

## **EXHIBIT D**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK----- X  
WELLS FARGO BANK, N.A., AS TRUSTEE,

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**REPLY MEMORANDUM OF LAW IN SUPPORT OF  
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Reggie Lewis, Chance Alberta, and Carl Bushman*

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Chukchansi Economic Development Authority (“CEDA”), The Board Of The Chukchansi Economic Development Authority (the “Board”), The Tribe Of Picayune Rancheria Of The Chukchansi Indians (the “Tribe”), The Tribal Council Of The Tribe Of Picayune Rancheria Of The Chukchansi Indians (the “Tribal Council” or “Lewis Council”), Reggie Lewis, Chance Alberta, and Carl Bushman (collectively, the “Lewis Parties”), by and through their attorneys, Schindler Cohen & Hochman LLP and Rosette LLP, respectfully submit this reply memorandum of law in further support of their motion to modify the Court’s July 2, 2013 preliminary injunction order (the “Motion”) pursuant to N.Y. C.P.L.R. Rules 2221 and 6311.

### **PRELIMINARY STATEMENT**

On July 2, 2013, this Court issued a ruling that appeared to: (1) keep the Casino competently and professionally managed; (2) ensure that the Casino paid its bills, including the payment to the Trustee; and (3) avoid becoming involved in the political dispute between the Lewis Council and the Ayala Faction. This Court seemingly put into place a management system which would not favor one side over the other. However, this management system has yielded over \$4 million to the Ayala Faction without yielding a single penny of governmental revenue to the Lewis Council, thereby creating the impression that the Court has recognized the Ayala Faction as the legitimate government. The Ayala Faction accomplished this by stripping the Lewis Council of signatory authority on the Rabobank account and assigning the Ayala Faction’s Casino manager with sole authority over cashflow. This Motion was made by the Lewis Council in order to correct the unintended consequences of the Court’s July 2 Preliminary Injunction Order (the “July 2 PI Order”).

In their brief in opposition to the Motion (the “Opposition Brief” or “Opp. Br.”),<sup>1</sup> the

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<sup>1</sup> This is Point VII of the Ayala Faction’s “Memorandum of Law in Opposition to the Lewis Faction’s Motion and In Support of Cross-Motion To Dismiss The Lewis Faction’s Cross-Claims” (Docket No. 166 at 32-42),

Ayala Faction focuses all of its arguments upon a single unsupported (and incorrect) assumption – that the Ayala Faction is the proper CEDA Board, Picayune Rancheria of Chukchansi Indians and Tribal Gaming Commission (“TGC”) (collectively, the “Tribal Government”), and in turn, should have unfettered access to Casino revenues. At the same time, the Ayala Faction seeks to prevent this Court from questioning this assumption (a conclusion which *no outside entity*, including federal governmental agencies, banks and Tribal business associates, has chosen to follow) by asserting that the Court lacks jurisdiction to recognize the legitimate Tribal Government. But this conclusion does not follow. If this Court lacks jurisdiction to recognize the legitimate Tribal Government, this Court should ensure that its July 2 PI Order – which had appeared to be neutral regarding the dispute – does not in fact become the tool to advantage one side to that dispute.

The Ayala Faction’s only claim to Casino revenue absent any oversight is that it is entitled to receive such funds as “Excluded Assets” pursuant to the Indenture. However, Excluded Assets are, by definition, Casino funds that are “transferred by the *Authority*” (*i.e.*, CEDA) to pay expenses for CEDA, TGC or the Tribe. (Indenture at 14.) Thus, payments can only constitute Excluded Assets if they are paid by *the legitimate CEDA*, for expenses of the *legitimate CEDA, TGC and Tribe*. The Ayala Faction has not and cannot demonstrate that they are the legitimate Tribal Government. If the Ayala Faction is not the Tribal Government,<sup>2</sup> payments to it cannot be deemed Excluded Assets and violate both the Indenture and the July 2

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which specifically concerns the Lewis Parties’ Motion. At the direction of the Court, the Lewis Parties are not presently addressing the Ayala Faction’s arguments regarding the Lewis Parties’ cross-claims. These arguments will be addressed in subsequent briefing to be set by the Court.

<sup>2</sup> In fact, the Ayala Faction is not legitimate and only gained temporary possession of the Casino by means of a thoroughly illegal (and preposterous) coup. (*See* Affidavit of Reggie Lewis dated September 9, 2013 (“Lewis Aff.”), ¶¶ 52-62.)

PI Order, both of which require all Casino Gross Revenues other than Operating Cash and Excluded Assets to be deposited into the Rabobank operating account.

Thus, assuming *arguendo* (only for the purposes of this motion) that this Court lacks jurisdiction to determine the legitimate composition of CEDA, the present motion to modify the July 2 PI Order should be granted. Absent adjudication of which side constitutes the legitimate CEDA, the Ayala Faction has no basis whatsoever in law to determine the disposition of Excluded Assets.<sup>3</sup> Put differently, precisely *because* the Court has not determined the CEDA dispute, there is no basis to permit the Ayala Faction to disburse Tribal assets. Rather, the Court's decisions in the July 2 PI Order and at the July 29 conference were exactly right: unless and until the CEDA dispute is resolved, *this Court's July 2 PI Order must be administered in a neutral, evenhanded and nonpartisan way.*

Unfortunately, the noble intent behind this Court's July 2 PI Order – to have in place effective Casino management, with appropriate payment of Casino bills to ensure proper operations, while not inserting the Court into the Tribe's political dispute – has been subverted by the subsequent actions of the Ayala Faction. There is ample evidence of abuse of tribal funds by the Ayala Faction, which has distributed over \$4 million it has wrongfully seized (and been given on pretense of emergency) in an inequitable and blatantly partisan manner (Lewis Aff., ¶¶ 36, 39; *see generally*, Affidavits of Carl Bushman, Evelyn Castro, Naiomi Davis, Pat Hammond, Wylenna Jeff, Dora Jones, Jo-Hanna Morris, Jonathan Morris, Karen Morris, Lary Rogers, and Bret Smith dated September 9, 2013 (collectively, the "Tribal Members").) Moreover, millions of dollars remain unaccounted for and hundreds of thousands of dollars have disappeared under the rubric of "mutilated currency." (Lewis Aff., ¶ 37.)

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<sup>3</sup> Indeed, it is the Lewis Council and the Lewis Council alone that can demonstrate through a plethora of evidence – including a referendum resoundingly approved by the Tribe's membership, pursuant to its laws – that it is, in fact, the legitimate governing body of the Tribe. (Lewis Aff., ¶ 69.)

By contrast, the Lewis Parties favor making all legitimate payments for tribal purposes such as scholarships, elder care, kindergarten and monthly tribal per capita distributions. However, they believe these should be made in a fair and nonpartisan way and without payments to the Ayala Faction itself.

Continuing to allow the Ayala Faction to have unfettered and unmonitored access to Casino revenues has and will result in a *de facto* recognition of a Tribal Government, and in turn, in continued violations of federal, state and Tribal law. Thus, the July 2 PI Order should be modified to require that all funds other than Operating Cash be deposited into Rabobank and not disbursed without the approval of the Lewis Parties and/or that a special master be appointed.

### **BACKGROUND AND PRIOR PROCEEDINGS**

There is an ongoing, heated dispute over the legitimate composition of the Tribal Government. (Lewis Aff., ¶¶ 9-13.) Following the Ayala Factions' illegal coup on February 21, there has been one legitimate Tribal Government – led by Chairman Reggie Lewis – and the unrecognized Ayala Faction that has held hostage the Casino and the revenues which flow from it, as well as the governmental compound.<sup>4</sup> (Lewis Aff., ¶ 21.) Because of the Ayala Faction's illegal coup, the Ayala Faction argues, there are currently two CEDA Boards, two Tribal Councils, two TGCs and two Tribal Courts, with each side's entities claiming to be the lawful ones. The Ayala Faction's argument squarely raises the question as to why one disputed government should be funded but not the other.

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<sup>4</sup> At this juncture, no governmental agency, financial institution or legitimate court has recognized the Ayala Faction as the legitimate governing body of the Tribe. Indeed, federal agencies – specifically the Environmental Protection Agency and the Department of Housing and Urban Development – have gone out of their way to recently state, in written correspondence, that the federal government *does not* recognize the Ayala Faction. (Lewis Aff., ¶ 20.)



Although the Court need not decide the CEDA dispute<sup>5</sup> for this motion, there is clear evidence that the Lewis Parties are the legitimate Tribal Government. This evidence demonstrates, *inter alia*: (i) Ayala engineered a grossly illegal coup on February 21, 2013, based on the claim that there were only 46 legitimate members of the Tribe (a claim that had previously been rejected by a California federal court); (ii) Ayala was lawfully suspended by the Tribal Council on March 7, 2013; (iii) an independently coordinated and monitored tribal referendum process affirmed Reggie Lewis, Chance Alberta, Carl “Buzz” Bushman, and Irene Waltz as the only active members of the Tribal Council; and (iv) Ayala, Brechbuehl, and Wynn were subsequently lawfully removed in a unanimous vote by all of the active Tribal Council members. (Lewis Aff., ¶¶ 69, 72; *see generally*, Affidavit of Dominique Carrillo dated September 9, 2013.)

Having seized the Casino by force following its illegal coup, the Ayala Faction discontinued making deposits into Rabobank as required by the Indenture and, instead, stockpiled cash in the Casino cage. (Affidavit of Robert A. Rosette dated September 9, 2013, ¶¶ 9-15.) Without deposits to Rabobank, the legitimate Tribal Government was unable to make the interest payment to the Trustee, as required under the Indenture. Upon the Indenture Trustee’s motion, the Court entered its July 2 PI Order, which set forth a procedure whereby the Ayala Faction was prohibited from improperly appropriating or stockpiling Casino revenues and ensured that no payments would be made from the Rabobank account without the Lewis Parties’ consent.

To ensure an orderly flow of funds pursuant to the Indenture, the July 2 PI Order required all Gross Revenues and Revenues and Cash of CEDA to be deposited “in CEDA’s operating account at Rabobank” which is consistent with Tribal Gaming Ordinance § 6.1, requiring all cash

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<sup>5</sup> As set forth in the Answer, Cross- and Counter-Claims of the Lewis Parties (Docket No. 71), this Court has jurisdiction to determine the identity of the Issuer under the Indenture – *i.e.*, CEDA.

be deposited in the bank. (July 2 PI Order ¶ 1.) The past practice from 2003-present was that the Tribe would not take Excluded Assets as cash from the cage but that gross revenues were deposited into Rabobank. (Affidavit of Richard J. Armstrong dated September 9, 2013 (“Armstrong Aff.”), ¶ 39; Affidavit of Richard Williams dated September 9, 2013 (“R. Williams Aff.”), ¶¶ 5-15.) Once deposited, the Casino would pay operating expenses and debt obligations. The Tribal Government would then take a Tribal Distribution to fund all Tribal Government programs, which would then become “Excluded Assets.” (R. Williams Aff., ¶ 8.) At the July 2 hearing, counsel for the Lewis Parties expressed concern that the aforementioned process should be adhered to and “Excluded Assets” should be deposited into Rabobank, so that the Ayala Faction could not unilaterally misappropriate funds from the Casino simply by calling them “Excluded Assets.” (Transcript of July 2 Hearing, Docket No. 65 (“PI Tr.”), at 14:6-7.) Indeed, the Court, recognizing the unfairness of funding one faction over the other, expressly stated that its July 2 ruling should have no bearing on the political dispute (PI Tr. at 52:9-15). However, counsel for the Ayala Faction assured the Court that all money would be deposited into the Rabobank operating account, and that the Ayala Faction would not attempt to take money under the guise of “Excluded Assets.” (PI Tr. at 16:9-17:9.) Specifically, counsel for the Ayala Faction stated:

[O]pposing Counsel’s statement that the tribe is going to somehow take the money first, you know, before making – for itself before it deposits in the operating account, is just wrong. And obviously, if the Ayala Faction or Lewis Faction, or anybody else tried to do that, it would be a violation of the indenture to the DACA [*sic*]. . . .

(*Id.*)<sup>6</sup> Mr. Marston’s assurance was not only appropriate but is mandated by Tribal Gaming

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<sup>6</sup> The Ayala Faction’s Opposition Brief suggests (for the first time) that some of the funds the Ayala Faction disbursed may have been Operating Cash. (Opp. Br. at 37-38.) This gambit also violates the Indenture and the Court’s July 2 PI Order and should also be prohibited. Specifically, pursuant to the Indenture, Operating Cash is defined as the cash necessary to run the Casino and therefore is exempt from deposit into Rabobank. (Indenture at

Ordinance § 6.1.<sup>7</sup> (Armstrong Aff., ¶ 19.)

Unfortunately, Mr. Marston's assertions that the Ayala Faction would not abuse "Excluded Assets" proved to be entirely false and disingenuous. In July, the Ayala Faction took at least \$1.8 million in cash, and possibly \$2.2 million directly from the Casino, without first depositing the funds into Rabobank (in violation of Tribal Gaming Ordinance § 6.1), later claiming that it was entitled to remove these funds as Excluded Assets. (Lewis Aff., ¶ 39; Armstrong Aff., ¶ 19.)<sup>8</sup>

On July 29, to stop this unilateral seizure of funds by the Ayala Faction, the Lewis Parties brought the instant motion to modify the July 2 PI Order to require that even purported "Excluded Assets" be deposited into Rabobank. The Court held a telephonic hearing the same day and ordered interim relief. The Court adopted a sensible, evenhanded approach, requiring joint consent to all Tribal expenditures, expressly including purported Excluded Assets: "both sides should be sitting down on a weekly basis to review the expenditures and rule on those that both sides agree have to be paid." (Transcript of July 29 Hearing ("July 29 Tr."), at 18:26-19:3.) The Court ordered any disputed amounts to be placed in escrow. (July 29 Tr. at 32:6-8.)

The Lewis Parties attempted to follow the Court's Order and establish an orderly payment procedure. Indeed, that process would have worked, but despite repeated requests by the Lewis Parties to the Ayala Faction to itemize and explain proposed Tribal Government

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23.) There is no provision in the Indenture or this Court's orders for using Operating Cash for any other purpose. Indeed, to the extent that cash is not needed to operate the Casino, it is, by definition, not Operating Cash.

<sup>7</sup> The July 2 PI Order also replaced the Lewis Council members with the Casino manager as the signatory on the Tribe's Rabobank accounts. The July 2 PI Order thus seriously altered the status quo and the balance of power between the parties. However, the Court expressly entered its Order on the theory that the Casino manager would act in accordance with his fiduciary duties in a neutral, independent fashion, favoring neither side.

<sup>8</sup> The Ayala Faction has taken advantage of other means to misappropriate money as well, including, without limitation, accounting for hundreds of thousands of dollars from the Casino cage as "mutilated currency" in a single month, an amount ten times more than the reported *annual* average. (Lewis Aff., ¶ 37.)

payments in detail, the Ayala Faction refused to provide information to allow the Lewis Parties to analyze the Ayala Faction's proposed lump-sum expenditures and effectively shut the Lewis Parties out of the process. (Armstrong Aff., ¶ 44; August 28 letter from Steven R. Schindler to Hon. Melvin L. Schweitzer, Docket No. 125, at 1.) The Ayala Faction has thus received tribal funds on an unsupervised basis and disbursed them in a discriminatory and partisan manner – or misappropriated them altogether.

*To be clear, the Lewis Parties favor, and have always favored, full payment for legitimate tribal services and distributions.* Specifically, as the Court has properly ruled, payments should be made for elder care, health care, food assistance, clothing allowances, scholarships, child care, tutoring, various community services, substance abuse programs, housing assistance, vocational training, special needs programs and reasonable per capita Tribal distributions.

However, such payments should obviously be made in an equitable and fair manner, without lining the pockets of the Ayala Faction and providing it with political capital to which it is not entitled. Unfortunately, they have not been, as set forth in the accompanying affidavits of Reggie Lewis and the Tribal Members. Not only has the Ayala Faction distributed funds and benefits in a selective, partisan manner, it has also used access to Casino funds for blatantly political purposes. (*See generally*, Affidavit of Chauncey Williams dated September 9, 2013.) For one example, supporters of the Lewis Parties who are entitled to receive elder care benefits have not received those benefits, whereas the Ayala Faction supporters have. (Lewis Aff., ¶ 36; *see generally*, Tribal Members Affs.) For another, Ayala has personally handed out Tribal distributions with political literature bearing her picture – turning this Tribal function into blatant political advertising for herself. (Lewis Aff. ¶ 27, fn. 2.) The Ayala Faction used these funds to

pay for public relations professionals that mischaracterized this Court's rulings vis-a-vis press releases,<sup>9</sup> produce internet YouTube videos, and pay for attorneys in this very action. (*Id.*) By contrast, the Lewis Council has been cut off from all funding because the July 2 PI Order removed the Lewis Council as a signatory on its bank accounts. (Lewis Aff., ¶ 22.)

As set forth below, while legitimate Tribal Government payments should certainly be made, until such time as this Court or other competent authority decides the proper Tribal leadership, they should be made in a fair and neutral way that does not allow the Ayala Faction to purchase political support, continue taking unilateral credit for the administration of benefits and related payments or line it own pockets. (Lewis Aff. ¶ 39.)

When the Court mandated on July 29 that the Lewis Council had the right to participate in Tribal Government distributions, the Ayala Faction manufactured a false emergency, pretending the Casino would close without immediate payments to the Ayala Faction's TGC, Tribal Government, and CEDA. The Court's August 28 Order permitted \$1.7 million to be paid to the "Tribal Gaming Commission, the Tribal Government and CEDA."<sup>10</sup> (August 28 Order, Docket No. 128, at 2.) In doing so, the Court made clear that it had not yet decided "who is the

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<sup>9</sup> For example, immediately after the July 2 PI Order was issued, the Ayala Faction published on July 3 a story on Business Wire, stating: "The Chukchansi Tribal Council, headed by Chairwoman Nancy Ayala, today celebrated a key victory in court. A Decision handed down Tuesday by New York State Supreme Court Justice Melvin Schweitzer removed former Tribal Council members Reggie Lewis and Chance Alberta from having control or signing authority over the Tribe's checking accounts." (Lewis Aff., Ex. H.) Also, after the Court's August 29 ruling, the Ayala Faction published a story on Business Wire with the headline: "Chukchansi Tribal Council Hails Court Victory; NY Supreme Court Justice Rules for Ayala Council, Approves Payments to Keep Casino Open, Services Intact."

<sup>10</sup> Upon receipt of the \$1.7 million, the Ayala Faction paid to selected Tribal members a cash payment and included a letter stating, "We're here to serve you. And we're proud to stand behind our commitment to do what's best for the Chukchansi people. That's why we're happy to be able to pay your August 2013 per capita – despite the tremendous financial challenges created by the rogue factions headed by Reggie Lewis . . . These outside groups will stop at nothing to sabotage our Tribe in an effort to cover up their own wrongdoing and to seize power for themselves." (Lewis Aff, Ex. G.)

rightful ‘authority’ to direct such payments as ‘excluded assets’ under the indenture . . . .”<sup>11</sup> (*Id.*)

The Ayala Faction, however, has used this recent order, coupled with the previous monies taken under the guise of “Excluded Assets” – *a staggering total of over \$4 million* – for the sole purpose of gaining political leverage within the Tribal community.<sup>12</sup> All the while, the Lewis Council – which, since the very inception of the dispute, has been funding Tribal programs and benefits in a nondiscriminatory way and lacks similar unfettered access to millions of dollars of Casino cash – has its governmental operations in serious jeopardy, with its lawful TGC and governmental budgets running dangerously low.

The Lewis Parties seek to prevent further abuses by the Ayala Faction, and, therefore, request that the Court modify the July 2 PI Order in accordance with the Lewis Parties’ Order to Show Cause (Docket No. 79) to: (1) require that all Casino Gross Revenues other than Operating Cash be deposited into CEDA’s Rabobank operating account; (2) require that all disbursements from such account be approved by both the Lewis Council and the Ayala Faction; (3) prohibit the use of Operating Cash for any purpose other operating the Casino; and/or (4) the Court appoint a special master to oversee all expenditures of Casino funds in a neutral, non-partisan manner for the benefit of the Tribe.

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<sup>11</sup> By the August 28 Order, the Court further required the parties to account for all funds received from the Casino since February 15, 2013. (*See* August 28 Order.) This was necessary because, notwithstanding the Ayala Faction’s proclamations that it would act with transparency (PI Tr. at 18:4-17; July 29 Tr. at 8:19-21, 31:21-22, 35:11-12, and 41:8-23), and notwithstanding this Court’s order to complete the 2012 year-end audited financial statements as soon as reasonably feasible, to date, the Lewis Parties have received no accounting of any past distributions made by the Ayala Faction.

<sup>12</sup> By way of example, the Ayala Faction has used Casino Revenues to produce video propaganda to leverage its political position within the community.

## ARGUMENT

### **THE PRELIMINARY INJUNCTION ORDER MUST BE MODIFIED, REGARDLESS OF WHETHER OR NOT THIS COURT HAS JURISDICTION TO DECIDE THE IDENTITY OF THE CEDA BOARD**

#### **I. Modification Of The Court's July 2 PI Order Is Necessary To Effectuate The Court's Efforts To Ensure Evenhanded, Transparent Distribution Of Casino Revenues**

Neither the Ayala Faction nor any other party to this litigation disputes that the Court has jurisdiction over the Indenture and distributions made thereunder. Indeed, the Ayala Faction affirmatively sought this relief by removing the Lewis Parties as the authorized signers on the Rabobank account in place of the so-called "neutral" Casino manager, Giffen Tan. The Ayala Faction, by having the Lewis Council removed as the legitimate authorized account signers, was (at least until the Court's July 29 Order) able to persuade Tan to make payments from the Casino to fund the Ayala Faction Tribal Government but not the Lewis Council Tribal Government. Unless and until the Court decides who the legitimate CEDA Board is, both parties should have equal access to and control of the Casino revenues. To do otherwise would effectively decide or substantially impact the tribal dispute.

The requested modification of the July 2 PI Order would not only ensure an evenhanded, nonpartisan approach to the distribution of Casino funds, it would be consistent with Tribal law, the Indian Gaming Regulatory Act ("IGRA") and past practices, which require depositing all gross revenues into Rabobank before allowing "Excluded Assets" to go to the Tribe in a neutral, nonpartisan process. (*See* Armstrong Aff., ¶ 19; R. Williams Aff., ¶¶ 5-6.) If the Court allows "Excluded Assets" to be disbursed directly from the Casino cage, then the Court should reaffirm its July 29 Order, requiring the Lewis Parties to consent to any funds disbursed as "Excluded Assets." In either case, to the extent that any additional funding is provided to the Tribe, CEDA or TGC, it must be disbursed through a system of neutrality that cannot be used by only the

Ayala Faction to accomplish a divisive political agenda, which would unwittingly create a de facto recognition of any one governing body, as has already occurred with the Ayala Faction's money grab. In the alternative, or in addition, the Court should appoint a special master to oversee the all-too-frequent disputes concerning the Casino Revenues, and have such special master oversee all expenditures of Casino funds in a neutral, nonpartisan manner for the benefit of the Tribe.

**II. The Court Should Modify The July 2 PI Order Because Despite The Court's Intent To Not Become Involved In The Internal Political Dispute, The Ayala Faction's Administration Of The Order Has Had That Effect**

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**A. The Indenture's Definition of "Excluded Assets" Requires A Determination Of The Identity Of CEDA**

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As defined in the Indenture, the government payments to the Ayala Faction cannot be "Excluded Assets." Under the Indenture in the circumstances applicable here, Excluded Assets is defined as "assets transferred *by the Authority* or either of the Guarantors to a Person other than the Authority or either of the Guarantors in transactions not prohibited by Section 4.9 [which, subject to certain conditions, includes the monthly Tribal Distribution] . . . ." (Indenture at 14 (emphasis added).) Thus, a monthly Tribal Distribution is only an Excluded Asset if it was transferred by "**the Authority**," which is defined in the Indenture as CEDA. (Indenture at 1.)

The Indenture only contemplates the existence of one CEDA with the sole authority to make the monthly Tribal Distributions. (*Id.*) Although the Ayala Faction is not – and cannot be – the true, valid CEDA (*i.e.*, the "Authority"), the Court has explicitly ruled that it has not yet determined, and was making no determination, to this effect.<sup>13</sup> (*See* PI Tr. at 43:4-6.) Despite this ruling, the Ayala Faction proceeds under the assumption that it is the proper legal entity. If

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<sup>13</sup> Although not necessary to determine the issues presented on the Motion, the Court has jurisdiction to identify the proper representatives of the parties to the Indenture, as well as the counsel representing such parties before the Court.



this Court does not stop allowing such distributions, it will effectively recognize the Ayala Faction as the Tribal Government – contrary to the federal government’s position. Absent a determination of the identity of “the Authority” under the Indenture, the Ayala Faction certainly is not the one and only CEDA, and it cannot direct revenues to or from the Casino under the guise of “Excluded Assets.”

The Opposition Brief utterly fails to explain why the Ayala Faction, rather than the Lewis Parties, should receive government payments as “Excluded Assets” when no federal or state entity has determined it to be the lawful Tribal Government.

**B. The Ayala Faction Provides No Rationale Preventing The Court From  
Modifying Its July 2 PI Order**

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The Ayala Faction’s Opposition Brief states in various headings that the Court has no jurisdiction over Excluded Assets. (*See* Opp. Br. at 32-33.) But, the substance of the Opposition Brief presents no arguments whatsoever to this effect. In fact, the *only* jurisdictional argument asserted by the Ayala Faction with respect to the modification of the Court’s July 2 PI Order is the wholly conclusory argument that “nothing in the Indenture, the Security Agreement or plaintiff’s Complaint that in any fashion supports the addition of the requested language pursuant to which ‘both Factions’ must agree to any payment decisions.” (Opp. Br. at 33.) However, this argument is obviously incorrect. As described above, “Excluded Assets” is a defined term under the Indenture, which is unquestionably the subject of this litigation, and no party has contested – nor could they contest – the Court’s jurisdiction over the Indenture and the mechanism for making payments pursuant to it.

The remainder of the Ayala Faction’s brief opposing modification of the July 2 PI Order simply argues that it has not violated the July 2 PI Order and the Court should permit it to

continue funding its own illegal government with “Excluded Assets.”<sup>14</sup> Of course, arguing that the Court should recognize the legitimacy of payments to the Ayala Faction’s government is entirely inconsistent with the Ayala Faction’s bald, unsupported contention that the Court does not have jurisdiction related to Excluded Assets. Moreover, the Ayala Faction’s arguments that it has not violated the July 2 PI Order and that it has not abused its authority require the Court to *assume* that the Ayala Faction’s CEDA is *the legitimate CEDA Board* entitled to receive Casino revenues as Excluded Assets. But, the Court has not determined that to be the case, nor is there any basis for it to do so.

Further, assuming, *arguendo*, that the Court does not have jurisdiction to determine the identity of “the Authority” under the Indenture only amplifies the rationale for modifying the Court’s July 2 PI Order. Indeed, absent modification of the Court’s July 2 PI Order, the Court would be – contrary to its stated objectives (*see* PI Tr. at 4:8-17, 52:2-15; July 29 Tr. at 33:10-34:3; and August 28 Order at 2) – inadvertently giving legitimacy to the Ayala Faction’s illegal government by providing a steady flow of unsupervised funds to it. *Thus, the only way for the Court to avoid wading into the Tribal dispute is to ensure that both competing government parties have a voice in distributing money to vital Tribal entities and services without favoring either side.*<sup>15</sup>

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<sup>14</sup> See, e.g., Opp. Br. at 33 (the Ayala Faction “did not Abuse the Excluded Assets”), 35 (the Ayala Faction “has not Abused Its Authority Over Excluded Assets”), and 39 (“Payments to CEDA do not Violate the Order or the Indenture”).

<sup>15</sup> To encourage the Court to decide the very issue that it claims is off-limits (*i.e.*, the identity of the legitimate CEDA), the Ayala Faction provides seven declarations and hundreds of pages of exhibits. The Lewis Parties agree that this Court has the power to decide the identity of CEDA, but should do so after discovery and on a full record, in connection with the Lewis Parties’ cross-claims. Further the Lewis Parties note that there is no provision under N.Y. state law to submit unsworn declarations for the purposes of bringing facts before the Court.

### **III. The Court's Decision To Fund Only The Ayala Faction Violates Federal, State And Tribal Law And Will Result In Closure Of The Casino**

Preliminary injunctions are equitable in nature and should not be used to cause inequity. *See, e.g., Bull v. Burton*, 227 N.Y. 101, 112 (1919) (“a court of equity should not do inequity, and that if the granting of an injunction . . . will result in inequity it will be denied”); *Gen. Elec. Co. v. S. Klein-on-the-Square, Inc.*, 121 N.Y.S.2d 37, 57 (N.Y. Sup. Ct., N.Y. Cty. 1953) (“he who comes into equity must come with clean hands”); *Lo Medico v. Conway*, 106 N.Y.S.2d 809, 811 (N.Y. Sup. Ct., Nassau Cty. 1951) (“court of equity will not do an inequitable thing. It is not bound by the rigid rules of the common law, but is founded to do justice”). Further, this Court has broad powers to modify the existing preliminary injunction it issued on July 2. *See* N.Y. C.P.L.R. § 6314 (permitting a defendant enjoined by a preliminary injunction to “move at any time . . . to vacate or modify it” and permitting judge to “vacate or modify the order”); *see also Enter. Window Cleaning Co. v. Slowuta*, 273 A.D. 662, 665, 79 N.Y.S.2d 91, 94 (App. Div. 1948) *aff'd*, 299 N.Y. 286, 86 N.E.2d 750 (1949) (“a court of equity has inherent power, under appropriate conditions, to vacate or to modify a continuing permanent injunction as events may shape the need”). The Court should exercise these powers to modify Court’s July 2 PI Order to prevent the Ayala Faction’s persistent abuse of that Order. Further, this Court must modify the July 2 PI Order, because, as described below, the Ayala Faction’s current implementation of the order violates federal, state and Tribal law and, as a result, risks closure of the Casino. (Armstrong Aff., ¶¶ 29, 47.)

#### **A. The Ayala Faction Has Manipulated The July 2 PI Order To Siphon Money For Its Own Gain To The Detriment Of The Tribe**

As demonstrated in the affidavits accompanying this brief, the Ayala Faction has been abusing the process designed by this Court to ensure compliance with the Indenture. In particular, contrary to its statements that it is “providing a full range of services to its tribal

members in a non-discriminatory manner” (Opp. Br. at 38), it is clear that the Ayala Faction has removed funds from the Casino’s cage and distributed them to its own supporters and to otherwise curry political favor. (See Lewis Aff., ¶¶ 36, 39; *see generally*, Tribal Members Affs.) Further, the documentary evidence establishes that the Ayala Faction has been abusing its physical control of the Casino cage to siphon money using other improper methods, including, for example, mischaracterizing hundreds of thousands of dollars a “mutilated currency.”<sup>16</sup>

In addition to the misuse of Casino revenues, the Ayala Faction has also continued to shield its expenditures and the flow of Casino revenues from any oversight. To date, the Lewis Parties still have no record of how the money the Ayala Faction previously siphoned as “Excluded Assets” has been spent.<sup>17</sup> Further, the Lewis Parties have received no confirmation that any Casino Revenues have been deposited in the Rabobank account as required by the Court more than two months ago.

**B. Continued Funding Mechanisms Favoring The Ayala Faction Will Result In Violations Of Federal Law And, In Turn, Risk Casino Closure**

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It is a fundamental precept of Indian gaming and the IGRA, perhaps the most fundamental of all, that Indian gaming must be operated: (1) by a federally recognized tribe; and (2) by the tribal leadership recognized by the Secretary of the United States Department of Interior (“Secretary”), not any other entity, including a dissident faction unrecognized by the Secretary. *See, e.g., In the Matter of Sac and Fox Tribe of the Mississippi in Iowa*, NOV/TCO CO-03-02, Dkt. No. NIGC 2003-1, Decision and Order issued September 10, 2003 (“*Sac and*

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<sup>16</sup> By doing so, the Ayala Faction is able to withdraw money from the Casino cage under the guise of removing it from circulation. Historically, prior to the Ayala Faction’s coup, the Casino has only removed an average of approximately \$40,000 per year as mutilated currency. Recently, the Lewis Parties have reason to believe that the Ayala Faction has removed more than \$500,000 from the Casino as mutilated currency. (Lewis Aff., ¶ 37.)

<sup>17</sup> The Ayala Faction has merely provided a budget containing past approved categories of governmental expenditures, but the Lewis Parties have received no confirmation of how the Ayala Faction has actually spent the money it removed under the guise of Excluded Assets.

*Fox* Decision and Order”). (Armstrong Aff., ¶ 10.) Further, and as the NIGC has recognized in its own decisions, “for the NIGC to ensure that the ‘governing body of the Indian tribe’ is responsible for the gaming activity, the NIGC necessarily must know what entity to recognize as the governing body of the Tribe” – in doing so, the NIGC looks to the BIA to determine that relationship. *Sac and Fox* Decision and Order at 15. Recognition of a governing body of the tribe and operation of gaming by that recognized governing body is absolutely crucial because, without those fundamentals, gaming is in effect unregulated. *See id.* Further, when a dissident faction has appropriated control of the gaming operations and diverted tribal assets into new bank accounts, it is impossible to ensure that the tribe is the primary beneficiary of the gaming operation, as required by IGRA. *See id.* at 16. Indeed, allowing unrecognized factions to operate tribal gaming operations is against public policy as it encourages the unlawful takeover of Indian gaming establishments, which in turn creates an environment that is “inimical to stable tribal governments and their gaming operations.” *Id.* at 17.

Quite simply, “[w]hen the federally recognized leadership is not in control of the gaming operation, the activity being conducted is not Indian gaming under the IGRA.” *Id.* at 16 (internal citations omitted). In the absence of a decision by the Secretary as to the lawful leadership of the Tribe, the algebraic variable of an unrecognized faction operating, purporting to regulate and maintaining a self-serving proprietary interest in the Tribe’s gaming revenues – as was the case in *Sac and Fox* – remains a constant violation of the IGRA, and should not be ignored to the detriment of the Tribe or the interest of the Trustee and the Bondholders as well.

The applicable facts here are relatively simple. The Secretary has never recognized the Ayala Faction as the governing body of the Tribe. Instead, the Secretary is aware of the current leadership dispute that erupted on February 21, 2013, when Ayala attempted to disenroll all but

46 Tribal members who were all members of her family. As of yet, the Secretary has not issued any decision regarding the present leadership dispute between the Ayala Faction and the Lewis Council. (Armstrong Aff., ¶ 35.) Therefore, putting in place a system that only funds the Ayala Faction rather than the Tribal Government as a whole will result in substantial violations of the IGRA and increasing the likelihood of NIGC enforcement in the form of a closure order.

**C. The July 2 PI Order, As Is Currently Implemented, Will Result In Continued Violations Of Tribal, State And Federal Law**

Pursuant to Tribal Gaming Ordinance § 6.1 (Armstrong Aff., ¶ 19; August 26 letter from Steven R. Schindler to Hon. Melvin L. Schweitzer, Ex. C (Docket No. 112)), **all** gross revenues of the Casino – regardless of whether or not they are “Excluded Assets” – are required to be deposited in the Rabobank account. Accordingly, the Ayala Faction’s removal of cash as “Excluded Assets” directly from the Casino unambiguously violates this law.

Indeed, prior to the Ayala Faction’s illegal coup, all cash proceeds were deposited with Rabobank prior to any distributions being made to the Tribe, Tribal Government, or any other entity. (Lewis Aff., ¶ 25; Armstrong Aff., ¶ 39) The only reason the Ayala Faction has elected to change this practice appears to be to ensure that its spending decisions are free from oversight.

The exclusion of the Lewis Parties from the Casino site also violates the compact with the State of California (the “Compact”). (Armstrong Aff., ¶¶ 7(f), 29.) Pursuant to this Compact, the Tribe must establish and operate an independent Tribal Gaming Commission to regulate the Casino. (Armstrong Aff., ¶ 10.) Only a gaming commission appointed by the lawful Tribal Council is thus permitted to carry out these duties. (Armstrong Aff., ¶¶ 9-11.)

Because neither the Court, nor any other state or federal entity has determined the Ayala Faction’s government to be the legitimate Tribal Government, the Ayala Faction’s gaming commission is not legitimate. Pending determination of the governance issue, the Lewis Tribal

Gaming Commission (which is fully functioning and performing regulatory duties) must be given equal funding and access to the Casino so that it can fulfill its legal mandate. (Armstrong Aff., ¶ 45.) Most importantly, the Lewis Parties' Tribal Gaming Commission should be given access to the Casino and its books to ensure that the NIGC does not close the Casino consistent with the *Sac and Fox* Temporary Closure Order. (Armstrong Aff., ¶¶ 12, 30.)

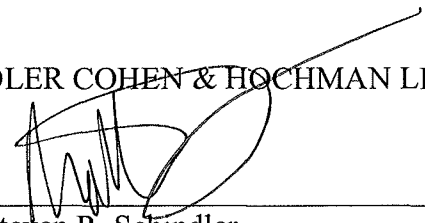
### **CONCLUSION**

For all of the foregoing reasons, the Court should modify the July 2 PI Order to: (1) require that all Casino Gross Revenues other than Operating Cash be deposited into CEDA's Rabobank operating account; (2) require that all disbursements from such account be approved by both the Lewis Council and the Ayala Faction; (3) prohibit the use of Operating Cash for any purpose other operating the Casino; and/or (4) appoint a special master to oversee all expenditures of Casino funds in a neutral, nonpartisan manner for the benefit of the Tribe.

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