

2014 WL 4494518 (N.Y.A.D. 1 Dept.) (Appellate Brief)
Supreme Court, Appellate Division, First Department, New York.

WELLS FARGO BANK, N.A., as Trustee, Plaintiff,

v.

CHUKCHANSI ECONOMIC DEVELOPMENT AUTHORITY. The Board of the Chukchansi Economic Development Authority, the Tribe of Picayune Rancheria of the Chukchansi Indians, the Tribal Council of the Tribe of Picayune Rancheria of the Chukchansi Indians, the Picayune Rancheria Tribal Gaming Commission, Rabobank, N.A., Global Cash Access, Inc., Nancy Ayala, Tracey Brechbuehl, Karen Wynn, Charles Sargosa, Reggie Lewis, Chance Alberta, Carl Bushman, and Bank of America, N.A., Defendants.

WELLS FARGO BANK. N.A., as Trustee, Plaintiff-Respondent,

v.

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, 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.

No. 12777.

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To be Argued by:
Jonathan L. Hochman

Brief for Defendants/Cross- and Counter-Claim Plaintiffs-Appellants

Rosette LLP, 565 W. Chandler Boulevard. Suite 212, Chandler, Arizona 85225, (480) 889-8990, rosette@rosettelaw.com, 193 Blue Ravine Road, Suite 255, Folsom, California 95630, (916) 353-1084, armstrong@rosettelaw.com, for defendants/cross-and counter-claim plaintiffs-appellants 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 Chukchansi Indians, Reggie Lewis, Chance Alberta, and Carl Bushman.

Schindler Cohen & Hochman LLP, 100 Wall Street, 15th Floor, New York, New York 10005, (212) 277-6300, sschindler@schlaw.com, for defendants/cross- and counter-claim plaintiffs-appellants 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.

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***1** Defendants/Counter- and Cross-Claim Plaintiffs/Appellants 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 (“Lewis”), Chance Alberta (“Alberta”), and Carl Bushman (“Bushman” and collectively, the “Lewis Parties”) appeal from the December 2, 2013 Decision and Order (the “December 2 Order”) of Justice Melvin L. Schweitzer, Part 45 of the Supreme Court of the State of New York, New York County, Commercial Division (the “Trial Court”), which (i) denied the Lewis Parties' motion to modify the Trial Court's Order dated July 2, 2013 (the “PI Order”); (ii) denied the Lewis Parties Order to Show Cause (the “Injunction Motion”); (iii) granted the motion of Plaintiff/Respondent Wells Fargo Bank, N.A (“Wells Fargo” or the “Trustee”) to dismiss the Lewis Parties' counterclaim against the Trustee; and (iv) granted the motion of 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 (“Ayala”), Tracey Brechbuehl (“Brechbueh”), Karen Wynn (“Wynn”), and Charles Sargosa (“Sargosa” and collectively, the “Ayala Faction”) to dismiss the Lewis Parties' cross-claims ***2** against them. For the reasons set forth below, the Lewis Parties request that this Court reverse, in part, the December 2 Order and remand this action to the Trial Court for further proceedings.

PRELIMINARY STATEMENT

This action arises from an illegal and purported takeover of the Tribal Council of the Tribe of Picayune Rancheria of Chukchansi Indians (the “Tribal Council”) and the Board of the Chukchansi Economic Development Authority (the “CEDA Board”) and forcible seizure of the Chukchansi Gold Resort and Casino (the “Casino”), which is owned by the Tribe of Picayune Rancheria of Chukchansi Indians (the “Tribe”), by a small faction of the Tribe, comprised of Defendants/Respondents Ayala, Wynn, Sargosa, and Brechbuehl.

In the aftermath of the Ayala Faction's illegal coup, by its PI Order, the Trial Court granted Wells Fargo's motion for a preliminary injunction enjoining various breaches of the Indenture between CEDA and the Trustee, dated May 30, 2012 (the “Indenture”) caused by the Ayala Faction's coup (including, but not limited to, the Ayala Faction's ongoing failure to deposit Casino revenues into the appropriate bank accounts). Because the Lewis Parties considered the Ayala Faction's conduct to be illegal and to constitute material breaches of the Indenture, they did not object to much of the injunctive relief sought by the Trustee and granted by the Trial Court. However, the PI Order contained language - included over the ***3** objection of the Lewis Parties - suggesting that the Ayala Faction could disperse Casino revenues for its own benefit under the rubric of “Excluded Assets,” a defined term under the Indenture. The Trial Court permitted the disputed language based on the entirely false representations of counsel for the Ayala Faction and the Trustee that such payments would not be made.

It quickly became apparent that the PI Order dramatically - and improperly - altered the status quo ante by permitting these payments and by transferring the legitimate CEDA's control of the Tribe's Casino-related bank accounts to the Ayala Faction's handpicked Casino Manager. The Trial Court's decision to alter the signatories to the bank accounts, *which it undertook sua sponte, over the objection of the Lewis Parties and without the benefit of any evidentiary hearing and without any findings*

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appropriate for such injunctive relief combined with the disputed “Excluded Assets” language, had the unintended effect of drastically affecting and altering the Tribal governance dispute by granting the Ayala Faction the new ability to abscond with millions of dollars from the Casino to fund its blatantly illegal and unrecognized government, while simultaneously starving the legitimate Lewis Parties' government of its right to Casino-derived revenues.

The Lewis Parties filed their motion to modify the Order (the “Motion to Modify”) after it became apparent that the Ayala Faction as abusing the PI Order *4 to siphon millions of dollars from the Casino. By enabling the funding of the illegal government, the effect of the Order was directly contrary to the Trial Court's stated intent of avoiding any rulings concerning or impacting the Tribal dispute. In light of these unintended and drastic effects, and in light of the Trial Court's order permitting such conduct without the benefit of any evidentiary hearing or findings sufficient to enable such injunctive relief, the Trial Court's December 2 Order denying the Motion to Modify represents a remarkable abuse of discretion. Indeed, the Trial Court's error in allowing the Ayala Faction to abscond with Casino revenue is clear in light of a recent decision by the Bureau of Indian Affairs (“BIA recognizing a Tribal Council led by Appellant Reggie Lewis as the lawful Tribal government).

The Trial Court's December 2 Order should also be reversed because the Trial Court erroneously dismissed the Lewis Parties' counter- and cross-claims for declaratory judgment confirming the legitimate CEDA's rights and obligations under the Indenture and confirming the true identity of CEDA thereunder.¹ Because the Ayala Faction, not the legitimate CEDA, has been exercising CEDA's rights under the Indenture, declaratory judgment identifying the proper parties to the Indenture is crucial to eliminate ongoing breaches thereof. The Trial Court's December 2 Order dismissed the Lewis Parties' declaratory judgment claim on the *5 grounds of lack of subject matter and personal jurisdiction. But, in light of the Trial Court's assertion of jurisdiction to address the Trustee's claims related to breaches of the Indenture, the Trial Court's decision betrays an inappropriately one-sided approach. The Trial Court completely ignored the fact that the Indenture is a contract between the Issuer (i.e., CEDA or the “Authority”) and the Trustee and, therefore, all the parties to this contract - including the Authority (CEDA) have important rights pursuant to the Indenture.

The Trial Court's December 2 Order is plainly erroneous because the Trial Court unquestionably has jurisdiction to enforce the Indenture, but it cannot do so without determining who the proper parties to the Indenture actually are. Just as the Trial Court has the jurisdiction to remedy breaches of the Indenture that affect the rights of the Trustee, so too must it have jurisdiction to address any impairments to the rights of the Issuer.

The doctrine of sovereign immunity and the fiduciary shield rule also do not prevent the Trial Court from exercising its jurisdiction. The Trial Court's cursory ruling ignores that (i) in the Indenture, all subparts of the Tribe - which necessarily include the Ayala Faction - unambiguously waived sovereign immunity and consented to personal jurisdiction for precisely these types of claims; (ii) the members of the Ayala Faction were not acting as legitimate government officers, and so sovereign immunity is inapplicable as to them; and (iii) the fiduciary shield *6 doctrine is barred by New York law, and so Ayala cannot escape personal jurisdiction thereunder.

Finally, the Trial Court's December 2 Order blatantly ignored the recent resolutions of the General Council of the Tribe - all qualified voters and not some disputed Tribal faction - confirming the identity of CEDA and the Court's power to enforce this determination. The Tribe's General Council resolutions on the matter should have been a significant consideration of the Trial Court because the Indenture's existence and the Court's jurisdiction over it derive solely from an identical General Council resolution that was adopted at a General Council meeting that took place on March 10, 2012.

QUESTIONS PRESENTED

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1. Did the Trial Court abuse its discretion by altering the status quo ante when it ordered a preliminary injunction requiring the change of signatories to relevant bank accounts without an evidentiary hearing and without any findings of irreparable harm or any other determination that the equities required such a change?

2. Did the Trial Court abuse its discretion by granting, in a preliminary injunction order, new rights to an Indian tribe's illegal, unrecognized government without the demonstration of the prerequisites to granting a preliminary injunction, including irreparable harm and likelihood of success on the merits?

*7 3. Did the Trial Court abuse its discretion by granting a preliminary injunction that resulted in ongoing violations of the federal Indian Gaming Regulator Act ("IGRA"), state law and Tribal law?

4. Did the Trial Court err when it dismissed a claim for declaratory relief concernin the parties' rights in a contract on the grounds of lack of subject matter and personal jurisdiction where the Indian tribe waived sovereign immunity and consented jurisdiction with respect to any claims arising out of the contract?

STATEMENT OF RELEVANT FACTS

A. Background And Facts Leading To The Present Dispute

I. Background Of The Tribe

In 1906 the federal government set aside parcels of land, called rancherias, for the benefit of Native Americans in California who lived outside of reservations or who liv reservations not suitable for cultivation, including the Tribe. (A. 348.) Pursuant to this act, the Picayune Rancheria of Chukchansi Indians, was establishec in 1912. (Id.)

After over fifty years, in 1958, Congress enacted the California Rancheria Act, which effectively terminated the Tribe's status as a federally recognized Indian tribe. (A. 348) Pursuant to the Act, the BIA approved a plan for the distribution of the Picayune Rancheria's assets amongst three individuals: Nancy Wyatt and her two children, Gordon Wyatt and aryan Ramirez (who also *8 received the land in her capacity as the administrator of the estate of Nancy Wyatt). (Id.)

In 1979, 36 of the previously terminated rancherias, among them the Picayune Rancheria, filed an action encaptioned *Hardwick v. United States*, No. 79-1710 (N.D. Ca.), which sought restoration of their federal recognition as Indian tribes. (A. 349.) In 1983, the parties to the *Hardwick* action filed a stipulation for entry of judgment (the "1983 Stipulation") pursuant to which the members of the rancheras were restored as Indians under the laws of the United States and the rancherias were reco as Indian entities with the same status that they possessed prior to their dissolution under the California Rancheria Act. (Id.) Following the 1983 Stipulation, the BIA again recognized the Tribe and began working with Maryan Ramirez, the sole living distributee of the Picayune Rancheria's assets, and after Ramirez's death, her heirs, to reorganize the Tribe. (Id.)

On October 22, 1988, the Tribe adopted its Constitution - which was formally approved and recognized by the BIA on February 14, 1989. (A. 349) In 1989, the Tribe enrolled more than 600 citizens. (Id.) Today, the Tribe's enrollment consists of approximately 900 members. (Id.)

*9 2. Background To The Indenture

The Tribe currently operates its government pursuant to the Constitution adopted in 1988, ordinances, regulations, policies, customs, traditions and bylaws. (A. 601.) Pursuant to the Constitution, the seven-member Tribal Council is delegated broad governing authority, including the authority to adopt ordinances for the Tribe. (Id.)

On or about June 15, 2001, the Tribal Council passed Resolution # 2001-11, which enacted an ordinance establishing and governing CEDA (the “CEDA Establishing Ordinance”). (A. 601) Pursuant to the CEDA Establishing Ordinance, the CEDA Board is comprised of the sitting members of the Tribal Council. Thus, the members of the CEDA Board and the Tribal Council are identical. (Id.) The CEDA Establishing Ordinance granted CEDA the power to, among other things, own and operate the Casino, which opened in 2003. (Id.)

In addition, to ensure compliance with (i) IGRA, [25 U.S.C. § 2701, et seq.](#); (ii) Minimum Internal Control Standards established by the National Indian Gaming Commission (“NIGC”), the regulatory body of IGRA; (iii) a compact with the State of California pursuant to the IGRA (the “Compact”); (iv) the Tribe’s Tribal Gaming Ordinance (the “Tribal Gaming Ordinance”); and (v) other related regulations, the Tribe, in or about 2003, established the Tribal Gaming *10 Commission (the “TGC”), an independent regulatory body required by both the Compact and IGRA.

Prior to the instant dispute and drafting of the related Indenture, in 2005, CEDA issued bonds to build the Casino, which were due beginning in 2012 (the “Old Notes”). (A. 2210.) In early 2012, CEDA was in payment default under the Old Notes. (Id.) In addition to the looming maturity date, a Tribal government dispute arose much like the current dispute, with two groups claiming to represent the governing authority of the Tribe - the Tribal Council led by Reggie Lewis and a faction led by another Tribal Council member, Morris Reid (the “Reid Faction”) - both claiming authority over the Tribe and CEDA. (Id.)

Due to the Tribal dispute, the Tribe and CEDA effectively became paralyzed, unable to cure defaults under the Old Notes or negotiate their restructure. (Id.) The Tribal Council split also threatened the long-term viability of the Casino, and a disruption in the distribution of Tribal government benefits became imminent. (Id.)

With the assistance of the Trustee, as the trustee for the bond holders, and Latham & Watkins as its legal counsel, the General Council established a quorum of the General Council on March 10, 2012 (the “2012 General Council Meeting”) - the first time in the Tribe’s twenty-five year history that a General Council Meeting quorum had been established. (A. 2211.)

*11 Once a quorum was established, the General Council enacted several General Council Resolutions (i) recognizing the Tribal Council led by Chairman Lewis over that led by Morris Reid (the “2012 Lewis Tribal Council”); (ii) authorizing the 2012 Lewis Tribal Council to negotiate and enter into the Indenture with the Trustee; and (iii) authorizing the 2012 Lewis Tribal Council to appropriately waive the Tribe’s and CEDA’s sovereign immunity from suit to grant specific courts’ jurisdiction over the Indenture, and specifically, the action pending before the Trial Court (the “2012 General Council Resolutions”). (A. 2210; A. 2045-2047; A. 1068-1083; A. 143-145.)

General Council Resolution # 2012-001 further authorized the 2012 Lewis Tribal Council to execute restructuring documents, pursuant to which CEDA executed various agreements memorializing the issuance of \$250 million in debt, including the indenture, between Wells Fargo, as Trustee, CEDA and the Tribe. (A. 2211; A. 2231; A. 78; A. 2451.)

After enactment of the 2012 General Council Resolutions, and because, and in recognition, of the authority granted the 2012 Lewis Tribal Council by those actions, the Trustee entered into the Indenture with CEDA and the Tribe to refinance the Old Notes. (A. 2212.)

Further, the NIGC has also effectively recognized the resolution process when making decisions regarding the regulation of the Casino. (Id.) For example, *12 the NIGC issued a “Declination of Jurisdiction” letter noting no legal issues regarding the 2012 General Council Resolutions, which enabled the Tribe to execute the Indenture. (A. 2211; see A. 2127-2128.)

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Finally, the BIA affirmed the General Council resolution process, as it recognized the Tribe's December 2012 election, which was conducted under the leadership of the Tribal Council that only existed because of the 2012 General Council Resolutions. (A. 2212; A. 818; A. 494-498.)

3. Relevant Regulations And Agreements

Gaming activities conducted and regulated by the Tribe must do so in compliance with all applicable gaming laws (the "Gaming Laws"), which include but are not limited to: the Tribe's Compact with the State of California, IGRA, and the Ordinance. (A. 649.)

4. Council Membership Prior To The Present Tribal Dispute

The present Tribal dispute arose from the attempted coup d'etat at a business meeting of the Tribe on February 21, 2013 orchestrated by a small group of Wyatt and Ramirez family members led by then-Chairwoman Ayala. The Tribal Council conducts staggered elections, with each Tribal Council seat coming up for election every two years; thus, three of the Tribal Council's seven seats were up for election in 2012. (A. 2212-2213.) After the Tribal Council election was held on December 1, 2012, Ayala was one of the three members elected. (A. 2213.) Thereafter, the *13 Tribal Council elected Ayala as Chairwoman, and Reggie Lewis as Vice Chairman of the Tribe. (Id.)

One month later, on January 24, 2013, at a duly called, noticed and convened Tribal Council/Administration Meeting, in response to allegations of violations of various Tribal rules and regulations, the Tribal Council (including Ayala) voted unanimously (5 for, 0 against, and 2 absent and excused for cause) to suspend Wynn and Brechbuehl. (A. 2213-2214.) As a result, the Tribal Council, on January 24, 2013, had five active members, and these five members conducted the business of the Tribe and CEDA.

5. The Ayala Faction's Coup

In 2012, more than 20 years after the Tribe's Constitution was adopted and hundreds of individuals were re-enrolled in the Tribe, 46 of the Tribe's members and descendants of Maryan Ramirez, who are also affiliated with the Ayala Faction, sought to disenroll hundreds of Tribal members by filing a "Motion to Enforce Judgment" in the Hardwick action. (A. 349; A. 2214.) In that motion, the Ramirez descendants sought a court order declaring that, under the 1983 Stipulation, only the descendants of Maryan Ramirez were authorized to formally organize the Tribe and establish Tribal leadership. (A. 350.) This disenrollment effort by the Ramirez descendants was an attempt at a bald money-grab: the Ramirez descendants hoped to consolidate the distributions of the Casino revenues *14 into the hands of approximately 5 percent of the Tribe's members. (Id.) This motion was rejected on the grounds of untimeliness and the merits. (Id.)

In the wake of the *Hardwick* decision, refusing to accept the District Court's ruling, at a business meeting of the Tribe attended by the five active members of the Tribal Council, Ayala and members of her family attempted to summarily oust the legitimately elected Tribal Council, including Lewis, Alberta, Bushman, Sargosa, and suspended Council members Wynn and Brechbuehl. (A. 2214-2215.) Specifically, at the February 21, 2013 meeting, Ayala unilaterally and illegally accepted a petition, which she claimed was a "referendum" pursuant to Article XI of the Tribe's Constitution, that had been signed by only 14 Tribal members, all of whom were also members of Ayala's extended family. (A. 350-351.) According to Chukchansi Tribal law, for a referendum to be valid, it must be signed by 30 percent of the Tribe's qualified voters, but the referendum unilaterally accepted by Ayala at the meeting was signed by only 14 of the Tribe's approximately 750 qualified voters, clearly nowhere close to the 30 percent threshold. (A. 2217.)

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Lewis, Alberta and Bushman, three of the five Tribal Council members then entitled to vote (a majority), voted to table the matter, as it was not properly brought, and then voted against the referendum, as it did not comport with Tribal law. (Id.) Ayala, ignoring the decision of the majority of the Tribal council members, nevertheless unilaterally declared that the referendum had passed and *15 summarily purported to dismiss all Tribal Council members other than herself. (Id.) Faced with threats of violence from Ayala and her family, the four remaining active members of the Tribal Council, Lewis, Sargosa, Alberta, and Bushman (a majority of the Tribal Council), voted to suspend Ayala for gross misconduct and violations under the Tribe's Constitution and other Tribal rules and ordinances. (A. 2215; A. 638-639.)

At around the same time, Ayala and members of her family, with the help of her cousin Ted Atkins, Ayala's "Director of Security at the Casino," seized control of the Tribal government compound and the Casino by force. (A. 2216.) 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.)

Ayala illegally attempted to appoint members of her family to the six other seats on the Tribal Council. (A. 2216.) Ayala then sent a notice on February 21, 2013 to the BIA, falsely informing it that there had been a change in the makeup of the Tribal Council. (A. 2216; A. 640.) By February 24, 2013, Ayala had brokered deals with suspended Tribal Council members Wynn and Brechbuehl and purported to unilaterally lift their suspensions and appoint them to her false council. (A. 2217.)

*16 As a result of the Ayala Faction's illegal coup attempt, there are now two entities claiming to be CEDA: the legitimate, duly authorized CEDA, led by Chairman Lewis, and the illegal entity purporting to be CEDA, led by Ayala and consisting of members of the Ayala Faction. (Id.)

Subsequent to the coup, the Ayala Faction's security forces continued to remain in physical control of the Casino and government facilities, and the faction set up a sham gaming commission to regulate the Casino. (A. 357.) The Ayala Faction immediately began exploiting its control of the Casino for its own benefit and in derogation of the Tribe's and CEDA's obligations under the Indenture and related transaction documents. (A. 2219.)

Specifically, one week after seizing control of the Casino, on February 28, 2013, the Ayala Faction ordered its newly-appointed Casino Manager, Giffen Tan, to discontinue depositing Casino funds into the Rabobank operating account, as required by Section 4.25 of the Indenture, and instead elected to hoard cash in the Casino cage. (Id.) It is notable that Giffen Tan was unqualified to serve as the Casino's General Manager, given that he had never served in such position in any Casino. (A. 2221.) In addition, purporting to act on behalf of CEDA, the Ayala Faction terminated numerous Casino employees and replaced them with individuals loyal to the faction. (A. 2821.)

*17 Despite the fact that the Ayala Faction had more than sufficient funds to make CEDA's interest payments, it refused to make deposits into the Rabobank account in relation to the interest payment due on March 30, 2013, as required under Section 6.1 (2) of the Indenture. (A. 2220.)

6. Status Of The Casino And Tribal Accounts After The Coup

In the midst of the intratribal dispute, both the legitimate Lewis Council, consisting of Lewis, Bushman and Alberta (the "Lewis Council"), and the Ayala Faction had instructed Rabo bank as to who should be the recognized signatories on the Tribe's accounts. (A. 2218.) Rabobank ultimately recognized that the Tribal Council consists of Alberta, Sargosa, Bushman, Lewis, Ayala, Brechbuehl, and Wynn, but because the Council had suspended Ayala Brechbuehl and Wynn, Rabobank determined such individuals would not be allowed signatory authority on any of the Tribe's accounts. (A. 616.) Shortly after Rabobank's decision, Sargosa attempted, in violation of CEDA protocol, to wire transfer three million dollars (\$3,000) out of a Rabobank account. (A. 2218-2219.) Sargosa's action resulted in Rabobank removing him as a signatory on any Rabobank account. *Thus,*

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at the time the Trustee brought this action, the status quo was that only the Lewis Parties (Lewis Alberta and Bushman) were authorized signatories on the CEDA Rabobank accounts.

*18 Following the Ayala Faction's hostile coup, no federal or state government agency, court or entity (other than the Ayala Faction's own self-serving, purported tribal court) has recognized the Ayala Faction as the legitimate government of the Tribe. Indeed, the legitimate Tribal Court, ruled on August 6, 2013 that the Lewis Council and CEDA Board, along with the Lewis Council's appointed TGC, were the legitimate governmental entities. (A. 621.) This determination is also in direct conflict with a recent decision by the BIA stating that it will only recognize the last uncontested Tribal Council, elected December 2010, which consists of a Council led by Appellant Reggie Lewis. See BIA Ltr. (Feb. 11, 2014).

The only reason the Ayala Faction can even purport to be the government is that it physically seized control of the government buildings and the Casino on February 21 with the aid of armed guards. (A. 605.) It maintains control of these facilities only by means of armed security forces (some of whom are known gang members with criminal records) and continued threats of violence. (Id.)

7. The Ayala Faction's Failure To Deposit Monies In Proper Accounts

In addition to setting up rival, illegitimate Tribal governing bodies, the Ayala Faction caused CEDA to commit numerous breaches of the Indenture, including many of the breaches that were the subject of the Trustee's Complaint filed in this action. (A. 358.) Those breaches include repeatedly refusing to make interest payments due under Section 6.1(2) of the Indenture, despite being in *19 control of sufficient funds from Casino revenues to do so. (Id.) Additionally, in violation of the Security Agreement that requires CEDA to deposit cash from the Casino only into accounts over which the Trustee has control (i.e. the Rabobank account), the Ayala Faction transferred millions of dollars of Casino revenues into new and unauthorized accounts at Bank of America and Westamerica. (Id.)

B. The Proceedings Below

1. Wells Fargo's Action And The PI Motion

Faced with the numerous ongoing breaches of the Indenture and other transaction documents caused by the Ayala Faction, Wells Fargo sought a preliminary injunction (i.e., the PI Motion) to prevent further irreparable harm. (A. 2699-2751.) The relief sought by Wells Fargo, in addition to relief sought directing certain transfers from the Ayala Faction's bank accounts at Bank of America, West america and Global Cash Access to the Rabobank Operating Account, includes, inter alia:

i. Preliminarily enjoining CEDA, the Tribe, Ayala, Brechbuehl, Sargosa, Wynn, Lewis, Alberta, and Bushman (collectively the "Individual Defendants") from maintaining Casino revenues and cash, with certain limited exceptions, in the cage of the Casino or anywhere other than in an account subject to an Account Control Agreement with the Trustee;

ii. Directing CEDA, the Tribe and the Individual Defendants to deposit, on an ongoing basis at least once per week, the Casino's revenues and cash into CEDA's Operating Account at Rabobank; and

*20 iii. Directing CEDA to provide financial statements to the Trustee and the Holders.

(Id.)

In addition, the Complaint filed by Wells Fargo alleged various causes of action against CEDA, the Tribe and the Individual Defendants, including, inter alia:

- i. Breach of contract for failure to deposit Gross Revenues and Revenues in Cash into the Rabobank Operating Account;
- ii. Failure to enter an account control agreement in relation to the Ayala Faction's account at Bank of America; and
- iii. Failure to make the interest payment required under Section 6.1(2) of the Indenture.

(A. 330-332.)

2. Defendants' Responses To The PI Motion

In response to Wells Fargo's PI Motion, the Lewis Parties supported a modified preliminary injunction. (A. 29-31.) In particular, the Lewis Parties supported the issuance of a preliminary injunction requiring the Ayala Faction to adhere to the terms of the indenture, by, among other things, depositing funds into the Rabobank Operating Account and making the required interest payments. (A. 2711-2712.) Furthermore, to preserve the *status quo* between the parties, the Lewis Parties requested that the Trial Court require that all funds be first deposited into the Rabobank Account as provided for in the Depository Account Control *21 Agreement (the "DACA") and directing that Rabobank maintain the authorized signatories at the time to CEDA's Operating Account at Rabobank, which, as explained supra, consisted of Lewis, Alberta and Bushman. (A. 2221-2222.) The Lewis Parties explained to the Trial Court that maintaining such *status quo* was crucial to create a check against the Ayala Faction's otherwise unfettered power over the Casino funds and the abuse and self-dealing that was resulting from such power. (A. 2702-2703.) The Lewis Parties further explained that they were prepared to cooperate to pay all legitimate Tribe and Casino expenses and make all payments under the indenture and transaction documents. (A. 2705-2708.)²

The Ayala Faction also supported a modified PI Order. (See A. 2699-2751.) The Ayala Faction sought modification to the preliminary injunction sought by Wells Fargo to provide its Casino manager Giffen Tan with access to the Tribe's Rabobank Operating Account. (See A. 2705-2706.) The Faction falsely alleged that if its unlawful Casino manager did not have access to the Rabobank Operating Account, the Casino would not be able to pay its normal operating expenses and would be forced to either reduce its operation or stop operating all together.

*22 3. At The July 2 PI Hearing, The Lewis Parties Sought To Ensure Excluded Assets Would Be Paid According To The Indenture

"Excluded Assets" is a defined term in the Indenture, referring to certain Casino or CEDA assets and/or revenues that are excluded from Casino revenues. (A. 2253-2254.) At issue in the Lewis Parties' response to the PI Motion is the provision in the Excluded Assets definition that permits CEDA to make Monthly Tribal Distributions (provided that certain preconditions are met), each of which are permitted to be \$1 million. (A. 30.)

Without any oversight by the Lewis Parties, it seemed likely that the Ayala Faction could use the Excluded Assets concept to siphon off Casino revenues prior to depositing money into the Rabobank Operating Account. The Lewis Parties, therefore, requested a modification of the proposed preliminary injunction order submitted by the Trustee. (A. 23.) Specifically, the Lewis Parties requested a modification of Paragraph 1 of the PI Order, which provides:

CEDA and the Tribe shall maintain the Gross Revenues and Revenues and Cash of CEDA, other than Operating Cash and Gross Revenues that constitute Excluded Assets, in CEDA's operating account at Rabobank, account number XXXXXXXXXX (the "Rabobank Operating Account").

(A. 1725.) At the July 2, 2013 hearing on the Trustee's PI Motion (the "PI Hearing"), counsel for the Lewis Parties requested that, after the term "Excluded Assets," a parenthetical be added stating "*to the extent that both factions agree that *23 those are properly [E]xcluded [A]ssets. .*" (A. 2712.) As counsel explained at the hearing, inclusion of this parenthetical was necessary to preserve the status quo and to ensure that the Lewis Parties had an opportunity to object to any payments "to the extent that the Ayala Faction wants to designate money for itself." *Id.*

In response to the concerns raised at the PI Hearing, counsel for the Ayala Faction, Lester Marston, unambiguously stated that the Trial Court need not include such a parenthetical because the terms of the Indenture bar the Ayala Faction from skimming off Casino revenues prior to depositing money in the Rabobank Operating Account. (*Id.*) Specifically, Mr. Marston stated that:

The tribe doesn't get any money under the [I]ndenture.... *So opposing Counsel's statement that the tribe is going to somehow take the money first, you know, before making for itself before it deposits in the operating account, is just wrong. And obviously, if the Ayala Faction or Lewis Faction, or anybody else tried to do that, it would be a violation of the [Indenture to the DACA [sic], and Wells Fargo will immediately be coming, running into the Court and saying, your Honor, they are not putting all the money in the account that they are supposed to be putting in the accounts.*

(A. 2713 (emphasis added).) The Trustee's counsel was almost equally insistent that its proposed preliminary injunction order would not permit the Ayala Faction to secrete money:

There's no issue with respect to whether the personal property of the Tribal Gaming Commission is going to be *24 deposited into the Rabobank account. That's not an issue here. So we think that this is much adieu [sic] about nothing and that the terms of the [I]ndenture speak for themselves here. And it's absolutely true, your Honor, if there are disputes that arise, just as if there are disputes that arise with respect to payments that are going out, those can be raised with a meet and confer, and if there are issues between the factions with respect to those, or with respect to the - or with the trustee, which, again, has no dog in the fight other than to want to ensure that the indenture is complied with, that that can be brought to the Court's attention.

(A. 2714-2715.)

4. The PI Order Altered The Status Quo Ante

Based on the Ayala Faction's and Trustee's misrepresentations, the Trial Court issued its PI Order. (A. 1721) In the PI Order, the Trial Court was clearly satisfied that, so long as the Lewis Parties received cash flow reports of all Casino revenues, it need not include the parenthetical requested by the Lewis Parties. (A. 2714-2717.) Accordingly, the PI Order did not include the parenthetical. (A. 1725.)

Critically, the Trial Court also decided, over the Lewis Parties' objection, sua sponte, to replace the Lewis Council members with the Ayala Faction's newly-installed and hand-picked Casino manager, Giffen Tan, as signatory on the Tribe's Rabobank accounts. (A. 1726.) The Trial Court did so based on the theory that Tan would act in accordance with his purported fiduciary duties in a neutral, independent fashion, favoring neither side. (A. 2707-2708.) However, the Trial *25 Court's decision was not bolstered by any documentary evidence or testimony. Further, the Trial Court made no findings as to why this material change was necessary to effectuate the preliminary injunction or otherwise appropriate in light of the Tribal governance dispute as to control of the Casino. The Trial Court's decision to grant this authority to Giffen Tan was also disconcerting because the Lewis Parties presented un rebutted evidence that he was entirely unqualified to act as the Casino's Manager. (A. 1726; A. 2722.)

5. The Lewis Parties' Counterclaim And Cross-Claims

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On July 19, 2013, the Lewis Parties filed their Answer, Affirmative Defenses, Counter-Claim and Cross Claims (A. 2205), denying the allegations in the Complaint as to the Lewis Parties and asserting, inter alia, that the Ayala Faction instead caused such breaches, and alleging a counterclaim and cross-claims for (i) tortious interference with the legitimate CEDA's contract against Ayala, Brechbuchl, Wynn, and Sargosa (collectively, the "Ayala Individuals"), and the Ayala Faction, for interfering with the legitimate CEDA's rights under the Indenture; (ii) declaratory judgment as to the Trustee, the Ayala Faction and the Ayala Individuals, seeking a judgment that the legitimate CEDA led by Lewis is the Issuer under the Indenture; and (iii) violations of the federal RICO statute as to the Ayala Individuals. (A. 2205.)

***26 6. In The Aftermath Of The PI Order The Ayala Faction Continues To Pilfer Casino Funds Under The Guise Of Excluded Assets**

In 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 for blatant political purposes. (A. 808.) The Ayala Faction effectively received Tribal funds on an unsupervised basis and disbursed them in a discriminatory and partisan manner - or misappropriated them altogether. (A. 659.)

For example, on July 19, 2013, the Lewis Parties learned of a \$1 million cash payment to "CEDA" from the Casino cage. (A. 28.) The payment was not distributed from the Rabobank Operating Account or made to any agreed-upon entities listed in Exhibit A to the PI Order, the list of Trial Court-approved vendors. (Id.)

7. The Trial Court Refused To Modify The PI Order After Considerable Delay

To prevent the Ayala Faction from further absconding with Casino revenues, on July 29, 2013, the Lewis Parties brought their Motion to Modify the Court's Order. (A. 23.) In particular, that motion sought to halt the practice of the Casino Manager Giffen Tan, who the Court believed would function as an independent fiduciary, from allowing the Ayala Faction to remove millions of dollars in cash from the Casino cage without first depositing it into the Rabobank Operating *27 Account. In particular, that Motion clearly explained that until the Trial Court made a determination as to the proper CEDA, no Excluded Asset payments could be made under the Indenture. (A. 33-34.)

Despite the urgency demonstrated in the Motion to Modify, while that Motion was sub judice before the Trial Court, the Lewis Parties learned that in July alone, the Ayala Faction secreted up to \$2.2 million from the Casino without first depositing the funds in the Rabobank Operating Account. (A. 605.) The Lewis Parties again brought this misuse of funds to the Trial Court's attention by way of the October 11, 2013 Injunction Motion. (A. 2763.) That motion explained that, without asking for any direction from the Court or approval by the Lewis Parties, the Casino manager simply handed money to the Ayala Faction's fraudulent TGC and CEDA under the pretense that these amounts were Excluded Assets. (A. 2768-2769.)

Despite the emergency created by the Ayala Faction's siphoning of funds, the Trial Court did not rule on the Motion to Further Modify until it issued the December 2 Order, which flatly denied the evenhanded approach sought by the Lewis Parties (A. 18-19), and which they now appeal.

Furthermore, the December 2 Order dismissed, in their entirety, the Lewis Parties' counterclaim and cross-claims with only cursory rationale. (A. 17.) In the brief, six sentence paragraph, the Trial Court explained that the Lewis Parties' *28 counterclaim and cross-claims "require[] the court to determine which faction is the legitimate CEDA and Issuer of the Indenture," which it baldly claimed to be a "tribal dispute" that "fall[s] within the exclusive jurisdiction of tribal institutions." (A. 18.)

ARGUMENT

1. The Trial Court Abused Its Discretion In Failing To Modify The PI Order To Bar Excluded Assets Payments And/ Or Restore The Status Quo Ante

A. The Trial Court Improperly Determined The Parties' Ultimate Rights Without An Evidentiary Hearing

The purpose of a preliminary injunction is to maintain the status quo pending a hearing on the merits, rather than to determine the parties' ultimate rights. *360 W. 11th LLC v. ACG Credit Co. II, LLC*, 46 A.D.3d 367, 367 (1st Dep't 2007). Here, one of the most fundamental rights accruing from the Indenture is CEDA's sole right to transfer certain funds from the Casino to the Tribal government for the purposes of making a Tribal Distribution. (A. 2253; A. 2295.) Nevertheless, the Trial Court, without any evidentiary hearing, altered the status quo and handed CEDA's exclusive rights to utilize Excluded Assets to a rogue group operating as unrecognized government. (A. 1726.) When the impact of the Trial Court's PI Order became apparent, the Trial Court refused to modify the order. This was an abuse of discretion.

*29 1. The Trial Court Improperly Altered The Status Quo

A court should not upset the status quo via a preliminary injunction absent a finding of irreparable harm. See *Residential Bd. of Managers of the Columbia Condo. v. Alden*, 178 A.D.2d 121, 122 (1st Dep't 1991) (reversing trial courts preliminary injunction order for failing to “maintain the status quo until there can be a full hearing on the merits”); *O?ara v. Corporate Audit Co.*, 161 A.D.2d 309, 310 (1st Dep*t 1990) (trial court abused discretion in granting preliminary injunction, which “upset[, rather than maintained], the status quo”); *Wheaton/TMWFourth Ave., LP v. NYC. Dep 7 of Bldgs.*, 65 A.D.3d 1051, 1052 (2d Dep't 2009) (“the preliminary injunction, as issued, was improper since it did not maintain the status quo, but had the practical effect of granting the petitioner the ultimate relief it seeks in the underlying proceeding”); *N.Y. Auto. Ins. Plan v. N.Y.Sch. Ins. Reciprocal*, 241 A.D.2d 313, 315 (1st Dep't 1997) (reversing the trial courts issuance of a preliminary injunction because “[t]he injunction here dramatically altered, rather than maintained, the status quo existing between the parties”). Nevertheless, without any hearing on, or analysis of, the manner in which the Trustee requested relief would affect CEDA's rights under the Indenture or the balance of power within the Tribe, the Trial Court proceeded to significantly alter the *status quo ante*. It compounded its error when it refused to remedy the situation it had created.

*30 Prior to the Trial Court's PI Order, the status quo was that the Ayala Faction had seized the Casino in a ludicrously illegal coup and was hoarding cash in the Casino cage. (A. 360.) The Ayala Faction was not depositing Casino-generated revenue into CEDA's bank accounts, as required by law (*id.*), because two members of the Lewis Council were the signatories on the CEDA accounts at Rabobank.

The PI Order altered this scenario. Without any evidentiary hearing, the Trial Court removed the Lewis parties as the signatories on CEDA's Operating Accounts and instead, *sua sponte*, gave signing authority to the Ayala-appointed Casino manager - on the wholly unfounded theory (indeed, there was no supporting evidence) that he would act as an independent, neutral fiduciary.³ At the hearing, counsel for the Lewis Parties requested that, if the Court was going to remove them as signatories to the Rabobank Operating Accounts, the PI Order should bar the Ayala Faction from unilaterally siphoning “Excluded Assets” from the Casino. (A. 2712.) As described above, based on, in part, the false assurances of the Ayala Faction's counsel and the Trustee's counsel, the Court opted to do nothing to bar removal of Excluded Assets.

The Trial Court's actions constituted a significant alteration to the balance of *31 power within the Tribe. By virtue of the PI Order, the Trial Court created for the Ayala Faction the newly unfettered right to transfer Casino assets - *i.e.*, “Excluded Assets” - to its government for the purposes of making Tribal Distributions at its sole discretion almost exclusively to those

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Tribal members that supported its illegal coup. As a result, the rogue Ayala Faction was now, for the first time, able to fund its takeover and deliver patronage to its supporters. (A. 2769; A. 809.)

The Trial Court had other options. Indeed, had the Trial Court simply opted to preserve the status quo (i.e., maintain the Lewis Parties as signatories to the Rabobank Accounts), the Trial Court would have ensured an evenhanded approach that would not prematurely impact the Tribal governance dispute. Further, when it became apparent that the Ayala Faction was illegally funding itself by siphoning millions of dollars under the guise of “Excluded Assets,” the Trial Court was obligated to modify the PI Order to ensure that no further change in the parties' respective positions occurred. However, by refusing to do so, the Trial Court, in essence, set in motion a slow dismantling of the legitimate Tribal government by depriving it of funds and instead granting those funds to the illegal government.⁴ This, in turn, had the effect of nullifying prosecution of this action to its completion. This was clearly an abuse of discretion. *See, e.g., Residential Bd. of Managers of the Columbia Condo., 178 A.D.2d at 122* (reversing preliminary *32 injunction because such order “obviated the necessity for plaintiff to prosecute this action to completion”).

2. The Trial Court's Refusal To Modify The PI Order Was Inconsistent With The Court's Non-Recognition Of The Ayala Faction's Government

Under the Indenture in the circumstances applicable here, the term “Excluded Assets” is defined as “assets transferred by *the Authority* or either of the Guarantors to a Person other than the Authority or either of the Guarantors in transactions not prohibited by Section 4.9 [which, subject to certain conditions, includes the monthly Tribal Distribution]...” (A. 2253 (emphasis added).) Thus, a monthly Tribal Distribution is only an Excluded Asset if it was transferred by “the Authority,” which is defined in the Indenture as CEDA. (A. 2231.)

Absent a determination of the identity of “the Authority” under the Indenture, the Ayala Faction certainly is not the one and only CEDA, and it has no authority under the Indenture to direct revenues to or from the Casino under the guise of “Excluded Assets.” In other words, unless it were determined that the Ayala Faction properly represented the legitimate CEDA, any money paid to it under the rubric of Excluded Assets does not meet the definition of Excluded Assets in either the Indenture or the Trial Court's PI Order. And the Trial Court has explicitly ruled that it has not determined, and was making no determination as to, the legitimacy of the Ayala Faction. (See A. 2741.) Nevertheless, as described *33 above, the Ayala Faction - with the complicity of the Casino Manager - has proceeded as if it is the proper CEDA and siphoned millions of dollars from the Tribe. (A. 2768.)

By refusing to modify the PI Order, the Trial Court has permitted the Ayala Faction to violate the terms of the Indenture and the PI Order and continues to fund itself under the guise of Excluded Assets while simultaneously starving the legitimate Tribal government of the resources it needs to function. Both the Indenture and the PI Order require that all funds other than Excluded Assets be deposited into the Tribe' account at Rabobank. (A. 2253; A. 2295; A. 1725.) The Trial Court permitted the violation of these provisions of the Indenture and the PI Order by permitting the Ayala Faction to receive purported Excluded Assets without any determination or reason to believe that the Ayala Faction represents the legitimate CEDA. Rather than asserting its unquestioned jurisdiction over payments made under the Indenture,⁵ the Trial Court abdicated its responsibility to ensure a proper flow of funds pursuant to the Indenture and left it to the Ayala Faction's hand-picked, biased and unqualified Casino Manager to decide whether, and to whom purported Excluded Asset payments would be made.

The Trial Court's refusal to modify, or even enforce, the PI Order therefore *34 effectively recognized the Ayala Faction as the lawful Tribal government - contrary to the Trial Court's own stated intent and the federal government's position. By granting new rights to the Ayala Faction's illegal purported government, the Trial Court injected itself squarely in the middle of the Tribal dispute, as it permitted the illegal Ayala Faction government to fund itself, reward its cronies and withhold payments for basic services to Lewis supporters (A. 608), while simultaneously starving the legitimate Tribal Council of funds and

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forcing it to distribute an ever-dwindling supply of cash to Tribal members (many of whom were not being served by the Ayala Faction's illegal government). The far-reaching implications of the PI Order were, therefore, well beyond the scope of permissible temporary injunctive relief. See [O'Hara, 161 A.D.2d at 310](#).

3. The Trial Court's Error In Refusing To Modify The PI Order Is Especially Pronounced If The Trial Court Does Not Have Jurisdiction To Determine The Identity Of The Authority Under The Indenture

As discussed below, the Trial Court committed an error when it declined to exercise jurisdiction over the identity of the Issuer under the Indenture. (See *infra* at 45, 48.) However, assuming, *arguendo*, that the Trial Court correctly declined jurisdiction, the absence of subject matter jurisdiction over that dispute only magnifies the Trial Court's error in refusing to modify the PI Order.

Without any hearing as to the facts of the situation on the ground, the Trial Court's PI Order granted the rights and responsibilities of CEDA under the *35 Indenture to an illegal, fraudulent entity purporting to be the Tribal government. If the Trial Court has jurisdiction to determine the identity of the issuer (and Appellants believe it does, see *infra* at 52), it should have preserved the status quo ante prior to making a final determination as to the identity of the Issuer. However, if the Trial Court does not have jurisdiction to determine the identity of the Issuer, it had no basis whatsoever to decide the issue by providing a steady flow of unsupervised funds to the Ayala Faction. Thus, the only way for the Trial Court to have acted consistent with its stated objective of avoiding involving itself in the Tribal dispute⁶ was to ensure that either (i) both competing government parties had a voice in distributing money to vital Tribal entities and services without favoring either side or (ii) that no Excluded Assets were distributed because the Trial Court could not determine which entity was the legitimate CEDA. Had the Trial Court chosen the latter, the Lewis Parties and the Ayala Faction would be forced to arrive at some compromise permitting the Casino to function in a nonpartisan manner.

B. The Trial Court Abused Its Discretion Because It Never Determined That The Prerequisites For A Preliminary Injunction Were Present

It is black letter law that a preliminary injunction cannot be issued unless the movant establishes, by clear and convincing evidence: (1) a likelihood of success *36 on the merits, (2) irreparable injury absent a preliminary injunction, and (3) a balancing of the equities in the movant's favor. *Arthur J. Gallagher & Co. v. Marchese*, 96 A.D.3d 791, 792 (2d Dep't 2012). But, the Trial Court made no finding that an injunction permitting payments to the Ayala Faction was necessary either to prevent irreparable injury or in light of the equities. See *Marietta Corp. v. Fairhurst*, 301 A.D.2d 734, 739 (3d Dep't 2003) (“[w]ith plaintiff failing to establish a likelihood of success on the merits and with the balance of the equities manifestly falling to [defendants]... we find a clear abuse of discretion in the granting of the motion”). Even more problematic is that the Trial Court's Order did not merely restrain action, but rather it “mandate[d]” the change in signatories to the Casino accounts without “any demonstration that such extraordinary relief is essential to maintain the status quo.” *Residential Bd. of Managers of the Columbia Condo*, 178 A.D.2d at 122; see also *N.Y. Auto. Ins. Plan*, 241 A.D.2d at 314 (reversing preliminary injunction where the trial court failed to “recognize or consider the remaining two [injunction] factors” and where the trial court “dramatically altered” the status quo).

C. The Trial Court Abused Its Discretion Because Permitting “Excluded Assets” Payments To The Ayala Faction Violates Federal, State And Indian Law

It is a fundamental precept of Indian gaming and IGRA, perhaps the most fundamental of all, that Indian gaming must be operated: (1) by a federally *37 recognized tribe; and (2) by the tribal leadership recognized by the Secretary of the United States Department of Interior (the “Secretary”). See, e.g., *In the Matter of Sac and Fox Tribe of the Miss. in Iowa*, NOV/TCO

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CO-03-02, Dkt. No. NIGC 2003-1, Decision and Order issued September 10, 2003 (A. 1994-2004); *Smith v. Babbitt*, 875 F. Supp. 1353, 1363 (D. Minn. 1995), judgment aff'd, appeal dismissed in part, 100 F.3d 556 (8th Cir. 1996) (“tribes do not have authority to conduct gaming in violation of IGRA”). Recognition of a governing body of the tribe and operation of gaming by that recognized governing body is absolutely crucial because, without those fundamentals, gaming is in effect unregulated. (See A. 2001.) Further, when a dissident faction has appropriated control of the gaming operations and diverted tribal assets into new bank accounts, it is impossible to ensure that the tribe is the primary beneficiary of the gaming operation, as required by IGRA. (See A. 2002.) Indeed, allowing unrecognized factions to operate tribal gaming operations is against public policy, as it encourages the unlawful takeover of Indian gaming establishments, which in turn creates an environment that is “inimical to stable tribal governments and their gaming operations.” (A. 2003.) Quite simply, “[w]hen the federally recognized leadership is not in control of the gaming operation, the activity being conducted is not Indian gaming under the IGRA.” (A. 2002 (internal citations omitted).) Because the BIA has never recognized the Ayala Faction as the governing body of the Tribe (A. 2712), the *38 Casino is being operated in violation of IGRA. This violation is particularly obvious now that the BIA has officially recognized a Tribal Council other than the Ayala Faction's illegal government. (See supra at 18.)

Likewise, the Trial Court's refusal to modify the PI Order's exclusion of the Lewis Parties from the Casino site also violates the Compact with the State of California. Pursuant to this Compact, the Tribe must establish and operate an independent TGC to regulate the Casino. (A. 650.) Only a gaming commission appointed by the lawful Tribal Council is thus permitted to carry out these duties. (Id.) The Trial Court's failure to give the Lewis Parties' TGC (which is fully functioning and performing all regulatory duties that are possible offsite) equal funding and access to the Casino to fulfill its legal mandate therefore resulted in continuing violations of the Compact.

Finally, the Trial Court's refusal to modify the PI Order resulted in ongoing violations of Tribal law, including Tribal Gaming Ordinance § 6.1, which requires all gross revenues of the Casino - regardless of whether or not they are “Excluded Assets” - to be deposited in the Rabobank Account. By refusing to modify the PI Order to be consistent with this ordinance, the Trial Court wrongly permitted the Ayala Faction to remove cash as “Excluded Assets” directly from the Casino in *39 direct violation of Tribal Gaming Ordinance § 6.1.⁷ (Id.)

Therefore, the Trial Court's refusal to modify the PI Order when confronted with this evidence was an abuse of discretion because, as described above, the PI Order instituted a system formalizing the Ayala Faction's near-total control over the Casino and its revenue stream. See *Wille v. City of Moraine*, No. C3-94-443, 1996 WL 1061506, at *28 (S.D. Ohio Jan. 2, 1996) (“This Court cannot issue a mandatory injunction requiring conduct that would be in violation of state law”).

II. The Trial Court Erred In Granting The Motions To Dismiss The Lewis Parties' Counterclaim And Cross-Claim

A. The Tribe Waived Sovereign Immunity With Respect To Any Claims Arising Out Of The Indenture

The Trial Court entirely failed to address the unequivocal waiver of the Tribes' sovereign immunity in the Indenture for claims related to any rights arising thereunder. This was a critical error, as this waiver entirely undermines the Trial Court's cursory determination that it has no subject matter jurisdiction over the Lewis Parties' counterclaim and cross-claims.

*40 1. The Claims Are Encompassed By The Waiver Of Sovereign Immunity Contained In The Indenture

It is axiomatic that Indian tribes can consent to waive sovereign immunity. See, e.g., *C & L Enters, v. Citizen Bank Potawatomi Indian Tribe*, 532 U.S. 411, 412 (2011) (finding tribe waived sovereign immunity because it had agreed to a binding arbitration clause that provided that “arbitral awards may be reduced to judgment ‘in accordance with applicable law in any court having jurisdiction thereof’”); *Narragansett Indian Tribe v. R.I.*, 449 F.3d 16, 25 (1st Cir. 2006); *Oneida Indian Nation v. Hunt Const.*

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Grp., Inc., 67 A.D.3d 1345, 1346 (4th Dep't 2009) (upholding tribe's waiver of sovereign immunity to claims seeking to enforce the terms of contract). Here, it is crystal clear that the Tribe, CEDA and/or any "entity, arm, or subunit" of the Tribe (each defined as a "Tribal Party") explicitly waived sovereign immunity for any "suit, arbitration, or other legal proceedings... with respect to the Transaction Documents [including the Indenture] and the transactions contemplated thereby... to... interpret or enforce provisions of the Transaction Documents or rights arising in connection therewith or the transactions contemplated thereby, whether such rights arise in law or equity." (A. 2348-2349 (emphasis added).)

The Lewis Parties' declaratory judgment claim specifically seeks exactly that - that the Court "interpret and enforce provisions" of the Indenture. Indeed, the claims directly concern enforcing the legitimate CEDA's rights to receive the *41 benefits of the Indenture and its obligations to perform under the Indenture in a manner that assures the continued viability of the Casino for the Tribe's benefit. At their core, the claims seek interpretation of the most bedrock of terms of the Indenture, the identity of the Issuer.

While the Tribal Parties' waiver of sovereign immunity in the Indenture applies to actions brought by the Trustee, such as this one, the Indenture unambiguously authorizes all "claims with respect to such action[s]." Thus, nothing in the Indenture limits the ability of any Tribal Party to assert defenses and cross- and/or counter-claims so long as the "Action [is] brought by or on behalf of a Grantee." (A. 2349 (emphasis added).) Here, the Trustee did, in fact, bring the Action,⁸ and so the Lewis Parties are not restricted in their ability to respond to those claims. Rather, in the closely-related Indenture section granting the Trial Court jurisdiction, the parties made clear that they "irrevocably and unconditionally agree that all claims in respect of any such action or proceeding may be heard and determined" by the Trial Court. (*Id.* (emphasis added).) Thus, so long as the Action is brought by a Grantee, as this one brought by the Trustee clearly is, the Trial Court may hear all claims relating to or within it.

***42 2. Sovereign Immunity Does Not Bar Cross-Claims Against The Ayala Faction Because Its Actions Are Unauthorized And Illegal**

Sovereign immunity cannot shield the Ayala Faction from the Lewis Parties' cross-claims. The Ayala Faction's conduct was illegal and not performed in any official capacity. (See A. 326-329.) 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. As the Fourth Department held, on strikingly similar facts, in *People by Abrams v. Anderson*, 137 A.D.2d 259 (4th Dep't 1988), "fi it is determined that the [purported] officials were acting beyond the scope of their tribal authority or acting other than in their representative capacity, suit against those officials would not be barred by their assertion of the tribe's sovereign immunity." *Id.* at 269 (emphasis added).

People by Abrams involved protests by a group of tribal members against a bingo hall situated on the tribe's reservation. The protestors claimed they were duly authorized tribal officials, trying to enforce tribal anti-gaming laws. *Id.* at 263-64. The defendants appealed the New York Supreme Court' grant of a preliminary injunction restraining them from interfering with the bingo hall, arguing that as "duly designated agents of the tribal government... they are immune from suit under the doctrine of sovereign immunity." *Id.* at 269. The *43 Fourth Department upheld the injunction and refused to dismiss the action, precisely because the protesters had not yet established that they were acting in their capacity as tribal officials when interfering with the bingo operation. See also, e.g., *Oneida Indian Nation of N.Y. v. Burr*, 132 A.D.2d 402, 403-04 (3d Dep't 1987) (confirming that New York state courts have jurisdiction over claims brought by Indian tribes against individual members of the tribes pursuant to 25 U.S.C. § 233 and N.Y. Indian Law § 5). Because "sovereign immunity... does not immunize the individual members of the Tribe," the members of the Ayala Faction are not insulated by that doctrine. *Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.*, 433 U.S. 165, 171-72 (1977).

3. The Tribe's General Council Confirmed That The Tribe's Waiver Of Sovereign Immunity In The Indenture Permits The Trial Court To Confirm The Identity Of CEDA

None of parties dispute that the Trial Court has the primary jurisdiction to hear disputes concerning the interpretation of and enforcement of the Indenture upon a breach. The sole basis for such jurisdiction is the vote of the Tribe's General Council on March 10, 2012 to: (i) recognize one Tribal council faction (led by Reggie Lewis) over a rival tribal faction (the "Reid Faction"); (ii) authorize the recognized Tribal Council (led by Lewis) to negotiate and enter into the Indenture with the Trustee; and (iii) to authorize the recognized Tribal Council to appropriately waive the Tribe's and the Authority's sovereign immunity from suit *44 to grant specific courts' jurisdiction over the Indenture. (See A. 2231.) in other words, the indenture was authorized by virtue of, and the Trial Court's jurisdiction derived from, a General Council resolution.

Recently, on September 14, 2013, the Tribe's General Council once again at a constitutionally mandated Quarterly General Council Meeting (see A. 106) established a quorum and passed six General Council Resolutions ("2013 General Council Resolutions"). Among these resolutions was Resolution #2013-01, which established the composition of the CEDA Board, led by Reggie Lewis as Chairman. In addition, Resolution #2013-03 confirmed the Trial Court's jurisdiction to enforce Resolution #2013-01 and all other resolutions pertaining to the Indenture. (A. 2806)

Because the Trial Court retained jurisdiction to consider the merits of the Trustee's claims, it should have done so with respect to the Lewis Parties' declaratory judgment claim to enforce CEDA's rights under the Indenture and to determine the identity of the proper CEDA. In other words, declining jurisdiction to hear CEDA's claim is entirely inconsistent with the Court's retaining of jurisdiction to consider the Trustee's claims.

***45 B. The Trial Court Erred In Determining That It Has No Subject Matter Jurisdiction Over The Counterclaim And Cross-Claim Related To Identifying The Parties To The Indenture**

The Trial Court's failure to recognize or analyze the Tribe's waiver of sovereign immunity for any claims related to interpretation and enforcement of the Indenture resulted in it summarily - and wrongly - dismissing the Lewis Parties' declaratory judgment claim as merely an "internal tribal dispute" beyond the scope of the Trial Court's jurisdiction. (A. 13-20.) The Trial Court's cursory decision fails to address the parties' unambiguous consent to jurisdiction for matters related to the Indenture. This consent must include court review and determination of the most basic of Indenture terms - the identity of the parties thereto. While resolution of the Lewis Parties' claims will impact the Tribal governance dispute, they do not require the Trial Court to resolve that dispute. As discussed below, this is a distinction made in a similar case, which the Trial Court also failed to address.

1. The Parties Chose New York Courts To Determine The Parties' Rights And Obligations Under The Indenture

The parties to the Indenture specifically consented to the Trial Court's jurisdiction over any action or proceeding arising out of or relating to any Transaction Document [including the Indenture] or the transaction contemplated thereby... and *each Tribal Party, the Trustee and the Collateral Agent will irrevocably and unconditionally agree that all claims in respect of any such action or proceeding may be heard and determined in such court's* (A. 2349 (emphasis *46 added).) Thus, the parties to the Indenture did not merely agree that actions or proceedings arising out of the Transaction Documents should be heard in New York courts, they irrevocably, unconditionally and expressly agreed that all claims *in respect of any such action or proceeding* would be heard here as well. Thus, the Trial Court not only has jurisdiction over the Trustee's action but -- if the above quoted language has any meaning at all - the Trial Court also has been given jurisdiction over all related claims, including the Lewis Parties' declaratory judgment cross-claim and counterclaim.

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The law authorizes the parties' selection of this forum. Pursuant to 25 U.S.C. § 233, a New York court has subject matter jurisdiction over the interpretation of the Indenture. See 25 U.S.C. § 233 (“[C]ourts 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”); *Seneca v. Seneca*, 293 A.D.2d 56, 58 (4th Dep't 2002) (citing 25 U.S.C. § 233) (“since 1953 New York courts have had jurisdiction over civil actions and special proceedings between Indians, and between Indians and other persons”); see also Gen. Oblig. Law § 5-1402 (“any person may maintain an action or proceeding against a foreign corporation, non-resident, or foreign state where the action or proceeding arises out of or relates to *47 any contract, agreement or undertaking for which a choice of New York law has been made in whole or in part”).

Because the declaratory judgment claim entails exactly the enforcement of CEDA's rights under the Indenture, the Trial Court has the power to determine the identity of the parties to the Indenture and to protect and enforce the rights and obligations of the Issuer of the bonds set forth in the Indenture. Indeed, the Trial Court must do so, as this is the jurisdiction selected by CEDA and the Trustee to determine all matters related to the interpretation of the Indenture - not merely the matters raised by the Trustee.

2. The Declaratory Judgment Claim Seeks Relief Under, And Interpretation Of, The Indenture, Not Resolution Of Tribal Governance Disputes

The Ayala Faction's illegal coup has created the wholly untenable situation in which there are two entities purporting to be the Issuer (i.e., CEDA) - the legitimate CEDA controlled by the Lewis Parties and the illegal Ayala Faction's CEDA. But the Indenture makes no provision for dueling Issuers. Instead, the Indenture grants a single CEDA the power to, *inter alia*:

- a. redeem the Notes (see A. 2284);
- b. make Monthly Tribal Distributions to the Tribe from Casino revenues (A. 2295); and
- c. own and operate the Facility (i.e., the Casino) in accordance with the CEDA Establishing Ordinance (A. 2314).

*48 Likewise, the Indenture also obligates only one CEDA to perform various tasks and/or make various representations, including, but not limited to:

- a. the obligation to ensure compliance with applicable laws and regulations and deliver reporting and compliance certificates to the Trustee (see A. 2290);
- b. the obligation to preserve and keep in full force and effect CEDA's legal existence in accordance with its respective organizational documents (see A. 2289);
- c. the obligation to maintain insurance for the Casino (A. 2310);
- d. the obligation to maintain all requisite Gaming Licenses and inform the Trustee of any violations of actions commenced by the State of California or the NIGC (A. 2310);
- e. the obligation to have all Gross Revenues of CEDA deposited at least once per week into specific deposit accounts in which the Trustee was granted security interests (see A. 2315; A. 87); and
- f. the obligation to repurchase the Notes upon a Change of Control (A. 2291).

The Trial Court's cursory opinion unnecessarily conflates the internal Tribal governance dispute with resolution of the identity of the Issuer under the Indenture. (A. 1724.) The Lewis Parties did not, and do not, request that the Trial Court decide any intratribal dispute; nor do they request that the Trial Court decide or determine the results of a Tribal election. The declaratory judgment claim, like their defenses to the Trustee's allegations, seeks only to enforce and protect Indenture-specific rights and obligations. While a decision as to the identity of the Issuer, or to determine that the Issuer's rights under the Indenture have been improperly interfered with, may have ramifications for the governance dispute *49 between the Ayala Faction and the Lewis Parties, the Trial Court would not, in fact, be doing anything to actually determine such dispute. Instead, the Trial Court would simply be determining which CEDA is the Issuer under the Indenture, with the attendant rights and obligations thereunder.

This is a distinction that courts are permitted make. Indeed, the Trial Court failed to address *Dauids v. Coyhis*, 857 F. Supp. 641 (E.D. Wis. 1994), which is one of the few cases on point with facts markedly similar to those in this action. In *Dauids*, the court was forced to address allegations that a rival tribal faction's illegal coup had “physically prevented [a] majority [of] members of the recognized [t]ribal [c]ouncil from entering the tribal government offices and the [c]asino, forcing them to set up temporary headquarters, denying them access to books and records necessary to govern the [t]ribe, and preventing them from supervising the [c]asino's operation.” *Id.* at 644. The tribe also alleged that the rival faction “wrongfully removed funds from the [c]asino, and that they refused to close the [c]asino temporarily to conduct an audit of funds and to alleviate any potential danger to [c]asino patrons and other members of the [t]ribe, despite a [t]ribal Council vote in favor of doing so.” *Id.* Accordingly, the recognized government sought relief, inter alia, (i) preventing the government's tribal council members from gaining access to the casino; (ii) enjoining the interference with the government's ability to supervise the casino and change the signature cards on *50 bank accounts opened by defendant faction; and (iii) enjoining the defendant faction from removing any funds and/or property from the casino or tribal headquarters. *Id.*

Just like the Ayala Faction, the disputed faction in *Dauids* challenged the court's jurisdiction to, among other things, “decide the issue of access to tribal headquarters,” arguing that such claims are “essentially an intratribal dispute over the legitimacy of the tribal government.” *Dauids*, 857 F. Supp at 645. The court disagreed with the defendants' assertions that, because the plaintiff's claims touched on the intratribal dispute, it had no jurisdiction:

In sum, I do not believe that defendants' jurisdictional challenge has merit. *The Community's complaint does not present a purely intratribal political dispute; this dispute involves a [c]asino which is frequented by the general public, the alleged theft of that [c]asino's funds, and the attempts by the [t]ribe's governing body to reopen the [c]asino, ensure the safety of the patrons and continue the revenue stream from the [c]asino to the [t]ribe.*

Id. at 646 (emphasis added). Likewise, the Trial Court here can, and should, resolve the Indenture interpretation issues as to the identity of the Issuer because it “does not present a purely intratribal political dispute.” *Id.* (emphasis added).

In re Sac & Fox Tribe of Miss. in Iowa/Meskwaki Casino Litig., 340 F.3d 749 (8th Cir. 2003) further demonstrates why the Trial Court is permitted to exercise jurisdiction over the claims affecting the Issuer's rights under the *51 Indenture. That case concerned a tribal governance dispute and the ensuing closure of the tribe's casino after a rival, unrecognized faction took control of it. Although the Eighth Circuit determined that the federal trial court did not possess jurisdiction over certain claims related to matters beyond the tribe's gaming enterprise because such claims sought resolution of the internal governance dispute, the appellate court reversed the district court's dismissal of the tribe's claims against the rival faction under IGRA because that act specifically conferred jurisdiction on the United States Courts. *Id.* at 763. This is significant, because the Sac and Fox Tribe's IGRA claims undoubtedly impacted the governance dispute. *Indeed*, the trial court dismissed those claims for that reason, finding that injunctive relief under IGRA “[was] not to enforce or to determine compliance with the IGRA, but

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rather to decide which [t]ribal [c]ouncil is properly in place under the [t]ribe's Constitution.” *Id.* at 753. Similarly, here, the claims may have ramifications for the Tribe's governance dispute, but they should have been permitted because the Indenture permits this Trial Court -just like IGRA gave the Sac & Fox Tribe court jurisdiction over gaming-related claims - to exercise jurisdiction over claims related to the Indenture.

***52 3. The Trial Court's Decision To Install A Crony Of The Ayala Faction As The Signatory To The Rabobank Account Is Inconsistent With Its Decision To Dismiss The Claims**

As described above, the Trial Court sua sponte exercised its jurisdiction to install the Ayala Faction's hand-picked general manager as the signatory to the Casino's Rabobank Operating Account. (See supra at 24.) This action is, as the Trial Court acknowledged, an exercise of jurisdiction over “*the revenues of the Chukchansi Gold Resort & Casino (Casino), where the go and how they are allocated.*” (Oct. 18 Trial Court Order at 1 (emphasis added).) However, the Trial Court erroneously failed to recognize, as described above, that doing so profoundly affected the rights of the legitimate CEDA as Issuer to the Indenture - precisely the exercise of jurisdiction implicated by the Claims. Whether intended or not, the Trial Court's PI Order implicated the Tribal governance dispute. Accordingly, if the Tribal Court has jurisdiction to install an individual aligned with a competing faction as the signatory to the Casino's accounts, the Trial Court has jurisdiction to determine which Tribal faction ultimately has the other rights and obligations set forth in the Indenture.

***53 C. The Trial Court Erred In Determining That It Had No Personal Jurisdiction Over The Ayala Faction**

I. The Trial Court Failed to Address The Ayala Faction's Contractual Consent To Jurisdiction

It is well-settled that parties to a contract can submit to the jurisdiction of a given court. *See, e.g., Nat Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315-16 (1964) (“[I]t is settled... that parties to a contract may agree in advance to submit to the jurisdiction of a given court...”); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Samples*, No. 13128/92, 1993 WL 764807, at *2 (N.Y. Sup. Ct., N.Y. Cnty. Dec. 14, 1992) (same). Pursuant to Section 13.1(c) of the Indenture, “each Tribal Party” agrees to “unconditionally submit” to the “exclusive jurisdiction” of the “courts of the State of New York sitting in the City of New York, County of New York” for “any action arising out of or relating to” the Indenture. (A. 2349 (emphasis added).) The Ayala Faction, which frequently refers to itself as the “Ayala Quorum” in an effort to legitimize itself as the Tribe's governing entity, is clearly a “Tribal Party,” which, as set forth in Section 13.1(a) of the Indenture, means “any entity, arm or subunit of the Tribe... .” (Id. (emphasis added).) *See, e.g., Matter of Ransom v. St. Regis Mohawk Educ. and Cmty. Fund*, 86 N.Y.2d 553, 559 (1995) (determining that nonprofit fund serving interests of Indian tribe was an “arm” of the tribe after analyzing whether: the organization was, inter alia, organized under the tribe's laws or constitution rather than federal law; the tribe *54 had legal title or ownership of property used by the organization; tribal officials exercised control over the administration or accounting activities of the organization; and the impact on “tribe's coffers” in defending a suit against the entity).

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. (See A. 2349; A. 2493-2494.) *See, e.g., Nat'l Equip. Rental, Ltd.*, 375 U.S. at 315-16 (is settled.that parties to a contract may agree in advance to submit to the jurisdiction of a given court); *Merrill Lynch, Pierce Fenner Smith Inc.*, 1993 WL 764807, at *2 (same). As described above (supra at 54), the Lewis Parties' cross-claims asserted against the Ayala Faction arise out of, and relate to, the Indenture. Specifically, the Lewis Parties' second cause of action for declaratory judgment is directly related to the Indenture, as it seeks the limited relief of declaratory judgment as to the identity of the Issuer under the Indenture.

2. The Individual Members Of The Ayala Faction Are Subject To New York's Long-Arm Statute

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This Court has personal jurisdiction over each of Ayala, Brechbuehl, Wynn, and Sargosa individually because they have “transact[ed] business” within this state. *N.Y. C.P.L.R. § 302(a)(1)*. To obtain personal jurisdiction under the “transacting business” arm of *Section 302(a) (1)*, the party need not be physically *55 present in the state at the time of service. *See Parke-Bernet Galleries Inc. v. Franklyn*, 26 N.Y.2d 13, 17 (1970). New York has jurisdiction over any nonresident who has “purposefully availed himself of the privilege of conducting [business] activities within New York and thereby invoked the benefits and protections of its laws.” *Id.* at 18 (internal quotations omitted).

The requirement of “transacting business” can be fulfilled by a single transaction if the cause of action arises from the transaction. *See George Reiner & Co., Inc. v. Schwartz*, 41 N.Y.2d 648, 651 (1977). Further, it is not necessary that the asserted cause of action sound in breach of contract in order for the “transacting business” prong of the Long Arm Statute to apply. Instead, the “transacting business” prong applies to actions in tort when there are sufficient facts to support the conclusion that the tort arose out of the relevant transaction. *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 466 (1965); *see also E. N.Y. Sav. Bank v. Republic Realty Mortg. Corp.*, 61 A.D.2d 1001, 1002 (2d Dep't 1978) (allegations of tort as a result of a business transaction do not alter conclusion that activities constituted purposeful business transactions).

a. Ayala Executed The Indenture Stipulating To This Court's Jurisdiction And To The Occurrence Of Transactions In New York

As described above, the Indenture confers jurisdiction upon the Trial Court and stipulates that the transactions under the Indenture occurred in New York. *56 Because Ayala herself executed this document, she has entered into a contract with the accompanying transactions likewise occurring in New York. In addition, the Indenture contains both a New York choice of law clause (*see* A. 2291) and a New York choice of forum clause. (A. 2350.) Under these circumstances, Ayala is subject to the personal jurisdiction of the Trial Court. *ESI, Inc. v. Coastal Corp.*, 61 F. Supp. 2d 35, 57 (S.D.N.Y. 1999) (forum selection and choice of law clauses which provide for New York forum and law are factors properly considered in deciding whether a party transacted business in New York); *Melkaz Int'l Inc. v. Flavor Innovation Inc.*, 167 F.R.D. 634, 638 (E.D.N.Y. 1996) (contracting parties' choice of New York law indicates purposeful efforts to invoke protections and benefits of New York law). Further, Ayala is not shielded from the Trial Court's jurisdiction by virtue of having executed the Indenture on behalf of CEDA and the Tribe. *See Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 470 (1988) (rejecting the fiduciary shield doctrine and holding that the state affords no “special treatment to fiduciaries acting on behalf of a corporation” and corporate actors are therefore, not “insulate[d]... from long-arm jurisdiction for acts performed in a corporate capacity.”)

b. Brechbuehl, Wynn And Sargosa Have Likewise Submitted To The Jurisdiction Of This Court

New York courts consider “the totality of the circumstances” to determine whether a party has “transacted business” in New York under *CPLR § 302(a)(1)*. *57 *See, e.g., Liberatore v. Calvino*, 293 A.D.2d 217, 220 (1st Dep't 2002) (“the non-domiciliary's contact with New York must be purposeful and the totality of the circumstances indicate that the exercise of jurisdiction would be proper”) (internal quotations and citations omitted); *Roper Starch Worldwide, Inc. v. Reymer & Assocs., Inc.*, 2 F. Supp. 2d 470, 474 (S.D.N.Y. 1998) (*citing Snyder v. Madera Broad., Inc.*, 872 F. Supp. 1191, 1194 (E.D.N.Y. 1995)); *Sterling Nat'l Bank & Trust Co. of N.Y. v. Fid. Mortg. Investors*, 510 F.2d 870, 873 (2d Cir. 1975). “A court cannot simply isolate each contact of the defendant with New York and say that each such contact does not constitute the doing of business.” *Bulova Watch Co., Inc. v. K. Hattori & Co., Ltd.*, 508 F. Supp. 1322, 1327-28 (E.D.N.Y. 1981) (internal quotation omitted). “The key inquiry is whether defendant purposefully availed itself of the benefits [and protections] of New York's laws.” *Courtroom Tel. Network v. Focus Media, Inc.*, 264 A.D.2d 351, 353 (1st Dep't 1999). Applying these standards, each of the members of the Ayala Faction has purposely availed himself of the benefits and protections of New York's laws and transacted business in this State.

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Ayala, Brechbuehl, Wynn, and Sargosa have invoked the privileges and protections of the Trial Court and are therefore barred from objecting to the Trial Court's jurisdiction over them. Indeed, Ayala has even attended hearings in this case. *Rubino v. City of N.Y.*, 145 A.D.2d 285, 288 (1st Dep't 1989) (“When a *58 defendant participates in a lawsuit on the merits, he indicates his intention to submit to the court's jurisdiction over the action.”); *Taveras v. City of N.Y.*, 108 A.D.3d 614, 617 (2d 2013) (“When a defendant participates in a lawsuit on the merits, he or she indicates an intention to submit to the court's jurisdiction over the action....”).

Specifically, on or about August 20 and August 27, 2013, counsel for the Ayala Faction requested and obtained an order from the Trial Court directing the Casino manager to fund their illegal government. (A. 448; A. 488; A. 525.) On August 28, 2013, the Trial Court ordered that the Casino could make interim payments to the Ayala Faction's TGC, the Ayala Faction's Tribal government and the Ayala Faction's CEDA board; the Trial Court additionally ordered that the Ayala Faction provide a list of any Casino revenues received. (A. 526-527.) *Likewise*, and not surprisingly, various attorneys have appeared before the Trial Court on behalf of the Ayala Faction's members to seek relief before the Trial Court. (See A. 382-383; A. 2605; A. 2615.) “In short, the defendants cannot deny jurisdiction and at the same time urge merits.” *Ray v. Fairfield Cnty. Trust Co.*, 18 Misc. 2d 808, 814 (N.Y. Sup. Ct. N.Y. Cnty. 1959); *Rubino*, 145 A.D.2d at 288.

*59 CONCLUSION

For the foregoing reasons, the Lewis Parties respectfully request that this Court reverse the December 2 Order of the Trial Court and remand this case for further proceedings.

Footnotes

- 1 The Lewis Parties brought additional cross-claims against the Ayala Faction and its members, the dismissal of which are not on appeal.
- 2 To the extent that the P1. Motion sought to enjoin the Lewis Parties from sending cease and desist letters to the Casino's vendors, the Lewis Parties opposed Wells Fargo's application, as it would infringe on the Lewis Parties' First Amendment right to free speech. (A. 2726-2727.)
- 3 This decision was also problematic because the newly-appointed Casino manager was wholly unqualified for the position. (A. 2722.) Prior to his appointment, he was a table manager and had never previously managed any casino.
- 4 That the Ayala Faction's government is illegal is now clear in light of the BIA's February 11, 2014 ruling. (See *supra* at 18.)
- 5 As the Trial Court noted in an order appointing a Referee: “The Indenture gives the court the authority to protect the revenues of the Chukchansi Gold Resort & Casino (Casino). where they go and how they are allocated.” (Trial Court Order, dated October 18, 2013 (“Oct. 18 Trial Court Order”) Dkt. No. 318 (a copy of the Oct. 18 Trial Court Order is not included in the Appendix on appeal, but can be provided at the Court's request).)
- 6 (See A. 2702; A. 2750; A 413-414; A. 526.)
- 7 Indeed, prior to the Ayala Faction's illegal coup, all cash proceeds were deposited with Rabobank prior to any distributions being made to the Tribe, Tribal government or any other entity. (A. 605; A. 657.) The only reason the Ayala Faction has elected to change this practice appears to be to ensure that its spending decisions are free from oversight.
- 8 The term “Action” in the Indenture is defined as any “unconsented suit, arbitration or other legal proceedings (each inclusive of actions for equitable or provisional relief and to compel arbitration (A. 2348-2349.)