John M. Peebles, CA Bar No. 237582
Michael A. Robinson, CA Bar No. 214666
Tim Hennessy, CA Bar No. 233595
James Qaqundah, CA Bar No. 270700
John Nyhan, CA Bar No. 51257
FREDERICKS PEEBLES AND MORGAN, LLP
2020 L Street, Suite 250
Sacramento, California 95811
Telephone: (916) 441-2700
Facsimile: (916) 441-2067
jpeebles@ndnlaw.com
mrobinson@ndnlaw.com
jqaqundah@ndnlaw.com
thennessy@ndnlaw.com
jnyhan@ndnlaw.com

Attorneys for Defendants PICAYUNE RANCHERIA OF CHUKCHANSI INDIANS and CHUKCHANSI ECONOMIC DEVELOPMENT AUTHORITY

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, Fed. R. Civ. P. 12(b)(1)

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

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INTRODUCTION

This Court lacks jurisdiction over this matter. First, there exists no federal question, and diversity jurisdiction does not apply. In addition, the Defendants possess sovereign immunity from suit, which has not been waived. Accordingly, this case must be dismissed.

BACKGROUND

The Picayune Rancheria of Chukchansi Indians ("Tribe") is a federally recognized Indian tribe. Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 82 Fed. Reg. 4915, 4917 (Jan. 17, 2017). Since 2003, Chukchansi Economic Development Authority ("CEDA"), which is a wholly-owned arm of the Tribe, has operated the Chukchansi Gold Resort and Casino (the "Casino") pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, Tribal gaming laws, and Gaming Compact between the Tribe and the State of California. Declaration of Chairwoman Claudia Gonzales (hereinafter "Gonzales Declaration"), ¶¶ 4 & 6.

In late 2014, an internal tribal dispute led to the Casino's closure. Gonzales Declaration, ¶¶ 7 & 8; *see also State of California v. Picayune Rancheria of Chukchansi Indians*, No. 1:14-cv-01593 LJO-SAB, 2015 WL 9304835 (E.D. Cal. Dec. 22, 2015). In 2015, after the Tribal dispute was resolved, the Tribe and CEDA (collectively, the "Defendants") worked to reopen the Casino, coordinating with federal, state, and local governments, as well as private institutions and vendors. Gonzales Declaration, ¶¶ 9 & 10. The Casino reopened on December 31, 2015. Gonzales Declaration, ¶ 10.

On July 8, 2015, Plaintiff Osceola Blackwood Ivory Gaming Group, LLC ("OBIG") and Defendants executed a Consulting Contract "for professional services related to the re-opening of the Chukchansi Gold Casino Resort." *See* Complaint Exhibit 1, Doc 1-1, page 1. The Consulting Contract went into effect upon execution and was to be effective for a term of twenty-four months or until the "facility becomes managed pursuant to a Management

Agreement approved by the National Indian Gaming Commission." Consulting Contract § 7, Doc 1-1, page 6. Plaintiff was paid under the Consulting Contract until the parties terminated the agreement early via a mutual settlement between the Consulting Contract parties on December 27, 2016. Gonzales Declaration, ¶ 12. Notably, OBIG does not allege any claim for breach of the Consulting Contract, and any such claim would be foreclosed under the terms of the settlement agreement, in which OBIG agreed to release the Tribe and CEDA from any and all claims arising out of or relating to the Consulting Contract. Gonzales Declaration, ¶ 12.

The Consulting Contract contained a provision purporting to waive CEDA's sovereign immunity, and the sovereign immunity of the Tribe, for legal actions with respect to the Consulting Contract. Consulting Contract § 14, Doc. 1-1, page 8-9. The Consulting Contract stated that such waiver is limited to "actions filed in the United States Federal Court for the Eastern District of California." Consulting Contract § 14, Doc 1-1, page 8-9. The Consulting Contract's "Choice of Law and Venue" provision provides that all claims arising under the Consulting Contract "shall be brought in the United States District Court for the Eastern District of California." Consulting Contract § 15, Doc. 1-1, page 9. The Consulting Contract also purports to stipulate that this Court's "personal jurisdiction" over CEDA and OBIG is proper due to "the complete diversity of citizenship of the parties and the amount in question." Consulting Contract § 15, Doc 1-1, page 9.

Furthermore, the Consulting Contract provides that its four corners are the limits of the agreement, stating: "This Contract contains the entire agreement of the parties, and there are no other promises or conditions in any other agreement, whether oral or written, concerning the subject matter of this Contract. This Contract supersedes any other prior written or oral agreements between the parties." Consulting Contract § 16, Doc 1-1, page 9.

The Consulting Contract, by its own terms, is not a "management contract" or a "collateral agreement" within the meaning of IGRA. Consulting Agreement § 9, Doc. 1-1, page 7. It is "independent of the Management Agreement" that would later be executed. Consulting

Agreement § 1, Doc. 1-1, page 1; *see* Complaint ¶ 33. Plaintiff makes no allegation that the Consulting Contract was ever determined to be a management contract or is otherwise subject to IGRA. Moreover, the Consulting Contract did not contain or contemplate any Tribal obligation to submit any future agreement to the NIGC for review and possible approval, as would be required for a management contract. *See* 25 U.S.C. §§ 2710(d)(9), 2711(a)(1); 25 C.F.R. Part 533.

On July 29, 2015, the Tribe signed the Management Agreement with OBIG. Management Agreement, Doc 1-2, page 3-49. Notably, The Management Agreement stated that it was "entered into pursuant to the IGRA." Management Agreement, Recital H, Doc. 1-2, page 7. The parties agree that the Management Agreement would constitute a management contract under IGRA, and therefore required the approval of the NIGC Chairman to become effective.

The complaint alleges that the "Management Agreement was valid, enforceable and in effect" "once it was signed and adopted" by the Tribe. Complaint at ¶ 35. However, the Management Agreement on its face would have become "operative and binding" only "upon the Effective Date." Management Agreement, Recital G, Doc 1-2, page 7. As OBIG's complaint acknowledges, the Management Agreement defined "Effective Date" as:

> the date five (5) days following the date on which all of the following listed conditions are satisfied:
>
> (1) written approval of this Agreement, and any documents collateral hereto identified by the National Indian Gaming Commission as requiring such approval, is granted by the Chairman of the NIGC; and
>
> (2) the Tribe and the NIGC, as appropriate, have concluded background investigations of the Manager and other appropriate persons in accordance with applicable Legal Requirements; and
>
> (3) receipt by the Manager of all applicable licenses and permits.

Management Agreement § 1.1, Doc 1-2, page 8; *see* Complaint ¶ 22.

OBIG's complaint admits that the listed conditions were never satisfied. Therefore the Management Agreement never went into effect by its own terms. *See, e.g.*, Complaint ¶ 30 ("To

date … Defendants have wholly failed to submit the Management Agreement … to the NIGC for approval.")

The Management Agreement does not contain an express waiver of the Tribe's or CEDA's sovereign immunity. Rather, the Management Agreement contemplated that the Tribe would agree to waive its immunity at some point in the future. Management Agreement § 8.1, Doc. 1-2, page 35. This provision stated that the "Tribe agrees to enact a Tribal Council resolution providing a limited waiver of the Tribe's sovereign immunity," and that the "waiver shall not be effective until the Resolution is enacted by the Tribal Council[.]" *Id.* OBIG does not allege that the Tribal Council ever passed any such resolution. The Tribal Council resolution attached to the complaint as part of Exhibit 2 does not contain any waiver of immunity. 2010 Tribal Council Resolution # 2015-46, Doc. 1-2, page 2-3. In fact, no such resolution or waiver exists. Gonzales Declaration, ¶ 13.

ARGUMENT

I. The Court lacks subject matter jurisdiction.

A. Legal standard for Rule 12(b)(1) motion to dismiss

United States federal courts are courts of limited jurisdiction. *Gunn v. Minton*, 133 S.Ct. 1059, 1064 (2013). Under the Federal Rules of Civil Procedure, Rule 12(b)(1), a party may move to dismiss a claim for lack of subject matter jurisdiction. Courts are presumed to lack jurisdiction unless the contrary appears affirmatively from the record. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006). On a Rule 12(b)(1) motion, the plaintiff has the burden of establishing that the court has subject matter jurisdiction. *Id.*; *see Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (plaintiff must make sufficient allegations to show that jurisdiction exists and, if factually challenged, plaintiff must prove each jurisdictional requirement by a preponderance of the evidence).

The Ninth Circuit has stated the standard for surviving a motion to dismiss for lack of jurisdiction as follows:

> When subject matter jurisdiction is challenged under Federal Rule of Procedure 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion. … A plaintiff suing in a federal court must show in his pleading, affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction, and, if he does not do so, the court, on having the defect called to its attention or on discovering the same, must dismiss the case, unless the defect be corrected by amendment.

Tosco Corp. v. Communities for a Better Env't, 236 F.3d 495, 499 (9th Cir. 2001) (abrogated on other grounds by *Hertz Corp. v. Friend*, 559 U.S. 77 (2010) (citations and internal quotations omitted); *see also Kokkenen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

A Rule 12(b)(1) motion can treat the complaint's factual allegations as true and challenge their sufficiency to establish jurisdiction (facial attack), or dispute the truth of allegations that otherwise would invoke federal jurisdiction (factual attack). *Leite v. Crane Co.*, 749 F.3d at 1121; *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A facial attack is resolved similarly to a motion to dismiss under Rule 12(b)(6). The Court takes the plaintiff's allegations as true and draws reasonable inferences in the plaintiff's favor, and then determines whether the allegations are legally sufficient to establish jurisdiction. *Leite*, 749 F.3d at 1121. For a factual attack, the Court "need not presume the truthfulness of the plaintiffs' allegations," and it "may look beyond the complaint to matters of public record," *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000), including exhibits attached to the complaint that contradict plaintiff's allegations, *Saldana v. Occidental Petroleum Corp.*, 774 F.3d 544, 551 (9th Cir. 2014), and "any other evidence properly before the court," *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989). *See also Edison v. United States*, 822 F.3d 510, 517 (9th Cir. 2016) (a Rule 12(b)(1) factual attack may be supported with declarations and affidavits challenging plaintiff's contention that defendant owes them a legal duty, to negate the claimed basis of federal jurisdiction).

In this case, the complaint seeks to invoke the jurisdiction of this Court only pursuant to IGRA, 25 U.S.C. § 2701, *et seq.*, and 28 U.S.C. § 1367, which provides for supplemental jurisdiction. Complaint ¶ 12. In addition, the Consulting Contract, attached to the complaint,

refers to the parties' purported diversity of citizenship. Consulting Contract § 15, Doc. 1-1, page 9. The gist of the complaint suggests that OBIG intends to invoke the Court's jurisdiction on the basis that the action presents a federal question under 28 U.S.C. § 1331, or because of diversity of citizenship under 28 U.S.C. § 1332, although the complaint does not cite either statute. In fact, no basis exists for the Court to assert jurisdiction over the subject matter of this action.

Despite the reference to IGRA, a federal statute, Plaintiff's complaint presents no federal question on its face. Rather, it alleges eight counts solely based on the state laws of California, including breach of contract, breach of implied contract, fraud, and the state's unfair competition law. Nor is there a basis for diversity jurisdiction. Finally, lacking original jurisdiction over any claim, there are no grounds for supplemental jurisdiction.

B. The complaint presents no federal question.

Federal courts have original jurisdiction over civil actions "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. "For a case to 'arise under' federal law, a plaintiff's well-pleaded complaint must establish either (1) that federal law creates the cause of action or (2) that the plaintiff's asserted right to relief depends on the resolution of a substantial question of federal law." *Peabody Coal Co. of Cal. v. Navajo Nation*, 373 F.3d 945, 949 (9th Cir. 2004) (citing *Franchise Tax Bd. v. Const. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 27-28 (1993)). Under the well-pleaded complaint rule, a claim "arises under" federal law only when a federal issue appears on the face of the plaintiff's complaint. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987).

First, Plaintiff attempts to invoke the jurisdiction of this Court under IGRA. The Ninth Circuit has expressly held, however, that "IGRA provides no general private right of action[.]" *Hein v. Capitan Grande Band of Diegueno Mission Indians*, 201 F.3d 1256, 1260 (9th Cir. 2000); *see also Hartman v. Kickapoo Tribe Gaming Comm'n*, 319 F.3d 1230, 1232 (10th Cir. 2003); *In re Sac & Fox Tribe of the Mississippi in Iowa*, 340 F.3d 749, 766 (8th Cir. 2003); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 63 F.3d 1030, 1049 (11th Cir. 1995).

IGRA did not create any of OBIG's causes of action, so they cannot "arise under" IGRA in the "most direct[]" sense. *Gunn v. Minton*, 133 S.Ct. at 1064.

Nor does OBIG's right to relief require the resolution of any substantial, disputed, question of federal law, whether under IGRA or otherwise. *See Grable & Sons Metal Prods., Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 312-14 (2005). This type of federal question jurisdiction arises only in a "special and small category of cases[.]" *Gunn v. Minton*, 133 S.Ct. at 1064 (internal quotation marks omitted). OBIG's claims allege breach of the Management Agreement, breach of an alleged oral contract and an alleged implied contract, fraud, state-law unfair competition, and economic torts. No issues of federal law need to be resolved with respect any of these claims for relief.

The Management Contract that forms the basis for two claims (the complaint's first and second claims, ¶¶ 32-45) states that it was entered into pursuant to IGRA. However, that incidental fact, which is not in dispute, is not a question that requires resolution, much less an issue upon which any claim depends.

Any tribal gaming management contract, even if it is fully executed, is void under federal law unless and until it is approved by the Chairman of the NIGC. 25 U.S.C. §§ 2711(a)(1) (class II gaming), 2710(d)(9) (class III gaming); 25 C.F.R. § 533.7 ("Management contracts … that have not been approved by the Chairman … are void."); *Bettor Racing, Inc. v. National Indian Gaming Comm'n*, 812 F.3d 648, 650 (8th Cir. 2016); *Wells Fargo Bank, N.A. v. Lake of the Torches Economic Development Corp.*, 658 F.3d 684, 699-700 (7th Cir. 2011). Contract claims arising from an Indian gaming contract only present a federal question if a contested issue asserted in the complaint is whether the document is a management contract governed by IGRA. *See, e.g., Calvello v. Yankton Sioux Tribe*, 899 F.Supp. 431, 435 (D. S.D. 1995) (dispute as to whether a contract was a "management contract" under IGRA triggered federal question jurisdiction). *But see Saybrook Tax Exempt Investors, LLC v. Lake of the Torches Econ. Dev't Corp.*, 929 F.Supp.2d 859, 862-63 (W.D. Wis. 2013) (no federal question jurisdiction exists

where *defendants* assert that IGRA provides an affirmative defense, because "IGRA is not part of the cause of action itself"). Here, OBIG's right to relief as pled does not turn on whether the Management Agreement is the sort of contract that requires the NIGC Chairman's approval pursuant to IGRA, or the effect under IGRA of the absence of that approval. All parties agree that the Management Agreement was a "management contract" under IGRA requiring the NIGC Chairman's approval, and that it was not approved. There is no analysis necessary under IGRA or the NIGC's regulations.

OBIG alleges, and the Defendants do not dispute, that the "Management Agreement required approval by the NIGC in order to comply with IGRA." Complaint ¶ 22. OBIG repeatedly emphasizes that the Management Agreement was not submitted for review. Complaint ¶¶ 30, 38, 44, 49, 56, 68, 72, 79. Having never been submitted, the Management Agreement never received the NIGC Chairman's approval. The Agreement itself states that NIGC approval was a mandatory prerequisite to the Agreement taking effect. Management Agreement Recital G; § 1.1 (defining "Effective Date"); Complaint ¶ 22. Therefore, under its terms and the set of facts OBIG alleges, the Management Agreement does not bind the parties, and never did.

Thus, there no substantial federal issue implicated in the claims for breach of the Management Agreement. However, even if there were, the facts as alleged establish that, under basic contract principles, OBIG cannot state a claim for breach of any duties under the Management Agreement because the Agreement never became "operative and binding." Management Agreement Recital G. In addition to the lack of NIGC approval, the Gaming Compact between the Tribe and the State of California imposes further limitations on any Tribal obligations under an agreement with a supplier of "Gaming Resources," which includes gaming management contractors.[1] The Compact requires all Gaming Resource Suppliers, and all

[1] The term "Gaming Resources" means "any goods or services provided or used in connection with Class III Gaming Activities … including, but not limited to, … Class III gaming consulting

persons "having a significant influence over the Gaming Operation," to be "licensed by the Tribal Gaming Agency." Gaming Compact § 6.4.1; *see also id.* § 6.4.5. Under the Compact, this tribal gaming license requires a background investigation, Compact § 6.4.7, and a positive "determination of suitability" by the California Gambling Control Commission, Compact §§ 6.4.5, 6.5.6. With certain limited exceptions for Tribal employees (not applicable here), the Tribal gaming agency must revoke a gaming license if the State agency determines the licensee is unsuitable. Gaming Compact § 6.5.1(b). The Compact impacts the terms of any contract with a Gaming Resource Supplier who lacks a positive determination of suitability from the State agency, providing:

> The Tribe shall not enter into, or continue to make payments pursuant to, any contract or agreement for the provision of Gaming Resources with any person whose application to the State Gaming Agency for a determination of suitability has been denied or has expired without renewal. Any agreement between the Tribe and a Gaming Resource Supplier shall be deemed to include a provision for its termination without further liability on the part of the Tribe, except for the bona fide repayment of all outstanding sums (exclusive of interest) owed as of, or payment for services or materials received up to, the date of termination, upon revocation or non-renewal of the Supplier's license by the Tribal Gaming Agency based on a determination of unsuitability by the State Gaming Agency.

Gaming Compact § 6.4.5. Information available from the California Gambling Control Commission indicates that OBIG has not received a determination of suitability. *See* Gaming

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services." Gaming Compact § 2.11. A "Gaming Resource Supplier" is "any person or entity who … supplies … Gaming Resources to the Gaming Operation or Gaming Facility[.]" Gaming Compact § 2.12. The compact defines the term "Management Contractor" as "any Gaming Resource Supplier with whom the Tribe has contracted for the management of any Gaming Activity or Gaming Facility, including, but not limited to, any person who would be regarded as a management contractor under IGRA." Gaming Compact § 2.14. Defendants request that the Court take judicial notice of the Tribal State Gaming Compact. The compact is available at the CGCC website, www.cgcc.ca.gov/documents/compacts/original_compacts/Picayune-Chuckchansi_Compact.pdf (last accessed May 9, 2017). Cited sections of the Gaming Compact are submitted with the Gonzales Declaration.

Resource Suppliers (Vendors) Found Suitable by CGCC, www.cgcc.ca.gov/?pageID=ActiveGVPR (last accessed May 9, 2017).[2]

Without the required State approval, the gaming compact barred OBIG from any right to receive payments from the Tribe under the Management Agreement. And just as with the lack of NIGC approval, OBIG's failure to obtain "all applicable licenses and permits" means another necessary condition for the Management Agreement's effectiveness was unsatisfied. On these facts, the ineffective, nonbinding Management Agreement cannot provide a basis for federal jurisdiction, even if its connection to IGRA were otherwise sufficient.

Finally, OBIG's other claims – those not based on the Management Agreement – likewise do not reveal any substantial issues regarding compliance with IGRA or any other federal laws. Neither the alleged oral contract nor the alleged implied contract, both of which OBIG asserts obligated the Tribe to submit the Management Agreement to the NIGC Chairman, could themselves be governed by IGRA, and indeed OBIG makes no allegations of any federal issue underlying the claims based on those alleged contracts. *See* Complaint ¶¶ 46-57. The remaining claims are similarly garden-variety state-law claims, which, even though they are based in part on an alleged failure to submit a document to a federal agency, do not arise under federal law.[3]

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[2] Defendants request that the Court take judicial notice of the record of approved gaming resource suppliers from the CGCC's website.

[3] There are no claims asserted on the basis of the Consulting Contract, which was the subject of a settlement agreement between OBIG, the Tribe and CEDA, terminating the Contract early, providing for payment to OBIG, and releasing the parties from further liability under the Consulting Contract. *See* Gonzales Declaration, ¶ 12. Even if such claims were asserted here, however, the Consulting Contract, which OBIG does not allege was regulated by IGRA, does not raise a federal question. *Calumet Gaming Group-Kansas, Inc. v. Kickapoo Tribe of Kansas*, 987 F.Supp. 1321, 1325 (D. Kan. 1997). *See also Casino Resource Corp. v. Harrah's Entertainment, Inc.*, 243 F.3d 435, 439 (8th Cir. 2001) ("Not every contract that is merely peripherally associated with tribal gaming is subject to IGRA's constraints."); *Iowa Mgmt. & Consultants, Inc. v. Sac & Fox Tribe of Mississippi in Iowa*, 207 F.3d 488, 489 (8th Cir. 2000); *Gallegos v. San Juan Pueblo Bus. Dev't. Bd., Inc.*, 955 F.Supp. 1348, 1350 (D. N.M. 1997).

C. Diversity jurisdiction does not apply in this case.

There exists no diversity jurisdiction in this matter because an "Indian tribe or an unincorporated arm of a tribe is not a citizen of any state." *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 722 (9th Cir. 2008); *see American Vantage, Inc. v. Table Mountain*, 292 F.3d 1091, 1098 (9th Cir. 2002). Both the Tribe and CEDA (alleged to be a "wholly-owned unincorporated economic arm of the Chukchansi Tribe," Complaint ¶ 11) are not "citizen(s) of any state within the meaning of § 1332(a)(1)." *American Vantage, Inc.* at 1098. This fact forecloses diversity of citizenship as a source of the Court's jurisdiction to hear the case. *Id.*

The Consulting Contract's "Choice of Law and Venue" provision purports to stipulate that litigation before a federal court is proper due to "the complete diversity of the parties." Consulting Contract § 15, Doc 1-1, page 9. However, it is fundamental that parties cannot create subject matter jurisdiction by consent. *Byers v. McAuley*, 149 U.S. 608, 618 (1893); *City of Colton v. American Promotional Events, Inc.-West*, 614 F.3d 998, 1006 fn.6 (9th Cir. 2010); *see Morrison v. Allstate Indem. Co.*, 228 F.3d 1255, 1261, 1275 (11th Cir. 2000) (courts may be "leery of any stipulations the parties offer concerning the facts related to jurisdiction"). Thus, the attempt to create jurisdiction in this Court through the Consulting Contract does not vest this Court with jurisdiction.

Furthermore, even if the parties could create diversity jurisdiction by stipulation, here it would only apply to claims under the Consulting Contract. Although the complaint contains factual allegations concerning the Consultant Contract, it does not assert any claims arising out of or relating to it.[4] Any attempt to assert such claims would be foreclosed by the parties' agreement releasing one another from such claims. Gonzales Declaration, ¶ 12.

[4] OBIG may intend the purported "implied contract," alleged to have been breached in the complaint's fourth claim for relief, to be seen as arising from the Consulting Contract. *See* Complaint ¶¶ 52-53. However, "it is well settled that an action based on an implied-in-fact or quasi-contract cannot lie where there exists between the parties a valid express contract covering the same subject matter." *Lance Camper Mfg. Corp. v. Republic Indem. Co.*, 44 Cal.App.4th 194, 203 (1996). The alleged oral contract suffers similar problems, as the Consulting Contract

Accordingly, diversity jurisdiction does not exist in this case.

D. Supplemental jurisdiction does not apply in this case.

The complaint cites 28 U.S.C. § 1367, which allows a district court to take "supplemental jurisdiction" over a claim outside the court's original jurisdiction when the claim is sufficiently related to a claim within the court's original jurisdiction. *See* Complaint ¶ 12. Supplemental jurisdiction under section 1367 does not establish federal subject matter jurisdiction over state law claims standing on their own. These "other claims" must be anchored to a claim within the Court's original jurisdiction. 28 U.S.C. § 1367(a); *see United Mine Workers v. Gibbs*, 383 U.S. 715, 725-27 (1966). In the absence of a federal question, diversity, or any other source of original jurisdiction in the District Court, section 1367 does not permit this Court to hear OBIG's state law claims.

II. The Court lacks jurisdiction to adjudicate this action because there is no valid waiver of Tribal sovereign immunity.

Because the issue of tribal sovereign immunity is "quasi-jurisdictional," a motion to dismiss on tribal sovereign immunity grounds is properly brought under Rule 12(b)(1). *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015); *see Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1014-15 (9th Cir. 2016); *Lewis v. Norton*, 424 F.3d 959, 961 (9th Cir. 2005). "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 U.S. 49, 58 (1978). "Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *see also Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2030-31 (2014). OBIG does not allege that Congress abrogated the Defendants' immunity.

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provides that "there are no other promises or conditions in any other agreement, whether oral or written, concerning the subject matter of this Contract," and that it "may be modified or amended only in writing[.]" Consulting Contract §§ 16, 18, Doc. 1-1, page 9.

Whether and to what extent a contract clause constitutes a waiver of tribal sovereign immunity turns on the terms of that clause. *See Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989). A waiver of tribal sovereign immunity must be clear, express and unequivocal. *C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418 (2001); *Santa Clara Pueblo*, 436 U.S. at 58; *Maxwell v. County of San Diego*, 708 F.3d 1075, 1087 (9th Cir. 2013). A waiver "may not be implied." *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006). "There is a strong presumption against waiver of tribal sovereign immunity." *Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001).

Absent a valid waiver, both the Tribe and CEDA, an arm of the tribe, are immune from suit. *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d at 725; *Allen v. Gold Country Casino*, 464 F.3d at 1046; *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1195-96 (10th Cir. 2010) (in a suit against the same defendant in this case, holding that CEDA shares the Tribe's sovereign immunity).

A. There is no waiver in the Management Agreement.

Plaintiff relies on a purported waiver of sovereign immunity contained in the Management Agreement. However, rather than containing an express waiver of sovereign immunity, the Management Agreement provides only that the Tribe would, at some later time, approve a Tribal resolution containing an express waiver of Tribal immunity. Management Agreement § 8.1, Doc. 1-2, page 31. "The waiver shall not be effective until the Resolution is enacted by the Tribal Council[.]" *Id.* The Tribe never adopted a Tribal resolution containing the waiver contemplated in § 8.1. Gonzales Declaration, ¶ 13.

Furthermore, even if the waiver itself were validly adopted, it still never would have been effective because the Management Agreement never went into effect, both by its terms and as a matter of federal law. Courts have confirmed that sovereign immunity waivers contained in unapproved management contracts are, with the rest of the document, void and without effect.

Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev't Corp., 658 F.3d 684, 686, 699-700 (7th Cir. 2011).

Accordingly, the Management Agreement cannot supply the necessary waiver of sovereign immunity in this case.

B. There is no waiver in the Consulting Contract, and any such waiver would be inapplicable to this action.

The Consulting Contract contains a provision purporting to be a limited waiver of the Tribe's and CEDA's sovereign immunity. The purported waiver states that the tribal entities waive immunity "from any suit, action, or proceeding or from any legal process … in any forum with respect to this Agreement, or any of the transactions contemplated herein." Consulting Contract § 14, Doc. 1-1, page 8. For several reasons, however, any reliance on the Consulting Contract's purported waiver is misplaced in this action.

First, the purported waiver is limited only to actions arising out of the Consulting Contract. Plaintiff cannot raise any claims under the Consulting Contract because the parties already settled any such claims, as discussed above. Gonzales Declaration, ¶ 12. And OBIG's complaint does not, in fact, assert any claims arising under the Consulting Contract. Therefore, by its terms, the purported waiver cannot apply to any claim in this action. Second, any waiver of the Tribe's immunity requires a two-thirds vote of the Tribal Council. Constitution of the Picayune Rancheria, art. V(r), Gonzales Declaration, Exhibit A. No action by CEDA can waive the Tribe's immunity, because CEDA, as a separate body, cannot produce the required Tribal Council resolution. Furthermore, under the Tribal ordinance establishing CEDA, CEDA possesses authority to waive only its immunity, not the Tribe's. CEDA Ordinance §§ 5(k), 12(b), Gonzales Declaration, Exhibit B. Third and finally, the purported waiver does not comply with the CEDA Ordinance's rules for the required terms of any valid waiver of CEDA's immunity. CEDA Ordinance § 12(b), Gonzales Declaration, Exhibit B (waiver must be specific and limited as to duration, among other requirements).

C. A purported "oral agreement" to submit a management agreement to the NIGC cannot be the source of a waiver of immunity.

OBIG alleges that the Defendants made certain unwritten promises, including a promise to submit the Management Agreement, or an amended version of it, or both, to the NIGC Chairman for approval. Complaint ¶¶ 25, 47. OBIG does not specifically allege that the purported oral agreement included a waiver of either Defendant's immunity. Even if the alleged ancillary agreement did exist, and an allegation of a waiver were made, such an oral agreement could not contain a valid waiver of sovereign immunity from suit. Waivers of the Tribe's sovereign immunity from suit require, *inter alia*, a formal written Tribal resolution approved by two-thirds of the Tribal Council. Gonzales Declaration, ¶ 13; Constitution of the Picayune Rancheria, art. V(r).

CONCLUSION

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

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Respectfully Submitted,

FREDERICKS PEEBLES & MORGAN LLP

/s/ Michael A. Robinson
John M. Peebles
Michael A. Robinson
Tim Hennessy
James Qaqundah
John Nyhan

Attorneys for Defendants