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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

DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Hearing Date: June 20, 2017
Time: 9:30 a.m.
Courtroom 5 (7th Floor)
Hon. Dale A. Drozd

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I. Legal Standards.

Plaintiff Osceola Blackwood Ivory Gaming Group LLC ("OBIG") contends that dismissals for lack of subject matter jurisdiction are "exceedingly rare" deviations from the norm. Doc. 12 at 5. OBIG is wrong. Dismissals for lack of subject matter jurisdiction are commonplace, as "[f]ederal courts are courts of limited jurisdiction, and are presumptively without jurisdiction over civil actions." *Lengen v. General Mills, Inc.*, 185 F.Supp.3d 1213, 1216 (E.D. Cal. 2016) (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). The standards OBIG cites involve actions that are accepted to allege a claim under federal law, but are nevertheless insufficient to confer federal jurisdiction because the claim is devoid of merit. *Bell v. Hood*, 327 U.S. 678, 682-83 (1946); *see Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89-90 (1998); *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666 (1974); *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039-40 (9th Cir. 2004). If OBIG's cause of action as pled does not arise under federal law, as defendants Picayune Rancheria of Chukchansi Indians and Chukchansi Economic Development Authority (collectively the "Tribe") argue, then it must be dismissed without regard to its substance or frivolity on the merits.

> For statutory purposes, a case can "arise under" federal law in two ways. Most directly, a case arises under federal law when federal law creates the cause of action asserted. *** [W]here a claim finds its origins in state rather than federal law … we have identified a 'special and small category' of cases in which arising under jurisdiction still lies. *** [F]ederal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of inclusion in federal court without disrupting the federal-state balance approved by Congress.

Gunn v. Minton, 568 U.S. 251, ---, 133 S.Ct. 1059, 1064-65 (2013).[1] OBIG's claims do not arise under federal law in either way.

OBIG also suggests it has "met its burden" with respect to the purported waiver of tribal sovereign immunity by attaching the Management Agreement and authorizing resolution to its

[1] A "substantial" federal issue in this context is one with "importance … to the federal system as a whole." *Gunn* at 1066. It is different from a "substantial" claim, as the term is used in the cases OBIG cites (e.g., Doc. 12 at 13 (citing *Hagans v. Levine*, 415 U.S. 528, 536-37 (1974))), meaning a claim not absolutely devoid of merit.

complaint because, OBIG asserts, the Court must accept as true OBIG's allegation that those documents waive the Tribe's immunity. Doc. 12 at 7. But the Court "do[es] not accept *legal conclusions* in the complaint as true, even if cast in the form of factual allegations." *Lacano Investments, LLC v. Balash*, 765 F.3d 1068, 1071 (9th Cir. 2014) (emphasis in original; internal quotation marks omitted). The parties' differences are not based on disputing the existence of the contract or resolution, but on the legal significance of those documents.

II. The Court lacks subject matter jurisdiction over this matter.

A. Tribal sovereign immunity bars the Court from exercising jurisdiction.

OBIG makes a two-part argument concerning tribal sovereign immunity: first, that the Tribe waived its immunity in section 8.1 of the Management Agreement, and second, that even though "the Management Agreement did not go into effect," the waiver it purportedly contains is nevertheless operational, because of the nature of OBIG's allegations. Doc. 12 at 16-17. Both parts are incorrect.

Section 8.1 of the Management Agreement does not waive tribal sovereign immunity. It describes a second document: "a Tribal Council resolution providing a limited waiver of the Tribe's sovereign immunity to suit in the same form as set forth below." Mgmt. Agmt. § 8.1. The Tribe "agrees" in section 8.1 "to enact" that resolution. *Id.* Further, section 8.1 describes two conditions for the waiver to have any effect: "The waiver shall not be effective until [1] the Resolution is enacted by the Tribal Council, and [2] a copy of the Resolution as enacted shall be attached as Exhibit 'C' and becomes a part of this Agreement." *Id.* Thus, section 8.1 contemplates that the Tribe will waive its immunity in a Tribal Council resolution, and only when that resolution is enacted, and then only when it is attached as an exhibit to the Management Agreement, will an effective waiver exist.

OBIG points to Resolution No. 2015-46 (attached to the Complaint as part of Exhibit 2) as the resolution in question, arguing that it "approv[ed] the Management Agreement in its entirety, which contained the aforementioned waiver of sovereign immunity." As shown above, however, the Management Agreement does not contain a waiver, but rather contains an agreement to separately enact a waiver. In approving the Management Agreement, Resolution No. 2015-46 approved that agreement,

along with the other things agreed to in the Management Agreement. But Resolution No. 2015-46 does not itself "provid[e] a limited waiver of the Tribe's sovereign immunity to suit in the same form as set forth" in section 8.1. The Resolution does not use the word *waiver*. It cites seven provisions of the Tribal Constitution that enumerate powers the Tribal Council evidently believed were relevant to the Resolution, but it does not cite the Constitutional provision empowering the Tribal Council "to waive the Tribe's sovereign immunity from unconsented suit." Doc. 1-2 at 2; Tribal Const., Art. V(r), Doc. 9-1, at 3. Moreover, Resolution No. 2015-46 was not "attached as Exhibit 'C'" to the Management Agreement. The Resolution does not state that it is intended to constitute Exhibit C to the Management Agreement, and OBIG does not allege that it was so attached.

OBIG's case authority, *Findleton v. Coyote Valley Band of Pomo Indians*, 1 Cal.App.5th 1194 (2016), is factually distinguishable. *Findleton* held that a waiver of immunity existed based on a Tribal Council resolution which approved the plaintiff's construction contract proposal. *Id.* at 1216-17. The resolution acknowledged that the proposal requested a waiver of the Tribe's sovereign immunity, recited the authority granted to the Tribal Council to waive the Tribe's immunity, and then expressly stated that the Tribal Council "consent[ed] to a limited waiver of Sovereign Immunity of the Tribe," followed by a list of limitations. *Id.* The resolution OBIG relies on in this case contains nothing remotely equivalent.

OBIG does not coherently explain how the future-tense and contingent language of section 8.1, in combination with a resolution notable for the absence of any waiver language at all, constitutes a clear and express waiver of the Tribe's immunity.

OBIG claims the purported waiver is effective, even though under the Indian Gaming Regulatory Act ("IGRA") the contract purportedly containing the waiver is void because it lacks the approval of the Chairman of the National Indian Gaming Commission ("NIGC"). This argument is unsupportable. The allegations against a sovereign Indian tribe (even allegations of fraud) do not affect the existence or waiver of the Tribe's sovereign immunity. *See People ex rel. Owen v. Miami Nation Enters.*, 2 Cal. 5th 222, 251 (2016) (noting that "[i]n every instance where some form of immunity bars suit, an alleged wrong will go without a remedy"). OBIG relies on *Oglala Sioux Tribe v. C & W Enterprises, Inc.*, 542 F.3d 224 (8th Cir. 2008) as a decision that enforced a waiver of immunity in a contract not approved by

the NIGC. Doc. 12 at 17. But *Oglala Sioux* had nothing to do with gaming or IGRA, and the contracts at issue did not need NIGC approval (they were road construction contracts, *id.* at 226), and there is no indication of any other required, but absent, agency approval. The case is entirely inapposite. Even if the Management Agreement contained a waiver, it "is not operable except as part of that Agreement. Since the entire contract is inoperable without [NIGC] approval, the waiver is inoperable and, therefore, the [T]ribe remains immune from suit." *A.K. Mgmt. Co. v. San Manuel Band of Mission Indians*, 789 F.3d 785, 789 (9th Cir. 1986).

B. The complete preemption doctrine does not provide jurisdiction.

OBIG's argument that IGRA completely preempts this action's state law claims is incorrect. OBIG claims that "breach of contract claims based on management agreements fall squarely into IGRA's complete preemptive scope." Doc. 12 at 9. To the contrary, however, even if complete preemption under IGRA is viable in the Ninth Circuit, the cases are clear that claims based on *void* management agreements are *not* within IGRA's preemptive scope.

The notion that IGRA can preempt state law causes of action came to prominence in *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536 (8th Cir. 1996), a decision with an expressly limited holding. *Gaming Corp.* indicated that the "term 'complete preemption' is somewhat misleading because even when it applies, all claims are not necessarily covered." *Gaming Corp.*, 88 F.3d at 543. "Only those claims that fall within the preemptive scope of the particular statute, or treaty, are considered to make out federal questions[.]" *Id.* The court's analysis of IGRA, including its "text and structure…, its legislative history, and its jurisdictional framework," *id.* at 544, led the court to conclude that only "causes of action which would interfere with the [tribal] nation's ability to govern gaming should fall within the scope of IGRA's preemption of state law," *id.* at 550. Conversely, "[p]otentially valid claims under state law are those which would not interfere with the nation's governance of gaming." *Id.*

Contrary to OBIG's suggestion, the Ninth Circuit has not followed *Gaming Corp*. The Ninth Circuit has held that IGRA may preempt state laws that would "usurp tribal control over gaming" or "threaten to undercut federal authority over Indian gaming." *Confederated Tribes of Siletz Indians v.*

Oregon, 143 F.3d 481, 487 (9th Cir. 1998). *Siletz*, however, did not involve "complete preemption" of a cause of action, but rather substantive federal preemption of a state's authority to act in accordance with state law. *Id.* at 486-87; *see also Runyan v. River Rock Entm't. Auth.*, No. C-08-1924-VRW, 2008 WL 3382783, *5 (N.D. Cal. Aug. 8, 2008) (noting that "the Ninth Circuit has not held that the IGRA completely preempts state law and it is not clear that the Ninth Circuit would do so").[2]

In fact, in the 21 years since it was issued, it appears that no federal circuit court has followed *Gaming Corp.* to hold that a state law cause of action really arises under federal law because of IGRA's complete preemptive force. At least one court has held that *Gaming Corp.*'s approach is inconsistent with the Supreme Court's subsequent decision in *Beneficial National Bank v. Anderson*, 539 U.S. 1 (2003), which held that complete preemption generally occurs only when the federal law provides the exclusive cause of action for the claim asserted. *Saybrook Tax Exempt Investors, LLC v. Lake of the Torches Econ. Dev't. Corp.*, 929 F.Supp.2d 859, 864 (W.D. Wis. 2013) (noting that "there is no cause of action under IGRA" that would replace a state law contract claim); *see Beneficial Nat. Bank*, 539 U.S. at 8.[3] The Eighth Circuit keeps *Gaming Corp.* viable but now acknowledges that "without a federal cause of action which in effect replaces a state law claim, there is an exceptionally strong presumption against complete preemption." *Johnson v. MFA Petroleum Co.*, 701 F.3d 243, 252 (8th Cir. 2012).

Several courts have drawn lines demarcating the boundaries of IGRA's preemptive scope. The Eighth Circuit held that a suit for breach of contract (among other state-law claims) brought by one gaming developer against another was not preempted by IGRA. *Casino Resource Corp. v. Harrah's Entm't, Inc.*, 243 F.3d 435 (8th Cir. 2001). The parties' relationship revolved around their efforts to develop and manage an IGRA-regulated tribal casino, but the case did not involve an approved

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[2] Like *Siletz*, the vacated district court opinion OBIG cites was not about subject matter jurisdiction or federalizing a state law cause of action. *Am. Greyhound Racing, Inc. v. Hull*, 146 F.Supp.2d 1012, 1051-52 (D. Ariz. 2001), *vacated on other grounds*, 305 F.3d 1015 (9th Cir. 2002). The question was whether IGRA *foreclosed* certain claims regarding the Governor's authority under state law to enter into tribal gaming compacts; the court held IGRA did *not* preempt the claims because they were "sufficiently tangential," i.e., only incidentally related, to tribal gaming regulation. *Am. Greyhound*, 146 F.Supp. at 1052 & n.2. *American Greyhound* does not stand for the proposition for which OBIG cites it.

[3] In a footnote, the Court set certain Indian tribal claims outside the general rule. *Beneficial Nat. Bank*, 539 U.S. at 8, n.4.

management contract, and as the court noted, "[n]ot every contract that is merely peripherally associated with tribal gaming is subject to IGRA's constraints." *Id.* at 439. The court concluded, "[i]t is a stretch to say that Congress intended to preempt state law when there is no valid management contract for a federal court to interpret, when the Nation's broad discretion to terminate management contracts is not impeded, and when there is no threat to the Nation's sovereign immunity or interests." *Id.* at 440.

The Eighth Circuit later reiterated the limits of IGRA's preemptive scope, stating:

> If a management company alleges only a 'routine contract action' against a tribe, such as a claim that the tribe has violated a consulting agreement not subject to regulation under IGRA, the complaint does not invoke federal jurisdiction. … Similarly, an issue of individual authority to sign on behalf of a tribe is not a federal question per se.

Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians, 317 F.3d 840, 848 (8th Cir. 2003) (internal quotations and alterations omitted). In contrast, a complaint that "raises the issue of whether [a] contract received valid federal approval under the IGRA regulatory scheme" can invoke federal jurisdiction. *Id.*

Another Eighth Circuit decision held that there was no federal jurisdiction over an action for breach of contract arising from an agreement the *defendant* claimed was a management contract requiring (and lacking) NIGC approval. *Iowa Mgmt. & Consultants, Inc. v. Sac & Fox Tribe of Miss. in Iowa*, 207 F.3d 488, 489 (8th Cir. 2000).

In *County of Madera v. Picayune Rancheria of Chukchansi Indians*, 467 F.Supp.2d 993 (E.D. Cal. 2006), this Court "assumed without deciding that the Ninth Circuit would agree with *Gaming Corp.*," and then held that IGRA did not preempt a state-law nuisance claim based on the failure to obtain construction permits for the construction of a hotel and spa located at an IGRA-regulated tribal casino. *Id.* at 1002. The Court rejected the argument that "any connection to the casino is sufficient for complete preemption," and observed that the "duty to obtain these permits seems to arise from the act of construction and not gaming," such that the suit did not appear to affect the subjects within IGRA's scope of preemption. *Id.* at 1002-03.

In *Rumsey Indian Rancheria of Wintun Indians v. Dickstein*, No. 2:07-cv-02412-GEB-EFB, 2008 WL 648451 (E.D. Cal. Mar. 5, 2008), an Indian tribe sued its former attorney for breach of contract,

breach of fiduciary duty, and other state law claims. *Id.* at *1. This Court rejected the argument that because the claims were "based on an alleged management contract that has not been approved by the NIGC," IGRA completely preempted them. "Even if the agreements are ultimately construed as void management contracts, they would be found to have never been valid contracts, and only an *attempt* at forming management contracts. If that is the case, then Plaintiff's suit in no way interferes with the regulation of a management contract because none ever existed." *Id.* at *4 (internal quotation marks and alterations omitted).

This Court reached the same conclusion again in *Shingle Springs Band of Miwok Indians v. Sharp Image Gaming, Inc.*, No. 2:10-cv-01396-FCD-GGH, 2010 WL 4054232 (E.D. Cal. Oct. 15, 2010). "[I]f a contract is *void* because it is a management contract that has not been authorized pursuant to the statutory requirements of the IGRA, the breach of such an unauthorized contract does not implicate the IGRA." *Id.* at *14.

The California Court of Appeal held that when a contract does not require, or did not receive, NIGC approval, then claims arising from that contract "fall outside the IGRA's protective structure." *Am. Vantage Companies v. Table Mountain Rancheria*, 103 Cal.App.4th 590, 596 (2002). "[A] void management agreement … is not subject to IGRA regulation." *Id.* Therefore, "although the IGRA may play a role" in resolving a case which involves a claim for the breach of an unapproved management contract, "it does not preempt" the claim. *Id.* at 596-97.

The federal district court in Connecticut held there was no complete preemption under IGRA with respect to claims arising from "an agreement to execute … a management contract in the future," or in other words, an agreement "precursory to the creation of a management contract." *Trump Hotels & Casino Resorts Dev't Co., LLC v. Roskow*, No. 3:03cv1133 (RNC), 2004 WL 717131, *2 (D. Conn. Mar. 31, 2004).[4]

[4] The same court earlier held that IGRA did not completely preempt breach of contract claims based on a management contract with an Indian tribe which was not federally recognized, as neither the tribe nor the contract were within IGRA's scope. *First Am. Casino Corp. v. Eastern Pequot Nation*, 175 F.Supp.2d 205, 209-10 (D. Conn. 2000).

The federal district court in New Mexico held, in an influential opinion followed by some of the cases cited above:

> [I]f the Agreement is void because it is a management contract that was not approved in advance by the Chairman of the NIGC as required by 25 U.S.C. § 2710(d0(9) it never was a valid written contract, but was only an attempt at forming a management contract. If that is the case, then [plaintiff's] suit in no way interfered with the regulation of a management contract because none ever existed.

Gallegos v. San Juan Pueblo Bus. Dev. Bd., Inc., 955 F.Supp. 1348, 1350 (D.N.M. 1997). The court found that Congress did not "intend[] to overcome the well-pleaded complaint rule on these facts. It is quite a stretch to say that Congress intended to preempt state law when there is no valid management contract for a federal court to interpret." *Id.*

This litany of decisions shows that a claim arising from an actual, approved, effective gaming management contract has been regarded as a claim brought under federal law because IGRA regulates such contracts to the exclusion of state law. But a claim arising from a contract not regulated by IGRA, or from a *void* management contract (which is no contract at all), or from an "attempt at forming a management contract," or from conduct peripheral to the subject matter of IGRA, is not subject to IGRA's complete preemption. This action is based upon an undisputedly void management contract, so IGRA has nothing further to contribute. The case is therefore outside of IGRA's preemptive scope.

OBIG argues that IGRA nevertheless preempts its state law claims because the contract is unapproved only as a result of an alleged "fraudulent scheme to induce OBIG" to work for less compensation than the contract provided. Doc. 12 at 9. No authority supports this argument. If the action is insufficiently rooted in federal law, emphasizing another state-law allegation cannot redeem it.

Furthermore, the fraudulent inducement emphasized repeatedly in OBIG's opposition brief (and forming part of the "crux" of its complaint) refers to an alleged fraudulent inducement to enter into the Consulting Agreement – not the management contract. OBIG's fraud claim alleges:

> Defendants misrepresented to OBIG the material fact that <u>if the Parties entered into the Consulting Agreement</u> and if OBIG assisted Defendants in reopening the Casino and continued to assist with its ongoing operations, <u>Defendants would immediately submit the Management Agreement and/or the proposed amended management agreement to the</u>

> NIGC for formal approval once it was approved, signed, and authorized by the Parties and the Casino was reopened.

Complaint ¶ 59 (emphasis added).[5] OBIG's claim of fraud is no more within IGRA's scope than its claim for breach of the void management contract. The Consulting Agreement was not an approved management contract subject to IGRA regulation. Moreover, the parties to the Consulting Agreement terminated it and executed a mutual release which irrevocably waived all claims arising out of, or relating to, the Consulting Agreement. Declaration of Claudia Gonzales, Doc. 9, ¶ 12. For these additional reasons, OBIG's allegation of fraud is no basis to depart from the mass of authority that a void management contract does not create federal jurisdiction under IGRA.

OBIG concludes that "it is for a federal court to decide to what extent the law protects defrauded parties like OBIG[.]" Doc. 12 at 10.[6] "The law" that protects OBIG would have to be IGRA. But IGRA has nothing whatsoever to say about alleged Tribal fraud inducing a party to enter into a contract, much less a contract that is admittedly void, or one that is not regulated by IGRA at all.

C. Plaintiff's claims do not support federal question jurisdiction.

OBIG additionally argues that federal question jurisdiction exists even if its claims are outside IGRA's scope of complete preemption. It asserts that the action arises under IGRA because the case is one "involving [a] management contract[] governed by IGRA," and "the entire association between the parties (and their various disputes) arise under IGRA," and "the action involves construing federal law and the management agreement between the parties." Doc. 12 at 11 (internal quotation marks omitted).

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[5] Defendants deny these allegations. Defendants also deny OBIG's speculation that the Management Agreement would have been "rubber stamped." Doc. 12 at 9. The "payment and duration terms" are not everything the NIGC reviews. *See, e.g.*, 25 C.F.R. §§ 533.6 (providing that the Chairman may disapprove a class III management contract if a principal person fails a suitability determination); and 533.3(e) (requiring submission of parties' financial information). Furthermore, as OBIG describes in its complaint, the executed Management Agreement violated the terms of the Tribe's financing agreements. Complaint ¶ 25. OBIG alleges the payment and duration terms found in the executed Management Agreement were to be modified, *id.* ¶¶ 25 and 29, such that the NIGC checklist should not be compared to the unmodified version of the contract submitted with the complaint.

[6] Here, OBIG says "…from Defendants who would fraudulently induce them to enter into a management agreement…." This characterization does not describe the plaintiff's fraud claim as alleged in its complaint, as discussed above.

It also asserts that in this case, "the parties dispute whether the contract at issue is an enforceable management agreement," and that such a dispute arises under IGRA. Doc. 12 at 11.

To the contrary, however, OBIG's complaint on its face does not raise a dispute as to whether the contract is an enforceable management agreement. It is undisputedly a management contract which required the NIGC Chairman's approval in order to take effect, according to OBIG's allegations and the terms of the contract itself. Complaint ¶ 22. And the entire premise of the complaint is that the contract was not submitted, and therefore never approved. Complaint ¶¶ 30, 38, 44, 49, 56, 68, 72, 79. The lack of approval plainly renders the contract ineffective under its terms (Mgmt. Agmt. Recital G and § 1.1) and under federal law. 25 C.F.R. §§ 531.1(n), 533.1, 533.7; *see Bettor Racing, Inc. v. Nat'l Indian Gaming Com'n*, 812 F.3d 648, 650 (8th Cir. 2016) ("The regulations mandate that any management contract that does not receive approval is void[.]").

Furthermore, even if OBIG's bare allegation that "the Management Agreement was valid, enforceable, and in effect" (Complaint ¶ 35) did not contradict its other allegations and the document attached to its complaint, such allegation implicitly invokes federal law only to rebut an anticipated defense that the contract is void under IGRA. "'Rebutting IGRA is not part of the cause of action for breach of contract itself.'" *Massachusetts v. Wampanoag Tribe of Gay Head*, 144 F.Supp.3d 152, 162 (D. Mass. 2015) (quoting *Saybrook*, 929 F.Supp.2d at 863) (alterations omitted). Moreover, just as anticipating a defense based on IGRA does not invoke federal jurisdiction, nor does a defense of tribal sovereign immunity convert a state law claim into a federal question. *Oklahoma Tax Com'n v. Graham*, 489 U.S. 838, 841-42 (1989); *see County of Madera*, 467 F.Supp.2d at 1000.

OBIG's reliance on *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412 (8th Cir. 1996), is misplaced. The *Lien* case involved a management agreement that had been approved by the BIA under its interim authority before the NIGC was operational. *Lien* at 1414, 1418. Since that approval, the NIGC had taken the contract in for further review, but under applicable regulations, the contract remained effective pending NIGC review. *Lien* at 1418 fn.11. The critical dispute was whether the person who executed the contract on behalf of the tribe was authorized to do so. *Id.* at 1415-16, 1417. The main thrust of the opinion was that such questions must be resolved first in tribal court. *Id.* at 1417,

1420-21. With relatively little discussion, the Eighth Circuit also found that federal question jurisdiction existed, but in doing so observed that "the issue of the contract's validity does not raise a federal question per se." *Id.* at 1421. Instead, the crucial IGRA-related basis for federal question jurisdiction was the fact that the management contract at issue was federally approved pursuant to IGRA, such that the parties' disputes – which, if the contract were found to have been executed with valid authority, would involve construing the contract's terms – "arise under IGRA." *Id.* The court had previously noted IGRA's complete preemption "vis a vis state law." *Id.* at 1417. Thus, it was apparently IGRA's complete preemption of state-law claims arising from the federally-approved management contract that caused those claims to arise under IGRA. Furthermore, the court identified an independent basis for jurisdiction, explaining that the tribal exhaustion issue itself raised a federal question, since "'a federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction.'" *Id.* at 1422 (quoting *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 853 (1985)). The reasons jurisdiction existed in *Lien* are not present here. The management contract, being unapproved, is a nullity as far as IGRA is concerned.[7]

OBIG also cites *Rita, Inc. v. Flandreau Santee Sioux Tribe*, 798 F.Supp. 586 (D.S.D. 1992), but that decision's persuasive force is limited, and its facts are distinguishable from the facts in this case. *Rita Inc.*'s jurisdictional analysis is quite brief, and cites IGRA only for its provision that allows "for judicial review of final agency decisions in the appropriate Federal district court." *Id.* at 587. The court was evidently referring to the plaintiff's allegation that a BIA letter stating that the parties' management contract "met the requirements for approval except for certain background investigations which needed to be completed and a change made in a quit claim deed" meant that the contract was "conditionally approved and therefor[e] enforceable." *Id.* at 588, 589. Here, there is no such claim. There is no arguable agency decision to review. The jurisdictional hook present in *Rita* is absent here.

[7] *Abdo v. Fort Randall Casino*, 957 F.Supp. 1111 (D.S.D. 1997), also cited by OBIG, *see* Doc. 12 at 11, found federal question jurisdiction for largely the same reasons as in *Lien*, adding that "the parties dispute whether Abdo's contract is a management contract under the IGRA or an employment contract that is not covered by the IGRA," a distinction requiring construction of IGRA and its regulations. *Abdo* at 1114.

OBIG also relies on another distinguishable case, *Tom's Amusement Co., Inc. v. Cuthbertson*, 816 F.Supp. 403 (W.D.N.C. 1993). That case, again, involved a federally approved management contract. *Id.* at 403. In connection with that management contract (between the non-party Tribe and the defendant Cuthbertson), and ostensibly in accordance with Tribe's gaming ordinance and Cuthbertson's tribal gaming license, a second contract existed between Cuthbertson "as a disclosed agent of the Tribe," *id.* at 405, and the plaintiff, out of which the plaintiff's claims arose. *Id.* at 404. Specifically, the plaintiff sought to recover possession of slot machines leased to Cuthbertson and located at the reservation casino that Cuthbertson owned and operated pursuant to the tribal management agreement, tribal lease, and tribal gaming license. *Id.* Cuthbertson contended that the lease agreement did not comply with Tribal gaming laws. *Id.* at 406. Like the *Lein* case, *supra*, the court's main conclusion was that the issues had to be decided first in tribal court. *Id.* at 405-06. Also like *Lein*, in *Tom's Amusement* there was an independent basis for subject matter jurisdiction, here diversity. *Id.* at 406. As for federal question jurisdiction, the court found that "the interpretation of contractual provisions involving gaming establishments on the Reservation involves federal question issues," since the reservation casino was "governed by the provisions of 25 U.S.C. § 81 and [IGRA]." *Id.*

For this, the *Tom's Amusement* court cited *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 788 F.Supp. 566 (S.D. Fla. 1992) ("*Tamiami I*"), in which the district court held the federal question presented was "the exercise of Tribal Court judicial power over non-Indians." *Id.* at 568. This decision was later reversed, as the Eleventh Circuit held that the complaint, which sought to compel arbitration pursuant to a gaming management agreement, did not state a federal question. *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 999 F.2d 503, 507-08 (11th Cir. 1993) ("*Tamiami II*"). "[T]his state law breach of contract claim is not appropriate for federal court jurisdiction." *Id.* at 508.

Tom's Amusement also cited *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074 (9th Cir. 1990), where an Indian tribe sued to enforce a tribal ordinance against a non-Indian. In bringing such a claim, the court held, "the Band necessarily invokes its sovereign power and relies on its disputed ability, under principles of federal common law, to apply that power against one outside of its community. … The federal question of the Band's power inheres in its complaint." *Morongo Band* at

1077. The holding in *Tom's Amusement* with respect to federal question jurisdiction must be understood in light of the authorities it relied upon, both of which were apposite to the tribal exhaustion focus in *Tom's Amusement*, but neither of which are relevant to OBIG's claims in this action.[8]

Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians, 177 F.3d 1212 (11th Cir. 1999) ("*Tamiami III*"), which OBIG discusses, Doc. 12 at 11-12, does not help OBIG's argument. This was, once again, a case stemming from a federally-approved gaming management contract. *Id.* at 1215. The plaintiff asserted a breach of contract. *Id.* at 1222-23. The contract "incorporated – by operation of law if not by reference – the provisions of IGRA and its associated regulations regarding licensing procedures," the subject of the alleged breach. *Id.* at 1223. The key distinction is that the present action does not involve a federally-approved contract gaming management contract.

OBIG characterizes the "crux" of its complaint as invoking the "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." Doc. 12 at 12. The Ninth Circuit answered this question in *A.K. Management Co. v. San Manuel Band of Mission Indians*, where it rejected the argument that an Indian tribe was "obligated under general contract principles to seek BIA approval" of a pre-IGRA gaming management agreement. *A.K. Mgmt.*, 789 F.2d at 788. Since the contract was void without federal approval, the court held, "it cannot be relied upon to give rise to *any* obligation by the Band, including an obligation of good faith and fair dealing." *Id.*; *see also U.S. ex rel. Citizen Band Potawatomi Indian Tribe of Okla. v. Enterprise Mgmt. Consultants, Inc.*, 883 F.2d at 890 (despite allegations of "particularly egregious conduct by the Tribe," unapproved gaming management contract was void).

[8] *Tom's Amusement* also string-cited four cases where, as the court described them, "federal jurisdiction was unquestioned in cases involv[ing] gaming establishments[.]" *Tom's Amusement* at 406. One was a "diversity suit." *A.K. Mgmt.*, 789 F.2d, 786. In another, the plaintiff tribe disputed the validity of unapproved (pre-IGRA) gaming management agreements. *U.S. ex rel. Citizen Band Potawatomi Indian Tribe of Okla. v. Enterprise Mgmt. Consultants, Inc.*, 883 F.2d 886 (10th Cir. 1989). The other two concerned the ability of states to enforce their gambling laws on Indian lands in light of IGRA. *United Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170 (10th Cir. 1991); *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir. 1990).

OBIG knows that a management contract must be "submitted to and approved by the Chairman of the NIGC," Doc. 12 at 12 (citing 25 U.S.C. § 2710(d)(9)), but it never explains how the Tribe could breach a contract that is unapproved, and thus void, imposing no duties on either party. Nor does it point to anything in IGRA or the NIGC's regulations providing any rule of law that would govern a claim of fraud based on an Indian tribe's failure to submit a contract to the NIGC.[9] These claims do not arise under IGRA.

OBIG attempts to distinguish a list of decisions holding that unapproved management contracts are void on the basis that they did not involve "purposeful refusal to submit" the contracts for approval, or some analogous "fraudulent plan." Doc. 12 at 12-13. The cited cases, however, did involve allegations in the nature of fraud or other inequitable conduct. For example, in *Bettor Racing, Inc. v. National Indian Gaming Commission*, a management contractor challenged the NIGC's notice of violation and civil fine assessment by pointing to the tribal party's fraud and bad faith, claiming the contractor's IGRA violations occurred only "because the Tribe represented that NIGC had approved" the management contract and its modifications. *Bettor Racing*, 812 F.3d at 652; *see Bettor Racing, Inc. v. Nat'l Indian Gaming Com'n*, 47 F.Supp.3d 912, 918 (D.S.D. 2014) (noting that the contractor sued the tribe in tribal court alleging fraud, and that the contractor argued in the federal case that the Tribe "assumed the responsibility to submit the modifications to the NIGC for approval, and it bears the responsibility for the ultimate lack of NIGC approval"). The court found the unapproved modifications were still void and still subjected the management contractor to civil penalties. 812 F.3d at 652.[10]

Next, in *Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev't Corp.*, 658 F.3d 684 (7th Cir. 2011), the plaintiff contended "that Lake of the Torches should be estopped from challenging the

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[9] In fact, the regulations demonstrate that federal law is indifferent to which of the parties to a management contract submits it to the NIGC Chairman. 25 C.F.R. § 533.2 provides (emphasis added):

> A tribe or a management contractor shall submit a management contract to the Chairman for review within sixty (60) days of execution by the parties. The Chairman shall notify the parties of their right to appeal the approval or disapproval of the management contract under part 583 of this chapter.

[10] Federal question jurisdiction existed in *Bettor Racing* because the action was for review of final agency action under the Administrative Procedure Act. *Bettor Racing*, 812 F.3d at 651.

validity of the Indenture because of its representations in the Bond Resolution that the Indenture was not a management contract." *Id.* at 691. The allegation did not deter the Seventh Circuit from affirming the decision that the Indenture was a gaming management contract, and that the "parties' failure to secure [NIGC] approval renders the Indenture void in its entirety and thus invalidates the [Tribal] Corporation's waiver of sovereign immunity." *Id.* at 702.[11]

In the next case OBIG cites, *Calvello v. Yankton Sioux Tribe*, 899 F.Supp. 431 (D.S.D. 1995), the court dismissed a contract action for lack of subject matter jurisdiction, based on the defendant Tribe's sovereign immunity, even though the contract under dispute contained a waiver of immunity. *Id.* at 436. The court reasoned that if the parties' contract was an employment agreement, as the plaintiff urged, the court would not have subject matter jurisdiction "over what is essentially a state law breach of contract claim." *Id.* And if it was a management contract, as the Tribe contended, the lack of NIGC approval would render the contract's waiver "inoperable." *Id.* Nor could the plaintiff rely on an alleged oral agreement, over which the federal court also lacked subject matter jurisdiction. *Id.* The court acknowledged that its "decision in this case reaches an inequitable result," since the plaintiff "conferred valuable services upon the Tribe for which he did not receive adequate compensation," and the Tribe's conduct showed "a lack of good faith." *Id.* at 438. Nevertheless, the court was "compelled by the law" to dismiss the action "without a legitimate basis for the exercise of federal subject matter jurisdiction," which it did without prejudice to the plaintiff pursuing any available action in state court. *Id.*

OBIG's effort to find some sort of equitable exception to IGRA's management contract rules is foreclosed by the cases it relies on. There is no resurrection of federal question jurisdiction for a plaintiff who contends that a federal question would have existed, but for the defendant's alleged bad acts.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss this action in its entirety and with prejudice.

[11] Diversity was the basis of the court's subject matter jurisdiction in *Lake of the Torches*. 658 F.3d at 692-94.

Dated: June 13, 2017

Respectfully Submitted,

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