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

----------X WELLS FARGO BANK, N.A., AS TRUSTEE, Plaintiff, - against - CHUKCHANSI ECONOMIC DEVELOPMENT AUTHORITY, THE BOARD OF THE CHUKCHANSI ECONOMIC DEVELOPMENT AUTHORITY, THE TRIBE OF PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS, THE TRIBAL COUNCIL OF THE TRIBE OF PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS, THE PICAYUNE RANCHERIA TRIBAL GAMING COMMISSION, RABOBANK, N.A., GLOBAL CASH ACCESS, INC., NANCY AYALA, TRACEY BRECHBUEHL, KAREN WYNN, CHARLES SARGOSA, REGGIE LEWIS, CHANCE ALBERTA, CARL BUSHMAN, and BANK OF AMERICA, N.A., Defendants. ----------X		Index No. 652140/13 **REPLY TO OPPOSITION TO MOTION TO DISMISS**

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INTRODUCTION

In their Memorandum of Law in Opposition to Motions to Dismiss the Lewis Parties' Cross- and Counter-Claims" (Opposition"), the Lewis Faction argues that the Picayune Rancheria of Chukchansi Indians ("Tribe") waived the Tribe's sovereign immunity and that of its tribal officials with regard to their claims against the Ayala Quorum Council through the waiver of sovereign immunity contained in the May 30, 2012, Indenture between the Chukchansi Economic Development Authority ("CEDA") and Wells Fargo Bank ("Bank"). The Lewis Faction further argues that this Court has jurisdiction over their claims and over the Ayala Quorum, based on the forum selection clause of the Indenture. Finally, the Lewis Faction contends that, despite the fact that their claims specifically seek an order from the Court determining that the Lewis Faction constitutes the Tribe's legitimate CEDA and Tribal Council, they are not asking the Court to rule on the Tribe's internal tribal leadership dispute. The Lewis Faction's arguments are entirely unpersuasive.

In this brief, the Ayala Quorum Council will demonstrate that the Lewis Faction cannot overcome any of the barriers to this Court's assertion of jurisdiction over their claims for the following reasons: (1) the Lewis Faction's factual assertions demonstrate that the Lewis Faction is seeking a ruling from the Court on the Tribe's internal leadership dispute; (2) the Tribe has not waived its sovereign immunity with regard to the Lewis Faction's claims; (3) this Court does not have jurisdiction over the Lewis Faction's claims; (4) the forum selection clause in the Indenture does not permit the Court to assert jurisdiction over the Lewis Faction's claims; (5) the case law cited by the Lewis Faction in support of their Opposition actually supports the Ayala Quorum Council's motion; and (6) the proper forum for the resolution of the Tribe's internal leadership

dispute is the Tribe's Tribal Court. The Tribe's motion to dismiss ("Motion"), therefore, must be granted.

I.

THE LEWIS FACTION'S FACTUAL ASSERTIONS REVEAL THAT THEY ARE SEEKING A RULING ON THE LEADERSHIP DISPUTE.

The Lewis Faction's assertion that they are not seeking a resolution of the Tribe internal leadership dispute is absurd on its face. Their claims and prayer for relief seek precisely such a determination from the Court: (1) a declaration that CEDA "is lawfully governed by a board comprised of seven active members: Reggie Lewis, Chairman, Carl "Buzzy" Bushman, Vice Chairman, Irene Waltz, Secretary, Chance Alberta, Treasurer, David Castillo, Member-at-Large, Lynn Chenot, Member-at-Large, Melvin Espe, Member-at-Large"; and (2) a "permanent injunction barring the Ayala Faction and Ayala, Brechbuehl, Wynn, and Sargosa, individually, from interfering with the rights and obligations under the Indenture of the legitimate Tribal Council and CEDA."

Even if their claims were not self-evidently a request for a determination of the Tribe's internal leadership dispute, no better evidence that the Lewis Faction's claims relate entirely to the Tribe's leadership dispute could be found than the factual assertions contained in the Opposition and the Declaration of Reggie Lewis ("Lewis Declaration") filed in support of the Opposition. Those factual assertions present a narrative of political machinations and battles for political authority and control over the Tribe's money, property, and facilities. The Opposition and the Lewis Declaration repeatedly cite to actions of tribal groups and alleged tribal entities in which members of the Tribal Council and CEDA were removed, replaced, or appointed. The Lewis Faction cites to votes of the General Council in which the Lewis Faction's legitimacy as

the current Tribal Council was "confirmed."[1] In addition, the Opposition and the Lewis Declaration cite to provisions of tribal law as the basis of their claim that members of the Lewis Faction are the legitimate Tribal Council and CEDA Board.

The Lewis Factions factual assertions are intended to draw the Court into the morass of the Tribe's internal leadership dispute by portraying the Ayala Quorum Council as a tiny, terrible group of violent people whose claims to governmental office have no legitimacy and who must be stopped before they destroy the Tribe and its economic enterprises. Even if they are accepted as true, which they are not,[2] those factual assertions describe a dispute among Indians in Indian Country regarding whether one group or another constitutes the duly elected or appointed officials of the Tribe who are authorized to act on behalf of the Tribe as the Tribe's government. The internal leadership dispute is the subject of the Lewis Faction's factual assertions and their claims. To argue, as the Lewis Faction does, that their claims are merely contract claims is refuted by their own factual assertions.

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[1]The alleged General Council "election" at which the General Council purportedly "reconfirmed" that the Lewis Faction is the current Tribal Council was not authorized under the Tribe's Constitution and was not held in conformity with the requirements of the Constitution. Supplemental Declaration of Michael Wynn ("Supplemental Wynn Declaration"), pp. 1-5, ¶¶ 2-9. filed herewith**.** The election was, therefore, void *ab initio*.

[2] The Lewis Factions factual assertions regarding the underlying leadership dispute are frequently false, inaccurate, or incomplete. See the Declarations of Michael Wynn and Lester J. Marston previously filed with the Court in support of the Tribe's motion to dismiss and the exhibits attached thereto. (A particularly obvious example is the assertion that the Ayala Quorum has never been recognized by any agency of the Federal Government, Lewis Declaration, p. 9, ¶ 34. That is demonstrably false. Supplemental Wynn Declaration, pp. 5-6, ¶¶ 20- 21 and Exhibits B and C thereto.) Because the facts surrounding that dispute are not relevant to the current motion, in the interest of judicial economy, the Tribe will not specifically address and refute the Lewis Faction's misrepresentations of fact in the Opposition and the Lewis Declaration. If the Court concludes that detailed discussion of those facts is necessary in order for the Court to address the current Motion, the Ayala Quorum Council requests that the Court permit it to file supplemental declarations to correct the Lewis Factions factual misrepresentations.

The Opposition's statement of facts and the Lewis Declaration entirely undermine the Lewis Faction's tortured reasoning. Based on those factual assertions and the Lewis Faction's statement of their claims and prayer for relief alone, the Court has a sufficient basis for dismissing the Lewis Factions claims on the grounds that the Court lacks jurisdiction over internal tribal leadership disputes.

II.

THE LEWIS FACTION CANNOT OVERCOME ANY OF THE BARRIERS THAT PREVENT THE COURT FROM ADDRESSING THEIR CLAIMS.

A. The Ayala Quorum Council is Protected by the Tribe's Sovereign Immunity.

As has already been discussed in the Tribe's memorandum of points and authorities in support of its motion to dismiss ("Memorandum"), Indian tribes are sovereign entities that enjoy the protection of sovereign immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("*Santa Clara Pueblo*"); *C & L Enters. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001). Tribal sovereign immunity extends to state court actions for breach of contract involving off-reservation commercial conduct, *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998). Indian tribes are not subject to suit unless that sovereign immunity is abrogated by Congress or waived by the tribe. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P. C.*, 476 U.S. 877, 890 (1986)*; Santa Clara Pueblo* 436 U.S. at 58*; Kiowa*, 523 U.S. at 754. Any waiver must be explicit, not implied. *Santa Clara Pueblo*, 436 U.S. at 58 (1978); *C & L Enters.* 532 U.S. at 418; *United States v. Testan*, 424 U.S. 392, 399 (1976). Tribal sovereign immunity also extends to tribal officials. *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); *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269 (9th Cir.

1991). Any such waiver extends only to those persons and claims explicitly identified in the waiver and only to the degree that the conditions of the waiver are met. *Missouri River Services, Inc. v. Omaha Tribe of Nebraska* 267 F.3d 848, 852 (8th Cir. 2001); *American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe,* 780 F.2d 1374, 1378 (8th Cir.1985); *Namekagon Development Co. v. Bois Forte Reservation Housing Authority* (8th Cir. 1975) 517 F.2d 508, 509. See also *Great Western Casinos v. Morongo Band of Mission Indians*, 74 Cal. App. 4th 1407, 1420 (1999).

The Lewis Faction asserts that the Tribe waived its sovereign immunity with regard to their claims through the waiver of sovereign immunity included in the Indenture and the DACA. That is categorically, demonstrably false:

> Each Tribal Party shall grant to the Trustee, the Collateral Agent, the Holders of 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 (and any defense based thereon) from unconsented suit, arbitration or other legal proceedings (each, inclusive of actions for equitable or provisional relief and to compel arbitration, an "*Action*") with respect to the Transaction Documents and the transactions contemplated thereby, *provided* that;
>
> (1) the Action shall be brought by or on behalf of a Grantee;
>
> (2) the Action shall be commenced within the statute of limitations applicable to such Action under applicable state or federal law;
>
> (3) the Action is to (i) 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 or (ii) enforce or execute any order, judgment, award or ruling resulting from such an Action;
>
> (4) the Action shall not include a claim seeking punitive damages;
>
> (5) the Action does not seek recourse against assets of a Tribal Party other than as permitted by the first paragraph of this section; and
>
> (6) for no other purpose whatsoever.

Indenture, Sec. 13.1(b), Exhibit A to Slade Affidavit, pp. 109-110, .

The waiver is granted only "*to the Trustee, the Collateral Agent, the Holders of Notes,*

and such other persons as may be expressly identified as beneficiaries in an applicable Transaction Document." Clearly, the members of the Lewis Faction are not the Trustee, the Collateral Agent, or the Holders of Notes, a beneficiaries identified in the Transaction Documents. There is no basis whatsoever for concluding that the waiver is granted in favor of one faction of the Tribe to permit them to bring claims against another faction.

Any action brought pursuant to the waiver, must be brought "*by or on behalf of a Grantee.*" Citing no legal authority, the Lewis Faction asserts that: "The waiver of sovereign immunity in the Indenture applies to the actions brought by the Trustee, such as this one. . . . Here, the Trustee did, in fact, bring the Action so the Lewis Parties are not restricted in their ability to respond to those claims." Their assertion that their claims can piggy back on the grant of the waiver to Wells Fargo as Grantee is a willful and insupportable misinterpretation of the explicit language of the waiver. Moreover, even the most generous interpretation of the Lewis Faction's argument could only conclude that the expansion of the waiver to the Lewis Faction and their claims constitutes an implied waiver. It falls far short of the requirement that a tribe's waiver of sovereign immunity or that of its officials, be explicit and unequivocal. *Santa Clara Pueblo,* 436 U.S. at 58; *C & L Enters.* 532 U.S. at 418; *United States v. Testan*, 424 U.S. at 399.

Furthermore, the claims that can be asserted through an action brought pursuant to the waiver are restricted: "*the Action is to . . . interpret or enforce the provisions of the Transaction Documents or rights arising in connection therewith or the transactions contemplated thereby*." A determination of whether the Lewis Faction or the Ayala Quorum Council constitutes the legitimate, duly appointed CEDA Board, the legitimate, duly elected Tribal Council, or the legitimate, duly appointed Tribal Gaming Commission is exclusively an matter of interpretation of tribal law. No interpretation of the Transaction Documents could possibly reach, interpret, or

determine that issue.

Finally, just in case the limitations on the reach of the waiver were not clear enough, the waiver can be enforced "*for no other purpose whatsoever*." The determination of the current, duly elected or appointed officials of the Tribe's government unquestionably falls into the category of "other purpose."

The Lewis Faction final argument, predictably, is that the Tribe's sovereign immunity does not protect the Ayala Quorum Council because the members of the Ayala Quorum Council are not tribal officials. Once again, the Lewis Faction's argument undermines any pretense that they are not seeking a ruling on an internal tribal leadership dispute: "The very crux of the Lewis Parties defenses and claims is that the Ayala Faction members cause the Indenture breaches alleged by the Trustees because they were acting as rogue tribal agents without proper authority." Opposition, p. 21. Indeed, the crux of the Lewis Factions claims is that the Ayala Quorum is not the Tribal Council of the Tribe, the CEDA Board or the Tribal Gaming Commission. The only way that the Court could find that the members of Ayala Quorum Council are not properly elected or appointed officials of the Tribe would be by determining whether the Lewis Faction or the Ayala Quorum Council is the legitimate tribal government, precisely the issue that the Court has no jurisdiction to address.

Moreover, the cases cited by the Lewis Faction, *People v. Anderson*, 137 A.D. 2d 259 (4th Dept. 1988) and *Oneida Nation of New York v. Burr*, 132 A.D. 2d 402 (3rd Dept. 1987) have no application here, because in both of those cases, the court concluded that there were not two factions that could both legitimately claim to be the tribe's government.[3]

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[3]Whether the *Anderson* and *Oneida Indian Nation* courts correctly determined that they had jurisdiction to determine that one group was unquestionably the legitimate tribal government

The Lewis factions assertion therefore, that the Indenture's waiver of the Tribe's sovereign immunity fails on all three possible levels: the waiver is not granted to the Lewis Faction; it does not extend to the claims they have brought, and it does not meet the conditions for the granting of the waiver. Their assertion that the Ayala Quorum Council is not protected by the Tribe's sovereign immunity requires precisely the determination of the Tribe's leadership dispute that the Lewis Faction claims it is not seeking. Without an effective waiver, the Lewis Faction's claims are barred.

B. This Court Lacks Jurisdiction over the Tribe's Internal Tribal Leadership Dispute.

"The whole intercourse between the United States and [Indian tribes], is, by our Constitution and laws, vested in the government of the United States." *Worcester v. Georgia*, 31 U.S.(6 Pet.) 515, 561 (1832). See U.S. Constitution, Art. I, § 8, cl. 3.It is 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[4] without the express authorization of Congress. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 170-171 (1973); *United States v. Burns*, 529 F.2d 114, 117 (9th Cir. 1976).

As was discussed in detail in the Memorandum, the only federal statute that grants the courts of the State of New York civil jurisdiction over claims involving Indians in Indian country is 25 U.S.C. § 233 ("Section 233"). As was also demonstrated in the Memorandum, Section 233 does not grant New York State courts jurisdiction over tribes or the internal disputes of tribes in

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need not be addressed here.

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

the State of New York. *Bowen v. Doyle,* 880 F. Supp. 99 (W.D.N.Y. 1995); *Bryan v. Itasca County*, 426 U.S. 373 (1976). Memorandum, pp. 13-16. Finally, the Memorandum, the Ayala Quorum demonstrated that Section 233 only applies to the Indian tribes of the State of New York. Memorandum, pp. 13-14.

The Lewis Faction's responses to these arguments border on the frivolous. First, the Lewis Faction asserts that the Indenture grants the Court jurisdiction, citing the *venue* provision of the Indenture (§ 13.1). "Thus, this Court not have [*sic*] jurisdiction over the Trustees action but – if the above quoted language has any meaning at all – this Court has been given jurisdiction over all related claims, including the Lewis Faction's cross claims." Opposition, p. 22. It is beyond dispute, however, that parties to litigation cannot confer jurisdiction, by a venue provision in a contract or otherwise, on a court that does not otherwise have jurisdiction. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *Brenner v. Great Cove Realty Co.* 6 N.Y.2d 435, 442 (1959); *Newham v. Chile Exploration Co.* 232 N.Y. 37, 42 (1921); *Dudley v. Mayhew* 3 N.Y. 9 (1849); *Morrison v. Budget Rent A Car Systems, Inc.* 230 A.D.2d 253, 260 (2nd Dept. 1997); *W.G. v. Senatore* 18 F.3d 60, 64 (2d Cir. 1994); *Cable Television Ass'n of New York, Inc. v. Finneran,* 954 F.2d 91, 94 (2d Cir. 1992); *U.S. v. Town of North Hempstead* 610 F.2d 1025, 1029 (2d Cir. 1979); See, *Veeder v. Omaha Tribe of Nebraska* 864 F.Supp. 889, 893 (N.D. Iowa 1994).

That the parties to the Indenture could not confer jurisdiction by agreement is also evident from the venue provision itself, which provides for alternative forums if the courts of New York do not have jurisdiction:

> in the event that the New York Federal Courts or the New York State Courts lack or decline jurisdiction, then the United States District Courts sitting in California and the courts of the State of California and any appellate court from which any

> appeals therefrom are available, or if none of the foregoing courts accepts jurisdiction over the action, then the tribal courts of the Tribe, . . .

Indenture, § 13.1(c).

The Lewis Faction argues that Section 233 grants the Court jurisdiction over their claims, because it would permit the Court to assert jurisdiction over "the interpretation of the Indenture." Opposition, p.23. As the foregoing discussion demonstrated, the Lewis Faction's claims do not seek an interpretation of the Indenture, but a determination of who constitutes the Tribe's government and officials. The Lewis Faction quotes language from Section 233 and *Seneca v. Seneca*, 293 A.D. 2d 56 (4th Dept. 2002), stating that the Courts of the State of New York "shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons." They ignore the fact that this language does not include civil actions involving Indian *tribes*, but only applies to *individual* Indians. The Lewis Faction also fails to address the thorough discussion of this issue in *Bowen v. Doyle*, 880 F. Supp. at 120, ("the express language of *§ 233* defeats any claim that it authorizes the State Court to exercise civil jurisdiction over internal tribal affairs."), and the analysis in *Bryan v. Itasca County,* 426 U.S. 373 (1976) of the same issue, as it relates to the grant of civil jurisdiction set forth in Public Law 280, 28 U.S.C. § 1360. *Bowen v. Doyle*, 880 F. Supp. at 119.

Finally, the Lewis Faction disputes that Section 233 only applies to Indian tribes located in the State of New York. Their only argument is that: "None of the cases cited by the Ayala Faction concern contractual consents to forum in New York and, therefore, such cases are inapposite." Opposition, p. 23. They do not address the language of Section 233 that restricts its application to the Indians and Indian reservations located in the State of New York. They also do not cite to a single case that supports their argument that Section 233 applies to Indian tribes

located outside of New York. Nor can they, since the courts of the State of New York would not base a decision on the same ignorance of black letter law that parties cannot, by agreement, grant subject matter jurisdiction to courts that would not otherwise have jurisdiction.

The Lewis Faction has presented no basis for concluding that Section 233 granted the courts of the State of New York jurisdiction over their claims.

C. The Court Has No Jurisdiction over Internal Tribal Leadership Disputes.

Even if the Courts of the State of New York had been granted jurisdiction over claims against Indian tribes, the Court would still not have jurisdiction over the Lewis Factions claims, because they seek a determination of an internal tribal leadership dispute.

There is no dispute that state and federal courts lack jurisdiction to resolve internal tribal leadership disputes. *United States v. Wheeler*, 435 U.S. 313, 323-36 (1978); *United States v. Kagama*, 118 U.S. 375, 381 (1886); *Runs After v. United States,* 766 F.2d 347, 352 (8th Cir. 1985); *Smith v. Babbitt*, 100 F.3d 556, 559 (8th Cir. 1996); *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983); *In re: Sac & Fox Tribe of the Mississippi in Iowa / Meskwaki Casino Litigation*, 340 F.3d 749, 763-764 (8th Cir. 2003); *Sac & Fox Tribe of the Mississippi in Iowa v. Bureau of Indian Affairs*, 439 F.3d 832, 835 (8th Cir. 2006). See, also, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.06[1][b][I]-[ii] (Nell Jessup Newton ed., 2012).

There cannot be a greater interference with the ability of a tribe to govern itself then to have a state court interpret tribal law and decide for the Tribe who are its elected tribal officials with the authority to operate the tribal government. Since the Tribe's first made contact with white society, they have fought to protect their right of self-determination and to govern themselves**.** The Supreme Court has ruled unequivocally that such an interference with tribal self-government is not permissible. *Williams v. Lee*, 358 U.S. 217, 223 (1959).

The Lewis Factions simultaneously admits that state and federal courts do not have jurisdiction over internal tribal disputes, then blithely dismisses all of the decisions cited to in the Memorandum as irrelevant, insisting that the only relevant decisions are *Davids v. Coyhis*, 857 F. Supp. 641 (E.D. Wis. 1994), and *People v. Anderson*, 137 A.D.2d 259 (4th Dept. 1988).

The Lewis Faction acknowledges that all of the cases cited in the Memorandum "stand for the uncontroversial proposition that state and federal courts do not have jurisdiction over the internal affairs of an Indian tribe." Opposition, p. 27. The Lewis Faction nevertheless states, "All of the cases cited by the Ayala Faction and the Trustee are inapposite. . . ." Opposition, p. 27. Why? "Critically, not a single one of these cases involves a disputed indenture that cannot be enforced without court intervention." Opposition, p. 27. Really?

On its face, this argument is nonsensical. First, the lack of state and federal court jurisdiction over internal tribal disputes is not dependent on whether the internal tribal dispute affects the enforcement of a contract. Second, neither *Davids* nor *Anderson* involved the interpretation or enforcement of an indenture. Thus, by their own criteria, *Davids* and *Anderson* are "inapposite."

A detailed examination of the *Davids* and *Anderson* cases, furthermore, reveals that those cases support the granting of the Motion. The Lewis Faction is correct in stating that the facts in the *Davids* case are quite similar to the facts in this case. The case involved a split in the Stockbridge-Munsee Community Band of Mohican Indians' seven member tribal council into two factions, one that could achieve a quorum of four and another that had only three. As a result, the quorum council was able, under tribal law, to take action on behalf of the Band without the support of the minority faction. As a result of the minority faction's frustration with its political impotence, the minority faction took a number of actions designed to take over the

tribe's government, including the occupation of the Band's tribal offices and its casino, the seizure of control of the Band's bank accounts and the holding of a "special election" among its supporters in which the members of the minority of the tribal council "elected' a new tribal council.

For the purposes of ruling on an application for a temporary restraining order sought by the quorum of the Band's tribal council, the district court ruled that it had jurisdiction over the case. The district court's decision was based on the conclusion that there was no real dispute as to who the legitimate tribal government was. The district court concluded, without detailed analysis, that the quorum council was the legitimate tribal government. "Neither the special election nor the new tribal council is recognized by the United States Department of the Interior's Bureau of Indian Affairs." *Davids*, 857 F. Supp at 643. Based on that conclusion, the district court found that it was appropriate to issue the temporary restraining order: "The dissident faction has allowed its frustrations (playing by the rules can sometimes be frustrating!) to create a situation of instability and chaos, both with respect to the government of the Tribe and the operation of the Casino. Money, lots of it, is being lost and the stability of the tribal government is being threatened. Also, violence is in the air and these lawsuits have been filed." *Id.*

The *Davids* decision is not relevant to the Motion, for a variety of reasons. First, the decision is in conflict with the case law cited above concerning federal court jurisdiction over internal tribal leadership disputes. Second, the *Davids* court's conclusion that it had jurisdiction was based on its conclusion that there was no real dispute as to who the legitimate tribal government was: "The action filed by the Community is not about an intratribal election dispute; it is about a group of dissidents taking over the Tribe's headquarters and its principal money-making enterprise and absconding with the proceeds of that enterprise." *Id.*, 857 F. Supp. at 645.

Later, the Court stated: "The Community's complaint does not present a purely intratribal political dispute; this dispute involves a Casino which is frequented by the general public, the alleged theft of that Casino's funds, and the attempts by the Tribe's governing body to reopen the Casino, ensure the safety of the patrons and continue the revenue stream from the Casino to the Tribe." *Id.*, 857 F. Supp. at 646. Here, even the Lewis Faction would be hard pressed to argue that there is no internal tribal leadership dispute. Third, to the extent that it addressed the issue of jurisdiction, the *Davids* decision addressed federal court, not state court, jurisdiction. Fourth, because *Davids* is a Wisconsin district court ruling on an application for a temporary restraining, not a final judgment, and it is in conflict with decisions of the Supreme Court and the Second Circuit, it has no precedential effect on this Court. The *Davids* case has never been cited by any court as authority for the proposition that a federal or state court may assert jurisdiction over a tribal leadership dispute.[5]

Ironically, if the Court were to apply the *Davids* analysis to this case, the Court would be compelled to recognize the Ayala Quorum Council. The Ayala Quorum Council, like the quorum of the tribal council recognized in *Davids*, is the only faction of the Tribe's Tribal Council that qualifies under tribal law to take action as the Tribe's governing body. Like the quorum of the tribal council in *Davids*, the Ayala Quorum can take action without the support of the minority faction. [citation to democracy can be cruel] The Lewis Faction, like the minority faction in *Davids*, became frustrated that it is powerless under the Tribe's constitution and has taken a variety of unauthorized actions in an effort to engineer a coup d'etat. It has attempted to

[5]In fact, the decision has only been cited once by any court, for the principle that th moving party seeking a preliminary injunction bears the burden of showing a likelihood of success on the merits. *Wis. Corr. Serv. v. City of Milwaukee*, 173 F. Supp. 2d 842, 863 (E.D. Wis 2001).

physically take over tribal government buildings and the casino. Unlike the minority faction in Davids, it was not successful. Like the minority of the Band's tribal council, the Lewis Faction has asserted that it had authority over the Tribe's bank accounts, and it has engaged in a variety of alleged votes and actions of the Tribe's members designed to make their actions legitimate under the Tribe's constitution. See Wynn Declaration, pp. 3-4, ¶¶ 13-14; Lewis Declaration, pp. 16-19, ¶¶ 65-71. At the same time, the Lewis Faction, like the minority faction in *Davids*, claims that the Ayala Quorum Council is engaging in all sorts of nefarious actions while they, the minority faction are acting in the best interests of the Tribe, hoping that the Court will intervene and confer legitimacy on their claim to authority. Under the *Davids* analysis, this Court would have jurisdiction to enjoin the Lewis Faction from taking any further actions to interfere with the Ayala Quorum Council carrying out its obligations as the Tribe's tribal government.

Under the *Davids* analysis, the Ayala Quorum Council has a stronger claim to recognition as the Tribe's legitimate government than the prevailing tribal council in *Davids*. Not only is the Ayala Quorum Council the majority of the Tribal Council's members who can establish a quorum, and thereby are the only group authorized to take action under the Tribe's constitution, the Ayala Quorum Council has retained control over the Tribe's facilities and its Casino. Thus, unlike the quorum faction in *Davids*, the Ayala Quorum Council is the de jure and de facto current tribal government. There is no question that the *Davids* court would have found the Lewis Faction to be an insurgent group.

Finally, in the Opposition, the Lewis Faction neglects to mention that, in a later decision in the *Davids* case, the court dismissed the claims of the minority faction of the tribal council based on tribal sovereign immunity and lack of jurisdiction. *Davids v. Coyhis*, 869 F. Supp. 1401 (E.D. Wis. 1994). This Court is compelled to do the same here.

Anderson also has no application to the present case. First, like *Davids*, it is simply inconsistent with the legal authority cited above prohibiting state and federal courts from asserting jurisdiction over intra-tribal disputes. Second, even if the *Anderson* court's reasoning is not rejected outright, it does not support the Lewis Faction's position. The *Anderson* decision was based on the court's conclusion that the dispute was not one that involved the Tribe as a sovereign entity. Rather, the court concluded that the dispute was between individual Indians. On that basis, the Court concluded that the court had jurisdiction pursuant to Section 233, "[A]t this stage, it appears that plaintiffs' action is a private civil claim by Indians against Indians. Such claim is within the contemplation of *25 USC § 233* and *Indian Law § 5*, . . . " *Id.*, 137 A.D.2d at 270. For the same reason, the court concluded that the Tribe's sovereign immunity did not apply.

> It is clear that the [trial] court understood the action to be a private civil dispute since nothing in its order circumscribes the tribe's sovereign functions. Indeed, the decision expressly states, "[The] issuance of an injunction in this case should not be construed to diminish or impair the rights of self-government of the Tuscarora tribe, nor * * * [to circumscribe] the conduct of Tuscarora government officials." Since the preliminary injunction issued to plaintiffs was not obtained against the sovereign . . . the relief is not barred by the doctrine of sovereign immunity.

Id., citing *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682 687 (1949).

The *Anderson* court's conclusion that sovereign immunity does not protect tribal officials acting beyond their official capacity or acting in something other than their representative capacity, cited by the Lewis Faction, Opposition, p. 21, has no bearing on the present case, as the *Anderson* court, in light of its conclusion that the dispute was between individuals, had not yet acknowledged that any of the parties was acting in an official capacity. *Anderson*, 137 A.D. 2d at 269.

Even if the *Anderson* case's reasoning is accepted, *Anderson* has no application to the current case, because there is no question that the current litigation involves the Tribe and its agencies. They are named parties to this action. Moreover, the Lewis Faction is explicitly seeking a determination of who CEDA and the Tribal Council are. The *Anderson* courts assertion of jurisdiction and conclusion that sovereign immunity did not bar the claims before was based on the conclusion that the tribe was not a party and the determination of who was authorized to act on behalf of the tribe was not before the court.

D. The Court is Compelled to Defer to the Tribe's Own Forums for Resolving a Leadership Dispute Based on Tribal Law.

Finally, even if the Lewis Faction was able to demonstrate that the Tribe had granted an effective waiver of its sovereign immunity with regard to their claims, that this Court has been granted jurisdiction over the Tribe, that this Court has jurisdiction over an internal tribal leadership dispute and that exercising that jurisdiction would not constitute an impermissible interference with tribal self-government, federal common law would compel the Court to defer to tribal courts in addressing such internal matters of tribal law and tribal leadership.

There is no debate that, with regard to matters of tribal law, tribal forums are the appropriate forums for the determination of those disputes. *Santa Clara Pueblo,* 436 U.S. at 55; *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. at 113. Even when a federal court has jurisdiction over a claim involving Indians, if the claim arises in Indian country, the court generally will be required to stay its hand until the plaintiff exhausts available tribal remedies. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 855-857 (1985); *Iowa Mutual Ins.*

Co. v. LaPlante, 480 U.S. 9, 16 (1987).

Here there are two tribal courts. Actions have been filed in each of those Courts seeking a determination of who constitutes the Tribe's legitimate government. While it is obvious that the Ayala Quorum Council and the Lewis Faction reject the legitimacy of the opponents' court, that is an issue that must be resolved by the Tribe, not by a state court.

E. This Court Has Not Asserted Jurisdiction over the Issue of Who Constitutes the Tribe's Government.

Finally, the Lewis Faction asserts that the Court has "already exercised subject matter jurisdiction as to the identity of CEDA." Opposition, p. 30. This is false. The Court has merely ensured that CEDA and the Tribe are able to meet their obligations under the Indenture. The Court granted to the current, on-site Casino General Manager (who was appointed before the filing of this lawsuit and was not appointed by the Court) access to the Casino's operating account so that he could pay the Casino's bills, which, in turn, permitted the Casino to continue to operate. The Court, furthermore, did not order the Casino to make the Excluded Assets payments. It did not prohibit those payments. Those payments are either required or authorized by the Indenture, and are necessary in order to ensure that the on-reservation CEDA, Tribal Gaming Commission and Tribal Council are able to carry out the Tribe's gaming regulatory and governmental obligations necessary to allow the Casino to continue to operate. Because the Ayala Quorum Council has maintained control of the Casino and the on-reservation tribal government, it is the only party able to carry out the Tribe's governmental agencies' regulatory obligations under federal law and the Indenture.

The Court has not chosen sides or issued any order that could be interpreted to be an order determining who constitutes the Board of CEDA or the Tribal Council despite the Lewis

Factions claims to the contrary.

CONCLUSION

The Ayala Quorum Council has demonstrated in great detail the many obstacles that the Lewis Faction would have to surmount in order for this Court to assert jurisdiction over the Lewis Faction's claims. The Lewis Faction has failed to demonstrate that it has overcome any one of those jurisdictional bars, let alone all of them.

The Ayala Quorum Council respectfully requests that this Court grant its motion to dismiss the Lewis Faction's claims.

Dated: November 4, 2013

Respectfully Submitted
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AFFIDAVIT OF SERVICE

Wells Fargo Bank, N.A., as Trustee v.
Chukchansi Economic Development Authority, et al.

STATE OF CALIFORNIA)
) ss:
COUNTY OF MENDOCINO)

Brissa De La Herran, being duly sworn, deposes and says:

I am not a party to this action, I am over eighteen (18) years of age and I reside in the State of California, County of Mendocino.

That on the 4th of November, 2013, I served a copy of the foregoing document(s) upon:

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by mailing same in a sealed envelope, with postage prepaid thereon via regular U.S. Mail within the State of California and **e-filing** via the Supreme Court website.

/s/Brissa De La Herran
Brissa De La Herran