, I will say, just to address that point very briefly, as indicated in the evidence before the Court, specifically in the affidavit of Michael Slade -- this is paragraph nine -- it outlines the allegations that the Lewis Faction had provided, in the action that they had filed in their tribal court, which is that the trustee, by exercising its contractual right to sweep a portion of the funds in the Rabobank account that were due to it under the indenture, that that constituted improperly engaging with the Ayala Faction. However, your Honor, as I indicated under the indenture, because that action arises and is related to the indenture and the other related agreements, then the Lewis faction -- both factions had already agreed they would not institute any such action

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1  
2 in their own tribal court systems, or, in fact, anywhere  
3 outside the exclusive jurisdiction of primary jurisdiction  
4 of the New York Courts. And all we are asking for, your  
5 Honor, as provided by the authority as we cite, and again,  
6 there's ample authority on this point, that your Honor order  
7 them not to file any further actions.

8 THE COURT: These are actions within tribal courts  
9 and Tribal Gaming Commissions?

10 MR. MALIONEK: Yes. That's exactly right. And  
11 both factions, since the dispute was filed, since the  
12 dispute arose, has set up their own Tribal Gaming  
13 Commissions in their tribal courts. And the Lewis Gaming  
14 Commission and the Lewis court that were set up by the Lewis  
15 Faction was hearing each of these actions that were filed by  
16 the Lewis Faction.

17 THE COURT: What is the provision in the indenture?

18 MR. MALIONEK: It's 13.1(c) and 13(d).

19 THE COURT: Just a minute.

20 MR. MALIONEK: And the indenture, your Honor, is  
21 provided in Exhibit A of the Michael Slade affidavit.

22 MR. ROSETTE: Your Honor, if I might just add  
23 something. I'm not agreeing -- I don't want what I said to  
24 you to be taken out of context. I agree with the language  
25 of the indenture, specifically that this court has  
26 jurisdiction over disputes that arise under the indenture,

## Proceedings

1  
2 but what I'm suggesting to you is that there may be --  
3 nobody could foresee the future, but there may be lawsuits  
4 in the future between, for example, the Tribe and Wells  
5 Fargo as trustee, that do not arise under these agreements.  
6 You know, there are all kinds of things that could happen  
7 that don't necessarily arise under these agreements where  
8 this court does not have jurisdiction. And there are  
9 several things --

10 MR. MALIONEK: Your Honor, I didn't want to  
11 interrupt, but that's not what we are asking for in the  
12 proposed order. In the proposed order, we are asking only  
13 that the Court order that the tribal parties and the  
14 individual defendants, through the factions, not file  
15 further actions against the trustee or any of the holders  
16 before any tribal court, any Tribal Gaming Commission or any  
17 other court or entity other than this court, with respect to  
18 issues relating to the indenture of the security agreement  
19 or the DACA. And so, it's only with respect to those issues  
20 as agreed in the indenture.

21 MR. ROSETTE: Your Honor --

22 THE COURT: That's what it says.

23 MR. ROSETTE: Your Honor, there are very clear  
24 provisions. These documents are governed by the National  
25 Indian Gaming Commission, which is something that I will  
26 address later as well, but I want to make sure I get

## Proceedings

1  
2 Mr. Marston's statement on the record that Giffen Tan's  
3 contract was approved by the NIGC. That's a statement that  
4 he made earlier to your Honor that I would like to get on  
5 the record; is that correct?

6 MR. MARSTON: Well, actually, your Honor, I believe  
7 it was submitted to the NIGC for approval. I don't know if  
8 they've actually approved it.

9 MR. ROSETTE: Your Honor, that was a  
10 misrepresentation to you earlier. In fact, this is one  
11 example. Giffen Tan, his employment as the general manager  
12 would be a violation of the indenture in and of itself  
13 because of his lack of experience in holding a position like  
14 that. He was placed there by Nancy Ayala.

15 The fact that Wells Fargo, for example, would  
16 breach their own indenture, you know, is not necessarily the  
17 cause of action that they are breaching the indenture, but  
18 along with other evidence that may exist that demonstrates  
19 that there was a concerted effort by the trustee -- not  
20 necessarily the trustee, as well, but also the note holders  
21 themselves, through correspondence and other documents that  
22 prove that they assisted the Ayala Faction would take over,  
23 et cetera, to funnel resources from the tribe, to change  
24 management and other terms.

25 THE COURT: What does that have to do with the  
26 provision that says that you are not supposed to bring any



## Proceedings

actions with respect to issues relating to the indenture, the security agreement and/or the management control agreement? That's what the language says.

MR. ROSETTE: Okay. As long as, your Honor, I guess, the understanding is clear that we can bring actions against the trustee for other causes of actions in other courts, I guess I'm fine with that.

THE COURT: It doesn't say that you are precluded.

MR. ROSETTE: Thank you.

MR. MARSTON: I'll be brief. The Ayala Faction joins with the trustee. What happened here is the tribe didn't make its payment that was due under the indenture to the bondholders. The trustee exercised their right under the indenture, issued letters of instruction to Rabobank to take the money that was in the operating account and pay the bondholders. Now, that payment fell short, but they had that right.

The Lewis Faction went into their court and sued the trustee to try to prevent the trustee from exercising their rights under the indenture, and as your Honor just read the provision, that's all the trustee is trying to do.

THE COURT: Okay.

MR. MARSTON: Is prevent them from suing.

THE COURT: Let's go on.

MR. ROSETTE: Absolutely not what occurred.

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THE COURT: Move on.

MR. MALIONEK: Thank you. The next issue, as described in slide eight, your Honor, relates to the next paragraph of the proposed order, which is paragraph eight. And that is what the trustee requests and what we understand the casino management have requested is that there not be any further actions that are taken by the -- by any of the individual defendants or the tribal parties that would undermine the operations of the casino in any way that would harm the economic interest of the holders. And I know that is a mouthful.

Your Honor, specifically, some of the actions that have occurred include the fact that one of the factions has sent cease and desist letters.

THE COURT: What paragraph are we in now?

MR. MALIONEK: This is paragraph eight of the proposed order.

(Whereupon, there is a brief pause in the proceedings.)

MR. MALIONEK: As that indicates that the tribal parties and individual defendants shall not make particular statements that disparage any of the employees or vendors, or interferes with the economic relations of the casino with their vendors or their employees. And specifically, your Honor, one of the factions has sent out cease and desist

## Proceedings

1  
2 letters to various, if not all, of the casino's vendors,  
3 informing them that because of the dispute, if they continue  
4 to do business with the casino, that there would be action  
5 taken against them.

6 The fright factor of such letters is concerning  
7 because it could undermine the economic interest, and we  
8 think it absolutely would undermine the economic interest of  
9 the holders, and that would be a violation of the indenture.

10 THE COURT: One side says this a violation of the  
11 first amendment.

12 MR. MALIONEK: That's right, your Honor, but as  
13 we've cited, in our reply, specifically, for example, in the  
14 Trojan Electric case, 557 NYS2d 756. This is a Third  
15 Department case from 1990. Any speech that actually hinders  
16 the business or property rights, threatens through tortious  
17 conduct is speech that can be, by the courts, enjoined.

18 In that case, there was picketing going on because  
19 there was a dispute between employees, or former employees  
20 of a business. And the court enjoined their picketing  
21 because that would undermine the business itself, and the  
22 business interest there needed to be protected.

23 Here, the trustee, to be crystal clear, again, your  
24 Honor, has no position with respect to which faction  
25 rightfully should be in control of the casino or the tribe,  
26 and the trustee has no interest, whatsoever, in taking any

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steps that are even close to considered management of the casino. However, the indenture does provide that any actions that interfere with the economic interests of the holders and that would undermine the business of the casino itself, will not be taken by any of the tribal parties.

Here, the cease and desist letters are exactly the kind of picketing that courts have enjoined in the past, and we would ask that that action stops.

THE COURT: Why can't we narrow this provision. It's awfully broad.

MR. MALIONEK: We would be happy to focus, and focus on the cease and desist letters, in fact.

MR. HOCHMAN: Your Honor, thank you for that. First of all, that was our first point. I mean, as written, it's grossly overbroad, and obviously, a prior restraint on speech.

The problem with narrowing it is exactly the problem we have here in its being a prior restraint. There is no proposed communication. There is no description of what might happen in the future for you to enjoin. There is no irreparable harm threat. There is no immediate harm of any sort. Nobody's drafted a letter. It's not sitting on anyone's desk. We don't know what it would say. We don't know who it would be to. We don't know why it would be written or whether it would be completely legitimate, 100

## Proceedings

percent accurate, or on the other hand, tortious. We don't know a single thing about this communication that the court would be enjoining.

The first amendment, your Honor, simply doesn't allow this. This isn't picketing. In the Trojan case there were people who were literally picketing outside of a condominium, and they were doing so, the Court found, in order to interrupt and violate the defendant's business and property rights.

THE COURT: Well, what about cease and desist letters?

MR. HOCHMAN: What cease and desist letters.

THE COURT: What is your position on that?

MR. HOCHMAN: They could be completely legitimate. We don't know what the circumstances would be.

THE COURT: How could a cease and desist letter be completely legitimate if it's a disparagement.

MR. HOCHMAN: Well, if it's a disparagement -- I mean, let's -- you could easily --

THE COURT: It says, don't do business with the casino. You do business with the casino, we are going to threaten you.

MR. HOCHMAN: Right. Well --

THE COURT: You are not going to do business with them.

## Proceedings

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2 MR. HOCHMAN: But say that there's a blatantly  
3 improper business relationship; say that there are kickbacks  
4 being paid; say whatever. I mean, obviously your Honor has  
5 properly envisioned that the Lewis Faction will be at least  
6 monitoring what is going on and have some input if what's  
7 going on turns out to be illegal or self-dealing or  
8 otherwise improper, um, you would expect us both to come to  
9 the court, which we certainly would do, and possibly,  
10 depending on what's going on, to take some action to say,  
11 hey, this contract you've entered into with the casino is  
12 illegal for various reasons. I mean, those are the rights  
13 that any citizen of this country has.

14 THE COURT: All right. I think this is too broad.

15 MR. MARSTON: Your Honor, if I may --

16 THE COURT: The two sides should get it narrowed  
17 down to what they agree about. I'm going to strike it.

18 MR. HOCHMAN: Thank you, your Honor.

19 MR. MARSTON: Your Honor, if I may just quickly, I  
20 would like to address it.

21 We do have, in the record, types of cease and  
22 desist letters that have been sent out. Let me give you  
23 just one example. They sent a letter to the casino  
24 insurance carrier, saying to the insurance carrier, cease  
25 and desist doing business with the insurance company. As a  
26 result of that. The insurance company pulled back and

## Proceedings

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2 stopped doing business so that 1,100 employees of the casino  
3 lost their health insurance. They were providing insurance  
4 coverage under COBRA, which is an added cost to the casino,  
5 which means there is not enough revenue to deposit in the  
6 operating account because we are providing COBRA coverage.  
7 They sent a cease and desist letter out to every single  
8 employee of the casino saying, stop doing business. Stop  
9 working for the casino. A lot of those employees took those  
10 jobs because they could get benefits and health coverage.

11 When they start getting threats levied against them  
12 that they shouldn't be working for the casino or their  
13 health coverage should no longer be provided and is getting  
14 terminated, I mean, your Honor, you know what effect that  
15 has on the operation of the business.

16 THE COURT: I understand. But I think the only way  
17 we are going to be able to deal with this is on a case by  
18 case basis. You will have to come into court, unless you  
19 could agree on some language, and I would think that that  
20 would take a long time.

21 MR. MALIONEK: Your Honor, may I make a quick  
22 proposal as to that --

23 THE COURT: Go ahead.

24 MR. MALIONEK: -- because we are here today? Your  
25 Honor, there is such a cease and desist letter, one of the  
26 examples that was sent by Mr. Rosette to Bally gaming, which

## Proceedings

1  
2 is one of the vendors that the casino needs to do business  
3 with. What it says is: "This letter demands that you cease  
4 and desist from further facilitation, coordination and  
5 conspiring actions with the Ayala Faction. We understand  
6 that you continue to work with the Ayala Faction; that you  
7 are attempting to be paid by the Ayala Faction. Please  
8 cease and desist doing these activities or risk becoming  
9 implicated in the criminal activities through an aiding and  
10 abetting legal theory."

11 It goes on to say, "You must immediately cease and  
12 desist from taking any directions from, having any  
13 discussions with and entertaining any contentions by the  
14 Ayala individuals, rather than participate in a civil and  
15 legal manner in the tribe's democratic process."

16 What we would ask is that this paragraph eight say  
17 simply that the tribal parties and the individual defendants  
18 shall not send further cease and desist letters to the  
19 vendors of the casino, as reflected on the attachment to the  
20 proposed order, in the form of this letter that I've just  
21 described on the record.

22 MR. MARSTON: And the employees, your Honor. And  
23 the employees.

24 THE COURT: I can write that in. Tribal parties  
25 and individual defendants shall not -- what do you want me  
26 to say?



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MR. MALIONEK: Issue any further cease and desist letters to any of the vendors or employees identified --

THE COURT: Hold on.

(Whereupon, there is a brief pause in the proceedings.)

THE COURT: Any further cease and desist letters.

MR. MALIONEK: To any of the vendors.

THE COURT: To any of the vendors.

MR. MALIONEK: Or employees.

THE COURT: Or employees.

MR. MALIONEK: Identified in Exhibit A.

THE COURT: Identified in Exhibit A.

MR. MALIONEK: In any form.

THE COURT: In any form.

MR. MALIONEK: Represented by Exhibit B.

THE COURT: Reflected and represented in Exhibit B.

MR. MALIONEK: And your Honor, Exhibit B will be attached to the proposed order.

THE COURT: Right. Attached to this order.

(Whereupon, there is a brief pause in the proceedings.)

THE COURT: Okay.

MR. MALIONEK: Thank you, your Honor. The last issue raised by the trustee, and then not to get too excited, but then there are two other issues that were

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2 raised by other parties. But the last issue raised by the  
3 trustee, in the motion for preliminary injunction is because  
4 the tribe and CEDA had not issued financial statements on a  
5 timely basis, as required under the indenture, that they do  
6 so.

7 And we have indicated in paragraph ten of the  
8 proposed order that CEDA shall comply with those  
9 requirements by a particular date. Of course, the trustee  
10 would like to have those as quickly as possible. I  
11 understand from Mr. Marston that there are some issues he  
12 would like to address with respect to that timing.

13 I also wanted to make one other point clear with  
14 respect to this paragraph ten, and that is, as it's drafted  
15 now, it states that CEDA shall provide those financial  
16 statement reports to the trustee, and as I had indicated  
17 earlier today, we would propose that those financial  
18 statement reports also be issued to the Lewis faction.

19 THE COURT: Just the Lewis Faction? Why isn't it  
20 to everybody?

21 MR. MARSTON: The Ayala Faction as well, your  
22 Honor.

23 MR. HOCHMAN: The Ayala Faction is, in effect,  
24 preparing them, so they will have them.

25 MR. MARSTON: Your Honor, we have no problem with  
26 the unaudited financial statements and unaudited monthly

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final statements.

The issue that we have is with the year-end audited financial statement. We are not in control of that. It's up to the CPA firm that we hire.

THE COURT: Where are they on that?

MR. MARSTON: Because of some cease and desist letters that were issued, the auditors stopped the audit, so we are going to be retaining, I believe it's Ernst and Yount, which is a nationally known auditing firm. And we will have the Court order us to complete that audit in an expeditious manner, to be done as quickly as possible, subject to whatever terms and conditions the auditor has regarding completion of the audit. We obviously have to work under his time frame.

We will negotiate a contract to try to get them to do it as quickly as possible, but as the Court, I'm sure, appreciates, we are not in control of that. It's going to take whatever time it takes the auditors to do that.

The other thing, the second issue, your Honor, is the auditor may need information, financial information that is in the possession of the Lewis Faction. We would like something in the Court's order that orders -- and let's make it equal -- both the Ayala Faction and the Lewis Faction to cooperate with the auditor and provide the auditor with whatever financial information they need, or he needs, or

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the firm needs in order to complete the annual audit.

MR. ROSETTE: Your Honor, could we clarify? If that's the case, that that would be limited to casino assets as covered by the indenture and the DACA, financial information.

THE COURT: I just want to figure out -- let's talk about the timing first.

CEDA shall provide reports containing it's 2012 year-end audited financial statements -- does anybody have some language they could suggest as --

MR. MARSTON: These audits are, as I'm sure the Court is aware, are controlled by generally accepting accounting principles, and the audit contract with the auditing firm will require them to prepare the reports under generally accepted accounting principles. So all we are asking that the Court do is order the Ayala and Lewis Factions to provide to the auditor whatever the auditor deems necessary in order to conduct the casino audit in accordance with generally accepted accounting principles.

THE COURT: I'm just dealing with the timing first. As soon as reasonably feasible.

MR. MALIONEK: Your Honor, if we could ask for an outside deadline with respect to that. I think what we would ask for is if the end of July is not sufficient, then we would say August 31st.

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THE COURT: To audit the books of the casino?

MR. MALIONEK: For a year-end close. I think the audit can be prepared in a couple of months.

MR. MARSTON: What I suggest, your Honor, is let us contract with the auditor. Let's go to the auditor, we will push the auditor as hard as we can to complete the audit as quickly as possible, but whatever contract is signed, we will provide that contract to the Lewis faction and to the trustee, and then if either party has problems with what's in the contract in terms of the time frame for completing the audit, if they think it's unreasonable, then they could come in and they could file objections with you, your Honor.

THE COURT: All right. As soon as reasonably feasible. And we have the language about first quarter 2013 unaudited financial statement and unaudited monthly financial statements beginning for the month of April 2013. The trustee, the Lewis faction and the Ayala Faction for distribution to the holders and to each of the factions simultaneously.

Now, let's get some cooperation language. Anybody want to take a crack at some cooperation language?

MR. MALIONEK: I need to confer with Mr. Marston on that. That's his proposal.

THE COURT: Let's say each of the factions shall lend their full cooperation.

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MR. HOCHMAN: Can we say reasonable cooperation, your Honor?

THE COURT: Full cooperation and reasonable -- full and reasonable. Cooperation is to the accountants in these endeavors. Okay. All right. Now, I would say that does it for the trustee.

Now, there are some issues of the factions.

MR. MALIONEK: Your Honor, there are some issues that were raised by some of the other defendants, Bank of America, whose Counsel is here today.

THE COURT: Bank of America wants 200-and-something-thousand dollars, right?

MR. MALIONEK: That's correct. Held back out of the transfer into the Rabobank account. The trustee has no objection to that hold back, and that's reflected, your Honor, in paragraph five of the proposed order.

THE COURT: Paragraph five?

MR. FRIEDMAN: Yes, your Honor. Robert Friedman for Bank of America. I believe we addressed this off the record already.

THE COURT: Yes.

MR. FRIEDMAN: There's no objection.

THE COURT: There was no objection.

MR. FRIEDMAN: No objection.

MR. MARSTON: We have no objections to Bank of

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2 America being paid. We want to make sure that they are --  
3 the work that was performed was reasonable, so we ask to be  
4 able to review their attorney billing statements. If that's  
5 not a problem. It shouldn't be, just to make sure that the  
6 legal work that was done was reasonable. Other than that  
7 your Honor --

8 THE COURT: Wait a minute let's deal with that.

9 MR. FRIEDMAN: Well, we don't -- we don't have a  
10 problem with that, your Honor. However, with respect to  
11 this order, the order should be issued, and with respect to  
12 our fees and deductions, because there is a date of July  
13 9th, once the funds are transferred, we lose control, which  
14 is the essence of our recoupment. So that process will  
15 delay the whole transfer. This is the first time it's being  
16 brought up. I believe the transfer should happen.

17 THE COURT: The transfer should happen.

18 MR. FRIEDMAN: And the deduction.

19 THE COURT: Your recoupment, if necessary. So  
20 let's put in a sentence that -- at the end of it, that Bank  
21 of America shall submit its attorney's --

22 MR. MARSTON: Detailed time records to justify its  
23 billing.

24 THE COURT: Attorney's billing statements and time  
25 charges for the review of --

26 MR. MARSTON: Both the Ayala and the Lewis Faction,

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your Honor.

THE COURT: Review of both factions.

MR. FRIEDMAN: And I assume, your Honor, that your Honor is going to retain jurisdiction over any questions or disputes over the billing, rather than the tribal courts before which Bank of America has been sued, and which I believe the parties are agreeing to a dismissal.

MR. MARSTON: So stipulated your Honor.

MR. MALIONEK: And that is, your Honor, paragraph 16 of the proposed order, that the Court shall retain jurisdiction to enforce the terms of this order, including those provisions.

THE COURT: Boy, you folks want to keep me busy.

MR. FRIEDMAN: Hopefully not, your Honor.

MR. MALIONEK: Your Honor, let me address the next issue quickly, which is that proposed order. Paragraphs 11, 12, 13 all relate to requests made by Counsel for Bank of America and Counsel for Rabobank that given the resolution of issues that have been raised by the trustee through this proposed order, that the actions that had been filed against those banks by the tribal parties be dismissed. And the trustee is simply teeing that issue up for your Honor, and those parties' Counsel can address that issues themselves.

THE COURT: That's 11, 12 and 13?

MR. MALIONEK: Correct, your Honor.



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THE COURT: Okay. Who wants to talk?

MR. MARSTON: I'll go first, your Honor. With regards to 11, I have no problem, your Honor, as long as it's without prejudice.

I'm going to skip 12 and go to 13, because I think that is an easy one as well. On 13 I have no problem with 13, your Honor, as long as we also insert a final judgment by any court of competent jurisdiction.

And then with respect to 12, I would like the same language that applies to Rabobank also apply to Bank of America. And that is, that the way I read this language now, we are precluded from bringing an action against Bank of America in the future. I'm not saying we are, but we are precluded from doing so once the intertribal dispute is resolved. And I want to reserve our right, after the intertribal dispute has been resolved, if we have a valid money damage claim against Bank of America, that we are free to bring that money damage claim.

THE COURT: Let's get one at a time. Is there any issue without prejudice? It says "with" or "without prejudice."

MR. FRIEDMAN: Yes. Well, your Honor, we would obviously prefer to have the dismissal with prejudice. Frankly, our view is that once the money is going out, this -- the design here is that we end our involvement in this

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process completely. Where we are giving up our right of set off and recoupment by giving up our control over the accounts. We are consenting to the relief. We are getting rid of all the money. The actions are being dismissed.

There is absolutely no conceivable grounds that we should be left for -- left in in any action for any damages, aside from the review of the invoices and the fee statements.

THE COURT: Well, there is one.

MR. FRIEDMAN: Right. That will be before your Honor. What I believe is being proposed now is that there be some type of reservation that there can be an action in the tribal court after the monies are transferred.

MR. MARSTON: Or any valid court, your Honor. Let me just say this, your Honor: Bank of America had the opportunity, when this dispute arose, to simply take and file an interpleader action in the State Court in California and interplead the money. That would have washed their hands of it. That was offered to them. They chose not to do that, and instead they froze that account. And so they were sued by the Lewis -- by the Ayala Faction in tribal court, and we have a money damage claim against them.

Now, we may very well, once the intertribal dispute is resolved, the tribe may elect not to pursue that, but we want to reserve our right, if we have a valid money damage

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claim, to be able to pursue it, and this court shouldn't limit us.

THE COURT: I really can't, in this position, make a determination that we issue with or without prejudice. That's an issue between the parties.

MR. FRIEDMAN: So with respect --

MR. MARSTON: We are going to dismiss without prejudice, your Honor.

MR. FRIEDMAN: If that's the stipulation part of it, if your Honor cannot rule that, then it will be dismissed without prejudice.

THE COURT: Yeah.

MR. FRIEDMAN: I think that brings us to paragraph 12, however, which I believe the Court does have jurisdiction over and can issue an order with respect to future actions in light of the fact that the money is now leaving the account. Our hands are washed with respect to this issue between the two factions.

MR. MARSTON: And your Honor, again, with respect to paragraph 12, we have no problem with that language as written, but we would like -- if you look at paragraph 13, with respect to Rabobank, we agree not to file or re-file any further actions against Rabobank until the dispute between the parties has been resolved, or as otherwise written by agreement of the parties and the trustee.

## Proceedings

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2 We think what's good for the goose is good for the  
3 gander. If we are putting that provision in there with  
4 respect to Rabobank, we want -- and it should be in there.  
5 We want the same provision put in with respect to Bank of  
6 America to be added at the end of paragraph 12.

7 MR. FRIEDMAN: Well, there are obviously  
8 differences between Rabobank and Bank of America. Once  
9 these funds are transferred next week, your Honor, we are  
10 out. We are not holding any money. The funds are going to  
11 Rabobank, so there is a reason that language is in with  
12 respect to Rabobank and not in there with respect to Bank of  
13 America.

14 MR. MARSTON: Again, your Honor, you only have the  
15 authority to enforce the indenture and the DACA and the  
16 security agreement. There is no indenture, DACA or security  
17 agreement between the tribe and Bank of America, therefore,  
18 the Court doesn't have the authority to limit our rights or  
19 any claims or causes of action that we may have against Bank  
20 of America arising out of the deposit of those funds in the  
21 Bank of America accounts, other than to order us, as the  
22 tribe, both the Lewis and the Ayala Faction, to take any of  
23 that money that is deposited in the Bank of America account  
24 and put it into the Rabobank account.

25 THE COURT: It's true.

26 MR. MARSTON: Thank you, your Honor.

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THE COURT: So I think we have to leave these two the way they are.

MR. MARSTON: Well, your Honor, again, paragraph 12 would limit our right, after the tribal dispute was resolved, to be able to bring any causes of action against Bank of America. And again, we don't have any problem dismissing those actions now without prejudice.

THE COURT: All right. That's done. I just did that without prejudice.

MR. MARSTON: But then subject --

THE COURT: That was 11.

MR. MARSTON: So, that's correct. So, 11 is completed. Now, on 12, we would simply ask that you add the language, that says that we will not file or re-file our actions against Bank of America with respect to any claims arising out of the Bank of America -- the banking relationship for the banking accounts involved in the actions listed above, unless and until there is a determination by the United States Department of Interior, Bureau of Indian Affairs, or a court of competent -- final judgment of a court of competent jurisdiction resolving this governance dispute, or otherwise by written agreement of the tribal parties and the trustee.

Again, adding that same language that is already in there in paragraph 13 and paragraph 12.

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THE COURT: This is the marriage of the agreement that you guys are making. It's -- I'll write in what you want. I can't do anything about it. Do you want to dictate it to me slowly.

MR. MARSTON: Yes, your Honor. So, on paragraph 12, right after the paragraph --

THE COURT: After the word "above," right?

MR. MARSTON: Yes. Except or until.

THE COURT: Slow down. Except and until --

MR. MARSTON: Except or until.

THE COURT: Or until.

MR. MARSTON: And then, your Honor, you could take the exact language out of paragraph 13, and I will read it slowly. There is a determination by the --

THE COURT: That's from 13?

MR. MARSTON: Yes. By the United States Department of --

THE COURT: Hold on.

(Whereupon, there is a brief pause in the proceedings.)

THE COURT: Okay.

MR. MARSTON: Should I keep reading, your Honor?

THE COURT: I did the whole thing.

MR. MARSTON: But did your Honor also insert, after the phrase "through final agency action," or a final

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judgment of a court of competent jurisdiction?

THE COURT: Oh, no. Give me that again.

MR. MARSTON: Or a final judgment of a court of competent jurisdiction.

THE COURT: Okay.

MR. MARSTON: And we would ask that that same phrase be inserted in paragraph 13 as well, and that's all we have, your Honor.

THE COURT: After the words "trustee," you mean?

MR. MARSTON: No. After the words -- after the phrase "through final agency action or" --

THE COURT: In 14?

MR. MARSTON: No. Just inserting the words "or a final judgment of a court of competent jurisdiction."

So paragraph 13, your Honor, the one, two, three, fourth line down, it would read, through final agency action, close paren, or a final judgment of a court of competent jurisdiction, because this dispute may very well be decided by a court.

And that's all I have, your Honor. Thank you.

THE COURT: Give me a second.

(Whereupon, there is a brief pause in the proceedings.)

THE COURT: Fortunately, it works there, but not the way I did it in paragraph 12. Let's see.

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(Whereupon, there is a brief pause in the proceedings.)

THE COURT: Maybe it works. Let me read you 12 to make sure this works. After the word "above," which is the last word of 12 written there.

MR. MARSTON: I'm with you, your Honor.

THE COURT: Then I said, except or until there is a determination by the US Department of Interior, Bureau of Indian Affairs, through final agency action, resolving this governance dispute, or otherwise by written agreement of the tribal parties and the trustee, or a final judgment of a court of competent jurisdiction.

MR. MARSTON: You are almost there, your Honor. If you would just take that last phrase "or a court of competent jurisdiction," and insert it right after the close of the parenthesis, through final agency action.

THE COURT: All right. It's not pretty, but it's there.

MR. MARSTON: Thank you, your Honor.

MR. MALIONEK: Thank you, your Honor. If I may move on. There's just one other item I would want to be able to address.

Paragraph 14, your Honor, of the proposed order was requested by Rabobank. We understand that there is no further request to keep paragraph 14 in. The trustee,



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itself, does not have any position on that, and so we would propose that that be stricken from the proposed order.

THE COURT: Paragraph 14?

MR. MALIONEK: Yes, your Honor.

THE COURT: Strike it.

MR. MALIONEK: And rest of the proposed order, your Honor, from the trustee's perspective, is ministerial or procedural, and so at this time we have nothing to address with respect to those.

THE COURT: Okay. Let's go off the record.

(Whereupon, there is a discussion held off the record among the Court and all parties.)

MR. HOCHMAN: Your Honor, I have two more. One is just with respect to paragraph -- that paragraph 15. The trustee has kind of helped itself to some relief that isn't justified by the record in saying that nothing -- the trustee -- no action the trustee is taking with respect to the issues underlying this action does or shall constitute management by the trustee of the casino.

That is an issue that gets litigated for various purposes. They are trying to do that to insulate themselves from future claims. They haven't made a record before this court. They are not entitled to have you, without even explaining what the issue is, making a ruling that could be significant. I'm not saying that it will be, but there's

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nothing -- that wasn't requested in their relief they were requesting, and it shouldn't be just slipped in there. I not saying it's not incidentally and I'm not saying Counsel did anything wrong, but the effect of it is to just kind of slide it in there. So I wanted to bring that to the Court's attention and ask that that paragraph 15 be struck.

THE COURT: The whole paragraph?

MR. HOCHMAN: Yes.

MR. MALIONEK: Your Honor, let me be heard just briefly on that. I'll be very frank, your Honor. There is a decision that has been issued by the Western District of Wisconsin in 2010. The case is called Wells Fargo Bank versus Lake of the Torches Economic Development Corporation. The cite is 977 F Supp. 2d 1056. And in that decision, the Court held that where there were terms of an indenture that amounted to a trustee engaging in managing an Indian gaming operation, that is forbidden under the Indian Gaming Regulatory Act when there is no prior approval of the NIGC.

We want to make sure, and we've indicated several times during this hearing, and in our papers, that there is nothing that we are asking for with respect to this action that is anywhere close to the management of the casino.

All we are asking for in this order, and what we believe this order reflects is simply that the parties comply with the terms of the indenture and the security

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agreement and the DACA.

As a matter of fact, here, the NIGC already has issued a declination letter, a no-action letter, in effect, with respect to the terms of the indenture and those other related agreements. And so, to the extent that this proposed order simply puts into effect what the NIGC has issued a declination letter on, which is that the parties shall comply with the terms of the indenture and related agreements, we believe that paragraph 15 is appropriate.

We understand Counsel's point and I think that what we could propose is that there's a clause in there that could be taken out at the bottom of page six on paragraph 15. If instead it were to read, "Nothing in this order shall constitute management by the trustee of the casino," and the rest of the paragraph stays in, we believe that would be appropriate.

THE COURT: So you would strike the words --

MR. MALIONEK: "And no action through this action does or" -- just that one line, your Honor.

THE COURT: That makes sense.

MR. MALIONEK: Thank you, your Honor. And then paragraph 16, your Honor, is simply, as we indicated before, "The Court's retain jurisdiction to enforce the terms."

THE COURT: Right.

MR. MALIONEK: Thank you, your Honor.

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2 MR. HOCHMAN: Your Honor, one last thing that's  
3 very brief, and I don't think in any dispute. The Court  
4 noted before that it wasn't taking a position with respect  
5 to the tribal governance issue, and I don't recall if that  
6 was on the record or off the record, but obviously there are  
7 parts of the order that the Court is going to issue that  
8 certainly the Lewis Defendants were not, you know, not  
9 consenting to; not in accord with at all. And I think it's  
10 very important that the record reflect that nothing about  
11 the Court's decision today, or any order that it issues, was  
12 intended, in any way, to express an opinion or have any  
13 bearing upon the on-going tribal governance dispute; is that  
14 accurate?

15 THE COURT: That's absolutely accurate.

16 MR. HOCHMAN: Thank you very much.

17 MR. MALIONEK: Your Honor, one housekeeping matter.  
18 We've read into the record, and your Honor had added a  
19 provision to the proposed order referring to the cease and  
20 desist letter as Exhibit B.

21 THE COURT: Yes.

22 MR. MALIONEK: What I would like to do, with your  
23 Honor's permission, is hand up a copy of Exhibit B, which is  
24 that cease and desist letter with an Exhibit B cover to  
25 that, so that it could easily be attached to the proposed  
26 order. May I approach?

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THE COURT: Fine.

MR. MARSTON: No objection to the Court receiving the letter in evidence, your Honor.

THE COURT: Now, we are up against a clock deadline. You folks need copies of this, and so do I. I just signed it, but I think you are going to have to come back at 2:00 to get it, because my part clerk has to go and he has to be the one to make these copies.

MR. MALIONEK: Yes, your Honor, we will be back here at 2:00 in order to pick those up so that we could serve copies on all Counsel.

THE COURT: All right. There is still 15 minutes. Wait a minute, we still have 15 minutes, yes. I forgot we have a fast clock.

Why don't -- Steve, why don't you do these now; is that all right?

THE COURT CLERK: Yes.

THE COURT: We will go off the record.

\* \* \* \*

I, Michael Ranita, a Senior Court Reporter for the State of New York do hereby certify that the foregoing is a true and accurate transcript of the stenographic minutes taken within.

Michael Ranita  
Senior Court Reporter