Case No. F077136

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

OSCEOLA BLACKWOOD IVORY GAMING GROUP LLC,
Appellant,

vs.

PICAYUNE RANCHERIA OF CHUKCHANSI INDIANS AND CHUKCHANSI ECONOMIC DEVELOPMENT AUTHORITY,
Respondents.

Appeal from the
Superior Court of the State of California, County of Fresno
Superior Court Case No. 17CECG02613
The Honorable Mark W. Snauffer, Judge Presiding

RESPONDENTS' BRIEF

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TABLE OF CONTENTS

PAGES

TABLE OF AUTHORITIES

PAGES

Cases

Statutes

Regulations

INTRODUCTION

1. Preliminary Statement

This case involves Osceola Blackwood Ivory Group, LLC's ("OBIG") attempt to enforce a management contract for the management of a class III Indian gaming facility. However, OBIG never provided any services pursuant to the Management Agreement. That is because – due to OBIG's lack of diligence and failure to comply with the licensing requirements relating to the management of a class III Indian gaming facility – the Management Agreement never went into effect.

Notably, through its Amended Complaint, as well as its Opening Brief, OBIG repeatedly admits – either directly or through silence – that the Management Agreement could not have gone into effect, and in fact was not intended to go into effect. Nonetheless, OBIG insists that the Management Agreement was binding and effective. In the same vein, OBIG insists that through the non-effective Management Agreement the Picayune Rancheria of Chukchansi Indians ("Tribe") and the Chukchansi Economic Development

Authority ("CEDA") waived their sovereign immunity from suit.

OBIG's entire argument is dependent upon disregarding the plain language of the Management Agreement, ignoring OBIG's failure to satisfy legally required conditions necessary to make the Management Agreement binding, and ignoring basic and long-standing principles of law. To save its claims and create a shield from the real facts and law applicable to this case, OBIG puts up a front casting itself as the victim of an elaborate and fanciful scheme to defraud OBIG. However, those claims are completely contracted by OBIG's First Amended Complaint ("AC"). More importantly for purposes of this appeal, OBIG's tale of fraud has no bearing on whether the Management Agreement was, or could have been, a valid and binding agreement. It was not. Nor does it have any impact on whether the Tribal Parties waived their immunity. They did not.

The Superior Court aptly saw past OBIG's front and correctly dismissed OBIG's AC after granting the Tribal Parties' Motion to Quash. Specifically, the Superior Court found that as a matter law the Management Agreement was void and unenforceable and that the Tribal Parties had not waived sovereign immunity. The Superior Court's decision was correct and should be affirmed.

OBIG's Opening Brief is misleading and lacks candor regarding material facts and applicable law. A few of the most notable instances of OBIG's lack of candor are as follows:

- OBIG fails to mention that the Management Agreement contained express conditions that had to be satisfied – under applicable law – before the Management Agreement could become legally binding.
- OBIG fails to mention that the Management Agreement provided that it would not be binding on the parties – irrespective of the date of signature – until five (5) days after all of the following conditions

were satisfied: (a) the Chairman of the NIGC approved the Management Agreement; (b) required background investigations of OBIG were completed; and (3) OBIG received all the permits and licenses necessary for OBIG to act as a management contractor in relation to Tribe's casino. (Clerks Transcript ("CT") at pages 143, 144, 151, 1 CT 172.)

- OBIG admits, openly and through persistent silence, that the conditions necessary to make the Management Agreement binding were never satisfied. For instance, OBIG admits that the Chairman of the NIGC did not approve the Management Agreement but fails to mention that OBIG never satisfied the licensing provisions of the Tribe's Gaming Compact, and never obtained a suitability determination from the California Gambling Control Commission.
- OBIG never mentions a single NIGC regulation regarding management contracts—which are directly relevant to OBIG's claims.

- For example, OBIG fails to mention 25 C.F.R. § 531.1(f), which requires that all management contracts contain a clause providing the contract "shall not be effective until it is approved by the Chairman of NIGC, date of signature of parties notwithstanding."
- Similarly, OBIG fails to mention 25 C.F.R. § 533.7, which provides that management contracts that are "not approved by the Chairman ... are void."

These are only a few examples of OBIG's lack of candor. Other instances – addressed in detail below – include additional omissions, distortions of fact, and selective "quotations" that OBIG uses to mischaracterize the requirements of the Management Agreement. While problematic, OBIG's approach is not surprising—Ignoring or distorting facts is the only way OBIG can make a claim of any kind.

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2. Factual Background

a. The Tribe and CEDA.

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. 4917, January 17, 2017.) The Chukchansi Economic Development Authority ("CEDA") is an arm of the Tribe that operates Chukchansi Gold Resort and Casino ("Casino"). The Casino is a class III gaming facility regulated pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2710 et seq., the Gaming Compact between the Tribe and the State of California, and the Tribe's gaming laws and regulations.

In 2014, the NIGC ordered the Casino closed due to an ongoing internal tribal governance dispute. (*See 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).) After the closure and after some, but not all, of

the dust settled regarding the tribal governance dispute, the Tribe and CEDA sought assistance with reopening the Casino. Consequently, the Tribal Parties contacted OBIG regarding consulting, advice, and assistance with tasks necessary to reopen the Casino.

b. The Consulting Agreement.

CEDA and OBIG executed the "Consulting Contract Between Osceola Blackwood Ivory Gaming Group LLC and Chukchansi Economic Development Authority For Professional Services Related To The Re-Opening Of The Chukchansi Gold Casino Resort" on July 8, 2015. (1 CT 127.) At the same time CEDA also executed an Employment Agreement with Christian Goode – a principal member of OBIG – under which Mr. Goode became the Chief Operating Officer of the Casino and an employee of CEDA. (1 CT 104:8-9.)

Under the Consulting Agreement OBIG was paid a monthly fee of $100,000.00 for "provid[ing] recommendations and advice to CEDA regarding the reopening and day to day

operations of the Casino and all related and ancillary economic development projects related to the Casino, including but not limited to operations, budgeting, accounting, internal controls, human resources, marketing, and compliance." (AC, Ex. 1, Section 2, pp. 1-6.) The Consulting Agreement was not a management contract, and it specified that "Consultant shall have no authority to perform management responsibilities at the Casino during the term of the [Consulting] Agreement." (AC, Ex. 1, Section 1, p. 1.)

Although many of OBIG's claims relate to the compensation rate OBIG received under the Consulting Agreement, the Consulting Agreement does not provide that the rate of compensation was discounted because OBIG anticipated entering into a formal management contract. Nor did the Consulting Agreement indicate that OBIG's willingness to enter into the Consulting Agreement was tied to any promise or agreement to enter into a management contract. The Consulting Agreement did provide that it was

"the entire agreement of the parties" and that there were "no other promises or conditions in any other agreement whether oral or written, concerning the subject matter of [the Consulting Agreement.]" (1 CT 135.)

During the term of the Consulting Agreement, the NIGC and Tribal Gaming Commission expressed concerns that the Consulting Agreement might constitute a management contract. (1 CT 213.) Therefore, CEDA suspended performance under the Consulting Agreement pending resolution of the NIGC's and TCG's concerns. (*Id.*) On December 27, 2016, after OBIG was issued a "Conditional Vendor's License," the Tribe negotiated a settlement of all disputes arising in relation to the Consulting Agreement.[1] In the Settlement Agreement OBIG waived and forever released all claims – current and

[1] OBIG received a "Conditional Vendor's License" on November 4, 2016. This is the only record of OBIG obtaining a license of any sort in relation to the services it was providing the Casino. Notably, OBIG received the license – which only relates to consulting services – a full year *after* OBIG claims the Management Agreement went into effect.

future – it might have arising out of, or relating to, the Consulting Agreement. (*Id.*)

c. The Management Agreement.

On July 29, 2015, the Tribe and OBIG signed a Management Agreement for management of the Casino. (AC, Ex. 2, Recital H.)

The Management Agreement contained several provisions regarding when it would become effective and binding upon the parties. For example, Article 1.1 defined the "Effective Date" as "the date five (5) days following" the date when three "listed conditions were satisfied[.]" (1 CT 144.) Those mandatory conditions were: (1) the Chairman of the NIGC's written approval of the Management Agreement; (2) the conclusion of background investigations into OBIG by the NIGC and the TGC; and (3) OBIG's receipt of all licenses and permits OBIG needed to manage the Casino. (1 CT 144.) Additionally, Recital G of the Management Agreement provided that the Management Agreement "shall be binding and operative on the parties upon the 'Effective Date,' as

hereinafter defined and shall continue for a term of five (5) years from the Effective Date, as hereinafter defined." (1 CT 143.) Article 2.2 reaffirmed Recital G by providing that the "term" of the Management Agreement "shall become binding upon the Parties on the Effective Date and continue thereafter for a period of five (5) years from and after the Effective Date . . .." (1 CT 151.)

Article 8 of the Management Agreement addresses the manner in which the Tribal Parties agreed they would waive immunity. In relevant part, Article 8 provides:

> ARTICLE 8
>
> Sovereign Immunity
>
> 8.1 Limited Waiver by the Tribe. The Tribe agrees to enact a Tribal Council resolution providing a limited waiver of the Tribe's sovereign immunity to suit in the same form as set forth below. The waiver shall not be effective until the Resolution is enacted by the Tribal Council, and a copy of the Resolution as enacted shall be attached as **Exhibit "C"** and becomes part of this Agreement.
>
> (a) The Tribe waives its immunity to suit only by Manager, and no other party, or an approved

assignee, and strictly for the purposes of enforcing the terms of this Agreement.

(b) The Tribe consents to suit in the United States District Court for the Eastern District of California, the United States Court of Appeals for the Ninth Circuit, and the United States Supreme Court, but only as to suits brought by the Manager for the enforcement of this Agreement. If the District Court for the Eastern District of California declines jurisdiction, the Tribe consents to suit in any court of competent jurisdiction and venue in California.

...

(d) By this limited waiver of sovereign immunity, the Tribe consents to the granting of equitable and legal relief to enforce the terms of this Agreement, provided that any damages awarded by a court shall be limited to general compensatory damages. The court shall have no authority to order the execution of any award against any asset of the Tribe except the Tribe's share of Net Revenues, as defined in IGRA.

(e) The term of this limited waiver of immunity shall be for the term of this

> Agreement and for a one (1) year period beginning immediately thereafter.
>
> ...
>
> The amendment or alteration of the Resolution of Limited Waiver to in any way lessen the rights of the Manager shall constitute a material breach of this Agreement.

(1 CT 171-172.)

Because, as discussed immediately below, OBIG created the need to negotiate an amendment to the Management Agreement and agree to delay submitting the Management Agreement to the NIGC for approval, the Tribal Parties never adopted the Resolution of Limited Waiver.

d. OBIG Causes the compensation rate of the Management Agreement to become invalid, requiring a new amended management agreement.

When CEDA and OBIG signed the Management Agreement the Casino was still shuttered. To reopen the Casino CEDA needed money. Therefore, performing under the Consulting Agreement, OBIG assisted with securing a $35,000,000.00 term loan ("Loan") to fund the reopening. (1 CT 106:24-107:11; AOB at 18 n.6.) Under existing financing

documents, CEDA needed its Senior Lenders' consent to the Loan and all other arrangements regarding the reopening of the Casino. (1 CT 106:7-14; AOB p. 18, n.6.) As a condition to consent, the Senior Lenders demanded that the management fee OBIG was to receive under the Management Agreement be reduced. Accordingly, the Management Agreement had to be renegotiated and could not have been submitted to the NIGC for approval. (1 CT 106:7-10.)

During discussions regarding modifying the Management Agreement, OBIG requested a new management term of more than five (5) years to compensate OBIG for having to accept a lower management fee. (1 CT 106:7-14.) However, there is no evidence that OBIG's request was anything more than a proposal or that the Tribal Parties ever agreed to OBIG's suggested modification.[2]

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[2] OBIG claims there was never a concern that the NIGC would approve the Management Agreement. That is not accurate, to

Ultimately, the Tribal Parties and OBIG did not agree to terms regarding an amended management contract. Presumably, it was OBIG's realization that it would not get the deal it hoped for that led OBIG to bring the federal action – and when it failed there – to bring the action below.

3. Procedural History

a. OBIG's Federal Action

Before bringing the action below, OBIG filed a complaint in the United States District Court for the Eastern District of California ("District Court") (2 CT 442-454.) The District Court dismissed OBIG's action finding that OBIG's federal complaint did not raise a federal question. (*Id.*) Specifically, the District Court found that OBIG's claims did not satisfy the complete preemption doctrine because OBIG could not

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the contrary, federal regulations provide a term of more than five (5) years will be approved on under exigent circumstances and where "the capital investment [of the management contractor] and the income projections for the particular gaming operation require" a term of more than five (5) years. (25 C.F.R. § 531.1(h).) Considering that OBIG had zero capital investment concerning the Casino, there is little to no chance that the NIGC would have approved OBIG's proposal.

"articulate how its claims would affect the tribe's ability to govern gaming on Native territory, or interfere with [the Tribe's] decisions about which gaming activities to permit in the Casino." (2 CT 451:5-7.)

b. Proceedings in the Superior Court

Following the District Court's dismissal, OBIG filed this state court action. (1 CT 6-98.) Before accepting service of OBIG's Complaint, the Tribal Parties wrote to OBIG and identified numerous flaws in the Complaint, including the issues addressed in the subsequent Motion to Quash. (1 CT 221-238.) The Tribal Parties' correspondence indicated that each of OBIG's claims for relief was frivolous and unsupported by evidence or the law. (*Id.*) The letter requested that OBIG withdraw its Complaint in its entirety or prepare necessary amendments. (1 CT 221.)

In response to the August 24, 2017, correspondence OBIG filed the Amended Complaint and withdrew two causes of action. (1 CT 99-185.) In all other respects, OBIG's Amended Complaint was nearly identical to its original

Complaint and did not address any of the other issues the Tribal Parties raised. (*Id.*)

After receiving the Amended Complaint, the Tribal Parties served OBIG with a motion for sanctions, pursuant to Code of Civil Procedure section 128.7. (1 CT 245-269.) The sanctions motion raised issues presented to OBIG in the Tribal Parties August 24, 2017, letter – which included all of the issues addressed in the Tribal Parties' subsequent Motion to Quash. (1 CT 248-269.)

OBIG did not respond to the Tribal Parties' sanctions motion with any further amendments to the Amended Complaint. Consequently, the Tribal Parties filed a Motion to Quash seeking to quash service of OBIG's summons and Amended Complaint and "dismiss [OBIG's Amended Complaint] with prejudice" (1 CT 208:17-19.) The Motion to Quash argued that the Superior Court lacked jurisdiction under the doctrines of tribal sovereign immunity and federal preemption. (1 CT 186:28-187:2.)

OBIG opposed the Motion to Quash arguing that the Motion to Quash was procedurally infirm, that the Tribal Parties waived immunity, and that the Tribal Parties were judicially estopped from raising the defense of federal preemption. (2 CT 458-464.) Additionally, without citing any authority, OBIG requested further briefing on the substance of the Tribal Parties' immunity arguments. (2 CT 458 n.1.)

The Superior Court heard the Tribal Parties Motion to Quash on December 14, 2017. During the hearing OBIG again asserted its procedural arguments and argued that the Tribal Parties waived immunity.

On January 2, 2018, the Superior Court granted the Motion to Quash. The Superior Court found that the Management Agreement was void as a matter of federal law and that the Tribal Parties had not waived immunity. The Superior Court denied OBIG's request for further briefing stating that it would "be inconsequential given the law." (2 CT 552.)

Presumably because the Superior Court had dismissed OBIG's action, the Superior Court took the Tribal Parties' pending Motion for Sanctions off calendar.

This appeal followed.

STANDARD OF REVIEW

The standard of review regarding the Superior Court's order granting the Motion to Quash and dismissal based on lack of jurisdiction due to tribal sovereign immunity is *de novo*. (*Warburton/Buttner v. Superior Court* (2002) 103 Cal.App.4th 1170, 1180.)

Review of the Superior Court's denial of OBIG's request for further briefing on substantive issues is for abuse of discretion. (See *Robinson v. Woods* (2008) 168 Cal.App.4th 1258, 1268.)

ARGUMENT

I. Indian Tribes May Raise Sovereign Immunity In A Motion To Quash.

Below, OBIG based nearly all of its opposition to the Motion to Quash on a procedural argument that Indian tribes, and tribal entities, cannot raise the "subject matter

jurisdiction" implications of sovereign immunity in a motion to quash. (2 CTA 458:2-464:9.) The Superior Court aptly disagreed, noting that "a motion to quash may be used to seek dismissal on grounds of tribal sovereign immunity" because [s]uch a motion entails a challenge to the trial court's authority to proceed." (2 CT 552.)

OBIG argues that the Superior Court erred by even considering the sovereign immunity defense, because: (1) the Tribal Parties did not make a "special appearance"; (2) the motion was not a "hybrid" motion to quash/dismiss; and the notice of motion contained the words "subject matter jurisdiction." (Appellant's Opening Brief ("AOB") at 24-34.)

OBIG's procedural arguments have no merit.

First, OBIG fails to recognize that a motion to quash – challenging the Superior Court's jurisdiction to proceed with any aspect of the case – is a "special appearance." It is "the character of the relief' sought, not how a party announces its presence, that determines if the appearance is special or general. (*Hernandez v. Nat. Dairy Products Co.* (1954) 126

Cal.App.2d 490, 492-93.) When a party raises only jurisdictional defenses, the appearance is "special" not general. (*See Goodwine v. Superior Court* (1965) 63 Cal.2d 481, 484 [a party challenging subject-matter jurisdiction does not make a "general appearance"]; *Fidelity Bank v. Kettler* (1968) 264 Cal.App.2d 481, 485-486 [a party objecting to consideration of any aspect of the case because a court lacks jurisdiction makes a special appearance].)

Here, the Motion to Quash raised only the jurisdictional defenses of tribal sovereign immunity and federal preemption. Therefore, the Tribal Parties' appearance was by nature a "special appearance." The fact that the Motion to Quash did not contain those precise words is immaterial. (*Goodwine*, *supra*, 63 Cal.2d. at 484.)

Second, OBIG's suggestion that a motion to quash based on a Tribe's or tribal entity's sovereign immunity from suit is improper unless the motion is identified as a "hybrid" motion to quash/dismiss is the epitome of putting form over substance. Going back to *Hernandez*, *Goodwine*, and

Fidelity Bank, supra, California courts do not take the pedantic approach OBIG advances. Nor does a "hybrid motion to quash/dismiss" have magical meaning. Rather, such a motion is really a legal fiction allowed because there is no logic in requiring any specific procedure for challenges asserting that a court has no jurisdiction to consider any aspect of a particular case. (*See generally Great Western Casinos, Inc. v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407 [affirming a motion to quash asserting lack of jurisdiction based on tribal sovereign immunity and federal preemption].) Moreover, as discussed more fully below, OBIG's argument misunderstands the "hybrid" character of sovereign immunity, and the policy behind allowing sovereign immunity to be raised any time in a proceeding and by any procedural mechanism. (*Id.* at 1416-1419.)

Finally, OBIG's argument that the Motion to Quash was improper because the Notice of Motion mentions that the Superior Court "lacks subject matter jurisdiction . . .

because the defendants are immune from suit under the doctrine of Tribal Sovereign Immunity and the claims are preempted" has repeatedly been rejected. (See 1 CT 186:28-187:2.)

OBIG's procedural argument relies primarily on a passage in *Greener v. Workers Comp. Appeals Bd.* (1993) 6 Cal.4th 1028, 1036-1037, stating that "[a] motion to quash service of summons lies on the ground that the court lacks personal, not subject matter jurisdiction over the moving party." (AOB at 25 [citing *Greener*, *supra*, 6 Cal.4th at 1036-1037].)

Unquestionably, *Greener* contains the passage on which OBIG bases its procedural argument.[3] (*Greener*,

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[3] OBIG attempts to bolster its argument here by asserting that at least two cases – *People v. Betts* (2005) 34 Cal.4th 1039, 1049 n.2 and *Borsuk v. Superior Court* (2015) 238 Cal.App.4th Supp. 1, 3, 8 n.3 – have "followed" *Greener*. However, neither *People v. Betts*, *supra*, nor Borsuk, *supra*, "follow" *Greener* on any point relevant to this action. *Betts*, *supra*, only mentions *Greener* in relation to a question of whether a court or a jury should make the determination of "territorial jurisdiction" in a criminal action involving in state, and out of state acts. (*Betts*, *supra*, 34 Cal.4th at 1043,149 n.2) Additionally, *Borsuk* discusses *Greener* in the context of an unlawful detainer action. (*Borsuk*, *supra*, 238

supra, 6 Cal.4th at 1036-1037.) However, as the Superior Court recognized, *Greener* did not involve a challenge based on sovereign immunity and California courts have determined that *Greener* does not apply to such situations. (2 CT 552 [citing *Great Western Casinos*, *supra*, 74 Cal.App.4th at 1416-1418].)

As the Superior Court recognized in matters involving jurisdictional challenges based on sovereign immunity, *Great Western* not *Greener* applies. The Superior Court's reliance on *Great Western* was appropriate because *Great Western* is particularly on point regarding the issues presented here. Moreover, in the years since *Great Western*, the analysis in that case has been universally recognized and accepted by California courts, including this Court and the Supreme Court of California, when addressing jurisdictional challenges based on sovereign immunity.

Cal.App.4th Supp. 1 at 8 n.3.) On that point, *Borsuk* "follows" *Greener* on the proposition that "[t]he only situation in which a motion to quash service of summons has been approved as a procedure by which to challenge the *sufficiency of the complaint* is in unlawful detainer, where demurrer is not available." (*Ibid.*)

In *Great Western*, a management contractor sued an Indian tribe and others alleging claims for relief including bad faith, breach of contract, and fraud. (*Great Western*, *supra*, 74 Cal.App.4th at 1414.) The defendants moved to stay/quash/dismiss based on federal preemption and lack of personal jurisdiction due to tribal sovereign immunity. (*Ibid.*)

The plaintiff opposed the motion arguing that the motion challenged subject matter jurisdiction and was therefore procedurally improper under *Greener*, *supra*. (*Id.* at 1415.) Accordingly, *Great Western* conducted an in-depth review of *Greener*, *supra*. In addressing, the application of *Greener*, *Great Western* acknowledged there was "some inconsistency in the law regarding whether claims of sovereign immunity affect a court's personal as opposed to subject matter jurisdiction." (*Great Western*, *supra*, 74 Cal.App.4th at 835.) Referencing Witkin, *Great Western* explained:

> In its substantive aspect, "sovereign immunity is concerned with immunity of a sovereign state and its governmental subdivisions and agencies from *liability*, except the extent expressly permitted by statute." By contrast, the procedural aspect of sovereign immunity "relates to the immunity of the sovereign from *suit*, except with its *consent*." Because of these dual aspects of sovereign immunity Witkin notes "[i]t is difficult, ..., to find authority to classify the defect as involving subject matter jurisdiction or jurisdiction over the person."

(*Ibid.*) *Great Western* continued, quoting the Supreme Court's decision in *Boisclair v. Superior Court* (1990) 51 Cal.3d 1140 for the proposition that although a motion to quash is normally limited to challenges based on personal jurisdiction, it is accepted practice when used to challenge jurisdiction based on tribal sovereign immunity. (*Great Western*, *supra*, 74 Cal.App.4th at 835 quoting *Boisclair*, *supra*, 51 Cal.3d at 1144 n1.) *Great Western* then concluded by stating:

> If the lack of subject matter jurisdiction can be raised at any time, it seems to follow no specified procedural vehicle should be required to bring the matter to the court's attention. For example, it would be anomalous to require a defendant to demur to a complaint, or to file another answer, or a motion for judgment on

> the pleadings if the defect only came to light in the middle of a trial.

(*Great Western, supra*, 74 Cal.App.4th at 1416-1418.)

Since *Great Western, supra*, California courts have routinely recognized that an Indian tribe may challenge jurisdiction because of sovereign immunity and federal preemption in a motion to quash irrespective of whether the challenge was fundamentally a matter of subject matter jurisdiction or personal jurisdiction. (See *People ex rel. Owen v. Miami Nation Enterprises* (2016) 2 Cal.5th 222 [upholding grant of motion to quash based on lack of jurisdiction due to sovereign immunity], *Brown v. Garcia* (2017) 17 Cal.App.5th 1198 [motion to quash challenging subject matter jurisdiction]; *Sharp Image Gaming, Inc. v. Shingle Springs Band of Miwok Indians* ("*Shingle Springs*") (2017) 15 Cal.App.5th 391, rehearing den'd Oct. 16, 2017, review den'd Dec. 20, 2017, cert. den'd 2018 WL 1427296 [reversing order denying motion to quash based on subject matter jurisdiction due to federal preemption]; *Yavapai-Apache Nation v. Iipay Nation of Santa Ysabel* (2011) 201 Cal.App.4th 190 [motion

to quash for lack of both personal and subject matter jurisdiction]; *Ameriloan v. Superior Court* (2008) 169 Cal.App.4th 81 [motion to quash challenging subject matter jurisdiction]; *Agua Caliente Band of Cahuilla Indians v. Superior Court*, (2006) 40 Cal.4th 239 [motion to quash based on sovereign immunity]; *Ackerman v. Edwards* (2004) 121 Cal.App.4th 946 [affirming order granting motion to quash challenging both subject matter and personal jurisdiction based on sovereign immunity]; *Lawrence v. Barona Valley Ranch Resort & Casino* (2007) 153 Cal.App.4th 1364 [motion to quash for lack of subject matter jurisdiction].)[4]

As alluded to in *Great Western*, *supra*, the reason courts view sovereign immunity differently from other jurisdictional challenges is that sovereign immunity is a jurisdictional bar that is neither "consistent with . . .

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[4] OBIG asserts that these cases did not "overrule[.]" *Greener*, *supra*. (AOB at 29, 31.) OBIG misses that each of these cases is a recognition that *Greener*, *supra*, is inapplicable to cases involving challenges based on sovereign immunity.

practice[s] regarding personal jurisdiction, nor definitively a matter of subject matter jurisdiction." (*Edelman* v. *Jordan* (1974) 415 U.S. 651, 678; *Wis. Dep't of Corr. v. Schact* (524 U.S. 381, 395 (Kennedy, J., concurring); *Patsy v. Bd. of Regents of Fla.* (1982) 457 U.S. 496, 515 n. 19.) As the Supreme Court has stated:

> As with state sovereign immunity, the jurisdictional nature of tribal immunity has never been definitively settled. The high court's cases indicate that tribal sovereign immunity is jurisdictional in a general sense but have not elaborated further. (Citations.) California Court of Appeal cases often describe tribal immunity as a challenge to subject matter jurisdiction, but this court's most recent tribal immunity case discussed it in terms of personal jurisdiction.

(*People ex rel. Owen, supra*, 2 Cal.5th at 243.)

The fact that sovereign immunity cannot be easily classified as either subject matter or personal jurisdiction is precisely why California courts allow consideration of general sovereign immunity defenses raised in a motion to quash or any other procedural vehicle at any time during a proceeding. Accordingly, the Superior Court's determination

to consider and to decide the immunity issue was not only appropriate, it was required.

II. The Tribal Parties Did Not Waive Immunity To Any Of OBIG's Claims For Relief.

A. General rules applicable to claims of tribal sovereign immunity.

Indian tribes and tribal entities possess the same immunity from suit traditionally enjoyed by all sovereigns. (*People ex rel. Owens, supra*, 2 Cal.5th at 235-239; *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58.) Sovereign immunity extends to both governmental and commercial activities. (*Findelton v. Coyote Valley Band of Pomo Indians* (2016) 1 Cal.App.5th 1194, 1204; *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.* (1998) 523 U.S. 751, 760.) Sovereign immunity is a mandatory doctrine that courts must honor and apply irrespective of the perceived equities of a particular case. (*Yavapai-Apache Nation, supra*, 201 Cal.App.4th at 206-207 [citing *Ute Distribution Corp. v. Ute Indian Tribe* (10th Cir. 1998) 149 F.3d 1260, 1267].)

There is a "strong presumption against a waiver of sovereign immunity." (*California Parking Services, Inc.*, *supra*, 197 Cal.App.4th 818 [citing *Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 Cal.App.4th 1185, 1193 ("*Big Valley*")]; *Santa Clara Pueblo*, supra, 436 U.S. at 58; *Demontiney v. United States* (9th Cir. 2001) 255 F.3d 801, 811.) Courts construe waivers of sovereign immunity "narrowly and in favor of the sovereign." (*Soghomonian v. United States* (E.D. Cal. 1999) 82 F.Supp.2d 1134, 1140; *Long v. Chemehuevi Indian Reservation* (1981) 115 Cal.App.3d 853, 857.) Consequently, waivers cannot be implied based on equitable considerations, or expanded beyond contractual limitations. (*California Parking Services, Inc.*, *supra*, 197 Cal.App.4th 818.)

Because waiving immunity is voluntary, purported waivers must be confined to the explicit terms, limitations, or conditions an Indian tribe has imposed. (*Ameriloan*, *supra*, 169 Cal.App.4th at 94; *Campo Band of Mission Indians v. Superior Court* (2006) 137 Cal.App.4th 175, 183;

Big Valley, supra, 133 Cal.App.4th at 1193 [quoting *Missouri River Services v. Omaha Tribe of Nebraska* (8th Cir. 2001) 267 F.3d 848, 852]; see also *Namekagon Dev. Co. v. Bois Forte Reservation Housing Authority* (8th Cir. 1975) 517 F.2d 508, 510 [consideration is not confined simply to whether there is a waiver but also requires determining the "extent to which that immunity was waived."].) Courts cannot construe a waiver limited to specific claims to also constitute a waiver to a different claim or cause of action even if the claim arises from the same set of circumstances. (See *Big Valley, supra*, 133 Cal.App.4th at 1194-1195 [waivers of immunity cannot be enlarged "beyond what the language requires."].) For instance, a contractual waiver expressly limited to the enforcement of the terms of a contract is not a waiver to non-contractual claims based on the same circumstances or facts. (See *Ramey Construction Co. v Apache Tribe of Mescalero Reservation* (10th Cir. 1982) 673 F.2d 315, 320 [terms of the consent establish the bounds of the court's jurisdiction.]; see also, *McClendon v. United*

States (9th Cir. 1989) 885 F.2d 627, 630 [noting that even when an Indian tribe brings a lawsuit and consents to the jurisdiction of the court, it does not waive immunity to counterclaims filed by the defendant.].)

Based on the principles of sovereign immunity, it does not matter if a party opposing immunity has a different understanding of the existence of a waiver or its scope. (See *United States v. USF&G* (1940) 309 U.S. 506, 514.) Rather all doubts regarding whether there is a waiver of immunity and the scope of a waiver must be resolved in favor of the sovereign. (*F.A.A. v. Cooper* (2012) 566 U.S. 284, 291; see also *California Parking Services, Inc., supra*, 197 Cal.App.4th at 818 [courts construe a waiver of a tribe's immunity strictly and hold a strong presumption against waivers].)

Because sovereign immunity is a defense to both suit and liability, the party asserting jurisdiction bears the burden of proving, by a preponderance of the evidence, that an Indian tribe clearly and unequivocally waived its

immunity, and that all conditions necessary for the waiver to become effective have been satisfied. (*Brown*, *supra*, 17 Cal.App.5th at 1203; *Lawrence*, *supra*, 153 Cal.App.4th 1364, 1368-69.) Moreover, the party asserting jurisdiction must show that the Indian tribe waived immunity to each claim for relief. (*Big Valley*, *supra*, 133 Cal.App.4th at 1194-1195.) This burden can only be satisfied through the introduction of "competent evidence in affidavits and authenticated documents." (*Brown*, *supra*, 17 Cal.App5th at 1203.) Unverified complaints and conclusory statements are not sufficient to prove a waiver of immunity. (*Ibid.*) Unless the party claiming jurisdiction makes the necessary showing, no court – federal, state, or tribal – has jurisdiction over an Indian tribe or the claims against it. (*Lawrence*, *supra*, 153 Cal.App.4th at 1368-69.)

B. The Superior Court Correctly Determined That the Tribal Parties did not Waive Immunity.

Although the Superior Court did not rule or opine on all of the reasons why the Tribal Parties did not waive immunity, the Superior Court nonetheless came to the correct

conclusion—that the Tribal Parties did not waive immunity to any of OBIG's claims. Accordingly, the Superior Court correctly determined to dismiss OBIG's AC.

1. Article 8 of the Management Agreement and Resolution 2015-46 Do Not Waive The Tribal Parties' Immunity.

OBIG asserts that the Superior Court's determination that the Tribal Parties did not waive their immunity to OBIG's claims was erroneous. In particular, OBIG asserts that Article 8 of the Management Agreement contained a "clear waiver of [the Tribal Parties'] immunity" which was approved by Tribal Council Resolution 2015-46. (AOB at 47-48.)

OBIG's claims are equally untenable and illogical in that OBIG's ignores language in the Management Agreement explicitly providing that the language of Article 8 was not intended to constitute an independent waiver of immunity and that any waiver of immunity was directly tied to the term of the Management Agreement, which never went into effect. Put differently, OBIG's interpretation of

Article 8 of the Management Agreement is contrary to the express provisions of the document, and additionally violates every interpretive rule of contracts generally, and waivers of immunity specifically.

"The fundamental goal of contract interpretation is to give effect to the mutual intention of the parties." (Civ.Code, § 1636; *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264.) Where possible the intention of the parties will be inferred "solely from the written provisions of a contract." (Civ.Code, §§ 1636, 1639; *Aiu Insurance Co. v. Superior Court* (1990) 51 Cal.3d 807, 821-822.) And, when the language of a contract is "clear and explicit, and does not involve an absurdity[]" the plain language of the contract governs its interpretation. (Civ.Code § 1638; *Bank of the West, supra*, 2 Cal.4th at 1264.)

Here, the language of Article 8 – which outlines how the Tribe would waive its immunity – is unmistakable. The very first sentence of Article 8 explicitly provides that *"[t]he Tribe agrees to enact a Tribal Council resolution providing a*

limited waiver of the Tribe's sovereign immunity to suit in the same form as set forth below. (1 CT 171.) The next sentence provides that "[t]he waiver shall not be effective until the Resolution is enacted by the Tribal Council, and a copy of the Resolution as enacted shall be attached as **Exhibit "C"** and becomes part of this Agreement." (*Id.*) Next, Article 8 provides the terms to be included in the Tribal Council resolution. (1 CT 171-172.) Then, the next to last sentence of Article 8, provides that "[t]he amendment or alteration of the Resolution of Limited Waiver to in any way lessen the rights of Manager shall constitute a material breach of this Agreement." (1 CT 172.)

This is not the language of an immediate and stand-alone waiver of immunity. Nor is the language optional or even remotely unclear. Quite the contrary, this language is explicit in requiring a very specific Tribal Council resolution containing very specific terms. To be sure, the requirements are so explicit that the Management Agreement dictates that if the language of the required resolution is changed in any

way to disadvantage OBIG, those changes would constitute a "material breach" of the Management Agreement. In other words, and again, the resolution waiving the Tribe's immunity required very specific and predetermined language.

Despite provisions of the Management Agreement explicitly detailing the mandatory contents of the Resolution of Limited Waiver, OBIG suggests that Resolution 2015-46 somehow satisfied the requirements of Article 8. OBIG asserts that with Resolution 2015-46, "the Tribe's Tribal Council passed a written tribal resolution approving the Management Agreement in its entirety, including the aforementioned waiver of sovereign immunity." (AOB at 48.) Moreover, OBIG asserts, in Resolution 2015-46 the Tribal Council determined that approving the Management Agreement was in the best interests of the Tribe and its members. (AOB 48-49.)

OBIG is correct that on July 30, 2015, the day after OBIG and the then Tribal Chairman signed the

Management Agreement, the Tribal Council did adopt Resolution 2015-46. (1 CT 138-139.) OBIG is also correct that Resolution 2015-46 provided that "the Tribal Council has determined that it is in the best interests of the Tribe and its members that it approve the Management Agreement with Osceola Blackwood Ivory Gaming Group LLC ..." (1 CT 138-139.) However, that is as far as Resolution 2015-46 goes.

What OBIG fails to address is that Resolution 2015-46 does not contain a single word required by Article 8.1 of the Management Agreement. Nor does it mention "sovereign immunity" or a waiver of sovereign immunity in any respect. Rather, Resolution 2015-46 is merely a resolution approving that language of the Management Agreement "in its entirety," including that language explicitly requiring a specific Tribal Council resolution containing specific terms.

In the absence of any reasonable argument that Resolution 2015-46 actually satisfies Article 8 of the Management Agreement, OBIG has – at best –

manufactured an ambiguity as to the intention behind Resolution 2015-46. However, as discussed above, merely manufacturing an ambiguity is not sufficient.

As noted above, there is a strong presumption against waivers of immunity. (*California Parking Services, Inc.*, *supra*, 197 Cal.App.4th at 818; *Big Valley*, *supra,* 133 Cal.App.4th at1193 ("*Big Valley*"); *Demontiney*, *supra*, 255 F.3d at 811.) Moreover, it is immaterial that the non-tribal party to an agreement has an understanding regarding the existence of a waiver that is different from the Tribe because courts must construe any ambiguities or doubts relating to the waiver in favor of the Tribe. (See *United States v. USF&G*, *supra*, 309 U.S. at 514; *F.A.A. v. Cooper*, *supra*, 566 U.S. at 291; see also *California Parking Services, Inc.*, *supra*, 197 Cal.App.4th at 818.)

These rules relating to the interpretation of purported waivers of immunity, along with the interpretative rules regarding contractual clauses generally, compelled the Superior Court to determine that neither Article 8 of the

Management Agreement, nor Resolution 2015-46 – either separately or in combination – waived the Tribal Parties sovereign immunity. Critically, they compel the same result here.

2. There Could Not Be A Waiver of Immunity Because Neither the Management Agreement nor the Waiver Ever Became Effective or Binding.

Even if OBIG could make a case that Resolution 2015-46 was sufficient to breathe life into Article 8, there still would not be an operative waiver of immunity. That is because even under that scenario the term of the waiver never went into effect.

Article 8.1(e), of the Management Agreement – one of the provisions Tribe necessarily would have approved in Resolution 2015-46 – provides that, "[*t]he term of this limited waiver of immunity shall be for the term of this Agreement* and for a one (1) year period beginning immediately thereafter. (1 CT 172 [emphasis added].) Article 2.2 of the Management Agreement address the term of the Management Agreement by providing that "[t]his

Agreement shall become binding upon the Parties *on the Effective Date* and continue thereafter for a period of five (5) years from and after the Effective Date . . .." (1 CT 151 [emphasis added].) Additionally, Recital G of the Management Agreement provides that "[t]his Management Agreement shall be operative and binding on the Parties *upon the 'Effective Date' as hereinafter defined and shall continue for a term of five (5) years from the Effective Date, as hereinafter defined.*" (1 CT 143 [emphasis added].)

As these provisions show, everything within the Management Agreement, including the language relating to the waiver of immunity, was directly tied to the Effective Date. Critically, the Management Agreement defined the "Effective Date" as follows:

> "Effective Date" means 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.

(1 CT 144.)

Consequently, even if the Court were to accept OBIG's argument that, despite the plain language of Article 8 of the Management Agreement, a specific Resolution of Limited Waiver was not necessary, there still would be no waiver unless all the conditions necessary to trigger the Effective Date were satisfied.

a. OBIG Did Not and Cannot Allege That It Satisfied the Second and Third "Listed Conditions" to the "Effective Date" of The Management Agreement.

As the Tribal Parties address in the proceedings before the Superior Court, OBIG's AC never alleges or provides any evidence establishing that OBIG satisfied either of the second or third "listed conditions" to the Effective Date. Similarly, even after the Tribal Parties raised these issues in their Motion to Quash, OBIG failed to respond with any

evidence showing that it had ever even submitted to the required background investigations, or obtained any of the licenses or permits OBIG was required to have under federal, tribal, or state law. Notably, when the Tribal Parties addressed OBIG's failure to satisfy these requirements at the hearing on the Tribal Parties Motion to Quash, OBIG remained silent on the issue.

Now, in its Opening Brief, OBIG once again attempts to dodge the specific requirements of the Management Agreement by pretending they did not exist. Instead, OBIG doubles down on its procedural arguments, and on the claim that – irrespective of whether the Effective Date was ever actually triggered – the Management Agreement and the waiver are equally effective and binding. In other words, OBIG's entire Opening Brief, and its entire case, is predicated on OBIG's commitment to ignoring key facts, the requirements of the Management Agreement, and the law.

To appreciate how flawed OBIG's position is, one need only look to the Tribe's Tribal-State Compact – one of the

"Legal Requirements" identified in the Management Agreement.[5] (1 CT 146.)

Under the Compact, a management contractor such as OBIG is considered a "Gaming Resource Provider." (Compact, section 2.14.) Section 6.4.5 of the Compact provides that "any Gaming Resource Suppliers who, directly or indirectly, provides, has provided, or is deemed likely to provide" goods or services with a value of over twenty-five ($25,000) during twelve (12) consecutive months in relation to the Tribe's casino, must be licensed by the Tribal Gaming Agency. (Compact, sections 6.4.5, 2.11.) Moreover, section 6.4.5 provides that a Gaming Resource Supplier must obtain the license "prior to" providing any goods or services in

[5] The Tribal-State Gaming Compact Between the Chukchansi Indians, a federally recognized Indian Tribe, and the State of California, is publicly available at http://www.cgcc.ca.gov/documents/compacts/original_compacts/Picayune-Chuckchansi_Compact.pdf. (Last accessed August 1, 2018.) However, for convenience of the Court, the portions of the Compact referenced in this Respondent's Brief are attached as Exhibit 1.

connection with the Casino operations or facilities. (Compact, section 6.4.5.)

To obtain the license required by Section 6.4.5 of the Compact, a Gaming Resource supplier must apply for and submit to a background investigation by the Tribal Gaming Agency. (Compact, section 6.4.8.) As noted, the Compact requires a tribal gaming license be issued before a putative Management Contractor provides any services to a Casino. (Compact, section 6.4.5.) Necessarily, therefore, the background investigation must also be completed before the Management Contractor provides any management services to the Casino. (Compact, sections 6.4.8, 6.4.5.)

In addition to the requirements relating to background investigations and tribal licensure, the Compact imposes other obligations on Management Contractors. Specifically, section 6.4.5 also requires that Management Contractors must also apply for and receive a finding of suitability from the State Gaming Agency before entering a contract for the provision of management services to a Tribal gaming facility.

(Compact, section 6.4.5.) On this point, section 6.4.5 provides:

> The Tribe shall not enter into, or continue to make payments 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 material 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.

(Compact, p. 15, section 6.4.5.)

While section 6.4.5 of the Compact speaks of denials and expirations and revocations of determinations of suitability, it necessarily follows that the section dictates that a Management Contractor/Gaming Resource Supplier must first apply for and obtain an initial determination of

suitability before it can be denied, revoked, or expired.[6] In other words, a current determination of suitability by the CGCC is a requirement of any prospective management contractor. Without such a determination, a management contract cannot be entered into, or made effective, and the manager cannot provide any management services.

Importantly, in addition to confirming that OBIG was required to comply with the Compact, the Management Agreement specified that it would not become an effective and binding agreement until – at the earliest – five (5) days after the Tribal Gaming Agency completed the required background investigation. (1 CT 144.) The Management Agreement similarly expressly specified that it would not be an effective and binding agreement until – at the earliest – five (5) days after the Tribal Gaming Agency issued OBIG a Tribal Gaming License. (1 CT 144.)

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[6] The application form for a Finding of Suitability is available at www.cgcc.ca.gov/documents/forms/bcg-100.pdf. Last accessed on July 31, 2018.

Thus, to show that the Management Agreement was binding and that any potential waiver of immunity was effective, OBIG's Amended Complaint had to establish by a preponderance of competent and credible evidence that it had satisfied those conditions necessary to trigger the "Effective Date". (*Brown, supra*, 17 Cal.App5th at 1203.) Without doing so, OBIG could not establish the Superior Court's jurisdiction over the Tribal Parties or any of OBIG's claims for relief. (*Lawrence, supra*, 153 Cal.App.4th at 1368-69; *Campo, supra*, 137 Cal.App.4th at 183.)

Despite being presented with the issue numerous times, dating back to August 24, 2017, OBIG never provided evidence showing that: (1) the NIGC and Tribal Gaming Agency had ever completed background investigations of OBIG, or (2) that OBIG had received any of the licenses or permits required by the Compact.

Presumably, the reason why OBIG continues to ignore or dodge these requirements is that OBIG knows that it never complied with them. For example, as addressed

above, the Compact required OBIG to obtain a favorable determination of suitability from the CGCC. (Compact, section 6.4.5) However, as the Tribal Parties pointed out to the Superior Court, the CGCC's publicly available records indicate that neither OBIG, nor anyone associated with OBIG, even applied for a determination of suitability, and certainly never received the required determination of suitability.[7]

As shown above, the fact that OBIG has not, and apparently cannot, show that it ever even applied for a

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[7] The CGCC maintains a searchable database of all entities that have been determined suitable for a gaming license which is available at www.cgcc.ca.gov/?pageID=lic_and_reg_detail. Searches show the current status of all applications such as "active," "withdrawn," "suspended," "pending," or "denied." When searched, the database contains no information related to Osceola Blackwood Ivory Gaming LLC, indicating that OBIG has never applied for a determination of suitability. Juxtapose that with Cascade Entertainment Group, LLC, the only other entity to have a management agreement to manage the Tribe's casino. (a copy of the approved Cascade Management Agreement is available at https://www.nigc.gov/images/uploads/approved-management-contracts/picayunecascade.pdf.) A search for "Cascade" on the CGCC's website shows that Cascade was issued a Gaming Vendor Providers License which is now shown as "Withdrawn." (The CGCC's database was last accessed on August 1, 2018.)

determination of suitability from the CGCC, let alone received a favorable finding, eviscerates OBIG's claim that either the Management Agreement, or the language OBIG claim waived the Tribal Parties' immunity could have gone into effect. Consequently, the Superior Court was not only correct in dismissing OBIG's Amended Complaint, that decision was required.

Additionally, as discussed, the Compact required OBIG to be licensed by the Tribal Gaming Agency. However, OBIG never submitted any evidence showing that it obtained the required Tribal license. The only evidence in the record related to the Tribal Gaming License is in the Settlement Agreement relating to the Consulting Agreement. (1 CT 213.) It was the Tribal Parties who submitted that evidence, not OBIG. (1 CT 210-216.) Notably, the recitals of the Settlement Agreement show that OBIG never received a license of any sort until **November 4, 2016**—more than a year after OBIG claims the Management Agreement went into effect. (1 CT 213.)

b. OBIG Admits that the First Condition of the Management Agreement Was Never Satisfied.

It is beyond dispute that both the express terms of the Management Agreement and federal law required that the Management Agreement and any purported waiver of immunity in the Management Agreement could not go into effect until it was approved by that Chairman of the NIGC. (1 CT 143, 144, 151, 172; 25 U.S.C. § 2710(d)(9) [requiring approval of management contract *before* a Tribe may enter the contract]; 25 C.F.R. § 531.1(f) [mandating that management contracts must include an "effective date" clause indicating that the contract is not effective until approved, "***date of the signature of the parties notwithstanding***"]; 25 C.F.R. § 533.7 [providing that unapproved management contracts are "void"].) It is also beyond dispute that the Management Agreement upon which OBIG bases each of its claims for relief was never approved by the Chairman of the NIGC (AOB 17-18, 1 CT 102:21-23; 109:11-14; 110:25-26; 112:6-7; 113:16-17; 115:9-10; 118:25-26.) As a consequence, it is beyond legal dispute

that neither the Management Agreement nor any provision within it, including Article 8, ever went into effect. To the contrary, as discussed below, the Management Agreement is, as a matter of federal law, void and unenforceable. (*Shingle Springs*, *supra*, 15 Cal.App.5th at 430.)

OBIG attempts to circumvent the undeniable fact that the Chairman of the NIGC never approved the Management Agreement with strained arguments that are contradicted by the Management Agreement. Specifically, OBIG argues that the only reason the Management Agreement was never approved was because the Tribal Parties breached provisions of the Management Agreement that OBIG claims expressly require the Tribal Parties to submit the Management Agreement to the NIGC for approval.

The problem for OBIG is two-fold. First, OBIG's argument is inconsistent with both the express terms of the Management Agreement and federal law. Contrary to OBIG's assertion, there is not a single term or provision in the Management Agreement that places the responsibility

for submitting the Management Agreement to the NIGC for approval on the Tribal Parties.

The only provision OBIG points to as imposing the obligation to submit the Management Agreement to the NIGC solely on the Tribal Parties is Article 7.6. (See AOB at 55.) In OBIG's words, Article 7.6 is "the term that required Respondents to submit the Management Agreement to the NIGC for approval." (*Id.*)

OBIG's reliance on Article 7.6 is somewhat quizzical. Contrary to OBIG's suggestion, Article 7.6 does not address who – between OBIG and the Tribal Parties – would bear ultimate responsibility for submitting the Management Agreement to the NIGC for approval. In fact, it does not impose any singular duties on the Tribal Parties at all. Rather, Article 7.6 provides: "Further Actions. The Tribe *and Manager* agree 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 hereof."[8] (1 CT 168.)

Under the plain language of Article 7.6, to the extent that provision relates to the requirement to submit the Management Agreement to the NIGC for approval, it creates mutual and equal obligations on OBIG and the Tribal Parties. Notably, that the Management Agreement would contemplate that *either* OBIG *or* the Tribal Parties would submit the Management Agreement for review and approval is perfectly in line with federal regulations governing this exact subject.

The NIGC's regulations provide that "[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.[9] (25 C.F.R. § 533.2) Therefore,

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[8] Despite the plain language of Article 7.6, OBIG repeatedly asserts that Article 7.6 only imposes positive obligations only on the Tribal Parties. (AOB at 15, 50, 55, and 56.)

[9] This raises another issue that OBIG chose to ignore in the Superior Court proceedings and in its Opening Brief. OBIG asserts that OBIG specifically agreed to delay submitting the Management Agreement to the NIGC for approval until after the

considering that OBIG shared a duty to "take all other actions necessary or appropriate to comply with" the provision and intent of the Management Agreement, OBIG must at a minimum share responsibility for the failure to obtain the NIGC's approval of the Management Agreement.

The second problem for OBIG is that under the law relating to tribal sovereign immunity, the reason why the waiver never went into effect is irrelevant. (*Yavapai Apache*, *supra*, 201 Cal.App.4th at 206-207.) All that matters is that it never went into effect. (*Id.*) OBIG's entire argument rests on OBIG's contradicted tale of fraud and deception based on the fact that the Tribal Parties never submitted the Management Agreement to the NIGC for approval. In other words, OBIG largely bases its claim of

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Casino reopened. The Casino reopened December 31, 2015. (1 CT 107:12-13.) This was well beyond the sixty (60) day limit imposed by 25. C.F.R. § 533.2. Consequently, by the time the Casino reopened the Management Agreement was, for lack of a better term, stale and the July 29, 2015, signatures no longer valid. Moreover, as noted, by December 31, 2015, the terms of the Management Agreement were no longer valid due to conflict with the terms of Tribal Parties' existing financing documents. (1 CT 106:8-14; AOB at 18 n. 6.)

waiver on purely equitable considerations. However, federal and California courts have been abundantly clear that the perceived equities are not grounds for implying a waiver of immunity. (*Ameriloan*, *supra*, 169 Cal.App.4th at 93; *Big Valley*, *supra*, 133 Cal.App.4th at 1195-1196; *Warburton*, *supra*, 103 Cal.App.4th at 1182; *Pan American Co. v. Sycuan Band of Mission Indians* (9th Cir. 1989) 884 F.2d 416, 419.)[10]

3. There Is No Waiver To OBIG's Non-Contractual Claims.

As discussed above, OBIG had the burden of not only establishing a valid waiver of immunity, but it had the burden of establishing a waiver to each of its claims for relief. (See *Big Valley*, *supra*, 133 Cal.App.4th at 1194-1195.) However, the only potential waiver OBIG points to

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[10] OBIG asserts that whether or not the Management Agreement was ever approved by the NIGC, the purported waiver is still effective. (AOB at 52.) This argument is nonsensical at its core because a void management contract cannot create any obligations on the part of an Indian tribe including an obligation to submit to the authority of a court. (*Shingle Springs*, *supra*, 15 Cal.App.4th 403-404.) More importantly however, this argument ignores the actual language of Article 8 which shows that the waiver could not go into effect until the Management Agreement went into effect. As shown, that never happened.

concerning its third through sixth claims for relief is Article 8 of the Management Agreement. (AOB at 54- 60.) Of course, this claim is belied by the fact that neither the Management Agreement nor the purported waiver ever went into effect. However, even if the waiver did go into effect, it still would not waive immunity to OBIG's alternative claims

Assuming for the sake of argument that the waiver in the Management Agreement was valid and effective, Article 8 explicitly provides that the waiver is strictly limited to claims "enforcing *the terms* of [the Management Agreement.]" (1 CT 172 [emphasis added].) In other words, the waiver, if it were effective, would be limited to the clauses contained within the four corners of the Management Agreement.

OBIG addresses this point by asserting that each of its six claims seeks to enforce "the term that required Respondents to submit the Management Agreement to the NIGC for formal approval." (AOB at 55.) That argument is – for lack of a better word – silly. First, the "term" OBIG

claims to be enforcing does not exist in the Management Agreement. There is no provision in the Management Agreement that places a special obligation uniquely on the Tribal Parties to submit the Management Agreement to the NIGC for approval. It does not exist.

Moreover, OBIG's argument is completely belied by the nature of its "alternative" claims. For example, OBIG's third and fourth claims for relief are based on two purported agreements – one oral and one implied – that are necessarily separate and distinct from the Management Contract. (1 CT 112:24-115:20.) Similarly, OBIG's fifth claim for relief for fraud is purely an "alternative" claim that only has any life if the Management Agreement itself is determined to be void and unenforceable. Otherwise, every fraudulent act OBIG alleges would constitute only a breach of contract. The same is true of OBIG's sixth claim for relief based on a violation of Business and Professions Code section 17200, et seq. That claim is purely a statutory claim. That is may use interactions between the parties as a basis for the claim is

immaterial because it is not a vehicle for enforcing the terms of the Management Agreement.

OBIG's third through sixth causes of action are, by their very nature, alternative claims OBIG has asserted in the event the Management Agreement was determined to be void and unenforceable. Consequently, while they may seek to provide OBIG with profits it believed it might have earned under a valid Management Agreement, they do not "enforce" any terms of the Management Agreement. Consequently, even if the Management Agreement and the waiver were valid and operative, the waiver would not extend to OBIG's third through sixth causes of action.

III. Federal Law Preempts Claims Based On Void Management Agreements.

A. The Tribal Parties Are Not Judicially Estopped From Asserting That Federal Preemption Precludes The Enforcement Of An Unapproved Management Contract.

In its Opening Brief OBIG asserts that the Tribe is judicially estopped from arguing that IGRA preempts the adjudication of claims to enforce the unapproved

Management Agreement.[11] OBIG bases this argument on the mistaken belief that the Tribal Parties have taken a position in this action – that federal law preempts the enforcement of an unapproved management agreement – that is inconsistent with the position they took in OBIG's federal action – that claims based on an unapproved management agreement do not raise a federal question. OBIG is wrong in every respect. First, as a general matter, OBIG misunderstands the doctrine of judicial estoppel, which does not apply in this instance. Second, OBIG misunderstands the preemption arguments the Tribal Parties have asserted and thus fails to realize that the arguments, though related in their source, are quite different.

Judicial estoppel "is an extraordinary remedy to be invoked when a party's inconsistent behavior will otherwise

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[11] To the extent the Tribe cites authority regarding judicial estoppel in this brief that it did not rely on below, it is free to do so. *Schmidt v. Bank of America, N.A.* (2014) 223 Cal.App.4th, 1505, fn. 11 [where appellant has not waived right to argue issue on appeal, party is free to cite new authority in support of issue]; *Giraldo v. Dep't of Corr. & Rehab.* (2008) 168 Cal.App.4th 231, 241, 251 ["We are aware of no prohibition against citation of new *authority* in support of an *issue* that was in fact raised below[.]"].

result in a miscarriage of justice." *Levin v. Ligon*, (2006) 140 Cal. App. 4th 1456, 1468. "[I]t is an *equitable doctrine*, and its application, even where all necessary elements are present, is discretionary." *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal. 4th 412, 422 [emphasis in original, citations omitted].

Judicial estoppel applies when (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are completely inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." *Aguilar v. Lerner* (2004) 32 Cal. 4th 974, 986-87 [citations omitted].

"Some Courts of Appeal have held that the inconsistent position 'generally must be factual in nature.'" *Levin v. Ligon* (Cal. Ct. App. 2006) 140 Cal.App.4th 1456, 1468 ("*Levin*") [quoting *ABF Capital Corp. v. Berglass* (Cal. Ct.

App. 2005) 130 Cal.App.4th 825, 832 ("*Berglass*")]; *but see Levin*, 140 Cal.App.4th at 1468 [noting that the California Supreme Court did not reject the application of the doctrine where the inconsistent positions were legal rather than factual, "although that issue was not directly considered by the Supreme Court[.]"], and 1469 [noting that in the Ninth Circuit, the doctrine can be triggered by legal or factual positions].[12] Regardless, "[i]f the challenge is merely a legal challenge that reflects two different positions in two lawsuits, this may be a reasonable litigation tactic, which does not undermine the integrity of the judicial process." *Id.* [citing *California Amplifier, Inc. v. RLI Ins. Col.* (Cal. Ct. App. 2001) 94 Cal.App.4th 102, 118. [citation omitted]].

Finally, although it appears no California court has directly addressed the precise issue, the Ninth Circuit has held that judicial estoppel is not implicated where a party's

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[12] The Tribe's research shows no Court of Appeal holding that the doctrine of judicial estoppel applies to changes in legal positions. Although the decision is uncitable by the Rules of Court because it is unpublished, this Appellate District cited with approval the proposition that the legal positions must be factual.

change in position is in response to a change in the law. *State of Arizona v. Shamrock Foods Co*, 729 F.2d 1208, 1215 (9th Cir. 1984) ("There is little of the playing fast and loose that the doctrine of judicial estoppel was intended to preclude. Rather, plaintiff was attempting to alter its theory of recovery in response to [a] change in the law[.]") (quotations and punctuation omitted); *see also Maui Land & Pineapple Co. v. Occidental Chem. Corp.*, 24 F. Supp. 2d 1083, 1086 (D. Hi. 1998) ("[Judicial e]stoppel is inappropriate when a party is merely changing its position in response to a change in the law.") In a related context, California courts do not apply the doctrine of *collateral* estoppel "where there has been a material change in the law." *Sacramento Cty. Employees' Ret. Sys. v. Superior Court* (2011) 195 Cal. App. 4th 440, 452.

Under the stated rules, judicial estoppel does not preclude the Tribal Parties' preemption arguments. First, as discussed more fully below, the positions taken by the Tribe in this action and the federal action are not inconsistent.

Second, even if the Tribe's positions are inconsistent the doctrine is not triggered here because the inconsistent positions are purely legal. Specifically, the Tribe's position turns on the jurisdiction of the state and federal district courts vis-à-vis actions to enforce management agreements not approved by the NIGC. This is purely a legal position and as such does not trigger judicial estoppel under *Levin* and *Berglass*. Third, to the extent the Tribe is taking a position different from the position it took in the federal District Court, it is a result of the intervening Court of Appeals opinion in *Shingle Springs*, *supra*, which came down after the federal action was dismissed and after OBIG filed the Amended Complaint. Finally, even absent the change in the law brought about by *Shingle Springs*, this is not a case where the doctrine should be applied because there is no threat of a miscarriage of justice. Specifically, the legal question underpinning this case is where OBIG can seek to enforce an illegal management contract, which was never approved by the NIGC as required by federal law. In this

context, there is no threat of miscarriage of justice on the courts based on the Tribe asserting legal arguments based on prevailing (even if dissonant) law.

B. Federal Preemption is an Independent Basis to Affirm the Lower Court Judgment

In addition to affirming the judgment on sovereign immunity grounds, this Court can also affirm the lower court judgment on the ground that IGRA preempts California courts from adjudicating an "action to enforce" an unapproved Management Agreement. (*See Shingle Springs*, *supra*, 15 Cal.App.5th at 400.)[13]

"IGRA preempts state contract actions based on unapproved 'management contracts' and 'collateral agreements to management contracts' as such agreements are defined in the IGRA regulatory scheme." (*Shingle*

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[13] Although the Superior Court did not directly address federal preemption, this Court may affirm the Superior Court's judgment based on federal preemption. (*See McMillin-BCED/Miramar Ranch North v. County of San Diego* (1995) 31 Cal.App.4th 545, 562 ["It is appropriate to affirm the judgment, where correct, regardless of the theories used by the trial court."] [citing *Shultz v. County of Contra Costa* (1984) 157 Cal.App.3d 242, 248].)

Springs, 15 Cal.App.5th at 400.) Put another way, "a state court claim cannot go forward based on an agreement that is an unapproved management contract or an unapproved collateral agreement to a management contract under IGRA." (*Id.* at 429.)

"Accordingly, the threshold question that must be answered is whether the agreements underlying this litigation are management contracts or collateral agreements to management contracts, bringing them within IGRA's protective scope." (*Shingle Springs*, *supra*, 15 Cal.App.5th at 429.) If they are, an "action to enforce the agreements is preempted by IGRA and the trial court [lacks] subject matter jurisdiction." (*Ibid.*)

Here, there is no dispute that the Management Agreement is a "management agreement" as defined in IGRA and as such is void unless approved by the NIGC.

Similarly, there is no dispute that the Chairman of the NIGC did not approve the Management Agreement. Thus, there is no dispute that as a matter of federal law the

Management Agreement is void and unenforceable and thus beyond the adjudicatory jurisdiction of state courts. (25 C.F.R. § 533.7; *Shingle Springs*, *supra*, 15 Cal.App.5th at 429.)

Here it is self-evident that the first and second claims for relief in OBIG's Amended Complaint -- breach of the Management Agreement, and breach of the duty of good faith and fair dealing concerning the Management Agreement – constitute actions enforcing terms OBIG believes are in the Management Agreement. These claims are indisputably subject to the preemptive effect of 25 C.F.R. § 533.7, which provides that unapproved management contracts are "void."

The preemption of those two claims is fatal to OBIG's remaining four claims, all of which admittedly are brought based on a supposed waiver of the Tribe's sovereign immunity in the Management Agreement. Accordingly, with the claims to enforce the management agreement preempted under *Shingle Springs*, the remaining four claims lack a

viable waiver of the Tribe's sovereign immunity and are therefore barred.

Contrary to OBIG's assertion, *Shingle Springs* is not inconsistent with the District Court's holding. In the federal action, OBIG alleged garden variety state law claims seeking damages under claims OBIG claimed arose out of or related in some way to the unapproved Management Agreement. The District Court determined that OBIG failed to raise a federal question under the IGRA because OBIG failed to "articulate how its claims would affect the tribe's ability to govern gaming on Native territory, or interfere with [the Tribe's] decisions about which gaming activities to permit in the Casino." (2 CT 451:5-7.) Thus, the District Court did not say it was impossible for OBIG to state a federal question, rather it said that there was no federal question due to the manner in which OBIG presented its claims. (*Id.*) Accordingly, the District Court correctly dismissed OBIG's federal action.

As OBIG's Opening Brief makes clear, OBIG has never fully grasped why the federal court determined it did not have jurisdiction over OBIG's claims. Nor has OBIG grasped that even if the federal court had determined it had jurisdiction, OBIG still would have run up against the fact that federal law declares that unapproved management contracts are void and unenforceable irrespective of where, or in which forum a party brings its claims, which is what the Tribal Parties argued to the Superior Court and reassert here.

Specifically, in the Superior Court and here, the Tribe argues that under *Shingle Springs,* once a state court determines that an agreement is an unapproved management contract, such agreement is consequently void under federal law. Because the contract is void, as a matter of law, no court – state, federal, or tribal – has authority to adjudicate claims based upon an unapproved management contract. The basis for this rule is simple: "If state actions against tribes can go forward to enforce agreements that are

management contracts by virtue of the rights and obligations created therein even though those agreements have not been approved, IGRA will be circumvented, and tribes will lose the protections Congress intended IGRA to provide." *Shingle Springs*, *supra*, 15 Cal.App.5th at 426. The fact that the Management Agreement is void because it is unapproved, and thus compels dismissal of the action – in any court, in any jurisdiction – is not inconsistent with the District Court's determination that OBIG's federal complaint did not raise a federal question.

To be sure, the result in both forums necessarily had to be the same, but that does not support OBIG's claim that inconsistent arguments are now denying OBIG a forum.[14] Rather, what OBIG fails to understand is that it does not have any legitimate claims that can be presented to any

[14] As discussed in detail, the reason OBIG does not have a forum for any of its claims is that the Tribal Parties have not waived immunity to those claims. This is something the Tribal Parties have consistently maintained.

forum for determination, because every one of its claims arises from a contract that federal law declares is void.

OBIG's remaining arguments against the Tribe's preemption arguments are equally unavailing. For instance, OBIG argues that "state courts cannot control questions of federal preemption" and thus *Shingle Springs* "has no effect on federal preemption law[]" (AOB at 43 [citing *Mackey v. Lanier Collection Agency* (1988) 486 U.S. 825, 830-31 ("*Mackey*")].) However, that is simply not true and makes little sense. To the contrary, state courts routinely determine that federal law preempts state court jurisdiction, which is exactly what happened in the cases OIBG cites for its novel argument.

For example, in *Mackey*, *supra*, the High Court affirmed the Georgia Supreme Court's holding that ERISA preempted conflicting Georgia statute. Moreover, OBIG's position is inconsistent with decisions of the California Supreme Court and the Ninth Circuit. (*See e.g., Sullivan v. First Affiliated Securities, Inc.* (9th Cir. 1987) 813 F.2d 1368,

1372, fn. 5 ["The state court is as competent to hear the preemption defense as the federal court."], *overruled on other grounds, cert. denied* 484 U.S. 850 (1987); *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 816 [determining whether "federal Medicaid law actually conflicts with and therefore preempts California's provider lien statutes"].) But even if state courts were not competent to consider issues of federal preemption, *Shingle Springs* determined the jurisdiction of *California courts* over the actions to enforce unapproved management contracts, and OBIG's argument does not explain how state courts might be barred from determining the scope of their jurisdiction.

Next, OBIG asserts that collateral estoppel "prevent[s] [the Tribe] from re-litigating the federal preemption issue, as it has already been decided by the Eastern District of California." (AOB at 41-42.) Relying principally on *Johnson v. GlaxoSmithKline, Inc.* (2008) 166 Cal.App.4th 1497, 1508, OBIG asserts that following *Shingle Springs* would "create[] an inconsistent outcome compared to that of the federal

court." Appellant Br. at 42. However, as discussed *supra*, *Shingle Springs* is not inconsistent with the Tribe's position in the Eastern District. Moreover, it was the jurisdiction of the Eastern District that was previously litigated and decided, not the jurisdiction of the state courts, which is at issue in the instant proceeding. The elements of collateral estoppel are therefore unmet. However, even if the elements of collateral estoppel were satisfied, there would be "sound judicial policy against applying collateral estoppel" to bar the Tribe from arguing *Shingle Springs*, which goes to this Court's subject matter jurisdiction. (*See Chern v. Bank of America* (1976) 15 Cal.3d 866, 872; *see also Gonzalez v. Thaler* (2012) 565 U.S. 134, 141 ["Subject-matter jurisdiction can never be waived or forfeited."].)

IV. The Superior Court Properly Denied OBIG's Request for Further Briefing On Substantive Issues Identified For OBIG Months Before OBIG Responded To The Tribal Parties' Motion to Quash.

As alluded to above, during briefing on the Tribal Parties' Motion to Quash OBIG argued that the Tribal

Parties waived immunity because the Tribal Chairman signed the Management Agreement, and the Tribal Council adopted Resolution 2015-46, approving the Management Agreement.

Nonetheless, despite admittedly arguing the substance of the waiver issue in its brief and at oral argument, OBIG requested that the Superior Court afford OBIG an additional opportunity to "fully brief the substantive issues" regarding tribal sovereign immunity. (2 CT 458 n.1.) OBIG now argues that the Superior Court erred by denying OBIG's request to essentially bifurcate the issues presented in the Tribal Parties Motion to Quash. (AOB at 34-35.)

OBIG founds its request for "further briefing" on *Carlton v. Quint* (2000) 77 Cal.App. 690 and *Robinson v. Woods* (2008) 168 Cal.App.4th 1258. (AOB at 35.) However, neither *Carlton* nor *Robinson* support OBIG's position. Rather, both confirm the correctness of the Superior Court's denial of OBIG's request and its commentary that OBIG's Opposition was "not well thought out." (2 CT 552.)

OBIG seems to suggest that *Carlton* applies in every instance where a party asserts a motion is procedurally defective, however that is not remotely accurate. Rather, *Carlton* applies only where a motion is procedurally defective because there was "inadequate notice" or "defective service" of a motion, thereby denying a party the opportunity to fully prepare an opposition on the merits. (*Carlton*, 77 Cal.App.4th at 693.)

In *Carlton*, a trial court granted summary judgment in favor of an attorney in a malpractice action. On appeal, the appellant argued that summary judgment was not proper because the motion was not timely served and because the proof of service for the motion was inadequate. (*Carlton*, *supra*, 77 Cal.App.4th at 696.) *Carlton* rejected those arguments. It noted that the Appellant waived any objections to untimely service of the motion or the adequacy of notice of the hearing on the motion by filing an objection and appearing at the hearing and arguing the merits.

Carlton stated that it was settled that "a party who appears and contests a motion in the court below cannot object on appeal or by seeking extraordinary relief in the appellate court that he had no notice of the motion or that the notice was insufficient or defective." (*Carlton, supra*, 77 Cal.App.4th at 697 [internal citations omitted].)

In explaining its reasoning, *Carlton* provided some practical advice:

> This court understands the dilemma faced by an attorney *who claims his client was not properly served with motion papers and/or an inadequate notice of the hearing was received.* If counsel is convinced his or her legal position is correct, he or she may appear at the hearing without filing a response to the motion and request a continuance for the purpose of preparing a proper response. If counsel makes a complete record relating to *both the defective service and/or inadequate notice and the inability to prepare a proper response,* and the court denies the continuance the record will be well preserved for any future writ proceeding or appeal.
>
> If counsel is unwilling to take the chance that a continuance will be granted, he or she should file the best opposition possible under the circumstances. The opposition should include counsel's position on the defective service/inadequate-notice issue, as well as the merits. The opposition should contain a complete discussion of counsel's position *as to*

> *why a more complete opposition was not able to be filed* (e.g., because the defective notice or motion did not give counsel adequate time to prepare a response). Counsel should then appear at the hearing, object to the hearing taking place *because* service was defective and/or inadequate notice of the hearing was received; again explain to the court the prejudice that has been suffered *by reason of the defective service and/or inadequate notice*; and request a continuance of the hearing *so that a proper response to the motion may be filed.* Obviously, if the court denies a continuance, counsel should be prepared to argue the motion on the merits. If, however, the steps described in this paragraph are taken, the record will be well preserved for any future writ proceeding or appeal.

(*Carlton*, 77 Cal.App.4th at 697-698 [emphasis added].)

Robinson, *supra*, also cited by OBIG bears some resemblance *Carlton*, *supra*. Like *Carlton*, *Robinson* involved a situation where a party claimed that it received insufficient notice of a hearing on a motion for summary judgment. (*Robinson*, *supra*, 168 Cal.App.4th at 1259-1260.) However, the issue in *Robinson* was whether a trial court had authority to shorten the notice period of a summary judgment motion. (*Id.* at 1268.) Notice in *Robinson* was improper for two reasons: (1) the moving party gave only 76-

day notice, rather than the 80-day notice required when service is by mail (*Id.* at 1260.); and (2) the hearing was noticed within 30 days of the trial date without a finding of good cause. (*Ibid.*)

Robinson merely found that when service of a summary judgment motion is ineffective in that it did not meet the notice requirements of Code of Civil Procedure section 437c, a trial court has no authority to hear the motion, or alter the statutorily mandated notice requirements. (*Robinson*, *supra*, 168 Cal.App.4th at 1267-1269.) However, unlike *Carlton*, *Robinson* determined that that under facts presented in that case there was no wavier to any objections regarding the sufficiency of notice. (*Ibid.*)

The statement of *Carlton* and *Robinson* is one of fairness, economy, statutory mandate, and commonsense. It prevents parties from being penalized and prejudiced due to another party's failure to provide proper notice or to properly serve a motion within the time requirements of the Code of Civil Procedure. In other words, these cases represent a

very unsurprising conclusion that a party should not be deprived the time, or ability, to muster a proper defense to a motion due to the mistake, or even gamesmanship, of the opposing party. But, *Carlton* cautions, if you have time to file an opposition, you should file the most comprehensive opposition possible considering the time constraints caused by the improper service. (*Carlton, supra*, 77 Cal.App.4th at 697-698.)

There is no claim here that the Tribal Parties' Motion to Quash was not timely served. It was. The Tribal Parties filed their Notice of Joint Motion to Quash on October 26, 2017, and immediately mailed the Notice of Motion and Motion to OBIG. (1 CT 209.) Service of the motion was complete on October 31, 2017. The Notice made clear that the hearing on motion was calendared for December 7, 2017, at 3:30 p.m. in Department 501 of the Fresno County Superior Court. Accordingly, OBIG was provided with notice of Tribal Parties' motion twenty-four (24) court days before

the scheduled hearing – eight (8) court days more than required by the Code of Civil Procedure. (CCP § 1005(b).)

Based solely on service of the notice for the hearing on the Tribal Parties Motion to Quash, OBIG had ample time to present a full defense, and muster all of the evidence necessary for the defense – assuming any such evidence existed. However, it is worth emphasizing that the date on which the Tribal Parties served OBIG with the Motion to Quash was not the first time they raised issues regarding OBIG's failure to take steps necessary to trigger the "Effective Date" of the Management Agreement – which was also necessary to breathe life into OBIG's strained argument that the Tribal Parties waived immunity. To the contrary, the Tribal Parties raised this issue in correspondence to OBIG as early as August 24, 2017. (1 CT 228.) Thus, OBIG had over three (3) months – or seventy-two (72) court days – to prepare a defense to the Tribal Parties claims and to come up with evidence showing that OBIG had submitted to the

required background investigations and had obtained the required licenses and permits.

Here, the obstacle OBIG faced regarding its presenting a full and reasonable defense to the Tribal Parties' claims was not a matter of time. Rather, the obstacle was that OBIG has no reasonable defense. Accordingly, the Superior Court was correct in noting that allowing any further briefing would be "inconsequential given the law" and therefore denying OBIG's request for additional time to prepare further briefing on any issue the Tribal Parties raised in their Motion to Quash.

CONCLUSION

There are only two things this Court needs to do to decide this case. The first is to read the Management Agreement focusing on the terms relating to when, and how, the Management Agreement would become binding on the parties, and when and how a waiver of immunity would be operative—something OBIG appears not to have done. The second is to look at the fact that OBIG cannot prove that any

conditions necessary to make the Management Agreement binding and effective were satisfied. Rather, OBIG openly admits that one statutorily mandated condition – the Chairman of NIGC's approval of the Management Agreement – never occurred. And, OBIG never even attempted to submit to the necessary background checks, or to obtain any of the licenses and permits OBIG was required to have before it could manage the Casino, and more importantly before the Management Agreement could go into effect.

The Superior Court correctly granted the Tribal Parties Motion to Quash and dismissed OBIG's Amended Complaint. The Court should affirm that decision.

Dated: August 14, 2018

FREDERICKS PEEBLES & MORGAN LLP

By: /s/ Michael A. Robinson
Michael A. Robinson
Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the content and form of brief specifications in California Rule of Appellate Procedure 8.204. The brief contains 13,831 words, prepared in a 14-point font proportionately-spaced typeface using Microsoft Word.

Date: August 14, 2018

By: /s/ Michael A. Robinson
Michael A. Robinson

PROOF OF SERVICE

I declare that I am employed with the law firm of Fredericks Peebles & Morgan LLP, whose address is 2020 L Street, Suite 250 Sacramento, California 95811. I am employed in Sacramento County, California. I am over the age of 18 and am not a party to this case.

On August 14, 2018, I caused the following documents(s) to be served as described as:

RESPONDENTS' BRIEF

on the interested party(ies) in this action as addressed as follows:

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The Hon. Mark W. Snauffer Fresno County Superior Court 1130 O Street Fresno, CA 93721-2220	Judge of the Superior Court

XX **Federal Express Mail**: by placing a true and correct copy thereof in an overnight delivery envelope in a Federal Express drop box at Sacramento, California, addressed to all above.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed on **August 14, 2018** at Sacramento, California.

/s/ Sally Eredia
SALLY EREDIA

Exhibit 1

TRIBAL-STATE COMPACT

BETWEEN

THE STATE OF CALIFORNIA

AND THE

CHUCKCHANSI INDIANS

supervising such gaming activities or persons who conduct, operate, account for, or supervise any such gaming activity, (b) is in a category under federal or tribal gaming law requiring licensing, (c) is an employee of the Tribal Gaming Agency with access to confidential information, or (d) is a person whose employment duties require or authorize access to areas of the Gaming Facility that are not open to the public.

Sec. 2.8. "Gaming Facility" or "Facility" means any building in which Class III gaming activities or gaming operations occur, or in which the business records, receipts, or other funds of the gaming operation are maintained (but excluding offsite facilities primarily dedicated to storage of those records, and financial institutions), and all rooms, buildings, and areas, including parking lots and walkways, a principal purpose of which is to serve the activities of the Gaming Operation, provided that nothing herein prevents the conduct of Class II gaming (as defined under IGRA) therein.

Sec. 2.9. "Gaming Operation" means the business enterprise that offers and operates Class III Gaming Activities, whether exclusively or otherwise.

Sec. 2.10. "Gaming Ordinance" means a tribal ordinance or resolution duly authorizing the conduct of Class III Gaming Activities on the Tribe's Indian lands and approved under IGRA.

Sec. 2.11. "Gaming Resources" means any goods or services provided or used in connection with Class III Gaming Activities, whether exclusively or otherwise, including, but not limited to, equipment, furniture, gambling devices and ancillary equipment, implements of gaming activities such as playing cards and dice, furniture designed primarily for Class III gaming activities, maintenance or security equipment and services, and Class III gaming consulting services. "Gaming Resources" does not include professional accounting and legal services.

Sec. 2.12. "Gaming Resource Supplier" means any person or entity who, directly or indirectly, manufactures, distributes, supplies, vends, leases, or otherwise purveys Gaming Resources to the Gaming Operation or Gaming Facility, provided that the Tribal Gaming Agency may exclude a purveyor of equipment or furniture that is not specifically designed for, and is distributed generally for use other than in connection with, Gaming Activities, if the purveyor is not otherwise a Gaming Resource Supplier as described by of Section 6.4.5, the compensation received by the purveyor is not grossly disproportionate to the value of the goods or services provided, and the purveyor is not otherwise a person who exercises a significant influence over the Gambling Operation.

Sec. 2.13. "IGRA" means the Indian Gaming Regulatory Act of 1988 (P.L. 100-497, 18 U.S.C. Sec. 1166 et seq. and 25 U.S.C. Sec. 2701 et seq.) any amendments thereto, and all regulations promulgated thereunder.

Sec. 2.14. "Management Contractor" means 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.

Sec. 2.15. "Net Win" means "net win" as defined by American Institute of Certified Public Accountants.

Sec. 2.16. "NIGC" means the National Indian Gaming Commission.

Sec. 2.17. "State" means the State of California or an authorized official or agency thereof.

Sec. 2.18. "State Gaming Agency" means the entities authorized to investigate, approve, and regulate gaming licenses pursuant to the Gambling Control Act (Chapter 5 (commencing with Section 19800) of Division 8 of the Business and Professions Code).

Sec. 2.19. "Tribal Chairperson" means the person duly elected or selected under the Tribe's organic documents, customs, or traditions to serve as the primary spokesperson for the Tribe.

Sec. 2.20. "Tribal Gaming Agency" means the person, agency, board, committee, commission, or council designated under tribal law, including, but not limited to, an intertribal gaming regulatory agency approved to fulfill those functions by the National Indian Gaming Commission, as primarily responsible for carrying out the Tribe's regulatory responsibilities under IGRA and the Tribal Gaming Ordinance. No person employed in, or in connection with, the management, supervision, or conduct of any gaming activity may be a member or employee of the Tribal Gaming Agency.

Sec. 2.21. "Tribe" means the Chuckchansi Indians, a federally-recognized Indian tribe, or an authorized official or agency thereof.

Sec. 3.0 CLASS III GAMING AUTHORIZED AND PERMITTED. The Tribe is hereby authorized and permitted to engage in only the Class III Gaming Activities expressly referred to in Section 4.0 and shall not engage in Class III gaming that is not expressly authorized in that Section.

Sec. 4.0. SCOPE OF CLASS III GAMING.

Sec. 4.1. Authorized and Permitted Class III gaming. The Tribe is hereby authorized and permitted to operate the following Gaming Activities under the terms and conditions set forth in this Gaming Compact:

satisfactory to the State. If the Tribe accepts the difference or does not provide a reconciliation satisfactory to the State, the Tribe must immediately pay the amount of the resulting deficiencies in the quarterly contribution plus interest on such amounts from the date they were due at the rate of 1.0% per month or the maximum rate permitted by applicable law, whichever is less.

(e) The Tribe shall not conduct Class III gaming if more than two quarterly contributions to the Special Distribution Fund are overdue.

Sec. 6.0. LICENSING.

Sec. 6.1. Gaming Ordinance and Regulations. All Gaming Activities conducted under this Gaming Compact shall, at a minimum, comply with a Gaming Ordinance duly adopted by the Tribe and approved in accordance with IGRA, and with all rules, regulations, procedures, specifications, and standards duly adopted by the Tribal Gaming Agency.

Sec. 6.2. Tribal Ownership, Management, and Control of Gaming Operation. The Gaming Operations authorized under this Gaming Compact shall be owned solely by the Tribe.

Sec. 6.3. Prohibition Regarding Minors. (a) Except as provided in subdivision (b), the Tribe shall not permit persons under the age of 18 years to be present in any room in which Class III Gaming Activities are being conducted unless the person is en-route to a non-gaming area of the Gaming Facility.

(b) If the Tribe permits the consumption of alcoholic beverages in the Gaming Facility, the Tribe shall prohibit persons under the age of 21 years from being present in any area in which Class III gaming activities are being conducted and in which alcoholic beverages may be consumed, to the extent required by the state Department of Alcoholic Beverage Control.

Sec. 6.4. Licensing Requirements and Procedures.

Sec. 6.4.1. Summary of Licensing Principles. All persons in any way connected with the Gaming Operation or Facility who are required to be licensed or to submit to a background investigation under IGRA, and any others required to be licensed under this Gaming Compact, including, but not limited to, all Gaming Employees and Gaming Resource Suppliers, and any other person having a significant influence over the Gaming Operation must be licensed by the Tribal Gaming Agency. The parties intend that the licensing process provided for in this Gaming Compact shall involve joint cooperation between the Tribal Gaming Agency and the State Gaming Agency, as more particularly described herein.

Sec. 6.4.2. Gaming Facility. (a) The Gaming Facility authorized by this Gaming Compact shall be licensed by the Tribal Gaming Agency in conformity with the

accompany any such inspection. The Tribe agrees to correct any Gaming Facility condition noted in an inspection that does not meet the standards set forth in subdivisions (b) and (c). The Tribal Gaming Agency and the State's designated agent or agents shall exchange any reports of an inspection within 10 days after completion of the report, which reports shall also be separately and simultaneously forwarded by both agencies to the Tribal Chairperson. Upon certification by the Tribal Gaming Agency's experts that a Gaming Facility meets applicable standards, the Tribal Gaming Agency shall forward the experts' certification to the State within 10 days of issuance. If the State's agent objects to that certification, the Tribe shall make a good faith effort to address the State's concerns, but if the State does not withdraw its objection, the matter will be resolved in accordance with the dispute resolution provisions of Section 9.0.

Sec. 6.4.3. Suitability Standard Regarding Gaming Licenses. (a) In reviewing an application for a gaming license, and in addition to any standards set forth in the Tribal Gaming Ordinance, the Tribal Gaming Agency shall consider whether issuance of the license is inimical to public health, safety, or welfare, and whether issuance of the license will undermine public trust that the Tribe's Gaming Operations, or tribal government gaming generally, are free from criminal and dishonest elements and would be conducted honestly. A license may not be issued unless, based on all information and documents submitted, the Tribal Gaming Agency is satisfied that the applicant is all of the following, in addition to any other criteria in IGRA or the Tribal Gaming Ordinance:

(a) A person of good character, honesty, and integrity.

(b) A person whose prior activities, criminal record (if any), reputation, habits, and associations do not pose a threat to the public interest or to the effective regulation and control of gambling, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, or activities in the conduct of gambling, or in the carrying on of the business and financial arrangements incidental thereto.

(c) A person who is in all other respects qualified to be licensed as provided in this Gaming Compact, IGRA, the Tribal Gaming Ordinance, and any other criteria adopted by the Tribal Gaming Agency or the Tribe. An applicant shall not be found to be unsuitable solely on the ground that the applicant was an employee of a tribal gaming operation in California that was conducted prior to the effective date of this Compact.

Sec. 6.4.4. Gaming Employees. (a) Every Gaming Employee shall obtain, and thereafter maintain current, a valid tribal gaming license, which shall be subject to biennial renewal; provided that in accordance with Section 6.4.9, those persons may

be employed on a temporary or conditional basis pending completion of the licensing process.

(b) Except as provided in subdivisions (c) and (d), the Tribe will not employ or continue to employ, any person whose application to the State Gaming Agency for a determination of suitability, or for a renewal of such a determination, has been denied or has expired without renewal.

(c) Notwithstanding subdivision (a), the Tribe may retain in its employ a person whose application for a determination of suitability, or for a renewal of such a determination, has been denied by the State Gaming Agency, if: (i) the person holds a valid and current license issued by the Tribal Gaming Agency that must be renewed at least biennially; (ii) the denial of the application by the State Gaming Agency is based solely on activities, conduct, or associations that antedate the filing of the person's initial application to the State Gaming Agency for a determination of suitability; (iii) the person is not an employee or agent of any other gaming operation; and (iv) the person has been in the continuous employ of the Tribe for at least three years prior to the effective date of this Compact.

(d) Notwithstanding subdivision (a), the Tribe may employ or retain in its employ a person whose application for a determination of suitability, or for a renewal of such a determination, has been denied by the State Gaming Agency, if the person is an enrolled member of the Tribe, as defined in this subdivision, and if (i) the person holds a valid and current license issued by the Tribal Gaming Agency that must be renewed at least biennially; (ii) the denial of the application by the State Gaming Agency is based solely on activities, conduct, or associations that antedate the filing of the person's initial application to the State Gaming Agency for a determination of suitability; and (iii) the person is not an employee or agent of any other gaming operation. For purposes of this subdivision, "enrolled member" means a person who is either (a) certified by the Tribe as having been a member of the Tribe for at least five (5) years, or (b) a holder of confirmation of membership issued by the Bureau of Indian Affairs.

(e) Nothing herein shall be construed to relieve any person of the obligation to apply for a renewal of a determination of suitability as required by Section 6.5.6.

Sec. 6.4.5. Gaming Resource Supplier. Any Gaming Resource Supplier who, directly or indirectly, provides, has provided, or is deemed likely to provide at least twenty-five thousand dollars ($25,000) in Gaming Resources in any 12-month period, or who has received at least twenty-five thousand dollars ($25,000) in any consecutive 12-month period within the 24-month period immediately preceding application, shall be licensed by the Tribal Gaming Agency prior to the sale, lease, or distribution, or

further sale, lease, or distribution, of any such Gaming Resources to or in connection with the Tribe's Operation or Facility. These licenses shall be reviewed at least every two years for continuing compliance. In connection with such a review, the Tribal Gaming Agency shall require the Supplier to update all information provided in the previous application. For purposes of Section 6.5.2, such a review shall be deemed to constitute an application for renewal. 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.

Sec. 6.4.6. Financial Sources. Any person extending financing, directly or indirectly, to the Tribe's Gaming Facility or Gaming Operation shall be licensed by the Tribal Gaming Agency prior to extending that financing, provided that any person who is extending financing at the time of the execution of this Compact shall be licensed by the Tribal Gaming Agency within ninety (90) days of such execution. These licenses shall be reviewed at least every two years for continuing compliance. In connection with such a review, the Tribal Gaming Agency shall require the Financial Source to update all information provided in the previous application. For purposes of Section 6.5.2, such a review shall be deemed to constitute an application for renewal. Any agreement between the Tribe and a Financial Source 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 the date of termination, upon revocation or non-renewal of the Financial Source's license by the Tribal Gaming Agency based on a determination of unsuitability by the State Gaming Agency. The Tribe shall not enter into, or continue to make payments pursuant to, any contract or agreement for the provision of financing with any person whose application to the State Gaming Agency for a determination of suitability has been denied or has expired without renewal. A Gaming Resource Supplier who provides financing exclusively in connection with the sale or lease of Gaming Resources obtained from that Supplier may be licensed solely in accordance with licensing procedures applicable, if at all, to Gaming Resource Suppliers. The Tribal Gaming Agency may, at its discretion, exclude from the licensing requirements of this

Sec. 15.6. Representations.

By entering into this Compact, the Tribe expressly represents that, as of the date of the Tribe's execution of this Compact: (a) the undersigned has the authority to execute this Compact on behalf of his or her tribe and will provide written proof of such authority and ratification of this Compact by the tribal governing body no later than October 9, 1999; (b) the Tribe is (i) recognized as eligible by the Secretary of the Interior for special programs and services provided by the United States to Indians because of their status as Indians, and (ii) recognized by the Secretary of the Interior as possessing powers of self-government. In entering into this Compact, the State expressly relies upon the foregoing representations by the Tribe, and the State's entry into the Compact is expressly made contingent upon the truth of those representations as of the date of the Tribe's execution of this Compact. Failure to provide written proof of authority to execute this Compact or failure to provide written proof of ratification by the Tribe's governing body will give the State the opportunity to declare this Compact null and void.

IN WITNESS WHEREOF, the undersigned sign this Compact on behalf of the State of California and the Chuckchansi Indians.

Done at Sacramento, California, this 10th day of September 1999.

STATE OF CALIFORNIA

Gray Davis

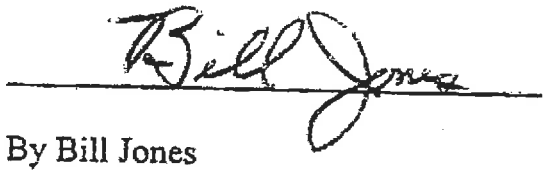
By Gray Davis
Governor of the State of California

CHUCKCHANSI INDIANS

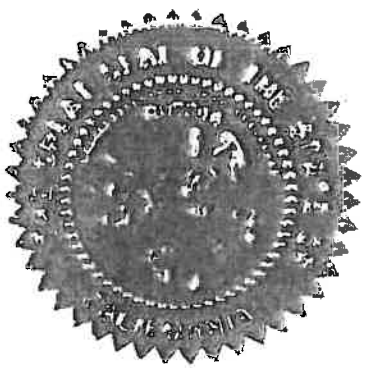
Roger T Davis

By ROGER DAVIS
Chairperson of the
Chuckchansi Indians

ATTEST:



By Bill Jones
Secretary of State, State of California



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COURT OF APPEAL Fifth APPELLATE DISTRICT, DIVISION

COURT OF APPEAL CASE NUMBER: F077136

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 214666
NAME: Michael A. Robinson
FIRM NAME: Fredericks Peebles & Morgan LLP
STREET ADDRESS: 2020 L Street, Suite 250
CITY: Sacramento STATE: CA ZIP CODE: 95811
TELEPHONE NO.: (916) 441-2700 FAX NO.: (916) 441-2067
E-MAIL ADDRESS: mrobinson@ndnlaw.com
ATTORNEY FOR (*name*): Respondents

SUPERIOR COURT CASE NUMBER: 17CECG02613

APPELLANT/
PETITIONER: Osceola Blackwood Ivory Gaming Group, LLC

RESPONDENT/
REAL PARTY IN INTEREST: Picayune Rancheria of Chukchansi Indians and Chukchansi Economic Development Authority

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(*Check one*): [x] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Picayune Rancheria of Chukchansi Indians, et al.

2. a. [x] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Nature of interest (*Explain*):
(1)		
(2)		
(3)		
(4)		
(5)		

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: August 13, 2018

Michael A. Robinson
(TYPE OR PRINT NAME)

(SIGNATURE OF APPELLANT OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2017]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
www.courts.ca.gov

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form Save this form Clear this form

PROOF OF SERVICE

I declare that I am employed with the law firm of Fredericks Peebles & Morgan LLP, whose address is 2020 L Street, Suite 250 Sacramento, California 95811. I am employed in Sacramento County, California. I am over the age of 18 and am not a party to this case.

On **August 14, 2018,** I caused the following documents(s) to be served as described as:

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

on the interested party(ies) in this action as addressed as follows:

Eileen R. Ridley Foley & Lardner LLP 555 California Street Suite 1700 San Francisco, CA 94104 Email: eridley@foley.com	Attorney for Appellants
Kimberly A. Klinsport Katherine A. Shoemaker Foley & Lardner LLP 555 South Flower Street Suite 3500 Los Angeles, CA 90071 Email: kklinsport@foley.com Email: kshoemaker@foley.com	Attorney for Appellants
Supreme Court of California 350 McAllister Street San Francisco, CA 94102	
The Hon. Mark W. Snauffer Fresno County Superior Court 1300 O Street Fresno, CA 93721-2220	Judge of the Superior Court

XX **Federal Express Mail**: by placing a true and correct copy thereof in an overnight delivery envelope in a Federal Express drop box at Sacramento, California, addressed to all above.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed on **August 14, 2018** at Sacramento, California.

/s/ Sally Eredia
SALLY EREDIA

STATE OF CALIFORNIA California Court of Appeal, Fifth Appellate District	***PROOF OF SERVICE*** **STATE OF CALIFORNIA** California Court of Appeal, Fifth Appellate District

Case Name: **Osceola Blackwood Ivory Gaming Group LLC v. Picayne Rancheria of Chukchansi Indians**
Case Number: **F077136**
Lower Court Case Number: **17CECG02613**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **mrobinson@ndnlaw.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF - RESPONDENT'S BRIEF (FEE PREVIOUSLY PAID)	Respondents Brief
CERTIFICATE - CERTIFICATE OF INTERESTED ENTITIES OR PERSONS	Certificate of Interested Entities or Persons

Service Recipients:

Person Served	Email Address	Type	Date / Time
Eileen Ridley Foley & Lardner LLP 151735	eridley@foley.com	e-Service	8/14/2018 2:41:26 PM
Kimberly Klinsport Foley & Lardner LLP 259018	kklinsport@foley.com	e-Service	8/14/2018 2:41:26 PM
Michael Robinson Fredericks Peebles & Morgan LLP 00214666	mrobinson@ndnlaw.com	e-Service	8/14/2018 2:41:26 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

8/14/2018

Date

/s/Michael Robinson

Signature

Robinson, Michael (214666)

Last Name, First Name (PNum)

Fredericks Peebles & Morgan LLP

Law Firm