3RD CIVIL NO. 070512

In the Court of Appeal of the State of California
Third Appellate District

Sharp Image Gaming, Inc.,
Plaintiff and Respondent

v.

Shingle Springs Band of Miwok Indians,
Defendant and Appellant

On Appeal From A Judgment Of The Superior Court
For The County Of El Dorado, Case No. PC20070154
The Hon. Nelson Brooks, Judge

APPELLANT'S OPENING BRIEF

Paula M. Yost (State Bar No. 156843)
Mary Kay Lacey (State Bar No. 142812)
Ian Barker (State Bar No. 240223)
SNR DENTON US LLP
525 Market Street, 26th Floor
San Francisco, California 94105
Phone: (415) 882-5000
Fax: (415) 882-0300
Attorneys for Defendant and Appellant
Shingle Springs Band of Miwok Indians

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

CALIFORNIA CASES

OTHER STATE CASES

FEDERAL STATUTES AND REGULATIONS

CALIFORNIA STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The Superior Court aptly summarized five years of litigation in a five word sentence, observing that "it's not a perfect world." (RT/Vol.XIV/pp. 3665:23-3666:3.) That is true. Nevertheless, the Superior Court was required to abide by the jurisdictional limits on its power, and correctly follow federal and state law on the issues before it.

In particular, the Superior Court erred in assuming subject matter jurisdiction over this breach of contract lawsuit by purporting to overturn a federal agency's binding determination that the contract was unenforceable under a preemptive federal statute. It was also error to assume jurisdiction over a sovereign Indian nation after finding the Tribe did not clearly and unequivocally waive its immunity. Nor did the law permit the Superior Court to allow the case to proceed years after the relevant statute of limitations expired, or disregard evidence establishing that the California Department of Justice found the plaintiff so lacking in moral and ethical integrity that it would not support issuing a license—meaning the disputed contract could not have been performed regardless of any alleged breach.

All of this occurred in the present case, yet none of it had to happen. This Court cannot make the world perfect. But it can and must require the Superior Court to honor the fundamental and dispositive rules governing the relationships among the federal government, state governments, and Indian tribal governments.

INTRODUCTION

This case shows why Congress was so concerned, when enacting the Indian Gaming Regulatory Act (IGRA) in 1988, about the need to ensure sovereign tribal governments are the primary beneficiaries of their own gaming operations and protected from unscrupulous contractors. A decade after Sharp Image Gaming, Inc. ("Sharp") tried and failed to develop a casino for the Shingle Springs Band of Miwok Indians ("Tribe"), Sharp

sued to recover revenue from an entirely different gaming facility built at great risk and expense by the Tribe, and with the assistance of a developer possessing the resources needed to make that facility, Red Hawk Casino, possible. Not only did Sharp seek to recover approximately $240 million from a casino in which it had no involvement, but Sharp claimed the exclusive right to provide machines to any casino ever developed by the Tribe for all time. Sharp claimed this right to exclusivity, even while admitting at trial that it received this claimed future "exclusive" in exchange for doing nothing. (RT/Vol.V/p. 1245:20-22 ("And it says at the end about the exclusivity of any future facility, I didn't have to do anything to achieve the exclusive.").)[1]

Despite the lack of consideration inherent in Sharp's theory of its case, and given the limited evidence the jury was allowed to hear based on the Superior Court's erroneous legal rulings leading up to trial, Sharp secured a judgment against the Tribe for $30 million in revenue from Red Hawk. However, as the federal agency that reviewed Sharp's overreaching contracts rightly concluded, the agreements are illegal and unenforceable because, among other reasons, they purport to make Sharp, not the Tribe, the primary beneficiary of the Tribe's gaming operation. Specifically, Sharp would be paid "off the top" and, indeed, before any of the persons who made (and make) the facility possible (including the Tribe, its developer, lenders and employees). Such a result violates governing federal law, which allows only approved contractors to recover an appropriate percentage of revenues from Indian gaming facilities, and even then, only from "*net* revenue"—i.e., the revenue that remains (if any) *after* the costs of doing business have been deducted. 25 U.S.C. §§ 2703(9); 2711(c). To allow Sharp to cut in line and get paid before operating costs,

[1] Throughout this brief, the Reporter's Transcript is abbreviated as "RT," and Appellant's Appendix as "AA."

and thus before anyone else, violates both the letter and spirit of IGRA. 25 U.S.C. § 2702(2).

Moreover, IGRA's revenue-related restrictions are hardly insignificant, particularly in the context of a debt-burdened gaming facility such as Red Hawk, where the Tribe had to assume approximately $525 million in debt to build its gaming facility and the interchange required to access it, and must now make payments to those who made the casino possible in order to keep the doors open. Indeed, these are precisely the considerations that formed the basis for the trial court's decision to stay the judgment's enforcement vis-à-vis Red Hawk Casino.

Given the disconnect between Sharp's claims and IGRA's requirements, it is not surprising that the federal agency specifically charged with regulating Indian gaming (the National Indian Gaming Commission or NIGC) took binding, final agency action declaring Sharp's gaming contracts "void"—a fact the jury was not allowed to know. Notably, it was not only the federal government that disapproved Sharp's business practices. In November 2008, one month before Red Hawk opened, Sharp could not have supplied gaming devices even if its contracts were valid, because the State's Bureau of Gambling Control found Sharp to be "unsuitable" to lease or sell *any* gaming machines within California—another fact the jury was not allowed to know.

In the end, Sharp's effort to turn a limited investment in a failed business venture known as Crystal Mountain Casino into a windfall by skimming $30 million "off the top" of Red Hawk's revenue—for literally doing nothing—fails. The lower court's pretrial rulings, the verdict, and the resulting judgment, rest on numerous prejudicial errors of established federal and state law, compelling reversal, and an award of attorney fees, for the Tribe.

STATUTORY SETTING: IGRA

When Congress enacted IGRA in 1988, its stated purpose was to "promot[e] tribal economic development [and] self-sufficiency[.]" 25 U.S.C. § 2702(1). To that end, IGRA was drafted to (1) assure the integrity of Indian gaming; (2) guard against "organized crime and other corrupting influences"; and (3) require that Indian tribes be the primary beneficiaries of their gaming operations. 25 U.S.C. §§ 2702(2).

In addition to giving federal courts complete preemptive control over Indian gaming, Congress established the NIGC as a new federal agency charged with IGRA's implementation and enforcement. 25 U.S.C. §§ 2702(3), 2706. Among other powers, the NIGC has full authority over "management contracts," and in particular, contracts under which a third party might exert authority or control over a Tribal gaming facility. To determine whether a contract involving Indian gaming is a "management contract" within the statute, and more precisely, to ensure that all such contracts satisfy protective federal requirements and that the contractor itself is "suitable" to exercise any degree over an Indian gaming operation, the agency must approve all such contracts for them to be effective. *See* 25 U.S.C. §§ 2710(d)(9), 2711; *United States ex rel. Maynard Bernard v. Casino Magic Corp.* (8th Cir. 2002) 293 F.3d 419, 421. Once the NIGC determines, in final agency action, that it possesses authority over a particular Indian gaming contract, that decision is entitled to "binding and preclusive" legal effect "unless and until" it is successfully challenged in a federal district court. *AT&T Corp. v. Coeur D'Alene Tribe* (9th Cir. 2002) 295 F.3d 899, 906, 908. Further, judicial review of the NIGC's determination of whether a contract is subject to its authority, like the review of other decisions made by federal administrative agencies, is within the *exclusive* jurisdiction of the federal courts. 25 U.S.C. § 2714; *United States ex rel. Saint Regis Mohawk Tribe v. President R.C.* (2d Cir. 2006)

451 F.3d 44, 51; *Federal Nat'l Mortgage Ass'n v. LeCrone* (6th Cir. 1989) 868 F.2d 190, 193.

STATEMENT OF FACTS

Appellant Shingle Springs Band of Miwok Indians is a federally recognized Indian Tribal government (hereinafter "Tribe"). (AA/Vol.II/pp. 338, 351.) *See* 25 U.S.C. § 479a-1; 77 Fed. Reg. 47868, 47871 (Aug. 10, 2012).) In connection with the United States' settlement of landless Indians on "Rancherias" within California, the Tribe's existing reservation was established in 1920, with the purchase of 160 acres in El Dorado County.[2]

Years later, in the 1960s, the Tribe's Reservation lost access to and from public roadways due to the State's realignment of Highway 50 to its present location. (RT/Vol.V/pp. 1387:21-1388:6.) The Tribe's only access was Grassy Run Road, a private road that wound through a private residential subdivision and that dead-ended at the Reservation. (RT/Vol.V/pp. 1388:7-16; RT/Vol.XI/pp. 2857:9-2858:4.) Owned and controlled by the Grassy Run Homeowner's Association, the Tribe was prohibited from using the road for any commercial purpose, and was only allowed to use the road for residential and limited governmental purposes. (RT/Vol.V/pp. 1388:17-28; RT/Vol.XI/pp. 2858:5-15, 2860:27-2861:15.) The realignment effectively landlocked the Reservation, and complicated its ability to pursue economic development on its own lands. (RT/Vol.V/pp. 1387:21-1388:6, 1393:13-21; RT/Vol.XI/pp. 2857:9-2858:4.)

---

[2] Veronica E. Velarde Tiller, ed., *Tiller's Guide to Indian Country*, 481 (2005) (attached to Appellant's Appendix Of Computer-Based And Other Authorities, Tab 4); *see generally* William Wood, *Symposium: 60 Years After the Enactment of the Indian Country Statute*, 44 Tulsa L. Rev. 317, 356-59 (Winter 2008).

Despite the Reservation's landlocked status, a series of gaming investors approached the Tribe in the early 1990's, seeking to profit from the business of Indian gaming by developing a casino on the Tribe's land. (RT/Vol.V/pp. 1389:16-22, 1391:16-23.) These investors, known within the Tribe as "Indian shoppers" (RT/Vol.V/p. 1391:24-28), were fairly numerous after IGRA's passage.

Appellee, Sharp Image Gaming, Inc., was among them, and met with the Tribe in 1996. (RT/Vol.V/pp. 1172:28-1173:5.) Unlike other early potential developers who viewed the lack of public access to the Reservation as an impediment to successfully establishing a gaming venture, Sharp agreed to pursue gaming on the Reservation. (RT/Vol.V/pp. 1203:8-12, 1264:24-1265:26.) To that end, Sharp entered two gaming contracts with the Tribe. The first was the Gaming Machine Agreement ("GMA"), which was entered in May 1996, and required Sharp to fund a casino, known as Crystal Mountain Casino. (AA/Vol.XXXIV/pp. 9146-9151.) The second was the Equipment Lease Agreement ("ELA"), which was entered in November 1997 (AA/Vol.XXXIV/pp. 9154-9161), along with a Promissory Note, reflecting Sharp's advances to build Crystal Mountain. (AA/Vol.XXXIV/pp. 9152-9153.)

A. Sharp's Contracts And Gaming At Crystal Mountain

1. The GMA

The GMA's terms detailed the plan to develop Crystal Mountain Casino. Sharp agreed to "advance all funds necessary for the immediate construction of a Sprung facility," which was a temporary tent structure that would house Sharp's gaming machines, until a "larger" permanent Casino facility was built. (AA/Vol.XXXIV/pp. 9151; RT/Vol.V/pp. 1230:7-1231:9, 1395:14-20, 1404:18-21.)

The temporary tent opened with Sharp's gaming machines for one night in October 1996, but it was shut down for safety reasons attributable, in part, to the lack of public access to the land-locked Reservation. (RT/Vol.V/pp. 1399:22-1400:24.) Immediately thereafter, the NIGC declared the GMA "void." (AA/Vol.XXXIV/pp. 9207-9208.) The NIGC concluded Sharp had supplied slot machines (in IGRA parlance, "Class III machines"), which were illegal without an effective Tribal-State Compact in place, and which the Tribe did not then have. (AA/Vol.XXXIV/pp. 9207-9208.)[3] At trial, Mr. Anderson admitted he had supplied the Tribe gaming machines capable of being played in Class III mode. (RT/Vol.X/pp. 2654:24-2655:14.) Crystal Mountain opened again in the spring of 1997, without gaming machines, but it was unsuccessful and closed within months. (RT/Vol.V/p. 1194:21-24, RT/Vol.VI/pp. 1538:19-1539:19.)

2. The ELA And The Promissory Note

In June 1997, Sharp sent a letter to the Tribe asking for new contracts to replace the GMA, submitting the ELA and Promissory Note. The letter stated the enclosed contracts "incorporate the points of the original [GMA] agreement, but further address some points that benefit both parties in having formalized." (AA/Vol.XXXIV/p. 9215.) In keeping with the terms of the GMA—in which Sharp committed to develop a casino for the Tribe, (AA/Vol.XXXIV/p. 9151)—the Tribal Council and Mr. Anderson testified that developing Crystal Mountain was a "two-step" or "multi-step" plan. (RT/Vol.V/pp. 1233:14-1234:6, 1404:18-1405:10.)

---

[3] The Tribe's Compact became effective May 2000. "Notice of Approved Tribal-State Compacts," 65 Fed. Reg. 31189 (May 16, 2000); 25 U.S.C. § 2710; *see also Pueblo of Santa Ana v. Kelly* (10th Cir. 1997) 104 F.3d 1546, 1557-58 (state and tribe must have entered into Compact, and the Compact must be in effect, for Class III gaming to be authorized).

Crystal Mountain would start in a "temporary" structure, and then a larger "permanent" casino would be built in the future, using gaming machines proceeds from the temporary tent casino. (RT/Vol.V/pp. 1233:14-1234:6, 1404:18-1405:10.)

With this plan in place, Mr. Anderson attended a Tribal Council meeting (open to all Tribal members) on November 15, 1997, which was memorialized in meeting minutes. (AA/Vol.XXXIV/p. 9162.) The minutes reflect, and Mr. Anderson confirmed, that Sharp was attempting to solve the Tribe's access problem by "purchas[ing] property to provide an easement to the Rancheria." (AA/Vol.XXXIV/p. 9164; RT/Vol.V/pp. 1264:24-1266:14.) The minutes reflect Mr. Anderson's expressed expectation that "the Casino" would reopen within months—i.e., January 1998. (AA/Vol.XXXIV/p. 9164; RT/Vol.V/pp. 1211:17-1212:6.) The Tribal Council members' testimony corroborated that written evidence, and evidenced their understanding that, as of November 1997, Sharp had a plan to reopen Crystal Mountain in the near future. (RT/Vol.V/p. 1409:22-27; RT/Vol.VI/pp. 1681:14-1682:1.) At the end of the meeting, the Tribal Council approved the ELA and the Note. (AA/Vol.XXXIV/pp. 9152, 9154, 9165; *see also* RT/Vol.V/p. 1383:10-12; RT/Vol.VI/pp. 1473:14-26, 1657:8-18.)

Under the ELA, Sharp had the right to provide 400 "video gaming devices" to the Tribe (the "Equipment"), as well as the "exclusive right" to "supply additional gaming devices ... to be used at its existing or any future gaming facility or facilities." (AA/Vol.XXXIV/p. 9154.) The ELA also stated the "Equipment" "will be delivered to the Crystal Mountain Casino." (AA/Vol.XXXIV/p. 9154.)

Under the Note, the Tribe acknowledged the total amount previously invested to develop Crystal Mountain (pursuant to the GMA) was $3,167,692.86. The Note stated this was "the full amount owed up to

September 30, 1997," and that the "principal sum" of the Note was "not to exceed" this amount. (AA/Vol.XXXIV/p. 9152.) Like the ELA, the Note also referenced "400 video gaming devices," and provided that repayment was to "commence ... following the date that four hundred (400) video gaming devices ... are installed and in operation at Borrower's Gaming Facility and Enterprise ("Enterprise")." (AA/Vol.XXXIV/p. 9152.)

The Crystal Mountain tent structure never reopened, and it never generated the revenues needed to build a larger, permanent facility, as the parties contemplated when entering the ELA and Note in November 1997. (AA/Vol.XXXIV/p. 9164; RT/Vol.V/pp. 1347:14-1348:23; RT/Vol.X/p. 2573:16-28.) In addition, although Sharp claimed it had no obligation to solve the Tribe's access problem, there was no dispute that a permanent solution was not achieved and Crystal Mountain never reopened. (RT/Vol.X/pp. 2573:16-18, 2595:13-21, 2599:5-17.)[4] Mr. Anderson also admitted that Sharp never "installed" or put "in operation" 400 gaming machines at Crystal Mountain as the Note required, which, Mr. Anderson further admitted, was a necessary condition to trigger its commencement date. (RT/Vol.X/pp. 2570:5-21, 2572:15-22.)

B. The Tribe Cancelled Sharp's Contracts In 1999

A year after the contracts were entered, Sharp advised the Tribe that it would not commit further resources to Crystal Mountain. (RT/Vol.X/p. 2664:1-23). Despite its withdrawal of funding, Sharp later maintained the Tribe "turned its back on Sharp Image" by seeking a new developer. (AA/Vol.XXVI/p. 6538:3-4.) In fact, it is undisputed that Mr. Anderson

---

[4] There was also uncontradicted trial testimony by the Grassy Run Homeowners Association, and El Dorado County Officials, that Grassy Run Road would never be made available to commercial traffic on a permanent basis, and an easement to the Rancheria from Grassy Run Road would never be approved. (RT/Vol.XI/pp. 2860:27-2861:15; RT/Vol.XII/pp. 3150:23-3151:11.)

and the Tribe *both* approached potential new investors after Sharp refused to further invest in Crystal Mountain's development. (RT/Vol.X/pp. 2664:24-2665:14.) One of these new investors was Lakes Entertainment, Inc. (RT/Vol.IX/p. 2513:2-5.) Lakes had the resources to both solve the Tribe's access problem and develop a viable casino, advancing all costs for the development of a highway interchange that would connect Highway 50 directly to Shingle Springs Rancheria, and a Las Vegas-style gaming facility known as Red Hawk Casino. (RT/Vol.XII/pp. 3122:11-3123:11.) While Lakes took on all development costs, the actual construction of the interchange and casino required the Tribe to secure substantial financing, resulting a $525 million debt. (RT/Vol.XII/pp. 3122:11-3123:11, 3334:18-3335:19.)

Before entering the agreement with Lakes, and 18 months after the Tribe entered the ELA and Note with the expectation that Crystal Mountain would reopen in a few months, the Tribe cancelled its contracts with Sharp in June 1999. (AA/Vol.XIV/pp. 3358-3362; AA/Vol.XIX/pp. 4617-4618; AA/Vol.XXXIV/pp. 9212, 9214; RT/Vol.IX/p. 2366:3-5.) Mr. Anderson admitted he understood his contracts were cancelled in 1999 when he received letters from the Tribe (including the June 28, 1999 letter stating the contracts were "void" because they would not receive necessary federal approvals). (RT/Vol.IX/p. 2366:3-5; RT/Vol.X/p. 2573:11-15; AA/Vol.XIV/p. 3361.) He also testified the only reason he waited until 2007 to file suit—eight years after the cancellation, and almost two years before Red Hawk opened—was because that is when it first appeared the Tribe would have money. (RT/Vol.X/p. 2554:7-16.)

C. Sharp's Lawsuit

Sharp filed its original Complaint in El Dorado County Superior Court on March 12, 2007. (AA/Vol.I/p. 1.) It alleged breach of contract under the GMA entered in May 1996, and the ELA and Note entered in

November 1997. The Complaint also alleged a "series" of "oral agreements" entered "later" regarding the repayment of advances made after the Note's execution. (AA/Vol.I/pp. 5:9-10, 7:21-24.) The Complaint asserted no sovereign immunity waiver as to the claimed oral contracts (AA/Vol.I/p. 5:9-10), leading Sharp to amend its lawsuit to include that allegation. (AA/Vol.I/p. 18:18-21.)

On May 22, 2007, Sharp filed a First Amended Complaint ("FAC"), claiming the oral agreements included an oral "waiver of sovereign immunity" that was "actually authorized" by the Tribal Council. (AA/Vol.I/p. 18:18-21.) Despite the amendment, Sharp later conceded its factual assertion was false, and acknowledged the Tribe never orally waived its sovereign immunity. (RT/Vol.V/pp. 1287:25-1288:2).

Disavowing this allegation of its FAC, Sharp asserted a different new fact during trial. Over the Tribe's objection, Sharp filed a Second Amended Complaint ("SAC") on November 30, 2011, alleging a new reading of the Note's provisions. Specifically, Sharp asserted it was entitled to $1.2 million in "advances" post-dating the Note, which were above the face amount and "not to exceed" provision of the Note. (AA/Vol.XXVI/pp. 6540:24-26, 6542:15-16.) The SAC also eliminated all causes of action involving the GMA. (RT/Vol.VIII/pp. 2139:22-2140:19.) This amendment confirmed Sharp's prior decision, when opposing the Tribe's motion to change venue, that it would drop all GMA-based claims (representing a claim of $5 million), to continue litigating in El Dorado County. (AA/Vol.I/p. 19:24-25; AA/Vol.VIII/p. 2012:1-7.)

This left Sharp, at trial, with breach of contract claims involving only the ELA and the Note.[5]

---

[5] Sharp also dropped its Fifth through Ninth Causes of Action from the SAC at the conclusion of trial and before the case went to the jury. (RT/Vol.XIV/p. 3731:5-12.)

D. Procedural History

1. The Tribe's Jurisdictional Motions

After Sharp filed its FAC, the Tribe moved, on July 9, 2007, to quash/dismiss on the bases of the federal doctrine of complete preemption and sovereign immunity. (AA/Vol.I/pp. 27-30.) The Tribe supported its motion, in part, with an Advisory Opinion letter from the NIGC's General Counsel concluding the GMA and ELA violated IGRA. (AA/Vol.I/pp. 33-44.) When Sharp sought expansive jurisdictional discovery, including every document that mentioned Sharp, Mr. Anderson, or Crystal Mountain Casino at any time (AA/Vol.I/pp. 57-59), the Tribe sought to bifurcate so the Court could resolve the purely legal issues presented by federal preemption first. (AA/Vol.I/pp. 31-32.)

Sharp opposed the bifurcation, and challenged the admissibility of the Advisory Opinion letter from the NIGC's General Counsel, concluding the GMA and ELA violated IGRA. (AA/Vol.I/pp. 33-44.) The trial court, Judge Daniel Proud presiding, denied the Motion to Bifurcate, and separately found the NIGC's Advisory Opinion offered in support of the Tribe's Motion to Dismiss did not constitute "official agency action," and lacked "legal effect" "until the agency [took] a final determinative action." (AA/Vol.I/pp. 49-50, 53.)

Following that evidentiary ruling, and complying with all requirements of the Administrative Procedure Act, the Tribe met with the NIGC and asked the Chairman to undertake a formal review of the agreements and make a final agency determination as to whether the contracts violated IGRA. (AA/Vol.I/pp. 62-66.) Supporting that request, the Tribe explained that formal review of the contracts was necessary because the trial court had ruled the NIGC's earlier determination would

only be entitled to "legal effect" if the agency took "final determinative action." (AA/Vol.VI/p. 1601:15-26.)

In the meantime, and during the course of extensive jurisdictional discovery directed by the court (AA/Vol.II/pp. 376-377), the NIGC advised the parties on July 18, 2008, that it would undertake a formal review of the contracts, and advised Sharp that before making any decision, it would "give Sharp an opportunity to share [its] views on this subject." (AA/Vol.I/pp. 67-68.) Both parties had the opportunity to submit briefing to the NIGC before it decided whether the GMA and ELA constituted "management contracts" under IGRA, and both did so. (AA/Vol.VI/pp. 1461-1465, 1486-1490; AA/Vol.XVI/pp. 3919-3921.)

2. Formal Action By The NIGC

On April 23, 2009, the Chairman of the NIGC issued a "formal determination under 25 U.S.C. § 2711" concerning the GMA and ELA, finding that "each agreement individually is a management contract," and disapproving each because it "fail[s] to include certain statutory provisions required for management contracts," rendering the Agreements "void." (AA/Vol.XVI/p. 3919; AA/Vol.XXIII/p. 5902.) Specifically, the Chairman found the ELA (and the GMA) had numerous indicia of management, that purported to confer on Sharp "broad operational control" of the gaming operation, and confirmed the ELA was not, as Sharp contended, a simple equipment lease agreement. (AA/Vol.XVI/p. 3926; AA/Vol.XXIII/p. 5909.) The Chairman noted that Sharp's agreements gave Sharp the exclusive right to provide gaming machines for all of the casino floor space, which meant that "the essence of managing a casino," was not within the Tribe's control. (AA/Vol.XVI/p. 3926; AA/Vol.XXIII/p. 5909.) Having confirmed Sharp's agreements were management agreements requiring NIGC approval, the Chairman found he could not approve the

agreements, observing they lacked many mandatory provisions management contracts must contain. (AA/Vol.XVI/pp. 3926-3928; AA/Vol.XXIII/pp. 5909-5911.) *See* 25 C.F.R. § 531.1(a)-(c).

In addition, the Chairman concluded the payment terms of the agreements violated IGRA. (AA/Vol.XVI/pp. 3929-3930; AA/Vol.XXIII/pp. 5912-5913.) Specifically, if Sharp's contracts were enforced (i.e., if Sharp collects breach of contract damages under the terms of its contracts), Sharp would receive 30% off the top of the gaming revenues—before any expenses or operating costs are paid. (AA/Vol.XVI/pp. 3929-3930; AA/Vol.XXIII/pp. 5912-5913.) Because the ELA's definition of "net revenue" excludes expenses and operating costs, the Chairman observed the ELA actually purports to give Sharp the right to 30% of "gross revenue." (AA/Vol.XV/p. 3490; AA/Vol.XXIII/p. 5870.) Significantly, because the ELA's definition of "net revenue" exceeds the "net revenue" allowed under IGRA (25 U.S.C. § 2711(c)(1)-(2)), the NIGC found Sharp would "receive the majority of the benefit from the operation over a five- or seven-year term" of the contract, and that allowing such payments would necessarily interfere with Tribe's ability to govern its gaming operation. (AA/Vol.XVI/pp. 3929-3930; AA/Vol.XXIII/pp. 5912-5913.) In that regard, it would violate IGRA's mandate that "tribes, not their contractors, are supposed to be the primary beneficiaries of Indian gaming. 25 U.S.C. § 2702(2)." (AA/Vol.XVI/pp. 3929-3930; AA/Vol.XXIII/pp. 5912-5913.)

The Chairman's final decision also advised that any challenge to the NIGC's formal determination is "subject to appeal to the full Commission [under] 25 C.F.R. § 539"[6] and thereafter to "a federal district court [under]

[6] 25 C.F.R, part 539, was recently recodified in parts 580 and 583. *See* Appeal Proceedings Before the Commission, 77 Fed. Reg. 58,941, 58,946-58,949 (Sept. 25, 2012).

25 U.S.C. § 2714." (AA/Vol.XVI/p. 3919; AA/Vol.XXIII/p. 5902.) The determination became final on June 20, 2009, and was subject thereafter to appeal to an appropriate federal district court under 25 U.S.C. § 2714. (AA/Vol.XVI/p. 3915; AA/Vol.XXIII/p. 5918.) Although Sharp had participated in the administrative process leading up to the NIGC's final decision (AA/Vol.XVI/pp. 3919-3921; AA/Vol.XXIII/pp. 5902-5904; AA/Vol.V/pp. 1295:27-1296:8, 1297-1317), Sharp never filed such an appeal. (AA/Vol.XV/p. 3472:1-3; AA/Vol.XXIII/pp. 5886:22-5887:5, 5868:25-5869:3, 5880-5882.)

3. The Superior Court's Ruling On The Motions To Dismiss

On September 11, 2009, three months after the NIGC's determination became "final agency action," the Superior Court heard oral argument on the Tribe's Amended Preemption and Sovereign Immunity Motions to Quash/Dismiss.[7] The Court issued its Order on November 30, 2009, denying the Tribe's Motions on both grounds. (AA/Vol.VII/pp. 1941-1961.) Over the Tribe's objection, the Superior Court reached the merits of Sharp's procedural and substantive challenge to the NIGC's final agency action, ruling that (1) the NIGC lacked "jurisdiction" to review Sharp's gaming contracts (despite the NIGC's contrary conclusion); and (2) even if the federal agency had such authority, it did not, in fact, take "final agency action" on Sharp's contracts (despite the NIGC's express finding that it did). (AA/Vol.VII/pp. 1954:11-1958:17; *see* AA/Vol.XVI/p. 3919; AA/Vol.XXIII/p. 5902; AA/Vol.XVI/p. 3915; AA/Vol.XXIII/p. 5918.)

[7] The Tribe's refiled amended Motions after discovery closed, and filed a supplemental memorandum supporting its preemption motion on July 29, 2009, after the NIGC Chairman's decision became final agency action. (AA/Vol.VI/pp. 1608-1626.)

In addition, with respect to its ruling on sovereign immunity, the Superior Court declined to resolve this jurisdictional issue, ruling that the sovereign immunity defense should be decided at trial because each side had a reasonable interpretation of the breadth of the Tribe's immunity waiver. (AA/Vol.VII/pp. 1959:20-1960:23).

4. The Tribe's Writ Petition To This Court

The Tribe petitioned this Court for a Writ of Mandate on December 15, 2009, asking that the important jurisdictional questions related to the Tribe's preemption and sovereign immunity claims be addressed before the Tribe was forced to stand trial. *Shingle Springs Band of Miwok Indians v. Superior Court*, No. C063645 (3rd. Dist. filed Dec. 15, 2009). The Tribe's Petition was denied on January 21, 2010.

The Tribe also petitioned the California Supreme Court for review. The Supreme Court ordered a stay of proceedings in the Superior Court on March 8, 2010. *Shingle Springs Band of Miwok Indians v. Superior Court*, S179922 (Cal. filed January 29, 2010). On March 30, 2010, the Supreme Court denied review.

5. The Tribe's Motion To Establish Sharp Could Not Perform The Disputed Contracts At The Time Performance Allegedly Became Due.

Immediately following the Supreme Court's stay, in April 2010, the Tribe discovered, through an independent internet search, that Sharp failed to produce documents it had previously provided to the California Bureau of Gambling Control, referencing its business dealings with the Tribe. (AA/Vol.IX/pp. 2179-2207, 2287-2298; AA/Vol.X/pp. 2490:7-12, 2504-2505.) The documents included an investigative report prepared by the Bureau, dated November 2008 (hereinafter "Bureau Report"), which specifically referenced Sharp's instant lawsuit against the Tribe.

(AA/Vol.IX/pp. 2183-2184.) The Bureau Report expressed various concerns about Sharp's moral and ethical integrity, including business dealings in foreign markets and unresolved tax liens, and specifically questioned the veracity of Sharp's representations about its "investments" with the Tribe. (AA/Vol.IX/pp. 2184-2186, 2190-2191, 2193.) The Bureau Report concluded that Sharp was not "suitable to conduct business within the California gaming environment." (AA/Vol.IX/p. 2305.)

Shortly thereafter, the Tribe sought sanctions against Sharp (in September 2010), commensurate with the withholding of this evidence. (AA/Vol.VIII/pp. 2129-2130; RT/Vol.II/pp. 417:16-418:19, 421:16-22.) Because the Bureau's finding of "unsuitability" meant the Tribe could not accept gaming machines from Sharp effective November 18, 2008 (one month *before* Red Hawk Casino opened) the Tribe sought an issue sanction establishing that fact and prohibiting Sharp from rebutting the withheld evidence. (AA/Vol.VIII/pp. 2135:4-19, 2144:4-10.) The Superior Court denied the Tribe's motion for issue sanctions. (RT/Vol.II/pp. 448:22-449:17.)

6. The Tribe's Motion for Summary Judgment Raising Issues Subject To De Novo Review.

Thereafter, the Tribe moved for summary judgment on various grounds, including the following: (1) Sharp's 2007 complaint was premised on an actual breach of its claimed right to exclusivity, which allegedly occurred in 1999, and its lawsuit was therefore time-barred; (2) alternatively, if the statute of limitations had not run, Sharp's lawsuit was still properly dismissed because Sharp could not prove its claims under the law governing anticipatory breach; and (3) the Bureau's Report established that under any theory of its complaint, the Tribe was not the "but for" cause of any alleged damages, since, given the Tribe's Compact

with the State, the Tribe could not accept gaming machines from Sharp in December 2008, when Red Hawk opened. (AA/Vol.XII/pp. 3054-3056.)

The Superior Court denied the Tribe's motion for summary judgment. (AA/Vol.XXI/pp. 5123-5124.)

7. The Parties' Pre-Trial Motions

Establishing the evidentiary limits of what would be admitted at trial, the Superior Court issued rulings on motions in limine prohibiting the Tribe from introducing any evidence related to:

(1) the NIGC's determination regarding Sharp's contracts, or the general standards employed by the NIGC in determining whether to review and approve a gaming contract; and

(2) the Bureau of Gambling Control's determination that Sharp lacked the moral and ethical integrity to be licensed to provide gaming machines in California. (AA/XXII/pp. 5490-5493; 5511:20-5512:16; RT/Vol.III/pp. 711:22-712:7, 797:20-798:7.)

These rulings, and all other motions in limine and 402 rulings, were made by Judge Riley following a pre-trial hearing on June 28, 2011. At the conclusion of the hearing—after each of the Tribe's motions was denied, and each of Sharp's 402 motions to exclude the Tribe's expert witnesses was granted—Judge Riley announced that he had been taken off the case several days earlier, and would not be the trial judge. (RT/Vol.III/pp. 805:12-807:11.)

On the threshold of trial, the Tribe moved for judgment on the pleadings on the ground that the NIGC's judicially noticeable final agency action bound the Superior Court, and required judgment for the Tribe. (AA/Vol.XXIII/pp. 5845-5865.) The trial court, The Honorable Nelson Brooks presiding, denied the motion based on Judge Riley's earlier ruling. (RT/Vol.IV/p. 898:21-25.)

8. Evidentiary Rulings At Trial

At trial, the Tribe sought to call an NIGC witness to rebut testimony by Mr. Anderson that the agency had no authority over his contracts because they were not "management contracts" and Sharp did not "manage" the Tribe's casino. (RT/Vol.IX/pp. 2533:18-2537:11; RT/Vol.XIV/pp. 3663:10-3664:2.) The NIGC had, in fact, made precisely the opposite determination—finding that the contracts were "management contracts" that the NIGC had authority to declare "void." (AA/Vol.IV/pp. 919, 929.) However, concluding that he was bound by *every* pre-trial ruling made by Judge Riley, Judge Brooks ruled the jury would not be permitted to hear the rebuttal evidence. (RT/Vol.XIV/pp. 3664:3-3666:3.)

9. Judgment Following Trial

Based on the evidence presented at trial, nine out of twelve jurors found \the Tribe was liable for "bad faith" "breach of contract," and awarded $20.4 million in damages to Sharp on the ELA, and $10 million in damages on the Note. (AA/Vol.XXVIII/pp. 7311-7312.) The Tribe moved for judgment notwithstanding the verdict, which the Superior Court denied on March 7, 2012. (AA/Vol.XXXIII/pp. 8794-8807.)

10. The Tribe's Motion Seeking Relief From Posting A Bond On Appeal

On January 11, 2012, the Tribe moved for an order waiving the requirement that it post a bond to stay enforcement of judgment pending appeal on the grounds that the Tribe could not afford to post a bond and that Sharp's efforts to collect the judgment could lead to the closure of the Tribe's Red Hawk Casino. (AA/Vol.XXIX/pp. 7612-7613; AA/Vol.XXXV/pp. 7626:17-22, 7627:21-7629:7, 7651:18-7652:8, 7653:3-11.) That motion was granted. (AA/Vol.XXXIII/pp. 8810-8811.)

STATEMENT OF APPEALABILITY

On February 24, 2012, the Tribe timely filed a notice of appeal from the final judgment after jury trial. (AA/Vol.XXXII/p. 8751.) *See* Code Civ. Proc. § 904.1(a)(1). On April 6, 2012, the Tribe timely filed a notice of appeal from the Superior Court's order denying the Tribe's motion for judgment notwithstanding the verdict. (AA/Vol.XXXIII/pp. 8937-8938.) *See* Code Civ. Proc. § 904.1(a)(4).

STANDARDS OF REVIEW

"A trial court's determination on issues regarding federal preemption involves questions of law which we independently review on appeal." *Hood v. Santa Barbara Bank & Trust* (2006) 143 Cal. App. 4th 526, 535 (citing *Washington Mutual Bank v. Superior Court* (2002) 95 Cal. App. 4th 606, 612). "In independently determining the preemptive effect of statutes or regulations, [the court of appeal] do[es] not defer to the trial court's conclusion or limit [itself] to the evidence of intent considered by the trial court." *Id.* at 535-36 (citing *Gibson v. World Savings & Loan Assn.* (2002) 103 Cal. App. 4th 1291, 1297).

"On a motion asserting sovereign immunity as a basis for dismissing an action for lack of subject matter jurisdiction, the plaintiff bears the burden of proving by a preponderance of evidence that jurisdiction exists. [Citations.] In the absence of conflicting extrinsic evidence relevant to the issue, the question of whether a court has subject matter jurisdiction over an action against an Indian tribe is a question of law subject to our de novo review." *American Property Management Corp. v. Superior Court* (2012) 206 Cal. App. 4th 491, 498 (quoting *Campo Band of Mission Indians v. Superior Court* (2006) 137 Cal. App. 4th 175, 183).

Likewise, a trial court's denial of a motion for summary judgment is reviewed de novo. *Buss v. Superior Court* (1997) 16 Cal. 4th 35, 60.

While courts have held that nearly every trial court ruling in a summary judgment proceeding, including the court's rulings on evidentiary objections, is subject to de novo review (*see City of Pasadena v. Department of Transportation* (1994) 29 Cal. App. 4th 1280, 1288), there is a split of authority in California as to "whether a trial court's rulings on evidentiary objections based on papers alone in summary judgment proceedings are reviewed for abuse of discretion or reviewed de novo" *Reid v. Google, Inc.* (2010) 50 Cal. 4th 512, 535 ; *see also Nazir v. United Airlines, Inc.* (2009) 178 Cal. App. 4th 243, 255, n.4.

An appellate court independently reviews the trial court's order on a motion for judgment on the pleadings. *Smiley v. Citibank* (S.D.), N.A. (1995) 11 Cal. 4th 138, 145-46; *Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal. App. 4th 592, 602. The appellate court examines the face of the pleadings, together with matters subject to judicial notice, to determine whether such facts are sufficient to constitute a cause of action. *O'Neil v. General Security Corp.* (1992) 4 Cal. App. 4th 587, 594.

Finally, on appeal from denial of a motion for judgment notwithstanding the verdict, the court of appeal "independently determine[s] whether substantial evidence supports the verdict and whether the moving party is entitled to judgment in its favor as a matter of law." *Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal. App. 4th 338, 367. "If the appeal challenging the denial of the motion for judgment notwithstanding the verdict raises purely legal questions, however, [the court of appeal's] review is de novo." *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal. App. 4th 1107, 1138 (citing *Trujillo v. North County Transit Dist.* (1998) 63 Cal. App. 4th 280, 284). Similarly, where the motion for judgment notwithstanding the verdict involves interpretation of a written instrument and no conflict exists in extrinsic evidence, it is the duty of the appellate court to independently interpret the written instrument.

Stevenson v. Oceanic Bank (1990) 223 Cal. App. 3d 306, 315 (citing *Estate of Platt* (1942) 21 Cal. 2d 343, 352).

ARGUMENT

I. The NIGC's Final Agency Action Binds The Superior Court And Requires Judgment For The Tribe.

Once the NIGC took final agency action ruling Sharp's ELA was a management contract that was void for lack of agency approval, this case was effectively over—or at least it should have been. The decision of the NIGC, the federal agency charged with approving and disapproving management contracts under IGRA, is binding on lower courts unless successfully challenged in a United States District Court. *AT&T*, 295 F.3d 899, 906, 909-10. Sharp opposed the Tribe's efforts to stay the Superior Court action to permit Sharp to initiate proceedings in the only proper forum: federal district court. (AA/Vol.V/pp. 1276-1294.) Instead, Sharp convinced the Superior Court to reach the merits of the NIGC's decision and enforce the very revenue sharing provisions the NIGC deemed illegal. (AA/Vol.VI/pp. 1669:6-1672:23, 1675:20-1678:3; AA/Vol.VII/pp. 1954:10-1958:17.) Sharp's election to proceed without first challenging the NIGC's final agency action is dispositive of the viability of Sharp's ELA: it is void unless and until Sharp brings a proper federal court challenge, and any claims predicated on the ELA's validity fail as a matter of law.

In two dispositive pleadings, the Tribe sought judgment on the ground that the NIGC's unappealed final agency action bound the Superior Court, since federal law rendered the federal agency's ruling binding on the state court.[8] (AA/Vol.XII/pp. 3078:6-3080:6; AA/Vol.XXIII/pp. 5858:22-

[8] On June 7, 2010, the Tribe also filed suit in federal district court, seeking declaratory and injunctive relief preventing Sharp from improperly challenging the NIGC's final agency action in the Superior Court. *Shingle Springs Band of Miwok Indians v. Sharp Image Gaming, Inc.* (E.D. Cal.

5859:21.) Without explaining how it could disregard the binding effect of the NIGC's final agency action under federal law, the Superior Court erroneously denied the Tribe's motions for summary judgment and judgment on the pleadings. (AA/Vol.XXI/pp. 5123-5124, 5154:21-5155:8; RT/Vol.IV/p. 898:21-25.) This Court should reverse.

A. IGRA Dedicates Review Of NIGC Final Agency Action To The Federal Courts, Binding Lower Courts To Enforce The NIGC's Decision Absent Such A Challenge.

Federal law empowers the Chairman of the NIGC to approve or disapprove management contracts for the operation of Class III gaming activities. 25 U.S.C. §§ 2710(d)(9), 2711; *AT&T*, 295 F.3d at 902. In addition, the determination of whether a gaming agreement is a management contract under IGRA is within the authority of the NIGC. *United States ex rel. Saint Regis Mohawk Tribe*, 451 F.3d at 51. Under regulations applicable here, the NIGC's final decision may be appealed to the full Commission. *See* Amendments to Various National Indian Gaming Commission Regulations, 74 Fed. Reg. 36,926, 36,938 (July 27, 2009) (formerly codified at 25 C.F.R. § 539.2). If the NIGC denies the appeal or fails to act within 30 days, "the Chairman's decision shall constitute a final decision of the Commission."[9] *Id.*; *Miami Tribe of Okla. v. United States* (D. Kan. June 8, 2004, Civ. 02-2591-CM) 2004 U.S. Dist. LEXIS 21833, *13 (citing 25 C.F.R. § 539.2 and 25 U.S.C. § 2714). Further, a final

---

Oct. 15, 2010, No. 2:10-cv-01396 FCD GGH) 2010 U.S. Dist. LEXIS 109908, at *9-11. The district court dismissed based on the Anti-Injunction Act and federal abstention principles, without reaching the merits of the Tribe's suit. *Id.* at *54-55.

[9] The regulations governing NIGC appeals were recently recodified, retaining the rule that the Chairman's decision becomes final agency in the absence of a decision of a majority of the NIGC. *See* Appeal Proceedings Before the Commission, 77 Fed. Reg. 58,941, 58,947, 58,949 (Sept. 25, 2012); *see* 25 C.F.R. §§ 580.11, 583.6.

decision regarding a management contract can only be appealed to "the appropriate Federal district court" under the Administrative Procedure Act (5 U.S.C. §§ 701 *et seq.*). 25 U.S.C. § 2714; *AT&T*, 295 F.3d at 908 ("IGRA lays out a specific regulatory scheme whereby the NIGC's approval of a management contract is a final agency decision that may be appealed only directly and in an action initiated by a proper party in federal district court"); *United States ex rel. Saint Regis Mohawk Tribe*, 451 F.3d at 51; *Federal Nat'l Mortg. Ass'n*, 868 F.2d at 193 (confirming Congress foreclosed state courts from entertaining APA claims by requiring such claims be brought "in a court of the United States" (citing 5 U.S.C. § 702)).

The onus was on Sharp to submit its agreements to the NIGC for approval when the contract was signed if it intended to perform the ELA or to sue to enforce its terms by asserting it is not a management contract. *See United States ex rel. Bernard*, 293 F.3d at 421, 425 ("For a management agreement involving Indian land to become a binding legal document, it must be approved by the ... NIGC."). This is because a party failing to obtain NIGC approval "assume[s] the risk of proceeding without" it. *Id.* at 425. Sharp took exactly such a risk by prosecuting this action without asking the NIGC to approve the agreements.

B. The NIGC's Unappealed Final Agency Action Establishes That Sharp's Agreements Are Void And Unenforceable In This Action.

Notwithstanding Sharp's improper collateral challenge, the NIGC's final decision that its agreements are void and unenforceable binds this Court as a matter of federal law. The Supremacy Clause of the United States Constitution requires a state court to follow federal law, including federal statutes and regulations, where (as here) federal law controls the issue before it. *Laufman v. Hall-Mack Co.* (1963) 215 Cal. App. 2d 87, 89 ("In enforcing a federally created right, the state court must follow federal

law."); *Free v. Bland* (1962) 369 U.S. 663, 666-68 (holding that federal regulations prevail where they conflict with state law).[10]

It is clearly established that a party can escape the consequences of the NIGC's final determination if—and only if—the party successfully challenges the NIGC's final agency action in federal district court. *AT&T*, 295 F.3d at 906, 909-10. In *AT&T*, the district court was asked to decide whether AT&T had to provide toll-free telephone service under an agreement with the Coeur D'Alene Tribe that would allow callers to participate in a "National Indian Lottery" the Tribe created. *Id.* at 902, 905. The district court concluded telephonic participation in the Lottery was not subject to IGRA regulation, even though the NIGC had taken final agency action reaching a different conclusion. *Id.* at 905. The Ninth Circuit vacated the district court's determination, holding the lower court could not "sidestep" the "crucial consideration[]" of the "effect it should accord the NIGC approval made consistent with the requirements of the detailed regulatory scheme Congress provided when it enacted the IGRA." *Id.* at 905-06. The court then explained the important implications of a "specific regulatory scheme" that the lower court had "failed to grasp." *Id.* at 907, 908. The Ninth Circuit emphasized that "[t]he NIGC's final agency actions approving both the management contract and the Tribe's resolution indicated that the Lottery is legal until and unless the NIGC's decision is overturned" through "a proper challenge and appeal." *Id.* at 906, 909.

---

[10] In interpreting the federal law they are bound to apply, California courts give great weight to the decisions of the Ninth Circuit. *See Viva! Int'l. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal. 4th 929, 943 (following Ninth Circuit authority analyzing preemption given the "persuasive" value of the Court's conclusions); *Dougherty v. Cal. Kettleman Oil Royalties, Inc.* (1937) 9 Cal. 2d 58, 88 (following Ninth Circuit's interpretation of Department of Interior regulations).

The exclusivity of the federal process makes sense because, unlike ad hoc state court adjudication, federal court APA review permits review of the entire administrative record compiled by the agency, and requires the agency to participate in the process and defend its decision in the context of the federal regulatory scheme within the agency's specialized expertise. 5 U.S.C. §§ 551(13), 704, 706. *AT&T* applies with equal force here: "[u]nless and until the NIGC's decision is overturned by means of a proper challenge and appeal" to an appropriate federal court, the NIGC's conclusion that the ELA is an unapproved management contract under IGRA bound the Superior Court as a matter of controlling federal law. *AT&T*, 295 F.3d at 909.

1. Because The ELA Is Void, There Is No Contract To Enforce, And No Possible Waiver of Immunity.

If the ELA is void, as the NIGC determined in its final agency action, the purported sovereign immunity waiver is void as well, necessarily depriving the Superior Court of subject matter jurisdiction.[11] *Wells Fargo Bank, N.A. Ass'n v. Lake of the Torches Econ. Dev. Corp.* (7th Cir. 2011) 658 F.3d 684, 702; *A.K. Mgmt. Co. v. San Manuel Band of Mission Indians* (9th Cir. 1986) 789 F.2d 785, 789. It is equally basic that a valid contract is necessary for a party to sue for breach of that contract. *San Francisco Int'l Yachting Center Dev. Group v. City and County of San Francisco* (1992) 9 Cal. App. 4th 672, 675-76, 684 (sustaining demurrer to breach of a contract not approved by governmental body). Likewise, a valid contract is essential for claims for breach of the covenant of good faith and fair dealing. *Pacific States Enters., Inc. v. City of Coachella* (1993) 13 Cal. App. 4th 1414, 1425; *First American Kickapoo Operations, L.L.C. v. Multimedia Games, Inc.* (10th Cir. 2005) 412 F.3d 1166, 1176-77

[11] As will be shown below (section III, *infra*), there was no unequivocal waiver of sovereign immunity to Sharp's claims in the first instance.

(holding failure to obtain NIGC approval for an agreement to lease gaming equipment fatal to a state law tort claim predicated on the agreement).

The only ELA-based claims upon which Sharp proceeded to trial were for breach of contract and breach of the implied covenant of good faith and fair dealing. (AA/Vol.XXVIII/p. 7311.) The sole basis for jurisdiction was the alleged immunity waiver provision in the ELA. (AA/Vol.I/p. 17:18-24.) Yet because the NIGC issued final agency action deeming the ELA an invalid and unenforceable management contract, the Superior Court lacked jurisdiction, and was compelled to dismiss, or alternatively, grant judgment for the Tribe.

2. The Superior Court Was Bound To Grant Judgment For The Tribe On The Promissory Note, A Collateral Agreement Inextricably Linked To The Void ELA.

In addition, although the Superior Court did not address this issue, the Promissory Note accompanying the ELA, which reflects money advanced by Sharp for Crystal Mountain Casino, is unenforceable as well. (AA/Vol.XV/pp. 3503-3504; AA/Vol.XXIII/pp. 5878-5879.) A collateral agreement that provides for management of "all or part" of a gaming operation is void without NIGC approval. 25 U.S. § 2702(1); *Machal, Inc. v. Jena Band of Choctaw Indians* (W.D. La. 2005) 387 F. Supp. 2d 659, 667. A collateral agreement to a management contract is defined as "any contract, whether or not in writing, that is related, either directly or indirectly, to a management contract, or to any rights, duties or obligations created between a tribe ... and a management contractor or subcontractor ...." 25 C.F.R. § 502.5. An agreement requiring the Tribe to repay a note on loans received for construction and other costs from the net revenues of the gaming operation is a collateral agreement because it "assigns responsibility for management activities" under IGRA and its

regulations. 387 F. Supp. 2d at 667-68 (citing 25 C.F.R. § 531.1). Here, the Note requires payment to Sharp out of the revenue from the Tribe's "Gaming Facility and Enterprise," expressly contemplating, in certain scenarios, payment of up to "25% of the gross net revenues [the Tribe] receives from the operation of the video gaming devices." (AA/Vol.XV/p. 3503; AA/Vol.XXIII/p. 5878.)

Moreover, reading the Note in conjunction with the ELA, as California contract law requires, confirms that it is an unapproved collateral agreement. *See* Civ. Code § 1642 ("Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together."). Here, the parties entered the ELA and the Note contemporaneously on November 15, 1997, and the Note's repayment date expressly references Sharp's obligation under the ELA. (AA/Vol.XV/pp. 3490, 3503; AA/Vol.XXIII/pp. 5870, 5878.) *See Nevin v. Salk* (1975) 45 Cal. App. 3d 331, 338 (Under Civil Code section 1642, "a note, mortgage and agreement of sale constitute one contract where they are part of the same transaction."); *Williston on Contracts* § 30:25 (4th Ed. 1999) ("Where a writing refers to another document, that other document, or the portion to which reference is made, becomes constructively a part of the writing, and in that respect the two form a single instrument."). Under the ELA, Sharp is required to deliver "four hundred (400) video gaming devices" to "Crystal Mountain Casino," and under the Note, repayment of money invested to develop Crystal Mountain is triggered when "four hundred (400) video gaming devices" are put in operation at the casino contemplated under the ELA. (AA/Vol.XXIII/pp. 5870, 5878; AA/Vol.XV/pp. 3490, 3503.) Reading these parallel provisions together means the Note, like the ELA, contemplates "broad operational control" in the form of Sharp's selection of gaming machines for the Tribe's gaming facility. (AA/Vol.XVI/p. 3926; AA/Vol.XXIII/p. 5909.) *See New Gaming*

Sys. v. Nat'l Indian Gaming Commission (W.D. Okla. Sept. 13, 2012, NO. CIV-08-0698-HE) 2012 U.S. Dist. LEXIS 130734, at *22-24.

Additionally, the Note is inextricably linked to the ELA and the GMA, both of which the NIGC declared void. (AA/Vol.XVI/p. 3919; AA/Vol.XXII/p. 5902.) *See New Gaming Sys.*, 2012 U.S. Dist. LEXIS 130734, at *3, *27-29, n.23 (noting NIGC's decision that voided equipment lease and promissory note, executed the same day, as a management contract "did not rely on [the note] to reach its conclusion"). The ELA and the Note, by Sharp's admission, together replaced the GMA, with the Note reflecting payments Sharp had "advanced" under the GMA to build Crystal Mountain. (AA/Vol.I/pp. 17:5-18:11; AA/Vol.XXIII/pp. 5973:6-5974:14; AA/Vol.XVI/pp. 3864:6-3865:14; AA/Vol.XV/pp. 3478-3483, 3490-3497, 3503-3504; AA/Vol.XXIII/pp. 5870-5879.) Indeed, Sharp has admitted the ELA and the Note are so closely linked that the provisions in the Note can be viewed as consideration for the ELA. (AA/Vol.XXIII/pp. 5973:17-5974:8; AA/Vol.XVI/pp. 3864:17-3865:8.)

Both the GMA and the ELA are invalid management contracts, and because performance under the Note is inextricably linked to the parties' performance under the ELA, the Note, and the Tribe's alleged immunity waiver therein, are invalid, depriving the Superior Court of jurisdiction and requiring judgment for the Tribe. *Wells Fargo Bank, N.A.*, 658 F.3d at 702; *see New Gaming Sys.*, 2012 U.S. Dist. LEXIS 130734, at *3, *27-29 & n.23; *Nevin*, 45 Cal. App. 3d at 338; *cf. Fong v. Miller* (1951) 105 Cal. App. 2d 411, 413-14 (rejecting argument that contract possessed a "dual nature" such that lease could be separated from contract for revenue from illegal gambling).

In the alternative, should this Court conclude the record below is inadequate to evaluate whether the Note is enforceable in light of the ELA's invalidity, the Court should remand for the Superior Court to decide

this issue in the first instance. *Wells Fargo Bank, N.A.*, 658 F.3d at 701 (remanding for proceedings to determine whether the enforceability of agreement was dependent on the enforceability of the void management agreement executed in the same transaction).

C. The Superior Court Could Not Avoid The Binding Effect Congress Assigned To The NIGC's Final Agency Action By Purporting To Overrule It.

Despite the federal law requiring that the NIGC's "final agency action" bind lower courts "unless and until the NIGC's decision is overturned by means of a proper challenge and appeal" to a federal district court (*AT&T*, 259 F.3d at 902, 905, 909-10; 25 U.S.C. § 2714), the Superior Court denied the preemption motion by purporting to rule the NIGC lacked "jurisdiction" to review Sharp's Agreements because they had been "cancelled." (AA/Vol.VII/p. 1955:2-4.) The Superior Court also opined that, even if the NIGC had jurisdiction, the NIGC did not take "final [agency] action," because the it (1) failed to require compliance with an NIGC regulation the Superior Court (but not the NIGC) found applicable, and (2) violated Sharp's due process rights by engaging in communications with the Tribe that the Superior Court found inappropriate. (AA/Vol.VII/pp. 1956:6-1958:17.)

Not only is the Superior Court's view of the merits of the NIGC's decision irrelevant, but the court's actions demonstrate precisely why Congress foreclosed state courts from interrupting the procedure IGRA requires.

1. Federal Law Prohibits The Superior Court From Overruling The NIGC's Final Agency Action.

The Supremacy Clause of the United States Constitution preempts a state court action that "usurp[s] a function that Congress has assigned to a federal regulatory body." *Ark. La. Gas Co. v. Hall* (1981) 453 U.S. 571,

581-82; *see Bethman v. City of Ukiah* (1989) 216 Cal. App. 3d 1395, 1408 (holding plaintiffs' suit requesting that a state court hold FAA safety standards inadequate was preempted where it "would be inconsistent with the FAA's exclusive authority to make these determinations"). Where the agency to whom Congress has assigned authority to regulate Indian gaming has decided an agreement violates IGRA, a state court's proceedings reviewing and applying the NIGC's decision are foreclosed by the federal regulatory scheme and exclusive federal court remedy Congress established: APA review in federal district court. 25 U.S.C. § 2714; 5 U.S.C. § 702.

Not surprisingly, in the only two known reported decisions where state courts were asked to entertain federal APA claims, both state courts recognized they lacked authority to review federal agency action. *See Double "LL" Contractors, Inc. v. State ex rel. Oklahoma DOT* (Okla. 1996) 918 P.2d 34, 42 ("[B]ecause this Court and its inferior [state] courts lack jurisdiction to review federal agency actions under the federal APA, should Double 'LL' be dissatisfied with the result of its administrative appeal to [the Department of Transportation], it must turn to the federal courts for relief."); *Mabin Constr. Co. v. Missouri Highway Trans. Comm.* (Mo. App. 1998) 974 S.W. 2d 561, 565 (state court lacks jurisdiction to review an agency denial of a certification application by the Department of Transportation). Quite simply, where a federal agency has acted, and Congress has "granted the exclusive discretion to make such judgments to the [agency], there is no further role that the state court could play." *Chi. & N. W. Transp. Co. v. Kalo Brick & Tile Co.* (1981) 450 U.S. 311, 326-27, 331 (holding state claims foreclosed by federal agency action after state litigation commenced, where plaintiff failed to challenge that ruling through the sole exclusive federal court remedy).

Sharp's attack on the NIGC's decision, and on its regulations, can only be decided in federal court on an APA challenge based on the entire administrative record in which the NIGC is a party. 5 U.S.C. §§ 551(13), 704, 706. Sharp, of course, has always had this avenue of redress, and still does. Moreover, if Sharp genuinely believed in the merits of its challenge to the NIGC's decision, surely it would have simply challenged it through the applicable federal procedure, rather than maintaining an improper collateral challenge before the Superior Court. *See AT&T*, 295 F.3d at 906-09.

2. The Superior Court's "Deference" Rationale Misconstrues The Effect Of Final Agency Action Under IGRA.

The Superior Court's conclusion, at Sharp's urging, that the NIGC's final agency action did not merit the Superior Court's "deference" misconstrued the issue before the court. (AA/Vol.III/pp. 618:6-622:9; RT/Vol.VII/pp. 1957:12-1958:3.) A court must decide whether to defer to an agency's decision when the agency has previously decided an issue that is properly before the court. *See generally Chevron, U.S.A., Inc. v. NRDC, Inc.* (1984) 467 U.S. 837, 841, 844 (applying deference analysis to statutorily authorized petition for review of regulations (citing 42 U. S. C. § 7607(b)(1)); *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal. 4th 559, 573 (applying deference analysis in challenge to agency action authorized under California Environmental Quality Act).

The faulty premise of the Superior Court's reasoning was that the issue of whether Sharp's agreements were management agreements was properly before it, such that it could apply a deference analysis to evaluate what weight to give the NIGC's ruling on this issue. (AA/Vol.VII/pp. 1956:6-1958:17.) Contrary to this premise, under IGRA, the NIGC's final agency action took the issue of whether the agreements were management

agreements out of the Superior Court's hands. *AT&T*, 295 F.3d at 906, 909-10. In short, *Chevron* and its progeny developing the law of "deference" set forth a substantive standard of review conducted in a distinct *procedural* context, but do not sanction violation of the mandatory procedures for appeal set forth in IGRA or any other federal statute. *See generally Chevron,* 467 U.S. at 841, 844; *Western States Petroleum Assn.,* 9 Cal. 4th at 573. Because the Superior Court was not required—and indeed was foreclosed—from deciding the issue the NIGC decided, it could not "defer" or "not defer" to that decision. *AT&T*, 295 F.3d at 906, 909-10.

3. Sharp's Arguments That The NIGC's Actions Were Not In Accordance With Law, Or Exceeded Its Jurisdiction, Are Exclusively Dedicated To The Federal Courts.

Patently, review in a federal district court under the APA is the proper avenue to challenge "agency action, findings and conclusions" on the grounds that they are "not in accordance with law" or are "contrary to constitutional right." 5 U.S.C. § 706(2). Claims that an agency has acted "in excess of statutory jurisdiction, authority, or limitations" must be addressed through APA review. *Id.*; *see J.L. v. Social Sec. Admin.* (9th Cir. 1992) 971 F.2d 260, 267 (dismissing direct non-APA challenge under the Rehabilitation Act because whether agency action violates a statute "is a question of law determined de novo once the plaintiffs reach the court for review of a final agency determination" under the APA).

Further, Sharp's argument, and the Superior Court's finding, that the NIGC's action was not final, merely represents another improper attempt to collaterally challenge the NIGC's decision, which IGRA forecloses absent an APA appeal. *See AT&T*, 295 F.3d at 905-06. Specifically, an agency's regulation assigning finality to its action is *dispositive* of finality triggering APA review. *Coomes v. Adkinson* (D.S.D. 1976) 414 F. Supp. 975, 987

(Secretary of the Interior took final agency action reviewable under the APA where its regulation provided that a decision "subject to appeal to a superior authority in the Department shall be considered final so as to be agency action" where "the officer to whom the appeal is made ... rule[s] that the decision appealed from shall be made immediately effective"); *Ware v. U.S. Dep't of Interior* (D. Or. April 8, 2004, Civ. 03-3081-CO) 2004 WL 902354, at *2 n.1 (relying on agency's own regulation to reject argument that decision was not final agency action subject to APA review). Moreover, an argument challenging federal regulations must be raised under the APA. *Nat'l Park Hospitality Ass'n v. DOI* (2003) 538 U.S. 803, 808 (federal agency regulations are subject to review in federal court under the APA); *George v. Bay Area Rapid Transit* (9th Cir. 2009) 577 F.3d 1005, 1013 ("those who find the ... DOT regulations unreasonable may challenge them under the Administrative Procedure Act").

Likewise, if Sharp believes the NIGC failed to follow regulations, this challenge must also be brought under the APA. *Thomas Brooks Chartered v. Burnett* (10th Cir. 1990) 920 F.2d 634, 642 ("The failure of an agency to follow its own regulations is challengeable under the APA." (citing *Service v. Dulles* (1957) 354 U.S. 363)); *Community Action of Laramie, Inc. v. Bowen* (10th Cir. 1989) 866 F.2d 347, 352 ("Because a valid legislative rule or substantive federal regulation is binding to the same extent as a statute ..., [the agency's] failure to follow its own regulations likewise may be challenged under the APA." (citation omitted)).

Sharp's argument that the NIGC violated IGRA by failing to entertain an appeal (AA/Vol.VI/pp. 1669:6-1670:10) is also subject to APA review. 5 U.S.C. § 706(1); *Thomas Brooks*, 920 F.2d at 642 ("where Congress commands the agency act there is law to apply and a court, pursuant to the standards of the APA, may review whether the agency acted in accordance with Congress wishes" (citing *Brock v. Pierce County* (1986)

476 U.S. 253, 260 n.7)); *see Cobell v. Norton* (D.C. Cir. 2001) 240 F.3d 1081, 1095.

In sum, because federal district court is the only proper forum for challenging the NIGC's decision, Sharp's collateral attack on that decision, and the findings made by the Superior Court, are outside the proper scope of state court review.

D. Even If The Superior Court's Rulings Were Within Its Authority, Its Findings Are Erroneous.

Finally, even if the Superior Court somehow had authority to reach the merits of Sharp's challenge to the NIGC's final agency action, its rulings were erroneous. The Superior Court erred in ruling that the NIGC lacked "jurisdiction" to review Sharp's contracts and that the agency's final determination was so "fatally flawed" as a substantive matter that it is not "final agency action." (AA/Vol.VII/pp. 1955:2-4, 1956:1-11.)

1. The Superior Court Erred In Concluding That The NIGC Lacked Jurisdiction To Disapprove An Allegedly Repudiated Contract Sharp Attempted To Enforce.

The Superior Court erred in ruling that the NIGC lost jurisdiction to review Sharp's contracts because the parties understood the contracts were "terminated and/or cancelled" (AA/Vol.VII/p. 1955:2-4), i.e., that the Tribe had repudiated them by partnering with another investor. (RT/Vol.II/pp. 349:18-350:4, 351:4-23; AA/Vol.VII/pp. 1954:15-1955:4.) The Superior Court failed to recognize that "[f]or a management agreement involving Indian land to become a binding legal document, it must be approved by the NIGC." *Casino Magic Corp.*, 293 F.3d at 421. Moreover, the NIGC "has broad power to determine" what contracts do or do not require approval. *United States ex rel. St. Regis Mohawk Tribe*, 451 F.3d at 51; *see* 25 U.S.C. §§ 2702, 2711; *see also New Gaming Sys.*, 2012 U.S. Dist. LEXIS 130734,

at *5-8, 33 (affirming NIGC's final decision voiding equipment lease agreement and promissory note nearly four years after Indian tribe "terminated the agreements"). Here, the NIGC acted pursuant to this broad authority to find the ELA was a management contract void as a matter of federal law. (AA/Vol.V/p. 1321; AA/Vol.IV/p. 1085.) In short, although the Superior Court lacked authority to opine on the NIGC's decision, the court's decision that the NIGC lacked jurisdiction here was contrary to binding federal law.

2. The Superior Court Erred In Interpreting The Regulation Under Which The NIGC Interpreted Sharp's Contracts.

Regarding the Superior Court's finding that the NIGC failed to "require compliance with 25 C.F.R. [§] 533.3" (AA/Vol.VII/p. 1957:13-23), the Tribe's evidence confirms that it submitted its request for formal review under a different regulatory provision, 25 C.F.R. § 533.2. (AA/Vol.I/p. 62.) Thus, Sharp's argument, and the Superior Court's finding, that the NIGC improperly "waived compliance" with 25 C.F.R. § 533.3 (when, in fact, § 533.2 was at issue) is misplaced. (AA/Vol.III/p. 619:1-16; AA/Vol.VII/pp. 1957:12-1958:3.)

Under 25 C.F.R. § 533.2, a "tribe or a management contractor" may submit a "management contract" for review. Under that provision, the Tribe submitted its request for a "final determination" regarding whether Sharp's contacts were management contracts under IGRA. (AA/Vol.I/p. 65.) In addition, and as the NIGC stated, its authority to review the contracts was pursuant to 25 U.S.C. § 2711. (AA/Vol.V/p. 1321; AA/Vol.IV/p. 1085.) Conversely, 25 C.F.R. § 533.3, applies to submissions where a tribe is seeking *approval* of a management contract, and requires certain submissions to substantiate the basis for an approval. *See New Gaming Sys.*, 2012 U.S. Dist. LEXIS 130734, at *6-8, 33

(affirming NIGC's determination that equipment lease agreement and promissory note were void even though Tribe submitting agreements "did not submit the documents required by 25 C.F.R. § 533.3"). As the NIGC recognized, § 533.3 has no relevance to its analysis, and the passage from the NIGC's letter of July 18, 2008 (AA/Vol.I/pp. 67-68), referenced in the Superior Court's ruling (AA/Vol.VII/pp. 1957:17-25), was simply to explain (in response to Sharp's assertion) why § 533.3 was irrelevant.

Put simply, there was no "waiver" of compliance with § 533.3. Instead, the NIGC simply, and correctly, did not find the provision relevant since the Tribe was not seeking *approval* of Sharp's contracts. (AA/Vol.I/p. 44.) In any event, IGRA's provisions and existing precedent recognize the NIGC's broad power to decide whether a contract is a management contract within the meaning of the federal statute. *See* 25 U.S.C. §§ 2702, 2711; *United States ex rel. St. Regis Mohawk Tribe*, 451 F.3d at 51; *see also* 25 C.F.R. § 580.2 (recognizing NIGC's power to waive any appeal requirement, other than the deadline for filing a notice of appeal).

3. The Superior Court Erred In Finding The NIGC's Decision Violated Sharp's Due Process Rights.

In the course of purporting to act as a federal district court, the Superior Court again ignored evidence before it and the applicable federal law in finding that the NIGC violated Sharp's "due process" rights. Although the Superior Court found the Tribe and its representatives should not have contacted the NIGC to request that it take formal agency action without notifying Sharp (AA/Vol.VII/pp. 1956:14-1957:12), undisputed facts in the record establish the Tribe and its representatives complied with the law.

In particular, the Superior Court adopted Sharp's position that the Tribe had an obligation to apprise Sharp of all communications with the

NIGC. (AA/Vol.III/pp. 619:24-622:9; AA/Vol.VII/pp. 1956:14-1957:11.) The Tribe had no such obligation. The relevant provisions of the APA are clear: the ban on *ex parte* communications applies only to formal adjudications where a hearing is to be conducted. 5 U.S.C. §§ 556, 557; *American Airlines, Inc. v. Department of Transportation* ("*American Airlines*") (5th Cir. 2000) 202 F.3d 788, 798; *see also Professional Air Traffic Controllers Org. v. FLRA* (D.C. Cir. 1982) 685 F.2d 547, 571-72 (contacts with agency regarding merits only improper if an adjudication by the agency has been initiated). Formal review of contracts by the NIGC under IGRA is not such a formal adjudication under the APA because there is no hearing. *See* 25 U.S.C. § 2711; *New Gaming Sys.*, 2012 U.S. Dist. LEXIS 130734, at *20-21 (rejecting argument that NIGC must provide notice and a hearing before issuing a final decision voiding a management agreement).

In addition, the Tribe's evidence showed its communications were not substantive, but were limited to a request seeking formal agency review of Sharp's contracts. (AA/Vol.VI/p. 1601:15-26.) *See American Airlines,* 202 F.3d at 798 (communications with federal agency seeking formal review is not *ex parte* contact under the APA). Indeed, the evidence was uncontradicted that the Tribe contacted the NIGC (without notice to Sharp) only *before* the NIGC decided to formally review the contracts, and had no such communications after it submitted its request for formal review of Sharp's contracts[12] (AA/Vol.VI/p. 1601:15-26), a request made necessary

[12] Notably, only Sharp engaged in *ex parte* contacts after the NIGC undertook formal review. As the Tribe advised the Superior Court, Sharp contacted an official of the NIGC after the agency made its formal determination, but before that determination became final agency action, without notifying the Tribe. (AA/Vol.IV/p. 1071:22-26; AA/Vol.VI/p. 1602:9-17.)

by the Superior Court's ruling that only final agency action would be entitled to "legal effect." (AA/Vol.I/pp. 49-50.)

Accordingly, because no *ex parte* communication with the NIGC can occur before the agency determines whether it will conduct a formal review for purposes of issuing a final agency determination, there was simply no basis, in fact or law, for the Superior Court to reach its finding.[13]

In sum, an independent review of *all* the evidence and relevant law confirms that—even assuming the Superior Court had authority to address the substantive and procedural merits of the NIGC's final agency action—the Superior Court's rulings were erroneous.

II. IGRA Completely Preempts Sharp's Claims And Deprives The Superior Court Of Subject Matter Jurisdiction.

Although federal law requires the Superior Court to give the NIGC's final decision binding and preclusive effect when adjudicating Sharp's claims, the case only proceeded on the merits because the Superior Court erred in failing to dismiss Sharp's claims as falling within IGRA's preemptive scope. Specifically, the Superior Court erred in failing to recognize that IGRA preempts Sharp's state law claims on a contract the NIGC has ruled is a void management contract falling within "IGRA's protective structure." *American Vantage Cos. v. Table Mountain Rancheria* (2002) 103 Cal. App. 4th 590, 595-96.

A. The NIGC's Final Agency Action Establishes That Sharp's Claims Fall Within IGRA's Protective Structure.

Pursuant to its constitutional plenary power over commerce with Indian tribes, Congress enacted IGRA to establish comprehensive federal

---

[13] Ignoring *American Airlines*, the Superior Court invoked *Home Box Office v. Federal Communications Commission* (D.C. Cir. 1977) 567 F.2d 9 (AA/Vol.VII/pp. 1956:14-1957:11), which is not factually analogous, as it involved *ex parte* contacts prohibited under the APA *after* formal rule-making hearings were concluded.

regulation of Indian gaming, vesting broad regulatory power in the NIGC, and giving federal courts exclusive jurisdiction over claims falling within IGRA's protective scope. *Gaming Corp. of America v. Dorsey & Whitney* (8th Cir. 1996) 88 F.3d 536, 544-45 (analyzing IGRA's text and structure, including its dedication of NIGC appeals to "the appropriate Federal district court" under 25 U.S.C. § 2714, to conclude that "Congress apparently intended that challenges to substantive decisions regarding the governance of Indian gaming would be made in federal courts"); *American Vantage*, 103 Cal. App. 4th at 595-96 (state courts lack jurisdiction to adjudicate claims "that concern the regulation of gaming activities" under IGRA).

It is well settled that state courts lack jurisdiction to adjudicate claims that "concern the regulation of Indian gaming activities." *American Vantage*, 103 Cal. App. 4th at 596. (holding claims not preempted in absence of final agency action and where agency advisory opinion concluded agreements were not management contracts). Thus, where a contract at issue in a state court action is "subject to IGRA regulation," the claim necessarily "falls within the preemptive scope of the IGRA," mandating dismissal for lack of state jurisdiction on the basis of the federal doctrine of complete preemption. *Id.* at 596.

Here, the NIGC issued a final agency determination that Sharp's contracts violate IGRA. (AA, Vol.V/p. 1321; AA/Vol.IV/p. 1085; AA/Vol.VI/pp. 1630, 1750.) Specifically, the NIGC's final agency action established not only that Sharp's claims are *potentially* subject to IGRA, but also that the agreement upon which they rest *actually* violated its provisions. *AT&T*, 295 F.3d at 906, 909-10. Because the NIGC has determined the agreements fall within "IGRA's protective structure," Sharp's claims predicated on the agreements are preempted. *American Vantage*, 103 Cal. App. 4th at 596.

B. The Superior Court Erred In Holding That It Had Jurisdiction Over Sharp's Claims To Enforce A Contract Violating IGRA.

The Superior Court failed to address whether Sharp's claims are "subject to the IGRA" and preempted because they potentially (or actually) "concern the regulation of Indian gaming activities." *American Vantage*, 103 Cal. App. 4th at 596; *see Boisclair v. Superior Court* (1990) 51 Cal. 3d 1140, 1152 (holding state law claims completely preempted where "one possible outcome of the litigation is the determination" of an issue reserved for federal court resolution). Rather than evaluating Sharp's claims in light of the NIGC's actions and IGRA's statutory scheme, the trial court focused on the Tribe's cancellation of Sharp's contracts.

Specifically, the court ruled that the NIGC had "no jurisdiction" to "review, regulate, approve or disapprove" Sharp's contracts because both parties—the Tribe's Chairman and "Mr. Anderson of Sharp"—understood the contracts were "terminated and/or cancelled." (AA/Vol.VII/p. 1954:13-1955:4.) In keeping with this finding, the court also found that "[o]n March 12, 2007, the date this legal action was filed, there was no viable contract existing between the Band and Sharp."[14] (AA/Vol.VII/p. 1954:11-12.) The Superior Court also opined that, at the time of its ruling on the preemption motion, (a) Sharp no longer had a contract involving "gaming on Indian Land," because the Tribe had entered a contract with the investor who funded Red Hawk Casino (AA/Vol.VII/pp. 1954:15-1955:4); and (b) thus "[a]bsent ... regulatory authority in the NIGC," Sharp was only seeking

---

[14] The Superior Court later recanted this finding (apparently recognizing that if there was no viable contract, there was no viable state court action), and in ruling on the Tribe's later-filed demurrer, stated that it only meant the Tribe had "terminated" the ELA, not that the parties had jointly terminated the agreement, and not that the agreement was unenforceable. (RT/Vol.II/pp. 349:18-350:4, 351:4-23.)

"damages" from a pure state court breach of contract suit. (AA/Vol.VII/p. 1955:4-6.)

In essence, the Superior Court's preemption ruling assumed that a claim for damages on an allegedly repudiated contract may not support an IGRA preemption defense, even where the NIGC has ruled the contract violates IGRA. This assumption was erroneous, and requires reversal. The single case upon which the Superior Court relied for this proposition—*American Vantage*—squarely supports dismissal of Sharp's lawsuit under these circumstances.

The Superior Court, at Sharp's urging (AA/Vol.VI/p. 1674:4-19), apparently put undue weight on the *American Vantage* court's suggestion that, where (unlike here) the NIGC has not issued final agency action to void an agreement, "[t]he contract is not subject to IGRA regulation" and so a suit for damages is not preempted. 103 Cal. App. 4th at 596. The *American Vantage* court's reasoning was that, regardless of whether the state court (1) rules in the first instance that agreement is a void management contract or (2) rules the agreement is not a management contract, the agreement is in either case outside IGRA's protective structure and "not subject to IGRA regulation." *Id.*

Even if this reasoning makes sense where the assigned federal agency has not taken final agency action on an agreement, it has no application here, where the agency has issued a final, binding decision establishing the agreement does fall within "IGRA's protective structure." *Id.*; *AT&T*, 259 F.3d at 902, 905, 909-10. Neither *American Vantage* nor any other court has held that, where the NIGC has taken final agency action finding a contract violates the IGRA's protections, a state court can assume jurisdiction to enforce such a contract. *American Vantage*, 103 Cal. App. 4th at 596; *see also Duggal v. G.E. Capital Communications Servs.* (2000) 81 Cal. App. 4th 81, 91 (holding state law claims for damages preempted

where they "plac[e] our state courts in the business of determining a reasonable level of service for matters subject to FCC regulation"). Plainly, Congress, in creating IGRA's comprehensive regulatory scheme, did not intend to put an Indian tribe in a position where terminating a management contract the NIGC declares void strips the federal courts of their exclusive jurisdiction, permitting a state court suit to enforce the void contract.

Where, as in *American Vantage*, the NIGC has *not* found a violation, the trial court can on its own "determine the character of the contract under the IGRA," without offending IGRA's statutory scheme. 103 Cal. App. 4th at 596. Conversely, where, as here, the NIGC has taken final agency action invalidating a contract, any state court proceedings on that contract necessarily amount to "challenges to substantive decisions regarding the governance of Indian gaming" that Congress unequivocally intended would be subject to exclusive federal jurisdiction. *Gaming Corp.,* 88 F.3d at 544-45. Moreover, permitting a state court to entertain jurisdiction of a suit on a contract after the NIGC has declared it void risks the very conflict that has resulted here: a state court judgment directly at odds with the final, binding determination of a federal agency applying governing federal law in an area in which the agency possesses authority and specialized expertise. *Ark. La. Gas Co.,* 453 U.S. at 581-82 (the Supremacy Clause prohibits a state court from "usurp[ing] a function that Congress has assigned to a federal regulatory body"); *cf. Chaulk Servs., Inc. v. Massachusetts Comm'n Against Discrimination* (1st Cir. 1995) 70 F.3d 1361, 1370 (state courts' intrusion into exclusive NLRB jurisdiction would "creat[e] a system of labor dispute adjudication parallel to the NLRB, leaving the state and federal courts to grapple piecemeal with issues Congress intended primarily for NLRB resolution").

The NIGC has taken final agency action determining that Sharp's contracts violate IGRA, and that decision "may be appealed only directly

and in an action initiated by a proper party in federal district court." *AT&T*, 295 F.3d at 902, 908. It is as simple as that. Sharp's claims necessarily "concern the regulation of Indian gaming activities," and so are preempted. *American Vantage*, 103 Cal. App. 4th at 596.

III. Federal Law Also Compelled Dismissal On The Basis Of The Tribe's Sovereign Immunity.

This appeal also comes before the Court subject to the long-established principle that under governing federal law, Indian tribes are subject to full sovereign immunity from civil suits unless the Tribe itself has explicitly and unequivocally waived this jurisdictional defense. Under bedrock federal law, this sovereign immunity applies to all forms of civil liability, whether in state or federal court, including claims for breach of contract. *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.* (1998) 523 U.S. 751, 756.

The Superior Court erred by failing to dismiss this case on mandated federal sovereign immunity principles. In ruling on the Tribe's jurisdictional motion to dismiss, the Court erroneously applied inapposite state law contract interpretation cases when the question is controlled by federal law. (AA/Vol.VII/p. 1960:1-11.) The Court also erred, as a matter of law, by failing to treat the defense as a question that needed to be resolved at the outset of the case, as opposed to one appropriate for a jury. (AA/Vol.VII/p. 1960:11-23.) Finally, the Superior Court erred when it issued a ruling that should have compelled dismissal, since it found that the Tribe's reading of the waiver provision in Sharp's contracts was "reasonable" given the evidence regarding the waiver's actual scope—i.e., that the waiver of immunity did not reach Sharp's claims, and was limited to the gaming facility that Sharp and the Tribe had partnered to build, Crystal Mountain Casino. (AA/Vol.VII/p. 1960:11-17.) On that record,

the Court had to dismiss, and its failure to do so, and instead order a jury trial, was reversible error.

A. Absent An Unequivocal Waiver of Sovereign Immunity, Federal Law Mandates Dismissal.

Federal common law governs the existence and scope of a sovereign tribe's immunity to suit, which is "not subject to diminution by the States." *Kiowa,* 523 U.S. at 756. As the U.S. Supreme Court explained long ago, Indian tribes "are 'distinct, independent political communities, retaining their original natural rights' in matters of self-government." *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 55. Though no longer "possessed of the full attributes of sovereignty" (*United States v. Kagama* (1886) 118 U.S. 375, 381), "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo*, 436 U.S. at 58. Because preserving tribal resources and autonomy is vitally important, tribal immunity is broad, extending to "suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Kiowa,* 523 U.S. at 760. For the same reasons—to preserve tribal assets and autonomy—tribal "[w]aivers of sovereign immunity are construed narrowly and in favor of the sovereign." *Soghomonian v. United States* (E.D. Cal. 1999) 82 F. Supp. 2d 1134, 1140. Consistent with this "strong presumption against waiver of tribal sovereign immunity" (*Demontiney v. United States*, (9th Cir. 2001) 255 F.3d 801, 811), a tribe's waiver of immunity "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58.

Based on these principles, and because the existence and scope of any waiver is grounded solely in the Tribe's consent (*United States v. USF&G* (1940) 309 U.S. 506, 514), it is irrelevant if the other party had a different understanding of a waiver's existence or scope, and, indeed,

waivers must be confined to the explicit conditions on which the Tribe granted them. *Ameriloan v. Superior Court* (2008) 169 Cal. App. 4th 81, 94; *Campo Band of Mission Indians v. Superior Court* (2006) 137 Cal. App. 4th 175, 183; *see also Namekagon Dev. Co. v. Bois Forte Res. Hous. Auth.* (8th Cir. 1975) 517 F.2d 508, 510 (issue is not simply whether a tribe has waived its immunity, but "extent to which that immunity was waived").

In addition, because sovereign immunity is a defense both to suit as well as liability, a party asserting the court's jurisdiction must prove, at the outset of the case and in response to any motion to dismiss, that the Tribe unequivocally waived its sovereign immunity. *Lawrence v. Barona Valley Ranch Resort & Casino* (2007) 153 Cal. App. 4th 1364, 1368-69. Without that showing, the Court cannot assume jurisdiction and the case must be dismissed. *Id.* Furthermore, where the case presents "competing claims" as to the existence or scope of immunity, the Court must resolve any "conflict" in the evidence. *Great Western Casinos, Inc., v. Morongo Band of Mission Indians* (1999) 74 Cal. App. 4th 1407, 1418. As shown below, the Superior Court erred by failing to apply these principles.

B. The Court Found No Unequivocal Waiver Of The Tribe's Sovereign Immunity, Requiring Dismissal of Sharp's Claims, Not A Jury Trial.

At the outset of the case, the Tribe moved to dismiss the lawsuit on the ground that the Tribe had not waived its immunity to Sharp's claims, as the waivers of immunity in the ELA and the Note were limited in scope. (AA/Vol.I/pp. 27-30.) Specifically, the Tribe presented evidence that the contracts and the waivers contained therein pertained to the Crystal Mountain Casino (a gaming facility that does not exist). (*See* AA/Vol.II/pp. 81:11-82:12; 436:8-437:7, 441:4-11, 457:10-458:10, 472:18-473:25, 474:13-24, 475:11-476:11, 477:1-8, 482:5-14, 483:5-10,

486:18-487:25, 488:7-18, 492:4-15, 511:11-21, 512:4-17, 520:17-521:5, 524:11-525:13.)

Sharp opposed the Tribe's motion, arguing the waiver provisions of both contracts encompassed Sharp's claim to a share of revenues from a different gaming facility that a different contractor helped the Tribe build. (AA/Vol.II/pp. 643:12-645:7.) Sharp also sought, and the lower court ordered, broad jurisdictional discovery, seeking all documents that mentioned Sharp, its principal, Crystal Mountain or Sharp's contracts. (AA/Vol.I/pp. 57-59.)

After reviewing the parties' showing (which included evidence from Sharp's broad discovery), the court concluded it could not decide whether the Tribe had unequivocally waived its immunity to Sharp's claims seeking revenues from Red Hawk Casino, because both parties had offered a "reasonable" interpretation of the scope and application of the waiver provisions. (AA/Vol.VII/p. 1960:15-17.) As such, the court ruled, a "jury trial will be necessary." (AA/Vol.VII/p. 1960:15-17.) The ruling was in error because it relieved Sharp of its legal burden of proof, and it was contrary to the Court's duty to "resolve" "competing claims" regarding the existence and scope of tribal immunity at the outset of the case. *Great Western Casinos, Inc.*, 74 Cal. App. 4th at 1418.

With respect to the Tribe's position, the court found "reasonable" the Tribe's testimony that its waiver of immunity was limited to Crystal Mountain Casino. (AA/Vol.VII/p. 1960:15-17; *see* AA/Vol.II/pp. 423:23-426:3.) Specifically, the 1997 Tribal Council members testified they understood language in the ELA referencing "any future gaming facility or facilities" to mean Crystal Mountain, whether that be the existing tent structure, or a permanent brick-and-mortar operation built from the tent's revenues—which the Council members testified was the "two step" plan they contemplated when approving the contracts. (*See* AA/Vol.I/pp.

81:11-82:12; AA/Vol.II/pp. 436:8-437:7, 441:4-11, 457:10-458:10, 472:18-473:25, 474:13-24, 475:11-476:11, 477:1-8, 482:5-14, 483:5-10, 486:18-487:25, 488:7-18, 492:4-15, 511:11-21, 512:4-17, 520:17-521:5, 524:11-525:13; *see also* AA/Vol.I/p. 166.) However, the court also found Sharp's position, that the "any future gaming facility" language meant the Tribe could have waived immunity to claims for revenue from a casino other then Crystal Mountain (AA/Vol.III/pp. 643:14-645:7), was reasonable. (AA/Vol.VII/p. 1960:15-17; *see* AA/Vol.I/p. 166.)

Similar competing claims were presented with respect to the scope of the waiver provision in the Promissory Note, and the lower court reached a similar conclusion with respect to the ambiguous nature of the waiver's application. (AA/Vol.VII/pp. 1959:20-1960:17.) The Note conditioned repayment of money advanced by Sharp upon delivery of 400 machines to "[the Tribe's] Gaming Facility and Enterprise." (AA/Vol.I/p. 283.) In the event of a dispute under the Note, the Tribe had agreed to waive its immunity "to enforce the terms of the Note." (AA/Vol.I/p. 284.) As the "Gaming Facility and Enterprise" meant Crystal Mountain, the Tribe contended the waiver to enforce "the terms of the Note" was predicated on a gaming facility that did not, and never would, exist. (AA/Vol.II/pp. 426:6-427:2.) Sharp contended otherwise, arguing the "Gaming Facility and Enterprise" meant Red Hawk. (AA/Vol.III/p. 644:8-13.)

Based on the parties' respective showing, and the court's finding that both interpretations were reasonable, it then proceeded to apply ordinary principles of contract law requiring ambiguities to be resolved by the trier-of-fact, and concluded the matter had to be sent to a jury. *Wolf v. Superior Court* (2004) 114 Cal. App. 4th 1343, 1351, 1359-60 (ambiguity exposed by extrinsic evidence where two competing interpretations are both "reasonable"). However, the existence and scope of any waiver of

sovereign immunity turns solely on *the Tribe's intent*, as explicitly and unequivocally expressed (*USF&G*, 309 U.S. at 514; *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58), and is *not* governed by ordinary principles of contract law.

Furthermore, had the court applied the principles embodied in controlling sovereign immunity law—specifically, the sovereign immunity cases the Tribe cited, not the contract interpretation cases upon which Sharp and the court relied—it would have dismissed. That is because in finding that "either interpretation [of the disputed terms] is reasonable," thereby requiring jury resolution, the Court necessarily found the evidence relevant to the waiver's scope to be ambiguous. *See Wolf*, 114 Cal. App. 4th at 1351; *see also Saporta v. Barbagelata* (1963) 220 Cal. App. 2d 463, 472 (where contract terms are not in conflict, or are "not uncertain or ambiguous," their interpretation is a "question of law"). The very finding that either interpretation was reasonable was itself tantamount to finding that Sharp had failed to demonstrate an unequivocal waiver of immunity, as it was required to do (*Lawrence*, 153 Cal. App. 4th at 1369), since waivers must be construed narrowly and strictly, in favor of the Tribe's immunity, meaning all doubts must be resolved in favor of sovereign immunity and against a waiver. *See Soghomonian*, 82 F. Supp. 2d at 1140; *Ameriloan*, 169 Cal. App. 4th at 94; *Demontiney*, 255 F.3d at 811.

In sum, had the lower court applied its finding that both parties' construction was "reasonable" to the law governing sovereign immunity, it would have been constrained to dismiss, because its conclusion meant Sharp failed to meet its burden of proving at the outset that the Tribe explicitly and unequivocally waived its immunity to Sharp's claims. Further, because there can is no doubt the case went to trial only because the court found the disputed contract terms to be "uncertain" or "ambiguous" (*Wolf*, 114 Cal. App. 4th at 1351); and once the court made

that determination, there was no jurisdictional basis to proceed, and the matter was then, and still is, properly dismissed.[15]

IV. The Superior Court Erred In Denying The Tribe's Motion For Summary Judgment.

Assuming the lower court had jurisdiction over this matter, Sharp's lawsuit should have been dismissed because Sharp filed it more than four years after the statute of limitations expired on its claims. The Tribe's Motion for Summary Judgment established that the statute of limitations for Sharp's claims began accruing in 1999 when the Tribe executed an agreement with a new gaming company, which Sharp claimed violated its right to exclusivity under the ELA. Ignoring fundamental principles of contract law, Sharp alleged the Tribe's violation of the ELA's exclusivity provision was not an actual breach of contract, but rather, constituted an "anticipatory breach" tolling the statute of limitations. (AA/Vol.XVII/pp. 4042:4-9.) In a two-sentence oral ruling, the lower court agreed, offering no analysis or reasoning for a decision that contradicts established California law. (AA/Vol.XXI/p. 5152:19-21; RT/Vol.II/p. 578:23-25.)

Alternatively, should this Court hold the Tribe's alleged breach of Sharp's claimed right to exclusivity did not immediately trigger the statute of limitations, and that Sharp could wait to bring suit under the doctrine of

---

[15] Although it was error for the lower court to send the jurisdictional defense to a jury, the evidence presented at trial only confirmed the Tribe's position as to its reading of the Note, and the limited scope of a waiver "to enforce [its] terms." (AA/Vol.I/p. 284.) When testifying during the second phase of trial regarding Sharp's ability to perform conditions precedent to repayment of the Note, Sharp's principal testified that the Tribe's reading of the "terms of the Note," was consistent with his own, and that "Borrower's Gaming Facility and Enterprise" meant Crystal Mountain, the only gaming facility that existed when the Note was signed. (RT/Vol.X/p. 2705:23-27.) Thus, by Sharp's own admission, the Tribe's position that it only waived sovereign immunity under the Note for claims related to Crystal Mountain was not only reasonable, but right.

anticipatory breach, Sharp's lawsuit was still properly dismissed. Applying California Supreme Court precedent to the undisputed facts confirms that Sharp could not have performed the contracts when it claimed performance became due in 2008.[16]

A. The Alleged Violation Of The Exclusivity Provision Would Have Been An Actual Breach Of Contract Immediately Triggering The Statute Of Limitations On The ELA And The Note.

1. Sharp's ELA-Based Claims Accrued In 1999 And Are Time-Barred.

Under California law, the breach of a contract's exclusivity provision constitutes an actual breach of contract. *Medico-Dental Bldg. Co. v. Horton & Converse* (1942) 21 Cal. 2d 411, 424-27 (a contract's exclusivity provision is breached at the moment defendant executes an agreement with a third party that is inconsistent with plaintiff's contractual right of exclusivity); *see also Boon Rawd Trading Int'l Co., Ltd. v. Paleewong Trading Co.* (N.D. Cal. 2010) 688 F. Supp. 2d 940, 949 (applying California law and finding that a plaintiff alleging the breach of an exclusivity agreement cannot toll the limitations period by mischaracterizing the breach as an anticipatory repudiation).

Indisputably, both parties understood the Tribe cancelled the ELA in June 1999. (AA/Vol.XX/pp. 4915:21-4918:19; AA/Vol.XIV/pp. 3358-3362, 3363-3413, 3414-3415, 3416-3466; AA/Vol.XV/pp. 3568:24-3569:2, 3579:21-3580:3, 3594:8-10, 3598:15-22, 3609:6-3613:10, 3616:4-

---

[16] An appellant may successfully assert on appeal that the trial court prejudicially erred in denying a motion for summary judgment where the question at issue was not decided at trial. *F.D.I.C. v. Dintino* (2008) 167 Cal. App. 4th 333, 343; Code Civ. Proc. § 906. In that circumstance, the appellant properly relies only on those "facts shown in the supporting and opposing affidavits and those admitted and uncontested in the pleadings." *Hamburg v. Wal-Mart Stores, Inc.* (2004) 116 Cal. App. 4th 497, 502.

3617:2, 3618:24-3619:4, 3620:10-15; AA/Vol.XVI/pp. 3786:26-3787:4, 3788:3-6, 3856:2-3862:21 3876, 3895, 3898.) The Tribe and Sharp exchanged a series of letters beginning in June 1999, where the Tribe questioned the validity and legality of Sharp's gaming machine agreements. (AA/Vol.XVII/p. 4086:13-14; AA/Vol.XIX/p. 4617-4618.) These communications culminated in a June 28, 1999 letter, where the Tribe confirmed its understanding that the GMA and ELA were "void" because "they [would] not meet necessary Federal approvals." (AA/Vol.XIV/p. 3361.)[17]

The undisputed facts also establish that immediately after terminating the ELA, the Tribe entered into a new contract with a different gaming company (Lakes Entertainment, Inc), which gave Lakes "exclusivity" over the Tribe's future gaming operations—an exclusive right to which *Sharp* claimed entitlement under the ELA.[18] Sharp's complaint alleged the Tribe had "acted inconsistently with the terms of the agreement" by "enter[ing] into an agreement with a third-party for purposes of leasing or purchasing gaming equipment for Defendant's

---

[17] In opposition, Sharp disputed the Tribe's use of the word "cancelled" to describe the Tribe's action, but the facts remain undisputed. (AA/Vol.XVII/p. 4067:25-4068:21; AA/Vol.XVII/p. 4040:21-25, n.5.). Mr. Anderson testified that after he received the letter, "I knew they cancelled my contract," and "as far as I was concerned, I was done with the Tribe." (AA/Vol.XV/p. 3611:15-24; *see also* AA/Vol.XVII/pp. 4150:8-10, 4168:23-4169:22.) Notably, the lower court found the contracts were "terminated and/or cancelled" (AA/Vol.VII/p. 1955:2-4), and later confirmed that finding, stating that the contracts had been "terminated," and "I don't think there is much dispute there." (RT/Vol.II/p. 351:10-13.)

[18] As Sharp recognized, the Tribe initially entered an agreement with Keane Argovitz Resorts ("KAR") on June 11, 1999, and shortly thereafter, Lakes and KAR formed a partnership (AA/Vol.XVII/p. 4067:25-4068:21), and on May 5, 2000, the Tribe signed a new agreement with LAKES/KAR (referenced throughout the briefing as "Lakes"). The Tribe supported its dispositive motion with these new contracts without evidentiary objection. (AA/Vol.XIV/pp. 3363-3413, 3416-3466.)

[future] casino, despite the exclusivity provisions in the contracts between Plaintiff and Defendant." (AA/Vol.I/p. 18:24-28.) When opposing the Tribe's dispositive motion, Sharp asserted the June 1999 contract with Lakes breached Sharp's right to exclusivity, reiterating that it "was inconsistent with and in disregard of Sharp Image's exclusive right to supply gaming machines to the Tribe under the ELA." (AA/Vol.XVII/pp. 4067:25-4068:25, 4072:7-4073:20.) The opposition further clarified Sharp's position, stating the Tribe's "agreement with Lakes [was] to obtain the equipment that Sharp Image had the exclusive right to supply under the ELA"—meaning Sharp had been "denied" "its exclusive right to lease gaming equipment to the Tribe's casino facilities." (AA/Vol.XVII/pp. 4037:24-4038:2, 4042:4-6; AA/Vol.XVII/pp. 4067:25-4068:21.) These admissions bind Sharp. *See Smith v. Walter E. Heller & Co.* (1978) 82 Cal. App. 3d 259, 269 ("Such a judicial admission may, as is the case here, be an allegation of a pleading or an attorney's concession or stipulation to facts. '[It] is not merely evidence of a fact; it is a conclusive concession of the truth of a matter which has the effect of removing it from the issues.'"); *see also Troche v. Daley* (1990) 217 Cal. App. 3d 403, 409-10; *St. Paul Mercury Ins. Co. v. Frontier Pacific Ins. Co.* (2003) 111 Cal. App. 4th 1234, 1248.

Notwithstanding its admissions, Sharp argued the alleged breach of the ELA's exclusivity was immaterial to whether the June 1999 cancellation constituted an "actual" breach that triggered the statute of limitations. (AA/Vol.XVII/pp. 4043:12-4044:18.) Sharp was wrong. Applying well-established law to these undisputed facts confirms the alleged breach occurred when Sharp was "denied" its "exclusive right to lease gaming equipment" to the Tribe. (AA/Vol.XVII/pp. 4037:24-4038:2.) Indeed, the California Supreme Court has long recognized that an alleged breach of a contract's exclusivity provision constitutes an actual

breach. *Medico-Dental Bldg. Co.,* 21 Cal. 2d at 424-27 (landlord breached lease with exclusivity provision the moment it entered a separate lease with a third-party for "the prohibited purpose"). And of course, once there is a claimed actual breach, the statutory clock immediately begins ticking. Code Civ. Proc. § 337 (four year statute applies to claims on written contracts).

Unable to refute the Tribe's showing, Sharp sought to avoid the four-year statute of limitations by asserting the June 1999 termination was an "anticipatory repudiation"—i.e., that the contract was repudiated, not actually breached, because the date for performance had not yet arrived. Sharp's argument ignores its admissions and the law. (AA/Vol.XVII/pp. 4037:24-4038:2, 4042:3-17.) As explained above, once the Tribe entered into a new contract with Lakes "to obtain the equipment that Sharp Image had the exclusive right to supply," Sharp was "denied" "its exclusive," and an actual breach occurred (if at all) the moment the "inconsistent" contract was "executed." *Medico-Dental Bldg. Co.,* 21 Cal. 2d at 424; *see also McWilliams v. Holton* (1967) 248 Cal App 2d 447, 453 (where a party "cancels" an agreement, and makes performance infeasible, the non-breaching party's cause of action accrues at that moment). (*See* AA/Vol.XIV/pp. 3368, 3370, 3372; AA/Vol.XIV/pp. 3418-3419, 3422.)

Finally, Sharp's effort to invoke "anticipatory breach" to avoid California's statute of limitations on an alleged breach of a contract's exclusivity was considered and rejected in the directly analogous *Boon Rawd Trading Int'l Co., Ltd.*, 688 F. Supp. 2d 940. Relying on the seminal California Supreme Court decision in *Romano v. Rockwell Int'l Inc.* (1996) 14 Cal. 4th 479, 489, the *Boon Rawd* court (Alsup, J.) found that where the alleged breach terminated a plaintiff's right to exclusivity, the elements necessary to establish an anticipatory breach were not met as a matter of California law:

> [T]he *Romano* court expressly recognized the option of plaintiff to "treat the repudiation as an empty threat, wait until the time for performance arrives and exercise his remedies for actual breach if a breach does in fact occur at such time." ... Here, the alleged [new agreement with a third-party] was not an empty threat, but rather an actual and material breach of the importation agreement's most important provision: exclusivity.

Boon Rawd, 688 F. Supp. 2d at 949 (quoting *Romano*, 14 Cal. 4th at 489).

This same analysis applies equally here. The fact that Sharp pled its lawsuit as an "anticipatory breach" does nothing to change the undisputed facts upon which its claims rest. The statutory clock necessarily began ticking in 1999, when everyone agrees the Tribe terminated Sharp's contract and entered a new "inconsistent[]" contract with a third-party that "denied Sharp Image its exclusive right to lease gaming equipment to the Tribe's casino facilities." (AA/Vol.I/p. 18:24-28; AA/Vol.XVII/pp. 4037:24-4038:2.) As in *Boon Rawd*, because the Tribe's termination of Sharp's contract was an alleged "actual and material breach" of the ELA's exclusivity provision, the limitations period on Sharp's ELA-based contract claims ran no later than 2003. Code Civ. Proc. § 337.

2. Sharp's Note-Based Claims Accrued in 1999 And Are Time-Barred.

Sharp's claims for repayment of "advances" reflected in the Promissory Note also accrued in 1999, along with Sharp's ELA claims. That is because the Promissory Note (entered contemporaneously with the ELA) also references the 400 video gaming devices identified in the ELA, and conditions the "commencement date" for repayment of the Note to "follow[] the date that four hundred (400) video gaming devices...are installed and in operation at Borrower's Gaming Facility and Enterprise." (AA/Vol.XV/p. 3503.) Because the Tribe allegedly violated Sharp's right

to exclusively perform the ELA, the condition necessary for the Note's repayment was likewise rendered infeasible no later than 1999. As such, Sharp's claims for breach of the Note are also necessarily time-barred. Code Civ. Proc. § 337.

To avoid summary judgment, Sharp argued the Note did "not condition the payment commencement date exclusively upon delivery of 400 video gaming machines *by Sharp Image* to the Tribe's casino." (AA/Vol.XVII/p. 4062:25-27 (Sharp's emphasis).) However, Sharp's new-found theory that it had no obligation to do anything to trigger payment under the Note was unsupported and insufficient to defeat summary judgment.

First, Sharp's new theory *contradicted* the allegations of its complaint. As with the ELA, Sharp's complaint alleged the Tribe anticipatorily breached its obligations when it "repudiated" the Note in 1999 by "enter[ing] into an agreement with a third-party for purposes of leasing or purchasing gaming equipment for Defendant's casino, despite the exclusivity provisions in the contracts between Plaintiff and Defendant." (AA/Vol.I/pp. 18:24-28, 19:1-4.)[19] Patently, if Sharp had no obligation to supply machines under the Note, the Tribe's alleged breach of exclusivity would have been irrelevant to the Note. *Walter E. Heller & Co.*, 82 Cal. App. 3d at 269; *Troche*, 217 Cal. App. 3d at 409. Moreover, if Sharp intended to plead it need do nothing to trigger the Note's repayment, then it could not assert the Note was "repudiated" in 1999,

---

[19] Sharp's opposition, before it asserted its new theory (AA/Vol.XVII/p. 4062:18-26), likewise embraced this allegation of its complaint, stating: "The Tribe breached *both* contracts with Sharp Image [the ELA and the Note] in December 2008 when it opened the [casino] using gaming equipment supplied by Lakes ..., a vendor that did not first acquire Sharp Image's exclusive rights as lessor of such equipment." (AA/Vol.XVII/p. 4036:7-10 (emphasis added).)

because California law does not recognize a claim for anticipatory breach of an alleged unilateral contract. *Diamond v. University of So. Cal.* (1970) 11 Cal. App. 3d 49, 53-54 (the doctrine of breach by anticipatory repudiation does not apply to unilateral contracts, because "the plaintiff has no future obligations to perform he is not prejudiced by having to wait for the arrival of defendant's time for performance in order to sue for breach"). As a result, to pursue its new theory, Sharp was required to dismiss or amend all claims related to the Note. Sharp refused to take such action, the Superior Court refused to order it, and Sharp therefore remained bound by the allegations of its complaint. (RT/Vol.II/pp. 528:6-531:25; AA/Vol.XIX/p. 4821:6-19.) *See Bosetti v. U.S. Life Ins. Co. in City of New York* (2009) 175 Cal. App. 4th 1208, 1225 ("The complaint serves to delimit the scope of the issues before the court on a motion for summary judgment, and a party cannot successfully resist summary judgment on a theory not pleaded.").

Second, reading the ELA and the Note together, as the law requires, highlights the incongruity of Sharp's position. *See* Civ. Code § 1642 ("Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together."); *Nevin v. Salk* (1975) 45 Cal. App. 3d 331, 338 (Under Civil Code section 1642, "a note, mortgage and agreement of sale constitute one contract where they are part of the same transaction."). Both the ELA and the Note reference "400 video gaming devices" that, under the ELA, Sharp was to "deliver" to "Crystal Mountain Casino," and under the Note had to be "installed and in operation at [the Tribe's] Gaming Facility and Enterprise" in order to trigger the "commencement date" for repayment of Sharp's prior investment in Crystal Mountain. (AA/Vol.XV/pp. 3490, 3503.)

Of course, Sharp did not (and could not) dispute that the only "Gaming Facility and Enterprise" that existed when the parties signed the Note was Crystal Mountain; nor did Sharp try to explain how it could possibly have entered two contacts on the same day that were not only incompatible, but contradictory. If Sharp's assertion that the Note was a unilateral contract was accepted, it would mean that one contract—the ELA—gave Sharp an *exclusive right* to supply gaming devices to the Tribe's casino facilities; while the other contract—the Note—contemplated that someone other than Sharp could supply the gaming devices to trigger repayment. Sharp's apparent argument that the Note was entered with the expectation that the ELA would be breached lacks credulity and, in any event, constitutes an interpretation that violates the statutory mandate that the contracts be read together. Civ. Code § 1642; *Nevin*, 45 Cal. App. 3d at 338.

In short, the record and the law confirm that Sharp's claims were time-barred, compelling summary judgment for the Tribe.

B. If Sharp's Lawsuit Was Not Time-Barred, It Was Still Properly Dismissed Because Sharp Failed To Prove Its Claims Under The Law Governing Anticipatory Breach.

If this Court finds the Tribe's alleged violation of its right to exclusivity was not an "actual" breach requiring Sharp to sue within four years, the only viable breach of contract claim Sharp had against the Tribe was at the time performance allegedly became due—i.e., in 2008 when the Tribe's hoped-for future casino opened. California law regarding anticipatory breach could not be more clear. As the Supreme Court explained in *Romano,* when a promisor allegedly repudiates a contract before performance becomes due, the plaintiff can elect one of two possible remedies: it can sue "immediately," or "wait until the time for performance arrives."

> [Plaintiff may] "treat the repudiation as an anticipatory breach and immediately seek damages for breach of contract, thereby terminating the contractual relation between the parties, **or** *he [or she] can treat the repudiation as an empty threat, wait until the time for performance arrives and exercise his [or her] remedies for actual breach if a breach does in fact occur at such time.*"

Romano, 14 Cal. 4th at 489 (emphasis added).

If, as Sharp maintains, the 1999 cancellation of the gaming contracts was a "repudiation" (and not an actual breach of its right to exclusivity) (AA/Vol.XVII/pp. 4067:25-4069:15), Sharp had an obligation to follow the directive of *Romano* and invoke one of the two remedies available. Because Sharp brought suit in 2007, eight years after the alleged repudiation, Sharp cannot contend it elected to sue "immediately." Indeed, in opposing the Tribe's demurrer, Sharp confirmed that, rather than suing immediately, it chose the second remedy available under *Romano* (*see* AA/Vol.VIII/p. 2110:10-13)—i.e., to "treat the repudiation as an empty threat" and "wait until the time for performance arrive[d] and exercise [its] remedies for actual breach *if a breach does in fact occur at such time.*" *Romano,* 14 Cal. 4th at 489 (emphasis added). Plainly, waiting for an "actual breach" to "in fact occur," would have required Sharp to sue after December 2008 when Red Hawk opened and Sharp's alleged performance became due under the contracts. *See Taylor v. Johnston (1975)* 15 Cal. 3d 130, 137 ("There can be no *actual* breach of a contract until the time specified therein for performance has arrived." (emphasis in original).) Of course, Sharp did not follow that directive either, because it sued in March 2007 (almost two years *before* performance allegedly became due).[20]

---

[20] The Tribe was unable to move to dismiss Sharp's March 2007 lawsuit as failing to state a cognizable claim, because the lower court did not resolve

Given the foregoing, if this Court holds that Sharp's 2007 lawsuit was viable even though it failed to follow the requirements of *Romano,* the only conceivable claim that Sharp could have against the Tribe rests on *Romano's* second remedy. Since Sharp failed to pursue that second remedy, and could not prove a claim under the law governing the second remedy available under *Romano,* its lawsuit should have been dismissed.

1. The Relevant Time of Performance For Both Parties Was When The Alleged Actual Breach Occurred In 2008.

As *Romano* explains, in a circumstance where (as here) the plaintiff elects *not* to sue immediately, the statutory limitations period is tolled to allow the plaintiff to elect to sue later, when "the time for performance arrives," *if* there is then an actual breach. The reason for this tolling is because "the plaintiff should not be penalized for leaving to the defendant an opportunity to retract his wrongful repudiation; and would be so penalized if the statutory period of limitation is held to begin to run against him immediately." *Romano,* 14 Cal. 4th at 489 (citation omitted). The significance of requiring Sharp to simply follow the law, by requiring it to elect one of the two remedies allowed under *Romano,* cannot be overstated. Had the Superior Court required Sharp to pursue an actual breach of contract claim based on *Romano's* second election, Sharp would have been required to prove all elements of an actual breach of contract claim. *See Troyk v. Farmers Group, Inc.* (2009) 171 Cal. App. 4th 1305, 1352; *St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co.* (2002) 101 Cal. App. 4th 1038, 1060. Specifically, Sharp would have been required to show what it pled in its complaint: that it could and would have performed when Red Hawk opened in December 2008 (i.e.,

---

the Tribe's jurisdictional challenges until March 10, 2010, after Red Hawk had opened without Sharp's machines.

when the Tribe opened the gaming facility from which it sought revenues), "but for" the Tribe's alleged breach. (*See* AA/Vol.I/p. 20:7-9, 20:21-23 (alleging it "was ready, able and willing to perform those terms and conditions on its part *to complete performance*" (emphasis added).)

2. Sharp Could Not Perform When The Alleged Actual Breach Occurred.

Once it became apparent Sharp could not make the showing necessary to establish an actual breach, it advanced an unprecedented hybrid reading of *Romano* that contradicts the Supreme Court's holding. As described previously, in April 2010, the Tribe discovered evidence that Sharp was unable "to complete performance "when Red Hawk opened, after an independent internet search revealed that Sharp had been the subject of a multi-year investigation by the Bureau of Gambling Control ("Bureau") (a division of the California Department of Justice). (*See* STATEMENT OF FACTS, section D.5). The Bureau concluded that Sharp (more precisely, Mr. Anderson), lacked the moral and professional integrity necessary to be "suitable" to be licensed as a gaming machine provider in the state of California. (AA/Vol.XIII/pp. 3119-3124, 3128-3258; AA/Vol.XV/pp. 3753:11-3754:2, 3755:14-3759:7; AA/Vol.XVI/pp. 3772:14-20, 3952-3980.) Under the terms of the Tribe's Compact with the State (which became effective in May 2000), the Tribe may not engage in business with—i.e., accept gaming machines from—a gaming machine provider considered "unsuitable" by the Bureau. (AA/Vol.XX/pp. 4924:12-4925:14; AA/Vol.XIII/pp. 3119-3124, 3128-3258; AA/Vol.XV/pp. 3753:11-3754:2, 3755:14-3759:7; AA/Vol.XVI/pp. 3952-3980.) Specifically, the Compact confirms that the Tribe "may not" issue a gaming license unless the applicant meets *all* requirements of "good character, honesty and integrity"; and this assessment includes reviewing any findings made by a State Gaming Agency (defined in the Compact to

include the Bureau). (AA/Vol.XIII/pp. 3135 (§ 2.18), 3143-3144 (§ 6.4.3), 3145 (§ 6.4.5), 3147 (§ 6.4.8).) Further, if the Tribe's Gaming Commission had issued a license before the Bureau's findings, the Compact would have required the Tribe revoke or suspend such license upon notice of the findings. (AA/Vol.XII/p. 3149 (§§ 6.5.2, 6.5.5).)[21]

3. The Tribe's Evidence That Sharp Could Not Perform When The Alleged Actual Breach Occurred Was Relevant And Admissible.

In an effort to defeat summary judgment and keep this damning evidence from the jury, Sharp contended that any evidence showing Sharp could not have performed in 2008 was irrelevant and inadmissible. (*See* RT/Vol.II/p. 491:10-13 ("subsequent events that affect ability to perform do not excuse repudiation. They do not justify repudiation. That's our position here."), 506:26-507:17.) The court accepted Sharp's arguments. (RT/Vol.II/pp. 506:26-507:17, 573:27-575:13; AA/Vol.XXI/pp. 5139:26-5140:17.) Each was erroneous.

a) Sharp's Ability To Perform In 2008 Was Essential To Proving Its Breach of Contract Claims.

According to Sharp's hybrid theory, even though it did not sue immediately on the alleged repudiation, as *Romano* required, it still only had to show it could have performed the ELA in 1999 because it sued before the actual breach occurred. (AA/Vol.XVII/pp. 4041:19-4043:9.).

---

[21] Although Sharp argued the Bureau's findings were not final, because the California Gambling Control Commission ("CGCC") had not scheduled the hearing requested by Sharp to consider those findings, the argument was neither relevant nor essential to the Tribe's position regarding the impact of the Bureau's findings given the Tribe's Compact. (AA/Vol.XII/pp. 3072:13-3073:2; AA/Vol.XVII/pp. 4046-4047(fn.12); AA/Vol.XIX/pp. 4821:20-4823:6.) Unless and until the CGCC invalidates the Bureau's findings, the Tribe's Gaming Commission is not privileged to ignore them.

Then, once Sharp established it could have supplied gaming machines in 1999, it would be entitled to damages as if it had supplied machines in 2008, when Sharp alleged performance was due. (AA/Vol.XVII/p. 4041:1-18.) This hybrid theory is nowhere supported in the law and Sharp never cited a single case to support its assertion that it could sue the Tribe in 2007 for an alleged 1999 repudiation entitling it to damages as if it could have performed in 2008.[22]

Disregarding the undeniable fact that Sharp failed to immediately sue on the Tribe's alleged "repudiation," Sharp relied on cases analyzing the law as if it had. Specifically, Sharp relied on cases and secondary authority that apply to the first election remedy in *Romano,* where the plaintiff "elects to treat the repudiation as an anticipatory breach and

---

[22] Notably, the trial court, Judge Nelson Brooks presiding, recognized that Sharp's theory did not comport with the law of anticipatory breach set forth in *Romano,* and questioned Sharp's counsel on its theory outside the presence of the jury, stating "I have a hard time seeing how repudiation even fits into this case... there's a point at which Sharp Image had to make an election between treating the repudiation as an anticipatory breach and treating the repudiation as an idle threat, and from the timing of the filing of the lawsuit, it appears that Sharp chose to treat the repudiation as an idle threat." (RT/Vol.XIV/pp. 3700:23-3701:4.) Judge Brooks was correct: repudiation had nothing to do with Sharp's lawsuit, since Sharp failed to sue immediately on a repudiation theory, and therefore this case should have been tried, if it was tried at all, as an actual breach occurring in 2008. However, Judge Brooks incorrectly concluded that he was bound by all prior rulings made by Judge Riley, and so the case went to the jury on Sharp's improper hybrid theory. (RT/Vol.XIV/p. 3664:11-13.) *See City of Los Angeles v. Oliver* (1929) 102 Cal. App. 299, 326 ("The doctrine that a previous ruling has become the law of the case has no application except as to the decision of appellate courts. It is a most common occurrence for a trial court to change its rulings during the progress of trial, upon questions of law, and no one would contend that it is not within its power to do so, or that it should not do so when satisfied that the former ruling was erroneous. If the court below, speaking through Judge Shaw, was convinced that it had ruled erroneously when speaking through Judge Keetch, it was not only its right but its duty to reverse its former ruling.")

immediately seek damages for the breach"; and convinced Judge Riley that Sharp's claims were governed under the law analyzing that election. This meant, according to Sharp, that its "anticipatory breach" claim was measured at the time of the "repudiation"—as if it had "treat[ed] the repudiation as an anticipatory breach and immediately [sought] damages for the breach." *Romano,* 14 Cal. 4th at 489. *See, e.g., Ersa Grae Corp v. Fluor Corp* (1991) 1 Cal. App. 4th 613, 625-26 (where plaintiff pursues an anticipatory breach by suing immediately after the repudiation, the time for performance is measured at the time of the repudiation).[23]

In short, because the undisputed facts show Sharp failed to bring suit immediately, it was error for the trial court to exclude evidence relevant to an alleged actual breach in 2008 under the second election of *Romano.*

b) The Tribe's Evidence That Sharp Was Unsuitable To Provide Gaming Machines Was Admissible And Mandates Dismissal Of Sharp's Claims.

Sharp filed 171 objections to the evidence submitted in support of the Tribe's Motion for Summary Judgment. (*See* AA/Vol.XIX/pp. 4656-4723.) The overwhelming majority of Sharp's objections were sustained without analysis (*see* RT/Vol.II/pp. 499:21-507:17), and where the lower court did comment on its ruling, the comments were often contradictory, confusing and/or contrary to law.[24] In addition, although the court stated

---

[23] Although *Romano* was not decided until after *Ersa Grae,* the election of remedies set forth in *Romano* has long been the law governing anticipatory breach claims, as previously noted. *See Taylor*, 15 Cal. 3d at 137.

[24] (*See, e.g.* RT/Vol.II/p. 500:8-13 ("I sustained the portion, 'However, we understood the waiver would be limited specifically, I understood that to the extent'—*he's not telling me what he heard. He's telling me what he understood, and that's pure hearsay.*") *See also* AA/Vol.XIX/pp. 4666:26-4667:4, 4669:18-24, 4672:25-4673:3, 4692:26-4693:4, 4694:10-16;

several times that it would entertain questions and argument on its evidentiary rulings, it then declined to do so, stating "No. It's my ruling, period, end." (*See* RT/Vol.II/pp. 504:14-19, 514:10-516:5.) Contradicting this statement, the court later said that: "All of the documents are before the Court"; and that "declaration[s]," "exhibit[s] and depositions will be looked at ..." (RT/Vol.II/pp. 534:10-25; 535:23-536:4.) Assuming this later ruling controls, it follows that all evidence reviewed by Judge Riley is properly reviewed by this Court as well. *Hamburg,* 116 Cal. App. 4th at 502.

Alternatively, in the event Sharp asserts the evidentiary rulings should stand, the Tribe challenges the following two objections for purposes of the "anticipatory breach" issues raised herein: (1) Sharp's objections 1-9 to the declaration of Bob Cloud; and (2) Sharp's objection 171 to the Tribe's RFJN, Exhibit K (California Department of Justice Bureau of Gambling Control, Tribal Vendor Background Investigation Report, Sharp Image Gaming, Inc., November 2008 ("Bureau Report")). (AA/Vol.XIX/pp. 4656:26-4662:18; 4723:5-12.)

With respect to the standard of review, there is a split in California authority as to "whether a trial court's rulings on evidentiary objections based on papers alone in summary judgment proceedings are reviewed for abuse of discretion or reviewed de novo." *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535; *see also Nazir v. United Airlines, Inc.* (2009) 178 Cal. App. 4th 243, 255, n.4 ("Whether abuse of discretion is the proper standard

---

RT/Vol.II/pp 500:14, 502:4, 503:5-12, 504:19-23, 505:11 (Sharp objected to prefatory statements of five Tribal Council declarants who testified "[u]nless the statement or context indicates otherwise, the facts set forth below are based on my own personal knowledge, and if I were called today to testify regarding those facts, I could do so"; Judge Riley overruled two of such objections, yet sustained three objections to identical language, striking it as "prepared by an attorney" and "boilerplate.").)

of review when rulings on evidentiary objections are based on papers alone presents an interesting question, one that is by no means settled").[25] However, regardless of what standard is used, where, as here, the trial court's blanket rulings "[cannot] provide any meaningful basis for review," the evidence will go before the reviewing court. *Nazir,* 178 Cal. App. 4th at 255. This is because "the trial court could not properly have sustained [so many] objections 'guided and controlled by fixed legal principles.'" *Id.* (*quoting Fasuyi v. Permatex, Inc.* (2008) 167 Cal. App. 4th 681, 695). So too here, the court's exclusion of Bob Cloud's declaration and the Bureau Report, upon sustaining Sharp's objections in summary fashion, was in error.

Sharp's objections 1-9 challenged the entirety of the declaration of Bob Cloud, the then Executive Director of the Tribe's Gaming Commission, who testified regarding the significance of the Bureau's Report on the Tribe's ability to license Sharp, and accept its machines in December 2008 when Red Hawk opened. (AA/Vol.XIX/pp. 4656:26-4662:18.) After sustaining each of Sharp's objections without comment (RT/Vol.II/p. 499:21-27), the court later stated "Mr. Cloud's total testimony, except what he knew—I first of all did not accept him as an expert, and he wasn't sufficiently qualified. And everything he was talking about is what he has heard and what he read and so forth." (RT/Vol.II/p. 502:24-28.) This ruling cannot stand because, *inter alia,* the Tribe never

---

[25] Favoring a de novo standard of review, courts have held that "[t]he only exception to the independent review standard [applied to summary judgment proceedings] applies when we review a trial court's exercise of discretion as allowed by [Civ. Proc. Code § 437c(e)]. *Under all other circumstances, it is legally and procedurally incorrect to apply an abuse of discretion standard.*" *City of Pasadena v. Department of Transportation* (1994) 29 Cal. App. 4th 1280, 1288 (emphasis added).

sought to establish Mr. Cloud as an expert and Mr. Cloud did not offer expert testimony.

A court may not exclude a witness as an unqualified expert where the witness was never presented as an expert and did not offer expert testimony. *See* Evid. Code §§ 800 (witness testifying to percipient facts not an expert), 801; Civ. Proc. § 2034.300 (exclusion of witness as an unqualified expert proper only where expert testimony is offered). Mr. Cloud was a percipient witness who testified about his personal knowledge regarding the practices and duties of the Tribe's Gaming Commission, which is bound by the Tribe's Compact with the State. (AA/Vol.XIII/pp. 3119-3124.) Mr. Cloud's statements concerned documents on which he relied to lead the Commission in its work, and the documents were presented solely for their effect on the hearer—i.e., how Mr. Cloud understands he was required to act when issuing licenses to machine suppliers based on his reading of those documents. As such, they are admissible for a nonhearsay purpose. *See* Evid. Code § 1200(a); *Hickman v. Arons* (1960) 187 Cal. App. 2d 167, 171; *Caro v. Smith* (1997) 59 Cal. App. 4th 725, 733-34.

Sharp's evidentiary objection to the Bureau Report also lacked merit. (AA/Vol.XIX/p. 4723:5-12.) Judge Riley sustained this objection on the theory that the Report post-dated the Tribe's repudiation of Sharp's contracts, rendering all post-1999 evidence (including the Report) irrelevant and inadmissible. (RT/Vol.II/pp. 506:26-507:17.) As explained above, however, this evidence was relevant because Sharp did not sue immediately under *Romano,* requiring it to show it could have performed the contracts when Sharp claimed the time for performance arrived in December 2008.

In addition, as detailed herein (section IV.C *infra*), even if *Sharp* was only required to show it could have performed in 1999, when the

alleged repudiation occurred, the evidence was still admissible *by the Tribe* to show that, due to subsequent events, Sharp was unable to perform the ELA regardless of any repudiation. Thus, the Bureau Report is not hearsay because it was presented, not for the truth of its contents, but rather, to show the effect the Report would have had on the Tribe's ability to accept Sharp's performance under the ELA. The Bureau Report (like the Compact) is an official record that has legal significance, and with its release by the State Gaming Agency one month before Red Hawk opened in December 2008, the Tribe could not have accepted Sharp's machines without violating the Tribe's Compact. See Evid. Code § 1200(a); *Am-Cal Inv. Co. v. Sharlyn Estates, Inc.* (1967) 255 Cal. App. 2d 526, 541; *Kunec v. Brea Redevelopment Agency* (1997) 55 Cal. App. 4th 511, 524. (See AA/Vol.XIII/pp. 3135 (§ 2.18), 3143-3144 (§ 6.4.3), 3145 (§ 6.4.5), 3147 (§ 6.4.8).)

In sum, if this Court finds that Sharp's claims were not time-barred and it could pursue a remedy under *Romano,* the only remedy available required Sharp to sue for "actual" breach (because, as Sharp admits, it did not elect to sue immediately). And, because the undisputed, admissible record shows Sharp could not have performed the contracts when Red Hawk opened due to the Bureau's finding of unsuitability, the Tribe was (and is) entitled to judgment as a matter of law.

C. Even If Sharp's Ability To Perform Was Properly Assessed In 1999, The Tribe's Evidence Established It Was Not The "But For Cause" Of Sharp's Alleged 2008 Damages.

Finally, even if Sharp's unprecedented theory of anticipatory breach is accepted, and Sharp was only required to show it could have performed in 1999 to recover damages measured in 2008, the Tribe was still entitled to defend itself against such a claim. Specifically, it was legal error for the Superior Court to reject the Tribe's undisputed, admissible evidence that it

could not have accepted gaming machines from Sharp in December 2008 due to Sharp's "unsuitability"; and thus the Tribe could not possibly have been the "but for" cause of Sharp's claimed damages.

As shown above, Sharp's opposition relied on authority setting forth the basic principle that a party who elects to sue for anticipatory breach immediately following a repudiation need only prove an ability to perform at the time of the repudiation. (AA/Vol.XVII/pp. 4044:19-4049:8.) However, assuming that law applied to Sharp's lawsuit despite its failure to sue immediately, it was legal error for the court to exclude *all* post-repudiation evidence—even the Tribe's evidence that it was not the "but for" cause of Sharp's alleged damages. (RT/Vol.II/pp. 491:10-12; 579:3-13.) Accepting Sharp's argument, Judge Riley set December 31, 1999 as the cut-off for admissible evidence, deeming all subsequent post-repudiation evidence undiscoverable, irrelevant and inadmissible. (RT/Vol.II/p. 579:3-13.) The law, however, is directly contrary to the ruling.[26]

Notably, the very authority upon which the court relied confirms that "[s]ubsequent events that affect [plaintiff's] ability to perform" can in fact "excuse the repudiation" if, by virtue of those subsequent events, the repudiation was not the cause of plaintiff's inability to perform. (RT/Vol.II/pp. 491:10-12; 573:27-575:17.) *See* 15 Lord, Williston on

---

[26] Confronted within the implications of this erroneous ruling, Judge Brooks acknowledged he did not understand the basis for Judge Riley's decision to exclude all post-repudiation evidence. During trial, when it was argued Sharp had "opened the door" for the Tribe to put on certain post-repudiation evidence, Judge Brooks responded: "There is no question here that Judge Riley has ruled on numerous occasions that this area of evidence is not admissible. My understanding is that's based upon the time frame in the anticipatory breach and to prove ability to perform with regard to anticipatory breach. *I don't pretend to understand how Judge Riley came to that decision, but he did.*" (RT/Vol.XIV/pp. 3663:15-3666:7 (emphasis added).)

Contracts § 43:32 (4th ed. 2012). Indeed, Williston's illustration of this rule as it applies to a repudiation claim confirms that while the court purported to follow Williston, it did not:

> [I]f, *following the breach*, it becomes apparent that the other party's failure to perform would have occurred regardless of the breach ... the other party ought not to be allowed to recover damages for the breach. *This rule is applicable, under the Restatement (Second) of Contracts, whether the breach takes the form of an anticipatory repudiation or consists of a failure to perform when performance is due* ... In all of these situations, the breach of contract does not cause compensable harm to its victim, since he or she would not have performed the contract in any event and the breaching party would not have received the expected consideration, regardless of his or her breach.
>
> Stated somewhat differently, *whenever subsequent events show that a party could not or would not have given the performance due under the contract, the party who first breaches the contract is excused from liability for the breach, and it makes no difference whether or not the reason for the breach is related in any way to the nonbreaching party's subsequent inability or unwillingness to perform.*

15 Lord, Williston on Contracts § 43:32 (4th ed. 2012) (emphases added); *see also* Restatement (Second) of Contracts § 254 (1981) ("A party's duty to pay damages for total breach by repudiation is discharged if it appears *after the breach* that there would have been a total failure by the injured party to perform his return promise." (emphasis added).)

California case law is, of course, in accord. In *Ersa Grae,* California's seminal case concerning a non-repudiating party's ability to perform, the court held that a plaintiff may not recover damages for anticipatory breach "without evidence that, but for the defendant's breach,

the plaintiff would have had the ability to perform." *Ersa Grae,* 1 Cal. App. 4th at 625. In determining plaintiff's ability to perform, the court held that, not only is plaintiff required to present evidence that it could have performed under the contract; defendant must also be given the opportunity to show that its repudiation did not cause the plaintiff's damages. As the court of appeal explained at page 626 (court's emphasis):

> On retrial [plaintiff] must present evidence sufficient to satisfy a jury that, but for [defendant's] breach, [plaintiff] was ready, willing and able to perform as required by the contract. [Defendant], of course, must be permitted to present evidence to persuade the jury that [plaintiff] would *not* have performed and that, therefore, [defendant's] breach did not cause damage to [plaintiff]."

Here, unlike *Ersa Grae,* no retrial is necessary, because the Tribe sought summary judgment supported by admissible, case-dispositive evidence that the Tribe was not the "but for" cause of any damage to Sharp. The undisputed record shows the Bureau (a State Gaming Agency under the Tribe's Compact) deemed Sharp unsuitable to lease gaming machines within the State as of November 2008. Accordingly, as of December 2008, when Red Hawk opened and performance allegedly became due, the Tribal Gaming Commission could not have licensed Sharp to supply machines, and the Tribe could not have accepted them.

Having demonstrated it was not the "but for" cause of Sharp's alleged 2008 damages as a matter of law, the Tribe was, and remains, entitled to summary disposition in its favor.[27]

---

[27] It should also be noted that Sharp's case presented a further barrier to demonstrating it could have performed in 1999. At trial, Mr. Anderson testified that every gaming machine produced, leased, and sold by Sharp during the 1999 time period used identical programming that enabled the machines to convert between a "Class II" or "Class III" mode.

V. The ELA Omitted An Essential Term Necessary For Contract Formation

Assuming this Court finds Sharp's lawsuit was properly tried in state court, the jury's unanimous special finding that the parties left essential terms of the ELA for future determination establishes that no contract was formed as a matter of law, requiring judgment for the Tribe on Sharp's ELA-based claims.

Under fundamental California contract law, "[i]n order for acceptance of a proposal to result in the formation of a contract, the proposal 'must be sufficiently definite, or must call for such definite terms in the acceptance, that the performance promised is reasonably certain.'" *Weddington Productions, Inc. v. Flick* (1998) 60 Cal. App. 4th 793, 811; *see also* Restatement (Second) of Contracts Section 33(1) ("Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain."); 1 Witkin, Summary 10th (2005) Contracts

---

(AA/Vol.XXIX/pp. 7483:11-7486:10, 7488:27-7489:16, 7498:12-7499:14; RT/Vol.IX/pp. 2386:11-2389:10, 2410:27-2411:16; RT/Vol.X/pp. 2654:24-2655:14.) Mr. Anderson also testified Sharp would have performed the ELA in 1999 by supplying the Tribe the same 396 convertible machines it delivered to the Tribe's tent casino under the GMA. (AA/Vol.XXIX/pp. 7494:5-7495:5; RT/Vol.X/pp. 2570:5-2571:5; AA/Vol.XXIX/pp. 7501:9-7503:6; RT/Vol.X/pp. 2696:9-2698:6.) However, after briefing on jury instructions, where the Tribe clarified that machines capable of being converted were illegal (*see* 18 U.S.C. § 1166(a); Pen. Code § 330b(1)), Mr. Anderson took the stand in rebuttal to contradict his own case-in-chief testimony, testifying he had a third type of previously undisclosed machine that was purportedly a stand-alone (legal) Class II machine. (AA/Vol.XXVI/pp. 6568-6572; RT/Vol.XIII/p. 3603:2-10.) The Tribe properly, but unsuccessfully, objected to this testimony. (RT/Vol.XIII/pp. 3587:9-3588:1). Nonetheless, while Sharp was allowed to advance a new theory in rebuttal suggesting it could have legally performed in 1999, Sharp's case-in-chief testimony confirmed precisely the opposite.

§§ 134, 137. "Where a preliminary contract leaves certain terms to be agreed upon for the purpose of a final contract, there can be no implication of what the parties will agree upon." *Kerr Glass Mfg. Corp v. Elizabeth Arden Sales Corp.* (1943) 61 Cal. App. 2d 55, 56-57 (no contract formed where the parties "leave a material condition to be left for future agreement").

Following trial, the jury was instructed from BAJI 10.66, concerning the requirement of "certainty" as an essential element of contract formation: "Where any essential terms of an apparent agreement are left for future determination and it is understood by the parties that the agreement is not complete, until they are settled or where it is understood that the agreement is incomplete until reduced to writing and signed by the parties, *no contract results until this is done.*" (RT/Vol.XV/p. 4088:3-8 (emphasis added)); BAJI 10.66. In addition, the jury was given the following special interrogatory #4 to test the validity of any general verdict finding that the Tribe had breached the ELA: "Was any essential term of the contract left for future determination?" The jury answered "yes" to that interrogatory. (AA/Vol.XXVIII/p. 7315.) The jury's special finding that the ELA left essential terms for future determination is fatally inconsistent with the general verdict awarding damages to Sharp on the basis of that same contract. As such, the verdict cannot stand.

The trial court may, as here, direct the jury to find upon particular questions of fact relating to a general verdict. Code Civ. Proc. § 625. Such special findings are primarily used to test the validity of the general verdict. *Travaglione v. Billings* (1993) 4 Cal. 4th 1150, 1156-57. "Where a special finding of fact is inconsistent with a general verdict, the former controls the latter, and the court must give judgment accordingly." Code

Civ. Proc. § 625; *Textron Fin'l Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.* (2004) 118 Cal. App. 4th 1061, 1073. A special finding is inconsistent with a general verdict when, as a matter of law, the special finding when taken by itself would authorize a judgment different from that which the general verdict will permit. *See Bond v. DeWitt* (1954) 126 Cal. App. 2d 540, 544. Therefore, the jury's special finding that an essential term of the contract was left for future determination confirmed that no enforceable contract was formed, and the Superior Court should have entered judgment for the Tribe.

Moreover, even if the jury's special finding were not dispositive, the evidence introduced at trial still required the court to enter judgment for the Tribe, notwithstanding the jury's general verdict. This is because it is undisputed that the ELA—an agreement to lease video gaming equipment (AA/Vol.XXXIV/pp. 9154-9161)—left for future determination the description of the kind of "video gaming devices" that would be supplied. The ELA states that Sharp was to provide, and the Tribe was to accept, gaming devices "as may be further described on Exhibit A." (AA/Vol.XXXIV/p. 9154.) Yet, Exhibit A does not describe or even list the Equipment. Because the only conceivable thing of value the Tribe could receive in exchange for Sharp's claimed exclusive right to provide gaming machines was that "Equipment," there is no doubt, as the jury found, that an essential term of the ELA was left for future determination. (AA/Vol.XXXIV/p. 9161.)

Further confirming the evidentiary basis for the jury's finding, Mr. Anderson admitted that when the parties signed the ELA, he did not know what equipment he was promising to provide; he knew only that it would be Sharp's equipment. (RT/Vol.X/pp. 2559:11-2565:17). And Mr.

Anderson also admitted that because of an integration clause in the ELA (Trial Exhibit 16, Section 23), in order for the parties to agree on the gaming machines that would later be provided under the ELA, a separate written agreement would have to be reached. (RT/Vol.X/pp. 2562:10-2565:17.)[28]

In sum, the undisputed evidence shows a material term of the ELA was left for future determination, requiring judgment for the Tribe under Code of Civil Procedure section 625. Alternatively, even if the jury's special finding was not dispositive under the Code, substantial evidence does not support judgment for Sharp on its ELA claims. Accordingly, judgment for the Tribe is appropriate.

VI. Substantial Evidence Does Not Support Sharp's Recovery On The Promissory Note.

A. Sharp Admitted The Note's Repayment Condition, Requiring Gaming Machines To Be In "Operation" At Crystal Mountain, Never Occurred.

"Under the law of contracts, parties may expressly agree that a right or duty is conditional upon the occurrence or nonoccurrence of an act or event." *Platt Pacific, Inc. v. Andelson* (1993) 6 Cal. 4th 307, 313. Sharp, as a plaintiff seeking to enforce the Note, bore the burden of proving that all of the conditions precedent to the Tribe's performance occurred. *Kadner v. Shields* (1971) 20 Cal. App. 3d 251, 271; Code Civ. Proc. § 457.

---

[28] Sharp's opposition to the Tribe's judgment notwithstanding the verdict attempted to discount the jury's special finding, pointing to testimony that the missing material term of the ELA would be supplied at a later date. (AA/Vol.XXXI/pp. 8162:15-21, 8329:23-8330:8, 8334:1-8, 8401:10-26; AA/Vol.XXXII/p. 8446:16-24; AA/Vol.XXV/p. 6342:16-24; RT/Vol.IX/p. 2410:10-26; RT/Vol.X/pp. 2811:23-2812:8; RT/Vol.XI/p. 2847:1-8.) This testimony only confirms that, as the jury found, the parties left a material term for later determination.

Indeed, the contract's explicit conditions establish the limits of the Tribe's sovereign immunity waiver; and, putting aside whether the jurisdictional defense should have gone to the jury, no court possesses jurisdiction to impose liability beyond any condition's express terms, which "must be strictly construed and applied." *Campo Band of Mission Indians v. Superior Court* (2006) 137 Cal. App. 4th 175, 183.

This means the jury could *only* properly find for Sharp on the Note if Sharp presented substantial evidence that all conditions precedent to payment on the Note occurred, or were excused. (RT/Vol.XV/pp. 4106:27-4107:8.) However, because Sharp admits that a condition precedent of the Tribe's Note obligations—i.e., the installation and operation of 400 gaming devices at Crystal Mountain Casino—never occurred, judgment should have been entered for the Tribe notwithstanding the verdict.

The Note provides: "Payment of principal and interest shall commence on the fifth day of the second month following the date that four hundred (400) video gaming devices (unless a reduced amount is put in operation and agreed upon by Sharp Image Gaming, Inc. and Borrower, or if mandated by the government) are installed and in operation at Borrower's Gaming Facility and Enterprise ...." (AA/Vol.XXXIV/p. 9152.) Accordingly, the installation and operation of 400 gaming devices at "Borrower's Gaming Facility and Enterprise" is an express condition precedent to any payment under the Note.

The record reveals no evidence, let alone substantial evidence, that 400 machines, or any machines whatsoever, were in operation at "Borrower's Gaming Facility and Enterprise" at any time after the Note's execution. It is undisputed, as Mr. Anderson confirmed, that the "Gaming Facility and Enterprise" referenced in the Note was Crystal Mountain. (AA/Vol.XXX/p. 7881:23-27; RT/Vol.X/p. 2705:23-27.) He further

conceded that 400 machines were never in operation at Crystal Mountain at any time after the Note's execution. (AA/Vol.XXX/pp. 7882:20-7883:7; RT/Vol.X/pp. 2706:20- 2707:7.) Therefore, Mr. Anderson had to admit at trial that "the commencement date under the promissory note has not yet occurred[.]" (AA/Vol.XXX/p. 7883:19-26; RT/Vol.X/p. 2707:19-26; *see also* RT/Vol.X/p. 2708:11-15.)

1. Sharp's Purported Ability To "Deliver" Gaming Machines "But For" The Tribe's Alleged Repudiation Is Irrelevant To The Note.

Unable to escape its principal's admissions that this condition precedent never occurred, Sharp instead argued, when opposing the Tribe's motion for judgment notwithstanding the verdict, that the "Tribe's repudiation of the agreements" excused it. (AA/Vol.XXXI/p. 8156:13-14.) Sharp contended that, even though Crystal Mountain never reopened, it could recover on the Note because it could have delivered 400 gaming devices had the Tribe not cancelled their business relationship. (AA/Vol.XXXI/pp. 8156:26-8157:3, 8322:26-8323:12, 8380:27-8383:6, 8383:17-28; RT/Vol.X/pp. 2551:27-2554:6, 2554:17-28, 2736:26-2737:12; AA/Vol.XXXII/pp. 8467-8468, 8484, 8485-8486, 8487-8488.) This argument misconstrues the Note's condition, and is belied by the evidentiary record.

The Note does not require "delivery" of 400 gaming devices to *any* casino. Instead, it conditions repayment of Sharp's prior investment in Crystal Mountain only after those 400 gaming machines are "in operation" there. (AA/Vol.XXXIV/p. 9152.)

Importantly, Sharp's complaint underscores the disconnect between the Note's conditions and Sharp's theory. Sharp's complaint alleged performance became due under the Note after the Tribe opened "a casino" (*See* AA/Vol.XXVI/pp. 6537:27-6538:3, 6543-6544 (emphasis added)),

and that the Tribe breached the Note by failing to begin making payments after Red Hawk opened. (*See* AA/Vol.XXVI/p. 6542:17-21.) Yet, Sharp offered no evidence at trial to support such a reading, or to contradict its principal's admissions that the Note referenced only Crystal Mountain, not Red Hawk. Put simply, nothing in the Note or the trial record supports Sharp's trial argument that (1) "delivery" of gaming machines triggers repayment under the Note or (2) that the Tribe's opening of Red Hawk somehow triggered repayment of Sharp's investment in the failed Crystal Mountain.

2. Crystal Mountain's Failure, Not The Tribe, Prevented Sharp From Satisfying The Note's Condition.

Sharp's performance is excused only if the Tribe breached a contractual duty that contributed materially to the condition's nonoccurrence. *Jacobs v. Tenneco West, Inc.* (1986) 186 Cal. App. 3d 1413, 1416-17. But, Sharp presented no evidence, let alone substantial evidence, that it could have installed and put into operation 400 machines at *Crystal Mountain,* the facility the Note specified, even if the Tribe had not ended their relationship. Rather, it was because a permanent solution to the Tribe's access problem was never achieved, and Crystal Mountain never reopened, that this condition of the Note did not occur. (RT/Vol.X/pp. 2572:19-2573:1.) *See Jacobs*, 186 Cal. App. 3d at 1417; *see also Troyk v. Farmers Group, Inc.* (2009) 171 Cal. App. 4th 1305, 1352 (to recover on breach of contract, plaintiff must prove "that the defendant's breach caused the plaintiff's damage"). Sharp's admissions confirm the parties intended the Tribe was only required to repay Sharp's investment in Crystal Mountain when Crystal Mountain reopened. (AA/Vol.XXX/p. 7881:18-27; RT/Vol.VI/pp. 1493:27-1494:2; RT/Vol.X/p. 2705:23-27; *see also*

RT/Vol.VI/pp. 1397:19-1398:11, 1415:24-1416:9; RT/Vol.X/p. 2800:13-25; RT/Vol.XI/pp. 3032:22-3033:28.)

Moreover, Sharp presented no evidence that the Tribe was required to reopen Crystal Mountain, or somehow breached the Note by failing to reopen Crystal Mountain. *See Jacobs*, 186 Cal. App. 3d at 1416-17 (holding condition excused only where nonoccurrence resulted from defendant's breach of a contractual duty (citing Restatement (Second) of Contracts § 245)). Certainly , the Note contains no provision imposing such an obligation on the Tribe. Instead, the Note simply sets out the repayment terms that will apply ***if*** 400 gaming machines are put into operation at Crystal Mountain, triggering the Tribe's payment obligations, and what will occur if the Tribe fails to make payment within 30 days thereafter. (AA/Vol.XXXVI/pp. 9152-9153.)

Of course, Sharp took no legal action against the Tribe for failing to reopen Crystal Mountain; and while Sharp has repeatedly claimed it had no obligation to reopen Crystal Mountain either, Mr. Anderson conceded it would have made good business sense for him to do so. (RT/Vol.X/pp. 2572:19-22.) Indeed, if Crystal Mountain had reopened with 400 gaming devices "installed and in operation," the Note's commencement date for repayment would have been triggered. However, Crystal Mountain failed, and so, as Sharp admitted, the condition for repayment never occurred. (AA/Vol.XXX/p. 7883:19-26; RT/Vol.X/p. 2707:19-26.)

In sum, because it is undisputed that 400 gaming machines were never in "operation" at Crystal Mountain after the Note was entered, and because Sharp never alleged or presented evidence to show the Tribe breached a contractual duty to reopen Crystal Mountain (RT/Vol.X,/pp. 2572:19-2573:1), the Superior Court erred by failing to grant judgment for the Tribe on the Note.

B. If Payment Under The Note Is Due, Sharp Cannot Recover Principal Above The "Not To Exceed" Amount.

The Note's very first paragraph expressly provides that its principal sum is "*not to exceed* THREE MILLION ONE HUNDRED SIXTY SEVEN THOUSAND SIX HUNDRED NINETY-TWO DOLLARS AND EIGHTY SIX CENTS ($3,167,692.86)." (AA/Vol.XXXIV/p. 9152 (italics added, capitalization in original).) The "not to exceed" language cannot be misinterpreted: the principal due on the Note cannot exceed that face amount. *See Bank of America Nat'l Trust & Sav. Ass'n v. Sage* (1936) 13 Cal. App. 2d 171, 172, 175 (construing contract limiting payment to amount "not exceeding the said sum of Seventy Five Thousand Dollars ($75,000)" to "limit[] the liability of the defendant to the sum of $75,000 *under any circumstance*" (emphasis added).) The Note's explicit language governs. *Bank of the West v. Superior Court* (1992) 2 Cal. 4th 1254, 1264; Civ. Code § 1638. Again, Sharp's admissions defeat its claims. Mr. Anderson admitted that the Note nowhere "says that there can be an increase in the not-to-exceed amount." (AA/Vol.XXX/p. 7780:14-17; RT/Vol.V/p. 1288:14-17.) *See Mikialian v. City of Los Angeles* (1978) 79 Cal. App. 3d 150, 159-60 (plaintiff's contradictory testimony and admissions at trial established that substantial evidence did not support his claims).

Accordingly, based on the Note's express language, the maximum amount Sharp can recover on the Note—assuming it is viable, at all—is $7,580,340.05—the principal of $3,167,692.86, plus interest. (AA/Vol.XXXIV/p. 9193; AA/Vol.XXX/pp. 7845:18-7848:11; RT/Vol.X/pp. 2771:18-2774:11.)

1. Sharp's Belated New Theory Of Its Case Cannot Change The Note's Actual Terms.

Consistent with Sharp's principal's reading of the Note at trial, its FAC rested on the theory that additional advances post-dating the Note were subject to oral contracts, under which the Tribe allegedly agreed to repay amounts exceeding the Note's "not to exceed" amount. (*See* AA/Vol.I/pp. 18:18-21, 20:28-21:14.) Realizing there was no evidence supporting alleged oral waivers for these "later" oral contracts, Sharp scuttled that theory at trial.[29] Over objection, Sharp was allowed to file a SAC during trial to change the basic facts of its claim. (RT/Vol.VIII/pp. 2140:23-2141:6, 2141:25-2142:2; RT/Vol.X//2724:1-2725:9; RT/Vol.XV/p. 4116:7-20.) To that end, Sharp contended for the first time that the Note's third to last paragraph—which permits Sharp to "*grant*[]" certain "extensions of time, renewals, waivers or modifications" (AA/Vol.XXXIV/p. 9153 (emphasis added))—somehow *obligates* the Tribe to pay "additional amounts" exceeding the "not to exceed" amount. (RT/Vol.VIII/pp. 2077:20-2078:5; AA/Vol.XXVI/pp. 6540:24-26, 6542:15-16.)

Even apart from Mr. Anderson's binding admission (that additional amounts owed under the Note were pursuant to alleged oral contracts for which there was no waiver of sovereign immunity), Sharp's belated discovery of this so-called "basic term[]" of the Note (AA/Vol.XXVI/p. 6540:21-26) cannot be read to permit Sharp to increase the Note's principal by an additional $1.2 million. The relevant paragraph provides:

---

[29] Indeed, Mr. Anderson testified, consistent with the Tribal Council members' testimony, that there was no waiver of sovereign immunity for any alleged oral contract to repay further advances. (RT/Vol.V/pp. 1287:25-1288:2; AA/Vol.XXX/p. 7819:3-28; RT/Vol.VI/pp. 1496:2-28, 1555:28-1556:4; 1693:6-13.)

> Borrower hereby waives presentment for payment, demand, notice of protest and protest of this Note, and hereby consents to any and all extensions of time, renewals, waivers or modifications that may be granted by Note Holder with respect to the payment or provisions of this Note.

(AA/Vol.XXXIV/p. 9153.) The first clause, referencing the Tribe's waiver of "presentment," merely relieves Sharp of certain formalities in demanding payment on the Note, and in no way relates to increasing the Note's principal amount. *See* Com. Code § 3501(a) (defining "presentment").

The second clause permits the "Note Holder," i.e., Sharp, to "grant[]" the "Borrower" certain rights, without jeopardizing the Note's viability. "Grant," of course, is a verb that denotes conferral of rights or benefits on the grantee by the grantor. *Black's Law Dictionary* (9th ed. 2009) ("**grant**, vb....1. To give or confer (something), with or without compensation.") Yet, Sharp argued the word somehow obligated the Tribe (the grantee) to accept any increase in the "not to exceed" principal that Sharp (the grantor) might *impose*.

Not surprisingly, no law supports Sharp's nonsensical reading of Note. Rather, these consents are simply boilerplate promissory note provisions that safeguard the Note's validity in case the holder makes certain concessions to a borrower. For instance, the purpose of a provision consenting to "extensions of time" to repay a promissory note is "to permit the holder and subsequent indorsees of the note to extend the time of payment, at or after maturity, without releasing the maker or any persons who may have indorsed the instrument prior to its maturity of the liability

which has attached to them as indorsers." *Pugh v. Dawson* (1928) 95 Cal. App. 505, 509-10.[30]

2. Neither General Language In The Note Nor Extrinsic Evidence Can Vitiate The Note's Specific "Not To Exceed" Provision.

Even assuming, *arguendo*, the Note's provisions somehow could be read to support Sharp's contrived reading, such general language is insufficient as a matter of law to trump the parties' clearly expressed intent that the principal "not [] exceed" $3,167,692.86. (AA/Vol.XXXIV/p. 9152.) It is a fundamental rule of contract interpretation that "when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it." Civ. Proc. Code § 1859; *Sage*, 13 Cal. App. 2d at 175; *see also United States Leasing Corp. v. DuPont* (1968) 69 Cal. 2d 275, 289-90. The general contract provisions upon which Sharp relies cannot trump the express cap on the principal amount due under the Note. (AA/Vol.XXXIV/p. 9152.)

Because the Note is not reasonably susceptible to Sharp's reading, and because Sharp is bound by its principal's admission that nothing in the Note authorizes an increase in the "not to exceed" amount (AA/Vol.XXX/p. 7780:14-17; RT/Vol.V/p. 1288:14-17), Sharp could not

---

[30] Sharp also erroneously argued other provisions somehow overrode the Note's explicit limit on the principal. (AA/Vol.XXXI/pp. 8158:12-15, 8158:27-28.) The provision that "[i]nterest ... shall accrue from the date all or *any portion* of the funds *are first advanced*...." simply means "portion[s]" of the agreed upon principal could be advanced in installments, not that the Tribe's obligation may exceed the maximum principal stated. (AA/Vol.XXXIV/p. 9152 (emphasis added).) Nor does the recitation that the "not to exceed" principal amount represents money advanced "up to September 30, 1997" relieve Sharp of securing a new written agreement, and a new immunity waiver, to bind the Tribe to any additional amounts advanced thereafter. (AA/Vol.XXXIV/p. 9152.)

properly rely on extrinsic evidence, and this Court can and should reverse based on the Note's plain meaning. *Wolf v. Superior Court* (2004) 114 Cal. App. 4th 1343, 1351; *Stevenson v. Oceanic Bank* (1990) 223 Cal. App. 3d 306, 315-18; *Mikialian*, 79 Cal. App. 3d at 159-60.[31]

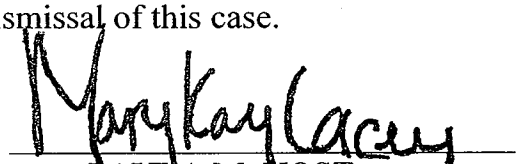
In sum, if the Court finds that Sharp satisfied the condition precedent to the Note's repayment, judgment on the Note cannot exceed the Note's face amount plus interest—totaling $7,580,340.05. (*See* AA/Vol.XXXIV/p. 9193.)

CONCLUSION

In a case about Sharp's long-abandoned effort to establish a viable gaming operation for the Tribe, is perhaps fitting that Sharp would attempt to turn a modest investment, in what turned out to be a complete business failure, into its own version of the California Lottery. The limits of the law, however, compel a different result. Once the NIGC determined that Sharp's contracts were void as a matter of governing federal law, this case should have been over. The Tribe is entitled to judgment in its favor for all

[31] Despite the Note's explicit language, Sharp offered extrinsic evidence in the form of testimony suggesting that some of the Tribe's officials felt a personal obligation to repay Sharp regardless of whether the Tribe was contractually bound. (AA/Vol.XXXI/pp. 8159:5-7, 8227:24-8229:8, 8233:11-8234:15, 8244:24-8245:6, 8324:7-8325:20, 8335:16-8336:17; AA/Vol.XXXII/pp. 8430-8438, 8442:9-8443:13; 8444:6-12, 8470:12-18, 8473:22-8474:16, 8477-8483; RT/Vol.V/p. 1366:12-18; RT/Vol.X/pp. 2738:7-2739:20; RT/Vol.XI/pp. 2959:16-2960:17, 2985:22-2986:16). This testimony hardly constitutes substantial evidence that the express "not to exceed" provision was a nullity and could be read out of the Note. Indeed, no tribal witness so testified. Instead, every Tribal witness questioned on this issue stated the Tribal Council never voted to increase the Note's face amount. (AA/Vol.XXX/pp. 7819:3-28, 7832:10-13; RT/Vol.VI/pp. 1496:3-28, 1693:10-13.)

the reasons set forth above, and respectfully requests that it be awarded the costs and attorney fees incurred in securing dismissal of this case.

By: 

PAULA M. YOST
MARY KAY LACEY
IAN R. BARKER

Attorneys for Defendant and Appellant
Shingle Springs Band Of Miwok Indians

CERTIFICATE OF INTERESTED PARTIES

Through its counsel of record, Defendant and Appellant Shingle Springs Band of Miwok Indians certifies as follows:

1. Appellant Shingle Springs Band of Miwok Indians is a governmental entity and, under California Rule of Court 8.208(c)(2), makes no disclosure under California Rule of Court 8.208(e)(1).

2. The following persons and entities have a financial or other interest in the outcome of this proceeding the Justices may wish to consider in deciding whether to disqualify themselves: Chris Anderson of Sharp Image Gaming, Inc.; Lakes Entertainment, Inc.

Dated: October 10, 2012

Mary Kay Lacey

CERTIFICATION OF BRIEF LENGTH

I, Mary Kay Lacey, counsel for Defendant and Appellant, certify that this brief contains 24,761 words, including footnotes, but excluding the tables and this certification, as calculated by the word processing program used to prepare this brief.

Dated: October 10, 2012

Mary Kay Lacey

PROOF OF SERVICE

I, Diane Donner, hereby declare:

I am employed in the City and County of San Francisco, State of California. I am over the age of 18 years, and not a party to the within action. My business address is SNR Denton US LLP, 525 Market Street, 26th Floor, San Francisco, California 94105.

On October 10, 2012, I served the foregoing documents:

1. APPELLANTS' OPENING BRIEF
2. APPELLANT'S APPENDIX , VOLS. 1-35
3. APPELLANT'S APPENDIX OF COMPUTER-BASED AND OTHER AUTHORITIES IN OPENING BRIEF

on the interested parties in this action by placing a true copy thereof, on the above date, following the ordinary business practice of SNR Denton US LLP, addressed as follows:

I caused such document to be served by Federal Express overnight delivery on the following:

Matthew G. Jacobs, Esq.
Steven Kimball, Esq.
DLA Piper LLP
400 Capitol Mall, Suite 1400
Sacramento, CA 95814
Telephone: 916-329-9111
Facsimile: 916-329-9110

Attorneys for Plaintiff and Respondent
SHARP IMAGE GAMING, INC.

El Dorado Superior Court
3321 Cameron Park Drive
Cameron Park, CA 95682
Telephone: 530-621-5867
Facsimile: 530-672-2413

Superior Court

Nicolas Fonseca
Tribal Chairman
Shingle Springs Band of Miwok Indians
5281 Honpie Road
Placerville, CA

Client
SHINGLE SPRINGS BAND OF MIWOK INDIANS

(Served by mail)

Supreme Court of the State of California
350 McAllister Street
San Francisco, CA 94102

(Four copies - Brief only)

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on October 10, 2012, at San Francisco, California.

Diane Donner

27396749\V-3