STATE OF MICHIGAN

IN THE SUPREME COURT

STAR TICKETS,
a Michigan corporation,

Plaintiff/Appellee

v.

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

Defendant/Appellant.

Supreme Court No. 152753

Court of Appeals Case No. 322371

Oakland County Circuit Court
Case No. 2014-138263-CB
Hon. James M. Alexander

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DEFENDANT/APPELLANT'S BRIEF IN REPLY TO PLAINTIFF/APPELLEE'S BRIEF IN OPPOSITION TO THE APPLICATION FOR LEAVE TO APPEAL

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INTRODUCTION

The Michigan Court of Appeals has created a new doctrine of sovereign immunity that subjects tribal sovereign immunity to implied abrogation under state law. This new doctrine contravenes nearly a century of controlling federal law, is inconsistent with precedent of this Court and the United States Supreme Court, and makes Michigan a rare outlier among the jurisdictions that have examined tribal sovereign immunity. Moreover, this new doctrine nullifies tribal laws governing the extent of tribal sovereign immunity, and invites more litigation against Indian tribes and their instrumentalities in Michigan's courts.

The Court of Appeals' new doctrine of tribal sovereign immunity has upset the well-settled law governing tribal sovereign immunity to such a great extent that Indian tribes and tribal instrumentalities conducting business in Michigan (or with Michigan-based organizations) must alter their relationships to both preserve and understand the scope of their immunity. That new doctrine will alter Indian tribes' existing relationships with both the State of Michigan and local units of governments, significantly impacting this State's jurisprudence under MCR 7.305(B)(3). As a result, this Court should grant leave to appeal in this case.

ARGUMENT

I. The Court of Appeals' new doctrine of tribal sovereign immunity significantly impacts the jurisprudence of this State because it upsets settled expectations regarding tribal sovereign immunity, and will lead to unknown consequences for agreements involving Indian tribes, the State of Michigan, local governments, and commercial actors.

As the United States Supreme Court has explained, "tribal immunity is a matter of federal law and is not subject to diminution by the states." *Kiowa Tribe of Oklahoma v Manufacturing Technologies, Inc*, 523 US 751, 756; 118 S Ct 1700 (1998). Michigan's courts,

including the Court of Appeals, are bound by the decisions of the United States Supreme Court on matters of federal law. See, *Abela v General Motors Corp*, 469 Mich 603, 606; 677 NW 2d 325 (Mich 2004)(noting that "state courts are bound by the decisions of the United States Supreme Court construing federal law…").

The Court of Appeals first announced its new state-law doctrine of tribal sovereign immunity in *Bates Assoc, LLC v 132 Assoc LLC*, 290 Mich App 52; NW2d 177 (2010). Contrary to the Plaintiff/Appellee's attempts to minimize the import of this case, the Court of Appeals' decision below expanded its new doctrine of tribal sovereign immunity in a manner that compounds its conflict with United States Supreme Court precedent, and impacts a wide range of existing agreements involving Indian tribes.

A. The new doctrine established by the Court of Appeals decision conflcts with controlling law governing waivers of tribal sovereign immunity.

The Court of Appeals first announced its new doctrine of tribal sovereign immunity in *Bates*. In that case, the Court found that Michigan courts can infer a waiver of tribal sovereign immunity based upon the conduct of an Indian tribe's agents and employees. See, *Bates*, 290 Mich App at 64 (noting that "the conduct of the parties" before and after the negotiations validly waived immunity).

In the instant case, the Court of Appeals took its new doctrine a step further by explicitly holding that an Indian tribe's laws are irrelevant to the determination of whether it has waived its sovereign immunity. The Court of Appeals stated, "…any failures in complying with [tribal law] in regard to waiver of sovereign immunity do not warrant rejecting the application of the clear waiver of sovereign immunity found in the parties' agreement." COA Opinion at 8. Instead of leaving the matter of the Tribe's sovereign immunity to the province of the Tribe's

laws, the Court of Appeals held that a defective waiver of immunity can be ratified under State law through the post-contract conduct of tribal agents and employees. See, *id* at 9-10. The Court of Appeals went so far as to state that such ratification could be either "express ***or implied***." *Id* at 10 (emphasis added).

But, the United States Supreme Court has already explained that waivers of tribal sovereign immunity cannot be implied. See, *Santa Clara Pueblo v Martinez*, 436 US 49, 59; 98 S Ct 1670 (1978)("It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed")(internal quotations omitted). That rule constitutes controlling precedent in Michigan's courts.

The Court of Appeals' new doctrine also conflicts with controlling United States Supreme Court precedent in two additional respects. First, the United States Supreme Court has held that an agent may not waive an Indian tribe's sovereign immunity from suit without authorization by law. *United States v United States Fidelity & Guar Co,* 309 US 506, 513; 60 S Ct 653 (1940)("It is a corollary to immunity from suit… that this immunity cannot be waived by officials"). Second, the Supreme Court has held that tribal sovereign immunity may not be diminished by state law. See, *Kiowa Tribe of Oklahoma v Manufacturing Technologies, Inc*, 523 US 751, 756; 118 S Ct 1700 (1998)("…[tribal sovereign immunity] is a matter of federal law and is not subject to diminution by the States").

The Plaintiff/Appellee has conceded that federal law controls the question of whether an Indian tribe has waived its sovereign immunity from suit.[1] Despite its concession, the

[1] See Plaintiff/Appellee's COA Answer Brief at 6 (October 3, 2014)("…whether a Tribe has waived its sovereign immunity is a question of federal law")(quoting *Kiowa*, 523 US at 756).

Plaintiff/Appellee's Brief in Opposition (or "Brief in Opposition") fails to address the controlling federal law regarding tribal sovereign immunity. Instead, the Brief in Opposition suggests that, in declining to follow the Sixth Circuit Court of Appeals' opinion in *Memphis Biofuels, LLC v Chickasaw Nation Indus, Inc*, 585 F3d 917 (6th Cir 2009), the Court was simply rejecting an outlying decision on this issue. But, as the Dissent in the Court of Appeals explained, *Memphis Biofuels* "represents the majority view" of the doctrine of tribal sovereign immunity.[2] COA Dissent at 2.

Chumash Casino Resort's Application for Leave to Appeal in this case explained that the Court of Appeals erred by disregarding controlling Supreme Court precedent. By failing to contest, or even address, this argument, the Plaintiff/Appellee has effectively conceded the point. See, *Walters v Nadell*, 481 Mich 377, 388; 751 NW2d 431 (Mich 2008)(holding that a party waives its argument when it does not respond to the other party's legal argument).

The Court of Appeals' decision to reject controlling Supreme Court precedent constitutes grounds for reversal. See, *Moore v Moore*, 266 Mich App 96; 700 NW2d 414, (Mich

[2] The Plaintiff/Appellee suggests that *Luckerman v Narragansett Indian Tribe*, 965 F Supp 224 (D RI 2013) is not an outlier in this area of the law. Plaintiff/Appellee's Brief in Opposition at 12. However, none of the federal cases cited in support of this assertion hold that an unauthorized agent may waive tribal sovereign immunity contrary to express tribal law. Only one of the cited cases – *Confederated Tribes of the Colville Reservation Tribal Credit v White*, 139 F3d 1268 (9th Cir 1998) – even references the authority of an agent to waive tribal immunity. *Colville* involved a bankruptcy claim filed by an attorney for a tribal entity, and the Court noted that the record did not include any evidence regarding the Tribe's own laws pertaining to sovereign immunity. That is not the case here, where the Tribe's laws are part of the record. *Luckerman* remains an outlier in federal law. To the extent that it bears upon this case, the Court's opinion in *Luckerman* makes it clear that express tribal law will control the manner in which an Indian tribe limits or waives its sovereign immunity. See, *Luckerman*, No 13-185-S (D RI 2014)("…constitutional provisions and ordinances put those dealing with the tribes on notice of the procedures that must be followed"). Thus, *Luckerman* merely offers only a narrow exception to the rule that unauthorized agents cannot waive tribal sovereign immunity, which applies only where tribal law does not address waivers of immunity.

App, 2005)("With respect to questions of federal law, [the Court of Appeals] is not bound by precedent from federal courts except the United States Supreme Court").

B. The Court of Appeals decision upsets settled expectations reagrding waivers of tribal sovereign immunity and impacts existing agreements involving the State of Michigan, local governments, commercial actors, Indian tribes, and tribal instrumentalities.

States, local units of government, and commercial entities, have relied upon the well-established federal doctrine of tribal sovereign immunity when negotiating agreements with Indian tribes. See, *Michigan v Bay Mills Indian Community*, 572 US ___,; 134 S Ct 2024, 2036 (2014) ("…tribes across the country, as well as entities and individuals doing business with them, have for many years relied on *Kiowa* (along with its forebears and progeny) …").

The State of Michigan has entered into numerous agreements with Michigan's twelve federally recognized Indian tribes, governing everything from the regulation of gambling and natural resources, to jurisdiction over taxation and law enforcement. See, eg, Tax Agreement Between the Bay Mills Indian Community and the State of Michigan (2002).[3] Numerous local units of government have entered into agreements to share public services with Michigan's

[3] This agreement (the "Tax Agreement") is available at http://www.michigan.gov/documents/BayMillsFinalTaxAgreement_61196_7.pdf (last accessed on January 15, 2016). The Tax Agreement includes limited and reciprocal waivers of sovereign immunity, under both tribal and state law. See, Tax Agreement, § I(G). Under the Court of Appeals' new doctrine, the Tribe's limited waiver of sovereign immunity in the Tax Agreement could be enlarged by implication after the fact, based upon the subsequent conduct of tribal agents. State law would prohibit a similar modification of the State's waiver of sovereign immunity. See, *McNair v State*, 305 Mich 181, 187; 9 NW2d 52 (Mich 1943)("If, as we hold, [sovereign immunity] can only be waived by legislative action, then it necessarily follows that the attorney general, an officer of the State of Michigan, may not waive such defense"). If allowed to stand, the Court of Appeals' new doctrine would create an asymmetry in the bargaining position between two sovereigns where none previously existed. It would also alter the parties' expectations regarding the performance and enforceability of the Tax Agreement, and similar agreements.

twelve Indian tribes, as well as their agencies and instrumentalities. And, as this case clearly demonstrates, Michigan-based companies enter into an indeterminate number of contractual relationships with Indian tribes in Michigan and across the United States.

When negotiating those agreements, the parties relied upon the settled understanding of nearly a century of federal law holding: 1) waivers of tribal sovereign immunity must be clear and unequivocal, and cannot be implied; 2) tribal sovereign immunity is not subject to diminution by the States; and, 3) unauthorized agents cannot waive tribal sovereign immunity.[4] See, *Santa Clara Pueblo*, *Kiowa*, and *United States Fidelity & Guar Co*, *supra*.

The Court of Appeals' new doctrine of tribal sovereign immunity runs counter to each of those principles by holding: 1) waivers of tribal sovereign immunity may be implied by the post-contract actions of tribal agents; 2) tribal sovereign immunity may be diminished by state law doctrines of equity, notwithstanding express tribal law; and 3) unauthorized agents can waive tribal sovereign immunity.

This dramatic transformation of settled law has frayed the fabric of jurisprudence affecting governments, commercial entities, and Indian tribes in Michigan, and beyond. Moreover, this transformation belies the Plaintiff/Appellee's characterization of this case as a "garden variety" contract dispute. Plaintiff/Appellee's Brief in Opposition at 9. This new doctrine has myriad unknown consequences for parties under existing agreements, and will compel Indian tribes and other actors to transform the way they structure their dealings with one another under Michigan law.

[4] In addition, Indian tribes have relied upon long-settled legal doctrine preserving their exclusive powers of self-government. See, *Kobogum v Jackson Iron Co*, 76 Mich 498, 508; 43 NW 602 (Mich 1889)("…Indians who were members of their tribes were not obliged or authorized to look to state laws in governing their own affairs).

II. The Plaintiff/Appellee waived its argument that the alleged waiver of sovereign immunity in this case complies with tribal law.

The Plaintiff/Appellee dedicates the bulk of its Opposition Brief to arguing that the purported wavier of sovereign immunity in the User Agreement was valid because it complied with the Tribe's laws. Throughout the course of this litigation, the Plaintiff/Appellee has consistently argued that the Tribe's laws were irrelevant to this case.

In its first brief submitted to the Circuit Court in support of its Motion to Dismiss, Chumash Casino Resort asserted that the alleged waiver of sovereign immunity contained in the Plaintiff/Appellee's User Agreement did not satisfy the requirements of the Tribe's own laws. Chumash Casino Resort's Circuit Court Br at 10 ("…such a waiver was not validly executed in accordance with the Tribe's laws")(Attached as Exhibit A). The Plaintiff/Appellee never contended otherwise, instead arguing that the alleged waiver was ratified by the alleged post-contract actions of its unauthorized agents. See, Plaintiff/Appellee's Circuit Court Br at 1-2 ("Defendant's second argument – that the parties' agreement is invalid because it was not approved according to the laws of the Tribe that owns Defendant – fares no better. ***The agreement was ratified by performance***")(emphasis added)(Attached as Exhibit B). The Circuit Court relied on the Plaintiff/Appellee's argument in its opinion. Circuit Court Opinion at 4 (reasoning that Chumash Casino Resort operated under the contract with the Plaintiff/Appellee, notwithstanding its employee's lack of authority to execute the agreement).

The Plaintiff/Appellee again advanced its ratification argument before the Court of Appeals, and none of its filings with that court asserted that the Tribe's laws had any bearing on the alleged waiver of sovereign immunity. The Court of Appeals recognized that the Plaintiff/Appellee "did not argue below . . . [or] in its appellate brief, that a waiver of tribal

sovereign immunity, as envisioned by and consistent with the [tribal law], was accomplished with respect to the [Chumash Casino Resort] or the Tribe's business relationship with the plaintiff." COA Opinion at 3. In fact, the Court recognized that during oral argument the Plaintiff/Appellee offered a new argument, by contending that the User Agreement complied with tribal law. *Id* at n 6. The Court found that it was unnecessary to "resolve [Plaintiff/Appellee's] *unpreserved argument* . . ." *Id* at 3 (emphasis added). Instead, the Court of Appeals proceeded on the basis that the requirements of the Enterprise Ordinance were not satisfied (*id*), and relied upon the Plaintiff/Appellee's briefed arguments, holding that the waiver was valid under the doctrine of ratification. COA Opinion at 9-10.

Now, before this Court, the Plaintiff/Appellee argues that the alleged waiver was valid under the Tribe's own laws. See, Plaintiff/Appellee's Brief in Opposition at 11-17. Other than the above-mentioned short exchange during oral argument before the Court of Appeals, the Plaintiff/Appellee's Brief in Opposition marks the first time in this litigation that it has briefed the application of the Tribe's laws to its alleged contract with Chumash Casino Resort.

As this Court previously explained, Michigan generally follows the "raise or waive" rule, which requires a litigant to raise an issue at trial in order to preserve it for appellate review. See, *Walters*, 481 Mich at 387-88. A plaintiff's failure to raise a legal argument in response to a motion to dismiss waives that argument. See, *id* (holding that it was "undisputed" that the Plaintiff waived his legal argument when he did not raise it in response to the Defendant's motion to dismiss). Moreover, a party abandons an argument when it fails to sufficiently brief it. See, *Blackburne & Brown Mtg Co v Ziomek*, 264 Mich App 615, 619; 692 NW2d 388 (2004)("Insufficiently briefed issues are deemed abandoned on appeal")(quotations omitted).

The Plaintiff/Appellee had the opportunity before the Circuit Court to respond to Chumash Casino Resort's argument that the alleged waiver did not comply with the Tribe's governing laws. It failed to do so. It also failed to present these arguments in any of its filings in the Court of Appeals.[5] The Court of Appeals dismissed the Plaintiff/Appellee's attempt to present this issue at oral argument, noting that it had not preserved this argument for consideration on appeal. See, COA Opinion at n 6 (stating that this argument was "unpreserved").

From the outset of this case, Chumash Casino Resort has argued that the alleged waiver of sovereign immunity did not satisfy governing tribal law. The Plaintiff/Appellee conceded this point by failing to respond to Chumash Casino Resort's primary argument at the Circuit Court, and in its filings in the Court of Appeals. Instead, Plaintiff/Appellee advanced the argument that the Tribe's own laws are irrelevant, and that the waiver was valid under State law.[6] The Circuit Court and the Court of Appeals improperly relied upon the Plaintiff/Appellee's argument, and further solidified its new doctrine of tribal sovereign immunity. See, COA

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[5] The Plaintiff/Appellee argues that this Court may consider an unpreserved argument to prevent a "miscarriage of justice." Plaintiff/Appellee's Brief in Opposition at 16. The Plaintiff/Appellee's consistent concession – up to this point – that the alleged waiver doesn't comply with the Tribe's laws hardly constitutes "a miscarriage of justice." Instead, it represents a tactical decision to argue that the Tribe's laws are irrelevant. As this Court noted in *Walters*, appellate courts are not responsible for rescuing litigants from their unsuccessful tactical decisions. See, *Walters*, 481 Mich at 388. (explaining that the "raise or waive" rule "avoids the untenable result of permitting an unsuccessful litigant to prevail by avoiding its tactical decisions that proved unsuccessful").

[6] Chumash Casino Resort maintains its original assertion, as offered to the Circuit Court in the first brief filed in this case, that the alleged waiver of sovereign immunity did not satisfy the Tribe's governing laws. Under the Tribe's Enterprise Ordinance, waivers of sovereign immunity must be approved by the Enterprise Board of Chumash Casino Resort. See eg, Enterprise Ordinance § 5 (attached to Application for Leave to Appeal as Exhibit A).

Opinion at n 6 ("…we shall proceed on the basis that the requirements of the [Tribe's laws] were not satisfied"). Under the principle this Court described in *Walters*, it is too late for the Plaintiff/Appellee to hedge its bet.

CONCLUSION

The Court of Appeals' decision in this case squarely conflicts with nearly a century of controlling precedent of the United States Supreme Court. Moreover, the Plaintiff/Appellee's attempt to rescue its lawsuit by raising a new argument must fail. By failing to raise the argument in its filings before either the trial court or the Court of Appeals, Plaintiff/Appellee waived any argument it may have that the alleged waiver of sovereign immunity in this case complied with tribal law . Chumash Casino Resort respectfully asks this Court to grant leave to appeal, reverse the Court of Appeals' decision in this case, and dismiss the Plaintiff's complaint on the basis of sovereign immunity. Alternatively, this Court should peremptorily reverse the decision of the Court of Appeals.

Respectfully submitted,

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Date: January 18, 2016

LIST OF EXHIBITS

EXHIBIT A: Brief in Support of Defendant Chumash Casino and Resort's Motion to Dismiss, excluding exhibits (also included in the record before the Oakland County Circuit Court and the Michigan Court of Appeals)

EXHIBIT B: Plaintiff's Response in Opposition to Defendant Chumash Casino Resort's Motion to Dismiss, excluding exhibits (also included in the record before the Oakland County Circuit Court and the Michigan Court of Appeals)

EXHIBIT A

Brief in Support of Defendant Chumash Casino and Resort's Motion to Dismiss, excluding exhibits

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BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

Plaintiff, Star Tickets, has brought the instant action asserting that Chumash Casino Resort, the Defendant, has breached an agreement between the two parties, and seeking an award of damages, costs, and attorney fees. The Chumash Casino Resort is a wholly owned enterprise of the Santa Ynez Band of Chumash Indians, and is therefore cloaked with the Tribe's sovereign immunity from suit pursuant to longstanding principles of law. Neither the Santa

Ynez Band of Chumash Indians, nor the Chumash Casino Resort, has consented to the Plaintiff's instant action. As a result, the Court should grant the Defendant's motion for summary disposition for lack of subject matter jurisdiction pursuant to MCR 2.116(C)(4) and because the Plaintiff's complaint is barred by governmental immunity pursuant to MCR 2.116(C)(7).

FACTUAL BACKGROUND

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.

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).[1] 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, Exhibit A (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

[1] IGRA divides Indian gaming activities into three separate "classes": Class I gaming consists of traditional forms of Indian gaming, and social games played for minimal prizes; Class II gaming consists of bingo and certain card games; and, Class III gaming consists of what is commonly-referred to as "Las Vegas-style" gaming. See, 25 USC 2703. While individuals and independent operators may conduct Class I and Class II gaming on an Indian reservation, only Indian tribes can possess the "sole proprietary interest" Class III gaming enterprises. 25 USC 2710(b)(2)(A). The Chumash Casino Resort is a Class III gaming facility, wholly owned and operated by the Tribe. See, Exhibit A (Chumash Casino and Resort Enterprise Ordinance or Enterprise Ordinance).

(ii) the waiver is duly approved by the Enterprise Board.

Id.

The Plaintiff's Complaint alleges that Chumash executed a "User Agreement" with the Plaintiff in April 2009, by which it had exclusive privileges to serve as a ticketing agent for performances at Chumash, and includes a copy of that document as an exhibit. Compl at ¶¶ 7, 10. The Plaintiff also alleges that the User Agreement's initial four-year term expired on November 8, 2010, but was automatically renewed for successive one-year terms because neither party notified the other of its intent to not renew. *Id* at ¶ 8. Moreover, the Plaintiff alleges that the User Agreement constitutes 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.

The User Agreement attached to the Plaintiff's Complaint was purportedly executed by Leah Carasco, a Marketing Assistant at Chumash. See, Compl. 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, Exhibit B (Affidavit of Vincent Armenta, Chairman of the Santa Ynez Band of Chumash Indians).

ARGUMENT

1. Standard of Review

The sovereign immunity of a defendant deprives the Court of subject matter jurisdiction. See eg, *Verlinden v Central Bank of Nigeria*, 461 US 480, 489; 103 S Ct 1962 (1983)("…if the claim does not fall within one of the exceptions [to sovereign immunity], federal courts lack subject matter jurisdiction"). The existence of subject-matter jurisdiction is a question of law. *Jones v Slick*, 242 Mich App 715, 718; 619 NW2d 733 (Mich App 2000). The Plaintiff bears the burden of establishing a court's subject-matter jurisdiction in a particular case. *Phinney v Perlmutter*, 222 Mich App 513, 521; 564 NW2d 532 (Mich App 1997). In reviewing a motion for summary disposition under MCR 2.116(C)(4), the Court, "must determine whether the pleadings demonstrate that the defendant [is] entitled to judgment as a matter of law or whether the affidavits and other proofs show there [is] no genuine issue of material fact." *Slick*, 242 Mich App at 718.

As with subject-matter jurisdiction, issues pertaining to governmental immunity are questions of law. *Willett v Waterford Twp*, 271 Mich App 38, 45; 718 NW2d 386 (Mich App 2006). A court reviewing a motion for summary disposition on the basis of governmental immunity pursuant to MCR 2.116(C)(7), "must also consider any affidavits, depositions, admissions, or other documentary evidence that the parties submit to determine whether there is a genuine issue of material fact." *Dextrom v Wexford Cnty*, 287 Mich App 406, 431; 789 NW2d 211 (Mich App 2010). Where no issue of fact exists, regarding an exception to governmental immunity, the Court must grant the motion under MCR 2.116(C)(7). See, *Id* at 433.

2. The Plaintiff's lawsuit is barred by the Tribe's sovereign immunity.

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) (The Indian Tribes are a direct continuation of "self-governing political communities that were formed long before Europeans first settled in North America."). Despite the loss of land and the passage of time, Tribes retain the sovereign status as "domestic dependent nations" under the dominion and protection of the United States. See, *Cherokee Nation v Georgia,* 30 US (5 Pet.) 1, 17 (1831); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe,* 498 U.S. 505, 509; 111 S. Ct. 905 (1991) ("Indian tribes are "domestic dependent nations" that exercise inherent sovereign authority over their members and territories"); and, *United States v. Wheeler,* 435 U.S. 313, 322; 98 S Ct 1079 (1978) ("Although physically within the territory of the United States and subject to ultimate federal control, [tribes] nonetheless remain "a separate people, with the power of regulating their internal and social relations").

As a fundamental attribute of their inherent sovereignty, "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 of sovereign immunity of Indian tribes was affirmed in *Kiowa Tribe v Manufacturing Technologies, Inc.,* 523 U.S. 751; 118 S Ct 1700 (1998). *Kiowa* is the modern reiteration of 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.

Michigan courts have similarly recognized this immunity. See, eg, *Huron Potawatomi, Inc v Stinger*, 227 Mich App 127; 574 NW2d 706 (1997). That 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").

Under both Michigan and federal law, "[s]uits against Indian tribes are barred by sovereign immunity absent a clear and unequivocal waiver by the tribe or congressional abrogation." *Huron Potawatomi, Inc*, 227 Mich App at 130; see also, *Santa Clara Pueblo,* 436 US at 58 (1978) (stating that waivers, "[c]annot be implied but must be unequivocally expressed"); *Oklahoma Tax Comm'n,* 498 US at 509 ("Suits against Indian tribes are…barred by sovereign immunity absent a clear waiver by the tribe."); and, *United States v United States Fidelity & Guar Co,* 309 US 506, 512 (1940) ("These Indian Nations are exempt from suit without Congressional authorization").[2]

A. The User Agreement neither expressly nor implicitly waives the Tribe's sovereign immunity.

As a threshold matter, the Plaintiff bears the burden of proving that Chumash has

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[2] Express is defined as:

> Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference.

Black's Law Dictionary (6th ed.)

clearly and unequivocally expressed its intent to waive its sovereign immunity to allow the Plaintiff's suit to proceed. See, *Odom v Wayne Cnty*, 482 Mich 459, 478-79; 760 NW2d 217 (Mich 2008) (noting that the burden of avoiding sovereign immunity rests with the plaintiff); and, *Phinney*, 222 Mich App at 521 ("The burden is on the plaintiff to establish jurisdiction").

The Plaintiff's complaint acknowledges that Chumash is vested with sovereign immunity from suit. See, Compl at ¶ 6 ("The Tribe has waived all claims of sovereign immunity…").[3] The Plaintiff then asserts that the User Agreement's choice of law and jurisdiction provisions impliedly waive that immunity.

Contrary to the Plaintiff's assertions, nothing in the User Agreement between the Plaintiff and Chumash constitutes an unequivocal waiver of sovereign immunity.

While the United States Supreme Court has held that a waiver need not use the words "sovereign immunity" in order to be valid, it has also explained a waiver must be made with "requisite clarity." See, *C&L Enterprises v Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 US 411, 418; 121 S Ct 1589 (2001). In *C&L Enterprises*, the Tribe tendered a contract to a private entity, by which the Tribe proposed to resolve contract disputes through binding arbitration enforceable in Oklahoma courts. *C&L Enterprises*, 532 US at 418-419.

The Michigan Court of Appeals has only found one example of contract language that

[3] As noted above, Chumash is a wholly owned entity of the Tribe; however, it is operated under the Enterprise Ordinance. See, Exhibit A, supra. The Enterprise Ordinance limits the assets subject to recovery where the Enterprise Board has waived its sovereign immunity. Section 8(a) of the Enterprise Ordinance expressly prohibits the Enterprise Board from waiving the Tribe's sovereign immunity. *Id*. The Tribe has not waived its immunity with respect to the Plaintiff; and, the Enterprise Board is not authorize to subject the Tribe's assets to potential recovery where it has waived the sovereign immunity of the Enterprise Board d/b/a Chumash Casino Resort.

clearly and unequivocally waives a tribe's sovereign immunity to suit. See, *Bates Assoc*, supra. The contract at issue in that case incorporated a prior agreement between the parties that included a paragraph entitled, "Waiver of Immunity." *Id* at 55. That particular agreement provided, "[t]he Seller and the Tribe…hereby expressly waive their sovereign immunity from suit…." *Id*.

In an unpublished decision in 2002, the Michigan Court of Appeals held that a choice of law provision, standing alone, does not reflect an Indian tribe's unequivocal intent to waive its immunity;[4] noting that it is "merely an agreement that a certain body of substantive law will apply to disputes which arise[.]" *Sungold Gaming USA, Inc v United Nation of Chippewa*, unpublished opinion per curiam of the Court of Appeals, issued April 5, 2002 (Docket No. 226524) (Exhibit C).

The User Agreement may be sufficient to require private entities to submit to litigation in Michigan courts. But, Chumash is not a mere private entity. It is a wholly owned enterprise of the Tribe, and is fully vested with the Tribe's sovereign immunity from suit. Only the Tribe and Congress can waive that immunity; and, where they act to waive that immunity, they must do so in clear and unequivocal language. A waiver cannot be based on mere inference.

Unlike the contract in *Bates Assoc*, the User Agreement contains no language even referencing Chumash's sovereign immunity from suit, let alone waiving that immunity unequivocally. And, unlike *C&L Enterprises*, the User Agreement was not tendered by the Tribe or Chumash, and does not submit Chumash to binding arbitration that is enforceable in

[4] The relevant language citied by the Court in *Sungold Gaming*, provided that the agreement, "has been made and shall be interpreted in accordance with the laws of the State of Arizona." *Id* at 2.

Michigan Courts. Rather, the choice of law provision cited in Plaintiff's complaint is similar to the choice of law provision in *Sungold Gaming*, which the Court of Appeals held did not constitute a waiver of tribal sovereign immunity.

Chumash has not clearly and unequivocally waived its immunity from suit through the User Agreement with the Plaintiff. Therefore, the Court should grant Chumash's Motion for Summary Disposition pursuant to MCR 2.116(C)(4) and MCR 2.116(C)(7).

B. Any purported waiver contained in the User Agreement was not approved in accordance with the Tribe's laws, and is therefore invalid.

Even if this Court were to determine that the language in the User Agreement clearly and unequivocally waived Chumash's sovereign immunity from suit, such a waiver was not validly executed in accordance with the Tribe's laws.

The Tribe's Enterprise Ordinance provides for a clear process by which Chumash's sovereign immunity may be waived. See, Exhibit A (Enterprise Ordinance). The alleged waiver contained in the User Agreement was never approved or ratified by the Enterprise Board in accordance with tribal law. See, Exhibit B (Affidavit of Vincent Armenta). Therefore, under the Tribe's governing law, the Plaintiff's alleged waiver is without effect.

Michigan courts have long understood that the State's sovereign immunity may only be waived by the people, through the Constitution, or by the Legislature, in accordance with law; and that it may not be waived by any individual purporting to act on behalf of the State. See, *Cnty Rd Ass'n of Michigan v Governor*, 287 Mich App 95, 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); and,

Cain v Lansing Housing Comm'n, 235 Mich App 566, 569; 599 NW2d 516 (Mich App 1999)(" A state officer or agent has no authority to waive sovereign immunity where such a waiver is not authorized by the Legislature")(citing *McNair v State Hwy Dep't*, 305 Mich 181; 9 NW2d 52 (Mich 1943)).

This rule upholds the underlying purpose of sovereign immunity, which is to prevent the sovereign from being subjected to suit without its unequivocal consent. Permitting an individual State employee to waive the State's sovereign immunity in a manner not provided for by law would undermine the entire doctrine. This same reasoning should be applied to Chumash in this case.

Numerous courts that have examined purported waivers of tribal sovereign immunity have adopted similar reasoning. In *US Fid & Guar Co*, the United States Supreme Court was confronted with a claim that the United States had waived its immunity from suit in a state court by failing to assert that immunity in defense against a cross claim.[5] *US Fidelity & Guar Co*, 309 US at 60. 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

[5] 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").

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 courts. *Id*.

Much more recently, the United States Court of Appeals for the Sixth Circuit has held that an agreement purporting to waive the sovereign immunity of a tribal corporation did not actually waive that immunity, because the waiver was not approved by its board of directors in accordance with its corporate charter. *Memphis Biofuels v Chickasaw Nation Industries*, 585 F3d 917 (6th Cir 2009). The Court explained that the tribal corporation's charter superseded any of its contracts, and that a contractual waiver of immunity was only effective where it complied with the charter's requirements for a waiver. See, *Id* at 922.

Earlier this year, the Arizona Court of Appeals reached a similar conclusion in a case with facts similar to those involved here. *MM&A Prods, LLC v Yavapai-Apache Nation*, ____ Ariz ____ No 2 CA-CV 2013-0051 (Ariz App 2014). 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).

In *Bates Assoc*, the Michigan Court of Appeals declined to apply the holding in *Memphis*

Biofuels for reasons that are not present in this case. In *Bates Assoc*, the Sault Ste. Marie Tribe of Chippewa Indians had executed a valid, clear, and unequivocal waiver of sovereign immunity in a contract to sell a parcel of property to the plaintiff. The Sault Ste. Marie Tribe conceded this fact in proceedings on the plaintiff's claim. See ,*Bates Assoc*, 290 Mich App at 63. That valid waiver was then incorporated by reference into a subsequent agreement between the same parties. The Sault Ste. Marie Tribe asserted that the waiver of immunity contained in the subsequent agreement was not valid, because that agreement was not properly approved by its Board of Directors in accordance with tribal law. *Id* at 59. The Court of Appeals held that the waiver of immunity in the subsequent agreement was valid, based largely on the fact that the agreement incorporated the Sault Ste. Marie Tribe's previous waiver of immunity to the same party:

> The settlement agreement itself contained waivers of sovereign immunity and tribal-court jurisdiction and incorporated by reference the clear and unequivocal waivers set forth in the sale agreement, *which the Tribe conceded was supported by a valid resolution*. In light of these facts, the trial court correctly ruled that the Tribe had waived its sovereign immunity and tribal-court jurisdiction and correctly granted summary disposition and entered judgment in Bates's favor.

Id at 63 (emphasis added).

In this case, there never was a valid and express waiver of immunity granted to the Plaintiff. Here, the User Agreement attached to the Plaintiff's Complaint was purportedly executed by a Marketing Assistant at Chumash. See, Exhibit B (Affidavit of Chairman Armenta). The Tribe's Enterprise Ordinance clearly states that only the Enterprise Board may execute a waiver of Chumash's sovereign immunity. The Enterprise Board did not authorize the User Agreement; nor did it authorize a waiver of its sovereign immunity. See, Exhibit B (Affidavit of

Chairman Armenta).

Unlike in *Bates Assoc*, the User Agreement does not incorporate a prior valid waiver of Chumash's sovereign immunity in favor of the Plaintiff. To the extent that the User Agreement may be construed as a waiver of sovereign immunity, it was executed by a mere employee of Chumash without the knowledge or consent of the Enterprise Board – as required by the Tribe's governing law.

This case is different from *Bates Assoc* in another critical respect: the Plaintiff 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 the United States. See, Exhibit D (Star Tickets "Venues," https://www.startickets.com/venues?itemid=149) (accessed on March 23, 2014). Given that the Plaintiff's relationships with those other Indian tribes involve venues at 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.

If the Plaintiff requires a waiver of sovereign immunity in order to engage in business with an Indian tribe, and its tribally owned businesses, it must explicitly ask for it. Holding that a mere employee of a tribal enterprise can waive a tribe's sovereign immunity by signing a contract with boilerplate choice of law provisions, and without gaining the approvals required by tribal law, confers an enormous advantage on the Plaintiff: it gains the financial benefit of the business transaction, as well as the benefit of a waiver of sovereign immunity that it did not explicitly request of the Tribe (and of which the Tribe will be unaware until it is served with a complaint).

Such an outcome runs counter to longstanding precedent from Michigan and other jurisdictions. This Court should adhere to that precedent by finding that Chumash's employees cannot execute a waiver of sovereign immunity that is not in accordance with the Tribe's governing law. Therefore, the Court should grant Chumash's motion.

3. There are no genuine issues of material fact: Chumash has not waived its sovereign immunity from suit through the User Agreement.

The Plaintiff's Complaint has asserted that the User Agreement waives Chumash's sovereign immunity from suit. Compl at ¶ 6. This brief, along with the affidavits and exhibits, demonstrates that Chumash has not waived that sovereign immunity. Neither party disputes the material facts alleged in the Plaintiff's complaint pertaining to Chumash's sovereign immunity. Because Chumash remains cloaked with its sovereign immunity from suit, the Court should grant Chumash's motion.

CONCLUSION

The Defendant is cloaked with sovereign immunity from suit, which has been recognized by the courts in this state, as well as every other jurisdiction in the United States that has examined this issue. No genuine issue of material fact exists with respect to that immunity; and, the Plaintiff cannot point to a valid, clear, and unequivocal waiver of that immunity in the User Agreement that would allow its lawsuit to proceed. For the reasons stated herein, the Defendant respectfully requests that the Court grant its Motion for Summary Disposition, and that the Court award such further relief that the Court deems just and reasonable, including costs and attorney fees.

Respectfully submitted,

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March 24, 2014

CERTIFICATE OF SERVICE

I hereby certify that on March 24, 2014, I filed the foregoing Motion for Summary Disposition and Notice of Hearing, and Brief in Support of the Motion for Summary Disposition on behalf of Chumash Casino Resort, and this certificate of service with the Clerk of the Court using the Oakland County Sixth Judicial Circuit Court E-File & Serve, which will send notice to counsel for the Plaintiff at:

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EXHIBIT B

Plaintiff's Response in Opposition to Defendant Chumash Casino Resort's Motion to Dismiss, excluding exhibits

JC

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

STAR TICKETS,
a Michigan corporation,

Plaintiff,

v.

Case No. 2014-138263-CB
HON. JAMES M. ALEXANDER

CHUMASH CASINO RESORT,
a foreign corporation,

Defendant.

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PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

INTRODUCTION

Defendant's motion should be denied. The clause in the parties' agreement waiving sovereign immunity is not a mere choice of law clause, as Defendant suggests. Rather, it expressly 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." Exhibit A at ¶13(D).

Defendant's second argument – that the parties' agreement is invalid because it was not approved according to the laws of the Tribe that owns Defendant – fares no

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better. The agreement was ratified by performance: the Parties operated under it for many years, and Defendant received millions of dollars as a result. Defendant received the full benefit of the contract. It cannot now be heard to complain that the contract is somehow invalid.

STANDARD OF REVIEW

Defendant argues that this Court lacks subject matter jurisdiction over Plaintiff's claims because Plaintiff has not waived its sovereign immunity. In deciding a motion for summary disposition brought based on a claim of immunity, 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 a basis for recovery. See, *Huron Potawatomi, Inc v Stinger*, 227 Mich App 127, 130 (1997).

FACTS

1. The Parties' Arrangement.

Plaintiff is one the nation's leading entertainment ticketing companies. 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 A, User Agreement at ¶2. Plaintiff and Defendant operated under the terms of the User Agreement from 2006 onward. Complaint at ¶7.

The initial term of the User Agreement was for a four-year period and expired on November 8, 2010. Exhibit A at ¶3. However, the User Agreement provided that it would be automatically renewed for successive one-year terms unless either party

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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. Complaint at ¶9.

The Parties' relationship was active, ongoing and significant. Between 2009 and 2013 alone, Defendant received over one million dollars every year under the terms of the User Agreement, including more than one million six hundred thousand dollars in 2011. Exhibit B, Affidavit of K. Fisher. In turn, Plaintiff received an average of approximately $150,000 per year in fees under the Agreement. Exhibit C.

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 D, Affidavit of M. Walthius.

In many but by no means all cases, Defendant's representative in dealings regarding the User Agreement and related issues was Leah Carasco. Defendant claims that, "according to her personnel file" Ms. Carasco was a mere "marketing assistant." If so, she has been misled by Defendant, since numerous communications both from Ms. Carasco herself and from other representatives of Defendant indicated that Ms. Carasco held several different management positions during the term of the User Agreement from 2007 onward. This is consistent with Ms. Carasco's LinkedIn profile. Exhibit E.

By way of 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

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identified as the "Players Club Manager." Exhibit F. Ms. Carasco executed the W-9 form on behalf of Defendant. Exhibit G. 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 H. In 2010, Ms. Carasco requested that Plaintiff prepare a renewal contract. Exhibit I. 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 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. Various 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, to the contrary, notified Plaintiff that it does not

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intend to allow Plaintiff to act as its ticketing agent for performances at Defendant's casino. Complaint at ¶11-12.

2. **Defendant's Alleged Sovereign Immunity.**

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 A at ¶13(D).

DEFENDANT WAIVED SOVEREIGN IMMUNITY

Plaintiff does not dispute that Indian tribes generally enjoy sovereign immunity from suits. But a tribe may be subject to suit if the tribe has relinquished its immunity by a clear and express waiver. The standard for determining whether a tribe has done so under a contract is governed by *C&L Enterprises v Citizen Band Potawatomi Tribe of Oklahoma*, 532 US 411 (2001).

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.

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 414. 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 has been cited at least 200 times for the proposition that arbitration clauses authorizing entry of judgment in a court of competent jurisdiction operate as a waiver of sovereign immunity. In other cases, a waiver of sovereign immunity was found simply where as part of the agreement at issue, the tribal entity had agreed that it was 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 U S 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

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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 citing *Sungold Gaming USA, Inc v United Nation of Chippewa* (Exhibit C to Defendant's Brief), an unpublished decision of the Court of Appeals that has been cited in no other case. *Sungold* is distinguishable and unpersuasive. In that case, the plaintiff argued that defendants had waived sovereign immunity based on language in the contract stating that the agreement was "valid and binding." The court had little difficulty concluding that this was not a clear waiver of sovereign immunity. The defendant next argued that immunity had been waived because the contract contained a choice of law provision stating that it would be interpreted under Arizona law. Again, the court found that a choice of law provision "standing alone" was not sufficient to constitute a clear and unequivocal waiver.

That is not the case here. Contrary to the characterization suggested by Defendant, ¶13(D) of the User Agreement is far more than a mere choice of law provision – it 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. If anything, the language in the User Agreement is even 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.

Likewise, Defendant's effort to differentiate this case from *Bates Assoc v 132 Ass'n, LLC*, 290 Mich App 52 (2010) is without merit. According to Defendant, since the provision upon which Plaintiff relies upon in this case does not expressly reference

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sovereign immunity, as the contract did in *Bates Assoc*, no waiver occurred here. This argument ignores the fact that the Supreme Court has never required "magic words" to waive immunity. *See Rosebud Sioux Tribe v Val-U Constr Co*, 50 F 3d 560, 563 (8th Cir 1995). Instead, all that is required is that the waiver be "'clear.'" *C&L Enterprises*, 532 US at 418.

The language in the User Agreement is clear. And since clarity is the standard, it is of no moment that the User Agreement was tendered by Plaintiff, rather than Defendant, as Plaintiff suggests on page 9 of its Brief, especially since Defendant's representative discussed terms of a renewal agreement. For that matter, the contract at issue in *C&L Enterprises* was a form contract.

C&L Enterprises is dispositive. The User Agreement contains an express waiver of sovereign immunity, and Defendant is subject to the jurisdiction of this Court in the pending case.

DEFENDANT IS ESTOPPED FROM DENYING THE CONTRACT

Defendant's second argument is that the person who signed the User Agreement did so without authority to waive sovereign immunity. The affidavit submitted in support of Defendant's pleading is careful not to assert that Defendant had no knowledge of the User Agreement, and 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 the terms of the Agreement. Defendant's argument also ignores a basic, key fact: this contract was performed by both parties for nearly eight years. Over these many years, Plaintiff served as Defendant's exclusive ticketing agent and Defendant paid Plaintiff for its service. Defendant was obviously aware of the

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Agreement's terms, and benefited greatly thereunder. Based on this fact alone, *Bates Assoc* controls.

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 a parking garage near Greektown Casino. The settlement agreement, which contained an explicit waiver of immunity, was executed by the defendant-tribe's CFO, who the defendant-tribe claimed 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.

The Court of Appeals 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).

Similar factors are present here – a long-term contract, during which time no one from Defendant asserted that it was invalid before this dispute arose, and full performance by both parties, including Defendant's receipt of millions of dollars. Also as in *Bates Assoc*, nothing on the record indicates that Defendant ever indicated to

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Plaintiff, or that Plaintiff ever had any knowledge that any tribal resolution was required for Defendant to waive sovereign immunity.

In *Bates Assoc,* our Court of Appeals also discussed with approval a decision of the California Court of Appeals rejecting a tribe's argument that the court had to apply the tribal sovereign immunity ordinance to determine whether otherwise binding contracts were ineffective to waive sovereign immunity because the waiver was made by contract rather than by ordinance or resolution. In that case, the court determined that it should look to state law. 290 Mich App at 62.

The analysis and result in *Bates Assoc* is consistent with years of Michigan law in which courts upheld contracts made by public officials without authority so long as the subject matter of the contract is (1) within the municipality's power and (2) is not illegal. A similar issue to the one here was examined in *Webb v Township of Wakefield*, 239 Mich 521 (1927). In that consolidated case, the defendant-township ordered heavy equipment from plaintiff. Plaintiff sought to recover the unpaid balance of the equipment. The defendant-township claimed that the orders were invalid because the township rules were not followed and the persons with whom the contract was entered did not have authority. 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

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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.

At a minimum, Defendant's motion for summary disposition of Plaintiffs' breach of contract claim should be denied as premature. "Generally, a motion for summary disposition is premature if granted before discovery on a disputed issue is complete." *Stringwell v Ann Arbor Pub Sch Dist*, 262 Mich App 709, 714 (2004). Summary disposition is appropriate before discovery only where "discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position." *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 160-161 (2007) (quotations and citations omitted).

CONCLUSION

For the reasons set forth above, Plaintiff asks this Court to deny Plaintiff's Motion for Summary Disposition and allow this case to proceed to discovery.

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CERTIFICATE OF SERVICE

On May 14, 2014, I electronically filed this document through the Oakland County WIZNET System, which will send notice of electronic filing to the attorneys of record.

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