

To Be Argued By:  
ROBERT J. MALIONEK

New York County Clerk's Index No. 652140/1B  
**MICROFICHE**

# 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 TRIBAL GAMING COMMISSION, RABOBANK, N.A., GLOBAL CASH ACCESS, INC., NANCY AYALA, TRACEY BRECHBUHL, KAREN WYNN, CHARLES SARGOSA, REGGIE LEWIS, CHANCE ALBERTA, CARL BUSHMAN, and BANK OF AMERICA, N.A.,

*Defendants.*

*(caption continued on inside cover)*

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## BRIEF FOR PLAINTIFF-RESPONDENT

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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 PICAYNE 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 PICAYNE 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.*

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Plaintiff-Respondent, Wells Fargo Bank, N.A. (“Wells Fargo” or the “Trustee”), respectfully submits this brief in opposition to the appeal of Defendants/Cross- and Counterclaim Plaintiffs-Appellants Chukchansi Economic Development Authority (“CEDA”), the Board of the Chukchansi Economic Development Authority (“CEDA Board”), the Tribe of Picayune Rancheria of the Chukchansi Indians (“Tribe”), the Tribal Council of the Tribe of Picayune Rancheria of the Chukchansi Indians (“Tribal Council”), Reggie Lewis, Chance Alberta, and Carl Bushman (collectively, the “Lewis Faction” or “Appellants”) from the December 2, 2013 Decision and Order (“December 2 Order”) of the Supreme Court, New York County, Honorable Melvin L. Schweitzer (“Trial Court”), (i) denying the Lewis Faction’s motion to modify the preliminary injunction (“PI Order”) issued by the Trial Court on July 2, 2013 (“Motion to Modify”); (ii) denying the Lewis Faction’s October 11, 2013 Order to Show Cause (“Injunction Motion”); (iii) granting the Trustee’s motion to dismiss the Lewis Faction’s counterclaim against the Trustee (“Counterclaim”); and (iv) granting the motion of Defendants/Respondents CEDA, the CEDA Board, the Tribe, the Tribal Council<sup>1</sup>, Nancy Ayala, Tracey Brechbuehl, Karen Wynn, and Charles Sargosa

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<sup>1</sup> As discussed below and as evident from the briefs filed by the other parties to this matter, this case involves an internal dispute between two Factions of the Tribe, each of which refers to itself as the “Tribe,” with its own “Tribal Council” and with authority over “CEDA.” By using these terms in this brief to refer to each Faction, the Trustee is not taking a position about which Faction is the rightful authority for the Tribe.

(collectively, the “Ayala Faction”) to dismiss the Lewis Faction’s cross-claims against the Ayala Faction (“Cross-Claims”).

### **COUNTERSTATEMENT OF QUESTIONS PRESENTED**

1. Whether the Lewis Faction can seek reversal of the PI Order given that it did not appeal from the PI Order?
2. Whether the Trial Court correctly granted the Trustee’s motion to dismiss the Lewis Faction’s Counterclaim for lack of subject matter jurisdiction because the Counterclaim sought resolution of an internal governance dispute of a sovereign tribe?

### **NATURE AND FACTS OF THE CASE**

This case arises out of a tribal dispute between two factions—the Ayala Faction and the Lewis Faction (each, a “Faction”)—struggling for control of a sovereign Native American tribe located in California. The two Factions seek control of the Tribe, the Tribal Council, and CEDA, which operates the Chukchansi Gold Resort and Casino (the “Casino”). As the dispute erupted in February 2013, the Ayala Faction ended up located on the Tribe’s reservation and in physical possession of the Casino, and the Lewis Faction ended up operating its own government off of the reservation.

Since long before the internal tribal dispute, Wells Fargo has been the Indenture Trustee for \$250 million of secured notes that were issued under an

indenture (the "Indenture") to refinance obligations used to construct the Casino ("Secured Notes"). The tribal dispute led to breaches of the Indenture and related agreements that substantially disrupted the operation of the Casino and imperiled the holders' collateral, which includes, in general, the gross revenues from the Casino's operations. Among other things, CEDA missed an interest payment on the Secured Notes, stopped using its authorized bank accounts and opened numerous unauthorized accounts, had been hoarding cash in the Casino's cage and using that cash to pay its employees and vendors rather than using bank accounts that were frozen as a result of the tribal dispute, failed to issue critical payments to the Casino's vendors, and failed to make a bank account available to other vendors so that payments could be made for the benefit of the Casino. Moreover, the two Factions instituted actions against each other in their respective Tribal Courts, and one Faction brought a lawsuit against the Trustee in that Faction's Tribal Court, in violation of the Indenture. In short, the tribal dispute had caused chaos and endangered the Casino's operations. After weeks of failed negotiations, in June 2013, the Trustee was finally forced to file its complaint and application for a preliminary injunction to enforce the terms of the Indenture. The Trustee filed suit in New York Supreme Court, pursuant to the terms of the Indenture, with respect to issues of interpretation and enforcement of the Indenture itself.



The Trustee narrowly tailored the relief that it sought to normalize the operations of the Casino in line with the requirements of the Indenture and its related documents, including the Deposit Account Control Agreement (the "Control Agreement") requiring gross revenues from the Casino to be deposited into a particular bank account over which the Trustee has certain rights. The Trustee has never asked the Trial Court to adjudicate the tribal dispute nor sought to interject itself in the management of the Casino. As it has stated many times, the Trustee takes no position regarding which Faction is the proper governing authority of the Tribe and CEDA. The Trustee's primary concern, and the singular rationale for this litigation, was protecting the holders' collateral and taking appropriate actions to help ensure that the interest payments are made, simply by enforcing the terms of the Indenture. That concern is driven directly by the Trustee's rights and duties as specifically provided under the Indenture.

The two Factions, recognizing the need to normalize the Casino's operations, largely supported the relief sought by the Trustee, and the PI Order was narrowly tailored to address the specific breaches pragmatically. After the PI Order was entered, the two Factions worked to cure the breaches and stabilize operations at the Casino. The Trial Court ordered the two Factions to meet and confer on an ongoing basis regarding the Casino's payment of employees and vendors, and appointed a referee to resolve any disputes. In short, the PI Order

largely resolved the issues raised by the Trustee. *Neither Faction appealed the PI Order.*

The Lewis Faction subsequently sought additional relief on two discrete issues. First, it filed the Motion to Modify, and later the Injunction Motion, asking the Trial Court to modify the PI Order to stop the Ayala Faction from receiving so-called "Excluded Asset" payments (as defined in the Indenture) from the Casino. The Trustee understands that those payments are used, *inter alia*, to pay the expenses of CEDA and the Tribal Gaming Commission, and to make a monthly distribution to the members of the Tribe. The Trustee did not take a position on the Excluded Asset payments below and does not take a position now. The Trial Court denied the Lewis Faction's Motion to Modify and Injunction Motion, and the Lewis Faction appealed from that order. However, the Lewis Faction, through this appeal, is trying to reverse the PI Order itself, which it did not appeal. The *only* issue in front of this Court related to the PI Order pertains to the Excluded Asset payments, and the rest of the Lewis Faction's arguments regarding the PI Order should not be part of this appeal.

Second, after the PI Order was issued, the Lewis Faction sought a vast expansion of this case by filing its Counterclaim and numerous Cross-claims against the Trustee and the Ayala Faction, seeking relief from the Ayala Faction related to the internal tribal dispute and seeking a declaration from the Trial Court

regarding which Faction rightfully should be in control of CEDA and the Tribe. In other words, the Lewis Faction asked the Trial Court to resolve the tribal dispute. It is black letter law, however, that the Trial Court does not have jurisdiction to resolve internal governance disputes between two factions of a sovereign tribe. And contrary to the Lewis Faction's arguments, the Tribe's limited waiver of sovereign immunity in the Indenture does not give the Trial Court jurisdiction to decide the tribal dispute, which would require it to interpret the Tribe's Constitution, the Tribal Council's by-laws and numerous tribal referendums. The Trial Court correctly granted the Trustee's and the Ayala Faction's motions to dismiss the Counterclaim and Cross-Claims, respectively, for lack of jurisdiction. Accordingly, the Trial Court's December 2 Order dismissing the Counterclaim and Cross-Claims should be affirmed.

### **FACTUAL BACKGROUND**

#### **The Indenture And Related Agreements, And The Security Interests Of The Trustee And The Holders**

On May 30, 2012, CEDA issued \$250,406,000 9¾% Secured Notes, due 2020, pursuant to the Indenture. (A. 2231-2449.) As part of the issuance of the Secured Notes, CEDA, the other grantors, and the Trustee also entered into a Security Agreement (the "Security Agreement"). (A. 2451-2545.) The financing to which the Secured Notes relate was used by CEDA to refinance obligations incurred by it to construct the Casino and make capital improvements. As part of

the refinancing, CEDA pledged the revenues earned by the Casino, among other things, as Collateral (as defined in the Indenture) and covenanted to deposit such revenues into certain specified bank accounts at Rabobank, or accounts over which the Trustee had control. (A. 78, 2464, 2479.) As part of the transaction, CEDA, Rabobank and the Trustee entered into the Control Agreement giving the Trustee control over an account at Rabobank (the "Rabobank Account"). (A. 78-97.)

### **The Tribal Dispute**

The Tribe elects and appoints a Tribal Council, which serves as the governing body for the Tribe and as the CEDA Board. (A. 601.) Thus, the make-up of the Tribal Council and CEDA is identical. (*Id.*)

CEDA is in charge of operating the Casino. (RA. 427.) When the Indenture was signed in May 2012, CEDA's Chairman was Reggie Lewis and its Vice Chairwoman was Nancy Ayala. (A. 2213.) In December 2012, Ayala was elected Chairwoman of the Tribal Council. (*Id.*)

In or around February 2013, a dispute erupted within the Tribe and CEDA regarding who should be in charge of those bodies. (RA. 2.) At least two separate factions have claimed to be the true leaders of the Tribe, the Tribal Council and CEDA: the Ayala Faction and the Lewis Faction. (*Id.*) The Ayala Faction asserted that Ayala is the Tribal Council Chairwoman and that, as such, she has proper authority to control CEDA and the Casino, while the Lewis Faction asserted

that Lewis is the Tribal Council Chairman and that, as such, he has proper authority to control CEDA and the Casino. (*Id.*) Each Faction set up its own Tribal Court and Tribal Gaming Commission. (*See, e.g., RA* 434-35.) During 2013, the Ayala Faction was in physical control of the Casino's operations. (*See RA* 5, 427.)

### **Breaches of the Indenture and Related Agreements**

The tribal dispute substantially disrupted the Casino's operations and finances, causing numerous breaches of the Indenture and related agreements, including, among other things, that:

- CEDA missed an interest payment on the Secured Notes;
- the Ayala Faction did not deposit Gross Revenues and Revenues and Cash (as defined in the Indenture) in the Rabobank Account, but instead began maintaining cash in the Casino, and running the Casino on a cash basis;
- the Ayala Faction opened new, unauthorized bank accounts over which the Trustee did not have control;
- after the Rabobank Account was frozen, critical Casino vendors were not being paid (or were being paid in cash), and at least one vendor was holding \$14 million in uncashed checks, which was part of the Collateral and was supposed to be deposited into the Rabobank Account;
- the Lewis Faction brought proceedings in its purported Tribal Court and Tribal Gaming Commission against the Trustee, in breach of the Indenture and related agreements, alleging that the Trustee violated the Indenture by sweeping funds from the Rabobank Account to apply toward CEDA's missing interest payment;

- the Lewis Faction sent “cease and desist” letters to certain Casino vendors, demanding that they stop providing services to the Casino, endangering the financial well-being of the Casino;
- the Tribe itself, through the actions of both Factions, restricted CEDA’s right and ability to conduct Casino business and did so in a manner materially adverse to the economic interests of the holders; and
- CEDA failed to provide required financial reports to the Trustee.

(See RA. 2-5.) These breaches caused significant harm to the Casino’s operations and endangered the holders’ collateral. (RA. 5.)

### **The Preliminary Injunction**

For weeks after the tribal dispute erupted, the Trustee and its counsel attempted to help the Factions reach an agreement that would temporarily normalize the operations of the Casino, but those negotiations failed. (RA. 432.) On June 18, 2013, the Trustee filed an Order to Show Cause why a preliminary injunction should not issue enjoining the Tribe, the Tribal Council, and CEDA from continuing to breach the Indenture and related agreements, as described above.

The Trustee brought the action in New York state court because the Tribe, CEDA, and other Tribal Parties (as defined in the Indenture) agreed in the Indenture to submit to the jurisdiction of the state or federal courts of New York in the first instance for “any action or proceeding arising out of or relating to [the

Indenture and related agreements].” (A. 2349 (Section 13.1(c).) In the Indenture, the Tribal Parties also granted the Trustee a limited waiver of sovereign immunity with respect to such actions. (A. 2348-49 (Section 13.1(b).)

On July 2, 2013, the Trial Court held an extensive hearing on the Trustee’s request for a preliminary injunction. The Lewis Faction and the Ayala Faction consented to almost all of the relief sought by the Trustee, except for a few issues that were addressed at the hearing.<sup>2</sup> (See App. Br. 20-21; A. 5 (“The [Lewis Faction] did not object to the majority of the injunction sought by the Trustee”).)

On July 2, 2013, the Trial Court issued the PI Order, which ordered, among other things, that:

- CEDA and the Tribe shall (i) maintain Gross Revenues and Revenues and Cash of CEDA, other than Operating Cash and Gross Revenues that constitute Excluded Assets, in CEDA’s Rabobank Account; (ii) close their unauthorized bank accounts, and (iii) deposit cash held in the Casino cage into the Rabobank Account;
- withdrawals from CEDA’s Rabobank Account shall be made solely (i) by checks signed by Giffen Tan, General Manager of the Casino, (ii) for the payment of legitimate operating expenses of the Casino, and (iii) payable only to those vendors and employees agreed upon by the two Factions, or if a dispute arises, by order of the Court;<sup>3</sup>
- the two Factions shall not issue further “cease and desist” letters to the Casino’s vendors and employees;

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<sup>2</sup> The preliminary injunction hearing lasted for nearly three hours, but the majority of it occurred off the record. (A. 2701.)

<sup>3</sup> The Trial Court later appointed a referee to resolve disputes between the Factions regarding the payment of Casino vendors. (A. 2695-2698.)

- the two Factions shall not file further actions against the Trustee in their respective Tribal Courts or Tribal Gaming Commissions with respect to issues relating to the Indenture and related agreements; and
- CEDA shall provide its missing financial information to the Trustee.

(A. 1723-1729.) At the end of the hearing, the Trial Court agreed with counsel for the Lewis Faction that the PI Order was not “intended, in any way, to express an opinion or have any bearing upon the on-going tribal governance dispute.”

(A. 2750.)

On July 3, 2013, the Trustee served a Notice of Entry of the PI Order on all parties. (RA. 437, 512.) The Lewis Faction did not appeal from the PI Order.

#### **The Lewis Faction’s Counterclaim and Cross-Claims**

On July 19, 2013, the Lewis Faction filed its answer to the Trustee’s complaint and asserted its Counterclaim against the Trustee and Cross-claims against the Ayala Faction. (A. 317-376.) The Counterclaim and Cross-claims sought, at bottom, a declaration that members of the Lewis Faction, and not the Ayala Faction, comprised the rightful CEDA board. (A. 373-374.) According to the Counterclaim and Cross-claim complaint, resolution of those claims would require the Trial Court to interpret, among other things, “the Tribe’s Constitution, Election, Enrollment, Ethics and Anti Violence Ordinances, other Tribal laws and By-laws.” (A. 353 ¶ 56.) The Trustee and the Ayala Faction subsequently moved



to dismiss the Counterclaim and Cross-claims, respectively, for lack of jurisdiction. (A. 18; A. 2205-06; A. 2859-60.)

**The Lewis Faction's Motion to Modify the PI Order**

On July 29, 2013, the Lewis Faction filed its Motion to Modify, asking the Trial Court to "require both [Factions] purporting to be CEDA to agree on what payments constitute Excluded Assets" before they are made. (A. 34; A. 23-24.) Under the Indenture, "Excluded Assets" are defined as, among other things, "any assets transferred by [CEDA] or either of the Guarantors to a Person other than [CEDA] or either of the Guarantors in transactions not prohibited by Section 4.9" (which includes the Monthly Tribal Distributions, as defined therein), and "all personal property of [CEDA] or any Restricted Subsidiary benefiting CEDA . . . primarily because of its use in connection with the Tribe's provision of customary essential governmental services, such as those related to health, safety and welfare." (A. 2253-54.) The Excluded Assets are expressly carved out from the Collateral (A. 2464), and the Trustee has no control over them. The sovereign Tribe alone controls the Excluded Assets, which are used to support Tribal functions (such as housing and education for members of the Tribe). Consistent with the fact that the Excluded Assets are outside the scope of the Indenture, the PI Order did not modify the handling of the Excluded Asset payments.

On August 29, 2013, the Ayala Faction filed its opposition to the Motion to Modify. (A. 309.) On September 4, 2013, the Trial Court ordered that, pending the next hearing, Excluded Asset payments could be made to the Tribal Gaming Commission, the Tribal Government, and the CEDA Board (which in effect meant the Ayala Faction's Tribal Gaming Commission, Government and Board that were on the reservation), and set a hearing on the Motion to Modify for September 11, 2013. (A. 2589-91.)

On September 6, 2013, the Trustee's counsel wrote a letter to the Trial Court, stating that, consistent with the terms of the Indenture and the Trustee's neutrality regarding the tribal dispute, "the Trustee takes no position on the Excluded Asset payments" that were the subject of the Motion to Modify. (A. 595.)

On September 11, 2013, the Trial Court held a hearing on the Motion to Modify. (A. 2604-81.) At the hearing, the Trustee reiterated that it could not take a position on the Excluded Assets issue. (A. 2672-73.) After a lengthy argument, the Trial Court indicated that it would take the Motion to Modify under advisement. (A. 2680.)

### **The Lewis Faction's Injunction Motion**

On October 11, 2013, the Lewis Faction filed the Injunction Motion, seeking an order (i) barring "Excluded Asset" payments to the Ayala Faction, and

(ii) directing that "Excluded Asset" payments be made to the Lewis Faction, pending the Trial Court's decision on the Motion to Modify. (A. 2763-66.) The Lewis Faction filed the Injunction Motion as an Order to Show Cause, but it was never signed by the Court, therefore neither the Ayala Faction nor the Trustee responded to it.

### **December 2 Order**

On December 2, 2013, the Trial Court issued an order (i) granting the Trustee's motion to dismiss the Counterclaim, (ii) granting the Ayala Faction's motion to dismiss the Cross-claims, (iii) denying the Motion to Modify the PI Order, and (iv) denying the Injunction Motion. (A. 17-20.)

Regarding the Counterclaim and Cross-claims, the Trial Court explained that it did not have subject matter jurisdiction over those claims because they "require[] the court to determine which faction is the legitimate CEDA and Issuer of the Indenture, which is an internal tribal dispute . . . [and] would require the court to interpret tribal law and by-laws." (A. 18.) The Trial Court also dismissed the Cross-claims because it found that it lacked personal jurisdiction over the individual members of the Ayala Faction. (A. 18-19.)

Regarding the Excluded Asset payments, the Trial Court held that "[t]he Lewis Faction's motion to further modify the court's [PI Order] is denied for lack of jurisdiction because it is also based on the internal tribal dispute." (A. 19.)

On December 23, 2013, the Lewis Faction filed a Notice of Appeal from the Trial Court's December 2, 2013 Order. (A. 9-12.)

### ARGUMENT

#### **I. THIS COURT SHOULD REJECT THE LEWIS FACTION'S ATTEMPT TO REVERSE THE PI ORDER, WHICH IT DID NOT APPEAL**

The present appeal relates, in part, to the Trial Court's denial of the Lewis Faction's Motion to Modify the PI Order, which sought relief solely in regard to Excluded Asset payments. The Lewis Faction, however, is attempting to reverse the PI Order itself—which it did not appeal. Accordingly, this Court should dismiss those parts of the appeal directed at reversal of the PI Order.

“An appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry.” CPLR § 5513(a). The time period for filing a notice of appeal “is nonwaivable and jurisdictional.” *Jones Sledzik Garneau & Nardone LLP v. Schloss*, 37 A.D.3d 417, 417 (2d Dep't 2007); see *In re Haverstraw Park, Inc. v. Runcible Props. Corp.*, 33 N.Y.2d 637, 637 (1973).

Here, the PI Order was entered on July 3, 2013, and the Trustee served a Notice of Entry on the Lewis Faction that same day. (RA. 437, 512.) It is undisputed that the Lewis Faction did not file a notice of appeal of the PI Order, and the time to do so has long since run, therefore its attempt to appeal the PI

Order must be dismissed. *See Gassab v. R.T.R.L.L.C.*, 69 A.D.3d 511, 513 (1st Dep't 2010) (finding appeal "not properly before this Court" for failure to submit a notice of appeal); *Dewey Ballantine LLP v. Philippine Nat'l Bank*, 303 A.D.2d 178, 178 (1st Dep't 2003) ("The appeal must be dismissed because of plaintiff's failure to serve and file a notice of appeal.").

The first three of the Lewis Faction's four "Questions Presented" pertain to whether the Trial Court abused its discretion by granting the PI Order in the first place:

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

(App. Br. 6-7.) Because the Lewis Faction failed to file a notice of appeal of the PI Order, these questions are not properly before this Court. Indeed, the full record relating to the PI Order is not even before this Court. The Lewis Faction lodged a

3,000-page record, but it does not include the filings submitted in connection with the Trustee's application for a preliminary injunction.

The failure to appeal from a preliminary injunction cannot be cured by bringing a motion to modify the injunction. In a case similar to this one, the Second Department dismissed appellants' appeal from a preliminary injunction because they did not timely file a notice of appeal. *See In re Xander Corp. v. Haberman*, 41 A.D.3d 489, 490 (2d Dep't 2007). The court then separately considered the appeal from the denial of appellants' motion to modify the preliminary injunction and found that the denial of that motion was not inequitable. *See id.* at 490-91.

Moreover, "[a]n order entered on consent is not appealable, as a party who consents to an order is not aggrieved thereby." *In re Jonathan G.*, 278 A.D.2d 324, 325 (2d Dep't 2000). Here, the Lewis Faction and the Ayala Faction consented to the majority of the relief sought. (*See App. Br.* at 20 ("[t]he Lewis [Faction] supported the issuance of a preliminary injunction"); A. 5 ("The [Lewis Faction] did not object to the majority of the injunction sought by the Trustee".)) Thus, on appeal, the Lewis Faction cannot argue, among other things, that the Trustee failed to establish the prongs necessary for the issuance of a preliminary injunction. (*See App. Br.* at 35-36.)

As explained below, the limited question on this appeal, with respect to the PI Order, is whether the Trial Court abused its discretion by denying the Lewis Faction's Motion to Modify and Injunction Motion related to Excluded Assets. That is the only issue before this Court regarding the PI Order; the rest of the PI Order is not at issue in this appeal. For all of these reasons, this Court should reject the Lewis Faction's improper appeal of the PI Order.

## **II. THE TRIAL COURT'S DENIAL OF THE LEWIS FACTION'S MOTION TO MODIFY THE PI ORDER AND INJUNCTION MOTION REGARDING EXCLUDED ASSET PAYMENTS PRESENTS A NARROW ISSUE**

The Lewis Faction's appeal from the denial of its Motion to Modify and Injunction Motion presents a very narrow issue. Indeed, as the Court of Appeals held in a procedurally similar case, "this is *not* an appeal from a judgment enjoining certain conduct, but an appeal from an order denying appellant's application to modify an injunction . . . [thus] the question posed is *exceedingly narrow*: whether the court below has abused its discretion in denying the application." *Enter. Window Cleaning Co. v. Slowuta*, 299 N.Y. 286, 288-89 (1949) (emphasis added).

The standard of review on an appeal from the denial of a motion to modify an injunction is abuse of discretion below. *See Rosemont Enters., Inc. v. Irving*, 49 A.D.2d 445, 448 (1st Dep't 1975) ("A motion to vacate or modify a preliminary injunction is addressed to the sound discretion of the court which also has the

power to impose conditions. One claiming error in its exercise has to show an abuse of such discretionary power.”). A petitioner moving to modify a preliminary injunction must show that compelling or changed circumstances render the continuation of the injunction in its present form inequitable. *See Washington Deluxe Bus, Inc. v. Sharmash Bus Corp.*, 47 A.D.3d 806, 807 (2d Dep’t 2008) (affirming denial of a motion to modify where movant “failed to allege facts showing compelling or changed circumstances that would render continuation of the injunction in its present form inequitable”); *In re Xander*, 41 A.D.3d at 490-91 (same); *Thompson v. 76 Corp.*, 37 A.D.3d 450, 452-53 (2d Dep’t 2007) (“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.”).

In the lower court, the Trustee did not take a position on the Lewis Faction’s Motion to Modify and Injunction Motion because they were directed at a singular issue—the distribution of Excluded Asset payments to the Tribe (as controlled by either Faction). The question of which Faction is the rightful recipient of the Excluded Asset payments is an issue outside the scope of the Indenture itself. As the Trustee has stated many times, it takes no position on which Faction rightfully should be in control of the Tribal Council, CEDA, or the Casino, and thus the Trustee cannot purport to know which Faction is entitled to receive Excluded Asset



payments. Accordingly, in this appeal, the Trustee takes no position on whether the Trial Court abused its discretion by denying the Lewis Faction's Motion to Modify the PI Order and Injunction Motion.

The Trustee, however, strongly disputes the Lewis Faction's assertion that counsel for the Trustee made any misrepresentations to the Trial Court at the hearing on the PI Order. (*See* App. Br. 23-24.) In the quotation cited by the Lewis Faction, counsel for the Trustee was merely making the point that the "personal property" of certain tribal entities, such as the Tribal Gaming Commission, are Excluded Assets that are not required to be deposited into the Rabobank Account under the Indenture. (A. 2713-14.)

Indeed, when drafting the PI Order, the Trustee attempted to mirror the exact language of the Indenture, and did not seek any relief regarding the Excluded Assets. Section 4.25 of the Indenture states, "[CEDA] shall cause all Gross Revenues of [CEDA], *other than Operating Cash and Gross Revenues that constitute Excluded Assets*, to be deposited at least once per week into Deposit Accounts." (A. 2315 (emphasis added).) That language is nearly identical to the PI Order, which states, "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." (A. 1725.)

The Trustee will leave all other arguments regarding the Excluded Asset payments to the two tribal Factions.

### **III. THE TRIAL COURT PROPERLY DISMISSED THE LEWIS FACTION'S COUNTERCLAIM FOR LACK OF JURISDICTION**

#### **A. The Counterclaim is an Internal Tribal Dispute Exclusively Within the Jurisdiction of Tribal Institutions**

As the Trial Court correctly determined, the Counterclaim falls outside the scope of state court subject matter jurisdiction because the question of which Faction is the legitimate CEDA Board (which is identical to the Tribal Council) is an internal tribal dispute. It is well-established that Indian tribes are domestic sovereign entities. *see United States v. Wheeler*, 435 U.S. 313, 322-36 (1978) and, as such, have exclusive jurisdiction over the governance of their internal affairs, *see Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe*, 609 F.3d 927, 943 (8th Cir. 2010). The Lewis Faction does not contest this long-standing principle but instead argues that, while determining the identity of the legitimate CEDA "may have ramifications for the governance dispute," it "would not, in fact, be doing anything to actually determine such dispute." (Lewis Br. at 48-49.) That is incorrect.

Because CEDA and the Tribal Council are made up of identical members, the Trial Court could not have determined the identity of the true CEDA without first determining which Faction rightfully controlled the Tribal Council. (A. 344.)

Despite acknowledging that “the Indenture makes no provision for dueling Issuers,” the Lewis Faction maintains that the Trial Court need only have interpreted the Indenture to resolve the Counterclaim. (App. Br. at 47-49.) To the contrary, resolving the Counterclaim would have required the Trial Court to interpret the Tribe’s Constitution, laws and ordinances to determine:

- whether Ayala’s February 21, 2013 removal of the existing Tribal Council members and appointment of six new members violated the Tribe’s Constitution, Election, Enrollment, Ethics, and Anti-Violence Ordinances, and other tribal laws and by-laws;
- whether the February 21, 2013 petition and referendum disenrolling 856 tribal members violated Article XI of the Tribe’s Constitution and was validly passed;
- whether members of the Lewis Faction vacated their positions by leaving the February 21, 2013 meeting before it concluded;
- whether members of the Ayala Faction were properly reinstated to the Tribal Council under tribal law;
- whether the Tribal Council validly voted to suspend Ayala from the Tribal Council on February 21, 2013 under Article X, Section 1 of the Constitution, and Section 6.3 of the Tribe’s Ethics Ordinance, and for violations of the Tribe’s Anti-Violence Ordinance and other tribal law;
- whether Sargosa forfeited his position on the Tribal Council pursuant to Article X, Section 3 of the Tribe’s Constitution by failing to attend meetings, and whether Irene Waltz was properly appointed under the Tribe’s Election Ordinance to serve the remainder of his term;
- whether the referendum process initiated on April 2, 2013 to affirm the composition of the Tribal Council complied with Article XI of the Tribe’s Constitution; and
- whether members of the Ayala Faction were properly removed from the Tribal Council around April 2013 for violations of the Tribe’s Ethics

Ordinance, the Oath of Office, the Anti-Violence Ordinance, Tribal Council By-Laws, and other tribal laws, and whether David Castillo, Lynn Chenot, and Melvin Espe were validly appointed to serve the remainder of their terms.

(See A. 351-357.) The Trial Court rightly found that it lacked jurisdiction to decide these tribal governance issues, to assess the validity of certain votes and procedures, and to interpret tribal law.<sup>4</sup> The Lewis Faction has cited no case that holds to the contrary.

The Lewis Faction's reliance on *Dauids v. Coyhis*, 857 F. Supp. 641 (E.D. Wis. 1994), which is not binding on this Court, is misplaced. Although the underlying facts are similar in certain respects, the *Dauids* plaintiffs (who represented the majority of their Tribal Council) did not seek a determination that they were the true governing authority of the tribe. Thus, the fact that the *Dauids* court found that it had jurisdiction to grant the requested relief—a temporary restraining order preventing a minority group from interfering with the operation of the Casino—because the “complaint d[id] not present a purely intratribal political dispute,” *id.* at 646, has no bearing on whether the Trial Court has jurisdiction to decide the Counterclaim (which on its face seeks a resolution of an intratribal dispute). In fact, the relief granted by the *Dauids* court is precisely the sort of relief that the Trial Court has already granted in this matter. Moreover, the cases

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<sup>4</sup> The Trial Court is not the proper tribunal to decide these issues. Indeed, as noted by Appellants, the Factions have sought the assistance of the Bureau of Indian Affairs to help resolve the dispute. (App. Br. at 18.)

that the  *Davids*  court distinguished involved allegations almost identical to those in the Counterclaim and support its dismissal.  *See id.*  at 645 (distinguishing cases “challenging two tribal resolutions . . . and disqualifying other individuals from running in a general tribal election.” “challeng[ing] the certification of members and officers of the Tribal Council,” which involved interpretation of the tribal constitution and bylaws, and involving “purely intratribal political controversies”).

*In re Sac & Fox Tribe of Mississippi in Iowa / Meskwaki Casino Litig.* , 340 F.3d 749 (8th Cir. 2003), is likewise inapposite. In that case, the court reversed the dismissal of IGRA claims, despite the fact that they sought resolution of internal tribal disputes, because IGRA specifically conferred jurisdiction on United States courts.  *Id.*  at 763. According to the Lewis Faction, this case is akin to  *In re Sac & Fox*  because the Indenture confers jurisdiction over the Counterclaim. But, as explained below, the Indenture does  *not*  confer jurisdiction over the Counterclaim. Instead, the Counterclaim is more akin to the non-IGRA claims in  *In re Sac & Fox* , which the court dismissed as non-justiciable because they “seek a form of relief that the federal courts cannot provide, namely, resolution of the internal tribal leadership dispute.”  *Id.*

The Counterclaim requires resolution of an internal tribal dispute, which is not justiciable before federal or state courts.  *See id.*  (“Jurisdiction to resolve internal tribal disputes . . . lies with Indian tribes and not in the district courts.”).

For that reason, this Court should affirm the Trial Court's dismissal for lack of subject matter jurisdiction.

**B. The Sovereign Immunity Waiver in the Indenture Does Not Confer Jurisdiction Over the Counterclaim**

The Lewis Faction's principal argument on the jurisdictional issue is that the limited waiver of sovereign immunity in the Indenture encompasses and confers jurisdiction over the Counterclaim. The Trial Court properly rejected this interpretation of the limited waiver, which is contrary to both well-established precedent and the language of the Indenture.

The Lewis Faction contends that, after the Tribal Parties carefully circumscribed the scope of the waiver in Section 13.1(b) of the Indenture by placing strict limits on *who* may bring a claim and *what* type of claim may be brought, the Tribal Parties then flung the gates of litigation wide open in Section 13.1(c) by specifying *where* those narrowly limited claims may be brought. That is a fundamental misinterpretation of the language of the limited waiver and does not comport with what the parties intended.

The limited waiver, which is found in Section 13.1(b) of the Indenture, provides:

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 . . .

from unconsented suit, arbitration or other legal proceedings . . . with respect to the Transaction Documents and the transactions contemplated thereby, *provided* that . . . the Action shall be brought by or on behalf of a Grantee . . . to . . . interpret or enforce the provisions of the Transaction Documents or rights arising in connection therewith or the transactions contemplated thereby, whether such rights arise in law or equity.

(A. 2348-49.)

By the plain terms of Section 13.1(b), the limited waiver is granted only to those persons identified as Grantees, such as the Trustee, and only in regard to an action to “interpret or enforce the provisions of the Transaction Documents or rights arising in connection therewith or the transactions contemplated thereby, whether such rights arise in law or equity.” (*Id.*) Section 13.1(b) contains some additional limitations not relevant here but, for the avoidance of doubt, states that the limited waiver of sovereign immunity shall be “*for no other purpose whatsoever.*” (*Id.* (emphasis added).)

While Section 13.1(b) contains the limited waiver itself, Section 13.1(c) governs *where* the claims subject to the limited waiver may be brought. Section 13.1(c) provides that, “[s]ubject to the limitations on each Tribal Party’s limited waiver of sovereign immunity in Section 13.1(b),” the parties agree to “unconditionally submit” to the jurisdiction of the New York federal and state courts “in any action or proceeding arising out of or relating to any Transaction Document or the transaction contemplated thereby” and agree that “all claims in

respect of any such action or proceeding may be heard and determined in such court.” (A. 2349.) The Lewis Faction argues that the last quoted phrase means that so long as a Grantee brings the action, the court has jurisdiction to hear to any and all claims brought by any party in that action, regardless of whether the claims meet the requirements of Section 13.1(b). (App. Br. at 41-42.) In other words, the Lewis Faction interprets Section 13.1(c) as a limit on Section 13.1(b), restricting application of Section 13.1(b) to the initiation of an action only. That interpretation is absurd. The plain language of Section 13.1(c) clearly expresses that Section 13.1(c) is limited *by* Section 13.1(b)—not the reverse. (A. 2348-49.)

In any event, the Counterclaim is utterly unrelated to the Indenture or the claims in the Trustee’s complaint. The Lewis Faction has yet to identify what provisions of the Indenture will assist in resolving the identity of the true CEDA, because there are none. As explained above, determining the identity of the true CEDA requires first resolving which Faction legitimately controls the Tribal Council, which can only be done by interpreting tribal law. In short, this is an internal tribal dispute and not encompassed by the Indenture’s limited waiver of sovereign immunity.<sup>5</sup>

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<sup>5</sup> To the extent that the Lewis Faction suggests that 25 U.S.C. § 233 confers jurisdiction over the Counterclaim, case law is clear that while the statute confers state court jurisdiction over, among other things, “private civil claim[s] by Indians against Indians,” *People by Abrams v. Anderson*, 137 A.D.2d 259, 270 (4th Dep’t 1988), Section 233 does *not* grant jurisdiction over internal tribal affairs, *see*

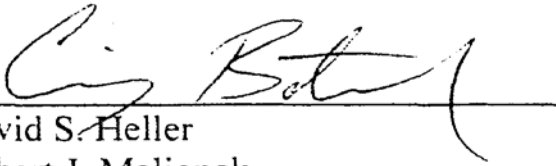


## CONCLUSION

For the foregoing reasons, the Court should affirm the Trial Court's December 2 Order granting the Trustee's motion to dismiss the Lewis Faction's Counterclaim.

Dated: March 26, 2014  
New York, New York

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*Bowen v. Doyle*, 880 F. Supp. 99, 123 (W.D.N.Y. 1995). Likewise, Section 5-1402(1) of the General Obligations Law is inapposite because that statute merely provides that a person may maintain an action in New York state court against a foreign state when the action or proceeding arises out of a contract subject to New York law and with a New York forum selection clause. See N.Y. Gen. Oblig. Law § 5-1402(1). The Counterclaim is an internal tribal dispute that does not arise out of the Indenture and does not fall within the limited waiver of sovereign immunity such that the New York forum selection clause would apply.