SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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

Index No. 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.

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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

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PRELIMINARY STATEMENT

This memorandum of law is submitted in opposition to the motion made by order to show cause by the "Lewis Faction" seeking amendment the Court's July 2, 2013 Order, an accounting from the Ayala Quorum of certain challenged payments and appointment of a Special Master to oversee compliance with the Court's July 2, 2013 Order, and in support of the cross-motion to dismiss the Lewis Faction's Cross-Claims (the "Claims"). The Lewis Faction's Claims – and the relief sought by its motion - are all premised on the assertion that the Lewis Faction constitutes the legitimateTribal Council, Board of Directors of the Chukchansi Economic Development Authority Board ("CEDA"), and the Tribe's Gaming Commission, and that this Court has the jurisdiction to rule as to the Lewis Faction's legitimacy. The first two cross-Claims specifically ask this Court to rule that the Lewis Faction constitutes the legitimate Tribal Council, Board of Directors of CEDA, and the Tribe's Gaming Commission, and that defendants Nancy Ayala, Tracey Brechbuehl, Karen Wynn and Charlie Sargosa (the "Ayala Quorum"), which constitutes four of the seven members of the Tribal Council elected in the December 2012 Tribal Council election, does not. The Third and Fourth Cross-Claims are based on the assumption that the Ayala Quorum's actions were not authorized actions of the Tribe's government but were, in fact, actions that interfered with the actions of the Tribe's government. The Lewis Faction's first two requests for relief seek a ruling that Reggie Lewis, Carl Bushman, Irene Waltz, Chance Alberta, David Castillo, Lynn Chenot and Melvin Espe comprise the seven current members of the CEDA Board of Directors, and ask that the Court enjoin the Ayala Quorum from "interfering with the rights and obligations under the Indenture of the legitimate Tribal Council and CEDA".

Thus, the Lewis Faction is making the audacious and insupportable request that this Court interfere in the internal affairs of the Tribe by determining who constitutes the lawful governing

body of the Tribe and the Board of CEDA. The Ayala Quorum demonstrates below that this Court has no jurisdiction to make such a determination because: (1) it has no jurisdiction over an Indian tribe located in California; (2) to rule on the issue would interfere in the Tribe's right to govern itself and the Tribe's internal affairs, (3) the claims are barred by the Tribe's sovereign immunity; and (4) the Court lacks personal jurisdiction as to the Ayala Quorum members in respect of the Claims. Further, principles of comity and the failure to exhaust tribal remedies supports dismissal of the Lewis Faction's claims and denial of their motion.

Because the Lewis Faction's Claims request relief that is, on its face, outside of the jurisdiction of this Court, the Ayala Quorum will not address all of the factual allegations contained in the Claims except to the extent necessary to support the present motions. The Ayala Quorum notes, however, that those allegations are replete with misrepresentations and outright falsehoods, the truth of which is vigorously disputed. The Ayala Quorum does not rely on declarations or other evidence to demonstrate the inaccuracy of the Lewis Faction's factual allegations in full, but rather relies on the declarations submitted herewith to present the basis for the opposition to the Lewis Faction's motion and in support of the cross-motion. It is critical that, even if the Lewis Faction's factual allegations were accepted as true, this Court would still lack jurisdiction to address the Lewis Faction's Claims.

The Ayala Quorum also demonstrates below that the only forum that has jurisdiction to determine who constitutes the Tribe's Tribal Council, the Board of Directors of CEDA and the Tribe's Gaming Commission is the Tribe's Tribal Court. The Tribal Court has ruled on that issue, and this Court is obligated to recognize that Tribal Court ruling pursuant to the doctrine of comity.

Finally, the Ayala Quorum will show that the payments made by the Casino to the Ayala Quorum are proper because: (1) they are Excluded Assets that the Casino is not required to deposit

into the Rabobank Operating Account under the Court's July 2, 2013, Order; (2) they are required to be made by the Casino to the Tribal Gaming Commission ("TGC"), Tribal Government ("TG") and CEDA pursuant to the May 20, 2013, Indenture between CEDA and plaintiff Wells Fargo Bank (the "Indenture") and (3) they are required to be made pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et seq. ("IGRA") and the Tribe's Revenue Allocation Plan, approved by the Secretary of the Interior, under the IGRA.

STATEMENT OF FACTS

1. The Tribe is a federally recognized tribe, organized under a written constitution (the "Constitution"), which designates the Picayune Tribal Council as the governing body of the Tribe. Constitution, Article IV, Section 2. Declaration of Michael Wynn (the "Wynn Declaration") ¶ 2.

2. Under Article IV, Section 2 of the Constitution, the Tribal Council is composed of seven persons who are elected by the eligible voting members of the Tribe, a quorum of the Tribal Council consists of four members, and no business of the Tribal Council shall be transacted unless a quorum is present. The Tribal Council can only transact business at a regular or special meeting of the Tribal Council Constitution. Wynn Declaration ¶ 2 and Exhibit A thereto.

3. The members of the Tribal Council prior to May 23, 2013, were Nancy Ayala, Chair; Reggie Lewis, Vice Chair; Tracey Brechbuehl, Secretary; Karen Wynn, Treasurer; Charles Sargosa, Council Member at Large; Chance Alberta, Council Member at Large; and Carl Bushman, Council Member at Large. Declaration of Nancy Ayala (the "Ayala Declaration") ¶ 3.

4. The Tribe is the owner and operator of a destination resort and Casino consisting of, among other things, a 400 room hotel, a gaming facility consisting of approximately 1,800 slot machines, 23 table games, and a variety of restaurants and entertainment venues. The Tribe operates the Casino under the fictitious business name of "Chukchansi Gold Resort and Casino." The Casino

employs approximately 1,100 people, including both members and, primarily, non-members of the Tribe. Declaration of Joyce Markle (the "Markle Declaration") ¶ 2..

5. The Casino is the Tribe's principal source of revenue that enables it to perform essential Tribal governmental functions, programs, and services. Markle Declaration ¶3; Declaration of Carl Casey (the "Casey Declaration") ¶ 3.

6. Lacking the capital necessary to construct and operate the Casino, the Tribe sought and obtained a loan (the "Loan") in the approximate amount of $240 Million Dollars from a group of investors or bondholders ("Bondholders"), pursuant to the Indenture. Under the repayment terms of the note executed by the Tribe in connection with the Loan and the deposit account control agreement (the "DACA"), the Tribe is obligated to make biannual payments to Wells Fargo in the approximate amount of $28 Million. Markle Declaration ¶ 3 and Exhibit A.

7. In order to operate the Casino and other economic enterprises, the Tribe entered into an agreement (the "Agreement") with Rabobank (the "Bank"). Under the terms of the Agreement and the DACA, the Tribe maintains a variety of accounts with the Bank (the "Accounts"). Four of those Accounts - the operating account, jackpot account, merchants account and payroll account (collectively, the "Casino Accounts") - are used to operate the Casino. Until the disputes in this case arose, the Casino deposited the revenues generated from the operation of the Casino into the Casino Accounts maintained at the Bank. Markle Declaration ¶ 4.

8. The Casino Accounts are the general operating accounts which the Tribe maintains in connection with the operation of the Casino. The other accounts (the "CEDA Accounts") are the used to operate other business enterprises for CEDA. Declaration of Martha Pedersen ("Pedersen Declaration") ¶ 3. The Casino Accounts were opened and maintained pursuant to the DACA and the Agreements. From the Casino Accounts, the Tribe issues checks in payment for virtually all goods,

services, wages, payment of prizes, capital improvements, and all other expenses incidental to the operation of the Casino, as well as for payments to Wells Fargo in accordance with the note executed in connection with the Tribe's Indenture. Markle Declaration ¶ 5.

9. From the Casino Accounts, the Casino also pays $1,000,000.00 to the Tribe monthly, which monies are used to fund the operation of the Tribe's government and other economic projects. Casey Declaration ¶ 3; Markle Declaration ¶ 6; Pedersen Declaration ¶ 2.

10. Between January 24, 2013, and February 24, 2013, a dispute (the "Dispute") arose between members of the Tribal Council. Motions were allegedly passed by the Tribal Council suspending and reinstating various Council members during this period. Ayala Declaration ¶¶ 4-23.

11. None of the suspensions of the members of the Tribal Council arising from the Dispute were valid, because they were not imposed at a duly noticed regular or special meeting of the Tribal Council and were not imposed in accordance with the Tribe's Constitution, By-Laws and Ethics Ordinance. Ayala Declaration ¶¶ 4-23. Wynn Declaration Exhibits B and C.

12. As a result of the Dispute, the Tribal Council divided into two factions. One faction consists of the Ayala Quorum. The other consists of Reggie Lewis, Chance Alberta and Carl Bushman (the "Lewis Faction"). Ayala Declaration ¶¶ 24-25.

13. Article VI, Section 2 of the Tribe's Constitution provides that four Tribal Council members constitute a quorum of the Tribe's Tribal Council and that the Tribal Council can only conduct business where a quorum is present. Only the Ayala Quorum can establish a quorum of the Tribal Council. Wynn Declaration, Exh. A, p. 3.

14. On or about February 25, 2013, the Lewis Faction stated to officials of the Bank that it had the authority to withdraw funds from the Accounts and to designate which check signers were authorized to withdraw funds from the Accounts. Ayala Declaration ¶ 27.

15. On or about March 4, 2013, the Ayala Quorum provided the Bank with documents and relevant legal authorities demonstrating that the suspensions from the Tribal Council were invalid, that the Tribal Council still consisted of all seven members of the Tribal Council, and that the Lewis Faction had no authority to withdraw funds from the Accounts or designate check signers for the Accounts. Ayala Declaration ¶ 28.

16. The Bank breached the Agreement with the Tribe by refusing to recognize the Tribal Council as the duly constituted and governing body of the Tribe with the authority to withdraw funds from the Accounts and to designate check signers for the Accounts. Instead, the Bank recognized the Lewis Faction, which cannot establish a quorum of the Tribal Council, as having the authority to withdraw money from the Accounts and designate check signers for the Accounts. Declaration of Lester J. Marston (the "Marston Declaration") ¶ 3.

17. On March 15, 2013, at a duly noticed special meeting of the Tribal Council, with a quorum of the Tribal Council present, a majority of the Tribal Council voted to file suit against the Bank in the Picayune Rancheria of Chukchansi Indians Tribal Court (the "Tribal Court") and seek a order preventing the Bank from allowing the Lewis Faction to withdraw funds from the Accounts and to require the Bank to interplead the funds in the Accounts with the Tribal Court, pending the resolution of the Tribal Court litigation (the "Tribal Court Action"). Ayala Declaration ¶ 29.

18. At the same March 15, 2013 special meeting, the majority of the Tribal Council voted to suspend Lewis, Alberta and Bushman from the Tribal Council, based on written allegations made by Ayala, Brechbuehl, Wynn, and Sargosa of a number of violations of the Tribe's Constitution and Ethic's Ordinance. Ayala Declaration ¶ 30.

19. On March 15, 2013, legal counsel for the Tribal Council notified the Bank's legal counsel that the Tribal Council had filed a complaint against the Bank for breach of contract and for

interpleader, and would be seeking a temporary restraining order directing the Bank to interplead the money in the Accounts with the Tribal Court. Counsel for the Tribal Council provided the Bank's legal counsel with a copy of the complaint, a motion for a temporary restraining order, a memorandum of points and authorities in support of the motion, and three declarations in support of the Tribal Council's motion. The Tribal Council's legal counsel also informed counsel for the Bank that the Tribal Court would hold a hearing on the motion later that afternoon, and provided a telephone conference call telephone number and pass code so that the Bank's legal counsel could appear by phone and participate in the hearing on the motion. Marston Declaration ¶ 4.

20. On March 15, 2013, the Tribal Court held a hearing on the Tribe's motion for a temporary restraining order. Legal counsel for the Bank appeared by telephone. Marston Declaration ¶ 5.

21. At the conclusion of the hearing, the Tribal Court issued a temporary restraining order prohibiting the Bank from allowing any person, other than a person or persons designated by the Tribal Council, from withdrawing any money from the Accounts and ordering the Bank to interplead the money in the Accounts with the Tribal Court. Marston Declaration ¶ 6.

22. On March 15, 2013, counsel for the Tribe served that order on counsel for the Bank by mail and e-mail. The Order also set a hearing for March 22, 2013, on a motion for preliminary injunction. By stipulation of the parties, the hearing date was moved to March 29, 2013. Marston Declaration ¶ 7.

23. On May 23, 2013, at a duly noticed Tribal Council meeting with a quorum present, the Tribal Council held a hearing on the on the question of whether Lewis, Alberta and Bushman should be removed from the Tribal Council. Written notice of the hearing and the charges was served on Lewis, Alberta and Bushman on April 16, 2013. Lewis, Alberta and Bushman did not

attend the hearing. At the conclusion of the hearing, based upon the facts and evidence presented at the hearing the Tribal Council rendered a decision by a vote of four in favor, zero against and three absent to remove Lewis, Alberta and Bushman from the Tribal Council for violations of the Tribe's Constitution and Ethics Ordinance. Ayala Declaration ¶ 32 and Exhibits 1-4.

24. On March 25, 2013, the Tribe filed an amended complaint in the Tribal Court, adding as defendants Reggie Lewis, Chance Alberta and Carl Bushman, in both their official and individual capacities. The Amended Complaint added causes of action against Lewis, Alberta, and Bushman and sought injunctive and declaratory relief. Marston Declaration ¶ 8.

25. On March 26, 2013, the Tribe filed and served on all of the defendants its motion for a preliminary injunction and supporting brief and declarations. The Bank filed opposition to the motion on March 28, 2013. Defendants Lewis, Alberta and Bushman did not file oppose the motion or file any responsive pleading. Marston Declaration ¶ 9.

26. On March 29, 2013, the Tribal Court held a hearing on the Tribe's motion for a preliminary injunction. At the hearing, counsel for the Tribe appeared in person in the Tribal Court and counsel for the Bank appeared by telephone, while no one appeared on behalf of defendants Lewis, Alberta or Bushman despite having been duly served. Marston Declaration ¶ 10.

27. Following the hearing, on March 29, 2013, the Tribal Court entered an order granting the Tribe's motion for a preliminary injunction (the "Tribal Court Injunction Order"). Marston Declaration ¶ 11 and Exhibit B.

28. The Tribal Court Injunction Order directed the Bank to pay from the Accounts to Wells Fargo Bank the amount of the loan payment owed pursuant to the Indenture and to interplead with the Tribal Court any funds that remained in the Accounts after the Loan payment was made. The Tribal Court Injunction Order also ruled that the Tribal Council consisted of seven persons:

Nancy Ayala, Chair; Reggie Lewis, Vice Chair; Tracey Brechbuehl, Secretary; Karen Wynn, Treasurer; Charles Sargosa, Council Member at Large; Chance Alberta, Council Member at Large; and Carl Bushman, Council Member at Large, and that a quorum of those seven Tribal Council members was the recognized governing body of the Tribe authorized to transact business on behalf of the Tribe or CEDA. Marston Declaration ¶ 11 and Exhibit B.

29. The Bank refused to comply with the Tribal Court Injunction Order and refused to comply with the Agreement, violating its contractual obligation. Instead, the Bank filed a notice of appeal challenging the Tribal Court's determination that it had jurisdiction to issue the preliminary injunction to the Tribal Court of Appeals. Marston Declaration ¶ 15.

30. As a direct and proximate result of the Bank's refusal to honor the Tribal Court's preliminary injunction, the Tribe and CEDA defaulted on its loan payment to Wells Fargo. As a direct and proximate result of the default, Wells Fargo elected to exercise its rights under the DACA and directed the Bank to pay all of the funds, except approximately $1,000,000.00 from the Casino Operating Account to Wells Fargo to pay the amount due the Bondholders under the Note and Casino loan. Unfortunately, there was not enough money in the Operating Account to pay the full amount due to the Bondholders under the Note, leaving a balance due of approximately $3,000,000.00. Marston Declaration ¶ 21. Because the Lewis Faction refused to allow any payment from the CEDA Account and other accounts not covered by the DACA to be used to pay the balance, the Tribe was unable to make up the shortfall and the Tribe defaulted on its loan under the terms of the Indenture. Marston Declaration ¶ 22; Eckstein Declaration ¶¶ 9-10.

31. The Ayala Quorum has never waived its sovereign immunity from suit and has never authorized the Lewis Faction to sue it or any of the members of the Ayala Quorum in this or any non-tribal court. Wynn Declaration ¶ 22.

ARGUMENT

POINT I

THE COURT LACKS JURISDICTION UNDER 25 U.S.C. 233 TO DETERMINE WHO IS THE LAWFUL GOVERNING BODY OF THE TRIBE

A. State Laws Cannot Be Enforced Against An Indian Tribe Or Indians On Their Reservation Absent An Act of Congress Expressly Granting Jurisdiction

The United States Constitution expressly removes relations with Indian tribes and their members from the jurisdiction of the states and specifically grants authority over such matters to the United States Congress.

> The Congress [not the states] shall have power . . . to regulate commerce . . . , with the Indian Tribes.

U.S. Constitution, Art. I, § 8, cl. 3

Under the authority granted by the Constitution, the Congress recognizes the Indian tribes as quasi-sovereign governmental entities, possessing inherent sovereign governmental powers. As such, the Congress maintains a government-to-government relationship with the Indian tribes that recognizes the Tribes' right to govern their members, as tribal citizens, free of state regulation and control.

> . . . Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes - - - a power as broad and as free from restriction as that to regulate commerce with foreign nations.

United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 194 (1876).

> The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.

Rice v. Olson, 324 U.S. 786, 789 (1945).

> Indian tribes possess an inherent sovereignty except where it has been specifically taken away from them by treaty or act of Congress.

Ortiz-Barraza v. United States, 512 F.2d 1176, 1178 (9th Cir. 1975).

Based upon Congress' exclusive jurisdiction over Indian affairs, it is now well settled that no state law can be enforced against an Indian tribe or its members while on their reservation or within their Indian Country[1] without the express authorization of Congress.

> State laws are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply.

McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 170-171 (1973).

> . . . state law is not to apply on Indian lands, unless expressly authorized by federal statute. . . .

United States v. Burns, 529 F.2d 114, 117 (9th Cir. 1976).

Therefore, in order for this Court to exercise jurisdiction over the Tribe, or the Ayala Quorum individual Indians named as defendants in the Lewis Faction's Claims, the Court must find a basis in a federal statute that expressly grants it jurisdiction to enforce New York State's laws against the Tribe and the Ayala Quorum on their Picayune Rancheria (the "Reservation") located in the State of California. There is no such statute. In fact, as developed below, the only federal statute that is germane is 25 U.S.C. § 233, and that statute simply does not confer jurisdiction on this Court to decide the issues raised by the Lewis Faction in their Claims or via their instant motion.

B. 25 U.S.C. Section 233 Did Not Grant New York Courts Jurisdiction Over Indian Tribes and Indians For Activities Conducted On Their Reservations Or Grant to New YorkCourts Jurisdiction Over A Tribe's Internal Tribal Affairs

It is a fundamental principle that Indian tribes retain the right to self-government and that "the sovereignty retained by tribes includes 'the power of regulating their internal and social relations.'" *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 332 (1983) (quoting *United States v. Kagama*, 118 U.S. 375, 381-82 (1886)). This authority includes the "power to make their own substantive law in internal matters and to enforce that law in their own forums." *Santa Clara*

[1] Indian Country is defined as all lands within the boundaries of an Indian Reservation. 18 U.S.C. § 1151.

Pueblo v. Martinez, 436 U.S. 49, 55 (1978) (citations omitted); *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 18 (1987); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 n.14 (1982); *United States v. Wheeler,* 435 U.S. 313, 322 (1978); *Ex parte Crow Dog,* 109 U.S. 556, 572 (1883); *Bowen v. Doyle*, 880 F. Supp. 99, 113 (W.D.N.Y. 1995). It is equally well-settled that tribal authority over internal matters is exclusive. *Talton v. Mayes,* 163 U.S. 376 (1896); *Bowen v. Doyle*, 880 F. Supp. at 113; *United States v. Charles*, 23 F. Supp. 346, 348 (W.D.N.Y. 1938).

"The right of a tribe to govern itself in accordance with tribal laws and customs without interference or dictation from the state courts has been recognized and upheld by the highest court of New York state." *United States v. Charles*, 23 F. Supp. 346, 348 (W.D.N.Y. 1938), citing *Mulkins v. Snow*, 232 N.Y. 47 (1921); *Patterson v. Seneca Nation,* 245 N.Y. 433, 440 (1927). *Accord, Bowen,* 880 F. Supp. at 113.

"A necessary corollary to the rights of Indian tribes to self-government and to exclusive jurisdiction over their internal affairs is the principle that state law does not apply on the reservations." *Bowen*, 880 F. Supp. at 113. *See, Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). "[F]rom the very first days of our Government, the Federal Government had been permitting the Indians largely to govern themselves, free from state interference." *Warren Trading Post v. Arizona Tax Comm.,* 380 U.S. 685, 686-87 (1965). *See, Ramah School Bd. v. Bureau of Revenue,* 458 U.S. 832, 846 (1982); *McClanahan v. Arizona Tax Comm'n,* 411 U.S. 164, 168 (1973); *Rice v. Olson,* 324 U.S. 786, 789 (1945).

This absence of state jurisdiction includes the absence of state court jurisdiction. *Fisher v. District County Court*, 424 U.S. 382, 387-88 (1976); *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987); *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759 (1985); *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226 (1985).

The only exception to the absence of state jurisdiction over Indians, Indian tribes, and Indian affairs on their reservations is where Congress specifically grants states such jurisdiction. Congress has granted New York State courts limited jurisdiction over certain civil actions involving Indians on Indian reservations in New York through the enactment of 25 U.S.C. § 233 ("Section 233"), which provides in pertinent part:

> The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State . . . .

Section 233 was designed to grant limited state court jurisdiction over certain civil claims relating to Indians in Indian country located in the State of New York, not tribes located in states outside of New York. This intent is self evident from the plain wording of the statute, which includes phrases that restrict the application of the statute to Indian tribes and Indian land located within the State of New York: "the governing body of any recognized tribe of Indians **in the State of New York** shall have the right to declare, by appropriate enactment prior to the effective date of this Act, those tribal laws and customs which they desire to preserve"; "nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation **in the State of New York**" (emphasis added). Nothing in Section 233 suggests that New York State courts have been granted jurisdiction over tribes located in California or any state other than New York.

Not surprisingly, few decisions have directly considered or ruled on the issue of whether Section 233 grants New York State courts jurisdiction over Indian tribes located in other states. In *Pyke v. Cuomo*, 209 F.R.D. 33 (N.D.N.Y. 2003), the United States District Court for the Northern District of New York addressed the question directly and concluded: "[A]lthough New York, with

certain exceptions which are not applicable here, has civil and criminal jurisdiction over all Indian reservations in the State . . . plainly that jurisdiction does not extend beyond the borders of this State." *See 25 U.S.C. §§ 232* and *233 (West 2001)*." *Id.* at 40 (ellipses added). *See also, Mohegan Tribe v. State of Connecticut*, 528 F. Supp. 1359, 1365 (D. Conn. 1982) ("The Act of September 13, 1950, *25 U.S.C. § 233*, gave the State of New York jurisdiction over legal proceedings **involving Indians within New York**" (emphasis added)).

All of the Lewis Faction's Claims either specifically seek (First and Second Causes of Action) or are dependent on (Third and Fourth Causes of Action) a ruling by this Court that the Lewis Faction is the duly elected, current Tribal Council of the Tribe, and the Board of Directors of CEDA. Because it is indisputable that the Tribe and its governmental agencies are all located in Madera County, California, the plain wording of Section 233 mandates the conclusion that this Court lacks jurisdiction over the Tribe and cannot grant the relief sought by the Lewis Faction.

Even if Section 233 could be construed to apply to Indians and Indian affairs located outside of the State of New York, it would still not apply to the Lewis Faction's Claims because those Claims relate to the Tribe itself and its internal affairs. Under the case law interpreting Section 233, the courts of this state do not have jurisdiction over those internal tribal affairs.

The *Bowen* Court analyzed in great detail the question of whether Section 233 grants state courts jurisdiction over Indian tribes and internal Indian affairs. The Court concluded unequivocally that, "the express language of § 233 defeats any claim that it authorizes the State Court to exercise civil jurisdiction over internal tribal affairs." 880 F. Supp. at 120. The Court stated further that this statute "does not authorize courts of the State of New York to become embroiled in internal political disputes amongst officials of the [tribe]'s government." *Id.* at 122 and 118. The Court, citing to

numerous federal court decisions relating to state jurisdiction over internal Indian affairs, held[2]:

> These cases all support the proposition that an Indian tribe's right to self-government cannot be abrogated absent an unequivocal expression of Congress' intention to do so. *Section 233* is not such an expression. **The plain language of *§ 233* does not authorize courts of the State of New York to become embroiled in internal political disputes amongst officials of the [tribe]'s government.** If it were Congress' intent to allow the State Courts to have jurisdiction over such disputes, it would have expressly said so, but it did not. **Significantly, *§ 233* does not provide for State Court jurisdiction over suits against the [tribe] itself.** Had Congress intended to abrogate the [tribe]'s rights to self-government and exclusive jurisdiction over internal tribal affairs, it would have made sense for Congress to provide for State Court jurisdiction over suits against the [tribe]. The fact that it did not, indicates that Congress did not intend for the State Courts to have jurisdiction over these types of internal disputes.

Id. at 118 (emphasis added).

The *Bowen* Court concluded further that, in analyzing the extent of state jurisdiction granted under Section 233, the Supreme Court's analysis as set forth in *Bryan v. Itasca County,* 426 U.S. 373 (1976) - interpreting the Congressional grant of civil jurisdiction over actions involving Indians from Public Law 280, 28 U.S.C. § 1360 ("P.L. 280") - should be applied, as that decision "sets forth the principles to be applied in construing a statute delegating jurisdiction over Indian affairs to a state, and its analysis applies to the question of whether the grant of civil jurisdiction in § 233 extends state jurisdiction over the Internal affairs of" an Indian tribe." 880 F. Supp. at 119.

The Second Circuit also held that Section 233 should be interpreted by applying the *Bryan* analysis. *United States v. Cook,* 922 F.2d 1026, 1035 (2d Cir. 1991). *See also, United States v. Burns*, 725 F. Supp. 116, 125 (N.D.N.Y. 1989); *Parry v. Haendiges*, 458 F. Supp. 2d 90, 96 (2006). At least one New York state court reached the same conclusion. *People v. Snyder,* 141 Misc. 2d 444, 532 N.Y.S.2d 827, 830-31 (County Ct. Erie Co. 1988).

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[2] *Worcester v. Georgia; Ex parte Crow Dog,* 109 U.S. 556 (1883); *Talton v. Mayes*, 163 U.S. 376 (1896); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

Applying the *Bryan* analysis, the *Bowen* Court concluded that both P.L. 280 and Section 233 "define the state courts' jurisdiction in the same basic terms." In *Bryan*, the Supreme Court stated in unequivocal terms that P.L. 280 does not apply to Indian tribes as "there is notably absent any conferral of state jurisdiction over the tribes themselves". 426 U.S. at 389. Based on application of the *Bryan* analysis to Section 233, the *Bowen* Court concluded: "Congress only intended to grant State Courts jurisdiction over private civil litigation between Indians and between Indians and non-Indians."

As the foregoing controlling authorities demonstrate, Section 233 does not grant New York State courts jurisdiction over Indian tribes or the internal affairs of Indian tribes located in New York State, let alone California. Because adjudication of the Lewis Faction's Claims would require this Court to exercise jurisdiction over the Tribe and determine one of the most fundamental aspects of the Tribe's internal affairs; *viz,* who are the members of the governing body of the Tribe, all of those Claims must be dismissed for lack of subject matter jurisdiction.

POINT II

THE COURT LACKS JURISDICTION OVER THE LEWIS FACTION'S CLAIMS BECAUSE GRANTING THE RELIEF REQUESTED IN THE CLAIMS WOULD CONSTITUTE AN IMPERMISSIBLE INTERFERENCE WITH THE TRIBE'S RIGHT TO SELF-GOVERNMENT

In *Williams v. Lee*, 358 U.S. 217 (1959), the Supreme Court had to determine whether a non-Indian could sue an Indian domiciled on the Indian's reservation in a state court where the Indian's tribe had a tribal court. The High Court held that the Indian's motion to dismiss the state court action should have been granted since the exercise of state jurisdiction would undermine the authority of the tribal court over reservation affairs and would infringe on the Indians' self-governance rights.

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would

> infringe on the right of the Indians to govern themselves. . . . The cases in this Court have consistently guarded the authority of Indian governments over their reservations. . . . If this power is to be taken away from them, it is for Congress to do it.

Id. at 223.

Even in those situations where a state court has been granted jurisdiction to hear a case, the state court must dismiss the action if the parties to the case have a tribal court forum available to them based on the exhaustion of remedies doctrine. In *Iowa Mut. Ins. Co. v. La* Plante, 480 U.S. 9 (1987), the Supreme Court addressed the issue of whether a federal district court, which had diversity jurisdiction over a case, should exercise that jurisdiction where the parties to the litigation had a tribal court forum available to them. The Court held that exhaustion of the remedies available to the parties in the tribal court was required before the parties could invoke a federal court's jurisdiction.

> We have repeatedly recognized the Federal Government's long standing policy of encouraging tribal self-government. [Citation omitted.] This policy reflects the fact that Indian tribes retain "attributes of sovereignty over both their members and their territory, [citation omitted], to the extent that sovereignty has not been withdrawn by federal statute or treaty. **The federal policy favoring tribal self-government operates even in areas where state control has not been affirmatively pre-empted by federal statute.** "[Absent] governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." [citation omitted] Tribal courts play a vital role in tribal-self-government [citation omitted], and the Federal Government has consistently encouraged their development. Although the criminal jurisdiction of the tribal courts is subject to substantial federal limitation [citation omitted], their civil jurisdiction is not similarly restricted. [citation omitted] **If state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law.**

Id. at 14-15 (emphasis and bracketed material added).

Even assuming *arguendo* that the New York state courts had concurrent jurisdiction with tribal courts over the Lewis Faction's Claims, the exhaustion rule enunciated in *Iowa Mutual* would

still require that this Court grant the Ayala Quorum's motion to dismiss the Claims and decline to grant the relief sought by the Lewis Faction's motion. The mandatory deference to tribal court proceedings requires state courts to decline jurisdiction, particularly where, as here, this Court is being asked to determine who is the lawful governing body of the Tribe.

> Even if 25 U.S.C. § 233, like 28 U.S.C. § 1332, creates concurrent jurisdiction over the subject matter of this controversy, that fact does not alter or preempt the presumption of tribal court jurisdiction over disputes arising on the reservation.

Bowen, 880 F. Supp. at 127.

Here, the Tribe's Tribal Court that has ruled on the very issue that the Lewis Faction wants this Court to decide: Who is the lawful governing body of the Tribe? The Tribal Court determined that the Tribal Council elected at the December 2013, Tribal Council election, was the governing body of the Tribe and, because the Ayala Quorum constituted a quorum of that Council, it was the lawful governing body of the Tribe. (Marston Declaration Exhibit B).

As was the case in *Bowen*, strong federal policies favoring tribal self-government require that the Lewis Faction's Claims against the Ayala Quorum involving activities on the Reservation be resolved exclusively in the sole appropriate forum, which is the Tribal Court, which has already exercised jurisdiction over the dispute. To hold otherwise would interfere with the right of Reservation Indians to govern themselves and constitute an impermissible interference with Tribal self-government. *Williams v. Lee*, 358 U.S. 217 (1959); *Bowen.*

POINT III

ALL OF THE LEWIS FACTION'S CLAIMS ARE BARRED BY TRIBAL SOVEREIGN IMMUNITY

As a federally recognized Indian tribe, the Tribe enjoys the protection of tribal sovereign immunity. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58.

The sovereign immunity of an Indian tribe is coextensive with that of the United States itself. *Chemehuevi Indian Tribe v. Cal. State Board of Equalization*, 757 F.2d 1047, 1050 (9th Cir.), *rev'd on other grounds*, 474 U.S. 9 (1985); *Kennerly v. United States*, 721 F.2d 1252, 1258 (9th Cir. 1983).

Although tribal sovereign immunity can be abrogated by Congress or waived by a tribe, any such waiver must be unequivocally expressed and is to be narrowly construed. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58; *C & L Enters. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001).

Judicial recognition of a tribe's immunity from suit is not discretionary. Rather, absent an effective waiver or abrogation, the assertion of sovereign immunity by a federally recognized tribe deprives the court of jurisdiction.

> Sovereign immunity involves a right which courts have no choice, in the absence of a waiver, but to recognize. It is not a remedy, as suggested by California's argument, the application of which is within the discretion of the court. . . . Consent alone gives jurisdiction to adjudge against the sovereign. Absent that consent, the attempted exercise of judicial power is void. . . . Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body.

People of the State of California v. Quechan Tribe of Indians, 595 F.2d 1153, 1155 (9th Cir. 1979). *See also, United States v. United States Fidelity and Guarantee Co.*, 309 U.S. 506, 512-513 (1940).

Tribal sovereign immunity is jurisdictional in nature and applies "irrespective of the merits" of the claim asserted against the Tribe. *Rehner v. Rice*, 678 F.2d 1340, 1351 (9th Cir. 1982), *rev'd on other grounds,* 463 U.S. 713 (1983).

The doctrine of Tribal sovereign immunity that bars lawsuits brought against an Indian tribe without its consent applies equally to lawsuits brought against tribal officials acting in their representative capacity and within the scope of their authority: "Tribal immunity extends to Tribal officials acting within their representative capacity and within the scope of their authority." *United*

States v. Oregon, 657 F.2d 1009, 1012 n. 8 (9th Cir. 1981); *see also, Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004); *Lineen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir. 2002); *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1321 (9th Cir. 1983). Federal courts have specifically found that tribal council members acting within the scope of their authority are protected by tribal sovereign immunity. *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269 (9th Cir. 1991); *Saucerman v. Norton*, 51 Fed. Appx. 241, 243 (9th Cir. 2002).

Ayala, Brechbuehl, Wynn and Sargosa were - at all times relevant to the events alleged in the Claims - acting in their official capacities. Wynn Declaration ¶ 23. Accordingly, Ayala, Brechbuehl, Wynn and Sargosa enjoy the protection of tribal sovereign immunity in the absence of a waiver by the Tribe or Congressional abrogation of that immunity. *People of the State of California v. Quechan Tribe of Indians*, 595 F.2d 1153 (9th Cir. 1979); *State of California v. Harvier*, 700 F.2d 1217 (9th Cir. 1983); *Chemehuevi Indian Tribe v. California State Board of Equalization*, 757 F.2d at 1051.

Because the Lewis Faction does not allege that the Tribe has waived its sovereign immunity with regard to the Lewis Faction's Claims, and the Tribe has never consented to a waiver of its sovereign immunity with regard to Ayala, Brechbuehl, Wynn and Sargosa for any of the Claims (Wynn Declaration ¶ 22), the Lewis Faction's Claims are barred by tribal sovereign immunity[3]. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58; *Bowen*, 880 F. Supp. at 18.

[3] While some federal courts have held that an *Ex parte Young*, 209 U.S. 123 (1908), action can be maintained against tribal officials that have exceeded the scope of their authority. *Wisconsin v. Baker*, 698 F. 2d 1323, 1332-33 (7th Cir. 1983), the *Young* doctrine does not apply where the tribal official is alleged to have violated tribal, rather than, federal law. *Bowen*, 880 F. Supp. at 128. Here, the only federal law that the Lewis Faction has alleged the Ayala Quorum violated is the RICO statute. But, as shown below, adjudication of those claims would require that this Court determine who constitutes the Tribe's Tribal Council, which this Court lacks no jurisdiction to do.

POINT IV

THE TRIBE'S SOVEREIGN IMMUNITY PREVENTS THIS COURT FROM EXERCISING PERSONAL JURISDICTION OVER THE INDIVIDUAL AYALA QUORUM MEMBERS

"[A] sovereign's interest encompasses not merely whether it may be sued, but where it may be sued." *Hunt Constr. Group, Inc. v. Oneida Indian Nation*, 53 A.D.3d 1048, 1049, 862 N.Y.S.2d 423, 424 (4th Dep't 2008) (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985). Moreover, as discussed above, "[t]ribal immunity extends to Tribal officials acting within their representative capacity and within the scope of their authority." *United States v. Oregon*, 657 F.2d 1009, 1012 n. 8 (9th Cir. 1981); *see also, Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004); *Lineen v. Gila River Indian Community*, 276 F.3d 489, 492 (9th Cir. 2002); *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1321 (9th Cir. 1983). Thus, while a state court may adjudicate the rights of individual defendants over whom it properly obtained personal jurisdiction (*Puyallup Tribe, Inc. v. Department of Game of Washington*, 433 U.S. 165, 173 (U.S. 1977)), it may not adjudicate the rights of tribal officials whose only contact with the forum state comes within their official capacities.

In the instant case, the sovereign immunity of Ayala, Brechbuehl, Wynn and Sargosa as to the Claims has never been waived (Wynn Declaration ¶ 22) and they acted in their official capacities. Accordingly, this Court lacks personal jurisdiction over the individual Ayala Quorum cross-defendants, and the Claims must be dismissed pursuant to CPLR 3211(a)(8).

POINT V

THE LEWIS FACTION'S RICO BASED CAUSES OF ACTION MUST BE DISMISSED BECAUSE THE COURT WOULD BE REQUIRED TO DETERMINE WHO CONSTITUTES THE TRIBE'S TRIBAL COUNCIL

The Lewis Faction's two RICO based claims are a transparent attempt to seek intervention into the Tribe's internal leadership dispute and must also be dismissed for the reasons stated above

and because they fail to state a cause of action.

The Lewis Faction alleges a pattern of racketeering, 18 U.S.C. § 1962(c), predicated on alleged interference with interstate commerce using violence or threats of violence, 18 U.S.C. § 1951, mail fraud, 18 U.S.C. § 1341, and wire fraud, 18 U.S.C. § 1343. It is beyond dispute that criminal statutes do not provide for a private cause of action unless Congress has explicitly provided for one. Rarely is there a private right of action under a criminal statute. *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979). With respect to 18 U.S.C. §§ 1951, 1342, and 1343, federal courts have consistently concluded that those statutes do not provide for a private cause of action. *See, e.g., Official Publications, Inc. v. Kable News Co.*, 884 F.2d 664, 667 (2d Cir. 1989); *John's Insulation Inc. v. Siska Constr. Co.* 774 F. Supp. 156, 163 (S.D.N.Y. 1991).

RICO does provide for a civil damages cause of action arising from 18 U.S.C. § 1964,[4] if a party can meet the elements of a criminal enterprise that has committed predicate offenses pursuant to 18 U.S.C. § 1962(c). The Lewis Faction's Claims fail because a determination on the merits of the those Claims would require the Court to determine who is the current Tribal Council of the Tribe and, as demonstrated above, this Court does not have jurisdiction to make such a determination.

To state a RICO claim, a plaintiff must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985). A "pattern of racketeering" consists of at least two predicate acts of racketeering committed within a ten-year period. 18 U.S.C. § 1961(5). Predicate acts are acts indictable under a specified list of criminal laws found at 18 U.S.C. § 1961(1).

In this case, the predicate acts alleged by Lewis Faction in the Third and Fourth Claims are violations of 18 U.S.C. § 1951, 18 U.S.C. § 1341, and 18 U.S.C. § 1343. Those Claims are based

[4] The Lewis Faction does not cite to 18 U.S.C. § 1964 as the basis for their RICO-based damage claims.

entirely on actions taken by Ayala, Brechbuehl, Wynn and Sargosa in the course of the current governance dispute. The factual allegations that support those Claims describe actions that the Ayala Quorum took in their official capacity as members of the Tribe's Tribal Council. All of the alleged actions relate to the Ayala Quorum's efforts to run the Tribe's government, of which they constitute the governing body. All of the actions alleged in the Claims are consistent with the Ayala Quorum's role as the Tribal Council. Those actions could constitute an illegal enterprise apart from the Tribe itself, under § 1962(c) only if the Ayala Quorum had not been acting as the Tribe's Tribal Council and members of the Board of Directors of CEDA. If, as the Ayala Quorum maintains, their actions were taken in their official capacities, the actions do not constitute an illegal enterprise. Rather, they constitute the actions of members of the Tribal Council seeking to uphold the results of the Tribe's most recent election and protect the interests of the Tribe.

Again, the Court lacks the jurisdiction to find that the predicate claims for a § 1962(c) violation have been properly plead because that determination would require a conclusion that the Ayala Quorum is not the legitimate Tribal Council of the Tribe.

In a strikingly similar case to the present one, the United States Court of Appeals for the Eighth Circuit upheld the district court's dismissal of claims for civil damages based on 18 U.S.C. § 1962(c)[5] brought by one faction of a tribal leadership dispute within the Sac & Fox Tribe of the Mississippi in Iowa against an opposing faction. The Eighth Circuit's analysis applies to this case:

> To state a claim under *§ 1962(c)*, a plaintiff must establish (1) the existence of an enterprise; (2) conduct by the defendants in association with the enterprise; (3) the defendants' participation in at least two predicate acts of racketeering; and (4) conduct that constitutes a pattern of racketeering activity. *United Healthcare Corp. v. American Trade Ins. Co.*, 88 F.3d 563, 570 (8th Cir. 1996). The district court found that the predicate violations alleged by the Elected Council could not be considered qualifying predicate violations unless the court first concluded that the Appointed

[5] A cause of action for damages arising from a violation of 18 U.S.C. § 1962 is established in 18 U.S.C. § 1964.

> Council was not the lawful governing body of the Tribe. In the alternative, we note that to define the Appointed Council as an "enterprise" separate from the Tribe itself we would first have to conclude that the Appointed Council does not, in fact, represent the Tribe. The district court lacked subject matter jurisdiction to decide these underlying, intra-tribal matters. We therefore agree that the district court lacked subject matter jurisdiction over the Elected Council's claims and affirm the district court's April 15 order.

In re: Sac & Fox Tribe of the Mississippi in Iowa / Meskwaki Casino Litigation, 340 F.3d 749, 767 (8th Cir. 2003).

The same reasoning applies in this case. In order to find that the Ayala Quorum engaged in any form of criminal enterprise, the Court would have to conclude that the Ayala Quorum is not the current Tribal Council and does not represent the Tribe. Because this Court lacks subject matter jurisdiction to decide those underlying, intra-tribal matters, the Lewis Faction's RICO claims should be dismissed.[6]

VI.

THE TRIBAL COURT ORDER SHOULD BE RECOGNIZED PURSUANT TO THE DOCTRINE OF COMITY

The issue of who constitutes the Tribe's Tribal Council was addressed and resolved by the court that has jurisdiction over internal disputes of the Tribe, the Tribe's Tribal Court. In fact, that issue was ruled upon by the Tribal Court, which issued a preliminary injunction in *Picayune Rancheria of Chukchansi Indians v. RaboBank, et al*, Picayune Tribal Court Case number 2013-001. In that case, the Tribal Court found that the Ayala Quorum, consisting of Nancy Ayala, Tracey Brechbuehl, Karen Wynn, and Charles Sargosa, constitutes the current Tribal Council authorized to act as the lawful governing body of the Tribe.

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[6] The RICO claims are insufficiently pleaded for a myriad of reasons. We do not address all of the grounds for dismissal since the jurisdictional objection is so clearly dispositive.

"As a general rule, federal courts must recognize and enforce tribal court judgments under principles of comity." *AT&T Corp. v. Coeur D'Alene Tribe*, 295 F.3d 899, 903 (9th Cir. 2002) citing *Wilson v. Marchington*, 127 F.3d 805, 809-810 (9th Cir. 1997)("[T]he recognition and enforcement of tribal court judgments in federal court must inevitably rest on the principles of comity"). "Comity is neither a matter of absolute obligation on the one hand, nor mere courtesy and good will on the other." *Marchington*, 127 F.3d at 809 citing *Hilton v. Guyot*, 159 U.S. 113, 163-164 (1895). "As a general policy, '[c]omity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect.'" *Marchington*, 127 F.3d at 809.

Recognition by federal courts of orders issued by tribal courts extends beyond final judgments. Under certain circumstances, where a tribal court issues an order, such as an injunction or a temporary restraining order, a federal court has the discretion to recognize and enforce the order:

> While there is no doubt that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians," . . . the decision whether to enforce non-final orders of a tribal court is left primarily to our discretion under the doctrine of comity . . . .

MacArthur v. San Juan County, 497 F.3d 1057, 1060 (10th Cir. 2007), quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. at 65-66.

State courts are required to recognize and enforce tribal court judgments in the same manner as are federal courts. *See, e.g., Mashantucket Pequot Gaming Enterprise v. Renzulli*, 188 Misc. 2d 710, 728 N.Y.S.2d 901 (Sup. Ct. Suffolk Co. 2001). "The New York Courts . . . have in fact adopted a rule of comity which requires that the state courts decline jurisdiction in favor of a previously-filed suit in tribal court covering the same parties and same subject matter." *Bowen*, 880 F. Supp. at 125 (ellipses added). *See, Jimerson v. Halftown Estate*, 44 Misc. 2d 1028, 255 N.Y.S.2d 627 (Sup. Ct. Albany Co. 1963), *aff'd*, 22 A.D.2d 417, 419, 255 N.Y.S.2d 959, 961 (3d Dep't 1965). As the *Bowen*

court stated: "Nothing about 25 U.S.C. § 233 overrides or affects the policy of deference to the tribal courts." *Id.* at 127.

Recognition of a tribal court judgment by a state or federal court would be precluded by only two factors, neither of which is present here: "Federal and state courts must neither recognize nor enforce tribal judgments if: (1) the tribal court did not have both personal and subject matter jurisdiction; or (2) the defendant was not afforded due process of law." *Marchington*, 127 F.3d at 810. "[U]nless a federal court determines that the tribal court lacked jurisdiction, . . . the proper deference to the tribal court system precludes relitigation of issues raised . . . and resolved in the tribal courts." *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1986).

Federal and state courts also have the authority to refuse to recognize tribal court judgments on certain discretionary grounds:

> a federal court may, in its discretion, decline to recognize and enforce a tribal judgment on equitable grounds, including the following circumstances: (1) the judgment was obtained by fraud; (2) the judgment conflicts with another final judgment that is entitled to recognition; (3) the judgment is inconsistent with the parties' contractual choice of forum; or (4) recognition of the judgment, or the cause of action upon which it is based, is against the public policy of the United States or the forum state in which recognition of the judgment is sought.

Marchington, 127 F.3d at 810. Applying those criteria, it is evident that none of the circumstances that would support denial of recognition of the Tribal Court Injunction Order are present.

1. The Tribal Court Had Jurisdiction over Lewis, Alberta and Bushman and the Claims Against Them

Article V, Section (w) of the Tribe's Constitution authorizes the Tribal Council to "provide for the establishment of Tribal Courts. . . ." Exhibit A to Wynn Declaration.

Pursuant to this constitutional authority, the Tribal Council established the Tribal Court through enactment of a tribal court ordinance ("Tribal Court Ordinance"). Wynn Declaration Exhibit D. Section 5 of the Tribal Court Ordinance sets forth the personal, subject matter and territorial

jurisdiction of the Tribal Court. Other provisions of tribal law grant the Tribal Court jurisdiction over specific areas of law. Under the provisions of tribal law and federal court decisions addressing the jurisdiction of tribal courts, it is evident that the Tribal Court had both personal jurisdiction over Lewis, Alberta, and Bushman and subject matter jurisdiction over the claims raised in the Tribal Court complaint.

a. The Tribal Court Had Personal Jurisdiction Over Lewis, Alberta and Bushman

There is no basis to dispute that the Tribal Court has personal jurisdiction over Lewis, Alberta, and Bushman. Each is a member of the Tribe and a former member of the Tribe's Tribal Council. Section 5.1(a) of the Tribal Court Ordinance specifically grants to the Tribal Court jurisdiction over tribal members and tribal officers. The Tribal Council has also adopted a law and order code ("Law and Order Code"). Wynn Declaration ¶ 8 and Exhibit F. Pursuant to the Law and Order Code, the Tribal Court was granted "jurisdiction over all civil causes of action . . . ." Law and Order Code, § 1-2-5, and over all matters in which the Tribe or its officers acting in their official or individual capacities are a party to the litigation Law and Order Code, § 1-2-7.

Federal courts have consistently found that Indian Tribes and their tribal courts have jurisdiction over their members. *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997) ("*Strate*"); *Duro v. Reina*, 495 U.S. 676, 694 (1990); *Santa Clara Pueblo v. Martinez*, 436 U.S. at55-56. "Tribal governing power is at its zenith with respect to authority over tribal members within Indian country." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.02 (2012, Matthew Bender & Company, Inc.).

b. The Tribal Court Had Subject Matter Jurisdiction Over The Claims Against Lewis, Alberta and Bushman

Article V of the Tribe's Constitution grants to the Tribal Council the authority to "promulgate and enforce ordinances governing the conduct of the members of the Tribe, and non-members within

the Tribe's jurisdiction; . . . to safeguard the peace, safety, morals and general welfare of the Tribe; . . . and to manage tribal funds in accordance with approved resolutions; . . . to regulate the conduct of business activities within the exterior boundaries of the Picayune Reservation; . . . to manage all economic affairs and enterprises of the Tribe; . . . to provide for the establishment of Tribal Courts for all purposes allowed by law . . . . " *Id.*

In Section 5.1(e) of the Tribal Court Ordinance, the Tribal Council granted the Tribal Court jurisdiction over "causes or rights of action of any kind, civil actions, . . . and any other matter to be judicially adjudicated . . . arising or that are subject to the Constitution, or the law, statutes, regulations or Ordinances of the Tribe and this Ordinance . . . ". Exhibit D to the Wynn Declaration. It is beyond dispute that tribal courts are the appropriate forum for resolving tribal leadership and election disputes.

> Tribal election disputes, like tribal elections, are key facets of internal tribal governance and are governed by tribal constitutions, statutes, or regulations. . . . Unless surrendered by the tribe, or abrogated by Congress, tribes possess inherent and exclusive power over matters of internal tribal governance. When a tribe conducts elections and provides administrative or judicial processes for contesting the elections, it engages in a core governmental function related to internal tribal affairs. . . . Unless Congress has indicated otherwise, federal courts lack jurisdiction to review tribal elections.

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.06[1][b][I]-[ii].

Federal courts have consistently concluded that, where leadership disputes between two factions of a tribal government occur, the tribal forums have jurisdiction to determine who the lawful governing body of the tribe is. Indian tribes "have power to make their own substantive law in internal matters . . . and to enforce that law in their own forums". *Santa Clara Pueblo v. Martinez*, 436 U.S. at55-56 . "Because tribal governance disputes are controlled by tribal law, they fall within the exclusive jurisdiction of tribal institutions." *Attorney's Process and Investigation Services, Inc., v. Sac & Fox Tribe of the*

Mississippi in Iowa, 609 F.3d 927, 943 (8th Cir. 2010). *See, Goodface v. Grassrope*, 708 F.2d 335, 338 n. 4 (8th Cir. 1983); *Shortbull v. Looking Elk,* 677 F.2d 645, 650 (8th Cir. 1982).[7]

There is, therefore, no question that the Tribal Court had both personal and subject matter jurisdiction over Lewis, Alberta and Bushman and the claims brought against them relating to the leadership of the Tribe.

2. The Tribal Court Afforded the Defendants Due Process

"Like a federal court, a state court must . . . reject a tribal judgment if the [party] was not afforded due process of law." *Marchington*, 127 F.3d at 811. "It has long been the law of the United States that a foreign judgment[8] cannot be enforced if it was obtained in a matter that did not accord with the basics of due process." *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1410 (9th Cir. 1995).

> Due process, as that term is employed in comity, [requires] . . . . that there has been opportunity for a full and fair trial before an impartial tribunal that conducts the trial upon regular proceedings after proper service or voluntary appearance of the defendant, and that there is no showing of prejudice in the tribal court or in the system of governing laws.

Marchington, 127 F.3d at 811.

> [E]vidence 'that the judiciary was dominated by an opposing litigant, or that a party was unable to obtain counsel, to secure documents or attendance of witness, or to have access to appeal or review, would support a conclusion that the legal system was one whose judgments are not entitled to recognition.

Id. (citing Restatement (Third) of Foreign Relations Law of the United States § 482 cmt. B (1986)); *Burrell v. Armijo*, 456 F.3d 1159, 1172 (10th Cir. 2006).

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[7] See also *Bowen v. Doyle*, supra(tribal courts have jurisdiction to determine who is the lawful governing body of a tribe).

[8] The extension of comity to tribal court judgments is based on the same considerations as the recognition of foreign judgments. *Marchington*, 127 F.3d at 808-810. *See, Hilton v. Guyot*, 159 U.S. at 163-164.

The Tribal Court afforded Lewis, Alberta and Bushman due process of law throughout the proceedings. The Tribal Court conducted the proceedings pursuant to rules that mirror the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Marston Declaration ¶ 16. Lewis, Alberta and Bushman were personally served with the summons and amended complaint. Marston Declaration ¶ 8. Defendants, through their legal counsel, were provided notice of and an opportunity to participate in the Tribal Court's preliminary injunction hearing. Marston Declaration ¶ 9. Defendants Lewis, Alberta, and Bushman, despite being served with the amended complaint and with the motion papers three days before the hearing and being provided with a conference call number and pass code which would have permitted them to appear by telephone, decided not to participate in the hearing on the motion for a preliminary injunction. Marston Declaration¶ 10.

Notably, the Tribal Court Judge - the Honorable Robert Moeller – is well qualified, as he worked for the Office of the Solicitor, Department of the Interior, for 35 years, primarily in the area of Federal Indian law, he is the Chief Judge of two other tribal courts and he has no personal or financial connection to the Picayune Rancheria of Chukchansi Indians beyond the judicial services contract with the Tribe, pursuant to which he carries out his functions as Tribal Court judge. Marston Declaration ¶ 20.

In sum, there is no basis for concluding that the Lewis Faction individual defendants were not afforded due process at any point in the Tribal Court proceedings.

3. The Discretionary Bases for Denying Recognition Do Not Apply

Non of the discretionary bases for denying recognition of the Tribal Court's Order are present in this case. There is no basis for concluding that the Tribal Court's orders were obtained by fraud. The declarations submitted to the Tribal Court by the Tribe were made under penalty of perjury, and the documentary evidence provided to the Tribal Court by the Tribe was consistent with the

allegations made by the plaintiffs, and the Tribal Court had substantial evidence to support its findings. Marston Declaration¶ 17.[9]

Second, the Tribal Court Orders are not in conflict with another judgment that is entitled to recognition by this Court. Marston Declaration ¶ 18.

Third, the question of whether the Tribal Court's orders are inconsistent with the parties' contractual choice of forum is simply not relevant. The Ayala Quorum and the Lewis Faction have never entered into any agreement regarding a choice of forum for the resolution of the current leadership dispute. Marston Declaration ¶ 19. As the foregoing analysis made clear, there is simply no question that the only proper forum for addressing the current leadership dispute is the Tribe's Tribal Court.

Finally, recognition of the Tribal Court's orders, or the causes of action upon which they based, is not against the public policy of the United States. On the contrary, it is the longstanding policy of the federal government to encourage the development of Tribal governmental institutions, and, in particular, tribal courts, as expressed through statutes such as 25 U.S.C. § 3601 (5) Congress and the Federal Courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights. . .) and 25 U.S.C. § 3651(6) (Congress and the Federal Courts have repeatedly recognized tribal justice systems as the most appropriate forums for the adjudication of disputes affecting personal and property rights on Native lands. . .).

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[9]In the interest of judicial economy, the Ayala Quorum has not submitted the pleadings and moving papers filed with the Tribal Court in the *RaboBank* proceedings. Should the Court conclude that the submission of the pleadings and moving papers filed with the Tribal Court would be necessary or useful to the Court in ruling on the current motion, the Ayala Quorum will submit those documents to the Court.

Thus, none of the discretionary factors for denying recognition are present in this case. Based on all of the foregoing, the principles of comity compel the Court to recognize the preliminary injunction issued by the Tribal Court and the Tribal Court's conclusion that the Ayala Quorum constitutes the current Tribal Council authorized to act as the lawful governing body of the Tribe.

POINT VII

THE PAYMENTS TO THE TRIBAL GOVERNMENT, TRIBAL GAMING COMMISSION, AND CEDA BOARD ARE EXCLUDED ASSETS OVER WHICH THIS COURT HAS NO JURISIDCTION

The Lewis Faction's motion asks the Court to modify the existing language in its July 2, 2013 Order to require "both Factions to agree" that an Asset is an Excluded Asset before it may be withheld from the Operating Account, based on vague, conclusory, unsubstantiated allegations, made on information to secure loyalty. That motion is nothing more than a thinly veiled attempt to control the Tribe's money through veto and to impermissibly create jurisdiction in this Court to interfere in tribal affairs that belong in a Tribal Court that has exercised jurisdiction. In fact, as the Court is aware, the Lewis Faction imposed blanket objections to the legitimate payments that the Casino wanted to make during the process established by the Court on July 29, 2013. As a result, the Court's August 28, 2013, order (Marston Decl. Exh. J) directed that the required payments to the Tribal Gaming Commission, Tribal Government and CEDA Board in the combined amount of $1,716,000 could be made. Thus, the Lewis Faction's motion seeks relief that conflicts with this Court's rulings on August 28, 2013 and July 29, 2013 (Marston Decl. Exh. C).

A. The Changes To The Order Requested By The Lewis Faction Exceed The Relief Sought By Plaintiff And This Court's Jurisdiction

Plaintiff Wells Fargo Bank commenced this litigation to protect its collateral, as set forth in the Indenture and Security Agreement. It sought nothing more or less than compliance with the

Indenture and Security Agreement and sought to protect the Casino and the pledged revenues. This Court's Order, dated July 2, 2013, granting a preliminary injunction in favor of plaintiff, reflects the limited nature of the relief sought. Specifically, footnote 3 provides:

> Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Indenture, entered into among CEDA, the Tribe and the Trustee and the Security Agreement, entered into between CEDA and the Trustee, both dated May 30, 2012 as applicable.

There is 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.

B. The Ayala Quorum did not Abuse the Excluded Assets, as the Disputed Payments were Authorized Under the Terms of the Court's July 2, 2013 Order and the Indenture

1. Payments from the Casino's Operating Cash for Expenses Reasonably Necessary or Desirable for CEDA Operations are Expressly Authorized under the July 2, 2013 Order and the Indenture

This Court's July 2, 2013, order held that:

> CEDA and the Tribe shall cause to be deposited into the Rabobank Operating Account . . . all Gross Revenues and Revenues and Cash of CEDA, other than Operating Cash and Gross Revenues that constitute Excluded Assets, held by CEDA. * * *
>
> CEDA and the Tribe shall not deposit or maintain the Gross Revenues and Revenues and Cash of CEDA, other than Operating Cash and Gross Revenues that constitute Excluded Assets, anywhere other than in the Rabobank Operating Account.

Order at ¶¶ 2, 4. Stated differently, Operating Cash, as well as Gross Revenues and Revenues and Cash of CEDA that constitute Excluded Assets, need not be deposited in the Rabobank Operating Account.

Unless otherwise expressly defined in the order, the defined terms have the same meaning as those in the Indenture. Order at 3, n. 3. As defined by both the order and the Indenture:

> "*Operating Cash*" means all cash in transit to and from the Facility, all cage cash, slot hopper fill, cash in valet or other registers and change boxes, cash in any gaming devices operated by the Authority, and other cash at any other location on the premises of the Facility necessary or desirable for the operation of the Facility, in each case to the extent that all such cash does not exceed $10 million in the aggregate. * * *
>
> "*Gross Revenues*" means, for any period, all revenues comprised of money, instruments, credit to a securities or deposit account, or other assets received, directly or indirectly, from the [Casino] . . . .

The Indenture defines "Excluded Assets" to mean "any assets transferred by the Authority . . . to any Person other than the Authority . . . in a transaction not prohibited by Section 4.9." The Indenture further provides that there is no limitation on "Permitted Payments," and defines "Permitted Payments" to include

> payments for actual services, products or benefits performed or delivered in the ordinary course of business of the Authority that are reasonably necessary or desirable, in the good faith determination of an Officer, to the operation of the Authority, not to exceed the amount that would otherwise be paid for such services, products or benefits to a third-party in an arm's-length transaction . . . .

Pursuant to the terms of this Court's July 2, 2013 order, the Authority and Casino are permitted to retain all cage cash, slot hopper fill, cash in valet or other registers and changes boxes, etc., up to $10,000,000.00. The Authority and Casino also do not violate the order by retaining any Gross Revenue that is used to pay for actual services, products, or benefits performed or delivered in the ordinary course of business that are reasonably necessary or desirable, and which do not exceed the amount of such services in an arm's-length transaction.

2. The Ayala Quorum has not Abused its Authority over Excluded Assets as Each Disputed Payment Constituted Excluded Assets and was Made from Operating Cash

As discussed above, the order and Indenture define Excluded Assets to include payments for benefits reasonably necessary or desirable to the operation of CEDA. Pursuant to the order, Excluded Assets need not be deposited in the Rabobank Operating Account. Similarly, the Order and Indenture define Operating Cash to include, among other things, cash in the Casino's cages, in an amount not to exceed $10,000,000.00. The order provides that such amounts need not be deposited in the Rabobank Operating Account.

Because, as developed below, the challenged payments either constitute Excluded Assets, or were made from Operating Cash, payment from these sources does not violate the Court's order.

i. Payments to the Tribal Gaming Commission were Required to Ensure Compliance with Federal Law.

As discussed above, a Permitted Payment, as defined by the Indenture, is an Excluded Asset, which, pursuant to the Court's order, need not be deposited in the Rabobank Operating Account. Permitted Payments are those "for actual . . . benefits . . . delivered in the ordinary course of business of the Authority that are reasonably necessary or desirable, in the good faith determination of an Officer, to the operation of the Authority.

The Tribe's Casino is comprehensively regulated pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. (the "IGRA"). The IGRA preempts all state laws pertaining to the Casino and the conducting of gaming on the Reservation. *Florida v. Seminole Tribe*, 181 F.3d 1237, 1242-1243 (11th Cir. 1999); *Gaming Corporation of America v. Dorsey & Whitney*, 88 F.3d 536

(8th Cir. 1996); *Tamiami Partners, Ltd., v. Miccosukee Tribe of Indians of Florida*, 63 F.3d 1030 (11th Cir. 1995).

The IGRA created the National Indian Gaming Commission (the "NIGC") and delegated to the Chair of the NIGC the authority to impose fines and order the temporary or permanent closure of any gaming facility found to be operating in violation of the IGRA or a tribal gaming ordinance approved by the NIGC. 25 U.S.C. § 2705 (a)(1); 25 U.S.C. § 2713 (b)(1); *see, United States v. Seminole Indian Nation of Oklahoma*, 321 F. 3d. 939, 944-945 (10th Cir. 2002).

Under the IGRA, the Casino cannot offer for play to the general public any slot machine or house banked games, such as black jack, unless the Tribe has entered into a tribal-state gaming compact with the State of California. 25 U.S.C. § 2710(d)(3)(A). Pursuant to the IGRA, the Tribe has entered into a Tribal-State gaming compact with the State of California (the "Compact"; Marston Declaration Exhibit L). Compact § 7.1 mandates that the Tribe establish a tribal gaming commission on the Reservation that regulates the Casino operations. Wynn Declaration ¶ 22.As the Tribe's independent gaming regulatory agency, the TGC is responsible for ensuring that the games conducted at the Casino are played fairly, patron disputes are resolved, the assets of the Casino are safeguarded, the Casino revenues are counted and accounted for, and the Tribe is the sole owner and recipient of the revenue generated from the gaming facility. Marston Declaration ¶ 30; Eckstein Declaration ¶ 4.

> It is the responsibility of the Tribal Gaming Agency to Conduct on-site gaming regulation and control in order to enforce the terms of this Gaming Compact, IGRA, and the Tribal Gaming Ordinance with respect to Gaming Operation and Facility compliance...

Compact § 7.1 (Marston Decl. Exh. L).

The Casino payment to the TGC is a facility licensing fee. The Compact mandates that the Casino be inspected and licensed annually.

> The Gaming Facility authorized by this Gaming Compact shall be licensed by the Tribal Gaming Agency in conformity with the requirements of this Gaming Compact, the Tribal Gaming Ordinance, and IGRA.

Compact § 6.4.2.

The TGC uses the facility licensing fee to fund its operations and functions. Had the licensing fee not been paid, the TGC would have run out of money and would not have been able to make payroll if the Casino had not made the payment to the TGC. Eckstein Declaration ¶ 5. Unless the Tribe has an operating and functioning TGC on site regulating the Casino, the Tribe/Casino will be in violation of the Tribe's Compact and the IGRA, which could result in a temporary or permanent casino closure order being issued by the Chair of the NIGC. Marston Declaration ¶ 30. Therefore, the TGC licensing fee clearly is "reasonably necessary or desirable" for the operation of the Casino.

Moreover, Indenture § 4.21 specifically directs the Authority to maintain in full force and effect at all times all Gaming Licenses necessary for the operation of the Casino. The payment of this expense by CEDA is not a discretionary activity, but rather is mandated under the Indenture. Payment of the licensing fee, therefore, constitutes an Excluded Asset, as it is a Permitted Payment that may be made out of the Casino's Gross Revenue without first being deposited in the Rabobank Operating Account. (Plaintiff did not object to the payment.) The Ayala Quorum therefore did not abuse the Indenture's Excluded Assets provision, as incorporated into the Court's July 2, 2013 order. That order should not be amended to grant the Lewis Faction veto power over Casino expenditures.

ii. Payments to the Tribe do not Violate the Court's Order or the Indenture

As discussed above, Indenture § 4.9(b) provides that the prohibitions in § 4.9(a) on certain transactions do not apply to prevent certain other transactions, while § 4.9(b)(8) identifies the payment of Monthly Tribal Distributions as a payment that is not prohibited.

The IGRA mandates that the revenue from the Casino must be used for governmental purposes. With one exception, net revenues from the Casino may only be used: (i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies. 25 U.S.C. § 2710(B)(2)(b). The exception is per capita payments of Casino revenues to tribal members. The IGRA, however, prohibits per capita distributions of gaming revenues unless they are made pursuant to a revenue allocation plan ("RAP") that has been approved by the Secretary of the Interior. 25 U.S.C. § 2710(b)(3); 25 C.F.R. Part 290. Pursuant to the IGRA, the Tribe has adopted and the Secretary has approved a RAP for the Tribe (Marston Declaration Exh. G (see exh. D thereto)); Wynn Declaration ¶ 23.

The use of the payment from the Casino to the Tribal Government (the "Monthly Distribution"), which is required under the Tribe's Indenture, is subject to the RAP. The RAP mandates that the Monthly Distribution can only be used to fund essential governmental programs and per capita payments to Tribal members. In accordance with the RAP and the Indenture, the Tribe is providing a full range of services to its tribal members in a non-discriminatory manner as set forth in the breakdown of payments provided to the Lewis Faction. Those services include, but are not limited to, scholarships programs for its youth, assistance payments to its elderly and the Tribal kindergarten program. These are essential services that the Tribe's members rely upon for support in their daily lives. Casey Declaration ¶ 4.

The basis for the Lewis Faction's challenge to these payments is their conjectural assertion, made only on information and belief, that the Ayala Quorum has used the payments "to secure loyalty for the Ayala [Quorum] by, for example, providing food cards to Ayala supporters but not others." Affirmation of Jonathan L. Hochman in Support of the Lewis Faction's motion at ¶ 15 (bracketed material supplied) (the "Hochman Affirmation"). Of course, the Lewis Faction does not provide any information as to how it obtained such information, or the factual basis for its supposed belief. Based on the meager allegations, and the evidence that the payments were made for a legitimate purpose and were permissible under both the Court's Order and the Indenture, the Court should give short shrift to the Lewis Faction's objections. There is no valid basis to contest the fact that the Ayala Quorum has been making, and will continue to make, payments in an appropriate, non-discriminatory manner.

Accordingly, any withholding from the Rabobank Operating Account Gross Revenues and Revenues and Cash of the Authority used to pay Monthly Tribal Distributions does not violate the express terms of the Order, the Indenture or the Security Agreement. The Ayala Quorum therefore did not abuse the Excluded Assets provision of the Indenture, as incorporated into the Court's July 2, 2013 order, and that order should not be amended to grant the Lewis Faction veto power over Casino expenditures.

iii. Payments to CEDA do not Violate the Order or the Indenture

As discussed above, "Permitted Payments" includes payments for "services . . . rendered . . . in the ordinary course of business of the Authority that are reasonably necessary or desirable, in the good faith determination of an Officer, to the operation of the Authority" in an amount "not to exceed the amount that would otherwise be paid for such services . . . to a third party in an arm's length transaction." Accordingly, CEDA may withhold from the Rabobank Operating Account the

Gross Revenues that are used to pay the CEDA Board for its services, as long as those payments do not exceed the amount that would otherwise be paid for such services to a third party in an arm's length transaction.

The CEDA Board payment is necessary to fund the operations of the Board so it can make decisions about how revenues from the Casino will be spent to promote the Casino and other tribal economic development projects consistent with the RAP and the IGRA. In fact, the IGRA mandates that the Tribe has the sole proprietary ownership of the Casino and that it make day-to-day decisions about the operation of the Casino. 25 U.S.C. § 2710 (b)(2)(A). The Tribe does so through the CEDA Board. The Lewis Faction has objected to the Casino making any payments to the CEDA Board without identifying any specific basis for its objection. The Lewis Faction has only stated that they object to any payment being made to CEDA until the Court determines whether the Ayala Quorum is the lawful CEDA Board (a determination the Court lacks the jurisdiction to make). However, the Lewis Faction does not dispute that the CEDA Board members provided the services for which they were paid, nor does it dispute that the payment was commensurate with an amount that would have been paid in an arm's length transaction. It is evident that the Ayala Quorum did not abuse the Excluded Assets provision of the Indenture, as incorporated into the Court's July 2, 2013 order; accordingly, that order should not be amended to grant the Lewis Faction veto power over Casino expenditures.

C. The Lewis Faction should Account for the Funds Withdrawn from Various Tribe Bank Accounts

The Ayala Quorum does not oppose providing an accounting of the challenged payments. However, the Ayala Faction should likewise be required to provide an accounting of withdrawals they made from Tribe deposit accounts maintained at Rabobank.

Immediately after the dispute arose between the Ayala Quorum and the Lewis Faction, members of the Lewis Faction, who were among the original signatories on deposit accounts kept by the Tribe at Rabobank, appear to have withdrawn millions of dollars from those accounts. Despite the fact that counsel for the Ayala Quorum, has twice requested that the Lewis Faction provide a simple accounting of these funds (specifically how much money was withdrawn, the date of the withdrawal and who the funds were paid to, if anyone, so that we could verify if these withdrawals were subject to this Court's July 2, 2013, order), the Lewis Faction has failed to even disclose whether they will or will not provide the information. The withdrawal of these funds at the onset of the dispute has contributed to the shortfall of revenue to the Tribe, CEDA Board and TGC. Eckstein Declaration ¶¶ 9-10; Pederson Declaration ¶ 3; Casey Decl. ¶ 14.

D. The Ayala Quorum Attempted to Meet and Confer in Good Faith with the Lewis Faction Before Making the Payments at Issue

In early August 2013, the Ayala Quorum acted in accord with the Court's directives by attempting in good faith to meet and confer with the Lewis Faction including to address any disputed payments. At the scheduled August 8, 2013, meeting, a representative of the Ayala Quorum attended to discuss the necessity and propriety of the payments, in an attempt to reach a reasonable accommodation to meet the pressing needs of the Casino and Tribe. The Lewis Faction sent only several attorneys, who objected to any payments to being made by the Casino to the TGC, CEDA Board, or Tribal Government until the Court determined its jurisdiction to determine the lawful governing body of the Tribe. The Lewis Faction did not attempt in good faith to accommodate the needs of the Casino and Tribe. Marston Declaration ¶ 25.

Ostensibly recognizing that the Lewis Faction's blanket objection was in direct contravention of the Court's instruction that such payments could be made absent an attempt by the Ayala Quorum to gain a political advantage over the Lewis Faction, the Lewis Faction now asserts the vague,

unsubstantiated and conclusory allegation, on information and belief, that some unidentified portions of the disputed payments were made "to secure loyalty for the Ayala [Quorum] by, for example, providing food cards to Ayala supporters but not others." Hochman Affirmation at ¶ 15. Such a bad faith, post hoc conjectural objection is clearly designed only to disrupt the Tribal government and CEDA Board operations.

POINT VIII

THE COURT SHOULD NOT APPOINT A SPECIAL MASTER

Finally, given all of the foregoing, it would be inappropriate for this Court to grant the relief sought by the Lewis Faction and appoint a Special Master to oversee the disputes between the Ayala Quorum and the Lewis Faction over permitted payments. The appointment of such a master is beyond this Court's jurisdiction.

CONCLUSION

For the foregoing reasons, defendants 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, Nancy Ayala, Tracey Brechbuehl, Dr. Karen Wynn and Charles Sargosa respectfully request that the Court deny the Lewis Faction's motion and grant their cross-motion in its entirety.

Dated: New York, New York
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