

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

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.

Index No. 652140/2013

Motion Sequence No. 012

Hon. Melvin L. Schweitzer

**MEMORANDUM OF LAW IN SUPPORT OF WELLS FARGO BANK, N.A.'S  
MOTION TO DISMISS THE LEWIS FACTION'S COUNTERCLAIM**

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N.A. in Its Capacity as Trustee Under the  
Indenture and Collateral Agent Under the  
Security Agreement*

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Plaintiff Wells Fargo Bank, N.A. (“Wells Fargo” or the “Trustee”), respectfully submits this memorandum of law in support of its motion to dismiss the Lewis Faction’s counterclaim (“Counterclaim”) pursuant to CPLR § 3211(a)(2). The Counterclaim is attached to the Affirmation of Craig A. Batchelor (“Batchelor Aff.”) as Ex. 1.

### **PRELIMINARY STATEMENT**

The Trustee originally filed its Complaint and Application for a Preliminary Injunction to cure specific breaches of the Indenture and related agreements. Those breaches had disrupted the operation of the Casino and imperiled the Holders’ collateral, and the Trustee narrowly tailored the relief that it sought to normalize the operations of the Casino. The Court’s July 2, 2013 Order also is narrowly tailored to address those breaches pragmatically, and there was broad support by all parties for the relief ordered.

The Trustee recognizes that there is an underlying tribal dispute between the Ayala and Lewis Factions, and that this dispute led to many of the breaches at issue. The Trustee has never asked this Court to adjudicate the tribal dispute nor sought to interject itself in the management of the Casino, however. As it has stated many times, the Trustee takes no position regarding which Faction is the proper governing authority of the Tribe and CEDA. The Trustee’s primary concern, and the singular rationale for this litigation, is protecting the Holders’ collateral and taking appropriate actions to help ensure that the interest payments are made. That concern is driven directly by the Trustee’s rights and duties as specifically provided under the Indenture.

Since the July 2 Order was entered, CEDA has paid the interest that had been overdue since April 1, 2013, the Casino has resumed the use of its main Rabobank operating account, CEDA’s unauthorized account at Bank of America has been closed, and the Casino has begun to restore its business relationships with vendors and employees. Some of the breaches of the Indenture still remain – for example, CEDA still has not provided the Trustee with reports

containing its audited 2012 financial statements or its unaudited financial statements for 2013 to date. And while many necessary payments are being made by the Casino on a routine basis now, the two Factions still disagree as to some. But the parties are following a process established by the Court to address those narrow issues, pursuant to which the two Factions have been meeting on a weekly basis to discuss the Casino's operating expenses, confer regarding potential disputes, and raise objections with the Court. In short, the Casino's operations by and large have been stabilized and restored.

This process is exactly what was contemplated by the parties to the Indenture, and is why they agreed to vest this Court with primary jurisdiction to hear disputes such as this one that concern the interpretation of and enforcement of the Indenture upon a breach. The remainder of this Court proceeding will be focused on converting the injunctions put in place through the Court's July 2 Order into a permanent injunction. The Trustee has raised this with both Factions, and there appears to be broad support, again, for such limited relief in this action.

The Lewis Faction, however, seeks a vast expansion of this case and the Court's role in it by filing numerous cross-claims against the Ayala Faction. The Lewis Faction also includes one counterclaim against the Trustee and the Ayala Faction seeking a declaration from this Court that the Lewis Faction is the proper governing body of CEDA. In other words, the Lewis Faction is asking this Court to resolve the underlying tribal dispute. Although the Trustee is in favor of resolution of the tribal dispute, this is not the proper forum for litigating that dispute, nor is the Trustee a proper party to such an intra-tribal matter. "New York courts do not have subject matter jurisdiction over the internal affairs of Indian tribes." *Seneca v. Seneca*, 293 A.D.2d 56, 58 (4th Dep't 2002).

The tribal dispute is an internal tribal governance issue and does not fall within the Tribe's limited waiver of sovereign immunity in the Indenture. As an initial matter, that waiver of sovereign immunity applies only to claims brought by the Trustee, the Collateral Agent and others as specified in the Indenture, and does not cover the Counterclaim brought by the Lewis Faction. Moreover, consideration of the Trustee's claims requires only a basic interpretation of the Indenture and related agreements, but resolution of the tribal dispute would require this Court to interpret the Tribe's Constitution, the Tribal Council's By-Laws and a number of tribal referendums. It also would require the parties to engage in substantial and wide-ranging discovery, as evidenced by the broad discovery requests that accompanied the Lewis Faction's Counterclaim and Cross-claims. Simply put, the dispute between the two Factions is not a dispute that arises under or is any way sufficiently tied to the Indenture to justify this Court's jurisdiction. It is a dispute that arises under the Tribe's internal affairs, and must be resolved internally by the Tribe – a “domestic sovereign” over which this Court does not have jurisdiction – potentially with the help of the federal government.

Although this Court does not have jurisdiction to adjudicate the tribal dispute, it does have the authority and power to ensure that the Casino is being operated in compliance with the Indenture and that the bondholders are being paid. This Court need not – and indeed, cannot – wade into a tribal dispute that exceeds the scope of its jurisdiction. The Trustee would not want to have the parties or the Court invest the time and resources to attempt to resolve the tribal dispute in this proceeding, only to find that the Court lacks jurisdiction over this uniquely tribal affair.

## **ARGUMENT**

### **I. THE COURT LACKS SUBJECT MATTER JURISDICTION TO DECIDE THE TRIBAL DISPUTE**

The Trustee joins and incorporates herein the arguments made in Points I-III of the Ayala Faction's Memorandum of Law in Support of Its Cross-Motion to Dismiss the Lewis Faction's Cross-Claims, dated August 30, 2013 [Dkt. No. 166], and will not repeat those arguments here in full. The Trustee, however, reiterates that Indian tribes are domestic sovereign entities, *i.e.*, "unique aggregations possessing attributes of sovereignty over both their members and their territory." *United States v. Wheeler*, 435 U.S. 313, 323-36 (1978). An internal tribal leadership dispute is governed by tribal law, and thus "fall[s] within the exclusive jurisdiction of tribal institutions." *Attorney's Process & Investigation Servs. v. Sac & Fox Tribe*, 609 F.3d 927, 943 (8th Cir. 2010). Such disputes are not justiciable before federal or state courts. *In re Sac & Fox Tribe of the Miss. in Iowa / Meskwaki Casino Litig.*, 340 F.3d 749, 763 (8th Cir. 2003) ("Jurisdiction to resolve internal tribal disputes . . . lies with Indian tribes and not in the district courts."). For the reasons noted in the Ayala Faction's memorandum, this Court does not have jurisdiction to decide the tribal dispute and the Counterclaim should be dismissed.

### **II. THE TRIBAL PARTIES' SOVEREIGN IMMUNITY WAIVER IN THE INDENTURE DOES NOT EXTEND TO THE LEWIS FACTION'S COUNTERCLAIM AND CROSS-CLAIMS.**

Section 13.1(b) of the Indenture sets forth the scope of the Tribe's limited waiver of sovereign immunity. It states:

"Each Tribal Party shall grant to the Trustee, the Collateral Agent, the Holders of the Notes, and such other persons as may be expressly identified as beneficiaries in an applicable Transaction document (each a 'Grantee') an irrevocable limited waiver of sovereign immunity . . . from unconsented suit, arbitration or other legal proceedings . . . with respect to the Transaction Documents and the transactions contemplated thereby . . . to . . . interpret or enforce the provisions of the Transaction documents or rights arising in connection therewith or the transactions contemplated thereby, whether such rights arise in law or equity."

Indenture § 13.1(b), Batchelor Aff. Ex. 2. Section 11.8(d) of the Security Agreement and Section 10(a) of the Deposit Account Control Agreement (“DACA”) contain substantially identical language.

In its Counterclaim, the Lewis Faction characterizes the tribal dispute as a matter arising under or related to the Indenture, and thus claims that the dispute falls under the Tribal Parties’ waiver of sovereign immunity as provided in the Indenture. That argument stretches the waiver of sovereign immunity well beyond the actual nature of the tribal dispute, which of course is simply an intra-tribal matter that is wholly independent of the Indenture itself. Just because CEDA, a Tribal Party, entered into the Indenture, that does not mean that any dispute within the Tribe over the control of CEDA somehow must be so tied to the Indenture that the sovereign immunity waiver and New York forum selection clause apply. There is no authority for expanding a sovereign immunity waiver as broadly as would be required to accept the Lewis Faction’s argument.

Although a tribe, as a domestic sovereign, enjoys broad immunity from suit in federal and state courts, a tribe may waive its sovereign immunity and consent to be sued, but such waiver must be clearly and unequivocally expressed. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978); *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 86 (2d Cir. 2001); *Ransom v. St. Regis Mohawk Educ. & Community Fund*, 86 N.Y.2d 553, 560 (N.Y. 1995). Further, any waiver of sovereign immunity is to be strictly construed in favor of the tribe. *Ransom*, 86 N.Y.2d at 560.

“When consent to be sued is given, the terms of the consent establish the bounds of a court’s jurisdiction.” *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982). Where a Tribe waives sovereign immunity for claims seeking to



enforce terms of a contract, New York courts have held that such a waiver is very limited and does not vest the courts with jurisdiction to hear any other claims. *See Oneida Indian Nation v. Hunt Constr. Group, Inc.*, 67 A.D.3d 1345, 1347 (4th Dep’t 2009) (dismissing counterclaims against Tribe that were beyond the limited waiver of sovereign immunity applying to claims seeking to enforce the terms of a contract); *Hunt Constr. Group, Inc. v. Oneida Indian Nation*, 53 A.D.3d 1048, 1050 (4th Dep’t 2008) (holding that where tribe consented to suit in courts located in the City of Syracuse, courts in Oneida County were not included in limited waiver of sovereign immunity).

The limited sovereign immunity waiver here does not apply to the Lewis Faction’s Counterclaim for at least two reasons. First, the waiver is granted only to “Grantees,” which the Indenture defines as the Trustee, the Collateral Agent, the Holders, and other persons expressly defined as beneficiaries in the transaction documents. *See* Indenture § 13.1(b), Batchelor Aff. Ex. 2. The Indenture clearly states that in order for the waiver to apply, “the Action *shall be brought by or on behalf of a Grantee.*” *Id.* § 13.1(b)(1) (emphasis added). Here, the Counterclaim is being asserted by members of the Lewis Faction, who are not “Grantees” as defined in the Indenture. Thus, because the Counterclaim seeking to resolve the dispute over tribal leadership is not an action “brought by or on behalf of a Grantee,” it does not fall within the scope of the limited waiver of sovereign immunity and the Court lacks jurisdiction to hear it.

Second, the sovereign immunity waiver applies only to claims to “interpret or enforce the provisions of the Transaction Documents or rights arising in connection therewith or the transactions contemplated thereby.” *See id.* § 13.1(b)(2). The tribal dispute is not such a claim. The Indenture and related agreements – like all other contracts to which CEDA or the Tribe are parties – govern the rights and obligations of CEDA and the Tribe, but they do not address which

Faction properly controls those entities. That is an issue wholly outside of the Indenture, and one that does not require interpretation or enforcement of the Indenture at all. As the Lewis Faction recognizes, resolution of the tribal dispute would require this Court to interpret, among other things, “the Tribe’s Constitution, Election, Enrollment, Ethics and Anti Violence Ordinances, other Tribal laws and By-laws” – but not the Indenture. *See* Counterclaim ¶ 56, Batchelor Aff. Ex. 1. The Lewis Faction’s allegations in support of its Counterclaim include claims that the Ayala Faction staged an illegal and violent coup of the Tribe, disenrolled hundreds of members of the Tribe, and ousted the Lewis Faction from the Tribal Council. All of those claims are completely irrelevant to the Indenture and related agreements. Moreover, even though the Lewis Faction names the Trustee as a defendant to the counterclaim asking this Court to resolve the tribal dispute, the Trustee has no involvement whatsoever in that dispute.

Tellingly, in a separate case the Lewis Faction argued that a federal court did not have jurisdiction to decide intra-tribal issues *because there was no waiver of sovereign immunity covering such a claim in the Transaction Documents*. In April 2013, the Ayala Faction sued Rabobank in the Eastern District of California to seek recognition of a judgment of its tribal court and to enforce the terms of the DACA. *See The Picayune Rancheria of Chukchansi Indians v. Rabobank, et al.*, No. 13-cv-00609 (E.D. Cal.). As noted above, the DACA contains a limited waiver of sovereign immunity and jurisdictional provisions nearly identical to those in the Indenture. The Lewis Faction intervened in that case and then moved to dismiss the complaint on the ground, among others, that the courts of New York rather than California were the proper venue for an action against Rabobank under the terms of the DACA. *See* Lewis Faction’s Memorandum at 12-13, Batchelor Aff. Ex. 3. However, the Lewis Faction also argued that the California court did not have jurisdiction over the Tribe or its members because, “*there*

*is no evidence – because it does not exist – of a clear, explicit and unequivocal waiver of sovereign immunity by the Tribe or by [the members of the Lewis Faction].” Id. at 12 (emphasis added).* According to the Lewis Faction, recognizing the judgment of the Ayala Tribal Court would impair the sovereign Tribe’s ability to self-govern. *See id.* at 13-18. In other words, despite a nearly identical waiver of sovereign immunity in the DACA as the one in the Indenture, the Lewis Faction argued that the waiver did not give the California court jurisdiction over the Tribe to decide intra-tribal issues outside of the scope of the DACA.<sup>1</sup> The Lewis Faction should be estopped from arguing that the Indenture’s sovereign immunity waiver allows this Court to decide the tribal dispute, which it clearly does not.

Finally, the Lewis Faction cannot claim that it will be prejudiced if this Court declines jurisdiction to decide the tribal dispute. Indeed, in the California case, the Lewis Faction argued that lacking a judicial form to resolve the dispute “is a common consequence of sovereign immunity, and the Tribe’s interest in maintaining sovereign immunity outweighs the plaintiff’s interest in litigating their claims . . . Indeed the absence of a judicial remedy is a basic feature of sovereign immunity.” *Id.* at 17. This Court has already afforded the parties substantial relief and stabilized the operations of the Casino. As long as the terms of the Indenture are enforced, and the Holders’ collateral is protected, this Court should not feel compelled to overreach its jurisdiction and decide the tribal dispute.

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<sup>1</sup> To be clear, the Lewis Faction did not argue that the California court lacked jurisdiction to decide the tribal dispute because it could be decided by the New York courts in the first instance. Rather, the Lewis Faction argued that there was no waiver of sovereign immunity applicable to those claims at all.

## CONCLUSION

For the foregoing reasons, the Trustee respectfully requests that this Court dismiss the Lewis Faction's Counterclaim.

October 1, 2013  
New York, New York

Respectfully submitted,

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