STATE OF MICHIGAN

IN THE COURT OF APPEALS

_____

STAR TICKETS,
a Michigan corporation,

Plaintiff/Appellee

v.

CHUMASH CASINO RESORT,
an entity of the Santa Ynez
Band of Chumash Indians,

Defendant/Appellant.

Court of Appeals Case No. 322371

Oakland County Circuit Court
Case No. 2014-138263-CB

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

This Court has appellate jurisdiction under MCR 7.203(A)(1) to review the Order denying the Defendant's motion for summary judgment, entered on June 6, 2014 in the Oakland County Circuit Court Case No. 2014-138263-CB. The Defendant timely filed its Claim of Appeal on June 23, 2014.

STATEMENT OF QUESTIONS INVOLVED

1. Did the trial court err in applying state law principles to actions taken under the authority of tribal law to determine that a tribal enterprise had waived its sovereign immunity?

   Chumash Casino Resort answers: yes
   Plaintiff will answer: no
   The trial court answered: no

2. Did the trial court err in ruling that a choice of law provision in a contract constituted a clear and unequivocal waiver of the Chumash Casino Resort's sovereign immunity from suit?

   Chumash Casino Resort answers: yes
   Plaintiff will answer: no
   The trial court answered: no

INTRODUCTION

Since its inception, the United States has recognized the exclusive authority of Indian tribes to govern their internal affairs. This case is about that authority, and the inherent right of the Santa Ynez Band of Chumash Indians to make its own laws and be ruled by them.

In 2002, the Santa Ynez Band's tribal government enacted a law to establish an independent business enterprise to operate a casino resort on its reservation. That law provided that the enterprise would be cloaked with the Tribe's sovereign immunity from suit, and established the only process by which that immunity could be waived.

The Plaintiff has brought this lawsuit against the Tribe's enterprise, arguing that a form contract it tendered to an employee of the enterprise waived its sovereign immunity from suit. The Plaintiff's alleged waiver was not approved in accordance with the Tribe's governing laws, and the Plaintiff has not argued otherwise. The Trial Court supplanted the Tribe's governing laws with Michigan's principles of agency and equity in denying Chumash Casino Resort's motion for summary disposition.

The Trial Court's decision runs counter to longstanding federal law precedent protecting the Tribe's exclusive powers of self-government, and prohibiting the application of state law to determine whether the Tribe has waived its sovereign immunity. That decision was also contrary to state law precedent regarding sovereign immunity. Accordingly, Chumash Casino Resort respectfully requests that this court reverse the Trial Court's decision, and dismiss the Plaintiff's complaint because it is barred by the Tribe's sovereign immunity.

STATEMENT OF FACTS

The material facts in this case are not in dispute. The Santa Ynez Band of Chumash Indians (Tribe) is a federally recognized Indian tribe located in southern California, near the unincorporated community of Santa Ynez. The Tribe's reservation was established within its aboriginal territory in 1901, pursuant to the Mission Indian Relief Act of 1891. 26 Stat 712, Act Jan. 12, 1891. The Tribe's government is organized pursuant to its Articles of Organization, which serves as its constitution. The Tribe's governing body is comprised of all adult members of the Tribe over the age of 21, who select five members of the Tribe's Business Council from among themselves. The Business Council conducts the day-to-day affairs of the Tribe, and acts only by motion, ordinance, or resolution.

Like most Indian tribes, the Santa Ynez Band of Chumash is unable to generate sufficient government revenues through the levying of taxes. Instead, the Tribe relies upon revenues from the Chumash Casino Resort to fund its government operations. Through those revenues, the Tribe is able to provide its citizens with governmental services, including fire protection, health care, education, and vocational training.

The Chumash Casino Resort (Chumash) is located on the Tribe's reservation, and is wholly owned and operated by the Tribe in accordance with the Indian Gaming Regulatory Act, 25 USC 2701 et seq (IGRA). Chumash is operated by the Board of Directors (Enterprise Board) of an unincorporated entity established by the Tribe's "Chumash Casino and Resort Enterprise Ordinance." See, Br in Support of Def's Mot for Summary Disposition, at Exhibit A, attached as Appendix B (Enterprise Ordinance). The Tribe adopted the Enterprise Ordinance in 2002. Section 5 of the Enterprise Ordinance explicitly acknowledges that the Resort is cloaked with

the Tribe's sovereign immunity; and, that such immunity may only be waived in accordance with prescribed procedures:

> **Section 5. Sovereign Immunity and Waivers of Sovereign Immunity**
>
> * * *
>
> (b) Except as provided in Section 7(i) of this Ordinance, no waiver of sovereign immunity by the Tribe or any Tribal Party other than the Enterprise or any other person or entity, shall ever permit or allow or be construed or interpreted to permit or allow any enforcement or recourse as against the Enterprise, its assets, revenues or business, except that a waiver of sovereign immunity meeting each of the following requirements will permit recourse against explicitly identified assets, revenues, business or activity of the Enterprise:
>
> (i) the waiver is in writing and expressly states that such waiver shall permit recourse and enforcement against the explicitly designated assets. Revenues, business or activity of the Enterprise (sic); and
>
> (ii) the waiver is duly approved by the Enterprise Board.

Id.

On April 1, 2009, a non-management, marketing employee (Chumash Employee) for Chumash signed a "User Agreement" presented by Star Tickets, which purported to make Star Tickets the exclusive ticketing agent for performances at the Chumash Casino Resort. See, Pl Compl at Exhibit A, attached as Appendix A. The User Agreement provided for an initial term lasting until November 8, 2010, but also allowed for an automatic renewal in the event that neither party notified the other of its intent to terminate the agreement. *Id*. The Enterprise Board, which is the only body authorized to waive the Enterprise's sovereign immunity from

suit, did not approve the User Agreement or authorize its execution; nor did it authorize a waiver of its sovereign immunity with respect to the Plaintiff. See, Br in Support of Def's Mot for Summary Disposition, at Exhibit B, attached as Appendix B (Affidavit of Vincent Armenta, Chairman of the Santa Ynez Band of Chumash Indians).

The Plaintiff filed its Complaint on January 9, 2014, alleging that Chumash had breached the User Agreement by operating ticket services in-house. Pl Compl at ¶ 13, Appendix A. The Plaintiff also alleged that ¶ 13(D) of the User Agreement constituted a waiver of the Tribe's sovereign immunity by virtue of the following language:

> The Agreement shall be governed by, and construed in accordance with the laws of the State of Michigan. Each party agrees that this Agreement, and each of its terms and provisions, may be enforced against any party hereto in any court of competent jurisdiction within the County of Kent, State of Michigan, and each party hereto fully consents to and submits to the personal jurisdiction of the State of Michigan for that purpose.

Id at ¶ 6.

Chumash filed a motion for summary disposition on March 23, 2014 pursuant to MCR 2.116(C)(4) and 2.116(C)(7), based on its sovereign immunity. The Trial Court held a hearing on the motion on June 4, 2014 at which it denied Chumash's motion, reasoning that ¶ 13(D) of the User Agreement was a clear waiver of the Tribe's sovereign immunity, and that Chumash was estopped from arguing that the waiver was not executed in accordance with the Tribe's governing law. June 6, 2014 Op & Order at 4, attached as Appendix D.

STANDARD OF REVIEW

This Court reviews questions regarding governmental immunity de novo. See *Cnty Rd Ass'n of Michigan v Governor*, 287 Mich App 95, 118; 782 NW2d 784 (Mich App 2010). A waiver of sovereign immunity must be unequivocally expressed, and cannot be implied. *Lane v Pena*, 518 US 187, 192; 116 S Ct 2092 (1996). A reviewing court must strictly construe an alleged waiver of sovereign immunity in favor of the sovereign, and must not enlarge any alleged waiver beyond its scope. *World Wide Minerals v Republic of Kazakhstan*, 296 F3d 1154, 1162 (DC Cir 2002).

ARGUMENT

From the time of first European contact, Indian Tribes have been regarded as "states" or "nations." *Worcester v Georgia*, 31 US (6 Pet) 515, 561 (1832); see also, *National Farmers Union Ins Cos v Crow Tribe*, 471 US 845, 851; 105 S Ct 2447 (1985) ("[Indian Tribes are self-governing political communities that were formed long before Europeans first settled in North America").

The Commerce Clause of the U.S. Constitution carried this recognition forward, when it recognized Indian tribes alongside other sovereign governments. See, US Const Art 1 § 8 ("[The Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes").

It has remained a maxim of federal Indian law ever since, that, "[t]ribes have plenary and exclusive power over their members and their territory subject only to limitations imposed by federal law." Cohen's Handbook of Federal Indian Law § 4.01[1][b] (2005 Ed).[1]

The earliest cases of the United States Supreme Court recognized the exclusive authority of Indian tribes over their own affairs and members, holding that state laws do not govern activities on Indian lands. See, *Worcester*, 31 US at 561 ("The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force…"). The Court has consistently upheld this

[1] Felix Cohen's Handbook of Federal Indian Law was first published in 1941, and has been described as the leading treatise on federal Indian law. See eg, *Cabazon Band of Mission Indians v Smith*, 34 F Supp 2d 1195, n 7 (CD Cal 1998). Cohen's Handbook has been cited by federal and state courts in numerous Indian law decisions, See, eg, *Michigan v Bay Mills Indian Community*, 572 US ___; 134 S Ct 2024, 2038-39 (2014).

principle, reaffirming the exclusive power of Indian tribes over their internal governance. See, *Williams v. Lee*, 358 US 217, 221-22; 79 S Ct 269 (1959).

In correlation with their inherent sovereignty and exclusive jurisdiction over their internal affairs, "Indian Tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v Martinez,* 436 US 49, 58; 98 S Ct 1670 (1978). This broad principle was affirmed in *Kiowa Tribe v Manufacturing Technologies, Inc,* 523 US 751; 118 S Ct 1700 (1998), and again in *Michigan v Bay Mills Indian Community*, 572 US ___; 134 S Ct 2024 (2014). *Kiowa* restated the longstanding rule that, "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." See *Id* at 754-756. This Court has also recognized tribal sovereign immunity. See, eg, *Huron Potawatomi, Inc v Stinger*, 227 Mich App 127; 574 NW2d 706 (1997).

Tribal sovereign immunity extends to other entities owned by the Tribe, including commercial enterprises. See, *Kiowa*, 523 US at 754 ("Nor have we yet drawn a distinction between governmental and commercial activities of a tribe"); and, *Bates Assoc v 132 Ass'n, LLC*, 290 Mich App 52, 56; 799 NW2d 177 (Mich App 2010)("This immunity applies to a tribe's commercial contracts, whether made on or off of an Indian reservation").

That immunity bars suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. See, *Kiowa*, 523 US at 760. Finally, as the Supreme Court recently explained, both tribes and entities doing business with tribes have relied on the doctrine of tribal sovereign immunity for many years, and structured their business transactions accordingly. See, *Bay Mills*, 572 US ___; 134 S Ct at

2036 ("[tribes and businesses] have for many years relied on *Kiowa* (along with its forebears and progeny), negotiating their contracts and structuring their transactions against a backdrop of tribal immunity").

I. Governing law renders any alleged waiver of sovereign immunity void in this case.

A. State law cannot diminish the exclusive power of the Santa Ynez Band of Chumash Indians to determine whether and how to waive its sovereign immunity.

The Santa Ynez Band of Chumash Indians is vested with exclusive powers of self-government, except where those powers have been diminished or divested through agreement in a treaty or an act of Congress. See, *United States v Michigan*, 471 F Supp 192, 262 (WD Mich 1979) ("Indian tribes retain all powers of self-government, sovereignty and aboriginal rights not explicitly taken from them by Congress").

Among the Tribe's exclusive powers of self-government, is its power to limit or waive its sovereign immunity from suit. See, *Kiowa*, 523 US at 754; and, *Bay Mills*, 572 US ___; 134 S Ct at 2027 (describing sovereign immunity as ""[a]mong the core aspects of sovereignty that tribes possess").

In the case of *Williams v Lee*, the United States Supreme Court examined whether an Arizona state court had jurisdiction to hear a lawsuit brought by a non-Indian trader against members of the Navajo Nation for a contract formed on Indian lands. *Williams*, 358 US at 218. The Court explained that the core principle of *Worcester* remains intact, and that the exclusive power of tribes to govern their internal affairs exists to the extent that Congress has not diminished it. *Id* at 219-20. The Court also noted that Congress has, "acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a

reservation." *Id*. In framing its inquiry, the Court stated, "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id*. The Court ultimately held that Arizona's exercise of judicial jurisdiction in that instance would have infringed upon the Tribe's exclusive right. *Id* at 220, 223.

The Supreme Court applied the *Williams* rule in *Fisher v District Court*, 424 US 382; 96 S Ct 943 (1976). In that case, the Court recognized that the Northern Cheyenne Tribe had a right "to govern itself independently of state law…." *Id* at 387. The Court ruled that a state court's assertion of jurisdiction over an adoption case involving tribal members, "plainly would interfere with the powers of self-government" of the Northern Cheyenne Tribe, by "subject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves."[2] *Id* at 387-88.

The Supreme Court applied this rule in the context of tribal sovereign immunity in *Kiowa*. In that case, a business entity of the Kiowa Tribe of Oklahoma entered into a commercial contract with Manufacturing Technologies, Inc. for the purchase of stock. *Kiowa*, 523 US at 753. The contract was executed outside of the Kiowa Tribe's lands. *Id* at 754. The Oklahoma Civil Court of Appeals held that the Kiowa Tribe's sovereign immunity did not bar the lawsuit, relying upon prior state court decisions holding that state courts only recognized tribal sovereign immunity as a matter of comity. *Id* at 755. The Oklahoma Court reasoned, "because the State holds itself open to breach of contract suits, it may allow its citizens to sue other sovereigns acting within the State." *Id*.

[2] The *Fisher* case pre-dated the passage of the Indian Child Welfare Act of 1978.

On appeal, the Supreme Court reversed the decision of the Oklahoma Court of Appeals, stating, "tribal immunity is a matter of federal law and is not subject to diminution by the States."[3] *Kiowa*, 523 US at 756. According to the Court, this is true even where state substantive laws would govern the underlying business transaction. See, *Id* at 755 ("To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit").

The Santa Ynez Band of Chumash Indians has retained its sovereign immunity as one of its "core aspects of sovereignty." *Bay Mills*, 572 US ___; 134 S Ct at 2027. It retains the exclusive control over whether and how to waive that immunity, subject only to the power of Congress. Pursuant to that exclusive control, the Tribe enacted governing laws prescribing how Chumash can waive its immunity from suit.

Under *Williams*, this Court's initial inquiry would be whether the Trial Court's application of state common law regarding contracts and equity to find a waiver of the Tribe's sovereign immunity would infringe upon the Tribe's power to make its own laws and be ruled by them. But, the Supreme Court answered this question in *Kiowa* when it reversed the state court's application of state common law and held: "tribal immunity is a matter of federal law and is not subject to diminution by the States." 523 US at 756. The judicial common law and statutory law of Michigan have no force in determining whether and how the Tribe can waive

[3] Federal law also preempts the application of state laws to the exercise of tribal self-government on the reservation, such as the manner in which a tribe waives its immunity from suit. See, eg, *White Mountain Apache Tribe v Bracker*, 448 US 136, 144; 100 S Ct 2578 (1980) ("When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in…tribal self-government is at its strongest").

its sovereign immunity from a contract-based suit, even where Michigan law might govern the subject of the contract. See, *Kiowa*, 523 US at 755.

Thus, the Trial Court erred on the first inquiry by looking to state law to determine whether Chumash waived its own immunity. By applying state law principles to find that Chumash waived its sovereign immunity, rather than governing tribal law, the Trial Court subjected the Tribe's members to a waiver process "other than the one they have established for themselves." *Fisher*, 424 US at 387-88. This infringed upon the Tribe's exclusive right to make its own laws and be ruled by them.

B. Chumash did not waive its sovereign immunity in accordance with governing law.

Because the Supreme Court foreclosed the application of state law to the Tribe's exclusive powers of self-government in *Kiowa*, the Court's first inquiry in this case must be to determine whether Chumash has waived its sovereign immunity in accordance with governing tribal law. See eg, *First Bank v. Maynahonah*, 2013 Ok Civ App 101, ___; 313 P3d 1044, 1054 (Okla Civ App, 2013)(explaining that state courts must give deference to tribal law in deciding whether an asserted waiver of immunity is valid).

As part of its exclusive authority over its internal affairs, the Tribe is free to limit or waive its own sovereign immunity from suit. See, *Kiowa*, 523 at 754. And, like any other sovereign government, the Tribe, "may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted." *Missouri River Serv, Inc v Omaha Tribe of Nebraska*, 267 F3d 848, 852 (8th Cir, 2000)(quoting *American Indian Agr Credit Consortium, Inc v Standing Rock Sioux Tribe*, 780 F2d 1374 (8th Cir 1985)).

The Tribe placed explicit conditions on the Chumash Casino Resort's ability to waive its sovereign immunity in Section 5 of the Enterprise Ordinance:

> (i) the waiver [must be] in writing and expressly states that such waiver shall permit recourse and enforcement against the explicitly designated assets. Revenues, business or activity of the Enterprise (sic); and
>
> (ii) the waiver [must be] duly approved by the Enterprise Board.

Br in Support of Def's Mot for Summary Disposition at Exhibit A, attached as Appendix B. As if to emphasize this requirement, the Tribe's governing body added the following language to the Enterprise Ordinance:

> **Section 8. <u>Enumerated Limitations</u>**. Notwithstanding any other provision in this Ordinance, the Enterprise shall not take any of the following actions without written authorization from the General Council, or if permitted by the Articles of Organization, the Business Council:
>
> (a) waive or purport to waive the sovereign immunity of the Tribe or any Tribal Party, except as expressly authorized in Section 7(i) with respect to the Enterprise.[4]

Id.

The Tribe enacted the 2002 Enterprise Ordinance pursuant to its exclusive authority to govern its internal affairs. That tribal law establishes a clear process by which Chumash can waive its sovereign immunity, requiring an express written waiver approved by the Enterprise Board.

In its complaint, the Plaintiff alleges that ¶ 13(D)) of the User Agreement constitutes a waiver of Chumash's sovereign immunity. Pl Compl at ¶ 6, Appendix A. Neither that provision,

[4] Section 7(i) of the Enterprise Ordinance merely authorizes the Chumash Casino Resort to waive its sovereign immunity in compliance with the Enterprise Ordinance. *Id*.

nor the User Agreement itself, was approved by the Enterprise Board as required by Section 5 of the Enterprise Ordinance. See, Br in Support of Def's Mot for Summary Disposition at Exhibit B, attached as Appendix B (Affidavit of Vincent Armenta).

The Plaintiff has not even attempted to argue otherwise, instead assuming that the Tribe's governing laws are irrelevant to its claim. As explained above, the Tribe's laws are relevant. Those laws establish the method by which the Plaintiff can seek the Tribe's permission to bring its suit in the first instance. The record in this case clearly demonstrates that the alleged waiver of the Tribe's sovereign immunity is invalid under tribal law. The Plaintiff-Appellee does not dispute this fact.

* * *

Here, the Tribe has retained its exclusive authority to govern its internal affairs, including the right to prescribe whether and how to waive one of its core sovereign rights. Congress has not enacted any law to diminish the Tribe's exclusive authority in this area, and governing case law holds that state judicial law and statutory law cannot diminish or infringe upon the Tribe's exclusive authority over its internal governance.

The Tribe enacted a law in 2002 that prescribes the manner in which Chumash can waive its sovereign immunity from suit. The alleged waiver was not executed in accordance with that governing law, and the Plaintiff has not even attempted to argue as much. The Trial Court should have ended its inquiry at that point.

Instead, the Trial Court applied state law to supersede the Tribe's immunity in this case. That was a reversible error. This Court should correct that error by properly deferring to the Tribe's exclusive authority to make its own laws and be governed by them.

II. The laws of equity cannot defeat the Tribe's sovereign immunity.

The Trial Court determined that Chumash Casino Resort was estopped from asserting its sovereign immunity in this case because "the parties operated under the terms of the User Agreement from 2006 onward[.]"[5] June 6, 2014 Op & Order at n 1, Appendix D. This determination was also erroneous as a matter of law.

As an initial matter, the Trial Court erred in its reliance upon state law cases applying the doctrine of estoppel to municipal contracts. *Id* at 4 (citing *Webb v Wakefield Twp*, 239 Mich 521; 215 NW 43 (1927) and *East Jordan Lumber Co v East Jordan*, 100 Mich 201; 58 NW 1012 (1894)). Municipal governments are creatures of state law; and, unlike Indian tribes, they are not vested with inherent sovereign immunity from suit. See, *Cnty Rd Ass'n of Michigan*, 287 Mich App at 121-122; 782 NW2d 784 (Mich App 2010) (explaining that political subdivisions are created by the State, and may only exercise those powers conferred by the State). Municipal contract cases are simply not applicable to cases involving tribal, federal, or state sovereign immunity.

[5] Chumash does not concede that the alleged contract was valid; nor does Chumash concede that it is estopped from denying the validity of the contract itself. Even assuming, arguendo, that the contract was valid, any alleged waiver provisions would remain invalid because they were not approved in accordance with governing tribal law. It is well settled that sovereign immunity can render an otherwise valid right unenforceable. See, eg, *Oklahoma Tax Comm'n v Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 US 505, 514; 111 S Ct 905 (1991)(holding that the State of Oklahoma may not enforce its right to collect certain on-reservation taxes directly against the Tribe because of sovereign immunity); *Seminole Tribe of Florida v Florida*, 517 US 44, 75; 116 S Ct 1114 (1996)(holding that the Tribe's right to negotiate a gaming compact with Florida was barred by Florida's sovereign immunity); and *Florida Paraplegic Ass'n v Miccosukee Tribe of Indians of Florida*, 166 F3d 1126, 1134 (11th Cir 1999) ("the Supreme Court recognized that Congress could enact a statute with substantive limitations on Indian tribes without providing any means for most individuals protected by the law to enforce their rights in federal court).

Second, equitable doctrines, such as estoppel, cannot be used to defeat the Tribe's sovereign immunity from suit. See, *Three Affiliated Tribes of Fort Berthold Reservation v Wold Engineering*, 476 US 877, 893; 106 S Ct 2305 (1986)("The perceived inequity of permitting the Tribe to recover from a non-Indian for civil wrongs in instances where a non-Indian allegedly may not recover against the Tribe simply must be accepted in view of the overriding federal and tribal interests in these circumstances…"); *Miccosukee Tribe*, 166 F3d at 1135 ("[i]mmunity doctrines inevitably carry within them the seeds of occasional inequities"); and, *Big Valley Band of Pomo Indians v Sup Ct*, 133 Cal App 4th 1185, 1195-96 (1st Dist 2005) ("Regardless of the equities, a court is not empowered to deprive an Indian tribe of its sovereign immunity").

In *United States v United States Fidelity & Guar Co,* 309 US 506; 60 S Ct 653 (1940) the United States Supreme Court held that an agent of the sovereign cannot act to waive its sovereign immunity in contravention of governing law.[6] The Court explained:

> It is a corollary to immunity from suit on the part of the United States and the Indian Nations in tutelage that this immunity cannot be waived by officials. If the contrary were true, it would subject the government to suit in any court in the discretion of its responsible officers. This is not permissible.

US Fid & Guar Co, 309 US at 513. The Court determined that federal and tribal sovereign immunity was not waived by an attorney's failure to assert the defense in state court proceedings, because Congress had only waived that immunity for proceedings in federal

[6] In that case, the United States was appearing on behalf of the Choctaw and Chickasaw Indian tribes. The Court's analysis was based upon the sovereign immunity of the tribes. *US Fid & Guar Co*, 309 US at 512 ("These Indian Nations are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did").

courts. *Id*.

More recently, the Tenth Circuit Court of Appeals rejected the notion that tribal immunity could somehow be waived through estoppel. *Native American Distrib v Seneca-Cayuga Tobacco*, 546 F3d 1288 (10th Cir, 2008). In that case, a tribal business entity actually misled one of its business partners regarding its immunity, stating that it was not immune from suit when asked to include a waiver in a commercial contract. *Id* at 1291. The Court held that the tribal business was not estopped from asserting its immunity, stating, "the misrepresentations of the Tribe's officials or employees cannot affect its immunity from suit." *Id* at 1295. The Court also quoted with approval the case of *Ute Distrib Corp v Ute Indian Tribe*, 149 F3d 1260, 1267 (10th Cir 1998), stating, "there can be no 'waiver of tribal immunity based on policy concerns, perceived inequities arising from the assertion of immunity, or the unique context of a case.'" *Id*.

Earlier this year, the Arizona Court of Appeals reached a similar conclusion in a case with facts nearly identical to those involved here. *MM&A Prods, LLC v Yavapai-Apache Nation*, ____ Ariz ____ No 2 CA-CV 2013-0051 (Ariz App 2014)(attached as Appendix E). In *Yavapai-Apache Nation*, the marketing director for the Tribe's gaming facility signed an "Exclusive Entertainment and Production Agreement" with a vendor, which included an express "waiver of sovereign immunity." *Id* at 2. The Court rejected the plaintiff's assertion that an agent cloaked with apparent authority could execute a waiver of sovereign immunity in violation of tribal law, stating:

> "Indian sovereignty, like that of other sovereigns, is not a discretionary principle subject to the vagaries of the commercial bargaining process or the equities of a given situation." To the extent the trial court implied it would not find a valid waiver of

> the Nation's sovereign immunity based on a theory of apparent authority, it did not err.

Id at 6 (internal citations omitted).

Michigan courts have consistently prohibited the application of principles of agency and estoppel to the State's sovereign immunity. This Court reiterated the rule in 1999, stating, "[a] state officer or agent has no authority to waive sovereign immunity where such a waiver is not authorized by the Legislature." *Cain v Lansing Housing Comm'n*, 235 Mich App 566, 569; 599 NW2d 516 (Mich App 1999) (citing *McNair v State Hwy Dep't*, 305 Mich 181; 9 NW2d 52 (Mich 1943)); see also, *Cnty Rd Ass'n of Michigan*, 287 Mich App at 119; 782 NW2d 784 (Mich App 2010)("Michigan courts have also recognized that immunity from suit can only be waived by an act of the Legislature or through a constitutional provision")(internal citations omitted).

The United States Supreme Court has made it clear that an agent of a Tribe may not waive tribal sovereign immunity without the consent of either the Tribe or Congress. See, *US Fid & Guar Co,* 309 US at 513. Other federal courts have applied this rule even where a Tribe may have acted in bad faith. *Seneca-Cayuga Tobacco*, 546 F3d at 1295. Nothing in the record in this case suggests that Chumash acted in bad faith, or that its employee even possessed the apparent authority to act on its behalf. Even if that were the case, the *United States Fidelity & Guar Co* and *Seneca-Cayuga Tobacco* cases make it clear that the Tribe's sovereign immunity would *still* remain intact. The Arizona Court of Appeals reached the same conclusion this year in an analogous situation, in *Yavapai-Apache Nation.*

Inferring a waiver of sovereign immunity through the subsequent actions of the parties runs counter to the longstanding rule that waivers of immunity must be strictly construed, and cannot be implied. See, *Pena*, 518 US at 192("A waiver of the Federal Government's sovereign

immunity must be unequivocally expressed…and will not be implied"). The purpose of this rule is to support the doctrine of sovereign immunity itself, which protects the sovereign from being sued without knowingly giving its unequivocal consent in accordance with its own laws.

Like other sovereign governments, the Tribe and its enterprises employ a large number of people to carry-on its day-to-day affairs. The doctrine of sovereign immunity does not command the Tribe, and its business enterprises, to continuously monitor each and every employee to guard against an unwanted waiver of immunity under the doctrine of apparent authority. The Supreme Court's ruling in *United States Fidelity & Guar Co* emphasizes this point.

Federal and state courts have consistently prohibited the application of estoppel to infer a waiver of sovereign immunity, and this court has applied that rule to the State of Michigan's sovereign immunity. The Tribe's sovereign immunity is entitled to the same level of respect in this case. See, *Bay Mills*, 572 US ___; 134 S Ct at 2042 ("This Court would hardly foster respect for the dignity of Tribes by allowing States to sue Tribes for commercial activity on State lands, while prohibiting Tribes from suing States for commercial activity on Indian lands.")(Sotamayor, J, concurring).

This Court should reverse the trial court's error, and reaffirm the principle that equity cannot be used to overcome sovereign immunity.

III. The Trial Court erred in relying on the case of *Bates Assoc v 132 Ass'n, LLC*.

The Trial Court relied upon this Court's decision in *Bates Assoc v 132 Ass'n, LLC*, 290 Mich App 52; 799 NW2d 177 (Mich App 2010) to determine that a tribal employee had executed a waiver of the Tribe's sovereign immunity in violation of tribal law. June 6, 2014 Op

& Order at 4, Appendix D. Notwithstanding the countervailing precedent prohibiting the application of state law to determine whether a tribe has waived its immunity, the Plaintiff's claim here also fails to meet the standard that this Court applied in *Bates*.

A. Bates involved a valid waiver of tribal sovereign immunity, which was acknowledged by the tribal party.

In *Bates*, the Sault Ste. Marie Tribe of Chippewa Indians ("Sault Tribe") entered into an agreement of sale with a real estate company to purchase a parking structure. *Id* at 53. That agreement of sale contained an explicit waiver of the Sault Tribe's sovereign immunity:

> Waiver of Immunity. The Seller and the Tribe (in connection with aforemented [sic] guaranty the Tribe) hereby expressly waive their sovereign immunity from suit should an action be commenced with respect to this Agreement or any document executed in connection with this Agreement of Sale. This waiver (i) is granted to Purchaser, its successor and assigns; (ii) shall be enforceable in [a] court of competent jurisdiction; and (iii) the governing law shall be the internal laws of the State of Michigan.

Id at 55-56.

The *Bates* parties had a dispute involving the transfer of the parking structure, and eventually entered into a settlement agreement. *Id* at 54. That settlement agreement incorporated the Sault Tribe's prior waiver of sovereign immunity by reference:

> The Tribe's waiver of sovereign immunity as provided in Section 10 of the Agreement of Sale attached to the Option Agreement dated November 3, 2000 is incorporated herein by reference with regard to any action or proceeding by Bates to enforce its rights relating to relating to [sic] this Settlement Agreement, the Tribe's guaranty, the parties' agreements, and/or Bates Garage.

Id at 55. The Sault Tribe subsequently disputed the payments under the settlement agreement, giving rise to the lawsuit that reached this court.

The Sault Tribe argued that the waiver of immunity in the second agreement, which incorporated the prior waiver by reference, was invalid because it was executed by a tribal employee in violation of governing tribal law that required approval of the Tribe's governing body. *Id* at 59. This court held otherwise, noting:

> [A]lthough there was no tribal resolution specifically pertaining to the waivers of sovereign immunity and tribal court jurisdiction in the settlement agreement, the Tribe conceded in the trial court that there was a tribal resolution pertaining to the agreement of sale, § 10 of which was incorporated into the settlement agreement.

Id at 63. This court explained that the Sault Tribe had waived its argument regarding the validity of the immunity waiver in the second agreement because it had conceded that the initial waiver was valid during proceedings at the trial court. *Id* at 64.

This Court was also persuaded by the plaintiff's argument that it was unaware that the laws of the Sault Tribe required action by its governing body in order to waive its sovereign immunity from suit.[7] *Id* at 62-63.

B. This case does not fit within the *Bates* framework.

This Court's holding in *Bates* can be fairly summarized as requiring a three-part inquiry to determine whether a tribe has waived its sovereign immunity:

1. Has the tribe has executed a waiver of immunity in accordance with governing tribal law?

[7] There is ample case law supporting the principle that a valid waiver of sovereign immunity cannot be conditioned upon the non-sovereign party's knowledge of the existence of that immunity, or the process by which that immunity may be waived. See, eg, *Seneca-Cayuga Tobacco*, 546 F3d at 1295 ("Whether a tribal entity has affirmatively led or passively permitted another party to believe it is amenable to suit, in both cases the entity has concealed its immunity, to its benefit and the other's detriment").

2. Was that waiver of immunity made applicable to the lawsuit?

3. Did the subsequent conduct of the parties evidence their belief that the waiver of immunity was valid?

See, *Id* at 64.[8]

This case does not satisfy any of those requirements. As explained above, Chumash did not execute a waiver of sovereign immunity in accordance with governing tribal law. The contract at issue in this case was purportedly executed by a non-management tribal employee, and was not approved by the Enterprise Board in conformity with the Enterprise Ordinance. While the subsequent conduct of the parties in this case may evince the existence of some sort of business relationship, nothing in that conduct shows that they both understood the User Agreement to contain a valid waiver of the Tribe's sovereign immunity. In fact, Chumash was unaware that the User Agreement purported to diminish its sovereign immunity until the Plaintiff brought its claim.

Finally, this case is different from *Bates* in one other critical respect: the Plaintiff here is not an unsuspecting actor engaging in a one-time business transaction with an Indian tribe. Rather, the Plaintiff's business involves relationships with numerous Indian tribes across

[8] This Court explained this inquiry as follows:

> The conduct of the parties both during the settlement agreement negotiations and after the agreement was executed support this conclusion. The settlement agreement itself contains waivers of sovereign immunity and tribal court jurisdiction and incorporates by reference such clear and unequivocal waivers set forth in the agreement of sale, which the Tribe conceded was supported by a valid resolution.

Bates, 290 Mich App at 64.

the United States. See, See, Br in Support of Def's Mot for Summary Disposition at Exhibit D, Appendix B. Given that the Plaintiff's relationships with those other Indian tribes involve ticketing at venues at tribal gaming facilities, it is the sovereign status of Indian tribes that makes those relationships possible. The Plaintiff is fully aware of the legal ramifications of tribal sovereignty – it is an important part of its business model. As the Supreme Court recently stated in *Bay Mills*, Indian tribes and the entities and individuals doing business with them, have negotiated their "contracts and structur[ed] their transactions against a backdrop of tribal immunity." Bay Mills, 572 US ___; 134 S Ct at 2036. The Plaintiff cannot now plead ignorance to the fact that tribes are sovereign governments, vested with the power to enact laws preserving, limiting, and waiving their sovereign immunity.

IV. Even if the Chumash Employee had the authority to waive the Tribe's immunity, the contract does not contain an explicit waiver of immunity.

The Trial Court determined that the choice of law provision in ¶ 13(D) of the User Agreement constituted an express waiver of the Tribe's sovereign immunity, in light of the Supreme Court's opinion in *C&L Enterprises v Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 US 411; 121 S Ct 1589 (2001). See, June 6, 2014 Op & Order at 3-4, Appendix D. This ruling was also in error. Assuming, arguendo, that the tribal employee had authority to waive the Tribe's sovereign immunity, the User Agreement's choice of law provision does not constitute a clear and unequivocal waiver of the Tribe's sovereign immunity.

A. Waivers of tribal sovereign immunity must be explicit, and cannot be implied.

A tribe's waiver of its sovereign immunity must be explicit, and cannot be implied. *Santa Clara Pueblo*, 436 US at 59. In examining the actions of any tribe, there is a strong judicial

presumption against waivers of sovereign immunity. *Pan American Co v Sycuan Band of Mission Indians*, 884 F2d 416, 419 (9th Cir 1989)(explaining that the *Santa Clara Pueblo* decision reiterates the presumption against waivers of immunity). Moreover, waivers of sovereign immunity must be "narrowly construed in favor of the sovereign and are not enlarged beyond what the language requires". *World Wide Minerals*, 296 F3d at 1162 (internal quotations omitted).

Many tribes, including the Santa Ynez Band of Chumash Indians, have structured their business dealings, "upon the justified expectation that absent an express waiver their sovereign immunity stood fast." *American Indian Agr Credit Consortium, Inc v Standing Rock Sioux Tribe*, 780 F2d 1374 (8th Cir 1985). The Supreme Court has held, however, that a waiver of tribal sovereign immunity does not necessarily have to use the words "sovereign immunity" in order to be valid, so long as the tribe has expressed its intent to be subject to suit "with the requisite clarity." See, *C&L Enterprises*, 532 US at 418.

B. *C&L Enterprises* is far narrower than applied by the Trial Court.

In *C&L Enterprises*, the Citizen Band of Potawatomi Indians ("Citizen Band") contracted with the plaintiff company to install a roof on a building owned by the Tribe outside of its reservation. *Id* at 415. The contract at issue was a form contract copyrighted by the American Institute of Architects and tendered by the Citizen Band to C&L Enterprises. *Id*. It contained an arbitration clause by which the parties agreed to submit to binding arbitration pursuant to the American Arbitration Association Rules, as well as a choice-of-law clause applying the laws of Oklahoma to the contract. *Id*. The Court noted that Oklahoma had adopted the Uniform

Arbitration Act, which authorized state courts to enter and enforce a judgment on an arbitration award. *Id* at 415-16.

Prior to commencement of work, the Citizen Band changed the design of the roof and solicited bids for a new contract. *Id* at 416. The Tribe ultimately selected another contractor, prompting a lawsuit by C&L Enterprises. *Id*.

The Court ultimately held that the Citizen Band had waived its immunity from suit with requisite clarity, by agreeing to submit to Oklahoma's "regime" for the enforcement of arbitration awards, explaining, "The arbitration clause . . . would be meaningless if it did not constitute a waiver of whatever immunity [the Tribe] possessed." *Id* at 422 (quoting *Native Village of Eyak v GC Contractors*, 658 P2d 756, 760 (Alaska 1983)). It is important to note that the Court did not hold that such a waiver could be used in instances where a plaintiff is seeking money damages under a contract.[9]

The fact that Citizen Band had tendered a form contract to the plaintiff was central to the Court's determination that the Tribe had intended to waive its immunity. See, *Id* at 423 ("…we conclude that *under the agreement the Tribe proposed and sign*ed, the Tribe clearly consented to arbitration and to the enforcement of arbitral awards in Oklahoma state court")(emphasis added). The Court explained:

[9] At trial, the Plaintiff-Appellee could point to only one case in which *C&L Enterprises* had been applied to find a waiver of immunity outside of the arbitration context. See, Pl's Brief in Opposition to Defendant's Motion for Summary Judgment, at 6, Appendix C. (citing *Colombe v Rosebud Sioux Tribe*, 835 F Supp 2d 736 (D SD 2012). The contract at issue in *Colombe* was a negotiated agreement that established an arbitration-like process for litigation in tribal court, with enforcement in federal court; and, the contract contained explicit words "permitting any party to bring suit before the United States Federal District Court". *Colombe*, 835 F Supp 2d at 745.

> In appropriate cases, we apply "the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it." *Mastrobuono v Shearson Lehman Hutton, Inc*, 514 US 52, 62 (1995) (construing form contract containing arbitration clause). That rule, however, is in apposite here. The contract, as we have explained, is not ambiguous. Nor did the Tribe find itself holding the short end of an adhesion contract stick: *The Tribe proposed and prepared the contract; C & L foisted no form on a quiescent Tribe*.

Id at 423 (emphasis added).

In sum, the Supreme Court's decision in *C&L Enterprises* is far narrower than advanced by the Plaintiff and applied by the Trial Court. While the Supreme Court expressed the notion that a waiver need not explicitly reference a tribe's "sovereign immunity" to be valid, it applied that principle very narrowly – to enforce an arbitration award where the Tribe itself had tendered the contract. In *C&L Enterprises*, the Tribe's act of tendering the form contract served as the clear evidence of its intent to waive its sovereign immunity. The Supreme Court reserved the common-law rules of contract construction in similar cases, where the application of those rules would be warranted by the facts.

C. The Plaintiff-Appellee's actions do not demonstrate the Chumash Casino Resort's clear and unequivocal intent to waive its own immunity.

Nothing in ¶ 13(D) of the User Agreement clearly evinces Chumash's intent to waive its sovereign immunity from suit. As in *C&L Enterprises*, the contract at issue in this case is a form contract containing an ambiguous choice of law provision. That is where the similarities end.

In *C&L Enterprises*, the Court held that the Citizen Band could not argue that it didn't intend to submit to the State of Oklahoma's enforcement regime for arbitration awards, because the Tribe itself tendered the contract. *C&L Enterprises*, 532 US at 423. In this case,

neither the Tribe nor Chumash intended to submit to Michigan's enforcement regime; it was the Plaintiff that tendered its form contract, with its choice of law provisions, to a mere marketing employee of Chumash. As the Court noted in *C&L Enterprises*, "the common-law rule of contract interpretation, that a court should construe ambiguous language against the interest of the party that drafted it," should still be applied in "appropriate cases." *Id*. This is an appropriate case.

The Court should not construe the form contract tendered by the Plaintiff as evidence of the Tribe's intent to waive its immunity, as it would run counter to the maxim that waivers must be clear, unequivocal, and construed narrowly in favor of the sovereign. *See*, *C&L Enterprises*, 532 US at 418 and *World Wide Minerals*, 296 F3d at 1162. If the Plaintiff requires a waiver of sovereign immunity in order to engage in business with the Tribe, it must explicitly demand and receive it. The law does not permit the Plaintiff to obtain a waiver by foisting an ambiguous form contract upon an unwary tribal employee. Therefore, this Court should reverse the Trial Court's erroneous determination that ¶ 13(D) constitutes a waiver of sovereign immunity.

CONCLUSION

For all of the foregoing reasons, this Court should reject the Plaintiff's efforts to apply state law to matters of the Tribe's internal governance, and uphold the Tribe's fundamental right to determine whether and how to waive its own sovereign immunity. This Court should also recognize that Chumash Casino Resort has not taken any action to clearly and unequivocally waive its sovereign immunity from suit. Accordingly, the Chumash Casino Resort

respectfully requests that this Court reverse the Trial Court's decision and dismiss the Plaintiff's complaint pursuant to MCR 2.116(C)(7).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2014, I filed the foregoing Brief on Appeal on behalf of Chumash Casino Resort, and this certificate of service with the Clerk of the Court using the Michigan Court of Appeals' E-File & Serve system, which will send notice to counsel for the Plaintiff at:

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