STATE OF MICHIGAN

IN THE COURT OF APPEALS

**STAR TICKETS**,

Plaintiff-Appellee,

v.

C.A. Case No. 322371
L.C. Case No. 2014-138263-CB

**CHUMASH CASINO RESORT**,
a foreign corporation,

Defendant-Appellant.

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# PLAINTIFF/APPELLEE'S BRIEF ON APPEAL

# PROOF OF SERVICE

# ORAL ARGUMENT REQUESTED

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## STATEMENT OF QUESTIONS INVOLVED

### I.

### DID THE TRIAL COURT PROPERLY CONCLUDE THAT DEFENDANT WAIVED SOVEREIGN IMMUNITY?

| | |
|---|---|
| Plaintiff/Appellee says | "Yes." |
| Defendant/Appellant says | "No." |
| The trial court says | "Yes." |

### II.

### DID THE TRIAL COURT PROPERLY CONCLUDE THAT DEFENDANT'S WAIVER WAS VALID AND IS ENFORCEABLE?

| | |
|---|---|
| Plaintiff/Appellee says | "Yes." |
| Defendant/Appellant says | "No." |
| The trial court says | "Yes." |

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## STATEMENT OF JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction pursuant to MCR 7.203(A)(1) because Defendant/Appellant filed a timely claim of appeal from the Order of the trial court.

This Court reviews decisions regarding motions for summary disposition under MCR 2.116(C)(4) and (C)(7) *de novo*. *Herbolsheimer v SMS Holding Co*, 239 Mich App 236, 240 (2000); *Fisher Sand and Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 553 (2013). The Court is to accept as true the plaintiff's well-pleaded allegations and construe them in the light most favorable to the plaintiff. The motion should not be granted unless no factual development could provide the basis for recovery. *Huron Potawatomi, Inc v Stinger*, 227 Mich App 127, 130 (1997).

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## INTRODUCTION

The trial court's decision to deny Defendant's motion for summary disposition should be affirmed for two reasons. First, the parties' contract contained a clear, express waiver of sovereign immunity. Paragraph 13(D) of the User Agreement provides consent for enforcement of the agreement "in any court of competent jurisdiction .... And each party hereto fully consents to and submits to the personal jurisdiction of the State of Michigan for that purpose." Contracts with similar explicit consents to enforcement of rights arising out of a contract in a court of law have long been held to constitute an express waiver of sovereign immunity.

Second, the waiver was valid and is enforceable because the contract was executed by a representative of Defendant with apparent authority and the contract was then ratified by Defendant's performance and acceptance of its benefits. The parties operated under the contract for many years and Defendant received millions of dollars as a result. It cannot now be heard to complain that the immunity waiver is somehow invalid.

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## COUNTER STATEMENT OF FACTS

### 1. The Parties' Contractual Arrangement.

Plaintiff is one the nation's leading entertainment ticketing companies. Exhibit A, Complaint at ¶3. It entered into a written contract with Defendant entitled a "User Agreement," which provided that Plaintiff would serve as the exclusive ticketing agent for performances held at the casino operated by Defendant. Exhibit B, User Agreement at ¶2. Plaintiff and Defendant operated under the terms of the User Agreement from 2006 onward. Exhibit A at ¶7.

The initial term of the User Agreement was for a four-year period and expired on November 8, 2010. Exhibit B at ¶3. However, the User Agreement provided that it would be automatically renewed for successive one-year terms unless either party notified the other party in writing of its intention not to renew the User Agreement not less than ninety days before the end of the initial or any renewal term. *Id.* Neither party to the User Agreement has ever provided the other party with any notice of its intent not to renew the User Agreement. Exhibit A at ¶9. On the contrary, Defendant's representative contacted Plaintiff in 2010 and requested that Plaintiff finalize the renewal to the User Agreement that the parties had previously discussed. Exhibit C.

The parties' relationship was active, ongoing and significant. Between 2009 and 2013 alone, Defendant received more than one million dollars a year under the terms of the User Agreement, including more than $1.6 million in 2011. Exhibit D, Affidavit of K. Fisher. In turn, Plaintiff received an average of approximately $150,000 per year in fees under the Agreement. Exhibit E.

During the course of the relationship between Plaintiff and Defendant, the parties exchanged many communications, provided each other with documents, and of course,

each received substantial sums of money. Payments and fees were handled in accordance with the terms of the User Agreement. Exhibit F, Affidavit of M. Walthius.

Although Defendant asserts that the facts are not in dispute, that is not the case. Defendant refers to the User Agreement as a "form contract" submitted by Plaintiff. Nothing in the record supports that assertion. In fact, Defendant's representative sought a renewal of the Agreement based on specific discussions the parties held about its terms. See, Exhibit C.

The parties also do not agree on the role of Leah Carasco, Defendant's representative in dealings regarding the User Agreement and related issues. In its Brief to this Court, Defendant refers to Ms. Carasco as a "non-management" employee. In the trial court, Defendant argued that Ms. Carasco was a mere "marketing assistant." Once again, the record is to the contrary. Numerous communications from Ms. Carasco and from other representatives of Defendant established that Ms. Carasco held several different management positions during the term of the User Agreement from 2007 onward.

For example, in an exchange of emails in early 2009 relating to Plaintiff's request that Defendant provide Plaintiff with a W-9 federal tax form, Ms. Carasco was identified as the "Players Club Manager." Exhibit G. Ms. Carasco then executed the W-9 form on behalf of Defendant. Exhibit H. Various representatives of Plaintiff dealt with Ms. Carasco on matters arising out of or relating to the User Agreement, including Defendant's request for a renewal of the User Agreement. E.g., Exhibit I. In 2010, Ms. Carasco requested that Plaintiff prepare a renewal contract. Exhibit C. In that same year, in her capacity as "Slot Marketing/Promotions Manager," Ms. Carasco provided Plaintiff with detailed information regarding shows at the Defendant's casino for which



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Plaintiff would be selling tickets. Exhibit J. In 2011, Jack Krasula, the President of Plaintiff, corresponded directly with Ms. Carasco regarding changes in the fees Plaintiff would charge Defendant for services provided under the User Agreement. Exhibit K. Many of the email messages made clear that Ms. Carasco was also in repeated contact with Wayne Hurte, the Executive Director of Marketing for Defendant, on matters arising out of the User Agreement. In December 2011, another representative of Defendant confirmed that Ms. Carasco and Mr. Hurte were still employed with Defendant in management positions. Exhibit L.

In 2012, Defendant requested information from Plaintiff regarding the total amount of fees Plaintiff had collected under the terms of the User Agreement. At the time, Defendant's representative stated that this information was sought only for "managements [sic] general knowledge." Exhibit M.

However, in November 2013, Plaintiff learned that Defendant had begun selling tickets to performances at Defendant's casino through another entity in violation of the terms of the User Agreement. Defendant requested that Plaintiff honor the terms of the User Agreement, but Defendant refused to do so and instead notified Plaintiff that it does not intend to allow Plaintiff to act as its ticketing agent for performances at Defendant's casino. Exhibit A at ¶11-12.

**2. <u>Defendant's Alleged Sovereign Immunity</u>.**

Defendant is owned by the Santa Ynez Band of Chumash Indians ("Tribe"). The Tribe has waived all claims of sovereign immunity and is subject to the jurisdiction of this Court in connection with this matter. In particular, the User Agreement states in pertinent part, "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." Exhibit B at ¶13(D).

**3. <u>Proceedings Below</u>.**

Plaintiff filed a single-count complaint against Defendant for breach of the User Agreement. In lieu of filing an answer, Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(4) and (C)(7), arguing that, as an Indian Tribe, it is immune from suit. The trial court disagreed, reasoning that the contract contained an express waiver of immunity, and that Defendant's argument that the individual who executed the User Agreement lacked the authority to do so failed because it had operated under the terms of the User Agreement for many years, during which time Defendant received millions of dollars as a result of the contract. The trial court denied Defendant's motion for summary disposition. Exhibit N, Opinion and Order dated June 6, 2014 at 4.

This appeal followed.

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# ARGUMENT

## I.

## THE TRIAL COURT PROPERLY CONCLUDED THAT DEFENDANT WAIVED SOVEREIGN IMMUNITY

### A. STANDARD OF REVIEW

This Court reviews decisions regarding motions for summary disposition under MCR 2.116(C)(4) and (C)(7) *de novo*. *Herbolsheimer v SMS Holding Co*, 239 Mich App 236, 240 (2000); *Fisher Sand and Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 553 (2013). The Court is to accept as true the plaintiff's well-pleaded allegations and construe them in the light most favorable to the plaintiff. The motion should not be granted unless no factual development could provide the basis for recovery. *Huron Potawatomi, Inc v Stinger*, 227 Mich App 127, 130 (1997).

### B. ARGUMENT

The trial court's determination that Defendant waived its sovereign immunity was not in error. In ¶13(D) of the User Agreement, Defendant clearly and expressly waived its sovereign immunity by consenting to enforcement of the agreement "in any court of competent jurisdiction" and "fully consent[ing] to and submit[ting] to the personal jurisdiction of the State of Michigan for that purpose." The trial court's conclusion that this language constituted a waiver of immunity is consistent with case law from the United States Supreme Court and it should be affirmed.

Defendant spent a substantial portion of its brief arguing that Indian Tribes generally enjoy sovereign immunity from suits. That point is not at issue in this appeal. Plaintiff agrees that Indian Tribes generally are immune. However, a Tribe subjects itself to suit if it relinquishes its immunity by an express waiver. *Kiowa Tribe of*

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*Oklahoma v Manufacturing Technologies, Inc*, 523 US 751, 754 (1998) ("An Indian tribe is subject to suit only where Congress has authorized the suit ***or the tribe has waived its immunity***.") (Emphasis added).

Whether a Tribe has waived its sovereign immunity is a question of federal law. *E.g.*, *Id* at 756. Under federal law, contractual waivers, such as the one at issue in this case, "need not contain 'magic words' stating that the tribe hereby waives its sovereign immunity." *JL Ward Assoc, Inc v Great Plains Tribal Chairmen's Health Board*, 842 F Supp 2d 1163, 1179 (D SD 2012). The only requirement is that the waiver be "'clear.'" *C&L Enterprises, Inc v Citizen Ban Potawatomi Indian Tribe of Oklahoma*, 532 US 411, 418 (2001) (citations omitted).

In *C&L Enterprises,* the United States Supreme Court held that arbitration clauses authorizing entry of judgment in a court of competent jurisdiction operate as a waiver of sovereign immunity. In *C&L Enterprises*, the contract read as follows:

> All claims or disputes between the Contractor [C & L] and the Owner [the Tribe] arising out of or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise . . . . The award rendered by the arbitrator or arbitrators shall be final, and ***judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof***.

*Id* at 415 (emphasis added).

The Supreme Court framed the question presented as "whether the Tribe waived its immunity from suit in state court when it expressly agreed to arbitrate disputes with C&L relating to the contract, to the governance of Oklahoma law, ***and to the enforcement of arbitral awards "'in any court having jurisdiction thereof***.'" *Id* at

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414 (emphasis added). The Court held that the arbitration clause was clear, that it did not need to include the words "sovereign immunity" or expressly state that the defense of sovereign immunity was waived, and that in light of the contractual language the Tribe was subject to a state-court suit to enforce the award in favor of the plaintiff.

*C&L Enterprises* is not an aberration and has been cited at least 200 times for the proposition that where a Tribe agrees to entry of a judgment following an arbitration in a court of competent jurisdiction, the Tribe waives sovereign immunity. Unremarkably, a waiver of sovereign immunity has also been found in situations where the agreement skips the arbitration clause and simply allows the Tribe to be subject to suit in a court of law in connection with disputes arising under the agreement. *E.g.*, *Colombe v Rosebud Sioux Tribe*, 835 F Supp 2d 736, 745-746 (D SD 2011), rev'd in part on other grounds, 2014 US App Lexis 6226 (8th Cir 2014) ("By agreeing to be subject to suit in federal district court, a tribe agrees to waive its sovereign immunity."); *Sokaogon Gaming Enter Corp v Tushie-Montgomery Assocs*, 86 F 3d 656, 659 (7th Cir 1996) ("To agree to be sued is to waive any immunity one might have from being sued.").

Here, Defendant waived sovereign immunity by virtue of ¶13(D) of the User Agreement: "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....***" (Emphasis added). Defendant tries to avoid the legal effect of its waiver by claiming that the fact that the contract containing the waiver in *C&L Enterprises* was tendered by the Tribe was "central to the Court's determination that the Tribe had intended to waive its immunity." Defendant's Brief at 32. This argument is without merit for three reasons.

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First, in finding a waiver, the *C&L Enterprises* Court relied not as much on the fact that the Tribe tendered the contract as it did on the language of the contract providing the Tribe's consent to having the arbitral award confirmed in court:

> [The arbitration clause] has a real world objective; it is not designed for regulation of a game lacking practical consequences. And to the real world end, ***the contract specifically authorizes judicial enforcement of the resolution arrived at through arbitration***. 'We believe it is clear that any dispute arising from a contract cannot be resolved by arbitration, as specified in the contract, if one of the parties intends to assert the defense of sovereign immunity.... The arbitration clause ... would be meaningless if it did not constitute a waiver of whatever immunity the Tribe possessed.'

532 at 422. (Citation omitted, emphasis added).

Second, courts in other cases addressing these issues have found waivers in a contract tendered by the plaintiff suing on the contract, not the Tribe. *E.g.*, *Smith v Hopland Band of Pomo Indians*, 95 Cal App 4th 1 (Ca App 2002); *Bradley v Crow Tribe of Indians*, 315 Mont 75 (2003).

Third, Defendant's argument violates two basic cannons of contract interpretation under both federal and state law. Defendant suggests that the User Agreement should be construed against Plaintiff since it was tendered by Plaintiff. But this misapplies the rule of *contra proferentem*, a rule of last resort in which contracts are construed against the drafter, but "only where there is a genuine ambiguity and where, after examining the entire contract, the relation of the parties and the circumstances under which they executed the contract, the ambiguity remains unresolved." *Gardiner, Kamya & Assoc, PC v Jackson*, 467 F3d 1348, 1352 (Fed Cir 2006). *See also* Scalia, Antonin, "Reading Law: The Interpretation of Legal Texts, 2012 at 427 (defining *contra proferentem* as "doubts and ambiguities are to be construed unfavorably to the drafter.").

Defendant's argument also ignores Michigan's well-established rule that, "A contracting party has a duty to examine a contract and know what the party has signed." *Montgomery v Fidelity & Guar Life Ins Co*, 269 Mich App 126, 130 (2005).

The contractual waiver in this case is clear and unambiguous and Defendant has not made an argument to the contrary. Paragraph 13(D) of the User Agreement is Defendant's specific consent to be subject to the jurisdiction of the court in an action filed to enforce the terms of the User Agreement. *C&L Enterprises* is dispositive on this point. If anything, the language in the User Agreement is clearer than that contained in the contract that was sufficient to find a waiver of sovereign immunity in *C&L Enterprises*, and it compels the same result in this case.

The trial court's determination that the relevant language in the User Agreement is an express waiver of sovereign immunity was correct and it should be affirmed.

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## II.

## THE TRIAL COURT PROPERLY CONCLUDED THAT DEFENDANT'S WAIVER WAS VALID AND IS ENFORCEABLE

### A. STANDARD OF REVIEW

This Court reviews decisions regarding motions for summary disposition under MCR 2.116(C)(4) and (C)(7) *de novo*. *Herbolsheimer v SMS Holding Co*, 239 Mich App 236, 240 (2000); *Fisher Sand and Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 553 (2013). The Court is to accept as true the plaintiff's well-pleaded allegations and construe them in the light most favorable to the plaintiff. The motion should not be granted unless no factual development could provide the basis for recovery. *Huron Potawatomi, Inc v Stinger*, 227 Mich App 127, 130 (1997).

### B. ARGUMENT

Defendant asserts that the waiver of sovereign immunity was ineffective because it was not approved in accordance with tribal law. Defendant's argument fails for two reasons: (1) the person who signed the User Agreement on behalf of Defendant had apparent authority to do so; and (2) the contract and the waiver were ratified by Defendant over the eight years that Defendant accepted the benefits of the contract to the tune of approximately $1M or more a year.

Courts apply principles of agency law in deciding whether the signatory to a contract had apparent authority to waive a Tribe's sovereign immunity.[1] *E.g.*

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[1] The cases Defendant cites for the proposition that state law cannot undermine a Tribe's ability to set the rules regarding immunity waivers are inapplicable. *First Bank v Maynahonah*, 313 P3d 1044 (Okla Civ App 2013) did not involve an express contractual waiver of immunity, as is the case here; it involved an interpleader action filed against a Tribe. *Missouri River Serv, Inc v Omaha Tribe of Nebraska*, 267 F3d 848 (8th Cir 2000) involved a contractual waiver, the limitation of which the plaintiff

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*Storevisions, Inc v Omaha Tribe of Nebraska*, 795 NW2d 271, 279-280 (Neb 2011) (applying "agency principles" to determine that signatory had apparent authority to waive the tribe's immunity); *Rush Creek Solutions, Inc v Ute Mountain Ute Tribe,* 107 P3d 402, 407 (Colo App 2004) (holding that the signatory had apparent authority to waive immunity after concluding that "the general law of agency governs here").

Where, as here, the parties' contract specifies the application of state law, state law controls. *Bates Assoc, LLC v 132 Associates, LLC*, 290 Mich App 52, 62 (2010) (applying Michigan law on the issue of the signatory's authority because the agreement executed by the Tribe "specifically provided that the settlement agreement would be governed by the laws of the state of Michigan rather than by tribal law." *Accord: Smith v Hopland Band of Pomo Indians*, 95 Cal App 4th 1, 10-11 (Ca App 2002).

The User Agreement specifically provides for the application of Michigan law: "This Agreement shall be governed by, and construed in accordance with, the laws of the State of Michigan." Exhibit B at ¶13. Under Michigan law, "[t]he test of whether an agency has been created is whether the principal has a right to control the actions of the agent." *Meretta v Peach*, 195 Mich App 695, 697 (1992). In determining whether an agent possesses apparent authority, courts consider all surrounding facts and circumstances to determine whether an ordinarily prudent person would be justified in assuming that the agent had authority to take action. *Id.* Whenever a principal has placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in assuming that

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challenged. But in *Missouri River*, the plaintiff knew the procedures the Tribe was required to follow to effectuate a waiver and admitted that the failure to follow them rendered the contract void. There was no issue of apparent authority or ratification, as there is in this case. In this case, the record is devoid of any evidence showing that Plaintiff had knowledge of Defendant's procedures for waiving immunity.

such agent is authorized to perform on behalf of the principal the particular act, and such particular act has been performed, the principal is estopped from denying the agent's authority to perform it. *Id* at 699–670.

*Rush Creek* and *Smith* are instructive and applicable to this case. In *Rush Creek*, the parties entered into a software contract containing a provision in which the Tribe waived its immunity. The contract was signed by the Tribe's chief financial officer. When the plaintiff sued the Tribe after the Tribe failed to perform under the contract, the trial court concluded that the CFO had the apparent authority to exercise a valid waiver based on, among other things, the contract language, which specified that the signatory was an "authorized" signer and designated the plaintiff as a party to the contract.

In affirming the decision of the trial court, the Colorado Court of Appeals distinguished between the language of the waiver itself, which must be express, and the signatory's authority to execute the waiver, which can be implied. 107 P3d at 407. The contract language, the fact that the CFO held himself out as the Tribe's agent, the plaintiff's reliance on the apparent authority to its detriment, and the fact that both parties performed their obligations under the contract for 18 months before the dispute arose led the court to conclude that the CFO had apparent authority to waive the Tribe's sovereign immunity. *Id* at 407-408. *See also Smith*, 95 Cal App 4th 1 (reversing the trial court's dismissal of the plaintiff's suit against a Tribe when the contract contained an express waiver, of which the Tribe had full knowledge and under which the Tribe operated).

This Court's reasoning in *Bates Assoc, LLC v 132 Associates, LLC*, 290 Mich App 52, 62 (2010), a case with facts similar to those presented here, is consistent with that in *Rush Creek* and *Smith,* and in fact it approved of the reasoning in *Smith*. In



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*Bates Assoc*, this Court analyzed the effectiveness of a contractual waiver not via an apparent authority framework, but rather by using principles of ratification. *Bates Assoc* involved the purchase of a parking garage located near Greektown Casino in Detroit. The parties entered into a settlement agreement following a dispute regarding the extent of repairs that the defendant-tribe had previously agreed to make to the parking garage. The settlement agreement, which contained an explicit waiver of immunity, was executed by the defendant-tribe's CFO, but the defendant-tribe claimed he had no authority to waive the tribe's immunity under tribal law. The trial court disagreed and denied the defendant-tribe's motion for summary disposition.

This Court affirmed. It pointed to specific facts that compelled the conclusion that the defendant-tribe had essentially ratified the contract through performance. Specifically:

> During the months following the execution of the settlement agreement, neither the Tribe nor the Tribe's attorney represented that the agreement was invalid, and ***$49,000 was paid to Bates pursuant to the agreement. Not until after Bates filed its complaint did the Tribe contend that the settlement agreement was unenforceable.*** These factors show that the Tribe was aware of the settlement negotiations and authorized [the CFO] to execute the agreement despite the waivers of sovereign immunity and tribal-court jurisdiction contained therein.

290 Mich App at 62-63 (emphasis added). *See also Luckerman v Narragansett Indian Tribe*, 965 F Supp 2d 224 (D RI) (2013) (finding that the Tribe's acceptance of the benefits of the contract constituted a waiver of the Tribe's immunity).

In this case, the trial court correctly pointed to the similar factors that are present here – the existence of a multi-year contract during which both parties performed their obligations fully and Defendant received millions of dollars of benefits, and during which

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time Defendant never asserted that the Agreement was invalid until it decided to breach its terms. And similar to the contract in *Rush Creek*, the User Agreement contains a provision in which the Tribe warranted that the agreement was "duly authorized, executed and delivered by [the Tribe] and constitutes the valid, legal and binding agreement of User, enforceable in accordance with its terms." Exhibit B at ¶11(A).

Although Defendant asserts that the signatory to the User Agreement on its behalf – Leah Carasco – was without authority to sign the agreement or waive Tribal immunity, she had the apparent authority to do so. E-mails sent by Ms. Carasco via Defendant's e-mail system label her as a member of Defendant's management team. Exhibit G. Ms. Carasco signed the W-9 federal tax form on Defendant's behalf. Exhibit H. Ms. Carasco was the person with whom Plaintiff interacted with respect to shows at Defendant's casino for which Plaintiff would sell tickets (which shows did, in fact take place) and with respect to changes in the fees Plaintiff would charge under the agreement. Exhibits J and K. Multiple members of Defendant's casino operations were in contact with Plaintiff over the years in connection with the contract. Not once did anyone state that the waiver of immunity contained in ¶13(D) was invalid.

In addition, as in *Bates Assoc*, nothing in the record shows that Defendant ever indicated to Plaintiff, or that Plaintiff ever had any knowledge that any tribal resolution was required for Defendant to waive sovereign immunity. Indeed, the affidavit submitted in support of Defendant's pleadings in the trial court was careful not to assert that Defendant had no knowledge of the User Agreement. It could not make such an assertion in light of the extensive documented contacts regarding the Agreement and the millions of dollars that flowed into Defendant's treasury under its terms. The contract in this case was performed by both parties for nearly eight years. Over these

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many years, Plaintiff served as Defendant's exclusive ticketing agent and Defendant paid Plaintiff for its service. Defendant was obviously aware of the Agreement's terms and benefited greatly thereunder.

These facts distinguish this case from *MM&A Prods v Yavapai-Apache Nation*, 316 P3d 1248 (Ariz App 2014), on which Defendant relies. There is no indication in *MM&A* that there had been full performance by both parties to the contract or detrimental reliance by the plaintiff on the waiver of sovereign immunity, as is the case here. In any event, the decision which is binding on this Court is *Bates Assoc, LLC v 132 Associates, LLC*, 290 Mich App 52, 62 (2010), not *MM&A Prods*. See, MCR 7.215(C)(2) ("A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis.").

Finally, the trial court's reliance upon equitable principles was not erroneous. The cases cited by Defendant to the contrary either pre-date *C&L Enterprises*, do not involve express waivers of immunity like the User Agreement does in this case, or they actually support Plaintiff's position. For example, although Defendant cites *Big Valley Band of Pomo Indians v Sup Ct*, 133 Cal App 4th 1185 (1st Dist 2005) for the proposition that, "regardless of the equities, a court is not empowered to deprive an Indian tribe of its sovereign immunity," the court in that case reached an opposite conclusion, citing to the well-settled principle that "an otherwise ineffective waiver may become binding if it is later ratified by the tribe's governing body," *Id* at 1191, and finding that the Tribe effected a limited waiver of its immunity in contracts signed with the plaintiff. *Id* at 1193.

The trial court also properly found persuasive the numerous Michigan cases in which courts upheld contracts made by public officials without authority so long as the subject matter of the contract is within the municipality's power and is not illegal. A

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good example is found in the decision in *Webb v Township of Wakefield*, 239 Mich 521 (1927). In that consolidated case, the defendant-township had ordered heavy equipment from plaintiff. Plaintiff sued to recover the unpaid balance owed for the equipment. The defendant-township claimed that the orders were invalid because the township rules were not followed and the persons who executed the contract did not have authority to do so. The Court of Appeals disagreed and held that "a city cannot shield itself behind a defense based on the manner in which the contract was made, and retain the benefits of the contract, without tendering at least a reasonable compensation for the benefits received." *Id* at 527. *Accord: East Jordan Lumbar Company v Village of East Jordan*, 100 Mich 201 (1894) ("If, on the other hand, the contract be one which it was within the power of the corporation to make, the fact that informalities may be found in the proceedings does not prevent recovery, in a case where, as in the present, the municipal corporation has had the benefit of performance by the other contracting party."); *Standard Transformer Co v Detroit*, 146 F Supp 740, 742 (ED Mich 1956) ("A municipality cannot accept the benefits of performance and then set up violation of its charter, or council procedure, as defense for refusal to pay.").

So too here. Defendant should not be allowed to retain the benefits of the contract under which it operated for years to the tune of millions of dollars, while at the same time denying the effect of its terms.

The trial court correctly determined that the express waiver of sovereign immunity in the User Agreement was valid and is enforceable against Defendant and it should be affirmed. In the unlikely event that this Court is inclined to disagree, this Court should remand the case for discovery in the trial court as to the internal

communications among Defendant's representatives, which may provide further support for a finding of apparent authority or ratification.

## RELIEF REQUESTED

Plaintiff/Appellee respectfully requests that this Court affirm the trial court's decision denying Defendant's motion for summary disposition.

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