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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS, a federally-recognized Indian tribe, and the **CHUKCHANSI ECONOMIC DEVELOPMENT AUTHORITY**, a wholly-owned Tribal enterprise,

Plaintiffs,

vs.

GIFFEN TAN, an individual; **JOYCE MARKLE**; an individual; **LARRY KING**, an individual; **TED ATKINS**, an individual; **JOHN AND JANE DOES 1-20; XYZ CORPORATIONS 1-20**,

Defendants.

Case No.:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' EX PARTE EMERGENCY APPLICATION AND MOTION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION

Date:
Time:
Dept:

I. Introduction

The Picayune Rancheria of the Chukchansi Indians, a federally recognized Indian tribe, (the "Tribe") and the Chukchansi Economic Development Authority ("CEDA" or "Authority"), a wholly owned unincorporated entity of the Tribe (the Tribe and CEDA are hereafter collectively referred to as the "Plaintiffs"), acting through and on the authority of the Tribal Council recognized by the United States on February 11, 2014[1], hereby submit this Memorandum of Points and Authorities in Support of their Ex Parte Application and Motion for Order to Show Cause and Temporary Restraining Order to enjoin Defendants and their agents, employees, and attorneys from making, directing, or authorizing, in any fashion, any and all Tribal governmental distributions of Casino revenue to any person or entity that is not recognized by the United States as the Tribe pending final resolution and identification of the properly authorized Tribal government. Defendants are aware that they have no legal authority to direct disbursements of Casino revenue to unauthorized individuals, including but not limited to disbursements in the form of "Excluded Assets." However, despite Plaintiffs' repeated requests, Defendants refuse to cease illegal disbursements of Casino revenue and instead have – ***as recently as February 13, 2014*** – likely made such illegal disbursements, all in violation of federal and Tribal law, causing certain and severe harm to Plaintiffs because assets of the Tribe once disbursed, cannot be recovered.

Plaintiffs respectfully request that this Order to Show Cause and Temporary Restraining Order be granted, pursuant to Federal Rule of Civil Procedure, Rule 65(b) and Local Rule 231, and a Hearing to Show Cause Regarding a Preliminary Injunction be set to avoid additional undue hardship to CEDA, the Tribe, and its membership. Failure to grant this emergency relief will result in great and irreparable injury to CEDA, the Tribe, and the Tribe's membership.

[1] As described below, on February 11, 2014, the United States Bureau of Indian Affairs ("BIA") recognized the following persons as comprising the official Tribal Council (*i.e.* the official governing body of the Tribe and members of the CEDA Board of Directors): Reggie Lewis, Morris Reid, Chance Alberta, Dora Jones, Nokomis Hernandez, Nancy Ayala, and Jennifer Stanley (The "United States-Recognized Tribal Council").

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II. STATEMENT OF FACTS

A detailed statement of facts is set forth in the accompanying Complaint and Affidavits of Chairman Reggie Lewis and Robert Rosette, all incorporated herein by reference.

Most significantly, the United States Bureau of Indian Affairs issued a decision on February 11, 2014, recognizing the following persons as members of the Tribal Council as of that time: Dora Jones, Chance Alberta, Jennifer Stanley, Nancy Ayala, Morris Reid, Reggie Lewis, and Nokomis Hernandez. *See* Affidavit of Robert Rosette Regarding Notice Of/Ex Parte Emergency Application and Motion for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction ("Rosette Aff."), ¶ 5 and Exhibit A attached thereto. The United States issued this decision, reasoning that

> the dispute over the Tribe's leadership has led to multiple financial hardships including reported defaults on loans connected with the Tribe's gaming facility. In addition, many Federal agencies have been unable to determine with whom to conduct business amidst the dispute, causing essential Tribal programs that are funded by the Federal government to cease operation . . . Due to these increasing issues, there appears to be several grounds for finding it would be in the public interest to put this decision into **immediate** effect.

See id. (emphasis added). This United States Decision is significant insofar as it is the ***only*** position that has been articulated by the United States regarding the Tribe's legitimate governing body at the current time. *See id.*

In keeping with the BIA's own sense of urgency, on February 19, 2014, the BIA filed its Request to Make February 11, 2014 Decision Effective Immediately with the United States Department of the Interior, Office of Hearings and Appeals, Interior Board of Indian Appeals ("United States Request"). *See* Rosette Aff., ¶ 6 and Exhibit B attached thereto. In filing the United States Request, the BIA cited the same exigent circumstances stated in the United States Decision as well as addition exigent circumstances including alleged concern that "immediately following the Regional Director's issuance of [the United States Decision], counsel for the Ayala Faction communicated his concern that any attempt by the Tribal Council recognized in the

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[United States Decision] to resume control of the Tribal Offices and/or Casino could possibly ***result in murder***." *See id.* (emphasis added).

In addition, there are several procedural facts that this Court should be aware of regarding a related matter, *Wells Fargo Bank, N.A., as Trustee v. Chukchansi Development Authority, et al.* (Index No. 652140/13) ("Wells Fargo Action"), now pending in the Supreme Court of the State of New York ("NY Supreme Court"). In the Wells Fargo Action, Wells Fargo Bank, N.A., acting in its capacity as the trustee for the bondholders that made possible a 2012 refinancing of the Tribe's Casino, initiated suit against the Tribe and various Tribal entities for default of the Indenture, the contractual document which governs that 2012 Tribal Casino refinancing. *See* Rosette Aff. ¶¶ 4 and 14, and Exhibit C attached thereto. In summary, the Indenture requires that the Tribe make periodic interest and other payments to the bondholders. *See id*. At the time of initiation of the Wells Fargo Action on June 18, 2013, the Tribe had, due to circumstances surrounding a February 2013 attempted coup by Tribal member Nancy Ayala and her supporters and the resulting disruption in Tribal governance, allegedly failed to make payments required by the Indenture. *See id*. Thus, the Wells Fargo Action, as initiated on behalf of the bondholders, has focused on correcting the alleged default under the Indenture and providing the bondholders with other protective measures to prevent any further default under the Indenture. *See id*.

III. ARGUMENT

A. The Standard for Issuance of a Temporary Restraining Order and Preliminary Injunction

The purpose of temporary restraining orders and preliminary injunctions is to preserve the status quo and prevent irreparable harm until a hearing on the merits of the underlying action can be held. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers,* 415 U.S. 423, 439 (1974). For a preliminary injunction or temporary restraining order to issue, the moving party must demonstrate the following factors: (1) a likelihood of success on the merits, (2) the likelihood of suffering irreparable injury in the absence of preliminary relief, (3) the balance of equities tips in the moving party's favor, and (4) that an injunction is in the public interest.

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Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 20 (2008). The Court can evaluate these factors on a "sliding scale," meaning that "a stronger showing of one element may offset a weaker showing of another. For example, a stronger showing of irreparable harm might offset a lesser showing of likelihood of success on the merits." *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011). Plaintiffs can demonstrate their need for a preliminary injunction under the *Winter* test as well as the sliding scale analysis of *Alliance for Wild Rockies* therefore entitling them to a temporary restraining order and order to show cause regarding a preliminary injunction.

B. Plaintiffs Are Likely to Prevail on the Merits of Their Complaint

Plaintiffs are likely to prevail on the merits of their claims because should Defendants' continue to make unlawful distribution of Casino assets to persons or entities that are not recognized by the United States government as the Tribe, this will result in violations of federal law, the Tribal-State Compact, and Tribal law.

1. Defendants Will Violate IGRA by Misappropriating Casino Revenues

IGRA establishes that Class III gaming facilities, such as the Tribe's Casino, are legally authorized only when conducted by a recognized Indian tribe on Indian lands. *See generally*, 25 U.S.C. §2710. An Indian tribe is defined as a band, nation, or other organized group or community of Indians *which is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians* because of their status as Indians and such group is recognized as possessing powers of self-government. 25 U.S.C. 2703(5) (emphasis added).[2] Despite this most basic of requirements, Defendants continue to manage and operate the Casino at the direction of persons and entities who have not been recognized by the United States as the Tribe and are therefore not an Indian Tribe as defined under IGRA.

Moreover, IGRA is explicit in its requirement that net revenues from tribal gaming cannot be used for purposes other than: (1) to fund tribal government operations or programs; (2) to provide for the general welfare of the Indian Tribe and its members; or (3) to promote tribal

[2] Many tribes, including this Tribe, operate pursuant to a constitution that delegates authority to a tribal counsel and permits that tribal council to take action on behalf of the tribe.

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economic development.[3] 25 U.S.C. § 2710(d). Plaintiffs' disbursement of such net Casino revenues to persons and entities which the United States has not recognized as the Tribe directly violates IGRA. *See In re Sac & Fox Tribe of Miss. in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749 (8th Cir. 2003).

For example, the Tribe recently learned that Defendants facilitated the removal of over $315,000 in cash from the Casino, which was intended for individuals not recognized by the United States Government as the Tribe (Rosette Aff., ¶¶ 8 and 9). Specifically, on February 18, 2014, legal counsel for the United States-Recognized Tribal Council received a letter from Mr. Colin West of Bingham McCutchen, LLP, outside legal counsel to Rabobank, the bank that holds several Tribal Casino accounts for the deposit of Casino revenues pursuant to the Indenture described (Rosette Aff., ¶ 8, Ex. D attached thereto). This letter states in relevant part:

> Also, we want to inform you of something that occurred ***on Thursday, February 13***. As you may know, Rabobank receives deposits through Garda for CEDA and others. Yesterday, Loomis delivered to Garda ***two bags of cash, totaling $316,017***, for CEDA. There was no identification written on the bag, but a document inside it was labeled "***PRCI Tribal Gaming Commission 46575 Rd. #417 Coarsegold, CA***." The branch manager of the Fresno Branch, Mr. Darrell Hyatt, contacted ***Joyce Markle*** to inquire about this deposit. ***She*** said the money belonged to the Chukchansi Rancheria, and that the money was mistakenly delivered to Garda. ***She*** directed Loomis to retrieve the money, and Loomis did."

(Emphasis added). In other words, it appears that Defendant Markle intended to make, and likely ultimately made, a $316,017.00 cash payment to the "PRCI Tribal Gaming Commission" located at 46575 Rd. #417 in Coarsegold, California after issuance of the February 11, 2014 United States Decision. *See id*.

Similarly, on February 14 and 17, 2014, Defendants' legal counsel represented to Plaintiffs' counsel that Defendants did not, at this time, intend to comply with any requests made of Defendants by the Tribal Council recognized by the United States on February 11, 2014. See Rosette Aff., ¶ 10.

[3] Other permissible purposes pursuant to IGRA include donation to charitable organizations or; helping fund operations of local government agencies. 25 U.S.C. § 2710(d).

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Significantly, the "PRCI Tribal Gaming Commission" located at "46575 Rd. #417" in Coarsegold, California is ***not*** acting under the authority or direction of the Tribal Council recognized most recently by the United States via the February 11, 2014 United States Decision. *See* Rosette Aff., ¶ 8. It is instead believed to be operating under the direction of a rogue faction that has never been recognized by the United States. *See id.* Thus, payment of more than $316,000 to this entity is, in effect, a payments a person and/or entity that is not recognized by the United States government as the Tribe. Accordingly, such payment violates the Gaming Ordinance, as it fails to fall into any of the approved purposes as referenced under the Ordinance Sections 1.3.1 and 1.3.2. Furthermore, such disbursements violate the provision in the Gaming Ordinance that requires Casino management to respond to orders issued by the Tribal Council, including orders to not make distributions of gaming revenues to unrecognized persons or entities. Therefore, Defendants' violations of the Gaming Ordinance result in violations of the Compact and IGRA which require that all gaming be conducted in accordance therewith. *See* 25 U.S.C. § 2710(d)(1).

Therefore, injunctive relief is both necessary and appropriate in this instance in order to preserve the status quo and prevent further violations of federal law.

2. Defendants Already Have and Will Continue To Violate IGRA as Interpreted Through the Tribal-State Compact and the Tribal Gaming Ordinance by Misappropriating Casino Revenues in Contravention of those Binding Requirements.

For a tribe to conduct Class III gaming[4] under IGRA, it must enter into a Tribal-State Compact ("Compact") with the State in which it resides. 25 U.S.C. § 2710(d)(1). IGRA requires that all gaming and activities relating thereto must be conducted in conformance with that Compact. *Id.* § 2710(d)(1). The Compact between the Tribe and the State of California requires compliance with various sources of Tribal law. Specifically, it provides: "All Gaming Activities conducted under this Gaming Compact shall, at a minimum, comply with ***a Gaming Ordinance***

[4] Class III gaming is "casino-style" gaming, including banking card games such as blackjack, as well as slot machines. *See* 25 U.S.C. § 2703(7), (8).

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duly adopted by the Tribe and approved in accordance with IGRA, and with all rules, regulations, procedures, specifications, and standards duly adopted by the Tribal Gaming Agency." Tribal-State Compact, § 6.1 (emphasis added).

Absent injunctive relief from this Court, Defendants will continue to make unlawful distributions of Casino revenues to persons and entities that are not recognized by the United States government as the Tribe, in derogation of the Tribe's Gaming Ordinance. This constitutes a violation of the Compact and, in turn, IGRA. In other words, violations of the Tribal Gaming Ordinance constitute additional violations of federal law.

i. Defendants' Actions Violate the Gaming Ordinance.

The Defendants' illegal distributions of gaming revenues as described above violate various provisions of the Gaming Ordinance. The Tribe's Gaming Ordinance specifically provides that "Net Revenues received by the Tribe ***shall*** be utilized and expended ***by the Tribal Council*** by resolution and for only the following purposes:

(1) To fund Tribal government operations or programs.
(2) To provide for the general welfare of the Tribe and its members.
(3) To promote Tribal economic development.
(4) To donate to charitable organizations.
(5) To help fund operations of local government agencies, general governmental services, the maintenance of peace and good order, the establishment of educational systems and programs, and the promotion and regulation of economic activities within the sovereign jurisdiction of the Tribe.

Tribal Gaming Ordinance of the Picayune Rancheria of the Chukchansi Indians ("Gaming Ordinance"), § 1.3.1 (emphasis added); *see also* 25 U.S.C. § 2710(b)(2)(B) (requiring that tribal gaming ordinances restrict the use of Casino revenues to these purposes). Moreover, the Gaming Ordinance mandates that "Gaming is regulated and controlled by the Tribe pursuant to the Compact, authorized by the IGRA, and the Net Revenues received by the Tribe from Gaming are used ***exclusively*** for the benefit of the Tribe." Tribal Gaming Ordinance at §1.3.2 (emphasis added). To accomplish this, the Ordinance requires that the Casino's management team respond to all inquiries, subpoenas and orders of the Tribal Council. *Id.* § 7.6.3.

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As discussed in detail in the Complaint and above, Defendants have already made what appears to be at least one illegal disbursement of Casino revenues to persons and entities that are not recognized by the United States government as the Tribe, and Plaintiffs have reason to believe that Defendants will make additional payments in the same manner—payments which will irreparably harm the Tribe.

For these reasons, Plaintiffs have demonstrated a strong likelihood of success on the merits of their Complaint.

C. Immediate and Irreparable Damage Will Result in the Absence of a Temporary Restraining Order and Preliminary Injunction Because Defendants Will Continue to Disburse Casino Revenue in Violation of Federal and Tribal Law.

To obtain a preliminary injunction, the proponent must show that irreparable injury is likely, not merely possible, in the absence of an injunction. *Winter*, 555 U.S. at 22. The threat of irreparable harm must be immediate. *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). Harm is irreparable when the harm cannot be undone by an award of compensatory damages. *Id.*

Plaintiffs' requested injunction is necessary to prevent Defendants from continuing to commit illegal acts that will irreparably harm CEDA, the Tribe, and the Tribe's membership. Once distributions are made to any person or entity that is not recognized by the United States government as the Tribe's Tribal Council, Plaintiffs are left without meaningful recourse because such unauthorized persons and entities can and likely will quickly disburse those funds upon receipt. Indeed, unauthorized persons and entities have already been the unlawful beneficiaries of hundreds of thousands of dollars, as evidenced by the Rabobank Letter, despite the fact that Defendants have a fiduciary responsibility to properly manage and oversee the Casino's resources. This already completed and continually impending and recurring theft of tribal assets will "significantly interefere[] with the Tribe's self-government," and is thus sufficient to establish that absent injunctive relief, the Tribe will suffer irreparable harm. *See Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163, 1171–72 (10th Cir. 1998).

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Plaintiffs anticipate that Defendants will argue against restraint of their unauthorized and illegal disbursement of millions of dollars of Casino revenue based on the fact that the United States Decision could be subject to further administrative recourse. The United States has acted expeditiously and has already taken formal action to make its decision final and effective immediately, including concerns of murder. *See* Rosette Aff., ¶ 6 and Exhibit B attached thereto. Moreover, such arguments by Defendants are unpersuasive in that they demonstrate precisely the need for the relief requested from this Court. Assuming, *arguendo*, that the United States Decision is not given immediate effect, Casino management must still comply with federal and Tribal laws prohibiting the distribution of gaming revenues to persons or entities not recognized by the United States government. The Ninth Circuit has held that an exhaustion requirement set forth under a federal statute is not a bar to a district court's jurisdiction if exhaustion would offer inadequate relief in light of the irreparable harm likely to occur if injunctive relief is not provided. *See N.D. Ex Rel. Parents Acting As Guardians Ad Litem v. Hawaii Department of Education*, 600 F.3d 1104, 1110 (9th Cir. 2010) (holding that exhaustion requirements do not bar the filing for injunctive relief in federal court when exhaustion would offer inadequate relief). Despite the clear direction that Defendants have received from the United States, Defendants disbursed and continue to threaten further disbursements of Casino revenue to persons and entities that are not recognized by the United States government as the Tribe. Defendants' actions in this regard will continue until this Court issues the temporary relief now requested by Plaintiffs.

Moreover, Defendants' goal as Casino management and fiduciaries of Casino assets should be consistent with Plaintiffs' goal in seeking the instant relief, *i.e.*, to ensure that Casino revenue is properly disbursed and accounted for—to the very penny—*especially* during a period when there is any doubt as to the identify of persons and entities entitled to such revenue. Plaintiffs submit that the only reasonable response that Defendants could make is to readily submit to this Court's jurisdiction, place the funds in question into a proper escrow account or a secure interest bearing bank account, and make any disbursement therefrom only as lawful and appropriate. Instead, through their actions, Defendants have shown that they are not choosing to

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protect Casino revenue and therefore refusing to protect the Tribe's assets——leaving emergency restraint and injunctive relief as the only relief available for protection thereof.

D. The Balance of Equities Tips in Plaintiffs' Favor Because Disbursement to Any Unauthorized Person or Entity That is Not Recognized by the United States Government Allows Such Revenue to Be Forever Lost, and Will Thus Permanently Harm the Tribal Membership.

The balancing aspect of the temporary restraining order analysis requires courts to weigh "the competing claims of injury and [ ] consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S. 531, 542 (1987).

As discussed above, the threat of great and irreparable harm is imminent, and has an immediate, permanent effect on Plaintiffs and the Tribe's membership. Defendants' recent and continued disbursement of Casino revenue in derogation of federal and Tribal law forces Plaintiffs to seek temporary injunctive relief in this forum to protect significant CEDA assets from being forever lost to persons and entities that are not recognized by the United States government as the Tribe's Tribal Council.

Persons and entities recognized by the United States as the Tribe have the power to act in the tribal membership's best interests. If Defendants are not prohibited from making disbursements of Casino revenue to any person or group of persons other than the persons and entities recognized by the United States government as the Tribe, Plaintiffs will effectively lose their assets without chance for their recovery. The balance of equities clearly tips in favor of the Plaintiffs, compelling this Court to enjoin the Defendants from making Tribal governmental distributions of Casino revenues to any entity other than that recognized by the United States as the Tribe.

E. A Temporary Restraining Order is in the Public Interest.

Granting a temporary restraining order is in the public interest. "The public interest analysis for the issuance of [injunctive relief] requires [district courts] to consider whether there

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exists some critical public interest that would be injured by the grant of preliminary relief." *Alliance for Wild Rockies*, 632 F.3d at 1138 (citation omitted).

In this case, the Court should find no such public interest that would be injured by the issuance of such injunctive relief and, in fact, the public interest will be advanced by providing injunctive relief. The Court has an interest in preventing the unlawful distribution of large sums of money as well as ensuring that Plaintiffs have the power to exercise sovereignty and self-determination in providing for its membership those essential government services funded by Casino revenues rightfully belonging to Plaintiffs.

Additionally, and perhaps most importantly, the public interest of the approximately 900 Tribal members, many of whom are citizens of Madera County and most of whom are citizens of this State, demonstrates that this Court should grant temporary injunctive relief. By issuing injunctive relief, the Court would be preventing irreparable harm to the Tribe's membership and preserving the crucial assistance those members receive from the Plaintiffs through Casino revenues.

Maintaining the status quo in this instance harms no party, protects the Tribal membership and prevents unlawful activity from occurring. Because the public interest favors granting Plaintiffs a temporary restraining order to prevent them from losing Casino revenue and CEDA assets forever, the Court should grant Plaintiffs' request for a temporary restraining order.

F. Issues Regarding Casino Management's Handling of "Excluded Asset" and Other Payments Now At Issue Are Within This Court's Jurisdiction For The Purposes of Temporary Emergency Injunctive Relief.

As elaborated in the Complaint, this Court has jurisdiction to preside over the instant action based on the violations of IGRA. *See In re Sac & Fox Tribe of Miss. in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749 (8th Cir. 2003). Defendants will not likely challenge such jurisdiction. However, Plaintiffs anticipate that Defendants will raise two claims in response to the instant motion for temporary emergency relief, both related to litigation pending in the NY Supreme Court. First, Defendants will likely argue that any issues related to "Excluded Assets"[5]

[5] Pursuant to the Indenture, Excluded Assets are Casino-derived revenues that may be segregated and

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or other payments by Casino management fall under the exclusive jurisdiction of the NY Supreme Court. Second, Defendants will likely argue that the NY Supreme Court has already resolved the core issue of to whom the Casino should issue "Excluded Assets" and other payments. Both arguments are without merit and ignore the NY Supreme Court's actual statements on this very issue.

As a threshold matter, the NY Supreme Court's focus has always been on protecting the bondholders and getting payment to them as required by the Indenture. The NY Supreme Court could not have been any more clear in this regard, stating "So long as the bondholders are being paid – which is what I'm supposed to insure [sic] – what difference does it make what else is going on?" Transcript of September 11, 2013 Hearing, Index No. 652140/13 at page 61:9-12, a true and correct copy of which is attached as Exhibit C to the Rosette Aff.

The NY Supreme Court maintained this position and focus on protecting the bondholders when confronted with the issue of who, from the Tribe, is entitled to receive "Excluded Assets" payments from the Casino. It expressly refused to exercise jurisdiction over, let alone finally resolve, the matter of to whom the Casino should issue "excluded assets" payments, and has instead directed the parties to "California Courts."[6] The Court's statements on this specific issue, as made during a September 11, 2013 hearing, affirm the same.[7]

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withheld from payments to the bondholders, and are instead to be deposited by the Casino into Tribal Accounts for use by the legitimate Tribal government in funding and administering various Tribal programs, including social welfare programs. By definition set forth in the Indenture, they cannot be "Excluded Assets" unless such funds are issued by the Casino to the recognized Tribal government.

[6] Though it is appealable, the United States Decision provides clear guidance as to who the United States Government recognizes and thus, there is a sound basis to issue the relief now sought, *i.e.*, an order prohibiting Casino Management from issuing any Tribal governmental payments pending resolution of any open questions regarding the finality of the United States Decision. The fact that the BIA has, as of February 19, 2014, filed its United States Request seeking immediate effectiveness of the United States Decision in light of exigent circumstances, including murder, only further illustrates the need for immediate relief. *See* Rosette Aff., ¶ 6 and Exhibit B attached thereto.

[7] While an earlier order issued by the NY Supreme Court on July 2, 2013 did generally address excluded assets and affirmed that the same could be withheld by Casino Management from payment to the Trustee in connection with the Indenture, that order did not address the issue of who, from the Tribe, had legitimate claim to receipt of payment of those "excluded assets" funds. This later issue was presented to the NY Supreme Court after issuance of the July 2 Order because Casino Management, and specifically Defendant Tan, approved payment of Excluded Asset funds ***in the millions of dollars*** to persons ***never***

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For example, in responding to arguments about which of the rival factions was entitled to "Excluded Assets" payment, the Court explained:

> See, but what you're doing, you're trying to rope me into a position where I'm going to be running [the] tribe and I don't want to do that . . . I've read the indenture now very carefully and ***exclude assets is a different category . . . And once you're talking about the excluded assets, you're talking about running the tribe.*** Right now, the way this Court has tried to approach it is with respect to operation of the casino, that was one thing because it had to do with making sure that interest payments get paid. The casino isn't operating properly if the [Gaming] Commission isn't being paid, things could come to a halt. ***But once you get into the issue of excluded assets, and we're talking about discriminatory payments and what's discriminatory and what's not and things like that, I'm running the show and I don't want to run the show***.

See Transcript of September 11, 2013 Hearing, Index No. 652140/13 ("Hearing Transcript") at pages 20:22 through 21:16, a true and correct copy of which is attached as Exhibit C to the Rosette Aff. (emphasis added).

The NY Supreme Court again reiterated its refusal to exercise jurisdiction over this issue in the same context, just minutes later, and directed the parties to "California courts" specifically for resolution of this issue, stating:

> See, I'm just dealing with what I found, and ***I don't think that I have the authority***. I mean, obviously, I'm going to read these briefs very carefully and the law to see what it is. ***I don't think I have the authority to make that decision, the ultimate decision of which faction is the right faction***. And the way I read the indenture, if I say that, ***you either have to go to California courts, because I don't have the jurisdiction***; where are your remedies? ***You can go to California courts or you can go to arbitration***.

Id. at page 28:4-13 (emphasis added).

Thus, the NY Supreme Court made clear that its jurisdiction rested on the Indenture alone, with primary focus on the bondholders getting paid pursuant to the Indenture. That court has repeatedly refused to take jurisdiction of the "Excluded Assets" issue, instead directing the parties

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recognized by any United States Government Agency. However, the NY Supreme Court, as demonstrated in the transcript excerpts cited herein, refused to exercise jurisdiction over that issue.

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to bring a separate action in California. Therefore, and given the absence of Unites States recognition up to February 11, 2014, no court has ever examined this issue – *i.e.*, the prohibition of cash being funneled out of the Casino under the guise of "Excluded Assets," or the related issue of who is legitimately entitled to receive Excluded Asset payments from the Casino. While Casino management may be bound by orders issued by the NY Supreme Court, no such orders address this issue, and that Court has refused to issue the same for fear of exercising jurisdiction it does not have.

IV. CONCLUSION

For the reasons set forth above, the Court should grant Plaintiffs' request for injunctive relief preventing Defendants from disbursing Casino revenues to persons and entities that are not recognized by the United States government as the Tribe. Such disbursements are in violation of federal and Tribal law.

Plaintiffs have demonstrated a strong likelihood of success on the merits and a strong likelihood that they will suffer irreparable injury in the absence of injunctive relief. Moreover, the equities tip in Plaintiffs' favor. Furthermore, Defendants are not harmed if they are prohibited from making illegal distributions to persons or entities that are not recognized by the United States government as the Tribe.

Additionally, given this Court's option to use a sliding scale analysis under *Alliance for Wild Rockies*, to the extent this Court finds any one of these factors to be weak, it should still grant the requested relief, because the remaining factors should more than make up for it. *See Alliance for Wild Rockies*, 632 F.3d 1127, 1131-32.

PRAYER FOR RELIEF

For the foregoing reasons, Plaintiffs respectfully request that this Court issue a Temporary Restraining Order and set an Order to Show Cause hearing regarding a preliminary injunction to enjoin Defendants Giffen Tan, Joyce Markel, Larry King, Ted Atkins and their officers, agents, servants, employees, and attorneys, and all persons acting by, through, under, or in concert with Defendants from disbursing or taking any action whatsoever – direct or indirect – to facilitate

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disbursement of Tribal governmental Casino revenues in violation of federal and Tribal law to any person or entity that is not recognized by the United States as the Tribe.

Respectfully submitted,
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Dated: February 19, 2014.

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