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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

OSCEOLA BLACKWOOD IVORY GAMING GROUP LLC, Plaintiff, vs. PICAYUNE RANCHERIA OF CHUKCHANSI INDIANS and CHUKCHANSI ECONOMIC DEVELOPMENT AUTHORITY, Defendants.	Case No. 1:17-cv-00394-DAD-BAM **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION** DATE: June 20, 2017 TIME: 9:30 a.m. PLACE: Courtroom 5 (7th Floor) JUDGE: Hon. Dale A. Drozd CASE FILED: March 16, 2017

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I. INTRODUCTION

At its core, Defendants' Motion to Dismiss is nothing more than a vain attempt to confuse the issues before this Court and to further conceal Defendants' unlawful business practices. Plaintiff Osceola Blackwood Ivory Gaming Group LLC ("Plaintiff" or "OBIG") filed its Complaint after Defendants Picayune Rancheria of Chukchansi Indians and the Chukchansi Economic Development Authority (respectively, the "Chukchansi Tribe" and "CEDA," or collectively, "Defendants") fraudulently induced OBIG to provide them with OBIG's tribal gaming expertise and proprietary knowledge to get their shuttered casino reopened as expeditiously as possible, with the promise of a long-term Management Agreement that Defendants were required to submit to the National Indian Gaming Commission ("NIGC"). In an unscrupulous attempt to prevent OBIG from obtaining the benefit of that agreement, Defendants purposefully failed to submit the fully executed and tribally approved Management Agreement to the NIGC, and now they seek to strip OBIG of its right to enforce the terms of the agreement by asserting that the agreement is unenforceable because Defendants unilaterally (and improperly) did not submit it. In doing so, Defendants ask the Court to ignore the fact that the parties entered into and fully executed the Management Agreement, and further, that the Chukchansi Tribe's Tribal Council passed a formal tribal resolution approving the Management Agreement and all of its terms. More specifically, Defendants incorrectly argue that this Court lacks subject matter jurisdiction over this dispute because Defendants' sole failure to submit the Management Agreement to the NIGC for approval has rendered it unenforceable, such that there is no federal question under IGRA and no waiver of sovereign immunity from suit. Defendants' arguments lack merit (especially given the existence of a signed and approved agreement expressly waiving sovereign immunity) and improperly seek to reward fraudulent conduct.

The crux of Defendants' Motion to Dismiss is that because the federal Indian Gaming Regulatory Act ("IGRA") requires that any management agreement be approved by the NIGC, the parties' Management Agreement at issue here is unenforceable by the simple fact that Defendants failed and refused to submit it for approval. Importantly, the express payment and duration terms of the parties' Management Agreement mirror the exemplar terms set forth on the

NIGC's official government website, leaving virtually no doubt that the agreement would have been approved if actually submitted. Defendants argue that because the Management Agreement was not formally approved by the NIGC, they did not waive sovereign immunity and the agreement does not arise under IGRA, such that this Court lacks jurisdiction to adjudicate this dispute. Defendants therefore seek to avoid a suit in federal court by hiding behind the requirements and regulations promulgated by IGRA, while also urging this Court to find that that same federal law is not at issue. Thus, by virtue of Defendants' argument, all Defendants had to do to succeed in carrying out their fraudulent scheme and to insulate themselves from suit was to fail to fulfill their own express and implied obligations under the terms of the Management Agreement.

Contrary to Defendants' assertions, this Court has subject matter jurisdiction over OBIG's claims for multiple reasons. First, IGRA completely preempts state-law claims based on the breach of IGRA-regulated management agreements such as the one at issue in this case. Next, even without considering IGRA's preemptive force, OBIG's claims state a federal question implicating IGRA on their face; namely, whether the failure to submit a fully executed and tribally approved Management Agreement to the NIGC as provided for by IGRA constitutes a breach of contract and fraud, and how far federal law goes to protect parties who fall victim to such fraudulent treatment. Finally, Defendants waived any sovereign immunity they possessed pursuant to a clear, written waiver in the fully executed and tribally approved Management Agreement. Defendants cannot rely on their own fraudulent conduct as a means of avoiding that express wavier.

OBIG's Complaint asks this Court to determine what recourse a contracting party has against a tribe when the tribe induces it to jointly execute an IGRA-regulated Management Agreement and approves the agreement by Tribal Council resolution, but, as part of a fraudulent scheme to avoid the tribe's obligation to remunerate the party for the valuable services it has provided to the tribe, the tribe refuses to take the final step of submitting the Management Agreement to the NIGC for approval. At bottom, OBIG's lawsuit asks this Court to decide where federal law draws the line between protecting Native American tribes from suit and

condoning fraud or allowing tribes to create one-sided loopholes by which they can renege on fully executed and agreed-to contract terms. Because OBIG's Complaint presents this federal question on its face, and because Defendants have expressly waived any sovereign immunity from this lawsuit, this Court must find that it has subject matter jurisdiction over the parties' dispute.

II. FACTUAL BACKGROUND

In or around April 2015, the Chukchansi Tribe and CEDA reached out to OBIG to enlist its services to assist with the reopening of the Chukchansi Gold Resort & Casino ("Casino"). [Dkt. 1 ("Complaint") ¶ 2.] At the time, Defendants had no funding available to support and/or maintain the Casino or to commence the reopening process, and they had defaulted on bonds totaling approximately $280 million in principal and accrued interest. [*Id.*] The parties initially discussed entering into a seven-year management agreement with a payment term of thirty percent (30%) of the Casino's net revenues, with OBIG arranging for outside financing to fund the reopening of the Casino. [*Id.* ¶ 3.] Soon thereafter, however, OBIG assisted Defendants with obtaining the necessary financing with the Chukchansi Tribe's existing Senior Lender rather than arranging for separate outside financing. [*Id.* ¶ 5.] As a result, the parties then agreed to enter into a management agreement with a term of five years and a payment term of twenty-five percent (25%) of the Casino's net revenues (the "Management Agreement"). [*Id.*] Pursuant to IGRA, the Chukchansi Tribe was required to submit the Management Agreement to the NIGC for approval. [*Id.* ¶ 6.] The terms agreed to by the parties for the Management Agreement complied with NIGC regulations and, in fact, mirror the exemplar terms set forth on the NIGC's government website. *See Regulation No. 533, Checklist for New Management Contracts*, NATIONAL INDIAN GAMING COMMISSION, https://www.nigc.gov/compliance/checklists-and-worksheets# (search for "New Management Contracts" and click "New Management Contracts" hyperlink) (last visited June 2, 2017).[1]

The parties anticipated that the process of obtaining the NIGC's approval could take up to a year. [*Id.* ¶ 6.] Due to Defendants' dire financial situation, the parties entered into an interim

[1] Plaintiff has concurrently filed a request for judicial notice of this Checklist.

Consulting Agreement under which OBIG agreed to provide immediate consulting services to Defendants in order to fast-track the reopening of the Casino. [*Id.*] As part of this arrangement and to ensure that it did not run afoul of IGRA, OBIG was to be paid significantly less than it would later be paid under the terms of the Management Agreement. [*Id.* ¶¶ 7, 15–20.] Shortly thereafter, the parties ***fully executed*** the Management Agreement, and ***the Tribal Council for the Chukchansi Tribe approved and authorized it*** by and through its adoption of Resolution No. 2015-46. [*Id.* ¶¶ 7, 21.] The Management Agreement contains both a forum selection clause providing for any suit under the agreement to be filed in the United States District Court for the Eastern District of California and a waiver of sovereign immunity clause providing that Defendants waive any sovereign immunity "for the purposes of enforcing the terms of this Agreement." [*Id.* ¶¶ 21, 24 (quoting Exhibit 2 ("Ex. 2"), Management Agreement, at Article 8.1).]

OBIG fulfilled all of its obligations under both the Consulting Agreement and the Management Agreement, and the Casino was reopened to great financial success and a nearly 100% increase in employment of members of the Chukchansi Tribe. [Complaint ¶¶ 8, 27–28.] At all times, Defendants were under a continuing obligation to submit the Management Agreement to the NIGC for approval. [Complaint ¶¶ 7, 8, 20, 30, 37, 41, 47, 52, 59, 66, 70, 76.] However, Defendants failed to do so. [*See, e.g.*, Complaint ¶¶ 8, 30.] Instead, Defendants operated a fraudulent scheme to prevent OBIG from receiving the benefits of the Management Agreement by unilaterally failing to submit it to the NIGC for approval and thereafter claiming that OBIG had no legal rights to enforce the Management Agreement as a result. [*See generally*, Complaint.] As a result, OBIG has been damaged in the approximate amount of $21 million. [*Id.* ¶¶ 8, 39, 50, 57, 64, 68, 74, 81.]

III. ARGUMENT

A. STANDARD FOR MOTION TO DISMISS UNDER RULE 12(b)(1)

Pursuant to Federal Rule of Civil Procedure 12(b)(1), a party may move to dismiss a plaintiff's claims for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1); *Mims v. Arrow*, 565 U.S. 368, 376 (2012). Defendants move to dismiss under Rule 12(b)(1) on two

grounds. First, Defendants allege that OBIG's Complaint fails to state a federal question within the jurisdiction of this Court. [Dkt. 8 (Motion to Dismiss ("Motion")) at 6:5–6.] Second, Defendants argue that this Court lacks subject matter jurisdiction because Defendants did not waive their sovereign immunity. [*Id.* at 12:11–13:13.] Both assertions fail.

Dismissals under Rule 12(b)(1) in federal question cases are exceedingly rare, and are "proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998) (quoting *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666 (1974)); *see also Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (stating that jurisdictional dismissals on federal question grounds are "exceptional" and fail unless the alleged claim is clearly "immaterial and made solely for the purpose of obtaining federal jurisdiction" or is "wholly insubstantial and frivolous.") (internal quotation marks and citations omitted). As is discussed in detail below, to the extent that Defendants' Rule 12(b)(1) motion is based on an alleged failure to state a federal question, it must fail, because OBIG's claims are not made solely for the purpose of obtaining federal jurisdiction and are not frivolous. *See Safe Air for Everyone*, 373 F.3d at 1039. Rather, the Complaint's purpose is clear: to seek relief for the wrongs Defendants have committed by failing to submit the Management Agreement to the NIGC for approval.[2]

Defendants also attempt to attack the Complaint under Rule 12(b)(1) based on tribal sovereign immunity. *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015) ("Although

[2] To the extent that Defendants also allege that the Complaint fails to state a federal claim, such an allegation is generally not a jurisdictional defect and should usually be challenged through a Rule 12(b)(6) motion rather than a Rule 12(b)(1) motion. *Bell v. Hood*, 327 U.S. 678, 682 (1946) ("[I]t is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction."); *Cement Masons Health & Welf. Trust Fund for N. Calif. v. Stone*, 197 F.3d 1003, 1008 (9th Cir. 1999) ("Any non-frivolous assertion of a federal claim suffices to establish federal question jurisdiction, even if that claim is later dismissed on the merits."). Here, Defendants have not asserted a Rule 12(b)(6) motion, and even if they did, such an attack on the Complaint would fail because Plaintiff has properly alleged that this action involves issues related to Defendants' gaming activities as regulated by IGRA and the NIGC (*i.e.*, Defendants' attempts to hide behind IGRA and the NIGC's requirements for management agreements as cover for their fraudulent scheme to induce Plaintiff to provide gaming expertise and consulting services for a much lower rate of compensation).

sovereign immunity is only quasi-jurisdictional in nature, Rule 12(b)(1) is still a proper vehicle for invoking sovereign immunity from suit."). A jurisdictional attack under Rule 12(b)(1) may be facial or factual. *Safe Air for Everyone*, 373 F.3d at 1039 (citing *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000)). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Id.* Defendants' challenge in the instant case appears to be both facial and factual, as Defendants assert that (1) waivers of sovereign immunity in unapproved management agreements cannot, as a matter of law, supply the necessary waiver of sovereign immunity to confer jurisdiction on this Court, and (2) contrary to Plaintiff's allegations in the Complaint, Defendants did not waive their immunity because the Chukchansi Tribe "never adopted a Tribal resolution containing the waiver . . . ." [Motion at 13:14–14:4; Dkt. 9 (Declaration of Claudia Gonzales in Support of Defendants' Motion to Dismiss ("Gonzales Decl.")) ¶ 13.] Neither attack has merit.

In resolving Defendants' facial attack, this Court must assume OBIG's allegations to be true, draw all reasonable inferences in OBIG's favor, and deny Defendants' challenge unless OBIG's allegations are frivolous. *See Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004); *Cook v. Layman*, No. CIV-F-00-6926 OWW SMS, 2002 U.S. Dist. LEXIS 20044, at *6 (E.D. Cal. Sept. 16, 2002). Here, OBIG has pleaded that "the Chukchansi Tribe waived its sovereign immunity to a lawsuit filed by OBIG 'for the purposes of enforcing the terms of this [Management] Agreement.'" [Complaint ¶ 13 (citations omitted).] OBIG's allegation that Defendants waived their sovereign immunity with respect to the instant action is non-frivolous, given both that OBIG in good faith seeks to recover for the losses it suffered due to Defendants' fraudulent actions and that Defendants executed, and the Chukchansi Tribe passed, a Tribal resolution approving of the waiver in the Management Agreement. [*See id.*, Ex. 2.] Moreover, the Complaint also notes that "CEDA, on its behalf and on behalf of the Chukchansi Tribe, 'expressly, unequivocally and irrevocably' waived its sovereign immunity from any action filed in the United States Federal Court for the Eastern District of California with respect to the

Consulting Agreement, or any of the transactions contemplated in the Consulting Agreement." [*Id.* ¶ 13.] The language of the waivers in both agreements make it clear that Defendants intended to and did waive sovereign immunity with respect to actions enforcing the Management Agreement. Accordingly, this Court should deny Defendants' facial attack on the Complaint's assertion of federal subject matter jurisdiction.

To combat Defendants' factual attack, OBIG must make a prima facie showing of subject matter jurisdiction. *Societe de Conditionnement en Aluminium v. Hunter Eng. Co., Inc.*, 655 F.2d 938, 942 (9th Cir. 1981). This Court "need not presume the truthfulness of the plaintiff's allegations," except where, as here, the parties submit declarations alone in support of their jurisdictional arguments. *Cf. Rhoades v. Avon Products, Inc.*, 504 F.3d 1151, 1160 (9th Cir. 2007); *Safe Air for Everyone*, 373 F.3d at 1039 (citing *White*, 227 F.3d at 1242). Thus, in resolving Defendants' Motion, the Court must accept the Complaint's factual allegations as true. *See Rhoades*, 504 F.3d at 1160. Here, OBIG attached a complete and fully executed copy of the Management Agreement to the Complaint, along with the Chukchansi Tribe's Tribal Council Resolution No. 2015-46 approving and authorizing the Management Agreement and all of its terms, including the sovereign immunity waiver. [*See* Complaint, Ex. 2.] Accordingly, OBIG has met its burden. Faced with this obvious obstacle, Defendants submitted a declaration from Tribal Chairwoman Claudia Gonzales stating that she is "aware of no resolution waiving the Tribe's or CEDA's sovereign immunity from suit" nor could Tribal staff "locate any such resolution." [Gonzales Decl. ¶ 13.] Yet, Tribal Council Resolution No. 2015-46, which approved and authorized the entire Management Agreement and all of its terms, was attached as an exhibit to the Complaint. [*See* Complaint, Ex. 2.] Moreover, Defendants do not dispute that the Management Agreement and Tribal Council Resolution No. 2015-46 are genuine. Accordingly, this Court must deny Defendants' factual attack on the Complaint's assertion of subject matter jurisdiction.

B. THIS COURT HAS SUBJECT MATTER JURISDICTION BECAUSE IGRA COMPLETELY PREEMPTS PLAINTIFF'S STATE LAW CLAIMS

Federal district courts have original jurisdiction over actions "arising under the

Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Actions that involve a "substantial" question of federal law "arise under" the laws of the United States for the purposes of federal question jurisdiction; only a federal question that is "so attenuated and unsubstantial as to be absolutely devoid of merit" or "plainly unsubstantial" fails to meet that test. *Hagans v. Lavine*, 415 U.S. 528, 536–37 (1974) (citations and internal quotation marks omitted).

Generally, the basis for federal question jurisdiction must appear on the face of the well-pleaded complaint. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987) (stating the well-pleaded complaint rule). But the doctrine of complete preemption provides an exception to the well-pleaded complaint rule: Where "Congress intends that a federal statute preempt a field of law so completely that state law claims are considered to be converted into federal causes of action," claims that do not patently present a federal question are nonetheless considered to arise under federal law. *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 543 (8th Cir. 1996) (citing *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987); *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968)); *see also Cnty. of Madera v. Picayune Rancheria of Chukchansi Indians*, 467 F. Supp. 2d 993, 999 (E.D. Cal 2006) ("Under the complete preemption doctrine, when the preemptive force of a statute is so strong that it completely preempts an area of state law, the federal law displaces a plaintiff's state-law claim and the state claim is considered, from its inception, a federal claim that arises under federal law.") (citing *Valles v. Ivy Hill Corp.*, 410 F. 3d 1071, 1075 (9th Cir. 2005)) (internal quotation marks omitted).

The federal Indian Gaming Regulatory Act ("IGRA") has such preemptive force. *Gaming Corp. of Am.*, 88 F.3d at 544, 547 ("Examination of the text and structure of IGRA, its legislative history, and its jurisdictional framework likewise indicates that Congress intended it completely preempt state law. . . . We therefore conclude that IGRA has the requisite extraordinary preemptive force necessary to satisfy the complete preemption exception to the well-pleaded complaint rule."). Although the issue was decided first by the Eighth Circuit, "[t]he Ninth Circuit also construes the scope of IGRA preemption to permit state law claims if they are sufficiently tangential to gaming regulation." *Am. Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1052 (D. Ariz. 2001), *rev'd on other grounds*, 305 F. 3d 1015 (9th Cir. 2002)

(citing *Confederated Tribes of Siletz Indians v. Oregon*, 143 F. 3d 481, 484 (9th Cir. 1998)). California state courts recognize IGRA's preemption as well. *See, e.g.*, *Am. Vantage Cos. v. Table Mountain Rancheria*, 103 Cal. App. 4th 590, 596 (2002) ("IGRA has been construed as having the requisite extraordinary preemptive force necessary to satisfy the complete preemption exception to the well-pleaded complaint rule."). Thus, "claims that fall within the preemptive scope of the particular statute, or treaty, are considered to make out federal questions . . . ." *Gaming Corp.*, 88 F.3d at 543. Importantly, ***breach of contract claims based on management agreements fall squarely into IGRA's complete preemptive scope***. *See Am. Vantage Cos.*, 103 Cal. App. 4th at 596 (citing 25 U.S.C. § 2711); *see also Cnty. of Madera*, 467 F. Supp. 2d at 1001 (stating that IGRA preempts claims that "interfere with tribal governance of gaming."); *Trump Hotels & Casino Resorts Dev. Co., LLC v. David A. Roskow*, No. 3:03cv1133 (RNC), 2004 U.S. Dist. LEXIS 5401, at *7 (D. Conn. March 31, 2004) (recognizing that IGRA preemption applies to contract disputes "pertaining to management contracts and collateral agreements to those contracts, as those terms are defined under the IGRA").

OBIG's Complaint alleges that Defendants breached the Management Agreement between the parties by wholly and unilaterally failing to submit the Management Agreement to the NIGC for approval as part of a fraudulent scheme to induce OBIG to assist them in reopening the Casino for far less compensation than OBIG contracted for and deserved. [Complaint ¶¶ 21, 38–39.] Because IGRA completely preempts state law related to the regulation of management agreements, OBIG's claim for breach of the Management Agreement (and its other claims related to the breach) is considered, "from its inception, to be a federal claim and therefore arises under federal law." *Am. Vantage Cos.*, 103 Cal. App. 4th at 595. This is particularly true where, as here, Defendants fraudulently induced OBIG to enter into a set of contracts that were designed to exploit OBIG's tribal gaming expertise on the front end, while systematically aiming to deprive OBIG of the fruits of its labor on the back end. [*See* Complaint ¶¶ 7, 8, 20, 30, 37, 41, 47, 52, 59, 66, 70, 76.] Indeed, it is well known that the specific terms of the parties' Management Agreement would have been "rubber-stamped" by the NIGC during the approval process, as the payment and duration terms set forth in the

Management Agreement are the exact same exemplar terms that the NIGC promulgates on its government website for tribal gaming management contracts. *See Regulation No. 533, Checklist for New Management Contracts*, NATIONAL INDIAN GAMING COMMISSION, https://www.nigc.gov/compliance/checklists-and-worksheets# (search for "New Management Contracts" and click "New Management Contracts" hyperlink) (last visited June 2, 2017)[3]; *see also Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1421 (8th Cir. 1996) (stating that NIGC review of management agreements is "not more than a paper review to test the sufficiency of the documents") (internal quotation marks omitted).

Given IGRA's complete preemptive scope, it is for a federal court to decide to what extent the law protects defrauded parties like OBIG from Defendants who would fraudulently induce them to enter into a management agreement, which conforms to regulatory standards, while intending to breach their obligations to submit the agreement to the NIGC for "rubber-stamp" approval. Thus, this Court should find that IGRA preempts Plaintiff's claims related to the Management Agreement and that those claims, as a result, state a federal question over which this Court has subject matter jurisdiction.

C. EVEN WITHOUT CONSIDERING THE COMPLETE PREEMPTION DOCTRINE, THE COMPLAINT STATES A FEDERAL QUESTION

1. This Court Has Federal Question Jurisdiction Over Plaintiff's Fraud and Contract-Based Claims.

Should this Court decline to find that Plaintiff's claims are completely preempted by IGRA, it should still find federal question jurisdiction exists outside of the preemption analysis. In cases involving management contracts governed by IGRA, courts not employing preemption analysis still find federal question jurisdiction where "the entire association between the parties (and their various disputes) arise under IGRA" and where the action "involves construing federal law and the [management] agreement between the parties . . . ." *Bruce H. Lien Co.*, 93 F.3d at 1421; *Rita, Inc. v. Flandreau Santee Sioux Tribe*, 798 F. Supp. 586, 587–88 (D.S.D.

[3] As noted above, a request for judicial notice of this Checklist is concurrently filed with this Opposition.

1992). Additionally, where, as here, the parties dispute whether the contract at issue is an enforceable management agreement because it has not been submitted to the NIGC, federal question jurisdiction still exists. *Abdo v. Fort Randall Casino*, 957 F. Supp. 1111, 1112, 1114 (D.S.D. 1997) (finding federal question where plaintiff contended that unapproved contract was enforceable management agreement that tribe breached).

Indeed, where "[t]he issues before the Court involve a contractual arrangement for the operation of a gaming establishment . . . governed by . . . the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*," courts find federal question jurisdiction under 28 U.S.C. § 1331. *Tom's Amusement Co., Inc. v. Cuthbertson*, 816 F. Supp. 403 (W.D. N.C. 1993). Finally, courts find federal question jurisdiction where the complaint alleges that the defendant tribe had an obligation to act in good faith under the management agreement and the facts show that the tribe breached that obligation solely for the purpose of depriving plaintiff of the benefit of its bargain. *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 177 F.3d 1212, 1222 (11th Cir. 1999). Management agreements for gaming operations, such as the agreement at issue here, incorporate IGRA's terms by operation of law. *See id.* at 1223. Thus, disputes arising under management agreements necessarily arise under the laws of the United States. *See id.*

In *Tamiami Partners, Ltd.*, the Eleventh Circuit considered whether a federal district court had subject matter jurisdiction over a gaming facility operator's claims against a tribe where the operator alleged that the tribe failed to process gaming license applications in good faith and rejected the license applications for "the sole purpose" of taking over the gaming facility, thus depriving plaintiff of the benefit of its bargain. *Tamiami Partners, Ltd.*, 177 F.3d at 1222. The Court found that federal question jurisdiction was present based on the fact that the complaint presented "more than a mere dispute concerning a contract," given plaintiff's "claims that the Tribe had an obligation under the Agreement to process the gaming license applications . . . in good faith, and that the Tribe breached its obligation when it rejected these license applications for the sole purpose of taking over [the gaming facility]." *Id.* Similarly, the instant lawsuit is much more than a simple contract dispute, as the Complaint clearly describes how Defendants fraudulently and in bad faith failed to submit the IGRA-regulated Management

Agreement to the NIGC for approval with the purpose of preventing OBIG from obtaining the benefit of that agreement. [*See generally*, Complaint.] Under such circumstances, this Court has federal question jurisdiction over OBIG's claims. *See Tamiami Partners, Ltd.*, 177 F.3d at 1222.

OBIG's first five causes of action—its fraud and breach-of-contract-based claims—involve a substantial question arising under IGRA. Specifically, IGRA provides that tribes may enter into management contracts—such as the Management Agreement at issue in this action—if the contract has been submitted to and approved by the Chairman of the NIGC. 25 U.S.C. § 2710(d)(9). The crux of OBIG's Complaint is that Defendants committed fraud and breached the fully executed and tribally approved Management Agreement by failing to submit it to the NIGC as provided for by IGRA. [*See, e.g.*, Complaint ¶¶ 8, 59–60.] These claims invoke the substantial question of whether the failure to submit a fully executed and tribally approved Management Agreement to the NIGC as provided for by IGRA constitutes a breach of contract and fraud under IGRA, and how far federal law will go to protect parties who fall victim to such treatment. *See Rita, Inc.*, 798 F. Supp. at 587–88 (finding federal question jurisdiction where tribe induced company to enter management agreement and then used lack of approval of agreement to exclude company from casino, because "this action involves construing federal law and the [management] agreement between the parties . . . .")

Defendants argue that OBIG's claims are not subject to federal question jurisdiction because "[n]o issues of federal law need to be resolved with respect any [*sic*] of these claims for relief."[4] [Motion at 7:8–9.] This argument ignores the substantial issues of federal law explained above and represents a further extension of Defendants' fraudulent scheme to deprive OBIG of the benefit of its bargain with respect to the Management Agreement. While Defendants cite case law holding that management agreements not approved by the NIGC are void under federal law, none of the cited cases include analogous factual allegations to those at issue here; namely, that the tribe's purposeful refusal to submit the Management Agreement to

[4] Defendants also spend an entire page of the Motion arguing that *diversity* jurisdiction does not apply in the instant action. [Motion at 11:1–12:1.] Such an argument is a red herring, as Plaintiff did not assert any diversity jurisdiction in its Complaint.

the NIGC for approval was part and parcel of a fraudulent plan to get the benefit of OBIG's expertise and proprietary knowledge and to avoid the burden of properly compensating OBIG. *See Bettor Racing, Inc. v. Nat'l Indian Gaming Comm'n*, 812 F.3d 648, 650–51 (8th Cir. 2016) (affirming grant of summary judgment against gaming business fined by the NIGC for multiple violations of IGRA—no allegations of fraudulent scheme to avoid approval); *Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 686, 699–700 (7th Cir. 2011) (holding that a trust indenture was an unapproved management contract void under IGRA—no allegations of fraudulent scheme to avoid approval); *Calvello v. Yankton Sioux Tribe*, 899 F. Supp. 431, 435 (D.S.D. 1995) (finding federal question jurisdiction where parties disputed whether contract was IGRA-regulated management agreement or non-IGRA employment contract, but that an unapproved management agreement is null and void—no allegations of fraudulent scheme to avoid approval); *Saybrook Tax Exempt Investors, LLC v. Lake of the Torches Econ. Dev. Corp.*, 929 F. Supp. 2d 859, 862–63 (W.D. Wis. 2013), *clarified by Saybrook Tax Exempt Investors, LLC v. Lake of the Torches Econ. Dev. Corp.*, No. 12-cv-255-wmc, 2013 U.S. Dist. LEXIS 100486 (W.D. Wis. May 30, 2013) (finding no federal question where *defendants* invoked IGRA as an affirmative defense—here, the procedural posture is distinguishable, as *Plaintiff* invokes federal question jurisdiction based on allegations of fraud).

Further, Defendants impermissibly attempt to advance Plaintiff's burden of proof by arguing that OBIG cannot state its claims because, Defendants allege, OBIG is not licensed by the California Gambling Control Commission. [*See* Motion at 8–10.] Defendants' licensing argument is another red herring. First, the California Gambling Control Commission website link that Defendants rely on for the assertion that "OBIG has not received a determination of suitability," www.cgcc.ca.gov/?pageID=ActiveGVPR, merely lists currently active gaming resource suppliers whose licenses have not yet expired as of the current date.[5] The fact that

[5] Defendants request in Footnotes 1 and 2 of the Motion that this Court take judicial notice of the Tribal State Gaming Compact and the record of approved gaming resource suppliers from the California Gambling Control Commission's website. This Court should ignore those requests because (1) the information sought to be judicially noticed is irrelevant to the only question before this Court—whether it has jurisdiction, and (2) Defendants have not supplied the Court with the "necessary information" required by the Federal Rules of Evidence; namely, facts requiring the conclusion that the facts sought to be judicially noticed are capable of accurate and ready determination by resort to sources whose

OBIG is not currently on the list is inapposite, as such information provides no evidence regarding OBIG's license status during the relevant time period. Second, Defendants purport to impose a nonsensical and nonexistent burden on OBIG that OBIG should *currently* be licensed as a gaming resource supplier in California when OBIG is not currently involved in any gaming activities in the state. This is especially suspect considering that Defendants have done everything they can to deprive OBIG of the benefits of the parties' contracts and business arrangements, first by refusing to submit the Management Agreement to the NIGC and then later by unilaterally and unceremoniously terminating the interim Consulting Agreement. [*See, e.g.*, Complaint ¶¶ 8, 30.] Setting aside both of these critical points, Defendants' licensing argument has no bearing on the issue of whether a federal question exists on the face of Plaintiff's well-pleaded complaint. As stated above, Plaintiff's complaint makes out a federal question, and any issue involving licensing is not relevant to that determination; if at all, it is an issue for another day. *See Caterpillar Inc.*, 482 U.S. at 392 (1987) (stating that where federal question exists on the face of the well-pleaded complaint, federal courts have jurisdiction to hear the complaint).

Based on the above, this Court should find that Plaintiff's claims related to the breach of the Management Agreement and related fraudulent conduct state a federal question over which this Court has subject matter jurisdiction.

2. <u>Supplemental Jurisdiction Exists Over Plaintiff's Remaining Claims.</u>

"[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). Indeed, section 1367(a) provides "a broad grant of supplemental jurisdiction over other claims within the same case or controversy," and, where "the court has original jurisdiction over a ***single claim*** in the complaint, it has original jurisdiction over a civil action within the meaning of

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accuracy cannot reasonably be questioned. Fed. R. Evid. 201(c)(2); *Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1075 (9th Cir. 2010).

§ 1367(a)." *Exxon Mobil Corp. v. Allapattah Serv., Inc.*, 545 U.S. 546, 548–49 (2005) (emphasis added).

Plaintiff's remaining claims are subject to supplemental jurisdiction because they form part of the same case or controversy as those over which this Court has original federal question jurisdiction. Each of Plaintiff's eight causes of action arises from the same common nucleus of operative facts; namely, that Plaintiff and Defendants entered into the Consulting Agreement and the Management Agreement for the purpose of reopening and managing Defendants' casino, Defendants approved and authorized both agreements through its adoptions of tribal resolutions, and while Plaintiff performed under the agreements to the benefit of Defendants, Defendants breached the Management Agreement by failing to submit it to the NIGC for approval, thus fraudulently depriving OBIG of approximately $21 million it is rightfully owed. [*See, e.g.*, Complaint ¶¶ 7–8.] Thus, Plaintiff's claims are all inextricably intertwined, as each is based on Defendants' fraudulent scheme and breach of the Management Agreement, which operated to deprive OBIG of a large sum of monies to which it is entitled. [*See generally*, Complaint.] As such, this Court may properly exercise its supplemental jurisdiction as to all of Plaintiff's claims over which it does not have original jurisdiction pursuant to 28 U.S.C. § 1367.

D. DEFENDANTS SPECIFICALLY WAIVED SOVEREIGN IMMUNITY THROUGH THE MANAGEMENT AGREEMENT

While tribes enjoy sovereign immunity from suit, they may relinquish that immunity pursuant to a "clear" waiver. *Kiowa Tribe of Oklahoma v. Mfg. Techns., Inc.*, 523 U.S. 751, 754 (1998); *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001) (citing *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)) (finding that tribe waived immunity from suit). Clear waiver may be found in a contract clause, even where it does not specifically mention waiver but otherwise assumes that disputes under the contract may be remedied by resort to judicial proceedings. *C & L Enters., Inc.*, 532 U.S. 418–19 (finding clear waiver in provisions of construction contract providing for application of Oklahoma law, binding arbitration, and enforcement of arbitration decisions in any state or federal court with jurisdiction).

As is applicable here, it is beyond dispute that a contract provision that specifically provides for a waiver of sovereign immunity with respect to disputes under the agreement constitutes a "clear" waiver. *See, e.g.*, *Oglala Sioux Tribe v. C & W Enters., Inc.*, 542 F.3d 224, 230–31 (8th Cir. 2008) (finding waiver of sovereign immunity where contract clause stated that the tribe "grants a limited waiver of its immunity for any and all disputes arising from this Contract.") (internal quotations and citations omitted); *Findleton v. Coyote Valley Band of Pomo Indians*, 1 Cal. App. 5th 1194, 1216–17 (2016) (holding that tribal council waived tribe's sovereign immunity by enacting resolution "to waive the Tribe's Sovereign Immunity on a limited basis in contracts related to the development and financing of a new gaming and resort facility . . . .") (internal quotations omitted).

The Management Agreement the parties entered into contains an explicit, clear waiver of Defendants' sovereign immunity. [Complaint ¶ 13.] In particular, pursuant to Article 8.1(a) of the Management Agreement, the Chukchansi Tribe waived its sovereign immunity to a lawsuit filed by OBIG "for the purposes of enforcing the terms of this Agreement." [*Id.*; *see also id.* at Ex. 2.] The Management Agreement was signed by the Chairman of the Chukchansi Tribe. [Complaint at Ex. 2.] Even further, the Tribal Council of the Chukchansi Tribe passed a tribal resolution approving the Management Agreement in its entirety, which contained the aforementioned waiver of sovereign immunity. [*Id.*] Such a waiver is even more "clear" than the type contemplated by the Supreme Court in *C & L Enters., Inc.*, 531 U.S. at 418.

Defendants' argument that the Management Agreement does not contain a waiver of sovereign immunity is contradicted by the language of the Agreement itself, through which Defendants specifically agreed to a waiver for the purpose of enforcing the Management Agreement. [Complaint ¶ 24; *id.* at Ex.2 , Art. 8.1.] Defendants' second argument—that the Chukchansi Tribe never enacted a resolution containing the waiver—is similarly specious, the Chukchansi Tribe enacted Resolution No. 2015-46, which specifically approved the Management Agreement with OBIG, the entirety of which was attached to the Resolution, and which contained the clear waiver of Defendants' sovereign immunity discussed above. [Complaint ¶ 7, Ex. 2.] Further, pursuant to Article 7.6 of the Management Agreement,

Defendants agreed "to execute all contracts, agreements and documents and to take all other actions necessary or appropriate to comply with the provisions of this Agreement and the intent thereof." [*Id.* ¶ 34; *id.* at Ex. 2, Art. 7.6.] This clause further reinforces that the Tribal Council's adoption of Resolution No. 2015-46 finally and formally approved of the terms of the Management Agreement, including Defendants' clear waiver of sovereign immunity with respect to the instant action.[6] Defendants cannot now rely on their own self-serving fraudulent conduct to escape the clear waiver executed and approved by the Tribal Council. Defendants cite *Wells Fargo Bank, N.A.*, 658 F.3d at 686, 699–700, for the proposition that a waiver in the Management Agreement cannot be effective because the Management Agreement never went into effect. [Motion at 13:20–14:2.] This argument again ignores the fact that the very reason the Management Agreement did not go into effect is because Defendants purposefully failed to submit it to the NIGC for approval as part of their fraudulent scheme to strip OBIG of its right to enforce the terms of the Agreement. Because the terms of the fully executed and tribally approved Management Agreement clearly contemplate a limited waiver of sovereign immunity for the purposes of enforcing the Agreement, and because the basis for this action is that Defendants fraudulently seek to avoid submitting it for the purpose of depriving OBIG of the benefit of its bargain, this Court should find that Defendants waived their sovereign immunity with respect to this action. Having executed and approved a contract containing a clear waiver of sovereign immunity, Defendants cannot be heard to complain that the waiver therein is ineffective. *See, e.g.*, *Oglala Sioux Tribe*, 542 F.3d at 230–31 (finding waiver of sovereign immunity where clause in contract not approved by NIGC waived tribal immunity); *Findleton*, 1 Cal. App. 5th at 1216–17 (holding that tribal council waived tribe's sovereign immunity by enacting resolution incorporating contractor's "proposal" requesting limited waiver). Defendants' intent to waive their sovereign immunity here is apparent and must be enforced.[7] Accordingly, Defendants are subject to the jurisdiction of this Court.

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[6] The clause also required Defendants to submit the Management Agreement to the NIGC for approval.

[7] Defendants argue that the Consulting Agreement between the parties cannot supply the basis for a waiver of sovereign immunity. [Motion at 14:4–23.] Defendants' argument fails to address Plaintiff's primary contention—that Defendants expressly waived sovereign immunity in the tribally approved Management Agreement.

IV. CONCLUSION

The instant case is subject to the jurisdiction of this Court because it raises a federal question and because Defendants have waived any immunity from suit. For the foregoing reasons, Plaintiff respectfully requests that this Court deny Defendants' Motion to Dismiss (the "Motion") in its entirety. Should this Court grant any portion of the Motion, Plaintiff requests that the Court grant Plaintiff leave to amend the Complaint pursuant to the liberal policy of amendment. *See* Fed. R. Civ. P. 15(a)(2); *Sonoma County Ass'n of Retired Employees v. Sonoma Cnty.*, 708 F.3d 1109, 1117 (9th Cir. 2013).

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