12777

To Be Argued By:
Lester J. Marston
(admission pro hac vice pending)

New York County Clerk's Index No. 653140/13

MICRO-FICHE

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

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

(Additional Caption on the Reverse)

BRIEF FOR DEFENDANTS-RESPONDENTS 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, NANCY AYALA, TRACEY BRECHBUEHL, KAREN WYNN AND CHARLES SARGOSA

Lester J. Marston
(admission pro hac vice pending)
RAPPORT AND MARSTON
405 West Perkins Street
Ukiah, California 95482
707-462-6846
marston1@pacbell.net

Peter T. Shapiro
LEWIS BRISBOIS BISGAARD & SMITH LLP
77 Water Street, 21st Floor
New York, New York 10005
212-232-1300
peter.shapiro@lewisbrisbois.com

Attorneys for Defendants-Respondents 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, Nancy Ayala, Tracey BrechBuehl, Karen Wynn and Charles Sargosa

Printed on Recycled Paper

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.

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

Plaintiff-Respondent,

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, REGGIE LEWIS, CHANCE ALBERTA, and CARL BUSHMAN,

Defendants-Cross- and Counter-Claim Plaintiffs-Appellants,

and

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, RABOBANK, N.A., GLOBAL CASH ACCESS, INC., NANCY AYALA, TRACEY BRECHBUEHL, KAREN WYNN, CHARLES SARGOSA, and BANK OF AMERICA, N.A.,

Defendants-Respondents.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL LAW

STATE LAW

TRIBAL LAW

PRELIMINARY STATEMENT

This appeal concerns a messy, internal, tribal governmental dispute in which two factions of the Tribal Council ("Tribal Council") of the Picayune Rancheria of Chukchansi Indians ("Tribe"), elected in December 2012, both claim to be the lawful governing body of the Tribe with the authority to operate and regulate the Tribe's Chukchansi Gold Resort and Casino ("Casino") located on the Picayune Rancheria, which is the Tribe's Reservation ("Reservation").

The two factions consist of the Ayala Quorum Tribal Council and the Lewis Faction. The Ayala Quorum Council consists of four members of the Tribal Council elected prior to the dispute arising and their subsequently elected replacements, and the Lewis Faction consists of a minority of the members of the Council at the time the dispute arose, and their successors.

When the dispute arose, all of the members of the Tribal Council were signatories on the Tribe's bank accounts ("Accounts"), including the bank accounts that the Casino and the Tribe's Chukchansi Economic Development Authority ("CEDA") maintained at Rabobank.

Immediately after the dispute arose, the Lewis Faction advised Rabobank that they were the Tribe's lawful governing body with the exclusive authority to designate check signers on the accounts and withdraw funds from the accounts. In

response, Rabobank initially turned control of the Casino's operating accounts over to the Lewis Faction. However, as a result of litigation, Rabobank ultimately froze all of the Casino and CEDA accounts it maintained.

Immediately after the dispute arose, the Lewis Faction also rented offices off the Reservation and attempted to set up a shadow government.

By contrast, the Ayala Quorum Council remained on the Reservation and continued to operate the Tribal government and the Casino, also located on the Reservation. This included not only providing essential governmental services that the Casino needs to operate, such as an independent Gaming Commission with the authority to regulate the Casino, but also the Casino oversight necessary for the Tribe, as an entity, to maintain its sole proprietary ownership in the Casino. When the CEDA did not make its loan payment to the bondholders who made the loan to the Tribe to construct the Casino, which happened because the Casino had no access to any bank accounts, the bondholders, through their trustee, Wells Fargo Bank, initiated this action seeking access for the Casino to the Rabobank operating account and requiring the Casino to deposit all of the revenue generated from the operation of the Casino, except the monthly Excluded Asset Payments which were, under the Indenture Agreement, required to be paid to the Tribe, CEDA, and Tribal Gaming Commission, into Rabobank's operating account.

On July 2, 2013, the Trial Court entered an order granting Wells Fargo's motion for a preliminary injunction.

After the preliminary injunction was issued, the Casino made the Excluded Asset Payment to the on-Reservation Tribal Gaming Commission, CEDA Board, and Tribal Government controlled by the Ayala Quorum Council. The Casino made the Excluded Asset Payment to these entities, as opposed to the off-Reservation Lewis Faction, because those on-Reservation entities were the ones providing the services to the Casino that it needed in order to continue to operate in accordance with applicable law.

In response, the Lewis Faction filed their Cross-Complaint and Counter-Claims and, subsequently, motions to modify the July 2, 2013, Order.

In addition, the Ayala Quorum Council moved to dismiss the Lewis Faction's Cross-Complaint ("Claims").

The Trial Court subsequently denied the Lewis Faction's request to modify the July 2, 2013, preliminary injunction and granted the Ayala Quorum Council's motion to dismiss, resulting in this appeal being filed.

A review of the Claims and the motions reveals that the Lewis Faction was asking the Trial Court to turn over control of the Casino's revenue to the Lewis Faction, requiring the Casino to make the Excluded Asset Payments to them. In

order to grant this relief requested by the Lewis Faction, the Trial Court would have had to determine that the Lewis Faction was the lawful governing body of the Tribe, entitled to appoint the CEDA Board.

In its opening brief, the Lewis Faction makes many wild, bold-faced, accusations that the Ayala Quorum Council is stealing the Tribe's money, illegally denying services and engaging in acts of threats and violence. None of this is true or relevant for purposes of this appeal.

The only relevant issue for purposes of this appeal is the relief requested by the Lewis Faction in its Claims and motions. Clearly, the Trial Court could not grant the relief requested by the Lewis Faction without first determining whether it had the jurisdiction necessary to do so. Because the relief requested by the Lewis Faction could only be granted if the Trial Court determined first who was the lawful governing body of the Tribe, with the authorization to control the Casino's revenue and receive the Excluded Asset Payments, the Trial Court properly dismissed the Claims and denied the motions because it did not have jurisdiction to make that determination.

The Ayala Quorum Council shows below, in accordance with overwhelming case law in support of its position, that the Trial Court lacked jurisdiction over the Claims and motions because of the Tribe's sovereign immunity from suit and

because the Trial Court had no authority to decide who is the lawful governing body of the Tribe.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Did the Trial Court actually alter the *status quo ante* in issuing and subsequently denying the Lewis Faction's motions to modify the July 2, 2013 Decision and Order ("Motions")?[1]

2. Did the Trial Court abuse its discretion in denying the Lewis Faction's Motions because changed circumstances rendered continuation of the injunction on its original terms inequitable?

3. Did the Trial Court properly determine that it lacked subject matter jurisdiction over the Lewis Faction's Claims and Counterclaims ("Claims") regarding the July 2, 2013, Decision and Order and personal jurisdiction over the

---

[1]The Lewis Faction improperly frames the legal issues currently before this Court. As discussed in Section II below, the Lewis Faction's notice of appeal does not request review of the July 2, 2013, Decision and Order, but only its denial of the Lewis Faction's motions to modify said preliminary injunction. The Ayala Quorum Council, therefore, will not address the standards for issuance of a preliminary injunction, including the balance of equities, in this brief.

In addition, Question 3 of the Lewis Faction's Questions Presented is irrelevant because it is clearly established that the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. ("IGRA") does not provide a private right of action as asserted by the Lewis Faction. *Hein v. Capitan Grande Band of Diegueno Mission Indians*, 201 F.3d 1256 (9th Cir. 1999); *Tamiami Partners v. Miccosukee Tribe*, 63 F.3d 1030, 1049 (11th Cir. 1995); *Davids v. Coyhis*, 869 F. Supp. 1401 (E.D. Wis. 1994).

members of the Ayala Quorum Council?

a.) Were the Claims and Motions barred by the Tribe's sovereign immunity from suit?

b.) Were the Claims and Motions barred because, in order to grant the relief requested in the Claims and Motions, the Trial Court would have had to decide who was the lawful governing body of the Tribe?

4. Did the Trial Court properly deny the Lewis Faction's Motions after finding that the requested modifications to the order would violate the Indenture and Depository Account Control Agreement and that the Trial Court did not have jurisdiction over the Lewis Faction's Claims?

SCOPE OF REVIEW

"A motion to vacate or modify a preliminary injunction is addressed to the sound discretion of the court and may be granted upon 'compelling or changed circumstances that render continuation of the injunction inequitable.'" *Thompson v. 76 Corp.*, 37 A.D.3d 450, 452-453 (2d Dep't 2007), citing *Wellbilt Equip. Corp. v. Red Eye Grill, L.P.*, 308 A.D.2d 411, 411 (1st Dep't 2003); *See also Dictograph Products, Inc. v. Empire State Hearing Aid Bureau, Inc.*, 4 A.D.2d 508, 510 (1st Dep't 1957). In this respect, a court does have the "inherent power to modify its equitable directives." *Wellbilt Equip. Corp.*, 308 A.D.2d at 411. However, one

claiming error in its exercise must show an abuse of such discretionary power. *Rosemont Enterprises, Inc. v. Irving*, 49 A.D.2d 445, 448 (1st Dep't 1975).

STATEMENT OF RELEVANT FACTS

The Appellants' Appendix contains numerous documents setting forth facts that are irrelevant to the legal issues pending before this Court. For this reason, Respondents will set forth the only facts that are relevant and that this Court needs to consider in order to resolve this appeal.

The Picayune Rancheria of Chukchansi Indians is a federally recognized Indian tribe, organized under a written constitution ("Constitution"), which designates the Tribal Council as the governing body of the Tribe. (A. 98.) Under Article IV, Section 2 of the Constitution, the Tribal Council is composed of seven persons who are elected by the eligible voting members of the Tribe, a quorum of the Tribal Council consists of four members, and no business of the Tribal Council shall be transacted unless a quorum is present. The Tribal Council can only transact business at a regular or special meeting of the Tribal Council. (A. 105.) The members of the Tribal Council prior to May 23, 2013, were Nancy Ayala, Chair; Reggie Lewis, Vice Chair; Tracey Brechbuehl, Secretary; Karen Wynn, Treasurer; and three Council Members at Large, Charles Sargosa, Chance Alberta, and Carl Bushman. (A. 54.)

The Tribe owns and operates the Chukchansi Gold Resort and Casino, a destination resort and casino ("Casino"), consisting of, among other things, a 400 room hotel, a gaming facility consisting of approximately 1,800 slot machines, 23 table games, and a variety of restaurants and entertainment venues. (A. 73-74.) The Casino employs approximately 1,000 people. (A. 73-74.) The Casino is the Tribe's principal source of revenue that enables it to perform essential Tribal governmental functions, programs, and services. (A. 74.)

Lacking the capital necessary to construct and operate the Casino, the Tribe sought and obtained a loan ("Loan") in the approximate amount of 240 Million Dollars from a group of investors or bond holders ("Bondholders"), pursuant to the Indenture. (A. 74.) Under the repayment terms of the note executed by the Tribe in connection with the Loan and the deposit account control agreement (the "DACA"), the Tribe is obligated to make biannual payments to Wells Fargo Bank ("Wells Fargo"), trustee for the Bondholders, in the approximate amount of 28 Million Dollars. (A. 74.) In order to operate the Casino and other economic enterprises, the Tribe entered into an agreement ("Agreement") with Rabobank. (A. 74.) Under the terms of the Agreement and the DACA, the Tribe maintains a variety of accounts with Rabobank ("Accounts"). (A. 74.) Four of those Accounts - the operating account, jackpot account, merchants account and payroll account

(collectively, the "Casino Accounts") - are used to operate the Casino. (A. 74.) Until the disputes in this case arose, the Casino deposited all revenues generated from the operation of the Casino, minus excluded asset payments, into the Casino Accounts maintained at Rabobank. (A. 74.)

The Casino Accounts are the general operating accounts maintained by the Tribe in connection with the operation of the Casino. (A. 74.) Other accounts ("CEDA Accounts") are used to operate other business enterprises for CEDA. (A. 47.) The Casino Accounts were opened and maintained pursuant to the DACA and the Agreements. (A. 74-75.) From the Casino Accounts, the Tribe issues checks in payment for virtually all goods, services, wages, payment of prizes, capital improvements, and all other expenses incidental to the operation of the Casino, as well as for payments to Wells Fargo in accordance with the note executed in connection with the Tribe's Indenture. (A. 74-75.) The Casino also pays $1,000,000.00 to the Tribe monthly ("Excluded Asset Payment"), which monies are used to fund the operation of the Tribe's government and other economic projects. (A. 40-41.; A. 75.)

Between January 24, 2013, and February 24, 2013, a dispute ("Dispute") arose between members of the Tribal Council. Motions were allegedly passed by the Tribal Council suspending and reinstating various Council members during this

period. (A. 54-57.) None of the suspensions of the members of the Tribal Council arising from the Dispute were valid, because they were not imposed at a duly noticed regular or special meeting of the Tribal Council and were not imposed in accordance with the Tribe's Constitution, By-Laws and Ethics Ordinance. (A. 54-57; 110-129) As a result of the Dispute, the Tribal Council divided into two factions. One faction consists of the Ayala Quorum Council. The other consists of a minority of Council members, Reggie Lewis, Chance Alberta and Carl Bushman ("Lewis Faction"). (A. 57-58)

Article VI, Section 2 of the Tribe's Constitution provides that four Tribal Council members constitute a quorum of the Tribal Council and that the Tribal Council can only conduct business where a quorum is present. After the dispute arose, only the Ayala Quorum Council could establish a quorum. (A. 106.) On or about February 25, 2013, the Lewis Faction stated to Rabobank that it had the authority to withdraw funds from the Casino Accounts and to designate which check signers were authorized to withdraw funds. (A. 58.) On or about March 4, 2013, the Ayala Quorum Council provided Rabobank with documents and relevant legal authorities demonstrating that the suspensions from the Tribal Council were invalid, that the Tribal Council still consisted of all seven members of the Tribal Council, and that the Lewis Faction had no authority to withdraw funds from the

Accounts or designate check signers for the Accounts. (A. 58.) Rabobank breached the Agreement with the Tribe by refusing to recognize the Tribal Council as the duly constituted and governing body of the Tribe with the authority to withdraw funds from the Accounts and to designate check signers for the Accounts. (A. 310.) Instead, Rabobank recognized the Lewis Faction, which could not establish a quorum of the Tribal Council, as having the authority to withdraw money from the Accounts and designate check signers. (A. 310.)

On March 15, 2013, at a duly noticed special meeting of the Tribal Council, with a quorum present, a majority of the Tribal Council voted to file suit against Rabobank in the Picayune Rancheria of Chukchansi Indians Tribal Court ("Tribal Court") and seek an order preventing Rabobank from allowing the Lewis Faction to withdraw funds from the Accounts and to require the Bank to interplead the funds in the Accounts with the Tribal Court, pending the resolution of the Tribal Court litigation (the "Tribal Court Action"). (A. 58.) At the same March 15, 2013, special meeting, the majority of the Tribal Council voted to suspend Lewis, Alberta and Bushman based on written allegations made by Ayala, Brechbuehl, Wynn, and Sargosa of a number of violations of the Tribe's Constitution and Ethics Ordinance. (A. 58.)

On March 15, 2013, legal counsel for the Tribal Council notified

Rabobank's legal counsel that the Tribal Council had filed a complaint against Rabobank for breach of contract and for interpleader, and would be seeking a temporary restraining order directing the Bank to interplead the money in the Accounts with the Tribal Court. (A. 310.) Counsel provided Rabobank's legal counsel with a copy of the complaint and its motion papers. (A. 310.) The Tribal Council's legal counsel also informed Rabobank's counsel that the Tribal Court would hold a hearing on the motion later that afternoon, and provided a telephone conference call telephone number and pass code so that counsel could participate in the hearing. (A. 310.)

On March 15, 2013, the Tribal Court held a hearing on the Tribe's motion for a temporary restraining order. (A. 311.) Legal counsel for Rabobank participated. (A. 311.) The Tribal Court issued a temporary restraining order prohibiting the Bank from allowing any person, other than a person or persons designated by the Tribal Council, from withdrawing any money from the Accounts and ordering the Bank to interplead the money in the Accounts with the Tribal Court. (A. 311.) On March 15, 2013, counsel for the Tribe served that order on Rabobank's counsel. The Order also set a date, later adjourned, for a hearing on a motion for preliminary injunction. (A. 311.)

On May 23, 2013, at a duly noticed Tribal Council meeting with a quorum

present, the Tribal Council held a hearing to decide whether Lewis, Alberta and Bushman should be removed from the Council. (A. 59.) Although written notice of the hearing and the charges was personally served on Lewis, Alberta and Bushman, they did not attend the hearing. (A. 59.) Based upon the facts and evidence presented at the hearing, the Tribal Council rendered a decision by a vote of four in favor, zero against and three absent, to remove Lewis, Alberta and Bushman from the Tribal Council for violations of the Tribe's Constitution and Ethics Ordinance. (A. 59.; A. 61-72.)

On March 25, 2013, the Tribe filed an amended complaint in the Tribal Court Action, adding as defendants Reggie Lewis, Chance Alberta and Carl Bushman and seeking injunctive and declaratory relief. (A. 311.) On March 26, 2013, the Tribe filed and served on all of defendants its motion for a preliminary injunction. (A. 311.) Rabobank filed opposition to the motion on March 28, 2013. (A. 311.) Defendants Lewis, Alberta and Bushman did not oppose the motion or file any responsive pleading. (A. 311.)

On March 29, 2013, the Tribal Court held a hearing on the Tribe's motion for a preliminary injunction. (A. 311-312.) At the hearing, counsel for the Tribe and counsel for Rabobank appeared, while there was no appearance on behalf of defendants Lewis, Alberta or Bushman despite their having been duly served. (A.

311-312.) Following the hearing, on March 29, 2013, the Tribal Court entered an order granting the Tribe's motion for a preliminary injunction (the "Tribal Court Injunction Order"). (A. 312; A. 377-381.) The Tribal Court Injunction Order directed Rabobank to pay from the Accounts to Wells Fargo Bank the amount of the loan payment owed pursuant to the Indenture and to interplead with the Tribal Court any funds that remained in the Accounts after the Loan payment was made. The Tribal Court Injunction Order also ruled that the Tribal Council consisted of seven persons: Nancy Ayala, Chair; Reggie Lewis, Vice Chair; Tracey Brechbuehl, Secretary; Karen Wynn, Treasurer; and Council Members at Large Charles Sargosa, Chance Alberta, and Carl Bushman, and that a quorum of those seven Tribal Council members was the recognized governing body of the Tribe authorized to transact business on behalf of the Tribe and CEDA. (A. 312; A. 377-381.)

Rabobank refused to comply with the Tribal Court Injunction Order and refused to comply with the Agreement, violating its contractual obligation. (A. 312.) Instead, Rabobank filed a notice of appeal challenging the Tribal Court's determination that it had jurisdiction to issue the preliminary injunction to the Tribal Court of Appeals. (A. 312.) As a direct and proximate result of Rabobank's refusal to honor the Tribal Court's preliminary injunction, the Tribe and CEDA

defaulted on its loan payment to Wells Fargo. (A. 313-314.) As a direct and proximate result of the default, Wells Fargo elected to exercise its rights under the DACA and directed Rabobank to pay all of the funds, except approximately $1,000,000.00 from the Casino Operating Account, to Wells Fargo to pay the amount due the Bondholders under the Note and Casino loan. (A. 313-314.) Unfortunately, there was not enough money in the Operating Account to pay the full amount due to the Bondholders under the Note, leaving a balance due of approximately $3,000,000.00. (A. 313-314.) Because the Lewis Faction refused to allow any payment from the CEDA Account and other accounts not covered by the DACA to be used to pay the balance, the Tribe was unable to make up the shortfall and the Tribe was in technical default on its Loan under the terms of the Indenture. (A. 314; A. 51.)

As demonstrated below, it is critical that the Ayala Quorum Council has never waived its sovereign immunity from suit to authorize the Lewis Faction to sue it or any of the members of the Ayala Quorum Council in this or any non-tribal court. (A. 103.)

A purported General Council meeting subsequently held by the Lewis Faction on September 14, 2013, discussed without citation to evidence by the Lewis Faction in the Appellate Brief, p. 6, was void because proper notice of that

meeting was not given, and the meeting was not called and conducted in accordance with the Constitution. (A. 2756-2757.) Specifically, the Lewis Faction purported to hold a General Council meeting at which the General Council was alleged to have passed a number of resolutions relating to the Tribe's leadership dispute and control of the Casino's and the Tribe's revenues. (A. 2757.) The Lewis Faction contacted the General Manager of the Casino, directing him to pay the revenues from the Tribe's gaming operations to the Lewis Faction, based on an alleged General Council Resolution passed at that meeting. (A. 2757.) The Tribal Council has never enacted an ordinance setting a specific date for the regular meetings of the General Council. (A. 2757.) It has been the consistent practice of the Tribal Council that, in calling regular General Council meetings, the Tribal Council passes a resolution setting the date for each quarterly meeting 30 to 45 days before the meeting date. (A. 2757.) Based on the resolution, the Tribal Council provides the voting members of the General Council with notice of the regular meeting at least 30 days before the regular meeting is held. (A. 2757.)

The Tribal Council did not pass a resolution to hold a regular meeting on September 14, 2013, or any other day in September. (A. 2757.) It is unclear what, if any, notice of the alleged General Council meeting on September 14, 2013, was given and to whom it was given. (A. 2758.) Notice of the meeting was not

provided to all of the voting members of the General Council, as none of the members of the families of the Tribal Council at that time, consisting of Ayala, Brechbuehl, Wynn and Sargosa, were given notice. (A. 2758.) No petition seeking a special meeting of the General Council in September was ever presented to Ayala, then acting Chair of the Tribal Council. (A. 2758.)

In order for any General Council resolution or action to be valid, a vote of the General Council on the motion or resolution has to be taken at a regular or special meeting of the General Council. (A. 2758.) Article VI, Section 3 of the Tribe's Constitution states:

> Regular meetings of the General Council shall be held quarterly. The date, time and place shall be determined by the Tribal Council. Special meetings of the General Council may be called by the Chairperson of the Tribal Council upon receipt of a petition signed by at least 51% of the members of the General Council.

(A. 2758.) It is unclear whether the Lewis Faction asserts that the alleged meeting at which the vote on the resolution was taken was a regular or a special meeting. Article VI, Section 3 of the Constitution grants authority to the Tribal Council to determine the date, time, and place of the regular meetings of the General Council to be held quarterly. (A. 2759.) It would not be inconsistent with the past practice of the Tribe that a regular meeting of the General Council be held in September. (A. 2759.) However, any such meeting would have to meet the other requirements

of the Constitution. (A. 2759.) In order to constitute a regular General Council meeting, the meeting would have to be called by the Tribal Council. (A. 2759.) The Tribal Council in August/September 2013, did not vote on or pass a resolution scheduling a regular quarterly meeting of the General Council for September 14, 2013. (A. 2759.) That fact alone means that the alleged General Council meeting was not called in conformity with the requirements of the Tribe's Constitution. (A. 2759.)

To the extent that the September 14, 2013, meeting is alleged to have been a special meeting of the General Council, it would have to have met the requirements for the calling of a special meeting under Article VI, Section 3 of the Constitution. (A. 2760.) Special meetings of the General Council can only be called by the Tribal Chairperson upon receipt of a petition signed by at least 51% of the members of the General Council. (A. 2760.) No petition signed by at least 51% of the members of the General Council was submitted to the then Tribal Chair Ayala, and she was not involved in the calling or conducting of the General Council September 14, 2013, meeting. (A. 2760.) It is not known whether a petition to call the General Council meeting was ever circulated. (A. 2760.) None of the relatives of the members of the Tribal Council seated in September of 2013, were contacted about any such petition or are otherwise aware of the circulation of

such a petition. (A. 2760.) There is, therefore, no basis for concluding that the putative General Council meeting on September 14, 2013, met the requirements for a special or regular General Council meeting. Any purported actions taken at the meeting are therefore void. (A. 2760.)

RESPONSE TO LEWIS FACTION'S CITATION ISSUES

It is important that the Court take note of a broader issue prevalent throughout the Lewis Faction's Appellate Brief. The Appellate Brief is replete with citations to provisions in the Appendix that: (1) plainly do not support the factual allegation they are intended to support; (2) are demonstrably false or intentionally misleading; or (3) are completely unsupported accusations. In the interests of judicial economy, because the number of these instances is too great to discuss at length here, Respondents highlight a few of the more egregious examples that are illustrative of these types of citation issues and they then address remaining issues as they arise in the response to the Lewis Faction's arguments.

There are numerous instances in the Appellate Brief in which the Lewis Faction makes a factual statement and, in putative support of the factual statement, cites to a provision in the Appendix that has nothing to do with the factual statement. For example, the cite to page A. 2806 of the Appendix, in the Appellate Brief, p. 44, purports to provide the factual foundation for the statement that

"Resolution # 2013-03 confirmed the Trial Court's jurisdiction to enforce Resolution #2013-01 and all other resolutions pertaining to the Indenture." Yet, page A. 2806 of the Appendix is part of the Lewis Faction's Supplemental Brief in the Trial Court and does not contain any information about the purported resolutions referenced in the Appellate Brief. Another instance of this type of citation issue is found in the Appellate Brief, p. 37, where the Lewis Faction states that, "the BIA has never recognized the Ayala Faction as the governing body of the Tribe (A. 2712)". However, page A. 2712 of the Appendix is a transcript of the July 2, 2013, hearing before the Trial Court, in which the topic of whether the BIA has recognized the Ayala Quorum Council is never mentioned. That portion of the transcript has nothing to do with the BIA's recognition of any faction.[2]

An example of the second type of citation issue - demonstrably false or intentionally misleading citations - can be found in the Appellate Brief, p. 26. There, the Lewis Faction cites to page A. 808 of the Appendix for the proposition that "[i]n the aftermath of the PI Order, the Ayala Faction began its practice of distributing, and continues to distribute, Casino funds in the form of benefits to Tribal members in a selective, partisan manner, and used access to Casino funds

[2] This statement is also demonstrably false. (A. 494-498); (A. 2761.)

for blatant political purposes." Page A. 808 of the Appendix is the cover page of the Affidavit of Chauncey Williams ("Williams Affidavit"). In the Williams Affidavit, Mr. Williams states that he was offered employment at the Tribe's Casino and, in his interview before the Tribal Gaming Commission, was asked questions regarding his mother's involvement with the Lewis Faction and was asked questions regarding the politics of the Tribe. (A. 809.) It is intentionally misleading to state that this affidavit is evidence that supports the allegation that the Ayala Faction was distributing Casino funds in a selective, partisan manner. It is also worth noting that the employment "offer" referenced in the Williams Affidavit, Appendix, A. 811, explicitly states that Mr. Williams was required to be cleared by the Tribal Gaming Commission in order to be employed.

An example of the Lewis Faction citing to unsupported accusations is found in the Appellate Brief, p. 15, where the Lewis Faction states, "Under Ayala's direction, a new security force was created to secure the Tribal Administration buildings and Casino and retain it for Ayala's illegitimate use. (A. 352-353.)" Pages A. 352-353 in the Appendix, however, are part of the Lewis Faction's own statement of facts in its Answer and do not cite to any evidence to support that proposition. Thus, the Lewis Faction has cited to an unsupported claim made in its own pleading in this case as evidence of the truth of the matter.

Another example of a cite to an unsupported accusation is located in the Appellate Brief, p. 25, where the Lewis Faction states, "The Trial Court's decision to grant this authority to Giffen Tan was also disconcerting because the Lewis Parties presented unrebutted evidence that he was entirely unqualified to act as the Casino's Manager. (A. 1726; A. 2722.)" Page A. 1726 of the Appendix is simply the Supreme Court's Order directing Casino Manager Tan to sign the Casino's checks and has nothing to do with his qualifications. Page A. 2722 of the Appendix is a portion of the transcript from the July 2, 2013, hearing in which Robert Rosette, attorney for the Lewis Faction, states: "Giffen Tan, his employment as the general manager would be a violation of the Indenture in and of itself because of his lack of experience in holding a position like that. He was placed there by Nancy Ayala." Thus, according to the Lewis Faction, an unsupported statement made by its legal counsel is "unrebutted evidence." There is no proof offered that this claim is true.

Problematically, the Appellate Brief, pp. 4, 18, 31, and 38, cites to a February 11, 2014 letter issued by the BIA that was not before the Trial Court and is not contained in the Appendix. The Appellate Division is bound by the record and the Court's review is confined to the evidence before the motion court. *Becker v. City of New York*, 249 AD.2d 96, 98 (1st Dep't 1988); *Merl v. Merl*, 125 AD.2d

685, 686 (2d Dep't 1987) (chastising the appellant for injecting matters dehors the record). This letter was issued after the Order on appeal here, was not before the Trial Court, and is thus not present in the Appendix, and should be disregarded.

Thus, in reviewing the Appellate Brief, it is important that the Court observe that the Lewis Faction's citations to relevant material in the record are rare and their Statement of Facts is unreliable.

ARGUMENT

I.
THE TRIAL COURT CORRECTLY DETERMINED THAT IT LACKS SUBJECT MATTER JURISDICTION OVER APPELLANTS' CLAIMS.

A. The Lewis Faction Has Failed To Show That The Trial Court Erred In Determining That It Lacks Subject Matter Jurisdiction.

The Lewis Faction challenges the Trial Court's determination that it does not have subject matter jurisdiction over the Lewis Faction's Claims. Appellants' Brief, p. 45.

The Lewis Faction's challenge to the Trial Court's determination that it lacks jurisdiction is based on a connected series of arguments. The Lewis Faction argues that the Tribe waived its sovereign immunity as to claims arising under the transaction documents between CEDA and the Bondholders. Appellants' Brief, p.

40-41. The Lewis Faction argues further that their Claims fall within the waiver of the Tribe's sovereign immunity. Appellants' Brief, p. 40-43. Finally, the Lewis Faction contends that the forum selection provision in the Indenture grants the Courts of the State of New York jurisdiction over those claims related to the transaction documents. Appellants' Brief, p. 45-49. For these reasons, the Lewis Faction concludes that the Trial Court had the authority to decide which faction of the Tribe has the right to receive the Excluded Asset Payments under the transaction documents.

The Lewis Faction's arguments do not require extensive analysis, because the arguments fail at a fundamental level. The waiver of sovereign immunity and the forum selection clause do not and cannot constitute a grant of subject matter jurisdiction to the Trial Court to rule on the issue of who constitutes the legitimate governing body of the Tribe or a grant of jurisdiction over claims against the Tribe. The Lewis Faction's fundamental error is in failing to distinguish between the limits to the jurisdiction of the Courts of the State of New York and the effect of the Tribe's waiver of sovereign immunity. While the affirmative defense of sovereign immunity from suit is jurisdictional in nature and has the effect of preventing a court from addressing claims against a sovereign, the limits of a court's jurisdiction are a separate issue. The lack of jurisdiction and sovereign

immunity are two separate, independent barriers to the assertion of a court's authority to address claims against a sovereign. In this case, the Trial Court was prevented from addressing the Lewis Faction's claims against the Ayala Quorum Council by both a lack of jurisdiction and the absence of a waiver of the Tribe's sovereign immunity as to the Lewis Faction and its Claims.

1. State Laws Cannot Be Enforced Against An Indian Tribe Or Indians On Their Reservation Absent An Act Of Congress Expressly Granting The State Courts Such Jurisdiction.

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

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

U.S. Constitution, Art. I, § 8, cl. 3.

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

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

from restriction as that to regulate commerce with foreign nations.

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

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

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

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

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

Based upon Congress' exclusive jurisdiction over Indian affairs, it is 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[3] without the express authorization of Congress.

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

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

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

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

---

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

In order for the Trial Court to exercise jurisdiction over the Tribe, or the individual Indians who are affiliated with the Ayala Quorum Council named as defendants in the Lewis Faction's Claims, it would be necessary to cite to a federal statute that expressly grants it jurisdiction to enforce New York State's laws against the Tribe and the Ayala Quorum Council on a breach of contract claim, whereas here, the contract was entered into and is being performed by the Tribe and its agents and agencies, on the Reservation in the State of California.

As will be shown below, the only federal statute that grants the Courts of the State of New York any jurisdiction on Indian Reservations or within Indian Country is 25 U.S.C. § 233, and that statute does not confer jurisdiction on the Trial Court to decide the issues raised by the Lewis Faction in their Claims.

2. 25 U.S.C. § 233 Did Not Grant New York Courts Jurisdiction Over Indian Tribes For Activities Conducted On Their Reservations Or Over A Tribe's Internal Tribal Affairs.

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

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

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

"A necessary corollary to the rights of Indian tribes to self-government and to exclusive jurisdiction over their internal affairs is the principle that state law does not apply on the reservations." *Bowen, id.* at 113; See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). "[F]rom the very first days of our Government, the Federal Government had been permitting the Indians largely to govern themselves, free from state

interference." *Warren Trading Post v. Arizona Tax Comm.*, 380 U.S. 685, 686-87 (1965). See also, *Ramah School Bd. v. Bureau of Revenue*, 458 U.S. 832, 846 (1982); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 168 (1973); *Rice v. Olson*, 324 U.S. 786, 789 (1945).

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

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

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

Section 233 grants limited state court jurisdiction over certain civil claims

relating to individual Indians in Indian country, not over claims against Indian tribes. In its exhaustive analysis of Section 233, the United States District Court for the Western District of New York in *Bowen* made this clear. Applying the United States Supreme Court's analysis of the civil jurisdiction provisions of Public Law 280, 28 U.S.C. § 1360 ("PL 280") in *Bryan v. Itasca County*, 426 U.S. 373 (1976) ("*Bryan*"), the *Bowen* Court concluded that both PL 280 and Section 233 "define the state courts' jurisdiction in the same basic terms." 880 F. Supp. at 119. In *Bryan*, the Supreme stated: "there is notably absent any conferral of state jurisdiction over the tribes themselves". 426 U.S. at 389. In applying the *Bryan* analysis to Section 233, the *Bowen* Court stated: "Congress only intended to grant State Courts jurisdiction over private civil litigation between Indians and between Indians and non-Indians." 880 F. Supp. at 122.

Moreover, Section 233's grant of jurisdiction over individual Indians in Indian country extends only to Indian country located in the State of New York, not Indians and Indian country located outside of the State of New York. This is self-evident from the statute's plain wording, which includes phrases that restrict the application of the statute to Indian tribes and Indian land located within the State of New York: "[T]he governing body of any recognized tribe of Indians in the State of New York shall have the right to declare, by appropriate enactment

prior to the effective date of this Act, those tribal laws and customs which they desire to preserve"; "nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York". (Emphasis added). There is nothing in Section 233 that would suggest that New York State Courts have been granted jurisdiction over tribes located outside New York.

Not surprisingly, there are few cases that have directly considered or ruled on the issue of whether Section 233 grants New York State Courts jurisdiction over Indian tribes located in other states. In *Pyke v. Cuomo*, 209 F.R.D. 33 (N.D. N.Y. 2003), however, the United States District Court for the Northern District of New York addressed the question directly and concluded: "[A]lthough New York, with certain exceptions which are not applicable here, has civil and criminal jurisdiction over all Indian reservations in the State, including the Akwesasne or St. Regis reservation, plainly that jurisdiction does not extend beyond the borders of this State. See *25 U.S.C. §§ 232* and *233 (West 2001)*." *Id.*, at 40. See also, *Mohegan Tribe v. State of Connecticut*, 528 F. Supp. 1359, 1365 (D. Conn. 1982), ["The Act of September 13, 1950, *25 U.S.C. § 233*, gave the State of New York jurisdiction over legal proceedings involving Indians within New York." (Emphasis added.) The Tribe and its gov[illegible]mental agencies are all located in Madera County,

California. Pursuant to the plain wording of Section 233, the Court lacks jurisdiction over the Tribe.

Even if Section 233 could be construed to apply to Indians and Indian tribes located outside of the State of New York, it would still not apply to the Lewis Faction's Claims because those Claims relate to the Tribe itself and its internal affairs. Under the case law interpreting Section 233, that statute does not grant the New York Courts jurisdiction over Indian tribes or their internal affairs.

The question of whether Section 233 grants state courts jurisdiction over Indian tribes and internal Indian affairs was analyzed in detail in *Bowen*. The *Bowen* Court concluded unequivocally that, "the express language of *§ 233* defeats any claim that it authorizes the State Court to exercise civil jurisdiction over internal tribal affairs." 880 F. Supp. at 120. Later, the Court stated: "§ 233 does not authorize courts of the State of New York to become embroiled in internal political disputes amongst officials of the [tribe]'s government." *Id.* at 122 and 118. The *Bowen* Court further stated, citing to numerous federal court decisions relating to ate jurisdiction over internal Indian affairs[4]:

These cases all support the proposition that an Indian tribe's right to

---

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

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

880 F. Supp. at 118 (Emphasis added.)

The *Bowen* Court further concluded that, in analyzing the extent of state jurisdiction granted under Section 233, the analysis set forth in *Bryan v. Itasca County, supra*, interpreting the Congressional grant of civil jurisdiction over actions involving Indians set forth in P.L. 280, should be applied to Section 233. "The *Bryan* decision sets forth the principles to be applied in construing a statute delegating jurisdiction over Indian affairs to a state, and its analysis applies to the question of whether the grant of civil jurisdiction in § 233 extends state jurisdiction over the internal affairs of "an Indian tribe." *Bowen*, 880 F. Supp. at 119.

Other courts within the Second Circuit have also concluded that Section 233 should be interpreted by applying the *Bryan* analysis. See, *United States v. Cook,*

922 F.2d 1026, 1035 (2d Cir. 1991); *United States v. Burns*, 725 F. Supp. 116, 125 (N.D.N.Y. 1989); *Parry v. Haendiges*, 458 F. Supp. 2d 90, 96 (W.D.N.Y. 2006). New York State Courts have reached the same conclusion. *See People v. Snyder*, 141 Misc. 2d 444 (County Ct. Eric Co. 1988).

Section 233, thus, does not grant New York State Courts jurisdiction over Indian tribes or the internal affairs of Indian tribes located in New York State, let alone those located in California. Because all of the Lewis Faction's Claims would require the Trial Court to exercise jurisdiction over the Tribe and determine one of the most fundamental aspects of the Tribe's internal affairs, who the governing body of the Tribe is, the Trial Court properly dismissed all of those Claims for lack of jurisdiction. *Bowen*, 880 F. Supp. at 119.

The Lewis Faction does not present any argument to contradict the foregoing analysis. Instead, the Lewis Faction contends that it did not ask the Trial Court to make the determination as to who constitutes the legitimate Tribal Council of the Tribe. Rather, the Lewis Faction argues, it is merely asking the Court to identify one of the parties to the Indenture: CEDA. The Lewis Faction argues that as a result of the waiver of sovereign immunity and venue provision of the Indenture, the Trial Court had jurisdiction to address that issue. Appellate Brief, p. 39-51. This argument fails for three fundamental reasons.

First, in order to determine whether it had jurisdiction over the Lewis Faction's Claims, the Trial Court was compelled to look within the four corners of the Answer, Counter-Claim and Cross-claims to determine whether the Court had jurisdiction over the Claims. The Lewis Faction's Claims are all premised on the assertion that the Lewis Faction constitutes the Tribal Council, the Board of Directors of the CEDA, and the Tribe's Gaming Commission. The first two Cross-Claims specifically seek a ruling from the Trial Court that the Lewis Faction constitutes the Tribal Council, Board of Directors of CEDA, and the Tribe's Gaming Commission and that the defendants Ayala, Brechbuehl, Wynn and Sargosa, who, at the time that the Claims were filed, constituted four of the seven members of the Tribal Council elected in the December 2012, Tribal Council election, do not. (A. 364-366.) The Third and Fourth Cross-Claims are based on the assumption that the Ayala Quorum Council 's actions were not authorized actions of the Tribe's government but were, in fact, actions that interfered with the actions of the Tribe's government. (A. 366-373.) The Lewis Faction's first two requests for relief seek a ruling by the Court that Reggie Lewis, Carl Bushman, Irene Waltz, Chance Alberta, David Castillo, Lynn Chenot, and Melvin Espe comprise the seven current members of the CEDA Board of Directors, and request that the Court enjoin the Ayala Quorum Council from "interfering with the rights

and obligations under the Indenture of *the legitimate Tribal Council and CEDA*". (A. 373-374 (emphasis added).)

The Lewis Faction, thus, unquestionably asked the Trial Court to determine who constitutes the Tribe's and the CEDA Board's lawful governing body. It is simply beyond question that any attempt by the Trial Court to determine who the "real CEDA" is would require a determination of the Tribe's leadership dispute. Under the Tribe's laws, the members of the CEDA Board are the members of the Tribal Council. In order to determine who constitutes the CEDA Board, the Court would have to determine who the members of the Tribal Council are. No further analysis of the law or the facts is necessary because it is so evident that the Court is not empowered to make those determinations.

Second, the Lewis Faction's argument itself reveals that the issues arising from the Tribe's leadership dispute are integral to the determination of who makes up the CEDA Board.

Third, the sovereign immunity provision contained in the transaction documents is not relevant to the issue of whether the Court has jurisdiction to determine who constitutes the "real" CEDA Board. As demonstrated above, the determination of who constitutes the "real" CEDA would be a determination of the Tribe's leadership dispute. As was also demonstrated above, the Courts of the State

of New York do not have jurisdiction over an internal tribal leadership dispute. In order for the sovereign immunity provisions to have any relevance to the Trial Court's jurisdiction over the Lewis Faction's Claims, the sovereign immunity waiver would have to grant New York Courts subject matter jurisdiction over an internal tribal leadership dispute. The Lewis Faction argues that the waiver of sovereign immunity in the Indenture grants the Court that jurisdiction, when it is combined with the venue provision of the Indenture. Appellate Brief, p. 41.

It is a matter of black letter law that parties to litigation cannot confer subject matter jurisdiction on a court that otherwise lacks that 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 (2d Dep't 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 also, *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 New York Courts 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) (A. 2349.)

The sovereign immunity and venue provisions of the Indenture do not confer subject matter jurisdiction on the Trial Court. The requested relief set forth in the Answer, Counter-Claim and Cross-Claims would require that the Trial Court make an impermissible determination as to who constitutes the Tribe's legitimate government.

Furthermore, the cases cited by the Lewis Faction - *Davids v. Coyhis*, 857 F. Supp. 641 (E.D. Wis. 1994) ("*Davids*"); *Oneida Nation of New York v. Burr*, 132 A.D. 2d 402 (3rd Dep't 1987)("*Oneida*"), and *In re Sac & Fox Tribe of Miss. in Iowa/ Meskwaki Casino Litig.*, 340 F.3d 749 (8th Cir. 2003)("*Sac & Fox*") - have no application here and do not support reversal.

The *Davids* decision does not control 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, and it stated: "The action filed by the Community is not about an intra-tribal 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." 857 F. Supp. at 645. Here, the Lewis Faction cannot dispute that an internal tribal leadership dispute exists. 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 order, not a final judgment, and it is in conflict with decisions of the Supreme Court and the courts within the Second Circuit, it has no precedential effect in this Court.

Moreover, 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).

The two other cases cited by the Lewis Faction - *Oneida* and *Sac & Fox* - do not provide any support for their position. *Oneida* involved a lawsuit by the Oneida Nation against a group of non-reservation individuals. The issue in that

case was whether Section 233 and Indian Law § 5 authorized the New York State Courts to hear cases brought by a tribe against individual Indians. On its face, the issues in that case are not relevant to this litigation. The Court in *Oneida* was not asked to determine which of two rival factions to the government was the legitimate government, nor was such a dispute at issue in that case, "The sole issue raised on appeal is whether the Supreme Court correctly ruled that plaintiff [tribe] has capacity to sue by reason of *25 USC § 233* and *Indian Law § 5*." *Oneida*, 132 A.D.2d at 403.

Sac & Fox actually contradicts the Lewis Faction's argument. There, as the Lewis Faction admits, the Court specifically concluded that it did not have jurisdiction over claims seeking the determination of a tribal leadership dispute. 340 F.3d at 763-764. The *Sac & Fox* Court's conclusion that it had jurisdiction over claims based on the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 ("IGRA"), is entirely irrelevant to these proceedings. The IGRA includes a specific grant of jurisdiction over certain claims arising under the IGRA to Federal Courts. Here, the Lewis Faction's Claims are not based on the IGRA, and the grant of jurisdiction in the IGRA applies exclusively to Federal Courts.

The Trial Court's conclusion, therefore, that it lacked jurisdiction over the Lewis Faction's Claims and its dismissal of those claims was clearly correct.

B. The Ayala Quorum Council Is Protected By The Tribe's Sovereign Immunity.

Even if the Trial Court had jurisdiction over the Tribe and the Lewis Faction's Claims, which it does not, the Lewis Faction's Claims are barred by the Tribe's sovereign immunity. As the Lewis Faction acknowledges, 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) ("*C & L Enters*"). 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) ("*Kiowa*"). 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; *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*, 517 F.2d 508, 509 (8th Cir. 1975). 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. The language of the Indenture shows that this is 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) (A. 2348-2349.)

This 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, or 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.

Additionally, 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." Appellant's Brief, p. 41. The Lewis Faction's 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. As such, 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 a 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, it is explicit that 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 argues, predictably, 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 caused the Indenture breaches alleged by the Trustee because they were acting as rogue Tribal agents without the proper authority." Appellants' Brief, p. 41. Indeed, the crux of the Lewis Faction's claims is that the Ayala Quorum Council is not the Tribal Council of the Tribe, the CEDA Board or the Tribal Gaming Commission. The only way that the Trial Court could find that the members of the 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.

The Lewis Faction's assertion, therefore, that the Indenture's waiver of the

Tribe's sovereign immunity has been waived with regard to their Claims fails on all possible levels: the waiver is not granted to the Lewis Faction; it does not extend to the claims they have brought, it does not extend to the individual members of the Ayala Quorum Council, and it does not meet the conditions for the granting of the waiver. The Lewis Faction's 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. Even if the Trial Court had jurisdiction over the Lewis Faction's Claims, without an effective waiver, the Lewis Faction's claims would be barred.

C. The Trial Court Properly Determined That It Lacked Personal Jurisdiction Over The Members Of The Ayala Quorum Council.

While it is unnecessary to address the Lewis Faction's argument that the Trial Court had personal jurisdiction over the members of the Ayala Quorum Council, because the Trial Court lacked subject matter jurisdiction over the Lewis Faction's Claims and the Ayala Quorum Council enjoys the protection of the Tribe's sovereign immunity, Respondents briefly respond to those arguments.

The Lewis Faction's arguments relating to the Ayala Quorum Council's contacts with the State of New York border on the frivolous. First, as with its other arguments, the Lewis Faction's assertion that the members of the Ayala Quorum

Council have sufficient contacts with the State of New York to be subject to the jurisdiction of New York courts is based on the assumption that they are not the Tribe's legitimate governing body. Clearly, any action that the Ayala Quorum Council took as officials of the Tribe acting in their official capacities with regard to the execution of the Transaction Documents and appearances at hearings in this case, were not taken in their individual capacities. The Ayala Quorum Council's only contacts with New York are actions taken as Tribal officials. The Trial Court could only have asserted jurisdiction over them as individuals if it determined that they are not the governing body of the Tribe, which, as it conceded correctly, it clearly lacks jurisdiction to determine.

The Lewis Faction is attempting to have things both ways. They deny that the Ayala Quorum Council are legitimate officials of the Tribe, but attempt to make them responsible, as individuals, for actions they took as officials of the Tribe. "Nancy Ayala, the leader of the Ayala Faction, personally signed the Indenture and thus explicitly consented to the Trial Court's jurisdiction with respect to any action related to the Indenture when she executed the Indenture." Appellate Brief, p. 54. The notion that Nancy Ayala is personally a party to the Transaction Documents is ludicrous. Ms. Ayala signed the Indenture in her capacity as Vice-Chairperson of the Tribe. (A. 2357.) Ms. Ayala does not fall

within the definition of "Tribal Party," Section 13.1 of the Indenture. (A. 2348.) Not only did she not "explicitly consent to the Trial Court's jurisdiction" over herself, Appellate Brief, p. 54, Section 6.7 of the Indenture specifically waives any claim of individual liability. (A. 2323.) Her appearance at hearings in this case in her capacity as Tribal Chair challenging the jurisdiction of the Trial Court over the Tribe similarly does not constitute consent. For the same reasons, no action taken by the other members of the Ayala Quorum Council constitutes consent to the Trial Court's jurisdiction over them personally.

Finally, the members of the Ayala Quorum Council are not subject to jurisdiction predicated upon New York's long-arm statute. The Lewis Faction asserts in the Appellate Brief, p. 54, that the Court has jurisdiction over the individual defendants under New York's Long-Arm Statute, CPLR § 302 ("Long-Arm Statute"). However, this argument rests on the erroneous presumption that the laws of the State of New York are applicable to Indian tribes, which they are not. See, Sections I (A-C), *supra*. State law does not to apply on Indian lands, unless expressly authorized by federal statute. *United States v. Burns*, 529 F.2d 114, 117 (9th Cir. 1976).

Therefore, the Long-Arm Statute would be applicable to Indian tribes and tribal officials only if Congress had made the Long-Arm Statute applicable. The

only federal statute relevant here is S 233, which, as discussed above, does not grant New York Courts jurisdictio . Indian tribes for activities conducted on their Reservations or grant to New York Courts jurisdiction over a Tribe's internal tribal affairs. Section 233 grants limited state court jurisdiction over certain civil claims relating to individual Indians in Indian country, not claims against Indian tribes. Thus, because no federal statute has made the Long-Arm Statute applicable to Indian tribes and tribal officials, the individual defendants are not subject to the Court's jurisdiction by virtue of the Long-Arm Statute.

Moreover, the Lewis Faction's argument that "Ayala is not shielded from the Trial Court's jurisdiction by virtue of having executed the Indenture on behalf of CEDA and the Tribe," Appellate Brief, p. 56, is misguided. The authorities cited by the Lewis Faction regarding the inapplicability of the fiduciary shield doctrine in corporate cases are inapplicable here because the grant of jurisdiction under New York's Long-Arm Statute is a state law, and such state laws are inapplicable to Indian tribes on their respective reservations. Whether or not the Long-Arm Statute grants personal jurisdiction over the agents of a corporation is irrelevant. The Long-Arm Statute is simply not applicable to Indian tribes because Congress has not made the Long-Arm Statute applicable and the sovereign immunity of the Tribe and its officials bars the Claims.

II.
THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE LEWIS FACTION'S MOTIONS TO MODIFY THE JULY 2 ORDER AND DID NOT IMPROPERLY ALTER THE *STATUS QUO*.

The Lewis Faction seeks review of the Trial Court's denial of its motion to modify the Court's July 2, 2013, Decision and Order ("July 2 Order") and its motion to further modify the July 2 Order. Their Notice of Appeal does not appear to challenge the actual July 2 Order, and there is nothing in the record showing that the Lewis Faction has ever challenged the July 2 Order itself. It is thus inappropriate for the Lewis Faction to, in its Appellate Brief, pose a number of dubious factual and legal assertions challenging the Trial Court's issuance of the July 2 Order. Because the Lewis Faction seeks review only of the denial of the motions to modify, the analysis in this Section will proceed as through their arguments focused solely on the Trial Court's refusal to modify the July 2 Order and will ignore their dubious assertions that the Trial Court did not properly determine that the prerequisites for a preliminary injunction existed.

As discussed above, the Trial Court's decision on a motion to modify a preliminary injunction may be reviewed for abuse of discretion. *Thompson v. 76 Corp.*, 37 A.D.3d at 452-453. Modification of a preliminary injunction may be

appropriate where changed circumstances render the continuation of the injunction inequitable. *Id.* The Lewis Faction alleges that the Trial Court changed the *status quo* by issuing the July 2 Order and, thus, abused its discretion. Not only is this assertion absurd and not bolstered by any cognizable factual or legal authority, it fails to meet the standard for overruling the denial of the motions to modify the July 2 Order.

The July 2 Order both preserved the *status quo*, under which the Tribe's Casino was in operation and the Tribe paid the debts and expenses of the Casino, and allowed for effective enforcement and performance of the Indenture. Thus, the Trial Court correctly found that there was no reason to modify it. It is curious that the Lewis Faction insists that their notion of what constitutes the *status quo* is the most equitable, efficient manner of enforcing the Indenture and the DACA, when it was the Lewis Faction's conduct under the *status quo* that necessitated the Trustee's initiation of this lawsuit. (A. 2639; A. 2643; A. 2671.) Because the Lewis Faction seized control of the Casino bank accounts at Rabobank, the Tribe and CEDA defaulted on its Loan payment to Wells Fargo. As a direct and proximate result of that default, Wells Fargo elected to exercise its rights under the DACA and directed the Bank to pay all of the funds, except approximately $1,000,000.00 from the Casino Operating Account, to Wells Fargo to pay the amount due to the

Bondholders under the Note and Casino loan. Unfortunately, there was not enough money in the Operating Account to pay the full amount due to the Bondholders under the Note, leaving a balance due of approximately $3,000,000.00. (A. 313.) Because the Lewis Faction also refused to allow any payment from the CEDA Account and other accounts not covered by the DACA to be used to pay the balance, the Tribe was unable to make up the shortfall and the Tribe defaulted on its Loan under the terms of the Indenture. (A. 313.)

By issuing the July 2 Order, the Trial Court ensured that CEDA and the Tribe were able to meet their obligations under the Indenture. The Trial Court granted to the current, on-site Casino General Manager, Giffen Tan (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. (A. 2702.) The Trial Court's assignment of check signing authority to Mr. Tan allowed the Trial Court to avoid weighing in on the Dispute, by removing the Lewis Faction members (who had caused the default on the loan) as check signers and instead assigning that authority to an individual who represents the interests of the Casino, the Tribe as an entity, and the Trustee. (A. 2702.) The Trial Court directed the Casino to pay the operating expenses of the Casino, subject to the right of the Lewis Faction to

present a good faith objection to specific expenditures. Any such objection is to be made pursuant to the meet and confer process as directed by the Court. (A. 2703); (A. 2706.)

The Trial Court, furthermore, did not order the Casino to make the Excluded Assets payments. It simply did not issue an order prohibiting the Casino from making those payments. Since under federal law, IGRA, the Casino is required to have a gaming commission regulating the Casino and a tribal government entity that can exercise proprietary ownership over the Casino in order to operate, the Casino made the Excluded Asset Payment to the on-reservation Tribal Gaming Commission and Government that was providing those services to the Casino. That Government is the Ayala Quorum Council. As discussed above, the Trial Court had no jurisdiction to 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 the IGRA and the

Indenture. The Trial 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 Faction's claims to the contrary. Instead, the July 2 Order ensures that the Casino's operations continue uninterrupted as required by the Indenture, that CEDA carries out its supervisory obligations over the gaming operations, and that the Tribal Government continues to provide the governmental programs and services that ensure that tribal members and visitors to the Casino and reservation are safe, secure, and able to use the Casino facility and that the infrastructure necessary to operate the facility is in place and functioning. As such, the July 2 Order correctly carries out the intention of the parties to the Indenture and the contractual obligations set forth in the Indenture.

Mr. Tan has, to the extent that the process was not interrupted by the machinations of the Lewis Faction, made the payments required under the Indenture and deposited all cash, other than operating cash and Excluded Assets, into the Rabobank account as required by the Indenture and the July 2 Order. The Lewis Faction's requested modifications would have been in violation of the Court's order and, at the same time, were not based on any articulation of how the continued payments pursuant to the Court's order caused irreparable harm. (A. 2713.) The Lewis Faction's Motions constituted nothing more than a new vehicle

for the Lewis Faction to lodge a "blanket objection" to the expenditures by the Tribal Government from the Excluded Asset Payments. The Lewis Faction raised blanket objections to the legitimate Excluded Asset Payments that the Casino had made during the process established by the Trial Court on July 29, 2013, stating that no payments should be made before the Trial Court resolved the issue of which faction is the proper "authority" to, among other things, direct such payments as contemplated by the Indenture. (A. 526.) It was only through an order issued by the Trial Court on August 28, 2013, that the required payments to the Tribal Gaming Commission, Tribal Government and CEDA Board in the combined amount of $1,716,000 could be made. (A. 526.) CEDA has an outstanding loan obligation to the Trustee and Bondholders. It is in the interest of all of the parties to use the money to keep CEDA current on its Loan repayment obligations. Any objection to such a payment by the Lewis Faction would arise exclusively from the Lewis Faction's desire to retain control of the money in order to pursue its efforts to prevail in the leadership dispute.

Mr. Tan's payment of the Excluded Asset Payments is consistent with the terms of the Indenture. The Casino, CEDA and the Tribe are contractually obligated to ensure that the Casino operations are not interfered with. That requires that the on-reservation Gaming Commission be paid so that it can

continue to carry out its statutorily mandated duty to regulate gaming at the Tribe's gaming facility[5]. As such, under the July 2 Order, the Casino is functioning and the necessary governmental activities and services are being provided to the Casino tribal enterprises, tribal members, and visitors to the reservation. That was the situation before the dispute erupted, and changes nothing about the political dispute between the Ayala Quorum Council and the Lewis Faction.

By contrast, payment of the Excluded Asset Payments to the Lewis Faction's shadow government, located in Fresno, California, off the Reservation, would be a dramatic change in the *status quo*. The Lewis Faction is not presently providing any governmental services to the Casino, Casino Patrons, or tribal members on the Reservation. Even if the Lewis Faction is taken at its word, that it intends to use the money to provide governmental services, it has given no indication as to how an off-Reservation shadow government could or would provide any services without any On-Reservation presence. They also do not address the fact that withholding the money from the On-Reservation Government would have the

[5] The Gaming Commission was able to carry out its regulatory obligations only because it had received previous payments from the Casino, pursuant to the Trial Court's orders and directives. This constitutes another act of the Lewis Faction that disrupted the *status quo* and necessitated initiation of the matter currently before this Court. The equities favor the stability arising from ensuring the *status quo* and weigh in favor of allowing the Excluded Asset Payments to continue as they have in recent months.

effect of crippling or halting the actual provision of those services by the tribal governmental entities that are on the Reservation and in a position to provide those regulatory and governmental services.

The Lewis Faction also fails to show that the Trial Court abused its discretion by ignoring a possible change in the *status quo*. Attorneys for the Lewis Faction insisted repeatedly that the July 2 Order changed the "balance of power"by transferring signing authority over the Casino accounts and authority to make the Excluded Asset Payments from the Lewis Faction to Giffen Tan and thus changed the *status quo*. (See A. 2620.) As noted previously, these changes made pursuant to the July 2 Order actually represented a preservation of the *status quo* and served to prevent continued interruption of the operation of the Casino, On-Reservation Gaming Commission, and On-Reservation Tribal Government and to prevent continued violation of the Tribe's obligations under the Indenture. The Trial Court correctly noted that the modifications to the July 2 Order sought by the Lewis Faction would require the Trial Court to make a determination of who is the lawful governing body of the Tribe. (A. 2624.) Furthermore, the Trial Court observed that it could only enforce the Indenture by making sure that the Gaming Commission was paid and that the Casino continued to operate. (A. 2624.) The Trial Court could only deal with the Tribe and Casino as it found them at the time this action

was filed and did not have the authority to determine which faction should be in control. (A. 2631.) The Trial Court also noted that there was no evidence in the record showing that the members of the Lewis Faction were the only signatories to the Casino Accounts before the issuance of the July 2 Order. (A. 2634.)

Moreover, the Lewis Faction fails to show that the Trial Court disregarded changed circumstances that rendered the continuation of the July 2 Order inequitable. Instead, the Lewis Faction harps on the notion that the July 2 Order disrupted the balance of power and that the facts that the Excluded Asset Payment is made to the Ayala Quorum Council and its Gaming Commission and the Casino's General Manager was hired by the Ayala Quorum Council somehow lead to a conclusion that the Casino is on the brink of ruin. (A. 2660.) The Lewis Faction also alleges that the Ayala Quorum Council, whose operations were funded through the Excluded Asset Payments, misused funds and administered benefits and services in a discriminatory manner. (A. 390; A. 392.) Of course, the Lewis Faction does not provide any statement as to how it obtained such information, or the factual basis for its allegations. As discussed above, the Excluded Asset Payments clearly were for a legitimate purpose, and were permissible under both the Court's Order and the Indenture. The Trial Court properly considered ample evidence and testimony that none of the Lewis

Faction's allegations about mismanagement of funds and predictions of a Casino shut down were true. (A. 413; A. 422; A. 2675.) In fact, the Trial Court established a process that would allow the Lewis Faction to object to any discrimination in Casino operating payments. (A. 422.) The Lewis Faction simply offers conjecture and inflammatory claims in support of its argument that the Trial Court abused its discretion in refusing to modify the July 2 Order.

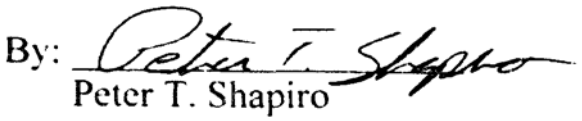
CONCLUSION

For all of the reasons set forth above, the Ayala Quorum Council respectfully requests that this Court affirm the Trial Court's ruling, dismissing the Lewis Faction's Cross-Complaint and Counter-Claims, and denying the Lewis Faction's motion for modification of the preliminary injunction, and dismiss their appeal with costs to Respondents.

Dated: March 26, 2014

Respectfully Submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: 
Peter T. Shapiro

RAPPORT AND MARSTON

Attorneys for Respondents
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, Nancy Ayala, Tracey Brechbeuhel, Karen Wynn and Charles Sargosa