3rd Civil No. C070512
(Superior Court Case No. PC 20070154)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

SHINGLE SPRINGS BAND OF MIWOK INDIANS,

Defendant and Appellant,

vs.

SHARP IMAGE GAMING, INC.,

Plaintiff and Respondent.

On Appeal from a Judgment of
The Superior Court of the State of California for El Dorado County
The Honorable Nelson Keith Brooks, Judge
Superior Court Case No. PC 20070154

RESPONDENT'S BRIEF

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rule of Court 8.488, the undersigned counsel for Plaintiff and Respondent Sharp Image Gaming, Inc. ("Sharp Image") hereby certifies that the parties themselves and Christopher S. Anderson, the President and founder of Sharp Image, have a financial interest in the outcome of this proceeding.

Executed on November 26, 2012, at Sacramento, California.

Matthew G. Jacobs

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INTRODUCTION

This case concerns the efforts of Defendant and Appellant Shingle Springs Band of Miwok Indians (the "Tribe") to renege on two written agreements it entered into with Plaintiff and Respondent Sharp Image Gaming, Inc. ("Sharp Image"). In 1997, the Tribe entered into (1) the Equipment Lease Agreement (the "ELA") for Sharp Image to supply gaming machines to the Tribe on an exclusive basis for five years from the date it opened a casino in return for a percentage of net revenue from the machines, and (2) a Promissory Note to repay funds Sharp Image had advanced to the Tribe.

After a nine-week trial, the jury awarded Sharp Image $20,398,858 in damages for breach of the ELA and $10,044,106.39 for breach of the Promissory Note.

The Tribe now seeks to reverse the jury's verdict based on a grab bag of arguments challenging rulings of the trial court at various stages of the litigation, as well as to the verdict itself. None of these arguments has merit.

First, the Tribe contends that the trial court should have dismissed the case because a letter procured by the Tribe through improper *ex parte* contacts with the Chairman of the National Indian Gaming Commission (the "NIGC") opined that the ELA (but not the Promissory Note) was void. The Tribe asserts the letter was "final agency action" under the federal Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. section 2701 *et seq.*, and was binding on the Superior Court unless successfully challenged in federal court. This federal preemption argument is erroneous for numerous reasons:

- IGRA only regulates casino management contracts. If the ELA was void, as the Tribe contends, the contract did not exist and there was nothing for IGRA to regulate. If the ELA was not a "management contract," it is not subject to IGRA regulation. *See American Vantage v. Table Mountain Rancheria*, 103 Cal. App. 4th 590, 596-597 (2002).

- The Tribe's position rests on a single Ninth Circuit case, *AT&T v. Coeur D'Alene Tribe*, 295 F.3d 899 (9th Cir. 2002), which involved a unique federal statute (18 U.S.C. § 1166(d)) that was not at issue here.

- The letter is not entitled to deference because the Tribe procured it to aid in its defense of this litigation.

- Sharp Image was denied due process because the letter was the product of secret correspondence and a secret meeting between the Chairman of the NIGC, the Chairman of the Tribe, and litigation counsel in this case.

- The NIGC Chairman's letter never became "final agency action" because the NIGC refused to entertain the administrative appeal to which Sharp Image was entitled under IGRA.

- The Chairman's letter violated his authority under IGRA.

Second, the Tribe asserts that the explicit waivers of sovereign immunity in the contracts at issue do not extend to a casino it subsequently developed (the Red Hawk Casino), even though the ELA states, *inter alia*, that it applies to the Tribe's "existing or any future gaming facility or facilities." (AA/XXXIV/p. 9154.)[1] But the trial court found that "[a]s to

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[1] "RT" refers to the Reporter's Transcript and "AA" refers to the Appellant's Appendix filed in conjunction with Appellant's Opening Brief, which is referred to as "AOB." "RA" refers to the Respondent's Appendix filed herewith.

the language used in each of the [contracts], it is quite clear there was a waiver of sovereignty." (AA/Vol. VII/p. 1959:9-10.) The jury also specifically found, in phase one of the bifurcated trial that the Tribe requested, that the Tribe had waived its sovereign immunity. (RT/Vol. VII/p. 1955:1-7.) The Tribe cannot appeal the denial of a motion to dismiss on issues it unsuccessfully tried to the jury. *See Waller v. TJD, Inc.*, 12 Cal. App. 4th 830, 833 (1993). Even if appeal on this issue were proper, the Tribe's assertion must fail because it is contrary to the language of the contract and the witnesses' testimony.

Third, the Tribe maintains that summary judgment should have been granted because the statute of limitations barred Sharp Image's contract causes of action. Since the Tribe failed to submit this issue to the jury after the trial court denied its motion for summary judgment, the Tribe has abandoned and waived it and cannot raise it on appeal. *See De Angeles v. Roos Bros., Inc.*, 244 Cal. App. 2d 434, 443 (1966).

The Tribe's statute of limitations theory is wrong in any event. According to the Tribe, the statute began to run in 1999 when the Tribe anticipatorily breached Sharp Image's contracts by contracting with other companies to supply gaming machines. But under the doctrine of anticipatory breach, Sharp Image could sue at any time up until four years (the applicable statute of limitations for written contracts, Code Civ. Proc. § 337) after the Tribe *actually* breached the contracts by failing to perform. The Tribe failed to perform in 2008 when it opened the Red Hawk Casino without Sharp Image's gaming machines, without paying Sharp Image a percentage of revenue from the gaming machines, and without repaying the Promissory Note. Thus even had the Tribe not waived this argument, it still would fail.

Fourth, the Tribe asserts that Sharp Image could not perform its side of the agreements by supplying gaming devices because in 2008 when the Red Hawk Casino opened, Sharp Image did not have a California gaming license and a California agency had made a preliminary report that Sharp Image was unsuitable for licensing. But to recover damages, a non-repudiating party must show it had the ability to perform at the time of repudiation, which in this case was 1999. In 1999, the State of California (and the Tribe) had no such licensing requirements.

Fifth, the Tribe contends that the ELA was too uncertain to be enforced because it provided that the gaming machines to be supplied by Sharp Image would be specified when the Tribe opened its casino. As the jury was instructed, a contract is sufficiently certain if an open term can be made definite by performance. The jury specifically found that the contract terms were certain, *i.e.*, "clear enough so that the parties could understand what each was required to do." (RT/Vol. XV/p.4134:23-25; AA/Vol. XXVIII/p. 7315.)

Sixth, the Tribe contends the jury's award on the Promissory Note is not supported by substantial evidence. The Tribe deliberately omits discussing the substantial evidence standard because it has no hope of meeting it. Suffice it to say that neither the terms of the Promissory Note nor the testimony of the Tribe's own tribal members support the Tribe's position that it need not repay the millions of dollars it borrowed from Sharp Image. The Tribe also ignores the significant evidence Sharp Image presented to rebut this position.

Because of the Tribe's scorched earth defense strategy, it took almost five years to bring this straightforward breach of contract case to

trial.[2] The trial court was liberal in allowing the Tribe to mount its defense in any way it could and the Tribe failed in every respect. The court below ruled correctly on every point the Tribe now disputes and the jury correctly found in favor of Sharp Image. Accordingly, the Court should affirm the judgment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. Statement of Facts

In 1996, the Tribe contacted Chris Anderson, the president of Sharp Image, about starting a gaming operation. (RT/Vol. V/pp. 1166:2-3, 1176:24-1178:15.) At that time, Sharp Image was supplying gaming machines to some 25 Indian-operated casinos in California. (RT/Vol. V/pp. 1169:6-1172:10, 1173:6-12.) Sharp Image agreed to take on the project and on May 24, 1996, the parties entered into the predecessor to the ELA, the Gaming Machine Agreement ("GMA"). Under the GMA, Sharp Image agreed to supply gaming machines to the Tribe on an exclusive basis for five years in return for 30 percent of the revenue from the machines. (RT/Vol. V/pp. 1178:16-1181:11, 1181:18-1184:18; AA/Vol. XXXIV/p. 9146.)

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[2] In the course of this litigation the Tribe filed over 40 motions, including two motions to dismiss, two demurrers, a motion for a "legal determination," two requests for a stay, a summary judgment motion on 10 different grounds, a motion to transfer venue, a motion for judgment on the pleadings, two motions to bifurcate, two motions for directed verdict, a motion for judgment on the pleadings, and many, many discovery motions, motions for reconsideration, objections and requests for "clarification," as well as two writ petitions. The Tribe also filed an entirely separate federal lawsuit seeking an injunction against the state court trial judge who had ruled against it on several of these motions. (AA/Vol. XXXIV/pp. 8948-9053; AOB at 12-19.)

Sharp Image also agreed to advance funds to construct and open the Tribe's casino, in a temporary structure to be called the Crystal Mountain Casino, with repayment at 12 percent interest. (RT/Vol. V/pp. 1175:12-1176:23, 11:83:12-15, 1188:17-1192:14, 1193:4-26; AA/Vol. XXXIV/p. 9151.) In October 1996, the Crystal Mountain Casino had a one-night, "pre-opening" on the Tribe's Rancheria in Shingle Springs, California, that was designed primarily to introduce the concept of gaming on the Rancheria to the community, and then closed after that event ended. (RT/Vol. V/pp. 1194:1-20, 1202:13-20.)

The only access to that casino on the Tribe's Rancheria was by way of a road that ran through a residential neighborhood. (RT/Vol. /p. 1196:15-26.) The neighborhood association sued in federal court and obtained a ruling that the access road was private. (RT/Vol. V/pp. 1196:5-1197:23.) Before beginning construction on the Crystal Mountain Casino, Mr. Anderson had no idea that the association claimed the road was private, since the Tribe had told him it was public. (RT/Vol. V/p. 1196:15-26.)

After the casino closed, Sharp Image continued to explore alternative ways to access the Rancheria. (RT/Vol. V/p. 1203:8-12.) At the Tribe's suggestion, Sharp Image spent millions of dollars purchasing contiguous properties along the freeway (U.S. Route 50) to build a new access road. (RT/Vol. V/pp. 1203:15-1204:21; RT/Vol. VIIII/pp. 2403:3-2406:22, 2417:12-2418:13, 2421:20-2422:22, 2426:12-2427:14, 2427:28-2428:22.)

During the summer of 1997, the Tribe and Sharp Image determined that they needed to update their contracts with each other. (RT/Vol. V/pp. 1204:22-1205:10.) Their respective counsel, each a specialist in Indian gaming law, negotiated the terms. (RT/Vol. V/pp. 1205:11-1206:12;

RT/Vol. IV/pp.1082:13-1098:26.) The agreements were circulated to the tribal membership. (AA/Vol. XXXI/p. 8211.) At a meeting of the tribal membership on November 15, 1997, which Mr. Anderson was invited to attend, the contracts were discussed, and the Tribe voted to authorize its Chairman to enter into the ELA and Promissory Note. The contracts were executed that day. (RT/Vol. V/pp. 1206:23-1215:8; AA/Vol. XXXIV/pp. 9152-9161, 9164-9165.)

The ELA, which replaced the GMA, was similar to that agreement in that Sharp Image was to supply the Tribe with an initial 400 gaming machines and additional machines at no upfront cost to the Tribe. (RT/Vol. V/pp. 1219:25-1220:27, 1226:22-1227:2; AA/Vol. XXXIV/pp. 9154-9161.) Also like the GMA, the ELA provided that Sharp Image would receive 30 percent of the net revenue from the machines, less prizes, jackpots and payouts. (RT/Vol. V/pp. 1220:28-1221:2; AA/Vol. XXXIV/pp. 9154.) Sharp Image was to be the exclusive supplier of gaming machines to any gaming facility operated by the Tribe for five years commencing on the date a casino opened on the Tribe's rancheria. (RT/Vol. V/pp. 1221:3-12; AA/Vol. XXXIV/p. 9154.) The ELA also stated that Sharp Image "shall have the exclusive right to lease or otherwise supply additional gaming devices to [the Tribe] to be used at its existing or any future gaming facility or facilities." (RT/Vol. V/pp. 1221:16-22; AA/Vol. XXXIV/p. 9154.) In other words, the Tribe named Sharp Image as the exclusive supplier of gaming machines to any gaming facility operated by the Tribe for five years commencing on the date a casino opened on the Tribe's Rancheria. (RT/Vol. V/pp. 1221:3-12; AA/Vol. XXXIV/p. 9154.)

To fulfill its obligations under the ELA, Sharp Image undertook to maintain an inventory of machines to supply any tribal casino. (RT/Vol.

V/pp. 1222:1-7.) Sharp Image also continued to support the Tribe financially. (*Id.*)

The ELA contained an express waiver of the Tribe's sovereign immunity:

> Lessee [the Tribe] hereby expressly waives its sovereign immunity from any suit, action or proceeding to enforce [the Tribe's] obligations under this Lease or from any action or claim in arbitration and [the Tribe] expressly consents to the jurisdiction by the courts of the State of California or the United States District Court for the Eastern District of California, the United States Court of Appeals for the Ninth Circuit, and the United States Supreme Court for any claims arising out of this lease.

(AA/Vol. XXXIV/p. 9159.)

Under the Promissory Note signed the same day as the ELA (November 15, 1997), the Tribe agreed to repay all sums previously advanced by Sharp Image through September 30, 1997 – approximately $3.1 million. (RT/Vol. V/pp. 1215:9-1216:10; AA/Vol. XXXIV/pp. 9152.) Sharp Image's previous periodic advances to the Tribe were rolled into the Promissory Note, the accrued interest forgiven, and the interest rate reduced to 10 percent. (RT/Vol. V/pp. 1206:13-19, 1215:9-1218:6, 1222:8-14, 1224:16-1226:21; AA/Vol. XXXIV/pp. 9152-9153, 9164-9165.) The Promissory Note also covered additional sums that Sharp Image had advanced between September and November 15, 1997. (RT/Vol. V/pp. 1216:11-16.) The parties further understood that the Tribe was to repay any additional funds advanced by Sharp Image after November 15, 1997 under the terms of the Promissory Note. (RT/Vol. V/pp. 1216:28-1217:16; RT/Vol. X/pp. 2736:13-2739:20; AA/Vol. XXXIV/pp. 9152-9153, 9164-9165.)

The Promissory Note also contained an express waiver of the Tribe's sovereign immunity and consent to the jurisdiction of federal and state courts over any claims by Sharp Image related to the note. (RT/Vol. V/pp. 1219:8-19; AA/Vol. XXXIV, p. 9153.)

Based on the language of the ELA (including the provision giving Sharp Image "the exclusive right to lease or otherwise supply additional gaming devices to [the Tribe] to be used at its existing or any future gaming facility or facilities"), the parties understood that the waiver of sovereign immunity in the ELA was not limited to a gaming facility that Sharp Image helped develop or build. (RT/Vol. V/p. 1224:7-12.) Certainly, that is what Mr. Anderson understood because that is what the language says. (*Id.*)

That is also the way the Tribe understood it. In fact, the Tribe's subsequent actions manifested that it too understood that the ELA applied to "any future gaming facility," regardless of who developed or built it. For example, Jim Adams, the Tribal Chair for the two years immediately after the contracts were signed (1998 and 1999), repeatedly acknowledged that for another vendor to replace Sharp Image as the supplier to a new casino project (*i.e.*, not the temporary structure called Crystal Mountain Casino), Sharp Image's contracts would have to be bought out. (AA/Vol. XXXI/pp. 8230:23-8231:22, 8232:17-24, 8237:24-8238:18, 8239:15-20, 8240:8-8242:5, 8243:17-23, 8255:22-8256:2, 8259:17-8261:12, 8270:12-25, 8272-8273, 8277, 8296, 8298, 8300.) To state the obvious, if the Tribal Chair thought the contracts did not apply to "any future gaming facility," there would have been no need to buy them out.

Moreover, no one at the November 15, 1997 meeting (when the Tribe approved the ELA and the Promissory Note) told Mr. Anderson that the Tribe's waivers of sovereign immunity in the contracts only applied to

the proceeds of a casino that Sharp Image helped build. (RT/Vol. V/pp. 1218:7-17, 1219:20-25.) In fact, no one in the Tribe ever told him that the waivers were limited in this manner. (RT/Vol. V/p. 1224:13-15.) If anyone had brought this up, Mr. Anderson would have said "no . . . because things evolve. Things change. The market was changing. I had no idea what was going to happen in the future, but at the same time I had to protect myself long-term." (RT/Vol. V/p. 1218:22-25.) The Tribe's lawyer, Michael Roy, also never told Sharp Image's lawyer, Michael Cox, that the waiver was limited to a casino that Sharp Image helped build. (RT/Vol. IV/pp. 1086:6-1090:13, 1094:9-1098:6.) Mr. Anderson first heard that the Tribe was claiming it had not waived its sovereign immunity, or that the waiver was limited to a gaming facility that Sharp Image helped build, after Sharp Image filed suit against the Tribe. (RT/Vol. V/p. 1227:5-25; RT/Vol. X/pp. 2544:10-2546:28.) Mr. Cox first heard this at his deposition in this case. (RT/Vol. IV/pp. 1101:20-26.)

After entering into the ELA, Sharp Image helped the Tribe identify a management company and interest it in the casino project. (AA/Vol. XXXI/pp. 8237:16-18.) All parties to discussions with prospective partners for the project recognized that under the ELA, Sharp Image had the exclusive right to supply gaming machines to the Tribe, and that for another gaming machine vendor to replace Sharp Image, the ELA would have to be bought out. (RT/Vol. VIII/pp. 2218:3-2219:7, 2242:8-28; RT/Vol. VIIII/pp. 2422:25-2424:12, 2432:11-2435:3; AA/Vol. XVII/pp. 4200:18-25, 4207:11-22; AA/Vol. XXXI/pp. 8230-8232, 8237-8239, 8240-8243, 8255-8256, 8259-8261, 8270, 8273, 8277, 8296, 8297-8298, 8300; RA/Vol. I/pp. 116:18-118:8.)

In early 1999, Mr. Anderson introduced Lakes Entertainment ("Lakes") to the Tribe as a potential investor and management company. (RT/Vol. VIIII, pp. 2435:5-19, 2514:3-2515:25; AA/Vol. XVIII/pp. 4109-4114.) Lakes discussed buying out Sharp Image for $75-80 million. (RT/Vol. VIIII, pp. 2514:13-2525:3; AA/Vol. XVII/pp. 4111-4112.) However, in June 1999, Keane Argovitz Resorts ("KAR") signed a casino development contract with the Tribe first. (RT/Vol. VIIII/pp. 2525:4-2526:24; AA/Vol. XVII/pp. 4112-4114, 4189.) KAR offered to buy out Sharp Image for $35 million, which Mr. Anderson refused in light of Lakes's offer of more than twice that amount. (RT/Vol. VIIII/p. 2537:8-15; RT/Vol. X/pp. 2541:19-2542:23, 2739:26-2740:8; AA/Vol. XVII/pp. 4112.)

Lakes and KAR then formed a partnership to which KAR assigned its management contract with the Tribe. (AA/Vol. XVII/pp. 4113-4114, 4199-4202.) Within a few days of signing the contract with KAR, the Tribe wrote Mr. Anderson stating for the first time that the Tribe viewed Sharp Image's contracts as invalid and unenforceable. (RT/Vol. X/pp. 2694:23-2695:20; AA/Vol. XXXIV/pp. 9175-9176.) In October 1999, the Tribe wrote Sharp Image that it had signed an agreement with Lakes and KAR giving them exclusive rights to develop the Tribe's casino and supply gaming machines to it. (RT/Vol. X/p. 2554:23-28; AA/Vol. XVIII/pp. 4113-4114, 4231-4232.)[3]

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[3] During this period, as tribal attorney Philip Thompson testified, the Tribe purposefully did not inform Sharp Image that it intended to repudiate the contracts because it did not want Sharp Image to cut off the financial support it was providing. (RT/Vol. XIII/pp. 3481:6-3482:3, 3494:4-21, 3502:24-3503:16, 3505:14-22, 3507:21-27, 3508:11-3509:7, 3530:19-3531:1, 3534:9-3535:27, 3540:12-24; see also RA/Vol. I/pp. 127:21-128:5

Sharp Image never got the opportunity to deliver gaming machines under the ELA, because, as Mr. Anderson testified, "my contract was cancelled," and by "cancelled," he meant, "[k]icked out. Told – I was told they weren't going to do business with me any longer." (RT/Vol. X, p. 2554:17-28.)

In 2007, construction began on the Tribe's Red Hawk Casino. (RT/Vol. X/pp. 2719:26-2720:1.) Mr. Anderson waited until then to sue the Tribe since he did not want to incur substantial legal fees if the Tribe had no gaming operation and no financial assets to pay a judgment. (RT/Vol. X/pp. 2554:7-16, 2720:17-20.)

II. Procedural History

A. Sharp Image's Pleadings

On March 12, 2007, Sharp Image filed a complaint alleging breach of the GMA, ELA, and Promissory Note, and asserted related causes of action against the Tribe. (AA/Vol. I/pp. 1-13.) On May 25, 2007, Sharp Image filed a First Amended Complaint to expressly allege the Tribe's waivers of sovereign immunity. (AA/Vol. I/pp. 14-26.)

On April 27, 2010, Sharp Image dismissed the GMA-based causes of action since they were unnecessary to Sharp Image's full recovery from the Tribe. (AA/Vol. VIII/pp. 2012:1-7)

On November 29, 2012, at the Tribe's suggestion and with leave of court, Sharp Image filed the Second Amended Complaint, which clarified that all of Sharp Image's contract causes of action were based on the ELA and Promissory Note. (RT/Vol. V/pp. 2139:22-2141:28, 2723:9-14, 2724:1-2725:2; AA/Vol. XXVI/pp. 6537-6547.)

(Tribe's attorney Philip Thompson referred to Sharp Image as the "Tribe's ATM").

On December 19, 2011, Sharp Image dismissed all causes of action except those arising out of the Tribe's breaches of the ELA and Promissory Note. (RT/Vol. XIIII/pp. 3731:5-12.)

B. The Tribe's Request To The NIGC For Help In Defending The Lawsuit

Almost immediately after Sharp Image filed suit, the Tribe began a secret effort to lobby the NIGC for an opinion that Sharp Image's contracts, signed 10 years earlier, were unapproved management contracts that were void under IGRA. In April and May 2007, the Tribe's litigation counsel in this case contacted NIGC officials and submitted argument and authorities via letter and e-mails in support of the Tribe's contention that the GMA and ELA were invalid management contracts. (AA/Vol. V/pp. 1281, 1426-1429, 1430-1440, 1441, 1442, 1443, 1444.) None of the Tribe's contacts with the NIGC were disclosed to Sharp Image until it filed a Freedom of Information Act request months later. (AA/Vol. V/pp. 1281, 1302.)[4]

On June 14, 2007, the NIGC's Acting General Counsel, Penny Coleman, supplied the letter the Tribe had requested, opining that the GMA

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[4] The Tribe attempted a similar maneuver in *Voices for Rural Living v. El Dorado Irrigation District*, 209 Cal. App. 4th 1096 (2012). In that case, the El Dorado Irrigation District ("EID") entered into an agreement to provide significantly more water to the Tribe's casino than allowed by the El Dorado County Local Agency Formation Commission ("LAFCO"). *Id.* at 1099. The Tribe, through some of the same lawyers who defended it in this lawsuit, then procured a letter opinion from the Office of the Solicitor of the federal Department of the Interior (which includes the Bureau of Indian Affairs) that the LAFCO conditions were preempted by federal law. *Id.* at 1103. The Tribe used this letter to convince EID to change its initial position and disregard the LAFCO conditions. *Id.*. This Court rejected the Tribe's assertion that the LAFCO conditions could be disregarded as unconstitutional and void and upheld the trial court's decision that EID had violated the LAFCO Act. *Id.* at 1115-16.

and ELA were unapproved management contracts. (AA/Vol. V/pp. 1302, 1445-1452.) Ms. Coleman copied counsel for Sharp Image on the letter. (AA/Vol. V/pp. 1452.) This was the first time Sharp Image became aware that the Tribe had enlisted the NIGC to aid its defense of the suit. (AA/Vol. V/p. 1302.) On June 28, 2007, the Tribe submitted Ms. Coleman's letter to the trial court in support of a motion to dismiss. (AA/Vol. V/p. 1302.) However, on December 12, 2007, the trial court ruled the letter inadmissible. (AA/Vol. VI/p. 1455-1456.)

Undaunted, the Tribe began another secret lobbying effort. On January 24, 2008, Tribal Chairman Nicholas Fonseca wrote NIGC Chairman Philip Hogen seeking "final agency action" invalidating the GMA and ELA. (AA/Vol. VI/pp. 1461-1465.) Mr. Fonseca candidly disclosed in his letter that "a final determination that the Sharp Image Agreements are unapproved management contracts under IGRA likely would have an impact on the lawsuit filed by Sharp Image against Shingle Springs." (AA/Vol. VI/p. 1464, n.11.) Mr. Fonseca's letter sought a personal meeting with Mr. Hogen. (AA/Vol. VI/p. 1465.) His letter set off a flurry of communications by telephone and email between the Tribe's litigation counsel, its other lawyers and the NIGC to set up the meeting, including a call by Alan Fedman, a law partner of the Tribe's lawyers in this case and a former NIGC counsel, to check on Mr. Hogen's schedule with his assistant. (AA/Vol. V/p. 1303; AA/Vol. VI/pp. 1466-1469.) None of these individuals or agencies copied Sharp Image on or informed it about any of these communications. (*Id.*)

The meeting went forward as planned without Sharp Image even aware that it was taking place. (AA/Vol. V/p. 1303.) Because of Mr. Hogen's busy schedule, Chairman Fonseca testified that he had to "chase

him down" at a hotel in Seattle where they met for about an hour. (AA/Vol. VI/pp. 1472:3-1474:14.) The Tribe's trial counsel, Mary Kay Lacey, also attended the meeting, as did Ms. Coleman. (*Id.*)

Chairman Fonseca testified that the purpose of the meeting was "[t]o see if we can get the NIGC to make some sort of decision" on the ELA. (AA/Vol. V/p. 1302; AA/Vol. VI/p. 1473:13-17.) Mr. Fonseca told Mr. Hogen that he believed the ELA "was illegal" and "would [the NIGC] please do something about it." (AA/Vol. VI/p. 1724:6-9.) Mr. Fonseca's "basic pitch" was "we are being sued for $100 million, and we don't believe that it's legal – it's a valid lawsuit. Period." (AA/Vol. VI/p. 1724:19-22.)[5]

The Tribe did not invite Sharp Image to the meeting because, according to Mr. Fonseca, "[I] wanted to talk to the NIGC myself." (AA/Vol. VI/pp. 1473:24-1474:2, 1476:12-14.) Mr. Fonseca felt Sharp Image "would impede the conversations." (AA/Vol. VI/p. 1476:15-21.) He testified that if "Chris Anderson was there, or somebody from Sharp Image, that they would be interrupting and I would not be able to get my point across to the NIGC." (AA/Vol. VI/pp. 1476:22-1477:1.)

On July 18, 2008, Ms. Coleman sent a letter informing Sharp Image for the first time that the Tribe had requested that Chairman Hogen find the GMA and ELA to be void. (AA/Vol. VI/pp. 1726-1727.) Ms. Coleman wrote that "[w]e understand that the parties are currently involved in litigation in the State of California over the validity of the contracts.

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[5] Mr. Fonseca testified, however, that he did not have an opinion that the GMA and ELA were invalid and first understood that the Tribe was taking that position "after we got sued by Mr. Anderson." (RA/Vol. I/pp. 122:9-123:8.)

Therefore, before the Chairman makes any decision we would like to give Sharp an opportunity to share their views on this subject." (*Id.*) Ms. Coleman gave Sharp Image two weeks to respond. (*Id.*) Ms. Coleman did not disclose the meeting between the NIGC and Tribal Chairman. (Sharp Image only found out about it through another FOIA request.) (AA/Vol. V/p. 1304.) Sharp Image responded to Ms. Coleman's invitation under protest because of, among other things, the lack of information about what the Tribe had already submitted and communicated to the NIGC. (AA/Vol. V/p. 1304.)

On April 23, 2009, Mr. Hogen issued a letter "disapproving" the GMA and ELA. (AA/Vol. V/pp. 1320-1334.) The Tribe promptly submitted the letter to the trial court in support of its motion to dismiss. (AA/Vol. IV/pp. 1084-1098.)

Mr. Hogen's letter gave Sharp Image 30 days to file an administrative "appeal to the full Commission." (AA/Vol. V/p. 1321, 1334.) On May 9, 2009, Sharp Image filed an administrative appeal, again under protest. (AA/Vol. V/pp. 1297-Vol. VI/p. 1580.) On June 5, 2009, an NIGC staff attorney informed Sharp Image that the full Commission could not review the administrative appeal. (AA/Vol. VI/p. 1750.) Out of the three commissioners required to be appointed to the Commission under IGRA, only two were serving and one commissioner had recused himself (leaving only Mr. Hogen to review his own decision). (*Id.*) Therefore, the staff attorney wrote, "[T]he Commission is functionally unable to review and decide your appeal." (*Id.*) Nonetheless, the staff attorney wrote that Mr. Hogen's letter would become the "final decision of the Commission" without review of Sharp Image's administrative appeal. (*Id.*)

C. The Tribe's Motion To Dismiss On Grounds Of Federal Preemption

On November 30, 2009, the trial court denied the Tribe's motions to dismiss for lack of subject matter jurisdiction based on federal preemption and sovereign immunity. (AA/Vol. VII/pp. 1944-1961.) On preemption, the court addressed the contacts between the Tribe and the NIGC. (AA/Vol. VII/pp. 1952:1-1954:9.) The court concluded that the Tribe could not ask Mr. Hogen to approve or disapprove the GMA and ELA because the Tribe had already "terminated" them many years prior to making that request. (*Id.* at pp. 1954:11-1956:5.)

The court also held that "the decision of the Chairman of the NIGC was not final action and must be disregarded because it is fatally flawed." (AA/Vol. VII/p. 1956:6-11.) The court found that

> [t]he decision violated the due process rights of Sharp. Although there was not a formal hearing by the Chairman of the NIGC and thus reasonable ex parte contacts may be made by a party thereto, the extensive nature of the contacts, the expressed friendship of the participants, and in particular, the 45-minute meeting by the Chairman and his attorney and the Band's Chairman and his attorney was so egregious a violation of the due process requirement as to require this Court to disregard the finding . . . .

(*Id.* at p. 1956:14-20.)

The court also itemized the provisions of IGRA and NIGC regulations that Mr. Hogen had violated in issuing his letter. (*Id.* at 1957:13-1958:12.)

In summary, the trial court held:

> An analysis of [Mr. Hogen's letter] confirms that it was not the final act of the commission but at most another expression of an opinion on the validity of the agreements involved.

> Without belaboring the point, it should be noted that the "decision" does not mention or explain the propriety of the meeting between Chairman Fonseca and the attorneys, the extensive nature of the ex parte contacts, the disregard of statutory requirements for the contract submission, the failure of the Band to submit the contracts "upon execution" and the passage of over 11 years before submission rather than within the time limits as required by [25 C.F.R. § 533.2]. While on page 5, paragraph one, the Chairman says the agreements were submitted for a legal opinion, he then goes on to say that there is no reason he cannot issue a conclusive determination without providing any basis for his conclusion. This again brings up the due process problem. The Court concludes that, at most, the so-called "decision" is a legal opinion which was the result of an almost total disregard of mandated procedures and an obvious lack of due process.

(AA/Vol. VII/p. 1958:4-18.)[6]

D. The Tribe's Motion To Dismiss On Grounds Of Sovereign Immunity

On November 30, 2009, the trial court also denied the Tribe's sovereign immunity motion. (AA/Vol. VII/pp. 1959-60.) The trial court found that "it is quite clear that there was a waiver of sovereign immunity" in the GMA, ELA and Promissory Note, and that the Tribe had duly

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[6] In 2010, the Tribe raised the NIGC "final agency action" preemption argument again in its motion for summary judgment, which the trial court (the Honorable Patrick J. Riley) denied. (AA/Vol. XII/pp. 3078-3080; AA/Vol. XVII/pp. 4055-4057; AA/Vol. XIX/pp. 4825-4826; AA/Vol. XXI/ pp. 5154:21-5155:8.) The Tribe filed a motion for judgment on the pleadings advancing this argument yet again. (AA/Vol. XXIII/pp. 5845-5865.) By that point, the case had been assigned to the Honorable Nelson K. Brooks for trial. (RT/ Vol. III/pp. 805:12-807:11.) Judge Brooks denied the motion, observing that "my review of the record indicates to me that Judge Riley did consider these matters and c[a]me to a conclusion on them. And I agree with that conclusion based on what I've seen." (RT/Vol. IV/p. 898:21-25.)

authorized the waivers. (AA/Vol. VII/p. 1959:4-20.) Regarding the scope of the waiver, the court noted disagreement between the parties as to whether the contracts were "to be restricted to income from the [temporary] tent or from the later larger casino to be built." (*Id.* at 1959:21-24.) The court explained that, under California contract law, if there is conflicting extrinsic evidence as to intent, the court must determine if both sides' interpretations are reasonable, and, if so, the jury must determine mutual intent. (*Id.* at pp.1960:1-11.) The court concluded that, "[i]n light of the fact that the limited discovery and the declarations [that] indicate that there are crucial areas as to the contracts and their intended source of payment, which casino is involved . . . it is the ruling of the Court that there is sufficient evidence to establish that either interpretation is reasonable and judicial economy dictates that a jury will be necessary." (*Id.* at p. 1960:11-17.) The court denied the sovereign immunity motion without prejudice to the interpretation issue being determined at trial. (*Id.* at p. 1960:17-23.)

E. The Tribe's Writ Petitions And Federal Lawsuit

After the trial court denied the Tribe's motions to dismiss on federal preemption and sovereign immunity grounds, the Tribe filed a petition for writ of mandamus to reverse that decision, which this Court denied, and a petition for review by the California Supreme Court to reverse this Court's decision, which also was denied. (RA/Vol. I/pp. 1-2); *see also* Appellant's Opening Brief ("AOB"), at 16; *Shingle Springs Band of Miwok Indians v. Sharp Image Gaming, Inc.*, 2010 WL 4054232, at *3 (E.D. Cal. Oct. 5, 2010) ("*Shingle Springs*"). The Tribe then filed an action in the United States District Court for the Eastern District of California against Sharp Image and Judge Riley seeking an injunction to reverse that decision. *Shingle Springs*, 2010 WL 4054232 at *3-4. After full briefing on Sharp

Image's motion to dismiss and the Tribe's motion for summary judgment, the federal court dismissed the Tribe's suit. *Shingle Springs*, 2010 WL 4054232 at *1.

F. The Tribe's Motion for Summary Judgment

On October 20, 2010, the Tribe filed a motion for summary judgment on several grounds, including the statute of limitations defense it had pled in its Answer. (AA/Vol. XIII/pp. 3054-3056.) On February 14, 2012, Judge Riley denied the motion, finding triable issues of fact as to all grounds asserted. (AA/Vol. XXI/pp. 5123-5158.) At trial, the Tribe did not present evidence or propose a jury instruction on its statute of limitations defense.

G. The Tribe's Motion to Bifurcate And The Phase I Trial

On September 15, 2011, the Tribe filed a motion to bifurcate the trial. (RA/Vol. I/pp. 35-50.) The Tribe asked that its sovereign immunity defense be tried first in a separate "Phase One" trial, along with its related contract formation defenses. (*Id.* at 36) As to sovereign immunity, the Tribe argued that bifurcation was necessary because "sovereign immunity is a jurisdictional defense that bars suit (not just liability) against a sovereign nation . . . ." (*Id.*) The issue as the Tribe framed it was whether it "intended to and did knowingly and expressly waive sovereign immunity for suit against it, either orally or in writing, for proceeds of a casino other than Crystal Mountain Casino (the only casino that existed in 1997 when the contracts were signed)." (*Id.*) The Tribe argued that sovereign immunity should have been resolved on its motion to dismiss. (*Id.* at 44-45.) The Tribe urged that "to avoid subjecting the Tribe to further prejudice, the Tribe should, at a minimum, be allowed to have the jury

resolve its sovereign immunity defense before it is needlessly subjected to a full trial on the merits." (*Id.* at 45.)

Over Sharp Image's objection, Judge Brooks granted the motion to bifurcate. (RT/Vol. III/pp. 817:1-828:3.) The Phase I trial ensued with the parties presenting argument and evidence on these issues to the jury. The jury was instructed on sovereign immunity with a form of instruction that the trial court modified from a special instruction submitted by the Tribe, which set forth the Tribe's contention that the waiver only extended to Crystal Mountain Casino, and Sharp Image's opposing contention that it applied to any casino operated by the Tribe. (RT/Vol. VII/pp. 1737:10-1741:6, 1756:5-1757:22. 1796:1-1797:11, 1870:15-1871:20; RA/Vol. I/pp. 51-62; *see also id.* at 53, 57-61.)

After deliberation, the jury rendered a verdict on a form that asked for specific findings on the Tribe's sovereign immunity defense, as well as its "no mutual assent" and "no consideration"[7] defenses. (RT/Vol. VII/p. 1955:1-23; AA/Vol. XXXIV/p. 9099.) The jury found in favor of Sharp Image on each defense. (*Id.*) On sovereign immunity, the jury found: (1) "[O]n the Sharp Image claim under the Promissory Note, we find that the Tribe waived sovereign immunity," and (2) "On Sharp Image's claim under the Equipment Lease Agreement, we find that the Tribe waived sovereign immunity." (RT/Vol. VII/p. 1955:1-7.)[8]

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[7] The Tribe complains in passing that Sharp Image provided no consideration for the ELA (AOB 2-3), but neglects to mention that it presented that argument to the jury and the jury rejected it. (RT/Vol. VII/pp. 1955:14-19.)

[8] The Tribe has omitted from its appendix and opening brief any mention of its motion to bifurcate or the jury's verdict in Phase I finding that the Tribe waived sovereign immunity as to the ELA and Promissory

H. Phase II Trial and Verdict

The Phase II trial proceeded to verdict. (RT/Vol. XV/pp. 4125:17-4227:15; AA/Vol. XXVIII/pp. 7311-7317.) The jury rendered a general verdict in favor of Sharp Image on its claims under the ELA and Promissory Note, awarding damages of $20,398,858 and $10,044,106.39, respectively. (RT/Vol. XV/pp. 4126:4-28; AA/Vol. XXVIII/p.p. 7311-7312.) At the Tribe's request, and over Sharp Image's objection, the trial court also submitted to the jury 17 special interrogatories on the ELA and 13 special interrogatories on the Promissory Note. (RT/Vol. XV/pp. 4134:3-4138:24; AA/Vol. XXVIII/pp. 7314-7317.) The jury answered each one in Sharp Image's favor. (*Id.* at 7311-12.)

ARGUMENT

I. The Trial Court Correctly Determined That Federal Law Does Not Preempt This Garden Variety State Law Breach of Contract Case.

A. The Tribe's Argument That Mr. Hogen's Letter Is Binding In State Court Merely Asserts Federal Preemption.

The Tribe asserts that the NIGC Chairman's April 23, 2009 letter opining that the GMA and ELA are void "is binding on lower courts unless successfully challenged in a United States District Court" in an action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.* (AOB at 22.) Although the Tribe splits its 22-page argument into "final agency action" (AOB at 22-39) and federal preemption sections (*id.* at 39-

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Note. The Tribe includes only the Phase II verdict as if Phase I had never occurred. (AOB at 19.)

44), they are one and the same. In the Tribe's federal case seeking to reverse Judge Riley's rulings on this issue, the District Court observed that the Tribe's claim (1) of "exclusive federal jurisdiction" under IGRA, and (2) that "Sharp Image cannot challenge the NIGC's action in state court, but must file an action in federal court" under the APA, both "amount to a complete preemption argument." 2010 WL 4054232 at *10.

B. Standard of Review

Courts are reluctant to infer preemption and the burden is on the party claiming preemption to prove it. *See Olszewski v. Scripps Health*, 30 Cal. 4th 798, 815 (2003); *Cellphone Termination Fee Cases*, 193 Cal. App. 4th 298, 311 (2011). When the issues regarding federal preemption involve undisputed facts, it is a question of law whether a federal statute or regulation preempts state law, and on appeal, the court independently reviews a trial court's determination on preemption. *Cellphone*, 193 Cal. App. 4th at 311. When the trial court resolves disputed issues of fact, its findings are reviewed under the substantial evidence standard and will be sustained unless shown to lack substantial evidentiary support. *Id.*

C. The Tribe Did Not Establish Federal Preemption Under IGRA.

The Tribe did not carry its burden to establish federal preemption. As the District Court held in the Tribe's federal lawsuit, the Tribe's claims do not even state a federal question. *Shingle Springs*, 2010 WL 4054232 at *13-14; *see also id.* at *10 n.12 ("Despite these vigorous protestations, [the Tribe] *never* sought timely removal to federal court.") (emphasis in original). The case on point is *American Vantage v. Table Mountain Rancheria*, 103 Cal. App. 4th 590 (2002), which holds that IGRA does not preempt a garden variety breach of contract case like this one. As the court

observed in *American Vantage*, "not every contract between a tribe and non-Indian contractor is subject to IGRA." 103 Cal. App. 4th at 596 (citing *Iowa Management & Consultants v. Sac & Fox Tribe*, 207 F.3d 488, 489 (8th Cir. 2000), and *Calumet Gaming Group-Kansas v. Kickapoo Tribe*, 987 F. Supp. 1321, 1325 (D. Kan. 1997)). "IGRA regulation is limited to management contracts and collateral agreements to management contracts." *American Vantage*, 103 Cal. App. 4th at 596; *see also Shingle Springs*, 2010 WL 4054232 at *13.

In *American Vantage*, the Court of Appeal rejected a tribe's assertion that plaintiff's breach of contract claims should be dismissed because, under IGRA, plaintiff's consulting agreement was really an unapproved management contract and therefore void. *Id.* at 596; *see also* 25 C.F.R. § 533.7 (NIGC regulation providing that gaming management contract not approved by the NIGC Chairman is void). In that situation, the court concluded there can be no federal preemption:

> [T]here are only two possible outcomes. The contract will be found to be either a consulting agreement or a void management agreement. Nevertheless, either characterization leads to the same result. The contract is not subject to IGRA regulation. Thus, although the IGRA may play a role in the resolution of this matter, it does not preempt appellant's claims. Rather, appellant's remedy, if any, for the alleged breach will be based on California law.

Id. at 596-97 (citations omitted). Thus, where, as here, a plaintiff contractor sues to enforce an agreement and a defendant tribe alleges the agreement is a "management contract" that is void because it was not approved by the NIGC, there can be no IGRA preemption no matter what the outcome of the issue may be.

American Vantage also expressly relied on the reasoning in *Gallegos v. San Juan Pueblo Bus. Dev. Bd, Inc.*, 955 F. Supp. 1348, 135 (D.N.M. 1997), where the court held:

> [I]f the Agreement is void because it is a management contract that was not approved in advance by the Chairman of the NIGC as required by 25 U.S.C. § 2710(d)(9) it never was a valid written contract, but was only an *attempt* at forming a management contract. If that is the case, then Mr. Gallegos' suit in no way interferes with the regulation of a management contract because none ever existed. . . . It is quite a stretch to say that Congress intended to preempt state law where there is no valid management contract for a federal court to interpret.

Id. (emphasis in original); *accord Rumsey Indian Rancheria of Wintun Indians of California v. Dickstein,* 2008 WL 648451, at *3-4 (E.D. Cal. Mar. 5, 2008) (citing *Gallegos* and stating that "[e]ven if the agreements are ultimately construed as void management contracts, they would be found to have never been valid contracts" and thus cannot serve as a basis for IGRA preemption).

The Tribe's response to *American Vantage* is to suggest that this decision is limited to circumstances where there was no "final agency action" and/or the NIGC has opined that the contract involved was not a management contract. (AOB) at 42-43. That explanation does not square with the core holding of *American Vantage* (and the Tribe never mentions *Gallegos* or *Rumsey*). In any event, the federal District Court in *Shingle Springs* considered the exact circumstances presented by this action, *i.e.*, Mr. Hogen's letter opining that the GMA and ELA were void. The District Court, citing *American Vantage, Gallegos*, *Rumsey* and other cases, held that "[i]f a contract is not construed by the NIGC to be a management contract, the contract falls outside the preemptive effect of the IGRA."

Shingle Springs, 2010 WL 4054232 at *13. "Further, if a contract is *void* because it is a management contract that has not been authorized pursuant to the statutory requirements of the IGRA, the breach of such an unauthorized contract does not implicate the IGRA." *Id.* at *14 (emphasis in original).[9]

Accordingly, the District Court concluded that the Tribe's attempt to reverse the decisions of the trial judge in the state court action failed to state a federal question:

> [U]nder either party's interpretation of the validity of the Agreements, the litigation is based on a contract dispute that fails to raise a federal question. To the extent defendant Sharp Image asserts that the Agreements are not management contracts or that the time to challenge the contracts as management contracts has passed, the IGRA is not implicated. Alternatively, to the extent plaintiff Shingle Springs asserts the GMA and ELA are *void* as unapproved management contracts, the IGRA is also not implicated. As such neither plaintiff's nor defendant's theory of the case raises a federal question.

Shingle Springs, 2010 WL 4054232 at *14 (emphasis in original, citations and footnote omitted).

In sum, whether or not Mr. Hogen validly opined that the GMA and ELA were void, there was no federal preemption that deprived the state

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[9] The Tribe cites *Boisclair v. Superior Court*, 51 Cal. 3d 1140, 1152 (1990) for the supposed general proposition that state law claims are preempted by federal law where one possible outcome of litigation is a determination that the issue is reserved for federal court resolution. (AOB at 41.) The Tribe omits that *Boisclair* involved construction of a specific statute, 28 U.S.C. § 1360, which expressly prohibits states from asserting jurisdiction over disputes concerning whether or not land is Indian land. *Boisclair* did not involve, discuss or touch on IGRA preemption.

court of jurisdiction to adjudicate Sharp Image's breach of contract causes of action. *See Shingle Springs*, 2010 WL 4054232 at *13-14.

D. The Ninth Circuit's Decision In *AT&T* Does Not Furnish A Basis For Federal Preemption.

Although preemption plainly does not apply, the Tribe pressed the argument in the trial court, in interim writ proceedings, in the federal court, and now on appeal that based on *AT&T*, 295 F.3d 899, "this case raises unique issues of exclusive federal jurisdiction, *not* simply preemption." *Shingle Springs*, 2010 WL 4054232 at *11 (emphasis in original). The District Court in *Shingle Springs* summarized the Tribe's position as follows: "[W]here the federal court has exclusive jurisdiction, the state court is *wholly without jurisdiction* and powerless to proceed." *Id.* (emphasis in original). It found that "plaintiff offers no applicable legal authority in support of this conclusion." *Id.* The District Court was and is correct.

In *AT&T,* the Ninth Circuit determined that state Attorneys General had no authority to send letters warning AT&T not to provide toll-free service to a tribe's lottery game because the game violated state gambling laws. 295 F.3d at 903. The court observed that the NIGC had approved a management contract and tribal resolution authorizing the lottery. *Id.* at 902. The court held that the NIGC's approvals constituted "final agency decisions" subject to appeal under the APA. *Id.* at 905 (citing 25 U.S.C. § 2714). It further held 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."[10] 295 F.3d at 906.

AT&T is easily distinguished on several grounds. To begin with, the District Court held, "*AT&T*, relied upon by [the Tribe], is distinguishable. *AT&T* involved management contracts *approved* by the NIGC and thus, regulated by the IGRA. Conversely, in this case, the NIGC concluded that the GMA and ELA were *unapproved* management contracts, and thus, outside the purview of the IGRA." *Shingle Springs,* at *14 n.17 (emphasis in original); *see also* Section I.C., *supra,* pp. 23-27.

In addition, in *AT&T*, there was no dispute that the NIGC validly took "final agency action" in compliance with IGRA in approving the Tribe's management contract. *AT&T*, 295 F.3d at 907. However, as explained in the next section of this brief, there was no "final agency action" here.

As yet another important point of distinction, and as the District Court observed, *AT&T* does not apply here because it involved a unique federal statute: 18 U.S.C. § 1166(d). *See Shingle Springs*, 2010 WL at

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[10] The Tribe asserts that "California courts give great weight to the decisions of the Ninth Circuit" (AOB at 25, n.10), thereby conceding that Ninth Circuit decisions are not binding on California courts. *See McLaughlin v. Walnut Properties, Inc.*, 119 Cal. App. 4th 293, 297 (2004) ("Decisions of the United States Supreme Court are binding. Lower federal court decisions, including those of the Ninth Circuit Court of Appeal, are not."). Moreover, in *Missouri v. Coeur D'Alene Tribe*, 164 F.3d 1102, 1109 & n.5 (8th Cir. 1999), the Eighth Circuit, dealing with the same tribe and same issue as in *AT&T*, came up with same conclusion as did the District Court of Idaho in the decision overturned in *AT&T* (*i.e.*, that the lottery was illegal). The *AT&T* decision – issued 10 years ago – has never been cited by any court in any reported decision as determinative on the issue of IGRA preemption.

*10-11. Under 18 U.S.C. Section 1166(a), all state gambling laws are applicable in Indian country, but Section 1166(d) provides that "[t]he United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country . . . ." To the extent that state law prohibits the gaming devices operated by an Indian tribe, "Section 1166(d) also grants the federal government exclusive power to enforce *that* law." *Sycuan Mission Indians v. Roache*, 54 F.3d 535, 540 (9th Cir. 1994) (emphasis in original); *see also United States v. E.C. Investments*, 77 F.3d 327, 330-331 (9th Cir. 1996).

Section 1166(d) is intended to prevent and preclude state prosecution of state anti-gambling laws in Indian country. That special purpose takes Section 1166 out of the realm of ordinary claims of federal preemption or federal jurisdiction. *Shingle Springs*, 2010 WL 4054232 at * 11 (in *AT&T,* Section 1166(d) "presented a unique issue with respect to the federal court's ability to enforce the exclusive criminal prosecution provision" in the statute).

Section 1166(d) is at the heart of the *AT&T* decision. Under Section 1166(d), the Ninth Circuit found that state prosecutors lacked jurisdiction to issue letters to AT&T that a tribe's lottery would violate state and federal gambling laws. *AT&T*, 295 F.3d at 909 (citing Section 1166(d) and *E.C. Investments* and stating that "the federal government has exclusive jurisdiction to prosecute any state gambling law violations applicable in Indian country. States, on the other hand, are without jurisdiction."). Where Section 1166(d) is inapplicable, as here, *AT&T* does not stand for the proposition that the federal court has exclusive jurisdiction over a garden variety breach of contract claim, simply because the NIGC

Chairman has said that the contract is void at the Tribe's behest. *See Shingle Springs*, 2010 WL 4054232 at *11 ("Such a unique situation . . . is not present in this case"). Indeed, the *Gallegos-American Vantage-Rumsey-Shingle Springs* line of cases is exactly to the contrary: there is no federal preemption or even a federal question raised by Sharp Image's breach of contract causes of action and the Tribe's IGRA-based defense.

E. The Trial Court Correctly Declined To Defer To Mr. Hogen's Letter.

As the District Court in *Shingle Springs* also pointed out, the Tribe's jurisdictional dispute stems from "the Superior Court's refusal to give deference to the NIGC's determination" that the GMA and ELA are void management contracts. *Shingle Springs,* 2010 WL 4054232 at *14.[11] But outside of the rejected theory that Mr. Hogen's letter deprived the state court of jurisdiction, the Tribe does not discuss principles of judicial deference to federal administrative agencies. *See Grand Traverse Band of*

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[11] The Tribe's assertion that only a federal court may entertain an APA action is beside the point, since Sharp Image was not required to bring an APA action. (AOB at 24, 31.) *Double LL Contractors, Inc. v. State of Oklahoma, ex rel. Oklahoma Dep't of Transportation*, 918 P.2d 34, 40-42 (Okl. 1996), *Federal Nat'l Mortgage Assn. v. LeCrone*, 868 F.2d 190, 193 (6th Cir. 1989), and the like, cited by the Tribe (AOB at 24, 31), determined that APA actions to challenge federal agency decisions must be brought in federal court because Congress passed a statute waiving the United States' sovereign immunity to judicial review under the APA but only "in a court of the United States." 5 U.S.C. § 702. These cases do not mandate that Sharp Image bring an APA action just so that it could assert that the trial court should not defer to Mr. Hogen's letter. Deference and APA review are separate and different inquiries. *See Arent v. Shalala*, 70 F.3d 610, 614-616 (D.C. Cir. 1995); *Shays v. Federal Election Com.*, 528 F.3d 914, 919 (D.C. Cir. 2008). Sharp Image was entitled to assert that the trial court need give no deference to Mr. Hogen's letter, and the trial court was entitled to adjudicate the issue.

Ottawa and Chippewa Indians v. United States Attorney for the Western Dist. of Michigan, 198 F. Supp. 2d at 920, 927-928 (W.D. Mich. 2002) (discussing levels of deference to an NIGC letter opinion, citing, *inter alia*, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), *United States v. Mead Corp.*, 533 U.S. 218 (2001), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). The Tribe's reluctance to discuss deference principles may be explained by the fact that, for numerous reasons, Mr. Hogen's letter is not entitled to any deference, as the trial court held.

In any case, Sharp Image never "collaterally attacked" Mr. Hogen's letter, as the Tribe claims. (AOB at 35.) To the contrary, Sharp Image's position has always been that the letter is not entitled to any deference because it is infected with both procedural and substantive error. The Tribe's position has always essentially been that once the court determines that the letter was written by a federal official, its inquiry ends. That would mean that even if Mr. Hogen had scribbled the words "the ELA is a management contract" on a napkin and a staff attorney had declared that to be "final agency action," that would be enough and that the "decision" could not be further examined. That is not the law.

Nonetheless, the Tribe argues the letter is binding – the highest level of deference afforded to agency decisions (essentially so-called "*Chevron* deference") because it is "final agency action." (AOB at 22.) As explained below, there was no "final agency action" here. But even if there had been, *Chevron* deference would not have applied because, as Mr. Hogen's letter expressly advised, it was "not a formal adjudication . . . ." (AA/Vol. V/p. 1333.) As *Grand Traverse* held, *Chevron* deference does not apply to an

NIGC opinion letter where the NIGC "did not employ formal adjudicatory procedures." 198 F. Supp. 2d at 927.

Moreover, there was no "final agency action" here because Sharp Image was denied the administrative review guaranteed by IGRA.[12] As that statute provides, a decision by the Chairman of the NIGC to approve or disapprove a "management contract" does not constitute a "final agency decision[]" subject to review by a federal district court. 25 U.S.C. § 2714. Under Section 2705(a)(4) of IGRA, the Chairman has the power to approve a gaming management contract "subject to an appeal to the Commission . . . ." Thus, to reach a "final agency decision" by the Commission requires completion of an administrative appeal process to review the Chairman's initial decision. 25 U.S.C. §§ 2705(a)(4), 2714.

Sharp Image filed a timely administrative appeal of Chairman Hogen's April 23, 2009 letter (AA/Vol. V/pp. 1297-Vol. VI/p. 1580), but learned from a letter from an NIGC staff attorney that the Commission was "functionally unable" to review the appeal due to the recusal of the only commissioner on the Commission besides Mr. Hogen himself. (AA/Vol. VI/p. 1750.) This was correct: IGRA requires the Commission to consist of three members, two of whom are necessary for a quorum to render any decision. 25 U.S.C. § 2704(b), (d). In March 2009, there were only two commissioners serving. (AA/Vol. VI/p. 1750.) Decisions of fewer than the statutorily required quorum of a federal agency's commissioners are

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[12] Even if Mr. Hogen's letter purporting to void Sharp Image's contracts constituted "final agency action" (which it does not), the letter still would not deprive the state court of jurisdiction to adjudicate Sharp Image's breach of contract claims, as the *American Vantage-Gallegos-Rumsey-Shingle Springs* line of cases demonstrates.

invalid.[13] *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2639-42 (2010).

The NIGC staff attorney asserted, however, that the Commission could eschew administrative review under 25 C.F.R. section 539.2 and still issue a "final agency decision." (AA/Vol. VI/p. 1750.) But Section 539.2 only allows *the Commission – i.e.*, the full Commission or a legal quorum of the Commission – to forego writing a separate decision and adopt the NIGC Chairman's decision after 30 days. The regulation does not permit the NIGC to skip administrative review entirely, that is, not without violating due process. In promulgating 25 C.F.R. section 539.2, the NIGC emphasized that "[d]ue process and 25 U.S.C. § 2705 require a review of the [the Chairman's management contract decisions] by the full Commission. Such a review would constitute final agency action appealable to the appropriate district court under 25 U.S.C. 2714. Hence, an appeal of the Chairman's action to the full Commission is appropriate and necessary." Management Contracts Requirements and Procedures under the Indian Gaming Regulatory Act, 58 Fed. Reg. 5818-01, 5828 (Jan. 22, 1993).[14]

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[13] Moreover, under elementary principles of due process, Mr. Hogen could not review his own decision for error. *Brown v. City of Los Angeles*, 102 Cal. App. 4th 155, 177-78 & n.13 (2002).

[14] Where a statute provides for an administrative appeal, the agency has no discretion whether to hear the appeal or not. *See Adams House Health Care v. Bowen*, 862 F.2d 1371, 1375-76 (9th Cir. 1988). An agency cannot simply decline to hear an appeal provided by statute. *See Assoc. Builders and Contractors of Texas Gulf Coast, Inc. v. United States Dep't of Energy*, 451 F. Supp. 281, 282 (S.D. Tex. 1978). Nor can an agency promulgate a regulation that "streamlines" an administrative appeal guaranteed by statute by reducing the review panel from three officials to one. *Chen v. Ashcroft,* 378 F.3d 1081, 1086-87 (2004). An agency may

Second, NIGC letters solicited and procured by the Tribe to help it defend this lawsuit are entitled to limited or no deference. *See, e.g.*, *Citizens Action League v. Kizer*, 887 F.2d 1003, 1007 (9th Cir. 1989) (declining to defer to letter from federal agency to the defendant state agency where, among other things, the letter was for the state agency to use in defending the action), cited in *Olszewski v. Scripps Health*, 30 Cal. 4th at 822, n.17 (describing the letter in *Kizer* as "represent[ing] the views of an administrator obtained solely for purposes of litigation"); *Independent Living Center of Southern California v. Maxwell-Jolly*, 572 F.3d 644, 654 (9th Cir. 2009), vacated and remanded on other grounds, *Douglas v. Independent Living Center of Southern Cal.*, 132 S. Ct. 1204 (2012); *Culligan Water Conditioning v. State Bd. of Equalization*, 17 Cal. 3d 86, 93 (1976) (deference denied because "the 'position' taken by the Board ... was not the equivalent of a regulation or ruling of general application but ...was merely its litigating position in this particular matter[.]").

Third, Mr. Hogen's letter was the direct product of a secret request from the Tribe to help it defend against Sharp Image's lawsuit, and involved numerous secret communications and a 45-minute secret meeting between the Tribe's Chairman and the NIGC Chairman and their legal counsel (including the lawyer who represented the Tribe at trial and now represents the Tribe on this appeal). (*See, supra,* pp. 13-16.) The Tribe says these contacts were appropriate because they complied with the APA

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not rely on a regulation as a basis to ignore a statutory duty. *See Thai v. Ashcroft*, 366 F.3d 790, 798 (9th Cir. 2004). And a court need not defer to such an interpretation. *See Ahktar v. Burxynski*, 384 F.3d 1193, 1198 (9th Cir. 2004). To do so would raise a due process issue. *See Americana Nursing Centers, Inc. v. Weinberger*, 387 F. Supp. 1116, 1120 (S.D. Ill. 1975).

rules on administrative adjudications not involving hearings. (AOB at 38; AA/Vol. V/p. 1333.)[15] Not so.

An agency decision violates due process and is invalid when it lacks "basic fairness," as here, because it is the product of private lobbying. *See Sangamon Valley Television v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959) ("basic fairness" requires that agency proceedings resolving conflicting private claims "be carried on in the open"); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 53-57 (D.C. Cir. 1977) (*ex parte* contacts are inconsistent with fundamental notions of due process, citing *Sangamon*).[16] Accordingly, the trial court correctly determined that the Mr. Hogen's letter was the result of an "obvious lack of due process." (AA/Vol. VII/p. 1958:18.)

Fourth, as the trial court correctly determined, Mr. Hogen's opinion was also the result of "an almost total disregard of mandated procedures" under IGRA. (AA/Vol. VII/p. 1958:18.) Judge Riley held that the Tribe failed to comply with IGRA regulations in requesting that the Chairman review contracts that had been executed 10 years earlier. (*Id.* at pp. 1957:12-1958:18.) The NIGC Chairman violated 25 C.F.R. section 533.2 which requires that management contracts "shall" be submitted to the NIGC Chairman for review "upon execution." Fed. Reg. 5818-01, 5829

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[15] To the extent the Tribe justifies its *ex parte* contacts by asserting that what Mr. Hogen did was not a "formal adjudicatory proceeding," it negates its contention that Mr. Hogen's letter was "final agency action."

[16] The Tribe attempts to distinguish *Home Box Office* (but not *Sangamon*) as involving only *ex parte* contacts after the record had closed on formal rulemaking. (AOB at 39, n.13.) But the court in *Home Box Office* held that under well-established principles, communications received at any time that form the basis of agency decision must be publicly disclosed. 567 F.2d at 57.

(Jan. 22, 1993). (Tellingly, The Tribe omits this language from its quotation of Section 533.2. (AOB at 36).) That regulation was amended in 2009 to require submission "within sixty (60) days of execution by the parties." 74 Fed. Reg. 36926-10, 36935 (July 27, 2009). Under either version, the Tribe missed the deadline by 10 years, and the Chairman had no authority to waive it.

Moreover, a management contract submitted to the NIGC must be in contemplation of the parties actually continuing or commencing a gaming operation, and be accompanied by documents to that effect. 25 C.F.R. § 533.3. Here, as Judge Riley found, the Tribe had "terminated" the contracts at issue in 1999. Its submission of the contracts in 2007 thus was not in contemplation of the parties continuing or commencing a gaming operation.

That is one of the reasons why the Tribe's 2007 submission to the NIGC did not include any projected income statements or projected sources and uses of funds, as the regulations require: there was no income or sources and uses of funds to project from the contracts it was submitting. 25 C.F.R. § 533.3(e). Without a "complete submission" of the requisite accompanying documents, the NIGC Chairman has no authority to review a contract. *See Jena Band of Choctaw Indians v. Tri-Millennium Corp., Inc.*, 387 F. Supp. 2d 671, 677 (W.D. La. 2005). The NIGC's power to approve or disapprove management contracts is limited to those that have been submitted as prescribed. *See Bruce H. Lien v. Three Affiliated Tribes*, 93 F.3d 1412, 1418 (8th Cir. 1996); *Jena Band*, 397 F. Supp. 2d at 677. In short, there is nothing in IGRA or its implementing regulations that gives

the NIGC Chairman a free-ranging commission to invalidate contracts in order to assist a tribe in litigation.[17]

Given these abundant deficiencies, the trial court correctly determined that "the submission by [the Tribe's Chairman to the NIGC Chairman] was never intended to be a legitimate submission of a request for approval of a management contract; rather it was another request for an expression of an opinion by [the NIGC Chairman] with regard to" the GMA and ELA, and "[a]s such it is . . . entitled to no deference." (AA/Vol. VII/pp. 1957:25-1958:3.)

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[17] The Tribe claims that Judge Riley mistakenly evaluated Mr. Hogen's decision for compliance with 25 C.F.R. section 533.3 when Mr. Hogen supposedly undertook this exercise pursuant to 25 C.F.R. section 533.2. (AOB at 36-37.) Actually, Judge Riley found that Mr. Hogen had ignored *both* sections. (AA/Vol. VII/pp. 1957:13-1958:18.) And Mr. Hogen purported to disapprove the contracts because the documents required by Section 533.3 had not been submitted, demonstrating that he was purporting to follow that section, just as Judge Riley thought he was. (AA/Vol. V/pp. 1330-1331.)

The Tribe next suggests that the NIGC can disregard its own regulations, citing *United States ex rel. St. Regis Mohawk Tribe v. President R.C.-St. Regis*, 451 F.3d 44, 51 (2d Cir. 2006). (AOB at 37.) But that decision did not address the requirements under Sections 533.2 or 533.3 that management contracts be submitted (1) upon execution, and (2) with all necessary supporting documentation. Under *Bruce H. Lien*, the NIGC has no authority to review contracts – whether or not they are "management contracts" – absent compliance with these regulations. 93 F.3d at 1418.

The Tribe also cites 25 C.F.R. section 580.2, which gives the NIGC power to waive an appeal requirement. But this regulation was not adopted until 2012, and refers only to the NIGC's new process for appealing decisions to approve or disapprove a management contract. *See* 25 C.F.R. § 583.1 *et seq.*; *see also* AOB at 14, n.6. The requirements for submission of a management contract for approval or disapproval in the first instance remain unchanged.

F. The Promissory Note Is Not A Collateral Agreement To A Management Contract.

Mr. Hogen's letter did not analyze the Promissory Note or conclude that it was a management contract, nor did the Tribe request that he do so. (AA/Vol. V/pp. 1320-1334; AA/Vol. VI/pp. 1461-1465.) Nonetheless, the Tribe now asserts that the Promissory Note is a "collateral agreement" to a management contract that is also void if not approved by the NIGC. (AOB at 27-30; *see also* 25 C.F.R. § 502.15.) In other words, the Tribe argues here not that Mr. Hogen's letter should have ended the issue, but that the trial court should have determined *as a factual matter* that the Promissory Note was a collateral agreement to a management contract. This fact-based determination was not appropriate for a motion to dismiss; nothing required the trial court to resolve this factual issue. It was submitted to the jury at trial, and the jury rejected it.

Moreover, even if the GMA and the ELA were management contracts (which they were not), not every agreement related to a management contract is such a "collateral agreement." An unapproved collateral agreement is void only it also provides for *management* of all or part of a gaming operation. *See* 25 C.F.R. §§ 502.5, 502.15, 533.7; *see also Catskill, L.L.C. v. Park Place Entertainment*, 547 F.3d 115, 130 (2008); *Wells Fargo, N.A. v. Lake of the Torches Economic Dev. Corp.*, 658 F.3d 684, 700-702 (7th Cir. 2011).

As explained in *Jena Band*:

> [O]nly those collateral agreements that should also be considered management contracts because they provide for the management of the gaming operation are void without NIGC approval. Therefore, even if one of the agreements entered into by the parties is a collateral agreement, pursuant

> to 25 C.F.R § 502.5, because it is related to a management contract, it still would not be void for lack of NIGC approval unless it also provides for the management of a gaming operation.

Jena Band, 387 F. Supp. 2d at 678.[18]

The term "management" is not defined by statute or regulation but is given its ordinary meaning. *Jena Band*, 387 F. Supp. 2d at 676. Under this standard, the Promissory Note is not a collateral agreement subject to NIGC approval because it plainly does not involve any management activities. It simply requires the Tribe to repay the funds it had borrowed from Sharp Image.

The Tribe cites *New Gaming Systems, Inc. v. NIGC*, 2012 WL 4052546 (W.D. Okla. Sep. 13, 2012), in support of its assertion that the Promissory Note is a collateral agreement to a management contract. (AOB at 28-29.) In that decision, however, neither the NIGC nor the court considered the standards for a collateral agreement. *New Gaming*, 2012 WL 40552546 at *8.

Then the Tribe suggests that this Court remand to the Superior Court "to decide the issue in the first instance." (AOB at 29-30.) But this issue was tried to the jury and decided in Sharp Image's favor. As specifically requested by the Tribe, the trial court instructed the jury on management contracts (RT/Vol. XIIII/pp. 3836:22-3840:12), as follows:

> Federal law requires that Indian tribes or their contractors obtain approval of the National Indian Gaming Commission

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[18] By contrast to the Promissory Note, the contract before the court in *Jena Band* was a collateral agreement because it gave a party an "'exclusive right to enter into a management contract.'" *Jena Band*, 387 F. Supp. 2d at 680.

> to enter into a management contract for the operation or management of an Indian gaming operation.
>
> The Commission has broad power to determine what agreements do and do not require approval. Management contracts become effective only on federal approval. The Chairman cannot approve a management contract unless the Indian tribe is the primary beneficiary of the gaming operation.
>
> A management contract is any contract between an Indian tribe and a contractor that provides for any management activity with respect to all or part of a gaming operation. Management encompasses activities such as planning, organizing, directing, coordinating and controlling.
>
> When multiple agreements, read together, provide for management of an Indian gaming operation, each of the agreements requires federal approval. Management contracts that have not been approved by the Chairman [of the NIGC] are void.

(RT/Vol. XV/pp. 4116:26-4117:18.)

The jury thus instructed found the Tribe liable on the Promissory Note. (RT/Vol. XV/pp. 4125:17-4227:15; AA/Vol. XXVIII/pp. 7311-7317.)[19]

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[19] The Tribe's jury instruction on gaming management contracts also covered the ELA. (RT/Vol. XV/pp. 416:26-4117:8.) The verdict thus established that *neither* the ELA nor the Promissory Note were gaming management contracts. That is, having been instructed on the characteristics of gaming management contracts and that unapproved management contracts are void, the jury nonetheless found the Tribe liable for breach of contract. (RT/Vol. XV/p. 4126:8-22.) The jury could not have rendered this verdict if it had determined that either contract was a gaming management contract. (*Id.*)

The Tribe's passing complaint that it was not permitted to rebut Mr. Anderson's testimony that his contracts were not management contracts

II. Sharp Image's Claims Were Not Barred By Sovereign Immunity Because The Tribe Expressly Waived That Defense In The Contracts At Issue.

The Tribe contends the judgment should be reversed because the trial court should have granted its motion to dismiss based on sovereign immunity. (AOB 44-50.) This contention fails for at least two reasons. First, the trial court was correct that a jury should resolve conflicts in extrinsic evidence affecting the interpretation of a contract, including a contractual waiver of sovereign immunity. The jury did just that and found in favor of Sharp Image. Second, if anything, the trial court should have denied the motion outright based on the plain language of the agreements.

A. The Trial Court's Ruling And The Jury's Verdict On Waiver Of Sovereign Immunity

The trial court denied the Tribe's sovereign immunity motion, finding that "[a]s to the language used in each of the [contracts], it is quite clear there was a waiver of sovereignty." (AA/Vol. VII/p. 1959:9-10.) The issue then became the scope of the waivers and whether they applied to a future tribal casino pursuant to the language in the ELA giving Sharp Image "the exclusive right to lease or otherwise supply additional gaming devices to [the Tribe] to be used at its existing or any future gaming facility or facilities," (AA/Vol. XXXIV/p. 1954.), or whether, as the Tribe contended, the waivers only applied to a facility that Sharp Image helped build and develop.

(AOB at 19) ignores that one of its own lawyers testified at some length that he had concluded that the contracts were management contracts. (RT/Vol. XIII/pp. 3429:18-3432:12, 3453:15-20.)

Judge Riley was reluctant to rule on the issue on a motion to dismiss since it was the very same issue the jury would be asked to decide at trial, *i.e.*, whether the Tribe had breached the contracts because Sharp Image's right to revenues under the ELA applied to a future tribal casino.[20] Accordingly, Judge Riley decided that the jury should resolve this issue based on all of the evidence, including extrinsic evidence. (AA/Vol. VII/pp. 1959:20-1960:23.)

The court's ruling was and is fully consistent with applicable law. *See Warburton/Buttner v. Superior Court*, 103 Cal. App. 4th 1170, 1180 (2002) (interpretation of contractual waiver of sovereign immunity may turn on extrinsic evidence admitted at trial); *Morey v. Vanucci*, 64 Cal. App. 4th 904, 913 (1998) ("As a trier of fact, it is the jury's responsibility to resolve any conflict in extrinsic evidence properly admitted to interpret the language of the contract."); *see also Wolf v. Walt Disney Pictures & Television*, 162 Cal.App.4th 1107, 1126 (2008).

In fact, the jury did review all the evidence and found that the Tribe's "clear" "waiver of sovereignty" in the contracts (AA/Vol. VII/p. 1959:9-10) did extend to Sharp Image's claims based on the ELA and the Promissory Note. (RT/Vol. VII/p. 1955:1-7.) At the Phase I trial, among

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[20] AA/Vol. VII/ pp. 1959:24-1960:1 ("The intent appears to be a strongly contested area and its resolution directly involves the basis for liability of the note and encompasses the main issues of payment and source addressed by the complaint."); *id.* at 1960:17-23 ("It is further the Court's conclusion that judicial economy mandates that the issue of intent will in all probability require a jury which will determine the correct interpretation of payment issues and source of payment issues and related sub issues, that those issues should be reserved for a jury and the motion to quash/dismiss should be denied without prejudice to the interpretation issue be[ing] tried at the trial in chief since neither party should be forced to elect or decline jury at this stage.").

other things: (1) the Tribe and Sharp Image presented evidence and argument as to whether the waiver of sovereign immunity was limited to the temporary casino Sharp Image had built (the Crystal Mountain Casino); (2) tribal witnesses admitted that no one from the Tribe had ever communicated this purported limitation to Sharp Image and that the sum total of the Tribe's expression on the subject was contained in the text of the contracts; (3) the jury was instructed on sovereign immunity with an instruction submitted by the Tribe (RT/Vol. VII/pp. 1737:10-1741:6; RA/Vol. I/pp. 53, 57-61.)[21] and (4) the jury determined that the Tribe waived sovereign immunity as to both the ELA and Promissory Note.[22]

Thus, the trial court's ruling on the motion to dismiss was legally correct and fully carried out. The jury rendered a verdict on sovereign immunity and that verdict is supported by substantial evidence. *Bowers v. Bernards*, 150 CA3d 870, 873–874 (1984).

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[21] Both counsel for Sharp Image and the Tribe displayed this instruction for the jury during oral argument. (RT/Vol. VII/pp. 1796:1-1797:11, 1870:13-1872:22.) And the Tribe's counsel stressed the language in the instruction requiring any waiver of sovereignty to be "unequivocally expressed." (RT/Vol. VII/pp. 1871:3-1872:7.)

[22] (RT/Vol. IV/pp. 1034:4-1042:7, 1051:11-1055:13, 1063:3-1065:14, 1068:3-1073:19; RT/Vol. V/pp. 1385:10-1386:14, 1402:8-27, 1409:28-1419:10; RT/Vol. VI/pp. 1466:8-1467:21, 1488:1-1493:2, 1495:2-1496:1, 1515:4-9, 1550:6-1552:5, 1554:25-1555:7, 1574:18-26, 1581:22-1582:7, 1600:3-1604:25, 1609:15-1611:7, 1616:2-12, 1639:23-1642:5, 1683:5-1684:24, 1686:6-1689:18, 1692:2-16, 1699:16-1700:20; RT/Vol. VII/pp. 1756:5-1757:22, 1765:22-1768:27, 1796:1-1797:11, 1799:2-21, 1841:12-1854:6, 1867:19-1888:15, 1955:1-23; RA/Vol. I/pp. 89:8-90:5, 96:23-97:11.)

B. Since The Jury Decided The Sovereign Immunity Issue In Phase I Of The Bifurcated Trial, The Tribe Was Not Prejudiced By The Trial Court's Decision Not To Rule Earlier On Its Motion To Dismiss.

Under established California law, the Tribe cannot simply claim that the trial court erred by failing to decide sovereign immunity definitively on its pretrial motion to dismiss. The Tribe had a full opportunity to try its sovereign immunity defense to the jury in a separate trial that the Tribe obtained through its motion to bifurcate. The Tribe put on evidence, drafted the instruction that the trial court gave to the jury, and obtained a verdict (albeit one unfavorable to the Tribe) on this issue before a separate trial on liability and damages. As a result, the Tribe cannot carry its burden to show that it was prejudiced by the trial court's denial of its motion to dismiss. Absent a showing of prejudice, the judgment may not be disturbed.

This Court set forth these principles in *Waller*: "When the trial court commits error in ruling on matters relating to pleadings, procedures, or other preliminary matters, reversal can generally be predicated thereon only if the appellant can show resulting prejudice, and the probability of a more favorable outcome, *at trial*." *Waller*, 12 Cal. App. 4th at 833 (emphasis in original), citing Code Civ. Proc. § 475 and Cal. Const., art. VI, § 13; *accord Reid v. Balter*, 14 Cal. App. 4th 1186, 1195 (1993). "Prejudice is not presumed, the burden is on the appealing party to demonstrate that a miscarriage of justice has occurred." *Waller*, 12 Cal. App. 4th at 833. The appellate court does not "look at the particular ruling complained of in isolation, but rather must consider the full record in deciding whether a judgment should be set aside." *Id.* Since the court must "presume that the

trial itself was fair and the verdict in plaintiffs' favor was supported by the evidence, [it] cannot find that an erroneous pretrial ruling based on declarations and exhibits renders the ultimate result unjust." *Id.*

Here, the Tribe makes no claim of error in the Phase I trial – in fact, it does not even mention Phase I at all. That trial must be presumed "fair and the verdict in plaintiff's favor. . . supported by the evidence." *Waller*, 12 Cal. App. 4th at 833. Therefore, the Tribe cannot show prejudice with respect to its claim that the trial court erred in denying its motion to dismiss on grounds of sovereign immunity. The Tribe's claim that the trial court erred is thus of no consequence.

C. The Trial Court Could And Should Have Denied The Motion Based On The Plain Language Of The Agreements.

Assuming, *arguendo*, that the trial court should have ruled definitively on sovereign immunity on the Tribe's motion to dismiss and that the Tribe was prejudiced by its failure to do so, that ruling would have to be have been the same as the jury's verdict: that the Tribe waived sovereign immunity based on the plain language of the ELA and Promissory Note.[23]

The standard of review on appeal in that respect is also well established. Absent conflicting extrinsic evidence, a *de novo* standard of review applies to the trial court's ruling on a motion to dismiss for lack of

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[23] The California Supreme Court has noted that "the United States Supreme Court, while consistently affirming the sovereign immunity doctrine, has grown increasingly critical of its continued application in light of the changed status of Indian tribes as viable economic and political nations." *Agua Caliente Band of Cahuilla Indians v. Superior Court*, 40 Cal. 4th 239, 254 (2007).

subject matter jurisdiction on grounds of sovereign immunity. *Yavapai-Apache Nation v. Iipay Nation of Santa Ysabel*, 201 Cal. App. 4th 190, 206 (2011); *Warburton/Buttner*, 103 Cal. App. 4th at 1180. If the relevant facts are undisputed, an appellate court may resolve the issue as a question of law without regard to the findings of the trial court. *Yavapai-Apache*, 201 Cal. App. 4th at 207. Here, the relevant facts are undisputed and consist of the plain language of the ELA and Promissory Note, which required denial of the Tribe's motion.

An Indian tribe's waiver of sovereign immunity must be clear and express as to scope and application and made by a person authorized to do so. *Yavapai-Apache*, 201 Cal. App. 4th at 206; *Warburton/Buttner*, 103 Cal. App. 4th at 1182. While clear expression is necessary, particular words are not. *Yavapai-Apache*, 201 Cal. App. 4th at 206-07. "No magic words are required . . . ." *Warburton/Buttner*, 103 Cal. App. 4th at 1190.

"With regard to the contractual type of waiver, the courts will look for expressed intent of the parties, *under an objective standard*." *Yavapai-Apache*, 201 Cal. App. 4th at 209 (emphasis added); *Warburton/Buttner*, 103 Cal. App. 4th at 1180; *Brant v. California Dairies*, 4 Cal. 2d 128, 133 (1935). The parties' subjective intent is not determinative. *Warburton/Buttner*, 103 Cal. App. 4th at 1191; *Brant*, 4 Cal. 2d at 133.

The written words of the contract are the primary evidence of the parties' agreement. *See Cedars-Sinai Med. Center v. Shewry*, 137 Cal. App. 4th 964, 979 (2006); *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.*, 109 Cal. App. 4th 944, 956 (2003). Where the language of the contract is clear and explicit, the parties' intent is determined solely by the contract's language. Civ. Code

§§ 1638, 1639.[24] A party's undisclosed intentions are irrelevant and may not be considered. *Brant*, 4 Cal. 2d at 133; *Cedars-Sinai*, 137 Cal. App. 4th at 980; *Founding Members*, 109 Cal. App. 4th at 956; *Oakland-Alameda County Coliseum, Inc. v. Oakland Raiders, Ltd.*, 197 Cal. App. 3d 1049, 1058 (1988).

The Tribe does not dispute that the text of the ELA and Promissory Note contained explicit and authorized waivers of sovereign immunity.[25] Rather, the Tribe's position is that the scope of its waiver was limited to the temporary gaming operation called Crystal Mountain Casino. (AOB at 47-48.)

The language of the ELA and Promissory Note are exactly to the contrary. The ELA expressly provides that Sharp Image has the exclusive right to supply gaming machines to the Tribe "to be used at its existing *or*

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[24] A party manifests consent to the terms of a contract as written on its face by signing it. *Stewart v. Preston Pipeline, Inc.*, 134 Cal. App. 4th 1565, 1587 (2005); *see also Meyer v. Benko*, 55 Cal. App. 3d 937, 943 (1976); *Hilleary v. Garvin,* 193 Cal. App. 3d 322, 327 (1987). Moreover, where both sides were represented by legal counsel in contract negotiations, the court "may not give credence to a claim that a party did not intend clear and direct language to be effective." *Winet v. Price*, 4 Cal. App. 4th 1159, 1168 (1992).

[25] The ELA also contained an integration clause, providing that "[t]his document and any attachments thereto constitute the entire agreement of the parties with respect to the subject matter hereof. No variation or modification of this document and no waiver of any of its provisions or conditions shall be valid unless in writing signed by both parties." (AA/Vol. XXXIV/p. 9160, ¶ 23.) Any evidence offered to change or supplement the terms of the ELA violated the parol evidence rule and should not have been considered. Code Civ. Proc. § 1856(a); *Brant*, 4 Cal. 2d at 133.

any future gaming facility or facilities."[26] (Emphasis added.) (AA/Vol. XXXIV/p. 9154.) The Promissory Note is similar, referring to repayment commencing when gaming machines are installed and in operation at the "Borrower's Gaming Facility and Enterprise," not the Crystal Mountain Casino.[27] (AA/Vol. XXXIV/pp. 9152.)

Despite the language in the ELA prominently featuring the word "or" (*i.e.,* "Crystal Mountain Casino *or* any other gaming facility"),[28] the Tribe insists that the ELA does not mean what its words plainly say, and that the waiver only extended to a casino named Crystal Mountain – either the initial tent casino or another "brick-and-mortar" casino called Crystal Mountain built with the revenues from the tent casino. (*Id.* at 47-48.) There is nothing in the language of the contracts that supports the Tribe's limitation and everything in the contracts refutes it. The trial court should have ruled, based on the plain language of the contracts, that the Tribe waived sovereign immunity with respect to Crystal Mountain Casino *or* any other "gaming facility or facilities" operated by the Tribe.

The Tribe relies on lock-step declarations of tribal councilmembers that they only intended to waive sovereign immunity as to the Crystal

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[26] The ELA likewise provides that the lease commences "on the date that 400 gaming devices are installed and in operation at Lessor's Crystal Mountain Casino *or any other gaming facility owned and operated by Lessee* . . . ." (Emphasis added.) (AA/Vol. XXXIV/p. 9154.) It also provides that the Tribe was to lease 400 gaming machines and other equipment for "*any* gaming facility owned and operated" by the Tribe. (*Id.* (Emphasis added.))

[27] The jury also specifically found that the term "Borrower's Gaming Facility and Enterprise" did not refer only to the Crystal Mountain Casino. (RT/Vol. XV/pp. 4138:13-16; AA/Vol. XXVIII/p. 7317.)

[28] The Tribe was careful to omit this clause in its quotation of the agreement. (AOB at 47.)

Mountain Casino or a successor "brick and mortar" casino. (AOB at 46-47.) But those declarations were impeached when tested at trial, where tribal witnesses admitted they could not recall any discussions or communications about the Tribe's sovereign immunity waiver being limited to a specific facility. (*See* RT/Vol. V/p. 1364:13-28; RA/Vol. I/pp. 67:9-72:3, 73:13-74:4, 79:1-80:16, 81:9-82:23.)[29]

In any event, there was no dispute that the Tribe never communicated this purported limitation to Sharp Image. To the contrary, at trial – where the Tribe had its best opportunity to adduce some evidence of such communication – all of its witnesses admitted that that the Tribe had never expressed any intention to limit its waiver of sovereign immunity to the temporary casino. (RT/Vol. V/pp. 1414:22-27; RT/Vol. VI/pp. 1495:22-25, 1515:7-1518:9, 1688:20-28, 1692:10-16; AA/Vol. XXXI/pp. 8200:7-25, 8213:19-8214:18, 8215:10-28, 8216:22-27, 8217:7-8219:6, 8220:28-8221:9, 8222:5-20.) To reiterate, a party's undisclosed intentions are irrelevant and may not be considered. *See, e.g., Brant*, 4 Cal. 2d at 133; *Warburton/Buttner*, 103 Cal. App. 4th at 1191.

By contrast, subsequent actions are the best evidence of the parties' mutual intent when they signed the contract. *See, e.g., Kennecott Corp. v. Union Oil Co. of Cal.* (1987) 196 Cal.App.3d 1179, 1189 ("The conduct of the parties after execution of the contract and before any controversy has arisen as to its effect affords the most reliable evidence of the parties' intentions."); 1 Witkin, *Summary of Cal. Law, Contracts* § 749, p. 837 (10th ed. 2005 & 2011 supp.) ("Acts of the parties, subsequent to the

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[29] (*See also* RT/Vol. VI/ pp. 1462:28-1463:25, 1515:7-1517:23, 1562:25-1565:25, 1570:12-1575:26, 1580:8-1582:12, 1583:4-22, 1696:3-1697:24, 1699:16-1704:22.)

execution of the contract and before any controversy has arisen as to its effect, may be looked to in determining the meaning. The conduct of the parties may be, in effect, a *practical construction* thereof, for they are probably least likely to be mistaken as to the intent." (emphasis in original, citing numerous cases)). On that score, tribal councilmembers testified regarding discussions in 1999 with potential investors that Sharp Image's contracts would need to be bought out if another company was brought in to supply gaming machines to a new facility. (AA/Vol. XXXI/pp. 8230:23-8231:22, 8232:17-24, 8237:24-8238:18, 8239:15-20, 8240:8-8242:5, 8243:17-23, 8255:22-8256:2, 8259:17-8261:12, 8270:12-25, 8272-8273, 8277, 8296, 8298, 8300.) If the waiver of sovereign immunity in Sharp Image's contracts only applied to the Crystal Mountain Casino, such discussions would have been wholly unnecessary.

The Tribe's response to this overwhelming evidence and authority is to declare that the "existence and scope of any waiver of sovereign immunity turns solely on *the Tribe's intent*, as explicitly and unequivocally expressed . . . and is not governed by ordinary principles of contract law." (AOB at 48-49 (emphasis in original, citations omitted).)[30] This contention is absurd. *Yavapai-Apache* and *Warburton/Buttner* both cite the California Supreme Court's opinion in *Brant* stating the "ordinary" principle of

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[30] The Tribe cites *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 514 (1940) and *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), as authority for this contention. (AOB at 48-49.) These cases say nothing of the kind and simply state the general principle that tribes cannot be sued without an express waiver of sovereign immunity. Further, the notion that only the Tribe's intent counts flies in the face of the core concept of contract interpretation which is to give effect to the *mutual intent* of the parties at the time of contracting. *See Morey v. Vanucci*, 64 Cal. App. 4th at 912; *Warburton/Buttner*, 103 Cal. App. 4th at 1180.

contract law that objective, not subjective, intent determines the scope of a contractual waiver of tribal sovereign immunity. *See Yavapai-Apache*, 201 Cal. App. 4th at 209; *Warburton/Buttner*, 103 Cal. App. 4th at 1180; *see also Brant*, 4 Cal. 2d at 133.

Moreover, the ELA provides in Paragraph 21 that the agreement "shall be governed by California law." (AA/Vol. XXXIV/p. 9159.) Faced with a similar provision in *Warburton/Buttner*, the court said "California law follows an objective theory of contract. The parties' subjective intent in entering the contract is not determinative." *Warburton/Buttner*, 103 Cal. App. 4th at 1191; *see also C&L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 419-20 (2001) (contractual choice of state law provision clarifies scope of waiver of sovereign immunity). Under this principle, the Tribe's undisclosed, subjective intent is irrelevant and cannot be considered in determining the scope of the waiver.[31] *Brant*, 4 Cal. 2d at 133.

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[31] The Tribe also contends that because the trial judge found both parties' interpretations of the contracts to be reasonable, Sharp Image did not establish an unequivocal waiver of sovereign immunity. (AOB at 49.) The jury was instructed, however, that a sovereign immunity waiver must be "unequivocally expressed" and returned a verdict that the Tribe had waived its sovereign immunity on both the ELA and Promissory Note. (RT/Vol. VII/pp. 1796:1-1797:11, 1870:13-1872:22, 1955:1-7.) In other words, the jury found that the Tribe's waivers were "unequivocally expressed." (*Id.*) To the extent the trial court determined that the parties' competing interpretations of the contracts were reasonable, this does not invalidate the waiver provision but simply allows the court to have extrinsic evidence considered and determined by the jury as to contract interpretation, as occurred here. *Warburton/Buttner*, 103 Cal. App. 4th at 1180; *Morey v. Vanucci*, 64 Cal. App. 4th at 912-13.

The best evidence as to the scope of the Tribe's waiver of sovereign immunity is the words of the contracts themselves, which do not support the limitation proposed by the Tribe. *See Brant*, 4 Cal. 2d at 134. Rather, the contract language amply supports the jury's specific verdict in Phase I of the trial that the Tribe waived sovereign immunity as to both the ELA and Promissory Note. Had Judge Riley been required to decide this issue on the Tribe's motion to dismiss, he would have had to come to the same conclusion.

III. The Tribe's Failed Summary Judgment Motion Cannot Succeed On Appeal.

The Tribe contends that the trial court should not have denied its motion for summary judgment on the grounds that (1) Sharp Image's claims were barred by the statute of limitations or (2) if not barred, Sharp Image could not establish that it could perform its obligations under the contracts in 2008. This contention implicates the doctrine of anticipatory breach, which was tried to the jury and under which the jury found the Tribe liable for breach of contract. The Tribe cannot revisit the issue on appeal in the guise of reviewing the trial court's denial of a motion for summary judgment. In any case, under the anticipatory breach doctrine, the trial court correctly denied the Tribe's summary judgment motion.

A. The Tribe Cannot Appeal Anticipatory Breach Issues Abandoned Before Trial Or Tried To The Jury.

The issues the Tribe attempts to raise on appeal relating to anticipatory breach were either abandoned by the Tribe before trial (*i.e.,* the statute of limitations after an anticipatory breach) or fully litigated at trial (*i.e.*, Sharp Image's ability to perform after an anticipatory breach). Accordingly, neither issue works on appeal.

First, the Tribe contends that the trial court erred in not granting summary judgment on the Tribe's statute of limitations defense. (AOB at 51-58.) However, the Tribe abandoned this defense. The Tribe did not present any evidence at trial or propose a jury instruction on its contention that the statute of limitations barred Sharp Image's contract claims. The Tribe asserted this defense in its Answer to Sharp Image's pleading (RA/Vol. I/p. 4), but made no effort whatsoever to prove it at trial. No doubt this was a strategic move to obtain what the Tribe regarded as a more favorable standard of review on appeal, *i.e.*, a *de novo* review of the trial court's denial of its summary judgment motion, rather than a substantial evidence review of the jury's verdict. (AOB at 20-21.)

However, where an appellant has chosen to abandon a material issue for strategic reasons at the trial level, it may not reopen the issue on appeal. *De Angeles*, 244 Cal. App. 2d at 442; *Carmichael v. Reitz*, 17 Cal. App.3d 958, 969 (1971) (citing *De Angeles* and stating that "one cannot raise on appeal material issues which he abandons at the trial level as a matter of strategy and purely for his own advantage"); *see also Johanson Transp. Service v. Rich Pik'd Rite, Inc.*, 164 Cal. App. 3d 583, 588 (1985) (finding that "issues raised and abandoned in the trial court cannot be considered on appeal"); *Lane Mortgage Co. v. C.R.L. Crenshaw*, 93 Cal. App. 411, 431 (1928) (concluding that issue was abandoned at trial because of "the fact that no evidence had been adduced on the part of the defendant on that issue"); *Muzzi v. Bel Air Mart*, 171 Cal. App. 4th 456, 466 (2009) (reference to issue in plaintiff's complaint "was abandoned as the trial progressed"). In short, since the Tribe abandoned its statute of limitations defense at trial, it cannot raise it now on appeal.

Likewise, under *Waller*, the Tribe cannot seek reversal by focusing only on a pre-trial ruling when the same issue was tried to the jury. That is what it is attempting to do with respect to the denial of its motion for summary judgment on the grounds that Sharp Image could not perform its obligations under the contracts after the Tribe anticipatorily breached them. The parties litigated this issue extensively throughout discovery and at trial, and evidence was presented and the jury instructed on this issue, resulting in rulings and a verdict that the Tribe does not challenge on appeal. (RT/Vol. III/pp. 688:19-693:13, 696:25-705:11, 711:22-718:9, 742:21-743:3, 753:21-755:17, 793:11-795:14, 797:20-798:2, 802:5-6; RT/Vol. VIII/pp. 2197:17-2205:8; RT/Vol. VIIII/pp. 2383:9-2386:10, 2537:5-7; RT/Vol. X/pp. 2551:27-2554:6; RT/Vol. XV/p. 4096:1-18, 4103:27-4104:4; AA/Vol. XXII/pp. 5506-5514; AA/Vol. XXIII/pp. 5830-5840, 5841; RA/Vol. I/pp. 15-20, 21-24, 26-27, 31-34.)[32] As such, the *Waller* rule precludes reviewing the issue on appeal under the guise of an attack on the trial court's summary judgment ruling.[33]

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[32] The Tribe asserts that the trial court issued a "two-sentence oral ruling" to deny its motion for summary judgment on statute of limitations grounds. (AOB 50.) This fails to mention the numerous motions and proceedings referenced in the citations to the record above in which the trial court repeatedly addressed the effect of the Tribe's anticipatory breach. The Tribe also omits that the trial court conducted an unusually long hearing on summary judgment and related issues that began at 9:10 a.m. and concluded at 3:28 p.m., during which Judge Riley engaged in a lengthy discussion with counsel for the Tribe regarding its statute of limitations theory and the legal support for it. (RT/Vol. II/pp. 457-591; *see also id.*, pp. 517:24-525:17.)

[33] In a footnote, the Tribe cites *FDIC v. Dintino*, 167 Cal. App. 4th 333, 343 (2008), for the proposition that "[a]n 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 on

B. Under The Anticipatory Breach Doctrine, Sharp Image's Claims Are Not Time Barred.

If the Court revisits the anticipatory breach issues, it should affirm the trial court's denial of summary judgment.

When review of the denial of summary judgment is available, it is reviewed *de novo*. *See Buss v. Superior Court*, 16 Cal. 4th 35, 60 (1997). The appellate court applies the same principles as the trial court. *See Romero v. Superior Court*, 89 Cal. App. 4th 1068, 1077 (2001). The court strictly construes the moving papers and liberally construes the opposing papers, and all doubts about the propriety of granting summary judgment are resolved in favor of denial. *Id.*; *see also* Eisenberg, *et al.*, *Cal. Practice Guide: Civil Appeals and Writs* ¶¶ 8:117, 8:164, 8:165 (The Rutter Group 2012) (citing cases). "Pursuant to the weight of authority, appellate courts review a trial court's rulings on evidentiary objections in summary judgment proceedings for abuse of discretion." Eisenberg, *supra*, ¶ 8:168 (citing cases).

Applying the doctrine of anticipatory breach, the trial court denied the Tribe's summary judgment motion which asserted that Sharp Image's

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summary judgment." (AOB at 51, n.16.) *Dintino* is inapposite because here the issues the Tribe seeks to raise on review of denial of summary judgment *were* determined on summary judgment and at trial. In *Dintino*, in a bench trial on briefs, the parties by stipulation posed only the issue of the amount of damages for the trial judge's determination and did not address any questions of liability. 167 Cal. App. at 47. In this instance, every issue relating to anticipatory breach was litigated on pretrial evidentiary motions and presented to the jury, which made specific findings in rendering a verdict. It is axiomatic that denial of a motion for summary judgment may be appealed only in "'exceptional cases.'" *Transport*, 202 Cal. App. 4th at 1011, n.9 (citing Weil & Brown, *supra*, ¶ 10:385, at 10-149.) This is not one of them.

claims were barred by the statute of limitations. (RT/Vol. II/p. 578:23-25; AA/Vol. XXI/p. 5152:19-21.) The Tribe asserts that it breached the ELA in June 1999 when it signed an agreement with Lakes and KAR giving them exclusivity over the Tribe's gaming operations. (AOB at 50-53.) According to the Tribe, the statute of limitations ran from that date. (*Id.*)

The Tribe fundamentally misunderstands the doctrine of anticipatory breach. Sharp Image has never disputed that the Tribe repudiated and committed an anticipatory breach of the the ELA and Promissory Note in or about June 1999. There are two ways of committing an anticipatory breach – by express or implied repudiation – and the Tribe arguably accomplished both of them. "An express repudiation is a clear, positive, unequivocal refusal to perform." *Taylor v. Johnston*, 15 Cal. 3d 130, 137 (1975). "[A]n implied repudiation results from conduct where the promisor puts it out of his power to perform so as to make a substantial performance of his promise impossible." *Id.* Thus, an anticipatory breach can be express or implied, but both can arise with respect to the same contract. *Taylor*, 15 Cal. 3d at 137-140; *Central Valley General Hosp. v. Smith*, 162 Cal. App. 4th 501, 514 (2008).

But regardless of whether it is express or implied, a repudiation prior to the time of performance does not start the statute of limitations running. It is an anticipatory breach that *tolls* the statute of limitations. As explained in *McCaskey v. California State Auto. Ass'n*, 189 Cal. App. 4th 947 (2010):

> [A] repudiation may constitute an *anticipatory* breach, giving the aggrieved promissee the *option* of suing immediately. [Citation.] But it does not accelerate the accrual of a cause of action for limitations purposes; the promissee remains entitled to wait until performance is due and the promisor has failed to perform, i.e., to do the thing promised. [Citation.] . . . Unless and until that occurred, defendant's renunciation of the

> promise was, at plaintiff's election, an "empty" threat to breach the contract. [Citation.]
>
> [¶]
>
> The promisor's repudiation deprives the promissee of no right and subjects him to no obligation; it merely *empowers* him to declare the contract breached and to seek recompense in court. Unless he exercises that power, the repudiation does not constitute a breach of contract in the eyes of the law, and cannot commence the running of the statute of limitations.

McCaskey, 189 Cal. App. 4th at 958-59 (emphasis in original) (citing, *inter alia*, *Romano v. Rockwell Int'l, Inc.,* 14 Cal. 4th 479, 489 (1996) ("the statute of limitations does not begin to run until the time set for performance"); *Taylor,* 15 Cal. 3d at 137 ("There can be no *actual* breach until the time specified therein for performance has arrived." (emphasis in original); *see also Brewer v. Simpson*, 53 Cal. 2d 567, 593 (1960); *Trypucko v. Clark*, 142 Cal. App. 3d Supp. 1, 7 (1983); *Ross v. Tabor,* 53 Cal. App. 605, 614 (1921).

If the law were otherwise, *i.e.*, if repudiation commenced the running of the statute of limitations, the statute could expire "before the plaintiff has suffered any substantial injury and hence before it is worth plaintiff's while to sue." 3 Witkin, *Cal. Procedure, Actions* § 521, at 666 (5th ed. 2008). Indeed, "the statute of limitations cannot ordinarily run until 'the plaintiff possesses a true cause of action,' meaning that 'events have developed to a point where the plaintiff is entitled to a legal remedy, not merely a symbolic judgment such as an award of nominal damages.'" *McCaskey*, 189 Cal. App. 4th at 959 (citing *Marketing West, Inc. v. Sanyo Fisher (USA) Corp.*, 6 Cal. App. 4th 603 (1992)).

Thus, Sharp Image was entitled to wait until "events ha[d] developed to a point where [it] [was] entitled to a legal remedy," *i.e.*, when the Tribe was due to perform in 2008 and failed to. The Tribe's promised performance under the ELA was to pay Sharp Image 30 percent of the net revenue from gaming machines to be supplied exclusively by Sharp Image to the Tribe's casino facilities. (AA/Vol. XVII/p. 4088.) When the Tribe opened Red Hawk in December 2008, the time for the Tribe's performance arrived. But the Tribe failed to perform as promised when it opened with gaming machines supplied by another company and paid Sharp Image nothing. (*Id.* at pp. 4124:12-4126:23.) Sharp Image elected to file suit in 2007 when the Tribe's casino was about to become operational, in accord with the anticipatory breach doctrine.[34]

As mentioned above, the Tribe asserts that the statute of limitations began to run when the Tribe breached the exclusivity provision of the ELA by signing a contract with Lakes. (AOB at 54.) But that was just an implied repudiation. *See Central Valley*, 162 Cal. App. 4th at 514 & n.4

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[34] The point at which the injured party may elect to declare a breach is not limited to either the time the anticipatory breach occurs or the subsequent point in time when the repudiator's performance is due. An injured party may bring an action at any time in between as well. *See Central Valley,* 162 Cal. App. 4th at 516-17. During the period of time between the repudiation and the actual breach when performance is due, the repudiator may retract the repudiation. Civ. Code § 1440; *Taylor*, 15 Cal. 3d at 137-38; *Central Valley*, 162 Cal. App. 4th at 516-17. In fact, the statute of limitations is tolled in cases of anticipatory breach, because otherwise the plaintiff would be penalized for giving the defendant the opportunity to retract. *Romano*, 14 Cal. 4th at 489. However, once the time of performance arrives or the injured party has filed suit, retraction is no longer allowed. *Taylor,* 15 Cal. 3d at 138; *Central Valley*, 162 Cal. App. 4th at 517; *Crown Products Co. v. Cal. Food Products Corp.*, 77 Cal. App. 2d 543, 551 (1947).

(an implied repudiation is a voluntary act that makes it actually or apparently impossible for the party to perform); *Taylor*, 15 Cal. 3d at 137. In addition, the Tribe expressly repudiated the contracts in its June and October 1999 letters. But whether the repudiation was implied, express, or both is of no moment; as explained, the statute of limitations does not begin to run after an anticipatory breach (whether it be implied or express) until the time the repudiator's performance is due. *Central Valley*, 162 Cal. App. 4th at 516-17; *Taylor*, 15 Cal. 3d at 137-140.

The Tribe's response to these established principles is to cite three cases in which there was no anticipatory breach because the time for the repudiator's performance had already arrived by, or was coincident with, the time of repudiation. *See* 1 Witkin, *Summary of Cal. Law, Contracts* § 861, at 948 (10th ed. 2005) ("A repudiation at the time performance is due is not an anticipatory breach; it is an actual breach, and the statute of limitations begins to run at once.") (citing *Fox v. Dehn*, 42 Cal. App. 3d 165, 171 (1974)); *see also Gold Mining & Water Co. v. Swinerton*, 23 Cal.2d 19, 29 (1943) ("By its very name an essential element of anticipatory breach is that the repudiation by the promisor occur before his performance is due under the contract."). Here, the repudiator's (the Tribe's) performance became due several years after it anticipatorily breached the contracts.

The Tribe principally relies on *Boon Rawd Trading Int'l Co., Ltd. v. Paleewong Trading Co.*, 688 F. Supp. 2d 940 (N.D. Cal. 2010). (AOB at 54-55.) In *Boon Rawd*, an importer alleged that an exporter breached an exclusive dealership agreement by setting up a company that distributed the exporter's beer in the importer's exclusive territory. Based on this "dual importation" situation, the importer alleged a cause of action for *actual*

breach, not *anticipatory* breach. *Id.* at 948. Nonetheless, the importer attempted to avoid a statute of limitations bar by citing *Romano*. *See Boon Rawd*, 688 F. Supp. 2d at 948; *Romano*, 14 Cal. 4th at 489. The federal court observed that *Romano's* discussion of anticipatory breach did not apply for numerous reasons:

> Here, the alleged "dual importation" conducted [by the exporter] in 2006 was not an empty threat, but rather an actual and material breach of the importation agreement's most important provision: exclusivity. Additionally, since the alleged agreement between [the importer] and [the exporter] was open-ended, there was no specific time—or "time of performance" as explained in *Romano*—where the parties could definitely gauge whether an actual breach "d[id] in fact occur." Indeed, an actual breach had already occurred in 2006, as readily admitted in the [importer's pleading].

688 F. Supp. 2d at 949.[35]

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[35] The Tribe's reading of *Boon Rawd* takes the "empty threat" language of *Romano* and stands the anticipatory breach doctrine on its head: the repudiating party would get to decide when an anticipatory breach becomes an actual breach. (AOB at 50.) However, the injured party's option to treat an anticipatory breach as an "empty threat" does not mean that the repudiating party may seek to demonstrate that the threat is real and start the statute of limitations running. The core of the doctrine is that the injured party is empowered to elect when to "treat" the threat as an actual breach by electing the time to sue after an anticipatory breach. *McCaskey,* 189 Cal. App. 4th at 959. The repudiating party's only option during the time between repudiation and performance is to retract the repudiation; it cannot provoke an actual breach. *Taylor*, 15 Cal. 3d at 137-38; *Central Valley*, 162 Cal. App. 4th at 516-17. In the Tribe's view, the court's comments in *Boon Rawd* take the injured party's option to elect when to declare a breach and transfer it to the repudiating party. This is the antithesis of the anticipatory breach doctrine. *McCaskey,* 189 Cal. App. 4th at 959.

Thus, *Boon Rawd* involved an *actual* breach, not an *anticipatory* breach (whether express or implied), and hence the statute of limitations began running immediately upon that breach. *Id.* The Tribe cites no authority – California or otherwise – holding that (1) the repudiation of a contract giving plaintiff the exclusive right to supply products or services (2) prior to the time defendant's performance is due (3) becomes an actual breach and starts the statute of limitations running (4) *at the election of the defendant* who enters into a conflicting contract. Under California law, it is the *plaintiff* who has the right and power to elect remedies after the defendant's anticipatory breach, not the *defendant*.[36]

In sum, the Tribe's anticipatory breach tolled the statute of limitations until Sharp Image elected to declare the contract terminated by filing suit.[37]

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[36] The Tribe's other cases are equally inapposite. (AOB at 54, citing *Medico-Dental Bldg. Co. v. Horton & Converse*, 21 Cal. 2d 411, 424-27 (1942) (no discussion of anticipatory breach); *McWilliams v. Holton*, 248 Cal. App. 2d 447, 453 (1967) (no discussion of anticipatory breach; time of performance of contract to lease to plaintiff and time of defendant's repudiation by failing to evict current tenant were the same, so repudiation and actual breach occurred at the same time).)

[37] The Tribe argues that the Promissory Note was either (1) a unilateral contract not subject to the anticipatory breach doctrine, or (2) a bilateral agreement that was *actually* breached in 1999 when the Tribe entered into a contract that conflicted with the ELA (since the Tribe contends that Sharp Image had to deliver gaming machines under the ELA to trigger repayment on the Promissory Note). (AOB at 55-56.) The jury resolved this issue. It determined that the Promissory Note was a bilateral contract that the Tribe breached. As mentioned, the jury was instructed that the Tribe contended that the Promissory Note required Sharp Image to deliver gaming machines as a condition precedent to the Tribe's performance on the Promissory Note. (RT/Vol. XV/ p. 4110:2-4, 4111:27-4112:26.) The jury also was instructed that, as in the case of anticipatory

C. Under the Anticipatory Breach Doctrine, Sharp Image's Post-Repudiation Ability To Perform Was Irrelevant.

The Tribe next contends that, despite its anticipatory breach, Sharp Image cannot recover for breach of contract because it could not supply gaming machines to the Tribe's new casino when it opened in 2008 (AOB at 58-71), even though there is no dispute that the Tribe repudiated the ELA and Promissory Note in 1999. (RT/Vol. II/p. 574:20-575:6, 579:10-13.) As a corollary, the Tribe maintains that the trial court should have considered evidence that Sharp Image did not have a gaming license in 2008 and that the Bureau of Gambling Control had made a preliminary finding in 2008 that Sharp Image was unsuitable for licensing, which, according to the Tribe, meant it could not accept Sharp Image's machines. (AOB at 64-68.)

As the trial court ruled, however, under the doctrine of anticipatory breach in California, such post-repudiation events are irrelevant. (RT/Vol.

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breach (*see* Civ. Code § 1440), performance of a condition precedent is excused when the other party refuses to perform its promise or prevents or makes impossible the performance of the condition. (RT/Vol. XV/p. 4112:23-26.) In answering the special interrogatories to the verdict, the jury found in Sharp Image's favor on these points. (RT/Vol. XV/p. 4137:16-20; AA/Vol. XXVIII/p. 7316.) The jury further found that that the Tribe had repudiated the Promissory Note. (RT/Vol. XV/p. 4138:1-4/AA/Vol. XXVIII/p. 7317.) Finally, the jury rendered a verdict that the Tribe was liable on the Promissory Note for repayment of all funds loaned by Sharp Image plus interest. The jury's findings and verdict established that the Promissory Note is a bilateral contract and that Sharp Image's performance was excused by the Tribe's anticipatory breach. Accordingly, the statute of limitations on the Promissory Note was tolled by the Tribe's anticipatory breach until Sharp Image elected to sue. *Central Valley*, 162 Cal. App. 4th at 516-17.

II/p. 573:27-576:2, 579:3-13.)[38] The ability of a party injured by an anticipatory breach to perform its obligations under the contract is measured as of the time of repudiation. The authority in support of this principle is overwhelming.

To begin with, Civil Code Section 1440 provides:

> If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or *offering to perform any conditions upon his part in favor of the former party.* (Emphasis added.)

Under Section 1440, a party injured by repudiation need not perform or tender performance of its obligations under the contract. *See Ersa Grae Corp. v. Fluor Corp.*, 1 Cal. App. 4th 613, 625 (1991); *see also Ocean Airways Tradeways, Inc. v. Arkay Realty Corp.*, 480 F.2d 1112, 1116 (9th Cir. 1973). To be sure, the injured party must still prove it had the ability to perform but for the repudiation of the other party. However, the time for establishing that ability is as of the time of the promisor's repudiation, not some later date. *Ersa Grae* is a seminal case on the subject:

> Although it is true that an anticipatory breach or repudiation of a contract by one party permits the other party to sue for

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[38] At the same hearing at which the trial court denied summary judgment, Judge Riley affirmed the discovery referee's ruling that discovery regarding Sharp Image's ability to perform would be cut off as of the 1999 date of repudiation. (RT/Vol. II/p. 574:20-575:6.) The Tribe has not appealed that ruling. The Tribe then filed a motion for clarification of the discovery referee's order on the same subject matter, which resulted in an order from the trial court further elucidating the principles of the anticipatory breach doctrine. (RT/Vol. III/pp. 633:5-653:16; RA/Vol. I/pp. 15-20.) The Tribe has not appealed that ruling.

> damages without performing or offering to perform its own obligations[], this does not mean damages can be recovered without evidence that, but for the defendant's breach, the plaintiff *would have had* the ability to perform.

Id. at 625 (citations omitted, emphasis added).

This backward-looking language – "would have had" instead of "does have" or "will have" – establishes that the non-repudiating party's ability to perform is assessed at the time of repudiation. *See also County of Solano v. Vallejo Redevelopment Agency*, 75 Cal. App. 4th 1262, 1276 (1999) (damages proper if injured party shows "it *had* the ability to perform under the contract" (emphasis added)).

The court in *Ersa Grae* cited *Corbin on Contracts* as support for this rule. 1 Cal. App. 4th at 625. That treatise states:

> The defendant's wrongful repudiation justifies the plaintiff in taking him at his word and at once taking steps that may make subsequent performance impossible. *The willingness and ability to perform need not continue after the repudiation; it is merely required that they should have existed before the repudiation and that the plaintiff would have rendered the agreed performance if the defendant had not repudiated.*

10 *Corbin on Contracts* § 978 (2012) (emphasis added). *Ersa Grae* also cites Professor Williston's treatise regarding the timing of the non-repudiating party's ability to perform. 1 Cal. App. 4th at 625. That treatise is even more unequivocal that the Tribe's contention is wholly incorrect:

> The requirement that the repudiation must have materially contributed to the nonperformance and, thus, that the party facing repudiation must have had the ability to perform before its nonperformance will be excused, *does not mean that it is necessary for that party to tender performance or prove its ability to perform in the future.* After an anticipatory

> repudiation has occurred, *the party facing repudiation need not perform or even tender performance in the sense of showing a readiness, willingness and ability to perform; rather, that party need only show that before the repudiation, he or she was ready, willing and able to perform.*

13 Lord, *Williston on Contracts* § 39.41, at 695 (4th ed. 2000) (emphasis added).[39]

Numerous California cases are in accord. *See Alderson v. Houston*, 154 Cal. 1, 11 (1908); *Scribner v. Schenkel*, 128 Cal. 250, 253-254 (1900); *Gherman v. Colburn*, 72 Cal. App. 3d 544, 585-586 (1977); *Alphonzo E. Bell Corp. v. Listle*, 74 Cal. App. 2d 638, 644-645 (1946); *Gregg v. McDonald*, 73 Cal. App. 748, 755 (1925); *Ross v. Tabor*, 53 Cal. App. at 611.[40] On summary judgment (as now), the Tribe has yet to distinguish any of these cases, or even mention them.[41]

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[39] The rule is understandably different for specific performance claims. After an anticipatory breach by the seller, a buyer seeking specific performance of a real estate sale contract must still show readiness, willingness and ability to perform. *See Henry v. Sharma*, 154 Cal. App. 3d 665, 669 (1984); *Am-Cal Investment Co. v. Sharlyn Estates, Inc.*, 255 Cal. App. 2d 526, 539 (1967); Civ. Code § 3392. In an action for damages, as here, the specific performance rule does not apply. *See* II *Farnsworth on Contracts*, § 8.20, at 654 (3d ed. 2004, 2012-2 supp.).

[40] Under the anticipatory breach doctrine, the non-repudiating party's *damages* are measured as of the time the repudiator's performance is due. The Tribe asserts that Sharp Image "never cited a single case to support" this rule. (AOB at 63.) The issue was not before the trial court on summary judgment but came up on the Tribe's request for clarification of a subsequent discovery order. In that proceeding (and as support for the jury instruction given by the trial court to that effect) Sharp Image cited the following: *Caminetti v. Pac. Mut. Life Ins. Co. of Calif.*, 23 Cal.2d 94, 108 (1943); *Guerrieri v. Severini*, 51 Cal.2d 12, 21-22 (1958); *U.S. Trading Corp. v. Newmark Grain Co.*, 56 Cal.App.176, 191(1922); Restatement of Contracts § 338 & cmt. a (2010); 11 *Corbin on Contracts, supra*, § 57.25;

Moreover, the salutary purpose of the rule is evident. As Judge Riley put the question to the Tribe's counsel, "is it good faith and fair to require someone who knows they have been replaced to continue to be able to perform 5, 10, 15 years after they have been told they are done, and someone else has been hired to do it? . . . [¶] Isn't that . . . requiring a useless act?" (RT/Vol. III/p. 641:11-19.)

D. Evidence Of Post-Repudiation Licensing Requirements Is Irrelevant.

The Tribe asserted that under the terms of its Compact with the State of California and its gaming ordinance, it could not license any vendor deemed to be unsuitable by the Bureau. (AOB 67.) However, all the evidence the Tribe now asserts would require dismissal of Sharp Image's claims was irrelevant (*i.e.*, the declaration from Bob Cloud, the Executive Director of the Tribe's Gaming Commission, and a 2008 report from the Bureau of Gambling Control regarding Sharp Image's California gaming license application). (AA/Vol. XIII/pp. 3118-3258; AA/Vol. XVI/pp. 3952-3980.) This evidence pertained entirely to the period *after* the Tribe

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Roehm v. Horst, 178 U.S. 1, 20-21 (1900); RT/Vol. XV/pp. 4103:23-4104:4; RA/Vol. I/pp. 15-20.

[41] The Tribe asserts that the complaint alleged that Sharp Image "could and would have performed when Red Hawk opened in December 2008 . . . ." (AOB at 60.) In so asserting, the Tribe omits the italicized portion of the allegation in the complaint to which it cites: "*At all material times*, Plaintiff had performed all of the conditions and things on its part to be done and performed, and/or was ready, able, and willing to perform those terms and conditions on its part to complete performance." (AA/Vol. I/p. 20:7-9 (Emphasis added).) As explained above, December 2008 was not a "material time," and nowhere did the complaint allege that Sharp Image could or would have performed at any immaterial time, such as December 2008.

repudiated the ELA and Promissory Note in 1999. Mr. Cloud was not even employed by the Tribe until 2007. (AA/Vol. XII/p. 3119.) The Compact was entered in 2000 and amended in 2008. (*Id.* at p. 3121:2-5.) The Bureau's report is dated November 2008. (AA/Vol. XVI/pp. 3952-3980.) Mr. Cloud admitted the Tribe's Gaming Commission had no real function until Red Hawk was about to open in 2008. (*Id.* at p. 4295:3-24.) He grudgingly agreed that the Tribe had no licensing requirements when the ELA was repudiated in 1999. (*Id.* at p. 4299:4-25.) Therefore, the trial court did not abuse its discretion when it sustained objections to all the Tribe's post-repudiation evidence concerning ability to perform. (RT/Vol. II/p. 506:26-507:1; RA/Vol. 21-34.)[42]

E. The Tribe's Repudiation Caused Sharp Image's Damages.

The Tribe's final contention on this topic is that evidence of "subsequent events" ought to be admitted to prove that the Tribe's anticipatory breach in 1999 was not the "but for" cause of Sharp Image's damages. (AOB at 68-71.) To be sure, if it becomes apparent after the repudiation that the non-repudiating party had no ability to perform *at the time of the repudiation*, the repudiation did not cause the plaintiff's damages. *Ersa Grae*, 1 Cal. App. 4th at 625; Restatement (Second) of Contracts § 254(1) (2012).

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[42] The trial court also properly sustained Sharp Image's objection to Mr. Cloud's declaration with respect to the Bureau's report and the report itself as hearsay. (RT/Vol. III/pp. 633:1-653:16; RT/Vol. II/p. 502:27-28, 506:28-507:17; AA/Vol. XXI/p. 5135:27-28, 5139:26-5140:17; AA/Vol. XIX/pp. 4659-4662, 4723.) *See Thompson v County of Los Angeles,* 142 Cal. App. 4th 154, 168-170 (2006) (government investigative report properly excluded as hearsay).

But is something else to say that *events subsequent to the repudiation* can be used to show that there are no damages resulting from the repudiation. For this notion, the Tribe cites another section of Professor Williston's treatise which refers to "subsequent events." (AOB at 70, citing 15 Lord, *Williston on Contracts* § 43:32 (4th ed. 2012).) This section in turn cites Restatement (Second) of Contracts § 254(1) as support. *Williston*, *supra*, § 43.32. But the Reporter's Note to Section 254 of the Restatement indicates that California does not recognize subsequent events as bearing on ability to perform, citing *Gherman v. Colburn*, 72 Cal. App. 4th at 585-86, in which, as the Reporter summarizes the decision, "the court said that '[a] defendant may not justify a repudiation by proof of subsequent failure of consideration . . . .'" In fact, the Williston treatise itself notes that *Gherman* rejects employing subsequent events to justify repudiation. 15 Williston, *supra*, § 43:32, n.26.

Rather, Professor Williston's treatise reiterates the rule followed in California in Section 63:53, which states that repudiation "is . . . unless withdrawn, operative as a continuing excuse for the failure of the injured party to perform or be ready, willing and otherwise able to perform." 23 Williston, *supra*, §63:53. In the supporting footnote that follows, Professor Williston cites two California cases that Sharp Image has also cited on this issue: *Alderson v. Houston* and *Alphonso E. Bell*. *See* 23 Williston, *supra,* § 63:53, n.4.

In sum, the trial court ruled correctly in a manner that admits no dispute. Sharp Image's showing of ability to perform its side of the

contracts does not extend to events subsequent to the Tribe's repudiation in 1999; any such evidence was properly excluded.[43]

IV. The Jury Correctly Found That The ELA Was Certain And Enforceable.

The Tribe advances a near frivolous contention that the ELA was too uncertain to be enforced because the contract provided that specification of the particular machines to be installed at the Tribe's casino was to occur when it opened. (AOB at 72-75.) To make this claim, the Tribe omits a key jury instruction and a key jury finding.

Exhibit A to the ELA provides that "[d]escription of the equipment . . . will be supplied upon opening of Casino." (AA/Vol. XXXIV/p. 9161.) The jury found that an "essential term of the contract was left for future determination." (RT/Vol. XV/p. 4134:23-25; AA/Vol. XXVIII/p. 7315.)

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[43] The Tribe makes a half-hearted assertion in a footnote that Sharp Image could not have performed in 1999 because Sharp Image machines at that time were convertible from Class II machines to Class III machines, and this convertibility made them illegal. (AOB at 71-72, n.27.) As the Tribe concedes, however, Mr. Anderson testified on direct and on cross-examination that in 1999 he had a stand-alone, non-convertible Class II machine certified by the NIGC. (RT/Vol. XIII/pp. 3602:26-3604:12, 3612:10-3614:5.) Further, the Tribe omits any mention of the fact that the ELA did not specify the type of machines to be supplied and that it was up to the Tribe to determine which Sharp Image machines it wanted once its casino was set to open. (*Id.*; *see also* AA/Vol. XXXIV/pp. 9154, 9161.) The Tribe further omits that the jury was specifically instructed on the Tribe's legality defense and on the difference between Class II and Class III machines. (RT/Vol. XV/pp. 4088:13-4091:24.) The jury found that the contract had a "legal purpose" and did not "require Sharp Image to supply class III gaming machines or slot machines." (RT/Vol. XV/pp. 4134:18-22.) On appeal, the Tribe does not challenge (or even mention) this instructions and these jury findings.

Exhibit A to the ELA serves a common sense purpose. As Judge Riley commented:

> The parties were dealing with something, obviously, in the future, and I think common sense has to come into contract interpretation. They are dealing with what's going to be there when the place is done. If the place is done and they the ability to go to [Class] three, their compact is accepted; they meet the requirement – fine. That's in the future. It does not automatically avoid [sic] the contract. [¶] And it's understandable why the exact type of machine will vary according to what is the legal status at the time, and they were dealing with the future . . . .

(RT/Vol. II/581:20-582:1.)

Under California law, such a provision does not render the contract uncertain and unenforceable. "'The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.'" 1 Witkin, *supra, Contracts* § 137, at 177. Contractual terms can be reasonably certain "even though the contract empowers one or both parties to make a selection of terms in the course of performance." *Id.*, § 139, at 179; *see also Bohman v. Berg*, 54 Cal. 2d 787, 794 (1960). "That is certain which can be made certain." Civ. Code § 3538; *see also Bettancourt v. Gilroy Theatre Co.*, 120 Cal. App. 2d 364, 367 (1953) ("The description of the subject matter of an agreement may be indefinite but if it is capable of being identified and rendered definite and certain by evidence *aliunde* [elsewhere], the contract is enforceable"); *Pease v. Lindsey*, 129 Cal. App. 408, 409-12 (1933); *McKinley v. Lagae*, 207 Cal. App. 2d 284, 290-91 (1962).

The Tribe omits the instruction given to the jury on exactly this point: "[T]he description of the subject matter of an agreement may be

indefinite. But if it is capable of being identified and made certain in the course of the parties' performance, the contract is enforceable." (RT/Vol. XV/p. 4088:9-12.) The jury followed this instruction in rendering its verdict for Sharp Image based on substantial evidence, which included the testimony of the Tribe's lawyer, Mr. Roy, that it was "not unusual when you're negotiating an agreement that there will be an exhibit that's got to be added later . . . and that can be inserted later on." (AA/Vol. XXXII/p. 8446:6-24.) Mr. Anderson and tribal councilmembers Tamara Murray-Guerrero and Jeff Murray agreed. (AA/Vol. XXXI/pp. 8401:10-26, 8334:1-8, 8329:23-8330:8.)

Notwithstanding the instruction and evidence, the Tribe contends that the jury's finding that a term was left for future determination trumps the general verdict in favor of Sharp Image. AOB at 73-74. Actually, there is nothing inconsistent between the finding and the general verdict: a term – the specification of the exact machines – *was* left for future determination and *would have been* determined had the Tribe not committed an anticipatory breach of the ELA. This fully accords with the precedent cited above.

But even if this finding could be considered inconsistent, there is a presumption in favor of the general verdict, which will "be set aside only where the jury's special findings are 'so clearly antagonistic to it as to be absolutely irreconcilable, the conflict being such as to be beyond the possibility of being removed by any evidence admissible under the issues, so that both the general verdict and special findings cannot stand.'" *See* Wegner et al., *Cal. Practice Guide: Civil Trials and Evidence* ¶ 17:54 (The Rutter Group 2011) (citations omitted), quoting *Curtis v. State of Cal. ex*

rel. Dep't of Transp., 128 Cal.App.3d 668, 689 (1982). That is not the case here.

In any event, the Tribe neglects to mention another of the jury's special findings, the one that "the contract terms [were] clear enough so that the parties could understand what each was required to do." (RT/Vol. XV/p. 4134:14-17; AA/Vol. XXVIII/p. 7314.) The finding is taken from a model verdict form, CACI VF-303, which in turn is based on a jury instruction, CACI 302, in which that phrase serves to inform the jury that a contract must be reasonably certain. 1 Judicial Council of California Civil Jury Instructions ("CACI"), 302. Contract Formation—Essential Elements, 96-97 (Fall 2012); *id.*, VF-303 Breach of Contract—Contract Formation at Issue, at 231. Thus, the jury found that the ELA was sufficiently certain. (*See also* RT/Vol. VII/p. 1955:8-13 (jury verdict in Phase I that parties "agreed to the terms" of the ELA and Promissory Note, i.e., the phrase used in CACI 302 that instructs the jury on the essential contract formation element of mutual assent, 1 CACI, at 96, 98.))

Even assuming for argument's sake an inconsistency between the jury's two special findings, the general verdict in favor of Sharp Image controls. "Where the special findings are inconsistent with each other—e.g., where one supports the general verdict and the other does not—the general verdict controls." Wegner, *supra*, ¶ 17:56, citing *Curtis*, 128 Cal. App. 3d at 690.

In short, California law, the jury instructions, the evidence, the jury's special findings, and the general verdict all refute the Tribe's argument that the ELA is uncertain and unenforceable.

V. Substantial Evidence Supports The Jury's Verdict On The Promissory Note.

The Tribe contends that the jury's verdict on the Promissory Note is not supported by substantial evidence for two reasons: (1) the Promissory Note required Sharp Image to deliver gaming machines to the Tribe's Crystal Mountain Casino, and not to any other casino, as a condition precedent to the Tribe's obligation to repay its loan from Sharp Image; and (2) the amount owed under the Promissory Note could not exceed the $3,167,692.86 that the note states was owed through September 30, 1997. (AOB at 75-84.) Under the substantial evidence standard, these contentions are meritless.

The jury specifically found that "the phrase 'Borrower's Gaming Facility and Enterprise' in the Promissory Note" did not "refer only to Crystal Mountain Casino." (RT/Vol. XV/p. 4138:13-16; AA/Vol. XXVIII/p. 7317.) The jury also found that Sharp Image and the Tribe did not "intend to limit the principal amount that Sharp Image could recover on the Promissory Note to $3,167,692.86." (RT/Vol. XV/p. 4138:9-12; AA/Vol. XXVIII/p. 7317.) The instructions that led to these findings included the Tribe's contentions stated above. (RT/Vol. XV/p. 4107:9-4112:26, 4116:11-20.) Having been so instructed, the jury awarded the full amount Sharp Image contended it was owed: $3,167,692.86 in principal through September 30, 1997; an additional $1,206,618.97 in principal it had loaned the Tribe thereafter; and $5,777,524.59 in interest through the date of trial; for a total award of $10,044,106.39. (RT/Vol. XV/pp. 4116:11-20, 4126:27-28; AA/Vol. XXVIII/p. 7312.)

A. Standard of Review.

The Tribe omits any mention of the familiar substantial evidence standard of review. (*See* AOB 20-21.) As recently reiterated in *Shoyoye v. County of Los Angeles*, 203 Cal. App. 4th 947 (2012):

> "Under [the substantial evidence] standard of review, our duty 'begins and ends' with assessing whether substantial evidence supports the verdict. [Citation.] '[T]he reviewing court starts with a presumption that the record contains evidence to sustain every finding of fact.' [Citation.] We review the evidence in the light most favorable to the respondent, resolve all evidentiary conflicts in favor of the prevailing party and indulge all reasonable inferences possible to uphold the jury's verdict. [Citation.]"

Id. at 954 (quoting *US Ecology, Inc. v. State of Cal.*, 129 Cal. App. 4th 887, 908 (2005); *accord Cardinal Health 301, Inc. v. Tyco Electronics Corp.*, 169 Cal. App. 4th 116, 146 (2009) (under the substantial evidence standard, the appellate court will "'defer to the jury's assessment of the credibility of witnesses'" (citation omitted)).

The testimony of a single witness may constitute substantial evidence, even if other witnesses testify to the contrary. *In re Marriage of Mix*, 14 Cal. 3d 604, 614 (1975); Eisenberg, *supra*, ¶ 8:52. Also, where, as here, the parties presented varying extrinsic evidence on the interpretation of a contract, the substantial evidence rule applies and the conflict must be resolved in favor of the prevailing party. Eisenberg, *supra*, ¶¶ 8:64-8:65 (citing cases).

The substantial evidence standard is the most difficult for an appellant to meet; reversal on this ground is very rare. *See Whiteley v. Philip Morris Inc.,* 117 Cal. App. 4th 635, 678 (2004); *In re Michael G.*, 203 Cal. App. 4th 580, 589 (2012).

B. Substantial Evidence Supports The Jury's Verdict That The Promissory Note Did Not Refer Only To The Crystal Mountain Casino.

The jury's verdict on the Promissory Note is amply supported in the record.

As for the Tribe's contention that the Promissory Note required Sharp Image to deliver gaming machines to the Tribe's Crystal Mountain Casino, and not to any other casino, as a condition precedent to the Tribe's performance, the note simply does not say that. It does not refer to delivery of gaming machines to the Crystal Mountain Casino, but to the "Borrower's Gaming Facility and Enterprise." (AA/Vol. XXXIV/p. 9152.) The plain language of the Promissory Note is thus substantial evidence of the parties' intent not to limit Sharp Image's delivery obligation to the Crystal Mountain Casino. Since it was not so limited, delivery to that specific facility was not a condition precedent to the Tribe's performance.

Moreover, the Tribe argues in its opening brief that the Promissory Note is "inextricably linked" to the ELA and that the two should be taken together. (AOB at 27-30; *see id.* at 28 (citing Civ. Code § 1642).) The ELA in its "Equipment Description" provision refers to Sharp Image supplying gaming machines to the Tribe's "existing or any future gaming facility or facilities" with similar language in its "Term" and "Lease Payment" provisions. (AA/Vol. XXXIV/p. 9154.) Based on the terms of the contracts themselves, there was substantial evidence to support the jury's finding that "Borrower's Gaming Facility and Enterprise" in the Promissory Note did not mean only the Crystal Mountain Casino. *See Brant,* 4 Cal. 2d at 133.

Further, Mr. Cox, the lawyer who negotiated the contracts for Sharp Image with his counterpart for the Tribe, Mr. Roy, testified that the Promissory Note, like the ELA, was not limited to Crystal Mountain Casino, as did Mr. Anderson. (RT/Vol. IV/p. 1092:16-1093:12, 1148:20-1149:27; RT/Vol. X/p. 2545:14-18.) In fact, on cross-examination, Mr. Anderson testified that the Promissory Note referred to Crystal Mountain Casino when it was signed in 1997, because that was the only casino the Tribe had "[a]t that time." (RT/Vol. X/p. 2705:23-27; *see also* RT/Vol. V/p. 1295:21-24.) However, once the Tribe was operating the Red Hawk Casino, Mr. Anderson testified that the conditions in the Promissory Note referred to "Red Hawk – at that time it would be a future facility. That future facility now is Red Hawk." (*Id.* at p. 2709:15-19; *see also* RT/Vol. V/pp. 1240:18-1241:8.)[44]

The jury's finding that "Borrower's Gaming Facility and Enterprise" did not refer only to Crystal Mountain Casino is thus supported by substantial evidence.

C. Substantial Evidence Supports The Jury's Verdict That All Amounts Advanced By Sharp Image To The Tribe Were Owed Under The Promissory Note.

The Tribe contends that substantial evidence does not support the jury's determination that additional funds that Sharp Image loaned to the Tribe after the date of the Promissory Note were added to the principal amount owed under the note. (AOB at 80-84.) The Tribe's contention is

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[44] Thus, the Tribe's repeated assertion that Sharp Image admitted that its delivery of 400 gaming machines specifically to Crystal Mountain Casino was an unfulfilled condition precedent to the Tribe's performance under the Promissory Note is false. (*E.g.*, AOB 76, 77, 78.)

based solely on language in the Promissory Note that the Tribe promises to pay "the principal sum not to exceed" $3,167,692.86. (*Id.*)[45]

The Tribe misreads the agreement. The Promissory Note states that "[f]ull documentation has been presented on the amount above [of $3,167,692.86] and represents the full amount owed up to September 30, 1997." (AA/Vol. XXXIV/p. 9152.) The specification that the amount stated in the note represents the funds loaned *to date* indicates that further amounts would be loaned and owed in the future.[46] In that event, the note provides that "Borrower [the Tribe] . . . hereby consents to any and all extensions of time, renewals, waivers or modifications that may be granted by Note Holder [Sharp Image] with respect to the payment or other provisions of the Note." (*Id.* at 9153.) Thus, the principal amount of the note may be modified to reflect further advances of funds. *See, e.g.*, *Lennar Northeast Partners v. Buice*, 49 Cal. App. 4th 1576, 1584 (1996). By this term, the parties agreed that the principal amount of the note would increase automatically every time Sharp Image advanced additional funds. This provision itself is substantial evidence that the note was to apply to additional funds advanced by Sharp Image. Indeed, any other

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[45] Mr. Anderson testified that two successive tribal chairmen had agreed and told him that the Promissory Note would be the governing document for future loans from Sharp Image to the Tribe. (RT/Vol. X/pp. 2736:13-2739:20.) This testimony alone is substantial evidence to support the jury's special finding. *Mix*, 14 Cal. 3d at 614.

[46] The Promissory Note also provides that interest shall accrue from the date "the funds are first advanced" by Sharp Image to Tribe. (AA/Vol. XXXIV/p. 9152.) This language would make no sense if the note was limited to the funds advanced as of the date it was signed.

interpretation is unreasonable and would mean that Sharp Image simply gifted all additional funds to the Tribe.

Nonetheless, the Tribe argues that the word "grant" does not refer to a modification of the principal amount of the Promissory Note or that the Tribe's "consent" to "modification" of the amount is superseded by the "not to exceed language . . . ." (AOB at 81-84.) However, as the jury was instructed, contract interpretation involves consideration of "the subsequent acts and conduct of the parties." (RT/Vol. XV/p. 4110:27-4111:15.) The Tribe's conduct after the note was signed belies its attempt to restrict the amount owed to funds loaned up until September 30, 1997. Tribal members and the Tribe's lawyer, Mr. Thompson, as well as Mr. Anderson, testified that the Tribe intended to repay in full *all* amounts Sharp Image advanced to the Tribe. (RT/Vol. XIII/p. 3482:17-21; AA/Vol. XXXI/pp. 8227:24-8229:8, 8233:11-8234:15; 8324:7-8325:20, 8335:16-8336:17, 8244:24-8245:6; AA/Vol. XXXII/pp. 8470:12-18, 8473:22-8474:16, 8442:9-8443:13, 8444:6-12; RA/Vol. I/pp. 83:9-84:13, 85:6-12. 90:19-25, 104:11-105:15, 106:6-107:2, 111:23-112:11.) In addition, Tribal records reflect that the principal amount of the note was increasing (AA/Vol. XXXII/p. 8478), and had grown to more than $4 million by October 14, 1998. (*Id.* at pp. 8430, 8437.) The only way that could have happened is if the Tribe understood that Sharp Image's post-November 15, 1997 advances (the date the note was signed) would be rolled into the note.

The jury's damages award on the Promissory Note is thus supported by substantial evidence in the form of the language of the note, the

testimony of Mr. Anderson and tribal witnesses, and tribal documents. Accordingly, the verdict should be affirmed.

CONCLUSION

The ELA and Promissory Note were garden variety contracts containing explicit waivers of sovereign immunity. Sharp Image's suit on those contracts presented no federal question or preemption issue. The trial court's straight-ahead application of the anticipatory repudiation doctrine was correct. In short, there was nothing extraordinary about the contracts or causes of action at issue in this lawsuit. The only extraordinary aspect of this lawsuit was the lengths to which the Tribe went (and continues to go) to try to avoid its contractual obligations.

The Tribe had its proverbial day – a very long day – in court. The jury has spoken. The judgment should be affirmed.

Dated: November 26, 2012

DLA PIPER LLP (US)

By _____
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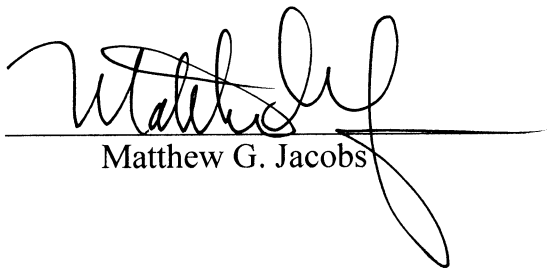
CERTIFICATE OF WORD COUNT

I, Matthew G. Jacobs, counsel for Plaintiff and Respondent Sharp Image Gaming, Inc., certify that this brief contains 23,278 words, including footnotes, but excluding the tables and certifications, as calculated by the word processing program used to prepare this brief.

Dated: November 26, 2012



Matthew G. Jacobs

Computer-Based Cases

New Gaming Systems, Inc. v. National Indian Gaming Commission, et al.

--- F.Supp.2d ----, 2012 WL 4052546 (W.D.Okla.)
(Cite as: 2012 WL 4052546 (W.D.Okla.))

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Only the Westlaw citation is currently available.

United States District Court,
W.D. Oklahoma.
NEW GAMING SYSTEMS, INC., Plaintiff,
v.
NATIONAL INDIAN GAMING COMMISSION, et al., Defendants.

No. CIV–08–0698–HE.
Sept. 13, 2012.

Background: Gaming machine lessor brought action against National Indian Gaming Commission (NIGC), its chairman and vice chairman, the Sac and Fox Indian Nation, and Nation's business enterprise, seeking judicial review of NIGC's final decision under Administrative Procedure Act (APA), that machine lease and promissory act constituted a management contract under Indian Gaming Regulatory Act (IGRA).

Holdings: The District Court, Joe Heaton, J., held that:
(1) IGRA implementing regulation was not void for vagueness;
(2) NIGC's construction of IGRA in issuing implementing regulation was not contrary to clear congressional intent;
(3) lessor was not entitled to a hearing prior to NIGC's final decision; and
(4) machine lease and promissory note constituted a "management contract" for the operation of a gaming facility within the meaning of IGRA.

Affirmed.

West Headnotes

[1] Administrative Law and Procedure 15A 796

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak796 k. Law Questions in General. Most Cited Cases

Statutes 361 219(2)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(2) k. Existence of Ambiguity. Most Cited Cases

Statutes 361 219(4)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(4) k. Erroneous Construction; Conflict with Statute. Most Cited Cases

Under the Administrative Procedure Act (APA), the District Court reviews matters of law de novo and will defer to the agency's construction of a statute if Congress has not clearly spoken on the issue before the court and has delegated authority over the subject at issue to the agency, unless the agency's construction is unreasonable or impermissible. 5 U.S.C.A. § 706.

[2] Administrative Law and Procedure 15A 390.1

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak390 Validity
15Ak390.1 k. In General. Most Cited Cases

A regulation is void for vagueness if it (1) fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits, or (2) authorizes or even encourages arbitrary and discriminatory enforcement.

--- F.Supp.2d ----, 2012 WL 4052546 (W.D.Okla.)
(Cite as: 2012 WL 4052546 (W.D.Okla.))

[3] Constitutional Law 92 ⚿1133

92 Constitutional Law
92VIII Vagueness in General
92k1132 Particular Issues and Applications
92k1133 k. In General. Most Cited Cases

Indians 209 ⚿331

209 Indians
209IX Gaming
209k331 k. Constitutional and Statutory Provisions. Most Cited Cases

Indian Gaming Regulatory Act's (IGRA) implementing regulation was not void for vagueness, despite fact that neither IGRA nor regulation defined "management"; regulation defined a management contract as any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor if such contract or agreement provided for the management of all or part of a gaming operation, and the likelihood that anyone would not understand the common words "management" and "part of a gaming operation" was quite remote. 25 U.S.C.A. § 2701 et seq.; 25 C.F.R. § 502.15.

[4] Constitutional Law 92 ⚿1131

92 Constitutional Law
92VIII Vagueness in General
92k1131 k. Vagueness in All Applications, Necessity Of. Most Cited Cases

Speculation about possible vagueness in hypothetical situations not before the court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications.

[5] Indians 209 ⚿339

209 Indians
209IX Gaming
209k338 Operation and Conduct of Authorized Gaming
209k339 k. In General. Most Cited Cases

National Indian Gaming Commission's (NIGC) construction of Indian Gaming Regulatory Act (IGRA) in issuing implementing regulation—that it applies to an agreement providing for the management of all or part of a gaming operation–was not contrary to clear congressional intent, where IGRA expressly delegated to the Commission the task of promulgating such regulations and guidelines as it deemed appropriate to implement IGRA's provisions. 25 U.S.C.A. § 2706; 25 C.F.R. § 502.15.

[6] Administrative Law and Procedure 15A ⚿386

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak385 Power to Make
15Ak386 k. Statutory Basis. Most Cited Cases

If Congress has explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation; such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

[7] Indians 209 ⚿341

209 Indians
209IX Gaming
209k341 k. Administrative Agencies and Proceedings. Most Cited Cases

Gaming machine lessor was not entitled to a hearing prior to final decision by National Indian Gaming Commission (NIGC) as to whether machine lease and promissory note constituted a management contract for the operation of a gaming facility within the meaning of Indian Gaming Regulatory Act (IGRA). 25 U.S.C.A. § 2711(f).

[8] Indians 209 ⚿339

209 Indians
209IX Gaming
209k338 Operation and Conduct of Authorized Gaming

--- F.Supp.2d ----, 2012 WL 4052546 (W.D.Okla.)
(Cite as: 2012 WL 4052546 (W.D.Okla.))

209k339 k. In General. Most Cited Cases

Gaming machine lease and promissory note constituted a "management contract" for the operation of a gaming facility within the meaning of Indian Gaming Regulatory Act (IGRA), even though lease related principally to just one aspect of the casino's operation, where lease contained provisions for maintenance of adequate accounting procedures and preparation of verifiable financial reports on a monthly basis, development and construction costs incurred or financed by a party other than the tribe, term of contract that established an ongoing relationship, compensation based on percentage fee, and a provision for assignment or subcontracting of responsibilities. 25 U.S.C.A. § 2711(a)(1); 25 C.F.R. §§ 502.15, 502.19.

Steven W. Bugg, McAfee & Taft, Oklahoma City, OK, for Plaintiff.

Robert Don Evans, Jr., Amanda Leigh Maxfield Green, U.S. Attorney's Office, Jimmy K. Goodman, Crowe & Dunlevy, Oklahoma City, OK, Ty Bair, U.S. Dept of Justice Environ Div–7611–DC, Washington, DC, D. Michael McBride, III, Elliot P. Anderson, Crowe & Dunlevy, Tulsa, OK, for Defendants.

ORDER

JOE HEATON, District Judge.

***1** Plaintiff New Gaming Systems, Inc. ("NGS") filed this action against the National Indian Gaming Commission ("NIGC"), its chairman and vice chairman, the Sac and Fox Nation ("Nation") and the Sac & Fox Business Enterprise ("Enterprise"), seeking judicial review of a final decision of the NIGC under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706. The dispute arises out of an equipment lease and promissory note NGS, the Nation and the Enterprise executed in conjunction with the construction and operation of a casino. The controversy over the validity of the lease and note has resulted in proceedings in three different forums. After considering the Administrative Record and the parties' briefs, the court concludes the agency's decision should be affirmed.

Background [FN1]

The Indian Gaming Regulatory Act ("IGRA" or "Act"), 25 U.S.C. §§ 2701–2721, establishes a comprehensive regulatory framework for gaming activities on Indian lands to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments," while simultaneously "shield[ing tribes] from organized crime and other corrupting influences [and] ensur[ing] that ... Indian tribe[s are] the primary beneficiar[ies] of ... gaming operations." 25 U.S.C. § 2702; *First American Kickapoo Operations, L.L.C. v. Multimedia Games, Inc.*, 412 F.3d 1166, 1167 (10th Cir.2005). The Act "effects these goals in part by providing for federal oversight of contracts between tribes and non-tribal entities for the management of tribal gaming operations." *Id.* at 1167–68; *Casino Res. Corp. v. Harrah's Entertainment, Inc.*, 243 F.3d 435, 438 n. 3 (8th Cir.2001) ("IGRA recognizes a tribe's authority to enter into contracts for the management and operation of an Indian gaming facility by an entity other than the tribe or its employees, so long as certain requirements are satisfied and subject to approval by the Chairman of the National Indian Gaming Commission."). Approval of the NIGC Chairman is required if a tribe enters into a management contract for a gaming operation. 25 U.S.C. § 2711(a)(1); *First American*, 412 F.3d at 1168. An unapproved management contract is void, 25 C.F.R. § 533.7, and a gaming operation that violates any provision of the IGRA may be closed and fined. 25 U.S.C. § 2713.

The Nation decided in 2003 to build a new casino in Oklahoma and selected NGS to provide financing and equipment for the project. Admin. R. at 2. The dispute in this action arises out of a gaming machine equipment lease and promissory note [FN2] NGS, the Nation and Enterprise executed on August 8, 2003, in conjunction with the construction and operation of the casino, which is owned and operated by the Enterprise for the Nation. On August 14, 2003, the Nation sent the lease and note to the NIGC for review,[FN3] seeking an opinion on whether the two documents constituted a management agreement within the meaning of the IGRA, 25 U.S.C. § 2711, which required the NIGC Chairman's approval. [FN4] Admin.R. at 2–3, 961,992–93. The Nation resubmitted the lease and note for review on or about May 6, 2004. Admin.R. 180.

***2** The Sac & Fox Casino opened approximately August 1, 2004, with NGS supplying the gaming machines. On August 11, 2004, NIGC's acting general counsel, Penny J. Coleman, responded to the Nation's request of a year earlier for an opinion regarding the lease and note the parties had executed. She concluded the agreements constituted a management contract

that, under IGRA, required the approval of the Chairman of the NIGC. She asked the Nation to submit the information and documents that, pursuant to 25 C.F.R. § 533.3, must accompany a request for approval of a management contract within twenty days. She advised the Nation that "an unapproved gaming management contract is void and no action should be taken under it," and also noted that the NIGC had "serious concerns" regarding the classification of the gaming devices leased by NGS. Admin.R. at 964. She "reminded" the Nation "that operation of Class III gaming without benefit of a Tribal–State compact is a violation of the IGRA and grounds for closure of the operation." *Id.* Upon receipt of the letter, the Nation—by this time under different tribal leadership than was in place in 2003—terminated the agreements with NGS and demanded that it remove its gaming machines from the casino.[FN5] Neither party provided the requested documents to the NIGC or, at that time, requested a formal ruling from the NIGC.

In 2005, NGS sued the Nation and Business Enterprise in the Sac and Fox tribal court for breach of the lease and note.[FN6] A key issue in that litigation was the validity of the agreements. Two years later, while that action was pending, the Nation requested a final agency determination as to whether the lease and note comprised a management agreement under IGRA. Admin.R. at 666. The Nation asked the NIGC to"[p]lease note" that it was "*not* requesting that [the NIGC] approve such Contracts as a management contract...." Admin.R. at 285. The NIGC told the Nation to "submit the Agreements, together with all submission requirements set forth in 25 C.F.R. § 533.3" and "invite[d] NGS to submit any information it wish[ed]." Admin.R. at 416. The Nation submitted the lease and note, but did not submit the documents required by 25 C.F.R. § 533.3. *Id.* at 84. NGS submitted an expert report and the deposition testimony of its president, two members of the Board of Directors for the Business Enterprise and Chief Rhoads, and requested a hearing on the issue of whether the lease constituted a management contract.

The Chairman of the NIGC issued an opinion dated March 26, 2008. He denied NGS's request for a hearing, concluding there is no right to a hearing prior to a decision by the Commission approving or disapproving a management contract. *See* 25 C.F.R. § 539. The Chairman concurred with, and adopted, the Office of General Counsel's opinion that the lease and note were a management contract. He then disapproved the contract, finding the lease and note did not "satisfy the standards of 25 C.F.R. Part 531 and § 533.3." Admin.R. at 85.

***3** NGS appealed the Chairman's decision and, on May 22, 2008, the agency issued its final decision and order, concluding that the Chairman had properly determined that the equipment lease and promissory note constituted a management contract [FN7] and had properly disapproved the contract because the agreements did not "include all of the provisions required of management contracts by 25 U.S.C. § 2711(b) or 25 C.F.R. § 531.1." Admin.R. at 2. [FN8] NGS then filed this action on July 10, 2008, seeking review of the NIGC's final decision under the APA.[FN9] The Tribe and Enterprise immediately moved to stay these proceedings pending a final resolution of the tribal court action.

On October 16, 2008, the tribal district court dismissed NGS's lawsuit, finding that the equipment lease and promissory note, when considered together, met the definition of a management contract under IGRA requiring the approval of the NIGC Chairman. As the Chairman had not approved the lease and note, the tribal court concluded they were void. Because the agreements were void, the tribal court held that the Tribe's limited waiver of sovereign immunity contained in the agreements was ineffective, requiring dismissal of the case for lack of jurisdiction. The Sac & Fox Supreme Court affirmed the dismissal on appeal on June 16, 2011.

The Nation then moved to dismiss this action on the basis of sovereign immunity and issue preclusion. The court denied the motion following a hearing on December 2, 2011. It concluded it had jurisdiction under the APA to hear NGS's appeal from the final agency decision and, after that ruling, would consider issues relating to the preclusive effect of the tribal court's decision, if necessary.

The court also deferred ruling on plaintiff's objection to the administrative record filed by the NIGC. NGS argued the record was incomplete and that the agency had improperly withheld materials designated as privileged. It claimed the withheld materials might demonstrate that the NIGC "improperly took action in order to support the new Principal Chief, Kay Rhoads,

from avoiding valid obligations of the Nation and Enterprise to New Gaming." Plaintiff's Objection, Doc.# 63, p. 2. Plaintiff asserted that the NIGC "did not act in a fair and impartial manner in applying the law to determine whether the Equipment Lease and Promissory Note constituted a management contract," and that certain documents plaintiff had not seen "may directly relate to the NIGC's motivation in reviewing the Equipment Lease and Promissory Note." *Id.* at p. 4.

As both parties appeared to agree that the appeal issue—whether the lease and note constituted a management contract—is an objective determination that can be made as a matter of law,[FN10] the court concluded that its resolution of that threshold question might eliminate the need to determine whether the withheld documents, which might bear on the agency's subjective motivation, should be produced. *See* plaintiff's reply, p. 2. It decided to defer its ruling on plaintiff's objection to the record until it had considered the parties' briefs on the merits.

Standard of Review

***4** [1] Under the APA the court decides relevant questions of law and interprets statutory provisions. 5 U.S.C. § 706. The court "review[s] matters of law de novo and will defer to the agency's construction of the [statute] if Congress has not clearly spoken on the issue before [the court] and has delegated authority over the subject at issue to the agency, unless the agency's 'construction is unreasonable or impermissible.' " *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 704 (10th Cir.2010) (quoting *Wyo. Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1231 (10th Cir.2000)).

The court understood the parties to essentially agree that, in the circumstances of this case, the question of whether the note and lease constituted a management agreement was a legal issue subject to *de novo* review. [FN11] As the NIGC makes clear in its surreply, its position now is that the court should review its final decision under the arbitrary and capricious standard. That is the usual standard of review under the APA and one that would have been applied here, had the parties not agreed, or seemed to agree, that the court could make "a four corners determination based upon what's in the terms of the contract." Doc. # 87, Exhibit 1, p. 24.

The court has conducted a de novo review of the lease and note. As it concludes the agency determination was proper even under this more exacting standard, it is unnecessary to consider the potential application of the arbitrary and capricious standard.

Analysis

Plaintiff claims that IGRA's implementing regulations are both void-for-vagueness and arbitrarily enforced, and that the NIGC failed to follow proper procedures.[FN12] It also contends the NIGC erred in determining that the equipment lease and promissory note (collectively the "Agreement") constituted a management contract under IGRA.

Validity of 25 C.F.R. § 502.15

[2] A regulation is void for vagueness if it (1) "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," or (2) "authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000). While neither the statute nor the regulations define "management," the regulations define a management contract as "any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor if such contract or agreement provides for the management of all or part of a gaming operation." 25 C.F.R. § 502.15. Plaintiff claims the definition relies upon two critical undefined terms: "management" and "all or part of a gaming operation," which are so vague they are void and lack valid enforcement standards. Plaintiff's brief, p. 26.

Plaintiff argues that because the term "management" is not defined, a person of common intelligence must guess "as to whether having the right to participate in the selection of the auditor" or "supply[ing] [a casino with] 20%, 40%, 60%, 80% or 100% of the games constitutes management" under IGRA." Plaintiff's brief, pp. 27, 28. It asserts a similar problems exists with the term "part of a gaming operation." Due to the lack of guidance in the regulation, plaintiff claims it is unclear whether "a person who repairs a broken machine [is] engaged in 'management' of 'part of a gaming operation.' " Plaintiff's brief, 28.

***5** Because the term "management" can cover a broad range of activities, the regulation cannot, as plaintiff appears to suggest, enumerate them all.

However, that does not mean that the term is vague. The Seventh Circuit has concluded that "[t]here is no solid indication, in either the language or the structure of the statute, that Congress intended to limit its regulation of third-party contractual participation in Indian enterprises to a particular kind of activity." *Wells Fargo Bank, Nat'l Ass'n v. Lake of the Torches Econ.Dev.Corp.*, 658 F.3d 684, 695 (7th Cir.2011). Citing 25 C.F.R. § 502.12, the court found the NIGC had taken the "same broad approach to regulation." *Id.*

[3] Here, as in *Hill,* plaintiff is "proffer[ing] hypertechnical theories as to what the statute covers." *Hill,* 530 U.S. at 733. The Commission did not conclude the lease was a management contract on the basis of a single provision. It did not find the authority to help choose an auditor, by itself, turned the lease into a management agreement. It did not mention the repair provision in the lease in its Final Decision and also did not focus on the percentage of machines that NGS was going to supply to the casino. Its concern was NGS's right to determine the type or mix of the gaming machines on the casino floor.[FN13]

[4] "[S]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications." *Id.* (internal quotations omitted). As "[t]he likelihood that anyone would not understand ... [the] common word[s] [management and "part of a gaming operation"] seems quite remote, *id.* at 732, the court rejects plaintiff's attack on 25 C.F.R. § 502.15. The terms in the challenged regulation, 25 C .F.R. § 502.15, are sufficiently explicit to give notice and prevent arbitrary enforcement. *See generally Scherer v. U.S. Forest Serv.*, 653 F.3d 1241, 1243 (10th Cir.2011) ("To prevail in this and any facial challenge to an agency's regulation, the plaintiffs must show that there is 'no set of circumstances' in which the challenged regulation might be applied consistent with the agency's statutory authority."). NGS also has not shown sufficiently similarity between its lease and other agreements, to demonstrate that the Commission has arbitrarily and capriciously "enforce[d] the management contract regulation against [it]," and not enforced the regulation "against vendors with similar contract provisions." Plaintiff's brief, p. 29.

[5][6] Plaintiff also contends that the NIGC violated the language of the IGRA when it issued § 502.15. It claims "[t]he legislative history of the IGRA makes it clear that only contracts 'governing the *overall* management and operation' of a gaming facility are covered." Plaintiff's brief, p. 11 (emphasis added). Citing a Senate Report, S.Rep.No. 100–466, U.S.Code Cong. & Admin. News 1988 at 3071, plaintiff asserts that the term "management contract" was not meant to apply to "contracts 'for the procurement of particular services, materials or supplies.' "[FN14] Plaintiff's brief, p. 12. However, plaintiff has not shown that the agency's construction of the statute—that it applies to an agreement providing for the management of "all *or part of* a gaming operation," 25 U.S.C. § 502.15 (emphasis added), is contrary to clear congressional intent. *See generally Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n. 9, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."). The IGRA expressly delegates to the Commission the task of "promulgat[ing] such regulations and guidelines as it deems appropriate to implement the provisions of [IGRA]." 25 U.S.C. § 2706(b)(10). "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron,* 467 U.S. at 843–44.

***6** The Seventh Circuit has recognized that, while "[a]n examination of the statutory provisions simply yields no definitive answer with respect to the breadth of the term 'management contract,' ... [i]t does, however, make clear that Congress wrote in broad strokes in crafting this legislation. *Wells Fargo Bank,* 658 F.3d at 695. The court noted that, in enacting IGRA, Congress intended "to provide a comprehensive regulatory framework for gaming operations by Indian tribes that would promote tribal economic self-sufficiency and strong tribal governments while shielding them from organized crime and other corrupting influences." *Id.* at 694. In light of the legislative delegation and Congress's stated goals in enacting IGRA, *see* 25 U.S.C. § 2702, the court concludes the regulation is based on a permissible construction of the statute.

Right to a Hearing

[7] Plaintiff contends the NIGC failed to afford it a hearing prior to issuing its Final Decision. It claims it requested a hearing pursuant to 25 U.S.C. § 2711(f), "to present evidence concerning the technical terms and terms of art specific to the gaming industry contained in the Equipment Lease ... [and] evidence on what activities constitute management of a gaming operation." Plaintiff's brief, pp. 23–24.

The statute plaintiff relies on is inapplicable. It provides that "[t]he Chairman, after notice and hearing, shall have the authority to require appropriate contract modifications or may void any contract if he subsequently determines that any of the provisions of this section have been violated." 25 U.S.C. § 2711(f). As explained by the Commission, § 2711(f), by its terms, "applies only in those situations where the Chairman reaches out and voids or modifies a contract he already approved. IGRA requires a notice and hearing before he does so." Admin.R. at 13. As plaintiff was not entitled to a hearing, the Commission did not commit procedural error by failing to conduct one.[FN15]

Management Contract

Determining whether the Agreement is a management contract for the operation of a gaming facility within the meaning of IGRA is a matter of statutory interpretation. IGRA allows an Indian tribe to "enter into a management contract for the operation and management of a class II gaming activity," if the contract has been approved by the Chairman of the Commission. 25 U.S.C. § 2711(a)(1).[FN16] The Act does not define "management contract," but the term is defined in the regulations as "any contract, subcontract, or collateral agreement between an Indian tribe and a contractor ... [that] provides for the management of all or part of a [tribal] gaming operation.' " *First American,* 412 F.3d at 1172 (quoting 25 C.F.R. § 502.15).[FN17] The regulations also define a primary management official as "[a]ny person who has authority ... [t]o set up working policy for the gaming operation." 25 C . F.R. § 502.19.

[8] Key to this case is the phrase "all *or part of* a gaming operation" in the regulation's definition of a management contract. 25 C.F.R. § 502.15 (emphasis added). While the lease relates principally to just one aspect of the casino's operation, its gaming machines, that is sufficient under both the regulations and case law for the Agreement to be governed by the IGRA. *See Wells Fargo Bank,* 658 F.3d at 694–99; *First American,* 412 F.3d at 1175.

*7 Under the terms of the lease, NGS had control over the type of gaming equipment that would be available at the casino. It was to provide 80% of the gaming machines, with the remaining 20% to be provided by "other manufacturers which [were] agreed upon by the parties." Admin.R. at 299. "The exact mix of the machines that NGS [was to] make available [was to] be agreed upon by the parties." *Id.*[FN18] *See First American,* 412 F.3d at 1175 (court rejected argument that "a contract is only a management contract if it confers rights rather than opportunities to manage," noting that "neither the statute nor the regulations contain a definition of manager or management that would suggest that management is only management when the manager's decisions are not subject to tribal oversight"). As the Commission concluded, "[c]hoosing the mix of machines on the casino floor is an essential management function." Admin. R. at 10. The right to participate in game selection altered NGS's role from that of equipment supplier to manager of at least one aspect of the Nation's gaming operation.

The lease, which was a percentage lease, also obligated NGS to provide "a complete computerized cash accounting system" [FN19] and train casino employees on its operation. The Enterprise was barred from using a different system without NGS's prior consent. Admin.R. at 302, ¶ 6. Plaintiff discounts the significance of NGS' control over the system used, describing it as "nothing more than an integrated software program to track all bets and payouts." Plaintiff's brief, p. 20. The Commission viewed NGS's contractual right differently. "Like the choice of machine mix, the choice of slot accounting system is an essential management function because such systems enable player reward programs and, in some instances, ticket redemption." Admin.R. at 11. Whether or not the accounting system is of "fundamental importance to the casino's management," defendants' brief, p. 14, the court concludes that, by choosing the system, NGS was exercising a management function.

Other lease provisions required Enterprise to prepare and supply NGS with daily, weekly, monthly and annual reports generated by an electronic data tracking system that was "developed in cooperation and with the agreement of NGS." Admin.R. at 307, ¶

16.1. Enterprise was to maintain books and records pertaining to all use of the gaming equipment NGS provided and they were to be accessible to NGS "at all times during the [lease] Term and for a period of three (3) years thereafter." *Id.* at ¶ 16.3. The parties also were to share responsibility for the selection of the accounting firm which would perform the annual audit required by IGRA. See 25 U .S.C. § 2710(b)(2)(C).[FN20]

NGS was not authorized or obligated by the equipment lease to be involved in the "overall" management of the casino. However, that is not required for IGRA to apply. Pursuant to its agreement with the Nation, NGS given the right to manage, or the opportunity to manage, significant parts of the gaming operation. Its role was more than that of a mere supplier. *See First American,* 412 F.3d at 1172–75; NIGC Bulletin 94–5 ("A requirement for including within the scope of audit of the gaming operation other contracts, including supply contracts, is similarly a means of protecting the gaming operations and ultimately the tribes from those deemed unsuitable for Indian gaming or on terms at variance with IGRA's requirements.).[FN21]

***8** NIGC Bulletin 94–5, which discusses the distinction between management contracts and consulting agreements, supports this conclusion. While the Bulletin, as an informal agency pronouncement, is not entitled to deference under *Chevron,* the Tenth Circuit observed in *First American* "that the NIGC's apparent position coincides with [the court's] holding." *Id.* at 1174. The court noted that the Bulletin "defines management broadly to include 'planning, organizing, directing, coordinating, and controlling ... all or part of a gaming operation.' " *Id* . (quoting NIGC Bulletin 94–5 at 2). It considered the seven management activities the Bulletin "singles out ... as especially probative of the question whether an agreement is a management contract." *Id.*

The equipment lease contains five of those seven provisions: provisions for maintenance of adequate accounting procedures and preparation of verifiable financial reports on a monthly basis; development and construction costs incurred or financed by a party other than the tribe; term of contract that establishes an ongoing relationship; compensation based on percentage fee (performance); and a provision for assignment or subcontracting of responsibilities. An agreement does not have to include all seven activities to be a management contract. *First American.* 412 F.3d at 1174. Rather, the " 'presence of all or part of these activities in a contract with a tribe strongly suggests that the contract or agreement is a management contract requiring [NIGC] approval.' " *Id.* (quoting Bulletin 94–5 at 2).

The conclusion that the lease and note constitute a management contract is "reinforced by the fact that [they] do[ ] not much resemble a consulting agreement." *Id.* "A contract that identifies a finite task, specifies a date for its completion, and provides recompense based on an hourly or daily rate or fixed fee 'may very well be determined to be a consulting agreement' rather than a management contract." *Id.* (quoting Bulletin 94–5 at 3). The agreement here was essentially open-ended with machine rentals based on a percentage of the income stream from the machines—the "net win or drop from each and every machine." Admin. R. at 306, ¶ 15.

NGS offers multiple reasons why the note and equipment lease are not a management contract. Initially it argues that, in her opinion letter, Ms. Coleman significantly relied on the promissory note and that was improper as the note was a separate contract, but not a "collateral agreement." [FN22] However, as the lease, by itself, is a management contract, the court does not have to characterize or even consider the impact of the note on the analysis. [FN23] It then contends that, as reflected in the recitals in the agreement, the parties did not intend for the lease to constitute a management agreement. However, the parties' expressed intent is not controlling when the agreement they executed, due to the rights and obligations it created is a management contract. An agreement's status as a "management contract," or not, is determined by the substance of the agreement, not the label the parties attach to it.[FN24]

***9** NGS downplayed the significance of its right to determine, jointly with the Nation, the exact mix of the machines it will make available. It asserts that the "true management decisions concerning the choice of games are decisions regarding game theme, floor placement, part percentage, game displays and promotions, all of which are retained exclusively to the Enterprise management." Plaintiff's brief, p. 18. However, as the Commission noted in its Final Decision, the "Nation's ability to make decisions regarding

theme, placement, displays, and promotions is limited when the Nation cannot freely choose *any* of the games on its floor." Admin. Record at 10.[FN25]

NGS's also argues that the rights to participate in the selection of the accounting firm that will perform the annual "independent certified audit," to control the cash accounting system and to inspect, have access to books and records and audit are not management functions. Singly, these provisions might not be enough to render the lease a management agreement. However, when combined with the other provisions discussed above, they transfer sufficient management responsibility to NGS to "require the Chairman's scrutiny." *Wells Fargo Bank*, 658 F.3d at 697.

The court agrees with plaintiff that there are distinctions between the equipment lease in this case and other agreements that courts have found to be management contracts. The Operating Lease reviewed by the Tenth Circuit in *First American* and the Indenture Agreement analyzed by the Seventh Circuit in *Wells Fargo Bank* placed significantly more management authority in the hands of third parties. However, management contracts are not "only those agreements that strip a tribe of decision-making authority entirely." *First American*, 412 F.3d at 1175. "[T]he regulations' definition of a management contract as an agreement that provides for the management of 'all or part' of a gaming operation suggests a definition of management that is partial rather than absolute, contingent rather than comprehensive." *Id.* at 1176. Recognizing that "Congress wrote in broad strokes in crafting this legislation," to "ensure that the tribes retain control of gaming facilities set up under the protection of IGRA and of the revenue from these facilities," *Wells Fargo Bank*, 658 F.3d at 695, 700, the court concludes that definition is satisfied here.

The NIGC's Final Decision determined both that the equipment lease and promissory note constituted a management contract and that the Commissioner properly disapproved the agreements. However, plaintiff has challenged only the first determination in its appeal and the court has therefore restricted its review to the question of whether the parties' agreement was a management contract under IGRA. Having concluded that it was, it is unnecessary to consider whether the agency should be required to produce documents that might reflect any subjective motivation for its actions.

***10** The Tenth Circuit noted in First American that "[n]on-tribal parties who enter into contracts relating to tribal gaming undertake, in addition to ordinary business risks, certain regulatory risks as well." *First American*, 412 F.3d at 1178–79. This case no doubt illustrates the accuracy of that observation. To that listing of risks might also be added the uncertainties introduced by tribal politics. Nonetheless, for the reasons indicated, the Final Decision of the NIGC is **AFFIRMED.**

IT IS SO ORDERED.

FN1. The background is taken principally from the Administrative Record ("Admin.R. at ___").

FN2. The Nation signed a second promissory note on April 28, 2004, which was identical to the first, excepting the amount and date. Admin.R. at 2.

FN3. The documents were sent to Marcelin Pate, a Field Investigator with the NIGC. She forwarded them to Penny Coleman, Deputy General Counsel. Admin.R. 992–93.

FN4. The lease and note were submitted to the NIGC for a determination of whether "the agreement require[d] the approval of the NIGC," not for its approval as a management contract. See www.nigc.gov/ Reading—Room/Bulletins/Bulletin—No.—1993–3.aspx. ("In order to provide timely and uniform advice to tribes and their contractors, the NIGC and the BIA have determined that certain gaming-related agreements, such as consulting agreements or leases or sales of gaming equipment, should be submitted to the NIGC for review. In addition, if a tribe or contractor is uncertain whether a gaming-related agreement requires the approval of either the NIGC or the BIA, they should submit those agreements to the NIGC."). If the agency determined approval was required, it would notify the tribe to formally submit the agreement. *Id.*, see 25 C.F.R. § 533.3.

FN5. The Administrative Record reflects that the Enterprise board contacted the Nation, stating that it was "imperative" that it commence negotiations with the NIGC and obtain written permission that "would allow the Casino to remain open while the deficiencies of the Equipment Lease Agreement and Promissory Note are resolved." Admin.R. at 185. By letter dated August 20, 2004, NGS also sent the Nation proposed amendments to the lease addressing issues raised by the Coleman opinion. *Id.* at 186–88.

FN6. While that action was pending the Nation paid the promissory notes in full and NGS amended its complaint to sue for breach of the equipment lease.

FN7. The court does not agree with plaintiff that the NIGC Decision is "based directly upon the Coleman Letter." Plaintiff's reply, p. 3. The Chairman did "concur with, and adopt, the OGC opinion that the Agreements are a management contract." Admin.R. at 84. However, the Commission, while agreeing with the decision reached by the Chairman, and finding that he "properly determined that the equipment lease and promissory note constitute a management contract for the reasons stated in his March 26, 2008 disapproval letter," *id.* at 2, conducted its own analysis of the issue. See Admin.R. at 9–12.

FN8. The Commission also concluded the Chairman had properly disapproved the management contract. As the present appeal goes only to the question of whether the arrangement constituted a management contract—not whether any management contract should be approved—the court has no reason to pass on the approval question. It does note, however, its considerable skepticism that the agency could properly disapprove a management contract on the basis of a desire to avoid "impos[ing] upon the Nation any agreement that it no longer wanted." Admin.R. at 2. Protecting the interests referenced in the IGRA is one thing. Turning a contract into a deal binding only on one party is something decidedly different.

FN9. After determining that the lease and note constituted a management agreement, the NIGC Chairman disapproved the agreement. On appeal, the NIGC affirmed both decisions. Plaintiff has appealed the determination that the lease and note fall within IGRA. It has not challenged the NIGC's decision that the Chairman properly disapproved the parties' agreement under both 25 U.S.C. § 2711(b) and (e)(4).

FN10. In its objection to the record, NGC argued that "[t]he determination of whether the Equipment Lease and Promissory Notes together constitute a management contract is a legal question that does not involve an exercise of discretion or a determination of what is in the best interests of the Nation." Plaintiff's Objection, Doc.# 63, p. 6. In its July 23, 2007, letter to the NIGC requesting final agency action, the Nation stated: "We believe that determinations about whether the agreements are management agreements or not can be made by simply looking at the 'four corners' of the agreements with no need to delve into extensive factual issues such as performance, termination or alleged bad faith as NGS seeks to do in the tribal litigation." Admin.R. at 430.

FN11. See supra note 10.

FN12. Although the plaintiff refers to invalid regulations, plural, it discusses only § 502.15 in its brief.

FN13. The lease provided that:

> The machines will be a mix of approximately eighty percent (80%) of machines, which are NGS design and approximately twenty percent (20%) of machines from other manufacturers which are agreed upon by the parties so that Enterprise will have a proper mix of gaming equipment at its casino. The exact mix of the machines that NGS will make available will be agreed upon by the parties.
>
> Admin. R. at 299, ¶ 1.1.

FN14. The lease the parties executed was more that just a procurement contract.

FN15. The Chairman also noted that because the contract language was unambiguous, resort to extrinsic evidence was unnecessary. Admin.R. at 12–13.

FN16. Approval of management contracts by the Chairman is also required in connection with Class III, rather than II, gaming operations. 25 U.S.C. § 2710(d)(9). There appears to have been at least a question as to the types of games provided by NGS. Coleman letter of August 11, 2004, p. 4; Admin.R. at 964.

FN17. "In contrast, contracts for supplies, services, or concessions involving amounts in excess of $25, 000 annually are merely subject to audits by the Commission." *Casino Res.*, 243 F.3d at 438 n. 3, citing 25 U.S.C. § 2710(b)(2)(D).

FN18. Plaintiff asserts in its reply that "[p]aragraph 1.1 does not specify who will select the leased machines," that "[p]aragraph 1.1 does not state that NGS will select the machines, and NGS did not in fact select the machines, only supply them." Plaintiff's reply, p. 5. Plaintiff ignores the lease language, which provides that the "exact mix of the machines that NGS will make available will be agreed upon by the parties." Admin.R. at 299. Plaintiff asserts that the NIGC "has never stated how the powers purportedly granted to NGS under paragraph 1.1 differ from a standard lease. Plaintiff's reply, p. 5. In a standard lease, the lessor/vendor would provide the machines or equipment the lessee selected, rather than the machines which it determined the lessee should use or which it played a significant role in selecting. That control is what distinguishes this lease from a "standard lease."

FN19. The Commission refers to this as the "slot accounting system." Admin. R. at 11.

FN20. NGS asserts that reliance on ¶ 16.4 of the lease as a basis for concluding the contract is a management agree is "misplaced" in part because "the scope of the independent audit subject to that requirement is limited to matters 'applicable to the use of the Equipment.' " Plaintiff's reply, p. 6 (quoting Admin. R. at 308). However IGRA specifically requires that an Indian tribe engaged in Class II gaming provide "annual outside audits of the gaming," 25 U.S.C. § 2710(b)(3)(C), which includes proceeds from the equipment provided pursuant to the terms of the lease.

FN21. NIGC Bulletin 94–5 is available at www. nigc. gov/Reading—Room/Bulletins/Bulletin—No.—1994–5.aspx.

FN22. The Administrative Record does not reflect that either the parties or the NIGC ever considered the note and lease separately, rather than as components of a single agreement.

FN23. The court does not agree, though, that the note played a significant role in Ms. Coleman's analysis. The Commission did not rely on it to reach its conclusion.

FN24. Similarly, the fact that the lease was negotiated with the advice of counsel does not preclude a determination that the agreement is governed by IGRA.

FN25. As the court's discussion is based on its view of the substance of the contractual arrangements, it is unnecessary to address the "Help" email mentioned by plaintiff in its brief. The court also has not discussed other lease provisions that it did not rely upon, but which were cited by Ms. Coleman in her Opinion Letter. See plaintiff's brief, pp. 21–22.

W.D.Okla.,2012.
New Gaming Systems, Inc. v. National Indian Gaming Com'n
--- F.Supp.2d ----, 2012 WL 4052546 (W.D.Okla.)

END OF DOCUMENT

Rumsey Indian Rancheria of Wintun Indians of California v. Dickstein

Not Reported in F.Supp.2d, 2008 WL 648451 (E.D.Cal.)
(Cite as: 2008 WL 648451 (E.D.Cal.))

C
Only the Westlaw citation is currently available.

United States District Court,
E.D. California.
RUMSEY INDIAN RANCHERIA OF WINTUN INDIANS OF CALIFORNIA; Rumsey Government Property Fund I, LLC; Rumsey Development Corporation; Rumsey Tribal Development Corporation; Rumsey Management Group; and Rumsey Automotive Group, Plaintiffs,
v.
Howard DICKSTEIN; Jane G. Zerbi; Dickstein & Zerbi; Dickstein & Merin; Arlen Opper; Opper Development, LLC; Metro V Property Management Company; Capital Casino Partners I; Mark Friedman; Fulcrum Management Group, LLC; Fulcrum Friedman Management Group, LLC, dba Fulcrum Management Group, LLC; ILlinois Property Fund I Corporation; Illinois Property Fund II Corporation; ILlinios Property Fund III Corporation; 4330 Watt Avenue, LLC; and Does 1-100, Defendants.

No. 2:07-cv-02412-GEB-EFB.
March 5, 2008.

Jeffry Samuel Butler, Sanford Kingsley, Sonnenschein Nath & Rosenthal, San Francisco, CA, Louis Alexander Boli, IV, Law Office of Michael L. Boli, Oakland, CA, Niall P. McCarthy, Cotchett, Pitre & McCarthy, Burlingame, CA, for Plaintiff.

Brian Lee Ferrall, Elliot Remsen Peters, Keker and Van Nest LLP, San Francisco, CA, Malcolm S. Segal, Segal and Kirby, William R. Warne, Janlynn R. Fleener, Downey Brand LLP, Steven S. Kimball, Stevens & Oconnell LLP, Sacramento, CA, for Defendants.

ORDER

GARLAND E. BURRELL, JR., District Judge.

***1** Plaintiffs move to remand this action to state court. Defendants Howard Dickstein, Jane G. Zerbi, Distein & Zerbi and Dickstein & Merin ("Defendants") oppose the motion. Oral arguments on the motion were heard February 11, 2008. For the reasons stated, Plaintiffs' motion is granted and the case is remanded to state court.

BACKGROUND

Plaintiffs filed this action in Superior Court of the State of California in the County of Yolo on October 9, 2007. Plaintiff Rumsey Band of Wintun Indians ("the Tribe") is a sovereign Indian tribe who owns the Cache Creek Casino Resort. (Compl.¶¶ 1, 3(b).) Defendant Howard Dickstein ("Dickstein") is the Tribe's former attorney and Defendant Arlen Opper ("Opper") is the Tribe's former financial advisor. (*Id.* ¶ 2.) Plaintiffs allege that Opper and Dickstein "repeatedly involved the Tribe in complicated investments or transactions in which the business terms were more favorable to others than they were to the Tribe. Many such deals were fraught with self-dealing and conflicts of interest they failed to disclose." (*Id.* ¶ 2.) Plaintiffs further allege that Opper

> collected fees for purportedly managing Tribal assets, without actually managing them[, and] Opper's entire method and structure of compensation was an artifice created [by Opper and Dickstein] to avoid regulatory oversight of Opper's management of an Indian-owned gaming facility, which was illegal without the prior approval of the National Indian Gaming Commission.

(*Id.* ¶ 7.) Plaintiffs' Complaint comprises fourteen state law claims including breach of contract, breach of fiduciary duty, unjust enrichment and violation of the California Business and Professions Code Section 17200. (*Id.* at 34:21, 36:11, 40:13, 50:14, 52:2.)

On November 8, 2007, Defendants removed the action to this Court under 28 U.S.C. §§ 1441 and 1446, arguing that federal question jurisdiction exists because the Indian Gaming Regulatory Act, 25 U.S .C. §§ 2701-2721, completely preempts Plaintiffs' state law claims and because Plaintiffs' claims raise substantial questions of federal law. (Notice of Removal ¶¶ 1, 2, 10.)

Congress passed the Indian Gaming Regulatory Act ("IGRA") "to provide a statutory basis for the operation and regulation of gaming by Indian tribes." *Seminole Tribe of Fla. v. Florida,* 517 U.S.

44, 48, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). IGRA established the National Indian Gaming Commission ("NIGC") to oversee gaming activities on tribal lands. 25 U.S.C. §§ 2704, 2706. IGRA permits tribes to enter into management contracts for the operation and management of their gaming facilities subject to the NIGC's approval, which includes ensuring that the contracts provide minimum protection for the tribes. *Id.* § 2711. The NIGC also has the authority to hold a hearing and void any management contract that violates IGRA. *Id.* § 2711(f). NIGC regulations further establish that any management contract that is not approved by the NIGC is void. 25 C.F.R. § 533. Decisions by the NIGC are final agency actions for purposes of the Administrative Procedures Act and are appealable to a federal district court. 25 U.S.C. § 2714.

REMOVAL STANDARDS

***2** "[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by [ ] the defendants, to the district court [ ] for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). The removal statute is strictly construed against removal jurisdiction, *see Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir.1992), and the party seeking removal "has the burden of establishing that removal [is] proper." *Duncan v. Stuetzle*, 76 F.3d 1480, 1485 (9th Cir.1996). There is a " 'strong presumption' against removal" with "any doubt" resolved in favor of remand. *Gaus*, 980 F.2d at 566.

Defendants' removal is premised on allegations that federal question jurisdiction exists. To sustain removal on this basis, "a defendant [must establish] Plaintiff's case 'arises under' federal law." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 10, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983). "The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint ...." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). "As the master of the complaint, a plaintiff may defeat removal by choosing not to plead independent federal claims." *ARCO Envtl. Remediation, L.L.C., v. Dep't of Health & Envtl. Quality*, 213 F.3d 1108, 1114 (9th Cir.2000) (citing *Caterpillar Inc.*, 482 U.S. at 399). However, "the artful pleading doctrine is a useful procedural sieve to detect traces of federal subject matter jurisdiction in a particular case," through a determination of whether Plaintiffs have "artfully phrased a federal claim by dressing it in state law attire." *Lippitt v. Raymond James Fin. Servs., Inc.*, 340 F.3d 1033, 1042 (9th Cir.2003). Even where the complaint does not indicate on its face that a case "arises under" federal law, jurisdiction may lie if "Congress ... so completely pre-empt[s] a particular area that any civil complaint raising [Plaintiffs'] select group of claims is necessarily federal in character," *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987), or when the claims "turn on substantial questions of federal law." *Grable & Sons Metal Prods. Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005).

ANALYSIS

I. Complete Preemption

Defendants argue that "IGRA provides a textbook example of an exclusive federal regulatory regime, sufficient to convert state claims, such as those advanced by the Tribe, into federal claims." (Opp'n at 4:26-5:7 (citing *Great W. Casinos, Inc. v. Morongo Band of Mission Indians*, 74 Cal.App.4th 1407, 1428, 88 Cal.Rptr.2d 828 (1999); *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 543 (8th Cir.1996)).) Defendants argue evidence of this exclusive federal regime is IGRA's creation of the NIGC

> ***3** to monitor and investigate tribal gaming activity .... The NIGC Chairman is responsible for approving all Indian gaming management contracts pursuant to federal guidelines .... If the Chairman fails to act in a timely manner or a tribe wishes to appeal the Chairman's decision, IGRA specifies the United States District Courts as the exclusive jurisdiction for relief.

(Opp'n at 5:17-22 (citing 25 U.S.C. §§ 2706, 2711, 2711(d), 2714).) Defendants argue Plaintiffs' claims fall within the preemptive scope of IGRA because

> [i]n deciding the meaning of management-and whether Opper's agreement required NIGC approval-the state court would effectively decide the extent of the NIGC's regulatory reach. If the Court allows a state court to make such a decision, it will condone state interference with the Tribe's gov-

> ernance of gaming activity and require "a determination outside the administrative review scheme crafted by Congress."

(Opp'n at 7:17-22 (citing *United States ex rel. The Saint Regis Mohawk Tribe v. President R.C.-St. Regis Mgmt. Co. (Mohawk Tribe)*, 451 F.3d 44, 51 (2nd Cir.2006). Plaintiffs rejoin that "disputes involving illegal management by 'consultants' " fall outside IRGA's preemptive scope because "the statutory provisions and framework[ ] do not address consulting agreements disguised as management contracts, and ... provide no remedy or right of action for such ." (Mot. at 9:4-6.)

Removal is proper under the complete preemption doctrine when "the federal statute[ ] at issue provide[s] the exclusive cause of action for the claim asserted and also set[s] forth procedures and remedies governing that cause of action." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8, 123 S.Ct. 2058, 156 L.Ed.2d 1 (2003). "Complete preemption is rare." *ARCO Envtl. Remediation*, 213 F.3d at 1115.

Defendants argue Plaintiffs' claims are completely preempted by IGRA since they are based on an alleged management contract that has not been approved by the NIGC. (Opp'n at 1:9-2:4.) Defendants assert that Plaintiffs "seek[ ] to have a state court invalidate [Opper's consulting agreement] as an illegal contract under IGRA." (*Id.* at 7:12-16.) However, Plaintiffs' Complaint includes no such claim. Instead, the first and second claims are for **breach** of contract. (Compl. at 34:20-21, 36:10-12.) Similarly, Plaintiffs' tenth cause of action for violation of California Business and Professions Code section 17200 ("section 17200") alleges:

> The Opper Defendants engaged in unfair, unlawful and/or fraudulent acts under [section 17200] by, *inter alia*, ... (2) disguising illegal management of a gaming facility as management of the Tribe's assets, and pursuant to that agreement, collecting as disguised "asset management" fees what were, in reality, casino management fees [and, therefore, t]he Tribe is entitled to restitution of all sums wrongfully held and/or obtained by [Defendants] as a result of the unlawful, unfair and fraudulent acts alleged above.

***4** (Compl.¶ 205.) Defendants argued at oral arguments that Plaintiffs' prayer for restitution damages evinces that they are seeking to void the Opper agreement. "However, restitution is also available as a remedy to redress [state] statutory violations. And in a statutory action, rescission is not a prerequisite to granting restitution." 1 B.E. Witkin, Summary of California Law (Contracts) § 1013 (10th ed.2005) (citing a section 17200 action).

At this point it is unknown whether the Opper agreements at issue are unapproved management contracts and therefore are void. Even if the agreements are ultimately construed as void management contracts, they would be found to have never been valid contracts, and "only an *attempt* at forming ... management contract[s]. If that is the case, then [Plaintiff's] suit in no way interferes with the regulation of a management contract because none ever existed." *Gallegos v. San Juan Pueblo Bus. Dev. Bd., Inc.*, 955 F.Supp. 1348, 1350 (D.N.M.1997).

> Not every contract that is merely peripherally associated with tribal gaming is subject to IGRA's constraints .... For instance, in [*Calumet Gaming Group-Kan., Inc. v. Kickapoo Tribe of Kan.*, 987 F.Supp. 1321, 1325 (D.Kan.1997)], the court found that a dispute arising from a consulting agreement was not subject to IGRA and, consequently, there was no need to interpret or apply IGRA to resolve the plaintiff's state law claims for breach of that agreement.

Casino Res. Corp. v. Harrah's Entm't, Inc., 243 F.3d 435, 439 (8th Cir.2001) (citations omitted).

However, claims "which would interfere with [Plaintiffs'] ability to govern gaming [ ] fall within the scope of IGRA's preemption of state law" because "Congress unmistakably intended that tribes play a significant role in the regulation of gaming." [FN1] *Gaming Corp.*, 88 F.3d at 549-50.

> FN1. The *Gaming Corporation* court relied in part on the following legislative history: " 'S. 555 [(IGRA)] is intended to expressly preempt the field in the governance of gaming activities on Indian lands. Consequently, Federal courts should not balance competing Federal, State, and tribal interests to determine the extent to which various gaming activities are allowed.' " *Gaming Corp.*, 88

> F.3d at 544 (quoting S.Rep. No. 446, 100th Cong., 2d Sess. 6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 307, 3076).

Defendants argue that Plaintiffs' claims interfere with the Tribe's "ability to govern gaming" because to address Plaintiffs' breach of fiduciary duties, breach of contract, and violation of section 17200 claims, "the Court must first decide whether Opper's agreement is subject to NIGC review as a management contract [and t]he meaning of 'management' under IGRA implicates tribal control over gaming activity because it provides a standard for subjecting [tribal contracting] decisions to NIGC approval." (Opp'n at 8:10-18.)

This argument concerns fact-bound questions regarding the nature of the agreements at issue, and whether they are void management contracts, but it does not establish that these determinations interfere with the Tribe's ability to govern gaming. "Congressional intent is the touchstone of the complete preemption analysis." *Magee v. Exxon Corp.*, 135 F.3d 599, 601 (8th Cir.1998). "It is a stretch to say that Congress intended to preempt state law when there is no valid management contract for a federal court to interpret, when [Plaintiffs'] broad discretion ... is not impeded, and when there is no threat to [Plaintiffs'] sovereign immunity or interests." *Casino Res. Corp.*, 243 F.3d at 440; *see also Confederated Tribes of Siletz Indians v. Oregon*, 143 F.3d 481, 486 n. 7 (9th Cir.1998) (rejecting argument that IGRA entirely preempts a field including Oregon public records laws because "the application of [state public record laws] has no effect on the determination 'of which gaming activities are allowed.' ") (citing S.Rep. No. 446, 100th Cong., 2d Sess. 6 (1988)).

***5** Defendants also argue *Mohawk Tribe* supports their complete preemption position. In *Mohawk Tribe,* the Second Circuit held that it was without jurisdiction to issue "a declaration that the [ ] Contract is void for lack of contract approval by the Commission as required by IGRA" because the tribe failed to exhaust its administrative remedies. *Mohawk Tribe,* 451 F.3d at 50-51. In *Mohawk Tribe,* the Indian tribe filed a *qui tam* action seeking to void a contract under IGRA. But Plaintiffs' claims do not seek to void the agreements. As Plaintiffs assert, *Mohawk Tribe* "is perhaps relevant to a defense on the merits as to whether a state (or federal) court can pass on the validity of a contract before NIGC has done so, but such provides no support for removal ...." [FN2] (Reply at 18:28-19:3.)

> FN2. Indeed, the *Mohawk Tribe* court explicitly stated that it "decline[d] to hold that regulation of Indian gaming contracts under IGRA creates federal question jurisdiction over any contract claim relating to Indian gaming." *Mohawk Tribe,* 451 F.3d at 51 n. 6.

For the reasons stated, Defendants have not shown that IGRA completely preempts Plaintiffs' claims.

II. Substantial Question of Federal Law

Defendants also contend that removal is appropriate because Plaintiffs' "complaint presents a [substantial] question of federal law on which many of its claims depend: what does 'management' mean for purposes of applying IGRA?" (Opp'n at 11:19-20.) The gist of Defendants' position follows:

> By arguing that Opper's agreement should be voided as an unapproved management contract, the Tribe necessarily raises a federal question that must be resolved before the Court can decide state law claims for breach of contract (Count 2), breach of fiduciary duties by Opper and Dickstein (Counts 4 and 5), and unjust enrichment by Opper (Count 11). The Tribe cannot recover for breach of contract without demonstrating the existence of a valid contract.... Similarly, the fiduciary duties owed by Opper to the Tribe will vary depending upon the nature and legal force of their agreement .... Moreover, the availability of the Tribe's requested relief for the fiduciary claims-disgorgement-will depend upon how the Court characterizes Opper's agreement.... Finally, it is unclear that the Tribe can recover for unjust enrichment based upon a contract rendered illegal by the absence of NIGC approval.

(Opp'n at 12:16-13:15 (citations omitted).) Plaintiffs reply that those claims do not allege or seek recovery for any IGRA violation and, therefore, do not raise illegality of the Opper agreement as an essential element.[FN3] (Reply at 15:1-18.)

> FN3. Since Defendants argue that a substantial federal question justifies removal based on four specific claims, only those claims are analyzed. Plaintiffs argue that because Defendants' Notice of Removal "does not spe-

> cifically contend that any of Plaintiffs' " claims aside from Counts 4 and 5 "raise questions of federal law" Defendants are "foreclosed" from basing their arguments on those claims now. (Mot. 19:19-27, 20:1-15 (citing *Mattel, Inc. v. Bryant*, 441 F.Supp.2d 1081, 1091 n. 11 (C.D.Cal.2005)).) The Notice of Removal, however, states "[t]he factual allegations ... (pertaining to the alleged violation of IGRA) are incorporated by reference into every cause of action asserted in this case. The IGRA allegations figure particularly prominently in the causes of action for breach of fiduciary duty ... and aiding and abetting in breaches of fiduciary duty ...." (Notice of Removal ¶ 4.) This statement was sufficient to put Plaintiffs on notice that Defendants based removal jurisdiction on all of Plaintiffs' claims.

Defendants argue "the [general allegations section of the] Complaint contains extensive allegations concerning Opper's management of gaming activity" and since Plaintiffs' state law claims incorporate all of the allegations into each cause of action, "the Tribe necessarily raises a federal question" as an element of their state law claims.[FN4] (Opp'n at 3:2-20, 12:16-18.) The Ninth Circuit rejected such an argument in *Duncan v. "Footsie Wootsie Machine Rentals"*, stating that the plaintiff's incorporation by reference of a general allegation that she owned the trademark to "Footsie Wootsie" did not provide a basis for substantial federal question jurisdiction since the state law claim was not necessarily based on the misappropriation of the federal trademark. 76 F.3d 1480, 1488 n. 11 (9th Cir.1995).

FN4. For instance, Plaintiffs allege:

> [B]y restructuring Opper's contracts to pay him a set fee for "consulting" for the Casino, while paying him under a separate agreement of "managing" assets he did not actually manage, Dickstein and Opper ensured a continued cash flow of a particular sum to Opper, while circumventing the NIGC oversight otherwise required. (In truth, if Opper was managing under these contracts, irrespective of their terms and titles, his contracts were *de facto* management contracts and thus void.)
>
> * * *
>
> [O]n information and belief, Dickstein and Opper purposefully structured Opper's compensation so as to avoid triggering NIGC approval for his actual management of the Casino. In reality, on information and belief, the asset management agreement that Dickstein and Opper devised was an artifice to allow Opper to continue to exert managerial control of all or part of the Tribe's Casino, while still securing a target sum that was roughly equivalent to what Opper would have received under the initial "consulting" contract with the Casino, had it remained in place.
>
> (Compl.¶¶ 16, 44.)

***6** Federal question removal jurisdiction exists where a state law claim "necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state jurisdictional responsibilities." *Grable & Sons Metal Prods. Inc.*, 545 U.S. at 314. "When a claim can be supported by alternative and independent theories-one of which is a state law theory and one of which is a federal law theory-federal question jurisdiction does not attach because federal law is not a necessary element of the claim." *Rains v. Criterion Sys., Inc.*, 80 F.3d 339, 346 (9th Cir.1996). "While [Defendants] may defend against the state law claims by arguing that [they fail because the agreements are void under the federal IGRA], this answer is a defense to [Plaintiffs'] claimed right, not an element of [Plaintiffs'] state law cause of action." *ARCO Envtl. Remediation*, 213 F.3d at 1116. Thus, the issue is whether Plaintiffs' **right to relief** arises out of a necessary, substantial and "disputed issue of federal law," *Bennett v. Southwest Airlines Co.*, 484 F.3d 907, 909 (7th Cir.2007); it is not enough that Plaintiffs' right to relief could fail because of a Defendant's defense based on federal law. "In the main, a claim 'arises under' the law that creates the cause of action." *Id.* at 909.

The unjust enrichment claim against Opper can be supported simply by showing that he failed "to reimburse the Tribe for his personal use of aircraft in which the Tribe possessed rights of use." (Compl.¶ 211.) The obligation to reimburse the tribe appears to have arisen

from tribal policies, completely independent from any contract that Opper made with the Tribe. "Pursuant to the Tribe's policies, the Tribal Council permitted ... Dickstein and Opper to use the NetJets aircraft for personal trips for 10 hours per year as long as they reimbursed the Tribe for half the trip's hourly rate ." (Compl.¶ 128.) Thus, the unjust enrichment claim can be supported by alternative and independent state law theories.

Nor has it been shown that Plaintiffs' breach of contract, breach of fiduciary duties and unjust enrichment claims arise under a necessary federal question of IGRA law. Plaintiffs' breach of contract claim arises out of state contractual rights. Similarly, Plaintiffs' breach of fiduciary duties claims arise out of the duties Defendants owe the tribe as their lawyers, agents and managers, not out of any right created by federal law.[FN5] (Compl.¶¶ 157, 165.) Therefore, Defendants have not shown that the substantial federal question doctrine supports removal jurisdiction.

> FN5. Plaintiffs' request for disgorgement does not necessarily mean Plaintiffs premised their breach of fiduciary duties claims on an illegal contract. *See Jain v. Clarendon Am. Co.*, 304 F.Supp.2d 1263, 1265 (W.D.Wash.2004) (citing previous decision ordering defendant to disgorge profits as award for breach of contract and breach of fiduciary duties claims).

CONCLUSION

For the reasons stated, Plaintiffs' motion to remand is granted and the Clerk of the Court shall remand this action to the Yolo County Superior Court.

IT IS SO ORDERED.

E.D.Cal.,2008.
Rumsey Indian Rancheria of Wintun Indians of Cal. v. Dickstein
Not Reported in F.Supp.2d, 2008 WL 648451 (E.D.Cal.)

END OF DOCUMENT

Shingle Springs of Band of Miwok Indians v. Sharp Image Gaming, Inc.

Not Reported in F.Supp.2d, 2010 WL 4054232 (E.D.Cal.)
(Cite as: 2010 WL 4054232 (E.D.Cal.))

C
Only the Westlaw citation is currently available.

United States District Court,
E.D. California.
SHINGLE SPRINGS BAND OF MIWOK INDIANS, a federally recognized Indian Tribe, Plaintiff,
v.
SHARP IMAGE GAMING, INC., a California corporation; National Indian Gaming Commission; the Honorable Patrick J. Riley, Judge of the El Dorado County Superior Court (Retired, Sitting By Designation), Defendants.

No. 2:10–cv–01396 FCD GGH.
Oct. 15, 2010.

West KeySummary**Courts 106 508(2.1)**

106 Courts
106VII Concurrent and Conflicting Jurisdiction
106VII(B) State Courts and United States Courts
106k508 Injunction by United States Court Against Proceedings in State Court
106k508(2) Restraining Particular Proceedings
106k508(2.1) k. In General. Most Cited Cases

Injunction prohibiting gaming corporation from pursuing review in California state courts was not "necessary in aid of jurisdiction" of an Indian tribe's claim that the National Indian Gaming Commission's (NIGC) decision required review in federal court, and was therefore barred by the Anti-Injunction Act. Indian tribe failed to seek removal to the federal court system, challenged the subject matter jurisdiction of the state court, and unsuccessfully appealed the adverse determination to the state appellate court. 28 U.S.C.A. § 2283.

Ian R. Barker, Mary Kay Lacey, Paula M. Yost, Sonnenschein Nath & Rosenthal, James M. Wagstaffe, Kerr And Wagstaffe, San Francisco, CA, for Plaintiff.

Matthew G. Jacobs, Steven S. Kimball, Charles Joseph Stevens, James Patrick Arguelles, Stevens, O'Connell & Jacobs, LLP, George Michael Waters, Department of Justice, Office of the Attorney General, Sacramento, CA, for Defendants.

MEMORANDUM AND ORDER

FRANK C. DAMRELL, JR., District Judge.

***1** This matter is before the court on defendants Sharp Image Gaming, Inc. ("Sharp Image") and the Honorable Patrick J. Riley's (the "Superior Court") [FN1] (collectively, "defendants") motions to dismiss plaintiff Shingle Springs Band of Miwok Indians' (the "Tribe" or "plaintiff") complaint on the basis that it is barred by the Anti–Injunction Act, or alternatively, that the court should abstain from exercising jurisdiction over the claims under the principles set forth by *Younger v. Harris* and its progeny. Plaintiff opposes the motion and moves for partial summary judgment on its claims for declaratory and injunctive relief. On October 8, 2010, the court heard oral argument. For the reasons set forth below, defendants' motions to dismiss are GRANTED, and plaintiff's motion for partial summary judgment is DENIED.

FN1. Defendant Honorable Patrick J. Riley asserts (1) that plaintiff has named an individual judge of the El Dorado Superior Court as a defendant in order to avoid the Eleventh Amendment's restriction on federal jurisdiction by individuals against States or state agencies; and (2) that plaintiff's complaint seeks relief against the entire Superior Court. As such, defendant Honorable Patrick J. Riley refers to himself as "the Superior Court," but expressly notes that this is not a waiver of sovereign immunity. (Def. Honorable Patrick J. Riley's Mot. to Dismiss, filed July 19, 2010, at 1 n. 1.)

BACKGROUND[FN2]

FN2. The factual background is taken from plaintiff's allegations in the Complaint as well as the parties' requests for judicial notice. While the parties file numerous objections to evidence, the court concludes that the disputed evidence is irrelevant to the court's determination or otherwise without merit.

This case arises out of claims made by defendant Sharp Image with respect to contracts the Tribe and Sharp Image entered into in the mid–1990s. Specifically, Sharp Image alleges that (1) on or about May 24, 1996, the Tribe and Sharp Image entered into a contract known as the Gaming Machine Agreement (the "GMA"); [FN3] (2) on or about November 15, 1997, the parties entered into an agreement known as the Equipment Lease Agreement (the "ELA"); [FN4] and (3) on or about November 15, 1997, the parties entered into a third agreement known as the Promissory Note (collectively, the "Agreements"). (First Am. Compl. filed in Superior Court of California, County of El Dorado ("State Compl."), Ex. C to Compl., filed June 7, 2010, ¶¶ 5, 7.) Sharp Image contends that the Tribe breached the Agreements by, *inter alia,* entering into an agreement with a third-party for purposes of leasing or purchasing gaming equipment for the Tribe's casino in contravention of exclusivity provisions in the Agreements. (*Id.* ¶ 11.) The Tribe contends that the Agreements are void and unenforceable.

> FN3. On November 5, 1996, the National Indian Gaming Commission (the "NGIC") issued an opinion finding that the GMA contemplated illegal Class III gaming, and as a result, the GMA was "null and void." (Compl.¶ 23.)

> FN4. Sharp Image alleges that the ELA superseded the GMA in its entirety. (Compl.¶ 25.)

A. State Court Proceedings

On March 12, 2007, Sharp Image filed suit against the Tribe in the Superior Court of California, County of El Dorado, alleging claims for breach of contract based upon the 1996 and 1997 agreements. (Compl.¶ 29.) On May 22, 2007, Sharp Image filed its First Amended Complaint (the "State Complaint"), asserting that the Agreements are all "valid and binding contracts," which it had the right to enforce. (*Id.* ¶ 30.)

Subsequent to the filing of the lawsuit, on April 13, 2007, the Tribe sought review by the National Indian Gaming Commission (the "NGIC") regarding whether the GMA and ELA were unapproved "management contracts" that required but did not receive NIGC approval in violation of the Indian Gaming Regulatory Act (the "IGRA"). (*Id.* ¶ 31; Ex. G to Pl.'s Request for Judicial Notice ("PRFJN"), filed Sept. 10, 2010.) On June 14, 2007,[FN5] the NIGC issued an Advisory Opinion letter from the NIGC's General Counsel, providing that the GMA and ELA were management contracts that violated the IGRA. (Ex. I to PRFJN.)

> FN5. Plaintiff's Complaint asserts that the letter was issued on June 5, 2007. However, this conflicts with the exhibits attached to the parties' submissions.

***2** On July 9, 2007, the Tribe moved to quash/dismiss the State Complaint on the grounds of complete preemption and sovereign immunity. (Compl.¶ 32.) On September 12, 2007, Sharp Image made an evidentiary objection to the June 14 Advisory Opinion, contending that "the advisory opinion of the NIGC's General Counsel ... has no legal effect because it is not a final decision of the agency ." (*Id.* ¶ 33) (emphasis deleted). On December 12, 2007, the Superior Court issued a ruling, concluding that the June 14 Advisory Opinion had "no legal effect," did not constitute "official agency action," and was, therefore, not entitled to "judicial review ... until the agency took a final determinative action." (*Id.* ¶ 34; Ex. J to PRFJN.)

Consequently, on January 24, 2008, the Tribe requested the NIGC to undertake a formal review of the GMA and ELA and make a final agency determination. (*Id.* ¶ 35; Ex. K to PRFJN.) On July 18, 2008, the NIGC advised the parties that it would undertake a formal review of the contracts to determine whether the GMA and ELA were "management contracts" that violated the IGRA. The NIGC also advised that it would "give Sharp an opportunity to share its views on the subject" prior to making any decision. (Compl. ¶ 35; Ex. M to PRFJN.) By letter dated August 1, 2008, Sharp Image urged the NIGC to conclude that the GMA and ELA were not management contracts. (Compl.¶ 37.) On April 23, 2009, the Chairman of the NIGC issued his "formal determination under 25 U.S.C. § 2711," finding that "each agreement individually is a management contract," but concluding that they were "void" for failure to comply with IGRA statutory requirements. (*Id.* ¶ 38; Ex. A to RFJN.) The Chairman noted that the determination was "subject to appeal to the full Commission under 25 C.F.R. § 539" and thereafter to "a fed-

eral district court under 25 U.S.C. § 2714." (*Id.*)

On May 21, 2009, Sharp Image appealed to the full Commission. (Compl. ¶ 40; Ex. P to PRFJN.) By letter dated June 5, 2009, the NIGC asserted that because it did not have the necessary Commissioners available to provide a full Commission review, the NIGC was "functionally unable to review" the appeal, and that the Chairman's final determination would become final action by the NIGC on June 20, 2009. (Compl. ¶ 41; Ex. S to PRFJN.) Sharp Image did not file any subsequent appeals to either the NIGC or in federal court. (Compl.¶ 41.)

On September 11, 2009, the Superior Court heard oral argument on the Tribe's Motion to Quash/Dismiss on the basis of complete preemption and sovereign immunity. (*Id.* ¶ 42.) On November 30, 2009, the Superior Court issued its Order, concluding that the Agreements had been "terminated and/or cancelled" prior to the filing of the State Complaint on March 12, 2007 and well before the NIGC undertook review of the GMA and ELA between 2007 and 2008; thus, the Superior Court held that the Tribe's Motion to Quash/Dismiss on the basis of NIGC action must be denied because the NIGC was without jurisdiction "to review, regulate, approve or disapprove" the GMA and ELA. (Ex. E to Compl., at 11–12.) Further, the Superior Court concluded that the decision of the Chairman of the NIGC was not "final action" and "must be disregarded" because (1) the decision violated the due process rights of Sharp due to unreasonable ex parte contacts between the Tribe's Chairman and the Chairman of the NIGC; and (2) the NIGC did not comply with fee requirements and time limits set forth in applicable statutes and regulations.[FN6] (*Id.* at 13–14.) As such, the Superior Court held that preemption did not apply. (*Id.* at 14.) The Tribe asserts that in reaching these conclusions, the Superior Court acted outside the scope of its authority. (Compl.¶ 42.)

FN6. The Superior Court's order provides:

> The NIGC did not require compliance with 25 C.F.R. 533.3 or 25 U . S.C.A. 2722 regarding items which must accompany a request for approval of a management contract, nor was the fee under subsection (i) required. In addition, the NIGC did not comply with the time limits for decision set forth in subsection (d) of the above referenced code section.
>
> (*Id.* at 14.)

***3** On December 15, 2009, the Tribe petitioned the California Court of Appeal, Third Appellate District, to overturn the Superior Court's decision. (Ex. A to Def. Superior Court's Request for Judicial Notice ("DRFJN"), filed July 19, 2010.) On January 21, 2010, the Court of Appeal denied the petition. (*Id.*)

On January 29, 2010, the Tribe petitioned the California Supreme Court to reverse the decision of the Court of Appeal declining to reverse the Superior Court's decision. (*Id.;* Ex. B to DRFJN.) On March 8, 2010, the California Supreme Court issued an order staying all proceedings in the Superior Court pending final determination of the petition. (Ex. B to DRFJN.) On March 30, 2010, the California Supreme Court dissolved the stay and denied the petition. (*Id.*)

Thereafter, the Superior Court set the case for trial on November 1, 2010. At the Tribe's request, however, the trial was continued until February 7, 2011. (Decl. of Steven S. Kimball in Supp. of Def. Sharp Image's Opp'n ("Kimball Decl."), filed Sept. 24, 2010, ¶ 8.)

B. Federal Action

On June 7, 2010, after the California Supreme Court denied its petition, the Tribe filed a Complaint for Declaratory and Injunctive Relief in this court. Specifically, the Tribe seeks (1) a declaration that the NIGC's April 23, 2009 decision is binding final agency action that must be appealed to a federal district court; (2) a declaration that the Superior Court may not entertain an appeal of the NIGC's April 23, 2009 decision; (3) an injunction to prevent the Superior Court from hearing an appeal of the NIGC's April 23, 2009 action; and (4) a declaration that the NIGC correctly decided that the Agreements are unapproved management contracts, and thus, void. The Tribe prays for relief in the form of:

> a. a preliminary and permanent injunction directing and compelling Sharp immediately to cease and desist from challenging in the Superior Court the NIGC's final agency action declaring the Agreements unapproved management contracts;

b. a preliminary and permanent injunction directing and compelling the Superior Court to immediately cease and desist reaching the merits of Sharp's substantive and procedural challenge to the NGIC's final agency action in the State Court Action;

c. a preliminary and permanent injunction directing and compelling the Superior Court to vacate and reverse any prior order to the extent that it is consistent with federal law holding that final agency action by the NGIC is entitled to binding and preclusive effect unless and until it is successfully challenged in a United States District Court;

d. declaration that, notwithstanding any other relief that this Court may order, the Superior Court may not continue to maintain jurisdiction over Sharp's state court action in a manner that defies federal law mandating that the NGIC's April 23, 2009 decision that the Agreements are unapproved management contracts that violate IGRA is final agency action entitled to binding and preclusive legal effect unless and until Sharp successfully appeals the decision to a United States District Court;

***4** e. a declaration that the Superior Court lacks jurisdiction to reach the merits of, and is precluded by federal law from reaching the merits of, a substantive and procedural challenge to a final agency decision of the NIGC, which found the Agreements to be unapproved management contracts that violate IGRA, because only a United States District Court possesses jurisdiction to hear a challenge to the procedural or substantive merits of the NIGC's final agency decision;

f. in the alternative to the foregoing relief, a declaration that the NIGC properly determined that the Agreements constituted unapproved management contracts that violate IGRA and that are thus void, and that no grounds exist to set aside the NIGC's decision under the APA; and

g. such other relief as the Court deems just and proper.

(Compl., Prayer for Relief.)

STANDARD

A. Motion to Dismiss

Under Federal Rule of Civil Procedure 8(a), a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *See Ashcroft v. Iqbal*, —— U.S. ——, ——, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). Under notice pleading in federal court, the complaint must "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atlantic v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (internal quotations omitted). "This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002).

On a motion to dismiss, the factual allegations of the complaint must be accepted as true. *Cruz v. Beto*, 405 U.S. 319, 322, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972). The court is bound to give plaintiff the benefit of every reasonable inference to be drawn from the "well-pleaded" allegations of the complaint. *Retail Clerks Int'l Ass'n v. Schermerhorn*, 373 U.S. 746, 753 n. 6, 83 S.Ct. 1461, 10 L.Ed.2d 678 (1963). A plaintiff need not allege " 'specific facts' beyond those necessary to state his claim and the grounds showing entitlement to relief." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S.Ct. at 1949.

Nevertheless, the court "need not assume the truth of legal conclusions cast in the form of factual allegations." *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n. 2 (9th Cir.1986). While Rule 8(a) does not require detailed factual allegations, "it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Iqbal*, 129 S.Ct. at 1949. A pleading is insufficient if it offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555; *Iqbal*, 129 S.Ct. at 1950 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Moreover, it is inappropriate to assume that the plaintiff "can prove facts which it has not alleged or that the defendants have violated the ... laws in ways that have not been alleged." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpen-*

ters, 459 U.S. 519, 526, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983).

***5** Ultimately, the court may not dismiss a complaint in which the plaintiff has alleged "enough facts to state a claim to relief that is plausible on its face." *Iqbal,* 129 S.Ct. at 1949 (citing *Bell Atlantic Corp. v. Twombly,* 550 U.S. 554, 570 (2007)). Only where a plaintiff has failed to "nudge [his or her] claims across the line from conceivable to plausible," is the complaint properly dismissed. *Id.* at 1952. While the plausibility requirement is not akin to a probability requirement, it demands more than "a sheer possibility that a defendant has acted unlawfully." *Id.* at 1949. This plausibility inquiry is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 1950.

In ruling upon a motion to dismiss, the court may consider only the complaint, any exhibits thereto, and matters which may be judicially noticed pursuant to Federal Rule of Evidence 201. *See Mir v. Little Co. Of Mary Hospital,* 844 F.2d 646, 649 (9th Cir.1988); *Isuzu Motors Ltd. v. Consumers Union of United States, Inc.,* 12 F.Supp.2d 1035, 1042 (C.D.Cal.1998).

B. Motion for Summary Judgment

The Federal Rules of Civil Procedure provide for summary judgment where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see California v. Campbell,* 138 F.3d 772, 780 (9th Cir.1998). The evidence must be viewed in the light most favorable to the nonmoving party. *See Lopez v. Smith,* 203 F.3d 1122, 1131 (9th Cir.2000) (en banc).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If the moving party fails to meet this burden, "the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Cos.,* 210 F.3d 1099, 1102–03 (9th Cir.2000). However, if the nonmoving party has the burden of proof at trial, the moving party only needs to show "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp.,* 477 U.S. at 325.

Once the moving party has met its burden of proof, the nonmoving party must produce evidence on which a reasonable trier of fact could find in its favor viewing the record as a whole in light of the evidentiary burden the law places on that party. *See Triton Energy Corp. v. Square D Co.,* 68 F.3d 1216, 1221 (9th Cir.1995). The nonmoving party cannot simply rest on its allegations without any significant probative evidence tending to support the complaint. *See Nissan Fire & Marine,* 210 F.3d at 1107. Instead, through admissible evidence the nonmoving party "must ... set out specific facts showing a genuine issue for trial." Fed.R.Civ.P. 56(e).

ANALYSIS

A. Anti–Injunction Act

***6** Defendants move to dismiss plaintiff's complaint and oppose plaintiff's motion for partial summary judgment on the basis that this action is barred by the Anti–Injunction Act. Plaintiff opposes the motion, arguing that the Anti–Injunction Act does not bar a federal court order from prohibiting a state court from violating exclusive jurisdiction over matters involving the regulation of gaming on tribal lands.

The Anti–Injunction Act provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. § 2283. Congress adopted this restriction on federal courts based on "the essentially federal nature of our national government." *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs,* 398 U.S. 281, 285, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970). "When this Nation was established by the Constitution, each State surrendered only a part of its sovereign power to the national government.... One of the reserved powers was the maintenance of state judicial systems for the decision of legal controversies." *Id.* As such, the Court acknowledged that from its formation, this country has had "two essentially separate legal systems," each of which "proceeds independently of the other with ultimate review" by the Supreme Court of federal questions raised in either system. *Id.* at 286. Further, the Court observed that "[o]bviously this dual

system could not function if state and federal courts were free to fight each other for control of a particular case." *Id.*

In effectuating the fundamental and vital role of comity in the formation of this country's government, the Anti–Injunction Act "is an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of the three specifically defined exceptions." *Id.* When it first interpreted the statute in 1955, the Court noted that it "is not a statute conveying a broad general policy for appropriate ad hoc application. Legislative policy is here expressed by a clearcut prohibition qualified only by specifically defined exceptions." *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511, 515–16, 75 S.Ct. 452, 99 L.Ed. 600 (1955). "Since that time Congress has not seen fit to amend the statute," and as such, the Court has adhered to the position that any injunction to a state court proceeding must be based on one of the specific enumerated statutory exceptions. *Atl. Coast Line*, 398 U.S. at 287.

The three statutory exceptions to the Anti–Injunction Act's bar on federal courts enjoining state court actions apply only when: (1) an injunction is "necessary in aid of [the federal court's] jurisdiction;" (2) Congress has expressly authorized such relief by statute; [FN7] or (3) an injunction is necessary "to protect or effectuate [the federal court's] judgments." [FN8] 28 U.S.C. § 2283; *Alton Box Bd. Co. v. Esprit de Corp.*, 682 F.2d 1267, 1271 (9th Cir.1982). Moreover, the Court has cautioned that "the exceptions should not be enlarged by loose statutory construction." *Atl. Coast Line*, 398 U.S. at 287. Rather, it is well established that the "exceptions must be narrowly construed." *Alton Box Bd. Co.*, 682 F.2d at 1271. "Doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." *Id.* (quoting *Vendo Co. v. Lektro–Vend Corp.*, 433 U.S. 623, 630, 97 S.Ct. 2881, 53 L.Ed.2d 1009 (1977)).

FN7. While the court notes that most analyses of the Anti–Injunction Act address the "expressly authorized" exception first, because plaintiff advanced the "necessary in aid of jurisdiction" exception as its first argument, the court discusses the exceptions out of the conventional order.

FN8. Plaintiff does not raise any argument that the third exception to the Anti–Injunction Act applies. However, to the extent plaintiff cites cases discussing it, an essential prerequisite to application of the "relitigation" exception "is that the claims or issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court." *Sandpiper Village Condominum Ass'n, Inc. v. Louisiana–Pacific Corp.*, 428 F.3d 831, 848 (9th Cir.2005) (quoting *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147–48, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988)). This essential prerequisite is absent in this case.

1. Applicability of the Anti–Injunction Act

***7** The Anti–Injunction Act applies not only to claims for injunctive relief directed at a state court, but also to claims for declaratory relief that have the same effect as an injunction. *California v. Randtron*, 284 F.3d 969, 975 (9th Cir.2002); *Bank of Am., N.A. v. Miller*, No. Civ. S–06–1971, 2007 WL 184804, *2 (E.D.Cal. Jan.19, 2007). "[O]rdinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the longstanding policy limiting injunctions was designed to avoid." *Samuels v. Mackell*, 401 U.S. 66, 72, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971) (noting that a declaratory judgment may serve as the basis for a subsequent injunction against state proceedings and may, standing alone, have the same practical impact as a formal injunction); *H.J. Heinz Co. v. Owens*, 189 F.2d 505, 508 (9th Cir.1951) ("It is equally clear that no power to grant such injunctive relief can be created by casting a law suit as an action seeking both a declaratory judgment and an injunction."); *cf. Amerisource Bergen Corp. v. Roden*, 495 F.3d 1143, 1153 (9th Cir.2007) (noting that "even if the [Anti–Injunction Act] applied to certain requests for injunctive relief—a remedy closely related to a formal injunction—it certainly does not apply to requests for money damages," which would arguably be the province of the *Younger* doctrine).[FN9] Furthermore, the Anti–Injunction Act applies even though an injunctions would be aimed at a litigant instead of the state court proceeding itself. *Randtron*, 284 F.3d at 975.

FN9. Contrary to plaintiff's representation in

its reply, the Ninth Circuit's decision in *AmerisourceBergen Corp.* does not restrict application of the Anti–Injunction Act solely to "an injunction to stay proceedings." (Pl.'s Reply in Support of Mot. for Partial Summ. J. ("Pl.'s Reply"), filed Oct. 10, 2010, at 9–10.) Indeed, the Ninth Circuit expressly declined to express an opinion on this issue. *AmerisourceBergen Corp.*, 495 F.3d at 1153 n. 16.

Through this case, plaintiff seeks a preliminary and permanent injunction directing and compelling both defendant Sharp Image and the Superior Court to cease and desist from determining the merits of the pending state litigation to the extent it challenges the NIGC's determination regarding the Agreements between the Tribe and Sharp Image. Plaintiff also seeks a preliminary and permanent injunction directing the Superior Court to vacate and reverse any prior order relating to the dispute. This requested injunctive relief directed at the power of the Superior Court to adjudicate a pending action filed over three years ago falls squarely within the ambit of the Anti–Injunction Act.

Moreover, the declaratory relief sought by plaintiff in this case would have the same practical effect as the issuance of an injunction. Specifically, plaintiff seeks a declaration that the Superior Court may not continue to maintain jurisdiction over the pending state action as it relates to the validity of the Agreements and that the Superior Court lacks jurisdiction to reach the merits of that litigation. Alternatively, plaintiff asks the court to make its own determination with respect to the effect of the GMA and ELA contracts between the Tribe and Sharp Image, which the Superior Court has already done.[FN10] If issued, these declarations would impede the state court actions in the same manner as the requested injunctive relief.

FN10. The claim before this court, which seeks a determination of the validity of the NIGC decision under an APA analysis, is framed differently than the claim before the Superior Court, which determined whether federal preemption applied because of the NIGC decision. However, both of these claims necessitate a *judicial determination* of the effect of the NIGC's decision on the GMA and ELA. To the extent that principles of federalism and comity allow for a "race to judgment" in parallel state and federal proceedings, that race is over. (The state court clearly crossed the finish line first.)

***8** Plaintiff argues that it is not seeking a stay of the state court action, but rather "an order that, in the course of litigating its state court claims, Sharp may not collaterally attack the NIGC's final action." (Pl.'s Reply at 9.) However, plaintiff's argument proffers a distinction without a difference. Plaintiff's position in the underlying state litigation is that defendant Sharp Image's breach of contract claims must fail because the NIGC concluded that the Agreements were void, and the Superior Court does not have jurisdiction to review this determination. In this action, plaintiff seeks injunctive and declaratory relief precluding any litigation relating to the effect of the GMA and ELA and reversing certain prior Superior Court orders regarding such agreements. Such relief necessarily has the effect of enjoining the Superior Court.[FN11] The court concludes that, absent an applicable statutory exception, the relief requested by plaintiff is barred by the Anti–Injunction Act.

FN11. Plaintiff contends that its requested relief does not apply to all Agreements and that Sharp Image's claims with respect to the Promissory Note are unaffected. This contention is irrelevant to the application of the Anti–Injunction Act, which does not require that a requested federal injunction bring a state suit to a complete halt. *See Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1201 (7th Cir.1996). Rather, the Supreme Court has explained that the term "proceeding" is a comprehensive term, which includes all parties to the state court action as well as the court itself and all supplemental or ancillary actions. *Id.* (quoting *Hill v. Martin*, 296 U.S. 393, 403, 56 S.Ct. 278, 80 L.Ed. 293 (1935)). As such, "a federal injunction which falls short of bringing a state suit to a complete halt may nonetheless violate the Anti–Injunction Act." *Id.; see also Dubinka v. Judges of the Superior Court of the County of Los Angeles*, 23 F.3d 218, 223 (9th Cir.1994) (holding that *Younger* abstention has not been limited to injunctions that apply to entire proceedings).

2. Necessary In Aid of Jurisdiction

Generally, application of the "necessary in aid of

jurisdiction" exception to the Anti–Injunction Act is limited to parallel state in rem, rather than in personam, actions. *See* Vendo Co. v. Lektro–Vend Corp., 433 U.S. 623, 641–42, 97 S.Ct. 2881, 53 L.Ed.2d 1009 (1977) ("The traditional notion is that in personam actions in federal and state court may proceed concurrently, without interference from either court, and there is no evidence that the exception to § 2283 was meant to alter this balance."). The Supreme Court has noted that the language of this exception implies that "some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." Atl. Coast Line, 398 U.S. at 295. As such, circuit courts have applied this exception where conflicting orders from different courts would only serve to make ongoing federal oversight unmanageable, *see* Garcia v. Bauza–Salas, 862 F.2d 905, 909 (1st Cir.1988), or where a parallel state court action threatens to frustrate proceedings and disrupt the orderly resolution of consolidated, mulitdistrict federal litigation. *Id.*; Carlough v. Amchem Products, Inc., 10 F.3d 189, 197 (3d Cir.1993); *In re.* Baldwin–United Corp., 770 F.2d 328, 336 (2d Cir.1985); *In re.* Corrugated Container Antitrust Litigation, 659 F.2d 1332, 1334–35 (5th Cir.1981). However, "[t]he mere existence of a parallel action in state court does not rise to the level of interference with federal jurisdiction necessary to permit injunctive relief under the "necessary in aid of" exception." Alton Box, 682 F.2d at 1272–73.

Indeed, the Supreme Court has expressly excluded from the "necessary in aid of jurisdiction" exception cases that merely implicate preemption issues or exclusively federal rights. Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 149, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988). "[A] federal court does not have inherent power to ignore the limitations of § 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area pre-empted by federal law, *even when the interference is unmistakably clear." Id.* (quoting Atl. Coast Line, 398 U.S. at 294)) (emphasis added); *see* NLRB v. Nash–Finch Co., 404 U.S. 138, 142, 92 S.Ct. 373, 30 L.Ed.2d 328 (1971) ("There is in the Act no express authority for the Board to seek injunctive relief against pre-empted state action."); Alton Box, 682 F.2d at 1273 ("The possibility that [a] state claim may be preempted by federal law is not sufficient of itself to invoke the second exception of the Act."). "This rule applies regardless of whether the federal court itself has jurisdiction over the controversy." Atl. Coast Line, 398 U.S. at 294.

***9** Moreover, the Supreme Court has expressly rejected the argument that § 2283 "does not apply whenever the moving party in the District Court alleges that the state court is *'wholly without jurisdiction over the subject matter,'* having invaded a field pre-empted by Congress." Amalgamated Clothing Workers, 348 U.S. 511, 515, 75 S.Ct. 452, 99 L.Ed. 600 (1955); Vendo, 433 U.S. at 637 n. 8 (discussing *Amalgamated Clothing Workers* and the Court's holding that "exclusive federal jurisdiction was not sufficient to render § 2283 inapplicable"). In *Amalgamated Clothing Workers,* the Court noted that in enacting the Anti–Injunction Act, Congress left no justification for the recognition of such an exception. 348 U.S. at 516. The court further reasoned that such an exception would not be easily applied as areas of law that are "withdrawn from state power are not susceptible of delimitation by fixed meets and bounds. What is within *exclusive federal authority* may first have to be determined by this Court to be so." *Id.* (internal quotations and citations omitted). Moreover, "[t]o permit the federal courts to interfere, as a matter of judicial notions of policy, may add to the number of courts which pass on a controversy before the rightful forum for its settlement is established," including appellate review of the "collateral issue." *Id.* at 519. After underscoring its confidence in state courts to recognize the "demarcation between exclusive federal and allowable state jurisdiction," the Court held that exclusive federal jurisdiction does not provide an exception to the Anti–Injunction Act. *Id.* at 519, 521; *see* Vendo, 433 U.S. at 632, 635–39 (holding that even though § 16 of the Clayton Act provided a "uniquely federal right or remedy" that could only be brought in federal court, an exception to the Anti–Injunction Act was not warranted); *see also* Texas Emp'rs Ass'n v. Jackson, 862 F.2d 491, 498–99, 504 (5th Cir.1988) (holding that a "complete lack of subject matter jurisdiction, due to federal preemption, comes within none of the exceptions to section 2283 and provides no basis for avoiding the prohibition of 2283").

"Rather, when a state proceeding presents a federal issue, even a pre-emption issue, the proper course is to seek resolution of that issue by the state court." Chick Kam Choo, 486 U.S. at 149; *see* Tunica–Biloxi

Tribe of La. v. Warbutron/Buttner, No. Civ. A. 04–1516, 2005 WL 1902889, at *3 (D.D.C. July 20, 2005) ("California state courts are well within their authority to make such preemption determinations"). "[S]tate litigation must, in view of § 2283, be allowed to run its course, including the ultimate reviewing power in" the United States Supreme Court. *Amalgamated Clothing Workers*, 348 U.S. at 521. Further, if a plaintiff believes a claim brought in state court is completely preempted by federal law, "the appropriate course of action is to seek removal of the action to the appropriate federal district court in California." *Tunica–Biloxi*, 2005 WL 1902889, at *3.

***10** In this case, plaintiff contends that the "necessary in aid of jurisdiction" exception applies because of the exclusive federal jurisdiction over Indian gaming under the IGRA. Moreover, plaintiff contends that Sharp Image cannot challenge the NIGC's action in state court, but rather must file an action in federal court under the Administrative Procedures Act ("APA"). Both of these contentions amount to a complete preemption argument that was raised and rejected by the Superior Court and appealed to both the Court of Appeal and the California Supreme Court.[FN12]

> FN12. Despite these vigorous protestations, plaintiff *never* sought timely removal to federal court.

However, under Supreme Court precedent, the existence of exclusive federal rights guaranteed by the IGRA is an insufficient basis to invoke the necessary in aid of jurisdiction exception, *"even when the interference is unmistakably clear."* *Chick Kam Choo*, 486 U.S. at 149; *see Vendo*, 433 U.S. at 639 ("Given the clear prohibition of § 2283, the courts will not sit to balance and weigh the importance of various federal policies in seeking to determine which are sufficiently important to override historical concepts of federalism underlying § 2283."). Rather, the appropriate avenue for relief is appeal through the state court system and, potentially, to the United States Supreme Court. *See Atl. Coast Line*, 398 U.S. at 296 ("Unlike the Federal District Court, this Court does have potential appellate jurisdiction over federal questions raise in state court proceedings, and that broader jurisdiction allows this Court correspondingly broader authority to issue injunctions 'necessary in aid of its jurisdiction.' "). Plaintiff sought such relief, appealing the Superior Court's decision regarding preemption to the Court of Appeal and California Supreme Court. It was only *after* such appeals proved unsuccessful that the Tribe sought to collaterally attack the Superior Court orders by review in a federal district court. This court finds that such a review would undermine the fundamental and vital role of comity the Supreme Court asserts is inherent in our federalism. *See Atl. Coast Line*, 398 U.S. at 286.

Plaintiff's reliance on the Ninth Circuit's decision in *Sycuan Band of Mission Indians v. Roach*, 54 F.3d 535 (9th Cir.1995), is misplaced. In *Sycuan Band*, Indian tribes that operated gaming centers on their reservations sought a federal injunction and declaratory relief against California's criminal prosecution of individuals employed in the tribes' gaming centers. *Id.* at 537. The court held that because the IGRA, 18 U.S.C. § 1166(d), mandated exclusive federal jurisdiction over criminal enforcement of Class III state gaming laws in Indian country, the state proceedings were in derogation of federal jurisdiction. *Id.* at 540. However, the application of the "necessary in aid of jurisdiction" exception to exclusive federal jurisdiction over a criminal prosecution as in *Sycuan Band* is clearly distinguishable from application of the same exception to a civil matter. Unlike a civil litigant, a criminal defendant simply does not have the option to remove a state criminal prosecution that he asserts is preempted by federal law. Unlike a civil litigant, a criminal defendant may be subject to punitive sanctions as a result of a state criminal prosecution, including imprisonment, during the pendency of any appeal relating to a preemption defense. As such, the application of a narrow exception to the Anti–Injunction Act may be warranted in the context of a criminal prosecution exclusively entrusted to federal jurisdiction but certainly alien to civil litigation.

***11** Moreover, the particular criminal statute before the court in *Sycuan Band* presented a unique issue with respect to the federal court's ability to enforce the exclusive criminal prosecution provision set forth in 18 U.S.C. § 1166. *See Morongo Band of Mission Indians v. Stach*, 951 F.Supp. 1455, 1466 (C.D.Cal.1997), judgment vacated and remanded for dismissal as moot, 156 F.3d 1344 (9th Cir.1998).[FN13] Under § 1166(a), Congress provided that for purposes of the IGRA, all state law pertaining to the licensing, regulation, or prohibition of gambling, including state criminal prosecution for violations of such laws,

would apply in Indian country in the same manner and to the same extent as they applied in the state. However, § 1166(c) provided that the United States has exclusive jurisdiction over criminal prosecution of violations of such state laws that were made applicable to Indian tribes under § 1166(a). Because the federal law expressly incorporated state law, and because a defendant cannot be prosecuted twice for the same offense, a federal court's power to enforce § 1166(c) would be "effectively crippled" unless a state court prosecution for violations of the incorporated state gambling law was enjoined. *Id.* (citing *Schiro v. Farley,* 510 U.S. 222, 229, 114 S.Ct. 783, 127 L.Ed.2d 47 (1994)). Such a unique situation, implicating the constitutional infirmity of double jeopardy, is not present in this case.

> FN13. Even though the decision was vacated as moot, the court finds the analysis instructive. *See In re. SNTL Corp.,* 571 F.3d 826, 844 n. 19 (quoting with approval a district court's decision that was vacated as moot).

During oral argument, plaintiff emphasized that this case raises unique issues of exclusive federal jurisdiction, *not* simply preemption. Counsel pointed to language in *Sycuan Band,* 54 F.3d at 540, which noted that an injunction "was necessary to preserve exclusive jurisdiction." Plaintiff further relied on the holding in *AT & T Corp. v. Coeur d'Alene Tribe,* 295 F.3d 899 (9th Cir.2002), which concluded that the state acted without jurisdiction in issuing warning letters because the federal district court had exclusive jurisdiction over any challenge to the validity of the NIGC's approval of management contracts. Presumably, based on plaintiff's argument, unlike concurrent federal/state jurisdiction, the apparently unique quality of exclusive federal jurisdiction conferred by Congress over Indian gaming law justifies application of the "necessary in aid of jurisdiction" exception; where the federal court has exclusive jurisdiction, the state court is *wholly without jurisdiction* and powerless to proceed. However, the court concludes that plaintiff offers no applicable legal authority in support of this conclusion.

As set forth above, *Sycuan Band* is distinguishable, and *AT & T* never addressed the effect of "exclusive jurisdiction" on the Anti–Injunction Act. [FN14] Rather, in *Amalgamated Clothing Workers,* the Supreme Court expressly found that a party's assertion that "a state court is *wholly without jurisdiction* over the subject matter" is an *insufficient basis* for applying an exception to the Anti–Injunction Act. 348 U.S. at 515 (emphasis added); *Jackson,* 862 F.2d at 498 ("Nor is the result any different because the federal preemption is such as to deprive the state court of *jurisdiction"*) (emphasis in original). Indeed, even if the state court mistakenly interprets that it has jurisdiction, state court litigation "must be allowed to run its course." *Amalgamated Clothing Workers,* 348 U.S. at 520–21 ("Misapplication of this Court's opinions is not confined to the state courts, nor are delays in litigation peculiar to them."). Despite plaintiff's protestations that the Superior Court did not have jurisdiction to make any finding regarding the efficacy of the NIGC's determination, this court possesses no counter-vailing authority to collaterally enjoin the Superior Court's rulings with respect to the exercise of its jurisdiction, right or wrong. Therefore, the court finds plaintiff's arguments unpersuasive.

> FN14. Moreover, like *Sycuan Band, AT & T* also involved the application of § 1166(d), which the Ninth Circuit concluded preempted actions by states and their various Attorneys General. *Id.* at 909–10.

***12** The court does find the court's decision in *Jena Band of Choctaw Indians v. Tri–Millennium Corp., Inc.,* 387 F.Supp.2d 671 (W.D.La.2005), persuasive. In *Jena Band,* the defendants sued a federally recognized Indian tribe in state court for breach of contract arising out of agreements between the parties to develop a casino. *Id.* at 673. The tribe did not seek to remove the action, but brought suit in federal court seeking a declaration that the contracts were void as unapproved management contracts under the IGRA and that the state court lacked subject matter jurisdiction to hear the breach of contract claims. *Id.* The federal court stayed its proceedings pursuant to the Anti–Injunction Act, and the state court subsequently ruled that it had subject matter jurisdiction over the parties' dispute. The tribe then resubmitted its request that the federal district court issue a declaratory judgment that the state court was without jurisdiction to hear the defendant's breach of contract claim. *Id.* at 674. The district court held that the tribe had fully litigated the issue of subject matter jurisdiction before the state court, which had been appealed and upheld by the state appellate court. Therefore, under principles of res judicata, the district court was bound by the

state court's determination. *Id.* at 674–75 ("When the jurisdiction of a tribunal is actually brought into question in the proceeding before it, such tribunal has the power to determine its own jurisdiction, and once determined, whether right or wrong, that decision cannot ordinarily be attacked collaterally.") (internal quotations omitted).

The facts before the court in *Jena Band* are strikingly similar to the facts before the court in this case. In both cases, defendants brought claims for breach of contract. In both cases, despite later raising the spectre of exclusive federal jurisdiction under the IGRA, *plaintiffs failed to seek removal.* In both cases, the tribes challenged the subject matter jurisdiction of the state court and unsuccessfully appealed adverse determinations to the state appellate court. Just as the *Jena Band* court determined that it was precluded from reviewing the state court's conclusions regarding jurisdiction, this court similarly finds that principles of equity, comity, federalism, and res judicata preclude what is, at its core, a review of a state court's determination of its jurisdiction over litigation. *See Alt. Coast Line,* 398 U.S. at 296 ("[L]ower federal courts possess no power whatever to sit in direct review of state court decisions.").

Accordingly, the court concludes that the "necessary in aid of jurisdiction" exception does not apply to plaintiff's claims.

3. Expressly Authorized

"[I]n order to qualify as an 'expressly authorized' exception to the anti-injunction statute, an Act of Congress must have created a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding." *Mitchum v. Foster,* 407 U.S. 225, 237, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972). The federal statute need not expressly reference the Anti–Injunction Act nor expressly authorize an injunction of a state court proceeding. *Id*. "The test, rather, is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope *only* by the stay of a state court proceeding." *Id.* at 238 (emphasis added).

***13** Plaintiff contends that the unique relationship between Indian tribes and the United States and the preservation of exclusive federal jurisdiction over Indian gaming supports a federal injunction against the state court proceedings. Specifically, plaintiff asserts that the Anti–Injunction Act does not bar an Indian tribe from seeking an injunction authorized by 28 U.S.C. § 1362 because the United States, pursuant to its trust relationship with the Tribe, could sue to invalidate unapproved management contracts and obtain such an injunction. (Pl.'s Reply at 7.)

Section 1362 provides, "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." The Supreme Court has interpreted this section as allowing an Indian tribe to bring claims that the United States could have brought as trustee for a tribe, such as challenges to state taxation of Indian tribes or actions to determine real property rights. *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation,* 425 U.S. 463, 473–74, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976) (state taxation); *Arizona v. San Carlos Apache Tribe of Arizona,* 463 U.S. 545, 566–67, 103 S.Ct. 3201, 77 L.Ed.2d 837 (1983) (water rights); *see Agua Caliente Band of Cahuilla Indians v. Hardin,* 223 F.3d 1041 (9th Cir.2000) (state taxation); *Fort Mojave Tribe v. Lafollette,* 478 F.2d 1016, 1018 (9th Cir.1983) (quiet title). As such, there is federal jurisdiction under § 1362 "whenever a covered Indian tribe is suing to protect federally derived property rights and the United States has declined to sue on behalf of the [Indian tribe]." 13D Wright, Miller, Kane, Amar, Federal Practice & Procedure: Jurisdiction & Related Matters § 3579 (3d ed.2010). If an Indian tribe is standing in the shoes of the United States under § 1362, it is not barred from seeking an injunction to the extent the United States would not be barred from seeking an injunction. *Moe,* 425 U.S. at 474–75. The Supreme Court has held that the Anti–Injunction Act does not apply where the United States is the party seeking injunctive relief. *Leiter Minerals, Inc. v. United States,* 352 U.S. 220, 226, 77 S.Ct. 287, 1 L.Ed.2d 267 (1957).

However, § 1362 "does not grant jurisdiction to every suit by a tribe where the United States could bring an action on behalf of the tribe under 28 U.S.C. § 175. Thus a simple contract dispute, raising no federal question is not within the statute." 13D Wright, Federal Practice & Procedure: Jurisdiction & Related

Matters § 3579; *see* Gila River Indian Community v. Henningson, Durham & Richardson, 626 F.2d 708, 714 (9th Cir.1980) (holding that § 1362 did not apply because "[t]here is nothing in the present case which suggests that the action is anything more than a simple breach of contract case").

Courts have noted that not every contract between a tribe and non-Indian contractor is subject to the IGRA. *Am. Vantage Co. v. Table Mountain Rancheria,* 103 Cal.App.4th 590, 597, 126 Cal.Rptr.2d 849 (2002) (citing *Iowa Mgmt. & Consultants v. Sac & Fox Tribe,* 207 F.3d 488, 489 (8th Cir.2000); *Calumet Gaming Group–Kansas v. Kickapoo Tribe,* 987 F.Supp. 1321, 1325 (D.Kan.1997)). "Rather, IGRA regulation of contracts is limited to management contracts and collateral agreements to management contracts." *Id.* (citing 25 U.S.C. § 2711). If a contract is not construed by the NIGC to be a management contract, the contract falls outside of the preemptive effect of the IGRA. *Id.*

***14** Further, if a contract is *void* because it is a management contract that has not been authorized pursuant to the statutory requirements of the IGRA, the breach of such an unauthorized contract does not implicate the IGRA. *Rumsey Indian Rancheria of Wintun Indians of Cal. v. Dickstein,* No. 2:07–cv–2412, 2008 WL 648451, at *4 (E.D.Cal. Mar.5, 2008). Specifically, if agreements "are ultimately construed as *void* management contracts, they would be found to have never been valid contracts, and 'only an *attempt* at forming ... management contracts. If that is the case, then [the] suit in no way interferes with the regulation of a management contract because none ever existed.' " *Id.* (quoting *Gallegos v. San Juan Pueblo Bus. Dev. Bd., Inc.,* 955 F.Supp. 1348, 1350 (D.N.M.1997)) (emphasis added). "It is a stretch to say that Congress intended to preempt state law when there is no management contract for a federal court to interpret ...." *Casino Res. Corp. v. Harrah's Entm't, Inc.,* 243 F.3d 435, 439 (8th Cir.2001).

In this case, § 1362 does not apply because, under either party's interpretation of the validity of the Agreements, the litigation is based on a contract dispute that fails to raise a federal question. To the extent defendant Sharp Image asserts that the Agreements are not management contracts or that the time to challenge the contracts as management contracts has passed, [FN15] the IGRA is not implicated. *See Am. Vantage Co.,* 103 Cal.App.4th at 597, 126 Cal.Rptr.2d 849. Alternatively, to the extent plaintiff Shingle Springs asserts that the GMA and ELA are *void* as unapproved management contracts, the IGRA is also not implicated. *Rumsey Indian Rancheria,* 2008 WL 648451, at *4. As such, neither plaintiff's nor defendant's theory of the case raises a federal question.

FN15. The Superior Court concluded that the NIGC did not have jurisdiction to review the GMA and ELA because those contracts had been terminated or cancelled prior to review. The Superior Court also concluded that the NIGC did not comport with time limitations for review set forth in federal statutes and regulations.

Plaintiff contends that § 1362 nevertheless applies because the Tribe raises a federal question arising out of its request for review of the NIGC determination under the APA.[FN16] Plaintiff, however, fails to cite any case where § 1362 has been applied to a Tribe seeking review of a *favorable* agency decision (which effectively divests a federal court of jurisdiction over the underlying matter).[FN17] *Cf. Mescatlero Apach Tribe v. Rhoades,* 775 F.Supp. 1484, 1493 (D.N.M.1990) ("[Section] 1362 specifically will not bar a claim for equitable relief from *adverse* agency or government action.") (emphasis added). Indeed, the APA mandates that a court "compel agency action unlawfully withheld or unreasonably delayed" and "set aside agency action" that the court concludes is unlawful. 5 U.S.C. § 706. In the instant action, plaintiff does not seek a determination that the NIGC's action was unlawful, but rather an *affirmance* from this court that the NIGC action was lawful. The only basis for a live controversy lies in the Superior Court's refusal to give deference to the NIGC's determination and plaintiff's request that this court reverse that refusal. As such, plaintiff's unique APA claim is wholly enveloped by the state breach of contract claim, which simply fails to raise a federal question.

FN16. At oral argument, plaintiff's counsel asserted that its claims were based upon the exclusive jurisdiction provided by the APA, not § 3162. However, the APA, alone, does not constitute an exception to the Anti–Injunction Act.

FN17. *AT & T,* relied upon by plaintiff, is distinguishable. *AT & T* involved management contracts *approved* by the NIGC and thus, regulated by the IGRA. Conversely, in this case, the NIGC concluded that the GMA and ELA were *unapproved* management contracts, and thus, outside the purview of the IGRA.

***15** At its core, plaintiff's APA argument repackages the preemption argument the Tribe advanced under the "necessary in aid of jurisdiction" exception. Specifically, plaintiff asserts that federal courts have exclusive jurisdiction to review decisions of the NIGC under the APA, and thus, the Superior Court's decision denying the Tribe's Motion to Dismiss/Quash on preemption grounds was in error. In the absence of timely removal to federal court, the appropriate procedure for review is through the state court appellate system and potentially to the United States Supreme Court; a federal district court has no authority to review. The court declines to strain interpretations of § 1362 and the APA to allow the Tribe to do under one exception that which it could not under the other. *See Atl. Coast Line,* 398 U.S. at 287 ("[T]he exceptions should not be enlarged by loose statutory construction.").

Accordingly, the court concludes that the "expressly authorized" exception does not apply to plaintiff's claims.

B. *Younger* Abstention

Alternatively, defendant Sharp Image opposes plaintiff's motion for partial summary judgment on the basis that it should be dismissed pursuant to the prudential abstention doctrine set forth in *Younger v. Harris,* 401 U.S. 37, 43 (1971).[FN18] Plaintiff asserts that *Younger* abstention does not apply because the Superior Court has acted beyond its authority.[FN19]

FN18. While, as set forth *supra,* the court concludes that the Anti–Injunction Act precludes plaintiff's claims, for the sake of completeness, the court also addresses defendant's arguments under *Younger.*

FN19. Plaintiff also argues that *Younger* abstention does not apply because it is not seeking to enjoin all state court proceedings. However, as set forth *supra,* in the court's discussion of the applicability of the Anti–Injunction Act, plaintiff's requested injunctive and declaratory relief would have the practical effect of enjoining most, if not all, of Sharp Image's claims in the Superior Court. *See Dubinka,* 23 F.3d at 223 (holding that *Younger* abstention has not been limited to injunctions that apply to entire proceedings).

"Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." *Younger v. Harris,* 401 U.S. 37, 43 (1971). This desire is premised upon the fundamental and vital role of comity in the formation of this country's government and "perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism.' " *Id.* at 44. Our Federalism demonstrates "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways." *Id.* It represents "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.*

Generally, the Supreme Court's decision in *Younger* and its progeny direct federal courts to abstain from granting injunctive or declaratory relief that would interfere with pending state judicial proceedings. *Younger v. Harris,* 401 U.S. 37, 40–41 (1971); *Samuels v. Mackell,* 401 U.S. 66, 73, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971) (holding that "where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well"). The *Younger* doctrine "reflects a strong policy against federal intervention in state judicial processes in the absence of great and immediate injury to the federal plaintiff." *Moore v. Sims,* 442 U.S. 415, 423, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979). When federal courts disrupt a state court's opportunity to "intelligently mediate federal constitutional concerns and state interests" and interject themselves into such disputes,

"they prevent the informed evolution of state policy by state tribunals." *Moore*, 442 U.S. at 429–30.

***16** While the doctrine was first articulated in the context of pending state criminal proceedings, the Supreme Court has applied it to civil proceedings in which important state interests are involved. *Id.; see Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975). "The seriousness of federal judicial interference with state civil functions has long been recognized by the Court. [It has] consistently required that when federal courts are confronted with requests for such relief, they should abide by standards of restraint that go well beyond those of private equity jurisprudence." *Huffman*, 420 U.S. at 603.

Therefore, in the absence of "extraordinary circumstances," abstention in favor of state judicial proceedings is required if the state proceedings (1) are ongoing, (2) implicate important state interests, and (3) provide the plaintiff an adequate opportunity to litigate federal claims. *See Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982); *see San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose*, 546 F.3d 1087, 1092 (9th Cir.2008) (noting that where these standards are met, a district court "may not exercise jurisdiction" and that "there is no discretion in the district courts to do otherwise"). "Where *Younger* abstention is appropriate, a district court cannot refuse to abstain, retain jurisdiction over the action, and render a decision on the merits after the state proceedings have ended. To the contrary, *Younger* abstention requires *dismissal* of the federal action." *Beltran v. State of Cal.*, 871 F.2d 777, 782 (9th Cir.1988) (emphasis in original).

1. Interference with Ongoing State Proceedings

Younger abstention is only implicated "when the relief sought in federal court would in some manner directly 'interfere' with ongoing state judicial proceedings." *Green v. City of Tucson*, 255 F.3d 1086, 1097 (9th Cir.2001) (en banc) *receded from on other grounds by Gilbertson v. Albright*, 381 F.3d 965 (9th Cir.2004). "The mere potential for conflict in the results of adjudications is not the kind of interference that merits federal court abstention." *Id.* (internal quotations and citation omitted). Rather, the system of dual sovereigns inherently contemplates the possibility of a "race to judgment." *Id.* Rather, the relevant question is whether the relief requested in federal court would "enjoin or 'have the practical effect of' enjoining the ongoing state court proceedings." *AmerisourceBergen*, 495 F.3d at 1152.

In this case, as set forth in Section A.1 in the court's discussion of the Applicability of the Anti–Injunction Act, all of plaintiff's claims and requested declaratory and injunctive relief, if granted, would have the effect of enjoining pending state court proceedings or reviewing issues already reached by the state court. The state court proceedings were initiated in March 2007, over three years before the complaint was filed in this case. Further, the requested injunctive relief would be impossible to enforce without violation of established principles of federalism and comity. Accordingly, the first element of *Younger* abstention is present in this case.

2. Important State Interests

***17** The interpretation and application of state common law implicates important state interests. *See R. R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 499–500, 61 S.Ct. 643, 85 L.Ed. 971 (1941) (noting that the "last word" on the interpretation of state law issues from that state's highest court); *see also Tunica–Biloxi Tribe*, 2005 WL 1902889, at *3. Moreover, state courts are better qualified to interpret the state's own common law. *Id.*

In this case, the pending state actions involve, *inter alia,* common law breach of contract claims governed by California law. As such, California courts are best suited to determining the merits of these claims. *See Tunica–Biloxi Tribe*, 2005 WL 1902889, at *3 (holding that the second prong of *Younger* was satisfied where the defendants had filed a breach of contract claim in California state court, but the plaintiff filed a case in federal court to enjoin such proceedings on the basis that the issues raised in state court were completely preempted under the IGRA).

Plaintiff's contention that important state interests are not implicated because it is "readily apparent" that the state court is exceeding its authority is without merit. *See Sycuan Band*, 54 F.3d at 541 (holding that the second *Younger* element was not satisfied because the state "can have no legitimate interest in intruding on the federal government's exclusive jurisdiction to prosecute"); *Gartrell Const. Inc. v. Aubry*, 940 F.2d 437, 441 (9th Cir.1991) ("No significant state interest is served where the state law is preempted by federal

law and that preemption is readily apparent."). Specifically, plaintiff's argument is unpersuasive because its assertion that defendant's state law claims are completely preempted is not "readily apparent." As set forth above, the IGRA is not implicated to the extent that a contract is not a "management contract" or to the extent that a contract is void as an unapproved management contract. *See supra* Part A.3. Further, despite plaintiff's assertion that preemption is clear, the Superior Court denied the Tribe's motion on this ground, and both the Court of Appeals and the California Supreme Court declined to reverse that decision.

Accordingly, the second element of *Younger* abstention is present in this case.

3. Adequate Opportunity to Present Federal Claims

"Minimal respect for state processes, of course, precludes any *presumption* that the state court will not safeguard federal constitutional rights." *Middlesex County Ethics Comm.*, 457 U.S. at 431. Rather, a federal court "should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987).

In this case, plaintiff can, and did, raise preemption as a defense in the state court action. If plaintiff is dissatisfied with the Superior Court's action, it can, and did, appeal to the California Court of Appeals and the California Supreme Court. Ultimately, plaintiff can file a petition for review in the United States Supreme Court. *See Tunica–Biloxi Tribe*, 2005 WL 1902889, at *3 (holding that the third *Younger* element was satisfied where the plaintiff Indian tribe could raise preemption as a defense in the state court, appeal through the state system, and ultimately file a petition for review with the United States Supreme Court).[FN20]

FN20. If plaintiff believed defendant Sharp Image's claims were completely preempted, it could have sought removal to the appropriate federal district court. *See id.*

***18** Accordingly, the third element of *Younger* abstention is met in this case.

CONCLUSION

Therefore, for the foregoing reasons, defendants' motions to dismiss are GRANTED, and plaintiff's partial motion for summary judgment is DENIED. Specifically:

(1) Because the court concludes that the claims alleged and relief sought by plaintiff in this case falls within the purview of the Anti–Injunction Act, and because none of the narrow exceptions to the Anti–Injunction Act apply, defendants' motions to dismiss on the grounds that the complaint is barred by the Anti–Injunction Act is GRANTED, and plaintiff's motion for partial summary judgment is DENIED; and

(2) Because plaintiff's claims would interfere with ongoing state court proceedings that implicate important state interests and plaintiff has an adequate opportunity to pursue their federal claims in those proceedings, the court must abstain from adjudicating these claims pursuant to *Younger v. Harris.*

The Clerk of Court is directed to close this case.

IT IS SO ORDERED.

E.D.Cal.,2010.
Shingle Springs Band of Miwok Indians v. Sharp Image Gaming, Inc.
Not Reported in F.Supp.2d, 2010 WL 4054232 (E.D.Cal.)

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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is DLA Piper LLP (US), 400 Capitol Mall, Suite 2400, Sacramento, California 95814-4428. On November 26, 2012, I served the within documents:

1. **RESPONDENT'S BRIEF**

2. **RESPONDENT'S APPENDIX**

On the interested parties in this action (**BY U.S. MAIL**) by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as set forth below.

Paula M. Yost Mary Kay Lacey Ian Barker SNR Denton US LLP 525 Market Street, 26th Floor San Francisco, CA 94105-2708	**Attorneys for Defendant and Appellant SHINGLE SPRINGS BAND OF MIWOK INDIANS**
El Dorado Superior Court 3321 Cameron Park Drive Cameron Park, CA 95682	**1 Copy of Brief Only**
Supreme Court of the State of California 350 McAllister Street San Francisco, CA 94102	**4 Copies of Brief Only**

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on November 26, 2012, at Sacramento, California.

DEBBIE BLUM